Mississippi College Law Review

Volume 3 | Issue 1 Article 10

6-1-1982

Antitrust - Municipalties and the State Action Exemption of the Sherman Antitrust Act - Community Communications Co. v. City of Boulder

Charlene Robb Pierce

Custom Citation
3 Miss. C. L. Rev. 149 (1982-1983)

ANTITRUST— MUNICIPALITIES AND THE STATE ACTION EXEMPTION OF THE SHERMAN ANTITRUST ACT— *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982).

Since 1966 Community Communications Co. has provided cable television service to an area within the city of Boulder encompassing approximately 20% of the city's population. This service was authorized by a 20-year, revocable, non-exclusive permit granted pursuant to an ordinance enacted by the city council.[1] The city's authority to enact such an ordinance is derived from its status as a 'home rule' municipality, organized as such under the Colorado State Constitution. The Home Rule Amendment to this constitution grants "the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters . . . ."[2] City charters and ordinances made in furtherance of this authority supersede the laws of the state.[3]

Until 1979 limited technology and geographic conditions restricted the services provided by the Communications Co. At that time improved technology offered the company the capability of expanding its services and the company notified the city of its plans to do so. However, the new technology also presented an occasion for potential competitors to enter the area and the city chose to reevaluate its cable television policy. An emergency ordinance resulted, prohibiting the Communications Co. from expanding its business for a period of three months. This time period was to enable the city to enact a model cable television ordinance and to give new competitors a chance to enter the market. It was also felt that the emergency ordinance was necessary to prevent the Communications Co.'s expansion from discouraging potential competitors.[4]

The Communications Co. filed suit in District Court[5] seeking a preliminary injunction which would prohibit the city from enforcing its ordinance. The company based its allegations on the grounds that the ordinance violated the Sherman Act.[6] The city

---

1. Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982). This permit was originally granted to Colorado Televents, Inc. in 1964 and was assigned to Community Communications in 1966. *Id.* at 44.

2. COLO. CONST. art. XX, § 6. (quoted in *City of Boulder*, 455 U.S. at 44 n.1).

3. *Id.*

4. 455 U.S. at 44-46.

5. Community Communications Co. v. City of Boulder, 485 F. Supp. 1035 (D. Colo. 1980).

6. *Id.* at 1038. Sherman Act, 15 U.S.C. § 1 (1976).

argued that under the *Parker* doctrine[7] it was entitled to antitrust immunity.[8] The District Court rejected this argument stating that the *Parker* exemption did not apply according to *City of Lafayette v. Louisiana Power & Light Co.*[9] and granted the injunction. The Court of Appeals reversed.[10] That court distinguished *City of Lafayette* in that the city here was not involved in any proprietary activity and since the city's actions were the only 'state' involvement as to supervision or statement of policy, it satisfied the criteria for a *Parker* exemption.[11]

The United States Supreme Court found that the central question to be resolved was "whether a 'home rule' municipality, granted by the state constitution extensive powers of selfgovernment in local and municipal matters, enjoys the 'state action' exemption from Sherman Act liability announced in *Parker* . . . ."[12] The Court held that the city had not satisfied the requirements developed under the *Parker* doctrine and thus was not entitled to an exemption from the antitrust laws. It reversed judgment of the Court of Appeals and remanded the case for further proceedings.[13]

History of the State Action Exemption

That section of the Sherman Act applicable here reads in part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is declared to be illegal."[14] A literal reading of the phrase 'every contract' would lead to the conclusion that all contracts, regardless of subject matter, terms, provisions, etc., would violate the Act. Thus it is apparent that some limitations on the application of the act were intended according to the purpose for which it was enacted. However, there is little legislative history from which to determine either what limitations, if any, were envisioned, or the specific objectives of this antitrust law. Therefore, in the 93 years since its enactment there have been and are various positions as to the Act's objec-

---

7. Parker v. Brown, 317 U.S. 341 (1943).

8. 455 U.S. at 48-49. The city also argued that its actions were within its police powers, but the district court responded that those powers only concerned local matters and that cable television involved other concerns such as interstate commerce.

9. 435 U.S. 389 (1978).

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

11. 455 U.S. at 40.

12. *Id.* at 43.

13. *Id.* at 57.

14. 15 U.S.C. § 1 (1976).

tives and the application of the limitations which have been created to restict it.[15]

One judicially created limitation is the state action exemption. Generally, this will apply when a state, in legitimate exercise of its sovereign power, legislates conduct which may violate the Sherman Act.[16] The exemption is essentially the result of a conflict between two principles: the constitutional principle that when a federal law conflicts with a state law, the federal law will prevail versus the principle of federalism, which prescribes that a state should be able to regulate its own economy.[17] When a conflict arises between an antitrust law and a state law a court must determine whether it should imply a Congressional intent to defer to the type of state act involved.[18] The state action exemption is not an absolute rule—it involves an assessment of the proper relationship between the particular state act and its surrounding circumstances, and the antitrust law.[19] What factors must be considered in making this assessment have been the subject of controversy and the source of confusion since the exemption was first recognized. While this note is limited to a review of the state action exemption as applied to municipalities, it is necessary to review the entire history of the exemption in order to gain a perspective on the holding in *City of Boulder.*

The *Parker* case is credited with establishing the state action doctrine.[20] At issue was a state law authorizing a marketing program which restricted competition and maintained prices among the growers, distributors and packers of raisins.[21] The program was to be instituted by state officials and administered by a commission appointed by the governor and confirmed by the state senate.[22] Basing its decision on principles of federalism,[23] the

15. *See generally,* S. OPPENHELM, G. WESTON, & J. MCCARTHY, FEDERAL ANTITRUST LAWS (4th ed. 1981); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST (1977).

16. S. OPPENHELM, G. WESTON, & MCCARTHY, FEDERAL ANTITRUST LAWS 31 (4th ed. 1981).

17. Bricker, *Municipal Liability: City of Lafayette v. Louisiana Power & Light Co.,* 18 URB. L. ANN. 265 (1980).

18. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 737 (1977).

19. *Id.* at 734.

20. It did so by drawing on the following language from Olsen v. Smith, 195 U.S. 332, 345 (1904) which concerned a state law regulating pilotage within Texas:

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

21. 317 U.S. at 346-7.

22. *Id.*

23. Note, *The Application of Antitrust Laws to Municipal Activities,* 79 COLUM. L. REV. 518, 519 (1979).

Supreme Court found that the Sherman Act was intended to prohibit individual and not state action.[24] While the program was proposed and approved by individuals, it was the state which adopted and enforced the program in execution of "governmental policy."[25] In emphasizing that the program concerned was authorized and effectuated by legislative command and could not have operated without that command, the Court stated:

> We find 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. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly attributed to Congress.[26]

However, the Court also warned that a state could not bestow immunity on one who violated the Act by either authorizing them to do so or by proclaiming their acts to be lawful.[27]

For over 30 years following *Parker* the Court refused to review cases contesting the state action exemption and *Parker* stood as the Court's sole guidance for application of the doctrine.[28] This left the lower courts with little direction as to the scope of the doctrine and a confusion of inconsistent and contradictory opinions resulted.[29] A reexamination of the doctrine began in 1975 and resulted in a line of seven state action cases, the most recent being *City of Boulder.*

The first of these cases, *Goldfarb v. Virginia State Bar,*[30] concerned a county bar association which published a minimum fee schedule.[31] Enforcement of the schedule was provided by the Virginia State Bar Association, an administrative agency through which the Virginia Supreme Court regulated the practice of law.[32] In rejecting the state action exemption argument, it was found that, according to *Parker,* the first inquiry which had to be made when considering if a state's anticompetitive activity was exempt was whether that activity was required by the state acting as

---

24. 317 U.S. at 352.
25. *Id.*
26. 317 U.S. at 350-51.
27. 317 U.S. at 351 (citing Northern Securities Co. v. United States, 193 U.S. 197, 332, 344-7 (1904).
28. Note, *The Application of Antitrust Laws to Municipal Activities,* 79 COLUM. L. REV. 518, 519-20 (1979).
29. Comment, *Municipal Liability: City of Lafayette v. Louisiana Power & Light Co.,* 18 URB. L. ANN. 265, 271 (1980).
30. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).
31. *Id.* at 776.
32. *Id.*

when considering if a state's anticompetitive activity was exempt was whether that activity was required by the state acting as sovereign.[33] The fee schedule concerned was not the result of a state law and while mentioned in the state's supreme court rules, it was not mandatory.[34] The Court added that it was insufficient for an activity to be 'prompted' by state action—it must be 'compelled' by the state acting as sovereign.[35] Thus a condition of compelling state action was imposed.

A year later the Court again looked at the exemption again in *Cantor v. Detroit Edison Co.*[36] There a privately owned electric company distributed free light bulbs to its customers. The company's rates, which compensated for the omission of a charge for the bulbs, had to be approved by the state's Public Service Commission, through which the state regulated electric utilities. No state authority had investigated or approved the light bulb program and this program did not implement any state-wide policy. The state's position was found to be one of neutrality and thus insufficient to support the exemption.[37] The opinion found that *Parker* was limited to official action taken by the state, that *Parker* did not consider a situation where the action involved was essentially that of a private company, and so was not controlling.[38] The Court did indicate that there might be situations where state participation would be so dominant as to require exemption[39] and went on to outline some of the previously proposed conditions.[40] The state action immunity claim was then rejected on the grounds that the program involved did not meet the condition of being necessary to make the states's regulation of public utilities work.[41] Thus another condition for application of the exemption was created.

In *Bates v. State Bar of Arizona*[42] attempted refinement of the exemption was continued. There the state supreme court, as part of its regulation of the state bar, enforced a rule which

33. *Id.* at 790 (citing *Parker*, 317 U.S. at 350-52).
34. 421 U.S. at 790.
35. *Id.* at 791.
36. 428 U.S. 579 (1976).
37. *Id.* at 585.
38. *Id.* at 591-92.
39. *Id.* at 594-95.
40. *Id.* at 592-93 nn. 26-29. The court cited Northern Securities Co. v. United States, 193 U.S. 197, 346 (1904). (state authorization); *Parker*, 317 U.S. at 351 (state approval); *Goldfarb*, 421 U.S. at 791 (state encouragement); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) (state participation).
41. *Cantor*, 428 U.S. at 597 & n. 34 (citing *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963)).
42. 433 U.S. 350 (1977).

restricted advertising by attorneys.[43] *Goldfarb* was distinguished on the grounds that the action concerned in *Bates* was compelled by the state supreme court as the ultimate state authority over the practice of law.[44] *Cantor* was also distinguished in that the action in *Bates* was directed at the state, not a private company, and regulation of the bar's activities was the central point of the state's authority, not a limited association to the state's regulatory authority.[45] It was found that the Court's concern for unnecessary and inappropriate subordination of federal policies was minimized in this situation and that it considered it "significant that the state policy [was] so clearly and affirmatively expressed and that the state's supervision [was] so active."[46] Thus the Court clarified the point that the extent to which the exemption would apply to governmental action would rest in large part on the type of governmental decision involved.[47] *Bates,* therefore, established two new conditions for consideration—clearly and affirmatively expressed state policy and active state supervision.

At this point the state action exemption cases had been concerned only with action by the state itself or private parties in some relationship to the state. *City of Lafayette v. Louisiana Power & Light Co.*[48] became the first case to consider whether the exemption also applied to municipal action. In *Lafayette* it was claimed that cities, given the power under state law to own and operate an electric utility system, had committed various antitrust violations.[49] The Court reviewed the history of the state action exemption and stated that this review revealed a limitation by the *Parker* decision to apply the exemption only to those programs that were the direct result of a state command.[50] The opinion found that this limitation had been emphasized and had undergone further refinement in *Goldfarb* (activity compelled by the state's acting as sovereign) and *Bates* (clearly articulated and affirmatively expressed state policy, active state supervision).[51] There was no support for the proposition that a city itself is sovereign. Therefore, to extend the doctrine to municipalities would conflict with the

---

43. *Id.* at 353.
44. *Id.* 359-60
45. *Id.* at 360-62.
46. *Id.* at 362.
47. *Id.* at 359-63 (discussing *Parker*, 317 U.S. 341; *Goldfarb*, 421 U.S. 773; *Cantor*, 428 U.S. 579).
48. 455 U.S. 389 (1978).
49. *Id.* at 391-92.
50. *Id.* at 409.
51. *Id.* at 410.

established basis for the doctrine (state sovereignty resulting from principles of federalism).[52]

> Cities are not themselves sovereign; they do not receive all the federal deference of the states that create them. *Parker's* limitation of the exemption to 'official action directed by a state', is consistent with the fact that the state's subdivisions generally have not been treated as equivalents of the states themselves.[53]

The Court held that it was unwilling to find a blanket extension of the state action exemption for anticompetitive activities by municipalities. This did not mean that all municipal anticompetitive activities would be subjected to the antitrust laws.[54] Rather, "[i]t only means that when the state itself has not directed or authorized an anticompetitive practice, the state's subdivisions in exercising their delegated power must obey the antitrust laws."[55] Comment was made that this holding would not affect the state's ability to delegate power or use municipalities to administer state regulatory policies and that it would not affect the municipalities ability to govern its inhabitants or provide services.[56]

That same term the Court also considered a state law which provided that a motor vehicle manufacturer had to notify the state Motor Vehicle Board of its intention to open a new retail dealership within an existing franchisee's market area.[57] Approval of that Board had to be secured if the existing franchisee protested.[58] There was little discussion of the state action exemption in *New Motor Vehicle Board of California v. Orrin W. Fox, Co.*, as the court found the question presented strictly one of law.[59] *Parker*, *Bates* and *Lafayette* were cited in support of the holding that the state law provided a "system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships. The regulation is therefore outside the reach of the antitrust laws under the 'state action' exemption."[60]

Finally, in *California Retail Liquor Dealers Ass'n. v. Midcal*

---

52. *Id.* at 411-12.
53. *Id.* at 411-12 (citing Edelman v. Jordan, 415 U.S. 651, 667 n. 12 (1974); Lincoln County v. Luning, 133 U.S. 529 (1890); and Parker v. Brown, 317 U.S. at 351).
54. 435 U.S. at 413.
55. *Id.* at 416.
56. *Id.* at 415-16.
57. New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96, 98 (1978).
58. *Id.* at 98.
59. *Id.* at 109, n. 13.
60. *Id.* at 109.

Aluminum, Inc.,[61] the Court again undertook the task of resolving the conflicts and confusions which had arisen from its previous treatment of the state action exemption. *Midcal* concerned a state law requiring all wine producers, wholesalers and rectifiers to file fair trade contracts or price schedules with the state.[62] No wine could be sold at other than the set price. [63] The state had no direct control over the prices and did not review their reasonableness.[64] Again the opinion contained a review of the state action exemption case history.[65] This time it was found that previous cases had established two conditions which had to be satisfied in order for the *Parker* exemption to apply: 1) a clearly articulated and affirmatively expressed state policy; and 2) active supervision of the activity at issue by the state itself.[66] While the wine pricing system satisfied the first condition in that it was a forthrightly stated legislative policy, it did not satisfy the second condition because it simply authorized and enforced the price setting—it did not establish the prices, review their reasonableness, monitor market conditions, or reexamine the prices at appropriate intervals.[67] The opinion concluded by citing *Parker* for its support of the proposition that the national policy for competition could not be circumvented by "casting . . . a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement."[68]

The City of Boulder Decision

In *City of Boulder* the Court again faced the question of the applicability of the state action exemption to a municipality. As in the previous state action decisions, a summary of the case law on the exemption was discussed.[69] The Court reached the conclusion that these precedents, taken as a whole, could be synthesized into two criteria, one inapplicable to a municipality and a second which must be satisfied in order to entitle a municipality to avail itself of the state action exemption.[70]

The first criterion is that an activity is not exempt unless it

---

61. 445 U.S. 97 (1980).
62. *Id.* at 99.
63. *Id.* at 99.
64. *Id.* at 100.
65. *Id.* at 103-06, discussing *Parker*, 317 U.S. 341; *Goldfarb*, 421 U.S. 773; *Cantor*, 428 U.S. 579; *Bates*, 433 U.S. 350; *Lafayette*, 435 U.S. 389; and *Orrin Fox*, 439 U.S. 96.
66. 445 U.S. at 105.
67. *Id.*
68. *Id.* at 106.
69. 455 U.S. at 48-57.
70. *Id.* at 52.

"constitutes the action of the [s]tate . . . itself in its sovereign capacity."[71] This criterion is based on the *Parker* holding that there is nothing in the Sherman Act that indicates it was intended to restrain a state or its officers from actions directed by the legislature.[72] As to whether the word 'state' included municipalities and subdivisions of the state, the Court simply quoted from and reiterated its holding in *Lafayette* to the effect that cities are not sovereign, treated as the equals of a state, or included as sovereigns within the principles of federalism.[73]

Although a municipality will be unable to satisfy this first criterion it does not follow that a municipality is automatically subjected to the scrutiny of the Sherman Act. It is still possible for a municipality to gain immunization from antitrust liability if the activity in question "constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy."[74] Although *Bates* is not relied on by the Court, this standard was first expressed in that case,[75] later reexamined in *Lafayette*,[76] and adopted in *Orrin Fox*,[77] and *Midcal*.[78] Again, reliance was simply placed on the language and reasoning of the *Lafayette* opinion for support of this second criterion, and it was stated that this criterion was merely a "recognition that a state may choose to effectuate its policies through the instrumentality of its cities and towns," leading to the conclusion that some protection must be offered.[79]

In establishing these two criteria, no new reasoning for or insight into the criteria was offered nor was additional clarification provided for application of the criteria to a municipality. This opinion was essentially a 'codification' of previous case law. And because the city did not satisfy the second criterion as required, the Court deemed it unnecessary to consider whether the active state supervision condition also had to be satisfied in order for the exemption to apply. Thus it refused to discuss a condition which it found to be an underlying basis for its decision in *Bates*, later described in *Lafayette*, and relied upon in *Midcal*.[80] Indeed, this opinion was basically confined to the narrow question of

71. *Id.*
72. *Id.* at 54 (citing *Parker*, 317 U.S. at 350-51).
73. *Id.*
74. *Id.* at 52.
75. 433 U.S. at 362.
76. 435 U.S. 389 at 410.
77. 439 U.S. 96 at 105.
78. 445 U.S. 97 at 105.
79. 455 U.S. at 51.
80. *Id.* at 51, n. 14.

whether the 'home rule' municipality satisfied either criterion under the facts presented.

The city's first contention was that the Home Rule Amendment vested the city with all powers previously held by the legislature in regard to municipal matters. Since regulation of cable television within the city limits is a local concern, the city was acting as the state in regulation of a local matter. This argument was rejected by a finding that *Parker* and the subesquent state action cases which followed all stood for the proposition that the principle of federalism was limited in that our dual system of government contained no place for sovereign cities. This proposition was found to have been recognized in *Lafayette* and reaffirmed in *Orrin Fox* and *Midcal.* Thus without delving into the exact status of a home rule municipality in relation to the state, the court found that no municipality of any type is sovereign. Therefore, it cannot avail itself of the first criterion.[81]

Consideration was then given to the city's argument that the second criterion of a clearly articulated and affirmatively expressed state policy was satisfied because within the grant of local autonomy the state comprehended the inclusion of the city's power to enact the challenge ordinance. This led to the conclusion that the state 'contemplated' the city's action. The Court stated that acceptance of this contention would obviate the need for the requirement of a clearly articulated and affirmatively expressed state policy. Echoing its language in *Cantor* it stated that the state's relationship to the challenged ordinance was one of neutrality in that a general grant of powers cannot be said to 'contemplate' a specific anticompetitive ordinance. Therefore, the second criterion was not fulfilled. Thus a home rule grant of general power by the state to the municipality will be insufficient to immunize the municipality from Sherman Act liability unless there is an independent, clearly articulated and affirmatively expressed state policy on the challenged activity.[82]

The response to the city's final argument that denial of the exemption would have a grave effect on all municipalities was that this was simply another attack on the long-standing national policy of committment to free competition. Again returning to its language in *Lafayette,* the opinion stated that this holding would not impair the state's ability to allocate power, nor would it prohibit a city from providing necessary services for its inhabitants.

---

81. *Id.* at 53-54.
82. *Id.* at 54.

Thus the entire opinion is in essence a restatement of prior decisions concerning the state action exemption.[83]

Justice Rehnquist's dissent centered on what he considered two serious 'flaws' in the majority's opinion. His first concern was that the majority phrased its issue as one of a municipality's 'exemption' from the Sherman Act.[84] He stated that the question was not one of *exemption,* but "whether statutes, ordinances, and regulations enacted as an act of government are *preempted* by the Supremacy Clause."[85] His second concern was that the majority, in holding that a municipality is entitled to an exemption only if it satisfies the requirement of a clearly articulated and affirmatively expressed state policy, had placed a municipality on the same footing as any privately owned business.[86] This, he found, would "radically alter the relationship between the States and their political subdivisions."[87] A city's ability to regulate its economy will be nonexistent without a clearly expressed state policy to that affect.[88] This will essentially destroy the home rule movement because in a home rule situation the state has disabled itself from articulating the necessary state policy.[89] In order to avail itself of the state action exemption, the home rule municipality will have to return its hard-won authority to the state.[90] In Justice Rehnquist's words "[i]t is unfortunate enough that the Court today holds that our Federalism is not implicated when municipal legislation is invalidated by a federal statute. It is nothing less than a novel and egregious error when this Court uses the Sherman Act to regulate the relationship between the states and their political subdivisions."[91]

Analysis

The holding in *City of Boulder* emerges as a finding that when application of the state action exemption to a municipal activity is at issue, the Court will examine that issue from the same viewpoint as it would if determining whether an activity engaged in by a private individual or business is eligible for the exemption. Thus, in order to determine the status of the state action exemp-

---

83. *Id.* at 56-57.
84. *Id.* at 60 (Rehnquist, J., dissenting).
85. *Id.* (Rehnquist, J., dissenting).
86. *Id.*
87. *Id.* at 70.
88. *Id.*
89. *Id.* at 71.
90. *Id.*
91. *Id.*

tion as applied to a municipality, it is necessary to determine the status of the exemption as a whole.

At the time *Parker* was decided it was considered to stand for the broad proposition that acts which were attributed to the state in implementation of a governmental policy were not subject to the Sherman Act.[92] This brief treatment had two results: 1) it provided little guidance for the lower courts and produced a confusion of disparate rationales and holdings;[93] and 2) it provided little substance when the Court undertook its examination of the area in 1975. This lack of guidance by the Court is not restricted to the *Parker* opinion. While the opinions since 1975 have determined whether the particular challenged activity in question was eligible for the exemption, they did little to clarify or delineate those conditions which must be satisfied for the exemption to be available to a party, private or municipal.

In the first case subsequent to *Parker, Goldfarb,* the Court immediately began to limit the *Parker* holding. *Goldfarb* found that activities not *required* by the state's acting as sovereign were not covered by the exemption. Even if an activity passed this test, it was implied that there could be other conditions which had to be met.[94] *Cantor* contributed to the limitation process by stating that the *Parker* holding was clearly restricted to official action taken by state officials.[95] This decision also added to the surrounding confusion when five justices found that *Parker* applied to private as well as state activities.[96] The groundwork for further conditions, clearly articulated and affirmatively expressed state policy and active state supervision, was laid in *Bates.*[97] Tighter limitations were found in *Lafayette,* which denied extension of the exemption to a municipality and which restricted the *Parker* doctrine to those activities for which there was direct legislative mandate regardless of whether the party concerned was a subdivision of the state or a private business. *Lafayette* also added to the confusion by providing another possible condition which the challenged activity may have to satisfy—and by failing to

---

92. Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws.* 49 N.Y.U. L. REV. 693 (1974).

93. Handler, ANTITRUST—1978. 78 COLUM. L. REV. 1363, 1374-75 (1978).

94. 421 U.S. at 788.

95. 428 U.S. at 591.

96. This essentially disregards the distinctions between the two types of activities and is possibly the forerunner of the holding in *City of Boulder.*

97. 433 U.S. at 362.

clarify exactly which condition is appropriate.[98] The dissent in that case also suggested the direction of the holding in *City of Boulder* when it stated that requiring a legislative mandate for a municipal activity would "blur, if indeed it does not erase," the distinctions between private and governmental actions.[99] The two conditions proposed in *Bates* were also accepted by the Court in *Lafayette* and were reaffirmed in *Orrin Fox,* where the brief treatment of the exemption seems to indicate that the law in this area is settled. *Midcal* retains these two conditions but also adds to the confusion by failing to provide objective criteria by which the active state supervision requirement can be judged.

City of Boulder has clearly continued this trend of limitation of the state action doctrine by placing the municipality on par with a private party. From "actions of a state acting as sovereign" ,[100] the doctrine has been reduced to only those activities by any party which are directly mandated by the state. While there was some room for argument as to the applicability of the doctrine to municipalities under *Lafayette* in that that opinion was a plurality decision, the Court appears to have solidified its approach since that time with *Orrin Fox, Midcal,* and *City of Boulder* all receiving majority votes. However, *City of Boulder* also continues the trend of confusion in this area by refusing to consider whether the condition of active state supervision should be added as a third criterion. What appeared to be established in *Midcal* is now a question of uncertainty, resulting in a delay before a point central to the application of the doctrine can be clarified. Once again the lower federal courts, the states, and the municipalities are left with no choice but to follow the latest opinion until 'their' case gives the Court the opportunity to reexamine the state action doctrine.

Conclusion

The resulting effects of a holding which places a municipality on the same footing as a private party raise serious questions as to the soundness of the holding. The Court did not consider the issue of appropriate remedies to be extracted from municipal officials. The Sherman Act[101] requires that one injured by violation of the antitrust laws shall recover treble damages. In *Lafayette*

98. 435 U.S. at 415. The other three possibilities are the "compulsion" standard, *Goldfarb,* 421 U.S. at 790; the "approval" standard, *Cantor,* 428 U.S. at 596-7; and the "authorization" standard, *Bates,* 433 U.S. at 360.

99. 435 U.S. at 431 (Stewart, J., dissenting).

100. 317 U.S. at 350-51.

101. 15 U.S.C. § 15 (1976).

damages claimed were 180 million dollars which trebled would equal 540 million in damages to be collected from cities with a combined population of 75,000.[102] Collection of an award of this amount would place an unreasonable burden on a city who might be left with the problem of who is to pay – the municipal officials actually involved or the taxpayers, either on a pro rata basis or through tax increases.

Another problem resulting from this decision concerns the manner in which a municipality operates. Those who act pursuant to a home rule or implied power doctrine will be hard-pressed under their general grant of powers to find a specific legislative command while those municipalities operating under a specific enabling act will have evidence of the state's policy.[103] This supports the dissent's argument that the majority's holding will alter the relationship between a state and its subdivisions.

Also, while it has been established that a municipality may socialize or monopolize some activities such as school systems, fire departments, and police departments without violation of the antitrust laws, this has been done on grounds of natural monopoly or special relationship to the quality of the life of its inhabitants.[104] Who will make the decision as to whether monopolization of garbage collection or an ambulance service is so related to the quality of life of a city's inhabitants that it will not be subjected to the scrutiny of antitrust laws?

There are other effects to be considered. Subjecting municipalities to the stringent standards found in the majority's opinion will also permit the federal courts to conduct a far-ranging inquiry into the reasonableness of a state's policies and will discourage municipalities from attempting new and innovative social and economic programs.[105] And if active state supervision is found to be a condition which must be satisfied for the exemption to apply, will the courts require the state to supervise enforcement of a municipal ordinance?[106] Finally, denial of the exemption will surely increase the number of cases involving municipalities in alleged violation of the antitrust laws.

These questions and problems support the conclusion that the Court's holding, which places a municipality on equal footing with

---

102. 435 U.S. at 440 (Stewart, J., dissenting).

103. Note, *the Application of Antitrust Laws to Municipal Activities*, 79 COLUM. L. REV. 518, at 528 (1979).

104. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 739 (1977).

105. 435 U.S. at 439 (Stewart, J., dissenting).

106. 455 U.S. at 71 n. 6 (Rehnquist, J., dissenting).

a private party in determining application of the state action exemption, is too restrictive. They also lead to the determination that a separate standard should be evolved for applying this exemption to a municipality rather than using the standard applicable to a private party. Various arguments to reinforce these conclusions can be found from *Parker* and its statement that "we have no question of the state *or its municiplities* becoming a participant . . .,"[107] which implies that the court there considered the state and its municipalities to be on an equal basis, to the dissent in *City of Boulder* and a broad range of points in between. While a blanket exemption for a municipality is not advocated, reducing a governmental entity, such as a municipality, to the status of a private party can produce nothing but continued conflict and confusion in this area of antitrust law. Thus a separate, less restrictive, standard is advocated.

Charlene Robb Pierce

107. 317 U.S. at 351.