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Honorable Leon D. Lazer
Touro Law Center

MUNICIPAL LAW

Hon. Leon Lazer:

I would like to speak on several cases of interest. These are not cases of constitutional proportion, but I think that they are of special interest to municipal lawyers and persons who practice in that area.

SHERMAN ANTI-TRUST ACT AND MUNICIPAL ZONING PRACTICES

The Sherman Anti-Trust Act[1] says that "[e]very contract, combination in form of trust . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."[2] It also states, "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, . . . shall be deemed guilty of a felony . . . ."[3] Comparing the jobs of municipalities, legislative bodies, and administrative boards of municipalities to the language of the Sherman Anti-Trust Act, can be quite alarming. If a governmental body prevents a new shopping center from coming into town[4] or limits the number of taxi franchises,[5] cable television franchises,[6] or garbage collection companies,[7] is it restraining trade?

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1. 15 U.S.C. §§ 1-7 (1988 & Supp. II 1991).

2. *Id.* § 1.

3. *Id.* § 2.

4. *See, e.g.*, Juster Assoc. v. City of Rutland, 901 F.2d 266 (2d Cir. 1990) (City's agreement to support developers of a new shopping center is not injurious to pre-existing shopping center and does not establish any antitrust liability).

5. *See, e.g.*, Golden State Transit Corp. v. City of Los Angeles, 726 F.2d 1430, 1434 (9th Cir. 1984) ("a city need not prove active state supervision to be entitled to *Parker* immunity when it franchises taxicab companies and regulates taxicab fares within the city").

6. *See, e.g.*, Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982) (City's moratorium on the expansion of cable companies is subject to anti-trust scrutiny).

I would like to discuss a case decided by the Supreme Court last April, *City of Columbia v. Omni Outdoor Advertising, Inc.* [8] In *City of Columbia*, a very active billboard company, Columbia Outdoor Advertising ("COA"), had about ninety-five percent of the billboards in Columbia, South Carolina.[9] COA had a rather cozy relationship with the city council and the mayor. Around election time, the mayor's political party and the city council were given free use of billboards around the city.[10] Things were fairly jolly until 1981, when a new company called Omni Outdoor Advertising, Inc. ("Omni"), came to town. Much to the alarm of COA, Omni vigorously started to solicit business.[11] In response, COA did its best to stifle its new competitor by cutting its own prices and trying to get advertisers to break their agreements with Omni.[12] When all efforts failed, COA solicited the efforts of its friends at the city council and the mayor's office who then helped to arrange for a one hundred eighty day moratorium on any new billboards in Columbia.[13] The moratorium was overturned in the state courts,[14] at which point COA arranged for a zoning ordinance which would determine the amount of space between billboard signs.[15] Since there were so

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7. *See, e.g.*, Jefferson Disposal Co. v. Parish of Jefferson, 603 F. Supp. 1125 (E.D. La. 1985) (retroactive application of the Local Government Antitrust Act is constitutional).

8. 111 S. Ct. 1344 (1991), *on remand*, No. 88-1388, 1992 WL 210602 (4th Cir. Sept. 2, 1992). On remand the Fourth Circuit held that Omni previously waived its monopolization charge against COA. 1992 WL 210602 at 2. Therefore, Omni may not be granted a new trial on that theory of liability. *Id.*

9. *City of Columbia*, 111 S. Ct. at 1347.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 1348. The City imposed "a 180-day moratorium on the construction of billboards throughout the city, except as specifically authorized by the council." *Id.*

14. *Id.* The "state court invalidated this ordinance on the ground that its conferral of unconstrained discretion upon the city council violated both the South Carolina and Federal Constitutions." *Id.*

15. *Id.*

many COA signs situated around the city, the new ordinance tended to put Omni out of business.[16]

Omni brought an action against both COA and the City of Columbia, charging a violation of the Sherman Anti-Trust Act.[17] The jury found in favor of Omni and awarded damages in the amount of one million dollars, six hundred thousand of which could be trebled, so the verdict was well in excess of the original one million dollars.[18] The district court judge reversed the jury's verdict and the matter went on appeal to the Fourth Circuit. The Fourth Circuit reversed the district court's decision[19]and permitted the verdict to stand against COA, but remanded the case to the district court for a determination of whether an injunction should be granted against the City.[20] Since billboards were regulated through the City's zoning statute, the issue before the Supreme Court involved the use of the Sherman Anti-Trust Act in connection with the enactment of a zoning ordinance.[21]

In 1943, in a case called *Parker v. Brown*,[22] the Supreme Court decided that the Sherman Anti-Trust Act did not apply to the states.[23] In *Parker*, the state of California had regulated the pricing structure of California raisins.[24] The Court held that the

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16. *Id.*

17. *Id.*

18. *Id.* Section 4 of the Clayton Act provides: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue . . . and shall recover threefold the damages by him sustained . . . ." 15 U.S.C. § 15 (1988).

19. Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc., 891 F.2d 1127 (4th Cir. 1989), *rev'd*, 111 S. Ct. 1344 (1991).

20. *Id.* at 1145. Although "the Local Government Antitrust Act (LGAA), 15 U.S.C. §§ 34-36, [protected] the City from a damage award, it was still subject to an injunctive judgment." *Id.* at 1137. Hence, the case was remanded so that the district court could grant Omni an appropriate injunction against the City.

21. *Id.* at 1132.

22. 317 U.S. 341 (1943).

23. *Id.* at 350-51.

24. *Id.* at 347-48. Under a seasonal proration market program for raisins, every producer was required to deliver all of his inferior grade raisins and at least twenty percent of the total raisins produced into a surplus pool and fifty

state itself could not be subjected to the Sherman Anti-Trust Act.[25] This immunity became known as the *Parker* exception and eventually was extended to exempt municipalities from the Act.[26]

But in the early 1980s, in *Community Communications Co. v. City of Boulder*,[27] the City of Boulder decided to enact a moratorium on expansion of cable television in Boulder.[28] An action was brought against the City by an established cable television company under the Sherman Anti-Trust Act.[29] Upon the entry of new competition in the market, this cable operator alleged that the City was conspiring with a new cable television company.[30] In *Community Communications*, the Court held that the fact that the City had the power to franchise cable television and many other forms of communication, as part of home rule power,[31]did not exempt the City from the operation or the scope of the Sherman Anti-Trust Act.[32] As can be imagined, this decision caused great tremors among municipalities.

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percent into a stabilization pool, to be sold by the program committee "in such manner as to obtain stability in the market." *Id.* at 348.

25. *Id.* at 350-51.

26. *See* Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) (City's refusal to supply sewer treatment services to neighboring towns does not constitute Sherman Antitrust violation since its actions are part of clearly articulated and affirmatively expressed state policy).

27. 455 U.S. 40 (1982) (City's actions do not satisfy *Parker* doctrine because state policy was not clearly articulated and affirmatively expressed).

28. *Id.* at 45-46.

29. *Id.* at 46-47.

30. *Id.* at 47 n.9.

31. *See* COLO. CONST. art. XX § 6(h). The home rule provision states:

> It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right. The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.

Id.

32. *Community Communications*, 455 U.S. at 53. The Court stated that "municipalities 'are not themselves sovereign,' . . . and that accordingly they

Another case, *City of Lafayette v. Louisiana Power & Light Co.*,[33] was decided along the same lines. In *Louisiana Power & Light*, the City of Lafayette, authorized under state law to own and operate electric utility systems, brought an action against a competing investor-owned utility charging federal antitrust violations.[34] The private utility counterclaimed, also charging antitrust violations.[35] The Court decided that municipalities were exempt from antitrust enforcement only "when acting as state agencies implementing state policy to the same extent as the State itself . . . ."[36]

The thrust of these cases is that the mere fact that the state delegates some power to municipalities does not make the action of those municipalities equivalent to state action, or action of the state.[37] Liability would exist under the Sherman Anti-Trust Act unless a clearly articulated statement in the delegation of power permitted the restriction of competition.[38] As a consequence, Congress enacted the Local Government Anti-Trust Act of

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could partake of the *Parker* exemption only to the extent that they acted pursuant to a clearly articulated and affirmatively expressed state policy." *Id.* (quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 412-13 (1978)). Furthermore, the Court noted that the general grant of power to enact ordinances does not necessarily imply state authorization to enact specific anti-competitive ordinances. *Id.* at 56.

33. 435 U.S. 389 (1978).

34. *Id.* at 391-92.

35. *Id.* at 392.

36. *Id.* at 413 n.42.

37. *Id.* at 414. The Supreme Court found that:

> When cities, each of the same status under state law, are equally free to approach a policy decision in their own way, the anticompetitive restraints adopted as policy by any one of them, may express its own preference, rather than that of the State. Therefore, in the absence of evidence that the State authorized or directed a given municipality to act as it did, the actions of a particular city hardly can be found to be pursuant to 'the state'[s] command.'

Id. (quoting Parker v. Brown, 317 U.S. 341, 352 (1943)).

38. *Id.* at 413. "[T]he *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." *Id.*

1984,[39] which exempted municipalities from damages under the Sherman Anti-Trust Act.[40]

The issue of municipal liability was not before the Supreme Court in *City of Columbia* because the exemption was already in existence.[41] The issue before the Court was whether the private entity, which promoted the restrictive zoning legislation before the Columbia City Council and the Mayor, was liable under the Sherman Anti-Trust Act.[42] The Court concluded that a zoning ordinance, in itself, is by its own nature restrictive because zoning limits uses.[43] It limits business uses, industrial uses, and, of course, it even limits residential uses. So, the fact that the state had delegated to the municipalities of South Carolina the power to zone was the equivalent of a clearly articulated policy that the use of that zoning power for anti-competitive reasons would not subject that use to Sherman Act liability.[44] Although there was some further discussion concerning some of the exceptions to the general rule, the end result was that the case against COA, the promoter of the restrictive legislation, was dismissed.[45]

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39. Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750 (codified at 15 U.S.C. § 34-36 (1988)).

40. The Local Government Anti-Trust Act provides in pertinent part that "[n]o damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. § 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity." 15 U.S.C. § 35(a).

41. *City of Columbia*, 111 S. Ct. at 1348 n.2.

42. *Id.* at 1347-48.

43. *Id.* at 1350. The Court noted that "[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants." *Id.*

44. *Id.* at 1350.

45. *Id.* at 1356. The Court maintained that "[t]he 'sham' exception . . . encompasses situations in which persons use the governmental *process* - as opposed to the *outcome* of that process - as an anti-competitive weapon." *Id.* at 1354. The Court rejected the question of "a 'conspiracy' exception, which would apply when government officials conspire with a private party to employ government action as a means of stifling competition." *Id.* at 1355.

The case is of substantial significance to municipal law practitioners. It establishes a rule that, as far as zoning is concerned, those who promote restrictive legislation or restrictive rules to inhibit competition are exempt, whether they are members of the government that promotes or enacts the legislation or the rules, or whether they are the private persons who push for that legislation in order to restrain competition.[46]

City of Columbia makes municipalities breathe much easier because it extinguishes all antitrust litigation possibilities against municipalities and others deriving from zoning regulations.[47] Additionally, those private interests who promote zoning legislation of a restrictive nature are not going to be held liable for those zoning activities.[48]

THE HOBBS ACT AND ITS APPLICATION TO CAMPAIGN CONTRIBUTIONS

The Hobbs Act, 18 U.S.C. 1951,[49] provides that:

> [W]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.[50]

Extortion is defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."[51] When the Hobbs Act was passed in 1948, it was generally construed as involving duress and pressure.[52] It was only in the 1970s that

46. *Id.* at 1356.
47. *Id.* at 1350.
48. *Id.* at 1355-56.
49. 18 U.S.C. § 1951 (1988 & Supp. II 1991).
50. *Id.* § 1951(a).
51. *Id.* § 1951(b)(2).
52. *See, e.g.*, United States v. Kubacki, 237 F. Supp. 638, 641 (E.D. Pa. 1965) (distinguishing between bribery, the essence of which is "the voluntary

federal prosecutors began to view the law as a weapon to fight bribery.[53] In *McCormick v. United States*,[54] decided in April, 1991, the Court dealt with the Hobbs Act as applied to campaign contributions.

McCormick was a member of the West Virginia legislature who seemed to be quite interested in protecting foreign doctors who still were not licensed in West Virginia, but were studying towards their licenses.[55] He sponsored legislation which gave such doctors the privilege of practicing under temporary licensing permits until they could obtain permanent licenses.[56] McCormick had this temporary licensing program extended[57] and even agreed to sponsor a bill granting the doctors permanent licenses based on their years of work experience,[58] since many of these doctors, after all their studies, failed to pass the licensing test anyway.

During his 1984 reelection campaign, McCormick informed John Vandergrift, a lobbyist for foreign doctors, of the great expense involved in running a campaign and that he had not heard anything from the foreign doctors whom he was helping with his legislation.[59] Vandergrift contacted one of the foreign doctors and shortly thereafter McCormick received visits from Vandergrift, during which on four occasions various envelopes were handed to him, containing one hundred dollar bills.[60] He accepted the money and did not report it as campaign contributions nor on his income tax returns.[61]

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giving of something of value to influence the performance of official duty" and extortion, the essence of which is duress). *See also* James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815 (1988).

53. *See* McCormick v. United States, 111 S. Ct. 1807, 1813 n.5 (1991).
54. 111 S. Ct. 1807 (1991).
55. *Id.* at 1809.
56. *Id.*
57. *Id.* at 1810.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*

The following year McCormick sponsored the permanent licensing legislation he had promised.[62] Two weeks after it was enacted, more money came his way in envelopes from the foreign doctors.[63] Again, he did not list those receipts on his campaign receipt forms nor on his income tax returns.[64] Following an investigation, McCormick was indicted by a grand jury charging him with five counts of violating the Hobbs Act, for extorting payments under color of official right, and with one count of tax evasion.[65] Eventually, the case went to trial and he was convicted on the first Hobbs Act count for receiving the initial cash payment and on the income tax violation.[66] At the trial, the district judge charged the jury as follows: "Extortion under color of official right . . . does not occur where one who is a public official receives a legitimate gift or a voluntary political contribution even though the political contribution may have been made in cash in violation of local law."[67] Voluntary means that the money is given "without expectation of benefit."[68] I might interpolate that the judge's charge, which covers a full page of the Supreme Court reporter in a footnote, is something less than an exercise in scholarship or even comprehension.[69]

It may be asked whether anyone contributes to today's candidates without some expectation of benefit. But in any event, that is the language of the charge that the judge gave to the jury, which then convicted the defendant. The Fourth Circuit affirmed[70] and concluded that the party never intended the money to be a campaign contribution.[71] It found that the tax laws were

62. *Id. See* W. Va. H.B. 1431 (1985).
63. *McCormick,* 111 S. Ct. at 1810.
64. *Id.*
65. *Id.*
66. *Id.* at 1812.
67. *Id.*
68. *Id.*
69. *Id.* at 1810 n.4.
70. United States v. McCormick, 896 F.2d 61 (4th Cir. 1990), *rev'd,* 111 S. Ct. 1807 (1991).
71. *Id.* at 67.

certainly violated[72] and rested its determination to a great degree on what it found in the charge.[73]

The Supreme Court found that the conviction should be dismissed.[74] Justice White's opinion established a quid pro quo rule[75] that political contributions are vulnerable under the Hobbs Act as having been taken under color of official right, "but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act."[76] Under this quid pro quo rule, there must be an explicit promise in return for the money. "In such situations the . . . official conduct will be controlled by the terms of the promise or undertaking"[77] and the money is received by the elected official under color of official right.[78]

The Court took a very practical and realistic view of what would happen if the Hobbs Act was interpreted to have been violated under the facts of this case. Under such circumstances, the state legislatures of the state houses and Congress would be emptied and the denizens of those establishments would be in custody. According to Justice White, writing for the majority:

> Whatever ethical considerations and appearances may indicate, to hold that legislators commit the Federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, 'under color of official right.' To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable . . . .[79]

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72. *Id.*
73. *Id.*
74. *McCormick*, 111 S. Ct. at 1818.
75. *Id.* at 1817.
76. *Id.* at 1816.
77. *Id.*
78. *Id.*
79. *Id.*

The result in *McCormick* is sensible. It was Justice White's view that if there was to be a change in campaign financing, the campaign financing law would have to be changed.[80] Additionally, if there are to be Hobbs Act convictions under the circumstances of the *McCormick* case, the receipt of campaign contributions from lobbyists promoting particular interests would become criminal in such a large proportion of situations as to make the present conduct of our political campaigns and of our legislative institutions impossible.[81] Thus, the *McCormick* decision is sound.

This discussion does not go into detail on how the jury charge was insufficient nor how the trial judge's understanding of the Hobbs Act was unrealistic. In concurring, Justice Scalia questioned the quid pro quo rule in view of the fairly simple language of the Hobbs Act,[82] which refers to extortion of property under color of right. It does not mention campaign contributions nor quid pro quo. Thus, according to Scalia, the Court simply invented the rule.[83] While Justice Scalia agreed that there had to be a reversal, he could not accept the majority's reasoning.[84]

Justices Stevens, Black, and O'Connor dissented,[85] based on technical reasons, relying on the lack of objection to the trial judge's charge by the defense counsel.[86] Thus, the dissenters would have affirmed the lower court. The final paragraph of their opinion declared that "'[w]hen a public official accepts a payment [from the beneficiary of the legislation] for an *implicit* promise of fair teatment, [sic] there is an inherent threat that, without the payment, the public official would exercise his discretion in an adverse manner' . . . ."[87] From this reasoning, the dissenters

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80. *Id.*

81. *Id.*

82. *Id.* at 1818 (Scalia, J., concurring).

83. *Id.* (Scalia, J., concurring).

84. *Id.* (Scalia, J., concurring).

85. *Id.* at 1820 (Stevens, J., dissenting).

86. *Id.* (Stevens, J., dissenting).

87. *Id.* at 1824 (Stevens, J., dissenting) (quoting 7 Tr. 1070 (Dec. 5, 1988)).

concluded that there was extortion within the meaning of the Hobbs Act.[88]

THE FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT

Another case of significance, while not of constitutional magnitude, is *Wisconsin Public Intervenor v. Mortier*,[89] which involved the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[90] FIFRA establishes an affirmative scheme for regulating pesticide use, sales, and labeling.[91]

The Town of Casey, Wisconsin, population four to five hundred, adopted a pesticide ordinance.[92] By virtue of this ordinance, Mortier, the plaintiff, was prevented from spraying his lands.[93] He attacked the ordinance as illegal and as preempted by FIFRA.[94] As a consequence, the tiny town of Casey wound up in the United States Supreme Court.[95] The Town was able to afford the litigation because the Wisconsin Public Intervenor, a local agency that deals with environmental matters, took the matter to the Supreme Court.[96]

The issue in the Wisconsin courts was whether the Casey ordinance was preempted by federal law.[97] Since FIFRA was a fairly comprehensive scheme for regulating pesticide use, sales, and labeling,[98] the Wisconsin Supreme Court and the lower courts concluded that FIFRA did indeed preempt the local law.[99]

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88. *Id.* at 1824-25 (Stevens, J., dissenting).
89. 111 S. Ct. 2476 (1991).
90. 7 U.S.C. § 136(a) *et. seq.* (1988 & Supp. II 1991).
91. *Id.*
92. *Mortier*, 111 S. Ct. at 2480 n.1.
93. *Id.* at 2481.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*; *see* Mortier v. Town of Casey, 452 N.W.2d. 555 (Wis. 1990), *rev'd sub nom.* Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476 (1991).
98. *Mortier*, 111 S. Ct. at 2479-80.
99. *Town of Casey*, 452 N.W.2d at 555.

FIFRA provides that "[a] State may regulate the sale or use of any federally registered pesticide . . . but only if and to the extent the regulation does not permit any sale or use prohibited by [FIFRA]."[100] The question was whether the permission granted to the states to adopt pesticide regulation extended to subdivisions of the state.[101] In the antitrust case,[102] the Supreme Court made a distinction between the state and localities.[103] That distinction is not just limited to anti-trust matters. Thus, the state is not a 'person' under 42 U.S.C. § 1983,[104] but localities are.[105] The rationale for freeing the state from federal preemption under FIFRA, but subjecting the localities to it, was that localities are insular and are not generally interested in particular interests apart from their own.[106] Consequently, there can be consistent types of legislation such as state or federal laws and every locality ought not to have the right to adopt its own pesticide, rodenticide, and fungicide laws.[107]

The Supreme Court reversed the Wisconsin Supreme Court and concluded that it was not the intent of Congress to preempt local pesticide regulations.[108] A substantial part of the reasoning for the Supreme Court's determination related to the Supreme Court's study of the congressional debates and the committee reports relative to whether it was the intention of this legislation to preempt local legislation.[109]

Under the Supremacy Clause,[110] the exercise of powers granted to Congress by the Constitution operate to preempt

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100. 7 U.S.C. § 136(v) (1988); *see Mortier*, 111 S. Ct. at 2482.

101. *Mortier*, 111 S. Ct. at 2482.

102. City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344 (1991).

103. *See supra* note 37 and accompanying text.

104. 42 U.S.C. § 1983 (1988).

105. *See* Monell v. Department of Social Services, 436 U.S. 658 (1978).

106. Mortier v. Town of Casey, 452 N.W.2d 555, 558-60 (Wis. 1990).

107. *Id.* at 558-59.

108. Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476, 2487 (1991).

109. *Id.* at 2481-87.

110. U.S. Const. art. VI, cl. 2. The Supremacy Clause provides:

concurrent state authority in that same area.[111] Furthermore, if the regulatory scheme enacted by the higher jurisdiction is so pervasive as to occupy the entire field, then local regulation is preempted.[112]

In *Mortier*, the Supreme Court considered these rules and concluded on two grounds that the local regulation was not preempted. First, while the federal scheme was rather comprehensive, it was not pervasive to the extent that local regulation could be precluded.[113] Second, the congressional committee reports and the debates indicated that there was not an intention to preclude local regulation.[114]

For those who deal with statutory construction and statutory intent, there is an interesting debate in *Mortier*. The majority placed great emphasis on what happened at the congressional committee and congressional debate level.[115] While Justice Scalia agreed with the majority that there was no preemption,[116] he scoffed at the idea of using congressional committee reports or congressional debates to interpret the intent of legislation.[117] According to Justice Scalia, the Wisconsin Supreme Court's only mistake "was failing to recognize how unreliable Committee Re-

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> This Constitution, and the Law of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Law of any State to the Contrary notwithstanding.

Id.

111. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824) (defining preemption as situations where state laws "interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution . . ."). *See also* Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478 (1990).

112. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (where federal regulation is "so persuasive as to make reasonable the inference that Congress left no room for the States to supplement it," then local regulation is preempted).

113. *Mortier*, 111 S. Ct. at 2481-82.

114. *Id.* at 2483.

115. *Id.* at 2481-87.

116. *Id.* at 2487 (Scalia, J., concurring).

117. *Id.* at 2488 (Scalia, J., concurring).

ports are - not only as a genuine indicator of congressional intent but as a safe predictor of judicial construction. We use them when it is convenient, and ignore them when it is not."[118] This is a common failing of judges, perhaps. In any event, the conclusion was that localities can regulate and they are not preempted by FIFRA.[119]

118. *Id.* (Scalia, J., concurring).
119. *Id.* at 2487.