ANTITRUST—FEDERAL PREEMPTION—SECTION 1 OF SHERMAN ACT DOES NOT PREEMPT MUNICIPAL ORDINANCE FIXING RENTAL RATES—*Fisher v. City of Berkeley*, 106 S. Ct. 1045 (1986).

The Sherman Antitrust Act[1] is designed to promote unrestricted competition[2] and to decentralize economic power.[3] Despite this federal legislation, state and local governments often enact regulations that restrain trade and disrupt the free market system.[4] For over forty years,[5] the United States Supreme Court has struggled with the conflict between federal antitrust laws and anticompetitive state and local regulations.[6] In general, the Court has permitted states to impose restraints on trade.[7] Until

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[1] *See* Sherman Act, ch. 647, § 1, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1-7 (1982)). In United States v. Topco Assoc., Inc., 405 U.S. 596, 610 (1972), the United States Supreme Court noted that:

> 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.

Id.

[2] *See* 15 U.S.C. § 1 (1982). Section 1 of the Sherman Act states in pertinent part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce or among the several States, or with foreign nations, is declared to be illegal." *Id.*

[3] *See* 15 U.S.C. § 2 (1982). Section 2 of the Sherman Act prohibits unilateral and concerted conduct which constitutes monopolization "or [an] attempt to monopolize . . . any part of the trade or commerce among the several States." *Id.*; *see also* Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) (discussing congressional intent for enacting section 2 of Sherman Act).

[4] *See* Note, *Preemption or Exemption—What is the Proper Test for Home Rule Antitrust Immunity? Community Communications Co. v. City of Boulder*, 31 DE PAUL L. REV. 819, 819 (1982).

[5] *See* Fisher v. City of Berkeley, 106 S. Ct. 1045, 1053 (1986) (Brennan, J., dissenting).

[6] *See, e.g.*, Community Communications Co. v. City of Boulder, 445 U.S. 40 (1982); California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); Parker v. Brown, 317 U.S. 341 (1943). See *infra* notes 7-8, 85-129 and accompanying text for a further explanation of the conflict involved in these cases.

[7] *See, e.g.*, Rice v. Norman Williams Co., 458 U.S. 654 (1982) (upholding state law which allowed liquor distiller to control distribution of products within state); New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978) (validating state franchise law requiring automobile manufacturers to acquire permission from state before opening dealership); Parker v. Brown, 317 U.S. 341 (1943) (upholding state sponsored marketing program even though program restricted competition and fixed prices). *But cf. California Retail Liquor Dealers Ass'n.*, 445 U.S. at 102 (invalidat-

recently, however, the Court had been reluctant to extend the same protection to municipal regulations[8] unless they were enacted pursuant to an expressed state policy.[9] In adjudicating the validity of a municipal ordinance enacted pursuant to state authorization, the Court has traditionally presumed that the ordinance was violative of the Sherman Act without first applying traditional antitrust analyses.[10] In *Fisher v. City of Berkeley*,[11] however, the Court found it unnecessary to address the state authorization question since it concluded that under traditional antitrust principles a local rent control ordinance was not violative of section 1 of the Sherman Act.[12]

In June 1980, the citizens of Berkeley, California, enacted by initiative the "Rent Stabilization and Eviction for Good Cause Ordinance"[13] (Ordinance) in order to prevent unwarranted rent increases.[14] The Ordinance imposed strict rent controls on all of

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ing state statute requiring wine producers to fix prices); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) (holding state's participation in private company's marketing program was insufficient to qualify for state action exemption).

8 *See, e.g.*, Town of Hallie v. City of Eau Claire, 105 S. Ct. 1713 (1985) (holding municipality entitled to state action protection from antitrust laws only if local regulation was enacted pursuant to expressed state policy); *Community Communications Co.*, 455 U.S. at 48 (invalidating local ordinance since essential state authorization was lacking); *City of Lafayette*, 435 U.S. at 410 (holding municipal ordinances valid under antitrust laws provided they are enacted pursuant to state authorization and "clearly articulated and affirmatively expressed state policy").

9 *See City of Lafayette*, 435 U.S. at 410. The state policy must be "clearly articulated and affirmatively expressed. . . ." *Id.*

10 *See* Fisher v. City of Berkeley, 37 Cal. 3d 644, 661, 693 P.2d 261, 276, 209 Cal. Rptr. 682, 697 (1984), *aff'd on other grounds*, 106 S. Ct. 1045 (1986) (citing Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978)). In analyzing alleged antitrust violations, the Court has traditionally applied a per se or rule of reason analysis. *See* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L. J. 775, 775 (1965). A per se analysis is applicable where the Court establishes that an agreement fixes prices "and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense." United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940). Most other restraints of trade are analyzed under the rule of reason standard which "requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition." Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 343 (1982).

11 106 S. Ct. 1045 (1986).

12 *See id.* at 1051.

13 *See Fisher*, 37 Cal. 3d at 652, 693 P.2d at 269, 209 Cal. Rptr. at 690.

14 *See* Berkeley, Cal., Rent Stabilization and Eviction for Good Cause Program 13.76.030 (1980) [hereinafter Ordinance]. The stated purpose of the Ordinance is:

> to regulate residential rent increases in the city of Berkeley and to protect tenants from unwarranted rent increases and arbitrary, discriminatory, or retaliatory evictions, in order to help maintain the diversity of

the city's residential units[15] and established a rent ceiling[16] which landlords could not exceed unless they acted pursuant to an annual rate increase prescribed by the Rent Stabilization Board or they successfully petitioned the Board for an individual adjustment.[17]

Shortly thereafter, a group of landlords instituted an action in the Superior Court of California seeking declaratory and injunctive relief from enforcement of the Ordinance.[18] The landlords claimed that the Ordinance violated their fourteenth amendment due process and equal protection rights.[19] The trial court granted the city a judgment on the pleadings and held that the Ordinance was valid on its face.[20]

The California Court of Appeals reversed the trial court and held that the Ordinance was unconstitutional because procedural delays in rent adjustments deprived landlords of their right to due process of law.[21] While the case was pending appeal to the

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> the Berkeley community and to ensure compliance with legal obligations relating to the rental of housing. This legislation is designed to address the City of Berkeley's housing crisis, preserve the public peace, health and safety, and advance the housing policies of the city with regard to low and fixed income persons, minorities, students, handicapped, and the aged.

Id.

15 *See Fisher*, 106 S. Ct. at 1047. Section 5 of the Ordinance exempts "government owned units, transient units, cooperatives, hospitals, certain small owner-occupied buildings, and all newly constructed buildings" from the city-imposed rent controls. *Id.* (citing Ordinance, *supra* note 14).

16 *Id.* The Ordinance defines "rent ceiling" as "the maximum allowable rent which a landlord may charge on any rental unit covered" under the Ordinance. Ordinance, *supra* note 14, at 13.76.040(m).

17 Ordinance, *supra* note 14, at 13.76.120. Section 6 of the Ordinance establishes a rent stabilization board consisting of nine commissioners. *Id.* at 13.76.060. This section also sets out the powers, duties, procedures, and rules, in addition to a means of terminating rent control, if Berkeley's vacancy rate exceeds five percent. *Id.* Under section 11 of the Ordinance, the Board can make annual general adjustments to cover any increases or decreases in utilities and taxes. *Id.* at 13.76.110. Landlords not satisfied with general increases may petition the Board for individual adjustments pursuant to section 12. *Id.* at 13.76.120.

18 *Fisher*, 37 Cal. 3d at 653, 693 P.2d at 270, 209 Cal. Rptr. at 691.

19 *Fisher*, 106 S. Ct. at 1047.

20 *Fisher*, 37 Cal. 3d at 653, 693 P.2d at 270, 209 Cal. Rptr. at 691.

21 Fisher v. City of Berkeley, 148 Cal. App. 3d 267, 195 Cal. Rptr. 836, 837 (1983), *vacated*, 37 Cal. 3d 644, 693 P.2d 261, 209 Cal. Rptr. 682 (1984), *aff'd on other grounds*, 106 S. Ct. 1045 (1986). While this action was pending before the court of appeals, the citizens of Berkeley passed the "Tenants' Rights Amendments Act of 1982," which revised specific sections of the 1980 Rent Control Ordinance. *Fisher*, 106 S. Ct. at 1047 n.1. The California Court of Appeals, the California Supreme Court, and the United States Supreme Court reviewed the Ordinance as amended. *Id.*

California Supreme Court, the United States Supreme Court decided the case of *Community Communications Co. v. City of Boulder*.[22] In that case, the Court held that an ordinance enacted by a home rule municipality was subject to federal antitrust scrutiny.[23] Thereafter, certain *amici curiae*[24] raised the issue of the effect of *Boulder*, and of antitrust laws in general, on the Berkeley Ordinance.[25]

The California Supreme Court considered the validity of the rent control Ordinance under the Sherman Act even though the lower courts had not addressed the issue.[26] The court initially noted that the Ordinance would be scrutinized under the standard articulated in *Boulder* only if found to conflict with, and thus be preempted by, the federal antitrust laws.[27] In determining whether the Ordinance was in fact preempted, the court developed its own criteria instead of applying traditional antitrust standards.[28] Concluding that the Ordinance did not conflict with either section 1 or 2 of the Sherman Act,[29] the court did not address the issues raised in *Boulder*.[30] Accordingly, the court held that the Ordinance was valid on its face.[31]

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22 455 U.S. 40 (1982); *see infra* notes 112-29 and accompanying text (discussion of *City of Boulder*).

23 *See City of Boulder*, 455 U.S. at 48-57.

24 *See Fisher*, 106 S. Ct. at 1047.

25 *Fisher*, 37 Cal. 3d at 654, 693 P.2d at 270-71, 209 Cal. Rptr. at 692.

26 *Id.* The California Supreme Court relied on California case law in justifying its authority to consider the antitrust issue on appeal. *Id.* at 654 n.3, 693 P.2d at 271 n.3, 209 Cal. Rptr. at 692 n.3. The court noted the following: (1) a new legal issue was decided while the *Fisher* case was pending appeal; (2) the case was on appeal from an action seeking injunctive relief; and (3) the new issue raised was a question of law and involved public policy matters. *See id.*

27 *Id.* at 660, 693 P.2d at 275, 209 Cal. Rptr. at 696.

28 *Id.* at 667-77, 693 P.2d at 280-88, 209 Cal. Rptr. at 700-09. The California Supreme Court developed a four part test based on the United States Supreme Court's commerce clause cases. *Id.* Under this test, the Ordinance would be preempted only if it did not have a proper local purpose; it was not rationally related to the municipality's police powers; it was discriminatory; and its purpose could be achieved through less intrusive means. *Id.* at 674-77, 693 P.2d at 286-88, 209 Cal. Rptr. at 706-09. The court refused to apply the per se rule of illegality because the two principle justifications of this standard, economic reliability and ease of administration, did apply to the case at bar. *Id.* at 667, 693 P.2d at 281, 209 Cal. Rptr. at 702.

29 *Id.* at 652, 693 P.2d at 269, 209 Cal. Rptr. at 690.

30 *Id.*

31 *Id.* Specifically, the court held that the Ordinance did not conflict with the federal antitrust laws. *Id.* The court also concluded that the Ordinance was constitutional, on its face, with regard to the state and federal due process challenges. *Id.* The court also determined, however, that the provision of the Ordinance creating an evidentiary presumption as to the burden of proof regarding retaliatory evic-

On appeal, the United States Supreme Court limited its jurisdiction to the antitrust preemption question.[32] The United States Supreme Court affirmed the California Supreme Court's decision on different grounds.[33] Applying traditional antitrust standards, the Court held that the Berkeley Ordinance was not preempted by section 1 of the Sherman Act and was thus valid.[34]

Section 1 of the Sherman Act prohibits all entities from contracting, conspiring, or combining to unreasonably restrain trade.[35] The United States Supreme Court has not extended section 1 to invalidate unilateral or independent conduct irrespective of any anticompetitive purpose or effect that such conduct may have.[36]

As early as 1919, in *United States v. Colgate & Co.*,[37] the United States Supreme Court determined that the Sherman Act permits independent activity provided there is no intent to monopolize.[38] In *Colgate*, the federal government contended that a manufacturer of soap and related products conspired with wholesalers and retailers to fix prices.[39] Scrutinizing the manufacturer's actions, the Court concluded that Colgate specified resale prices and refused to deal with wholesalers and retailers who failed to comply with Colgate's pricing practice.[40] In the Court's view, however, Colgate acted independently.[41] Therefore, its conduct

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tions was invalid. *Id.* Since the evidentiary provision was severable, the court concluded that the remainder of the Ordinance was legal. *Id.*

32 *Fisher*, 106 S. Ct. at 1048.

33 *Id.* Rather than relying on the four part standard developed by the California Supreme Court, the United States Supreme Court applied a traditional antitrust analysis. *Id.*

34 *Id.* at 1051.

35 *See* 15 U.S.C. § 1 (1982).

36 *Fisher*, 106 S. Ct. at 1049.

37 250 U.S. 300 (1919).

38 *Id.* at 307. The Court specifically held that "[t]he purpose of the . . . Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of . . . trade and commerce—in a word to preserve the right of freedom to trade." *Id.*

39 *Id.* at 302. The United States government indicted Colgate because it:

> knowingly and unlawfully created and engaged in a combination with . . . [its wholesalers and retailers] . . . for the purpose and with the effect of procuring adherence on the part of such dealers . . . to resale prices fixed by [Colgate], and of preventing such dealers from reselling such products at lower prices, thus suppressing competition . . . in violation of the [Sherman Act].

Id. at 302-03.

40 *Id.* at 306.

41 *See id.*

was not prohibited by section 1 of the Sherman Act.[42] The Court further reasoned that an opposite result would interfere with a manufacturer's right to do business with whomever it pleased.[43]

In the 1984 case of *Monsanto Co. v. Spray-Rite Service Corp.*,[44] the United States Supreme Court reiterated its position that section 1 of the Sherman Act applies exclusively to concerted activity.[45] In *Monsanto*, a manufacturer of agricultural herbicides refused to renew a distributorship agreement with the Spray-Rite Service Corporation (Spray-Rite).[46] Spray-Rite instituted suit alleging that the manufacturer and other distributors conspired to maintain resale prices and to terminate Spray-Rite's distributorship.[47] The trial court determined that the manufacturer conspired with several of its distributors in violation of section 1.[48] After reviewing the trial court's findings of fact, the Court held that there was sufficient evidence to support the lower court's holding.[49]

In reaching this conclusion, the Supreme Court articulated the standard of proof antitrust plaintiffs must meet in order to successfully challenge a price fixing conspiracy.[50] Under *Monsanto*, antitrust plaintiffs must establish the existence of an agreement through either direct or circumstantial evidence.[51] Applying this standard, the Court reasoned that the mere fact that the manufacturer received complaints regarding Spray-Rite's price cutting practice from several of its distributors did not support an inference of an agreement or conspiracy.[52] The Court observed that Spray-Rite had to produce additional evidence clearly illustrating conduct which could not possibly have been an independent act.[53] Moreover, Spray-Rite had to demonstrate that the manufacturer and its distributors intentionally ac-

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42 *See id.*

43 *Id.* at 307. Relying on prior decisions, the Court observed that a manufacturer is free to "announce in advance the circumstances under which he will refuse to sell." *Id.* The Court also noted that a retailer has the right to refuse to deal with a manufacturer who the retailer feels is acting unfairly. *Id.* (citing Eastern States Retail Lumber Dealers' Ass'n. v. United States, 234 U.S. 600, 614 (1914)).

44 465 U.S. 752 (1984).

45 *Id.* at 761.

46 *Id.* at 757.

47 *Id.*

48 *Id.* at 757-58.

49 *Id.* at 768.

50 *Id.* at 763.

51 *Id.* at 764.

52 *Id.* at 763.

53 *Id.* at 764.

ted pursuant to a common scheme with some unlawful purpose.[54] Spray-Rite met this burden of proof, thereby establishing that the manufacturer's termination of Spray-Rite's distributorship was an illegal conspiracy.[55]

Three months later in *Copperweld Corp. v. Independence Tube Corp.*,[56] the United States Supreme Court held that a price fixing agreement between a parent corporation and its wholly owned subsidiary did not constitute concerted action under section 1 of the Sherman Act.[57] The Court began its analysis by refuting the intra-enterprise conspiracy doctrine,[58] which was based on the principle that the parent-subsidiary relationship did not shield an entity from section 1 liability.[59] The Court stated that the doctrine erroneously treated agreements between a parent and its wholly owned subsidiary as concerted conduct.[60] Although a subsidiary is separately incorporated from its parent company, the Court reasoned that coordinated activity between such entities was analogous to agreements made between members of a single firm or between a corporation and its unincorporated departments.[61] In the *Copperweld* Court's view, coordinating activities between a parent and its wholly owned subsidiary were unilateral since the two corporations were effectively a single enterprise acting with a common purpose.[62] Accordingly, the *Copperweld* Court concluded that a parent and its wholly owned subsidiary are not separate entities and, therefore, could not conspire in violation of section 1.[63]

In dealing with conflicts between federal antitrust laws and state and local regulations, the United States Supreme Court has developed the state action doctrine in lieu of a traditional anti-

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54 *Id.*

55 *Id.* at 768.

56 467 U.S. 752 (1984).

57 *Id.* at 777. *See* Note, *Parent Corporation and Its Wholly Owned Subsidiary Incapable of Conspiring in Violation of Section One of Sherman Act*, 15 SETON HALL L. REV. 943 (1985).

58 *See Copperweld*, 467 U.S. at 759-73. The *Copperweld* Court stated that the intra-enterprise conspiracy doctrine "provides that § 1 liability is not foreclosed merely because a parent and its subsidiary are subject to common ownership." *Id.* at 759. The Court then proceeded to set forth the development of this doctrine by analyzing several of the Supreme Court's earlier opinions. *See id.* at 759-66.

59 *Id.* at 759.

60 *Id.* at 777. The Court expressly overruled the intra-enterprise conspiracy doctrine as it applied to wholly owned subsidiaries. *Id.*

61 *See id.* at 766, 769, 770.

62 *Id.* at 771.

63 *See id.*

trust analysis.[64] The leading case espousing this doctrine is the 1943 decision of *Parker v. Brown*[65] which was predicated upon the federalism precept that states are sovereign under the federal Constitution.[66]

In *Parker*, a California raisin producer instituted an action to enjoin the enforcement of a state sponsored marketing program which restricted competition and fixed prices.[67] The producer alleged that the state and public officials responsible for the administration of the program were thereby violating the Sherman Act.[68] The United States Supreme Court began its analysis by observing that if private individuals or corporations had implemented a similar marketing program, their conduct would have been illegal under the antitrust laws.[69] Since the *Parker* program was authorized and administered by the state, the Court held that the activities of the state and its agents were not subject to antitrust scrutiny.[70] Moreover, the Court noted a lack of express congressional intent to restrain states from enacting economic regulations in their sovereign capacity.[71] In reaching its conclusion, the Court relied on the United States Constitution which provides for a federal system of government in which the states are sovereign and where only Congress can expressly limit the authority of the states.[72] In dicta, the Court further noted that a state could not extend this antitrust immunity to private citizens through its legislation.[73]

Eight years later, in *Schwegmann Brothers v. Calvert Distillers Corp.*,[74] the United States Supreme Court was once again confronted with the issue of whether a state regulation conflicted with the Sherman Act.[75] In that case, the Court refused to up-

64 *See* Parker v. Brown, 317 U.S. 341, 350 (1943).

65 *Id.* Although *Parker* is the case most frequently cited as the starting point for cases dealing with conflicts between the Sherman Act and anticompetitive regulations, the state action doctrine actually originated in Olsen v. Smith, 195 U.S. 332 (1904). *See* Cantor v. Detroit Edison Co., 428 U.S. 579, 615-16 n.3 (1976) (Stewart, J., dissenting).

66 *See* Community Communications Co. v. City of Boulder, 455 U.S. 40, 53 (1982).

67 *Parker*, 317 U.S. at 344, 346.

68 *See id.* at 344.

69 *Id.* at 350. While the Court made this statement, it failed to explain why such conduct on the part of private parties would have been illegal. *Id.*

70 *Id.*

71 *Id.* at 351.

72 *Id.*

73 *Id.*

74 341 U.S. 384 (1951).

75 *Id.*

hold a Louisiana statute which authorized individuals to enforce price fixing contracts against parties, as well as nonparties, to such agreements.[76] In *Schwegmann*, a group of liquor distributors contracted with their retailers to establish minimum prices.[77] A New Orleans retailer refused to sign the agreement and proceeded to sell the distributors' products at reduced prices.[78] Thereafter, the distributors sued to enjoin the retailer from engaging in allegedly unlawful price cutting activities.[79]

Although the *Schwegmann* Court did not apply the *Parker* state action analysis, it relied on the dicta articulated by the *Parker* Court to invalidate the statute on the grounds that it compelled all retailers to abandon price competition.[80] Consequently, the *Schwegmann* Court reasoned that such conduct constituted horizontal price fixing which is prohibited by the Sherman Act.[81] The Court also rejected the distributors' contention that the statute was protected from the antitrust laws under the Miller-Tydings Act.[82] While the Miller-Tydings Act granted limited antitrust immunity to certain state authorized retail price maintenance agreements, the Court explained that the Act did not sanction the statute's nonsigner provision.[83] Accordingly, the Supreme Court refused to enjoin the nonconsenting retailer

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76 *Id.* at 387.

77 *Id.* at 385.

78 *Id.*

79 *Id.* at 385-86.

80 *Id.* at 389.

81 *Id.*

82 *Id.* at 386-87. The Miller-Tydings Act was "enacted in 1937 as an amendment to § 1 of the Sherman Act." *Id.* at 386. It provided in pertinent part that " 'nothing herein contained shall render illegal, *contracts or agreements* prescribing minimum prices for the resale' of specified commodities when *'contracts or agreements of that description* are lawful as applied to intrastate transactions' under local law." *Id.* (emphasis in original) (quoting Miller-Tydings Act, 1937, ch. 690, title VIII, 50 Stat. 693, *repealed by* Consumer Goods Pricing Act of 1975, Pub. L. 94-145, § 2, 89 Stat. 801 (codified as amended at 15 U.S.C. § 1 (1982)). The Miller-Tydings Act was later repealed in 1975 by the Consumer Goods Pricing Act. *See* California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97, 102 (1980).

83 *See Schwegmann*, 341 U.S. at 388-89. After reviewing the Miller-Tydings Act's legislative history, the Court stated the following:

> What is granted is a limited immunity—a limitation that is further emphasized by the inclusion in the state law and the exclusion from the federal law of the nonsigner provision. The omission of the nonsigner provision from the federal law is fatal to respondents' position unless we are to perform a distinct legislative function by reading into the Act a provision that was meticulously omitted from it.

Id. at 388.

from selling the distributors' products below the fixed prices.[84]

Similarly, in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*,[85] the Supreme Court invalidated a state statute which permitted private parties to fix prices.[86] The statute required all wine producers to file price schedules with the state and all wholesalers to sell wine at fixed prices.[87] The Court initially observed that the state's wine pricing system allowed producers to prevent price competition by dictating the prices charged by the wholesalers[88] and summarily noted that such activities constituted retail price maintenance, a per se violation of the Sherman Act.[89] Since the statute conflicted with the antitrust laws, the Court next considered whether the state's involvement in the wine pricing scheme was sufficient to qualify for an exemption under the *Parker* state action doctrine.[90] After reviewing its prior decisions, the Court articulated the standards required for antitrust immunity.[91] First, the challenged restraint has to be implemented pursuant to a " 'clearly articulated and affirmatively expressed . . . state policy,' " and second, the restraint has to be actively supervised by the state.[92] Although the California wine

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84 *See id.* at 395.

85 445 U.S. 97 (1980).

86 *See id.* at 99, 102.

87 *Id.* at 99.

88 *Id.* at 103. The Court noted that "such vertical control destroys horizontal competition as effectively as if wholesalers 'formed a combination and endeavored to establish the same restrictions . . . by agreement with each other.' " *Id.* (quoting Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 408 (1911)).

89 *See id.* at 102-03. The Court observed that it had consistently held that resale price maintenance agreements are illegal restraints of trade. *Id.*

90 *Id.* at 103.

91 *See id.* at 103-05. The Court relied on four recent decisions dealing with the state action doctrine in articulating its two-prong test. *Id. See also* New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978) (holding state statutory scheme restricting competition in sale of new automobiles exempt from antitrust scrutiny because program supervised by state); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (holding state supreme court ban on lawyer advertising constituted state involvement qualifying for *Parker* exemption); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) (holding mere state approval of anticompetitive activity insufficient to establish state action exemption); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (denying *Parker* protection because enforcement of minimum fee schedules for lawyers by state bar association did not constitute act of state as sovereign).

92 *Midcal*, 445 U.S. at 105 (quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978) (Brennan, J., plurality)). Relying on *Lafayette*, the Court established a two-prong test for private parties seeking immunity under the *Parker* state action doctrine. *See Midcal*, 445 U.S. at 105. Although *Midcal* was originally a mandamus action seeking an injunction against a state agency, the state had no involvement in setting prices. *See* Town of Hallie v. City of Eau Claire, 105 S. Ct. 1713, 1717 n.3 (1985). This illegal activity was carried out by private wine deal-

pricing system satisfied the first requirement, the Court found that it lacked the necessary state supervision.[93] Accordingly, the pricing system was not entitled to protection from the antitrust laws under the *Parker* state action doctrine.[94] In dicta, the Court noted that if the state had established the prices, reviewed the reasonableness of the price schedules, or monitored market conditions, the challenged pricing scheme would have been exempt from antitrust scrutiny.[95]

In contrast to *Schwegmann* and *Midcal*, both of which involved state statutes authorizing private market restraints, the 1978 case of *City of Lafayette v. Louisiana Power & Light Co.*,[96] addressed the conditions under which local governments may gain *Parker* protection.[97] In *Lafayette*, the Louisiana Power & Light Co. (L.P.& L.) sued two municipalities that owned and operated their own electric utility systems.[98] L.P.& L. alleged that the municipalities had violated the antitrust laws by engaging in illegal tying arrangements[99] with their customers; that is, the municipalities required customers to purchase electricity from them as a condition of continuing to supply other utility services.[100] The municipalities defended their actions on the grounds that they

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ers; therefore, the *Midcal* Court framed its holding in terms of a private party seeking *Parker* immunity. *See Midcal*, 445 U.S. at 105.

93 *Midcal*, 445 U.S. at 105-06. The Court stated that "[t]he State simply authorizes price setting and enforces the prices established by private parties." *Id.* at 105. In the Court's view, this was insufficient to entitle a private party to antitrust immunity. *See id.* at 105-06.

94 *See id.* at 106.

95 *Id.* at 105-06.

96 435 U.S. 389 (1978). The *Lafayette* Court's decision was rendered in two phases. *See id.* at 394. The first issue pertaining to the Court's refusal to find congressional intent to exempt local governments from antitrust liability was a majority opinion. *See id.* at 408. As to a local government's protection under the *Parker* doctrine, only a plurality of the Court agreed that state government subdivisions were not exempt simply because of their governmental status. *See id.* at 413.

97 *Fisher*, 37 Cal. 3d at 658, 693 P.2d at 274, 209 Cal. Rptr. at 694-95.

98 *Lafayette*, 435 U.S. at 392 n.6. This action was initially instituted by municipalities who claimed that the Louisiana Power & Light Co. (L.P.&L.) engaged in anticompetitive activities. *Id.* at 391-92. L.P.&L. counterclaimed alleging, *inter alia*, that the municipalities required their customers to purchase electricity from them as a condition for continuing to supply water and gas services. *Id.* at 392 n.6. The Court's opinion addressed only the issues raised by the L.P.&L. on the counterclaim. *See id.* at 392.

99 In Northern Pac. R.R. Co. v. United States, 356 U.S. 1 (1958), the Court defined a tying arrangment as "an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Id.* at 5-6.

100 *Lafayette*, 435 U.S. at 391-92 n.6.

were exempt from the antitrust laws under the *Parker* doctrine.[101]

The *Lafayette* majority refused to infer that Congress intended to exempt cities from antitrust liability.[102] The Court also rejected the municipalities' claim that the purpose of the antitrust laws is to protect the public only from the abuses of private businesses and not from the acts of local governments which exist to serve the welfare of the public.[103] Moreover, the majority observed that the municipalities' motive was not solely for the public benefit.[104] Instead, like every business entity, the municipalities may have acted in furtherance of their own self-interest without regard to the economic impact on surrounding communities.[105] Accordingly, the Court recognized that the challenged tying arrangements adversely affected utility customers in the same manner as similar agreements initiated by private enterprises.[106]

The next part of the *Lafayette* decision was a plurality opinion written by Justice Brennan who rejected the municipalities' argument that all governmental entities, including state agencies and cities, were exempt from the antitrust laws simply because of their governmental status.[107] After evaluating the Supreme Court's prior decisions, the plurality concluded that the *Parker* exemption was available only if the restraint of trade was an act of government performed by a state in its sovereign capacity or by its subdivisions acting pursuant to state policy.[108] The plurality based its conclusion on the fact that the municipalities were not sovereign entities and therefore were not entitled to the same federal deference as a state.[109] Without deciding the issue, Justice Brennan suggested that a city may come within the purview of the *Parker* doctrine if it acted pursuant to a "clearly articulated and affirmatively expressed . . . state policy" which was actively supervised by the state itself.[110] Refusing to grant automatic im-

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101 *Id.* at 392.

102 *See id.* at 408.

103 *Id.* at 403.

104 *Id.*

105 *Id.* at 404.

106 *Id.* The Court noted that the municipalities could charge discriminating rates to customers outside of their jurisdiction. *Id.*

107 *Id.* at 408.

108 *Id.* at 413.

109 *Id.* at 412. The dissent, however, relied on *Parker* and maintained that the city of Lafayette was entitled to state action protection because it was a governmental body, not a private person, and its action was, therefore, an act of government. *Id.* at 426 (Stewart, J., dissenting).

110 *Id.* at 410. In a concurring opinion, Chief Justice Burger viewed the owner-

munity, the plurality remanded the case for a determination whether the municipalities acted in furtherance of an expressed state policy.[111]

Four years later, in *Community Communications Co. v. City of Boulder*,[112] the Supreme Court reaffirmed its adherence to a narrow interpretation of the *Parker* doctrine as it applies to local governments.[113] In *Boulder*, the defendant city, a home rule municipality, was given the authority to govern its own local affairs.[114] Acting in its regulatory capacity, the city enacted an emergency ordinance prohibiting the plaintiff corporation from expanding its cable television operation for three months.[115] During that time, the city council was to draft a model cable television ordinance which would increase competition in the city.[116] The corporation sued to enjoin the enforcement of the moratorium, alleging that it restrained trade in violation of section 1 of the Sherman Act.[117] The city argued that the ordinance was protected from the antitrust laws under the *Parker* state action doctrine.[118] In a split decision, the United States Court of Appeals for the Tenth Circuit held that the city's actions were immune from liability under the Sherman Act.[119] The Tenth Circuit dis-

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ship of the utility companies as a proprietary function. *See id.* at 422 (Burger, C.J., concurring). Accordingly, the Chief Justice would insist on more stringent standards than those articulated by the plurality before granting the municipalities immunity from the Sherman Act. *Id.* at 425 n.6 (Burger, C.J., concurring). In lieu of the "clearly articulated and affirmatively expressed state policy" standard, the Chief Justice would require the cities to prove that their conduct was *compelled* by the State and was essential to a state plan. *Id.* (emphasis in original).

111 *See id.* at 393-94.

112 455 U.S. 40 (1982).

113 *See id.* at 52.

114 *Id.* at 43. The city of Boulder was granted local autonomy pursuant to the Home Rule Amendment to the Colorado State Constitution. *Id.* The Colorado Home Rule Amendment, COLO. CONST. art. xx, § 6, provides in pertinent part:

> The people of each city or town of this state . . . 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 its organic law and extend to all its local and municipal matters.
>
> . . .
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> It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters.

Id. at 43-44.

115 *City of Boulder*, 455 U.S. at 45-46.

116 *Id.* at 46.

117 *Id.* at 46-47.

118 *Id.* at 47.

119 *See* Community Communications Co. v. City of Boulder, 630 F.2d 704 (10th Cir. 1980), *rev'd*, 455 U.S. 40 (1982).

tinguished the case at bar from *Lafayette* by noting that the city of Boulder had no proprietary interest in the cable television business.[120]

The United States Supreme Court reversed the Tenth Circuit's holding.[121] Reluctant to extend the *Parker* protection, the Court held that an ordinance could not be immune from antitrust liability unless it constituted sovereign state action or municipal action "in furtherance . . . of [a] clearly articulated and affirmatively expressed state policy."[122] The Court rejected the city's contention that the Home Rule Amendment to the Colorado Constitution[123] rendered the ordinance a governmental action performed by the city serving as representative for the state in local matters.[124] The *Boulder* Court then proceeded to apply the two-prong test suggested by the *Lafayette* plurality.[125] The Court focused on the city's argument that its home rule status satisfied the "clearly articulated and affirmatively expressed state policy" requirement set forth in *Lafayette*.[126] In examining the Home Rule Amendment, the Court noted that by granting the city general autonomy, the state took a neutral position with regard to local matters, including the cable television business.[127] The Court concluded that neutrality alone was insufficient to satisfy the first part of the *Lafayette* test.[128] Consequently, it was unnecessary for the *Boulder* Court to consider whether the city had to act under the guidance of the state.[129]

After the *Boulder* and *Lafayette* decisions, municipalities became the targets of increased antitrust litigation and, consequently, treble damage liability.[130] In response to lobbying efforts by local governments, Congress enacted the Local Gov-

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120 *Id.* at 708.

121 *City of Boulder*, 455 U.S. at 48.

122 *Id.* at 52 (relying on California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978)).

123 *See supra* note 114 and accompanying text for pertinent provisions of Colorado Home Rule Amendment.

124 *City of Boulder*, 455 U.S. at 53.

125 *Id.* at 54-56. *See supra* notes 108-10 and accompanying text for two-prong test suggested in *Lafayette*.

126 *City of Boulder*, 455 U.S. at 55.

127 *Id.*

128 *Id.*

129 *Id.* at 51 n.14. The Court expressly declined to address the application of the active state supervision criterion articulated in *Lafayette*. *Id.*

130 *See* Mayo, *The Local Government Antitrust Act: A Comment On the Constitutional Questions*, 50 J. AIR L. & COM. 805, 807 (1985). Over a span of three years the

ernment Antitrust Act of 1984[131] which prohibits the recovery of damages against a municipality or its agents acting in their official capacity.[132] Under the Act, however, injunctive relief is still available to antitrust plaintiffs.[133]

Although *Boulder* and *Lafayette* noted limitations to the state action doctrine, the United States Supreme Court never definitively explained how precisely a state policy must be articulated or whether the second prong of the *Lafayette* standard applies to a municipality.[134] In the 1985 decision of *Town of Hallie v. City of Eau Claire*,[135] the Supreme Court clarified these ambiguities.[136] In *Town of Hallie*, the city refused to supply sewage treatment to unincorporated townships but supplied such services to individual landowners living within the townships.[137] The townships alleged that the city engaged in illegal tying arrangements with its customers and had acquired a monopoly over the sewage treatment services.[138] The city defended its actions under the state action doctrine.[139]

In addressing what constituted adequate state policy under the *Lafayette* standard, the Supreme Court held that a state statute need not expressly declare that the legislature intended the delegated action to have an anticompetitive effect.[140] By granting a municipality broad authority to regulate a specific local concern, the Court noted that a state could anticipate that anticompetitive restraints would be enacted.[141] The Court, therefore, rejected the contention that a municipality had to be compelled by the

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number of antitrust suits pending against local governments increased from 43 in 1981, to over 200 in 1983. *Id.*

131 *Id. See also* Local Government Antitrust Act of 1984, Pub. L. 98-544, § 2, 98 Stat. 2750 (codified as amended at 15 U.S.C. §§ 34-36 (1982 & Supp. 1986)).

132 *See* 15 U.S.C. § 35 (1982 & Supp. 1986) which states that "[n]o damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act . . . from any local government, or official or employee thereof acting in an official capacity." *Id.*

133 H. R. REP. No. 965, 98th Cong., 2d Sess. 2, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4603.

134 *See* Town of Hallie v. City of Eau Claire, 105 S. Ct. 1713, 1717 (1985).

135 *Id.*

136 *Id.* at 1717.

137 *Id.* at 1715.

138 *Id.* at 1716.

139 *See id.* at 1715-16.

140 *See id.* at 1718.

141 *Id.* at 1717-18. The Court reviewed several of the provisions of the Wisconsin statute and noted that WIS. STAT. ANN. § 62.18(1) granted "authority to cities to construct, add to, alter, and repair sewage systems." *Town of Hallie*, 105 S. Ct. at 1717-18.

state to act in order to qualify for *Parker* protection.[142] The Court next inquired as to whether the *Lafayette* active state supervision requirement applied to municipalities.[143] After noting the ambiguity in its prior decisions with regard to this issue, the Court observed that the purpose of the supervision criterion was to assure that the actor was engaged in conduct which would further state policy.[144] When the actor is a municipality, as opposed to a private party, however, the Court found little or no danger of a local government acting contrary to the interests of the state.[145] Accordingly, the Court concluded that it is unnecessary to require a state to actively supervise a city's execution of a properly delegated function.[146]

Although the United States Supreme Court had clearly established the parameters of the state action doctrine, it never clearly explained the applicability of the doctrine until *Rice v. Norman Williams Co.*[147] In *Rice*, the Court declared that the *Parker* state action doctrine would be applied only after it was established that the challenged state regulation irreconcilably conflicted with, and thus was preempted by, the federal antitrust laws.[148]

Rice involved a 1982 challenge to a California law which allowed liquor distillers to control the distribution of their prod-

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142 *Town of Hallie*, 105 S. Ct. at 1720. The townships relied on Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) and Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), to support their "compulsion" argument. *Id.* *See supra* note 91 and accompanying text for explanation of these cases. Distinguishing these cases, the *Town of Hallie* Court noted that they involved private parties claiming *Parker* protection. *Town of Hallie*, 105 S. Ct. at 1720. The Court observed that a municipality "is an arm of the State" and as such it acts for the benefit of the public. *Id.* The Court then stated that none of its decisions concerning municipal immunity from the antitrust laws required that the municipality be compelled by the state to act. *Id.* (citing Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978)). *See supra* notes 96-129 and accompanying text for a discussion of these cases.

143 *See Town of Hallie*, 105 S. Ct. at 1720.

144 *Id.*

145 *Id.* at 1720-21. The Court noted that "[t]he only real danger is that [the municipality] will seek to further purely parochial public interests at the expense of more overriding state goals. This danger is minimal, however, because of the requirement that the municipality act pursuant to a clearly articulated state policy." *Id.* at 1721. Since the Court already determined that the city acted pursuant to a clearly articulated state policy, it found it unnecessary to require state supervision. *Id.*

146 *Id.*

147 458 U.S. 654 (1982).

148 *Id.* at 659.

ucts within the state.[149] The Court unanimously held that the statute, considered in the abstract, did not conflict with the Sherman Act since it did not authorize conduct which is a per se violation.[150] In reaching this conclusion, the Court relied upon principles similar to those applied when the Court analyzes statutes under the supremacy clause of the United States Constitution.[151]

Initially, the *Rice* Court observed that the California statute was not automatically preempted by the Sherman Act simply because it may have an anticompetitive effect.[152] In order to establish preemption, the Court stated that an antitrust plaintiff must prove that the challenged statute mandated or authorized conduct which constituted an illegal act under the antitrust laws.[153] In the alternative, the plaintiff must demonstrate that the statute placed irresistible pressure upon a nonpublic entity to violate the Sherman Act in complying with the statute.[154] The Court further explained that the statute would be preempted only if it required conduct that was a per se violation of the Sherman Act.[155] Moreover, the Court examined the actions of distillers under the California statute and characterized them as a vertical nonprice restraint.[156] Since this restraint was not per se illegal, the Court

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149 *Id.* at 656. The California Business and Professional Code Annotated provided that a " 'licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent.' " *Rice*, 458 U.S. at 656-57 (quoting CAL. BUS. & PROF. CODE § 23672 (West Supp. 1982)).

150 *See Rice*, 458 U.S. at 658.

151 *Id.* at 659. The Court applied principles analogous to those used when determining whether a state regulation is preempted by federal law pursuant to the supremacy clause; that is, the Court inquired as to whether an "irreconcilable conflict [exists] between the federal and state regulatory schemes." *Id.* If there is a conflict between the state regulation and the federal act, then, under the principles of the supremacy clause, the federal law prevails. *See id.* The *Rice* Court further noted, however, that "[a] state statute is not pre-empted by the federal antitrust laws simply because the state scheme *might* have an anticompetitive effect. A party may successfully enjoin the enforcement of a state statute only if the statute on its *face* irreconcilably conflicts with federal antitrust policy." *Id.* (citations omitted) (emphasis added).

152 *See id.*

153 *Id.* at 661.

154 *Id.*

155 *Id.* The Court refused to analyze the nonprice restraint under the rule of reason standard. *Id.* Such an analysis, the Court reasoned, would require an evaluation of the economic circumstances, an impossible task when reviewing a statute in the abstract. *Id.*

156 *See id.* at 661-62. A vertical nonprice restraint can be defined as follows: an agreement made between a supplier and dealer or a buyer and seller with the purpose and effect of restraining trade without fixing prices. *See* Continental T.V., Inc.

concluded that the statute did not irreconcilably conflict with the Sherman Act.[157] It was therefore unnecessary for the Court to consider the validity of the statute under the *Parker* state action doctrine.[158]

The preemption doctrine adopted in *Rice* is predicated upon the principle that federal laws are superior to conflicting state laws.[159] In *Fisher v. City of Berkeley*,[160] the United States Supreme Court applied the same theory in analyzing a municipal rent control ordinance.[161] After utilizing traditional antitrust standards, the Court determined that the Berkeley Ordinance did not conflict with the Sherman Act and therefore was not preempted by the federal antitrust laws.[162] The Court also concluded that the absence of preemption rendered it unnecessary to consider whether the Ordinance was exempt from the antitrust laws under the *Parker* state action doctrine.[163]

Writing for the majority, Justice Marshall focused his opinion on the alleged conflict between the Berkeley rent control Ordinance and section 1 of the Sherman Act.[164] The Court began its analysis by observing that a regulation was not preempted solely because it had an anticompetitive effect.[165] Relying on the standard articulated in *Rice*, the *Fisher* Court reasoned that it was justified in expanding this rule to the Berkeley Ordinance since neither the *Rice* rule nor any other preemption case distinguished between state and local governments.[166]

Based upon the *Rice* standard, the Supreme Court then me-

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v. GTE Sylvania Inc., 433 U.S. 36 (1977). In analyzing the conduct authorized by the California statute, the *Rice* Court stated that the statute "merely enforces the distillers' decisions to restrain intrabrand competition." *Rice*, 458 U.S. at 661. It permits the distiller to designate which wholesalers may import the distillers' products into the State. *Id.*

157 *Rice*, 458 U.S. at 661-62.

158 *Id.* at 662 n.9. Although the Court found that the California statute was not preempted by the Sherman Act, it noted that the distillers' conduct pursuant to the statute was subject to an antitrust analysis under the rule of reason. *Id.* at 662.

159 *See id.* at 659.

160 106 S. Ct. 1045 (1986).

161 *See id.* at 1048-49.

162 *See id.* at 1048.

163 *Id.* at 1051.

164 *See id.* at 1049.

165 *See id.* at 1048 (relying on Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982); Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 133 (1978)).

166 *Id.* Justice Marshall relied on White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204 (1983), for the proposition that preemption analyses in areas other than antitrust do not distinguish between state and local authorities. *See Fisher*, 106 S. Ct. at 1048.

ticulously analyzed the landlords' conduct under the Ordinance.[167] In doing so, the Court first addressed the landlords' contention that the Ordinance violated the Sherman Act because it imposed rent ceilings which amounted to illegal price fixing.[168] The majority assumed that if the landlords had privately arranged to stabilize rent rates, their conduct would have constituted price fixing, a per se violation of the Sherman Act.[169] Justice Marshall conceded that the Ordinance had the same adverse economic effect on the housing market as the hypothetical private conspiracy.[170] In distinguishing the Ordinance from a private arrangement, however, the Court observed that the city of Berkeley unilaterally imposed the rent ceilings upon the landlords.[171]

In the Court's view, the distinction between unilateral and concerted action was critical.[172] The Court was greatly influenced by its prior antitrust decisions which required concerted action between separate entities as a condition precedent for establishing illegal price fixing.[173] Justice Marshall emphasized that section 1 of the Sherman Act was aimed only at concerted activity which unreasonably restrained trade by contract, combination, or conspiracy.[174] The Court further explained that even where a single entity's conduct has the same anticompetitive effect as concerted action, there is no section 1 violation.[175] Accordingly, the Court proceeded to scrutinize the Berkeley Ordinance in order to determine whether the required concerted activity existed.[176]

After examining the Ordinance, the *Fisher* Court concluded that it constituted neither an agreement between the city and the

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167 *Fisher*, 106 S. Ct. at 1049.

168 *Id.*

169 *Id.* The landlords noted that price fixing has been a per se violation "since the earliest days of the Sherman Act." *Id.*

170 *Id.*

171 *Id.*

172 *See id.*

173 *See id.* The Court relied on two of its most recent decisions in requiring a showing of concerted action in order to maintain a section 1 claim: Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984) (holding parent and wholly owned subsidiary are not separate entities and cannot conspire to fix prices) and Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 763 (1984) (noting that independent activity must be distinguished from concerted action when analyzing price fixing practices). *See supra* notes 44-63 and accompanying text for a more complete discussion of these cases.

174 *Fisher*, 106 S. Ct. at 1049 (citing *Copperweld*, 467 U.S. at 768).

175 *Id.* (relying on *Monsanto*, 465 U.S. at 760-61; United States v. Parke, Davis & Co., 362 U.S. 29, 44 (1960)).

176 *See id.*

landlords nor a horizontal price-fixing restraint among the landlords themselves.[177] The Court reasoned that the relationship between the municipality and the landlords was not a section 1 combination because the landlords were forced to obey the law.[178] The majority also noted that while all the landlords charged the same rent in compliance with the Ordinance, their conduct did not establish a horizontal agreement since there was "no meeting of the minds" to fix prices.[179] Since the landlords did not have the freedom to resist the city's rent controls, the Court concluded that the Berkeley Ordinance was a unilaterally imposed restraint.[180] In dicta, the Court noted that not all governmental restraints necessarily amount to unilateral action outside the purview of section 1.[181] Furthermore, the Court explained that certain restraints may be characterized as "hybrids" in that private actors are given power by a state or local government to engage in illegal price-fixing practices.[182] Justice Marshall stated that, in the past, the Supreme Court has found such hybrid restraints to violate the Sherman Act.[183]

Having determined that the Berkeley Ordinance was unilaterally imposed, the *Fisher* Court held that it did not conflict with the Sherman Act.[184] Because the Court determined that the Ordinance was valid pursuant to the preemption analysis, the question of whether the Ordinance would be exempt under the *Parker*

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177 *See id.* at 1049-50.

178 *Id.* at 1050.

179 *Id.*

180 *Id.* at 1051.

181 *Id.* at 1050-51.

182 *Id.* at 1050. The Court noted that although the Ordinance gave tenants, a group of interested private parties, some power to enforce the provisions of the Ordinance, it was insufficient to classify it as a hybrid restraint. *Id.* at 1051. In deciding what constituted a hybrid restraint, the Court distinguished California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 444 U.S. 97 (1980) and Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) from *Fisher*. *Fisher*, 106 S. Ct. at 1050-51.

183 *Fisher*, 106 S. Ct. at 1051. *See* California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951); and *supra* notes 74-95 for a further analysis of this proposition.

184 *Fisher*, 106 S. Ct. at 1051. The Court acknowledged that in some instances a state or local regulation may be a vehicle for disguising a private price-fixing arrangement. *Id.* Justice Marshall observed, however, that there was no indication that such corruption had "tainted" the Berkeley Ordinance. *Id.* The fact that the Ordinance was adopted by initiative and that it was being challenged by a group of landlords convinced the Court that the Ordinance was not a "cloak for any conspiracy among the landlords or between the landlords and the municipality." *Id.*

state action doctrine did not have to be addressed.[185]

In a concurring opinion, Justice Powell maintained that instead of applying preemption analysis, the majority should have evaluated the Berkeley Ordinance under the well established state action doctrine.[186] Referring to the *Town of Hallie* decision, Justice Powell observed that a municipality claiming *Parker* protection need only demonstrate that the state expressly authorized a municipality to act in such a manner which would foreseeably result in anticompetitive effects.[187]

Justice Powell began his analysis of the Ordinance by reviewing the legislative history of rent control in Berkeley.[188] The concurrence noted that in 1972 the California Legislature ratified an amendment to the city's charter authorizing city controlled rent stabilization.[189] The California Supreme Court, however, subsequently invalidated the amendment based on procedural grounds.[190] In 1980, the citizens of Berkeley adopted the rent control Ordinance challenged in the case at bar.[191] Notwithstanding the California Supreme Court's decision, Justice Powell concluded that the state's ratification of the 1972 amendment satisfied the *Lafayette* "clearly articulated . . . state policy" requirement.[192] Accordingly, Justice Powell found that the Ordinance was exempt from antitrust liability.[193]

In a dissenting opinion, Justice Brennan argued that the majority's decision disregarded principles that had been evolving for over forty years.[194] Justice Brennan maintained that the

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185 *Id.* (relying on Town of Hallie v. City of Eau Claire, 105 S. Ct. 1713 (1985)).

186 *Id.* at 1051 (Powell, J., concurring).

187 *Id.* at 1052 (Powell, J., concurring) (citing *Town of Hallie*, 105 S. Ct. at 1719).

188 *See id.*

189 *Id.*

190 *Id.* Justice Powell noted that in Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976), the California Supreme Court invalidated the charter amendment because it "permitted individual adjustments of the across-the-board rent ceiling only on a unit-by-unit basis, and only after a hearing on the particular unit whose rent was to be raised." *Fisher*, 106 S. Ct. at 1052 n.2 (Powell, J., concurring).

191 *Fisher*, 106 S. Ct. at 1052 (Powell, J., concurring).

192 *Id.* at 1053 (Powell, J., concurring). Justice Powell rejected the landlords' contention that the California Supreme Court's invalidation of the 1972 charter amendment cancelled the legislature's ratification. *Id.* The state court invalidated the amendment because it lacked procedural safeguards for the landlords; the court never determined that rent control was bad policy or against state law. *Id.* Therefore, the state's ratification remained intact. *Id.*

193 *Id.*

194 *Id.* at 1053 (Brennan, J., dissenting). Unlike the majority, Justice Brennan viewed California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S.

Berkeley rent control Ordinance effectively fixed prices and, as a result, was preempted by the Sherman Act.[195] In his view, the majority failed to recognize the establishment of rent ceilings as price fixing per se.[196] Justice Brennan also noted that by imposing rent controls, the city forced the landlords to abandon price competition and to engage in horizontal price fixing.[197] In addition to this horizontal restraint, Justice Brennan posited that the Ordinance effectuated a vertical combination between the city and the landlords because it compelled the landlords to fix prices.[198] Moreover, the dissent concluded that, notwithstanding the absence of any agreement, the Ordinance constituted a per se violation of the Sherman Act since it was impossible to demonstrate that the city and landlords had acted independently.[199]

After concluding that the Ordinance irresistibly conflicted with the Sherman Act, Justice Brennan analyzed the Ordinance under the *Parker* state action doctrine.[200] The Justice conceded that the Supreme Court's prior holdings did not completely foreclose municipalities from enacting anticompetitive measures.[201] The dissent observed, however, that a local government was accorded antitrust immunity only when it acted pursuant to express

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97 (1980), and Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951), as being directly on point. *See id.* at 1055 n.2 (Brennan, J., dissenting). Justice Brennan acknowledged that the Berkeley landlords had no power to set their own rent rates, whereas private parties in those other cases did. *Id.* Justice Brennan contended, however, that this distinction was relevant only as to the state supervision criterion of the *Lafayette* two-prong test. *Id.*

195 *See Fisher*, 106 S. Ct. at 1054 (Brennan, J., dissenting). Justice Brennan contended that the Berkeley Ordinance "irresistibly pressures landlords to fix prices for their rental units. Thus, the Ordinance 'facially conflict[s] with the Sherman Act because it *mandate[s]* [price fixing,] an activity that has long been regarded as a *per se* violation of the Sherman Act.' " *Id.* (quoting Rice v. Norman Williams Co., 458 U.S. 654, 659-60 (1982)) (emphasis in original).

196 *Id.* Justice Brennan commented that the Court's holding in *Rice* did not support the *Fisher* majority's narrow view of preemption. *Id.* Agreements to set prices are per se illegal under the Sherman Antitrust Act which because of their " 'pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.' " Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 (1977) (quoting Northern Pac. R.R. Co. v. United States, 356 U.S. 1, 5 (1958)).

197 *Fisher*, 106 S. Ct. at 1055 (Brennan, J., dissenting) (relying on Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951)).

198 *Id.* Justice Brennan noted that the majority failed to explain why the relationship between the landlords and the city was not a combination for section 1 purposes. *Id.*

199 *See id.* at 1055-56 (Brennan, J., dissenting).

200 *Id.* at 1056 (Brennan, J., dissenting).

201 *Id.*

state authority and a "clearly articulated and affirmatively expressed state policy."[202] Applying this standard to the Berkeley Ordinance, Justice Brennan opined that the Ordinance did not qualify for *Parker* protection.[203] In his view, California's ratification of the 1972 charter amendment was a *pro forma* approval of Berkeley's rent control policy[204] and that such a general grant of authority did not satisfy the *Parker* criteria.[205]

The *Fisher* majority opinion significantly alters the analysis of municipal regulations under the antitrust laws. In the past, the Supreme Court summarily noted or implied that an ordinance conflicted with the Sherman Act before proceeding to the *Parker* state action issue.[206] The *Fisher* holding modified over forty years of precedent by applying traditional antitrust principles to explicitly determine whether section 1 of the Sherman Act preempted the Berkeley Ordinance.[207] As a threshold inquiry to the preemption issue, the Court required proof of concerted conduct either among the landlords or between the landlords and the city.[208]

Prior to *Fisher*, the Court had never stipulated that concerted action was a prerequisite to finding preemption.[209] A close examination of the *Rice* preemption standard, however, reveals that concerted conduct is necessary to establish a conflict with the Sherman Act. The *Rice* Court pronounced that in order for a regulation to be facially preempted by section 1, it must constitute a per se violation.[210] Before it can be condemned as per se illegal, however, the challenged regulation must fall within the purview of section 1. On its face, section 1 extends exclusively to coordinating activities between separate entities.[211] In order to satisfy the concerted activity criterion, antitrust plaintiffs must prove the existence of an agreement, contract, or combination which tends to foreclose competition.[212] The agreement may be

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202 *Id.* (citing Community Communications Co., Inc. v. City of Boulder, 455 U.S. 40, 52 (1982)).

203 *Id.* at 1057 (Brennan, J., dissenting).

204 *Id.* at 1056 (Brennan, J., dissenting).

205 *See id.*

206 *Fisher*, 37 Cal. 3d at 661, 693 P.2d at 276, 209 Cal. Rptr. at 697.

207 *See Fisher*, 106 S. Ct. at 1053-54 (Brennan, J., dissenting).

208 *See id.* at 1049.

209 *Id.* at 1054 (Brennan, J., dissenting).

210 Rice v. Norman Williams Co., 458 U.S. 654 (1982). *See supra* notes 147-58 and accompanying text for a discussion of *Rice*.

211 *See* 15 U.S.C. § 1 (1982).

212 *See* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 765 (1984).

expressed or implied.[213] The Court infers an agreement when concerted action is contemplated by competitors and these parties, in turn, participate in a common arrangement.[214] Absent proof of a "meeting of the minds" by conspiracy or agreement, the Court will not condemn independent conduct under section 1.[215] Unilateral action, regardless of how detrimental to competition, is permitted.[216] Only after the concerted conduct element is satisfied, will the challenged regulation be scrutinized under traditional antitrust standards to determine if it authorizes or mandates conduct that is a per se violation.[217]

The *Fisher* Court correctly held that the conduct of the landlords and the city did not constitute concerted action for section 1 purposes. Admittedly, the conduct among the landlords resembles horizontal price fixing; that is, all competing property owners in Berkeley abandon their independent pricing schemes and charge identical rental rates. Although the landlords appear to be conspiring to fix prices, their actions are not pursuant to an expressed or tacit agreement. Each landlord sets his own rental rates in accordance with the Berkeley Ordinance. Similarly, no vertical conspiracy to eliminate price competition can be inferred between the city and landlords. The city has established a rent ceiling that compels landlords to abide by the specified rates.

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213 *See* American Tobacco Co. v. United States, 328 U.S. 781, 809-10 (1946). The Court stated that:

> No formal agreement is necessary to constitute an unlawful conspiracy. . . . The essential combination of conspiracy in violation of the Sherman Act may be found in a course of dealing or other circumstances as well as in an exchange of words. Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding or a meeting of minds in an unlawful arrangement[,] the conclusion that a conspiracy is established is justified.

Id. (citations omitted).

214 United States v. Paramount Pictures, Inc., 334 U.S. 131, 142 (1948).

215 Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984). The Court has been reluctant to condemn the independent activities of a single enterprise unless there is a threat of monopolization in violation of section 2 of the Sherman Act. *Id.* at 767-68.

216 *Id.* at 768.

217 Arguably, rent control laws have adverse economic effects. Indeed, many economists have condemned rent stabilization practices. *See Fisher*, 37 Cal. 3d at 715-16, 693 P.2d at 316, 209 Cal. Rptr. at 737 (Lucas, J., dissenting). For a discussion of the economic impact of rent control see M. LETT, RENT CONTROL: CONCEPTS, REALITIES, AND MECHANISMS 27-56 (1976). The author notes several disadvantages of rent control laws. *Id.* at 44. Despite these anticompetitive effects, rent control laws cannot be per se violations of the Sherman Act unless the concerted action element is present. *See Fisher*, 106 S. Ct. at 1051.

The landlords have no choice but to obey the law. They are not acquiescing to an agreement but, rather, are complying with the law in order to avoid criminal penalties.

As a result of the Court's narrow application of the concerted action element,[218] municipalities are now granted broader immunity from the antitrust laws than permitted in the recent past.[219] Local governments may now enact regulations with anticompetitive implications, whether instituted to benefit public welfare or enhance parochial interests.[220] Indeed, municipal activities that were once deemed to conflict with the antitrust laws will no longer be barred by section 1 of the Sherman Act. For instance, municipalities will be able to unreservedly engage in zoning, licensing, franchising, and transporting activities even if such practices hinder or eliminate competition.[221]

Although the Court's holding immunizes many local regulations from the antitrust laws, courts are not precluded from finding preemption when conspiracies are blatantly present. Thus, regulations that the Court characterizes as "hybrid" satisfy the concerted conduct requirement since they grant private entities the power to enforce agreements with third parties to restrict trade.[222] Preemption also ensues when a municipal price stabilization scheme is a shield for a private conspiracy to fix prices.[223]

Without the requisite concerted activity, a regulation will not

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218 *See* P. AREEDA, ANTITRUST LAW 14 (1982 Supp.) The author noted that:

> Superficially, one might characterize any "meeting of the minds" as a conspiracy. So broad a definition is both meaningless and inconsistent with the Sherman Act, because it is grossly overinclusive for the purposes of antitrust law. When Supreme Court justices, legislators, city council members, or zoning commissioners come to agreement within their respective organizations, there is a meeting of the minds. However, no one would use the language of conspiracy, with its connotations of impropriety, if not criminality, to describe the situation. Nor would one say that a judge, commissioner, or other official who decides in favor of party A rather than party B conspires with A, even if he adopted all of A's arguments.

Id.

219 *See* Melton, *The State Action Antitrust Defense for Local Governments: A State Authorization Approach*, 12 URBAN LAWYER 315, 318 (1980).

220 Ideally, a distinction should be made between the proprietary and governmental functions of a municipality. However, such a distinction would require an inquiry as to the purpose for a specific enactment. This would entail a rule of reason analysis which is inappropriate under the *Rice* preemption standard.

221 *See* Melton, *supra* note 219, at 319-21 n.14. The commentator lists 10 categories of common municipal activities that, after City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978), were deemed to have antitrust implications.

222 *See Fisher*, 106 S. Ct. at 1050-51.

223 *Id.* at 1051.

be preempted by section 1. If a challenged restraint is held to be unilaterally imposed, a claimant must base his assertion on some other provision of the antitrust laws. Section 2 of the Sherman Act, for example, extends to both unilateral and concerted actions which "monopolize, or attempt to monopolize" a particular economic market.[224] A monopolization allegation requires an inquiry as to the market power of the parties and their intent to establish a monopoly.[225] Therefore, this assertion is unavailable when a regulation is challenged in the abstract.[226]

Perhaps, the *Fisher* Court focused its analysis on the concerted action requirement because of the recent resurgence of the *Colgate* doctrine. The Supreme Court's interpretation of concerted action has paralleled the development of municipal immunity. When *Boulder* and *Lafayette* were decided, the concerted action criterion was significantly broadened to proscribe conduct that was essentially independent.[227] By the time *Fisher* was decided, the Court had reinstated its commitment to a narrow view of what constituted coordinating conduct. Accordingly, the *Fisher* Court distinguished between concerted and independent conduct and concluded that the Berkeley Ordinance neither mandated nor authorized conduct proscribed by section 1 of the Sherman Act. Thus, the *Fisher* holding is consistent with the Court's construction of the concerted action requirement.

Moreover, the Court's decision is consistent with the recently enacted Local Government Antitrust Act of 1984.[228]Although Congress considered various proposals that would have altered the analysis of municipal regulations,[229] it declined to interfere with the substantive evolving case law. In-

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224 Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 n.13 (1984).

225 American Tobacco Co. v. United States, 328 U.S. 781, 814-15 (1946).

226 *See Fisher*, 106 S. Ct. at 1051 n.2.

227 *See* United States v. Parke, Davis & Co., 362 U.S. 29 (1960). In a dissenting opinion, Justice Harlan noted that the majority's holding effectively overruled the *Colgate* doctrine, which articulated that section 1 did not prohibit unilateral conduct. *Id.* at 49-50 (Harlan, J., dissenting).

228 *See supra* note 131 and accompanying text.

229 The House Judiciary Committee actually considered three separate approaches that would have extended municipal immunity. *See* H.R. Rep. 965, 98th Cong. & 2d Sess. 13-16, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4603. One approach provided for "a legislative immunity for municipalities co-extensive with that of States provided that local conduct is 'valid under State law' or that 'authority is vested' by the States for such conduct." *Id.* at 13. The second approach would have exempted the nonproprietary functions of a municipality. *Id.* at 15. The third and final approach would have established a rule of reason analysis for municipal regulations. *Id.* at 16. The Committee rejected these proposals since

stead, the Act exclusively concerns the issue of damages. In passing this legislation, Congress created a deterrent to frivolous antitrust suits and, in effect, increased municipal immunity.[230] Similarly, the *Fisher* Court's reliance on the concerted action requirement erects a barrier to antitrust challenges of purely regulatory schemes. Municipal conduct that is unilateral in nature will not be preempted by section 1 of the Sherman Act. Accordingly, there will be no need to determine whether the challenged conduct is exempt from the antitrust laws. An analysis under the state action doctrine will thus be circumvented, and municipalities will be free to enact economic regulations without the threat of antitrust litigation.

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they would have added confusion in the courts to the problems facing local governments. *Id.* at 13-16.

230 *See* H.R. REP. No. 965, 98 Cong., 2d Sess. 19, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4603. The House Judiciary Committee Report noted that:

> While this remedy approach does not create a new substantive test, it does impose a substantial burden on plaintiffs at the outset of litigation. Plaintiffs who fail to secure a preliminary injunction may have to weigh carefully the costs of proceeding with the suit for a final disposition on the merits. Thus, this proposal should work to deter frivolous suits and to readjust the litigation advantages and disadvantages more equitably for local government defendants.

Id.