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# MUNICIPAL ANTITRUST LIABILITY: A QUESTION OF IMMUNITY

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## INTRODUCTION

Antitrust litigation directed at municipalities has grown significantly in the last decade.<sup>1</sup> This litigation has arisen in various contexts including cable television franchises,<sup>2</sup> waste collection and disposal,<sup>3</sup>

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1. See Victoria M. Mather, *Antitrust Implications of Municipal Land Use Planning*, 33 WAYNE L. REV. 965, 966 (1987) (discussing the past, present, and future of municipal antitrust liability in the context of land use planning and zoning); see also Richard S. Williamson, *Commentary: The Reagan Administration's Position on Antitrust Liability of Municipalities*, 32 CATH. U. L. REV. 371 (1983) (discussing the proliferation of the application of antitrust laws to state and local governments during the Reagan era).

2. For examples of cases involving cable television, see, e.g., *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982) (holding that a city moratorium on cable service expansion is not exempt from federal antitrust liability); *Nor-West Cable Communications Partnership v. City of St. Paul*, 924 F.2d 741 (8th Cir. 1991) (challenging the award of a single franchise to a cable operation), *cert. denied*, 111 S. Ct. 2853 (1991); *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1415 (9th Cir. 1985) (applying the "clearly articulated and affirmatively expressed" state policy standard to hold that the city properly "displaced competition with regulation"), *aff'd*, 476 U.S. 488 (1986); *Catalina Cablevision Assoc. v. City of Tucson*, 745 F.2d 1266 (9th Cir. 1984) (holding that a city may, without being subject to federal antitrust scrutiny, issue a single, non-exclusive cable television license); *Omega Satellite Prods. Co. v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982) (noting that a limited partnership may challenge the city's grant of de facto exclusive franchises); *Carlson T.V. v. City of Marble*, 612 F. Supp. 669 (D. Minn. 1985) (noting that a state statute "clearly articulated and affirmatively expressed" policy to exempt the city from antitrust liability); *Carlson v. Village of Union City*, 601 F. Supp. 801 (W.D. Mich. 1985) (noting that the state action doctrine exempted village trustees from federal antitrust liability); *Ciminelli v. Cablevision*, 583 F. Supp. 144 (E.D.N.Y. 1984) (holding that the state action doctrine shields defendants from causes of action brought under state statute governing theft of cable services).

3. For examples of recent cases involving waste collection and disposal, see *L & H Sanitation, Inc. v. Lake City Sanitation, Inc.*, 769 F.2d 517 (8th Cir. 1985) (exclusive franchise challenged); *Tom Hudson & Assoc. v. City of Chula Vista*, 746 F.2d 1370

water,<sup>4</sup> sewers,<sup>5</sup> electrical power,<sup>6</sup> telephones,<sup>7</sup> ambulance services,<sup>8</sup> health services,<sup>9</sup> airport services,<sup>10</sup> land use planning,<sup>11</sup> and many

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(9th Cir. 1984) (municipal award of exclusive contract), *cert. denied*, 472 U.S. 1028 (1985); *Hybud Equip. Corp. v. City of Akron*, 742 F.2d 949 (6th Cir. 1984) (city monopolization of waste collection and disposal), *cert. denied*, 471 U.S. 1004 (1985); *Central Iowa Refuse Sys., Inc. v. Des Moines Metro. Solid Waste Agency*, 715 F.2d 419 (8th Cir. 1983) (noting that state action exempted a challenge to a state statute mandating that all solid waste be brought to municipal landfill), *cert. denied*, 471 U.S. 1003 (1985); *Heille v. City of St. Paul*, 671 F.2d 1134 (8th Cir. 1982) (municipality entered trash collection business); *Ideal Waste Sys., Inc. v. Provo City Corp.*, 605 F. Supp. 100 (D. Utah 1985) (denying city immunity where ban on waste hauling did not meet state action requirements).

4. For examples of cases involving water, see *Auton v. Dade City*, 783 F.2d 1009 (11th Cir. 1986) (challenging ordinance that prohibited construction of private water wells); *LaSalle Nat'l Bank v. County of DuPage*, 777 F.2d 377 (7th Cir. 1985) (challenging joint activity of municipalities), *cert. denied*, 476 U.S. 1170 (1986); *Community Builders, Inc. v. City of Phoenix*, 652 F.2d 823 (9th Cir. 1981) (challenging charge for hook-up fees in area previously serviced by another city).

5. For examples of recent cases involving sewers, see *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) (challenging an annexation requirement to tie into sewer system); *Vickery Manor Serv. Corp. v. Mundelein*, 575 F. Supp. 996 (N.D. Ill. 1983) (challenging municipal sewer requirements for developer).

6. For examples of recent cases involving power, see *Grason Elec. Co. v. Sacramento Mun. Util. Dist.*, 770 F.2d 833 (9th Cir. 1985) (challenging a municipal utility district operation), *cert. denied*, 474 U.S. 1103 (1986); *Rural Elec. Co. v. Cheyenne Light, Fuel & Power Co.*, 762 F.2d 847 (10th Cir. 1985) (challenging a grant of nonexclusive franchise to a public utility); *City of Groton v. Connecticut Light & Power Co.*, 497 F. Supp. 1040 (D. Conn. 1980) (noting that municipalities' participation in lawsuit not anticompetitive), *aff'd in part, rev'd in part*, 662 F.2d 921 (2d Cir. 1981).

7. For examples of recent cases involving telephone services, see *Capital Tel. Co. v. New York Tel. Co.*, 750 F.2d 1154 (2d Cir. 1984) (challenging differences in services and charges and holding that state action immunized phone company's conduct from antitrust scrutiny), *cert. denied*, 471 U.S. 1101 (1985); *Capital Tel. Co. v. City of Schenectady*, 560 F. Supp. 207 (N.D.N.Y. 1983) (challenging denial of telephone line service franchise); *Jackson v. Taylor*, 539 F. Supp. 593 (D.D.C. 1982) (challenging actions by a municipal jailor for price-fixing telephone services), *aff'd*, 713 F.2d 865 (D.C. Cir. 1983).

8. For examples of recent cases involving ambulance service, see *Springs Ambulance Serv., Inc. v. City of Rancho Mirage*, 745 F.2d 1270 (9th Cir. 1984) (challenging free city ambulance service); *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983) (challenging exclusive franchise for ambulance service), *cert. denied*, 471 U.S. 1003 (1985); *Trinity Ambulance Serv., Inc. v. G & L Ambulance Serv., Inc.*, 625 F. Supp. 142 (D. Conn. 1985) (challenging exclusive contract for ambulance services), *aff'd*, 787 F.2d 86 (2d Cir. 1986); *Mercy-Peninsula Ambulance, Inc. v. County of San Mateo*, 592 F. Supp. 956 (N.D. Cal. 1984) (challenging a refusal to certify paramedics), *aff'd*, 791 F.2d 755 (9th Cir. 1986).

9. For examples of recent cases involving health services, see *Marrese v. Interqual, Inc.*, 748 F.2d 373 (7th Cir. 1984) (challenging revocation of doctor's clinical privi-

leges), *cert. denied*, 472 U.S. 1027 (1985); *Benson v. Arizona State Bd. of Dental Examiners*, 673 F.2d 272 (9th Cir. 1982) (challenging dental licensing law); *Hospital Dev. and Serv. Corp. v. North Broward Hosp. Dist.*, 619 F. Supp. 535 (S.D. Fla. 1986) (challenging district's policies regarding indigent patients); *Addino v. Genesee Valley Medical Care, Inc.*, 593 F. Supp. 892 (W.D.N.Y. 1984) (holding no immunity for state action nonprofit corporation's health insurance plan deemed to be a private corporation); *Brazil v. Arkansas Bd. of Dental Examiners*, 593 F. Supp. 1354 (E.D. Ark. 1984) (challenging state board and private state dental association activities), *aff'd*, 759 F.2d 674 (8th Cir. 1985); *Feldman v. Jackson Memorial Hosp.*, 571 F. Supp. 1000 (S.D. Fla. 1983) (refusal to grant podiatrist hospital privileges), *aff'd*, 752 F.2d 647 (11th Cir.), *cert. denied*, 472 U.S. 1029 (1985). For a discussion of the health care antitrust liability issue, see William R. Trail & Susan Kelley-Claybrook, *Hospital Liability and the Staff Privileges Dilemma*, 37 BAYLOR L. REV. 315, 348-62 (1985) (discussing potential health care antitrust liability for denial of staff privileges).

10. For examples of recent cases involving airport services, see *Independent Taxi-cab Drivers' Employees v. Greater Houston Transp. Co.*, 760 F.2d 607 (5th Cir.) (challenging an exclusive franchise granted for airport transportation), *cert. denied*, 474 U.S. 903 (1985); *Lorrie's Travel & Tours, Inc. v. SFO Airporter, Inc.*, 753 F.2d 790 (9th Cir. 1985) (challenging grant of exclusive airport transportation contract); *Deak-Perera Hawaii, Inc. v. Department of Transp.*, 745 F.2d 1281 (9th Cir. 1984) (challenging grant of exclusive currency exchange), *cert. denied*, 470 U.S. 1053 (1985); *Pueblo Aircraft Serv., Inc. v. City of Pueblo*, 679 F.2d 805 (10th Cir. 1982) (challenging operation of airport concession), *cert. denied*, 459 U.S. 1126 (1983); *Greyhound Rent-a-Car, Inc. v. City of Pensacola*, 676 F.2d 1380 (11th Cir. 1982) (challenging denial of license to operate airport rent-a-car facility), *cert. denied*, 479 U.S. 1171 (1983); *Wellwoods Dev. Co. v. City of Aurora*, 631 F. Supp. 221 (N.D. Ill. 1986) (challenging competition for fixed-based operators), *aff'd*, 822 F.2d 1091 (7th Cir. 1987); *Transport Limousine v. Port Auth.*, 571 F. Supp. 576 (E.D.N.Y. 1983) (challenging a percentage fee by a limousine operator); *Hill Aircraft & Leasing Corp. v. Fulton County*, 561 F. Supp. 667 (N.D. Ga. 1983) (challenging airport authority's space allocation), *aff'd*, 729 F.2d 1467 (11th Cir. 1984); *All Am. Cab Co. v. Metropolitan Knoxville Airport Auth.*, 547 F. Supp. 509 (E.D. Tenn. 1982) (challenging monopolization of airport ground transportation), *aff'd*, 723 F.2d 908 (6th Cir. 1983).

11. For examples of recent cases involving land use planning, see *Scott v. City of Sioux City*, 736 F.2d 1207 (8th Cir. 1984) (challenging restriction of commercial development in outlying areas to promote urban renewal), *cert. denied*, 471 U.S. 1003 (1985); *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983) (challenging municipality's refusal to vacate platted streets without concessions from developer); *Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982) (challenging city's rezoning in favor of developer's competitor), *cert. denied*, 461 U.S. 945 (1983); *Miracle Mile Assoc. v. City of Rochester*, 617 F.2d 18 (2d Cir. 1980) (challenging city's efforts to require developer's compliance with state and federal environmental legislation); *Brontel Ltd. v. City of New York*, 571 F. Supp. 1065 (S.D.N.Y. 1983) (challenging a city exempted city-owned property from rent control), *aff'd*, 742 F.2d 1439 (2d Cir.), *cert. denied*, 469 U.S. 882 (1984); *Ossler v. Village of Norridge*, 557 F. Supp. 219 (N.D. Ill. 1983) (challenging a refusal to rezone and increase development potential); *Mason City Center Assoc. v. City of Mason City*, 468 F. Supp. 737 (N.D. Iowa 1979) (challenging refusal to rezone property to permit regional shopping center), *aff'd in part, rev'd in part*, 671 F.2d 1146 (8th Cir. 1982).

other areas.<sup>12</sup> In 1982, the United States Supreme Court in *Community Communications Co. v. City of Boulder*,<sup>13</sup> held that the regulatory activities of local governments<sup>14</sup> and agencies were not exempt from antitrust liability.<sup>15</sup> The decision increased considerable doubt about a local government's ability to act in areas of traditional municipal regulation, and increased the spectrum of treble damage liability.<sup>16</sup>

12. See also *Hefner v. Alexander*, 779 F.2d 277 (5th Cir. 1985) (challenging an attorney disciplinary proceeding); *Riverview Inv., Inc. v. Ottawa Community Improvement Corp.*, 774 F.2d 162 (6th Cir. 1985) (challenging a refusal to issue industrial revenue bonds); *Garcia v. Colorado State Bd. of Law Examiners*, 760 F.2d 239 (10th Cir.) (challenging grading of bar exam), *cert. denied*, 474 U.S. 856 (1985); *First Am. Title Co. v. South Dakota Land Title Ass'n*, 714 F.2d 1439 (8th Cir. 1983) (challenging state agency regulations on abstracting), *cert. denied*, 464 U.S. 1042 (1984); *Euster v. Eagle Downs Racing Ass'n*, 677 F.2d 992 (3d Cir.) (challenging racing commission establishment of jockey pay), *cert. denied*, 459 U.S. 1022 (1982); *Parks v. Donrey, Inc.*, 596 F. Supp. 347 (W.D. Ark. 1984) (challenging a sign ordinance that restricted outdoor advertising); *Limeco, Inc. v. Division of Lime*, 571 F. Supp. 710 (N.D. Miss. 1983) (challenging the state lime business), *aff'd*, 778 F.2d 1086 (5th Cir. 1985).

13. 455 U.S. 40 (1982).

14. "Local governments" include counties, cities, towns, and municipal corporations. See Ellen J. Tchorni, Note, *Antitrust Law and Municipal Corporations: Are Municipalities Exempt from Sherman Act Coverage Under the Parker Doctrine?*, 65 GEO. L.J. 1547, 1556-61 (1977) (discussing the scope of the term "municipality" to include only those entities having governmental-proprietary functions but not those purely governmental in character).

15. 455 U.S. at 48-57 (1982). Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade of commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1988). Section 2 of the Sherman Act provides that "[e]very 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." 15 U.S.C. § 2 (1988). The other federal antitrust laws of general application are the Clayton Act, 15 U.S.C. §§ 12-27 (1988), and portions of the Federal Trade Commission Act, 15 U.S.C. §§ 41-44 (1988). See generally WILLIAM C. HOLMES, 1983-84 ANTITRUST LAW HANDBOOK (1991) (providing a comprehensive overview of antitrust law); 1 EARL W. KINTNER, FEDERAL ANTITRUST LAW § 4.18 (1980) (addressing the intended scope of the Sherman Antitrust Act); Paul R. Dixon, *Antitrust Policy: Some "Legal" and "Economic" Considerations*, 14 UCLA L. REV. 979 (1967) (discussing the effect of antitrust law on economic efficiency and fair play in the marketplace); Allen C. Holmes, *Have the Antitrust Laws Promised Too Much and Accomplished Too Little?*, 46 ANTITRUST L.J. 764 (1977) (evaluating the success of antitrust laws in achieving the stated goals of the legislation).

16. 15 U.S.C. § 15 (1988) provides in pertinent part:

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the

The United States Supreme Court recently readdressed the liability standard for municipal regulations in *City of Columbia v. Omni Outdoor Advertising, Inc.*<sup>17</sup> The Court in *Omni* extended the antitrust exemptions defined for state governments — known as the state action immunity doctrine — to municipal and local governments, and resolved certain conflicts about the doctrine's purpose and relationship to municipalities.<sup>18</sup>

This Recent Development discusses the past, present, and future of municipal antitrust liability. Part I explains the history of municipal antitrust liability. Part II analyzes the *Omni* decision which enlarged the municipal exemption from antitrust liability. Finally, Part III discusses how the *Omni* decision impacts both present and future municipal conduct relating to economic regulation.

## I. HISTORY OF MUNICIPAL ANTITRUST LITIGATION

The state action immunity doctrine exempts anticompetitive activities established and controlled by the state from Sherman Antitrust liability.<sup>19</sup> The United States Supreme Court first announced the state action immunity doctrine<sup>20</sup> in *Parker v. Brown*<sup>21</sup> when it upheld a California agricultural marketing system restricting competition among

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amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. . . .  
15 U.S.C. § 15 (1988) (emphasis added).

17. 111 S. Ct. 1344 (1991).

18. *Id.* at 1351-56. See also *infra* notes 62-90 and accompanying text for a detailed analysis of the *Omni* case.

19. The exact label that attaches to the state action doctrine varies. The doctrine is often referred to as an "exemption," "immunity," "preemption" analysis. Yet, while the label may differ, the inquiry and analysis remains the same. See Michal Dlouhy, Note, *Judicial Review as Midcal Active Supervision: Immunizing Private Parties From Antitrust Liability*, 57 *FORDHAM L. REV.* 403, 405 n.19 (1988) for a discussion of the subtle distinctions between preemption, exemption, and immunity.

20. *Parker v. Brown*, 317 U.S. 341, 352 (1943). The exemption first appeared in cases immediately following the enactment of the Sherman Act. See, e.g., *Olsen v. Smith*, 195 U.S. 332, 344-45 (1904) (holding that the state may regulate the licensing of harbor pilots).

21. 317 U.S. at 341 (1943).

raisin growers.<sup>22</sup> In *Parker*, a raisin producer alleged that the California Director of Agriculture violated the Sherman Antitrust Act through the enforcement of regulations regarding price and commodity distribution controls.<sup>23</sup> The United States Supreme Court refused to impose Sherman antitrust liability upon the state administrative agency because the Sherman Antitrust Act prohibited individual and not state action.<sup>24</sup>

Following *Parker*, the United States Supreme Court has focused on the meaning of "state action" and the development of standards for the application of the state action immunity doctrine.<sup>25</sup> Generally, direct state involvement as a government actor is necessary to apply the doc-

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22. *Id.* at 352. The *Parker* Court found that the prorate program was never intended to operate as an individual agreement or without legislative command. *Id.* The Court also noted that, although the actual prorate program was petitioned for and operated by the producers, the state itself created the administrative machinery, approved the program, and enforced the sanctions within the California Prorate Act. *Id.*

23. 317 U.S. at 344. Defendants other than the California Director of Agriculture included the members of the State Agricultural Prorate Advisory Commission and others charged by the California statute with the administration of the California Agricultural Prorate Act. *Id.* The plaintiff was a private individual allegedly affected by the enforcement of the Prorate Act. *Id.* The Prorate Act mandated a petition by ten producers to be filed and public hearings held by the Advisory Commission to decide whether a prorate marketing plan should be established within a defined production zone. *Id.* at 346. The program was intended to conserve the agricultural wealth of the state and prevent waste. 317 U.S. at 346. Upon the petition's approval, a program committee of private producers regulated the marketing of the commodity involved. *Id.* at 347. In *Parker*, all raisins from the defined zone must be sent to program receiving stations for quality grading. *Id.* The program pooled a large portion of the raisins for market distribution and subjected it to price standardization. *Id.* at 346-48.

24. 317 U.S. at 351-52. The Supreme Court stated:

We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

*Id.* at 350-51.

25. See generally *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-06 (1980) (holding that a California statute which required wine producers to post prices or face license revocation violated the Sherman Act); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 110 (1978) (holding that the state may properly require automobile manufacturers to obtain state approval before obtaining a new dealership or relocating an existing one); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 394-97 (1978) (noting that the definition of "person" under antitrust law includes cities); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 363 (1977) (holding that state regulation of legal practice through disciplinary rules promulgated by state supreme court did not violate the Sherman Act); *Goldfarb v. Virginia State Bar*,

trine.<sup>26</sup> No state action exists for Sherman Act purposes unless the state preempts the anticompetitive conduct and directs the conduct in its sovereign capacity.<sup>27</sup> The *Parker* doctrine applies when a significant state interest exists and when state policy for anticompetitive conduct is clearly articulated and affirmatively expressed with active state supervision.<sup>28</sup>

Municipalities have no inherent regulatory power; instead, they derive their regulatory authority from the chartering state.<sup>29</sup> Past United States Supreme Court decisions have applied the state action exemption directly to state regulation and only indirectly to municipal regulation.<sup>30</sup> Nevertheless, the state has the power, if it chooses, to transfer the state action exemption along with its regulatory powers to the

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421 U.S. 773, 793 (1975) (holding that a minimum fee schedule enforced by a state bar association violated the Sherman Act as unfair price-fixing).

26. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the Court held that to determine whether the *Parker* doctrine applies, "[t]he threshold inquiry . . . is whether the activity is required by the State acting as sovereign." *Id.* at 790. See also Stephen C. Sherrill, Note, *Parker v. Brown Revisited: The State Action Doctrine After Goldfarb, Cantor, and Bates*, 77 COLUM. L. REV. 898, 902-13 (1977) (discussing how the Supreme Court's decisions in *Goldfarb*, *Cantor*, and *Bates* affected the state action doctrine, and explaining the proper state action immunity inquiry).

27. 421 U.S. at 791.

28. See *Bates v. Arizona State Bar*, 433 U.S. 350, 359-63 (1977). In *Bates*, appellants were attorneys licensed in Arizona and members of the state bar. *Id.* at 353. Appellants advertised their services and the state bar recommended suspension pursuant to Arizona Supreme Court Disciplinary Rules which prohibit such advertising. *Id.* at 354-55. In an action against the state bar for an alleged violation of the Sherman Act, the state bar claimed an exemption from antitrust scrutiny under the *Parker* doctrine. *Id.* at 359. In holding that the *Parker* doctrine applied, the *Bates* Court distinguished *Goldfarb* and *Cantor*. 433 U.S. at 359-62. The Court distinguished *Goldfarb* because no Virginia Supreme Court Rule required anticompetitive activities. *Id.* at 359-60. In contrast, the Court distinguished *Cantor* because *Cantor* involved a private defendant, while in *Bates*, the Court noted that the real party in interest was the state. *Id.* at 361. The *Bates* Court characterized the state bar as an agent of the court under its continuous supervision with the bar's role completely defined by the court. *Id.* The Court also noted a difference in the state interest in *Bates*, emphasizing that the state's interest in the regulation of lawyers is historically critical. 433 U.S. at 361-62. Furthermore, the *Bates* court noted that the state clearly expressed its policy regarding professional behavior. *Id.* at 362. See generally Sherrill, *supra* note 16.

29. See generally S. Paul Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. REV. 693 (1974) (discussing the division of regulatory powers between states and their municipalities).

30. See *supra* note 2 for a comprehensive list of lower federal court cases which analyze the state action exemption to municipalities in various contexts.

municipalities.<sup>31</sup>

In *City of Lafayette v. Louisiana Power & Light Co.*,<sup>32</sup> the Supreme Court addressed the state action doctrine and its application to municipalities. In *Lafayette*, two municipalities operating electric utilities sued a private utility for antitrust violations.<sup>33</sup> The private utility counterclaimed for antitrust violations against the municipalities.<sup>34</sup> The private utility challenged an arrangement under which the cities would provide gas and water service to a customer only if the customer purchased the municipality's electricity.<sup>35</sup> The Supreme Court narrowly construed the state's authorization of regulatory authority to a city and held that conduct falling outside the authorization also falls outside the state action exemption.<sup>36</sup> The *Lafayette* Court recognized that while the state's anticompetitive conduct was automatically immune, state subdivisions were immune only when the state authority allowed the subdivisions to operate in a given area.<sup>37</sup> However, the *Lafayette* Court limited its holding by stating that a scrutinized local agency does not have to rely on specific legislative authorization before it may assert a state action defense to the antitrust suit.<sup>38</sup>

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31. See, e.g., *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 52 (1982) (noting that the city ordinance "cannot be exempt from antitrust scrutiny unless it constitutes the action of the [state] itself . . . or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy"). See also *supra* note 28 and accompanying text for a discussion of the division of regulatory powers between states and municipalities.

32. 435 U.S. 389 (1978).

33. *Id.* at 391-92.

34. *Id.* at 392.

35. *Id.* at 392 n.6. The defendant utility claimed that the cities tried to restrict competition within the municipal boundaries by: (1) the use of covenants in their respective debentures needed by the defendant to finance construction of the plant; (2) the use of long term supply agreements in certain markets; and (3) by requiring certain customers of the defendant to purchase electricity from the cities as a condition of continued water and gas service. 435 U.S. at 392 n.6. The cities moved for dismissal of the counterclaim on the ground that cities and subdivisions of a state are exempt from antitrust scrutiny under the *Parker* doctrine. *Id.* at 392.

36. 435 U.S. at 413. The Court, in a plurality opinion, stated that acts of the state must be distinguished from acts of subordinate agencies, subdivisions, or officials not exercising power delegated by the state legislature for the purpose of displacing antitrust law. *Id.* at 412.

37. *Id.* at 413-14. "In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws . . . we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach." *Id.* at 412-13.

38. 435 U.S. at 415. To be eligible for the state action exemption, a political subdi-



In subsequent cases, the United States Supreme Court has further narrowed the scope of the state action exemption.<sup>39</sup> In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*,<sup>40</sup> the plaintiff challenged a California statute requiring wine producers and wholesalers to post retail prices.<sup>41</sup> The statute subjected retail liquor licensees who undersold the posted prices to a fine and license revocation without a state review process.<sup>42</sup> The Supreme Court established a two-part test for granting state action antitrust immunity. The state action immunity doctrine applies when a state has: (1) clearly articulated and affirmatively expressed state policy; and (2) exercised active supervision.<sup>43</sup> Applying this test, the Supreme Court refused to grant immunity because the state-regulated resale price maintenance plan for wine producers and wholesalers met the first prong of the test, but failed to meet the second.<sup>44</sup> Thus, the Court found that the state failed to actively supervise the price maintenance policy.<sup>45</sup>

The United States Supreme Court further limited the state action exemption available for municipalities in *Community Communications Co., Inc. v. City of Boulder*.<sup>46</sup> In *Boulder*, the City of Boulder pre-

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vision need only show the existence of an adequate state mandate for anticompetitive activities of subdivisions. *Id.* This intent can be found where it is clear "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." *Id.* (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 532 F.2d 431, 434 (5th Cir. 1976)).

39. See, e.g., *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978). In *Orrin W. Fox*, plaintiffs challenged the California Automobile Franchise Act which regulates the establishment of new automobile franchises. *Id.* at 98. The Court held that because the state directly imposed the Act and the Act served to further the general economy and welfare of the state, the *Parker* doctrine protected it from Sherman Act scrutiny. *Id.* at 109-11.

40. 445 U.S. 97 (1980).

41. *Id.* at 100.

42. *Id.*

43. *Id.* at 105. The *Midcal* Court stated that if a program enacted by the state or municipality fails to meet one standard or the other, the program does not receive blanket immunity from federal antitrust suits. 445 U.S. at 105-06.

44. 445 U.S. at 105. Although the State of California directly imposed the statute in question in furtherance of a legitimate state purpose, the Supreme Court held that it was not exempt from Sherman Act liability because the state did not actively supervise the regulation. *Id.*

45. *Id.* The Court held that authorizing price setting and enforcing prices established by private parties does not rise to the level of active supervision when the state does not establish prices, review the reasonableness of price schedules, or regulate the terms of fair trade contracts. *Id.* at 105-06.

46. 455 U.S. 40 (1982).

vented the plaintiff from installing its cable systems by enacting a three month moratorium on cable television hook-ups.<sup>47</sup> During the moratorium, the city council drafted a model cable television ordinance to attract new cable companies to the area.<sup>48</sup> Boulder claimed that its "home rule" powers<sup>49</sup> vested the municipality with all the state's sovereign powers in local affairs.<sup>50</sup> In response, the Supreme Court held the moratorium ordinance enacted under the Colorado home rule powers not exempt from antitrust scrutiny.<sup>51</sup> The Court stated that despite the home rule statute, the state had no clearly articulated and affirmatively expressed policy about the moratorium.<sup>52</sup> Thus, the Supreme Court

47. *Id.* at 45-46.

48. *Id.* The city council imposed the moratorium to allow them time to draft a model television ordinance and invite new cable television business to enter the market. *Id.* The Boulder City Council believed that, because of the technological cable communications advances which occurred in the late 1970's, the petitioner cable company could rapidly expand and effectively preclude entry by competitor cable businesses. 455 U.S. at 44-45. The city council therefore enacted the ordinances to promote competition. *Id.* at 45.

49. The Home Rule Amendment to the Colorado Constitution provides in pertinent part:

The people of each city or town of this state, having a population of two thousand inhabitants . . . are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.

Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.

. . . .

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 . . . .

COLO. CONST. art. XX, § 6. The effect of "home rule" charters for municipalities is to leave the municipality free to manage its own affairs, as long as such matters are local in their scope, and as long as its government is in accordance with the state laws and the state constitution. 2 EUGENE MCQUILLAN, *THE LAW OF MUNICIPAL CORPORATIONS* § 9.08, at 855 (3d ed. 1988). Under the Colorado home rule amendment, municipal ordinances supersede state statutes in local matters. COLO. CONST. art. XX, § 6. See generally Kenneth E. Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269, 269 (1968) (noting that the "home rule" is one method municipalities can use to gain a measure of freedom from state control).

50. 455 U.S. at 52-54. Boulder equated its home rule powers to the powers of the Colorado state legislature and cited *Denver Urban Renewal Auth. v. Byrne*, Colo., 618 P.2d 1374 (Colo. 1980) as authority. *Id.* at 52 n.15. The petitioner cable company disputed this construction of *Byrne*. *Id.*

51. *Id.* at 53.

52. 455 U.S. at 55. The Court held that the state's general grant of power to the municipality does not clearly articulate and affirmatively express state policy. *Id.* at 55-

required the state to clearly articulate and affirmatively express any regulations before allowing a municipality to claim a state action defense to an antitrust suit.

The Supreme Court retreated from its hard stance on the municipal antitrust exemption in *Town of Hallie v. City of Eau Claire*.<sup>53</sup> In *Hallie*, a Wisconsin city refused to provide sewage treatment services to surrounding unincorporated territories unless the residents in that territory agreed to annexation.<sup>54</sup> Wisconsin law authorized cities to construct sewage systems with the right to refuse service.<sup>55</sup> The plaintiffs claimed that conditioning service upon annexation constituted a misuse of monopoly power in violation of antitrust laws.<sup>56</sup> The *Hallie* Court rejected the plaintiffs' argument and held that, although state supervision is required when private parties engage in anticompetitive conduct, the existence of municipal action reduces the dangers of anticompetitive conduct.<sup>57</sup> Once state authorization exists, the Court

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56. The municipality must articulate and express a state policy to regulate the specific activity. *Id.*

53. 471 U.S. 34 (1985).

54. *Id.* at 36-37. Petitioners included the towns of Hallie, Seymour, Union and Washington — four unincorporated townships located adjacent to Eau Claire, Wisconsin. *Id.* at 36. Petitioners sought injunctive relief. *Id.*

55. 471 U.S. at 41. After the completion of Eau Claire's sewage treatment facility, the four surrounding towns sought to collect sewage from their residents and transport the sewage to Eau Claire's sewage treatment plant. *Id.* at 37. Eau Claire refused to provide treatment services unless the towns agreed to annexation. *Id.* Under the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1375 (1988), the City of Eau Claire obtained federal funds to help build a sewage treatment facility within the Eau Claire service area. *Id.* The relevant Wisconsin law provides in pertinent part:

[E]ach village or city may by ordinance fix the limits of such service in unincorporated areas. Such ordinance shall delineate the area within which service will be provided and the municipal utility shall have no obligation to serve beyond the area so delineated. Such area may be enlarged by a subsequent ordinance. No such ordinance shall be effective to limit any obligation to serve which may have existed at the time the ordinance was adopted.

Wis. STAT. ANN. § 66.069 (2)(c) (West 1990). The Wisconsin law dealing with joint sewer systems provides in relevant part: "If an application for an annexation referendum is denied under § 66.024(2) or the referendum under § 66.024(4) is against annexation, the order shall be void. If an annexation proceeding is not commenced within the 30-day period, the order shall become effective." Wis. STAT. ANN. § 144.07 (1m) (West 1989).

56. 471 U.S. at 41-43.

57. *Id.* at 46-47. The Court stated that it "may presume, absent a showing to the contrary, that the municipality acts in the public interest." *Id.* at 45. The Court also noted that, "[a]mong other things, municipal conduct is invariably more likely to be exposed to public scrutiny than is private conduct." *Id.* at 45 n.9.

reasoned that the state need not actively supervise the municipality in carrying out its delegated role.<sup>58</sup> Moreover, the state authorization at issue sufficiently reflected a state policy to displace competition with regulation.<sup>59</sup> The *Hallie* Court indicated that the state need not compel the city to act and need not expressly indicate that its delegation to municipalities is intended to have anticompetitive effects.<sup>60</sup> The Supreme Court therefore eliminated the requirement that the state actively supervise the municipality to qualify for state action exemption from antitrust laws.

Although *Hallie* arguably found local governments immune from antitrust law whenever state authorization exists, the Eighth Circuit refused to grant state action immunity when a city conspired to violate antitrust laws. In *Westborough Mall, Inc. v. City of Cape Girardeau*,<sup>61</sup> the plaintiff alleged that the city conspired with a shopping mall developer to eliminate the plaintiff's proposed competing mall.<sup>62</sup> The court did not apply the state action immunity doctrine and held that a conspiracy to frustrate normal zoning procedures did not further state policy when it deprived the plaintiffs of the right to develop their property.<sup>63</sup> Thus, the Eighth Circuit refused to extend the state action immunity exemption to municipalities when an anticompetitive conspiracy exists between government officials and private parties.

The *Westborough Mall* rationale is consistent with other federal jurisdictions which have held that a municipality loses antitrust liability immunity when a conspiracy to stifle competition exists between government officials and private individuals.<sup>64</sup> However, the foregoing ra-

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58. 471 U.S. at 47.

59. *Id.*

60. 471 U.S. at 43. The Court in *Hallie* distinguished the Wisconsin statute from the type of home rule statute in *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982). *Id.* Although the statute in *Boulder* allowed the city to decide every aspect of its cable television policy, the Wisconsin statute specifically authorized the "cities to provide sewage services and has delegated to the cities the express authority to take action that foreseeably will result in anticompetitive effects." *Id.*

61. 693 F.2d 733 (8th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983).

62. *Id.* at 737.

63. *Id.* at 746.

64. *See, e.g.*, *Oberndorf v. City & County of Denver*, 900 F.2d 1434, 1440 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 129 (1990) (implying that the "co-conspirator" exception is limited to cases of bribery or other overt corruption); *Video Int'l Prod. v. Warner-Amex Cable Communications Co.*, 858 F.2d 1075 (5th Cir. 1988), *cert. denied*, 490 U.S. 1047 (1989) (noting that the bribery of government official would invalidate immunity); *see also* *Mason City Center Assoc. v. City of Mason City*, 468 F. Supp. 737, 744 (N.D.

tionale is flawed because any "meeting of the minds" may be characterized as a conspiracy. Perhaps because of the far-reaching impact of these rulings on antitrust law, the Supreme Court recently chose to review the state action doctrine and how it affects municipalities.

## II. CITY OF COLUMBIA V. OMNI OUTDOOR ADVERTISING INCORPORATED

In *City of Columbia v. Omni Outdoor Advertising, Inc.*,<sup>65</sup> the United States Supreme Court granted local governments sweeping protection against antitrust suits for their official actions. The *Omni* Court ruled that municipalities may not be sued even if they deliberately conspire to favor one private entity over another.<sup>66</sup> Justice Scalia, writing for the majority, stated that municipal action which qualifies as state action is automatically exempt from the operation of the antitrust laws.<sup>67</sup> The *Omni* majority noted, however, that the only possible exception is when the government acts as a private party participating in the market.<sup>68</sup>

Omni Outdoor Advertising, a billboard company, sought damages and injunctive relief under the Sherman Act alleging that the city and the area's dominant billboard company, Columbia Advertising (COA), prevented it from entering the Columbia market.<sup>69</sup> COA executives

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Iowa 1979) (noting that a city is not automatically exempt from the Sherman Act if it uses state-delegated zoning powers to further "an unlawful anticompetitive agreement with private developers").

65. 111 S. Ct. 1344 (1991).

66. *Id.* at 1351. The Supreme Court explicitly stated that "[t]here is no such conspiracy exception." *Id.* But see *supra* note 54 indicating several courts of appeals, decisions which have previously recognized the conspiracy exception.

67. 111 S. Ct. at 1353. Einer R. Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 668, 704-06 (1991) (advocating the limitation of the state action "co-conspirator" exception to government officials conspiring with private individuals where both parties have a financial interest in the action).

68. 111 S. Ct. at 1353. The Court further declared:

This does not mean, of course, that the States may exempt *private* action from the scope of the Sherman Act; we in no way qualify the well established principle that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."

*Id.* (quoting *Parker v. Brown*, 317 U.S. 341, 351 (1943)). See also *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 389 (1951) (noting that "when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids").

69. 111 S. Ct. at 1347-48. COA tried to prevent Omni from entering the market in

allegedly met with city officials to seek the enactment of a zoning ordinance that would restrict billboard construction.<sup>70</sup>

COA conducted its outdoor advertising business in the Columbia market for more than forty years<sup>71</sup> and owned more than ninety-five percent of the billboards in the area.<sup>72</sup> Omni first tried to enter the Columbia outdoor advertising market in 1981.<sup>73</sup> COA, which enjoyed close relations with city officials,<sup>74</sup> lobbied to enact a zoning ordinance to restrict billboard construction.<sup>75</sup> In the spring of 1982, the city council passed an ordinance that placed a moratorium on all billboard construction without the council's express consent.<sup>76</sup> After a state court declared the ordinance unconstitutional,<sup>77</sup> the city asked the state's regional planning authority to conduct a comprehensive analysis of the local billboard situation and to develop a valid ordinance.<sup>78</sup> In

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several ways. *Id.* at 1347. COA redoubled its billboard construction and modernized its stock. *Id.* They also allegedly undertook several anticompetitive actions including "offering artificially low rates, spreading untrue and malicious rumors about Omni, and attempting to induce Omni's customers to break their contracts." *Id.*

70. 111 S. Ct. at 1347. COA executives were not the only individuals who met with city officials lobbying for the enactment of zoning ordinances restricting billboard construction. *Id.* Other citizens supporting these restrictions included newspaper article and editorial writers. *Id.*

71. *Id.*

72. 111 S. Ct. at 1347.

73. 111 S. Ct. at 1347.

74. *Id.*

75. *Id.* COA first met with the City Zoning Board of Adjustments and then City Councilman Patton Adams. "The following day, Councilman Adams introduced for first reading a proposed ordinance that would have barred billboard construction in the downtown area and the relevant neighborhood absent Council approval." Petitioner's Brief at 3, *City of Columbia & Columbia Outdoor Advertising, Inc. v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991) (No. 89-1671).

76. 111 S. Ct. at 1348.

77. *Id.* The South Carolina district court struck down this ordinance because it granted "unconstrained discretion" to the city council and thereby violated both the South Carolina and Federal Constitutions. *Id.*

78. *Id.* The City Council commissioned the Central Midlands Regional Planning Council (CMRPC) to formulate a comprehensive billboard ordinance. Petitioner's Brief at 4, *City of Columbia & Columbia Outdoor Advertising, Inc. v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991) (No. 89-1671). The CMRPC is a state-authorized agency which provides planning services for the four counties and their municipalities in such areas as zoning transportation, health care, and senior citizen services. *Id.* at 4 n.3. During the five months between this commission and the enactment of the ordinance on September 22, 1982, numerous public meetings addressed the CMRPC's recommendations. Many other discussions occurred between city officials, CMRPC personnel and billboard operators — including representatives of Omni and COA. *Id.*

September 1982, the council enacted a new ordinance to restrict the size, location, and spacing of billboards.<sup>79</sup> These restrictions favored COA, which already had its billboards in place, and severely limited Omni's ability to compete.<sup>80</sup>

As a result, Omni sued COA under Sections 1 and 2 of the Sherman Act<sup>81</sup> and the South Carolina Unfair Trade Practices Act.<sup>82</sup> Omni alleged that the ordinances resulted from an anticompetitive conspiracy that divested COA of state action immunity.<sup>83</sup> Although Omni obtained a \$3,000,000 jury verdict,<sup>84</sup> the district court excluded the city from liability under the Local Government Antitrust Act,<sup>85</sup> because the city's actions took place outside the scope of the federal anti-

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79. 111 S. Ct. at 1348.

80. *Id.*

81. *Id.* See *supra* note 4 and accompanying text for a discussion of the scope of antitrust liability under the Sherman Act.

82. The South Carolina Unfair Trade Practices Act provides:

(a) Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages. If the court finds that the use or employment of the unfair or deceptive method, act or practice was a willful or knowing violation of § 39-5-20, the court shall award three times the actual damages sustained and may provide such other relief as it deems necessary or proper. Upon the finding by the court of a violation of this article, the court shall award to the person bringing such action under this section reasonable attorney's fees and costs.

S.C. CODE ANN. § 39-5-140(a) (Law. Co-op. 1985).

Section 39-5-20(a) states in pertinent part: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." S.C. CODE ANN. § 39-5-20(a) (Law. Co-op. 1985).

83. 111 S. Ct. at 1348.

84. *Id.* \$3,000,000 was the jury verdict after trebling. *Id.*

85. *Id.* The Local Government Antitrust Act of 1984 exempts local governments from paying damages for violations of the federal antitrust laws filed after September 24, 1984. 111 S. Ct. at 1348 n.2. See *supra* note 6 and accompanying text for a discussion of the Local Government Antitrust Act of 1984.

Although enacted after the events in *City of Columbia*, the Act may be applied retroactively if "the defendant establishes and the court determines, in light of all the circumstances . . . that it would be inequitable not to apply this subsection to a pending case." 111 S. Ct. at 1348 n.2 (citing 15 U.S.C. § 35(b) (1988)). The District Court determined that it may be applied retroactively and the Court of Appeals refused to disturb that ruling. 111 S. Ct. at 1348 n.2.

Regarding actions filed prior to that time, the statute provides a mechanism whereby the courts on a case-by-case basis will determine whether damages were appropriate. 15 U.S.C. § 35.

trust laws.<sup>86</sup> The Fourth Circuit reversed the judgment against both the city and COA.<sup>87</sup>

### III. CONCLUSION

The Supreme Court's decision in *Omni* correctly enlarges the state action exemption for municipalities. By removing the conspiracy exception to the state action immunity exemption, the Court clearly establishes a city's ability to regulate in areas historically within municipal authority. Without this broad exemption, all anticompetitive regulation would be vulnerable to a conspiracy charge. Public officials are often forced to support the wishes of one private group of citizens over another. Forcing city governments to choose between satisfying all affected interest groups and facing antitrust liability is impractical and unworkable. A plaintiff could allege a conspiracy based on nothing more than the agreement to impose the regulation in question.<sup>88</sup>

Municipal officials are free to act without the fear of antitrust violations because the Supreme Court has refused to recognize a conspiracy exception to the state action immunity exemption. Few municipal ac-

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86. 111 S. Ct. at 1348.

87. *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising*, 891 F.2d 1127 (4th Cir. 1989). The *Omni* Court of Appeals stated, "we . . . reverse the district court's grant of judgment notwithstanding the verdict to the City. We agree that it is shielded from a damages award; however, we remand for entry of appropriate injunctive relief." *Id.* at 1145. The Court of Appeals also reversed the judgment notwithstanding the verdict to COA and reinstated the jury's damage award. *Id.* On remand, the Court of Appeals recommended that the district court consider *Omni's* motion for treble damages and attorney fees under the Sherman Act and South Carolina Unfair Trade Practices Act. *Id.*

88. See also *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). In *Noerr*, the Supreme Court held the Sherman Act inapplicable to an anticompetitive conspiracy among railroads which sought and obtained state legislative and executive action harmful to their trucker competitors. The conspirators lobbied through antitruck advertising. *Id.* at 131. The Court relied on three points: (1) the Court did not want to limit anyone's constitutional right to petition his government and the Court feared chilling legitimate modes of government petitioning; (2) the Court wished to keep the government's channels open for receiving information; and (3) relying on the history of the Sherman Act, the Court noted the statute's concern with economics and not politics. *Id.* at 137-38. *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 229 (7th Cir. 1975) (noting the immunity of unethical conduct by city council members when dealing with the city council as a legislative body); PHILLIP E. AREEDA & DONALD F. TURNER, *ANTITRUST LAW* §§ 203-04 (1978 & 1991 Supp.) (discussing the petitioning of government officials through political action and other dealings).



tions are immune from a charge of corruption or failure to act in the public interest.<sup>89</sup> Virtually all regulation benefits some segments of society and harms others. Thus, allowing courts to make an *ex post facto* judicial assessment of public officials' actions would severely diminish municipalities' ability to regulate.<sup>90</sup> Moreover, if the conspiracy excep-

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89. See *United States Football League v. National Football League*, 634 F. Supp. 1155 (S.D.N.Y. 1986). In *United States Football League*, the plaintiff alleged that the NFL used unnecessarily coercive methods such as threats to leave town to convince state and/or local governments to lease stadiums to it rather than the plaintiffs. *Id.* at 1176. The court held the NFL immune from antitrust liability even though their conduct may have been anticompetitive. *Id.* at 1179-80. But see *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344, 1355-56 (1991) in which the Supreme Court states:

*Parker* and *Noerr* are complementary expressions of the principle that the antitrust laws regulate business, not politics; the former decision protects the States' acts of governing, and the latter the citizens' participation in government. Insofar as the identification of an immunity-destroying "conspiracy" is concerned, *Parker* and *Noerr* generally present two faces of the same coin. The *Noerr* invalidating conspiracy alleged here is just the *Parker* invalidating conspiracy viewed from the standpoint of the private sector participants rather than the governmental participants. The same factors which . . . make it impracticable or beyond the purpose of the antitrust laws to identify and invalidate lawmaking that has been infected by selfishly motivated agreement with private interests likewise make it impracticable or beyond that scope to identify and invalidate lobbying that has produced selfishly motivated agreement with public officials. "It would be unlikely that any effort to influence legislative action could succeed unless one or more members of the legislative body became . . . 'co-conspirators'" in some sense with the private party urging such action. And if the invalidating "conspiracy" is limited to one that involves some element of unlawfulness (beyond mere anticompetitive motivation), the invalidation would have nothing to do with the policies of the antitrust laws.

*Id.* (citation omitted).

90. See *Stauffer v. Town of Grand Lake*, 1981-1 Trade Cas. (CCH) ¶ 64,029, at 76,326 (D. Colo. Oct. 9, 1980). *Stauffer* involved a claim against a town and local zoning board officials who had allegedly conspired among themselves in rezoning plaintiff's property to further their private economic interests. *Id.* at 76,328. The court initially denied state action immunity because the alleged "conspiracy" was not authorized by state law. *Id.* In a subsequent unreported opinion, the court dismissed the action against the officials because zoning board members are entitled to absolute quasi-judicial antitrust immunity in carrying out their duties. Apparently, the claim against the town survived. The court must have assumed that a conspiracy among the zoning board members to serve their *personal* interests would violate the Sherman Act and create town liability. See also *Mason City Center Assoc. v. City of Mason City*, 671 F.2d 1146, 1149 (8th Cir. 1982) (admitting testimony of city council members to distinguish their motivations); *Scott v. City of Sioux City*, 1983-2 Trade Cas. ¶ 65,589, at 68,939 (N.D. Iowa June 17, 1983) (invoking state action immunity to shield alleged conspiracy between city and developers to prevent other development outside an urban renewal shopping area). Cf. *French v. Corrigan*, 432 F.2d 1211, 1213-14 (7th Cir. 1970) (expressing the fear that conclusory allegations of conspiracy would make the federal courts the ultimate supervisors of state law), *cert. denied*, 401 U.S. 915 (1971);

tion remained intact, courts would have to scrutinize the intent of public officials.

Congress did not intend to exempt from the Sherman Act only those state actions undertaken without contact with private individuals who have a vested interest in the outcome.<sup>91</sup> A rule denying *Parker* protection based on perceived conspiracies between public officials and affected private individuals throughout the legislative process would nullify the state action exemption because private interests support virtually all legislation.<sup>92</sup>

Furthermore, the validity of municipal legislation should not turn on a court's inquiry into possible corruption of the legislative process. Congress did not intend to invalidate corrupt government action through the enforcement of antitrust laws.<sup>93</sup> If the corruption exception applied, courts would invalidate corrupt restraints of trade while exempting precisely the same restraints when they are not based on corrupt motives. Additionally, the corruption exception to state action immunity is unnecessary: when corrupt governmental conduct is illegal under other laws, those laws provide an adequate remedy without using antitrust laws.<sup>94</sup>

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*Erie Builders Concrete Co. v. Erie-Western Pa. Port Auth.*, 705 F. Supp. 1125, 1130-31 (W.D. Pa.) (exempting actions taken by individual members of Port Authority in their private capacity under *Noerr* because it was unclear whether these actions were limited to persuading the Port Authority to pursue a particular course of conduct), *aff'd*, 882 F.2d 510 (3d Cir. 1989).

91. See 1 EARL W. KINTER, FEDERAL ANTITRUST LAW § 4.18 (1980) (addressing the intended scope of the Sherman Antitrust Act — to promote the general principle of “full and free competition” in interstate and foreign commerce). In *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958), the Court declared:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, 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 . . . . [T]he policy unequivocally laid down by the Act is competition. *Id.* at 4.

92. See *supra* notes 78-80 and accompanying text for a discussion of the undesirability of judicial review of public officials' actions.

93. See *supra* note 5 and accompanying text for a discussion of the intended scope of the Sherman Act.

94. See *Rangen, Inc. v. Sterling Nelson & Sons*, 351 F.2d 851 (9th Cir. 1965) (holding the bribery of state purchasing official not immune from consideration in context of violation by seller of Robinson-Patman Act; Sherman Act liability not involved), *cert. denied*, 383 U.S. 936 (1966).

The United States Supreme Court decision in *City of Columbia v. Omni Outdoor Advertising, Inc.* clarifies the type of municipal conduct that the Sherman Antitrust Act prohibits. As a result of the *Omni* decision, courts will now properly judge the anticompetitive activities of local governments and municipalities by the same antitrust standard applicable to sovereign states.<sup>95</sup>

*David A. Korn\**

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95. The Supreme Court has recognized the importance of local governments and municipalities serving the needs of the public. *See, e.g.,* *Breard v. Alexandria*, 341 U.S. 622, 636-37 (1951) (recognizing that municipal judgment of local needs is made from a more intimate knowledge of local conditions), *overruled by* *Schaumburg v. Citizens for Better Env't.*, 444 U.S. 620 (1980).

\* J.D. 1992, Washington University.

