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# United States Supreme Court Review of Tenth Circuit Decisions: *Community Communications Corporation v. City of Boulder* -- Reversed

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Following the traditional analysis, as exemplified by *Roche* and *Will v. United States*, the Supreme Court seemed to be saying that "clear abuse of discretion" is not the correct standard for determining whether mandamus should issue. Rather, the proponent of mandamus must show an abuse of indiscretion: in other words, an order by a trial judge which he had no discretion to enter. In the case of this kind of order—for example, a trial court's violation of the Federal Rules of Civil Procedure in granting a new trial—it could be argued that the trial court was acting outside its power, and thus the traditional standard would be satisfied.

In addition, the Supreme Court emphasized that mandamus in this case violated the strong Congressional policy opposing "piecemeal review," and stated that *Daiflon* had an adequate means of relief through the normal appellate process.<sup>24</sup> The Court thus implied that the inconvenience to *Daiflon* of a new trial, without more, would not constitute a harm great enough to justify circumvention of the normal appellate process.<sup>25</sup>

Justices Blackmun and White dissented from the *per curiam* opinion, expressing dissatisfaction with the majority's peremptory handling of the case.<sup>26</sup>

The *Daiflon* case is part of the Court's general trend toward restricting opportunities for interlocutory review.<sup>27</sup> The court is apparently proceeding from the premise that piecemeal review wastes judicial resources. Though the Court's decision in *Daiflon* was correct under traditional mandamus analysis, perhaps it should more closely examine whether, in this kind of case, judicial resources can better be conserved by allowing interlocutory review to avoid the repetition of lengthy jury trials in complex cases.

Neal Richardson

## II. *COMMUNITY COMMUNICATIONS CO. v. CITY OF BOULDER*—REVERSED

In *Community Communications Co. v. City of Boulder*,<sup>28</sup> the United States Supreme Court reversed a Tenth Circuit decision<sup>29</sup> in which the court of appeals had declared that the City of Boulder was immune from antitrust liability under the Sherman Act.<sup>30</sup>

In 1964, the Boulder City Council granted Community Communication Company's (CCC) predecessor a twenty-year, revocable, nonexclusive permit to operate a cable television business in the city. The permit was

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24. *Id.*

25. *Cf.* 612 F.2d at 1254.

26. 449 U.S. at 37.

27. *See* *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), restricting the application of the "death knell" doctrine.

28. 50 U.S.L.W. 4144 (1982). Justice Brennan wrote the majority opinion, joined by Justices Marshall, Blackmun, Powell and Stevens. Justice Stevens filed a special concurrence, and Justice Rehnquist dissented, joined by Chief Justice Burger and Justice O'Connor. Justice White did not participate.

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

30. 15 U.S.C. § 1 (1976).

assigned to CCC in 1966. Since then CCC has provided cable television service to the University Hill area of the city, an area where approximately twenty percent of the city's residents live and where for geographic reasons broadcast television signals cannot be received well. Because of limited technology, CCC's service was restricted to the retransmission of Denver and Cheyenne broadcasts. When improved technology enabled CCC to offer substantially more entertainment than could be provided by local broadcast television, CCC informed the city council that it planned to expand into other areas of the city. At approximately the same time, newly formed Boulder Communications Company informed the council of its interest in obtaining a permit to provide competing cable service in the city.<sup>31</sup>

The city council responded by enacting an emergency ordinance prohibiting CCC from expanding its business into other areas of the city for three months. The city planned during the moratorium to draft a model cable television ordinance and to invite new businesses to enter the Boulder market. The purpose of the moratorium was to prevent the expansion of CCC during the drafting of the model ordinance because it was feared that such expansion would discourage potential competitors from entering the market.<sup>32</sup> When the CCC continued building, city authorities arrested CCC's construction crews and tore down its cables.<sup>33</sup>

CCC filed suit in the United States District Court for the District of Colorado seeking a preliminary injunction and alleging that the city's restriction on CCC's expansion was a violation of section 1 of the Sherman Act.<sup>34</sup> The district court held that the state action exemption of *Parker v. Brown*<sup>35</sup> was not available to Boulder, and therefore the city was subject to antitrust liability.<sup>36</sup> The city appealed, and a divided panel of the Tenth Circuit Court of Appeals reversed, concluding that the city was immune from antitrust liability under *Parker*.<sup>37</sup>

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31. 50 U.S.L.W. at 4144-45.

32. *Id.* at 4145.

33. 630 F.2d at 710 (Markey, C.J., dissenting) (sitting by designation).

34. 15 U.S.C. § 1 (1976). This section states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal."

35. 317 U.S. 341 (1943).

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

37. 630 F.2d 704 (10th Cir. 1980). For a thorough discussion of the proceedings in the lower courts and a discussion of the state action exemption, see *Antitrust, Seventh Annual Tenth Circuit Survey*, 58 DEN. L.J. 249 (1981). See also Kennedy, *Of Lawyers, Lightbulbs and Raisins: An Analysis of the State Action Doctrine under the Antitrust Laws*, 74 NW. U. L. REV. 31 (1979).

During the pendency of this appeal, Boulder decided on a districting plan whereby more than one cable company will be operating in Boulder. The district court granted CCC another preliminary injunction against what had become for CCC a permanent geographic limitation. The district court granted the injunction on both Sherman Act and first amendment grounds. *Community Communications Co. v. City of Boulder*, 496 F. Supp. 823 (D. Colo. 1980). The court of appeals held that to the extent the lower court grounded its order on the Sherman Act, it erred because of the Tenth Circuit's earlier opinion. *Community Communications Co. v. City of Boulder*, No. 80-1882, slip op. at 9 (10th Cir. Sept. 22, 1981). The court of appeals reversed on the first amendment claim, holding that the district court erred in summarily applying the first amendment principles governing newspapers to cable operators. *Id.* at 15. The appellate court remanded to the district court for a determination of whether cable television's

The question facing the Supreme Court in Community Communications' appeal from the Tenth Circuit decision was whether Boulder was immune from liability under *Parker* and its progeny. In *Parker*, the Supreme Court was called upon to determine the validity of a program adopted by the State of California that sought to restrict competition in the state's raisin industry and prevented raisin producers from freely distributing their raisins through private channels.<sup>38</sup> The *Parker* Court held that the program was exempt from the antitrust laws, stating:

We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.<sup>39</sup>

For over three decades the Supreme Court did not elaborate on its view of state immunity from antitrust liability. Then, in 1975, in *Goldfarb v. Virginia State Bar*<sup>40</sup> the Court struck down a minimum fee schedule established by the Fairfax County Bar Association. The Court held that the threshold requirement for establishing antitrust immunity under *Parker* is that the activity must be required by the state in its sovereign capacity; immunity is permitted only if the action was in fact compelled, rather than merely authorized, by the state.<sup>41</sup> Because the State of Virginia did not require minimum fee schedules, the bar association enjoyed no immunity.

The following year, the Supreme Court was again faced with a state action question. In *Cantor v. Detroit Edison Co.*,<sup>42</sup> the Court held that a public utility's policy of dispensing free light bulbs to consumers of electricity was subject to the antitrust laws. The Court stated that, in the absence of a state policy regarding the regulation of the distribution of light bulbs, approval by the Michigan Public Service Commission of the tariffs containing the distribution was not a sufficient basis for immunity.<sup>43</sup>

In *Bates v. State Bar of Arizona*,<sup>44</sup> the Supreme Court for the first time since *Parker* granted a defendant immunity on state action grounds. At issue was a state disciplinary rule prohibiting advertising by lawyers. Because the rule was an "affirmative command of the Arizona Supreme Court,"<sup>45</sup> and because the Arizona Supreme Court was given authority to govern the legal profession by the state constitution, the court sustained the State Bar's claim of immunity.

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"unique attributes" warrant, under the first amendment, the type of regulation the city seeks to impose. *Id.* at 24.

38. 317 U.S. at 344-48.

39. *Id.* at 350-51.

40. 421 U.S. 773 (1975).

41. *Id.* at 790.

42. 428 U.S. 579 (1976).

43. *Id.* at 598.

44. 433 U.S. 350 (1977).

45. *Id.* at 360.

In 1978, the Supreme Court addressed the applicability of the *Parker* doctrine to municipalities. In *City of Lafayette v. Louisiana Power & Light Co.*,<sup>46</sup> the Court rejected the proposition that cities were automatically entitled to the *Parker* exemption. The issue in the case was whether two Louisiana cities, which owned and operated electric utility systems, could be held liable under the Sherman Act for offenses allegedly committed in the conduct of their utility systems. A plurality applied a test for immunity based upon the authorization by the state of the challenged conduct. According to the plurality, municipal conduct is shielded from the antitrust laws if the conduct is engaged in "pursuant to state policy to displace competition with regulation or monopoly public service."<sup>47</sup> This state policy must be "clearly articulated and affirmatively expressed."<sup>48</sup> The plurality opinion stated:

Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them. Parker's limitation of the exemption to "official action directed by a state" is consistent with the fact that the States' subdivisions generally have not been treated as equivalents of the States themselves. In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach.<sup>49</sup>

Chief Justice Burger concurred in the judgment on the basis that the antitrust laws should reach municipal action when the city is acting in a proprietary capacity, but not when it is acting in its governmental capacity. Because the City of Lafayette was engaged in the business of a public utility, the Chief Justice would not allow them an exemption.<sup>50</sup>

In *Community Communications*, the Court held that Boulder's moratorium could not be exempt from the antitrust laws unless it constituted either the action of the State of Colorado or municipal action in furtherance of "clearly articulated and affirmatively expressed state policy."<sup>51</sup> Boulder argued that these conditions were met because of its status as a home rule city.<sup>52</sup> Because home rule cities in Colorado have "every power theretofore possessed by the legislature . . . in local and municipal affairs,"<sup>53</sup> Boulder argued that its

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46. 435 U.S. 389 (1978). See generally Kletzke, *Antitrust Liability of Municipal Corporations: The Per Se Rules vs. The Rule of Reason—A Reasonable Compromise*, 1980 ARIZ. ST. L.J. 253; Rogers, *Municipal Antitrust Liability in a Federalist System*, 1980 ARIZ. ST. L.J. 305; Rose, *Municipal Antitrust Liability*, 1980 ARIZ. ST. L.J. 245.

47. 435 U.S. at 413.

48. *Id.* at 410. A majority of the Court later adopted this test in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.* 445 U.S. 97, 105 (1980).

49. *Id.* at 412-13 (citations omitted).

50. *Id.* at 422.

51. 50 U.S.L.W. at 4146-47.

52. *Id.* at 4147. The Colorado Home Rule Amendment gives cities and towns having a population of two thousand inhabitants the power to enact ordinances relating to local matters which "supersede within territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith." COLO. CONST. art. xx, § 6.

53. 50 U.S.L.W. at 4147 (quoting *Denver Urban Renewal Authority v. Byrne*, 618 P.2d 1374, 1381 (Colo. 1980), quoting *Four-County Metropolitan Capital Improvement Dist. v. Board of County Comm'rs*, 149 Colo. 284, 294, 369 P.2d 67, 72 (1962) (emphasis in original)).

ordinance was an act of government performed by the city acting as the state in local matters.<sup>54</sup> The Court rejected this argument, stating that the city misconceived both the letter and the spirit of the law. The Court stated that “[o]urs is a ‘dual system of government,’ which has no place for sovereign cities,”<sup>55</sup> and quoted the dissent in the court of appeals as stating “[w]e are a nation not of ‘city-states’ but of States.”<sup>56</sup>

The Court couched its opinion in terms of legislative intent, stating that [w]hen *Parker* examined Congress’ intentions in enacting the anti-trust laws, the opinion noted that ‘nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities *directed by its legislature* . . . . [And] an unexpressed purpose to nullify a *state’s control over its officers and agents* is not lightly to be attributed to Congress.’ Thus *Parker* recognized Congress’ intention to limit the state action exemption based upon the federalism principle of limited state sovereignty.<sup>57</sup>

The Court’s argument is misleading in two respects. First, it suggests that Congress, when it passed the Sherman Act, intended to exempt state, but not municipal, action. Given the extremely narrow definition of “interstate commerce” at the turn of the century,<sup>58</sup> it is more likely that it never occurred to Congress that the Act might one day be applied to government action. Second, the majority opinion suggests that the *Parker* Court intended to exclude municipal action from the exemption it created. That message from the *Parker* opinion is not as clear as the majority implies. The *Parker* Court stated, in examining the legislative history of the Act, that “[t]he sponsor of the bill . . . declared that it prevented only ‘business combinations.’”<sup>59</sup> The *Parker* Court continued, stating that the purpose of the Sherman Act “was to suppress combinations to restrain competition and attempts to monopolize by *individuals and corporations*,”<sup>60</sup> and “we have no question of the *state or its municipality* becoming a participant in a private agreement or combination by others for restraint of trade . . . .”<sup>61</sup> The *Parker* opinion simply does not support the conclusion that the *Parker* Court intended to limit the scope of the exclusion.

The City of Boulder also argued that the ordinance constituted action undertaken pursuant to a clearly articulated and affirmatively expressed state policy, contending that by virtue of the Colorado Home Rule Amend-

54. The Court assumed, without deciding, that the ordinance fell within the scope of the power delegated to the city by virtue of the Colorado Home Rule Amendment, that is, that the regulation of cable television is a local matter. 50 U.S.L.W. at 4147 n.16.

55. *Id.* (quoting *Parker v. Brown*, 317 U.S. at 351) (emphasis added by *Community Communications* Court).

56. 50 U.S.L.W. at 4147 (quoting *Community Communications Co. v. City of Boulder*, 630 F.2d at 717 (Markey, C.J., dissenting)).

57. 50 U.S.L.W. at 4147 (emphasis added by *Community Communications* Court) (citations omitted).

58. *See, e.g.*, *United States v. E.C. Knight Co.*, 156 U.S. 1 (1896) (sugar trust not engaged in interstate commerce).

59. 317 U.S. at 351 (citing Cong. Rec. 2562, 2457).

60. 317 U.S. at 351 (emphasis added).

61. *Id.* at 351-52 (emphasis added).

ment's guarantee of local autonomy Colorado has granted to Boulder the power to enact the moratorium ordinance and that the legislature contemplated the kind of action complained of.<sup>62</sup> The Court held, however, that the requirement of "clear articulation and affirmative expression" is not satisfied by neutrality on the part of the state, stating that acceptance of the proposition that a general grant of power to enact ordinances constitutes state authorization to enact anticompetitive ordinances would "wholly eviscerate" the concepts of "clear articulation and affirmative expression" required by the Court's earlier precedents.<sup>63</sup>

The Court went on to say that the mere finding that the *Parker* exemption was not available to the city did not mean that the same antitrust rules that now apply to private persons would apply to cities. The Court stated that "[i]t may be that certain activities, which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government."<sup>64</sup>

In a vigorous dissent, Justice Rehnquist described the majority's decision as a "novel and egregious error"<sup>65</sup> and expressed concern that it would "impede, if not paralyze"<sup>66</sup> the efforts of local governments to protect the public health, safety, and welfare.

The dissent argued that the majority erred in characterizing the *Parker* decision as one involving *exemption* from the Sherman Act, arguing instead that it involved *preemption*. Because the presumptions utilized in exemption analysis are quite different from those used in preemption analysis, the dissent argued that failure to distinguish between the two led the Court to the wrong conclusion. According to Justice Rehnquist, preemption analysis involves "the interplay between the enactments of two different sovereigns—one federal and the other state."<sup>67</sup> Under the supremacy clause,<sup>68</sup> when there is a conflict between the laws of the federal government and those of a state or local government,<sup>69</sup> or where the federal government has occupied a field exclusively, the state or local enactment must fall. Because of federalism concerns, there is a presumption against preemption that can be overcome only by a clear manifestation by Congress of an intention that the federal act should supersede the police powers of the state.<sup>70</sup>

Justice Rehnquist argued that exemption, on the other hand, does not involve the interplay of enactments of different jurisdictions, but rather the interplay of enactments of a single sovereign. The question under exemption

62. 50 U.S.L.W. at 4147.

63. *Id.* at 4147-48.

64. *Id.* at 4148 n.20.

65. 50 U.S.L.W. at 4152 (Rehnquist, J., dissenting).

66. *Id.* at 4149.

67. *Id.* (quoting Handler, *Antitrust - 1978*, 78 COLUM. L. REV. 1363, 1379 (1978)).

68. U.S. CONST. art vi, cl. 2, states in pertinent part:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . .

69. The Supreme Court has never made a distinction between states and their subdivisions with regard to the preemptive effects of federal law. 50 U.S.L.W. at 4151 (Rehnquist, J., dissenting). *See* *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960).

70. 50 U.S.L.W. at 4149 (Rehnquist, J., dissenting).

analysis is whether one law was intended to relieve a party from the necessity of complying with a prior enactment, and the presumption is that there was no such intent.<sup>71</sup>

The dissent predicted a number of problems to be encountered in the future due to the majority's application of the antitrust laws to municipalities. These problems include a determination of whether the *per se* rules of illegality<sup>72</sup> will apply to municipal defendants in the same manner as they are applied to private defendants, and whether cities will be liable for treble damages for enacting anticompetitive ordinances.<sup>73</sup> The major problem foreseen by the dissent, however, is the application of the "rule of reason" to municipalities. Under the rule of reason, as applied to private defendants, restraints may be defended only on the basis that the restraint has no unreasonable effect on competition or that its pro-competitive effects outweigh its anticompetitive effects.<sup>74</sup> For example, in *National Society of Professional Engineers v. United States*,<sup>75</sup> which dealt with a provision in the Society's ethical code prohibiting competitive bidding, the Court held that an anticompetitive restraint could not be defended on the basis of a private party's conclusion that competition is itself unreasonable. The *Community Communications* dissent questioned whether the same rule would apply to municipalities, that is, whether municipalities would be foreclosed from arguing that the benefits to the health, safety, and public welfare outweigh the anticompetitive effects of the ordinance. Justice Rehnquist stated that "[i]f municipalities are permitted only to enact ordinances that are consistent with the pro-competitive policies of the Sherman Act, a municipality's power to regulate the economy would be all but destroyed."<sup>76</sup>

On the other hand, he argued, if the rule of reason were modified to permit a municipality to defend its regulation on the ground that its benefits to the community outweigh its anticompetitive effects, the Court would be called upon to engage in the same wide-ranging, standardless inquiry into local regulation that it did during the *Lochner* era.<sup>77</sup>

If the problem were analyzed as one of preemption rather than one of exemption, argued the dissent, these problems would be avoided.<sup>78</sup> Instead of a sweeping review by federal courts, the courts would be confronted with the simpler question of whether the ordinance enacted is preempted by the Sherman Act. Moreover, because a municipality does not violate the anti-trust laws when it enacts legislation preempted by the Sherman Act, deter-

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71. *Id.*

72. Under the *per se* rules, some kinds of conduct are considered unreasonable as a matter of law, and there will be no inquiry into their reasonableness. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (price fixing).

73. Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained." 15 U.S.C. § 15 (1976).

74. *See Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

75. 435 U.S. 679 (1978).

76. 50 U.S.L.W. at 4151 (Rehnquist, J., dissenting).

77. During the "*Lochner* era," the Supreme Court invalidated a great amount of social and economic legislation on the ground that it violated the due process clause. *See, e.g., Lochner v. New York*, 198 U.S. 45 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

78. 50 U.S.L.W. at 4151 (Rehnquist, J., dissenting).



mining the remedy is not a problem—the preempted legislation is simply invalid and unenforceable.

Finally, the dissent warned that the majority's decision effectively destroys the "home rule movement," through which local governments have garnered some autonomy over matters of local concern.<sup>79</sup> The impact of this decision will be felt most by those municipalities having the greatest autonomy because they will be least able to avail themselves of the protective mantle of the state.

The impact of this case is far from certain, and the resolution of the problems forecasted by the dissent will not be simple. Perhaps a better resolution of the case would have been to adopt the preemption analysis of the dissent in *Community Communications* and Chief Justice Burger's concurrence in *City of Lafayette*, in which he argued for a distinction between proprietary and governmental functions.<sup>80</sup> Under this analysis, municipal activity is not subject to the antitrust laws if the activity is governmental and not preempted; municipal activity is subject to the antitrust laws if the municipality is engaging in proprietary activity or governmental activity that is preempted.

Local governments should not be hamstrung in their ability to protect the health, safety, and public welfare of their citizens; nor should they, when engaging in a proprietary activity, be permitted to avail themselves of an "exemption" from the antitrust laws, thereby putting themselves in a position superior to that of their private competitors. In the absence of a clear manifestation by Congress of an intent to preempt local government action, such action should not be subject to the antitrust laws.

*Kingsley R. Browne*

### III. *MITCHELL v. D.R.*—VACATED AND REMANDED

In *Mitchell v. D.R.*,<sup>81</sup> the Supreme Court vacated and remanded for further consideration in light of *Harris v. McRae*<sup>82</sup> and *Williams v. Zbaraz*,<sup>83</sup> the Tenth Circuit Court of Appeals' decision in *D.R. v. Mitchell*.<sup>84</sup> The court had held that a Utah statute,<sup>85</sup> which prohibited the expenditure of public assistance funds for abortions except where the operation was necessary to

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79. *Id.* at 4152.

80. Admittedly, this is not always a clear distinction. For example, in the Tenth Circuit's *Community Communications* decision, the majority felt that the regulation of cable television was an exercise of governmental authority, 630 F.2d at 707, while the dissent claimed that the ordinances are, "in fact and intent," contracts, reflecting a proprietary interest. 630 F.2d at 719 (Markey, C.J., dissenting). The city was not, however, engaging in the *operation* of a cable television business, in which case it would be involved in proprietary activity; instead, it was involved in the *regulation* of the cable television business, a governmental activity.

81. 449 U.S. 808 (1980).

82. 448 U.S. 297 (1980).

83. 448 U.S. 358 (1980).

84. 617 F.2d 203 (10th Cir. 1980).

85. Utah Code Ann. § 55-15a-3 (Supp. 1979).