

Municipalities' Increased Susceptibility to Antitrust Liability: *Community Communications Co. v. City of Boulder*.¹ — Section one of the Sherman Antitrust Act² prohibits “[e]very contract, combination . . . or conspiracy in restraint of trade or commerce among the several States. . . .”³ This provision, if it was applicable not only to the activities of private industry and individuals, but also to those of government, would serve to restrict social and economic regulation. The Supreme Court, however, perhaps in recognition of this difficulty, created the so-called “state action exemption” to the antitrust law in *Parker v. Brown*.⁴ In *Parker*, the Court held that a state statute authorizing and directing an allegedly anticompetitive marketing program was not invalidated by the Sherman Act.⁵ Over time, the Court has considered the applicability of the state action exemption to various forms of government related activity.⁶ In so doing, the Court developed two requirements which must be satisfied in order for the exemption to apply. There must be a clearly articulated and affirmatively expressed state policy authorizing the anticompetitive activity, and active supervision of that policy by the state.⁷

Any test for establishing the applicability of the state action exemption will be applied to various forms of government related activity. The degree and type of government involvement can vary in many ways. The mechanical application of any given test is likely to cause problems in some situations. In *Community Communications Co. v. City of Boulder*,⁸ the Supreme Court was confronted with such a situation: the applicability of the state action exemption to the activity of a home rule municipality. A home rule municipality is a municipality to which the state has granted full power over matters of local concern.⁹ In *Community Communications*, the City Council had passed an ordinance

¹ 455 U.S. 40 (1982).

² 15 U.S.C. § 1 (1976).

³ *Id.*

⁴ 317 U.S. 341 (1943).

⁵ *Id.* at 350-51.

⁶ The Court has considered the applicability of the exemption to: (1) private activity directed or authorized by the state, *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) (exemption not applicable to private utility's allegedly anticompetitive program mandated by tariff which utility filed with state); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (exemption not applicable to county bar association's publication of minimum fee schedule); (2) municipal activity, *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (exemption not applicable to anticompetitive activities of publicly owned utility); and (3) activity of the state acting as sovereign, *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (exemption not applicable to state statute which enforced private price control agreements). *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978) (exemption applicable to activity of state board which could prohibit establishment or relocation of new car dealerships under certain circumstances); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (exemption applicable to state's prohibition of advertising by lawyers).

⁷ *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

⁸ 455 U.S. 40 (1982).

⁹ See COLO. CONST. art. XX, § 6 (1980). See, e.g., *Four County Metropolitan Capital Improvement Dist. v. Board of County Comm'r*, 149 Colo. 284, 304, 369 P.2d 67, 77 (1962).

which prohibited a cable television company from expanding its operations for a period of three months.¹⁰ Community Communications Co. challenged the ordinance under the antitrust laws, and the city of Boulder claimed that it was exempt from such laws under the state action doctrine.¹¹ The Court then applied its test in a straightforward manner and held that municipal activity is exempt from the antitrust laws only if the activity is action of the state acting in its sovereign capacity, or municipal action in furtherance of a clearly articulated and affirmatively expressed state policy favoring regulation over free competition.¹²

By the Supreme Court's straightforward application of its test, the Court indicated that municipalities will not be exempt from the antitrust laws unless the state has an express policy allowing municipalities to act in an allegedly anticompetitive manner. This requirement could have a large impact on the abilities of municipalities, particularly home rule municipalities, to effectively govern themselves. This result is obtained because the Court, in its mechanical application of its test, failed to take into account the fact that their test might not always produce logical results when applied to different types of government related activities (sovereign state activity, municipal activity, and private activity directed by the state). In particular, the Court failed to fully examine the distinctive characteristics of home rule municipalities, and the effect these characteristics should have on the applicability of the state action exemption.

This casenote will analyze the Court's decision in *Community Communications* and argue that the straightforward application of the Court's test produces a result that is inconsistent with the underlying purpose of the state action exemption. This casenote will begin with a brief examination of the historical development of the *Parker* state action exemption, particularly considering *City of Lafayette v. Louisiana Power & Light Co.*,¹³ the only previous case in which the Court dealt with the applicability of the exemption to municipal activity. Section I will conclude with an examination of how the test the Court used developed.¹⁴ The casenote will then examine the Court's analysis, and application of its test in *Community Communications*.¹⁵ The casenote will demonstrate that the test the Court used to determine the applicability of the state action exemption to Boulder cannot rationally be applied to all types of state, private and municipal activity.¹⁶ The result of the Court's failure to fully consider the special home rule status of the city of Boulder will also be examined.¹⁷ This

¹⁰ *Community Communications*, 455 U.S. at 45-46.

¹¹ *Id.* at 46-47.

¹² *Id.* at 52.

¹³ 435 U.S. 389 (1978).

¹⁴ See *infra* notes 64-74 and accompanying text.

¹⁵ See *infra* notes 75-125 and accompanying text.

¹⁶ See *infra* notes 126-166 and accompanying text.

¹⁷ See *infra* notes 167-188 and accompanying text.

casenote will conclude by considering the serious implications the Court's decision has for both home rule municipalities and state-municipal relations.¹⁸

I. DEVELOPMENT OF THE STATE ACTION EXEMPTION

A. *Parker v. Brown*

In order to fully understand the Court's decision in *Community Communications*, it is necessary to examine the development of the "state action exemption" from the antitrust laws. The exemption was first clearly announced by the Supreme Court in a 1943 decision, *Parker v. Brown*.¹⁹ In *Parker*, the Court considered the validity of a California statute which authorized the establishment of proration programs for marketing agricultural products.²⁰ These marketing programs were designed to restrict competition among the growers in order to maintain high prices.²¹ Brown, a producer and packer of raisins, a product for which such a proration program had been established, challenged the validity of the act.²²

In deciding whether California's marketing plans were in violation of the Sherman Act, the Court considered the nature of the state's program. The Court was convinced the proration program was an act of the state government, deriving its "authority and efficacy from the legislative command of the state"²³ Next, the Court examined the Sherman Act, finding "no suggestion" of any Congressional purpose to restrain state action in the act's legislative history.²⁴ The Court viewed the Sherman Act as a prohibition on individual and corporate but not state action.²⁵ The Court therefore held that the Sherman Act does not restrain state action, or official action directed by the

¹⁸ See *infra* notes 189-202 and accompanying text.

¹⁹ 317 U.S. 341 (1943). Although this is the first case which clearly states the exemption, earlier cases had foreshadowed the decision. *Olsen v. Smith*, 195 U.S. 332, 345 (1904); *Lowenstein v. Evans*, 69 F. 908, 911 (C.C.D.S.C. 1895).

²⁰ *Parker*, 317 U.S. at 344. The Court considered the validity of the California Agricultural Prorate Act, ch. 754, Statutes of California of 1933 at 1969 (as amended). *Id.*

²¹ *Id.* at 346. The program was administered by a program committee, whose members were chosen by the state Director of Agriculture, subject to the approval of the Agricultural Prorate Advisory Committee (whose members were appointed by the governor and confirmed by the state senate). *Id.* The act also provided a penalty for violations of any proration program. *Id.* at 347.

²² *Id.* at 344. Ironically, Brown initially challenged the program only on the theory that the program interfered with his constitutional right of interstate commerce. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 586 (1976) (discussion of procedural history of *Parker*). Just before the Court heard oral argument on the commerce clause issue, the Court held, in *Georgia v. Evans*, 316 U.S. 159, 162 (1942), that a state was a person within the meaning of § 7 of the Sherman Act. *Id.* at 586-87. The Court immediately scheduled *Parker* for reargument, and specifically asked the parties to consider whether the Agricultural Prorate Act was invalidated by the Sherman Act, the Agricultural Adjustment Act, or any other act of Congress. *Id.* at 586-88.

²³ *Parker*, 317 U.S. at 350.

²⁴ *Id.* at 351.

²⁵ *Id.* at 352. The Court recognized, however, that the state cannot immunize private individuals who violate the Sherman Act by authorizing their violation of the act. *Id.* at 351.

state's legislature.²⁶ The Court indicated this conclusion was required by the principles of federalism: "[in] a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."²⁷

In *Parker*, the Supreme Court therefore clearly stated that the prohibitions of the Sherman Act do not apply to legislatively directed activity of a state. It is important to note, however, that the *Parker* Court only dealt with the narrow issue of whether the acts of a state agency, taken pursuant to authority granted by the state legislature, were invalid under the Sherman Act. The Court did not consider the broader issue of the applicability of the Sherman Act to either private action taken pursuant to a legislative command, or to municipal²⁸ action. With the limited type of state activity the Court considered, however, the Court repeatedly emphasized that to qualify for exemption from the prohibitions of the Sherman Act, an agency's action must be directed by the state.²⁹ Despite the clear commitment of the Court to the requirement of state direction for the exemption to be applicable, *Parker* left unanswered many questions about the extent of the state action doctrine.

Despite this uncertainty about the scope of the *Parker* exemption,³⁰ the Court declined to reexamine the doctrine for over thirty years. Eventually, however, the Court began to examine the limits of the *Parker* state action exemption, in cases that considered the applicability of the exemption to allegedly anticompetitive private activity which the state was to some extent involved in,³¹

²⁶ *Id.* at 350-51.

²⁷ *Id.* at 351.

²⁸ The only time the Court mentioned municipalities in *Parker* was in a statement which indicated that if a state or its municipalities became a participant in a private agreement in restraint of trade, then the Sherman Act would be violated. *Id.* at 351-52. Perhaps the logical inference to be drawn from this statement is that municipalities should be treated like states when no private agreement is involved. Note, *City of Lafayette v. Louisiana Power & Light Co.: Will Municipal Antitrust Liability Doom Effective State-Local Government Relations?*, 36 WASH. & LEE L. REV. 129, 143 (1979).

²⁹ The Court states: "The Sherman Act . . . gives no hint that it was intended to restrain state action or official action directed by a state." *Parker*, 317 U.S. at 351. "[Nothing suggests the Sherman Act's] purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id.* at 350-51 (emphasis added). The proration program was not invalid because it "derived its authority and its efficacy from the legislative command of the state. . . ." *Id.* at 350.

³⁰ See Handler, *Twenty-Fourth Annual Antitrust Review*, 72 COLUM. L. REV. 1, 7-11 (1972). Professor Handler concluded the *Parker* doctrine was in a state of "murky confusion." *Id.* at 18.

³¹ In 1975, the Court considered the applicability of the state action exemption to the allegedly anticompetitive activities of a county bar association and a state bar association in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). The Court concluded the state action doctrine did not exempt the county bar association's publication of, or the state bar association's enforcement of, minimum fee schedules from the antitrust laws because the associations' anticompetitive activities were not compelled by the state acting as sovereign. *Goldfarb*, 421 U.S. at 791.

In *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), a sharply divided Court held

and allegedly anticompetitive sovereign state activity.³² In 1978, the Court was first confronted with a case that required consideration of whether the *Parker* exemption applied to the anticompetitive activities of municipalities.

B. *The Application of the Parker Doctrine to Municipalities:*

City of Lafayette v. Louisiana Power & Light Co.

*City of Lafayette v. Louisiana Power & Light Co.*³³ dealt with the alleged anti-trust violations of a municipally owned utility.³⁴ The Court was sharply divided over the applicability of the state action exemption to this type of municipal activity.³⁵ The plurality opinion considered the *Parker* doctrine as it had been modified by previous cases.³⁶ The plurality believed the doctrine of federalism was of primary importance in *Parker*, reasoning that the *Parker* exemption was based upon state sovereignty.³⁷ The plurality therefore reasoned that because the basis for the *Parker* exemption was that the antitrust laws were not intended to apply to sovereign states, the exemption could not be extended to municipalities.³⁸ The plurality noted that municipalities are not themselves sovereign and are not treated as the equivalents of states.³⁹

that the state action exemption was not applicable to Detroit Edison's private anticompetitive activity which the state had authorized and arguably had mandated. A plurality of the Court stated the *Parker* exemption applied only to official action, and not private action. *Cantor*, 428 U.S. at 591. A concurring Justice maintained that the Court must focus on the challenged activity, and not merely the identity of the parties in determining the applicability of the exemption. *Id.* at 604.

³² In *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977), the Court held that the *Parker* exemption was applicable to a statutory state bar regulation that restricted advertising by attorneys because the statute restricting advertising was the act of a sovereign state. *Bates*, 433 U.S. at 360.

³³ 435 U.S. 389 (1978).

³⁴ *Id.* at 391-92. The municipality had allegedly conspired to engage in sham litigation against Louisiana Power & Light Co. to delay construction of a nuclear power plant, to eliminate competition within municipal boundaries, and to exclude competition in certain markets. *Id.* at 392 n.6.

³⁵ Justice Brennan authored an opinion that was joined totally by Justices Marshall, Powell and Stevens. *City of Lafayette*, 435 U.S. at 391. Justice Marshall also filed a concurring opinion. *Id.* at 417. Chief Justice Burger joined Part I of Justice Brennan's opinion, making that part of Justice Brennan's opinion the opinion of the Court. *Id.* at 394-408. Chief Justice Burger also filed an opinion concurring in part and concurring in judgment. *Id.* at 418. Justice Stewart authored a dissenting opinion that was joined totally by Justices White and Rehnquist, and joined partially by Justice Blackmun. *Id.* at 426. Justice Blackmun also filed his own dissenting opinion. *Id.* at 441.

³⁶ *City of Lafayette*, 435 U.S. at 409-10 (plurality opinion). The plurality specifically examined the Court's reasoning in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), and *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977). In *Goldfarb*, the Court had held the state action exemption was not applicable to the state bar association (which had been enforcing minimum fee schedules), even though the state bar was a state agency, because the minimum fee schedules were not directed by the state acting as sovereign. *Goldfarb*, 421 U.S. at 790-91. In *Bates*, the Court held the exemption was applicable because the restrictions on advertising by lawyers (the alleged anticompetitive activity) was compelled by the direction of the state acting as sovereign. *Bates*, 433 U.S. at 360.

³⁷ *City of Lafayette*, 435 U.S. at 412 (plurality opinion).

³⁸ *Id.*

³⁹ *Id.*

Because municipalities are not treated as sovereigns, and because of a concern that anticompetitive activity by cities could wreak havoc on the national economy, the plurality refused to presume that Congress intended to exclude anticompetitive municipal activity from the coverage of the Sherman Act.⁴⁰ The plurality therefore concluded that the *Parker* doctrine only exempts "anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to a state policy to displace competition with regulation or monopoly public service."⁴¹ The plurality emphasized, however, that their interpretation of the doctrine does not mean the state must enact specific detailed legislation to authorize municipalities to act anticompetitively.⁴² It would be sufficient if, from the authority given in a particular area, it can be found that the state legislature "contemplated" the type of anticompetitive activity engaged in by the municipality.⁴³

In a concurring opinion, Chief Justice Burger rejected the plurality's approach to the *Parker* doctrine. The Chief Justice made a distinction between a municipality's proprietary and governmental activities.⁴⁴ The opinion emphasized two features of the municipal activity in *City of Lafayette* which supported this distinction. First, Chief Justice Burger argued that the critical factor in *City of Lafayette* was that the municipality was clearly engaged in a business activity from which a profit was realized.⁴⁵ Nothing in the *Parker* doctrine, in this view, indicated this type of proprietary municipal activity should be exempt from the antitrust laws.⁴⁶ Second, Chief Justice Burger recognized that although the city of Lafayette was a municipality, the dispute between the parties was no different from an ordinary dispute among competitors in the same market.⁴⁷ Burger thus concluded that in this case, for purposes of applying the antitrust laws, the city of Lafayette should be treated in the same manner as Louisiana Power & Light Company.⁴⁸ Whether Congress intended to exempt the type of

⁴⁰ *Id.* at 412-13.

⁴¹ *Id.* at 413.

⁴² *Id.* at 415.

⁴³ *Id.*

⁴⁴ *Id.* at 418 (Burger, C.J., concurring).

⁴⁵ *Id.*

⁴⁶ "There is nothing in *Parker* . . . or its progeny, which suggests that a proprietary enterprise with the inherent capacity for economically disruptive anticompetitive effects should be exempt from the Sherman Act merely because it is organized under state law as a municipality." *City of Lafayette*, 435 U.S. at 418 (Burger, C.J., concurring). In addition to making a distinction between proprietary and governmental activity, Chief Justice Burger questioned the Court's ability to determine congressional intent or purpose in passing the Sherman Act. *Id.* at 420. According to the Chief Justice, the Sherman Act was adopted at a time when a very restrictive view of interstate commerce prevailed. *Id.* He reasoned that Congress could not have imagined many of the situations to which the Sherman Act is being applied today. *Id.* (As the notion of interstate commerce has expanded, the Court has allowed the reach of the Sherman Act to expand in a similar manner. *See, e.g.,* *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 232-33 (1948).)

⁴⁷ *City of Lafayette*, 435 U.S. at 419 (Burger, C.J., concurring).

⁴⁸ *Id.* at 424. Louisiana Power & Light Co., as a private utility, was subject to the prohibitions of the antitrust laws. *Id.*

anticompetitive conduct engaged in by the city of Lafayette was not a factor in this analysis because "private" activity of the state (as opposed to sovereign activity) has always been subject to regulation under the commerce clause.⁴⁹

In dissent, Justice Stewart maintained that the *Parker* exemption was applicable.⁵⁰ Justice Stewart found fault with both the plurality's and the Chief Justice's opinions for failing to recognize the distinction *Parker* made between private and governmental action.⁵¹ According to Justice Stewart's interpretation of *Parker*, this distinction was the important distinction made in that case, and not the distinction made between state legislative actions and the actions of other governmental units.⁵² The Justice also reprimanded the plurality for misconstruing precedents.⁵³ Justice Stewart then criticized the governmental-proprietary approach embraced by the Chief Justice for two reasons. First, Stewart rejected such a distinction, reasoning that a government is not partly public and partly private.⁵⁴ Second, on a practical level, Justice Stewart argued the governmental-proprietary distinction is incapable of precise definition, thus making the distinction virtually impossible to apply.⁵⁵ The dissent concluded with a consideration of policy arguments, warning that the decision in *City of Lafayette* will diminish the extent to which a state can share its power with a municipality, cause excessive judicial interference in governmental decisions, and impose staggering costs on municipal governments.⁵⁶

⁴⁹ *Id.* at 422. See *United States v. California*, 297 U.S. 175, 183-86 (1936).

Burger also notes that this reasoning was consistent with the Court's opinion in *National League of Cities v. Usery*, 426 U.S. 833 (1976). In *National League of Cities*, the Court held that the extension of the federal Fair Labor Standards Act to state and municipal employees was not within the power granted to Congress by the commerce clause. *National League of Cities*, 426 U.S. at 852. Congress did not have the authority because the Act operated to "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions. . . ." *Id.* Thus, Burger claimed this supported his proprietary-governmental distinction. *City of Lafayette*, 435 U.S. at 423-24 (Burger, C.J., concurring).

In addition to Chief Justice Burger, others have noted the interesting relation between the *Parker* doctrine and *National League of Cities*. One district court has reasoned that perhaps there are situations in which a state's activity would not be exempt under the *Parker* doctrine, but the activity would be protected by *National League of Cities* analysis. *Jordan v. Mills*, 473 F. Supp. 13, 18 (E.D. Mich. 1979). If the state action exemption was inapplicable, the state's activity could still be protected if the activity's prohibition would displace the state's ability to structure integral operations in areas of traditional government functions. *Id.* See Rogers, *Municipal Antitrust Liability in a Federalist System*, 1980 ARIZ. ST. L.J. 305, 341 (1980).

⁵⁰ *City of Lafayette*, 435 U.S. at 426 (Stewart, J., dissenting).

⁵¹ *Id.* at 428.

⁵² *Id.* at 429.

⁵³ *Id.* at 431-32. Justice Stewart argued that *Goldfarb*, see *supra* note 31, is inapplicable to *City of Lafayette* because *Goldfarb* involved essentially private activity. *Id.* at 431 (Stewart, J., dissenting). Likewise, Stewart noted that *Cantor*, see *supra* note 31, can be distinguished from *City of Lafayette*, in that *Cantor* held that private action must be compelled by the state legislature in order to be exempt from the Sherman Act. *Id.* at 431 (Stewart, J., dissenting).

⁵⁴ *Id.* at 433 (Stewart, J., dissenting) (quoting *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 383-84 (1947)).

⁵⁵ *Id.* at 433 (Stewart, J., dissenting).

⁵⁶ *Id.* at 434-41. In his separate dissent, Justice Blackmun concluded the wide ranging opinions of the members of the Court by emphasizing the extent to which municipalities could be

Because of the five separate opinions, it is difficult to determine the significance of *City of Lafayette*. Although the plurality maintained that the *Parker* exemption could not extend to municipalities because they are not sovereign, procedurally the Court's holding on the applicability of the *Parker* doctrine is limited to the position taken by the member of the Court who concurred on the narrowest grounds.⁵⁷ One commentator has noted that Chief Justice Burger's pivotal vote against exempting the city from the antitrust laws limits the precedential force of *City of Lafayette* to proprietary activities of municipalities.⁵⁸

An examination of the subsequent interpretations of the *City of Lafayette* decision reveals that for the most part, the procedural limitations on the extent of the holding have not had any effect on other courts' application of the opinion. Generally, the federal courts have adopted the plurality's standards as if these standards had been the opinion of the Court.⁵⁹ In fact, in subsequent cases dealing with the state action exemption, the Supreme Court itself chose to follow the plurality opinion.⁶⁰ In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*,⁶¹ the Court refined the standard used in *City of Lafayette* to a simply stated two prong test. In order for anticompetitive activity to be ex-

harmful by the treble damage penalty mandated by the Sherman Act. *Id.* at 442-43 (Blackmun, J., dissenting).

⁵⁷ See *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976). With a fragmented Court, "the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds. . . ." *Id.*

⁵⁸ Taurman, *Reflections on City of Lafayette: Applying the Antitrust "State Action" Exemption to Local Governments*, 13 URB. LAW 159, 166 (1981). Mr. Taurman also noted that "it is significant that five Justices expressed views in *City of Lafayette* consistent with absolute exemption for cities' traditional governmental functions." *Id.*

⁵⁹ See, e.g., *Princeton Community Phone Book, Inc. v. Bate*, 582 F.2d 706, 719 (3d Cir.), cert. denied, 439 U.S. 966 (1978) (the weaker the relationship between the state and the defendant, the more clearly the state must command the precise action taken by the defendant for the defendant to enjoy the state action exemption); *Highfield Water Co. v. Public Service Comm'n*, 488 F. Supp. 1176, 1190 (D. Md. 1980) (local governmental activities are exempt if the legislature contemplated the kind of action complained of and such action was taken pursuant to a state policy to displace competition with regulation); *Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. 1025, 1029 (N.D. Tex. 1978) (activities of municipalities and others are exempt only if undertaken pursuant to acts of the state as sovereign that evince a state policy to displace competition with regulation).

⁶⁰ In *New Motor Vehicle Board of Cal. v. Orrin W. Fox, Co.*, 439 U.S. 96 (1978), the first case which considered the extent of the state action exemption subsequent to *City of Lafayette*, the Court applied the exemption to the actions of a state board that was authorized, by a state statute, to prohibit the establishment or relocation of new car dealerships under certain circumstances. *Orrin Fox*, 439 U.S. at 103-04. The Court held the exemption was applicable because the scheme was clearly articulated and affirmatively expressed by the state and designed to replace business freedom with regulation. *Id.* at 109.

⁶¹ 445 U.S. 97 (1980). *Midcal Aluminum* dealt with a state statute which controlled the pricing of wine by calling for producers and wholesalers to file resale price schedules and providing penalties for licensees selling wine below the established prices. *Id.* at 99-100. The state neither had direct control over the prices established, nor considered the reasonableness of such prices. *Id.* at 100.

empt from the antitrust laws under the state action doctrine: (1) the restraint on competition must be "clearly articulated and affirmatively expressed as state policy"⁶² and (2) the state must "actively supervise" the policy.⁶³ This was the test the Court required the city of Boulder to satisfy in *Community Communications*. The reasons why the Court's mechanical application of this test in *Community Communications* was both illogical and inconsistent with the underlying purpose of the *Parker* doctrine can be more easily understood if the development of the Court's clearly articulated test is examined.

C. *The State Action Exemption Before Community Communications:
The Development of the Clearly Articulated Test*

The clearly articulated test that the Court used to determine the applicability of the *Parker* exemption to the city of Boulder in *Community Communications* was developed in a series of cases dealing with a wide range of governmentally related activities, such as sovereign state activities, municipal activities and private activities in which the state was involved. The language which was to develop into the Court's clearly articulated standard first appeared in *Bates v. State Bar of Arizona*.⁶⁴ In *Bates*, the Court held that a statutory state bar regulation restricting advertising by lawyers was exempt from the antitrust laws under the *Parker* doctrine because the statutory restriction was the act of a sovereign state.⁶⁵ The Court, however, also felt compelled to distinguish the earlier case of *Cantor v. Detroit Edison Company*.⁶⁶ *Bates* dealt with state activity, while *Cantor* had dealt with private activity in which the state was to some extent involved. Instead of noting the difference between state activity and private activity, the Supreme Court distinguished *Cantor* by declaring that it is "significant that the state policy is so clearly and affirmatively expressed and that the state's supervision is so active."⁶⁷ This language from *Bates* later developed into the Court's test for determining the applicability of the state action exemption. With *Bates*, the Court began to develop its technique of applying the rationale developed in previous cases to subsequent cases involving the state action exemption, regardless of whether the subsequent case involved the same type of activity (private, state or municipal).

Consequently, in *City of Lafayette*, where the Court confronted a type of activity it had not considered before — the allegedly anticompetitive acts of a municipality — the plurality felt compelled to apply the *Parker* doctrine as it

⁶² *Id.* at 105.

⁶³ *Id.* In applying this test in *Midcal Aluminum*, the Court held the exemption was not applicable because the state was not actively supervising the program and was merely enforcing price schedules determined by private parties. *Id.*

⁶⁴ 433 U.S. 350 (1977).

⁶⁵ *Id.* at 360.

⁶⁶ 428 U.S. 579 (1976). In *Cantor*, a divided Court held the state action exemption was not applicable to the allegedly anticompetitive activity of a private utility which was authorized by a tariff the utility had filed with the state. *Id.* at 591-92.

⁶⁷ *Bates*, 433 U.S. at 362.

had been explicated by *Bates*.⁶⁸ The plurality concluded that in order to avail itself of the state action exemption to the antitrust laws, a municipality must have acted pursuant to a state policy to displace competition.⁶⁹ This approach is strikingly similar to the standard the Court announced in *Bates*, a case which dealt with the activities of a state agency.⁷⁰

After *City of Lafayette*, the Court refined the requirements used to determine the applicability of the state action exemption to an easily stated two prong test. The two cases subsequent to *City of Lafayette*, *New Motor Vehicle Board of California v. Orrin W. Fox Co.*,⁷¹ and *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*,⁷² were, however, limited to the activities of the state acting as sovereign. Both cases were concerned with the validity of state statutes.⁷³ The test employed by the Court in these decisions was essentially identical to the language used by the plurality in *City of Lafayette*.⁷⁴ In these cases, therefore, the Court used essentially the same test in applying the *Parker* doctrine to the activity of a municipality (*City of Lafayette*), and the activity of the state acting as sovereign (*Orrin Fox* and *Midcal Aluminum*). The Court had apparently developed an all purpose standard, which it used interchangeably in cases concerning different types of challenged activity.

This two pronged standard thus had been established as the test to use to determine the application of the *Parker* exemption at the time *Community Communications* was considered by the Supreme Court. *Community Communications*, however, presented the Court with a situation never previously considered — the applicability of the state action exemption to a home rule municipality.

⁶⁸ *City of Lafayette*, 435 U.S. at 408-10. For a brief discussion of *Goldfarb*, 421 U.S. 773 (1975), see *supra* note 31.

⁶⁹ *City of Lafayette*, 435 U.S. at 413.

⁷⁰ See *supra* note 67 and accompanying text.

⁷¹ 439 U.S. 96 (1978).

⁷² 445 U.S. 97 (1980).

⁷³ In *Orrin Fox*, the Court considered a state statute which gave a state agency the authority to prohibit the establishment or relocation of a new car dealership under certain circumstances. *Orrin Fox*, 439 U.S. at 101-03. In *Midcal Aluminum*, the Court considered a state statute by which the state enforced price schedules established by wine producers and wholesalers. *Midcal Aluminum*, 445 U.S. at 99-100.

⁷⁴ In *City of Lafayette*, it was stated that *Bates* had emphasized the significance of the fact that "the state policy requiring the anticompetitive restraint as part of a comprehensive regulatory system, was one clearly articulated and affirmatively expressed as state policy, and that the State's policy was actively supervised by the State Supreme Court as the policymaker." *City of Lafayette*, 435 U.S. at 410 (plurality opinion).

In *Orrin Fox*, the Court stated the "dispositive answer" to the claim that the statute violated the Sherman Act, was that "the Automobile Franchise Act's regulatory scheme is a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships." *Orrin Fox*, 439 U.S. at 109.

In *Midcal Aluminum*, the Court stated there were two requirements for antitrust immunity under the *Parker* doctrine. *Midcal Aluminum*, 445 U.S. at 105. "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the state itself. *Id.* (quoting *City of Lafayette*, 435 U.S. at 410 (opinion of Brennan, J.)).

This casenote will next examine the unique factual situation considered in *Community Communications*, and the rationale the Court used to apply its multi-purpose standard to the activities of a home rule municipality.

II. *COMMUNITY COMMUNICATIONS CO. v. CITY OF BOULDER*

In *Community Communications Co. v. City of Boulder*,⁷⁵ the Supreme Court applied the multi-purpose test it had developed to determine if the activities of a home rule municipality should be exempt from the antitrust laws. The Court held that municipal activity is exempt, under the *Parker* doctrine, only if the activity is action of the state undertaken in its sovereign capacity, or municipal activity in furtherance of a clearly articulated and affirmatively expressed state policy to replace competition with regulation.⁷⁶

The city of Boulder is a home rule municipality which has been granted broad powers over matters of local concern by the Colorado Constitution.⁷⁷ The Colorado Supreme Court has stated that Colorado's home rule amendment confers on municipalities "full, complete and exclusive authority" with respect to local and municipal affairs.⁷⁸ The amendment confers every power possessed by the legislature to authorize municipalities to function in local and

⁷⁵ 455 U.S. 40 (1982).

⁷⁶ *Id.* at 52.

⁷⁷ COLO. CONST. art. XX, § 6 (1980). Article XX, § 6 of the Colorado Constitution states:

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

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

Id.

Constitutional home rule amendments are a relatively recent development in the United States. "Since the end of World War II, it has been adopted by fourteen states This number exceeds by three the number of states which authorized it during what might be called its formative period (1875-1912)." Vandlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269, 277 (1968). In 1966, 33 states had home rule amendments in their constitutions. *Id.*

As early as 1875, however, the Supreme Court had recognized that a state may give its municipalities broad powers. "A municipal corporation . . . is but a department of the State. The legislature may give it all the powers such a being is capable of receiving, making it a miniature State within its locality." *Barnes v. District of Columbia*, 91 U.S. 540, 544 (1875). See *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 108-09 (1953); *New Orleans Water Works v. New Orleans*, 164 U.S. 471, 481 (1896).

The state of Colorado has fully embraced the concept of home rule. Of the state constitutions with home rule amendments, Colorado's constitution contains one of the broadest and strongest grants of home rule power to municipalities. YEAR BOOK OF THE STATE OF COLORADO 201 (1961), quoted in Klemme, *The Powers of Home Rule Cities in Colorado*, 36 U. COLO. L. REV. 321, 359 (1964).

⁷⁸ *Four County Metropolitan Capital Improvement Dist. v. Board of County Comm'rs*, 149 Colo. 284, 304, 369 P.2d 67, 77 (1962).

municipal affairs.⁷⁹ Under this provision, therefore, a home rule municipality is not inferior to the state legislature in matters of purely local concern.⁸⁰ Furthermore, because municipalities have exclusive authority in matters of local and municipal concern,⁸¹ the enactment of a municipal ordinance on a purely local matter supersedes a state statute.⁸²

Municipalities in Colorado, however, do not have unlimited power and authority. The Supreme Court of Colorado has recognized that the powers granted to home rule municipalities by the state are delegated powers; municipalities may legislate only on matters for which the state has given municipalities authority.⁸³ Home rule municipalities are therefore actually a branch of the state.⁸⁴ Except for the express limitations on the state's legislative power contained in the home rule amendment, the legislative power of the state is "all embracing."⁸⁵ Therefore, in an area that is of both state and local concern, local ordinances cannot preempt state regulatory schemes.⁸⁶ In matters of purely local concern, however, the municipality has exclusive authority, and its ordinances can supersede conflicting state statutes.⁸⁷ In effect, the Colorado home rule municipality acts as the state in areas of such concern.

In 1964, the Boulder City Council used this broad home rule power to pass an ordinance granting Colorado Televents, Inc., a revocable, non-exclusive permit to conduct a cable television system within the city.⁸⁸ The limits of cable television technology in 1964 made it feasible for the cable company to provide service to only 20% of the city's population.⁸⁹ By 1980, however, tre-

⁷⁹ *Id.* at 294, 369 P.2d at 72.

⁸⁰ COLO. CONST. art. XX, § 6 (1980). *See also* Denver Urban Renewal Auth. v. Byrne, ____ Colo. ____, 618 P.2d 1374, 1381 (1980).

⁸¹ *Four County Metropolitan Dist.*, 149 Colo. at 304, 369 P.2d at 77.

⁸² COLO. CONST. art. XX, § 6 (1980). *See* Davis v. City of Denver, 140 Colo. 30, 35, 342 P.2d 674, 676 (1959). *See* Bennion v. City of Denver, 180 Colo. 213, 215, 504 P.2d 350, 351 (1972). For a state statute to be superseded by a local ordinance, two requirements must be met. The state statute and the local ordinance must be in conflict, and the ordinance must pertain to a purely local matter. *Vela v. People*, 174 Colo. 465, 467, 484 P.2d 1204, 1205 (1971). Where both of these conditions exist, the state statute is without effect within the jurisdiction of the home rule city. *Id.*

⁸³ *City of Denver v. Sweet*, 138 Colo. 41, 46-47, 329 P.2d 441, 444 (1958). *See* COLO. CONST. art. XX, § 6 (1980).

⁸⁴ *Id.* at 48, 329 P.2d at 445. The court also stated that the "United States Constitution provides for a national government with a federal system of *states*. All powers not expressly granted to the federal government are reserved to the *states or to the people*. United States Constitution, Tenth Amendment. . . . Clearly our federal system does not envisage as a part thereof city-states." *Id.*

⁸⁵ *Id.* at 47, 329 P.2d at 444.

⁸⁶ *Century Electric Serv. and Repair, Inc. v. Stone*, 193 Colo. 181, 183-84, 564 P.2d 953, 955 (1977). Statutes dealing with matters of statewide concern operate to the exclusion of local ordinances. *Id.* at 183, 564 P.2d at 955.

⁸⁷ *See supra* notes 81-82 and accompanying text.

⁸⁸ *Community Communications*, 455 U.S. at 44. The license was assigned to the petitioner, Community Communications Co., in 1966. *Id.*

⁸⁹ *Id.* Service was originally provided to the University Hill area of the city, where regularly broadcast television signals could not be received. *Id.* Although the cable company

mendous improvements in cable technology gave companies the capability of offering a wide range of programming services to their subscribers, thus making the companies' services attractive to the entire city, even to those households which could receive regularly broadcast programming.⁹⁰ These improvements provided Community Communications Co. with a broader market, and in May 1979, Community Communications informed the City Council that it planned to expand.⁹¹

The improved cable technology also made Boulder an attractive potential market for other cable television operators. Two months after Community Communications announced its expansion plans, a newly formed company, Boulder Communications Co., expressed to the City Council an interest in obtaining a permit to provide cable services throughout the city.⁹² In response to these developments, the City Council undertook a review of its cable television policy. A number of study meetings were held and a consultant was hired to help the Council formulate a cable television policy.⁹³ The consultant advised the Council that it should be concerned about the tendency of a cable system to become a natural monopoly.⁹⁴ Because of this concern, and to allow the City Council time to draft a cable television ordinance and invite new businesses to enter the Boulder market, the City Council enacted an "emergency" ordinance on December 19, 1979.⁹⁵ The ordinance prohibited Community Communications from expanding into other areas of the city for a period of three months.⁹⁶

Community Communications brought an action in United States District Court seeking a preliminary injunction to prevent the city from restricting the company's right to expand.⁹⁷ Community Communications claimed the restriction by the city violated the Sherman Act.⁹⁸ The city maintained it was exempt from the antitrust laws under the state action doctrine announced in *Parker v. Brown*.⁹⁹ The District Court granted the preliminary injunction,

could have provided service to the entire city, there was no market for the company's services, which consisted of the retransmission of regular television signals, in areas that could receive the broadcast signals clearly. *Id.* at 44 n.3.

⁹⁰ *Id.* at 44.

⁹¹ *Id.* at 45.

⁹² *Id.*

⁹³ *Community Communications*, 485 F. Supp. 1035, 1037 (D. Colo. 1980).

⁹⁴ *Id.* The Council was concerned with the fact that Community Communications had the potential to dominate the market since it was already operating in the city. *Id.*

⁹⁵ *Id.*

⁹⁶ *Community Communications*, 455 U.S. at 45-46. The Council felt the ordinance was necessary because Community Communication's continued expansion during the time required to draft a cable television ordinance would make Boulder a less attractive market for other operators. *Id.*

⁹⁷ *Id.* at 46-47.

⁹⁸ *Id.* at 47. Section one of the Sherman Act declares that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ." 15 U.S.C. § 1 (1976).

⁹⁹ 317 U.S. 341, 350-51 (1943).

holding that the *Parker* doctrine was completely inapplicable because governmental action is immune from antitrust liability only when the action is taken pursuant to a clearly articulated and affirmatively expressed state policy, actively supervised by the state.¹⁰⁰

The Court of Appeals reversed the decision of the District Court,¹⁰¹ and held that the *Parker* doctrine was applicable because the city was a governmental entity asserting a governmental, rather than a proprietary interest.¹⁰² The court found that the city of Boulder had satisfied the requirement that the action be taken pursuant to a clearly articulated and affirmatively expressed state policy actively supervised by the state.¹⁰³ The court reasoned the policy requirement was satisfied because Boulder, as a home rule municipality, had complete authority in matters of local concern.¹⁰⁴

The Supreme Court held the city was not exempt from the antitrust laws because its action was neither action of the State of Colorado acting in its sovereign capacity, nor municipal action in furtherance of a clearly articulated and affirmatively expressed state policy.¹⁰⁵ The Court rejected the city's argument that as a home rule municipality the city was acting as the state on matters of purely local concern. In rejecting this argument the Court stated that the *Parker* exemption is a reflection of the principles of federalism,¹⁰⁶ and noted that federalism is a limited scheme, based on a dual system of government which has no place for sovereign cities.¹⁰⁷ The Court emphasized that *Parker* itself had recognized this limit of federalism.¹⁰⁸ Quoting from *Parker*, the Court stated that "'nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature . . . [And] an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.'" ¹⁰⁹ The Court understood this language from *Parker* to mean that the *Parker* Court had recognized Congress's intention to limit the exemption based on the federalism principle of state sovereignty.¹¹⁰ The Court noted that recent cases¹¹¹ also reaf-

¹⁰⁰ *Community Communications*, 485 F. Supp. at 1039.

¹⁰¹ *Community Communications*, 630 F.2d 704, 709 (10th Cir. 1980).

¹⁰² *Id.* at 708.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 707. In a dissenting opinion, Judge Markey maintained that the policy must be affirmatively expressed and actively supervised by the state itself. *Id.* at 719 (Markey, J., dissenting). Judge Markey also would have affirmed the District Court's decision on first amendment grounds. *Id.* at 711-14.

¹⁰⁵ *Community Communications*, 455 U.S. at 52-56.

¹⁰⁶ *Id.* at 53-54.

¹⁰⁷ *Id.* at 53. The Court stated that all sovereign authority in the United States resides either in the federal government or with the states of the union. *Id.*

¹⁰⁸ *Id.* at 53-54.

¹⁰⁹ *Parker*, 317 U.S. at 350-51, quoted in *Community Communications*, 455 U.S. at 54.

¹¹⁰ *Community Communications*, 455 U.S. at 54.

¹¹¹ The Court cited *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978),

firmed the "intrinsic limits" of the *Parker* doctrine.¹¹² The Court interpreted these cases as demonstrating that municipalities are not themselves sovereign, and thus were only exempt from the antitrust laws under the *Parker* doctrine to the extent that they acted "pursuant to a clearly articulated and affirmatively expressed state policy."¹¹³ Applying this test in *Community Communications* the Court concluded that Boulder had not acted pursuant to a clearly articulated and affirmatively expressed state policy. Boulder claimed that this requirement was fulfilled by Colorado's Home Rule Amendment, which guaranteed local autonomy. Under the Home Rule Amendment, Boulder argued, the state had given Boulder the authority to enact the ordinance, and thus it can be inferred that the state contemplated that the city would take this type of action.¹¹⁴ The Court rejected this argument, reasoning that the state's relationship to the city's ordinance was one of "precise neutrality."¹¹⁵ The Court also noted that acceptance of the city's argument would completely destroy the concept of clear articulation and affirmative expression that the Court felt the precedents required.¹¹⁶

The Court also was not convinced by Boulder's policy arguments that denial of the *Parker* exemption would have serious and adverse effects on municipalities and would unduly burden the federal courts by encouraging antitrust suits against municipalities.¹¹⁷ The Court observed that this was merely an attack on the wisdom of the policy of free market and open competition that is the basis of the antitrust laws.¹¹⁸ The Court reiterated that it was simply holding that if a state has not directed or authorized the anticompetitive action, the city must obey the antitrust laws.¹¹⁹ In a concurring opinion, Justice Stevens particularly emphasized that the issue of an exemption from the antitrust laws is different from the issue of a violation of the antitrust laws.¹²⁰

Justice Rehnquist, joined in dissent by Chief Justice Burger and Justice O'Connor, argued there were two serious flaws in the majority's decision.

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

¹¹² *Community Communications*, 455 U.S. at 54.

¹¹³ *Id.*

¹¹⁴ *Id.* at 55.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 56. The Court maintained that if a general grant of power was enough to satisfy this requirement, different home rule cities could pursue vastly different regulatory schemes, and yet all the schemes would be the result of a clearly articulated state policy. *Id.* The Court found this somewhat illogical. *Id.*

Having concluded that Boulder had not acted pursuant to a clearly articulated and affirmatively expressed state policy, the Court found it unnecessary to consider a second aspect of the requirements needed for action to be exempt from the antitrust laws under the *Parker* doctrine. *Community Communications*, 445 U.S. at 51 n.14. In *Midcal Aluminum*, the Court had focused on this second requirement of whether the activity was actively supervised by the state. *Midcal Aluminum*, 445 U.S. at 105.

¹¹⁷ *Community Communications*, 455 U.S. at 56.

¹¹⁸ *Id.* at 56-57.

¹¹⁹ *Id.* at 57.

¹²⁰ *Id.* at 58 (Stevens, J., concurring).

First, Justice Rehnquist maintained the state action doctrine should be treated as an example of the preemption doctrine rather than as an exemption.¹²¹ Second, the dissent expressed amazement over the majority's conclusion that municipal ordinances are more easily invalidated under the antitrust laws than state statutes, and that principles of federalism are not implicated when a federal law invalidates otherwise legal municipal legislation.¹²² The dissent stated that the key determination to be made in deciding applicability of the exemption is whether the regulation is truly an act of government, and not an act of regulated private entities.¹²³ The dissent noted that under the majority's requirements, the *Parker* exemption is available to municipalities only to the same extent as the exemption is available to private parties.¹²⁴ The dissent stated that this limitation on the availability of the exemption will both seriously alter the relationship between states and their subdivisions, and will also effectively destroy the home rule movement by forcing municipalities to cede authority back to the states.¹²⁵

In addition to the dissent's criticisms of the Court's opinion, the Court's opinion can be criticized because the Court's straightforward application of its clearly articulated test produced a result that is inconsistent with the underlying purpose of the *Parker* exemption. Accordingly, this casenote will next demonstrate that the Court's attempt to apply a single standard to determine the applicability of the state action doctrine in situations involving private activity, municipal activity and state activity leads to a result inconsistent with the purpose of the exemption in *Community Communications* because of the great differences between these types of activities.

III. THE COURT'S CLEARLY ARTICULATED STANDARD

A. Consistent Application to Varying Situations

In developing the standard the Court used in *Community Communications* to determine the availability of the state action exemption to the city,¹²⁶ the Court

¹²¹ *Id.* at 61-69 (Rehnquist, J., dissenting). There is a distinction between exemption and preemption. The exemption doctrine deals with possibly conflicting enactments of a single sovereign. Handler, *Antitrust — 1978*, 78 COLUM. L. REV. 1363, 1378 (1978). The preemption doctrine deals with possibly conflicting enactments of two different sovereigns. *Id.* at 1379. One key difference in the manner in which the courts handle the two doctrines is in the presumptions the courts make. With exemptions, the presumption is in favor of the antitrust laws and against implied repeals of these laws by other enactments. *Id.* at 1380. With the preemption doctrine, the presumption is that the state law is not superseded by the federal law. *Id.* See Fox, *The Supreme Court and the Confusion Surrounding the State Action Doctrine*, 48 ANTITRUST 1571, 1571-72 (1979); Rogers, *Municipal Antitrust Liability in a Federalist System*, 1980 ARIZ. ST. L.J. 305, 322 (1980). But see Handler, *The Current Attack on the Parker v. Brown State Action Doctrine*, 76 COLUM. L. REV. 1, 14-15 (1976).

¹²² *Community Communications*, 455 U.S. at 69 (Rehnquist, J., dissenting).

¹²³ *Id.* at 70.

¹²⁴ *Id.*

¹²⁵ *Id.* at 70-71.

¹²⁶ In order to be exempt from the antitrust laws, the activity must be pursuant to a

did not examine the important distinctions between state activity, private activity and municipal activity.¹²⁷ It would be proper to determine the applicability of the exemption by using the same "clearly articulated and affirmatively expressed state policy" standard in situations involving state activity, private activity and municipal activity, as the Court has, if these types of activities were identical. There are substantial differences, however, between state activity, private activity and municipal activity. Because of these differences, the application of the same standard to these different types of activities produce illogical results.

There are apparent differences between state activity, private activity, and municipal activity. Activities by the state are clearly unique in that they are actions of a sovereign government. As the Court recognized in *Parker*, "the states are sovereign, save only as Congress may constitutionally subtract from their authority. . . ." ¹²⁸ The state, although it has ceded some powers to the federal government through the Constitution, still has inherent authority to act on all matters that are within its sphere of power.¹²⁹ A private corporation, however, is not a sovereign entity, and does not have any inherent authority to act.¹³⁰ A private corporation's power to act is limited to the powers expressly or impliedly granted by the sovereign.¹³¹ Although it is true that sovereign states may engage in the same type of activities as private actors, it does not necessarily follow that such situations eliminate the distinctions between state activity and private activity. The state, since it draws its power from the people, is generally politically accountable to the people and concerned with maximizing public welfare. A private corporation, by comparison, is generally most concerned with maximizing the benefits of the corporation's shareholders.¹³² Although a

clearly articulated and affirmatively expressed state policy. *Id.* at 52.

¹²⁷ See *supra* notes 64-74 and accompanying text.

¹²⁸ *Parker*, 317 U.S. at 351.

¹²⁹ This concept is the foundation of the doctrine of federalism. The Federalist Papers, in discussing the Constitution, states that the Constitution "aims only at a partial Union or consolidation, [and] the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act *exclusively* delegated to the United States." THE FEDERALIST NO. 32, at 200 (A. Hamilton) (J. Cooke ed. 1961). "The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement, and prosperity of the state." THE FEDERALIST NO. 45, at 313 (J. Madison) (J. Cooke ed. 1961).

¹³⁰ "A corporation obtains its powers from the same source as it does its existence, namely, from the sovereign." 6 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2477 (perm. ed. 1979).

¹³¹ *Id.*

¹³² The majority of the Court rejected this type of argument when comparing *municipal* and private activity. *City of Lafayette*, 435 U.S. at 403-08. The Court felt that although municipalities are politically accountable, they are not accountable to everybody their activities may affect. *Id.* at 405-06. The Court also argued a municipally operated utility had the same profit maximizing goals as a private utility. *Id.* at 403-04. This analysis, however, does not apply equally to states. States are generally accountable to everyone whom their activities affect. If

sovereign state and a private corporation may use similar means in some situations, the ultimate end for which the activity is undertaken demonstrates the clear difference between the two types of activities. The identity and attributes of the actors necessarily distinguishes sovereign state activity from private activity. The private actor, taken to be acting in his own self-interest, is properly subject to the antitrust laws, despite the fact that his actions may happen to have socially beneficial effects. The state, however, is expressly attempting to create socially beneficial results in the name of the public welfare. This general concern with the public good creates the need for an exemption from the antitrust laws.

It has long been recognized that municipalities have a special place in the scheme of government.¹³³ In effect, municipalities work towards the general public good in much the same manner as states.¹³⁴ Municipalities in certain respects may be more effective at fulfilling the public good because they have a greater awareness of local conditions and needs.¹³⁵ A municipality's concern about local needs is one of the major factors which distinguishes a municipal corporation from a private corporation. A traditional definition of a municipal corporation is that it is a political body endowed with the right to exercise a portion of the political power of the state.¹³⁶ Private corporations, although they

states are affecting activities beyond their borders, the problem is an interstate problem, which Congress may remedy, if it chooses. Even if a state acts pursuant to a goal of profit maximization, that profit benefits all residents of the state, and not the small number of investors that private activity benefits.

¹³³ One of the nation's "Founding Fathers," Thomas Jefferson, recognized the importance of municipalities: "These little republics . . . would be the main strength of the great one. We owe to them the vigor given to our revolution. . . . Could I once see this [division of counties into smaller units], I should consider it as the dawn of the salvation of the republic." *People v. Hurlbut*, 24 Mich. 44, 102 (1871) (opinion of Cooley, J.) (quoting 5 JEFFERSON'S WORKS at 525).

¹³⁴ "That a city or town can exercise no other than public powers results from the fact that it is a public institution created and existing to serve the general interests of the people residing . . . within the city area, not as private individuals but as members of the political society." 1 MCQUILLIN, MUNICIPAL CORPORATIONS § 1.57 (3d ed. 1971).

Many years ago, the Supreme Court recognized that:

A municipal corporation is a subordinate branch of the domestic government of a State. It is instituted for public purposes only; and has none of the peculiar qualities and characteristics of a trading corporation, instituted for purposes of private gain. . . . Its objects, its responsibilities, and its powers are different. As a local governmental institution, it exists for the benefit of the people within its corporate limits.

Mayor of Nashville v. Ray, 86 U.S. (19 Wall.) 468, 475 (1873). See also 1 MCQUILLIN, MUNICIPAL CORPORATIONS § 1.60 (3d ed. 1971). But see *City of Lafayette*, 435 U.S. at 403-08.

¹³⁵ The Supreme Court has recognized the importance of municipalities in serving the needs of the public. "Their judgment of local needs is made from a more intimate knowledge of local conditions than that of any other legislative body." *Breard v. Alexandria*, 341 U.S. 622, 641 (1951).

¹³⁶ 1 MCQUILLIN, MUNICIPAL CORPORATIONS § 2.07a (3d ed. 1971).

derive their power from the state, do not have any authority to exercise the political power of the state,¹³⁷ and are created for non-governmental purposes.¹³⁸

Another distinctive characteristic of municipalities is that they have traditionally been viewed as agents of the state.¹³⁹ Throughout its history, the Supreme Court has consistently stressed that municipal corporations are political subdivisions, created by the state as "convenient agencies" for exercising governmental power.¹⁴⁰ Viewing municipalities as agents of the state, their activities clearly are of a different character than private activity.¹⁴¹ Actions of a municipality can be viewed, in an indirect way, as actions of the state.¹⁴² Although there may be instances when municipal activity appears similar to private activity,¹⁴³ municipal activity will generally be similar to state activity in that both seek to achieve the same goal — benefiting the public through the use of governmental power. Nonetheless, municipal activity cannot be equated

¹³⁷ *Id.* at § 2.02.

¹³⁸ *Id.* at § 2.03. Corporations have been traditionally characterized as either "public" or "private." All municipal corporations are public corporations, but all public corporations are not municipal corporations. *Id.* Both types of corporations derive their existence from the state. *Id.* at § 2.02. In addition to the differences in purposes between private corporations and public corporations, Fletcher, in his treatise on corporations, stated another distinguishing factor:

A private corporation involves the idea of consent of the individuals who compose it, and after incorporation cannot be changed or dissolved without their consent, unless the power to do so is reversed [sic] at the time of creation, or unless it has forfeited the right to do business or exist by virtue of the abuse or nonuser [sic] of its powers. On the other hand, a public corporation, being an instrument or means of government, is subject to creation or dissolution at the will of the legislative body or lawmaking power, and in total disregard of the wishes of the members who compose it.

W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 58 (perm. ed. 1974).

¹³⁹ See 1 MCQUILLIN, MUNICIPAL CORPORATIONS § 1.58 (3d ed. 1971).

¹⁴⁰ *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907). See, e.g., *City of Trenton v. New Jersey*, 262 U.S. 182, 185-86 (1923); *Metropolitan R.R. Co. v. District of Columbia*, 132 U.S. 1, 8 (1889); *Mount Pleasant v. Beckwith*, 100 U.S. 514, 524 (1879). These cases all illustrate the traditional view of municipalities as mere agents of the sovereign states. One commentator has recently noted that because of the increased direct regulatory contact with municipalities by the federal government, municipalities can no longer automatically be treated as "synonymous with, or subordinate to," the states. Lee, *The Federal Courts and the Status of Municipalities: A Conceptual Challenge*, 62 B.U.L. REV. 1, 34 (1982). This commentator maintains that in recent cases (*City of Lafayette*, 435 U.S. 389 (1978) and *Monell v. New York City Dep't of Social Serv.*, 436 U.S. 658 (1978)), the Court's analysis of municipalities has been "instrumental" rather than formal, stressing the importance of the respective federal policies and only giving lip service to the traditional category of municipalities as state instrumentalities. Lee, *supra*, at 46. This commentator also noted that in *Community Communications*, the Court returned to a more formalistic approach. *Id.*

¹⁴¹ The Supreme Court has maintained, however, that in certain situations a municipality can act as a private corporation. *City of Lafayette*, 435 U.S. at 403-08. See *supra* note 132.

¹⁴² In another context, the Supreme Court has equated municipal action with state action. "[It] is now beyond question that a State's political subdivision must comply with the Fourteenth Amendment. The actions of local government are the actions of the state." *Avery v. Midland County*, 390 U.S. 474, 480 (1968).

¹⁴³ *City of Lafayette*, 435 U.S. at 403-08.

with state activity.¹⁴⁴ There are limits to municipal authority. As the plurality in *City of Lafayette* emphasized, municipalities are not themselves sovereign;¹⁴⁵ they depend on the powers granted to them by the state in order to act.¹⁴⁶

In essence, action by the state fundamentally differs from that of a private actor because it is directed toward increasing the public good. Consequently, the compelling need to subject private economic activity to the antitrust laws in order to advance the public good does not really apply to actions of the state. In certain respects, municipalities resemble the state; they act in the public good. The power to do so, however, is derived from the state itself. As a result of these differences between private, state and municipal activity, there are various considerations which must be weighed when deciding how the antitrust laws should apply to each. Given the distinct differences between state activity, private activity and municipal activity, the same standard should not be used in each situation to determine if a challenged activity is exempt from the antitrust laws under the *Parker* state action doctrine.

The standard adopted by the Court — that in order for the exemption to apply there must be both a clearly articulated state policy and active supervision by the state¹⁴⁷ — is understandably appropriate for deciding whether *Parker* should apply to actions of the state itself. Under the first element of the Court's standard, that the challenged restraint must be one clearly articulated and affirmatively expressed as state policy, there will be very few instances when allegedly anticompetitive state activity cannot fulfill this requirement. There will almost certainly be a state statute authorizing the allegedly anticompetitive activity. A statute was involved, for instance, in each of the cases in which the Court considered the applicability of the *Parker* doctrine to the activities of a state.¹⁴⁸ If the state legislature, however, has not authorized the state to act in the allegedly anticompetitive manner, the exemption is not applicable. In effect, with the requirement of a clearly articulated and affirmatively expressed state policy, the Court has insured that the decision to engage in anticompetitive activity is made by the appropriate authority in the state. That is, the decision will be made by the legislative rather than, for instance, an administrative body.

¹⁴⁴ *But see* *Avery v. Midland County*, 390 U.S. 474, 480 (1968).

¹⁴⁵ *City of Lafayette*, 435 U.S. at 412.

¹⁴⁶ "Dillon's Law" of municipal power is a classic statement of the limits of the powers of a municipality.

It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation — not simply convenient, but indispensable. . . . All acts beyond the scope of the power granted are void.

1 DILLON, MUNICIPAL CORPORATIONS § 237 (5th ed. 1911).

¹⁴⁷ *Midcal Aluminum*, 445 U.S. at 105.

¹⁴⁸ *Midcal Aluminum*, 445 U.S. at 99 (CAL. BUS. & PROF. CODE §§ 24862, 24864-24866

The second element of the Court's standard, that the state actively supervise the policy, is also logical when applied to state activity. The requirement of active state supervision is merely a reaffirmation of what the Court had recognized in *Parker*: a state cannot give immunity to those who violate the Sherman Act by authorizing them to violate it or by declaring their action is lawful.¹⁴⁹

The standard developed by the Supreme Court could also be adequately applied to allegedly anticompetitive private activity directed by the state.¹⁵⁰ Although the Court has not had the opportunity to consider the applicability of the state action exemption to private activity since *Cantor v. Detroit Edison Co.* (which was decided before the Court clearly articulated the current standard), the application of the Court's standard to allegedly anticompetitive private activity directed by the state seems appropriate. If private anticompetitive activity is required by a state statute, and the two elements of the Court's standard are satisfied, the activity would therefore be exempt from the antitrust laws under the *Parker* doctrine. If allegedly anticompetitive private activity, directed by the state pursuant to a clearly articulated and affirmatively expressed state policy, actively supervised by the state, was not exempt under the *Parker* doctrine, irrational results would obtain. For instance it would be irrational to hold a private actor liable for violations of the antitrust laws if the private actor was merely following a state command. In addition, the *Parker* doctrine is here applied to those situations in which the state has explicitly decided to use private means to effectuate its policy. If the state decides to use private means to effectuate policy, that policy should be clearly articulated, affirmatively expressed, and supervised by the state. If the state is not involved at least to this extent, the state action exemption should not be applied.¹⁵¹ In essence, where either the state expressly adopts and supervises an anticompetitive activity itself, or does so through a private actor, then the antitrust laws should not apply. In both situations the action is being taken to further the public good. Whether the activity is carried on by the state itself or by a private actor at the request of the state, the antitrust laws should not apply, as long as a public goal is served. To ignore this would be to frustrate social and economic legislation in a manner unintended by Congress.¹⁵²

(West 1964)); *Orrin Fox*, 439 U.S. at 103 (California Automobile Franchise Act, CAL. VEH. CODE §§ 3062-3063 (West Supp. 1978)); *Bates*, 433 U.S. at 355 (17A ARIZ. REV. STAT. Rule 29(a) (1973)); *Parker*, 317 U.S. at 344 (California Agricultural Prorate Act, Statute of Cal. of 1933, c. 754).

¹⁴⁹ *Parker*, 317 U.S. at 351. See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 386 (1951); *Northern Sec. Co. v. United States*, 193 U.S. 197, 344-47 (1904).

¹⁵⁰ As *Goldfarb* indicates, the threshold question in cases dealing with private anticompetitive activity is whether the activities were compelled by the state acting as sovereign. *Goldfarb*, 421 U.S. at 791.

¹⁵¹ E.g., *Midcal Aluminum*, 445 U.S. at 103-06.

¹⁵² In *Parker*, the Court itself noted that the Sherman Act was a prohibition on individual and not state action. *Parker*, 317 U.S. at 352. The Court also noted that there is "no suggestion of

Although requiring both that an affirmative state policy be adopted and that it be supervised by the state is reasonable where state and private activities are involved, this standard is inappropriate where the activities of a municipality are called into question. First, the application of the same standard requiring a clearly articulated and affirmatively expressed state policy effectively denies municipalities the right to regulate matters in the local economy.¹⁵³ For the Court to require the governmental unit which is closest to the people,¹⁵⁴ and most responsive to their needs, to have state approval of all local regulations seems unproductive.¹⁵⁵ This requirement of state approval could have the effect of making municipalities merely administrative arms of the state with no real control over local conditions.¹⁵⁶ Second, the requirement that the state actively supervise the implementation of the policy will prove equally restrictive to municipalities. As the dissent in *Community Communications* stated, requiring the state to actively supervise the policy will lead to a situation in which the state is virtually controlling the municipalities.¹⁵⁷ That is, in order to defend itself from Sherman Act attacks, a municipality will have to cede authority back to the state,¹⁵⁸ allowing the state to supervise any potentially anticompetitive activity.

The difficulties likely to result from applying the Court's standard to municipalities is illustrated by the result in *Community Communications*. By choosing to apply its standard in a mechanical fashion, the Court insured that the city of Boulder would not benefit from the state action exemption. Boulder, however, as a municipality, is a government body. As a result, many of its activities are directed towards increasing public welfare. In neglecting this fact, the Court appears to be drifting away from the most important distinction made in *Parker*: the distinction between state (governmental) action and private action.¹⁵⁹ As noted, where a government body is legitimately acting to enhance

a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only 'business combinations.' '' *Parker*, 317 U.S. at 351 (quoting 21 CONG. REC. 2562, 2457 (1890) (remarks of Sen. Sherman)).

¹⁵³ *Community Communications*, 455 U.S. at 70-71 (Rehnquist, J., dissenting).

¹⁵⁴ See *supra* note 135.

¹⁵⁵ Many types of municipal regulations could have antitrust implications. See Rose, *Municipal Activities and the Antitrust Laws After City of Lafayette*, 57 U. DET. J. URB. L. 483, 486-87, 489-515 (1980) (identifying types of municipal activities likely to give rise to antitrust litigation).

¹⁵⁶ If municipalities are viewed as mere administrative arms of the state, the distinction between municipal corporations and non-municipal public corporations would be eliminated. The distinguishing feature of a municipal corporation is that it is a "body politic." 1 MC-QUILLIN, MUNICIPAL CORPORATIONS § 2.07a (3d ed. 1971). A non-municipal public corporation is defined as a corporation created by the state "solely as its own device and agency for the accomplishment of some part of its own public work other than the local government. . . ." *Id.* at § 2.03b.

¹⁵⁷ *Community Communications*, 455 U.S. at 71 (Rehnquist, J., dissenting).

¹⁵⁸ *Id.*

¹⁵⁹ *Parker*, 317 U.S. at 351. "There is no suggestion of a purpose to restrain state action in the [Sherman] Act's legislative history. . . . That its purpose was to suppress combinations to

the general welfare, and in so doing uses an anticompetitive mechanism, the antitrust laws should not apply to invalidate the action. This rationale would seem to apply whether the government involved is a state or a municipality. By using the requirement that the *state* be the body to adopt the policy and oversee its implementation, the Court has effectively precluded municipalities from taking affirmative action towards many social and economic goals.

The most likely objection to this notion — that states and municipalities should be treated similarly for antitrust purposes when fulfilling similar government goals — is that in the federalist system, states have an independent existence and municipalities do not. Arguably, the two levels of government should, therefore, be treated differently. In *Community Communications*, the Court correctly emphasized that the *Parker* state action exemption is based upon the doctrine of federalism.¹⁶⁰ As the dissent in *Community Communications* notes, however, federalism is likewise implicated when federal law invalidates municipal legislation.¹⁶¹ Yet, the Court never clearly explains why federalism is not involved when a municipal ordinance is held invalid. Rather, relying on an 1886 decision, the Court merely notes that only the state and federal governments exist “within the broad domain of sovereignty.”¹⁶² Accordingly the court’s discussion of whether federalism is implicated when a municipal ordinance is invalidated is insufficient, particularly since *Community Communications* represents the first time a majority of the Court has agreed on the inapplicability of the *Parker* exemption to municipalities.¹⁶³ Despite the Court’s pronouncement, there is merit to the dissent’s argument that federalism is implicated when a city ordinance is declared invalid. A municipality is limited to acting on those matters for which it has been given authority to act by the state.¹⁶⁴ By granting municipalities the power to act on certain matters, a state makes a conscious decision on how it wants these matters governed. If this decision of the state is denied effect by the federal government, federalism is necessarily implicated.

The mechanical application of the Court’s multi-purpose standard to the allegedly anticompetitive activity in *Community Communications* led to results that are inconsistent with the underlying purpose of the *Parker* doctrine. *Parker*

restrain competition and attempts to monopolize by individuals and corporations abundantly appears from its legislative history.” *Id.* (emphasis added). The Sherman Act “must be taken as a prohibition of individual and not state action.” *Id.* at 352.

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), also recognized that this was the key distinction. “In *Parker* . . . the Court held that an anticompetitive marketing program . . . was not a violation of the Sherman Act because the Act was intended to regulate private practices and not to prohibit a state from imposing a restraint as an act of government.” *Id.* at 788.

¹⁶⁰ *Community Communications*, 455 U.S. at 50.

¹⁶¹ *Id.* at 69 (Rehnquist, J., dissenting).

¹⁶² *Id.* at 53-54 (quoting *United States v. Kagama*, 118 U.S. 375, 379 (1886)).

¹⁶³ In the only other case to consider municipal activity, *City of Lafayette*, the Court had been sharply divided. See *supra* note 30.

¹⁶⁴ For a description of the powers a municipality can exercise, see *supra* note 146.

was concerned with exempting state (governmental) action from the antitrust laws,¹⁶⁵ and limiting the application of those laws to the entities Congress intended the laws to apply to: individuals and corporations.¹⁶⁶ By forcing the municipality to satisfy the same requirements as state activity and private activity in order for the *Parker* exemption to be applicable, the Court once again, as it had in the cases that had developed the multi-purpose test, failed to recognize the important distinctions between state activity, private activity and municipal activity. Because of the differences between these distinct types of activities, there are different sets of reasons to consider in determining the applicability of the *Parker* exemption to each type of activity. By mechanically applying its test, rather than considering the unique status of municipalities, the Court reached results inconsistent with the purpose of the *Parker* exemption. This inconsistency was particularly evident in *Community Communications* because the Court was dealing with a special type of municipality — a home rule municipality. This casenote will demonstrate that a home rule municipality, when acting in areas of local concern, is so similar to a state that the state action exemption should apply, and the Court should examine whether the *municipality* has a clearly articulated and affirmatively expressed policy to replace competition with regulation.

B. State Action and Home Rule Municipalities

In *Community Communications*, the Supreme Court was so concerned with the notion of dual (federal-state) sovereignty that it refused to recognize the uniqueness of a home rule municipality.¹⁶⁷ The city of Boulder argued that because of the home rule amendment,¹⁶⁸ Boulder was acting as the state when it enacted the allegedly anticompetitive ordinance, and accordingly was entitled to the *Parker* exemption.¹⁶⁹ Relying on its dual sovereignty-federalism reasoning, the Court failed to seriously consider the city's argument.¹⁷⁰ This failure, and the Court's consequent failure to recognize that in matters of purely local concern a home rule municipality has all the powers of the sovereign state,¹⁷¹ leads the Court to a result that is inconsistent with the purpose of the *Parker* doctrine and created two flaws in the Court's analysis.

First, *Parker*, the case which began the development of the state action exemption, was decided before the substantial growth in constitutional home rule amendments.¹⁷² It is unlikely, therefore, that the *Parker* Court ever contem-

¹⁶⁵ See *supra* note 159 and accompanying text.

¹⁶⁶ See *supra* note 25 and accompanying text.

¹⁶⁷ *Community Communications*, 455 U.S. at 53-54.

¹⁶⁸ See *supra* notes 77-87 and accompanying text.

¹⁶⁹ *Community Communications*, 455 U.S. at 52-53.

¹⁷⁰ See *supra* notes 107-113 and accompanying text.

¹⁷¹ See *supra* notes 77-82 and accompanying text.

¹⁷² *Parker* was decided in 1943. Substantial growth in the number of states with home rule amendments has occurred since World War II. See *supra* note 77.

plated that states would cede their power on local matters to their municipal governments. In *Community Communications*, the Court also ignores the fact that constitutional home rule is a relatively recent development. As support for its dual sovereignty argument, the Court cites a case decided in 1886,¹⁷³ years before the existence of home rule municipalities. The Court apparently is attempting to fit a completely new situation into an outdated method of analysis. This type of procrustean analysis detracts greatly from the force of the Court's argument because it is an indication that the Court's straightforward application of its test was made without a careful consideration of home rule municipalities.

Second, even if the Court's starting point, that "ours is a dual system of government," is accepted, a proper analysis of a case involving a home rule municipality leads to a result different from that reached by the Court in *Community Communications*. It is clear that states are sovereign entities.¹⁷⁴ In Colorado, the state constitution gives municipalities exclusive authority in matters of purely local concern.¹⁷⁵ Assuming, as the Court did, that the regulation of cable television is a matter of local concern,¹⁷⁶ the federal government should respect a municipal ordinance concerning cable television, since the state constitution has granted municipalities *exclusive* authority to enact such an ordinance.¹⁷⁷ In other words, in matters of local concern, the municipality is acting as the state. Consequently, in determining the applicability of the *Parker* exemption, it would have been more enlightening for the Court to apply the "clearly articulated, affirmatively expressed policy" test to the municipality. That is, the Court should have determined if the municipality had a clearly articulated and affirmatively expressed policy to replace competition with regulation in a matter of local concern.¹⁷⁸ Furthermore, the Supreme Court should not interfere with the states' (and its people's) decision to grant municipalities exclusive authority to act on matters of purely local concern by denying home rule municipalities the exemption to the antitrust laws that the states enjoy. Home rule municipalities, acting on matters of purely local concern, should therefore be exempt from the antitrust laws under the state action doctrine.

The Court, however, would not accept such an argument because it felt to do so would allow each city in Colorado to pursue its own policy towards cable television (regulation, monopoly, or competition).¹⁷⁹ The Court reasoned that this would "wholly eviscerate" the requirement of clear articulation and affirmative expression "that our precedents require."¹⁸⁰ This reasoning of the

¹⁷³ *United States v. Kagama*, 118 U.S. 375, 379 (1886) quoted in *Community Communications*, 455 U.S. at 54-54.

¹⁷⁴ See, e.g., *Community Communications*, 455 U.S. at 53-54.

¹⁷⁵ COLO. CONST. art. XX, § 6 (1980). See *supra* notes 77-82 and accompanying text.

¹⁷⁶ *Community Communications*, 455 U.S. at 53 n.16.

¹⁷⁷ See *supra* note 78 and accompanying text.

¹⁷⁸ This was the approach the Court of Appeals took in *Community Communications*. See *supra* notes 101-104 and accompanying text.

¹⁷⁹ *Community Communications*, 455 U.S. at 56.

¹⁸⁰ *Id.*

Court is faulty because it both misapplies the Court's precedents and misinterprets the logic of federalism. First, *Community Communications* was the first time the Court considered the applicability of the state action exemption to a home rule municipality. The standard by which the Court determined the applicability of the exemption (clearly articulated and affirmatively expressed state policy) was developed by the Court in cases that dealt with a variety of activities (state, private and municipal) between which the Court failed to make distinctions.¹⁸¹ Because the precedents represent an intermingling of a variety of different types of situations, and because in *Community Communications* the Court was faced with a completely new issue, the precedents do not clearly require that the Court's standard be applied to determine if home rule municipalities are exempt from the antitrust laws. Second, the faults in the Court's logic can be demonstrated. If cable television is a matter of local concern,¹⁸² as the Court assumes, it should logically be regulated at the local level. Under the principles of federalism, the federal government should not require the states to regulate matters of local concern. It is not vital to federalism that matters of local concern be regulated at the state, rather than municipal level.¹⁸³

Under the Court's approach, however, in order for any regulation to be exempt from the antitrust laws under the *Parker* exemption, there must be involvement by the state. The Court fails to see the paradox this requirement of state involvement creates.¹⁸⁴ In Colorado, a home rule municipality has exclusive authority in matters of local concern.¹⁸⁵ Yet, the Supreme Court's decision in *Community Communications* mandates a clearly articulated and affirmatively expressed state policy in order for municipal activity to be exempt from the antitrust laws.¹⁸⁶ But, in Colorado, the state cannot give a clearly articulated and affirmatively expressed state policy to replace competition with regulation in matters of local concern because its municipalities have exclusive au-

¹⁸¹ See *supra* notes 64-74 and accompanying text.

¹⁸² It is debatable whether cable television is a matter of local concern. In *Manor Vail Condominium Ass'n v. Vail*, the Colorado Supreme Court considered an ordinance regulating cable television and implied that it was a matter of local concern, noting that local governments have wide latitude in regulating local economies. *Manor Vail Condominium Ass'n v. Vail*, 199 Colo. 62, 66, 604 P.2d 1168, 1171 (1980). In *United States v. Southwestern Cable Co.*, the Supreme Court held that cable television systems are engaged in interstate commerce. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168-69 (1968). Perhaps it would have been more profitable for the Court, in *Community Communications*, to determine if cable television is an area of local concern, thus determining whether Boulder even had the authority to enact the ordinance.

¹⁸³ Since states can displace competition with regulation, allowing the states to delegate this power to home rule municipalities in matters of local concern would not greatly alter the effectiveness of the antitrust laws.

¹⁸⁴ Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 HARV. L. REV. 435, 449 (1980); Thomas, *City of Lafayette's State Action Test Reformulated: A Meaningful Standard for Antitrust Immunity for Cities*, 1980 ARIZ. ST. L.J. 345, 372 (1980).

¹⁸⁵ *Four County Metropolitan Capital Improvement Dist. v. Board of County Comm'rs*, 149 Colo. 284, 304, 369 P.2d 67, 77 (1962).

¹⁸⁶ *Community Communications*, 455 U.S. at 52.

thority in such matters. The Court developed standard and the concept of home rule municipalities are inherently inconsistent. Applying the Court's standard, home rule municipalities will never be able to take advantage of the state action exemption.¹⁸⁷ In order to satisfy the Court's standard for determining the applicability of the state action exemption, home rule municipalities would have to cede some power back to the states.¹⁸⁸ This would no doubt appeal to states eager to regain the power granted to municipalities when home rule amendments were inserted into states' constitutions.

In *Community Communications*, the Court failed to give adequate attention to Boulder's status as a home rule municipality, and the effect that home rule status should have on the application of the state action doctrine. Furthermore, the Court did not consider the implications of the decision for municipalities and for the enforcement of the antitrust laws. The final section of this casenote will consider the implications of the Court's decision in *Community Communications*, focusing on the implications of the decision for home rule municipalities.

C. *The Implications of Community Communications*

In *Community Communications*, the Court's use of a clearly articulated standard eliminated some of the confusion surrounding the applicability of the state action exemption to municipalities. The Court's standard, however, also greatly increases municipalities' vulnerability to possible antitrust suits.¹⁸⁹ In *Community Communications*, the Court continued its recent trend of limiting the use of the *Parker* state action doctrine. By adopting an extremely narrow view of the *Parker* doctrine, the Court indicated an unwillingness to allow municipalities to regulate the economy in an anticompetitive manner.

Despite its adoption of a clearly articulated standard, the Court in *Community Communications* left unanswered many questions with significant implica-

¹⁸⁷ Areeda, *supra* note 184, at 449; Thomas, *supra* note 184, at 372.

¹⁸⁸ *Community Communications*, 455 U.S. at 71 (Rehnquist, J., dissenting). As Justice Rehnquist notes, perhaps this fact that home rule municipalities may have to cede power back to the state explains why 23 states filed an amicus curiae brief with the Court in support of the *Community Communications Company*. *Community Communications*, 455 U.S. at 71 n.1 (Rehnquist, J., dissenting).

¹⁸⁹ Antitrust suits have recently been brought against municipalities challenging such activities as ambulance services, sewage treatment services and the operation of parking facilities. *Gold Cross Ambulance and Transfer and Standby Serv. Inc. v. City of Kansas City*, 705 F.2d 1005, 1007-08 (8th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3039 (U.S. July 25, 1983) (No. 83-138) (challenging city's implementation of a single operator ambulance system to provide all of city's emergency and nonemergency ambulance service); *Town of Hallie v. City of Eau Claire*, 700 F.2d 376, 378 (7th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3070 (U.S. May 11, 1983) (No. 82-1832) (challenging city's refusal to sell sewage treatment services to surrounding areas unless the areas were annexed to the city); *Cincinnati Riverfront Coliseum, Inc. v. City of Cincinnati*, 556 F. Supp. 664, 665-66 (S.D. Ohio 1983) (challenging city's action of granting tenants of Cincinnati's Riverfront Stadium the right, pursuant to a lease, to prevent Coliseum patrons from using the parking facility while the stadium is in use).

tions for the antitrust laws, the state action doctrine, and municipalities. One of these issues is the future use of the Court developed standard for determining the applicability of the state action doctrine. Having decided that Boulder failed to meet the "clearly articulated and affirmatively expressed state policy" requirement, the Court found it unnecessary to consider the second part of the standard, which requires active state supervision of the allegedly anticompetitive activity.¹⁹⁰ If the Court determines, in subsequent cases, that it is necessary for the state to actively supervise the implementation of the policy in order for municipalities to be exempt from the antitrust laws, this could, as the dissent notes, lead to a virtual takeover of municipalities by the states.¹⁹¹ Since many types of municipal activity could lead to claims of antitrust violations,¹⁹² in order for a municipality to protect itself under the Court developed standard, it would have to permit the state to both "articulate" and "supervise" the "municipal" policy. If the Court determines, however, in subsequent cases that municipalities do not have to satisfy the state supervision requirement for the exemption to be applicable, the Court would be admitting that municipal activity has to be treated differently from other types of activity. In deciding whether to apply the active state supervision requirement to determine the applicability of the state action exemption to municipalities, the Court will therefore have to choose between requiring the state to articulate and supervise municipal policy or recognizing that municipal activity is a unique type of activity.¹⁹³

Although the question of the applicability of both parts of the Court's standard could have substantial implications for municipalities in general, the *Community Communications* decision has even greater implications for home rule municipalities. The Court's mandate, that municipal activity be pursuant to a clearly articulated state policy in order to qualify for the state action exemption, is directly in conflict with the purposes of home rule.

¹⁹⁰ *Community Communications*, 455 U.S. at 51 n.14.

¹⁹¹ *Id.* at 70-71 (Rehnquist, J., dissenting).

¹⁹² See *supra* note 155.

¹⁹³ Subsequent to *Community Communications*, the Seventh and Eighth Circuits have held that the active state supervision standard is not applicable to the alleged anticompetitive activity of a municipality. *Gold Cross Ambulance and Transfer And Standby Serv., Inc. v. City of Kansas City*, 705 F.2d 1005, 1014-15 (8th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3039 (U.S. July 25, 1983) (No. 83-138); *Town of Hallie v. City of Eau Claire*, 700 F.2d 376, 383-84 (7th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3070 (U.S. May 11, 1983) (No. 82-1832). See *Pueblo Aircraft Serv. Inc. v. City of Pueblo*, 679 F.2d 805, 809-11 (10th Cir. 1982), *cert denied* 103 S. Ct. 762 (1983).

Regardless of what standard the Supreme Court uses, if the Court does find that municipal activity violated the antitrust laws, the Court would still be faced with the difficult issue of remedies, an issue which the Court did not consider in *Community Communications*. *Community Communications*, 455 U.S. at 56 n.20. The Court refused to consider whether municipalities would be liable for treble damages under the antitrust laws. The Clayton Act states that an injured party "shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15 (1976). A federal district court has held that a municipality is liable for treble damages under the Clayton Act. *Grason Elec. Co. v. Sacramento*

There are two major reasons for the enactment of home rule amendments. One reason is to eliminate some of the authority the legislature has over a municipality and to give municipalities full self government in matters of local concern.¹⁹⁴ Another reason for home rule is to relieve the legislature of the burden of handling local matters.¹⁹⁵ The Court's decision in *Community Communications* destroys the rationale behind home rule, and makes the exercise of home rule power a dangerous gamble. Municipalities are free to use their home rule powers, but if they want the protection of the state action exemption from the antitrust laws, they had better make sure they act pursuant to a clearly articulated state policy. The Court's decision to require that home rule municipalities satisfy the same requirements as private corporations and state agencies in order to be exempt under the *Parker* doctrine both misconstrues the *Parker* doctrine as it was initially enunciated,¹⁹⁶ and fails to consider the unique status of home rule municipalities.¹⁹⁷ As the dissent in *Community Communications* notes, the Court's decision "effectively destroys" the home rule movement.¹⁹⁸

Home rule municipalities would be able to function safely and effectively if the Supreme Court had adopted the analysis used by the Tenth Circuit Court of Appeals in deciding *Community Communications*.¹⁹⁹ The Court of Appeals reasoned that because of the home rule amendment, Boulder had all the power of the state in matters of local concern.²⁰⁰ After equating the municipality's activity with state activity, the Court of Appeals felt justified in applying the "clearly articulated, affirmatively expressed and actively supervised" test to the actions of Boulder itself.²⁰¹ Since Boulder's policy was clearly articulated, and the city actively supervised the policy, the Court of Appeals held the ordinance exempt from the antitrust laws under the state action doctrine.²⁰² If the

Mun. Util. 526 F. Supp. 276, 281-82 (E.D. Cal. 1981). Unless the Supreme Court is willing to rewrite the Clayton Act for Congress, municipalities will be liable for treble damages for violations of the antitrust laws. The payment of a large treble damage award would have a disastrous financial impact on any municipality. The only consolation for municipalities concerned about incurring such liabilities is that the Court has implied that it might apply the antitrust laws differently in cases involving municipalities. "Certain activities, which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government." *City Of Lafayette*, 435 U.S. at 417 n.48, quoted in *Community Communications*, 455 U.S. at 56 n.20.

¹⁹⁴ 1 McQUILLIN, MUNICIPAL CORPORATIONS § 3.21b (3d ed. 1971).

¹⁹⁵ *Shalvoy v. Curran*, 393 F.2d 55, 59 (2d Cir. 1968).

¹⁹⁶ See *supra* note 159 and accompanying text.

¹⁹⁷ See *supra* notes 167-171 and accompanying text.

¹⁹⁸ *Community Communications*, 455 U.S. at 71 (Rehnquist, J., dissenting).

¹⁹⁹ 630 F.2d 704 (10th Cir. 1980).

²⁰⁰ *Id.* at 706-07.

²⁰¹ *Id.* at 708.

²⁰² *Id.* For another case applying this analysis, see *Pueblo Aircraft Serv. Inc. v. City of Pueblo*, 498 F. Supp. 1205, 1209-11 (D. Colo. 1980), *aff'd* 679 F.2d 805 (10th Cir. 1982) (applying analysis used by Supreme Court in *Community Communications*), *cert. denied*, 103 S. Ct. 762 (1983).

issue of the applicability of the exemption is approached in this manner, the governmental activities of a home rule municipality would be exempt from the antitrust laws, and the Court's application of the standard it developed (for example, did the *municipality* have a clearly articulated and affirmatively expressed policy) would not produce the awkward and unfortunate results produced in *Community Communications*.

CONCLUSION

In *Community Communications Co. v. City of Boulder*, the Supreme Court held that the allegedly anticompetitive activities of a home rule municipality are not exempt from the antitrust laws unless the action was taken pursuant to a clearly articulated and affirmatively expressed state policy. In applying this standard, the Court found that Boulder's ordinance, which restricted the expansion of a cable television company, was not exempt under the state action doctrine. The standard the Court applied, however, was derived from a variety of situations involving private activity directed by the state, municipal activity and state activity. In developing this standard, the Court made no distinctions between these different types of activities. The application of this standard to these different types of activities therefore produces inconsistent and unfortunate results. This is particularly so when the standard is applied so that a home rule municipality must have the state clearly articulate and affirmatively express an anticompetitive policy on a matter of purely local concern in order for the activity to be exempt from the antitrust laws. The Court's decision in *Community Communications* also raises serious doubts about the continued existence and viability of home rule municipalities and threatens a return to total state control of municipal affairs. In light of these problems, the Court should recognize that the distinctions between private, state and municipal activity make it impossible to apply the same standard to determine the applicability of the *Parker* exemption in situations involving these different types of activities. In particular, the Court should recognize that in matters of local concern the home rule municipality (in Colorado) is acting as the state. The applicability of the *Parker* exemption to a home rule municipality acting in a matter of local concern should therefore be determined by ascertaining whether the municipality, and not the state, had a clearly articulated policy to replace competition with regulation.

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