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Dr. Boulderlove; Or, How I Learned to Stop Worrying and Love Local Antitrust Liability

Community Communications v. Boulder arose in the context of local cable registration, but the decision raised the spectre of antitrust liability for nearly any local regulatory activity. This comment reviews state legislation enacted in response to Boulder against a framework of the post-Boulder "Parker Doctrine" and its probable requirements.

INTRODUCTION

In all probability, few major problems were anticipated by the Boulder, Colorado town council when it set out to find the "best" cable service for its medium-sized college community. The goals would be met with simple ordinances, with an eye toward temporary restraint of an existing cable system's growth. The plan might well have worked in cable's younger, limited profit potential days. But cable was no longer a simple business. In contrast to its early antenna substitute function,¹ the cable company had become an independent programmer and supplier of services.² Thirty channels or more of two-way cable service were possible.³ The future seemed limitless; new cable programming services

1. Cable's predecessor amounted to a group antenna shared by neighbors. Two or more families would pool their resources to erect an antenna tower tall enough for fringe area reception, then share the signal.

The first commercial cable system was built in 1950 in Lansford, Pennsylvania, a town shielded from available signals by terrain and limited by a Federal Communications Commission freeze on new stations. An enterprising citizen decided to make the best of the situation. He erected an antenna tower atop one of the mountains blocking Lansford's reception and distributed its signals by wire to the town. The entrepreneur presumably made money, the citizens of Lansford joined "the TV age" and a new communications technology was born. See generally, E. FOSTER, UNDERSTANDING BROADCASTING 345-47 (1978). See also M. HAMBURG, ALL ABOUT CABLE 5 (1979).

2. Initially, cable was merely a relay service, snagging local signals off the air and later bringing distant signals in by wire and microwave. The first effort at a sort of "original" programming appeared in Bartlesville, Oklahoma in 1957, when a movie theater chain thought of the idea of sending movies directly to the home by cable. The system was dubbed "Telemovie." THE FIRST FIFTY YEARS OF BROADCASTING 138 (1982). The late 1970's brought economical satellite distribution and an explosion of special cable services. See J. ROMAN, CABLEMANIA 57-101 (1983).

3. J. ROMAN, *supra* note 2, at 61. Two-way cable systems allow viewers to "talk back." This facilitates everything from simple viewer surveys to videotext systems.

were springing up right and left while cable system companies fought vigorously for the right to supply cable service to towns across the country.⁴ Elaborate promises were made to secure franchises with the view that their company had a "blue sky" potential for profit.

Not long after Boulder set out to get its super cable system, dark clouds began forming in cable's blue sky. With so many new program services competing for viewers, channel space and advertising, it became apparent that less than all would survive. More importantly, cable companies were beginning to conclude that the ever more extravagant demands of cities were too expensive. Where an existing franchise was involved, confrontations brewed as renewal time approached.⁵

The Boulder cable franchise negotiations followed this path, the ultimate result being the termination of the franchise in favor of a local upstart company.⁶ The old franchisee sued. Boulder found itself in court facing antitrust allegations and the vague complexities of the "*Parker Doctrine*" state action defense.⁷ Soon the Supreme Court was involved and *Community Communications Company v. City of Boulder*⁸ left its confusing stamp on antitrust law.

This comment examines the impact of that stamp, by dividing the analysis into three distinct parts that assume progressively more involved knowledge of the issues at hand. First, the basic provisions of the Sherman Act are examined. Second, the line of cases dubbed the *Parker Doctrine* are examined in an effort to draw a common thread through their underlying policy goals. Third, the most current post-*Boulder* legislation by the states is examined in light of selected case law and commentary. The comment is thus a guide of sorts to living with *Boulder*.

4. This resulted from the industry's emergence from the quagmire of regulation. E. FOSTER, *supra* note 1, at 364-67.

5. See J. ROMAN, *supra* note 2, at 141-48. See also Warner's Franchise Problems Dominate Texas Cable Show, *Broadcasting*, Jan. 23, 1984, at 38.

6. For a factual discussion of the *Boulder* dispute, see *infra* notes 75-91 and accompanying text.

7. In a sentence, the *Parker Doctrine* provides:

The sovereign conduct of the several states is not subject to the restrictions of the federal antitrust laws.

The application of this doctrine to state subdivisions was the issue in *Boulder* and is the broad topic of this comment.

8. 102 S. Ct. 835 (1982).

PART 1

The Sherman Antitrust Act

The goal of Congress in enacting the Sherman Antitrust Act⁹ was simple: to ensure a competitive economy.¹⁰ This goal was achieved by making *any* agreement, tacit or otherwise, restraining trade illegal¹¹ and by likewise declaring illegal any use of existing monopoly power, or any attempt or conspiracy to gain monopoly power.¹² Although the issue in *Boulder* focused not on the City's actual liability for antitrust violations, but on the *nature* of liability, a summary of the touchstone elements of the Sherman Act will be of value in understanding the impact of *Boulder* and the legislation it inspired. Further, a working knowledge of the Act allows an understanding of the following premise: "[I]t is one thing to say that certain . . . activities are not absolutely exempt from the reach of the Sherman Act, but quite another to find those activities violate the Act."¹³

9. 15 U.S.C. §§ 1-7 (1973 & Supp. 1983). The heart of the Sherman Act is found in its first two sections which are set forth in pertinent detail *infra* at notes 11 and 12.

10. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553-54 (1944). For a concise and very readable summary of the Sherman Act, see E. KITNER, *AN ANTITRUST PRIMER* (2d ed. 1973); J. VAN CISE, *UNDERSTANDING THE ANTITRUST LAWS* (8th ed. 1980) (including a summary of the common law roots of modern statutes). For a critical review of the effectiveness of the Act, see R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976).

11. Section one of the Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared illegal." 15 U.S.C. § 1 (1973 & Supp. 1983).

12. Section two states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony. . . ." 15 U.S.C. § 2 (1973 & Supp. 1983). Both sections one and two are enforceable by private parties through a civil action to enjoin the conduct of any person or entity violating the provisions, and make available treble damages. 15 U.S.C. §§ 1-3 (1973 & Supp. 1983). See generally, 1 VON KALINOWSKI, *ANTITRUST LAWS AND TRADE REGULATION* § 1.06, at 3-16 (Desk ed. 1982); 2 VON KALINOWSKI, *supra*, §§ 8-9; E. KITNER, *supra* note 10, at 150-58. In criminal proceedings, the elements set forth in sections one and two constitute specific intent. *United States v. Gypsum Co.*, 438 U.S. 422 (1978).

13. *Driker & Shore, Community Communications v. Boulder — New Problems for Municipalities: Antitrust Liability*, 61 MICH. B.J. 426-32 (1982). It must be kept in mind that a lack of immunity subjects cities to greater defense costs, for without the blanket shield of the *Parker* Doctrine, it is unlikely that municipalities will often be able to dispose of antitrust claims in a summary manner. See *Poller v. Columbia*, 368 U.S. 464 (1962); Report of the Governor's Task Force on Local Government Antitrust Liability 10-11 (Feb. 16, 1983).

1.1 Section One

Although the language of section one makes quite clear the result Congress sought to avoid, it provides no express delineation of what conduct is prohibited. The section simply states that all conduct in “restraint of trade” is illegal.¹⁴ Initially, the courts took the language quite literally and some agreements that would have been legal at common law were held to be a violation of the Act.¹⁵ This theory was premised in part upon the belief that Congress had done more than simply codify the common law concerning restraint of trade and illegal combinations, so that the Sherman Act would necessarily be more restrictive.¹⁶ The illusory question seemed to be where to draw the new line of legality. As the Court later observed, “[t]o bind, to restrain, is of [the] very essence” of a contract.¹⁷ After a period during which it appeared that almost any contract would violate the Act, the Court effectively reversed itself in *Addyston Pipe & Steel Company v. United States*.¹⁸ In *Addyston*, the Supreme Court upheld the Sixth Circuit’s view that a contract violated section one of the Sherman Act not simply because it restrained trade, but because it unreasonably restrained trade.¹⁹

This analysis was later adopted expressly in *Standard Oil Company v. United States*²⁰ and has come to be known as the “Rule of

14. 15 U.S.C. § 1 (1973 & Supp. 1983). See E. KITNER, *supra* note 10, at 15.

15. See *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290 (1896) (rejecting the assertion that section one outlawed only *unreasonable* restraints of trade). See also *National Soc’y of Professional Engineers v. United States*, 435 U.S. 679, 688 (1978) (observing that “read literally, § 1 would outlaw the entire body of private contract law”).

16. E. KITNER, *supra* note 10, at 16.

17. *Board of Trade of the City of Chicago v. United States*, 246 U.S. 231, 238 (1918).

18. 176 U.S. 211 (1899). The ill-fated agreement in *Addyston* involved a contract for the sale of pipe. The Court found that it served no purpose but to restrain trade and that such agreements were of the type made illegal by the Sherman Act. While the result reached in *Addyston* could have arisen just as well from a strict reading of section one (as in *Trans-Missouri*), the rationale laid the foundation for the express adoption of the “Rule of Reason” in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

19. 85 F. 271, 278-79 (6th Cir. 1899). “Contracts that were in unreasonable restraint of trade at common law . . . were . . . void, and were not enforced by the courts. The effect of the Act of 1890 [the Sherman Act] is to render such contracts unlawful . . .” *Id.* at 279 (citations omitted).

20. 221 U.S. 1 (1911). The Court followed *Addyston* in looking to the English and American common law understanding of the term “restraint of trade” to evaluate its use in the Sherman Act. *Id.* at 51. The Court concluded that since Congress gave no other explanation, its intent must have been that “in restraint of trade” have a meaning similar to its usage at common law. 221 U.S. at 59. The dissent argued that the “rule of reason” approach amounted to the same sort of judicial meddling in private affairs that had been discarded with the decline of

Reason."²¹ The constant rehashing of certain patterns of restraint feared by the dissent in *Standard Oil* has been avoided by judicial recognition of certain conduct as unreasonable "*per se*."²² Today, the *per se* rules stand alongside the Rule of Reason in setting the standard of what sort of conduct amounts to a proscribed restraint of trade.²³

That a restraint of trade be unreasonable is but one element of a section one offense. There are three others:²⁴

substantive due process. *Id.* at 82 (Harlan, J., concurring in the result but dissenting as to the method of analysis).

21. See *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 687 (1978). "[T]he inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition." *Id.* at 691. "[T]he purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest [T]hat policy decision has been made by Congress." *Id.* at 692. The current state of the Doctrine is discussed in E. DISNER, *THE RULE OF REASON: FUDGE FACTOR IN ANTITRUST LAW*, *L.A. Daily Journal Report*, July 13, 1979 (reprinted in *ANTITRUST: NEW DEVELOPMENTS* 132, August 1982).

22. See *Northern Pacific Ry. v. United States*, 356 U.S. 1, 5 (1958):

[T]here are certain agreements or practices which, because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or business excuse for their use. This principle . . . avoids the necessity for an incredibly complicated and prolonged economic investigation.

Id. at 5.

23. There are five basic types of conduct that are recognized as unreasonable *per se*:

1. Price fixing; see *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1939); 1 VON KALINOWSKI, *supra* note 12, § 3.02[7][a], at 3-20-21;
2. Tying arrangements, or those which make the availability of a service or product contingent on the purchase of another or upon exclusive use; see 1 VON KALINOWSKI, *supra* note 12, § 3.02[7][b][i], at 3-27-28;
3. Horizontal and vertical boycotts (horizontal schemes involve the concerted action of parties at one level of the marketing chain [all peanut wholesalers], while vertical schemes involve the concerted effort of those at various levels of a product/service marketing chain [a peanut grower, wholesaler, and retailer]); see *Radiant Burners, Inc. v. Peoples Gas Light and Coke Co.*, 364 U.S. 656 (1961); *United States v. Frankfort Distilleries*, 324 U.S. 293 (1945);
4. Horizontal division of markets; see *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), *final judgment*, 1973 Trade Cas. ¶ 74,391, *amendment*, 1973 Trade Cas. ¶ 74,485 (N.D. Ill. 1972), *aff'd without opinion*, 414 U.S. 801 (1973); 1 VON KALINOWSKI, *supra* note 12, § 3.02[7][d], at 3-38;
5. Reciprocal dealing; see *United States v. Griffith Co.*, 334 U.S. 100 (1948); *United States v. General Dynamics Corp.*, 258 F. Supp. 36 (S.D.N.Y. 1966).

24. If the Justice Department is bringing a criminal action, the four elements are joined by a fifth: criminal intent. See *supra* note 12.

1. two persons must act in concert,²⁵
2. this conduct must be for the purpose or have the effect of restraining trade or commerce,²⁶ and;
3. the involved trade or commerce must be interstate in nature.²⁷

1.2 Section Two

Section two of the Sherman Act makes illegal the use of monopoly power or any attempts to gain monopoly power. While the use of such power *may* involve acts in “restraint of trade,”²⁸ all such acts are not necessarily independently in restraint of trade.²⁹ While section one prohibits unreasonable restraints of trade, section two prevents the use of restraints of trade that, although reasonable, involve the improper furtherance or attempted creation of monopoly power.³⁰ Specifically, section two enumerates three separate offenses: (1) actual monopolization, (2) attempts to monopolize, and (3) combinations and conspiracies with monopolization as a goal. As with section one, the courts have developed a set of criteria delineating the elements of these offenses.

A case of actual monopolization is made out by showing that

25. 1 VON KALINOWSKI, *supra* note 12, § 3.02[1], at 3-5. In the *Boulder* litigation, the city is assumed to have acted in concert with some new entrant into the cable market. However, this theory was rejected by the trial court. 485 F. Supp. 1035, 1038.

26. 1 VON KALINOWSKI, *supra* note 12, § 3.02[4], at 313-15. However, some exceptions may apply, as was the central issue litigated in *Boulder*. For a quick survey of the remaining exceptions (express and implied), see J. VAN CISE, *THE FEDERAL ANTTITRUST LAWS* 7, 55-56 (4th rev. ed. 1982).

27. The plain meaning of the statute’s language makes this clear. See 1 VON KALINOWSKI, *supra* note 12, § 1.02[1], at 1-9. The scope of activity defined as interstate in nature has expanded dramatically since the Sherman Act was passed into law, the coverage of the Act expanding as well. E. KITNER, *supra* note 10, at 18-19. The operation of a cable television system has been expressly held to effect interstate commerce. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168-69 (1968).

28. See *Standard Oil*, 221 U.S. at 61.

29. *Id.*

In other words, having by the first section forbidden all means of monopolizing trade . . . the second section seeks . . . to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize . . . even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section.

See also *supra* note 20.

30. 1 VON KALINOWSKI, *supra* note 12, § 1.02[2] nn. 20-23, at 1-11 and accompanying text. The section reflects the intent of the Congress to include all anti-competitive activity within the proscriptions of the Sherman Act. See also *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948) *reh’g denied*, 334 U.S. 862; 1 VON KALINOWSKI, *supra* note 12, § 3.03[1][c], at 3-52.

the defendant possesses monopoly power³¹ in the relevant market³² and that the defendant intends to use, or has used, that power.³³ There is nothing inherently wrong with the possession of monopoly power. Illegality attaches only to its misuse. In contrast, the two remaining offenses involve situations where monopoly power is yet to exist, but is actively sought. An attempt to monopolize consists of the specific intent to destroy competition

31. Looking to case law from all of the federal courts, von Kalinowski has formulated a three-step analysis for determining whether a defendant has monopoly power:

1. Has defendant used his market position to raise prices or exclude competition? If so, defendant clearly has monopoly power. If not:
2. How much of the market does defendant control? If less than 50%, there is no monopoly. If more than around 80%, it is "virtually certain" there is a monopoly. If defendant controls between 50% and 80%:
3. Considering defendant's market share and one or more of these factors:
 - (1) market or industrial structure;
 - (2) business policies and conduct of defendant; and
 - (3) defendant's business performance.

It should be clear that the outcome in the 50 to 80 percent range is far from certain. 1 VON KALINOWSKI, *supra* note 12, § 3.03[2][c][iii], at 3-67-72.

32. United States v. Grinnel Corp., 384 U.S. 563 (1966). This element springs from the section two language, "any part of the trade or commerce . . ." 15 U.S.C. § 2 (1973 & Supp. 1983), and is the first step in analyzing the propriety of a defendant's conduct. The identification of a relevant market has been held to turn on what, if any, substitutes for the defendant's product or service are part of the product market. United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377 (1956). This involves a two point analysis, based on the product's fungibility and the "cross-elasticity of demand." *Id.* This basically involves a study of how, if at all, a slight decrease in the price of one of the products or services will effect the two products' market shares. The more substantial the effect, the more likely the products are to be found part of the same market.

Once the relevant *product* market is determined, the relevant *geographic* market must be outlined. *In re* IBM Peripheral EDP Devices Antitrust Litigation v. International Business Machines Corp., 481 F. Supp. 965 (N.D. Cal. 1979). This market can vary in size from a small town to the entire nation. See 1 VON KALINOWSKI, *supra* note 12, § 3.03[2][b][ii], at 3-61-63.

33. United States v. Griffith, 334 U.S. 100, 105 (1948). All that must be shown for a finding of a general intent is that defendant acted unlawfully or engaged in practices that furthered or maintained its monopoly. 16B VON KALINOWSKI, BUSINESS ORGANIZATIONS: ANTITRUST LAWS AND TRADE REGULATION § 8.02[4] at 8-44-48.1 Compare *infra* notes 34-38, for examples of a specific intent requirement. Von Kalinowski notes that courts often infer the intent from the circumstances:

1. Where defendant achieved his monopoly power via unlawful acts;
2. Where power was achieved fairly, but maintained illegally;
3. Where power was lawfully attained and is maintained by otherwise legal business policies that don't consist of continued product excellence.

Id. at 8-46-47. However, the mere *possession* of monopoly power does not constitute a violation of section two. United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377 (1956); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

or build a monopoly³⁴ coupled with a “dangerous probability” of attaining monopoly power.³⁵ A dangerous probability of success exists if the defendant has so much market power that there exists a reasonable likelihood that he may gain monopoly power,³⁶ and if he has engaged in overt conduct designed to reach his goal. A conspiracy to monopolize consists of overt concerted action, the specific intended result³⁷ of which is the acquisition of monopoly power.³⁸ For the reasons noted above, extensive discussion of the elements of section two offenses is left to other sources.

With a basic understanding of what constitutes a violation of the Sherman Act in hand, it is time to turn to the question of just who is subject to the Act’s proscriptions. Both sections one and two provide that any person may be liable.³⁹ This clearly includes corporations and associations,⁴⁰ but to what extent, if at all, does the Act apply to the conduct of a state government or its subdivisions? The Supreme Court has struggled with this question since it first directly addressed it in *Parker v. Brown*.⁴¹

PART 2

The Parker Doctrine

Although the Court touched on the question of state antitrust immunity before *Parker*, the issue was never squarely, much less conclusively, addressed.⁴² In *Parker*, the issue was met head on

34. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953). This specific intent may be inferred from the practices of defendants. *United States v. Jerrold Electronic Corp.*, 187 F. Supp. 545, 567 (E.D. Pa. 1960), *aff’d per curiam*, 365 U.S. 567 (1961); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939). Where the line between inferred specific intent and mere general intent lies is unclear. 16B VON KALINOWSKI, *supra* note 33, § 9.01[4] n.65 at 9-25 and accompanying text.

35. *Times-Picayune*, 345 U.S. at 626; *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co., Inc.*, 614 F.2d 832 (1980).

36. There is some debate as to whether it is necessary to show that the “reasonable chance of success” exists in a *relevant market*. The majority of circuits seem to require that the relevant market be shown. 1 VON KALINOWSKI, *supra* note 12, § 3.04[3], at 3-100-102.

37. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953). Specific intent may be inferred.

38. As is the case with attempted monopolization, the generally accepted view is that the intended acquisition of monopoly power must be in the relevant market. *See United States v. Yellow Cab*, 332 U.S. 218 (1947); 1 VON KALINOWSKI, *supra* note 12, § 3.05[4], at 3-116-120.

39. *See supra* note 13 and accompanying text.

40. The antitrust laws were developed in reaction to the conduct of large corporations. *See generally* R. POSNER, *supra* note 10, at 23-31. Likewise, the circumstances in which an association may find itself in antitrust trouble are numerous. *See generally* 1 VON KALINOWSKI, *supra* note 13, § 2.06, at 2-98-116.

41. 317 U.S. 341 (1943).

42. The seeds of the doctrine may be found in *Olsen v. Smith*, 195 U.S. 332 (1904). There the Court considered a Texas law providing for a steamboat pilotage

and has since been discussed at length in a series of inconsistent decisions that constitute the "*Parker Doctrine*." Each of these decisions is discussed in turn in an effort to draw a common thread between them so that some workable standard for reviewing the legislation enacted in response to *Boulder* may be developed.

2.1 *Parker v. Brown*

Parker began as a dispute between a raisin farmer and a California state official over compliance with the California Agricultural Prorate Act, which the farmer claimed illegally interfered with interstate commerce.⁴³ The question of antitrust liability was not raised in the trial court and was addressed in the Supreme Court only at the query of the justices.⁴⁴

The challenged scheme was rather complex and involved action by a state commission at the request of, and subject to the final approval of, the farmers to be regulated. While the raisin farmer met with success in the trial court, his victory was not on anti-trust grounds. Rather, the trial court found that the program unreasonably interfered with interstate commerce.⁴⁵

The Supreme Court rejected this holding, finding the policy of the marketing program to be consistent with federal marketing programs.⁴⁶ More importantly, the Court found the program to be valid under the Sherman Act.⁴⁷ Simply stated, the Court held

monopoly. In dicta, the Court suggested that the "antitrust laws of Congress" did not displace a state's authority to regulate matters of state concern. *Id.* at 344-45.

43. *Brown v. Parker*, 39 F. Supp. 895 (S.D. Cal. 1941).

44. The *Parker* Court requested that counsel address the question of state antitrust liability in their briefs on re-argument in light of the Court's holding that the State of Georgia was a "person" under § 7 of the Sherman Act and could therefore recover treble damages. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 587 (1976). See *Georgia v. Evans*, 316 U.S. 159 (1942).

45. The lower court held that the Act was an illegal interference with and undue burden upon interstate commerce. 39 F. Supp. 895, 902.

46. Farmer Brown pointed to the Federal Agricultural Marketing Agreement Act of 1937 as support for the trial court's conclusion that the California law violated the commerce clause. *Parker*, 317 U.S. at 349. The *Parker* Court observed that while the federal Act *envisioned* regulation in the realm of the California Act, no such federal regulation had been promulgated. *Id.* at 353-55. The federal act discussed in *Parker* remains in force today. See 7 U.S.C. §§ 601-624 (1980 & Supp. 1983).

47. The exact language the Court used in stating this conclusion is the basis of the *Parker Doctrine* and therefore the basis of arguments concerning the Doctrine's nature and scope. Because succeeding decisions often cite the discussion and because its exact impact is even today debated, it is set forth at length:

We may assume for present purposes that the California prorate program

that the Act did not apply to action by a state. Since the conduct involved in *Parker* was clearly that of a state (acting through an

would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate. We may assume also, without deciding, that Congress could, in the exercise of its commerce power, prohibit a state from maintaining a stabilization program like the present because of its effect on interstate commerce. Occupation of a legislative "field" by Congress in the exercise of a granted power is a familiar example of its constitutional power to suspend state laws. . . .

But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It 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. *We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.*

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

There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only "business combinations". 21 Cong. Rec. 2562, 2457; see also at 2459, 2461. That its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, abundantly appears from its legislative history. . . .

True, 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 [emphasis added], *Northern Securities Co. v. United States*, 193 U.S. 197, 332, 344-47; 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, cf. *Union Pacific R. Co. v. United States*, 313 U.S. 450. Here the state command to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required vote on the referendum is one of these conditions.

The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or

administrative agency), the limits of the holding were left for the future.⁴⁸ Likewise, a definitive statement of the underlying rationale for the decision (*i.e.*, whether it was based on federal *preemption* or was merely a judicially created *exception*) was left for explanation in cases to come.⁴⁹

2.2 Basic Limits of *Parker*: *Goldfarb*, *Cantor* and *Bates*

The question of state antitrust liability did not reach the Court again for thirty years;⁵⁰ however, the first case to address the is-

to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.

317 U.S. at 350-52 (emphasis added; citations omitted).

48. "[I]t is the state, acting through the Commission, which adopts the program and which enforces it . . . in the execution of a governmental policy." 317 U.S. at 352. Hence, *Parker* expressly holds only that a state may act to restrain trade without violating the Sherman Act. The language of the case left a gap of uncertainty where the conduct of entities merely *associated* with the state was concerned.

49. The question of whether the "*Parker* Doctrine" is a judicially created exemption or an application of federal preemption norms is arguably pivotal in determining the scope of the Doctrine. This follows from judicial hesitance to expand federal Congressional Acts beyond their clearly expressed limits where preemption is the issue, and the Court's similar hesitation to find "implied exemptions" to the coverage of the antitrust laws. See *Lafayette v. Louisiana Power and Light*, 435 U.S. 389, 398 (1978). Thus, if the Doctrine is preemption based, the presumption should be against a narrow interpretation of its limits. In contrast, if the Doctrine is exemption based, the presumption should be towards limiting the applicable scope of the Doctrine.

Many respected commentators argue that the Doctrine is preemption based. See 2 VON KALINOWSKI, *supra* note 13, § 7.20[1], at 7-310-312.1; Handler, *Antitrust — 1978*, 78 COLUM. L. REV. 1374, 1378 (1978) (cited in VON KALINOWSKI). The Supreme Court's post-*Parker* decisions tend to identify the Doctrine as exemption based. See, e.g., *Goldfarb*, 421 U.S. at 788; *Cantor*, 428 U.S. at 600; *Bates*, 433 U.S. at 361, 363, 404 (both the majority and dissent refer to the *Parker* exemption); *Orin Fox*, 439 U.S. at 109-10; *California Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc.*, 445 U.S. at 102.

Furthermore, on its face, the language of *Parker* is the language of preemption. The Court not only searched for some indicia of legislative intent to "occupy the field" covered by the prorate Act, but also searched for the elements of a Sherman Act violation. 317 U.S. at 350-52. The arguments for two theories intertwine. That the lower courts continued to struggle with the issue through *Boulder* is indicative of how dull the line of demarcation is. It is important to note that the *Parker* Court never expressly adopted one theory or the other as the sole basis for its antitrust holding. All of the language in the decision arguably supports either or both theories. Since both theories supported the Court's decision, there was no need to choose.

50. The Court mentioned the Doctrine peripherally in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); and *Schwegman Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1959).

sue seemed to set off a chain reaction of litigation that seemed only to add to the haze. At issue in *Goldfarb v. Virginia State Bar*⁵¹ was the State Bar's minimum fee schedule. While the State, acting through its supreme court, compelled certain conduct on the part of the State Bar, the fee schedule was the result of a mere suggestion by the state legislature that the quality of legal services was related to their cost.⁵²

The *Goldfarb* court rejected the State Bar's *Parker* Doctrine claim of exemption, holding that the doctrine would apply only where the challenged conduct was "compelled by the state acting as sovereign."⁵³ In reaching this conclusion, the court did not discuss the nature of the *Parker* Doctrine, referring to it as the "*Parker* exception" from antitrust liability.

In *Cantor v. Detroit Edison*,⁵⁴ the Court examined what sort of conduct would amount to the requisite state compulsion. Defendant's electric company's rates were set by the company subject to state approval. The approved structure included a free light bulb exchange program. Plaintiff alleged that the program was an illegal tying arrangement⁵⁵ and that the company's conduct was an improper use of monopoly power. The power company asserted that the light bulb program was compelled by the state and that it was therefore immune to liability under *Parker*. A divided Court

51. 421 U.S. 773 (1975). Chief Justice Burger wrote for the Court.

52. The pricing plan in *Goldfarb* was similar to that in *Parker* in that it was imposed in part by a state administrative agency (*i.e.*, the State Bar). However, in sharp contrast to *Parker*, there was no express legislative intent to set prices. The controlling statutes then provided merely that the State Supreme Court of Appeals could adopt rules and regulations regarding legal conduct; *see* Va. Code § 54-56 (1972). The state supreme court adopted various regulations concerning fees, none of which expressly commanded the adoption of a minimum fee schedule set by the State Bar. Rather, the rules suggested that one factor in setting fees should be "the customary charges of the Bar for similar services." 421 U.S. at 789 n.19.

The state bar, in turn, adopted such schedules which were apparently closely followed by the county bar associations in Virginia. However, all the state bar was expressly required to do was investigate and report violations of rules promulgated by the court. None of the rules required that a fee schedule be set. *Id.*

53. The court observed that the focus of inquiry was whether the activity was *required* by the state. Anticompetitive conduct that was merely "prompted" by state action, as in *Goldfarb*, was held insufficient. 421 U.S. at 790-91.

54. 428 U.S. 579 (1976). The facts in *Cantor* fell squarely between those in *Parker* and *Goldfarb*. The result was a sharply divided court. Justices Brennan, Marshall and White joined Justice Stevens' plurality opinion; Chief Justice Burger joined in portions of Justice Stevens' opinion and filed a concurrence to establish the majority. Justice Blackmun filed another concurrence. Justices Powell and Rehnquist joined Justice Stewart in his dissent. Thus, the Court announced four distinct views as to the proper manner in which to resolve the case—three of those by members establishing the majority.

55. 428 U.S. at 612 (Blackmun, J., concurring.) *See supra* note 23 for an explanation of what constitutes an illegal tying agreement. In short, the sale of electricity was "tied" to the sale of light. Those who bought electricity in Detroit in effect were forced to purchase a certain number of light bulbs as well.

managed a slim majority opinion holding that the utility's conduct in giving light bulbs away was merely approved by the state, not compelled by the state.⁵⁶

The Court examined the flip-side of the compulsion course in *Bates v. Arizona State Bar*.⁵⁷ There, the Bar's limitations on lawyer advertising withstood antitrust challenge because they were compelled by the state (acting through its supreme court).⁵⁸ As in *Goldfarb* and *Cantor*, the Court gave no determinative indica-

56. *Cantor* created more confusion than anything else. Three justices contended that *Parker* did not even apply to the case as the actor was not a public entity. 428 U.S. at 591. The heart of the majority opinion was that the light bulb program was the utility's idea—not the state's. The approval of the rate structure was thus viewed as nothing more than "authorizing" the conduct, an act expressly beyond *Parker's* limits. ("[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it. . . ." *Parker*, 317 U.S. at 351.) Although Chief Justice Burger concurred with the majority, he rejected the view that *Parker* could only apply to state officials.

Justice Blackmun approached the case with preemption analysis (as opposed to the majority's exemption method) concluding that the legislature had preempted any state conduct or legislation merely authorizing anti-competitive conduct. He thus arrived at the same conclusion by different means. 428 U.S. at 605 (Blackmun, J., concurring).

The dissent concluded that the Court's decision "[would] . . . surely result in the disruption of the operation of every state-regulated public utility in the nation and in the creation of 'the prospect of massive treble damage liabilities' . . ." 428 U.S. at 615 (Stewart, J., dissenting) (quoting Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U.L. REV. 693, 728 (1974)). History shows that the Justice may have overstated or misstated the case's impact. There appears to have been no disruption of state-regulated utilities. On the other hand, *Cantor* eventually led to *Lafayette* and *Boulder*, both of which spurred considerable litigation on the local level.

Despite its overstatement, the dissent presented an interesting preemption theory of the case. First, the utility "petitioned the state" to approve its proposed tariff. Even if this proposal included otherwise illegal restraints, the petition was protected under the *Noerr* Doctrine. *Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127 (1961) (holding that private parties may petition for anti-competitive state regulation without violating the antitrust laws). Second, Michigan approved the tariff with the restraint. No violation occurred there because the state acted—not the utility—a rather straightforward application of *Parker* in the dissent's eyes. Third, the utility complied with the tariff terms as required by state law. Under *Goldfarb*, this amounted to state compulsion to act.

57. 433 U.S. 350 (1977), *reh'g denied*, 434 U.S. 881. Justice Blackmun wrote for the unanimous (as to the antitrust issue) Court. The bulk of the *Bates* opinion deals with the first amendment issue raised by the case; however, the Court also attempted to clarify *Cantor*. Discussion of the *Parker* Doctrine was a necessary part of the decision from a traditional standpoint in that the Court normally resolves cases on statutory grounds if at all possible. Thus, the Court's comments on *Parker* are far from mere dicta.

58. *Bates* is factually very similar to *Parker*, the major difference being that the acting body was a state supreme court rather than a state legislature. From a

tion as to whether the *Parker* Doctrine was exemption or preemption based.⁵⁹

With these decisions, the Court established the basic bounds of the *Parker* Doctrine. The decisions are best viewed as reference points on a continuum representing the degree of state involvement in the decision to displace competition. Near one end are *Parker* and *Bates*; at the other *Goldfarb*. Midway lies *Cantor*, with its facts placing it just within the liability range of the continuum.⁶⁰

2.3 *City of Lafayette v. Louisiana Power and Light Company*

Lack of authority notwithstanding, it was generally assumed that state subdivisions (i.e., municipalities) and their agents were more or less safe from antitrust liability.⁶¹ While *Boulder* eventually sank this notion, *City of Lafayette v. Louisiana Power &*

Parker point of view, however, the difference is immaterial because both entities are ultimately the state.

The Court distinguished *Bates* from *Goldfarb* on the origin or the challenged restraint; the state v. the bar association. *Cantor* was likewise distinguished, for the “real” actor there was the utility, not the state. In this context, one might argue that the Model Rules were initiated by the American Bar Association (a private body) and merely “approved” by the Arizona Court. See 433 U.S. at 362, n.15 (stating that the Model Rules were first incorporated merely by reference).

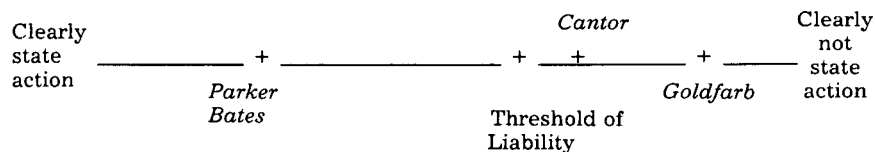
In concluding its discussion of the antitrust issue, the Court observed:

The disciplinary rules reflect a clear articulation of the State’s policy with regard to professional behavior. *Moreover, as the instant case shows, the rules are subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in enforcement proceedings.* Our concern that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced in such a situation; *we deem it significant that the state policy is so clearly and affirmatively expressed and that the State’s supervision is so active.*

Id. *Bates* thus presents the first suggestion that the presence of some sort of ongoing state review or supervision of conduct restraining trade might be a necessary element of the *Parker* Doctrine. Although never mentioned by the Court in *Parker*, such supervision was an integral part of the raisin marketing plan.

59. See *supra* note 54. While discussing this point, the Court first denotes the *Parker* Doctrine as an exemption, then speaks in the language of preemption. See 433 U.S. at 361-62.

60. For purposes of analyzing the *Parker* line of cases, it is helpful to present a continuum of state involvement in the decision to displace competition. The end points are *Parker*, *Bates* (no liability) and *Goldfarb* (liability).



61. Areeda, *Antitrust Immunity For State Action After “Lafayette”*, 95 HARV. L. REV. 435, 438-39 (1981).

*Light Company*⁶² amounted to a shot across the bow, warning of what was to come.

The shot was, however, a shaky one. While five justices agreed that the City was subject to antitrust liability, there was no majority opinion as to why such liability existed. Four justices felt that the immunity of any state subdivision had to flow from the state as sovereign. Thus, in order for *Parker* type immunity to exist, the subdivision had to act pursuant to an affirmatively expressed state policy designed to replace competition with regulation.⁶³ In his concurring opinion, Chief Justice Burger agreed that while such authorization was required, it was needed only where the subdivision was acting more like a private party than like a government entity.⁶⁴ In his view, the nature of the activity as "proprietary" or "non-proprietary" was determinative.⁶⁵

The decision in *Lafayette* created more questions than it answered. Of them, the most important was for what activities and on what grounds antitrust liability apply to state subdivisions. Also left for another time were the questions of whether state subdivisions could be liable for treble damages and how particular and "clear" the authorizing legislation would have to be to confer the state's immunity.⁶⁶ These questions were not addressed again until *Boulder*; however, before *Boulder* the Court twice encountered the general question of state immunity. Both of these decisions merit review before considering *Boulder* and its impact.

62. 435 U.S. 389 (1978). On the *Parker* continuum, *Lafayette* was a close call. Hence, the Court produced five opinions, none of which state a majority method of analysis for the outcome in the case.

63. 435 U.S. at 413. This was in substance a restatement of the "threshold" requirement, clarified in *Goldfarb*, *Cantor* and *Bates*. The Court suggested that municipalities could be equated to state administrative agencies and that any protection from antitrust liability therefore arose out of a state command rather than out of the municipalities' status as a subdivision of state government. 435 U.S. at 413.

64. Although such a distinction is not always clear, it was in *Lafayette*. The city was selling electric power outside the city limits. Its customers in this area had no voice in the operation of the utility (only city residents vote on city government affairs) and were therefore dealing with a "private party."

65. Areeda, *supra* note 61, at 441.

66. *Id.* at 441-42. The possibility that the Chief Justice's "propriety" tract might later be adopted left an additional question: What is a proprietary activity? *Id.* at 443.

2.4 Filling in the Doctrine: *New Motor Vehicle Board v. Orin Fox Co.* and *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*

Hot on the heels of *Lafayette, New Motor Vehicle Board of California v. Orin W. Fox Co.*⁶⁷ involved a challenge to a statute allowing car dealers to block the installation of another car dealership in certain situations.⁶⁸ The Court rejected the anti-trust claim stating that the “dispositive answer [was] that the . . . Act’s regulatory scheme [was] a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom [in a particular arena].” The Court also noted with approval that the operation of the program was “subject to ongoing regulatory supervision.”⁶⁹ *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*⁷⁰ involved a challenge of California’s wine pricing system. The state required all wine producers, wholesalers and rectifiers to file “fair trade contracts” or price schedules with the state. No state licensed wine merchant was permitted to sell wine to a retailer at any price lower than those set in the fair trade contracts.⁷¹

In rejecting the assertion of state action immunity, the Supreme Court reviewed the *Parker* line of cases summarizing their holdings:

These decisions establish two standards for antitrust immunity under *Parker v. Brown*. First, the challenged restraint must be “one clearly ar-

67. 439 U.S. 96 (1973). Justice Brennan delivered the opinion of the Court. Justice Stewart dissented on the grounds that other than the antitrust issues were raised.

68. Under the California Automobile Franchise Act, a motor vehicle manufacturer must secure the approval of the California New Motor Vehicle Board before opening a retail motor vehicle dealership within the market area of an existing franchise, if and only if that existing franchise protests the establishment of the competing dealership. The Act also directs the Board to notify the manufacturer of this statutory requirement upon the filing of a timely protest by an existing franchisee. The Board is not required to hold a hearing on the merits of the dealer protest before sending the . . . notice. . . .

Id. at 98.

69. *Id.* at 109-10.

70. 445 U.S. 97 (1980). Justice Powell delivered the opinion of the unanimous Court. Justice Brennan did not take part in the consideration of the case.

71. *Id.* at 99-100. *See also* CAL. BUS. & PROF. CODE §§ 24862, 24864-66, 24880 (West Supp. 1980 & Supp. 1984). The heart of the legislation in question is set forth in two paragraphs:

Each wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier shall:

- (a) Post a schedule of selling prices of wine to retailer or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.
- (b) Make and file a fair contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers.

Id. at § 24866.

articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised by the state itself." [Citation omitted]⁷²

The unanimous Court specifically cited the plurality in *Lafayette* for this proposition; however, the page cited includes reference to a footnote that points out that the active supervision requirement may, or may not, be applicable to a state subdivision.⁷³ Thus, although the *Midcal* Court adopted the *Lafayette* plurality's requirement of "clear articulation and affirmative expression" as to state subdivisions, the question of a need for active supervision was left open.

These cases in hand, Community Communications Company, Inc. headed to court to fight for the right to expand its Boulder cable television system.

2.5 *Community Communications Company v. City of Boulder*

In *Community Communications Company v. City of Boulder*,⁷⁴ the Supreme Court held that the *Parker* Doctrine's requirement of clear articulation and affirmative expression was not satisfied by a broad delegation of state power through a state constitution's "home rule" provision. Before proceeding to analyze the Court's opinions, it will be helpful to review the facts of the dispute that led to litigation and the application of the pre-*Boulder Parker* Doctrine to those facts by the lower courts.

2.5.1 Facts: "Wanted — The BEST Cable System for Boulder"

When cable first came to Boulder in 1964, its only function was to provide acceptable television reception for viewers blocked by terrain from over the air signals.⁷⁵ The University Hills area of Boulder was the only part of town where reception was a problem, so only it was "wired." The remainder of the city was left unwired presumably because there was no business reason to do otherwise, as residents could receive service merely by extending

72. 445 U.S. at 105.

73. *Lafayette*, 435 U.S. at 410 n.40.

74. 102 S. Ct. 835 (1982). Justice Brennan wrote for the Court joined by Justices Marshall, Blackmun, Powell and Stevens. Justice Stevens filed a concurring opinion, while Chief Justice Burger, Justices O'Connor and White joined Justice Rehnquist's dissent. Justice Stevens' concurrence expressed no separate reason for the result. Thus, while *Boulder* is a close case, it is a more definitive statement of the law than *Lafayette* (where there was no majority view of the reasoning behind the result).

75. See *supra* notes 1-3 and accompanying text. This type of service is modernly referred to as "basic cable."

an antenna. However, the explosion of special cable programming services in the late 1970's created a use for cable in the rest of Boulder. Community Communications Company (CCC), the successor in interest to the original 1964 franchise holder, set out to upgrade its system and offer all of Boulder services that were unavailable over the air.

In May of 1979, CCC wrote to the mayor of Boulder advising her of its intention to expand its service area to include the entire city and of its intention to install a satellite dish (downlink) in order to offer special "cable only" services on the system.⁷⁶ To effect the expansion, CCC began to negotiate telephone pole easements⁷⁷ with local utility companies and arrange for the installation of a downlink. As the pole easements were secured, CCC began installing cable. Meanwhile, a newly formed cable company, Boulder Cable Communications (BCC) informed the mayor that it too would seek a city-wide franchise to provide cable service. BCC stated that it intended to build its system regardless of CCC's future plans.⁷⁸

Faced with two parties interested in providing cable service, the City Commission decided to study the question in general terms. A cable consultant was hired to review the options available. Citizen advocates approached the council expressing their concern

76. 485 F. Supp. at 1037. "Cable only services should soon be available everywhere in the United States by consumer oriented direct-to-home satellite transmission. The total control over the availability of such services will thus be wrested from local hands. See J. ROMAN, *supra* note 2, at 50-56.

77. Cable for a system may be installed either above or below ground. Generally, the easiest way to install a system is to place the cable along the same path that utilities follow. Since utility companies generally own the easements through which their wires and pipes pass, the cable company must arrange for use of part of the easements. This, in turn, is accomplished by the creation of additional easements in the existing easements. See 485 F. Supp. at 1037.

78. 485 F. Supp. at 1037. "[W]hatever action the City takes in regard to TCI [parent of CCC], it is the plan of BCC to begin building its system as soon as feasible . . ." Panel Discussion, *The Antitrust Panic of 1982: Is It Justified?*, PUBLIC MANAGEMENT, January 1983, at 11 (Bud Westdyke, City Manager, Boulder, Colorado, speaking). BCC's choice of words to convey its message to the city seems curious in that there was no indication then (in the public record) that the City planned to do anything about the CCC expansion. Their willingness to compete was, however, short lived.

Had BCC and CCC built in the same areas of the city, residents in those areas would be able to choose between cable services. In trade jargon, such a situation is known as an "overbuild." There are eight franchise areas in the country presently "overbuilt." *Overbuilds Subject of Study*, CABLEVISION, April 4, 1983, at 220. Only three of these systems are reported to be economically viable. *Id.* Two advanced systems are competing head-to-head in some areas of Phoenix, Arizona. Each system is owned by a major MSO (Multiple System Operator) (Cox Cable and Times Mirror Cable). See Gits, *Andrenalin Days*, CABLEVISION PLUS, Jan. 17, 1983, at 4. Whether both will eventually be profitable is uncertain, however, neither company is plowing money into a system with loss as a goal.

that once CCC had the rest of the city wired, no one else would be interested in the franchise and that the city would then be stuck with whatever CCC decided to install.⁷⁹ The consultant's report concurred, emphasizing that "the city should be concerned about the tendency of a cable system to become a natural monopoly."⁸⁰

As CCC continued to install cable in previously unwired areas, the council prepared a "model" cable TV ordinance that expressed the council's goal for Boulder's cable system. The council envisioned that bids for franchises would be based on the model, with the successful bidder(s) expected to operate under a similar document. The model plan provided for:

The city's right to purchase the cable company, at a price excluding goodwill and limited to depreciated investment; the city's right of prior approval of every company contract; rate regulation; the city's right to change rates at any time; a 5% franchise fee (two and one-half times the present fee); a requirement for five leased access channels; a complaint procedure monitored by the city manager, with a liquidated damage provision; a requirement to upgrade company facilities continually to state-of-the-art conditions; and a requirement for renegotiation, at specified intervals, of rate structures, free or discounted service, services provided, *programming offered*, and human rights.⁸¹

BCC wrote the city again in November 1979, offering to accept the terms set forth in the model ordinance. The company expressed its desire that the city grant BCC a permit and discard plans to seek bids based on the model franchise. Alternatively, BCC stated that it would participate in the bidding process, but suggested that it would accept a franchise only if CCC's license was modified to limit its service area or altogether revoked, although earlier CCC had claimed it was willing to compete.⁸²

Whatever its motivation, the council decided in December to act on the question of cable service.⁸³ Two emergency ordinances

79. The 1964 franchise under which CCC was operating had no programming requirements, hence, CCC could provide whatever sort of service it desired. Price, *Moratorium on Boulder Cable Expansion Initiates Series of Legal Actions*, TVC, March 1, 1980, at 21.

80. 485 F. Supp. at 1037.

81. 630 F.2d at 710 (emphasis by the Court in reference to first amendment problems). Franchise agreements with similar terms are not at all unusual. For a sample franchise agreement and bid request, see CURRENT DEVELOPMENTS IN CATV 245-338 (1981) (G. Shapiro, ed.).

82. 630 F.2d at 710. This assertion stood in stark contrast to BCC's earlier claims that it was willing to compete with CCC. See *supra* note 78 and accompanying text.

83. The City Council claimed that it was acting to promote competition. Panel

were enacted. The first revoked the 1964 franchise ordinance and reenacted it with a three-month moratorium on expansion.⁸⁴ The second ordinance unilaterally amended the 1964 franchise ordinance to restrict any expansion by CCC for three months. The city also asked 50 companies to propose systems for Boulder.⁸⁵

CCC, apparently unimpressed with the legality of the ordinances restricting its expansion, continued its installation of cable. The city council, equally unimpressed with CCC's irreverence for its authority, sent out work crews to tag along behind CCC installers and tear the cable down.⁸⁶ The city went to the Boulder District Court seeking to enjoin further wiring by CCC, but relief was denied.⁸⁷ CCC in turn sought to prevent further negative action by the city. The cable company filed suit in federal court claiming that, among other things, the city's expansion ban violated the antitrust laws and the first amendment. The company asked the court to enjoin enforcement of the ordinances and any other conduct hampering CCC's 1964 franchise rights.⁸⁸

Putting aside for a moment the issues involved, the equities of the controversy merit consideration. The expressed goals of all parties were seemingly noble. CCC wanted to provide the best cable system possible and was acting—in its *expressed* mind—to protect competition. BCC wanted to provide new cable service to the city—either alone or, at least initially, alongside CCC. That is what everyone *said* they were trying to do. However, the facts raise many legitimate questions as to the true motives of the combatants. The technology to deliver special cable programming had existed for a number of years before CCC moved to expand.⁸⁹ Had CCC moved as quickly as was reasonable from a business point of view, or was it merely reacting to recent local concerns to protect its *de facto* monopoly?⁹⁰ As for the city and BCC, how

Discussion, *The Antitrust Panic*, *supra* note 78, at 11 (Bud Westdyke, city manager, Boulder, Colorado, speaking). CCC feared that the city was acting to protect BCC at CCC's expense, perhaps even on BCC's suggestion. Price, *Moratorium Initiates Legal Actions*, *supra* note 79, at 22-23.

84. 485 F. Supp. at 1037. The ordinance provided that continued operation of the system constituted acceptance of the new terms.

85. Panel Discussion, *supra* note 78, at 11.

86. 630 F.2d at 710. *See also* Price, *supra* note 79, at 21.

87. Price, *supra* note 79, at 22 and 26. *See* 630 F.2d at 710.

88. 485 F. Supp. at 1038.

89. Special programming became available by satellite in 1975, but was available by land microwave link in 1972. HAMBURG, *supra* note 1, at 353.

90. In the eyes of some residents, the service offered by CCC was less than admirable. *See Antitrust Panic*, *supra* note 78, at 10. CCC's announced plans for additional "cable-only" channels did not meet the expectations of some community members. They wanted "two-way" cable, cable security services, local access production facilities and more. *Id.* For a discussion of these capabilities see J. ROMAN, *supra* note 2, at 37-39.

close were the ties, if any, between BCC principals who were former city officials and the city council? Were the council members acting in the best interest of the city, or for the financial benefit of their friends? It seems curious that most of the principals were politically connected.⁹¹ In short, the facts present no clearcut "good guy."

2.5.2 The Lower Court Decisions

Community Communication's complaint cited two major theories to support enjoining enforcement of Boulder's new ordinances: (1) the enactment of the ordinances was a violation of the antitrust laws⁹² and (2) the ordinances operated in violation of CCC's rights under the first amendment.⁹³ Although the court discussed both issues, its decision was grounded primarily on the antitrust claim. The trial court's antitrust analysis exemplifies the difficulty courts encountered in applying the *Parker Doctrine*.

91. *Id.* Such potential conflicts are not uncommon. In Houston, the cable TV market was divided by region among four companies. The mayor then informed the companies that they would have to make room for a fifth. Of course, that the fifth firm was partially controlled by the mayor's attorney had no bearing on the other firm's decision to acquiesce. Entry was subsequently denied a sixth company. See *Affiliated Capital Corp. v. City of Houston*, 700 F.2d 226 (5th Cir. 1983). For the original territory breakdown, see Gits, *Houston Hustle*, CABLEVISION, June 20, 1983 at 171, 182. Questions of such patronage have also arisen in Marquette, Michigan where the company awarded the franchise sought initial financing from local banks with city commissioners on their boards of directors. Kagan, *Cable T.V. Franchising, News Roundup: Cox to Pull the Plug In Marquette*, December 17, 1982, at 304. For the local view see Neubrecht, *City Eyes Action to Halt Cable TV Service Cut Off, Marquette Mining J.*, Dec. 16, 1982, at 1, col. 1. See also Kagan, *Boulder Litigation Roundup*, CABLE T.V. FRANCHISING, July 30, 1982, at 1.

92. 485 F. Supp. at 1038.

93. *Id.* at 1040. The court rejected CCC's assertion that the first amendment precluded all regulation, but found a fine line between permissible regulation of the use of public ways and impermissible content regulation. There seems to be little justification (other than pole space limits and the need to avoid having public ways repeatedly torn up for cable installation) for putting a cap on the number of systems in a given area. Cable has none of the "spectrum limitations" that justify many of the limits on broadcasters, yet, because most households are passed by only one cable system, the most pervasive speech limits of broadcasting are applied with near equal force to cablecasting. 47 C.F.R. §§ 76.205, 76.209 (1982). The FCC is presently considering repealing the rules. In the matter of Amendment of Part 76, Subpart G of the Commission's Rule and Regulations Concerning the Fairness Doctrine and Political Cablecasting Requirements for Cable Television Systems, 48 F.R. 26472 (1983). See Reddy, *Fairness Question Debated*, CABLEVISION, September 12, 1983, at 53. For a review of the major content limitations presently imposed on broadcasters and cablecasters, see *The Law of Political Broadcasting and Cablecasting*, 69 F.C.C. 2d 2209 (1978); Fairness Report, 48 F.C.C. 2d 1 (1974).

The court looked to the standards set forth in *Midcal* and *Lafayette* and concluded that *Parker* Doctrine immunity was available to states *and cities*, but only when they were acting in a “governmental capacity.”⁹⁴ Thus, the court looked for a “clearly articulated, affirmatively expressed” policy to displace competition promulgated not by the state, but *by the city* acting in its governmental capacity.⁹⁵ No such policy was found. Accordingly, the court found the city subject to antitrust liability and also found facts sufficient to enjoin enforcement of the ordinance.⁹⁶

On appeal, the Tenth Circuit reversed the trial court, expressly finding that the city had acted within the scope of the authority afforded by the state’s “home rule” provision,⁹⁷ and that the ordinances were enacted pursuant to an affirmatively expressed city plan to displace competition that was subject to active city supervision.⁹⁸ The court’s understandings of the requirements of the *Parker* Doctrine differed from those of the trial court. The judges concluded that *Lafayette* required express state policy to displace competition (as opposed to such expression by the state’s delegate) only where the municipality was involved in some sort of proprietary activity.⁹⁹ The court turned to the *Midcal* decision for a standard of liability:

The Court in *California Retail* set out two standards for governmental antitrust immunity: First, the challenged restraint must be “one clearly articulated and affirmatively expressed as *State* policy”; second, the policy must be “actively supervised” by the *State* itself. (445 U.S. at 105, 100 S. Ct. at 943, citing *City of Lafayette, supra.*) The latest test for the *Parker* exemption has been met by the City of Boulder. *The policy was affirmatively expressed through the language of the ordinances.* The second part of the *California Retail* test was met by the active supervision and enforcement of the policy by imposition of the 90-day moratorium on construction and by issuance of civil and then criminal citations to cable workers when the moratorium was ignored.¹⁰⁰

Ignored by the court was the fact that *Midcal* dealt with the regulatory acts of a *state* while the case before it dealt with the

94. 485 F. Supp. at 1039.

95. The Court’s opinion necessarily assumes that *Parker* was available to cities since it proceeds to question the nature of the city’s conduct. “[T]he approach taken is not an appropriate exercise and articulation of a policy of regulation.” *Id.*

96. The traditional elements of probability of success and nature of irreparable harm were considered. The court found that CCC might well be able to prove an antitrust violation on the city’s part and that issuing the injunction would cause the city no permanent harm while denying issuance would cause CCC substantial irreparable harm.

97. 630 F.2d 704, 705-07 (10th Cir. 1980). In contrast, the trial court found only that the City had the *authority* to regulate cable. In the trial court’s view, the method chosen to exercise the power was improper.

98. *Id.* at 708.

99. The dissent notes that this distinction is found relevant by a sole justice in *Lafayette*. 630 F.2d at 717 (Markey, C.J., dissenting).

100. *Id.* at 708 (emphasis added and citations omitted).

regulatory acts of a city. The reality of the court's view was that a home rule city equaled the state provided there was no proprietary involvement in the challenged conduct.¹⁰¹ Citing what it dubbed the "*Parker-Midcal* doctrine," the court found the city's conduct exempt from the proscription of the antitrust law and dissolved the injunction.

2.5.3 The Supreme Court Decision

In the Supreme Court's view, the issue presented was "whether a 'home rule' municipality, granted by the state constitution extensive powers of self-government in local and municipal matters, enjoys the 'state action' exemption from the Sherman Act liability announced in *Parker*. . . ."¹⁰² After reviewing the facts of the case, the Court turned to examine the elements of the *Parker* Doctrine, concluding that Boulder's moratorium ordinance was not exempt from antitrust scrutiny unless it constituted state action as a sovereign: "municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy."¹⁰³

The city argued that *both* of the tests were satisfied. First, it claimed to be *acting as the state* by virtue of the delegation of state power through the home rule amendment.¹⁰⁴ The Court rejected this view as misstating the spirit and the letter of the law. Although it was never expressly stated, the Court necessarily

101. *Id.* The dissent rejected this notion, asserting there is no room for local exercise of state power absent *express* delegation. "We are a nation not of 'city-states,' but of States." *Id.* at 717.

102. *Community Communications Co. v. Boulder*, 455 U.S. 40, 43 (1982). Justice Brennan wrote for the majority, joined by Justices Marshall, Blackmun, Powell and Stevens. Justice Stevens filed a separate, but consistent, concurring opinion. Chief Justice Burger and Justice O'Connor joined in Justice Rehnquist's dissent. The majority's statement of the issue implicitly adopts the express reasoning of the court of appeals in *Lafayette* that a "subordinate state governmental body is not *ipso facto* exempt from the operation of the antitrust laws." 532 F.2d 431, 434 (1976).

103. 455 U.S. at 52. The essence of *Parker* was to declare that municipalities are substantially akin to private entities for purposes of Sherman Act liability.

104. 455 U.S. at 52.

Respondent city urges that the only distinction between the present case and *Parker* is that here the act of government is imposed by a home rule city rather than by the state legislature. Under *Parker* and Colorado law, the argument continues, this is a distinction without a difference, since in the sphere of local affairs home rule cities in Colorado possess every power once held by the state legislature.

Id. at 53 n.17.

concluded that a state may not make a broad delegation of its sovereign authority.¹⁰⁵

The *Parker* state-action exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution. But this principle contains its own limitation: Ours is a "dual system of government," *Parker*, 317 U.S. at 351 (emphasis added), which has no place for sovereign cities.¹⁰⁶

The city's second argument was that even if it wasn't acting in the state's shoes, it was acting pursuant to a clearly articulated and affirmatively expressed plan to displace competition. The "plan" was theoretically imbedded in the home rule amendment.¹⁰⁷ This contention was rejected for the same underlying reasons as the city's first argument.

[P]lainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. *A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought.* Nor can those actions be truly described as "comprehended within the powers granted," since the term, "granted," necessarily implies an affirmative addressing of the subject by the State. The State did not do so here: The relationship of the State of Colorado to Boulder's moratorium ordinance is one of precise neutrality.¹⁰⁸

Thus, the Court concluded that notwithstanding the litigation

105. If a broad delegation of power was assumed possible by the court, no further discussion would have been necessary, the requirements of *Parker* being met by the home rule amendment.

106. 455 U.S. at 53.

107. *Id.* at 54-55. Were this argument accepted, one could assert that home rule clauses contemplated displacement of competition in any area of concern primarily to the City. Whether such a result is desirable is quite obviously a policy rather than legal question. In that regard, such a result would seem inconsistent with the Sherman Act's goal of vigorous competition.

The City further argued that the ordinances were unculpable in that they went to a non-proprietary rather than proprietary activity. Although the Court concludes that the distinction is irrelevant as to the City's liability, the question of the distinction's application in determining the nature of liability is left open. 455 U.S. at 55 n.18.

For the text of the Colorado home rule amendment, see COLO. CONST., Art. XX, § 6.

108. 455 U.S. at 55. The Court went on to find invalid the city's stand that the home rule amendment effectively allowed municipalities to choose for themselves whether to regulate certain areas.

[I]n Boulder's view, it can pursue its course of regulating cable television competition, while another home rule city can choose to proscribe monopoly service, while still another can elect free-market competition: and all of these policies are equally "contemplated," and "comprehended within the powers granted." Acceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of "clear articulation and affirmative expression" that our precedents require.

Id. at 56. This language is of particular importance in evaluating post-*Boulder* legislative attempts to secure municipal immunity.

its decision might spark, the policy behind the Sherman Act necessitated a finding that the home rule amendment was insufficient to insulate *Boulder* from liability.

The dissent¹⁰⁹ found two major flaws in the Court's holding. First, it disagreed with the majority's preemption theory.¹¹⁰ The dissent suggested that if preemption norms were properly applied, the statute would merely be held invalid; no penalties would be assessed against the enacting authority.¹¹¹

The dissent's second major point was that, by lumping municipalities together with private individuals, the Court destroyed the "home rule" movement in the country. This was seen as a fundamental intrusion into the nature of the relationship between city and state.¹¹²

Thus, for better or worse, *Boulder* left its mark on the *Parker* Doctrine. Many aspects of applying the Doctrine to cities were left unclear. Hence, an analysis of just what *Boulder* requires is necessary.

PART 3

The Impact of Boulder: A Legislative Survey

Regardless of the merits of the allocation of state and local power *Boulder* demands, the simple fact is that *Boulder* is the law. Municipalities that ignore its implications are flirting with fiscal disaster. The question thus becomes, how does a municipality go about regulating local activity without subjecting itself to

109. *Id.* at 60 (Rehnquist, J., dissenting).

110. The dissent made various policy arguments in support of this conclusion, but offered no law.

First, to say that Congress never intended to subject states to the antitrust laws says nothing about its intent as to cities, *i.e.*, regardless of whether Congress intended the states to be exempt from the laws or if Congress simply did not intend to preempt certain regulations, it does not follow that a similar intent was manifest as to cities. Second, to assert that federal laws preempting other legislation may not subject those who violate these norms to penalties is simply a misstatement of the law. A municipality that breaks a contract by legislative act is subject to a suit for damages.

111. *Id.* at 64-65. An exemption analysis clearly leads to the result of monetary liability for if one is not exempt from a law's proscriptions, he is subject to its penalties.

112. 455 U.S. at 70-71. However, the dissent's desire to lump cities together with states (for *Parker* Doctrine purposes) ignores the realities of local government. By its very nature, local government is more susceptible to undue and improper influence than is state government. *See id.* at 68.

antitrust liability and, perhaps more importantly, to the defense of antitrust claims beyond summary disposition?¹¹³ The answer to this question is neither simple nor definite; the *Parker Doctrine* as a whole presents a tangled array of policy factors to consider while *Boulder* itself expressly reserved judgment on matters of significant importance.¹¹⁴

Any effort to deal with *Boulder* must therefore be based not merely on the decision itself, but on the overall policy underlying the *Parker Doctrine*. Going further, one would do well to examine what others have done to deal with potential antitrust liability. Hence, the questions left open by *Boulder* are considered here in light of the *Parker* line of cases as a whole. Next, selected post-*Boulder* decisions of the lower federal courts and commentary are considered in an effort to predict how these open questions will be resolved. Last, legislation enacted in response to *Boulder* is surveyed in light of liberal and strict interpretations of *Boulder's* requirements.

3.1 Unanswered Questions

The *Boulder* decision leaves four major unanswered questions:

- (1) How "clearly articulated and affirmatively expressed" must stated policy to displace competition be? Must the policy compel displacement of competition?¹¹⁵
- (2) Will active state supervision of a program implementing such policy be required for immunity?
- (3) Is the nature of the municipalities' conduct somehow determinative in establishing standards for liability — i.e., are the rules regarding a city acting as sovereign different than those for a city acting in a proprietary capacity?¹¹⁶
- (4) Where municipalities are found subject to antitrust liability:
 - (i) Will treble damages be available?
 - (ii) Will established *per se* rules of liability apply?
 - (iii) How will the "Rule of Reason" apply?¹¹⁷

113. The defense of an antitrust claim past summary disposition is so costly that it amounts to a sort of penalty itself. For example, the city of Boulder spent a quarter of a million dollars defending Community Communication Company's suit before finally settling it. *The Antitrust Panic of 1982: Is It Justified?*, PUBLIC MANAGEMENT, January 1983, at 10-11.

114. *Boulder's* unanswered questions are discussed *infra* at notes 115-37. See also Brame & Feller, *Antitrust Liability of Local Governments: The Effect of City of Boulder*, 9 VA. B.A.J. 14-15 (1983).

115. See Howard, *The Perspective of a Defendant's Lawyer* in ANTITRUST & LOCAL GOVERNMENT, 36-37 (J. Siena ed. 1982). As to *Boulder's* unanswered questions in general, see Wiley, *Boulder's Unanswered Questions: The Future of Cable Franchising*, NAT'L L.J., March 29, 1982, at 33, col. 1.

116. As *Boulder* clearly established, this distinction is irrelevant as to the availability of the *Parker* doctrine. However, it is unclear how and whether the distinction should be a factor in establishing actual liability.

117. See 455 U.S. at 60-71 (Rehnquist, J., dissenting).

The overall policy of the *Parker* Doctrine and post-*Boulder* decisions are next applied to these questions in turn.

3.1.1 Expression of State Policy

The question is, "how much is enough?" Clearly, under *Boulder*, a broad grant of authority under a home rule provision is insufficient. However, it is not clear that the doctrine requires an express state policy compelling the displacement of competition. Lower courts reaching the issue to date have concluded that a general statement of state policy that contemplates, rather than requires, displacement of competition is sufficient for immunity.¹¹⁸

We hold that any municipality acting pursuant to clearly articulated and affirmatively expressed state policy which evidences an intent of the legislature to displace competition with regulation—*whether compelled, directed, authorized or in the form of a prohibition*—is entitled to antitrust immunity because conduct pursuant to such a policy would constitute state action.¹¹⁹

118. See *United States v. Southern Motor Carriers Date Conference, Inc.*, 1983-1 CCH Trad. Cases ¶ 65,320 (5th Cir. 1983). In *Southern Motor Carriers*, the court held (on rehearing) that *private* parties could not enjoy *Parker* benefits absent a state decision to displace competition; that the *Doctrine* would not protect a *private* decision merely "contemplated" by state legislation. However, in reaching this conclusion, the court observed:

A necessary corollary of the rationale of *Goldfarb* and *Cantor* is that compulsion should not be required of state defendants. Regardless of their motives for undertaking anticompetitive behavior, states are nevertheless acting as states. Since *Goldfarb*, the Court has consistently pointed out that the analysis of state action differs substantially depending on whether the defendant is a private party or a public institution. [Citations.] The same analysis applies to municipalities, at least when they act as agents of the state. Thus, the Supreme Court has not required compulsion for municipalities, but has held that when a state indicates its intention that the municipality may act as an instrumentality of the state — *i.e.*, when the state "sanctions" anticompetitive behavior of the municipality — a state action defense may be available to the municipality.

Southern Motor Carriers, 1983-1 CCH Trad. Cases at 69,890-91 (citations omitted).

119. *Town of Hallie v. City of Eau Claire*, 700 F.2d 376, 381 (7th Cir. 1983) (emphasis added). See also *Gold Cross Ambulance, Inc. v. City of Kansas*, 705 F.2d 1005 (8th Cir. 1983).

The Supreme Court has made it clear that "a specific, detailed legislative authorization "of monopoly service need not exist to infer the necessary state intent." It is sufficient that "the legislature contemplated the kind of action complained of." In other words, a sufficient state policy to displace competition exists if the challenged restraint is a necessary or reasonable consequence of engaging in the authorized activity.

Gold Cross, at 1012-13 (citations omitted) (quoting *Lafayette*, 435 U.S. at 415). Accord, P. Areeda, *Antitrust Law* 212.3a, at 53-54 and n.8 (Supp. 1982) (cited by *Hallie* and *Gold Cross*); Areeda, *Antitrust Immunity for State Action After Lafayette*, 95 HARV. L. REV. 435, 466 (1981) (cited by *Hallie* and *Gold Cross*). See also Central

While it may be permissible to leave the decision to displace competition up to the city, such an approach may fall victim to the charge that the state is merely “authorizing” a violation of the antitrust laws. A careful review of the *Parker* cases lends support to the argument that the state need not compel displacement. All the cases really require is that the state establish the *mechanism* by which competition will be displaced. In *Parker* itself, the decision to regulate (and thus displace competition) was made by private parties. The regulations were then developed by a state agency required to base its findings on public hearings and were implemented only upon the approval of those to be regulated. Thus, the state simply set procedures to be followed in developing the regulations—not the regulations themselves. The policy served in *Parker* was the particular state goal of maintaining the raisin market.¹²⁰

The same is not true in *Goldfarb* (where the *Parker* Doctrine was held unavailable). There the state did nothing more than mention a vague policy goal: quality legal services. The decision to reach this goal by a price schedule was made by the bar association. Likewise, the method in which the fees were determined was established by the bar association. Although in effect a state administrative agency, the state bar’s conduct was without *Parker* bounds because the state had not contemplated the method that the bar selected to meet a legislative goal.¹²¹

Cantor presents a legal situation similar to *Goldfarb* despite the fact that the equities would seem to favor a dissimilar result. The light bulb program was of private design and served no state policy. There was no state involvement in the initial means of the decision. What troubled the Court was how the displacement decision was made.¹²²

Bates is also consistent with the proposition that what the Court really is requiring is a state expression of *how* laws and policies affecting free competition will be made along with some expression or recognition of what ends they will serve. In *Bates*, the state itself—through its supreme court—expressed the rule and the goal it was to serve. Further, the state (acting through the court) established the enforcement mechanism.¹²³ By contrast, in *Lafayette* the state had merely determined that cities

Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency, 1983-2 CCH Trad Cases ¶ 65,575 (8th Cir. 1983) (finding “exemption”); Parks v. Watson, 1983-2 Trade Cas. ¶ 65,632 (9th Cir. 1983) (denying exemption).

120. See *supra* notes 43-49 and accompanying text.

121. See *supra* notes 51-52 and accompanying text.

122. See *supra* notes 54-56 and accompanying text.

123. See *supra* notes 57-59 and accompanying text.

could operate electric utilities. Even if displacement of competition beyond city limits was contemplated by this grant of power, there were no established means by which the displacement could be accomplished. In short, there was no state expression of how competition beyond city limits might be displaced.¹²⁴

The Court's most recent decisions drive the point home. *Orin Fox* presented a situation similar to that in *Parker*. The action of the state was triggered by a private request; however, as in *Parker*, the procedures followed thereafter were developed by the state to serve a particular policy goal of the state.¹²⁵ Such was not the case in *Midcal*. There, as in *Goldfarb* and *Cantor*, the state's involvement consisted solely of enforcing privately developed rules.¹²⁶ *Boulder* simply strengthens the proposition. Colorado's home rule provisions provide no guidance on the question of how competition may be displaced.¹²⁷

In short, one could still argue that once a state has decided that competition may be displaced by private parties or its subdivisions, the only other determination required of the state (by *Parker*) is *how* that displacement should be accomplished.¹²⁸ However, in dealing with *Boulder*, it must be kept in mind that a requirement of express compulsion lurks in the *Parker* cases.

3.1.2 Active State Supervision

Many commentators suggest that to be on the safe side, some sort of state supervision should be included in legislation designed to confer state immunity on municipal acts.¹²⁹ However, other commentators and at least two post-*Boulder* decisions,

124. See *supra* notes 61-66 and accompanying text.

125. See *supra* notes 67-69 and accompanying text.

126. See *supra* notes 70-73 and accompanying text.

127. See *supra* notes 102-12 and accompanying text.

128. Assuming this view is eventually adopted, home rule provisions may still stand (somewhat modified) in light of *Boulder*. The "home rule" article need only be amended to provide that the state intends to displace competition in particular named areas (*i.e.*, cable, airport vending) when the representative government decides, pursuant to state established and supervised procedures, and that the goals of the state (better services in the given area) are served by the displacement of competition. Such a "home rule" provision is consistent with the expressed policy of the court, preserves local control, and protects from local political manipulation to serve the private interests of those in power.

129. See, *e.g.*, Orland, *The Requirements for Antitrust Immunity*, in ANTITRUST AND LOCAL GOVERNMENT 73, 81 (J. Siena ed. 1983) ("State legislation that requires municipal economic conduct is more likely to be successful than legislation that simply permits municipal conduct.")

along with *Boulder* itself, suggest that active state supervision is not required.¹³⁰ As a sort of mid-ground, one might argue that the normal process of the states' courts and political system provide a sort of "supervision." Such supervision is hardly *active* and would be effective where those affected had no voice in the policymaker's election or could not afford litigation. Nonetheless, proof of the effective operation of such checks may convince trial courts that ordinances are exempt until the question of state supervision is resolved. A decision on the requirement of supervision could come this term.¹³¹

3.1.3 Rules of Liability

Should the nature of the municipalities' conduct—proprietary or non-proprietary—be considered in determining liability? Some have argued that state policy contemplating displacement is only necessary where the municipalities' conduct is proprietary in nature.¹³² While this contention has been rejected by a lower court, the *Boulder* decision leaves the question open. When does an activity become proprietary? It seems unlikely that such a distinction will be adopted by the Court.

130. Hoskins, *The "Boulder Revolution" in Municipal Antitrust Law*, 70 ILL. B.J. 684, 686 (1982) ("If the state clearly intended that the city be permitted to take a course of action, it should not additionally be required to supervise that course.").

In analyzing the impact of *Boulder*, the Maryland Governor's Task Force on Local Government Antitrust Liability observed:

In the view of the Task Force the quoted language from *Boulder* and *Lafayette* as well as the views of most commentators are inconsistent with the notion that active supervision by a state administrative agency is a condition of municipal immunity. The requirement of active supervision was originally enunciated in the *Midcal* case which related to private conduct, not to municipal conduct already subject to political restraints. No such requirement in the view of the Task Force has been imposed as a condition of municipal immunity by the federal cases.

Report of the Governor's Task Force on Local Government Antitrust Liability 21 (February 16, 1983). See also Orland, *supra* note 129, at 82.

In *Hallie*, the Seventh Circuit concluded that state supervision was not required by *Boulder* and that, from a policy standpoint, requiring supervision was unwise. *Town of Hallie v. City of Eau Claire*, 700 F.2d 376, 384 (7th Cir. 1983). See also *Gold Cross Ambulance, Inc. v. City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983). The court observed that "[b]ecause Municipal officials generally are politically accountable to the citizens they represent for their decisions regarding the challenged restraint, state supervision is not as necessary to prevent abuse as in the private context." *Id.* See also Areeda, *Antitrust Law, supra* note 119, § 212.2a, at 47 (Supp. 1982) ("[R]equiring state authorization for local conduct is analogous to requiring active supervision of private conduct; it tests whether challenged local activity is truly state action and therefore entitled to immunity.").

131. The plaintiffs in *Hallie* applied for a writ of certiorari on May 11, 1983. 52 U.S.L.W. 3070 (U.S. May 11, 1983) (No. 82-1382).

132. If the conduct was non-proprietary, a city policy to displace competition would satisfy *Parker/Boulder*.

3.1.4 Municipality Liability

Treble Damages

The Act's language regarding treble damages for all guilty defendants is not cast in stone. The antitrust laws are a fluid package designed to be applied in a manner consistent with their overall policy goals. Bankrupting municipal governments or causing them to raise taxes to meet treble damage obligations is hardly consistent with the laws' pro-competition goal.¹³³ Yet, the statute says plaintiff *shall* recover treble damages.¹³⁴ The best advice is to avoid liability in the first place and seek federal legislation amending the law to reflect the policy understandings set forth above.¹³⁵

Per Se Rules, Rule of Reason

The arguments against the award of treble damages apply with equal force against the application of the "*per se*" rules of liability. These rules were adopted in litigation involving private parties. To blindly apply them to cities is to ignore yet again the policy of the antitrust laws.¹³⁶ It follows that the Rule of Reason should be amended as applied to municipalities to include in the balance the social benefits of the conduct in question. Because local government is designed to protect such interests, any other construction would defeat the primary purpose of municipal control. The ills of "Lochnerizing" may be avoided by judicial deference similar to that given legislation claimed to violate the due process clause. The reason for denying this deference to private parties is that such parties are not qualified to make such assessments.

133. Hoskins, *The "Boulder Revolution" in Municipal Antitrust Law*, 70 ILL. B.J. 684, 686-87 (1982) ("Such an argument, while bold, is not without hope of success. The Supreme Court itself has encouraged the view that municipalities need not necessarily be treated like other persons for purposes of imposing treble damages under the Clayton Act.") See *Lafayette*, 435 U.S. at 401-02.

134. 15 U.S.C. § 15 (1973 & Supp. 1983).

135. See Civilletti, *The Fallout From Community Communications Co. v. City of Boulder: Prospects For A Legislative Solution*, 32 CATH. U. L. REV. 379, 392 (1983).

136. Hoskins, *supra* note 133, at 686.

3.1.5 Summary

The following points should be kept in mind when reviewing legislation designed to deal with *Boulder*:

1. The broader the scope of the purported immunizing reach of the statute, the more likely it will be declared mere "authorization" of antitrust violations. The state policy providing for displacement must be carefully set forth.
2. Legislation requiring displacement of competition, or providing for state review of a decision to displace competition, is more likely to succeed than provisions leaving the decision to the city.
3. *Boulder* laws providing some sort of *active* state supervision are likewise the safer, although not necessarily required, route to antitrust immunity.¹³⁷

3.2 Legislative Survey

An extensive analysis of all state legislation in this area is beyond the scope of this article. Only post-*Boulder* legislation is considered. Legislation enacted before *Boulder* is not considered even though it may be effective in dealing with *Boulder's* demands. Further, it should be noted that some states did not respond to inquiries regarding recent legislation.¹³⁸

3.2.1 California

In California, one law was enacted by the legislature and acts in two other areas are under consideration. The new law is aimed at providing antitrust immunity to "cities, counties, cities and counties, and certain special districts" that operate airports.¹³⁹

The airport law sets out a particular state policy (the promotion and development of commerce and tourism) and declares that public airports must serve the policy. Next, the act "contem-

137. See generally Orland, *supra* note 129, at 80-82.

138. See, e.g., *Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency*, 1983-2 CCH Trade Cas. ¶ 65,575 (8th Cir. 1983), where the court found Iowa's pre-*Boulder* solid waste disposal statute sufficient to confer *Parker* Doctrine "immunity." See IOWA CODE ANN. §§ 455B301-308 (West Supp. 1983) (enacted in 1972 and last amended in 1982 to a non-*Parker* topic).

A letter inquiring about legislative activity spawned by *Boulder* was sent to the attorney general of each of the fifty states. Of the 40 states responding, 24 indicated that there had been no legislation considered or enacted in response to *Boulder* while 16 provided information about state legislation or policy regarding *Boulder*. The efforts of the state attorneys general, state legislative research services, private interest research services and their staffs were an integral part of this survey.

The following states indicated that no *Boulder* inspired legislation had been passed or considered: Alaska, Alabama, Arizona, Connecticut, Delaware, Georgia, Hawaii, Idaho, Montana, New Jersey, New Mexico, Ohio, Rhode Island, Texas, Vermont, West Virginia and Wyoming.

139. 1982 Cal. Stat. Ch. 767.

plates" that in order to accomplish this end, the public airport operators may need to displace competition.

[T]o further the policies and fulfill the objectives stated in this article, it is often necessary that publicly owned or operated airports enter into exclusive or limited agreements with a single operator or a limited number of operators. The governing bodies of publicly owned or operated airports shall grant exclusive or limited agreements to displace business competition with regulation or monopoly service whenever the governing body determines, in consideration of the factors set forth [elsewhere in this article] that such agreements are necessary to further the policies and to fulfill the objectives stated in this article. *The Legislature contemplates that publicly owned or operated airports will grant exclusive or limited agreements in furtherance of the policy of this state to displace business competition by exclusive or limited agreements to fulfill these policies and objectives.*¹⁴⁰

Before deciding to displace competition, the airport board must, "under authority . . . expressly delegated by the state, determine the necessity for an exclusive or limited agreement."¹⁴¹ Particular determinations must be made with the policy objectives of the act in mind.¹⁴²

Thus, the airport law contains no express requirement that competition be displaced. Further, no means are provided for any type of state supervision in an active sense.¹⁴³ While the act ex-

140. CAL. PUB. UTIL. CODE § 21690.8 (West Supp. 1983) (emphasis added). The "factors" to be considered by the public airport in deciding to displace competition are set forth in the text. *See infra* note 143 and accompanying text; CAL. PUB. UTIL. CODE § 21690.5(d) (West Supp. 1983) reads: "The policy of this state is to promote the development of commerce and tourism to the end of securing to the people of this state the benefits of these activities conducted in the state." *Id.*

The authority to displace competition is broad, extending to agreements "in connection with the management of any airport facility or operation of any airport concession." *Id.* at § 21690.9.

141. CAL. PUB. UTIL. CODE § 21690.9 (West Supp. 1983).

142. *Id.* In particular the airport may consider:

- (a) Public safety.
- (b) Public convenience.
- (c) Quality of service.
- (d) The need to conserve airport space.
- (e) The need to avoid duplication of services.
- (f) The impact on the environment or facilities of the airport as an essential commercial and tourist service center.
- (g) The need to avoid destructive competition which may impair the quality of airport services to the public, lead to uncertainty, disruption, or instability in the rendering of such services, or detract from the state's attractiveness as a center of tourism and commerce.

The airport must still comply with state and local requirements for competitive bidding. *Id.* at § 21690.10.

143. One could argue that the conduct of the board in deciding to displace competition is subject to the supervision of the state's courts in that failure to make a

pressly declares that it is designed to meet the demands of *Boulder*,¹⁴⁴ it will fall short of its goal if either state compulsion or active state supervision is required.

The acts under consideration by the California legislature concern taxi cab regulation and the provision of emergency medical services. The taxi bill takes an approach similar to the enacted airport law. The municipality is not required to displace competition and no means are provided for state supervision.¹⁴⁵ All the state subdivisions are required to do is to adopt "an ordinance or resolution in regard to taxi cab transportation service . . . [providing] a *policy* for entry into the business [and] . . . [t]he establishment *or registration* of rates"¹⁴⁶ No pervasive displacement of competition would be required, but it is expressly contemplated.¹⁴⁷ Thus, the taxi bill carries the same potential problems found in the airport act.¹⁴⁸

The remaining California measure died in the Assembly, but is reviewed nonetheless as an interesting approach to immunizing legislation.¹⁴⁹ For a number of years, the state's Emergency Medical Services Authority has served as a sort of master state organizer for crisis health care. The actual planning was left to local governmental units with the Authority having the option to disapprove the plan if it failed to provide sufficient service.¹⁵⁰ Thus, a sort of *Midcal/Cantor* situation exists, the important difference

reasonable decision would be subject to some sort of extraordinary preemptive writ.

144. The Legislative Counsel's Digest notes:

Federal laws which prohibit monopolies and certain anticompetitive activities are generally not applicable to the state in its sovereign capacity, but are generally applicable to local governmental entities, except when the local governmental agency engages in monopolistic or anticompetitive activity on behalf of the state in accordance with criteria established by the courts.

1982 Cal. Stat. Ch. 767. In justifying the measure as an "urgency statute," the legislature declared:

In view of the recent decision of the United States Supreme Court in *Community Communications Co. v. Boulder*, . . . uncertainty presently exists as to whether the practices of publicly owned or operated airports, in contracting to have vital public services rendered through limited or exclusive concession agreements, may contravene federal statutes which prohibit contracts in restraint of trade or commerce. In order that airport authorities may continue to provide such services in the most efficient and least costly manner, it is necessary that this act take effect immediately.

Id. at Legislative Counsel's Digest section 3.

145. Cal. S.B. 944, 1983-84 Session (1983).

146. *Id.* at § 2 (emphasis added).

147. While the municipalities must set an entry policy and at least register rates, they are not limited to those acts alone. *Id.* at § 2.

148. The bill "died" January 30, 1984 pursuant to CAL. CONST. art. IV, § 10(a). See Cal. Senate Weekly History, Feb. 2, 1984, at 540.

149. Cal. Assembly Weekly History, Feb. 2, 1984, at 84.

150. CAL. HEALTH AND SAFETY CODE § 1797.108 (West 1982).

being that the actor whose conduct is "merely approved" by the state is a governmental subdivision rather than a private party.

The potential for antitrust liability seems clear to California's legislature. Presently, the emergency medical services bill (EMS bill) observes:

It is the intent of the Legislature in amending . . . and adding . . . the Health and Safety Code . . . to prescribe and exercise the degree of state direction and supervision over the emergency and nonemergency medical services affected by this act, as will preclude the incurrence of liability under federal antitrust laws for activities undertaken by local governmental entities in carrying out their prescribed functions¹⁵¹

The bill does not require counties to displace competition, but does provide a means for Authority (state agency) review of the emergency medical services plan on a yearly basis:

(a) Local EMS agencies shall annually submit an emergency medical services plan for the EMS area to the affected health systems agency and the authority. *The emergency medical services plan may divide the EMS area into subareas or zones and may designate exclusive providers of non-emergency and emergency medical services within the EMS area, subarea, or zone.*

(b) The health systems agency shall have 60 days to make recommendations and may request modification of the plan if the plan is not deemed to be in the interest of the consumers to be served, or is not consistent with the overall plan for health care delivery.

(c) If a plan designates one or more exclusive providers, the authority shall review such exclusive provider designation and, unless the authority notifies the local agency within 60 days that such exclusive designation is deemed not to be in the interest of the consumers to be served, the exclusive designation shall be implemented and shall for all purposes be deemed an action proposed and implemented at the direction of the state acting as sovereign.¹⁵²

The EMS bill presented a situation not yet considered by the courts; no state compulsion, but active state supervision.¹⁵³

3.2.2 Colorado

For obvious reasons,¹⁵⁴ the *Boulder* decision sparked an initial scurry of activity in Colorado. Yet, the current stance of the state

151. Cal. A.B. 49, § 1, 1983-84 Regular Sess. (1983). See also Cal. A.B. 1908, 1983-84 Regular Sess. (1983).

152. *Id.* at § 4 (some emphasis omitted).

153. The California Assembly is also considering a bill exempting joint research activities from the proscriptions of the *state* antitrust laws. Cal. A.B. 326, 1983-84 Regular Sess. Similar legislation has been urged at the federal level. See L.A. DALY J., Sept. 19, 1983, at 1, col. 6. California's antitrust laws do not apply to restraints imposed by government. *Widdows v. Koch*, 263 Cal. App. 2d 228, 235, 69 Cal. Rptr. 464, 468 (1968). See CAL. BUS. & PROF. CODE §§ 16700-758 (West 1964).

154. The city of Boulder is in Colorado.

seems to be that immunizing legislation is unneeded and undesirable. The Rocky Mountain State's first foray into post-*Boulder* legislation was an omnibus bill that expressly authorized municipalities to "displace competition with regulation and to partake of the exemption and immunity of the state."¹⁵⁵ This approach would clearly be subject to challenge on the language of *Parker* itself: "[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it. . . ."¹⁵⁶ This proposal apparently died (or is still tied up) in the state legislature.

Colorado lawmakers next considered a bill designed to confer immunity in the area of land use planning. The proposed legislation declared that it was state policy to "authorize local governments to displace competition with regulation in planning for or regulating land use pursuant to the powers granted to local governments [in the state's constitution or statutes]. In so doing, local governments and their officers and employees shall partake of the exemption and immunity of the state of Colorado from liability under any antitrust law."¹⁵⁷

The unfortunate choice of the word "authorize" flares in suggesting that the proposal would, in direct contradiction to *Parker*, merely "authorize" municipalities to violate the antitrust laws.¹⁵⁸ However, the language surely contemplates displacement of competition. The bill also opens itself to antitrust attack by providing that the decision to displace competition will be left to the municipalities¹⁵⁹ and by providing no *active* means of state supervision.¹⁶⁰

155. Civelletti, *Antitrust or Anti-Cities?* in ANTITRUST & LOCAL GOVERNMENT, 181, 185 (J. Siena ed. 1983).

156. *Parker*, 317 U.S. at 351. Such an approach is surely the most efficient way to deal with the *Boulder* problem without displacing local control, yet its enactment would surely be soon followed by a *Boulder* type challenge of its validity. Civelletti, *supra* note 155, at 186.

157. Col. S.B. 211, 29-20.5-101, 54th Gen. Assembly, First Regular Sess. 1983 (emphasis added).

158. *Parker*, 317 U.S. 341, 351 (1943). The attorney general's office recognized this deficiency in its review of the legislation. "The bill's main problem is that it is declaratory rather than operative in nature; it does not add anything to the land use planning powers already possessed by local government." Memo from T. McMahon & B. Morris, Assistant Attorneys General, to G. Smith, First Assistant Attorney General, Feb. 24, 1983 [hereinafter cited as "Colorado Zoning Memo"].

159. The bill provided:

When acting to displace competition with regulation in planning for or regulating land use as authorized by the Colorado constitution or statutes, each local government shall proceed according to the judgment of its governing body, authorized boards and commissions, or electors as to the type and degree of regulatory activity deemed to be in the best interest of its citizens.

Col. S.B. 211, 29-20.5-103, 54th Gen. Assembly, First Reg. Sess. (1983).

160. Rather, the bill provided for a sort of *passive* supervision by mechanisms already in place:

In its review of the proposed legislation, the State Attorney General's Office questioned the bill not only as to its obvious conflicts with *Parker Doctrine*, but as to its service of any purpose:

[The bill] simply does not make good sense from a policy perspective. There is no real likelihood that local governmental units will actually be subjected to any significant amount of antitrust litigation as a result of their land use planning decisions. During the four years between the Supreme Court decisions in *Lafayette* and *Boulder*, only 5 reported decisions out of the 6,000 antitrust cases filed have involved the question of antitrust liability of local governmental units for land use planning.¹⁶¹

Even before the zoning bill was considered, the Senate Committee on Local Government had concluded that immunizing statutes in general were likely to be unwise from a public policy point of view.

The antitrust laws establish a national policy favoring free competition in the market place [and] . . . [a]pplication of the . . . laws to political subdivisions can be viewed as a step in furtherance of national policy.

* * *

A legislative grant of immunity could act to protect abuses by public officials.

Recourse to suit under the federal antitrust laws provides [a] reasonable and necessary mechanism . . . to compensate . . . for the damage caused by . . . unreasonable conduct [of] local officials.

* * *

. . . [Therefore,] legislation immunizing local government entities from [antitrust liability] is not advisable.¹⁶²

3.2.3 Florida

While Florida has considered no legislation in response to *Boul-*

Sufficient state supervision of local government land use planning and regulation shall be provided by the availability of judicial review, the availability of initiative and referendum, the availability of election and recall, the authority of the general assembly to enact and amend statutes, the authority of the people of Colorado to amend the Colorado constitution, and the continuing administrative structure and quasi-judicial procedures available by statute, charter, ordinance, or resolution to implement and review local government land use planning and regulatory activities.

Id. at 29-20.5-104. The zoning bill would also have required the filing of land use regulations with the state in order to "further ensure an effective state ability to supervise. . . ." *Id.* at 29-20.5-104.

161. Colorado Zoning Memo, *supra* note 158, at 3.

162. Draft Report, Col. Sen. Comm. on Local Gov., Sept. 14, 1982, at 9-13.

Colorado's state antitrust laws provide an express exemption for price discrimination as to region by publicly regulated utilities. Col. Rev. Stat. § 6-2-103(2) (1974). This exemption does not extend to contracts that otherwise restrain trade. Laitos and Feverstein, *May Regulated Utilities Monopolize the Sun*, 56 DEN. L. J. 31, 59-60 (1979). See generally Ducker, *Antitrust and the Lay Lawyer*, 44 DEN. L. J. 558 (1967).

der, the Attorney General's Department of Legal Affairs has considered the matter.

Though local government antitrust is a rapidly evolving area and our analysis is, therefore, preliminary, a number of points have emerged:

- (1) proposals for legislation amending the federal antitrust laws to provide blanket immunity for municipal anticompetitive activity are probably both unnecessary and undesirable.

First, blanket immunity for municipalities would mean that all municipal anticompetitive activity would be protected even if it did not further any valid public interest and even if it was unnecessarily injurious to competition.

Second, proponents of such an amendment may find their goal difficult to achieve because of the fundamental role played by the antitrust laws in our society and a strong legislative presumption in favor of competition.

- (2) Critics of the *Boulder* case may have overstated its threat to local governments.

Lower court cases such as *Town of Hallie v. City of Eau Claire*, 1983-1 (CCH) Tr. Cas., ¶ 65,227, indicate that local government immunity is available when necessary.¹⁶³

The Attorney General's office also suggests that if use of the federal laws to meet this pro-competitive goal proves too unwieldy, state antitrust laws could be applied to reach the same result.¹⁶⁴ Florida's state antitrust laws provide no exemption for municipal activity.¹⁶⁵

3.2.4 Illinois

Illinois is presently considering a "we dub thee immune" approach to dealing with *Boulder*. The proposed amendment to the state's antitrust act declares that, as a matter of "state policy," units of local government may displace competition, "to the extent that they exercise any power conferred by the laws and regulations of the state . . ."¹⁶⁶ No mechanism for active state supervision is provided, however, the bill suggests that "active"

163. Letter from R. Bellack, Assistant Attorney General, to M. Parrish (June 30, 1983).

164. *Id.* at 2.

165. See A.B.A. SECTION ON ANTITRUST LAW, STATE ANTITRUST LAWS 9-8 (1973).

166. Ill. H.B. 1208, § 12, 83rd Gen. Assembly (1983) (as amended). It is not entirely clear that the proposed legislation is intended to operate on the federal level. An amendment to the bill provides: "For purposes of this section, the courts of this State in construing this Act shall not follow the construction given to the Federal law by the Federal Courts." Ill. H.B. 1208, § 12, 83rd Gen. Assembly (1983) (as amended). This appears aimed at the construction provision of the state act: "When the language of this Act is the same or similar to the language of a Federal Anti-trust Law, the courts of this state in construing this Act shall follow the construction given to the Federal Law by the Federal Courts." Ill. Rev. Stat. ch. 38 § 60-11 (1977). However, the language of the statute seems just as clearly aimed at providing immunity on the federal level. The state antitrust laws provide exemptions for various activities including the operation of regulated public utilities. Ill. Rev. Stat. ch. 38 § 60-5(3) (1977). As to exemptions from the state laws in general, see A.B.A. Section on Antitrust Law, *supra* note 200, at 13-7-8.

supervision will be accomplished on the local level.¹⁶⁷ The decision to displace competition is left to the municipality as well.¹⁶⁸ To the extent the bill purports to protect against liability, it would likely be of little, if any, substantive value.¹⁶⁹

3.2.5 Maine

Maine has avoided a broad *Boulder* immunity bill in favor of attention to problem areas one at a time. The sole area considered to date involves solid waste disposal.¹⁷⁰ The thrust of the proposed bill is enabling municipalities to dispose of waste using energy recovery techniques. This method is only effective if a steady stream of waste is available, hence, the bill empowers municipalities to require that all community solid waste be disposed of at a particular site for use in an energy recovery plant.¹⁷¹

Although the proposed legislation *literally* purports to author-

167. As in Colorado and California, the only state supervision posited is passive. Ill. H.B. 1208, § 12, 83rd Gen. Assembly (1983) (as amended). This arguably fails the *Midcal* requirement in that it is not *state* supervision.

168. *Id.*

169. The bill is a broad "authorization" statute that leaves the decision to displace competition up to the municipality and provides no *active* state supervision. It seems unlikely that the court would allow slack sufficient to let each of these apparent problems pass muster. *Id.*

170. Maine H.P. 1048, L.D. 1392, 111th Legislature, 1st Reg. Sess. (1983). The bill would amend ME. REV. STAT. ANN. Tit. 38, § 1304 (Supp. 1983).

171. The Statement of Fact accompanying the bill explains the concept and requirements of energy recovery from solid waste:

Energy recovery is the extraction and use of energy from solid waste. There are a number of ways to extract this energy, but the most common method is incinerating solid waste to produce hot water or steam. The hot water or steam is then sold to offset the cost of incineration.

Energy recovery technology is complex and the equipment requires a steady supply of waste to operate efficiently. Because of the complicated technology, energy recovery facilities have high capital costs and long payback periods. In order to remain cost-effective throughout their lives, energy recovery facilities usually enter long-term agreements with waste suppliers in order to guarantee that they have a steady supply of waste. In most cases, these waste suppliers are municipalities.

In order to guarantee a steady waste supply, most energy recovery facilities require participating municipalities to enter long-term agreements to deliver a minimum amount of waste to the facility or pay a penalty if insufficient waste is delivered. This type of agreement is known as a "put or pay" contract. The municipality must deliver the waste, or pay for it anyway. In order to meet their contractual obligations, most of these municipalities pass ordinances requiring waste generated within the municipality to be delivered to the facility with whom the municipality has a contract.

Maine H.P. 1048, L.D. 1392, p.3-4, 111th Leg., 1st Reg. Sess. (1983).

ize municipalities to run astray of antitrust norms, a careful reading of the bill in context with the state's overall plan for waste management reveals that it likely meets the requirements of *Boulder*. The bill expressly sets forth "state policy" encouraging the use of energy recovery plants for waste disposal¹⁷² and "contemplates"¹⁷³ that making such facilities feasible may require displacement of competition. Existing legislation already provides a sort of active state supervision of municipal solid waste management plans.¹⁷⁴ Assuming that state contemplation of displacement is sufficient to meet *Boulder's* requirements, the bill demonstrates that *Boulder* concerns are subject to resolution without substantial initial intrusion into local government.¹⁷⁵

3.2.6 Maryland

Maryland's consideration of *Boulder's* impact is the most exten-

172. The bill declares that its purpose is "to promote energy recovery and authorizing municipalities to guarantee delivery of their solid waste to specific waste facilities." *Id.* at 4.

173. Whether merely "contemplating" displacement (as opposed to requiring it) is insufficient is still debated. If contemplation is sufficient, the bill surely passes muster:

Because of the complicated technology, most energy recovery facilities have high capital costs and long payback periods. In order to remain cost-effective throughout their lives, energy recovery facilities require a guaranteed, steady supply of waste. Consequently, municipalities utilizing energy recovery facilities are usually required to enter long-term agreements to provide the facilities with specific amounts of waste. In order to make these energy recovery facilities financially feasible, and thereby simultaneously improve the environmental impacts and the economics of municipal solid waste disposal, municipalities shall have the legal authority to control the handling of solid waste generated within their borders.

Id. The legislature's Statement of Fact notes:

Municipalities need the express authority to enforce this type of ordinance. Recent federal court decisions, . . . indicate that a state legislature must "clearly articulate and affirmatively express" a policy to promote energy recovery and authorize municipalities to control their solid waste flow before these ordinances can withstand judicial scrutiny. *This bill establishes that policy and affirms that authority.*

Id. (emphasis added).

174. See MAINE REV. STAT. ANN. Tit. 38, § 1304(3), § 1305(4) (1978). Municipal plans are sent to the State Board of Environment Protection. The Board may promulgate regulations based, in part, upon such reports. In making its decisions, the State Board is required to consider a variety of factors, including economic impact. Presumably, the Board could determine that a decision to displace competition was imprudent and take corrective measures by means of regulation.

175. While every municipality is required to make solid waste management and status reports and to provide some means for local solid waste disposal, the ultimate decisions of how, what and where are initially left to local government. The Waste bill is not the sole piece of Maine proposed legislation taking *Boulder* to heart. The decision was also considered in drafting a white water rafting zone law. Maine S.P. 625, L.D. 1763, 111th Leg. 1st Reg. Sess. (1983). The authority to zone rivers for rafting use was granted with the understanding that competition might be displaced, however, the acting entity is a state agency, not a state subdivision.

sive of any state to date. In July of 1982, Governor Hughes formed a task force "with the responsibility for identifying those areas of local government operations which are most subject to antitrust scrutiny and for recommending legislation to preserve, as much as practicable, the 'state action' defense in those areas where it is needed and appropriate."¹⁷⁶ After studying the matter for six months,¹⁷⁷ the task force submitted its report to the governor.¹⁷⁸ In determining whether protective legislation was "appropriate," the task force examined the gravity of state policy promoted by the local acts in question.¹⁷⁹ Next, the task force examined whether the state subdivisions to be protected were "politically visible in a high degree" and "subject to political control."¹⁸⁰

The report concluded that legislation was needed in a number of areas and might be desirable in others. Specifically, the report suggested legislation to protect state subdivision activities in:

- (1) zoning;¹⁸¹
- (2) solid waste disposal;¹⁸²
- (3) ambulance, hospital and health care;¹⁸³
- (4) public transportation;¹⁸⁴

176. Letter from Maryland Governor Harry Hughes to George Lieberman, Esq. (July 28, 1982) (establishing the Governor's Task Force to Study Local Government Antitrust Liability).

177. The task force held "work sessions" open to the public and conducted a public hearing. Testimony and written materials were accepted from a number of interested persons. Report of the Governor's Task Force on Local Government Antitrust Liability 1-2 (Feb. 16, 1983) [hereinafter cited as "Task Force Report"].

178. *Id.*

179. This step seems implicit in the Task Force Report. *See, e.g.*, Task Force Report, *supra* note 177, at 13. "[R]egulation of the waste stream is basic to the planning of new solid waste disposal plants. . . ."

180. *See, e.g., id.* at 15.

181. *Id.* at 12-13. The report recommended amendment of the existing regulatory scheme to make it clear that the authority to zone was granted with the understanding that competition might be displaced.

182. *Id.* at 13-14. The concern in this area is similar to that in Maine and flows from the Supreme Court's decision in *Hybud Equipment Corp. v. City of Akron*, 455 U.S. 931 (1982) (reversed and remanded for reconsideration in light of *Boulder*); *see* 654 F.2d 1187 (6th Cir. 1981) (holding solid waste regulations immune from antitrust scrutiny under *Parker*).

183. Task Force Report, *supra* note 177, at 14.

In Maryland there has been significant political and judicial scrutiny of arrangements in this area. In the view of the Task Force, no benefit would be derived from the subjection of practices of public hospitals with regard to health care providers to whatever federal antitrust controls may exist.

Id.

184. *Id.* at 15. The report advised that either a statewide licensing system could be implemented, or the laws granting local political power could be amended "to

- (5) water and sewer service,¹⁸⁵
- (6) towing service,¹⁸⁶
- (7) concessions and leases,¹⁸⁷
- (8) urban development,¹⁸⁸
- (9) alcoholic beverages,¹⁸⁹
- (10) soil conservation,¹⁹⁰
- (11) mixed income housing,¹⁹¹ and
- (12) industrial development.¹⁹²

The task force advised the legislature that before adopting the report's proposals, it "should separately consider the competitive impact of each power granted."¹⁹³ So are the seeds of "state contemplation" sown.

In April of 1983, the Maryland Legislature enacted a package of bills closely resembling those proposed by the task force.¹⁹⁴ Also adopted was the report's recommendation that the state attorney general be authorized to defend municipalities against antitrust

restrict municipal discretion in adopting particular types of franchise agreements." *Id.*

185. *Id.* at 16. The report notes that this is an area of vigorous litigation. See *Community Builders, Inc. v. City of Phoenix*, 652 F.2d 823 (9th Cir. 1981); *Gas and Electric Co. v. Sacramento Public Utility District*, 526 F. Supp. 276 (E.D. Cal. 1981); *Schrader v. Horton*, 471 F. Supp. 1326 (W.D. Va. 1979); *City of Mishawaka v. American Electric Power Co.*, 465 F. Supp. 1320 (N.D. Ind. 1979).

186. Task Force Report, *supra* note 177, at 16.

187. *Id.* at 16-17. This too is a much litigated area. See *Pueblo Aircraft Service v. City of Pueblo*, 1982-1 Trade Cas. (CCH) ¶ 64,668 (10th Cir. 1982); *Corey v. Look*, 641 F.2d 32 (1st Cir. 1981); *Kurek v. Pleasure Driveway*, 557 F.2d 580 (7th Cir. 1977), *vacated and remanded*, 435 U.S. 992 (1977), *original judgment reinstated*, 583 F.2d 378 (7th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1978); *Duke and Company v. Foerster*, 521 F.2d 1277 (3d Cir. 1975); *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971); *Guthrie v. Genesee County*, 494 F. Supp. 950 (W.D.N.Y. 1980); *Pinehurst Airlines, Inc. v. Resort Air Services*, 476 F. Supp. 543 (M.D.N.C. 1979).

188. Task Force Report, *supra* note 177, at 17. The task force expressed concern about Baltimore's special redevelopment plans.

189. *Id.* at 17-18. Alcoholic beverages are subject to extensive regulation.

190. *Id.* at 18-19. Although the state's soil conservation districts are largely state funded (as opposed to municipally funded), the report notes that they are a special prospect for antitrust liability because they provide goods and services available in the private sector.

191. *Id.* at 19.

192. *Id.* at 19-20.

193. *Id.* at 12.

194. Md. S.B. 770 (1983) to be codified at MD. ANN. CODE art. 23A, § 2A (Supp. 1982); MD. ANN. CODE art. 25, § 3D (Supp. 1984); MD. ANN. CODE art. 25A, § 5A (Supp. 1984); MD. ANN. CODE art. 25B, § 13B (Supp. 1984); Charter of Baltimore City Art. II § 57 (Supp. 1984). Md. S.B. 629 (1983) to be codified at MD. ANN. CODE art. 23A, § 2(34) (Supp. 1984); MD. ANN. CODE art. 25A, § 5(X) (Supp. 1984); MD. ANN. CODE art. 66B, § 2.01 (Supp. 1984); MD. ANN. CODE art. 66B, § 4.01(d) (Supp. 1984). Md. S.B. 635 (1983) to be codified at MD. ANN. CODE art. 2B, § 1 (Supp. 1984); MD. ANN. CODE art. 41, § 266B(1) (Supp. 1984); MD. ANN. CODE art. 41, § 266C(f) and (1) (Supp. 1984); MD. ANN. CODE art. 44A, §§ 2, 8A, 8B, 8C, 8D (Supp. 1984); MD. AGRIC. CODE ANN. §§ 8-102(e), 8-306(a)(20)-(21) (Supp. 1984); MD. AGRIC. CODE ANN. § 8-306(a)(17), (18), (19) (Supp. 1984).

All of the above measures became effective July 1, 1983.

claims.¹⁹⁵ Each attempt to cloak subdivisions with antitrust immunity is accompanied by a thorough statement of state policy and plans in a specific area that expressly recognizes that, in satisfying the mandates of the legislative decree, municipalities may need to displace competition. The zoning enactment is representative:

(I) It has been and shall continue to be the policy of this state that the orderly development and use of land and structures requires comprehensive regulation through implementation of planning and zoning controls.

(II) It has been and shall continue to be the policy of this state that planning and zoning controls shall be implemented by local government.

(III) To achieve the public purpose of this regulatory scheme, the general assembly recognizes that local government action will . . . *displace or limit economic* competition by owners and users of property.

(IV) It is the policy of the general assembly and of this state that competition and enterprise shall be so *displaced or limited* for the attainment of the purposes of the state policy for implementing planning and zoning controls as set forth in this article and elsewhere in the public local and public general law.¹⁹⁶

Each extension of immunity is tempered with specific limitations:

(V) The powers granted to the municipality pursuant to this subsection shall not be construed:

(1) To grant to the municipality powers in any substantive area not otherwise granted to the municipality by other public general or public local law;

(2) To restrict the municipality from exercising any power granted to the municipality by other public general or public local law or otherwise;

(3) To authorize the municipality or its officers to engage in any activity which is beyond their power under other public general law, public local law, or otherwise; or

(4) To preempt or supersede the regulatory authority of any state department or agency under any public general law.¹⁹⁷

Because all of the new laws leave the ultimate decision to displace competition up to state subdivisions, they will not serve their purpose if state compulsion is eventually found to be necessary. However, the laws strike an interesting compromise between express compulsion and the municipal choice. The subdivision is not required to displace competition, however, it is

195. Md. S.B. 645 (1983) to be codified as MD. ANN. CODE art. 32A, § 12J (Supp. 1984). This bill also became effective July 1, 1983.

196. Md. S.B. 629, § 1 (1983) to be codified as MD. ANN. CODE art. 23A, § 2(34) (Supp. 1984).

197. *Id.* (emphasis omitted).

required to regulate in a manner that the state recognizes *may* require that competition be displaced.

None of the bills provide for active *state* supervision. The task force's initial selection of areas to protect included a finding that the areas were to be "politically visible and subject to political control,"¹⁹⁸ however, such supervision is arguably passive. It is unclear whether the legislature or governor adopted the task force recommendation so that some group would be organized to review municipal conduct impacting competition.¹⁹⁹

All in all, it appears that Maryland's efforts will likely be successful. The shotgun "we dub thee immune" approach is avoided in favor of reasoned analysis in particular areas. Although displacement is not required, other conduct that may require displacement is. This allows for maximum local control with clear state contemplation of possible displacement. Last, the provisions extend the antitrust shield in areas subject to high visibility, and political control.

3.2.7 Nevada

Nevada is in the initial stages of considering *Boulder's* impact. Because some Nevada municipalities "have levied franchise and license fees on business enterprises or imposed controls over their activities in a manner which would not meet the requirements²⁰⁰ for exemption from federal antitrust laws,"²⁰¹ the State Assembly directed the state legislative commission to:

- (1) Study the effect of the federal antitrust laws on licensing of businesses by local governments;
- (2) Examine the activities of local government to determine which do not constitute state action as described in the *Boulder* case and are therefore subject to scrutiny by the courts for compliance with the federal antitrust laws; and
- (3) Examine the relevant state laws and submit recommendations for any new legislation or amendments needed to protect the local governments from potential liability under federal antitrust laws.²⁰²

If the state senate adopts the resolution, the report will be due at the 63rd session of the Nevada legislature.²⁰³

198. See *supra* note 180 and accompanying text.

199. This appears to have been a "let's be safe" recommendation for it is appended to the report's conclusion that "[n]o such [active supervision] requirement . . . has been imposed as a condition of municipal immunity by the federal cases." Task Force Report, *supra* note 177, at 21. Whether this conclusion is accurate is far from certain.

200. It is probably more accurate to say that the conduct is undertaken without sufficient state direction and supervision to satisfy *Parker* as applied in *Boulder*.

201. Nev. A.C.R. 18, 1, 62nd Leg. (1983).

202. *Id.* at 2.

203. The resolution was referred to the Senate on April 25, 1983.

3.2.8 New York

While New York has enacted no legislation directly in response to *Boulder*, the state's "model" resource recovery act (drafted before *Boulder*) reflects a subtle awareness of the pre-*Boulder Parker Doctrine* case law.²⁰⁴ The act, in effect, sets up a resource recovery agency for a particular county. Since *Boulder*, the state has enacted similar legislation to create resource recovery agencies for other communities.²⁰⁵ Each of the laws in turn provides that municipalities within the agencies' area may enact legislation regulating the disposal of solid waste.²⁰⁶

To further the governmental and public purposes of the agency including the implementation of any contract or proposed contract contemplated by this title, the county and all other municipalities within the county shall have power to adopt and amend local laws *imposing appropriate and reasonable limitations on competition*, including, without limiting the generality of the foregoing, as to the municipalities within the county local laws requiring that all solid waste generated or originating within their respective boundaries, subject to such exceptions as may be determined to be in the public interest, shall be delivered to a specified solid waste management-resource facility; provided, however, that the county shall not be empowered under this section to adopt any such local law requiring the delivery of solid waste to a specified solid waste management-resource recovery facility.²⁰⁷

The law also declares that agencies and municipalities acting pursuant to its provisions are acting in a governmental capacity.²⁰⁸ While the ordinances enacted by municipalities are subject to preemption by the agencies' promulgation of regulations, there is no means provided for active state supervision. Further, the decision to displace competition is left entirely to the municipality. These flaws surely are not fatal to the Act's viability under *Boulder*. The Act is strong in expressing state policy contemplating displacement of competition and the necessity of state compulsion and supervision (as noted many times above) has yet to be firmly established.

3.2.9 North Carolina

North Carolina has enacted one bill that specifically takes ac-

204. See, e.g., N.Y. PUB. AUTH. LAW §§ 2045-a - -x (McKinney Supp. 1983).

205. See, e.g., *id.* at §§ 2046-a - -u.

206. See *id.* at § 2045-t(2).

207. *Id.* (emphasis added).

208. N.Y. PUB. AUTH. LAW §§ 2045-t (McKinney Supp. 1983). This likely reflects the distinction between proprietary and non-proprietary municipal conduct alluded to in *Lafayette*.

count of *Boulder*. The broad purpose of the law was to establish the North Carolina Energy Development Authority.²⁰⁹ In order to insure the success of the Authority, the law provides that municipalities contracting with the Authority may be *compelled* by the Authority to ordinances controlling waste disposal.

The Authority . . . shall have . . . the following powers:

* * *

(7) [T]he power to compel any participating municipality to adopt and enforce an ordinance, which plan or ordinance shall provide that any or all persons subject to the jurisdiction of the participating party shall use the services and facilities of the Authority for solid waste management;

* * *

(8) The power and obligation to review and *actively supervise* the enforcement of such solid waste plans or ordinances, when adopted in conjunction with a project.²¹⁰

Thus, the Authority, which is in effect a state administrative agency, may compel municipalities to displace competition pursuant to a clearly articulated and affirmatively expressed state policy to so act. Continuing agency supervision is also expressly provided. The terms of *Boulder* are clearly met.²¹¹

3.2.10 North Dakota

North Dakota has taken the shotgun approach to antitrust immunity. The state's emerging law (effective March 10, 1983) succinctly provides:

All immunity of the state from provisions of the Sherman Antitrust Act . . . is hereby extended to any city or city governing body acting within the scope of the grants of authority contained in sections [enumerating state subdivision powers]. When acting within the scope of the grants of authority contained in [the] sections, . . . a city or city governing body shall be presumed to be acting in furtherance of state policy.²¹²

The flaws in the measure are fairly obvious if a strict reading of

209. 1983 N.C. Sess. Laws 131, ch. 652, to be codified as N.C. GEN. STAT. § 159F-1-9 (Supp. 1984).

210. *Id.* at 136 (emphasis supplied), to be codified as N.C. GEN. STAT. § 159F-5(a)(7), (8) (Supp. 1984). This provides means to soften the impact of such ordinances on private industry:

[I]f a private solid waste landfill shall be substantially affected by such plan or ordinance then the unit of local government compelled to adopt the plan or ordinance shall be required to give the operator of the affected landfill at least 2 years' written notice prior to the effective date of the proposed plan or ordinance.

Id.

211. The act also provides that other "necessary" ordinances may be adopted. "When a municipality enters into a joint venture or contract with the Authority, that municipality shall also have the power to adopt, at the direction and supervision of the Authority, solid waste ordinances necessary to effectuate the purpose of this Chapter . . ." *Id.* at 138, to be codified as N.C. GEN. STAT. § 159F-7(c) (Supp. 1984).

212. N.D.H.B. 1064, § 1, 48th Leg. Assembly (1983). State subdivision powers are enumerated at N.D. CENT. CODE §§ 40-05-01, 40-05-02 and 40-05.1-06 (Supp. 1981).

the *Parker* Doctrine is applied.²¹³ It would be an uphill argument to suggest that the legislature contemplated every anticompetitive effect the bill purports to immunize. The statutes referenced in the law cover 108 general headings ranging from the authority to operate public restrooms to the power to enact zoning ordinances.²¹⁴

The effort may prove effective, however, for there is a substantial difference between the broad grant of power under a home rule provision and the broad but specifically defined grant made in North Dakota's municipal law. The obvious result of the state's tack is the absence of intrusion on municipal control.

3.2.11 Tennessee

Tennessee's post-*Boulder* legislation addressed the now familiar subject of solid waste disposal.²¹⁵ The solid waste disposal plan contemplates that various subdivisions will build and operate disposal facilities drawing raw waste product from themselves and surrounding communities.²¹⁶ In contrast to some state schemes, the operating authority is thus not a state agency.²¹⁷

Effective May 5, 1983, the modifications to the state's waste act express the legislature's understanding that in order to meet the act's goals, subdivisions may need to displace competition.

In connection with the construction, financing, operation or maintenance of an energy production facility under the provisions of this chapter, a municipality other than a power district is authorized to exercise exclusive jurisdiction [sic] and *exclusive right to control the collection and disposal of solid waste* within its boundaries, and in furtherance of the energy and environmental objectives of this Act, and the Tennessee Solid Waste Disposal Act, to *take all necessary and proper actions which displace competition* with regulation or monopoly public service. Any county which

213. Aside from the difficulties mentioned in the text *infra*, the bill clearly provides no active state supervision and does not compel the displacement of competition.

214. See *supra* note 212.

215. Despite its familiar theme, the bill makes some interesting observations. The legislative findings of fact note that one not so obvious result of *Boulder* is difficulty in selling bonds to projects that may find themselves subject to antitrust liability. Tenn. S.B. 860, H.B. 864 (1983).

The Senate made express reference to *Boulder* citing "municipal action in furtherance or implementation of clearly articulated and affirmatively expressed stated policy . . ." *Id.*

216. 1983 Tenn. Pub. Acts ch. 226 (1983) to be codified as TENN. CODE ANN. § 7-54-103(d) (Supp. 1984).

217. For example, the entity operating energy plants in North Carolina is a state agency. See *supra* notes 245-51.

contracts with a municipality in connection with such municipality's construction, operation or maintenance of an energy production facility is authorized to exercise exclusive jurisdiction and exclusive right to control the collection and disposal of solid waste within that portion of the county's boundaries not located within the corporate limits of a municipality, and in furtherance of the energy and environmental objectives of this Act, and of the Tennessee Solid Waste Disposal Act, *to take all necessary and proper actions which displace competition with regulation or monopoly public service.*²¹⁸

Hence, there is no requirement that competition be displaced, but, as noted many times before, such compulsion may be unnecessary.

The statutory scheme is strengthened substantially by its requirement of active state supervision.

- (a) Any municipality, . . . and any county which, as a part of the construction, financing, operation or maintenance of an energy production facility under the provisions of this Act, or of an energy recovery facility or resource recovery facility . . . or of a solid waste disposal system . . . proposes to displace competition with regulation or monopoly public service shall file with the Tennessee Department of Public Health a certified copy of its proposed ordinance or resolution and of the plans for the construction, financing, operation and maintenance of the proposed project, not less than sixty (60) days before the ordinance or resolution becomes effective.
- (b) The Commissioner of the Tennessee Department of Public Health or his authorized representative shall review such implementing ordinance or resolution and such plans, and, based solely upon the record before the municipality or before the county, determine, in his discretion, whether they are reasonably necessary in order to achieve the energy and environmental policy objectives of this Act and of Title 53, Tennessee Code Annotated.²¹⁹

This strikes an interesting balance between ongoing active supervision and mere passive political judicial supervision. The decision to displace competition is actively supervised by the state much as in *Parker*.²²⁰ The continued desirability of such displacement is left to passive political supervision, provided that the state review is meaningful. This provides an effective method of policing against favoritism in local politics while minimizing state intrusion into ostensibly local affairs.

3.2.12 Utah

Utah has considered no post-*Boulder* legislation. The attorney general's office opines that the state's constitutional and statutory²²¹ policy will preclude such legislation in all areas but "es-

218. 1983 Tenn. Pub. Acts ch. 226 (1983) to be codified as TENN. CODE ANN. § 7-54-103(d) (Supp. 1984) (emphasis added).

219. *Id.*, to be amended to TENN. CODE ANN. § 7-54.

220. The regulatory scheme in *Parker* was tripped into action at the request of those to be regulated by the state. In Tennessee, the "request" for regulation amounts to the enactment of an ordinance that the state may accept or reject.

221. The state constitution expressly prohibits price fixing, while the state's an-

sential governmental functions." Accordingly, the attorney general's antitrust compliance education program assumes that immunizing legislation will be available only for such activities. Meantime, a number of Utah cities have petitioned the federal legislature for some sort of federal exemption of municipal conduct.²²²

3.2.13 Virginia

Virginia is taking the piecemeal approach to *Boulder*. To date, the legislature has addressed two areas. The first was cable television; the second, taxi cabs.²²³

When the Supreme Court decided *Boulder*, Fairfax County, Virginia was in the process of making a cable franchise award. The County wrote the state attorney, noting that the state cable regulation law was deficient by *Boulder* standards. The office agreed and recommended legislation providing that subdivisions could issue one cable franchise and, after a public hearing, could award additional franchises if needed. The bill was amended to provide that while acting pursuant to the statute, subdivisions could take actions that would violate the antitrust laws.²²⁴ The amendment was later deleted.²²⁵ The enacted bill mirrors the attorney general's proposal.

The governing body of any county, city or town may grant a license or franchise . . . to no more than one community antenna television system. . . . The governing body shall have the authority to award additional licenses, franchises or certificates of public convenience as it deems appropriate, if such governing body finds that the public welfare will be enhanced by such awards after a public hearing at which testimony is heard concerning the economic consideration, the impact on private property rights, the impact on public convenience, the public need and potential benefit, and such other factors as are relevant. It may regulate such sys-

titrust laws require the state attorney general to advocate competition. *See, e.g.*, UTAH CONST. art. XII, § 20; UTAH CODE ANN. § 76-10-923 (Supp. 1983).

222. *See* Siena, *A Proposed Federal Legislative Solution* in ANTITRUST & LOCAL GOVERNMENT 198 (J. Siena ed. 1983).

223. VA. CODE § 15.1-23.1 (Supp. 1983) (cable policy); Va. H.B. 479, 1983 Sess. (taxi cab policy).

224. Stitt, *An Experience in Obtaining Immunizing Legislation*, in ANTITRUST & LOCAL GOVERNMENT 90-91 (J. Siena ed. 1983).

225. *Id.* This was allegedly the result of cable interest lobbying. In any case, it is questionable whether the amendment would achieve the desired result. Standing alone it is an authorization of the type *prohibited* by *Parker*. Read in context, it is arguably state recognition that displacement may be necessary. Less troublesome language would be much more effective.

tems, including the establishment of fees and rates. . . .²²⁶

The legislation's potential trouble areas are its lack of state compulsion and supervision.²²⁷

3.2.14 Washington

Washington has considered no legislation in direct response to *Boulder*, however, one proposed bill touches upon the issue. The legislation under consideration is part of a package of bills that would amend various portions of the state's government tort claims scheme.²²⁸ The general plan is that government entities may be liable in tort for activities "of a type performed not only by the state and municipal corporations but also by persons and corporations in the private sector."²²⁹ The act then sets out exceptions to this general rule. One exception provides that there is no liability arising out of:

The issuance, conditional issuance, nonissuance, denial, suspension, or revocation of any permit, license, franchise, certificate, order to desist, variance approval, zoning, rezoning, or similar authorization²³⁰

While such language may prove effective if a liberal reading of *Boulder* is adopted, the cautious municipality will not invest much reliance interest in the provision if it becomes law. The act, read broadly, may contemplate subdivision action to displace competition, however, there is minimal discussion of the state policy served by the displacement. Further, the exemption created would be broad in scope, a method that, as noted above, speaks poorly for the legislatures actually contemplating displacement in every effected area.

3.2.15 Wisconsin

No legislation has been considered in Wisconsin, however, at least one city has petitioned the legislature to act in the area of

226. VA. CODE § 15.1-23.1 (Supp. 1983).

227. The state attorney general's office points to *Town of Hallie*, 700 F.2d 376 (7th Cir. 1983), in asserting that active state supervision and state compulsion are not required. Letter from Craig T. Merritt to Kevin Boyle (May 5, 1983) (responding to *Boulder* legislation inquiry).

228. Wash. S.B. 4213, § 1 (1983).

229. *Id.*

230. *Id.* at § 2. The act also notes:

[I]t is not the intent of the legislature to extend liability so that it limits the effectiveness of the state and municipal corporations in providing services and regulatory functions necessary for the public health, welfare, and safety, *It is specifically recognized that the threat of damage claims against the state and municipal corporations based on land use and permit decisions places detrimental constraints on the legitimate exercise of police powers.*

Id. at § 1 (emphasis added).

cable regulation in particular and municipal conduct in general.²³¹

CONCLUSION

The ultimate requirements of *Parker* as applied to municipalities will (absent federal legislation) be determined by the Supreme Court,²³² however, it is notable that the majority of states adopting post-*Boulder* legislation have avoided terms requiring that competition be displaced and have provided for minimal or no state supervision. Yet, nearly every scheme provides some protective mechanism to foil anticompetitive favoritism. This is consistent with the argument that the gist of the *Parker* cases is that the state controls the means whereby a non-state party may decide to engage in conduct violative of the antitrust laws. It is quite reasonable that the degree of this control varies as to the public or private nature of the entity making the decision. Such an approach encourages careful consideration of state decisions to extend its immunity with minimal state intrusion into what are ultimately local affairs.²³³

The *Boulder* dissent's predictions of doom for municipal regulation have proven overstated. Although localities are surely more cautious in making such decisions, they are still being made and litigation does not appear to be inevitable. In sum, the uncertainty left by *Boulder* breeds a desirable result. No longer do local governments acting to protect local (and sometimes private/personal) concerns proceed without carefully considering the consequences. In a country where pro-competitive enactments have been equated to fundamental rights, such a result seems very appropriate.²³⁴

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231. West Allis, Wisc. Res. 20625 (1982) (available from the Wisconsin Legislative Reference Bureau as document 352.12/2, Pos. t4).

232. The Court has before it a neatly packaged opportunity to declare whether state compulsion and/or active state supervision is necessary in *Town of Hallie v. Eau Claire*, 700 F.2d 376 (7th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3070 (U.S. May 11, 1983) (No. 82-1382).

233. For other suggestions and theories on dealing with *Boulder*, see Bryant & Bellak, *A Proposal to Resolve Problems Resulting from Lafayette/Boulder Municipal Antitrust Liability*, 57 FLA. B.J. 482 (1983); Page, *After Boulder: Some Practical Advice for Avoiding Antitrust Liability*, 9 CURRENT MUN. PROB. 264 (1983); Brame & Feller, *Antitrust Liability of Local Governments: The Effect of City of Boulder*, 9 VA. B.A.J. 14 (1983).

234. Epilogue: The *Boulder* case was settled in mid-1982. For its \$200,000 plus

legal bill, Boulder got the cable company to promise to use best efforts to upgrade the system to 35 channels in two years, two public access channels, a studio and a remote van. For its part, the cable company got the city to "recognize its first amendment rights," acknowledge the feasibility of cable competition and to agree not to control programming, rates or the number of channels offered. Most importantly, the company's parent got to keep its multimillion dollar asset. KAGAN, CABLE T.V. FRANCHISING, August 27, 1982, at 1.