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ANTITRUST IMPLICATIONS OF MUNICIPAL LAND USE PLANNING

Victoria Mikesell Mather†

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I. INTRODUCTION

Congress passed the Local Government Antitrust Act of 1984,¹ primarily to shield municipal governments from monetary damage awards for violations of antitrust laws. The statute was passed after a rash of antitrust suits against municipalities that began in the mid-1970's, causing federal courts to struggle with applying the state action exemption to local governmental units. The Act eliminates the threat of treble damage awards against municipal governments, but continues to allow injunctive relief.

This Article discusses the past, present, and future of municipal antitrust liability, focusing on land use planning and zoning. Part II reviews the federal courts' application of the judicially-created state action exemption to the antitrust laws. It also presents problems inherent in the doctrine, particularly as applied to municipal governments. Part III discusses state statutory shields against antitrust liability, the new federal law, and recent cases decided under the Act. It also discusses the preemption rationale, an alternative judicial form of analysis for municipal antitrust cases. Part IV advocates another solution to the problem—a federal statute granting complete immunity from the antitrust laws to local governmental units.

II. ANTITRUST CHALLENGES TO LAND USE PLANNING DECISIONS

A. Introduction

In 1984, the National Institute of Municipal Law Officers (NIMLO) surveyed the recent antitrust suits against municipalities. A summary² included ninety-nine lawsuits divided into fifteen categories. The most frequently litigated issues involved cable television,³ solid waste collection and disposal,⁴ water and other utility

1. 15 U.S.C. §§ 34-36 (Supp. III 1985).

2. Summary of the Results of the N.I.M.L.O. Survey on Antitrust, Breakdown by Subject on Antitrust Suits against Municipalities and Damages Claimed Where Available (1984) (on file at *The Wayne Law Review*).

3. The award or restriction of cable television franchises is a very frequently litigated area. *See, e.g.*, *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982); *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985), *aff'd*, 106 S. Ct. 1396 (1986); *Catalina Cablevision Assoc. v. City of Tucson*, 745 F.2d 1266 (9th Cir. 1984); *Affiliated Capital Corp. v. City of Houston*, 700 F.2d 226, *reh'g granted*, 714 F.2d 25 (5th Cir. 1983), *cert. denied*, 106 S. Ct. 788 (1986); *Omega Satellite Prods. Co. v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982); *Carlson T.V. v. City of Marble*, 612 F. Supp. 669 (D. Minn. 1985); *Capital City Cable v. District Cablevision, Inc.*, No. 84-3524 (D.D.C. 1985); *Carlson v. Village of Union City*, 601 F. Supp. 801 (W.D. Mich. 1985); *Nor-West Cable Communications Partnership v. City of St. Paul*, No. 3-83 Civ. 1228 (D. Minn. 1984); *Ciminelli v. Cablevision*, 583 F. Supp. 144 (E.D.N.Y. 1984).

4. For recent waste collection and disposal systems cases, see *L & H Sanitation, Inc. v. Lake City Sanitation, Inc.*, 769 F.2d 517 (8th Cir. 1985) (exclusive

services,⁵ hospital and ambulance services,⁶ airport, taxi, and other

franchise challenged); *Tom Hudson & Assoc., Inc. v. City of Chula Vista*, 746 F.2d 1370 (9th Cir. 1984) (municipal award of exclusive contract), *cert. denied*, 472 U.S. 1028 (1985); *Hybud Equip. Corp. v. City of Akron*, 742 F.2d 949 (6th Cir. 1984) (city monopolization of waste collection and disposal), *cert. denied*, 471 U.S. 1004 (1985); *Central Iowa Refuse Sys., Inc. v. Des Moines Metropolitan Solid Waste Agency*, 715 F.2d 419 (8th Cir. 1983) (all solid waste to be brought to municipal land fill), *cert. denied*, 471 U.S. 1003 (1985); *Heille v. City of St. Paul*, 671 F.2d 1134 (8th Cir. 1982) (municipality entered trash collection business); *Ideal Waste Sys., Inc. v. Provo City Corp.*, 605 F. Supp. 100 (D. Utah 1985) (city denied immunity when ban on waste hauling did not meet state action requirements).

5. For examples of cases involving water, see *Auton v. Dade City*, 783 F.2d 1009 (11th Cir. 1986) (challenge to ordinance prohibiting construction of private water wells); *LaSalle Nat'l Bank of Chicago v. County of DuPage*, 777 F.2d 377 (7th Cir. 1985) (challenge to joint activity of municipalities), *cert. denied*, 106 S. Ct. 2892 (1986); *Community Builders, Inc. v. City of Phoenix*, 652 F.2d 823 (9th Cir. 1981) (challenge to charge for hook-up fees in area previously serviced by another city); *Shrader v. Horton*, 626 F.2d 1163 (4th Cir. 1980) (challenge to compulsory hook-up with municipal water system).

For examples of recent cases involving sewers, see *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) (annexation required to tie into sewer system); *Vickery Manor Service Corp. v. Mundelein*, 575 F. Supp. 996 (N.D. Ill. 1983) (challenge to municipal sewer requirements for developer).

For examples of recent cases involving power, see *Grason Elec. Co. v. Sacramento Mun. Util. Dist.*, 770 F.2d 833 (9th Cir. 1985) (challenge to municipal utility district operation), *cert. denied*, 106 S. Ct. 886 (1986); *Rural Elec. Co. v. Cheyenne Light, Fuel & Power Co.*, 762 F.2d 847 (10th Cir. 1985) (challenge to nonexclusive franchise); *City of Groton v. Connecticut Light & Power Co.*, 497 F. Supp. 1040 (D. Del. 1980) (participation in lawsuit not anticompetitive), *aff'd in part, rev'd in part*, 662 F.2d 921 (2d Cir. 1981).

For examples of recent cases involving telephone services, see *Capital Tel. Co. v. New York Tel. Co.*, 750 F.2d 1154 (2d Cir. 1984) (challenge to differences in services and charges), *cert. denied*, 471 U.S. 1101 (1985); *Capital Tel. Co. v. City of Schenectady*, 560 F. Supp. 207 (N.D.N.Y. 1983) (denial of franchise); *Jackson v. Taylor*, 539 F. Supp. 593 (D.D.C. 1982) (challenge by prisoners against municipal jailor for price-fixing telephone services), *aff'd*, 713 F.2d 865 (D.C. Cir. 1983).

6. For examples of recent cases involving ambulance service, see *Springs Ambulance Serv., Inc. v. City of Rancho Mirage*, 745 F.2d 1270 (9th Cir. 1984) (free city ambulance service); *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983) (exclusive franchise for ambulance service), *cert. denied*, 471 U.S. 1003 (1985); *Trinity Ambulance Serv., Inc. v. G & L Ambulance Serv., Inc.*, 625 F. Supp. 142 (D. Conn. 1985) (exclusive contract for ambulance services); *Mercy Peninsula Ambulance, Inc. v. County of San Mateo*, 592 F. Supp. 956 (N.D. Cal. 1984) (refusal to certify paramedics), *aff'd*, 791 F.2d 755 (9th Cir. 1986).

For examples of recent cases involving health services, see *Marrese v. Interqual, Inc.*, 748 F.2d 373 (7th Cir. 1984) (doctor's clinical privileges revoked), *cert. denied*, 472 U.S. 1027 (1985); *Benson v. Arizona State Bd. of Dental Examiners*, 673 F.2d 272 (9th Cir. 1982) (challenge to dental licensing law); *Hospital Dev. and Serv. Corp. v. North Broward Hosp. Dist.*, 619 F. Supp. 535 (S.D. Fla. 1986) (challenge to district's policies regarding indigent patients); *Addino v. Genesee Valley Medical Care, Inc.*, 593 F. Supp. 892 (W.D.N.Y. 1984) (nonprofit corporation's health insurance plan deemed private corporation; no immunity); *Brazil v. Arkansas*

transportation services,⁷ and land use planning decisions.⁸ Almost

Bd. of Dental Examiners, 593 F. Supp. 1354 (E.D. Ark. 1984) (challenge to activities of state board and private state dental association), *aff'd*, 759 F.2d 674 (8th Cir. 1985); Feldman v. Jackson Memorial Hosp., 571 F. Supp. 1000 (S.D. Fla. 1983) (refusal to grant podiatrist hospital privileges), *aff'd*, 752 F.2d 647 (11th Cir.), *cert. denied*, 472 U.S. 1029 (1985). For a discussion of this issue, see Trail & Kelly-Claybrook, *Hospital Liability and the Staff Privileges Dilemma*, 37 BAYLOR L. REV. 315, 348-62 (1985).

7. For examples of recent cases involving airport services, see Independent Taxicab Drivers' Employees v. Greater Houston Transp. Co., 760 F.2d 607 (5th Cir. 1985) (exclusive franchise granted for airport transportation), *cert. denied*, 106 S. Ct. 231 (1985); Lorrie's Travel & Tours, Inc. v. SFO Airporter, Inc., 753 F.2d 790 (9th Cir. 1985) (grant of exclusive airport transportation contract); Deak-Perera Hawaii, Inc. v. Department of Transp., 745 F.2d 1281 (9th Cir. 1984) (grant of exclusive currency exchange), *cert. denied*, 470 U.S. 1053 (1985); Pueblo Aircraft Servs., Inc. v. City of Pueblo, 679 F.2d 805 (10th Cir. 1982) (operation of airport concession); Greyhound Rent-a-Car, Inc. v. City of Pensacola, 676 F.2d 1380 (11th Cir. 1982) (denial of license to operate airport rent-a-car facility), *cert. denied*, 459 U.S. 1171 (1983); Wellwoods Dev. Co. v. City of Aurora, 631 F. Supp. 221 (N.D. Ill. 1986) (competition for fixed-base operators); Transport Limousine v. Port Auth., 571 F. Supp. 576 (E.D.N.Y. 1983) (limousine operator's challenge to a percentage fee); Charley's Taxi Radio Dispatch Corp. v. Sida of Hawaii, Inc., 562 F. Supp. 712 (D. Hawaii 1983) (exclusive contract for taxi services); Hill Aircraft & Leasing Corp. v. Fulton Co., 561 F. Supp. 667 (N.D. Ga. 1983) (challenge to airport authority's allocation of space), *aff'd*, 729 F.2d 1467 (11th Cir. 1984); All Am. Cab Co. v. Metropolitan Knoxville Airport Auth., 547 F. Supp. 509 (E.D. Tenn. 1982) (monopolization of airport ground transportation), *aff'd*, 723 F.2d 908 (6th Cir. 1983).

For examples of recent cases involving taxicab and other transportation services, see Golden State Transit Corp. v. City of Los Angeles, 726 F.2d 1430 (9th Cir. 1984) (franchise and fare regulation of city's taxi services), *cert. denied*, 471 U.S. 1003 (1985); City of North Olmstead v. Greater Cleveland Regional Transit Auth., 722 F.2d 1284 (6th Cir. 1983) (transit authority absorbed municipal bus lines), *cert. denied*, 467 U.S. 1205 (1984); Crocker v. Padnos, 483 F. Supp. 229 (D. Mass. 1980) (bus transportation contract award challenge).

8. For examples of recent cases involving land use planning, see Scott v. City of Sioux City, 736 F.2d 1207 (8th Cir. 1984) (restriction of commercial development in outlying areas to promote urban renewal), *cert. denied*, 471 U.S. 1003 (1985); Parks v. Watson, 716 F.2d 646 (9th Cir. 1983) (challenge to municipality's refusal to vacate platted streets without concessions from developer); Westborough Mall, Inc. v. City of Cape Girardeau, 693 F.2d 733 (8th Cir. 1982) (developer's challenge to city's rezoning in favor of competitor), *cert. denied*, 461 U.S. 945 (1983); Miracle Mile Assoc. v. City of Rochester, 617 F.2d 18 (2d Cir. 1980) (challenge to city's efforts to require developer's compliance with state and federal environmental legislation); Lockary v. Kayfetz, 587 F. Supp. 631 (N.D. Cal. 1984) (12 year water moratorium restricting further expansion approved); Brontel Ltd. v. City of New York, 571 F. Supp. 1065 (S.D.N.Y. 1983) (city exempted city-owned property from rent control), *aff'd*, 742 F.2d 1439, *cert. denied*, 469 U.S. 882 (1984); Jonnet Dev. Corp. v. Caliguiri, 558 F. Supp. 962 (W.D. Pa. 1983) (allegation of conspiracy to monopolize urban hotel business when city purchased building for subsequent reconveyance to third party); Ossler v. Village of Norridge, 557 F. Supp. 219 (N.D. Ill. 1983) (refusal to rezone and increase development potential); Mason City Center Assoc. v. City of Mason City, 468 F. Supp. 737 (N.D. Iowa 1979)

every state or municipal activity, however, has been challenged.⁹

The NIMLO survey reveals the severity of the threat of anti-trust lawsuits faced by municipalities prior to the Local Government Antitrust Act.¹⁰ The survey cites examples of damage figures sought and/or awarded in several of the cases. For example, a cable television company sued both a competitor and a municipality, challenging the award of an exclusive franchise to the competitor and seeking \$280 million in damages.¹¹ Another cable company claimed \$255 million in damages against the City of Los Angeles, the mayor, and various city officials for their refusal to award a franchise.¹² In *Westborough Mall v. City of Cape Girardeau*¹³ the original damage claim was for \$180 million. Likewise, in *Richmond Hilton v. City of Richmond*,¹⁴ the claim was for \$260 million. Both suits involved alleged anticompetitive uses of the zoning power. Although most cases in this area were filed in the federal courts, a few cases have been

(challenge to refusal to rezone property to permit regional shopping center), *aff'd in part, rev'd in part*, 671 F.2d 1146 (8th Cir. 1982).

9. See, e.g., *Hefner v. Alexander*, 779 F.2d 277 (5th Cir. 1985) (attorney disciplinary proceeding); *Riverview Inv., Inc. v. Ottawa Community Improvement Corp.*, 774 F.2d 162 (6th Cir. 1985) (refusal to issue industrial revenue bonds); *Garcia v. Colorado State Bd. of Law Examiners*, 760 F.2d 239 (10th Cir.) (grading of bar exam), *cert. denied*, 106 S. Ct. 163 (1985); *First Am. Title Co. v. South Dakota Land Title Ass'n*, 714 F.2d 1439 (8th Cir. 1983) (state agency regulations on abstracting), *cert. denied*, 464 U.S. 1042 (1984); *Euster v. Eagle Downs Racing Ass'n*, 677 F.2d 992 (3rd Cir.) (racing commission establishing jockey pay), *cert. denied*, 459 U.S. 1022 (1982); *Cine 42nd St. Theatre Corp. v. Nederlander Org., Inc.*, 609 F. Supp. 113 (S.D.N.Y. 1985) (particular companies designated as developers for Times Square area); *Parks v. Donrey, Inc.*, 596 F. Supp. 347 (W.D. Ark. 1984) (sign ordinance restricting outdoor advertising); *Limeco, Inc. v. Division of Lime*, 571 F. Supp. 710 (W.D. Miss. 1983) (lime business of the state), *aff'd*, 778 F.2d 1086 (5th Cir. 1985).

10. 15 U.S.C. §§ 34-36.

11. *Central Telecommunications, Inc. v. Jefferson City*, 589 F. Supp. 85 (1984).

12. *Universal Cable v. City of Los Angeles*, No. 82-5202 (C.D. Cal. filed Oct. 6, 1982).

13. 693 F.2d 733 (8th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983).

14. C.A. No. 81-1100R (E.D. Va. 1981), *rev'd on other grounds*, 690 F.2d 1086 (4th Cir. 1982); see also *Campbell v. City of Chicago*, 639 F. Supp. 1501 (N.D. Ill. 1986) (state action immunity denied, \$18 million claim); *Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. 1025 (N.D. Tex. 1978) (state action immunity denied, \$9 million claim); *Coral Ridge v. City of Margate*, No. 83-6267 (S.D. Fla. filed 1983) (\$30 million claim); *D.E.S. Waste Control v. City of Carrollton*, No. C82-10-N (N.D. Ga. filed 1982) (\$1 million claim); *LaSalle Nat'l Bank v. County of Lake*, No. 81-C3160 (N.D. Ill. filed 1983) (state action exemption denied, \$15 million claim); *Asher v. City of Doniphan*, No. 582-0097C (E.D. Mo. filed 1982) (\$800,000 claim).

heard in the state courts,¹⁵ particularly liquor control cases.¹⁶

This section focuses on antitrust challenges to land use planning and zoning. These municipal activities are well suited to a discussion of the applicability of antitrust laws in the governmental arena. This is true because when a city, town, or county engages in land use planning it is not acting as a business or a commercial enterprise, but theoretically is engaging in traditional local government activities—promoting the health, safety, and welfare of its citizens. Also, land use planning, arguably, is handled best at the local, not the state, level.¹⁷

B. *The State Action Exemption*

1. *The Parker Doctrine*

In 1890, the federal government passed the Sherman Act,¹⁸ its first effort to preserve business competition. The Sherman Act prohibited contracts, combinations, and conspiracies in restraint of trade,¹⁹ as well as monopolies and attempts to monopolize.²⁰ It also authorized treble damages for violation of its provisions.²¹ The Sherman Act contains no internal exceptions for municipalities, since the primary goal of the Act was to prohibit restraint of trade in interstate commerce.²² The reach of the Sherman Act, like all federal statutes, was limited by the Supreme Court's interpretation of the commerce clause of the United States Constitution.²³ In 1890, the

15. The best known state court case is *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 693 P.2d 261, 209 Cal. Rptr. 682 (1984), *aff'd*, 106 S. Ct. 1045 (1986). The *Fisher* case is discussed *infra* notes 242-77 and accompanying text. For other state court cases, see *Benson & Gold Chevrolet, Inc. v. Louisiana Motor Vehicle Comm'n*, 403 So. 2d 13 (La. 1981) (automobile commission's activities); *Kartell v. Blue Shield of Massachusetts*, 384 Mass. 409, 425 N.E.2d 313 (1981) (nonprofit medical services corporation not immune to antitrust challenge); *George W. Cochran Co. v. Comptroller of Treasury*, 292 Md. 3, 437 A.2d 194 (1981).

16. See, e.g., *Alcoholic Beverage Control Bd. v. Taylor Drug Stores, Inc.*, 635 S.W.2d 319 (Ky. 1982); *M.H. Gordon & Son, Inc. v. Alcoholic Beverages Control Comm'n*, 386 Mass. 64, 434 N.E.2d 986 (1982); *Intercontinental Packaging Co. v. Novak*, 348 N.W.2d 330 (Minn. 1984).

17. See *infra* notes 64-127 and accompanying text.

18. Sherman Act, ch. 647, 26 stat. 209 (1890) (currently codified as amended at 15 U.S.C. §§ 1-7 (1982 & Supp. III 1985)).

19. 15 U.S.C. § 1 (1982 & Supp. III 1985).

20. *Id.* § 2 (1982).

21. The treble damage provision of the Sherman Act was later superseded by § 4 of the Clayton Act, ch. 323, 38 stat. 730 (1914) (currently codified in part as amended at 15 U.S.C. §§ 12-27 (1982 & Supp. III 1985)).

22. 15 U.S.C. §§ 1-2 (1982).

23. U.S. CONST. art. 1, § 8, cl. 3 in pertinent part grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

judiciary narrowly interpreted the scope of the commerce clause.²⁴ Courts generally held that interstate commerce meant, almost literally, a crossing of state lines.²⁵

The Supreme Court's interpretation of the federal commerce power gradually expanded until it decided *Wickard v. Filburn*.²⁶ In *Wickard*, the Court held that certain completely intrastate activities could be regulated by the federal government if their combined economic effects could affect interstate commerce.²⁷ Until the Supreme Court decided *Wickard*, any exemption for local municipal activity would have been deemed unnecessary. Almost by definition, most actions by local governments do not have interstate impacts. Many local regulations, however, do affect interstate commerce. In *Parker v. Brown*,²⁸ decided the next year, the Court first pronounced a doc-

24. Hovenkamp & McKerron, *Municipal Regulation and Federal Antitrust Policy*, 32 UCLA L. REV. 719, 723-24 (1985). The authors argue that under the then commonly accepted interpretation of the commerce clause such an exemption would have seemed incomprehensible to legislators and judges alike. For example, in *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895), the Supreme Court held that the antitrust laws did not apply to manufacturing combinations absent a direct connection to interstate commerce. Only a few years later, the Court expanded this very strict application of the interstate commerce requirement, at least in the anti-trust area. In *Swift & Co. v. United States*, 196 U.S. 375 (1905), the Court found that price-fixing by meat dealers in their bidding on cattle directly impacted commerce, even though the bidding took place in one state.

The court gradually evolved from an interpretation that limited the commerce clause in terms of the tenth amendment and that applied artificial tests (direct versus indirect impact on commerce or manufacturing versus commerce activity) to an interpretation that emphasized the economic consequences of regulation. For a discussion of the development of the federal commerce power, see J. NOWAK, R. ROTUNDA & J.N. YOUNG, *CONSTITUTIONAL LAW* 146-67 (2d ed. 1983).

25. *Compare* *Caminetti v. United States*, 242 U.S. 470 (1917) (upholding constitutionality of White Slave Traffic Act, which prohibited interstate transportation of women for immoral purposes); and *Champion v. Ames*, 188 U.S. 321 (1903) (upholding federal regulation of interstate transportation of lottery tickets) *with* *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (invalidating minimum wage law for women); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (striking child labor law restricting interstate transportation of goods produced by factories in violation of law); and *Illinois Cent. R.R. v. McKendree*, 203 U.S. 514 (1906) (striking federal regulation concerning quarantine of diseased animals).

26. 317 U.S. 111 (1942). In *Wickard*, the Court held that a farmer who grew wheat for his household and farm use only was subject to federal quotas on wheat production. The Court reasoned that although each individual farmer's crop may have had only a minimal effect on interstate commerce, when taken in the aggregate, the impact on the price of wheat nationwide would be "far from trivial." *Id.* at 128.

27. *Id.* at 125.

28. 317 U.S. 341 (1943). In the *Parker* case, the State of California set up a scheme to control the production, price, and marketing of raisins. California produced half the world's supply of raisins, most of which were consumed in the United States. Interstate commerce clearly was affected by California's activities, but the

trine commonly known as the "state action exemption," which stands for the proposition that the Sherman Act was intended to prohibit individual, not state, action.²⁹ Thus, the Sherman Act did not restrain a state, its officers, or agents from undertaking activities directed by its legislature.³⁰ Although the doctrine has been the subject of numerous cases and articles in recent years, the Supreme Court did not elaborate on the state action exemption and its requirements for more than thirty years after deciding *Parker*.³¹

2. Application of the Doctrine

a. Supreme Court Cases

As early as 1951, the Supreme Court distinguished state action from private action that was merely enforced by the state. In *Schwegmann Bros. v. Calvert Distillers Corp.*,³² the Court struck down a Louisiana statute that permitted a distributor and retailer to contractually fix a resale price that could also bind nonparties to the contract. A retailer who knowingly sold goods below the price stipulated in a contract was guilty of unfair competition. The Court found that this statute did not constitute state action because the prices were set by private parties and merely were enforced through the state mechanisms.³³

More than twenty years later, in *Goldfarb v. Virginia State Bar*,³⁴ the Court reached a similar result. The Goldfarbs unsuccessfully sought an attorney to perform a title examination for a fee below that published on the county bar minimum fee schedule. The Court found that publishing a minimum fee schedule constituted

Court found that the state regulation coincided with federal antitrust policy. P. AREEDA, *ANTITRUST ANALYSIS* 115-16 (2d ed. 1974).

29. 317 U.S. at 351.

30. *Id.* at 352. The Court stated that the Sherman Act "must be taken to be a prohibition of individual and not state action The state itself exercises its legislative authority in making the regulation and in prescribing conditions of its application." *Id.*

31. Comment, *Antitrust Liability for Municipal Action and Concerted Attempts by Businessmen to Influence Such Action: Separate but Unequal—An Anomaly Persists*, 88 DICK. L. REV. 697, 705 (1984). As that Comment points out, the Court denied certiorari in several cases in which the state action issue was presented. *Id.* at 703 n.50 (citing *Export Liquor Sales, Inc. v. Ammex Warehouse Co.*, 426 F.2d 251 (6th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970); *E.W. Wiggins Airways, Inc. v. Massachusetts Port Auth.*, 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966)). The Comment also notes that when *Parker* was decided, only two law reviews even mentioned the case, and then only in their "Recent Decisions" sections. *See id.* at 701 n.33.

32. 341 U.S. 384 (1951).

33. *Id.* at 389.

34. 421 U.S. 773 (1975).

price fixing and was not required by the state acting as a sovereign because no Virginia statute regulated fees.³⁵ The Court rejected the argument that the fee schedule was prompted by ethical codes promulgated with statutory authority by the Virginia Supreme Court and was thus required by the state.³⁶ The fact that the state bar was a state agency for limited purposes provided no shield for what the Court deemed an essentially private activity.³⁷

In *Cantor v. Detroit Edison Co.*,³⁸ the Court reiterated this public-private distinction. In *Cantor*, a private utility regulated by the Michigan Public Service Commission allowed residential customers to exchange free light bulbs for burned-out bulbs. This exchange program was incorporated into tariff rates that were approved by the Commission and that required Commission approval for revision. The Court found that the state action exemption was not available to the utility because the utility controlled the option to conduct the program.³⁹ The Court also held that no inherent inconsistency existed between the federal antitrust laws and the regulations involved in *Cantor*.⁴⁰

In contrast, the Court in *Bates v. State Bar of Arizona*⁴¹ found that the *Parker*⁴² exemption encompassed a restriction on lawyer advertising imposed by the Arizona Supreme Court. The Court distinguished *Goldfarb*,⁴³ stating that the restriction was compelled by the state acting as a sovereign.⁴⁴ The *Bates* Court also distinguished *Cantor*⁴⁵ noting that because the claim in *Bates* was against the state itself, rather than against a private party as in *Cantor*, the state had an actual interest in the regulation that was essential to its regulatory scheme.⁴⁶ The *Bates* Court also clarified the test for state action immunity by requiring that the regulation clearly articulate an ex-

35. *Id.* at 790.

36. *Id.* at 791.

37. *Id.* at 791-92.

38. 428 U.S. 579 (1976).

39. *Id.* at 594. The Court stated: "There is nothing unjust in a conclusion that respondent's participation in the decision is sufficiently significant to require that its conduct implementing the decision, like comparable conduct by unregulated businesses, conform to applicable federal law." *Id.* The Court further noted that this conclusion was not inconsistent with the rationale underlying *Parker v. Brown*, 317 U.S. 341 (1943), because in *Parker* the state required all raisin producers in the state to comply with the proration program. By contrast, Michigan never required any utility to comply with a light bulb exchange program. 428 U.S. at 594 n.32.

40. 428 U.S. at 595-96.

41. 433 U.S. 350 (1977).

42. 317 U.S. 341.

43. 421 U.S. 773.

44. 433 U.S. at 360.

45. 428 U.S. 579.

46. 433 U.S. at 361.

press state policy, be subject to pointed reexamination by the policy maker and active state supervision.⁴⁷

Similarly, in *New Motor Vehicle Board of California v. Orrin W. Fox Co.*,⁴⁸ the Court upheld a statute requiring an automobile manufacturer to obtain board approval to open a new retail motor vehicle dealership if any existing local franchise protested the establishment of a competing dealership. Again, the Court found a clearly articulated and affirmatively expressed policy to replace some competition with regulation.⁴⁹ The Court found that some inconsistency with federal policy did not render the law invalid.⁵⁰

In 1978, the Court examined municipal rather than state anti-trust liability. In *City of Lafayette v. Louisiana Power & Light Co.*,⁵¹ a plurality held that a city was a person under the antitrust laws and that local governments were not entitled to automatic exclusion.⁵² Four justices would have exempted cities from the Sherman Act only when anticompetitive conduct was directed or authorized and supervised by the state as part of its clearly articulated and affirmatively expressed policy to substitute regulation for competition.⁵³ Chief Justice Burger, concurring with the result, would have required the state to compel the anticompetitive activity and the cities to show that the regulation was essential to its regulatory scheme. Because he viewed the city as acting as a municipal utility, not as a governmental body, no state action immunity was available.⁵⁴ Four justices dissented, arguing that cities should be immune from anti-trust liability in the exercise of a governmental function.⁵⁵ Significantly, however, the Supreme Court recently rejected the use of integral, necessary, or traditional governmental functions as a test for distinguishing state immunity from federal regulation. In *Garcia v. San Antonio Metropolitan Transit Authority*,⁵⁶ the Court stated that such a rule was "unsound in principle and unworkable in practice."⁵⁷

47. *Id.* at 362.

48. 439 U.S. 96 (1978).

49. *Id.* at 109.

50. *Id.* at 110.

51. 435 U.S. 389 (1977).

52. *Id.* at 397, 413.

53. Justices Brennan, Marshall, Powell, and Stevens comprised the plurality. *Id.* at 413.

54. *Id.* at 424-26 (Burger, C.J., concurring).

55. *Id.* at 426, 429-30 (Stewart, White, Blackmun & Rehnquist, J.J., dissenting). The dissenters argued that municipal governments were state instrumentalities whose actions constituted exercise of the state's sovereign power. "City governments . . . are thus a far cry from the private accumulations of wealth that the Sherman Act was intended to regulate." *Id.* at 429-30.

56. 469 U.S. 528, *reh'g denied*, 471 U.S. 1049 (1985).

57. *Id.* at 546.

In *California Retail Liquor Dealer's Ass'n v. Midcal Aluminum, Inc.*,⁵⁸ the Court, relying on prior case law, established a two-part test for state action antitrust immunity under *Parker*. The regulation must be a part of a "clearly articulated and affirmatively expressed state . . . policy" and must be "actively supervised by the state."⁵⁹ In *Midcal*, the Court found that a state-regulated resale price maintenance agreement on wine met the first prong of the test, but not the second.⁶⁰

Midcal was similar to *Schwegmann Bros.*⁶¹ The state in *Midcal* merely authorized the price setting and enforced the prices established by private parties.⁶² The Court stated that "[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price fixing arrangement."⁶³ In *Community Communications Co. v. City of Boulder*,⁶⁴ the Court concluded that the state constitutional grant of home rule power to a municipality was insufficient to immunize the municipality from antitrust liability under the *Midcal-Parker* doctrine.⁶⁵ In *Boulder*, the city enacted a three month moratorium on cable television hook-ups by the plaintiff to enable the city council to draft a model cable television ordinance and to attract new cable companies to the area.⁶⁶ The city claimed that the state of Colorado vested the municipality with all of the state's sovereign powers in local and municipal affairs via the home rule powers. The Court held that despite the home rule statute the state had no clearly articulated and affirmatively expressed state policy with regard to the moratorium.⁶⁷ To the contrary, the state assumed a neutral position on the issue.⁶⁸ The dissent argued that the Court's decision effectively destroyed not only the municipalities' power to regulate the local economy, but also the home rule movement in the United States today. Rehnquist's dissent also contended that the Court's decision radically alters the relationship between the states and their political subdivisions by requiring home rule units to seek the imprimatur and approval of the state for many decisions affect-

58. 445 U.S. 97 (1980).

59. *Id.* at 105 (citing *Lafayette*, 435 U.S. at 410 (1978)).

60. *Id.* The state failed to meet the second-prong because it merely authorized price setting without setting prices or reviewing the reasonableness of set prices.

61. 341 U.S. 384 (discussed *supra* notes 32-33 and accompanying text).

62. 445 U.S. at 105.

63. *Id.* at 106.

64. 455 U.S. 40 (1982).

65. *Id.* at 54-56.

66. *Id.* at 45-46.

67. *Id.* at 53.

68. *Id.* at 55.

ing only matters of local concern.⁶⁹

Recently, however, the Supreme Court has found state or local governments to be immune from the antitrust law. In *Hoover v. Ronwin*,⁷⁰ the Court held that the Arizona Supreme Court acted in a legislative capacity in determining a grading formula for bar admissions and that state-enacted legislative actions are ipso facto exempt from the antitrust laws.⁷¹

In *Town of Hallie v. City of Eau Claire*,⁷² the Supreme Court eliminated the active state supervision requirement for exemption from the antitrust laws when the actor is a municipality. The Court distinguished *Midcal*, indicating that state supervision is required when private parties engage in the anticompetitive conduct.⁷³ However, because the dangers of anticompetitive conduct are deemed lessened in the municipal action situation,⁷⁴ the state supervision prong is not necessary. Justice Powell's opinion for a unanimous court noted that once state authorization exists, the state need not actively supervise "the municipality's execution of what is a properly delegated function."⁷⁵ On the issue of a clearly articulated and affirmatively expressed state policy, the Court held that Wisconsin statutes, which grant authority to cities to construct and maintain sewer systems, to delimit service areas and to refuse to serve unannexed areas, sufficiently reflected a state policy to displace competition with regulation.⁷⁶ The Court indicated that cities need not be compelled to act by the state and that the state need not expressly indicate that its delegation to municipalities is intended to have anticompetitive effects.⁷⁷

69. *Id.* at 70-71 (Rehnquist, O'Connor, J.J., & Burger, C.J., dissenting).

70. 466 U.S. 558 (1984).

71. *Id.* at 579-80. "When the conduct is that of the sovereign itself . . . the danger of unauthorized restraint of trade does not arise. Where the conduct in issue is in fact that of the state legislature or supreme court, we need not address the issues of 'clear articulation' and 'active supervision.'" *Id.* at 569.

72. 471 U.S. 34, 47 (1985).

73. *Id.* at 39-40 & n.3.

74. The Court stated: "We may presume, absent a showing to the contrary, that the municipality acts in the public interest." *Id.* at 45 (footnote omitted). The Court added: "Among other things, municipal conduct is invariably more likely to be exposed to public scrutiny than is private conduct." *Id.* n.9.

75. *Id.* at 47. The Court contrasted the Wisconsin statute with the type of home rule statute in *Boulder*, 455 U.S. 40. Although the statute in *Boulder* allowed the city to decide every aspect of its cable television policy, the Wisconsin statute specifically authorized the "cities to provide sewerage services and has delegated to the cities the express authority to take action that foreseeably will result in anticompetitive effects." 471 U.S. at 43.

76. 471 U.S. at 44.

77. *Id.* at 44-46. In *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985), decided the same day as *Town of Hallie*, 471 U.S. 34, the Court found that both prongs of the *Midcal*, 445 U.S. at 105, test were

Most recently, the Supreme Court decided *Fisher v. City of Berkeley*.⁷⁸ In *Fisher*, the Court found that the city's rent control ordinance was not preempted by the Sherman Act and thus was constitutional.⁷⁹

Recently, state action exemption requirements appear somewhat relaxed when compared to the *Midcal*⁸⁰ requirements of state authorization and supervision. The *Hoover*⁸¹ case illustrates that a state government is ipso facto exempt from antitrust scrutiny when acting in a legislative capacity. Yet, to claim immunity from the antitrust laws, a municipality still must show state authorization or a state policy to displace competition with regulation. This state policy, however, need not compel the anticompetitive activity or expressly indicate an anticompetitive intent or goal.⁸² After *Town of Hallie*,⁸³ state supervision of an authorized local activity is no longer required.⁸⁴

Currently, the state action doctrine does not help determine whether a state policy to displace competition with regulation exists,

satisfied when motor common carriers were authorized by state law to submit collective rate proposals to the public service commissions of their respective states. The Court overruled the Fifth Circuit by holding *Midcal* applicable to private party defendants, and that the anticompetitive activity need only be permitted rather than compelled under state law when the private parties are regulated. 471 U.S. at 59-60, 61-62. Justice Stevens, joined by Justice White, dissented, arguing that the Court's decision was inconsistent with the policies of the Sherman Act and with prior Court decisions. *Id.* at 66-80. Stevens cited as examples: *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592-93, 597 (state involvement in restrictive private activities yields no antitrust immunity) (Stewart, Powell & Rehnquist, J.J., dissenting; state action exemption requires private conduct to be "compelled," not merely "prompted" by state action); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975) (anticompetitive conduct "prompted" by state action not sufficient; such conduct must be required by state acting as sovereign); *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 561 (1949) (only Congress can write exceptions into Act); *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 456 (1945) (regulated industries not automatically exempt from Sherman Act).

Justice Stevens noted that in *Cantor* the Court was divided on whether compulsion alone was sufficient to confer antitrust immunity. 471 U.S. at 72. He also cited statutes that exempt certain rate-making activities from the antitrust laws. *Id.* at 77, 79. Stevens argued: "Only Congress, expressly or by implication may authorize price-fixing and has done so in particular industries or under compelling circumstances." *Id.* at 67.

78. 106 S. Ct. 1045 (1986).

79. *Id.* at 1051. For discussion of the *Fisher* case, see *infra* notes 242-77 and accompanying text.

80. 445 U.S. 97.

81. 466 U.S. 558.

82. For discussion of *Town of Hallie*, see *supra* notes 72-77 and accompanying text.

83. 471 U.S. 34.

84. *Id.* at 47.

particularly when an express indication of any anticompetitive goals is not required. Many of the lower court cases discussed in the next section illustrate this problem. The courts struggle with the implied powers to restrict competition granted to local governing bodies by their state legislatures via statute.

Another conceptual problem with the courts' present approach is the apparent extreme deference granted to state legislature decisions and the complete lack of deference to more localized decision-making. This approach is inconsistent with Justice Powell's unanimously supported view in *Town of Hallie*,⁸⁵ which presumes that a municipality acts in the public interest.⁸⁶ Additional problems inherent in the state action doctrine are discussed below.

b. Lower court decisions

In land use planning, federal courts generally have found municipal activities and decisions to be immune from liability under the antitrust laws, particularly in the absence of specific allegations of conspiracy or self-dealing by local officials. Such allegations are often determinative of the threshold issue of immunity. Another important factor in determining immunity is the courts' perception of the likelihood that state legislatures considered the possible anticompetitive effects of state-authorized municipal activities.⁸⁷

For example, in 1985 the Seventh Circuit granted immunity to three local governmental units—two villages and a county—charged with conspiracy regarding sewage service, water service, annexation, and zoning.⁸⁸ The plaintiffs were potential developers of a luxury housing development on a 143 acre tract. The municipalities allocated the area's water and sewage services between themselves and the county, allegedly in a conspiracy. The municipalities then denied the developers a special use permit for the proposed development.⁸⁹ The court found that the anticompetitive effects that resulted from state zoning statutes authorizing these activities were foreseeable by the state legislature.⁹⁰

In a recent shopping center case, the Eighth Circuit found a city's zoning ordinance that restricted outlying commercial development, and its contract with a private developer for a central city

85. *Id.* at 34.

86. *Id.* at 45.

87. As the Supreme Court decisions instruct, the state legislatures need not intend for the authorized municipal actions to have anticompetitive consequences. See *supra* notes 28-86 and accompanying text.

88. *LaSalle Nat'l Bank v. County of DuPage*, 777 F.2d 377 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 2892 (1986).

89. *Id.* at 379-80.

90. *Id.* at 381-85.

redevelopment project, to be immune to an antitrust challenge.⁹¹ The plaintiffs owned land along the city's periphery that was zoned for commercial development, upon which they proposed to build a regional shopping center. The city, however, later rezoned the property to prohibit such development because of an existing downtown urban renewal plan. The court found state authorization under a state urban renewal law and concluded that the state legislature must have anticipated the potential anticompetitive economic impacts of the statute.⁹²

In *Unity Ventures v. County of Lake*,⁹³ an Illinois federal judge granted a defense motion for judgment notwithstanding the verdict. The jury had awarded the plaintiffs \$9.5 million, which amounted to a \$28.5 million judgment against the municipal defendants under the treble damages provisions of the antitrust laws.⁹⁴ The plaintiffs filed suit against a county, its board members, and a village, including its trustees and mayor, alleging that the defendants conspired to prevent the plaintiffs from developing land by denying them access to sewer services and by invalid annexation and rezoning activities.⁹⁵ The court granted the defendants' motion on alternative grounds, noting that the municipal defendants' conduct was authorized and that anticompetitive consequences were foreseen by the state legislature. Thus, the governmental conduct was protected from antitrust liability under the *Parker* doctrine.⁹⁶ Furthermore, the court found the antitrust claim wanting because the plaintiffs failed to establish requisite relevant markets or injury to competition within those markets.⁹⁷

A federal district court in Maryland recently found antitrust immunity for the denial of a special use permit needed to construct a

91. *Scott v. City of Sioux City*, 736 F.2d 1207 (8th Cir. 1984), *cert. denied*, 471 U.S. 1003 (1985).

92. *Id.* at 1210-16. Similarly, in *Miracle Mile Assocs. v. City of Rochester*, 617 F.2d 18 (2d Cir. 1980), the court held that the city's actions were immune to an antitrust challenge. *Id.* at 20. The city was building a downtown shopping center and therefore opposed the construction of a shopping mall bordering the community. The city petitioned the New York Department of Environmental Conservation and the Army Corps of Engineers to restrict the development. The court held that the city's activity was protected under the state action doctrine because the state and federal agencies in question accepted jurisdiction and forced the complainant to comply with their regulations. *Id.* at 20-21.

93. 631 F. Supp. 181 (N.D. Ill. 1986).

94. Clayton Act ch. 323 § 4, 38 stat. 730 (current version at 15 U.S.C. § 15 (Supp. III 1985)).

95. 631 F. Supp. at 185-87.

96. *Id.* at 191.

97. *Id.* at 191-96. A discussion of the merits of an antitrust claim in the municipal area is relatively rare, as evidenced by the *Unity Ventures* court's failure to cite cases based on challenges to municipal activity.

filling station.⁹⁸ The court, following *Scott v. City of Sioux City*,⁹⁹ predicted the *Town of Hallie*¹⁰⁰ rule that active state supervision is not required to establish a state action exemption.¹⁰¹ The court also found that the state zoning statute and Maryland court decisions reflected a clearly articulated and affirmatively expressed state policy to displace competition with regulation.¹⁰²

In *Brontel Ltd. v. City of New York*,¹⁰³ a New York district court found that the state action exemption encompassed the city's rent control regulations.¹⁰⁴ The state had enacted an emergency housing rent control act authorizing the city to adopt and administer appropriate ordinances.¹⁰⁵ Therefore, the court found a state policy to displace competition with regulation.

In *Jonnett Development Corp. v. Caliguri*,¹⁰⁶ a Pennsylvania federal court granted summary judgment against a developer's allegations that the city of Pittsburgh conspired to prevent it from acquiring property on which it planned to construct a hotel. The court found that the developer failed to establish two elements essential to an antitrust claim—conspiracy and illegal objective or conduct.¹⁰⁷ On the immunity issue, the court found that the city and its named officials were exempt from antitrust liability under the state action doctrine.¹⁰⁸ The court determined that the municipal defendants had the power to plan the redevelopment area, including the location and number of hotels. Because the Pennsylvania legislature enacted an urban redevelopment statute authorizing the municipality to purchase real property in blighted areas for redevelopment

98. *Racetrack Petroleum, Inc. v. Prince George's County*, 601 F. Supp. 892 (D. Md. 1985), *aff'd*, 786 F.2d 202 (4th Cir. 1986).

99. 736 F.2d 1207 (discussed *supra* text accompanying notes 88-90).

100. 471 U.S. 34 (1985).

101. 601 F. Supp. at 903. The court also held, in the alternative, that state court review of local zoning decisions would constitute sufficient state supervision. *Id.* at 907-08.

102. *Id.* at 906-07. The court emphasized the state's statutory criteria for zoning decisions, including public need, which was the expressed basis for the denial in this case. *Id.* at 908.

103. 571 F. Supp. 1065 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 1439 (2d Cir.), *cert. denied*, 469 U.S. 882 (1984).

104. *Id.* at 1071.

105. *Id.* at 1071-72.

106. 558 F. Supp. 962 (W.D. Pa. 1983).

107. *Id.* at 966. The court cited *Martin B. Glauer Dodge Co. v. Chrysler Corp.*, 570 F.2d 72, 81 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978), as establishing the four essential elements to a cause of action under § 1 of the Sherman Act. These elements include: 1) a conspiracy, 2) an anticompetitive impact on the relevant product and geographical markets attributable to the conspiracy, 3) illegal conduct and purpose of the conspiracy, and 4) the plaintiff's injury proximately caused by the conspiracy. 558 F. Supp. at 966.

108. 558 F. Supp. at 965.

purposes.¹⁰⁹

When more specific allegations of self-dealing and conspiracy are raised, however, courts are more likely to deny summary judgment on the issue of immunity or to find that the antitrust claims should be tried on their merits. For example, in *Westborough Mall, Inc. v. City of Cape Girardeau*,¹¹⁰ the court found genuine issues of material fact sufficient to preclude summary judgment on an alleged antitrust violation. The plaintiffs alleged that the city deprived them of their zoning rights and then improperly granted those rights to another developer in contravention of state law and policy. The court concluded that a conspiracy to thwart normal zoning procedures and to deprive persons of their property was not encompassed by any clearly articulated state policy.¹¹¹

In another shopping center case,¹¹² the plaintiffs sought to develop a regional shopping center bordering the downtown area. They sued the city and various individual defendants for conspiring with developers of a downtown shopping center to discourage outlying development. The plaintiffs attributed their denial of a rezoning request to the alleged anticompetitive agreement.¹¹³ The court found that the allegations precluded summary judgment. The court, strictly construing the state zoning statute, found that the statute did not compel any zoning activity by the municipality and did not contemplate any anticompetitive conduct.¹¹⁴ When the case was tried on the merits, the jury denied relief to the plaintiffs and the result was affirmed on appeal.¹¹⁵ This particular result may also be explained by the tenor and the language of the Supreme Court cases in this area at the time the case was heard. In 1979, courts strictly construed the type of state authorization required, largely because of such Supreme Court decisions as *City of Lafayette*¹¹⁶ and *Midcal*,¹¹⁷ and because of the Court's description of the state action test as requiring "a clearly articulated and affirmatively expressed state policy."¹¹⁸

In *Whitworth v. Perkins*,¹¹⁹ the City of Impact, Texas author-

109. *Id.*

110. 693 F.2d 733 (8th Cir. 1982), *cert. denied*, 401 U.S. 945 (1983).

111. *Id.* at 746.

112. *Mason City Center Assoc. v. City of Mason City*, 468 F. Supp. 737 (N.D. Iowa 1979), *aff'd in part, rev'd in part*, 671 F.2d 1146 (8th Cir. 1982).

113. *Id.* at 740.

114. *Id.* at 742-43.

115. 671 F.2d 1146.

116. 435 U.S. 389 (1978).

117. 445 U.S. 97 (1980).

118. *See, e.g.*, 435 U.S. at 413; 445 U.S. at 105. For a discussion of these cases, see *supra* notes 51-55, 58-60 and accompanying text.

119. 559 F.2d 378 (5th Cir. 1977), *cert. denied*, 440 U.S. 911 (1979).

ized the sale of alcoholic beverages, but later enacted an ordinance prohibiting such sales on lots zoned for residential purposes.¹²⁰ Consequently, the plaintiff could not sell alcoholic beverages and filed an antitrust suit. The appellate court, reversing the lower court's summary judgment for the defendants, distinguished *Whitworth* from *Parker*.¹²¹ In *Whitworth* the challenged conduct was that of the city and not the state. The program allegedly was enacted to further private and not public goals and was not adopted with federal assistance and cooperation.¹²² Because the actor was a municipality and not the state itself, the court focused on whether the governmental decision was bona fide and not merely an action taken for private benefit.¹²³

Other lower federal court cases reflect similar reasoning.¹²⁴ Ap-

120. *Id.* at 380.

121. *Id.* at 380-82.

122. *Id.* at 381-82.

123. *Id.*

124. In 1983, a South Carolina federal court found that the enactment of certain ordinances regulating billboards did not automatically clothe a municipality with immunity from antitrust liability. *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, 566 F. Supp. 1444 (D.S.C. 1983). The complaint was based on an alleged separate conspiracy between municipal officials and a major local billboard company and not the existence of the ordinances themselves. Thus, the court did not have to decide whether the South Carolina zoning statute authorized this activity or expressed a state policy regarding billboard regulation. *Id.* at 1446. The court distinguished an allegation that the city's action violated the antitrust laws from an allegation that the city conspired to violate the antitrust laws by finding that, although the city's actions may be exempt from the antitrust laws, conspiracy to violate such laws could render state action immunity unavailable.

The *Omni* court cited other cases in which courts reached the same conclusion. *Id.* (Cedar-Riverside Assoc., Inc. v. United States, 459 F. Supp. 1290 (D. Minn. 1978), *aff'd on other grounds sub nom.*, Cedar-Riverside Assoc., Inc. v. City of Minneapolis, 606 F.2d 254 (8th Cir. 1979); *Stauffer v. Town of Grand Lake*, 1981-1 Trade Cas. (CCH) ¶ 64,029 (D. Colo. 1980)).

In *Stauffer*, a Colorado federal court found that a town and various municipal officials were not immune under the state action doctrine when the complaint alleged that a rezoning of the plaintiff's property sought to promote individual officials' self-interest. The municipality rezoned the plaintiff's property from multifamily to single family use. 1981-1 Trade Cas. at ¶ 76,327. The suit alleged that the rezoning resulted from a conspiracy to prevent the plaintiff from competing for multifamily housing and to enhance the value of several municipal officials' property, which was suitable and zoned for multifamily housing. *Id.* at ¶ 76,328. The court found that the Colorado zoning statutes evidenced a policy "to displace competition with regulation" and that adequate state supervision of this policy was established by the statutes. *Id.* at ¶ 76,329-30. The promotion of individual economic benefit, however, was not authorized by the statutes. Thus, the court denied summary judgment. *Id.* at ¶ 76,330.

In 1977, a Utah federal court found that a county and its employees were not immune from antitrust liability when the plaintiffs alleged a conspiracy to decrease competition in the real estate market. *Nelson v. Utah County*, 1978-1 Trade Cas.

parently, the lower federal courts have employed either the test for potential liability suggested by Deutsch or by Wiley. Deutsch would recognize antitrust liability when local governments act as developers, as partners with developers, or when local officials act outside their authority, succumbing to corruption, self-dealing, or improper influence.¹²⁵ Wiley would expose local governments to antitrust liability when the challenged regulation resulted from private party influence rather than in response to a market problem.¹²⁶ Both of these tests explain the denial of summary judgment in cases of alleged self-interest by municipal officials.

The cases discussed illustrate problems inherent in the judicially created and interpreted state action doctrine. In factually similar situations, courts have frequently reached different results on the issue of immunity. The determination of immunity is important because a trial on the merits significantly increases the cost of such lawsuits to the municipality, notwithstanding the Local Government Antitrust Act,¹²⁷ under which injunctive relief is the only available remedy. Furthermore, this threshold determination appears to turn on the strength of the plaintiff's allegations of individual wrongdoing or self-dealing by government officials.

The de facto approach of the courts, as explained by the Deutsch and Wiley theories, is unsatisfactory for several reasons. Criticisms of the application and analysis used in the state action exemption doctrine are discussed in the next section.

3. Criticisms of the Doctrine

a. Problems of Analysis

As previously noted, the *Parker* decision generated little comment in 1943.¹²⁸ Some classic criticisms of the *Parker* doc-

(CCH) ¶ 62,128 (D. Utah 1977). The plaintiffs alleged that a conspiracy between county officials and a private corporation caused the county to enact an invalid zoning ordinance and to deny building permits to the plaintiffs. *Id.* at ¶ 74,967. The court found that the Utah zoning statutes did not confer sufficient state authorization to automatically exempt the county and its officials from the antitrust laws because the zoning statutes were merely discretionary. *Id.* at ¶ 74,968.

125. See *infra* notes 172-73 and accompanying text.

126. See *infra* notes 222, 235-38 and accompanying text.

127. 15 U.S.C. §§ 34-36 (Supp. III 1985); see also *infra* notes 194-220 and accompanying text.

128. Even recently, in referring to *Boulder*, 455 U.S. 40 (1982), one commentator noted:

This most recent U.S. Supreme Court decision on municipal antitrust liability caused an initial ripple of concern that quickly subsided. The American Planning Association began conducting a series of workshops on land use law in the early 1980's, and after a couple of years with a lecture on antitrust in the workshop curriculum, it was eventually dropped because of

trine—state action exemption—note the expense of litigation and the chilling or deterrent effect of the threat of antitrust suits on a municipality.¹²⁹ Critics claim that cities and counties would hesitate or refuse to legislate even though legislation might improve the public health, safety, and welfare if threatened with antitrust litigation.¹³⁰ The federal solution to this problem, the Local Government Antitrust Act of 1984,¹³¹ does not eliminate the deterrent effect of the antitrust laws because injunctive relief (and the tandem expense of litigation) remains available. The Act does, however, alleviate municipal concerns about large monetary damage awards, which could be trebled under the antitrust laws.¹³²

lack of interest, even after the *Boulder* decision. However, interest in the issue was revived in 1984 because of recent developments in the case law and federal statutes.

Merriman, *Limiting Land Use Liability*, in 1985 ZONING AND PLANNING LAW HANDBOOK § 7.03(2)(b). For a discussion of recent decisions and statutes, see *infra* notes 175-277 and accompanying text.

129. Lopatka, *State Action and Municipal Antitrust Immunity: An Economic Approach*, 35 FORDHAM L. REV. 23, 73-74 (1984); accord Civiletti, *The Fallout From Community Communications Co. v. City of Boulder: Prospects for a Legislative Solution*, 32 CATH. U.L. REV. 379, 385-87 (1983); Williamson, *Commentary: The Reagan Administration's Position on Antitrust Liability of Municipalities*, 32 CATH. U.L. REV. 371, 377 (1983); Comment, *State Action Immunity for Local Land Use Decisions: Oregon and Washington Systems Provide Broad Contrasts*, 20 WILLAMETTE L.J. 755, 782 (1984).

130. Sterk criticizes the award of money damages in unconstitutional land use regulation cases on a variety of grounds. Sterk, *Government Liability for Unconstitutional Land Use Regulation*, 60 IND. L.J. 113 (1983). The sections discussing the efficiency aspects of monetary awards could apply to antitrust concerns as well: "First, a blanket liability rule could provide a general incentive for government inaction because no comparable damage sanction would attach to a decision not to act." *Id.* at 138. Sterk further noted:

[T]he threat of municipal damage liability for enactment of unconstitutional ordinances would probably cause municipal officials to engage in more extensive evaluation of constitutional issues. However, because municipal officials are not, as a group, well-suited for constitutional decision-making, damage liability is likely to deter enactment of constitutional and socially desired ordinances while producing little gain in constitutional enforcement.

Id. at 115. Many of Sterk's arguments parallel those raised by Lopatka, *infra* notes 290-91 and accompanying text.

131. 15 U.S.C. §§ 34-36. For a discussion of the Act, see *infra* notes 194-220 and accompanying text.

132. The treble damages provision of the Sherman Act appears to be mandatory, not discretionary, which has caused concern. Treble damages are apparently required in all cases in which damages are awarded, even when regular or no damages might be more appropriate. Huge antitrust awards could have had a "devastating" impact on a municipal treasury. Civiletti, *supra* note 129, at 385. Phillip Areeda and Donald Turner, however, indicate that, although punitive sanctions should not be permitted, only injunctive relief is available to the antitrust plaintiff and to the courts as a preferred remedy in a suit against a municipality. 1 P.

A major analytical problem with the state action doctrine is the resulting impact of the antitrust laws on the state-federal allocation of regulatory power.¹³³ Hovenkamp and MacKerron note that the current doctrine interferes with state and federal relationships in two ways. First, the federal government interferes with state decisions on division of regulatory power between state and local government. Second, it permits the states to determine the scope and the impact of the antitrust laws as applied to the actions of their local governing bodies.¹³⁴ The federal government, not the state, should decide what markets need federal regulation. Professor Wiley expresses this concern in another way, by claiming that the state "can express 'sovereign state policies' just as importantly by delegating key decisions about specific policy details to decentralized decisionmakers . . . as by reserving them to centralized organs of state authority, such as the legislature."¹³⁵

Wiley also raises efficiency concerns by identifying four costs imposed by the clear-statement-of-state-policy-rule. First, the rule discourages delegation, and since "[d]elegation of responsibility permits greater governmental efficiency,"¹³⁶ the rule makes the "process of state government more time-consuming and costly."¹³⁷ Second, the doctrine may discourage otherwise efficient policies that fail to meet the state authorization and supervision requirements.¹³⁸ Wiley uses *Boulder* as an example in which the city's attempt to increase competition in the long run was defeated by the *Midcal* standard. Third, the *Boulder* holding that home rule designation of cities does not make them sovereign will sacrifice local autonomy. Cities again will be obliged to apply to their state legislatures for authority to legislate in areas of local concern.¹³⁹ Lastly, the rule disturbs the allocation of state and federal power by dictating how states must implement their policies.¹⁴⁰

The *Boulder* case is frequently criticized for its limited reading of the home rule power. To protect themselves adequately from anti-

AREEDA & D. TURNER, ANTITRUST LAW ¶ 217(a)(1) (1978). Nevertheless, Civiletti's point is well taken since large damage awards against cities were possible until recently.

133. 1 P. AREEDA & D. TURNER, *supra* note 132, ¶ 217(a)(1); Lopatka, *supra* note 129, at 23.

134. Hovenkamp & MacKerron, *supra* note 24, at 724; *see also* Civiletti, *supra* note 129, at 387-88; Wiley, *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 736 (1986).

135. Wiley, *supra* note 134, at 731.

136. *Id.* at 732.

137. *Id.* at 734.

138. *Id.*

139. *Id.* at 735.

140. *Id.* at 736.

trust attack, municipalities could be forced to approach their state legislatures and compete with many other important legislative issues to be considered with limited time and resources. One author hypothesizes that the home rule powers granted to municipalities in recent years free the state legislatures to focus on more state-wide concerns.¹⁴¹ Justice Rehnquist, in his *Boulder* dissent, also raised this issue.¹⁴²

In retrospect, although Justice Rehnquist may have overstated the potential disruption of state and local relations in his dissent, the thrust of his criticism remains valid. The state action doctrine effectively can coerce state legislatures to allocate regulatory power to their local governing bodies. This point can be illustrated by comparing the Oregon and Washington state land use planning statutes.¹⁴³ The Oregon statute requires statewide planning goals, strict state supervision, and limited local discretion.¹⁴⁴ On the other hand, the Washington system emphasizes local planning and gives local governments substantial discretion.¹⁴⁵ The Washington approach might not survive antitrust scrutiny except in implementing certain environmental programs.¹⁴⁶ However, the Oregon system also could have problems if, notwithstanding the regulation's effect of displacing competition, the legislature failed to consider its anticompetitive aspects and did not intend displacement.¹⁴⁷ Thus, although each system is justifiable under land use planning theory, constitutional law and other relevant legal principles, each might pose problems in the

141. Civiletti, *supra* note 129, at 387-88; *see also* Wiley, *supra* note 134, at 735.

142. Justice Rehnquist stated:

The decision today effectively destroys the "home rule" movement in this country, through which local governments have obtained, not without persistent state opposition, a limited autonomy over matters of local concern. . . . In order to defend itself from Sherman Act attacks, the home rule municipality will have to cede its authority back to the State.

455 U.S. at 71 (Rehnquist, J., dissenting) (footnote omitted).

143. *See, e.g.*, Comment, *supra* note 129.

144. OR. REV. STAT. §§ 197.005-.855 (1983). Recently, New Jersey also enacted a state-wide planning act. N.J. STAT. ANN. §§ 52:18A-196 to 207 (West Supp. 1986).

145. WASH. REV. CODE ANN. §§ 5.63.010-.130 (1965 & Supp. 1986) (planning commission); §§ 35A.63.010-.170 (1986 Special Pamphlet) (planning and zoning in code cities; optional municipal code); §§ 36.70.010-.970 (1964 & Supp. 1986) (Planning Enabling Act).

146. Comment, *supra* note 129, at 778-79.

147. *Id.* at 769-72. Hovenkamp & MacKerron stated that: "In addition, the state action doctrine has forced the federal courts to look for state legislative 'intent' to displace the federal antitrust laws. Yet, there may be no state legislative intent expressed because the state legislation was not designed with the modern state action exemption in mind." Hovenkamp & MacKerron, *supra* note 24, at 724 (footnote omitted).

antitrust arena. The Washington system is vulnerable because it lacks specific state authorization or policy objectives and leaves such objectives to the local legislative bodies. The Oregon system is subject to state-wide planning goals but may lack sufficient demonstrable state consideration of the consequences of its policies on competition, as implemented by local governments. Furthermore, a state that elects a more localized system of planning has a greater risk of antitrust liability for its municipalities than a state that elects to retain control over general land use planning. This should be a matter for state and local discretion.

Conversely, a few states are attempting to confer a blanket immunity from the antitrust laws for their local governments.¹⁴⁸ These states have enacted statutes that range from very general to very specific grants of immunity for various local activities. Most of the statutes are fairly recent and, therefore, have not been challenged. The state action doctrine would seem to permit an exemption from antitrust liability when such a statute is in effect. This approach, however, permits the state to determine permissible types of anticompetitive conduct. Because the antitrust laws are federal statutes, immunity from those laws should be a matter of federal law.¹⁴⁹

The state action exemption is also criticized because of the inherent inconsistency of antitrust liability with the nature of municipal regulation. For example, Professor Areeda points out that the grant of zoning power necessarily reflects a state determination that regulation should displace market competition otherwise protected by antitrust law.¹⁵⁰ Zoning, similar to other municipal functions, is inherently anticompetitive in nature and impact. In a zoning situation, certain uses of a specific parcel of land may be permitted and others may be prohibited. For example, the central business district in a medium-sized community may not be able to compete with both a large regional shopping mall and smaller strip shopping areas. The local legislative body may decide, as a matter of public policy, to prioritize preservation of the downtown retail business area and to restrict suburban retail development. This type of situation has cre-

148. See the discussion of statutory remedies *infra* notes 175-93 and accompanying text.

149. This is closely related to the preemption and supremacy clause problems discussed *infra* notes 221-77 and accompanying text.

150. I P. AREEDA & D. TURNER, *supra* note 132, at ¶ 212.7d (Supp. 1982); see also Vanderstar, *Liability of Municipalities Under the Antitrust Laws: Litigation Strategies*, 32 CATH. U.L. REV. 395 (1983). Vanderstar stated that "[a] decision by a municipal government to displace competition in pursuit of some other public purpose seems to lack the certain essential qualities of the type of conduct that normally falls under the ban of the Sherman Act." *Id.* at 399 (footnote omitted).

ated antitrust problems in the past.¹⁵¹

As illustrated by the cases discussed in the previous section, denial of a building permit or a decision to rezone may have anticompetitive consequences, yet may be clearly authorized by the zoning statute. Courts have failed to find municipal antitrust immunity, however, when an ulterior motive on the part of local officials is alleged.¹⁵² This is true despite the fact that such decisions are almost inevitably anticompetitive, particularly to the property owner whose permit application is denied.

b. Problems of Application

Courts and commentators also raise some practical problems of application. Section one of the Sherman Act prohibits contracts, combinations, and conspiracies in restraint of trade.¹⁵³ Implicitly, this means that more than one person must be involved.¹⁵⁴ A plaintiff may confront what has been called the "bathtub conspiracy" problem—the issue of whether a government can conspire with itself or its agencies.¹⁵⁵ Professor Areeda notes that a conspiracy cannot exist when officials agree among themselves, even if their decision is later held unconstitutional, erroneous, or otherwise unauthorized by law.¹⁵⁶ Nor can agreement on issues of policy—a "policy bias"—

151. See *Scott v. City of Sioux City*, 436 F.2d 1207 (8th Cir. 1984), cert. denied, 471 U.S. 1003 (1985) (discussed *supra* text accompanying notes 91-92); *Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733 (8th Cir.), cert. denied, 461 U.S. 945 (1983) (discussed *supra* text accompanying notes 110-11); *Miracle Mile Assocs. v. City of Rochester*, 617 F.2d 18 (2d Cir. 1980) (discussed *supra* note 92 and accompanying text); see also *supra* notes 90-91, 110-18 and accompanying text (shopping center cases).

152. For a discussion of this issue, see Mandelker, *Control of Competition as a Proper Purpose in Zoning*, 14 ZONING DIG. 33 (1962); Weaver & Duerksen, *Central Business District Planning and the Control of Outlying Shopping Centers*, 14 URB. L. ANN. 57, 65-69 (1977).

153. 15 U.S.C. § 1 (1982).

154. See, e.g., ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 2 (2d ed. 1984) [hereinafter cited as ABA, ANTITRUST LAW DEVELOPMENTS], which states: "Regardless of the purpose or effect on competition, Section 1 (of the Sherman Act) 'does not prohibit independent business actions and decisions' by a single entity." *Id.* at 2 (footnote omitted). A seventh circuit decision, *Contractor Util. Sales Co. v. Certain-teed Prods. Corp.*, 638 F.2d 1061 (7th Cir. 1981), cited in ABA, ANTITRUST LAW DEVELOPMENTS, states: "The fundamental prerequisite is unlawful conduct by two or more parties pursuant to an agreement, explicit or implied. Solely unilateral conduct, regardless of its anti-competitive effects is not prohibited by Section 1." *Id.* at 1074.

155. Vanderstar, *supra* note 150, at 401.

156. Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 HARV. L. REV. 435, 451 (1981). Recently, the Supreme Court held that a parent corporation and its wholly owned subsidiary are incapable of conspiring with each other under § 1 of the Sherman Act. *Copperweld Corp. v. Independence Tube*

constitute a conspiracy. The Supreme Court, in *Fisher v. City of Berkeley*,¹⁵⁷ addressed this issue. The Court stated that the concerted action required by section one of the Sherman Act is not present when a governmental unit unilaterally imposes a restriction.¹⁵⁸ Thus, the fact that all landlords in the City of Berkeley were obligated to comply with a rent control ordinance was not sufficient to establish a conspiracy.¹⁵⁹ The Court, however, noted that some governmental restrictions grant private actors regulatory power and are subject to Sherman Act attack under the provisions of section one.¹⁶⁰

A second conspiracy problem for plaintiffs is the *Noerr-Pennington* doctrine, which holds that antitrust laws are not applicable to a party who seeks legislative action, even if the action seeks to injure competition.¹⁶¹ The lobbying efforts, however, must genuinely attempt to influence legislation.¹⁶² Municipalities often must choose between individuals, businesses, and other entities. Those parties are entitled to lobby their lawmakers and such interaction cannot be deemed a conspiracy.¹⁶³ Practically, the courts may have difficulty

Corp., 467 U.S. 752, 777 (1984).

157. 106 S. Ct. 1045 (1986).

158. "The ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy." *Id.* at 1050.

159. *Id.* at 1049-50.

160. *Id.* at 1050. The Court cited two cases as examples of this hybrid type of regulation: California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) and Schwegmann Bros. V. Calvert Distillers Corp., 341 U.S. 384 (1951).

161. The doctrine arose from two cases: Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) and United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965). In *Noerr*, truck operators brought suit against several railroads alleging that the railroads successfully conducted a massive publicity and lobbying effort designed to convince the Governor of Pennsylvania to veto a bill favorable to the trucking industry. The Supreme Court rejected the challenge, stating that the Sherman Act does not prohibit joint efforts to influence legislation that will restrain competition. 365 U.S. at 136. Furthermore, to hold otherwise might infringe upon the right to petition the government for redress of grievances under the first amendment, and would impair the government's ability to act as a representative of the people. *Id.* at 136-38.

In *Pennington*, several large coal companies persuaded the Secretary of Labor to set higher minimum wages for companies selling coal to the Tennessee Valley Authority (T.V.A.), and urged the T.V.A. to buy coal only from these companies. The action sought to eliminate smaller coal companies. The Court held that the intent underlying the attempts to influence legislation was irrelevant. 381 U.S. at 670. See Comment, *supra* note 31, at 711-13.

162. This is also known as the "sham exception" to the *Noerr-Pennington* doctrine. *Noerr*, 365 U.S. at 144; see also Vanderstar, *supra* note 150, at 406-07.

163. See Areeda, *supra* note 156, at 452; Levin, *The Antitrust Challenge to Local Government Protection of the Central Business District*, 55 U. COLO. L. REV. 21 (1983); Spiegel, *Local Government and the Terror of Antitrust*, 69 A.B.A. J. 163, 165 (1983).

distinguishing successful legislative lobbying from an antitrust conspiracy.

A further application problem is the use of the "rule of reason" analysis in the municipal context and the concurrent danger of a return to substantive due process¹⁶⁴ in the antitrust area. Although the Sherman Act is statutory, and substantive due process is constitutional, the mode of analysis is arguably similar when the rule of reason is applied to municipal regulation. In either case, the court focuses on whether the regulation in question unreasonably restricts competition. Alternatively, the court balances the benefits to the public health, safety, and welfare against the detriments to the competitive process. The Supreme Court applied the rule of reason analysis to the Sherman Antitrust Act in 1911.¹⁶⁵ The rule provides that the activity challenged must not unreasonably restrict competition.¹⁶⁶ Later that year, the Court expanded upon the rule of reason by defining restraint of trade as activities that unduly restrict competition or unduly obstruct the due course of trade.¹⁶⁷

In his *Boulder* dissent, Justice Rehnquist criticized the application of the rule of reason analysis to the municipal decision making process.¹⁶⁸ Rehnquist argued that if municipalities may or must balance community benefits versus anticompetitive effects, "the federal courts will be called upon to engage in the same wide-ranging, essentially standardless inquiry into the reasonableness of local regulation that this Court has properly rejected."¹⁶⁹ The concern of many com-

164. See generally J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 425-51 (2d ed. 1983).

165. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). The Supreme Court also has adopted a test, known as the per se rule, for antitrust problems. When applying the per se rule, the Court undertakes only a limited inquiry to determine whether the actor engaged in the conduct alleged, and whether the conduct falls within the categories of behavior described as per se unlawful. Historically, these categories have included price fixing, group boycotts, tying arrangements, and horizontal market division. See ABA, ANTITRUST LAW DEVELOPMENTS, *supra* note 154, at 22. The "dangers" of substantive due process do not apply to the per se rule. Arguably, however, per se analysis simply is not appropriate in the municipal antitrust context. Note, *Municipal Antitrust: An Overview*, 60 CHI-KENT L. REV. 349, 371 (1984).

166. 221 U.S. at 62.

167. *United States v. American Tobacco Co.*, 221 U.S. 106, 179 (1911). For the origin of the rule of reason, see ABA, ANTITRUST LAW DEVELOPMENTS, *supra* note 154, at 15-21; P. AREEDA, ANTITRUST ANALYSIS ¶ 303 (2d ed. 1974); A. STICKELLS, FEDERAL CONTROL OF BUSINESS: ANTITRUST LAWS § 40 (1972).

168. *Boulder*, 455 U.S. at 60-71 (Rehnquist, J., dissenting).

169. *Id.* at 67. The concept of substantive due process required courts to determine the constitutionality of government regulatory measures by deciding whether the regulation had a substantial relation to the police power goals of public health, safety, and welfare. During the late 1800's and the early part of this century, the Supreme Court frequently struck down legislation that, in its view, did not bear this

mentators, shared by Justice Rehnquist, is that the rule of reason analysis gives the courts the unfettered discretion reminiscent of that permitted under substantive due process analysis at the turn of the century.¹⁷⁰ According to Churchwell, these fears were realized in the California Supreme Court's decision in *Fisher v. City of Berkeley*.¹⁷¹

Although the Supreme Court has never considered a municipal liability antitrust case on the merits, the criticism of rule of reason balancing in the municipal context is valid. It exacerbates many of the problems discussed in this section. If federal courts must balance pro and anticompetitive effects of local legislation, the results will be unpredictable. This would increase the deterrent effect of antitrust suits on municipalities. More fundamentally, rule of reason balancing in the municipal context potentially allows federal courts to decide issues within the province of state and local legislatures. The

substantial relation to the police power goals. Beginning in 1937, however, the Court began to shun this method of analysis, and has subsequently rejected it, at least for economic-based regulation. As Nowak, Rotunda, and Young indicate: "[T]he independent review of legislation during this period [pre-1937] resulted in an unprincipled control of social and economic legislation. . . . The justices had complete discretion to determine the permissibility of economic and social welfare legislation." J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 164, at 443-44 (footnotes omitted).

For well-known cases striking down economic based legislation, see *Morehead v. New York ex rel. Tiplado*, 298 U.S. 587 (1936) (rejecting minimum wage law for women); *Hammèr v. Dagenhart*, 247 U.S. 251 (1918) (striking child labor law); *Lochner v. New York*, 198 U.S. 45 (1905) (striking maximum hours of work per week law).

For cases reversing the substantive due process trend, see *City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *Williamson v. Lee Optical*, 348 U.S. 483 (1955); *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

170. See M. LEE, *ANTITRUST LAW AND LOCAL GOVERNMENT* 19 (1985); Civiletti, *supra* note 129, at 387; Hovenkamp & MacKerron, *supra* note 24, at 724-25. But see Brummitt, *Zoning and Planning and Antitrust*, in 1984 INST. ON PLAN. ZONING, & EMINENT DOMAIN 241 (rule of reason/balancing appropriate in this area).

171. 37 Cal. 3d 644, 693 P.2d 261, 209 Cal. Rptr. 682 (1984), *aff'd*, 106 S. Ct. 1045 (1986). Professor Churchwell stated: "It [the court] then completely scuttled eighty years of common law antitrust development and declared a new standard of liability 'modeled after the [United States Supreme] Court's commerce clause cases' for judging a conflict between the antitrust laws and a municipal ordinance." Churchwell, *The Federal Antitrust Implications of Local Rent Control: A Plaintiff's Primer*, 112 PEPPERDINE L. REV. 919, 945 (1985) (footnote omitted). The *Fisher* court stated that:

[I]f a municipal regulation has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power, and operates in an evenhanded manner, it must be upheld . . . unless the plaintiff demonstrates that the city's purposes could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies.

37 Cal. 3d at 652, 693 P.2d at 269, 209 Cal. Rptr. at 690. For discussion of the *Fisher* case, see *infra* notes 242-76 and accompanying text.

courts may second guess municipal decision makers' determinations that some restraint on competition is necessary for the general health, safety, and welfare. Moreover, such rule of reasoning balancing further disrupts the allocation of state and federal powers.

The rule of reason balancing analysis may work well in traditional antitrust cases involving two private actors. The concerns are, or should be, different, however, when a municipality is involved. Professor Deutsch suggests that local governments do not base decisions on economic factors and should be immune under the antitrust laws, particularly in land use planning.¹⁷² He also notes that local governments are constrained by their mandate to legislate for the health, safety, and welfare of the community.¹⁷³ To apply the same standards used in evaluating the impacts of a private, commercial decision to the effects of a municipal decision is conceptually improper. The motivations and goals of a local government differ greatly from those of private business.¹⁷⁴

Thus, the state action exemption as used by the courts today is riddled with analytical and practical problems. For defendants, it potentially deters useful and legitimate municipal activity and is inconsistent with the very nature of many areas of local legislation, including land use planning and zoning decisions. For plaintiffs, the effective defense of *Noerr-Pennington* immunity and the problem of establishing that a conspiracy exists frustrate potential antitrust claims. The use of rule of reason analysis on a merits question can be detrimental to both parties by making the results of a lawsuit unpredictable. Additionally, evaluating municipal action should differ from evaluating private action. Most fundamentally, the doctrine plays havoc with the traditional state and federal distribution of regulatory power. This problematic preemption issue will be discussed again in Part III.

172. Deutsch, *Antitrust Challenges to Local Zoning and Other Land Use Controls*, 60 CHI-KENT L. REV. 63 (1984). Professor Deutsch states that "[w]hile local governments are economic actors in some aspect of their existence, the land use control process is one where the local government is not acting as an economic entity but as a regulator of the private decision process." *Id.* at 86.

173. *Id.* at 85. For example, local land use decisions involve choices between residential and commercial development, or single versus multi family density. Deutsch also points out that the political process will help control land use decision making.

174. Justice Brennan, writing for the majority in *Boulder*, indicated that "certain activities, which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government." 455 U.S. at 56-57 n.20.

III. PROPOSED SOLUTIONS TO THE ANTITRUST PROBLEM FOR MUNICIPALITIES

A. State Statutory Solutions

A few state legislatures have either considered or enacted statutes protecting municipalities from state or federal antitrust liability.¹⁷⁶ In 1983, Illinois enacted one of the earliest and broadest statutes of this sort. The statute attempts to make the state action exemption fully available to home rule and nonhome rule municipalities and townships.¹⁷⁶ According to the statute, state policy dictates that "all powers granted, either expressly or by necessary implication" to local governmental units may be exercised by them "notwithstanding effects on competition."¹⁷⁷

The Illinois legislature recently amended its policy statement concerning municipal antitrust liability. The new sections express an even stronger state policy to protect local governments, their officers, agents, or employees from liability.¹⁷⁸ The new statute provides that the state action exemption shall be "liberally construed in favor of such municipalities and the agents, employees and officers thereof, such exemption shall be available notwithstanding that the action of the municipality or its agents, officers or employees constitutes an irregular exercise of constitutional or statutory powers."¹⁷⁹ The Illinois Act limits plaintiffs' remedies to injunctive relief, as does the new federal act discussed below.¹⁸⁰

North Dakota enacted a similar statute in 1983.¹⁸¹ The North Dakota statute extends "[a]ll immunity of the state from the provisions of the Sherman Antitrust Act" to any city or city governing body when acting within the scope of its authority; when acting within its authority, the statute presumes the city is acting in furtherance of state policy.¹⁸²

Similarly, a Maryland statute lists several areas in which a local government may displace competition with regulation.¹⁸³ Enacted in

175. See Comment, *The Federal Local Government Antitrust Act of 1984 and the 1985 Amendments to the Florida Antitrust Act: A Survey and Analysis of Florida Local Government Antitrust Vulnerability*, 13 FLA. ST. U.L. REV. 77, 105-08 & nn.123-38 (1985). That Comment notes that statutes were considered but failed to pass in Colorado, New Jersey, Mississippi, and California. *Id.* at 106.

176. ILL. ANN. STAT. ch. 24, § 1-1-10 (Smith-Hurd Supp. 1986); *id.* ch. 139, § 4-2 (Smith-Hurd 1986).

177. *Id.* ch. 24, § 1-1-10.

178. *Id.*

179. *Id.*

180. The Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 (Supp. III 1985), is discussed, *infra* notes 194-220 and accompanying text.

181. N.D. CENT. CODE § 40-01-22 (1983).

182. *Id.*

183. MD. ANN. CODE art. 23A, § 2A (Supp. 1986).

1984, the statute provides that it is "the policy of the State to authorize each municipal corporation to displace or limit competition" in the areas of public transportation, water and sewerage systems, port regulation and award of concessions, or the leasing or subleasing of property owned or leased by the municipality.¹⁸⁴ In each subsection the statute lists general purposes for which the authority to limit competition may be used.¹⁸⁵

Some states have protective but limited legislation. For example, Virginia enacted a statute enumerating specific grants of authority to regulate cable television by the governing bodies of any county, city, or town.¹⁸⁶ The statute also contains a policy statement indicating that the grant of authority to local governments to displace or limit competition in cable television is based on state concerns for the public benefit.¹⁸⁷

A Louisiana statute extends immunity from liability under the antitrust law to "any municipal corporation, parish, sewerage or water district acting within the scope of [its granted] authority."¹⁸⁸ The subsection also presumes that the local governmental unit acts in furtherance of state policy when acting within the section's authority.¹⁸⁹ The statute specifically authorizes both displacement of competition with regulation in this area and a monopolistic public service.¹⁹⁰

Narrow state protection from antitrust liability is offered by a Tennessee statute granting "a municipality other than a power district" authority to "displace competition with regulation or monopoly public service" to control the collection and disposal of solid waste in connection with the construction, financing, operation, or maintenance of an energy production facility.¹⁹¹

The future of such statutes is unclear. States may enact legisla-

184. *Id.* § 2A(a).

185. For example, in publicly owned or leased land, the purposes are: to utilize properly the assets of the municipality for the best public purpose; to provide necessary or desirable governmental services at the lowest possible cost; to protect the public from unscrupulous business practices and excessive prices; to provide for the accessibility to public property by as many citizens as possible; and to promote the general welfare by utilizing public property for the benefit of the citizens of the community.

Id. § 2A(d). The statute also specifically grants authority to limit or displace competition in each area. For example, in the area of water and sewer systems, the municipalities may grant franchises, enter into contracts, set rates, etc. "notwithstanding any anticompetitive effect." *Id.* § 2A(b).

186. VA. CODE §§ 15.1-23.1 (Supp. 1986).

187. *Id.*

188. LA. REV. STAT. ANN. § 33:4169(E)(2) (West Supp. 1986).

189. *Id.*

190. *Id.* § 33:4169(E)(1).

191. TENN. CODE ANN. § 7-54-103(d) (1985).

tion limiting liability under state antitrust law. In view of recent Supreme Court decisions, however, statutes designed to confer broad federal antitrust immunity probably will be insufficient to protect municipalities. Rather, specific legislation is required.¹⁹² Furthermore, as demonstrated by the statutes discussed, the varied levels of protection granted by the states foster inconsistent results under the antitrust laws in federal courts. Finally, these state statutes may create direct conflicts, leading to supremacy clause and preemption problems. For example, the Illinois statute purportedly dictates that the federal law of the state action exemption should be liberally construed in favor of the municipal defendants.¹⁹³

B. The Federal Statutory Solution

1. The Local Government Antitrust Act of 1984

Congress enacted the Local Government Antitrust Act of 1984¹⁹⁴ in response to outcomes in many well-publicized cases and to widespread criticism of the state action doctrine as applied by the courts. The Act took effect retroactively.¹⁹⁵ It provides generally that "[n]o damages, interest on damages, costs or attorney's fees may be recovered from any local government, or official or employee thereof acting in an official capacity"¹⁹⁶ or "in any claim based on any official action directed by a local government, or official or employee thereof acting in an official capacity."¹⁹⁷

The Act has been criticized both for eliminating treble damages liability and for not granting complete immunity to the municipalities. According to some authors the Act is unlikely to deter potential antitrust claimants because most plaintiffs already seek injunctive, rather than monetary, relief.¹⁹⁸ Although the Act eliminates the specter of treble damage suits, it fails to protect developers and circumvents the purposes of permitting treble damage remedies. These purposes are: to make the plaintiff whole; counterbalance the diffi-

192. See, e.g., the discussion of *Boulder*, 455 U.S. 40, *supra* notes 64-69 and accompanying text.

193. ILL. ANN. STAT. ch. 24, § 1-1-10 (Smith-Hurd Supp. 1986).

194. 15 U.S.C. §§ 34-36 (Supp. III 1985). The complete text of the Act is reproduced herein as Appendix A.

195. *Id.* § 36(b). The Act took effect 30 days prior to its enactment on Oct. 24, 1984.

196. *Id.* § 35(a).

197. *Id.* § 36(a). A local government is defined as "a city, county, parish, town, township, village, or any other general function governmental unit established by State law or . . . a school district, sanitary district, or any other special function governmental unit established by State law in one or more States." *Id.* § 34(1).

198. M. LEE, *supra* note 170, at 4. Lee notes that many suits combine antitrust claims with constitutional, tort, contract, and other claims.

culty and expense of a private action; and deter anticompetitive conduct. Deterrence is achieved by promoting private enforcement, which saves the government time and money and vindicates the public interest in free competition, and by punishing wrongdoers.¹⁹⁹ Critics also claim that municipal taxpayers benefit from their elected officials' decisions. Therefore, the fact that taxpayers eventually might bear the losses of an antitrust suit should not exempt municipalities from paying money damages.²⁰⁰

2. *Recent Cases Decided Under the Act*

Several cases have been decided under the Act's provisions since it became effective at the end of 1984.²⁰¹ The majority of the recent cases concern the Act's retroactive applicability to cases commenced prior to its effective date of September 24, 1984. Section 35(b) of the Act requires the defendant to prove that, "in light of all the circumstances, including the stage of litigation and the availability of alternative relief under the Clayton Act, . . . it would be inequitable not to apply this subsection to a pending case."²⁰² The section also indicates that a jury verdict, district court judgment, or any subsequent action is prima facie evidence that the Act is not applicable retroactively.²⁰³ For example, in a case in which the plaintiff filed suit in 1981 and received a jury verdict in 1984, the defendants failed to show "compelling equities" to persuade the court to apply the Act retroactively. Therefore, the defendants were unable to rebut the statutorily created prima facie evidence that the Act should not apply.²⁰⁴

A Pennsylvania district court also declined to apply the statute retroactively because the case before it had been pending for two years before the statute was enacted and because discovery was al-

199. See Merriam, *Limiting Land Use Liability*, 1985 ZONING AND PLANNING LAW HANDBOOK § 7.03(3).

200. See Note, *supra* note 165, at 381-83.

201. Some cases have been dismissed at the district court level without much discussion or need to interpret the statute. See, e.g., *Montauk-Carribean Airways, Inc. v. Hope*, 784 F.2d 91 (2d Cir. 1986) (affirming district court's dismissal of airline's claim for money damages against town). In *Palm Springs Medical Clinic, Inc. v. Desert Hosp.*, 628 F. Supp. 454, 457 (C.D. Cal. 1986), a California district court decided that a hospital district fit the definition of local government under the Local Government Antitrust Act of 1984. The court examined the Act and its legislative history and determined that Congress intended the Act to apply to such a district. *Id.* at 458-64. The court also found that local governments have absolute immunity from antitrust damage liability under the Act. *Id.* at 459-64.

202. 15 U.S.C. § 35(b) (Supp. III 1985).

203. *Id.*

204. *Unity Ventures v. County of Lake*, 631 F. Supp. 181, 188 (N.D. Ill. 1986).

most complete.²⁰⁵ Additionally, a Michigan court denied retroactive relief in a case initially filed in 1978 but that was in pretrial discovery as a new case after the district court's judgment was reversed and remanded by the circuit court.²⁰⁶

Cases or claims for damages that have been dismissed at the district court level include suits that were in early stages of litigation when the Act took effect.²⁰⁷ A Wyoming district court granted an intermediate level of relief, using the Act to limit the plaintiffs' recovery to actual damages, rather than the trebled, punitive damages.²⁰⁸ The court expressed concern for the taxpayers because of an existing jury award against the city in a breach of contract suit for \$64,000, with potential liability for attorney's fees. This result is peripheral to the language of the Act since section 35(b) provides only for the potential retroactive application of section 35(a), which bars awarding damages, costs, etc. to plaintiffs in certain antitrust suits under the Clayton Act.²⁰⁹

A Colorado district court granted relief in a case in which discovery was complete and the suit was ready for trial. The case had been filed twenty months previously.²¹⁰ The court dismissed damage claims against the town and various town officials after considering the stage of litigation, the availability of alternative relief, the level of potential harm to the local unit of government, the degree to which the action was based on federal law, and the good faith of the municipality. Although the statute only enumerated the first two factors,²¹¹ the court found that the Act's legislative history deline-

205. *Meetinghouse Assoc. v. Warwick Township*, Civ. Act. No. 82-5226 (E.D. Pa. 1985).

206. *Huron Valley Hosp., Inc. v. City of Pontiac*, 612 F. Supp. 654 (E.D. Mich. 1985).

207. *See, e.g., Pontarelli Limousine, Inc. v. City of Chicago*, 623 F. Supp. 281 (N.D. Ill. 1985) (suit filed 13 months prior to Act's effective date but was in pre-trial discovery); *S. Kane & Son, Inc. v. W.R. Grace & Co.*, 623 F. Supp. 162 (E.D. Pa. 1985) (suit in early discovery and plaintiff could obtain relief from other defendants); *Chris' Wrecker Serv. v. Town of Fairfield*, 619 F. Supp. 480 (D. Conn. 1985) (though suit in early stages plaintiffs' losses would be redressed by actual damages); *Jefferson Disposal Co. v. Parish of Jefferson*, 603 F. Supp. 1125 (E.D. La. 1985) (suit in pretrial discovery when Act became effective); *TCI Cablevision, Inc. v. City of Jefferson*, 604 F. Supp. 845 (W.D. Mo. 1984) (suit filed Sept. 7, 1984; Act became effective Sept. 24, 1984).

208. *Everts v. Board of Trustees of S. Lincoln Hosp.*, 604 F. Supp. 40, 45 (D. Wyo. 1985).

209. 15 U.S.C. §§ 35(a), (b) (Supp. III 1985). The *Everts* court noted that the legislative history of the Act indicates that Congress intended to limit "alternative remedies" under the Act to injunctive relief. 604 F. Supp. at 44 (citing H.R. REP. NO. 1158, 98th Cong., 2d Sess. 3 (1984)).

210. *Miami Int'l Realty Co. v. Town of Mt. Crested Butte*, 607 F. Supp. 448 (D. Colo. 1985).

211. 15 U.S.C. § 35(a).

ated the other three.²¹² The court did not, however, dismiss the monetary claims against a private defendant because such claims cannot be retroactively barred under the Act.²¹³ The Act specifically provides that the section shielding private parties acting under government direction does not apply to cases commenced before the Act's effective date.²¹⁴

A Texas district court found that the Act was retroactively applicable to litigation that was seven years old.²¹⁵ The court noted that pretrial discovery was not complete and that the plaintiffs could seek alternative relief.²¹⁶ The court also found that the cities exercised their normal regulatory authority in furtherance of state law and that a treble damages award would have an adverse impact on the municipalities.²¹⁷

Future cases will likely focus on the substantive portion of section 4 of the Act, which bars damage recovery against "a person based on official action directed by a local government, or official or employee thereof acting in an official capacity."²¹⁸ Private individuals or businesses may argue that a municipality directed their actions. The success of such an argument depends on the degree of control and close relations between the municipality and the private party.²¹⁹

The Local Government Antitrust Act is helpful because it relieves municipalities of the threat of huge damage awards. Nonetheless, the possibility of costly, time-consuming litigation still exists and the chilling effects of litigation for injunctive relief on municipalities persist. The state action exemption issue remains problematic because injunctive relief remains available to plaintiffs.²²⁰

Furthermore, the Act itself does not completely protect public officials or private parties acting at the direction of local government. To determine monetary liability under the antitrust laws, the courts still must determine whether an individual is acting in an official or private capacity. The Act, however, fails to facilitate court analysis in this area. Apparently, the Act's sole function is to protect

212. 607 F. Supp. at 454.

213. *Id.* at 451-52.

214. 15 U.S.C. § 36(b).

215. *Woolen v. Surtran Taxicabs, Inc.*, 615 F. Supp. 344 (N.D. Tex. 1985).

216. *Id.* at 351-52.

217. *Id.*

218. 15 U.S.C. § 36(a).

219. A Pennsylvania district court rejected this argument, finding that the Act did not protect a private electrical inspection agency. The local government licensed company was not required to interfere with the plaintiffs' efforts to get approval to conduct inspections. *Atlantic-Inland, Inc. v. Township of W. Goshen*, Civ. Act. No. 86-416 (E.D. Pa. 1986).

220. *See infra* notes 85-86 and accompanying text.

municipal treasuries. This goal is legitimate but ignores the conceptual and practical problems that plague the current application of the antitrust laws to municipalities.

Although many commentators advocate some type of qualified immunity, middle-ground solutions do not alleviate problems created by the state action doctrine, which itself is a qualified immunity theory. Instead, Congress should grant cities, their officials, and those acting at their direction, complete immunity from the antitrust laws. Municipal decision making by nature is not conducive to antitrust analysis. The current state action exemption does not function well in practice and leads to inconsistent, confusing results in the court decisions. The state and federal balance of regulatory power is upset by the present status of the doctrine. Moreover, state legislative attempts to protect local government foster inconsistent results and potential supremacy clause problems.

C. *The Preemption Rationale*

1. *Preemption Generally*

Perhaps the most famous advocate of preemption analysis in antitrust cases is Justice Rehnquist, who discussed it extensively in his *Boulder* dissent.²²¹ Subsequently, several law review articles addressed preemption analysis.²²² Rehnquist argues that a state statute with anticompetitive consequences that is invalidated by the *Parker* doctrine does not violate the Sherman Act. Nevertheless, according to Rehnquist, such a statute is unenforceable because federal law preempts it.²²³ Rehnquist regards preemption and exemption as distinct concepts. The preemption issue arises when two different sovereigns have enacted potentially conflicting statutes. Exemption concerns arise when the "interplay between the enactments of a single sovereign" is at issue.²²⁴ The difference between preemption and exemption is important because the presumptions involved in their application are contradictory. Preemption is found only if Congress clearly intended federal law to supersede state law—preemption renders state law invalid. In contrast, an exemption approach tends to uphold and reconcile both statutory schemes.²²⁵ According to Rehnquist, preemption analysis avoids such problems as requiring federal courts to second-guess local legislative bodies or "to engage in

221. *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 60-71 (1982) (Rehnquist, J., dissenting).

222. Hovenkamp & MacKerron, *supra* note 24, at 778-79; Wiley, *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713 (1986).

223. 455 U.S. at 64 (Rehnquist, J., dissenting).

224. *Id.* at 61.

225. *Id.* at 61-62.

standardless review of the reasonableness of local legislation."²²⁶

Although many commentators agree with Justice Rehnquist that preemption analysis should replace exemption analysis as a means of federal control over municipal activity, others argue that the Sherman Act preempts any legislation inconsistent with it.²²⁷ This pure preemption approach, unlike Rehnquist's test, completely disregards the state action doctrine.

Professor Michael Conant²²⁸ argues that no state action exemption should be available when state and federal law conflict. Thus, when state economic regulation conflicts with the federal antitrust laws, the supremacy clause²²⁹ renders the state law unenforceable.²³⁰ According to Conant, the *Parker* decision is invalid because it directly violates the supremacy clause.²³¹ He argues that the Constitution permits state or local economic regulation to stand only when the regulation's effects are procompetitive—consistent with the goals of the antitrust laws.²³²

The pure preemption approach appears unsound. Judge Easterbrook rejects the supremacy clause analysis because it forces courts to invalidate all state laws that are inconsistent with substantive antitrust law and policy. This approach prevents state and local governments from legislating in many important safety, health, and welfare areas.²³³ Furthermore, it creates analytical and practical problems

226. *Id.* at 68.

227. See 1 P. AREEDA & D. TURNER, *supra* note 132, ¶ 217(a)(2); Lopatka, *supra* note 129, at 69-71; Williamson, *Commentary: The Reagan Administration's Position on Antitrust Liability of Municipalities*, 32 CATH. U.L. REV. 371, 377-78 (1983).

228. Conant, *The Supremacy Clause and State Economic Controls: The Antitrust Maze*, 10 HASTINGS CONST. L.Q. 255 (1983).

229. U.S. CONST. art. VI, cl. 2. "This Constitution and the Laws of the United States which shall be made in pursuance thereof . . . shall be the Supreme Law of the Land." *Id.*

230. Conant, *supra* note 228, at 256-57.

231. *Id.* at 283. "The Sherman Act contains no express exemption for persons and firms violating its provisions under state compulsion and supervision and its language does not imply one. . . . In *Parker*, . . . the state action defense was approved with full knowledge that the state law was inconsistent with, and contrary to, the mandate of competition in the Sherman Act. . . . The states have no power to create exemptions to federal statutes. That is the essence of the Supremacy Clause." *Id.* at 271.

232. Conant also notes that the antitrust laws have always been considered "quasi-constitutional" in character. *Id.* at 261. He quotes Justice Marshall in *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972): "They (the antitrust laws) are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *Id.* at 261-62.

233. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. ECON. 23, 24 (1983).

because Congress never intended the antitrust laws to apply to municipalities.²³⁴

Professor Wiley offers another preemption mode of analysis.²³⁵ He would apply a capture theory to antitrust problems that would preempt a state or local regulation that meets the following criteria: 1) it restrains market rivalry, 2) it is not protected by a federal anti-trust exemption, 3) it does not respond directly to a substantial market inefficiency, and 4) it results from producer capture.²³⁶ The first three criteria are self-explanatory; producer capture is a government market regulation enacted to benefit producers rather than consumers. Under Wiley's theory, government benefits, such as price supports and entry level barriers to new competition, are widely available to market producers. Well-organized producers eagerly seek such benefits, while consumer opposition is frequently diffuse and unorganized. He concludes that producer political power frequently results in government market legislation.²³⁷ Thus, Wiley suggests that courts recognize proof of capture by "determin[ing] that producer political participation was decisive" in securing enactment of the legislation or by a finding that the facial effects of the regulation clearly point to "producer capture as the single most likely explanation of its origin."²³⁸

Although Wiley's article anticipates objections to his capture theory solution, he fails to respond to its major problem—the proposed method of proof of capture flies in the face of the first amendment and the *Noerr-Pennington* exception²³⁹ to the antitrust laws. Further, his theory is subject to many of the same criticisms leveled against the present system. For example, it is not clear that the test is easily understood, predictive of results, or readily applicable by courts.²⁴⁰ The theory allows regulations that represent legitimate and reasonable exercises of municipal discretion to be invalidated because they meet the four criteria. For example, in shopping center cases in which a regulation restricts development in order to preserve the central business district, a court easily could conclude that the regulation meets the four criteria, particularly capture. Yet, most

234. See 1 P. AREEDA & D. TURNER, *supra* note 132, ¶ 217(a)(1); Lopatka, *supra* note 129, at 23. Although Congress did not expressly exempt states and their local sub-parts, the interpretation of the commerce clause at the time would have rendered such an exemption unthinkable and unnecessary. See *supra* notes 24-25 and accompanying text.

235. Wiley, *supra* note 222, at 713.

236. *Id.* at 743.

237. *Id.* at 725.

238. *Id.* at 743, 769-70.

239. See *supra* note 161 and accompanying text.

240. Wiley's theory may be too difficult for courts to apply in real-life situations. See Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986).

courts now would uphold such legislation against an antitrust challenge.²⁴¹

Preemption analysis is problematic because it only avoids second-guessing local governments in their economic and social decision making. The remaining criticisms of the doctrine persist because the federal courts still must determine whether the activity can be saved by the *Parker* doctrine.

2. Fisher and Preemption

The Supreme Court recently decided *Fisher v. City of Berkeley*,²⁴² which involved a challenge to the city's rent control ordinance by a group of landlords. The landlords claimed that the rent control program constituted price fixing, rendering the program a per se violation of the Sherman Act. They alleged vertical price fixing between the landlord and the rent stabilization boards and horizontal price fixing between all covered landlords.²⁴³ In holding the ordinance constitutional, the California Supreme Court declined to use traditional antitrust analysis, noting that such analysis is inapplicable to municipalities.²⁴⁴ Instead, the court employed a substantive due process test to determine whether the rent control program bore a rational relationship to legitimate public purpose.²⁴⁵

The posture of the case and the parties' specific arguments are unique. During pendency of the appeal to the California Supreme Court, the dissent in an intervening United States Supreme Court decision, *Community Communications Co. v. City of Boulder*²⁴⁶ raised the preemption issue. In his dissent, Justice Rehnquist characterized the key issue in applying the *Parker* doctrine as one of preemption rather than exemption.²⁴⁷ The California court in *Fisher* held that the ordinance was not preempted by the Sherman Act.²⁴⁸ In argument before the Supreme Court, the landlords asserted that no clearly articulated state policy regarding rent control existed and that the conduct required by the city ordinance directly violated the

241. See Levin, *The Antitrust Challenge to Local Government Protection of the Central Business District*, 55 U. COLO. L. REV. 21, 23 n.6 (1983); Weaver & Duerksen, *supra* note 152.

242. 106 S. Ct. 1045 (1986). At trial, the only issue was a constitutional question. On appeal, the landlords raised an antitrust challenge. 37 Cal. 3d at 653, 693 P.2d at 270, 209 Cal. Rptr. at 691.

243. 37 Cal. 3d. at 667, 693 P.2d at 280, 209 Cal. Rptr. at 701.

244. *Id.* at 672, 693 P.2d at 284, 209 Cal. Rptr. at 705.

245. *Id.* at 671-77, 693 P.2d at 284-85, 209 Cal. Rptr. at 705-09.

246. 455 U.S. 40 (1982).

247. *Id.* at 60 (Rehnquist, J., dissenting). For a discussion of the preemption issue, see *infra* notes 221-41 and accompanying text.

248. 37 Cal. 3d at 660, 693 P.2d at 275, 209 Cal. Rptr. at 696.

pro competition policy of the Sherman Act.²⁴⁹ Therefore, the supremacy clause preempted the ordinance.²⁵⁰ The landlords also argued that the California Supreme Court employed improper analysis because a municipality engaged in anticompetitive conduct is no different than a private economic actor.²⁵¹ In response, the city argued that no contract, combination, or conspiracy to restrain trade existed, the effect on competition was not an unreasonable restraint of trade, and the rent control ordinance had state authorization.²⁵²

The majority opinion affirmed the decision of the California Supreme Court, but limited its analysis to the preemption question and decided the case on traditional antitrust grounds.²⁵³ The Court rejected the argument that the municipality had engaged in price fixing, a per se violation of the Sherman Act.²⁵⁴

The Court distinguished two prior cases, *Schwegmann Bros. v. Calvert Distillers Corp.*,²⁵⁵ and *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*,²⁵⁶ in which anticompetitive restraints were hybrids—government regulations enforcing private marketing decisions.²⁵⁷ The Court concluded that no preemption problem existed because the rent controls in *Fisher* lacked the requisite concerted action to bring them within the Sherman Act.²⁵⁸ Therefore, to consider whether the controls were exempt from antitrust liability under the state action doctrine was unnecessary.²⁵⁹ The Court simply reiterated the preemption standard expressed in *Rice v. Norman Williams Co.*,²⁶⁰ that a state statute is not preempted unless it conflicts irreconcilably with the antitrust laws, or it authorizes or mandates conduct that necessarily violates antitrust laws.²⁶¹ The

249. 106 S. Ct. at 1048.

250. *Id.*

251. 54 U.S.L.W. 3367 (1985).

252. *Id.* at 3368.

253. 106 S. Ct. at 1048.

254. *Id.* at 1049-50. The Court noted:

The distinction between unilateral and concerted action is critical here.

. . . A restraint imposed unilaterally by government does not become concerted action within the meaning of the statute simply because it has a coercive effect among parties who must obey the law. . . . Similarly, the mere fact that all competing property owners must comply with the same provisions of the Ordinance is not enough to establish a conspiracy among landlords.

255. 341 U.S. 384 (1951).

256. 445 U.S. 97 (1980).

257. 106 S. Ct. at 1051.

258. *Id.*

259. *Id.*

260. 458 U.S. 654 (1982). The *Rice* Court held that a California statute which permitted liquor distillers to control the distribution of their products within the state was not preempted. *Id.* at 656.

261. 106 S. Ct. at 1048.

Court held that although *Rice* involved a state statute, the same analysis was applicable to a municipal regulation.²⁶²

Justice Brennan was the sole dissenter.²⁶³ He argued that *Rice* could be distinguished as a *non* price restraint on competition whereas *Fisher* involved direct price restriction.²⁶⁴ He found *Midcal*²⁶⁵ and *Schwegmann Bros.*²⁶⁶ to be directly on point.²⁶⁷ Further, Justice Brennan found that a combination or conspiracy existed between the city and its officials and between the landlords themselves.²⁶⁸ Finally, Brennan found that the ordinance lacked the requisite authority and clearly articulated, affirmative state policy to warrant exemption from the antitrust laws under the state action doctrine.²⁶⁹

Notably, the *Fisher* Court's preemption analysis varied from that suggested by Justice Rehnquist in his *Boulder* dissent,²⁷⁰ in which a statute that is not saved by the state action doctrine may be preempted by federal law.²⁷¹ The *Fisher* Court apparently decided the case in reverse order. The Court first considered preemption and decided that the city ordinance was not preempted by federal law.²⁷² The Court then indicated in dicta that the state action doctrine might have saved the ordinance even if it had been preempted.²⁷³

This approach seems to conflict with the intrinsic theory of preemption. If the Court wishes to combine the state action doctrine and preemption analysis in municipal antitrust cases, it is logical to apply the state action test first to determine whether a clear state policy to displace competition with regulation exists. The *Fisher* Court did not consider this issue because its review was limited to the preemption question.²⁷⁴ Because the preemption theory is based

262. *Id.* Justice Powell concurred, noting that the ordinance fell squarely within the state action exemption of *Parker*. *Id.* at 1051-53 (Powell, J., concurring) (citing *Parker v. Brown*, 317 U.S. 341 (1943)). Powell found that the state had a clearly articulated policy with foreseeable anticompetitive effects. *Id.* at 1053.

263. *Id.* at 1053-57 (Brennan, J., dissenting).

264. *Id.* at 1054 n.1.

265. 445 U.S. 97.

266. 341 U.S. 384.

267. 106 S. Ct. at 1054-55 (Brennan, J., dissenting).

268. *Id.* at 1055.

269. *Id.* at 1056-57.

270. 455 U.S. 40 (Rehnquist, J., dissenting). For a discussion of the dissent and the preemption issue, see *supra* text accompanying notes 221-27.

271. *Id.* at 63.

272. 106 S. Ct. at 1051.

273. *Id.* As Justice Marshall's majority opinion states: "We therefore need not address whether, even if the controls were to mandate § 1 violations, they would be exempt under the state action doctrine from antitrust scrutiny." *Id.*

274. *Id.*

on the supremacy clause,²⁷⁵ once a conflict between state or local and federal law is established, the federal statute should control. Although the preemption analysis proposed in Justice Rehnquist's *Boulder* dissent appears to follow this approach, all of the dissenters in *Boulder* joined the majority opinion in *Fisher*.²⁷⁶

Moreover, if the state action doctrine had been applied by the *Fisher* Court, the preemption issue need not have been discussed. As Justice Powell noted in his concurrence, the California legislature expressly authorized the rent control ordinance enacted by the city.²⁷⁷ Powell's concurrence suggests that the state action doctrine resolved the case and made considering the preemption issue unnecessary.

Thus, the usefulness of preemption analysis in municipal anti-trust cases is questionable. Lower federal courts will have difficulty applying it, particularly since the Supreme Court's opinion in *Fisher* did not reconcile the state action doctrine with preemption analysis. The Court declined to consider the state action issue and apparently decided the case in reverse order by deciding the preemption issue before the state action issue.

IV. APPROPRIATE RELIEF—IMMUNITY FOR LOCAL GOVERNMENTS FROM THE ANTITRUST LAWS

Proposed solutions to problems of analysis and application of the *Parker* doctrine and its progeny range from complete immunity for municipalities to mere modifications of the balancing test. The proper solution is a federal statutory grant of immunity to local governments from the antitrust laws.

Some authors make a sophisticated economic argument for immunity, claiming that analysis of municipal activities under the anti-trust laws is inefficient. One theory proposes that consumers select, either through the political system or through their choice of places to live, the mix of regulation and competition that maximizes their welfare. Economic theory, however, requires certain conditions for this equilibrium²⁷⁸ to be reached: 1) people and resources must be mobile; 2) there must be several jurisdictions from which to select;

275. "This Constitution and the Laws of the United States which shall be made in pursuance thereof . . . shall be the Supreme Law of the Land." U.S. CONST. art. VI, cl. 2.

276. See *Boulder*, 455 U.S. 40, 60-71 (Burger, C.J., Rehnquist & O'Connor, J.J., dissenting).

277. 106 S. Ct. at 1052 (Powell, J., concurring).

278. In equilibrium, the economy is perfectly competitive and efficient in that no other allocation of inputs, outputs, or distribution is possible to make one person "better" off without making another "worse" off in terms of each person's preferences. See P. AREEDA, *supra* note 28, at 7.

3) the jurisdictions must be free to select any mix of laws; and 4) consequences of a jurisdiction's action must be felt only within *that* jurisdiction.²⁷⁹ Whether any of the four conditions can be met is questionable. The fourth required condition is particularly difficult. A municipality would have to pay all of the costs of its regulation and reap all of the benefits — the classic and quintessential problem of externalities.²⁸⁰

In the zoning context, the problem of regional impacts of local legislation is illustrated by exclusionary zoning cases. To exclude low-income housing, local legislatures enacted legislation such as rezoning from multi-family to single-family use; establishing large minimum lot sizes or floor sizes; and requiring subdivision improvements and public dedications. The ordinances purportedly address such issues as crime, overcrowding in schools, preservation of the local tax base, and aesthetics. When many municipalities zone to exclude low income housing, however, the low income classes must congregate in the few areas where they are not excluded. Thus, a few municipalities must shoulder the burden of accommodating a large low income population.²⁸¹

Another economic-based argument contends that municipalities should be treated like states for antitrust purposes to maximize efficiency.²⁸² Antitrust laws should maximize consumer welfare.²⁸³ Municipalities may act in one of four ways to affect competition:²⁸⁴ 1) to promote competition; 2) to correct market defects;²⁸⁵ 3) to promote a value other than efficiency;²⁸⁶ or 4) to generate monopoly profits for city officials, private parties or the public treasury.

The first possibility does not create antitrust problems. The sec-

279. Easterbrook, *supra* note 233, at 45. "Competition among the states to create attractive systems of economic regulation is greatest if states may adopt *any* regulations they choose, at any level of government they choose, so long as the residents of the state that adopts the regulation also bear the whole monopoly overcharge." *Id.*

280. *See infra* note 285.

281. For discussion of discriminatory zoning techniques, see D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW §§ 242-47 (1975); *see also* Note, *An Argument for an Antitrust Attack on Exclusionary Zoning*, 50 BROOKLYN L. REV. 1035 (1984) (exclusionary zoning might constitute a group boycott, a concerted refusal to deal, a horizontal market division or price-fixing).

282. Lopatka, *supra* note 129, at 54-74.

283. *Id.* at 54.

284. *Id.* at 55.

285. For example, a municipality may act to address the problem of "public goods," which Lopatka describes as goods that are consumable by more than one individual simultaneously and that individuals cannot be easily excluded from consuming. *Id.* at 57. Police protection, fireworks displays, and natural monopolies are examples of public goods. *Id.* at 57-58.

286. Municipalities may act to redistribute wealth or to protect people from their own mistakes. *Id.* at 61.

ond possibility may increase consumer welfare. Therefore, antitrust liability should not attach because courts are unequipped to second-guess the municipality as to whether a particular action increases efficiency.²⁸⁷ If the third and fourth possibilities reduce consumer welfare, they are best remedied through the political process.²⁸⁸ This option is not available when a private actor engages in anticompetitive conduct. Furthermore, when the political system fails,²⁸⁹ problems can be resolved by the state legislature or the federal commerce clause.

According to Professor Lopatka if the goal of antitrust law is to maximize consumer welfare, imposing liability is inefficient for several reasons. First, antitrust analysis is a sophisticated, learned process. Courts are bound to make errors in analysis and results as they perfect the technique.²⁹⁰ These errors have inherent economic costs. Second, the specter of liability may so chill municipalities that they fail to act to improve consumer welfare. Third, litigating antitrust issues is notoriously expensive. Finally, immunity for municipalities should be independent and not derivative from state authorization because state authorization of individual municipal activities is expensive and will adversely affect the municipalities' sense of autonomy.²⁹¹

287. Lopatka notes:

About all a court could do is simply disagree with the decision and find that the city misestimated the magnitude of the externalities. The city may have, of course To allow an antitrust court to make this determination, though, is to allow it to perform a task it is not equipped to accomplish.

Id. at 60.

288. The electorate may choose or reject inefficiency results. Additionally, Lopatka does not regard the generation of monopoly profits for city officials—the fourth possibility—as an antitrust problem, but rather as one to be resolved by state laws governing fiduciary duties of public officials. *Id.* at 63. This argument is related to the “Tiebout Hypothesis,” developed by Professor Charles Tiebout regarding suburban specialization. He postulates that consumers may “vote with their feet” to select among municipalities offering different “packages” of goods and services, including better schools, more police protection, etc. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). Consumers similarly could select the municipality with their preferred mix of regulation and competition.

289. The political system fails when those who are unable to participate in the decision making process are burdened most by inefficient results. Lopatka, *supra* note 129, at 68.

290. Lopatka cites *Boulder* as an example of judicial reasoning gone astray in that the goal and the effect of the cable television moratorium “was designed to and did enhance efficiency. . . . Yet the district court entered a preliminary injunction against the city, holding that the city’s conduct ‘in reasonable probability will be declared unlawful under the antitrust laws.’” Lopatka, *supra* note 129, at 73 (quoting *Community Communications Co. v. City of Boulder*, 485 F. Supp. 1035, 1040 (D. Colo.), *rev’d*, 630 F.2d 704 (10th Cir. 1980), *rev’d*, 455 U.S. 40 (1982)).

291. *Id.* at 73-76. This last argument is common. See Hovenkamp & MacK-

Other advocates of immunity argue that municipal abuses of power will be curbed by conflict of interest laws, sunshine laws, the Freedom of Information Act,²⁹² section 1983 of the Civil Rights Act,²⁹³ the commerce clause,²⁹⁴ the first amendment,²⁹⁵ and the fifth and fourteenth amendments,²⁹⁶ in addition to political and demographic changes.

The argument for immunity is supported by analogy; judges are granted immunity for judicial acts, legislators for legislative acts, and various officials have qualified immunity for official acts. Thus, municipalities should be granted immunity for municipal acts.²⁹⁷

Proponents of solutions to perceived problems inherent in the *Parker* doctrine strive for a middle ground between total immunity and rule of reason balancing. One solution grants municipalities immunity, except when they act in a commercial capacity.

Professor Deutsch advocates imposing antitrust liability when local governments act as developers, partners of developers, or when local officials engage in corruption, improper influence, or self-dealing.²⁹⁸ He advocates treble damage awards when an individual

error, *supra* note 24 and accompanying text.

292. 5 U.S.C. § 552 (1982).

293. 42 U.S.C. § 1983 (1982). Claims were made under both the antitrust laws and the Civil Rights Act in *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983); *Gold Cross Ambulance & Transfer & Standby Serv. v. Kansas City*, 705 F.2d 1005 (8th Cir. 1983), *cert. denied*, 471 U.S. 1003 (1985); *Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983).

294. The commerce clause states: "Congress shall have the power . . . To regulate Commerce with foreign Nations, and among the several States . . ." U.S. CONST. art. I, § 8, cl. 3.

295. The first amendment states: "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

296. The fifth amendment states: "No person . . . shall be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The fourteenth amendment, in pertinent part, states: "[N]or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

297. See GIVENS, ANTITRUST: AN ECONOMIC APPROACH § 18.01 (1984); "The problem of delegation is quintessentially a question of state law turned into a federal question by confusing standards for governmental and private action authorized by the state. A commercial/non-commercial distinction makes more sense than 'authorization' issues"; see also Vanderstar, *Liability of Municipalities Under the Antitrust Laws: Litigation Strategies*, 32 CATH. U.L. REV. 395, 397-98 (1983): "The [Supreme] Court has been reluctant to apply the antitrust laws to the conduct of those who are not engaged in commercial activities."

298. Deutsch, *supra* note 172, at 86-87; see, e.g., *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983); *Cedar-Riverside Assoc., Inc. v. United States*, 459 F. Supp.

abuses the public trust for private benefit, but only actual damages when the local government acts as a developer.²⁹⁹ The attempt to find a middle-ground solution for determining immunity is unworkable because it relies on the governmental function analysis previously rejected by the Supreme Court.³⁰⁰ Moreover, in cases of corruption, self-dealing, or improper influence, adequate civil and criminal safeguards and sanctions already exist. Thus, to resort to the antitrust laws when individual government officials have acted wrongfully is unnecessary.

Critics of immunity raise several arguments. First, Congress intentionally made no exceptions to the antitrust laws at the time of their enactment. Therefore, Congress, not the judiciary, should develop any exceptions.³⁰¹ Second, if the public accepts the benefits of their officials' anticompetitive behavior, it should bear the costs when the behavior violates the law.³⁰² Finally, the rule of reason is as effective in the municipal context as in the business arena.³⁰³

In response, this author advocates that the source of immunity should indeed be Congress, not the courts. The Local Government

1290 (D. Minn. 1978), *aff'd on other grounds sub nom.*, Cedar-Riverside Assoc., Inc. v. City of Minneapolis, 606 F.2d 254 (8th Cir. 1979). Allegations of corruption, improper influence, or self-dealing by officials were made in Whitworth v. Perkins, 559 F.2d 378 (5th Cir. 1977), *cert. denied*, 440 U.S. 911 (1979); Stauffer v. Town of Grand Lake, 1981-1 Trade Cas. (CCH) ¶ 64,029 (D. Colo. 1980); Brown v. Carr, 1980-1 Trade Cas. (CCH) ¶ 63,033 (D.D.C. 1979); Nelson v. Utah Co., 1978-1 Trade Cas. (CCH) ¶ 62,128 (D. Utah 1977).

299. In these cases, "private economic goals are being pursued by the public entity, and being pursued inappropriately." Deutsch, *supra* note 172, at 87-88.

300. See Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528 (1985). Although this case presented a tenth amendment issue, Justice Blackmun's opinion is relevant to immunity issues:

The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common wealth [T]he States cannot serve as laboratories for social and economic experiment, if they must pay an added price when they meet the changing needs of their citizenry by taking up functions that an earlier day and a different society left in private hands.

Id. at 546 (citing *Newstate Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (citations omitted)).

301. Justice Stevens made this argument in his dissent in *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 66-80 (Stevens, J., dissenting).

302. This argument was made in Note, *Municipal Antitrust, An Overview*, 60 CHI-KENT L. REV. 349, 382 (1984).

303. Several authors support rule of reason analysis. See, e.g., Note, *supra* note 302, at 373, which proposes a test under which the court will balance the pro and anticompetitive effects of the regulation if the regulated area is appropriate for competition.

Antitrust Act³⁰⁴ is a step in that direction. Congress has already limited liability in other contexts³⁰⁵ and should expand protection for local governments by granting them total immunity, subject to specific, applicable limitations. Second, whether the public actively accepts or rejects the anticompetitive behavior of their local governments is questionable. Local legislatures have a duty to act in the interest of public health, safety, and welfare. As previously discussed, some municipal decisions are inherently anticompetitive. The public should not lose general revenue because the local governing board made an apparently unwise decision.³⁰⁶ Finally, municipal decision making is inherently different from that of the business world.³⁰⁷

Thus, the antitrust laws are not amenable to control of municipal conduct, as illustrated when they are applied to land use planning.³⁰⁸ Anything short of total immunity retains many of the flaws of the traditional state action rule. Even the Local Government Antitrust Act will not prevent courts from refusing summary judgment in cases in which actual allegations of conspiracy are present. The time and expense of litigation, albeit for injunctive relief only, are still problematic. The Act does not relieve the state-local pull imposed by the Supreme Court in its recent cases.³⁰⁹ Municipalities derive little protection under current state statutes that are not specific in their authorization of activity.³¹⁰

This author also agrees with the arguments advanced by Lopatka,³¹¹ Easterbrook,³¹² and other proponents of economic efficiency. To the extent that economic considerations are relevant in the municipal context, a strong argument supports immunity on efficiency grounds.

Lastly, other existing limitations on governmental power provide enough protection for private parties against the misconduct of municipal officials. Basic due process, equal protection, and other constitutional guaranties, as well as various statutory remedies are avail-

304. 15 U.S.C. §§ 34-36 (Supp. III 1985).

305. See, e.g., *id.* § 13(c) (exemption of nonprofit institutions from the price discrimination provisions of the Robinson-Patmon Act); *id.* § 17 (antitrust laws not applicable to labor organization); *id.* § 45(a)(2) (permitting minimum or stipulated prices for trademarked goods); *id.* § 638(d)(3) (aid to small business for research and development not within prohibitions of antitrust laws).

306. See *supra* notes 129-30, 133-49 and accompanying text.

307. See *supra* notes 150-52 and accompanying text.

308. See *supra* notes 150-51 and accompanying text.

309. See Hovenkamp & MacKerron, *supra* note 24.

310. See, e.g., the discussion of *Boulder*, 445 U.S. 40, *supra* notes 64-69 and accompanying text.

311. Lopatka, *supra* note 129.

312. Easterbrook, *supra* note 233; see also Wiley, *supra* note 134.

able to disgruntled plaintiffs.³¹³ As Professor Areeda stated:

The most flagrant displacements of competition usually are clearly authorized by the state and are thus immune from the Sherman Act. Federal control must therefore take another form. Congress can preempt the state suppression of competition through further regulation, or federal courts can strike down a state law or enjoin an official action that unduly burdens interstate commerce, impinges on the first amendment, or violates due process.³¹⁴

IV. CONCLUSION

The Local Government Antitrust Act, as enacted by Congress, is a step in the right direction. However, the protection offered by the Act does not go far enough. Congress should extend complete antitrust immunity to local governments.

The activities of governmental units differ from those of private businesses and cannot be evaluated under the antitrust laws in the same manner. The impact of local legislation is frequently anticompetitive as applied to an individual, but actually benefits the community as a whole. This concern for the general welfare is the guiding principle for municipal governing bodies. Antitrust litigation tends to be complex, expensive, and time-consuming. It may have a chilling effect on the local governing body. Also, adequate safeguards already exists outside of the antitrust laws, to protect individual citizens from improper government regulation. A grant of immunity from Congress avoids supremacy clause problems, as well as some of the ambiguity, line drawing, and separation of powers problems of a judicially-created exemption.

Society and the role of local government has changed fundamentally since the Sherman Act of 1890, the Clayton Act of 1913, and the *Parker* doctrine of 1943. Today, municipal governments often are required to provide more services, perform more functions, and regulate more actively than in the past. A local government is not a private business and should not be treated as such. Therefore, Congress should recognize and remedy this problem.

313. See *supra* notes 292-96 and accompanying text.

314. Areeda, *supra* note 156, at 454.

APPENDIX A

15 U.S.C. § 34. Definitions applicable to Local Government
Antitrust Act of 1984 provisions

For purposes of this section and sections 35 and 36 of this title—

- (1) the term “local government” means
 - (A) a city, county, parish, town, township, village, or any other general function governmental unit established by State law, or
 - (B) a school district, sanitary district, or or any other special function governmental unit established by State law in one or more States,
- (2) the term “person” has the meaning given it in subsection(a) of section 12 of this title, but does not include any local government as defined in paragraph (1) of this section, and
- (3) the term “State” has the meaning given it in section 15g(2) of this title.

§ 35. Recovery of damages, etc., for antitrust violations from any local government, or official or employee thereof acting in an official capacity

(a) Prohibition in general

No damages, interest on damages, costs, or attorney’s fees may be recovered under section 15, 15a, or 15c of this title from any local government, or official or employee thereof acting in an official capacity.

(b) Preconditions for attachment of prohibition; prima facie evidence for nonapplication of prohibition

Subsection (a) of this section shall not apply to cases commenced before the effective date of this Act unless the defendant establishes and the court determines, in light of all the circumstances, including the state of litigation and the availability of alternative relief under the Clayton Act, that it would be inequitable not to apply this subsection to a pending case. In consideration of this section, existence of a jury verdict, district court judgment, or any stage of litigation subsequent thereto, shall be deemed to be prima facie evidence that subsection (a) of this section shall not apply.

§ 36. Recovery of damages, etc., for antitrust violations on claim against person based on official action directed by local government,

or official or employee thereof acting in an official capacity

(a) Prohibition in general

No damages, interest on damages, costs or attorney's fees may be recovered under section 15, 15a, or 15c of this title in any claim against a person based on any official action directed by local government, or official or employee thereof acting in an official capacity.

(b) Nonapplication of prohibition for cases commenced before effective date of provisions

Subsection (a) of this section shall not apply with respect to cases commenced before the effective date of this Act.