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RECENT DEVELOPMENT

Municipalities and the Antitrust Laws: Home Rule Authority is Insufficient to Ensure State Action Immunity

I. INTRODUCTION

A large number of states have granted wide-ranging, general authority to certain cities under statutory or constitutional home rule provisions that are designed to provide municipalities with sufficient power to deal effectively with local problems.¹ As a result

1. For representative home rule amendments, see ARIZ. CONST. art. XIII, § 2; ILL. CONST. art. VII, § 6; MICH. CONST. art. VII, § 22; N.Y. CONST. art. IX, § 2; OR. CONST. art. XI, §§ 2-2(a); PA. CONST. art. IX, § 2; WIS. CONST. art. XI, § 3. Since the state of Missouri enacted the first home rule constitutional amendment in 1875, a large number of state legislatures have fashioned either constitutional or statutory home rule provisions. Commentators disagree on the precise number of states that have provided municipal authority approximating home rule. See, e.g., C. ANTIEAU, 1 MUNICIPAL CORPORATION LAW § 3.00 (1982) (31 states have home rule); Note, *Antitrust Law and Municipal Corporations: Are Municipalities Exempt from Sherman Act Coverage Under the Parker Doctrine?*, 65 GEO. L.J. 1547 (1977) (33 states). The confusion occurs because some of the constitutional or statutory provisions for municipal government do not mention the term "home rule." E.g., N.E.V. CONST. art. VIII, § 8. Because the precise wording of the constitutional amendments and statutes varies greatly from state to state, the state courts have played a major role in interpreting the extent of a municipality's home rule authority. See 1 C. ANTIEAU, *supra*, § 3.01. See also *infra* notes 93, 121 & 145 and accompanying text.

One commentator has observed that municipal home rule has two important attributes. First, home rule provisions are express grants of authority to municipalities to act in local matters. In constitutional home rule states, a city derives its home rule authority from the state constitution rather than from the legislature. 1 C. ANTIEAU, *supra*, § 3.01. Many courts have construed home rule statutes liberally, although the possibility of a narrow construction appears to be greater in a legislative than in a constitutional state. See *id.* §§ 3.09-10. Second, home rule provisions generally limit the authority of the state legislature to act in local matters. *Id.* § 3.01. All state constitutions, however, reserve to the state the power to regulate and control the disposition of matters of general or statewide concern. *Id.* § 3.08. Because state courts have examined the parameters of the distinction between a "municipal affair" and a "state concern" on an ad hoc basis, the municipal law of the states lacks uniformity on this question. One commentator has criticized judicial dependence upon that terminology:

The labelling process can be almost a temptation to a hasty, mechanistic jurisprudence, and there are many decisions in this area that are not defensible from either the intent

of economic and technological developments that have heightened local concern with economic regulations,² several home rule municipalities recently have adopted anticompetitive measures to restrain competition determined not to be in the public interest.³ While these restraints on trade would appear to violate the anti-trust laws,⁴ the municipalities—supported by their broad home rule authority—have maintained that they are immune from anti-trust scrutiny under the state action exemption from the antitrust laws first articulated in *Parker v. Brown* in 1942.⁵ A plurality of

of the framers responsible for the state constitutional home rule clause or from sound social engineering. What is called for is an open discussion of whether the concern of the people of the entire state is greater, in a particular instance, than the concern of the local residents. This will certainly mean that even though certain large areas are ordinarily labelled one or the other, sub-areas therein may call for a different decision.

Id. § 3.21, at 3-59. For a general overview of home rule authority, see *id.* §§ 3.00-4.00; J. MCGOLDRICK, *LAW AND PRACTICE OF MUNICIPAL HOME RULE 1916-30* (1933); E. MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* §§ 10.13-16 (3d ed. 1979); C. RHYNE, *MUNICIPAL LAW* § 4-3 (1957). See *infra* notes 93, 121-25, 145 & 154 and accompanying text for discussions of the Colorado and Ohio home rule laws.

2. See *Hybud Equipment Corp. v. City of Akron*, 654 F.2d 1187, 1188 n.1 (6th Cir. 1981) (use of solid waste as an alternative energy source), *vacated and remanded*, 102 S. Ct. 1416 (1982); *Community Communications Co. v. City of Boulder*, 485 F. Supp. 1035, 1036-37 (D. Colo. 1980) (improvements in cable television technology), *rev'd*, 630 F.2d 704 (10th Cir. 1981), *rev'd*, 102 S. Ct. 835 (1982); *infra* note 89 and accompanying text. Of course, many home rule municipalities have long regulated such areas as sanitation, public works, and zoning. State courts often have sustained some of these regulatory measures under the broad grant of home rule authority despite the absence of specific legislative authorization by the state. For a catalogue of these state court decisions, see 1 C. ANTIEAU, *supra* note 1, § 3.13. The clearly anticompetitive nature of some recent municipal regulation, coupled with the Supreme Court's current interpretation of the scope of the antitrust laws, apparently have invited more challenges to municipal action in the federal courts.

3. See *infra* notes 88-116 and accompanying text.

4. Justice Rehnquist has asserted that most plaintiffs will challenge municipal actions under § 1 of the Sherman Act. *Community Communications Co. v. City of Boulder*, 102 S. Ct. 835, 848 n.1, (1982) (Rehnquist, J., dissenting). This section provides in relevant 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 declared to be illegal." 15 U.S.C. § 1 (1976).

5. 317 U.S. 341 (1943); see *infra* notes 21-26 and accompanying text. The Supreme Court has recognized that the use of the term "exemption" is a "shorthand expression" for the Court's belief that Congress did not intend state action to be within the purview of the Sherman Act. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 393 n.8 (1978) (plurality opinion). Most cases have adopted this terminology. *E.g.*, *Community Communications Co. v. City of Boulder*, 102 S. Ct. 835, 840 (1982); *Bates v. State Bar of Arizona*, 433 U.S. 350, 359 (1977); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975). Justice Rehnquist, however, contended recently that the *Parker* doctrine is a matter of *preemption* under the supremacy clause rather than *exemption* from the Sherman Act. *Community Communications Co. v. City of Boulder*, 102 S. Ct. at 846 (Rehnquist, J., dissenting). He found the distinction between preemption and exemption to be of the utmost importance in applying the antitrust laws to a municipality. See *infra* notes 129-36 & 181-84 and accompa-

the Supreme Court in *City of Lafayette v. Louisiana Power & Light Co.*,⁶ however, held that the Sherman Act did apply to certain small Louisiana municipalities not organized pursuant to that state's constitutional home rule provision. The *Lafayette* decision encouraged those persons harmed by municipally imposed restraints upon competition to challenge the home rule cities under the antitrust laws. These suits have raised questions about not only the scope of the *Lafayette* interpretation of the *Parker* doctrine, but also the degree to which a federal court applying the antitrust laws should consider state court interpretations of home rule constitutional or statutory provisions⁷ and the exigencies of a particular city's situation.⁸

During the past seven years, the Supreme Court has defined and narrowed the parameters of the *Parker* exemption in several decisions. Because these cases have addressed challenges to actions taken by agents of the state⁹ rather than by the state legislatures themselves, the Court has reconsidered the conflicting policies implicated in the application of the federal antitrust laws to an alleged state action. The Supreme Court has recognized that the sweeping language of the antitrust laws embodies a strong congres-

nying text.

6. 435 U.S. 389 (1978); see *infra* notes 48-79 and accompanying text. For additional commentary on the *Parker* doctrine and the *Lafayette* opinion, see *Antitrust Symposium: Municipal Antitrust Liability*, 1980 ARIZ. ST. L.J. 245; Areeda, *Antitrust Immunity For "State Action" After Lafayette*, 95 HARV. L. REV. 435 (1981); Bangasser, *Exposure of Municipal Corporations to Liability for Violations of the Antitrust Laws: Antitrust Immunity After the City of Lafayette Decision*, 11 URBAN LAW. vii (1979); Blumstein & Calvani, *State Action as a Shield and a Sword in a Medical Services Antitrust Context: Parker v. Brown in Constitutional Perspective*, 1978 DUKE L.J. 389; Handler, *The Current Attack on the Parker v. Brown State Action Doctrine*, 76 COLUM. L. REV. 1 (1976); Smith, *Antitrust Immunity for State Action: A Functional Approach*, 31 BAYLOR L. REV. 263 (1979); Comment, *Municipal Antitrust Liability: Applying City of Lafayette v. Louisiana Power & Light Co.*, 31 BAYLOR L. REV. 563 (1979); Note, *The Antitrust Liability of Municipalities Under the Parker Doctrine*, 57 B.U.L. REV. 368 (1977); Note, *The Application of Antitrust Laws to Municipal Activities*, 79 COLUM. L. REV. 518 (1979) [hereinafter cited as *Application of Antitrust Laws*]; Note, *supra* note 1; Note, *Whither Municipal Antitrust Liability After Lafayette?*, 15 WAKE FOREST L. REV. 89 (1979); Note, *City of Lafayette, Louisiana v. Louisiana Power & Light Co.: Will Municipal Antitrust Liability Doom Effective State-Local Government Relations?*, 36 WASH. & LEE L. REV. 129 (1979); 49 MISS. L.J. 725 (1978); 1979 WIS. L. REV. 570.

7. See *infra* notes 57-58 and accompanying text; *infra* notes 93, 96-97 & 121.

8. See *infra* notes 88-118 and 142-44 and accompanying text.

9. The only private party to claim the *Parker* exemption in a recent Supreme Court case was the defendant utility in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976). The defendant in that case asserted the challenged action was exempt from the Sherman Act because the state public service commission had approved the action as part of a proposed rate package. See *infra* notes 32-34 and accompanying text.

sional policy to promote free markets and competition,¹⁰ but the *Parker* decision evidenced a judicial deference for the authority of the states to impose economic regulation in areas not delegated to the federal government under the Constitution.¹¹ Nevertheless, when an agent of the state has acted to displace competition pursuant to general statutory or constitutional authority, the Supreme Court has refused to extend the *Parker* state action exemption without first inquiring into the scope of the state authorization of the challenged regulation.¹²

In *Lafayette* a plurality of the Supreme Court held that the antitrust laws applied to municipalities "in the absence of evidence that the State authorized or directed a given municipality to act as it did."¹³ Subsequent Supreme Court decisions have considered the *Lafayette* standard,¹⁴ but the Court's holding that the statutory authorization in *Lafayette* was insufficient to invoke *Parker* immunity raised serious doubts about the permissible limits of economic regulation by municipalities. The *Lafayette* opinion, however, did not explicitly sound the death knell for efforts by all municipalities to displace competition with economic regulation since only a plurality of justices supported the rationale for denying antitrust immunity to the municipalities.¹⁵ Moreover, the State of Louisiana

10. In *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972), the Supreme Court stated the philosophical foundation of the antitrust laws:

Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity, whatever economic muscle it can muster.

Id. at 610; see *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398-400 (1978) (plurality opinion).

11. See *Community Communications Co. v. City of Boulder*, 102 S. Ct. 835 (1982) (Rehnquist, J., dissenting); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 434 (1978) (Stewart, J., dissenting); *Bates v. State Bar of Arizona*, 433 U.S. 350, 362 (1977).

12. See *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 408 (1978) ("If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established.").

13. *Id.* at 414 (plurality opinion).

14. See *infra* notes 80-87 & 109-36 and accompanying text.

15. Justices Marshall, Powell, and Stevens joined Justice Brennan in his plurality opinion. See *infra* notes 48-58 and accompanying text. Justice Marshall and Chief Justice Burger joined in the result but expressed different rationales in separate concurring opinions. See *infra* notes 59-66 and accompanying text. Justices White, Blackmun, and Rehnquist joined Justice Stewart in his dissenting opinion. See *infra* notes 67-79 and accompany-

had not vested the cities in *Lafayette* with home rule authority.¹⁶

Most states, including Louisiana, have vested their larger cities with broad grants of home rule authority.¹⁷ In these states, therefore, a home rule municipality's power to oversee local economic issues depends upon whether its home rule authority meets the *Lafayette* standard of state authorization. In three lower federal court decisions, a municipality's authority to restrain trade pursuant to a home rule constitutional provision was a significant if not determinative factor in those courts' extensions of antitrust immunity to the cities.¹⁸ The Supreme Court, however, in reversing one of these decisions, recently held in *Community Communications Co. v. City of Boulder*¹⁹ that the home rule amendment to the Colorado Constitution alone did not provide sufficient authorization for a municipality to restrain trade in violation of the Sherman Act.²⁰

This Recent Development first considers the evolution of the *Parker* doctrine in a variety of contexts—with special attention to the Supreme Court's decision in *Lafayette* and the Court's ratio-

ing text. Justice Blackmun also filed a brief separate dissent pertaining to a portion of Justice Stewart's opinion with which he did not join. See *infra* note 79 and accompanying text.

16. See *supra* note 6 and accompanying text.

17. A number of home rule provisions extend home rule authority only to those cities with a prescribed minimum population. *E.g.*, ARIZ. CONST. art. XIII, § 2 (3500); COLO. CONST. art. XX, § 6 (2000); ILL. CONST. art. VII, § 6(a) (25,000); NEB. CONST. art. XI, § 2 (5000); TEX. CONST. art. XI, § 5 (5000). While other states provide any city with home rule authority, many still require a minimum population to frame a city charter. *E.g.*, MASS. CONST. amend. art. II, § 2 (12,000); OKLA. CONST. art. XVIII, § 3(a) (2000); WASH. CONST. art. XI, § 10 (20,000); W. VA. CONST. art. VI, § 39(a) (2000); WIS. STAT. ANN. § 62.06(1) (West 1957) (1500). See Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269,278 (1968).

18. *Hybud Equipment Corp. v. City of Akron*, 654 F.2d 1187 (6th Cir. 1981), *vacated and remanded*, 102 S. Ct. 1416 (1982); *Community Communications Co. v. City of Boulder*, 630 F.2d 704 (10th Cir. 1981), *rev'd*, 102 S. Ct. 835 (1982); *Pueblo Aircraft Serv., Inc. v. City of Pueblo*, 498 F. Supp. 1205 (D. Colo. 1980); see *infra* notes 88-100 & 109-16 and accompanying text; *infra* notes 93 & 96.

19. 102 S. Ct. 835 (1982), *rev'g* 620 F.2d 704 (10th Cir.), *rev'g* 485 F. Supp. 1035 (D. Colo. 1980). In an article published prior to the Supreme Court's decision in *Boulder*, Professor Areeda posited three reasons why a home rule provision should give sufficient state authorization to satisfy the *Parker* exemption. First, he maintained that because a court frequently infers the requisite state intent when "reasonable" governmental action is anticompetitive, failure to do so in a home rule situation with an equally reasonable restraint on trade would be anomalous. Second, a state often will not enact specific legislation on every aspect of a project authorized by the legislature. Last, the presence of home rule authority is a matter of state constitutional law and "denotes a conscious state decision to decentralize." AREEDA, *supra* note 6, at 448-49.

20. See *infra* notes 117-36 and accompanying text.

nale in *Boulder*. After discussing the recent lower federal court decisions that based the availability of the *Parker* exemption upon the existence of general home rule authority under the respective state's constitution, this Recent Development examines the problems posed by the *Boulder* decision for cities and states contemplating economic regulation tailored to particular local concerns. This Recent Development then analyzes the competing policy interests in the question of a home rule municipality's liability under the antitrust laws. In light of the Court's decision in *Boulder* to reject home rule authority as sufficient state authorization for an application of the *Parker* doctrine, this Recent Development concludes that the Supreme Court's approach in *Boulder* will be least burdensome for home rule municipalities if the Court utilizes a preemption rationale under the supremacy clause to avoid subjecting these cities to liability for treble damages under the antitrust laws.

II. LEGAL BACKGROUND

The Supreme Court in *Parker* held that a state-sponsored agricultural program which restricted the production of raisins and restrained competition among raisin producers did not violate the Sherman Act.²¹ By controlling the distribution of the raisin crop, the State of California had sought to regulate prices and thereby "conserve the agricultural wealth of the state" and "prevent economic waste in the marketing of agricultural products."²² The Court assumed that the program would have violated the antitrust laws if it had been instituted by private persons,²³ but found "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."²⁴ The

21. *Parker v. Brown*, 317 U.S. at 352. Under the terms of the California Agricultural Prorate Act, a group of agricultural producers can petition the Agricultural Prorate Advisory Commission to establish a prorate zone in which all producers of a given commodity must follow the marketing and distribution procedures of the Act. For a discussion of the mechanics of the challenged program, see *id.* at 344-50. Although individual producers proposed both the establishment of a prorate zone and the proration program under the California scheme, the Supreme Court found that the state's adoption and enforcement of the proposal constituted state action. *Id.* at 352.

22. *Id.* at 346. At the time of the *Parker* decision, raisin producers in the challenged proration zone provided almost all of the raisins consumed in the United States and about half of the world crop. *Id.* at 345.

23. *Id.* at 350.

24. *Id.* at 350-51. The Court observed,

There is no suggestion of a purpose to restrain state action in the Act's legislative

Parker Court emphasized that even though a "state or its municipality" was not participating in a private action to restrain trade,²⁵ "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."²⁶ Thus, *Parker* established clearly that direct action by a state legislature is exempt from the antitrust laws.

A. *The Evolution of the State Action Exemption*

Twenty-nine years after *Parker* the Court considered a different form of state action in *Goldfarb v. Virginia State Bar*.²⁷ The petitioners in *Goldfarb* challenged the Virginia State Bar Association's enforcement of a minimum fee schedule published by the Fairfax County Bar Association.²⁸ The state bar was the administrative agency through which the Supreme Court of Appeals regulated the practice of law in Virginia.²⁹ Concluding that the minimum fee schedule was "a classic illustration of price fixing,"³⁰ the

history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only "business combinations." That its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, abundantly appears from its legislative history.

Id. at 351 (citing 21 CONG. REC. 2457, 2562 (1890)).

25. *Id.* at 351-52.

26. *Id.* at 351.

27. 421 U.S. 773 (1975).

28. The petitioners in *Goldfarb* were a husband and wife seeking an attorney to perform a required title search for a home they wished to purchase. Unable to find a member of the Virginia State Bar who would examine the title for less than the minimum fee prescribed in the schedule, petitioners brought this action under § 1 of the Sherman Act. *Id.* at 775-78.

29. *Id.* at 776. A Virginia statute established the authority of the Virginia Supreme Court to promulgate rules and maintain the state bar. The current version of the pertinent Virginia statute provides as follows:

The Supreme Court may, from time to time, prescribe, adopt, promulgate and amend rules and regulations organizing and governing the association known as the Virginia State Bar, composed of the attorneys-at-law of this State, to act as an administrative agency of the Court for the purpose of investigating and reporting the violation of such rules and regulations as are adopted by the Court under this article for such proceedings as may be necessary, and requiring all persons practicing law in this State to be members thereof in good standing.

VA. CODE § 54-49 (1978).

30. 421 U.S. at 783. Acknowledging the "inherent power" of the Virginia Supreme Court "to regulate the practice of law in that State," *id.* at 789 n.18, the Court quoted from a Virginia Supreme Court rule adopted in 1938:

In determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee.

Id. at 789 n.19 (quoting RULES FOR INTEGRATION OF THE VIRGINIA STATE BAR, 171 Va. xvii,

United States Supreme Court held that the relevant Virginia statute did not indicate that the "anticompetitive activities [were] compelled by direction of the State acting as a sovereign."³¹ Therefore, the Court found the *Parker* exemption inapplicable to the challenged regulations.

Goldfarb ushered in a series of important decisions concerning the applicability of the antitrust laws to actions initiated by agents and agencies of a state pursuant to general statutory authorization. The only respondent in *Cantor v. Detroit Edison Co.*³² was a private utility, but the challenged action—the utility's furnishing of light bulbs to its residential customers—was part of a rate structure that the Michigan Public Service Commission had approved.³³ The Supreme Court held that since neither the state nor "any of its officials or agents" were parties to the suit, the *Parker* exemption was unavailable to the utility.³⁴

In *Bates v. State Bar of Arizona*³⁵ the state bar charged the appellants³⁶ with violating a state supreme court disciplinary rule barring advertising by attorneys.³⁷ Although the United States Supreme Court held that the rule violated the protection afforded

xviii (1938)), (U.S. Supreme Court's emphasis). Virginia adopted the *Model Code of Professional Responsibility* in 1970. 211 Va. 295 (1970).

31. 421 U.S. at 791. The Third Circuit applied the *Goldfarb* compulsion standard in *Duke & Co. v. Foerster*, 521 F.2d 1277 (3d Cir. 1975). Holding that Pittsburgh municipal corporations violated the antitrust laws by refusing to sell the plaintiffs' malt beverages in certain municipal facilities, the court found no state statute compelling such action. *Id.* at 1279-80. The failure of later cases to carry forward the *Goldfarb* compulsion language indicates a retreat from that rigid rule. The Supreme Court now appears to require only authorization from and not compulsion by the state legislation. See *infra* notes 80-87 and accompanying text.

32. 428 U.S. 579 (1976).

33. *Id.* at 583. The respondent instituted its light bulb program in 1886, 23 years before the State of Michigan started regulating electric utilities. In 1964, the Michigan Public Service Commission approved the cessation of the program for large commercial customers as part of a reduction in rates for these customers. *Id.*

34. *Id.* at 591-92.

35. 433 U.S. 350 (1977).

36. The appellants in *Bates* were attorneys licensed by the Arizona State Bar. *Id.* at 353.

37. The State Bar charged the appellants with violating Disciplinary Rule 2-101(B), which has since been amended. The disciplinary rule provided in relevant part as follows: (B) A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.

433 U.S. at 355. The remainder of part (B) of the rule contained exceptions to the prohibition, none of which applied in *Bates*. See *id.* at 355 n.5.

commercial speech under the first amendment,³⁸ the Court determined that the regulation was not subject to attack under the Sherman Act.³⁹ The Court distinguished *Goldfarb* on two bases: (1) the challenged minimum fee schedule clearly constituted "price fixing";⁴⁰ and (2) the Virginia statute did not explicitly authorize the Virginia Supreme Court to adopt the fee schedule.⁴¹ The Supreme Court in *Bates*, on the other hand, in its holding that the constitution specifically authorized and directed the Arizona court to enact the disciplinary rule,⁴² relied upon a state constitutional provision establishing the Arizona Supreme Court as "the ultimate body wielding the State's power over the practice of law."⁴³ Distinguishing *Cantor*, the Court noted that the petitioner in that case filed suit against a private party rather than against the state or its agent.⁴⁴ In addition, the Court in *Bates* observed that the State of Michigan had no independent, recognizable interest in regulating the market for light bulbs.⁴⁵ The *Bates* Court concluded that the

38. *Id.* at 384.

39. *Id.* at 363.

40. *Id.* at 359; see *supra* notes 27-31 and accompanying text.

41. 433 U.S. at 359.

42. *Id.* at 362. Justice Blackmun's majority opinion in *Bates* contained overtones of the balancing test for state and federal interests that he advocated in his concurring opinion in *National League of Cities v. Usery*, 426 U.S. 833 (1976). Because the majority in *Usery* failed to articulate a clear means for determining when state interests outweigh interests of the federal government in the exercise of its commerce power under the fourteenth amendment, some federal courts have applied the balancing approach that Justice Blackmun used in casting the "swing vote" in *Usery*. See, e.g., *Usery v. Edward J. Meyer Memorial Hosp.*, 428 F. Supp. 1368, 1370 n.4 (W.D.N.Y. 1977) ("Mr. Justice Blackmun's views are particularly to be noted as limiting possible overbroad interpretations of the Court's holding."); *Remmick v. Barnes County*, 435 F. Supp. 914, 915 n.2 (D.N.D. 1977); *State of Colorado v. Veterans Admin.*, 430 F. Supp. 551, 559 (D. Colo. 1977), *aff'd*, 602 F.2d 926 (10th Cir. 1979); cf. *Tennessee v. Louisville & N. R.R.*, 478 F. Supp. 199, 206 (M.D. Tenn. 1979) ("Since Justice Blackmun's concurrence was the swing vote in the ultimate holding of *National League of Cities*, it is impossible to discern what test, if any, was established for analyzing congressional exercises of power pursuant to the Commerce Clause."), *aff'd*, 652 F.2d 59 (6th Cir. 1981).

43. *Id.* at 360. Article III of the Arizona Constitution provides as follows:

The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.

ARIZ. CONST. art. III; see *In re Bailey*, 30 Ariz. 407, 412, 248 P. 29, 30 (1926) ("[T]here is no more important duty, nor one whose performance is more necessary to the proper functioning of the courts, than to see that their officers are of proper mental ability and moral character."), *appeal dismissed*, 275 U.S. 575 (1927).

44. 433 U.S. at 361; see *supra* note 9.

45. 433 U.S. at 361; see *supra* notes 32-34 and accompanying text.

effectiveness of the state's regulatory scheme in *Cantor* did not depend upon an exemption for the light bulb program,⁴⁶ unlike the challenged action in *Bates*, which was "at the core of the State's power to protect the public."⁴⁷

B. *The Application of Parker to Municipalities Under Lafayette*

The Supreme Court's next major discussion of the limits of the *Parker* doctrine occurred in *Lafayette v. Louisiana Power & Light Co.*⁴⁸ The petitioners in *Lafayette*, cities organized and operated under the laws of Louisiana, sought to enjoin the respondent utility from alleged antitrust violations.⁴⁹ Although Louisiana statutes authorized the petitioner cities to construct and maintain electric systems both within and without their city limits,⁵⁰ the *Lafayette* plurality held that the Sherman Act nevertheless applied to the petitioner's conduct. Observing that Congress explicitly excluded several municipal services from the antitrust laws,⁵¹ the plurality refuted the contention that the municipally owned utilities were interested primarily in public service.⁵² The plurality also

46. 433 U.S. at 361.

47. *Id.*

48. 435 U.S. 389 (1978).

49. The petitioner cities charged the respondent utility with a variety of antitrust violations including attempts to monopolize the generation and transmission of power by preventing the construction of competing systems, boycotts against the cities, and improper efforts to frustrate petitioners' attempts to secure financing for generating facilities. *Id.* at 392 n.5. The Supreme Court, however, dismissed the petitioners' complaint and decided the case on the basis of a counterclaim filed by the respondent utility. The respondent charged that the petitioners engaged in numerous actions to eliminate or suppress competition, including requiring residents to purchase electricity from the petitioners as a precondition to continued gas and water service. *Id.* at 392 n.6.

50. *Id.* at 436 (citing LA. REV. STAT. ANN. §§ 33:621, :1326 (West 1951), §§ 33:4162-63 (West 1966)) (Stewart, J., dissenting).

51. *Id.* at 397. The Court cited the explicit inclusion of public libraries within an exemption to the Robinson-Patman Act, 15 U.S.C. §§ 13-13b & 21a (1976). In fact, the Court has considered a number of congressionally created antitrust exemptions. *See, e.g.*, *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, *modified*, 383 U.S. 932 (1966) (construing antitrust exemption in Shipping Act for lawful rate-making activities); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951) (construing antitrust exemption provided by Miller-Tydings Act).

52. 435 U.S. at 403. The Court stated,
[T]he economic choices made by public corporations in the conduct of their business affairs, designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders.

Id.

rejected the argument that the citizens of a state, "consumers dissatisfied with the service provided by the municipal utilities,"⁵³ may safeguard the public welfare through their electoral control of government.⁵⁴ Noting that the Sherman Act established "competition as the polestar by which all must be guided in ordering their business affairs,"⁵⁵ the plurality interpreted the Act as an indication of congressional unwillingness to subject "this fundamental national policy to the vagaries of the political process."⁵⁶ Finally,

53. *Id.* at 405-06.

54. *Id.* at 406.

55. *Id.*

56. *Id.* The Court has considered the relationship between municipal affairs and federal regulatory schemes in a variety of contexts. In concluding that the regulatory framework of the Shipping Act applied to municipal, state, and privately owned shipping terminals, the Supreme Court found that Congress must have realized that the exclusion of the governmental operations "would have defeated the very purpose for which Congress framed the scheme." *California v. United States*, 320 U.S. 577, 585 (1944); *see also Massachusetts v. United States*, 435 U.S. 444 (1978) (state has no constitutional immunity from federal registration tax on all civil aircraft); *California v. Taylor*, 353 U.S. 553 (1957) (Railway Labor Act applies to state-owned railroad in interstate commerce despite statute's failure expressly to include public employees); *Marshall v. Owensboro-Daviess County Hosp.*, 581 F.2d 116 (6th Cir. 1978) (definition of "employers" in Equal Pay Act includes state-operated hospitals or their employees).

In an equal protection challenge to a county's apportionment scheme for county commissioners, however, the Supreme Court held that

it is now beyond the question that a State's political subdivisions must comply with the Fourteenth Amendment. The actions of local government *are* the actions of the State. A city, town, or county may no more deny the equal protection of the laws than it may abridge freedom of speech, establish an official religion, arrest without probable cause, or deny due process of law.

Avery v. Midland County, 390 U.S. 474, 480 (1967) (emphasis in original); *see also Waller v. Florida*, 397 U.S. 387 (state and municipality are the same for purposes of double jeopardy), *reh'g denied*, 398 U.S. 914 (1970); *Saenz v. University Interscholastic League*, 487 F.2d 1026, 1028 (5th Cir. 1973) (defendant organization, as a part of the University of Texas at Austin, was "outside the ambit of the Sherman Act"). *But cf. Reynolds v. Sims*, 377 U.S. 533, 575 ("Political subdivisions of States—counties, cities or whatever—never were and never had been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions."), *reh'g denied*, 379 U.S. 870, 871 (1964); *Williams v. Eggleston*, 170 U.S. 304, 310 (1898) (municipality is agency of the state); *Barnes v. District of Columbia*, 91 U.S. 540, 544 (1875) ("A municipal corporation, in the exercise of all its duties, including those most strictly local or internal, is but a department of the State").

In another pre-*Lafayette* decision, the Fourth Circuit held that the exemption created by *Parker* has "a very limited application." *City of Fairfax v. Fairfax Hosp. Assoc.*, 562 F.2d 280, 284 (4th Cir.), *vacated*, 435 U.S. 992 (1977). The court added, "[t]he mere fact that a body is 'a state agency for some limited purposes' does not make it an 'antitrust shield that allows it to foster anticompetitive practices.'" *Id.* at 284-85 (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975)); *see also California v. Federal Power Comm'n*, 369 U.S. 482 (1962) (construing § 7 of the Clayton Act (current version at 15 U.S.C. § 18 (1976 & Supp. IV 1980))).

the plurality articulated its suspicion that municipalities might act parochially if allowed to implement economic regulation of their own design."⁵⁷ The plurality, however, agreed with the Fifth Circuit that a municipality's permissible activities should not be restricted to those actions that receive "specific detailed legislative authorization"; rather, the municipality must only demonstrate "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of."⁵⁸

Justice Marshall's concurring opinion interpreted the *Parker* doctrine as an exemption from the antitrust laws that exists only when "the State must 'impose' the practice as 'an act of government.'"⁵⁹ In a separate concurrence, Chief Justice Burger urged the Court to shift its emphasis from the parties to the suit to an examination of the character of the challenged activity.⁶⁰ The Chief Justice observed that the "*Parker* decision was thus firmly grounded on principles of federalism,"⁶¹ but he saw the issue as being "whether the Sherman Act reaches the proprietary enterprises of municipalities."⁶² In the Chief Justice's view, the Supreme Court already had recognized the fundamental "difference between a State's entrepreneurial personality and a sovereign's decision—as in *Parker*—to replace competition with regulation."⁶³ Furthermore, Chief Justice Burger concluded that such an approach was consistent with the focus of *National League of Cities v. Usery*⁶⁴ upon the "attributes of sovereignty."⁶⁵ Thus, by con-

57. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. at 408; see *supra* note 12.

58. *Id.* at 415 (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 532 F.2d 431, 434 (5th Cir. 1976)).

59. *Id.* at 418 (Marshall, J., concurring).

60. *Id.* at 420 (Burger, C.J., concurring).

61. *Id.* at 421 (Burger, C.J., concurring).

62. *Id.* at 422 (Burger, C.J., concurring). The Chief Justice offered little guidance on the scope of the "proprietary enterprises of municipalities." *Id.* In a footnote he stated, I use the term "proprietary" only to focus attention on the fact that all of the parties are in a competitive relationship such that each should be constrained, when necessary, by the federal antitrust laws. It is highly unlikely that Congress would have meant to impose liability only on some of these parties, when each possesses the means to thwart federal antitrust policy.

Id. at 422 n.3; see *infra* notes 176-80 and accompanying text.

63. *Id.* at 422 (Burger, C.J., concurring).

64. 426 U.S. 833 (1976). In *Usery* the Court held "that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress . . ." *Id.* at 852. The members of the Court had yet to agree upon the role of the *Usery* reasoning in a determination of the applicability of the *Parker* doctrine. See *infra* notes 157-58 and accompanying text.

65. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. at 423 (Burger, C.J.,

cluding that "the running of a business enterprise is not an integral operation in the area of traditional government functions,"⁶⁶ the Chief Justice concurred in the plurality's decision that the Louisiana cities' utility operations were within the coverage of the Sherman Act.

Writing in dissent, Justice Stewart⁶⁷ criticized the plurality for "effectively [limiting] the governmental action immunity of the *Parker* case to the acts of a state legislature."⁶⁸ After examining the legislative history of the Sherman Act⁶⁹ and the *Parker* opinion, Justice Stewart concluded that the Court previously had drawn "the line between private action and governmental action."⁷⁰ Criticizing the plurality's observation that municipalities may not claim sovereign immunity under the eleventh amendment,⁷¹ the dissent questioned the plurality's use of *Goldfarb* because the petitioners in that case were private persons.⁷² The dissent also contended that the distinction urged by the Chief Justice was too ambiguous to provide any guidance on the scope of the immunity doctrine.⁷³ Noting that the states may delegate their authority as they wish,⁷⁴ the dissent observed that this option allows a state to delegate power to "municipalities to deal quickly and flexibly with local problems."⁷⁵ The dissent also questioned the plurality's failure to establish the requirements for a state authorization sufficient to qualify for the *Parker* exemption.⁷⁶ The normal paucity of legislative history at the state level often interferes with

concurring) (quoting *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976)).

66. *Id.* at 424 (Burger, C.J., concurring).

67. Justices White and Rehnquist joined the dissent *in toto*, while Justice Blackmun joined all but the portion that concerned the applicability of *Parker* to joint action by the petitioners and private parties.

68. 435 U.S. at 427 (Stewart, J., dissenting).

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

70. 435 U.S. at 429 (Stewart, J., dissenting).

71. *Id.* at 430 (Stewart, J., dissenting).

72. *Id.* at 431 (Stewart, J., dissenting); see *supra* note 28 and accompanying text. Justice Stewart also distinguished the *Goldfarb* compulsion standard on the basis that *Cantor* and *Goldfarb* held that the state legislature must compel the *private* action to escape the reach of the Sherman Act. 435 U.S. at 431 (Stewart, J., dissenting).

73. *Id.* at 433 (Stewart, J., dissenting); see *supra* notes 60-66 and accompanying text; *infra* notes 176-80 and accompanying text.

74. *Id.* at 434 (Stewart, J., dissenting).

75. *Id.* at 435 (Stewart, J., dissenting); see *supra* note 1.

76. *Id.* at 435-37 (Stewart, J., dissenting).

the determination whether a state authorized or contemplated a restraint on trade that would otherwise violate the Sherman Act.⁷⁷ According to the dissent, the extension of antitrust liability to municipalities acting without specific legislative authorization will inhibit "experimentation with innovative social and economic programs" and enable the federal judiciary to engage in wide-ranging evaluations of the reasonableness of state and local regulations.⁷⁸ Both Justices Stewart and Blackmun, in separate dissents, expressed concern for the potential liability that municipalities might face under the antitrust laws.⁷⁹

The Court again considered the application of the *Parker* doctrine in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*⁸⁰ when it held that a California statute⁸¹ requiring wine wholesalers to file wine price schedules with the state violated the Sherman Act.⁸² The Court, relying on *Lafayette*, articulated for the first time a twofold inquiry to determine whether a challenged action lies within the scope of the *Parker* exemption. First, citing *Lafayette*, the Court ruled that the action must be "clearly

77. *Id.* at 437 (Stewart, J., dissenting); see *infra* text accompanying note 156.

78. *Id.* at 439 (Stewart, J., dissenting).

79. *Id.* at 440 (Stewart, J., dissenting), 442 (Blackmun, J., dissenting).

80. 445 U.S. 97 (1980).

81. The statute provides as follows:

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 for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.

(b) Make and file a fair 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 1964).

82. 445 U.S. 97, 105-06 (1980). The California Department of Alcoholic Beverage Control charged the respondent with violating the challenged statute by selling 27 cases of wine below the price schedule of E. & J. Gallo Winery. *Id.* at 100.

Prior to its decision in *Midcal*, the Supreme Court held in *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978), that the California Automobile Franchise Act was "a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships." *Id.* at 109. The Court apparently found the state authorization to restrain trade so explicit that it summarily dismissed the contention that *Parker* was inapplicable. The Act provides that an auto manufacturer must secure the authorization of the New Motor Vehicle Board before opening or moving a new franchise into the territory of an existing franchised dealer if the existing dealer protests the move. CAL. VEH. CODE § 3062 (West Supp. 1981). While it did not articulate any systematic analysis of the legislative history of the Act, the Court observed that the federal government and 25 states have enacted legislation to protect new car dealers. 439 U.S. at 100-01. Eighteen states have statutes very similar to the California Automobile Franchise Act. *Id.* at 102 n.7.

articulated and affirmatively expressed as state policy.”⁸³ The Court found that the statute for resale price maintenance of wines in California met this part of the *Lafayette* test.⁸⁴ Second, the Court determined that the action must be “actively supervised” by the state.⁸⁵ California, however, failed to satisfy this part of the inquiry because the state merely “authorize[d] price-setting and enforce[d] the prices established by private parties.”⁸⁶ The Court found the “gauzy cloak of state involvement” insufficient to bring the price-setting arrangement within the purview of the newly redefined *Parker* exemption.⁸⁷

III. RECENT DEVELOPMENT

Since the Court first established in *Parker* that the Sherman Act does not apply to a restraint on trade imposed directly by a state, it has groped for an analytical framework to determine the limits of the state action immunity. The two-part inquiry in *Midcal* set forth the criteria that a state agency must satisfy before its anticompetitive acts fall within the scope of the *Parker* exemption. The Court’s earlier effort in *Lafayette* to apply to a municipality the requirement that eventually became the first part of the *Midcal* test—whether the state explicitly authorized the restraint on competition—however, resulted in no clear majority position. Because the petitioners in *Lafayette* were not acting pursuant to home rule authority, the Court did not have occasion to consider whether the Louisiana home rule amendment would provide the clear state authorization to regulate competition that the enabling statute in *Lafayette* lacked. With no guidance other than the divergent rationales in the separate opinions of *Lafayette*, several lower courts have reached conflicting conclusions on the applicability of the *Parker* exemption to home rule municipalities seeking to displace competition with regulation.

The Sixth Circuit extended the *Parker* exemption to a home rule municipality in *Hybud Equipment Corp. v. City of Akron*.⁸⁸ The court upheld a city ordinance requiring all garbage collectors

83. 445 U.S. at 105.

84. *Id.*

85. *Id.*

86. *Id.* The Court apparently distinguished the wine program in *Midcal* from the agricultural proration scheme in *Parker* on the basis that the state did not review the price maintenance in *Midcal*. *Id.* at 105; see *supra* notes 21-26 and accompanying text.

87. *Id.* at 106.

88. 654 F.2d 1187 (6th Cir. 1981), *vacated and remanded*, 102 S. Ct. 1416 (1982).

within the city and county to deposit all refuse at a new energy recycling plant and to pay a tipping fee when they deposited the garbage.⁸⁹ Without the ordinance's guarantee of a steady supply of garbage to the plant, the underwriters for the bonds necessary to finance the plant would have refused to underwrite the offering.⁹⁰ The conditions in the ordinance, however, interfered with the plaintiff's landfill operation and the profitable business of selling recyclables that he operated in conjunction with the landfill.⁹¹ Observing that Ohio courts have held that the Ohio home rule consti-

89. *Id.* at 1195. The challenged portions of the Akron ordinance read:

No person, except duly authorized collectors of the City or private haulers licensed pursuant to law shall collect or remove any garbage, or rubbish accumulating within the City or use the streets, avenues and alleys of the City for the purpose of collecting or transporting the same. All licenses granted to such private haulers and all contracts or other forms of authorization of duly authorized collectors shall require that all garbage or rubbish collected and transported under authority for disposal by the City's energy plant, be disposed of at such plant from and after the date on which such plant begins accepting garbage and rubbish for disposal.

Until such time as the City's recycle energy plant begins accepting rubbish for disposal, no rubbish shall be deposited by the holder of a rubbish hauler's license within the corporate limits of the City except at a place designated in writing by the Mayor. From and after the date on which such plant begins accepting rubbish for disposal, all rubbish collected within the corporate limits of the City by a holder of a rubbish hauler's license shall be deposited at such plant; provided that rubbish which is not acceptable for disposal by such plant shall not be deposited within the City except at a place designated in writing by the Mayor.

Id. at 1189 n.3 (quoting Akron ordinance).

90. The underwriters for the bond issue, Dillon, Reed & Co., required that the city, county, and the Ohio Water Development Authority execute an agreement, which contained the following provisions:

[The City of Akron] will not establish, construct, or operate nor consent to the establishment, construction or operation of any facility for the disposal or other treatment of Solid Waste which is acceptable for disposal [at the plant] and for which the [plant] has capacity available and which the [Water Authority] determines to be detrimental to the [plant], and, further, to the extent legally permissible, it will oppose the establishment, construction or operation of such a facility

. . . .

For the term of this Agreement, the [City] shall require that all collectors and haulers of Solid Waste within the [City] be licensed by the [City] and all such licenses shall provide that all collectors or haulers of Solid Waste shall dispose of all Solid Waste generated within the corporate limits of the [City] which is acceptable for disposal by the [plant] to be delivered to the [plant] for disposal through the [plant] and require that such haulers and collectors and the [City] pay or cause to be paid the fees and charges imposed by the [City] for the disposal of Solid Wastes at the [plant]. The [City] will take all available action, administrative, judicial and legislative, to cause all Solid Waste generated within the corporate limits of the [City] and which is acceptable for disposal by the project, to be delivered to the [plant] for disposal through the [plant].

Id. at 1189 n.2.

91. *Id.* at 1190.

tutional provisions "pass the sovereign power of municipal government . . . directly from the people of the state to the people of the city,"⁹² the Sixth Circuit also noted that a state statute grants Ohio cities authority to regulate the disposal of wastes.⁹³ The court found it difficult to apply the *Lafayette* decision "since the plurality and dissenting opinions [were] each supported by four justices, and no line of reasoning command[ed] a majority of the Court."⁹⁴ The Sixth Circuit distinguished *Lafayette* because the Louisiana cities were competing "with others outside the boundaries of [their] governmental authority in an area in which [they were] not

92. *Id.* at 1191.

93. *Id.* OHIO REV. CODE ANN. § 715.43 (Page 1976) reads: "Any municipal corporation may provide for the collection and disposition of sewage, garbage, ashes, animal and vegetable refuse, dead animals, and animal offal, and may establish, maintain, and regulate plants for the disposal thereof."

The Ohio home rule amendment reads: "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary, and other similar regulations, as are not in conflict with general laws." OHIO CONST. art. XVIII, § 3 (adopted 1912).

One commentator has noted that the "unfortunate" drafting of the Ohio clause has forced courts to distinguish between matters of "local self-government" and those areas subject to the "general laws." 1 C. ANTIEAU, *supra* note 1, § 3.02; *see also* *Cincinnati & Suburban Bell Tel. Co. v. City of Cincinnati*, 215 N.E.2d 631, 641 (Ohio P. Ct. 1964). Nevertheless, Ohio courts often have stressed the extensive authority delegated to municipalities under the state's constitutional home rule. *E.g.*, *Bazell v. City of Cincinnati*, 13 Ohio St. 2d 63, 68, 233 N.E.2d 864, 868 ("[A] charter city has all powers of local self-government, except to the extent that those powers are taken from it or limited by other provisions of the Constitution or by statutory limitations on the powers of a municipality which the Constitution has authorized the General Assembly to impose.") (emphasis in original), *appeal dismissed*, 391 U.S. 601 (1968); *City of Cleveland v. Raffa*, 13 Ohio St. 2d 112, 113-14, 235 N.E.2d 138, 140, *cert. denied*, 393 U.S. 927 (1968); *State ex rel. McClure v. Hagerman*, 155 Ohio St. 320, 328, 98 N.E.2d 835, 837 (1951) (municipalities have full authority over municipal affairs regardless of express provisions of local charter); *Billings v. Cleveland Ry.*, 92 Ohio St. 478, 489, 111 N.E. 155, 158 (1917) (home rule city has authority to franchise street railway). The Ohio case law reveals the varied areas in which municipalities have authority to act. *E.g.*, *Young v. City of Dayton*, 12 Ohio St. 2d 71, 72, 232 N.E.2d 655, 656 (1967) (home rule city has authority to convey surplus municipal property); *Thompson v. City of Cincinnati*, 2 Ohio St. 2d 292, 294, 208 N.E.2d 747, 749-50 (1965) (home rule city can impose an income tax); *State ex rel. Bindas v. Andrisb*, 165 Ohio St. 441, 445, 136 N.E.2d 43, 45 (1956) (home rule city has power to set qualifications for city councilmen different from those prescribed by state legislature); *Village of Perrysburg v. Ridgway*, 108 Ohio St. 245, 258-59, 140 N.E. 595, 598 (1923) (home rule city can control buses traveling through the city); *Froelch v. City of Cleveland*, 99 Ohio St. 376, 384-85, 124 N.E. 212, 215 (1919) (home rule city can regulate load weights of vehicles on city streets); *Massa v. City of Cincinnati*, 110 N.E.2d 726, 731 (Ohio C.P.) (home rule city can dictate manner and method of street repair), *appeal dismissed*, 160 Ohio St. 254, 115 N.E.2d 689 (1953); *City of Columbus ex rel. Falter v. Columbus Metropolitan Housing Auth.*, 67 N.E.2d 338, 351 (Ohio C.P.) (home rule city can require slum clearance and provision of low-cost housing), *aff'd*, 68 N.E.2d 108 (Ohio Ct. App. 1946).

94. *Hybud Equipment Corp. v. City of Akron*, 654 F.2d at 1195.

politically accountable."⁹⁵ To justify its holding in light of the contradictory signals from *Lafayette*, the court offered three rationales for its decision. First, garbage collection and incineration are "traditional" activities of government.⁹⁶ Second, the "legal system of the state" allows the state water authority to maintain some degree of supervision over the facility.⁹⁷ Last, the waste disposal system accords with the energy and environmental policies of the federal government.⁹⁸ Recognizing the validity of the federal policy of open markets and competition that underlies the antitrust laws,⁹⁹ the court, nevertheless, found that this federal interest should not preempt a municipality's "plenary, governmental power to deal with such local problems affecting the public interest."¹⁰⁰

Just ten days before the Sixth Circuit issued its opinion in *Ak-*

95. *Id.* The Sixth Circuit had speculated that this "may turn out [to be] the narrow holding" of *Lafayette*. *Id.*; see *Glenwillow Landfill, Inc. v. City of Akron*, 485 F. Supp. 671, 678 n.11 (N.D. Ohio 1979), *aff'd sub nom. Hybud Equipment Corp. v. City of Akron*, 654 F.2d 1187 (6th Cir. 1981), *vacated and remanded*, 102 S. Ct. 1416 (1982).

96. 654 F.2d at 1195. Furthermore, the case law in Ohio expressly authorizes a home rule city to maintain a monopoly in the disposal of solid waste. See *infra* note 154 and accompanying text.

97. *Id.* at 1195-96. OHIO REV. CODE ANN. § 6123.03 (Page 1977) (current version at OHIO REV. CODE ANN. § 6123.03 (Page 1982)) established the water development authority to provide for the comfort, health, safety, and general welfare of all employees and other inhabitants of the state and for the conservation of the land, air and water resources of the state through efficient and proper methods of disposal, salvage and reuse of or recovery of resources from solid wastes [T]he Ohio water development authority may initiate, acquire, construct, maintain, repair and operate solid waste projects or cause the same to be operated pursuant to a lease, sub-lease or agreement with any person or governmental agency

Id. The district court in *Akron* found this statutory framework sufficient to demonstrate that the state legislature authorized the anticompetitive action by the water development authority. *Glenwillow Landfill, Inc. v. City of Akron*, 485 F. Supp. at 677. The city had approached the water authority originally about financing the project, but the agency was unable to pay for the bonds from its funds. *Id.* at 688.

98. 654 F.2d at 1196. The Department of Energy and the Environmental Protection Agency filed amicus curiae briefs for the City of Akron. Furthermore, the *Akron* court noted that the city's use of refuse as an alternative energy source was consistent with the policy underlying the Resource Conservation and Recovery Act. *Id.* at 1196 & n.5. The Act provides in relevant part as follows:

The Congress finds with respect to energy, that—

(1) solid waste represents a potential source of solid fuel, oil, or gas that can be converted into energy;

(2) the need exists to develop alternative energy sources for public and private consumption in order to reduce our dependence on such sources as petroleum products, natural gas, nuclear and hydro-electric generation; and

(3) technology exists to produce usable energy from solid waste.

42 U.S.C. § 6901(d) (1976).

99. 654 F.2d at 1196; see *supra* note 10 and accompanying text.

100. 654 F.2d at 1196.

ron, the District Court for the Southern District of Texas refused to extend the *Parker* exemption to a home rule city in *Affiliated Capital Corp. v. City of Houston*.¹⁰¹ The petitioner in *Houston* was a cable television company that had failed in its bid to gain a franchise for a portion of the lucrative Houston market.¹⁰² In evaluating the city's claim for immunity under the *Parker* doctrine, the court traced the recent evolution of the exemption and the various interpretations of the applicable standard.¹⁰³ The District Court determined that the city could meet neither the *Goldfarb* standard of compulsion by the state to displace competition,¹⁰⁴ nor the *Lafayette* requirement of a legislative intent to restrain trade.¹⁰⁵ The court noted that the Texas constitutional provision for home rule municipalities,¹⁰⁶ which did not contain any limitation upon a city's power to franchise,¹⁰⁷ constituted a neutral ex-

101. 519 F. Supp. 991 (S.D. Tex. 1981). The court in *Houston* also sustained a jury verdict that the defendants—the successful franchisee, the city, and the mayor—“had participated in a conspiracy to limit competition from non-conspirators and to limit competition among co-conspirators.” *Id.* at 1005. Nevertheless, because the plaintiff failed to demonstrate that its failure to receive a franchise resulted from the conspiracy, *id.* at 1009, the court granted the defendant's motion for judgment *n.o.v.* The court analyzed the *Parker* doctrine extensively “to demonstrate that [it] would have been inapplicable on the current record, even if plaintiff had prevailed on the causation issue.” *Id.* at 1012.

102. *Id.* at 998-99.

103. *Id.* at 1023-27.

104. *Id.* at 1026-27; see *supra* notes 27-31 and accompanying text.

105. 519 F. Supp. at 1027.

106. TEX. CONST. art. 11, § 5 provides as follows:

Cities having more than five thousand (5000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the Legislature, and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State; said cities may levy, assess and collect such taxes as may be authorized by law or by their charters; but no tax for any purpose shall ever be lawful for any one year, which shall exceed two and one-half per cent. of the taxable property of such city, and no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and creating a sinking fund of at least two per cent. thereon; and provided further, that no city charter shall be altered, amended or repealed oftener than every two years.

107. The Texas Legislature has expressly provided full franchising authority to home rule cities:

To prohibit the use of any street, alley, highway or grounds of the city by any telegraph, telephone, electric light, street railway, interurban railway, steam railway, gas company, or any other character of public utility without first obtaining the consent of the governing authorities expressed by ordinance and upon paying such compensation as may be prescribed and upon such condition as may be provided by any such ordinance. To determine, fix and regulate the charges, fares or rates of any person, firm or corporation enjoying or that may enjoy the franchise or exercising any other

pression of legislative intent by the state legislature to provide freedom to home rule cities in the franchising process.¹⁰⁸

The Tenth Circuit held in *Community Communications Co. v. City of Boulder*¹⁰⁹ that the *Parker* exemption applied to an anticompetitive ordinance enacted by the city pursuant to its home rule authority. The Supreme Court granted certiorari to clarify the impact of home rule on the availability of *Parker* immunity. In *Boulder* the petitioning cable television company had operated a cable television system in Boulder, Colorado, under license from the city council since 1966.¹¹⁰ Because technological advances increased the capabilities of cable television,¹¹¹ the petitioner notified the city council in May 1979 that it intended to expand its service area.¹¹² A newly formed cable television company informed the city council in July 1979 of its interest in operating a cable television system in Boulder.¹¹³ Based upon a study of its cable television policy conducted with the aid of an outside consultant,¹¹⁴

public privilege in said city and to prescribe the kind of service to be furnished by such person, firm or corporation, and the manner in which it shall be rendered, and from time to time alter or change such rules, regulations and compensation . . .

TEX. REV. CIV. STAT. ANN. art. 1175 (12) (Vernon 1963).

108. 519 F. Supp. at 1029. See *infra* notes 121-23 and accompanying text.

109. 630 F.2d 704 (10th Cir. 1980), *rev'd*, 102 S. Ct. 835 (1982).

110. *Community Communications Co. v. City of Boulder*, 102 S. Ct. 835, 835 (1982). In 1964 the city issued a 20 year exclusive license to a company that subsequently assigned it to petitioner in 1966. Under the provisions of the license, petitioner maintained a cable television service for residents of the University Hills section of Boulder who were unable to receive broadcast television for geographical reasons. Approximately 20% of Boulder's population lived in the University Hills area. *Id.* at 837.

111. The district court summarized the recent developments in the cable television industry as follows:

Up to late 1975, cable television throughout the country was concerned primarily with retransmission of television signals to areas which did not have normal reception, with some special local weather and news services originated by the cable operators. During the late 1970's however, satellite technology impacted the industry and prompted a rapid, almost geometric rise in its growth. As earth stations became less expensive, and "Home Box Office" companies developed, the public response to cable television greatly increased the market demand for such expanded services.

The "state of art" presently allows for more than 35 channels, including movies, sports, FM radio, and educational, children's, and religious programming. The institutional uses for cable television are fast increasing, with technology for two-way service capability. Future potential for cable television is referred to as "blue sky", indicating that virtually unlimited technological improvements are still expected. *Community Communications Co. v. City of Boulder*, 485 F.Supp. 1035, 1036-37 (D. Colo.), *rev'd*, 630 F.2d 704 (10th Cir. 1980), *rev'd*, 102 S. Ct. 835 (1982).

112. 102 S. Ct. at 837.

113. *Id.*

114. *Id.* at 837 n.6 (quoting *Community Communications Co. v. City of Boulder*, 485 F. Supp. 1035, 1037 (D. Colo. 1980)).

the council passed an ordinance prohibiting the petitioner from expanding its business for three months while the council drafted an ordinance to regulate the cable television market in the city.¹¹⁵ The council expressed its concern that any further expansion by the petitioner might dissuade potential competitors from entering the Boulder market.¹¹⁶

The Supreme Court surveyed the relevant case law¹¹⁷ and con-

115. 102 S. Ct. at 837-38. The preamble of the interim ordinance read in pertinent part as follows:

" . . . cable television companies have within recent months displayed interest in serving the community and have requested the City Council to grant [them] permission to use the public right-of-way in providing that service; and

" . . . the present permittee, [petitioner], has indicated that it intends to extend its services in the near future . . . ; and

" . . . the City Council finds that such an extension . . . would result in hindering the ability of other companies to compete in the Boulder market; and

" . . . the City Council intends to adopt a model cable television permit ordinance, solicit applications from interested cable television companies, evaluate such applications, and determine whether or not to grant additional permits . . . [within] 3 months, and finds that an extension of service by [petitioner] would result in a disruption of this application and evaluation process; and

" . . . the City Council finds that placing temporary geographical limitations upon the operations of [petitioner] would not impair the present services offered by [it] to City of Boulder residents, and would not impair [its] ability . . . to improve those services within the area presently served by it."

Id. at 838 n.7 (quoting Boulder, Colo., Ordinance 4473 (1979)).

After the Tenth Circuit's decision in *Community Communications Co. v. City of Boulder*, 630 F.2d 704 (10th Cir. 1981) (*Boulder I*), and the expiration of the 90 day moratorium, the city instituted additional temporary restrictions on petitioner while the city studied its plan. Petitioner unsuccessfully challenged these restraints prior to the Supreme Court's decision in *Boulder I* in *Community Communications Co. v. City of Boulder*, 496 F. Supp. 823 (D. Colo. 1980), *rev'd*, 660 F.2d 1370 (10th Cir. 1981) (*Boulder II*). Because the Tenth Circuit in *Boulder II* relied upon its reasoning in *Boulder I*, this Recent Development concentrates on the rationale of the earlier decision.

116. 102 S. Ct. at 838. The district court noted that "[t]he primary thrust of [the consultant's] advice was that the City should be concerned about the tendency of a cable system to become a natural monopoly." *Community Communications Co. v. City of Boulder*, 485 F. Supp. 1035, 1037 (D. Colo.), *rev'd*, 630 F.2d 704 (10th Cir. 1980), *rev'd*, 102 S. Ct. 835 (1982). At the time the Tenth Circuit considered *Boulder II*, two additional cable television companies had expressed an interest in the Boulder market. *Boulder II*, 660 F.2d 1370, 1374 (10th Cir. 1981).

117. 102 S. Ct. at 839-43. The District Court for the District of Colorado, which had denied the *Parker* exemption to the city in the *Boulder* cases, reached a different result in *Pueblo Aircraft Serv., Inc. v. City of Pueblo*, 498 F. Supp. 1205 (D. Colo. 1980). In that case the court held that the city was immune from the antitrust laws in its operation of an airport outside the city's corporate limits. Although the district court outlined carefully the Tenth Circuit's holding in *Boulder I*, *id.* at 1209-10, and the Colorado home rule provision, *id.* at 1207-08, the court appeared to base its holding primarily upon a statute that stated:

"[T]he . . . establishment . . . and operation of airports . . . are hereby declared to be public, governmental functions, exercised for a public purpose, and matters of public necessity; and such lands and other property, easements and privileges acquired and

cluded that the city's action did not fall within the parameters of *Parker*, unless the ordinance constituted "the action of the State of Colorado itself in its sovereign capacity . . . [or] municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy."¹¹⁸ Rejecting the application of the *Parker* doctrine by the Tenth Circuit,¹¹⁹ the Supreme Court held that the system of federalism embodied in the Constitution has "no place for sovereign cities."¹²⁰ The city of Boulder maintained that the home rule amendment to the Colorado Constitution was sufficient to meet the *Lafayette* requirement of "clear articulation and affirmative expression"¹²¹ of a state authorization to

used in the manner and for the purpose enumerated in this act shall and are hereby declared to be acquired and used for public purposes and as a matter of public necessity."

498 F. Supp. at 1207. The court found that in view of this statute, "complete sovereignty has been granted by the Constitution to Home Rule Cities." *Id.* Furthermore, the express language of the statute convinced the court that the City of Pueblo "was acting in a governmental and not in a proprietary capacity." *Id.*

In a case decided prior to *Goldfarb*, the Seventh Circuit denied a challenge that an unsuccessful cable television applicant made to a city for granting an exclusive franchise to another company. *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975). The city had acted pursuant to an Illinois franchising statute, which provided in relevant part: "The corporate authorities of each municipality may license, franchise and tax the business of operating a community antenna television system as hereinafter defined." ILL. ANN. STAT. ch. 24, § 11-42-11 (Smith-Hurd Supp. 1981-82). Even though the plaintiff admitted that the actions of the city council did not violate the Sherman Act, the court noted that the law implicitly granted a city "the authority to determine whether one or more than one applicant should be franchised." *Id.* at 228.

118. 102 S. Ct. at 841. The Court did not discuss the compulsion standard articulated in *Goldfarb*. See *supra* notes 27-31 and accompanying text.

119. *Id.* at 842. The Tenth Circuit held in *Boulder I* that *Lafayette* does not control when "the governmental entity is asserting a governmental rather than proprietary interest." *Boulder I*, 630 F.2d 704, 708 (10th Cir. 1980), *rev'd*, 102 S. Ct. 835 (1982). Furthermore, the court appeared to identify the city and the state as one entity because it found the city's ordinances and their enforcement sufficient to meet the *Midcal* test. *Id.*; see *supra* notes 80-87 and accompanying text. This position undoubtedly prompted the dissent to the Tenth Circuit's opinion in *Boulder I* to assert "We are a nation not of 'city-states' but of States." *Id.* at 717 (Markey, C.J., dissenting) (quoted with approval in 102 S. Ct. at 842).

120. 102 S. Ct. at 842.

121. *Id.* The home rule amendment to the Colorado Constitution provides in relevant 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 municipi-

restrain trade. Furthermore, the city contended that the ordinance was within the powers "granted" by the home rule provision. The Supreme Court rejected this view,¹²² holding instead that "the State's position . . . of mere *neutrality* respecting the municipal actions challenged as anticompetitive" did not satisfy the *Lafayette* requirement.¹²³ The Court dismissed the theory that a general grant of authority to enact ordinances implied a state authorization of anticompetitive practices by a municipality.¹²⁴ The city ar-

palities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and towns and to the people thereof, any right or power essential or proper to the full exercise of such right.

The statutes of the state of Colorado so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.

COLO. CONST. art. XX, § 6 (home rule amendment).

The Colorado home rule amendment explicitly establishes the supremacy of municipal regulation over state law in municipal matters. Colorado courts have recognized the plenary power of municipalities in a variety of contexts. *See, e.g.,* Security Life & Accident Co. v. Temple, 177 Colo. 14, 16, 492 P.2d 63, 64 (1972) (state cannot preclude home rule cities from local taxation because it is "essential . . . to the full exercise" of the right of self government") (quoting Colorado home rule amendment); Fladung v. City of Boulder, 165 Colo. 244, 248-49, 438 P.2d 688, 691 (1968) (state debt limit does not apply to home rule municipalities' bond issues); Leach & Arnold Homes, Inc. v. City of Boulder, 32 Colo. App. 16, 18, 507 P.2d 476, 477 (1973) (Colorado law provides "unlimited authority to reserve to the electors of the City of Boulder the referendum power and the manner of exercising the same"). The courts have emphasized that the state legislature may not impair constitutionally conferred home rule authority. *See, e.g.,* Denver Urban Renewal Auth. v. Byrne, 618 P.2d 1374, 1380-81 (Colo. 1980); Vela v. People, 174 Colo. 465, 466-67, 484 P.2d 1204, 1205 (1971) (en banc); Kelly v. City of Fort Collins, 163 Colo. 520, 522-23, 431 P.2d 785, 787 (1967) (en banc); Four-County Metropolitan Capital Improvement Dist. v. Board of County Comm'rs, 149 Colo. 284, 294, 369 P.2d 67, 72 (1962) (en banc); City of Fort Collins v. Public Utilities Comm'n, 69 Colo. 554, 195 P. 1099, 1100 (1921). The Colorado courts, however, also have held that matters of statewide concern are the sole province of the state legislature. *E.g.,* Century Elec. Serv. & Repair, Inc. v. Stone, 193 Colo. 181, 183-84, 564 P.2d 953, 955 (1977) (en banc) (licensing of electricians is statewide concern); City of Englewood v. Mountain States Tel. & Tel. Co., 163 Colo. 400, 406, 431 P.2d 40, 43 (1967) (en banc) (telephone utility is state concern); Alessi v. Municipal Court, 38 Colo. App. 153, 154, 556 P.2d 87, 88-89 (1976) (state supreme court may impose rules of procedure for municipal courts).

The Tenth Circuit placed great emphasis upon the Colorado courts' construction of this amendment, *see Boulder I*, 630 F.2d at 707, but the Supreme Court rejected this reliance. *See infra* notes 150-56 and accompanying text.

122. 102 S. Ct. at 843. The *Boulder* majority stated,

A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. Nor can these actions be truly described as "comprehended within the powers granted," since the term, "granted," necessarily implies an affirmative addressing of the subject by the State. The State did not do so here

Id. (emphasis in original).

123. *Id.* (emphasis in original).

124. *Id.*; *see infra* notes 145 & 154 and accompanying text.

gued that a denial of the *Parker* exemption would have deleterious effects upon cities, but the Court viewed that contention as merely "an attack upon the wisdom of the longstanding congressional commitment to the policy of free markets and open competition embodied in the antitrust laws."¹²⁵

In a separate concurring opinion, Justice Stevens suggested that both *Boulder* and *Lafayette* presented two separate issues: (1) whether the *Parker* doctrine exempts the municipality from the antitrust laws; and (2) whether the municipality's actions constitute a violation of the Sherman Act. According to Justice Stevens, the majority did not hold that Boulder violated the antitrust laws, but merely that the Sherman Act applies to Boulder despite the city's status as a home rule municipality.¹²⁶ Recommending that the "dissent's dire predictions about the consequences of the Court's holding . . . be viewed with skepticism,"¹²⁷ Justice Stevens noted that subsequent events had not substantiated a similar warning by Justice Stewart in *Cantor*.¹²⁸

In a strong dissenting opinion, Justice Rehnquist¹²⁹ warned that the majority position will "impede, if not paralyze, local governments' efforts to enact ordinances and regulations aimed at protecting public health, safety, and welfare, for fear of subjecting the local government to liability under the Sherman Act."¹³⁰ Justice Rehnquist cited two propositions to support his charge that the majority made two serious errors in its consideration of *Boulder*:

125. *Id.*

126. *Id.* at 844 (Stevens, J., concurring). Justice Stevens also maintained that the Court did not hold in *Lafayette* that the Louisiana cities had violated the Sherman Act. *Id.* He stated, "Moreover, that question is quite different from the question whether the City of Boulder violated the Sherman Act because the character of their respective activities differs. In both cases, the violation issue is separate and distinct from the exemption issue." *Id.*

127. *Id.*; see *infra* notes 129-34 and accompanying text.

128. *Id.* In his dissenting opinion in *Cantor* Justice Stewart stated,

The Court today holds that a public utility company, pervasively regulated by a state utility commission, may be held liable for treble damages under the Sherman Act for engaging in conduct which, under the requirements of its tariff, it is obligated to perform. I respectfully dissent from this unprecedented application of the federal anti-trust laws, which will surely result in disruption of the operation of every state-regulated public utility company in the Nation and in the creation of "the prospect of massive treble damage liabilities" payable ultimately by the companies' customers.

Cantor v. Detroit Edison Co., 428 U.S. 579, 614-15 (1976) (Stewart, J., dissenting) (quoting Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U.L. REV. 693, 728 (1974)).

129. Chief Justice Burger and Justice O'Connor joined the dissent.

130. 102 S. Ct. at 845 (Rehnquist, J., dissenting). For a discussion of the Supreme Court's treatment of the issue of a municipality's liability for treble damages, see *infra* notes 170-85 and accompanying text.

(1) that the state action questions of the *Parker* doctrine are more properly questions of *preemption* rather than *exemption*; and (2) that the majority essentially treated a subdivision of a state as "indistinguishable from any privately owned business."¹³¹ In Justice Rehnquist's view, the majority's suggestion that a municipality actually may violate the Sherman Act¹³²—rather than merely enact a statute that is unenforceable because the federal government has preempted the area under the supremacy clause¹³³ of the Constitution—potentially will subject the municipality to great liability because of the vicissitudes of judicial interpretations of the Sherman Act.¹³⁴ Furthermore, Justice Rehnquist found no distinction between cities and states under a supremacy clause analysis¹³⁵ and saw no reason for the majority's "startling conclusion that our Federalism is in no way implicated when a municipal ordinance is invalidated by the Sherman Act."¹³⁶

131. 102 S. Ct. at 845 (Rehnquist, J., dissenting).

132. *Id.* (Rehnquist, J., dissenting).

133. The supremacy clause of the United States Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be 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.

U.S. CONST. art. VI, cl. 2.

134. 102 S. Ct. at 848-49 (Rehnquist, J., dissenting). Justice Rehnquist's view that the *Boulder* majority failed to distinguish the city from a private party is particularly significant in light of *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978), in which the Court held that a party cannot defend a restraint upon trade on the basis that unfettered competition threatens public safety or a profession's ethical standards. *Id.* at 693-94. Thus, Justice Rehnquist found that the majority's holding in *Boulder*, coupled with *Professional Engineers*, would preclude a municipality's efforts to justify a restraint upon trade "on the basis that its benefits to the community, in terms of traditional health, safety, and public welfare concerns, outweigh its anticompetitive effects." 102 S. Ct. at 848 (Rehnquist, J., dissenting). Justice Rehnquist maintained, however, that a rejection of the applicability of the *Professional Engineers* rationale to municipal legislation created other difficulties:

If the Rule of Reason were "modified" to permit a municipality to defend its regulation on the basis that its benefits to the community outweigh its anticompetitive effects, the courts will be called upon to review social legislation in a manner reminiscent of the *Lochner* era. Once again, the federal courts will be called upon to engage in the same wide-ranging, essentially standardless inquiry into the reasonableness of local regulation that this Court has properly rejected.

Id. at 849 (Rehnquist, J., dissenting); see *infra* notes 168-75 and accompanying text.

135. 102 S. Ct. at 849-50 (Rehnquist, J., dissenting).

136. *Id.* at 850 (Rehnquist, J., dissenting). According to Justice Rehnquist, the Supreme Court has failed to distinguish between states and their subdivisions when the questions concern preemption. *Id.* (Rehnquist, J., dissenting) (citing *City of Burbank v. Lockhead Air Terminal, Inc.*, 411 U.S. 624 (1973)); *Huron Portland Cement Co. v. City of*

IV. ANALYSIS

While the Supreme Court's decision in *Boulder* dispelled some uncertainty about the extent of the Court's resolve to deny the *Parker* exemption to municipalities, the Court has left a number of questions unanswered for home rule cities that must consider their newfound vulnerability to antitrust challenges. The Supreme Court concluded that the city of Boulder, despite its home rule authority, failed to meet the *Lafayette* criterion of clear articulation and authorization by the state for an extension of *Parker* immunity,¹³⁷ but the Court neglected to provide any framework—absent a specific legislative enactment from the state legislature—for evaluating the importance of local control of municipal economic matters. For example, the Supreme Court struck down the ordinance in *Akron* even though it furthered significant public policies by regulating garbage collection.¹³⁸ Similarly, the development of cable television systems on a community-by-community basis results not only from current technological advances, but also from the widely varying opportunities offered by certain cities, which heighten each city's interest in regulated and controlled expansion of this medium.¹³⁹ The limited application of *Parker* immunity by *Boulder*, however, poses potential problems for home rule municipalities that traditionally have developed regulatory schemes tailored to their particular needs. Because local government has a significant interest in regulating certain activities, the Court should modify the approach in *Boulder* to permit home rule cities to rely upon their constitutional authority to restrain competition without the threat of liability for treble damages. In developing a rationale for applying *Parker* that will accommodate local governmental interests, however, the Court also must weigh important federal interests at stake when a home rule municipality implements anticompetitive measures. This part of the Recent Development first analyzes the *Boulder* decision and

Detroit, 362 U.S. 440 (1960). Prior to the Supreme Court's holding in *Lafayette*, Professor Handler argued that "the preservation of our federalism overrides whatever benefits might flow from extending the reach of antitrust by limiting the ambit of the state action defense." Handler, *supra* note 6, at 20. In the context of his discussion in support of the *Parker* doctrine, Professor Handler criticized a preemption analysis as "plainly at war with the fundamental principles of American federalism." *Id.* at 15.

137. See *supra* notes 119-25 and accompanying text.

138. See *supra* notes 88-100 and accompanying text.

139. One author has encouraged cities to take the initiative in developing cable systems to realize the potential benefits of the medium to urban society. R. JACOBSON, *MUNICIPAL CONTROL OF CABLE COMMUNICATIONS* (1977).

the problems it poses for cities like Akron,¹⁴⁰ and then discusses possible rationales that the Court may utilize to determine whether a home rule municipality denied the state action exemption under *Boulder* actually has violated the antitrust laws. Finally, the Recent Development concludes that the preemption analysis advocated by Justice Rehnquist best accommodates the competing federal and local interests at stake.¹⁴¹

A. *The Imposition of Liability: Elevating Federal Interests Over Local Concerns*

The *Boulder* case presented the Supreme Court with an opportunity to define the role of home rule authority in the *Parker* doctrine in a factual setting in which the municipality lacked a compelling justification for the regulation. In *Boulder* the Court noted that the new cable television company that sought to enter the local market had indicated its intention to do so regardless of any action by the city council.¹⁴² Thus, the failure of the existing company's intended expansion to dissuade the potential competition may have weakened significantly the city's position that an anticompetitive ordinance was needed. The city in *Akron*, on the other hand, sought to advance an important local interest—preservation of a viable central business district¹⁴³—as well as an important federal policy—development of alternative energy sources.¹⁴⁴ The *Boulder* case also offered the Court an opportunity to assess the significance of a broad home rule amendment. Colorado cities derive their home rule authority from the state constitution rather than from statute, and the Colorado home rule provision is one of the most expansive in existence.¹⁴⁵ Thus, despite the

140. See *infra* notes 142-62 and accompanying text. For several recent newspaper accounts of the potential impact of the *Boulder* decision, see Page, *Iowa Survey—State warns cities on taxi regulations*, Nat'l Cities Weekly, Apr. 19, 1982, at 1, col. 1; Ranii, *Cities' Immunity Loss Spawning Antitrust Suits?*, Nat'l L.J., Mar. 1, 1982, at 8, col. 3; Siena, *Boulder decision put cities between rock and hard place*, Nat'l Cities Weekly, Feb. 1, 1982, at 3, col. 1.

141. See *infra* notes 163-84 and accompanying text.

142. *Boulder I*, 102 S. Ct. at 837 n.5.

143. One event that prompted the city of Akron to undertake the energy project was the desire of the company supplying steam heat to downtown businesses to abandon the Akron market. *Hybud Equipment Corp. v. City of Akron*, 654 F.2d at 1188.

144. See *supra* note 98.

145. The Colorado Supreme Court has noted the extreme breadth of its state's home rule provision: "In numerous opinions . . . it has been made perfectly clear that when the people adopted [the home rule amendment] they conferred every power theretofore possessed by the legislature to authorize municipalities to function in local and municipal af-

more compelling case for municipal immunity in *Akron*, the Supreme Court's decision to reverse and vacate the Sixth Circuit's decision in *Akron* was within the scope of *Boulder*.¹⁴⁶

The Supreme Court's reluctance to allow municipal governments to avoid the restrictions of the antitrust laws without scrutiny is understandable in light of the strong federal policies underlying the Sherman Act.¹⁴⁷ On several occasions, the Court has expressed its fear that local parochialism could prevent municipalities from giving proper consideration to outside concerns.¹⁴⁸ The *Houston* case, in which the court found that a conspiracy to limit competition included the mayor and other city officials, certainly demonstrates the susceptibility of an exclusive franchising procedure to political corruption and influence peddling.¹⁴⁹ Nevertheless, the same sorts of pressures that could corrupt the legislative process on the local level also can influence state legislatures. In fact, because the vast majority of state legislators would have little or no direct interest in municipal regulation of the type undertaken in *Boulder*, *Akron*, and *Houston*, important municipal issues could become pawns in a legislative chess match of compromise and negotiation.

Moreover, as the *Boulder* dissent noted, the denial of the *Parker* exemption to home rule municipalities raises an important question concerning the relationship between the federal and state governments under American federalism.¹⁵⁰ In those lower federal court decisions extending *Parker* immunity to home rule municipi-

fairs." Four-County Metropolitan Capital Improvement Dist. v. Board of County Comm'rs, 149 Colo. 284, 294, 369 P.2d 67, 72 (1962) (emphasis in original), quoted in Denver Urban Renewal Auth. v. Byrne, 618 P.2d 1374, 1381 (Colo. 1980). In *City of Denver v. Sweet*, 138 Colo. 41, 329 P.2d 441 (1958), the supreme court acknowledged that it knew "of no state with any broader provisions than ours," *id.* at 46, 329 P.2d at 444, but held that a municipality had no power to tax because the state constitution exclusively grants that right to the General Assembly. *Id.* at 51-53, 320 P.2d at 446-47. The Colorado court also used language that foreshadowed the district court opinion in *Boulder I* when it observed that "today [home rule cities] think of themselves as being like medieval city-states with plenary powers which bar the state from any form of supervision or control of matters which later events show to be either matters of constitutional or state-wide concern." *Id.* at 47, 320 P.2d at 444. The court's focus in *Sweet*, however, was the statewide concern/local interest dichotomy that determines whether a municipality may exert its home rule authority in a given area. See *supra* note 1.

146. 102 S. Ct. 1416 (1982), vacating and remanding 654 F.2d 1187 (6th Cir. 1981). See *supra* note 95.

147. See *supra* note 10.

148. See *supra* notes 12 & 57 and accompanying text.

149. See *supra* note 101.

150. See *supra* notes 129-36 and accompanying text.

palities,¹⁵¹ each court relied heavily upon the respective state court's construction of the applicable home rule amendment.¹⁵² The Supreme Court, however, rejected the relevance of state court holdings on the scope of Colorado home rule authority.¹⁵³ The Court's refusal to examine the judicial interpretation of the Colorado home rule amendment is particularly significant for *Akron* because the Ohio Supreme Court previously had upheld the authority of a home rule city to institute a monopoly in garbage collection. Thus, unlike the Colorado decisions on home rule, Ohio's case law explicitly authorizes the activity challenged in *Akron*.¹⁵⁴ Although the Supreme Court's position prevents the vicissitudes of state municipal law from assuming a pivotal role in determining the applicability of antitrust immunity,¹⁵⁵ the Court has foreclosed any input by the state courts on an important state constitutional question. Because little if any state legislative history exists from the periods during which many of the states enacted home rule provisions,¹⁵⁶ state court decisions are often the only tools available in determining a state legislature's intent. Although the Supreme Court has disputed the relevance of *National League of Cities v. Usery*¹⁵⁷ in *Parker* cases, the Court in *Usery* observed "that there are attributes of sovereignty attaching to every state government

151. See *supra* notes 88-100 & 109-16 and accompanying text.

152. See *supra* notes 92-93 & 121 and accompanying text.

153. See *supra* notes 122-25 and accompanying text.

154. *State ex rel. Mook v. City of Cincinnati*, 120 Ohio St. 500, 508-09, 166 N.E. 583, 586, cert. denied, 280 U.S. 578 (1929); see *supra* note 93; see also *Gardner v. Michigan*, 199 U.S. 325 (1905) (City of Detroit has authority to grant exclusive 10-year privilege to provide for disposal of garbage within city); *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905) (Board of Supervisors of San Francisco has authority to provide for disposal of garbage within city and county for 50 years). The Supreme Court in *California Reduction Company* cited the California constitutional home rule provision. *Id.* at 316 (citing CALIF. CONST. art. XI, § 11). See *Sailors v. Board of Educ.*, 387 U.S. 105, 109 (1967) ("Save and unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs."). A number of Ohio court decisions indicate agreement with the traditional view in many states that matters affecting public health are state concerns. See *State ex rel. Mowrer v. Underwood*, 137 Ohio St. 1, —, 27 N.E.2d 773, 775-76 (1940) ("[T]he State did not surrender its sovereign power to protect the public health of the state."); *City of Bucyrus v. State Dep't of Health*, 120 Ohio St. 426, 429-30, 166 N.E. 370, 370 (1929) (state may compel municipality to install sewage treatment facilities). The motivation for the challenged action in *Akron*, however, was apparently economic rather than health-related. See *supra* note 143 and accompanying text.

155. See 1 C. ANTIEAU, *supra* note 1, §§ 3.00-4.00.

156. See *supra* note 77 and accompanying text.

157. 426 U.S. 833 (1976).

which may not be impaired by Congress."¹⁵⁸ In matters that the Constitution does not delegate expressly to the federal government, the states remain sovereign¹⁵⁹ and presumably may delegate their authority as they wish within the limits imposed by their state constitutions and the commerce clause.¹⁶⁰ Furthermore, because many states adopted constitutional home rule amendments by referendum,¹⁶¹ the reservation of authority to the *people* in the tenth amendment¹⁶² may warrant greater deference for such provisions. By enacting a home rule amendment in this manner, the people of a state have made a conscious decision concerning the administration of that state's sovereignty.

158. *Id.* at 845. The Sixth Circuit has enumerated four factors that are important in determining whether an activity is protected under the *Usery* analysis:

(1) the government service or activity benefits the community as a whole and is available to the public at little or no direct expense; (2) the service or activity is undertaken for the purpose of public service rather than for pecuniary gain; (3) government is the principal provider of the service or activity; and (4) government is particularly suited to provide the service or perform the activity because of a communitywide need for the service or activity.

Amersbach v. City of Cleveland, 598 F.2d 1033, 1037 (6th Cir. 1979) (held that operation of an airport is an "integral governmental function"); *see also United Transp. Union v. Long Island R.R.*, 634 F.2d 19 (2d Cir. 1980) (held that state's operation of passenger rail service is "integral governmental function" and not subject to Railway Labor Act), *cert. granted*, 452 U.S. 960 (1981); *Public Serv. Co. v. Federal Energy Regulatory Comm'n*, 587 F.2d 716 (5th Cir. 1979) (Texas oil and gas business held not to be "traditional governmental function"), *cert. denied*, 444 U.S. 879 (1979). *But cf. Kurek v. Pleasure Driveway & Park Dist.*, 557 F.2d 580, 589 (7th Cir. 1977) ("[S]ubordinate units of government—notwithstanding that they derive their powers from a state—are not entitled to all of the federalistic deference that the state would receive."), *vacated*, 435 U.S. 992 (1978), *cert. denied*, 439 U.S. 1090 (1979).

159. U.S. CONST. amend. X; *see infra* note 162.

160. In *Hughes v. Oklahoma*, 441 U.S. 322 (1978), the Supreme Court observed that "[t]he Commerce Clause has . . . been interpreted by this Court not only as an authorization for congressional action but also, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation." *Id.* at 326. The Court outlined the following test to assess the validity of governmental actions under the commerce clause:

(1) [W]hether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

Id. at 336; *see Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 727-29 (1981); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977).

161. *See supra* note 1.

162. The tenth amendment provides as follows: "The powers not delegated to the United States by the Constitution, not provided by it to the states, are reserved to the states respectively, or to the people." U.S. CONST. amend. X (emphasis added).

B. Determining the Validity of a Nonexempt Municipal Action

Notwithstanding these arguments, the *Boulder* decision demonstrates the Court's determination that the policies promoted by the Sherman Act outweigh the local government's interest in regulating certain activities unless the state legislature specifically has authorized the regulation. The question remains, however, whether the Court will accommodate federalistic concerns once a party challenges the municipal action under the antitrust laws. By limiting its decision to the availability of the *Parker* doctrine, the *Boulder* majority did not outline what standard courts should apply to assess the validity of a nonexempt municipal restraint on trade imposed under home rule authority. Therefore, the Court may yet develop a suitable rationale for upholding a nonexempt municipal action under existing antitrust law that will accommodate municipal hardships such as those present in *Akron*. Although the Supreme Court has stressed the failure of Congress to provide an explicit state action exclusion in the Sherman Act,¹⁶³ the Court previously has recognized that the language of the Act is less inclusive than it may appear on its face.¹⁶⁴ Thus, the Court probably will subject municipally imposed restraints upon trade to the well-established rule of reason analysis.¹⁶⁵ This approach would enable the federal courts to deal flexibly with municipal actions and avoid

163. See *supra* note 51 and accompanying text.

164. The Supreme Court's adoption of the rule of reason in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 59-62 (1911), demonstrated a belief that a literal application of the § 1 prohibition of the Sherman Act was not consistent with the congressional intent. The Court elaborated upon its decision in *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972):

In lieu of the narrowest possible reading of § 1, the Court adopted a "rule of reason" analysis for determining whether most business combinations or contracts violate the prohibitions of the Sherman Act. [citation omitted] An analysis of the reasonableness of particular restraints includes consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption. [citation omitted]

Id. at 606-07; see also *Apex Hosiery v. Leader*, 310 U.S. 469, 488 (1940) ("The long time failure of Congress to alter the [Sherman] Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one."). The Supreme Court, however, also broadened the Sherman Act by extending its coverage to insurance companies, despite the Court's earlier determination that insurance is not interstate commerce. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). After surveying the legislative history of the Sherman Act, the Court failed "to find . . . an expression of a clear and unequivocal desire of Congress to legislate only within that area previously declared by this Court to be within the federal power." *Id.* at 556-57 (footnote omitted).

165. See *supra* note 164.

the prospect of state court control of the enforcement of federal antitrust laws through construction of state constitutions. Two problems, however, may arise if the courts apply a rule of reason analysis to challenged municipal actions. First, because many of the anticompetitive measures that municipalities institute may fall within the categories of restraints that are per se unreasonable and, therefore, violative of the Sherman Act,¹⁶⁶ a rule of reason standard could be of little or no assistance to home rule cities facing challenges to municipal actions. Second, and more importantly, the Rehnquist dissent in *Boulder* observed that because the Court treated the municipality as a private entity for purposes of the antitrust laws, the Supreme Court cannot sustain a restraint on trade based solely upon the municipality's conclusion that unfettered competition is against the public interest.¹⁶⁷ The Court's decision in *National Society of Professional Engineers v. United States*¹⁶⁸ established the net impact of a restraint on trade on competition as the only criterion for determining the regulation's reasonableness.¹⁶⁹ Thus, the Court has foreclosed any inquiry under the rule of reason analysis into possible arguments that a challenged ordinance promotes public interests other than competition. Nevertheless, the Court must develop an alternative rationale to enable municipalities—and ultimately, local taxpayers—to avoid the financial burden of treble damages,¹⁷⁰ because the threat of such damages effectively may prevent financially strapped local governments from instituting necessary measures in response to local concerns.¹⁷¹ The language of the antitrust laws provides no basis

166. Recognizing that a rule of reason analysis requires lengthy fact finding and subjective policy decision-making, the Supreme Court has determined,

[t]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. . . . Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing [citation omitted]; division of markets [citation omitted]; group boycotts [citation omitted]; and tying arrangements [citation omitted].

Northern Pac. R.R. v. United States, 356 U.S. 1, 5 (1957).

167. See *supra* note 134.

168. 435 U.S. 679 (1978).

169. *Id.* at 690-91; see *supra* note 134.

170. Several Justices have chastised the Court for its failure to confront the question of a city's liability for treble damages. *Community Communications Co. v. City of Boulder*, 102 S. Ct. at 845 (Rehnquist, J., dissenting); *City of Lafayette v. Louisiana Power & Light*, 435 U.S. at 440-41 (Stewart, J., dissenting), 442-43 (Blackmun, J., dissenting).

171. See 102 S. Ct. at 845 (Rehnquist, J., dissenting); *supra* note 75 and accompanying text.

for avoiding the treble damages remedy if a restraint on trade is unreasonable.¹⁷² Moreover, the Supreme Court's failure to address the damages issue in *Boulder* is especially significant because damages are potentially much greater in larger home rule cities¹⁷³ with complex local economies. This Recent Development surveys three options that the Court might utilize to avoid the prospect of municipal liability for treble damages in many cases that lie outside the scope of the *Parker* exemption. First, the Court could fashion an exception to the traditional rule of reason analysis when a municipality is accused of an antitrust violation. Second, Chief Justice Burger has proposed that the courts apply a "proprietary-governmental" distinction to determine when a municipality violates the antitrust laws. Last, the preemption analysis advocated by Justice Rehnquist might shelter a city from treble damages under the Sherman Act.

To accommodate local interests threatened by a traditional application of the antitrust laws, the Court could develop a reasonableness standard for municipalities that is distinct from the rule of reason analysis articulated in *Professional Engineers* and earlier cases. Undoubtedly, municipalities seeking to regulate trade in the public interest without specific legislative authorization would welcome the availability of an exception to *Professional Engineers* whereby the Court would consider specialized local concerns. To divorce this reasonableness standard from the traditional rule of reason analysis, however, the Court must articulate clearly both the relationship between municipal regulation and the antitrust laws, and the interests that courts should evaluate in determining the reasonableness of a municipally imposed restraint on trade.¹⁷⁴ The Supreme Court in both *Boulder* and *Lafayette* has demonstrated a marked propensity to disagree on the relationship be-

172. Section four of the Clayton Act provides in relevant part:

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 amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (Supp. IV 1980); see *Community Communications Co. v. City of Boulder*, 102 S. Ct. at 844-45 n.2 (Rehnquist, J., dissenting).

173. See *supra* note 17.

174. After the Supreme Court's decision in *Lafayette*, one commentator proposed a three-part "governmental interest defense" for municipalities. *Application of Antitrust Laws, supra* note 6, at 539-43. While the standard purports to accommodate local concerns and federal antitrust policy, its reliance upon vague criteria undoubtedly would lead to uneven application by the courts.

tween municipalities and the antitrust laws.¹⁷⁵

Notwithstanding the likelihood that the Court will rely upon the traditional rule of reason analysis to determine when a municipality violates the Sherman Act, Chief Justice Burger's "proprietary-governmental" distinction in *Lafayette*¹⁷⁶ arguably provides one means of avoiding the vagueness and uncertainty inherent in that analysis. The Supreme Court, however, has recognized previously the pitfalls that are also inherent in the use of the "proprietary-governmental" terminology.¹⁷⁷ Furthermore, since the Court demonstrated its desire to prevent state court control of the enforcement of the federal antitrust laws by its refusal to consider state municipal law in *Boulder*, the Court is unlikely to adopt a terminology that might force it to consider state tort decisions¹⁷⁸ as well as municipal law. The Chief Justice's failure in *Lafayette* to define clearly "proprietary" and "governmental"¹⁷⁹ is indicative of the lack of clarity that pervades opinions that address these distinctions. Municipalities concerned about liability for treble damages would find that the vagueness of the terminology offers potential flexibility in considering the availability of the *Parker* doctrine, but the outcome of an application of either the rule or reason or of some new reasonableness standard to this nebulous distinction would be difficult to predict.¹⁸⁰

175. See *supra* notes 48-79 & 109-36 and accompanying texts.

176. See *supra* notes 60-66 and accompanying text.

177. In *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), the Supreme Court referred to the "'non-governmental'-'governmental' quagmire that has long plagued the law of municipal corporations." *Id.* at 65. The Court also noted that "the decisions in each of the States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound." *Id. But cf. Ohio v. Helvering*, 292 U.S. 360, 368 (1934) ("[T]he immunity of the states from federal taxation is limited to those agencies which are of a governmental character. Whenever a state engages in a business of a private nature it exercises nongovernmental functions, and the business, though conducted by the state, is not immune . . ."). Determining that a federal tax on mineral water applies to an activity by the state of New York, the Supreme Court expressly rejected limitations on the taxing power of Congress derived from "such untenable criteria as 'proprietary' against 'governmental' activities of the States, or historically sanctioned activities of Government, or activities conducted merely for profit, and [found] no restriction upon Congress to include the States in levying a tax enacted equally from private persons upon the same subject matter." *New York v. United States*, 326 U.S. 572, 583-84 (1945); see *United States v. California*, 297 U.S. 175, 183 (1936).

178. Professor Prosser observed that the distinction between governmental and proprietary functions for purposes of tort liability is "confused and difficult" and "the subject of . . . much disagreement." W. PROSSER, *HANDBOOK ON THE LAW OF TORTS* 979 (4th ed. 1971).

179. See *supra* note 62.

180. See *supra* notes 163-79 and accompanying text.

By addressing the question posed by the *Boulder* case as one of preemption rather than exemption, Justice Rehnquist arguably fashioned a rationale for avoiding the damages question altogether.¹⁸¹ Under his view, since the Sherman Act merely preempts a municipally imposed restraint upon trade, the measure would be unenforceable, but not violative of the Act.¹⁸² Because the precise question presented in *Boulder* was moot,¹⁸³ the Supreme Court still may adopt the preemption analysis when faced with an active violation of the antitrust laws. One critical question left unresolved by Justice Rehnquist's dissent is to what extent, if any, a city should be liable for damages incurred by the plaintiff in the interim between the regulation's enactment and the judicial declaration of its unenforceability. The resolution of this issue under a preemption analysis requires examination of the federalism policies embodied in the Constitution.¹⁸⁴ Precluding the possibility of treble damages would ease significantly the potential burden placed upon home rule cities by the *Boulder* decision to seek specific legislative authorization for *all* economic regulations of questionable legality. Unless the Court adopts the preemption rationale, courts must choose either to impose damage liability if the restraint on trade proves unreasonable or to distort the plain meaning of the antitrust laws.

V. CONCLUSION

In light of the Supreme Court's holding in *Boulder*, the threat of treble damages imposes three potential burdens upon home rule cities: (1) securing specific approval by the state legislature of any regulatory measure with anticompetitive effect; (2) litigating anti-trust challenges; and (3) incurring liability for treble damages. If the Court, however, were to conclude that a municipality is not liable for treble damages, city officials would not feel compelled to seek specific legislative authorization for each instance of municipal economic regulation. Thus, by favorably resolving the damages

181. See *supra* notes 129-36 and accompanying text.

182. See *supra* note 4.

183. The challenged action in *Boulder I*—the 90-day moratorium on expansion by petitioner—had expired by the time of the Supreme Court's decision. See *supra* note 110.

184. A discussion of this question is beyond the scope of this Recent Development. If a preemption analysis is to have the effect Justice Rehnquist intended, however, the courts must develop a suitable rationale to protect a municipality from liability for interim damages. Otherwise, the preemption analysis may not dispell adequately the deterrent effect of treble damage liability. See Blumstein & Calvani, *supra* note 6, at 414-31 (discussing the application of the tenth and eleventh amendments to state action).

issue the Supreme Court may eliminate the potential burden of treble damages and significantly lessen the number of instances in which a municipality would request specific enabling legislation from the state legislature. Furthermore, the unavailability of treble damages also may reduce municipalities' expenses in defending antitrust claims by reducing the incentive for frivolous suits.

Despite the potential problems it poses for home rule municipalities, the Supreme Court's decision in *Boulder* has clarified the Court's commitment to the position of the *Lafayette* plurality and to a narrow construction of the *Parker* doctrine. The dispatch with which the Court dismissed the federalism problem in *Boulder*—as well as the important role *stare decisis* has played in another judicially created antitrust exemption¹⁸⁵—indicates the unlikelihood that the Court soon will reverse the trend of the recent cases on the *Parker* doctrine.

The Court's adoption of the preemption rationale not only could remove the treble damages problem, but it also could preserve the Court's well-established rule of reason analysis. Because an unreasonable, municipally imposed restraint on trade would be unenforceable under this rationale, the city's anticompetitive action would not impinge upon the important federal policies underlying the antitrust laws. Even though the use of a preemption rationale could deny monetary relief to individuals challenging the city's action, absent a subsequent state legislative authorization, the individuals would gain the equivalent of a permanent injunction since the unreasonable restraint would be unenforceable. Should the Court fail to adopt the *Boulder* dissent's preemption analysis in considering the damages question, home rules cities may find a court's use of a separate reasonableness standard to determine whether a municipally imposed restraint on trade violates the Sherman Act to be the only means for avoiding the debilitating burden of treble damages.

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185. The Supreme Court has cited *stare decisis* as a prime factor in its decision to continue the judicially created antitrust exemption for professional baseball. *Flood v. Kuhn*, 407 U.S. 258, 284 (1972) (following *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922)).