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MUNICIPAL GOVERNMENT EXEMPTION FROM FEDERAL ANTITRUST LAWS: AN EXAMINATION OF THE *MIDCAL* TEST AFTER *BOULDER*

In 1890, Congress enacted the Sherman Antitrust Act (Act)¹ to prohibit large business concerns from practicing various kinds of anticompetitive activity in interstate commerce.² The Sherman Act proscribes contracts, combinations, and conspiracies in restraint of trade³ and monopolies,⁴ but does not describe specifically all the acts included under the forbidden arrangements.⁵ Legislative history indicates that Con-

¹ Pub. L. No. 190, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1976 & Supp. V 1981)).

² *Parker v. Brown*, 317 U.S. 341, 351 (1943) (citing 21 CONG. REC. 2457, 2562 (1890) (remarks of Sen. Sherman)). Senator Sherman declared that the Sherman Act (Act) only prevented business combinations in restraint of trade. *Id.* at 351. A combination is the association of two or more persons for the attainment of some common end. *Albrecht v. Herald Co.*, 367 F.2d 517, 523 (8th Cir. 1966), *rev'd*, 390 U.S. 145 (1968). Remarks of other senators indicate that Congress intended the Sherman Act to prevent combinations of private persons, whether individual or corporate, in restraint of trade. 21 CONG. REC. at 2562, 2728.

³ 15 U.S.C. § 1 (1976). Section 1 of the Sherman Act prohibits "every contract, combination . . . or conspiracy in restraint of trade" in interstate or foreign commerce. *Id.* Restraint of trade includes conspiracies, contracts or combinations of persons, including corporate persons, with the intention of eliminating or reducing competition or creating a monopoly. See *United States v. Reading Co.*, 253 U.S. 26, 30 (1920). Restraints of trade might also include attempts to maintain prices artificially or other actions designed to interrupt the natural course of trade and commerce. *Id.* Under the Sherman Act, interferences with free competition that tend to restrict production or affect prices are illegal per se. See *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 102-03 (1980) (resale price maintenance constitutes per se violation of Sherman Act). Alternatively, some restraints are subject to a rule of reason analysis. *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 255 F.2d 214, 230 (9th Cir. 1958). The rule of reason applies to restraints of trade ordinarily reasonable, but made unreasonable because the violator specifically intends to accomplish the equivalent of a forbidden restraint, as for example, the reduction of competition. *Id.*; see *infra* notes 78-81 and accompanying text (under rule of reason analysis, restraint of trade is defensible only if negative competitive effect is not unreasonable).

⁴ 15 U.S.C. § 2 (1976). Section 2 of the Act prohibits monopolization. *Id.* Monopoly, as prohibited by § 2 of the Act, has two elements: possession of monopoly power in the relevant market and willful acquisition of that power. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Courts distinguish an improper use of monopoly power from growth of a monopoly as a consequence of a superior product, business acumen, or historic accident. *Id.*; see *United States v. Otter Tail Power Co.*, 331 F. Supp. 54, 58 (D. Minn. 1971) (Sherman Act condemns monopoly possessing power to fix prices or exclude competition, coupled with policies designed to preserve that power). Section 2 of the Sherman Act also prohibits persons from combining or conspiring to acquire or maintain power to exclude competitors from any part of trade or commerce. *Davidson v. Kansas City Star Co.*, 202 F. Supp. 613, 617 (W.D. Mo. 1962). To violate § 2, persons must use their market power, as a group, to exclude actual or potential competition, and must intentionally and purposefully exercise that power. *Id.* at 617-18.

⁵ *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 406 n.32 (1978).

gress intended that federal courts determine the scope of these forbidden arrangements in light of the Act's expressed purpose to prevent restraints on competition.⁶ In 1897, the United States Supreme Court upheld the Act's constitutional validity, emphasizing Congress' commerce clause power.⁷ Since that time, the Court has extended the prohibitions of the Act to cover a wide variety of business activities in interstate commerce.⁸

In 1904, the Supreme Court held that a municipality was a person within the meaning of the Sherman Act, thus enabling a municipality to maintain a federal antitrust action in its own name.⁹ For many years, however, the Supreme Court did not address whether the Act proscribed anticompetitive municipal action.¹⁰ Federal courts assumed that the principles of federalism, which protected anticompetitive state action from the purview of the Act,¹¹ extended to the actions of states' political subdivisions.¹² In several recent decisions, however, the

⁶ *Id.* (citing 21 CONG. REC. 2460, 3148 (1890)). The Judiciary Committee of the Senate considered it impractical for Congress to set down precise and all-inclusive definitions of prohibited conduct in the Sherman Act, and believed courts more capable of handling the matter of definition. *See* 21 CONG. REC. at 2460, 3148 (1890). Senator Hoar, who helped draft the Act, noted that Congress intended to provide the courts with the power and the Department of Justice with the duty to prevent all combinations in restraint of trade. *See* 36 CONG. REC. 522 (1903).

⁷ *See* *United States v. Trans-Missouri Freight Ass'n.*, 166 U.S. 290, 309-43 (1897). In *Trans-Missouri*, the Supreme Court upheld the application of the Sherman Act for the first time. *Id.* at 309-43. Two years earlier, the Court had refused to apply the Sherman Act in a case involving the direct monopolization of the manufacture of refined sugar. *See* *United States v. E.C. Knight Co.*, 156 U.S. 1, 12-17 (1895). In *E.C. Knight*, the Court held that manufacturing was not commerce within the meaning of the commerce clause. *Id.* at 16-17. After the *Trans-Missouri* decision, the Court began to distinguish the *E.C. Knight* holding. *See* *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 234-48 (1899). In *Addyston Pipe*, the Court, in holding that the Sherman Act could apply to the conspiracy in question, noted that the case differed from *E.C. Knight* in that the *Addyston Pipe* conspiracy directly restrained not only the manufacture, but also the purchase, sale or exchange of the manufactured commodity, iron pipe, among the states. *See* 175 U.S. at 234-48.

⁸ *See, e.g.,* *Lorain Journal Co. v. United States*, 342 U.S. 143, 149-55 (1951) (Act applied to newspaper in Ohio with daily circulation of over 20,000 copies, only 165 of which went to subscribers outside Ohio); *Swift & Co. v. United States*, 196 U.S. 375, 396-98 (1905) (Act applied to livestock dealers in different states when plaintiffs alleged combination of dealers to control cattle prices); *Northern Sec. Co. v. United States*, 193 U.S. 197, 325-27 (1904) (within Act's purpose to break up holding company's joint control of competing railroads). *But see* *Federal Baseball Club v. National League*, 259 U.S. 200, 208-09 (1922) (Sherman Act inapplicable to major league baseball).

⁹ *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906); *see* *Georgia v. Evans*, 316 U.S. 159, 162 (1942) (state is person within meaning of Sherman Act for purpose of bringing own antitrust action).

¹⁰ *See* *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 429 (1978) (Court addressed question of municipal antitrust immunity for first time).

¹¹ *See* *infra* notes 15-20 and accompanying text (anticompetitive state program immune to Sherman Act liability).

¹² *Pinehurst Airlines, Inc. v. Resort Air Serv., Inc.*, 476 F. Supp. 543, 551 (M.D.N.C. 1979).

Supreme Court limited the scope of state action immunity for certain parties, including municipalities and local governments.¹³ Under current law a federal court may impose antitrust liability on a municipal government if the municipality fails to satisfy the Supreme Court's strict standard of state authorization required for all anticompetitive municipal action.¹⁴

The Supreme Court first clearly enunciated the doctrine of state governmental immunity from federal antitrust laws in the 1943 case of *Parker v. Brown*.¹⁵ *Parker* involved a challenge under the Sherman Act to a California state program that authorized state-wide organizations to develop marketing policies for the state raisin crop.¹⁶ The Court considered the legislative history of the Sherman Act and found that Con-

¹³ See, e.g., *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 408 (1978) (plurality opinion) (municipality may be held liable under federal antitrust law); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 585 (1976) (state regulated private utility must show state commanded anticompetitive behavior to obtain antitrust immunity); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791-92 (1975) (state agency may be held liable under Sherman Act).

¹⁴ See *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 43-57 (1982) (Court clarified standard of state authorization necessary for municipality to maintain immunity from federal antitrust laws). In addition to potential liability under the Sherman Act, a municipality may incur liability under the Clayton Act. See *The Clayton Act*, Pub. L. No. 212, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-17 (1976 & Supp. V 1981)). Section 14 of the Clayton Act prohibits tying arrangements and exclusive dealing arrangements. See 15 U.S.C. § 14 (1976). A tying arrangement is an agreement between two persons, in which one agrees to sell one product, the tying product, only on condition that the other person also purchases another product, called the tied product. *Northern v. McGraw-Edison Co.*, 542 F.2d 1336, 1344 (8th Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977). An exclusive dealing arrangement involves an agreement to deal exclusively with one buyer or seller. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 325-26 (1961). Section 15 of the Clayton Act provides for treble damages when a plaintiff proves any violation of either the Sherman Act or Clayton Act. See 15 U.S.C. § 15 (1976).

¹⁵ 317 U.S. 341 (1943). Before the *Parker* decision, the Supreme Court had addressed the state action problem only once, in a case decided in 1904. See *Olsen v. Smith*, 195 U.S. 332, 338-39 (1904). In *Olsen*, the Court upheld a Texas regulatory scheme giving commissioned pilots a monopoly on pilotage service for Texas because the state had sovereign power to regulate pilotage. *Id.*

¹⁶ *Parker*, 317 U.S. at 346. In *Parker*, a California statute authorized producers to create marketing programs for agricultural products cultivated in the state. *Id.* The purpose of the program was to preserve the state's agricultural wealth and prevent economic waste in marketing agricultural products. *Id.*; see California Agricultural Prorate Act, ch. 754, 1933 Cal. Stats. 1969 (current version codified at CAL. FOOD & AGRIC. CODE §§ 59501-60015 (West 1968 & Supp. 1979)). The statute authorized the establishment of an Agricultural Prorate Advisory Commission under which producers of a particular commodity could petition the Commission for the establishment of a prorate marketing program. *Parker*, 317 U.S. at 346-47. Pursuant to the raisin producers' request, the Commission established a prorate marketing program for raisins to alleviate chronic and harmful overproduction. *Id.* at 347-48. Under the prorate marketing program, a committee composed of producers and packers controlled the marketing of raisins and never sold raisins below the prevailing market price in order to achieve market stability. *Id.* The plaintiff in *Parker*, a producer and packer of raisins who had entered into contracts for the sale of raisins prior to the adoption of the prorate program, sought to enjoin appellants from enforcing the program. *Id.* at 349.

gress intended to prevent "business combinations" but did not intend to restrain legitimate state action.¹⁷ The *Parker* Court noted that the state of California had "commanded" the anticompetitive activity and had taken an active role in approving and enforcing the program.¹⁸ The Court held that the state had acted lawfully as sovereign to replace competition with regulation.¹⁹ In later cases, federal courts labelled the *Parker* exemption from the federal antitrust laws the state action doctrine.²⁰

After *Parker*, federal courts tacitly assumed that the state action doctrine extended to local and municipal governments acting pursuant

¹⁷ *Parker*, 317 U.S. at 351. Although the *Parker* Court clearly expressed the view that Congress did not pass the Sherman Act to restrain legitimate state action, the Court referred to an earlier antitrust decision and declared that a state cannot provide immunity for those who violate the Act by authorizing them to violate it or declaring their action lawful. *Id.*; see *Northern Sec. Co. v. United States*, 193 U.S. 197, 332, 344-47 (1904) (holding company's acquisition of rival railroads violated Sherman Act). The *Parker* Court also referred to another case in which the Court upheld a permanent injunction against a municipality for having violated a different federal act. 317 U.S. at 351-52; see *Union Pac. R.R. v. United States*, 313 U.S. 450, 453, 474 (1941) (Court upheld injunction against city illegally receiving rebate on transportation of food by common carrier through city-owned railroad terminal). Unlike the *Union Pacific* Court, the *Parker* Court did not face the question of a state or municipality becoming a participant in a private agreement in restraint of trade. 317 U.S. at 351-52. By citing the *Union Pacific* decision, however, the *Parker* Court implied that a state or municipality might not be immune from the Sherman Act in the private agreement situation. *Id.* Recent Supreme Court decisions have relied on the *Parker* implication to hold that private companies and state agencies are not exempt automatically from federal antitrust laws simply because the state acquiesced in the challenged activity. See *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 585, 598 (1976) (state regulated private utility not immune from antitrust laws for anticompetitive action acquiesced in and not commanded by state); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791-92 (1975) (Virginia State Bar acting as state agency for some limited purposes not immune under Sherman Act when Bar voluntarily joined in essentially private anticompetitive activity).

¹⁸ *Parker*, 317 U.S. at 350; see *supra* note 16. The *Parker* Court noted that the California Prorate Advisory Commission only established a prorate marketing program after holding a public hearing. 317 U.S. at 346. Once the Commission granted a petition, the Director of the Commission would select a program committee composed of producers and packers to formulate a proration marketing program, which the Commission could approve or modify. *Id.* at 346-47. The committee then would supervise the operation of the program, but the state would enforce the program. *Id.*

¹⁹ *Parker*, 317 U.S. at 352. The *Parker* Court relied on two earlier cases. See *id.*; *Olsen v. Smith*, 195 U.S. 332, 344-45 (1904) (discussed *supra* note 15); *Lowenstein v. Evans*, 69 F. 908, 911 (C.C.D.S.C. 1895). The *Lowenstein* court addressed the issue of whether South Carolina's monopoly in the purchase, transportation, and sale of liquor violated the recently enacted Sherman Act. 69 F. at 911. The Circuit Court for the District of South Carolina found no substantive violation of express provisions of the Act since the state neither made any contracts nor entered into a combination or conspiracy. *Id.*

²⁰ See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 (1975) (Court denied State and County Bar antitrust protection for set fee schedules under so-called state action doctrine); *Saenz v. University Interscholastic League*, 487 F.2d 1026, 1027-28 (5th Cir. 1973) (court upheld state action defense in rejecting claim of conspiracy between state agency and private competitor of plaintiff).

to state grants of authority.²¹ In the meantime, however, the Supreme Court recognized greater congressional power to regulate under the commerce clause.²² Concurrently, the Court's view of state power narrowed.²³ Since 1975, the Supreme Court has decided several cases that have dramatically narrowed the scope of state action exemptions.²⁴ The Court held that municipalities and local governments do not enjoy automatic immunity from federal antitrust laws simply because of the governments' status as political subdivisions of a state.²⁵ In three recent

²¹ *Pinehurst Airlines, Inc. v. Resort Air Serv., Inc.*, 476 F. Supp. 543, 551 (M.D.N.C. 1979); see *E.W. Wiggins Airways, Inc. v. Massachusetts Port Auth.*, 362 F.2d 52, 55-56 (1st Cir.), cert. denied, 385 U.S. 947 (1966). In *E.W. Wiggins*, the plaintiff charged that the Port Authority had engaged in a conspiracy to deny the plaintiff a license to operate at Logan Airport, and that the Port Authority was subject to suit under the antitrust laws for conducting a private business in a purely proprietary capacity. 362 F.2d at 55. The First Circuit upheld a dismissal of the plaintiff's claims because the Port Authority acted under authorization from the state that established the Port Authority as a public corporation. *Id.* at 55-56. Therefore, according to the court, any actions in which the Port Authority engaged pursuant to the state's authorization, constituted a valid exercise of governmental power. *Id.*

²² See, e.g., *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 420-21 (1978) (Burger, C.J., concurring) (municipality may be held liable for violating federal antitrust laws); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 243 (1964) (motel that provided lodging to transient guests affected interstate commerce per se); *Lorain Journal Co. v. United States*, 342 U.S. 143, 149-55 (1951) (newspaper's actions covered by federal antitrust laws even though paper only reached 165 out-of-state readers); *Wickard v. Filburn*, 317 U.S. 111, 118-29 (1942) (Court upheld congressional commerce clause power to regulate amount of wheat farmer grew for personal consumption).

²³ See, e.g., *National League of Cities v. Usery*, 426 U.S. 833, 851-52 (1976) (Court reversed trend of applying federal minimum wage and maximum hour provisions to state employees); *Parden v. Terminal Ry.*, 377 U.S. 184, 192 (1964) (state-owned railroad subject to liability to injured employee under Federal Employers Liability Act).

²⁴ See *Bates v. State Bar*, 433 U.S. 350, 359-63 (1977); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 594-95 (1976). In *Bates*, the plaintiffs claimed that an Arizona State Bar rule prohibiting lawyers from advertising services violated the Sherman Act. 433 U.S. at 354-56. The Supreme Court held that the Arizona State Supreme Court, which promulgated the rule, provided sufficient state authorization to exempt the advertising ban from the purview of the Sherman Act. *Id.* at 359-63. The Court nevertheless invalidated the rule for violating the first amendment rights of plaintiffs. *Id.* at 363-82.

In *Cantor*, the Court held that a private electrical utility, allegedly monopolizing the light bulb market, did not qualify for a federal antitrust exemption when the state merely acquiesced in the challenged activity. 428 U.S. at 594-95; see *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 783 (1975). In *Goldfarb*, the Court held that the Virginia Bar's minimum fee schedule constituted price fixing in violation of § 1 of the Sherman Act. *Id.*; see 15 U.S.C. § 1 (1976); *supra* note 3 (price fixing is per se violation of Sherman Act). The *Goldfarb* Court noted that neither the state court nor any state statute actually required the Bar to adopt the fee schedule. 421 U.S. at 790-91.

²⁵ See *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 43-57 (1982) (home rule status for city insufficient state authorization to provide city with immunity from federal antitrust law); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 394-417 (1978) (plurality opinion) (municipality lacking proper state authorization for anti-competitive actions may be liable under federal antitrust law).

decisions the Court established a standard of state authorization that local and municipal governments must meet to qualify for a state action exemption from the federal antitrust laws.²⁶

In the 1978 decision *City of Lafayette v. Louisiana Power & Light Co.*,²⁷ the Court addressed for the first time the question of municipal antitrust immunity.²⁸ A divided Court rejected two municipalities' claims of absolute immunity from the federal antitrust laws.²⁹ In *Lafayette*, two cities that owned and operated state authorized municipal electric systems sued Louisiana Power & Light, a privately owned utility, under the federal antitrust laws.³⁰ Louisiana Power & Light counterclaimed, alleging that the cities had committed various federal antitrust offenses while operating the municipal electric systems.³¹ In rejecting the cities' claim of absolute immunity, the four member plurality opinion held that the municipalities must have "state authorization" for alleged anticompetitive action before the action will be exempt from federal antitrust scrutiny.³² The Court stated that a political subdivision of a state need not point to a specific detailed statutory mandate before properly asserting a state action defense.³³ Rather, the Court held that sufficient state authorization would exist if the legislature "contemplated" the kind of

²⁶ See *infra* notes 53-56 and accompanying text (under two-part *Midcal* test, state must clearly articulate and affirmatively express policy to displace competition, and state must actively supervise the activity).

²⁷ 435 U.S. 389 (1978) (plurality opinion).

²⁸ *Id.* at 394-417.

²⁹ *Id.* at 394.

³⁰ *Id.* at 391-92. The plaintiff cities in *Lafayette* charged the defendant Louisiana Power & Light Co. and other private electric utilities with conspiracy to restrain trade in violation of § 1 of the Sherman Act, and with monopolizing the generation, transmission, and distribution of electric power by preventing the construction and operation of competing utility systems in violation of § 2 of the Sherman Act. *Id.* at 392 n.5; see 15 U.S.C. §§ 1-2 (1976); *supra* notes 3-4 (discussion of Sherman Act).

³¹ *Lafayette*, 435 U.S. 392. In *Lafayette*, Louisiana Power & Light Co. alleged a conspiracy between the cities and a nonparty electric cooperative to prevent the construction of Louisiana Power & Light Co.'s nuclear power plant. *Id.* at 392 n.6. The private utility also alleged a conspiracy to eliminate competition within the cities' boundaries and in other markets by the use of long-term supply agreements. *Id.* The final allegation stated that the cities attempted to displace the private utility in certain areas by requiring that the utility's customers purchase electricity from the cities as a condition of continued water and gas service. *Id.*

³² *Id.* at 408-15. The *Lafayette* plurality stated that *Parker* did not equate political subdivisions with sovereign states and also that in other areas of the law the Supreme Court has not accorded cities the same deference accorded states under federalism doctrines. *Id.* at 408, 412; see *infra* notes 42-47 and accompanying text (cities not sovereign under tenth or eleventh amendments). The plurality expressed the fear that if cities within the same state are free to approach policy decisions on their own, each may express its own "parochial preference" in adopting anticompetitive restraints rather than the preference of the state. *Lafayette*, 435 U.S. at 414 (plurality opinion).

³³ *Lafayette*, 435 U.S. at 415.

action identified in the complaint.³⁴ But the plurality provided no guidelines for determining sufficient state contemplation of a particular local action.³⁵

In a concurring opinion, Chief Justice Burger focused on the nature of the challenged municipal activity.³⁶ The concurrence distinguished municipalities engaged in "proprietary" or business activities from municipalities engaged in traditional government activities.³⁷ When a municipality engaged in a proprietary activity, the concurrence would have required that the state actually command the municipality to perform the anticompetitive action before granting the municipality an exemption.³⁸ Otherwise, the concurrence suggested approval of the doctrine of per se immunity from the federal antitrust laws for municipalities engaged in traditional governmental activities.³⁹ The *Lafayette* plurality never adopted the concurring opinion's proprietary-nonproprietary distinction, and in a subsequent decision a majority of the Court clearly rejected the distinction.⁴⁰

The *Lafayette* dissent vigorously defended the cities' claim of absolute immunity from the federal antitrust laws.⁴¹ The dissent, relying

³⁴ *Id.* (citing *City of Lafayette v. Louisiana Power & Light Co.*, 532 F.2d 431, 434-35 (5th Cir. 1976)).

³⁵ *Id.* at 415-17; see *infra* notes 119-26 and accompanying text (courts deciding state contemplation issue differently on similar fact situations). Compare *In re Airport Car Rental Antitrust Litig.*, 521 F. Supp. 568, 585 (N.D. Cal. 1981) (legislative enactments clearly contemplated challenged limit on number of rental companies leasing space at airport, despite lack of specific statutory authority) with *Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. 1025, 1031 (N.D. Tex. 1978) (cities lacked statutory authority to grant taxi service monopoly at municipal airport). Several lower federal courts admitted confusion as to the actual standard the *Lafayette* Court adopted. See, e.g., *Hybud Equip. Corp. v. City of Akron*, 654 F.2d 1187, 1195 (6th Cir. 1981), *vacated and remanded*, 455 U.S. 931 (1982); *Pinehurst Airlines, Inc. v. Resort Air Serv., Inc.*, 476 F. Supp. 543, 552 (M.D.N.C. 1979).

³⁶ *Lafayette*, 435 U.S. at 420 (Burger, C.J., concurring).

³⁷ *Id.* at 418-25 (Burger, C.J., concurring). The Chief Justice rejected arguments that the tenth amendment applied in *Lafayette*, but he hinted that municipalities might qualify for automatic immunity from the federal antitrust laws in some circumstances. See *id.* at 421-24. The concurrence stated that the running of a business enterprise, such as an electrical service, is not an integral operation of a state in the area of traditional government function, and therefore the Court need not defer to tenth amendment principles of federalism. *Id.* at 424 (Burger, C.J., concurring).

³⁸ *Id.* at 425 n.6 (Burger, C.J., concurring). In *Lafayette*, the Chief Justice placed particular emphasis on the allegation that the cities made a profit on the municipally owned electrical operations in support of his position that the cities were operating a proprietary enterprise. *Id.* at 418 (Burger, C.J., concurring).

³⁹ *Id.* at 422-25 (Burger, C.J., concurring).

⁴⁰ See *id.* at 391-417; see also *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 50 n.13, 52-57 (1982) (city engaged in nonproprietary action not immune from federal antitrust law); *infra* notes 84-87 and accompanying text (same).

⁴¹ See *Lafayette*, 435 U.S. at 426-41 (Stewart, J., dissenting). Ironically, Justice Stewart cited the same *Parker* dicta in support of his *Lafayette* position as the Supreme Court

on *National League of Cities v. Usery*,⁴² argued that the tenth amendment forbids interference with a state's freedom to allocate governmental power to political subdivisions as the state wishes.⁴³ The dissent referred to a footnote in the *National League of Cities* opinion that, in effect, equated interference with a state's political subdivision as interference with the state itself.⁴⁴ The *Lafayette* plurality rejected the interference argument summarily by stating that nothing in *National League of Cities* supported the dissent's position.⁴⁵ Instead, the plurality cited with approval Supreme Court decisions interpreting the eleventh amendment and holding that cities and counties are not sovereign states within the

previously had used to limit the state action doctrine. *Id.* at 429 (Stewart, J., dissenting) (citing *Parker v. Brown*, 317 U.S. 341, 351 (1943)). But see *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) (citing *Parker v. Brown*, 317 U.S. 341, 351-52 (1943)). Justice Stewart cited the *Parker* statement "the state or its municipality" to support his position that *Parker* equated the state and the municipality with regard to immunity from the federal antitrust laws. *Id.* (Stewart, J., dissenting); see *supra* note 17 (*Parker* dicta implied that state or municipality might not have immunity from Sherman Act when participating in private agreement to restrain trade).

⁴² 426 U.S. 833 (1976).

⁴³ *Lafayette*, 435 U.S. at 430 (Stewart, J., dissenting).

⁴⁴ *Id.* (Stewart, J., dissenting) (citing *National League of Cities v. Usery*, 426 U.S. 833, 855 n.20 (1976)). The *National League of Cities* Court stated in a footnote that political subdivisions derive power from the state and that Congress therefore, in the exercise of its commerce clause power, must give political subdivisions the same deference given states. 426 U.S. at 855 n.20. The *National League of Cities* Court held that states are free under the tenth amendment to "structure integral operations in areas of traditional government function." *Id.* at 852. Traditional areas of operation refer to, among other things, fire prevention, police protection, sanitation, public health, parks, and recreation. *Id.* at 851-52; see *Gold Cross Ambulance v. City of Kansas City*, 538 F. Supp. 956, 967-68 (W.D. Mo. 1982).

In *Gold Cross*, the District Court for the Western District of Missouri applied the state action exemption to a city maintaining a monopoly ambulance service. 538 F. Supp. at 965-67. The *Gold Cross* court, however, also found the city immune from the federal antitrust laws under the tenth amendment. *Id.* at 967. The *Gold Cross* court found the city's regulations a legitimate exercise of the city's police power for the general public welfare, a right reserved, according to the court, to states and their subdivisions. *Id.* The *Gold Cross* court relied on *National League of Cities* to support the position that a city has sovereign immunity from federal antitrust laws. *Id.* (citing *National League of Cities v. Usery*, 426 U.S. 833, 851 (1976)). The *Gold Cross* court recognized, however, that a recent Supreme Court decision substantially narrowed the broad language of *National League of Cities*. *Id.* at 967-68 (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 287 (1981)).

In *Lafayette*, the plurality clearly rejected the argument that cities are sovereign within the meaning of the tenth amendment by stating that *National League of Cities* did not establish a "principle of presumptive congressional deference" toward cities. See *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 412 n.42 (1978). In *Boulder*, the Court affirmed the *Lafayette* decision by noting that the United States is a "nation of states that makes no accommodation for sovereign subdivisions of states." *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 50 (1982). Thus, the *Gold Cross* tenth amendment argument is probably erroneous in light of the *Boulder* decision. Compare *Boulder*, 455 U.S. at 50 with *Gold Cross*, 538 F. Supp. at 967-68.

⁴⁵ *Lafayette*, 435 U.S. at 412 n.42 (plurality opinion).

meaning of the eleventh amendment and thus are subject to suit in federal court.⁴⁶ By analogy, the plurality held that municipalities cannot claim sovereignty under the tenth amendment.⁴⁷ In a separate opinion, Justice Blackmun joined the *Lafayette* dissent to warn of the danger of subjecting municipalities to potential treble damage awards under the Clayton Antitrust Act.⁴⁸ Nevertheless, Justice Blackmun would have held a municipality liable if the municipality conspired with private parties to the detriment of another private party.⁴⁹

⁴⁶ *Id.* at 412 (citing *Edelman v. Jordan*, 415 U.S. 651, 667 n.12 (1974), and *Lincoln County v. Luning*, 133 U.S. 529, 531 (1890)). The eleventh amendment, like the tenth amendment, supports principles of federalism by prohibiting citizens from suing a state in a federal court. See U.S. CONST. amend. XI. In *Lincoln County*, a county claimed immunity from a suit in federal court in which the plaintiff alleged that the county had defaulted on the interest payments for a bond issue. 133 U.S. at 530. The Supreme Court held that the eleventh amendment does not protect counties from suit in federal court. *Id.* at 531. In *Edelman*, the Supreme Court applied the so-called stripping doctrine to state officials unlawfully withholding welfare payments. 415 U.S. at 664. The stripping doctrine allows a federal court, in effect, to strip a state official of his state authority and thereby permits a suit against him in federal court. See *id.* at 651-68. The Supreme Court established the stripping doctrine to enable a citizen to circumvent the prohibition of the eleventh amendment when a state official pursues a policy that violates a citizen's federal and constitutional rights. See *id.* In *Edelman*, the Court noted that political subdivisions cannot claim eleventh amendment immunity to suit in federal court because subdivisions are not states within the meaning of the amendment. *Id.* at 667 n.12.

⁴⁷ See *Lafayette*, 435 U.S. at 412 n.42. The *Lafayette* plurality held that if cities are not sovereign under the eleventh amendment, then cities are not sovereign under the tenth amendment. *Id.*

⁴⁸ *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 442 (1978) (Blackmun, J., dissenting); see 15 U.S.C. § 15 (1976) (provides for treble damages whenever violation of Sherman or Clayton Act occurs). In *Lafayette*, the potential damages under a single claim of the private utility amounted to \$540,000,000, the result of trebling the damage claim under § 15 of the Clayton Act. 435 U.S. at 440 (Stewart, J., dissenting). The *Lafayette* dissent noted that the two cities had a combined estimated population of 75,000 and that ultimate liability would bankrupt the cities. *Id.* (Stewart, J., dissenting). As yet, no federal court has held that a municipality actually violated federal antitrust laws and therefore the question of treble damage liability for a municipality remains unanswered. See *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 56 n.20 (1982). The *Lafayette* and *Boulder* Courts specifically noted that the cases did not require that the Courts answer the question of appropriate damages because liability under the antitrust laws remained in issue. See *Boulder*, 455 U.S. at 56 n.20; *Lafayette*, 435 U.S. at 401 n.22. Nevertheless, the *Lafayette* and *Boulder* dissents expressed the view that in the event of actual antitrust liability for a municipality, a federal court will have a difficult time refraining from imposing treble damages because the language of § 15 of the Clayton Act requires a court to award treble damages for any violation of the antitrust laws. See *Boulder*, 455 U.S. at 65 n.2 (Rehnquist, J., dissenting); *Lafayette*, 435 U.S. at 440 n.30 (Stewart, J., dissenting); 15 U.S.C. § 15 (1976). In one recent case, a court denied a city's motion for summary judgment on the issue of the city's liability for treble damages. See *Grason Elec. Co. v. Sacramento Mun. Util. Dist.*, 526 F. Supp. 276, 282 (E.D. Cal. 1981).

⁴⁹ *Lafayette*, 435 U.S. at 441 (Blackmun, J., dissenting). The *Lafayette* Court remanded the case to determine whether the cities had in fact been operating under sufficient state authorization to qualify for an exemption from federal antitrust laws. 435 U.S. at 425 (Burger, C.J., concurring). The litigants, however, apparently settled the claims after the

In 1980, the Supreme Court decided *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*⁵⁰ *Midcal* involved a wine wholesaler's claim that California's wine pricing system constituted resale price maintenance⁵¹ in violation of the Sherman Act.⁵² A unanimous Court⁵³ announced a two-part test, derived from previous state action cases involving state agencies and private organizations, for determining what constitutes proper state authorization in federal antitrust cases.⁵⁴ The first prong of the *Midcal* test required "clear articulation and affirmative expression" of state policy regarding the challenged activity.⁵⁵ The second prong required "active state supervision" of the activity.⁵⁶ The *Midcal* Court held that the California program met the first prong of the test, but failed the active state supervision requirement because the state simply authorized price setting and neither established prices nor reviewed the reasonableness of the price schedules established by private parties.⁵⁷ In *Midcal*, the Court applied the two-part test to a state program organized for the benefit of private wine producers.⁵⁸ Thus, the *Midcal* Court did not clearly decide whether the two-part test would apply to municipal and local government claims of immunity from federal antitrust laws.⁵⁹ In 1982, the Court directly ad-

Supreme Court remanded the case to the district court. See *Pinehurst Airlines, Inc. v. Resort Air Serv., Inc.*, 476 F. Supp. 543, 555 n.22 (M.D.N.C. 1979) (citing Note, *The Erosion of State Action Immunity from the Antitrust Laws: City of Lafayette v. Louisiana Power & Light Co.*, 45 BROOKLYN L. REV. 165, 190 n.130 (1978)).

⁵⁰ 445 U.S. 97 (1980).

⁵¹ *Id.* at 100-01; see *Rubbermaid, Inc. v. Federal Trade Comm'n*, 575 F.2d 1169, 1171 (6th Cir. 1978) (defining resale price maintenance). Resale price maintenance is an agreement between a manufacturer and a retailer that the latter will not resell the manufacturer's product below a specified minimum price. *Rubbermaid*, 575 F.2d at 1171.

⁵² *Midcal*, 445 U.S. at 100; see 15 U.S.C. § 1 (1976) (resale price maintenance violates § 1 of Sherman Act).

⁵³ *Midcal*, 445 U.S. at 114. Justice Brennan did not take part in the consideration of the *Midcal* case. *Id.*

⁵⁴ See *id.* at 104-05; see also *Bates v. State Bar*, 433 U.S. 350, 362 (1977) (Court first enunciated standard of antitrust immunity later known as two-part *Midcal* test); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-92 (1975) (first case in which Court limited scope of state action doctrine). In *Bates*, the Supreme Court held that rules against lawyer advertising were immune from Sherman Act challenge because the rules "reflected a clear articulation of the state's policy" regarding professional behavior and were "subject to pointed reexamination" by the Arizona Supreme Court in enforcement proceedings. 433 U.S. at 362.

⁵⁵ *Midcal*, 445 U.S. at 104-05.

⁵⁶ *Id.*

⁵⁷ *Id.* at 105-06. The *Midcal* Court stated that the California legislature clearly and forthrightly intended to permit resale price maintenance, but the state failed to engage in any "pointed reexamination" of the program. *Id.*

⁵⁸ See *id.* at 97-106.

⁵⁹ See *id.* at 105. The *Midcal* Court cited *Lafayette* as established precedent for the two-part test. *Id.* (citing *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (plurality opinion)). But in fact the *Lafayette* plurality only stated the test in its clearer, present form during the plurality's review of the *Bates* holding. See *Lafayette*, 435 U.S. at 410; see *supra* note 54 (citing the two-part test as originally stated in *Bates*). The

dressed the application of the *Midcal* test to a municipality in *Community Communications Co. v. City of Boulder*.⁶⁰

In *Boulder*, a cable television operator claimed that a city ordinance, which imposed a ninety-day moratorium on cable television market expansion, violated section 1 of the Sherman Act.⁶¹ The defendant Boulder argued that as a home rule municipality under the Colorado Constitution, the city had sufficient state authorization to take any action regarding the regulation of the local cable television business.⁶² A majority of the Court disagreed, and held that a home rule amendment which provides a city with the right of self-government in municipal matters does not indicate a clearly articulated and affirmatively expressed state policy to displace competition with regulation.⁶³ Inasmuch as the ordinance lacked specific sovereign authorization, the *Boulder* Court considered it unnecessary to decide whether the ordinance "must or could" satisfy the second part of the *Midcal* test requiring active state supervision of the activity.⁶⁴

Lafayette plurality never specifically applied the two-part *Bates* test for determining a municipal government's antitrust immunity. *Lafayette*, 435 U.S. at 410. Actually, the *Lafayette* plurality impliedly equated the two-part test with a requirement that the state actually command the anticompetitive activity before a court could grant an exemption. See *id.* at 410 n.40. But the *Lafayette* plurality never endorsed a state command or compulsion standard for a municipality claiming state action immunity. See *id.* at 389-417. A strict state command standard would conflict with the plurality's approval of a lower level of statutory authorization, state contemplation of the challenged activity. See *id.* at 415.

⁶⁰ 455 U.S. 40 (1982).

⁶¹ *Id.* at 46-47. Community Communications Company (C.C.C.) intended to expand its cable television business within the city beyond the area the city originally assigned to the Company. *Id.* at 44-45. The Boulder city council subsequently enacted an emergency ordinance prohibiting C.C.C. from expanding its business for three months, during which time the council was to draft a new ordinance and invite new cable businesses to enter the market under the terms of the city's new ordinance. *Id.* at 44-47.

⁶² *Id.* at 46-47. In the original *Boulder* case, the District Court for the District of Colorado rejected the city's claim of a *Parker* exemption, relying on the Supreme Court's holding in *Lafayette*. See *City of Boulder v. Community Communications Co.*, 485 F. Supp. 1035, 1039 (D. Colo.), *rev'd*, 630 F.2d 704 (10th Cir. 1980), *rev'd*, 455 U.S. 40 (1982). The Tenth Circuit reversed, holding *Lafayette* inapplicable. *Community Communications Co. v. City of Boulder*, 630 F.2d 704, 708 (10th Cir. 1980), *rev'd*, 455 U.S. 40 (1982). The Tenth Circuit contrasted the city's regulation of a cable television franchise, involving no municipal proprietary interest, with the municipally operated revenue-producing utility companies in *Lafayette*. See *id.*; *supra* notes 36-40 and accompanying text (proprietary-nonproprietary distinction discussed).

⁶³ *Boulder*, 455 U.S. at 53-56. In *Boulder*, the city relied on Colorado state court decisions holding that the citizens of Colorado had vested Colorado's municipalities with every power the state legislature possessed over municipal affairs when the citizens adopted the home rule amendment. *Id.* at 52 n.15, 52-53. The *Boulder* Court rejected the home rule argument. *Id.* Interestingly, the state of Colorado and 22 other states filed amicus briefs in support of the cable television company. *Id.* at 71 n.7 (Rehnquist, J., dissenting). The *Boulder* dissent suggested that the states saw an opportunity to recapture power over local affairs that the states had lost because of home rule amendments. *Id.*

⁶⁴ *Id.* at 51 n.14.

In the *Boulder* dissent, Justice Rehnquist argued that the majority violated fundamental principles of federalism by treating political subdivisions and private litigants alike when a political subdivision or private litigant attempts to invoke the state action doctrine.⁶⁵ The dissent believed that a more sensible analysis would involve the use of the supremacy clause and the preemption doctrine.⁶⁶ If a court determined that a municipal ordinance could or did violate the Sherman Act, then under the supremacy clause the federal Sherman Act would preempt the local ordinance, unless the ordinance satisfied the dissent's unique version of the two-part *Midcal* test.⁶⁷

The *Boulder* dissent's view of the *Midcal* criteria indicates the dissent's perception of municipal action as a reflection of state sovereign power.⁶⁸ The dissent would uphold a challenged municipal ordinance if the city enacted the ordinance under an affirmative policy to restrain competition, provided the city actively supervised and implemented the policy.⁶⁹ The *Boulder* dissent noted that the majority did not consider whether the contested ordinance met the active state supervision prong of the *Midcal* test in view of the majority's finding that the city had failed the clear state articulation requirement.⁷⁰ The dissent implied, however, that should the majority require active state supervision of local anticompetitive activities, serious practical limitations would hinder implementation of active state supervision at the local level.⁷¹ The

⁶⁵ *Boulder*, 455 U.S. at 70-71 (Rehnquist, J., dissenting). The *Boulder* dissent noted that local governments often enact ordinances and regulations aimed at protecting public health, safety, and welfare. *Id.* at 60. The dissent stated further that the *Boulder* decision will "impede, if not paralyze, local governments' efforts to enact" such ordinances for fear of violating the federal antitrust laws. *Id.*

⁶⁶ *Id.* at 61-62 (Rehnquist, J., dissenting). A preemption analysis, as explained in the *Boulder* dissent, differs from an exemption analysis because preemption involves the supremacy clause and the concept of federalism. *Id.* at 61. The dissent described a preemption analysis as a court's attempt to resolve a conflict between the enactments of two sovereign governments, or a situation in which the federal government has occupied a field exclusively, foreclosing state regulation. *Id.* When a court finds preemption, the federal law invalidates or preempts the state law. *Id.* Because the Supreme Court wishes to protect the legitimate use of state police powers, however, the Court has been reluctant to infer preemption. *Id.*

In an exemption analysis, on the other hand, the *Boulder* dissent stated that no problems of federalism are present because the enactments of only one sovereign, the federal government, are involved. *Id.* A court simply must determine whether Congress intended to grant an exemption to the party claiming immunity. *Id.* (Rehnquist, J., dissenting). In an earlier state action case, Justice Blackmun, in a concurrence, advocated a preemption approach for the Sherman Act. See *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 605-14 (1976) (Blackmun, J., concurring).

⁶⁷ *Boulder*, 455 U.S. at 68-69 (Rehnquist, J., dissenting).

⁶⁸ See *id.* at 69 (Rehnquist, J., dissenting) (dissent considers states and political subdivisions sovereign).

⁶⁹ *Id.* (Rehnquist, J., dissenting).

⁷⁰ *Id.* at 71 n.6 (Rehnquist, J., dissenting).

⁷¹ See *id.* (Rehnquist, J., dissenting) (unusual to require state enforcement of municipal ordinances).

dissent equated active state supervision with actual enforcement of a challenged activity, thus implying that *Midcal* required constant state involvement in the local action rather than periodic state review.⁷²

The *Boulder* dissent justified a preemption approach with practical arguments.⁷³ By narrowing the issue to one of preemption, the Court could avoid the problem of having to impose treble damages on municipalities in the event of ultimate antitrust liability.⁷⁴ If a court were to find a local ordinance void for being inconsistent with the Sherman Act, the ordinance simply would have no effect.⁷⁵ Thus, the plaintiff would receive injunctive or declaratory relief to prevent further implementation of the ordinance by local authorities.⁷⁶ At the same time the plaintiff would be unable to claim damages because a court would assume that the local government acted lawfully up to the moment that the court actually decided that federal law superseded the local ordinance.⁷⁷

The *Boulder* dissent described a greater potential problem resulting from the Supreme Court's decision in *National Society of Professional Engineers v. United States*.⁷⁸ In *National Society of Professional Engineers*, the Court held that under the rule of reason applied in some federal antitrust cases, a private entity could not defend competitive restraints on the ground that competition is itself unreasonable.⁷⁹ Under

⁷² *Id.* (Rehnquist, J., dissenting); see *supra* note 57 and accompanying text (*Midcal* Court defined active state supervision test in terms of review and pointed reexamination).

⁷³ *Boulder*, 455 U.S. at 65 (Rehnquist, J., dissenting).

⁷⁴ *Id.* (Rehnquist, J., dissenting). The *Boulder* dissent noted that if a court ultimately found that a municipality violated the federal antitrust laws, the court would then find it difficult not to conclude that the municipality was subject to treble damages under the Clayton Act. *Id.* at 65 n.2. The *Boulder* majority, however, did cite the *Lafayette* plurality's remark that in a federal antitrust suit, activities that might appear anticompetitive when engaged in by private parties, may appear differently when adopted by a local government. *Id.* at 56 n.20; see *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 417 n.48 (1978). The *Boulder* Court also noted that the decision did not resolve the question of appropriate remedies against municipal officials. 455 U.S. at 56 n.20. The Court's remarks suggest that the *Boulder* majority may be reluctant to impose liability on local governments for some types of anticompetitive activities and may be averse to imposing treble damages on local governments. *But see supra* note 48 (Clayton Act requires mandatory imposition of treble damages for any antitrust violation).

⁷⁵ *Boulder*, 455 U.S. at 68 n.4 (Rehnquist, J., dissenting); see *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 154-58 (1978) (state tanker regulatory provisions partially preempted by federal law). *But see Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133 (1978) (Court rejected argument that Sherman Act preempted state law that reduced retail gasoline competition).

⁷⁶ See *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 154-58 (1978). In *Ray*, the Supreme Court affirmed in part the lower court's permanent injunction against state officials who sought to enforce a state tanker regulatory law that the Court found partially preempted by the federal Ports and Waterways Safety Act. *Id.*

⁷⁷ See *Boulder*, 455 U.S. at 68 n.4 (Rehnquist, J., dissenting); see also *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 614 n.6 (1976) (Blackmun, J., concurring) (proposing preemption analysis for application of Sherman Act).

⁷⁸ *Boulder*, 455 U.S. at 65-66 (Rehnquist, J., dissenting); see *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 696 (1978).

⁷⁹ *National Soc'y of Professional Eng'rs*, 435 U.S. at 696. Under the rule of reason, a

the rule of reason analysis, a restraint is defensible only if the negative effect on competition is not unreasonable or if the restraint actually has procompetitive effects.⁸⁰ Applying the decision to municipal restraints, the *Boulder* dissent argued that a municipality could not defend anticompetitive actions by establishing the actions' benefits to the community in terms of traditional health, safety, and public welfare concerns.⁸¹ The dissent pointed out that even if courts modify the rule of reason so that municipalities can defend regulation on the basis of community benefits, courts then would have to engage in a review of the reasonableness of particular local legislation.⁸² According to the dissent, judicial review would create an even greater evil, the establishment of the lower federal court system as a superlegislature sitting in judgment of state legislatures.⁸³

The *Boulder* decision represents a clear rejection of the proprietary-nonproprietary distinction that the Chief Justice suggested in *Lafayette*.⁸⁴ The Court rejected the city's attempt to classify the ordinance as a traditional government action distinguishable from the proprietary activity involved in *Lafayette*.⁸⁵ Instead, the *Boulder* Court clearly required state authorization for all local and municipal anticompetitive activities.⁸⁶ The *Boulder* decision apparently ends the possibility that the Court might carve out an exception to the state authorization requirement in areas of traditional government function.⁸⁷ The nonproprietary nature of the ordinance may account for the Chief Justice's shift to the dissent in *Boulder*.⁸⁸ Justice Blackmun, however, may have predicated his shift from the *Lafayette* dissent to the *Boulder* majority on a belief that the cities and a rival cable television operator had engaged in a conspiracy against the plaintiff, Community Communica-

court evaluates the legality of restraints of trade by weighing all the relevant factors including the history of the restraint, the evil perceived to exist, and the reason for adopting the particular remedy. See *United States v. National Soc'y of Professional Eng'rs*, 404 F. Supp. 457, 460-61 (D.D.C. 1975), *aff'd*, 555 F.2d 978 (D.C. Cir. 1977), *aff'd*, 435 U.S. 679 (1978).

⁸⁰ *Boulder*, 455 U.S. at 66 (Rehnquist, J., dissenting).

⁸¹ *Id.*

⁸² *Id.* at 67-68 (Rehnquist, J., dissenting).

⁸³ *Id.* at 68 (citing *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 535 (1949)). The *Boulder* dissent stated that the Sherman Act does not authorize a federal court to substitute the court's social and economic beliefs for the judgment of an elected local legislative body. *Id.* at 68 (Rehnquist, J., dissenting).

⁸⁴ See *Boulder*, 455 U.S. at 50 n.13, 55 n.18, 53-55.

⁸⁵ *Id.* at 47-48. The *Boulder* Court clearly rejected the Chief Justice's proprietary-nonproprietary distinction by reversing the Tenth Circuit, which had granted the city of Boulder immunity primarily on the proprietary-nonproprietary distinction. See *id.*; *supra* note 62 (Tenth Circuit contrasted nonproprietary action in *Boulder* with proprietary operation in *Lafayette*).

⁸⁶ *Boulder*, 455 U.S. at 53-55.

⁸⁷ See *id.*

⁸⁸ *Id.* at 60 (Rehnquist, J., dissenting).

tions Company.⁸⁹ Any explanation for the shift admittedly is speculative in view of the two Justices' silence in *Boulder*.⁹⁰ Nevertheless, the possibility remains that Justice Blackmun, who expressed grave fears over treble damages in *Lafayette*, would side with the *Boulder* dissent in future cases addressing the extent of municipal liability under the federal antitrust laws.⁹¹

As the test stands after *Boulder*, regardless of the type of activity involved, the municipality or local government must act under a clearly articulated and affirmatively expressed state policy to displace competition with regulation.⁹² Nevertheless, two post-*Boulder* decisions indicate that the nature of the activity continues to play a decisive role in federal courts' examinations of antitrust exemptions in the context of municipal or local regulations.⁹³

In *Gold Cross Ambulance v. City of Kansas City*,⁹⁴ two private ambulance companies sued Kansas City and a privately owned ambulance service for conspiring to restrain trade in violation of section 1 of the Sherman Act, and for monopolizing the local ambulance service industry in violation of section 2 of the Sherman Act.⁹⁵ The city had enacted an or-

⁸⁹ See Yetter, *Local Government Exemption from the Federal Antitrust Laws: Community Communications Co. v. City of Boulder*, 56 FLA B.J. 565, 565-66 (1982) (citing *City of Boulder v. Community Communications Co.*, 485 F. Supp. 1035, 1038 (D. Colo.), *rev'd*, 630 F.2d 704 (10th Cir. 1980), *rev'd*, 455 U.S. 40 (1982)); see also *supra* text accompanying note 49 (Justice Blackmun's view that Sherman Act does not exempt municipality engaging in conspiracy from antitrust liability). In *Boulder*, C.C.C. alleged a conspiracy between the city and a rival company to restrict competition by substituting the rival for C.C.C.. 455 U.S. at 47 n.9. But the district court noted that although C.C.C. had gathered some circumstantial evidence that might indicate a conspiracy, the evidence was insufficient to establish a probability that the petitioner would prevail on the claim. *Boulder*, 485 F. Supp. at 1038.

⁹⁰ *Boulder*, 455 U.S. at 41, 60. Neither Justice Blackmun nor Chief Justice Burger wrote an opinion for the *Boulder* case. See *id.* at 41; Yetter, *supra* note 89, at 565-66.

⁹¹ See *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 442 (1978) (Blackmun, J., dissenting) (expressing grave fears over imposing treble damages on municipalities).

⁹² *Boulder*, 455 U.S. at 53-55.

⁹³ See *infra* notes 94-109 and accompanying text.

⁹⁴ 538 F. Supp. 956 (W.D. Mo. 1982).

⁹⁵ *Id.* at 959; see *supra* notes 3-4 (§§ 1-2 of Sherman Act). In *Gold Cross*, the plaintiff ambulance companies sued the city and four private defendants who had formed their separate ambulance companies into a single corporation. 538 F. Supp. at 959. Although the district court granted summary judgment in favor of the city on all the Sherman Act allegations, the court refused to do so with respect to the antitrust allegations against the four private defendants. See *id.* at 969, 973. The *Gold Cross* court reasoned that the alleged action of the four private defendants in illegally combining their ambulance service companies into one to foreclose competition did not qualify for an antitrust exemption. *Id.* at 969. In refusing to grant the private defendants an exemption, the *Gold Cross* court implied that the individuals had engaged in a private conspiracy to monopolize the ambulance service industry and that the state action exemption does not shield a private anticompetitive conspiracy. See *id.* at 967; *infra* note 158 (some courts refuse to grant local governments antitrust immunity for otherwise lawful action when plaintiff alleges conspiracy); *supra* note 17

dinance that clearly created a private monopoly for ambulance service within the city limits.⁹⁶ The District Court for the Western District of Missouri noted that the city acted under a comprehensive state statutory scheme regulating ambulance companies, and that one of the statutes allowed a municipality to decide for itself whether to contract with one or more ambulance service providers.⁹⁷ The court held that the state statutes satisfied the first prong of the *Midcal* test by indicating a clearly articulated and affirmatively expressed state policy to regulate ambulance service on the basis of public need.⁹⁸ The court noted further that the state statutes clearly contemplated the possibility of municipalities imposing restrictions on ambulance service in addition to those imposed by the state.⁹⁹

Although the *Gold Cross* court applied the *Midcal* test, the court focused on the nature of ambulance service and the fact that state and local governments traditionally have regulated ambulance service.¹⁰⁰ The court compared *Lafayette*, in which municipalities sought to increase revenues at the expense of a private enterprise, with *Gold Cross*, in which the city had passed the ambulance ordinance to improve ambulance service for the protection of the public safety and health.¹⁰¹ The *Gold Cross* court's emphasis on local government's traditional regulation of ambulance service indicates that federal courts may continue to place great importance, albeit unstated, on the proprietary or nonproprietary

(*Parker* dicta implied that municipality might not deserve antitrust immunity when participating in private conspiracy to restrain trade).

⁹⁶ *Gold Cross*, 538 F. Supp. at 960-61. The city in *Gold Cross* purportedly had enacted an ordinance to eliminate the problem of slow responses to emergency calls by private ambulance companies observed under the city's former competitive ambulance service system. *Id.* at 960. Emergency calls apparently were less profitable for the ambulance companies than nonemergency calls, and thus the competitive system actually promoted poorer quality ambulance service in emergencies. *Id.*

⁹⁷ *See id.* at 964-65.

⁹⁸ *Id.* at 965. The *Gold Cross* court noted with approval that the Missouri Supreme Court had found that the purpose of the state regulatory scheme was to control destructive competition and improve ambulance service. *Id.* (citing *City of Raytown v. Danforth*, 560 S.W.2d 846, 849 (Mo. 1978) (en banc)).

⁹⁹ *Gold Cross*, 538 F. Supp. at 964 (citing MO. ANN. STAT. §§ 190.105.4, 190.105.5 (Vernon Supp. 1981)).

¹⁰⁰ *Gold Cross*, 538 F. Supp. at 968-69. The *Gold Cross* court contrasted the importance of the interaction of the state and local regulations in the ambulance service field with *Boulder*, in which the Supreme Court found no interaction of state and local regulation. *Id.* at 966; see *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 55 (1982) (Supreme Court cited with approval lower court's acknowledgment of no interaction of state and city regulation).

¹⁰¹ 538 F. Supp. at 965. The *Gold Cross* court noted that the defendant city, to insure quick and efficient emergency service for its citizens, was willing to subsidize the single company service if necessary to eliminate the difficulty ambulance companies had in controlling emergency service costs and collecting fees for emergency work. *See id.* at 960. The court noted further that the plaintiffs made no showing that the city would derive any economic benefit from the establishment of a single provider ambulance system. *Id.* at 965.

nature of the challenged activity in determining an antitrust exemption for a local government.¹⁰²

In another post-*Boulder* case, *Pueblo Aircraft Service, Inc. v. City of Pueblo*,¹⁰³ the plaintiff alleged that the city of Pueblo violated the federal antitrust laws by failing to renew plaintiff's fixed base operation¹⁰⁴ at the municipally operated airport.¹⁰⁵ The Tenth Circuit, affirming summary judgment against the plaintiff, noted that one particular state statute satisfied the *Midcal* clear articulation requirement for the city.¹⁰⁶ The *Pueblo* court cited statutory language indicating that the state required the municipality to operate the airport for the benefit of the general public and not, as the court stated, for the particular advantage of the inhabitants of Pueblo.¹⁰⁷ The *Pueblo* court stated that in the absence of an express statutory direction, courts generally regard the operation of an airport as a proprietary rather than a governmental function.¹⁰⁸ The *Pueblo* court's statement suggests that if the statute had authorized the municipality's operation of an airport without expressing a public purpose behind the regulation, the court would have been less inclined to find an exemption as the activity then would appear proprietary in nature.¹⁰⁹

The *Pueblo* decision suggests that the *Midcal* clear articulation test does not clarify how explicit state statutory authorization must be and fails to indicate whether public policy statements, such as the statement

¹⁰² See *id.* at 964-69.

¹⁰³ 679 F.2d 805 (10th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3498 (U.S. Jan. 11, 1983) (No. 82-352).

¹⁰⁴ *Id.* at 806-07. A fixed base operation is one in which an operator enters into a lease agreement with the city to provide specific facilities, services, equipment, and personnel for the airport. *Id.* at 806 n.3. Under the lease, the fixed base operator must meet all requirements for those operations of an airport used by aircraft, passengers, crews, and freight shippers. *Id.*

¹⁰⁵ *Id.* at 806-07.

¹⁰⁶ *Id.* at 808; see COLO. REV. STAT. § 41-4-101 (1973). The *Pueblo* court granted the city an antitrust exemption by relying on statutory language which stated that the acquisition and operation of a municipal airport were "public governmental functions, exercised for a public purpose and matters of public necessity." 679 F.2d at 808 (citing COLO. REV. STAT. § 41-4-101 (1973)).

¹⁰⁷ *Pueblo*, 679 F.2d at 811; see COLO. REV. STAT. § 41-4-101 (1973).

¹⁰⁸ *Pueblo*, 679 F.2d at 810-11. The *Pueblo* and *Gold Cross* courts continued to justify challenged activities using proprietary-nonproprietary language even after the *Boulder* holding rejected the distinction. See *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 50 n.13, 55 n.18, 53-55 (1982); *Pueblo*, 679 F.2d at 810-11; *Gold Cross Ambulance v. City of Kansas City*, 538 F. Supp. 956, 965 (W.D. Mo. 1982). The *Pueblo* and *Gold Cross* courts' reliance on the proprietary-nonproprietary distinction suggests federal courts' reluctance to abandon the proprietary-nonproprietary distinction as an analytical framework for distinguishing among anticompetitive activities of local governments. See *Pueblo*, 679 F.2d at 810-11; *Gold Cross*, 538 F. Supp. at 965. But see *supra* notes 84-86 and accompanying text (*Boulder* court clearly rejected the proprietary-nonproprietary distinction).

¹⁰⁹ *Pueblo*, 679 F.2d at 810-11.

cited in *Pueblo*, constitute sufficiently clear state authorization.¹¹⁰ The *Pueblo* court's approach contrasts with the approach of the court in *Pinehurst Airlines, Inc. v. Resort Air Service, Inc.*,¹¹¹ a post-*Lafayette* but pre-*Midcal* decision.¹¹² As in *Pueblo*, *Pinehurst* involved a federal antitrust claim by a plaintiff denied a license to operate at a county-operated airport.¹¹³ In *Pinehurst*, the District Court for the Middle District of North Carolina stated that the operation of an airport is clearly a proprietary function.¹¹⁴ The court noted the potential for anticompetitive abuses in granting an exclusive license to operate at an airport, and then reviewed all evidence that might show a legislative intent to authorize the granting of an exclusive fixed base operation by the county.¹¹⁵ The *Pinehurst* court cited statutory language that authorized a municipality to confer exclusive service and facility concessions at the airport unless the concessions deprived the public of its "rightful and equal use of the facilities."¹¹⁶ The court then denied an antitrust exemption to the county, holding that the county board lacked authority to grant an exclusive fixed base operation under the statute.¹¹⁷ In effect, the *Pinehurst* court drew economic conclusions about the reasonableness of allowing an exclusive fixed-base operation and on the basis of its conclusion decided not to infer legislative authorization.¹¹⁸

The *Pinehurst* and *Pueblo* cases illustrate that different federal courts may reach opposite conclusions on essentially the same facts.¹¹⁹ The *Pueblo* court did not draw conclusions about the reasonableness of the city's action, but simply held that the statutory language calling for the operation of an airport to benefit the general public satisfied the

¹¹⁰ See *id.* at 811; *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 43-57 (1982) (state authorization prong of *Midcal* test requires clear articulation and affirmative expression by state for anticompetitive action); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 102-06 (1980) (stating two-part test for state authorization of anticompetitive action).

¹¹¹ 476 F. Supp. 543 (M.D.N.C. 1979).

¹¹² Compare *id.* at 552-55 with *Pueblo*, 679 F.2d at 810-11.

¹¹³ *Pinehurst*, 476 F. Supp. at 551. The *Pueblo* and *Pinehurst* cases involved claims of fixed base operators denied licenses to operate at the airports in question. See *Pueblo Aircraft Serv., Inc. v. City of Pueblo*, 679 F.2d 805, 806 (10th Cir. 1982); *Pinehurst Airlines, Inc. v. Resort Air Serv., Inc.*, 476 F. Supp. 543, 552-53 (M.D.N.C. 1979).

¹¹⁴ See *Pinehurst*, 476 F. Supp. at 552.

¹¹⁵ *Id.* at 553-54.

¹¹⁶ *Id.* at 554; see N.C. GEN. STAT. 63-53(3) (1981).

¹¹⁷ *Pinehurst*, 476 F. Supp. at 554-55. In effect, the *Pinehurst* court reasoned from the North Carolina statute's language that the legislature had contemplated limits upon the activities of municipalities engaged in the proprietary activity of operating a publicly owned airport. *Id.*; see N.C. GEN. STAT. § 63-53(3) (1981). The limits, according to the court, clearly covered the anticompetitive action of granting an exclusive fixed base operation at the airport. *Pinehurst*, 476 F. Supp. at 554-55.

¹¹⁸ *Pinehurst*, 476 F. Supp. at 554-55.

¹¹⁹ See *supra* notes 103-18 and accompanying text. Compare *Pueblo*, 679 F.2d at 811 with *Pinehurst*, 476 F. Supp. at 555.

Midcal test.¹²⁰ The *Pinehurst* court, however, based its decision almost completely on an analysis of the reasonableness of allowing an exclusive aircraft service operation at a locally operated airport.¹²¹ Similarly, the *Gold Cross* court decided the case on a motion to dismiss, but only after hearing three days of testimony regarding the history and nature of the ambulance service.¹²² The *Gold Cross* court clearly indicated a belief that the city had acted reasonably in granting an exclusive ambulance service.¹²³ But the *Gold Cross* court also cited language indicating that the legislature had contemplated an exclusive ambulance service.¹²⁴ In contrast, the *Pueblo* court, in granting the city an antitrust exemption, cited no language indicating that the legislature had contemplated exclusive concessions at the airport.¹²⁵ The *Pinehurst* court, however, which denied an exemption, at least referred to statutory language indicating the possibility that the legislature had contemplated an exclusive fixed base operation at the airport.¹²⁶

The *Pinehurst*, *Pueblo*, and *Gold Cross* decisions indicate that a problem may arise in future municipal antitrust cases when federal courts decide whether mere contemplation of municipal anticompetitive activity by a state will satisfy the *Midcal* clear articulation test.¹²⁷ In

¹²⁰ See *Pueblo*, 679 F.2d at 807-08. In effect, the *Pueblo* court relied on the statute's public policy statement to grant governmental immunity for any municipal action taken to effectuate the running of a public airport. See *id.*

¹²¹ See *Pinehurst*, 476 F. Supp. at 554-55. The *Pinehurst* court relied on a North Carolina statute's public policy statement to limit actions taken by the county that might thwart the public's "rightful and equal use" of the airports. See *id.*; N.C. GEN. STAT. § 63-53(3) (1981).

¹²² See *Gold Cross*, 538 F. Supp. at 959-60.

¹²³ See *id.* at 964-66.

¹²⁴ *Id.* at 964; see MO. ANN. STAT. §§ 190.105.4, 190.105.5 (Vernon Supp. 1981).

¹²⁵ See *Pueblo*, 679 F.2d at 808.

¹²⁶ See *Pinehurst*, 476 F. Supp. at 554; N.C. Gen. Stat. § 63-53(3) (1981).

¹²⁷ See *supra* notes 94-126 and accompanying text. Despite some confusion in the *Lafayette* decision regarding the appropriate standard, the Court in *Lafayette* and *Boulder* never adopted state "compulsion" as the standard local governments must meet to claim antitrust immunity. See *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 43-57 (1982); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 n.40 (1978) (plurality opinion); see also *supra* note 35 (lower courts admitted confusion as to appropriate *Lafayette* standard). In an earlier state action case involving a privately owned utility's claim of antitrust immunity, the Supreme Court held that a private litigant engaged in anticompetitive behavior would have to show that the state commanded the challenged conduct to obtain immunity from the federal antitrust laws. See *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 585 (1979). But in a footnote to the *Lafayette* opinion, the plurality noted that the *Cantor* Court's analysis did not necessarily apply to municipalities in view of the difference between a political subdivision of a state and a purely private party. *Lafayette*, 435 U.S. at 410 n.40; see Areeda, *Antitrust Immunity for "State Action" after Lafayette*, 95 HARV. L. REV. 435, 445 n.49 (1981) (compulsion not necessary in antitrust cases involving public defendants). The Fifth Circuit recently divided on the issue of applying a compulsion analysis to a private litigant's actions, in light of the *Midcal* decision. Compare *United States v. Southern Motors Carriers Rate Conference, Inc.*, 672 F.2d 467, 475 (5th Cir. 1982) with *id.* at 482 (Hill, J., dissenting). Although *Southern Motors* did not involve a political

Lafayette, the Supreme Court stated that a municipality need not point to a specific detailed statutory mandate before claiming an antitrust exemption.¹²⁸ In *Boulder*, the Court affirmed *Lafayette*, holding that a legislature need only have contemplated the challenged activity for a court to grant a municipal antitrust exemption.¹²⁹ As the *Lafayette* dissent and the *Pinehurst* court pointed out, little state legislative history is available to which a federal district court may refer in determining whether a legislature contemplated a particular municipal action.¹³⁰ In the absence of a state supreme court ruling on a particular local or municipal action, the only source available to the federal district court would be the language of the statute.¹³¹ A federal court's literal interpretation of statutory language undercuts the credibility of the contemplation approach because a literal statutory interpretation leaves little room for legislative contemplation of an anticompetitive activity.¹³² A

subdivision, the majority noted that the *Boulder* Court never endorsed a state compulsion standard for anticompetitive actions by political subdivisions in view of the *Boulder* Court's statement that a local government need not point to an express statutory mandate for each challenged anticompetitive act. *Id.* at 473 (citing *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 49 (1982)); see 455 U.S. at 49 n.12.

¹²⁸ See *Lafayette*, 435 U.S. at 415.

¹²⁹ See *Boulder*, 455 U.S. at 49 n.12 (noting circuit court's standard for determining antitrust exemption).

¹³⁰ *Lafayette*, 435 U.S. at 437 (Stewart, J., dissenting); *Pinehurst*, 476 F. Supp. at 551. In *Lafayette*, Justice Stewart remarked that "the bare words of a statute will often be unilluminating in interpreting legislative intent." *Lafayette*, 435 U.S. at 437 (Stewart, J., dissenting).

¹³¹ See *Lafayette*, 435 U.S. at 435 (Stewart, J., dissenting). The Third Circuit has noted recently that the highest court of a state is the ultimate interpreter of state statutes and that the state court's construction binds a federal court. See *Euster v. Eagle Downs Racing Ass'n*, 677 F.2d 992, 995-96 (3rd Cir. 1982). The *Eagle Downs* court cited the *Boulder* decision to support the proposition that interpreting legislative intent is a matter of state law and that federal courts deciding antitrust liability should defer to state court interpretations of state law. See *id.* at 996 n.6 (citing *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 52 nn.15 & 16 (1982)). But see *Hybud Equip. Corp. v. City of Akron*, 654 F.2d 1187, 1195-96 (6th Cir. 1981), *vacated and remanded*, 455 U.S. 931 (1982) (remanded for further consideration in light of *Boulder*). In *Hybud*, the Sixth Circuit found state authorization for the challenged activity in home rule provisions of the state constitution that the Ohio Supreme Court had interpreted. *Id.* If the Supreme Court decided to remand because the *Hybud* court erroneously relied on the state supreme court, then the *Eagle Downs* proposition appears questionable. See *Boulder*, 455 U.S. at 52 nn.15 & 16 (*Boulder* Court equivocated on importance of state supreme court interpretations of home rule amendment).

¹³² See, e.g., *Guthrie v. Genesee County*, 494 F. Supp. 950, 955-57 (W.D.N.Y. 1980) (court denied immunity to local government granting exclusive aircraft service concessions at locally operated airport); *Pinehurst Airlines, Inc. v. Resort Air Serv., Inc.*, 476 F. Supp. 543, 554-56 (M.D.N.C. 1979) (court denied antitrust exemption to county granting exclusive service operation at county airport); see also Areeda, *supra* note 127, at 449 n.64 (noting that *Genesee County* and *Pinehurst* courts cited statutes guaranteeing public access to airport service facilities as evidence of state intent to limit grant of exclusive aircraft service concessions).

court that implies state contemplation for a challenged activity when no statutory language supports the implication, however, undercuts the usefulness of a clear articulation standard because clear articulation implies that statutory authorization for an anticompetitive activity will be in clear, unambiguous language.¹³³

If the Supreme Court truly desires clear state articulation and affirmative state expression to support a challenged activity, then a federal court should rely solely on statutory language to determine whether sufficient state authorization exists.¹³⁴ In the absence of state legislative history, federal courts will have to decide the clear articulation test on the presence or absence of statutory language in most municipal antitrust exemption cases.¹³⁵ In cases in which a clear statutory interpretation is questionable, the federal courts should construe the language liberally to find that the state contemplated the challenged municipal activity.¹³⁶ If federal courts do not interpret statutory language liberally, decisions similar to *Pinehurst* may occur in which courts will decide a municipality's claim of antitrust exemption on the basis of courts' attitudes toward the reasonableness of the challenged anticompetitive activity.¹³⁷

One commentator suggests that the reasonableness approach typifies a court's approach to resolving difficulties in statutory interpretation.¹³⁸ The commentator is confident about the federal courts' ability

¹³³ See *Pueblo Aircraft Serv., Inc. v. City of Pueblo*, 679 F.2d 805, 806-11 (10th Cir. 1982) (statute authorizing operation of airport for general public provides municipal antitrust immunity).

¹³⁴ See *Boulder*, 455 U.S. at 43-57.

¹³⁵ See, e.g., *Pueblo Aircraft Serv., Inc. v. City of Pueblo*, 679 F.2d 805, 808 (10th Cir. 1982); *Gold Cross Ambulance v. City of Kansas City*, 538 F. Supp. 956, 964 (W.D. Mo. 1982); *Pinehurst Airlines, Inc. v. Resort Air Serv., Inc.*, 476 F. Supp. 543, 554 (M.D.N.C. 1979); see also *supra* notes 94-118 (courts granting or denying antitrust exemptions on presence or absence of statutory provisions). Although the Supreme Court has not required compulsory statutory language as the standard for state authorization of a local anticompetitive activity, compulsory language would be the strongest evidence of state intent to grant an immunity. See *Areeda*, *supra* note 127, at 438; *supra* note 127 (compulsory language not the standard established by Court). One commentator noted the irony in the *Parker* state action doctrine, which exempts even the most flagrantly anticompetitive actions from antitrust liability if the actions are part of a clearly expressed state regulatory scheme. Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption after Midcal Aluminum*, 61 B.U. L. REV. 1099, 1099 (1981).

¹³⁶ See *Gold Cross*, 538 F. Supp. at 964.

¹³⁷ See *Pinehurst*, 476 F. Supp. 543, 554-56 (M.D.N.C. 1979) (court interpreted statutory language as evidence that state intended to limit exclusive service facilities at publicly operated airport).

¹³⁸ See *Areeda*, *supra* note 127, at 447. Under a reasonableness approach, a court will infer state intent to displace the antitrust laws if the challenged restraint of competition is a necessary or reasonable consequence of acting in the authorized area. *Id.* at 446. In one pre-*Boulder* decision, a federal court stated that the court would grant immunity if the challenged restraint were necessary to the successful operation of the legislative scheme. See *Corey v. Look*, 641 F.2d 32, 37 (1st Cir. 1981).

to determine reasonableness, but as *Pinehurst* and *Pueblo* suggest, the reasonableness approach may result in different evaluations of similar activities.¹³⁹ The question of state action exemption is properly one of law, not fact, whereas questions about an activity's reasonableness invariably involve interpretations and assumptions of facts.¹⁴⁰ A liberal statutory interpretation favoring state contemplation of a challenged anticompetitive activity may help insure judicial deference toward principles of federalism and may deter a court from denying an exemption on the basis of the court's attitude toward the municipal action's reasonableness.¹⁴¹ If the state legislature clearly did not contemplate the activity, then a court should not find an antitrust exemption.¹⁴² But if a court interprets unclear statutory language against the municipality by applying an indefinite "reasonableness standard," then the court's decision may interfere with a legitimate attempt on the part of the state legislature to authorize the challenged municipal activity.¹⁴³ Deference, to principles of federalism, is surely more appropriate for a federal court than to be acting as a "superlegislature."¹⁴⁴ Federal court deference to state legislatures and principles of federalism will avoid the problem of a municipality or local government having to return to the legislature seeking more explicit statutory authorization.¹⁴⁵

¹³⁹ See *Pueblo*, 679 F.2d at 811; *Pinehurst*, 476 F. Supp. at 555. In *Boulder*, the dissent pointed out that questions of reasonableness often arise in an antitrust suit during trial on the merits. See 455 U.S. at 65-67 (Rehnquist, J., dissenting). As the *Boulder* dissent noted, a court determining the issue of actual antitrust liability may inquire into the reasonableness of the competitive restraint, unless the restraint is a violation per se of the antitrust laws. *Id.* (Rehnquist, J., dissenting); see *supra* note 3 (some competitive restraints are violations per se of antitrust laws).

¹⁴⁰ See *Euster v. Eagle Downs Racing Ass'n*, 677 F.2d 992, 997 (3rd Cir. 1982). The *Eagle Downs* court pointed out that state action exemption cases clearly indicate that the issue of governmental immunity involves a question of law, which is generally an issue of statutory construction. *Id.* Thus the question of whether a governmental entity is subject to federal antitrust liability generally is resolved on a motion to dismiss or a summary judgment motion. *Id.* The *Eagle Downs* court noted that in *Parker*, the Supreme Court did not inquire into the reasonableness of the challenged marketing program, and that federal courts developed the state action doctrine to avoid such an inquiry. *Id.*; see *Parker v. Brown*, 317 U.S. 341, 350-52 (1943). Thus, according to the *Eagle Downs* court, once a district court finds state authorization for the challenged activity, the court is not justified in looking into the wisdom or efficiency of using the regulation in question as a means of accomplishing the intended objective. 677 F.2d at 997.

¹⁴¹ See *Hybud Equip. Corp. v. City of Akron*, 654 F.2d 1187, 1196 (6th Cir. 1981), *vacated and remanded*, 455 U.S. 931 (1982). The *Hybud* court stated that although the tenth amendment limitation on affirmative congressional action is narrow, a district court should not read tenth amendment values narrowly when Congress has not expressly or by clear implication displaced a traditional exercise of local police power. *Id.* at 1196.

¹⁴² See *Boulder*, 455 U.S. at 55.

¹⁴³ See *Page*, *supra* note 135, at 1124-25.

¹⁴⁴ See *Boulder*, 455 U.S. at 68 (Rehnquist, J., dissenting); see also *supra* notes 78-83 and accompanying text (*Boulder* dissent expressed fear that decision would turn federal courts into superlegislatures overseeing state legislatures).

¹⁴⁵ See *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 438 (1978)

The Supreme Court could help alleviate the problem of inconsistent decisions in the lower federal courts by defining the clear articulation test more narrowly, or alternatively, by carefully indicating that the state contemplation standard satisfies the clear articulation test.¹⁴⁶ A narrow clear articulation test should result in fewer municipalities qualifying for an exemption but greater uniformity in district court decisions.¹⁴⁷ Similarly, if the Supreme Court clearly establishes a standard under which legislative contemplation is sufficient authorization for the challenged activity, then most statutory authorization more specific than the Colorado home rule amendment, invalidated as too general in *Boulder*, should satisfy the test.¹⁴⁸

The *Boulder* Court, in failing to find a clearly articulated state policy to support the city ordinance, did not consider whether a municipality could or should satisfy the second prong of the *Midcal* test, active state supervision.¹⁴⁹ In the absence of clear Supreme Court direction, several lower federal courts have required municipal defendants to satisfy the active state supervision requirement.¹⁵⁰ In *Hybud Equipment Corp. v. City of Akron*,¹⁵¹ decided prior to the Supreme Court decision in *Boulder*, the Sixth Circuit applied both prongs of the *Midcal* test.¹⁵² The court held that state law clearly authorized a municipal solid waste monopoly and that the state actively supervised the monopoly because an agency of

(Stewart, J., dissenting) (municipalities may seek explicit state authorization for each anticompetitive act).

¹⁴⁶ See *supra* note 35 (courts reach different conclusions on similar fact situations). Compare *Pueblo Aircraft Serv., Inc. v. City of Pueblo*, 679 F.2d 805, 810-11 (10th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3498 (U.S. Jan. 11, 1983) (No. 82-352) (court granted exemption when no explicit statutory provision authorized exclusive airport service operation) with *Pinehurst Airlines, Inc. v. Resort Air Serv., Inc.*, 476 F. Supp. 543, 554-56 (M.D.N.C. 1979) (court denied exemption when statute provided for service franchises if public's use of airport not diminished thereby).

¹⁴⁷ See *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 43-57 (1982).

¹⁴⁸ See *Gold Cross*, 538 F. Supp. at 963-67; see also *supra* notes 94-102 and accompanying text (state clearly contemplated city taking effective measures to insure efficient emergency ambulance service).

¹⁴⁹ *Boulder*, 455 U.S. at 51 n.14.

¹⁵⁰ See, e.g., *Gold Cross Ambulance v. City of Kansas City*, 538 F. Supp. 956, 966-67 (W.D. Mo. 1982) (active state supervision satisfied by interaction of state and local regulation of ambulance service industry); *Hybud Equip. Corp. v. City of Akron*, 654 F.2d 1187, 1195-96 (6th Cir. 1981) (active state supervision found for municipal solid waste monopoly), *vacated and remanded*, 455 U.S. 931 (1982); *Corey v. Look*, 641 F.2d 32, 37 (1st Cir. 1981) (no statutory provisions to satisfy either part of *Midcal* test for steamship authority and town allegedly engaged in monopolizing local parking market); *Stauffer v. Town of Grand Lake*, 1981-1 Trade Cas. (CCH) ¶ 64,029, 76,330 (D. Colo. 1980) (state supervision of municipal zoning authority found in detailed statutory scheme); *Affiliated Capital Corp. v. City of Houston*, 519 F. Supp. 991, 1028 (S.D. Tex. 1981) (no statutory provisions providing clearly articulated state policy or active state supervision of exclusive cable television franchising by municipality).

¹⁵¹ 654 F.2d 1187, 1196 (6th Cir. 1981), *vacated and remanded*, 455 U.S. 931 (1982).

¹⁵² *Id.* at 1195-96.

the state, the Water Authority, maintained "some oversight" of the facility.¹⁵³ The Supreme Court, however, vacated and remanded *Hybud* for reconsideration in light of *Boulder*.¹⁵⁴ In *Hybud*, the Sixth Circuit relied on the Ohio Supreme Court's interpretation of the home rule provisions of the Ohio Constitution to satisfy the clear state articulation requirement of *Midcal*.¹⁵⁵ The United States Supreme Court probably vacated the *Hybud* decision because the Sixth Circuit improperly relied on a home rule amendment to establish sufficient state authorization of the challenged monopoly rather than for an inadequate showing of active state supervision of the monopoly.¹⁵⁶

In *Stauffer v. Town of Grand Lake*,¹⁵⁷ the District Court for the District of Colorado found adequate state supervision of a municipal zoning authority under a state statutory scheme that required local public hearings on all zoning activities, required the establishment of a board of adjustment to hear appeals and review any zoning order, and subjected all adjustment board decisions to state court review.¹⁵⁸ *Stauffer* in-

¹⁵³ *Id.*

¹⁵⁴ *Hybud*, 455 U.S. 931 (1982).

¹⁵⁵ *Hybud*, 654 F.2d at 1195.

¹⁵⁶ See *Boulder*, 455 U.S. at 43-57; see also *supra* note 131 (*Hybud* court may have relied erroneously on state supreme court interpretation of home rule status in granting antitrust exemption to city).

¹⁵⁷ 1981-1 Trade Cas. (CCH) ¶ 64,029 (D. Colo. 1980).

¹⁵⁸ *Id.* at 76,330. The *Stauffer* court did not grant an antitrust exemption to the town of Stauffer or the town's zoning board, despite a finding that the defendants had proper authorization under the *Midcal* test. *Id.* The court noted that the plaintiff alleged misconduct on the part of members of the zoning board by attempting to obtain the plaintiff's property to promote their own interests and economic benefit. *Id.* The court held that the state legislature did not contemplate or intend zoning officials to exploit official positions to advance personal interests. *Id.* The *Stauffer* court referred to a statement in the *Lafayette* decision to support the proposition that "even a lawful monopolist is subject to antitrust restraints when the monopolist seeks to extend or exploit the monopoly in a manner not consistent with the governmental authorization." *Id.* (citing *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 417 (1978)).

The idea that state and local governments, agencies, and officials may be liable under antitrust laws for abusing legitimate grants of authority from the state dates as far back as dicta in *Parker*. See *Parker v. Brown*, 317 U.S. 341, 351-52 (1943); see also *supra* note 17 (citing *Parker* dicta). Justice Blackmun, dissenting in *Lafayette*, expressed his opposition to state immunization for local governments engaged in conspiracies against private parties. See *Lafayette*, 435 U.S. at 441 (Blackmun, J., dissenting). In several recent cases, courts have refused to grant exemptions to local governments for conduct legally authorized by the state when the plaintiffs alleged conspiracy or misconduct between the local governments and private individuals. See, e.g., *Whitworth v. Perkins*, 559 F.2d 378, 379-82 (5th Cir. 1977) (court denied exemption when plaintiff alleged zoning ordinance that precluded sale of liquor on his land was part of conspiracy to restrain competition in liquor business), *remanded for reconsideration in light of Lafayette*, 435 U.S. 992, *reinstated*, 576 F.2d 696 (5th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Schiessle v. Stephens*, 525 F. Supp. 763, 776-77 (N.D. Ill. 1981) (exemption denied when plaintiff alleged conspiracy between local officials and private developers in exercising eminent domain powers for sham redevelopment project); *Mason City Center Assocs. v. City of Mason City*, 468 F. Supp. 737, 742-43 (N.D. Iowa 1979).

licated a rather detailed supervisory scheme to oversee the activity of zoning, whereas *Hybud* presented little evidence of state supervision.¹⁵⁹ In effect, even the *Stauffer* scheme mandates a system of review rather than actual supervision at the state level, although the system does provide for redress in the state courts.¹⁶⁰

The *Gold Cross* court applied the second prong of the *Midcal* test and found adequate state supervision of the ambulance service industry in a statutory scheme providing for the licensing and periodic inspection of ambulance vehicles and personnel.¹⁶¹ But the *Gold Cross* court also found the active supervision requirement independently satisfied by the interaction of the state statute authorizing the city to formulate rules and regulations for the use of ambulance equipment with the city's organized system of review and enforcement of the ordinance establishing an exclusive ambulance service.¹⁶²

Commentators disagree in their interpretation of the *Midcal* active state supervision requirement.¹⁶³ One commentator suggests that the requirement is an unjustified burden upon a state because the requirement forces the state to "command" and "control" local regulation when the state already has indicated an otherwise legitimate state policy to displace competition at the local level.¹⁶⁴ Another commentator asserts that the Supreme Court's emphasis on supervision implies a requirement for state scrutiny and deliberation but not actual command.¹⁶⁵ If the *Stauffer*, *Hybud*, and *Gold Cross* decisions are examples of an acceptable level of state supervision, then the latter view appears correct.¹⁶⁶

If the Supreme Court decides that municipalities must satisfy the second prong of *Midcal*, many municipalities appear unlikely to meet the active state supervision requirement.¹⁶⁷ Probably the states will not have provided a system of review for the local activity, either out of

(court denied immunity because state zoning statute did not authorize denial of plaintiff's rezoning application when city officials and developers of downtown shopping center agreed to exclude competitive development projects). *But see* *Mason City Center Assocs. v. City of Mason City*, 671 F.2d 1146, 1149 (8th Cir. 1982) (affirming jury verdict in favor of defendant city). *See also* *Areeda*, *supra* note 127, at 450-53 (most conspiracy claims highly conclusory but survive dismissal under notice pleading).

¹⁵⁹ *See Hybud*, 654 F.2d at 1195-96; *Stauffer*, 1981-1 Trade Cas. (CCH) ¶ 64,029, 76,330 (D. Colo. 1980).

¹⁶⁰ *Stauffer*, 1981-1 Trade Cas. (CCH) ¶ 64,029, 76,330 (D. Colo. 1980).

¹⁶¹ *Gold Cross*, 538 F. Supp. at 966-67. In *Gold Cross*, the state statutory scheme provided for licensing and periodic inspection of ambulances in addition to an administrative hearing if a licensing officer revoked a license. *Id.* at 966.

¹⁶² *Id.*

¹⁶³ *See Areeda*, *supra* note 127, at 438 n.19; *Page*, *supra* note 135, at 1129.

¹⁶⁴ *Page*, *supra* note 135, at 1129.

¹⁶⁵ *Areeda*, *supra* note 127, at 438 n.19.

¹⁶⁶ *See Gold Cross*, 538 F. Supp. at 966-67; *Hybud*, 654 F.2d at 1195-96; *Stauffer*, 1981-1 Trade Cas. at 76,330.

¹⁶⁷ *See Community Communications Co. v. City of Boulder*, 455 U.S. 40, 69-71, 71 n.6 (1982) (Rehnquist, J., dissenting).

neglect or because of practical limitations.¹⁶⁸ Arguably, imposition of the second prong of the *Midcal* test relegates local governments to the status of private entities seeking state immunity.¹⁶⁹ Yet local governments often have more pressing reasons than private entities for displacing competition, particularly when local governments act in areas of traditional government function.¹⁷⁰ A compromise approach taking into consideration the difference between municipalities and private defendants would take into account the *Boulder* dissent's proposal that a city's own supervisory scheme be used to satisfy the second *Midcal* requirement.¹⁷¹

The *Gold Cross* court found active supervision partially satisfied by the city's own system of review and enforcement of the anticompetitive action.¹⁷² The *Gold Cross* decision is consistent with the *Boulder* dissent's version of the active state supervision requirement.¹⁷³ If insufficient supervision or review exists at the state level, a court still could grant an antitrust exemption if the locality had initiated a supervisory scheme or system of review for the challenged activity.¹⁷⁴ Should the Supreme Court require state supervision in municipal antitrust cases, the Court probably would justify the requirement by reasoning that the state, a presumably impartial party, can better guarantee fairness in the enforcement of any local anticompetitive action.¹⁷⁵ In the absence of a conspiracy between a local government and a private party, however, the local government could insure fairness as well as the state through a local supervisory scheme that the city probably could implement more easily than any state supervisory system.¹⁷⁶

Many questions remain unanswered regarding the application of the two-part *Midcal* test to municipalities.¹⁷⁷ The clear articulation requirement fails to indicate how explicit state statutory authorization should

¹⁶⁸ See *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 69-71, 71 n.6 (1982) (Rehnquist, J., dissenting); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 434-38 (1978) (Stewart, J., dissenting); see also *Gold Cross Ambulance v. City of Kansas City*, 538 F. Supp. 956, 966-67 (W.D. Mo. 1982).

¹⁶⁹ See *Gold Cross*, 538 F. Supp. at 967 (court found active state supervision of anticompetitive ordinance).

¹⁷⁰ See *id.* (city's action motivated by concern for public health and safety).

¹⁷¹ See *Boulder*, 455 U.S. at 69 (Rehnquist, J., dissenting).

¹⁷² See *Gold Cross*, 538 F. Supp. at 966-67.

¹⁷³ Compare *Boulder*, 455 U.S. at 69 (Rehnquist, J., dissenting) (equating local supervision to state supervision) with *Gold Cross*, 538 F. Supp. at 966-67 (state supervision requirement satisfied by local supervision authorized by state statute).

¹⁷⁴ See *Gold Cross*, 538 F. Supp. at 966-67.

¹⁷⁵ See *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-06 (1979).

¹⁷⁶ See *Boulder*, 455 U.S. at 71 n.6 (Rehnquist, J., dissenting); *Gold Cross*, 538 F. Supp. at 966-67.

¹⁷⁷ See *supra* notes 110-37 & 149-76 and accompanying text (reviewing recent decisions applying clear articulation and active state supervision requirements to municipal and local governments seeking antitrust immunity).

be to exempt a challenged local action.¹⁷⁸ Additionally, the Supreme Court did not indicate clearly whether mere contemplation by the state would satisfy the clear articulation requirement.¹⁷⁹ Further, assuming the legitimacy of a contemplation standard, the Court never stated how broadly a lower court could interpret contemplation by the state to grant an antitrust exemption for a contested local action.¹⁸⁰ The Supreme Court also left open the possibility of applying the active state supervision requirement of *Midcal* in municipal antitrust cases.¹⁸¹ The Court ultimately may decide not to apply the second *Midcal* requirement in view of the practical problems that could arise by imposing active state supervision over all local anticompetitive activities.¹⁸² But in the meantime, federal courts that apply the second *Midcal* requirement must decide without Supreme Court guidance what constitutes proper state supervision of a local anticompetitive activity.¹⁸³

The *Boulder* Court's failure either to clarify the clear articulation requirement or to reconcile the requirement with the state contemplation standard probably will result in inconsistent decisions in federal courts addressing the issue of municipal antitrust immunity.¹⁸⁴ Thus, a municipal litigant's claim of state action exemption ultimately may succeed or fail depending on the particular federal court in which the municipal litigant appears.¹⁸⁵ The Supreme Court should move to end the confusion and attempt to restore some uniformity by either strictly defining or widening the leeway a district court has in interpreting statutory language.¹⁸⁶ If the Supreme Court ultimately decides to require municipalities to satisfy the *Midcal* test's second prong, active state supervision, then the Court should allow municipalities to rely on locally initiated supervisory schemes to maintain a state action defense.¹⁸⁷ In effect, local supervision may insure the same objective as a state author-

¹⁷⁸ See *supra* notes 110-26 and accompanying text (courts reach different conclusions on similar factual situations or same conclusion using different levels of statutory authorization).

¹⁷⁹ See *supra* notes 127-33 and accompanying text ("contemplation" standard's usefulness when court's search for state authorization limited to statutory language).

¹⁸⁰ See *id.*

¹⁸¹ See *supra* notes 70-71 and accompanying text (*Boulder* Court found it unnecessary to address second *Midcal* requirement because city failed first requirement).

¹⁸² See *supra* notes 70 & 167-71 and accompanying text (requiring state supervision over local activities may tax state resources).

¹⁸³ See *supra* notes 150-62 and accompanying text (reviewing decisions that have required active state supervision).

¹⁸⁴ See *supra* notes 119-26 and accompanying text (courts reaching different conclusions on similar factual situations; *supra* note 35 (same)).

¹⁸⁵ See *id.*

¹⁸⁶ See *supra* notes 134-37 & 146-48 and accompanying text (proposing narrowing or widening of clear articulation test to achieve consistent decisions).

¹⁸⁷ See *supra* notes 68-69, 161-62 & 172-76 and accompanying text (reviewing *Boulder* dissent recommendation on active state supervision and *Gold Cross* decision).

ized supervisory scheme.¹⁸⁸ Until the Supreme Court decides on the application of the second prong of *Midcal*, however, some federal courts may require a standard of active state supervision that municipalities will find impossible to meet.¹⁸⁹

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¹⁸⁸ See *id.* (local government can insure fairness objective as well as state and can supervise more easily than state).

¹⁸⁹ See *supra* notes 167-68 and accompanying text; Page, *supra* note 135, at 1129.