ANTITRUST STATE ACTION DEFENSE EXPANDED TO INCLUDE HOME RULE MUNICIPALITIES

Community Communications Company v. City of Boulder, [1980-2] Trade Cas. (CCH) ¶ 63,362 (10th Cir.)

In *Community Communications Company v. City of Boulder*[1] the Tenth Circuit Court of Appeals expanded state action immunity to encompass Colorado home rule municipalities[2] exercising a governmental function.[3]

The plaintiff, holder of a non-exclusive permit from defendant to provide cable television service to the city, planned to extend services to the entire city.[4] The city, fearing a complete cessation of competition in the Boulder market, issued ordinances that placed a ninety-day moratorium on expansion by plaintiff[5] and solicited competition for plaintiff by circulating a model ordinance among other cable television companies in the United States.[6] The plaintiff moved for a preliminary injunction, arguing that the ordinances were a restraint of trade and thus a violation of the Sherman Act.[7] The defendant argued that the ordinances were a valid exercise of police powers and immune from the

1. [1980-2] Trade Cas. (CCH) ¶ 63,362 (10th Cir.).

2. The term "municipality" includes corporations, towns, and cities, but not counties. 1 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 2.20 (3d ed. 1971).

3. *See* note 49 *infra*.

4. *See* Community Communications Co. v. City of Boulder, [1980-2] Trade Cas. ¶ 63,362, at 75,841 (10th Cir.). When plaintiff planned expansion of services, it was only serving 20% of the Boulder market, Community Communications Co. v. City of Boulder, 485 F. Supp. 1035, 1036 (D. Colo. 1980), or approximately 1,500 subscribers, Amicus Curiae Brief of the Colorado Attorney General at 5, Community Communications Co. v. City of Boulder, [1980-2] Trade Cas. (CCH) ¶ 63,362 (10th Cir.).

5. *See* Boulder, Colo., Ordinances 4472 & 4473 (December 18, 1979, and January 1, 1980, respectively). Ordinance No. 4472 revoked a 1964 ordinance under which plaintiff was operating and re-enacted it to include a restriction on plaintiff's expansion of services for three months. Ordinance 4473 amended the 1964 ordinance to include the same three month restriction. Both ordinances stated that their purpose was to allow other cable television companies to bid to provide services to the city. 485 F. Supp. at 1037.

6. *See* Community Communications Co. v. City of Boulder, [1980-2] Trade Cas. (CCH) ¶ 63,362, at 75,841 (10th Cir.). The model ordinance, distributed to more than fifty cable television companies in the United States, expressly stated that the purpose of the ordinance was to solicit competition for the Boulder market. A letter accompanying the ordinance, however, stressed that the city had not yet adopted the ordinance. Brief of Appellant City of Boulder at 8, Community Communications Co. v. City of Boulder, [1980-2] Trade Cas. (CCH) ¶ 63,362 (10th Cir.).

7. *Id.* at 75,841. Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1976).

antitrust laws under the state action exemption.[8] The trial court found that the city was not immune from antitrust liability[9] and granted the injunction.[10] On appeal, the Tenth Circuit Court of Appeals reversed, remanded, and *held*: Antitrust immunity extends to Colorado home rule municipalities exercising governmental functions if the municipality establishes that the alleged anticompetitive activity is; (1) specifically directed by the state in furtherance of state policy, and (2) supervised by the state.[11]

The Sherman Act, enacted in 1890 to stimulate competition, prohibits unreasonable restraints of trade and monopolization.[12] One of the few judicially created exemptions to the Sherman Act is the state action exemption, which absolves sovereign actions of a state or its political subdivisions from antitrust liability.[13] Although the principle underlying the state action exemption emerged shortly after passage of the Act,[14] courts did not completely accept the doctrine until *Parker v.*

8. *See* Community Communications Co. v. City of Boulder, 485 F. Supp. 1035, 1038 (D. Colo. 1980).

9. *See id.* at 1039.

10. *Id.* at 1041.

11. Community Communications Co. v. City of Boulder, [1980-2] Trade Cas. (CCH) ¶ 63,362, at 75,844 (10th Cir.).

12. Sherman Act § 1 provides:

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

Sherman Act, 15 U.S.C. § 1 (1976). Sherman Act § 2 provides:

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

Id. at § 2. *See generally* R. SHERMAN, ANTITRUST POLICIES AND ISSUES 33-38 (1978); J. VAN CISE, THE FEDERAL ANTITRUST LAWS 7-9 (3d rev. ed. 1975).

13. In contrast to the few judicially created exemptions, there are numerous statutory exemptions. *See, e.g.*, 7 U.S.C. §§ 291-92 (1976) (exempting agricultural cooperatives); 15 U.S.C. § 17 (1976) (exempting labor, horticultural, and agricultural associations); 15 U.S.C. § 18 (1976) (exempting SEC, CAB, ICC, FPC, and FCC approved transactions); 15 U.S.C. § 45(a)(2) (1976) (exempting state supervision of resale prices); 15 U.S.C. § 62 (1976) (exempting export trade associations); 15 U.S.C. § 1012 (1976) (exempting state regulation of insurance companies).

14. The principle was suggested but not fully explored in Lowenstein v. Evans, 69 F. 908 (4th

Brown[15] in 1943.

In *Parker* the Supreme Court held that a state statute[16] authorizing a marketing program,[17] which allegedly restrained competition,[18] was not within the intended scope of the Sherman Act.[19] The Court examined the legislative history of the Sherman Act and concluded that the Act prohibited "business combinations,"[20] but not official acts of government undertaken by a state in its sovereign capacity.[21] Chief Justice Stone, writing for the majority, provided three rationales for the decision to exempt state action. First, although a state is a "person" for some purposes under the Act,[22] the Act neither mentions the state nor

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Cir. 1895). The court held that the Sherman Act did not apply to a state's monopolization of traffic in liquor because the state is neither a "person" nor "corporation" within the Act. *Id.* at 911. The Supreme Court expanded the principle in Olsen v. Smith, 195 U.S. 332 (1904), stating that if the state has authority to regulate an activity, no monopoly or combination results when the state excludes all but state agents from participating in that activity. *Id.* at 345; *see* note 25 *infra.*

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

16. California Agricultural Prorate Act, ch. 754, 1933 Cal. Stats. 1969, as amended by chs. 471 and 473, 1935 Cal. Stats; ch. 6 Extra Session, 1938; chs. 363, 548, and 894, 1939 Cal. Stats; and chs. 603, 1150, and 1186, 1941 Cal. Stats.

17. The California Agricultural Prorate Act authorized establishment of an agricultural marketing program that restricted the amount of raisins a producer could market. *See* Parker v. Brown, 317 U.S. 341, 344-50 (1943).

18. The Supreme Court assumed that "the California prorate program 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." *Id.* at 350.

19. *Id.* at 352.

20. Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 NW. U.L. REV. 71 (1974), criticized the Court's interpretation of the Sherman Act:

> The Court's contention that Senator Sherman declared the bill to prevent only "business combinations" is a quotation taken out of context. What Senator Sherman actually said was:
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> It [the act] does not interfere in the slightest degree with voluntary associations made to affect public opinion to advance the interests of a particular trade or occupation. . . .
>
> They are not business combinations. They do not deal with contracts, agreements, etc.

Id. at 83 (quoting Senator Sherman from 21 CONG. REC. 2562 (1890)). *But see* American Column & Lumber Co. v. United States, 257 U.S. 377 (1921); Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 58 (1911); Note, *Antitrust Law-Governmental Action Immunity—Should State Presence Alone Be Sufficient to Justify the Exemption?*, 26 MERCER L. REV. 995, 996 (1975). *See also* Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (1940); United States v. Addyston Pipe & Steel Co., 85 F. 271, 283 (6th Cir. 1898), *modified*, 175 U.S. 211 (1899).

21. *See* Parker v. Brown, 317 U.S. 341, 351 (1943).

22. One year before *Parker*, the Supreme Court held that a state is a "person" within the meaning of the Sherman Act. *See* Georgia v. Evans, 316 U.S. 159, 162-63 (1942). *Cf.* United States v. Cooper Corp., 312 U.S. 600 (1941) (United States not a "person" within meaning of Sherman Act). More importantly, the Supreme Court has held that a city is a "person" for purposes of the Sherman Act. *See* Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 396 (1906).

gives any indication that it applies to state actions.[23] Second, actions of the state or its political subdivisions are not "business combinations."[24] Finally, principles of federalism demand preservation of state sovereignty. The Court, in the absence of clear congressional intent to displace state regulatory schemes, cannot infer legislative intent.[25] The state, however, can neither have "blanket immunity," nor can it deliberately shield private parties from antitrust liability.[26] Although the Court did not address the application of the "state action" exemption to municipalities, it suggested that a municipality is the equivalent of an agent of the state.[27] The precedential value of *Parker* remained unclear, however, because the Court failed to establish guidelines to aid courts in determining when to apply the exemption.[28]

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23. *See* Parker v. Brown, 317 U.S. 341, 351 (1943).

24. *See* note 20 *supra* and accompanying text.

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

26. *Id.* The Court commented: "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." *Id.* (citing Northern Sec. Co. v. United States, 193 U.S. 197, 332, 344-47 (1904)).

27. 317 U.S. at 350-51.

28. This failure to provide clear guidelines caused a split in the lower courts. *Compare* City of Fairfax v. Fairfax Hosp. Ass'n, 562 F.2d 280 (4th Cir. 1977), *vacated and remanded mem.*, 435 U.S. 992 (1978) (county hospital association required by state agency to lease hospital from county industrial development authority not exempt); Whitworth v. Perkins, 559 F.2d 378 (5th Cir. 1977), *vacated and remanded mem. sub nom.* City of Impact v. Whitworth, 435 U.S. 992 (1978) (town zoning ordinance prohibiting sale of alcohol in residential zones not exempt); Kurek v. Pleasure Driveway & Park Dist., 557 F.2d 580 (7th Cir. 1977), *vacated and remanded mem.*, 435 U.S. 992 (1978) (city park commission demand for uniform increase in concession fees at all municipal golf course concessions not exempt); Duke & Co. v. Foerster, 521 F.2d 1277 (3d Cir. 1975) (city ban on sale of malt beverage, manufactured by plaintiff, in public facilities not exempt); Allegheny Uniforms v. Howard Uniform Co., 384 F. Supp. 460 (W.D. Pa. 1974) (State Port Authority denial to plaintiff of approval to sell uniforms to Port Authority employees not exempt) *and* Azarro v. Town of Branford, [1974-2] Trade Cas. (CCH) ¶ 75,337 (D. Conn.) (town purchase of insurance from select companies and boycott of all other companies not exempt) *with* Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220 (7th Cir. 1975) (city council grant of cable television franchise to defendant and refusing franchise to plaintiff exempt); New Mexico v. American Petrofina, Inc., 501 F.2d 363 (9th Cir. 1974) (state and its political subdivisions conspiracy to fix prices on asphalt exempt); Saenz v. University Interscholastic League, 487 F.2d 1026 (5th Cir. 1973) (state agency determination that slide rule manufactured by plaintiff not within requirements of state and consequent ban of plaintiff's slide rule from interscholastic competition exempt); E.W. Wiggins Airways, Inc. v. Massachusetts Port Auth., 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966) (state agency operation of airport with one fixed base operator and consequent exclusion of plaintiff exempt); Continental Bus. Sys., Inc. v. City of Dallas, 386 F. Supp. 359 (N.D. Tex. 1974) (city grant of exclusive franchise to pick up passengers at airport to

Thirty-two years after *Parker*,[29] the Supreme Court began to narrow the scope of the state action immunity doctrine. In *Goldfarb v. Virginia State Bar*[30] the Court declared that action merely authorized by the state[31] was outside the state action exemption.[32] The state, acting in its sovereign capacity, must compel a state agency to engage in anticompetitive activities to apply the *Parker* exemption.[33] In 1977 the Court in *Bates v. State Bar of Arizona*[34] expressly affirmed the compulsion re-

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city owned bus system and consequent exclusion of private bus lines exempt) *and* Trans World Assocs. v. City & County of Denver, [1974-2] Trade Cas. (CCH) ¶ 75,293 (D. Colo.) (city limit on number of car rental concessions at airport and consequent exclusion of plaintiff exempt). *See generally* Donnem, *Federal Antitrust Law Versus Anticompetitve State Regulation*, 39 ANTITRUST L.J. 950 (1970); Jacobs, *State Regulation and the Federal Antitrust Laws*, 25 CASE W. RES. L. REV. 221 (1975); Posner, *The Proper Relationship Between State Regulation and Federal Antitrust Laws*, 49 N.Y.U. L. REV. 693 (1974); Tepley, *Antitrust Immunity of State and Local Governmental Action*, 48 TUL. L. REV. 272 (1974); White, *Participant Governmental Action Immunity From the Antitrust Laws: Fact or Fiction?*, 50 TEX. L. REV. 474 (1972); Note, *Federal Antitrust Liability and the State Administrative Official*, 28 BAYLOR L. REV. 405 (1976); Note, *The Antitrust Liability of Municipalities Under the Parker Doctrine*, 57 B.U.L. REV. 368 (1977); Note, *An Application of the Federal Antitrust Laws to a State Authority*, 43 B.U.L. REV. 541 (1963); Note, *Antitrust Law and Municipal Corporations: Are Municipalities Exempt From Sherman Act Coverage Under the Parker Doctrine?*, 65 GEO. L.J. 1547 (1977); Note, *The State Action Antitrust Exemption: The Confinement of the Parker Doctrine Within the Emerging Cantor Formula*, 29 HASTINGS L.J. 211 (1977); Note, *Antitrust Law-Governmental Action Immunity—Should State Presence Alone Be Sufficient to Justify the Exemption?*, 26 MERCER L. REV. 995 (1975); Note, *Government Action and Antitrust Immunity*, 119 U. PA. L. REV. 521 (1971).

29. The Supreme Court did not review a lower court's ruling on the state action exemption from 1943 to 1975.

30. 421 U.S. 773 (1975).

31. The defendant argued that its actions were "prompted" by a state agency. The Court found defendant's argument inconclusive and, consequently, inspected the Virginia statutes to determine if defendant's activities were required by state law. Finding no state law behind defendant's activities, the Court ruled that a mere "prompting" was insufficient to satisfy the dictates of the *Parker* doctrine. *Id.* at 790-91.

32. *Id.* at 791.

33. *See* Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (state supreme court disciplinary rule prohibiting advertisements by attorneys held a sufficiently articulated prohibition to compel compliance); Padgett v. Louisville & Jefferson County Air Bd., 492 F.2d 1258 (6th Cir. 1974) (state legislative mandate charging instrumentality with authority to operate airport held sufficient compulsion to establish monopoly taxi service); Ladue Local Lines, Inc. v. Bi-State Dev. Agency, 433 F.2d 131 (8th Cir. 1970) (statutory provisions enacting compact between adjacent states for creation of transporation agency held sufficient compulsion to establish monopoly bus service); E.W. Wiggins Airways, Inc. v. Massachusetts Port Auth., 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966) (state legislative mandate charging instrumentality with authority to operate airport held sufficient compulsion to establish monopoly fixed base operations); Asheville Tobacco Bd. of Trade, Inc. v. FTC, 263 F.2d 502 (4th Cir. 1959) (statutory provisions creating local tobacco board with authority to regulate sales of tobacco held sufficient compulsion to establish selling time allotted to tobacco warehouses).

34. 433 U.S. 350 (1977).

quirement. Anticompetitive activities are exempt from the antitrust laws when they are part of a state policy, which is clearly expressed and supervised by the state.[35] If the state's directives are permissive, rather than compulsory, then the state's policy is neutral and no immunity attaches to the anticompetitive activities.[36] Furthermore, if an exemption is not necessary to the successful functioning of the state's regulatory policy, then there is no immunity.[37]

In *City of Lafayette v. Louisiana Power & Light Co.*[38] a sharply divided Court rejected a claim that municipalities are sovereign and thus exempt from the antitrust laws.[39] The Court found that municipalities are agents of the state and merely reflect state policy.[40] Municipalities

35. *Id.* at 362.

36. *See, e.g.*, Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Northern Sec. Co. v. United States, 193 U.S. 197 (1904); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970); Asheville Tobacco Bd. of Trade, Inc. v. FTC, 263 F.2d 502 (4th Cir. 1959); Princeton Community Phonebook v. Bate, [1978-2] Trade Cas. (CCH) ¶ 62,138 (3d Cir.); United States v. Texas State Bd. of Pub. Accountancy, 464 F. Supp. 400 (W.D. Tex. 1978) (per curiam), *aff'd mem.*, 592 F.2d 919 (5th Cir.), *cert. denied*, 444 U.S. 925 (1979); Star Lines Ltd. v. Puerto Rico Maritime Shipping Auth., [1978-1] Trade Cas. (CCH) ¶ 62,027 (S.D.N.Y.). *See also* Cedar-Riverside Assocs. v. United States, 459 F. Supp. 1290 (D. Minn. 1978), *aff'd*, 606 F.2d 254 (8th Cir. 1979).

37. *See* Cantor v. Detroit Edison Co., 428 U.S. 579 (1976). The Court stated: "The Court has consistently refused to find that regulation gave rise to an implied exemption without first determining that exemption was necessary in order to make the regulatory Act work, 'and even then only to the minimum extent necessary.'" *Id.* at 597 (quoting Justice Goldberg in Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963)). *See, e.g.*, Bates v. State Bar of Ariz., 433 U.S. 350 (1977); United States v. National Ass'n of Sec. Dealers, 422 U.S. 694 (1975); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); United States v. Bordon Co., 308 U.S. 188 (1939); Posadas v. National City Bank, 296 U.S. 497 (1936). *But cf.* Surety Title Ins. Agency, Inc. v. Virginia State Bar, [1977-1] Trade Cas. (CCH) ¶ 61,406 (E.D. Va.) (Virginia State Bar practice of issuing advisory opinions resulting in illegal restraint of trade beyond scope of authorization by Supreme Court).

38. 435 U.S. 389 (1978).

39. *Id.* at 412. The Court insisted that states were superior to municipalities within the federal system. "Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them." *Id. See, e.g.*, Edelman v. Jordan, 415 U.S. 651, 667 n.12 (1974); Lincoln County v. Luning, 133 U.S. 529 (1890). *See generally* Bangasser, *Exposure of Municipal Corporations to Liability for Violations of the Antitrust Laws: Antitrust Immunity after the City of Lafayette Decision*, 11 URB. LAW. vii (1979); Note, *The Application of Antitrust Laws to Municipal Activities*, 79 COLUM. L. REV. 518 (1979); Comment, *Municipal Antitrust Liability: City of Lafayette v. Louisiana Power & Light Co.*, 18 URB. L. ANN. 265 (1980).

40. *See* 435 U.S. at 413. *See, e.g.*, Folsom v. Mayor of New Orleans, 109 U.S. 285, 287 (1883). *Accord,* Padgett v. Louisville & Jefferson County Air Bd., 492 F.2d 1258 (6th Cir. 1974) (per curiam); Ladue Local Lines, Inc. v. Bi-State Dev. Agency, 433 F.2d 131 (8th Cir. 1970); E.W. Wiggins Airways, Inc. v. Massachusetts Port Auth., 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S.

may exercise only those powers that the state grants them.[41] A municipality, like a state, cannot claim automatic immunity.[42] To qualify for immunity, the municipality must show that the state legislature intended to displace competition through the alleged anticompetitive activity.[43] If the intent is unclear, the courts can infer intent[44] from the degree of state supervision,[45] the purpose of the legislation,[46] or the legislative history of the act.[47] If the court finds no intent to displace anticompetitive activity, then the state policy is neutral.[48] Only Chief Justice Burger distinguished between a municipality's governmental

947 (1966); Murdock v. City of Jacksonville, 361 F. Supp. 1083, 1092 (M.D. Fla. 1973). *See also* Cantor v. Detroit Edison Co., 428 U.S. 579 (1976).

Municipalities, however, are not mere instrumentalities of the state because they have autonomous power, granted by the state, to protect the health, safety, and general welfare of their citizens. *See, e.g.,* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 383-89 (1926); Hadacheck v. City of Los Angeles, 239 U.S. 394, 413-14 (1915); Barnes v. Merritt, 428 F.2d 284, 287 (5th Cir. 1970) (dictum). *See generally* Note, *Antitrust Law and Municipal Corporations: Are Municipalities Exempt From Sherman Act Coverage Under the Parker Doctrine?*, 65 GEO. L.J. 1547, 1559 (1977).

A state may exercise only limited power over a municipality. *See* Gomillion v. Lightfoot, 364 U.S. 339 (1960) (state attempt to fix boundaries of municipality to exclude black voters forbidden by fifteenth amendment); City of Tacoma v. Taxpayers, 357 U.S. 320 (1958) (state attempt to block construction of dam by municipality forbidden as waters within dominion of the United States); City of Davenport v. Three-fifths of an Acre of Land, 252 F.2d 354 (7th Cir. 1958) (state opposition to congressional authorization of city's condemnation of state owned land barred by eleventh amendment).

41. *See, e.g.,* City of Clinton v. Cedar Rapids & Mo. River R.R., 24 Iowa 455 (1868); 1 J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237 (5th ed. 1911); Vanlandingham, *Local Governmental Immunity Re-Examined*, 61 NW. U.L. REV. 237 (1966).

42. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978). *See* note 28 *supra* and accompanying text.

43. 435 U.S. at 413. The Court cited the *Bates* test as appropriate to determine liability in this situation. *Id.* at 410.

44. *Id.* at 415. The Court stated: "This does not mean however, that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit." *Id.*

45. *See, e.g.,* Jeffrey v. Southwestern Bell, 518 F.2d 1129 (5th Cir. 1975); Bangasser, *supra* note 39, at vii, xxv (1979).

46. *See, e.g.,* Mobilfone of Northeastern Pa. Inc. v. Commonwealth Tel. Co., 428 F. Supp. 131 (E.D. Pa. 1977), *aff'd*, [1978-2] Trade Cas. (CCH) ¶ 61,873 (3d Cir.); BANGASSER, *supra* note 39, at vii, xxv.

47. *See, e.g.,* Bangasser, *supra* note 39, at vii, xxiv-xxv (1979). Bangasser notes that most states do not keep records of legislative debates.

48. 435 U.S. at 414. *See, e.g.,* Northeastern Tel. Co. v. American Tel. & Tel. Co., 477 F. Supp. 251 (D. Conn. 1978); Interconnect Planning Corp. v. American Tel. & Tel. Co., 465 F. Supp. 811, 814 (S.D.N.Y. 1978); Star Lines Ltd. v. Puerto Rico Maritime Shipping Auth., 451 F. Supp. 157, 166 (S.D.N.Y. 1978).

and proprietary functions.[49]

In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*[50] the Supreme Court held that a state agency that issues anticompetitive regulations must meet the requirements of the two step test[51] announced in *City of Lafayette* and *Bates*.[52] First, the state legislature must expressly declare that the challenged activity is performed with regard to state policy.[53] Second, the state itself must supervise the workings of the policy.[54] The *Midcal Aluminum* Court also did not distinguish between governmental and proprietary activities.[55] The Court stated that the two step test was appropriate for determining antitrust immunity under *Parker*,[56] implying that the test was applicable whether the municipality's activity was governmental or proprietary.

Home rule municipalities are a particularly difficult problem for the

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49. *Id.* at 422 (Burger, C.J., concurring with opinion in Part I and in the judgment).

A municipality may exercise either governmental or proprietary functions. Note, *The Antitrust Liability of Municipalities Under the Parker Doctrine*, 57 B.U.L. REV. 368, 378 (1977); Note, *Antitrust Law and Municipal Corporations: Are Municipalities Exempt From Sherman Act Coverage Under the Parker Doctrine?*, 65 GEO. L.J. 1547, 1557 (1977). Governmental functions are "those undertaken as administrative subdivisions of the state entrusted with the execution of a broad range of express and implied powers." 57 B.U.L. REV. at 378. *See* City of Trenton v. New Jersey, 262 U.S. 182, 185-87 (1923); City of Safety Harbor v. Birchfield, 529 F.2d 1251, 1254 n.51 (5th Cir. 1976). Proprietary functions are "those activities that are quasi-private in nature and that are performed primarily for the benefit of the residents or for the private benefit of the municipality itself." Note, *The Antitrust Liability of Municipalities Under the Parker Doctrine*, 57 B.U.L. REV. 368, 378 (1977).

50. 445 U.S. 97 (1980).

51. *Id.* at 105.

52. *Id. See* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

53. *See* 445 U.S. at 105. *See also* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); Bates v. State Bar of Ariz., 433 U.S. 350 (1977); United States v. Texas State Bd. of Pub. Accountancy, 592 F.2d 919 (5th Cir.), *cert. denied*, 444 U.S. 925 (1979); Crocker v. Padnos, 483 F. Supp. 229, 232 (D. Mass. 1980); Caribe Trailor Systems, Inc. v. Puerto Rico Maritime Shipping Auth., 475 F. Supp. 711, 721 (D.D.C. 1979); City of Mishawaka v. American Elec. Power Co., 465 F. Supp. 1320, 1347 (N.D. Ind. 1979), *aff'd in part and vacated in part*, 616 F.2d 976 (7th Cir. 1980).

54. *See* 445 U.S. at 105. *See also* New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); Bates v. State Bar of Ariz., 433 U.S. 350 (1977); Allstate Beer, Inc. v. Julius Wile Sons & Co., 479 F. Supp. 605 (N.D. Ga. 1979); Beckenstein v. Hartford Elec. Light Co., 479 F. Supp. 417 (D. Conn. 1979); Huron Valley Hosp. v. City of Pontiac, 466 F. Supp. 1301 (E.D. Mich. 1979).

55. *See* 445 U.S. at 104-06. *See* note 49 *supra*.

56. 445 U.S. at 105.

courts.[57] The majority of states[58] have enacted either statutory or constitutional home rule charters[59] that allow municipalities to regulate local matters.[60] They do not, however, grant complete autonomy to municipalities.[61] Home rule municipalities remain subservient to state

57. *Compare In re* Airport Car Rental Antitrust Litigation, 474 F. Supp. 1072 (N.D. Cal. 1979) (home rule charter did not mandate city to monopolize airport car rental market) *and* Woolen v. Surtan Taxicabs, Inc., 461 F. Supp. 1025 (N.D. Tex. 1978) (home rule charter did not mandate city to monopolize airport taxicab market) *with* Glenwillow Landfill v. City of Akron, 485 F. Supp. 671 (N.D. Ohio 1979) (home rule charter did mandate city to regulate competition in solid waste disposal).

A comparison of lower court decisions on home rule is difficult because the courts deal with different kinds of home rule charters. *See* note 58 *infra*. The quantity and type of power, which a particular home rule charter confers on a municipality, will greatly influence a court's deference to the municipality. *See generally* 2 E. MCQUILLIN, MUNICIPAL CORPORATIONS §§ 4.83, 10.09-.14 (3d ed. 1971); S. SATO & A. VAN ALSTYNE, STATE AND LOCAL GOVERNMENT LAW 216-25 (1970); Bangasser, *supra* note 39, at vii; Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269 (1968); Note, *The Antitrust Liability of Municipalities Under the Parker Doctrine*, 57 B.U.L. REV. 368 (1977); Note, *The Application of Antitrust Laws to Municipal Activities*, 79 COLUM. L. REV. 518 (1979).

In Colorado the state courts often interpreted various provisions of that state's home rule charter. *See* Public Util. Comm'n v. City of Durango, 171 Colo. 553, 469 P.2d 131 (1970); City & County of Denver v. Sweet, 138 Colo. 41, 329 P.2d 441 (1958); City & County of Denver v. McNichols, 129 Colo. 251, 268 P.2d 1026 (1954).

58. Vanlandingham, *supra* note 57, at 277. Vanlandingham commented that by 1966 thirty-three states had enacted some form of home rule charter. *Id.*

59. Although a state's enactment of a home rule charter is either statutory or constitutional, home rule charters are generally classified into three types: self-executing, mandatory, and permissive. A self-executing charter grants a city the authority to implement power without relying on state legislative action. A mandatory charter, characterized by inclusion of the term "shall," permits a state legislature to enact legislation to implement home rule powers. A permissive charter allows the state legislature to enact implementing legislation at its own discretion. Vanlandingham, *supra* note 57, at 278.

60. In effect, home rule charters limit a state legislature's control over matters of purely local concern. *See* People v. Sours, 31 Colo. 369, 74 P. 167 (1903); Big Rapids v. Michigan Consol. Gas Co., 324 Mich. 358, 37 N.W.2d 136 (1949); City of Canton v. Whitman, 44 Ohio St. 2d 62, 337 N.E.2d 766 (1975); City of West Allis v. Milwaukee, 39 Wis. 2d 356, 159 N.W.2d 36 (1968), *cert. denied*, 393 U.S. 1064 (1969).

Definitions of a local matter are rarely, if ever, included in a home rule charter. The lack of definition leaves delineation of the elements of a "local affair" to the state courts. *See* City of Pueblo v. Kurtz, 66 Colo. 447, 182 P. 884 (1919); Denver v. Hallett, 34 Colo. 393, 83 P. 1066 (1905); State v. Lynch, 88 Ohio St. 71, 102 N.E. 670 (1913).

See generally S. SATO & A. VAN ALSTYNE, STATE AND LOCAL GOVERNMENT LAW 217 (1970); Bangasser, *supra* note 39, at vii, xxxii; Vanlandingham, *supra* note 57, at 280; Note, *The Antitrust Liability of Municipalities Under the Parker Doctrine*, 57 B.U.L. REV. 368, 382 (1977); Note, *Antitrust Law and Municipal Corporations: Are Municipalities Exempt From Sherman Act Coverage Under the Parker Doctrine?*, 65 GEO. L.J. 1547, 1559 (1977).

61. The state legislature may enact statutes that supersede a home rule municipality's ordinances if the statute concerns a matter that is a state affair and not a purely local concern. *See* Spears Free Clinic & Hosp. for Poor Children, Inc. v. State Bd. of Health, 122 Colo. 147, 149-50,

legislative dictates.[62] Nonetheless, municipalities are not simply instrumentalities of the state because they have a general police power to protect the health, safety, and general welfare of their citizens.[63] Colorado's home rule charter,[64] although enacted as a constitutional provision, is not appreciably different from other home rule charters in the degree of autonomy it grants to municipalities.[65] Colorado home rule is a delegated power because of its derivation from the state constitution.[66]

In *Community Communications Company v. City of Boulder*[67] the Court of Appeals for the Tenth Circuit determined that the city was immune from antitrust liability because of its authority under the Colo-

220 P.2d 872, 874 (1950); Nugent v. City of East Providence, 103 R.I. 518, 524, 238 A.2d 758, 762 (1968).

A state statute also may supersede the ordinances of a home rule municipality if the statute affects local affairs directed to a state concern. *See* Del Luca v. Town Adm'r of Methuen, 368 Mass. 1, 8, 329 N.E.2d 748, 755 (1974); City of Canton v. Whitman, 44 Ohio St. 2d 62, 69, 337 N.E.2d 766, 771 (1975).

See generally Vanlandingham, *supra* note 57, at 280; Note, *Antitrust Law and Municipal Corporations: Are Municipalities Exempt From Sherman Act Coverage Under the Parker Doctrine?*, 65 GEO. L.J. 1547, 1560 (1977).

62. *See* note 61 *supra*. *See generally* City of Clinton v. Cedar Rapids & Mo. River R.R., 24 Iowa 455, 463 (1868); 1 J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS, § 237 (5th ed. 1911); Vanlandingham, *supra* note 41.

63. *See* Kansas City v. Frogge, 352 Mo. 233, 176 S.W.2d 498 (1944).

64. COLO. CONST. art. XX, § 6. The home rule charter, in pertinent part reads:

> Section 6. Home rule for cities and towns. The people of each city or town of this state, having a population of two thousand inhabitants as determined by the last preceding census taken under the authority of the United States, the state of Colorado or said city or town, are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.
>
> Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.
>
> . . . .
>
> It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.
>
> The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.

Id.

65. *See* note 61 *supra*.

66. *See* Service Oil Co. v. Rhodus, 179 Colo. 335, 500 P.2d 807 (1972); State Farm Mutual Auto Ins. Co. v. Temple, 176 Colo. 537, 491 P.2d 1371 (1972).

67. [1980-2] Trade Cas. (CCH) ¶ 63,362 (10th Cir.).

rado home rule statute.[68]

Chief Judge Seth, writing for the majority, emphasized that the ordinances regulating cable television[69] were not beyond the city's authority.[70] He found that state courts recognized a municipality's authority to regulate local affairs.[71] Because plaintiffs' franchise only permitted service to residents within the city limits of Boulder,[72] these ordinances were a purely local affair.[73]

Chief Judge Seth then examined a municipality's authority under Colorado's home rule charter.[74] He acknowledged the trial court's conclusion that the people of Colorado are the ultimate source of governmental power.[75] He argued that because the people had grafted the home rule provisions into the Colorado Constitution, home rule municipalities operate by the authority of the people.[76] The city thus has supreme authority over local matters because its authority is express.[77]

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68. *Id.* at 75,843.

69. *See* notes 5-6 *supra.*

70. [1980-2] Trade Cas. (CCH) ¶ 63,362, at 75,841 (10th Cir.).

71. *Id. See* Manor Vail Condominium Ass'n v. Town of Vail, ___ Colo. ___, 604 P.2d 1168 (1980); Veterans of Foreign Wars, Port 4264 v. City of Steamboat Springs, 195 Colo. 44, 54, 575 P.2d 835, 840 (1978); Security Life & Accident Co. v. Temple, 177 Colo. 14, 16, 492 P.2d 63, 64 (1972); Four-County Metropolitan Capital Improvement Dist. v. Board of County Comm'rs, 149 Colo. 284, 294-95, 369 P.2d 67, 72 (1962); People v. Mountain States Tel. & Tel. Co., 125 Colo. 167, 173, 243 P.2d 397, 399 (1952). *But see* City & County of Denver v. Sweet, 138 Colo. 41, 329 P.2d 441 (1958). In that case, the Colorado Supreme Court stated:

> The United States Constitution provides for a national government with a federal system of *states.* All powers not expressly granted the federal government are reserved to the *states or to the people.* Colorado's Enabling Act, approved by the federal government when we acquired statehood insured that our state will have a republican form of government. Clearly our federal system does not envisage as a part thereof city-states. It therefore follows that home rule cities can be only an arm or branch of the state with delegated power. That is the kind of power granted by Article XX.

Id. at 48, 329 P.2d at 445 (citations omitted) (emphasis in original).

72. *See* note 4 *supra.*

73. [1980-2] Trade Cas. (CCH) ¶ 63,362, at 75,842 (10th Cir.). Judge Seth also considered the Supreme Court decision in TV Pix, Inc. v. Taylor, 396 U.S. 556 (1970) (per curiam). The Supreme Court affirmed a lower court's opinion that held regulation of community antenna television systems within the state was the local business of the state. Chief Judge Seth found the situation in *City of Boulder* comparable, even though *TV Pix* dealt with state regulation of anticompetitive activities. Judge Markey, dissenting, noted that the antitrust laws were nowhere mentioned in *TV Pix.* He believed the Supreme Court decision in United States v. Southwestern Cable Co., 392 U.S. 157 (1968), which held that cable television is not a local matter, should control. [1980-2] Trade Cas. (CCH) ¶ 63,467, at 76,468 (10th Cir.) (Markey, J., dissenting).

74. *See* note 65 *supra.*

75. [1980-2] Trade Cas. (CCH) ¶ 63,362, at 75,842 (10th Cir.).

76. *Id.*

77. *Id.*

Furthermore, the City's authority to regulate an activity that the state has failed to regulate is beyond dispute.[78]

Chief Judge Seth ruled, with only minimal discussion, that the City's regulation of cable television was a governmental and not a proprietary interest.[79] By distinguishing *City of Boulder* from *City of Lafayette*, he held that the municipality in *City of Lafayette* was exercising a proprietary interest.[80] Consequently, the *City of Lafayette* test does not apply when a municipality acts in its governmental capacity.[81] Chief Judge Seth ruled that the *Midcal Aluminum* test is the appropriate standard when a municipality regulates a governmental interest.[82]

Chief Judge Seth applied the *Midcal Aluminum* standard to *City of Boulder* and found that the city was exempt from the antitrust laws.[83] He stressed that the state had failed to express a policy on the regulation of cable television.[84] He ruled that the language of the moratorium and model ordinances represented the city's policy and thus fulfilled the first step of the *Midcal Aluminum* test.[85] The ninety-day moratorium reflected the supervision of the city's policy and fulfilled the second step of the *Midcal Aluminum* test.[86]

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78. *Id. But see* note 37 *supra* and accompanying text.

79. [1980-2] Trade Cas. (CCH) ¶ 63,362, at 75,842 (10th Cir.). *See* note 49 *supra.*

80. [1980-2] Trade Cas. (CCH) ¶ 63,362, at 75,844 (10th Cir.).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 75,842.

85. *Id.* at 75,843. *See* notes 51-56 *supra* and accompanying text. *But cf. In re* Airport Car Rental Antitrust Litigation, 474 F. Supp. 1072 (N.D. Cal. 1979) (state grant of power to home rule city to operate transportation system not authorization for anticompetitive regulation and monopolization); Woolen v. Surtan Taxicabs, Inc., 461 F. Supp. 1025 (N.D. Tex. 1978) (state grant of power to home rule city to operate airport not authorization for anticompetitive activities in operation of airport).

86. [1980-2] Trade Cas. (CCH) ¶ 63,362, at 75,844 (10th Cir.). *But see* Bangasser, *supra* note 39, at vii. *See also* Norman's On The Waterfront, Inc. v. Wheatley, 444 F.2d 1011, 1017-18 (3d Cir. 1971) (Virgin Islands Alcoholic Beverages Fair Trade Law requiring filing by wholesalers and other dealers of a minimum retail price list held insufficient to invoke state action immunity); Gas Light Co. v. Georgia Power Co., 440 F.2d 1135, 1140 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972) (power company regulated by state Public Service Commission as to rates and services held sufficient to invoke state action immunity); Woods Exploration & Producing Co. v. Aluminum Co. of Am., 438 F.2d 1286, 1294-95 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (natural gas producers regulation by Texas Railroad Commission, where producers had filed false forecasts with an anticompetitive effect, held insufficient to invoke state action immunity); Allstate Ins. Co. v. Lanier, 361 F.2d 870, 872 (4th Cir.), *cert. denied*, 385 U.S. 930 (1966) (state statutory program regulating rates and standards of insurance companies, established, and supervised by state held sufficient to invoke state action immunity); Marnell v. United Parcel Serv. of Am., Inc., 260 F.

Judge Markey, in a lengthy dissent,[87] criticized the majority's interpretation of the state action exemption. He emphasized that the *Parker* Court narrowly limited the exemption to state legislative action.[88] He strenuously objected to the treatment of municipalities as states or as sovereign within their borders.[89] He argued that *City of Lafayette* controlled and should foreclose immunity for the city.[90]

The *City of Boulder* court's effort to formulate a special test for assessing antitrust liability when a city asserts a governmental interest is commendable. Numerous policy arguments, however, including the devastating effect on a municipality of a treble damage judgment, weigh heavily in favor of exempting municipalities from the antitrust laws.[91] Nonetheless, the majority opinion in *City of Boulder* is questionable on two grounds—the court's analysis of home rule powers and its application of the principles of federalism.[92]

First, the *City of Boulder* court overstates the authority of a home rule municipality. Home rule charters do not equate a municipality with a state.[93] Municipalities are agents of the state and, therefore, are

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Supp. 391, 409-10 (N.D. Cal. 1966) (state authorization of Public Utilities Commission to change rates and contracts of retail parcel delivery companies held insufficient to invoke state action immunity).

87. [1980-2] Trade Cas. (CCH) ¶ 63,467, at 76, 464-70 (10th Cir.) (Markey, J., dissenting).

88. *Id.* at 76,466 (Markey, J., dissenting).

89. *Id.* at 76,467 (Markey, J., dissenting). Judge Markey placed great reliance on City & County of Denver v. Sweet, 138 Colo. 41, 329 P.2d 441 (1958). *See* note 71 *supra.*

90. [1980-2] Trade Cas. (CCH) ¶ 63,467, at 76,467 (10th Cir.) (Markey, J., dissenting).

91. Subjecting municipalities to the threat of a treble damage judgment would have a chilling effect on services provided by the municipality. *See* Note, *Municipal Antitrust Liability: Applying* City of Lafayette v. Louisiana Power and Light Co., 31 BAYLOR L. REV. 563 (1979), Comment, *Antitrust Law and Municipal Corporations: Are Municipalities Exempt From Sherman Act Coverage Under the Parker Doctrine?*, 65 GEO. L.J. 1547 (1977).

In addition, denial of municipal immunity may result in municipalities being joined in every antitrust action involving private parties. *See* Note, *Antitrust Law and Municipal Corporations: Are Municipalities Exempt From Sherman Act Coverage Under the Parker Doctrine?*, 65 GEO. L.J. 1547 (1977). *Cf.* Cantor v. Detroit Edison Co., 428 U.S. 579, 616 n.4 (1976) (the holding in *Parker* would lose all meaning if private parties were allowed to avoid liability by joining the municipality).

92. The *City of Boulder* decision is also open to question on its use of the *Midcal Aluminum* test. The Court in *Midcal Aluminum* did not formulate a new standard. It affirmed criteria that had evolved from the *Parker* doctrine to the fairly narrow test in *City of Lafayette.* The *Midcal Aluminum* test was initially stated in *Bates* and affirmed in *City of Lafayette.* The *Midcal Aluminum* criteria are implicit to the *City of Lafayette* standard and, therefore, do not constitute a separate test. Consequently the *City of Boulder* court's rejection of the *City of Lafayette* standard has no basis in fact.

93. *See* notes 60-63 *supra* and accompanying text.

subordinate to the state.[94] Home rule charters expressly limit municipalities to exercise of control over local matters.[95] Moreover, even in areas of purely local concern, municipalities are not completely autonomous.[96] Municipal regulations that conflict with general statutes of the state are invalid.[97] In addition, home rule charters do not deprive the state legislature of power to declare public policy.[98] The *Midcal Aluminum* test explicitly requires state, not municipal, policy and supervision.[99] If the state fails to express an opinion about an alleged anticompetitive activity, the state's policy is neutral.[100] A municipality cannot then assume the position of the state and regulate local affairs in an anticompetitive manner.

Second, the *City of Boulder* court's ruling on the authority of the city demonstrates a failure to appreciate the distribution of authority in the federal system.[101] Under the Constitution the federal system is a dual system of government comprised exclusively of states and the federal government.[102] The Constitution nowhere extends recognition to municipalities. Within the federal system, both states and the federal government are sovereign.[103] Municipalities are not sovereign and, thus, cannot occupy the same position as states in the federal system.[104] Municipalities exist at the will of state legislatures.[105] Home rule charters, including Colorado's, allow municipal ordinances to supersede state law under certain circumstances.[106] The *Parker* Court made clear,[107]

94. *See* notes 61-63 *supra* and accompanying text.

95. *See* note 61 *supra*.

96. *See* notes 60-63 *supra* and accompanying text.

97. *See* note 61 *supra*. *See also* Bennion v. City & County of Denver, 180 Colo. 213, 215, 504 P.2d 350, 351 (1972); Vela v. People, 174 Colo. 465, 466, 484 P.2d 1204, 1205 (1971); Vick v. People, 166 Colo. 565, 566-67, 445 P.2d 220, 221 (1968), *cert. denied*, 394 U.S. 945 (1969); Horst v. City & County of Denver, 101 Colo. 284, 73 P.2d 388 (1937).

98. *See* Stokes v. Newton, 106 Colo. 61, 101 P.2d 21 (1940); People v. City & County of Denver, 90 Colo. 598, 603, 10 P.2d 1106, 1108 (1932).

99. *See* note 92 *supra*.

100. *See* notes 43-48 *supra* and accompanying text.

101. *See* note 39 *supra*.

102. *See* note 39 *supra*. *See also* S. HOLLOWAY, INTER-GOVERNMENTAL RELATIONS IN THE UNITED STATES 8 (1972).

103. *See* note 25 *supra*.

104. *See* note 25 *supra*.

105. *See* notes 60-61 *supra* and accompanying text.

106. *See* Vela v. People, 174 Colo. 465, 484 P.2d 1204 (1971); Zelinger v. Public Sewer Co., 164 Colo. 424, 435 P.2d 412 (1967); City & County of Denver v. Sweet, 138 Colo. 41, 329 P.2d 441 (1958); Horst v. City & County of Denver, 101 Colo. 284, 73 P.2d 388 (1937).

107. *See* note 26 *supra*.

however, that home rule charters cannot vest municipalities with authority to enact laws that violate valid congressional acts such as the Sherman Act.[108] The state cannot grant power it does not possess. Thus, if the state does not qualify for the state action exemption, a municipality cannot automatically qualify for immunity simply because of its status as a home rule municipality.

City of Boulder, therefore, despite the court's efforts to add clarity to the state action exemption, provides little guidance for courts that seek to judge a municipality's claim of immunity from the antitrust laws.

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108. U.S. CONST. art. VI, cl. 2, provides in pertinent part: "This Constitution, and the laws of the United States which shall be made in Pursuance thereof. . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding." City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 430-31 (1977) (Stewart, J., dissenting). *But see* National League of Cities v. Usery, 426 U.S. 833 (1976). In *City of Lafayette* Justice Stewart, in dissent, stated that *National League of Cities* held that both states and their instrumentalities must receive equal deference with regard to services traditionally provided by the state. The plurality in *City of Lafayette* disagreed. Justice Brennan stated that nothing in *National League of Cities* suggested "a constructional principle of presumptive congressional deference in behalf of cities." *Id.* at 412-13 n.42 (1977).