

Comments

A MISAPPLICATION OF THE SHERMAN ACT TO RENT CONTROL: *FISHER v. CITY OF BERKELEY*

In Fisher v. City of Berkeley, the California Supreme Court and the United States Supreme Court upheld municipal rent control under the Sherman Act. This Comment points out several flaws in the Fisher analysis. Nonetheless, while acknowledging the economic problems associated with rent control, this Comment concludes that municipal rent control ordinances are clearly outside the scope of Sherman Act antitrust analysis.

INTRODUCTION

Rent control elicits intense negative reaction among economists. Economists generally agree that rent controls have virtually no redeeming features. While some tenants may benefit, the general public loses due to a misallocation of scarce resources. Landlords tend to devote fewer resources to construction of new rental housing and to maintenance of the already existing housing stock. The housing shortage is thereby worsened, and existing units may deteriorate. Despite such ill effects, tenants continue to vote for local rent control ordinances.¹ Landlords continue to fight what appears to be a losing rent control battle; over 200 United States cities are now governed by rent control ordinances.² Recently, a local ordinance was attacked

1. Are renters who vote for rent control simply shortsighted and ill-informed? I think there is a better explanation. Although rent control is bad for renters taken as a whole, it is good for the particular subgroup of tenants that votes on the measure and bad for the subgroup of tenants that does not vote. Rent control benefits those of the "tenant class" who are now tenants, at the expense of those that will become tenants later. These include nonresidents, those who are too young to establish independent households, and those who are currently homeowners and plan to become tenants.

Rabin, *The Revolution in Residential Landlord Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 555 (1984).

2. *Id.* at 527.

on the basis that the control unreasonably restrained trade under the Sherman Act.³

This Comment will discuss the economic problems associated with rent control. Further, the Comment will analyze the viability and desirability of a Sherman Act attack on local rent control ordinances. This Comment concludes that it is inappropriate to invalidate rent controls based on the Sherman Act. To give the reader a clear overview of the economic and antitrust implications of local rent controls, this Comment will discuss the following: the economics of rent control; municipal antitrust liability as it relates to rent control; an analysis of the recent *Fisher v. City of Berkeley*⁴ decision; and the applicability of the Sherman Act to nonproprietary⁵ local government functions such as the enforcement of rent controls.

THE ECONOMICS OF RENT CONTROL

The theoretical objections to rent control may be inferred from the basic supply and demand model of a competitive market.⁶ In a com-

3. See *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 693 P.2d 261, 209 Cal. Rptr. 682 (1984), *aff'd*, 106 S. Ct. 1045 (1986).

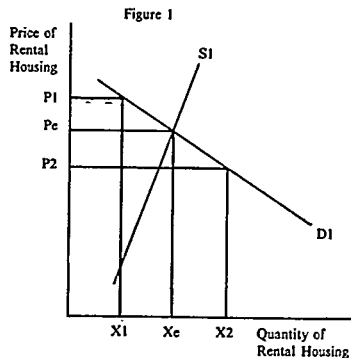
4. *Id.*

5. See *infra* note 29.

6. The assumptions underlying the model for pure competition are as follows: (a) each landlord's goal is to maximize profits; (b) all rental units are homogeneous; (c) no individual landlord or tenant can significantly affect the price of the rental; (d) there are no artificial price restraints; and (e) resources are perfectly mobile.

Some economists may modify the analysis to account for housing submarkets and housing which is not totally substitutable.

Professor Rabin claims, however, that the rental housing market is intensely competitive as more than half of all rentals are buildings of less than five units, ownership of such units is diffuse, few landlords demonstrate any significant degree of monopoly power, and landlords compete with ownership units and mobile homes as well as other rental units. See Rabin, *supra* note 1, at 578-79 (1984). But see Weitzman, *Economics and Rent Regulation: A Call For a New Perspective*, 13 N.Y.U. REV. L. & SOC. CHANGE 975 (1985) (arguing that conventional economic analysis of rent regulation is deficient).



The model (see Figure 1) assumes a relatively inelastic supply curve (S1) in the short

petitive market without price restraints, market forces determine the equilibrium price. At the equilibrium price there are no shortages or surpluses.⁷ On the other hand, where a price ceiling is engaged and set below the equilibrium price a shortage of rental units will result.

The supply of housing adjusts in the long run.⁸ If economic profits⁹ are made, existing and new landlords will have the incentive to provide more rental housing, either by construction or rehabilitation. The supply will increase until all excess profits are eliminated and each landlord is earning a normal rate of return.¹⁰ If a landlord is earning less than a normal rate of return, he will either cut costs and continue in the rental business, or he will leave the market. To cut costs, landlords may invest fewer or no resources into maintenance. The inevitable result is deterioration of existing rental units. Studies suggest that post-World War II rent controls may have had this effect on New York City's housing stock.¹¹ Landlords may also cut

run as landlords will be largely unresponsive to changes in price. The "short run" is an indefinite period of time during which at least some costs must be fixed. A landlord, for example, could not respond to changes in price by either disposing of or acquiring additional amounts of rental property. Either one of these will take time. *See generally* R. LEFTWICH & R. ECKERT, *THE PRICE SYSTEM AND RESOURCE ALLOCATION* (1982). The demand curve (D1) is downward sloping representing the inverse relationship between the price and quantity of rentals. Because rental housing is a normal good, renters will demand more as the price drops and less as the price increases. In effect, the demand curve represents the tenants' willingness to pay. The demand for a good is the various quantities of the good per unit of time that consumers will take at all possible alternative prices, other things being held constant. The quantity demanded is affected by the price of the good, consumer tastes and preferences, the number of consumers, consumer income, the price of related goods, the range or number of goods available, and consumer expectations regarding future prices of the good. *Id.* at 42-43.

7. If a landlord were to set price at P1, renters would only demand X1 and a surplus of rental units would exist equal to the distance between X1 and Xe. Because the market is competitive, no landlord can increase price and still attract tenants, as tenants will not be willing to pay P1. If a landlord were to charge P2, renters would demand X2 rentals and, because X2 is greater than the supply, a shortage of rental housing would exist equal to the distance between Xe and X2. *See* Figure 1.

8. The "long run" is the period when all costs are variable.

9. Economic profits are a pure surplus or excess of total receipts over all costs of production.

10. A normal rate of return is the rate of return necessary to attract funds into an industry. After subtracting from revenues the cost of business, the normal rate of return is what is left over to cover the opportunity cost of the owner's investment. If a business earns more than a normal rate of return, new businesses will be attracted into the industry. If less than a normal rate is earned, then businesses will exit the industry.

11. *See, e.g.,* C. RAPKIN, *THE PRIVATE RENTAL HOUSING MARKET IN NEW YORK CITY* (1966); G. STERNLIEB & J. HUGHES, *HOUSING AND ECONOMIC REALITY: NEW YORK CITY* (1976). A study of the total number of occupied rentals in New York City shows that rental units declined from 2,077,000 units in 1965 to 1,999,000 in 1975, a 3.8% loss. According to Sternlieb & Hughes, the situation is at best a stagnating one. Between 1960 and 1975 the overall rental housing supply was relatively stable, but there

costs by evading local property taxes, thereby decreasing the local tax base.

As the population grows, demand for rental housing grows. Rent controls tend to reduce the supply of rental housing in proportion to the population in several ways. Private investment is discouraged. Landlords may convert rent controlled units to condominiums to avoid controls.¹² Rent controlled units may even be abandoned. Short run rental price reductions give way to long run rental price increases.

Little empirical evidence exists as to the effects of rent control on the nation's distribution of income.¹³ It is clear, however, that rent controls have serious effects on the allocation of resources. Resources are diverted from their most highly valued uses. The most detrimental effect is that builders and lenders refuse to invest in new construction.¹⁴ Existing evidence indicates no beneficial long-run effects.

STATE ACTION IMMUNITY, PREEMPTION AND MUNICIPAL ANTITRUST LIABILITY

The Sherman Antitrust Act¹⁵ prohibits monopolization and unreasonable restraints¹⁶ of trade.¹⁷ States acting anticompetitively gener-

were significant shifts between controlled and noncontrolled units. There were 1,476,000 controlled units in 1960 and only 642,000 in 1975. Noncontrolled units shifted from 362,000 in 1960 to 1,174,000 in 1975.

12. See Rabin, *supra* note 1, at 535.

13. See Muth, *Redistribution of Income Through Regulation in Housing*, 32 EMORY L.J. 691 (1983) (rent controls probably have little or no impact on the distribution of income). *But see* Siegan, *Commentary on Redistribution of Income Through Regulation in Housing*, 32 EMORY L.J. 721, 722-23 (1983) (rent controls probably have an adverse impact on production significant enough to be reflected in the national distribution of income).

14. See Siegan, *supra* note 13, at 723 (As Chair of the Regulations Committee of the President's Commission on Housing, Professor Siegan stated that builders and lenders "virtually swore" to the Commission "that they would never invest in rental housing construction in a community subject to rent controls, even if those controls did not apply to newly constructed housing.").

15. 15 U.S.C. §§ 1-7 (1982).

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

17. Section 1 of the Sherman Act provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (1982).

Section 2 of the Sherman Act provides:

Every person who shall monopolize or attempts to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be

ally are immune from the federal antitrust laws under the state action, or *Parker*, doctrine.¹⁸ In *Parker v. Brown*,¹⁹ an agricultural marketing program enacted by the State of California was challenged under the Sherman Act. The program restricted competition among growers and maintained prices in the distribution of the growers' commodities to packers.²⁰ Based on principles of state sovereignty and federalism, *Parker* held that states are immune as "nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."²¹ Immunity did not extend to state or municipal participation in private agreements or combinations with others for the purpose of restraining trade.²²

Thirty-five years passed before the United States Supreme Court decided whether *Parker* immunity would automatically protect local governments from the antitrust laws. In *City of Lafayette v. Louisiana Power & Light Co.*,²³ two Louisiana cities that owned and operated electric utility systems pursuant to Louisiana law sued a private power company alleging antitrust violations. The private company then counterclaimed, claiming that it was the municipalities that were in violation of federal antitrust law. The Court held that "the *Parker* doctrine exempts only anticompetitive conduct engaged in as

deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2 (1982).

18. For extensive coverage of the evolution of the state action doctrine, see Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 HARV. L. REV. 435 (1981); Hovencamp & Mankerron, *Municipal Regulation and Federal Antitrust Policy*, 32 UCLA L. REV. 719 (1985); Vanderstar, *Liability of Municipalities Under the Antitrust Laws: Litigation Strategies*, 32 CATH. U.L. REV. 395 (1983).

For a concise and current history of the *Parker* doctrine and its relationship to the *Noerr-Pennington* doctrine, see Comment, *Municipal and Private Petitioner Immunity from Antitrust Liability: A Declaration of Independence to Preserve the Parker and Noerr-Pennington Doctrines*, 65 NEB. L. REV. 330 (1986); see also Wiley, *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713 (1986). See *infra* notes 22, 26, & 34.

19. 317 U.S. 341 (1943).

20. *Id.* at 346.

21. *Id.* at 350-51.

22. *Id.* at 351-52. For development of the *Parker* doctrine between 1975 and 1977, see Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (anticompetitive activities must be "compelled" by the state acting as a sovereign to be immune from antitrust scrutiny); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) (active state policy required in addition to compulsion for state action immunity); Bates v. State Bar, 433 U.S. 350 (1977) (antitrust immunity where restraint compelled by state, actively supervised by the state, and state policy is clearly articulated and affirmatively expressed); see *infra* notes 26, 34.

23. 435 U.S. 389, 412 (1978).

an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service.”²⁴ For *Parker* immunity, the Court required a clearly articulated and affirmatively expressed state policy.²⁵ The anticompetitive conduct, however, need only be contemplated by the state and not the subject of express state authorization.²⁶ A plurality of the Court based its conclusion on principles of federalism. The crux of the opinion was the statement that cities are not sovereign in the same way as states.²⁷

In a concurring opinion, Chief Justice Burger focused on the nature of the challenged activity and the status of the adversary parties.²⁸ The Burger opinion drew a distinction between cities involved in proprietary activities and those involved in traditional activities.²⁹ The concurrence implied that municipalities engaged in nonproprietary functions should be exempt from antitrust laws.

Justice Stewart, dissenting, would have found the cities immune. Justice Stewart argued that *Parker* immunity was premised on the distinction between governmental and private action. *Parker* did not distinguish between the actions of a state legislature and other levels of the government.³⁰

After *Lafayette*, it was believed that a “home rule” municipality, which enjoyed a broad grant of power from the state to act autonomously, would fall within the state action doctrine.³¹ However, in *Community Communications Corp. v. City of Boulder*,³² the Court

24. *Id.* at 413.

25. *Id.* at 410.

26. *Id.* at 415. For subsequent refinement of the *Parker* doctrine between 1978 and 1980, see *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978) (applying both the “clearly articulated and affirmatively expressed” and “active state supervision” tests); see also *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (explicitly adopted the two-prong “active state supervision” and “clearly articulated and affirmatively expressed” test for cases involving state regulation of private parties); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 105 S. Ct. 1721, 1727 (1985) (*Parker* immunity available to state regulated private parties if two-part *Midcal* test satisfied). See *supra* note 22; see *infra* note 34.

27. *Lafayette*, 435 U.S. at 412.

28. *Id.* at 418-20 (Burger, C.J., concurring).

29. The distinction between proprietary and nonproprietary municipal action is not always clear. If the city performs services for which fees are charged, then the service looks much like private enterprise and is usually considered proprietary. Other activities “are usually considered governmental in the sense that they involve the kind of power expected of government” W.P. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* § 131 (5th ed. 1984).

Perhaps a distinction could be made on the basis of whether the interests of the municipality coincide with the interests of the public at large.

30. *Id.* at 426-30 (Stewart, J., dissenting).

31. Municipalities empowered by the state to act autonomously in local matters are home rule municipalities. The grant of power may result from the state constitution or statute.

32. 455 U.S. 40 (1982).

held that home rule municipalities are not exempt from the antitrust laws.³³ “[T]he requirement of clear articulation of alternative expression is not satisfied when the State’s position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive.”³⁴ Hence, after *Boulder*, local governments engaged in anticompetitive and nonproprietary practices may be liable for an antitrust violation.³⁵

For cases filed before the passage of the Local Government Antitrust Act of 1984,³⁶ the Court’s threshold analysis could determine the extent of municipal liability, and the results vary. Application of preemption analysis to a local rent control ordinance will result in its *invalidation* if it conflicts with the Sherman Act.³⁷ However, threshold application of the state action immunity doctrine to the same ordinance may result in a *violation* of the Sherman Act with money damages as the remedy. A violation will result if the ordinance does not constitute action of the state itself or arise from a “clearly articulated and affirmatively expressed” state policy. Even when money damages are not sought,³⁸ the distinction may be important.

33. For more detail on the *Boulder* decision, see Note, *Home Rule and the Sherman Act After Boulder: Cities Between a Rock and a Hard Place*, 49 BROOKLYN L. REV. 259 (1983).

34. *Boulder*, 455 U.S. at 55 (emphasis in original). *Boulder* did not determine whether the two-prong *Midcal* test must be met by *cities* seeking protection under the *Parker* doctrine. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), resolved this issue. As to municipalities, the court held that the “active state supervision” requirement *did not* apply to municipal conduct but the conduct must be pursuant to clearly articulated and affirmatively expressed state policy. The conduct, however, need not be expressly mentioned so long as it is a “foreseeable result” of the “broad authority to regulate” conferred by the state. *Id.* at 42. The requirement in *Goldfarb* and *Cantor* that the state “compel” the anticompetitive conduct was rejected in *Town of Hallie* (although explicit compulsion language is evidence of state policy). *Id.* at 4. See *supra* notes 22, 26; see also Comment, *supra* note 18.

35. Although a conflict between municipal regulation and the Sherman Act could be alleged before *Boulder* pursuant to *Lafayette*, *Lafayette* involved proprietary conduct. Hence, nonproprietary conduct was not scrutinized in a real sense until *Boulder*.

36. Pub. L. No. 98-544, 98 Stat. 2750 (codified at 15 U.S.C. §§ 34-36 (1984)).

37. Preemption analysis is correctly applied when the federal antitrust laws conflict with state or local regulation. See *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982); see also *infra* note 39.

38. Section 4 of the Clayton Act provides for treble damages: “Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold damages by him sustained, and the cost of reasonable attorney’s fee.” 15 U.S.C. § 15 (Supp. V 1981).

After *Boulder*, the House Judiciary Committee identified the treble damages remedy as a major incentive underlying civil suits against local governments. In response, President Reagan signed the Local Government Antitrust Act of 1984. The Act prohibits the recovery of damages under the Clayton Act against local governments. Hence, any suit filed after Oct. 24, 1984 cannot claim money damages. 15 U.S.C. §§ 34-36.

A court might prefer one approach over another to reach a desired outcome. For example, if there is little or no support for a finding that municipal action was pursuant to the state action standard, but the court does not want to find a violation, it may apply preemption analysis.³⁹ Since *Boulder*, lawsuits have targeted various local government functions, such as utility regulation,⁴⁰ zoning,⁴¹ airport transportation,⁴² garbage collection,⁴³ sewer services,⁴⁴ and rent control.⁴⁵

*Fisher v. City of Berkeley*⁴⁶ is the first Supreme Court case to apply section 1 of the Sherman Act to local rent controls. While the *Fisher* appeal was pending, *Boulder* was decided. It was only then that the antitrust issue was raised by amicus curiae.⁴⁷ The California Supreme Court gave considerable attention to the antitrust issue and the United States Supreme Court granted certiorari solely to determine the antitrust issue. The impetus behind the *Fisher* antitrust issue was *Boulder*. Apparently, both courts wanted to dispel the belief

39. Judicial and scholarly debate exists as to the correct approach. See *Boulder*, 455 U.S. at 68-69 (Rehnquist, J., dissenting).

It is beyond this Comment's scope to consider in depth all of the philosophies and ramifications of applying preemption analysis. For scholarly debate see Cirace, *An Economic Analysis of the "State-Municipal Action" Antitrust Cases*, 61 TEX. L. REV. 481, 486-90 (1982); Note, *Preemption or Exemption — What is the Proper Test for Home Rule Antitrust Immunity?*: Community Communications Co. v. City of Boulder, 31 DE PAUL L. REV. 819 (1982); Conant, *The Supremacy Clause and State Economic Controls: The Antitrust Maze*, 10 HASTINGS CONST. L.Q. 255 (1983).

40. See *City of Los Angeles, Dep't of Water & Power v. Preferred Communications*, 106 S. Ct. 2034 (1986).

41. *Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982), cert. denied, 461 U.S. 945 (1983); *Mason City Center Assocs. v. City of Mason City*, 468 F. Supp. 737 (N.D. Iowa 1979).

42. See *generally Executive Town & Country Serv., Inc. v. City of Atlanta*, 789 F.2d 1523 (11th Cir. 1986); *Independent Taxicab Drivers' Employees v. Greater Houston Transp. Co.*, 760 F.2d 607 (5th Cir. 1985); *Lorrie's Travel & Tours v. SFO Airporter, Inc.*, 753 F.2d 790 (9th Cir. 1985).

43. See *Hybud Equip. Corp. v. City of Akron*, 742 F.2d 949 (6th Cir. 1984); *Central Iowa Refuse Sys., Inc. v. Des Moines Metro. Solid Waste Agency*, 715 F.2d 419 (8th Cir. 1983); *Hume v. City of St. Paul*, 671 F.2d 1134 (8th Cir. 1982); *Savage v. Waste Management, Inc.*, 623 F. Supp. 1505 (D.S.C. 1985); *Chambers Dev. Co. v. Municipality of Monroeville*, 617 F. Supp. 820 (D. Pa. 1986); *Ideal Waste Sys., Inc. v. Provo City Corp.*, 605 F. Supp. 100 (D. Utah 1985); *Jefferson Disposal Co., Inc. v. Parish of Jefferson*, 603 F. Supp. 1125 (D. La. 1985); *Seay Bros., Inc. v. City of Albuquerque*, 601 F. Supp. 1518 (D.N.M. 1985).

44. See, e.g., *Town of Hallie v. City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983), *aff'd*, 471 U.S. 34 (1985).

45. *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 693 P.2d 261, 209 Cal. Rptr. 682 (1984), *aff'd*, 106 S. Ct. 1045 (1986).

46. *Id.*

47. Jon Smock, representing the California Apartment Association, argued that the rent control ordinance did not fall within the state action exemption as California did not grant the City of Berkeley the express power to displace competition through rent control. He also argued that the rent ceilings constituted illegal price fixing under a per se standard of antitrust liability.

that antitrust damages would be readily available.⁴⁸

It is noteworthy that although the *Boulder* decision had initially prompted the *Fisher* antitrust issue,⁴⁹ the California Supreme Court held that the *Boulder* state action issue was not reached, and the United States Supreme Court agreed. The proper threshold inquiry, according to both courts, was whether the rent control ordinance conflicted with the Sherman Act such that it would be invalidated.

The choice of preemption analysis displayed a judicial unwillingness to find a violation of the Sherman Act. Using the state action immunity doctrine to exempt the ordinance from Sherman Act scrutiny would have been strained because the ordinance was not passed pursuant to a "clearly articulated and affirmatively expressed" state policy nor did it constitute municipal action of the state itself. A thorough examination of the *Fisher* case is necessary to obtain a full understanding of the implications for local governments engaging in rent controls.

THE *Fisher* DECISION

A group of landlords owning property in the City of Berkeley sought injunctive and declaratory relief against the enforcement of the "Rent Stabilization and Eviction for Good Cause Ordinance" (Ordinance).⁵⁰ The Ordinance affects 23,000 out of 27,000 Berkeley rental units. Government owned units are excluded from the controls. Section 10 of the Ordinance fixes base rent ceilings. Landlords may not exceed those ceilings except as permitted by the Rent Stabilization Board. The Board retains authority to adopt a general formula which allows adjustments for utility and tax increases. A landlord, dissatisfied with the general increase may petition the Board for individual adjustment. The Board may not deny a rent increase needed to allow a landlord a "fair return on investment."⁵¹

48. For commentary on the wave of fear that hit municipalities after *Boulder*, see Goodrich, *The Limits of Municipal Power*, 4 CAL. LAW., March 1986, at 26; Spiegel, *Local Governments and the Terror of Antitrust*, 69 A.B.A.J. 163 (1983). This issue is now moot due to the Local Government Antitrust Act of 1984. See *supra* note 38.

49. See *Fisher*, 37 Cal. 3d at 654 n.3, 693 P.2d at 271 n.3, 209 Cal. Rptr. at 692 n.3.

50. Berkeley, Cal., Ordinance 5261 (June 3, 1980).

51. See *Fisher*, 37 Cal. 3d at 653, 693 P.2d at 270, 209 Cal. Rptr. at 691 ("[T]he Board must consider many nonexclusive factors, including a landlord's individual costs, but in no event may it deny a rent increase needed to allow a landlord a 'fair return on investment.'").

The antitrust issue in *Fisher* revolved around the possible conflict between the Ordinance and the Sherman Act. The court used a preemption analysis based on the Constitution's supremacy clause.⁵² The immunity issue was never reached since no conflict was found. The court clarified that *Parker* was a preemption case characterized by *Boulder* and *Lafayette* as establishing a state action exemption from the antitrust laws, and that "[u]nlike *Parker*, both of these later cases were private antitrust suits for damages, not invalidation of a regulation."⁵³ Read literally, the court seemed to indicate that the test applied would depend on the remedy sought. It is more likely, however, that the court was alerting potential plaintiffs that damages would not be awarded in cases involving nonproprietary functions like rent control.⁵⁴ The *Fisher* opinion exhibited a great unwillingness to use the Sherman Act to invalidate rent controls. An examination of the conflict issue is important.

Section 1 of the Sherman Act states: "Every contract, combination . . . or conspiracy in restraint of trade or commerce among the several States . . . is . . . declared to be illegal."⁵⁵ Section 2 of the Sherman Act states: "Every person who shall monopolize, or attempt to monopolize or conspire with any other person or persons, to monopolize any part of trade or commerce among the several States . . . shall be deemed guilty of a felony."⁵⁶

The landlords claimed that the Ordinance mandating rental housing rates constituted illegal price fixing under section 1 of the Sherman Act. In order to find a facial conflict between the Ordinance and the Sherman Act, the court noted that the "plaintiff must establish as a matter of law (a) that two or more 'persons' acted in concert, (b) that the activities complained of affect interstate commerce, and (c) that the action constitutes an unreasonable restraint on commerce."⁵⁷ And the court could invalidate the Ordinance only when it "mandates or authorizes conduct that necessarily constitutes a violation of the antitrust law in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute."⁵⁸

The court focused on traditional antitrust liability rules in deter-

52. U.S. CONST. art. VI, cl. 2; see *supra* notes 37 & 39.

53. See *Fisher*, 37 Cal. 3d at 660 n.8, 693 P.2d at 275 n.8, 209 Cal. Rptr. at 696 n.8.

54. See *supra* note 38.

55. 15 U.S.C. § 1 (1982).

56. *Id.* § 2.

57. *Fisher*, 37 Cal. 3d at 662, 693 P.2d at 276, 209 Cal. Rptr. at 697.

58. *Id.* at 662, 693 P.2d at 277, 209 Cal. Rptr. at 698; *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982).

mining the existence of a conflict. Certain types of restraints are classified as illegal "per se." Any combination formed "for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity"⁵⁹ is illegal per se under the Sherman Act.⁶⁰ A "rule of reason" approach applies to the majority of nonprice restraints.⁶¹ These nonprice restraints are analyzed in light of their economic effects on market conditions.⁶²

If the landlords had voluntarily joined together to fix rental prices, there is no doubt that the combination would constitute a per se violation of section 1. The issue then is whether a local government should be deemed guilty of a per se violation because its rent control ordinance has the same effect as a clearly illegal private combination.⁶³

The California Supreme Court noted that the traditional antitrust rules regulated private business and were premised on the assumption that rational business competitors were profit maximizers. Municipal decisions to replace competition with rent control measures were based instead on public health, safety and welfare considerations.

The court concluded that per se⁶⁴ or rule of reason⁶⁵ analyses were inapplicable to municipalities. The court sought a test "sufficiently flexible to accommodate the interest of local government in promoting public health, safety and welfare programs or regulations" and,

59. *Fisher*, 37 Cal. 3d at 666, 693 P.2d at 279, 209 Cal. Rptr. at 700 (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940)).

60. There are generally five types of restraints that fall within the per se rule: (1) horizontal price fixing; (2) vertical price maintenance; (3) group boycotts; (4) tying arrangements; and (5) horizontal market division. Other restraints are analyzed under a rule of reason. *See generally* 1 E. KINTNER, FEDERAL ANTITRUST LAW §§ 8.2, 8.3 (1980).

61. *See id.*

62. *See Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918).

[T]he court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Id. at 238.

63. *See Fisher*, 37 Cal. 3d at 714, 693 P.2d at 316, 209 Cal. Rptr. at 736.

64. The two principal justifications for a per se rule are economic reliability and ease of administration. *Fisher*, Cal. 3d at 668-71, 693 P.2d at 281-84, 209 Cal. Rptr. at 702-04.

65. The rule of reason approach considers the effects of the conduct on competition. If applied, most municipal action would violate the law. *Id.* at 671-73, 693 P.2d at 284-85, 209 Cal. Rptr. at 705-06.

at the same time, one that was “not toothless.”⁶⁶ The court turned to the commerce clause of the United States Constitution⁶⁷ for guidance, concluding:

[I]f a municipal regulation has a proper local purpose, is rationally related to the municipality’s legitimate exercise of its police power, and operates in an even handed manner, it must be upheld against a claim that it conflicts with section 1 of the Sherman Act unless the plaintiff demonstrates that the city’s purposes could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies.⁶⁸

Based on *Birkenfeld v. City of Berkeley*,⁶⁹ the court determined that the regulation was clearly supported by a legitimate purpose and was rationally related to the municipality’s legitimate exercise of its police power. Finally, the plaintiffs failed to suggest alternatives that would have had a less intrusive impact.⁷⁰ Based on the new test, no conflict was found between section 1 and the Ordinance.

The section 2 monopolization offense requires: (1) possession of monopoly power in the relevant market, and (2) the wilful acquisition of that power.⁷¹ The court refused to apply this traditional test and found no section 2 conflict. The court did state, however, that the plaintiff would likely have a meritorious claim if the traditional test were applied.⁷²

Justice Lucas, in a strong dissent,⁷³ stated that the Ordinance was per se illegal because it fixed rents and the Constitution’s supremacy clause mandated that the Ordinance be declared a *nullity*. Justice Lucas argued that the Ordinance failed the court’s own test since less intrusive alternatives to rent control did exist. He pointed to rent subsidies, public housing projects, and negotiated purchase or condemnation.

More important, Justice Lucas stated that “[t]o allow a local government entity to excuse a price fixing scheme on the basis of asserted public health, safety or welfare considerations would enmesh the courts in an impossible task of weighing the ‘apples’ of social welfare with the ‘oranges’ of antitrust policy.”⁷⁴ For this reason he would have invalidated the ordinance.

The same reasoning justifies the opposite view. The application of Sherman Act principles to municipal rent controls is inappropriate

66. See *Fisher*, 37 Cal. 3d at 674, 693 P.2d at 285, 209 Cal. Rptr. at 706.

67. U.S. CONST. art. I, § 8, cl. 3.

68. *Fisher*, 37 Cal. 3d at 675, 693 P.2d at 286-87, 209 Cal. Rptr. at 707-08.

69. 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976).

70. *Fisher*, 37 Cal. 3d at 678, 693 P.2d at 289, 209 Cal. Rptr. at 709.

71. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

72. *Fisher*, 37 Cal. 3d at 678, 693 P.2d at 288, 209 Cal. Rptr. at 709.

73. *Id.* at 713-19, 693 P.2d at 315-18, 209 Cal. Rptr. at 735-39 (Lucas, J., dissenting).

74. *Id.* at 717, 693 P.2d at 317, 209 Cal. Rptr. at 738 (Lucas, J., dissenting) (quoting *Boulder*, 455 U.S. 40, 67 (Rehnquist, J., dissenting)).

since procompetitive antitrust policy and social welfare are not comparable. As Justice Rehnquist stated in *Boulder*, “[t]he Sherman Act should not be deemed to authorize federal courts to substitute their social and economic beliefs for the judgment of legislative bodies”⁷⁶

The United States Supreme Court Opinion

The United States Supreme Court affirmed the California decision, finding no actionable conflict. It was affirmed, however, on different grounds than the case below.⁷⁶ The traditional rules proved adequate to resolve the issue. A voluntary landlord combination to fix rents would clearly have been illegal per se. The court found instead that the municipality had *unilaterally* imposed the restraint on the landlords. “A restraint imposed unilaterally by government does not become concerted action within the meaning of the [Sherman Act] simply because it has a coercive effect upon parties who must obey the law.”⁷⁷

Not all restraints imposed upon private actors by local government would necessarily constitute unilateral action. Restraints which grant private actors “a degree of private regulatory power” would be considered “hybrid” and could be attacked under section 1. Such “hybrid” restraints differ from unilateral ones because the power to enforce the provision is given to the interested private parties.⁷⁸

In a concurring opinion, Justice Powell found the preemption inquiry unnecessarily complicated. Using the *Boulder* and *Lafayette* state action exemption analysis, he found California expressly delegated to the city of Berkeley regulatory power that foreseeably would lead to anticompetitive effects. On that basis, Justice Powell would have declared the Ordinance valid.⁷⁹

Justice Brennan, dissenting,⁸⁰ rejected the majority’s unilateral restraint theory. Justice Brennan, like Justice Lucas below, would have

75. *Boulder*, 455 U.S. 40, 68 (Rehnquist, J., dissenting) (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963)).

76. *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 693 P.2d 261, 209 Cal. Rptr. 682 (1984), *aff’d on other grounds*, 106 S. Ct. 1045 (1986).

77. *Fisher*, 106 S. Ct. at 1049-50. It is interesting to note the shift in attention to the “concerted action” issue. In the lower courts, *Fisher* was strictly a rent control case. The focus of the case at the California Supreme Court was the application of antitrust rules of liability. Once before the United States Supreme Court, the case was no longer about rent control or liability rules but, instead, it became a case about combination.

78. *Id.* at 1050.

79. *Id.* at 1052 (Powell, J., concurring).

80. *Id.* at 1053 (Brennan, J., dissenting).

found a per se section 1 conflict because the Ordinance mandated price-fixing. According to Justice Brennan, "concerted action . . . [is not] a prerequisite to a finding of preemption."⁸¹ Arguably, the "functional 'combination'" between the city and its officials and the landlords would satisfy the requirement.⁸² Justice Brennan interpreted the majority's decision as follows: a municipality's authority to protect the public welfare should not be constrained by the Sherman Act despite *Boulder* and *Lafayette*.⁸³

THE IMPLICATIONS OF *Fisher* FOR RENT CONTROL CHALLENGES PREMISED ON THE SHERMAN ACT

The California and United States Supreme Courts were unwilling to use the Sherman Act to invalidate the Berkeley Ordinance. On the surface, neither opinion appears to foreclose future Sherman Act attacks. However, closer analysis reveals otherwise.

Although the California Supreme Court sidestepped settled anti-trust precedent to avoid the invalidation, a plaintiff could presumably demonstrate "less intrusive alternatives" to invalidate a rent control. The United States Supreme Court has not sufficiently addressed the section 2 "monopolization" offense⁸⁴ which, applying traditional antitrust liability rules, appears to be viable.⁸⁵

81. *Id.* at 1054. In his dissent, Justice Brennan pointed to *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982), and to *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Justice Brennan stated that there was nothing in *Rice* that supported such a narrow view of preemption. "*Rice* held that a 'state statute is not preempted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect.'" *Id.* at 1054 n.1 (Brennan, J., dissenting). In *Rice*, a California statute effectively allowed liquor distillers to control the distribution of their products. Justice Brennan stated that because it involved a nonprice restraint, which is not illegal per se, the statute was not preempted. Justice Brennan pointed out that the Berkeley rent control ordinance is illegal per se because it is a price restraint.

In *Midcal*, a California statute effectively required a wine wholesaler to sell at prices set by producers. The Court held that the system was illegal price maintenance.

Justice Brennan also found *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), to be directly on point. Paraphrasing the Court in *Schwegmann*, Justice Brennan stated that "when [the city] compels [landlords] to follow a parallel price policy, it demands private conduct which the Sherman Act forbids." *Fisher*, 106 S. Ct. at 1050 (Brennan, J., dissenting).

82. *Id.* at 1055. Justice Brennan stated that the majority apparently interpreted the Sherman Act to forbid only privately arranged price fixing schemes as it flatly stated that "[t]he ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy." *Id.* at 1050. According to Justice Brennan, to the contrary, *Midcal* and *Schwegmann* held that statutes which coerced parties to obey the law violated section 1. It should be noted that these cases were characterized by the *Fisher* majority as "hybrid" cases because private parties were largely responsible for setting prices.

83. *Id.* at 1050. Justice Brennan disagrees with the majority's apparent decision because Congress has not enacted a broad antitrust exemption for municipalities.

84. Unlike a section 1 offense, a valid section 2 cause of action may involve unilateral conduct. See 3 P. AREEDA & D. TURNER, ANTITRUST LAW § 820 (1978).

85. *Fisher v. City of Berkeley*, 106 S. Ct. 1045 (1986). For a section 2 cause of

Neither decision is wholly satisfactory. The California Supreme Court recognized that the traditional rules were fashioned for private business. The analysis becomes blurred, however, when the court created its own standard while simultaneously claiming to be analyzing the Ordinance under Sherman Act principles. Assuming the Sherman Act were an appropriate vehicle for ordinance invalidation, the United States Supreme Court correctly used the traditional rules. Both courts reached the correct result in finding no Sherman Act violation.⁸⁶ The most persuasive legal analysis for these results emanates not from the majority's holdings, however, but from the *Fisher* dissent by California Supreme Court Justice Lucas, who declared it an impossible task to weigh the "apples" of social welfare with the "oranges" of antitrust policy. Sherman Act "conflicts" are inapplicable to rent control ordinances. Any ordinance or regulation is clearly a restraint, but these are not the restraints Congress contemplated when formulating the Sherman Act.

Regulation, by its very nature, is anticompetitive. Furthermore, antitrust law is guided by economic policy which assumes the actor is a profit maximizer. Profit maximization is inapposite to municipalities engaged in nonproprietary conduct and forecloses municipal antitrust action on that theory. An examination of the underlying intent of the Sherman Act, the goals of the act, and basic consumer welfare theory (upon which antitrust decisions should be made) will demonstrate the incompatibility of Sherman Act analysis to rent control issues.

THE SHERMAN ACT: AN INAPPROPRIATE DEVICE FOR INVALIDATING LOCAL RENT CONTROLS

The Sherman Act is an inappropriate device for invalidating local rent controls because cities typically act for the benefit of the general public.⁸⁷ Municipalities are not profit seekers making decisions based

action, a plaintiff would need to demonstrate that a city has a substantial market share. See *supra* note 71 and accompanying text.

86. The United States Supreme Court's result was based on the finding of "no conflict" between the ordinance and the Sherman Act. The Court, however, has created what is, in essence, an antitrust exemption for municipalities. There is law to the contrary which indicates that government coercion of private parties may violate section 1. See *supra* notes 82-83 and accompanying text.

87. The City of Berkeley could have selfish interests since the city does own some rentals in Berkeley which are exempt from the controls. Because 23,000 out of 27,000 rentals are controlled, it is likely, however, that the city would have little to gain as its market share is insubstantial. If the city is a market participant in the regulated market and if it has a substantial degree of market power in the relevant market, it could be

on a profit maximization goal. These types of Sherman Act lawsuits represent a waste of resources and may discourage local governments from making good decisions, although as Chief Justice Burger pointed out in *Lafayette*, a municipality competing directly with private entities for profit should be subject to the legal rules governing an ordinary dispute between competitors.⁸⁸ In *Lafayette*, the cities owned and operated utility companies which competed with a private power company. Traditional municipal regulation, including rent control, is clearly distinguishable. Neither Sherman Act goals nor underlying antitrust theories support antitrust scrutiny of local rent control ordinances.

Many legislative goals were considered when the Sherman Act was passed in 1890.⁸⁹ The courts have considered noneconomic values in the determination of antitrust cases.⁹⁰ Nevertheless, economic objectives have been paramount in the majority of cases.⁹¹ Judge Bork⁹² has concluded that the only legitimate goal of the antitrust laws is the maximization of consumer welfare. No other values should be considered.⁹³ Consumer welfare is maximized when society's economic resources are allocated so that consumer wants are satisfied.⁹⁴ The procompetitive⁹⁵ policies of the antitrust laws in-

presumed that the city is acting in its own interest, that is, as a profit maximizer. Absent any significant degree of power it should be assumed that the city is acting for the benefit of the general public.

88. See *Lafayette*, 435 U.S. at 418.

89. See generally 1 P. AREEDA & D. TURNER, *supra* note 84, §§ 103-113; 1 E. KINTNER, FEDERAL ANTITRUST LAW §§ 4.1-4.18 (1980).

90. See *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933) (discussing a producer, rather than consumer, welfare goal; that is, the court permitted price fixing among economically distressed coal producers enabling greater profits than were otherwise possible absent the cartel); *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918) (balancing of consumer welfare with the welfare of small businesses); *United States v. Aluminum Co. of America*, 148 F.2d 416, 428 (2d Cir. 1945) (Hand, J.) ("We have been speaking only of the economic reasons which forbid monopoly; but . . . there are others, based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results . . . [A]mong the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them.")

91. See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); see also 1 P. AREEDA & D. TURNER, *supra* note 84, § 104; Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. L. & ECON. 7 (1966).

92. Judge Bork is recognized for his achievements as a scholar, in government service, and on the bench, and has recently spoken on the confluence of economic rights and the Constitution. See, e.g., Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986).

93. See R. BORK, *THE ANTITRUST PARADOX* 51 (1978).

94. *Id.* at 90.

95. *Id.* at 51. Judge Bork defines competition as "any state of affairs in which consumer welfare cannot be increased by judicial decree." *Id.*

There may be situations where the market fails and cannot reach the optimal outcome. For example, an economic activity may create social costs. The typical example is pollution. The firm may not internalize all of its costs of production and an externality problem results which may only be corrected with the aid of legislation.

crease the wealth of the nation by driving resources to their most highly valued uses.⁹⁶

If consumer welfare is the only legitimate goal of the antitrust laws and consumer welfare is maximized through competitive forces, then cursory analysis indicates that a local rent control ordinance inherently conflicts with the procompetitive policies of the Sherman Act. Further inquiry exposes the fallacy of this conclusion. As Justice Lucas reasoned, comparing the competing values of competition and public welfare is like comparing *apples* with *oranges*. The sole goal of the Sherman Act, when addressing either private anticompetitive offenses or public offenses when the city acts as a profit maximizer, is consumer welfare.

CONCLUSION

Competition cannot always satisfy other social objectives. Direct legislation is a more effective method of promoting such goals.⁹⁷ When a municipality is acting in a nonproprietary role, courts should not become enmeshed in a tortured application of antitrust principles to social and public welfare values. Economic price theory must be employed to make rational antitrust decisions, but price theory does not consider values other than consumer welfare. Further, the primary assumption underlying the theory is that the actor is a profit maximizer.⁹⁸ Local governments acting in a nonproprietary manner are not acting as profit maximizers. Price theory, therefore, is virtually useless in these situations and there is no rational basis for an antitrust decision. Municipal rent control ordinances are clearly outside the scope of Sherman Act antitrust analysis.

ROBIN M. BERNHARDT

96. *Id.* at 91. Competition drives resources into their most efficient uses. Efficiency can be broken down into (1) allocative efficiency (the placement of resources in the community) and (2) productive efficiency (the effective use of resources by the firm). These two types of efficiency determine the nation's wealth or consumer welfare. Antitrust laws should improve allocative efficiency so much as to produce either no loss or a net gain in consumer welfare.

97. See 1 P. AREEDA & D. TURNER, *supra* note 84, § 105.

98. See R. BORK, *supra* note 93, at 116.

