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COMMENTS

ALTERNATIVE APPROACHES TO MUNICIPAL ANTITRUST LIABILITY

I. Introduction

In *Parker v. Brown*,¹ the Supreme Court held that anticompetitive activities authorized and implemented by states are beyond the intended reach of the Sherman Act.² Under the aegis of the *Parker* doctrine,³ municipalities were widely believed to be protected from the strictures of the antitrust laws.⁴ Recently in *Community Com-*

1. 317 U.S. 341 (1943). See notes 26-33 *infra* and accompanying text.

2. 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1976)). The Sherman Act prohibits anticompetitive conduct. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 20-21 (1977). The Act "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). The legislative history of the Sherman Act indicates that it was directed at abuses of private business and capital. See, e.g., 21 CONG. REC. 2457, 2459, 2460 (1890) (remarks of Sen. Sherman); *id.* at 2469 (remarks of Sen. Reagan); *id.* at 2562 (remarks of Sen. Teller) (antitrust law seeks to curb "these great trusts, these great corporations, these large moneyed institutions"); *id.* at 2647 (remarks of Sen. Vance); *id.* at 2726 (remarks of Sen. Edmunds); *id.* at 3147 (remarks of Sen. George). The remaining federal antitrust laws, see 15 U.S.C. § 12 (1976) (defines "antitrust laws"), are (1) the Clayton Act, 15 U.S.C. §§ 12-27 (1976) (proscribes exclusive dealing, anticompetitive mergers, and interlocking directories), (2) the Robinson-Patman Price Discrimination Act, 15 U.S.C. §§ 13-13b, 21a (1976) (proscribes anticompetitive price discrimination not justified by cost differentials) and (3) the Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1976) (proscribes unfair methods of competition).

3. Through custom and usage, the terms "*Parker* doctrine" and "state action doctrine" refer to the protection from antitrust liability which the Court in *Parker v. Brown* afforded to states and their instrumentalities. See, e.g., *Community Communications Co. v. City of Boulder*, 102 S. Ct. 835, 838 (1982) (refers to "*Parker* doctrine"); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 392 (1978) (refers to "state action doctrine"). These terms are used interchangeably in this Comment.

4. See, e.g., *Pinehurst Airlines, Inc. v. Resort Air Servs. Inc.*, 476 F. Supp. 543, 551 (M.D.N.C. 1979) (protection applied when municipalities acted purely in governmental capacity or pursuant to state direction), citing *E.W. Wiggins Airways, Inc. v. Massachusetts Port Auth.*, 362 F.2d 52, 55 (1st Cir.) (antitrust laws are aimed at private, not government, action), *cert. denied*, 385 U.S. 947 (1966); see Note, *The Antitrust Liability of Municipalities Under the Parker Doctrine*, 57 B.U.L. REV. 368, 379-81 & n.68 (1977) (limited precedent involving municipal defendants in 30 years following *Parker* due to assumption of municipal exemption under this decision); Note, *The Application of Antitrust Laws to Municipal Activities*, 79 COLUM. L. REV. 518, 524 n.54 (1979) [hereinafter cited as Note, *Municipal Activities*].

munications Co. v. City of Boulder,⁵ the Supreme Court treated municipalities as private parties for purposes of the *Parker* doctrine.⁶ This decision exerts a significant impact upon municipal governmental operations. Potential municipal antitrust liability increases bond interest⁷ and insurance costs.⁸ Municipal treasuries will be strained by costs incurred in defending antitrust suits.⁹ Treble damage liability¹⁰ imposes the spectre of municipal bankruptcy.¹¹ Moreover, uncertainty surrounding the *Boulder* decision¹² exerts a chilling effect upon mu-

5. 102 S. Ct. 835 (1982).

6. For the *Parker* doctrine to apply, the anticompetitive activities of private parties must (1) further clearly articulated and affirmatively expressed state policies and (2) be actively supervised by the state. See notes 48-49 *infra* and accompanying text. In *Boulder*, the Court applied the "clear articulation" requirement to municipalities and indicated strongly that the "active state supervision" requirement would also apply. 102 S. Ct. at 841 & n.14; see notes 81-87 *infra* and accompanying text.

7. Bond Buyer, July 1, 1982, at 4 (remarks of Mayor Hayes testifying before the Senate Judiciary Committee on behalf of the United States Conference of Mayors); *id.* (remarks of Mayor Moody testifying on behalf of the National League of Cities). Higher interest rates result from increased investor risk associated with municipal activities now subject to the antitrust laws. Mayor Moody argues that potential antitrust challenges to municipal regulation will discourage the underwriting of municipal revenue bonds. *Id.*

8. See *Liability Lawsuits: Cities Large and Small Suffer*, A.P. Report, May 16, 1982 [City Liability] (remarks of Dennis Connolly, senior counsel for the American Insurance Association).

9. *Federal Antitrust Laws and Local Government Activities: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 2 (1982) (testimony of William F. Baxter, Assistant Attorney General, Antitrust Division) (Department of Justice transcript) [hereinafter cited as *Hearings*]; Washington Post, March 19, 1982, at B3 (remarks of Sally Lackey of Maryland Municipal League); *id.*, Jan. 14, 1982, at A2. In *Boulder*, the respondent argued that denial of a *Parker* exemption to municipalities would unduly burden the federal courts. 102 S. Ct. at 843. The Court dismissed this argument as "simply an attack" upon the wisdom of the congressional commitment to competition embodied in the antitrust laws. *Id.*

10. The Clayton Act provides that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained. . . ." 15 U.S.C. § 15 (1976). On ripeness grounds, the Court has left open the question whether remedies applicable against private corporate violators are appropriate when applied against municipalities. *Boulder*, 102 S. Ct. at 843 n.20 (case's preliminary posture prevents confrontation of the remedies issue); *City of Lafayette*, 435 U.S. at 402 n.22 (same). Clear statutory language and strong policy arguments indicate that municipalities would be liable for treble damages. See note 209 *infra*.

11. The four Justices dissenting in *City of Lafayette* recognized the certainty of municipal bankruptcy resulting from a typical treble damage award. 435 U.S. at 440 (Stewart, J., dissenting). Justice Blackmun observed that the treble damages sought equals \$28,000 for each family of four residing within these municipalities. *Id.* at 442 n.1 (Blackmun, J., dissenting).

12. This uncertainty is due largely to the Court's refusal to indicate whether remedies and substantive antitrust principles applicable to private defendants are

nicipalities seeking to provide innovative services.¹³ These concerns have generated substantial support for an amendment to the antitrust laws protecting municipal activities.¹⁴

The Burger Court characterizes its interpretation of the *Parker* doctrine in terms of exemption analysis.¹⁵ This analysis is typically applied to conflicting federal statutes.¹⁶ This Comment, however, argues that preemption analysis, applied when federal statutes conflict with state or municipal enactments,¹⁷ should be used by the

appropriate for municipal defendants. *Boulder*, 102 S. Ct. at 843 n.20; see note 10 *supra*. The following experts have commented adversely on the uncertainty generated by the *Boulder* decision: (1) Assistant Attorney General William F. Baxter, *Hearings, supra* note 9, at 2; (2) Representative of the National League of Cities Tom Moody, Bond Buyer, July 1, 1982, at 4; (3) Representative of the United States Conference of Mayors Janet Gray Hayes, *id.* ("it is largely the uncertainty that the *Boulder* decision has created that is the evil that needs correction").

13. Hill, *Former Attorney General Warns of Effects of Antitrust Ruling*, A.P. Report, April 30, 1982 [Cities—Antitrust] (comments of Mr. Civiletti). Similar concerns were generated by the *City of Lafayette* decision. *City of Lafayette*, 435 U.S. at 440 (Stewart, J., dissenting); see Comment, *Municipal Antitrust Liability: Applying City of Lafayette v. Louisiana Power & Light Co.*, 31 BAYLOR L. REV. 563, 567 (1979).

14. The National League of Cities recently proposed a three-part "municipal action exemption" from the antitrust laws to the Senate Judiciary Committee. Bond Buyer, July 1, 1982, at 4. This test first requires cities to "establish a policy to substitute regulation or monopoly public service for competition. Second, the city would have to supervise the activities or functions that it regulates. Third, the city would have to be acting within its authority under state law." *Id.* A federal legislative solution to the *Boulder* decision has been advocated by Senate Judiciary Committee Chairman Strom Thurmond, *id.*; Benjamin Civiletti, Hill, *Former Attorney General Warns of Effects of Antitrust Ruling*, A.P. Report, April 30, 1982 [Cities—Antitrust]; and former president of the National League of Cities William Hudnut, U.P.I. Report, May 19, 1982 [Homerule]. The present Administration is undecided as to whether a federal legislative response to *Boulder* is appropriate. See *Hearings, supra* note 9, at 9.

15. See note 53 *infra*.

16. Exemption analysis is applied when the federal antitrust laws conflict with a federal regulatory scheme. See, e.g., *National Broiler Mktg. Ass'n v. United States*, 436 U.S. 816 (1978) (Sherman Act and Capper-Volstead Act); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) (Sherman Act and Federal Power Act); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973) (Federal Aviation Act and Sherman Act); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963) (Clayton Act and Bank Merger Act of 1960); *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963) (Sherman Act and Securities and Exchange Act of 1934). In *Silver*, the Court stated that exemption analysis "reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." *Id.* at 357.

17. Preemption analysis is applied when the federal antitrust laws conflict with a state or municipal regulatory scheme. See, e.g., *Rice v. Norman Williams Co.*, 102 S. Ct. 3294 (1982) (California liquor importer designation statute and Sherman Act); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 109-11 (1978) (California franchising regulation and the Sherman Act); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) (Maryland retail gasoline regulation and federal antitrust laws);

courts in applying the *Parker* doctrine to municipalities.¹⁸ Alternatively, this Comment will advocate a qualified municipal exemption from the antitrust laws.¹⁹ Since municipalities receive less federal deference²⁰ than states,²¹ this exemption should not be coextensive with that enjoyed by states under the *Parker* doctrine. However, the preferential treatment²² that municipalities receive in our federalist system as compared to private parties mandates formulation of a municipal exemption. Constitutional and practical difficulties encountered under substantive antitrust law²³ and at the remedies stage²⁴ in accounting for the noncompetitive public benefits²⁵ con-

Parker v. Brown, 317 U.S. 341 (1943) (California raisin prorate program and Sherman Act); *Olsen v. Smith*, 195 U.S. 332 (1904) (Galveston, Texas pilotage regulation and the Sherman Act).

18. Specifically, this Comment advocates preemption analysis because (1) a majority of the Court has expressly adopted preemption analysis in applying the *Parker* doctrine to nonmunicipal defendants, *see* note 129 *infra* and accompanying text, (2) the Court in *Parker* engaged in preemption analysis, *see* notes 125-28 *infra* and accompanying text and (3) preemption analysis is analytically sound as applied to conflicting federal and state or municipal enactments, *see* notes 88-90 *infra* and accompanying text.

19. This qualified exemption reflects the constitutional protection accorded municipalities by *National League of Cities v. Usery*, 426 U.S. 833, 851-52 (1976) (integral municipal operations in areas of traditional government functions are constitutionally protected from federal interference); *see* notes 138-47 *infra* and accompanying text. The qualified exemption is narrower than the exemption recently proposed by the National League of Cities to the Senate Judiciary Committee. *See* note 14 *supra* (municipalities' statutory exemption coextensive with that afforded states under the *Parker* doctrine).

20. *See* note 59 *infra* for a definition of "federal deference."

21. *City of Lafayette*, 435 U.S. at 412 (plurality opinion) (municipalities exempt from antitrust laws when state legislature "contemplates" their anticompetitive activities) (citing *Edelman v. Jordan*, 415 U.S. 651, 667 n.12 (1974); *Lincoln County v. Luning*, 133 U.S. 529 (1890) (unlike states, municipalities not immune from suit in federal court under eleventh amendment)).

22. This preferential treatment stems from constitutional limitations on federal legislative power, *see* text accompanying notes 138-68 *infra*, in addition to federal legislation reflecting these limitations. *See* text accompanying notes 169-206 *infra*.

23. Compliance with the *Boulder* standard may unconstitutionally interfere with state delegation of power to municipalities. *See* note 147 *infra*. Imposition of treble damages may unconstitutionally interfere with municipal fiscal integrity. *See* note 147 *infra*. Substantive antitrust laws do not measure noncompetitive benefits and harms. *See* notes 207-11 *infra* and accompanying text. Allowing municipalities to defend anticompetitive activities in terms of traditional public health, safety and welfare benefits facilitates unrestrained judicial review. *See* notes 212-22 *infra* and accompanying text.

24. Remedies applicable against antitrust violations are delineated in clear statutory language and encourage private enforcement of the antitrust laws. *See* note 209 *infra*.

25. *See* note 210 *infra* (municipal public purposes).

ferred by municipalities support these departures from the *Boulder* decision.

II. The *Parker* Doctrine: Application of Antitrust Law to Government Entities

A. *Parker v. Brown*: the Seminal Decision

The Supreme Court first explicitly recognized state sovereignty as a limitation on the reach of the Sherman Act in *Parker v. Brown*.²⁶ *Parker* involved an elaborate program regulating the production and distribution of raisins which was authorized by the California legislature and enforced by state agents. Finding "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature,"²⁷ the Court upheld the program. This interpretation of legislative intent was influenced profoundly by principles of federalism.²⁸ However, the *Parker* Court did not view federalism as an affirmative limitation upon the Sherman Act's application to states because it assumed that Congress, through its commerce power,²⁹ could prohibit the state program.³⁰

26. 317 U.S. 341 (1943). In *Parker*, a producer and packer of raisins sought injunctive relief. *Id.* at 344. He named as defendants officials charged by state statute to administer the prorate act. *Id.* Prior to *Parker*, the Court addressed state sanctioned anticompetitive activity on two occasions. See Teply, *Antitrust Immunity of State and Local Government Action*, 48 TUL. L. REV. 272, 274-75 (1974). In *Olsen v. Smith*, the Court held that municipal licensing of harbor pilots was not preempted by the Sherman Act. 195 U.S. 332, 344-45 (1904). Earlier that term, the Court rejected the defense that a challenged merger was not preempted by the Sherman Act because it was made pursuant to state corporation law. *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904).

27. 317 U.S. at 350-51.

28. The Court stated that "[i]n [our] dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.* at 351. The Court has frequently reiterated the federalist underpinnings of its *Parker* decision. See, e.g., *Boulder*, 102 S. Ct. at 842 (municipality restricts cable television expansion); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 103 (1980) (state authorized wine resale price maintenance); *City of Lafayette*, 435 U.S. at 415-16 (municipality provided electricity); *id.* at 421 (Burger, C.J., concurring); see generally Rogers, *Municipal Antitrust Liability in a Federalist System*, 1980 ARIZ. ST. L.J. 305, 320-21.

29. The commerce clause empowers Congress "[t]o regulate Commerce with foreign Nations, among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. This constitutional provision grants Congress plenary authority, *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 46 (1974); *United States v. Darby*, 312 U.S. 100, 116 (1941), to free the national economy from unjustifiable local entanglements. *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 760 (1967); cf. *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 328 (1977)

A unanimous Court assumed that the program would violate the Sherman Act if it were conducted by private parties.³¹ The Court also noted that a state may not protect private anticompetitive conduct through mere authorization or declaration of legality.³² In addition, the Court emphasized that the state was not involved in a private anticompetitive agreement.³³ Hence, the Court required that a governmental entity, rather than a private party, retain the decision making power for the exemption to apply.

B. Supreme Court's Application of *Parker* to Private Parties

In a line of decisions following *Parker*,³⁴ the Court has reiterated its refusal to shield private anticompetitive decisions made under the pretense of state authorization from antitrust scrutiny. The Court denied a private party an exemption in *Goldfarb v. Virginia State Bar*³⁵ and determined that before private parties will be granted a state action exemption, their anticompetitive activities must be com-

(the commerce clause seeks to create an area of free trade among the several states); *Northern Natural Gas Co. v. Federal Power Comm'n*, 399 F.2d 953, 959 (D.C. Cir. 1968) (direct federal regulation pursuant to the commerce clause and indirect federal regulation under the antitrust laws have the same basic goal—to maximize allocational efficiency). The tenth amendment requires that congressional exercise of its commerce power must avoid impairing the states' ability to function effectively as separate and independent entities in our federal system. *Fry v. United States*, 421 U.S. 542, 547-48 & n.7 (1975); see B. SCHWARTZ, *CONSTITUTIONAL LAW* 126-29 (2d ed. 1979).

30. 317 U.S. at 350.

31. *Id.* Professors Davidson and Butters take issue with this assumption. Davidson and Butters, *Parker and Usery: Portended Constitutional Limits on the Federal Interdiction of Anticompetitive State Action*, 31 *VAND. L. REV.* 575, 597 (1978). They pose the question whether Congress could amend the Sherman Act to proscribe anticompetitive state action, *id.*, and reach a negative conclusion. *Id.* at 604 (relying on *National League of Cities*); see note 147 *infra* (discusses constitutional infirmities in treble damage liability and municipal compliance with the *Boulder* standard).

32. *Parker*, 317 U.S. at 351, *citing* *Northern Sec. Co. v. United States*, 193 U.S. 197, 332, 344-47 (1904); *cf.* *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 389 (1951) (while invalidating state enforcement of resale price maintenance, the Court noted "when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids").

33. *Parker*, 317 U.S. at 352. It has been argued that the Court in *Parker* implicitly equated states with municipalities. Case Comment, *Antitrust State Action Defense Expanded to Include Home Rule Municipalities: Community Communications Company v. City of Boulder*, 58 *WASH. U.L.Q.* 1026, 1029 (1980) (analyzing circuit court opinion in *Boulder*).

34. See text accompanying notes 31-33 *supra*.

35. 421 U.S. 773 (1975) (unanimous decision). *Goldfarb* involved a potential client's claim of unlawful price fixing through a minimum fee schedule for lawyers. *Id.* at 778. This schedule was published by the county bar, a private association, and enforced by the state bar, a state agent for limited purposes. *Id.* at 776-78. Only the

pelled by the state acting as sovereign.³⁶ In *Cantor v. Detroit Edison Co.*,³⁷ a state regulated private utility that engaged in an illegal tying arrangement³⁸ was denied an exemption. Findings of neutral state policy towards the anticompetitive activity³⁹ and insufficient public participation in the decision making process were central to the Court's holding.⁴⁰ These findings evidenced the Court's concern that the federal policy of competition was being unnecessarily and inappropriately subordinated to private interests.⁴¹ Such concern is assuaged where the state policy is affirmatively implemented by the appropriate state agency. Thus, in *Bates v. State Bar of Arizona*,⁴² the Court granted an exemption where the state policy proscribing attorney advertising was implemented by the affirmative command⁴³ of

Virginia Supreme Court was authorized by state law to regulate the legal profession. *Id.* at 789 & n.18.

36. *Id.* at 791; *cf. id.* at 790 (*Parker* protects anticompetitive activity required by the state acting as sovereign). In denying an exemption, the *Goldfarb* Court noted that the fee schedules were not required by any state statute or by the appropriate state agency—the Virginia Supreme Court. *Id.* at 790-91. This strict “compulsion” standard is better understood in view of the Court's recognition that the state bar joined in an essentially private anticompetitive activity by enforcing the county bar's fee schedule. *See id.* at 792.

37. 428 U.S. 579 (1976). In *Cantor*, a state regulated private utility furnished light bulbs to its customers without separate charge. A rate structure approved by the Michigan Public Service Commission reflected bulb cost. These rates could not be changed unless the utility filed for, and the commission approved, a new tariff. *Id.* at 582-83. A light bulb retailer claimed that the utility tied light bulb distribution to its monopoly power in furnishing electricity. *Id.* at 581 & n.3.

38. A tying arrangement “exists when a seller, having a product which buyers want (the ‘tying product’), refuses to sell it alone and insists that any buyer who wants it must also purchase another product (‘the tied product’).” L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 431 (1977).

39. *Cantor*, 428 U.S. at 585. In reaching its conclusion, the Court noted that (1) light bulb distribution in the state was unregulated, (2) the desirability of the challenged program was not investigated by the state legislature or regulatory agency and (3) other state regulated utilities did not operate similar programs. *Id.* at 584-85.

40. *Id.* at 594-95. *Parker* was distinguished on the grounds that no public agencies or agents were parties in *Cantor*. *Id.* at 591. This distinction was crucial as the Court later intimated that *Cantor* would have been a completely different case had the defendant been a public agency or agent rather than a private party. *Bates v. State Bar of Arizona*, 433 U.S. 350, 361 & n.13 (1977).

41. 433 U.S. at 362 (clear articulation of state policy) (distinguishing *Cantor*, 428 U.S. at 594 (state regulatory commission acquiesces in anticompetitive activity instigated by private utility)).

42. 433 U.S. 350 (1977). In *Bates*, two lawyers challenged the proscription of attorney advertising by the Arizona Supreme Court. The court is authorized by the state constitution to oversee the state's legal profession. *Id.* at 360.

43. This affirmative command was expressed in disciplinary rules adopted by the Arizona Supreme Court. *Id.* The Court distinguished *Goldfarb* on the grounds that the private anticompetitive activity in that case was not required by the appropriate

the Arizona Supreme Court.⁴⁴ Similarly, a state statutory scheme regulating automobile dealership franchising was accorded *Parker* doctrine protection in *New Motor Vehicle Board v. Orrin W. Fox Co.*⁴⁵ Rather than a privately initiated restraint of trade,⁴⁶ this case was found to involve a “clearly articulated and affirmatively expressed” state policy reflected in a state regulatory system.⁴⁷ In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*,⁴⁸ the Supreme Court required private parties seeking a state action exemption to establish both (1) a clearly articulated and affirmatively expressed state policy to replace competition and (2) active state supervision of the regulatory scheme.⁴⁹

C. Supreme Court Application of *Parker* to Municipalities

The Court first considered application of the *Parker* doctrine to municipalities in *City of Lafayette v. Louisiana Power & Light Co.*⁵⁰

state agency. *Id.* at 359-60. In distinguishing *Cantor*, the Court noted that in that case the state (1) was not a real party in interest and (2) merely acquiesced in private anticompetitive conduct. *Id.* at 361-62.

44. Under the state constitution, the Arizona Supreme Court oversees the state legal profession. This state agency subjected the advertising ban to “pointed reexamination” in enforcement proceedings. *Id.* at 362. In concluding that the dangers which caused concern in *Cantor*, *see* text accompanying notes 39-40 *supra*, were reduced in *Bates*, the Court “deem[ed] it significant that the state policy [was] so clearly and affirmatively expressed and that the State’s supervision [was] so active.” *Bates*, 433 U.S. at 362.

45. 439 U.S. 96 (1978). A California statutory scheme required an automobile manufacturer, intending to establish or relocate a franchise in an area occupied by an objecting franchisee, to secure approval from a state administrative agency. *Id.* at 103.

46. *See, e.g.*, *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 389 (1951) (state enforced private resale price maintenance).

47. 439 U.S. at 109. The Court distinguished *Schwegmann* on the grounds that the state administrative agency, rather than private franchisees, retained the power to decide whether there was good cause to prohibit the proposed franchise. *Id.* at 110.

48. 445 U.S. 97 (1980). *Midcal* involved a California statute requiring wine producers and wholesalers to file fair trade contracts or price schedules with the state. *Id.* at 99. The state authorized and enforced the prices agreed upon by the private parties without evaluating their reasonableness. *Id.* at 105; *cf. Bates*’ “pointed reexamination,” note 44 *supra*.

49. The Court emphasized that both prongs of this test must be satisfied. *Midcal*, 445 U.S. at 105-06. Although the state policy was clearly expressed, an exemption was denied for lack of active supervision. *Id.*

50. 435 U.S. 389 (1978). It has been suggested that the limited precedent prior to this decision stemmed from an assumption that municipalities were not subject to the antitrust laws. *See* note 4 *supra* and accompanying text. Prior to *City of Lafayette*, the lower courts generally granted state subdivisions either an *ipso facto* exemption, *see, e.g.*, *Saenz v. University Interscholastic League*, 487 F.2d 1026, 1028 (5th Cir.

Pursuant to state statutory authority,⁵¹ petitioner cities owned and operated electrical utilities both within and beyond their respective city limits. Responding to an antitrust counterclaim,⁵² petitioner argued that as state subdivisions they shared state exemption⁵³ from the antitrust laws under the *Parker* doctrine.⁵⁴

A sharply divided Court denied a state action exemption.⁵⁵ Employing the presumption against implied exclusions from the antitrust

1973) (antitrust laws not intended to restrain government action); *E.W. Wiggins Airways, Inc. v. Massachusetts Port Auth.*, 362 F.2d 52, 55 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966) (antitrust laws are aimed at private, not government, action); *Continental Bus Sys., Inc. v. City of Dallas*, 386 F. Supp. 359, 363 (N.D. Tex. 1974) (municipal grant of exclusive franchise exempt from antitrust laws), or required an express or implied state legislative mandate for the anticompetitive activity. *Kurek v. Pleasure Driveway & Park Dist.*, 557 F.2d 580, 590 (7th Cir. 1977), *vacated and remanded*, 435 U.S. 992, *reinstated on remand*, 583 F.2d 378 (7th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979) (denies exemption as inadequate state mandate) (quoting *Duke & Co. v. Foerster*, 521 F.2d 1277, 1280 (3d Cir. 1975) (state intent to restrain competition in a given area "may be demonstrated by explicit language in state statutes, or may be inferred from the nature of the powers and duties given to a particular government entity"))).

51. LA. REV. STAT. ANN. § 33:4162 (West 1966) (municipality may own and operate revenue producing electric utility); *id.* § 33:4163 (West 1966) (municipality may establish rates and regulations pertaining to utility services); *id.* § 33:1326 (West 1951) (municipality may extend utility service beyond its territorial bounds).

52. Initially, petitioner cities alleged that respondent, a privately owned electrical utility service which competed with them beyond their city limits, engaged in anti-competitive conduct. *City of Lafayette*, 435 U.S. at 392 n.5. The counterclaim alleged the petitioner conspired to engage in sham litigation and to exclude competition through use of debenture covenants, long term supply contracts and tying arrangements. *Id.* at 392 n.6.

53. The Court stated that "[t]he word 'exemption' is commonly used by the courts as a shorthand expression for *Parker's* holding that the Sherman Act was not intended by Congress to prohibit the anticompetitive restraints imposed by California in that case." *Id.* at 393 n.8. *But see* note 16 *supra* and accompanying text ("exemption" refers to judicial analysis of conflicting enactments of a single sovereign state). This imprecise language may have confused the Court's analysis in *City of Lafayette*. *See* note 88 *infra* (inappropriate use of exemption presumption).

54. The petitioners framed their argument as follows: "since a city is merely a subdivision of a state and only exercises power delegated to it by the state, *Parker's* findings regarding the congressionally intended scope of the Sherman Act apply with equal force to such political subdivisions." Brief for Petitioner at 5, *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). The Court reasoned that implicit in petitioner's argument was the contention that Congress never intended to subject local governments, apart from their status as state agents under the *Parker* doctrine, to the antitrust laws. *City of Lafayette*, 435 U.S. at 394.

55. *Id.* at 390. Justice Brennan authored a plurality opinion joined by Justices Marshall, Powell and Stevens. The Chief Justice concurred in the judgment and Part I of the plurality opinion. Justice Stewart wrote a dissenting opinion joined by Justices White and Rehnquist. Justice Blackmun joined all but Part II-B of this opinion and filed his own dissenting opinion.

laws,⁵⁶ the majority rejected the petitioners' implicit⁵⁷ contention that Congress never intended to subject municipalities to the antitrust laws.⁵⁸ Noting that municipalities receive less federal deference⁵⁹ than states,⁶⁰ the plurality concluded that municipalities, as state subdivisions exercising delegated power, do not benefit equally from the *Parker* Court's finding that states are beyond the intended reach of the Sherman Act.⁶¹ The plurality recognized the municipal role in implementing state policy⁶² and departed from the "clear articulation" standard applied to private parties in *New Motor Vehicle Board*.⁶³ Adopting a standard formulated by the lower court,⁶⁴ the plurality

56. *Id.* at 399; see notes 96-97 *infra* and accompanying text (origin of presumption). Since this presumption properly applies to statutes enacted by a single sovereign state, the Court's analysis and conclusion are accordingly tainted. *City of Lafayette*, 435 U.S. at 427 n.1. (Stewart, J., dissenting).

57. See note 54 *supra*.

58. *City of Lafayette*, 435 U.S. at 408. The cities supported this contention by indicating that the antitrust laws seek to prevent abuses of private power. *Id.* at 403. In response, the majority reasoned that municipalities which promote the public benefit of their local constituencies are not more likely to comport with the federal procompetitive policy than private corporations, which further shareholder interests. *Id.* Moreover, the Court noted that economic dislocation would result from municipalities making economic decisions counseled only by their own parochial interests. *Id.* at 408. In addition, the Court rejected the argument that municipalities are restrained from competitive abuses by the political process. *Id.* at 406-07 & n.33; *cf.* note 157 *infra* and accompanying text (Court considered absence of effective political restraints on states relevant in limiting state immunity from federal taxation).

59. The term "federal deference" refers to federal noninterference with state or municipal affairs that either is constitutionally compelled, see notes 138-68 *infra* and accompanying text, or a result of "legislative grace" (influenced by constitutional concerns). See notes 175-206 *infra* and accompanying text.

60. *City of Lafayette*, 435 U.S. at 412. The plurality supported this conclusion exclusively with cases construing the eleventh amendment and opined that the tenth amendment is not even "tangentially implicated." *Id.* at 412 n.42. However, the Court did not address whether remedies appropriate against private corporate defendants also apply against municipal defendants. *Id.* at 402 n.22; *cf. Boulder*, 102 S. Ct. at 843 n.20 (preliminary status of case renders remedies issue unripe). Since cogent arguments have been raised that municipal treble damage liability violates the tenth amendment, see note 147 *infra*, the Court's summarial dismissal of tenth amendment arguments in *City of Lafayette* was premature.

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

62. Justice Brennan noted that municipalities are state instrumentalities for the convenient administration of government within their limits and may thereby reflect state policy. *Id.* at 413 (citing *Louisiana v. Mayor of New Orleans*, 109 U.S. 285, 287 (1833)).

63. See notes 44-47 *supra* and accompanying text; see also *United States v. Southern Motor Carriers Rate Confer. Inc.*, 467 F. Supp. 471, 484 (N.D. Ga. 1979), *aff'd*, 672 F.2d 469 (5th Cir. 1982) (explicitly recognizing that municipalities, as "limited sovereigns," face a less stringent standard than private parties after *City of Lafayette*).

64. *City of Lafayette v. Louisiana Power & Light Co.*, 532 F.2d 431, 434 (5th Cir. 1976) (holding that the actions of a city are not automatically outside the scope of the federal antitrust laws), *aff'd*, 435 U.S. 389 (1978).

exempted municipal activities "contemplated" by the state legislature.⁶⁵ In his concurrence, Chief Justice Burger limited the plurality's state "contemplation" standard to municipal proprietary activities.⁶⁶ The four dissenting justices maintained that the Sherman Act prohibits private, rather than governmental anticompetitive conduct.⁶⁷ Thus, every member of the *City of Lafayette* Court distinguished, either expressly⁶⁸ or impliedly,⁶⁹ municipalities from private parties.

Recently, in *Community Communications Co. v. City of Boulder*,⁷⁰ the Supreme Court equated municipalities with private parties for *Parker* doctrine purposes.⁷¹ Respondent City of Boulder is a home rule municipality⁷² which granted petitioner's assignor a non-exclusive

65. For an exemption to exist, the plurality required that "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." *City of Lafayette*, 435 U.S. at 415. This standard received widely divergent application in the lower courts. *Compare Guthrie v. Genesee County*, 494 F. Supp. 950, 956 (W.D.N.Y. 1980) (required express state authorization of municipal anticompetitive regulation) with *Feminist Women's Health Center v. Mohammad*, 586 F.2d 530, 550 (5th Cir. 1978), cert. denied, 444 U.S. 924 (1979) (state contemplation "may be inferred from the nature of the powers and duties given to a particular government entity") (citing *Duke & Co. v. Foerster*, 521 F.2d 1277, 1280 (3d Cir. 1975)).

66. *City of Lafayette*, 435 U.S. at 422 n.3, 424-25 (defining municipal proprietary activities in terms of competitive relationship with private businesses) (Burger, C.J., concurring). Several commentators have recognized this limitation on the plurality opinion. See, e.g., Taurman, *Reflections on City of Lafayette: Applying the Antitrust "State Action" Exemption to Local Governments*, 13 URB. LAW. 159, 166 (1981); Ely, *The Supreme Court 1977 Term*, 92 HARV. L. REV. 5, 279-80 (1979).

67. *City of Lafayette*, 435 U.S. at 428 & n.2 (Stewart, J., dissenting). Justice Stewart reached this conclusion by interpreting the Sherman Act's legislative history without the exemption presumptions utilized by the majority. *Id.* at 427 n.1 (exemption presumptions have "no relevance to the *Parker* doctrine"); cf. *United States v. Rock Royal Co-op*, 307 U.S. 533, 560 (1939) (Sherman Act restrains private rather than governmental action); *Alabama Power Co. v. Alabama Elec. Coop., Inc.*, 394 F.2d 672, 675-77 (5th Cir.), cert. denied, 393 U.S. 1000 (1968) (same).

68. The dissenters maintained that, unlike private parties, municipalities are beyond the intended reach of the Sherman Act. See note 67 *supra* and accompanying text.

69. Rather than the "compulsion" standard then applicable to private parties, see text accompanying note 36 *supra*, the plurality imposed the more lenient "contemplation" standard. See note 65 *supra* and accompanying text. The Chief Justice implicitly equated states with municipalities acting in their governmental capacity. See note 66 *supra* and accompanying text.

70. 102 S. Ct. 835 (1982).

71. *Compare id.* at 841 (municipality must act pursuant to a clearly articulated and affirmatively expressed state policy) with *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978) (private parties must act pursuant to a clearly articulated and affirmatively expressed state policy). See notes 80-87 *infra* and accompanying text (municipalities must satisfy both articulation and supervision requirements applicable to private parties).

72. Under the Colorado constitution, the City of Boulder has "the full right of self government in both local and municipal matters." COLO. CONST. art. XX, § 6 (4). In

permit to provide cable television services within the city limits.⁷³ Petitioner alleged that a city ordinance temporarily prohibiting its expansion violated the Sherman Act.⁷⁴ Relying on *City of Lafayette*, the District Court denied a state action exemption and granted petitioner a preliminary injunction.⁷⁵ Finding no municipal proprietary activity at issue, the Tenth Circuit reversed.⁷⁶ The court distinguished *City of Lafayette*, which involved revenue producing municipal utility companies.⁷⁷

Relegating the circuit court's reliance on the nonproprietary nature of the city's activities to a footnote,⁷⁸ a sharply divided Supreme Court reversed and remanded.⁷⁹ The Court abandoned the "contemplation" standard set forth in *City of Lafayette*⁸⁰ and held that municipalities are exempt from the antitrust laws only if they act to further clearly articulated and affirmatively expressed state policies.⁸¹ The city did not satisfy this requirement as the Court characterized the state policy⁸² towards the challenged municipal conduct as "precise neutrality."⁸³ Since the "clear articulation" requirement was not satisfied, the Court did not decide whether municipalities must also satisfy the "active state supervision" requirement⁸⁴ set forth in *Midcal*.⁸⁵ In *Midcal*, the Court required private parties to satisfy both the articulation and supervision requirements before a state action exemption would

such matters, city charters and ordinances supersede state law. *Id.*; see generally Vanlandingham, *Constitutional Municipal Home Rule Since the AMA (NLC) Model*, 17 WM. & MARY L. REV. 1 (1975); Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269 (1968).

73. The permit was issued in the form of a revocable nonexclusive 20 year franchise to use the city's public ways to string cable. *Community Communications Co. v. City of Boulder*, 485 F. Supp. 1035, 1036 (D. Col.), *rev'd*, 630 F.2d 704 (10th Cir. 1980), *rev'd*, 102 S. Ct. 835 (1982).

74. 485 F. Supp. at 1038. Since cable systems tend to become natural monopolies, the city prohibited petitioner's expansion to give other cable companies an opportunity to offer cable services. *Id.* at 1037.

75. *Id.* at 1041.

76. 630 F.2d 704 (10th Cir. 1980), *rev'd*, 102 S. Ct. 835 (1982).

77. 630 F.2d at 708. The court observed that "[t]he City is not in the television business in any way, and whether by contract or police power the action is an exercise of governmental authority. There is no element of proprietary interest of the City." *Id.* at 707.

78. *Boulder*, 102 S. Ct. at 842 n.18.

79. *Id.* at 844 (5-3 decision).

80. See note 65 *supra* and accompanying text.

81. *Boulder*, 102 S. Ct. at 841.

82. The state policy was expressed in the home rule amendment to the state constitution. *Id.* at 843; see note 72 *supra*.

83. *Boulder*, 102 S. Ct. at 843.

84. *Id.* at 841 n.14.

85. See text accompanying note 49 *supra* for the *Midcal* Rule.

be granted.⁸⁶ The *Boulder* majority did not suggest that the factual distinctions between *Boulder* and *Midcal* were significant.⁸⁷ Thus, the Court in *Boulder* implicitly equated municipalities and private parties by indicating strongly that these distinct entities must satisfy identical requirements for protection under the *Parker* doctrine.

III. Municipal Antitrust Liability: A Preemption Approach

Much of the confusion surrounding the *Parker* doctrine results from the erroneous application of exemption,⁸⁸ rather than preemption, principles.⁸⁹ Preemption principles should be applied in determining whether municipal laws and ordinances are void as inconsistent with the federal antitrust laws.⁹⁰ The use of preemption analysis will enable the courts to accord municipalities appropriate federal deference.⁹¹

86. See note 49 *supra*.

87. By contrast, the majority noted that the antitrust laws and other federal laws imposing civil or criminal sanctions upon "persons" apply to both municipalities and private corporations. *Boulder*, 102 S. Ct. at 843. Although the Court indicated in dictum that municipalities may receive preferential treatment under substantive antitrust law, *id.* at 843 n.20, such treatment may facilitate unrestrained judicial review. See notes 212-22 *infra* and accompanying text; see also note 10 *supra* (Court hedges on remedies issue).

88. In *Cantor*, the Court relied on exemption precedents, 428 U.S. at 596 n.36, in opining that "Congress could hardly have intended state regulatory agencies to have broader power than federal agencies to exempt private conduct from the antitrust laws." *Id.* at 596. The *City of Lafayette* plurality compounded this doctrinal confusion by inappropriately applying exemption presumptions, 435 U.S. at 398 (presumption against implied exclusions), in inferring congressional intent to subject municipalities to the antitrust laws. *Id.* at 408.

89. See *Boulder*, 102 S. Ct. at 846 (Rehnquist, J., dissenting); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 618 (1976) (Stewart, J., dissenting); Handler, *Antitrust—1978*, 78 COLUM. L. REV. 1363, 1378 (1978); cf. Davidson & Butters, *supra* note 31, at 583 (*Parker* preempts private anticompetitive acts).

90. See notes 125-31 *infra* and accompanying text (preemption analysis); see also note 2 *supra* (compiles federal antitrust laws). In determining whether the Sherman Act preempts a state statute, the Supreme Court applies "principles similar to those . . . employ[ed] in considering whether any state statute is preempted by a federal statute pursuant to the Supremacy Clause." *Rice v. Norman Williams Co.*, 102 S. Ct. 3294, 3299 (1982) (state statute permitting delivery of distilled spirits only to licensed importers designated by manufacturer not preempted). Principles of federal preemption apply similarly to state and municipal enactments. Compare *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978) (state exercise of historic police powers are not preempted absent clear and manifest congressional purpose) with *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973) (municipal ordinance enacted pursuant to historic police power not preempted absent clear and manifest congressional purpose). Hence, no distinction will be made between states and municipalities in articulating the principles determining the preemptive effect of the federal antitrust laws on these government units.

91. See notes 104 & 111 *infra* and accompanying text.

Exemption analysis entails reconciling conflicting enactments of a single sovereign.⁹² The courts are required to determine the express or implied legislative intent concerning the statutes at issue.⁹³ Since the enactments of only one sovereign are involved, the federalism concerns underlying the *Parker* doctrine do not arise.⁹⁴ The absence of these tenth amendment concerns is most significant in the context of implied exemptions, where the courts must reconstruct an unexpressed legislative intent and reconcile the divergent objectives of ostensibly conflicting enactments.⁹⁵ Since antitrust law furthers a dominant national policy of competition,⁹⁶ implied exemptions from antitrust law are strongly disfavored.⁹⁷ The Supreme Court requires a demonstration of plain repugnancy between the antitrust laws and the conflicting (federal) regulatory scheme for an exemption to exist.⁹⁸ Even when this rigorous showing is made, an implied exemption is granted only to the minimum extent necessary to allow operation of the regulatory scheme.⁹⁹

Preemption differs from exemption as it requires analysis of conflicting statutes enacted by separate sovereigns.¹⁰⁰ Since preemption involves the interplay between federal and state or municipal governments, fundamental principles of federalism are operative.¹⁰¹ Hence, presumptions operating in favor of the federal antitrust laws in ex-

92. See note 16 *supra* for examples of exemption decisions.

93. *Boulder*, 102 S. Ct. at 846 (Rehnquist, J., dissenting).

94. *Id.*

95. Handler, *supra* note 89, at 1379.

96. See *United States v. Topco Assocs. Inc.*, 405 U.S. 596, 610 (1972) (Sherman Act is the "Magna Carta" of free enterprise); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 235-36 (1948); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 492-95 (1940).

97. *Carnation Co. v. Pacific Westbound Conf.*, 383 U.S. 213, 217, *modified*, 383 U.S. 932 (1966); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350 & n.28 (1963); *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963); *California v. Federal Power Comm'n*, 369 U.S. 482, 495 (1962).

98. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 & n.29 (1963); *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963).

99. *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963); see Handler, *supra* note 89, at 1379.

100. *Boulder*, 102 S. Ct. at 845 (Rehnquist, J., dissenting); Handler, *supra* note 89, at 1379. Compare *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963) (exemption analysis of federal antitrust and securities laws) with *Exxon v. Governor of Maryland*, 437 U.S. 117 (1978) (preemption analysis of state retail gasoline regulatory statute and Robinson-Patman Act).

101. See *Synercom Technology, Inc. v. University Computing Co.*, 474 F. Supp. 37, 42 (N.D. Tex. 1979) ("[p]reemption analysis involves by its very nature the problem of federalism. . . ."); Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975).

emption analysis are effectively reversed in preemption analysis.¹⁰² Exercise of federal preemption is not likely to be presumed.¹⁰³ This rule of statutory construction applies with added vigor when states or municipalities act in furtherance of public health, safety and welfare.¹⁰⁴

State or municipal enactments are preempted under the supremacy clause¹⁰⁵ when they (1) actually conflict with federal statutes¹⁰⁶ or (2) purport to act in a field exclusively occupied by federal legislation.¹⁰⁷ Local regulation actually conflicting in terms, but not with the purpose of federal enactments have been upheld under preemption analysis.¹⁰⁸ Notwithstanding pointed criticism,¹⁰⁹ this approach represents

102. See *Boulder*, 102 S. Ct. at 846-47 (Rehnquist, J., dissenting); *Handler*, *supra* note 89, at 1379; compare note 97 *supra* (antitrust exemption strongly disfavored) with note 103 *infra* (preemption not likely to be presumed).

103. *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978); *New York State Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 413 (1973) (quoting *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952)); see Note, *Parker v. Brown: A Preemption Analysis*, 84 YALE L.J. 1164, 1171 (1975) (federal courts should be reluctant to preempt state policy).

104. *Maurer v. Hamilton*, 309 U.S. 598, 614 (1940); *Kelly v. Washington*, 302 U.S. 1, 12-13 (1937); *Synercom Technology, Inc. v. University Computing Co.*, 474 F. Supp. 37, 42 (N.D. Tex. 1979); see Note, *supra* note 101, at 627.

105. See note 151 *infra*.

106. Actual conflict occurs when (1) compliance with both statutory schemes is a physical impossibility, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) (state fruit classification not preempted); see *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158-60 (1978) (state pilotage regulation on registered/non-coastwise traffic not preempted); *Federal Power Comm'n v. Corporation Comm'n of Oklahoma*, 362 F. Supp. 522, 538-40 (W.D. Okla. 1973) (state natural gas price regulation preempted) or (2) the state/municipal enactment stands as an obstacle to the accomplishment of federal objectives; *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); see *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)), 546 (citing *Savage v. Jones*, 225 U.S. 501, 533 (1912)) (1977) (state flour labeling requirements preempted); *Perez v. Campbell*, 402 U.S. 637, 649 (1971). In *Perez*, the Court stated that conflict analysis is "essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict." *Id.* at 644.

107. In *Rice v. Santa Fe Elevator Corp.*, the Court stated that the congressional intent to occupy a field may be evidenced by (1) scope of regulation, (2) dominant federal regulatory interest and (3) state laws producing results inconsistent with federal purpose. 331 U.S. 218, 230 (1947). It has been suggested that *Rice* indicates that strictly defined legislative intent "is an inadequate source for the decision of preemption questions." Note, *supra* note 101, at 634.

108. See, e.g., *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 130-31 (1973) (state law prohibiting contract provisions restraining practice in a lawful profession not preempted by NYSE arbitration rules); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 446 (1960) (municipal smoke abatement ordinance not preempted by federal ship inspection laws). Recently, the Court

the trend in the law.¹¹⁰ Thus, it appears that local regulation seeking to advance public health, safety and welfare, rather than to frustrate competition, would not actually conflict with the federal antitrust laws.¹¹¹

To preempt an exercise of state police power,¹¹² courts must determine a clear and manifest congressional purpose to supercede state law in the field.¹¹³ This stringent¹¹⁴ standard requires (1) express congressional preemptive language or (2) exclusive,¹¹⁵ not merely per-

implicitly approved this purpose approach. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 165 (1978) (factually distinguished *Huron* rather than repudiate purpose approach).

109. The Court in *Perez*, 402 U.S. 637 (1971), condemned the purpose approach as "aberrational," fearing that this approach would "enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law." *Id.* at 652; see *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 612-13 (1926).

110. See *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 164-65 (1978); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1973); *Mobil Oil Corp. v. Tully*, 639 F.2d 912 (2d Cir.), *cert. denied*, 452 U.S. 967 (1981); *Synercom Technology, Inc. v. University Computing Co.*, 474 F. Supp. 37, 40 (N.D. Tex. 1979) (*dicta*); see generally Note, *supra* note 101, at 647.

111. *Compare Seagram & Sons Inc. v. Hostetter*, 384 U.S. 35, 45-46 (1966) (state statute requiring private parties to compile price information not preempted as it does not place irresistible pressure on private parties to violate Sherman Act) with *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 389 (1951) (state regulation preempted as it compels private anticompetitive conduct condemned by the antitrust laws); see *Handler*, *supra* note 89, at 1382.

112. A valid exercise of the police power is (1) related to the public health, safety or morals, (2) reasonable, (3) not arbitrary, and (4) rationally related to the purported evil being remedied. *Hennington v. Georgia*, 163 U.S. 299 (1896); *Lowton v. Steele*, 152 U.S. 133 (1894).

113. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973) (municipal noise ordinance); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47 (1963); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 611 (1926); *Savage v. Jones*, 225 U.S. 501, 533 (1912); *Reid v. Colorado*, 187 U.S. 137, 148 (1902).

114. *Jones v. Rath Packing Co.*, 430 U.S. 519, 545 (1977) (Rehnquist, J., dissenting). The Court has suggested in dictum that federal preemption of states in the exercise of their police power may be limited to actual conflict situations. *Kelly v. Washington*, 302 U.S. 1, 12 (1937) (citing *Savage v. Jones*, 225 U.S. 501, 533 (1912)).

115. The Court has recognized that the comprehensiveness of federal regulation may indicate the complexity of subject matter rather than preemptive intent. *De Canas v. Bica*, 424 U.S. 351, 359 (1976) (federal immigration laws do not preempt state restrictions on employing illegal aliens); *New York Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 415 (1973) (state employment assistance program only partially preempted by federal scheme). The *Dublino* Court also looked to extrinsic facts—state practice at the time the federal legislation was passed—in determining legislative intent. *Id.* at 414. Since 21 states had provisions at that time similar to the one challenged in *Dublino*, the Court concluded that preemptive intent "would in all

vasive,¹¹⁶ federal regulation in the field. Absent this showing, the local regulation resists federal preemption.

It has been judicially determined that Congress exerted its full commerce power in enacting the Sherman Act,¹¹⁷ and that the statute is nearly constitutional in its breadth.¹¹⁸ It may be argued, therefore, that all state and municipal enactments not otherwise constitutionally protected¹¹⁹ are preempted by the Sherman Act. However, the Court rejected an analogous argument in *Exxon Corp. v. Governor of Maryland*.¹²⁰ In *Exxon*, a state statute prohibited gasoline producers and oil refiners from operating retail service stations within the state and required a uniform extension of temporary price reductions granted to independent retailers. It was argued that the state program was preempted¹²¹ as it had an anticompetitive effect inconsistent with the central policy of the Sherman Act.¹²² Refusing to construe preemptive congressional intent from the "broad implications" of the antitrust laws, the Court upheld the state law.¹²³ Reflecting concerns similar to those expressed in *Parker*, Justice Stevens stated, "if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the State's power to engage in economic regulation would be effectively destroyed."¹²⁴ Thus, *Exxon* indicates that a rather explicit manifestation of congressional intent is necessary to preempt local government regulation with acknowledged anticompetitive effects.

Since *Parker* involved the conflicting enactments of two distinct sovereigns,¹²⁵ it is more appropriately viewed as a preemption deci-

likelihood have been expressed in direct and unambiguous language." *Id.* Additionally, the Court considered the limited funding level and operational scope of the federal regulatory scheme in determining a nonexclusive legislative intent. *Id.* at 417.

116. In the following cases, the Court has focused on the pervasive nature of federal regulation as evidencing congressional intent to occupy the field. *See, e.g.,* *Chicago & North Western Trans. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981) (railroads); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973) (airport noise); *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941) (immigration); *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 613 (1926) (railroads).

117. *See* note 215 *infra*.

118. *See* note 215 *infra* and accompanying text.

119. The tenth amendment is the likely source of protection. *See* *National League of Cities v. Usery*, 426 U.S. 833, 845, 851-52 (1976).

120. 437 U.S. 117 (1978).

121. *Id.* at 122 n.5 (arguably preempted by Robinson-Patman Price Discrimination Act and the Federal Emergency Petroleum Allocation Act of 1973).

122. *Id.* at 133.

123. *Id.* at 133-34.

124. *Id.* at 133; *cf. Rice v. Norman Williams Co.*, 102 S. Ct. 3294, 3299 (1982) (anticompetitive effect insufficient to preempt state statute), *citing* *Seagram & Sons Inc. v. Hostetter*, 384 U.S. 35, 45-46 (1966) (state law requiring wholesalers and retailers to file price information with state agency not preempted).

125. In *Parker*, the California state raisin prorate program ostensibly conflicted with the federal Sherman Act. 317 U.S. at 350.

sion.¹²⁶ The *Parker* Court's reliance on preemption precedents¹²⁷ and presumptions¹²⁸ supports this conclusion. In subsequent decisions, a majority of the Justices have adopted expressly the preemption formulation of the *Parker* doctrine.¹²⁹ Thus, the Court's reliance on exemption principles in *Cantor*¹³⁰ and *City of Lafayette*¹³¹ was misplaced.

Preemption analysis of anticompetitive municipal enactments facilitates affording local governments appropriate federal deference. Under conflict analysis, municipal enactments seeking to advance public health, safety and welfare—rather than to frustrate competition—would resist federal preemption. However, local regulation merely authorizing private anticompetitive conduct remains subject to federal preemption.¹³² The presumption against federal preemption and the resulting judicial reluctance to preempt local regulation with acknowledged anticompetitive effects indicate that federal intent to occupy exclusively the field is unlikely to be inferred from the procompetitive policies embodied in the antitrust laws.

IV. Reformulating *Boulder*: A Proposed Qualified Municipal Antitrust Exemption

A. Introduction

The *City of Lafayette* plurality concluded that states and municipalities are not equivalent under the *Parker* doctrine.¹³³ Central to this conclusion was the plurality's recognition that municipalities receive less federal deference than states.¹³⁴ By implicitly equating municipalities and private parties,¹³⁵ *Boulder* indicates that a more appropriate

126. This conclusion is supported by the commentators. See, e.g., P. AREEDA & D. TURNER, *ANTITRUST LAW* § 212(a) (1978); Handler, *supra* note 89, at 1378; Posner, *The Proper Relationship between State Regulation and the Antitrust Laws*, 49 N.Y.U. L. REV. 693, 733-34 (1973) (proposes a nonstatutory injunction, implicitly based on preemption analysis, to avoid state treble damage liability); Verkuil, *Preemption of State Law by the Federal Trade Commission*, 1976 DUKE L.J. 225, 227.

127. *Olsen v. Smith*, 195 U.S. 332, 339 (1904) (Court framed issue as whether state pilotage laws were void because they conflicted with Acts of Congress) (cited in *Parker*, 317 U.S. at 352).

128. *Parker*, 317 U.S. at 351 ("an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress").

129. *Boulder*, 102 S. Ct. at 846-47 (Rehnquist, Burger and O'Connor, JJ., dissenting); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 607 (1976) (Blackmun, J., concurring); *id.* at 618 (Stewart, Powell and Rehnquist, JJ., dissenting).

130. See note 88 *supra*.

131. See note 88 *supra*.

132. See note 111 *supra*.

133. See text accompanying note 61 *supra*.

134. See text accompanying note 60 *supra*.

135. See notes 80-87 *supra* and accompanying text.

comparison is between municipalities and private parties, rather than between municipalities and states, as in *City of Lafayette*. Consequently, the *Boulder* standard is fully justifiable only if municipalities receive no more federal deference than private parties. Municipalities do, however, receive this federal deference. It is expressed not only in constitutional limitations of congressional power,¹³⁶ but also in legislation reflecting these limitations.¹³⁷ Thus, a withdrawal from the *Boulder* standard in the form of a qualified exemption is required.

B. Constitutionally Based Distinctions

1. Limitations on Federal Commerce Power

State sovereignty imposes an affirmative limitation on Congress' plenary commerce power¹³⁸ as applied to states and municipalities.¹³⁹ Although the minimum wage and maximum hour provisions of the Fair Labor Standards Act¹⁴⁰ (FLSA) apply to private employers,¹⁴¹ extension of these provisions¹⁴² to state and municipal employers was held unconstitutional in *National League of Cities v. Usery*.¹⁴³ There,

136. See notes 138-68 *infra* and accompanying text (constitutional limitation on exercise of federal commerce and taxing power as applied to state subdivisions).

137. See notes 175-206 *infra* and accompanying text (federal legislation granting municipalities preferential treatment as compared to private parties).

138. See note 29 *supra*.

139. *National League of Cities v. Usery*, 426 U.S. 833, 851-56 (1976) (overruling *Maryland v. Wirtz*, 392 U.S. 183 (1968) (upholds FLSA extension to state school and hospital employees)); *Fry v. United States*, 421 U.S. 542, 555-57 (1975) (Rehnquist, J., dissenting) (upholds temporary wage freeze on state employees' salaries); see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 311-15 (1978). The Court in *National League of Cities* expressly equated states and municipalities in its limitation of the federal commerce power by stating "[i]nterference with integral governmental services provided by such subordinate arms of a state government [are] therefore beyond the reach of congressional power under the Commerce Clause just as if such services were provided by the State itself." 426 U.S. at 855 n.20.

140. 29 U.S.C. §§ 206, 207 (1976).

141. See *United States v. Darby*, 312 U.S. 100, 115-17 (1941) (unanimous decision) (overruling *Hammer v. Dagenhart*, 247 U.S. 251 (1918)).

142. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (amending the Fair Labor Standards Act of 1938, ch. 676, §§ 1-19, 52 Stat. 1060 (1938)), codified at 29 U.S.C. §§ 201-218 (1976).

143. 426 U.S. 833 (1976). Prior to *National League of Cities*, the Court indicated that the tenth amendment merely announces the relationship between the federal and state governments. *Darby*, 312 U.S. at 124 ("[t]he [tenth] amendment states but a truism that all is retained which has not been surrendered"). For over forty years preceding its decision in *National League of Cities*, the Court did not utilize the tenth amendment as an affirmative limitation on the commerce power. See, e.g., *Fry v. United States*, 421 U.S. 542 (1972) (upholds temporary state employee wage freeze). As the Court in *National League of Cities* indicated in dictum, 426 U.S. at 852 n.17, 854 n.18, this decision did not limit federal legislative powers under the spending clause, U.S. CONST. art. I, § 8, cl.1; see *North Carolina v. Califano*, 445 F. Supp.

the Court observed that, in addition to straining state and municipal treasuries,¹⁴⁴ compliance with FLSA provisions (1) displaces state policies regarding the manner in which governmental services will be delivered and (2) "restructure[s] traditional ways in which the local governments have arranged their affairs."¹⁴⁵ The Court held that Congress exceeded its commerce power when it enacted legislation directly displacing state and municipal freedom to "structure integral operations in areas of traditional government functions"¹⁴⁶ Therefore, exercise of Congress' commerce power, although valid as applied to private parties, may violate principles of federalism when applied to states and their political subdivisions.¹⁴⁷

532 (E.D.N.C. 1977), *aff'd mem.*, 435 U.S. 962 (1978) (federal health care aid may be conditioned on prescribed minimum standards), § 5 of the fourteenth amendment, U.S. CONST. amend. XIV, § 5, *see* Fitzpatrick v. Bitzer, 427 U.S. 445, 455-56 (1976) (federal courts may assess money damages against states engaging in sex discrimination) or the war powers provision, U.S. CONST. art I, § 8, cl. 1, 11-15; *see* Peel v. Florida Dep't of Transp., 600 F.2d 1070, 1082 (5th Cir. 1979) (state required to reinstate employee discharged because he was absent from work due to military service).

144. *National League of Cities*, 426 U.S. at 846.

145. *Id.* at 849.

146. *Id.* at 852. Justice Blackmun limited the plurality opinion by interpreting it as requiring a balancing approach. *Id.* at 856 (Blackmun, J., concurring). This approach upholds federal legislation operating in areas "where the federal interest is demonstrably greater and where state facility compliance with the imposed federal standards would be essential." *Id.* This balancing test has been applied by lower courts in upholding federal legislation regarding environmental protection. *See, e.g.*, *United States v. Ohio Dep't of Highway Safety*, 635 F.2d 1195, 1205 (6th Cir. 1980); *SED, Inc. v. City of Dayton*, 519 F. Supp. 975, 984 (S.D. Ohio 1981) (preempts municipal ordinance regulating P.C.B. storage); *United States v. Duracell Int'l, Inc.*, 510 F. Supp. 154, 156 (M.D. Tenn. 1981). The Court, however, has recently supplemented the balancing approach with a three-part conjunctive test. *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 287-88 & n.29 (1981) (balancing approach comes into play only after the three threshold requirements have been satisfied); *see* Comment, *The Supreme Court Rejects Constitutional Challenges to the Surface Mining Control and Reclamation Act of 1977*, 48 BROOKLYN L. REV. 137, 151-59 (1981).

147. *Compare* *United States v. Darby*, 312 U.S. 100 (1941) (private employers) with *National League of Cities v. Usery*, 426, U.S. 833 (1976) (state and municipal employers). There are strong arguments that denial of a qualified municipal exemption from the antitrust laws unconstitutionally interferes with municipal operations. Compliance with the *Boulder* standard, requiring clear articulation and active state supervision, frustrates state delegation of governmental powers to its political subdivisions. *Boulder*, 102 S. Ct. at 851 (Rehnquist, J., dissenting); *see* *City of Lafayette*, 435 U.S. at 434-35 (Stewart, J., dissenting); Comment, *National League of Cities and the Parker Doctrine: The Status of State Sovereignty Under the Commerce Clause*, 8 FORDHAM URB. L.J. 301, 335-36 (1980). Since delegation reflects state policy on how to structure the delivery of basic services, it is arguable that such delegation is constitutionally protected under *National League of Cities*. Bangasser, *Exposure of Municipal Corporations to Liability for Violations of the Antitrust Laws:*

2. Doctrine of Intergovernmental Tax Immunity

Municipalities receive a qualified nonstatutory¹⁴⁸ immunity from federal taxation. This immunity arises by implication rather than from any express constitutional provision.¹⁴⁹ The doctrine of intergovernmental tax immunity was first formulated in *McCulloch v. Maryland*.¹⁵⁰ Relying on the supremacy clause,¹⁵¹ the Supreme Court invalidated a discriminatory Maryland stamp tax on notes of banks chartered by the United States.¹⁵² *McCulloch* indicates that federal immunity from state taxation rests on federal supremacy.¹⁵³ Subse-

Antitrust Immunity after the City of Lafayette Decision, 11 URB. LAW. vii (1979); Rogers, *supra* note 28, at 341; Note, *Municipal Activities*, *supra* note 4, at 524. Moreover, the *Boulder* standard exposes municipalities to potentially devastating treble damage liability. See *City of Lafayette*, 435 U.S. at 442-43 (Blackmun, J., dissenting) (failure to satisfy exemption requirements exposes municipalities to treble damage liability); *Cantor*, 428 U.S. at 615 (Stewart, J., dissenting) (nonexempt public utilities subject to treble damage liability). When treble damages are so large that they strain municipal resources, thereby causing substantial interference with the delivery and structure of traditional government functions, such damages violate state sovereignty. Note, *Municipal Activities*, *supra* note 4, at 547. Relief is required before liability is imposed because the judiciary lacks the discretion to deny treble damages on a case-by-case basis when state sovereignty would be violated. See note 209 *infra*.

148. See notes 155 & 168 *infra* and accompanying text. Municipalities also benefit from statutory exemptions from income taxation. 26 U.S.C. § 115(a)(1) (1976) (excludes from gross income all income derived from any public utility or exercise of any essential government function); *id.* § 103(a)(1) (excludes from gross income interest on the obligations of a political subdivision). Since considerable controversy exists as to whether these statutory exemptions are constitutionally compelled, see notes 202 & 205-06 *infra* and accompanying text, they will be discussed separately. See notes 202-06 *infra* and accompanying text.

149. *New York v. United States*, 326 U.S. 572, 575 (1946) (state sale of mineral water not immune); *Allen v. Regents of the Univ. Sys. of Georgia*, 304 U.S. 439, 452 (1938) (admission charge to state university athletic event not immune); *Helvering v. Gerhardt*, 304 U.S. 405, 424 (1938) (income of state agents not immune); *Collector v. Day*, 78 U.S. (11 Wall.) 113, 123-27 (1870) (income of state judicial officer immune); *California v. United States*, 441 F. Supp. 21, 26 (E.D. Cal. 1977) (state agents not immune from federal tax on air travel); *City of New York v. United States*, 394 F. Supp. 641, 644 (S.D.N.Y. 1975) (city employees traveling on official business not immune from air transportation excise tax).

150. 17 U.S. (4 Wheat.) 316 (1819).

151. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . ." U.S. CONST. art. VI, § 2.

152. *McCulloch*, 17 U.S. (4 Wheat.) at 433.

153. *Id.* See *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 221-22 (1928); *Farmers and Mechanics Sav. Bank v. Minnesota*, 232 U.S. 516, 521 (1914); *Weston v. City Council*, 27 U.S. (2 Pet.) 448, 468 (1829); see also Rakestraw, *The Reciprocal Rule of Governmental Tax Immunity—A Legal Myth*, 3 OKLA. L. REV. 131, 137 (1950).

quent decisions based the federal immunity also upon the practical necessity of maintaining a dual system of government with overlapping tax jurisdictions.¹⁵⁴ Applying the federalism rationale, the Supreme Court later extended the doctrine of intergovernmental tax immunity to states and their instrumentalities.¹⁵⁵

State immunity from federal taxation was once reciprocal and coextensive with that enjoyed by the federal government from state taxation.¹⁵⁶ The decrease in federal tax jurisdiction and revenue sources resulting from this broad state immunity caused substantial judicial concern.¹⁵⁷ In responding to this concern, courts sought to articulate a standard limiting state and municipal tax immunity while preserving the operation of these governmental units in our federal system.¹⁵⁸ In *South Carolina v. United States*,¹⁵⁹ the Court set forth a standard that

154. *United States v. California*, 297 U.S. 175, 184-85 (1936); *Helvering v. Powers*, 293 U.S. 214, 225 (1934); *Collector v. Day*, 78 U.S. (11 Wall.) 113, 126 (1870); Comment, *Intergovernmental Tax Immunities: An Analysis and Suggested Approach to the Doctrine and Its Application to State and Municipal Bond Interest*, 15 VILL. L. REV. 414, 416 (1970).

155. *Collector v. Day*, 78 U.S. (11 Wall.) 113, 123-27 (1870) (salary of state judicial officer, an instrumentality for carrying out government powers, is exempt from federal income tax). *Collector* was effectively overruled by *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 487 (1939) in which the Court reasoned that the burden on the federal government, imposed by increasing labor prices, was too indirect and incidental to constitute an unconstitutional interference with governmental operations. *Id.* at 487.

156. See, e.g., *Indian Motorcycle Co. v. United States*, 283 U.S. 570, 575 (1931) (municipal police department immune from federal excise tax); *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 522 (1926) (engineers employed by states or their subdivisions on a noncontinuous basis not exempt from federal income tax).

157. *Massachusetts v. United States*, 435 U.S. 444, 455-60 (1978) (scope of state immunity should not extend beyond that necessary to protect state's ability to deliver traditional government services); *New York v. United States*, 326 U.S. 572, 584 (1946) (Rutledge, J., concurring); *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 483 (1939); *Helvering v. Gerhardt*, 304 U.S. 405, 416-17 (1938); *South Carolina v. United States*, 199 U.S. 437, 463 (1905). Since members of Congress are chosen by state constituencies, political accountability restrains abusive federal taxing of the states. By contrast, federal citizens who are not residents of the state imposing the tax against a federal instrumentality have no political redress. See *Massachusetts v. United States*, 435 U.S. 444, 456-57 n.13 (1978); *New York v. United States*, 326 U.S. at 577, (quoting *Collector*, 78 U.S. (11 Wall.) at 128-29 (Bradley, J., dissenting)); *Helvering v. Gerhardt*, 304 U.S. at 412; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) at 435-36. In addition, the Court was reluctant to confer advantages on government bodies competing with private businesses. See *New York v. United States*, 326 U.S. at 584 (Rutledge, J., concurring); *Helvering v. Gerhardt*; 304 U.S. at 421.

158. In *New York v. United States*, Justice Frankfurter observed that "[i]n the older cases the emphasis was on immunity from taxation. The whole tendency of recent cases reveals a shift in emphasis to that of limitation upon immunity." 326 U.S. at 581.

159. 199 U.S. 437 (1905).

essentially distinguishes activities usually carried on by private parties from those normally engaged in by governmental entities.¹⁶⁰ In holding that state instrumentalities distributing liquor were subject to federal taxation, the Court stated that “the exemption of state agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business.”¹⁶¹ For over forty years, the Court struggled with variations on this distinction¹⁶² before discarding it in *New York v. United States*¹⁶³ wherein the Court upheld a federal excise tax on the state sale of mineral water. The state’s argument that it was exercising the governmental function of natural response disposal was unavailing as the Court rejected the government-proprietary distinction as “untenable.”¹⁶⁴

Three separate opinions were filed in *New York v. United States*.¹⁶⁵ The Court opinion, written by Justice Frankfurter on behalf of himself and Justice Rutledge, maintained that states and their instrumentalities are immune from discriminatory taxes only.¹⁶⁶ By contrast, the

160. In developing this distinction, the Court analogized state immunity from taxation to its immunity from tort liability. *Id.* at 463; *see also* *Flint v. Stone Tracy Co.*, 220 U.S. 107, 172 (1911). This analogy was subsequently rejected because of the differing objectives of taxation and tort recovery and because taxation is a matter of federal law while tort law is a matter of local law. *City of Trenton v. New Jersey*, 262 U.S. 182, 192 (1923).

161. *South Carolina v. United States*, 199 U.S. 437, 461 (1905).

162. *See, e.g.*, *Allen v. Regents of the Univ. Sys. of Georgia*, 304 U.S. 439, 451 (1938) (admission charge to athletic event comparable to those “usually conducted by private owners” not immune from federal tax); *Helvering v. Gerhardt*, 304 U.S. 405, 416-17 (1938) (suggesting in dictum that essential government operations qualifying for immunity should be those exercised by local governments at the time the Constitution was adopted); *Helvering v. Powers*, 293 U.S. 214, 225 (1934) (state railroad trustee’s salary taxable as such an enterprise is a “departure from usual government functions”); *Ohio v. Helvering*, 292 U.S. 360, 368 (1934) (state liquor sale not a governmental function exempt from federal excise tax); *Indian Motorcycle Co. v. United States*, 283 U.S. 570, 576 (1931) (municipal police department immune from federal excise tax); *Flint v. Stone Tracy Co.*, 220 U.S. 107, 172 (1911) (only those functions a local government can do itself are immune).

163. 326 U.S. 572, 580-83 (1946).

164. *Id.* at 583. Justice Frankfurter elaborated, “[t]o rest the federal taxing power on what is ‘normally’ conducted by private enterprise in contradiction to the ‘usual’ governmental functions is too shifting a basis for determining constitutional power and too entangled in expediency to serve as a dependable legal criterion.” *Id.* at 580.

165. Justice Frankfurter announced the judgment of the Court in an opinion joined only by Justice Rutledge. Chief Justice Stone concurred in the result in an opinion joined by Justices Reed, Murphy and Burton. Justice Douglas dissented in an opinion joined by Justice Black. Justice Jackson took no part in the consideration of the case.

166. 326 U.S. at 582. Justice Frankfurter noted the recent judicial trend narrowing state immunity, reflecting the fiscal and political concerns associated with state immunity. *Id.* at 581; *see note 157 supra* and accompanying text.

majority of Justices held that a nondiscriminatory federal tax may unconstitutionally interfere with the sovereign functions of state government.¹⁶⁷ The majority, however, failed to articulate an alternative standard delineating the scope of state immunity from federal taxation. Their rejection of the discrimination test indicates that a constitutional immunity from federal taxation exists in favor of states and municipalities and that this immunity does not extend to private parties.¹⁶⁸

3. Collateral Areas of the Law

Federal legislation in (1) bankruptcy,¹⁶⁹ (2) securities regulation,¹⁷⁰ (3) labor relations,¹⁷¹ (4) price discrimination,¹⁷² and (5) taxation¹⁷³ indicates that municipalities receive more federal deference than do private parties. Such legislation reflects federal reluctance to interfere with municipal fiscal and governmental affairs.¹⁷⁴

167. 326 U.S. at 586-87 (Stone, J., concurring) (joined by Justices Reed, Murphy and Burton). In his dissent, Justice Douglas rejected the nondiscrimination test as it "disregards the Tenth Amendment, places the sovereign States on the same plane as private citizens, and makes the sovereign States pay the federal government for the privilege of exercising the powers of sovereignty guaranteed them by the Constitution." *Id.* at 596 (Douglas, J., dissenting) (joined by Justice Black). The Court recently rendered a contrary interpretation of this decision in *Massachusetts v. United States*, 435 U.S. 444, 457-58 & n.15 (1978) where they upheld a nondiscriminatory registration fee applied to state aircraft used for police functions. The Court concluded that the four concurring Justices in *New York v. United States* upheld the federal tax on the grounds that it was nondiscriminatory. *Id.* at 458-59. This strained reading of *New York v. United States* ignores the concurring Justices' observation "that a federal tax which is not discriminatory . . . may nevertheless so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government." 326 U.S. at 587 (Stone, C.J., concurring).

168. See note 167 *supra* and accompanying text (nondiscriminatory federal tax on states or their instrumentalities may be unconstitutional). *But see* *Massachusetts v. United States*, 435 U.S. 444, 461-62 (1972) (indicating nondiscriminatory tax may be constitutionally applied to state and its subdivisions but refusing to address vitality of state tax immunity).

169. See notes 178-80 *infra* and accompanying text (municipal debt adjustment may only be brought voluntarily and with state approval).

170. See notes 187-91 *infra* and accompanying text (municipalities exempt from civil liability for securities registration violations).

171. See notes 193-95 *infra* and accompanying text (municipalities generally exempt from federal labor regulations).

172. See notes 197-98 *infra* and accompanying text (government purchasers exempt from Robinson-Patman Price Discrimination Act).

173. See notes 202-04 *infra* and accompanying text (municipal income from exercise of essential governmental function and bond interest exempt).

174. Such reluctance is manifested by federal legislation in the following areas: bankruptcy, see notes 178-80 & 183 *infra*, securities regulation, see note 191 *infra*,

Bankruptcy proceedings against a private debtor under Chapter 7 of the Federal Bankruptcy Code may be initiated by a creditor without a debtor's consent.¹⁷⁵ In addition, a private debtor's assets must be effectively applied to his debts.¹⁷⁶ Application of similar provisions¹⁷⁷ to municipalities unconstitutionally interferes with state sovereignty.¹⁷⁸ Accordingly, Chapter 9 proceedings for municipal debt adjustment may be brought only (1) voluntarily by the municipal debtor¹⁷⁹ and (2) pursuant to an affirmative authorization under state law.¹⁸⁰ Moreover, there is no liquidation of assets or creation of a

labor relations, *see* note 195 *infra*, price discrimination, *see* note 200 *infra*, and taxation, *see* notes 202 & 204 *infra*.

175. 11 U.S.C. § 303 (1978) (provides basis for private creditor voluntarily initiating proceeding); *see* *Newhouse v. Corcoran Irrigation Dist.*, 114 F.2d 690, 690-91 (9th Cir. 1940), *cert. denied*, 311 U.S. 717 (1941) (court refused to apply private bankruptcy principles to a state subdivision).

176. 114 F.2d at 690.

177. Act of May 24, 1934, ch. 345, §§ 78-80, 48 Stat. 798 (1934 Code).

178. *Ashton v. Cameron County Water Improvement Dist. No. One*, 298 U.S. 513, 530 (1936) (restriction of municipal debtors' control over fiscal affairs violates state sovereignty). In 1937, Congress enacted a modified municipal bankruptcy code, Act of Aug. 16, 1937, ch. 657, 50 Stat. 653 (1937 Code). While retaining the basic procedural framework, the 1937 Code deleted a provision in the 1934 Code which vested general bankruptcy powers in the federal courts analogous to those available in private bankruptcies. *See* 48 Stat. 798 § 80(i) (deleted provision). Furthermore, the 1937 Act expressly provided that nothing contained therein should be construed as limiting state control of municipalities in the exercise of their political or governmental powers. 50 Stat. 654, 659 § 83(i); *cf.* 11 U.S.C. § 904(1) (current Code contains similar limitation). Emphasizing that Congress was "especially solicitous" to avoid interference with municipal fiscal affairs and autonomy, the Court in *United States v. Bekins* upheld the 1937 Code. 304 U.S. 27, 49-51 (1938); *see* *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502, 508-09 (1942) (reiterates concern for preserving municipal autonomy and fiscal integrity); Note, *Municipal Bankruptcy, the Tenth Amendment and The New Federalism*, 89 HARV. L. REV. 1871, 1896-98 (1976) (reviews judicial interpretations of 1934 and 1937 Codes).

179. 11 U.S.C. § 901(a) (1976 & Supp. II 1978) (adopts only voluntary provisions); 11 U.S.C. § 109(c)(4) (Supp. II 1978) (Chapter 9 debtor must "desire to effect a plan to adjust such debts"). H.R. Doc. No. 137, 93d Cong., 1st Sess. 1, Pts. I and II (1973) (involuntary proceedings are neither feasible nor desirable and are of suspect constitutionality); *see* *United States v. Bekins*, 304 U.S. 27, 51 (1938) (voluntary provision avoids undue interference with the fiscal or governmental affairs of a political subdivision).

180. 11 U.S.C. § 903 (1976 & Supp. II 1978). The legislative history of this section clearly indicates that the courts may not interfere with a municipality's choice of essential services: "[§ 903] sets forth the primary authority of a State, through its constitution, laws and other powers, over its municipalities. . . . In light of the recent Supreme Court case, *National League of Cities v. Usery*, 426 U.S. 833 (1976), maximum flexibility for the states in solving the debt problems of their municipalities is advisable." H.R. REP. No. 595, 95th Cong., 1st Sess. 397-98 (1977); *see* Fippinger, *Securities Law Disclosure Requirements for the Political Subdivision Threatened with Bankruptcy*, 10 FORDHAM URB. L.J. 541, 555-57 & n.82 (1982).

fictional debtor's estate as in a Chapter 7 proceeding.¹⁸¹ Thus, the present bankruptcy code¹⁸² defers to principles of federalism¹⁸³ in its provisions concerning municipal debt adjustment.

Under the Securities Act of 1933 (1933 Act),¹⁸⁴ municipal securities are exempt from registration¹⁸⁵ but remain subject to the antifraud provisions.¹⁸⁶ Civil liability may not be imposed upon municipal issuers for (1) false statements or omissions in the registration statement¹⁸⁷ or (2) improprieties concerning prospectuses and other communications.¹⁸⁸ Therefore, antifraud provisions of the 1933 Act may only be enforced against municipal issuers by injunctions or criminal prosecution.¹⁸⁹ Similarly, municipal issuers may not be held liable under the

181. *In re North and South Shenango Joint Mun. Auth.*, 14 Bankr. 414, 420 (Bankr. W.D. Pa. 1981); Fippinger, *supra* note 180, at 552-53 ("[c]hapter 9 contemplates the maintenance of public property for public purposes as well as decisions made by public officials, not by private trustees"); J. MacLACHLIN, *HANDBOOK ON THE LAW OF BANKRUPTCY* 2 (1956).

182. 11 U.S.C. §§ 901-946 (Supp. II 1978).

183. Regarding municipal debt adjustment, "[b]oth Congress and the Supreme Court have . . . been careful to stress that the federal municipal Bankruptcy Act is not in any way intended to infringe on the sovereign power of a state to control its political subdivisions; for . . . to the extent that the federal Bankruptcy Act does infringe on a state or municipality's function it is unconstitutional." *Ropico, Inc. v. City of New York*, 425 F. Supp. 970, 983 (S.D.N.Y. 1976). One commentator stated that "[t]here is no infringement upon the sovereignty of a state over its political subdivisions so long as the state may in some way effectively prevent federal interference in the internal fiscal management of the state. . . ." Note, *A Survey of Municipal Bankruptcy Law and Procedure*, 38 BROOKLYN L. REV. 478, 485 (1971). Section 903 of the Code provides states with such control. See note 180 *supra* and accompanying text.

184. Securities Act of 1933, 48 Stat. 74 (1933) (codified as amended, 15 U.S.C. §§ 77a-77aa (1976 & Supp. III 1979)). The 1933 Act seeks to promote full and fair disclosure and prevent fraud in sales of securities in interstate commerce and through the mails. 48 Stat. at 74.

185. 15 U.S.C. § 77e (1976) (registration requirement); 15 U.S.C. § 77d (1976) (registration exemption for governmental issuers). The definition of "political subdivisions" exempted from securities registration under the 1933 Act corresponds to that of governmental units exempted from federal income taxation. H.R. REP. NO. 85, 73d Cong., 1st Sess. 14 (1933). This definitional symmetry reflects federal legislative concern to avoid "any constitutional difficulties that might arise with reference to the inclusion of state and municipal obligations [under the securities laws]. . . ." *Id.*; see Fippinger, *supra* note 180, at 544-45 n.14.

186. 15 U.S.C. § 77(q)(2) (1976); see *In re New York City Mun. Sec. Litig.*, 507 F. Supp. 169, 181 n.26 (S.D.N.Y. 1980) (antifraud provisions in 1933 Act are the only ones that apply to governmental issuers) [hereinafter cited as *Securities Litigation*]; see *Cady, Roberts & Co.*, 40 S.E.C. 907 (1961) (registration compliance does not insure antifraud compliance).

187. See 15 U.S.C. §§ 77k(a)(1)-(a)(4) (1976).

188. See 15 U.S.C. § 77l(2) (1976).

189. *Securities Litigation*, 507 F. Supp. at 181 n.26; Fippinger, *supra* note 180, at 548; see 15 U.S.C. § 77(t) (1976) (confers SEC with injunctive powers); 15 U.S.C. §

Securities and Exchange Act of 1934 (1934 Act)¹⁹⁰ antifraud provisions.¹⁹¹ Hence, congressional reluctance to interfere with municipal fiscal affairs through securities regulation is evident in both the 1933 Act and the 1934 Act.

In its regulation of labor relations, Congress fully asserts its commerce power.¹⁹² However, state political subdivisions receive exemptions from federal labor laws.¹⁹³ These exemptions arise from the

77x (1976) (criminal sanctions). The constitutionality of SEC enforcement actions against municipal issuers remains to be established conclusively. *See* City of Philadelphia v. SEC, 434 F. Supp. 281, 286 (E.D. Pa. 1977), *appeal dismissed for want of jurisdiction*, 434 U.S. 1003 (1978) (court avoided considering constitutionality of formal SEC investigation on ripeness grounds); *see also* Note, *Federal Securities Fraud Liability and Municipal Issuers; Implications of National League of Cities v. Usery*, 77 COLUM. L. REV. 1064, 1071-74 (1977) (suggests constitutional limitation on enforcing antifraud provisions on municipalities for disclosures to the general public).

190. Securities Exchange Act of 1934, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. §§ 78a-78kk (1976 & Supp. III 1979)). The 1934 Act was designed to prevent inequitable and unfair practices through the regulation of securities exchanges and over the counter markets. S. REP. No. 792, 73d Cong. 2d Sess. 1(1934).

191. *Securities Litigation*, 507 F. Supp. at 186 (municipal securities market, but not municipal issuers themselves, subject to regulation); *Woods v. Homes and Structures of Pittsburg*, 489 F. Supp. 1270, 1281 (D. Kan. 1980) (notes reluctance to subject government issuers to civil liability). Earlier cases relied primarily on the definition of "person" under the 1934 Act in holding municipalities not liable. *See, e.g., Greenspan v. Crosbie*, [1976-77 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,780 (S.D.N.Y. 1976); *In re Equity Funding Corp. of America Sec. Litig.*, 416 F. Supp. 161, 198 (C.D. Cal. 1976). In 1975, Congress amended the definition of "person" under the 1934 Act to expressly include municipalities. Pub. L. 94-29, § 3 (2), 89 Stat. 97 (1975), 15 U.S.C. § 78c(a)(9) (1976). Emphasizing that the Tower Amendments, 15 U.S.C. § 78o-4(d) (1976) (exempts municipal issuers from disclosure requirements), were designed to ensure that the amended 1934 Act would "not tamper in any way with the prerogatives of state and local governments in their sale of securities," 121 CONG. REC. 6188 (1975) (remarks of Senator Williams), the court in *Securities Litigation* held that municipal issuers remained not subject to the antifraud provisions. 507 F. Supp. at 184 (1975 amendments exempt municipal issuers while subjecting others in municipal securities market to regulation); *cf. Ohio v. Crofters*, 525 F. Supp. 1133, 1136 (S.D. Ohio 1981) (Congress intended to exclude governments from liability for violations of the 1934 Act).

192. *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 567 (1942) ("the purpose of [FLSA] was to extend federal control in this field to the farthest reaches of interstate commerce").

193. *See, e.g.,* 29 U.S.C. § 152(2) (1976) (Wagner Act excludes state political subdivisions from term "employer"); 29 U.S.C. § 142(3) (1976) (Taft-Hartley Act). An exempted "political subdivision" must be (1) created directly by the state so as to constitute a department or administrative arm of the government and (2) administered by individuals responsible to public officials or the general electorate. *NLRB v. Natural Gas Util. Dist.*, 402 U.S. 600, 604-05 (1971). *Compare* *Truman Medical Center v. NLRB*, 239 N.L.R.B. 1067, *enforced*, 641 F.2d 570, 572 (8th Cir. 1981) (state created medical center not exempt from NLRB jurisdiction) *with* *Board of Trustees of the Memorial Hosp. v. NLRB*, 624 F.2d 177, 184 (10th Cir. 1980)

denial of government employees' right to strike or bargain collectively.¹⁹⁴ This denial reflects federal legislative deference to state sovereignty.¹⁹⁵ No corresponding exemption protects private employers as their coverage under the federal labor laws raises no tenth amendment implications.

Unlike private parties,¹⁹⁶ government agencies are not subject to the proscriptions of the Robinson-Patman Act¹⁹⁷ when making purchases for traditional governmental purposes.¹⁹⁸ This statutory interpretation, made in *Jefferson County Pharmaceutical Association v. Abbott Laboratories*,¹⁹⁹ was heavily influenced by "tenth amendment implications."²⁰⁰ The court interpreted the Act as not requiring governmental agencies to pay minimum prices for goods comparable to those charged to private parties.²⁰¹

Municipal income derived from the exercise of any essential government function is exempt from federal taxation.²⁰² In 1895, the Court

(publicly operated hospital exempt from NLRB jurisdiction). If private employers do not retain "sufficient control over their employment relationship[s] to engage in meaningful collective bargaining" then they may become exempt under the aegis of the political subdivision whom they serve. *R.W. Harmon & Sons, Inc. v. NLRB*, 664 F.2d 248, 251 (10th Cir. 1981); *National Transp. Serv., Inc.*, 240 N.L.R.B. 565 (1979) (Board abandons "intimate connection" with political subdivision requirement); see *NLRB v. Austin Dev. Center*, 606 F.2d 785, 790 (7th Cir. 1979) ("intimate connection" was discretionary rather than statutory limitation on Board's jurisdiction).

194. *NLRB v. Natural Gas Util. Dist.*, 402 U.S. 600, 604 n.3 (1971).

195. *Crilly v. Southeastern Pa. Transp. Auth.*, 529 F.2d 1355, 1360 (3d Cir. 1976). The Constitutional basis of this federal deference was illustrated in *National League of Cities* where extension of federal minimum wage and maximum hour provisions to nearly all state and municipal employees was held to be an unconstitutional infringement on state sovereignty. See text accompanying notes 138-47 *supra*.

196. *Abbott Laboratories v. Portland Retail Druggists Ass'n*, 425 U.S. 1 (1976) (drug manufacturer may not sell to nongovernmental nonprofit hospitals at a lower price than to private retailers).

197. 15 U.S.C. §§ 13-13b, 21a (1976) (proscribes anticompetitive price discrimination not justified by cost differentials).

198. *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 656 F.2d 92, 102 (5th Cir. 1981) (per curiam), *cert. granted*, 102 S. Ct. 1629 (1982).

199. *Id.* Nonprofit hospitals, operated by state subdivisions, purchased drugs at prices below those charged to private retailers. These drugs were subsequently sold in hospital pharmacies which compete with private retailers.

200. *Id.* at 99.

201. *Id.* at 102-03 (relying on *National League of Cities*).

202. 26 U.S.C. § 115(a)(1) (1976) (income derived from any public utility or the exercise of any essential government function is statutorily exempt from state and municipal gross income). This statutory exemption codifies at least partially the constitutional immunity as it existed when the statute was originally enacted in 1913. Tucker & Rumbro, *State Immunity from Federal Taxation: The Need for Reexamination*, 43 GEO. WASH. L. REV. 501, 514 (1975). To the extent that the constitutional

held that federal taxation of municipal bond interest unconstitutionally burdens municipal borrowing power.²⁰³ The Internal Revenue Code reflects this holding by excluding municipal bond interest from gross income.²⁰⁴ Despite its present questionable constitutional basis,²⁰⁵ numerous legislative attempts to abolish this exemption have been unsuccessful.²⁰⁶

C. Consequences of Denying a Qualified Municipal Exemption

Failure to extend a qualified exemption to municipalities subjects these governmental entities to scrutiny under substantive antitrust law. The Supreme Court's decision in *National Society of Professional Engineers v. United States*²⁰⁷ prohibits inquiry, apart from the competitive effect, of municipal policies.²⁰⁸ *Professional Engineers pro-*

immunity has contracted since that time, compare *South Carolina v. United States*, 199 U.S. 437, 461 (1905) (state functions immune only if strictly governmental in character) with *New York v. United States*, 326 U.S. 572, 581 (1946) (state clearly immune from discriminatory tax), the statutory exemption is correspondingly less constitutionally based. Tucker & Rumbro, *supra*, at 521, 525.

203. *Pollock v. Farmer's Loan and Trust Co.*, 157 U.S. 429, *aff'd on rehearing*, 158 U.S. 601 (1895).

204. "Gross income does not include interest on . . . the obligations of a state . . . or any political subdivision. . . ." 26 U.S.C. § 103(a)(1) (1976).

205. The prevailing view is that this exemption is constitutionally based in the doctrine of intergovernmental tax immunity. See SECURITIES INDUSTRY ASSOCIATION, *FUNDAMENTALS OF MUNICIPAL BONDS* 115-19 (9th ed. 1972) [hereinafter cited as *BOND FUNDAMENTALS*]; Comment, *Tax Exempt State and Local Bonds: Form of Intergovernmental Immunity and Form of Intergovernmental Obligation*, 21 DEPAUL L. REV. 757, 772 (1972) (relying on *Pollock*). Opponents argue that the erosion of the doctrine of intergovernmental tax immunity confers the federal government with power to tax municipal bond interest. See, e.g., Ratchford, *Intergovernmental Tax Immunities in the United States*, 6 NAT'L TAX J. 305, 332 (1953) (§ 103 is not constitutionally compelled); Tucker & Rumbro, *supra* note 202, at 507 & n.42 (same); Comment, *Intergovernmental Tax Immunities: An Analysis and Suggested Approach to the Doctrine and Its Application to State and Municipal Bond Interest*, 15 VILL. L. REV. 414, 437 (1970) (same) [hereinafter cited as Comment, *Municipal Bond Interest*]. It has also been argued that the sixteenth amendment, U.S. CONST. amend. XVI (Congress has power to tax income from any source without apportionment) (enacted after *Pollock* decision), renders municipal bond interest subject to federal taxation. See, e.g., *BOND FUNDAMENTALS*, *supra*, at 116.

206. *BOND FUNDAMENTALS*, *supra* note 205, at 118. Direct federal subsidies as an alternative to the exemption was proposed in a 1969 House Bill, H.R. REP. NO. 413, 91st Cong., 1st Sess. 172, *reprinted in* 1969 U.S. CODE CONG. & AD. NEWS, 1645, 1825. Expressing reluctance to interfere with the municipal bond market, the Senate deleted the proposal from the final bill. S. REP. NO. 552, 91st Cong., 1st Sess. 3, *reprinted in* 1969 U.S. CODE CONG. & AD. NEWS 2027, 2029.

207. 435 U.S. 679 (1978).

208. *Id.* at 692. *Professional Engineers* involved a challenge to a professional code prohibiting competitive bidding among engineers. The defendant argued that price competition adversely affected engineering quality and ultimately, public safety.

hibits municipalities from defending an antitrust challenge on grounds that the benefits of the restraint, measured in terms of public health, safety and welfare, outweigh its anticompetitive harms.²⁰⁹ Municipalities often pursue governmental policy objectives unrelated to competition.²¹⁰ Hence, substantive antitrust law is ill-suited to evaluate municipal policies.²¹¹

The Court concluded that public safety is irrelevant as "the purpose of [antitrust] analysis is to form a judgment about competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry." *Id.* Thus, the Court expressly limited substantive antitrust inquiry to the competitive effects of the challenged conduct.

209. *Boulder*, 102 S. Ct. at 848 (Rehnquist, J., dissenting). Although many commentators advocate limiting remedies for municipal antitrust violations to injunctive relief, *see, e.g.*, P. AREEDA & D. TURNER, *supra* note 126, at § 217; Posner, *supra* note 126, at 727; Note, *Antitrust Treble Damages as Applied to Local Government Entities: Does the Punishment Fit the Defendant?*, 1980 ARIZ. ST. L.J. 411, 420-24; Comment, *supra* note 13, at 581, the remedies stage is also unsuitable for recognizing the public benefit conferred by municipalities. The statutory language is mandatory and unambiguous. *See* note 10 *supra* (quotes §15 of Clayton Act). Congress has repeatedly rejected proposals to make treble damages discretionary. *City of Lafayette*, 435 U.S. at 443 & n.2 (Blackmun, J., dissenting) (documents repeated congressional refusal to make treble damages discretionary). Moreover, treble damages encourage "private attorneys general" by providing private plaintiffs with the financial means and incentive to challenge anticompetitive conduct. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 754 (1977) (Brennan, J., dissenting); J. VAN CISE, *THE FEDERAL ANTITRUST LAWS* 47-48 (1975) (private enforcement may be more effective than that of government).

210. The Supreme Court has expressly recognized the public purposes advanced by municipalities. *See, e.g.*, *Hill v. Memphis*, 134 U.S. 198, 203 (1890) (compares purposes of public and private corporations); *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 517, 688-89 (1819) (Story, J., concurring) (municipalities further public purposes); *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 50 (1915) (Court first recognized public purposes advanced by local governments); *see generally*, Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1102-04 (1980) (documents judicial recognition of public purposes furthered by municipalities); 56 AM. JUR. 2D § 14 *Municipal Corporations, Counties, and Other Political Subdivisions* (1971) (notes differing powers and beneficiaries of municipal and private corporations). In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the Court noted that "[t]he public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." *Id.* at 788-89 n.17 (dictum) (lawyer fee schedule). Relying on *Goldfarb*, lower courts have consistently applied the rule of reason to professional anticompetitive conduct otherwise subject to per se illegality. *See, e.g.*, *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981) (group boycott by psychologists); *Boddicker v. Arizona State Dental Ass'n*, 549 F.2d 626 (9th Cir. 1977) (tying arrangement by dentists); *Hyde v. Jefferson Parish Hosp. Dist. No. 2*, 513 F. Supp. 532, 543 (E.D. La. 1981); *Paralegal Inst., Inc. v. American Bar Ass'n*, 475 F. Supp. 1123 (E.D.N.Y. 1979) (group boycott by paralegal training school); *cf. Nara v. American Dental Ass'n*, 526 F. Supp. 452, 457 (W.D. Mich. 1981) (noncommercial restrictions designed solely to benefit public are exempt from antitrust laws) (dic-

Accommodating municipalities by recognizing, in substantive anti-trust analysis,²¹² benefits and harms unrelated to competition facilitates unrestrained judicial review of local economic regulations.²¹³ Legislative intent ordinarily restrains statutory review, therefore substantive economic review is avoided.²¹⁴ Such judicial restraint does not effectively exist in interpreting the Sherman Act as the lack of limiting legislative history renders this statute nearly constitutional in its breadth.²¹⁵ Hence, courts applying the Sherman Act may "substitute their view for those of the people's elected representatives in the state and municipal legislatures—precisely the type of judicial lawmaking which the court engaged in during the now discredited regime of substantive due process."²¹⁶ Rather than the "liberty of contract"

tum); *Selman v. Harvard Medical School*, 494 F. Supp. 603, 621 (S.D.N.Y. 1980) (antitrust laws inapplicable to noncommercial aspects of medical profession). Certain professional conduct, which would violate the Sherman Act if engaged in by private parties, may survive under the rule of reason. However, the Supreme Court did not intend to fashion a broad exception for learned professions. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 690-91 (1978) (price fixing among engineers). Clearly, if the "public service aspect" of professional conduct requires a less rigorous application of antitrust law, then the public purposes advanced by anticompetitive municipal activity deserve judicial recognition. *Id.* at 697. *But see* notes 212-22 *infra* (similar rule of reason approach to municipalities raises problems of unrestrained judicial review).

211. *See* notes 207-10 *supra* and accompanying text.

212. A balancing of the competitive harms against the public health, safety and welfare benefits at the exemption stage has been proposed. Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 Nw. U.L. Rev. 71, 104-08 (1974); *see* *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 610-11 (1976) (Blackmun, J., concurring) (rule of reason exemption approach). This approach is subject to the same criticism as is a balancing approach in substantive antitrust analysis. *Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. 1025, 1028 (N.D. Tex. 1978) (Blackmun's approach frustrates the judicial neutrality which *Parker* seeks).

213. *City of Boulder*, 102 S. Ct. at 849 (Rehnquist, J., dissenting); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 628-30, 640 (1976) (Stewart, J., dissenting), *citing* *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) ("we have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."); *see* Ely, *supra* note 66, at 286 (fears return to unrestrained judicial review and proposes "rational relation" test).

214. Verkuil, *State Action, Due Process and Antitrust: Reflections on Parker v. Brown*, 75 COLUM. L. REV. 328, 333 (1975).

215. *United States v. Topco Assocs. Inc.*, 405 U.S. 596, 610 (1970); *see* *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 111 (1980) (Congress exercises all of its constitutional power under the commerce clause in enacting the Sherman Act) (*citing* *Atlantic Cleaners and Dyers Inc. v. United States*, 286 U.S. 427, 435 (1932)).

216. *Handler*, *supra* note 89, at 1382; *see* *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Lochner v. New York*,

theory used during the era of substantive due process,²¹⁷ courts would use the procompetitive principles of the antitrust laws as the yardstick for determining the reasonableness of local regulation.²¹⁸

The *Parker* doctrine responds to fundamental principles of federalism²¹⁹ and concerns for judicial economic neutrality.²²⁰ *Parker* was decided soon after the Court repudiated the doctrine of substantive due process.²²¹ As a result, this decision reflects the Court's unwillingness to "commence a new round of invalidating state regulatory laws on federal principles."²²² Analysis of public benefits unrelated to competition in substantive antitrust analysis facilitates judicial lawmaking and is consequently inimical to the *Parker* doctrine itself.

Since municipalities receive more federal deference than private parties, their implicit equation in *Boulder* is not justifiable. A distinction favoring municipalities should be made at the exemption stage as substantive antitrust law is unsuitable for recognizing the public benefits conferred by municipalities which are not related to competition. Thus, a municipal exemption from the antitrust laws reflecting state sovereignty and federal procompetitive interests should be created by

198 U.S. 45, 74-75 (1905) (Holmes, J., dissenting); *Horsemen's Benevolent and Protective Ass'n Inc., v. Pennsylvania Horse Racing Comm'n*, 530 F. Supp. 1098, 1102 (E.D. Pa. 1982) (judiciary is constitutionally prohibited from substituting their social and economic beliefs for those of the legislature).

217. See *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating regulation of bakers' hours).

218. *Boulder*, 102 S. Ct. at 849 n.3 (Rehnquist, J., dissenting).

219. *Parker v. Brown*, 317 U.S. 341, 350-51 (1943); see *Boulder*, 102 S. Ct. at 842; *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 103 (1980); *City of Lafayette*, 435 U.S. at 421 (Burger, C.J., concurring); *Feldman v. Gardner*, 661 F.2d 1295, 1306-07 (D.C. Cir. 1981); *Horsemen's Benevolent and Protective Ass'n Inc., v. Pennsylvania Horse Racing Comm'n*, 530 F. Supp. 1098, 1103 (E.D. Pa. 1982). When the Sherman Act was enacted in 1890, state and municipal local regulation were largely beyond Congress' commerce power. *City of Lafayette*, 435 U.S. at 420-21 (Burger, C.J., concurring); see *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895). Subsequent expansion of the commerce power under the "affection doctrine" extended the jurisdictional reach of the Sherman Act. See *NLRB v. Fainblatt*, 306 U.S. 601, 605 n.1 (1939); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 636-38 (1976) (Stewart, J., dissenting), quoting Slater, *supra* note 134, at 85. This "retroactive expansion" of the Sherman Act's jurisdictional reach is largely responsible for the *Parker* doctrine. *Cantor*, 428 U.S. at 636 (Stewart, J., dissenting).

220. *City of Lafayette*, 435 U.S. at 422 (Burger, C.J., concurring); *Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. 1025, 1030 (N.D. Tex. 1978); Verkuil, *supra* note 214, at 334; see *Horsemen's Benevolent and Protective Ass'n., Inc., v. Pennsylvania Horse Racing Comm'n*, 530 F. Supp. 1098, 1102 n.6 (E.D. Pa. 1982).

221. The doctrine of substantive due process was repudiated by the Court in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), and *Nebbia v. New York*, 291 U.S. 502 (1934). *Parker* was decided 5 years after *Parrish*.

222. *City of Lafayette*, 435 U.S. at 421 (Burger, C.J., concurring).

the courts or the legislature. Since municipalities receive less federal deference than states, this exemption must be qualified by making it narrower than that enjoyed by states under the *Parker* doctrine. This exemption must reflect the federalist concerns expressed in *National League of Cities v. Usery*. At a minimum, anticompetitive municipal conduct involving "integral operations in areas of traditional government functions" should be exempt. To avoid emasculation of the exemption, its terms should be liberally construed. In order to prevent unrestrained judicial review of municipal economic regulation, the balancing of public welfare benefits against anticompetitive harms must be avoided. Municipal participation in a private anticompetitive agreement and mere authorization of private anticompetitive conduct should not receive protection under the qualified municipal exemption.

V. Conclusion

Employing exemption analysis, the Supreme Court in *Community Communications Co. v. City of Boulder* implicitly equated municipalities and private parties under the *Parker* doctrine. This decision exerts a significant adverse impact on local governmental operations. Since application of the federal antitrust laws to municipal enactments involves the interplay of two separate sovereigns, preemption analysis should be utilized. In the alternative, municipalities should be extended a qualified exemption from the antitrust laws because they receive more federal deference than private parties. As this Comment advocates, adoption of either approach will facilitate appropriate recognition of the municipal role in our federalist system of government.

Martin Cronin

