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Antitrust: Municipal Immunity and the Sherman Act: A New and Ambiguous Standard. Fisher v. City of Berkeley, 106 S. Ct. 1045 (1986)

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NOTE

ANTITRUST — Municipal Immunity and the Sherman Act: A New and Ambiguous Standard. *Fisher v. City of Berkeley*, 106 S. Ct. 1045 (1986).

Section 1 of the Sherman Act states, "every contract, combination . . . or conspiracy in restraint of trade . . . is declared to be illegal."[1] In *Fisher v. City of Berkeley*,[2] the United States Supreme Court held that Berkeley's municipal rent control ordinance, which imposed a ceiling on rental prices[3] on residential property in Berkeley, did not conflict with the Sherman Act[4] and therefore was constitutional.[5]

The United States Supreme Court, in an eight to one decision,[6] ruled that Berkeley's rent control ordinance[7] lacked the

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1. 15 U.S.C. § 1 (1982). This section provides:

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

Id.

2. 106 S. Ct. 1045 (1986).

3. *Id.* at 1047. The rent ceilings placed a price maximum on the residential rents charged by Berkeley's landlords. *Id.* Agreements to impose price maximums "no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." Albrecht v. Herald Co., 390 U.S. 145, 152 (1968) (quoting Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211, 213 (1952)). Such restraints are violations of the Sherman Act. *Albrecht*, 390 U.S. at 154.

4. 106 S. Ct. at 1051.

5. The ordinance, if determined to conflict with the Sherman Act, would have been preempted by federal antitrust laws, and therefore be invalid pursuant to the supremacy clause of the United States Constitution. *Id.* at 1047. The constitutional primacy of federal law over conflicting state law assures that the federal antitrust laws will dominate whenever there is a head-on conflict between them and state law. *See* Rice v. Norman Williams Co, 458 U.S. 654, 659-61 (1982).

6. Justice Marshall delivered the majority opinion. Chief Justice Burger and Justices Rehnquist, Stevens, White, Blackmun and O'Connor joined. Justice Powell filed a concurring opinion and Justice Brennan dissented. 106 S. Ct. at 1046.

7. Berkeley, Cal., Ordinance 5261 - N.S. (June, 1980).

element of concerted action[8] required for a section 1 violation of the Sherman Act.[9] The Court acknowledged that although traditional antitrust law has determined price fixing activities to be per se violations[10] of section 1, the unilateral nature of the Berkeley price fixing scheme rendered the ordinance outside the realm of antitrust attack,[11] irrespective of its economic impact.[12]

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8. 106 S. Ct. at 1051.

9. A concerted action is a required element of a section 1 violation of the Sherman Act. *See* American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946). The traditional definition of a concerted action is a "unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *Id.* at 810. *See also* William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1055 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982).

10. The per se test is one method the courts have used to determine that a challenged activity unreasonably restricts competition. Per se violations are anti-competitive agreements which by "nature and necessary effect are so plainly anti-competitive that no elaborate study of the industry is needed to establish their illegality." National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978).

Although the Supreme Court has limited the application of the per se rule (*see, e.g.*, Broadcast Music, Inc. v. Columbia Sys., Inc., 441 U.S. 1, 7-25 (1978) (blanket copyright licenses negotiated by the American Society of Composers, at fees fixed by the Society, held not to be a per se violation of section 1); *Professional Eng'rs*, 435 U.S. at 693-96 (engineers anti-competitive bid practices must be analyzed by the rule of reason)), price fixing agreements traditionally have been classified as per se violations of the Sherman Act. In United States v. Trenton Potteries, 273 U.S. 392 (1927), 82% of the pottery industry's manufacturers formed a cartel to fix prices. *Id.* at 394. Justice Stone, delivering the Court's opinion which outlined the per se test, stated:

> The aim and result of every price fixing agreement, if effective, is the elimination of one form of competition . . . . The reasonable price fixed today may through economic or business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable . . . .

Id. at 397.

The subsequent decision of United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), first used the per se terminology in finding that "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing . . . or stabilizing the price of a commodity . . . is illegal *per se*." *Id.* at 223 (emphasis in original).

11. 106 S. Ct. at 1049-50.

12. The effect of the ordinance was to deprive Berkeley's landlords of the power to freely raise their rent. *Id.* at 1051. The economic impact of such control will be to eliminate economic efficiency and stabilization, skew income distribution and lead to uncontrolled economic power. See P. AREEDA, ANTITRUST ANALYSIS 118-19 (1967) for a specific discussion of the negative impact resulting from displacement of competition.

This Note commences with a brief synopsis of the facts in *Fisher*. Next, a short historical outline and discussion of pertinent antitrust law and its application to state and municipal activities will be presented. An analysis of the Supreme Court's decision will follow, and this Note will conclude with an assessment of the ruling and its impact on both economic activities promoted by municipalities and the national economic objectives protected by the Sherman Act.

I. STATEMENT OF THE CASE

In June, 1980, the Berkeley electorate passed a rent control ordinance,[13] which imposed a restraint on the rental rates a landlord could charge for residential units,[14] and froze Berkeley's rental rates at the May 1980 price level.[15] The ordinance was designed to address Berkeley's housing crisis,[16] preserve the community's health and welfare, and advance the policies of the city.[17] It affected approximately 23,000 rental units in Berkeley.[18]

Landlords affected by the ordinance filed suit in California Superior Court,[19] seeking injunctive and declaratory relief based on allegations that the ordinance violated their rights under the due process and equal protection clauses of the fourteenth amendment.[20] The superior court upheld the ordi-

13. 106 S. Ct. at 1047 (1986).

14. *Id.* The ordinance provided an exemption for government-owned units, cooperatives, hospitals, certain small owner-occupied buildings, and all newly-constructed buildings. *Id.*

15. *Id.*

16. Berkeley and other Southern California cities have experienced a sharp decline since 1972 in new housing units while experiencing dramatic increases in rent, the number of condominium conversions and tenant evictions. *See* A. HESKINS, TENANTS AND THE AMERICAN DREAM 41-44 (1983).

17. Section 3 of the ordinance provides in part:

> The purposes of this Ordinance are 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 Berkeley community and to ensure compliance with legal obligations relating to the rental of housing.

Berkeley, Cal., Ordinance 5261 - N.S. § 3 (June 1980).

18. Fisher v. City of Berkeley, 37 Cal. 3d 644, 678, 693 P.2d 261, 288, 209 Cal. Rptr. 682, 709 (1985).

19. The original complaint was entered in Alameda County Superior Court. *Id.* at 660, 693 P.2d at 269, 209 Cal. Rptr. at 690.

20. 106 S. Ct. at 1047.

nance and the landlords appealed. After the California Court of Appeals reversed the superior court's decision,[21] the United States Supreme Court decided in *Community Communications Co. v. City of Boulder*[22] that the economic activities promulgated by home-rule municipalities were subject to antitrust scrutiny.[23] Following that decision, the California Supreme Court, urged by certain amici curiae,[24] addressed the antitrust issues presented by the ordinance and held that Berkeley's ordinance did not conflict with the Sherman Act.[25]

The United States Supreme Court noted probable jurisdiction on the antitrust issue[26] and affirmed the decision.[27] The Court rejected the analysis presented by the California Supreme Court[28] and applied traditional antitrust principles[29] to resolve the issue of whether a municipal ordinance, which places an economic restraint on private parties, directly conflicts with the Sherman Act.[30]

II. THE SHERMAN ACT: BACKGROUND, ELEMENTS AND IMMUNITY

A. Background

Congress passed the Sherman Act in 1890 in response to the racing expansion of new industries which engaged in a

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21. *Id.*

22. 455 U.S. 40 (1982).

23. A home-rule municipality is entitled, under the state constitution, to exercise the "full right of self-government in local and municipal matters." *Id.* at 43. In limiting municipal immunity from antitrust law, the Supreme Court held that such a grant of authority is not sufficient to exempt municipalities from antitrust scrutiny. *Id.* at 54.

24. The decision to review the issue of the effect of *Boulder* on the landlords' claim was raised by amici curiae for both parties. 106 S. Ct. at 1047. The antitrust claim became the dispositive issue on appeal. *Id.* at 1047-48.

25. *Id.* at 1048.

26. *Id.*

27. *Id.* at 1051.

28. The California Supreme Court devised its own analytical standard for the anticompetitive practices of municipalities after recognizing that traditional economic analysis failed to give deference to the legitimate municipal interest of promoting public welfare. 106 S. Ct. at 1048. The standard employed by the California Supreme Court was based upon United States Supreme Court commerce clause cases. *Id.*

29. *Id.*

30. *Id.* at 1047.

concentration of power and price fixing. The Act outlaws combinations that unreasonably restrain trade.[31]

The initial Act was broad and simple.[32] According to its promoter, Senator Sherman, its purpose was to declare "general economic principles."[33] One such fundamental principle was to retain the advantages of both combination and competition in the economy while prohibiting combinations that prevent competition.[34]

The aim and scope of the Act has changed dramatically since its early challenge to the flagrantly anti-competitive activities of the trusts.[35] Modern antitrust, so far as practicable, seeks to arrest private efforts which impair competitive vigor, fairness and effectiveness.[36] In pursuit of this objective, the Act has been broadly applied to challenge anti-competitive activities of corporations, associations and cities throughout the country.[37]

B. Elements of a Section One Violation: Concerted Action and Unreasonable Restraint of Trade

Section 1 of the Sherman Act outlaws only those combinations which unreasonably restrain trade.[38] Regardless of the economic impact of an activity, section 1 does not prohibit unilaterally anti-competitive activities. A concerted action, defined as "a unity of purpose or a common design . . . or a

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31. Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911). The Supreme Court, after reviewing the legislative history behind the Act, concluded in *Standard Oil* that it was not the intent of Congress to prohibit all contracts which significantly imposed a restraint on trade, but rather only those agreements which unreasonably restricted competition. *Id.*

32. See A. NEALE & D. GOYDER, THE ANTITRUST LAWS OF THE U.S.A. 14-21 (1980) for an excellent outline of the historical development of antitrust laws in the United States.

33. 21 Cong. Rec. 2,460 (1890).

34. See A. NEALE & D. GOYDER, *supra* note 32, at 20.

35. *Id.* at 20. The level of enforcement of the Sherman Act has been subject to the American business climate, political pressures and judicial interpretation since 1890. *See generally id.* at 19-21.

36. *Id.* at 21.

37. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 395 (1978).

38. *Standard Oil,* 221 U.S. at 58.

meeting of minds in an unlawful arrangement"[39] must be present for a violation of the Act.

Section 1 does not apply to all concerted actions. Only those activities which result in unreasonable restraints of trade are outlawed.[40] Through decades of enforcement of the Act, two standards have been used to determine whether the challenged activity unreasonably restrains trade: the rule of reason and the per se test. Under the rule of reason, an activity will be violative of the Sherman Act if it has a substantially adverse effect upon trade,[41] while per se violations are limited to activities which have been held to have anti-competitive effects regardless of the context in which they are found.[42] Horizontal price fixing, including price ceilings, has traditionally been considered a per se violation of section 1.[43]

C. *Immunity From Antitrust Laws*

As previously noted, the objective of the Sherman Act is to protect free market competition.[44] However, given that an unregulated market does not always accommodate important public interests,[45] certain anti-competitive activities have been found to be immune from the Sherman Act. The scope and number of such immunities has been limited, however, to instances where there is an overwhelming public policy reason

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39. American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946). In addition to a concerted action and unreasonable restraint of trade, section 1 requires that interstate commerce be affected. Richter Concrete Corp. v. Hilltop Basic Resources, Inc., 547 F. Supp. 893, 917 (S.D. Ohio 1981). The interstate commerce requirement is generally satisfied by a wide variety of circumstances and is broadly construed. *See, e.g.*, Palmer v. Roosevelt Lake Log Owners Ass'n, 651 F.2d 1289, 1293 (9th Cir. 1981).

40. See National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978) for an analysis of the two standards employed by the courts.

41. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 375 (1967); *see also* Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 n.15 (1940) (Sherman Act designed to prevent restraints of trade which have a significant effect on competition). Although the rule of reason is the standard more commonly utilized to determine if an activity unreasonably *restrains* trade, the rule of reason was not applied in the *Fisher* decision.

42. The per se test is the applicable standard for the rent ceiling created by the Berkeley ordinance. For a discussion of the per se standard, see *supra* note 10.

43. Albrecht v. Herald Co., 390 U.S. 145, 151-52 (1968).

44. *See supra* text accompanying notes 33-35.

45. Areeda, *Introduction to Antitrust Economics,* in ANTITRUST POLICY IN TRANSITION: THE CONVERGENCE OF LAW AND ECONOMICS 45 (1984).

for displacement of competition.[46] Anti-competitive actions of the states is one area where such immunity has been found.[47]

1. *Parker* State-Action Doctrine

In 1943, the United States Supreme Court considered the applicability of the Sherman Act to regulatory activities of the states for the first time in its landmark decision of *Parker v. Brown*.[48] *Parker* involved a challenge to a California state program which restricted production levels in California's raisin industry in order to stabilize industry prices.[49] The Court held that the state's anti-competitive program was immune from antitrust attack. The Court found that market stabilization was a matter of state as well as national concern, and that state efforts to achieve this objective should be permitted in the "absence of inconsistent congressional action."[50]

The Supreme Court's decision that certain conduct of the state was rendered immune from antitrust scrutiny was based on principles of federalism.[51] The Court stated that "in a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."[52] *Parker* stands for the principle that unless the state itself has expressly directed or authorized an anti-competitive practice, the state's subdivisions, in exercising their delegated power, must obey the antitrust laws.[53]

Subsequent rulings have narrowed the scope and use of the *Parker* state-action exemption as a defense to antitrust chal-

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46. *See generally* ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 599-640 (2d ed. 1984). Areas which have been exempt from antitrust attack include organized labor, specific sectors of the insurance and banking industries, and agricultural cooperatives. *Id.*

47. *See, e.g.*, Parker v. Brown, 317 U.S. 341 (1943); *see also infra* text accompanying notes 50-55.

48. *Id.*

49. *Id.* at 344-50.

50. *Id.* at 367.

51. *Id.* at 351. "The principles of federalism leave in the states a power to regulate in the interest of safety, health and well-being of local communities . . . ." *Id.* at 362.

52. *Id.* at 351.

53. *Id.* at 352.

lenges.[54] However, it was not until 1978 in *City of Lafayette v. Louisiana Power & Light Co.*[55] that the Supreme Court addressed the issue of immunity from antitrust attack for municipal defendants acting as agents "of the state with broadly delegated responsibilities and a distinct governmental character."[56]

2. Municipal Immunity: The *Lafayette* and *Boulder* Decisions

In *Lafayette*,[57] the availability of the *Parker* state-action exemption for municipalities was addressed.[58] *Lafayette* involved a allegation by a public utility that two municipality-owned power companies violated section 1 of the Sherman Act by attempting to delay construction of the public utility's nuclear power plant.[59] The city of Lafayette raised the *Parker* state-action immunity as a defense.[60]

In a plurality opinion, the Court addressed the implications of granting municipalities a general exemption from antitrust liability.[61] Conceding that municipalities are more concerned with the public welfare of the community than of private parties, the opinion stated that "municipalities were no more likely than private interests to protect national economic goals."[62] The Court stated that the benefits of municipal activity did not outweigh the risk that municipalities will "place

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54. The lead cases refining the scope of the *Parker* immunity are: Bates v. State of Ariz. 433 U.S. 350, 359-63 (1977); Cantor v. Detroit Edison Co., 428 U.S. 579, 588-603 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773, 788-92 (1975). "Each case involved a private party or quasi-public body which claimed to be exempt from antitrust liability under the state action doctrine." Note, *The Application of Antitrust Laws to Municipal Activities*, 79 COLUM. L. REV. 519, 520 (1979). The trilogy reflected the Supreme Court's disfavor of antitrust exemptions. *Id.* at 521. However, these cases did not present a wholly public body claiming exemption from antitrust immunity. *Id.* at 521.

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

56. Note, *supra* note 54, at 521.

57. 435 U.S. 389 (1978).

58. Community Communications Co. v. City of Boulder, 455 U.S. 40, 49 (1982).

59. 435 U.S. at 392.

60. *Id.* at 394. After *Lafayette*, the *Parker* state-action defense for municipal defendants was severely restricted. For an authoritative discussion of the *Lafayette* decision, see Comment, *Antitrust Immunity for "State Action" After Lafayette*, 95 HARV. L. REV. 435 (1981).

61. 435 U.S. at 403-04.

62. *Id.* at 403.

their own parochial interests above the economic goals,"[63] and refused to grant municipalities the same deference afforded to the states in *Parker* based on their municipality status alone.[64] However, the Court held that "municipalities would qualify for antitrust immunity if the municipal activity was pursuant to state policy to displace competition with regulation."[65] *Lafayette* placed strict limitations on antitrust immunity granted to municipalities.[66]

The 1982 decision of *Community Communications Co. v. City of Boulder*[67] affirmed the *Lafayette* principle that antitrust immunity for municipalities should be cautiously found. In *Boulder*, the city had passed an emergency ordinance prohibiting Community Communications Company, Inc., the assignee of a permit to conduct cable television within the limits of the city, from expanding its cable television business. At the same time, the city invited competitors to enter the Boulder cable television market.[68] Community Communications Company, Inc., brought suit alleging that the restriction violated section 1 of the Sherman Act.[69]

The city defended the action by asserting that the *Parker* state-action doctrine was applicable.[70] The city argued that Colorado's Home Rule Amendment[71] for municipalities had "vested in the city of Boulder 'every power theretofore pos-

63. *Id.* at 412-13.

64. *Id.* at 411-13. For an in-depth commentary on the potential damage due to municipal exemptions from antitrust law, see generally Note, *Antitrust Law and Municipal Corporations: Are Municipalities Exempt from Sherman Act Coverage under the* Parker *Doctrine?*, 65 GEO. L.J. 1547 (1977).

65. *Lafayette*, 435 U.S. at 413.

66. Note, *supra* note 54, at 522.

67. 455 U.S. 40 (1982).

68. *Id.* at 46. The emergency ordinance was for a period of three months and the Boulder City Council announced it was necessary to prevent Community Communication Co.'s expansion from discouraging potential competitors from entering the market. *Id.*

69. *Id.* at 47.

70. *Id.* at 48. On appeal, the United States Court of Appeals for the Tenth Circuit distinguished *Boulder* from *Lafayette*, and held that the city's actions satisfied the criteria for the *Parker* exemption. *Id.*

71. COLO. CONST. art. XX § 6. Although the Colorado "home rule" statute granted extensive powers to municipalities and may have given the City of Boulder the authority to regulate the cable television industry, the statute did not sufficiently articulate a state policy to confer immunity from the antitrust laws. ABA ANTITRUST SECTION, *supra* note 46, at 610.

sessed by the legislature . . . in local and municipal affairs,' "[72] and that this broad grant of authority was sufficient to satisfy the state-action criterion of *Parker*.[73]

The Supreme Court rejected this argument, however, and in doing so continued the trend of limiting immunities from antitrust attack for municipalities put forth in *Lafayette*.[74] *Boulder* held that broad grants of authority to enact municipal ordinances are not sufficient to satisfy the *Parker* exemption.[75]

III. THE *FISHER* OPINIONS

A. The Marshall Majority

Justice Marshall, writing for the majority in *Fisher v. City of Berkeley*,[76] disregarded the *Parker* doctrine and utilized an alternative antitrust analysis to resolve the issue presented to the Supreme Court.[77] Although Justice Marshall acknowledged that the ordinance would affect the city's residential housing market in much the same way as a landlord cartel established to control prices,[78] the opinion distinguished the ordinance's regulatory scheme from a cartel based on the fact that the rental ceiling had been unilaterally imposed.[79] The distinction between a concerted and unilateral action became crucial to the majority's opinion. The Court noted that unless a concerted action is present, there can be no municipal liability under section 1 of the Sherman Act, even if the restraint itself unreasonably affects trade.[80]

The Marshall opinion was careful to indicate that "[n]ot all municipal restraints imposed upon private actors . . . constitute unilateral action outside the purview of section 1."[81] When private actors are granted a degree of private regulatory

72. 455 U.S. at 52.
73. *Id.* at 51.
74. *Id.* at 56.
75. *Id.*
76. 106 S. Ct. 1045 (1986).
77. *Id.* at 1048.
78. *Id.* at 1049. A cartel is a small number of competitors who act in concert to decrease quantity and maximize profits. R. POSNER, ANTITRUST CASES, ECONOMIC NOTES AND OTHER MATERIALS 5 (1974).
79. 106 S. Ct. at 1049.
80. *Id.*
81. *Id.* at 1050.

power in the restraint, it will be characterized as hybrid and subject to antitrust attack.[82] The Court found the purely regulatory scheme imposed by the ordinance to be free of any private interest and therefore solely unilateral in nature.[83] Since the ordinance lacked a concerted action as required by section 1, the Court concluded it was not "facially inconsistent" with the Sherman Act.[84] The judgment of the California Supreme Court was affirmed.[85]

B. The Powell Concurring Opinion

Justice Powell concurred with the judgment,[86] but criticized the Court for its failure to utilize the straightforward analytical framework established in *Parker v. Brown*.[87] Maintaining that the *Parker*[88] state-action exemption[89] was applicable to the facts put forth in *Fisher*, Justice Powell viewed the issue presented to the Court as whether California's legislature had expressly delegated to the city of Berkeley an adequate mandate to displace competition in the rental housing market.[90] Finding that the California legislature had directly authorized the displacement of competition in the housing market, Justice Powell concluded that the mandate satisfied the *Parker* requirements for exemption and concurred with the majority's finding of immunity.[91]

C. The Brennan Dissent

Justice Brennan, the sole dissenter, criticized the Court's disregard of "over 40 years of carefully considered precedent."[92] He determined that municipalities should not be found immune from antitrust attack and criticized the majority's conclusion that the ordinance lacked a concert of action

82. *Id.*
83. *Id.* at 1051.
84. *Id.* Had the ordinance been a concerted action it would have been both in conflict with and preempted by federal antitrust laws. *See supra* note 9.
85. 106 S. Ct. at 1051.
86. *Id.* (Powell, J., concurring).
87. *Id.*
88. 317 U.S. 341 (1943).
89. *See supra* text accompanying note 52.
90. 106 S. Ct. at 1051-53.
91. *Id.* at 1053.
92. *Id.* (Brennan, J., dissenting).

sufficient to satisfy section 1.[93] Justice Brennan cited as controlling precedent *Schwegmann Bros. v. Calvert Distillers Corp.*,[94] which held that a statutory scheme authorizing liquor distributors to enforce agreements fixing minimum prices on their products against retailers who had not agreed to price restrictions was a concerted action sufficient to satisfy the requirement of section 1.[95] Quoting *Schwegmann*, Justice Brennan pointed out that "[w]hen [landlords] are *forced* to abandon price competition, they are driven into a *compact* in violation of the spirit of the proviso [Sherman Act] which forbids 'horizontal' price fixing."[96]

The Brennan dissent continued by criticizing the majority's proposition that the "ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy,"[97] stating that no previous decision had "held, or indeed even suggested, that government-imposed restraints on economic actions cannot constitute concerted action."[98] Brennan concluded with an inference that the majority's rule infringed upon Congress' power to expressly grant immunity from the antitrust laws.[99]

IV. ANALYSIS

The *Fisher*[100] decision creates a new approach to the resolution of municipal social-welfare problems. The decision allows local social-welfare problems to be resolved by regulatory methods traditionally outlawed by the Sherman Act.

Irrespective of the intent behind the decision, the majority failed to recognize and incorporate established antitrust prin-

93. *Id.* at 1055.

94. 341 U.S. 384 (1951). Justice Brennan's dissent also noted that California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 455 U.S. 97 (1980) was applicable. 106 S. Ct. at 1054 (Brennan, J., dissenting).

95. *Id.* at 1054-55.

96. *Id.* (emphasis added) (quoting *Schwegmann*, 341 U.S. at 389).

97. 106 S. Ct. at 1055.

98. *Id.*

99. *Id.* at 1057. Congress' power is to create explicit statutory exemptions from the antitrust laws. Other exemptions have been implied by the courts. *See* ABA ANTITRUST SECTION, *supra* note 46, at 599.

100. 106 S. Ct. 1045 (1986).

ciples, consider the long-run economic implications of the rule in Berkeley and throughout the United States, or to recognize Congress' unique position to expressly grant immunity from antitrust scrutiny in its decision. These omissions in the *Fisher* decision led to the creation of a new antitrust immunity which will have a broad and detrimental impact on the country's municipalities.

A. The Erosion of The Sherman Act

1. The Coercive Government Activity Standard

In its creation of a new antitrust immunity for municipal ordinances, the majority in *Fisher* fails to incorporate properly the *Schwegmann Bros. v. Calvert Distillers Corp.*[101] standard for coercive governmental restraints of trade. *Schwegmann* held that governmental actions which had a coercive effect upon private parties, who must obey the governmental action, were concerted actions sufficient to satisfy the requirements of section 1 of the Sherman Act.[102] The majority distinguished *Schwegmann*[103] and proceeded to create a new standard for coercive municipal activities which restrain trade.[104] The new standard created by the Marshall majority requires the municipal activity must first be classified as hybrid in order to be a concerted action sufficient to violate section 1.[105]

In theory, the standard may be reasonable, but when applied to the diverse activities of the nation's 62,437 municipalities,[106] it becomes ambiguous and unmanageable. It is the Court's failure to define the extent of private participation necessary to characterize an activity as hybrid which creates the ambiguity.

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101. 341 U.S. 384 (1951).

102. *Id.* at 389.

103. The majority in *Fisher* distinguished *Schwegmann* by asserting that the regulatory scheme in *Schwegmann* left both the selection of price levels and exclusive power to enforce those levels to private parties, while in *Fisher* the only private party interest was "some power to trigger enforcement." 106 S. Ct. at 1050-51.

104. *Id.* at 1049-51.

105. *Id.*

106. 1 U.S. BUREAU OF THE CENSUS, 1982 CENSUS OF GOVERNMENTS, GOVERNMENTAL ORGANIZATION 1 (1983). Municipalities throughout the nation administer and regulate a broad range of activities including airports, schools, highways, utilities, libraries, recreation, and sanitation, in addition to public housing. *See* C. RHYNE, MUNICIPAL LAW § 4-6, at 68-69; § 21-1, at 465; § 25-1, at 516 (1957).

Municipal ordinances are often the result of private party lobbying efforts. Therefore, even though it may seem that a popularly enacted ordinance has no such interest in it, in reality there may be a high degree of such interest promoting the ordinance. The lack of a clear and legitimate standard to classify a municipal activity as unilateral or hybrid will lead to a broad application of the newly found immunity in all municipal markets.

2. Precedential Limitations on Municipal Immunity

The *Fisher* majority opinion disregarded the trend put forth in both *City of Lafayette v. Louisiana Power & Light Co.*[107] and *Community Communications Co. v. City of Boulder*[108] which limits municipal immunity from the antitrust laws. The result was that the majority created exactly the type of immunity which the *Lafayette* majority feared; one which "leave[s] this fundamental national policy [of competition] open to the vagaries of the political process."[109] The *Fisher* decision presents municipalities with the freedom to make economic choices counseled solely by their own parochial interests and without regard to their anti-competitive effects. The result is that "a serious chink in the armor of antitrust protection [is] introduced"[110] which directly conflicts with free market competition.

Had the strong policy preference disfavoring antitrust exemptions been carefully considered by the Marshall majority, *Fisher* would have been decided in a manner more consistent with antitrust precedent. An erosion of national economic objectives, codified in the Sherman Act, would not have been authorized by the United States Supreme Court had precedent been considered carefully.

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107. 435 U.S. 389 (1978). *See supra* text accompanying note 67.

108. 455 U.S. 40 (1982). Broad grants of authority to municipalities to regulate economic activities within their boundaries are not sufficient to qualify a municipality for antitrust immunity. *Id.* at 54-56.

109. 435 U.S. at 406.

110. *Id.* at 408.

B. Economic Impact

The decision of *Fisher v. City of Berkeley* will have an adverse economic impact not only in Berkeley, but also in municipalities throughout the country.

1. The Berkeley Housing Market

Although rent control has the short-run, meritorious effect of stablilizing housing markets,[111] over time the impact becomes detrimental to the community enforcing it. Because rent control displaces competition,[112] the economic incentive justifying investment in the community is reduced as the likelihood that investors will maximize profit becomes uncertain.[113] A long-term shortage of rental units results.[114] The current housing stock deteriorates because of the lack of investment incentives.[115] Poor quality housing then leads to a displacement of residents of the community.[116] Unfortunately, in failing to consider the long-term impact of the ordinance on the community, a decision was made which will lead the city of Berkeley into the exact situation that the ordinance was trying to instantaneously rectify.

2. The Markets of Municipalities Throughout the Country

The ultimate ruling of the Court, that a municipality's authority to protect public welfare should not be constrained by the Sherman Act, will greatly influence municipal economies throughout the country.[117] This new immunity places no limitations upon the market sectors in which municipal ordinances can affect competition. Therefore, the potential for

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111. M. LETT, RENT CONTROL 42 (1976).

112. *Id.* at 44.

113. *Id.* Investors may turn to communities without such controls or abandon the rental market entirely and focus on the construction of fee-simple, owner-occupied housing. *Id.*

114. *Id.* at 45.

115. *Id.* "The redistribution operates not only between landlords and tenants of rent controlled housing but also between owners of controlled and exempt buildings and between protected tenants and other housing consumers." *Id.* at 47.

116. *Id.* at 47. Further, rent control can lead to "severe inequities" because housing subject to rent control will fill up with early "claimants." This leaves later claimants to "compete for whatever, if any, controlled units become available or pay the higher controlled market price." *Id.*

117. 435 U.S. at 412.

serious market distortion in all municipal economies is great. No longer will the beneficial, stabilizing effect of market forces[118] be protected in municipal economies, since the holding in *Fisher* allows municipalities to engage in conduct which "eliminates price competition more effectively than any private 'agreement' ever could."[119]

C. *Congressional Authority to Grant Antitrust Immunity*

The final flaw of the *Fisher* decision is the obvious usurpation of power by the judiciary in its authorization of antitrust immunity for municipal ordinances. As Justice Brennan asserts, it is Congress that "may choose to amend the antitrust laws to grant municipalities broad discretion to enact anticompetitive measures in the public interest."[120] Given the tradition of judicial restraint limiting antitrust immunities, the Supreme Court should have given deference to the one branch of government empowered to enact expressed immunity from the Sherman Act.

V. CONCLUSION

Fisher v. City of Berkeley[121] presented the United States Supreme Court with a difficult conflict between two competing policies: maintaining competition as the fundamental economic principle in the United States versus municipal rights to implement social-welfare programs. The Supreme Court chose the latter, and in doing so has opened a potentially vast area of antitrust immunity for municipalities. Unfortunately, this new area of immunity from antitrust attack represents an erosion of the Sherman Act and subjects national economic policy to the vagaries inherent in local political processes.[122]

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118. Competitive forces promote efficiency and progress as they stabilize supply and demand naturally in a market economy. *See* P. AREEDA, *supra* note 12, at 8-10.

119. 106 S. Ct. at 1056 (Brennan, J., dissenting).

120. *Id.* at 1057.

121. 106 S. Ct. 1045 (1986).

122. The Court expressly noted that such vagaries were *not* the intent of Congress. *See Lafayette*, 435 U.S. at 406.