MUNICIPAL ANTITRUST LIABILITY: *COMMUNITY COMMUNICATIONS CO. v. CITY OF BOULDER*

Congress enacted the Sherman Act[1] to preserve free and unfettered competition in interstate and foreign commerce.[2] States, however, retain power to regulate the commercial affairs of their citizens.[3] The

1 The applicable sections of the Sherman Act, for purposes of this article, are sections one and two. They have remained unchanged since their promulgation in 1890 Section one of the Sherman Act provides in pertinent part: "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 hereby declared to be illegal. . . ." 15 U.S.C. § 1 (1976 & Supp. III 1979). Section two 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 misdemeanor. . . ." *Id.* § 2.

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

2. 15 U.S.C. §§ 1-2 (1976). The Supreme Court, viewing the Sherman Act a "character of freedom," has broadly interpreted the Act. In Northern Pac. Ry. v. United States, 356 U.S. 1 (1958), the Court stated that the Sherman Act was designed to be a "comprehensive charter of economic liberty. . . . It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resouces, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." *Id.* at 4-5. *See also*, City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 406 (1978) ("In enacting the Sherman Act . . . Congress mandated competition as the polestar by which all must be guided in ordering their business affairs."); United States v. Topco Assocs., 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise.").

3. Parker v. Brown, 317 U.S. 341, 351 (1943). The Supreme Court in *Parker* said that 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 the state." *Id.* at 350. *See also* Eli Lilly & Co. v. Sav-On-Drugs, Inc., 366 U.S. 276 (1961) (upholding state statute requiring a business permit); Milk Control Bd. v. Eisenberg Farm Prods., 306 U.S. 346 (1939) (upholding state statute regulating milk prices); Cooley v. Board

"state action"[4] doctrine protects that power by exempting from federal antitrust liability states engaged in anticompetitive conduct. A series of recent Supreme Court decisions[5] has attempted to develop criteria for applying the state action doctrine.[6] Those cases, however, did not clearly delineate the contours of state action immunity as applied to municipalities.[7] The Supreme Court, in *Community Commu-*

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of Wardens, 53 U.S. (12 How.) 299 (1851) (upholding state statute requiring ships to hire local pilots). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978); Lucas, *Constitutional Law and Economic Liberty*, 11 J.L. & ECON. 5 (1968).

Historically, states have had authority to formulate regulation for the health, safety, and general welfare of their citizens, restricted only by constitutional and statutory provisions. The basic rationale for exempting state action from the Sherman Act is a concern for the impact of conflicting policy on federalism interests. *See generally* Donnem, *Federal Antitrust Law Versus Anticompetitive State Regulation*, 39 A.B.A. ANTITRUST L.J. 950, 951 (1970).

4. The "state action" doctrine, which the Supreme Court announced in *Parker*, provides that federal antitrust laws do not apply to action deriving from and directed by a state's sovereign power.

5. Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (immunity granted to anticompetitive activity because of high degree of state supervision); Cantor v. Detroit Edison Co. 428 U.S. 579 (1976) (immunity denied because anticompetitive action not initiated or compelled by state); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (threshold factor in determining state action is whether the state was acting as sovereign).

6. *Goldfarb*, *Cantor* and *Bates* state different approaches the Court has taken to define the scope of state action immunity. In *Goldfarb*, the Court applied a "threshold inquiry" to determine whether the state required the activity. In *Cantor*, the Court examined whether the state approved the anticompetitive action. In *Bates*, the Court attempted to determine whether the state authorized the regulatory statute. The Court applied yet another test in City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 415 (1978). Then the Court stated that the state legislature must have contemplated the regulatory action. The Court expanded the *City of Lafayette* test in California Retail Liquor Dealers Ass'n v. Midcal Aluminum Co., 445 U.S. 97 (1980). The *Midcal* Court stated that "the challenged restraint must be 'one clearly articulated and affirmatively expressed as State policy;' [and] the policy must be 'actively supervised' by the state itself." *Id.* at 105 (quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978)).

7. Although the Supreme Court had not yet examined the application of the state action doctrine to municipalities, lower courts had done so. *See, e.g.,* Whitworth v. Perkins, 559 F.2d 378, 381 (5th Cir. 1977), *vacated sub nom.* City of Impact v. Whitworth, 435 U.S. 992 (1978) (need more thorough analysis before applying state action doctrine to municipality instead of state); Duke v. County of Foerster, 521 F.2d 1277 (3d Cir. 1975). *See generally* Note, *The Antitrust Liability of Municipalities under the Parker Doctrine*, 57 B.U.L. REV. 368 (1977); Note, *Antitrust Law and Municipal Corporations: Are Municipalities Exempt from Sherman Act Coverage under the Parker Doctrine*?, 65 GEO. L.J. 1547 (1977).

nications Co. v. City of Boulder,[8] demonstrated the limited availability of the state action doctrine for municipalities,[9] holding that federal antitrust laws apply to municipal regulatory action unless there is active state supervision or a clearly articulated and affirmatively expressed state policy requiring the action.[10]

Community Communications Company (CCC) sued the City of Boulder, seeking a preliminary injunction.[11] The company alleged

8. 102 S. Ct. 835 (1982). In 1966, Community Communications Company (CCC) was granted a revocable, non-exclusive permit to conduct a cable television business within the city limits of Boulder. Although CCC was licensed to provide cable service to the entire city, it was impractical at that time for the company to provide service outside the University Hill area, where only 20% of the city's population lived. *Id.* at 837. Prior to 1975, CCC provided transmission only from television stations in the Boulder area. During the late 1970's, satellite technology spurred a growth in the cable television industry, establishing access to remote stations via satellite. *Id.* Technological improvements in the late 1970's enabled CCC to offer many more channels of entertainment and offer its service to residents in other areas of the city where, for geographical reasons, the residents previously could not receive the television signals. *Id.*

In 1979, CCC sought to expand its cable television service to other areas of the city as a result of the improved technology. Due to the new technology, however, other potential competitors sought to provide service to Boulder. In July of 1979, Boulder Communications Company (BCC) requested a permit to provide a competing cable television service in the city. *Id.* In response to the request, the mayor and city council members met with a consultant to review and reconsider the city's cable television regulations in light of new changes in the industry. *Id.* The council enacted two emergency ordinances, which restricted expansion by CCC for a period of three months. *Id.* During the three months the council drafted a model ordinance that gave control to the city over the eventual cable television operator. Community Communications Co. v. City of Boulder, 630 F.2d 704, 710 (10th Cir. 1980) (Markey, J., dissenting), *rev'd,* 102 S. Ct. 835 (1982).

9. For purposes of this Comment, "municipality" includes municipal corporations, cities and townships. Counties are sometimes considered as municipalities. For a discussion of the state action doctrine and its application to municipalities, *see generally* 16E J. VON KALINOWSKY, BUSINESS ORGANIZATIONS ANTITRUST LAWS AND TRADE REGULATIONS § 46.03 (1978); Donnem, *supra* note 3; Jacobs, *State Regulation and the Federal Antitrust Laws*, 25 CASE. W. RES. L. REV. 221, 231-57 (1975); Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption after Midcal Aluminum*, 61 B.U. L. REV. 1099 (1981).

10. 102 S. Ct. 835, 841 (1982). Justice Rehnquist, dissenting, feared that municipalities would be held liable under the Sherman Act and this opinion unless they could point to an affirmative expression of state policy. "Surely the Court does not seek to require a municipality to justify every ordinance it enacts in terms of pro-competitive effects. If municipalities are permitted only to enact ordinances that are consistent with the pro-competitive policies of the Sherman Act, a municipality's power to regulate the economy would be all but destroyed." *Id.* at 849 (Rehnquist, J., dissenting).

11. 485 F. Supp. 1035, 1038 (D. Colo.), *rev'd,* 630 F.2d 704 (10th Cir. 1980), CCC

that two ordinances,[12] which restricted CCC from expanding its cable television service, violated Section One of the Sherman Act.[13] Boulder argued that enacting the restrictive ordinances was within its police power as a "home rule" municipality.[14] The city asserted that its constitutionally derived "home rule" authority accorded it the same immunity to antitrust laws that the state possessed under the "state action" doctrine.[15]

The district court rejected the city's argument, holding the state action doctrine inapplicable. The court granted the injunction.[16]

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also brought suit against Boulder Communications Company (BCC), alleging that BCC and the city conspired to restrict competition by substituting BCC for CCC. *Id.* The district court noted that although there was some evidence that might point to a conspiracy, the evidence was "insufficient to establish a probability that petitioner would prevail on this claim." *Id.*

12. 485 F. Supp. at 1037. The first ordinance, amending the original ordinance, imposed a 90-day moratorium on CCC's cable expansion in Boulder. City of Boulder, Colo. ordinance 4473 (Dec. 19, 1979). The second ordinance revoked the original ordinance and reenacted it to include the moratorium. Boulder, Colo. Ordinance 4472 (Dec. 19, 1979). The Boulder Council determined that this action was necessary to prevent CCC from obtaining a competitive advantage by connecting up new customers while negotiations with other cable companies were beginning. The council expressed fears that CCC might not be the best operator for Boulder, but would be the only operator because of its head start in the area. *Id.*

13. 15 U.S.C. § 1 (1976). *See supra* note 1. CCC contended that these ordinances violated the Act because they prevented CCC from expanding its business and thus restricted trade. 485 F. Supp. at 1038.

14. The Colorado Home Rule Amendment, COLO. CONST., art. XX, § 6, grants municipalities having populations of 2,000 or more the right of self-government in local matters. The amendment states that ordinances enacted by home rule municipalities supersede conflicting state laws.

15. 102 S. Ct. at 838. Home rule charters grant municipalities the power to tax or serve the public without seeking specific state legislation first. Commentators have generally agreed that a requirement of state contemplation of local government action prior to granting state action immunity may be unworkable. *See* 1 P. AREEDA & D. TURNER, ANTITRUST LAW 57, 58 (1978 Supp. 1982); Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269, 280 (1968); Note, *Antitrust Law and Municipal Corporations: Are Municipalities Exempt from Sherman Act Coverage under the Parker Doctrine*?, 65 GEO. L.J. 1547, 1559 n.7 (1977).

16. 485 F. Supp. at 1039. The district court noted that the case might have been decided differently if the city had enacted the moratorium with other regulations as might have been necessary or proper in the exercise of police power. *Id.*

The district court further determined that the city, in drafting the model ordinance, had "submitted it to the cable television industry with a request that those who wished to make proposals to enter the Boulder market should give their comments on that draft." *Id.* at 1038. The court concluded that immunity was not proper because of the excessive involvement by private parties in the drafting of the modern ordinance. *Id.* at 1039.

The Tenth Circuit reversed,[17] finding the city immune from antitrust liability under the state action doctrine[18] because Boulder had no proprietary interest.[19] The Supreme Court reversed[20] the court of

17. 630 F.2d 704 (10th Cir. 1980), *rev'd*, 102 S. Ct. 835 (1982). The Tenth Circuit court reversed, concluding that the regulation of cable television was within the city's authority over local matters. Chief Judge Seth, writing for the majority, concluded that the city was exempt under the state action doctrine because Boulder had complete authority over local matters. 630 F.2d at 706-07. The court found that Boulder had a clearly articulated policy to foster competition, which the city actively supervised by enacting a moratorium on construction by CCC and drafting a model ordinance. Thus, Boulder satisfied the state action immunity test and was immune from antitrust liability. *Id.* at 707-08.

18. 630 F.2d 704 (10th Cir. 1980).

19. When a municipality performs acts of a private proprietary nature, such as corporate and commercial activities generally performed by private enterprise, a municipality acts autonomously. When a municipality provides service in its public or governmental capacity, it is considered "an agency of the state for conducting the affairs of government." 1 E. MCQUILLIN, MUNICIPAL CORPORATIONS, § 2.09 at 146-47 (rev. 3d ed. 1977). The various tests for classifying whether a particular activity is proprietary or governmental have created confusion and conflict. Among the criteria for making the determination are "whether the activity is primarily for the advantage of the state as a whole or for the special local benefit of the community involved, and whether the activity is of a business nature which is generally engaged in by private persons or corporations." *Id.*

In Pueblo Aircraft Serv., Inc. v. City of Pueblo, 679 F.2d 805 (10th Cir. 1982) the Tenth Circuit discussed the difference between proprietary and governmental activities by affirming a trial court's finding of municipal immunity. Pueblo Aircraft charged antitrust violations arising from the city's operation of the municipal airport. Pueblo contended that the city was operating the airport in a proprietary capacity because it owned, maintained and operated the airport. Thus, Pueblo argued, the city was not immune from antitrust liability under the state action doctrine. The court of appeals stated that in cases where ownership, maintenance and operation of a municipal airport have been found to be a proprietary instead of governmental function, state authorization has been absent. *Id.* at 810. The court found that a state statute authorizing the city to acquire and operate the municipal airport provided a sufficient declaration of public purpose to confer state action exemption. *Id.* at 808. *See, e.g.*, Semke v. Enid Automobile Dealers Ass'n, 456 F.2d 1361 (10th Cir. 1972) (statute authorizing anticompetitive marketing program held to advance purpose); Rocky Mountain Motor Co. v. Airport Transit Co., 235 P.2d 586 (Colo. 1951) (ordinance establishing municipal airport held to be a proprietary action).

Jefferson County Pharmaceutical Ass'n, Inc. v. Abbott Laboratories, 51 U.S.L.W. 4195 (U.S. Feb. 23, 1983) (No. 81-827) (The sale of pharmaceutical products to state and local government hospitals for resale in competition with private pharmacies is not exempt from the Robinson-Patman Act under the state action doctrine. Such an exemption is not supported by the Act's terms nor by the purposes of the antitrust laws.)

In cases where a municipality functions in an essentially commercial manner, the policy for immunizing the conduct does not exist. *See* Note, *The Antitrust Liability of Municipalities Under the Parker Doctrine*, 57 B.U.L. REV. 368, 386 (1977). *Cf.* Note,

appeals, concluding that the "home rule" provision in the state constitution did not satisfy the requirement of a clearly articulated and affirmatively expressed state policy.[21] A majority of five justices[22] held that the state action doctrine did not exempt a "home rule" city from federal antitrust liability.[23]

The Supreme Court has interpreted the Sherman Act to permit states to engage in anticompetitive conduct when the conduct is not an undue burden on interstate commerce or otherwise in violation of the Constitution.[24] In a leading case, *Parker v. Brown*,[25] the Court held that states are immune from federal antitrust liability when act-

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Antitrust Law and Municipal Corporations: Are Municipalities Exempt from Sherman Act Coverage Under the Parker Doctrine?, 65 GEO. L.J. 1547, 1583-85 (1977) (suggests abolishing the governmental/proprietary distinction). The difficulty, however, in many cases is that the municipality is involved in business activities that also serve regulatory or governmental purposes.

20. 102 S. Ct. 835 (1982).

21. *Id.* at 842-43. The city argued that in local matters, the Colorado General Assembly has no authority to act in a home rule city. The *Boulder* Court responded that if each home rule municipality were able to establish a different antitrust policy, the clear articulation and affirmative expression test would no longer be viable. In Glenwillow Landfill v. City of Akron, 485 F. Supp. 671, 678 (N.D. Ohio 1979), *aff'd sub nom.* Hybuel Equip. Corp. v. City of Akron, 654 F.2d 1187 (6th Cir. 1981), *vacated,* 50 U.S.L.W. 3667 (U.S. Feb. 22, 1982), the Ohio district court stated that the "clearly articulated and affirmatively expressed" state policy need not reflect a uniform state policy. Rather, the court must look at the "clearly articulated and affirmatively expressed" intent on the part of the state. The Supreme Court in *Boulder* rejected this rationale.

22. 102 S. Ct. at 844. Justice Brennan wrote the majority opinion. He was joined by Justices Powell, Blackmun, Marshall and Stevens.

23. *Id.* Citing from its opinion in City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978), the Court emphasized that the ruling did not preclude municipalities from providing services on a monopolistic basis if they have clear state authority. 102 S. Ct. at 844.

24. *See, e.g., Parker*, 317 U.S. at 351. The concepts of federalism, preemption and limits on federal power are involved in the constitutional aspect of the antitrust-state action conflict. The tenth amendment allows states to regulate locally "save only as Congress may constitutionally subtract from their authority." *Id. See also* United States v. Darby, 312 U.S. 100, 124 (1941) ("Tenth Amendment was enacted to allay fears . . . that states may not be able to exercise their fully reserved powers"); Comment, *Municipal Antitrust Liability*, 18 URBAN L. ANN. 265, 269 n.22 (1980).

25. 317 U.S. 341 (1943). *See generally* Handler, *The Current Attack on the Parker v. Brown State Action Doctrine*, 76 COLUM. L. REV. 1 (1976); Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. REV. 693 (1974); Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 NW. U. L. REV. 71 (1974); Verkuil, *State Action, Due Process and Antitrust: Reflections on Parker v. Brown*, 75 COLUM. L. REV. 328 (1975).

ing pursuant to state policy.[26] In *Parker*, the Supreme Court found that Congress did not intend the Sherman Act to restrain the anticompetitive activities of a state and its officers.[27] The Court admitted that California's anticompetitive marketing program would constitute an illegal restraint of commerce if instituted by private citizens.[28] Nevertheless, the California scheme was outside the scope of the federal antitrust laws because the program derived its authority from the state and did not operate or become effective without state authority.[29]

The *Parker* Court noted that a state may use its power to immunize private parties from antitrust scrutiny only if these parties receive specific direction from the state.[30] A state cannot grant immunity, however, to violators of the antitrust laws merely by authorizing the violations.[31] The Court further limited the scope of state action immunity when it stated that neither a state nor its municipality is exempt from federal antitrust liability in instances of conspiracy

26. 317 U.S. at 352-68. *Parker* involved a Sherman Act challenge to California legislation that restricted competition among raisin growers in order to stabilize prices. The legislation grew out of a petition by private growers to the California Agricultural Advisory Commission, requesting specific production quotas. After the commission and 65% of the growers in the area approved the petition, it became law. *Id.* at 344-51. The Court upheld the statute on commerce clause grounds, reasoning that the state program applied only to intrastate business. Additionally, the Court found that in the absence of preemptive federal statutes, states have the authority to supervise local concerns. *Id.* at 360-61, 368. *See also* Note, *Parker v. Brown Revisited: The State Action Doctrine after Goldfarb, Cantor and Bates*, 77 COLUM. L. REV. 898, 898 n.3 (1977).

27. 317 U.S. at 350-51. "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 legislatures." *Id.*

28. *Id.* at 350.

29. *Id.*

30. The state created and enforced the private raisin program in execution of a governmental policy. *Id.* at 352.

31. 317 U.S. at 351. The first elucidation of the later *Parker* doctrine, which stated that a state cannot grant immunity to violators of antitrust laws by authorizing the violation, was in Northern Securities Co. v. United States, 193 U.S. 197 (1904) (agreement between two railroad companies to form a joint holding company violated the Sherman Act even though the state allowed the chartering of the holding company). For a discussion of *Northern Securities* and other cases prior to *Parker*, see NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, STATE REGULATION AND THE ANTITRUST LAWS: CONFLICTING ROLES FOR ATTORNEYS GENERAL (1975). *See also* Schwegman Bros. v. Calvert Distillers Corp., 341 U.S. 384, 386-87 (1951) (Louisiana law enforcing private price-fixing agreement declared invalid).

to restrain trade.[32]

Parker firmly established the state action immunity doctrine.[33] The Supreme Court, however, failed to provide criteria that adequately defined the limitations placed on state action immunity.[34] The lower courts, therefore, have applied the doctrine inconsistently.[35]

In *Goldfarb v. Virginia State Bar*,[36] the Supreme Court began to define the scope of the *Parker* state action doctrine. The *Goldfarb* Court found that the minimum fee schedules of a local bar association, which the state bar association enforced, constituted price fixing in violation of federal antitrust laws.[37] Citing *Parker*, the Court stated that the threshold standard in determining state action for Sherman Act purposes is whether the state, acting as sovereign, requires the activity.[38] The Court found no indication that either Virginia's Supreme Court or legislature required the establishment of a minimum fee.[39] The *Goldfarb* Court therefore concluded that, absent compelling state action, the state bar association's use of a minimum

32. 317 U.S. at 351-52.

33. Although *Parker* is historically recognized as establishing the state action immunity doctrine, the doctrine actually had its origin in Olsen v. Smith, 195 U.S. 332, 344-45 (1904). For further discussion on the state action doctrine before *Parker*, see Handler, *The Current Attack on the Parker v. Brown State Action Doctrine*, 76 COLUM. L. REV. 1 (1976).

34. Following *Parker*, the Supreme Court continuously denied judicial review in state action immunity cases. *See, e.g.,* Lamb Enter., Inc. v. Toledo Blade Co., 461 F.2d 506 (6th Cir.), *cert. denied*, 409 U.S. 1001 (1972); Hecht v. Pro Football, Inc., 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970).

35. *Compare* New Mexico v. American Petrofina, Inc., 501 F.2d 363 (9th Cir. 1974) (state and its political subdivisions automatically immune from antitrust liability when involved in prohibited antitrust conduct) *with* Hecht v. Pro Football, Inc., 444 F.2d 931 (D.C. Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972) (antitrust violative action taken by public official not automatically protected from antitrust liability).

36. 421 U.S. 773 (1975).

37. *Id.* at 781-83. A Virginia statute established the authority of the Virginia Supreme Court to create and enforce the state bar rules. The pertinent parts of the Virginia statute provide as follows: "The Supreme Court may . . . prescribe, adopt, promulgate and amend rules and regulations organizing and governing the association known as the Virginia state bar . . . to act as an administrative agency of the Court for the purpose of investigating and reporting the violation of such rules and regulation. . . ." VA. CODE § 54-49 (1982).

38. 421 U.S. at 790.

39. *Id.*

fee schedule was not exempt from the Sherman Act.[40]

In *Cantor v. Detroit Edison Co.*,[41] the Supreme Court denied state action immunity for a public utility's distribution of "free" light bulbs to encourage use of electricity.[42] Despite the utility's argument that the program was part of the tariff that the Michigan Public Service Commission required, the *Cantor* Court found no clear indication that the commission considered the anticompetitive implications of the program. The Court, therefore, concluded that the commission's neutral position would not support a claim of state action immunity.[43] Justice Stevens wrote the plurality opinion. He outlined two circumstances in which private parties would not be liable for their anticompetitive conduct: 1) when the state compelled the private party to obey the state sovereign, and 2) when Congress intentionally avoided interfering with conduct the state already regulated.[44] The utility failed the first part of the test because it initiated the anticompetitive conduct many years before the state began regulation.[45] The utility failed the second part of the test because the state had no interest in regulating the light bulb program that federal antitrust laws would thwart.[46] On these facts, Justice Stevens found Detroit Edison liable for its anticompetitive conduct under federal antitrust laws.[47]

In *Bates v. State Bar of Arizona*,[48] lawyers challenged the state bar's regulation of lawyers' advertising. The Court held the disciplinary rule of the Arizona Bar exempt from antitrust challenge.[49] In

40. *Id.* at 791. The Third Circuit applied the *Goldfarb* compulsion standard in Duke & Co. v. Foerster, 521 F.2d 1277, 1282 (3d Cir. 1975). Because of the absence of statutory compulsion, the court held that Pittsburgh municipal corporations violated the antitrust laws by refusing to sell the plaintiffs' malt beverages in certain municipal facilities. *Id.*

41. 428 U.S. 579 (1976).

42. *Id.* at 598. The plurality in *Cantor* found that the anticompetitive conduct of the public utility was not immune under the state action doctrine, because the case presented no question regarding the legality of any acts of the state, its officers or agents. *Id.* at 591-92 (Stevens, J., concurring).

43. *Id.* at 584-85.

44. *Id.* at 592.

45. *Id.* at 594.

46. *Id.* at 595-98.

47. *Id.* at 598.

48. 433 U.S. 350 (1977).

49. *Id.* at 359-63. The Supreme Court distinguished *Cantor* as involving claims against a private party, while *Bates* involved a claim against the Arizona Supreme Court as the real party in interest. The *Bates* Court also noted that in *Cantor* the

finding the state action immunity doctrine applicable, the Court focused on the inclusion of the disciplinary rule in the official rules of the Arizona Supreme Court. This finding enabled the Court to conclude that the disciplinary rule was a clear articulation of state policy, which the Arizona Supreme Court actively supervised.[50]

After *Goldfarb*, *Cantor* and *Bates*, the extent to which the state action doctrine applied to municipalities remained unclear.[51] The Supreme Court, therefore, discussed the limits of state action immunity with respect to municipalities in *Lafayette v. Louisiana Power & Light Co.*.[52] The *Lafayette* Court specifically addressed the question of whether municipalities, involved in a conspiracy to restrain trade, are exempt from antitrust liability.[53] A sharply divided Supreme Court concluded that municipal regulatory conduct is not always immune from antitrust liability.[54] The plurality opinion[55] noted that

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State of Michigan had no regulatory interest in the market for light bulbs. The State of Arizona, on the other hand, had a well-established interest in the regulation of lawyer advertising. *Id.* at 360-62. In distinguishing *Goldfarb*, the Court noted that the Virginia Supreme Court rules did not require the use of minimum fee schedules, whereas the Arizona Supreme Court rules clearly prohibited legal advertising. *Id.* at 359-60.

50. *Id.* at 359-63. For further insight into the impact of *Cantor*, *Goldfarb* and *Bates* on the state action doctrine, see generally Note, *Parker v. Brown Revisited: The State Action Doctrine After Goldfarb, Cantor and Bates*, 77 COLUM. L. REV. 898 (1977).

51. *See supra* note 7.

52. 435 U.S. 389 (1978). The Court emphasized clear state authorization. Justice Marshall, concurring with the plurality, stated that the state must impose anticompetitive practices "as an act of government state action involving more anticompetitive restraint than necessary to effectuate governmental purposes must be viewed as inconsistent with the plurality's approach." *Id.* at 418.

53. *Id.* at 389-92. Two municipally-owned power companies sued a privately-owned competitor for antitrust violations. Louisiana Power & Light Co. counterclaimed, alleging that the city illegally attempted to delay the construction of its nuclear power plant in violation of federal antitrust laws. The Louisiana laws allows cities to own and operate public utilities. LA. REV. STAT. ANN. §§ 33:1326, :4162, :4163 (West 1950).

54. 435 U.S. at 394.

55. *Id.* at 415. Justices Brennan, Marshall, Powell and Stevens joined in the plurality opinion.

Justice Blackmun agreed with Justice Stewart's dissent, which stated that municipalities should be exempt from liability under the Sherman Act. He would have reserved decision on the one case, however, where a municipality conspired with private parties. Justice Blackmun expressed an unwillingness to impose possible antitrust liability on the unilateral actions of governmental subdivisions. The explanation for his change of position is that, in *Boulder*, CCC alleged a conspiracy between the city

the state action doctrine exempts anticompetitive activity conducted by a sovereign state or by its subdivisions pursuant to state authorization.[56] Thus, the *Lafayette* Court concluded that a municipality, claiming exemption under *Parker*, must show that the state legislature mandated its activities with an intent to displace[57] the applicable antitrust laws.

Two years later, in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*,[58] the Court attempted to define more precisely the degree of state participation necessary for finding state ac-

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and a competitor to eliminate it from the market. Justice Blackmun had previously indicated that conspiracy situations should not be exempt. For further discussion, see Hoskins, *The "Boulder Revolution" in Municipal Antitrust Law,* 70 ILL. B.J. 684 (1982).

56. 435 U.S. at 415. Other cases illustrate that certain conduct can be beyond the reach of antitrust laws if the challenged restriction is a clear articulation and affirmative expression of state policy and activity supervised by the state. *See, e.g.,* New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96 (1978) (California statute requiring state approval of the location of car dealership franchises exempt due to ongoing regulatory supervision by the state); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (*see supra* note 37 and accompanying text); Turf Paradise, Inc. v. Arizona Downs, 670 F.2d 813 (9th Cir.) (date allocation between operators sharing the same racetrack held immune to antitrust laws after a finding of active state supervision), *cert. denied*, 102 S. Ct. 2308 (1982).

In cases where there is neither clear articulation of state policy nor active state supervision, however, there is no immunity. *See, e.g.,* California Liquor Dealers v. Midcal Aluminum, 445 U.S. 97 (1980); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); City of Kirkwood v. Union Elec. Co., 671 F.2d 1173 (8th Cir. 1982) (rate program not adequately supervised by state to be immune from antitrust laws); City of Mishawka v. American Elec. Power Co., 616 F.2d 976 (7th Cir. 1980) (rate reductions ordered by state agency held insufficient to immunize city from antitrust laws), *cert. denied*, 449 U.S. 1096 (1981); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.) (adoption by local government of defendant's swimming pool specifications held inadequate to exempt promotion of specifications by defendant to restrict trade), *cert. denied*, 400 U.S. 850 (1970).

57. 435 U.S. at 413, 415. A state may displace competition through anticompetitive legislation in two ways. First, the state may either adopt mandatory regulation to be directed by an agency or select permissive regulation authorizing private cooperative agreements. Second, mandatory regulation may be used to remedy a situation in which competition would not yield a stable, efficient equilibrium. *See, e.g.,* New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 100-03 (1978) (statutory plan allowing existing car dealers to delay establishment of new franchises within relevant market area by filing timely protest); *Parker*, 317 U.S. at 346-47 (raisin growers allowed to petition for establishment of prorate marketing plans and serve on governing program commission). Permissive regulation may attempt to remedy instances in which antitrust principles unduly restrict business relationships. *See* R. POSNER & F. EASTERBROOK, ANTITRUST CASES, ECONOMIC NOTES AND OTHER MATERIALS 1009-10 (2d ed. 1981). For a general discussion on the two theories, see Page, *supra* note 9.

58. 445 U.S. 97 (1980).

tion.[59] Midcal Aluminum alleged that the enforcement of a California statute, which authorized wine distillers to set wine resale prices, violated the Sherman Act.[60] The Supreme Court struck down the statute after determining that the action did not satisfy the prerequisites for immunity under *Parker*[61] and *Lafayette*.[62] Those prerequisites are 1) a clearly articulated and affirmatively expressed state policy, and 2) active state supervision of the anticompetitive action.[63] The wine pricing system satisfied the first requirement,[64] but failed the second.[65] The state's failure to actively monitor the market conditions and to establish and review prices convinced the *Midcal* Court that enforcement of the Sherman Act would not frustrate state sovereignty.[66]

In *City of Boulder*, the majority applied the principle previously adopted in *Lafayette* and *Midcal*: municipal anticompetitive conduct must clearly articulate or affirmatively express state policy to gain antitrust immunity.[67] The *Boulder* Court found that the constitutional "home rule" guarantee of local automomy was not a clearly

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59. *Id.* Courts have refrained from applying the compelling state participation solely on the basis of language. In *Midcal*, the Court defined compulsion as a combination of supervision and articulated state policy, emphasizing supervision, but not command. 445 U.S. at 104-05. Areeda, *supra* note 7.

60. The statute provides in pertinent part:

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

(a) Post a schedule of selling prices of wine to retailers or consumers . . .

(b) Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers.

CAL. BUS. & PROF. CODE § 24866 (West 1982).

61. The first part of the test derives from language in *Parker*. There, the Court stated that the Sherman Act was not intended to restrain a state or its officers from activities directed by its legislature. 317 U.S. at 350-51.

62. The second part of the test was enunciated in *Lafayette*. The Supreme Court concluded that the *Parker* doctrine exempts only anticompetitive conduct that is made pursuant to state policy to displace competition with regulations or monopoly public services. 435 U.S. at 413.

63. 445 U.S. at 105-06.

64. *Id.* The Court noted that the clear articulation and affirmative expression requirement of the state action test was met when California authorized and enforced the price setting. *Id.*

65. *Id.* The *Midcal* Court found that the wine-pricing system failed the active state supervision requirement, because the state neither established the prices nor reviewed the reasonableness of the price schedules. *Id.*

66. *Id.*

67. 102 S. Ct. 835, 842-43 (1982). For a discussion of *Lafayette*, see *supra* note 55

articulated and affirmatively expressed manifestation of state policy that contemplated Boulder's enactment of an anticompetitive regulatory program.[68] Rather, the majority viewed the state's position as neutral.[69] The Court also rejected[70] Boulder's contention that the Home Rule Amendment delegated powers permitting municipalities to act as the state in purely local matters. The majority recognized that principles of federalism which recognize both national and state governments support the state action exemption.[71] Federalism does not extend to sovereign cities.[72]

Three justices dissented,[73] arguing that the issue in *Parker* was whether federal antitrust laws preempt local statutes and ordinances, not whether local governments are exempt from antitrust laws.[74] The

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and accompanying text. For a discussion of *Midcal*, see *supra* notes 58-65 and accompanying text.

68. 102 S. Ct. at 843.

69. *Id.*

70. *Id.* at 842.

71. *Id.* The principle of federalism is derived from the supremacy clause of the United States Constitution, U.S. CONST. art. VI, cl. 2, which provides:

> This Constitution and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, under the Authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.

Id. Thus, state law that is inconsistent with federal law will be preempted. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-23 to 6-27, at 376-91 (1978); Note, *The Preemption Doctrine: Shifting Perspective on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975); Note, *A Framework for Preemption Analysis*, 88 YALE L.J. 363 (1978).

72. 102 S. Ct. at 842-43. Case law gives municipalities a constitutional basis for claiming immunity from antitrust liability. In National League of Cities v. Usery, 426 U.S. 833 (1976), the Court concluded that a federal minimum wage law unconstitutionally interfered with the sovereign police power of the states. The Court held that Congress may not regulate state and local government functions absent a national emergency. At least one commentator has argued, therefore, that statutory interference with local and state functions render antitrust regulations inapplicable. *See generally* Comment, *At Federalism's Crossroad: National League of Cities v. Usery*, 57 B.U.L. REV. 178 (1977).

73 Justice Rehnquist, joined by Chief Justice Burger and Justice O'Connor, dissented. 102 S. Ct. at 846.

74. *Id.* at 845. Justice Rehnquist's dissent concentrated on a single legislative issue—that whether the regulatory action is preempted by conflicting federal legislation. In distinguishing between preemption and exemption, Rehnquist noted that preemption involves conflict between federal and state laws, while exemption addresses whether Congress intended an enactment to relieve a party from complying

dissenters also rejected the majority's implication that municipalities may be liable for violation of the Sherman Act unless their actions further or implement an affirmatively expressed state policy.[75] On the other hand, Justice Stevens, concurring, maintained that the majority did not hold that Boulder had violated federal antitrust laws, but merely that the antitrust laws apply even though Boulder has home rule status.[76]

The holding in *Boulder* clarified the expression of state policy criterion previously adopted in *Lafayette* and *Midcal*: blanket authorizations in state constitutional home rule provisions are not sufficiently explicit to satisfy the requirement of an expressed state policy.[77] The majority opinion suggests that governmental subdivisions should evaluate their ordinances and official conduct in light of their antitrust significance.[78] Unfortunately, few state legislators consider potential antitrust lawsuits when formulating statutes.[79] Although the Supreme Court has stated previously that express authorization is not required, *Lafayette*, *Midcal* and *Boulder* convey the unmistakable message that municipal actions are immune from antitrust liability only when the municipality can show that the legislature contem-

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with a prior enactment. *Id.* at 845-46. Since the state action issues commonly involve state and local regulation that conflict with the Sherman Act, Rehnquist maintained that a preemption analysis should be utilized. *Id.* at 846. Justice Rehnquist observed that the decision in *Parker*, *Midcal* and *New Motor Vehicle Bd.* demonstrate the preemption rationale. *Id.* at 846-47. Rehnquist viewed these decisions as establishing that local governmental legislation, which restricts competition, is not preempted so long as there is sufficient state supervision. *Id.* at 847-48.

75. *Id.* at 849. "If municipalities are permitted only to enact ordinances that are consistent with the pro-competitive policies of the Sherman Act, a municipality's power to regulate the economy would be all but destroyed." *Id.* (Rehnquist, J., dissenting).

76. *Id.* at 844. Justice Stevens noted, "the violation issue is separate and distinct from the exemption issue." *Id.* (Stevens, J., dissenting).

77. Because the state action doctrine lacks specific criteria with respect to municipalities, the Supreme Court's decision in *Lafayette* has been applied with varying results. *See, e.g.,* Hybuel Equip. Corp. v. City of Akron, 654 F.2d 1187 (6th Cir. 1981) (traditional role of local government in providing sanitary service contemplated by legislature); *In re* Airport Car Rental Antitrust Litig., 521 F. Supp. 568, 586 (N.D. Cal. 1981) ("legislative enactments here clearly contemplate" the challenged activity); Highfield Water Co. v. Public Serv. Comm'n, 488 F. Supp. 1176, 1190 (D. Md. 1980) (state regulatory law contemplates state monopoly of public water service).

78. 102 S. Ct. at 844.

79. *Id.* at 843. A possible reason is that municipalities have traditionally been regarded as arms of the state and thus are presumed to be exempt from antitrust laws.

plated the kind of action undertaken.[80] This broad construction allows the lower courts to infer whether a challenged anticompetitive conduct is a necessary or reasonable consequence of state authorized activity.[81]

Although the *Boulder* Court has dispelled some uncertainty regarding the extent to which state action immunity applies to municipalities, the Court has left several issues unsettled. For example, the Court neglected to provide a framework for determining the clarity with which the state must authorize an anticompetitive regulation and display its intention to displace the antitrust laws.[82] Moreover, the Court does not indicate whether the "active state supervision"

80. *Id.* at 842.

81. *See, e.g., In re* Airport Car Rental Antitrust Litig., 521 F. Supp. 568, 586 (N.D. Cal. 1981) (despite lack of statutory authority, general grant of power to airports found to contemplate the regulatory action); Jordan v. Mills, 473 F. Supp. 13 (E.D. Mich. 1979) (despite absence of express statute concerning prison stores or monopolies, immunity granted on basis of the importance of state prison regulation). *Cf.* Woolen v. Surtran Taxicabs, Inc., 461 F. Supp. 1025 (N.D. Tex. 1978) (immunity denied to city granting monopoly to a taxi company). *See generally* Areeda, *Antitrust Immunity for "State Action" After Lafayette,* 95 HARV. L. REV. 435, 445 (1981).

82. After *Boulder*, it remains unclear whether the treble damage remedy will apply to state municipalities and subdivisions. The *Boulder* majority stressed that "We do not confront the issue of remedies appropriate against municipal officials." 102 S. Ct. at 843 n.20. The eleventh amendment protects states from retroactive monetary relief in private suits based on federal causes of action, but does not forbid equitable or prospective relief. *See, e.g., Ex parte* Young, 209 U.S. 123 (1908) (equitable cause of action lies against state officers in their individual capacities, notwithstanding the eleventh amendment). Municipalities, therefore, are not completely protected by the eleventh amendment. Lincoln County v. Luning, 133 U.S. 529, 530 (1890); Markham v. City of Chicago, 176 F. Supp. 323 (N.D. Ill. 1959).

If the Supreme Court finds that the treble damages provision of the federal antitrust laws applies to municipalities, the Court will have to consider the applicability of National League of Cities v. Usery, 426 U.S. 833 (1976) and its tenth amendment concerns. The Court's holding in *National League of Cities* limits Congressional power to interfere with essential state and local government functions. The Court was also concerned that federal interference would make the cost of delivering essential government service prohibitively high, resulting in a displacement of such services. The imposition of punitive damages may not increase the cost of essential services, but it would certainly interfere with the municipalities' ability to deliver traditional services. Thus, if treble damages were so great that they strained municipal resources, and adversely affected delivery and structure of traditional governmental functions, municipalities would raise a *National League of Cities* defense. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978); Note, *The Application of Antitrust Laws to Municipal Activities*, 79 COLUM. L. REV. 518, 544-49, 546 n.202 (1979); Note, *Damage Remedies Against Municipalities for Constitutional Violation*, 89 HARV. L. REV 922 (1976).

criterion of *Midcal* applies to local governments in conjunction with the requirement of expressed state policy.[83] Finally, the Court fails to define clearly the governmental entities that represent the state and require state authorization before acting.[84]

Despite those uncertainties, the Supreme Court's decision in *Boulder* has clarified the position of the *Lafayette* plurality.[85] *Boulder* clearly states that a general authorization of governmental powers will not satisfy the standard for state action immunity.[86] Rather, state action immunity requires a clear demonstration of legislative intent.

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83. 102 S. Ct. at 841 n.14. Lower courts have inferred that the active supervision requirement applies to municipalities. *See* Hybuel Equip. Corp. v. City of Akron, 654 F.2d 1187 (6th Cir. 1981) (agency of state found to supervise adequately municipal solid waste plant); Stauffer v. Town of Grand Lake, 1981-1 Trade Cas. (CCH) § 64.029 (D. Colo. 1981) (adequate supervision maintained when municipal zoning authority was found to have adequate supervision through a mandated board of adjustment). *Cf.* Corey v. Look, 641 F.2d 32, 37 (1st Cir. 1981) (supervisory requirement found unsatisfactory).

84. For a general discussion of the problems involved in determining whether the local governmental unit represents the state or whether the regulatory conduct by the unit requires authorization, see generally Areeda, *supra* note 81, at 444.

85. For a discussion on the *Lafayette* plurality opinion, see *supra* note 55 and accompanying text.

86. 102 S. Ct. at 843. The *Boulder* Court noted that acquiescence in the proposition that a general grant of power to enact ordinances necessarily implies state authorization, "would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that our precedents require." *Id.*