Dillon’s Rule Under the Burger Court: The Municipal Liability Cases

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Under the Burger Court, the constitutional relationship between states and their municipalities has been examined primarily in cases involving private suits initiated against municipalities under federal antitrust and civil rights statutes. Since the Court’s 1943 Parker v. Brown decision, it had been presumed that municipalities as political subdivisions of states were as immune as their states from tort liability under the Sherman Antitrust Act. The Burger Court, however, ruled that municipalities are not automatically immunized from tort liability simply because of their status as political subdivisions unless they can demonstrate that their actions were undertaken pursuant to an expressed state policy. After 1980, the Court continued to uphold the vulnerability of municipalities to private suits authorized by federal statutes, but moved to narrow the types of remedy appropriate under common law. The Burger Court did not, therefore, address the more fundamental question of whether municipalities as public actors should be liable to private damages in the course of their public functions.

During the past ten years, the burgeoning number of private suits brought under federal antitrust and civil rights statutes against municipalities has reopened the fundamental question of the constitutional relationship between states and their political subdivisions. Prior to 1978, municipalities as political subdivisions of states were thought to enjoy the same degree of immunity from tort liability as did states, particularly in terms of antitrust liability. The constitutional argument that states were immune from tort liability rested on the U.S. Supreme Court’s 1943 decision in Parker v. Brown, in which the majority ruled that states were public actors not explicitly regulated under the language of the Sherman Antitrust Act of 1890. Moreover, because of the unique, sovereign status accorded to states in common law and under the Tenth and Eleventh amendments, actions of states were considered constitutionally protected from federal intrusion until such time as the Congress intentionally and explicitly regulated the functional field in which those actions took place.¹

The *Parker* decision left many issues unresolved however. If states are statutorily immune from the Sherman Act because they are not explicitly regulated by it, do municipalities as political subdivisions of states also enjoy that degree of immunity from antitrust actions? The language and legislative history of the Sherman Act contain no reference to states or their political subdivisions, and municipalities have never been accorded independent sovereign status. Therefore, efforts to shed light on municipal liability have focused almost entirely on the intentions of the authors of the Sherman Act (as expressed in the act itself) and the precise role played by municipalities as political subdivisions of states.

The Sherman Act was originally designed to prevent abuses in the marketplace by private business and capital and, in so doing, preserve democratic institutions. As public agencies carrying out public functions using authority delegated to them by their respective state legislatures, municipalities could hardly be included among the types of aggregates of private power targeted by the act. Municipalities administer state laws and enforce local ordinances pursuant to established state policies and, thus, are accountable to both the state legislature and local electorates. By the nature and scale of their activities, municipalities would appear to pose little threat to the stated objectives of national antitrust policy. In all probability, the Congress did not expect municipalities to engage in significant (market disrupting) anticompetitive activity. After the *Parker* decision, therefore, municipalities quite naturally presumed that as political subdivisions of states, they would enjoy the same level of immunity from Sherman provisions as did states.

In *Parker*, the Court expressly declined to consider whether municipalities were subject to Sherman regulation if they did engage in anticompetitive activities. Even so, there was no particular reason to expect that the level of immunity accorded to states could not be extended to municipalities. If municipalities functioned primarily as agents through which states administer state policy (i.e., their actions were pursuant to expressed policy enacted by the state in its sovereign capacity), a denial of immunity to municipalities would have had the effect of abrogating whatever level of immunity of state actions had been declared by the Court in *Parker*. It is not surprising, therefore, that for thirty-five years after the *Parker* decision, the lower courts held that municipalities as political subdivisions of states were immune from antitrust liability regardless of the nature of their activities or their impact

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on the marketplace.  

THE DOCTRINE OF EXPRESSED POWERS

The immunity of municipalities from the provisions of the Sherman Act would, therefore, depend on the precise statutory relationship between states and municipalities. In 1872, this legal constitutional-legal relationship was examined by John F. Dillon in his definitive Treatise on the Law of Municipal Corporations. All corporations, he argued unequivocally, whether private or public (including municipal), were legal institutions by virtue of express state legislative enactment and possessed only those properties and powers conferred upon them by their charters of creation.

Moreover, with respect to municipal corporations in particular, Dillon found that:

[all municipal corporations intended as agencies of administration of civil government, are public, as distinguished from private . . . created for civil or political purposes . . . chiefly to regulate and administer the local or internal affairs of the city, town, or district which is incorporated. Like other corporations, they must be created by law. They possess no powers or faculties not conferred upon them, either expressly or by fair implication, by the law which creates them, or the statutes applicable to them.]

In effect, therefore, the power of the state legislature over municipalities must be considered "supreme and transcendent." Municipalities "owe their origins to and derive their powers and rights from the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so may it destroy. If it may destroy it may abridge and control. . . . [Municipalities] are, so to phrase it, mere tenants at the will of the legislature."  

Dillon's Treatise left little doubt that municipalities must be considered public corporations created and empowered by state legislatures for express state purposes. Their activities were always presumed to be governmental because they were authorized by state statute. Moreover, their powers were considered explicitly derivative because of their corporate status:

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7 Ibid., pp. 28–30.

8 City of Clinton v. Cedar Rapids and Missouri River Railroad, 24 Iowa 455 (1868): 462–463.
It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in express words; second, those necessary or fairly implied in, or incident to, the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable.9

Activities other than those expressly authorized would be considered ultra vires (i.e., beyond the express range of municipal jurisdiction and authority and thereby without legal effect). Ultra vires not only constrained municipal action within that authority expressly delegated by the state legislature, but also restrained a state from empowering a municipality to exercise broad authority outside the range of matters generally understood to be "purely local" in nature.10

Until 1819, municipal corporations in America had been considered immune from state legislative interference due to their corporate status under the contract clause of the U.S. Constitution. Yet in Dartmouth College v. Woodward, the U.S. Supreme Court accepted a legal distinction between public and private corporations based on degree of state legislative control, and held that the contract clause did not protect the incorporation charters of public (including municipal) corporations.11 There existed no basis in English common law for a distinction between different types of corporations, by their incorporation status or function, as the basis for differential legal treatment until the establishment of the late eighteenth century of the Doctrine of the Nonliability of Quasi-Corporations. Under this doctrine, English corporations were held to be immune from tort liability when engaged in "crown functions" (i.e., functions over which they were wholly directed by central authority and exercised no independent judgment of their own).12 This type of distinction was first utilized in American law in the seminal case of Bailey v. City of New York (1842) to sustain private tort actions against municipal corporations engaging in certain types of functions considered to be private.13

That municipal corporations could only engage in those actions specifically authorized by unambiguous statutory language had become commonly accepted and applied legal doctrine in the state courts by the 1850s. Such explicit state delegation was required even in areas of traditional local functions and in cases where municipal actions were claimed to be consistent with a clear legislative intent contained in a broader statutory grant of

10Ibid., pp. 374-375.
authority. Accordingly, municipalities have never been recognized by the U.S. Supreme Court as enjoying sovereign status under the U.S. Constitution; instead, under what became known as the doctrine of expressed powers, municipalities have been consistently treated as political subdivisions of sovereign states charged with administering state policy.

Furthermore, municipalities were confined by the state courts to exercising only those powers expressly delegated and directly supervised by the state legislature. In some cases, they were prohibited from exercising discretionary powers that had been delegated to them under types of broadly defined enabling legislation (including home-rule provisions) that had become a standard statutory format for authorizing municipal actions. When a municipality acted under broad enabling language but without express authorization, the courts often denied that the municipality had the authority to act because the state legislature either had never considered express statutory language or had considered it, but opted for the broader language. It was not unusual for the courts to scrutinize local ordinances designed to implement state policies (such as the structuring or financing of local activities) to determine if they were strictly "necessary" to achieve state policy objectives or if they had been explicitly authorized by statute.

THE INTERSTICES OF STATE LAW

Difficulties arise when the courts are called upon to interpret the specificity of state enabling legislation. When municipalities have been expressly empowered by state statute to engage in certain activities, they could, under the doctrine of expressed powers, be considered direct agents of the state, thus making their activities immune from Sherman regulation under Parker. However, under circumstances in which municipalities have been empowered by state statute to exercise independent legislative or administrative discretion relatively free of state supervision, a municipality’s claim to be a direct agent of the state carrying out express state policy is far more difficult to sustain. In those circumstances, municipal actions appear analogous to the actions of private actors and are therefore subject to the enforcement of Sherman provisions.

Even when a state legislature intends to delegate express powers to municipalities, the statutory language used can still leave the actions of municipalities vulnerable to Sherman regulation. Enabling statutes rarely provide sufficient clarity of policy purpose or prescribe sufficient state supervisory presence to meet Dillon’s requirements that the actions be carried out pursuant to an explicit state policy. In most cases of state delegation,

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municipalities are called upon to exercise a wide range of incremental administrative discretion to "fill out the interstices of the law" left by general statements of policy direction or incomplete guidelines for structures or procedures of implementation. Moreover, few enabling statutes prescribe or even intend to prescribe a continuous state presence in implementation. Therefore, when subsequent municipal actions are challenged as ultra vires, state courts are placed in the position of mediating substantive, structural, or procedural issues that were left unresolved by the language of the enabling legislation.

As originally undertaken in Bailey v. City of New York, the courts attempted to simplify the problems of interpreting state legislative intent by sorting municipal actions into those expressly authorized by legislative enactment and those analogous to the actions of private actors and performed primarily for the public benefit of all local residents (as opposed to residents of the entire state) or the private benefit of the municipal corporation itself. Such a distinction allowed the classification of expressly authorized activities as "governmental" or "public" actions and, following Dillon, the certification of those actions as the actions of a direct agent of the state. In its "governmental" activities, therefore, the municipality could reasonably expect the same degree of Parker immunity from Sherman restrictions enjoyed by the state. At the same time, activities of municipalities that were not expressly authorized and were analogous to economic actions of private actors could be classified as "proprietary" actions, subjecting municipalities themselves to the same legal restrictions (under the Sherman Act) that constitutionally govern private individuals or corporations.

Such a classification schema has proven difficult to apply, either in the context of English common law or in early American law, and has been abandoned in most recent cases as a "legal quagmire." It was not unusual for a municipality to engage in activities that could be considered private (or proprietary) for public interest motives, such as providing needed services to residents or generating revenues to sustain ongoing public (or governmental) activities. Even in the execution of legitimate state policy responsibilities, a municipality might engage in what might be considered wholly reasonable activities that give the appearance of conspiracy to produce another.

ticompetitive results, even if the objective of municipal action is not expressly anticompetitive.\textsuperscript{21} However, if the motive behind the activity was public, regardless of whether it directly benefited the residents of the municipality only or the residents of the entire state, or whether the means chosen to carry out the activity were analogous to the actions traditionally associated with private actors, Dillon would insist that the municipality is still a public actor with public responsibilities to its residents and to the state legislature.\textsuperscript{22} If we follow Dillon precisely, municipalities may well fall outside the intent if not the language of the Sherman Act and not be subject to its regulations, irrespective of whether they may be eligible for immunity under \textit{Parker}.\textsuperscript{21}

MUNICIPALITIES AS PUBLIC ACTORS

The principal concern therefore is whether the Sherman Act can be reasonably applied to public (or governmental) actors at all. Municipalities are undeniably public actors, and if the prohibitions of the Sherman Act are not aimed at public actors, municipalities would be clearly outside its jurisdictional reach. However, neither the statutory language nor the legislative history of the Sherman Act allows such an unequivocal interpretation. The language of the act focuses explicitly on the nature of the action and its actual or potential impact rather than on the nature of the actor. The law does not attempt to distinguish among, or even anticipate, the various types of actors that may engage in actions having anticompetitive effects on commerce.

The Supreme Court has recognized that states as public actors are, under the Tenth Amendment, accorded a greater measure of sovereign protection from federal intrusion than other public actors, but the Court has neither sustained that protection as absolute nor explicitly addressed the constitutional protections of other public actors outside the context of the Tenth Amendment.\textsuperscript{24} Within the context of Tenth Amendment protections, the Court has stipulated that the actions of municipalities would be considered tantamount to the actions of states if municipal actions were pursuant to

\textsuperscript{21} Taussing, "Reflections on \textit{City of Lafayette}," 169–171.

\textsuperscript{22} Dillon, \textit{Treatise on the Law of Municipal Corporations}, pp. 83–84, note 1, citing Darlington \textit{v. Mayor}, 3 N.Y. 164 (1865). Whereas Dillon correctly sourced the attempt to distinguish between public and private functions as "judicial legislation imperceptibly evolved in the process of adjudication," he concluded (184) that it was nevertheless "necessary to promote justice."


\textsuperscript{24} See note 1 above.
a "clearly articulated and affirmatively expressed" policy of the state acting in its sovereign capacity. Actions not meeting this standard would not be "immunized" from Sherman provisions as state action under Parker. Under the enforcement provisions of the Sherman Act, such actions would then be subject to the full range of scrutiny for antitrust violations as those of any private actor.

If a municipal action were challenged under the Sherman Act, the Court would, under the per se rule, automatically focus its attention entirely on the impact of the municipal action rather than on the nature of the actor (whose motive may well have been to serve the public interest) or the nature of the action (whether it be governmental or proprietary). The per se rule holds that once the Court has accepted certain types of impacts on competitive conditions as violations of the Sherman Act, those types of impacts, if found in subsequent cases, are classified as per se violations of the Sherman Act (i.e., "presumed to be unreasonable and therefore illegal without elaborate inquiry into the precise harm they have caused or the business excuse for their use"). Once a court rules an action to be a per se violation, evidence of the presence of reasonable justification (such as a greater public interest being served) or countervailing considerations (such as the means chosen by the municipality to implement state policy being the only means feasible) is foreclosed.

The problems created by the application of the per se rule to the actions of public actors, such as municipalities, are obvious. Simply put, municipalities have a unique set of predominantly public responsibilities and accountabilities not characteristic of private actors. In some areas of municipal activity, few if any competing public or private producers exist. Under circumstances in which it is not considered profitable for private producers to enter a productive field or in which private producers initiated but subsequently abandoned the productive activity, the municipality may be engaging in the productive activity purely as the producer of the last resort. Moreover, what appear to be "excess revenues" produced by one municipal activity may not constitute "profits" in the traditional sense of private enterprise but rather serve to allay the costs of performing other public responsibilities that generate no net revenue. In addition to these differences of economic circumstance, municipalities have historically endured far stricter state regulation of their (corporate) organizational structure and operating practices than other private actors, and their actions are politically account-

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26 Northern Pacific Railway v. United States, 5.


28 Ibid.: 266-268.
able to local electorates, which demand not only that specific services be provided but also expect constant public access to the decisional process utilized in their production.

THE BURGER COURT AND THE TORT LIABILITY OF MUNICIPALITIES

From 1978 to 1986, the Burger Court significantly clarified its interpretation of the constitutional relationship between states and their municipalities in a series of tort cases. In *Lafayette v. Louisiana Power & Light* and *Monell v. Department of Social Services of New York City*, both decided in 1978, the Court served notice that, despite the long-standing presumption to the contrary, municipalities would not automatically be considered immune from tort actions under *Parker* simply because of their status as political subdivisions of states. Municipalities still had to demonstrate that their actions were pursuant to expressed state policy and, if they failed to do so, could be liable for private damages. In 1980, the Court considered a case involving a violation of the Civil Rights Act of 1871 and let stand compensatory damages awarded in private suit against a municipality. The following year, it narrowed the type of damages awarded against municipalities by holding that the legislative intent of the Civil Rights Act of 1871 and the consistent pattern of common law prior to its passage precluded the awarding of punitive damages against a municipality. Finally, in a strict application of the *Lafayette* ruling, the Court held in *Community Communications v. City of Boulder* (1982) that general enabling statutes extending home-rule powers to municipalities did not constitute sufficient legal basis for a municipality to argue that its particular activities were in pursuance of an expressed state policy.

The pertinent question is whether this pattern of decisions has been consistent with established Court doctrine regarding the relationship between states and their municipalities. The answer is decidedly yes. Case decisions of the Burger Court, including dissenting opinions, have proven extremely faithful to Dillon's Rule. The Court consistently reaffirmed that municipalities as political subdivisions of states are not sovereign actors under the Constitution. Even under circumstances in which they are engaging in func-

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28As cited in note 7 above.
29436 U.S. 658.
30Unlike *Bailey v. City of New York* which based tort liability on the nature of the function being performed, this doctrine could be considered consistent with English common law if one equates "crown functions" (as opposed to the broader defined public functions) of English municipal corporations with explicitly delegated state functions of American municipal corporations. See Barnett, "The Foundations of the Distinction Between Public and Private Functions," 258, note 26.
33As cited in note 27 above.
34*Lafayette v. Louisiana Power & Light*, 411-413; *Community Communications Co. v. City of Boulder*, 53-54. See also note 22 above.
tions delegated by state statute, municipalities are not considered sovereign equivalents of states. Rarely has any member of the Burger Court even intimated consideration of whether municipalities have inherent rights of local self-government outside of the sovereign protections that might be accorded them under the Tenth Amendment. In short, the relationship between states and their municipalities has been treated as that between a sovereign entity and a political subdivision that has been delegated both legislative and administrative discretion in the carrying out of state policy.

Because municipalities do enjoy a measure of legislative and administrative discretion, they have attracted a greater Court scrutiny than other types of state agencies in antitrust actions. In several cases, the Burger Court attempted to clarify the conditions under which municipalities engaging in anticompetitive actions might be considered as pursuing explicit state policy in such a manner as to be immunized from Sherman Act provisions under Parker. What evolved from these decisions has been the doctrinal position that any public or private actor, in order to successfully claim Parker-type immunity, must demonstrate that (1) the state explicitly delegated authority to that actor to engage in such regulatory actions, (2) the resulting anticompetitive impact was pursuant to a clearly articulated and affirmatively expressed state policy, and (3) the execution of those actions was actively supervised by the state.

The Burger Court focused most of its attention on the application of the second requirement, which in itself is basically a restatement of Dillon's Rule. Under circumstances in which there is an absence of explicit statutory language, the Court held that evidence of an expressed state policy must demonstrate that the state legislature both comprehended the powers being delegated to the municipality (i.e., had established an affirmative, non-neutral, state presence in the regulatory area), and contemplated (anticipated) the kind of anticompetitive actions likely to result from the exercise of those powers. The Court consistently maintained, however, that a municipality need not demonstrate either the presence in the statutory language of specific and detailed authorization or that the language compels the municipality to engage in the actions at issue.

The Court also clarified for the first time how the third requirement—the
presence of active state supervision—could be applied to municipalities. It concluded that such a requirement served primarily “an evidentiary function” (i.e., providing a type of evidence that the actor claiming immunity from Sherman provisions under Parker could offer to support the claim that the anticompetitive action was pursuant to state policy). It argued in effect that because municipalities present a more limited range of dangers to public (federal or state) goals than do private actors, a demonstration of clear state authorization (i.e., fulfillment of the second requirement) is sufficient to establish that a municipality was engaging in conduct pursuant to a properly delegated state function. Evidence of additional state presence, such as active supervision of local policy execution, is therefore unnecessary.

UNRESOLVED ISSUES IN STATE-LOCAL RELATIONS

Recent decisions of the Burger Court are consistent with established judicial doctrines concerning the relationship between states and their municipalities; nevertheless, these decisions raise again two significant issues that have yet to be resolved by the Court’s evolving doctrines of federalism: (1) Is the sovereign capacity of states to distribute/delegate authority to their political subdivisions obstructed by federal statutes that subject municipalities to tort liability? (2) Should municipalities as public actors be subject to tort liability in the first place?

The Burger Court has ruled that the requirement that municipalities demonstrate pursuance of an expressed state policy in order to qualify for immunity from Sherman liability under Parker does not impair the state’s sovereign power to distribute authority to its political subdivisions. Arguments to the contrary have focused less on constitutional requirements than on the impending political inconvenience of securing state legislative authorization for local actions that might be considered anticompetitive, namely, the inconvenience to the municipality in terms of securing a statewide policy to meet an immediate local need and the inconvenience to the state legislature itself in terms of the time required to consider policies addressing essentially local concerns.

The more serious question is whether a strict adherence to this requirement forecloses the ability of a state to delegate broad authority over local matters (such as by home-rule statutes or amendments) to municipalities. Home-rule amendments are often read as requiring that, in matters local in nature, municipal action supersedes any previous or future action by the state. This type of interpretation, however, could effectively prevent the state from formulating an expressed policy on various types of emerging local needs. The result would be, it is argued, that in order to qualify for Parker immunity

44Ibid.
46Lafayette v. Louisiana Power & Light, 416; Community Communications Co. v. City of Boulder, 57.
47Lafayette v. Louisiana Power & Light (Stewart dissenting), 438.
from Sherman regulations, a home-rule municipality would "have to cede its authority back to the State." 48

Whether such a circumstance in fact "radically alter[s] the relationship between the States and their political subdivisions" or "effectively destroys the 'home rule' movement in this country" 49 is of course subject to debate. However, as the Court continues strict adherence to this requirement, states will have to amend existing home-rule enabling legislation and also supplement it with expressed policy in functional areas that are likely to produce anticompetitive local policies. The Town of Haile v. Eau Claire decision, though, clearly demonstrated that the Court is willing to "exempt" local actions from Sherman liability in the presence of evidence of state legislative "comprehension" of how municipalities may use the authority so granted and "contemplation" of the likely anticompetitive impact that might result.

The Burger Court has not completely resolved the issue of whether municipalities as public actors should be subject to the same types of federal regulations and be held liable for the same types of remedies as private actors. While the Court has often acknowledged that a municipality acts in a public rather than private interest, members of the Court have alternatively considered the compelling element in liability cases to be the nature of the actor (municipality as a governmental actor), the nature of its particular action (motivated by the public welfare rather than private interest), or the potential impact of its action on the execution of an expressed federal policy. 50 The root of much of this diversity of opinion is the sheer ambiguity of the Parker decision with respect to the source and dimensions of state sovereignty discussed above.

In short, municipalities are governmental actors with significant traditional public responsibilities and multiple levels of popular accountability. If in the performance of their public responsibilities, municipalities undertake activities that would constitute a violation of federal laws if performed by private actors, two related legal questions are raised: (1) has the state expressly authorized the municipality to engage in those specific types of activities, and (2) can the state extend immunity from federal laws to its municipalities when federal law does not? The Parker decision found that states were immune, but purposely rendered no judgment on whether or how such immunity could be extended to their political subdivisions. The Burger Court essentially merged the two questions into a doctrinal standard requiring expressed state authorization if a municipality's actions are to be immunized under Parker.

48 Community Communications Co. v. City of Boulder (Rehnquist dissenting), 71.
50 Re: notes 20 and 23 above. Compare, for example, the positions taken in Lafayette v. Louisiana Power & Light, 403-408, especially note 33; 426-434 (Stewart dissenting); and 418-426 (Burger concurring); and Community Communications Co. v. City of Boulder (Rehnquist dissenting), 65-70.
This approach sidesteps the fundamental issue of whether state immunity under *Parker* should be extended to municipalities at all. *Parker* did immunize acts of government from Sherman liability, but the decision specified "acts of government by States acting in their sovereign capacity." Municipalities are governmental actors, but are not states and are not recognized as sovereign under the U.S. Constitution. Arguments that municipalities should be immunized are not based on principles of sovereignty (the inherent rights in our common law system to local self-government) or questions of whether municipal actions may thwart the execution of federal policy, but rather on the type of impact that enforced liability judgments would have on their subsequent operations. These arguments anticipate liability judgments against municipalities from private suits that are so costly as to raise the specter of municipal bankruptcy (thereby jeopardizing the provision of basic local services) or to "impede, if not paralyze, local governments' efforts to enact ordinances and regulations aimed at protecting public health, safety, and welfare, for fear of subjecting local government to liability." One could argue that the Burger Court already resolved the question of the appropriateness of various types of remedies awarded against municipalities. The Court upheld the vulnerability of municipalities to private suits under both federal civil rights legislation and antitrust legislation in 1978. Yet, when municipalities were found in actual violation of the former, the Court narrowed the types of remedy that could be afforded, based not only on the intent of the law and its damages provision, but also on the public interest responsibilities of municipalities as well as common law protections traditionally afforded municipalities from tort liabilities. The tort liability of municipalities under the Sherman Act on the other hand has never been adjudicated on constitutional grounds; after their general vulnerability under Sherman regulations was sustained, the Congress quickly amended the Sherman Act to restrict the liability that can be imposed on municipalities to injunctive relief.

As a consequence, the Burger Court has not in any doctrinal fashion resolved the fundamental issue of whether municipalities as public actors should be liable for private damages in the course of their public functions. The courts have wrestled unsuccessfully (and perhaps unevenly) with this issue since the early nineteenth century. Federal regulation of certain kinds of activities or impacts has, unless explicitly exempted in statutory language, swept

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51 See note 25 above.
52 *Lafayette v. Louisiana Power & Light* (Stewart dissenting), 440-441; *ibid.* (Brennan dissenting), 442-443; *Community Communications Co. v. City of Boulder* (Rehnquist dissenting), 65, note 2.
55 Re: notes 36 and 37 above and accompanying text.
public actors such as municipalities into a position of liability when that type of remedy is expressly authorized by the Congress. The Court's ruling in City of Newport v. Facts Concerts established the parameters of municipal liability in Section 1983 (civil rights) cases, but these parameters have not been applied to other regulatory areas in which municipalities might be liable (such as antitrust).

In this realm, the Burger Court moved quite cautiously, drawing each case decision narrowly and determining the extent of municipal liability according to interpretation of the particular statutory language, congressional intent, and (in Section 1983 cases at least) common law. This pattern of decisions indicates that with respect to state-local relations, we might only expect incremental development of judicial doctrine concerning the legal status of municipalities as the Court continues to deal with municipal liability in a piecemeal fashion. The pattern also indicates that future Court decisions will remain consistent with the doctrine of expressed powers.