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COMMENTARY: THE REAGAN ADMINISTRATION'S POSITION ON ANTITRUST LIABILITY OF MUNICIPALITIES

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In recent years, the United States Supreme Court has greatly expanded its application of antitrust laws to state and local governments. These decisions raise significant concerns about judicial interference with the allocation of responsibility among units of government.

By applying antitrust laws to cities beyond any clear and manifest intention of Congress, the Court has ignored the tenth amendment¹ and infringed on the flexibility and freedom of state and local governments to carry out their responsibilities. This has chilled decisionmaking by elected officials. Further, it ignores the distinctions between open, public decisionmaking, monitored by citizens through the ballot box, and anticompetitive conspiracies among competitors.

I. DEVELOPMENT OF MUNICIPAL ANTITRUST LIABILITY

In the second half of the nineteenth century, a number of states passed local statutes directed at anticompetitive pools, trusts, and holding companies. By 1889, however, a number of these anticompetitive arrangements were interstate in nature and, therefore, beyond the reach of intrastate action. This led President Harrison to urge Congress to determine whether these private trusts were a matter of federal jurisdiction and whether legislation should be enacted to insure competition in our economy.²

The consequent Sherman Antitrust Act³ grew out of procompetition

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1. U.S. CONST. amend. X. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

2. For a discussion of the legislative history of the Sherman Antitrust Act, see 21 CONG. REC. 1765 (1890), *reprinted in* 3 AMERICAN LANDMARK LEGISLATION, HISTORY OF THE SHERMAN ANTITRUST ACT OF 1890 (1976).

3. 15 U.S.C. §§ 1-7 (1976).

state statutes and well-known, common-law principles condemning undue restraints and monopolization of trade. The Act was directed against private cartel structures and behavior, trusts, and combinations and targeted individuals who sought to prevent competition and profit personally from a noncompetitive economic order.⁴

Since 1906 it has been clear that a municipality can sue as a plaintiff for violations of the Sherman Act and other antitrust laws. In *Chattanooga Foundry & Pipe Works v. City of Atlanta*,⁵ the city of Atlanta brought suit against two Tennessee corporations which, in a previous Supreme Court ruling,⁶ were held to be members of an unlawful combination. The city brought an antitrust action when it was forced to buy water pipes at an unreasonable price.

Thirty-seven years later in *Parker v. Brown*,⁷ the Supreme Court examined the issue of the state as an antitrust defendant and established the "state action" exemption. The case involved a suit by a raisin producer to terminate an anticompetitive agriculture marketing program instituted pursuant to a California statute. Although the Court assumed Sherman Act violations would have been found if the program had been a private initiative, it upheld the program, stating that there is "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."⁸

During the next thirty-two years, the Supreme Court did not elaborate on the "state action" exemption. Beginning in 1975, however, the Court issued a series of decisions narrowing this "state action" exemption. In *Goldfarb v. Virginia State Bar*,⁹ a lawyers' fee schedule published by a county bar association and enforced by the Virginia State Bar was held to violate section 1 of the Sherman Act. The Court found no evidence that the schedule was instituted pursuant to a state command, such as a state law requiring the use of fee schedules.

In *Cantor v. Detroit Edison Co.*,¹⁰ a light bulb retailer challenged an electric utility's program of giving customers free bulbs. The utility claimed an antitrust exemption on the grounds that the free bulb plan was

4. *Standard Oil Co. v. United States*, 221 U.S. 1, 51 (1911); see also H. THORELLI, *THE FEDERAL ANTITRUST POLICY* 27-30, 226 (1955).

5. 203 U.S. 390 (1906).

6. *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899).

7. 317 U.S. 341 (1943).

8. *Id.* at 350-51.

9. 421 U.S. 773 (1975).

10. 428 U.S. 579 (1976).

included in a tariff approved by the Michigan Public Service Commission, and that state law required the utility to obey the tariff. In the decision, the Court noted that Michigan had no statute regulating the bulb industry and no policy regarding such programs. Therefore, since the Commission's approval of the tariff could not be deemed the implementation of a state command, there was no "state action" exemption.

In *Bates v. State Bar of Arizona*,¹¹ the Court unanimously held that the "state action" exemption precluded antitrust suits by attorneys against the Arizona State Bar, relating to an Arizona Supreme Court rule limiting lawyer advertising. The Court noted that the Arizona Supreme Court had promulgated the rule pursuant to its authority under the Arizona Constitution to regulate law practice.

The next year, the Supreme Court for the first time addressed the question of whether the "state action" exemption provided immunity to municipalities from antitrust laws. In *City of Lafayette v. Louisiana Power & Light Co.*,¹² the Court, in a plurality opinion, ruled that cities are immune only when they are acting under a state policy authorizing municipal actions in a particular area and when the state legislature contemplated the action in question.

The cities of Lafayette and Plaquemine, Louisiana, which owned electrical utilities as authorized by Louisiana law, brought an antitrust suit against a competing, investor-owned, electric company. The investor-owned utility, Louisiana Power and Light, counterclaimed, alleging that the cities themselves had violated the antitrust laws by sham litigation, the use of debenture covenants, and the tying of gas and water contracts to electric service. The cities moved to dismiss the counterclaim on the ground that *Parker* had rendered the federal antitrust laws inapplicable to them as political subdivisions of the State of Louisiana.

The Supreme Court rejected the argument that Congress never intended to subject cities to antitrust liability. A plurality of the Court (Justices Brennan, Marshall, Powell and Stevens) concluded that "the *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service."¹³ The four dissenting members of the Court (Justices Stewart, White, Rehnquist and Blackmun) expressed the view that federal antitrust statutes have no more application to political subdivisions of the states than to the

11. 433 U.S. 350 (1977).

12. 435 U.S. 389 (1978).

13. *Id.* at 413.

states themselves under *Parker*. The decisive vote was cast by Chief Justice Burger, who wrote separately suggesting that cities should be exempt only to the extent that the state compelled their anticompetitive activity and the city demonstrated that the exemption was essential to the state regulatory scheme.

The fragmented Court in *Lafayette* made it possible to read that decision as imposing potential antitrust liability on local governments only when they acted in a proprietary rather than a governmental capacity.¹⁴ It was unclear in *Lafayette*, however, what activities Chief Justice Burger would consider to be proprietary and exactly what remedies would be available against a local government. In addition, it was unclear whether a state constitutional general home rule provision granting local governmental authority would provide sufficient authorization to satisfy the *Parker* test.

The "state action" exemption was further clarified and narrowed in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*,¹⁵ where the Court held a California resale price maintenance system was not exempt. Although the system was pursuant to a clear California legislative policy, the Court ruled that to be state action, the challenged restraints must be "clearly articulated and affirmatively expressed as state policy," and must be actively supervised by the state. California did not "actively supervise" the resale price maintenance system and, therefore, it failed the two-step test and was open to an antitrust challenge. For cities, this may mean that states can immunize municipal activities only by establishing official affirmative policy and subjecting resulting city activities to state review and oversight.

The Court went even further in *Community Communications Co. v. City of Boulder*.¹⁶ In this case, a cable television franchise brought an antitrust suit to enjoin a city with home rule powers from imposing a moratorium on expansion of the cable companies' business in the city.¹⁷ The city of Boulder argued that because of the home rule amendment to the Colorado Constitution, the moratorium constituted either the action of Colorado in its sovereign capacity, or municipal action pursuant to a clearly articulated, specific state policy. The trial court considered the *Lafayette* deci-

14. Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 HARV. L. REV. 435, 443 (1981).

15. 445 U.S. 97 (1980).

16. 455 U.S. 40 (1982).

17. *Id.* On December 19, 1979, the Boulder City Council enacted two ordinances, the net effect of which was to prohibit Boulder's current cable television company from expanding its area of service for three months. The stated purpose of both ordinances was to provide a moratorium on construction to give other cable companies an opportunity to make proposals to enter the municipality's regulated market.

sion and determined that *Parker* was "wholly inapplicable,"¹⁸ and entered a preliminary injunction against the moratorium ordinances. On appeal, the United States Court of Appeals for the Tenth Circuit reversed with one member dissenting, holding that the city of Boulder was "exempt from the antitrust liability under *Parker v. Brown*."¹⁹ The majority found that the city of Boulder was not engaged in the cable television business, and therefore had a governmental rather than a proprietary interest in cable franchises. This was consistent with Chief Justice Burger's determinative test for municipal exemption in *Lafayette*.²⁰

The Supreme Court, reversing the Tenth Circuit, held Boulder's activities subject to federal antitrust laws, but did not rely on the proprietary/governmental dichotomy articulated by Chief Justice Burger in *Lafayette*. In *Lafayette*, Chief Justice Burger's approach was critical because the Court was otherwise divided. In *Boulder*, however, Justice Blackmun, who had dissented in *Lafayette*, joined the *Lafayette* plurality and concurred in the majority opinion. The Court concluded that cities are not sovereign in the federal system, and that the home rule amendments' "guarantee of local autonomy" contained no "clear articulation and affirmative expression" of support for the anticompetitive acts at issue.²¹ Thereby, the Supreme Court greatly restricted, for purposes of federal law, the ability of states to delegate powers to their political subdivisions. The Court did not decide whether the disputed ordinance must or could satisfy the *Midcal Aluminum* "active supervision" test. In a concurring opinion, Justice Stevens stressed the difference between the Court's holding that the city could be sued under the antitrust laws, and a holding that the city had violated the antitrust laws.

II. PROBLEMS WITH MUNICIPAL ANTITRUST LIABILITY

A host of practical problems is raised by the *Boulder* holding that sub-state entities may be subject to antitrust scrutiny, regardless of the nature of the activities they pursue, unless the activities have been expressly and affirmatively immunized by state legislatures. The *Boulder* case opens possible municipal antitrust liability in a wide spectrum of areas including, among others: solid waste disposal; transit service; ambulance service; operation of municipal civic centers; city harbors; water supply; city off-street

18. 485 F. Supp. 1035, 1039 (D. Colo. 1980), *rev'd*, 630 F.2d 704 (10th Cir. 1980), *rev'd*, 455 U.S. 40 (1982).

19. 630 F.2d 704, 708 (10th Cir. 1980), *rev'd*, 455 U.S. 40 (1982).

20. *See* 630 F.2d at 708.

21. *See* 455 U.S. at 54-56. Thirty-five states have some type of constitutional provision for home rule.

parking facilities; taxicab franchises at public airports; and zoning to permit or restrict residential or commercial development.²² Questions also arise regarding procurement procedures and practices, including: public works contracts; purchase of materials, supplies and equipment; and purchases of real property, municipal liability insurance, and contracts for specialized, technical or professional services. These activities are routinely regulated by substate governments.

The *Boulder* case creates added uncertainties and costs that can cripple implementation of local public policy. The question of remedies remains uncertain: will treble damages apply to cities or will special remedies be devised?²³ Municipalities are going to their state capitals to seek new legislation to satisfy the *Boulder* standard. However, what will satisfy the requirement that states "expressly and affirmatively" delegate activities to cities? The "supervision" requirement remains unclear. Does supervision by the state require a new cumbersome and costly state bureaucracy of review boards? Since the city attorney will likely be named as a defendant in any antitrust litigation, cities will retain outside counsel at great expense. And, if the city loses, will it be required to pay plaintiffs' attorney fees? What standards of liability apply?

Under the language of *Boulder*, even states seeking to provide protection to cities may be unable to write the legislation. As Janet Gray Hayes, former Mayor of San Jose, California, said,

The states, or anyone else for that matter, cannot know what to do to meet the dictates of *Boulder* other than passing legislation that mandates a certain activity by a city and that also expresses the states' policy to displace competition in a way that is 'clearly articulated and affirmatively expressed' and that provides some means by which the state will actively supervise the performance of the city.²⁴

That seemingly impossible task is further complicated by the retroactivity of the *Boulder* case.

22. In November 1982, the National Institute of Municipal Law Officers published a listing of 57 antitrust suits against municipalities involving various aspects of city services and franchises. The list is being continuously updated. P. Maier, NIMLO Survey of Antitrust Suits Involving Municipalities, presented at the National Institute of Municipal Law Officers 47th Ann. Conference (Nov. 7-10, 1982).

23. In congressional testimony, Assistant Attorney General William F. Baxter indicated that the federal government will not seek criminal sanctions against state subdivision violators of the federal antitrust laws. *Local Government Antitrust Liability—The Boulder Decision: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. (June 30, 1982) (statement of William F. Baxter, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice) [hereinafter cited as *Hearings*].

24. *Hearings*, *supra* note 23 (statement of Janet Gray Hayes, Mayor of San Jose, Cal.).

But the fundamental issue of municipal antitrust liability is not cost or inconvenience. The fundamental issue is judicial interference with the allocation of responsibility among units of government. Such allocations of authority between the states and their political subdivisions are a matter of peculiarly local, rather than federal, concern. And, diversity among the states in the allocation of that authority between the states and their political subdivisions is a matter of peculiarly local, rather than federal, concern. Diversity among the states in the allocation of that authority historically has been viewed as a strength of America's federal system.²⁵ William Baxter, Assistant Attorney General, Antitrust Division, told a Congressional committee,

The Administration is firmly committed to the concept of federalism, which lies at the core of our constitutional system. Its intent is to develop policies wherever possible that will help to restore the Tenth Amendment to its rightful stature, affording state and local governments the flexibility and freedom from federal interference they require to carry out their responsibilities. Thus, any potential for application of the antitrust laws in a manner interfering with the relationship between states and their political subdivisions is cause for significant concern.²⁶

Unless Congress clearly and expressly passes legislation to preempt state constitutions or state statutes, there should be a presumption of legality for state laws. Justice Rehnquist in his *Boulder* dissent stated: "The Sherman Act should not be deemed to authorize federal courts to 'substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.'"²⁷ The courts should give proper weight to decisions made in the political marketplace. A state's decision to delegate certain responsibilities to local governments by means of home rule laws, whether through state constitutions or legislation, should be honored. The courts should not distort the original intent of federal antitrust laws to reshuffle the distribution of intergovernmental power.

Tom Moody, Mayor of Columbus, Ohio, pointed out,
City governments are natural monopolies established to protect

25. In a dissenting opinion, Justice Louis Brandeis wrote: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

26. *Hearings, supra* note 23 (statement of William F. Baxter, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice).

27. 455 U.S. at 68 (Rehnquist, J., dissenting) (citing *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963)).

the health, safety, and welfare of their populations. In the normal course of governing, governmental decisions are made, which by their very nature, result in an advantage to one party, a disadvantage for another, or a limitation in the operations of a third party.²⁸

Any local government abuses can be prevented by federal and state laws such as civil rights laws under section 1983 of the Civil Rights Act,²⁹ conflict of interest laws, sunshine laws, public disclosure of interests of public officials, and freedom of information laws. More important, the public interest is protected by the ballot box. Assistant Attorney General Baxter noted, "there is a fundamental difference between public officials, who are politically responsible to the electorate, and purely private businesses, which are responsible only to their owners."³⁰

28. *Hearings, supra* note 23 (statement of Tom Moody, Mayor of Columbus, Ohio).

29. 42 U.S.C. § 1983 (1976).

30. *Hearings, supra* note 23 (statement of William F. Baxter, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice).