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I. INTRODUCTION

In February 1986 the United States Supreme Court in *Fisher v. Berkeley*[1] upheld the validity of a municipal rent control ordinance against a contention that the Sherman Act preempted the ordinance. In an eight-to-one decision, the Court effectively gave the *coup de grace* to its earlier attempt to apply the federal antitrust laws to municipalities and political subdivisions. It also may have finally ended the remarkable series of disingenuous state-action decisions that had become an almost regular part of the Court's calendar since *Goldfarb v. Virginia State Bar*[2] in 1975. *Fisher* holds a promise of restoring to the state-action exemption a simplicity and predictability not seen since *Parker v. Brown*.[3]

This Article examines the origin, history, and scope of the state-action doctrine of federal antitrust law—a doctrine exempting state legislation and other (generally regulatory) activity from invalidation by the federal antitrust laws. The Article describes the ways in which the Court increasingly confused and elaborated that doctrine. The Article examines in particular how the Court's recent decisions involving the relation of federal antitrust law to municipal legislation spun a web of confusion and uncertainty from which the Court itself has been forced to withdraw; how the lower federal courts refused to apply the Court's state-action precedents with which they disagreed; and how even the Congress was provoked into action to undo some of the uncertainties engendered by these decisions. The examination of the state-action doctrine attempts to identify the concerns underlying the Court's recent state-action decisions and to show why the series of state-action decisions since 1975 has been a failure. The Article also attempts to delineate the proper reach of federal antitrust law and to provide a reasoned basis for its conclusions. The analysis includes an assessment of *Fisher v. Berkeley* and its ramifications for the relation between federal antitrust law and the regulatory laws of states and local governments. Finally, the Article proposes legislation that provides an optimum reconciliation of the free market policies underlying the federal antitrust laws and the internal governing autonomy to which the states are entitled.

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1. 106 S.Ct. 1045 (1986).
2. 421 U.S. 773 (1975).
3. 317 U.S. 341 (1943).

II. The Doctrinal Background

A. Parker v. Brown

The modern state-action exemption began with the Court's 1943 decision in *Parker v. Brown*.[4] In *Parker* a producer and packer of raisins brought suit to enjoin the California State Director of Agriculture and other officials from enforcing the California Agricultural Prorate Act against him. The California act had established a cartel-like mechanism to govern the marketing of certain crops and thus interfered with the plaintiff's desire to sell his own raisin crop. The plaintiff initially based his challenge to the California act on the due process clause of the fourteenth amendment, but the Supreme Court, reviewing the case on appeal, called for arguments on the application of the Sherman Act to the plaintiff's claim to be free from state marketing controls.[5] When it decided the case, however, the Court rejected all the plaintiff's challenges to the prorate act, including the challenge based upon the Sherman Act. Writing for the Court, Chief Justice Stone asserted that the Sherman Act's purpose "was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations" and was not "to restrain a state or its officers or agents from activities directed by its legislature."[6]

In subsequent cases the Court broadened the state-action doctrine to embrace more than this superficially simple dichotomy between state and individual action. Indeed, the Court experienced difficulty in applying even that distinction. In *Parker* itself Chief Justice Stone added an element of complexity to the distinction when he observed that "we have no question [in this case] of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade."[7] Stone's

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4. 317 U.S. 341 (1943).

5. See the discussion of the *Parker v. Brown* litigation in Cantor v. Detroit Edison Co., 428 U.S. 579, 586-88 (1976).

6. 317 U.S. at 350-51.

7. 317 U.S. at 351-52. A municipality's participation in a private agreement violating the antitrust laws would have involved more than the issue of preemption. It would have exposed the municipality to liability in damages for violating the antitrust laws. A claim of municipal violation of the antitrust laws raises complex questions involving the relationship between legislators and their constituents under the so-called *Noerr-Pennington* doctrine. *See* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 676 (1965), *see also* Westborough Mall, Inc. v. City of Cape Girardeau, Mo., 693 F.2d 733, 743-46 (8th Cir. 1982), *cert. denied sub nom.*, Drury v. Westborough Mall, Inc., 461 U.S. 945 (1983). If the legislators themselves and other officials are named defendants, the claim of municipal violation may also involve issues of

words intimated that the state action held to be lawful in *Parker* should be distinguished from essentially private action under a state mantle, which apparently would not be immunized against Sherman Act attack.

B. Schwegmann

Between 1943, when *Parker* was decided, and the 1970s the Court only once found a conflict between the Sherman Act and state legislation.[8] In *Schwegmann Brothers v. Calvert Distillers Corp.*[9] the Court invalidated the nonsigner provisions of the Louisiana Fair Trade Law as inconsistent with the Sherman Act. Under the prevailing Miller-Tydings Act[10] the Sherman Act's normal condemnation of vertical price maintenance agreements[11] did not apply to the resale of branded products subject to interbrand competition in a state whose laws authorized those agreements. The Louisiana statute at issue in *Schwegmann* contained not only provisions authorizing such vertical price maintenance agreements, but it also contained a so-called "nonsigner" provision. The nonsigner provision forbade all dealers in the state from reselling a branded product for less than the price specified in a vertical price maintenance contract between the supplier and any of its dealers.

The plaintiffs, out-of-state suppliers, had entered into fair trade contracts with some Louisiana retailers. The defendant was a discount retailer who refused to enter into a resale price maintenance contract and who sold the plaintiff's brands of liquor at cut-rate prices. The plaintiffs sought to enjoin the defendant retailer under the Louisiana nonsigner provisions from selling below the

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official immunity. *See, e.g.*, Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555, 1568 (5th Cir. 1984), *cert. denied sub nom.*, Gulf Coast Cable Television Co. v. Affiliated Capital Corp., 106 S. Ct. 788 (1986). The Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 19, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS, has reduced, but not eliminated, the circumstances in which a local government may be exposed to antitrust liability in damages.

8. In Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966), the Court addressed a claim that a New York law requiring that the sales price of liquor to New York dealers be the lowest price at which the seller had sold anywhere in the United States during the previous month was in conflict with the Sherman Act and the Robinson-Patman Act. The Court, however, stated that it could see no potential conflict with the Sherman Act and that conflict with the Robinson-Patman Act was too speculative to condemn the New York law. *Id.* at 45-46.

9. 341 U.S. 384 (1951).

10. 50 Stat. 693 (1937) *amended by* Consumer Goods Pricing Act of 1975, 89 Stat. 801 (codified as amended at 15 U.S.C. § 1, (1982)).

11. Vertical price maintenance agreements have been treated as illegal per se under the Sherman Act. *See* Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

price fixed in the plaintiffs' outstanding fair trade contracts. Although the Miller-Tydings Act exempted only vertical price maintenance agreements from the Sherman Act, the plaintiffs argued that the nonsigner provision of the Louisiana law needed no such exemption because the nonsigner provisions operated in situations in which no agreements had been entered.[12] Indeed, the plaintiffs based their case on the command of the state operating through the nonsigner provision of the Act rather than on an individual agreement. The Court, however, took a radically different view of the Louisiana statute than did the plaintiffs. By compelling "retailers to follow a parallel price policy," the Louisiana statute, according to Justice Douglas, "demand[ed] private conduct which the Sherman Act forbids."[13] Under this rationale the Court declared the Louisiana nonsigner provision invalid as conflicting with the Sherman Act.

C. The Case Law of the 1970s and 1980s

Beginning in 1970s, after a two-decade absence from the Court's agenda,[14] the state-action exemption came before the Court with troublesome frequency. The Court has attempted to describe the parameters of the state-action doctrine in eleven cases in the last eleven years.[15] The very number of these cases demonstrates the Court's inability to articulate stable and predictable criteria governing the state-action exemption.[16] Not until it had struggled through the first five of these cases was the Court able in its 1980 decision in *California Retail Liquor Dealers Association v.*

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12. 341 U.S. at 387.

13. 341 U.S. at 389. The Court described the Louisiana Act as driving nonsigning retailers "into a compact" involving horizontal price fixing. *Id.*

14. In Flood v. Kuhn, 407 U.S. 258, 284-85 (1972), the Court rejected an antitrust-based challenge to baseball's reserve system by following its prior rulings in Federal Baseball Club v. National League, 259 U.S. 200 (1922), and Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953), that baseball was exempt from the federal antitrust laws. The Court also affirmed rulings below that state antitrust law could not be applied to baseball.

15. Fisher v. Berkeley, 106 S. Ct. 1045 (1986); Town of Hallie v. City of Eau Claire, 105 S. Ct. 1713 (1985); Southern Motor Carriers Rate Conference v. United States, 105 S. Ct. 1721 (1985); Hoover v. Ronwin, 104 S. Ct. 1989 (1984); Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); New Motor Vehicle Bd. of California v. Orrin W. Fox Co., 439 U.S. 96 (1978); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

16. *See, e.g.*, Hart, *The Supreme Court, 1958 Term—Forward: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 96-98 (1959); *see also* Friedman, *Legal Rules and the Process of Social Change*, 19 STAN L. REV. 786, 815 (1967).

Midcal Aluminum, Inc.[17] to state succinctly apparently workable standards for applying the state-action doctrine.[18] Yet even as the Court consolidated its state-action precedents to form a doctrine, the Court had already begun unraveling the doctrine when in 1978 it launched an antitrust attack against anticompetitive actions by municipalities and other political subdivisions.[19]

D. Three Kinds of State-Action Cases

The Court's state-action decisions fall into a number of overlapping groups. Into one group fall those decisions in which the defense of otherwise unlawful trade restraints imposed or approved by a state agency rests on the attribution of these restraints to the state. *Goldfarb v. Virginia State Bar*[20] is such a case. In *Goldfarb* the state bar association defended its price fixing activities as state action. Although the bar did perform some official functions, the Court held the bar's price fixing activities not to fall within the scope of its official authorization. In a second group of cases the validity of a state statute is attacked on the ground that it has been preempted by the Sherman Act. *Midcal*[21] and *Schwegmann*[22] fall within this group. A third group of cases is a subclass of the last group; in these cases a municipality's anticompetitive legislation or other behavior is challenged as preempted by the Sherman Act because the municipality does not act under the umbrella of a state economic policy. Cases in this last group include *City of Lafayette v. Louisiana Power & Light Co.*,[23] *Community Communications Co. v. City of Boulder*,[24] and *Town of Hallie v. City of Eau Claire*.[25] Although the Court's decisions and consequent elaborations of the state-action doctrine's content are the product of an evolutionary growth, they can be analyzed best in the conceptual framework sketched above.

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17. 445 U.S. 97 (1980).

18. Reviewing its prior decisions, the Court in *Midcal* concluded that they established two standards for application of the state-action exemption from the federal antitrust laws: "First, the challenged restraint must he 'one clearly articulated and affirmatively expressed as state policy'; second the policy must be 'actively supervised' by the State itself." *Id.* at 105.

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

20. 421 U.S. 773 (1975).

21. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

22. 341 U.S. 384 (1951).

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

24. 455 U.S. 40 (1982).

25. 105 S. Ct. 1713 (1985).

1. The First Group of State-Action Cases: When is the Action of a State Agency Properly Attributable to the "State"?

In *Goldfarb* the Court examined the role the state bar played in establishing and enforcing a schedule of legal fees and found that the bar's price fixing activities were not compelled by the state.[26] In *Cantor v. Detroit Edison Co.*[27] an electric utility provided replacement light bulbs without separate charge to residential customers pursuant to a provision in the rate schedule that it filed with the state public service commission. Although the governing state law obliged the utility to behave in accordance with its rate schedule, the Court ruled that the utility had participated sufficiently in the formulation of the tariff to make the subjection of the utility to the antitrust laws not "unfair."[28] The Court further ruled that the light bulb distribution program had been approved only in a pro forma way by the state and its public service commission. In short, no authentic state policy protected the light bulb distribution program. In reaching that result and consequently subjecting the utility's light bulb distribution program to the antitrust laws, however, the Court was unable to summon a majority for an opinion, and the several Justices issued a total of four plurality, concurring, and dissenting opinions. The same issue arose in *Hoover v. Ronwin*,[29] in which an antitrust action was brought against the members of the Arizona Supreme Court's Committee on Examinations and Admissions for allegedly unduly restricting entry into the practice of law. In *Hoover* the Court ruled that because the Committee performed an advisory role to the Arizona Supreme Court, the suit properly was characterized as one against the state. That determination resolved the issue of whether the challenged action was individual or state action. Nonetheless, the Court, speaking through Justice Powell, cautioned that for cases in which parties other than the legislature or the state supreme court carry out market restricting activity, "[c]loser analysis is required"[30] into the authorization or approval of the restriction by the state legislature or supreme court. The Court, as will be shown below, has not worked out adequate standards for this "closer analysis."

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26. 421 U.S. at 791-92.
27. 428 U.S. 579 (1976).
28. 428 U.S. at 595.
29. 104 S. Ct. 1989 (1984).
30. 104 S. Ct. at 1995.

2. The Second Group of State-Action Cases: Antitrust Challenges to State Legislation

The state-action cases in which an antitrust attack has been mounted against a state statute or regulatory scheme include the following: *Parker v. Brown*,[31] *Schwegmann Brothers v. Calvert Distillers Corp.*,[32] *Bates v. State Bar of Arizona*,[33] *New Motor Vehicle Board of California v. Orrin W. Fox Co.*,[34] and *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*[35] The Court held that the challenged legislation was protected by the state-action doctrine in each of these cases except *Schwegmann* and *Midcal*, both of which involved state fair trade laws. *Midcal* established the Court's standards for governing the applicability of the state-action doctrine to state statutes or regulations challenged as inconsistent with the federal antitrust laws.

(a) *The Background to* Midcal

Until its 1980 decision in *Midcal*, the Court made little attempt to reconcile its state-action decisions. The Court inadequately explained both its decision in *Parker* upholding a state-governed agricultural marketing mechanism and its decision in *Schwegmann* striking down the nonsigner provisions of a state fair trade law. In the five years before *Midcal*, the Court denied the benefit of the state-action exemption to private parties that claimed to be acting for the state in *Goldfarb* and *Cantor*. During this period the Court also limited the availability of the state-action exemption to municipalities and other political subdivisions in *City of Lafayette v. Louisiana Power & Light Co.* The Court, however, rejected an antitrust challenge to a restriction upon lawyer advertising promulgated by a state supreme court in *Bates*, as well as an antitrust challenge to a state law protecting automobile dealers against intrabrand competition in *New Motor Vehicle Board*. Although in the aggregate the Court's state-action decisions did not constitute a coherent body of doctrine, the cases involving direct attacks on the validity of state legislation particularly required reconciliation. The Court failed to explain why the cartel-like arrangements at issue in *Parker* and *New Motor Vehicle Board*

31. 317 U.S. 341 (1943).
32. 341 U.S. 384 (1951).
33. 433 U.S. 350 (1977).
34. 439 U.S. 96 (1978).
35. 445 U.S. 97 (1980).

could be protected by the state-action defense in the face of *Schwegmann*'s condemnation of a statute establishing a system of vertical price maintenance.

(b) *The* Midcal *Formulation*

In *Midcal* the Court struck down a California law[36] establishing a system of resale price maintenance for wines. Under the California law, wine suppliers filed either a resale price maintenance contract or a price schedule with state authorities and thereby set the prices at which wholesalers resold their wines to retailers. The resale prices fixed by the filing bound both signers and nonsigners. Because the federal laws permitting states to authorize resale price maintenance systems[37] had been repealed by the Consumer Goods Pricing Act of 1975,[38] the California law was invalid under the reasoning of *Schwegmann*.

In striking down the California resale price maintenance law, the Court attempted to establish a formulation of the state-action doctrine that would reconcile its state-action decisions. Reviewing those decisions, the Court concluded that it had established two standards for application of the state-action doctrine: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself."[39] The Court held that the California statute met the first standard; it was clear in its purpose to permit resale price maintenance. But it failed to meet the second standard: "The State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts."[40]

Although the clear articulation and supervision standards were drawn from the Court's prior state-action decisions, only in *Midcal* did they attain the status of *sine qua nons* for application of the state-action defense. Despite the new importance of the standards, however, the Court did not provide an adequate rationale for them in *Midcal*. Even so, it was no mean task for the Court to formulate

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36. *Cal. Bus & Prof. Code* §§ 24752, 24862, 24864-24866, 24880 (repealed 1980).

37. *See* McGuire Act, 66 Stat. 632 (1952); *repealed by* Consumer Goods Pricing Act of 1975, 89 Stat. 801; Miller-Tydings Act, 50 Stat. 693 (1937), *repealed by* Consumer Pricing Act of 1975, 89 Stat. 801 (codified 15 U.S.C. § 1 (1982)).

38. Pub. L. No. 94-145, 89 Stat. 801 (1975).

39. 445 U.S. at 105.

40. *Id.* at 105-06.

criteria that, even on a technical level, could reconcile all of its prior state-action case law. Moreover, *Midcal* is significant not only as the Court's first attempt to reconcile and summarize its prior state-action decisions; *Midcal* has remained a significant precedent because its standards have continued, at least formally, to govern the application of the state-action doctrine.[41]

(c) *The Derivation of a Rationale for* Midcal

The two tests adopted in *Midcal* for application of the state-action doctrine had appeared in the prior case law as factors for testing the responsibility of the state for challenged market restraints. The first *Midcal* requirement of "clear articulation" had been used in cases in which private parties attempted to shelter their anticompetitive behavior under the protective umbrella of state authorization[42] or in which political subdivisions asserted that their ordinances were expressions of state policy.[43] These cases raise issues of authority: did the state properly authorize the market restraints under challenge? The Court probably adopted the clear articulation requirement at least in part to facilitate judicial resolution of the authority question. The second *Midcal* requirement of state supervision seems designed to ensure that antitrust exemptions were not bestowed upon private decisionmaking.

The Court in *Midcal* did not explain the significance of the two tests that it had adopted. It did not explain why a state policy had to be "clearly" articulated or what standards would govern compliance with this clear articulation requirement. Nor did the Court provide a detailed explanation of why it was imposing a su-

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41. *See, e.g.*, Southern Motor Carriers Rate Conference, Inc. v. United States, 105 S.Ct. 1721 (1985); Massachusetts Furniture & Piano Mover's Ass'n. v. Federal Trade Comm'n, 773 F.2d 391 (1st Cir. 1985).

42. That clear articulation requirement may have been implied in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) and Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), cases in which the issue was whether restrictive behavior properly was attributable to private actors or to a state. *See* 1 P. AREEDA & D. TURNER, *Antitrust Law* 91-92 (1978). The Court used that phrase in Bates v. State Bar of Arizona, 433 U.S. 350, 362 (1977). The basis which Areeda and Turner gave for reading the clear articulation requirement in the *Cantor* opinion was the Court's insistence that an antitrust exemption could not be hroader than necessary to make a system of state regulation work. That approach was explicitly repudiated in Southern Motor Carriers Rate Conference, Inc. v. United States, 105 S. Ct. 1721, 1727 n.21 (1985).

43. In City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978), Justice Brennan relied upon *Bates* as authority for the significance of a state policy "clearly articulated and affirmatively expressed" and of active state supervision, the two factors that were adopted as governing tests for application of the state-action doctrine in *Midcal.*

pervision requirement. The Court also failed to mention that two years before its *Midcal* decision, Professors Areeda and Turner had recommended both a clear statement and a governmental supervision requirement as conditions for the application of the state-action doctrine.[44] Areeda and Turner argued that a supervision requirement would ensure that exemptions from the Sherman Act would be confined to those areas in which state government exercises regulatory oversight and that private firms would not be set free of all restraint.[45] They argued that requiring a state legislature to state clearly when it is adopting a regulatory policy at odds with the Sherman Act would help the federal courts to interpret such a statute and that the requirement would reduce the chances for error in judicial applications of the state-action exemption.[46]

The underlying assumption of the *Midcal* decision was that almost all systems of governmental regulation needed the state-action doctrine to protect them against a federal antitrust challenge. Some kinds of state regulation, it is true, produce only de minimis anticompetitive effects, which may not need such protection.[47] But because most economic regulation is inefficient and thus produces anticompetitive effects, it needs the protection of the state-action doctrine. This view of state regulation underlies *Midcal*'s explanation of *New Motor Vehicle Board*.[48] The dealer protection legislation involved in *New Motor Vehicle Board* survived antitrust attack while the fair trade legislation involved in *Midcal* did not because the former, but not the latter, passed both of the tests formulated in *Midcal* and therefore was protected by the state-action doctrine.[49]

3. The Third Group of State-Action Cases: The Municipal Liability Cases

Municipalities and other political subdivisions are special entities under the state-action doctrine. Until the recent decision in *Fisher v. Berkeley*,[50] municipal exposure to antitrust law depended

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44. P. AREEDA & D. TURNER, *supra* note 42, at 71-92.

45. *Id.* at 73.

46. *Id.* at 91.

47. *See, e.g.*, Exxon Corp. v. Maryland, 437 U.S. 117 (1978). *Compare* Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966) *with* Brown-Forman Distillers Corp. v. New York State Liquor Auth., 106 S. Ct. 2080 (1986).

48. 439 U.S. 96 (1978).

49. *See* 445 U.S. at 105-06 & n.12.

50. 106 S.Ct. 1045 (1986).

upon whether the challenged municipal action was carried out under a mandate from the state legislature, an issue governed by *City of Lafayette v. Louisiana Power & Light Co.*,[51] *Community Communications Co. v. City of Boulder*;[52] and *Town of Hallie v. City of Eau Claire*.[53] It has been primarily the municipal liability cases that have exposed the Court's "clear articulation" standard for application of the state-action doctrine as unworkable. The municipal liability cases also demonstrate that the clear articulation standard lacks an adequate rationale. In these cases the Court both has expanded the reach of the federal judiciary furthest into state affairs and has met the greatest resistance. Finally, it has been the intractability of the "clear articulation" issue that has forced the Court to abandon its ill-fated attempt to review local legislation for conformity with the federal antitrust laws.

(a) *The Starting Point*: Lafayette

In 1978, two years before its decision in *Midcal*, the Court began to expose municipalities to antitrust liability. In *City of Lafayette v. Louisiana Power & Light Co.*[54] the Court rejected the claim that a municipally owned utility automatically was entitled to a state-action defense to an antitrust claim asserted against it by an investor owned utility. In writing the plurality opinion, however, Justice Brennan went beyond the facts of the case to write an essay on the relationship of the state-action doctrine to municipalities.

Justice Brennan viewed the issue of municipal exposure to federal antitrust law as cast against a backdrop of competing policies. The national policy embodied in the Sherman Act of favoring freely operating competitive markets had to be balanced, in Brennan's analysis, against the federal structure of the American government, in which the states were—and should be—free, within limits, to adopt their own economic policies. Brennan would bend the national free market policy to accommodate state decisions to regulate particular markets. Under Justice Brennan's approach, however, the federal antitrust laws are not so flexible as to accommodate the potentially multitudinous and inconsistent anticompetitive policies of cities.[55]

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51. 435 U.S. 389 (1978).
52. 455 U.S. 40 (1982).
53. 105 S.Ct. 1713 (1985).
54. 435 U.S. 389 (1978).
55. *See* 435 U.S. at 408, 412-15. According to Brennan's formulation of the state-

Although in his *Lafayette* opinion Justice Brennan made the state-action doctrine's applicability to municipal regulatory action turn on the question of whether the challenged municipal action had been authorized by the state legislature, he applied federal judicial standards to the authorization question. Brennan's *Lafayette* opinion indicated that a state legislature's authorization had to be specific; a general grant of power might indicate that the state lacked a policy and was instead "neutral."[56] In these circumstances no "state" economic policy to which federal antitrust law should defer would exist.

Two years after *Lafayette,* when a unanimous *Midcal* Court reconciled and consolidated its earlier state-action holdings, the Court reformulated *Lafayette*'s requirement that a municipality act pursuant to a "state" policy in displacing competition and incorporated the requirement into the first of the two *Midcal* tests: the governing state policy must be one that is "clearly articulated." This Article will demonstrate that the federal judiciary's imposition of this clear articulation standard upon the regulatory actions of cities broke down the expansion of federal antitrust law into state and municipal affairs.

(*b*) Boulder *as the Peak of Federal Intervention*

In its 1982 decision *Community Communications Co. v. City of Boulder*[57] the Court reached the apogee of its interventionist approach. The plaintiff, Community Communications Co., provided cable television service to a part of Boulder, Colorado whose topographical configuration interfered with the reception of broadcast television.[58] As a result of technological developments during the 1970s, cable services became capable of supplying extensive programming. Community Communications announced plans to expand its service throughout the city to supply what it perceived to be a new market. The city government also had become aware of

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action doctrine, local units of government could claim the state-action exemption only when they were carrying out state policy: "The *Parker* [state-action] doctrine, so understood, preserves to the States their freedom under our dual system of federalism to use their municipalities to administer state regulatory policies free of the inhibitions of the federal antitrust laws without at the same time permitting purely parochial interests to disrupt the Nation's free-market goals." *Id.* at 415-16.

56. 435 U.S. at 414.

57. 455 U.S. 40 (1982).

58. The facts are reported in detail in Community Communications Co. v. City of Boulder, 485 F. Supp. 1035, 1036-38 (D. Colo.), *rev'd,* 630 F.2d 704 (10th Cir. 1980), *rev'd,* 455 U.S. 40 (1982).

the increasing capabilities of cable television and adopted a moratorium ordinance prohibiting Community Communications from expanding while the city sought applications from rival cable firms for a city franchise. Community Communications, in response, brought an antitrust claim against the city. The federal district court issued a preliminary injunction against enforcement of the moratorium ordinance.[59] The Tenth Circuit reversed the district court's decision on the ground, *inter alia*, that under the home-rule provisions of the state of Colorado, the city exercised the powers of the state within its boundaries.[60]

When the case reached the Supreme Court, the Court ruled that the Boulder moratorium ordinance was not entitled to the state-action exemption. In its *Boulder* decision the Court used the first of the *Midcal* tests to deny the moratorium ordinance the benefit of the state-action doctrine. Writing for the Court, Justice Brennan repeated in *Boulder* much of the state-action analysis contained in his earlier *Lafayette* plurality opinion. In *Boulder* Brennan also employed the clear articulation standard from the *Midcal* reformulation. Because the city's claim to be exercising state power arose from the home-rule provision of the state constitution, Justice Brennan was able to say that the state had no policy at all on the regulation of cable television. Although the city indisputably was exercising state power as a matter of state law, its action in adopting the moratorium ordinance was not carrying out a "clearly articulated" state economic policy. The city's action therefore failed the first of the *Midcal* tests.

(c) The Impact of the Boulder *Decision*

(1) Fears Generated by *Boulder*

Boulder generated widespread concern that the federal antitrust laws would be used to interfere with the ordinary functioning of local governments. Whenever a local government ordinance imposing a significant market restraint could not claim protection from an umbrella economic policy adopted by the state legislature, it would be vulnerable to invalidation as inconsistent with the federal antitrust laws. Moreover, partially because Justice Brennan wrote his *Boulder* opinion in the language of antitrust "exemp-

59. 485 F. Supp. at 1041.

60. Community Communications Co. v. City of Boulder, 630 F.2d 704, 707 (10th Cir. 1980), *rev'd*, 455 U.S. 40 (1982).

tion,"[61] the case stimulated fears that cities that had enacted such ordinances and that were held not to be entitled to the exemption would be held to have violated the federal antitrust laws and thus would be subject to treble-damage liability as well as to injunctive actions.

(2) The Response of the Lower Federal Courts

The fears stimulated by the *Boulder* decision were largely, but not entirely,[62] unrealized. The lower federal courts resisted the demands of the *Boulder* precedent. Although the courts always paid lip service to *Boulder*'s requirement that anticompetitive municipal regulation carry out a "clearly articulated" state economic policy, they almost invariably found the needed clearly articulated policy, even when discovering the policy required considerable imagination. The United States Court of Appeals for the Eighth Circuit, for example, went so far as to find a state policy "clearly articulated" even though the court had to "engage in some speculation"[63] to discover it.

The Eighth Circuit heavily influenced the decisions of other lower courts. That Circuit had restated the clear articulation requirement of *Boulder* in its own two part test: "The legislature

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61. Justice Brennan stated the issue as "whether a 'home rule' municipality . . . enjoys the 'state action' exemption from Sherman Act liability announced in *Parker v. Brown*." 455 U.S. at 43. Thereafter, he employed the exemption terminology throughout his opinion. *Id.* at 49, 50, 53. Brennan had previously explained that "[t]he word 'exemption'; is commonly used by courts as a shorthand expression for *Parker's* holding that the Sherman Act was not intended by Congress to prohibit the anticompetitive restraints imposed by California in that case." City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 393 n.8 (1978). Justice Rehnquist in his *Boulder* dissent asserted that the exemption terminology was ill advised because it implied that a city could violato the antitrust laws by enacting legislation in conflict with tlie Sherman Act. 455 U.S. at 60 (Brennen, J., dissenting). In the background was the district court's ingenuity in finding that the concerted-action requirement of Sherman Act § 1 apparently had been satisfied despite an inadequate showing of conspiracy. *See* Community Communications Co. v. City of Boulder, 485 F. Supp. 1035, 1039 (D. Colo.), *rev'd*, 630 F.2d 704 (10th Cir. 1980), *rev'd*, 455 U.S. 40 (1982); *see also* 455 U.S. at 65 n.1.

62. Although, as the text shows, the lower federal courts often strained to find that particular municipal enactments met the *Midcal* tests and were therefore protected by the state-action exemption, there have been erratic and largely unpredictable exceptions. *Compare, e.g.*, Westborough Mall, Inc. v. City of Cape Girardeau, 693 F.2d 733 (8th Cir. 1983), *cert. denied sub nom.*, Drury v. Westborough Mall, Inc., 461 U.S. 945 (1983) *with* Scott v. City of Sioux City, 736 F.2d 1207 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 1864 (1985); *compare also* Parks v. Watson, 716 F.2d 646 (9th Cir. 1983) *with* Town of Hallie v. City of Eau Claire, 700 F.2d 376 (7th Cir. 1983), *aff'd*, 105 S. Ct. 1713 (1985).

63. Central Iowa Refuse Sys., Inc. v. Des Moines Metro. Solid Waste Agency, 715 F.2d 419, 426 (8th Cir. 1983), *cert. denied*, 105 S. Ct. 1864 (1985).

must have authorized the challenged activity, and it must have done so with an intent to displace competition."[64] When the Eighth Circuit applied its formulation in *Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Waste Agency*,[65] the court upheld the validity of a grant to a municipal waste disposal agency of a monopoly over waste generated within metropolitan Des Moines, even though the authorizing statutes failed to indicate that the legislature had intended to replace the market (represented by private sanitary landfill operators) with a municipal monopoly. Applying its two part test, however, the court had no difficulty in finding that the legislature had authorized the creation of the metropolitan waste agency. The court concluded that the Iowa legislature placed an extremely high priority on the activities of intergovernmental agencies like the defendant in the disposal of solid waste.[66] The court then found that the second rung of its two part test was satisfied because "[t]he reasonable and perhaps even inescapable conclusion" from the Iowa statutes authorizing local governments to dispose of solid waste was that "the legislature desired agencies such as Metro to have broad discretion to do whatever was necessary to ensure their success."[67] Because bond consultants had advised that a monopoly grant over solid waste was necessary to the agency's financial success and hence to the marketing of the bonds issued to finance the agency's facilities, the court concluded that the monopoly was necessary and that therefore the legislature intended to displace competition with monopoly. This reasoning is tortuous at best, and how the *Boulder* mandate of clear articulation was met in the circumstances is hard to see.[68]

The United States Courts of Appeals for the Sixth and Ninth Circuits have followed the Eighth in holding that the clear articulation requirement is met when the legislature addresses a subject

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64. Gold Cross Ambulance & Transfer v. City of Kansas City, 705 F.2d 1005, 1011 (8th Cir. 1983), *cert. denied*, 105 S.Ct. 1964 (1985).

65. 715 F.2d 419 (8th Cir. 1983), *cert. denied*, 105 S. Ct. 1864 (1985).

66. 715 F.2d at 426.

67. *Id.*

68. The Eighth Circuit followed a similar route in Scott v. City of Sioux City, 736 F.2d 1207, 1211 & n.4 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 1864 (1985). There the court upheld the city's use of its zoning power to exclude development on the ground that the Iowa Urban Renewal Law authorized zoning to further urban renewal. The court then relied upon the "legislature's deep concern and broad delegation of power" to municipalities for its conclusion that the state had authorized them to restrict competition among developers through the zoning power. *Id.* at 1213.

and broadly grants discretion to local governments to handle the problem as seems best to them. The Ninth Circuit used this approach in recent cases involving the grant of municipal monopolies over trash collection and cable television.[69] The Sixth Circuit has used a reasonable foreseeability analysis to weaken the force of the clear articulation requirement. In *Hybud Equipment Corp. v. City of Akron*[70] the court, over the objections of competing sanitary landfill operators, upheld a monopoly grant over solid waste to a public waste disposal agency because the grant (like the similar grant in the *Des Moines* case[71]) had been extended on the advice of revenue bond consultants. Although the appeals court acknowledged that "we cannot agree with the district court that the statutes governing [the Ohio Water District Authority] meet the requirement of a clear and affirmative state policy,"[72] the court nonetheless enlarged its search area to find the needed articulation. The court joined together the authority possessed by municipalities under Ohio law to regulate the disposal of waste and to construct disposal facilities with the waste agency's authority to contract with municipalities. That joinder, according to the court, produced the needed "clearly articulated" state policy to displace competition. At that point, however, the state policy to displace competition was "clearly articulated" only in the eyes of the court. The court admittedly reduced "clear articulation" to a showing of a "reasonable" relation between the imposed municipal restraint and a state policy to regulate solid waste.[73]

As administered by the lower federal courts, the clear articulation standard became largely meaningless. Those courts tended to find that almost all local regulation was carried out under a "clearly articulated" state policy. Moreover, the Supreme Court's failure to formulate an understandable rationale for the clear articulation standard provided the lower courts with no guidance on how to apply that standard. The state-action doctrine thus became inadministrable; it had no apparent justification, and it was perceived widely as a threat to local self-government. The Court's im-

69. *Compare* Tom Hudson & Assocs., Inc. v. City of Chula Vista, 746 F.2d 1370, 1373-74 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 3503 (1985) *and* Catlina Cablevision Assocs. v. City of Tucson, 745 F.2d 1266, 1269-70 (9th Cir. 1984) *with* Parks v. Watson, 716 F.2d 646, 664 (9th Cir. 1983) and Golden State Transit Corp. v. City of Los Angeles, 726 F.2d 1430, 1433 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 1865 (1985).

70. 742 F.2d 949 (6th Cir. 1984).

71. *See supra* notes 64-68 and accompanying text.

72. 742 F.2d at 961.

73. *Id.* at 960-61.

position of the clear articulation requirement to govern the relation of state to local governments was a case of judicial bungling at its worst. The failure of this judicial policy initiative precipitated a congressional response and retrenchment by the Court.

(3) The Response of Congress

The antitrust "exemption" language in *Boulder* that engendered fears of municipal exposure to treble-damage antitrust liability[74] provoked Congress into enacting the Local Government Antitrust Act of 1984.[75] That Act eliminated most of the exposure of municipalities to antitrust damage liability. The Act, however, did not address the exposure of municipal ordinances to invalidation by a suit in equity.

(4) The *Hallie* Case

The Court in *Town of Hallie v. City of Eau Claire*[76] began the painful process of retreating from the interventionist path taken in its *Lafayette* and *Boulder* decisions. In *Hallie* the Court indicated that it no longer would use the antitrust laws to review allocations of power between the state legislature and units of local government. The Court in *Hallie* (and its companion *Southern Motor Carriers Rate Conference, Inc. v. United States*[77]) ruled that when a state legislature manifests an intention to impose economic regulation upon an identified area of business behavior, its economic policy will be deemed to be "clearly articulated" within the meaning of *Midcal*.[78] The Court also ruled that even when a state grants to a municipality permissive authority to impose a specified restraint, the state will be taken to have "clearly articulated" its umbrella policy. Retreating broadly from *Boulder*, Justice Powell's

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74. *See supra* note 61 and accompanying text.

75. P.L. 98-544, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 2750.

76. 105 S. Ct. 1713 (1985).

77. 105 S. Ct. 1721 (1985).

78. *See* 105 S. Ct. at 1718-19. In *Boulder*, the city's moratorium ordinance admittedly was authorized under state law. Yet the Court ruled that the ordinance was invalid because the home-rule provisions of the state constitution under which the city was acting evidenced, at most, only a policy of "neutrality" on the regulation of cable television. The state therefore had no clearly articulated policy on cable television regulation, and the city ordinance failed the first of the two *Midcal* tests. *Hallie* reinterpreted the concept of policy neutrality as it appeared in *Boulder* to mean that when the state legislature refers to a subject matter and commits that subject matter to local governments for discretionary regulation, the state will not be deemed to be neutral on policy. For reasons discussed below, the importance of the *Hallie* revision has been diminished by *Fisher v. Berkeley*. *See infra* notes 112-114 and accompanying text.

opinion indicated that as long as a state legislature refers to a subject matter and commits that subject matter to local government for discretionary regulation, the courts will not deem the state policy to be "neutral."[79] The Court's basic concern was that state goals should override "purely parochial public interests" of the local governments.[80] Thus, the state's approval of local government imposed market restraints obviates any need for the coherent state economic policy that Justice Brennan apparently visualized in *Lafayette* and *Boulder.*[81] *Hallie* and its companion *Southern Motor Carriers Rate Conference*[82] effectively adopted the delegation doctrine from administrative law as a guide to the meaning of the state-action case law's "clear articulation" requirement.[83] If a state legislature expresses an intent to replace the free market with regulation, it can leave to agencies or to municipalities the details of how that replacement is carried out.

III. The Scope of the State-Action Doctrine

At the time the Court decided *Midcal,* it was believed widely that the state-action doctrine was needed to protect systems of state economic regulation that produced significant anticompetitive market effects. Because the Court previously had upheld state legislation having only de minimis anticompetitive effects against antitrust attack without reference to the state-action doctrine,[84] the state-action doctrine appeared to be needed as a defense only when the anticompetitive effects were severe and market supply was significantly restricted or the effects replicated a per se offense.[85] Although most systems of state public utility regulation would pass the two *Midcal* tests for protection under the state-action doctrine, regulation administered to maximize scale econo-

79. *See supra* note 78.

80. 105 S. Ct. at 1721.

81. *See* 435 U.S. at 408; 455 U.S. at 56.

82. 105 S. Ct. 1721 (1985).

83. In *Hallie* and *Southern Motor Carriers Rate Conference,* the Court spoke in language reminiscent of that employed by courts reviewing the actions of regulatory agencies: only the most basic purposes of displacing competition in a particular field with a regulatory structure must be articulated; the regulatory details can be filled in by administering agencies, including, presumably, local governments. *See* 105 S. Ct. at 1731.

84. *See, e.g.,* Exxon Corp. v. Maryland, 437 U.S. 117 (1978). *Compare* Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966) *with* Brown-Forman Distillers Corp. v. New York State Liquor Auth., 106 S. Ct. 2080 (1986).

85. *See, e.g.,* National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okl., 468 U.S. 85, 112-114, 118-120 (1984).

mies probably would not even have needed such protection.[86]

In *Rice v. Norman Williams Co.*[87] the Court upheld, without direct reliance upon the state-action doctrine, a California "designation" statute[88] against an antitrust-based challenge. The California statute enabled a distiller to designate an exclusive California importer of its brand of alcoholic beverages. The California legislature enacted the statute as a defense to an Oklahoma law that provided that any distiller selling to any Oklahoma wholesaler was required to sell to any other wholesaler who wished to purchase its products.[89] Fearing that the Oklahoma law would be construed to apply extraterritorially, the California legislature enacted its designation statute to prevent the Oklahoma statute from destroying the ability of distillers to establish vertically restricted distribution systems within California.

Writing for the Court in *Rice,* Justice Rehnquist stated:

> . . . [A] state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation.[90]

Because the conduct contemplated by the California designation statute was the distillers' imposition of vertically restricted distribution systems—systems that the Court had recognized in *Continental T.V., Inc. v. GTE Sylvania, Inc.*[91] as likely to produce procompetitive results in many circumstances—the California statute could not be condemned on its face.

Justice Rehnquist's opinion in *Rice* suggests the following classification of state statutes: (1) The first class of state statutes are those that do not produce significant anticompetitive effects in all cases. Within this group are statutes, like the California designation statute in *Rice,* that produce or are likely to produce procompetitive effects or that impose only de minimis restraints.[92] These statutes survive a facial attack without recourse to the state-

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86. *See* Omega Satellite Prods. Co. v. City of Indianapolis, 694 F.2d 119, 126 (7th Cir. 1982).

87. 458 U.S. 654 (1982).

88. CALIF. BUS. & PROF. CODE § 23672 (West Supp. 1985); *see* 458 U.S. at 657.

89. OKLA. STAT., tit. 37, § 533 (Supp. 1985).

90. 458 U.S. at 661.

91. 433 U.S. 36, 57-58 (1977).

92. *See, e.g.,* Exxon Corp. v. Maryland, 437 U.S. 117 (1978); Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966).

action doctrine. (2) The second class of state statutes are those that mandate or authorize conduct that is per se illegal under the antitrust laws,[93] but that meet the two *Midcal* tests and therefore are saved from invalidation by the state-action doctrine.[94] (3) The third class of state statutes are those that mandate or authorize conduct that is per se illegal under the antitrust laws and that do not pass the *Midcal* tests. The federal antitrust laws preempt this last class of state statutes.[95]

The three-class framework represents the general understanding up to the time of *Fisher v. Berkeley*. Under this scheme most state legislation was free from preemption by the federal antitrust laws. By contrast, municipal legislation was significantly more vulnerable. Municipal legislation that mandated or authorized per se illegal conduct (like state legislation of the second class above) was preempted unless the state-action doctrine saved it. But municipal legislation, unlike state legislation, had to pass the federal court's evaluation of its authorization by the state legislature. Because most of the municipal legislation challenged had been enacted under relatively broad grants of power, it was peculiarly exposed to invalidation under the clear articulation standard as employed in *Boulder*.

The Court's most recent decision in *Fisher v. Berkeley*, however, drastically changed the scope of the state-action doctrine.

IV. *Fisher v. Berkeley*

Fisher v. Berkeley[96] involved a challenge to Berkeley, California's rent control ordinance. A rent control ordinance is a form of maximum-price regulation, a form of market control that, when carried out pursuant to private agreement, is per se illegal under the Sherman Act. Under the three-class framework approach,[97] therefore, a rent control ordinance would be deemed to require conduct that the Sherman Act forbids and would be preempted unless protected by the state-action exemption. Under the case law

93. The assumption is that when Rehnquist spoke of a state statute mandating or authorizing conduct that was a violation of the antitrust laws in all cases, he referred to conduct that, if performed pursuant to private agreement, would be per se illegal. *See* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 389 (1951).

94. *See, e.g.*, New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96 (1978); Parker v. Brown, 317 U.S. 341 (1943).

95. *See, e.g., Midcal*, 445 U.S. 97 (1980); *Schwegmann*, 341 U.S. 384 (1951).

96. 37 Cal. 3d 644, 693 P.2d 261, 209 Cal. Rptr. 682 (1984), *aff'd*, 106 S.Ct. 1045 (1986).

97. *See supra* notes 92-95 and accompanying text.

prevailing at the time of *Fisher*, whether the California legislature had authorized the city to impose rent control would have controlled the applicability of the state-action exemption.

The California Supreme Court refused to consider the state-action doctrine. It took the view that the Berkeley ordinance on its face did not conflict with the Sherman Act, and hence did not need protection under the state-action doctrine, because the Sherman Act was not intended to interfere with such a normal governing function of cities as a rent control ordinance.[98] The California court thus effectively challenged the United States Supreme Court to withdraw from its antitrust foray into municipal government and indeed even to back away from the standards that the Court had adopted for application of the state-action doctrine generally.

In earlier Supreme Court decisions, various Justices had urged that the *Midcal* standards be applied directly to municipalities and other units of local government. Justice Rehnquist, for example, had urged in *Boulder* that no greater inquiry should be made into the validity of municipal legislation than into the validity of state legislation,[99] and Justice Stewart had urged the same theory in *Lafayette*.[100] *Lafayette* and *Boulder* had limited the state-action doctrine's application to local governments by requiring, as a precondition to protection, a judicial determination that challenged municipal legislation was carried out under a mandate from the state legislature. The Court in *Fisher*, therefore, could have retreated from *Lafayette* and *Boulder* by reconsidering and adopting the suggestions of Rehnquist and Stewart. It could have reaffirmed the *Midcal* tests, but made them applicable directly to municipal legislation. This approach would have been the most obvious line of retreat, and the one involving the least tampering with prior decisions. It would have produced an affirmance of the California decision on different grounds than the broad one employed by the state court.

To its credit, the Court took a broader stance. While it did not endorse the state court's reasoning, the Court reinterpreted its own prior case law. According to Justice Marshall's majority opinion, neither local nor state legislation will be preempted by the Sherman Act unless the legislation involves concerted action. The Court will consider concerted action to be present only when the

98. 37 Cal. 3d at 677, 693 P.2d at 288, 209 Cal. Rptr. at 709.
99. 455 U.S. at 69-71 (Rehnquist, J., dissenting).
100. 435 U.S. at 427, (Stewart, J., dissenting).

challenged legislation is of the so-called hybrid type involved in *Schwegmann, Midcal,* and *Rice.* The hybrid statutes, exemplified by the fair trade regulation of *Schwegmann*[101] and *Midcal*[102] and the designation statute of *Rice,*[103] involve schemes in which legislation effectively empowers private parties to make decisions that then are enforced by governmental apparatus.

A. *The* Fisher *Rationale*

Fisher added a new element to the analysis of whether the Sherman Act preempts nonfederal legislation. *Fisher* took the concerted action requirement for a violation of section one of the Sherman Act and used it to determine the outcome of the preemption issue. This approach seems to confuse the essentials for a section one violation with the issue of whether nonfederal legislation confiicts with the Sherman Act. The Court decided none of the prior state-action cases on a rationale that distinguishes concerted from unilateral action. Justice Marshall's insistence that no concerted action (and hence no preemption) occurs when a nonfederal government compels behavior raises a new set of problems. How nonfederal legislation that merely permits or facilitates anticompetitive behavior will fare under the new approach is unclear. Moreover, it is not obvious that the so-called hybrid category of nonfederal legislation involves any greater degree of concerted action than a rent control ordinance like Berkeley's. The Berkeley ordinance works only because all landlords observe it; the fair trade ordinances of *Schwegmann* and *Midcal* worked only because all dealers observed the mandated prices. Indeed, Justice Douglas' opinion in *Schwegmann* described the evil of the Louisiana nonsigner provision as mandating a system that resembled horizontal price fixing, a result that was produced by the compulsion of the Louisiana statutes.[104]

The criteria that *Fisher* used to decide the validity of the Berkeley ordinance appear to have been no more well reasoned than the criteria formulated in *Midcal.* In each case the Court reached for a formula that provided a desired result and that would be consistent with the Court's earlier decisions. The *Fisher*

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101. *See supra* notes 9-13 and accompanying text.

102. *See supra* note 35 and accompanying text.

103. *See supra* notes 87-90 and accompanying text.

104. 341 U.S. at 389 ("When retailers are *forced* to abandon price competition, they are driven into a compact in violation of the spirit of the proviso which forbids 'horizontal' price fixing.") (emphasis in the original).

Court had to annex the hybrid-restraint concept to its principal concerted action criterion in order to formulate an approach that would be consistent with prior decisions. As in *Midcal*, the Court offered no adequate rationale for its approach. Because *Fisher* represents a judicial withdrawal, however, the new formulation is apt to meet with less severe challenges than did the relatively expansive *Midcal* state-action criteria.

B. The Impact of Fisher *on Prior Case Law*

Under the scheme established by *Rice* and the state-action cases, state and local legislation was safe from antitrust attack as long as it did not impose a market restraint analogous to conduct that is per se illegal under section one of the Sherman Act. If state or local legislation did impose such a market restraint, then it nonetheless would be protected if it passed the *Midcal* tests. The *Midcal* tests in practice protected nearly every kind of state legislation except price fixing laws; these tests protected local legislation as long as it fell under the protective umbrella of state legislation.

Fisher has altered this arrangement substantially. *Fisher* protects both state and local legislation from antitrust attack unless concerted action is present. State or local legislation compelling parallel action is not sufficient to meet *Fisher*'s concerted action requirement. Justice Marshall's opinion clearly states that the "unwilling acquiescence" of the Sherman Act combination cases[105] is not enough to meet this new preemption requirement.[106] Because the Sherman Act is inapplicable unless concerted action is present and because government acts by command rather than by agreement with those who must obey the law, almost all state and local legislation has been freed from vulnerability to Sherman Act preemption.

Justice Marshall left one category of legislation that involves concerted action within the purview of his restatement of Sherman Act preemption. "Hybrid" legislation that establishes government mechanisms for the enforcement of private marketing decisions is to be treated as involving concerted action. Such legislation, therefore, is vulnerable to a Sherman Act challenge. Justice Marshall

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105. *See* Albrecht v. Herald Co., 390 U.S. 145, 149-50 & n.6 (1968); United States v. Parke, Davis & Co., 362 U.S. 29 (1960); *see also* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 764 & n. 9 (1984).

106. 106 S.Ct. at 1049.

correctly observed that the Court previously had invalidated fair trade statutes in *Schwegmann* and *Midcal* that involved such hybrid market restraints.

Although the hybrid nature of a legislatively created market restraint takes nonfederal legislation out of the category of unilateral action and subjects it to Sherman Act evaluation, the legislation nevertheless may pass muster under the Act. Even legislation incorporating a hybrid market restraint will survive Sherman Act attack unless it produces a per se illegal restraint. For example, although the designation statute at issue in *Rice* created a hybrid market restraint, the statute did not replicate per se illegal behavior; such a hybrid restraint thus would survive antitrust challenge under *Fisher*.

In summary, except for legislation establishing so-called hybrid restraints, all state and local legislation has been freed from vulnerability to Sherman Act preemption. Even the hybrid legislation is vulnerable only when it establishes a per se illegal restraint. Conversely, if legislation establishes a per se hybrid market restraint, then the legislation is invalid; it cannot be saved by the state-action doctrine. Hybrid restraints such as those involved in *Schwegmann, Midcal,* and *Rice* by their nature cannot pass the *Midcal* supervision test and thus cannot receive protection under the state-action doctrine. Under this analysis, the state-action doctrine that has grown in increasing complexity over the last eleven years is now dead. It has been replaced by the new restatement of federal antitrust preemption announced in *Fisher*.

C. *The Scope of Hybrid Restraints Under* Fisher

Fisher arguably may give greater scope to the state-action doctrine of *Midcal* and related cases than the preceding summary recognizes. Although, after *Fisher*, Sherman Act preemption issues only arise in instances of a hybrid market restraint, the hybrid category may be broader than the simple government enforcement of private designations of resale prices or exclusive distributors involved in *Schwegmann*, *Midcal*, and *Rice*. The hybrid category may embrace restraints like *Parker*'s, in which producers established and operated marketing controls under a state regulatory framework.[107] Indeed, a broad interpretation of hybrid restraints would include the price fixing involved in *Goldfarb* and a utility's use of a tariff-filing mechanism to impose market restraints, as in

107. Doe v. St. Joseph's Hosp., 788 F.2d 411, 416 (7th Cir. 1986).

Cantor. This broad view of the newly important hybrid category would leave room for evaluation under the *Midcal* standards, even after *Fisher*. A legislatively imposed restraint would be subjected to a multistage evaluation. First, a court would have to determine whether it was a hybrid restraint. If not a hybrid, the restraint would not be preempted. If a court decided that the restraint was a hybrid, the court then would determine whether the restraint imposed illegal per se conduct. If not, the restraint would be upheld. If the restraint was a hybrid that imposed illegal per se conduct, then the restraint would be subjected to evaluation under the *Midcal* tests to see whether the state-action doctrine protected it.

The price fixing restraint of *Goldfarb* and the tariff filing of *Cantor* may, like fair trade laws, fail *Midcal*'s supervision test: no state agency approved of the rates in *Goldfarb* or (except in a pro forma way) of the light bulb distribution program in *Cantor*. The *Goldfarb* and *Cantor* restraints likely would fail the first *Midcal* test as well, at least so long as the test was interpreted consistently with the Court's earlier decisions in those cases.[108] In light of the Court's treatment of *Parker*, however, it is clear that restraints such as *Parker*'s will pass the *Midcal* tests. Not one of the state-action cases has suggested remotely that the cartel-like restraint involved in *Parker* might not be valid or that its validity should be rethought. Therefore, a state-established, cartel-like, agricultural marketing mechanism like the one in *Parker*, if tested after *Fisher*, likely would come out the same way. If deemed to be a hybrid restraint because of producer involvement, that type of hybrid restraint would pass the *Midcal* state-action tests, including its supervision requirement.

Strong reasons, however, exist for not extending a broad construction to *Fisher*'s category of hybrid restraints. First, *Midcal* originated the hybrid category under the rubric of its supervision requirement in order to reconcile the Court's state-action cases. *Fisher*'s hybrid restraint category was adopted for the same purpose: to reconcile the Court's decisions invalidating fair trade laws in *Schwegmann* and *Midcal* with the rest of its state-action case law. Prima facie, the sweep of the *Fisher* hybrid category and that of *Midcal*'s supervision requirement appear to be the same.

Second, a broad construction of *Fisher*'s hybrid restraint category would be purposeless. The class of restraints deemed hybrid under *Fisher* ought to be coextensive with the restraints that can-

108. *See* P. AREEDA & D. TURNER, *supra* note 42, at 82.

not pass the *Midcal* supervision requirement. No reason exists for construing *Fisher*'s hybrid category broadly in order to subject restraints to evaluation under the *Midcal* supervision test if those restraints by nature will pass that test. Conversely, having a class of hybrid restraints that will fail that *Midcal* test is pointless if the hybrid category itself is broad enough to condemn them directly. Occam's razor ought to dispense with the evaluation of hybrid restraints under *Midcal*'s supervision requirement.[109]

It is true that equating *Fisher*'s hybrid restraint category with the class of restraints that would fail the *Midcal* supervision requirement also would eliminate further use of the first *Midcal* test of clear articulation. That test, however, is best eliminated. It was responsible for the *Boulder* fiasco and has been constantly evaded by the lower federal courts.[110] The purpose of the clear articulation requirement is to aid the federal courts in determining whether the state legislature has approved a market restraint. This question, however, is essentially a matter of state law. Federal courts have little excuse for involvement in questions of state allocations of power to agencies or to municipalities. Moreover, the clear articulation requirement never worked as it was intended. Justice Brennan, who applied the clear articulation requirement against a city ordinance in *Boulder*, indicated earlier in *Lafayette* that a municipality need not "necessarily. . .be able to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit."[111] This remark is tantamount to admitting that a policy could be deemed clearly articulated although in fact a court had to extract it from several statutes. Moreover, the Court itself recently reduced the clear articulation requirement to relative meaninglessness.[112]

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109. It is possible to contend that the *Fisher* hybrid category should be construed broadly in order to expand the scope of restraints that are evaluated under *Midcal*'s clear articulation requirement. This contention appears most properly directed at restraints imposed by a subordinate government agency whose authority to issue those restraints is in issue. *See id.* at 80, 91.

110. *See supra* notes, 62-73 and accompanying text.

111. 435 U.S. at 415.

112. *See supra* notes 76-83 and accompanying text. The *Hallie* and *Southern Motor Carriers* cases indicated that the clear articulation requirement would be assessed with guidance from the delegation doctrine of administrative law. These cases also indicated that the legislature could confer permissive authority upon a municipality or an agency to impose a substantial market restraint. Together these rulings undercut the rationale provided for the clear articulation requirement in P. AREEDA & D. TURNER, *supra* note 42, at 80-92. The cases also lend support to those lower court decisions which have transformed that requirement into a fiction. *See supra* notes 62-73 and accompanying text.

D. *The Ramifications of* Fisher v. Berkeley *for Municipal Regulation*

The narrow definition of a hybrid restraint eliminates the uncontrolled growth of the state-action doctrine as represented by the two-pronged test of *Midcal*. Courts will test municipal legislation by the same standards applied to state legislation. A court will uphold the legislation unless it involves a hybrid restraint, and if it involves a hybrid restraint, a court will uphold it if the restraint is not a per se restraint. Otherwise the legislation will be condemned.

This Article has argued that the *Fisher* hybrid analysis should replace entirely the *Midcal* state-action tests. If the courts do not accept that position, then the *Midcal* tests will play only a narrow role. They will be used to evaluate hybrid restraints under a broad definition of hybrid that includes any substantial private decision-making in a government imposed market restraint. Under this broader definition of *Fisher's* hybrid restraint concept, the courts have some room to apply the line of state-action precedents stretching from *Goldfarb* to *Hallie*, but that room has been narrowed drastically. Indeed, it is a vestigial remnant of a failed policy of antitrust intrusion into internal state affairs.

Even under a broad definition of a hybrid restraint, the state-action doctrine is not needed to protect from preemption a municipality that enacts ordinances imposing substantial controls on markets, so long as government officials alone, without substantial involvement of private parties, determine the particular restraints applied. Cities are thus free to adopt rate, price, or rent controls, and they may limit franchising and otherwise restrict competition if the restriction is accompanied by government control over rates or prices.[113]

A broad construction of *Fisher*'s hybrid restraint concept restricts a city's ability to establish, within a particular sector of its economy, a joint government-seller cartel. A city may not involve private parties in the establishment or operation of a mechanism that restricts entry or controls prices, unless the city retains ultimate control over the mechanism's operation and can point to a state statute endorsing the city's regulation of that sector of the city's economy. This narrow area of possibilities is reserved under *Fisher* for application of the *Midcal* tests and even this narrow area remains the domain of the *Midcal* tests only to the extent

113. *See e.g.*, North Carolina *ex rel.* Edmisten v. P.I.A. Asheville, Inc., 740 F.2d 274, 278 (4th Cir. 1984).

that a court broadly interprets *Fisher*'s concept of a hybrid restraint. Like states, cities may not use any version of hybrid restraint under which private decisionmaking receives government enforcement if those restraints impose a regimen of per se illegal conduct.

For reasons already stated, courts would be unwise to construe *Fisher*'s hybrid restraint category more broadly than the class of restraints that would fail the *Midcal* supervision test. Courts using the recommended approach would no longer use the clear articulation requirement. Federal antitrust preemption of municipal regulation would then be governed by standards that were coextensive with the standards governing preemption of state regulation.

V. *Parker* Reevaluated: A Legislative Proposal for the Intersection of Federal Antitrust Policy with State and Local Regulation

A. A Need for a Legislative Initiative

1. The Failure of the Judicially Developed State-Action Doctrine

Parker[114] was the Supreme Court's first substantial attempt to reconcile the federal antitrust laws with the demands of federalism. In *Parker* the Court achieved that reconciliation by exempting "state" action from the Sherman Act. The rash of cases involving the state-action issue in recent years—especially as applied to municipal governments—demonstrates the difficulty courts face in determining what constitutes state, as opposed to local government, action. The state-action concept as it evolved through *Hallie*[115] and *Southern Motor Carriers Rate Conference*[116] demanded reevaluation and rearticulation. The Court in *Fisher v. Berkeley*[117] effectively met this demand. With the *Fisher* decision the Court finally achieved the possibility of a modicum of doctrinal stability. Under the wisest construction of that case, the federal antitrust laws will preempt only that state and local legislation that imposes hybrid restraints compelling illegal per se behavior.

The Court's venture into the application of the federal antitrust laws to the states thus has failed. The *Midcal* standards, which the Court finally formulated after exhaustive effort, have

114. 317 U.S. 341 (1943).
115. 105 S. Ct. 1713 (1985).
116. 105 S. Ct. 1721 (1985).
117. 106 S. Ct. 1045 (1986).

proved impossible to administer. In *Fisher v. Berkeley* the Court admitted defeat. Henceforth, almost all state and local market restraints will be upheld apart from the narrow hybrid category. Although the law will be stable, stability will be purchased at the expense of the Sherman Act's free market policies. This result is the best available under the circumstances. Society would benefit from an extension of free markets, but the courts have proved incapable of reconciling the national free market policy with due respect for state and local autonomy.

2. The Substantive Factors Underlying the Court's Development of the State-Action Doctrine

(a) Governmental Inroads Into the Free Market

The Court's ill-fated venture into antitrust review of state and municipal regulation was motivated by its appreciation of the substantial threat that nonfederal legislation poses to free market policies. In *Hallie*, as well as in the earlier *Boulder*[118] and *Lafayette*[119] cases, the Court recognized the threat to free market policies posed by the parochial interests of municipalities.[120] Indeed, these opinions may have reflected the view of many economists that the most dangerous forms of trade restraint are government imposed entry barriers and other forms of regulation.[121] Only government imposed restrictions are impervious to erosion by market forces. These opinions also may have expressed the Court's recognition that local governments are peculiarly prone to interest group pressures for the creation of private benefits at public expense. Finally, the Court may have believed that federal antitrust policy was powerless to constrain state government imposed market restraints, but that federal policy nonetheless could be shaped to curtail market restraints imposed by local governments.

(b) State Autonomy

Although its state-action decisions are subject to criticism for undue intrusion into state and local affairs, the Court did recognize a need to bend the antitrust laws to accomodate the states' conflicting economic regulatory policies. Indeed, the Court's attempts

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118. 455 U.S. 40 (1982).

119. 435 U.S. 389 (1978).

120. *See* 105 S. Ct. at 1721; 455 U.S. at 51; 435 U.S. at 408.

121. *See, e.g.*, M. FRIEDMAN, CAPITALISM AND FREEDOM 125-26 (1982); *see also* W. GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS (1956).

to reconcile these conflicting federal and state interests account for the complexity and inadministrability of its state-action precedents.

The Court's two *Midcal* tests[122] were an attempt to achieve the desired accomodation of federal and state policies. The "clear articulation" test recognized that a state properly could adopt any economic policy that it wished. The state-action decisions, however, required a state that adopted a regulatory policy that conflicted with the Sherman Act to state the conflicting policy clearly. The clear articulation requirement was designed to ensure that the state legislature indeed had adopted the conflicting policy. The test was designed to help the federal courts defer to state policies without bending the antitrust laws for policies devised by lower ranking officials or invented in litigation by imaginative lawyers. The supervision requirement also recognized that states properly could adopt regulatory policies that conflicted with the Sherman Act. The supervision requirement attempted to ensure that the state, through its instrumentalities, took responsibility for the restrictive and anticompetitive facets of its market regulation.

(c) A Need for Legislation

Only Congress can provide standards under which the federal antitrust laws test state or local legislation. The Court has demonstrated the judiciary's inability to formulate administratable standards. It is appropriate, therefore, for Congress to articulate standards for achieving an optimum reconciliation of federal antitrust policies with the deference due to the states.

B. The State-Action Problem Reexamined

1. *Parker* Reexamined

Because the state-action doctrine seeks to reconcile a national policy in favor of free markets with a deference to the states' proper governmental roles, the doctrine's structure should rest upon a carefully delineated balance of those policies. This careful delineation was absent from *Parker*, the foundation upon which the state-action doctrine rested until the decision in *Fisher v. Berkeley*. In *Parker* the state of California had established a restrictive marketing program for raisins, a crop grown in California and sold nationally. California imposed marketing restrictions that

122. *See supra* text accompanying notes 39-49.

burdened the national market with supracompetitive prices while providing the benefit of the supracompetitive prices to its own growers. Such a marketing program directly conflicts with the national policy in favor of free markets. That conflict was muted in the *Parker* case, however, because the California marketing program was apparently consistent with the policies of the federal Agricultural Marketing Agreement Act. In general, however, in the absence of a federal regulatory policy that legitimates state action, a state's role in a federal system does not include establishing a marketing mechanism that penalizes the rest of the country for the benefit of in-state producers.[123] Such overreaching regulation is especially inappropriate in light of the historic concerns underlying the United States' constitutional structure: the present federal system was established largely to eliminate economic exploitation of some states by others through tariffs, duties, and other preferences for domestic industries.

These considerations indicate that the Sherman Act issue in *Parker* should have been decided differently. The Court either should have ruled that the federal Agricultural Marketing Agreement Act implicitly exempted analogous state programs from the Sherman Act, or it should have invalidated the California prorate act. The Court should have ruled that any state regulation that imposes significant anticompetitive restrictions on a national market (*i.e.*, raises price significantly above the competitive level or significantly restricts supply in the market) for the benefit of in-state producers is in conflict with the Sherman Act and hence invalid. Indeed, the Court should have adopted an even more expansive view and ruled that any state regulation that produces a significant restrictive effect on price or supply in a market extending substantially beyond the enacting state's boundaries, and that therefore burdens nonresidents with the restraints, conflicts with the Sherman Act and hence is preempted.

It may be too late for the Court to arrive at such a sensible result. Its obvious failure to achieve a stable and consistent approach to the state-action doctrine in eleven decisions since 1975, coupled with its present abandonment of the case law created by those decisions, certainly would counsel against the Court's further attempting to rewrite the state-action doctrine. Any successful at-

123. *See* P. AREEDA & D. TURNER, *supra* note 42 at 126-27 (suggesting that in the absence of the federal policy embodied in the Agricultural Marketing Agreement Act, the California prorate law in *Parker* should have been condemned under the commerce clause).

tempt to eliminate the deference that *Parker* requires federal antitrust laws to accord to state regulatory policies imposing extraterritorial anticompetitive restraints must be legislative. Should Congress wish to confine the sweep of a state's regulatory policies to its own borders, Congress has the power to do so; drafting such a statute is a straightforward task presenting no significant problems.[124]

2. A Broad Reconciliation Between Federal Antitrust Policy and State Autonomy Over Internal Economic Policy

Although the suggested approach would provide an intellectually coherent structure for a state-action exemption from federal antitrust policy in cases like *Parker*, most of the state-action cases have involved state or local governments imposing restraints that primarily affected the state's own residents. *Goldfarb*, *Bates*, and *Hoover v. Ronwin*[125] involved restraints on the provision of legal services, restraints that generally affect markets confined within the regulating state. *Cantor* involved a local market in light bulbs. *New Motor Vehicle Board* involved a restraint upon in-state automobile distribution, the principal burden of which the state's own residents bore. *Schwegmann* and *Midcal* involved fair trade regulation, which primarily burdened the enacting state's own residents. *Boulder* involved a local (and therefore in-state) restraint. Although the facts of *Lafayette* suggest that the anticompetitive conduct affected an extramunicipal market, the facts are not clear whether the conduct affected the operation of a market extending substantially beyond Louisiana. *Fisher v. Berkeley* involved local rent control, which burdened local property owners. In these cases the Court wrestled with the applicability of the federal antitrust laws to restraints that primarily affected residents of the regulating state. Although the Court always insisted that a state ultimately could choose its own economic policies, the Court tried, ultimately unsuccessfully, to condition the manner in which the state adopted and exercised a nonfree market regulatory policy.

This Article proposes that market restraints adopted by a state or its political subdivision whose burden falls primarily upon state residents be left to that state's political processes and hence be exempted from the Sherman Act, provided that certain conditions are met. These conditions are designed to heighten the visi-

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124. *See infra* Section 2 of the statutory proposal.

125. 467 U.S. 558 (1984).

bility of the anticompetitive and restrictive aspects of the state or local regulation as well as its anticipated benefits. This heightened visibility will assist the state or local electorate to assess fully the benefits and burdens of economic policies that differ from the national free market policy.[126] This approach is workable and respects the opposing concerns set forth in the Supreme Court's case law. The proposal addresses the Court's perceived need to bend the Sherman Act to accommodate "state" economic regulation and local regulation adequately endorsed by the state political process. In seeking to reach an accommodation between state autonomy and the federal antitrust laws through the full utilization of state political processes, this approach seeks to attain through legislation results that earlier commentators sought to reach by means of the now discredited judicial avenue.[127]

3. The Background for a New Approach to the "Clear Articulation" Requirement

The approach that the Court has worked out to determine whether the state-action exemption applies includes the requirement that conflicting state policy be "clearly articulated and affirmatively expressed."[128] Although tbis requirement is applied easily to state legislation that on its face contemplates the substitution of regulation for a free market, applying the standard to determine whether a local government is entitled to the state-action exemption has caused significant difficulties.

The Court's requirement of clear articulation, however, has not been arbitrary. Underlying that requirement is the ultimate premise of the state-action doctrine: that absent a massive and impractical assertion of federal control over state and local affairs, the Court is essentially powerless to prevent the states from adopt-

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126. *See* Aranson, Gellhorn & Robinson, *A Theory of Delegation*, 68 CORNELL L. REV. 1, 42 (1982) (following M. FIORINA, RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS (1981)). Aranson, Gellhorn, and Robinson suggest that "[m]ost citizens appear to be relatively insensitive to the welfare consequences of most public decisions, especially those decisions that allocate private, divisible benefits to others." Publicly identifying the costs and benefits of the regulatory legislation of states and their political subdivisions would aid the relevant electorate and their representatives to evaluate regulatory proposals from an adequate information perspective.

127. *See* P. AREEDA & D. TURNER, *supra* note 42, at 80-92; Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After* Midcal Aluminum, 61 B.U.L. REV. 1099, 1123-24 (1981).

128. 445 U.S. at 105 (quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978)).

ing regulatory policies that are inconsistent with the Sherman Act. The Court, of course, can prohibit a carefully defined class of legislation such as the hybrid restraints referred to in *Fisher*. The federal courts, however, cannot impose greater substantive prohibitions upon the range of state and local legislation without disabling the states from carrying out concededly proper governance. The Court can intrude at most only by imposing procedural requirements upon the manner and the methods by which the states adopt and administer their inconsistent regulatory policies. The Court took this approach when it evaluated state and local legislation under the twin tests of the *Midcal* opinion.[129] Even when the Court purported to extend the reach of the antitrust laws further into the affairs of local governments than into the affairs of state governments, the Court acknowledged that it could not prevent the state legislature from conferring upon subordinate units of government the power to adopt and to administer regulatory policies at odds with the Sherman Act's free market policy. Again, the only constraint that the Court tried to impose involved the manner in which the state legislature conferred that power.

The Court originally imposed the clear articulation requirement to ensure that an exemption from the antitrust laws would be provided only to anticompetitive policies that a state had in fact adopted. The requirement attempted to keep the exemption within its proper limits. After insisting in *Cantor* that an exemption from the antitrust laws be no broader than necessary to accommodate state concerns,[130] Justice Blackmun relied in *Bates* upon the state's clear articulation, in lawyer disciplinary rules, of its regulatory concerns as assurance that the federal antitrust laws deferred no further than necessary:

> The disciplinary rules reflect a clear articulation of the State's policy with regard to professional behavior. Moreover. . . the rules are subject to pointed reexamination by the policymaker—the Arizona Supreme Court—in enforcement proceedings. Our concern that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced in such a situation; we deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active.[131]

Although the clear articulation requirement has become problematic as a measure of state authorization of municipalities' adoption

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129. *See supra* text accompanying notes 39-40.

130. *See* 428 U.S. at 597. This no-broader-than-necessary approach to the state-action exemption was repudiated in Southern Motor Carriers Rate Conference, Inc. v. United States, 105 S. Ct. 1721, 1727 n.21 (1985).

131. 433 U.S. at 362.

of anticompetitive local regulation, the requirement's function always has been an identification function: to identify the anticompetitive policies adopted by the states in order to measure how far the federal antitrust laws should bend to accommodate those policies.

4. Two Facets of the Clear Articulation Requirement.

This Article has shown the clear articulation requirement to possess two facets. First, if a state-action exemption is to be recognized at all, clear articulation is one of the few conditions that properly can be attached to the exemption. The logic of recognizing a state-action exemption implies that the choice of an anticompetitive state economic policy must be left to the internal political processes of each state. Furthermore, as a practical matter, those processes must be accorded the ultimate right to confer upon subordinate units of government and political subdivisions the power to adopt anticompetitive local economic policies. Second, the clear articulation requirement serves an identification function: by aiding in the definition of the state economic policy, it defines the antitrust exemption.[132]

5. A Third Facet of the Clear Articulation Requirement.

Although never mentioned by the Court, a third facet of the clear articulation requirement emerges from an analysis of the first two facets: a clear articulation requirement stringently applied would expose anticompetitive state policies to the state electorate. The more clearly a state articulates the anticompetitive dimensions of its economic policies, the better able is the state's political process to determine whether the benefits arising from those policies outweigh the burdens. Professor Page, writing in support of *Midcal* in 1981, argued that a clear articulation requirement was desirable because it brought trade restraints before the state legislature and thereby subjected the restraints to political review.[133] A similar view is implicit in the arguments of Professors Areeda and Turner on behalf of a clear statement requirement.[134] Furthermore, if the state-action doctrine were reinterpreted to apply only

132. *See e.g.*, P. AREEDA & D. TURNER *supra* note 42, at 80-81, 91. Areeda and Turner believe tbat a clear statement requirement will resolve ambiguities that otherwise might surround the assertion of an anticompetitive regulation by a subordinate governmental entity.

133. Page, *supra*, note 127, at 1106.

134. P. AREEDA & D. TURNER, *supra* note 42, at 92.

when the restraint's burden falls primarily upon the economy of the state adopting the anticompetitive regulatory program, the in-state political process would be particularly qualified to weigh the benefits and burdens.

6. The Proposal

The difficulties that the courts have encountered in applying the clear articulation test demonstrate its unworkability in its judicially developed form. This Article therefore proposes legislation that would redefine the state-action exemption in terms that, as applied to governmentally imposed restraints whose impact is primarily internal to the regulating state, largely consist of an elaboration of the clear articulation requirement. The proposal also goes to the core of the difficulty that has underlain the judicial development of the state-action defense; the proposal limits that defense to restraints that are internal to the state responsible for them. This modification of the state-action defense not only best accords with the proper role of a state in a federal system, but it also eliminates the bias that might infect state political processes were they to weigh in-state benefits against out-of-state burdens. In so doing, the proposal prepares the way for a clegislative redefinition of the clear articulation requirement.

As incorporated in the proposal, the required articulations are faithful to the concerns expressed by Justice Brennan in *Lafayette* and *Boulder* regarding the potential for anticompetitive restraints represented by thousands of units of local government. This proposal is also consistent with regulatory approaches that have passed the test of experience. Thus, it is consistent with the Congress' approaches in the Miller-Tydings and McGuire Acts.[135] These Acts gave carefully limited scope to exemptions from the federal antitrust laws in order to accommodate state concerns. The Acts exempted from the federal antitrust laws state "fair trade" laws authorizing vertical price fixing, but only under carefully confined conditions designed to ensure the presence of interbrand competition. The Acts effectively required these conditions to be incorporated into the exempted state laws themselves.[136] By requiring cer-

135. 50 Stat. 693 (1937); 66 Stat. 632 (1952).

136. The technique employed in both the Miller-Tydings and McGuire Acts was to exempt from the federal antitrust laws a carefully delineated class of resale price maintenance contracts so long as contracts "of that description" were made lawful by state law. 50 Stat. 693 (1937); 66 Stat. 632 (1952). State laws, accordingly, carefully copied the phrasing of the federal acts. *See, e.g.*, N.Y. GEN. BUS. LAW § 369-a (McKinney 1968) (repealed 1975).

tain legislative findings and by requiring an official identification of burdens and benefits, this Article's proposal makes use of techniques widely employed in environmental and other forms of regulation.[137] Finally, this proposal contemplates subjecting state and local legislation to a form of antitrust review consistent with the Local Government Antitrust Act of 1984, but significantly broader than the level of review to which the Court retreated in *Fisher v. Berkeley*. In the Local Government Antitrust Act the Congress exempted local governments from liability in damages for antitrust violations. The Congress, however, consciously refrained from exempting either state or local legislation from preemption by the Sherman Act, whose standards the Court had then most recently expressed in *Boulder*. In short, this proposal is traditional in its structure and sensitive both to the free market policies underlying the federal antitrust laws and to the inherent freedom of state and local governments to substitute various forms of economic regulation for the free market within their jurisdictions.

This Article therefore proposes that Congress enact the following statute:

THE STATE-ACTION EXEMPTION ACT

Section 1. For purposes of this Act:

(1) the term "law of a state or political subdivision thereof" means any law, regulation, ordinance, or other requirement enacted, adopted, or otherwise issued by any state or political subdivision of a state or any agency or instrumentality of any state or political subdivision of a state;

(2) the term "antitrust laws" has the meaning given it in section 1 of the Clayton Act (15 U.S.C. § 15), except that such term includes section 5 of the Federal Trade Commission Act (14 U.S.C. § 45) to the extent that said section 5 applies to unfair methods of competition;

(3) the term "anticompetitive effect" means (a) a substantial reduction in the supply of goods or services from the level that would have been offered in a competitive market, or (b) a substantial increase in the price level for goods or services over the level that would have prevailed in a competitive market;

(4) the term "deadweight social loss"[138] means the value (in-

137. See 42 U.S.C. § 4332(C) (1982).

138. This economic term of art is employed in the draft bill to focus attention upon the social costs of restrictive legislation. *See, e.g.*, P. SAMUELSON, ECONOMICS 486 n.10 (11th

cluding lost consumer surplus) in goods or services that would have been produced or sold in a competitive market but that are not produced because of the anticompetitive effects of the law of a state or a political subdivision thereof.

Section 2. Except as provided in Section 4, any law of a state or political subdivision thereof that imposes an anticompetitive effect upon a market extending substantially beyond the boundaries of the state is invalid. A market shall not be deemed to extend substantially beyond the boundaries of a state if a majority of the persons burdened by the anticompetitive effect are residents of the state or persons who become or expect to become residents of the state.

Section 3. Except as provided in Section 2, the federal antitrust laws shall not apply to any law of a state or political subdivision thereof, when the following conditions are met:

(1) The law shall contain the following findings:

> (a) a finding identifying each intended or anticipated anticompetitive effect to be produced by the law;
> (b) a finding identifying: (i) the class or classes of persons anticipated to be benefited by the law; (ii) the class or classes of persons upon whom the burden of any anticompetitive effect is anticipated to fall; and (iii) the geographical locations (including identification by state and political subdivisions thereof) where such burdens and benefits are anticipated to fall; and
> (c) a finding estimating for the first ten years of the law's operation (or such lesser period if the law has an earlier expiration date): (i) the economic benefit to each benefited class and geographical area; (ii) the economic burden to each burdened class and geographical area; and (iii) an estimate of the "deadweight social loss" anticipated to be produced by the law.

(2) The findings required to be made in subparagraphs (a) through (c) of this Section shall be remade at the expiration of each ten year period or at any time the duration of the law is extended.

(3) The findings specified in this Section shall be succinctly stated. Estimates contained in findings shall be: (a) based upon relevant data reasonably available to the authority promulgating the law; and (b) based upon methodology that at the time employed is currently in use or acceptable by professionals making comparable determinations. All such estimates shall be presumed to have been made in the manner specified herein, unless the contrary is proved by clear and convincing evidence.

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ed. 1980); F.M. SCHERER, INDUSTRIAL MARKET STRUCTURE & ECONOMIC PERFORMANCE 17-18 (2d ed. 1980). The purpose of the proposed statute could be fulfilled without using this particular term.

(4) The law shall provide for the governmental supervision of the principal anticompetitive effects produced by the law.

Section 4. The federal antitrust laws shall not apply to any law of a state or political subdivision thereof that is in existence at the effective date of this Act until five years after such date.

This proposal, if enacted, would redefine the relationship between the federal antitrust laws and the regulatory laws of states and local governments. If applied to the facts of *Parker v. Brown*, it would produce a different result than the Court reached in 1942, unless the Court construed the federal laws governing agriculture to create an antitrust exemption. On the *Parker v. Brown* facts, a preexisting prorate law could not survive longer than five years after the proposal's enactment. Enacting the proposal would eliminate a state's ability to create anticompetitive market restrictions benefiting its own producers at the expense of other states' consumers.

With the exception of fair trade laws and similar legislation, the proposal would leave virtually all other market restraints to the political processes of the states. Because the proposal incorporates the *Midcal* supervision requirement, the Sherman Act would continue to preempt fair trade laws, as it has under *Schwegmann* and *Midcal* and under the hybrid analysis of *Fisher v. Berkeley*.

Like *Fisher*, this proposal applies the same tests to local legislation as are applied to state legislation. Like *Fisher*, this proposal will not tolerate fair trade legislation. Unlike *Fisher*, however, this proposal does impose limited federal antitrust oversight of state and local regulatory legislation. In imposing this limited oversight, the proposal attempts to further the free market goals embodied in the Court's *Lafayette* and *Boulder* decisions without falling prey to the administrative difficulties that those cases engendered.

The proposal answers several objections to *Lafayette* and *Boulder*. First, although it uses the clear articulation requirement formulated in the Court's state-action cases, the proposal substitutes a legislatively defined clear statement for a judicially mandated amorphous statement. In so doing, the proposal makes the requirement administratively workable. Legislatures know in advance what is required of them, and courts have sufficiently precise standards to enforce. Second, critics' assertions that the federal courts have intruded into the states' internal affairs will be more muted under the enacted proposal than they were under *Lafayette* and *Boulder*. Under the proposal the states and their subdivisions can enact virtually any in-state market restriction they desire, and,

contrary to the standards that prevailed under *Lafayette* and *Boulder*, no more stringent test applies to local subdivisions than to state governments.

Most importantly, the proposal gives to the clear articulation requirement a new function that respects the autonomy of the states' political processes. In the pre-*Fisher* case law, the Court did not provide an adequate rationale for its clear articulation requirement. The requirement's function could be inferred, but the Court never explained its function sufficiently to guide application by the lower courts. Indeed, the clear articulation requirement appeared to be a device for federal intrusion into the states' internal allocation of governmental power. Under the proposal, the clear articulation requirement performs an unambiguous role that is visibly consonant with state autonomy. Under the proposal, the clear articulation requirement's function is to assist a state's political processes to reflect the will of its electorate. Federal intrusion is reduced to a minimum: the proposal requires only that the state's own people be told about the expected economic consequences of proposed legislation.

Finally, the role of the clear articulation requirement under the proposal provides a comprehensible reconciliation of the policies of federal antitrust law and state autonomy over internal affairs. The federal antitrust laws are designed to protect the public from monopolies and cartels. The proposal ensures that the public receives this protection unless the public chooses otherwise through the political process. The clear articulation requirement ensures that any governmental decision to abandon the free market is made in a manner designed to inform the affected public about the expected benefits and burdens of the change.

This public information requirement ought not to be seen as federal intrusion. The Congress could extend the Sherman Act broadly to restrict the states' substantive powers to regulate. Indeed, strong arguments support such congressional action as it is widely believed that state and local special-interest regulation creates significant social waste. Moreover, the Congress implicitly sanctioned the federal judiciary's equity review of local legislation under *Boulder*'s standards when it enacted the Local Government Antitrust Act of 1984.[139] Little doubt remains, therefore, that the federal interest in furthering free markets legitimately extends to

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

ensuring that, when free markets are abandoned, the affected public is informed about the expected results. Finally, because the proposal is legislative, the minimal intrusion into state political processes that it requires will be seen as more legitimate than the judicial intrusion in state-action cases.

VI. The Superiority of the Proposal to Alternatives

A. *Professor Wiley's Capture Theory*

1. Wiley's Criteria

In a recent issue of the *Harvard Law Review*, Professor John Shepard Wiley, Jr., proposed a new approach to Sherman Act preemption of state and local regulation, which he termed a "capture" theory.[140] Under Wiley's proposal, state and local regulation would be preempted when the following four criteria were met: (1) the regulation restrained market rivalry; (2) no federal antitrust exemption protected the regulation; (3) the regulation did not respond directly to a substantial market inefficiency; and (4) the regulation originated from the "decisive" political efforts of producers who stand to profit from its competitive restraint.[141]

The first three of Wiley's criteria are not problematic. The first two are conditions for the application of the federal antitrust laws in any case. Those laws do not apply unless market rivalry is restrained, either by agreements among market actors or by the substitution of a monopolistic actor for the rivalry of competitors. By definition the antitrust laws do not apply to activity exempted from their application. Wiley's third condition identifies a kind of state or local legislation widely recognized as immune from antitrust attack: a regulation that reduces inefficiency furthers the same ends as a federal antitrust law and therefore is not preempted.[142] A typical example of such a law is the conferral of an

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140. Wiley, *A Capture Theory of Antitrust Federalism*, 99 Harv. L. Rev. 713 (1986). In addition to the proposals discussed in text, Professor Herbert Havenkamp and John A. Mackerron III have proposed that economic regulation be performed by the optimal regulator. Under this test, the federal courts would pass upon the question as to whether economic effects of the regulation were contained within the political boundaries of the governmental entity performing the regulation. See Hovenkamp & Mackerron, *Municipal Regulation and Federal Antitrust Policy*, 32 U.C.L.A. L. Rev. 719, 774-779 (1985). This proposal is consistent with the proposal of this Article but it lacks the safeguards proposed here to ensure that the political processes of the regulating unit of government respond to an informed electorate.

141. *Id.* at 743.

142. *See* Omega Satellite Prods. Co. v. City of Indianapolis, 694 F.2d 119, 125-27 (7th Cir. 1982). In Affiliated Capital Corp. v. City of Houston, 700 F.2d 226, 234 (5th Cir. 1983),

exclusive franchise upon a so-called "natural" monopoly, a business whose economies increase indefinitely with output. Public utility regulation sometimes meets this description. Building more than one utility in a circumstance of increasing returns to scale would be wasteful. Government prohibition of a second utility's entry fosters efficient production.

Wiley's fourth condition, however, is problematic. Wiley would invalidate state or local regulation that results from the "decisive" efforts of producers who benefit from the market restraint. Such an approach raises a hornet's nest of problems, as Wiley himself admits. Professor Wiley's approach does not furnish adequate guidance for distinguishing producer capture from capture by other special interests. Although Wiley identifies "producer" capture as the basis for preemption, he surely would include "buyer" capture as well, for no sound basis exists for favoring monopsonies over monopolies. Yet Wiley favors exempting the recent rent control ordinance involved in *Fisher* from antitrust preemption. He defends his position on the ground that applying his proposed capture approach requires "the exploitation of the many by the few," rather than a consumer cartel of many renters penalizing a smaller number of landlords.[143] This many-versus-few analysis may work less easily, however, in cases displaying a lesser disparity between the benefited and burdened interests.

Wiley's approach also would involve the judiciary in reviewing the acceptability of lobbying and in penalizing successful lobbying. Wiley recommends proving capture by evidence of lobbying. He notes,[144] but does not discuss, the implications of the *Noerr-Pennington* doctrine,[145] a doctrine that places lobbying outside of the

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cert. denied sub nom., Gulf Coast Cable Television Co. v. Affiliated Capital Corp. 106 S. Ct. 788 (1986), the Fifth Circuit conceded that a city's grant of an exclusive franchise in a natural-monopoly market was not precluded by the antitrust laws, but the court held that pregrant competition among applicants was required. *See also* Central Telecommunications, Inc. v. TCI Cablevision, Inc., 1986-2 Trade Cases ¶ 67,247 (8th Cir. 1986).

143. Wiley, *supra* note 140, at 768.

144. *Id.* at 772-73. Wiley seeks to avoid the application of the *Noerr-Pennington* doctrine hy limiting the use of capture theory against public defendants to declarations of invalidity and injunctions against enforcement. *Id.* at 773. Yet Wiley would penalize lobbying activity by invalidating the legislation that was enacted in response to it. He would make the criterion for invalidation the identification of the lobbyists or the interests that they represented. Indeed, in *Noerr* itself, the Court explicitly condemned a capture theory such as the one propounded by Wiley. *See* Eastern R.R. Pres. Conf. v. Noer Motor Freight, Inc., 365 U.S. 127, 137-38, n.17 (1961).

145. In Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), the Court ruled that a combination of business firms in a lobbying campaign does not fall within the prohibitions of the Sherman Act, even though the objective of the cam-

concerns of the Sherman Act. The doctrine also reflects the constitutional concerns connected with the proper functioning of governmental branches and people's ability freely to communicate with their representatives and other officials.[146] Because the Court already has held that the Sherman Act is not concerned with lobbying activities, even lobbying activities directed at persuading the legislature to enact legislation imposing anticompetitive restraints on competitors, Wiley's recommendation conflicts with the spirit, if not the letter, of the *Noerr-Pennington* doctrine.

It is difficult to imagine an activity more intrusive into the political processes of the states than the federal courts deciding whether an interest group, through its lobbying efforts, had exerted too much influence upon the enactment of state legislation. Such a judicial decision would be tantamount to ruling that the right of petition was exercised too effectively. Lobbying is not a suspect practice that the courts must check whenever the lobbyists successfully convince the legislators of the justness of their cause. As the Court has recognized, lobbying serves purposes other than the interests of the lobbyists.[147] It is a primary means through which the legislators inform themselves about issues before them. A legislator need not be captured by a lobbyist to make use of the information that the lobbyist supplies or indeed to be persuaded of the rightness of his cause. Although legislation imposing restrictions upon the operation of the free market often may be unwise, a state or local legislature should not require federal judicial permission to enact such legislation.

The results of a serious attempt to implement Wiley's recommendations are not easy to predict. On the one hand, his recommendations carry the potential to destroy lobbying by special interest groups interested in market regulation economically beneficial to them. Indeed, under the facial effects analysis that Professor Wiley advocates, economic regulation that benefits a small interest group would be prima facie forbidden whether or not it resulted from lobbying. On the other hand, Wiley would allow a government to rebut a prima facie case of capture by showing that

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paign is the enactment of anticompetitive legislation. The Court elaborated this doctrine in United Mine Workers v. Pennington, 381 U.S. 657 (1965), and in California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

146. *See* 365 U.S. at 137; *see also* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-511 (1972); United Mine Workers v. Pennington, 381 U.S. 657, 669-670 (1965).

147. *See* 365 U.S. at 139.

its legislators "did in fact consider public interest arguments."[148] Because most sophisticated legislators would be aware of the need at least formally to consider "public interest arguments," how any prima facie case would not be effectively rebuttable is unclear. And if rebuttal is easy, the whole capture analysis appears to be an exercise without a point.

Finally, Wiley's recommendation that capture be proved by analyzing the facial effects of regulatory legislation would extend antitrust review deeply into state affairs, far beyond the intrusion contemplated by even the most extreme reading of *Boulder*. Wiley would permit proof of producer capture not only by direct evidence of decisive producer support, but also by a facial effects showing.[149] A facial effects showing would be made by analyzing the regulation to determine the identity of the classes that the regulation benefited and burdened. Wiley illustrates the facial effects approach with a Pennsylvania statute prohibiting corporations from opening new drug stores unless all the corporation's stockholders are licensed pharmacists. He deduces that the statute most likely resulted from the lobbying efforts of small druggists seeking a shield against chain store competition.[150] The statute, according to Wiley, was thus the result of capture and should be exposed to federal antitrust review.

Wiley's capture approach would maximize federal intrusion into state affairs. A facial effects showing potentially would subject all state and local regulation to antitrust scrutiny, an extension of federal concern vastly broader than any contemplated by even the most interventionist case law. Wiley's facial effects test for capture produces a positive reading whenever a small number of producers benefit from the market restriction. Because this result is a common circumstance (as the cases involving exclusive franchises for taxi companies, entry restrictions on auto dealers, and development restrictions demonstrate), Wiley's approach potentially would subject a vast amount of state and local regulation to antitrust preemption.

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148. Wiley, *supra* note 140, at 771. Wiley would restrict rebuttal to evidence "of actual legislative influence or consideration." *Id.* at 772.

149. *Id.* at 771.

150. *Id.*

2. Wiley's Approach Compared with this Article's Proposal

The proposal contained in this Article defers to state political processes on decisions to substitute regulation for the free market. The proposal's only restrictions on the states are that they may not impose monopolistic restraints extraterritorially and that legislation that imposes substantial market restraints must be accompanied by findings of the anticipated benefits and burdens. Underlying these provisions is the premise that no reason prevents the citizens of any state or subdivision, acting through their representatives, from surrendering the protections against monopolistic market restrictions that the federal antitrust laws provide. This Article's proposal mandates federal deference to the legislative processes of the states and local governments. The federal interest in maintaining free markets is manifested only in the prohibition of states' imposing extraterritorial monopolistic restraints and in the requirement of legislative findings on burdens and benefits to ensure that the electorate is informed about the anticipated economic consequences of market-restricting legislation.

By contrast, Wiley's approach embodies an extreme form of what he himself calls "antitrust imperialism."[151] All state or local economic regulation that benefits a small class at the expense of a larger number would be vulnerable to Sherman Act preemption. Moreover, Wiley proposes that in doubtful cases evidence on lobbying activity be introduced into court and evaluated for the activity's "decisiveness" in the state legislative processes.[152] The federal courts in effect would scrutinize the responsiveness of legislators to segments of the electorate. This scrutiny would involve a vastly greater judicial intrusion into state affairs than was called for by *Midcal, Lafayette,* and *Boulder.*

B. Professor Page's Capture Theory

After the Court's decision in *Midcal,* Professor Willilam H. Page offered a rationale for the clear articulation standard.[153] Drawing from scholarly literature that suggested that regulatory agencies are more susceptible to capture by special interests than

151. *See id.* at 767. Wiley is aware of an approach similar to the one proposed in this Article, but he dismisses it as not "worth the candle." As applied to a proposed statute such as the one set forth in this Article, his conclusion is not supported adequately. *See id.* at 744-45 & n.147.

152. *Id.* at 769-770.

153. Page, *supra* note 127.

are legislatures, Page argued that the clear articulation requirement beneficially prevented state regulatory agencies from initiating substantial market restraints. Instead, the requirement forced states to act through their legislatures when they imposed substantial restrictions on markets. Page argued that use of the legislative process subjected economic regulation to greater scrutiny, potentially including the scrutiny of the electorate. Moreover, legislatively enacted market restrictions enjoyed a higher degree of underlying legitimacy than restrictions enacted by politically unresponsive regulatory agencies. In Page's view, only the restraints produced by the legislative process merited the deference of the federal antitrust laws.

Page's approach properly recognizes that federal antitrust policy must bend to conflicting state economic policies. His approach also recognizes that the federal courts, acting in the name of antitrust laws, practically cannot do more than impose procedural restrictions upon the states. His proffered approach to the *Midcal* clear articulation requirement, however, is faulty in several respects. First, although Page would impose procedural restrictions upon the states when they adopt market-restricting legislation, he accepts the basic legitimacy of *Parker*. Page wants to force the states to use the legislative process to impose market restrictions because that process is politically accountable. Yet state legislative action is not truly politically accountable when it imposes market restraints that primarily burden nonresidents. Second, the politically unresponsive nature of regulatory agencies does not explain why the clear articulation requirement should apply to cities. Because the application of the clear articulation requirement to cities produced the morass from which the Court since has been trying to extricate itself, Page's failure to provide an adequate rationale for his support of the requirement's application to cities is a serious deficiency. Finally, a judicially imposed clear articulation requirement does not work. Unless the federal antitrust laws are to withdraw entirely, the interaction between the federal antitrust laws and economic regulation by states and local governments must be governed by legislation setting forth in detail the limits of state and local regulation.

C. The Approach of Professors Areeda and Turner

In 1978 Professors Phillip Areeda and Donald Turner argued that a clear statement requirement was implicit in the Court's re-

cent decision in *Cantor v. Detroit Edison Co.*[154] and that other state-action decisions also supported the requirement.[155] Areeda and Turner argued that a clear statement requirement was the hest way to reconcile federal antitrust policy with state autonomy:

> [a] clear statement requirement is the best approach because it ensures that the strong federal policy embodied in the antitrust laws will not be set aside where not intended by the state, and yet also guarantees that the state will not be prevented by the antitrust laws alone from supplanting those laws as long as it makes its purpose clear.[156]

The Court in effect followed their recommendation two years later in *Midcal* by formally adopting the suggested requirement.[157] Experience, however, has shown that the judicially mandated clear statement requirement that Areeda and Turner recommended does not work.

Although the judicial clear statement of Areeda and Turner has not worked successfully, their analyses of the state-action problem offer important insights. Various aspects of this Article's legislative proposal, in particular Section 2, find support in the Arreeda and Turner treatise. Commenting upon *Parker v. Brown*, Areeda and Turner acknowledged that the substantial market restriction that California imposed on the rest of the nation in order to benefit its own producers should have invalidated the Act in the absence of the coinciding federal policy manifested in the Agricultural Marketing Agreement Act.[158] Areeda and Turner, however, relied upon the commerce clause to reach that result.

In discussing their recommendation for judicial supervision over the administration of a market restraint, Areeda and Turner point to a problem: is it at all practical for courts to insist that state officials make good faith determinations of the data that is or could be available to them? Areeda and Turner answer in the negative: "There simply is no way to tell if the state has 'looked' hard enough at the data."[159] This response is obvious. The problem that they raise cannot be solved by the judiciary acting alone. Ensuring that the data are before the legislators and their constituents, how-

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154. 429 U.S. 579 (1976).

155. P. AREEDA & D. TURNER, *supra* note 42, at 91-92.

156. *Id.* at 91.

157. In its 1980 *Midcal* decision, the Court also adopted a supervision requirement. Both the clear statement requirement and the supervision requirement had been recommended by Areeda and Turner two years earlier. P. AREEDA & D. TURNER, *supra* note 42, at 71-73, 91-92.

158. *Id.* at 126-27.

159. P. AREEDA & D. TURNER, *supra* note 42, at 75.

ever, is entirely possible. Impact statements of various kinds provide analogues for the legislative findings requirements set forth in Section 3 of the proposal.

VII. Conclusion

In *Fisher v. Berkeley* the Supreme Court essentially gave up its attempt to use the antitrust laws to probe the anticompetitive restraints imposed by states and local governments. The Court's new approach is an improvement over its predecessor, because the older approach did not work. Prior to *Fisher* the Court was deciding an undue number of state-action cases without formulating workable standards, and the lower courts were evading the mandates of the Supreme Court precedents.

This Article contains a legislative proposal designed to govern the relationship between the federal free market policies embodied in the antitrust laws and nonfederal economic regulation. The proposal is workable and ensures that when state and local governments decide to depart from the free market, those decisions will be made in the light of adequate information about the likely burdens and benefits of those decisions. The proposal addresses the concerns of other critics and, for reasons set forth above, it is superior to the approaches they have recommended.