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APPLICATION OF THE SHERMAN ACT STATE ACTION EXEMPTION TO MUNICIPAL ENVIRONMENTAL REGULATION: A CASE FOR BROADER LOCAL DISCRETION

Ross J. Hamlin*

I. INTRODUCTION

Although "The Sherman Act\(^1\) was instituted in 1890 in an attempt to rid the nation of private trusts and other pervasive corporate combinations\(^2\) that prevented free competition,"\(^3\) courts have held that state agencies\(^4\) and municipalities\(^5\) may also sue and be subject to suit under the Act. In response to recent Sherman Act attack, municipalities have asserted that they are exempt from regulation by the statute. Recent decisions, however, have severely limited a municipality's access to the normal Sherman Act exemptions. For example, in a recent Supreme Court case,\(^6\) the City of Boulder's attempt to place a moratorium on cable TV development was disallowed under the Sherman Act.\(^7\) The city defended the suit claiming a state action exemption existed for their activities due to the state's home rule amendment.\(^8\) The Supreme Court, however, in deciding the case, narrowed the exemption to such an extent that the city could not

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* Staff member, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW
2. See infra text and notes at notes 117-20.
3. See infra text and notes at notes 117-20.
4. See infra text and notes at notes 179-261.
5. See infra text and notes at notes 261-313.
7. See infra text and notes at notes 283-313.
8. See infra text and notes at notes 283-313.
meet the new standards and was held to be included within the
scope of the statute.9
In the area of environmental regulation, the potential unavail­
ability to local governments of the Sherman Act exemptions ap­
ppears to create significant problems.10 For example, in response to
a serious shortage of waste disposal sites, the City of Akron, Ohio,
implemented a monopolistic solid waste disposal program.11 The
city developed an ambitious plan to build a disposal plant which
would also supply much-needed energy to local industry.12 In
order to guarantee a sufficient supply of fuel, the city passed a
regulation requiring that all waste be disposed of at the municipal
plant.13 This regulation was challenged under the Sherman Act as
an unreasonable restraint of trade and an attempt to monopolize
the industry.14 The city defended, arguing that it was exempt
from the application of the Act15 due to the presence of state
action.16 After the district court17 and the circuit court18 decided in
favor of Akron, the Supreme Court reversed and remanded, holding
that stricter requirements than those used by the lower
courts had to be met to obtain the exemption.19 Although on
remand, the district court again found for the city,20 the judicial
fate of this project is still uncertain as of this writing.
In an effort to clarify and address some of the issues raised in
the Akron case, this article will consider whether it is appropriate
to place antitrust limitations on municipalities, particularly when
the city is responding to critical environmental problems such as
solid waste disposal. First, the article will briefly examine the case
of Hybud Equipment Corp. v. Akron,21 the ongoing case discussed

9. See infra text and notes at notes 283-313.
11. See infra text and notes at notes 22-59.
12. See infra text and notes at notes 22-59.
13. See infra text and notes at notes 22-59.
14. See infra text and notes at notes 121-40.
671 (E.D. Ohio 1979), aff'd sub nom. Hybud Equipment Corp. v. Akron, 654 F.2d 1187
cases were consolidated at the district court level.
16. See infra text and notes at notes 313-80.
18. Hybud, 654 F.2d at 1197.
19. 455 U.S. at 931. The Court vacated and remanded Hybud for examination under
the stricter standards for state action exemption as defined by the Court in Community
currently on appeal to the Sixth Circuit.
above, which clearly depicts the solid waste problems faced by cities today, and considers the approach one city took to solve the problem. Second, this article will describe the specific statutory law relevant to the Ohio case. This section will examine, in particular, the federal Solid Waste Disposal Act, the creation of the Ohio Water Development Authority and its resulting responsibilities, and the doctrine of municipal home rule in Ohio. Third, this article will analyze in some detail the powers and the limitations of the Sherman Act; particular emphasis will be placed on the exemptions to the Act, including statutory immunity, implied exemption, and the exemption for government approved transactions, the so-called state action exemption. Fourth, this article will examine, in detail, the litigation challenging the Akron plan. Finally, a proposal for a statutory exemption from the Sherman Act for solid waste disposal will be presented.

II. AKRON AND THE SOLID WASTE DISPOSAL PROBLEM

Like many cities in the United States, Akron, Ohio faced a significant solid waste disposal problem during the 1960s and 1970s. The city was running out of dump space and regulations prevented the creation of new dumpsites. Akron chose to solve its disposal problem by creating a waste incineration/energy recycling system. The program, however, was attacked on antitrust grounds in Hybud Equipment Corp. v. Akron. While the final result of this litigation is as yet unknown, the potential impact of such suits on solid waste disposal and other municipal programs with monopolistic effects can be extremely significant. Thus, the Akron case warrants close examination.

A. Factual Background

In the late 1960s Akron officials recognized the impending need for a new solid waste disposal system. The problem became apparent for three reasons: first, between the years 1950 and 1970, six of Akron’s seven solid waste landfill sites were closed because they had reached capacity levels; second, the last solid

25. Id. at 6, Appendix A, Stipulation 19.
waste landfill site was also approaching capacity; and third, the possibility of opening another landfill site had been severely limited by an Ohio statute which requires compliance with highly detailed licensing, monitoring, and performance standards.

In an effort to solve the impending disposal problem, Akron contracted with its City Planning Department to carry out a regional study and to recommend solutions to the solid waste problem. The study examined 102 potential landfill sites. All but seven were deemed unsuitable for solid waste disposal. The Planning Department did, however, indicate that a solid waste incineration program might be possible. Interest in the program grew, and in 1969 the city hired a consulting firm to develop a solid waste incineration plan. Although the consulting report indicated that the technology necessary to build an energy recycling system existed, the city determined that the project, at that time, was economically unfeasible.

Meanwhile, the last permanent Akron landfill site had reached capacity. After much litigation, the city established a temporary site in June of 1970. This new site provided adequate disposal of the city's solid waste for several years. However, the increasing supply of refuse and the space limitation at the tem-

26. Id. at 686, Appendix A, Stipulation 19(2).
27. Id. at 686, Appendix A, Stipulation 19(1).
28. OHIO REV. CODE ANN. § 3734.01-.99 (Baldwin 1982).
30. Id. at 686, Appendix C, Stipulation 7.
31. Id. at 686, Appendix A, Stipulation 21.
32. Id. at 687, Appendix A, Stipulations 23, 24.
33. Id. at 687, Appendix C, Stipulation 24.
34. Id. at 687, Appendix A, Stipulation 25.
35. Id. at 687, Appendix C, Stipulation 30.
36. Id. at 687, Appendix A, Stipulation 25.
37. Id. at 687, Appendix A, Stipulation 25.
38. Id. at 687, Appendix A, Stipulations 25, 26.
39. Id. at 687, Appendix A, Stipulation 26. The following chart illustrates the dramatic increase in solid waste production which occurred in Akron in the 1970's:

<table>
<thead>
<tr>
<th>Year</th>
<th>Garbage Tons</th>
</tr>
</thead>
<tbody>
<tr>
<td>1971</td>
<td>79,000</td>
</tr>
<tr>
<td>1972</td>
<td>70,988</td>
</tr>
<tr>
<td>1973</td>
<td>101,958</td>
</tr>
<tr>
<td>1974</td>
<td>164,325</td>
</tr>
<tr>
<td>1975</td>
<td>239,900</td>
</tr>
<tr>
<td>1976</td>
<td>239,399</td>
</tr>
<tr>
<td>1977</td>
<td>272,273</td>
</tr>
<tr>
<td>1978</td>
<td>284,122</td>
</tr>
</tbody>
</table>

Id. at 687, Appendix A, Stipulation 26.
porary site prompted the County Board of Health to institute successful litigation in 1975 to revoke the license of the new landfill site,\(^{40}\) again leaving the city without a proper disposal location.\(^ {41}\) In 1978, however, the city successfully annexed the site property and contiguous land, thus enabling the site to continue in operation.\(^ {42}\) Throughout this period the city was aware that landfill was a temporary solution,\(^ {43}\) so Akron turned again to the recycling energy system proposal.\(^ {44}\)

While the city was examining its various alternatives, Ohio Edison, which provides electrical power to the citizens of Ohio, petitioned the Ohio Public Utilities Commission for the right to abandon its steam generation operation in Akron.\(^ {45}\) Because of its need for steam generation and its lack of solid waste disposal sites, the City of Akron seized this opportunity to move ahead with the recycling energy system as a means of disposing of solid waste and of providing steam to local industry.\(^ {46}\)

To obtain funds for the recycling system the city approached the Ohio Water Development Authority (OWDA)\(^ {47}\) for financial assistance.\(^ {48}\) The OWDA agreed to finance the project using Dillon-Reed, an investment banking house, as the underwriters.\(^ {49}\) The OWDA, however, required three guarantees from the city before it would co-underwrite the financing: (1) a sufficient saleable energy output over the term of the bonds to assure repayment;\(^ {50}\) (2) long term agreements locking in the steam purchasers;\(^ {51}\) and (3) a $10 million fund to cover construction cost overruns.\(^ {52}\)

Once this issue was settled, Akron instituted, under its home

\(^{40}\) Id. at 687, Appendix A, Stipulation 26.
\(^{41}\) Id. at 687, Appendix A, Stipulation 26.
\(^{42}\) Id. at 687, 688, Appendix A, Stipulation 26.
\(^{43}\) Id. at 688, Appendix A, Stipulation 29.
\(^{44}\) Id. at 688, Appendix A, Stipulation 30.
\(^{45}\) Id. at 688, Appendix A, Stipulation 28. The request was ultimately denied.
\(^{46}\) Id. at 688, Appendix A, Stipulation 30.
\(^{47}\) For a discussion of the responsibilities of the OWDA, see infra text and notes at notes 97-103.
\(^{48}\) For a discussion of the financing arrangements see infra text and notes at notes 47-52.
\(^{49}\) 485 F. Supp. at 688, Appendix A, Stipulation 33.
\(^{50}\) Id. at 688, Appendix A, Stipulation 32.
\(^{51}\) Id. at 689, Appendix A, Stipulation 34(1).
\(^{52}\) Id. at 689, Appendix A, Stipulation 34(2).
rule power, a revised solid waste collection and disposal licensing ordinance to assure a supply of solid waste sufficient to generate the required amount of energy. The effect of the ordinance was to:

1. require all licensees to dispose of all collected solid waste at the recycling energy facility;
2. require all licensees to pay a dumping fee to dump their loads;
3. prevent all licensees from taking any solid waste to any private or public disposal facilities outside the city;

53. The home rule power was granted by OHIO CONST. art XVIII, § 7, proposed and accepted in 1912; see infra text and notes at notes 104-16.
54. The ordinance states:

   Whereas, in connection with the financing of the City's recycle energy facility, it is necessary to provide for revised service charges for the collection and disposal of garbage and rubbish and to revise licensing provisions to require that garbage and rubbish collected by private haulers be disposed of at the new facility when completed.

City of Akron Ordinance 841-76, reprinted in 485 F. Supp. at 691-92. Section 1(a) of the ordinance amends § 850.06 of the codified ordinance as follows:

   Until such time as the City's recycle energy plant begins accepting rubbish for disposal, no rubbish shall be deposited by the holder of a rubbish hauler's license within the corporate limits of the City except at a place designated in writing by the Mayor. From and after the date on which such plant begins accepting rubbish for disposal, all rubbish collected within the corporate limits of the City by a holder of a rubbish hauler's license shall be deposited at such plant; provided that rubbish which is not acceptable for disposal by such plant shall not be deposited within the City except at a place designated in writing by the Mayor.

Id. Section 2 of the Ordinance states:

   No person, except duly authorized collectors of the City or private haulers licensed pursuant to law, shall collect or remove any garbage or rubbish accumulating within the City or use the streets, avenues and alleys of the City for the purpose of collecting or transporting the same. All licenses granting to such private haulers and all contracts or other forms of authorization of duly authorized collectors shall require that all garbage or rubbish collected and transported under authority for disposal by the City's energy plant, be disposed by the City's energy plant, be disposed of at such plant from and after the date on which such plant begins accepting garbage and rubbish for disposal.

Id. Section 3 of the Ordinance establishes a collection and disposal fee for garbage and rubbish generated within the City's limits during the calendar year 1978. Section 3 also provides that:

The Director of Public Service is authorized to promulgate rules and regulations for the collection of said service charge and he is further authorized with consent of Council to adjust such charge upward on January 1, 1979 or on January 1 of any year thereafter.

55. Id. at 692, Appendix A, Stipulation 45.
56. Id. at 692, Appendix A, Stipulation 45.
57. Id. at 692, Appendix A, Stipulation 42.
4. prevent all licensees from separating out any materials for the purpose of keeping those materials from the recycling energy plant.\textsuperscript{58}

This ordinance was the subject of the antitrust litigation that was to ensue.\textsuperscript{59} In order to fully understand the actions taken by the city, as well as the legal challenges which the city faced as a result of its actions, the next section will examine the applicable law in place at the time the ordinance was passed.

III. STATUTORY BACKGROUND

The previous section described some of the unique policy issues facing the City of Akron. The actions taken by the city, however, resulted not just from policy issues, but from a body of state and federal law as well, which also helped to determine the options available to Akron. First examined will be the federal Solid Waste Disposal Act,\textsuperscript{60} which established the federal solid waste disposal program now in place. Next examined will be the Ohio statutes creating the Ohio Water Development Authority,\textsuperscript{61} the body responsible for the creation, regulation, and financing of Ohio's waste disposal programs. Lastly, a general overview of home rule provisions is presented since Akron used the home rule powers granted by the Ohio Constitution to implement its waste disposal program.\textsuperscript{62}

A. The Solid Waste Disposal Act: A National Problem Requiring Local Solutions

Congressional concern over the nation's solid waste disposal problem led to the passage of the Solid Waste Disposal Act of 1965.\textsuperscript{63} Congress hoped that the Act would provide states with the power and the impetus necessary to solve the solid waste problem using creative local solutions. That Congress intended the Act to be widely applied to local problems is indicated by the statute's broad definition of waste as,
any garbage, refuse, sludge . . . and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities.64

Congress made a series of findings concerning solid waste. First, the amount of solid waste is constantly increasing.65 This increase has created “serious financial, management, intergovernmental, and technical” solid waste disposal problems in expanding urban areas.66 Second, Congress determined that although collection and disposal of solid waste should continue to be primarily a function of the state, regional, and local agencies, the problem is national in scope. Federal action is therefore necessary to provide financial and technical assistance and to improve methods of dealing with local solid waste disposal.67 Third, it was found that “alternatives to existing methods of land disposal must be developed since many of the cities in the United States will be running out of suitable solid waste disposal sites within five years unless immediate action is taken,”68 resulting in the health and safety dangers inherent in continuing to dispose of solid waste in landfills.69 Fourth, Congress determined that “millions of tons of recoverable material . . . are needlessly buried each year.”70 Much of this waste “represents a potential source of solid fuel, oil, or gas that can be converted into energy,”71 thereby reducing American dependence on foreign resources and shrinking the deficit in the balance of payments.72 These findings, coupled with a general concern over energy shortages, led Congress to view solid waste as a viable potential energy source,73 and recommended the possible use of solid waste as recoverable energy producing material.74 In the Solid Waste Disposal Act, therefore, Congress proposed that various forms of resource recovery facilities and systems be examined.75 The statute treats these systems as a poten-

tional energy source as well as a feasible solution to the solid waste disposal problem.\(^{76}\)

The major objective of the Solid Waste Disposal Act is to assist in the development of solid waste disposal plans, and to encourage the use of effective methods of solid waste disposal in the local marketplace. The statute does not require the formation of a state plan or adherence to any federal scheme.\(^{77}\) Rather, the statute requires that if federal solid waste funds are desired by the state, then the state must implement disposal plans which will meet standards no less stringent than federal standards.\(^{78}\) It is the responsibility of any state choosing to implement a waste disposal plan to follow the federal guidelines as they are adapted to local conditions, and to enforce the guidelines promulgated under the state plan.\(^{79}\) There is no penalty for failure to implement a state plan or for implementing a state plan which does not meet federal standards. The only adverse consequence of non-implementation is the refusal of federal financial assistance if requested by the state.

Should the state decide to promulgate a plan, the Act states that the plan should be "designed to foster cooperation among federal, state, and local governments and private industry."\(^{80}\) The means of fostering cooperation may take the form of intermunicipal\(^{81}\) or interstate\(^{82}\) agencies. Each agency would have the power and responsibility to carry out the state or regional solid waste plan.\(^{83}\) In designing the cooperative or individual disposal plan, the government agency must consider the unique factors of each marketplace.\(^{84}\) These factors include geological and hydrological conditions,\(^{85}\) type of waste to be disposed of,\(^{86}\) political, organiza-

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81. An "intermunicipal agency" is defined by the statute as, "an agency established by two or more municipalities with responsibility for planning or administration of solid waste." 42 U.S.C. § 6903(9) (1976).
82. The statute defines an "interstate agency" as, "an agency of two or more municipalities in different States, or an agency established by two or more States, with authority to provide for the management of solid waste and serving two or more municipalities located in different States." 42 U.S.C. § 6903(10) (1976 & Supp. III 1979).
tional and financial problems,\textsuperscript{87} population factors,\textsuperscript{88} and types of resource recovery facilities which may produce marketable energy.\textsuperscript{89}

As it applies to energy development, the statute requires that the plan fully examine the economic and technical aspects of any resource recovery program.\textsuperscript{90} The disposal program offered must analyze such issues as market opportunities for energy recovered from municipal waste,\textsuperscript{91} cost comparisons between fossil fuel and resource recovery,\textsuperscript{92} transportation and storage feasibility analyses,\textsuperscript{93} conservation effects,\textsuperscript{94} and cost-benefit comparisons between recovery and disposal.\textsuperscript{95} The final requirement is that the state plan must assist municipalities in their efforts to recover energy and materials from municipal waste.\textsuperscript{96}

Overall, the federal regulations indicate the direction in which the states should travel, but they do not mandate the particular routes the states must follow. Each state is left to its own creativity in applying the federal standards to its local problems. This article now turns to an examination of how one state, Ohio, attempted to meet the federal standards with local statutes.

\textbf{B. The Ohio Water Development Authority: One State's Response To a National Concern}

The Ohio Water Development Authority (OWDA) was initially established to regulate waste water facilities.\textsuperscript{97} Pursuant to the Federal Solid Waste Disposal Act, however, the scope of OWDA authority was expanded in 1980 to include management of the state's solid waste programs.\textsuperscript{98} The OWDA was given responsibility for providing such financial and other state assistance as may be needed by Ohio localities attempting to implement new waste disposal programs.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{87} 42 U.S.C. § 6942(c)(9) (1976 & Supp. IV 1980).
\item \textsuperscript{88} 42 U.S.C. § 6942(c)(4) (1976 & Supp. IV 1980).
\item \textsuperscript{89} 42 U.S.C. § 6942(c)(10)-6942(c)(11) (1976 & Supp. IV 1980).
\item \textsuperscript{90} 42 U.S.C. § 6943(c)(b)(A) (1976 & Supp. IV 1980).
\item \textsuperscript{96} 42 U.S.C. § 6943(c)(b)(C) (1976 & Supp. IV 1980).
\item \textsuperscript{97} OHIO REV. CODE ANN. § 6121.03 (Baldwin 1982). This section was the original Ohio Water Development Authority (OWDA) enabling statute.
\item \textsuperscript{98} OHIO REV. CODE ANN. § 6123.03 (Baldwin 1982).
\end{enumerate}
\end{footnotesize}
The most significant new responsibility of the OWDA was working with local governments in the creation of facilities for developing energy resources from solid waste. An energy resource development facility is defined by the Ohio statute as "any energy resource development, research or conservation facility, including pilot as well as demonstration facilities" that recycles solid waste for use in the production of energy. It was this type of facility that Akron viewed as a possible solution to its solid waste disposal problem which, in addition, would also serve as an energy production facility, thereby qualifying for federal aid under the Solid Waste Disposal Act. Akron contacted the OWDA and proposed building a resource recovery facility to be created under the combined powers of the OWDA and Akron's home rule power. The next section will address home rule in general as well as the home rule powers available to the City of Akron.

C. Municipal Home Rule

In its broadest terms "municipal home rule means the power of local self-government." States grant home rule powers in order to give local communities power over matters that uniquely affect the citizens of the locality. The sphere of power, however, is limited to matters of local concern since issues that affect all the

99. Section 6123.031 states, "the OWDA may exercise the powers set forth in this chapter . . . for the purpose of constructing or providing financial assistance for the construction of any energy resource development facilities." OHIO REV. CODE ANN. § 6123.031 (Baldwin 1982). Interestingly, the state created the OWDA pursuant to a state constitutional amendment which determined that solid waste disposal and/or recycling is in the public interest and is a legitimate public end. Ohio Constitution Article VIII § 13 states:

To dispose of solid waste, it is hereby determined to be in the public interest and a proper public purpose . . . for agencies . . . to . . . construct . . . and issue bonds . . . to provide moneys . . . for the construction . . . of such facilities.

Except for facilities for . . . solid waste disposal . . . no lending of aid or credit shall be made . . . for facilities to be constructed for the purpose of providing electric or gas utility service to the public.

OHIO CONST. art. VIII, § 13.

100. OHIO REV. CODE ANN. § 1551.01 (Baldwin 1982).

101. Since the Ohio definition is somewhat vague, the federal definition may be useful. The federal statute defines a resource recovery facility as a "facility at which solid waste is processed for the purpose of extracting, converting to energy, or otherwise separating and preparing solid waste for reuse." 42 U.S.C. § 6903(24) (1976 & Supp. IV 1980).

102. See supra text and notes at notes 24-59.

103. See supra text and notes at notes 24-59.


105. Id. at § 1.40.
inhabitants of the state are viewed as state problems, subject to state control.\textsuperscript{106}

Once the home rule powers of a municipality are authorized,\textsuperscript{107} the city’s power may still be subject to limitation. In Ohio, the home rule amendment, adopted in 1912, authorizes the city to act on local matters; and it may act on these matters as long as its actions are not in conflict with state laws.\textsuperscript{106} “Local,” however, is a misleading term. In the Ohio amendment, “local” means matters of a purely local nature;\textsuperscript{109} yet some matters which would appear to be local have been held to be of a statewide concern.\textsuperscript{110} On the other hand, a city in Ohio may regulate some matters which extend far beyond the city’s geographic boundaries—for example, a city may acquire a public utility\textsuperscript{111} whose service area extends outside its corporate limits of the city.\textsuperscript{112} Thus, “local” is a vague concept as used in the amendment, and its boundaries must be defined issue by issue rather than by general definition.\textsuperscript{113}

A city which has been granted home rule powers is still subject to the decisions of the state legislature and may therefore be

\textsuperscript{106} Id.

\textsuperscript{107} Authorization takes two general forms: the self-executing and the permissive home rule models. Van Landingham, \textit{Municipal Home Rule in the United States}, 10 WM. & MARY L. REV. 269 (1968). Permissive home rule power requires an act of the state legislature to grant to the cities the power delineated in the state constitution. For example, the Pennsylvania legislature authorized home rule in the state but waited 27 years before granting the home rule power to the cities. Conversely, the Ohio home rule provision is an example of a self-executing model as it grants the home rule power within the constitutional amendment itself; “Municipalities shall have the authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.” \textit{OHIO CONST}. art. XVIII, § 3. Overall, each home rule model implements the home rule power in a different way, but the outcome is the same: the municipality involved is granted the power to promulgate local regulations which are not in conflict with the general laws of the state.

\textsuperscript{108} \textit{OHIO CONST}. art. XVIII, § 3.


\textsuperscript{110} \textit{E.g.}, Foltz v. Dayton, 22 Ohio Misc. 27, 32-34, 254 N.E.2d 395 (1969) (municipal civil service salaries are a matter of statewide concern).

\textsuperscript{111} \textit{OHIO CONST}. art. XVIII, § 4 states: “Any municipality may acquire . . . within or without its corporate limits, any public utility the products or service of which is or is to be supplied to the municipality.”

\textsuperscript{112} \textit{E.g.} Village of Blue Ash v. Cincinnati, 173 Ohio St. 345, 347-48, 182 N.E.2d 557, 559-60 (1962) (condemned land outside corporate limits for construction of airport).

\textsuperscript{113} E. MCQUILLIN, MUNICIPAL CORPORATIONS § 1.41 (3rd ed. 1978).
preempted by that body.\textsuperscript{114} Furthermore, a city attempting to regulate a local problem may run afoul of federal statutes and will similarly be preempted. Thus, a city exercising its home rule authority in an attempt to respond, for example, to a solid waste disposal problem, may find that the actions taken are inconsistent with another state or federal legislative act and will, therefore, be nullified as being in conflict with the "general laws."\textsuperscript{115}

Akron's solid waste disposal plan, taken pursuant to its home rule power, could theoretically be challenged as running afoul of state or federal statutes or activities in this area. Since no action was taken by the state, it appeared that the waste disposal problem was a local matter within the sphere of the city's power to regulate. As the Hybud litigation indicated,\textsuperscript{116} however, the waste disposal ordinance arguably conflicts with the federal laws, specifically the Sherman Antitrust Act.

IV. THE SHERMAN ANTITRUST ACT

In 1890, Senator Sherman proposed the Sherman Act in response to the growing public outcry that Congress should use its power to curb the proliferation of trusts.\textsuperscript{117} Trusts, such as the infamous railroad trusts, were designed to control the relevant marketplace by setting prices and production quotas at levels approved by inter-company stock voting trusts.\textsuperscript{118} Congress saw

\textsuperscript{114} See Columbus v. Glasscock, 117 Ohio App. 63, 64; 189 N.E.2d 889, 890 (1962) (local police regulations are a matter of local concern and do not conflict with general laws such that they may be preempted).

\textsuperscript{115} See supra text and notes at notes 104-14.

\textsuperscript{116} See infra text and notes at notes 313-80 for a discussion of the Hybud case.

\textsuperscript{117} E.g. Lovinger, Antitrust Means Economic Freedom, in Hoffman's Antitrust Law and Techniques 143, 144 (M. Hoffman & A. Winard eds. 1963).

\textsuperscript{118} A statement made almost one hundred years ago by Senator Turpie of Indiana illustrates the 1889 definition of a trust:

Mr. President, a trust, in the most recent acceptation of the term, is a union or combination, rarely of individuals, usually of corporations, dealing in or producing a certain commodity, of the total amount of which belonging to them a common stock is made with the intention of holding and selling the same at an enhanced price, by suppressing or limiting the supply and by other devices, so that the price of such trust commodity shall depend merely upon the agreement made about it by those in the combination, without reference to the cost of its production, the quantity of the article held for consumption, or the demand therefore among buyers.

The act of fixing the price of the commodity the ultimate result of this confederated association, and sometimes the handling of its goods and funds, are intrusted to one or more persons, called the syndicate, or executive commit-
these trusts as more than just an isolated practice. The market control to which the trust gave rise was viewed as a threat to the underpinnings of an economic system based on a competitive marketplace.\footnote{119} Congress, therefore, did not design the statutory scheme solely to control any particular trust; rather, it crafted the statute with a broad enough brush that courts of the future could limit any type of market control which might arise.\footnote{120}

\textbf{A. The Sherman Act Sections One and Two}

Section one of the Sherman Act\footnote{121} provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."\footnote{122} The section imposes criminal liability where three elements are present:

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

\footnotetext[119]{Congress, therefore, did not design the statutory scheme solely to control any particular trust; rather, it crafted the statute with a broad enough brush that courts of the future could limit any type of market control which might arise.\footnote{120}}

\footnotetext[121]{Section one of the Sherman Act provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal." The section imposes criminal liability where three elements are present:}

\footnotetext[122]{\begin{itemize}
    \item every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.
    \item Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
\end{itemize}}
first, the trade affected must be in interstate or foreign commerce; second, there must be either a contract, a "combination," or a conspiracy; third, the contract, combination, or conspiracy must be in restraint of trade. If the plaintiff proves that these three elements are present, section one of the Act imposes significant criminal penalties. The penalties provided include a fine of up to $1 million for corporations and up to $100 thousand for individuals, imprisonment of up to three years, or both a fine and imprisonment.

While section one addresses restraint of trade, section two of the Act provides for the regulation of trade monopolization. Section two states that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States ... shall be deemed guilty of a felony."

125. A contract is currently defined broadly by the courts as a binding agreement between two or more parties. Pearl Brewing Co. v. Anheuser-Busch, Inc., 339 F. Supp. 945, 950 (S.D. Tex. 1972); see also Helix Milling Co. v. Terminal Flour Mills Co., 523 F.2d 1317, 1322 (9th Cir. 1976), cert. denied, 423 U.S. 1053 (1976).
127. A "conspiracy" is defined as "a joint undertaking extending over a period of time with a common purpose, intent or design resulting from a combination or agreement, express or implied, to accomplish an unlawful end or to accomplish a lawful end by an unlawful means." Pearl Brewing Co. v. Anheuser-Busch, Inc., 339 F. Supp. 945, 950. See also American Tobacco Co. v. United States, 328 U.S. 781, 803-10 (1946).
128. An action in restraint of trade is seen as an action that impedes the natural flow of commerce. United States v. American Tobacco Company, 221 U.S. 106, 179-81 (1911). See also Eastern States Retail Lumber Dealers Ass'n v. United States, 234 U.S. 600, 609-10 (1914) (restraint of trade is an obstruction of the due course of trade).
129. 15 U.S.C. § 7 (1982) states: "The word 'person' or 'persons' ... shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the law of any foreign country."
131. 15 U.S.C. § 2 states in full:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one
The statute imposes criminal penalties for the three distinct offenses outlined in section two: actual monopolization, attempts to monopolize, and combining or conspiring to monopolize. The criminal sanctions imposed in section two are identical to those imposed in section one.

The key component of section two is the concept of monopolization, and the manner in which the courts define that concept is therefore of significant consequence. The current definition of the term "monopolize" is the creation of a system that "interferes with the natural flow of interstate commerce" by control of prices or competition, regardless of whether "the tendency is a creep-


132. Although all three offenses can be found at trial, punishment for more than one raises double jeopardy issues. The Supreme Court addressed this problem in American Tobacco Co. v. United States, 328 U.S. 781 (1946), holding that attempts to monopolize will be merged into actual monopolization. The Court held, however, that a party may be found guilty of two different sections of the act and sentenced on both without violating the double jeopardy rules. Id. at 787-89. See also United States v. American Honda Motor Co., 271 F. Supp. 979, 986 (N.D. Cal. 1967) (one cannot fragment claims to avoid § 6).

133. Actual monopolization requires the existence of two elements: (1) monopoly power in the relevant market; and (2) the intent and purpose to exercise that power. The key test of the section is defining monopoly power. The Supreme Court has stated that monopoly power exists when a company can raise prices in the market or exclude competition from the market when it desires to do so. American Tobacco Co. v. United States, 328 U.S. 781, 811 (1946). See also United States v. Aluminum Company of America, 148 F.2d 416, 427-28 (2d Cir. 1945) (Hand, J.).

134. Attempt to monopolize has been defined as "the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approaches so close as to create a dangerous probability of it . . ." American Tobacco Co. v. United States, 328 U.S. 781, 785 (1946).

135. See supra text and notes at notes 126-27 for a discussion of the required standards to show a combination or conspiracy under the Sherman Act. In addition, under § 2, the conspiracy must actually exist, American Tobacco Co. v. United States, 328 U.S. 781, 809-10 (1946); there must be overt acts in furtherance of the illegal purpose, id. at 809; a substantial amount of commerce must be affected, United States v. Yellow Cab Co., 332 U.S. 218, 225 (1947); and there must be a specific intent to monopolize, Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 626-27 (1953).

136. See supra note 13 for the full text of § 2.

137. At early common law, a monopoly was merely a special privilege granted by the state. W. Dana, Monopoly under the National Antitrust Act, 7 HARV. L. REV. 338 (1894). See also United States v. E.I. DuPont de Nemours and Co., 351 U.S. 377, 389 (1956) (citing Standard Oil Co. v. United States, 221 U.S. 1, 51 (1911)).

ing one rather than one that proceeds at a full gallop.” This broad definition of monopolize clearly carries out the drafters original intention that the Sherman Act be broadly defined to ensure free and unfettered competition in the marketplace.

The Sherman Act is an inclusive statute. As such, every anticompetitive activity is held to violate the Act unless the action is shown to be exempt from the Act’s application. In some cases, the only way a party may escape Sherman Act liability is the successful use of an exemption from the Act. Those exemptions will now be examined.

B. Sherman Act Exemptions

Any unreasonable restraint of trade, no matter what its source, may be held to violate the Sherman Act. Certain anticompetitive restraints, however, may be exempt from Sherman Act application. An action that is exempt may be said to be free of the general application of the Sherman Act, or, in the language of the Supreme Court, “disinfected from the strictures of the antitrust

140. See supra note 119; text and note at note 120.
141. If read literally, the Sherman Act could proscribe every restraint of trade no matter how reasonable. This would prohibit, in essence, every contract between parties that was an exclusive arrangement. After a few years of early confusion, the Supreme Court, in Standard Oil v. United States, 221 U.S. 1 (1911), was given the opportunity to establish Sherman Act analysis, referred to as the rule of reason. This rule states that the Sherman Act only proscribes unreasonable restraints of trade. Six years later, the specific standards to be examined were defined by the Court in Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1917).

The true test of legality is whether the restraint imposed merely regulates, and perhaps thereby promotes competition, or whether it may suppress or even destroy competition. To answer that question, the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; and the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, and the purpose or end sought, are all relevant facts.

Id. at 238.

The rule of reason analysis can, however, be precluded by a court’s finding a per se violation. Per se violations were recognized because the judiciary felt that there were some anticompetitive activities that were so pernicious as to be declared per se illegal regardless of the merits of the restraint. Included in this category are price fixing, tying arrangements, group boycotts, horizontal market divisions and vertical market divisions.

142. See infra text and notes at notes 153-312.
laws.\textsuperscript{143} The exemption of an action does not cure the violation of the Sherman Act. Rather, the restraint is a violation but the Sherman Act is unable to reach the action due to the protective cloak of immunity.\textsuperscript{144}

There are three general categories of exemptions;\textsuperscript{145} statutory,\textsuperscript{146} implied,\textsuperscript{147} and government approved actions.\textsuperscript{148} The exemptions created may be quite broad and offer a blanket immunity for a class of actions;\textsuperscript{149} or the exemption may be limited to application in specific circumstances.\textsuperscript{150} When a defendant claims an exemption, the claim is filed as an affirmative defense.\textsuperscript{151} The party claiming immunity bears the burden of proving that the standards for application of the exemption are fully satisfied. If the party fails to do so, the exemption will not apply.\textsuperscript{152}


\textsuperscript{144} For example, the state action exemption simply shields the anticompetitive action from Sherman Act application. See infra text and notes at notes 179-195.

\textsuperscript{145} Although professional baseball still has a unique antitrust exemption, a discussion of the issues raised by this exemption is not within the scope of this article. See Toolson v. New York Yankees, 346 U.S. 366 (1953); see also Federal Baseball Club v. National League, 259 U.S. 200 (1922).

\textsuperscript{146} E.g., McCarran-Ferguson Act 15 U.S.C. §§ 1011-1015 (1976); see infra text and notes at notes 153-66.

\textsuperscript{147} See infra text and notes at notes 167-78.

\textsuperscript{148} See infra text and notes at notes 179-312.


The labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.


\textsuperscript{151} The district court stated:

For a set of operative facts to be properly classified as an affirmative defense, they must operate as an excuse or justification for the accused, who in effect admits his guilt, but pleads non-en forcibility on other grounds. United States ex. rel. Crosby v. Delaware, 346 F. Supp. 213, 216 (D. Del. 1972).

1. Statutory Exemptions

Statutory exemption from the Sherman Act may be granted either because applying the Act in a particular case would not effectively increase competition, or, because of other policy considerations. These concerns have led to the creation of exemptions in areas such as the insurance industry; American business competing in foreign commerce; pooling activities of small businessmen; interlocking arrangements in the aviation industry; and cooperative associations among fishermen. In each of these markets, the normal competitive process would be counterproductive as it might actually decrease competition in the long run, or frustrate another federal policy. Statutory exemptions were created to prevent these counterproductive effects.

Due to the importance of the policies underlying the antitrust laws, exemptions which offer blanket immunity are looked on with disfavor by legislative bodies and the courts. The exemptions granted by statute are therefore written so as to exempt the minimum number of activities or practices. In addition, the courts will construe the exemption as narrowly as possible.

The creation of a statutory exemption requires that Congress foresee conflicts between the pertinent statute and the Sherman

159. In the case of fishermen, for example, large fishing companies could price the small fisherman out of the marketplace. To counteract this possibility, small fishermen were granted the right to form cooperatives under the Fisherman's Collective Marketing Act, 15 U.S.C. §§ 521, 522 (1976).
160. The McCarran-Ferguson Act, for example, was passed to enable states to regulate and tax the business of insurance in the state. St. Paul Marine Insurance Co. v. Barry, 438 U.S. 531, 539 (1978).
163. Id. at 350, 351.
164. In Group Health & Life Insurance Co. v. Royal Drug Co., 440 U.S. 205 (1979), the Supreme Court reiterated that, "it is well settled that exemptions from the antitrust laws are to be narrowly construed. This doctrine is not limited to implicit exemptions from the antitrust laws, but applies with equal force to express statutory exemptions." Id. at 231 (applying the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1976)).
Act. This clairvoyance is unlikely and situations often arise in
which an unforeseen conflict exists between statutes. The Courts,
in recognition of this problem, created an implied immunity from
the antitrust laws,165 which has the same effect as exemptions
created by statute.166

2. Implied Immunity

If a statutory exemption does not exist, but immunity is neces­
sary to effectuate another statutory scheme, antitrust immunity
may be judicially implied. The court’s perception of the antitrust
laws as an expression of a fundamental national policy167 to en­
able enterprise to be carried on in an unfettered marketplace168
places severe limitations on the granting of implied immunities.169
Courts will grant implied immunity only when a “clear repug­
nancy” between the antitrust laws and the regulatory scheme at
issue has been shown.170 Since immunity is granted solely upon a
showing of repugnancy in a specific situation by a specific defen­
dant, the immunity applies only to that case, and then only to the
extent necessary to enable the conflicting regulations or laws to
function.171

The requirement of a “clear repugnancy” between the antitrust
laws and the objective of another legislative act requires that the
defendant show that Congress fully intended to provide the im­
plied immunity.172 In National GeriMedical Hospital & Gerontol­
ogy Center v. Blue Cross of Kansas City,173 the Supreme Court
made this point with reference to the health care industry:

166. See supra text and notes at notes 153-66.
168. The Supreme Court has stated that:
Antitrust laws in general, and the Sherman Act in particular, are the Magna
Carta of free enterprise. They are as important to the preservation of economic
freedom and our free enterprise system as the Bill of Rights is to the protection
of our fundamental personal freedoms. And the freedom guaranteed each and
every business, no matter how small, is the freedom to compete . . .
170. Id.; Gordon v. New York Stock Exch., 422 U.S. 659, 682 (1975); Nat'l Gerimedical
172. Nat'l Gerimedical Hospital & Gerontology Center v. Blue Cross of Kansas City, 452
There are some activities that must, by implication, be immune from antitrust attack. If Health Systems Agencies [HSA's] and state agencies are to exercise their authorized powers . . . where, for example, an HSA has expressly advocated a form of cost saving cooperation among providers [of health care], it may be that anti-trust immunity is necessary to make the National Health Planning and Resource Development Act work.\(^{174}\)

This reasoning calls for the purest sort of implied immunity, one based on a basic conflict between the antitrust laws and the goals of a subsequent act of Congress.

An alternative line of reasoning was followed in *United States v. National Association of Securities Dealers*.\(^{175}\) In this case, after lengthy discussion of the Securities and Exchange Commission's authority to monitor restraint of trade in the securities industry, the Supreme Court held that:

In generally similar situations, we have implied immunity in particular and discreet instances to assure that the federal agency entrusted with regulation in the public interest could carry out that responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws (citations omitted). In this instance, maintenance of an antitrust action for activities so directly related to the SEC's responsibilities poses a substantial danger that appellees would be subjected to duplicative and inconsistent standards. This is hardly the result that Congress would have mandated. We, therefore, hold that . . . the Sherman Act has been displaced by the pervasive regulatory scheme established by the Maloney and Investment Company Acts.\(^{176}\)

This form of implied immunity is almost a statutory exemption in that the enabling legislation of the regulatory agency authorized that agency to supervise the type of conduct under antitrust challenge, and thereby removes that activity from the purview of the Sherman Act, even though the Court did not necessarily find a direct statutory conflict. Under this approach and the approach

\(^{174}\) Id. at 393 n.18 (quoting Brief for the United States as Amicus Curiae at 5). HSAs are local health planning agencies of the Federal Government called Health Systems Agencies. They are authorized under P.L. 93-641, the National Health Planning and Resource Development Act. Their main purpose is to control the cost of health care by limiting growth and expenditures in the health care industry.

\(^{175}\) 422 U.S. 694 (1975).

\(^{176}\) 422 U.S. at 734, 735.
taken by the Supreme Court in Blue Cross—where a statutory conflict resulted in an implied exclusion from the Sherman Act—the result is the same: the immunity is implied to facilitate the functioning of subsequent legislation which is either in conflict with, or appears to supersede, the Sherman Act.

In addition to immunity implied by statutory conflict or overlap, the Supreme Court has also created an exemption for government approved transactions. This exemption, termed the “state action exemption,” excepts from the Sherman Act actions taken which are mandated and supervised by a state.\footnote{See infra text and notes at notes 179-312.} It was this exemption that the city of Akron relied upon in the Hybud litigation.\footnote{See infra text and notes at notes 313-80.}

3. The State Action Exemption

Actions which normally violate the Sherman Act may be removed from the scope of the Act by virtue of the judicially created state action exemption. In essence, this exemption protects actions taken by the state from scrutiny under the antitrust laws. The state action exemption was first enunciated in \textit{Parker v. Brown,} a 1943 Supreme Court decision which held that state approval of an action may give rise to an exemption from the Sherman Act.\footnote{317 U.S. 341 (1943); see infra text and notes at notes 184-195.} For the next thirty years, the lower courts analyzed state action cases without further direction from the Supreme Court.\footnote{Id. at 352.} The Supreme Court, after denying certiorari for decades, then reentered the state action field, deciding a series of cases beginning in 1975.\footnote{Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (discussed \textit{infra} text and notes at notes 196-205); Cantor DBA Seldin Drugs v. Detroit Edison, 428 U.S. 579 (1976) (discussed \textit{infra} text and notes at notes 206-25); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (discussed \textit{infra} text and notes at notes 226-235); Lafayette v. Louisiana Power}
narrowing standards for state action and thus led to much uncertainty as to the tests to be applied in each case. It was not until two recent cases, decided in 1980 and 1982,\(^{183}\) that the Court clearly delineated what the modern requirements would be for the state action exemption.

A. Early Background

In the 1943 case of *Parker v. Brown*,\(^{184}\) the Supreme Court for the first time addressed the question of immunity from the Sherman Act for anticompetitive schemes approved by a state government.\(^{185}\) At issue in *Parker* was a state run program designed to stabilize the price of raisins by controlling the flow of raisins into the marketplace.\(^{186}\) Brown, a producer and packager of raisins, challenged the program as a restraint of trade violative of section one of the Sherman Act.\(^{187}\) The Court upheld the program, finding that it derived its authority from a state legislative command to stabilize raisin prices without which the program would not have come into existence.\(^{188}\) The Court went on to conclude that even though the action taken might have violated the Sherman Act if it had been done by private individuals, the action in this case had been taken by the state. It was not, therefore, within the prohibitions of the Sherman Act.\(^{189}\)

The most significant aspect of the opinion was the Court's application of federalism principles to the activities at issue. The Court reasoned that since the Sherman Act did not specifically include actions by states within its purview, and since the federal...
government could only subtract from the state’s authority in certain constitutionally permissible areas, the Court could not nullify a state’s control over its officers and agents without the express direction of Congress.\textsuperscript{190} Therefore, the Court exempted the action taken by the state from the purview of the Sherman Act.\textsuperscript{191}

The state action exemption that grew out of the \textit{Parker} decision was based on the Court’s use of federalism principles.\textsuperscript{192} Since the Court ruled that the Sherman Act applies to private action\textsuperscript{193} and not to state action,\textsuperscript{194} the issue under a \textit{Parker} analysis is, what type of action is “state action” for purposes of the Act. Only if the action taken by the state satisfies the state action test will that action, though violative of the Sherman Act if taken privately, be exempt from the scope of the Act.\textsuperscript{195}

\textbf{B. The Development of the Current State Action Test}

The development of the modern state action test began in 1975 with the Supreme Court decision in \textit{Goldfarb v. Virginia State Bar.}\textsuperscript{196} Goldfarb was a purchaser of real estate who required a title search.\textsuperscript{197} The local bar association had published a recommended fee schedule for use by local attorneys.\textsuperscript{198} Goldfarb, after unsuccessfully searching the marketplace for a title search costing less than the recommended fee, brought an action against the bar for price fixing.\textsuperscript{199} The local bar claimed that the state bar had “prompted” it to issue the fee schedules.\textsuperscript{200} The local bar then argued that since the state bar is regulated by the State Supreme Court, an agency of the state, the local bar’s action was exempt from the Sherman Act under the state action exemption.\textsuperscript{201}

\textsuperscript{190.} Id. at 350, 351.

\textsuperscript{191.} Id. at 351.


\textsuperscript{193.} \textit{Parker}, 317 U.S. at 352.

\textsuperscript{194.} Id. at 352.

\textsuperscript{195.} Id. at 350-52.

\textsuperscript{196.} 421 U.S. 773 (1975). The district court found that the fee schedule promulgated violated the Sherman Act, 355 F. Supp. 491, 496 (E.D. Va. 1973). On appeal the Court of Appeals reversed, 497 F.2d 1, 20 (4th Cir. 1974), holding, inter alia, that the enforcement of the fee schedule was exempt from Sherman Act scrutiny due to the state action exemption. 421 U.S. at 775.

\textsuperscript{197.} Id. at 775.

\textsuperscript{198.} Id. at 776.

\textsuperscript{199.} Id. at 777, 778.

\textsuperscript{200.} Id. at 790.

\textsuperscript{201.} Id. at 790.
The *Goldfarb* Court formulated a test for state action which required that the "anticompetitive activities be compelled by the direction of the state acting as sovereign."202 In other words, the Court wanted to see affirmative action by the state directing the defendant to take the specific anticompetitive action at issue. In applying its test, the Court found that the local bar had attempted to control private competition by hinting to its members that a deviation from the fee schedule might bring ethical sanction.203 Therefore, unless it could show that the fee schedule resulted from the state acting in its sovereign capacity, the local bar's actions would not be protected by the state action exemption and would therefore violate the Sherman Act.204 The local bar could not make the required showing of state compulsion since there was no state directive to create a fee schedule. Therefore, the fee schedule, left unprotected by the state action exemption, was held to violate the Act.205

The *Goldfarb* narrowing of the *Parker* state involvement test to require a showing of state compulsion was only the beginning of the Court's readjustment of the state action standard. In *Cantor v. Detroit Edison*,206 the Supreme Court addressed two Sherman Act issues: first, whether approval by a state was a positive enough action to meet the compulsion standards;207 and second, whether the Sherman Act applied to situations where the state is a pervasive regulatory force, but the application of the Sherman Act would not impair the functioning of the state's regulatory scheme.208

The issue in *Cantor* was whether a lightbulb distribution program conducted by Detroit Edison, and approved by the Michigan Public Utilities Commission, was a Sherman Act violation exempted from sanction by the state action doctrine.209 The respondent Detroit Edison claimed exemption under the *Parker* test, arguing that the Sherman Act should not be applied in areas of the economy pervasively regulated by the states.210 Additionally,
the respondent argued, even if the Sherman Act does apply in such cases, the explicit approval of the program given by the Michigan Public Utilities Commission would satisfy the state action exemption requirement.211

The Court rejected both the state regulation212 and the state action exemption213 arguments. In refusing to accept these arguments, the Court developed a four part state regulation test214 to determine whether the Sherman Act should be subordinated to state regulatory schemes. The initial hurdle required a showing of state compulsion.215 The Court reasoned that if the state had in fact ordered the party to act it would not be fair to make the party liable for merely obeying the state's directive.216 The second part of the test required that there be more than just state activity in an area regulated by the Sherman Act; rather, the state's regulatory program itself must conflict with the antitrust laws.217 The

211. Id. at 595.

212. With reference to the Michigan Public Utilities Commission's approval argument, the Court concluded that "neither Michigan's approval of the tariff filed by respondent, nor the fact that the lamp exchange program may not be terminated until a new tariff is filed, is a sufficient basis for implying an exemption from the federal antitrust laws for that program." Id. at 598.

213. Referring to the regulatory scheme argument, the Court held that:

There are at least three reasons why this argument is unacceptable. First, merely because certain conduct may be subject both to state regulation and to the federal antitrust laws does not necessarily mean that it must satisfy inconsistent standards; second, even assuming inconsistency, we could not accept the view that the federal interest must inevitably be subordinated to the State's; and finally, even if we were to assume that Congress did not intend the antitrust laws to apply to areas of the economy primarily regulated by a State, that assumption would not foreclose the enforcement of the antitrust laws in an essentially unregulated area such as the market for electric light bulbs. Cantor, 428 U.S. at 596. 214. See generally Dorman, State Action Immunity: A Problem under Cantor v. Detroit Edison, 27 CASE W. RES. L. REV. 503, 527-38 (1977). See also Kennedy, Of Lawyers, Lightbulbs, and Raisins: An Analysis of the State Action Doctrine under the Antitrust Laws, 74 NW. U. L. REV. 31, 61 (1979).


216. Cantor, 428 U.S. at 594-95. The fairness test actually consists of two factors: first, whether a party should be held liable for treble damages for his actions; and, second, whether it is fair to hold a party liable when he was compelled to act by the state. A succinct discussion of the fairness issue is presented in Kennedy, supra note 214, at 61.

217. In the words of the Court:

First, merely because certain conduct may be subject both to state regulation and to the federal antitrust laws does not necessarily mean that it must satisfy inconsistent standards; second, even assuming inconsistency, we could not accept the view that the federal interest must inevitably be subordinated to the
third element required reconciling the state’s regulatory scheme and the antitrust laws with an eye toward limiting the application of the Sherman Act to the minimum extent necessary to enable the state regulatory scheme to function.\textsuperscript{218} The fourth aspect required balancing the state’s regulatory interest against the federal government’s interest in competition.\textsuperscript{219} The balancing requirement indicated a recognition by the Court that the federal interest in competition and the state interest in regulation are both legitimate, but that the Court must balance these interests, taking into consideration the various policies underlying the conflicting programs.\textsuperscript{220}

The \textit{Cantor} Court then went on to apply its newly formulated test to the facts of the case. The Court first found that the threshold requirement of compulsion was not met. Mere tacit approval, the Court held, without Public Utilities Commission or legislative investigation and direction would not meet the compulsion requirement.\textsuperscript{221} Applying the second part of the test, the Court then held that state regulation and federal antitrust law are not inconsistent solely on the basis of their concurrent existence.\textsuperscript{222} In fact, the Court found that in this case the Sherman Act could be applied to the lightbulbs market, which itself was unregulated by the state,\textsuperscript{223} without impairing the state’s legitimate regulation of electrical energy distribution.\textsuperscript{224} Lastly, the Court balanced the state and federal interests involved and found the state’s regulatory interest to be non-existent since the market in lightbulbs was unregulated.\textsuperscript{225}

\textsuperscript{218} Cantor, 428 U.S. at 598. See also Kennedy, supra note 214, at 63.
\textsuperscript{219} Cantor, 428 U.S. at 596-97.
\textsuperscript{220} The Court stated that “even assuming inconsistency, we could not accept the view that the federal interest must inevitably be subordinated to the State’s (interest).” Cantor, 428 U.S. at 596. See also Kennedy, supra note 214, at 63.
\textsuperscript{221} The Court held that “the state’s policy was neutral on the question whether a utility should, or should not, have such a program.” Cantor, 428 U.S. at 585.
\textsuperscript{222} It was reasoned by the Court that, “merely because certain conduct may be subject both to state regulation and to the federal antitrust laws does not necessarily mean that it must satisfy inconsistent standards.” Cantor, 428 U.S. at 595.
\textsuperscript{223} Id. at 596.
\textsuperscript{224} Id. at 598.
\textsuperscript{225} The Court reasoned that “even if we were to assume that Congress did not intend the antitrust laws to apply to areas of the economy primarily regulated by a state, that
The Supreme Court again addressed the state action issue in 1977 in *Bates v. State Bar of Arizona.*226 The significance of *Bates* was twofold. First, it furthered the general understanding of state compulsion versus state neutrality. Second, the Court's decision led the way to the current standard used by the courts in applying the state action exemption.

At issue in *Bates* was an Arizona bar ethical canon prohibiting attorneys from advertising. Bates, an advertising attorney, asserted that the no advertising rule was based on adoption of the Model Code of Professional Responsibility by the Arizona Supreme Court. This adoption, it was argued, was a mere tacit approval by the State, and thus did not meet the *Cantor* compulsion requirement.227 Therefore, no state action immunity should flow to the bar merely because of its success in having the Code adopted. The petitioners also asserted that if the Court applied a balancing test, as is called for by *Cantor*, the policies of the Sherman Act would prevail over the state's interest in regulating the bar.228

The Supreme Court distinguished the *Cantor* case from the case before it, finding that the state action exemption protected the Arizona bar from Sherman Act liability. The Court reasoned that in *Cantor* there was no independent regulatory interest in the lightbulbs market;229 nor was the regulation "a response to health or safety concerns."230 In *Bates*, on the other hand, the state, in regulating the bar, was exercising its power to meet its responsibility to protect the public.231 The Court also reasoned that in *Cantor*, the state action was merely approval of the light-
bulb distribution program, whereas in Bates the state's policy was clearly articulated through the adoption of the Code of Professional Ethics.

The Court then went on to consider the third part of the Cantor test which balances the state interest against the federal interest. The Court found that there was no real chance that the federal antitrust policies were being subordinated to the state's policies because the facts indicated that constant state supervision and reexamination of the regulations would effectively prevent such an imbalance. In Cantor, on the other hand, there was no such ongoing supervision or reexamination.

The Bates Court, in summarizing its opinion, gave fair notice as to what would be the new state action standard. The Court deemed it "significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active." The Court was to reiterate this standard in its next major state action case, California Retail Liquor Dealers Ass'n v. MidCal Aluminum, Inc., decided in 1980.

MidCal is the most recent state action case. The case is also the clearest statement of the requirements necessary for a defendant to escape the Sherman Act under the state action exemption. The issue in MidCal was whether the setting of prices by means of a statutorily required fair trade contract between producers, wholesalers, and distillers was an unreasonable restraint of trade. Under California law, no state licensed wine merchant

232. "Finally, the light-bulb program in Cantor was instigated by the utility with only the acquiescence of the state regulatory commission." Id. at 362.

233. Id. at 362.

234. The Court reasoned that, "moreover, as the instant case shows, the rules are subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in enforcement proceedings." Id. at 362.

235. Id.

236. 445 U.S. 97 (1980). In MidCal, the California Court of Appeals rejected the claims of state action by the Liquor Dealers and found a restraint of trade in violation of the Sherman Act. California Retail Liquor Dealers Ass'n v. MidCal Aluminum, Inc., 90 Cal. App. 3d 979, 984 (1977), 153 Cal. Rptr. 757, 761 (1979). In fact, the next state action case was Lafayette v. Louisiana Power & Light, 435 U.S. 389 (1978). That case, however, is more appropriately viewed as an application of the state action exemption to a municipality. See infra text and notes at notes 268-82. One of the reasons for the strength of the MidCal standard is the unanimity of the opinion, a fact not present in the previous state action cases. The decision was 8-0, with Justice Brennan taking no part in consideration of the case. MidCal, 445 U.S. at 98.

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Each wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier shall:

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could sell wine to a retailer at a price other than that set by the fair trade contract price schedule. The Supreme Court held that the program “plainly constitutes resale price maintenance in violation of the Sherman Act.” Having determined this, the Court then went on to consider “whether the State’s involvement in the price-setting program is sufficient to establish antitrust immunity under *Parker v. Brown*.”

In *MidCal*, the Court designed a two-step test for a defendant to show state action sufficient to trigger the state action exemption. Echoing the *Bates* decision, the Court held that the defendant first had to show that the challenged restraint was “clearly articulated and affirmatively expressed” as state policy. Second, the defendant had to prove that the activity was actively supervised by the state itself. The *MidCal* defendants satisfied the first level of the test by showing that the State Legislature had expressly articulated its policy to allow resale price maintenance set by the fair trade contract. The Court, however, held that the defendants failed to meet the second half of the test requiring active state supervision. The Court found that the state “neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The state does not monitor market conditions or engage in any ‘pointed reexamination’ of the program.” The Court viewed the prices set by the fair trade contract as private price fixing that was followed by state enforcement of the prices established by the private parties. The Court concluded that “the national policy

(a) Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.

(b) Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers.

**CAL. BUS. & PROF. CODE** § 24,866 (West 1964) (repealed 1980).
in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement."247

It is evident from the foregoing discussion that in the past, state approval alone may have created an umbrella of state action immunity for private activities. If it is assumed, as it must be, that the MidCal decision is the new blueprint for the state action exemption defense, qualifying under the exemption may become significantly more difficult in the future. MidCal requires that the state, acting in its sovereign capacity, clearly articulate and affirmatively express the anticompetitive policy at issue.248 As indicated by the Supreme Court, the affirmative expression requirement will not be satisfied by evidence of state "prompting" as in Bates.249 Nor will the standard be met by the mere tacit state approval offered in Cantor.250 Rather, the test requires a showing of narrow statutory or regulatory language; language requiring the anticompetitive action, which is promulgated by the state legislature.251

In addition, the MidCal test requires that the anticompetitive policy be actively supervised by the state.252 The supervision requirement is often the most difficult hurdle for the defendant to clear. The supervision must be carried out by a state agency253 or another branch of the state government254 specifically authorized to monitor the activity. The monitoring should take the form of ongoing reviews255 examining market conditions,256 judging the reasonableness of the anticompetitive action,257 and ascertaining whether the anticompetitive program is actually meeting its

declaring that their action is lawful." Parker, 317 U.S. at 351, cited in MidCal, 455 U.S. at 106.

247. MidCal, 445 U.S. at 106.
248. See supra text and notes at notes 241-42.
249. See supra text and notes at notes 226-35.
250. See supra text and notes at notes 206-25.
251. MidCal, 445 U.S. at 105.
252. See supra text and notes at notes 241-42.
253. In Parker, the Court stated that: "It is the state which has created the machinery for establishing the prorate program ... it is the state, acting through its commission, which adopts the program and which enforces it." Parker, 317 U.S. at 352.
254. See Bates, in which the Court held: "The Arizona Supreme Court is the real party in interest; it adopted the rules." Bates, 433 U.S. at 361.
255. See MidCal, 445 U.S. at 105 (exemption failed due to lack of ongoing reviews).
256. See id. at 106 (exemption failed due to lack of monitoring of market conditions).
257. See id. at 106 (exemption failed due to no examination of the reasonableness of the prices).
stated goals. Because of the stringent supervision requirements, it is possible for a claim to pass the clear articulation standard, yet still fail to obtain the state action exemption because the program did not meet the supervision requirement.

Even though it is now apparent that state involvement may supply immunity for state actions, the question remains whether the state action immunity defense is available to municipalities. Only twice have municipalities taken this issue to the Supreme Court. Both of these cases, though holding against the application of the exemption to the specific facts, indicated the standards by which a city’s claim to the state action exemption would be judged. In order to understand when the state action exemption will be available to a defendant-municipality accused of anticompetitive activity, it is necessary to examine both cases in detail.

C. Use of the State Action Exemption by Municipalities

Since the passage of the Sherman Act, cities, being corporate entities, have been liable to suit under the Act’s provisions. When the Supreme Court began to reformulate the state action exemption in the mid-seventies, it appeared to municipal corporations that the exemption might offer needed immunity for their anticompetitive actions. In 1978 the applicability of the state action exemption to municipalities was first addressed by the Supreme Court in Lafayette v. Louisiana Power & Light Co.

Lafayette v. Louisiana Power & Light Co. was the result of a battle between a utility owned by a municipality and a private power company. The City of Lafayette operated its electrical utility under a grant of power from the State of Louisiana. The

258. See id. at 106 (exemption failed due to lack of pointed reexamination of the program).
260. Lafayette, 435 U.S. at 413; Community Communications, 455 U.S. at 52.
261. 15 U.S.C. § 7 (1976) defines “person[s]” to include “corporations and associations existing under or authorized by the laws . . . of any State.”
262. 435 U.S. 389 (1978). The district court granted the city’s motion to dismiss, finding that the antitrust laws were inapplicable due to the state action exemption. The circuit court however, reversed this holding and remanded. 532 F.2d 431 (5th Cir. 1976).
263. 435 U.S. at 391-92.
264. LA. REV. STAT. ANN. § 33:4162 (West 1966) states that: “Any municipal corporation . . . may construct, acquire, extend, or improve any revenue producing public utility
city agreed to provide customers with water and gas only if the customers purchased electricity from the city-owned utility.\footnote{This plan is essentially a tying arrangement, in which a seller will sell a desired item only if the buyer will purchase an additional item. See, e.g., International Salt Co. v. United States, 332 U.S. 392 (1947).} The Louisiana Power and Light Company, a privately owned company, provided power to the areas surrounding Lafayette.\footnote{Lafayette, 435 U.S. at 391-92.}

The city alleged that the private power company had violated sections one and two of the Sherman Act by instigating boycotts and frivolous litigation, and by otherwise attempting to monopolize generation of electrical power by foreclosing supply lines.\footnote{Id. at 392 n.5.} The private power company counterclaimed that, in fact, the city had violated sections one and two of the Sherman Act and section three of the Clayton Act,\footnote{The Clayton Act § 3, 15 U.S.C. § 14 (1976) is a general prohibition of agreements between a lessor and lessee or seller and purchaser that the lessee will not deal with a competitor of the lessor.} by using the same monopolistic practices.\footnote{Lafayette, 435 U.S. at 392 n.6.}

The city moved for dismissal of the counterclaim on the ground that “as cities and subdivisions of the State of Louisiana, the state action doctrine of \textit{Parker v. Brown} rendered federal antitrust laws inapplicable to them.”\footnote{Id. at 390.}

In a sharply divided opinion, the Supreme Court addressed the application of the \textit{Parker} doctrine to cities.\footnote{Justice Brennan wrote part I of the opinion in which Justices Burger, Marshall, Powell and Stevens joined. In parts II and III, Justices Marshall, Powell and Stevens joined with Justice Brennan. Justice Marshall filed a concurring opinion. Chief Justice Burger filed an opinion concurring in part and concurring in the judgment. Justice Stewart filed a dissenting opinion in which Justices White and Rehnquist joined and with which Justice Blackmun joined with the exception of part IIB. Justice Blackmun also filed a dissenting opinion. Id. at 390.}

The Court analyzed the arguments in this manner: “Petitioners’ principal argument is that ‘since a city is merely a subdivision of a state and only exercises power delegated to it by the state, Parker’s findings regarding the Congressionally intended scope of the Sherman Act apply with equal force to such political subdivisions.’” Id. at 394. See also id. at 397, where the Court refers to this argument as the “argument for exemption as agents of the State.”
this argument and analyzed the problem under a balancing test. The Court found that the city must overcome the presumption against exclusion from the antitrust laws. The Court held that a city could gain an exclusion based on its status only if it could “demonstrate that there are countervailing policies which are sufficiently weighty to overcome the presumption.” The Court concluded that the city had not shown such powerful countervailing policies. Thus, the Court reasoned, subjecting the city to liability would not submerge policies that should displace the antitrust laws. The Court concluded that the state action exemption should not be expanded to include cities based solely on their status as such, and that the exemption was not available to Lafayette based on the facts before the Court.

Lafayette had also claimed that even if a congressional intent to exempt cities from the purview of the Sherman Act could not be inferred, the Parker doctrine itself could be seen as an exemption for cities as well as for states. The plurality analyzed this claim by reviewing the applicable line of cases. Justice Brennan reasoned that Parker applied to exempt the state when it acted in its sovereign capacity. Brennan then found that since cities themselves are not sovereign, extending the Parker doctrine to include cities would be inconsistent with the sovereignty limitation.

273. Id. at 399.
274. Id. at 400.
275. Id. at 408 (referring to countervailing policies to be balanced against the antitrust laws). For a policy that did overcome the presumption, see Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), where the Court held that organizations created to lobby for legislative action will overcome the presumption against repeal since open communication to law makers is vital to the functioning of a representative democracy.

276. Lafayette, 435 U.S. at 397. See also Justice Brennan’s concurrence which stated that “municipalities, simply by their status as such, are not within the Parker doctrine.” Id. at 413 (Brennan, J. concurring).
278. See supra note 179; Lafayette, 435 U.S. at 408-17.
279. It was held that: “The state ... as sovereign, imposed the restraint as an act of governmental which the Sherman Act did not undertake to prohibit.” Lafayette, 435 U.S. at 409 (citing with approval Parker, 317 U.S. at 352).
280. The Court found that: “Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them.” Lafayette, 435 U.S. at 412.
281. Justice Brennan concluded that: “Parker’s limitation of the exemption to ‘official action directed by a state,’ 317 U.S. at 351, is consistent with the fact that the States’ subdivisions generally have not been treated as equivalents of the states themselves.” Id. at 412 (Brennan, J. concurring).
The plurality did not deny municipalities all access to immunity. Rather, the plurality limited the application of the *Parker* immunity by holding that "the *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service."282 Thus, a municipality could successfully employ the state action exemption only if it could demonstrate that its actions and resulting anticompetitive effects complied with state policy. *Lafayette*, therefore, raised a question as to how a city could prove that its anticompetitive actions were taken pursuant to state policy. The opportunity to address this question arose several years later in the 1982 case of *Community Communications Company, Inc. v. Boulder*.283

The litigation arose out of actions taken by the City of Boulder, Colorado, to prohibit the Community Communications Company from expanding its cable television service area for three months.284 The city imposed the moratorium to give the city council time to draft a new model cable television code and enable other competing cable operators to enter the marketplace.285 Community Communications brought suit, claiming that the moratorium was a restraint of trade in violation of the Sherman Act.

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282. *Id.* at 413 (Brennan, J. concurring).
283. 455 U.S. 40 (1982). In response to Community Communications' claim that the expansion moratorium violated the Sherman Act, the district court found that the ordinance did violate the Act and that the state action exemption was inapplicable. Community Communications, Inc. v. Boulder, 485 F. Supp. 1035, 1039-40 (D. Colo. 1980). Accordingly, the district court issued a preliminary injunction against the city. On appeal, the circuit court reversed, holding that the state action exemption did apply to shield the city. Community Communications, Inc. v. Boulder, 630 F.2d 704, 708 (10th Cir. 1980).
284. City of Boulder, Colorado Ordinance No. 4473 (1979), cited in *Community Communications*, 455 U.S. at 46 n.7.
285. In the preamble to the ordinance, the city justified its actions by finding:
   (1) Other cable TV operators have indicated an interest in serving the Boulder community;
   (2) Community Communications plans to expand in the near future;
   (3) Such expansion would hinder the opportunity for other cable TV operators to move into the area;
   (4) The city intends to adopt a model code and invite other operators to compete with Community Communications;
   (5) That temporary geographical and time constraints on its activities would not harm Community Communications' ability to improve the services it offers to the city.
City of Boulder, Colorado Ordinance No. 4423 (1979), cited in *Community Communications*, 455 U.S. at 46 n.7.
Act.286 Boulder responded that the moratorium was a legitimate exercise of the city's legislative powers287 and that the city enjoyed antitrust immunity under the Parker state action doctrine.288 In considering these arguments, the Supreme Court found that the issue was "whether a 'home rule'289 municipality, granted by the state constitution extensive powers of self-government in local and municipal matters, enjoys the 'state action' exemption from Sherman Act liability announced in Parker v. Brown."290

The Community Communications Court relied on Lafayette for the proposition that a municipality could gain immunity under Parker if certain requirements were met. The standard defined in Lafayette, however—that the anticompetitive action must be engaged in pursuant to a state policy291—was interpreted extremely narrowly by the Court. In Community Communications, the Court held that for a city to successfully invoke the state action exemption, the city must show specific state authorization for the anticompetitive actions.292 The authorization required may be shown either by action taken by the state itself or by the MidCal

286. 455 U.S. at 46-47.
287. The Colorado home rule provision provided that:
   [Each city of over 2000 inhabitants may] make, amend, add to or replace the charter . . . which shall be its organic law in local and municipal matters; such charter shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith;
   this article grants the people of the eligible municipalities the full rite of self-government in both local and municipal matters;
   The statutes of the state of Colorado shall apply . . . except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.
   COLO. CONST. art. XX, § 6.
288. 455 U.S. at 47. See supra text and notes at notes 179-282.
289. See supra text and notes at notes 104-16.
290. Community Communications, 455 U.S. at 43.
291. The Court held that: "Under the plurality's standard, the Parker doctrine would shield from antitrust liability municipal conduct engaged in 'pursuant to state policy to displace competition with regulation or monopoly public service.'" Id. at 51 (quoting Lafayette, 435 U.S. at 413). The quote, however, is qualified by the Court's statement that: "It was stressed, however, that the 'state policy' relied upon would have to be 'clearly articulated and affirmatively expressed.'" Community Communications, 455 U.S. at 51 (quoting Lafayette, 435 U.S. at 410).
292. The Court took note of the Lafayette reasoning: "Municipalities 'are not themselves sovereign' and . . . accordingly they could partake of the Parker exemption only to the extent that they acted pursuant to a clearly articulated and affirmatively expressed state policy" Community Communications, 455 U.S. at 54 (citing Lafayette, 435 U.S. at 413).
“clearly articulated and affirmatively expressed” state policy standard. In addition, the city must meet the MidCal requirement of ongoing supervision. Thus, in narrowing the requirements for municipalities attempting to obtain the state action exemption as defined in Lafayette, the Court made the MidCal state action test the new general standard for municipalities.

Applying its new test, the Court held that Boulder could not be exempted from the Sherman Act unless the city made the required showing of clear articulation and affirmative expression by the state legislature, coupled with the necessary state supervision of the program. Anticipating this holding, Boulder had contended that the state home rule provision was demonstrative of state authorization of the anticompetitive actions taken by the city. The Court, however, found this argument without merit, reasoning that a home rule amendment was “a mere tacit approval of the actions taken by a municipality.” It was the Court’s opinion that “a state that allows its municipalities to do as they please can hardly be said to have contemplated the specific anticompetitive actions for which municipal liability is sought in this case.”

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293. Community Communications, 455 U.S. at 52.
294. Although the Court does not reach the supervision issue, it is indicated that supervision is the second half of the test: “We do not reach the question whether [the] ordinance must or could satisfy the ‘active state supervision test’ focused on in MidCal.” Community Communications, 455 U.S. at 52 n.14.
295. The Court found that:
In MidCal we held that a California resale price maintenance system, affecting all wine producers and wholesalers within the State, was not entitled to exemption from the antitrust laws. In so holding, we explicitly adopted the principle, expressed in the plurality opinion in City of Lafayette, that anticompetitive restraints engaged in by state municipalities or subdivisions must be “clearly articulated and affirmatively expressed as state policy” in order to gain an antitrust exemption. MidCal, 445 U.S. at 105. The price maintenance system at issue in MidCal was denied such an exemption because it failed to satisfy the ‘active state supervision’ criterion described in City of Lafayette, 435 U.S. at 410, as underlying our decision in Bates v. State Bar of Arizona, 433 U.S. 350 (1977). Because we conclude in the present case that Boulder’s moratorium ordinance does not satisfy the ‘clear articulation and affirmative expression’ criterion we do not reach the question whether that ordinance must or could satisfy the ‘active state supervision’ test focused upon in MidCal.
Id. at 51-52 & n.14. (The Court’s cites to Lafayette refer to Justice Brennan’s concurring opinion in which Justices Marshall, Powell and Stevens joined.)
296. Id. at 52.
297. Id. at 54-55.
298. Id. at 55.
299. Id.
Boulder had also argued that the delegation of power by means of a home rule provision gave the city the sovereignty of the state for the purposes of local legislation. Thus, argued the city, the grant of sovereignty so given should trigger the application of the state action exemption to the anticompetitive actions of the city. The Court vehemently disagreed with this argument, as well, holding that the nation is a dual system of federal and state governmental entities, and that "there exists within the broad domain of sovereignty but these two." In the words of the Court "we are a nation not of 'city-states' but of States."

Continuing to address home rule provisions in general, the Court held that a home rule provision merely grants powers and thus does not give rise to an implication of affirmative direction by the state. In fact, the Court found that the relationship between the actions of the City of Boulder and the State of Colorado was one of "precise neutrality." Such a neutral posture does not give rise to the clearly articulated, affirmatively expressed directive required to trigger the state action exemption. If such a proposition were accepted, the Court reasoned, the acceptance "would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that our precedents require." Thus, the Court clearly put to rest the argument that the municipality is a sovereign entity by virtue of its home-rule authority, and thus entitled to protection from Sherman Act liability by the state action exemption.

In summary, it is evident that cities may use the state action exemption to protect their anticompetitive activities. The standard that must be satisfied by a municipality claiming the exemp-

300. Id. at 52 ("Colorado's Home Rule Amendment . . . vested in the City of Boulder every power theretofore possessed by the legislature . . . ").
301. Id. at 53 (city acting as the state in local matters, which meets the state action criterion of Parker).
302. Id. ("Ours is a dual system of government which has no place for sovereign cities," (citing Parker, 317 U.S. at 351)).
303. Id. (quoting United States v. Kagama, 118 U.S. 375, 379 (1886)).
304. Community Communications, 455 U.S. at 54 (quoting the court of appeals Community Communications decision, 630 F.2d 704, 717 (10th Cir. 1980)).
305. The Court held: "A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought." Community Communications, 455 U.S. at 55.
306. Id.
307. Id.
308. Id. at 56.
309. See supra text and notes at notes 261-308.
tion, however, is quite stringent. A city must show a clear and affirmative state directed program, over which the city has no discretionary power.\textsuperscript{310} The city will also have to show that the state legislature or authorized state agency is monitoring the anticompetitive program on an ongoing basis.\textsuperscript{311} Neither a city's status as such,\textsuperscript{312} nor the existence of a home rule provision will satisfy the exemption requirements. If a municipality can meet these requirements, however, then state action immunity may be granted. Against this statutory and common law background, the \textit{Hybud} litigation developed.

V. THE LITIGATION CHALLENGING THE AKRON SOLUTION

\textbf{A. Litigation to Date}

As discussed above,\textsuperscript{313} Akron developed a solid waste disposal program in the 1970s which centered around an incineration/energy production facility. In order to guarantee an adequate supply of waste for the new facility, the city required that all waste be disposed of at the new plant. This regulation was challenged as a violation of the federal antitrust laws by a group of Akron landfill operators whose businesses were affected by the program.\textsuperscript{314} In 1978 two landfill operators, Glenwillow Landfill and Hybud Equipment Corp., claimed that actions taken by the city to guarantee the flow of solid waste fuel to the municipal facility violated their right to a free and unfettered competitive market.\textsuperscript{315} In District Court, the plaintiffs claimed, inter alia,\textsuperscript{316} that the ordinance violated sections one and two of the Sherman Act.\textsuperscript{317} The plaintiffs asked for a declaratory judgment and injunctive relief.\textsuperscript{318}

\textsuperscript{310} See supra text and note at note 292.
\textsuperscript{311} See supra text and note at note 294.
\textsuperscript{312} See supra at note 276.
\textsuperscript{313} See supra text and notes at notes 24-59.
\textsuperscript{315} \textit{Hybud}, 485 F. Supp. at 673 (E.D. Ohio 1979).
\textsuperscript{316} Other claims made by the plaintiffs in the district court included: deprivation of due process under the 14th Amendment; unlawful taking of property under the 5th Amendment; and unlawful restraint of interstate commerce in violation of art. I, § 8 of the United States Constitution. In addition, the plaintiffs claimed that the acts taken were outside the powers of the municipal corporation under the powers granted by OHIO CONSTITUTION art. XVIII, § 3. \textit{Hybud}, 485 F. Supp. at 673.
\textsuperscript{317} For a discussion of these sections, see supra text and notes at notes 114-40.
\textsuperscript{318} \textit{Hybud}, 485 F. Supp. at 679-74.
The City of Akron answered that its actions were protected under the state action exemption to the Sherman Act. The city based its state action argument on two claims: first, that the OWDA as a state agency could authorize regulation and implementation of solid waste recycling programs; and second, that the home rule powers granted to the city by the state give the city the same protective cloak against antitrust actions as that possessed by the state.

The district court agreed with the city’s arguments. In _Hybud Equipment Corp. v. Akron_, the court held that the city was protected by the state action exemption. In holding for the city, the district court applied the _Bates_ state action test. The court interpreted _Bates_ as requiring first, a demonstration of the state’s interest in protecting the public welfare, and second, a clearly articulated state policy to restrain trade in order to achieve specified policy goals. Applying these standards to the situation in Akron, the district court found that the OWDA was a state agency; that the state had a “legitimate interest in protecting the public by promoting safe and sanitary methods of solid waste disposal”; and that these state policies were clearly articulated in the enabling statutes for the OWDA. Thus, since the _Bates_ standards were satisfied, the district court held that the state action exemption applied to shield the city from liability.

The court went on to find that, in addition to being eligible for state action immunity under _Bates_, the city was also exempt under the Supreme Court’s opinion in _Lafayette_. The district court viewed _Lafayette_ as granting Sherman Act immunity “when it is found from the authority given a governmental entity to operate in a particular area that the legislature contemplated

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319. _Hybud_, 485 F. Supp. at 677. For a discussion of the state action exemption, see _supra_ text and notes at notes 260-312.
321. _Id._
322. _Id._ at 677-78.
323. _Id._ at 676. For a discussion of _Bates_, see _supra_ text and notes at notes 226-35.
324. _Hybud_, 485 F. Supp. at 676.
325. _Id._
326. _Id._
327. _Id._ For a discussion of § 6123.03 and the OWDA, see _supra_ text and notes at notes 97-103.
the kind of action complained of.' "330 In applying this test to the situation in Akron, the district court found that in establishing the OWDA, Ohio had contemplated the possibility that municipalities might choose to provide for solid waste disposal by monopolizing the market.331 Thus, under the reasoning of the Lafayette decision, the court held, the municipality was found to be exempt from the scope of the Sherman Act.332

On appeal333 in 1981, the Sixth Circuit Court affirmed the holding of the district court exempting Akron from the application of the Sherman Act.334 The circuit court reasoned that in Ohio the home rule provision335 as well as the courts,336 authorized local governments to create a municipal solid waste monopoly.337 The court went on to find that an agency of the state, such as the OWDA, provided the necessary supervision required under Mid-Cal.338 Lastly, the circuit court found that the solid waste monopoly was in the public interest as that interest is defined by the Congress and the Ohio legislature.339 Thus, the court concluded that the anticompetitive action was exempt from the Sherman Act.340

The private landfill operation appealed the decision of the circuit court to the Supreme Court.341 It was petitioners good

330. Id. at 677 (quoting Lafayette, 435 U.S. at 415). In addition, the district court found that: "Today's decision does not threaten the legitimate exercise of governmental power, nor does it preclude municipal government from providing services on a monopoly basis." Hybud, 485 F. Supp. at 677 (quoting Lafayette, 435 U.S. at 416-17).
334. The circuit court held that: "We find no federal constitutional or statutory violation and accordingly affirm." Id. at 1188.
335. For a discussion of home rule provisions, see supra text and notes at notes 104-16.
336. Id.
337. Hybud, 654 F.2d at 1195.
338. The circuit court found that: "The legal system of the state specifically allows the municipal ordinance in question here, and an agency of the state, the Water Authority, maintains some oversight of the facility." Id. at 1195-96.
339. The appeals court held that: "Finally, the United States Government has advised us that this municipal activity is in accord with federal energy and environmental policy as established in the Resource Conservation and Recovery Act ...." Hybud, 654 F.2d at 1196. For a discussion of the Act, see supra text and notes at notes 63-96.
340. The court held that: "Since solid waste disposal including the regulation of garbage collection, incineration and 'recycling' is a customary area of local concern long reserved to state and local governments by practice, tradition and legal precedent, the Sherman Act should not apply." Hybud, 654 F.2d at 1196.
341. 455 U.S. 931 (1982).
fortune that the Court had just delineated new state action exemption requirements in *Community Communications*. The Court summarily vacated and remanded *Hybud* to the circuit court for decision in accordance with the *Community Communications* decision.

The circuit court proceeded to remand the case to the district court for a decision consistent with *Community Communications*. In applying the *Community Communications* standards for granting the state action exemption to a municipality, which incorporates, in part, the *MidCal* test, District Court Judge Manos found for the City of Akron. The court applied the first part of the *MidCal* test—which requires that state support for the monopolistic practice be evidenced by clear articulation and affirmative expression of legislative intent—and held that the city had established the necessary legislative direction. In finding clear articulation and affirmative expression, the court relied upon the enabling statutes of the OWDA. The court found that the OWDA statutes indicate that the state legislature granted the OWDA broad authority to covenant with municipalities ‘with a view to effective cooperation and safeguarding of the respective interests of the parties’ (citation omitted). That the legislature contemplated the use of anti-competitive measures to ensure the financial viability of its waste disposal facilities is unquestionable.

The court found legislative support for Akron’s use of monopolistic regulations in the OWDA authorizing statute which prohibits it from financing “any competing projects that would undermine the financial feasibility of an existing development project.” The court reasoned that by directing the OWDA to refrain from supporting any project which provided competition to an existing OWDA project, the Legislature was articulating its support for the concept that such state-financed projects should operate free from market competition.

342. 455 U.S. 40 (1982); see *supra* text and notes at notes 283-312.
344. 701 F.2d 178 (6th Cir. 1982).
345. 445 U.S. at 105. For a discussion of *MidCal*, see *supra* text and notes at notes 236-60.
347. 445 U.S. at 105.
348. 1983-1 Trade Cas. at p. 70,122.
349. *Id.* at p. 70,122.
350. *Id.*
B. The Akron Litigation: Prognosis

The court's finding of exemption, necessary to uphold the monopolistic regulations vital to the project, may have been wise for policy reasons. Unfortunately, however, this finding is inconsistent with the state action test, as articulated by the Supreme Court in *MidCal* and *Community Communications*. Under the sections relating to the powers and duties of the OWDA, the legislature has simply granted the Authority power to offer financial assistance for a city project.\(^\text{351}\) In fact, the sections do nothing more than authorize the OWDA to “make loans and grants . . . and adopt rules and procedures for making such loans and grants.”\(^\text{352}\) The statute does give the OWDA the power to do what acts are necessary to carry out the duties delineated in the statute.\(^\text{353}\) These powers, however, relate solely to financial and technical assistance, and in no way specifically authorize the creation of anticompetitive programs by a city. This type of enabling statute is not representative of the clearly articulated and affirmatively expressed legislative intent required by the Supreme Court in *Community Communications*. Rather, the decisions require a demonstration that the state clearly anticipated and authorized the specific anticompetitive actions at issue. In fact, the cases relied on by Judge Manos in finding for the city provide examples of the specific legislative authorization required by the Supreme Court; authorization that is not present in Akron. They are thus distinguishable from the situation in Akron.

In finding that the OWDA financial enabling statutes constitute articulation of support by the state sufficient to meet the *Community Communication* requirement, the court relied on four post-*Community Communications* decisions.\(^\text{354}\) In *Hallie v. Eau Claire*,\(^\text{355}\) the Town of Hallie sued the City of Eau Claire, Wiscon-
sin, for monopolizing sewage treatment facilities, in response to Eau Claire’s refusal to supply such services to Hallie. In this case, the articulation requirement was met by a Wisconsin statute that specifically states, in regard to sewage treatment services, that a city ordinance “shall delineate the area within which service will be provided and the municipal utility shall have no obligation to serve beyond the area so designated.”356 In this way, the state clearly articulated its acceptance of the exact anticompetitive activity at issue.357 Unlike the OWDA authorization statute relied on in Hybud, the statute relied on in Eau Claire clearly meets the Community Communications clear articulation and express approval standard. There was no such specific state authorization for Akron’s monopolization of the city’s waste disposal market.

In the second case relied on by the Hybud court, Pueblo Aircraft v. Pueblo,358 a fixed base airline service lease granting an exclusive concession at the airport was put out for competitive bid and the losing bidder sued the city for Sherman Act violations.359 In Pueblo, the State specifically authorized the city to own and operate an airport.360 The court went on to note that the state legislature specifically stated that “such acquisition and operation ‘are hereby declared to be public governmental functions exercised for public purpose and matters of public necessity.’ . . .”361 This authorization by the state enabling the city to run the airport as a business impliedly authorized the use of a competitive bid procedure to appoint fixed base operators. Unfortunately for Akron, there is no similar legislation in Ohio regarding waste recycling facilities.

The third case relied on by the Hybud district court, Euster v. Eagle Downs,362 involved a price fixing claim by a jockey who claimed that the Pennsylvania Horse Racing Commission did not have the power to set jockey fees.363 The Horse Racing Commission was a state commission designed to oversee horse racing364 in the same way that a public utilities commission oversees utility

357. Hallie at p. 69,338.
358. Pueblo, 1982-1 Trade Cas. ¶ 64,668 (1982).
359. Id. at p. 73,628.
360. Id. at p. 73,630.
361. Id. (citing Colo. Rev. Stat. § 41.4.101 (1973)).
362. Euster, 1982-2 Trade Cas. ¶ 64,668 (1982).
363. Id. at p. 71,568.
364. Id. at p. 71,569.
operations. In *Euster*, the state clearly contemplated the setting of jockey fees by the commission. The goal of the legislature in setting up the Commission was to vest a supervisory body with appropriate powers to control the "previously unlawful activity of thoroughbred racing."\(^{365}\) The legislature hoped that the Commission would use its power to foster public confidence in racing by maintaining high legal standards.\(^{366}\) The court went on to find that the imposition of a jockey fee schedule was one of the actions necessary to accomplish the stated legislative goal.\(^{367}\) The *Hybud* court could point to no such specific powers conferred on the City of Akron, nor was there a state administrative body present in Ohio with *Euster*-like powers.

The last case relied on by the *Hybud* court, *Gold Cross Ambulance v. Kansas City*,\(^{368}\) was a suit by a losing bidder for a contract to provide ambulance services to Kansas City.\(^{369}\) *Gold Cross* is similar to *Eau Claire* in that the scheme, in which the successful bidder would be the sole provider of ambulance services to Kansas City, was specifically authorized by a Missouri statute which states that "[a]ny . . . city may provide a general ambulance service . . . [by] contract with one or more individuals . . . for the furnishing of emergency treatment."\(^{370}\) Here, the exact monopolistic program employed by the city was specifically authorized by the state, as opposed to the Akron situation, where no such specific authorization exists. There was no analogous Ohio statute which specifically stated that any Ohio municipality could establish a waste disposal program to the exclusion of all private operators.

Thus, it appears that Judge Manos' finding of clear articulation and affirmative expression of legislative intent was in error, and will probably be reversed on appeal. There was no showing that the state anticipated and authorized the specific monopolistic program employed by Akron. In addition, rather than lending support to the city's case, a close examination of the cases relied on by the *Hybud* court demonstrates that the Akron situation is distinguishable from those cases in which a clear articulation and

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365. *Id.* at p. 71,570.
366. *Id.*
367. *Id.*
368. *Gold Cross*, 1982-2 Trade Cas. ¶ 64,758 (1982).
369. *Id.* at pp. 71,671-72.
370. *Id.* at p. 71,676.
affirmative expression have been found. The *Parker* state action exemption, therefore, should not have been granted to Akron by the district court on remand.

Even assuming that the court was right, however, and that Akron does pass the first tier of the *MidCal* test, adopted by the Supreme Court in *Community Communications*, the court still erred in dismissing the second tier of the state action test—a demonstration of ongoing supervision of the monopolistic activity by the state.371 The court dismissed the second tier of the test, stating that the active state supervision requirement is not required when a city is acting in a traditional municipal function.372 Interestingly, the court based this finding on a *Community Communications* footnote that simply states “because we conclude in the present case that Boulder’s moratorium does not satisfy the ‘clear articulation and affirmative expression’ criterion, we no not reach the question whether the ordinance must or could satisfy the active state supervision test focused upon in *MidCal*.”373 In addition, the court relied on *Eau Claire*374 which found that since the state policy was so clearly expressed, additional state supervision was unnecessary and possibly inappropriate.375 Assuming that the *Eau Claire* court was correct in finding that where the state policy is clearly expressed, no ongoing supervision is necessary, this holding is inapplicable to the Akron situation. The Wisconsin statute specifically authorized the exact actions taken by the City of Eau Claire. In Akron, however, where the clear articulation of *Eau Claire* is lacking, there are good reasons to require active state supervision to ensure that the program is carried out fairly and effectively. For example, Akron has entered the realm of private for-profit business. The unsupervised use of blanket monopoly power by the city may give rise to abuses that would give it an unfair advantage over its competitors, a situation that did not exist in *Eau Claire*, or for that matter, in any post-*Lafayette* state action decision.376 Even if clear and explicit state authorization of the monopolistic

372. *Id*.
373. 455 U.S. at 51-52 & n.14, cited in *Hybud*, 1983-1 Trade Cas. at p. 70,123.
376. *See supra* text and notes at notes 262-82.
activity in question makes active supervision unnecessary, this reasoning is inapplicable to the *Hybud* case, where no such explicit state approval exists. Assuming that the OWDA statute sufficiently articulates state approval of the Akron plan to pass the first tier of the state action test, this approval is so broad and vague that the legislature has not really stated what the city can and can not do. Thus, the potential for abuse remains and it would appear that the *MidCal* supervision requirement would be appropriately applied to Akron. Since the OWDA statute does not provide for any ongoing supervision of the type required by *MidCal*, the Akron regulations would be ineligible for the state action exemption because they do not meet second tier of the *MidCal* test.

VI. THE NEED FOR A LIMITED MUNICIPAL EXEMPTION

Thus, it appears likely that the district court's most recent decision granting the state action exemption from antitrust liability to the city of Akron, again on appeal to the Sixth Circuit Court of Appeals, will be reversed. While the court's decision seems to be the correct one for practical reasons—the disposal plant was necessary and operating at the time of the decision—it is inconsistent with the Supreme Court's decisions in *MidCal* and *Community Communications*. Regardless of the outcome of the appeal, the problems raised by municipal vulnerability to antitrust liability will remain. Even if the Sixth Circuit finds for the City of Akron, municipalities will still be left with, at best, mixed signals as to their potential antitrust vulnerability. Whether Akron wins or loses, cities in the same position have reason to feel insecure about the legality of any programs with monopolistic effects. In fact the Akron situation is just one example of a good, useful, and necessary program that has run afoul of antitrust prohibitions.

Cities often find that they need to regulate monopolistically.377 The areas involved are diverse and include: cable television; land

377. Monopolistic environmental regulation is often useful or even necessary. For example, in Akron, for the Resource Recovery Facility to succeed as a business enterprise capable of paying its debts, the facility had to sell the energy it produced. In order to maintain contracts with industry whereby the concerns would purchase energy, a certain minimum energy output was necessary. *See supra* note 50. In order to maintain this minimum, the city had to be assured of receipt of every available pound of waste. *Id.* To obtain the necessary amount of recyclable waste, the city chose to use a monopolistic program to control the solid waste disposal “market.” *See supra* notes 54-58.
use and zoning; waste collection and disposal; hospital and ambulance services; water and sewage systems; airport services; utility services; towing services; mass transit; licenses and concessions; land leasing; and, contracts. Monopolistic regulation in these areas has given rise to pending antitrust challenges with potential damages totalling over $746 million.379


379. Id. at 149. This figure includes a number of challenges to environmental programs as violative of the antitrust laws. The Senate Judiciary Committee noted the following actions:

**Land Use and Zoning**

1. *Scott v. City of Sioux City*, No. C79-4009 (N.D. Ia 1979) (damages claimed $15,000,000.00).
   
   Antitrust action brought by disappointed developers seeking a rezoning of their property, in order to construct a commercial development.

   
   Suit brought by disgruntled developers denied a change in zoning to construct a shopping mall.

   
   Antitrust action alleging that the municipality utilized the zoning laws to hinder the development of a shopping center in order to promote downtown development.

   
   Action brought by developers alleging that the city's petitioning of state and federal agencies in order to insure that the developers complied with applicable environmental regulations constituted a violation of antitrust laws.

   
   Suits by developers alleging zoning laws were utilized in an anticompetitive manner in order to promote development in a redevelopment area.

   
   Same facts as above.

   
   Action brought challenging actions of redevelopment agency.

8. *Aspen Post v. Board of County Commissioners*, No. 81-1400 (D. Colo. 1981) (damages claimed $135,000,000.00).
   
   Suit alleging that various actions taken by municipal officials to limit development violated antitrust laws.

A city's fear of antitrust liability will eventually result in fewer services being offered to the citizens of the municipality. Cities may decide that the cost of the potential suit in fees and possible damages is not worth the benefit to its citizens. For example, if full damages had been assessed in *Lafayette*, the cost would have been $540 million or $28 thousand for every family of four in the city. A city must assess at what point that potential cost is too high a price to pay to continue to provide such services. While in some cases, the result may merely be a restructuring of municipal programs to circumvent the antitrust laws, in other cases, the result may be the cancellation of planned or existing service. For example, the Akron disposal project could not have been financed without implementing the monopolistic regulations because of underwriter constraints.

Antitrust suit brought challenging public acquisition of a property for subsequent conveyance to third party in order to promote the redevelopment of the downtown area of Pittsburgh, Pennsylvania.

**Waste Collection and Disposal**


   Action brought challenging a municipal cooperative requirement that all solid waste be brought to municipal landfill. Suit has delayed for over one year construction of municipal landfill.

**Water and Sewage Systems**

1. *Community Builders v. City of Phoenix*, 652 F.2d 823 (9th Cir. 1981) (damages claimed $1,536,000.00). Antitrust action brought to challenge hook-up fees for provision of municipal water service outside municipal boundaries.

2. *Tuld v. City of Scottsdale and City of Phoenix*, 665 F.2d 1054 (9th Cir. 1981) ($750,000.00). Suit brought challenging municipal charges for water hook-up.


4. *Howland Township v. City of Warren*, C.A. No. 81-954 (N.D. Oh. 1981) (damages claimed $1,890,000.00). Antitrust action brought challenging a municipal policy of providing water only to municipal residents.

Damages claims are trebles in accordance with antitrust laws.

*Judiciary hearings*, supra note 378 at 149.

380. *Id.* at 86 (statement by Mayor Corrinne Freeman). Highlighting this issue is Richmond Hilton v. Richmond, C.A. No. 81-1100R (E.D. Va. 1980), where the $260 million asked for in damages is larger than the city's yearly budget.
Cities must be able to plan with greater certainty. They can not continue to operate in fear of antitrust challenges, nor can they, in good conscience, lower the level of services they provide to the public. Thus, the issue presented is, what can be done to provide greater protection to municipalities from antitrust liability, while maintaining the integrity of the antitrust laws.

Under the current enunciation of the state action exemption test, municipalities would have to request state legislative involvement of the highest order in order to obtain the exemption. The request could take one of two forms. The first is for the municipality to voluntarily relinquish to the state legislature all authority over local environmental regulation. The state preferably by statute, would then have to clearly articulate and affirmatively express its desire to establish a program to regulate the local hazard. Ideally, the program would also provide for ongoing supervision by a state authorized agency. Thus, each city would have to seek, for example, specific state solid waste disposal legislation. The legislation, if passed, would probably meet the clear articulation requirement, and provide the municipality with state action immunity if active state supervision is also present.

There are a series of significant problems, however, in requiring each state legislature to enact specific legislation authorizing each local program. First, continuing with the solid waste example, it is probably unrealistic to expect state legislatures to spend their time addressing every local solid waste disposal concern. Second, any form of state-wide program might not sufficiently address the specific problems unique to the local marketplace, such as Akron's specialized need for steam generation. Third, each legislator would have little interest in legislation which addresses the problems of just one city, unless the city happens to be in his or her district. Thus, generating enough legislative interest to even get the legislature to vote on each program may be difficult. Fourth, significant staff and personnel additions would be necessary to assess each plan, creating a significant increase in

381. For a discussion of the clear articulation standard, see supra text and notes at notes 283-308.
382. See supra text and notes at notes 283-308.
383. See supra text and notes at notes 283-308.
384. See supra text and notes at notes 236-60.
385. See supra text and notes at notes 262-308.
cost. Finally, the passage of the legislation is merely the first step as an entirely new bureaucracy, with its consequent costs, would have to be created to carry out the required ongoing supervision of the regulatory scheme. Therefore, it appears that present-day exemption requirements may preclude the use of the state action exemption to adequately protect monopolistic environmental regulation, even where such regulation is genuinely needed to solve pressing municipal problems.

Monopolistic regulation, however, should remain one of the tools in a municipality's regulatory arsenal. Its utility was clearly demonstrated in the Akron situation, and the extent to which monopolistic regulation is employed in other circumstances. Together with decreasing the amount of litigation flowing from such regulation, these trends indicate that the ability of municipalities to solve environmental and other problems would increase with a reduction in the risk they face from potential antitrust liability. Failure to ease the antitrust burden would result in the continued threat of protracted litigation and potential damages to already strained municipal budgets, and may seriously hamper the cities' ability to provide innovative solutions to environmental and other problems. At the very least, the courts, as did Judge Manos in considering the *Hybud* case on remand, would find themselves forced to distort the antitrust laws to protect vital municipal programs.

VII. PROPOSAL FOR A LIMITED STATUTORY EXEMPTION

Several proposals have been made which would provide to municipalities greater protection from antitrust liability. Two particular proposals demonstrate the polar approaches to this problem. The first proposal was offered by the National League of Cities in testimony to the Senate Judiciary Committee on the issue of municipal monopolistic regulation. The second proposal was offered by Justice Rehnquist in his *Community Communications* dissent.

The National League of Cities recommended to the Judiciary Committee that municipal economic regulation be granted a blanket immunity from the antitrust laws. The drawbacks of

386. See *supra* text and notes at notes 24-59.
388. *Community Communications*, 455 U.S. at 60-71 (Rehnquist, J. dissenting).
389. The requirements for such an immunity would be that, "(1) a city would have to establish an affirmative policy of substituting regulation or monopoly public service for
this approach are significant. A blanket immunity has enormous potential for abuse. The potential for abuse would necessitate continual judicial monitoring on a case-by-case basis, and the cost to a city treasury for this type of antitrust litigation would be a significant drain on city revenues. The only alternative to litigation would be the creation of monitoring agencies, also at significant cost. Also, blanket immunities, unlimited in scope, are greatly disfavored by Congress and the courts. Finally, this type of immunity is inconsistent with the spirit and scope of the Sherman Act as interpreted by the courts. Thus, this proposal, beyond being unworkable, would also be unacceptable to the legislature and the judiciary.

Justice Rehnquist, in his Community Communications dissent, proposed maintaining the status quo which would require that the courts continue to decide, case by case, whether the antitrust laws apply to the challenged actions. This approach, however, also suffers from significant problems. First, as litigation goes forward valuable time in implementing the program is lost. Second, since the legality of each program cannot be known until it is tested in the courts, the resulting uncertainty would likely hinder progress in developing and implementing these plans. Third, due to the cost, cities may not be able to afford to litigate every suit. This, in turn may give rise to frivolous litigation challenging every municipal action in the hope that the city will back down and change its plans. Fourth, choosing which challenge to litigate may become a political decision with consequent special interest problems. Fifth, the public's tax dollar can go to better use than the support of the
full time antitrust litigation staffs. Thus, this solution also has significant drawbacks.

The aforementioned approaches are inconsistent with what should be the goals of any such system: to limit the possibility for abuse; to minimize the addition of new layers of governmental involvement; to limit the necessity of using litigation to solve each problem; and to minimize cost. There is, however, one alternative which would be consistent with all of these goals: a grant of statutory immunity attached as an amendment to, for example, the Solid Waste Disposal Act. 394

Although it is sometimes the most intrusive form of exemption, the explicit statutory exemption 395 may be a reasonable compromise solution between the National League of Cities blanket exemption proposal 396 and the Rehnquist case-by-case proposal. 397 An amendment exempting a specific type of municipal environmental program, like the McCarran-Ferguson Act exemption of the insurance industry, 398 could be proposed. As applied to solid waste disposal programs, the language might state:


An immunity written in this way would meet a number of concomitant goals. First, the immunity is limited in its scope and thus would be acceptable to Congress and the courts. 399 Second,


395. See supra text and notes at notes 153-66.

396. See supra text and note at note 389.

397. See supra text and note at note 388.


399. See supra text and notes at notes 167-78.
since the immunity is specific, the possibility for wholesale abuse is limited.400 Third, the management of the exemption could be carried out by existing personnel.401 Fourth and last, subsequent litigation which would define the scope of the exemption, would give courts the opportunity to define "waste disposal" in light of modern needs and goals.402

There are, of course, problems with this proposal. Approval by Congress of any proposal is always uncertain, regardless of the logic behind the legislation. In addition, it is unknown what effect lobbying will have on the amendment. Finally, it is unclear how the courts will define the business of waste disposal. Even with its problems, however, the proposal strikes a reasonable compromise between Rehnquist's case-by-case approach and the National League of Cities blanket immunity.

Regardless of the acceptance or rejection of this proposal, any resulting discussion must address the fact that the local environmental problems of the present will be the national ones of the future. In order to limit the adverse effect of current local problems on the state or nation as a whole, action should be taken today to enable municipalities to address their unique local problems with creative local solutions. The attitude that these problems will disappear or can be handled by simple blanket solutions has created the current environmental crisis, a crisis we cannot afford to ignore.

VIII. CONCLUSION

In the late 1960's and early 1970's Akron, Ohio faced a solid waste disposal crisis; landfill space was at a premium and new

400. Id.
401. Id.
402. Since the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1976), was passed in 1945, the business of insurance has undergone massive changes. For example, in Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205 (1979), the Court noted that: "At the time of the enactment of the McCarran-Ferguson Act, corporations organized for the purpose of providing their members with medical services and hospitalization were not considered to be engaged in the insurance business at all . . . e.g. Jordan v. Group Health Ass'n, 107 F.2d 239 (D.C. Cir. 1939); California Physicians Service v. Garrison, 155 P.2d 885 (Cal. App. 1945), aff'd, 28 Cal. 2d 790, 172 P.2d 4 (1946)." 440 U.S. at 225-27. It is clear today that corporations organized to provide medical services may be in the business of insurance and as cases are litigated on this issue, it is important that a court be in a position to analyze the exemption issues that arise in light of the needs and uses of the times. See generally Royal Drug Co., 440 U.S. 205 (1979). Just as this ability to redefine insurance is important for a consistent and modern application of the McCarran-Ferguson exemption, so would it be important to consistent and modern application of any exemption applied to municipal monopolistic regulations.
laws limited the potential for development of alternative disposal sites. The city chose to solve this problem by implementing a monopolistic waste disposal plan which required all waste disposal operations to use only a new, city-owned, energy recycling facility.

Private landfill operators responded by filing a number of antitrust claims, claiming that Akron had violated sections one and two of the Sherman Act. The Sherman Act, which prohibits concerted actions that are in restraint of trade and any actual or attempted monopolization of an industry, applies to individuals and corporations, as well as municipalities and states.

The courts recognize several exemptions from the Act. An activity may be protected from the antitrust laws explicitly by federal statute; immunity may be implied by a clear repugnancy between the Sherman Act and another statute authorizing the anticompetitive activity; or the activity may be protected by the state action exemption, which exempts activities either performed or directed by the state. Under the current state action test, the anticompetitive activity must be clearly articulated and affirmatively expressed by the state. In addition, the activity must be supervised by the state in an ongoing fashion. Municipalities have access to the state action exemption, but they must meet the same standards imposed as those on private entities.

When the Akron waste disposal regulations were challenged on antitrust grounds, the city claimed that it was protected by the state action exemption. The district and the circuit courts held for Akron, and the landfill operators appealed to the Supreme Court. The Supreme Court remanded the case to the circuit court for a decision consistent with the new state action standards delineated in a recent case. The circuit court remanded the case to the district court which again upheld the Akron regulations. The district court opinion, however, appears to conflict with the Supreme Court’s state action test, and a reversal seems likely. Regardless of the outcome of the challenge to the Akron litigation, again on appeal to the Sixth Circuit, the threat of antitrust liability undoubtedly has a chilling effect on the often necessary municipal use of monopolistic regulation. The creation of an exemption which could protect programs like Akron’s may, therefore, be appropriate.

The exemption should be statutory, and could be offered as an amendment to, for example, the Solid Waste Disposal Act. The amendment would exempt from antitrust liability municipal anti-
competitive actions taken to implement a solid waste disposal program. This amendment would further the purpose of the Solid Waste Disposal Act—to provide federal support to municipal efforts to solve the national waste disposal problem with creative, local solutions. The necessity of such an exemption for other environmental programs would, of course, have to be examined by the Congress. At least in the case of solid waste disposal, however, the Akron situation demonstrates that a statutory exemption would have protected an environmentally necessary program. In addition, this exemption would have saved a financially-strained city the cost of defending its program in at least five judicial proceedings, and would protect the integrity of the antitrust laws from judges who find it necessary to distort antitrust doctrine in order to save needed programs.