

1983

The Fallout from Community Communications Co. v. City of Boulder: Prospects for a Legislative Solution

Benjamin R. Civiletti

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

Recommended Citation

Benjamin R. Civiletti, *The Fallout from Community Communications Co. v. City of Boulder: Prospects for a Legislative Solution*, 32 Cath. U. L. Rev. 379 (1983).

Available at: <https://scholarship.law.edu/lawreview/vol32/iss3/16>

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

THE FALLOUT FROM *COMMUNITY COMMUNICATIONS CO. V. CITY OF BOULDER*: PROSPECTS FOR A LEGISLATIVE SOLUTION*

*Benjamin R. Civiletti***

The Supreme Court's recent decision in *Community Communications Co. v. City of Boulder*¹ has generated intense interest in, and lively debate concerning, the potential imposition of antitrust liability—including criminal sanctions and treble damages—on local governments.² This article briefly examines the *Boulder* decision and discusses potential legislative solutions to the concerns raised by the decision and its perceived ramifications.

I. THE *BOULDER* DECISION

Boulder involved a challenge under the federal antitrust laws³ to an ordinance enacted by the City of Boulder, Colorado. The city is a "home rule" municipality which, under the Colorado Constitution, enjoys extensive powers of self-government in local and municipal matters.⁴ It was sued by Community Communications Company (CCC), the assignee of a

* This article is adapted from three speeches given to the National League of Cities (Apr. 30, 1982), the National Association of Counties (July 12, 1982), and the American Public Works Association (Sept. 13, 1982).

** Attorney General of the United States, 1979-1981. Currently a partner with Venable, Baetjer, Howard and Civiletti, Washington, D.C. The author acknowledges the assistance of Abbe David Lowell and Leslie A. Vial in the preparation of this article.

1. 455 U.S. 40 (1982).

2. "Local governments" include counties, cities, towns, and municipal corporations. For convenience, the term "municipality" or "city" may sometimes be used. It should be noted, however, that not all types of local governments perform the same functions or occupy the same relationship with the state. See Note, *Antitrust Law and Municipal Corporations: Are Municipalities Exempt from Sherman Act Coverage under the Parker Doctrine?*, 65 GEO. L.J. 1547, 1550 n.18 (1977). Such differences could be important under the facts of a particular case, but are less so in the context of a discussion of possible legislation.

3. 15 U.S.C. § 1 (1976).

4. The Colorado Home Rule Amendment, COLO. CONST. art. XX, § 6, provides in pertinent part:

The people of each city or town of this state, having a population of two thousand inhabitants . . . are hereby vested with, and they shall always have, power to

twenty-year, revocable, nonexclusive permit to conduct a cable television business within city limits.

Since 1966 CCC had provided cable television service to the University Hill area of Boulder, an area inhabited by approximately twenty percent of the city's residents, and where, for geographical reasons, broadcast television signals could not be received.⁵ Until 1980, because of the limits of available technology, that service consisted essentially of retransmitting commercial broadcast television from Denver, Colorado or Cheyenne, Wyoming. During the latter part of the 1970's, however, the development of cable and satellite technology permitted cable operators to offer a greatly expanded array of programming, including sports and movies. Consistent with the experience of other localities, the increased programming and lower costs made feasible by developing technology increased public interest in, and demand for, cable service. Desirous of tapping the increased market, CCC informed the Boulder City Council in May 1979 that it intended to expand its business into other areas of the city and began negotiations with city utilities for the use of their poles to carry its cables.⁶

The potential market for cable service attracted new entrants into the industry as well. In July 1979, Boulder Communications Company (BCC) also wrote to the city council expressing an interest in obtaining a permit to provide competing cable television service throughout the city. BCC's letter outlined its proposal and stated that it was prepared to go forward no matter what action the city took with respect to CCC.⁷

The city then initiated a review of its cable television policy, which included hiring a consultant and holding a number of study meetings. On the basis of the consultant's advice that cable television had a tendency to

make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.

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

It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters. . . .

The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.

5. *Boulder*, 455 U.S. at 44. CCC's permit allowed it to serve the entire city if it chose to do so. *Id.*

6. *Community Communications Co. v. City of Boulder*, 485 F. Supp. 1035, 1036-37 (D. Colo.), *rev'd*, 630 F.2d 704 (10th Cir. 1980), *rev'd*, 455 U.S. 40 (1982).

7. *Boulder*, 485 F. Supp. at 1036-37; 455 U.S. at 45 & n.5.

become a natural monopoly,⁸ and its own view that CCC might not offer the city's residents the best cable system, the city council enacted an "emergency" ordinance prohibiting CCC from expanding its business for three months.⁹ During the moratorium, the city drafted a model ordinance and began negotiations for the provision of cable service with BCC, which expressed a willingness to operate under the terms of the model ordinance.¹⁰

CCC sued in federal court for a preliminary injunction, pursuant to section 1 of the Sherman Act,¹¹ to prevent the city from restricting or revoking its rights under the original permit. The city defended on the ground that the moratorium and negotiation of the model ordinance constituted regulation of use of public ways and, as such, were exercises of the city's police powers and exempt from antitrust scrutiny under *Parker v. Brown*.¹²

The federal district court agreed that the city had the right and responsibility to control and regulate the use of the public ways and that some restrictions on the use of utility poles were reasonably necessary to protect the public. The court disagreed, however, that the approach the city had taken—negotiating an ordinance with a private entity as if it were a contract—was an appropriate exercise and articulation of the city's policy of regulation: "It is not characteristic of utility regulation for the regulating authority to negotiate with those to be regulated and then formulate the

8. *Boulder*, 485 F. Supp. at 1037.

9. *Id.* The ordinance actually amended the earlier ordinance which constituted CCC's permit. A second ordinance revoked the permit, which was then reenacted to include the moratorium. Both ordinances expressly stated that their purpose was to allow other cable companies to make proposals for serving the city. *Id.*

10. *Id.* Although the city council thought it had a responsibility to regulate cable television, it had received advice questioning its authority to do so. The council believed, however, that it could achieve the desired regulatory ends by contract and thus forestall a challenge to its regulatory authority by the regulated company. It therefore included contract language in the model ordinance, and submitted a draft to BCC for comments and acceptance. *Id.* at 1038.

11. 15 U.S.C. § 1 (1976).

12. 317 U.S. 341 (1943). *Parker* involved a California agricultural marketing program that restricted raisin production in order to stabilize prices. The Court assumed that the program would violate the Sherman Act if established by private parties, but found that Congress intended the Sherman Act to restrain private anticompetitive conduct and not "state action or official action directed by a state." *Id.* at 351-52. The *Parker* doctrine, although commonly referred to as an exemption or immunity, is, in fact, a determination that the antitrust laws do not apply to certain state-maintained activities.

Additionally, the *Parker* Court indicated that a state could not immunize private action that violated the antitrust laws merely by authorizing that action, and the Court expressly refrained from considering the situation where a state or municipality participated in a private agreement to restrain trade. *Id.* The "exemption" announced, therefore, was by no means a blanket immunity for all state action.

final policy by exercising legislative power through an offer and acceptance mechanism."¹³ The court found that the city's regulation using the contract approach did not constitute governmental action and, therefore, that the city did not enjoy state action immunity under *Parker*.

The court then examined the city's allegedly anticompetitive actions to determine whether a preliminary injunction was appropriate. While the court found no agreement or other conduct that would constitute a per se violation of the antitrust laws,¹⁴ it nevertheless issued an injunction after evaluating the challenged conduct under the rule of reason.¹⁵ The court disagreed that cable television was a natural monopoly and found that competition was feasible. With respect to the city's claim that its motivation was to foster competition in the long run, the court found that "the direct and immediate effect [was] a restraint of trade and an artificial and unreasonable geographical market allocation."¹⁶

The United States Court of Appeals for the Tenth Circuit reversed, holding that the *Parker* state action doctrine did apply.¹⁷ The court of appeals found a distinction, for purposes of the availability of *Parker* immunity, between a municipality's governmental and proprietary acts. Because the city was not in the television business, the Tenth Circuit found the ordinance to be an exercise of the city's governmental authority rather than a proprietary act and, therefore, protected by the state action exemption.¹⁸

13. *Boulder*, 485 F. Supp. at 1039.

14. *Id.* Although § 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade," 15 U.S.C. § 1 (1976), the Supreme Court has held that Congress intended to outlaw only unreasonable restraints of trade, *E.g.*, *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958). Certain restraints of trade are held to be per se unreasonable: "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pac. Ry.*, 356 U.S. at 5.

15. *Boulder*, 485 F. Supp. at 1039-40. Where challenged conduct is not per se illegal, a court must inquire into the nature, purpose, and effect of the alleged restraint in order to determine its reasonableness and hence its legality. *E.g.*, *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

16. *Boulder*, 485 F. Supp. at 1039.

17. *Community Communications Co. v. City of Boulder*, 630 F.2d 704 (10th Cir. 1980), *rev'd*, 455 U.S. 40 (1982).

18. *Id.* at 707. The court also appeared to be influenced by the city's announced purpose in enacting the moratorium was to foster free competition in the cable market in the city. *Id.* at 708. The governmental/proprietary distinction relied on by the Tenth Circuit previously had been suggested by Chief Justice Burger in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 418 (1978) (Burger, C.J., concurring).

The Supreme Court granted certiorari¹⁹ to determine “whether a ‘home rule’ municipality, granted by the state constitution extensive powers of self-government in local and municipal matters, enjoys the ‘state action’ exemption from Sherman Act liability announced in *Parker v. Brown*.”²⁰ The Court reversed the Tenth Circuit.²¹ After reviewing its earlier decision in *City of Lafayette v. Louisiana Power & Light Co.*,²² and other decisions that had considered the applicability of *Parker* state action immunity in contexts other than municipal action,²³ the Court concluded that the city’s ordinance would not be exempt from antitrust scrutiny unless it constituted the action of the state itself or unless it was “municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy.”²⁴

The city had argued that, because Colorado’s Home Rule Amendment vested in the city “every power theretofore possessed by the legislature . . .

19. 450 U.S. 1039 (1981).

20. *Boulder*, 455 U.S. at 43. Because the Tenth Circuit determined that the city’s action was immune from antitrust scrutiny under *Parker*, it did not reach the question of the legality of that conduct under the antitrust laws. Thus the only issue presented to the Supreme Court was the availability of *Parker* immunity to the city.

21. *Boulder*, 455 U.S. at 57.

22. 435 U.S. 389 (1978). In *Lafayette*, two municipally owned power companies brought an antitrust action against a large, privately owned utility which counterclaimed alleging that the municipalities had engaged in sham litigation, and had entered into illegal “tying” arrangements and anticompetitive long-term supply contracts and debenture agreements. The municipalities moved to dismiss the counterclaims, alleging state action immunity. The district court dismissed the claims under *Parker*, but the United States Court of Appeals for the Fifth Circuit reversed.

The Supreme Court affirmed the Fifth Circuit, holding that the definition of “person” covered by the antitrust laws included cities, whether as plaintiffs or defendants, and that the cities had failed to show any overriding public policy which would mandate excluding municipalities from the coverage of the antitrust laws. A plurality of the Court determined that the *Parker* doctrine did not automatically exempt from the antitrust laws all governmental entities, whether state agencies or subdivisions, simply by reason of their status as such. Instead, *Parker* exempted 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.

The plurality noted that, in examining the activities of private entities claiming state action immunity in earlier cases, it had found significant the fact that the state policy requiring the anticompetitive restraint “was one clearly articulated and affirmatively expressed.” In the context of allegedly anticompetitive actions by local governmental entities, the plurality agreed with the Fifth Circuit and noted that “an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found ‘from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.’” *Lafayette*, 435 U.S. at 415 (citation omitted). Thus, specific, detailed legislative authorization was not necessary. *Id.*

23. *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978).

24. *Boulder*, 455 U.S. at 52.

in local and municipal affairs, [the] cable moratorium ordinance [was] an 'act of government' performed by the city acting as the state" with respect to municipal affairs and was therefore exempt under *Parker*. The Court disagreed, recapitulating the historic distinction between states and their subdivisions and holding that municipalities are not on similar sovereign footing.²⁵

The Court then considered the city's argument that the Colorado Home Rule Amendment constituted an "adequate state mandate" for its anticompetitive action because the amendment's guarantee of local autonomy fulfilled the requirement of a clearly articulated and affirmatively expressed state policy and because the state had contemplated that home rule cities would take the action complained of.²⁶

The Court determined that the state's position toward the city's ordinance was one of "precise neutrality":

A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as 'comprehended within the powers *granted*,' since the term, 'granted,' necessarily implies an affirmative addressing of the subject by the State.²⁷

Home rule, which allows each municipality to determine its own course with respect to regulating cable television, could not be said to be "a clearly articulated and affirmatively expressed state policy" to displace competition with regulation or monopoly public service in the cable television area. The Court therefore determined that the *Parker* exemption did not bar the district court's grant of injunctive relief against the city.

Because the only question presented to the Court was the availability of the state action exemption for home rule cities, the Court did not decide whether the city's ordinance actually violated the antitrust laws.²⁸ In addition, the Court expressly reserved the questions whether "certain activities, which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government," and what remedies would be appropriate against municipal officials.²⁹

25. *Id.* at 52-53.

26. *Id.* at 54-55.

27. *Id.* at 55 (emphasis in original).

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

29. *Id.* at 56 n.20. Potentially as important as the expressly reserved questions is another question that the Court did not mention. In *Midcal*, 445 U.S. at 105, the Court required that a state actively supervise private anticompetitive conduct engaged in pursuant to state policy in order for private parties to share the state's exemption from antitrust liability.

II. RAMIFICATIONS OF *BOULDER*

The full ramifications of the *Boulder* decision are not yet known and may not be realized for some time. Nevertheless, a variety of effects, some immediate and some more remote but no less important, can be predicted.

Section 4 of the Clayton Act provides that an injured plaintiff who proves a violation of the antitrust laws "shall recover" treble damages.³⁰ Although the Court, in *Lafayette* and *Boulder*, expressly reserved the question of subjecting local governmental entities and their officials to such awards,³¹ the mandatory nature of the statutory language creates the possibility that a municipality held liable for restraint of trade will be required to pay treble damages.³²

The impact of a treble damage award on a municipal treasury could be devastating.³³ In *Lafayette*, for example, Louisiana Power & Light Company sought damages of \$180 million, \$540 million after trebling.³⁴ Few local governmental entities could satisfy a judgment of such magnitude and remain solvent. Even if not actually bankrupted by such an award, a municipality's ability to provide essential services would be severely hindered by the allocation of other funds in the budget to satisfy an antitrust judgment. The brunt of such an award ultimately, of course, would fall on the municipality's taxpayers whose assessments must be increased in order

The Court in *Boulder* did not indicate whether state supervision was required or whether active municipal supervision of municipal action would suffice.

30. Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), provides in pertinent part: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

31. *Lafayette*, 435 U.S. at 401-02; *Boulder*, 455 U.S. at 56 n.20.

32. *Lafayette*, 435 U.S. at 440 n.30 (Stewart, J., dissenting), 442-43 (Blackmun, J., dissenting); *Boulder*, 455 U.S. at 65 n.2 (Rehnquist, J., dissenting). See also Note, *The Application of Antitrust Laws to Municipal Activities*, 79 COLUM. L. REV. 518, 544 nn.189-90 (1979) (arguing that the Supreme Court, nevertheless, can properly decide that treble damages are not applicable to municipalities); Comment, *City of Lafayette v. Louisiana Power & Light Co.: Will Municipal Antitrust Liability Doom Effective State-Local Government Relations?*, 36 WASH. & LEE L. REV. 129, 142 & n.88 (1979) (arguing that treble damage awards against cities were not contemplated by Congress which enacted the penalty section and should not be made until Congress expressly directs their imposition).

33. Cities are, of course, subject to damage awards and other penalties under a variety of statutes. See *Lafayette*, 435 U.S. at 400-02 & nn.19-21; Note, *supra* note 2, at 1581. However, potential antitrust damages are, in general, substantially greater than those damages which have been awarded against local governmental entities in other contexts. See *Lafayette*, 435 U.S. at 442 & n.1 (Blackmun, J., dissenting); Note, *supra* note 2, at 1581-82 & n.209.

34. *Lafayette*, 435 U.S. at 440 (Stewart, J., dissenting); *id.* at 442 n.1 (Blackmun, J., dissenting).

to provide sufficient revenue to run the government and to pay damages.³⁵

Although such damages would be severe, the realities of litigation are such that awards of treble damages may not be made for a number of years.³⁶ A more immediate and more important effect of the *Boulder* decision will be the substantially increased number of lawsuits which are likely to be brought against municipalities.³⁷ A variety of franchisers, developers, businesses and deliverers of municipal services are likely to sue when frustrated by regulation of their business³⁸ or the grant of an exclusive franchise to a competitor, whether for the provision of ambulance services,³⁹ or a pro shop concession at a municipal golf course.⁴⁰ Regardless of the outcome of such lawsuits, cities will have to expend a substantial amount of money and time in their defense rather than in providing services and government for their residents.⁴¹

Additionally, the examination, during litigation, of municipal actions according to antitrust standards may have undesirable consequences. Antitrust law does not now recognize as a defense the argument that competition poses a potential threat to public safety.⁴² A municipality's primary

35. See *id.* at 440-41 (Stewart, J., dissenting). See also Note, *supra* note 32, at 544 & n.188; *Local Government Antitrust Liability—The Boulder Decision: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. Aug. 31, 1982 (statement of John J. Dodds, Jr., Mayor of Mt. Pleasant on behalf of the Municipal Ass'n of South Carolina, and statement of Henry W. Underhill, Jr., City Attorney of Charlotte on behalf of the North Carolina League of Municipalities) [hereinafter cited as *Hearings*].

36. See, e.g., *Boulder*, 455 U.S. at 59-60 (Stevens, J., concurring).

37. *Hearings*, *supra* note 35, June 30, 1982 (statement of Howard Adler, Jr., and statement of Robert J. Logan, City Attorney of San Jose on behalf of National Institute of Municipal Law Officers, League of California Cities, and City of San Jose, and submitted Report of National Institute of Municipal Law Officers). See *id.*, Aug. 31, 1982 (statement of Tracy Stallings, Mayor, City of Carrollton, Georgia, and statement of Henry W. Underhill, Jr., City Attorney of Charlotte on behalf of North Carolina League of Municipalities).

38. E.g., *Hybud Equip. Corp. v. City of Akron*, 654 F.2d 1187 (6th Cir. 1981), *vacating and remanding*, 485 F. Supp. 671 (N.D. Ohio 1979) (for further consideration in light of *Boulder*, 455 U.S. 40 (1982)).

39. *Gold Cross Ambulance v. City of Kansas City*, 538 F. Supp. 956 (W.D. Mo. 1982) (suit filed before *Boulder* decided).

40. *Kurek v. Pleasure Driveway & Park Dist.*, 583 F.2d 378 (7th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979).

41. *Lafayette*, 435 U.S. at 440-41 & n.31 (Stewart, J., dissenting) (noting that legal fees to defend a current antitrust suit had been estimated at one-half million dollars per month by The New York Times, June 27, 1977, Sept. 4, 1977). See *Hearings*, *supra* note 35, Aug. 31, 1982 (statement of Kirkman Finlay, Sr., Mayor, Columbia, S.C., and statement of Tracy Stallings, and statement of Frank B. Gummey, III, on behalf of the Florida Municipal Attorneys' Ass'n, and statement of Henry W. Underhill, Jr.).

42. *Boulder*, 455 U.S. at 66 (Rehnquist, J., dissenting) (citing *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978)).

concern, however, is with public welfare and safety. The requirement that a city always act to further competition would substantially interfere with its ability effectively to carry out its responsibilities.⁴³

Positing the development of a defense for municipal actions on the ground that their public benefit outweighs their anticompetitive effect, however, raises the specter that a municipality's actions would be subjected to substantive review by federal courts in order to determine the reasonableness of the municipality's method of balancing competition and public welfare.⁴⁴ Such scrutiny poses dangers similar to the substantive due process review of state action conducted by federal courts during the *Lochner* era.⁴⁵ Moreover, substantive review by federal courts is simply inefficient. The federal courts are ill-equipped to respond to or make determinations about day-to-day local concerns.⁴⁶

Equally troubling as the prospect of treble damage awards and antitrust lawsuits against local governmental entities and their officials is the severe "chilling" effect that *Boulder* is likely to have on responsible local government action. Restrictive zoning, the requirement of business or occupational licenses, and grants of exclusive franchises to utility services are all common actions by municipalities designed to further the public welfare, yet all may subject municipalities to antitrust challenges. Consequently, municipal officials may hesitate to act even if the proposed actions are clearly in the best interest of the citizens.⁴⁷

Finally, the *Boulder* decision may have a severe adverse effect on the relationships of states with their political subdivisions. In recent years, municipalities have gradually acquired greater autonomy over local matters.⁴⁸ Although such autonomy has often been hard won,⁴⁹ it reflects an acknowledgement that local officials are more knowledgeable about, and

43. *Hearings, supra* note 35, June 30, 1982 (statement of Tom Moody, Mayor, Columbus, Ohio on behalf of the National League of Cities). See *Boulder*, 455 U.S. at 66 (Rehnquist, J., dissenting) ("Competition simply does not and cannot further the interests that lie behind most social welfare legislation.").

44. *Boulder*, 455 U.S. at 67-68 (Rehnquist, J., dissenting); *Lafayette*, 435 U.S. at 439 (Stewart, J., dissenting).

45. *Lochner v. New York*, 198 U.S. 45 (1905); see *Boulder*, 455 U.S. at 67 & n.3 (Rehnquist, J., dissenting).

46. *Hearings, supra* note 35, Aug. 31, 1982 (statement of Tracy Stallings).

47. *Boulder*, 455 U.S. at 60 (Rehnquist, J., dissenting); *Lafayette*, 435 U.S. at 439 (Stewart, J., dissenting); Note, *supra* note 2, at 1582; *Hearings, supra* note 35, Aug. 31, 1982 (statement of Tracy Stallings, and statement of Frank B. Gummey, III).

48. Note, *supra* note 32, at 528-29 & n.88; *Hearings, supra* note 35, Aug. 31, 1982 (statement of Tracy Stallings and statement of Frank B. Gummey, III).

49. *Boulder*, 455 U.S. at 71 & n.7 (Rehnquist, J., dissenting); *Hearings, supra* note 35, June 30, 1982 (statement of Tom Moody).

better able to act on, local matters than are state legislators.⁵⁰

Faced with *Boulder's* unanswered questions, however, local governmental entities and officials who wish to ensure that their actions will not be held to violate the antitrust laws must seek specific authorization for such actions from the state.⁵¹ Such a requirement places municipalities in a difficult position. The limited time during which many state legislatures are in session⁵² and the variety of issues with which legislatures must deal during their sessions could make timely authorization of municipal action by the state almost impossible.⁵³ In addition, the nature of the legislative process may demand compromises or concessions from municipalities in order to obtain authorization, thereby reversing the beneficial trend of increased municipal autonomy.

The situation is also unsatisfactory from the states' point of view: home rule or a general enabling act frees states from concern with a myriad of local matters.⁵⁴ The necessity, after *Boulder*, of considering and acting on a variety of specific requests from different municipalities could greatly hamper the states' ability to deal effectively with matters of regional or

50. Note, *supra* note 2, at 1559-60 & n.78; *Hearings, supra* note 35, June 30, 1982 (statement of Robert J. Logan); *id.* Aug. 31, 1982 (statement of Tracy Stallings and statement of Frank B. Gummey, III).

51. *Boulder*, 455 U.S. at 71 (Rehnquist, J., dissenting); *Lafayette*, 435 U.S. at 438 (Stewart, J., dissenting); Comment, *supra* note 32, at 147, 149.

52. Some state legislatures meet only biannually, see *Hearings, supra* note 35, June 30, 1982 (statement of Janet Gray Hayes, Mayor of San Jose, Cal. on behalf of the United States Conference of Mayors); others sit for only 90 days each year, see MD. CONST. art. III, § 15.

53. The *Lafayette* Court stated that, as of the 1972 Census of Governments, there were 38,552 counties, municipalities and townships in the United States. 435 U.S. at 407-08 & n.34, this is an average of more than 730 per state. If even a fraction of those local governmental entities requests state legislation dealing with particular circumstances, the state legislature's consideration of those requests along with usual state business could require more time than is allotted for the state legislature's session. See also *Hearings, supra* note 35, June 30, 1982 (statement of Janet Gray Hayes and statement of Hugh Allen, Jr., Mayor of Demopolis, Ala.).

54. See *Lafayette*, 435 U.S. at 435 (Stewart, J., dissenting); Note, *supra* note 32, at 532 & n.109; Comment, *supra* note 32, at 147; *Hearings, supra* note 35, June 30, 1982 (statement of Robert J. Logan and statement of Hugh Allen, Jr.).

Indeed, in some states where home rule exists, the state legislature is forbidden to act on matters of a local nature. In such states the legislature will be unable to provide any protection for a municipality carrying out its normal governmental functions. See *Boulder*, 455 U.S. at 71 (Rehnquist, J., dissenting); Note, *supra* note 32, at 532 n.108. See also *Hearings, supra* note 35, Aug. 31, 1982 (statement of Roy D. Bates, City Attorney, Columbia, S.C.). This dilemma could be solved by repealing or abolishing home rule, but such a course would reverse the trend toward greater local autonomy and lead to grave inefficiencies in government. See *Boulder*, 455 U.S. at 71 (Rehnquist, J., dissenting); *Lafayette*, 435 U.S. at 435 (Stewart, J., dissenting); Comment, *supra* note 32, at 149; *Hearings, supra* note 35, June 30, 1982 (statement of Robert J. Logan and statement of Tom Moody); *id.*, Aug. 31, 1982 (statement of Kirkman Finlay, Jr. and statement of Frank B. Gummey, III).

statewide concern. By creating the necessity for states to focus on local concerns, *Boulder* interferes with the states' decisions regarding the internal delegation and assignment of governmental responsibility.⁵⁵

As is evident from the foregoing discussion, the principal effect of *Boulder* now, and for some time to come, is uncertainty—as to the type of state authorization needed to immunize municipal actions, as to the availability of a “public interest” defense, and as to the applicability of treble damages. It is this uncertainty, the inability of municipalities to predict the consequences of specific acts, that may have the most detrimental effect on responsible local government and effective state-local relations.

III. LEGISLATIVE SOLUTIONS

In *Boulder*'s wake, municipalities' first need is to develop sound decisionmaking and litigation strategies to minimize lawsuits and their effects. However, the only long-term solution to *Boulder*'s many problems will have to come through legislation.⁵⁶

There are two legislative levels that can provide refuge to local governments from the dangers they face from *Boulder*'s storm. The Supreme Court, both in *Boulder* and in *Lafayette*, made clear that state legislatures could exempt local governments from antitrust liability for their governmental activities by making “clearly articulated and affirmatively expressed” delegations of state authority.⁵⁷ The Court thus invited states to legislate so as to protect their subdivisions.

A question remains, however, as to the type of legislation which will be effective to protect local governmental entities. *Boulder* made clear that omnibus home rule laws will not suffice.⁵⁸ Similarly, general enabling acts will fall short of the test. Typically, such statutes contain very broad language leaving to municipalities the choice of restricting competition, by regulation or monopoly service, or some other course best serves local citizens.⁵⁹ As with home rule powers, the municipality's ability to choose competition or regulation would probably be held to evidence the lack of a clearly articulated and affirmatively expressed state policy.

In fact, after *Boulder*, there is serious question whether any one law can provide automatic protection for municipalities. Some states, such as Col-

55. *Boulder*, 455 U.S. at 71 (Rehnquist, J., dissenting); *Lafayette*, 435 U.S. at 438 (Stewart, J., dissenting). See *Hearings, supra*, note 35, June 30, 1982 (statement of Robert J. Logan).

56. See generally *Hearings, supra* note 35.

57. See generally *Boulder*, 455 U.S. at 52; *Lafayette*, 435 U.S. at 413-15.

58. *Boulder*, 455 U.S. at 55.

59. Note, *supra* note 32, at 528-29 & nn.90-92.

orado, have introduced bills that purport to provide blanket immunity for their subdivisions. While such laws would affirmatively express a state policy to *allow* regulation to displace competition, they still permit local governments to choose the circumstances when regulation is appropriate. Because it is doubtful that a state actually intends to displace competition in every arena in which a municipality might act, it is questionable whether such a law would be found to "clearly . . . [articulate] and affirmatively . . . [express] state policy" to displace competition in any particular area.⁶⁰ Moreover, a statute which purports to grant blanket immunity to a state's municipalities could run afoul of the *Parker* admonition that a state may not immunize private conduct which violates the antitrust laws merely by authorizing it.⁶¹

It seems possible, therefore, that only specific state enactments authorizing municipalities to regulate or monopolize the particular area in which a municipality intends to act will suffice as protection against antitrust challenge.⁶² As discussed above, such an approach presents numerous procedural difficulties and is likely to affect adversely state-municipal relations. Therefore, the state legislative approach presents almost as many problems as it solves.

A second and better legislative solution is a federal one—an amendment to the antitrust laws. This approach would have the advantage of providing a uniform rule throughout the country, of ending the uncertainty now facing municipalities in every state, of preventing needless friction between states and their subdivisions, and of avoiding the problems likely to arise if municipalities seek piecemeal authorization from the states.

The most effective amendment would simply provide *Parker*-type immunity for local governments. Such legislation would exempt from anti-

60. See, e.g., *Boulder*, 455 U.S. at 52.

61. *Parker*, 317 U.S. at 351. See Note, *supra* note 2, at 1551 n.26; Note, *supra* note 32, at 529-30 & n.95.

62. See, e.g., *Gold Cross Ambulance v. City of Kansas City*, 538 F. Supp. 956 (W.D. Mo. 1982) (Missouri statute authorizing counties or cities to own ambulance or to contract with one or more entities to furnish emergency service, and to establish rules and regulations governing such service, sufficient to express state policy concerning ambulance service so as to exempt Kansas City's actions in establishing a single ambulance operator system from antitrust scrutiny). See also Note, *supra* note 32, at 534 & n.124.

Hopefully, courts will recognize that a state may affirmatively express its policies concerning competition other than through legislative enactments. For example, the Supreme Court has already found that a state's highest court is capable of expressing a state policy to displace competition with regulation. *E.g.*, *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977). Similarly, a state agency vested with regulatory power over a specific field, which authorizes municipal regulation within the field, should be found to express state policy to replace competition with regulation. *Cf.* Note, *supra* note 32, at 534 & n.124.

trust scrutiny actions by a local governmental entity if that entity established an affirmative policy of substituting regulation or monopoly public service for competition, actively supervised the regulated activity, and acted within its authority under state law.⁶³ Such an approach has been criticized on the ground that it might exempt from scrutiny some actions taken by a municipality purely to increase its own revenues from a proprietary activity.⁶⁴ However, local governments and officials are subject to a variety of federal and state laws designed to prevent or remedy abuse of power. The addition of antitrust liability would add little real protection to that provided by these laws.⁶⁵ It would, however, as it has already done, subject municipalities to a substantially increased number of law suits. Establishing a *Parker*-type immunity for municipalities, unlike other legislative solutions, would limit the litigation to which local governments would be subjected, providing necessary freedom of operation, and would avoid the danger of unchecked substantive review of municipal enactments by federal courts.

Should a total *Parker* exemption not be feasible, federal legislation could take a number of other forms. One possibility is an amendment to the Clayton Act expressly providing that treble damages are not available against local government entities.⁶⁶ Such a law would avoid the difficulties inherent in providing a defense grounded in the governmental nature of the challenged municipal action.⁶⁷ On the other hand, even single dam-

63. *Hearings, supra* note 35, June 30, 1982 (statement of Tom Moody).

64. *See Note, supra* note 32, at 538.

65. A short listing of those laws would include federal protections of due process and equal protection. This, of course, includes actions under section 1983 of the Civil Rights Act, and both federal and state requirements concerning open meetings, freedom of information, public disclosure of the financial interests of public officials, and anticorruption and conflict of interest laws.

Hearings, supra, note 35, June 30, 1982 (statement of Janet Gray Hayes).

66. *See Comment, supra* note 32, at 148-49 (arguing that Congress should reassess its prior reluctance to remove treble damage liability in certain cases, but that, because the Congress which enacted the treble damage penalty probably did not consider its impact on municipalities, treble damages should not now be awarded against municipalities absent express congressional statement that they should be so applied); *Note, supra* note 32, at 544 & nn.190, 193 (stating that the language of the Sherman Act offers no indication that municipalities are not to be subject to treble damages, but arguing that, because the framers of the Sherman Act did not foresee municipal defendants, the Court can judicially create an exception for local governmental entities). *Cf. Lafayette*, 435 U.S. at 443 n.2 (Blackmun, J., dissenting) (listing instances when Congress has rejected legislation that would make treble damages discretionary).

67. *See infra* notes 68-71 and accompanying text. *See also* Areeda, *Antitrust Immunity for "State Action" after Lafayette*, 95 HARV. L. REV. 435, 441, 443 (1981); *Note, supra* note 32, at 524-27 (discussing difficulty of drawing proprietary-governmental distinction).

ages in an antitrust suit could be devastating to a municipal treasury,⁶⁸ and would be entirely inappropriate if the anticompetitive governmental action had been taken in furtherance of the public welfare.

A second type of law would establish a governmental interest defense for local governments, should one not be developed by the courts themselves.⁶⁹ Under such a rule, a municipality would not be liable for an allegedly anticompetitive action if it could show a competing governmental interest, that the means chosen to achieve the end did not have an unreasonable anticompetitive impact, and that the means selected substantially furthered the asserted governmental interest.

Such a law would allow municipalities to avoid liability altogether where they have acted governmentally and in the public welfare, but would subject them to liability when their actions either were taken purely for private benefit or were unnecessarily anticompetitive.⁷⁰ It would, however, inevitably involve federal court review of local legislation in order to determine whether an action was "unreasonably" anticompetitive or "substantially furthered" the asserted governmental interest.⁷¹ Although federal courts have had experience conducting similar reviews in the context of equal protection challenges to state legislation, a defense that requires such review presents a danger that courts may base their judgment of the legality of municipal action on their view of the wisdom of an ordinance.⁷² Moreover, while the first proposal would limit damage awards against municipalities, and the second would provide them with an additional defense, neither would stem the flow of litigation against municipalities or could be asserted early enough in a lawsuit to alleviate the resulting diversion of time and money from governmental purposes.

The achievement of a federal solution to the problems created by *Boulder* is not without its own procedural difficulties. Congress, like the state legislatures, is confronted with numerous issues which demand its attention. Educating Congress to the problem and obtaining action on a pro-

68. Single damages sought in *Lafayette* were \$180 million. 435 U.S. at 440 (Stewart, J., dissenting). See also Comment, *supra* note 32, at 142 n.88 (discussion of potentially devastating class action judgments).

69. Note, *supra* note 32, at 539-41. The Court in *Boulder*, 455 U.S. at 56 n.20, reserved the question whether "certain activities, which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government." With vigorous advocacy by municipalities, lower courts may take their cue from the above-cited footnote and develop a special "rule of reason" for local governments which would require weighing the public interest in displacing competition in a particular situation against the general policy favoring competition.

70. Note, *supra* note 32, at 539-41.

71. *Id.* at 540-41 & n.168; see also *supra* note 44 and accompanying text.

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

posed solution may take a substantial amount of time. By the time any action occurs, the issue of municipal liability may have been disparately addressed by a dozen or more federal courts or state legislatures, resulting in different laws governing the same conduct. And, as in the state legislatures, opponents of local governmental authority may use the opportunity presented by efforts to enact immunizing legislation to seek concessions or compromises from cities and counties. That danger is somewhat ameliorated in the federal arena since the state is not the ultimate decisionmaker there as it is in the state context. Nevertheless, achieving a federal solution will not be easy.

IV. CONCLUSION

Local governmental entities have been thrust into a position of uncertainty and jeopardy with respect to the exercise of their duties and powers after the Supreme Court's decision in *Boulder*. The threat of treble damages, the prospect of extensive litigation, and the resulting uncertainty as to the antitrust risks of operating local governments may paralyze effective government and adversely alter relationships with states.

States can, under *Boulder*, protect their political subdivisions from antitrust liability by specific legislation, but the process of obtaining such legislation for each action which a local government wishes to take may impair effective government at both state and local levels and upset the current balance between state and local regulation.

An amendment to the federal antitrust laws to grant municipalities *Parker*-type immunity would provide a uniform rule and remove the uncertainty currently facing local governments. Other types of federal legislation have been suggested and would provide some relief. *Parker*-type immunity for local governmental entities, however, would reduce litigation against municipalities as well as limit the damages to which they might be subject. Such a law would comport with the modern trend of government authority by restoring to local governmental entities their ability to govern effectively for the public welfare. To prevent a patchwork of different rules arising in various courts and state legislatures, such an amendment should be proposed and enacted quickly by Congress.

