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MUNICIPAL ANTITRUST: AN OVERVIEW

DONALD GENE KALFEN*

The Sherman Antitrust Act\(^1\) is generally viewed as prohibiting certain types of anticompetitive conduct that is engaged in by private parties. Notwithstanding this view, trial courts must now grapple with the problem of applying the substantive provisions of the Sherman Act to alleged anticompetitive conduct of municipalities. This situation is before the federal courts due to the Supreme Court's recent narrowing of the state action doctrine. The state action doctrine was first articulated in \(Parker v. Brown\),\(^2\) where the Court held that the federal antitrust laws are inapplicable to the states when they are acting pursuant to their sovereign capacity.\(^3\) However, the Supreme Court held in \(Community Communications Co., Inc. v. City of Boulder\),\(^4\) that a municipality, even though acting pursuant to its lawful authority, does not enjoy this blanket exemption afforded to the states.

Two recent lower court decisions have held, on the merits, that a

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Section 2 of the Sherman Act provides that "Every person who shall monopolize, or attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . ." Act of July 2, 1890, ch. 647, § 2, 26 Stat. 209 (codified as amended at 15 U.S.C. § 2 (1976 & Supp. III 1979)).

2. 317 U.S. 341 (1943).


city officials and a village violated the antitrust laws. All other lower court decisions have only considered in what circumstance municipal action is protected under the state action doctrine. This note will examine the significant problems the courts will encounter when presented with a municipal antitrust action. Part I of this note tracks the development of the state action doctrine. Part II states the Boulder holding and the significance it has on municipal antitrust cases. Part III examines the analytical problems of applying section 1 of the Sherman Act to municipal defendants and suggests an approach which would permit municipalities to defend their anticompetitive conduct. Finally, Part IV considers the likelihood of treble damages being assessed against a municipal defendant.

I. DEVELOPMENT OF THE STATE ACTION DOCTRINE

The state action doctrine finds its roots in federalism notions first expressed by the Court long before the Parker decision. However, it was not until Parker did the Court highlight the interaction between federalism principles and the Sherman Act in a state regulatory context. Parker’s progeny help to further define this interaction as well as the contours of the state action doctrine.

A. Parker v. Brown

In Parker v. Brown, the Supreme Court first articulated the state action doctrine. In Parker, a California state statute authorized state officials to establish marketing programs for agricultural commodities produced in the state. The defendants were the California Director of Agriculture and other public officials charged by the statute with the responsibility for administering a program for the marketing of the

5. Affiliated Capital Corp. v. City of Houston, 700 F.2d 226 (5th Cir. 1983), reh'g granted en banc, 714 F.2d 25 (1983).
7. The Sherman Act as originally passed provided for treble damages, ch. 647, § 7, 26 Stat. 209 (1890). This section was repealed and substantially adopted in § 4 of the Clayton Act which provides in full:
   Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover treble the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.
8. For a discussion of the Court’s view of state action prior to Parker, see Deak-Perera Hawaii, Inc. v. Department of Transp., 553 F. Supp. 976, 979 (D. Hawaii 1983).
1940 raisin crop. The express purpose of the program was to restrict competition among growers and maintain prices in the distribution of raisins to packers. The plaintiff, a producer and packer of raisins, alleged that this program prevented him from freely marketing his crop in interstate commerce.

The Court noted that a comparable program organized by private parties would violate the antitrust laws. Nevertheless, the Court held that the defendants had not violated the Sherman Act because the Act was not intended to restrain a state, its officers, or agents from activities directed by their legislature. The Court found nothing in the language of the Sherman Act or in its history which suggested that the Act could proscribe anticompetitive state action. Furthermore, the Court emphasized that in a "dual system of government" such as ours, that recognizes the sovereignty of states, an "unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."

Although the Parker decision recognized the inapplicability of the Sherman Act to state action and official action directed by the state, it raised many unanswered questions. The Court did not define what constitutes state action for Sherman Act purposes or what officials or institutions can be considered state actors. Particular problems arise concerning the application of the state action doctrine to activities of municipalities, state agencies, other state political subdivisions and even ostensibly private conduct. The decisions below have attempted to deal with these problems.

**B. Application of the State Action Doctrine**

The Parker holding was dormant for over thirty years before it was rediscovered in Goldfarb v. Virginia State Bar. In Goldfarb, the Court held that a local county bar association's activity of publishing

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10. 317 U.S. at 346.
11. Id. at 350. However, the Court stated that the state cannot give immunity to private parties who violate the Sherman Act by authorizing them to violate it or by declaring their action lawful. Id. at 351-52. (See, e.g., Northern Sec. Co. v. United States, 193 U.S. 197 (1904)). A state or its municipalities can become participants in an illegal private agreement with third parties to restrain trade. 317 U.S. at 351-52.
12. 317 U.S. at 351.
13. Id.
14. Id.
16. The county bar association in Goldfarb was a purely voluntary association of attorneys having no formal powers to enforce its list of recommended minimum prices for common legal services. 421 U.S. at 776.
a minimum fee schedule for lawyers, which was enforced by the Virginia State Bar, was not exempt from the Sherman Act. The Virginia State Bar is the administrative agency through which the Virginia Supreme Court regulates the practice of law in Virginia. The county bar association, which was a private entity, argued that the ethical codes and activities of the Virginia State Bar "prompted" it to issue fee schedules. Thus, the county bar association contends, its actions were state action for Sherman Act purposes and therefore shielded under the state action doctrine. The Court, unpersuaded, held that anticompetitive activity must be "compelled" by the state acting as sovereign and not just "prompted" by it in order for the activity to fall within the state action doctrine. What proved dispositive in Goldfarb was the fact that the Virginia Supreme Court's ethical codes did not direct or require the Virginia State Bar Association or the county bar association to supply and enforce minimum fee schedules. Hence, the county bar association's challenged activity could not have been state action.

In contrast to Goldfarb, the Court in Bates v. State Bar of Arizona upheld the Arizona Bar's disciplinary rules that restricted lawyer advertising. These rules were expressly adopted by the Arizona Supreme Court and enforced by it. This contrasts with Gold-

17. Id. at 791.
19. 421 U.S. at 790. The local county bar, to support its position, asserted that the Virginia State Bar had published reports condoning fee schedules and had issued two ethical opinions indicating that fee schedules could not be ignored. Id. at 776-77. The most recent opinion at the time stated that "evidence that an attorney habitually charges less than the suggested minimum fee schedule adopted by his local bar Association, raises a presumption that such a lawyer is guilty of misconduct. . . ." Id. at 778, quoting, Virginia State Bar Comm. on Legal Ethics, Opinion No. 170 (May 28, 1971). Notwithstanding, the Virginia Supreme Court, through its own rules, has never explicitly adopted the bar's ethical opinions concerning minimum fee schedules, but, it has admonished lawyers not "to be controlled" by fee schedules. 421 U.S. at 789-90 n.19.
20. Id. at 790.
21. Id. at 791.
22. Id.
24. As in Goldfarb, the Arizona State Bar was an administrative arm of the Arizona Supreme Court. The Arizona State Bar was created pursuant to Rule 27(a) of the Supreme Court of Arizona, ARIZ. REV. STAT. ANN. § 17A at 84-85 (1973).
25. The disciplinary rule provides in part:
(B) A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.
Disciplinary Rule 201(B) incorporated in Rule 29(a) of the Supreme Court of Arizona, ARIZ. REV. STAT. ANN. § 17A at 26 (Supp. 1976).
26. 433 U.S. at 361.
farb, where the Virginia Supreme Court did not adopt the state bar’s publishing and enforcement of the challenged minimum fee schedule.\textsuperscript{27} Thus, the restraints on certain attorney practices in \textit{Bates}, unlike in \textit{Goldfarb}, was imposed by the state's highest court wielding the power of the state. As a result, the \textit{Bates} Court found that the Arizona Bar's disciplinary rules reflected a state policy that was "clearly and affirmatively expressed and actively supervised" by the state.\textsuperscript{28} Hence, the disciplinary rules of the Arizona Bar fell within the state action doctrine and were therefore exempt from the antitrust laws.\textsuperscript{29}

The state's "active supervision" or lack of it over alleged anticompetitive conduct significantly influenced the outcome of two additional Supreme Court cases. In \textit{New Motor Vehicle Board of California v. Orrin W. Fox Co.},\textsuperscript{30} the Court found that a California program which required state approval of the location of new automobile dealerships to be protected under the state action doctrine. The program provided that the state would hold a hearing if an automobile franchisee protested the establishment or relocation of a competing dealership.\textsuperscript{31} In view of the state's active role, the Court held the program was not subject to the Sherman Act.\textsuperscript{32} However, in \textit{California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.},\textsuperscript{33} the Court held that a California statute\textsuperscript{34} that implemented a wine pricing system constituted illegal resale price maintenance\textsuperscript{35} in violation of the Sherman Act. Under the pricing system the state simply authorized price setting and enforced the prices established by private parties.\textsuperscript{36} The state did not establish prices, review the reasonableness of the prices, or engage in any

\begin{itemize}
  \item \textsuperscript{27} 421 U.S. at 791.
  \item \textsuperscript{28} 433 U.S. at 362.
  \item \textsuperscript{29} \textit{Id.} at 363.
  \item \textsuperscript{30} 439 U.S. 96 (1978).
  \item \textsuperscript{31} \textit{See} \textit{CAL. VEH. CODE ANN. §§ 3062, 3063 (West Supp. 1978).}
  \item \textsuperscript{32} 439 U.S. at 110-11.
  \item \textsuperscript{33} 445 U.S. 97 (1980).
  \item \textsuperscript{34} The statute provides in part:
    \begin{enumerate}
      \item Each wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier shall:
        \begin{enumerate}
          \item Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.
          \item Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers.
        \end{enumerate}
    \end{enumerate}
    \textit{CAL. BUS. & PROF. CODE ANN. § 24866 (West 1964).}
  \item \textsuperscript{35} Typically, a resale price maintenance agreement is an agreement between a manufacturer and retailer in which the latter cannot resell the manufacturer's product below a specified minimum price. \textit{See United States v. Parke, Davis & Co.}, 362 U.S. 29 (1960); \textit{United States v. Bausch & Lomb Optical Co.}, 321 U.S. 707 (1944).
  \item \textsuperscript{36} 445 U.S. at 105.
\end{itemize}
"pointed reexamination" of the program. The Court therefore concluded that although the program was a "clearly articulated and affirmatively expressed state policy," it violated the Sherman Act because it was not "actively supervised" by the state itself.

City of Lafayette v. Louisiana Power and Light Co. was the first antitrust case which involved municipal defendants to reach the Supreme Court. In Lafayette, the municipal defendants were authorized by state law to own and operate electric utility systems both within and beyond their city limits. The municipalities competed in areas beyond their city limits with Louisiana Power and Light Co. (LP&L), a privately owned electric utility. The municipalities filed suit against LP&L alleging that LP&L committed various antitrust offenses which injured the municipalities in the operation of their electric utility systems. LP&L counterclaimed, seeking damages and injunctive relief for various antitrust offenses which the municipalities had allegedly committed.

The municipalities moved to dismiss the counterclaim on the ground that, as cities and political subdivisions of the State of Louisiana, the state action doctrine of Parker v. Brown rendered federal antitrust laws inapplicable to them. The Court, in a plurality decision, held that municipalities, simply by their status as such, are not protected by the Parker doctrine. The Court explained that the Parker doctrine

37. Id. at 106.
38. Id. at 105.
40. For detailed treatments regarding municipalities, see generally J. Dillon, Law of Municipal Corporations (5th ed. 1911); E. McQuillan, Municipal Corporations (3d ed. 1977).
42. 435 U.S. at 392.
43. The complaint also named as defendants Middle-South Utilities, Inc., a Florida corporation of which LP&L is a subsidiary, Central Louisiana Electric Co., Inc. and Gulf States Utilities. The latter two companies are Louisiana and Texas corporations, respectively, and are engaged in the generation, transmission, and sale of electric power at wholesale and retail in Louisiana. 435 U.S. at 391 n.3.
44. The counterclaim, as amended, alleged a conspiracy between the City of Lafayette and other municipalities and a nonparty electric cooperative to engage in sham litigation against LP&L to prevent the financing with the purpose and effect of delaying or preventing the construction of a nuclear generating plant; eliminate competition within the municipal boundaries by use of covenants in their respective debentures; exclude competition in certain markets by using long-term supply agreements; and displace LP&L in certain areas by requiring customers of LP&L to purchase electricity from defendants as a condition of continued water and gas service.
45. 435 U.S. at 392 n.6.
46. Id. at 408-11 (Brennan, J., Marshall, J., Powell, J., and Stevens, J., plurality).
exempts only "anticompetitive conduct engaged in as an act of government by the state as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." The Court noted that "pursuant to state policy" does not mean that a political subdivision must be able to point to a specific, detailed legislative authorization before it properly may assert a Parkera defense to an antitrust suit. Rather, an adequate state mandate for anticompetitive activities of municipalities exists when it is found "from the authority given [it] to operate in a particular area, that the legislature contemplated the kind of [anticompetitive conduct] complained of." 

Chief Justice Burger, in an opinion concurring in part and in result, considered the issue before the Court to be whether the Sherman Act reaches the proprietary enterprises of municipalities. In determining the applicability of the state action doctrine in such circum-

47. 435 U.S. at 413. The Court did not state whether a municipality's or other political subdivision's anticompetitive conduct must be "actively supervised" by the state. The Supreme Court cases which have mandated active state supervision dealt with private party defendants seeking protection under the state action doctrine. See, e.g., 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). In such circumstances, the Court probably reasoned that greater state involvement in the anticompetitive conduct is necessary than mere state authorization of the private party's conduct. Presumably, this would insure that the private party follows the articulated and affirmatively expressed state policy that was involved.


48. 435 U.S. at 415.

49. Id., quoting, City of Lafayette, La. v. Louisiana Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976).

50. 435 U.S. at 422. A municipality is acting in a proprietary manner when it "performs [services] which might as well be provided by a private corporation, and particularly when it collects revenue from it." W. PROSSER, LAW OF TORTS § 131 (4th ed. 1971). The Chief Justice stated that he used the term "proprietary" to highlight the competitive relationship between the parties in Lafayette. 435 U.S. at 422 n.3. In fact, the Chief Justice termed this case to be "an ordinary dispute among competitors in the same market." Id. at 419.
stances, the Chief Justice agreed with the plurality that "the threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign."51 However, on remand, the Chief Justice would require the district court to supplement the plurality's inquiry by determining "whether the implied exemption from federal law was necessary to make the (state regulation) work."52 Implicit in the Chief Justice's opinion is the apparent blanket immunity from the antitrust laws he would give to nonproprietary municipal action.

In sum, the above line of cases delineate the parameters of "state action" for Sherman Act purposes. In all instances when a state is acting in its sovereign capacity, it is absolutely immune from the antitrust laws. In contrast, municipalities and other state political subdivisions do not enjoy this blanket immunity from the antitrust laws. They must show that their anticompetitive conduct was made pursuant to a "state policy to displace competition with regulation or monopoly service."53

52. 435 U.S. at 426. The Chief Justice also would require a strong showing on the part of the municipal defendant that the state intended it to displace competition with regulation. Justice Burger disagreed with the plurality that the state only need "contemplate" the anticompetitive activities undertaken by a municipality. Rather, the Chief Justice would require the state to compel the anticompetitive conduct of the municipalities. Nonetheless, the Chief Justice joined the judgment of the Court and the directions of the remand "because they (represented) at a minimum" what should be demanded of the defendants. Id. at 425 n.6.
It is not clear whether a municipality's anticompetitive conduct must also be actively supervised by the state. A private party's anticompetitive conduct will be exempt from the Sherman Act under the state action doctrine if it satisfies the above criteria, as well as showing that its conduct was compelled and actively supervised by the state.

II. COMMUNITY COMMUNICATIONS CO., INC. v. CITY OF BOULDER DECISION

Four years after the Lafayette decision, the Supreme Court confronted another municipal antitrust case in Community Communications Co., Inc. v. City of Boulder. Boulder presented the Court with two novel facts in the state action line of cases. First, the municipal defendant (City of Boulder) was a "home rule" municipality acting pursuant to its delegated powers. Secondly, the municipality's challenged conduct did not involve a proprietary function. This section will examine the Boulder holding and discuss its significance.

A. Factual Background

In Boulder, the City of Boulder was a home rule municipality under the Constitution of the State of Colorado. The city is thus entitled to exercise "the full right of self-government in both local and mu-

Mall, Inc., 103 S. Ct. 2122 (1983) (municipality's attempt to thwart normal zoning procedures not protected under the state action doctrine); Mason City Center Assocs. v. City of Mason City, 485 F. Supp. 737, 742 (N.D. Iowa 1979), aff'd in part and rev'd in part, 671 F.2d 1146 (8th Cir. 1981) (denial of rezoning request).

54. See supra note 47 and accompanying text.

55. The Supreme Court and the lower courts have not been consistent in applying the "compulsion" criterion. The Supreme Court in Midcal did not explicitly mention "compulsion" though the defendants were private parties. California Retail Liquor Ass'n v. Midcal Aluminum, 445 U.S. 97 (1980). Nonetheless, the Fifth Circuit in United States v. Southern Motor Carrier Rate Conferences, 672 F.2d 469, 472 (5th Cir. 1982), interpreted Midcal as still requiring state compulsion in order for a private party to invoke the state action doctrine. See generally Note, Parker v. Brown Revisited: The State Action Doctrine after Goldfarb, Cantor, and Bates, 77 COLUM. L. REV. 898, 916 (1977). But see Areeda, supra note 3. Areeda believes that the courts have not "applied the compulsion language literally." Rather, the "lower courts employ the rhetoric of compulsion . . . but immunize private action that is essential to a state regulatory scheme." Id. at 438 n.8.


57. The facts of the case discussed in the text can be found at 455 U.S. at 43-48.

58. For a discussion on the nature and characteristics of "home rule" municipalities, see generally C. ANTEAUK, 1 MUNICIPAL CORPORATION LAW § 3.00 (1982); E.MCQUILLIN, supra note 40, §§ 3.09, 4.62.

59. The Colorado Home Rule Amendment provides in part:

The people of any city or town of this state, having a population of two thousand inhabitants . . . are hereby vested with and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be organic law and extend to all its local and municipal matters.

COLO. CONST. art. XX § 6.
municipal matters" and with respect to such matters the City Charter and ordinances supersede the laws of the state. In 1964 the Boulder City Council enacted an ordinance granting to Colorado Televerts, Inc. a 20 year, revocable, nonexclusive permit to conduct a cable television (CATV) business within the city limits. This permit was assigned to Community Communications Co., Inc. (CCC) in 1966.

In May 1979, CCC informed Boulder that it planned to expand its business into other areas of the city. In July 1979, Boulder Communication Company (BCC) also informed the city council of its interest in obtaining a permit to provide competing cable television services throughout the city. The city council in response to these developments announced a three month moratorium that prohibited CCC from expanding its business into other areas of the city while the council drafted a model cable television ordinance. The city council claimed that CCC's continued expansion during the drafting of the model ordinance would discourage potential competitors from entering the market.

In response to the three month building moratorium imposed on it, CCC filed suit against Boulder seeking a preliminary injunction to prevent the moratorium from becoming effective. CCC alleged that the moratorium was in violation of section 1 of the Sherman Act. Boulder responded that its moratorium ordinance did not violate the Sherman Act because it was protected under the state action doctrine.

The district court found that the regulation of CATV was beyond Boulder's home rule powers. The court further held that even if the moratorium ordinance was within Boulder's authority, the state action doctrine was "wholly inapplicable" to Boulder. Therefore, Boulder was subject to the Sherman Act and the court granted CCC its motion

60. 445 U.S. at 44.
61. The preamble to the city's model cable television ordinance reads in part:
[T]he City Council intends to adopt a model cable television permit ordinance, solicit applications from interested cable television companies, evaluate such applications, and determine whether or not to grant additional permits . . . [within] 3 months, and finds that an extension of service by [CCC] would result in a disruption of this application and evaluation process; and . . . the City Council finds that placing temporary geographical limitations upon the operations of [CCC] would not impair the present services offered by [it] to City of Boulder residents, and would not impair [its] ability . . . to improve those services within the area presently served by it.

BOULDER, Colo., ORDINANCE No. 4473 (1979).
62. CCC alleged that a conspiracy to restrain trade existed between the City of Boulder and BCC. 455 U.S. at 47 n.9.
64. Id. at 1039.
for a preliminary injunction.\textsuperscript{65}

On appeal, a divided panel of the Tenth Circuit reversed the district court's decision. The majority disagreed with the district court that the regulation of CATV was beyond Boulder's home rule powers.\textsuperscript{66} The court also distinguished \textit{Boulder} from \textit{Lafayette}, noting that \textit{Lafayette} dealt with municipalities engaged in proprietary functions, while in \textit{Boulder} no proprietary interests of the City of Boulder were implicated.\textsuperscript{67} As such, the court found Boulder's regulation to be an adequate expression of governmental policy concerning an active supervision of the CATV industry to satisfy the criteria for the application of the state action doctrine.\textsuperscript{68}

\textbf{B. Supreme Court Holding}

The Supreme Court reversed the appellate court decision and agreed with the district court that the City of Boulder was subject to the Sherman Act.

The Supreme Court held that Boulder's moratorium ordinance cannot be exempt from antitrust scrutiny "unless it constitutes the action of the State of Colorado itself in its sovereign capacity" or "unless it constitutes municipal action in furtherance or implementation of a clearly articulated and affirmatively expressed state policy."\textsuperscript{69} The City of Boulder argued that its home rule powers, in essence, gave it sovereign power over local and municipal matters.\textsuperscript{70} Therefore, any action by the city made pursuant to its home rule powers—i.e., the moratorium ordinance—was state action and hence shielded from the antitrust laws.\textsuperscript{71} The Court rejected this contention that the "Home Rule" statute granted municipalities sovereign powers, noting that only the state and federal government are sovereigns, not municipalities.\textsuperscript{72} Alternatively, Boulder contended that the requirement of "clear articulation and affirmative expression" was fulfilled by the Colorado Home Rule Amendment's "guarantee of local autonomy."\textsuperscript{73} This amendment, Boulder argued, indicated that Colorado, by granting the city power to

\textsuperscript{65. \textit{Id.}}
\textsuperscript{66. \textit{Community Communications Co. v. City of Boulder}, 630 F.2d 704, 707 (10th Cir. 1980).}
\textsuperscript{67. \textit{Id.} at 708.}
\textsuperscript{68. \textit{Id.}}
\textsuperscript{69. 455 U.S. at 52.}
\textsuperscript{70. \textit{Id.}}
\textsuperscript{71. \textit{Id.}}
\textsuperscript{72. \textit{Id.} at 53.}
\textsuperscript{73. \textit{Id.}}
enact the challenged ordinance, contemplated its enactment.\textsuperscript{74} The Court also rejected this argument, stating that Colorado was merely neutral regarding the challenged conduct and that mere neutrality was not "a clear articulation and affirmative expression of state policy."\textsuperscript{75} Thus, the Court rejected the proposition that a general grant of power to a municipality to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances.\textsuperscript{76}

The three dissenting justices\textsuperscript{77} in \textit{Boulder} considered the majority's interpretation of \textit{Parker} and the state action doctrine seriously flawed.\textsuperscript{78} The dissent argued that the majority erred in identifying the issue to be whether the state action doctrine exempts\textsuperscript{79} Boulder's challenged conduct from the Sherman Act.\textsuperscript{80} The dissent contended that the state action doctrine does not create an exemption from the Sherman Act, but rather implicates federal preemption principles.\textsuperscript{81} Federal preemption analysis is implicated when courts examine "the interplay between the enactments of two different sovereigns—one federal and the other state."\textsuperscript{82} If the court finds that a state or local law directly conflicts with federal law, the state law is preempted by the federal law through the operation of the supremacy clause.\textsuperscript{83} Where preemption is found, the state law is rendered void. The dissenters, contrasting preemption with exemption, noted that exemption involves only the "interplay between the enactments of a single sovereign" rather than between two sovereigns.\textsuperscript{84} The state action doctrine, the dissent stated, involved the "enactment of two different sovereigns"—specifically, state and local regulations which purportedly conflict with federal antitrust laws. Thus, the dissent would use a preemption analysis in \textit{Boulder} and would frame the issue as "whether statutes, ordinances, and regulations enacted [by the local government] are

\textsuperscript{74} Id.
\textsuperscript{75} Id. at 56.
\textsuperscript{76} Id.
\textsuperscript{77} Burger, C.J., Rehnquist, J., O'Connor, J., dissenting.
\textsuperscript{78} 455 U.S. at 60.
\textsuperscript{79} It is not clear that the majority considered the state action doctrine to be an exemption. For articles that discuss the nature of the state action doctrine, see supra note 3 and accompanying text.
\textsuperscript{80} 455 U.S. at 61.
\textsuperscript{83} U.S. \textit{Const.} art. VI. A state law is also preempted under the supremacy clause, where the law regulates a field that the federal government has intended to occupy exclusively so as to foreclose any state regulation. See generally, G. \textit{Gunther}, \textit{Constitutional Law} ch. 5, (10th ed. 1980).
\textsuperscript{84} 455 U.S. at 61.
preempted by the Sherman Act under the operation of the Supremacy Clause."85

Under the dissent's analysis, the validity of a municipal ordinance would be tested under the state action doctrine, but its consequences would be different from the majority's. A challenged ordinance or statute would be found valid if it were enacted pursuant to an affirmative policy on the part of the municipality to restrain competition and that the municipality supervise and implement this policy.86 If the ordinance did not meet this test, it would be preempted by the Sherman Act and, as a result, rendered void.87 Therefore, municipalities would avoid any antitrust liability under the preemption analysis.

C. Significance of the Boulder Decision

The Boulder decision is important because a majority of the Court held for the first time that "home rule" municipalities are not immune from the Sherman Act, though the municipality may be acting pursuant to its delegated authority from the state. Justice Blackmun, who dissented in Lafayette, provided the key swing vote in Boulder. In Lafayette, Justice Blackmun agreed with Justice Stewart's dissent that municipal action—proprietary or nonproprietary—generally is immune from the antitrust laws.88 However, Justice Blackmun would deny such immunity if a municipality was found to have been acting in concert with private parties to unlawfully restrain trade.89 Therefore, Justice Blackmun's vote in Boulder was completely consonant with his dissent in Lafayette because of the alleged conspiracy to restrain trade between the City of Boulder and BCC, a private corporation.

As a result of Boulder, municipal decision-makers must be wary of enacting "anticompetitive" ordinances that favor one private competitor over another. Due to the liberal pleading requirements in antitrust actions, the "injured" competitor could easily bring an action by pleading that the ordinance is evidence of a conspiracy between his competitor and the municipality to restrain trade. Although the likeli-

85. Id.
86. Id. at 68. The dissent significantly alters the test developed under the state action doctrine. All previous tests required the state or its officials to be acting in their sovereign capacity for the state action doctrine to be implicated. The dissent apparently does not require the state to be acting in its sovereign capacity but only that a municipality be acting in an authorized manner for the state action doctrine to be implicated.
87. Id.
88. 435 U.S. at 442 (dissent).
89. Id.
hood of success on the merits may be doubtful, such cases, even in the preliminary stages, will consume valuable time and resources of the municipal defendant.

The Boulder decision also takes Lafayette one step farther. In Lafayette, the municipalities were clearly engaged in proprietary activity, while in Boulder the municipality was engaged in governmental conduct (enactment of the moratorium ordinance). Boulder thus broadens the reach of the antitrust laws to encompass a larger scope of municipal activity than under Lafayette.

The courts will now be confronted with the dual problems of applying the substantive provisions of the Sherman Act to claimed municipal anticompetitive conduct, as well as the possibility of assessing treble damages against a municipal violator. These problems will be examined in the next two sections.

III. Application of Section 1 of the Sherman Act in Municipal Antitrust Cases

The Supreme Court has yet to decide a municipal antitrust case on the merits. Boulder has been remanded to the trial court for further proceedings consistent with the Supreme Court's holding in that case. Thus, the lower courts will be faced with the task of applying the substantive provisions of the Sherman Act to the claimed anticompetitive conduct of a municipality. Past precedent gives little guidance as to how the courts will deal with the unique problems that may arise in a municipal antitrust context or how the courts may modify the traditional antitrust analysis used with private defendants. Regardless of how the courts choose to analyze a municipality's alleged anticompetitive conduct, section 1 of the Sherman Act makes clear that to prevail, a plaintiff must prove that defendant's conduct affected interstate commerce, or was pursuant to a combination, contract, or conspiracy and restrained trade.91 This section will discuss the analytical problems of applying these elements of section 1 in the context of a municipal antitrust case.92

92. In private antitrust suits, damages comprise an important element of a Sherman Act § 1 action. Nonetheless, a discussion of proving up damages by a private plaintiff in a municipal antitrust suit is being omitted. Damages will be discussed in the next section but only with respect to the likelihood of the court's assessing treble damages against a municipality. Additionally, there will be no discussion concerning the availability of equitable remedies to plaintiffs in municipal antitrust cases.
A. Interstate Commerce Requirement

The Sherman Act was enacted pursuant to the authority granted to Congress by the commerce clause. Therefore, the jurisdictional reach of the Sherman Act is equal to Congress' constitutional powers to regulate commerce. Jurisdiction under the Act has expanded along with the expanding notion of Congress' power under the commerce clause. Due to this expansion, the Sherman Act covers not only activities in interstate commerce, but also intrastate activities that substantially affect interstate commerce. Although there have been cases holding that a particular intrastate activity does not substantially affect commerce, the reach of the "substantially affects" doctrine into intrastate activity is broad. For example, in Hospital Building Co. v. Trustees of Rex Hospital, the operator of a small hospital in Raleigh, North Carolina, brought suit against Rex Hospital, alleging that Rex had conspired with others to block the proposed expansion of plaintiff's hospital and to monopolize hospital services in Raleigh. The Supreme Court held that defendant's activity substantially affected interstate commerce because it reduced plaintiff's out of state medical purchases, insurance revenues, financing for expansion, and payment of management fees to

96. E.g., McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 242 (1980). The interstate commerce requirement can be satisfied by a showing that defendant's activities were in the "flow of interstate commerce." For example, in Goldfarb, real estate purchasers challenged the Virginia State Bar's minimum fee schedule for real estate title searches. The Supreme Court held that interstate commerce was involved because title examinations by attorneys were an "integral" and "inseparable" part of interstate real estate financing. 421 U.S. at 784-85.
97. McLain v. Real Estate Bd. of New Orleans, 444 U.S. at 241; Hospital Bldg. Co. v. Trustees of Rex Hospital, 425 U.S 738, 743 (1976); Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n, 666 F.2d 1130, 1144 (8th Cir. 1981); Palmer v. Roosevelt Lake Log Owners Ass'n, Inc., 651 F.2d 1129, 1291 (9th Cir. 1981).
98. United States v. Yellow Cab Co., 332 U.S. 218 (1947) (the transportation by local taxicabs of interstate train passengers between their homes and the railroad station was held not to be in interstate commerce); Cardio-Medical Assocs. v. Crozer-Chester Medical Center, 536 F. Supp. 1065, 1084 (E.D. Pa. 1982) (the ordinary denial of physician's hospital staff privilege does not substantially affect interstate commerce).
99. For "substantially affects" cases, see, e.g., McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232 (1980) (alleged price fixing conspiracy among local real estate brokers was held to affect interstate commerce); Burke v. Ford, 389 U.S. 320 (1967) (statewide wholesaler's territorial division was found to inevitably affect interstate commerce); James R. Snyder Co. v. Associated Gen. Contractors, 677 F.2d 1111 (6th Cir. 1982), cert. denied, 103 S. Ct. 374 (1983) (conspiracy to require conformance with fixed rate of labor of local independent masonry contractors in Detroit was held to affect interstate commerce).
100. 425 U.S. 738 (1976).
plaintiff's out of state parent corporation.\textsuperscript{101}

A municipality's power and authority are generally limited to its local jurisdiction, thus most municipal action probably will be intra-state in character. However, before determining if a municipality's conduct substantially affects interstate commerce, the court must decide what conduct must be scrutinized in order to determine if jurisdiction exists. Currently, the courts are split between scrutinizing defendant's challenged conduct's effect on interstate commerce\textsuperscript{102} or the defendant's general business activity's\textsuperscript{103} effect on interstate commerce. Under the latter and more liberal approach, few municipal defendants would be able to assert that jurisdiction does not exist. It is difficult to imagine a municipality that does not engage in any activity that substantially affects interstate commerce. However, even under the former and more restrictive approach, municipal conduct can easily be found to affect interstate commerce. For example, municipal ordinances that have restricted the number of taxis servicing a regional airport,\textsuperscript{104} the right of an individual to sell alcohol in a municipality,\textsuperscript{105} and the area where refuse could be dumped\textsuperscript{106} have all been found to substantially affect interstate commerce.

\textbf{B. Conspiracy Requirement}

Section 1 of the Sherman Act forbids "[e]very contract, combination . . . or conspiracy in restraint of trade or commerce."\textsuperscript{107} Implicit

\textsuperscript{101} \textit{Id.} at 744. Plaintiff purchased 80\% of its medicines and supplies from out of state vendors. In 1972, plaintiff spent $112,000 on such items. \textit{Id.} at 741.


\textsuperscript{104} Woolen v. Surtan Taxicabs, Inc., 461 F. Supp. 1025 (N.D. Tex. 1978) (municipality's adoption of an ordinance to restrict the number of taxi companies permitted to service a large regional airport was found to affect interstate commerce because 90\% of the fares were from out of state).

\textsuperscript{105} Whitworth v. Perkins, 559 F.2d 378 (5th Cir. 1977) (municipality refused to grant plaintiff a zoning permit to sell alcohol within the municipality).


in section 1 is the requirement that two or more people agree to restrain trade. However, certain unilateral business practices do come within the purview of section 1. This section will generally discuss the application of the conspiracy requirement in a municipal antitrust context and what, if any, unilateral activities on the part of municipalities fall within section 1.

The conspiracy requirement of section 1 of the Sherman Act will make it difficult for plaintiffs to prevail against a municipal defendant if they simply assert that some unilateral municipal conduct was anticompetitive. As previously noted, one element of a section 1 violation is the requirement that two or more parties have agreed to restrain trade. This has meant that a private corporation generally cannot combine with itself, its officers, or its employees to restrain trade. Therefore, a municipality should not be able to combine with itself or its employees to restrain trade. The conspiracy requirement also precludes the possibility of a conspiracy between unincorporated divisions within a single corporation. Similarly, it is evident that departments within the same municipal government should not be able to conspire with each other or its municipal government to restrain trade.

However, a municipality can conspire with another independent governmental unit to restrain trade. For example, Corey v. Look involved an alleged conspiracy between the Town of Falmouth, Massachusetts, and the Nantucket Steamship Authority (Authority) to monopolize the parking lot market in Falmouth. In Corey, the Authority terminated plaintiff's (a private party) contract to operate a parking

108. The requirement of two or more persons was made clear in Union Pacific Coal Co. v. United States, 173 F. 737 (8th Cir. 1909). The court stated that "The union of two or more persons, the conscious participation in the scheme of two or more minds, is indispensable to an unlawful combination, and it cannot be created by the action of one man alone." Id. at 745. There appears little technical difference between a combination and conspiracy. The Supreme Court, in Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968), used the terms interchangeably. Id. at 142. The fine technical distinctions between a contract, combination, and conspiracy do not appear to be dispositive to the application of § 1.


111. 641 F.2d 32 (1st Cir. 1981).
lot in Falmouth.\textsuperscript{112} Falmouth then awarded a contract to the Authority to operate parking lots within the town. This occurred despite the fact that the plaintiff allegedly outbid the Authority for the contract.\textsuperscript{113} Additionally, through the use of severe regulation, the two defendants hampered plaintiff's ability to use land that he obtained from other sources as a parking lot in Falmouth.\textsuperscript{114} The court stated that "such conduct, on its face amounted to a concerted refusal to deal with a disfavored purchaser."\textsuperscript{115}

1. INTRA-MUNICIPAL CONSPIRACY. The conspiracy issue becomes more complex when the alleged conspirators are a municipality and an entity created by the municipality. Municipalities frequently have the power to create and delegate some of their powers to special districts, zoning boards and other agencies.\textsuperscript{116} These entities, in their daily operations, are often autonomous from their municipal creator.

This relationship is somewhat analogous to that of a subsidiary corporation to its parent corporation. A parent and its wholly owned subsidiary, as well as two commonly controlled corporations, are capable of conspiring with one another to restrain trade.\textsuperscript{117} (This is commonly referred to as an intra-corporate conspiracy.) Although the conspiracy, in reality, involves only one consolidated corporation, a conspiracy can, nevertheless, exist because each conspirator is a separate legal entity.\textsuperscript{118} Due to the conspirators' separate legal identities, each is treated as any other individual entity and is thus considered amenable to the antitrust laws.\textsuperscript{119}

\textsuperscript{112} Id. at 34.
\textsuperscript{113} Id. Falmouth made bid information and other confidential information available to the Authority prior to the Authority's bid for the operation of the parking lot. \textit{Id.}
\textsuperscript{114} Id. at 36.
\textsuperscript{115} Id.
\textsuperscript{116} See E. McQuillan, supra note 40, § 25.215.
\textsuperscript{119} Perma Life Mufflers, Inc. v. International Parts Corp., 392, U.S. 134, 141-42. The lower courts are split regarding how they analyze intracorporate conspiracies. The First, Third, and Fifth Circuits have held, as a matter of law, that a parent and its wholly owned subsidiary have the capacity to conspire with one another solely from the fact of their separate incorporations. Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp., 597 F.2d 20, 33-34 n.49 (3d Cir.), cert. denied, 439 U.S. 876 (1978); H&B Equipment Co., Inc. v. International Harvester Co., 577 F.2d 239, 244-45 (5th Cir. 1978); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 557 (1st Cir. 1974), cert. denied, 421 U.S. 1004 (1975). The Second, Seventh, Eighth, and Ninth Circuits have held that the capacity of related corporations to conspire with each other can only be determined after analyzing the facts and circumstances regarding the corporations'
The requirement of separate legal identity will not be met in most "intra-municipal" conspiracies. The municipal created entity usually will not have a separate legal personality from its municipality. Thus, the created entity is more analogous to an unincorporated division than a corporate subsidiary. An unincorporated division, regardless of the autonomy it may have from the rest of the corporation, is not capable of conspiring with other divisions or the corporation itself. Therefore, unless a municipal created entity has a separate legal existence from its municipality, no "intra-municipal" conspiracy can exist.

2. UNILATERAL ENACTMENTS OF MUNICIPAL ORDINANCES. Many cases involving municipal defendants have dealt with the enactment of an allegedly anticompetitive ordinance that has caused harm or injury to the plaintiff's business interests. A municipality's unilateral enactment of an ordinance, regardless of its anticompetitive impact, is missing the necessary element of concerted action and hence should not violate the antitrust laws. Attempts to analogize such unilateral activity to private unilateral conduct that violates the antitrust laws will be difficult.

However, that is what the district court in Boulder attempted to do when it analogized the City of Boulder's three month moratorium ordinance to an illegal resale price maintenance scheme (RPM). Typically, a resale price maintenance agreement is an agreement between a manufacturer and retailer in which the latter cannot resell the manufacturer and retailer in which the latter cannot resell the manufact-
manufacturer's product below a specified price.\textsuperscript{123} It is lawful for a manufacturer to unilaterally refuse to deal with a retailer who fails to adhere to a previously announced price schedule.\textsuperscript{124} However, a resale price maintenance scheme is unlawful in two circumstances: 1) where the manufacturer attempts to secure adherence to its pricing practices through coercion or threats,\textsuperscript{125} or 2) when the manufacturer, in response to competing dealers’ complaints of a discounting retailer, terminates the discounter.\textsuperscript{126} Although the element of conspiracy is apparently missing, the courts have nevertheless held such resale price maintenance schemes to be \textit{per se} violations\textsuperscript{127} of the antitrust laws.

It is arguable that Boulder's moratorium ordinance may have anticompetitive consequences. Nevertheless, this possibility is not enough to bring such unilateral enactments into the same status as unlawful RPM schemes. The rationale for holding the latter unlawful is clear—RPM is a form of price fixing, which the courts consider to be a particularly pernicious economic evil that the Sherman Act was intended to rid. Therefore, the courts have been willing to liberalize their concept of conspiracy in order to bring certain RPM practices under the proscriptions of the Sherman Act.

In contrast to RPM schemes, the moratorium ordinance does not involve the discernible economic vices that are present in RPM schemes. The ordinance neither affected plaintiff's ongoing business operations (except for restrictions put on expanding its service) nor instructed or coerced plaintiff to engage in conduct that violated the anti-

\textsuperscript{123} United States v. Colgate & Co., 250 U.S. 300 (1919).
\textsuperscript{124} Id.
\textsuperscript{127} It is clear that when a local government forces a private party to violate the antitrust laws, it may implicate itself in an unlawful conspiracy. For example, in Kurek v. Pleasure Driveway & Park District, 557 F.2d 580 (7th Cir. 1977), remanded for reconsideration in light of Lafayette, 435 U.S. 992 (1978), antitrust judgment reinstated, 583 F.2d 378 (7th Cir. 1978), cert. denied, 439 U.S. 1090 (1979), a local park district, which operated five municipal golf courses, granted licenses to private parties to operate the pro shops at each course. The plaintiffs, who individually had operated a pro shop, had their licenses terminated by the park district which, in turn, granted an exclusive license to another party, Golf Shop Management, Inc. (GSM), to operate all the shops. The plaintiffs alleged that their licenses were terminated and an exclusive license granted to GSM because they refused to follow the park district's demand to raise and fix their retail prices. \textit{Id.} at 587. The Seventh Circuit sustained the plaintiffs' complaint, holding that the state action doctrine does not authorize local governmental units "to force private competitors to violate the antitrust laws." \textit{Id.} at 590.
trust laws. As a consequence, the rationale for liberalizing the conspiracy requirements is absent in the Boulder case. Therefore, except for enactment of ordinances that sanction RPM or other violations of the antitrust laws by private parties, unilateral enactment of ordinances should not fall within the ambit of the Sherman Act.

3. CONSPIRACY WITH PRIVATE PARTY. Typically, a plaintiff, to satisfy the conspiracy requirement of section 1, will allege that a conspiracy exists between a municipality or its officials and a private party to illegally restrain trade. The subject matter of these alleged conspiracies have included many "traditional" functions of local government such as zoning, garbage collection, transit systems, airports, parking lots, taxi service, and operation of sports arenas. The plaintiffs in these cases frequently have lost in the political process (i.e., denial of zoning request or exclusive contract) to a competitor and now seek redress in the courts for their alleged injuries under the antitrust laws. Generally, the plaintiff will allege that the municipality conspired with plaintiff's competitors to enact legislation favorable to the latter and to the detriment of the plaintiff.

A number of decisions have sustained conspiracy allegations against municipal defendants, on the pleadings alone. Although the

128. 684 F.2d at 1234.
131. Gold Cross Ambulance & Transfer v. City of Kansas City, 705 F.2d 1005 (8th Cir. 1983).
136. See, e.g., Mason City Center Assocs. v. City of Mason City, 671 F.2d 1146 (8th Cir. 1981) (plaintiff's alleged denial of a zoning request by city was in furtherance of an anticompetitive agreement with downtown developers to exclude competing shopping center developments from Mason City); Westborough Mall, Inc. v. City of Cape Girardeau, 693 F.2d 733, 736 (8th Cir. 1982) (plaintiff alleged city officials and private developers conspired to preclude competition by improperly altering zoning that would have permitted plaintiff to construct a mall; instead, development rights were given to the private developer defendant).
conspiracy allegation may be dubious, it is doubtless that complaints will often be sustained due to the liberal pleading policies under the Federal Rules of Civil Procedure\textsuperscript{138} and the antitrust laws. However, at trial, for a plaintiff to prevail, he must prove that the municipality and private party defendants were acting in concert to achieve their allegedly unlawful goals.\textsuperscript{139} In cases where a private party simply prevailed upon a municipality to act favorably to it, though at the expense of the plaintiff, a conspiracy claim should be without substance. Otherwise, an inference of conspiracy could always be raised after a private party consulted with or petitioned the municipality to take action favorable to it and against a competitor. Moreover, the \textit{Noerr-Pennington}\textsuperscript{140} doctrine exempts concerted efforts by the private parties to induce governmental action\textsuperscript{141}—even if the purpose and effect of the concerted activities is to eliminate competition\textsuperscript{142} from the antitrust laws.

In situations where a private party and a municipality have, in fact, conspired together to eliminate or restrain competition, the plaintiff will be faced with the same proof problems present as in any antitrust case. However, it will often be a difficult line to draw between a municipality that is simply listening and responding to various competitors’ suggestions and requests, and a municipality that is acting in concert with a private party to unlawfully restrain trade.

\textsuperscript{138} See supra note 90 and accompanying text.


\textsuperscript{140} The \textit{Noerr-Pennington} doctrine is a shorthand term used to represent the antitrust immunity that was created in the two seminal antitrust cases of Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) and United Mine Workers v. Pennington, 381 U.S. 657 (1965). See generally Fischel, Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine, 45 U. Chi. L. Rev. 80 (1977).

\textsuperscript{141} 365 U.S. at 136-38. When the concerted activities occur in an adjudicatory setting, they are also protected under the \textit{Noerr-Pennington} doctrine so long as such activities are legitimate. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 512-13 (1972).

\textsuperscript{142} 381 U.S. 657, 670 (1965). Municipal defendants have also successfully invoked the \textit{Noerr-Pennington} doctrine in adjudicatory settings. In Miracle Mile Assocs. v. City of Rochester, 617 F.2d 18 (2d Cir. 1980), the City of Rochester was owner of a commercial tract of land that was allegedly suitable for a shopping center. Plaintiff, who had proposed building a shopping center on a competing parcel of land, alleged that the city instituted various “sham” proceedings to delay the progress of plaintiff’s shopping center. The court held that Rochester’s actions did not fall under the “sham” exception, but was entitled to immunity under \textit{Noerr-Pennington}. Id. at 21. In City of Gainesville v. Florida Power & Light Co., 488 F. Supp. 1258 (S.D. Fla. 1980), a private electric utility, Florida Power & Light, (FP&L) filed a counterclaim against various Florida municipalities, alleging that the municipalities engaged in an unlawful conspiracy to injure FP&L’s business. The municipalities allegedly commenced litigation and other adjudicatory proceedings with the purpose of coercing and harassing FP&L into agreeing to various demands of the municipalities. The court held the municipalities’ conduct immune from the antitrust laws under \textit{Noerr-Pennington}. Id. at 1266.
C. Rule of Reason Analysis

The Sherman Act does not prohibit all agreements that restrain trade but only those agreements that unreasonably restrain trade.\(^{143}\) The reasonableness of a challenged agreement is determined under the Rule of Reason.\(^{144}\) The chief inquiry under the Rule of Reason is whether the challenged agreement is one that promotes or suppresses competition.\(^{145}\) Generally, courts will go into a detailed analysis of the challenged restraint, the facts peculiar to the industry to which the restraint is imposed, the nature of the restraint and its probable or actual effect on competition to determine its reasonableness.\(^{146}\) However, the courts have identified certain restraints that are so anticompetitive in nature that no detailed analysis is needed—such restraints are conclusively presumed to be unreasonable.\(^{147}\) These restraints are classified as *per se* violations of the Sherman Act.\(^{148}\) This section will discuss the application of the Rule of Reason and *per se* rule to alleged anticompetitive conduct on the part of municipalities.

As previously noted, under the Rule of Reason the court analyzes a challenged restraint's impact on competition to determine its lawfulness. It is no defense to allege that competition itself is unreasonable\(^{149}\) because it might allegedly impact adversely on safety considerations\(^{150}\) or ethical behavior.\(^{151}\) This is said to reflect the national economic policy that competition is the best method for allocating scarce resources in a free market.\(^{152}\) The *Lafayette* Court believed that Congress did not intend to permit municipalities to place their own

144. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).
146. *Id.* at 690.
147. *Id.* at 692. For a discussion of restraints of trade that are illegal *per se*, see generally 2 E. KINTNER, *supra* note 108, § 10.
148. 435 U.S. at 692.
149. *Id.* at 695.
150. *Id.*
152. 435 U.S. at 695. The importance of the Sherman Act in implementing competitive values was noted by the Supreme Court in United States v. Topco Assocs., 405 U.S. 596 (1972): Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy. *Id.* at 610.
economic self-interests above this national policy. Therefore, under the Rule of Reason municipalities will be unable to defend their challenged conduct on the basis of legitimate safety, health, and welfare considerations of their communities. Yet circumstances may arise where local intervention in the marketplace is needed, even with its possible anticompetitive effects.

The substantive analysis under the Sherman Act will have to be altered if municipalities are to be permitted to justify their anticompetitive conduct on non-economic grounds. The debates of the Act indicated a congressional intent to allow the courts to develop governing principles of law with respect to substantive violations of the Act. The Court, drawing on its discretion, has altered its analysis to accommodate non-economic factors in a few cases; however, these cases are considered anomalies. Notwithstanding, the Supreme Court has recently indicated its willingness to change its conventional analysis. In Goldfarb, the Court noted that certain practices of the legal profession might survive scrutiny under the antitrust laws even though they would be viewed as a violation of the Sherman Act in another context. More importantly, the Court stated in Boulder that "certain activities, which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government."

However, any modification of the substantive analysis should ad-
here to the general structure underlying the Act itself as stated by the Supreme Court in *Cantor v. Detroit Edison Co.*:

The Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definition which might either work injury to legitimate enterprises or through particularization defeat its purposes by providing loopholes for escape. The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness.\(^{160}\)

Therefore, any modification must be broad enough so as to permit the Court its continued wide latitude in interpreting the scope and meaning of the Sherman Act. Additionally, a special rule for municipal defendants must not, in practical effect, emasculate the power of the Sherman Act so as to render it useless in checking anticompetitive conduct of a municipality.

1. PROPOSED AFFIRMATIVE DEFENSE. Drawing on the above guidelines, this article proposes that an affirmative defense be created for municipal defendants. The proposed affirmative defense would permit a municipality to defend its challenged conduct on non-economic grounds. This proposal would not alter the substantive analysis with respect to the prima facie elements of section 1 of the Act. Rather, the burden would be on the municipality to justify its anticompetitive conduct. Otherwise, it would be inequitable to require a plaintiff to prove that a restraint was not only unreasonable, but also not justified on non-economic grounds.

The proposed affirmative defense would consist of the following two-part analysis:

Part I: Does the challenged municipal activity restrain an area suitable for competition. If not, the affirmative defense is sustained and the court would terminate its analysis.

Part II: If the answer to Part I was yes, the court would then weigh the benefits claimed from the restraint versus the restraint’s effect on competition.

2. ANALYSIS OF PROPOSED AFFIRMATIVE DEFENSE. The purpose of Part I is to permit the court to identify certain activities that clearly could not exist in a competitive unregulated environment. For example, road construction and maintenance are activities that municipal governments frequently finance and regulate. Without the community as a whole bearing the cost of such activities, private construction

companies would have to charge commuters and travelers user fees in order for it to recoup its investment and make a profit. User fees could make daily travel nearly impossible for certain economic groups.

The Sherman Act, of course, is aimed at promoting competition. However, if promoting competition is impossible in a particular area of the local economy, then the Sherman Act proscription may be counterproductive. Therefore, as the case above illustrates, it seems reasonable to permit a municipality's challenged conduct to continue in that particular area. Notwithstanding, it must be emphasized that very few areas of economic control or regulation are not suitable for competition. This initial inquiry is only to identify those few areas. And in those areas, anticompetitive conduct on the part of a municipality will be permitted without further justification.

Part II is resorted to if the challenged conduct does restrain an area suitable for competition. If the restraint's effect on competition was deemed less injurious than beneficial to the community, the restraint would be upheld. However, a restraint that is found to have no benefits to the community would immediately be held unreasonable, thereby foreclosing the need to balance. The court's inquiry into a restraint's claimed benefits should look beyond any alleged motive for or purpose of the restraint and consider only the actual or probable benefits to be derived by the community from the restraint.

Part II presents the greatest deviation from conventional Sherman Act analysis by permitting anticompetitive conduct to stand because of noncompetitive factors. The purpose of Part II is to permit municipalities some leeway to restrain trade for the benefit of their community without always violating the Sherman Act.

The dissent in Boulder criticized any attempt to permit municipal defendants to defend their anticompetitive conduct on the basis of the conduct's benefits, reasoning that it would open a "Pandora's Box." This "Pandora's Box," the dissent claimed, would allow the federal courts to engage in a wide ranging standardless inquiry into the reasonableness of local regulations which they claim has long been rejected by the Court. The dissenters concluded that the Boulder decision would effectively paralyze local governments from enacting ordinances and regulations aimed at protecting public health, safety, and welfare, for fear of subjecting local government to liability under the Sherman Act.

161. 455 U.S. at 67.
162. Id. at 67-68.
MUNICIPAL ANTITRUST

The dissent's criticism of permitting the courts to weigh municipal anticompetitive conduct against its benefits is unfounded. The Supreme Court has long recognized the usefulness of balancing tests when state or local ordinances conflict with federal interests. For instance, local versus national interests are balanced in dormant commerce clause cases. In dormant commerce clause cases, the state has regulated an area of commerce not yet preempted by Congress. The balancing test necessarily required the Court to inquire into the nature of the ordinance, its effect on interstate commerce, and its marginal benefits to the local community. This area of law is currently in a state of flux, but at no time has the Court expressed dissatisfaction in regard to inquiring into local legislation. Therefore, the proposed affirmative defense does not put the Court into an uncharted area.

The scheme as outlined above adheres to the general tenets of the Sherman Act as being "general" and "adaptable" but not "detailed" nor "particularized.", It permits the Court the wide latitude of analy-

163. Id.

164. See generally G. Gunther, supra note 83, ch. 5. In dormant commerce clause cases, Congress has been silent regarding the area of commerce regulated by a state statute. The statute is challenged on the basis that it impinges on interstate commerce. In analyzing the statute, the Court takes "it upon itself to implement the values of the grant of power to Congress in the Commerce Clause by restricting state impingements on interstate commerce." Id. at 256-57. Thus, a state statute will be preempted by the commerce clause if it is found to burden interstate commerce.

165. Id.

166. The Court first developed the balancing test for dormant commerce clause cases in Southern Pac. v. Arizona, 325 U.S. 761 (1945), where the Court balanced the state's safety benefits derived from state's regulation of train car lengths versus the regulation's detrimental effect on the free flow of interstate commerce. See also Raymond Motor Transps., Inc. v. Rice, 434 U.S. 429 (1978) (state law which banned trucks longer than 55 feet held unconstitutional); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) (state law requiring rear mudflaps on trucks held unconstitutional). The lower courts have also used balancing tests for suits against cities under Title VIII (Fair Housing) of the Civil Rights Act of 1968, 42 U.S.C. § 3601. See, e.g., United States v. City of Blackjack, Mo., 508 F.2d 1179 (8th Cir. 1974) (once plaintiff has established a prima facie case by demonstrating racially discriminatory effect of the city's conduct, the burden shifts to the government defendant to demonstrate that its conduct was necessary to promote a compelling governmental interest); Stingley v. City of Lincoln Park, 429 F. Supp. 1379 (E.D. Mich. 1977) (permits city to show valid nondiscriminatory reasons for challenged actions); cf. Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977) (court did not adopt Blackjack's "compelling interest" justification, but would permit municipal defendants to show that no alternative course of action could be adopted that would enable the municipal interest to be served in a less discriminatory impact).

167. In Kassel v. Consolidated Freightways, 450 U.S. 662 (1981), the Supreme Court in a plurality decision held that if the state's safety benefits were nonillusory (if there was a significant safety benefit), no balancing would be necessary. The plurality would require balancing only if the safety benefits from the state regulation were marginal. The dissent would uphold state regulation if there was a rational basis to assert its safety benefits.

168. The Court has stated that these are the underlying tenets of the Sherman Act. See supra note 160.
sis permitted under the conventional Sherman Act analysis and yet al-
allows for the additional inquiry concerning noncompetitive benefits of a
given restraint. Moreover, although the proposed affirmative defense
factors are non-economic factors, its principal focus is on competition.

Three important benefits will be derived from the proposed affirm-
ative defense which can be summarized as follows:

1. The affirmative defense is broad enough to give the courts the
discretion needed to fully implement the policies of the Sherman
Act.
2. Municipalities and their officials are given some standard by
which to measure their conduct.
3. The members of the local community will derive the benefits of:
   a. Having local governments abandon ill conceived local re-
      straints for the beneficial influences of competition; and
   b. The maintenance of local restraints that yield the greatest
      marginal benefits to the community.

D. Per Se Analysis

The courts have held that certain types of restraints are conclu-
sively presumed to be unreasonable.\(^\text{169}\) The court, in so holding, can
avoid any elaborate inquiry as to the harm caused by the restraint or
economic investigation of the industry involved, in an effort to deter-
mine whether a particular restraint has been unreasonable.\(^\text{170}\) There
are very few restraints that fall within the per se rule, however, because
the courts are reluctant to so hold without the benefit of considerable
experience in evaluating the restraint’s competitive impact.\(^\text{171}\)

The per se analysis should not initially be used in municipal anti-
trust cases. The courts have not developed any experience or expertise
with municipal restraints of trade or their effects on competition, unlike
the courts’ long experience with private restraint. Therefore, the courts
currently are not equipped with sufficient knowledge to consider a mu-
nicipal restraint a per se violation. Additionally, the per se analysis
would be inconsistent with the proposed affirmative defense or any
type of balancing test the court may fashion. Implicit in the balancing
test is that any given restraint may have beneficial effects that override
its detrimental effect on competition. The per se analysis would pro-
hibit any balancing leaving municipalities unable to defend their
regulations.

\(^{170}\) Id. at 5.
\(^{171}\) I. E. KINTNER, supra note 108, § 8.3.
IV. ASSESSMENT OF TREBLE DAMAGES AGAINST MUNICIPALITIES

Lafayette and Boulder have raised the specter of treble damages being assessed against a municipality that violates the antitrust laws. Since Lafayette, commentators\(^{172}\) as well as several Supreme Court Justices have concluded that treble damages should not be assessed against a municipality that violates the antitrust laws.\(^{173}\) The Boulder decision did not clarify whether treble damages could be applied against municipalities because the issue was not before the Court. However, the dissenter in Boulder noted that:

> It [would] 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." Section 4 of the Clayton Act \(* * *\) is mandatory, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws \(* * *\) shall recover threefold the damages sustained by him.\(^{174}\)

In fact, a federal jury has recently awarded a plaintiff damages in an antitrust case against a county, a village, and village officials.\(^{175}\) Nonetheless, the treble damage issue is still an open question as the plurality in Lafayette noted that "remedies appropriate to redress violations by private corporations" may not be "especially appropriate for municipalities."\(^{176}\)

This section will discuss the likelihood that the Supreme Court will permit treble damages to be assessed against a municipal defend-

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172. A Justice Department attorney feels that "threats of criminal and treble damage liability may not be the best way of inducing optimum decision-making" by municipal representatives. Abbot B. Lipsky, Jr., Deputy Assistant Attorney General-Antitrust Division, Remarks at Florida ALI-ABA Course of Study (Oct. 21, 1982). See also Areeda, supra note 3, at 454-56; Hoskins, "The Boulder Revolution" in Municipal Antitrust Law, 70 ILL. B.J. 684, 685-86 (1982).

173. Justice Stewart, in his dissent in Cantor v. Detroit Edison Co., 428 U.S. 579, noted that treble damages would seriously disrupt the operation of every state regulated utility company in the U.S. Id. at 615 (Stewart, J., dissenting). Justice Blackmun, in his dissent in Lafayette, stated that it would be a grave act to assess treble damages against governmental units. 435 U.S. at 442 (Blackmun, J., dissenting).

174. 455 U.S. at 65 n.2.

175. Unity Ventures v. County of Lake, TRADE REG. REP. (CCH) (1984-1 Trade Cas.) ¶ 65,883 (N.D. Ill. 1984). In Unity Ventures, a district court jury sustained the plaintiff's contention that a county municipality and county and municipal officials unlawfully blocked his plans to develop a tract of land within the municipality. The jury awarded the plaintiff $9.5 million which was automatically trebled to $28.5 million. Id. Affiliated Capital Corp. v. City of Houston, 700 F.2d 226 (5th Cir.), rev'd granted en banc, 714 F.2d 25 (5th Cir. 1983), is the only other case to find a municipality to have violated the antitrust laws. Affiliated Capital involved a conspiracy by the City of Houston and private parties (cable TV applicants) to engage in an unlawful territorial market division of cable TV franchises awarded by the city. However, on appeal the City of Houston was dismissed as a defendant, Id. at 237 n.15, and as a consequence no damages were awarded against it.

176. 435 U.S. at 402. The plurality did not articulate on what basis or in what situations a municipality may not be liable for treble damages.
ant. As illustrative of the Court’s attitude toward and rationale for assessing damages against municipalities, this section will examine the development of municipal liability under section 1983 of the Civil Rights Act of 1871. Section 1983 cases provide an excellent example of the Court’s permitting significant damages to be awarded against municipalities, while disregarding the pleas of “financial ruin” that might befall cities by allowing damage recovery. Historical development of municipalities’ liability under section 1983 will be discussed with the Court’s rationale for permitting damages to be assessed against municipalities and denying them immunity from damages. Next, an examination of the legislative history of the treble damages section of the antitrust laws will be discussed with the underlying purposes of the section and the Court’s self-imposed limitations from formulating new remedies. Together, these two areas may help discern overall case trends and Court attitude toward assessing damages against municipalities which violate federal statutes and thus may determine the likely course the Court will take in respect to assessing treble damages against municipalities.

A. Municipalities’ Civil Rights Liability Under 42 U.S.C. § 1983

The Lafayette Court did not consider it anomalous to subject municipalities to criminal and civil liabilities imposed upon violators of the antitrust laws. The Court concluded this by noting that compliance by municipalities with substantive standards of other federal laws which impose monetary sanctions upon persons has long been recognized. Section 1983 imposes liability upon every person who, under color of state law or custom, “subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.” Therefore, since section 1983, which imposes liability on “persons,” is

178. 435 U.S. at 400.
179. Id. See, e.g., Union Pac. R.R. v. United States, 313 U.S. 450 (1941) (the Court held that municipalities were subject to § 1 of the Elkins Act, 32 Stat. 847, as amended, 34 Stat. 587, 49 U.S.C. § 41 (1)); Ohio v. Helvering, 292 U.S. 360 (1934) (the Court sustained federal tax liability imposed upon the State of Ohio in its business as a distributor); California v. United States, 320 U.S. 577 (1944) (the Court held that a city and state are subject to §§ 16 and 17 of the Shipping Act, 39 Stat. 734 (1916), as amended, 46 U.S.C. §§ 815-16).
180. 435 U.S. at 400. Municipalities were first held to be “persons” within the meaning of the Sherman Act in Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906). However, in Chattanooga the municipality was a plaintiff; it was not until Lafayette that municipal defendants were considered “persons” under the Sherman Act. 435 U.S. at 392-93.
remedial\textsuperscript{182} in nature like the antitrust laws, and permits recovery of large damage awards against municipalities,\textsuperscript{183} it would be instructive to discuss the evolution of municipalities' section 1983 liability.\textsuperscript{184}

1. HISTORICAL DEVELOPMENT. The initial historical development of municipalities' section 1983 liability parallels that of the Sherman Act. The first question before the Court was whether municipalities were "persons" for section 1983 purposes. In \textit{Monroe v. Pape},\textsuperscript{185} the Court held that local governments were not "persons" for section 1983 purposes and hence were wholly immune from suit under section 1983. The Court, after analyzing the legislative history of section 1983, concluded that Congress doubted its constitutional power to impose civil liability on municipalities and that such doubt would have extended to any type of civil liability.\textsuperscript{186} Justice Douglas, the author of \textit{Monroe}, suggested that the municipal exclusion rested on the theory that Congress sought to prevent the financial ruin that civil rights liability might impose on municipalities.\textsuperscript{187} The Court, in \textit{Monell v. Department of Social Services},\textsuperscript{188} disregarded Justice Douglas' suggestion and expressly overruled \textit{Monroe}, holding that municipalities were "persons" for purposes of section 1983.\textsuperscript{189} The Court, at this point, declined to express the full contours of municipalities' potential liability under section 1983.

Thus, municipalities after \textit{Monell} were faced with the possibility of enormous civil rights liability exposure, similar to the situation now facing municipalities after \textit{Boulder} and \textit{Lafayette}, of significant antitrust liability exposure. The dissent in \textit{Monell} expressed strong concern about cities' potential liability. The dissent stated that it never occurred to members of Congress that the Civil Rights Act did impose or could have imposed any liability upon municipal corporations.\textsuperscript{190} The dissent further noted that none of the members of the Congress could foresee the practical consequences of their decision of removing munic-

\textsuperscript{183} See infra note 207 and accompanying text.
\textsuperscript{185} 365 U.S. 167 (1961).
\textsuperscript{186} Id. at 190.
\textsuperscript{187} 436 U.S. at 665 n.9.
\textsuperscript{188} 436 U.S. 658 (1978).
\textsuperscript{189} After a lengthy analysis of the Civil Rights Act of 1871's history, \textit{Id.} at 685-701, the Court found nothing in the Act's legislative history to conclude that municipalities were to be exempt from its reach. \textit{Id.} at 701.
\textsuperscript{190} 436 U.S. at 722 (Rehnquist, J., dissenting).
ipalities’ immunity and, hence, exposing municipalities’ limited treasuries to their officials’ failure to predict the course of constitutional jurisprudence. The dissent hoped that Congress would modify the law to protect municipalities from civil rights liability.

Congress and the Court disregarded the dissent’s dire warnings. The Court in Owen v. City of Independence had an opportunity to limit municipalities’ exposure to liability by permitting a qualified good faith immunity to local governments for violations of section 1983. Nonetheless, the Court denied municipalities a qualified immunity. The Court, later in that term, further broadened the scope of section 1983 suits by permitting plaintiffs to bring section 1983 suits for violations of federal statutes as well as the Constitution. The Court also upheld the application of the Civil Rights Attorney’s Fee Award Act to the statutory section of 1983 claims. The following year, however, the Court gave municipalities some relief from civil rights liability by denying the recovery of punitive damages against a municipal defendant.

2. RATIONALE FOR PERMITTING MUNICIPAL SECTION 1983 LIABILITY AND ITS EFFECT ON MUNICIPALITIES. Section 1983 and the antitrust laws both envision private parties recovering damages against one who violates these statutes. Owen makes it clear that municipalities should be liable in damages for violating section 1983. The underlying rationale for permitting section 1983 damages to be assessed against municipalities as well as denying them immunity will be discussed below. Additionally, how the Court has dealt with the impact of civil rights liability on public treasuries will be examined.

The Monell and Owen Courts considered the historical treatment

191. Id. at 724.
192. Id.
196. 42 U.S.C. § 1988. The Civil Rights Attorney’s Fee Award Act permits prevailing parties in § 1983 cases to collect reasonable attorney’s fees as part of their costs.
197. 448 U.S. at 11.
198. Newport v. Facts Concerts, Inc., 453 U.S. 247 (1981). The Newport Court reasoned that punitive damages were unavailable as against municipal defendants because Congress did not intend to disturb the settled common law that recognized municipal immunity from punitive damages. Id. at 265. Therefore, the Court reasoned that if Congress intended to permit punitive damage awards against municipalities, it would have explicitly made such a provision. Id.
of municipalities' tort liability as indicative of political subdivisions' amenability to suit and paying out damages to an injured party. The Owen Court articulated the following additional policy reasons why municipalities should be assessed damages under section 1983: 1) Without a meaningful remedy, aggrieved individuals will have little incentive to seek vindication of their rights.  

199. 445 U.S. at 651 n.33.

200. Id.

201. Id. at 652.


203. 445 U.S. at 654.

204. Id.

205. Id. at 656.


207. Colello, The Mandate, the Mayor, and the Menace of Liability, 7 Intergovernmental Persps. 15 (1980). This article contains preliminary data from a survey undertaken by the Na-
The Owen Court addressed the issue of revenue raised by taxation being diverted to the benefit of a single or discrete group of taxpayers. The Court stated that it is only fair that a city should be liable to make good the damage sustained by an individual in consequence of the city's conduct. Further, the Court stated that it is perfectly proper to use the taxpayers' money because it is the public who enjoys the benefit of government and therefore it is the public who is responsible for its administration. Therefore, the Court concluded that it is "fairer to allocate any resulting loss to the inevitable cost of government borne by all the taxpayers, than to allow its impact to be felt by those whose rights have been violated."

B. Treble Damages Under the Antitrust Laws

The importance of the treble damages remedy provided by the antitrust laws cannot be overstated. The legislative history of the Sherman and Clayton Acts together with case law suggests that treble damages are an indispensable part of the antitrust laws for several reasons. This section will explore those reasons as well as the self-imposed court limitations on fashioning new remedies.

1. TREBLE DAMAGES' LEGISLATIVE HISTORY AND PURPOSE. The legislative debates concerning the Sherman Act do not mention the possibility of municipalities being held liable for treble damages. Nonetheless, the debates highlight the importance Congress attached to the remedies section of the Sherman Act.

Initial antitrust bills introduced into the House of Representatives did not incorporate a civil remedies section but contained only criminal provisions. An antitrust bill containing a civil remedy was first introduced into the Senate by Senator John Sherman (R-Ohio) and authorized recovery of double damages. An amended version of the bill was later debated in the Senate. Sherman, in responding to criticism of the bill, emphasized that citizens should have the right to a

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209. Id. at 655.
210. Id.
211. I E. KINTNER, supra note 108, § 4.3.
212. Id. §§ 4.3, 4.4.
remedy and to sue for and recover damages for antitrust injuries that they have suffered.\textsuperscript{213}

The Senate Judiciary Committee, perhaps acting upon Senator Sherman's concern for an adequate remedy, amended the remedies section (section 7) of the bill to provide for treble damages.\textsuperscript{214} This version eventually passed the Senate and without debate passed the House of Representatives. The bill, known as the Sherman Antitrust Act,\textsuperscript{215} was signed into law on July 2, 1890.\textsuperscript{216}

Section 7 of the Sherman Antitrust Act was later repealed and incorporated in whole in section 4 of the Clayton Act.\textsuperscript{217} The House debates on section 4 of Clayton considered the section as "opening the door of justice to everyman, whenever he may be injured by those who violate the antitrust laws, and giving the injured party ample damages for the wrong suffered."\textsuperscript{218} Additionally, treble damage suits were considered a principal method for enforcing the antitrust laws.

The purpose of the treble damage section of the Clayton Act closely mirrors those underlying section 1983 of the Civil Rights Act. As in section 1983, the private antitrust action was created primarily as a remedy for injured parties.\textsuperscript{219} Treble damages serve to make whole those who have been injured by the conduct of a violator\textsuperscript{220} and counterbalance the difficulty of maintaining a private action.\textsuperscript{221} Additionally, treble damages strongly deter future antitrust violators as well as punish past violators.\textsuperscript{222} Furthermore, treble damages encourage private enforcement of the antitrust laws. This private enforcement helps to vindicate the important public interest in free competition\textsuperscript{223} and also to encourage individuals to serve as "private attorney generals" to enforce the antitrust laws.\textsuperscript{224} Finally, these private suits provide a significant supplement to the limited resources available to the Depart-

\begin{itemize}
\item \textsuperscript{213} Id. § 4.8. Sen. Turpie (R.-Ind.) echoed Sen. Sherman's attitude, by stating that one of the chief purposes of the antitrust bill was to provide parties injured a civil remedy for injury reflected. \textit{Id}.
\item \textsuperscript{214} Id. § 4.12.
\item \textsuperscript{215} 15 U.S.C. § 1.
\item \textsuperscript{216} 1 E. KINTNER, supra note 108, § 4.17.
\item \textsuperscript{219} American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 576 (1982).
\item \textsuperscript{220} \textit{In re} Multidistrict Vehicle Air Pollution, 583 F.2d 231, 235 (9th Cir. 1976).
\item \textsuperscript{221} 429 U.S. at 486 n.10, quoting, 21 CONG. REC. 246 (1908) (remarks of Sen. Sherman).
\item \textsuperscript{222} 456 U.S. at 576-7.
\item \textsuperscript{223} Fortner v. United States Steel Corp., 394 U.S. 495, 502 (1969).
\item \textsuperscript{224} Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 147 (1968).
\end{itemize}
ment of Justice for enforcing the antitrust laws.225

2. LIMITATION ON THE COURTS FROM FORMULATING NEW REMEDIES OR ALTERING EXISTING ONES. In every case involving the construction of a statute, the starting point of the analysis must be the language employed by Congress.226 On its face, section 4 of the Clayton Act contains little in the way of restrictive language.227 From this it is evident that Congress did not intend to give courts wide discretion in formulating remedies to enforce provisions of the Sherman Act. Congress' intent to allow the courts to develop governing principles with regard to substantive violations does not appear in debates on the treble damage action created in section 7 of the original Act.228 The description of the power of federal courts under the Antitrust Acts suggests a sharp distinction between the courts' power to define antitrust violations and its ability to fashion relief available to the parties.229

The Supreme Court, on several instances, has shown its reluctance to limit the remedial scheme of the antitrust laws. For example, the Court has denied the common law defense of pari delicto230 for an antitrust violation231 and the right to contribution among joint antitrust violations.232 The Court has often indicated the inappropriateness of

225. 456 U.S. at 572 n.10.
227. Id.
229. Id. at 644. The remedies section of the antitrust laws are very detailed in structure as opposed to the broad language of §§ 1 and 2 of the Sherman Act. For example, violations of §§ 1 or 2 are crimes; private parties can recover treble damages, costs, and reasonable attorney's fees, Clayton Act §§ 4, 15 U.S.C. §§ 15; the United States can enjoin violations, Sherman Act § 4, 15 U.S.C. § 4; the United States can recover single damages for injury to its "business or property," Clayton Act § 4A, 15 U.S.C. § 15a; parens patriae suits can be brought by state's attorney general, Clayton Act §§ 4c-4h, 15 U.S.C. §§ 15c-15h; a final judgment of an antitrust violation in one action will serve as prima facie evidence in any subsequent action or proceeding, Clayton Act § 5(a), 15 U.S.C. § 16(a); additionally, the remedial provisions of the antimerger laws are also quite detailed, Clayton Act §§ 7-11, 15 U.S.C. §§ 18-21.
230. Pari delicto means "in equal fault." Black's Law Dictionary 1004 (5th ed. 1979). This defense is employed by the defendant when he alleges that the plaintiff, who is seeking damages or equitable relief, is himself involved in the same wrongdoing.
231. Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968). In Perma Life, the Court noted that there is nothing in the language of the antitrust laws indicating congressional intent that the doctrine of pari delicto should constitute a defense to a private antitrust action. Moreover, the Court stated that the application of the doctrine would undermine the important function performed by the private antitrust action in enforcing the antitrust laws. Id. at 138-40.
232. 451 U.S. 630. Contribution, a common law rule, is invoked when several tortfeasors have caused injury but damages have been assessed against only one of the tortfeasors. This sole tortfeasor, pursuant to the contribution doctrine, will demand that each tortfeasor pay his pro rata share of the damages. See generally W. Prosser, supra note 50, § 50.
invoking broad common law barriers to relief where a private suit serves an important public purpose.\textsuperscript{233} Moreover, the Court has broadly read section 4 of the Clayton Act so as to permit a foreign nation\textsuperscript{234} to bring an antitrust suit and to reject arguments that the section 4 remedy is only available to redress injury to commercial interests.\textsuperscript{235}

Municipalities are also not likely to escape liability by arguing that because their primary goals are not private profit but chiefly public service it would be inappropriate to levy treble damages against them. The Court disregarded similar arguments in an analogous setting. In \textit{American Society of Mechanical Engineers, Inc. v. Hydrolevel Corporation},\textsuperscript{236} the Court refused to immunize from treble damages a non-profit, tax-exempt trade association which promulgated codes and standards for various areas of engineering and industry. The majority disregarded the dissent’s view that levying treble damages against such organizations was wholly inappropriate and stated that regardless of the organization’s status, if it violates the antitrust laws, it is only fitting that it should be liable for damages arising from such a violation.\textsuperscript{237}

\textbf{C. Analysis of Section 1983 Case Law and Antitrust Policies of Assessing Damages on Municipalities}

The section 1983 cases highlight the fact that the Court will assess

\textsuperscript{233} 392 U.S. at 138. The Court’s overriding concern of not discouraging private antitrust suit is also shown by its disinterest of any alleged wrongdoing of the plaintiff. For example, a plaintiff was not barred recovery, even by proof that it had engaged in an unrelated antitrust violation. Kiefer-Stewart Co. v. Joseph E. Seagrams & Sons, 340 U.S. 211 (1951). In another case, a dealer who had signed an agreement with defendant to adhere to fixed resale price could bring an antitrust suit even though he was partially involved in the illegal activity. Simpson v. Union Oil Co., 377 U.S. 13 (1964).

\textsuperscript{234} Pfizer Inc. v. India, 434 U.S. 308, 312 (1978).

\textsuperscript{235} Reiter v. Sonotone Corp., 442 U.S. 330, 338-39 (1979). In \textit{Reiter}, the Court held that a consumer has standing to seek a § 4 remedy reflecting the increase in the purchase price of goods attributable to a price fixing conspiracy. \textit{Id.}

The Supreme Court has recognized two types of limitations on the availability of a § 4 remedy which courts must consider when examining whether a treble damages action is maintainable. In Hawaii v. Standard Oil Co., 405 U.S. 251 (1972) the Court held that § 4 did not authorize a state to sue in its \textit{pares patriae} capacity for damages to its “general economy.” In Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), the Court held that indirect purchasers in a chain of distribution were precluded from bringing a damage action based on overcharge passed on to them by the direct purchasers of an antitrust violator. The Court based these decisions on two policy considerations: 1) the risk of duplicate recovery by every person in the distribution chain, and 2) to avoid burdening § 4 actions with damage issues giving rise to the need for massive evidence and complicated theories, where the consequence would be to discourage vigorous enforcement of the antitrust laws by private suits. \textit{See} Blue Shield v. McCready, 457 U.S. 465, 474-75 n.11 (1982).

In a municipal antitrust context neither of the above two policy considerations are implicated. 236. 456 U.S. 556.

\textsuperscript{237} \textit{Id.} at 577.
damages against municipalities irrespective of its potentially damaging effects on the operations of local government. The fear of public treasuries being depleted due to a large antitrust judgment against a municipality, while a reasonable concern, will probably not persuade the Court to immunize cities against treble damages. The Owen Court clearly took this view in regard to municipalities' section 1983 liability by espousing the doctrine of equitable spending (i.e., injury to a party at the hands of government should be compensated and the cost borne by each member of the community). By reason of the section 1983 cases it would seem unlikely that the Court will take a more benevolent attitude toward municipalities by immunizing them from treble damage liability.

The policy rationales underlying section 1983 damages are clearly implicated in the antitrust context. Without treble damages available to private parties the remedial, deterrent, and private enforcement attributes of treble damages would be greatly diminished if not eliminated. The section 1983 cases noted that these rationales were sufficient to impose section 1983 liability on municipalities.

The section 1983 cases also pointed out the beneficial effects of municipalities' section 1983 liability on their decision-makers by creating an incentive for them to scrutinize more carefully the policies they implement so as to comply with constitutional rights and guarantees. Similarly, public officials would be forced to examine local regulations of the economy to assure comportment with the antitrust laws, if municipalities faced treble damages. However, if municipalities were immune from treble damages, their local decision-makers would probably be less deterred from promulgating anticompetitive policies for two reasons. First, municipalities would face only the threat of injunctive relief and other equitable remedies. Clearly, such remedies are much less onerous than treble damages, thus making decision-makers less concerned with contemplating antitrust laws while promulgating and implementing policies. Secondly, private enforcement of the antitrust laws as against municipalities would be greatly diminished. A potential plaintiff will likely view equitable relief as an inadequate remedy, especially in view of the enormous costs associated with antitrust litigation and thus refrain from bringing private suits. This fact takes on special importance in view of the unlikelihood of the Department of Justice bringing antitrust suits against municipalities. Thus, with no governmental enforcement and little or no private enforcement of the

238. 445 U.S. at 656.
antitrust laws as against municipalities, municipal officials could implement policies with little concern for the antitrust laws.

Notwithstanding the above, perhaps the most compelling reason the courts will permit treble damages to be assessed against municipalities is that "there is nothing in the statute itself, in its legislative history, or in the overall regulatory scheme to suggest that Congress intended courts to have the power to alter or supplement the remedies enacted."239 If public policy deems it inappropriate to hold municipalities liable for treble damages, such change must come from Congress and not from the courts.240

239. 451 U.S. at 645.
240. The Court made this explicit concerning antitrust defendants' right to contribution, stating it is up to Congress to enact legislation to permit such right. 451 U.S. at 646. When Congress wished to exempt municipal service operations from the coverage of the antitrust laws, it has done so without ambiguity. The Act of May 26, 1938, ch. 283, 52 Stat. 446, 15 U.S.C. § 13c (1976 ed.), grants a limited exemption to certain not-for-profit institutions for "purchases of their supplies for their own use" from the provisions of the Clayton Act as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. §§ 13-13b, 21a (1976 ed.), which otherwise make it unlawful for a supplier to grant, or for an institution to induce, a discriminatory discount with respect to such supplies. Congress expressly included public libraries in this exemption. (Public libraries are, by definition, operated by local government.) See 1 U.S. OFFICE OF EDUCATION, BIENNIAL SURVEYS OF EDUCATION IN THE UNITED STATES 27 (Library Service 1938-40) (1947); 2 U.S. OFFICE OF EDUCATION 38 (Statistical Summary of Education, 1941-42) at 38; 32 AM. LIBR. A. BULL. 272 (1938).

Federal and state governmental responses to the threat of municipal antitrust damages have been varied. The state action doctrine was reviewed by a congressional commission in 1979 which concluded that the narrowing of the doctrine is "appropriate and desirable, and [the narrowing] contributed greatly to the general movement toward greater scrutiny of the regulatory decision-making . . . ." The commission believes that the "general direction of the development of the case law is . . . clearly correct." National Commission for the Review of Antitrust Laws and Procedures, Report to the President and the Attorney General 183 (Jan. 22, 1979).

However, after the Boulder decision Sen. Strom Thurmond (R.-S.C.) introduced a bill in the Senate that granted municipalities partial immunity from the antitrust laws. The text of the Thurmond bill follows:

S. 1578. A bill to clarify the application of the Federal antitrust laws to local governments.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Local Government Antitrust Act of 1983".

Sec. 2. The Federal antitrust laws shall not apply to any law or other action of, or official action directed by, a city, village, town, township, county, or other general function unit of local government in the exercise of its regulatory powers, including but not limited to zoning, franchising, licensing, and the establishment of monopoly public services, but excluding any activity involving the sale of goods or services by the unit of local government in competition with private persons, where such law or action is valid under state law, except to the extent that the Federal antitrust laws would apply to a similar law or action of, or official action directed by, a State. For purposes of this section, the term "Federal antitrust laws" means the antitrust laws, as such term is defined in the first section of the Clayton Act (15 U.S.C. § 12), and section 5 of the Federal Trade Commission Act (15 U.S.C. § 45).

Thurmond Introduces Bill to Extend Parker to Local Government Regulation, [July-Dec.] ANTITRUST & TRADE REG. REP. (BNA) No. 1122, at 22-23 (July 7, 1983). In response to Sen. Thurmond's proposed bill, William Baxter, then chief of the antitrust division of the Justice Department, stated that the proposed bill was unnecessary because Boulder "really did not change

Maryland has become the first state to attempt to protect its local governmental units from potential antitrust liability. The Maryland legislature has enacted legislation designed to "confirm existing powers of local governments to displace or limit competition" in specified areas. (S.B. 629, S.B. 635, S.B. 770). *Maryland Becomes First State to Address Boulder Standards*, [July-Dec.] ANTITRUST & TRADE REG. REP. (BNA) No. 1122, at 23 (July 7, 1983).

One area is waste disposal and the resultant bill states: "It has been and shall continue to be the policy of the state that [each local governmental unit] is directed and authorized to exercise all powers regarding waste collection and disposal notwithstanding any anticompetitive effect." *Id.* Whether the Maryland statutes, or statutes similar to them, constitute sufficient state authorization so as to bring municipal anticompetitive conduct under the state action doctrine remains to be tested.