1995

Federalism, Efficiency, the Commerce Clause, and the Sherman Act: Why We Should Follow a Consistent Free-Market Policy

Daniel J. Gifford
University of Minnesota Law School, giffo001@umn.edu

EMORY LAW JOURNAL

Volume 44 FALL 1995 Number 4

ARTICLES

FEDERALISM, EFFICIENCY, THE COMMERCE CLAUSE, AND THE SHERMAN ACT: WHY WE SHOULD FOLLOW A CONSISTENT FREE-MARKET POLICY

*Daniel J. Gifford**

The focus of the dormant commerce clause is on free trade among the states. Indeed, the Supreme Court, borrowing from the vocabulary of European integration, frequently asserts that the dormant commerce clause calls for an American "common market."[1] Borrowing from the language of international trade, the Court invalidates state or local legislation which is "protectionist."[2] This focus is consistent with the purpose of the Framers, who sought to prevent economic barriers to trade from threatening the

* Robins, Kaplan, Miller & Ciresi Professor of Law, University of Minnesota. The author gratefully acknowledges helpful comments on an earlier draft of this Article from Professors Jim Chen, Daniel A. Farber, Fred L. Morrison, Robert Hudec, Leo Raskind, and David S. Weissbrodt.

[1] C & A Carbone, Inc. v. Town of Clarkstown, 114 S. Ct. 1677 (1994); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980); Hunt v. Washington State Apple Adv. Comm'n, 432 U.S. 333, 350 (1977); Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 380 (1976); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 538 (1949).

[2] West Lynn Creamery, Inc. v. Healy, 114 S. Ct. 2205, 2217 (1994); *Carbone*, 114 S. Ct. at 1683; Oregon Waste Sys., Inc. v. Department of Envtl. Quality, 114 S. Ct. 1345, 1354 (1994); New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1988); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 272 (1984); South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 100 (1984); New England Power Co. v. New Hampshire, 455 U.S. 331, 339 (1982); Minnesota v. Clover Leaf Creamery Co. 449 U.S. 456, 471 (1981); City of Phila. v. New Jersey, 437 U.S. 617, 624 (1978).

new political order established by the United States Constitution. Stated in a more positive vein, the free-trade objectives incorporated in the dormant commerce clause further the efficient allocation of resources within our society, just as free trade among nations helps to further the efficient allocation of resources in the world. The Court's use of the vocabulary of international trade is an implicit recognition of the efficiency objectives furthered by the dormant commerce clause.

Like the dormant commerce clause, the Sherman Act is also concerned with efficiency objectives. However, unlike the constitutional provision which focuses on state and local governmental acts, the Sherman Act is directed primarily (albeit not exclusively) at market restraints and monopolies erected by private business firms.[3] Its prohibitions are designed to preserve free and open markets, thereby enabling the competitive process to allocate goods and services in accordance with demand, and to facilitate the replacement of inefficient with efficient producers. Thus, while the Commerce Clause targets public restraints and the Sherman Act targets primarily private restraints, they share a common concern with facilitating trade and furthering the efficient allocation of society's resources. Moreover, when monopolies and market restraints are created by state and local governments, the concerns underlying either or both provisions may be triggered. When these restraints block trade between the states, they are condemned by the dormant commerce clause. When they interfere with intrastate trade, they fall within the scope of the Sherman Act, but are frequently exempted from Sherman Act scrutiny under the antitrust state-action exemption.

This Article argues that the similar efficiency concerns underlying the dormant commerce clause and the Sherman Act provide ground for judicial recognition of the close relationship between these two provisions. Such recognition would, in time, foster an expansion of the factors explicitly considered under the dormant commerce clause to embrace the consumer interest and efficiency factors which are now dealt with only indi-

---

[3] Parker v. Brown, 317 U.S. 341, 351 (1943) ("[I]t's purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations . . . .") The Sherman Act nonetheless does invalidate some state legislation. *See, e.g.*, 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951).

rectly and by implication.[4] More importantly, judicial recognition of the provisions' similar concerns would assist in reconceptualizing the antitrust state-action exemption's application to local governments, an area in which the Court has experienced enormous difficulties in establishing a workable and credible case law.[5] A judicious incorporation of dormant-commerce case law into the interpretation of the antitrust state-action exemption would resolve issues at the interface of antitrust law and federalism which have so far proved intractable.

At present, despite their similar efficiency objectives, the dormant commerce clause and the Sherman Act are construed in isolation. As a result, municipally imposed restraints of identical kinds are treated differently by the courts, depending upon whether the restraint occurs in a relevant market containing suppliers and purchasers from two different states. Under the dormant commerce clause, the municipal restraint imposed in a cross-border market is invalidated in order to vindicate the national interest in free trade among the states. In an interior market, however, the municipal restraint is evaluated under the Sherman Act where it is generally upheld in deference to federalism. These different results occur despite the fact that in both instances the countervailing national interest—expressed in the dormant commerce clause and in the Sherman Act, respectively—inheres in free trade and free markets.

---

[4] Some readers will ask how the Sherman Act can play any role (however small) as a referent for the construction of the Commerce Clause, a constitutional provision which antedates the Sherman Act by more than one hundred years. Moreover, readers will also legitimately ask how a statute—which is subject to repeal by the ordinary lawmaking process—can serve as a means for interpreting the constitutional text. These matters are considered in Part V below. My approach to constitutional interpretation is less radical than may first appear. I am, after all, proposing a way in which the courts should construe the dormant commerce clause, an area where all judicial interpretations are subject to congressional revision. Indeed, it is precisely this congressional power of revision which provides support for drawing interpretative norms from legislation. Additionally, the main impact of construing the dormant commerce clause and the Sherman Act in tandem falls on the Sherman Act and in particular on the state-action exemption. Under my proposal, the scope of the state-action exemption would be narrowed significantly.

[5] *See* City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991); Fisher v. City of Berkeley, 475 U.S. 260 (1986); Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985); Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978). This case law exhibits a remarkable lack of coherence, even though it represents a timespan of only approximately one and one half decades.

A recently decided dormant commerce clause case, *C & A Carbone, Inc. v. Town of Clarkstown*,[6] discussed below, illustrates this effect. A municipally imposed monopoly over solid waste collected for transfer was invalidated under the dormant commerce clause on the ground that it barred out-of-state sanitary landfill operators from the local market for solid waste disposal.[7] Yet other cases involving similar municipally imposed monopolies over solid waste, which because of their geographic location did not impact out-of-state suppliers, have been upheld under the Sherman Act's state-action exemption.[8]

There are, of course, substantial reasons for applying the dormant commerce clause differently than the Sherman Act. These reasons concern the interplay of representative democracy and government-imposed trade restraints. Respect for state and local governments' decisionmaking is subordinated under the dormant commerce clause but respected under the Sherman Act because of the view that local and state governments cannot be trusted to deal with regulatory issues where the burdens of regulation fall disproportionately upon those outside the state responsible for the regulation. Put negatively and in a somewhat more fundamentalist way, the argument in favor of taking differing approaches under the two provisions is cast in terms of the federal system's assessment of juridical or institutional competence: An underlying premise of the United States Constitution is that one state cannot be permitted to use trade weapons against another state, but the federal compact just is not concerned in the same way with intrastate trade. Conversely, the importance of the states in a federal system invokes the maximum freedom of state political institutions to set autonomous economic policies, regardless of the distribution of burdens and benefits, provided that all of the effects occur within the state.

This Article argues that the radically different approaches taken by the courts towards municipal restraints under the dormant commerce clause

---

[6] 114 S. Ct. 1677 (1994).

[7] *Id.* at 1681. *Accord*, Waste Sys. Corp. v. County of Martin, 985 F.2d 1381, 1386-89 (8th Cir. 1993).

[8] Tri-State Rubbish, Inc. v. Waste Management, Inc., 998 F.2d 1073, 1078-79 (1st Cir. 1993); Kern-Tulare Water Dist. v. City of Bakersfield, 828 F.2d 514, 519-20 (9th Cir. 1987); L&H Sanitation, Inc. v. Lake City Sanitation, Inc., 769 F.2d 517, 522 (8th Cir. 1985); Hybud Equip. Corp. v. City of Akron, Ohio, 742 F.2d 949, 962-64 (6th Cir. 1984), *reaff'g* Hybud Equip. Corp. v. City of Akron, 654 F.2d 1187 (6th Cir. 1981); Central Iowa Refuse Sys., Inc. v. Des Moines Metro. Solid Waste Agency, 715 F.2d 419, 428 (8th Cir. 1983), *cert. denied*, 471 U.S. 1003 (1985).

and the Sherman Act are inappropriate; that the divergent results under the two provisions can and should be minimized; that the premises underlying the current differences are improperly formulated; that an appreciation of the public-choice considerations which the Court has already incorporated into its case law under both the dormant commerce clause and the Sherman Act counsels against the present divergence in approach; that the common national policy favoring free trade and free markets is sufficiently strong to overcome the diverging countervailing considerations under the two provisions; and finally that dormant commerce clause jurisprudence provides the needed tool for reinvigorating antitrust law while respecting legitimate local autonomy.

Part I describes the factual setting of the Supreme Court's most recent application of the dormant commerce clause to a municipally conferred monopoly over a waste-transfer facility. Part II looks at the "protectionist" rhetoric which is often employed in dormant commerce clause cases and which was employed by both the majority and the dissent in *Carbone*. The economic and political problems underlying cases where municipalities establish legal monopolies are identified in Part III. The now-failed attempt of antitrust law to deal with the establishment of municipal monopolies is the subject of Part IV. Part V explores the consequences of construing the dormant commerce clause and the Sherman Act in tandem and identifies possible difficulties with that approach. Part VI examines the interplay between free market/free trade policies and representative democracy under both provisions and reviews that interplay from the perspective of public-choice theory and the civic-republicanism movement. Part VII raises (and answers affirmatively) the question of whether the major reconstruction of the Sherman Act's state-action exemption proposed here is consistent with accepted approaches to statutory interpretation. Finally, Part VIII concludes that by considering the two provisions together, the courts would further the policies of both free markets and local democracy. Policy coherence, then, is shown (in this case) to be capable of furthering two widely shared substantive values.

I. *CARBONE* AND THE DORMANT COMMERCE CLAUSE

In the Supreme Court's recent decision, *C & A Carbone, Inc. v. Town of Clarkstown*,[9] invalidating a municipally imposed monopoly over solid-waste transfer, both the majority and dissent, in their separate ways, construed the economic policy underlying the commerce clause without reference to the analogous statutory policy in the Sherman Act.

The *Carbone* case involved the municipal disposal of solid waste. The town of Clarkstown, New York, under pressure from the New York State Department of Environmental Conservation, closed its landfill and arranged for the construction of a new solid-waste transfer station as a replacement. The transfer station would separate solid waste into recyclable and nonrecyclable material, ship the former to a recycling facility, and ship the latter to a landfill or incinerator.

The cost of the new transfer station was estimated at 1.4 million dollars. In order to finance the station the town entered into an agreement with a local private contractor pursuant to which the contractor would erect the transfer station and operate it for profit for five years. At the end of the five-year period, the station was to be transferred to the town for the nominal price of one dollar. The town guaranteed 120,000 tons of waste per year and allowed the operator to charge haulers a tipping fee of $81 per ton, a fee which exceeded the cost of disposing of unsorted waste on the private market by approximately $11 per ton.[10] Because the $81 tipping fee exceeded the market price, the town's arrangement with the operator would not have worked had waste haulers been free to select disposal sites. The town took away that freedom, however, by enacting an ordinance requiring that all nonhazardous solid waste within the town (including both waste generated within the town and waste brought into the town from elsewhere) be deposited at the transfer station. This ordinance thus conferred monopoly status upon the transfer station, and forced haulers to pay the above-market $81 price imposed by its operator.

The Court struck down the ordinance under the dormant commerce clause, ruling that it acted as a trade barrier blocking out-of-state treatment facilities from access to haulers within the town. As such a barrier,

---

[9] 114 S. Ct. 1677 (1994).

[10] *See* 114 S. Ct. at 1680, 1699.

it conflicted with the Commerce Clause goal of creating a single market within the boundaries of the United States.

The principal point of contention was whether the town's ordinance should be deemed "protectionist" or whether it incidentally burdened interstate commerce while seeking a legitimate goal. Under the Court's precedents, the ordinance would be treated under a "virtually *per se* rule of invalidity" if found to lie in the first category,[11] but would be subjected to a balancing test if found to lie in the second category.[12] The majority, in an opinion by Justice Kennedy, held the ordinance was "protectionist" because it barred out-of-state suppliers from the local market. Justice O'Connor, concurring, thought the ordinance not protectionist but nonetheless invalid because it failed the balancing test. In his dissenting opinion, Justice Souter viewed the ordinance as not protectionist and would have upheld it under the balancing test.

II. THE "PROTECTIONIST" ANALYSIS EMPLOYED UNDER THE DORMANT COMMERCE CLAUSE

The focus of both the majority and the dissent on protectionism as the evil targeted by the dormant commerce clause conforms to the concerns articulated in past case law.[13] There is no question that the Commerce Clause was designed to end the power of the states to erect barriers to trade. In the majority opinion in *Carbone*, Justice Kennedy described the Framers' objective as the creation of an American "common market,"[14] a

---

[11] Legislation that discriminates facially against out-of-state commerce is treated under the "virtually per se illegal" rule. *See* Oregon Waste Sys., Inc. v. Department of Envtl. Quality, 114 S. Ct. 1345, 1350 (1994); Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334, 342 (1992); Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, 504 U.S. 353, 360 (1992); City of Phila. v. New Jersey, 437 U.S. 617, 624 (1978).

[12] Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970).

[13] The case law under the dormant commerce clause differentiates between a category of restraints which act like tariffs and import or export prohibitions and quotas which are referred to as discriminating against interstate trade. The Court has often referred to these barriers as facially discriminatory or protectionist. The cases also identify a second class of restraints which impose burdens on trade flows incident to serving a legitimate state purpose. In these cases, the Court determines whether the burden is excessive in the light of that purpose. *See supra* notes 8-9 and accompanying text.

[14] 114 S. Ct. at 1698. The phrase is contained in a quote from Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 350 (1977). *See also* cases cited in note 1 *supra*. While the phrase implicitly evokes references to the policies of the European Community and other regional trading arrangements, the European Community itself has experienced difficulties in dealing with

phrase employed in earlier decisions to suggest an expansive approach to trade.

While Justice Kennedy's referents were suggestive of a broad condemnation of trade barriers, the dissent took a more conservative approach towards the scope of the barriers outlawed by the dormant commerce clause. According to the dissent, the government-conferred monopoly of the local waste-transfer station—although impeding trade with out-of-state waste-disposal operations—was not protectionist within the meaning of the Commerce Clause case law. A local regulation would be deemed protectionist (and hence invalid) only where it benefited a class of local businesses and disadvantaged out-of-state competitors.

Under the dissent's view, most local government-conferred monopolies do not contravene the Commerce Clause, even when interstate trade is restrained: only where a monopoly is conferred upon a group composed of all businesses located within a municipality is the monopoly illegitimate. A municipality may legitimately confer a monopoly upon a single business. The critical difference, according to the dissent, is that in the latter case local businesses other than the legally franchised monopoly are disadvantaged together with out-of-state businesses, and their potential opposition is an assurance that the monopoly franchise serves some public purpose apart from enriching local business people. This is a developed form of protectionist analysis that combines the traditional flow-of-commerce across state lines concern with elements of public-choice theory in that the disadvantage imposed upon local firms is both inconsistent with pure protectionism and provides assurance that social benefits recognizable by the local electorate lie behind the local regulation.

The trouble with the dissent's analysis is that it attributes an unduly narrow meaning to the Commerce Clause and fails to follow the ramifications of its own public-choice analysis. For reasons developed later in this Article, the Clause should be read broadly to include the condemnation of government-franchised monopolies that interfere with interstate trade, despite the absence of a protected class of local business firms. The entire

---

government monopolies. International analogues to the dormant commerce clause's concern with facilitating trade flows over political boundaries in the GATT are discussed in Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401 (1994).

field of government-imposed trade restraints is permeated with the distortions of interest group pressures and the efforts of politicians to obscure or distort the visibility of their own responses to those pressures. Although the presence of adversely affected local business groups discourages private-regarding legislation, such a check is not infallible; there is a wide array of legislation diminishing the public interest that is not condemned under the dissent's test. Indeed, the paradigm which the dissent had in mind is one in which a state or municipality enacts legislation favoring its own producers over out-of-state producers. It is "protectionist" in the same sense that tariffs or import quotas are protectionist in the international trade context.[15] For reasons developed below, the dissent's paradigm fails to meet the political/economic dilemma posed by legislation such as that involved in *Carbone*.

III. The Underlying Economic/Political Problem

Carbone is representative of a significant number of cases in which municipalities have erected waste disposal facilities and conferred monopoly rights upon them.[16] Generally, the plan involves financing the waste disposal facility with "tipping revenues," fees paid by waste haulers to the facility in return for the facility accepting the waste. Bonds are issued to pay for the construction of the facility and the bonds are serviced with tipping revenues.

The monopoly arises when the municipality requires that all waste within its borders be disposed of at the new facility. The municipality imposes such a requirement to ensure that the facility handles enough

---

[15] Even in the international trade context, the contention that cartels or monopolies controlling domestic supply do not discriminate against foreign suppliers because they also discriminate against potential domestic suppliers is problematic. *See* Daniel J. Gifford & Mitsuo Matsushita, *Antitrust or Competition Laws Viewed in a Trading Context: Harmony or Dissonance? in* Domestic Policy Divergence in an Integrated World Economy: Fairness Claims and the Gains from Trade ___ (M.I.T. Press 1996) (forthcoming).

[16] *See, e.g.*, Tri-State Rubbish, Inc. v. Waste Management, Inc., 998 F.2d 1073 (1st Cir. 1993); Waste Sys. Corp. v. County of Martin, Minn., 985 F.2d 1381 (8th Cir. 1993); Swin Resource Sys., Inc. v. Lycoming County, Pa., 883 F.2d 245 (3d Cir. 1989); Kern-Tulare Water Dist. v. City of Bakersfield, 828 F.2d 514 (9th Cir. 1987); L&H Sanitation, Inc. v. Lake City Sanitation, Inc., 769 F.2d 517 (8th Cir. 1985); Hybud Equip. Corp. v. City of Akron, Ohio, 742 F.2d 949 (6th Cir. 1984), *reaff'g* Hybud Equip. Corp. v. City of Akron, Ohio, 654 F.2d 1187 (6th Cir. 1981); Central Iowa Refuse Sys., Inc. v. Des Moines Metro. Solid Waste Agency, 715 F.2d 419 (8th Cir. 1983), *cert. denied*, 471 U.S. 1003 (1985).

waste to be profitable. Two elements, both connected to volume, are involved. First, high volume generally lowers unit costs in these facilities. Because of high fixed costs resulting from the initial expenditures on construction and low or moderate operating costs, the facilities possess scale economies: unit cost falls with volume. Mandating that all waste be taken to the facility ensures that the facility will operate at the volume requisite to generate these efficiencies. Second, profit increases with volume over a considerable range so long as unit revenues exceed unit costs and the average cost curve is declining.[17] Thus, municipalities have often based their financing plans upon these factors: The facility is paid for by the issuance of municipal bonds and the operation of the facility at high volume is deemed essential to service the bonds. Often influenced by advice from the bond underwriters,[18] a municipality typically confers a legal monopoly over all waste within its boundaries as a means of sustaining the facility at the requisite high volume of operation.

While the municipalities have emphasized the need to attain scale efficiencies as a justification for bestowing a monopoly on their waste-treatment facilities, there is an obvious alternative method of achieving scale economies—bring tipping fees down to the level necessary to attract the requisite volume of waste on the open market. There is always a price level at which the facility will attract the volume of waste required to operate at an efficient scale.

The municipalities may respond to this suggestion by conceding that they could attract the requisite volume to reach an efficient scale of operations by reducing tipping fees, but argue that at those reduced fees the facility would operate at a loss, shrinking the tipping revenues to amounts inadequate to service the bonds. But if this is the municipal response, what are its ramifications? If a facility cannot generate sufficient revenue to pay for itself, then perhaps it should not have been built. The market appears to be telling us that alternative waste treatment facilities can perform the disposal function more efficiently.

---

[17] Indeed, in a market where the price level is given, profits continue to increase with volume even after the average cost curve starts to rise until marginal cost rises to the level of price. However, where a monopolist has discretion over the price it charges, profits increase with volume only to the point where marginal cost ceases to be exceeded by marginal revenue.

[18] *See, e.g.*, Central Iowa Refuse Sys., Inc. v. Des Moines Metro. Solid Waste Agency, 715 F.2d 419, 421-22 & n.6 (8th Cir. 1983), *cert. denied*, 471 U.S. 1003 (1985).

A waste treatment facility that cannot compete against rival treatment facilities is prima facie inefficient, and the legislature which authorizes its construction is apparently mishandling the public revenues of which it is the trustee. I refer to the "prima facie" inefficiency of the facility and the "apparent" mishandling of public funds by the legislature because it is possible that the facility can be justified by factors which the market does not reflect. In the case of a waste incinerator, for example, perhaps alternatives (such as sanitary landfills) have more adverse environmental effects which the market fails to reflect.

On the basis of such externalities, the legislature could appropriately decide to dispose of waste through incineration, despite its higher costs. But if the legislature chooses to justify the construction and operation of a high-cost facility on the grounds of social externalities, then it should be willing to subsidize the extra costs from general revenues. In this way the legislature's judgments and the actions which proceed from them attain the highest visibility and are most subject to the check of the electorate.

When a legislature chooses to obscure the costs and benefits of its decisions and camouflages its spending through a device like a municipally imposed monopoly charging extra-market rates, then its motives are legitimately subject to question. Is the legislature responding to pressure from an interest group which wants an inefficient facility, and attempting to hide its improvident actions from the taxpayers? Or is the local legislature creating a monopoly simply to evade state-law constraints upon its own spending or capital borrowing? Or some combination of the above?

The answers to such questions are not always simple and straightforward. Indeed, government behavior parallels society's increasing complexity. The vitality of democratic institutions, accordingly, is challenged when the complexity of government behavior impairs the abilities of citizens to understand it and hence to evaluate it.

Municipalities have commonly taken the financing of waste facilities out of their own budget by arranging for the facility to be paid for out of revenues generated by the facility itself. When the facility produces revenues sufficient to cover its construction, this is an appropriate path: there is no reason in such circumstances to bring financing into the municipal budget. Indeed, in such cases, the self-financing of the facility can take

place at below-market interest rates when its construction is paid for with nontaxable bonds.[19]

When the facility cannot generate revenues to pay for itself on the market, however, subsidization is essential if the facility is to be built. In such a case, financing of the facility through revenue bonds takes on a wholly new aspect. Because the facility's revenues from market-based activities would be inadequate, those market-based revenues must be augmented. In *Carbone* and most of the other cases which have reached the courts, the market-based revenues were augmented by the addition of a monopoly surcharge which the facility was able to impose when it was granted a legal monopoly. When a municipality confers such a monopoly franchise, it compels its taxpayers to pick up the cost of the subsidy. The effect is equivalent to a tax.

The tax imposed in such circumstances does not show up in the municipality's budget.[20] Limitations imposed by the state on municipal taxing powers are evaded.[21] Limitations on municipal borrowing may also be evaded.[22] Yet while the municipal legislators have freed themselves from constraints imposed by state law on taxing and borrowing, they have nonetheless proceeded with the construction of a facility which requires subsidization and have imposed the burden of that subsidy upon municipal taxpayers. Because the burden takes the form of an off-budget monopoly surcharge imposed by a private business firm, the tax-like effect is obscured. Citizens whose attention would be drawn to a new tax sufficiently to question the wisdom of subsidizing an inefficient facility are unlikely to focus their attention on the less visible monopoly imposed equivalent.

In these cases important questions of governance are obscured by the complexity of the municipality's actions: while the policy choices are taken by the municipal legislators, the tax-like impact is imposed in the guise of

---

[19] *See* IRC § 142(a)(6) (1994).

[20] An analogy from international trade is apt here. The effect is analogous to a quota or other nontariff barrier. The quota confers a subsidy on domestic manufacturers by raising the cost of goods (both imported and domestic) to consumers because it reduces competition, permitting suppliers to raise prices above the competitive level. The effect is the same as a tax on imports (a tariff). Yet the quota does not show up as producing any effect on government revenues or expenditures.

[21] *See, e.g.*, N.Y. CONST. art. VIII, § 10 (McKinney 1986).

[22] *See* 15 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 39.32 (Beth A. Buday & Donna M. Poczatek rev. ed. 1995).

private behavior. As important issues are obscured, greater leeway is provided for manipulation of municipal decisionmaking by private interests whose agendas do not correspond to the considered will of the local electorate. As pointed out below, some interests possess peculiar power only at the local government level. These interests—as well as others less locally based—are more likely to skew local decisionmaking the more local officials are able to lower the visibility and ramifications of their decisions.

First, in the municipal-waste-facility cases, pressures to erect a facility and to finance it off-budget might come from private businesses that will stand to profit from its erection. The design and construction of waste treatment facilities (including transfer stations) has often been viewed as so complex and complicated a subject as to be beyond the purview of generic regulations governing other municipal purchasing. Accordingly, traditionally imposed competitive bidding requirements have been bent in order to facilitate the negotiation deemed essential for such complex subject matter.[23] The format often consists of a municipal government inviting proposals from interested contractors and negotiating over the content of these proposals.[24] This format, of course, provides an enhanced opportunity for private contractors to attempt to skew municipal decisionmaking towards their special advantage.

Second, some environmental groups may possess incentives for prodding municipal decisionmaking towards off-budget subsidization of waste facilities. Such an environmental group would be one that attributes a high value to the symbolism of building a new waste treatment facility, apart from the question of whether more efficient alternatives are available for addressing the environmental problem. That such groups exist may be inferred from the history of the Clean Air Amendments of 1977, where some environmental groups apparently sought a legislative mandate for

---

[23] *See, e.g.*, N.Y. GEN. MUN. LAW § 120-w (McKinney 1986).

[24] *See, e.g.*, Metropolitan Waste Management Corp. v. Town of Hempstead, 135 Misc.2d 548, 549, 515 N.Y.S.2d 956, 957 (N.Y. Sup. Ct. 1987):

> The legislation specifically provides therein the means and methods by which municipalities can address the unique needs and demands made upon them by the current state of affairs in their waste disposal functions. As a part of the statute, the time honored requirements for competitive bidding procedures were relaxed or eliminated in favor of permitting municipal governments to negotiate for the erection of waste management and disposal facilities on a 'request for proposals' basis (General Municipal Law § 120-w, subd.4[e]).

smokestack "scrubbers" for symbolic and ideological reasons.[25] Such a group (because it possesses a different set of values from the public at large) might believe that it could not succeed in open debate. Like the private contractors, therefore, such a group would have an incentive to pressure municipal decisionmakers towards constructing and financing an inefficient waste treatment facility off-budget.

In the *Carbone* case, pressure on the municipal council members came from the New York State Department of Environmental Conservation. It is unclear whether this pressure fully explains the particular decision made by the Town of Clarkstown to build and finance a transfer station out of monopoly generated revenues. Perhaps pressure or influence came from other sources as well. The case reports tell nothing about the expected profit of the facility operator nor of the existence of local pressure groups. However, when a municipal legislature authorizes the construction of a plant that is to be financed from monopoly revenues pegged substantially above market rates, an inference arises that the decision is more the result of interest group politics or of a self-regarding legislature than the result of reasoned deliberation. Otherwise, why obscure its financing? There are, of course, many ways to rebut this inference. The best rebuttal occurs when the legislature acts against the background of full public debate and widespread dissemination of costs and benefits.

In the case of the waste transfer station involved in the *Carbone* decision, the Supreme Court effectively imposed upon the town a pattern of behavior close to the one recommended above. The monopoly franchise was invalidated, requiring the town to compete with alternative waste-reception sites on the basis of price. Losses resulting from operating the transfer facility at competitive rates will have to be made up by the town, presumably out of general revenues.

Although the Court justified its decision with antiprotectionist rhetoric, the decision benefited not only the out-of-state sanitary landfill operators, but also the town's citizens. The former now have access to a larger mar-

[25] This position led these environmental groups into an alliance with the Eastern coal interests producing high-sulfer content coal. If emission controls rather than scrubbers were mandated, then environmental controls would properly confer a competitive advantage upon low-sulfer Western coal, to the detriment of the Eastern producers. Although the realization of this advantage would appear to be the environmentally optimal result, the environmental groups opposed it. *See* BRUCE A. ACKERMAN, CLEAN COAL/DIRTY AIR (1981).

ket, but the latter are no longer subject to the high tipping fees which the monopoly franchise made possible. Unfortunately, the town's citizens will have to bear the brunt of the additional taxes that will be necessary to pay for the new—and apparently inefficient—facility. The new arrangement, however, will foster closer scrutiny by the town's citizens over the way the town's legislators make their decisions. And, as a precedent, *Carbone* will force the legislators of other towns to proceed in a more visible fashion when they consider the construction, operation and financing of new waste facilities.

Yet *Carbone* protects only citizens of those municipalities which are located near state borders, for only in those situations does a monopoly franchise (like the one in *Carbone*) impede the flow of commerce across state lines. Citizens of municipalities located further from state borders are unprotected. For a limited time in the early 1980s, they might have sought protection under the federal antitrust laws. But after an initial attempt to curb the power of local governments to impose monopolies on their citizens, the Court gave up. The result is the current disparity between the way the law treats identical municipally imposed market restraints in cross-border markets and interior markets.

The disparity exists although the countervailing national policy is essentially the same in both cases: the free-trade national policy embodied in the dormant commerce clause in the cross-border market case, and the free-market policy embodied in the Sherman Act in the interior market case. Whether the latter policy is less strong than the former and therefore properly accounts for the greater deference allowed local government decisionmaking is taken up in Part VII below.

IV. The Failed Antitrust Approach

A. *The Boulder Fiasco*

In the early 1980s an ordinance like the one in *Carbone* would not only have been vulnerable to challenge under the Commerce Clause, but it would also have raised serious issues under the antitrust laws and their state-action exemption.[26] Indeed, the antitrust issues would have been pre-

[26] The state-action exemption originated in Parker v. Brown, 317 U.S. 341 (1943), where the Court rejected a grower's Sherman Act based challenge to a California marketing program. The

sent, even in a circumstance in which the municipality was located far from the state's borders.

The Supreme Court, after first narrowing the state-action exemption in *Community Communications Co. v. City of Boulder*[27] to increase the vulnerability of municipalities under the antitrust laws for monopolistic and market-restrictive legislation, then broadened the exemption in *Town of Hallie v. City of Eau Claire*,[28] effectively eliminating the antitrust laws as a constraint upon municipal action. In both expanding and later contracting municipal antitrust vulnerability, the Court largely avoided any economic analysis of the municipal behavior in question and engaged in only the most rudimentary political analysis.

Throughout its various reincarnations, the state-action antitrust exemption has always been justified primarily on the grounds of federalism. To be consistent with the federal structure of the United States, the Court opined that antitrust laws should be construed to permit the individual states extensive freedom to adopt their own internal economic policies. The legal rules which expressed this result and defined its limits, however, have always been couched in a purely doctrinal form. The important economic and political factors underlying the relationship of the federal free market policies to state and local regulation have never been adequately addressed. This is especially true in the case of local government regulation. The shifting content of the Court's state-action decisions reflects the Court's own uncertainties about how the free market policies of

---

Court ruled that because the prorate program "derived its authority and its efficacy from the legislative command of the state," it was not prohibited by the Sherman Act. *Id.* at 350. The ambiguities of the state-action exemption were later revealed in an immense number of cases in which the Court has struggled to find the scope of the Sherman Act's application to state and local legislation and other official acts. *See* FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992); City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991); Patrick v. Burget, 486 U.S. 94 (1988); 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987); Fisher v. City of Berkeley, 475 U.S. 260 (1986); Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985); Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985); Hoover v. Ronwin, 466 U.S. 558 (1984); Rice v. Norman Williams Co., 458 U.S. 654 (1982); Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96 (1978); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); Bates v. State Bar of Ariz., 433 U.S. 350 (1977); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Flood v. Kuhn, 407 U.S. 258 (1972); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951).

[27] 455 U.S. 40 (1982).

[28] 471 U.S. 34 (1985).

the federal antitrust laws should be reconciled with the deference to state and local government decisionmaking appropriate to a federal system.

In the plurality opinion in *City of Lafayette*[29] and later in the majority opinion in *Midcal*,[30] the Court adopted a two-part test to determine the applicability of the state-action exemption. In *Midcal* Justice Powell summarized the results of the prior case law and concluded: "[Prior] . . . decisions establish two standards for antitrust immunity under *Parker v. Brown*. First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself."[31] Substantial difficulties arose as these purported requirements were applied to municipalities. Speaking for a plurality in *Lafayette* and later for the majority in *Boulder*,[32] Justice Brennan distinguished between the states as such which were entitled to the state-action exemption under a federalism rationale and political subdivisions which were exempted only insofar as they were implementing a state policy. Thus, in the *Boulder* case, the city was unsuccessful in asserting a state-action justification for a municipal ordinance imposing a moratorium on cable television expansion because the State of Colorado had not clearly expressed a state policy to take cable television out of the free market and to subject it to regulation. The municipal regulatory policy therefore was not shown to fall within an overriding state policy. Indeed, the fact that Colorado allowed municipalities to follow whatever policy they wished on cable television—the free market, regulation, or government ownership—made it apparent to Justice Brennan that Colorado had no cable television policy at all. As a result, the Boulder ordinance failed the first of the two-part test.

In later cases, the Court broadened the state-action exemption to cover just about anything which municipalities decided upon. In *Town of Hallie v. City of Eau Claire*,[33] the Court abandoned the clear-articulation requirement as Justice Brennan had set it forth in *Boulder*. A coherent and consistent state-determined economic policy was no longer required. It was now sufficient for the state to confer permissive authority in the most

---

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

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

[31] *Id.* at 105 (citation omitted).

[32] Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982).

[33] 471 U.S. 34 (1985).

general terms upon a municipality to deal with a matter in the municipality's discretion. In *Eau Claire*, the State of Wisconsin had granted municipalities the authority to establish a sewage treatment plant. Because such a plant could not possibly serve everyone, decisions would have to be made about who could be served. This was the reasoning which Justice Powell used in his majority opinion to support the conclusion that the state had impliedly consented to Eau Claire's monopoly and its use of the monopoly power which flowed from that monopoly. Under this reasoning, not only is there no requirement of a consistent state economic policy, but there is no meaningful requirement of a "clearly expressed and fully articulated" economic policy of any kind. The first part of the two-part test has been reduced to a linguistic formalism.

Justice Powell buttressed his approach by relying on the broad discretionary delegation that the state had made to the municipality. The mere fact that the state had adverted to a problem (such as the provision of sewage treatment facilities) and decided to leave the decision as to how to deal with the matter to the municipalities was sufficient.[34] Although he recognized that municipalities might possess "purely parochial public interests" which might conflict with those of the state, Justice Powell somewhat inconsistently asserted that those local interests would be kept subordinated to whatever overarching goals (or lack of them) the state embraced as a result of the state's compliance with the first *Midcal* requirement of "clearly articulating" the governing state policy, a requirement that his opinion had just gutted.[35]

In the period between the *Boulder* and *Eau Claire* decisions, the lower courts had often (although not consistently) eliminated the *Midcal* requirement of a clear articulation of state economic policy by construing the requirement so leniently as to make it meaningless.[36] *Eau Claire* ef-

---

[34] *Id.* at 42-43.

[35] *Id.* at 47.

[36] *See, e.g.*, Tom Hudson & Assoc., Inc. v. City of Chula Vista, 746 F.2d 1370, 1373-74 (9th Cir. 1984), *cert. denied*, 472 U.S. 1028 (1985); Catalina Cablevision Assocs. v. City of Tucson, 745 F.2d 1266, 1269-70 (9th Cir. 1984); Hybud Equip. Corp. v. City of Akron, 742 F.2d 949, 960-62 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985); Scott v. City of Sioux City, 736 F.2d 1207, 1211-14 & n.4 (8th Cir. 1984), *cert. denied*, 471 U.S. 1003 (1985); Central Iowa Refuse Sys., Inc. v. Des Moines Metro. Solid Waste Agency, 715 F.2d 419, 423-28 (8th Cir. 1983), *cert. denied*, 471 U.S. 1003 (1985). *See* Daniel J. Gifford, *The Antitrust State-Action Doctrine After Fisher v. Berkeley*, 39 VAND. L. REV. 1257, 1272-75 (1986).

fectively ratified and endorsed that approach. The lower courts stretched the governing precedents because they could not abide their consequences. A strict application of the *Boulder* approach would have seriously constrained the power of local governments to confer monopoly or quasi-monopoly power upon private actors. Because local governments tend to make significant use of such powers (in land redevelopment projects, cable television franchising, waste disposal arrangements, taxi and other transportation-licensing arrangements, and elsewhere), the constraint was serious. Moreover, the lower courts were reluctant to employ the first *Midcal* standard of clear articulation to constrain traditional kinds of local government activity because they did not understand the purpose of that standard.

B. The Unarticulated Rationale of Midcal and Boulder

When the Court formally embraced "clear articulation" and "active supervision" as standards governing the application of the state-action exemption in *Midcal*, it failed to provide any economic or political justification for them. The Court merely asserted that the two standards had emerged from the Court's own prior decisions: they were, in effect, what precedent required.

In other decisions, the Court has made limited attempts to justify or explain those standards. In the particularly problematic case of local government regulation, the explanations have been terse indeed. In his *Lafayette* and *Boulder* opinions, Justice Brennan explained the state-action exemption in terms of federalism. Although Congress (in the Sherman Act) has adopted a national policy in favor of free competition, the policy bends to accommodate the economic policies of the states, whenever a state chooses to substitute regulation for the free market in a particular subject-matter area. Accordingly, the choice to take a particular sector out of the free market belongs to each of the states—and not to local governments acting alone—because under the United States Constitution it is the states which share governing power with the federal government. Local governments are merely political subdivisions of the state which created them.

Justice Brennan formulated the requirement that a state that chose to substitute regulation for the free market would have to say so explicitly. Otherwise there was a danger that unduly expansive antitrust exemptions would result. Exceptions to the antitrust laws are said to be generally

disfavored and to be narrowly construed.[37] As in many areas where the Court limits otherwise applicable policies, Brennan thought that federal antitrust policy ought to be constrained only where there was no danger of error: the clear-articulation requirement minimizes the prospect of misunderstanding.

Moreover, clear-articulation (or clear-statement) rules are a familiar judicial tool, which can have salutary effects in addition to the avoidance of ambiguity. Such a rule has often been employed when the Court is faced with a hard decision: no need to decide hard cases if they can be avoided. In the Cold War era, for example, the Court avoided deciding difficult questions about the constitutional validity of executive or congressional encroachments on traditional liberties unless those branches explicitly authorized those encroachments.[38] The Court would presume that both branches intended to respect tradition unless they acted explicitly to the contrary. Indeed, the requirement of an explicit statement there served as a substantive deterrent as well. Both the President and the Congress would hesitate before explicitly invading common understandings of procedural or substantive protections. More recently, the Court has used clear-statement rules to skew interpretation towards a wide range of policy values which it has come to believe are constitutionally preferred.[39] Viewed in this light, the *Midcal* requirement of a clear-articulation was designed to compel a state to avoid ambiguity in its economic policies. When it wished to opt out of the free market in favor of a regulatory approach, the state would be required to say so explicitly. This requirement would avoid judicial mistakes, and it would also heighten the visibility of that decision to the state's citizens.[40] This requirement of clear-articulation might, like the analogous requirements elsewhere, deter unwise policies by exposing them to the critical gaze of voters.

---

[37] *See, e.g.*, Cantor v. Detroit Edison Co., 428 U.S. 579, 596-97 (1976); Gordon v. New York Stock Exch., Inc., 422 U.S. 659, 682-83 (1975).

[38] *See, e.g.*, Greene v. McElroy, 360 U.S. 474, 507 (1959).

[39] *See* William N. Eskridge & Philip P. Frickey, *Quasi-Constitutional Law: Clear-Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1991).

[40] Professor Page has argued that the primary purpose of the clear-articulation requirement lies in heightening the visibility of legislation, thereby encouraging the electorate to acquire information about competing policies and to debate them. William H. Page, *Interest Groups, Antitrust, and State Regulation: Parker v. Brown in the Economic Theory of Legislation*, 1987 DUKE L.J. 618, 640-41.

In *Boulder*, Brennan reinforced the clear-articulation requirement by implying that the state economic policy had to be consistently applied throughout the state.[41] Only in that way would the economic policy truly be that of the state itself. Yet, in *Lafayette*, *Midcal*, and *Boulder*, the Court failed to explain the rationale underlying the clear-articulation requirement. And in *Boulder*, it failed to explain why the articulated economic policy had to be consistently applied throughout the state.

Underlying the clear-articulation requirement and the additional requirement that the articulated economic policy be consistently applicable throughout the state was Brennan's awareness of the power of private interest groups to influence government decisionmaking.[42] Indeed, much of the monopoly-granting legislation at the municipal level involves business ventures that are large enough to wield considerable power at the local level, but whose influence at a state level would be substantially reduced: waste treatment facilities, cable television franchises, and taxi medallions. Governing decisionmaking in these areas by consistent statewide

---

[41] 455 U.S. at 54-56. Justice Brennan riduculed the contention, based upon Boulder's home-rule charter, that the State of Colorado could be deemed to have a cable television policy under which Boulder could "pursue its course of regulating cable television competition, while another home rule city can choose to prescribe monopoly service, while still another can elect free-market competition." *Id.* at 56.

[42] These problems have not escaped the attention of antitrust scholars, a number of whom have addressed the public-choice issues underlying the antitrust state-action exemption in the literature. Despite their efforts, the very real problem of how to reconcile federal free market policies of the antitrust laws with federalism concerns remains unsolved. Professor John Shepard Wiley, Jr. has proposed a capture theory for assessing state and local legislation. Under his approach, a court would undertake a four-part analysis of state or local regulation as follows: the court would determine (1) whether the regulation restrains market rivalry; (2) whether the regulation was protected by a federal antitrust exemption; (3) whether the regulation responds to a substantial market inefficiency; (4) whether the regulation originated from the decisive political efforts of producers who stand to profit from its competitive restraint. Affirmative answers to (1) and (4) and negative answers to (2) and (3) would require the invalidation of the regulation; otherwise it would be upheld. John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 743 (1986). Critics have rejected his proposal as unworkable. *See* Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L.J. 486, 508-18 (1987); Gifford, *supra* note 36, at 1299-1304; Page, *supra* note 40, at 645-60; Matthew L. Spitzer, *Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory*, 61 S. CAL. L. REV. 1293, 1310-18 (1988). Professor Page has sought to employ the clear-articulation requirement as a means of furthering local democracy. Page, *supra* note 40. *See also* William H. Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum*, 61 B.U. L. REV. 1099 (1981). Page's hopes, however, have been undermined by the Court's retreat from its *Boulder* decision. This author proposed federal legislation as a means of reconciling free market policies with respect for local self government. Gifford, *supra* note 36, at 1294-99.

standards would help to offset (but not necessarily control) the power of these ventures to influence government decisionmaking.

Justice Brennan's opinion in *Boulder* was a set-up for failure. He understood the need for standards to resolve the clash of the free-market policies of the Sherman Act with local regulation or municipally established monopolies. The extension of the clear-articulation requirement into a requirement for a coherent state wide economic policy shows that Brennan understood the dynamics of private interest pressures on government at the local level. Yet his opinion for the Court imposed stringent requirements on local governments without adequately explaining or justifying them. It is as if Justice Brennan assumed that the rationale for these requirements was self-evident.

C. *The Failure of the Boulder Approach to the State-Action Antitrust Exemption*

The resistance of many lower courts to *Boulder* is explainable by the fact that Brennan's approach would restructure the relationship between local governments and the states. Grants of local monopoly would, under a tight reading of *Boulder*, have to be part of a comprehensive statewide economic policy. Indeed, Brennan's stringent clear-articulation policy appeared to be a federalization of Dillon's rule, a canon once widely employed by courts construing municipal charters, but which has gradually eroded away with the growth of the "home rule" movement.[43]

Dillon's rule, as a canon of construction, is premised upon the fact that a municipality possesses only those powers which the state confers upon it. Dillon's rule states that in construing municipal powers, a court resolves ambiguities against the possession of an asserted power. Commentators have supplied a rationale for Dillon's rule: that probabilities for cor-

---

[43] Dillon's rule is a canon of construction under which courts construe powers conferred upon municipalities by states. Dillon's rule requires that powers be expressly conferred, and raises a presumption against the power when the legislation purportedly conferring the power is ambiguous. Dillon's rule has been widely criticized as hostile to local self-government and has been effectively abolished in the many jurisdictions that have conferred home rule upon municipalities. *See* Gary T. Schwartz, *Reviewing and Revising Dillon's Rule*, 67 CHI.-KENT L. REV. 1025, 1025-26 (1991); *see also* Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for Courts*, 48 MINN. L. REV. 643, 644-52 (1964); Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. REV. 671, 681-83 & n.57 (1973).

ruption at the municipal level are often significant, and Dillon's rule is a method for preserving higher level supervision of municipal activities.[44]

When Justice Brennan ruled for the Court in *Boulder* that the city could not validly impose a cable television moratorium because the state had not established a nonfree-market policy for cable television, he rejected the contention that the city could act, within its boundaries, as the state because Colorado's constitution conferred "home rule" power on cities.[45] Thus, it was precisely in a case involving "home rule" that the Court strengthened the clear-articulation requirement by mandating that the articulated policy be applied consistently throughout the state.

Confronted with the prospect of enforcing such a major change in state/municipal relations and failing to understand the reasoning underlying the *Boulder* requirement, the lower courts refused to apply the requirement. The courts carefully couched their opinions in language which paid lip service to *Boulder* as a governing precedent, but which avoided its ramifications.[46] Indeed, many commentators saw the *Boulder* requirement as unwarranted federal involvement in intra-state governmental matters.[47] Only a few saw the potentialities of the *Boulder* approach for liberating the electorate from the distortions imposed upon their municipal government by powerful special interest lobbying.

Congress was also concerned about the ramifications of the *Boulder* decision. The primary congressional concern was avoiding the potential treble damage liability that might be visited upon local governments rather than recognizing any right of local governments to confer private monopolies at public expense. Two years after that decision, Congress enacted the Local Government Antitrust Act of 1984,[48] abolishing money-damage liability under the antitrust laws for municipalities, their officials, and private persons acting under the direction of local governments and their officials. Resistance to more extensive change prevented Congress

---

[44] *See* Clayton P. Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law?*, 67 CHI.-KENT L. REV. 959, 983-85, 990, 997-98 (1991).

[45] 455 U.S. at 54-56.

[46] *See, e.g.*, Gifford, *supra* note 36, at 1272-75.

[47] *See, e.g.*, Garland, *supra* note 42.

[48] 15 U.S.C. §§ 34-36 (1988).

[49] *See* H.R. REP. No. 965, 98th Cong., 2d Sess 2, 18-19 (1984), *reprinted in* 5 U.S.C.C.A.N. 4602, 4619-20 (1984).

from altering the underlying substantive antitrust standards.[49] The case law applied, as before, in suits for injunctive relief.

In *Eau Claire*, the Court caught up with the hostile reaction accorded to its *Boulder* decision by the lower courts and the Congress. In *Eau Claire*, the Court not only reinterpreted the first *Midcal* requirement of clear-articulation so broadly as to render it effectively meaningless,[50] the Court also scrapped the second *Midcal* requirement of state supervision as it applied to municipalities.[51] The requirement of state supervision, the Court explained, was to ensure that nonfree-market policies are pursued for public purposes and not to enrich private actors. When regulation is administered by private actors, there are incentives for these actors to place their own economic interests ahead of the public. When a municipality establishes or administers a regulatory scheme, this danger is absent, because (according to the Court) the municipality's interests (and hence its actions) coincide with the public interest (locally determined). Any divergence between the "purely parochial public interests" and "more overriding state goals" is precluded by the state authorization under which the municipality is acting.

The cases have thus created a body of doctrine which rests upon shifting and questionable rationales: The clear-articulation requirement has lost the meaning that Justice Brennan originally sought to bestow upon it and now effectively has no meaning other than that the restraint in question has been authorized—however obscurely—by state law. (Even the authorization has been redefined expansively to embrace apparent authorizations, whether or not valid under state law.[52]) Municipalities are exempt from the supervision requirement on the contrary-to-fact premise that municipal legislation or administration is never or rarely captured by

---

[50] The Court's transformation of the clear-articulation requirement into a requirement of authorization effecively abolishes the first *Midcal* test, because a policy which was not authorized would be a legal nullity in any event. The muting of the first *Midcal* test in *Eau Claire* may be related to the Court's decision in Gregory v. Ashcroft, 501 U.S. 452 (1991), employing a clear-statement rationale to protect states against intrusive congressional intervention under the commerce power. The uncertainty as to where federalism concerns should presumptively control and where national free market policies should presumptively override them underlay both the *Gregory v. Ashcroft* and the *Midcal* uses of the clear-statement rule. The waffling by the Court on these clear-statement rules echoes the Court's earlier inconsistent approaches to federal-state relations manifested in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); and National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[51] 471 U.S. at 46-47.

[52] City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991).

private actors who put their own economic good ahead of the electorate. In short, the antitrust exemption is doctrinal in the worst sense of the word and has little, if any, supportable economic or political rationale.

D. Scholarly Reaction to the Boulder Experiment

The *Boulder/Eau Claire* scenario can be described in the insightful terms of Professors William Eskridge and Philip Frickey as a return to a stable institutional equilibrium (between the Court and the other governmental institutions which interact with it) after a temporary displacement.[53] *Boulder* upset the pre-existing institutional equilibrium because it raised the specter of massive treble damage liability being imposed upon local governments. When Congress reacted to eliminate that possibility by enacting the Local Government Antitrust Act of 1984, the major displacing factor had been removed. Indeed, Congress refused to mandate a return to the pre-existing substantive law.[54] The Court, however, decided nonetheless to abandon its initiative entirely in its 1985 *Eau Claire* decision. The prior equilibrium was fully recaptured in *Eau Claire* (albeit at a price of emptying the clear-articulation standard of content). Yet institutional equilibrium, at least for the short run, may well have been reached the previous year with the Local Government Act.

Perhaps the best explanation of why the Court retreated so blatantly from its *Boulder* initiative is that it concluded that *Boulder* was untenable both institutionally (as the Court relates to other governmental institutions) and intellectually. First, the hostile reactions of politicians and the patent reluctance of the lower courts to follow *Boulder*'s dictates indicated to the Court that it had intruded too far into local politics. Second, the Court may have decided that there was no logical stopping place under the *Boulder* approach which would prevent it from subjecting most local legislation to antitrust scrutiny. Had the Court not abandoned the *Boulder* approach entirely as it did in *Eau Claire*, it might have engendered a new disequilibrium when it found itself forced by the logic of its own decisional law to subject routine municipal legislation to antitrust review. Although the 1984 antitrust legislation probably resolved the institutional

---

[53] *See* William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term, Forward: Law as Equilibrium*, 108 HARV. L. REV. 26, 32 (1994).

[54] *See supra* note 49 and accompanying text.

disequilibrium for the short term, it did not entirely cure the long-term potential for disequilibrium and the intellectual problem remained a critical one.

Two strains of critical reaction to the *Boulder* experiment are identifiable in the academic literature. One strain, generally sympathetic to the *Boulder* decision, argues that the federal courts should employ antitrust law to actively scrutinize state and local government legislation for their efficiency effects. These scholars correctly observe that legislation is frequently the result of interest group influence.[55] As a result, much legislation takes economic benefits away from consumers or other diffuse and unorganized groups and confers those benefits upon producers or other organized groups. In a widely discussed article written after the Court's retreat in *Eau Claire*, Professor John Shepard Wiley contended that federal courts should use antitrust law to invalidate state legislation found to be inefficient and the result of producer-interest lobbying.[56] Professor Matthew Spitzer, writing even later, urged that federal courts should review state and local legislation on either of two standards: they should strike legislation that is (1) inefficient or (2) that transfers wealth from consumers to producers.[57] During the *Boulder* period, Professor John Cirace argued that antitrust law should employ an efficiency criterion to assess the validity of state and local legislation.[58]

The other strain argues that the federal courts had no legitimate basis for the *Boulder* experiment—asserting that federalism concerns amply justify the Court's retreat from an ill-advised venture into federal antitrust imperialism. Proponents of this view, of whom Merrick Garland[59] may be the most well known, argue that there is no sound basis for differentiating municipalities from the states for federal antitrust law purposes,[60] as the Court sought to do in *Lafayette* and *Boulder*. Garland rejects the use of antitrust law to subject state and local laws to scrutiny under public-

---

[55] The theory behind interest group influence on legislation is discussed in DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 23 (1991). *See also* discussion, *supra* text accompanying notes 42-47.

[56] Wiley, *supra* note 42, at 743.

[57] Spitzer, *supra* note 42, at 1318-26.

[58] John Cirace, *An Economic Analysis of the "State-Municipal Action" Antitrust Cases*, 61 TEX. L. REV. 481 (1982).

[59] Garland, *supra* note 42.

[60] Garland, *supra* note 42, at 503.

choice or efficiency standards. Instead, Garland reads the Court's *Eau Claire* line of decisions as a straightforward attempt to draw a line of political accommodation or compromise between the competing claims of state and local governments to control their own policymaking and the claims of the federal government to forbid private restraints under the Sherman Act.

Subjecting state and local legislation to review for interest group "capture" or efficiency effects would, in Garland's view, be tantamount to reinstituting *Lochner*-like review[61] under the antitrust laws and would effectively destroy "the States' power to engage in economic regulation."[62] That power will be optimally preserved, Garland argues, under the antidelegation standard that was built into *Midcal* and effectively modified in *Eau Claire*. Although criticizing the conception of a "hybrid restraint" set forth by Justice Marshall in his *Fisher v. Berkeley* opinion,[63] Garland himself essentially adopts that concept as identifying the point where state and local law lose their immunity from federal antitrust scrutiny. Under this view, states and local governments should be free to pursue whatever economic regulatory strategy they choose, except to delegate to private parties the power to restrain the market.[64] It is this delegation of governmental powers to private parties, Garland asserts, which is "precisely the issue at the heart of the state action immunity cases."[65] The point of the *Midcal* tests is to prevent such delegation.

I agree with Garland that state and local legislation ought not to be exposed as a matter of course to review by the federal courts for their efficiency effects. On the other hand, state and particularly local laws[66]

---

[61] Under the approach of Lochner v. New York, 198 U.S. 45 (1905), the validity of state legislation under the Due Process Clause was evaluated substantively as to whether it unduly interfered with freedom of contract and other such substantive "rights." In making this argument, Garland is following Rehnquist's *Boulder* dissent. Community Communications Co. v. City of Boulder, 455 U.S. 40, 67 (1982) (Rehnquist, J., dissenting). Rehnquist's concern over the *Boulder* decision was at least partially attributable to the irrelevance of nonmarket justifications under contemporary antitrust analysis. *Id.* at 66.

[62] Garland, *supra* note 42, at 500. Here Garland is quoting from Exxon Corp. v. Governor of Md., 437 U.S. 117, 133 (1978). Similar language appears in Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982), and New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 110-11 (1978).

[63] Garland, *supra* note 42, at 507.

[64] Garland, *supra* note 42, at 506.

[65] Garland, *supra* note 42, at 506.

[66] *See* discussion of the special amenability of local law to manipulation by interest groups *supra* text accompanying notes 42-47.

are probably the source of most of the anticompetitive restraints remaining in the American economy. Ideally, the Sherman Act would be brought to bear on the worst of these restraints but would leave routine legislative matters to state and local governments. Is there a way, short of the total deference approach defended by Garland, to resolve the intellectual dilemma underlying the Court's retreat from *Boulder*? I believe that this question can be answered affirmatively, and that the core of the answer lies in importing into antitrust analysis approaches which the Court has worked out in its dormant commerce clause jurisprudence.

V. THE CONSTRUCTION OF THE COMMERCE CLAUSE AND THE SHERMAN ACT IN TANDEM

A. *Substantive Coordination*

1. *Impact on Dormant Commerce Clause Interpretation*

I suggest above that the dormant commerce clause and the Sherman Act be interpreted from a similar perspective. Before taking up the difficulties with this suggestion, let us first consider what it would mean substantively. First, the accepted construction of the dormant commerce clause proceeds from an antiprotectionist perspective. The focus, thus, is whether state or local legislation disadvantages out-of-state business firms vis-à-vis in-state firms. Although not emphasized in the dormant commerce clause cases, an additional consideration is that legislation disadvantaging out-of-state suppliers also disadvantages consumers who are denied access to those out-of-state suppliers. Legislation imposing such disadvantages does so by imposing market restraints similar to the market restraints condemned by the Sherman Act.

The Sherman Act is widely recognized as a consumer welfare statute.[67] The cases construing the Act often refer to a restraint's impact on consumers. This concern with consumers, however, is the other facet of the concern of the dormant commerce clause with the protection of out-of-state suppliers. Consumer welfare is impaired when social resources are

---

[67] *See* National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 107 (1984); Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979). *See also* ROBERT H. BORK, THE ANTITRUST PARADOX 89 (1978); HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW § 2.3, at 48-49 (1985).

inefficiently allocated.[68] Indeed, within their respective spheres, both the dormant commerce clause and the Sherman Act condemn restraints which interfere with the efficient allocation of social resources. The policies behind these provisions would become operationally more coherent were they both to condemn municipally imposed monopolies.[69]

Judicial reference to the Sherman Act in construing the Commerce Clause would incorporate the former's concern with consumer welfare and efficient use and allocation of resources. These interests are presently protected under the dormant commerce clause; however, they are not emphasized. Recognizing these consumer and efficiency concerns would surely be consistent with the dormant commerce clause objective of furthering a national market. In a national market, consumer welfare and efficiency are furthered when trade is not impeded by barriers erected at state borders. There would be no change in the substance of the dormant commerce clause case law, but there would be modest change in the supporting rationale, which would be more inclusive. The result, under the commerce clause, would be educative and pedagogical: it would foster a broadened awareness by both the Court and its critics that the economic barriers to trade targeted by the dormant commerce clause and the Sherman Act are similar and produce similar economic effects.

2. *Impact on Sherman Act Interpretation*

Although not changing the substance of the dormant commerce clause case law, a common interpretative approach to the two provisions would have significant repercussions upon the current case law under the Sherman Act as it treats municipally erected trade barriers. Under the current construction of the Sherman Act's state-action exemption, the creation of monopoly franchises by municipalities is generally upheld under a rationale of deference to federalism. If, in construing the antitrust state-action exemption as applied to municipalities, the Supreme Court were to draw from the free-trade jurisprudence that it has developed under the Commerce Clause, it would be impelled to fashion a more coherent approach

---

[68] *See* BORK, *supra* note 67, at 107-15. Under the analysis put forth by Robert Bork, consumer welfare is measured by the sum of consumer surplus plus producer surplus. It is thus equivalent to efficiency as a criterion for measuring economic performance. This understanding of the phrase appears to be accepted by the courts. *See, e.g.*, *National Collegiate Athletic Ass'n*, 468 U.S. at 107.

[69] *See* discussion *infra* text accompanying notes 80-85.

towards municipally created monopolies. In invalidating the local monopoly in *Carbone*, despite the existence of disadvantaged local suppliers, the Court appears to have added weight to the concern which it accords to free trade. At least the dissenters and some commentators have so thought.[70] Carrying over this heightened concern with free trade into the administration of the Sherman Act would help reset the balance towards more competition and less deference towards governmental restraints in the state-action area. Indeed, if the United States is to be a "common market" as the majority in *Carbone* suggested, local governments should not be able to unilaterally take themselves out of that common market, erect trade barriers, and confer monopoly franchises upon private parties to the detriment of outside suppliers.[71]

B. The Dormant Commerce Clause Jurisprudence Imported into the Sherman Act

1. The Conundrum

The analytical conundrum which undid the Court's *Boulder* experiment was how to subject the worst of the local government restraints to federal antitrust review without bringing all municipal legislation under federal antitrust scrutiny.[72] Even under the most stringent version of

---

[70] *See, e.g.*, Eskridge & Frickey, *supra* note 53, at 51.

[71] In Part VI, the case is developed for expanding the concern for unrepresented outsiders to embrace locals who are exposed to monopoly exploitation by their elected representatives when the monopoly is employed as a financing mechanism, thus obscuring the costs and benefits of legislative action from the electorate.

[72] In *Midcal*, the Court dealt with part of the problem involving the antitrust/federalism interface. The *Midcal* standards are effective, as Garland argues, to prevent both states and local governments from delegating the power to impose market restraints to private parties. The other part of the antitrust/federalism problem, as the Court initially saw it, lay in the special vulnerability of local governments to manipulation by powerful private interests. The Court responded to this part of the problem in *Lafayette* and *Boulder*. In these cases, the Court, under Justice Brennan's leadership, experimented with applying analogous antidelegation standards against local governments. As shown below, the *Lafayette/Boulder* approach would have strengthened local democracy by providing a Dillon's rule kind of check against such manipulation, a check which has an analogue in the dormant commerce clause case law. The *Lafayette/Boulder* approach floundered, however, because those cases failed to provide criteria for limiting federal antitrust intervention in local government affairs to major market dislocations. It was the potential for bringing routine municipal legislation under antitrust review which ultimately was responsible for the undoing of the *Lafayette/Boulder* approach. What is needed is a middle ground: a role for the courts in protecting the public from oppression by monopolies while maximizing effective local democracy.

Boulder, the Sherman Act would have invalidated on its face only a limited class of local regulation.[73] Potentially, however, *Boulder* would have subjected a vast array of local legislation to antitrust review under the rule of reason. For reasons developed in the next section, any acceptable reshaping of the antitrust state-action exemption which would extend federal antitrust review of local legislation must be limited to the most egregious market restraints: primarily those which create or impose monopolies or price controls.

If the state-action exemption were to be reformulated to permit the courts to condemn municipally imposed monopolies, how could they be prevented from subjecting all municipal regulations—such as zoning laws, for example—to review for their market consequences? The problem is severe because existing antitrust law does not recognize nonmarket justifications for trade restraints,[74] so purported justifications for trade restraining legislation based on health or welfare considerations would not suffice. The split in the academic literature dealing with the state-action exemption reflects this problem: one group of scholars would like to see extensive federal antitrust review of local restraints for their efficiency effects[75] while a different group of scholars would like the federal courts to defer entirely to the decisions of local government to restrain the market.[76]

2. *The Dormant Commerce Clause Approach as a Possible Solution*

If the Court were to draw from its Commerce Clause jurisprudence to reform the Sherman Act's state-action doctrine, it would have at its disposal a tool for distinguishing major barriers to trade (such as import prohibitions, quotas and monopolies) from incidental barriers arising from routine regulation. This is the distinction which the Court makes under the dormant commerce clause. Legislation which targets foreign products or services for discriminatory taxes or which restricts their importation is presumptively "protectionist" and invalid. In contrast, legislation which is

---

[73] The legislation which would be subject to facial invalidation would correspond roughly to the class of private restraints which are per se illegal. *See* Rice v. Norman Williams Co., 458 U.S. 654, 659-60 n.5 (1982).

[74] *See* National Soc'y of Professional Eng'rs. v. United States, 435 U.S. 679, 692 (1978).

[75] *See* Cirace, *supra* note 58; Spitzer, *supra* note 42, at 1318-26 (recommending outcome tests which are generally reducible to efficiency criterion); Wiley, Jr., *supra* note 42.

[76] *See* Garland, *supra* note 42.

designed to deal with a domestic problem will be upheld, even if it imposes a burden upon interstate trade, so long as the Court deems that burden not to be excessive in relation to the domestic benefits. This kind of distinction is familiar to international trade lawyers.[77] Its whole point is to protect free trade while avoiding unnecessary interference with routine governmental functions. An analogous distinction is exactly what is required to reform the state-action doctrine: one which can identify municipally created monopolies for antitrust scrutiny without also invalidating conventional municipal legislation.

While *Carbone* illustrates the way the dormant commerce clause deals with a "protectionist" restraint, *Minnesota v. Clover Leaf Creamery Co.*[78] illustrates the way the Commerce Clause cases approach legislation ostensibly targeted at a domestic problem. In the latter case, the Court upheld a Minnesota law prohibiting the sale of milk in nonreturnable rigid or semi-rigid containers. The law was designed to ease the problem of solid waste disposal, which had been exacerbated by widespread use of nonreturnable milk containers. Although the Court acknowledged that the Minnesota pulpwood industry would benefit from the law (as a result of the increased use of paper cartons), while a corresponding burden fell on the out-of-state producers of plastic resin (the raw material from which the prohibited containers were produced), the Minnesota law was not a disguised import prohibition. It thus merited evaluation under the Court's balancing test. Performing that evaluation, the Court ruled that the burden on out-of-state producers was outweighed by the in-state benefits. In so ruling, the Court gave credence to the environmental benefits of the legislation and concluded that any discriminatory effect upon out-of-state producers was attenuated.

The dormant commerce clause cases thus carve out for condemnation under a "virtually per se rule of invalidity" legislation which blocks interstate trade in the most egregious ways, but upholds under a more tolerant "balancing test" most legislation which is overtly designed to serve local needs and which does not impose excessive burdens on that trade. A standard of this kind obviously calls for judicial judgment, weighing the domestic benefits of the legislation against the burdens it imposes upon

---

[77] *See* Farber & Hudec, *supra* note 14, at 1431-40.

[78] 449 U.S. 456 (1981).

trade. Justice Scalia has repeatedly objected to the performance of this quasi-political judgmental function by the courts.[79] Yet the dormant commerce clause jurisprudence does sort out the most severe restraints for condemnation while upholding the remainder. The distinctions which it draws (like many legal distinctions) are relatively clear at the core, but admittedly fuzzy at the boundaries. In applying the balancing test, the courts may be pushing the boundaries of their competence. Overall, however, the dormant commerce clause jurisprudence succeeds because it provides a workable distinction for administration of the free-trade mandates of that clause, and minimizes interference with state and local government. As pointed out above, this kind of distinction is precisely what is needed for the Sherman Act's state-action exemption: a test for sorting out the most egregious legislatively imposed restraints for antitrust scrutiny.

As transformed into Sherman Act jurisprudence, the dormant commerce clause approach would identify for antitrust scrutiny monopoly franchises and price controls. These categories of restraints encompass a significant amount of the trade-restricting legislation now enacted by local governments. Ordinary zoning would not come under antitrust scrutiny because it has a plausible social objective, only incidentally raises costs for producers and traders, and rarely creates monopolies. Even in cases which are superficially more troubling from a purely antitrust perspective, local legislation would generally be upheld in situations where it furthered a local governmental purpose and imposed only incidental restraints on local trade.

C. A Monopoly Focus

1. Government and the Principle of Efficiency

Reference to the dormant commerce clause jurisprudence helps to clarify the reasons why the Sherman Act should be restricted in its application to state and local legislation. The reasons why the scope of the dormant commerce clause condemns only the most severe (or "protectionist") state and local legislation and the reasons why the Sherman Act should be similarly so limited have to do not only with the relation between the

---

[79] Itel Containers Int'l Corp. v. Huddleston, 113 S. Ct. 1095, 1108 (1993) (Scalia, J., concurring); Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring); CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 95 (1987) (Scalia, J., concurring).

national and state governments, as is universally acknowledged, but also with the relation between government as an institution and the principle of efficiency. This latter relationship is complex, but its main outlines are straightforward.

A widely recognized governmental function lies in market correction. Markets sometimes do not allocate resources in a socially optimum way. They fail to effect an optimum allocation because some social costs (for example, costs of worker injuries or environmental damage) may not be internalized by business enterprises, with the result that these real social costs are not reflected in pricing decisions. Informational disparities may also skew the market's result. In these cases, government must act through legislation to "correct" the market result, that is, to bring about a result which incorporates social costs or other values that are neglected by the market. Finally, the provision of public goods—those goods and services which the market alone either does not provide or does not provide in the optimum quantity because of free rider problems—is universally recognized as a function of government.

Governments, however, differ in their views about when particular markets fail to function adequately or when free-rider problems arise to levels requiring correction. They differ in their judgments about when social costs are incurred and when they should be internalized. They also differ in their understanding of when government action is needed to provide public goods. The resolution of these issues in each of the various jurisdictions takes place through the political process. Political resolution is particularly apt because these matters are complex, and particular problems are subject to a wide range of rational solutions.

State and local legislation that is intended to remedy market failure, therefore, ought to be respected by the courts as the performance of an essential governmental function. Similarly, legislation that addresses primarily health, safety, and welfare issues ought to be respected by the courts, even when that legislation produces incidental restraints on trade (as, for example, zoning legislation already discussed). In short, most state and local legislation ought not to be vulnerable to antitrust challenge. Accordingly, any reassertion of federal antitrust authority in this area ought to be confined within narrow limits. As set out below, my proposal for extending the scope of federal antitrust review conforms to these concerns.

trade. Justice Scalia has repeatedly objected to the performance of this quasi-political judgmental function by the courts.[79] Yet the dormant commerce clause jurisprudence does sort out the most severe restraints for condemnation while upholding the remainder. The distinctions which it draws (like many legal distinctions) are relatively clear at the core, but admittedly fuzzy at the boundaries. In applying the balancing test, the courts may be pushing the boundaries of their competence. Overall, however, the dormant commerce clause jurisprudence succeeds because it provides a workable distinction for administration of the free-trade mandates of that clause, and minimizes interference with state and local government. As pointed out above, this kind of distinction is precisely what is needed for the Sherman Act's state-action exemption: a test for sorting out the most egregious legislatively imposed restraints for antitrust scrutiny.

As transformed into Sherman Act jurisprudence, the dormant commerce clause approach would identify for antitrust scrutiny monopoly franchises and price controls. These categories of restraints encompass a significant amount of the trade-restricting legislation now enacted by local governments. Ordinary zoning would not come under antitrust scrutiny because it has a plausible social objective, only incidentally raises costs for producers and traders, and rarely creates monopolies. Even in cases which are superficially more troubling from a purely antitrust perspective, local legislation would generally be upheld in situations where it furthered a local governmental purpose and imposed only incidental restraints on local trade.

C. A Monopoly Focus

1. Government and the Principle of Efficiency

Reference to the dormant commerce clause jurisprudence helps to clarify the reasons why the Sherman Act should be restricted in its application to state and local legislation. The reasons why the scope of the dormant commerce clause condemns only the most severe (or "protectionist") state and local legislation and the reasons why the Sherman Act should be similarly so limited have to do not only with the relation between the

---

[79] Itel Containers Int'l Corp. v. Huddleston, 113 S. Ct. 1095, 1108 (1993) (Scalia, J., concurring); Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring); CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 95 (1987) (Scalia, J., concurring).

national and state governments, as is universally acknowledged, but also with the relation between government as an institution and the principle of efficiency. This latter relationship is complex, but its main outlines are straightforward.

A widely recognized governmental function lies in market correction. Markets sometimes do not allocate resources in a socially optimum way. They fail to effect an optimum allocation because some social costs (for example, costs of worker injuries or environmental damage) may not be internalized by business enterprises, with the result that these real social costs are not reflected in pricing decisions. Informational disparities may also skew the market's result. In these cases, government must act through legislation to "correct" the market result, that is, to bring about a result which incorporates social costs or other values that are neglected by the market. Finally, the provision of public goods—those goods and services which the market alone either does not provide or does not provide in the optimum quantity because of free rider problems—is universally recognized as a function of government.

Governments, however, differ in their views about when particular markets fail to function adequately or when free-rider problems arise to levels requiring correction. They differ in their judgments about when social costs are incurred and when they should be internalized. They also differ in their understanding of when government action is needed to provide public goods. The resolution of these issues in each of the various jurisdictions takes place through the political process. Political resolution is particularly apt because these matters are complex, and particular problems are subject to a wide range of rational solutions.

State and local legislation that is intended to remedy market failure, therefore, ought to be respected by the courts as the performance of an essential governmental function. Similarly, legislation that addresses primarily health, safety, and welfare issues ought to be respected by the courts, even when that legislation produces incidental restraints on trade (as, for example, zoning legislation already discussed). In short, most state and local legislation ought not to be vulnerable to antitrust challenge. Accordingly, any reassertion of federal antitrust authority in this area ought to be confined within narrow limits. As set out below, my proposal for extending the scope of federal antitrust review conforms to these concerns.

2. *A Small Scope for Antitrust Challenge*

Under my recommendations, federal antitrust review would extend to only a small part of nonfederal economic regulation. Because I urge a return to a modified *Boulder/Midcal* version of the state-action exemption, most state legislation would be exempt from judicial challenge (under the *Midcal* tests) as would most local legislation enacted under a state wide mandate (under *Boulder*). Therefore, the scope for the federal courts to subject economic regulation to antitrust scrutiny would be exceedingly small. It would extend to local legislation not protected by an overarching state mandate. Additionally, within that sphere, federal antitrust review would be confined by constraining analogies drawn from the dormant commerce clause jurisprudence.

Under the recommended approach, the operative policies pursued under the dormant commerce clause and the Sherman Act would coalesce as they impact upon municipal legislation. Municipal monopoly grants would be suspect under both provisions. The public would be more likely to obtain the benefits of free trade across all jurisdictional boundaries. The free market would presumptively allocate goods and services, but government (including local government) would remain free to "correct" market malfunctions in the traditional ways that local governments have always done. And government would remain free to address safety, health, and other traditional governmental concerns through legislation, even though incidental trade restraints resulted from that legislation.

As developed more fully below, the distinction made under the recommended approach is between trade restraints which incidentally result from legislation addressing a safety or health concern (such as zoning) and legislation which employs a market restraint as a means of achieving a legislative objective (as, for example, in *Carbone*, where the municipality established a monopoly as a financing mechanism).

3. *The Bite of the Proposal: What Kinds of Restraints Would Be Vulnerable to Antitrust Challenge*

Under the proposal, municipalities (unless they were acting pursuant to a statewide economic regulatory policy) would no longer possess unfettered freedom to confer monopoly franchises or to impose price controls. In particular, municipalities would no longer be able to employ monopoly

grants as methods of financing inefficient projects. Here the abuse of monopoly by politicians is at its zenith because monopoly does not result from efficiency or because of an historical accident,[80] but is deliberately imposed solely for revenue-generating purposes. Indeed, the grant of monopoly works like a tax and is designed to produce the results which would be produced by an excise tax. The municipality, however, by using the monopoly franchise technique, avoids limits on its taxing powers imposed by state law. The justification for the monopoly thus is reduced to the need of the local politicians to camouflage their efforts to raise money. Surely if any government-imposed trade restraint should be subject to antitrust scrutiny, this one should be.

There are a number of related, legislatively imposed restraints which effectively finance needed services through monopoly charges for services which the market demands. Thus, for example, monopoly franchises for airport, taxi, and ambulance services have been justified under a so-called "public-utility" rationale.[81] Operators are authorized to charge monopoly rates for taxi service to the airport during busy hours in order to pay for uneconomic taxi service during the (night time) slack hours. Similarly, ambulance operators are permitted to impose monopoly level charges upon paying customers in order to generate the revenues required to subsidize emergency service to the poor.[82] These approaches effectively tax one group of customers to subsidize another group of customers and hide the imposition of the tax from the public. Richard Posner calls this phenomenon "taxation by regulation," because monopoly or quasi-monopoly revenues are employed as a means of financing unremunerative services.[83] Better that the service which the market will support operate competitively and that the government subsidize the service which the market will not support. In this manner, the public subsidy will be made more visible and the role of the government in providing public goods will be made transparent. Except in the few metropolitan areas that extend across state lines, these latter restraints occur entirely within the political boundaries

---

[80] *See* United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (recognizing that monopoly power resulting from "growth or development as a consequence of a superior product, business acumen, or historic accident" is not an offense under the Sherman Act).

[81] *See* Gold Cross Ambulance & Transfer v. City of Kansas City, 705 F.2d 1005, 1008-09 (8th Cir. 1983), *cert. denied*, 471 U.S. 1003 (1985).

[82] *Id.*

[83] Richard A. Posner, *Taxation by Regulation*, 2 BELL J. ECON. 22, 29, 32 (1971).

stituted for such cases.[85] Hovenkamp and Mackerron thus take a "protectionist" approach to the application of the state-action exemption, anticipating my present argument that the construction of the Sherman Act should draw from the dormant commerce clause case law. Under a restored *Boulder* approach (and the revived state-supervision requirement implied by *Boulder*), the state role in approving monopolies created by local governments in markets involving overlapping boundaries of political subdivisions becomes analogous to the congressional role where Congress decides to legislate over the markets that cross state borders.

Under a revived *Boulder* approach to the state-action exemption, monopoly franchises conferred directly by state governments would be lawful under the antitrust laws, but vulnerable under the commerce clause when they impacted cross-border markets. This vulnerability, however, would reflect a concern similar to that addressed in the Hovenkamp/Mackerron proposal of reinstituting the state-supervision requirement when municipalities are disposed to impose burdens on outsiders for the benefit of locals. Moreover, the Commerce Clause/Sherman Act policy divergence would be reduced to a minimum and, as pointed out in this Article, would be more justifiable than the widespread divergence presently tolerated.

E. Objections to a Common Interpretative Approach

Allowing judicial constructions of the dormant commerce clause to influence the prevailing interpretation of the Sherman Act is desirable on its face. The Commerce Clause is the constitutional foundation for the Sherman Act; the national free-trade policy embodied in the constitutional provision creates part of the background against which is set the national free-market policy of the Sherman Act. The other question—whether the judicial construction of the dormant commerce clause should be influenced by judicial construction of the Sherman Act—also can be answered in the affirmative. Both provisions are cast in broad and imprecise language, intentionally granting wide interpretative scope to courts to develop their content experientially.[86] Given the similar policies of the two provisions, experience under the Sherman Act can provide grounds for the construc-

---

[85] Herbert Hovenkamp & John A. Mackerron, *Municipal Regulation and Federal Antitrust Policy*, 32 UCLA L. REV. 719, 776 (1985).

[86] *See* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM, 278, 288 (1985). *See also* Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933).

tion of both provisions. Second, the influence of statutes upon constitutional interpretation is recognized as legitimate by important elements in current constitutional scholarship.[87]

The most problematic part of this suggestion involves the different focus of the dormant commerce clause from that of the Sherman Act and the considerations which weigh against the implementation of the free trade/free market policy under each provision. The dormant commerce clause targets cross-border market restraints because it is concerned with reinforcing the political integration of the United States with economic integration. Therefore, it is directed specifically against government-imposed restraints. By contrast, the focus of the Sherman Act is on market restraints imposed by private business firms.[88] Granted that both the dormant commerce clause and the Sherman Act embody free-market policies, are they directed to such different objectives (involving, accordingly, different types of offsetting considerations) so as to preclude a common interpretative approach? I address this important question below.

VI. THE INTERPLAY OF FREE TRADE/FREE MARKET CONSIDERATIONS WITH REPRESENTATIVE DEMOCRACY UNDER THE DORMANT COMMERCE CLAUSE AND THE SHERMAN ACT

A. *Local Democracy as a Criterion for Limiting the Application of Federal Policies*

As noted above, any suggestion that the Court interpret the dormant commerce clause and the Sherman Act consistently involves more than a recognition that the economic effects of a municipally created monopoly are the same, regardless of whether the relevant market extends across a state border. It also involves the strength of the political considerations weighing for and against the free trade/free market policies of the Commerce Clause and the Sherman Act. Under the conventional dormant commerce clause approach, municipally imposed trade restraints must bend to the core constitutional concern with the free flow of trade across

---

[87] *See, e.g.*, R. George Wright, *Two Models of Constitutional Adjudication*, 40 AM. U. L. REV. 1357, 1367-68, 1381-82 (1991) (discussing "coherentism").

[88] *See, e.g.*, Parker v. Brown, 317 U.S. 341, 351 (1943) ("That [the Sherman Act's] purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, abundantly appears from its legislative history.")

state boundaries. But since the effective overruling of *Boulder* in *Eau Claire*, identical municipally imposed trade restraints that do not directly impact cross-border trade flows prevail over the national free-market policy embodied in the Sherman Act because here a federalism rationale is allowed to prevail. The post-*Eau Claire* view is that Congress does not view the national interest in free markets as sufficiently strong to override the decisions of a local government.

There is no reason to think that Congress is less concerned with consumer welfare in interior municipalities than in border municipalities. Yet at the same time that the Court has been presuming that Congress wishes to limit its free-market policy under the Sherman Act by deferring to local government decisionmaking, the Court has been overriding local government decisionmaking under the Commerce Clause in order to impose a free-market result. If the two situations are to be treated differently, it must be because the political ramifications of the municipally imposed monopoly in the border situation are critically different.

The traditional wisdom differentiates the two situations in the following way: The municipally imposed monopoly that affects cross-border traffic harms out-of-state business firms which have no effective representation in the municipality which imposed the trade barrier. In this way of looking at the problem, the impediment to cross-border trade flows becomes entwined with the question of representative democracy. The dormant commerce clause protects interstate trade from impediments imposed by one state for its benefit at the expense of another state's citizens who had no effective say in the decision. This relationship between representation and the burden of the restraint underlay the *Carbone* dissent's protectionist analysis.

Conversely, the municipally imposed monopoly that does not affect cross-border traffic burdens citizens wholly within a single state. Alleviating those burdens does not concern the Commerce Clause, which focuses on reinforcing political union through economic integration. Should these burdens be a concern of the Sherman Act? Indeed, is the Sherman Act concerned at all with a relationship between government-imposed restraints and representative democracy? The answers to both questions, I argue, are affirmative ones.

The concern of the Sherman Act with representative democracy arises directly from the need to draw the boundaries between its own national free-market policy and the areas in which state and local government should be free to impose economic regulation. While federalism concerns dictate that the Sherman Act be construed to respect the legitimate interests of the states, it is not entirely a one-way street. The states also must respect the national free-market policy, as the cases have consistently reminded us. Thus, a state is not free to opt out of the Sherman Act entirely; while a state may legislatively subject an economic sector to regulation, there are certain forms of regulation which a state may not delegate to private business firms. For example, several cases have clearly established that a state may neither authorize business firms to enter into resale price maintenance contracts nor confer control over resale prices to suppliers.[89]

This case law attempts to allocate to state governments a range of decisionmaking in order to provide them with the opportunity to engage in the market-correcting activity (including furtherance of health, safety, and welfare concerns) which constitutes much of governance. At the same time, however, this case law denies state governments significant authority to legislate in ways that would palpably skew results away from such market-correcting behavior. Thus, although the government itself may set prices, it may not delegate that function to private business, because business is likely to ignore the interests of the public and exercise that power in self-seeking ways. Also, in the realm of local government-imposed restraints, Justice Powell, speaking for the majority in *Eau Claire*, explicitly observed that because local governments may be motivated by their own "purely parochial public interests,"[90] it was necessary for local government decisionmaking to be governed by state legislation in order to merit a federal antitrust exemption.

This case law, then, does not mandate a blind subjection of the Sherman Act to the states in the interest of federalism. Rather, it requires that the Sherman Act bend to accommodate state legislation which plausibly articulates the interest of the state by correcting market results for externalities, lack of information, free rider effects, and health, safety, and wel-

---

[89] 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951). *See* Fisher v. Berkeley, 475 U.S. 260 (1986).

[90] 471 U.S. at 47.

fare concerns. Conversely, the case law does not require the Sherman Act to accommodate state legislation which is patently skewed away from any plausible formulation of the public interest (understood broadly as market-correcting activity). In short, the antitrust exemption does not mandate deference to state and local legislation as such, but does require deference to state and local legislation which can be plausibly viewed as market-correcting. This distinction, articulated here, is drawn from the antitrust state-action exemption cases themselves. It is admittedly a rough one, too rough to permit judicial fine-tuning. But for that reason, the distinction also guards against an over-zealous judiciary. It should be employed to uphold state and local legislation in cases of doubt, i.e., when the legislation is plausibly market-correcting in the broad sense of that phrase, because state and local governments must have the necessary scope to make rational judgments about how the market requires correction or supplementation, judgments which constitute much of the historical core of governance. This approach would be tantamount to erecting a presumption of validity over state and local legislation. Nonetheless, the distinction is sufficiently powerful to invalidate extreme cases, such as those illustrated by *Carbone*, in which state or local governments confer monopoly franchises with the expectation of exploiting the revenue-raising potentials of those monopolies.

This judicial supervision rarely involves reviewing state legislation substantively. Rather, the courts consider whether the market restraints were adopted by a body whose interests depart from—or are likely to depart from—the public interest. Attempts to resolve this issue underlay the Court's decisions in *Eau Claire*, *324 Liquor Corp.*, and *Fisher v. Berkeley.*

This approach also underlay Justice Brennan's *Lafayette* and *Boulder* opinions for the Court, as well as Justice Powell's opinion in *Midcal.* Brennan and Powell wanted to constrain the scope of the exemption, especially as applied to local governments, because they feared that local governments would be particularly vulnerable to capture and therefore more likely to impose the kind of market-restrictive legislation that unjustifiably imposes monopoly rents upon citizens. That was why Powell formulated the double test of *Midcal*: to switch the initial forum to the state level where the private interests that might distort legislative decisionmaking at the local government level would be less powerful. In essence, the Bren-

nan/Powell approach incorporates public-choice analysis in the interest of achieving the primary goal of the Sherman Act, maximizing consumer protection. That Justice Powell later backed away from this approach in *Eau Claire* does not affect the rationale which underlay his earlier action.

B. An Overlay of Public Choice Considerations

We have seen that dormant commerce clause doctrine embodies a significant element of political analysis. Out-of-state business firms must be protected from self-seeking legislation in-state where such firms are unrepresented. We have also seen that legislation of the type invalidated in *Carbone* does not necessarily benefit the local citizenry. Besides disadvantaging the New Jersey landfill operators, the municipality, in *Carbone*, subjected its own citizens to waste-disposal charges that may have been uneconomically high. This suggests a flaw in the political analysis employed by the *Carbone* dissent. The dissent thought that if local businesses were disadvantaged, that would provide insurance against an ordinance attempting to benefit locals at the expense of nonlocals. So long as a class of locals were disadvantaged, the dissent reasoned, an effective opposition to such ordinance would exist, and, presumably, the municipality would enact it only if a widely recognized public benefit would result.

Yet in *Carbone*, the municipality adopted an ordinance which prima facie disadvantaged local residents by forcing them to pay substantially above-market prices to dispose of their waste. The widely shared but diffuse consumer interest was overridden by politicians who may have been catering to narrow interests. The sector holding these narrow interests included those who would profit from an unduly costly waste-transfer facility,[91] and those who may have wished either to obscure public expenditures or to take them out of the public budget.[92] In short, the political process did not work for the benefit of the town's citizens. The decision in *Carbone*, however, will operate as a precedent protecting the citizens of other border communities. It will force the legislators of those communities to act more openly, and to bring the full costs and benefits of proposed new municipal facilities into the public debate. This aspect of *Carbone* is

---

[91] For discussion of the phenomenon involved, see DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 23 (1991). *See also* DENNIS C. MUELLER, PUBLIC CHOICE 13 (1979); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 14-16 (1965).

[92] *See supra* text accompanying notes 20-25.

closely connected with goals of civic republicanism, because it fosters enhanced public involvement in governmental decisionmaking, raises the debate to a more informed level, and thereby encourages legislators to become less responsive to interest group pressures and more inclined toward reasoned deliberation as a primary mode of decisionmaking.[93]

Carbone also provides a lesson for antitrust analysis. The case shows that local government decisionmaking does not work very well when politicians are pressed to build costly new facilities, especially when they have open to them the option of financing the facility from revenues generated by a municipally imposed monopoly. The root of the problem is the propensity for politicians to make spending decisions without full public debate about costs and benefits. Financing a facility out of monopoly revenues is a way of obscuring the facility's costs and benefits and thus of avoiding political accountability.

The Court's antitrust state-action decisions assume that when local governments impose monopolies, they are pursuing a broad public interest. These decisions have ignored the propensity of politicians to subordinate the interests of their constituents to those of special interests or even to the interests of the legislators themselves in minimizing accountability. Presumptively, a locally imposed monopoly diminishes the public interest, because it misallocates assets for the benefit of a few to the detriment of the many. It is a prime example of the social inefficiency that antitrust laws are designed to prevent. This was shown theoretically in Part III. The facts of *Carbone* provide an empirical case study of the propensity of local government officials to misallocate resources to the detriment of their citizens.

Justice Brennan's requirement in *Boulder* that a consistent statewide economic policy be a precondition to the invocation of the state-action exemption was prescient.[94] Interest groups possess the potential for skewing government decisionmaking in their favor at every level of government. But a consistent statewide policy would remove from municipalities the decision of whether to create a particular monopoly for particular actors. The activities involved in the municipal monopoly cases—waste facilities,

---

[93] *See, e.g.*, Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1548-51 (1988).

[94] *See supra* note 32 and accompanying text.

cable television, taxi certificates, land development, et cetera—usually involve business interests whose size is large enough to pose a danger of undue influence to municipal government. Yet a powerful lobby at the local government level may count for much less at the state level.[95] Conditioning the state-action exemption on the existence of a statewide economic policy would reduce substantially the ability of these private interests to induce the creation of monopolies.

VII. THE FEASIBILITY OF RECONSTRUING THE SHERMAN ACT STATE-ACTION EXEMPTION IN THE LIGHT OF THE DORMANT COMMERCE CLAUSE CASE LAW: A FINAL WORD FROM THE JURISPRUDENCE OF STATUTORY INTERPRETATION

The suggestion that the Court draw from the dormant commerce clause case law in reshaping the dimensions of the antitrust state-action doctrine may appear to some readers as too much of a change to be easily accommodated within accepted approaches to statutory interpretation. It is apparent that the proposal would affect a number of fields. First, the Court would have to extend substantive antitrust law further into the domain of the states than it does at present under the *Eau Claire* line of cases. Second, the Court would incorporate a concern for effective democracy and civic republicanism into the realm in which the antitrust laws impact upon local legislation. Third, the Court would be imposing similar substantive prohibitions upon municipally created monopolies in cases involving both cross-border markets (where those monopolies are condemned under the Commerce Clause) and internal markets (where those monopolies fall within the antitrust laws and the associated state-action doctrine).

The expansion of pre-existing law in the first two fields, however, is not as great as first appears. My suggestion would have the Court extend federal antitrust law only to the point it had previously extended it under *Boulder*. Again, while the fostering of effective local democracy and civic republicanism have not frequently been associated with federal antitrust

---

[95] This point is related to the Madisonian belief that the factionalism that would inhere in a small democracy with direct self-rule would be muted within a large republic where the factions would be more numerous and more likely to cancel each other out. *See* THE FEDERALIST NO. 10 (JAMES MADISON); CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION 14-15 (1990). *See also* Page, *supra* note 40, at 639; Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 839, 856 (1983); Spitzer, *supra* note 42, at 1317.

law, those concerns did underlay Justice Brennan's opinions in *Lafayette* and *Boulder*.[96] In addition, the principal arguments for retrenching antitrust jurisdiction after *Boulder* have been based upon the view that local governments can best determine economic policy within their boundaries. Broadly understood, that is a claim which puts the operation of local government into the realm of factors that must be assessed in shaping the intersection between federal antitrust law and state-and-local government policymaking. Moreover, legal commentators such as Professor William Page[97] have connected the antitrust state-action doctrine with local democracy and reasoned deliberation. Finally, the doctrinal reasons why the Commerce Clause and the Sherman Act have imposed different results in past municipal monopoly cases become less persuasive as the federal interest in free trade and free markets becomes stronger. As a result, there is less reason to subordinate the broad national policy favoring free trade and free markets.

Such an imaginative reshaping of this important sector of antitrust law as would be accomplished by importing dormant commerce clause jurisprudence into the antitrust state-action doctrine would confer beneficial effects upon society as resources were allocated increasingly according to dictates of economic efficiency and as the workings of local democracy were enhanced. It would also involve a reweaving of important policy concerns into a coherent whole. The union of the free-market/free-trade concerns of the dormant commerce clause and the Sherman Act would cause the courts to treat municipal monopolies the same way under either provision. The courts would also address longstanding concerns about the operation of local democracy. The public-choice concerns permeating the Brennan state-action opinions (and which reflect similar concerns in the dormant commerce clause cases) would be dealt with in ways that are consistent with the purposes of the federal antitrust laws and are consistent with a proper respect for local self government.

This imaginative reinterpretation of the state-action exemption would, for all of the reasons stated, bring about a better "fit" between the state-action exemption and well-recognized policies permeating associated areas of law: the dormant commerce clause case law, the broad policies support-

---

[96] *See supra* note 42 and accompanying text.

[97] *See* Page, *supra* note 40, at 640-44.

ing free trade and free markets embodied in both the dormant commerce clause and the antitrust laws, policies relating to federalism and the relation between federal laws and local self-government, and the concerns increasingly incorporated into law-interpretation about the impact of public choice on the operation of legal institutions. This kind of imaginative reinterpretation of existing doctrine to bring about a better "fit" between that doctrine and surrounding areas of law, while unusual, is supported by a number of legal theorists. Ronald Dworkin, for example, has emphasized coherence and "fit" as forces in law interpretation.[98] In this vein, Dworkin would integrate statutory meaning into the body of surrounding law as that body changes over time.[99] To a considerable extent, this approach to statutory interpretation resembles that of the legal-process theory of Henry Hart and Albert Sacks. Under that theory, statutes are construed in light of the whole body of law of which the statute is only a part.[100] As Professor Vincent Wellman puts it, the legal-process theory requires that a statute be construed in such a way as to facilitate its incorporation into the corpus of existing law.[101] The Court has substantial freedom to construe the Sherman Act in this way, because its broadly phrased provisions evince Congress's purpose to confer wide interpretative discretion upon the courts.[102] In addition, the Local Government Antitrust Act does not constrain the Court's ability to take a more aggressive approach towards free-trade than is represented in the *Eau Claire* line of cases. Even the ascendant public-choice approach to statutory interpretation, which emphasizes the statute as an embodiment of a political "deal" struck between contending interest groups, acknowledges that the "deal" extends only to the four corners of the enacted statute. As Professors Daniel Farber and Philip Frickey have argued, interest groups lobbying for particular statutes are likely to focus upon specific problems rather than "system-wide

---

[98] *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 247 (1986).

[99] DWORKIN, *supra* note 98, at 349.

[100] *See* William N. Eskridge, Jr. & Philip P. Frickey, *The Making of The Legal Process*, 107 HARV. L. REV. 2031, 2043 (1994). *See also* HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

[101] Vincent A. Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart & Sacks*, 29 ARIZ. L. REV. 413, 460 (1987). Wellman has observed that Dworkin's own approach is indebted in a number of ways to the legal process theory of Hart & Sacks. *Id.* at 461.

[102] POSNER, *supra* note 86, at 278.

inquiries that may complicate the passage of legislation."[103] In the case of the Local Government Antitrust Act, we know that because Congress was unwilling to change the substantive antitrust law (which at that time was represented by the Supreme Court's *Boulder* decision),[104] the political deal underlying that Act extended only to the elimination of municipal liability for damages. And subsequent developments under the dormant commerce clause (represented by the Court's *Carbone* decision) have added weight to the free-trade calculus.[105]

Finally, the suggested reinterpretation of the antitrust state-action doctrine in the manner suggested in this Article would be consistent with a new (and long term) institutional equilibrium in the sense expounded by Professors Eskridge and Frickey. The aggressive approach to the dormant commerce clause which the Court took in *Carbone* may itself have weakened local government based opposition to the extension of the Sherman Act as suggested here, because the antitrust state-action doctrine has become pro tanto less important after *Carbone*, especially in markets which extend across state borders. Moreover, with the *Carbone* approach now embodied in the case law, and with the public becoming increasingly aware of the extensive market restraints imposed by local governments, the Court is able to unify its free-trade jurisprudence under both the Commerce Clause and the Sherman Act relatively free from the prospect of an adverse reaction from the Congress.

VIII. CONCLUSION

In the preceding pages I have argued that the assumption of the state-action cases since *Eau Claire* has been that the political processes of local governments are adequate to protect consumers from rent-seeking legislation. The cases involving municipal grants of monopolies to waste-handling facilities, however, suggest that municipal governments often misuse public funds by constructing uneconomic plants and camouflage their acts with financing schemes dependent upon the creation of municipally im-

---

[103] Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 898 (1991).

[104] *See supra* note 49 and accompanying text.

[105] Changes in the corpus of existing law are one of the factors causing present value of any political deal underlying legislation to decline as the statute ages. *See* Eskridge & Frickey, *supra* note 100.

posed monopolies. Thus, not only do the political processes as presently established fail to protect consumers from municipally established monopolies, but these political processes also foster the creation of monopolies as ways of obscuring from the voting public the extent to which society's assets are being misallocated.

Under the dormant commerce clause, municipally created monopolies are invalidated when they impede cross-border trade flows, because adversely affected out-of-state suppliers are cut off from local patrons, and have no say in the legislation which harms them economically. Although not presently a part of the dormant commerce clause case law, those municipally created monopolies also harm consumers who do vote in the legislating municipality. In fact, as the cases show us, the legislators in those communities obscure the effects of their actions and reduce their own accountability to the electorate by generating revenues from municipally established monopolies.

The abuses that are not tolerated under the dormant commerce clause are remarkably similar to the abuses that are tolerated under the current interpretation of the antitrust state-action exemption. In both cases the factors influencing the judicial treatment of the restraints are concerned with the workings of representative democracy. Where the mechanisms of representative democracy cannot protect a class of out-of-state business firms from market exclusion, the dormant commerce clause invalidates the exclusion. Similarly, where the mechanisms of representative democracy have proven ineffective in protecting consumer classes from rent-seeking legislation, the Sherman Act should come to their rescue. This expressed concern for Sherman Act protection is especially compelling in light of the fact that the present inapplicability of the Sherman Act is premised on the view that the political processes extend the needed protection, a view which public choice theory gives us reason to question. In providing this protection, the Sherman Act would be playing a role comparable to that played in the cross-border context by the dormant commerce clause. Moreover, the factors weighed in the balance in determining the applicability of the Sherman Act are remarkably similar to those weighed in determining the impact of the dormant commerce clause within its sphere of operation.