

The Burger Court Opinion Writing Database

Community Communications Co. v. Boulder

455 U.S. 40 (1982)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

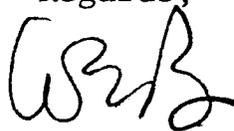
December 4, 1981

RE: No. 80-1350 - Community Communications Co.,
Inc. v. City of Boulder, Colorado

Dear Bill:

I join your dissenting opinion.

Regards,



Justice Rehnquist

Copies to the Conference

WJB
 TD
 MD

To: The Chief Justice
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

0\$1350B, 11/16/81 Drb

From: Justice Brennan

Circulated: NOV 18 1981

Recirculated: _____

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1350

COMMUNITY COMMUNICATIONS COMPANY, INC.,
 PETITIONER *v.* CITY OF BOULDER,
 COLORADO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE TENTH CIRCUIT

[November —, 1981]

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented in this case is 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*, 317 U. S. 341 (1943).

I

Respondent City of Boulder is organized as a "home rule" municipality under the Constitution of the State of Colorado.¹ The City is thus entitled to exercise "the full right of

¹The 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 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

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

November 18, 1981

RE: No. 80-1350 Community Communications Co. v.
Boulder

Dear John:

Thanks very much for your helpful comments on my circulation in the above. I'll have some suggested changes for your consideration very soon. My hope will be to meet your concerns, although I confess I may have problems embracing any governmental-proprietary dichotomy.

Sincerely,



Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

November 20, 1981

RE: No. 80-1350 Community Communications Co., Inc. v. City of
Boulder, Colorado

Dear Lewis and John:

Thank you very much for your helpful suggestions for revisions in the opinion in the above. After our exchange I am making the following changes:

1. Page 1, opening paragraph, add after "in this case" in the first line the following: ""in which the District Court for the District of Colorado granted preliminary injunctive relief."

2. Page 6, footnote 11, add the following sentence at the end: "The petition for certiorari did not present the First Amendment question and we do not address it in this opinion."

3. Page 11, first full paragraph, second sentence, change to read as follows: "The Parker state action exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution."

4. Page 14, footnote 19, delete this footnote.

5. Footnote 21, add the following paragraph:

"We hold today only that the Parker v. Brown exemption was no bar to the District Court's grant of injunctive relief. This case's preliminary posture makes it unnecessary for us to consider issues regarding the applicability of antitrust law in the context of suits by private litigants against government defendants. As we said in City of Lafayette, '[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.' 435 U.S.,

- 2 -

at 417 n. 48. Compare, e.g., National Society of Professional Engineers v. United States, 435 U.S. 679, 687-692 (1978) (considering the validity of anticompetitive restraints imposed by private agreement) with Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 133 (1978) (holding that anticompetitive effect is an insufficient basis for invalidating a state law). As the plurality noted in Cantor v. Detroit Edison Co., 428 U.S. 579, 589-591, the Court's opinion in Parker v. Brown placed great emphasis on the fact that the case involved a challenge to official action rather than private action. Moreover, as in City of Lafayette, 435 U.S., at 401-402, we do not confront the issue of remedies appropriate against municipal officials."

Sincerely,



Mr. Justice Powell

Mr. Justice Stevens

cc: The Conference

Pages 1, 6, 11, 14, 15,
& footnote renumbering

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

0\$1350B rev. 11/20/81 spw

From: Justice Brennan

Circulated: _____

Recirculated: 20 November 81

1st REVISED PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1350

COMMUNITY COMMUNICATIONS COMPANY, INC.,
PETITIONER *v.* CITY OF BOULDER,
COLORADO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

[November —, 1981]

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"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.

Pages 2, 15, 16

To: The Chief Justice
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

0\$1350B rev. 11/240/81 Drb

From: Justice Brennan

Circulated: _____

Recirculated: 25 Nov 1981

2nd PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1350

COMMUNITY COMMUNICATIONS COMPANY, INC.,
 PETITIONER v. CITY OF BOULDER,
 COLORADO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE TENTH CIRCUIT

[November —, 1981]

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"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.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 18, 1981

Re: 80-1350 - Community Communications Co., Inc.
v. City of Boulder, Co.

Dear Bill,

Please note that I took no part in the
decision of this case.

Sincerely yours,

Byron

Justice Brennan

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 17, 1981

Re: No. 80-1350 - Community Communications Company v.
City of Boulder, Colorado

Dear Bill:

Please join me.

Sincerely,

JM.
T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 23, 1981

Re: No. 80-1350 - Community Communication Co.
v. City of Boulder

Dear Bill:

I have read with interest your first revised printed draft of an opinion for this case. I suppose that one of the keys to the opinion is footnote 20, on page 15, inserted in response to concerns expressed by Lewis and John.

My positions in City of LaFayette and in Cantor demand the utmost care on my part in the present case. I prefer not to write separately, for we have too much of that already, but I must do so if it proves necessary.

I have concluded that I could join your opinion and give you a Court if the following could be omitted:

1. The next to the last sentence of footnote 20 on page 15. This is the sentence beginning with "As the plurality noted"
2. The words "sole viable" in the fifth line of the paragraph beginning on page 2. My old friend "viable" is constantly misused and every generation of clerks makes me fight the battle all over again. It drove Henry Putzel to distraction, and he finally gave up only to hold the line on "parameter." I think the two words add nothing to the sentence which is just as strong, if not stronger, without them.

Sincerely,



Justice Brennan



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 24, 1981

Re: No. 80-1350 - Community Communications Co.
v. City of Boulder

Dear Bill:

I appreciate you making that one minor change in footnote 20 of your first revised printed draft. I therefore join your opinion.

Sincerely,



Justice Brennan

cc: The Conference

See

... in ...

2.

pursuit of legitimate state regulatory program). And as in City of Lafayette, 435 U.S. at 401-02, we do not confront the issue of remedies appropriate to the municipal context.

The second area of concern is your footnote 14, which seems to me to create some uncertainty. May I suggest that you replace the final sentence in that footnote with something similar to this:

Midcal's "active state supervision" requirement has no application in this case, where the party that must show a "clearly articulated and affirmatively expressed" state authorization is itself a public body. Our cases have never required such supervision of public bodies when they operate pursuant to adequate state authorization. Compare Bates v. State Bar of Arizona, 433 U.S. 350, 359-361 (1977) (State Bar enforcement of lawyer advertising restriction exempt because "its role is completely defined" by "the ultimate body wielding the State's power over the practice of law") with Goldfarb v. Virginia State Bar, 421 U.S. 773, 790-791 (1975) (minimum price schedule enforced by the State Bar--"a state agency for some limited purposes"--not exempt because "state law simply does not refer to fees").

Parenthetically, I note the CA 10's latest opinion, as well as oral argument, discussed the First Amendment. Do you think it desirable to say that we granted only on the anti-trust issue and intimate no view on possible First Amendment questions?

If you can accommodate these views, I will be happy to join you.

Sincerely,

Lewis

Justice Brennan

LFP/vde

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 20, 1981

80-1350 Community Communications v. City of Boulder

Dear Bill:

I will be quite content with changes along the lines suggested by John in his letter of November 19.

Sincerely,

Lewis

Justice Brennan

lfp/ss

cc: Justice Stevens

Brennan

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 20, 1981

80-1350 Community Communications v. City of Boulder

Dear Bill:

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Sincerely,

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Justice Brennan

lfp/ss

cc: Justice Stevens

Brennan

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 20, 1981

80-1350 Community Communications v. City of Boulder

Dear Bill:

Please join me.

Sincerely,

Lewis

Justice Brennan

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

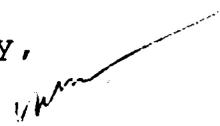
November 17, 1981

Re: No. 80-1350 Community Communications Co., Inc.
v. City of Boulder, Colorado

Dear Bill:

I shall circulate a dissent in due course.

Sincerely,



Justice Brennan

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

Justice Rehnquist

DEC 2 1981

Re: No. 80-1350, Community Communications Co., Inc. v. City of
Boulder

Justice Rehnquist, dissenting

The Court's decision in this case is flawed in two serious respects, and will thereby impede, if not paralyze, local governments' efforts to enact ordinances and regulations aimed at protecting public health, safety, and welfare, for fear of subjecting the local government to liability under the Sherman Act, 15 U.S.C. § 1 et seq. First, the Court treats the issue in this case as whether a municipality is "exempt" from the Sherman

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Stevens
 Justice O'Connor

From: Justice Rehnquist

Circulated: DEC 4 1981

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 80-1350

COMMUNITY COMMUNICATIONS COMPANY, INC.,
 PETITIONER *v.* CITY OF BOULDER,
 COLORADO, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
 STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[December —, 1981]

JUSTICE REHNQUIST, ~~joined by~~ ^(with whom) JUSTICE O'CONNOR, ^(JOINS)
 dissenting.

The Court's decision in this case is flawed in two serious respects, and will thereby impede, if not paralyze, local governments' efforts to enact ordinances and regulations aimed at protecting public health, safety, and welfare, for fear of subjecting the local government to liability under the Sherman Act, 15 U. S. C. § 1 *et seq.* First, the Court treats the issue in this case as whether a municipality is "exempt" from the Sherman Act under our decision in *Parker v. Brown*, 317 U. S. 341 (1943). The question addressed in *Parker* and in this case is not whether State and local governments are *exempt* from the Sherman Act, but whether statutes, ordinances, and regulations enacted as an act of government are *preempted* by the Sherman Act under the operation of the Supremacy Clause. Second, in holding that a municipality's ordinances can be "exempt" from antitrust scrutiny only if the enactment furthers or implements a "clearly articulated and affirmatively expressed state policy," *ante*, at —, the Court treats a political subdivision of a State as an entity indistinguishable from any privately owned business. As I read the Court's opinion, a municipality may be said to *violate* the Sherman Act by enacting legislation having an anti-

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Stevens
 Justice O'Connor
 Justice Rehnquist

circulated: _____

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1350

COMMUNITY COMMUNICATIONS COMPANY, INC.,
 PETITIONER *v.* CITY OF BOULDER,
 COLORADO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE TENTH CIRCUIT

[December —, 1981]

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and
 JUSTICE O'CONNOR join, dissenting.

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pp. 1, 2, 6, 7, 9

✓

P. 1+6

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Rehnquist

Circulated: _____

Recirculated: _____

3rd DRAFT

JAN 3 1982

SUPREME COURT OF THE UNITED STATES

No. 80-1350

COMMUNITY COMMUNICATIONS COMPANY, INC.,
PETITIONER *v.* CITY OF BOULDER,
COLORADO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

[December 14, 1981]

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and
JUSTICE O'CONNOR join, dissenting.

The Court's decision in this case is flawed in two serious respects, and will thereby impede, if not paralyze, local governments' efforts to enact ordinances and regulations aimed at protecting public health, safety, and welfare, for fear of subjecting the local government to liability under the Sherman Act, 15 U. S. C. § 1 *et seq.* First, the Court treats the issue in this case as whether a municipality is "exempt" from the Sherman Act under our decision in *Parker v. Brown*, 317 U. S. 341 (1943). The question addressed in *Parker* and in this case is not whether State and local governments are *exempt* from the Sherman Act, but whether statutes, ordinances, and regulations enacted as an act of government are *preempted* by the Sherman Act under the operation of the Supremacy Clause. Second, in holding that a municipality's ordinances can be "exempt" from antitrust scrutiny only if the enactment furthers or implements a "clearly articulated and affirmatively expressed state policy," *ante*, at _____, the Court treats a political subdivision of a State as an entity indistinguishable from any privately owned business. As I read the Court's opinion, a municipality may be said to *violate* the antitrust laws by enacting legislation in conflict with

40

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 17, 1981

Re: 80-1350 - Community Communications v.
City of Boulder, Colorado

Dear Bill:

Perhaps further study will change my mind, but I am now concerned about three aspects of your opinion.

First, I am not sure that the so-called Parker state action exemption is founded entirely on a federalism principle, as you state at page 11. It is true that the Parker opinion emphasizes our "dual system of government," but the full opinion seems to attach greater importance to congressional intent.*

* The following excerpts show the context in which the term "dual system" appeared:

"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.

"The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.

* * *

Footnote continued on next page.

- 2 -

Second, although the quotation from Kagama on page 12 lends support to my evaluation of Indian tribal sovereignty in the Jicarilla Apache case, I question its relevance in this case.

Third, and of greatest importance, I am troubled by footnote 19 on page 14, which seems to suggest that the antitrust laws have the same applicability to municipalities as to private entrepreneurs. As I noted in Cantor, the Court in Parker v. Brown placed great emphasis on the fact that the case involved a challenge to official action rather than private action. See 428 U.S., at 589-591. I am still persuaded that the distinction is important. It seems to me that there are two separate strands to the antitrust inquiry in a case brought against public officials. First, City of Lafayette holds that a municipality is not automatically exempt from antitrust liability without a clearly articulated and affirmatively expressed state policy to displace competition with regulation or monopoly public service. I agree with you that the grant of home rule powers does not express any state policy with respect to the regulation of cable television and therefore does not support Boulder's claim to an exemption in this case. However, in my mind, this cannot end the inquiry, or else a city will be subject to antitrust liability merely by licensing taxicab operators or fixing their rates. It was clear in the Lafayette case that the antitrust laws

"There is no suggestion of a purpose to restrain state action in the Act's legislative history." Parker v. Brown, 317 U.S. 341, 351.

As Harry noted in his concurring opinion in Cantor, "the principal question in the case, that of the Sherman Act's pre-emptive effect upon inconsistent state laws, ... is, as the dissent points out, one of congressional intent." 428 U.S., at 605.

- 3 -

were applicable because the city was acting in a proprietary capacity as a provider of services, see e.g., 435 U.S. at 403, 408. It is by no means equally clear that Congress intended to subject governmental bodies to the antitrust laws when they act solely in a regulatory capacity. In this case there is a factual question whether the collection of a royalty from the cable operators gives the City an entrepreneurial interest in the business or is merely an appropriate aspect of a regulatory exercise of its police powers. I read your opinion, as now written, as requiring a municipality that does not come within the City of Lafayette holding to be subject to the antitrust liability to the same extent as if it were a private party. I am afraid that the imposition of antitrust liability against the City of Boulder will follow automatically from that holding and I am not at all sure that this is the correct result.

As I indicated, these thoughts are somewhat tentative and may change when I try to write them out, but as presently advised I do not believe that I will be able to join your opinion.

Respectfully,



Justice Brennan

Copies to the Conference

we had only that the Parker v. Brown case was no longer a challenge to a state law

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 19, 1981

80-1350 COMMUNITY COMMUNICATIONS CO., INC. v.
CITY OF BOULDER, COLO.

Dear Bill:

Thank you for sharing Lewis' suggestions with me. I think his idea that we should reserve the questions that trouble us, rather than addressing them, is eminently sound. I have some problems with the footnote that he proposes, however, and wonder if the two of you would find the following formulation acceptable:

This case's preliminary posture makes it unnecessary for us to consider issues regarding the applicability of antitrust law in the context of suits by private litigants against government defendants. As we said in City of Lafayette, "[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." 435 U.S. at 417 n.48.] Compare, e.g., National Society of Professional Engineers v. United States, 435 U.S. 679, 687-692 (1978) (considering the validity of anticompetitive restraints imposed by private agreement) with Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 133 (1978) (holding that anticompetitive effect is an insufficient basis for invalidating a state law). As the plurality noted in Cantor v. Detroit Edison Co., 428 U.S. 579, 589-591, the Court's opinion in Parker v. Brown placed great emphasis on the fact that the case involved a challenge to official action rather than private

Beverly

action. Moreover, as in City of LaFayette, 435 U.S. at 401-402, we do not confront the issue of remedies appropriate against municipal officials.

With respect to Lewis' proposed addition to footnote 14, I have some reservations. Instead of adopting his suggestion that we squarely hold that the "active state supervision" requirement has no application to municipal bodies, would it not be more appropriate merely to say we have no occasion to decide whether or not that requirement would apply to a municipal body.

Finally, I agree that it would be advisable to point out that our grant was limited to the antitrust issue.

Respectfully,



Justice Brennan

cc: Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 20, 1981

Re: 80-1350 - Community Communications v.
City of Boulder, Colorado

Dear Bill:

Please join me.

Respectfully,



Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 24, 1981

Re: 80-1350 Community Communications v.
City of Boulder

Dear Bill:

Although my "join" is firm, I think I will try my hand at a brief concurring opinion suggesting some differences between a private antitrust claim against public officials and a claim against private parties.

Respectfully,



Justice Brennan



80-1350 - Community Communications Co. v.
City of Boulder

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

Circulated: DEC 7 '81

Recirculated: _____

JUSTICE STEVENS, concurring.

The Court's opinion, which I have joined, explains why the City of Boulder is not entitled to an exemption from the antitrust laws. The dissenting opinion assumes that the absence of an exemption is tantamount to the existence of a violation.¹ The assumption is not valid. The dissent's dire predictions about the consequences of the Court's holding should therefore be viewed with skepticism.²

1

"[I]n holding that a municipality's ordinances can be 'exempt' from antitrust scrutiny only if the enactment furthers or implements a 'clearly articulated and affirmatively expressed state policy,' ante, at __, the Court treats a political subdivision of a State as an entity indistinguishable from any privately owned business. As I read the Court's opinion, a municipality may be said to violate the Sherman Act by enacting legislation having an anticompetitive effect, unless the legislation is enacted pursuant to an affirmative state policy to supplant competitive market forces in the area of the economy to be regulated." Post, at 1-2 (REHNQUIST, J., dissenting) (emphasis in original).

²Compare Cantor v. Detroit Edison Co., 428 U.S. 579, 615 (STEWART, J., dissenting) (the Court's holding "will surely result in disruption of the operation of every state-regulated public utility company in the Nation and in the creation of 'the prospect of massive treble damage liabilities'") (quoting Posner, Footnote continued on next page.

2-3

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Stevens
 Justice Rehnquist
 Clerk of the Court

RECEIVED
 DECEMBER 17 1981

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1350

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[December —, 1981]

JUSTICE STEVENS, concurring.

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¹"[I]n holding that a municipality's ordinances can be 'exempt' from anti-trust scrutiny only if the enactment furthers or implements a 'clearly articulated and affirmatively expressed state policy,' *ante*, at —, the Court treats a political subdivision of a State as an entity indistinguishable from any privately owned business. As I read the Court's opinion, a municipality may be said to *violate* the Sherman Act by enacting legislation having an anticompetitive effect, unless the legislation is enacted pursuant to an affirmative state policy to supplant competitive market forces in the area of the economy to be regulated." *Post*, at 1-2 (REHNQUIST, J., dissenting) (emphasis in original).

²Compare *Cantor v. Detroit Edison Co.*, 428 U. S. 579, 615 (STEWART, J., dissenting) (the Court's holding "will surely result in disruption of the operation of every state-regulated public utility company in the Nation and in the creation of 'the prospect of massive treble damage liabilities'") (quoting Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U.L. Rev. 693, 728 (1974)). See also *United States Railroad Retirement Bd. v. Fritz*, 449 U. S. 166, 176 n. 10.

Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Brennan

Justice Stevens

Regulated: _____

Recirculated: _____

7.1

Footnote 1 omitted

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1350

COMMUNITY COMMUNICATIONS COMPANY, INC.,
 PETITIONER *v.* CITY OF BOULDER,
 COLORADO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE TENTH CIRCUIT

[January —, 1982]

JUSTICE STEVENS, concurring.

The Court's opinion, which I have joined, explains why the City of Boulder is not entitled to an exemption from the anti-trust laws. The dissenting opinion seems to assume that the Court's analysis of the exemption issue is tantamount to a holding that the antitrust laws have been violated. The assumption is not valid. The dissent's dire predictions about the consequences of the Court's holding should therefore be viewed with skepticism.¹

In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, we held that municipalities' activities as providers of services are not exempt from the Sherman Act. The reasons for denying an exemption to the City of Lafayette are equally applicable to the City of Boulder, even though Colorado is a home-rule State. We did not hold in *City of Lafayette* that the City had violated the antitrust laws. More-

¹ Compare *Cantor v. Detroit Edison Co.*, 428 U. S. 579, 615 (STEWART, J., dissenting) (the Court's holding "will surely result in disruption of the operation of every state-regulated public utility company in the Nation and in the creation of 'the prospect of massive treble damage liabilities'") (quoting Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U.L. Rev. 693, 728 (1974)). See also *United States Railroad Retirement Bd. v. Fritz*, 449 U. S. 166, 176 n. 10.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

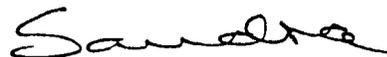
November 17, 1981

No. 80-1350 Community Communications Co., Inc.
v. City of Boulder, Colorado

Dear Bill,

I shall wait for the dissent in this case.

Sincerely,



Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 3, 1981

No. 80-1350 Community Communications Co., Inc.
v. City of Boulder

Dear Bill,

Please join me in your excellent dissent in the
referenced case.

Sincerely,



Justice Rehnquist

Copies to the Conference