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THE THREAT OF TREBLE DAMAGE ANTITRUST CLAIMS AGAINST LOCAL GOVERNMENTS

*Jefferson County Pharmaceutical Association v. Abbott Laboratories*¹

State and local governments are concerned for many reasons about the extent to which the antitrust laws² apply to them and what remedies exist when the laws are applicable.³ The Sherman Act⁴ authorizes suits against state and local governments.⁵ In *Jefferson County Pharmaceutical Association v. Abbott Laboratories*,⁶ the Supreme Court held that the sale of pharmaceuticals to state and local government hospitals for resale in competition with private pharmacies is not exempt from the Robinson-Patman Act.⁷ Thus, a trade association of retail pharmacists was allowed to bring a price discrimination suit against the University of Alabama and Cooper Green Hospital.⁸

1. 103 S. Ct. 1011 (1983).

2. The phrase "antitrust laws" is defined in section 1 of the Clayton Act, 15 U.S.C. § 12 (1982). It is used here to refer to the Sherman Act, 15 U.S.C. §§ 1-7 (1982), the Clayton Act, 15 U.S.C. §§ 12, 13, 14-20, 21, 22-27 (1982), and the Robinson-Patman Act, 15 U.S.C. §§ 13-13b, 21a (1982).

3. The question of most concern is whether the treble damage provision, 15 U.S.C. § 15(a) (1982) will apply. See notes 80-90 and accompanying text *infra*.

4. 15 U.S.C. §§ 1-7 (1982) (prohibits monopolization and attempts to monopolize).

5. See, e.g., *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 46-48 (1982) (district court may issue preliminary injunction against enforcement of city ordinance which was potential violation of the Sherman Act); *Goldfarb v. Virginia State Bar*, 421 U.S. 733, 791-92 (1975) (enforcement of minimum fee schedules by state bar association within antitrust scrutiny).

6. 103 S. Ct. 1011 (1983).

7. *Id.* at 1014. Justice O'Connor, joined by Justices Brennan, Rehnquist and Stevens, dissented. *Id.* at 1025-33 (O'Connor, J., dissenting). She found that the business and legal communities traditionally believed that the Robinson-Patman Act did not apply to local governments, *id.* at 1025, 1030, and that therefore, the Court should not hold that they do absent a clearly expressed legislative intent for application. *Id.* at 1028-29 & n.10. The majority took the position that the plain language of the statute indicates that there should be no exemption, and therefore, the law will be applied absent a clearly expressed legislative intent for exemption. *Id.* at 1016. While *Jefferson County* appears to be a debate over legislative history, both sides agree that Congress never considered the point. *Id.* at 1017-18 & n.18; *id.* at 1028 (O'Connor, J., dissenting). Since a decision either way is arbitrary, the implications of the holdings are more interesting than how the Court reached them.

8. 103 S. Ct. at 1023. The Robinson-Patman Act, 15 U.S.C. §§ 13-13b & 21a (1982), prohibits the selling of similar goods to purchasers at different prices unless the differential can be cost justified or reflect changing market conditions. *Id.* § 13(a). The hospital pharmacies were sued under *id.* § 13(f), which prohibits purchasers from re-

Jefferson County authorizes suits against local governments under the Robinson-Patman Act⁹ and, implicitly, the Clayton Act¹⁰ as well. The case fails, however, to resolve two important issues. First, to what extent do the antitrust laws apply to state and local governments? That is, will the same standards of antitrust enforcement be applied to local governments as apply to private defendants, and if not, what standards will apply? Second, in those cases in which the antitrust laws do apply to state and local governments what remedies are appropriate?

The antitrust laws generally prohibit "any person" from engaging in proscribed conduct,¹¹ and the Court has held that this phrase includes state and local governments.¹² Thus, if the Court declines to hold a state or city liable on a specific fact situation, it will be very difficult to impose liability on a similarly situated private defendant.¹³ To avoid creating an unwanted exemption for private defendants, any exemption for state and local governments¹⁴ should be grounded on some inherent characteristic of a state or local government as a defendant.

Federalism is a very plausible basis for such an exemption. The tenth amendment¹⁵ is a constitutional expression of federalism¹⁶ that prevents Con-

ceiving or inducing discriminatory prices.

The University, which the Court treated as "the State itself," operated two pharmacies in its medical center. 103 S. Ct. at 1013, 1014 n.5. Cooper Green Hospital is a county hospital that operates a pharmacy. *Id.* at 1013.

9. 15 U.S.C. § 13(f) (1982).

10. The Robinson-Patman Act amended the Clayton Act, 15 U.S.C. §§ 12, 13, 14-20, 21 & 22-27 (1982), and thus the definitional provisions are the same. 103 S. Ct. at 1015 & n.13.

11. *See, e.g.*, 15 U.S.C. § 1 (1982) (combinations in restraint of trade); *id.* § 13 (discriminatory pricing).

12. 103 S. Ct. at 1015 & n.10 (municipalities are "persons" under the antitrust laws, including the Robinson-Patman Act); *City of Lafayette v. Louisiana Power & Light*, 435 U.S. 389, 397 & n.14 (1978) (plurality opinion) ("person" in Sherman and Clayton Acts includes municipal governments both as plaintiffs and defendants).

13. While this appears to be a "slippery slope" argument, it really is not. The argument is that there is no basis in the statutory language for treating private and government defendants differently. While the Court can find factual distinctions, it would be obvious when it applied a different standard to governments.

14. Justice Rehnquist has suggested that the issue is really one of preemption rather than exemption. *Community Communications v. City of Boulder*, 455 U.S. 40, 60-71 (1982) (Rehnquist, J., dissenting). He concluded, therefore, that where Congress did intend to preempt a state's right to regulate competition, any conflicting state law would be void, but the state could never actually violate the antitrust laws. *Id.* at 64-65. This analysis assumes that because Congress intended to preempt state law they did not intend the federal law to apply to states. There is no apparent basis for this assumption. Indeed, the more logical assumption is that, by preempting, Congress did intend the law to apply to the states. To rebut Justice Rehnquist's argument, however, one need only recognize that the preemption issue is not determinative of the exemption issue.

15. U.S. CONST. amend. X.

16. *See Fry v. United States*, 421 U.S. 542, 547 n.7 (1975) (tenth amendment

gress from excessively restricting state¹⁷ and local¹⁸ governments' sovereignty. The Court has defined the tenth amendment constraints with a three-part test.¹⁹ For commerce clause legislation²⁰ to be invalid it must first regulate the states as states.²¹ The Court has had little difficulty with this prong, generally finding that it exists where the regulation dictates how a state conducts its own affairs²² but not where the regulation affects only private conduct²³ or how a state may regulate private conduct.²⁴ This requirement would be met in *Jefferson County* because the state²⁵ was sued for obtaining discriminatory prices for itself.²⁶

The second prong of the tenth amendment test requires that the federal regulation address an "indisputable attribute of state sovereignty."²⁷ The Court has not clearly defined this phrase, but it appears to be rather limited. It does not, for example, even include all of a state's employment decisions.²⁸

declares that "Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system").

17. *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926).

18. *National League of Cities v. Usery*, 426 U.S. 833, 855 & n.20 (1976) (plurality opinion).

19. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 287-88 (1981).

20. The Court has held that the same tenth amendment constraints may not apply to legislation enacted pursuant to other constitutional grants of power, such as section 5 of the fourteenth amendment. *EEOC v. Wyoming*, 103 S. Ct. 1054, 1064 n.18 (1983). The degree of state protection afforded by the tenth amendment is apparently dependent on when the constitutional provision purportedly authorizing the federal legislation was adopted relative to the tenth amendment. Thus, the fifteenth amendment allows federal regulation of voting which might otherwise violate the tenth amendment. *City of Rome v. United States*, 446 U.S. 156, 178-80 (1980); see also *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (eleventh amendment limited by the fourteenth amendment).

21. *EEOC v. Wyoming*, 103 S. Ct. at 1061; *Hodel*, 452 U.S. at 287; *Usery*, 426 U.S. at 854.

22. See *EEOC v. Wyoming*, 103 S. Ct. at 1061.

23. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 249-50 & 262 (1964) (commerce power legislation requiring private owners of public accommodations to serve minorities need be only reasonably adapted to congressional end of vindicating deprivation of dignity caused by denial of equal access).

24. E.g., *Hodel*, 452 U.S. at 289-90 (tenth amendment does not prevent Congress from proscribing minimum regulations governing surface coal mining and requiring the states to implement the regulations themselves or submit to the federal regulation).

25. The Board of Curators of the University of Alabama was treated as the state. See note 8 *supra*.

26. 103 S. Ct. at 1013 n.2.

27. *EEOC v. Wyoming*, 103 S. Ct. at 1061; *Hodel*, 452 U.S. at 287-88; *Usery*, 426 U.S. at 845.

28. *EEOC v. Wyoming*, 103 S. Ct. at 1061 n.11 (only employment decisions that are vehicles for a state's exercise of its core sovereign functions or are clearly connected to the execution of underlying sovereign choices are entitled to tenth amendment protection).

The Court explicitly held in *Jefferson County* that the retail sale of pharmaceuticals is not an indisputable attribute of state sovereignty.²⁹

The final prong of the tenth amendment test requires that the federal regulation directly impair the state's ability to structure the integral operations of a traditional governmental function.³⁰ This portion of the test may be no more than an alternative statement of the "indisputable attribute of state sovereignty" requirement of the second prong.³¹ The third prong, however, is more difficult to analyze.³²

The structural integrational operations element was first articulated in *National League of Cities v. Usery*.³³ Although the Court still uses the *Usery* language,³⁴ it appears to apply a narrower test.³⁵ For federal commerce power regulations to conflict with the tenth amendment, they may now have to address what ends a state seeks to achieve,³⁶ rather than simply address how a state structures its operations in pursuit of those ends.³⁷ If strictly followed, this test would virtually eliminate the states' tenth amendment protections. Federal commerce power legislation would be invalid only if it wholly prevented a state from exercising a sovereign function.³⁸ Thus, even if supplying pharmaceuticals was a sovereign function,³⁹ the state and local governments in

29. 103 S. Ct. at 1014 n.6.

30. *EEOC v. Wyoming*, 103 S. Ct. at 1061; *Hodel*, 452 U.S. at 288; *Usery*, 426 U.S. at 843.

31. *Usery* dealt with the concepts interchangeably. 426 U.S. at 851 & n.16. *But see EEOC v. Wyoming*, 103 S. Ct. at 1061 n.11 (although management of state parks is a traditional governmental function, the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1982), is constitutional because it does not directly impair the states' ability to structure that function). The Court specifically declined, however, to decide whether the Act addresses an undoubted attribute of state sovereignty. 103 S. Ct. at 1061.

32. Although several tenth amendment cases have been decided on this prong, *see EEOC v. Wyoming*, 103 S. Ct. at 1061-64; *FERC v. Mississippi*, 456 U.S. 742, 769-70 (1982); *Usery*, 426 U.S. at 852, the Court has yet to articulate a clear standard for its application. The standards the Court has announced, such as threatening a state's "separate and independent existence," *EEOC v. Wyoming*, 103 S. Ct. at 1062, are of little analytical value.

33. 426 U.S. 833 (1976).

34. *EEOC v. Wyoming*, 103 S. Ct. at 1061; *Hodel*, 452 U.S. at 288.

35. *Usery* held that minimum wage and maximum hour provisions could not be constitutionally imposed on state employees. 426 U.S. at 839-40. *EEOC v. Wyoming* held that Congress could prohibit states from imposing mandatory retirement on game wardens. 103 S. Ct. at 1064. It is difficult to see a constitutional distinction between these regulations.

36. *EEOC v. Wyoming*, 103 S. Ct. at 1062; *FERC v. Mississippi*, 456 U.S. at 771.

37. *See Usery*, 426 U.S. at 849-50.

38. The Court surely did not intend for this test to be taken literally. It would permit Congress to regulate, for example, how a state conducts its police and emergency services as long as the state is not entirely prevented from achieving its ultimate goals.

39. In *Jefferson County*, the Court noted that supplying pharmaceuticals is not

Jefferson County would not receive tenth amendment protection under the new standard because the Robinson-Patman Act does not require them to abandon that goal. Under the old standard, there is at least a plausible argument that the third prong is met in *Jefferson County*. If supplying pharmaceuticals was a sovereign function,⁴⁰ preventing states from obtaining discriminatory prices would arguably impair the states' financial ability to perform that function.⁴¹

Even where all three prongs of the test are met, the Court will balance the federal and state interests before invalidating federal commerce power legislation under the tenth amendment.⁴² While the Court has not clearly said what factors it will consider, the indication is that it will simply weigh the policies underlying the state and federal interest, with no presumption in favor of either.⁴³

The tenth amendment provides a legitimate basis for treating state and local governments differently than private defendants in some federal antitrust actions. If the tenth amendment provided state and local governments' with their sole protection from the antitrust laws, however, much of their social and economic legislation would be subject to judicial scrutiny,⁴⁴ in a manner reminiscent of the *Lochner*⁴⁵ era. Antitrust review is perhaps even more troublesome than declaring legislation invalid under fourteenth amendment substantive due process,⁴⁶ because local governments may be faced with treble

a sovereign function. 103 S. Ct. at 1014 n.6.

40. Supplying pharmaceuticals to indigents might be a sovereign function. 103 S. Ct. at 1014 n.7.

41. Although the Court has said that financial burden is not a key to this constitutional issue, *EEOC v. Wyoming*, 103 S. Ct. at 1063; *Usery*, 426 U.S. at 851; it certainly spent a great deal of time discussing the financial impact before making the constitutional ruling. *EEOC v. Wyoming*, 103 S. Ct. at 1063; *Usery*, 426 U.S. at 846-49. The Court may be deciding the issue on financial criteria and justifying the decision on vague notions of "structuring integral operations." This rationale would explain the apparent inconsistency between *EEOC v. Wyoming* and *Usery*. See note 35 *supra*.

42. *EEOC v. Wyoming*, 103 S. Ct. at 1061; *Hodel*, 452 U.S. at 288 n.29.

43. See *EEOC v. Wyoming*, 103 S. Ct. at 1063-64 & n.17 (articulated but did not reach the balancing test).

44. See notes 69-72 and accompanying text *infra*.

45. See *Lochner v. New York*, 198 U.S. 45 (1905). *Lochner* and its progeny allowed the Court to act as a superlegislature, balancing the individual's right to contract, as found in the due process clause of the fourteenth amendment, against the reasonableness of the states' exercise of police power. See J. ELY, *DEMOCRACY AND DISTRUST* 14-21 (1980) (suggesting that "substantive due process is a contradiction in terms). See generally Strong, *The Economic Philosophy of Lochner: Emergence, Embrace and Emasculation*, 15 ARIZ. L. REV. 419, 435 (1973) (discussing the development and decline of the *Lochner* approach to invalidating economic regulation). The state and local government antitrust issue is analogous because absent significant tenth amendment protections the Court must simply balance the states' exercise of police power against the congressional policy of promoting competition.

46. U.S. CONST. amend. XIV.

damage claims.⁴⁷ For the Court to avoid reviewing the merits of state legislation while maintaining the integrity of the antitrust laws with respect to private defendants, it must find an exemption that is as principled as the tenth amendment rationale yet much broader.

The state action doctrine may be a partial answer. In its first articulation of this doctrine, the Court held simply that Congress did not intend the Sherman Act⁴⁸ to apply to state action or action directed by a state.⁴⁹ The Court has since clarified the doctrine to apply only where the state, acting as sovereign, has compelled rather than merely prompted⁵⁰ or consented to⁵¹ anticompetitive activity. Further, the state must clearly express its policy and actively supervise the activity.⁵²

Although the Court's expression of the state action doctrine has changed, the underlying theme has not. If the state is making policy decisions in its sovereign capacity and closely supervising the implementation of those policies, the Court will likely apply the state action doctrine.⁵³ As the relationship between the anticompetitive activities and the state becomes attenuated, so does the Court's willingness to apply the doctrine.⁵⁴

Municipal or county legislation, however, is not necessarily an expression of state policy for purposes of state action antitrust immunity.⁵⁵ Similarly, implementation of legislation by a local government does not constitute active state supervision.⁵⁶ Although local governments are given less state action immunity than a state, it is not clear how much less. *City of Lafayette v. Louisiana Power & Light Co.*⁵⁷ indicates that local governments are entitled to more immunity than private parties.⁵⁸ Private anticompetitive activities are shielded

47. See notes 106-13 and accompanying text *infra*.

48. 15 U.S.C. §§ 1-7 (1982).

49. *Parker v. Brown*, 317 U.S. 341, 352 (1943) (state adopted and enforced raising-marketing plan not subject to antitrust scrutiny).

50. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975) (state bar minimum fee schedules not entitled to antitrust immunity because they were merely suggested, rather than required, by the state supreme court).

51. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 598 (1976) (state approval of private utility rates, which included potentially anticompetitive activity, did not shield the activity from antitrust scrutiny).

52. *Bates v. State Bar*, 433 U.S. 350, 362 (1977) (disciplinary rules regarding lawyer advertising exempt from antitrust laws because they were promulgated and enforced by the state supreme court).

53. See *id.*

54. See note 50 *supra*.

55. *City of Lafayette v. Louisiana Power & Light*, 435 U.S. 389, 410-11 (1978) (plurality opinion) (city not automatically entitled to state action exemption because of its status as a state subdivision). This conclusion apparently was based on legislative intent. *Id.* at 413.

56. *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 53 (1982) (city's implementation of cable television moratorium ordinance does not constitute state action).

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

58. *Id.* at 410 n.40 (*Cantor* dealt with private parties and is not applicable to

from antitrust scrutiny when they are undertaken pursuant to clearly articulated and affirmatively expressed state policy and are conducted under active state supervision.⁵⁹ Local governments, however, are entitled to the state action exemption when they are acting as the government and pursuant to state policy to displace competition.⁶⁰

There are two implications. First, because the emphasis is on state policy with no mention of state supervision, local governments may not have to meet the active state supervision prong required of private defendants.⁶¹ This is important because local governments frequently enact potentially anticompetitive laws, such as zoning and licensing ordinances, without state supervision.⁶² Second, the "pursuant to state policy" language of *Lafayette* appears to be a lower standard than "clearly articulated and affirmatively expressed." The implication is that in delegating authority to local governments states need only contemplate, rather than explicitly authorize, specific anticompetitive conduct.⁶³

Following this rationale, granting a home-rule charter to a city could be a sufficiently broad delegation of authority to immunize a variety of anticompetitive activities, such as allocating the city's cable television market.⁶⁴ This was not the result reached in *Community Communications Co. v. City of Boulder*.⁶⁵ The *Boulder* Court held that actions of local governments are not immune under the state action doctrine unless they are in furtherance of a clearly articulated and affirmatively expressed state policy.⁶⁶ Although *Boulder* purportedly relies on precedent, it is a clear change of direction.⁶⁷ Local

cases involving municipal defendants).

59. See *Lafayette*, 435 U.S. at 412.

60. *Id.* at 413.

61. The lower courts seem to be adopting this position. See *Gold Cross Ambulance & Transfer v. City of Kan. City*, 705 F.2d 1005, 1014-15 & n.13 (1983) (no state supervision required to city providing ambulance service).

62. State supervision cannot be implied from a mere grant of authority. *Boulder*, 455 U.S. at 52-56 (home-rule charter does not constitute state supervision). But see *Gold Cross*, 705 F.2d at 1015 (requiring state supervision would be "duplicative, wasteful regulation").

63. *Lafayette*, 435 U.S. at 415.

64. There are two types of home rule. Both forms allow municipal governments to act without enabling legislation from the state, as long there is no specific state denial of authorization. The distinguishing characteristic is the way they deal with direct conflicts between state and municipal laws. The first method allows the municipal charter to supersede state law in areas of local concern, while state law always supersedes the municipal charter under the second method. Westbrook, *Municipal Home Rule: An Evaluation of the Missouri Experience*, 33 MO. L. REV. 45, 74-79 (1968). Under either type, the state could surely be said to have "contemplated" that the local government would regulate the cable television market.

65. 455 U.S. 40 (1982).

66. *Id.* at 52.

67. See *id.* at 51-52 (citing *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978); *Lafayette*, 435 U.S. at 410). Although *Lafayette* used the "clearly

governments are now no more exempt from the antitrust laws than private defendants, though they may not be required to show active state supervision.⁶⁸

Virtually all of a city's traditional functions are subject to scrutiny under the present application of the antitrust laws.⁶⁹ Consider a convenience store opening in a residential neighborhood. The local residents do not like retail businesses coming into the area, so they petition the city council for a zoning ordinance to prevent additional retail development. By passing the ordinance, the council gives the existing store an effective monopoly and opens itself to antitrust liability. The city would have no tenth amendment protection in this case because the antitrust laws do not regulate the states as states, but merely define how the state (city) may regulate private conduct. Further, there is no state action exemption because the zoning policy was neither clearly articulated nor affirmatively expressed by the state.⁷⁰

A city that issues a limited number of licenses to sell liquor is in a similar situation. Restricting the total number of retail establishments is a clear restraint on trade.⁷¹ Again, the antitrust law would not be regulating the states as states, so there would be no tenth amendment protection, and there is no state involvement to invoke the state action doctrine.

A final example concerns ambulance service. To quicken emergency response time, a city buys sufficient ambulance equipment to serve the entire city and then contracts with a single operator. To ensure the success of the system, the city bans all other ambulance companies from operating within the city. Without specific state authorization for such a plan, the city is not entitled to state-action immunity.⁷² The city, however, may be entitled to tenth

articulated and affirmatively expressed" language, the Court referred to private defendants, and specifically stated that the test is not necessarily applicable to governmental defendants. *Id.* at 410 n.40. *Lafayette* held that local governments are exempt when acting "pursuant to state policy to displace competition." *Id.* at 414. While *Fox* used the clearly articulated and affirmatively expressed standard, the Court actually discussed the state action exemption with respect to a specific act of the California legislature rather than the defendant Board established under the act. 439 U.S. at 109. Thus, *Fox* stands for the general proposition that the California legislature may choose to displace competition and, impliedly, that the Board was acting within the scope of the legislature's choice. *Midcal* also required the clearly articulated and affirmatively expressed standard, 445 U.S. at 105, but is entirely consistent with *Lafayette* since the defendant was a private trade association. 445 U.S. at 102 n.5.

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

69. See notes 55-56 and accompanying text *supra*.

70. The Court has upheld zoning laws against due process challenges. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 396-97 (1927). This result, however, has no bearing on the antitrust issue of whether the state specifically authorized the local government to enact a given ordinance.

71. See 15 U.S.C. § 1 (1983) (prohibiting monopolies or attempts to monopolize).

72. See *Gold Cross Ambulance & Transfer v. City of Kan. City*, 705 F.2d 1005, 1011 (1983). A general state authorization, such as granting a home-rule char-

amendment protection.

By outlawing the city's regulation of ambulance services, the antitrust laws are addressing the state as a state,⁷³ thus satisfying the first prong of the tenth amendment test.⁷⁴ Although the undoubted attribute of state sovereignty prong is not as clear, providing quality ambulance service would come within a city's function of protecting public health.⁷⁵ Moreover, the antitrust laws, if enforced, would impair the city's ability to structure an integral operation in a traditional governmental function.⁷⁶ Since the service can be run most effectively as a monopoly, the antitrust laws would not only regulate how the city seeks to achieve its goals,⁷⁷ but could in practice prevent it from obtaining those goals.⁷⁸ If the city could survive all three prongs of the tenth amendment test, it would likely survive the final balancing test as well. The well-defined state interest in providing quality ambulance care would surely outweigh the generalized federal interest in promoting competition.⁷⁹

Thus, local governments have state action immunity only where the state has specifically authorized an activity and tenth amendment protection only when performing a core sovereign function. Since this leaves cities exposed to many antitrust claims, it is appropriate to ask what remedies they may face.

Section 16 of the Clayton Act⁸⁰ allows injunctive relief. This applies to both state and local governments.⁸¹ Section 4 of the Clayton Act⁸² provides that "any person who shall be injured in his business or property by reason of anything forbidden by the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."⁸³ Section 4A⁸⁴ is worded similarly, but limits recov-

ter, would be insufficient. *See* note 62 *supra*.

73. For tenth amendment purposes, political subdivisions are equivalent to states. *Usery*, 426 U.S. at 855 n.20.

74. *See Hodel*, 452 U.S. at 287.

75. *See Usery*, 426 U.S. at 851 & n.16.

76. *See Gold Cross*, 705 F.2d at 1014 n.13 (ambulance service is a traditional governmental function).

77. *EEOC v. Wyoming*, 103 S. Ct. at 1062 (to violate the tenth amendment, the federal regulation must address more than the way in which a state seeks to achieve its goals).

78. *FERC v. Mississippi*, 456 U.S. at 771 (federal law cannot compel the exercise of a state's sovereign powers).

79. *See EEOC v. Wyoming*, 103 S. Ct. at 1064 n.17. This result is by no means certain, however. The Court could determine that the national economic interest in promoting competition outweighs the local health concerns. As suggested at note 45 *supra*, the Court would be acting as a legislature, and predictions as to specific results would be speculative.

80. 15 U.S.C. § 26 (1982).

81. *See, e.g.*, 103 S. Ct. at 1013-14 (allowing claim for injunctive relief in *Robinson-Patman* case).

82. 15 U.S.C. § 15 (1982).

83. *Id.*

84. *Id.* § 15a.

ery to ordinary damages and the cost of suit, with no mention of attorney's fees, when the United States is the plaintiff.

Since this language is mandatory,⁸⁵ it appears that state and local governments may be sued for damages. The eleventh amendment,⁸⁶ however, denies federal jurisdiction in suits for damages where a state is a party.⁸⁷ Since the antitrust laws grant exclusive federal jurisdiction,⁸⁸ an antitrust suit for damages against a state is effectively barred. The eleventh amendment protection does not, however, apply to local governments.⁸⁹ Given the mandatory language of the antitrust damages provisions and the absence of a constitutional bar, "judicial gymnastics" would be required to shelter local governments from damage claims.⁹⁰

As the preceding discussion indicates, the antitrust laws now apply to local governments to nearly the same extent as private defendants. Although state governments receive considerably more protection because of the state action doctrine, they are by no means free from antitrust scrutiny. Moreover, local governments face the threat of damages.⁹¹ To decide whether this is desirable, it is necessary to determine whether applying the antitrust laws to state and local governments promotes the policies underlying the antitrust laws.

The antitrust laws are designed to advance two basic policy objectives. The first goal is based on the congressional determination that the needs of society are best served by a competitive marketplace.⁹² The Sherman Act is the premier example of Congress' desire to maintain such a marketplace.⁹³ Protection of small businesses, as exemplified by the Robinson-Patman Act,⁹⁴ is the second main policy objective.

By enacting antitrust exemptions for several specific industries,⁹⁵ Congress has acknowledged that the policies embodied in the antitrust laws do not always promote the best interests of society.⁹⁶ The antitrust laws may thus be

85. *Boulder*, 455 U.S. at 65 n.2 (Rehnquist, J., dissenting).

86. U.S. CONST. amend. XI.

87. *Parden v. Terminal Ry.*, 377 U.S. 185, 186 (1964) (eleventh amendment bars suits against a state by its citizens as well as citizens of other states).

88. See 15 U.S.C. §§ 15, 26 (1982).

89. *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890).

90. *Boulder*, 455 U.S. at 65 n.2 (Rehnquist, J., dissenting).

91. 103 S. Ct. at 1014.

92. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975).

93. "Language more comprehensive is difficult to conceive. On its face it shows a carefully studied attempt to bring within the [Sherman] Act every person engaged in business whose activities might restrain or monopolize commercial intercourse." *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944).

94. 103 S. Ct. at 1027 & n.7.

95. See, e.g., 7 U.S.C. § 671 (1982) (milk marketing); *id.* § 608b (agricultural producers); 15 U.S.C. § 522 (1982) (fishing industry).

96. The Court has also found implied exemptions because of pervasive federal regulation. *Silver v. New York Stock Exch.*, 373 U.S. 341, 357-61 (1963) (federal securities laws provide basis for granting New York Stock Exchange implied antitrust

thought of as general mandates for competition and the preservation of small businesses while reserving exclusively to Congress the ability to decide when other policy considerations are of sufficient magnitude to warrant an exemption.⁹⁷ There are obvious dangers in leaving these policy determinations to private parties. The private sector may have neither the means nor the incentive to determine when the policies of the antitrust laws are outweighed by alternative policy implications.

State and local governments, however, do have the means and incentive to make these determinations. Indeed, the very purpose of state and local governments is to promote the interests of society.⁹⁸ In some instances they may be better equipped than Congress to make certain policy decisions because of their superior knowledge of local conditions and their political accountability. Where the interests of state and local governments parallel those of society, the underlying objectives of the antitrust laws are not advanced by applying them to those governments.

Consider the hypothetical town of Blackville which owns an electrical power generating plant. Because Blackville can provide electricity to its residents much cheaper if it serves all of them, the city council prohibits anyone else from selling electricity within the city. This is not alarming, because local governments are expected to play a role in providing electricity to their inhabitants. Moreover, if residents become displeased with the quality of service or rate structure, they may elect a new administration. City officials thus have a vested interest in carefully supervising their monopoly.

This is not to say that state and local governments should be completely exempt from the antitrust laws. There may be cases where the interests of a local government are in direct conflict with the interests of surrounding communities. Assume the town of Bedrock is near Blackville. Bedrock buys electricity from a town on the opposite side of Blackville and, for a small fee, Blackville allows the electricity to be wheeled over its lines.⁹⁹ Realizing its monopoly position¹⁰⁰ and dwindling revenues, Blackville informs Bedrock that it will no longer wheel power, but that it will gladly sell it at twice the price Bedrock is now paying. This result is disturbing not simply because it is an antitrust violation,¹⁰¹ but because the government of Blackville made a decision to displace competition yet has no incentive to consider the harm to the

exemption).

97. See *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 685 n.7, 699 (1978) (association could not use public safety arguments to justify anticompetitive bidding process).

98. See, e.g., MO. CONST. art. I, § 2 (purpose of government is to provide for public welfare).

99. "Wheeling" is transmitting power from one utility to another over the lines of a third company. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 368 (1973).

100. Blackville has a monopoly in that it is the only means of wheeling power from the third town to Bedrock.

101. *Otter Tail*, 410 U.S. at 368-72, 381-82.

people of Bedrock. Since Blackville has no incentive to weigh the detrimental effects of its anticompetitive policies, the reasons for not applying the antitrust laws are no longer valid.

Jefferson County is an example of the second situation in which the reasons for not applying the antitrust laws break down. The parties allegedly seeking discriminatory prices in *Jefferson County* were the University of Alabama and Cooper Green Hospital.¹⁰² There is no apparent incentive for either of these entities to consider the impact on private pharmaceutical retailers before obtaining discriminatory prices. Moreover, even if such an incentive were present, government hospital pharmacists have no means of evaluating the economic and social impact of their actions. Legislative bodies, however, are uniquely suited to this task. When other governmental agencies or branches begin adopting anticompetitive policies, the justifications for a state and local government antitrust exemption are no longer appropriate.

Deciding when the antitrust laws ought to apply to state and local governments is a difficult task. There are cases where there is no valid reason for applying the antitrust laws to state and local governments. Zoning laws and utility services are prime examples. In these situations, local governments have both the means and the incentive to weigh the public benefits against the potential anticompetitive effects. Moreover, these are the kinds of services residents expect local governments to provide.

There are other situations, however, where there are not clear reasons for exempting state and local governments from the antitrust laws. The over-aggressive utility¹⁰³ and the retail oriented government¹⁰⁴ are illustrative. In those cases, the government or governmental agency may have neither the means nor the incentive to consider the anticompetitive effects of their actions. Before attempting to draft a legislative proposal that will readily distinguish these different situations, however, the remedial aspects of the antitrust laws must be considered.

The previous discussion indicated that state and local governments should not be entirely exempt from the antitrust laws. For this decision to have meaning, there must be some form of remedy. At a minimum, the injured party should be able to prevent the governmental unit from engaging in the violative conduct. Thus, injunctive relief is appropriate against state and local government antitrust defendants. Since this is the only remedy presently available

102. See note 8 *supra*.

103. In *Lafayette*, Louisiana Power & Light's (LP&L) counterclaim alleged that the cities conspired to engage in sham litigation against LP&L to prevent or delay construction of a nuclear power plant. LP&L also alleged that the cities required some customers to purchase electricity as a condition of continued water and gas service. 435 U.S. at 392 n.6. Since this conduct bears little or no relationship to the cities' goal of providing electricity to their inhabitants, it is difficult to justify exempting it from antitrust scrutiny.

104. 103 S. Ct. at 1027.

against states,¹⁰⁵ there is no need to further limit the remedies a party may seek against them. Moreover, since the current limitation is constitutional there is no need, at least from a legislative perspective, to consider providing more generous remedies against states.

Local governments, however, may be sued for treble damages and attorney's fees¹⁰⁶ as well as injunctive relief. Here, it may be helpful to determine whether the policy considerations supporting treble damages against private defendants are valid when applied to local governments.

Treble damages are punitive; they serve as a deterrent to potential anti-trust violators and an incentive to potential plaintiffs. A strong argument can be made that there is no need for such a deterrent effect with local governments. Treble damage awards can be tremendously large and, could seriously burden most cities. Although an ambitious corporation might risk incurring treble damages, the average city would not. Indeed, the threat of treble damages may make local legislators and governmental agencies overly cautious.¹⁰⁷ Where there is even a slight risk of treble damage liability, local policy makers may refuse to attempt innovative social reform, particularly where the reform would benefit only minority constituencies.¹⁰⁸ Thus, such a strong deterrent effect is unnecessary with local government defendants and may prevent them from implementing socially desirable, although potentially anticompetitive, programs.

The plaintiff incentive justification for treble damages is not so easily dismissed. The antitrust laws should apply to local governments in some cases for the same reasons they apply to private defendants; neither have the means nor the incentive to weigh the social implications of their anticompetitive actions. From a plaintiff's perspective it makes no difference whether the violator is a private party or a governmental unit. If treble damages are necessary to encourage suits against private defendants, they must be equally necessary to encourage suits against governmental defendants. Since the need for incentive is the same, any treble damage exemption must be based on policy considerations which are unique to local governments and which outweigh society's interest in insuring that all meritorious antitrust claims are prosecuted.

A number of considerations weigh heavily in local governments' favor. First is the strong deterrent effect discussed above. Citizens have come to ex-

105. See *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945) (eleventh amendment bars suits for damages against states).

106. 103 S. Ct. at 1032-33 n.22 (O'Connor, J., dissenting).

107. In view of the changes made by *Boulder*, cities may be even more cautious because they are unsure what the current standards are.

108. Consider a city which sets rates for local ambulance services. Such an arrangement would violate the antitrust laws. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-25 n.59 (1940) (price fixing per se illegal). It may nevertheless be socially desirable because it would ensure ambulance service at a reasonable price. The poor, who would benefit most, may have the least political clout. Thus, under even a slight risk of antitrust liability legislators might forego the program.

pect their cities to provide a wide variety of essential services.¹⁰⁹ The threat of treble damages could affect a city's willingness to perform these services. A second consideration in favor of local governments is that the relationship between a town and its citizens differs from the relationship between a corporation and its shareholders. Shareholders of a corporation benefit from the increased profits of anticompetitive conduct, and they should be burdened when the company violates the antitrust laws. There is no similar rationale for imposing treble damages on citizens, however, because they may receive no benefit from antitrust violations by their city councils.¹¹⁰ Further, a stockholder's potential liability is limited to the amount of his investment, while a citizen's potential liability would be virtually unlimited.¹¹¹

The threat of treble damages may be used against local governments. Even where a city is confident that a given program would not violate the antitrust laws, it might abandon the program rather than risk the potential expense of threatened litigation. Admittedly, this applies to private defendants as well. The result is much more disturbing with respect to local governments, however, because it directly interferes with the political processes.

Treble damages and the threat of treble damages may impair local governments' ability to fulfill their dual function of administering public law and providing public services.¹¹² It is more important to prevent this impairment and maintain access to local governments¹¹³ than to provide additional incentives for private antitrust enforcement.

The policy considerations against awarding ordinary damages are basically the same as those against treble damages, differing only in degree. Local governments would still be deterred, only not as much; innocent taxpayers would still be penalized, but not as extensively; and the antitrust laws could still be used as a lever, albeit a smaller one. The policy considerations in favor of single damages are stronger than those for treble damages. Some form of damages may be necessary for effective deterrence. Further, there would be little incentive for private enforcement if plaintiffs could not recover even the amount of their injuries. Single damages would have less effect upon local governments' ability to fulfill their societal roles while providing the incentive necessary to meaningful application of the antitrust laws. Therefore, they ap-

109. These services may include fire and police protection, public health, and parks and recreation. *Usery*, 426 U.S. at 851 & n.16.

110. Taxpayers could benefit from a city's anticompetitive behavior. A city-owned monopoly utility, for example, might benefit the entire community through lower rates. In *Jefferson County*, however, it is extremely doubtful that all of the local taxpayers took advantage of potentially lower prescription prices. It is difficult to justify imposing antitrust liability on those who either did not buy any prescription drugs or bought elsewhere.

111. The federal courts could presumably force local governments to issue judgment bonds which, via the supremacy clause, U.S. CONST. art. VI, cl. 2, would preempt any state or local limits on tax liability.

112. *Usery*, 426 U.S. at 851.

113. See note 108 *supra*.

pear to be an appropriate remedy against local government defendants.

Local governments are currently liable for attorney's fees as well as damages. Attorney's fees have punitive as well as compensatory aspects.¹¹⁴ From the defendant's perspective, attorney's fees are more like punitive damages because they represent costs beyond the gains reaped from the anticompetitive conduct. From the plaintiff's perspective, however, attorney's fees are purely compensatory because they represent the costs of recovering damages.

Although attorney's fees may be quite large in an antitrust suit,¹¹⁵ they will generally be much less than the damages sought.¹¹⁶ Therefore, barring recovery of fees will not eliminate the incentive for private enforcement. Further, single damages alone are a sufficient antitrust deterrent for local governments.

The preceding sections indicate that for various policy reasons, the antitrust laws should apply differently to state and local governments than private parties. Moreover, this distinction is not reflected by the way the antitrust laws are presently applied. The purpose of this section is to evaluate a current congressional proposal in light of those policy considerations.

Senate bill 1578, the "Local Government Antitrust Act of 1983," provides:

The Federal antitrust laws shall not apply to any law or other action of, or official action directed by, a city, village, town, township, county, or other general function unit of local government in the exercise of its regulatory powers, including but not limited to zoning, franchising, licensing, and the establishment of monopoly public services, but excluding any activity involving the sale of goods or services by the unit of local government in competition with private persons, where such law or action is valid under state law, except to the extent that the Federal antitrust laws would apply to a similar law or action of, or official action directed by, a State. For purposes of this section, the term "Federal antitrust laws" means the antitrust laws, as such term is defined in the first section of the Clayton Act (15 U.S.C. 12), and section 5 of the Federal Trade Commission Act (15 U.S.C. 45).¹¹⁷

This bill is a significant step in the right direction. First, it recognizes certain policy areas where local governments are capable of determining what market structures best suit the need of local communities. It recognizes that local governments often perform "organizing" functions, such as zoning and licensing. By defining these areas as "regulatory powers", the bill provides a

114. See *Hall v. Cole*, 412 U.S. 1, 5 (1973) (bad faith of opponent may trigger punitive award of attorney's fees).

115. Legal fees in one recent antitrust case were estimated at \$500,000 per month. *N.Y. Times*, June 27, 1977, at 41, col. 6.

116. In *Lafayette*, for example, the private utility's treble damage claim was over \$540 million. 435 U.S. at 440.

117. S. 1578, 98th Cong., 1st Sess., 129 CONG. REC. 9505-06 (1983). On August 2, 1984, the House Judiciary Committee approved a bill that exempts local governments from antitrust damages liability.

principled method for distinguishing an average municipally owned utility from a utility which becomes overly aggressive toward its neighbors. Further, in areas where local governments compete with private parties, the bill ensures that any antitrust activity must be closely supervised by the government itself. Thus, a governmental agency without the means or incentive to weigh the anticompetitive effects of its policies would still be subject to antitrust scrutiny.

Although the bill is titled "Local Government Act of 1983," it also has some implications for state governments because it represents at least a de facto congressional adoption of the state action doctrine. While the courts have been applying the state action doctrine for over forty years, it does send a message to the courts that Congress endorses the doctrine. Hence, the courts will be very hesitant to narrow its application, a result which is potentially important in light of waning tenth amendment protections.¹¹⁸

Senate Bill 1578 adequately defines when local governments should be exempt from the antitrust laws. It is deficient, however, in addressing what remedies are appropriate in those cases where the antitrust laws should apply. By failing to deal with this issue, the bill effectively condones the imposition of treble damages suggested by *Boulder* and *Jefferson County*.

Senate Bill 1578 would greatly enhance local governments' ability to perform their functions in society. Congress will not have fully addressed the problems of applying the antitrust laws to local governments, however, until it limits potential recovery to single damages. Moreover, the bill would continue to allow antitrust scrutiny in cases such as *Jefferson County* where anticompetitive decisions are made apart from the legislative process and by bodies with neither the means nor the incentive to weigh the social implications of their conduct.

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118. See text accompanying notes 15-47 *supra* (in light of recent Supreme Court decisions the tenth amendment will give local governments virtually no antitrust immunity).