Antitrust Immunity for Local Governments: Maryland's Response in the Wake of Boulder

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Note

ANTITRUST IMMUNITY FOR LOCAL GOVERNMENTS:
MARYLAND'S RESPONSE IN THE
WAKE OF BOULDER

With two decisions, City of Lafayette v. Louisiana Power and Light Corp.¹ and Community Communications Co. v. City of Boulder,² the Supreme Court sent shock waves through state and local governments.³ These decisions dispelled the belief⁴ that local governments had the same degree of antitrust⁵ immunity as state governments. Suddenly, local governments were subject to the possibility of lengthy antitrust trials and treble damage awards. This Note will review the history of the state action doctrine,⁶ the decisions of the Supreme Court that held this doctrine inapplicable to local government actions, and Maryland’s attempt to protect its localities from antitrust liability.

I. STATE ACTION DOCTRINE

The state action doctrine was first articulated in Parker v. Brown.⁷ In Parker, a California state statute⁸ authorized state officials

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² 455 U.S. 40 (1982).
³ As used in this paper, the term local government refers to both county and municipal governments.
⁴ This belief probably stemmed from overly broad statements made by the Supreme Court in previous decisions. See, e.g., Parker v. Brown, 317 U.S. 341, 351 (1943) ("[The purpose of the Sherman Act] was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations . . . .") (emphasis added).
⁶ The state action doctrine provides that the Sherman Act is inapplicable when states are acting pursuant to their sovereign capacity. Thus, when state regulation supplants the competitive market and regulates it intensively, the antitrust laws do not apply. Parker, 317 U.S. 341.
⁷ Id. For further discussion of Parker, see Easterbrook, Antitrust and the Economics of Federalism, 26 J. LAW AND ECON. 23 (1983); Massella, The Antitrust State Action Exemption, 107 PUB. UTIL. FOR. 50 (January 15, 1981); Shenefield, The Parker v. Brown State Action Doctrine and the Federalism of Antitrust, 51 ANTITRUST L.J. 337 (1982); Slater, Antitrust and
to establish marketing programs for agricultural commodities produced in the state. The defendants were the California Director of Agriculture and other public officials required by the statute to administer a program for the marketing of the 1940 raisin crop. The express purpose of the program was to restrict competition among growers and maintain prices in the distribution of raisins to packers. The plaintiff, a producer and packer of raisins, alleged that this program prevented him from freely marketing his crop in interstate commerce.

The Court, while noting that a comparable program organized by private parties would violate the antitrust laws, held that the defendants had not violated the Sherman Act because the Act was not intended to restrain a state, its officers or agents from activities directed by their legislature. The Court found nothing in the language of the Sherman Act or in its history suggesting that the Act proscribed anticompetitive state action. This decision, based on


9. Specifically, the statute authorized the creation of a Prorate Advisory Commission (the “Commission”) and a Director of Agriculture (the “Director”). Upon the petition of ten producers, the Commission would hold a public hearing and make economic findings showing that the institution of a program was necessary to meet the purposes of the Act. The Director, with the approval of the Commission, would then select a program committee that would formulate a marketing program for the commodity subject to the Commission’s approval. If the program was approved by a public hearing, the last step in the process would be to hold a referendum on the program. If 65% of the producers approved of the program it would be put into effect. Parker, 317 U.S. at 346-47.

10. 317 U.S. at 346. The Act stated that it was designed to “ensure the agricultural wealth of the State” and “to prevent economic waste in the marketing of agricultural crops.” Id.

11. The program for marketing raisins became effective on September 7, 1940. Under the program, producers were permitted to sell only 30% of their raisins through ordinary commercial channels and the remaining product was controlled by the program committee. The plaintiff had entered into contracts to sell his raisins before the adoption of the program. He alleged that the Commission’s enforcement of the program would prevent him from fulfilling these contracts. Parker, 317 U.S. at 346-47. The Act provided for both criminal and civil penalties in the event a producer violated the requirements of the program. Id. at 347.

12. Id. at 350.

13. Id. at 351. The Court reached this conclusion despite the fact that it is the producers, not the State, who petition for the program and that these same producers approve the program by referendum. Id. at 352.

14. Id. Furthermore, the Court found nothing in either the Sherman Act or its history suggesting that the Act did not proscribe anticompetitive state conduct; “[t]he Sherman Act makes no mention of the state as such . . . .” Id. at 351.
the concept of federalism, emphasized that in a dual system of government such as ours, which recognizes state sovereignty, "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."\textsuperscript{15}

While the \textit{Parker} decision recognized that the Sherman Act was inapplicable to state action, the Court did not define what constitutes state action for Sherman Act purposes, nor did it identify which officials would be considered state actors. These questions remained unanswered for thirty years until, in a flurry of antitrust rulings, the Supreme Court defined and narrowed the state action doctrine.

\section*{II. Narrowing the State Action Doctrine}

Beginning in the mid-1970's, the Supreme Court rendered a series of decisions that narrowed the application of the state action doctrine. The first of these decisions was \textit{Goldfarb v. Virginia State Bar},\textsuperscript{16} in which the Court held that a local county bar association's publication of a minimum fee schedule for lawyers was not exempt from the Sherman Act, even though the schedule was enforced by the Virginia State Bar.\textsuperscript{17} The fee schedule at issue was published by the Fairfax County Bar Association. The County Bar Association had no enforcement powers; the fee schedule was enforced by the Virginia State Bar. The Virginia State Bar was the administrative agency through which the Virginia Supreme Court regulated the practice of law.\textsuperscript{18}

The Virginia State Bar, a state agency by law, contended that issuing fee schedule reports and ethical opinions condoning fee schedules was its method of implementing the fee provisions of the ethical codes adopted by the Virginia Supreme Court.\textsuperscript{19} The County Bar Association, a private entity, argued that the ethical codes and activities of the Virginia State Bar "prompted" it to issue

\textsuperscript{15} Id.


\textsuperscript{17} \textit{Goldfarb}, 421 U.S. at 791. The case arose when the petitioner unsuccessfully tried to find an attorney who would conduct a title examination for less than the fee prescribed in the minimum-fee schedule published by the Fairfax County Bar Association. \textit{Id.} at 776. The petitioner brought suit alleging that the minimum fee schedule and its enforcement mechanism was a violation of Section 1 of the Sherman Act. \textit{Id.} at 778.

\textsuperscript{18} \textit{Id.} at 776. The County Bar Association was a voluntary organization, while membership in the State Bar was mandatory in order to practice law in Virginia. \textit{Id.}

\textsuperscript{19} \textit{Id.} at 789-90.
fee schedules. Based upon this assertion, the County Bar Association maintained that its actions were state action for Sherman Act purposes and therefore protected by the state action doctrine. The Court rejected this assertion, holding that anticompetitive activity must be "compelled" by the state acting as sovereign in order for the activity to fall within the state action doctrine. The Court found that Virginia did not require either the State Bar or the County Bar Association to engage in anticompetitive activities. There was no Virginia statute regarding fees, and the Virginia Supreme Court did not direct either of the parties to enact fee schedules, nor did it approve the State Bar's ethical opinions. Since both the State Bar's and the County Bar Association's activities were only "prompted" by the state, those activities were not protected by the state action doctrine.

In Goldfarb, the dispositive fact for the Court was that the Virginia Supreme Court's ethical code did not direct, nor require, the State Bar or the County Bar Association to establish or enforce minimum fee schedules. The State Bar, according to the Court, was not shielded from antitrust liability simply because it was a state agency for some limited purposes. By voluntarily joining in the private anticompetitive conduct of the County Bar Association, the State Bar became subject to the Sherman Antitrust requirements. Hence, in the Court's view, the County Bar Association's challenged activity could not be considered state action.

Two years later, the Supreme Court was again faced with an antitrust claim against a state bar in Bates v. State Bar of Arizona. In Bates, the Court held that the Arizona Bar's disciplinary rules restricting lawyers from advertising did not violate the Sherman Act. The fact that these rules were expressly adopted and enforced by

20. Id. at 790.
21. Id.
22. Id. at 791.
23. Id. at 790-91.
24. Id. at 791.
25. Id. at 791-92 (emphasis added). This action was voluntary because the Virginia Supreme Court did not require the State Bar to participate in such activities. See supra note 23 and accompanying text.
26. The Court reached this conclusion despite the fact that the Virginia State Bar published reports condoning fee schedules and also issued opinions indicating that the fee schedules could not be ignored. 421 U.S. at 776-77.
28. The attorneys conceded (Bates, 433 U.S. at 355) that they had violated Discipli-
the Arizona Supreme Court\textsuperscript{29} distinguished \textit{Bates} from \textit{Goldfarb}. In \textit{Goldfarb}, the Virginia Supreme Court did not expressly adopt the State Bar's minimum fee schedule.\textsuperscript{30} The \textit{Bates} court found that the disciplinary rules reflected a clearly and affirmatively expressed state policy that was actively supervised by the state.\textsuperscript{31} Thus, the rules were exempt from any Sherman Act claims.\textsuperscript{32}

The \textit{Goldfarb} and \textit{Bates} decisions failed to fully clarify the state action exemption. Within a year the Court addressed the issue once again. In \textit{Motor Vehicle Board of California v. Orrin W. Fox Co.},\textsuperscript{33} the Supreme Court upheld the California Automobile Franchise Act (the Act), which required motor vehicle manufacturers to "secure the approval of the California New Motor Vehicle Board before

\begin{quote}
A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.
\end{quote}

The appellants placed an advertisement in a daily newspaper of general circulation. The advertisement stated that the appellants were offering "legal services" at "very reasonable fees" and listed their fees for certain services. \textit{Bates}, 433 U.S. at 354.

\begin{itemize}
\item \textit{Goldfarb}, 421 U.S. at 791. The Court also distinguished \textit{Cantor v. Detroit Editor Co.}, 428 U.S. 579 (1976). In \textit{Cantor} the defendant, an electric utility company, distributed light bulbs to its residential customers without charge. The cost of this program was included in its state-regulated utility rates. The plaintiff, a retailer who sold light bulbs, claimed the utility was using its monopoly power in the distribution of electricity to restrain competition in the sale of light bulbs. According to the \textit{Bates} court, the \textit{Cantor} opinion held "that the utility could not immunize itself from the Sherman Act by embodying its challenged practices in a tariff approved by a state commission." \textit{Bates}, 433 U.S. at 360.

The Court found \textit{Cantor} distinguishable from \textit{Bates} on three grounds. First, \textit{Cantor} was a suit against a private party; the Court stated that it "would have been an entirely different case if the claim had been directed against a public official or public agency." 433 U.S. at 361. Second, in \textit{Cantor} the State had no independent regulatory interest in the market for light bulbs. \textit{Bates}, on the other hand, involved regulation of bar activities, which were within the State's police powers. \textit{Id.} at 361-62. Finally, "the ... program in \textit{Cantor} was [begun] by the utility with only the acquiescence of the state regulatory commission." \textit{Id.} at 362. By contrast, the disciplinary rules at issue in \textit{Bates} clearly reflected the State's policy regarding professional behavior. \textit{Id.}

\begin{itemize}
\item 433 U.S. at 362.
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\item 32. \textit{Id.} at 363. \textit{Bates} demonstrates the possible dangers arising when a state succeeds with a "state action" defense in antitrust suits. Once state action is found, the activity in question becomes subject to the fourteenth amendment. Thus, in \textit{Bates}, because the disciplinary rules were state action regulating speech, they were subject to the first amendment. The Court found that a total ban on attorney advertising violated the first amendment: the disciplinary rule, therefore, was unconstitutional. \textit{Id.} at 384.
\end{itemize}

\begin{itemize}
\item 33. 439 U.S. 96 (1978).
\end{itemize}
opening a retail motor vehicle dealership within the market area of an existing franchise if . . . that existing franchise protested the establishment of a competing dealership." 34 The Act provided that the state would hold a hearing if an automobile franchisee protested the establishment or relocation of the competing dealership. 35 The appellees contended that the state scheme gave effect to privately initiated restraints on trade, since the Act allowed competing dealers to delay the establishment of new automobile dealerships. 36 The appellees perceived the Act as an attempt to immunize private conduct that violated the antitrust laws. 37 The Court found that the Act was "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." 38 In view of the state's active role, particularly when existing franchisees invoked their statutory right to protest, the Court held that the program was not subject to the Sherman Act. 39

The state action doctrine was finally crystalized into a two-part test in California Retail Liquor Dealers Association v. Midcal Aluminum, Inc. 40 In that case, the California legislature passed a statute designed to implement a wine pricing system. The statute required that all wine producers and wholesalers file fair trade contracts or price schedules with the state. 41 A wholesaler selling below the es-

34. Id. at 98. The Court noted that these regulations were actually passed to promote competition. The Act was enacted to protect retail dealers from perceived abusive and oppressive acts by the manufacturers. Id. at 100-01. The Act was designed, inter alia, to prevent manufacturers from adding dealerships to the market areas of its existing franchisees in circumstances where "intrabrand competition" effectively would injure both existing franchisees and the public interest. Id. at 102.

35. Id. at 103.
36. Id. at 109.
37. Id.
38. Id. The Court found that the Act did not lose this exemption simply because existing dealers initially invoked the review of the Board through their protests. Id. at 110. The Court did note, however, that dealers who press sham protests in an effort to delay the establishment of competing dealerships would be subject to antitrust suits. Id. at 110 n.15.
39. Id. at 110-11.
41. 445 U.S. at 99.
tablished prices faced fines or license suspension or revocation. The state had no control over the wine prices and did not review the reasonableness of these prices.

The Court held that the statutory wine pricing system amounted to illegal resale price maintenance, thus violating the Sherman Act. In reaching this result, the Court stated that a two-part test must be met to qualify for state action immunity: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." The first part of the test was met since the California legislature expressly stated that its purpose was to permit resale price maintenance. Yet the pricing scheme itself failed the supervisory requirement. Under the pricing system "the State simply authoriz[ed] price setting and enforc[ed] the prices established by private parties." The state did not establish prices, review the reasonableness of the prices, or engage in any "pointed re-examination" of the program. This system left the wine producers with the power to prevent price competition by determining the prices to be charged by wholesalers. The Court determined that the state's supervisory involvement in the price-setting program was insufficient to establish state action immunity. Thus, the program was not entitled to state action immunity. It is against this background that the Court decided the first antitrust case to involve local government defendants, City of Lafayette v. Louisiana Power and Light Co.

42. Id. at 100.
43. Id. at 99.
44. Id. at 103. A resale price maintenance agreement is an agreement between a manufacturer and retailer in which the latter cannot resell the manufacturer's product below a specified minimum price. See U.S. v. Parke, Davis & Co., 362 U.S. 29 (1960); U.S. v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944).
46. 445 U.S. at 105.
47. Id.
48. Id.
49. Id. at 105-06.
50. Id. at 103.
51. Id. at 105-06. The Court distinguished the program issue in Parker, supra notes 7-15, because of the extensive official oversight inherent in that program. Without such oversight, the result could have been different. 445 U.S. at 104. The Court noted that the state action role also distinguished Fox from the problems of the statute at issue in Midcal. Id. at 105.
52. 445 U.S. at 105.
Lafayette involved a group of municipal defendants who were authorized by state law to own and operate electric utility systems, both within and beyond their city limits. The municipalities competed in areas beyond their city limits with Louisiana Power and Light Company (LP&L), a privately owned electric utility.\(^{54}\) The municipalities filed suit against LP&L, among others, alleging that: LP&L monopolized the generation, transmission, and distribution of electric power by preventing the construction and operation of competing utility systems; by foreclosing supplies from markets served by defendants; by engaging in boycotts; and by utilizing sham litigation and other improper means to prevent the financing of construction projects beneficial to the municipalities.\(^{55}\) LP&L counterclaimed against the municipalities, seeking damages and injunctive relief for alleged antitrust offenses. These alleged offenses included: conspiring to engage in sham litigation; using covenants to eliminate competition within the municipal boundaries; using long-term supply agreements to exclude competition in certain markets; and displacing LP&L by requiring the utility's customers to purchase electricity from the municipalities in order to maintain receipt of water and gas service.\(^{56}\)

The municipalities "moved to dismiss the counterclaim on the ground that, as cities and political subdivisions of the State of Louisiana, the 'state action' doctrine . . . rendered federal antitrust laws inapplicable to them."\(^{57}\) The Court, in a plurality decision, held that municipalities, simply by their status as such, are not protected by the Parker doctrine.\(^{58}\) A majority of the Court agreed only that

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54. 435 U.S. at 391-92.
55. Id. at 392 n.5.
56. Id. at 392 n.6.
57. Id. at 392.
58. Id. at 408-11 (Brennan, J., Marshall, J., Powell, J., and Stevens, J., plurality). The result in Lafayette appears to contradict the decision in Avery v. Midland County, 390 U.S. 474 (1968). In Avery, the Supreme Court held that the actions of local governments are actions of the state for purposes of the fourteenth amendment. The Court did not
Congress did not intend to exempt local governments *per se* from antitrust laws.\(^5^9\)

The plurality in *Lafayette* gave two reasons why local governments should not be granted the same state action immunity enjoyed by state governments. First, municipal decisions might express only "purely parochial interests" rather than state policy.\(^6^0\) Second, cities might disregard possible adverse impacts on consumers beyond municipal boundaries, who lack direct recourse through the political process.\(^6^1\) The Court found that *Parker* "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."\(^6^2\)

The plurality made it clear that a local government would not be required to point to a "specific detailed legislative authorization" in order to receive state action immunity.\(^6^3\) The requisite "state action" would be demonstrated if the "legislature contemplated the kind of action complained of."\(^6^4\) While the plurality made clear
what was not required for state action protection, it failed to provide
guidance as to the type of state expression which would satisfy the
"contemplated" standard.

Many states believed that by granting, or having already
granted, home rule\textsuperscript{65} powers to local governments, these govern-
ments would be protected by state action immunity.\textsuperscript{66} This belief
stemmed from the nature of home rule powers. When a municipa-
licity is granted home rule powers it has the right to enact legislation
in specifically enumerated areas, while the state gives up its right to
govern only in those enumerated areas. However, this belief of mu-
nicipal immunity resulting from home rule powers was proven in-
correct when the Supreme Court in \textit{Community Communications Co. v. City of Boulder}\textsuperscript{67} held that granting home rule powers was not
even enough to give a local government state action immunity.\textsuperscript{68}

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\textsuperscript{65} Home rule "is the power granted to local units of government to frame, adopt,
and amend charters for their government and to exercise powers of local self-govern-
ment, subject to the constitution and general laws of the state." \textsc{C. Adrian, State and
Local Governments} 127 (2d ed. 1967).

\textsuperscript{66} The assertion that many states believed that the granting of home rule powers
satisfied the "contemplated" standard is derived from a negative implication. By 1978,
34 states had some form of home rule powers and at least one state, Delaware,
granted its political subdivisions home rule powers after the \textit{Lafayette} decision. \textsc{Del.
Code Ann.} tit. 22, \textsection 802 (1981). \textsc{1 C. Antieau, Municipal Corporation Law \textsection 3.00
(1986).} After the Supreme Court's decision in \textit{Lafayette}, no state took any action to pro-
tect its subdivisions from antitrust liability. One implication of this failure to act is that
the states believed their subdivisions were already protected.

\textsuperscript{67} 455 U.S. 40 (1982). For articles discussing state and local governments' reaction
to \textit{Boulder} and the decision's implications, see Boyle, \textsc{Dr. Boulder Love; or, How I Learned to
Stop Worrying and Love Local Antitrust Liability}, \textsc{11 Pepperdine L. Rev.} 635 (1984); \textsc{Cirace,
An Economic Analysis of the "State-Municipal Action" Antitrust Cases}, \textsc{61 Tex. L. Rev.} 481
(1982); \textsc{Civiletti, The Fallout from Community Communications Co. v. City of Boulder: Prospects
for a Legislative Solution}, \textsc{32 Cath. U.L. Rev.} 379 (1983); \textsc{Fallon, Municipal Government Ex-
emption from Federal Antitrust Laws: An Examination of the Midcal Test After Boulder}, \textsc{40 Wash.
& Lee L. Rev.} 143 (1983); \textsc{Lerner, Community Communications Co. v. City of Boulder: Forcing
a Reorganization of the State Municipality Relationship Through the Antitrust Laws}, \textsc{60 U. Det. J.
Urb. L.} 241 (1983); \textsc{Page, After Boulder: Some Practical Advice for Avoiding Antitrust Liability},
\textsc{9 Current Mun. Probs.} 264 (1983); \textsc{Sentell, The United States Supreme Court as Home Rule
Wrecker}, \textsc{34 Mercer L. Rev.} 363 (1982); \textsc{Note, Antitrust: The Parker Doctrine and Home Rule
Municipalities}, \textsc{22 Washburn L.J.} 534 (1983); \textsc{Note, Community Communications Co. v. City of
Boulder: The Emasculation of Municipal Immunity from Sherman Act Liability}, \textsc{32 Cath. U.L.
Rev.} 413 (1983); \textsc{Note, Home Rule and the Sherman Act After Boulder: Cities Between a Rock
and a Hard Place}, \textsc{49 Brooklyn L. Rev.} 259 (1983).

\textsuperscript{68} This result should not have come as a complete surprise. The \textit{Boulder} decision
was foreshadowed in Justice Stewart's dissent in \textit{Lafayette}. One of Justice Stewart's ob-
jections to the plurality opinion was that the plurality failed to make clear if a local gov-
ernment's action would be immune from antitrust liability if the state merely
"authorized" the local government's activities. Thus, according to Justice Stewart, "a
municipality that is merely 'authorized'... to provide a monopoly service... cannot be
certain it will not be subject to antitrust liability...." 435 U.S. at 435.
In 1964, the Boulder City Council enacted an ordinance granting Colorado Televents, Inc., a twenty-year revocable nonexclusive permit to conduct a cable television business within the city limits.69 This permit was assigned to the Community Communications Company (CCC) in 1966.70 In May, 1979, CCC informed Boulder that it planned to expand its business into other areas of the city. In July, Boulder Communications Company informed Boulder of its interest in obtaining a permit to provide competing cable television services throughout the city. The city council responded by announcing a three-month moratorium that prohibited CCC from expanding its business into other areas of the city while the council drafted a model cable television ordinance. The council claimed that CCC's continued expansion during the drafting of the ordinance would discourage potential competitors from entering the market.71

CCC filed suit against Boulder, seeking a preliminary injunction to prevent the moratorium from taking effect. It alleged that the moratorium was in violation of Section 1 of the Sherman Act. Boulder responded that its moratorium was protected from antitrust claims by the state action doctrine.72

The district court found that the regulation of cable television was beyond Boulder's home rule powers and, further, that the state action doctrine was "wholly inapplicable" to Boulder.73 On appeal, a divided panel of the Tenth Circuit reversed.74 The Supreme Court, in a five-to-three decision, reversed the appellate court and agreed with the district court.75

According to the Court, a city may not invoke the state action doctrine.

69. 455 U.S. at 44.
70. Id.
71. Id. at 45-46. This claim was based upon advice the Council received from a hired consultant. The consultant warned that there was a tendency for a cable system to become a natural monopoly. The Council was concerned about the unfair advantage CCC might have because it was already operating in Boulder. Id. at 45-46 n.6.
72. Id. at 46-47.
74. Community Communications Co. v. City of Boulder, 630 F.2d 704, 707 (10th Cir. 1980).
75. 455 U.S. 40. Justice Rehnquist wrote the dissent, in which Chief Justice Burger and Justice O'Connor joined. Justice Rehnquist argued that the majority incorrectly concluded that standards of federalism are not implicated when the Sherman Act is applied to invalidate a municipal ordinance. Id. at 69. He contended that a municipal ordinance should be upheld when it satisfies the Midcal test, requiring that the ordinance be enacted pursuant to an affirmative policy on the part of the city to restrain trade and that the city actively supervises and implements the policy. Id. at 68-69 (emphasis added).
doctrine merely because the state specifically granted that city the right to regulate with respect to the challenged subject matter.\textsuperscript{76} Rather, the state must have specifically authorized the very action or conduct that is challenged as anticompetitive.\textsuperscript{77} "A state that allows municipalities to do as they please," observed the Court, "can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought."\textsuperscript{78} Thus, the Court rejected the contention that home rule statutes granted municipalities sovereign powers and held that a municipality, even though acting pursuant to its lawful authority, does not enjoy the blanket antitrust exemption afforded to the states.\textsuperscript{79}

In both \textit{Lafayette} and \textit{Boulder} the cities' attempts to place themselves within the state action doctrine failed because the cities could not demonstrate that they were acting in furtherance of a clearly articulated and affirmatively expressed state policy. While \textit{Boulder} resolved the home rule question, it added little to state and local governments' understanding of what kind of expression of state policy is required to receive the protection of the state action doctrine.

\textbf{IV. MARYLAND'S RESPONSE}

Even before the appointment of the Governor's Task Force on Local Government Antitrust Liability (Task Force), the Maryland Legislature acted to protect its local governments from the antitrust liability specifically at issue in \textit{Boulder}. Because of the obvious potential for adverse impact of the \textit{Boulder} decision on local government's cable television franchises, the General Assembly clarified the authority of Maryland local governments to supplant competition by granting one or more franchises for cable television systems on an exclusive basis, to impose franchise fees, to establish certain rates charged to subscribers, and to establish rules and regulations to govern the operation of franchises.\textsuperscript{80} The second step was to appoint the Task Force, which was given the "responsibility for identifying those areas of local government operations which would be most subject to antitrust scrutiny and for recommending legislation

\textsuperscript{76} \textit{Id.} at 54-56.
\textsuperscript{77} \textit{Id.}
\textsuperscript{78} \textit{Id.} at 55.
\textsuperscript{79} \textit{Id.} at 55-56. It is important to note, as Justice Stevens did in his concurring opinion, that the Court did not reach the merits of CCC's claim. \textit{Id.} at 58. The majority did not decide that Boulder's ordinance violated the Sherman Act; it only decided a home rule municipality is not exempt from antitrust liability merely by its status as such.
\textsuperscript{80} 1982 Md. Laws 562.
to preserve, as much as practicable, the 'state action' defense in those areas where it was most needed and appropriate.\footnote{81} In order to gather information on the local government antitrust problem, the Task Force held or scheduled eight meetings, including a public hearing, and seven work sessions open to the public.\footnote{82} The Task Force consulted with and received testimony and written submissions from numerous people, including city and county officials as well as attorneys in private practice.\footnote{83} Areas of local government activity found to be the subject of potential antitrust liability included land-use planning and zoning,\footnote{84} municipally owned and managed businesses,\footnote{85} licensing, franchising and regulating businesses,\footnote{86} environmental management and resource recovery,\footnote{87} pro-

\footnote{81. \textit{Governor's Task Force on Local Government Antitrust Liability, Report} at 1 (1983) (hereinafter \textit{Task Force Report}). Membership of the Task Force included the City Solicitor of Baltimore City, the Chief of the Antitrust Division of the Maryland Attorney General's Office, the County Attorney of Prince George's County, the City Attorney of the City of Bowie, the County Attorney of Carroll County, the County Attorney of Kent County, and the City Attorney of the City of Rockville, in addition to lawyers in private practice with experience in representing both plaintiffs and defendants in antitrust litigation. \textit{Id.}\footnote{82. \textit{Id.} The Task Force received testimony and written submissions from a Baltimore City Councilman, the Executive Director and Assistant Executive Director of the Maryland Association of Counties, Counsel for the Maryland Environment Service, the Department of Natural Resources, the Northeast Maryland Waste Disposal Authority, a senior staff associate for the Maryland Municipal League, Legislative Counsel for Montgomery County, the Legislative Liaison Officer for Baltimore City, a representative for the University of Maryland Institute for Government Service, a former Deputy Assistant Attorney General of the United States Department of Justice, a Professor of Law at the University of Maryland, and four lawyers in private practice in Baltimore and Washington, D.C. \textit{Id.}}\footnote{83. \textit{Id.}}\footnote{84. Letter from Richard Geltman, General Counsel for the National Governor's Association, to members of Legal Affairs Committee (Feb. 28, 1983) at p. 2 [hereinafter Geltman letter]. Several lower courts had found local governments liable for antitrust violations arising out of zoning decisions even before \textit{Boulder}. These cases included Staufer v. Town of Grand Lake, Colorado, 1981-1 Trade Cas. (CCH) ¶ 64,029 (D. Colo. 1980) (no immunity for town and planning commission because state legislature did not "intend that zoning officials would use their legislative authorization to promote their own interests and economic benefit[s]," \textit{id.} at p. 76,330); Mason City Center Associates v. City of Mason City, Iowa, 468 F. Supp. 737 (N.D. Iowa 1979); Whitworth v. Perkins, 559 F.2d 378 (5th Cir. 1977), \textit{vacated in light of Lafayette, 435 U.S. 992 (1978), judgment reinstated, 576 F.2d 696 (5th Cir. 1978), cert. denied, 440 U.S. 911 (1979); and Schiessel v. Stephens, 525 F. Supp. 763 (N.D. Ill. 1981). \textit{See also Brummit, Zoning and Planning and Antitrust, Inst. on Plan. Zon. & Eminent Domain Proc. 241 (Ann. 1984); Deutsch, Antitrust Challenges to Local Zoning and Other Land Use Controls, 60 Chi.-Kent L. Rev. 63 (Winter 1984); and Comment, An Argument for an Antitrust Attack on Exclusionary Zoning, 50 BROOKLYN L. REV. 1035 (Summer 1984).}}\footnote{85. Geltman letter, supra note 84, at 2.} \footnote{86. \textit{Id.} This category includes business and occupational licensing as well as regula-
curing and contracting by local governments, and health care services.

The Task Force made several recommendations to the General Assembly. First, the Task Force determined that no changes in the present cable television law were necessary. Given the explicit nature of the recently enacted cable television law, it would have been difficult for the General Assembly to enact a more clearly articulated or affirmatively expressed state policy. The Task Force did recommend changes in other areas. These recommendations included: an omnibus bill amending the various Express Powers Acts and the Baltimore City Charter to authorize counties and municipalities to supplant competition with respect to a number of specifically identified areas of governmental activity; a bill amending statutory authorization for liquor boards and authorities, housing authorities, industrial development authorities, and soil conservation districts to similar effect; an act amending the various zoning enabling statutes to specify the authority to make anticompetitive decisions in the zoning process; amendments to the provisions of law creating the Maryland Environmental Service and the Northeast Maryland Waste Disposal Authority to specify their authority to regulate and control trade in the disposal of solid waste; and amendments to the provisions of the law governing the State Law Department to authorize the Office of the Attorney General to defend, as well as prosecute, antitrust actions on the behalf of municipalities.

88. Id. This category includes public works construction and operations, competitive and sole-source procurement, and contracting for the operation of civic centers, sports stadiums and parks.
89. Id.
91. TASK FORCE REPORT at 5-6. These areas of activity included the sale and lease of property, the grant of concessions on publicly owned land, and the licensing and operation of transportation facilities, towing facilities, utilities and health and waste disposal activities. Id. at 5.
92. Id. at 5.
93. Id.
94. Id.
95. Id. at 6. The response of the Colorado Legislature was exactly the opposite. Geltman letter, supra note 84, at 3. On Sept. 9, 1982, following a number of hearings, the Colorado Legislative Committee unanimously recommended against adopting legislation to immunize local governments. The Committee found that broad based legislation could not meet the requirements of the case law and would therefore be ineffectual.
Overall, these recommendations were designed to correct ambiguities in state law regarding when it would be permissible for local government conduct to have anticompetitive effects. Explicit grants of authority were necessary to meet the first prong of the \textit{Midcal} test: the requirement that the local government conduct stem from a clearly articulated and affirmatively expressed state policy that the local government displace or limit competition in its areas of regulation.\textsuperscript{96}

Based on these recommendations, a group of four bills was submitted to the General Assembly. These included Senate Bill 629,\textsuperscript{97} which contained the Task Force recommendation regarding amending the various zoning enabling statutes; Senate Bill 635,\textsuperscript{98} which consisted of the Task Force's second recommendation to amend the

The Committee also believed that such a broad based immunity would act to protect abuses by public officials. Because of the questions left unanswered by the Supreme Court, such as the required supervision, the Committee held that legislation at this time would be precipitous. \textit{Id.} As of November, 1984, the legislatures of Georgia, Illinois, Louisiana, North Dakota, Tennessee, Virginia and Washington have followed Maryland's lead and enacted legislation designed to immunize their local governments from antitrust immunity. \textit{See}, \textit{GA. CODE ANN.} §§ 36-65-1, 36-65-2 (Cum. Supp. 1985); \textit{ILL. ANN. STAT. ch. 34 401, ch. 85 §§ 2625.1 & 2901 (Smith-Hurd Supp. 1986); LA. CIVIL CODE ANN. art. 33 § 4792 (Supp. 1986); N.D. CENT. CODE § 40-01-22 (1983 Repl. Vol.); TENN. CODE ANN. § 7-54-103(d) (1986 Repl. Vol.) (with respect to energy production facilities); VA. CODE ANN. §§ 15.1-23.1 and 15.1-28.01 (Supp. 1986); and WASH. REV. CODE ANN. § 81.72.200 (Cum. Supp. 1986). \textit{Note}: The immunity legislation of Tennessee, Virginia and Washington is interspersed throughout the Code sections governing county and municipal powers in much the same manner as the Maryland legislation. Thus, the statutes cited merely point out representative examples of these states' legislation.

\textsuperscript{96} 445 U.S. 97.

\textsuperscript{97} Enacted at 1983 Md. Laws 395. This act does not create new powers for local governments but expressly states that the local governments may displace or limit competition through their zoning powers when the purpose of such zoning is to assure the good government of the localities, to protect and preserve the localities' rights, property and privileges, to preserve peace and good order, to secure persons and property from danger and destruction, and to protect the health, comfort and convenience of the citizens of the locality.

\textsuperscript{98} Enacted at 1983 Md. Laws 510. This act allows government agencies that regulate the alcoholic beverages industry, industrial development authorities, housing authorities, and soil conservation districts to exercise their powers in such a manner as to displace or limit competition. Again, the Act grants no new powers; it merely states expressly a power which prior to the passage of this Act was implicit. According to the Act, the purpose of any regulation promulgated regarding the alcoholic beverages industry must be to obtain respect and obedience to law, to foster and promote temperance, to prevent deceptive, destructive and unethical business practices, and to promote the general welfare of the citizens of Maryland. The purpose of any housing authority regulation must be to provide safe, sanitary and decent housing for the citizens of Maryland. Any regulation that does not meet one of the purposes stated in the Act is beyond the scope of the Act.
statutory authorization of liquor boards, etc.; Senate Bill 645, which empowered the Attorney General to defend local governments in antitrust suits; and Senate Bill 770, which was the omnibus bill recommended by the Task Force to amend the various Express Powers Acts and the Baltimore City Charter.

V. SENATE BILL 770

The debate in the Maryland Legislature surrounding the Task Force recommendations focused on Senate Bill 770. The following discussion mirrors that narrowed focus. However, although Senate Bill 770 will be the only bill expressly mentioned, the problems and effects discussed are equally applicable to the other bills.

Senate Bill 770 was designed to eliminate the possibility of antitrust liability that might otherwise occur as a result of local government activities. It reaffirmed the Maryland public policy that local governments are authorized to regulate or engage in activities that may limit or displace free economic competition.

Several questions about Senate Bill 770 were raised at the hearings conducted prior to its passage. One concern was that the law could be interpreted to grant new powers to local governments. In order to prevent such an interpretation the bill was reworded. The parts of the bill that referred to the power of local governments to "supplant or limit free business enterprise" were replaced with the words "displace or limit economic competition." This new language comes directly from the Midcal case and is narrower than the original wording.

A second concern raised at the hearing was that such a broad-based statute would also immunize illegal conduct. However, Senate Bill 770 immunizes only conduct that is already authorized by statute or the state constitution. Improper conduct, such as the acceptance of bribes, is not authorized conduct; when such conduct

99. Enacted at 1983 Md. Laws 396. Before this Act was passed the Attorney General's Office could only prosecute antitrust cases for local governments; it could not defend them in the event of such a suit.

100. Enacted at 1983 Md. Laws 397.

101. See supra note 91.


103. Id.

104. COMMITTEE REPORT, supra note 102, at 2.

105. See supra note 91. The Colorado Legislature had refused to enact any antitrust legislation designed to give local governments immunity from liability based on similar concerns. See Geltman letter, supra note 84, at 3.
results in an antitrust violation, it has been and remains punishable through criminal and civil enforcement procedures of the antitrust laws. Maryland precedent already recognizes that zoning actions having no purpose but the prevention of competition are subject to challenge on that basis. This same logic would apply to other improper conduct allegedly protected by the new bill. 

The courts are free to examine how the local governments exercise their authority, and the inquiry does not necessarily stop with a determination that the local government has the general authority required. Courts have the expertise to determine when a zoning board has exceeded the scope of its authority and zoned an area, or failed to zone an area, because of an impermissible motive or consideration. Stauffer v. Town of Grand Lake, a Colorado district court case, exemplifies how courts make this type of inquiry. In Stauffer, a landowner alleged that town officials had manipulated the zoning process to prevent him from developing his property, so as to enhance the commercial value of their own property. As an initial matter, the court found that Colorado's general zoning legislation, pursuant to which the defendants had acted, "clearly show[ed] a state policy that some competition [would] be displaced with regulation." The court then held that while Colorado's general zoning legislation did confer state action immunity in appropriate circumstances, the alleged conduct in this case was not within the contemplated scope of the town's zoning authority. "The Colorado Legislature," asserted the court, "did not foresee, contemplate or intend that zoning officials would use their legislative authorization to promote their own interests and economic benefit." Accordingly, immunity was disallowed.

Thus, general authorization statutes do not grant blanket im-

106. Letter from Charles O. Monk, II, Assistant Attorney General and Chief of the Antitrust Division, to Honorable Helen L. Ross, Chairman of the Constitutional and Administrative Law Committee (April 6, 1983) at p. 3.
107. See Lucky Stores, Inc. v. Board of Appeals, 270 Md. 513, 528-29, 312 A.2d 758, 766 (1973) ("the prevention of competition is not a proper element of zoning") (quoting Kreatchman v. Ramsburg, 224 Md. 209, 219, 167 A.2d 345, 351 (1961)); Aspen Hill Venture v. Montgomery County Council, 265 Md. 303, 314, 289 A.2d 303, 308 (1972) ("where the lack of need is unaccompanied by any detriment to the public interest ... we cannot view [the denial of rezoning] as amounting to anything more than [the Council's] substituting an economic judgment of its own for that of [the petitioner], as to the financial success of the venture.").
108. 1981-1 Trade Cas. (CCH) ¶ 64,029 (D. Colo. 1980).
109. Id. at pp. 76,329-76,330. Thus, as a general matter, the zoning board was not subject to antitrust liability for its zoning decisions even when those decisions had an anticompetitive effect.
110. Id. at p. 76,330.
The first step in a court's inquiry is whether the state authorized the local government to displace competition. Depending upon the facts alleged, the court can then inquire into whether this authorization was exercised in the fashion intended by the legislature.

The major opposition to Senate Bill 770 came from those in the business of waste disposal. Their concern seemed to be that this legislation would lead to the taking over of waste disposal by local governments, thus leaving the waste disposal companies without a market. This fear seems unfounded. Before the Supreme Court decisions in Lafayette and Boulder, local governments believed that they had the authority to displace competition, yet they still employed private waste disposal companies. There does not seem to be any reason to believe that, just because the authority has now been codified, local governments will radically change their behavior.

A criticism of the Task Force report, raised by some General Assembly members, was the Task Force's failure to make any recommendations concerning the "active supervision" requirement first announced by the Supreme Court in Midcal. The Task Force concluded that the Supreme Court would continue to interpret laws with anticompetitive effects as requiring active state supervision only when private conduct is involved, and it did not recommend that such a requirement be included in the proposed statutes. The Task Force indicated that requiring such state supervision would be "so intrusive as to nullify many of the benefits of local home rule and would overburden any agency in which such authority is vested." This conclusion proved correct two years later in Town of Hallie v. City of Eau Claire, when the Supreme Court held that active state supervision is not required for a finding of local government antitrust immunity. In Hallie, several towns surrounding the respondent city brought suit alleging antitrust viola-

111. *Id.*
112. See Constitutional & Public Law Comm. File for S. 770, which contains the letters from different waste disposal companies that operate in the state.
113. *Id.*
115. *Id.* The Task Force found that active supervision would not be applied to municipal conduct because this conduct, unlike private conduct, is already subject to political restraints.
117. *Id.* at 1720. The Court justified distinguishing a municipality from a private party by establishing a presumption that private parties act in their own behalf, whereas municipalities, as creatures of the states, act in the interest of the public. *Id.* at 1720-21.
tions based upon the city's refusal to supply sewage treatment services to the towns. While the city refused these services to the towns, it did supply such services to individual landowners who allowed their property to be annexed and who also used the city's sewage collection and transportation services. The Court found that the city was acting pursuant to a "clearly articulated" state policy to displace competition because the statute empowering the city to provide sewage services also empowered the city to refuse to furnish those services to unannexed areas. The Court then went on to hold that the active state supervision requirement should not be imposed in cases in which the actor is a municipality. According to the Court, there is no need for a state to actively supervise the local government's exercise of a properly delegated function. Thus, in order to receive antitrust immunity under the state action doctrine, a local government need demonstrate only that it is acting pursuant to a clearly articulated state policy. Senate Bill 770 was designed to articulate Maryland policy.

VI. Conclusion

Senate Bill 770 expressly grants authority to local governments to displace competition in certain areas in order to protect those governments from antitrust liability resulting from the performance of their normal duties. Some commentators believe that this type of legislation is unnecessary now because of Congress' enactment of the Local Government Antitrust Act of 1984 (the Act) which prevents plaintiffs from recovering damages from local governments. While this legislation removes the immediate threat of treble damages, the belief that this legislation corrects the problems associated with subjecting local governments to antitrust liability ignores the burdensome nature of antitrust litigation. The Act leaves intact the threat of suits seeking injunctions, and the potential invalidation of local government laws. Even before the passage of the Act, a significant number of antitrust claimants against local governments

118. Id. at 1715-16.
119. Id.
120. Id. at 1718-19.
121. Id. at 1720.
122. Id. at 1721.
sought only equitable relief. Antitrust litigation is enormously expensive and has increasingly become the province of a specialized bar that commands high fees.\textsuperscript{125} Under the rule of \textit{Poller v. Columbia Broadcasting System},\textsuperscript{126} summary procedures are to be used sparingly in antitrust litigation.\textsuperscript{127} For this reason, antitrust litigation characteristically is not resolvable on a motion to dismiss, but only after prolonged discovery proceedings.\textsuperscript{128}

Even when defendants succeed in ultimately securing dismissal of an antitrust case or a victory at trial, their attorney's fees and other expenses are not reimbursable.\textsuperscript{129} Consequently, the extended prosecution of an antitrust action will frequently be a catastrophe for a local government.\textsuperscript{130} This problem was demonstrated in Maryland prior to enactment of Senate Bill 770. In 1982, the Attorney General of Maryland, pursuant to Chapter 139 of the Acts of 1982, to defend Soil Conservation Districts in antitrust cases, requested a special allocation of $40,000 from the Board of Public Works to defend a single antitrust suit against five districts, the Maryland Department of Agriculture and the Secretary of Agriculture.\textsuperscript{131} Another example occurred in 1982, when a Maryland municipality, Sharpsburg, was sued in an antitrust case based on a zoning decision concerning the selling of tires in a certain section of the municipality. The ensuing litigation cost Sharpsburg $12,000 in a one-year period.\textsuperscript{132} At the time, the town had a yearly budget of $18,151.\textsuperscript{133}

It is not just the litigation itself which is a financial drain on local governments. Litigation often adversely affects municipal bond ratings.\textsuperscript{134} Also, the project which is the subject of a suit may be halted pending disposition of that suit. These delays will often contribute to increased project costs.\textsuperscript{135} While federal legislation protects local governments from the most publicized aspect of antitrust suits, i.e. treble damage awards, it by no means protects local governments from all the ills associated with antitrust litigation.

\textsuperscript{125} Task Force Report at 9-10. 
\textsuperscript{126} 368 U.S. 464 (1962). 
\textsuperscript{127} Id. at 473. 
\textsuperscript{128} Task Force Report at 9-10. 
\textsuperscript{129} Id. 
\textsuperscript{130} Id. 
\textsuperscript{131} Id. at 10 n.4. 
\textsuperscript{132} Letter from the Maryland Municipal League to the Constitutional and Administrative Law Committee in support of Senate Bill 770 (April 5, 1983) at p.3. 
\textsuperscript{133} The Baltimore Sun, Feb. 22, 1983, at 6A, col. 3. 
\textsuperscript{134} Geltman letter, supra note 84, at 2. 
\textsuperscript{135} Id.
Despite the recent federal legislation, in order to protect local government from antitrust suits states still need to provide a clear articulation of their policy concerning the displacement of competition. Maryland is at the vanguard of this type of legislation. It was the first state to enact a statute specifically designed to protect local governments from antitrust liability. The statute affords local governments the greatest protection possible by going one step beyond what the Supreme Court has stated is required in order for local governments to receive "state action" protection. By providing "specific detailed legislative authorization" Maryland protects its local governments from the uncertainty of a court determination on whether the statute under which they are acting is a clear articulation of a state policy to displace competition. Given the historical confusion surrounding what exactly constitutes a clearly articulated and affirmatively expressed state policy, a statute such as that enacted by Maryland is the only sure method of providing antitrust immunity to local governments.

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