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## State Action and Municipal Antitrust Immunity: An Economic Approach

### Cover Page Footnote

I would like to thank Thomas S. Ulen, Laura A. Reynolds, and Marie T. Reilly for their helpful comments on prior drafts of this Article. I am also indebted to James J. Gettel for his valuable research assistance.

# STATE ACTION AND MUNICIPAL ANTITRUST IMMUNITY: AN ECONOMIC APPROACH

JOHN E. LOPATKA\*

## INTRODUCTION

FROM their inception, the antitrust laws were intended to prevent private firms from restraining competition, so that consumers would not be forced to pay monopoly prices.<sup>1</sup> It was therefore no surprise when, in 1943, the Supreme Court held that state governments are immune from antitrust attack even when their actions are anticompetitive.<sup>2</sup> Whatever harm the state governments might do, it was not the kind of harm against which the antitrust laws were directed. Surprise, however, would not properly describe the reaction to the Supreme Court's 1978 decision that municipal governments are not similarly immune from antitrust challenge.<sup>3</sup> Call it shock. In *City of Lafayette v. Louisiana Power & Light Co.*,<sup>4</sup> the Court held that while cities may acquire immunity from the state, they do not enjoy immunity by virtue of their own status as governments.<sup>5</sup> Four years later, in *Community Communications Co. v. City of Boulder*,<sup>6</sup> the Court held that for a city to acquire antitrust immunity, it is not enough that the state explicitly delegate broad powers of home rule to that city. Rather, the state must at least authorize the specific municipal actions challenged.<sup>7</sup>

Few recent opinions of the Supreme Court, at least in the area of economic regulation, have generated the controversy and activity produced by these two decisions. In Senate and House Committee hearings on the issue of municipal immunity,<sup>8</sup> the witnesses have expressed widely divergent views. One asserted that the possibility of antitrust liability has so

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1. For general treatments of the legislative origins and early judicial interpretations of the Sherman Act, see R. Bork, *The Antitrust Paradox: A Policy at War with Itself* 15-90 (1978); W. Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (1965); H. Thorelli, *The Federal Antitrust Policy: Origination of an American Tradition* (1954).

2. *Parker v. Brown*, 317 U.S. 341, 350-52 (1943).

3. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

4. 435 U.S. 389 (1978).

5. *Id.* at 413.

6. 455 U.S. 40 (1982).

7. *Id.* at 52, 55, 57.

8. See *Senate Committee Reviews Options for Legislation in Wake of Boulder*, 46 *Antitrust & Trade Reg. Rep. (BNA)* No. 1162, at 813-14 (April 26, 1984) [hereinafter cited as *Senate Review*]; *House Judiciary Committee Reviews Legislative Options in Light of Boulder*, 46 *Antitrust & Trade Reg. Rep. (BNA)* No. 1167, at 1062-63 (May 31, 1984) [hereinafter cited as *House Review*].

chilled municipal actions that his city has become "a frozen wasteland."<sup>9</sup> Another remarked that "mayors are sitting ducks . . . Having the threat of antitrust suits hanging over our heads is enough to bring government to a grinding halt."<sup>10</sup> Still another lamented that cities "have lost their power to control their destiny."<sup>11</sup> Another witness, however, argued that cities "should be subject to the federal antitrust laws, just as they are to federal laws on employment discrimination and interstate commerce."<sup>12</sup> Others advocated middle grounds between full antitrust exposure and complete immunity.<sup>13</sup> Bills were introduced in both houses of Congress to change the doctrine created by the Supreme Court, and a conference committee was ultimately able to win approval of the Local Government Antitrust Act of 1984.<sup>14</sup> Scholarly response has been abundant and diverse.<sup>15</sup> Articles and editorials in the popular press relating to the issue have become almost as common as reports of presidential news

9. *House Review*, *supra* note 8, at 1062 (statement of Fred L. Foreman, State's Attorney of Lake County, Illinois).

10. *Id.* (statement of Kenneth A. Gibson, Mayor of Newark, New Jersey).

11. *Senate Review*, *supra* note 8, at 813 (statement of Joseph Riley, Mayor of Charleston, South Carolina).

12. *House Review*, *supra* note 8, at 1062 (statement of Thomas J. Campbell, Stanford University professor, former director of the Federal Trade Commission's Bureau of Competition).

13. *Compare Boulder Bill Stirs Up Differing Perspectives From States, Localities*, 46 *Antitrust & Trade Reg. Rep. (BNA) No. 1159*, at 688 (April 5, 1984) (statement of Gerald L. Baliles, Virginia Attorney General) (advocating middle ground) *and id.* (statement of Dick Hemstad, Washington State Senator) (same) *with id.* (statement of Donald Murray, Legislative Representative of the Nat'l Ass'n of Counties) (advocating equal immunity for state and municipal governments) *and id.* at 689 (statement of William Hunter, Attorney, Washington, D.C.) (opposing legislation to limit municipal liability).

14. The bill was signed into law by the President on Oct. 24, 1984. *See* 47 *Antitrust & Trade Reg. Rep. (BNA) 753* (Oct. 25, 1984). The Act essentially provides that no antitrust damages may be recovered from a local government, or from a private party based on an official act directed by local government. *Id.*; *see id.* at 716-18 (Oct. 18, 1984).

15. *See, e.g.,* *Antitrust & Local Government* (J. Siena ed. 1982); Areeda, *Antitrust Immunity for "State Action" after Lafayette*, 95 *Harv. L. Rev.* 435 (1981); Brame & Feller, *The Immunity of Local Governments and Their Officials from Antitrust Claims After City of Boulder*, 16 *U. Rich. L. Rev.* 705 (1982); Cirace, *An Economic Analysis of the "State-Municipal Action" Antitrust cases*, 61 *Tex. L. Rev.* 481 (1982); Civiletti, *The Fallout from Community Communications Co. v. City of Boulder: Prospects for a Legislative Solution*, 32 *Cath. U.L. Rev.* 379 (1983); Easterbrook, *Antitrust and the Economics of Federalism*, 26 *J. Law & Econ.* 23 (1983); Robinson, *The Sherman Act as a Home Rule Charter: Community Communications Co. v. City of Boulder*, 2 *Sup. Ct. Econ. Rev.* 131 (1983); Rogers, *Municipal Antitrust Liability in a Federalist System*, 1980 *Ariz. St. L.J.* 305 (1980); Sentell, *The United States Supreme Court as Home Rule Wrecker*, 34 *Mercer L. Rev.* 363 (1982); Slater, *Local Governments and State Action Immunity after City of Lafayette and City of Boulder*, 51 *Antitrust L.J.* 349 (1982); Stroll, *Home Rule and the Sherman Act After Boulder: Cities Between a Rock and a Hard Place*, 49 *Brooklyn L. Rev.* 259 (1983); Vanderstar, *Liability of Municipalities Under the Antitrust Laws: Litigation Strategies*, 32 *Cath. U.L. Rev.* 395 (1983); Note, *The Preemption Alternative to Municipal Antitrust Liability*, 51 *Geo. Wash. L. Rev.* 145 (1982); Note, *Antitrust: The Parker Doctrine and Home Rule Municipalities*, 22 *Washburn L.J.* 534 (1983); Note, *Municipal Government Exemption from Federal Antitrust Laws: An Examination of the Midcal Test After Boulder*, 40 *Wash. & Lee L. Rev.* 143 (1983).

conferences.<sup>16</sup> The Federal Trade Commission initially began to challenge municipal actions as unfair trade practices.<sup>17</sup> Subsequently, in the 1985 appropriations bill covering the FTC, Congress passed a rider that barred the Commission from expending funds to enforce antitrust actions against municipalities.<sup>18</sup> It later repealed the rider.<sup>19</sup>

No doubt this controversy has been generated primarily by the real impact that antitrust liability has had or is expected to have on the functioning of local governments. Part of the response, though, stems from an instinctive, somehow moral sense of indignation. To many people, holding city governments liable for antitrust violations just seems *wrong*. Perhaps instinctive reactions should not be often trusted, but in this case we would do well to heed them. It may not be immoral, but the notion of municipal antitrust liability is misguided.

The antitrust laws serve an economic objective.<sup>20</sup> Consequently, any assessment of the wisdom of applying these laws to cities must start with an economic analysis of the impact of and alternatives to municipal antitrust liability. This kind of analysis requires an understanding of the economic justifications for the actions of city governments. This Article undertakes the analysis and demonstrates that of all the ways in which a city may affect competition, only a fraction disserve the goal of the antitrust laws. Many other municipal actions that affect competition promote that goal, and still other actions promote other goals without impairing the objective of the federal antitrust laws.

Even as to those actions that impair the federal objective, the antitrust laws should be inapplicable. The nature of governmental actions makes it almost impossible to distinguish between conduct that is harmful and that which is not. Allowing the judiciary to impose liability invites error, which in turn dissuades cities from engaging in activities that would increase social welfare. More fundamentally, individuals organized into a political entity ought to have the right to sacrifice the benefit of the antitrust laws for whatever reason, as long as they bear the cost. When they do not bear the cost of their decisions, they should be restrained. But that restraint should flow from federal and state legal requirements other than the antitrust laws. Municipalities, as well as private parties adequately authorized by them, should be absolutely immune from antitrust liability. The Supreme Court could reach this result by reinterpreting

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16. See *Free Enterprise for Taxis*, Chi. Tribune, May 14, 1984, at 10, col. 1 (midwest ed.); *Cities Facing Test Over Taxi Powers*, N.Y. Times, May 10, 1984, at 25, col. 6.

17. See *In re City of Minneapolis*, 3 Trade Reg. Rep. (CCH) ¶ 22,149 (complaint issued May 10, 1984); *In re City of New Orleans*, 3 Trade Reg. Rep. (CCH) ¶ 22,149 (same).

18. The President signed the bill on August 30, 1984. See 47 Antitrust Trade Reg. Rep. (BNA) No. 1181, at 439-40 (Sept. 13, 1984).

19. See 47 Antitrust & Trade Reg. Rep. (BNA) 753 (Oct. 25, 1984); *id.* at 716 (Oct. 18, 1984).

20. See *infra* note 231 and accompanying text.

legislative intent. If it refuses to do so, however, the result should be effected by congressional action.

In order to lay a necessary foundation for analyzing the issue of municipal immunity, this Article begins with a discussion of the state action doctrine,<sup>21</sup> including the latest Supreme Court decision, *Hoover v. Ronwin*,<sup>22</sup> which has added significantly to the doctrine.<sup>23</sup> The Supreme Court's application of the state action doctrine to municipalities is then described, and an analysis of a municipal antitrust case now pending before the Court, *Town of Hallie v. City of Eau Claire*,<sup>24</sup> follows.

A resolution is then proposed. The goal of the antitrust laws and the ways in which a city might act in relation to this goal are discussed.<sup>25</sup> The problem of extra-territorial impact of municipal decisions is specifically addressed.<sup>26</sup> This Article argues that antitrust immunity is superior to any attempt to assess liability discerningly,<sup>27</sup> and that a doctrine of blanket immunity is superior to a doctrine of immunity derived from state governments.<sup>28</sup> A description of the way in which absolute municipal immunity would apply to private actors implementing municipal policies is then discussed.<sup>29</sup> Finally, the merits of various alternative approaches are addressed.<sup>30</sup>

## I. THE CURRENT STATE ACTION DOCTRINE

In a 1943 case, *Parker v. Brown*,<sup>31</sup> the Supreme Court held that the State of California did not violate the Sherman Act by enacting legislation that, in effect, permitted raisin growers located in the state to fix prices. At least, it may have so held.<sup>32</sup> *Parker* is the origin of the so-called "state action doctrine," which over the years has managed to become one of the more perplexing and confused doctrines in an area of law boasting more than its fair share of uncertainty.<sup>33</sup> The controversy

21. See *infra* pt. I.

22. 104 S. Ct. 1989 (1984).

23. See *infra* notes 39-102 and accompanying text.

24. 700 F.2d 376 (7th Cir. 1983), *cert. granted*, 104 S. Ct. 3508 (1984).

25. See *infra* notes 232-88 and accompanying text.

26. See *infra* notes 289-311 and accompanying text.

27. See *infra* notes 312-51 and accompanying text.

28. See *infra* notes 321-25 and accompanying text.

29. See *infra* notes 326-29 and accompanying text.

30. See *infra* notes 330-51 and accompanying text.

31. 317 U.S. 341 (1943).

32. *Id.* at 352. For this view of the *Parker* holding see *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 589 (1976) (opinion of Stevens, J.).

33. For a mere sampling of the scholarly commentary on the doctrine, see the material cited in note 15, *supra*. See also 1 P. Areeda & D. Turner, *Antitrust Law* §§ 207-18 (1978) & §§ 212.1-2.7 (Supp. 1982); Burling, Lee & Quarles, "State Action" Antitrust Immunity—A Doctrine in Search of Antitrust Immunity—A Doctrine in Search of Definition, 1982 B.Y.U. L. Rev. 809 (1982); Morgan, *Antitrust and State Regulation: Standards of Immunity After Midcal*, 35 Ark. L. Rev. 453 (1981); Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum*, 61 B.U.L. Rev. 1099 (1981); Posner, *The Proper Relationship Be-*

engendered by *Parker* extends not only to the application of the doctrine to new factual contexts,<sup>34</sup> but also to the decision of the Court in the *Parker* context itself.<sup>35</sup> Thus, even the very holding of *Parker* is disputable.

Briefly put, the state action doctrine provides that conduct that would otherwise violate the antitrust laws will not violate those laws if it is either undertaken by a state or sufficiently authorized by it.<sup>36</sup> Since the *Parker* decision, the Supreme Court has decided nine other state action cases, the first in 1951<sup>37</sup> and the remaining eight since 1975.<sup>38</sup> Rather than trace the development of the doctrine historically, I propose to offer an exposition of the doctrine as it exists today, following the latest Supreme Court pronouncement in *Hoover v. Ronwin*.<sup>39</sup> Of course, this exposition will require some discussion of the earlier cases, in analytical rather than chronological order. It will not address, however, the Court's application of the state action doctrine to municipalities; the next section of the Article pertains to that topic.

#### A. Conduct of the State

The plaintiff in *Ronwin* was an unsuccessful applicant for admission to the Arizona Bar.<sup>40</sup> Under the Arizona Constitution, the state supreme court had the authority to determine who should be admitted to the practice of law.<sup>41</sup> Acting pursuant to that authority, the court promulgated rules providing, inter alia, for the appointment of a Committee on Examinations and Admissions, consisting of seven Arizona attorneys selected from a list supplied by the state bar association.<sup>42</sup> The court required the Committee to examine applicants on subjects specified in the

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*tween State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. Rev. 693 (1974); Richards, *Exploring the Far Reaches of the State Action Exemption: Implications for Federalism*, 57 St. John's L. Rev. 274 (1983).

34. See *supra* note 33; *infra* note 37.

35. See *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), discussed *infra* at notes 165-77 and accompanying text, where Justice Stevens, writing for a plurality of the Court, implied that the *Parker* doctrine protects only state officials. *Cantor*, 428 U.S. at 590-92. A majority of the Court, however, stated or implied that the doctrine protects private parties as well. *Id.* at 605, 613 n.5 (Blackmun, J., concurring in the judgment); *id.* at 615-16 (Stewart, Powell, and Rhenquist, J.J., dissenting); see *id.* at 604 (Burger, C.J., concurring in part).

36. 1 P. Areeda & D. Turner, *supra* note 33, at ¶¶ 211-12.

37. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).

38. *Hoover v. Ronwin*, 104 S. Ct. 1989 (1984); *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

39. 104 S. Ct. 1989 (1984).

40. *Id.* at 1991.

41. *Id.*

42. *Id.* at 1991-92 & n.4.

rules.<sup>43</sup> The Committee was authorized to “utilize such grading or scoring system[s]”<sup>44</sup> as it deemed appropriate, though it was required to “file with the [c]ourt thirty (30) days before each examination the proposed formula for grading” the examination.<sup>45</sup> The Committee was directed ultimately to “recommend to . . . [the] court for admission to practice applicants who are found by the [C]ommittee to have the necessary qualifications and to fulfill the requirements prescribed by the rules of the [state bar association’s] board of governors as approved by this court respecting examinations and admissions.”<sup>46</sup> The Committee was specifically limited to recommending candidates for admission; under “the Rules and Arizona case law, only the court had authority to admit or deny admission.”<sup>47</sup> Further, an applicant was entitled to seek review, in the supreme court, of an adverse recommendation by the Committee.<sup>48</sup> Plaintiff Ronwin filed an action against the Committee members who did not recommend his admission to the bar, alleging a violation of Section 1 of the Sherman Act.<sup>49</sup> In essence, he claimed that the Committee had set the grading scale for his examination “with reference to the number of new attorneys they thought desirable, rather than with reference to some ‘suitable’ level of competence,”<sup>50</sup> thereby “artificially reducing the numbers of competing attorneys in the State of Arizona.”<sup>51</sup>

In a 4-3 decision,<sup>52</sup> the Supreme Court held that the bar examination Committee was shielded from antitrust challenge by the *Parker* doctrine.<sup>53</sup> Ronwin sued four members of the bar examination committee, not the Arizona Supreme Court.<sup>54</sup> At least since *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*,<sup>55</sup> the orthodoxy had been that if private parties claimed antitrust immunity under the state action doctrine, two conditions had to be met: “First, the challenged restraint must be ‘one clearly articulated and affirmatively expressed as state policy’; second, the policy must be ‘actively supervised’ by the State itself.”<sup>56</sup> There is a possibility that a third condition has to be met as well: that “anticompetitive activities must be compelled by direction of

43. *Id.* at 1992.

44. *Id.* at 1992 (quoting Rule 28(c) VIIA (1973) as amended, 110 Ariz. xxvii, xii (1974)).

45. *Id.* at 1992 n.6.

46. *Id.* at 1992 n.4.

47. *Id.* at 1992.

48. *Id.*

49. *Id.* at 1991 n.1, 1993-94. Section 1 of the Sherman Act is codified at 15 U.S.C. § 1 (1982).

50. *Id.* at 1994.

51. *Id.* (quoting plaintiff’s complaint).

52. *Id.* at 2003.

53. *Id.* at 1998.

54. *Id.* at 1991.

55. 445 U.S. 97 (1980).

56. *Id.* at 105 (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978)).



the State acting as a sovereign."<sup>57</sup> This state compulsion requirement will be discussed later.

In *Ronwin*, the Court acknowledged the *Midcal* test,<sup>58</sup> but held that it was not relevant in the case at hand because the conduct challenged was really that of the Arizona Supreme Court, not the bar examination Committee.<sup>59</sup> The Court said that "[w]here the conduct at issue is in fact that of the state legislature or supreme court, [the court] need not address the issues of 'clear articulation' and 'active supervision.'"<sup>60</sup> For purposes of state action immunity, the Court defined the "state" as encompassing the state legislature and the state supreme court "when acting in a legislative capacity."<sup>61</sup> It explicitly reserved the question of "whether the Governor of a State stands in the same position as the state legislature and supreme court . . . ."<sup>62</sup> The Court, citing *Parker*, held that the actions of a state "*ipso facto* are exempt from the operation of the antitrust laws."<sup>63</sup>

The dissent in *Ronwin* emphasized that Ronwin sued the individual members of the bar examination Committee, and not the Arizona Supreme Court.<sup>64</sup> In reality, of course, the conduct that injured Ronwin was "a blend of private and public decisionmaking."<sup>65</sup> In fact, *Parker* itself involved a mixture of public and private decisionmaking.<sup>66</sup> Ronwin alleged that the Committee, not the court, decided to base the number of applicants recommended for admission to the bar on market conditions rather than on professional competence.<sup>67</sup> The court then accepted the Committee's recommendations.<sup>68</sup> The Supreme Court examined this amalgam of activity and concluded that the operative act, for state action purposes, was the court's acceptance of the Committee's recommendation and its consequent denial of Ronwin's application.<sup>69</sup> The dissent examined the same amalgam and concluded that the operative act was the Committee's decision to base its recommendation on competitive consid-

57. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975).

58. 104 S. Ct. at 1995.

59. *Id.* at 1998.

60. *Id.* at 1996.

61. *Id.* at 1995.

62. *Id.* at 1995 n.17.

63. *Id.* at 1995.

64. *Id.* at 2004-05 (Stevens, J., dissenting).

65. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592 (1976).

66. *See id.* at 592 n.25. In *Parker*, discussed *infra* at notes 106-10 and accompanying text, the state enacted a statute that, in effect, permitted raisin growers to fix prices if the agreement were authorized by a state agency. 317 U.S. 341, 346-47 (1943).

67. 104 S. Ct. at 1994.

68. *Id.* at 1992, 1997-98. There is some dispute as to whether the Arizona court ever denied Ronwin's application. The Court appears to infer that since no one is admitted to the bar unless the state court grants admission, and the court did not grant admission to Ronwin, the court must have decided not to admit Ronwin. *See id.* at 1997-98, 2000 n.30. The inference seems reasonable. The dissent, however, remarks, "I find nothing in the record to indicate that the court ever made such a decision." *Id.* at 2008 (Stevens, J., dissenting).

69. *See id.* at 1998.

erations.<sup>70</sup> This act was private conduct. The dissent's argument could be interpreted as asserting that when the operative act is private, state action immunity will apply only when the act is compelled by the state acting as sovereign or when the act is taken pursuant to a clearly articulated and affirmatively expressed state policy.<sup>71</sup> Here, the Committee's alleged decision to base its recommendations on considerations of competition was neither compelled by the state supreme court nor consistent with any clearly articulated and affirmatively expressed state policy. The dissent, therefore, would have found that the Committee was not immune from antitrust attack.<sup>72</sup>

### 1. Proximate Cause of Antitrust Injury: Public or Private Conduct

How can one determine whether an anticompetitive act that is the product of both public and private decisionmaking will be deemed an act of the state or an act of private parties? The Court appears to have adopted the antitrust analog of the tort doctrine of proximate cause.<sup>73</sup> If A dashes into the street to retrieve a baseball, prompting B to swerve to avoid him but to slam into C's car in the process, both A's act and B's act are causes in fact of C's injury. Generally, a "cause in fact" is any action, omission, or condition which so far contributed to a result that the result would not have occurred without it.<sup>74</sup> The injury would not have occurred if A had not run into the street or if B had stopped his car in time. For that matter, C's Chevy would have been spared had D not smashed the ball over the left fielder's head. Although each act is a cause in fact of the injury, not every actor will be held legally responsible for that injury. Instead, liability will be imposed only on that person or those persons deemed to have proximately caused the injury.

Unfortunately, deciding where liability in the proximate cause analysis will be cut off is not a precise determination. Rather, the result will be a

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70. See *id.* at 2007-08 (Stevens, J., dissenting).

71. In Part II of his dissent, Justice Stevens states that "anticompetitive actions of a state instrumentality not compelled by the State acting as sovereign are not immune from the antitrust laws." *Id.* at 2007 (Stevens, J., dissenting) (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 411 n.41 (1978)). He also states that immunity was inapplicable here because the state supreme court did not "require" and did not "direct" the Committee to act as they did. *Id.* In Part III, however, he states that the applicable principle is that an anticompetitive restraint engaged in by a state instrumentality "must be 'clearly articulated and affirmatively expressed' as state policy in order to gain an antitrust exemption." *Id.* at 2009 (Stevens, J., dissenting) (quoting *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 51 n.14 (1982) (quoting *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980))). Whether Justice Stevens views state compulsion as synonymous with clear state policy is uncertain, but they are not identical concepts. See *infra* notes 153-63 and accompanying text. Because Justice Stevens found that there was neither state compulsion nor a clear state policy, he did not have to reach the active state supervision requirement.

72. 104 S. Ct. at 2009-10 (Stevens, J., dissenting).

73. Perhaps the best general description and analysis of the doctrine is contained in W. Prosser & W. Keaton, *The Law of Torts* 263-321 (5th ed. 1984).

74. *Id.* at 264-65. Courts often refer to this as "but for" causation. *Id.* at 265-66.

product of "those more or less undefined considerations which limit liability even where the fact of causation is clearly established."<sup>75</sup> It is a decision "associated with policy—with our more or less inadequately expressed ideas of what justice demands, or of [administrative possibility and convenience]."<sup>76</sup>

Likewise, for purposes of state action immunity, determining whether a proximate cause of an antitrust injury is the act of the state, when acts of both the state and the private parties are causes in fact, will depend upon "more or less undefined considerations" and "inadequately expressed ideas of what justice demands." Such a principle is bound to distress those who crave a rigorous test that can be applied with mathematical precision. Yet that appears to be the state of affairs. Some guidance on the determinants of state action proximate cause can, however, be gleaned from the case law. Those factors that do not control are discussed before those that may be relevant.

a. *Factors That Appear Irrelevant to a Proximate Cause Determination*

First, the determination will not be left to the plaintiff. That is, the Court will not attribute the restraint to the private actor simply because the plaintiff names only the private actor as the defendant. In *Ronwin*, the plaintiff sued members of the bar examination Committee, not the supreme court, but the Court had no trouble concluding that the "real party in interest" was the Arizona Supreme Court.<sup>77</sup>

Second, the test for determining whether the state's act, rather than the private act, is the proximate cause of the antitrust injury is not the same as the test used to determine whether private conduct is sufficiently authorized by the state to immunize the private actor under the state action doctrine. In the latter case, the test at least includes the existence of a clearly articulated and affirmatively expressed state policy and active state supervision;<sup>78</sup> the Court in *Ronwin*, however, expressly stated that those considerations were irrelevant to its decision.<sup>79</sup> Indeed, if the Court wishes to maintain a meaningful distinction between antitrust immunity for private individuals based on the fact that the operative conduct is that of the state, and such immunity based on the fact that the operative conduct is private but was sufficiently authorized by the state, the tests in the two instances logically cannot be identical.

Third, the relevant private conduct need not be compelled by the state

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75. *Id.* at 273.

76. *Id.* at 264.

77. 104 S. Ct. at 1999 (quoting *Bates v. State Bar of Arizona*, 433 U.S. 350, 361 (1977)). In *Bates*, discussed *infra* at notes 111-16 and accompanying text, the plaintiffs sued only the State Bar of Arizona, an agency of the state supreme court, and the Court held the defendant immune under the *Parker* doctrine. *Id.* at 353 & n.3, 363.

78. *See, e.g., Community Communications Co. v. City of Boulder*, 455 U.S. 40, 54-56 (1982); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978).

79. 104 S. Ct. at 1996.

for the state conduct to be deemed a proximate cause. The alleged decision of the Committee in *Ronwin* to consider competition in making bar admission recommendations was not compelled by the state court.<sup>80</sup> Yet the Supreme Court held that the proximate cause of the antitrust injury was the conduct of the state court.<sup>81</sup> This, of course, does not mean that state compulsion is irrelevant to a proximate cause determination. Indeed, one could argue that state compulsion is a sufficient, but not a necessary condition for a finding that state conduct is the proximate cause of an antitrust injury.<sup>82</sup> Under this argument, whenever private conduct is compelled by the state, the action that proximately caused the injury is that of the state. When the private action is not compelled by the state, the state's conduct may or may not be deemed the proximate cause.

Fourth, the fact that the private actors were designated by the legislative authority to act as state officials cannot be decisive and should not be relevant. Language in *Ronwin* suggests that the Court believed that the designation of examination Committee members as state officers was relevant to a proximate cause determination,<sup>83</sup> and that it may have believed this to be decisive.<sup>84</sup> To this extent, the opinion is misleading. The Court's ruling on the state action issue is supportable without resort to the status of the Committee. Other language in the opinion suggests that the status is irrelevant,<sup>85</sup> and the logic of the Court's position leads to the same conclusion.

In *Goldfarb v. Virginia State Bar*,<sup>86</sup> the state bar, an administrative agency of the state supreme court, enforced a minimum fee schedule adopted by a county bar association. The Court held that the state bar was not protected by the state action doctrine because the state supreme court did not require the promulgation and enforcement of fee schedules.<sup>87</sup> The state court's rules were neutral toward, or at most prompted, the conduct of the state bar, and that was insufficient for immunity.<sup>88</sup>

80. *Id.* at 2007 (Stevens, J., dissenting).

81. *Id.* at 2002.

82. See *infra* notes 161-62 and accompanying text.

83. In explaining why the conduct challenged was that of the state, the Court noted, "The petitioners here were each members of an official body selected and appointed by the Arizona Supreme Court. Indeed, it is conceded that they were state officers." 104 S. Ct. at 1997.

84. According to the Court, the dissent conceded that: first, the Arizona Supreme Court exercises sovereign power with respect to bar admissions; second, the challenged conduct, if it were that of the Court, would be immune under *Parker*; and third, the members of the examination Committee are state officers. *Id.* at 1999. "These concessions," the Court says, "dispose of *Ronwin's* contentions." *Id.* Thus, this language could be interpreted to mean that because the Committee members were state officers, their actions were those of the state.

85. See *id.* at 1999-2002 (the operative conduct was that of the state supreme court and was thus immune under the state action doctrine).

86. 421 U.S. 773 (1975).

87. *Id.* at 790.

88. *Id.* at 790-91.

The designation of the state bar as an agency was not controlling.<sup>89</sup> As the dissent in *Ronwin* pointed out, if the fact that the private actors participating in a blend of public and private decisionmaking are state administrative officers is sufficient to establish that the operative conduct is that of the state, the Virginia Bar would have been immune in *Goldfarb*.<sup>90</sup>

If the Court seriously believed that the designation of the Committee members as state officers was determinative of the proximate cause issue, and hence the ultimate issue of immunity, its decision could have been much simpler. It could have cited the Arizona Supreme Court rule specifying the status of the Committee and found immunity. Instead, the Court discussed several other factors bearing upon its finding of state action.<sup>91</sup> In fact, the Court at one point in the opinion suggested that there was a single fact, unrelated to the status of the Committee, that dictated the finding that the operative act was that of the state court: Only the state court had authority actually to admit or deny admission.<sup>92</sup>

Further, the logic of the Court's position suggests that the status of the private actors is irrelevant. When the issue to be determined is whether a proximate cause of an antitrust injury is the conduct of the state or of private parties, the analysis focuses on the relationship between the anticompetitive effect and the various causes in fact of that effect. The question is: Which cause in fact is sufficiently predominant to be deemed the legally responsible cause? The status of the private actor as a public agent pertains to a different relationship—that between the state and the private actor. Thus, the *Ronwin* Court said that if a state legislature enacted an anticompetitive law based on advice given by an advisory committee, the operative conduct would be that of the state, and therefore, both the state and the committee would be protected by the *Parker* doctrine.<sup>93</sup> Surely the Court would reach the same result even if the advice were given by a group of citizens with no official designation and the law would not have been passed but for the advice.

b. *Factors That Appear Relevant to a Proximate Cause Determination*

Having outlined, then, what is not relevant in locating the proximate cause of an anticompetitive effect, the question remains whether the Court has indicated what factors may be relevant. In *Ronwin*, the Court alluded to six factors: (1) the Arizona court appointed the members of the Committee; (2) the court retained strict supervisory powers over the Committee; (3) the court specified the general qualifications necessary for admission to the bar, including the subjects to be tested on the bar examination; (4) the Committee was required to submit for court review the

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89. *Id.* at 791.

90. *Hoover v. Ronwin*, 104 S. Ct. 1989, 2007 (1984) (Stevens, J., dissenting).

91. *Id.* at 1997-98.

92. *Id.* at 2001.

93. *Id.* at 2001-02.

grading formula that it intended to use; (5) the court itself made the final decision to grant or deny admission to practice; and (6) an aggrieved applicant had a right to obtain review by the court of an adverse recommendation by the Committee.<sup>94</sup> Of these factors, the first is clearly irrelevant to a determination of proximate cause, as discussed above. The second appears irrelevant as well; although the presence or absence of state supervision bears upon a finding that private conduct proximately causing antitrust injury is sufficiently authorized by the state to acquire state action immunity, the Court said that this issue was not presented in *Ronwin*.<sup>95</sup>

The third factor is a red herring. The fact that the state court specified the general qualifications necessary for admission simply has nothing to do with the plaintiff's antitrust allegation. *Ronwin* claimed that he was injured because the Committee set the number of recommended applicants on the basis of competitive considerations,<sup>96</sup> not because he was tested on contracts and could not be a convicted rapist. In essence, this factor is an aspect of the second factor, a kind of demonstration of the court's supervision, and as discussed above, irrelevant.

The fourth factor could be relevant if the grading formula that had to be filed with the court would have demonstrated that the Committee intended to base its recommendations on market conditions, assuming that the Committee intended to do so. But there is no evidence that the required submission had to be so detailed. Even if the Committee intended to be influenced by competitive considerations in making its recommendations, it is unlikely that the filed grading system would have disclosed that fact.

This leaves the final two factors, both of which certainly are relevant. If one views the injury sustained by *Ronwin* as the failure to be admitted to the bar, it is reasonable to conclude that the proximate cause of that injury is the denial of bar admission. Because only the state court had authority to deny admission and final authority to review and overturn a recommendation to deny admission,<sup>97</sup> the legally responsible actor must be the supreme court. Thus, the Court stated: "Th[e Arizona Supreme Court] Rules carefully reserve to the court the authority to make the decision to admit or deny, and that decision is the critical state action here."<sup>98</sup> It cannot be said, however, that whenever the state has ultimate authority to allow or prevent an anticompetitive restraint, the state's act or nonact is the proximate cause of the injury. The state will almost always have that authority, and if that were enough for immunity, virtually all private conduct would be immune. For instance, the state court

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94. *Id.* at 1997-98.

95. *Id.* at 1996. Although authorization may be relevant, supervision by itself is not.

96. *Id.* at 1993-94.

97. *See id.* at 2000-02.

98. *Id.* at 2001.

had the power to prohibit the use of fee schedules in *Goldfarb*.<sup>99</sup> Nevertheless, that power was not sufficient to make the court the proximate actor and thereby shield the state bar from antitrust attack.<sup>100</sup>

Of course, it would not be unreasonable to conclude, as the dissent did, that the act critical to Ronwin's injury was the Committee's tainted recommendation.<sup>101</sup> One could imagine that the Arizona Supreme Court would accept whatever recommendations the Committee made. Compared with the active nature of the Committee, the court's role would be that of a relatively passive actor in the scenario, even though the court had the power, in a legal sense, to reject the Committee's recommendations. So viewed, the proximate cause of Ronwin's injury could be the Committee's conduct.

As the above discussion indicates, it is not easy to determine which conduct will be deemed the proximate cause when an anticompetitive restraint is the product of both public and private conduct. The Court will examine all causes in fact of the injury sustained. It will find the state action to be the proximate cause of the injury if the conduct of the state is a cause in fact and it appears that the state's action rather than private conduct is more closely related to the harm—so "closely connected with the result and of such significance"<sup>102</sup> that the state should, in some moral sense, be held responsible for the restraint. Otherwise, the Court will deem the private conduct to be the proximate cause.

## 2. Application of the Proximate Cause Analysis

The Supreme Court's state action cases generally are consistent with this analysis. Of course, because the principle suggested ultimately depends upon a subjective, moral judgment, some may disagree that the decisions can be explained by the asserted principle. The interested reader is left to determine whether, in all the cases in which the Court denied state action immunity except one,<sup>103</sup> it can fairly be said that the private conduct was the proximate cause of the antitrust injury. The three cases other than *Ronwin* in which the Court found immunity<sup>104</sup> and the one exception<sup>105</sup> merit brief discussion.

It is important to keep in mind that when the Court has found immu-

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99. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 776 & n.2 (1975). The Bar in *Goldfarb* was merely an "administrative agency" of the state supreme court. *Id.*

100. *Id.* at 791.

101. See 104 S. Ct. at 2006 (Stevens, J., dissenting).

102. W. Prosser & W. Keaton, *supra* note 73, at 264.

103. Community Communication Co. v. City of Boulder, 455 U.S. 40 (1982); California Retail Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); Cantor v. Detroit Edison Co., 428 U.S. 479 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). The one exception is *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). The *Boulder* and *Lafayette* cases, in which municipal conduct was at issue, are discussed *infra*, throughout.

104. *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Parker v. Brown*, 317 U.S. 341 (1943).

105. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).

nity, it might have done so either because it deemed the conduct of the state to be the proximate cause or because the private conduct, which was the proximate cause, was adequately authorized by the state. Thus, merely because one might conclude that the state was not the proximate actor in a case in which the Court found immunity does not disprove the validity of the proximate cause rationale — the Court may have based its decision on the second prong of the state action doctrine.

In *Parker*,<sup>106</sup> the state enacted a statute that permitted raisin growers to petition a state agency for authority to formulate a plan that, in effect, provided for the restriction of output.<sup>107</sup> The statute authorized the agency to accept the plan, and thereafter, any violation of the plan was punishable by civil and criminal sanctions.<sup>108</sup> A raisin grower sued the individuals administering the statute to enjoin the enforcement of the program,<sup>109</sup> and the Supreme Court held that the defendants were immune from antitrust attack.<sup>110</sup>

The action of the state in enacting the statute appears to be closely related to the burden of the restriction imposed upon the plaintiff. Though the plaintiff presumably would not have been injured had the raisin growers not submitted the proration plan, the state's action appears to be more closely related to the plaintiff's injury and could reasonably be deemed to have been the proximate cause of it.

In *Bates*,<sup>111</sup> the Arizona Supreme Court adopted a disciplinary rule, derived from the American Bar Association Code of Professional Responsibility, that prohibited advertising by attorneys.<sup>112</sup> The state bar recommended suspension of the plaintiffs for violating the rule.<sup>113</sup> Although the plaintiffs would not have been harmed had the state bar not recommended sanctions, and might not have been harmed had the American Bar Association not restricted advertising in its Code, the Court held that the defendant state bar was protected by the state action doctrine.<sup>114</sup>

The Court's opinion could be read as an application of the state authorization prong of the state action doctrine, for the Court explicitly noted the existence of a clearly and affirmatively expressed state policy and active state supervision.<sup>115</sup> But the case is consistent with a proximate cause analysis as well. The plaintiff's injury appears to be more closely related to the action of the state court in adopting the disciplinary

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106. *Parker v. Brown*, 317 U.S. 341 (1943).

107. *Id.* at 346.

108. *Id.* at 347.

109. *Id.* at 344.

110. *Id.* at 352.

111. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

112. *Id.* at 355, 360.

113. *Id.* at 356.

114. *Id.* at 362-63.

115. The Court commented, "[W]e deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active." *Id.* at 362.



rule than to the action of the state bar or national bar association.<sup>116</sup>

In *New Motor Vehicle Board v. Orrin W. Fox Co.*,<sup>117</sup> California enacted a statute that gave an auto manufacturer's existing franchisee a right to protest to a state agency the attempted establishment of a new franchise in the same area.<sup>118</sup> If the state agency then found good cause for refusing to allow the new outlet, the new franchise could not be opened.<sup>119</sup> A foreclosed auto manufacturer and prospective franchisees sued.<sup>120</sup> The Court held that the scheme was the act of California and therefore immune from antitrust attack.<sup>121</sup>

Like *Bates*, this opinion could be read as an application of the state authorization prong of the doctrine. The Court explicitly noted that the restraint was the product of a "clearly articulated and affirmatively expressed" state policy<sup>122</sup> and "subject to ongoing regulatory supervision."<sup>123</sup> The decision, however, is also consistent with the proximate cause rationale. Although it seems clear that the plaintiffs would not have been injured without actions of existing franchisees and the state board,<sup>124</sup> it appears reasonable to conclude that the state legislature's enactment of the statute was the proximate cause of their injuries.

The case that cannot be reconciled easily with the proximate cause theory is *Schwegmann Brothers v. Calvert Distillers Corp.*<sup>125</sup> A Louisiana law permitted distributors and retailers to agree upon resale prices, as was then permitted<sup>126</sup> by a federal statute, the Miller-Tydings Act.<sup>127</sup> But the Louisiana law also required retailers who were not parties to the original agreement to sell at the price provided by such agreement.<sup>128</sup> That aspect of the law, in the Court's view, was not sanctioned by the Miller-Tydings Act.<sup>129</sup> Defendant distributors had attempted to force a non-

116. See *Hoover v. Ronwin*, 104 S. Ct. 1989, 1999 (1984). The Court in *Ronwin* cited *Bates* in support of its decision. See *id.* Justice Stevens, in dissent, argued that *Ronwin* was more like *Goldfarb* than it is like *Bates*. *Id.* at 2006-07 (Stevens, J., dissenting). The majority appears to have the better of the argument. Disciplining the attorney in *Bates* for violating the state supreme court's prohibition on advertising is more closely related to the action of the Arizona court in *Ronwin* than is paying inflated legal fees because of an agreement among lawyers not specifically sanctioned by the court.

117. 439 U.S. 96 (1978).

118. *Id.* at 98 n.1.

119. *Id.*

120. *Id.* at 104.

121. *Id.* at 109.

122. *Id.*

123. *Id.* at 110.

124. The status of a state agency is discussed *infra* at notes 164-86 and accompanying text.

125. 341 U.S. 384 (1951).

126. *Id.* at 386.

127. Miller-Tydings Act, Ch. 690, 50 Stat. 693 (1937) (repealed by the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, § 2, 89 Stat. 801 (codified as amended at 15 U.S.C. §1 (1982))).

128. *Schwegmann*, 341 U.S. at 387.

129. *Id.* at 389.

party retailer to adhere to the prices agreed upon with other retailers.<sup>130</sup> The Court held that the distributors were not protected by the state action doctrine, noting that “when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids.”<sup>131</sup> But if a distributor forces a retailer to adhere to resale prices agreed upon with other retailers, surely the proximate cause of the burdened retailer’s injury is not the distributor’s conduct, but the state’s enactment of the statute which explicitly provided for that conduct.

In attempting to reconcile *Schwegmann* with Supreme Court state action decisions prior to *Ronwin*, Professors Areeda and Turner argue that state action immunity was denied in *Schwegmann* because the required state supervision was absent.<sup>132</sup> But this argument conflicts with the Court’s opinion in *Ronwin*, where the Court stated that the requirements of clear state policy and active supervision are irrelevant when the operative, injury-producing conduct is that of the state.<sup>133</sup> The operative conduct in *Schwegmann* was more clearly that of the state than was the operative conduct in *Ronwin*.

Professor Robinson has written that “[p]erhaps we should understand *Schwegmann* as merely a refusal to extend *Parker* to general efforts by state legislatures to create wholesale exemptions from antitrust law, as distinct from more narrowly targeted efforts to suppress competition in favor of state regulatory objectives.”<sup>134</sup> He may be right. *Schwegmann* might be distinguished from *Ronwin* on the basis of the scope or magnitude of the anticompetitive restraints involved in the two cases. Another possibility, of course, is that *Schwegmann* is simply no longer good law. It is interesting and perhaps telling that neither the Court nor the dissent in *Ronwin* cited *Schwegmann*.

If it is determined that the proximate cause of an anticompetitive restraint is the conduct of the state, immunity for all participating public and private parties should follow ineluctably. The Court in *Ronwin* is quite clear about this. The actions of a state “*ipso facto* are exempt from the operation of the antitrust laws.”<sup>135</sup> Even the dissent in *Ronwin* remarked that when a state itself imposes an anticompetitive restraint, its action “does not violate the antitrust laws.”<sup>136</sup>

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130. *Id.* at 385-86.

131. *Id.* at 389.

132. See 1 P. Areeda & D. Turner, *supra* note 33, at ¶ 213a.

133. 104 S. Ct. 1989, 1996 (1984); see *supra* note 79 and accompanying text.

134. Robinson, *supra* note 15, at 133 (footnote omitted).

135. *Ronwin*, 104 S. Ct. at 1995.

136. *Id.* at 2004 (Stevens, J., dissenting). Later the dissent commented: “If respondent were challenging a restraint of trade imposed by the sovereign itself, this case would be governed by *Parker*, which held that the Sherman Act does not apply to the sovereign acts of States.” *Id.* at 2006 (Stevens, J., dissenting). It is clear from the result in *Ronwin* that if the state is the proximate actor, the Court will hold both participating private actors and the state immune. Justice Stevens would hold the state immune, but it is not certain whether he would also find participating private parties immune. Because he

### B. *Private Conduct Authorized by the State*

If the proximate cause of the antitrust injury is deemed to be private conduct, the private actors might still be protected by the second prong of the state action doctrine, if they can prove that their conduct was sufficiently *authorized* by the state. The test for the requisite authorization was stated most succinctly in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*<sup>137</sup>: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself."<sup>138</sup>

#### 1. Clear State Policy

The Court has put teeth into the requirement of a " 'clearly articulated and affirmatively expressed state policy' to replace competition with regulation."<sup>139</sup> For instance, if a state supreme court directed a state bar to oversee the conduct of attorneys and granted the state bar the power to discipline attorneys acting contrary to the public interest, the mandate would not be sufficient to allow the bar to enforce a price fixing scheme.<sup>140</sup> The court would have to specify either the prices themselves, or at least that it intended attorneys to agree upon prices. It must be apparent that the state had in mind the specific restraint in question.<sup>141</sup>

The clear state policy requirement makes sense. When private conduct restrains competition, there is no reason to immunize that conduct unless the restraint was *intended* by the state. As the *Ronwin* Court observed: "When the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization . . . it becomes important to insure that the anti-competitive con-

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found the restraint to be imposed by private parties, the dissent did not have to resolve that question.

The one possible exception to the principle that an anticompetitive restraint produced by action of the state does not give rise to antitrust liability for any of the involved parties was suggested above in the discussion of *Schwegmann*. Perhaps if the restraint created by the State is excessively broad, private participants in the scheme will be exposed to antitrust liability, though the state may not be.

137. 445 U.S. 97 (1980).

138. *Id.* at 105. The California statute at issue in *Midcal* required all wine producers, wholesalers, and rectifiers to file fair trade contracts or price schedules with the State and it required all licensed wholesalers to adhere to the prices set by a single wholesaler within a trading area. *Id.* at 99-100. The Court denied state action immunity, holding that there was a clearly articulated state policy but no active state supervision. *Id.* at 105. The *Midcal* test was cited favorably by the Court in *Ronwin*, although it was not relevant to the Court's analysis. See *Hoover v. Ronwin*, 104 S. Ct. 1989, 1995-96 (1984).

139. *Hoover v. Ronwin*, 104 S. Ct. 1989, 1995 (1984). See generally 1 P. Areeda & D. Turner, *supra* note 33, at ¶ 214 (discussion of limits on immunity when there is no authorized state action clearly intended to displace the antitrust laws).

140. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975).

141. For example, in *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), discussed *infra* at notes 194-205 and accompanying text, the Court interpreted the clear state policy requirement as demanding that the policy reflect that the state " 'contemplated' the specific anticompetitive actions" challenged. *Id.* at 55.

duct of the State's representative was *contemplated* by the State."<sup>142</sup>

Without a clear statement from the state that it intends the private actors to undertake the challenged conduct, the argument that the restraint was contemplated or intended by the state is weak, or at least weaker than it would be with such a statement. This substantial evidentiary requirement is justified by the significant compromise of federal antitrust policy that immunization might cause. For instance, in the above hypothetical, if the only state directive to the state bar was to oversee the practice of law in the public interest, the state court may not have considered the possibility that the bar would fix prices, and if it had, the state court might have specifically forbidden the conduct. Immunization of such conduct on the ground that federalism demands some deference to state policy would be wholly inappropriate.

## 2. Active State Supervision

The second requirement—that the private conduct be actively supervised by the state—is, on balance, unwise, and should be discarded.<sup>143</sup> The requirement might seem to serve a useful purpose: It may be that the state contemplated a specific anticompetitive restraint but did not, at the time it authorized the conduct, realize the magnitude of the effect that the conduct would have. Had it accurately perceived the effect, it would not have authorized the conduct. Continuing state supervision will insure that, in such a case, the state will be able to remedy its mistake more quickly than it could if it had to rely upon the political process to acquire the information necessary to prompt corrective action. Further, the private actors might exceed the limits of the state mandate. Such private conduct could and probably would be challenged successfully in court. A state actively supervising the private party, however, might well be able to stop the offending conduct more quickly than could a court, which could act only after a party had discovered the infraction and litigated the claim.

It appears that by "active state supervision" the Court means something akin to traditional public utility regulation.<sup>144</sup> Professors Areeda and Turner so understand the requirement, and endorse it, asserting that immunity is warranted only when a state supplants free market competi-

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142. *Ronwin*, 104 S. Ct. at 1995 (citations omitted) (emphasis added).

143. For a general discussion of the state supervision requirement, and a contrary opinion, see 1 P. Areeda & D. Turner, *supra* note 33, at ¶ 213. For another argument that the requirement should be abandoned, see Page, *supra* note 33, at 1125-36.

144. For instance, in *Midcal*, the Court wrote, "The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any 'pointed reexamination' of the program." 445 U.S. 97, 105-06 (1980). This passage fairly describes many of the functions of utility commissions.

For a description of the authority typically possessed by state regulatory commissions, see W. Jones, *Cases and Materials on Regulated Industries* 39-44 (2d ed. 1976); 1 A. Priest, *Principles of Public Utility Regulation* 31-33 (1969).

tion with regulation.<sup>145</sup> There is, however, no reason to assume that federalism requires deference to a state's decision to restrain competition only when the state chooses to replace it with regulation. The antitrust laws embody a federal policy with a single goal: the maximization of consumer welfare.<sup>146</sup> They seek to achieve that end through the means of competition. A state may seek to achieve that end through some means other than competition or regulation.<sup>147</sup> More fundamentally, the state may choose to sacrifice consumer welfare in pursuit of some other goal.<sup>148</sup> In either case, federalism ought to protect the state's choice.

Federalism focuses upon the identity of the policymaker, not the content of the policy. The Supreme Court has determined that Congress did not intend the Sherman Act to displace the policies of states,<sup>149</sup> even if those policies conflict with federal policy or pursue a federal policy goal in a different way.<sup>150</sup> The *Ronwin* Court noted that "[t]he Court did not suggest in *Parker*, nor has it suggested since, that a state action is exempt from antitrust liability only if the sovereign acted wisely . . . ."<sup>151</sup> It should make no difference to the Court whether the state carries out the policy itself or employs the aid of private parties, as long as it is clear that the private parties are in fact carrying out the state's policy, and that is assured by a strict application of the clear articulation requirement.

If state supervision were costless, the benefit of potentially quicker correction of state misperceptions or private misapplications might justify imposition of the requirement. But supervision is not costless.<sup>152</sup> Indeed, the cost of active state supervision, I believe, far exceeds its potential benefit. On balance, therefore, the active state supervision requirement should be abandoned.

### 3. State Compulsion

In *Goldfarb*, the Court stated that "[i]t is not enough that . . . an-

145. 1 P. Areeda & D. Turner, *supra* note 33, at ¶ 213a.

146. See *infra* note 231 and accompanying text.

147. For instance, a state might attempt to force externalities to be internalized, thereby increasing consumer welfare, by providing a good itself. See *infra* notes 252-54, 257-58 and accompanying text. Or it might choose to create a private monopoly and specify the service to be provided, but rely upon judicial remedies for service failures rather than upon control by a regulatory agency.

148. See *infra* notes 267-74 and accompanying text.

149. *Parker v. Brown*, 317 U.S. 341, 350-51 (1943).

150. See *id.*

151. *Ronwin*, 104 S. Ct. at 1998. The Court also stated that, "where the action complained of . . . was that of the State itself, the action is exempt from antitrust liability regardless of the State's motives in taking the action." *Id.* at 2001 (emphasis added).

152. A growing body of literature has been devoted to the failure of government regulation and its attendant costs. See e.g., J. Hirshleifer, J. De Haven & J. Milliman, *Water Supply: Economics, Technology, and Policy* 74-82 (1960); Easterbrook, *supra* note 15, at 31; Posner, *Theories of Economic Regulation*, 5 *Bell J. Econ. & Management Sci.* 335 (1974); Stigler, *The Theory of Economic Regulation*, 2 *Bell J. Econ. Management Sci.* 3 (1971); Stigler & Friedland, *What Can Regulators Regulate? The Case of Electricity*, 5 *J. Law & Econ.* 1 (1962).

ticompetitive conduct [by private parties] is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign."<sup>153</sup> Ever since, there has been confusion about whether state compulsion is a third requirement to be satisfied by private parties claiming state action protection.<sup>154</sup> *Ronwin* did not end the controversy. The Court's rationale in that case did not require resolution of the test for state action immunity of *private* conduct because the Court viewed the case as one involving state conduct rather than state-authorized private conduct. The Court did mention the test without reciting the requirement of state compulsion,<sup>155</sup> but the dissenting opinion, which represents the views of three Justices, repeatedly mentioned the need for state compulsion.<sup>156</sup> The Supreme Court may soon lay the matter to rest. It has granted certiorari to hear a case in which the Fifth Circuit held that state compulsion is required when private parties claim state action immunity.<sup>157</sup>

Although the issue is not yet settled, a fair reading of the cases indicates that state compulsion is not an independent, necessary condition for effective authorization of private conduct.<sup>158</sup> This is also the correct position. Surely a restraint carried out by a private party may be indisputably intended by or within the contemplation of the state without the state having compelled the private conduct.<sup>159</sup> In *Midcal*, the Court said that a private restraint must be consistent with a clearly articulated and affirmatively expressed state policy; it did not explicitly say, and should not be understood to have said, that the only suitable affirmative expression of policy is compulsion.<sup>160</sup>

Although compulsion should not be, and probably is not, a necessary condition for immunity, at times it should be a *sufficient* condition. The state action doctrine should immunize the parties participating in an anticompetitive restraint whenever the restraint is in fact intended or desired by the state. That appears to be the nub of the *Parker* doctrine.

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153. 421 U.S. 773, 791 (1975).

154. For a good summary, see 1 P. Areeda & D. Turner, *supra* note 33, at ¶ 215b (discussion of *possible* need of state compulsion for a private party's right to antitrust immunity); *id.* at ¶ 212.5 (1982 Supp.) ("The role of compulsion in *Parker* analysis continues to bedevil both courts and commentators.")

155. *Ronwin*, 104 S. Ct. at 1995-96.

156. *Id.* at 2007-09 (Stevens, J., with whom White, J. and Blackmun, J. joined, dissenting).

157. *United States v. Southern Motor Carriers Rate Conference, Inc.*, 702 F.2d 532 (5th Cir. 1983), *cert. granted*, 104 S. Ct. 3508 (1984). The court held that motor carrier rate bureaus, which agreed upon interstate rates to be proposed to state public service commissions, were not immunized by the state action doctrine because the conduct was not compelled by states. *Id.* at 538.

158. See 1 P. Areeda & D. Turner, *supra* note 33, at ¶ 215b2.

159. *But see United States v. Southern Motor Carriers Rate Conference*, 702 F.2d 532, 539 (5th Cir. 1983) ("We do not see how a private party can carry out a clearly articulated and affirmatively expressed state policy when it is left to the private party to carry out that policy or not as he sees fit."), *cert. granted*, 104 S. Ct. 3508 (1984).

160. See *supra* notes 138-42 and accompanying text.

When the act of a private party appears to be the cause in fact most closely related to the restraint, and that act was compelled by the state, the private party should be immune from antitrust attack, either because the state act is deemed the proximate cause of the restraint or because the private act is characterized as the proximate cause but deemed adequately authorized by the state.<sup>161</sup> If the state *compels* that private act, the conclusion seems inescapable that the state intended the restraint produced by the act. If private conduct other than that compelled by the state is more closely related to the restraint, the fact that *some* private conduct was compelled should not immunize the actor.<sup>162</sup> Thus, if a state law compelled attorneys to adhere to the rules promulgated by a local bar association, and the association adopted a rule requiring adherence to a schedule of stipulated fees, the members of the association would not be immune from a price-fixing charge. The private act most closely associated with the restraint would be the promulgation of the particular rule (an act not compelled by the state) rather than obedience to it (an act compelled by the state).

One could argue that the only pertinent requirement is a clear state policy, and that compulsion by itself is neither sufficient nor necessary, but is important evidence of the state policy.<sup>163</sup> This approach is appealing, in that a clear state policy should be the single necessary condition for effective state authorization. It is doubtful, however, that any case would be decided differently under this approach than under the approach that requires a clear state policy but allows state compulsion to be a sufficient condition. Disparate results would require the remarkable case in which a private act that is the cause in fact most closely related to a restraint was compelled by the state, but in which the state did not clearly intend the restraint.

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161. See *supra* notes 80-82 and accompanying text.

162. Professors Areeda and Turner argue that *Schwegmann* forecloses the possibility that compulsion can be a sufficient condition for immunity because that case held that a state command to its citizens ordering them to disobey the Sherman Act does not immunize the private actors. 1 P. Areeda & D. Turner, *supra* note 33, at ¶ 215b1. But *Schwegmann*, if it is still good law at all, can better be understood as holding that state action will not immunize those adhering to a clear state policy to displace the antitrust laws on a wholesale basis. See *supra* note 67 and accompanying text. Thus, compulsion can be viewed as a sufficient condition for immunity, except *perhaps* when it applies to a broad and ill-defined range of activities.

Professors Areeda and Turner also argue that compulsion by a foreign government might excuse conduct that would otherwise violate the antitrust law, because it would be unreasonable to subject innocent private parties to inconsistent sovereign directions. 1 P. Areeda & D. Turner, *supra* note 33, at ¶ 215b1. They argue that justification does not apply to conduct compelled by state governments, however, because, under the Constitution, state laws conflicting with federal statutes are invalid. This might be persuasive if federal law *always* preempted inconsistent state law. However, because "federal law may expressly or . . . impliedly give way to state law," *id.*, they admit, as they must, that federal law does not always prevail. It seems just as unfair to force innocent private parties to predict when a court will hold that federal law impliedly gives way to state law as it is to force them to choose between the inconsistent directives of national sovereigns.

163. See 1 P. Areeda & D. Turner, *supra* note 33, at ¶ 215b3.

### C. State Agencies

The discussion thus far has assumed a model in which there are three relevant entities: the state, meaning either the legislature, the supreme court acting in a legislative capacity, or perhaps the governor;<sup>164</sup> private parties who interact with the state to produce a restraint; and, the victim. To understand some cases, however, a fourth player has to be added—a legitimate state agency. By “legitimate”, I mean an agency composed of individuals who are not directly economically interested in the subject of their regulation. The need for this qualification can be seen by comparing *Cantor v. Detroit Edison Co.*<sup>165</sup> with *Goldfarb*.<sup>166</sup>

In *Cantor* the investor-owned electric utility had a policy of giving its customers light bulbs for no additional charge.<sup>167</sup> The policy was instituted prior to the creation of the Michigan Public Service Commission,<sup>168</sup> and was duly embodied in a tariff filed with the Commission after that agency came into existence.<sup>169</sup> By not rejecting the filed tariff, the Commission implicitly approved it.<sup>170</sup> Once a tariff is approved by the Commission, state law requires that the utility adhere to it.<sup>171</sup> The tariff can be changed only with the approval of the Commission. The idea of the free light bulb program clearly originated with the utility, not the Commission, as it was in place before the state began regulating electric utilities. The only evidence that the Commission endorsed the program was its tacit approval of the original and subsequent pertinent tariffs and the negative implication arising from the fact that the Commission approved the utility’s request to abandon the program with respect to commercial customers.<sup>172</sup>

In a welter of opinions,<sup>173</sup> a majority of the Court held that Detroit Edison was not protected from antitrust attack by the state action doctrine.<sup>174</sup> Though the free light bulb policy was a “blend of private and public decisionmaking,”<sup>175</sup> the Court viewed the operative decision (the

164. See *supra* note 62 and accompanying text.

165. 428 U.S. 579 (1976).

166. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

167. 428 U.S. at 582.

168. The policy was instituted in 1886, before Michigan began regulating utilities. See *id.* at 583.

169. *Id.*

170. *Id.*

171. *Id.* at 582-83.

172. See *id.* at 583.

173. Four separate opinions were filed. Four Justices took the position that the *Parker* doctrine protected *only* state officials, and was therefore inapplicable to Detroit Edison Co. *Id.* at 585-92. The Chief Justice rejected that reasoning but concurred in the judgment. *Id.* at 603-04 (Burger, C.J., concurring). Justice Blackmun also concurred in the judgment, but on the ground that state-sanctioned private anticompetitive activity is simply to be judged under the rule of reason, and that the challenged activity failed that test. *Id.* at 610-12 (Blackmun, J., concurring). Three Justices joined in a dissenting opinion. *Id.* at 614 (Stewart, J., with whom Powell, J. and Rehnquist, J. joined, dissenting).

174. *Id.* at 598.

175. *Id.* at 592.



proximate cause, if you will) to be the act of the utility.<sup>176</sup> Under the model in which there are only three relevant actors, immunity would require at least a policy, consistent with the private conduct, clearly articulated and affirmatively expressed by the state legislature, the supreme court, or perhaps the governor. Yet the Court implied that had the light bulb policy been the decision of the Public Service Commission, Edison would have been protected: "Respondent could not maintain the lamp-exchange program without the approval of the Commission, and now may not abandon it without such approval. Nevertheless, there can be no doubt that the option to have, or not to have, such a program is primarily respondent's, *not the Commission's*."<sup>177</sup>

One might conclude, then, that we should simply redefine the state entity to encompass not only the legislature, supreme court, and perhaps governor, but all state agencies as well.<sup>178</sup> Thus, the private party would be immune when it acts pursuant to a policy clearly articulated by a state agency. In *Goldfarb*, however, the attorney fee schedule policy was clearly articulated by the state bar, which was a state agency by law.<sup>179</sup> That was not enough for immunity.

*Cantor* should be distinguished from *Goldfarb* on the basis of the character of the agencies involved. In *Cantor*, the agency was an independent regulatory commission. It was composed of regulators, financially disinterested in the utilities under their authority,<sup>180</sup> who the Court could assume would act in the public interest. *Goldfarb* involved a different kind of agency. The governing body of the state bar was composed of lawyers who themselves were subject to their own regulation. It was like the guilds about which Justice Stevens cautioned in his *Ronwin* dissent: Guilds were mechanisms for private tradesmen to protect not only the public but their own economic interests as well.<sup>181</sup> The Court is not willing to assume that an agency economically interested in the subject of its regulation is acting solely in the public interest, as it assumes in the case of a disinterested agency, and rightly so. For the sake of convenience, and strictly for purposes of state action immunity, the disinterested

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176. *Id.* at 594.

177. *Id.* (emphasis added). In a part of the opinion representing only a plurality of the Court, Justice Stevens wrote, "Neither the Michigan Legislature, *nor the Commission*, has ever made any specific investigation of the desirability of a lamp-exchange program or of its possible effect on competition in the light-bulb market." *Id.* at 584 (emphasis added).

178. That, of course, is not how the Court defined "state" in *Ronwin*. See *supra* note 62 and accompanying text.

179. See *Goldfarb*, 421 U.S. at 789-90; see also *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 409 (1978) (restating the issue in *Goldfarb*). In an opinion representing the views of four justices, Justice Brennan wrote: "Plainly petitioners are in error in arguing that *Parker* held that all governmental entities, whether state agencies or subdivisions of a State, are, simply by reason of their status as such, exempt from the antitrust laws." *City of Lafayette*, 435 U.S. at 408.

180. See Mich. Comp. Laws Ann. § 460.1 (West 1967).

181. See *Ronwin*, 104 S. Ct. at 2003-04 (Stevens, J., dissenting).

agency will be labeled "legitimate" and the interested agency "illegitimate."

An illegitimate agency, in this state action model, stands in the position of private parties participating in an anticompetitive restraint. If its actions or the actions of private parties directed by it are the proximate cause of antitrust injury, the agency will be immune under the state action doctrine only if the actions are consistent with a policy clearly and affirmatively expressed by the state legislature, the supreme court, or perhaps the governor.

But what is the status of the legitimate agency in the state action model? It is not that of a private party, and obviously it is not that of the victim. Yet the Court in *Ronwin* did not include "agency" in its definition of the state.<sup>182</sup> In effect, however, the legitimate agency stands in the position of the state, as long as it has general authority from the state legislative entity to act in the relevant area. In *Cantor*, the Michigan Legislature vested the Public Service Commission with "complete power and jurisdiction to regulate all public utilities in the state."<sup>183</sup> It conferred "express power on the Commission 'to regulate all rates, fares, fees, charges, *services*, rules, *conditions of service*, and *all other matters pertaining to the formation, operation, or direction of such public utilities.*'"<sup>184</sup> This grant of authority would certainly seem a sufficient mandate from the state such that if the light bulb program had been the clearly and affirmatively expressed policy of the Commission, the utility would have been protected under the state action doctrine even though the program was not the clearly expressed policy of the legislature.<sup>185</sup> Of course, if a legitimate agency can immunize private conduct deemed the proximate cause of a restraint, a fortiori the agency itself, as well as any associated private parties, will be immunized if the agency's act, taken within the scope of delegated authority, is deemed the proximate cause of the restraint.<sup>186</sup>

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182. *See id.* at 1995.

183. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 584 (1976) (quoting Mich Comp. Laws Ann. § 460.6 (West 1970)).

184. *Id.* (emphasis added).

185. Of course, private conduct consistent with a clear policy expressed by the legislature will be protected even if there is no similar policy expressed by the agency.

Further, it could be argued that private conduct consistent with a legitimate agency's directive which is beyond the scope of the agency's delegated authority, as well as the agency's conduct itself, should be protected from antitrust attack. The claim would be that any victims of such conduct should challenge the actions under state administrative law, not the antitrust laws. Exposing the transgression to antitrust liability, however, is consistent with the Court's general reluctance to confer antitrust immunity, and it probably would do some good without doing any real harm.

186. The character of the agency is also relevant to the active state supervision requirement. Active supervision by an illegitimate agency would not satisfy the requirement, whereas active supervision by a legitimate agency surely would.

#### D. Summary

A brief recapitulation is useful at this point. If a plaintiff brings an antitrust suit against a state itself, he will lose. If he sues a private party (including an illegitimate state agency) that claims state action immunity, the defense may succeed in one of two ways. First, the court may find that the proximate cause of the restraint was conduct of the state itself and dismiss the suit. Second, the court may find that the proximate cause of the restraint was the defendant's conduct, but that it was sufficiently authorized by the state to immunize the private actor.

Adequate authorization requires a clearly articulated and affirmatively expressed state policy and active state supervision. It does not require state compulsion of the challenged conduct, although if the state did compel the private conduct deemed the proximate cause of the restraint, that action will satisfy the clear state policy requirement. The "state," for purposes of this doctrine, includes the legislature, the state's highest court acting in a legislative capacity, perhaps the governor, and legitimate state agencies, as long as these agencies are acting within the scope of their delegated power. It does not include illegitimate agencies, which stand in the same position as private parties.

## II. CURRENT APPLICATION OF STATE ACTION TO MUNICIPALITIES

In the model developed above, municipalities—governmental subdivisions of states—might be treated in one of three ways: as states, so that they are ipso facto immune from the antitrust laws; as legitimate state agencies, so that they are immune as long as their acts that proximately cause antitrust injury are within the scope of their delegated power; or, as private parties, so that they are immune only if their acts that proximately cause antitrust injury are taken pursuant to a clearly articulated and affirmatively expressed state policy and are actively supervised by the state. The Supreme Court has held that municipalities do not fall into either of the first two categories; they will be treated either like private parties or in yet a fourth way.

#### A. Existing Precedent

In *City of Lafayette v. Louisiana Power & Light Co.*,<sup>187</sup> the first municipal antitrust immunity case, a plurality of the Court held that municipalities do not stand in the position of states for purposes of state action immunity simply by virtue of their status as municipalities.<sup>188</sup> In that case, an investor-owned electric utility filed a counterclaim to the municipalities' antitrust complaint alleging that the municipalities had violated the antitrust laws by engaging in various acts designed to injure the utility as a competitor in the provision of electric service in the area within

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187. 435 U.S. 389 (1978).

188. *Id.* at 411.

and surrounding the cities' boundaries.<sup>189</sup> Four Justices rejected the municipalities' claim that their "status as such automatically affords [them] the 'state action' exemption."<sup>190</sup> The Chief Justice, however, reasoned that a municipality is not protected from the antitrust laws when it acts in a proprietary capacity, but, apparently, is protected when it acts in a governmental capacity.<sup>191</sup> Four dissenting Justices would have held that because municipalities are governmental bodies, they are immune,<sup>192</sup> at least when they are not acting in concert with private parties.<sup>193</sup>

In *Community Communications Co. v. City of Boulder*,<sup>194</sup> the Court held that cities do not occupy the position of legitimate state agencies.<sup>195</sup> The Constitution of Colorado established Boulder as a "home rule" municipality, granting the people of the city "the full right of self-government in both local and municipal matters."<sup>196</sup> The city had granted the plaintiff cable television company a nonexclusive, revocable permit to provide service in the city.<sup>197</sup> The company exercised the permit only in a limited area of the city for fourteen years.<sup>198</sup> When technology improved, however, it informed the City Council that it intended to expand service into new areas of the city.<sup>199</sup> But the city council, having been approached by a second cable company interested in providing competing cable service throughout the city, enacted an emergency moratorium ordinance that prohibited the incumbent from expanding into new areas for three months, while the city formulated a new cable policy that took account of the advanced technology and potential competition.<sup>200</sup> The incumbent sued the city, claiming that the ordinance violated Section 1 of the Sherman Act.<sup>201</sup>

The city council's action was sufficiently within the scope of authority granted by the home rule provision of the state constitution such that, had the delegation been made to a legitimate state agency, the agency would have been protected from antitrust challenge for promulgating a moratorium rule.<sup>202</sup> The Court, however, said that a municipality will be protected only if its actions were undertaken "pursuant to a clearly articulated and affirmatively expressed state policy."<sup>203</sup> The Court went on to emphasize this point, noting that a state policy, to be sufficient to im-

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189. *Id.* at 391-92, 403-05.

190. *Id.* at 411.

191. *See id.* at 418, 422, 425 (Burger, C.J., concurring).

192. *See id.* at 426-29.

193. *See id.* at 441 (Blackmun, J., dissenting).

194. 455 U.S. 40 (1982).

195. *See id.* at 53, 55.

196. *Id.* at 43.

197. *Id.* at 44.

198. *Id.*

199. *Id.* at 44-45.

200. *Id.* at 45-46.

201. *Id.* at 46-47.

202. *See supra* notes 177, 183-86 and accompanying text.

203. *Community Communications Co. v. City of Boulder*, 455 U.S. at 54.

part immunity, would have to demonstrate that the state contemplated the specific anticompetitive actions challenged:

[P]lainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers *granted*," since the term, "granted," necessarily implies an affirmative addressing of the subject by the State.<sup>204</sup>

At least to the extent that municipal immunity requires a clear state policy, the Court held that municipalities will be treated like private parties. The Court, however, did not determine whether municipalities would be subject to the second requirement of state action immunity for private parties: active state supervision. It noted that "[b]ecause we conclude in the present case that Boulder's moratorium ordinance does not satisfy the 'clear articulation and affirmative expression' criterion, we do not reach the question of whether that ordinance must or could satisfy the 'active state supervision' test focused upon in *Midcal*."<sup>205</sup> Thus, municipalities may be subject to only one part of the two-part state action test applicable to private parties.

#### B. Town of Hallie and the Active State Supervision Requirement

In *Town of Hallie v. City of Eau Claire*,<sup>206</sup> the Seventh Circuit held that when the challenged activity pertains to a traditional municipal function, municipalities are not required to satisfy the active state supervision condition for state action immunity.<sup>207</sup> The Supreme Court has granted certiorari.<sup>208</sup> The defendant city, operating within its borders the only sewage treatment facility in the region, refused to supply sewage treatment to the plaintiffs, four adjacent townships.<sup>209</sup> The city provided sewage treatment facilities to individuals located in the townships only if they agreed to be annexed by the city and thereby obtain sewage collection and transportation services from the city.<sup>210</sup> The court held that the

204. *Id.* at 55 (emphasis in original).

205. *Id.* at 51-52 n.14.

206. 700 F.2d 376 (7th Cir. 1983), *cert. granted*, 104 S. Ct. 3508 (1984).

207. *Id.* at 384; *accord*, *Golden State Transit Corp. v. City of Los Angeles*, 726 F.2d 1430, 1434 (9th Cir. 1984); *Gold Cross Ambulance & Transfer & Standby Serv., Inc. v. Kansas City*, 705 F.2d 1005, 1014 (8th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3039 (U.S. July 25, 1983) (No. 83-138). *But see* *Mason City Center Assocs. v. Mason City*, 468 F. Supp. 737, 742 (N.D. Iowa 1979) (A consideration of "special significance" in determining municipal immunity is whether "the state policy requiring the anticompetitive restraint is . . . actively supervised by the state as the policymaker.") (emphasis in original).

208. *See* 104 S. Ct. 3508 (1984).

209. 700 F.2d at 378.

210. *Id.*

city was protected under the *Parker* doctrine.<sup>211</sup> It found that the city's actions were undertaken pursuant to a clearly articulated and affirmatively expressed state policy, basing its decision on three facts. First, a state statute provided that a city may delineate the unincorporated area within which it will provide service and has no obligation to serve beyond that area.<sup>212</sup> Second, another statute provided that the state department of natural resources may order a city to provide sewage service to an unincorporated area, but that the order, which would not take effect for thirty days, would become void if the electors in the area refused to be annexed to the city.<sup>213</sup> Third, the Wisconsin Supreme Court construed these and other statutes to evince an intent on the part of the state legislature to permit a city to require annexation as a reasonable quid pro quo for supplying sewer services to an unincorporated area.<sup>214</sup>

Although some of the court's language on the specificity of the state authorization necessary to satisfy the clear articulation and affirmative expression standard appears to go too far, the court's holding was correct.<sup>215</sup> The state legislature apparently "'contemplated' the specific anticompetitive actions for which municipal liability"<sup>216</sup> was sought, and more importantly, the state supreme court so found.<sup>217</sup>

The court further held that the active supervision requirement does not apply to municipalities performing traditional municipal functions.<sup>218</sup> Though I believe that the requirement should be abandoned altogether, it is not clear why the requirement should be applied to private parties but not municipalities. The court stated that "[s]upervision [of municipalities] is unnecessary because local governments operate pursu-

211. *Id.*

212. *Id.* at 382.

213. *Id.*

214. *Id.* at 383.

215. The court cited the fairly liberal language of *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), instead of the relatively strict statement of the requirement in the more recent *Boulder* opinion. 700 F.2d at 381. The court then said, "[I]f we can determine that the state gave the City authority to operate in the area of sewage services and to refuse to provide treatment services, then we can assume that the State contemplated that anticompetitive effects might result from conduct pursuant to that authorization." *Id.* (footnote omitted). The first part of this statement is incorrect but the second is correct. It plainly is not enough that a state authorizes a city to provide or not to provide a type of service. It is true, however, that a court may assume that a legislature is cognizant of the anticompetitive effects of the conduct it authorizes. Here, the specific conduct authorized is withholding sewage service unless the requesting customers accept annexation. This is far more than simply allowing cities to provide or refuse to provide service. But it can be assumed that the legislature was aware of the effects that this conduct might have on customers and affected townships. The authorization, therefore, satisfies the clear state policy standard.

216. *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 55 (1982).

217. *See Town of Hallie v. City of Chippewa Falls*, 105 Wis. 2d 533, 314 N.W.2d 321 (1982).

218. 700 F.2d at 384. The court also held that state compulsion is not a necessary condition for municipal immunity. *Id.* at 381. On this point, the court is correct. See *supra* notes 153-63 and accompanying text.

ant to clearly articulated and affirmatively expressed restraints imposed by the state in its policies and delegation of authority."<sup>219</sup> This statement, however, confuses the purpose of the clear state policy requirement with that of the active supervision requirement. Certainly it is important that the state delineate what subordinate actors may or may not do; otherwise, anticompetitive conduct may be allowed out of deference to a state that would have prohibited the activity had it contemplated the conduct.<sup>220</sup> That is the reason for the clear state policy requirement, which, according to the Supreme Court, applies to both municipalities and private parties.<sup>221</sup> Likewise, the Seventh Circuit's observation applies to private parties as well as municipalities, and cannot be used to distinguish between the two for purposes of the active supervision requirement.

The supervision requirement does, however, have an independent purpose: to hasten corrective action when a state has misperceived the consequences of conduct it authorized or when a party exceeds the limits of its authorization.<sup>222</sup> Perhaps a municipality, because of its public character, is somehow inherently less likely than a private party to transgress the bounds of its authorization, making this aspect of the requirement's purpose less relevant. But there is no reason to believe that a state is any more likely to miscalculate the effects of specifically authorized private conduct than the consequences of specifically authorized municipal activities. If any distinction can be drawn between the two types of actors, it probably has more to do with the relative costs of imposing the requirement in the two contexts than with the benefits.

The Seventh Circuit identified one cost that imposition of the requirement would force municipalities but not private parties to bear. The requirement "would erode the concept of local autonomy and home rule authority which is expressed in the statutes and constitution of Wisconsin."<sup>223</sup> Of course, imposition of the clear state policy requirement on cities also "erodes the concept of local autonomy," but that did not stop the Supreme Court from applying this requirement to municipalities.<sup>224</sup> The marginal erosion produced by applying the supervision requirement in addition to the clear state policy requirement may be small. In any event, the amount of erosion will be affected by the type and degree of

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219. *Id.* at 384.

220. See *supra* notes 139-42 and accompanying text.

221. See *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 48-57 (1982).

222. See *supra* note 143.

223. 700 F.2d at 384. The Seventh Circuit specified two other reasons for its decision, neither of which is persuasive. It said that "courts would have to make the difficult determination of what 'active' supervision is in terms of frequency and effectiveness." *Id.* (footnote omitted). Courts often have to make difficult determinations, including deciding when a state policy is sufficiently clear. They must also judge the adequacy of supervision in the context of private parties. The court also said that states would have to "spend their limited resources actively supervising" municipalities. *Id.* That supervision is expensive has not deterred the Court from requiring that states supervise private parties.

224. See *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 54 (1982).

supervision required. Depending upon those factors, the marginal erosion of autonomy may be insignificant.

One could argue that supervision of municipalities would impose a greater cost on the *state* than would supervision of private actors. States are experienced in actively supervising private parties; they have been regulating utilities for over a century.<sup>225</sup> But they are not so experienced in supervising municipalities, and developing the necessary expertise and methods of supervision would be expensive. This argument, however, is highly speculative. Further, it ignores the fact that the kind of supervision that would be adequate and appropriate for municipalities might be significantly less expensive than that required for private parties.

In sum, it appears that the costs of active supervision exceed the benefits in all contexts and, thus, the requirement should be abandoned. But if the Court continues to impose the requirement upon private parties and continues to treat municipalities differently from states, not to impose the supervision requirement upon municipalities would be arbitrary.

### III. PROPOSED APPROACH TO MUNICIPAL ANTITRUST EXPOSURE

Municipalities should be treated exactly like states for purposes of immunity from the antitrust laws. Thus, a municipality should be immune from antitrust liability for acts that proximately cause antitrust injury. Private parties should also be immune from liability for their acts that proximately cause antitrust injury if those acts are undertaken pursuant to a policy clearly articulated and affirmatively expressed by the municipality. The Supreme Court has reached a different result because it has not been able to infer an intent on the part of the Congress that enacted the antitrust laws to withhold application to municipalities, although it has inferred such an intent with regard to the states. The Supreme Court, I believe, has misconstrued the legislative intent. Assuming, however, that the Court is correct, Congress ought to adopt legislation that would accomplish the suggested result, and leave no room for doubt about its intent. The Local Government Antitrust Act of 1984,<sup>226</sup> which shields municipalities from antitrust damages, is neither adequate nor theoretically sound.

Nowhere in the Sherman Act does Congress explicitly withhold application to the states. In *Parker*, the Court admitted that "[t]he Sherman Act makes no mention of the state as such."<sup>227</sup> Nor does the Sherman Act expressly refer to municipalities. Therefore, any difference in application of the law to states and municipalities cannot be attributed to an explicit

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225. The modern regulatory movement is traced to the formation of the Massachusetts Board of Railroad Commissioners in 1869. W. Jones, *supra* note 144, at 31. More powerful regulatory commissions emerged during the next ten years, as a product of the Granger movement. *Id.* at 39-41.

226. 47 Antitrust & Trade Reg. Rep. (BNA) 753 (Oct. 25, 1984); *see id.* at 716-18, 737 (Oct. 18, 1984).

227. *Parker v. Brown*, 317 U.S. 341, 351 (1943).



statutory distinction. Rather, the Court inferred an exemption for state conduct:

We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.<sup>228</sup>

The *Parker* Court's reasoning was negative and depended upon general principles of federalism: As neither the language nor history of the statute demonstrates an intent that it be applied to states, and because application would conflict with a generalized interest in state sovereignty, Congress will be presumed not to have intended application to the states. Since *Parker*, however, the Court has seemed consistently reluctant to find implied immunity for state actions, appearing to concede immunity only grudgingly.<sup>229</sup> That history is understandable, given the character of the reasoning originally used to find immunity.

However true it is that one should not lightly imply exemptions from federal statutes, and particularly from "the Magna Carta of free enterprise,"<sup>230</sup> affirmative and specific reasons support the position that the antitrust laws should not be applied to democratic governmental bodies. Some of these reasons apply with even greater force in the context of municipal governments than in that of state governments. The very purpose of the Sherman Act, as well as the important but general interests of federalism, may be disserved by application of the statute to these entities. Though the Congress that passed the Sherman Act almost certainly never considered the issue of application to governmental bodies, the proper inference from the purpose of the Act is that Congress would have explicitly exempted them had it fully understood the implications of exposing municipalities to antitrust liability.

What follows, then, is an argument that municipalities should be immune from the antitrust laws. Most of this discussion applies to state immunity as well. Because the Supreme Court has denied municipal immunity only because it could not infer the necessary legislative intent, this analysis constitutes an argument for a different inference, and, consequently, a different conclusion. To the extent that the Court remains unconvinced of the argument for finding a different legislative intent, the analysis constitutes an argument for a new statement of congressional policy. Protecting municipalities from damage liability was a step in the

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228. *Id.* at 350-51.

229. Of the cases mentioned in notes 37-38, *supra*, only in *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978), was immunity found.

230. *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972); *see also City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398-400 (1978) (exclusions from the antitrust laws will not be implied lightly).

right direction, but Congress should go further and immunize municipalities altogether.

### A. *Efficiency as the Goal of the Antitrust Laws*

The antitrust laws should be construed to serve a single purpose—the maximization of consumer welfare.<sup>231</sup> I do not intend here to join the debate that has raged among scholars for years as to whether the antitrust laws should be interpreted to serve additional goals.<sup>232</sup> Suffice it to say that I think the “Chicago-School” theorists<sup>233</sup> have the better of the argument. Even the Supreme Court might be moving in their direction, having recently observed that the Sherman Act “was especially intended to serve” the interests of the consumer.<sup>234</sup>

Consumer welfare is synonymous with allocative efficiency.<sup>235</sup> The consumer welfare model has at its root the idea that when goods and services are provided under conditions of pure competition, resources will move to their highest valued uses.<sup>236</sup> Competition forces price down to marginal cost, so that no consumer who values the good more than the cost of supplying it is denied the good. Thus, resources are allocated in the most efficient manner.<sup>237</sup> The principle implicit in the antitrust laws is that a competitive market economy will maximize efficiency or, stated otherwise, maximize the welfare of consumers.<sup>238</sup> If any supplier (or group of suppliers) manages to suppress competition, it will have an incentive to reduce output, raise price above marginal cost, and thereby maximize its own profit.<sup>239</sup> Thus, some consumers—those at the mar-

231. See 1 P. Areeda & D. Turner, *supra* note 33, at ¶¶ 103-05; R. Bork, *supra* note 1, at 81; R. Posner, *Antitrust Law: An Economic Perspective* 8, 18-20 (1976).

Although I believe that consumer welfare should be the only objective in construing the antitrust laws, it is not clear that a contrary assumption would dictate any different result on the issue of municipal immunity. Certainly some political goals that might be attributed to the antitrust laws are more severely impaired by municipal liability than is the goal of consumer welfare. For expositional simplicity, however, I adhere to the position that the only goal is efficiency.

232. See 1 P. Areeda & D. Turner, *supra* note 33, at ¶¶ 109-09b; Blake & Jones, *Toward A Three-Dimensional Antitrust Policy*, 65 *Colum. L. Rev.* 422 (1965).

233. Two of the most prominent are Richard A. Posner and Frank H. Easterbrook.

234. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 104 S. Ct. 1551, 1559-60 (1984).

235. There are many expositions of the economics of antitrust, from the simple to the sophisticated. Among the more lucid explanations are the following: R. Bork, *supra* note 1, at 107-15; R. Posner, *supra* note 231, at 237-55; R. Posner & F. Easterbrook, *Antitrust: Cases, Economic Notes, and Other Materials* 1055-69 (2d ed. 1981) (section written by W. Landes). For a more detailed discussion, the reader might consult a good microeconomics text, such as: D. Dewey, *Microeconomics: The Analysis of Prices and Markets* (1975); C. Ferguson & J. Gould, *Microeconomic Theory* (5th ed. 1980); J. Hirshleifer, *Price Theory and Applications* (2d ed. 1980); H. Kohler, *Intermediate Microeconomics: Theory and Applications* (1982).

236. See R. Bork, *supra* note 1, 107-08, 111.

237. See *id.* at 107-08, 111.

238. See *id.* at 50-51, 81; C. Ferguson and J. Gould, *supra* note 235, at 220-21.

239. See 1 P. Areeda and D. Turner, *supra* note 33, at ¶ 108; R. Bork, *supra* note 1, at 98-104.

gin—will be denied the good even though they value it more than the cost of supplying it to them. Of course, all other consumers—infra-marginal consumers—will have to pay more than the cost of the goods, but they will acquire the goods. The inflated price produces an economic profit that represents merely a transfer of wealth from these consumers to the supplier. The effect on them does not reduce efficiency. Efficiency is reduced, however, by the effect on marginal consumers. The amount of the reduction, called the deadweight welfare loss, equals the amount by which the value to consumers of goods not supplied exceeds the cost that would have been incurred in supplying those goods.<sup>240</sup>

A municipality can injure consumer welfare in two ways: It can act in such a way that the price of some good or service exceeds the cost, thereby enabling a monopoly profit to be earned, or it can act in such a way that a good is supplied by an inefficient supplier. In the latter case the good is supplied at economic cost, so that no monopoly profit is earned, but the cost is higher than that at which the good could be provided by a more efficient supplier. Both of these actions require some interference with a competitive market. Before examining more closely these ways in which a municipality might injure consumer welfare by restraining competition, it is important to outline all the ways in which a municipality might act to affect competition.

### B. *Objectives a City Might Pursue that Affect Competition*

A city may act in one of four ways that affect competition: to promote competition; to correct market defects; to promote some value other than efficiency; or to generate a monopoly profit.

#### 1. Municipal Action to Promote Competition

First, a city may act to facilitate competition. This objective is commonly associated with the federal government, as evidenced, for example, by the securities laws,<sup>241</sup> but it can motivate municipal governments as well.

Suppose a city constructs a facility for both the wholesale and the distribution of food. It designates areas within this center for transactions in different food types and confines merchants to their designated areas. These restrictions facilitate the functioning of the market by reducing information costs: A banana customer need only explore a limited area to canvass the prices of all fruit sellers, rather than having to roam the expanses of the entire facility. Yet a fresh fruit wholesaler claims that the city has violated the antitrust laws by conspiring with other fruit whole-

240. R. Bork, *supra* note 1, at 107-15.

241. For a general overview of securities laws and government objectives, see R. Jennings & H. Marsh, *Securities Regulation: Cases and Materials* 1-13 (5th ed. 1982).

salers to prevent him from setting up shop in the grocery department.<sup>242</sup>

The facts of *Boulder* illustrate another municipal attempt to facilitate competition.<sup>243</sup> Competition in the real world has a temporal element. It takes time for competitors to acquire information on which to base their offerings and for consumers to evaluate the products and services offered. The city attempted to buy time for the competitive process to work by preventing one cable television company from acting prematurely. After the necessary information was acquired by all firms and embodied in competing proposals, the city could reap the fruits of competition, but not before.

To be sure, this type of municipal action is designed to and does affect competition. But it promotes competition and increases consumer welfare. In other words, it serves the specific purpose of the antitrust laws. Whenever a city intentionally acts to promote competition, it should not be exposed to antitrust liability. Of course, the city may be wrong. Conduct designed to enhance competition may, in reality, have the opposite effect. Penalizing the city under the antitrust laws for that kind of error in judgment, however, seems excessive, unnecessary and inappropriate. Simply bringing the error to the attention of the city through political or governmental processes should suffice.

## 2. Municipal Action to Correct Market Defects

Second, the municipality might act to correct market defects. The purpose of the antitrust laws is to increase allocative efficiency. The assumption implicit in the laws is that competition—or a market mechanism—will achieve that end. The assumption is generally true, but there are several situations in which the market is known to fail, in which competition will not maximize consumer welfare.<sup>244</sup> The major instances of these are public goods, natural monopoly and externalities.<sup>245</sup>

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242. See *Jetro Cash & Carry Enters., Inc. v. Food Distribution Center*, 569 F. Supp. 1404 (E.D. Pa. 1983).

243. See *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), discussed *supra* at notes 194-205 and accompanying text.

244. The concept of "market failure" is discussed in all microeconomics texts. The clearest, most succinct and most entertaining discussion, however, is contained in G. Stigler, *The Economists' Traditional Theory of the Economic Functions of the State*, in *The Citizen and the State* 104-13 (1975). For other discussions, see the materials cited *supra* at note 235, and the following: J. Due & A. Friedlaender, *Government Finance: Economics of the Public Sector* 9-107 (7th ed. 1981); R. Haveman, *The Economics of the Public Sector* 17-46 (1970); W. Hirsch, *The Economics of State and Local Government* 11-48 (1970); N. Singer, *Public Microeconomics* 69-115 (2d ed. 1976).

245. See the sources as cited in note 244, *supra*. Professor Stigler treats natural monopoly as a sub-category of externalities. G. Stigler, *supra* note 244, at 105-06. For purposes of expositional clarity, it is here treated as an independent category of market failure. Further, he adds a category labelled "erroneous decisions." *Id.* at 104, 108-10. Again, purely for purposes of clarity, "erroneous decisions" will be analyzed under the topic of municipal conduct intended to promote some value other than efficiency. See *infra* note 267.

a. *Public Goods*

A public good has two properties: It can be consumed simultaneously by more than one individual, and the cost of excluding any one individual from consuming it, without excluding all other individuals, is infinite.<sup>246</sup> Police protection is an example of a public good routinely provided by municipalities. A Fourth of July fireworks display is another. Because many people can enjoy the public good if it is supplied to one, every person has an incentive to understate the value of the good to him.<sup>247</sup> If I know that I will enjoy the benefit of the fireworks exhibition if you pay for it, I will have an incentive to represent that it is worth less to me than it really is. A market will therefore produce less than the optimum amount of the good. In such a case, a city might produce the good itself or contract with a private seller to do so.<sup>248</sup> In either case, the objective will be to increase efficiency by supplying more of the good than would be supplied by a competitive market.

b. *Natural Monopoly*

A natural monopoly refers to a situation in which a good can be supplied at a constantly decreasing average unit cost throughout the range of relevant outputs.<sup>249</sup> Local distribution of electricity is considered a natural monopoly.<sup>250</sup> An implication of this condition of increasing returns to scale is that a single producer can supply the entire amount demanded at a lower total cost than can multiple producers. Competition, therefore, cannot be expected to result in a stable supply of the optimum amount of output. A single supplier of a natural monopoly good, however, has the incentive of any monopolist: to reduce output, raise prices and maximize profit. Thus, a city might undertake production itself, contract with a private firm for the optimum amount of supply, or in this case, regulate a private provider.<sup>251</sup> The city would interfere with the market, but with the objective and potential effect of increasing efficiency.

c. *Externalities*

An externality is an effect of an economic decision, whether beneficial or harmful, upon a party who was not a party to the decision.<sup>252</sup> If production of a good results in beneficial, or positive, externalities, the market will produce less than the optimum amount of the good; if

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246. See W. Hirsch, *supra* note 244, at 1; G. Stigler, *supra* note 244, at 107.

247. See R. Haveman, *supra* note 244, at 42-43; G. Stigler, *supra* note 244, at 108.

248. See W. Neenan, *Urban Public Economics* 171, 174-75 (1981).

249. See R. Haveman, *supra* note 244, at 32; N. Singer, *supra* note 244, at 86-91.

250. See W. Jones, *supra* note 144, at 6, 11-14. For an analysis of how maximum efficiency may result in natural monopoly, see N. Singer, *supra* note 244, at 81-87.

251. See generally W. Neenan, *supra* note 248, at 170-75 (discussion of options available to a municipality); N. Singer, *supra* note 244, at 91-93 (government encouraging private entry into the market).

252. See R. Haveman, *supra* note 244, at 33-35; N. Singer, *supra* note 244, at 107; G. Stigler, *supra* note 244, at 104.

production results in harmful, or negative, externalities, the market will produce more than the optimum amount of the good.<sup>253</sup> For instance, it might be worth \$5 to me to have garbage removed from my premises. The odor and unsightliness of the refuse might impose an additional cost of \$10 on my neighbors. If removal of the trash costs \$10 and entails a simple market transaction between me and the garbage collector, the trash will stay, since I am unwilling to pay more than \$5 and the collector is unwilling to accept less than \$10. Removal, however, would increase efficiency. The presence of the garbage imposes a total cost of \$15 on all those affected, but it could be removed at a cost of only \$10. Externalities exist because transactions are not costless.<sup>254</sup> If my neighbors could, without cost, pony up the \$10 benefit they would receive from the disposal of the trash, the trash would be removed. But even this relatively simple transaction is costly; more complicated transactions can be almost incomprehensibly expensive. A city may act to force economic decisions to take account of externalities. Thus, the city might collect the trash itself or pay a private collector to provide the service, in either case drawing \$10 from tax revenues.

#### d. *Implications of Correcting Market Defects*

Any of these municipal interferences with competition might increase consumer welfare. Private firms might also act to eliminate or exclude competition, but that private interference is not likely to increase consumer welfare. As rational profit maximizers, private firms are interested in their own welfare. An increase in their welfare would be likely to reduce efficiency, but even if it increased consumer welfare, that effect would be purely fortuitous.<sup>255</sup> For purposes of antitrust liability, then, one distinction between private and municipal conduct is that municipal conduct may be intended to and in fact may accomplish an increase in consumer welfare, which is the goal of the antitrust laws, whereas private conduct will not be intended to increase consumer welfare and rarely will have that effect.

It would be singularly perverse to impose antitrust liability upon a city for interfering with competition in a way by which efficiency is enhanced. Determining the optimum amount of a public good or the magnitude of externalities, for instance, is not an easy task. The market, the usual mechanism for measuring consumer preferences, is, by definition, flawed.

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253. See R. Haveman, *supra* note 244, at 35-39; N. Singer, *supra* note 244, at 107-15.

254. See G. Stigler, *supra* note 244, at 106-07; Coase, *The Problem of Social Cost*, 3 J. L. & Econ. 1, 1-44 (1960).

255. For example, the competitive market may fail when negative externalities exist. Allocative efficiency would require that output be reduced, but a monopolist, attempting solely to maximize his profit, would also reduce output to the point at which marginal revenue equaled his marginal, private cost. The reduced output produced by the monopolist may, by chance, equal the efficient output, and therefore, his action would increase efficiency. He intended, however, merely to maximize his profit, not to increase efficiency.

Consequently, a city may intend to increase efficiency but fail to do so. Thus, one commentator observed:

The private market provides remarkably well for consumer idiosyncrasies . . . .

In the private sector, people vote with their dollars; given a minimum number of others with similar tastes and constrained by the resources at their command, they effectively maximize their welfare. In the public sector, however, signals are not transmitted as clearly, and both determining what citizens' wishes are and judging whether citizens' welfare is maximized are difficult.<sup>256</sup>

The question is whether this observation leads to the conclusion that municipalities should be liable under the antitrust laws for actions that are intended to increase efficiency but in fact reduce it. The answer is no, principally because the same reasons that make it difficult for a city to assess consumer preferences also make it difficult for anyone to determine that efficiency has been reduced.

Suppose a sleepy island municipality is invaded by hordes of vacationers each summer.<sup>257</sup> For transportation and amusement, the vacationers rent mopeds, two-wheeled motorized noise makers. They swarm around the island, creating a buzzing racket that annoys everyone except those not themselves riding around annoying everyone else. The city determines that the mopeds are producing negative externalities and that if the total social cost were imposed upon the riders, fewer mopeds would be operated. The city might attempt to increase efficiency in a number of ways.<sup>258</sup> It might estimate the number of mopeds that would be operated if private cost equalled social cost, and simply order suppliers to restrict the number of vehicles offered to a specified number. It might take over the moped concession itself, prohibit new entry, and itself supply the restricted amount. It might estimate the cost per moped imposed upon society and levy a tax in that amount, thereby increasing the cost of moped riding and reducing the amount.

How can a court decide whether consumer welfare has been increased or decreased? The decision cannot depend upon the presence or absence of a monopoly profit. If the city restricts the number of mopeds that can be rented to the number that precisely reflects the externalities, the supplier may reap a monopoly profit, but efficiency would be increased nevertheless. Whenever social cost exceeds private cost, forcing price somehow to reflect social cost generates the possibility of a monopoly profit.<sup>259</sup> The existence of a monopoly profit is an irrelevant economic

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256. W. Neenan, *supra* note 248, at 70. See J. Due & A. Friedlaender, *supra* note 244, at 25-61.

257. See *Mopeds Spur Secession Talk on Block Island*, N.Y. Times, May 30, 1984, at A1, col. 2.

258. See R. Haveman, *supra* note 244, at 39-42.

259. See *supra* note 255.

detail.<sup>260</sup> Likewise, the decision cannot depend upon the identity of the recipient of any monopoly profit earned. In the hypothetical, restricting the output of the private supplier would allow him to earn a monopoly profit; condemning the business or taxing moped use would allow the city to reap the profit. Each device, however, may have exactly the same impact on efficiency. Further, because efficiency may be enhanced by permitting a supplier to earn a monopoly profit, it would not be surprising if a supplier brought to the city's attention a proposed solution to the problem of external costs that would produce a benefit for himself. It is impossible to conclude that the solution reduced efficiency merely because it was proposed by a private party who gained from it.

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. The market may have produced more than an optimum amount of moped use, but the city might reduce the amount so far below the optimum that a greater social cost results. To allow an antitrust court to make this determination, though, is to allow it to perform a task it is not equipped to accomplish. However intractable a problem measuring consumer wants and social costs is, it is generally more amenable to political than to judicial resolution.<sup>261</sup>

This hypothetical suggests another important characteristic of externalities: They change. An externality today may not be one tomorrow. More importantly for present purposes, something that produces an external cost on a resort island may produce a lesser cost or no cost at all in a metropolis. A moped might intrude upon one's solitude at a beach house but go unnoticed in midtown Manhattan. A gasoline station built in a neighborhood of Winnetka might be an eyesore, whereas the same gasoline station in East St. Louis might be a garden spot. Thus, a small governmental entity will sometimes be in a better position than a large one to measure and correct for externalities. Residents of Winnetka are more likely to be able to prove to the city council than to the Illinois legislature that a gas station will injure them, and the city council is better suited to measuring the burden and adjusting for it than is the legislature.<sup>262</sup> Of course, some activities will impose externalities only beyond a city's borders, and in such cases a larger governmental unit would be required to take appropriate corrective action.<sup>263</sup> This fact suggests that

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260. See R. Bork, *supra* note 1, at 114-15 (externalities involve other important factors that should be legislatively addressed).

261. Professor, now Judge, Bork, for example, recognizes that the market falters when economic activity produces negative externalities. R. Bork, *supra* note 1, at 114. He asserts that externalities should be taken into account not by antitrust courts, but by the legislature, though he does not specify at which level. Allowing municipalities to provide for externalities, which would require immunizing them from antitrust liability, seems consistent with Bork's view.

262. See J. Due & A. Friedlaender, *supra* note 244, at 486-87.

263. Pollution is a classic example of an externality that flows beyond municipal, state and even national boundaries. See W. Baumol & W. Oates, *Economics, Environmental Policy, and the Quality of Life* 225-28 (1979); see also J. Due & A. Friedlaender, *supra*



immunity should not be conferred only on municipalities, but it does not weaken the argument that municipalities as well as states should be immune.

Further, if a city incorrectly measures or responds to externalities, and antitrust remedies are unavailable, citizens are not helpless. Purchasers may be able to vote with their dollars, but citizens can vote with their voices and their feet.<sup>264</sup> They can elect new representatives or move to different towns. The limitations of the political remedy for inefficient municipal conduct will be addressed later.<sup>265</sup> This is not to say that competition among municipal governments eliminates the possibility of consumer injury by municipalities.<sup>266</sup> Rather, it is meant to suggest that the amount of harm to allocative efficiency that any town can do is finite.

In summary, when the market fails, a city may act intentionally to interfere with competition in order to increase efficiency. If the city succeeds, it is clear that it should not be exposed to antitrust liability. If, however, the city fails and produces a result that is less efficient than the market would have produced, it still should not be exposed to such liability because an antitrust court is not equipped to determine whether the city has succeeded or failed. The fact that the city's acts are intended to correct for market failure and to increase consumer welfare should be enough to make that city immune from antitrust attack.

### 3. Municipal Action to Promote a Value Other Than Efficiency

The third way in which a city might affect competition is by acting to promote a goal other than allocative efficiency and with no intent to generate monopoly profits. The major objectives other than efficiency that a city might pursue are the redistribution of wealth and the protection of citizens from their own erroneous decisions.<sup>267</sup> If a municipality imposes

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note 244, at 485-89 (the theoretically optimal structure would assign to the federal government those activities with benefits that are nationwide in scope while other activities would be allocated to governmental units coinciding in size with the group that directly benefits from the service involved).

264. See J. Due & A. Friedlaender, *supra* note 244, at 46-51; W. Hirsch, *supra* note 244, at 18-24; W. Neenan, *supra* note 248, at 59-67; Tiebout, *A Pure Theory of Local Expenditures*, 65 J. Pol. Econ. 416, 416-24 (1956). See generally J. Buchanan, *Public Finance in Democratic Process* (1967) (discussion of the delegation of fiscal decisions from the electorate to its elected representatives); A. Hirschman, *Exit, Voice, and Loyalty* (1970) (voicing dissatisfaction or exiting the process discussed as economic and political alternatives).

265. See *infra* notes 289-311 and accompanying text.

266. See *infra* notes 345-51 and accompanying text.

267. See G. Stigler, *supra* note 244, at 104. Although Stigler views the protection of individuals from their own erroneous decisions as an efficiency objective, *id.* at 108-10, I prefer, for expositional clarity, to assume that consumer judgments are always correct. Therefore, if consumers are forced to engage in a transaction that they would otherwise voluntarily avoid, that transaction is inefficient, even though the state believes that their decisions are erroneous and that the transaction would increase efficiency. For example, apart from the possibility of externalities, safety regulations decrease efficiency if they are imposed upon consumers.

an income tax to fund welfare services, it is acting to redistribute wealth. If a pool hall is built in River City, ya got trouble; pool is the work of the devil and people, well, they can't help themselves and ought to be protected.<sup>268</sup> An ordinance excluding such establishments from the town would be motivated by a desire to protect people from their own errors.

An action that succeeds in accomplishing a nonefficiency objective may or may not have an effect on efficiency.<sup>269</sup> A tax system might accomplish a redistribution of wealth without reducing allocative efficiency. Suppose, however, that a city decides to promote the welfare of minority-owned businesses in an effort to alleviate the burden of historic racial discrimination. It grants an exclusive contract to a minority firm to provide ambulance services at a stipulated price fifteen percent higher than the next highest bid proposing the identical service. The agreed-upon price might generate a profit, or it might represent no economic profit at all—the firm might simply be relatively inefficient.<sup>270</sup> In either case, efficiency is harmed as a by-product of an action designed to redistribute wealth.

The antitrust laws clearly have no relevance when the city promotes a nonefficiency objective at no expense to consumer welfare. When the city's actions incidentally injure consumer welfare, the possibility of antitrust liability arises. Since the end of the era of substantive due process, decisions of subordinate governmental units have not been amenable to federal preemption merely on the ground that they are unwise,<sup>271</sup> though they will be overturned if they violate some independent constitutional mandate.<sup>272</sup> At the heart of this principle is the idea that in a democracy, people ought to be able to decide their own fate. They ought to be able to choose the values that they will pursue and the means by which to pursue them, as long as those choices do not conflict with the preeminent directives of the constitution. Nothing in this concept implies that the right of subordinate self-government should be limited to states. Efficiency is a noble objective, but if the good fathers of River City wish to sacrifice some efficiency in order to prevent people from dropping their souls into the devil's sidepocket, the federal government should let them do it. The political process, though not perfect, should usually work tolerably well to ensure that the decisions made represent the will of the majority.<sup>273</sup> And frustrated pool players can always move to Cedar Rapids.

Implicit in the notion that the political process will maximize the welfare of citizens is the requirement that the electorate benefitting from a

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268. See generally M. Wilson, *Ya Got Trouble* (1962) (from "The Music Man").

269. For a good summary of the efficiency effects of taxation, see N. Singer, *supra* note 244, at 112-85.

270. See *infra* notes 275-88 and accompanying text.

271. See J. Nowak, R. Rotunda & J. Young, *Constitutional Law* 443-48 (2d ed. 1983).

272. See *id.* at 585-86.

273. See *infra* note 289 and accompanying text.

political decision be the same electorate that is burdened by it. As will be discussed later, this is not always the case; in those situations there is an argument under the antitrust laws for preempting decisions that reduce allocative efficiency, regardless of their purpose.<sup>274</sup> This Article rejects that argument, but even if it were accepted, it is important to note that it does not constitute an argument for supplanting a governmental decision that reduces efficiency when the burdens of that choice fall solely upon the electorate.

#### 4. Municipal Action to Generate Monopoly Profits

The final way in which a city might affect competition is by a deliberate act to generate a monopoly profit. Any monopoly profit produced can flow to one or more of only three groups: city officials, private parties or the public treasury.

##### a. *Personal Gain of City Officials*

If a city official acts somehow to impede the market in order to earn a profit, he would be in blatant violation of the fiduciary duty of a local government officer not to use his position in any way for private gain.<sup>275</sup> The antitrust laws are not needed to remedy this form of injurious conduct, as state laws are perfectly adequate.<sup>276</sup>

##### b. *Benefit of Private Parties*

For several reasons, a city might act to produce a monopoly profit for private individuals. Political favors are commonplace. For example, as a token to a political ally of the mayor, a city might contract with a firm to repair and maintain parking meters at a price substantially exceeding the cost of service. More importantly, a growing body of literature has developed the hypothesis that regulatory agencies come to be captured by those regulated.<sup>277</sup> In time, if not at the beginning, regulators will act to benefit the entities under their authority rather than to benefit the public. It has been suggested, for instance, that the Interstate Commerce Commission was created at the behest of railroads to shore up a flagging car-

274. See *infra* notes 291-311 and accompanying text.

275. 2A C. Antieau, *Municipal Corporation Law* § 22.63, at 22-117 (1984); see 2 C. Sands & M. Libonati, *Local Government Law* §§ 10.66, 10.68 (1982).

276. See sources cited in note 275, *supra*.

277. For a good synopsis of regulatory agencies and their relationships with those regulated, see M. Bernstein, *Regulating Business by Independent Commission* (1955); Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, in *Public Administration and Policy: Selected Essays* (P. Woll ed. 1966); Leiser-son, *Interest Groups in Administration*, in *Elements of Public Administration* (F. Marx ed. 1946); Jordan, *Producer Protection, Prior Market Structure and the Effects of Government Regulation*, 15 *J. L. & Econ.* 151 (1972); Posner, *Theories of Economic Regulation*, 5 *Bell J. Econ. & Management Sci.* 335 (1974); Stigler, *The Theory of Economic Regulation*, 2 *Bell J. Econ. & Management Sci.* 3 (1971).

tel.<sup>278</sup> The same process that leads regulatory commissions to promote the interests of the firms under their authority might lead city governments to promote the interests of private firms at the expense of the public.

To the extent that a government sacrifices the welfare of citizens for the gain of private business entities, the political process may have "failed."<sup>279</sup> That failure, however, is not the proper object of antitrust concern. No antitrust liability is imposed upon states for actions that injure consumer welfare, even if those actions are specifically designed to benefit private firms.<sup>280</sup> The reason for this, at least in part, is the principle implicit in the concept of democracy that individuals have a right to hurt themselves. A government may make decisions which injure the electorate, but the political process is designed to enlighten the electorate as to the decisions made and afford it the opportunity to express its displeasure. This reasoning applies equally to states and cities. In fact, because cities are smaller, the costs of obtaining information about government activities may be lower, producing a more knowledgeable electorate. The citizens may also be proportionately better represented. The political mechanism may therefore function to remedy injuries more effectively at the municipal than at the state level. In short, as long as the burdens imposed on consumers by city action designed to favor private firms at the citizens' expense fall upon the electorate, a qualification that will be discussed later,<sup>281</sup> application of the antitrust laws is unnecessary and inappropriate.

### c. *Municipal Action for Benefit of the Public*

A city might act to generate a monopoly profit for the public treasury. Whenever it does, it is imposing a form of taxation.<sup>282</sup> For instance, some municipalities historically have followed a policy of operating their own electric distribution systems and pricing to maximize profit in order

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278. See G. Kolko, *Railroads and Regulation 1877-1916* (1965).

279. "Failed" is used here in a specific sense. The government, which exists to promote the public welfare, can be said to "fail" in some substantive sense if it favors private interests at the expense of the public. Of course, the "public" interest is an aggregation of private interests. Government decisions almost invariably have different impacts upon different citizens. It is the purpose of governments to promote the welfare of some groups at the expense of others. According to this analysis, therefore, the government does not "fail" when it fulfills its function by favoring some private interests at the expense of others. Whether the particular private interest group served *should* have been served is a normative judgment about which reasonable people may differ. Thus, the only meaningful way to judge the success or failure of a government is not by its *product*, but by its *process*, and as long as a decision is produced by a process that is deemed sound, it cannot be a failure. If the democratic political process produces a result that favors private interests at the expense of consumer welfare, there is no "failure."

280. See *Parker v. Brown*, 317 U.S. 341, 350-52 (1943).

281. See *infra* notes 291-311 and accompanying text.

282. See J. Due, *Government Finance: Economics of the Public Sector* 355 (4th ed. 1968); W. Hirsch, *supra* note 244, at 35.

to generate funds for the public treasury.<sup>283</sup> In this example, the service provided is a natural monopoly. The same policy, however, could be applied to the provision of a private good that is not subject to natural monopoly conditions. Suppose emergency ambulance service is provided by several private firms at competitive prices. The city decides to provide the service itself and charge a user fee. It excludes the competing companies and sets a monopoly price. If that course of action were forbidden, the city would have a ready and adequate alternative. It could allow the private firms to continue operating and impose an excise tax on ambulance use equal to the monopoly profit available.<sup>284</sup> It is important to see that the impact on allocative efficiency is exactly the same in both instances.

Depending upon the supply and demand characteristics of the good involved, an excise tax, or a monopoly price imposed to generate public revenue, is likely to reduce allocative efficiency in a way that another tax producing the same amount of government revenue, such as an income tax, is not.<sup>285</sup> For this reason, this kind of municipal conduct may injure consumer welfare. The question, however, is whether the antitrust laws should be available to remedy this injury. It would be entirely arbitrary to use antitrust laws to prohibit a city from excluding competition and thereafter charging a monopoly price, but not use them to preclude the city from imposing an excise tax that is designed to achieve the same purpose and has the same effect on consumer welfare. It does not appear that anyone has seriously suggested that the federal antitrust laws can be applied to strike down a municipal excise tax. An ill-advised and inefficient municipal tax policy is subject to political constraints,<sup>286</sup> the direc-

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283. J. Due, *supra* note 282, at 355.

284. An excise tax "is a levy on a narrow range of exchanges, so the tax base is defined as the buying or selling of a *particular* good or service." W. Hirsch, *supra* note 244, at 93 (emphasis in original); see N. Singer, *supra* note 244, at 96-97.

285. See N. Singer, *supra* note 244, at 156-57, 159-64. Professor Singer writes: "An income tax is nearly neutral in its effects upon the allocation of resources, although . . . it does discriminate against saving, compared to a tax on consumption expenditures. An excise tax is not neutral, because it makes the taxed commodity relatively more expensive than before the tax. The distortion of resource allocation caused by excise taxation can impose a cost on taxpayers over and above the revenue cost of the tax." N. Singer, *Public Microeconomics* 159 (1st ed. 1972).

286. One might distinguish between direct forms of taxation and taxation through monopoly charges on the ground that the political process is more likely to be an effective check in the former than in the latter case. The argument would be that the costs of information borne by the electorate are lower when taxation is direct than when it is indirect. Thus, the average citizen perceives that he is being taxed when he pays a charge labeled "sales tax" and may voice his assessment of it through the political process. But he may not realize that five percent of his bill for electric service represents surplus revenue for the city.

It is not at all clear that this is a serious problem. Information can be expected to be acquired and disseminated by contesting parties in the political process. For instance, a candidate for city council would likely raise such an issue in a campaign against the incumbent. Further, the citizens' exposure to the activities of surrounding cities is likely to alert the people to the effect of their government's decisions sufficiently to allow them

tions of the state<sup>287</sup> and the mandates of the federal constitution,<sup>288</sup> but it is not amenable to antitrust challenge. All municipal conduct designed to secure a monopoly profit for the public treasury should be treated in the same way.

### C. *Efficacy of the Political Remedy*

As already explained, a city may act knowingly to impair allocative efficiency in four situations: as a by-product of an act designed to promote some value other than efficiency; in order to benefit city officials privately; in order to benefit private firms; and, by imposing an inefficient form of taxation. Only in these cases could application of the antitrust laws possibly be justified. In the second situation, state laws imposing a fiduciary duty on city officials present an entirely adequate remedy. In the other three situations, however, I have argued that the antitrust laws should not be applied, in part because if the electorate perceives the city's actions to be detrimental, the political process constitutes an alternative and adequate remedy. If the city's conduct is perceived by the electorate to be desirable despite the decrease in efficiency, there is no "harm" that

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to complain through the political process. If a resident of City A pays higher electric rates than her friend in City B, she may not understand why she is paying so much, but she will understand enough to be able to protest.

287. In the area of municipal taxation, the need for adequate state authorization is particularly acute. For instance, one commentator has written: "[T]he overwhelming weight of authority is to the effect that municipal corporations and other local government entities do *not* have an inherent power of taxation." 2A C. Antieau, *supra* note 275, at § 21.00 (emphasis in original). The same author went on to state:

Courts in the non-home-rule states, as well as in the "legislative" home-rule states, generally follow the rule that only a legislative act plainly and unmistakably delegating the specific power of taxation claimed will be recognized as conferring the power upon a local government entity . . . .

Even in the constitutional home-rule states, courts have occasionally applied the same rule.

*Id.* at § 21.01.

Further, courts generally hold that in determining whether a particular tax is within municipal power, it is not the designation given to the tax by the municipality which is determinative of the nature or validity of the tax; rather, the court will determine the character of the tax according to its incidents, operations and effect. *Id.* at § 21.07. This principle has led courts to strike down certain municipal licensing schemes on the ground that "the power to impose license taxes . . . will not be implied from a municipal power to regulate by the licensing technique." *Id.* at § 21.04. Thus, a city in New Jersey, a home-rule state, enacted an ordinance as a revenue-raising device which imposed license fees on local businesses. A state court struck down the ordinance on the ground that it was unauthorized, despite a state statute that permitted license fees to be imposed "for revenue." *Salomon v. Jersey City*, 12 N.J. 379, 392, 97 A.2d 405, 412 (1953). To the extent that a municipality suppresses competition in order to acquire a monopoly over a service it provides and for which it thereafter charges a monopoly price, a state court may be able to recognize the conduct for what it is, a form of taxation, and invalidate it unless it is specifically authorized.

288. See *infra* notes 301-311 and accompanying text, where the effect of the Commerce Clause is discussed. Other constitutional provisions, such as the Equal Protection or Due Process clauses, might conceivably affect a municipal tax policy. See 1 P. Areeda & D. Turner, *supra* note 33, at § 219.

should be remedied. This claim—that, with governmental action, the political process obviates the need for the antitrust laws— bears closer attention.

At the very least, the political process is a check upon governmental actions that injure consumer welfare, a process which is not directly available as a check upon private behavior that injures consumer welfare. Thus, it would not be arbitrary to distinguish between anticompetitive governmental and private behavior on this basis alone, and therefore to confine the application of the antitrust laws to the private sector.

The political process is not an infallible system for expressing majority preferences. Kenneth Arrow has demonstrated that under certain conditions that may be common in the American political process, a majority vote will not reflect the will of the majority.<sup>289</sup> Further, the political process surely may operate to harm a minority of the electorate for the benefit of the majority or even a different minority, and such a result can occur whether the disadvantaged minority objects or assents to the decision. For example, a city may decide to provide a shelter for drug addicts with revenue gained from an excise tax on the use of a municipal golf course. Golfers are likely to be a minority of the city's population and they may or may not object to the burden of wealth redistribution or deadweight loss imposed upon them. Whatever flaws the political process has, however, we are generally willing to tolerate them and abide by the results of that process. Certainly the flaws of a political system that produces validly enacted federal and state laws are insufficient warrant for refusing to enforce those laws. It is not apparent that these flaws are any more serious at the local than at the federal or state levels. In short, whatever the shortcomings of democratic rule, they are usually not a sufficient ground for refusing to enforce the product of that process, whatever the size of the political entity involved.

When a municipal government decides to impair efficiency, however, there is a particular reason to question whether the will of the people has been served. The costs of the action may be imposed upon consumers who are not represented in the electorate. For instance, suppose a city, as a way of promoting affirmative action, awards to an inefficient minority firm an exclusive contract to provide food concession services at a municipal airport. Or suppose the city awards that contract to a local private firm, intending that the firm reap monopoly profits, as a way of generating political support from the firm without seriously burdening other constituents. Or suppose the city chooses to provide the services itself at a monopoly price, as a way of generating revenue for the public treasury. The individuals paying inflated prices would at least include nonresident travelers.

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289. K. Arrow, *Social Choice and Individual Values* (1951); see J. Due & A. Friedlaender, *supra* note 244, at 66-73; Riker, *Arrow's Theorem and Some Examples of the Paradox of Voting*, in *Mathematical Applications in Political Science* 41 (J. Claunch ed. 1965).

Arguably, in these cases, the burden of the city's decision falls disproportionately on consumers who have no voice in the political process that produces the decision. The political process fails in the sense that the city might have acted in a different way had it been politically accountable to the individuals burdened by its decision. The problem is real, but it should be confined before the solution is addressed. For the political process to work tolerably well, the burdens of a governmental decision need not fall exclusively on the electorate. It is not important at all that the benefits be enjoyed by the electorate, though usually they will be. It is only important that a sufficient proportion of the total burden falls upon members of the electorate who do not perceive themselves as gaining offsetting benefits, so that they will have an incentive to oppose the decision politically. For example, in the airport concession hypothetical, municipal residents as well as nonresidents use the airport and presumably purchase food. Perhaps, however, the affected residents represent a small proportion of the total number burdened, and therefore, would make a correspondingly weak protest. Indeed, they may not protest at all if they believe the extra fifty cents they pay for a hot dog reduces their property taxes.

Suppose, however, that a city acts in such a way that taxi service is priced at a monopoly level. It is not at all clear that residents represent so small a proportion of cab riders that they would be unable to object adequately in the political system. The locus of the burdens imposed by a city's inefficient actions will fall along a continuum between residents exclusively and nonresidents exclusively. The impact must fall decidedly toward the nonresident end for there to be a serious deficiency in the political mechanism. In reality, the impact of most decisions will fall somewhere between the extremes, and it is not at all clear how many actual instances fall within the danger zone.

In those situations in which the political system cannot be trusted, the issue is whether the antitrust laws ought to be applied. At the very least, the above analysis suggests that if the antitrust laws should ever apply to municipalities, they should apply only when the burden of an anticompetitive municipal action falls disproportionately on nonresidents. For reasons of doctrinal purity, however, it would be better to immunize municipalities from antitrust challenge even in these instances, and instead subject them to challenge through other legal paths.<sup>290</sup>

### 1. State Law Limitations

Whenever a municipality acts to impose a disproportionate burden on nonresidents within the same state, state laws should be the appropriate method of attack. A state undoubtedly has the authority to prohibit its municipalities from acting in such a way as to injure nonresidents. Professor Antieau has stated the general principle: "The rule followed every-

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290. See *infra* notes 291-310 and accompanying text.



where in the United States is to the effect that the state legislatures have complete control over local governments, except as limited by the constitutional clauses—federal and state . . . .”<sup>291</sup> As early as 1876, the Supreme Court noted:

A municipal corporation, in the exercise of all its duties, including those most strictly local or internal, is but a department of the State. The legislature may give it all the powers such a being is capable of receiving, making it a miniature State within its locality. Again: it may strip it of every power, leaving it a corporation in name only . . . .<sup>292</sup>

A legislature’s power over a municipality may be limited, at least in theory, by state constitutional “home rule” provisions. These provisions vary, but generally they grant to municipalities some amount of power to govern themselves.<sup>293</sup> A typical provision states: “Cities are hereby empowered to determine their local affairs and government including the levying of taxes, excises, fees, charges and other exactions . . . .”<sup>294</sup> Not only do home rule provisions serve as a source of municipal power, but they also theoretically serve as a limitation on state legislative control.<sup>295</sup> For present purposes, however, the limitation is illusory. All home rule provisions restrict a municipality’s power to matters of local, rather than general or state, concern.<sup>296</sup> Though the test for distinguishing between matters of local and general concern is not sharp, the most important factor is the effect of a city’s action on people outside the city.<sup>297</sup> Professor Antieau summarizes: “[I]f the effect of the regulation or the administration of a particular matter is likely to be felt by a considerable number of people outside the city and in a rather strong degree, courts are probably going to conclude that the concern is for the state.”<sup>298</sup> Thus, the power of a state legislature to prohibit a city from injuring the welfare of citizens located in other municipalities within the state is not abridged by constitutional home rule provisions.

The almost unlimited control that a state legislature has over its municipalities can and has been exercised to prohibit a municipality from injuring nonresidents. For instance, in *State ex rel. McElroy v. City of Akron*,<sup>299</sup> the Ohio Supreme Court held that the state legislature had validly prohibited municipalities from imposing license fees for the privilege of operating watercraft on waters owned by the municipality.<sup>300</sup> When a

291. 1 C. Antieau, *supra* note 275, at § 2.00.

292. *Barnes v. District of Columbia*, 91 U.S. 540, 544 (1876).

293. See 1 C. Antieau, *supra* note 275, at § 3.00; 1 C. Sands & M. Libonati, *supra* note 275, at § 4.02; S. Sato & A. Van Alstyne, *State and Local Government Law* 134-43 (2d ed. 1977).

294. Kan. Const. art. 12, § 5(b) (1859, amended 1960).

295. 1 C. Antieau, *supra* note 275, at § 3.01.

296. *Id.* at § 3.21.

297. *Id.* at § 3.40.

298. *Id.*

299. 173 Ohio St. 189, 181 N.E.2d 26 (1962).

300. *Id.* at 195, 181 N.E.2d at 30.

municipality acts to burden nonresidents living within the state, the matter is one of internal state concern, which the state is entirely capable of resolving without resort to federal antitrust remedies.

## 2. Commerce Clause Limitations

A municipality may act in such a way that a substantial and disproportionate burden is imposed on nonresidents of the state. In those cases, the city's actions should be held to be pre-empted by the Commerce Clause of the federal Constitution.<sup>301</sup> The Commerce Clause not only is a source of power for Congress to pass laws that pre-empt inconsistent local governmental actions under the Supremacy Clause; it also, by its own force, limits local governmental actions that impose an excessive burden on the national economy.<sup>302</sup> It would be folly to attempt to discuss the Commerce Clause in even minimal detail, or to trace its historical development, in the course of this Article. Rather, the Article will suggest a test, based on a single case, to determine when municipal conduct injurious to consumer welfare should be pre-empted. Needless to say, this explores not even the tip of the iceberg.

In *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*,<sup>303</sup> the Supreme Court held that a municipality did not violate the Commerce Clause of the Constitution by charging one dollar per commercial airline passenger for enplaning at the municipal airport. The city had imposed the charge in order to help defray the cost of airport construction and maintenance.<sup>304</sup> The Court deemed it crucial that the charges reflected "a fair, if imperfect, approximation of the use of facilities for whose benefit they [were] imposed"<sup>305</sup> and were not "excessive in relation to costs incurred by the taxing authorities."<sup>306</sup> This reasoning implies that if a municipality acts in such a way as to create a substantial burden on out-of-state residents that is not reasonably related to services provided to those individuals, the act will be pre-empted by the Commerce Clause. Thus, if a city imposes a substantial excise tax that falls on nonstate residents, the amount of the tax must bear some relationship to the amount of services provided to them. The same reasoning could be used to establish the following principle: If a city restrains competition in such a way that an inefficient supplier is permitted to charge an excessive price, or a private firm or the city is permitted to earn a monopoly profit, and a significant proportion of the burden is imposed on nonstate residents, the action will be pre-empted by the Commerce Clause if the bur-

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301. U.S. Const. art. I, § 8, cl. 3.

302. For an excellent summary of the application of the Commerce Clause to state anticompetitive activities, see 1 P. Areeda & D. Turner, *supra* note 33, at ¶ 220b; J. Nowak, R. Rotunda, & J. Young, *supra* note 271, at 266-75.

303. 405 U.S. 707 (1972).

304. *Id.* at 709.

305. *Id.* at 717.

306. *Id.* at 719.

den substantially exceeds any benefits of the services provided.<sup>307</sup>

Comparing burdens to benefits will, of course, result in only a rough approximation. Some imprecision, however, is inescapable in any standard, and may be a virtue as well as a vice. If a standard proscribed all municipal conduct that adversely affected out-of-state consumers, the test could be applied precisely, but it would pre-empt virtually all municipal conduct that reduced efficiency. It would allow massive federal intrusion into primarily local affairs. In a mobile society, it is hard to imagine a municipal activity that will not affect some out-of-state consumers. If a standard proscribed all municipal conduct that imposed a disproportionate burden on nonresidents and reduced efficiency, however slightly, a detailed examination of the efficiency effects of even trivial injuries to consumer welfare would be required. Any practical test will have to be somewhat imprecise about both the necessary degree of economic harm and the identity of the injured parties. The proposed standard would allow a court to dispose of cases quickly when a cursory examination of market conditions discloses either that the amount of any potential harm is small or that the impact falls primarily on state residents. If, for example, the overcharge represents a monopoly profit to or the cost of inefficiency of a private firm, there will be no offsetting benefit provided by the city. The proposed standard would nevertheless permit a court to dismiss a suit based on such conduct, and avoid the expense of litigation, as long as the harm caused is sufficiently trivial that federal intervention is not justified.<sup>308</sup>

The proposed test, which would allow municipal actions to stand unless they impose a substantial and disproportionate burden on out-of-state residents, would probably not invalidate many actual instances of municipal conduct. It would seem that a Commerce Clause standard, which has been applied to give states substantial leeway in their conduct,<sup>309</sup> would pre-empt even fewer municipal actions than state actions. A municipality is likely to have less actual economic power to injure out-

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307. Areeda and Turner state that the test for determining Commerce Clause pre-emption of state anticompetitive conduct requires balancing the burden on out-of-state interests against the extent of the legitimate local benefits. 1 P. Areeda & D. Turner, *supra* note 33, at ¶ 220b. This test, which the authors assert is the one in fact applied by the Court, does not vary significantly from the one espoused in this Article. Both are consistent with Supreme Court precedent; I believe, however, that the formulation presented in this Article is preferable. In any case, it is important to limit the inquiry into the burden on out-of-state *interests* to the burden imposed on out-of-state *consumers*. That is the interest damaged by conduct reducing efficiency.

308. In *Parker v. Brown*, 317 U.S. 341, 359 (1943), the Court recognized this potential applicability of Commerce Clause pre-emption. Ironically, the Court held that the raisin price-fixing program was not invalid under the Commerce Clause even though ninety-five percent of the California raisin crop left the state. *Id.* at 368. *Parker* is a case in which the burden imposed on nonstate residents was probably sufficient to justify pre-emption. See Easterbrook, *supra* note 15, at 39-40.

309. For example, the Court held that the raisin proration program in *Parker* did not unduly burden interstate commerce. 317 U.S. 341, 367-68 (1943); see also *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970) (state regulations with an incidental effect on interstate

of-state consumers than is a state. The significance of Commerce Clause pre-emption, however, is not that it will often operate, but that it is capable of suppressing those rare instances of municipal conduct damaging consumer welfare that are not amenable to correction through state law or the political process.

One might argue that the test proposed in this Article for determining when the Commerce Clause will pre-empt anticompetitive municipal conduct should instead be used to determine when the Sherman Act will apply.<sup>310</sup> The proper test, however, for determining whether conduct violates the Sherman Act is whether it injures consumer welfare.<sup>311</sup> It focuses upon the fact that allocative efficiency is impaired, not upon the identity of the consumers injured. The Commerce Clause, on the other hand, does focus upon the location of the economic incidents of municipal behavior, and that is the proper focus in determining whether municipal conduct will be allowed to stand. Thus, even though a municipality might injure consumer welfare, its actions should be left undisturbed as long as most of the consumers allegedly injured are members of the municipal electorate.

#### D. *Immunity Rather Than Liability*

At this point, one might agree with the substance of the above analysis but argue that it provides only a framework for determining substantive municipal antitrust liability, not a reason for blanket immunity. The issue of immunity is distinct from that of liability on the merits, and when a municipality injures consumer welfare, it can be argued that the political mechanism may not provide as effective a remedy as that provided by the antitrust laws.

This argument has two major flaws. First, it incorrectly assumes that injury to consumer welfare should be prohibited even when an electorate chooses to sacrifice efficiency, for whatever reason, and bears the entire burden of lost efficiency. The antitrust laws have no business interfering with that kind of local political decision.<sup>312</sup> Second, it assumes that antitrust courts can and will accurately distinguish instances in which a municipality injures consumer welfare from instances in which municipal conduct has a positive or neutral impact on efficiency. If a municipality restricts the output of some product demonstrating negative externalities, so that price equals marginal social cost, it will have increased efficiency.<sup>313</sup> Yet, its action may look very much like a price-fixing arrange-

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commerce will be upheld unless the burden on commerce "is clearly excessive in relation to the putative local benefits").

310. See Easterbrook, *supra* note 15, at 45-46. Areeda and Turner have asserted that using the Commerce Clause and other nonantitrust remedies for anticompetitive state conduct is superior to imposing antitrust liability on state agencies and related private parties. 1 P. Areeda & D. Turner, *supra* note 33, at ¶ 220e.

311. See *supra* note 231 and accompanying text.

312. See *supra* notes 273, 279-81, 289 and accompanying text.

313. See *supra* notes 252-54, 257-60 and accompanying text.

ment. In both cases, price increases and output decreases. Of course, when private firms act to limit output, they will almost certainly injure consumer welfare.<sup>314</sup> But an antitrust court is virtually incapable of determining when a municipality's action designed to account for externalities increases or decreases efficiency. If a city prohibits the construction of a third gasoline station at an intersection, or requires used car lots to be closed on Sundays, it may look like an anticompetitive restraint, but it may have no effect at all on consumer welfare. Indeed, if a city forces all fruit dealers to locate in one area of the wholesale food center, it may look like an actionable restraint even though it facilitates the operation of the market.

The *Boulder* case<sup>315</sup> provides a particularly stark example of a court misinterpreting municipal conduct that was designed to and did enhance efficiency. The city acted to facilitate competition by restraining the incumbent cable television company from expanding its business in a way that would have precluded new entry, until competitive bids could be tendered and assessed. Yet the district court entered a preliminary injunction against the city, holding that the city's conduct "in reasonable probability will be declared to be unlawful under the antitrust laws."<sup>316</sup>

Courts are likely to impose antitrust liability on a municipality for conduct that does not injure consumer welfare because much of what a municipality does has no close analog in the private sector.<sup>317</sup> For example, Schwinn Bicycle Company can establish an exclusive outlet for Schwinn Bicycles in Champaign, Illinois, but it cannot prevent Raleigh Bicycle Company from opening its own dealership. Champaign, however, can designate the Acme Ambulance Company as the exclusive provider of emergency services in the city and prohibit the Jiffy Ambulance Company from operating within city boundaries.

Since the earliest decisions under the Sherman Act, the quality and sophistication of antitrust opinions have increased. This is due in part to progress in the science of economics, but also in part to the fact that each new decision has had another prior decision on which to build. Whatever criticism might be directed at the quality of current judicial enforcement of the antitrust laws, courts today are considerably more adept at discerning price-fixing arrangements than courts were fifty years

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314. But see *supra* note 255.

315. *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), discussed *supra* at notes 195-217 and accompanying text.

316. *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).

317. Professor Areeda states: "[M]any challenged governmental activities—such as zoning decisions, franchising and licensing, and matters related to the management of public facilities—seldom, if ever, violate the antitrust laws [substantively], even though they incidentally affect market competition." 1 P. Areeda & D. Turner, *supra* note 33, ¶ 212.3, at 52-53 (1982 supp.) (footnote omitted). As the above discussion indicates, I believe that he vastly underestimates the difficulty of identifying injuries to consumer welfare. See also 1 P. Areeda & D. Turner, *supra* note 33, at ¶ 216 (absence of immunity does not indicate presence of antitrust offense).

ago. If municipal antitrust liability is possible, courts will start near the beginning, without an inherited body of specifically relevant teaching, and they can be expected to err often and significantly.

How one feels about bearing the cost of error while knowledge is accumulated has a lot to do with how large one believes the burden on consumer welfare imposed by cities would be without the availability of antitrust liability. Because the political process is generally effective in correcting conduct injurious to consumer welfare, and because such conduct represents a relatively small proportion of the total amount of conduct affecting competition, the cost of erroneous judicial decisions imposing liability is not justified.

Furthermore, the threat of erroneous imposition of liability can be expected to chill municipalities from engaging in conduct that would either increase efficiency or have no impact on efficiency while promoting some other goal. This is an additional cost of exposing municipalities to antitrust liability that would not be borne if such entities were simply immune. The chilling effect was much greater when the potential antitrust remedies to which municipalities were exposed included treble damages. Before passage of the Local Government Antitrust Act of 1984,<sup>318</sup> some commentators suggested that treble damages would have been an inappropriate sanction to impose on a city. But others expressed doubt that there was any legislative authority for withholding the remedy.<sup>319</sup> Though the threat of damages will no longer chill municipal action, the prospects of defending an antitrust suit and the entry of an adverse judicial decree for prospective relief continue to constitute a burden that may well be sufficient to deter a city from acting.

Finally, the cost of potential municipal liability will include the cost of litigating cases in which the city is found innocent, cases in which the city is incorrectly found guilty, and cases which are brought merely to induce settlement and are dropped prior to judicial resolution. Antitrust litigation is notoriously expensive. Additionally, the uncertain state of substantive antitrust doctrine will not only result in a large number of erroneous decisions, but will also reduce the probability of settlement.<sup>320</sup>

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318. 47 Antitrust & Trade Reg. Rep (BNA) No. 1187, at 753 (Oct. 25, 1984); *see id.*, No. 1186, at 716-18, 737 (Oct. 18, 1984).

319. *See infra* notes 336-37 and accompanying text.

320. *See* R. Posner, *Economic Analysis of Law* 434-41 (2d ed. 1977). An excellent demonstration that potential liability will lead to strike suits is provided by *Capital Telephone Co. v. City of Schenectady*, 560 F. Supp. 207 (N.D.N.Y. 1983). In this case, the state required a city franchise for the provision of telephone service. Plaintiff petitioned the city for a franchise to establish a second landline telephone company. Because the plaintiff provided insufficient information in support of his proposal, and presumably because local telephone service is currently a natural monopoly, the city denied the request. The plaintiff then sued the city under, *inter alia*, Sections 1 and 2 of the Sherman Act. *Id.* at 208-09. The court correctly granted the city's motion for summary judgment, *see id.* at 212. The very fact that the city was put to the expense of litigating this ridiculous claim, however, indicates that potential antitrust liability gives leverage to any person disappointed in transactions with a municipality.

Taken together, these costs appear greatly to outweigh the increase in consumer welfare that subjecting municipalities to antitrust liability might produce.

### E. *Independent Rather Than Derivative Immunity*

The choice, of course, is not between potential liability and blanket immunity. Municipalities today can acquire immunity, as long as it is bestowed upon them by states.<sup>321</sup> Rather, the question is whether independent immunity is superior to this kind of derivative immunity. Independent immunity is indeed superior. Requiring a clearly articulated and affirmatively expressed state authorization of specific conduct, to say nothing of subsequent supervision, is expensive for both states and municipalities. Legislative authorization is not cost-free; it takes time and consumes resources. Further, the prudent city will have to seek authorization not only for acts that do in fact reduce efficiency, but also for acts that only appear to reduce efficiency but that may incorrectly be found by federal judges to violate the antitrust laws. There are 82,290 units of local government in this country, of which 38,851 are general-purpose local governments.<sup>322</sup> Simple multiplication of the number of municipalities by the number of municipal acts that might appear anticompetitive suggests the staggering direct costs of requiring specific state authorization.

Because these costs are so high, municipalities can be expected to avoid seeking immunity at times, and instead opt to refrain from engaging in activities that would in fact promote efficiency or some other value. The administrative costs of obtaining immunity will be avoided but at the price of reduced social welfare. Additionally, some cities will avoid the costs of acquiring immunity by operating without it, but will suffer the costs of erroneous liability determinations.

A more subtle but perhaps more significant cost of derivative immunity is its adverse impact on the municipality's sense of autonomy. The trend in this country has been toward increasing powers of self-government for local units, as evidenced by the movement toward home rule.<sup>323</sup>

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321. See *supra* notes 187-214 and accompanying text.

322. U.S. Dept. of Commerce, Bureau of the Census, 1 *Governmental Organization*, 1982 Census of Governments VI (1983). The category "general-purpose" local governments includes counties, municipalities, and townships; it does not include "limited-purpose" local governments, such as school districts and special districts. *Id.* For purposes of this Article, the term "municipality" refers generically to all general-purpose, elected local governments. Whether, for purposes of antitrust immunity, distinctions should be made among types of general-purpose governments, or how immunity should apply to limited-purpose governments, is not considered here.

323. As of 1978, 41 states, by constitution, legislation, or both, had granted their municipal governments some degree of home rule authority. M. Hill, *State Laws Governing Local Government Structure and Administration* 4, 43 (1978). See generally 1 E. McQuillin, *The Law of Municipal Corporations* §§ 1.40-1.43 (3d ed. 1971) (discussing the development of home rule and its advantage); 3 C. Sands & M. Libonati, *supra* note 275, at § 13.03 (discussing the nature of home rule powers).

To require state authorization for specific municipal actions is a flagrant affront to the deeply felt, almost religious conviction that "local people are best suited to administer local affairs."<sup>324</sup>

While the marginal cost of obtaining immunity through the state rather than independently is great, there is little marginal benefit. If a city seeks immunity for specific activities that will affect its own residents, a state may either allow or prohibit those activities. If it allows them, the result will be no different from what it would have been had the city been independently immune. If there can be any benefit from derivative immunity, it would have to be the result of a state's decision not to authorize conduct. As long as that conduct will burden primarily municipal residents, a decision by the state to refuse authorization is no more likely to increase welfare than it is to decrease it. The local political mechanism is capable of balancing advantages and disadvantages, and any override of its decision by a higher political entity cannot be presumed to produce a better result. If the conduct will burden nonmunicipal residents, the state can act to disallow it before it is undertaken.<sup>325</sup> The state can act to prohibit the conduct, however, even if the city is independently immune from the federal antitrust laws. Any benefit derived from requiring prior state authorization will, at best, reduce minimally the time during which a city may injure nonresidents. Thus, municipal antitrust immunity should be independent rather than derivative.

#### F. *Municipal Immunization of Others' Conduct*

If, as proposed, municipalities are treated exactly like states for purposes of antitrust immunity, a municipality's acts that proximately cause antitrust injury, like those of a state, would be immune from antitrust attack. The analysis so far has been directed to that proposition. It is equally important, however, that municipalities be treated like states with respect to the authorization prong of the state action doctrine;<sup>326</sup> a municipality must be able to immunize private parties for their acts proximately causing antitrust injury by clearly articulating and affirmatively expressing a policy contemplating the challenged conduct. The necessity of an authorization prong stems from the fact that implementation of a government's policies will often require the participation of private actors. This is why virtually all state action cases involve "a blend of private and public decision making."<sup>327</sup> The crux of immunity is that a public decision to restrain competition will not invite antitrust challenge. If a government cannot effect its decision through private parties without

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324. 1 E. McQuillin, *supra* note 323, at § 1.42.

325. See *supra* notes 291-300 and accompanying text.

326. See *supra* notes 137-63 and accompanying text.

327. Cantor v. Detroit Edison Co., 428 U.S. 579, 592 (1976). See *supra* notes 65-66 and accompanying text.



exposing them to liability, the government's immunity may be illusory. These considerations apply to states and municipalities with equal force.

Similar reasons require that legitimate governmental agencies themselves be immune for acts proximately causing antitrust injury, as long as the agencies are operating within the scope of their general authority.<sup>328</sup> Further, such agencies acting within their authority must be able to confer antitrust immunity on private parties for acts that are consistent with a clear policy expressed by the agency.<sup>329</sup> Efficiency and practicality may require that a government establish and implement its policies through agencies as well as private actors. Again, the rationale applies equally to state and municipal governments.

Conceivably, municipalities could be treated like legitimate state agencies rather than like states. The only relevant difference is that in the former case, they would not be immune if they acted outside the scope of authority delegated to them by the legislature, but this difference would have little real impact. If a city exceeds its delegated authority, it violates state law and can be punished accordingly. There is no pressing need to subject it to antitrust liability as well. This observation, of course, also applies to state agencies, but there is a significant difference between state agencies and municipalities that justifies different treatment for purposes of antitrust immunity: The state agency is not directly subject to the political process, whereas the municipality is.

#### IV. ALTERNATIVE APPROACHES TO THE CURRENT DOCTRINE OF MUNICIPAL LIABILITY

Given the controversy over municipal antitrust liability during the past several years, it is not surprising that a number of alternative approaches to the problem have been offered. Many differ from this Article's proposal of blanket immunity; others reach the same conclusion by different reasoning. A study of them all will not be undertaken here, but a few have become sufficiently prominent that brief comment is warranted.

In his concurring opinion in *City of Lafayette*, Chief Justice Burger asserted that a city should not be protected from antitrust liability when it acts in a proprietary capacity.<sup>330</sup> Although he did not explicitly say so, the Chief Justice implied that a city should be immune from liability when it acts in a governmental capacity.<sup>331</sup> The proprietary/governmental distinction has a long and inglorious past in the field of municipal tort liability.<sup>332</sup> That fact alone warns against transposing the doctrine into

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328. See *supra* note 186 and accompanying text.

329. See *supra* notes 165-85 and accompanying text.

330. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 418-22 (1978) (Burger, C.J., concurring).

331. See *id.* at 432-34 (Stewart, J., dissenting).

332. The governmental versus proprietary test has proven so unworkable that the highest courts of 35 states have openly repudiated it. 1A C. Antieau, *supra* note 275, at

the field of antitrust immunity, lest its failings come along with it. But there is a stronger, more specific reason for not using the distinction to determine antitrust liability: It focuses on an irrelevant economic detail.

The antitrust laws are designed to achieve an economic goal: the maximization of consumer welfare. To determine whether any conduct violates these laws, the analysis must focus on the effect of the conduct. A municipality's actions can have exactly the same effect whether they are proprietary or governmental. The earlier moped hypothetical illustrates the point.<sup>333</sup> If a city regulates the number of mopeds rented, or levies a tax on moped use, its actions are governmental. If it instead purchases the moped concession, prohibits entry, and reduces the number of mopeds it rents to the public, its actions are proprietary. Yet all three courses of conduct may be intended to and in fact have exactly the same effect—a reduction in moped use, coupled with an increase in price.

Nor can any distinction turn upon whether the municipal conduct involves public or private goods.<sup>334</sup> Municipalities cannot be confined to providing or regulating public goods, because forcing externalities to be internalized is certainly a legitimate function of any government, and as the moped example demonstrates, externalities can be generated by the use of private as well as public goods. Besides, the line separating pure public goods from pure private goods is so vague that any attempt to discern it in any real case would likely prove intolerably frustrating.<sup>335</sup> Thus, the deficiency in the proprietary/governmental distinction as a test for immunity is that by focusing incorrectly on the character rather than the effect of municipal conduct, the test elevates form over substance.

Before passage of the Local Government Antitrust Act of 1984, some commentators had suggested that the antitrust laws be fully applied to municipalities, except that treble damages be unavailable as a remedy for municipal violations.<sup>336</sup> It might have been that under the law existing at that time, a court could not have withheld categorically any of the relief specified by Congress as available for antitrust injuries.<sup>337</sup> But Congress

§ 11.40; see W. Prosser and W. Keaton, *supra* note 73, at 1053-54; *accord* 4 C. Sands & M. Libonati, *supra* note 275, at § 27.03, 27-10 ("It has long been apparent that the governmental versus proprietary distinction serves as an incantation for stating results rather than as a predictable and uniform guide to judicial decisions.").

333. See *supra* notes 257-58 and accompanying text.

334. See *supra* note 246 and accompanying text.

335. Professor Neenan has observed: "Local governments provide services that fall somewhere along a spectrum between [pure] Samuelsonian public goods and purely private goods. There is no Cuyahoga County Strategic Air Command, nor are there Little Rock Thirty-Eight Flavor Ice Cream Shoppes. Services provided by local governments have a mixed public-private nature. . . ." W. Neenan, *supra* note 248, at 57-58.

336. See, e.g., 1 P. Areeda & D. Turner, *supra* note 33, at ¶ 217(a)(1).

337. See *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 65 n.2 (1982) (Rehnquist, J., dissenting) ("It will take a considerable feat of judicial gymnastics to conclude that municipalities are not subject to treble damages to compensate any person 'injured in his business or property.'"); see also *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 442-43 (1978) (Blackmun, J., dissenting) ("Nor has the Court

has now resolved the dispute by explicitly shielding municipalities from damage liability,<sup>338</sup> and that was unquestionably a good idea. If the burden of anticompetitive conduct falls primarily on municipal residents, it would be a cruel joke indeed to force a municipality, and consequently its taxpayers, to pay damages, treble or otherwise, for engaging in conduct deemed objectionable because it injured those same taxpayers.

Elimination of the damage remedy, however, is not the ideal answer to the liability problem. With the remedy unavailable, no doubt fewer private parties will sue, but surely there will still be suits for injunctive relief. Thus, the costs of acquiring specific state authorization, of erroneous liability determinations, and of some litigation all remain, and will still produce no significant benefit.<sup>339</sup> In all, elimination of the damage remedy represents progress, but it is only a second best solution, inferior to the complete elimination of all possibility of antitrust liability.

Justice Rehnquist has drawn a distinction that, though it does not independently resolve the issue of liability, is so important to a proper analysis that it should be noted. He has stressed the difference between exemption and pre-emption.<sup>340</sup> Because the problem to be resolved concerns the conflicting pronouncements of different sovereigns, the question that should be asked with respect to actions of municipalities is whether they are pre-empted by the Sherman Act through the operation of the Supremacy Clause.<sup>341</sup> The issue is not exemption, because that pertains to the effect to be given to conflicting pronouncements of the same sovereign.<sup>342</sup> Thus the Sherman Act should never pre-empt municipal conduct, though at times the Commerce Clause should—a distinction embodied in the blanket immunity analysis.<sup>343</sup> However well-taken his observation, Justice Rehnquist does not explain *when* a municipality's conduct will be pre-empted,<sup>344</sup> and so his analysis is critically incomplete.

Finally, in the most important and best of the recent articles published on the topic of state action immunity, Professor Easterbrook has emphasized the relevance of competition among governmental units.<sup>345</sup> Easterbrook's analysis builds upon the "Tiebout Model,"<sup>346</sup> a theory offered by economist Charles M. Tiebout almost thirty years ago. In essence, Tiebout asserted that local government units offer packages of public goods

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come to grips with the plainly mandatory language of § 4 of the Clayton Act," which requires treble damages.)

338. Local Government Antitrust Act, enacted Oct. 24, 1984, 47 Antitrust & Trade Reg. Rep. (BNA) 753 (Oct. 25, 1984); see *id.* at 716-18, 737 (Oct. 18, 1984).

339. See *supra* notes 312-25 and accompanying text.

340. *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 61 (1982) (Rehnquist, J., dissenting).

341. *Id.*

342. *Id.*

343. See *supra* notes 301-09 and accompanying text.

344. See Robinson, *supra* note 15, at 137.

345. See Easterbrook, *supra* note 15, at 33-40.

346. Tiebout, *supra* note 264, at 416; see Robinson, *supra* note 15, at 149-52.

in competition with each other, and that each consumer-voter votes with his feet by choosing to reside in the community that offers the most desirable tax/expenditure combination.<sup>347</sup> Easterbrook argues that competition among government entities, both states and municipalities, restrains these entities from engaging in anticompetitive conduct.<sup>348</sup> Further, this competition increases as the amount of autonomy possessed by local governmental units increases.<sup>349</sup> By reducing autonomy, the current state action doctrine impedes competition and injures consumers.<sup>350</sup>

Easterbrook's observation is valuable, but I do not believe that competition among municipalities is alone sufficient to justify immunity. His theory does not consider the possibility of collusion among governmental units. Further, though competition among cities might constitute a long-run and substantially adequate solution to an assumed problem of restraints of trade imposed by a municipality, it would not appear to be a short-run or complete answer. People are not completely mobile, nor is there an infinite number of tax/expenditure options. Injury to consumer welfare is possible despite competition among governments.<sup>351</sup>

Easterbrook's point does demonstrate that the amount of harm any municipality can do is limited. This realization is crucial in order to acquire the perspective necessary to discern the optimal solution to the problem of municipal liability. It does not, however, resolve the problem. Thus, though we reach similar destinations, we travel different paths.

### CONCLUSION

This Article began with an analysis of the state action doctrine as it exists today. States are absolutely immune from antitrust attack; a private party participating in the state action will be immunized either if the related conduct of the state is deemed the proximate cause of the antitrust injury, or if the private actions are properly authorized and supervised by the state. A municipality is immune from antitrust attack only if its challenged actions are consistent with a clear state policy. Thus, it is not enough that the city is acting within the scope of general authority delegated by the state. A United States Court of Appeals has held that the active supervision requirement does not apply to municipalities, but the better view is that if it is applied to private parties, it should be applied to cities.

There are strong reasons why governments at whatever level should be

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347. Of course, the model is far more sophisticated than this statement suggests. For a lucid explanation of the theory and summary of some of the literature that has been devoted to it, see W. Neenan, *supra* note 248, at 59-67.

348. See Easterbrook, *supra* note 15, at 36-40.

349. See *id.*

350. *Id.* at 40.

351. See T. Brennan, *Municipal Antitrust Liability—An Economic Perspective* 15 n.21 (Economic Policy Office Discussion Paper, Antitrust Div., Dept. of Justice, EPO 83-9, May 26, 1983).

free from antitrust challenge. The antitrust laws are intended to promote consumer welfare by protecting competition. Cities, as well as other governmental entities, may act in any of four ways that affect competition: to foster competition, cure market defects, promote a value other than competition, or generate monopoly profits. If they act to foster competition, their actions directly complement the antitrust laws. If they act to cure market defects, they act specifically to undermine competition, but in a way that increases consumer welfare. If they act to promote a value other than efficiency, they may or may not incidentally sacrifice consumer welfare. If they act to generate monopoly profits, they intentionally sacrifice consumer welfare for the personal gain of city officials, the benefit of private parties, or the benefit of the public treasury through an inefficient form of taxation.

Whatever injury to consumer welfare a city might do as a by-product of promoting another value or as the result of conduct intended to impair efficiency, antitrust liability is an inappropriate response. People, acting through their government, have a right to sacrifice their welfare as consumers for any reason or for no reason at all, as long as they bear the costs. The antitrust laws should not be used to deny them that right. Further, antitrust courts cannot be expected to distinguish between municipal actions that injure consumer welfare and those that do not. If they attempt to do so, the risk of erroneous liability is high, and the consequent chilling effect on governmental action is significant. When cities do act to impose a burden of inefficiency on nonresidents, they should be restrained, but by available state and federal legal mandates other than the antitrust laws.

Currently, municipalities can acquire immunity derivatively from states, but this is not enough. Obtaining adequate state authorization is expensive because of both the direct costs imposed upon cities and states and the indirect costs engendered by the consequent reduction in local autonomy. Conversely, there is no marginal benefit in recognizing derivative rather than independent immunity.

Thus, for purposes of antitrust immunity, municipalities should be treated exactly like states: Municipalities should be immune from antitrust liability for their actions that proximately cause antitrust injury, and they should be able to immunize such actions of agencies and private parties. Congress has acted to shield municipalities from damages, but this does not go far enough. If the Supreme Court is unwilling to turn back from its present course and, for antitrust purposes, accord cities the same status it has bestowed upon states, Congress ought to point out the proper direction.

