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NOTES

PREEMPTION OR EXEMPTION—WHAT IS THE PROPER TEST FOR HOME RULE ANTITRUST IMMUNITY?

COMMUNITY COMMUNICATIONS CO. v. CITY OF BOULDER

The federal antitrust laws were ordained to foster competition and decentralize economic power. Despite this fact, state and municipal statutes often provide for market regulation that may partially or indirectly disturb federal antitrust policy. Article six of the Constitution, which mandates the supremacy of federal law over state law, ultimately controls this displacement by commanding that federal antitrust laws subjugate conflicting state law or policy. The federal antitrust laws do not, however, always supersede state laws infringing on competitive practices. Many state approved activities

1. See United States v. Von's Grocery Co., 384 U.S. 270, 274 (1960) (Congress passed the Sherman Act to protect small businesses and to preserve competition among large numbers of sellers); Standard Oil Co. v. F.T.C., 340 U.S. 231, 249 (1951) ("Congress was dealing with competition, which it sought to protect, and monopoly which it sought to prevent"); 21 Cong. Rec. 6314 (1890) (Senator Sherman remarked that the intent was to promote "full and free competition"). For an exhaustive discussion of the legislative history of the Sherman Act, see 1 E. KINTNER, FEDERAL ANTITRUST LAW §§ 4.1-4.18 (1980).


3. U.S. Const. art. VI, cl. 2, 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.


4. The principle of state action immunity from the antitrust laws appeared shortly after the Sherman Act was passed. In Olsen v. Smith, 195 U.S. 332, 341-44 (1904), the Court re-
are immune from federal antitrust sanctions under the judicially created state action exemption doctrine. Frequently, however, municipalities and other state political subdivisions receive less deference under the state action exemption doctrine than do states with respect to federal antitrust immunity.

Fundamental principles of federalism dictate that a state, as a sovereign, has the right to create political subdivisions and to allocate governmental power to these entities as the state so chooses. To date, thirty-five states

jected the argument that state regulation of harbor pilots violated the antitrust laws because operationally it gave the licensed pilots a monopoly on rendering pilotage services. The Court reasoned:

[S]ince if the State has the power to regulate, and in so doing to appoint and commission, . . . it must follow that no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the state are alone allowed to perform the duties devolving upon them by law.

Id. at 345. The Olsen Court’s rationale appeared to be grounded in a preemption analysis. The remedy [to overturn an unwise state law] is in Congress, in whom the ultimate authority on the subject is vested, and cannot be judicially afforded by denying the power of the State to exercise its authority over a subject concerning which it has plenary power until Congress has seen fit to act in the premises.

Id. The Court’s language seems to support the conclusion that judicially implied “exemptions” from congressional statutes would be disfavored. See also Lowenstein v. Evans, 69 F. 908, 911 (C.C.D.S.C. 1895) (state monopolization of purchase and sale of liquor does not violate the Sherman Act).


7. See infra note 103 and accompanying text. Three distinct state sovereign rights may be impinged upon when the antitrust laws are applied to local government regulation: (1) the state’s right to delegate power to local agents; (2) the state’s right to enact economic and regulatory policies; and (3) the sovereign right of the state created local governments themselves. See Melton, supra note 2, at 340. One commentator remarked that the strength of the American political system is in large part derived from the existence of autonomous local governments.

The first test to be applied in judging an alleged democracy is the degree of self-governing attained by its local institutions. If . . . the province is governed by the representative of the central government, there can be no true and complete democracy. Only local government can accustom men to responsibility and independence, and enable them to take part in the wider life of the state.


have enacted home rule charters, either by constitution or legislation, which cede to local entities the state's power to administer local government, thereby obviating the requirement of specific state authorization on matters of local concern. Until recently, a question remained as to whether these grants of home rule power conferred upon the recipient municipality the state's immunity from federal antitrust law.

In Community Communications Co. v. City of Boulder, the United States Supreme Court held that a constitutional grant of home rule power to a municipality is insufficient to immunize the municipality from federal antitrust liability. According to the Court, the state action exemption is a limited doctrine which attaches only when the home rule city can show that its actions are "in furtherance or implementation of clearly articulated and affirmatively expressed state policy." This Note will critically analyze the Boulder Court's interpretation of the state action exemption. Close examination of the decision reveals that a preemption analysis, instead of an exemption analysis, would have produced a result more protective of the state's sovereign right to delegate authority to its municipalities. The Note will suggest an alternative approach to the immunity problem that preserves the distinct federal and state spheres of authority, thereby safeguarding the principles and policies behind both federalism and antitrust legislation. As a final comment, the Note points out that the Boulder decision may have deleterious effects on the future of home rule government and on the recent entry of municipalities into cable television regulation.

BACKGROUND

Antitrust "immunity" is a general term that has been applied to governmental action at the federal, state, and local levels of government. This

9. See Vanlandingham, Municipal Home Rule in the United States, 10 WM. & MARY L. REv. 269, 280 (1968) [hereinafter cited as Vanlandingham]. Home rule is a generic term which describes a variety of ways a state transfers powers of self government to its subdivisions. The scope of home rule powers within a state is determined by its constitution, legislation, and judicial decisions. Id. at 279-83. Arguably, the term "home rule" is rather nondescript. This vagueness has caused one commentator to suggest that home rule may be simply any legal mandate which strengthens the position of the city in relation to the state. Schwartz, The Logic of Home Rule and the Private Law Exception, 20 U.C.L A. L. REv. 671, 674 (1973) [hereinafter cited as Schwartz].


11. Id.

12. Id. at 841.

13. "Immunity", as used in this Note, refers to whether a governmental entity may be liable for violating the antitrust laws. Although the existence of antitrust immunity was recognized shortly after the passage of the Sherman Act, see supra note 4, Parker v. Brown, 317 U.S. 341 (1943), is generally considered the seminal case in the area of antitrust immunity. In Parker, the Court held that nothing in the language or legislative history of the Sherman Act suggested an intent to restrain state action. Id. at 350-51. The terms "state action exemption" and "antitrust immunity" are frequently used synonymously by the courts to refer to the Parker doc-
immunity may be derived from either a preemption or exemption analysis. The preemption doctrine is rooted in the supremacy clause of the United States Constitution. In theory, preemption should be invoked only when federal and state legislation conflicts. Exemption analysis, on the other hand, should be invoked only to reconcile the conflicting legislation of a single sovereign.

Under traditional preemption analysis, a court determines whether Congress has occupied exclusively a legislative field. If the field is so occupied,
state and local laws are preempted even in the absence of an incompatible or direct conflict with federal legislation. If, however, the federal government has not occupied the entire field, state and local laws can be overruled only when they are so incompatible with federal law that the two enactments are not able to coexist. The courts, however, are usually reluctant to infer congressional occupation of a field, and instead permit state and local laws to coexist with federal legislation despite having inconsistent means or ends.

Applying a classic preemption analysis, the Supreme Court first promulgated the state action immunity doctrine in Parker v. Brown. In Parker,


23. Under fundamental principles of federalism, state policies that can coexist with federal constitutional and statutory schemes should not be superseded. See, e.g., Employees v. Dept. of Public Health & Welfare, 411 U.S. 279, 285 (1973) (Court will not infer congressional intent to deprive states of eleventh amendment immunity unless Congress indicates clear intent); United States v. Bass, 404 U.S. 336, 349 (1971) (federal criminal statute narrowly construed because Congress "will not be deemed to have significantly changed the federal-state balance" unless it clearly conveys its purpose to do so); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) ("historic police powers of the States" are not to be superseded by a federal act "unless that was the clear and manifest purpose of Congress").

24. Commentators have recognized that Parker was decided squarely under a preemption analysis. See, e.g., Tribe, supra note 3, §6-24, at 380-82. Professors von Kalinowski and Handler have noted that the Burger Court has not returned to this canon of construction in subsequent cases which purportedly follow Parker. See 7 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION, § 46.03[1], at 46-22 to -23 (1981) [hereinafter cited as VON KALINOWSKI]; Handler, supra note 14, at 1380.

a California law which established a raisin cartel was challenged under the Sherman Act. The declared purpose of the cartel was to "conserve the agricultural wealth of the state" and to "prevent economic waste." The legislation employed to effectuate the cartel was a marketing scheme which eliminated competition, fixed prices, and restricted output in the state raisin industry. Finding nothing in the language or the history of the Sherman Act which indicated congressional intent to exclusively occupy the legislative field or to proscribe state action, the Court upheld the state law creating the cartel. The Court recognized that a state, as a separate sovereignty, possesses the right concurrently to regulate commerce and to restrain competition absent express congressional intent to the contrary. The Parker Court noted that, conversely, a state can never, under the supremacy clause, remove conduct from the purview of the federal antitrust laws if Congress intended to prohibit such conduct. Specifically, a state cannot simply grant immunity to parties violating the Sherman Act either by authorizing the conduct or by declaring that the action is lawful.

Subsequent to Parker, the Supreme Court did not reconsider the state action doctrine for more than thirty years. Beginning in 1975, however, the Burger Court handed down a series of decisions that restricted the scope of antitrust immunity under Parker. The Court's latest decisions interpreting Parker, however, are replete with language indicative of an ex-

27. Id. at 350-51.
28. Id. at 351.
29. Id.
30. For a complete list of the cases decided by the lower courts during this period, see VON KALINOWSKI, supra note 24, § 46.03, at 46-20 n.4.
31. In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), the Court declared that action merely authorized by the state was outside the state action exemption. The state, acting in its sovereign capacity, must compel a state agency to engage in anticompetitive activities in order for the Parker exemption to apply. Id. at 791. The Court elaborated upon the requirement of mandatory state directives in Bates v. State Bar of Arizona, 433 U.S. 350 (1977). According to the Bates Court, anticompetitive activities are exempt from federal antitrust laws only when they are subject to active state supervision and part of a clearly expressed state policy. Id. at 362. Likewise, in Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), the Court held that if the state's directives are permissive, rather than compulsory, the state's policy is deemed neutral and no immunity attaches to the conduct. Furthermore, even if an exemption is instrumental to the successful functioning of the state's regulatory policy, no immunity is conferred upon it. Id. at 597. This same standard has been held to apply to municipalities. In City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978), the Court found that because municipalities are merely agents of the state which do not have independent sovereignty, they must demonstrate a state legislative intent to displace competition through the alleged anticompetitive activity to qualify for immunity. See also California Retail Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (to satisfy two step test for antitrust immunity state policy must be "clearly articulated and affirmatively expressed" and be "actively supervised" by the state itself); New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96, 109 (1978) (state regulatory scheme "clearly articulated and affirmatively expressed . . . [and] therefore outside the reach of antitrust laws under 'state action' exemption").
emption analysis. Unlike *Parker*, they are not predicated on federalism principles under the supremacy clause. As a result, these decisions talismantically have replaced *Parker*’s preemption rationale with ambiguous references to a “state action exemption” from antitrust liability.\(^3\)

Properly applied, exemption analysis addresses conflicts within a single sovereign. A court’s role under this analysis is to ascertain whether the legislature intended to carve out an exception to a given statute’s general rule.\(^3\) Exemptions can be created either expressly by statute or impliedly by judicial decision.\(^3\) If the exemption is express, the role of the judiciary is purely a matter of statutory interpretation, and the court must determine whether the exemptive language relieves certain parties from the obligation of compliance with the statute in question.\(^3\) In situations where there is no express exemption, courts may examine the disparate objectives of the conflicting enactments and determine whether an implied exemption would be proper.

When applying an exemption analysis in the antitrust context to conflicts between two federal statutes, (federal-federal conflicts), the Court routinely

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By analyzing the immunity question as one of exemption, the Court has circumvented the constitutional question of whether Congress could eliminate state sovereign immunity from the antitrust laws if it so desired. Cf. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Congress has the power to limit state sovereign immunity).


37. See, e.g., *National Broiler Marketing Ass’n v. United States*, 436 U.S. 816 (1978) (Court found that statutory exemption for farmers could not be relied upon by poultry suppliers).
presumes that promoting and protecting competition are dominant national policies which should not be easily displaced. Because of this assumption, the Court often attempts to subordinate the goals of the law which authorizes or contemplates anticompetitive conduct. These reconciliatory efforts by the Court would be deemed impermissible if applied to a federal-state conflict under a preemption analysis. Preemption analysis affords maximum state autonomy by guaranteeing state sovereignty “save only as Congress may constitutionally subtract from their authority.” The Burger Court’s decisions applying exemption analysis to federal-state conflicts, however, evidence this pro-competitive preference. This preference, which comes from an assumption of “competitive” superiority, results in frequent averments that “implied exemptions from the antitrust laws are not favored.” The Court has used a variety of standards to determine whether a state sanctioned activity performed by a private party is a “state action” for immunity purposes. For example, findings of actual state supervision of the regulatory policy or a declared state intention to replace free market competition with market regulation likely resulted in a determination that a particular activity constituted state action for the purposes of antitrust immunity. The Court

38. According to the Court, antitrust policy should be a major concern in the decision-making processes of federal regulatory agencies. See, e.g., Gulf States Util. Co. v. Federal Power Comm’n, 411 U.S. 747 (1973) (F.P.C. must consider anticompetitive consequences of security issue); Federal Maritime Comm’n v. Aktiebolaged Svenska Amerika Linien, 390 U.S. 238 (1968) (passenger steamship conference restraints interfering with antitrust laws will not be approved if contrary to “public interest”); Denver & R.G.W.R.R. v. United States, 387 U.S. 485 (1967) (I.C.C. required to consider anticompetitive consequences before approving stock issuances). The Court has also held, however, that encouragement of competition should not be the sole consideration of a regulatory agency when it is determining whether to permit certain anticompetitive activity. See, e.g., United States v. I.C.C. (Northern Lines Merger Cases), 396 U.S. 491 (1970) (benefits to public of railway merger outweigh loss of competition); F.C.C. v. RCA Communications, Inc., 346 U.S. 86, 93 (1973) (“encouragement of competition has not been considered the single or controlling reliance for safeguarding the public interest”).


41. See City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 398 (1978) (there is a presumption against implied exclusions from the antitrust laws); Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975) (stating “there is a heavy presumption against implicit exemptions”); Parker v. Brown, 317 U.S. at 351 (“an unexpressed purpose to nullify a state’s control over its officers is not lightly to be attributed to Congress”).

42. 317 U.S. at 352. For a discussion of the state action determination, see Areeda & Turner, supra note 5, ¶ 214, at 80-92; Melton, supra note 2, at 329-36.
presently uses a standard identical to that employed in federal-federal conflicts\(^43\) reasoning that Congress could not have intended state agencies to have more power than federal agencies to exempt private conduct from federal antitrust laws.\(^44\) The Court further developed the standard for determining when the state action exemption applies. In *City of Lafayette v. Louisiana Power & Light Co.*,\(^41\) the Court considered whether the state action exemption applied to municipal activities. This action arose when two cities filed an antitrust suit against private utility companies. The defendants argued that the cities themselves had violated the antitrust laws, citing various actions by the cities that clearly would violate Section 1 of the Sherman Act if engaged in by private parties.\(^46\) The cities responded that Congress never intended to subject local government to the antitrust laws, and that the "state action" doctrine rendered the antitrust laws inapplicable to them.\(^47\)

\(^43\) This practice began in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976). In *Cantor*, a retail druggist sued a state regulated utility charging that the utility's policy of dispensing free light bulbs to consumers restrained trade in the sale of light bulbs. The Court refused to imply an exemption from the antitrust laws "without first determining that the exemption was necessary in order to make the [state] regulatory act work, and 'even then only to the minimum extent necessary.'" *Id.* at 597. This standard was borrowed from cases which had confronted conflicts between the Sherman Act and another federal statute. *Id.* at 596 (quoting *Otter Tail Power Co. v. United States*, 410 U.S. 366, 389 (1973) and *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963)). In further support of this statement, the Court cited another case which involved a federal-federal statutory conflict. In *United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 719-20 (1975) the Court held that an implied antitrust immunity is not favored and can only be justified if there is a clear repugnancy between antitrust laws and the regulations.

\(^44\) See, e.g., *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 596-97 (1979) (when implying exemptions, state and federal regulations should be scrutinized under the same standards). This approach has been criticized for manifesting a disregard for the federalism principles expressed in *Parker*. Justices Rehnquist and Stewart have expressed reservations over the Court's practice. Justice Stewart stated:

> The Court's analysis rests on a mistaken premise. The "implied immunity" doctrine employed by this Court to reconcile the federal antitrust laws and federal regulatory statutes cannot, rationally, be put to the use for which the Court would employ it. That doctrine, a species of the basic rule that repeals by implication are disfavored, comes into play only when two arguably inconsistent federal statutes are involved. "Implied repeal" of federal antitrust laws by inconsistent state regulatory statutes is not only "not favored", it is impossible.

*Id.* at 628-29 (Stewart, J., dissenting) (emphasis and citations omitted). See also AREEDA & TURNER, supra note 5, ¶ 214a, at 83 n.11; Handler, supra note 14, at 1378 (both treatises noting that it is inappropriate to apply standards developed to reconcile federal-federal conflicts to federal-state problems).


\(^46\) The utilities alleged that the cities conspired to (1) "engage in sham litigation" to prevent the financing of nuclear power plant construction, (2) eliminate competition "by use of covenants in their . . . debentures," (3) exclude competition in various markets by entering into "long-term supply agreements," and (4) displace the utilities by requiring customers to purchase electricity from the cities as a "condition of continued water and gas service." *Id.* at 392 n.6.

\(^47\) *Id.* at 394.
A sharply divided Court held that municipalities are not immune from the antitrust laws merely because of their status as political subdivisions of the state. The majority opinion concluded that a congressional intent to immunize municipalities from the Sherman Act could not be inferred in light of the presumption against implied exclusions from antitrust laws. Congress "sought to establish a regime of competition as the fundamental principle governing commerce in this country," and in the Court's view, the municipalities did not demonstrate the existence of a compelling policy to overcome this fundamental principle. Further, notions of federalism emanating from the supremacy clause as discussed in Parker were not a bar to antitrust enforcement.

Although the Lafayette majority agreed that under certain circumstances city action could be immune from the antitrust laws, only a plurality agreed on the proper test to determine when immunity existed. The plurality exempted from antitrust laws only those anticompetitive acts engaged in by state and local governments that are "pursuant to state policy to displace competition with regulation or monopoly public service." The plurality Justices stressed, however, that a "specific, detailed legislative authorization" is not always necessary before a city can assert an immunity defense to an antitrust suit. Although the Justices did not elaborate on this proposition, the plurality suggested this standard could be met by showing that the state had contemplated the possible anticompetitive effects of the regulatory activity when it delegated to its subdivision the regulatory powers in question.

48. Id. at 408.
49. Id. at 397-408. Justice Brennan delivered the opinion of the Court. He was joined by Chief Justice Burger and Justices Marshall, Powell, and Stevens.
50. Id. at 398.
51. Id. at 400-08. The Court noted that economic decisions made by a municipally owned utility would probably not be in the community interest or in the interest of the national economy. Moreover, due to the sheer number of local governments, "a serious chink in the armor of antitrust protection" would result if local governments were able to make economic decisions with impunity from the antitrust laws. Id. at 408.
52. See supra notes 24-29 and accompanying text.
53. Id. at 400.
54. Id. at 405 n.31.
55. Id. at 413. The plurality consisted of Justices Brennan, Marshall, Powell, and Stevens. Chief Justice Burger joined in this result.
56. Id. at 415.
57. Id. (citing City of Lafayette v. Louisiana Power & Light Co., 53 F.2d 431, 434 (5th Cir. 1976)). In a concurring opinion, Chief Justice Burger stated that although he agreed with the plurality that state action immunity was not applicable automatically to municipalities, he advocated subjecting local governments involved in proprietary activities to the test promulgated in Cantor v. Detroit Edison Co., 428 U.S. 579 (1976). According to the Chief Justice, the state must compel the anticompetitive activity and the implied exemption from antitrust laws must be necessary for the regulatory act to work, "and even then only to the minimum extent necessary." 435 U.S. at 425-26, 425 n.6 (Burger, C.J., concurring) (quoting Cantor, 428 U.S. at 579).
Four Justices in *Lafayette* dissented⁵⁸ from the view that municipalities are not within the scope of the *Parker* immunity.⁵⁹ The dissenters asserted that the plurality's holding threatened to severely restrict the states' sovereign right to function autonomously within the federal system because it impaired the states' ability to delegate authority to their political subdivisions.⁶⁰ According to the dissent, the plurality ignored the principles of federalism enunciated in *National League of Cities v. Usery*.⁶¹ In *Usery*, the Supreme Court held that Congress could not "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."⁶² Underpinning the *Usery* decision was the recognition that the states are indispensable elements of a dual system of government,⁶³ and therefore, state sovereignty can suppress an otherwise valid congressional exercise of power.⁶⁴


⁵⁹. 435 U.S. at 430-32 (Stewart, J., dissenting). The dissent pointed out that states and municipalities have been equated in other contexts, for example, in construing the double jeopardy clause, the fourteenth amendment, and the contract clause. *Id.* at 430 n.7 (Stewart, J., dissenting).

⁶⁰. *Id.* at 434-35, 438 (Stewart, J., dissenting).

⁶¹. 426 U.S. 833 (1976). In *Usery*, the constitutionality of federal legislation which extended coverage of federal minimum wage and maximum hour standards to virtually all state government employees was challenged.

⁶². *Id.* at 852.


⁶⁴. In his concurring opinion in *Lafayette*, Chief Justice Burger also cited *Usery*, but for a different proposition than the dissent. The Chief Justice relied on *Usery* for the proposition that a city's operation of a business enterprise was not an integral state function. 435 U.S. at 424 (Burger, C.J., concurring). See also Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974) (business of supplying electric service not traditionally the exclusive prerogative of the state). Justice Stewart, however, characterized Chief Justice Burger's proprietary and governmental distinction as a "quagmire" and "virtually impossible to determine." 435 U.S. at 433 (Stewart, J., dissenting).

Significantly, the Chief Justice remarked about the marked similarity of language employed in *Parker* and *Usery*. Both of these decisions recognized that state governments possess "attributes of sovereignty" which cannot be vitiated because the Constitution establishes affir-
Two years after the *Lafayette* decision, a unanimous Court in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, promulgated a two-part test for antitrust immunity based on the *Lafayette* plurality's standard. First, the anticompetitive measure must be "one clearly articulated and affirmatively expressed as state policy." Second, the statutory scheme must be "actively supervised" by the state itself. Although the Court set forth this precise test, the *Usery* and *Lafayette* decisions indicate that a majority of the Court continues to recognize that principles of federalism may require some deference to a state's delegation of authority to municipal governments.

State home rule enactments evidence a policy decision to vest state sovereignty at the local level. Whether federalism principles will safeguard this delegation from federal encroachment was unresolved. This issue ultimately was addressed in *Community Communications Co. v. City of Boulder*.

The question before the Court was whether a state legislative grant of home rule powers to a municipality rendered it immune from liability under the federal antitrust laws, or whether additional state authorization is required before municipal action is viewed as equivalent to state action for purposes of antitrust immunity.

**FACTS**

The Colorado Constitution confers upon the city of Boulder the status of a home rule city. In 1964, Boulder granted a nonexclusive permit to

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66. Id. at 105 (quoting *Lafayette*, 435 U.S. at 410).
67. Id. The challenged state statute in *Midcal* called for retail price maintenance in the wine industry. The Court held that the scheme failed to satisfy the "actively supervised" prong of the test because the state did not monitor market conditions, review the reasonableness of the prices set by private parties, or regulate the terms of fair trade contracts. Id. at 105.
68. The four dissenting Justices in *Lafayette*, along with Chief Justice Burger in his concurring opinion recognized some federalism concerns in subjecting municipalities to antitrust liability. 435 U.S. 389, 422-23, 430 (Burger, C.J., concurring) (Stewart, J., dissenting). The same Justices formed the majority in *Usery*. See 426 U.S. at 834.
70. 102 S. Ct. 835 (1982).
71. Id. at 836.
72. The Colorado Constitution states that any town or city with a population over 2,000 is a home rule jurisdiction. COLO. CONST. art. XX, § 6.
Community Communications Co. (CCC), to build and operate a cable television system to serve the entire city. Due to the advent of satellite technology and the potential for expanded programming, the CCC announced plans to expand its existing system in 1979. Shortly thereafter, Boulder Communications Co. (BCC), another cable firm, expressed an interest in obtaining a permit to provide competing cable television services. After receiving BCC's request, the city imposed a three-month emergency moratorium on cable television expansion. This action prohibited CCC from geographically extending its system beyond the area already served. The city insisted that the moratorium was necessary because CCC's continued expansion during the drafting of the ordinance would act as an entry barrier discouraging competitors. During this period, the city drafted a model ordinance which provided for comprehensive regulation of the cable television industry.

CCC filed suit seeking injunctive relief against the city and BCC, complaining that they were engaged in a conspiracy to restrain trade in violation of the antitrust law. CCC informed the city that it considered the ordinance invalid and that it would proceed with the expansion. The city, attempting to avoid a total cessation of competition in the cable market, filed an action for injunctive relief in state court, but the action was denied. Failing to succeed at the judicial level, the city resorted to self-help and began to destroy CCC's cable.

73. Community Communications Co. v. City of Boulder, 485 F. Supp. 1035, 1037 (D. Colo. 1980). Until 1979, CCC's entire operation in Boulder consisted of re-transmitting television signals to part of the city that had poor TV reception due to the geography of the area. CCC enjoyed a de facto monopoly in this market despite the city's efforts to induce competition. See Respondent's Brief in Opposition at 2, Community Communications Co. v. City of Boulder, 102 S. Ct. 835 (1982). In 1979 CCC expressed its desire to construct an earth station for satellite reception of remote channels. 485 F. Supp. at 1037.

74. 485 F. Supp. at 1037. Prompted by these developments, Boulder hired a consultant to study the cable television market. The consultant advised the city that it should be concerned about the tendency of a cable system to become a natural monopoly. Id.

75. 102 S. Ct. at 837-38.

76. Id. at 887 n.7. The city claimed that other cable operators responding to its solicitation of permits indicated that they would not enter the market if CCC proceeded to wire the entire city. Respondent's Brief in Opposition at 5 n.8, Community Communications Co. v. City of Boulder, 102 S. Ct. 835 (1982).

77. Community Communications Co. v. City of Boulder, 630 F.2d 704, 710 (10th Cir. 1980) (Markey, J., dissenting).

78. CCC alleged that Boulder's ordinance would violate § 1 of the Sherman Act which provides that "[e]very contract, combination, . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." 15 U.S.C § 1 (1976). The district court noted that although CCC had gathered some circumstantial evidence of a conspiracy between BCC and Boulder, the evidence was insufficient to establish a likelihood that CCC would prevail on the merits of this claim. Boulder, 485 F. Supp. at 1038.


80. The city acted pursuant to BOULDER COLO., CODE ¶ 31-10 (rev. ed. 1965), which authorizes the removal of encroachments on public rights of way. Within a month, 6,350 feet of CCC's cable had been destroyed. Petition for Writ of Certiorari at 4, Community Communications Co. v. City of Boulder, 102 S. Ct. 835 (1982).
At the injunction hearing, the city claimed that it was immune from the federal antitrust laws and that the ordinance was a valid exercise of its police powers. The district court, relying on *Lafayette*, ruled that the city was not immune. The court of appeals reversed. The appellate court distinguished *Lafayette* and held that as a result of Boulder's home rule status, the city's action was equal to action by the state of Colorado for antitrust immunity purposes. The Supreme Court granted certiorari to decide the question of whether a state's grant of extensive powers of self-government in local matters to a home rule municipality confers state action antitrust immunity on the recipient municipality.

**DECISION**

In *Community Communications Co. v. City of Boulder*, the United States Supreme Court denied antitrust immunity to the city of Boulder. Justice Brennan, writing for the majority, held that the *Parker* exemption applies only to state actions when the state is acting in a sovereign capacity or to municipal actions that are in furtherance of a clearly articulated and affirmatively expressed state policy.

The Court rejected Boulder’s argument that home rule powers vest a right

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82. *Id.* at 708.
83. *Id.* at 708.
85. 102 S. Ct. 835 (1982).
86. Justices Marshall, Blackmun, Powell, and Stevens joined in Justice Brennan’s opinion. Justice Stevens wrote a concurrence stressing the fact that the majority's opinion was not tantamount to a holding that the antitrust laws had been violated. Justice Stevens remarked that the *Cantor* Court's rejection of *Parker* immunity did not suggest that the state utility regulatory commission in *Cantor* had become a party to a Sherman Act violation by authorizing the program under attack. *Id.* at 844-45. (Stevens, J., concurring). Justice Rehnquist wrote a dissent, in which Chief Justice Burger and Justice O'Connor joined. Justice Rehnquist criticized the Court for misconstruing the *Parker* doctrine as a matter of exemption rather than preemption. *Id.* at 845-46 (Rehnquist, J., dissenting). The dissent contended that by adopting the "clear articulation and affirmative expression" test to determine whether municipal actions qualify for state action immunity, the majority relegated the political subdivisions of states to a position indistinguishable from private entities for purposes of antitrust analysis. *Id.* at 845. Justice Rehnquist outlined three specific problems raised by the majority decisions: (1) whether per se rules would apply to municipalities; (2) whether municipalities will be subject to treble damage provisions of the Sherman Act; (3) whether *National Soc'y of Professional Engr's v. United States*, 435 U.S. 679 (1978), holding that a decision to replace competition with regulation is not within the competence of private entities, would apply to municipalities. *Id.* at 848. Justice Rehnquist warned that if *Professional Engineers* could be applied, municipalities would be unable to defend a challenged ordinance with claims that benefits to the community outweigh anticompetitive effects. *Id.* On the other hand, if *Professional Engineers* is deemed inapplicable and municipalities are permitted to defend regulations on the basis that benefits to the community outweigh anticompetitive effects, Rehnquist concluded that the courts would be called upon to review social legislation for reasonableness of local regulations. *Id.* at 849.
87. 102 S. Ct. at 841.
in local government, similar to the states', to conduct its business with impunity from antitrust laws. Rather, state action immunity under *Parker*, the Court held, was inherently limited to states, and a state's sovereignty cannot be transferred in toto to its subdivisions.

The majority further relied on the *Lafayette* decision which held that a state acting in its sovereign capacity may sanction anticompetitive municipal activities, thereby immunizing the locality from Sherman Act liability. Accordingly, the *Boulder* Court held that municipalities could partake of the "state action exemption" only to the extent that they acted pursuant to a clearly articulated and affirmatively expressed state policy in restraint of trade.

The Court was unwilling to infer that by simply granting home rule powers to its cities, Colorado intended to immunize Boulder from anticompetitive sanctions. The Court held that the state's broad"grant of plenary powers of self-government was, at best, a neutral accommodation of municipal action." Thus, the mere grant of home rule power to Boulder did not satisfy the "state action exemption" requirement that the city's challenged action embody a clearly expressed policy of the state.

**Analysis**

Despite the fact that the conflict in *Boulder* was between federal antitrust laws and a municipal ordinance enacted pursuant to state authority, the Court

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88. *Id.* at 841-42. The Court remarked that this argument "both misstates the letter of the law and misunderstands its spirit." *Id.* at 842.

89. *Id.* The Court held that *Parker* recognized a dual system of government in which there is no place for sovereign cities under federalism principles. *Id.* The Court's interpretation of *Parker* ignores preemption principles under the supremacy clause. See supra notes 28-29 and accompanying text. Furthermore, such a reading is not justified because the Court's discussion of legislative directives was not made in reference to specific grants of plenary authority to state subdivisions.

90. *Id.* at 843. Because the Court found that the ordinance did not meet the "clear articulation and affirmative expression" standard, it did not have to pass on the question of whether the ordinance would survive the "active state supervision" test formulated in California Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc., 445 U.S. 97, 105 (1980). 102 S. Ct. at 841 n.14.

91. 102 S. Ct. at 843. The Court 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 those actions be truly described as 'comprehended within the powers granted,' since the term, 'granted,' necessarily implies an affirmative addressing of the subject by the state.

*Id.* This statement effectively overrules the dictum in *Lafayette*. See supra notes 56-57 and accompanying text.

92. The Court dismissed this argument as simply an attack on the wisdom of the long-standing congressional commitment to antitrust regulation. 102 S. Ct. at 843. The Court held that the decision did not interfere with a state's ability to "allocate governmental power between itself and its political subdivisions." *Id.* at 844 (citing *Lafayette*, 435 U.S. at 416). Quoting *Lafayette*, according to the majority in *Boulder*, *Lafayette* meant "only that when the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws." 102 S. Ct. at 843-44.
used a "state action exemption" analysis rather than a preemption analysis to assess the legality of the ordinance.93 Perfunctorily applying this exemption analysis,94 the Court dismissed the city's argument that the moratorium ordinance was an act of government performed by the city acting as the state in local matters, thus satisfying the "state action exemption" criteria.95 Under the Boulder Court's analysis, Parker was interpreted as creating an implied exemption from the antitrust laws. Because Parker was indisputably decided under a preemption analysis, such a broad interpretation is unwarranted. The Court's mischaracterization of the issue as exemption was contraindicated by Parker, which provides that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ."96 The supremacy clause prohibits a state from creating an exception to a federal law if Congress intended regulation of the contemplated activity. Therefore, under a strict interpretation of Parker, the question the Court should have faced in Boulder was whether the city ordinance, enacted pursuant to its home rule autonomy under the Colorado Constitution, was preempted by the Sherman Act under the supremacy clause.97

A preemption analysis, rather than an exemption analysis, is inherently more appropriate whenever the Court is called upon to examine the coaction between enactments of a federal and a state sovereign. Under a preemption analysis, the supremacy clause prohibits only those state actions which stand as obstacles to the accomplishment of congressional objectives. Accordingly, states are assured a maximum amount of legislative freedom so long as state action does not interfere with federal goals.98 The dissenting Justices in Boulder noted another compelling reason for using a preemption analysis. Because exemption analysis standards developed to resolve federal-federal conflict problems interject no complicated federalism issues, they may be patently insufficient when applied in the very different context of federal-

93. See supra notes 31-44 and accompanying text.
94. 102 S. Ct. at 839-43. The Court simply stated: "Our precedents thus reveal that Boulder's moratorium ordinance cannot be exempt from antitrust scrutiny unless it constitutes the action of the State of Colorado itself in its sovereign capacity. . . ." Id. at 841.
95. Id. at 841-42.
96. Parker, 317 U.S. at 350-51. The Boulder Court interpreted Lafayette as holding "that the state as sovereign might sanction anticompetitive municipal activities and thereby immunize municipalities from antitrust liability." 102 S. Ct. at 840. This statement is irreconcilable with Parker. See supra note 40 and accompanying text.
97. Justice Rehnquist characterized the issue in this manner. 102 S. Ct. at 845 (Rehnquist, J., dissenting). The Court's expeditious reading of Parker as creating exemptions from the antitrust laws was neither unprecedented nor unexpected. The Burger Court had decided six prior federal-state conflict cases in the immunity area under exemption analysis prior to Boulder. See supra note 31 and accompanying text.
98. See supra notes 31-33 and accompanying text. See also Hart, supra note 14, at 21 ("[a] preemption analysis presumes that state action will not be preempted by the Sherman Act, while an exemption analysis, as stated in Cantor and Lafayette, presumes that exemption is granted only when necessary, and then only to the extent necessary").
state conflicts. Significantly, the exemption analysis used in Boulder failed to reach the constitutional question of whether requiring clearly articulated and affirmatively expressed state authorization of municipal anticompetitive activities impermissibly impinges upon a state’s ability to delegate authority to its subdivisions.

In National League of Cities v. Usery, the Court recognized that there are attributes of state sovereignty that may not be impaired by Congress without violating federalism principles resting at the core of a democratic government. The Usery Court posited two such sovereign state functions: "administering the public law and furnishing public services." In addition, the right to delegate governing authority to political subdivisions through home rule enactments has been held a sovereign state right. The prevalence of home rule, which decentralizes state government, has flourished because increased local autonomy serves the state’s interests in both administering public law and furnishing public services. A state which grants home rule

99. 102 S. Ct. at 845-46. (Rehnquist, J., dissenting). In discussing the conflicting doctrines, Justice Rehnquist noted that the preemption doctrine implicates basic notions of federalism because it involves utilization of supremacy clause principles, and that the presumptions implied in exemption analysis are different from those applied in the preemption context. Justice Rehnquist concluded that "questions involving the . . . 'state action' doctrine are more properly framed as being ones of preemption rather than exemption." Id. at 846. See supra note 44.

100. 426 U.S. 833 (1976).

101. Id. at 845. The doctrine of federalism, as applied to the antitrust law/state action controversy, is grounded in two specifically enumerated constitutional provisions which limit federal power. As interpreted by the Court, the tenth amendment authorizes states to regulate local markets and attend to local economic problems "save only as Congress may constitutionally subtract from their authority . . . ." Parker v. Brown, 317 U.S. 341, 351. See also United States v. Darby, 312 U.S. 100, 124 (1941) (tenth amendment was enacted "to allay fears . . . that the states might not be able to exercise fully their reserved powers"). Additionally, the eleventh amendment prohibits suits brought in federal court against a nonconsenting state. See, e.g., Lowenstein v. Evans, 69 F. 908, 910 (C.C.D.S.C. 1895) (action against state for monopolization of the sale of liquor dismissed for lack of jurisdiction).

Furthermore, the Court has recognized that the Constitution, and thus the federal government in general, is premised on the existence of states as independent entities. See Younger v. Harris, 401 U.S. 37, 44-45 (1971) (national government will operate best if state autonomy is properly respected); Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1869) ("[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States").

102. 426 U.S. at 851.

103. A state's power includes creating and structuring its government, which necessarily includes allocating power as it chooses. See Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 615 n.13 (1974) (the Constitution does not limit the state's plans for distribution of power); Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 612 (1937) (state's allocation of power to regulate dairy market to state commission beyond federal control); Dreyer v. Illinois, 187 U.S. 71, 84 (1902) (state regulation of public officials insulated from due process claim). The only limitations on the powers of a state are those affirmatively listed in the Constitution. One example of a constitutional limit on the exercise of this power is the "one man-one vote" rule for apportioning state legislatures, see Reynolds v. Sims, 377 U.S. 533 (1964), and for electing state officers. See Gray v. Sanders, 372 U.S. 368 (1963).

104. In Avery v. Midland County, 390 U.S. 474 (1968), the Court recognized the importance of local government control stating: "institutions of local government have always been a ma-
powers to its cities allows legislatures to devote more time to matters of state-wide importance, thus avoiding burdensome local matters raised by municipal officials who are dependent upon the legislature for authorization of each new ordinance. Broad delegations of home rule autonomy also permit decision-making by those most familiar with, and responsive to, local needs and conditions.103

The flaw in the Boulder decision lies in its narrow interpretation of federalism principles. The majority held that in order to protect a state's control over its municipalities, a clearly articulated and affirmatively expressed state policy to displace the federal antitrust laws must be demonstrated.106 Federalism principles need not be invoked to protect a state's ability to supervise its subdivisions, however, because this ability exists ipso facto in the state's relationship to its municipality. Rather, federalism is intended to protect a state's right to make autonomous decisions regarding internal operations.107

In a federalist system, state governments must be accorded unfettered control to provide for the political structure or prescribe the powers of its municipalities.108 Inquiries into abuses in the administration of the powers conferred by the state on its municipalities are not a proper function of the federal courts.109 Comity and federalism concerns integral to Parker and Usery cannot be reconciled with federal courts probing motives of states

103. See infra notes 117-18 and accompanying text.
106. 102 S. Ct. at 242-43.
108. Apparently, state legislative power over municipalities is not restricted by the Constitution. See Williams v. Mayor of Baltimore, 289 U.S. 36 (1933) (municipal corporation cannot invoke privileges or immunities against its state); City of Newark v. New Jersey, 262 U.S. 192 (1923) (municipality cannot assert equal protection claim against its state). Some states have proffered the proposition that a state has absolute control over its cities and may create or abolish them, realign their boundaries, grant or deny them power, or force them to carry out state policies. See, e.g., City of Scottsdale v. Superior Court, 103 Ariz. 73, 267 P.2d 717 (1954) (alteration of boundaries); Nahlen v. Woods, 255 Ark. 974, 504 S.W.2d 749 (1974) (enforcement of state fee collection); City of Long Beach Resort v. Collings, 261 So. 2d 498 (Fla. 1972) (merger of cities and unincorporated areas); Willows v City of Lewiston, 93 Idaho 337, 461 P.2d 190, (1969) (exercise of granted power of annexation); Landwer v. Village of North Barrington, 94 Ill. App. 2d 265, 237 N.E.2d 350 (5th Dist. 1968) (general grant and denial of powers), cert. denied, 393 U.S. 1082 (1969); City of Glasgow v. Duncan, 437 S.W.2d 199 (Ky. Ct. App. 1969) (extension of state right to appeal conferred to municipal employee); Scharping v. Johnson, 32 Wis. 2d 383, 145 N.W.2d 691 (1966) (denial of incorporation petition).
109. One commentator remarked:

The judiciary is not competent to determine the proper allocation of political power—to build a framework for government. . . . In an era of expanding municipal responsibility, the need for rational answers to questions about the proper limits on municipal power and proper restrictions on exercise of that power must be answered by a body whose special competence is politics rather than law.

in granting home rule power. Furthermore, there are few, if any, manageable judicial standards by which a court can ascertain the state’s intent in granting home rule power or in regulating competition.  

The Boulder Court’s placement of the burden on the states to articulate an intention to displace the antitrust laws ignores the fact that states may consciously choose not to articulate policies in order to facilitate decision-making and experimentation at the local level. This result, however, virtually was inevitable under an exemption analysis. By imposing the clearly articulated and affirmatively expressed standard on state action, the Court has ensured that the strong national policy favoring competition will not be abrogated by the states. Although this approach is consistent with the canon of construction the Court invokes in federal-federal conflict problems—that exemptions to antitrust laws are not to be easily inferred— its application to federal-state conflicts severely restricts the states’ liberty to enact legislation which may supplement or indirectly contravene the federal antitrust laws. Judicial activism, as endorsed in Boulder, is particularly egregious because it encroaches upon both congressional and state powers conferred under the Constitution. A preemption analysis is the preferred approach to resolve federal-state conflicts in which a legitimate exercise of congressional power encroaches upon the constitutional right of state sovereignty.

If a preemption analysis had been used in Boulder, the Court could have placed the burden on Congress to either manifest an intention to occupy the entire legislative field, or to create a legislative exclusion for certain anticompetitive activities or for home rule in general. A preemption analysis


111. Cf. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country").

112. See supra notes 41-44 and accompanying text.

113. The Parker Court assumed, without actually deciding the issue, that Congress had not occupied exclusively the antitrust field. Furthermore, the Parker Court noted that prohibiting a state from violating the antitrust laws because of its effect on interstate commerce was within the scope of the congressional commerce power. 317 U.S. at 350.

114. Undoubtedly, Congress could choose to create an exclusion from the antitrust laws for home rule municipalities. The Court has noted in earlier cases, however, that in passing the Sherman Act, Congress exercised all the power it possessed under the commerce clause. See United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 298 (1945) ("Congress in passing the Sherman Act, left no area of its constitutional power unoccupied"). Cf. United States v. Southeastern Underwriters Ass’n, 322 U.S. 533, 553 (1945) (all commercial enterprises are within the scope of congressional regulatory power). For this reason, the Burger Court’s creation of implied exemptions to the antitrust laws can be criticized as being contrary to precedent and congressional intent.
also would have reinforced the political safeguards of state sovereignty and avoided altering the relationship between the states and their political subdivisions.

Parker and Usery can be applied concertedly to the specific facts in Boulder to support the utilization of preemption analysis. Usery recognized a state’s right under the Constitution to exist as a separate governmental entity. This right was found necessarily to include the ability of a state to structure internal governmental affairs. A state’s decision to grant home rule power is an exercise of this right which must be accorded comity under Usery. A grant of home rule power exemplifies a policy decision by the people of the state to vest municipalities with sovereign powers to best provide for the welfare of the state as a whole. Thus, when a state has granted home rule power, it is erroneous to classify the interests of the state government as intrinsically more important than those of its municipality. Incontrovertibly, the legislature in a home rule state retains authority to effectuate state policy by subordinating municipal interests to more compelling state interests. The Court, however, should not presume such subordination

115. 426 U.S. at 844. The Usery Court relied on Lane County v. Oregon, 74 U.S. (7 Wall.) 71 (1868), for the proposition that there are constitutional provisions that incontrovertibly recognized the necessary existence and independent authority of states. See Davidson & Butters, Parker and Usery: Portended Constitutional Limits on the Federal Interdiction of Anticompetitive State Action, 31 Vand. L. Rev. 575, 597-604 (1978) (arguing that the results in Parker and Usery were based upon status of state as sovereign political entities).

116. See supra note 103. See also Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 71 (1978) (emphasizing, "the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them"); Lockport v. Citizens for Community Action, 430 U.S. 259, 269 (1977) (recognizing the wide discretion states have in forming and allocating governmental tasks to local subdivisions); Sailors v. Board of Educ., 387 U.S. 105, 108 (1967) (establishing procedures for selecting local school board officials is within the state's broad latitude in selection of such officials).

117. The grant of home rule power is radically different from the historical concept of a municipal corporation as embodied in Dillon's Rule:

It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporations,—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied.

1 J. Dillon, Commentaries on the Law of Municipal Corporations § 237 (5th ed. 1911) (emphasis in original). Traditionally, the courts have been suspicious of municipal actions and have scrutinized them strictly. See Note, City Government in the State Courts, 78 Harv. L. Rev. 1596 (1965) (municipal governments can be expected to act in their own self interests against the public good).

118. The grant of home rule authority delegates to the city the power to act as the state and to establish state policy at the local level. Furthermore, two home rule models evidence the presumption that home rule cities have all the powers of the state that are not denied. See Vanlandingham, supra note 9, at 307-08.

119. See, e.g., Del Luca v. Town Admr of Methuen, 368 Mass. 1, 11-12, 329 N.E.2d 748, 755 (1974) (municipal ordinances on subject of planning boards precluded by state planning
under the auspices of judicial review.120

As a matter of state constitutional law, Colorado’s home rule amendment fuses the municipal government with that of the state.121 For this reason, municipal actions pursuant to legitimate grants of home rule power should be presumed equal to state action under a Usery analysis.122 This presumption, however, could be rebutted because acts that are either ultra vires or preempted by state legislation would not be presumed state action for the purposes of this test.123 In Boulder, the presumption should stand because no ultra vires acts on the part of the city were alleged and no evidence was presented that Boulder acted beyond its chartered powers.

Once municipal action is equated with state action, the next question to resolve is whether the city’s ordinance is preempted by state legislation. In this regard, there was no evidence showing that Boulder had violated any state law, or that Colorado has any law or policy explicitly relating to cable television.124 Under a preemption analysis, however, municipal action can

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120. See Levi, Gehring & Groethe, supra note 69, at 118-19.


122. This presumption may enable home rule cities to demonstrate state policy or intent sufficient to satisfy the clearly articulated and affirmatively expressed standard adopted in Boulder. See Thomas, supra note 33, at 378. But see Woolen v. Surtran Taxicabs, Inc., 461 F. Supp. 1025, 1028-33 (N.D. Tex. 1978) (municipal acts should not automatically be equated with state acts for purposes of immunity).

123. Municipal acts beyond the authority of its home rule powers are ultra vires and, consequently, are invalid whether or not they conflict with a state statute. See, e.g., City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 394-97 (1977) (conduct having disproportionate impact on nonresidents ultra vires); Kurek v. Pleasure Driveway, 557 F.2d 580, 590-91 (7th Cir. 1977) (state grant to park district of power to contract and lease does not authorize the park district to force private competitors to violate antitrust laws), vacated, 435 U.S. 992 (1978), opinion reinstated, 583 F.2d 378 (7th Cir. 1978), cert. denied, 439 U.S. 1090 (1979). Furthermore, because municipalities always remain subservient to the dictates of the state legislature, the state has ultimate authority to preempt municipal statutes. See supra note 119 and accompanying text.

124. To date, the subject of cable television has yet to be addressed by either the Colorado Constitution or any state statute. Furthermore, the regulation of cable television is not among the eight enumerated powers in Colorado’s home rule amendment. The Colorado Public Utilities Commission also has declined to exercise jurisdiction over cable television. See Amicus Curiae Brief for the State of Colorado at 14, Community Communications Co. v. City of Boulder, 102 S. Ct. at 815 (1982). See also In re Mountain States Tel. & Tel. Co., 73 Pub. Util. Rep.
be preempted if it violates a policy underlying state law. Colorado does have a state antitrust statute which establishes a general policy of competition throughout the state.\footnote{125} This general policy, standing alone, is not sufficient to preempt the municipal action. Rather, the burden would be placed on Boulder to overcome the presumption of state legislative intent to subject cities to antitrust liability. If Boulder could show evidence of municipal exclusion from the state antitrust statute, the municipal action ordinance would be presumed tantamount to state action for purposes of immunity.

The presumption that municipal action is equivalent to state action for purposes of antitrust immunity determination is required by the comity principles underlying 

\textit{Usery}.\footnote{126} This presumption also is the starting point for traditional preemption analysis under 

\textit{Parker}. The 

\textit{Parker} Court recognized that Congress had not intended to preempt state law by occupying the entire field of antitrust legislation.\footnote{127} When exclusivity of federal regulation is neither express nor implied, the Court examines the nature of the state law. If enacted by a municipality in its sovereign capacity to further a legitimate state interest, the law may stand to the extent federal antitrust policy will not be defeated.\footnote{128}

The legitimate state interest advanced in 

\textit{Boulder} was to preserve competition in the market place.\footnote{129} The validity of the municipal ordinance must be evaluated to determine whether the ordinance presents an obstacle to the state's articulated interest. The 

\textit{Boulder} dissenters reasoned that the two-step 

\textit{Midcal} standard, used by the 

\textit{Boulder} majority in its "state action exemption" analysis, could be applied to test the validity of municipal ordinances under a preemption analysis.\footnote{130} The crucial difference between the majority's use of the 

\textit{Midcal} standard and the use suggested by the dissent is that the dissenters would apply the standard directly to the enacted municipal ordinance, not to the state legislation conferring power upon the home rule municipality. According to the facts in 

\textit{Boulder}, time was sought to draft a model ordinance and to solicit and evaluate applications from interested competitors.\footnote{131} The ordinance satisfies the first prong of the 

\textit{Midcal} test in that it reflects a clearly articulated and affirmatively expressed intention to restrain trade for a relatively short duration in furtherance of a legitimate

\footnote{125. \textsc{Colo. Rev. Stat.} §§ 6-4-101 to -102 (1973 & Supp. 1981). Despite the fact that Colorado's home rule amendment does not specifically subject home rule municipalities to federal and state antitrust laws, it does provide that all applicable Colorado statutes will continue to apply to home rule cities and towns. \textsc{Colo. Const.} art. XX, § 6. This provision likely is a truism in light of the supremacy clause and the state's omnipotent control over its subdivisions. \textit{See supra} note 108.}

\footnote{126. \textit{See supra} text accompanying notes 100-03.}

\footnote{127. \textit{See supra} note 27 and accompanying text.}

\footnote{128. \textit{See supra} note 113 and accompanying text.}

\footnote{129. 102 S. Ct. at 838.}

\footnote{130. \textit{Id.} at 850 (Rehnquist, J., dissenting).}

\footnote{131. \textit{See supra} notes 74-77 and accompanying text.}
goal. Likewise, the second prong of the test is met because the municipality retained active supervision of the ordinance. Having satisfied the two-part Midcal test, antitrust immunity should have been extended to Boulder.

This analytical framework will not result in the unfettered extension of antitrust immunity to municipal action. The same considerations that curtail grants of home rule power to municipalities limit the scope of municipal immunity as well. First, anticompetitive activities will be subject to scrutiny under state law to determine if the acts were ultra vires, or contrary to existing state antitrust laws or policy. Second, under a preemption analysis, a legitimate regulatory interest always must be demonstrated.

The foregoing analysis suggests an analytical framework for the lower courts and city attorneys to apply when determining whether particular anticompetitive conduct falls within the realm of Parker immunity. Under this analysis, the state retains the right to control home rule, which is inextricably intertwined with the ability of the state to structure its integral governmental functions, while Congress retains the right to control immunity under the Sherman Act.

**IMPACT**

*Viability of Home Rule Cities After Boulder*

One of the most severe implications of the Boulder decision is that it undermines the very advantages that home rule systems were intended to precipitate. Most home rule charters follow the "legislative supremacy" model that gives the municipality freedom to legislate in any area in which the state has not acted. The major advantage of this model is that it alleviates the problem of narrow judicial interpretation by allocating to municipalities plenary authority over matters of local concern. Under this scheme, municipalities are given latitude to supplement state efforts so long as compliance with state law or the effectuation of its purpose is not significantly impeded by the local law.

133. It bears emphasizing that under this analysis, neither the city by ordinance, nor the state by statute could establish "state policy" that would immunize its commercial activities from antitrust liability. To do so would clearly be beyond the scope of Parker. See *supra* notes 28-29 and accompanying text.
135. Schwartz, *supra* note 9, at 676; Vanlandingham, *supra* note 9, at 293-96. The "legislative supremacy" model was adopted by the American Municipal Association, which introduced a model home rule constitutional provision in 1953. In this model, the authority of municipalities to act without specific legislative authorization is emphasized. *American Municipal Association* [National League of Cities], *Model Constitutional Provisions for Municipal Home Rule* (1953). For a general discussion of this model, see Levi, Gehring & Groethe, *supra* note 69, at 116.
Statutory or non-home rule cities, on the other hand, derive their authority directly from state statutes. These authorizing state statutes, which are often narrowly construed, transfer to non-home rule cities the power to act in a particular area. Because a non-home rule city can always turn to the granting legislation and its history for evidence of a "clearly articulated and affirmatively expressed" state policy, non-home rule cities generally will be able to meet the standard, thus, insuring themselves immunity under Boulder. For home rule cities whose only statutory authorization is the grant of home rule power, securing antitrust immunity under Boulder's "clearly articulated and affirmatively expressed" standard will present a formidable problem.

Home rule municipalities, now leary of enacting legislation which may adversely affect competition without the imprimatur of clearly articulated and affirmatively expressed state policies, will be forced to petition state legislatures to articulate policies and goals with the efficacy of producing antitrust immunity. Many state legislatures may have neither the willingness, nor the resources or knowledge to comply with such requests. Arguably, many home rule powers are granted with the intention of eliminating the need for state approval of municipal action. Therefore, requiring state approval of specific local legislation would frustrate the states' original purpose for granting home rule power.

Not only does Boulder frustrate the policies behind home rule, but the decision also promotes highly centralized forms of state government which may radically alter the relationship between the states and their municipalities. Communities may find themselves subject to antitrust lia-

137. See City of Trenton v. New Jersey, 262 U.S. 182, 187 (1923) (absent safeguarding state constitutional provisions, municipalities have no powers of government beyond those specifically conferred by the state legislature). See also Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907) (statutory cities are agents of states). See generally 1 E. McQuillan, Municipal Corporations § 2.08(a) (3d ed. 1971) ("a municipal corporation is not itself sovereign").

138. Returning to the state legislature for statements or letters of intent appears to be the only way home rule cities will be able to meet the Boulder prerequisites absent specific statutory enactments. See infra note 141 and accompanying text.

139. Application, supra note 58, at 532 ("forcing municipalities to obtain state approval for any plan that might have anticompetitive effects would cause needless delay, overload the state legislatures, and frustrate decentralized decision making"). Professor Areeda notes that requiring conscious legislative displacement of the antitrust laws might produce a paradoxical result in that under a home rule system, the opportunity would not arise for the state legislature to enact the particular legislation from which the court might infer delegated power to displace the antitrust laws. Areeda, Antitrust Immunity for "State Action" After Lafayette, 95 Harv. L. Rev. 435, 449 (1981).

140. Inhibiting the state's ability to delegate authority to its municipalities may cause states to abandon certain courses of action altogether. State governments may decide it is not worth the time and effort to detail directives to secure antitrust immunity for its agents. Melton, supra note 2, at 345.

141. The pressing needs of municipalities may not coincide with the state legislature's docket of business. See Melton, supra note 2, at 357 n.143 ("[f]requent trips back to the legislature regarding new programs would be difficult enough, but rewriting a whole set of well-established laws on the basis of an implied construction of the antitrust laws is an unreasonable expectation").

142. See infra note 146 and accompanying text.
bility for actions taken when the *Parker* doctrine was thought to confer immunity.¹⁴³ Actions by home rule municipalities, if found non-exempt and violative of the antitrust laws, will subject municipalities to the Sherman Act's treble damage liability.¹⁴⁴ Even if municipalities are successful in arguing a "governmental immunity" to treble damage liability,¹⁴¹ the locally regulated businesses and those contracting with the city would still be liable for treble damages. To the extent that state and local governments attempt to avoid this liability, states will tend to limit broad delegations of power. Indeed, the dissenting Justices in *Boulder* noted that the only recourse may be for home rule municipalities to cede their authority back to the state, thereby destroying the popularity of home rule in the United States.¹⁴⁶

**Boulder's Impact on Cable Television Regulation**

Although the cable television industry is one of the fastest growing in the United States today,¹⁴⁷ its regulation is still in a trial and error stage.¹⁴⁸ Overlapping regulations at the federal, state, and local levels have burdened cable operators and prevented local communities from realizing the benefits

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¹⁴³. *But see* Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 437 n.22 (1978) (Stewart, J., dissenting) (it is inequitable to base the availability of *Parker* defenses on statutes passed before immunity criteria were determined). Moreover, commentators have cautioned against applying the "state action exemption" standards retroactively. See, e.g., Handler, *supra* note 14, at 1388 n.160 (any "clear statement" requirement should be applied only prospectively); Posner, *supra* note 33, at 725 (state regulatory agencies should be given the opportunity to explain relevant policy bases for prior decisions before they are subjected to antitrust liability). See generally Taurman, *Reflections on City of Lafayette: Applying the Antitrust "State Action" Exemption to Local Governments*, 13 URB. LAW. 159, 180-82 (1981) (local governments might have to breach anticompetitive contracts which were entered into when *Parker* was thought to provide immunity because such contracts usually are subject to continuing reevaluation).


¹⁴⁵. In *City of Newport v. Facts Concerts, Inc.*, 453 U.S. 247 (1981), the Court refused to award punitive damages in a § 1983 suit against a municipality. It could be argued that based on *Facts Concerts*, the Court would also refrain from imposing treble damages on municipal antitrust violations.

¹⁴⁶. 102 S. Ct. at 851 (Rehnquist, J., dissenting).


¹⁴⁸. See *On the Cable: The Television of Abundance, Report of the Sloan Commission on Cable Communications* 152 (1971) ("in the first two decades of cable growth, the federal government has been rudderless, the municipalities inept, and the states inactive") [hereinafter cited as *Sloan Report*]. *See also* Barnett, *State, Federal, and Local Regulation of Cable Television*, 47 NOTRE DAME LAW. 685, 691-98 (1972) (criticizing the franchise system for compromising public interest) [hereinafter cited as Barnett].
of cable television.\textsuperscript{149} Diagnosing this problem, the FCC recently eliminated most of the federal regulations applicable to the cable industry,\textsuperscript{150} thereby encouraging state and local governments to regulate television. In turn, states rely exclusively on local government to perform all non-federal cable regulatory functions.\textsuperscript{151}

Typically, municipal governments regulate cable television by enacting franchise ordinances, or by granting permits or licenses to cable operators. The legal justification for this municipal regulation derives from either an implied or an explicit power of the municipality over the use of its streets and public rights of way.\textsuperscript{152} Cable television differs from traditional over-the-air television broadcasting because it uses a direct cable link instead of radio waves to deliver programming to its subscribers.\textsuperscript{153} The necessity of using the city's thoroughfares to physically string cable into subscribers' houses is conducive to local regulation of market entry and rate determination.\textsuperscript{154} After Boulder, however, municipalities desiring to enter into exclusive franchising arrangements or to own their own cable systems must seek specific state authorization or risk antitrust liability.

\begin{itemize}
  \item \textsuperscript{149} See Sloan Report, supra note 148, at 151-54. See also Stern, The Evolution of Cable Television Regulation: A Proposal for the Future, 21 Urb. L. Ann. 179, 181 (1981) (in order to remedy situation, author advocates federal regulation with maximum autonomy in franchising process reserved to local governments) [hereinafter cited as Stern].
  \item \textsuperscript{150} In re Cable Television Syndicated Program Exclusivity Rules, 79 F.C.C. 2d 663 (1980) (to be codified in 47 C.F.R. §§ 76.151-161, .305, .5, .57-65, .7).
  \item \textsuperscript{151} In the absence of federal and state directives, cities have responded to the acute need for cable regulation. Early local regulatory efforts were unsuccessful primarily because municipal officials were uninformed and failed to envision the vast community services that cable television could provide. Furthermore, municipal officials often responded to the pressure of cable operators by adopting hastily written franchising ordinances with only vague specifications as to the design of the system. Most of the franchises granted did not require up-to-date technology or expansion of services, but instead only provided for maintenance of a minimum number of cable channels. See Snychef, Municipal Ownership of Cable Television Systems, 12 U.S.F.L. Rev. 205, 207-11 (1978).
  \item \textsuperscript{152} See 12 E. McQuillin, Municipal Corporations §§ 34.14 to .15, at 45-56 (3d ed. 1970). A local government has the authority to make franchise rights conditional. See Barnett, supra note 148, at 685 n.3 (1972); LaPierre, Cable Television and the Promise of Programming Diversity, 42 Fordham L. Rev. 25, 68-69 (1973); Mahoney, Cable Television's Jurisdictional Dispute, 24 Cath. U.L. Rev. 872, 883 (1975). See generally Davis, Cable Television Franchising—The Role of Local Governments, 51 Fla. B. J. 78, 79 (1977) (municipal consent is prerequisite to cable operator seeking to use public ways for carrying out business in the nature of a public utility).
  \item \textsuperscript{153} Operationally, the coaxial cable, which resembles telephone lines and carries signals from their point of origin to subscriber's television sets, is the basis of cable television. See Sloan Report, supra note 148, at 12-14. Within this decade, optical fiber cable will begin to replace the coaxial cable technology. Fiber optic systems will dramatically increase the cable's capacity to carry hundreds of television channels. See Miller & Beals, Regulating Cable Television, 57 Wash. L. Rev. 85, 86-88 (1981) [hereinafter cited as Miller & Beals].
  \item \textsuperscript{154} Studies performed on cable systems recommend that states should allow major cities to set maximum rates and terms of performance, create adjudicatory mechanisms and appeals procedures to resolve disputes, and establish franchise boundaries within the city. See Sloan Report, supra note 148, at 161-62. Accord Barnett, supra note 148.
\end{itemize}
Because several characteristics of the cable television industry make it a natural monopoly, the possibility of municipal antitrust liability when regulating that industry is indeed real.\textsuperscript{155} Cable television is highly capital intensive, and therefore, geographically large franchise areas may be required for economies of scale.\textsuperscript{156} Absent guarantees against overt competition and an adequate return on investment, franchisees may be reluctant to make the initial wiring expenditures in a given locality. Cable operators usually must wait several years before they can realize a profit. If during this time their financial stability could be placed in jeopardy by an overcrowded market, there will be an adverse effect on the development and growth of the municipality’s cable system. Furthermore, economists recognize that in most natural monopoly situations, consumers will receive the best service from one or a few operators.\textsuperscript{157}

Perhaps the most promising public benefit of cable television is its capacity to enable community-based programs to be aired on television.\textsuperscript{158} If local governments prudently regulate their franchises, cable television’s large channel capacity can be used to provide a multitude of community oriented services.\textsuperscript{159} As part of the franchise agreement, a municipality can require operators to devote a given number of channels for community-interest pro-

\textsuperscript{155} For a discussion of the monopolistic characteristics of cable, see 2 A. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 2 (1971); Stern, supra note 149, at 184.

\textsuperscript{156} Three characteristics of cable make it a natural monopoly; (1) the high capital expenditure necessary for the construction of a cable system; (2) the relatively narrow profit margin; (3) the length of time before a return on the investment is realized. Miller & Beals, supra note 153, at 95. For example, the total estimated cost of establishing a cable system in St. Louis County, Missouri was 34.7 million dollars. See Stern, supra note 149, at 184 n.24. Furthermore, it has been estimated that it may take 10 years before an investor in a cable operation realizes a profit. See Stern, supra note 149, at 184 n.27.

\textsuperscript{157} See Stern, supra note 149, at 184.

\textsuperscript{158} The F.C.C., recognizing the potential of cable, stated:

Cable can make a significant contribution toward improving the nation’s communications system—providing additional diversity of programming, serving as a communications outlet for many who previously have had little or no chance of ownership or of access to the television broadcast system, and creating the potential for a host of new communications services.

\textit{FCC, Report to Congress, CATV Regulation, reprinted in 22 P&F RADIO REG. 2d 1755, 1760 (1971).}

\textsuperscript{159} In addition to broadcast and entertainment programming, state-of-the-art cable television systems presently offer the following services: television channels for public and government use; cable operator originated programming of local interest (origination cablecasting); channels for educational use; closed circuit channels which connect local public institutions; specialty information channels devoted solely to financial, consumer price, or weather information; “all news” channels; FM radio channels; children’s and cultural programs, foreign language, video music, or other channels devoted to special audiences. Additional public services that cable television is expected to provide include: security monitoring (burglar, fire, and police alarms); computer terminals; medical monitoring; meter reading; energy management; transactional services (e.g. home shopping and banking); polling; new highway traffic management; accessing selected libraries of films or video tapes; and electronic mail delivery. Miller & Beals, supra note 153, at 87-88 nn.9 & 13.
grams and events, and to obtain the most technologically advanced cable television services. Most cable television planners recognize that if the industry is to be fully responsive to municipal needs, the regulating authority must be in a position to view and appraise those needs. Such a regulatory role would best be served by local government.

CONCLUSION

In Community Communications Co. v. City of Boulder, the Supreme Court denied antitrust immunity to the city of Boulder, a home rule municipality, when the city imposed a ninety day moratorium on cable television expansion for the purpose of drafting a statute to regulate cable franchises. The Court held that under the state action exemption doctrine, only when a municipality acts in furtherance of a "clearly articulated and affirmatively expressed" state policy can it be shielded from antitrust liability. The Court concluded that Colorado's grant of extensive home rule powers to Boulder was insufficient to meet this standard and, therefore, did not confer antitrust immunity on the recipient municipality's ordinance.

The outcome in the Boulder decision was not unexpected in light of the fact that the Burger Court has decided other federal-state conflicts in the antitrust immunity area using the "clearly articulated and affirmatively expressed" exemption test. Boulder, however, raised federalism issues which were not present in any of the Court's prior decisions and which rendered the state action exemption test inappropriate. By applying this test, the Court significantly impaired two essential elements of federalism. First, the state's ability to exercise its legislative powers in a manner not specifically prohibited by Congress was restricted. Second, the decision encroached upon the state's right as a sovereign to exist independently in a dual system of government. These infringements of state's rights occurred because the exemption analysis employed in Boulder was developed to resolve federal-federal conflicts, and therefore, it did not trigger the analysis necessary to resolve properly federal-state conflicts. Further, the decision contradicts the Court's prior stance in Usery that Congress may not act in a manner which functionally abrogates the state's ability to structure its internal operations.

As a result of Boulder, a home rule municipality may be denied immunity from antitrust laws that non-home rule cities potentially may enjoy. This inequitable result, and its accompanying burden on states which have

160. For example, municipalities may request two-way services or interconnection with other regional systems. Linking the cable systems of nearby communities may provide more funding and support for new services due to the larger viewing audiences.

161. The role of the states in cable regulation is to oversee and coordinate local regulation. Densely populated states like New Jersey, for example, might require a greater number of public access channels and a greater commitment to neighborhood service. Wyoming, on the other hand, might decide that individual community systems are unnecessary and opt for uniform state-wide service. Each state must assess its differing needs and specify franchising procedures, create franchise areas, and establish minimum standards for cable systems accordingly. See Sloan Report, supra note 148, at 152.
delegated broad plenary powers to their local subdivisions, is likely to result in an unwarranted restriction of a state's ability to structure its own government. The "clearly articulated and affirmatively expressed" standard required by *Boulder* hampers local government in regulating cable television. Unfortunately, this industry possesses characteristics which suggest that local regulation is most appropriate. Paradoxically, the Court's decision hampers state and local governments' ability to deal with local problems at a time when the current administration is imposing additional burdens and responsibilities on state and local governments to provide basic public services and to protect the public's health, safety and welfare.

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