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## Articles

### Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism

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I.	Introduction	

Federalism, the assignment of dual responsibilities for governing to lower and higher levels of government, is a founding political principle of the U.S. Constitution and today one of our country's leading intellectual exports. In Europe, the former Soviet Union, South Africa, and

elsewhere, the view that good government will involve a judicious blending of local and central governmental decisionmaking is now well accepted. What is not well accepted is exactly how that blending should be specified and achieved.<sup>1</sup> Indeed, even in the United States, scholars, politicians, and the courts are reconsidering the allocation of policy responsibilities between local, state, and national governments as part of a national political debate concerning the role of government in economic and social affairs.

This Article seeks to contribute to this national federalism debate through a careful analysis of one matter of current policy concern: the appropriate allocation of responsibility for business regulation between the states and the national government. U.S. courts face this issue today in their efforts to resolve the inevitable tension between federal antitrust law and state business regulation through their evolving antitrust state-action doctrine. We shall examine this doctrine in detail from the perspective of a well-articulated general theory of federalism.<sup>2</sup> The advantage of grounding our analysis in general theory is twofold. First, the principles of federalism that we articulate help us to understand current state-action case law as a reasoned doctrine of regulatory federalism to which we suggest certain perhaps fruitful extensions. Second, placing the current state-action doctrine within a general theory of federalism clarifies the role of that case law, and of the courts more generally, in determining a place for business regulation. In particular, the analysis delimits the appropriate domains of state and national legislatures in business regulation and the need for the judiciary as a principled arbiter of those responsibilities.

Part II presents a theory of federalism that respects the twin values of political participation and economic efficiency.<sup>3</sup> Both values play

1. For a recent overview of the current debates in federalism, see Robert P. Inman & Daniel L. Rubinfeld, *The Political Economy of Federalism*, in PERSPECTIVES ON PUBLIC CHOICE: A HANDBOOK (Dennis C. Mueller ed., 1996); Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447 (1994); and George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331 (1994).

2. A carefully specified theory of federalism has many useful applications: government expenditure policy, see, e.g., WALLACE E. OATES, *FISCAL FEDERALISM* 3-20 (1972); tax policy, see, e.g., Robert P. Inman & Daniel L. Rubinfeld, *Designing Tax Policy in Federalist Economies: An Overview*, 60 J. PUB. ECON. 307 (1996); deficit policy, see, e.g., Robert P. Inman, *Public Debts and Fiscal Politics: How to Decide?*, AM. ECON. REV. PAPERS & PROC., May 1990, at 81; and regulatory policy, see, e.g., Jerry L. Mashaw & Susan Rose-Ackerman, *Federalism and Regulation*, in THE REAGAN REGULATORY STRATEGY: AN ASSESSMENT 111 (George C. Eads & Michael Fix eds., 1984).

3. A third important value, the protection of the sovereign rights of citizens, will not be pursued further here because it has not entered substantially into the debate concerning antitrust state action. On sovereignty and the importance of small governments, see Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); James F. Blumstein, *Federalism and Civil Rights: Complementary and Competing Paradigms*, 47 VAND. L. REV. 1251 (1994); and Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341.

prominent roles in today's federalism debates, but rarely are they integrated within a common conceptual framework. Our theory provides that framework, which we then apply to deciding how best to assign responsibility for the regulation of business between state and national governments.

Part III extends our general analysis of regulatory federalism to consider explicitly current antitrust state-action doctrine. The conflict between state and federal interests has been longstanding in U.S. constitutional history. This conflict has typically been resolved by reference to the Supremacy Clause of the U.S. Constitution, which resolves conflicts in favor of federal law.<sup>4</sup> In contrast, however, the "state-action" doctrine has typically resolved the tension between federal antitrust regulations and the states' sometimes anticompetitive regulation of business activities in favor of the states. As spelled out by the Supreme Court's opinion in *Parker v. Brown*,<sup>5</sup> the doctrine largely exempts the actions of states from the antitrust laws.<sup>6</sup> In contrast to many of the state-action doctrine's scholarly critics,<sup>7</sup> we find the doctrine's two-pronged "participation" test requiring state regulations to be "clearly articulated" and "actively supervised" compelling, once the test has been given an intellectual

4. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . ." U.S. CONST. art. VI, cl. 2. For a historical overview of the tension between federal regulations and the activities of state and local governments, see U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *FEDERAL REGULATION OF STATE AND LOCAL GOVERNMENTS: THE MIXED RECORD OF THE 1980s* (1993) [hereinafter U.S. ADVISORY COMM'N, *FEDERAL REGULATION*] and U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *FEDERAL STATUTORY PREEMPTION OF STATE AND LOCAL AUTHORITY: HISTORY, INVENTORY, AND ISSUES* (1992).

5. 317 U.S. 341 (1943).

6. *Id.* at 350 (holding that neither the language nor the history of the Sherman Act suggests that it was intended to restrain state action). Without the *Parker* holding, the Supremacy Clause of the U.S. Constitution would invalidate all state regulations that violated federal antitrust laws.

7. Prominent critics of the current state-action doctrine include: Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23, 25 (1983) (stating that the Supreme Court has been unable to explain why there is an inverse preemption of state action over federal action); Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 668, 669-70 (1991) (describing the state action doctrine as "both odd and unfortunate" because it "defies our ordinary understanding of preemption law" and "precludes principled resolution"); William H. Page, *State Action and 'Active Supervision': An Antitrust Anomaly*, 35 ANTITRUST BULL. 745, 746 (1990) (suggesting that the drafters of the Sherman Act would be surprised that the states have been permitted to displace federal law); and John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 714-15 (1986) (criticizing the state action doctrine because state regulation has become economically inefficient due to "the capture of lawmaking bodies by producer groups seeking benefit at the expense of others"). For the other side of these debates, see David McGowan & Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment*, 17 HARV. J.L. & PUB. POL'Y 293, 301-59 (1994) (analyzing critically the efforts by Elhauge to provide a new foundation to the state action doctrine) and Matthew L. Spitzer, *Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory*, 61 S. CAL. L. REV. 1293 (1988) (critiquing Wiley's capture theory). We join the debate with our own commentary on the analyses and recommendations of Easterbrook, Elhauge, Page, and Wiley, as well as our own substantive proposal for understanding and strengthening the doctrine.

foundation in a general theory of regulatory federalism.<sup>8</sup> Part III offers this necessary grounding. So grounded, the current doctrine is seen to provide institutional protection for federalism's valued goal of political participation, though we shall argue the Court did err in one application of its two-pronged "participation" test in *Community Communications Co. v. City of Boulder*.<sup>9</sup> Federalism's goal of economic efficiency, however, is not well protected by present state-action doctrine. Part III argues that the current doctrine allows many state regulations that adversely affect the economic well-being of nonresidents to stand, at a potentially significant cost in lost economic welfare. Indeed, *Parker v. Brown*, the cornerstone of the current state-action doctrine, is just such a case.

The analysis in Part IV seeks to correct the current doctrine's neglect of federalism's efficiency goal. We advance our own two-pronged test aimed to ensure that state regulations do not ignore the adverse economic consequences of regulatory spillovers. Our "spillover" test asks: 1) Does a state regulation generate significant monopoly spillovers onto non-residents?; and 2) Was the state regulation decided without political participation of the affected nonresidents as evidenced by the lack of interstate regulatory agreement? If the answer to both questions is yes, then the state regulation fails the spillover test for economic efficiency, and a Sherman Act review of the regulation is appropriate. The reading of the current case law suggests the courts may find the spillover test attractive in principle. To move from principle to practice, we also offer guidelines for how the test might be implemented. The guidelines are simple and, importantly, keep the courts away from a deep substantive review of business regulations when deciding state-action cases.

Part V combines the Court's newly grounded "participation" test with the "spillover" test to form an extended and, we feel, intellectually stronger state-action doctrine. We apply our extended doctrine to the current case law and find support for the courts' decisions (though not always their analyses) in all but *Parker v. Brown* and *Community Communications Co. v. City of Boulder*, two cases we would reverse. In *Parker*, the Court allowed the state regulation to stand. In our analysis of *Parker*, the state regulation passes the Court's participation test but fails our spillover test; thus we would recommend a Sherman Act review. In *Boulder*, the Court exposed the regulation at issue to antitrust review. Under our analysis, we

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8. The Supreme Court articulated this two-pronged test in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). For a discussion of the current state-action doctrine and its evolution from *Parker* to *Midcal*, see *infra* subpart III(A).

9. 455 U.S. 40 (1982). In *Boulder*, the Court exposed a local ordinance to federal antitrust regulation, even though the process by which the local ordinance was approved met generally accepted principles of political participation. *Id.* at 47-48, 54-55. For our criticisms, see *infra* notes 198-200 and accompanying text.

would allow the regulation to stand. It passes the proposed spillover test and the now newly interpreted and conceptually more firmly grounded participation test. By drawing and enforcing these lines of regulatory responsibilities, the courts can make their unique contribution to regulatory federalism.

Our extended state-action doctrine provides the courts with needed guidelines as they police the boundaries between national and state responsibilities for setting business regulations. But the extended state-action doctrine provides only incomplete guidance. The doctrine helps the courts detect when a state regulation might intrude into the national policy domain, but it provides no guidance for judging when a national regulation might overreach into the state arena. Commerce Clause jurisprudence has sought to draw this line, relying on the Tenth Amendment to block federal regulatory intrusions into the domain of state policy.<sup>10</sup> Unfortunately, the case law beginning with *National League of Cities v. Usery*<sup>11</sup> and ending in *Garcia v. San Antonio Metropolitan Transit Authority*<sup>12</sup> has shown the Tenth Amendment to offer no substantive limits on federal regulatory reach.

An alternative approach is needed. In Part VI we provide such an alternative, one that builds upon the Supreme Court's own logic in *Garcia* and looks to the process of legislation and to the institutions of Congress to check any overreaching inclinations of the national legislators. We propose that Congress pass legislation requiring all new federal regulations to be reviewed by a seven-step Federalism Impact Statement (FIST) detailing the national economic benefits and costs of new regulations and any losses in state regulatory autonomy. FIST would serve a procedural goal only; its aim would be to ensure that important regulatory decisions were made only after Congress understood and balanced the proposed national regulation's economic gains against its likely losses in state autonomy and reductions in political participation. FIST would not dictate what that balance should be. As with other impact statements, the judiciary's role would be to ensure that FIST's seven-step process worked effectively. Experience in the United States and the European Union suggests that such impact statements, if enforced by the courts, do constrain central government regulatory powers. The recent Supreme Court decision in *United States v. Lopez*,<sup>13</sup> creating its own small procedural hurdle for national regulations, suggests that this Supreme Court might welcome our alternative.

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10. According to the Tenth Amendment, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

11. 426 U.S. 833 (1976).

12. 469 U.S. 528 (1985).

13. 115 S. Ct. 1624 (1995).

Part VII concludes our study by stressing the importance of the judiciary for ensuring the long-run vitality of a federalist political structure. Historical and contemporary evidence shows a steady drift of regulatory responsibility to the national level when daily politics are left unchecked. Reasoned judicial interventions can provide one check. To this end, current state-action doctrine has provided positive support for state regulatory policies; our “enhanced” state-action doctrine based upon a carefully articulated theory of federalism provides an even more confident basis for continuing this sympathetic tradition. Our FIST proposal provides the courts with a tool to actively protect state policymaking. Together, the Court’s current “participation” test, our proposed “spillover” test, and FIST give the courts what they need to both promote and protect a truly federalist political process for setting regulatory policies.

## II. Setting the Federalist Structure: A Framework for Evaluating Regulatory Federalism

Confederations of small governments have been praised by many—from Plato and Aristotle through Rousseau, Montesquieu, Smith, and Mills to contemporary federalist legal and economic scholars—as the political structure most likely to encourage a trio of social virtues: political participation, protection of the sovereign rights of citizens, and economic efficiency.<sup>14</sup> Other scholars have been more skeptical. *The Federalist Papers*, the intellectual blueprint for the U.S. Constitution, raises serious doubts about the virtues of such loose confederations.<sup>15</sup> Leading contemporary scholars from political science and economics have lent theoretical support to these concerns, arguing that a strong, democratically elected central government is more likely to promote political participation, the rights of citizens, and the efficient and equitable allocation of resources.<sup>16</sup>

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14. On the advantage of small governments for political participation, see CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 46, 110-11 (1970) and Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1067-74 (1980). On the importance of small governments for the protection of human rights, see Rapaczynski, *supra* note 3, at 380-414. On economic efficiency and the positive role of small governments, see Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

15. See THE FEDERALIST NO. 3, at 42-44 (John Jay) (Clinton Rossiter ed., 1961) (arguing that a strong union is required to ensure national security); NO. 9, at 71 (Alexander Hamilton) (proposing that a strong union serves as a barrier against domestic factions); NO. 15, at 109 (Alexander Hamilton) (criticizing a loose confederation because it “would place us in a situation to be alternate friends and enemies of each other, as our mutual jealousies and rivalships, nourished by the intrigues of foreign nations, should prescribe to us”).

16. On why small governments need not always generate greater political participation, see ROBERT A. DAHL & EDWARD R. TUFTTE, SIZE AND DEMOCRACY 41-65 (1973). On the potential inability of small governments to protect group rights, see WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE 139-55 (1964). For a technical discussion of why small governments might be economically inefficient, see Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387 (1954).

The currently unsettled choice between central government and state government powers in Europe, the United States, and developing economies makes very clear that the federalism debate remains open, visible, and at times contentious.

Wherever the debate is engaged, the central question is the same: Which form of government—decentralized or centralized—is best suited to make public policies, given that we want those policies to be democratically decided, respectful of personal rights, and economically efficient? A considered answer requires a careful balancing of the benefits and costs of decentralized and centralized political structures.

We begin our analysis by defining what we mean by decentralized and centralized federalist structures. In this Article, governments will be defined as “decentralized and state” or “centralized and national” according to their combination of two constitutional decisions. The first—called the *partition decision*—divides the single national citizenry into states. The second—called the *assignment decision*—allocates political responsibility for choices over a social or economic policy either to these states or to a national government. If the partition decision creates states and the assignment decision allocates ultimate responsibility for a social or economic policy to those states, then we will describe policymaking as “state” or “decentralized.” If the partition decision creates only a national government or the assignment decision gives final responsibility for a social or economic policy to the central government even when there are states, then we will describe policymaking as “national” or “centralized.”<sup>17</sup> Together, the partition and assignment decisions define the essential federalist structure of the government.<sup>18</sup>

The chosen federalist political structure in turn affects three valued outcomes: citizens’ rights, political participation, and efficient resource

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17. The partition and assignment choices can vary by public policy or can be set uniformly across all government decisions. For example, a fully centralized federalist structure or *unitary state* centralizes all government decisions. In contrast, a fully decentralized federal system would have one state government for each type of citizen and allow negotiated agreements—or *confederation*—among the independent states. Federalist structures between these extremes are also possible. For example, some government functions can be assigned to the central government (*e.g.*, defense spending) while others remain at the state level (*e.g.*, public education). Further, both the partition and the assignment decisions might be varied within the same federalist system—for example, large regional governments might be the preferred federalist institution for environmental policies.

18. Another important dimension of the federalist constitution is the rule of citizenship for each state. The United States defines states geographically and has adopted residency as the defining principle of citizenship, but this need not be the only criterion. States might also be defined by cultural or racial groupings with citizenship belonging to those who can prove an inherited linkage to the cultural or racial group. A combination of these two approaches to states and citizenship might also be used—for example, if the United States or Australia were to give separate statehood and central legislative representation to their aboriginal peoples. In this paper we will work with the simplest and most common definition of state citizenship based upon residency in a defined state territory.

allocations.<sup>19</sup> Debates regarding the appropriate federalist structure for regulatory policies—the concern of this paper—have focused almost exclusively on the goals of political participation and economic efficiency, the approach followed here.<sup>20</sup> Subpart A below reviews how the two federalist structures are likely to affect political participation and economic efficiency generally and how altering those structures may lead to varying levels of each valued goal. Subpart B applies the analysis in the specific policy area of regulatory federalism.

### A. *Federalism, Political Participation, and Economic Efficiency: An Overview*

1. *Federalism and Political Participation.*—Political participation is defined as “actions through which ordinary citizens of a political system influence or attempt to influence [political] outcomes.”<sup>21</sup> Political participation is by ordinary citizens, not by elected or appointed government officials or employees of political parties who are politically active because of direct compensation. Participatory actions include voting, debating, marching, picketing, contributing, and passive and armed resistance. The aim of these actions is to influence the direction of government policy. Active citizens may be successful in moving public policies closer to their preferred outcomes because of their participation. When this occurs, citizens are said to have influence. Alternatively, active citizens may be unsuccessful, with their political actions having no effect on policy outcomes. In this case, the citizens have attempted, but failed, to influence political outcomes.

The benefits to citizens of political participation can be divided into three categories: instrumental or utilitarian, developmental or educative, and intrinsic or consumptive.<sup>22</sup> In the utilitarian view, perhaps argued most directly in the work of Bentham and James Mill, political

19. Justice Sandra Day O'Connor, a leading spokesperson for federalism, explicitly recognized each of these three valued outcomes in her dissent (joined by Justices Rehnquist and Burger) in *FERC v. Mississippi*, 456 U.S. 742 (1982). Justice O'Connor argued that independent state governments within a federalist structure may provide a “salutary check on governmental power,” *id.* at 790, may enhance “the opportunity of all citizens to participate in representative government,” *id.* at 789, and may ensure that elected officials remain responsive to citizen preferences when providing public services, *id.* at 787.

20. For other policy questions such as the regulation of criminal behavior and the protection of civil rights, the third goal of citizen rights must be given full attention. See generally Amar, *supra* note 3; Blumstein, *supra* note 3; Rapaczynski, *supra* note 3.

For some political theorists, such as Rousseau and Mill, political participation, which we will discuss in detail, is instrumental in protecting individual rights. To that extent, citizen rights are part of our analysis. See *infra* notes 21-29 and accompanying text.

21. JACK H. NAGEL, PARTICIPATION I (1987) (emphasis omitted).

22. We follow the outline of NAGEL, *supra* note 21, at 11-15.

participation serves a specific function: it is to ensure that government maximizes aggregated citizen utility or welfare.<sup>23</sup> In democratic societies, political participation is a necessary check on abuses of citizen welfare by ill-informed or even greedy elected officials. Political participation guarantees that abusive elected officials will be exposed and defeated at the next election. For the utilitarians, political participation's value is fundamentally instrumental; it plays, in the words of Carole Pateman, a "protective function" for the public welfare.<sup>24</sup>

For Jean-Jacques Rousseau and John Stuart Mill, political participation is instrumental to another, perhaps more important, end: it protects citizen liberties.<sup>25</sup> While both Rousseau and Mill acknowledged the instrumental value of participation in protecting private economic interests and ensuring good (efficient) government, they extended the argument of the utilitarians to include participation's protective value for personal freedom as well. Participation ensures that no one individual or group is master over any other: "[T]he rights and interests of every or any person are only secure from being disregarded, when the person interested is himself able, and habitually disposed, to stand up for them."<sup>26</sup>

For many scholars, however, participation does much more than just protect private economic interests and personal liberties. Aristotle, Rousseau, J.S. Mill, de Tocqueville, and contemporary commentators such as Dewey and Pateman view citizen political participation as serving an important educative function.<sup>27</sup> By participating in the political process, the individual learns that his private interests are intimately linked to the interests of others. This knowledge leads to a willingness to compromise, to put private interests aside, and to call upon values of justice and common good when making public choices.<sup>28</sup> There may be beneficial

23. See Bhikhu Parekh, *Introduction to JEREMY BENTHAM, BENTHAM'S POLITICAL THOUGHT* 31, 30-31 (Bhikhu Parekh ed., 1973) (noting that Bentham thought that the best way to match government interests with public interests was through the "punitive weapon" of elections); JAMES MILL, *POLITICAL WRITINGS* 23-26 (Terence Ball ed., 1992) (stating that limiting the duration of a representative's power through frequent elections is the only viable means of checking that power, due to the close alignment of the representative's interests with those of the community).

24. PATEMAN, *supra* note 14, at 20.

25. See NAGEL, *supra* note 21, at 12; PATEMAN, *supra* note 14, at 26.

26. JOHN STUART MILL, *CONSIDERATION ON REPRESENTATIVE GOVERNMENT* (1861), *reprinted in THREE ESSAYS* 143, 186 (Oxford Univ. Press 1975). For a summary of the arguments of J.S. Mill and Rousseau in favor of political participation, see PATEMAN, *supra* note 14, at 26-27.

27. See PATEMAN, *supra* note 14, at 27; Frug, *supra* note 14, at 1071 & nn.50-52.

28. For Rousseau, because there will inevitably be conflict between the private and public spheres, individuals learn to compromise, to deliberate according to a sense of justice called the "constant will." PATEMAN, *supra* note 14, at 25 (quoting JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 153 (Maurice Cranston trans., Penguin Books 1968)). Similarly, for J.S. Mill, participation in society's political life causes the individual to "weigh interests not his own; to be guided, in the case of conflicting claims, by another rule than his private partialities; to apply, at every turn, principles and maxims which have for their reason of existence the common good." *Id.* at 30 (quoting MILL, *supra* note 26, at 197).

spillovers to private decisionmaking, too. Having recognized and accepted the validity of the interests of others in the public arena, we may be more accepting of those interests in our private dealings.<sup>29</sup> Simply put, we may be different people—more tolerant, less selfish—after political participation.

Finally, political participation may provide direct consumptive benefits to those who participate. From those who simply like to hear the sound of their own voice or revel in controlling others to those who take genuine satisfaction in having contributed to a cause they feel is worthy, many people derive a personal consumption benefit from the act of political participation. How else might we explain widespread voting in national elections?<sup>30</sup> While perhaps not the most compelling argument for increased political participation, for there are certainly other means to such consumption benefits, it should not be ignored.

If political participation is an activity to be valued, how do we know if there is more or less of it within society? Measures of each of participation's valued outcomes are needed. First, the effects of individual participation on political outcomes can be measured by a metric of political *influence*.<sup>31</sup> Second, the educative and consumption values of individual participation can be measured jointly by a metric of political *effort*—for example, by the hours, or the hourly equivalent of dollar contributions, given by the individual to a political activity.<sup>32</sup> Given these metrics of

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29. Aristotle, for example, argued that involvement in public decisions changes people, giving them a new appreciation of the need for compromise and accommodation in all spheres of social life. See Frug, *supra* note 14, at 1071.

30. See WILLIAM H. RIKER & PETER C. ORDESHOOK, AN INTRODUCTION TO POSITIVE POLITICAL THEORY 63 (1973) (arguing that the personal satisfaction derived from voting and participating in the political process can explain the rationality of an otherwise irrational decision).

31. There is no shortage of candidates for measures of political influence. For a detailed discussion, see JACK H. NAGEL, THE DESCRIPTIVE ANALYSIS OF POWER 83-100 (1975). For one effort to implement one such outcome measure—the *concurrence* of leaders' priorities with those of their constituents—see SIDNEY VERBA & NORMAN H. NIE, PARTICIPATION IN AMERICA: POLITICAL DEMOCRACY AND SOCIAL EQUALITY 299-333 (1972). Verba and Nie show that greater participation leads to greater concurrence beyond some lower threshold. *Id.* at 309-22, 328-33.

32. If the hourly metric is adopted—it is the one preferred by us—what "actions" should be counted as participatory? At a minimum we would include time involved in voting, listening to or reading about political debates, preparing for and speaking at public meetings, marching and picketing, and lobbying public officials. Dollars donated for political activities by others would be converted into participatory hours by dividing the individual's contribution by the individual's hourly wage. (The hours of the paid activist would not be counted as political participation; this would be double counting.) The hourly metric as a measure of effort seems closest to what most political theorists have in mind when speaking of the educative and consumptive benefits of political participation. Education and consumption benefits come from being involved. Using the dollar metric, a rich person earning \$100/hour would make a \$1000 political effort by contributing ten hours. A poor person earning \$10/hour would make the same \$1000 political effort by contributing 100 hours. Both citizens register the same political effort if measured in dollars, but the poor person clearly makes the greater effort measured in hours.

influence and effort, political participation by citizens in society can then be said to be higher when citizen influence and effort increase.<sup>33</sup>

The formal and informal institutions of politics are the most important determinants of citizen influence and effort, and thus, of a society's overall level of political participation. In dictatorships, average citizens have little influence and, except for revolutionaries, are likely to make only small efforts. In democracies, average citizen influence and efforts are both likely to be greater. Two democratic institutions seem particularly important: open elections and a free press. Open elections ensure that citizens can replace unacceptable political leaders; a free press ensures that citizens know when the leaders are unacceptable. Open elections and a free press shift the balance of power away from professional politicians to the citizens generally. Influence rises. The increase in average citizen influence in turn makes political effort more productive. Effort rises.<sup>34</sup> In South

33. The final measure of societal participation by citizens must be an index of individual citizen influence and efforts. Constructing such an index is a subtle matter. Decisions must be made as to how to value citizen influence and citizen political efforts. Strict utilitarians such as J.S. Mill, for example, were only interested in the influence value of participation. See Mill, *supra* note 26, at 188-90. Frug, on the other hand, places greatest value on political effort. See Frug, *supra* note 14, at 1070-73, 1151. Pateman values both influence and effort. See PATEMAN, *supra* note 14, at 109-10 (observing that it is only through the opportunity to exert political effort that one can begin to have political influence). The central difficulty for creating such a societal index arises when the index must compare one participatory state in which influence and/or effort are high for some citizens and low for others to another participatory state where the ordering of influence and/or effort is reversed. Interpersonal participatory comparisons will be needed. On the difficulty of creating such indices, see generally AMARTYA SEN, CHOICE, WELFARE, AND MEASUREMENT 264-79 (1982).

34. A simple model of citizen political behavior gives this prediction. When a citizen is "influential" she is said to receive a valued outcome from the government, for example,  $g$  (spending on education) =  $g^*$ . When she is not influential she receives the outcome of  $g = g^o$ . Her political influence is measured by the probability index that she is "influential," where  $\rho$  is the probability that she is influential and  $(1 - \rho)$  is the probability she is not. The citizen's political effort ( $\epsilon$ ) is measured in hours. The citizen values her political participation according to the expected utility ( $V$ ) she derives from making political effort, given that effort provides direct utility (or disutility) and impacts positively on the probability that she will be influential:  $V = \rho(\epsilon)\{U(g^*, \epsilon)\} + [1 - \rho(\epsilon)]\{U(g^o, \epsilon)\} = \rho(\epsilon)\{U(g^*, \epsilon)\} - U(g^o, \epsilon) + U(g^o, \epsilon)$ , where  $U(g, \epsilon)$  measures the "utility" a citizen receives from a given load of public services ( $g$ ) and effort ( $\epsilon$ ). The citizen's political effort is determined by balancing the marginal benefits of increased effort—the gain in expected utility from increasing the chance she will be influential and thus get  $g^*$  rather than  $g^o$ —against the marginal costs in lost utility of making that added effort. If the marginal productivity of extra political effort on influence declines as effort increases, as seems likely, then the marginal benefits from effort decline as effort increases. Further, if the disutility of political effort increases as effort rises, again as seems likely, then the marginal costs from effort rise as effort increases. When marginal benefits from more influence due to the extra effort just equal the marginal costs from the extra effort, then our citizen is in a "participatory equilibrium." Any political reforms that shift upward the marginal productivity of effort on influence—for example, moving from a dictatorship to democracy—will shift up the citizen's marginal benefit curve from effort, and political effort will rise. Such a shift in government could cause a reduction in the disutility of political effort (better press coverage, freer speech, etc.); this will cause the marginal cost curve to fall, and again, political effort will rise.

Africa, for example, both blacks and whites went from voter boycotts to nearly full voter participation with the fall of apartheid.<sup>35</sup>

The federalist structure of a democracy—centralized or decentralized—can also contribute to the levels of citizen influence and effort, and thus the level of political participation, in a society. Political influence is likely to be higher for each individual citizen when the democratic state has fewer participants. Each vote has more clout, access to politicians is likely to be easier, and information about politicians' activities is likely to be more readily available. If so, then for a given set of policy choices, smaller governments are likely to give each individual citizen more political influence over outcomes than larger governments. Again, increased political influence is likely to stimulate increased individual political effort.<sup>36</sup> Smaller governments and more decentralized democratic systems are therefore likely to foster increased political participation. Contemporary political theorists such as Pateman and Frug argue for this prediction as did Aristotle, Rousseau, and J.S. Mill before them.<sup>37</sup>

While the prediction that smaller democratic governments will involve greater political participation is a reasonable one, how the size of states actually affects political influence and political effort is ultimately an empirical question. The evidence is sparse, but what is available generally supports participation theorists' prediction that both citizen influence and effort increase as the size of government declines. Comparisons of political influence and effort across small and large governments within one country seem the most appropriate testing ground of the participation hypothesis.<sup>38</sup>

First, the evidence shows that citizens surveyed in five countries (United States, Britain, West Germany, Italy, and Mexico) all reported making a greater effort to understand and having more success in understanding local rather than national political issues.<sup>39</sup> In the surveyed

35. Compare William Claiborne, *Black Boycott Widespread in S. African Elections*, WASH. POST, Oct. 27, 1988, at A43 (noting the low turnout for elections in the face of a boycott), with Paul Taylor, *S. African Election Declared Free, Fair*, WASH. POST, May 7, 1994, at A1 (reporting a turnout of over 86% in the first nonracial democratic election).

36. The simple model of voter participation outlined in note 34 helps us to understand why. If with decentralization the marginal productivity of political effort increases for each level of effort, then the marginal benefits to the citizen from such efforts increase too. The higher marginal benefits from political effort stimulate greater political efforts.

37. See PATEMAN, *supra* note 14, at 30-31; Frug, *supra* note 14, at 1069 & n.41.

38. While there are cross-national comparisons between small and large countries of voter turnout, non-voter participation, and voter influence, such comparisons will be so badly contaminated by other factors unrelated to the size of the government—for example, variations in the use of laws requiring voting—that no valid conclusions regarding size on the participation hypothesis can be drawn. For a review and critique of the cross-national evidence on size and participation, see DAHL & TUFTE, *supra* note 16, at 44-53.

39. See *id.* at 55 tbl.4.8.

countries, citizen efforts to influence government were also typically two to three times higher for local than for national governments.<sup>40</sup> In supporting evidence, a detailed survey of political participation across Swedish cities found average citizens in small communities were more aware of local politics than their counterparts in middle-size cities and both knew more basic local political facts than large city residents.<sup>41</sup>

Second, political effectiveness or influence—at least as perceived by citizens—also seems to increase as governments get smaller in size. Again, the five-nation survey found that citizens feel much more influential at the local than at the national level; typically, half of the citizens in the surveyed countries felt they had no influence over national policies while only twenty-five to thirty percent felt powerless at the local level.<sup>42</sup> A more detailed analysis of the U.S. subsample showed a significant positive correlation between an index of political powerlessness and size of government.<sup>43</sup> Indirect evidence from the Swedish study also implies that citizen influence declines as governments get larger; the gap between the percentage of citizens and the percentage of elected officials who would support a tax increase increases as communities get larger.<sup>44</sup> Further, this same evidence from the United States, the Netherlands, and Switzerland shows that politics in larger communities, states, and cantons is increasingly dominated by organized interest groups or political parties.<sup>45</sup> While such groups make participation easier for some citizens, they may also make it more difficult for others. If so, then Rousseau's concern that participation becomes more unequal as governments get larger is confirmed.

Finally, contemporary political science research strongly supports the claim that within any level of government—national, state, or local—the legislature is likely to be the most responsive to citizen participation. Today's legislators view their task as servicing their constituents, working as the voters' "agents" to the government.<sup>46</sup>

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40. See *id.* at 59 tbl.4.11; see also Stephen Hansen et al., *The Downsian Model of Electoral Participation: Formal Theory and Empirical Analysis of the Constituency Size Effect*, 52 PUB. CHOICE 15, 19-32 (1987) (providing a careful econometric analysis of voter turnout and community size in school budget referenda, and concluding that turnout is lower in larger communities).

41. See DAHL & TUFTE, *supra* note 16, at 64 tbl.4.12.

42. See *id.* at 58 tbl.4.10.

43. See Ada W. Finifter, *Dimensions of Political Alienation*, 64 AM. POL. SCI. REV. 389, 403-04 (1970) (showing a positive correlation between feelings of alienation and community size); see also VERBA & NIE, *supra* note 31, at 229-47 (showing that as communities grow in size, or become less isolated, political participation declines); *id.* at 309-22, 328-33 (showing that as participation declines, concurrence between leader and voter preferences declines as well).

44. See DAHL & TUFTE, *supra* note 16, at 85-86.

45. See *id.* at 98-108.

46. The important, pathbreaking work arguing the close link between legislators and their constituents is DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974). For the

The reasoned arguments by most participation theorists and the current empirical evidence lead us to the working conclusion that smaller democratic governments, and thus more decentralized federalist structures, are likely to better encourage the valued goal of greater political participation. With respect to the two constitutional decisions that define the federalist structure—the partition decision and the assignment decision—greater political participation will be achieved with a “fine” partition and with extensive local assignment—that is, many small governments with widespread policy responsibilities.

2. *Federalism and Economic Efficiency.*—Using the economic efficiency criterion to choose the appropriate federalist constitution for economic activities is complex because it involves a comparison of the economic benefits and costs of assigning policy responsibility to each of three levels of government: national, state, or local.<sup>47</sup> There are two important dimensions to economic efficiency. First, *intra*jurisdictional efficiency, requiring government policies to satisfy the collective demands of citizens *within* a given jurisdiction at minimum costs. Second, *inter*jurisdictional

empirical evidence documenting the close connection between voters and legislators, see BRUCE CAIN ET AL., *THE PERSONAL VOTE* 213-14 (1987). Their conclusion is unequivocal:

Students of elections sometimes are asked why they do not concentrate their efforts on “real politics,” defined as the beliefs, calculations, and behavior of interest group leaders, high-level bureaucrats, substantive experts, and key elected officials. This query implies that public policy is determined by elites, not by voters. The citizenry at large supposedly pays little attention to political affairs, has no clear ideas about most issues, and votes largely on the basis of long-standing class, partisan, and other allegiances.

. . . [W]e disagree profoundly with such viewpoints. To understand legislative policymaking, one must understand the electoral relationship between representatives and their constituents.

*Id.* at 212. Finally, recent empirical research on government spending, tax, and regulatory policy establishes the final link from constituents to policy outcomes. For research at the state level, see Sam Peltzman, *Voters as Fiscal Conservatives*, 107 Q.J. ECON. 327, 358-59 (1992) (suggesting an agency relationship, however imperfect, between voters and elected officials). For a review of studies connecting constituent interests and local government policies, see Robert P. Inman, *The Fiscal Performance of Local Governments: An Interpretative Review*, in *CURRENT ISSUES IN URBAN ECONOMICS* 270 (Peter Mieszkowski & Marlon Straszheim eds., 1979).

That participation is a valued outcome and that the legislature is the most conducive institution does not imply that the legislature alone should decide regulatory policies. As we emphasize below, *infra* note 84, participatory legislatures often have significant adverse consequences for economic efficiency. One solution would favor *less* participatory legislatures, thereby allowing elected representatives to make tough decisions that improve overall efficiency but that may harm their own constituents. See, e.g., Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567, 1605-07 (1988) (suggesting that strong political parties are a more efficient means for organizing legislative activities).

47. Because the constitutional theory of federalism emphasizes the tension between federal and state sovereignty, we will tend to emphasize the federal-state distinction in the discussion that follows, though our approach does not rule out mixed solutions involving both state and local regulations. In addition, our approach explicitly allows for the possibility of interjurisdictional bargains among state and local governments.

efficiency, involving the appropriate allocation of individuals and other resources, such as capital, *among* different political jurisdictions.<sup>48</sup>

In our complex federal system both intrajurisdictional and interjurisdictional *inefficiencies* can arise, the former because the political process may not generate outcomes within a jurisdiction that maximize the well-being of its residents, that is, create *political inefficiencies*, and the latter because the decisions and actions of individuals within one jurisdiction can have effects on individuals located in other jurisdictions, that is, generate *spillovers*. In a broad sense the choice of the appropriate jurisdiction to be responsible for a government activity involves a trade-off: the larger the jurisdiction the less likely that there will be spillovers from one jurisdiction to the next, but the more likely that the political process will lead to a misallocation of resources within the jurisdiction.

A decentralized system of governments is ideal from the point of view of intrajurisdictional efficiency, because assigning economic responsibility to smaller and more homogeneous jurisdictions increases the likelihood that

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48. We ignore a third dimension of economic efficiency—the transaction costs of making choices—because it is likely to be of small importance when compared to these two allocative costs of regulation. The transaction costs of government include the costs of selecting legislators, the decisionmaking costs of setting a policy, and the monitoring costs of ensuring that the policy is put in place. See ALBERT BRETON & ANTHONY SCOTT, *THE ECONOMIC CONSTITUTION OF FEDERAL STATES* 7, 31-33 (1978). At the state level, the cost per voter of electing a U.S. Senator in the 1980s measured by all campaign spending for the incumbent and challenger was about \$2.30 per eligible voter (computed by the authors from FEDERAL ELECTION COMM'N, *FEC REPORTS ON FINANCIAL ACTIVITY 1981-1982: FINAL REPORT U.S. SENATE AND HOUSE CAMPAIGNS* tbl.A (1983); FEDERAL ELECTION COMM'N, *FEC REPORTS ON FINANCIAL ACTIVITY 1983-1984: FINAL REPORT U.S. SENATE AND HOUSE CAMPAIGNS* tbl.A (1985); and FEDERAL ELECTION COMM'N, *FEC REPORTS ON FINANCIAL ACTIVITY 1985-1986: FINAL REPORT U.S. SENATE AND HOUSE CAMPAIGNS* tbl.A (1988)). Though the numbers are not available, electing a state governor is probably about as costly. Electing members to a state legislature is typically less expensive. Thus, full state representation (= 1 governor, 1 state senator, and 1 state representative) should cost no more than \$6.00 per eligible voter (= \$2.00 per elected representative x 3 representatives). The costs per citizen of having the state decide state policies is also small, averaging around \$6 to \$9 per eligible voter during the 1980s (based on 1982, 1984, and 1986 aggregate state spending data for "Governmental Administration: General Control: Legislative," and data from the same years for the voting-age population). See U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *STATE GOV'T FINANCES IN 1982*, at 39 tbl.9 (1983); U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *STATE GOV'T FINANCES IN 1984*, at 24 tbl.11 (1985); U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *STATE GOV'T FINANCES IN 1986*, at 24 tbl.11 (1987); U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES: 1988*, at 252 tbl.423 (108th ed. 1987). Finally, the cost of administering state regulatory policies averages about \$17 to \$23 per eligible voter over the same years (based on similar data for spending on "Prospective Inspection and Regulation"). See U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *STATE GOV'T FINANCES IN 1982*, at 38 tbl.9 (1983); U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *STATE GOV'T FINANCES IN 1984*, at 22 tbl.11 (1985); U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *STATE GOV'T FINANCES IN 1986*, at 22 tbl.11 (1987). The total cost of deciding and then enforcing state regulatory policies is not likely to be much more than \$33 per eligible voter (= \$6 + \$7.66 + \$19.14). When compared to the potential consequences of business regulation on market resource allocations, these transaction costs of government are likely to be small.

services provided and regulations promulgated will be consistent with the desires of each member of the population. Unfortunately, decentralization has its weaknesses too, due primarily to the spillovers that are likely to arise when a jurisdiction's size is small. A less decentralized system with larger jurisdictions can minimize these spillovers.

The economic case for small governments has been made most completely by Charles Tiebout and his commentators in his famous model of economic competition between governments.<sup>49</sup> Tiebout's decentralized model of governmental competition is analogous to the purely competitive market model with complete information. In the Tiebout model, government policies are determined by market, or economic, exchange alone. Each household and business is highly mobile and chooses to reside in the jurisdiction that offers the tax-expenditure-regulation package that it most prefers. Five conditions define the competitive Tiebout public economy:

1. Publicly provided goods, services, and regulatory activities are provided at minimum average cost;
2. There is a perfectly elastic supply of political jurisdictions, each capable of replicating all attractive economic features of its competitors;
3. Households and businesses are fully informed about the fiscal and regulatory policies of each jurisdiction;
4. Mobility of households and businesses among jurisdictions is costless; and
5. There are no interjurisdictional externalities or spillovers.<sup>50</sup>

If Tiebout's condition 1 holds, there is an efficient population size that minimizes the average cost per household of providing that government activity. Goods that can be allocated by the Tiebout competitive process are those goods for which more users reduce, proportionally, the flow of services enjoyed by current users. These goods are *congested* public goods; education, police protection, and parks are examples. The efficient scale of operation for such goods must be sufficiently small (for example, fifteen thousand in population) so that each household can find a suitable jurisdiction in which to reside. Existing evidence suggests that this constraint can be met for many government services.<sup>51</sup>

Tiebout's condition 2 ensures that efficient alternatives exist. This is the task of public sector entrepreneur-politicians who run against and defeat

49. See Tiebout, *supra* note 14. For a detailed review of Tiebout and his commentators, see Daniel L. Rubinfeld, *The Economics of the Local Public Sector*, in 2 HANDBOOK OF PUBLIC ECONOMICS (Alan J. Auerbach & Martin Feldstein eds., 1987).

50. See Tiebout, *supra* note 14, at 419.

51. See, e.g., HELEN F. LADD & JOHN YINGER, AMERICA'S AILING CITIES: FISCAL HEALTH AND THE DESIGN OF URBAN POLICY 83-85 (1989) (discussing lower costs in smaller cities for fire, police, and general services, including health, highways, corrections, libraries, sanitation, and water).

inefficient incumbents; competitive political entrepreneurs play a role analogous to takeover "artists" in the private market. Public sector entrepreneurs can also appear as enterprising real estate developers who build new jurisdictions—analogue to "new entrants" in a private market—to draw away dissatisfied residents from inefficient governments.<sup>52</sup> Tiebout's conditions 3 and 4 promise that families and businesses will know about and can move to the efficient alternative once it has been constructed. Tiebout's condition 5 ensures that all public activities can be provided within these efficient local jurisdictions—larger government or intergovernmental cooperation is not required.

In the end, a public economy satisfying Tiebout's conditions 1 through 5 and organized as a fully decentralized network of competing jurisdictions will maximize economic efficiency. In such an economy, citizens and businesses will consume their preferred levels of public goods and regulations with a minimum sacrifice of private incomes.

Larger governments have a potential role to play when Tiebout's conditions 1 through 5 do not hold. When condition 1 is violated, the public activity becomes a "public good" with additional users of the facility having no adverse effects on the consumption benefits enjoyed by previous users. In this case, small governments are no longer the efficient producer of the service; bigger is cheaper as costs are shared over more users. Typical examples of such public goods include defense, television or radio signals, and new knowledge. Small governments will be at a significant cost disadvantage in the provision of these noncongested public services and are likely to lose the competitive struggle for new citizens to larger, more centralized governments.

Losing condition 2 means that all successful communities no longer can be easily replicated. Communities with unique advantages may become overpopulated, creating a possible inefficiency in the allocation of workers and capital.<sup>53</sup> The consequence will be a less-than-efficient private economy. In contrast, a larger government shares these locationally unique advantages with all citizens, thereby avoiding these private market inefficiencies.<sup>54</sup>

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52. See J. Vernon Henderson, *The Tiebout Model: Bring Back the Entrepreneurs*, 93 J. POL. ECON. 248, 261-62 (1985).

53. See DAVID E. WILDASIN, *URBAN PUBLIC FINANCE* (1986); Robin Boadway & Frank Flatters, *Efficiency and Equalization Payments in a Federal System of Government: A Synthesis and Extension of Recent Results*, 15 CANADIAN J. ECON. 613, 615-30 (1982) (summarizing the inefficient migratory implications of models of fiscal federalism); James M. Buchanan & Charles J. Goetz, *Efficiency Limits of Fiscal Mobility: An Assessment of the Tiebout Model*, 1 J. PUB. ECON. 25, 40 (1972) ("[F]iscally-induced migration is responsible for an undue concentration of persons in the large and growing conurbations of America . . .").

54. For central government solutions to the private sector inefficiencies created by the loss of condition 2, see WILDASIN, *supra* note 53. Losing condition 2 creates another problem for economic

Losing conditions 3 and 4 undercuts the workings of the competitive process and thereby limits the efficiency advantages of having many governments provide public services. If there are significant relocation costs, then the current community can "exploit" residents and firms with higher taxes or lower services up to the cost of relocation. Further, if families and businesses do not know the full implications of government policies, then again they run the risk of being exploited by better informed government officials or developers. Families and businesses could appoint a new manager, mayor, or governor to protect their interests, but how will they know the new agent is doing a better job? When conditions 3 and 4 are lost, local government competition loses its clear advantage over a larger central government in protecting citizen economic interests.

The strongest case for a central government arises when Tiebout's condition 5 is lost. Centralized government is most likely to find its institutional comparative advantage in controlling interjurisdictional externalities and spillovers. When the public activities of local communities produce positive external benefits for neighboring communities, but costs remain local, then there will be a tendency to underprovide that valued activity. Conversely, when the public activity generates external costs, but benefits are local, then there will be a tendency for overprovision.

Interjurisdictional externalities are common in the local public economy. For example, communities that clean up rivers or provide welfare payments at their own cost provide positive external benefits to their neighbors. There will be a tendency to underprovide such activities.<sup>55</sup> Communities that allow firms to pollute rivers or that provide tax breaks to businesses and wealthy taxpayers to attract jobs and a tax base impose an external cost on their neighbors.<sup>56</sup> In both cases, other

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efficiency in a Tiebout economy, but one that cannot be solved by a move to a more centralized government. This is the problem that arises when each government contains citizens with different views of what constitutes the government's best policy. If so, politics becomes important. If decisions are made by majority rule, the outcome will not necessarily be economically efficient. Large governments, of course, face the same problem.

55. See Edward M. Gramlich & Deborah S. Laren, *Migration and Income Redistribution Responsibilities*, 19 J. HUMAN RES. 489, 489 (1984) (pointing out, as one argument against returning welfare to the states, that state governments might hesitate to provide generous benefits for fear of attracting potential welfare recipients from elsewhere); Pierre Pestieau, *The Optimality Limits of the Tiebout Model*, in *THE POLITICAL ECONOMY OF FISCAL FEDERALISM* 173, 178 (Wallace E. Oates ed., 1977) ("[T]here is no public service that fails to afford some benefits external to the region that provides it.").

56. This argument has been developed for regulatory policies by John H. Cumberland, *Efficiency and Equity in Interregional Environmental Management*, 10 REV. REGIONAL STUD., Fall 1980, at 1, 2-3 (arguing that the federal government's current practice of siting government facilities without compensating or gaining the consent of the selected communities results in detrimental externalities). See also William A. Fischel, *Fiscal and Environmental Considerations in the Location of Firms in Suburban Communities*, in *FISCAL ZONING AND LAND USE CONTROLS* 119, 143 (Edwin S. Mills & Wallace E. Oates eds., 1975) (applying the Tiebout model to nonresidential land use in suburbs). See

communities will feel a pressure to adopt similar “beggar-thy-neighbor” policies. The final outcome of Tiebout’s competition among small governments will be a race to the bottom and economically inefficient public policies. The solution is to find a more centralized government to manage these misallocations.

Ronald Coase’s analysis of market failures in his classic article, *The Problem of Social Cost*, suggests one centralized approach for correcting the failures in the Tiebout public economy: intercommunity agreements or Coasian “bargains.”<sup>57</sup> Such agreements require that residents living outside the state or local jurisdiction harmed by an inefficient public policy to “compensate” the residents inside the policy-setting jurisdiction for the benefits they lose when the inefficient policy is removed.<sup>58</sup> As Coase and others have pointed out, the benefits to the outside residents from removing the harmful policy are sufficient to outweigh the compensation dues so that all residents—outside and inside—are better off. In practice, such compensation would be paid through an intercommunity agreement in which jurisdictions raise taxes and pay compensation to their neighboring governments who in turn return those funds to groups initially favored by the inefficient policy. For a successful Coasian bargain to occur, five conditions must be met:

1. There are no, or very small, resource costs associated with the bargaining process;
2. Preferences over bargaining outcomes and the resources of households are common knowledge;
3. Bargaining agents perfectly represent the economic interests of their constituents;
4. All bargaining agreements are costlessly enforceable; and
5. The parties can agree to a division of the bargaining surplus.<sup>59</sup>

We are skeptical that bargaining between governments will easily satisfy the five Coasian conditions. On its face, condition 1 seems unproblematic. The institutions for bargaining—elected government officials—are already in place, and the marginal costs of applying those institutions to one additional political agreement are likely to be very small. When the benefits

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generally Wallace E. Oates & Robert M. Schwab, *Economic Competition Among Jurisdictions: Efficiency Enhancing or Distortion Inducing?*, 35 J. PUB. ECON. 333 (1986). For an extension of this argument to tax policies, see GEORGE F. BREAK, INTERGOVERNMENTAL FISCAL RELATIONS IN THE UNITED STATES 23-24 (1967); OATES, *supra* note 2, at 142-43; and Inman & Rubinfeld, *supra* note 2, at 314-15.

57. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

58. Consistent with the view that states and localities cannot prevent another state or local government from passing its own laws, this specification of the Coasian bargain assigns the public policy “property rights” to the government passing the policy.

59. See Inman & Rubinfeld, *supra* note 1, at 76-77.

of such agreements are large—as for example if the New England states were to bargain with Alaska and Texas for lower regulations or taxes on state oil and gas production—they will easily swamp these small additional costs of bargaining.

Problems are more serious for conditions 2 to 5. If the preferences of the participants to the bargain are not common knowledge—condition 2 no longer holds—then there may be a strategic advantage to concealing costs and benefits. The concealment enables you to demand greater compensation from the agreement if you represent the “polluting” government or to offer less compensation if you represent one of the “consumer” jurisdictions. If both parties adopt the “conceal” position, however, no agreement may be forthcoming.<sup>60</sup> Further, if you represent one of many consumer jurisdictions, it will be in your interest to understate your constituents’ losses from the adverse policy. Such free-riding behavior is likely to undo a Coasian bargain when preferences are not common knowledge and the number of affected jurisdictions is large.<sup>61</sup>

Even if the benefits and costs of agreement are common knowledge, there is no guarantee that elected government officials will choose to represent those harmed by an out-of-state policy, in which case condition 3 no longer holds. Harmed citizens may be a minority in a majority rule state.

60. In choosing their bargaining strategy, jurisdictions must assess the extent to which other parties are likely to make concessions. In game theoretic terms, the parties try to assess the threat points of the other parties—the minimum offer that they are willing to accept. In addition, they try to estimate the extent to which the other party will be willing to make concessions prior to reaching their threat point. If the parties make poor estimates of each other’s threat points or miscalculate the chances that the other party will accept a compromise offer, they may take a hard line in the bargaining process. Therefore, Coasian bargainers will not be immune to possibilities for strategic behavior when they negotiate, and to the extent that they succumb, Coasian bargaining may break down. See Vincent P. Crawford, *A Theory of Disagreement in Bargaining*, 50 *ECONOMETRICA* 607, 608 (1982) (hypothesizing that in some situations it may be rational for bargainers to act in a way that increases the likelihood of disagreement); David M. Kreps & Robert Wilson, *Reputation and Imperfect Information*, 27 *J. ECON. THEORY* 253, 254 (1982) (noting that a firm may adopt hard-bargaining tactics in order to maintain a certain reputation with its rivals); A. Mitchell Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 *STAN. L. REV.* 1075, 1092 (1980) (observing that antagonists in the bargaining process may adopt “hold out” tactics and never reach an agreement).

61. For the first treatment of the effects of group size on voluntary agreements, see MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* 46-52 (1965) (stating that in large groups, individuals face higher costs of collective action and may receive less individual benefits, both discouraging collective action). The effect of group size and information on bargaining has been studied extensively through the use of experiments. See, e.g., Elizabeth Hoffman & Matthew L. Spitzer, *The Coase Theorem: Some Experimental Tests*, 25 *J.L. & ECON.* 73, 76, 82-95 (1982); see also Mark Bagnoli & Michael McKee, *Voluntary Contribution Games: Efficient Private Provision of Public Goods*, 29 *ECON. INQUIRY* 351, 361 (1991) (“[I]f . . . a well-defined group of people [is offered] the opportunity to contribute to the provision of a public good when the cost of the good, the pay-offs to those in the group, and the initial wealth positions of those in the group are all common knowledge, then the Pareto-efficient outcome will emerge.”).

In contrast to private market agreements, here the affected parties are heard only if generally elected representatives choose to make their case.

Condition 4 is likely to be a problem only when important contingencies that might affect the agreement cannot be foreseen in advance. Intergovernmental agreements are legally enforceable.<sup>62</sup> But if a future event occurs that alters the benefits or the costs of the agreement significantly, then the agreeing states may decide to break the contract. These problems are most likely to arise in the case of new governmental activities or products whose future benefits and costs are not well known. In these cases, initial interstate agreements may be very difficult to fashion. If enforcement is lost, then governments, like private parties, have little incentive to reach an agreement in the first place.

Arguably the most important and least appreciated source of bargaining failure is condition 5.<sup>63</sup> Even if conditions 1 through 4 hold, the parties may not be able to agree as to how the economic surplus generated by the bargaining process should be divided. Any Coasian bargain does two things: it establishes an efficient exchange that creates an economic surplus *and* it distributes that surplus among the bargaining parties. Proponents of Coase emphasize the first outcome and have largely ignored the important difficulties of the second. Yet it is well known that the division of any economic pie is a bargaining problem that may have no solution. The often observed result in "divide-the-pie" games is that bargaining breaks down because the proposed division is viewed by one or more of the participants as not "fair."<sup>64</sup> In the case of government bargaining, one jurisdiction can reject an economically beneficial offer from another jurisdiction because the proposed offer violates the first's exogenous and no doubt politically motivated sense of economic fairness.<sup>65</sup>

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62. Ellickson suggests that intergovernmental rights should be enforceable through arbitration compacts or statutory structures set up by higher-level governments. See Robert C. Ellickson, *Public Property Rights: Vicarious Intergovernmental Rights and Liabilities as a Technique for Correcting Intergovernmental Spillovers*, in *ESSAYS ON THE LAW AND ECONOMICS OF LOCAL GOVERNMENTS* 51, 73-74 (Daniel L. Rubinfeld ed., 1979). He discusses the idea of creating a series of public property rights and duties to encourage bargaining solutions to environmental spillovers. See *id.* at 75 (citing an example in which the U.S. and Canada established an arbitration tribunal that "eventually ordered Canada to pay the United States a substantial sum for past damage inflicted"). For a discussion of the use of interstate compacts that deal with the problem of acid rain, see Regan J.R. Smith, *Playing the Acid Rain Game: A State's Remedies*, 16 *ENVTL. L.* 255, 301-03 (1986).

63. See Robert Cooter, *The Cost of Coase*, 11 *J. LEG. STUD.* 1, 17 (1982) (emphasizing that the Coase Theorem optimistically assumes that parties can solve the problem of distribution, although in reality self-interested players may not agree on how to divide the pie).

64. When redistribution games might have equilibrium outcomes is an important topic of recent economic research. See Kenneth Binmore et al., *The Nash Bargaining Solution in Economic Modelling*, 17 *RAND J. ECON.* 176 (1986); Ariel Rubinstein, *Perfect Equilibrium in a Bargaining Model*, 50 *ECONOMETRICA* 97 (1982).

65. What is seen as an exogenous norm of fairness in a one-time game may be a rational endogenously chosen strategy in a repeated political game. For example, a governor seeking re-election

Strategic interplay becomes even more complicated, and agreement even less likely, as the number of bargaining jurisdictions increases beyond two or if the bargain is one of many.<sup>66</sup>

The hope that voluntary interstate Coasian compacts might control interjurisdictional externalities and spillovers seems to us optimistic. The conditions required for such Coasian agreements are very demanding and unlikely to hold when governments come to the bargaining table. When any one of conditions 1 to 5 fails to hold, Coasian agreements will not arise and state-created interjurisdictional inefficiencies will remain.

What can be done? The *economic* theory of federalism advocates the use of the central government to internalize the spillovers and externalities created by the smaller states and local governments. The *political economy* theory of federalism recognizes that this solution comes with its own costs, and that centralization does not automatically promise economic efficiency.

In a typical federalist hierarchy, central government policies will be decided by majority rule in legislatures composed of elected representatives from member states.<sup>67</sup> Such legislatures must overcome a fundamental structural defect of democratic choice: the propensity of the majority-rule process to cycle from one policy outcome to another.<sup>68</sup> When no winning

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cannot appear "weak" when bargaining with another state. If the money involved in a regulatory agreement is modest relative to the overall state budget—as it is likely to be—then the political symbolism of the "share" from the divide-the-pie game may be far more important for re-election prospects than the actual dollars involved. If so, and if both governors must demand more than 50%, then agreement will not be possible. For evidence from the experimental literature that a subjective sense of fairness is crucial to the ability of parties to reach agreement, see Alvin E. Roth, *Toward a Focal Point Theory of Bargaining*, in *GAME—THEORETIC MODELS OF BARGAINING* 259 (Alvin E. Roth ed., 1985).

66. For evidence of the difficulties states have in fashioning Coasian agreements, even when the number of states is few, see generally BRUCE A. ACKERMAN ET AL., *THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY* 190-207 (1974); Dennis Coates & Michael Munger, *Strategizing in Small Group Decisionmaking: Host State Identification for Radioactive Waste Disposal Among Eight Southern States*, 82 *PUB. CHOICE* 1 (1995); and Charles D. Kolstad & Frank A. Wolak, Jr., *Competition in Interregional Taxation: The Case of Western Coal*, 91 *J. POL. ECON.* 443 (1983).

67. In this brief presentation of central government decisionmaking, we choose to focus on the role of the legislature. This is not to imply that the executive is not an important player in U.S. policymaking. It is, but the role of the executive is to control the legislature, which itself sets the basic path of policy. For an introduction to presidential politics, see generally the classic study RICHARD E. NEUSTADT, *PRESIDENTIAL POWER* (1960), and the recent comprehensive survey by STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH* (1993).

68. Popularly known as the paradox of voting, this fundamental observation regarding majority-rule processes has been well recognized at least since the work of de Condorcet. See MARIE JEAN ANTOINE NICHOLAS DE CARITAT, MARQUIS DE CONDORCET, *ESSAI SUR L'APPLICATION DE L'ANALYSE À LA PROBABILITÉ DES DÉCISIONS RENDUES À LA PLURALITÉ DES VOIX* (Paris, L'Imprimerie Royale 1785). Even though majority rule leads a legislature to vote for policy *A* over policy *B*, and for policy *B* over policy *C*, it is certainly possible, and often likely, that policy *C* will defeat policy *A*. Kenneth Arrow has proved that this paradox of voting is a symptom of a more fundamental problem with all democratic processes: there is no guarantee that such processes can find a best outcome or are immune

coalition is capable of holding its majority against small policy variations offered by a losing minority, then either no decision will be made or final policy outcomes will be random and uncertain.

If legislatures are to reach decisions, additional legislative institutions must be discovered for overcoming this inherent instability of the majority-rule process. Two institutional approaches are commonly used by legislatures. The first assigns agenda-setting powers to a small subset of members, say the speaker of the house or a key legislative committee. Other members in the legislature then simply vote—up or down—on the items in the approved agenda. Most likely, policies will be approved by a bare majority—a minimal winning coalition—in this strong agenda-setter legislature.<sup>69</sup> A second strategy shares agenda-setting powers among all members, giving each legislator a right to select her most preferred policy in that policy area most germane to the legislator's constituents. This second approach to legislative decisionmaking involves each legislator deferring to the preferred policies of all other legislators, provided the other legislators defer to the legislator's own policy requests. The guiding principle here is a norm of deference—"You scratch my back, I'll scratch yours"—and it typically results in legislative proposals that are approved unanimously. For this reason, such legislatures are often called "universalistic."<sup>70</sup>

to manipulation. See KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 1-8 (1963). Thus, the design of political institutions will almost inevitably be a search among the second-best. For a survey of this literature in the context of the new political economy, see Robert P. Inman, *Markets, Government, and the "New" Political Economy*, in 2 *HANDBOOK OF PUBLIC ECONOMICS*, *supra* note 49, at 647, 672-739.

69. For an articulation of the general theory of how this process overcomes cycling, see David P. Baron & John A. Ferejohn, *Bargaining in Legislatures*, 83 *AM. POL. SCI. REV.* 1181, 1199-2001 (1989). For a careful description of what legislative institutions are used to assign agenda control, see Kenneth A. Shepsle, *Institutional Arrangements and Equilibrium in Multidimensional Voting Models*, 23 *AM. J. POL. SCI.* 27, 29-38 (1979). An extensive literature tests for the direct influence of agenda-setters—typically congressional committees—on policy outcomes. For a critical but balanced review, see KEITH KREHBIEL, *INFORMATION AND LEGISLATIVE ORGANIZATION* (1991).

70. The guiding theory can be found in Barry R. Weingast, *A Rational Choice Perspective on Congressional Norms*, 23 *AM. J. POL. SCI.* 245, 249 (1979) (defining universalism as "the tendency to seek unanimous passage of distribution programs through inclusion of a project for all legislators who want one") and Emerson M.S. Niou & Peter C. Ordeshook, *Universalism in Congress*, 29 *AM. J. POL. SCI.* 246, 246 (1985) (offering a "model based on constituency motivations that establishes universalism as an optimal individual choice and which accommodates inefficient legislation directly"). The theory has been developed for, and its applications must be limited to, understanding how legislative bodies allocate government projects and government regulations—what has been called *distributive* politics. See THEODORE J. LOWI, *THE END OF LIBERALISM* (1969). A norm of deference is not an appropriate model for predicting how legislatures will decide *redistributive* policies such as welfare or progressive taxation—politics in which one group of constituents must lose to another.

Details regarding the legislative institutions needed to enforce the norm of deference can be found in Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislators, Like Firms, Are Not Organized as Markets*, 96 *J. POL. ECON.* 132, 144 (1988) ("The committee system provides substantial protection against opportunistic behavior, thereby providing durability to policy bargains.").

A single legislator choosing between the closed rules of a bare-majority, minimal-winning-coalition legislature and the more open rules of a universalistic legislature managed by a norm of deference will typically favor the more open rules. The universalistic legislature will be preferred because under universalism and its norm of deference, projects that benefit the legislator's constituents are nearly certain to be chosen. With closed rules, a legislator has to belong to a winning coalition to have his or her constituents' projects approved. Without additional side-deals, the probability of being in that coalition is at best 50:50. For a member of the legislature seeking re-election the logic is simple: it is better to take home a "slice of bacon" for sure than to face a lottery with a 50:50 chance of a "pork chop" or nothing.<sup>71</sup>

Unfortunately, universalistic legislatures operating under a norm of deference run a significant risk that their chosen policies will be economically inefficient. Consider, for example, the typical case of providing a public good or a regulation that benefits the residents of one jurisdiction but that is funded, because this is a central government policy, by residents of all jurisdictions. There results a cross-subsidy from taxpayers nationally to the residents of the jurisdiction receiving the public good or regulation. The incentive for the legislator selecting a project and facing such a subsidy is, of course, to ask for too much of the good or regulation. The norm of deference—"You scratch my back, I'll scratch yours"—allows these inefficiencies to stand, not just for one jurisdiction but for all jurisdictions represented in the legislature.<sup>72</sup>

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71. Specifically, within the bare-majority legislature, each legislator can expect her jurisdiction to pay for a little more than half of the legislature's average project, since all legislative districts share in the costs of each legislator's project and one more than half of all the districts receive projects. Further, each legislator can expect her jurisdiction to be given a project, on average, a little more than half the time. Thus, expected net benefits from bare-majority rule will be a little more than  $.5 \times [\text{Project Benefits} - \text{Average Project Costs}]$ . When the legislature operates under a norm of deference, however, all districts' projects are accepted with certainty. Thus, expected net benefits will be simply  $[\text{Project Benefits} - \text{Average Project Costs}]$ . If benefits exceed average project costs in a majority of districts—a likely case—then a legislature run by a norm of deference will be the preferred legislative institution. Weingast, *supra* note 70, at 249-56, and Niou & Ordeshook, *supra* note 70, at 256-58, prove exactly when this outcome holds. For an extension of the analysis to legislative projects of variable size, see Robert P. Inman & Michael A. Fitts, *Political Institutions and Fiscal Policy: Evidence from the U.S. Historical Record*, 6 J.L. ECON. & ORG. 79, 84-92 (Special Issue 1990) and Thomas Schwartz, *Representation as Agency and Pork Barrel Paradox* (1989) (unpublished manuscript, on file with the UCLA library). The conclusion that legislators prefer universalism to bare-majority rule extends to this more general case.

72. An efficient size of a government policy occurs when the social marginal benefits from the policy ( $MB$ ) just equal the social marginal costs ( $MC$ ) of the policy. Suppose that (1) the social marginal benefits of the policy all accrue to the residents of one legislative district, but the social marginal costs are shared equally by residents of all  $n$  legislative districts, and (2) each legislator is free to set her preferred policy by equating the marginal benefits and marginal costs that accrue to the residents of her district alone. What will happen? Social efficiency requires that  $MB = MC$ , but each legislator select a policy level so that  $MB = (1/n) \cdot MC < MC$ . Clearly, too much of each policy is chosen by

Will this bias towards inefficient public policies undermine the usual case for centralization of economic spillovers? If the spillovers are positive, then a centralized universalistic legislature may improve resource allocations. Universalism's cost-sharing incentive to the local jurisdiction stimulates those local citizens to provide more of the nationally beneficial public good (for example, support for the poor) or regulation (for example, air quality control) than they would on their own under decentralization.<sup>73</sup> Unfortunately, when the spillovers are negative, centralization and the use of a universalistic legislature are likely to make matters worse; now the sharing of local costs leads the local jurisdiction to buy *more* of the activity producing the negative spillover. Central government *regulation*—but not provision—of these activities would improve resource allocation in the case of negative spillovers, but only if that regulation effectively constrains their use. From the political economy perspective, centralization is no all-purpose cure for the efficiency ills of decentralization.<sup>74</sup>

What federalist structure of government should we then recommend for the valued objective of economic efficiency? The analysis here suggests some general guidelines. Decentralized governments will be most efficient for those activities and regulations that can be efficiently provided to small populations and that have no significant positive or negative spillovers onto nonresidents. For goods with significant economies of scale in

the central government legislators. See Barry R. Weingast et al., *The Political Economy of Benefits and Costs: A Neoclassical Approach to Distributive Politics*, 89 J. POL. ECON. 642, 650-54 (1981) (offering a detailed mathematical proof that the degree of inefficiency in public projects goes up as the number of districts in a legislature increases). For empirical estimates as to the size of these economic inefficiencies from the U.S. Congress, see Inman & Fitts, *supra* note 71, at 114, and William P. Rogerson, *Comment on "Political Institutions and Fiscal Policy: Evidence from the U.S. Historical Record"*, 6 J.L. ECON. & ORG. 155, 164-66 (1990).

73. In contrast to the previous case where benefits were localized and costs were diffused across all legislative districts, see *supra* note 72, assume here that both costs and benefits are shared equally across all  $n$  legislative jurisdictions. That is, the benefits of the policy that fall in one district are only  $(1/n)$  of the national benefits. Now allow the individual legislator to select her preferred policy, and again assume the policy is decided by equating the marginal benefits and marginal costs that accrue to the residents of her district alone. This is the situation when policy benefits and costs are diffused. What will happen in this case? Each legislator will select a policy level so that  $(1/n)MB = (1/n) \cdot MC$ . Happily, this implies that  $MB = MC$ , which is exactly what social efficiency requires.

74. Our critique of centralized government uses the model of a universalistic legislature, but the minimum-winning-coalition legislature suffers from the same incentive problems, though admittedly they are less pronounced. In a minimum-winning-coalition legislature—say, one dominated by strong political parties—the majority coalition still has an incentive to overprovide goods with negative externalities or no externalities at all. Here, the cross-subsidy is not from the country as a whole to a single jurisdiction but from the minority to the majority. The cross-subsidy will be less, and the resulting economic efficiencies smaller, but the inefficiencies remain. See Inman & Fitts, *supra* note 71, at 111-12.

Strong executives can also control the inefficiencies of the universalistic legislature, thus reducing the costs of centralization. See *id.* at 114-16; Michael Fitts & Robert Inman, *Controlling Congress: Presidential Influence in Domestic Fiscal Policy*, 80 GEO. L.J. 1737, 1738 (1992) (describing methods by which the president can reduce inefficiencies in the congressional budgeting process).

production (“public” goods) and other goods and regulations with positive economic spillovers, a single centralized government is likely to improve efficiency. The positive spillovers are “internalized” through the incentives implicit within a national legislature. Goods with negative spillovers, however, should be decentralized in provision and (ideally) regulated by central government laws constraining their use.

In contrast to political participation, which favors nearly full decentralization—a “fine” partition and full local assignment—economic efficiency favors a combined use of decentralized and centralized federalist structures. Along the partition dimension, a “fine” partition with very many decentralized governments is likely to be inefficient as spillovers across political jurisdictions become pervasive. A “coarser” partition reduces those spillover inefficiencies but creates new problems as larger legislatures inefficiently allocate nonspillover goods and regulations. A single central government—the very coarsest partition—internalizes all positive spillovers but inefficiently allocates all other government goods and regulations.

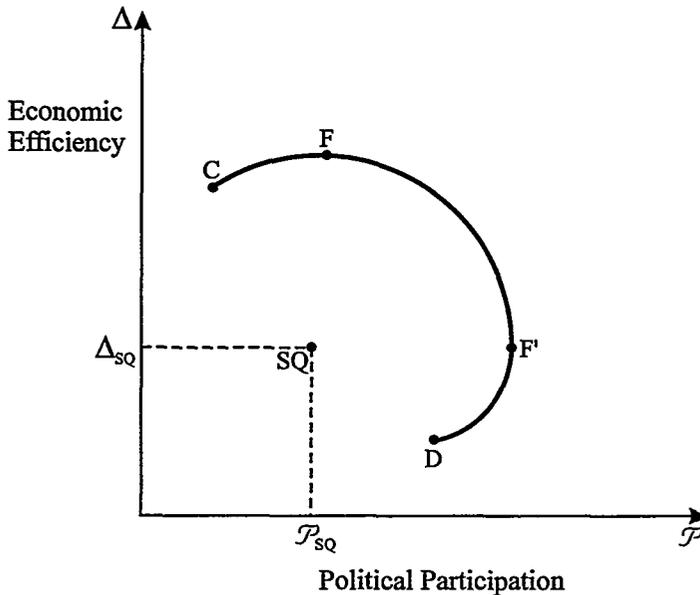
Efficient assignment will also involve a mixed federalist structure. If one can draw the fine lines between positive and negative spillovers, then our advice is clear: Assign to a central government the provision of goods and regulations with positive externalities, but assign to smaller governments those goods and regulations with negative externalities and those with no externalities at all. If they can be written, then central government regulations that constrain negative spillovers will be useful.

3. *Balancing Participation and Efficiency Through Federalism.*—Our analysis of how alternative federalist structures are likely to affect federalism’s valued goals of political participation and economic efficiency makes clear that no one structure—decentralized or centralized—will maximize both goals. Although political participation increases as the federalist partition moves from one government to many and assignment shifts responsibilities from the national to the state and local jurisdictions, economic efficiency is likely to first rise and to then decline with such increased decentralization.<sup>75</sup>

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75. We use the shorthand “decentralization” and “centralization” to reflect the federalist structure that results from the dual specification of a partition and an assignment. Decentralized structures imply finer partitions and more local assignments; centralized structures mean a coarser partition and central assignments. Strictly speaking, we should only use the complete language of partition and assignment when describing a federalist structure, since these two institutional variables are independent choices and both contribute separately to the goals of efficiency and participation. We will use the richer language when there is a possibility of confusion.

FIGURE 1—THE FEDERALISM FRONTIER\*



\* Moving from point *C* to point *D* along the Federalism Frontier represents an increasing number of governments. At point *C*, there is one national government. At point *D*, when the political economy is fully decentralized, there is one government for each person—that is, individual autarky.

A tension exists, creating an unavoidable trade-off between the valued goals of participation and efficiency, at least over some ranges of decentralization. The horizontal axis in Figure 1 measures an index of political participation denoted as  $\mathcal{P}$ , a weighted average of citizen influence and citizen effort made possible through decentralization.<sup>76</sup> From our review of the participation literature, higher values of  $\mathcal{P}$  occur as the federalist structure becomes more decentralized. The vertical axis measures an index of economic efficiency denoted as  $\Delta$ ;  $\Delta$  is the economic welfare made possible with decentralization.<sup>77</sup> As decentralization

76. The index is a weighted average of all citizens' values of political influence and participatory efforts, denoted by  $\rho$  and  $\epsilon$ , respectively. See *supra* note 34. If  $\rho$  and  $\epsilon$  are used to represent vectors of all citizens' political influence and efforts, then  $\mathcal{P} = \mathcal{P}(\rho, \epsilon)$ . How one creates such an index is a subtle matter. See *supra* note 33.

77. We choose to measure economic efficiency as the sum of all consumer and producer surpluses possible under each federalist institutional structure. We should be clear that our approach to the economic consequences of federalism avoids any explicit consideration of how federalist structures affect the distribution of economic surpluses across groups in society. We feel this is the appropriate approach for matters of institutional design and judicial enforcement, our two questions here. Cf. JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 63-84 (1962) (providing one approach to the design of the economically efficient—or contractarian—constitution); Richard A.

increases,  $\Delta$  first rises but then declines as many small governments assume more economic responsibilities and economic spillovers become more pervasive. The two anchor points for the “federalism frontier” are the efficiency-participation outcomes when the federalist structure is fully centralized with one national government (point *C*) and when the federalist structure is fully decentralized with no governments at all (point *D*). The important range of the frontier is the one in which hard choices must be made, the range  $FF'$ , where efficiency declines as participation continues to increase. Decentralizing the federalist structure from point *C* to *F* gives society more of both valued outcomes, as does centralizing the federalist structure from point *D* to *F'*.<sup>78</sup> In the range  $FF'$ , no single federalist structure is clearly dominant. Which structure one prefers depends upon how one chooses to weight the now competing federalist values of political participation and economic efficiency.

Having seen the inevitable tension between political participation and economic efficiency, the task of those setting a society's federalism policy becomes clear. First, select those federalist institutions—a partition and an assignment—that move us to the outer,  $FF'$  range of the federalism frontier. Then adjust those institutional choices to reflect society's preferred mix of efficiency and participation along the  $FF'$  range where the values are competing. Subpart II(B) illustrates how this general theory of federalism applies to the specific task of establishing the institutions of regulatory federalism, highlighting the potentially important role current state-action doctrine can play in moving us to the  $FF'$  range of our federalism frontier.

### *B. Participation, Efficiency, and the Design of the Federalist Regulatory State*

Federal, state, and local government regulations play an important role in the United States economy, setting the rules that determine the flows and often the prices of capital, labor, and goods and services.<sup>79</sup> One

Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 502-07 (1980) (using a Pareto-superior analysis to show that distributive effects are not an important factor in determining what is economically efficient).

78. From point *C*, increasing decentralization by creating more governments and increasing local assignment improves economic efficiency and enhances participation. From point *D*, increasing centralization by moving from no governments to small local governments and giving them responsibilities increases economic efficiency and for most participation theorists increases participation as well. Although political influence is highest when each person is her own government, it is difficult to have a meaningful political dialogue or group learning when each government is a single person!

79. For excellent surveys of the effects of regulatory policy on the American economy, see Paul L. Joskow & Nancy L. Rose, *The Effects of Economic Regulation*, in 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 1450 (Richard Schmalensee & Robert D. Willig eds., 1989) and Howard K. Gruenspecht & Lester B. Lave, *The Economics of Health, Safety, and Environmental Regulations*, in 2 HANDBOOK OF INDUSTRIAL ORGANIZATION, *supra*, at 1508.

particularly important set of regulations are those affecting the competitive practice of business, and nowhere is the potential tension between federal, state, and local rules more acute. At the federal level stand the antitrust laws designed to preserve competitive markets. From state and local governments come often quite restrictive rules aimed at controlling how businesses behave when producing and selling their goods and services. Conflict seems almost inevitable. The task of a well-articulated theory of regulatory federalism—and a reasoned state-action doctrine in particular—is to define the separate domains for federal antitrust rules on the one hand and state business regulations on the other. This subpart begins by outlining how the assignment of regulatory responsibilities to federal and state governments can enhance federalism's twin values of political participation and economic efficiency.

*1. Political Participation in the Federalist Regulatory State.*—In contrast to the active and visible role legislatures and elected executives play in setting and implementing government spending and taxation policy, government regulations are often specified and enforced one step removed from direct electoral controls. Although legislatures set the goals for regulation—clean air, safe workplace, fair prices—the implementation of policies to achieve those goals typically falls to regulatory agencies and appointed commissions. This is understandable; regulation of the economy is complicated and experts are needed. Further, while the direct consequences of government spending and tax policies can usually be identified, it is often very difficult to learn how a government regulation affects our daily lives. For both reasons—policymaking as once removed and consequences hard to discern—citizen participation in regulatory policy may be difficult to achieve. What can be done?

The logic of participatory politics and the available evidence reviewed in section II(A)(1) above both suggest that political participation is likely to increase as policy responsibilities are decentralized to state and local governments. This conclusion is not reversed for policies regulating business. State and local governments are more likely than a large central government to foster an environment conducive to citizen political influence and political effort over regulatory affairs. First, the important difficulty of monitoring politicians' and regulators' activities is reduced for state and local governments because citizens can look across local and state boundaries to reveal—in ways not possible with centralized regulation—the more obvious effects of regulations harmful to citizen interests.<sup>80</sup> Second, when abuses are discovered, the relatively low cost of running for state and

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80. For example, Pennsylvanians can discover the disadvantages they face in the purchase of wines and spirits because of regulated "state stores" by simply comparing Pennsylvania liquor prices and wine selection to those available in Delaware and New Jersey.

local offices permits easier entry of competitive candidates capable of bringing the case for reform to the voters' attention. Regulatory policies are complicated and removed, but assigning responsibility for those policies to state and local governments helps to lift the veil of voter ignorance and provides easier access to the channels of reform.

Once regulatory authority is decentralized, more can be done. Although expert agencies and commissions will be needed to implement regulatory policies, oversight of the agencies and commissions by elected officials can be strengthened. Enabling legislation for regulations can explicitly require periodic review by the legislature. Sunset provisions requiring regulations to be re-authorized are also useful.<sup>81</sup> Strengthening the hand of elected officials through review and re-authorization in turn strengthens the hand of the average citizen. Citizen influence is potentially increased and, if so, involvement in regulatory policymaking will be encouraged. Participation rises.

There is no direct evidence on the extent of citizen participation in regulatory affairs at different levels of government. But recent empirical studies showing the influence of legislatures over regulatory agencies,<sup>82</sup> when coupled with the earlier evidence showing that decentralization enhances voter control over legislators and thus encourages participation generally,<sup>83</sup> lend support to the view that decentralization and enhanced legislative control will contribute to citizen participation in regulatory affairs.

We conclude that to encourage political participation in setting business regulatory policies, decisionmaking should be decentralized to the state and local levels, and institutional reforms that strengthen the control of the elected legislature and executive over regulatory agencies should be encouraged. An antitrust state-action doctrine might usefully serve these ends.

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81. Sunset provisions require the legislature to vote explicitly to continue a regulation. Without that approval, the regulation is discontinued. Once a regulation has been in place for several years, new information about the effects of the regulation on consumers and producers will be available, which should make it easier to remove inefficient regulations. But not always: individuals who have invested in anticipation of an inefficient regulation's being continued—e.g., owners of taxicab medallions in New York City—have a vested interest in its approval.

82. See Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 433 (1989) (asserting that a legislature can exercise effective political control over agencies by restricting their decisionmaking ability through manipulation of agency structures and processes); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 792 (1983) (arguing that Congress exerts control over regulatory agencies even without systematic oversight hearings).

83. See *supra* section II(A)(1).

2. *Economic Efficiency in the Federalist Regulatory State.*—Economic efficiency of regulatory policies demands that policies be efficient both with respect to the preferences of citizens of a regulating state (*intra*jurisdictional efficiency) and with respect to the preferences of citizens living outside the state (*inter*jurisdictional efficiency). Whether these two dimensions of efficiency will be achieved depends upon the performance of the legislatures and regulators selecting and implementing policies.

The pivotal institution in setting the goals and means of state regulatory policies will be the state legislature. State legislatures must overcome majority-rule's propensity to voting cycles and policy indecision, and, like all legislatures, they tend to find a solution in logrolling across policies and the "you scratch my back, I'll scratch yours" norm of deference.<sup>84</sup> Under a norm of deference, each legislator is allowed to propose policies that her constituents favor, and favorite policies are then "bundled" (that is, logrolled) into large omnibus bills which the legislature as whole approves. Such logrolled policies are often economically inefficient, and state regulatory policies will be no exception.

As an example, consider how regulations to restrict industry output might be decided by a state legislature in which a legislator or small coalition of legislators represent districts where a majority of residents work for, or own businesses in, a single industry.<sup>85</sup> If unregulated, firms in that industry would be competitive, pricing their goods at marginal cost and earning the competitive rate of return. If regulated through price or output restrictions, however, the many firms in the industry could operate

84. See *supra* notes 70-73 and accompanying text. For evidence that state politics have long been decentralized—not strong party, minimum-winning coalition—politics, see V.O. KEY, JR., *POLITICS, PARTIES, AND PRESSURE GROUPS* (5th ed. 1964). Key wrote:

Although we have no precise measures of the change, clearly over the past 50 years American party organizations have undergone radical alterations. Tightly managed statewide party organization has become exceptional and has been largely replaced by a fractionalized system of personal and factional cliques of professionals . . . .

*Id.* at 341. More recent analyses have reached the same conclusion. See John F. Bibby et al., *Parties in State Politics*, in *POLITICS IN THE AMERICAN STATES* 85, 117 (Virginia Gray et al. eds., 5th ed. 1990). Bibby wrote that "party cohesion is not particularly high and that it tends to be greatest in states with strong interparty competition. Few states, however, have sufficient party cohesion in their legislatures to fulfill the requirements of the party government model." *Id.*

85. Regulations that restrict industry outputs are a common issue in state-action doctrine cases and the focus of most commentaries on this case law. See, e.g., *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982) (examining the regulation of cable television in Boulder, Colorado); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (addressing the regulation of attorneys' fees in Virginia); *Parker v. Brown*, 317 U.S. 341 (1943) (addressing the regulation of raisin prices in California); *Easterbrook*, *supra* note 7, at 23-25 (discussing the conflict between antitrust law and state regulation of industry generally); *Elhauge*, *supra* note 7, at 668 (noting the conflict between federal antitrust laws and state regulations that restrict output, such as rent control, conservation measures, and occupational licenses); *Wiley*, *supra* note 7, at 713 (characterizing federal, state, and local laws that seek to regulate as tantamount to the restraint of particular markets).

Although regulations to restrict industry output are common and our analysis will focus on such cases, our analysis extends to other forms of regulatory policy as well. See *infra* note 92.

as a single, profit-maximizing cartel. Raisins in California might be one—not randomly chosen—example.<sup>86</sup> What would the firms and workers prefer now, and how would their legislators vote?

FIGURE 2—INDUSTRY PRICES AND OUTPUTS

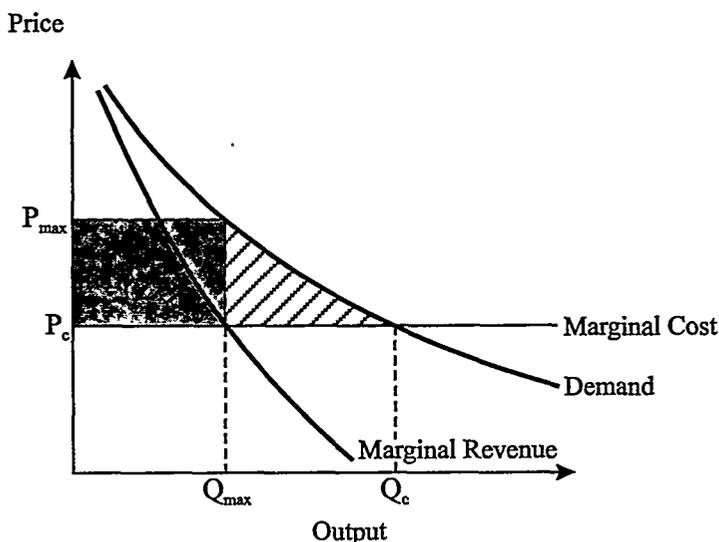


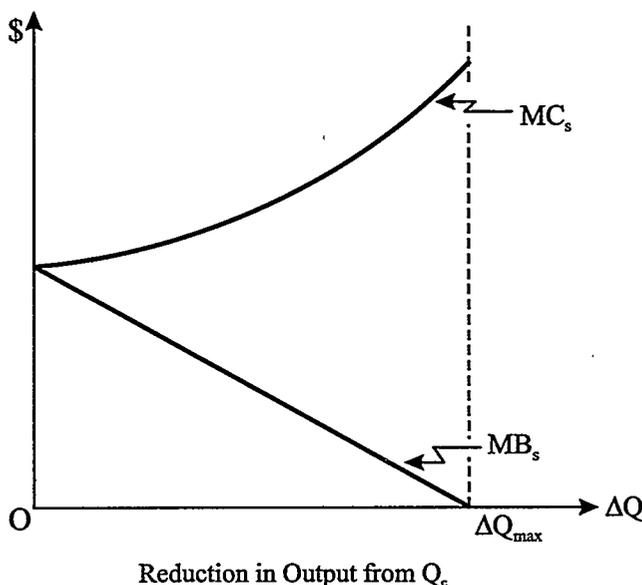
Figure 2 makes clear that these competitive firms will prefer the regulated cartel arrangement. When the industry is competitive, prices settle at  $P_c$  and output at  $Q_c$ , where demand equals the long-run marginal cost (or industry supply). There are no extra profits earned when the industry is unregulated, as prices just cover costs. If state regulation can establish a cartel pricing scheme among industry firms, however, then prices will be above costs, say at the profit-maximizing price shown as  $P_{max}$ . Extra “monopoly” profits equal to the shaded area are earned by the owners of the specialized inputs used in the industry—owners of existing capital, owners of land, and unionized workers. The same effect on profits could be achieved through a quantity regulation restricting total industry output to  $Q_{max}$ . Given the choice between no extra profits (unregulated) or extra profits (regulated), the industry clearly prefers extra profits (regulated). The curve shown as  $MB_s$  in Figure 3 shows how the industry’s firms gain additional profits for each regulated reduction in industry output of  $\Delta Q$  below the competitive level of  $Q_c$ .<sup>87</sup> These additional profits—the

86. The validity of California regulations controlling raisin production was the central issue in *Parker v. Brown*, the cornerstone of modern state-action doctrine.

87. The  $MB_s$  curve shows that as output is reduced from  $Q_c$ , the marginal profit earned by the industry’s specialized inputs decline. See ROBERT S. PINDYCK & DANIEL L. RUBINFELD,

“marginal benefits” of restrictive business regulation—decline as regulation increases until total profits are maximized at a reduction in output of  $\Delta Q_{max}$  ( $= Q_c - Q_{max}$ ).

FIGURE 3—THE MARGINAL BENEFITS AND COSTS OF REGULATION



Consumers of the industry's output, on the other hand, clearly prefer no regulation; no regulation means lower prices and more output. The consumers' economic losses are the costs of regulation, and curve  $MC_s$  in Figure 3 shows how those costs might increase as the regulated reduction in industry output ( $\Delta Q$ ) increases.<sup>88</sup> As  $\Delta Q$  rises, available output declines and market prices rise making consumers increasingly worse off. Importantly, as shown in Figure 3, the marginal costs to consumers in lost consumption ( $MC_s$ ) lie everywhere above the gains to the industry in higher

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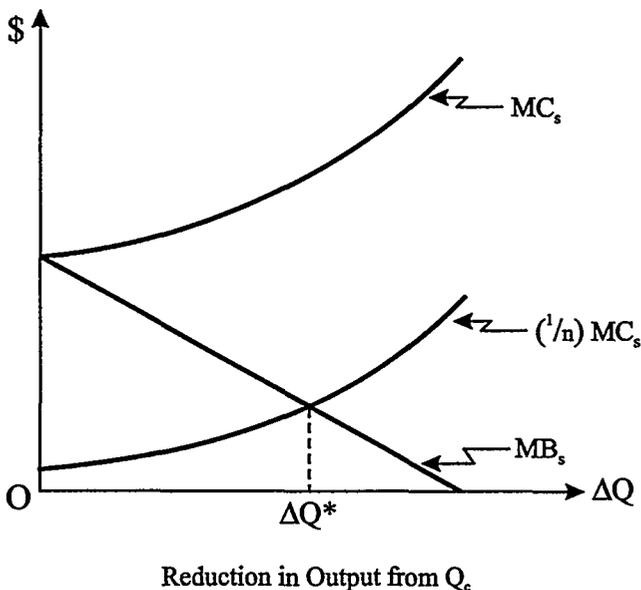
MICROECONOMICS 325 fig.10.3 (3d ed. Prentice Hall 1995) (showing that the monopolist's profit function increases at a diminishing rate until the profit-maximizing output is reached).

88. The curve  $MC_s$  is the marginal cost to state residents of regulating industry output. The most significant component of  $MC_s$  is the loss in consumer surplus enjoyed from consuming the industry's output, measured as the area between the demand curve and the price charged for the good. See PINDYCK & RUBINFELD, *supra* note 87, at 113-16. This loss is shown in Figure 2 as the combination of the shaded area of industry profits plus an added (or "excess") burden equal to the dashed triangle. The loss in consumer surplus increases as the output is reduced and prices rise. Importantly, the lost consumer surplus always exceeds the industry's profits at each level of  $\Delta Q$  by the dashed triangle, so the curve  $MC_s$  is always above the curve  $MB_s$ . See *id.* at 341 fig.10.9. For completeness, one can also include in  $MC_s$  the extra government spending needed to regulate an industry's output. These added bureaucratic costs increase  $MC_s$  still further above  $MB_s$ . See *supra* note 48.

profits ( $MB_s$ ); restrictive business regulation of a competitive industry is economically inefficient.<sup>89</sup> If those consumers reside within the state, they should oppose the industry's desire for this inefficient regulation. Will they succeed?

If the proposed regulation affects only a relatively minor portion of consumers' budgets (for example, raisins), and legislators are capable of responding to only a few major concerns each year, then consumers' interest in the regulation is likely to go unrepresented. If the regulation affects a few consumers significantly (for example, vegetarians), but those consumers are spread throughout the state, then consumers' interests are again likely to be ignored. Only when the regulation is economically important and those affected are concentrated in a few legislative districts will significant opposition arise to block an anticompetitive business regulation.

FIGURE 4A—LEGISLATIVE CHOICE OF REGULATORY POLICIES:  
*No Regulatory Spillovers*



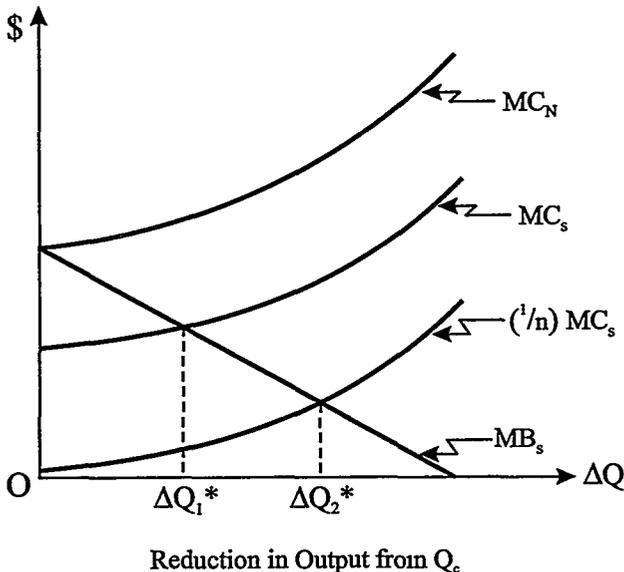
Anticompetitive business regulations will be submitted by legislators representing the benefitted industries and, except in rare instances, no other legislators will rise to oppose the legislation. The amount of regulation that will be submitted—the level of  $\Delta Q$ —is that which the legislator from the business district prefers. The legislator balances the district's gains in profits against the district's lost consumer benefits because some fraction

89. Figure 3 makes the well-known point in economics that competitive industries are more efficient than monopoly industries. See PINDYCK & RUBINFELD, *supra* note 87, at 332-33.

of the state's consumers—say,  $(1/n)$ th if there are  $n$  districts—is likely to reside within the district. In Figure 4a, the politically favored level of business regulation is shown as  $\Delta Q^*$ , where the district's marginal benefits from regulation equal the district's marginal cost:  $MB_s = (1/n) \cdot MC_s$ . At  $\Delta Q^*$ , statewide costs are much greater than statewide benefits. Business regulations creating significant intrajurisdictional economic inefficiencies may be approved by logrolling legislatures.<sup>90</sup>

So, too, may legislatures approve regulations creating significant *interjurisdictional* inefficiencies. Indeed, the temptation is even greater in this case since regulations creating interjurisdictional spillovers export much of the cost of regulation outside the boundaries of the state. Again, raisins grown almost exclusively in California but consumed nationally are a good example. The benefits from the regulation of raisin output and prices accrue to producers in California, but the costs are born by consumers nationwide. Even if the California legislature considered the full costs of the regulation on California consumers—and thus the regulation was efficient for California residents alone—there still would be significant *interjurisdictional* inefficiencies imposed on residents outside of California. Matters are even worse, of course, if the California legislature decides policies using a localized norm of deference, for then *intra*jurisdictional inefficiencies remain.

FIGURE 4B—LEGISLATIVE CHOICE OF REGULATORY POLICIES:  
*Regulatory Spillovers*



90. The analysis here is an application to business regulation of the general model of inefficient policymaking in universalistic legislatures. See *supra* notes 71-73 and accompanying text.

Figure 4b illustrates the case of *interjurisdictional* inefficiencies where the regulated industry exports a major portion of its output to residents outside the state. The benefits of regulation to state producers are significantly higher. Extra profits can be earned from out-of-state consumers, and these profits are indicated by an upward shift in  $MB_s$ . In-state consumers continue to bear the same costs as before (as in Figure 4a), so their marginal costs from regulation remain at  $MC_s$ . But to these costs we must now add the additional lost consumer benefits borne by out-of-state consumers to obtain the national costs,  $MC_N$ , of state regulation. Even if the state legislature fully recognized the costs of regulation to its own resident consumers, it would still provide positive regulation— $\Delta Q_1^*$  where  $MB_s = MC_s$ —because the profits earned for its producers from out-of-state consumers are too attractive.<sup>91</sup> Of course, for reasons noted above, the state legislature may ignore its own resident consumers too. In this case, regulation of industry output will be even more restrictive, moving to  $\Delta Q_2^*$ , where  $MB_s = (1/n) \cdot MC_s$ . Here the legislature approves regulation that exploits both in-state and out-of-state consumers; intrajurisdictional and interjurisdictional inefficiencies are the result.<sup>92</sup>

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91. These profits are also sufficient to compensate in-state consumers for their own losses from industry regulations. This effect is illustrated in Figure 4b by the fact that the area under the state's  $MB_s$  curve (*i.e.*, its total profits from the regulation) is greater than the area under the  $MC_s$  curve (*i.e.*, the losses to in-state consumers). A regulation of  $\Delta Q_1^*$  is efficient from the perspective of state residents alone, but is shown in Figure 4b to be inefficient when the costs of all national citizens are considered.

92. Although the central focus of this essay is on the regulation of business output, the analytical framework presented in Figures 2 to 4 can be extended easily to study other prominent forms of government regulations such as the regulation of prices to favor consumers, the regulation of pollution, and the regulation of public utilities.

For example, when market prices are regulated to favor consumers—rent control is a prominent example—consumers benefit as prices are lowered. Producers lose, however, as prices and, consequently, their profits decline. As prices fall, the quantity of the good available to consumers declines as well. Thus, consumer price controls can also be studied as regulations that restrict output. The analysis in Figures 3 and 4 therefore applies, only here  $MB_s$  represents consumer benefits from lower prices,  $MC_s$  represents lost profits to in-state producers, and  $MC_N$  represents the sum of lost profits to in-state and out-of-state producers. The political analysis is identical, except in this case the consumers are concentrated in one legislative district (*e.g.*, renters in the urban area) while the producers (*e.g.*, owners of housing) are assumed to live throughout the state or nation. According to the logic of Figures 4a and 4b, there will be too many consumer price controls, resulting in intrajurisdictional and interjurisdictional inefficiencies. Rent control was attacked as price fixing under the Sherman Act in *Fisher v. City of Berkeley*, 475 U.S. 260, 261 (1986).

That this single model of political decisionmaking helps us to understand the four prominent forms of regulatory policy is both a blessing and a curse. It is a blessing because it suggests we may have captured the basic forces at work when policies are decided by legislatures. It is a curse because it means we cannot simply observe the process of producers and consumers influencing legislators and know exactly what the outcome will be. John Wiley has proposed such a "process" approach to the antitrust state-action doctrine: if producers are crucial to the passage of the regulation, then the regulation must entail producer capture, be inefficient, and fall subject to antitrust review. See Wiley, *supra* note 7, at 764-73. As the analysis here makes clear, no such conclusion is warranted. Producers can

What can be done? If decentralized business regulation is inefficient, perhaps we should centralize these regulatory policies in the national government. Recent experience suggests we should think carefully before adopting this strategy.<sup>93</sup> Congress faces the same political pressures to manage public policies for local constituent interests as do state legislatures, and, like state legislatures, it is designed as an institution to facilitate logrolls, not control them.<sup>94</sup> Furthermore, a national regulatory policy creates additional incentives to overregulate because taxpayers and consumers in the country as a whole, not just in a given state, pay for regulations that benefit local producers. Rather than controlling regulatory inefficiencies, Congress may actually prove conducive to even more regulatory logrolls.<sup>95</sup>

An alternative approach—and the one we shall recommend in this Article—seeks to strengthen the hand of those forces in the decentralized economy that can enhance regulatory efficiency. Judge Frank Easterbrook in *Antitrust and the Economics of Federalism*<sup>96</sup> explores this same approach, but focuses, we argue, on the wrong forces. He looks to find

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be involved in all kinds of regulations—good and bad—as can consumers. Matthew Spitzer has developed this critique of Wiley's analysis more completely. See Spitzer, *supra* note 7, at 1310-15 (arguing that there is no tenable process-orientated distinction between producer- and consumer-capture, and criticizing Wiley's argument that interjurisdictional regulatory exploitation by majority rule is more democratically legitimate than intrajurisdictional interest-group regulation).

93. For surveys of national regulatory policies and their associated inefficiencies, see Gruenspecht & Lave, *supra* note 79, at 1541-42, and Joskow & Rose, *supra* note 79, at 1465-86.

94. See Thomas Stratmann, *The Effects of Logrolling on Congressional Voting*, 82 AM. ECON. REV. 1162, 1169-74 (1992) (finding significant correlations between support for legislation benefitting parochial constituencies and vote-trading on other issues); Weingast & Marshall, *supra* note 70, at 145 (explaining how the committee system encourages exchange among legislators who serve a diversity of constituencies).

95. The restriction of agricultural output and farm price support programs are good examples of how a national logroll facilitates a regulatory price subsidy that would be very difficult to achieve through interstate bargaining. See Bruce L. Gardner, *Causes of U.S. Farm Commodity Programs*, 95 J. POL. ECON. 290, 309 tbl.6 (1987) (finding that geographic concentration of commodity production and an optimal constituency size correlate with increased price support intervention by Congress). Indeed, passage of the omnibus agriculture bill involves a curious coalition of representatives from farm states and from inner-city congressional districts. See John Ferejohn, *Congress and Redistribution, in MAKING ECONOMIC POLICY IN CONGRESS* 131, 144 (Allen Schick ed., 1983) (noting that "food stamp authorizations are usually tacked onto the omnibus agriculture bill," which could account for the inner-city support).

For an overview of the growth in federal regulatory expenditures and activities, see generally MELINDA WARREN & BARRY JONES, *REINVENTING THE REGULATORY SYSTEM: NO DOWNSIZING IN THE ADMINISTRATION PLAN* (Center for the Study of Am. Bus. Occasional Paper No. 155, July 1995). From 1970 to 1995, federal staffing and federal expenditures (in real dollars) both tripled. See *id.* at 7 figs. 1-2. Many political science scholars see this period as the time when Congress shifted from an institution run by its leaders to an institution run by its members—members primarily interested in servicing their local constituents through the passage of locally helpful fiscal and regulatory policies. See, e.g., Weingast & Marshall, *supra* note 70, at 137 ("[E]lector competition induces congressmen, at least in part, to represent the interests of their constituents.").

96. Easterbrook, *supra* note 7.

the pressures for efficiency in *intergovernmental economic* competition.<sup>97</sup> We shall look instead to *intragovernmental political* competition, hoping to find ways to strengthen that competition and thereby improve regulatory performance.

In setting regulatory policy, Judge Easterbrook argues that the world of decentralized, economically competitive governments will create a national regulatory marketplace in which individuals and businesses move among local jurisdictions or states to select that regulatory combination they most desire. Just as a private marketplace forces suppliers to produce their goods at the lowest cost, and to provide the goods most desired by consumers, so too—argues Easterbrook—will the pressure of citizens and businesses shopping, through exit and relocation, force governments to be efficient in their provision of public regulations.<sup>98</sup> Relying on Charles Tiebout's famous economic model of government competition, Easterbrook concludes "that the goal[] of competition to avoid exit leads jurisdictions to enact that set of laws most beneficial to the population. . . . [E]xit causes a powerful *tendency* toward optimal legislation."<sup>99</sup> Easterbrook recommends that the courts show a strong presumption in favor of state and local economic regulations, shaped as they are from the pressures of efficient economic competition.<sup>100</sup>

Although we support Judge Easterbrook's recommendation, we feel it follows from the wrong analysis. Economic competition will not ensure efficient regulations. Consider the plausibility of Charles Tiebout's five conditions for efficiency for regulatory competition between states.<sup>101</sup> If Tiebout's conditions do not hold, then Easterbrook's conclusion that economic competition alone will produce regulatory efficiency cannot be accepted. We will need to look elsewhere to justify regulatory decentralization. Tiebout's condition 1—regulations provided at minimum average cost—is likely to hold; Tiebout's conditions 2 through 5 are more problematic.

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97. *See id.* at 33-35.

98. *See id.*

99. *Id.* at 34 (emphasis in original).

100. *See id.* at 45-46 (suggesting that courts step in when monopoly overcharges are paid by consumers outside of the jurisdiction and ignore arguments that commerce into the jurisdiction is burdened).

101. *See supra* note 50. Interstate regulatory competition is our central concern because most business regulation, and the primary focus of the antitrust state-action doctrine, is state regulation. The Tiebout-Easterbrook analysis has a better chance at the metropolitan level with competition between local governments. Certainly this seems to be the case for local fiscal policies. *See* Edward M. Gramlich & Daniel L. Rubinfeld, *Micro Estimates of Public Spending Demand Functions and Tests of the Tiebout and Median Voter Hypotheses*, 90 J. POL. ECON. 536, 554-55 (1982) (describing empirical results that were "reasonably consistent with a Tiebout interpretation: In large metropolitan areas, there is quite extensive grouping; in smaller areas, there is some grouping"). Whether we can generalize from fiscal performance to regulatory performance is an important question, however. *See infra* note 103.

Condition 2—an elastic supply of jurisdictions, each capable of replicating the attractive features of its competitors—is realistically valid only in metropolitan areas with undeveloped land.<sup>102</sup> Today, however, we have a fixed number of states. Citizens are forced to choose from only a limited number of locations (fifty); finding a perfect combination of private amenities and public policies for each citizen is unlikely. More likely, citizens must decide between states with good jobs and bad regulations or states with bad jobs and good regulations. It is unlikely good regulations will win.<sup>103</sup> With a limited number of jurisdictions, bad government policies can survive in those states with sufficient compensating benefits from the private economy.

Condition 3—households and businesses are fully informed about regulations in each jurisdiction—is also required for Tiebout-Easterbrook efficiency. Although government taxes and spending are well covered in the daily news, and households and firms “see” their tax bills and service deliveries, regulatory policies are often hidden policies: Are prices higher because of state business regulations or because firm costs rose? Further, for condition 3 to hold, not only must families and firms know the consequences of regulatory policies in their own communities, they must also understand how regulation works in other jurisdictions. They must spend resources to discover the true consequences of regulatory policies, and acting on the information—relocating to another jurisdiction—is itself an expense. Finally, private information becomes public when the citizen does act in the marketplace, creating an incentive to “free ride” on the information-gathering efforts of other citizens. In the end, no information may be gathered.<sup>104</sup> When we recognize that the location decision

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102. See Henderson, *supra* note 52. On the importance of the free entry assumption to the Tiebout model and its empirical validity, see generally Dennis Epple & Thomas Romer, *On the Flexibility of Municipal Boundaries*, 26 J. URB. ECON. 307, 317-18 (1989).

103. The economic evidence shows that job prospects—wages and employment—are the primary reasons for interstate and interregional location of households. See Michael J. Greenwood, *Research on Internal Migration in the United States: A Survey*, 13 J. ECON. LITERATURE 397 (1975). For more recent evidence showing that job prospects and government transfers also matter, see Rebecca M. Blank, *The Effect of Welfare and Wage Levels on the Location Decisions of Female-Headed Households*, 24 J. URB. ECON. 186, 207-08 (1988). For evidence that businesses are not particularly sensitive to regulations when they relocate, see Timothy J. Bartik, *The Effects of Environmental Regulation on Business Location in the United States*, GROWTH & CHANGE, Summer 1988, at 22, 23 (finding that variations in state environmental regulations have no statistically significant impact on business location) and Virginia D. McConnell & Robert M. Schwab, *The Impact of Environmental Regulation on Industry Location Decisions: The Motor Vehicle Industry*, 66 LAND ECON. 67, 79 (1990) (concluding from a study of motor vehicle facility locations that varying environmental regulations are generally unimportant in the location decision). On the possible importance of regulations in business location decisions, see generally ROGER W. SCHMENNER, MAKING BUSINESS LOCATION DECISIONS 39-41, 45-59 (1982).

104. For the public-good aspects of private information, see Sanford J. Grossman & Joseph E. Stiglitz, *On the Impossibility of Informationally Efficient Markets*, 70 AM. ECON. REV. 393, 400-05 (1980) (arguing that prices cannot fully reflect costly information because informed traders, by acting

involves a choice of regulatory packages over multiple jurisdictions, that collecting and acting upon the information is expensive, and that it is strategically advantageous to wait for others to (literally) move first, then it seems to us unlikely that families or firms acting on their own will be motivated to satisfy the Tiebout-Easterbrook full-information requirement for efficient regulatory policy.

Condition 4—mobility of households and businesses—represents another high hurdle for Judge Easterbrook's application of the Tiebout argument. But relocation costs can be significant, both for families and for firms. Both bear search costs, moving costs, and the costs of replacing valuable but locationally tied assets (for example, gardens and friends; plants and customers). If these relocation costs are large, then households and businesses can be "exploited" by inefficient public policies, including inefficient regulations, up to the cost of relocation.<sup>105</sup> Matters are more

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on their knowledge, reveal the same to uninformed traders and thus lose their competitive advantage). See also ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 101-02, 117-19 (2d ed. 1997); Sanford J. Grossman & Joseph E. Stiglitz, *Information and Competitive Price Systems*, 66 AM. ECON. REV. 246 (1976) (arguing that informed investors can only earn compensation for the cost of gathering information when the market does not reflect true value, *i.e.*, when information has not been "fully conveyed" to the uninformed investors).

105. A simple example shows how large these relocation costs can be. If a family earns \$40,000 a year and lives in a \$100,000 house, then moving from one location to another and buying an identical house will cost approximately \$6000 in realty fees (3% when selling and 3% when buying) and approximately \$2500 in moving expenses. Amortizing these one-time costs of \$8500 at 5% per year implies an annual cost of relocation of about \$425/year. That leaves a lot of room for inefficient business regulations before the family will relocate. Further, this \$425 annual ceiling is conservative; it ignores all the psychic costs of finding new friends and keeping in touch with old ones that any move entails. These psychic costs are likely to be large for interstate relocations. The costs of home purchase and moving expenses are present even with metropolitan relocations, and these costs create barriers to efficient competition. Although differences in fiscal policies—taxes and school quality in particular—are often large enough to warrant a relocation, *see* Gramlich & Rubinfeld, *supra* note 101, at 551-55, it is not clear that differences in local regulatory policies (*e.g.*, cable TV, rent control, liquor store pricing, legal services) will loom so large. If not, condition 4 is violated and there is reason to doubt the usefulness of the Tiebout-Easterbrook model as the basis for efficient regulatory policy at the local level as well. Easterbrook's potential rebuttal to this argument is that: (1) it is the "marginal mover" (*i.e.*, the one who makes the winning bid) who determines site prices for homes and businesses; (2) this crucial marginal mover is a family or business from outside the jurisdiction—or more generally, has choices outside the jurisdiction—and so makes a low bid that reflects the relative inefficiencies of the jurisdiction's public policies; and (3) the fall in land prices is a stimulus to regulatory reform. *See* Easterbrook, *supra* note 7, at 44. While step 1 is obviously true, *see* R. Preston McAfee & John McMillan, *Auctions and Bidding*, 25 J. ECON. LITERATURE 699, 707 (1987), the validity of steps 2 and 3 is not so clear, particularly for state jurisdictions. It is important to realize that the land market is not one market for identical parcels whose price is determined by one marginal buyer, but rather thousands of markets, one for each type of home or business in each location, whose prices will be determined by thousands of marginal buyers. For Easterbrook's argument to hold, there must be a marginal buyer with out-of-state options in each of these markets. Most residential relocations, however, involve in-state moves; nationally, only three percent of individual moves are across state lines within a given year. *See* U.S. BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES* 32 tbl.33 (1995). It is not clear that there are sufficient "marginal movers" to significantly affect overall state land prices. Furthermore, as Tiebout originally conceived the efficiency role for

complicated, but even worse for Easterbrook's argument, when relocation costs are asymmetric—high for families but low for business. As states compete for mobile businesses, there will be pressure to offer those businesses favorable regulations. One pro-business regulation that might be offered is cartel control over output and prices.<sup>106</sup> If consumers cannot exit the state easily, if they are geographically spread throughout the state, and if the good is a small fraction of consumers' budgets, then such inefficient regulations may be approved.<sup>107</sup> Rather than fostering economic regulatory efficiency in this case, economic competition contributes to inefficiency.<sup>108</sup>

Condition 5—no interjurisdictional externalities or spillovers—is also essential for Tiebout-Easterbrook regulatory efficiency. When spillovers are present, state and local governments underprovide regulations with valuable, positive spillovers (for example, air quality control) and overprovide regulations with harmful, negative spillovers (for example, anti-competitive business regulations). Economic inefficiency results. Judge Easterbrook recognizes that condition 5 is likely to be violated by real-world regulations, and we agree. Indeed, economic competition often makes matters worse when there are spillovers. Consider, for example, the case of anticompetitive business regulations with negative spillovers.<sup>109</sup> Here states might use the promise of “pro-cartel” regulations to attract firms, or groups of firms, that sell their products in national markets. As long as these firms remain the industry's leaders, excess profits can be earned.<sup>110</sup> Interstate regulatory competition can lead to a proliferation of

mobile households, *everyone* left the inefficient government. It was the total evacuation that led to reform—bad governments disappeared. See Tiebout, *supra* note 14, at 419. Clearly, that is not going to happen to our states. Thus, the reform must come from another source. Implicitly, Easterbrook is assuming that the discipline of exit comes from the fact that bad policies lead to lower values for homes and businesses, giving current residents an incentive to lobby for reforms. But this requires responsive politics. Realistically, even Easterbrook needs to supplement the Tiebout process with politics—an important general point made first by Dennis Epple & Allan Zelenitz, *The Implications of Competition Among Jurisdictions: Does Tiebout Need Politics?*, 89 J. POL. ECON. 1197, 1216 (1981).

106. See *supra* Figure 2.

107. See *supra* Figures 3 & 4.

108. In fairness, Easterbrook understood this problem, but he assumed it away with his Tiebout assumption of equal and costless mobility for families and firms. Easterbrook argues:

Competition among the states to create attractive systems of economic regulation is greatest if states may adopt *any* regulations they choose, . . . *so long* as the residents of the state that adopts the regulation also bear the whole monopoly overcharge. Under such an approach states could have any rules they want, so long as he who calls the tune also pays the piper.

Easterbrook, *supra* note 7, at 45 (second emphasis added). If consumers cannot escape the state, however, then they involuntarily contribute to the “piper,” and too many pro-business “tunes” are played.

109. See *supra* Figures 2 to 4.

110. The regulated firms create a cartel for the industry, and acting as a price leader—charging what Easterbrook calls the “monopoly overcharge,” Easterbrook, *supra* note 7, at 39—they can earn excess monopoly profits. See PINDYCK & RUBINFELD, *supra* note 87, at 442-43 (recognizing that in

these inefficient business regulations. In this case, economic competition no longer guarantees efficiency; more likely, competition becomes a "race to the bottom."<sup>111</sup>

Our review of the conditions for Tiebout competition applied to regulatory policy lead us to conclude that *intergovernmental economic* competition will not ensure that states and communities will select efficient regulatory policies. Tiebout's conditions 2 to 5 are unlikely to hold. There is an alternative approach to promoting efficient regulatory choices that seems more promising, however: *intragovernmental political* competition. If a governor or a legislature selects policies that harm the majority of the voters, and those voters know about the harmful policies and can be mobilized to support reform and the reformers, then efficient policies can emerge.<sup>112</sup>

For efficient, intragovernmental political competition, three political conditions—similar in structure and purpose to Tiebout's conditions 2, 3, and 4—must be satisfied. They are:

1. *Open access* to reform, ensuring policy choices ( $\approx$  Tiebout condition 2);
2. *Full information about policy consequences* ( $\approx$  Tiebout condition 3); and,
3. *Ability to mobilize* support for policy reform ( $\approx$  Tiebout condition 4).

oligopolistic markets, dominant firms, or price leaders, will maximize their own profits by taking into account how the output of smaller firms varies depending on the set price).

111. For an example from environmental policy, see Charles E. David & James P. Lester, *Federalism and Environmental Policy*, in ENVIRONMENTAL POLITICS AND POLICY: THEORIES AND EVIDENCE 57, 59 (James P. Lester ed., 1989) (discussing the negative externalities and inefficiencies related to the decentralization of federal environmental programs). For other examples of the race to the bottom, see Cumberland, *supra* note 56, at 3 (arguing that federal siting of toxic storage facilities results in resource misallocation because "the activity generating the toxic waste receives, in effect, a subsidy with the result that its output tends to be underpriced and over-produced"); Gramlich & Laren, *supra* note 55, at 506 (finding that "if AFDC families should happen to make an interstate move, they are much more likely to go to a state with higher AFDC benefits"); Inman & Rubinfeld, *supra* note 2, at 314-15 (noting the potentially negative effects of competitive tax policies in a decentralized economy); and Oates & Schwab, *supra* note 56, at 334-35 (presenting a model in which interjurisdictional competition can lead to suboptimal tax rates and environmental standards).

112. This conceptual distinction between economic processes based on "exit" and political processes based on "voice" as alternative mechanisms for the allocation of resources was first formalized in ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 15-20 (1970). Although Judge Easterbrook makes the argument for "exit" as the means to regulatory efficiency, we will be making the argument for "voice." Easterbrook did recognize that political competition is an alternative to economic competition, but he doubted that one could collect the information necessary to make a reasoned choice between the two approaches. See Easterbrook, *supra* note 7, at 33. Pleading ignorance about "voice," he opted for "exit." We feel that the needed analysis and evidence is now available, and it favors "voice" as the relatively more effective mechanism for controlling regulatory inefficiencies at the state level.

If these three political conditions hold, then policies that make a majority of citizens better off will be on the agenda, known and understood by the voters, and chosen either directly by referendum or through their elected representatives. We argue below that these three political conditions are more likely to hold than their economic (Tiebout) counterparts, and that it is consequently more productive to look to the process of political, rather than economic, competition as a source for regulatory efficiency.

Politics with *open access* permits citizens and their representatives to select from a range of policy choices and to do so without moving their residence. Open access to reform is most likely to occur when key policy choices and policy implementation are decided by elected officials chosen through competitive elections.<sup>113</sup> Candidates are free to choose their policy positions from a wide range of alternatives. In contrast to economic competition, in which there are at most fifty policy options offered by separate states, competitive state and local politics can mimic the successful policies of neighboring states and localities—in effect, bringing the options available through Tiebout-Easterbrook competition into play—but promising that new policies may be introduced as well. To ensure a wide range of possible reform options for consideration, competitive state and local politics seem the more promising venue.

But opening the political system to new ideas does not ensure economic efficiency; both efficient and inefficient policies can be admitted. For example, universalistic legislatures in which each legislator can offer her favorite policy is a source of regulatory inefficiencies.<sup>114</sup> A political incentive to choose efficient over inefficient policies must exist for individual legislators, and the political means to implement the efficient reform choice must be created. It is here that the political conditions ensuring full information and the ability to mobilize collective action play their role.

Full information about the consequences of regulatory policies—current and proposed—allows voters to reward the elected officials who deliver the economically beneficial policies. But as argued above in our critique of Tiebout's condition 3, individual citizens will find the collection of such information costly and probably not worth their personal efforts.<sup>115</sup> Political candidates, on the other hand, will find such information valuable if it helps them pass efficient policies and win

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113. Professor Ely seems to feel this way as a matter of democratic theory:

The recent attention given the problem of ventilating legislative purposes is healthy; in fact it is critical to representative government . . . . The problem seems more basic, and may lie not in a propensity to make politically controversial decisions without telling us why, but rather in a propensity not to make politically controversial decisions—to leave them instead to others, most often others who are not elected . . . .

JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 134 (1980).

114. See *supra* Figure 4a.

115. See *supra* text accompanying note 104.

elections, and the candidates can often share the costs of collecting this valuable information via political parties and legislative committees.<sup>116</sup> For both reasons—higher benefits and lower costs—political candidates will find the collection and dissemination of information valuable in ways that private parties will not. Full information is more likely the outcome of political competition than of economic competition.

Finally, if more efficient regulatory policies can be placed on the legislative agenda and their benefits are known, will they pass? More pointedly, how can a political coalition in favor of economic efficiency be mobilized in an open, universalistic legislature? States with strong parties or strong governors can mobilize broad-based citizen support and thereby control regulatory inefficiencies. By definition, strong parties form a stable legislative majority. Members who might be tempted to deviate from the party's platform can be disciplined so that deviations will not occur. Regulatory policy will therefore be the policy that is in the interests of the stable, majority party; minority-party districts will receive no regulatory benefits. Further, because party leaders are likely to internalize regulatory inefficiencies generated by their members *on* their members, majority-party districts will seek fewer regulatory favors. In the end, strong political parties are likely to produce fewer regulations, and those that do emerge are likely to be more efficient.<sup>117</sup>

116. More precisely, if the extra value to the candidate(s) of being in office multiplied by the increase in the chance of re-election made possible by the information exceeds the cost of collecting the information, then the candidate(s) will invest in information. On the use of political parties as a source of shared policy information for candidates, see JOHN H. ALDRICH, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF PARTY POLITICS IN AMERICA* 273 (1995). On the use of legislative committees as a source of useful policy information, see generally KREHBIEL, *supra* note 69, at 61-191.

117. Fewer regulations follow from the fact that the strong, majority party no longer has to give any economic benefits to the minority party to ensure a stable policy outcome. Thus, only regulatory policies that favor majority districts will be approved. Inefficient regulations in minority districts will be defeated.

But even in the majority districts, strong political parties improve regulatory performance. Assume there are  $m$  districts (a majority) represented in the party. From the perspective of party leaders, industry regulation for any one district provides  $MB_i$  benefits to party constituents—those in the district that benefit from the regulation—but imposes  $(m/n) \cdot MC_i$  costs on party members, calculated as the  $m$  party districts each paying  $(1/n) \cdot MC_i$  in regulatory costs. The preferred level of regulation in each majority district will be set where *party* marginal benefits equal *party* marginal costs:  $MB_i = (m/n) \cdot MC_i$ . Because  $(m/n) \cdot MC_i > (1/n) \cdot MC_i$  for all levels of regulation, then for the same  $MB_i$  curve, the party-preferred level of regulation must be less than the level of regulation preferred by the universalistic legislature. Less regulatory restriction of output follows, and improved economic efficiency is the result.

Political parties may even promote full economic efficiency, setting  $\Delta Q = 0$  in Figure 4a. This limiting case occurs if the political party controls all representatives in the legislature so that  $m = n$ . Then by the argument above, if the party seeks to set  $(m/n) \cdot MC_i = MB_i$  in each district asking for regulation, the party must equate  $(m/n) \cdot MC_i = MC_i = MB_i$ . This pushes  $\Delta Q$  to 0, which is the efficient outcome. See Donald Wittman, *Why Democracies Produce Efficient Results*, 97 J. POL. ECON. 1395, 1411 (1989). In this situation, each district has an incentive to elect a representative to the stable majority party because this is its only way to join the controlling coalition and to receive constituent

Likewise, governors who have access to extra-legislative political resources—appointment powers, control over appropriated budgets, and an executive veto—can achieve efficient economic reforms. Using appointment powers and discretionary executive authority over policies and the budget, the governor can fashion a regulatory reform coalition in which each member district agrees to sacrifice its inefficient regulatory policy for a compensating executive-controlled substitute policy. On balance, regulatory reform makes all residents in the state better off, thereby increasing the governor's chances for re-election. But only strong governors, those with sufficient executive-controlled resources to pay compensation to the district hurt by deregulation, can hope to achieve regulatory reform.<sup>118</sup>

Finally, successful political competition leading to the adoption of efficient economic reforms can be contagious. States serve as laboratories for public policies, and successful policies will be copied. Governor Christine Todd Whitman's reduction in New Jersey income tax rates now sets the standard against which other state governors are to be compared. Studying state tax policies over the period 1960-1988, Professors Besley and Case show that the Whitman example holds as a general proposition: Good tax policies are mimicked, and if they are not, the governor loses.<sup>119</sup> Both anecdotal and empirical evidence show that open, informed, and mobilized political processes can and often do lead to the adoption of efficient economic policies. Institutions and rules that promote

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benefits. What might limit this move to full efficiency are the incentives of those who control the original stable majority coalition. Although previously excluded districts might elect representatives with the majority party "label," there is no reason for the original majority to share the benefits of being in control without compensation from the new districts. Seniority is one way the original members of the strong party make new members wait their turn.

Our more modest claim here is that strong political parties, if they arise, will be more economically efficient than the "everyone for themselves" universalistic legislatures shown in Figure 4a. For empirical evidence that strong political parties have historically led to more efficient policies, see Inman & Fitts, *supra* note 71, at 111-16.

118. See generally Fitts & Inman, *supra* note 74. Although Fitts and Inman's analysis focuses on the ability of the president to control Congress, the argument can be analogized directly to the ability of a governor to control a state legislature.

Crucial to the Fitts-Inman argument are the resources available to the governor. Without resources, the governor has no independent influence over the legislature. They identify three broad categories of resources: (1) resources allocated to the governor by the state constitution (*e.g.*, appointment powers); (2) resources turned over to the executive by the legislature for executive allocation (*e.g.*, legislatively granted regulatory and spending powers); and (3) the resources of the "bully pulpit" (*e.g.*, the governor's ability to mobilize broad citizen support for reform). See *id.* at 1757-58. Fitts and Inman then show how a governor's veto power can be used to leverage these resources into major economic reforms. See *id.* at 1769-73.

For evidence in support of the prediction that strong executives will promote economic reform, see Inman & Fitts, *supra* note 71, at 122-24 (showing that a strong president can control Congress).

119. See Timothy Besley & Anne Case, *Incumbent Behavior: Vote-Seeking, Tax-Setting, and Yardstick Competition*, 85 AM. ECON. REV. 25 (1995) (building an economic model suggesting that voters determine whether to re-elect incumbents in part by comparing their jurisdiction's tax policy with those of neighboring jurisdictions).

such political processes—legislative responsibility, competitive elections, strong parties, executive control—increase the prospects for efficient state and local government regulatory reforms.

What an open, informed, and mobilized political system cannot promise, however, is full economic efficiency. Just as the Tiebout-Easterbrook conditions 2 to 4—if met—prove sufficient for *intra*jurisdictional efficiency alone, the usefulness of the analogous political conditions 1 to 3 is similarly constrained. *Inter*jurisdictional regulatory inefficiencies remain a problem even if *intra*jurisdictional inefficiencies are controlled by in-state political competition. The incentives remain for residents and their elected officials to approve state and local regulations that burden nonresidents.<sup>120</sup> Furthermore, for reasons noted above, we are skeptical that voluntary interstate (Coasian) agreements will adequately control these regulatory inefficiencies.<sup>121</sup> Therefore, like Judge Easterbrook, we shall look instead to central government supervision for assistance. In the case of business regulations with “monopoly spillovers,” the appropriate supervisory vehicle is the Sherman Act. Without federal antitrust protection, potentially significant interjurisdictional economic inefficiencies are likely to arise in the federalist regulatory state.

3. *Participation and Efficiency in the Federalist Regulatory State.*—The analysis of participation and efficiency in the regulatory state leads us to the following conclusions. First, to enhance political participation in the management of business regulatory policies, such policies should be decentralized to the state and local levels of government, and efforts should be made to ensure the active and constant role of elected executives and legislators. A fully centralized regulatory process or one that delegates primary authority for the design and supervision of policies to government agencies will fall short of a fully participatory state—that is, the level of political participation will be inside the “federalism frontier,” say at point  $\mathcal{P}_{SQ}$  of Figure 1.

Second, to enhance economic efficiency in the management of business regulatory politics, such policies should again be decentralized to competitively elected, informed, and politically mobilized state and local legislators and executives, except when such policies entail significant interjurisdictional spillovers. Regulatory policies with spillovers should be managed by the central government; in the case of business regulations with “monopoly spillovers,” the application of federal antitrust laws is a potentially effective federal policy response. To the extent that business regulation policy is assigned to the central government, is decided in

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120. See *supra* Figure 4b.

121. See *supra* notes 57-66 and accompanying text.

isolated and unsupervised government agencies, or entails significant inter-jurisdictional monopoly spillovers unmitigated by federal antitrust supervision, the level of economic efficiency achieved by the federal regulatory state will be inside its full potential, say at point  $\Delta_{SQ}$  in Figure 1.

Adherence to a pre-*Parker* standard of regulatory policymaking is probably well approximated by a point such as  $SQ$  in Figure 1. Many current federal business regulations reduce economic efficiency and political participation.<sup>122</sup> At the same time, present state regulations may encourage inefficient interstate monopoly spillovers.<sup>123</sup> To move from  $SQ$  to a regulatory state whose performance places our political economy on, and not inside, the federalism frontier of Figure 1 requires institutional reforms. Parts III to V below show how an expanded state-action doctrine can enhance our current regulatory performance. Part III argues that the Court's current antitrust state-action doctrine requiring "clear articulation" and "active supervision" contributes importantly to improved political participation and, as the doctrine strengthens intrastate political competition, makes a contribution to intrajurisdictional economic efficiency as well. Part IV expands the present doctrine to include a "monopoly spillover" test; the expanded doctrine contributes to interjurisdictional efficiency and, as the expanded doctrine protects out-of-state consumers, gives those consumers an indirect but still effective voice in regulatory policies. Part V applies the expanded state-action doctrine to the present case law and argues that the new doctrine offers significant gains for our twin federalism goals of political participation and economic efficiency.

### III. Current State-Action Doctrine: Increasing Political Participation

It is inherent in our federal system that there will be conflicts between the federal antitrust laws and the regulatory activities of state and local governments. The antitrust laws are directed toward encouraging competition through the prohibition of activities that restrain trade or monopolize markets.<sup>124</sup> State and local regulations, however, frequently limit market competition. Because such regulations may have conflicting and not easily discerned motivations—some to control monopoly power or reduce adverse externalities, others to promote state cartels for politically favored producers—it is necessary to ask under what conditions the federal antitrust laws should apply to state and local regulatory activities.

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122. On the inefficiency of regulation, see, for example, Rose-Ackerman & Mashaw, *supra* note 2. For participation concerns, see Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 423 (1990) (explaining that groups likely to be harmed by redistributive regulation are also likely to be poorly organized and incapable of expressing themselves politically).

123. See our discussion of California's raisin cartel, *infra* Part IV.

124. See E. THOMAS SULLIVAN & HERBERT HOVENKAMP, *ANTITRUST LAW: POLICY AND PROCEDURE* 19 (2d ed. 1989).

Whereas in the *Lochner* era the U.S. Supreme Court tried to undertake a full substantive review of state economic regulations that balanced state and federal interests, in recent years the Court has moved toward a more limited approach to regulatory federalism, developing a process-oriented test aimed, we shall argue here, at enhancing political participation in the regulatory process.<sup>125</sup> As a consequence of this change, the validity of a particular state regulation now depends heavily on whether that regulation has been clearly authorized by the state legislature and, if so, whether that legislature actively supervises the regulatory activity.<sup>126</sup>

### A. *The Evolving State-Action Doctrine: From Parker to Midcal*

1. *The Path Is Set: Parker v. Brown.*—In 1890, when Congress passed the Sherman Antitrust Act, Congress would not have thought that it had authority to apply federal antitrust laws to the activities of states and to the political units within the state.<sup>127</sup> The applicability of the antitrust laws to the states was first raised in the 1943 case of *Parker v. Brown*, in

125. Two other commentators on the state-action doctrine cases have also interpreted recent cases as supporting the goal of political participation. See Thomas M. Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 CAL. L. REV. 227, 249 (1987); McGowan & Lemley, *supra* note 7, at 307.

126. Although the main focus of the Court's clear articulation test has been on requiring state legislatures to approve regulatory policy, in *Hoover v. Ronwin*, 466 U.S. 558 (1984), the Court suggested that a state's supreme court could also be viewed as a legitimate approving body. In *Hoover*, the plaintiff challenged the manner in which the Arizona Supreme Court's Committee on Examinations and Admissions graded the bar examinations. According to the plaintiff, the committee chose pass-fail rates based on its determination of how many new lawyers it wanted instead of whether the examinee was competent. *Id.* at 564. Importantly, the committee was appointed by the state supreme court itself. By determining that grading should be considered an action of the Arizona Supreme Court, not of the appointed committee, the Court determined that *Parker v. Brown* governed the case and that the grading was immune from the federal antitrust laws. *Id.* at 573. What proved decisive for the Court was not the possibly adverse economic outcome of the admission regulations, but rather the Court's confidence that the state's supreme court participated enough to ensure that all affected parties had an opportunity to influence the final regulations. In fact, the participation test is passed in *Hoover* because "the Arizona Supreme Court established the Committee to examine and recommend applicants for admission to the Arizona Bar" and "[t]he Arizona Supreme Court Rules . . . delegated certain responsibilities to the Committee." *Id.* at 561. Evidently, the Arizona court was functioning in a legislative capacity by setting and supervising policies. It may also have been relevant that the judges had been elected by the public and the court had been granted the authority to admit or deny admissions.

Although *Hoover* did "not present the issue whether the Governor of a State stands in the same position as the state legislature and supreme court for purposes of the state-action doctrine," *id.* at 568 n.17, the Court's reasoning suggests that regulatory actions by a state governor would also be exempt from antitrust review. Cf. *Parker v. Brown*, 317 U.S. 341, 352 (1943); *Olsen v. Smith*, 195 U.S. 332, 340, 344-45 (1904) (both finding the action of a commission whose members were appointed by the governor to fall under the state-action doctrine).

127. See Herbert Hovenkamp & John A. Mackerron III, *Municipal Regulation and Federal Antitrust Policy*, 32 UCLA L. REV. 719, 725-28 (1985) (asserting that the prevailing views on constitutional law at the time the Sherman Act was passed would have obviated any need for the *Parker* state-action doctrine).

which the Court was asked whether California's Agricultural Prorate Act violated the Sherman Act. California had established a program to maintain the prices of and competition for a number of agricultural products. Under the program, ten producers of any crop within a production zone could petition the Prorate Advisory Commission to implement a restrictive marketing program. If the Commission agreed, a proposed program would then be drawn up and submitted for ratification by at least sixty-five percent of the growers. The Agricultural Prorate Act was challenged by a producer of raisins on the grounds that it violated the Sherman Act and the negative Commerce Clause.<sup>128</sup>

The Court began its analysis by noting that the marketing program would violate the Sherman Act if it had been devised solely upon the initiative of the producers. However, the Court asserted that while Congress had the power under the Commerce Clause to prohibit anti-competitive state programs, Congress did not intend to prohibit states from undertaking regulatory activities approved and directed by state legislatures.<sup>129</sup> Underlying the Court's decision in *Parker* was a concern to protect state legislative sovereignty in a federalist system; the Court was not unusually troubled by the fact that the Prorate Act was anticompetitive in that it cartelized California's raisin producers by restricting output and raising the price of raisins.

In its dormant Commerce Clause analysis, the *Parker* Court did concern itself with the substantive economic effects of the California regulation on residents within and outside the state, but it chose to evaluate those effects in political rather than economic terms. The Court seemed persuaded by the fact that the raisin production was confined largely to California. However, the fact that almost all of the raisins consumed in the U.S. were grown in California was interpreted by the Court not as a source of harmful economic spillovers, but rather as a fortunate configuration of the economic interests of raisin producers.<sup>130</sup> Interestingly, in its analysis of the Sherman Act, the *Parker* Court rested its judicial restraint on a view of federalism emphasizing state legislative sovereignty: "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority,

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128. *Parker v. Brown*, 317 U.S. 341, 344-49 (1943). The negative Commerce Clause is largely a court-developed doctrine that restricts states from discriminating against out-of-state residents. As such, it stands as a possible constraint on the ability of states to approve regulations that generate out-of-state spillovers. Because of its narrow focus on discrimination against out-of-state residents, however, the negative Commerce Clause does not act to limit regulations affecting only in-state residents. The negative Commerce Clause does have a potential role to play when a state business regulation creates significant interstate monopoly spillovers. See *infra* Part IV.

129. *Parker*, 317 U.S. at 341, 350-51.

130. *Id.* at 359-61.

an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."<sup>131</sup>

Furthermore, the Court in *Parker* saw the sovereignty of the state legislature as a means of protecting the participation of the citizens of California in a public decision of close interest to them. The Court noted:

Examination of . . . available data of the raisin industry in California, of which we may take judicial notice, leaves no doubt that the evils attending the production and marketing of raisins in that state present a problem local in character and urgently demanding state action for the economic protection of those engaged in one of its important industries.<sup>132</sup>

To the Court, only the legislature of the state of California, and no other governmental unit, had the proper incentive to worry about the plight of the raisin growers of California.

It is also noteworthy that the Court's willingness to grant California antitrust immunity coincided with a substantive area—the regulation of agricultural production—in which Congress itself had also resorted to market intervention. One might assume that having taken up agricultural marketing regulation, Congress could have relied on the Commerce Clause to explicitly limit raisin and other agricultural cartels. Having chosen not to do so, Congress left the door open to the states. Against this background it is not surprising that the *Parker* Court concluded:

This history shows clearly enough that the adoption of *legislative* measures to prevent the demoralization of the industry by stabilizing the marketing of the raisin crop is a matter of state as well as national concern and, in the absence of inconsistent Congressional action, is a problem whose solution is peculiarly within the province of the state.<sup>133</sup>

It seems clear that the *Parker* Court understood that there were economic consequences outside of California but believed that, absent any explicit action by Congress to remedy such consequences, the action by the state legislature was sufficient to warrant the state-action exemption. Looking favorably upon decentralized political decisionmaking, the *Parker* Court set the path along which all subsequent state-action doctrine would evolve: the economic consequences of state regulations would be largely ignored, provided those regulations were decided by an open, participatory political process, as evidenced by state legislative involvement.

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131. *Id.* at 351.

132. *Id.* at 363.

133. *Id.* at 367 (emphasis added).

2. *The Evolving Participation Test.*—In a series of cases beginning in 1975 with *Goldfarb v. Virginia State Bar*,<sup>134</sup> the Court sought to clarify the applicability of the federal antitrust laws to the regulatory activities of the states. In *Goldfarb*, the Court denied state-action immunity to a local bar association that set a minimum fee schedule for attorneys. This ruling was made despite the fact that the state bar association, a state agency authorized by the legislature, had issued opinions and reports that condoned the use of fee schedules.<sup>135</sup> In the Court's view, there was no evidence that the anticompetitive fee schedules were required by the state bar.<sup>136</sup> Rather, the Court argued that the state bar's enforcement of violations of local fee schedules made the state bar a private participant in a restraint of trade.<sup>137</sup> Apparently, then, the state regulation of the bar was not upheld in *Goldfarb* because there was no evidence the state legislature actually wanted the minimum fee schedules that the Virginia bar had promulgated—that is, the Court saw no evidence of sufficiently open political participation in setting the regulation.

In contrast, when the state legislative interest was clear and there was reason to believe that all affected groups were given the opportunity to participate politically, the Court has granted a state-action exemption from the Sherman Act. In *Bates v. State Bar of Arizona*,<sup>138</sup> the Court saw evidence of clear and active supervision by the state and acknowledged that “the regulation of the activities of the bar is at the core of the State's power to protect the public.”<sup>139</sup> The Court explained, “[O]ur concern that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced in [a situation like this]; we deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active.”<sup>140</sup>

In *Cantor v. Detroit Edison Co.*,<sup>141</sup> the Court denied immunity from federal antitrust laws to an electric utility's free light bulb exchange program despite the fact that the utility's rate structure had been approved by the legislatively appointed Michigan Public Service Commission. The Court's primary concern in *Cantor* was that the light bulb program itself had not been explicitly approved by the Public Service Commission.<sup>142</sup>

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134. 421 U.S. 773 (1975).

135. *Id.* at 777.

136. *Id.* at 790. According to the Court, “[t]he fact that the State bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.” *Id.* at 791.

137. *Id.* at 792.

138. 433 U.S. 350 (1977).

139. *Id.* at 361.

140. *Id.* at 362.

141. 428 U.S. 579 (1976).

142. The Court stated that although the integration of the lamp exchange program into the utility rate structure involved a “mixture of private and public decisionmaking[,] . . . there can be no doubt

Those individuals and interest groups involved in the determination of Public Service Commission regulations did not have the opportunity to express their views explicitly through a legislatively approved political process.<sup>143</sup>

Seen from the perspective of promoting federalism's valued goal of political participation, exemptions from the federal antitrust laws should, in principle, be given to municipal as well as to state governments. The previous analysis suggests that local governments are in many ways the most participatory of all governments.<sup>144</sup> Yet the Court has been more reluctant to grant immunity to lower levels of governments than to states. Whether and to what extent state exemptions should apply to local governments was the focal point of the Court's opinion in *City of Lafayette v. Louisiana Power & Light Co.*<sup>145</sup> In *Lafayette*, a municipally owned utility was accused of unfair tying arrangements by a suburban investor-owned utility. The municipal utility offered gas and water on a tie-in contract requiring that suburban users switch their electricity consumption to the municipal utility.<sup>146</sup> Seeing a problem with political participation in this case, the Court opted not to grant an antitrust exemption.<sup>147</sup> The Court stressed the various ways in which a municipal utility, though akin to a regulated business in some respects, was less likely to act in the broad public interest.<sup>148</sup> However, the Court did say that the political participation hurdle could be overcome if proper *state legislative* direction and authorization were present.<sup>149</sup> Finally, the *Lafayette* Court also noted the presence of economic spillovers, remarking that a municipal utility's predatory practices outside its city boundaries are not subject to the same political checks as are a state's regulatory activities:

[When local governments] act as owners and providers of services, they are fully capable of aggrandizing other economic units with

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that the option to have, or not to have, such a program is primarily [the utility's], not the Commission's." *Id.* at 593-94 (footnote omitted).

143. The Court made clear that "[t]he Commission's approval of [the utility's] decision to maintain such a program does not, therefore, implement any statewide policy relating to light bulbs." *Id.* at 585.

144. See *supra* section II(A)(1).

145. 435 U.S. 389 (1978).

146. *Id.* at 403-04.

147. *Id.* at 406-08.

148. "[The municipal utility's] goal is likely to be, broadly speaking, the benefit of its citizens. But the economic choices made by public corporations . . . are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations . . . ." *Id.* at 403.

149. The Court acknowledged the argument that "because government is subject to political control, the welfare of its citizens is assured through the political process and that federal antitrust regulation is therefore unnecessary." *Id.* at 406. But the Court made it clear that "when the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws." *Id.* at 416.

which they interrelate, with the potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets[,] . . . [and thus cities should not be] free to make economic choices *counseled solely by their own parochial interests* and without regard to their anticompetitive effects . . . .<sup>150</sup>

But, as in *Parker*, the Court resolved its concern not through an efficiency analysis, but rather by using its emerging political participation doctrine. It was the city's political process, in which the disenfranchised power company and customers had no representation, that most troubled the Court.<sup>151</sup>

3. *The Court Defines its Participation Test: Midcal.*—The Court's decision in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*<sup>152</sup> was the defining step in the development of the current political participation test for state-action immunity. In *Midcal*, the Court faced the

150. *Id.* at 408 (emphasis added).

151. *Id. Lafayette* revealed for the first time a fundamental disagreement as to how the line should be drawn to distinguish exempt government activities from nonexempt ones. In *Lafayette*, an alternative to the emerging participation test was offered by Chief Justice Burger, but the Burger approach was rejected by the plurality. Believing that the immutable nature of an economic activity—public or private—would logically determine how that activity would be provided—using politics or markets—Burger sought to distinguish traditional governmental activities (exempt) from proprietary activities (not exempt). *Id.* at 418, 422-25 (Burger, C.J., concurring). If an activity could be classified as private or proprietary then it must be provided through a market process. Thus, public enterprises providing proprietary goods and services must act similarly to private firms. Justice Burger argued that there should be no exemption when “cities are engaging in what is clearly a business activity . . . with the inherent capacity for economically disruptive anticompetitive effects.” *Id.* at 418 (Burger, C.J., concurring). He added, “It certainly is the case that the Cities are attempting to provide a public service, but it is likewise undeniable that they seek to do so in the most profitable way.” *Id.* at 418 n.1. (Burger, C.J., concurring).

A majority of the *Lafayette* Court declined to accept Chief Justice Burger's alternative approach for identifying immune public activities, preferring instead the participation approach that evolved from *Parker* and *Cantor*. *Id.* at 415-19. In his dissenting opinion, Justice Stewart remarked that “the scope of immunity envisioned by The Chief Justice is virtually impossible to determine. The distinction between ‘proprietary’ and ‘governmental’ activities has aptly been described as a ‘quagmire.’” *Id.* at 433 (Stewart, J., dissenting) (citation omitted). Justice Stewart's comments foreshadowed an important later result in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which rejected the “traditional government function” test because it is “unworkable” and inconsistent with federalism. *Id.* at 531. It also drew upon *National League of Cities v. Usery*, 426 U.S. 833 (1976), in which the Court demonstrated solicitude for the states' right to “structure delivery of those governmental services which their citizens require.” *Lafayette*, 435 U.S. at 439 (quoting *National League of Cities*, 426 U.S. at 847). We strongly concur in the wisdom of Stewart's insight. The traditional versus proprietary distinction can be drawn only after a full balancing of the production and transaction costs of using governments or markets. See Inman, *supra* note 68, at 753-65. There is no obvious “mapping,” as Chief Justice Burger's test requires, from the technological attributes of a commodity to the use of governments (politics) or markets (exchange) for its provision. That steel is produced efficiently by private firms in the United States and by the government in Korea illustrates the point.

152. 445 U.S. 97 (1980).

question of whether the involvement of a state agency in a per se violation of the antitrust laws—supporting a resale price maintenance scheme for wine distributors—would render the scheme immune from the federal antitrust laws. The state legislature had clearly authorized price setting and provided an enforcement mechanism, but the state did not establish prices, review the reasonableness of price schedules, regulate the terms of fair trade contracts, monitor market conditions, or engage in any “pointed reexamination” of the program.<sup>153</sup>

After reviewing the facts, the Court put forth a two-part participation test to determine whether a state regulatory system should be immune from antitrust liability: (1) “the challenged restraint must be ‘one clearly articulated and affirmatively expressed as state policy’”; and (2) “the policy must be ‘actively supervised’ by the State itself.”<sup>154</sup> The state interests identified by the state court were “to promote temperance” and to protect “small licensees from predatory pricing policies of larger retailers.”<sup>155</sup> Although there was a clearly articulated state resale price maintenance policy approved by the state legislature, the liquor pricing program was deemed to violate the second prong of the Court’s test. The Court found there was no indication that the program was actively supervised, because there was no supervision or review of the prices set by the producers and wholesalers.<sup>156</sup>

As an approach for protecting political participation of the citizens of the state in regulatory policymaking, *Midcal*’s two-part test has proven to be an important step forward. Requiring the clear articulation of the regulatory policy by the state legislature—*Midcal*’s first prong—helps to ensure that all interested parties know of and have the opportunity to be involved in the original political agreement. Demanding that the legislature actively supervise the approved regulation—*Midcal*’s second prong—assures the original participants that their initial bargain will be enforced. The second prong gives meaning to the first, for without supervision, interested individuals cannot be assured that their initial participation in the political process will be meaningful.

Subsequent cases have reinforced the importance, and clarified the reach, of each part of *Midcal*’s two-part participation test. The “clear articulation” prong of the *Midcal* test was the focus of the Court’s decision in *Community Communications Co. v. City of Boulder*. In *Boulder*, the plaintiff, a cable television licensee, attacked the anticompetitive regulation

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153. *Id.* at 105, 105-06.

154. *Id.* at 105 (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (Brennan, J., concurring)).

155. *Id.* at 112 (quoting *Rice v. Alcoholic Beverage Control Appeals Bd.*, 579 P.2d 476, 490, 493 (Cal. 1978)).

156. *Id.* at 105.

of local cable television by the city, which had been granted “home rule” authority by the state. The Court made it clear that to satisfy the first prong of the *Midcal* test, the state must clearly articulate and affirmatively express its decision to allow the city to regulate a market.<sup>157</sup> “Home rule” authorization is not enough. In the Court’s mind, home rule is only a “neutral” mandate and does not show a clear articulation by the legislature to allow the city to set regulatory policy.<sup>158</sup>

The dissent in *Boulder* expressed concern that the application of the *Midcal* test was casting too wide a net and that the courts would be overwhelmed—that is, drawn into detailed economic analyses—if all local ordinances were to be evaluated on the basis of a cost-benefit analysis.<sup>159</sup>

Subsequent cases reaffirmed a commitment to *Midcal* but clarified its reach. Although clear articulation of a regulatory policy will be required, a substantive evaluation of the final consequences of the regulation will not. In *Town of Hallie v. City of Eau Claire*,<sup>160</sup> a number of small towns near and around the City of Eau Claire charged that the city was seeking to acquire a monopoly in sewage treatment services, in part by tying treatment facility access to the purchase of collection and transportation services. The city responded that as a city and not a state, it was immune from Sherman Act prosecution under the state-action doctrine of *Parker*. In ruling in favor of Eau Claire, thereby granting it antitrust immunity, the Court held that a state statute need not explicitly spell out legislative intent to regulate competitive activity, stating, “It is not necessary . . . for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects.”<sup>161</sup> Furthermore, the argument that a state must expressly anticipate a locally anticompetitive effect in its authorizing statute was labeled by the Court as “an unrealistic view of how legislatures work and of how statutes are written. No legislature can be expected to catalog all of the anticipated effects of a statute of this kind.”<sup>162</sup> In *Hallie*, the Court also retreated from the

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157. *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 52 (1982).

158. “[P]lainly the requirement of ‘clear articulation and affirmative expression’ is not satisfied when the State’s position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have ‘contemplated’ the specific anticompetitive actions for which municipal liability is sought.” *Id.* at 55 (emphasis in original).

159. The dissent in *Boulder* expressed fear that a “[local] ordinance could not be defended on the basis that its benefits to the community, in terms of traditional health, safety, and public welfare concerns, outweigh its anticompetitive effects.” *Id.* at 66 (Rehnquist, J., dissenting). The result, the dissent predicted, would be antitrust liability for “enacting restrictive zoning ordinances, by requiring business and occupational licenses, and by granting exclusive franchises to utility services.” *Id.* (Rehnquist, J., dissenting).

160. 471 U.S. 34 (1985).

161. *Id.* at 42.

162. *Id.* at 43.

pursuit of legislative intent, viewing such an exercise as burdensome for the courts and tending to undermine the principle of political participation that state immunity was supposed to serve.<sup>163</sup>

In *Southern Motor Carriers Rate Conference, Inc. v. United States*,<sup>164</sup> the Court again gave a relaxed interpretation of its clear articulation test, at least with respect to a need to fully detail all—or even any—anticompetitive effects of local regulations. In *Southern Motor Carriers*, the federal government had challenged as price fixing the joint rate proposals submitted to the Public Service Commissions in four southern states. The Court accepted the Commissions' claim that "without collective ratemaking they would be unable to function effectively as rate-setting bodies."<sup>165</sup> The Court further held that there need not be a "specific, detailed legislative authorization" for the conduct.<sup>166</sup> If the state clearly intends to create a regulatory program, its failure to spell out unforeseen details of how the program should operate will not cause the program to fail the *Midcal* test as long as there was a clear intent by the legislature to delegate the determination of the details to the agency.

Although immunity is not always granted to local governments, recent case law has suggested that fears that courts would be overwhelmed by dealing with local ordinances under a "Rule of Reason"<sup>167</sup> standard have been greatly exaggerated. For example, in *City of Columbia v. Omni Outdoor Advertising, Inc.*,<sup>168</sup> the state granted a municipality zoning authority over billboards. The Court held that the state grant of power was sufficient to give the city immunity from antitrust liability.<sup>169</sup> In clarifying its view about the ability of a state to extend its immunity to local governments, the Court stated that, if the city's "restriction of competition [is] . . . an authorized implementation of state policy," antitrust immunity should apply to the city's actions as well.<sup>170</sup>

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163. *Id.* at 44 n.7.

164. 471 U.S. 48 (1985).

165. *Id.* at 51.

166. *Id.* at 64 (citing *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978)).

167. The Rule of Reason, a common-law doctrine, has been applied to limit the Sherman Act by requiring that the Sherman Act focus directly on the challenged restraint's impact on competitive conditions. The Rule of Reason forecloses inquiry into the reasonableness of the prices set by private agreement. *See National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 691 (1978) ("[T]he inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition.").

168. 449 U.S. 365 (1991).

169. *Id.* at 379.

170. *Id.* at 370. In dissent, Justice Stevens, joined by Justices White and Marshall, stressed that federalism requires municipal immunity only to the extent that the municipality is acting for the state. *Id.* at 389-90 (Stevens, J., dissenting). The dissenters argued further that the decision whether to replace competition with regulation must be that of the state. In this case, however, they found that

Although *Boulder* required explicit state authorization for municipal government regulations, *Hallie*, *Southern Motor Carriers*, and *Omni* made clear that such authorization need not be intrusive. Municipal governments cannot do all that they please; under *Boulder* the state legislature must sanction municipal regulations through an enabling statute. But under *Hallie*, *Southern Motor Carriers*, and *Omni*, the enabling statute can be quite open-ended, even to the point of allowing municipalities to pursue clearly anticompetitive policies with possibly adverse effects for residents outside the regulating community. Together, these cases promote the Court's intention to foster political participation when setting regulatory policy. The most participatory of all governments—municipalities—are allowed to regulate their own economies, but citizens outside the regulating community must have had a chance to consider, and possibly constrain, those regulations through an enabling state statute.

Similarly, the Court has encouraged political participation through the second prong of the *Midcal* test—the requirement that authorized state regulations be “actively supervised.” For municipal governments, the Court sees active supervision as less essential because the affected citizens have the direct ability to remove city officials if they abuse their role as regulators. But when private parties have been authorized to regulate, there is no such participatory check; the Court has found in these cases a strong need for active supervision by the enabling state legislature. In *Hallie*, for example, the Court effectively dropped the active supervision requirement for municipalities. The rationale for this lenient treatment was the Court's observation that local participatory politics provide the needed supervision.<sup>171</sup> At the same time, the Court has tightened the constraint

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authorization of zoning does not imply the authority to displace competition. Therefore, the city was not acting under state authority and should not be protected by the state action immunity. *Id.* at 391-94 (Stevens, J., dissenting).

171. See *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 45 n.9 (1985) (“Among other things, municipal conduct is invariably more likely to be exposed to public scrutiny than is private conduct. Municipalities in some States are subject to ‘sunshine’ laws or other mandatory disclosure regulations, and municipal officers, unlike corporate heads, are checked to some degree through the electoral process.”).

Professors Hovenkamp and Mackerron have offered an expanded, tougher version of a municipal exemption test, one which directly considers the effects of a local regulation on nonresidents:

- (1) Is the municipality an “optimal” regulator, where “optimal” is defined to mean no significant regulatory spillovers to residents outside the community? If yes, the regulation should be exempt from federal antitrust scrutiny.
- (2) If no, then the two-prong test of *Midcal* should apply. That is, did the state clearly articulate and does the state actively supervise the regulation? If yes, the regulation should be exempt from federal antitrust scrutiny.
- (3) Does the local regulation conflict with any existing federal regulatory requirement on states and their subdivisions? If yes, the inconsistent local regulation must yield to the federal regulation.

Hovenkamp & Mackerron, *supra* note 127, at 775-76. The attractiveness of the Hovenkamp-Mackerron test for political participation is that it assures nonresidents a voice—through the state

for regulations set by private parties. In *Southern Motor Carriers*, and more recently in *324 Liquor Corp. v. Duffy*,<sup>172</sup> *Patrick v. Burget*,<sup>173</sup> and *Federal Trade Commission v. Tico Title Insurance Co.*,<sup>174</sup> the Court established the need for a state's active supervision of regulations that arise from decisions made by private firms.<sup>175</sup> Active legislative supervision of regulatory decisions made by private firms ensures that all parties setting the initial regulatory framework continue to have a say in its implementation.

In *Southern Motor Carriers*, the statutes of the four states allowed privately owned common motor carriers to submit rate proposals to the legislatively appointed public service commissions. The proposed rates would become effective if the state commissions did not act within a specified time. The states' public service commissions could call hearings, and if so, formally approve or disapprove the rates within the required number of days.<sup>176</sup> After acknowledging the need to supervise private parties under the *Midcal* test, the Court found that the states' commissions did have final authority over rates, the commissions were appointed by the legislature, and that the review process was sufficient to meet the active supervision requirement.<sup>177</sup>

In *324 Liquor* and *Patrick*, however, the state regulations at issue did not meet the active supervision test. In *324 Liquor*, the Court invalidated a state resale price maintenance scheme under which prices were set by private parties in the affected markets and not directly by a state actor. Because there was no opportunity for others—that is, consumers—to participate in the decision, the Court's participation hurdle was not met.<sup>178</sup> Similarly, in *Patrick*, the Court stressed the active supervision prong of the *Midcal* test, holding "that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy."<sup>179</sup> The Court also quoted from *Hallie*:

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legislature—when their interests are affected by a municipal regulation. Political participation is thereby enhanced. By checking municipal spillovers, economic efficiency can be improved as well. Our own expanded version of the state-action doctrine to control interstate monopoly spillovers is similar in spirit to the Hovenkamp-Mackerron test to control municipal spillovers. See *infra* Part IV. Like the Hovenkamp-Mackerron test, our expanded state-action doctrine also improves participation and efficiency.

172. 479 U.S. 335 (1987).

173. 486 U.S. 94 (1988).

174. 504 U.S. 621 (1992).

175. *324 Liquor*, 479 U.S. at 345 n.7; *Patrick*, 486 U.S. at 100-01; *Tico Title*, 504 U.S. at 633-35.

176. *Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 50-51 (1985).

177. *Id.* at 57-60.

178. *324 Liquor*, 479 U.S. at 343-45.

179. *Patrick*, 486 U.S. at 101.

“[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State”<sup>180</sup> and therefore that “private party . . . may be presumed to be acting primarily on his or its own behalf.”<sup>181</sup>

The importance of legislative oversight in the second prong of the *Midcal* test was stated clearly once again in *Ticor Title*. In *Ticor Title*, the Federal Trade Commission sued six title insurance companies for unfair competition, alleging that they had fixed prices for title searches and examinations.<sup>182</sup> The insurance companies belonged to rating bureaus which were licensed—but not appointed—by the state legislature, and which submitted rates to the state that went into effect if the state did not act within thirty days.<sup>183</sup> Despite the fact that the insurers had participated in the ratemaking process, the Court denied state-action immunity, holding that the State had not actively supervised the rate making process. According to the Court, the active supervision prong of the participation test would only be satisfied when

the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of *deliberate state intervention*, not simply by agreement among private parties. Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy.<sup>184</sup>

Implicitly, the Court may have been concerned that a ratemaking policy generated by the political process without active supervision by the state could be “captured” by the industry being regulated, a result contrary to the original regulatory goals.

As in its specification of *Midcal*'s clear articulation test, the Court has defined the domain of *Midcal*'s active supervision requirement with the apparent goal of maximizing political participation. In *Hallie*, the Court exempted municipal regulations from the active supervision requirement while still requiring those regulations to meet a clear articulation test.<sup>185</sup> This makes sense if political participation is the goal. *Hallie*'s clear-articulation/no-supervision version of the *Midcal* test for municipalities allows residents living outside a municipality an initial (state) legislative say in setting local regulations when their interests are affected, but it does not allow those outsiders to intervene—that is, actively supervise—after the

180. *Id.* at 100 (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985)) (alteration in original).

181. *Id.* (quoting *Hallie*, 471 U.S. at 45).

182. *Federal Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. 621, 625 (1992).

183. *Id.* at 629.

184. *Id.* at 634-35 (emphasis added).

185. *Hallie*, 471 U.S. at 46-47.

local regulations have passed state legislative muster and are in place. Local political participation is thereby encouraged as local residents are allowed to set local regulations, subject to the limits of the enabling state statutes, and to see those regulations enforced as they wish.<sup>186</sup>

In contrast, when a *private party* has been given rights to set regulations, *Southern Motor Carriers*, *324 Liquor, Patrick*, and *Ticor Title* do require active supervision. This seems a sensible safeguard if political participation is the goal. When private parties rather than municipalities are involved, active supervision ensures that all parties to the original regulatory agreement will continue to have oversight of each chosen regulation, even though that regulation itself has been proposed by only one of the interested parties to the original legislative agreement. By requiring active supervision, the Court ensures all affected parties still have their say.

The current state-action doctrine's two-pronged clear articulation and active supervision test provides important safeguards for federalism's valued goal of political participation. The most participatory of all political bodies—state and local government legislatures—are assigned a central responsibility for the design and enforcement of business regulations. Only when those branches of government have been pushed aside or ignored may federal antitrust law come to bear.<sup>187</sup> By showing a clear but moderated deference to state and local legislatures—arguably the branches of government “closest to the people”—the Court significantly advances the goal of political participation in regulatory policymaking.

### B. *Evaluating the Critics*

Not all legal scholars of federalism and business regulation agree, however, that the Court's current doctrine draws a valid, or a sufficiently bright, line between federal and state regulatory responsibilities. Critics of the Court's current state-action doctrine have rejected the doctrine for three reasons. First, the doctrine does not succeed in its objective of enhancing political participation in the formulation of regulatory policies. Second, even if participation is encouraged, the doctrine has significant, and more than offsetting, negative consequences for federalism's other valued goal of economic efficiency. Third, even if the participation is

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186. For a stronger “active supervision” test for municipalities, one which is likely to enhance both goals of participation and efficiency, see *supra* note 171.

187. There is one exception. The Eleventh Amendment protects the state and its officers from suits for damages associated with antitrust liability. See, for example, *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996), in which the Court held that the Eleventh Amendment precludes Congress from authorizing suits against states pursuant to federal statutes enacted under the commerce power. *Id.* at 1131-32. However, suits against individuals acting under the authorization of the state are not affected by the Eleventh Amendment. As a result, *Seminole* is likely to have at best a minor, indirect effect on both current state-action jurisprudence and our expanded state-action test.

encouraged and efficiency not adversely affected, the Court is ill-equipped to do the review it has set for itself in the two-pronged *Midcal* test. Although the critics do raise a number of valid issues, we remain generally sympathetic with the direction taken by current doctrine.

1. *The Current State-Action Doctrine Will Enhance Participation.*—Of the recent commentators, Einer Elhauge and William Page are perhaps the most skeptical that present doctrine can deliver on its promised goal of enhanced political participation.<sup>188</sup> Elhauge doubts that greater political participation will follow from *Midcal*'s two-pronged test. Page argues that the clear articulation test is conducive to citizen control of regulatory policy, but that the active supervision test undermines those gains. Neither critique strikes us as decisive.

Professor Elhauge, as part of a larger effort to rationalize current antitrust law, sees the present state-action doctrine not as a concern for valued *outcomes*—for example, political participation or economic efficiency—but as part of a larger doctrine that seeks to subject both private and public restraints on competition to antitrust review whenever the process setting those restraints allows those controlling the restraints to profit financially from the restraints they impose.<sup>189</sup> Elhauge sees current political institutions as poorly designed to ensure citizen participation in policymaking. Further, he doubts that citizens pay much attention to policy decisions. Thus, only minimal citizen participation is likely to result under *Midcal*.<sup>190</sup> Elhauge is certainly correct in his prediction: *Midcal* has not stimulated a groundswell of popular participation in regulatory policy. But that is not the important point. What *Midcal*'s two-pronged test does is protect the most open channels for political activity now available—legislatures at the state and local levels—for those moments when citizens do decide to participate. By protecting a central role for state legislatures and municipalities in regulatory policymaking, *Midcal* keeps the costs of participation as low as possible. This is an important contribution towards enhancing federalism's goal of political participation. We believe this Article's focus on political participation to be at least as compelling an explanation for the current case law as Elhauge's process approach. Our political-participation approach also provides a stronger

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188. See Elhauge, *supra* note 7, at 672-82; Page, *supra* note 7, at 768-69. Two other commentators who have argued that the current state-action doctrine will enhance the objective of political participation are Jorde, *supra* note 125, at 249-50, and Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L.J. 486, 507, 499-508 (1987) (explaining that state and municipal action decisions result from the Court's attempt to reconcile state and federal interests while respecting "the results of the political process at both levels").

189. See Elhauge, *supra* note 7, at 671.

190. See *id.* at 678-79.

foundation upon which to build a sharpened, and perhaps expanded, state-action doctrine. Professor Elhauge's own theory requires the Court to distinguish between financially disinterested and financially interested parties setting a state regulatory restraint of trade.<sup>191</sup> Although this distinction might be possible in the private sector, where individuals can reasonably be assigned a "profit motive," how will this distinction be made in the public sector, where citizens and public officials operate from a variety of motives and regulatory policies follow from group actions? Assigning a "financially disinterested" or "financially interested" motive for public policies will take the courts into some of the darkest and least understood territories of contemporary political analysis.<sup>192</sup>

Professor Page reads the intention of the current state-action doctrine much as we do: to promote the valued goal of political participation in the formulation and execution of regulatory policies.<sup>193</sup> He finds that the current doctrine's clear articulation test puts matters squarely in the hands of the state legislature, where it belongs for citizen participation.<sup>194</sup> However, Page would abandon the active supervision test.<sup>195</sup> First, active supervision, Page argues, adds nothing to what clear articulation has already contributed toward the goal of ensuring legislative involvement in regulatory policy.<sup>196</sup> This argument misses an obvious point: passing a law does not mean the law will be implemented. Effective implementation requires supervision. Without implementation, there is no incentive to pass legislation. Active supervision serves, therefore, as an essential incentive to engage in clear articulation, particularly when there is a risk that the initial intentions of the law might be subverted by private parties as the law is implemented. Second, Page worries that the Court may focus its attention on the active supervision test, ignoring the more important (to Page) clear articulation standard.<sup>197</sup> This has not happened. As implemented, the *Midcal* doctrine clearly requires both clear articulation and active supervision to be satisfied. Clear articulation has remained a significant hurdle to be cleared by any state regulation.

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191. See *id.* at 685.

192. Cf. Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279, 281-85 (1984) (arguing that the "economic theory" of legislator voting patterns has been adopted too quickly, and examining "publicly-interested" voting objectives as an alternative); Steven D. Levitt, *How Do Senators Vote? Disentangling the Role of Voter Preferences, Party Affiliation, and Senator Ideology*, 86 AM. ECON. REV. 425, 427 (1996) (finding personal ideology and core "support" constituency more determinative of voting habits than party or general constituency preferences); Sam Peltzman, *Constituent Interest and Congressional Voting*, 27 J.L. & ECON. 181, 206-10 (1984) (considering the impact of party ideology on legislators' votes and finding it generally less determinative than constituency and political contributions).

193. See Page, *supra* note 7, at 747.

194. See *id.* at 749.

195. See *id.* at 754-59.

196. See *id.* at 748-49.

197. See *id.* at 754.

More compelling is the concern for political participation expressed by Justice Rehnquist in his dissenting opinion in *Boulder*. Justice Rehnquist worried that requiring *municipal* regulations to meet a clear *state* articulation requirement would chill local government action and thus local citizen participation in regulatory policymaking.<sup>198</sup> Justice Rehnquist's solution was to use a state approved "home rule" charter as a compromise standard between no state supervision and the more intrusive clear articulation standard of *Midcal*.<sup>199</sup> This approach has appeal, subject to one important extension. If there are significant monopoly spillovers from the municipal regulation, then nonresidents must be protected. Professors Hovenkamp and Mackerron suggest joining Justice Rehnquist's "home rule" standard with a state-level spillover test as the preferred approach—that is, municipal regulations would be allowed if there is a home rule charter and no intercommunity monopoly spillovers.<sup>200</sup> Absent a home rule charter or finding significant intercommunity spillovers, however, *Midcal*'s clear articulation standard would apply. This home-rule/no-spillover standard for municipal regulations should be preferred to the strict application of *Midcal*'s clear articulation test if enhancing political participation is the goal. Local regulations that affect only local residents need only be approved locally, without having to use the less participatory political process of state government as is now true under *Midcal*. The likely outcome would be an increase in overall participation in regulatory policy.

2. *The Current State-Action Doctrine Increases Economic Efficiency.*—Whatever the *Midcal* doctrine might mean for political participation, Judge Easterbrook and Professors Wiley and Page each criticize the current doctrine for its potential adverse effects on economic efficiency, in particular, administrative efficiency. First, writing in 1983, Judge Easterbrook was particularly concerned that the application of the clear articulation prong of the *Midcal* test as applied in the (then recent) *Boulder* decision would become overly intrusive and as a consequence stifle potentially efficient municipal regulations.<sup>201</sup> Judge Easterbrook essentially advocates a "hands-off" approach to state regulations, relying upon Tiebout "exit" competition to ensure that states adopt *intra*jurisdictionally efficient regulatory policies.<sup>202</sup> We reject this approach because we doubt that

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198. *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 66-67, 70-71 (1982) (Rehnquist, J., dissenting).

199. *Id.* at 71 (Rehnquist, J., dissenting).

200. *See supra* note 171. For one concrete standard for implementing the Hovenkamp-Mackerron spillover test, see *infra* subpart IV(B).

201. *See Easterbrook, supra* note 7, at 37-38.

202. *See id.* at 34, 45.

Tiebout competition will be sufficient to discipline state governments.<sup>203</sup> We favor political competition instead and have argued that, rather than inefficiently intervening when no intervention is required (Easterbrook's critique), the current state-action doctrine may actually help *intra*jurisdictional regulatory efficiency.<sup>204</sup> Decisions subsequent to *Boulder*, that is, *Hallie* (1985), *Southern Motor Carriers* (1985), and *Omni* (1991) may ease his concerns on this point.<sup>205</sup> Judge Easterbrook's one exception to his "hands-off" approach is when a state regulation generates significant *inter*jurisdictional inefficiencies through monopoly spillovers. He suggests imposing antitrust review in these cases.<sup>206</sup> We agree; in Part IV of this Article, we propose how one might implement Judge Easterbrook's recommendation.

Easterbrook, Wiley, and Page also object to the active supervision prong of *Midcal* on the related ground that it limits the state's ability to delegate regulatory authority and thus hampers administrative efficiency.<sup>207</sup> But again, subsequent decisions have significantly loosened this requirement, dropping active supervision for municipal<sup>208</sup> and agency-promulgated regulations,<sup>209</sup> but keeping it for regulations suggested by private parties.<sup>210</sup> Even in the case of private-party regulations, the state legislature can be an "active" supervisor dictating the economic behavior of the private parties or a "re-active" supervisor approving proposed private party actions.<sup>211</sup> Both modes of regulation

203. See *supra* notes 96-111.

204. See *supra* notes 112-19.

205. Judge Easterbrook wishes the Court had followed the Rehnquist reasoning in *Boulder* effectively favoring "home rule" for business regulations. See Easterbrook, *supra* note 7, at 37-38. Wiley, writing in 1986, also expressed concern for a loss of local autonomy. See Wiley, *supra* note 7, at 735. He is pleased with the reasoning in the *Hallie-Southern Motor Carrier-Omni* case law but, like Easterbrook, favors dropping the clear articulation test in favor of home rule. See *id.* at 737-39.

206. See Easterbrook, *supra* note 7, at 49-50.

207. See *id.* at 38 (criticizing *Midcal* and other decisions for eliminating delegation as a regulatory option that states may choose); Page, *supra* note 7, at 758, 755-58 (criticizing the current definition of active supervision in part because it prohibited New York from using "market-based, permissive regulation" instead of "a cumbersome system of command-and-control regulation"); Wiley, *supra* note 7, at 733, 733-34 (criticizing *Midcal*'s clear-statement requirement for making "the process of state and local government less efficient by discouraging delegation"). Elhauge is less critical of an active supervision test in principle, see Elhauge, *supra* note 7, at 708 (arguing that supervision of "financially interested" parties "make[s] perfect sense"), though he finds the current implementation of the test in *Midcal* to be ambiguous, see *id.* at 674.

208. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985).

209. *Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 65 (1985).

210. See *Federal Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. 621, 640 (1992); *Patrick v. Burget*, 486 U.S. 94, 105 (1988); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 352 (1987).

211. The new theory of public administration catalogues all regulatory styles as either active monitoring—often called "command and control" or, more vividly, "police patrols"—or re-active monitoring—called "fire alarms." These two basic approaches to regulatory supervision are discussed in Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984).

will meet the *Midcal* test.<sup>212</sup> Rather than constraining the administrative structure for regulatory policy, current Court doctrine allows the state to adopt either of these two common forms of regulatory supervision; we doubt there will be any significant efficiency losses here.

Finally, Professor Wiley expresses concern that the *Midcal* test pushes regulatory policymaking and supervision onto state and local legislatures, institutions which he sees as open to regulatory "capture."<sup>213</sup> Starkly put, with the *Midcal* doctrine the Court is assigning regulatory responsibility to what may be an inherently inefficient branch of government.<sup>214</sup> But such a criticism misses the point: what is relevant is the relative performance of regulatory alternatives.<sup>215</sup> Although elected state and local legislatures may choose economically inefficient regulations, will non-legislative institutions do a better job? Recent theoretical argument and empirical evidence on state government economic performance strongly suggest that periodic election review can be an important stimulus for *intra*jurisdictional economic efficiency. In particular, while elected legislatures will surely generate some inefficient regulations, there are important institutional features (political parties and strong governors, for example) that can constrain this inefficiency.<sup>216</sup> Furthermore, there are strong electoral incentives that encourage the adoption of efficient policies.<sup>217</sup> The efficiency-enhancing benefits of political competition

212. In *Southern Motor Carriers*, the rating bureaus made joint rate proposals to the Public Service Commission, which had the authority to accept or reject them. *Southern Motor Carriers*, 471 U.S. at 50. The Public Service Commission clearly operates as a "re-active" supervisor, and such an administrative structure was sufficient to meet the *Midcal* active supervision test. *Id.* at 62.

213. Wiley, *supra* note 7, at 731-33.

214. Professor Wiley proposed replacing the current doctrine with his own four-step test: Does the state regulation (1) restrain competition, (2) have no current exemption from antitrust laws, (3) have no plausible efficiency rationale, and (4) result from the direct political action of producers? If the answer to all four questions is *yes*, then immunity should be denied. *See id.* at 743. Regulations that emerge from such "producer capture" will typically be inefficient. *See, e.g., supra* notes 86-92 and accompanying text. For Wiley, such direct state challenges to the goal of economic efficiency should be met directly by federal antitrust review. *See Wiley, supra* note 7, at 788-89. Wiley's test has been criticized in detail by Professor Jorde as a serious misreading of the current state-action doctrine, *see Jorde, supra* note 125, at 239; by Professor Spitzer as analytically incomplete, *see Spitzer, supra* note 7, at 1302-03; and by Professor Elhauge as intrusive and leading to the risk of "substantial judicial decisionmaking," *see Elhauge, supra* note 7, at 725, 717-29. We share these concerns. *See infra* notes 215-18.

215. In fairness to Professor Wiley, he does not miss this point, and indeed makes his arguments about legislative inefficiencies to balance those of other commentators who see bureaucratic regulatory agencies as the sole source of regulatory inefficiencies. Compare Wiley, *supra* note 7, at 732-33, with 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, 1118 (1981). Professor Wiley is rightly concerned about regulatory inefficiencies from all sources within government. He offers his efficiency arguments against *Midcal* as a starting point for his own decision rule of how to draw the line between federal and state regulatory responsibilities. *See Wiley, supra* note 7, at 733. For detailed comments on Wiley's decision rule, *see Spitzer, supra* note 7, and Elhauge, *supra* note 7, at 717-29.

216. *See supra* notes 118-19.

217. For theoretical arguments that political competition through elections pushes political

may not apply, or at least not with equal force, to bureaucratic and agency regulatory policymaking, however.<sup>218</sup> We conclude that moving regulatory policies from politically isolated commissions and agencies to an electorally responsible legislature is likely to contribute to, or at least not discourage, *intra*jurisdictionally efficient regulatory performance.

3. *The Current State-Action Doctrine Has Begun to Clarify the Line Between Valid and Invalid State Regulation.*—Professor Elhauge raises concerns that the current state-action doctrine pushes courts into making difficult, complicated substantive determinations in an unstructured way: to establish the source of regulation, courts must determine what constitutes state action; to establish clear articulation, courts must determine what constitutes state intent; and to guarantee active supervision, courts must determine what constitutes state supervision. Because courts have had difficulty making these determinations, a confused and uncertain doctrine has emerged that fails to provide a bright line between those state and local regulations that are, and those that are not, exempt from federal antitrust oversight.<sup>219</sup>

The Supreme Court has been sensitive to these worries and, we feel, has been responsive. The Court has consistently defined a state regulatory action as a rule promulgated by an elected public body, whether that body is the state legislature (*Parker* and *Goldfarb*), the elected state supreme court (*Hoover*), or, presumably, the state's elected governor.<sup>220</sup> Likewise, the Court has consistently sought to remove substantive analyses of

decisionmaking toward efficient economic policies, see Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 396 (1983), and Wittman, *supra* note 117, at 1416-18. For empirical evidence that such competition moves state governments towards more efficient policies, see the recent studies by Timothy Besley & Anne Case, *Does Electoral Accountability Affect Economic Policy Choices? Evidence from Gubernatorial Term Limits*, 110 Q.J. ECON. 769, 775-93 (1995) (finding that gubernatorial term limits have positive efficiency effects on policy), and Peltzman, *supra* note 46, at 329 (asserting that "the voting market punishes growth" in government spending through votes against politicians who support or allow it).

218. If legislatures can exercise full control over agencies—*i.e.*, agencies are simply extensions of legislatures—then our distinction here between elected policymakers and appointed policymakers is moot. Voters will have full control over politicians or their appointed servants either way, and the efficiency performance of an elected or an appointed system will be identical. If agencies have discretion, however, then elected legislatures or appointed agencies can have different efficiency performance. There remains some controversy in the political science literature as to the degree of control legislative bodies can exercise over regulatory agencies. Compare Weingast & Moran, *supra* note 82 (demonstrating that legislatures can influence agency policies), with Terry M. Moe, *The Politics of Bureaucratic Structure*, in *CAN THE GOVERNMENT GOVERN?* 267 (John E. Chubb & Paul E. Peterson eds., 1989) (arguing that legislative control over agency policies is not extensive). But no one disputes that legislative control will tend to be imperfect and agencies will retain at least some discretion. For one theory that this discretion is used inefficiently, see WILLIAM A. NISKANEN JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 38-42 (1971).

219. Elhauge, *supra* note 7, at 674.

220. As noted above, the logic of *Hoover* would appear to extend to a state governor. See *supra* note 126.

legislative motives and to clarify its requirements under its clear articulation test: Regulations (*Cantor*) or a clear responsibility for regulatory policies (*Hallie*, *Southern Motor Carriers*, and *Omni*) must be explicitly (*Boulder*) allowed by the state legislature (*Parker*) or other elected agents (*Hoover*). Further, intent has no bearing on the legality of the regulation; legislatively allowed regulation or legislatively assigned regulatory responsibility can be approved for anticompetitive reasons or have anticompetitive consequences (*Hallie* and *Omni*) and still satisfy the clear articulation test.<sup>221</sup> The Court has sought to be equally precise in the specification of its active supervision test: Supervision must be by an elected legislative body (*Hallie*, *Patrick*, and *Ticor Title*) or an agency appointed by the legislature (*Southern Motor Carriers*). Acceptable legislative supervision can involve either direct legislative management of the policies (*Ticor Title*) or explicit approval of regulations suggested to it and enforced by private parties (*Southern Motor Carriers*).

While some confusion and uncertainty remains, the present state-action doctrine seems to have begun to clarify the line between allowable state regulations and those regulations that must be reviewed further for federal antitrust liability. Simply put, business regulations that are explicitly approved by an elected state body and then supervised by that body, or its appointed agent, are likely to be acceptable state regulations under current state-action doctrine; they are immune to review under federal antitrust laws. Not only is the line becoming brighter, it also has some bite, as the Court's most recent ruling in *Ticor Title* shows. To the extent that doctrinal uncertainty remains, the Court appears committed to using its state-action doctrine to enhance federalism's valued goal of political participation in setting regulatory policies. Our review of participation theory may provide the Court with the guidance it needs to address any unsettled questions.<sup>222</sup>

### C. Summary

Current state-action doctrine seeks to resolve the fundamental tension between the national interest in economic competition now embodied in our

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221. *Omni* is quite explicit in stating the Court's desire to avoid a deep substantive review of legislative intent and stands as the Court's response to the difficulties faced in *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005, 1008-10, 1013 (8th Cir. 1983), and *Affiliated Capital Corp. v. City of Houston*, 700 F.2d 226, 227-30 (5th Cir. 1983), *rev'd en banc*, 735 F.2d 1555 (5th Cir. 1984). See Hovenkamp & Mackerron, *supra* note 127, at 762-64, 767. In *Omni*, the briefs for the plaintiffs and their amicus curiae suggested that the Court craft a rule that would deny antitrust immunity when the regulation came from "corrupt or bad faith decisions" or was "not in the public interest." *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 376 (1991) (quoting Brief for Respondent at 44 and Brief for Associated Builders and Contractors, Inc., as amicus curiae at 5, respectively). The Court rejected this suggestion for substantive review as an approach "we have consistently sought to avoid." *Id.* at 377.

222. See *supra* sections II(A)(1), II(B)(1), & subpart III(B).

antitrust laws and the interests of the states in regulating business activities within their borders. Travelling down the path first chosen by the Court in *Parker v. Brown*, present doctrine shows strong deference to the regulatory decisions of the states and their agencies. But two hurdles must be cleared for antitrust immunity: A state's business regulation must have been *clearly articulated* by a politically elected body within the state government (legislature, supreme court, governor) and the regulation must be *actively monitored* by that elected body or its directly appointed agent. Having met these tests, the state regulation is protected from review under federal antitrust laws. As currently articulated, the state-action doctrine serves well federalism's twin goals of political participation and economic efficiency and does so in a principled and reasoned way. First, requiring state regulations to clear the twin hurdles of clear articulation and active supervision from an elected legislature channels regulatory policymaking into the arena most conducive to citizen participation. Second, once within the legislative arena, re-election pressures for *intra*jurisdictional economic efficiency come to bear on those setting regulatory policy. Although current state-action doctrine does not guarantee more participation and improved efficiency, it confines regulatory policy to an institutional setting where those valued outcomes are most likely to occur. This is an important step forward.

Yet more can be done. As Judge Easterbrook has stressed in his own commentary on the current doctrine, what is not now well handled is states regulation of business that creates inefficient "monopoly spillovers" on residents of neighboring states. Part IV argues for an extended state-action doctrine to promote *inter*jurisdictional economic efficiency.

#### IV. Beyond *Midcal*: Increasing Economic Efficiency

Although the state-action doctrine under *Midcal* offers citizens a clear political voice in determining regulatory policies within their state, the present doctrine offers no such protection for regulatory policies decided in neighboring states. Such protections are neither needed nor desired when state policies have no cross-border economic effects. But if one state's economic regulations create significant interjurisdictional economic spillovers, then affected residents in neighboring states may be harmed.<sup>223</sup> The resulting economic inefficiencies go unameliorated under *Midcal* and its progeny. This gap in the *Midcal* doctrine is viewed by Judge Easterbrook and Professors Hovenkamp and Mackerron, Jorde, and Spitzer as its major weakness.<sup>224</sup> We agree. Subpart IV(A) argues that there is substantial recognition of the problems created by interjurisdictional spillovers in the current antitrust exemptions cases although to

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223. See *supra* Figure 4b and accompanying text.

224. See Easterbrook, *supra* note 7, at 45-50; Hovenkamp & Mackerron, *supra* note 127, at 768-71, 775; Jorde, *supra* note 125, at 253-56; Spitzer, *supra* note 7, at 1319-21.

date the Court has not yet embraced a test to correct the problem. Subpart IV(B) specifies a two-step "spillover test" that courts can use to identify those instances in which interjurisdictional economic harm may have been imposed on out-of-state residents without their prior political approval. If a state regulation fails the two-step test, then it should be subject to Sherman Act review. The proposed spillover test enhances overall economic efficiency in the regulatory economy and contributes to the goal of political participation as well.

### A. *The Legal Underpinnings*

In its state-action antitrust jurisprudence, the Court has regularly confronted the nexus between state regulatory action and interstate commerce. In *Parker v. Brown*, for example, the Court was clearly aware of the presence of significant monopoly spillovers associated with the raisin cartel. In *Parker*, state law created a Prorate Advisory Commission to control the production of raisins, subject to the approval of sixty-five percent of the raisin growers. The effect of the state law was to facilitate a California cartel for the sale of raisins. At the time, however, more than ninety percent of raisin consumption occurred outside the state of California.<sup>225</sup> Monopoly prices would be paid by consumers, most of whom lived outside of California, and monopoly profits would be earned by producers, most of whom lived inside California. Ruling in favor of the state law and the Prorate Advisory Commission, the Court focused solely on the regulatory benefits to the California raisin industry and on the political process that created and maintained the cartel. It recognized, but failed to weigh in the balance, the monopoly spillovers created by the state's regulatory policy.<sup>226</sup>

Taken to its extreme, the approach to monopoly spillovers seen in *Parker* would allow states to actively pursue self-aggrandizing policies that impose substantial costs on other states. The obvious limits to such policies would be the unfettered threats of regulatory reprisals by other states, running the risk of a regulatory race to the bottom, or alternatively, the constraint of federal law.<sup>227</sup> The latter approach seems clearly

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225. *Parker v. Brown*, 317 U.S. 341, 345 (1943).

226. See *supra* text accompanying notes 128-33.

227. In principle, the Commerce Clause of the U.S. Constitution could be used affirmatively as a source of regulatory jurisprudence because it authorizes congressional regulation of commerce, subject to the Tenth Amendment's reservation of certain rights to the states. See U.S. CONST. art. I, § 8, cl. 3; *id.* amend. X. In fact, the line of Commerce Clause cases beginning with *National League of Cities v. Usery*, 426 U.S. 833 (1976), and ending with *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), back away from defining standards whereby a public regulatory activity could be classified as federal, state, or local. The cases simply suggest that the Tenth Amendment imposes an external check on Commerce Clause regulation. See *infra* notes 268-78 and accompanying text.

preferable, in which case two legal alternatives are available: application of the current negative Commerce Clause doctrine or developing an expanded state-action doctrine.<sup>228</sup>

Consideration of interstate monopoly spillovers from state regulations will not be a new worry for the Court in state-action doctrine cases. In *Goldfarb v. Virginia State Bar*, for example, the Court explicitly dealt with the link between state action and interstate commerce. In *Goldfarb*, the Court stated that “there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states.”<sup>229</sup> This language tracks closely the constitutional language in the negative Commerce Clause cases and could have led the Court to conclude that an activity must not substantially affect interstate commerce if an exemption is to be granted.

To the extent that any check could be inferred from the Tenth Amendment, it would seem to involve notions of sovereignty, *see* Rapaczynski, *supra* note 3, at 345, rather than the efficient provision of regulatory activities or political participation, which are our concerns here. Susan Rose-Ackerman’s recent commentary on the links among the Commerce Clause, the Tenth Amendment, and regulatory federalism in the area of environmental regulation provides a useful perspective. *See* Susan Rose-Ackerman, *Environmental Policy and Federal Structure: A Comparison of the United States and Germany*, 47 VAND. L. REV. 1587 (1994). According to Rose-Ackerman, the Commerce Clause has not provided the basis for a normative evaluation of the level of government to which regulatory assignments should be made. *Id.*

228. In the negative Commerce Clause framework, a court starts by asking whether a state regulation discriminates against interstate commerce (that is, its effects are not merely incidental). If there is no discrimination, deference is given to the state. If there is discrimination, the state must justify it. The court is then required to balance the federal interest in free interstate commerce against the competing state regulatory interest. A state regulation that places too much of a burden on interstate commerce without good reason is disallowed under the negative Commerce Clause doctrine. For a useful summary of current negative Commerce Clause doctrine, *see* generally Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982).

The application of the negative Commerce Clause’s balancing approach has proven problematic in practice. After more than 100 years of application, no clear standard has yet emerged to guide the courts as they seek to balance the burdens on interstate commerce of a state regulation against the benefits to state residents of the regulation. According to Justice Rehnquist:

The true problem with today’s decision is that it gives no guidance whatsoever to [the] states as to whether their laws are valid or how to defend them. . . . We know only that Iowa’s law is invalid and that the jurisprudence of the “negative side” of the Commerce Clause remains hopelessly confused.

*Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 706 (1981) (Rehnquist, J., dissenting). Further, the balancing approach raises questions not only about the competency of the judiciary to make the needed value-based calculations but, more fundamentally, about whether this is an appropriate task for an unelected branch of government. *See, e.g.*, Eule, *supra*, at 441-42 (examining objections to a “super-legislature” approach, which is implicit in the negative Commerce Clause balancing test). Far simpler in application, and with a stronger doctrinal foundation, would be an extension of current state-action doctrine to the case of monopoly spillovers, the approach we take here. *See* Easterbrook, *supra* note 7, at 46 (discussing the uncertainties inherent in negative Commerce Clause adjudication and asserting that an antitrust state-action doctrine focusing on monopoly spillovers avoids these problems).

229. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 784 (1975) (quoting *United States v. Frankfort Distilleries*, 342 U.S. 293, 297 (1945)).

Instead, however, the Court declined to take the balancing approach of the negative Commerce Clause, stating that "once an effect is shown, no specific magnitude need be proved."<sup>230</sup>

The Court also raised a spillover concern in *City of Lafayette v. Louisiana Power & Light Co.* In *Lafayette*, the Court noted that a municipal utility's predatory practices outside its city boundaries were not subject to the same political checks as were a state's regulatory activities.<sup>231</sup> In fact, the *Lafayette* Court discusses spillovers at a number of points in its analysis, stating, for example:

[T]he economic choices made by public corporations in the conduct of their business affairs, designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders.<sup>232</sup>

Further, the Court stated that "those consumers living outside the municipality who are forced to take municipal service have no political recourse at the municipal level . . . ."<sup>233</sup> Had the Court wished, the participation approach used in state-action cases could have been amended to include a substantive spillover test.<sup>234</sup>

The Court dabbled with and eventually dismissed a spillover test in *Community Communications Co. v. City of Boulder* as well. In the district court's opinion, as described by the Supreme Court, home-rule "status gave autonomy to the city only in matters of local concern, and . . . the operations of cable television embrace 'wider concerns, including interstate commerce . . . [and] the First Amendment rights of communicators.'"<sup>235</sup> This language suggests that the Court might be open to a test that took spillovers into account. The city claimed that "the regulation of cable television is a local matter."<sup>236</sup> Ultimately the Court, by failing to find adequate state authorization for the regulation's enactment, reached the same result as the district court but did not adopt a spillover test.

230. *Id.* at 785.

231. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 406 (1978).

232. *Id.* at 403.

233. *Id.* at 406.

234. The inclusion of a spillover test would not have altered our view as to the correct outcome in *Lafayette*. Our full theory will suggest that *intrastate* spillovers need not invalidate an exemption if a statewide political participation test is satisfied. The record in *Lafayette* suggests that there were substantial spillovers from the city to the suburbs. However, it also provides no evidence that such spillovers extended beyond the boundaries of the state. The regulation fails because a political participation goal was not met, not because of the presence of city-suburb spillovers. See *infra* Part V.

235. *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 47 (1982) (quoting *Community Communications Co. v. City of Boulder*, 485 F. Supp. 1035, 1038-39 (D. Colo. 1980)).

236. *Id.* at 53 n.16.

The Court again confronted the spillover question in *Town of Hallie v. City of Eau Claire*. Recall that in *Hallie* a number of small towns near and around the City of Eau Claire filed suit against the city, charging it with seeking to acquire a monopoly in sewage treatment services, in part by tying access to sewage treatment services to the purchase of collection and transportation services.<sup>237</sup> The Court avoided a complete substantive analysis of the regulation. It did, however, make clear that if the state authorizes a regulatory activity by a local government, that regulation is immune from the antitrust laws even if it generates substantial spillovers across the jurisdiction's boundaries.<sup>238</sup> The only requirements are that the authority from the state must be somewhat specific as to the area in which the city is operating, and that the state must contemplate the city's acts.<sup>239</sup>

The decision in *Hallie* to ignore interjurisdictional spillovers is consistent with the current state-action doctrine's singular focus on political participation. If the tying arrangement between sewage treatment and transportation were known to generate substantial spillovers outside the jurisdiction, but the connection had been accounted for in the state's authorization of the program, an antitrust exemption would be appropriate under a participation test. According to the Court in *Hallie*, "The only real danger is that [a city] will seek to further purely parochial public interests at the expense of more overriding state goals. This danger is minimal, however, because of the requirement that the municipality act pursuant to a clearly articulated state policy."<sup>240</sup> To the *Hallie* Court, ensuring political participation at the state level was sufficient to protect all state residents from the adverse economic effects of monopoly spillovers from a local regulation. In the Court's mind, to subject state-monitored local regulations to federal antitrust review would sacrifice the valued goal of participation and offer little improved economic efficiency in return.<sup>241</sup>

Although there are good reasons to be confident that the current state-action doctrine promotes local political participation and encourages *intrastate* economic efficiency, those reasons do not apply when state regulations create *interstate* monopoly spillovers.<sup>242</sup> Although *Parker* does hint at a congressional check on state regulations,<sup>243</sup> the two-

237. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 36-37 (1985).

238. *Id.* at 40.

239. *Id.* at 41, 44.

240. *Id.* at 47.

241. *Id.* at 45. *But see* Hovenkamp & Mackerron, *supra* note 127, at 782-83 (characterizing the state-action exemption as economically inefficient and unjustified in light of the Sherman Act's legislative history).

242. *See supra* Figure 4b and accompanying text.

243. *See Parker v. Brown*, 317 U.S. 341, 350-51 (1943).

pronged *Midcal* participation test for clear articulation and active supervision has never been extended to Congress as a justification for allowing a state regulation. Put simply, there appears to be no protection for political participation at the national level in *Midcal*. As a consequence, nonresidents affected adversely by a state's regulation at present have no direct say in its passage and remain exposed to any resulting monopoly spillovers. Although Congress might provide protection to affected out-of-state residents without judicial prodding, current analyses of congressional policymaking suggest this is unlikely. The incentives in Congress are to favor local constituents. One effective way to favor them is to grant a regulation with monopoly spillovers to particular industries that are economically important to a state or congressional district. Agricultural price support programs and tariff protections are examples.<sup>244</sup> There is, however, an alternative to direct congressional control of state regulatory spillovers. It is to extend the current state-action doctrine to require antitrust review of any state regulation with significant monopoly spillovers where the affected out-of-state consumers did not have a direct say in the approval of the regulation. Subpart IV(B) shows how this alternative might be specified and implemented.

### B. *Specifying and Implementing a Spillover Test*

Our proposed approach to the problem of *interstate* regulatory spillovers is to use a state-action review to evaluate, first, the economic significance of the monopoly spillovers and, second, the participatory history of the offending regulation. Then, if the regulation generates significant monopoly spillovers and ignores out-of-state interests, courts should subject that regulation to an antitrust review against the standards of the Sherman Act. To implement this strategy the courts would ask two questions:

1. Does the state regulation create an interjurisdictional monopoly spillover with the potential to significantly harm customers outside the state?
2. If so, was the state regulation decided without the effective political participation of the affected customers residing outside the regulating state?

If the answer to both questions is yes, then the state regulation will fail the monopoly spillover test and a Sherman Act review of the regulation is appropriate.<sup>245</sup>

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244. See *supra* subpart II(A) (discussing the inefficiencies of universalistic legislatures).

245. Note that this approach will fall substantially short of the Lochnerian dilemma of whether to undertake a complex review that seeks to balance state and federal interests; by requiring the plaintiff to show that significant spillovers are present, we ensure that most litigation will not proceed to a full-

1. *Does the state regulation create an interjurisdictional economic spillover with the potential to significantly harm customers outside the state?* Implementation of step one of the two-step spillover test requires a clear definition of an interjurisdictional economic spillover and a standard of potential economic harm borne by out-of-state customers. An interjurisdictional economic spillover occurs when a state's regulatory policy raises the price charged for an exported good or service purchased by residents outside of the regulating state. The good or service may be consumed directly by out-of-state residents or be used by those residents as an input into the production of other goods and services. In either case, the state's regulation will have imposed an economic burden on residents outside the state in the form of higher consumption or production costs.

To limit the bringing of frivolous state-action cases under our spillover test—almost all state regulations can be argued to have some final equilibrium effects on prices paid by out-of-state residents—our test is limited to those state regulations that impose a *significant* potential economic burden on nonresidents through higher prices. Here the U.S. Department of Justice's and the Federal Trade Commission's *Horizontal Merger Guidelines*<sup>246</sup> are suggestive. In those guidelines, mergers thought to lead to price increases of five percent or more are to be given close scrutiny under the Clayton and Sherman Acts.<sup>247</sup> A similar standard for economic harm seems reasonable for our spillover test review of a state regulation.

Attributing a given price increase to the challenged state regulation requires an analysis of underlying market conditions, but a simple pricing rule used by profit-maximizing monopolies and cartels should provide sufficient information to trigger Sherman Act review. The rule sets the percentage mark-up of price ( $P$ ) above marginal cost ( $MC$ ) in proportion to the inverse of the market's (absolute value) elasticity of demand ( $|\epsilon_d|$ ) for the monopolized good or service:  $(P-MC)/P = 1/|\epsilon_d|$ .<sup>248</sup> If a five percent monopoly mark-up is a guideline of sufficient economic harm, then

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fledged rule-of-reason analysis. This view is mentioned by Hovenkamp & Mackerron, *supra* note 127, as well as by Rose-Ackerman & Mashaw, *supra* note 2, at 111-85.

246. See U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1992).

247. See *id.* at 7.

248. See PINDYCK & RUBINFELD, *supra* note 87, at 326-27 (articulating a rule of thumb for determining correct pricing in which the mark-up over the marginal cost, as a percentage of price, should equal the negative inverse of the elasticity of demand). The price elasticity of demand in the above formula is understood to be measured as its absolute (always positive) value. Strictly speaking, the rule can be applied only in those ranges of demand where the marginal revenue from the sale of additional goods or services is positive. This will be the case for most state-exported goods and services. Goods with a price elasticity of demand of 20 (in absolute value) will, if cartelized, see their prices rise by 5% or more:  $P/MC = 1/(1 - 1/|\epsilon_d|) \geq 1.05$  for values of  $|\epsilon_d| \leq 20$ .

a state regulation restricting the sale of goods or services for which the elasticity of demand by out-of-state residents is twenty or lower exhibits sufficient potential economic harm to warrant Sherman Act review.

Assuming that transportation costs are minimal, goods and services supplied by state residents to competitive national markets—markets where there are ready substitutes—will face very high price elasticities. In perfectly competitive markets, the elasticities will be infinite. State regulation of such goods will be immune from Sherman Act review under our spillover test, although they must still pass the Court's *Midcal* test for in-state political participation.

In contrast, state regulations restricting out-of-state supply of goods and services that have unique demand features are potential candidates for Sherman Act review under our spillover test. Goods such as California avocados, Utah uranium, and Wyoming coal do compete in national markets, but their unique features give producers in those states potential monopoly power—that is, the price elasticities of demand by out-of-state residents for those goods are less than twenty.<sup>249</sup> If a state regulation were passed that restricted the supply of those goods to nonresidents, that regulation would fail step one of the two-step spillover test.

We then ask: 2. *Was the state regulation decided without the effective political participation of the affected customers residing outside the regulating state?* This second step seeks to protect interstate (that is, Coasian) agreements on regulatory policies. Such agreements may restrict the sale of products from one state to another in violation of step one above, but the residents of each affected state may have balanced those potential economic losses against other, presumably greater, economic gains made possible by the agreement. For example, regional paper production in North Carolina might be regulated to the detriment of regional paper consumers in Tennessee and Georgia, but the residents of those states gain cleaner “downstream” rivers in return. Step two will allow such regulations to stand provided that residents in all affected states were given valid opportunities to participate in setting the interstate agreement.

Much as the Court's current *Midcal* doctrine protects state regulations decided by participatory state politics, step two of the spillover test protects regulations with interstate effects and decided by participatory interstate politics. We propose as a measure of participatory interstate politics the application of the *Midcal* doctrine to each state whose residents are affected

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249. For examples of such low price elasticities of demand from Californian agricultural production, see CAROLE FRANK NUCKTON, DEMAND RELATIONSHIPS FOR VEGETABLES: A REVIEW OF PAST STUDIES (Giannini Found. of Agricultural Economics Special Report 80-1, 1980) and CAROLE FRANK NUCKTON, DEMAND RELATIONSHIPS FOR CALIFORNIA TREE FRUITS, GRAPES, AND NUTS: A REVIEW OF PAST STUDIES.

by the regulations of the interstate agreement. Are the regulation's affected customers citizens of an agreeing state and does that state's interstate agreement demonstrate "clear articulation" and "active supervision" as now interpreted by *Midcal* and its progeny? If the answer to both of these questions is yes, then the regulation passes step two of the spillover test and stands immune from Sherman Act review.<sup>250</sup>

Finally, implementation of the two-step spillover test should not be difficult. The Court has reviewed the economic benefits and costs of a state regulation in deciding state-action cases, but in its debate has raised concerns about the appropriateness of undertaking a deep substantive review.<sup>251</sup> We agree with this view. Step one—the market elasticity test for sufficient economic harm—only requires the courts to decide the relevant market for the regulated good; this task is familiar terrain.<sup>252</sup> Step two—whether the regulation is covered by an actual interstate agreement encompassing all affected customers—seems conceptually straightforward.

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250. In the application of our spillover test, the Court will have to decide what is sufficient evidence of an interstate agreement sufficient to satisfy step two. Certainly sufficient is the presence of an actual agreement involving all states whose consumers are substantially affected by the monopoly spillover. More difficult is the case in which two states cannot reach an agreement after serious negotiations or the case in which a few states reach an agreement but other affected states do not join. To keep the courts off the slippery slope of having to infer "best intentions," we would require an actual interstate agreement of all affected states for satisfaction of step two.

251. See, e.g., *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976). In *Cantor*, several members of the Court considered the merits of a substantive review of the benefits and costs of regulation. Justice Blackmun, concurring, offered an attempt to balance federal antitrust interests with state regulatory interests. In Justice Blackmun's view, the extent of an exemption should be determined by applying a "rule of reason" analysis as in other antitrust cases, but allowing "the fact of state sanction [to figure] powerfully in the calculus of harm and benefit," and thus, usually, to yield a state action exemption. *Id.* at 610-11 (Blackmun, J., concurring). In effect, Justice Blackmun's notion was that the Court should distinguish beneficial from harmful regulation and in the latter case search for more desirable alternatives; spillovers would apparently be included in that calculus. However, Justice Blackmun supplied no procedures for making such a benefit/harm distinction.

A strong opinion to the contrary was expressed by Justice Stewart, who worried about a chilling effect of such a substantive review on state policymaking: "If a state legislature can ensure antitrust exemption only by eschewing such broad delegation of regulatory authority and incorporating regulatory details into statutory law, then there is a very great risk that the State will be prevented from regulating effectively." *Id.* at 638 n.26 (Stewart, J., dissenting). Justice Stewart also expressed concern about the increased power of the federal judiciary: "[T]he Court is adopting an interpretation of the Sherman Act which will allow the federal judiciary to substitute its judgment for that of state legislatures and administrative agencies with respect to . . . anticompetitive regulatory provisions . . ." *Id.* at 630 (Stewart, J., dissenting).

252. The determination of the relevant antitrust market is typically the first step in an analysis of monopoly power under Section II of the Sherman Act as well as in analyses of mergers and acquisitions under § 7 of the Clayton Act. See PHILLIP AREEDA & LOUIS KAPLOW, *ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES* 567 (4th ed. 1988). What the elasticity test does not consider is the extent of the market "damage" that the state regulation might impose once it has been determined that the  $|e_d| \leq 20$ . That is, is there one out-of-state consumer harmed or are there millions? This inquiry into the extent of economic damage from the state regulation is best left to the antitrust portion of the case, where such considerations are commonplace.

State regulations failing both steps one and two above—those with significant adverse spillovers not politically approved by affected residents outside the state—will be subject to scrutiny under the Sherman Act. *Parker v. Brown* involved one state regulation that would fail the spillover test and (likely) a subsequent Sherman Act review as well. In *Parker*, the California legislature passed, at the request of producers, an Agricultural Prorate Act creating a Prorate Advisory Commission to implement restrictive marketing programs for California produce.<sup>253</sup> Approval of the Commission and of sixty-five percent of the crop's producers was required to establish a marketing regulation.<sup>254</sup> Because California is an important national producer of agricultural products, restrictive marketing regulations in that state are likely to have adverse effects on the prices of the regulated produce. Nonetheless, the resulting regulations would pass the participation tests of the current *Midcal* doctrine: they were allowed by the state legislature ("clear articulation") and supervised by a legislatively appointed Commission ("active supervision").

Under the extended spillover test, however, *Parker* would not be exempt from the antitrust laws. The spillover consequences of California's Agricultural Prorate Act are potentially significant. The Act was challenged by a producer of raisins on the ground that the state's approved regulation of raisin production restricted competition in violation of the Sherman Act.<sup>255</sup> At the time of the regulation, California produced "almost all the raisins consumed in the United States," and ninety-five percent of that output was shipped out of the state.<sup>256</sup> Further, the demand for raisins by out-of-state residents was relatively price inelastic.<sup>257</sup> The Agricultural Prorate Act, at least as applied to the regulation of raisin production, clearly creates interjurisdictional monopoly spillover with the potential to significantly harm customers outside the state and therefore violates step one of our spillover test.

The Act also violates step two, the requirement that the regulation be decided with effective political participation by the affected out-of-state residents. There is no evidence that the Act was part of any participatory interstate agreement to limit raisin production. Indeed, because raisins are consumed throughout the nation, Congress would be the appropriate participatory arena in which to reach such an agreement. But Congress, despite

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253. *Parker v. Brown*, 317 U.S. 341, 346 (1943).

254. *Id.* at 347.

255. *Id.* at 344.

256. *Id.* at 345, 359.

257. For a detailed empirical study of the raisin industry, see CAROLE FRANK NUCKTON ET AL., AN ECONOMETRIC ANALYSIS OF THE CALIFORNIA RAISIN INDUSTRY (Giannini Found. Research Report No. 339, Dec. 1988).

having approved the regulation of other agriculture production, did not choose to limit raisin production. Because it fails our spillover test, California's Agricultural Prorate Act should undergo Sherman Act review. Most state-action doctrine commentators agree that the Act would not now survive such scrutiny.<sup>258</sup>

### C. *The Spillover Test and the Goals of Federalism*

The two-step spillover test seeks to ensure that state regulations that adversely affect the economic interests of citizens living outside the regulating state will be curtailed. To the extent that such monopoly spillovers now exist but are checked by the two-step test—for example, the overturning of California's Agricultural Prorate Act—then regulatory efficiency will be increased. This is a gain for economic efficiency, one important goal of federalism.

But will the application of our spillover test discourage political participation, federalism's other goal? Professor Elhauge has expressed concern that suppressing regulations with associated spillovers will chill local and state regulatory policymaking.<sup>259</sup> Most all regulations, he correctly notes, will have some consequences on residents living outside the regulating jurisdiction.<sup>260</sup> Our test, however, is not a blanket condemnation of all spillovers and all regulations. First, only those regulations that restrict the supply of goods and services to markets across state lines will be affected. Health regulations, environmental regulations, and labor market regulations are unlikely to have such effects.<sup>261</sup> Second, because most markets are now national, or even international, in scope, most goods and services produced within a state will have many competitors outside the state. Substitutes are readily available. Thus, few states that regulate their interstate goods or services violate the elasticity requirement ( $|\epsilon_d| \leq 20$ ) in step one of the spillover test.<sup>262</sup> Finally, step two of the spillover test

258. See, e.g., Easterbrook, *supra* note 7, at 47 ("Under an approach forbidding the export of a monopoly overcharge, the raisin prorate program would have been preempted by the Sherman Act."). At the time of the original decision, however, it might well have passed muster. See Jorde, *supra* note 125, at 254 n.153.

259. See Elhauge, *supra* note 7, at 730-31 ("Antitrust review that preempts such spillovers (and thus forces regulatory decisions into a higher level of government) may impair rather than improve the overall quality of decisionmaking and make meaningful local autonomy impossible.").

260. See *id.* at 729-30.

261. Though, of course, they may. Environmental, labor, and health regulations can all raise firm costs that will lead to less industry output by the regulating state. This reduction in output can in turn have an adverse effect on market prices and consumption by out-of-state residents. Although such regulations could conceivably fail our spillover test, they should not fail the antitrust review that follows (in contrast to the raisin cartel in *Parker*).

262. For an explanation of the elasticity requirement, see *supra* note 248 and accompanying text.

should encourage political participation as it rewards with an exemption from federal antitrust laws those regulations set by participatory interstate agreement. Currently, nonresidents are excluded from the political deliberations that set the offending regulations. Step two will encourage the states setting those regulations to hear and then, as part of an agreement, to compensate the out-of-state consumers hurt by the regulations. Political participation in regulatory policy should be enhanced by such interstate agreements.

We conclude that adding the spillover test to *Midcal* is likely to strengthen the federalist performance of our current state-action doctrine. *Midcal* and its progeny promise significant improvement in *intrastate* political participation with possible gains in *intrastate* regulatory efficiency. The spillover test promises significant improvements in *interstate* economic efficiency with possible gains in *interstate* political participation. Together, an extended state-action doctrine using *Midcal* plus a spillover test allows our federalist regulatory institutions to achieve their full potential.

#### V. An Overview: Assessing the Performance of an Extended State-Action Doctrine

Using the logic of Part II's theory of federalism articulating the twin goals of economic efficiency and political participation, Parts III and IV have argued for two tests to be met before any state regulation is to be exempted from federal antitrust review. The first test (in Part III) has been developed by the Court in its *Midcal* doctrine. Our theory of federalism allows us to see the potential of the *Midcal* test: encouraging political participation by state residents in the setting of their state's regulatory policies. Furthermore, to the extent the test centers regulatory policymaking in the politically responsive state legislature, there is the chance that economic efficiency will be improved as well. The second test (in Part IV), first suggested by Judge Easterbrook, allows the Court to address in a principled fashion those state regulations that generate significant interstate monopoly spillovers. Our version of the spillover test is likely to promote economic efficiency in national regulatory policymaking and may also encourage interstate political participation. Perhaps one of the central benefits of using a more encompassing theory of federalism—a theory that recognizes both participation and efficiency as valued outcomes—is recognition that the Court's current *Midcal* doctrine and a more efficiency-oriented doctrine can stand side-by-side, not as competitors but as complements. The extended state-action doctrine joining *Midcal* to the spillover test is one attempt to productively exploit these complementarities.

TABLE 1—THE ANTITRUST STATE-ACTION CASES

		Midcal Participation Test	
		Pass	Fail
Spillover Test	Pass	<i>Bates v. State Bar of Arizona</i> <i>Columbia v. Omni Outdoor Advertising, Inc.</i> Community Communications Co. v. City of Boulder* <i>Hoover v. Ronwin</i> <i>Town of Hallie v. City of Eau Claire</i> <i>Southern Motor Carriers Rate Conference, Inc. v. United States</i> I	Goldfarb v. Virginia State Bar Cantor v. Detroit Edison Co. City of Lafayette v. Louisiana Power and Light Co. Community Communications Co. v. City of Boulder California Retail Liquor Dealers Ass'n v. Mideal Aluminum, Inc. Federal Trade Commission v. Ticor Title Insurance Co. 324 Liquor Corp. v. Duffy Patrick v. Burget II
	Fail	<i>Parker v. Brown</i> III	IV

Note: Cases in which the Court has granted an exemption are in italics.

\* *Boulder* fails the Court's current interpretation of the *Midcal* participation test. *Boulder* would pass a "relaxed" *Midcal* test allowing a home rule exemption for municipal regulation without spillovers.

How will our extended doctrine work? Table 1 summarizes the application of the extended state-action doctrine to the leading cases previously considered by the Court. Cases that pass both the *Midcal* and spillover tests are placed in Quadrant I of Table 1. Cases that fail the *Midcal* test but pass the spillover test appear in Quadrant II, and cases that pass *Midcal*

but fail the spillover test appear in Quadrant III. (None of the cases discussed will appear in Quadrant IV, where both tests are failed.) Table 1 shows that, of the cases in which the Court gave exemptions (those in italics), the Court acted in accordance with the extended state-action doctrine in all but one instance: *Parker v. Brown*. As Table 1 indicates, the extended state-action doctrine would have decided *Parker* differently. Table 1 also shows a desire to reverse *Boulder*, moving the case from Quadrant II (failing the *Midcal* test) to Quadrant I (passing a “relaxed” *Midcal* test for municipal regulations).

The problem in *Parker* is not the *Midcal* test but the failure of the state regulation to survive the interstate spillover test. Recall that at issue in *Parker* was the validity of the California Agricultural Prorate Act, which protected raisin growers by allowing them to form a cartel that reduced raisin output and raised raisin prices. In our view, *Parker* satisfies the participation test. Because almost all U.S. raisins were grown in California and ninety percent of those were consumed outside of the state, the act of cartelization was obviously in the interest of most residents in the state, which supported the cartel with its enforcement authority. *Parker* clearly fails the spillover test, however. The state sanctioned raisin cartel generated monopoly spillovers that flowed across the country. Further, the price elasticity of demand for raisins is below the spillover test guideline.<sup>263</sup> Finally, there was no evidence of an interstate Coasian agreement approving the cartel; indeed, the expansiveness of the spillover alone made such a bargain between states difficult to achieve. As a consequence, the regulation in *Parker* fails the spillover test.

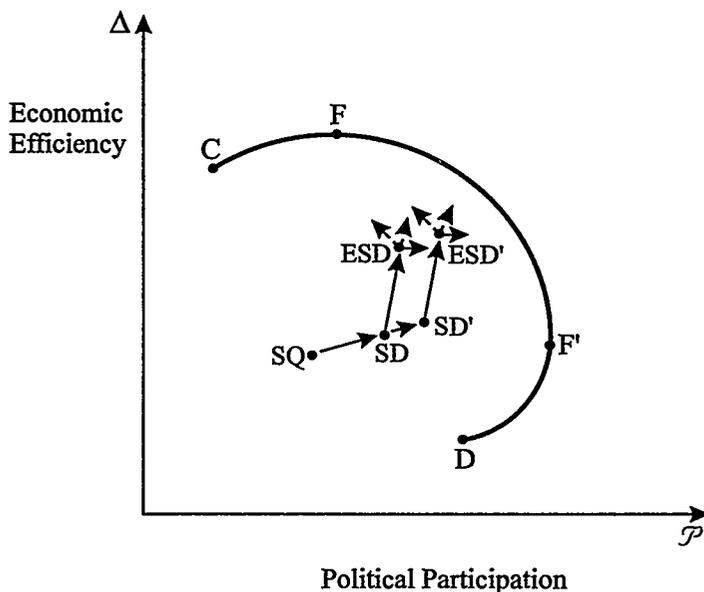
The problem with *Boulder* is the application of *Midcal*'s “clear articulation” standard to a municipal regulation, in effect requiring state legislative approval of local regulatory policies. This makes sense only if the municipal regulation creates intercommunity monopoly spillovers. To foster federalism's twin goals of participation and efficiency, local regulations should be decided locally unless there are spillovers. If there are spillovers, then requiring the state to clearly articulate its approval is appropriate. For municipal regulations, the “home rule” standard from Justice Rehnquist's *Boulder* dissent supplemented by the spillover test is preferred.<sup>264</sup> Under this version of our extended state-action doctrine—using a “relaxed” *Midcal* plus the spillover test for municipal regulations—the regulation in *Boulder* would survive scrutiny and the case would move to Quadrant I.

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263. See *supra* note 249.

264. See *supra* section III(B)(1).

FIGURE 5—STATE-ACTION DOCTRINE  
AND THE FEDERALISM FRONTIER



What are the ultimate benefits to federalism of implementing the extended state-action doctrine outlined here? Figure 5 shows the potential gains in political participation and economic efficiency. As argued in Part III, the *Midcal* doctrine—or a “relaxed” *Midcal* doctrine allowing a “home rule” standard for municipal regulations—is likely to contribute to both of federalism’s goals. The *Midcal* doctrine’s twin hurdles of “clear articulation” and “active supervision” ensure that state regulations will be decided within, and enforced by, the elected branches of state government, most prominently the state legislature. Without the *Midcal* constraint, regulatory policies might well be decided in the nonelected branches of governments, most prominently the state regulatory bureaucracy. This centering of regulatory policymaking in elected politics has two beneficial effects.

First, the *Midcal* doctrine is likely to increase political participation because it confines decisionmaking to those arenas of government in which citizens have the most direct influence. As a consequence, political participation should rise from a pre-*Midcal* level at SQ to a post-*Midcal* performance at SD in Figure 5. By encouraging local policymaking, a “relaxed” *Midcal* might stimulate even more political participation, an effect denoted as a further improvement in  $\mathcal{P}$  to SD' in Figure 5.

Second, *Midcal* may also have a beneficial effect for federalism’s goal of economic efficiency. By limiting regulatory policymaking to the elected branches of government, *Midcal* brings the discipline of political competition to bear on the policymaking process. Although elected

political institutions are not sufficient to ensure intrastate economic efficiency, the current political-economy evidence suggests they may be necessary.<sup>265</sup> If so, then the *Midcal* doctrine should improve economic efficiency as well as participation, shown by the increase in  $\Delta$  as one moves from a pre-*Midcal* level at *SQ* to the post-*Midcal* allocations at *SD* or, with a “relaxed” *Midcal* doctrine, to *SD'*.

As argued in Part IV, extending the *Midcal* doctrine to include the interstate monopoly spillover test should provide still greater benefits for regulatory efficiency and political participation. The spillover test checks state regulations that impose economic harm on out-of-state consumers, an area of regulatory policy where the political temptations to be inefficient are particularly pronounced.<sup>266</sup> Were the Court to adopt the spillover test, the expected efficiency gain would appear in Figure 5 as the increase in  $\Delta$  resulting from a shift from those allocations available under *Midcal* (*SD* or *SD'*) to those available under the extended state-action doctrine (*ESD* or *ESD'*).

The spillover test might also improve political participation. The test explicitly includes an exemption for state regulations that arise from interstate agreements among all states affected by a regulation. Affected, but previously excluded, citizens would become parties to the process of regulatory policymaking. The move from *SD* (or *SD'*) to *ESD* (or *ESD'*) therefore shows a gain in political participation ( $\mathcal{P}$ ) too.<sup>267</sup>

In the end, the extended state-action doctrine advocated here offers potentially significant progress toward both valued goals of federalism. The *Midcal* test is likely to make its central contribution toward the goal of political participation, the monopoly spillover test toward the goal of economic efficiency. Together the extended state-action doctrine permits state and local governments to approach their full potential as federalist institutions for the regulation of business.

## VI. Protecting the States: Enforcing Guidelines for National Regulatory Restraint

The extended state-action doctrine linking *Midcal* (or a “relaxed” *Midcal*) with a spillover test seeks to assist the Court as it polices the boundaries between state and national responsibilities for the regulation of business. But the extended state-action doctrine guidelines are one-sided.

265. See *supra* notes 217-18.

266. See *supra* Figure 4b and accompanying text.

267. Figure 5 must be understood for what it is: a theoretical construct that illustrates the potential gains in efficiency and participation from an improved state-action doctrine. We have made detailed arguments throughout this Article as to why we expect the gains in  $\mathcal{P}$  and  $\Delta$  to be significant relative to the pre-*Parker* regulatory status quo, but we do not have the detailed economic and political information necessary to quantify those gains. Efforts to measure these gains could provide an important extension of our understanding of regulatory federalism.

They protect legitimate national interests from the intrusions of municipal and state regulations, but they provide no safeguards in reverse. What is to protect legitimate state and municipal interests from overreaching national regulations? The Commerce Clause of the U.S. Constitution opens wide the door for Congress to regulate business within state boundaries.<sup>268</sup> Standing in the way has been the Tenth Amendment's reservation to the states of those "powers not delegated to the United States by the Constitution."<sup>269</sup> Beginning with *National League of Cities v. Usery*, the Supreme Court has sought to provide Tenth Amendment guidelines for when a national regulation has overreached its bounds.<sup>270</sup>

The Court's efforts in this direction have not yet proved successful. In *National League of Cities*, the Court held that Congress could not apply a minimum wage and national hour standard to state and local employees working in areas of "traditional governmental functions."<sup>271</sup> Efforts to apply the *National League of Cities* guidelines in later cases, however, showed that the Court was unable to agree on a definition of what would constitute a traditional government function.<sup>272</sup> Although over three hundred cases raising Tenth Amendment claims were brought following *National League of Cities*, most were rejected by the courts.<sup>273</sup> The Supreme Court itself never relied on *National League of Cities* to invalidate another federal law.<sup>274</sup> Finally, after nine years of frustration, the Court overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*. In evaluating the application of the federal Fair Labor Standards Act to the states, the Court stated in *Garcia*: "We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'"<sup>275</sup>

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268. See U.S. CONST. art. I, § 8 (giving Congress the power to "regulate Commerce . . . among the several States").

269. *Id.* amend. X.

270. In *National League of Cities*, the Court held that Congress could not impose wage restrictions on state employees because "Congress may not . . . force upon the States its choices as to how essential decisions regarding the conduct of integral government functions are to be made." *National League of Cities v. Usery*, 426 U.S. 833, 855 (1976). The decision in *National League of Cities* was a sharp break with the Court's past interpretation of Tenth Amendment protections for states. Since *United States v. Darby*, 312 U.S. 100 (1941), the Court had refused to read the Tenth Amendment as a cap on Congressional powers, calling the Amendment nothing more than a "truism." *Id.* at 124.

271. *National League of Cities*, 426 U.S. at 852.

272. See Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988) (reviewing the *National League of Cities* case law and the difficulty the Court has experienced defining "traditional governmental functions").

273. See D. Bruce La Pierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577, 580 n.9 (1985).

274. See Merritt, *supra* note 272, at 12.

275. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985). The Court has not fully abandoned the use of the Tenth Amendment as a source of state protection, however.

In the place of defining explicit Tenth Amendment guidelines for what constitutes a protected arena of state policymaking, the *Garcia* Court turned to the *process* of congressional decisionmaking as the best guarantor for state policy discretion.<sup>276</sup> The Court saw the U.S. Senate in particular—giving each state two members elected statewide—as that branch of government most in tune with state government interests.<sup>277</sup> Because every federal regulation requires Senate approval, the Senate serves to protect state interests.<sup>278</sup>

The Court's recent decision in *United States v. Lopez* can be read as reaffirming *Garcia's* focus on process. At issue in *Lopez* was the constitutionality of the Gun-Free School Zones Act, which outlawed the possession

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Recently, in *New York v. United States*, 505 U.S. 144 (1992), the Court examined a number of provisions in the Low-Level Radioactive Waste Policy Amendments Act of 1985 that were intended to encourage states to participate in waste disposal. *Id.* at 152-54. The Court had no problem with monetary incentives, but ruled unconstitutional the "take title" provisions that appeared to require the states to undertake particular regulatory activities without compensation; the law's take-title regulation "crossed the line distinguishing encouragement from coercion." *Id.* at 175. *New York* would seem to suggest that it would not be acceptable for the federal government to require states or localities to undertake regulatory activities (including those that violate the antitrust laws) without federal compensation.

From the perspective of our analysis, *New York* makes good sense. It balances federal and state policy interests and is likely to promote federalism's twin values of efficiency and participation. When Congress uses the states to do its regulatory bidding, it must "pay" for those services under *New York*. This improves efficiency. To the extent that unfunded mandates become fully funded choices for the states, political participation is encouraged. Deciding what level of "payment" will be sufficient, however, remains a subtle issue. Cf. U.S. ADVISORY COMM'N, FEDERAL REGULATION, *supra* note 4, at 2-3 (finding that Congress has continued to pass legislation placing regulatory burdens on states that are greater than the associated increases in federal aid); Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services*, 46 VAND. L. REV. 1355, 1396-1406 (1993) (arguing that remedies such as disclosure, supermajority rules, and retrospective reimbursement regimes would fail to sufficiently deter the imposition of unfunded mandates, and that only allowing lower governmental tiers to prospectively nullify mandates in the absence of full up-front funding will succeed).

276. *Garcia*, 469 U.S. at 554 ("[W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result.").

277. *See id.* at 551 (describing the Senate as giving states "more direct influence" over the House of Representatives and the presidency than the influence they enjoy by their control of electoral qualifications or their role in presidential elections).

278. The first to make this argument was Professor Herbert Wechsler in *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 548 (1954) (arguing that "the Senate cannot fail to function as the guardian of state interests"). *See also* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175-84 (1980) (examining ways in which various elected bodies might reflect the viewpoints of individual states better than the judiciary). Professor Graglia argues the Wechsler-Choper position even more forcefully: the legislature should be the preferred institution for protecting state policymaking even if the Court could design a workable Tenth Amendment test. *See* Lino A. Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 TEXAS L. REV. 719, 767-71 (1996). For a critique of the Wechsler-Choper position, *see* Merritt, *supra* note 272, at 15-17 (arguing that nothing suggests that our current legislators are predisposed to protect state sovereignty).

of a gun within one thousand feet of a school. The Court ruled that absent a “substantial effect” of gun possession on interstate commerce, the law is simply not within Congress’s power to enact.<sup>279</sup> Congress had failed to provide, either in the statute itself or in the accompanying committee reports, a rationale linking the regulation of guns near school yards to a substantial effect on interstate commerce. As things stood, “no such substantial effect was visible to the naked eye.”<sup>280</sup> Presumably, if Congress had made the link to interstate commerce either in the statute or elsewhere—that is, if the *process* of approving the national regulation had illuminated the substantial effect—then the statute would have been upheld.<sup>281</sup>

Given the Court’s current approach, if protections for state regulatory policymaking are to be fashioned, then they must be built into the *process* of national policymaking. The question then becomes how to strengthen the hand of state and local regulatory interests in the process of setting national regulatory policies. We offer one answer: Congress should consider the adoption of a self-disciplinary check as it decides on those policies. We call this check a Federalism Impact Statement, or FIST.<sup>282</sup> FIST is a seven-step guide to national regulatory policymaking that explicitly incorporates federalism’s interests in protecting states and localities as independent policymaking bodies. A FIST would be required before any federal regulatory scheme were put into place. The application of FIST becomes a procedural hurdle that each national regulation must clear.<sup>283</sup>

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279. *United States v. Lopez*, 115 S. Ct. 1624, 1630 (1995).

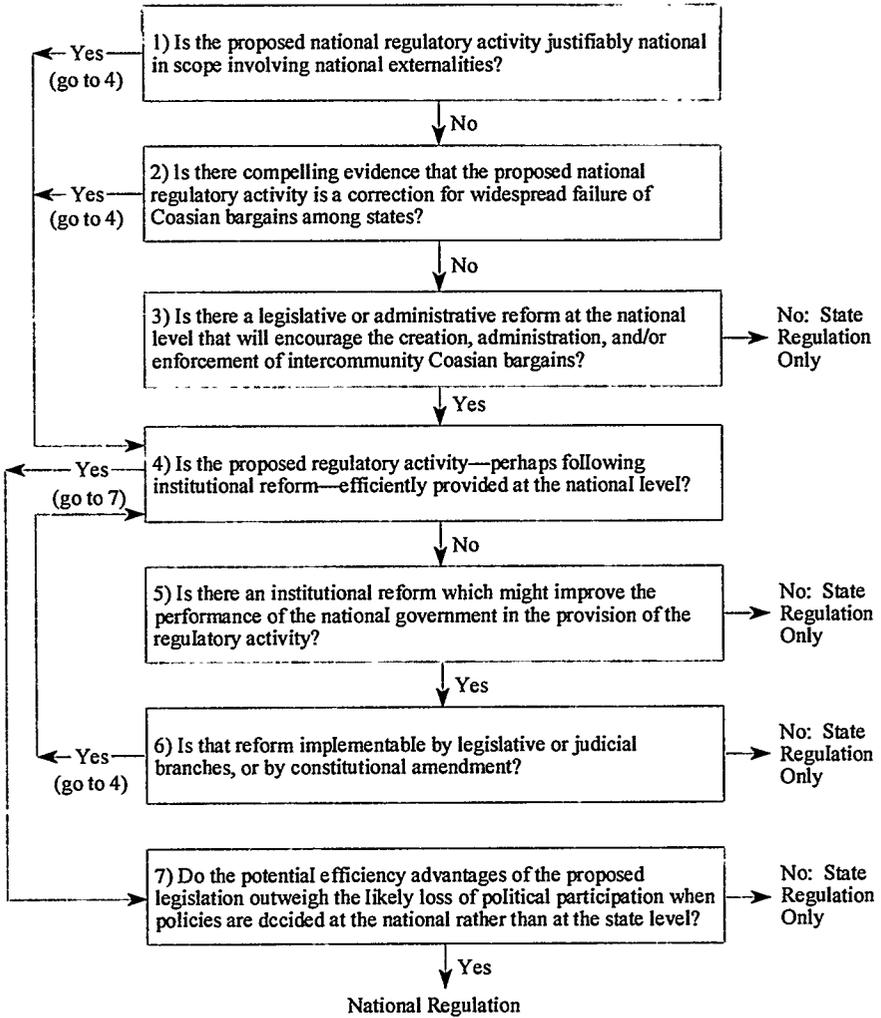
280. *Id.* at 1632. However, the Court agreed with the government that “Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce.” *Id.* at 1631.

281. The question remains as to whether the Court might be tempted to do more in future cases—that is, to pass on the substantive merits of congressionally stated links between regulation and interstate commerce. See Richard Cordray, *Judicial and Legislative Enforcement of Federalism: A Summary of Recent Efforts by the Supreme Court and Proposals Introduced in Congress to Enforce Principles of Federalism Through the Courts*, in COUNCIL OF STATE GOV’TS, *THE BOOK OF THE STATES* 485, 488, 488-89 (1996) (stating that it remains to be seen whether or not *Lopez* “will come to stand for rigorous judicial second-guessing of congressional determinations about where and why it derives authority to legislate in a particular area”). Three recent commentators seem to think this is unlikely. See Bednar & Eskridge, *supra* note 1, at 1484 (arguing that “*Lopez* is no declaration that the Court is prepared to stop a wide range of congressional initiatives” and “does not and should not augur a new period of aggressive judicial enforcement of jurisdictional limitations on congressional power”); Graglia, *supra* note 278, at 767 (“It is most unlikely, however, that the Court will be able to muster five votes to invalidate a commerce power measure when Congress does not commit the oversight that explains *Lopez*.”).

282. See *infra* Figure 6.

283. We see the requirement for a FIST arising from congressional legislation, much as the requirement for Environmental Impact Statements was part of the National Environmental Policy Act. A recent article by Professor Garbbaum argues that a FIST requirement might also originate in the Court from its enforcement of the Necessary and Proper Clause on matters of national regulation. See U.S. CONST. art. I, § 8, cl. 18 (“The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested

FIGURE 6—FIST GUIDELINES FOR NATIONAL REGULATORY RESTRAINT



The judiciary’s responsibility is to ensure that a FIST is in fact performed for each national regulation.<sup>284</sup> Ample experience suggests that a FIST

by this Constitution in the Government of the United States . . . .”); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEXAS L. REV. 795, 799-802, 824-25 (1996). He distinguishes his approach to protecting state policymaking as a “third model of federalism,” *id.* at 796, distinct from the Tenth Amendment approach in *Lopez* or the political approach in *Garcia*, *id.* at 795.

284. FIST, like any procedural hurdle, has associated costs that may be substantial, depending on the requirements. If public hearings and a full-fledged spillover analysis are required, then the admini-

proposal can be made operational. Currently in the United States, regulatory impacts are evaluated with respect to state and local budgets, takings, the environment, inflation, justice, and arms control. Moreover, the European Union now uses a process hurdle much like FIST with some success.<sup>285</sup>

How will FIST work? Each proposed national regulation will be required to show that it has answered successfully (that is, YES) either Question 1, 2, 3, or 6 and then Questions 4 and 7. Questions 1 and 2 ask, respectively, whether the proposed regulation deals directly with a national spillover or with a regional spillover that has not been adequately addressed through interstate agreements. If the answer to Questions 1 and 2 is NO, then direct national regulation is not appropriate. Question 3 allows for another policy approach and asks whether the proposed national policy might be redesigned to foster interstate Coasian agreements rather than to regulate directly. If the answer to Question 3 is NO, then there is no compelling economic case for the proposed national regulation. FIST therefore recommends *state regulation only*.

However, if the answer to Question 1, 2, or 3 is YES, then the FIST analysis moves to Question 4: Is the proposed national regulation or policy efficiently provided at the national level of government, or might it be better to provide the regulation at the state or local level? There is, of course, no guarantee that Washington knows best when it comes to regulatory policies.<sup>286</sup> If national policymaking is likely to be inefficient relative to state or local policymaking (Question 4: NO), then Question 5 asks whether there might be an institutional or procedural reform that could improve national performance. For example, greater executive or political-party control over legislation and administration might improve national regulatory performance.<sup>287</sup> If so (Question 5: YES), then Question 6 asks if those national institutional reforms can be implemented. If so (Question 6: YES), then the national regulation deserves another chance and FIST returns to Question 4 for a re-evaluation. If Questions 5 and 6 are answered NO, however, then FIST recommends *state regulation only*.

Finally, if Question 4 is decided on efficiency grounds in favor of the national regulation (Question 4: YES), then the regulation moves to

strative costs of producing a FIST could be high. However, if the only requirements are a clear statement of purpose from the legislating body and a characterization of the nature of the spillovers involved, then the direct costs would be small. The more detail required in the FIST analysis, the clearer become the economic benefits and costs and the consequences for political participation of any federal regulation.

285. See *infra* notes 304-06 and accompanying text.

286. See, e.g., *supra* notes 95, 122 (citing studies that reveal the inefficiency of federal regulation).

287. See *supra* notes 117-18 (discussing studies that reveal that strong political parties and executives improve the efficiency of regulatory policies).

Question 7 and the final FIST hurdle. Because most national regulations are less participatory than corresponding state regulations, Question 7 asks whether the national efficiency gains justify the possible decline in state and local political participation. If Congress answers NO, then FIST recommends *state regulation only*. If Congress decides that the answer is YES, then the proposed *national regulation* is approved.

For this study of business regulation, one particularly relevant national regulatory policy is embodied in the Sherman Antitrust Act,<sup>288</sup> which seeks to foster economic competition and to control privately and publicly created monopoly spillovers. Will the Sherman Act pass a FIST review? The answer to Question 1 is YES; the Sherman Act is a logical response to the need to monitor national monopoly spillovers from firm collusion or from state and local government regulations.<sup>289</sup> The answer to Question 4 is YES as well; it is hard to imagine an equally effective state or local government alternative for controlling national monopoly powers. Finally, the answer to Question 7 involves Congress's own balancing of improved economic efficiency from the national regulation versus a possible decline in state and local political participation. A Sherman Act review might actually improve political participation by forcing states to consider their neighbors when passing regulations with monopoly spillovers—that is, there may be no efficiency/participation trade-off at all.<sup>290</sup> In any case, Congress ultimately decides Question 7. All FIST requires is that there be evidence in the legislative record that the legislature recognized the possible trade-off between efficiency and participation when making its decision. If such evidence exists, the Sherman Act passes a FIST review and will be allowed to stand as a national regulatory policy.

The adoption by Congress of a FIST requirement for national regulatory policy would not push congressional or executive decisionmaking into uncharted waters. Congress and the executive branch have approved and worked under impact-statement guidelines in a variety of policy areas in the past. For example, the requirement that new policies include an Environmental Impact Statement (EIS), introduced in the National Environmental Policy Act (NEPA), has been in effect since 1969. Under NEPA, each government agency is required to file an EIS with each new regulation or policy proposal.<sup>291</sup>

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288. 15 U.S.C. §§ 1-7 (1994).

289. The original framers of the Sherman Antitrust Act appreciated the Act's national scope and viewed its purpose as the control of business combinations that restrain trade among the several states. See 1 EARL W. KINTNER, *THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES* 32 (1978) ("As a study of the debates makes clear, and subsequent Supreme Court decisions have recognized, Congress chose, in enacting the Sherman Act, to exercise the full extent of its constitutional power to regulate interstate commerce.")

290. See *supra* subpart IV(C).

291. See National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C)(I) (1994).

Both the State and Local Government Cost Estimate Act of 1981 and the Unfunded Mandates Reform Act of 1995 demand a level of analysis not unlike that which we suggest for a FIST.<sup>292</sup> The State and Local Government Cost Estimate Act of 1981 requires the Congressional Budget Office (CBO) to produce “an estimate of the cost which would be incurred by State and local governments in carrying out or complying with any significant bill or resolution . . . .”<sup>293</sup> “Significant” is deemed to involve a cost of two hundred million dollars or more.<sup>294</sup> The Unfunded Mandates Reform Act of 1995 expanded the reporting requirements associated with the effect of proposed federal legislation on state and local government budgetary costs. The law requires that the CBO prepare cost estimates of mandates that cost fifty million dollars or more.<sup>295</sup> The CBO has devoted increased staff to this effort.<sup>296</sup>

Furthermore, in the executive branch, regulatory impact analyses have been required in various forms for nearly fifteen years. During the Reagan Administration, two Executive Orders were promulgated that required agencies to do cost-benefit analyses for the Office of Management and

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292. See State and Local Government Cost Estimate Act of 1981 § 2(a)(3), 2 U.S.C. § 653(a)(2) (1994); Unfunded Mandates Reform Act of 1995 § 101, 2 U.S.C. § 658c(a)(2) (Supp. I 1995). Another, perhaps less successful, example of a FIST-like analysis is Executive Order 12,612, which directs executive agencies not to propose laws or rules that violate principles of federalism. See Exec. Order No. 12,612, 3 C.F.R. 252 (1988), *reprinted in* 5 U.S.C. § 601 (1994). In theory, the Order is implemented on a department-by-department basis and coordinated by the Office of Management and Budget for proposals that have sufficient implications for federalism to require a federal assessment. In practice, the Federal Assessment appears to have seen relatively little use. See U.S. ADVISORY COMM’N, FEDERAL REGULATION, *supra* note 4, at 2 (“Although Executive Order 12612 on Federalism has had a positive impact on certain policy decisions, weaknesses in its design and implementation have prevented the federalism assessment process from achieving its potential.”).

293. 2 U.S.C. § 653(a)(2).

294. *Id.* at § 653(c) (1981), *repealed by* Unfunded Mandates Reform Act of 1995 § 104(3), Pub. L. No. 104-4, 109 Stat. 48, 62. Attempting to estimate direct costs falls far short of a complete efficiency analysis. Moreover, because of time constraints, varied subject matter, lack of databases, and competing priorities, the CBO relied generally on projected cost estimates of state and local officials that were provided by telephone and that can vary widely. See Ann Calvares Barr, *Cost Estimation As an Anti-Mandate Strategy*, in *COPING WITH MANDATES: WHAT ARE THE ALTERNATIVES?* 49, 50-51 (Michael Fix & Daphne A. Kenyon eds., 1990).

295. See 2 U.S.C. § 658c(a)(1) (Supp. I 1995).

296. Telephone Interview with Theresa Gullo, Chief, State and Local Government Cost Unit, Congressional Budget Office (Mar. 19, 1997). Ms. Gullo commented that the process is hard to routinize, information is often scarce, and there is little time to do the job. Nonetheless, she concluded that in several cases the cost estimate of mandates has helped Congress to shape a more reasoned policy. For further discussion, see U.S. ADVISORY COMM’N, FEDERAL REGULATION, *supra* note 4, at 4 (recommending a moratorium on unfunded mandates because they “have reached such proportions as to constitute an overextension of the constitutionally delegated powers of the Congress and the Executive”) and HUMAN RIGHTS DIV., GENERAL ACCOUNTING OFFICE, LEGISLATIVE MANDATES: STATE EXPERIENCES OFFER INSIGHTS FOR FEDERAL ACTION 2-3 (1988) (finding that when cost estimate requirements are “coupled with strong legislative concern about restraining costs to subordinate levels of government, these processes appeared to have some success in deterring, modifying, or providing funding for mandates”).

Budget (OMB) before issuing new regulations.<sup>297</sup> Under these Orders, each agency must put together an annual agenda of anticipated significant regulatory actions, and submit the agenda to OMB. OMB checks for consistency with the goals of the agency and the administration and then compiles a regulatory program for the administration as a whole.<sup>298</sup> Finally, there are other, though less prominent, examples of the legislative and executive branches requiring impact statements as guides to policy choices, including land use policy, inflation policy, judicial policy, and arms-control policy.<sup>299</sup>

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297. See Exec. Order No. 12,291, § 3(a), 3 C.F.R. 127 (1982); Exec. Order No. 12,498, 3 C.F.R. 323 (1986).

298. Executive Order 12,291 says that the agencies must submit a Regulatory Impact Analysis to OMB before issuing a new rule. See 3 C.F.R. 127, § 3(a). If OMB objects to the Regulatory Impact Analysis, it can prevent the agency from publishing the rule until the agency responds to the OMB criticisms. See 3 C.F.R. 129, § 3(f)(1) (1982). Executive Order 12,498 also requires a cost-benefit analysis earlier in the process. See 3 C.F.R. 323. For a good overview of how the two orders work, see generally W. Andrew Jack, Note, *Executive Orders 12,291 and 12,498: Usurpation of Legislative Power or Blueprint for Legislative Reform?*, 54 GEO. WASH. L. REV. 512 (1986).

For an analysis of the effectiveness of Executive Order 12,291 from an efficiency perspective, see generally Cass R. Sunstein, *Cost-Benefit Analysis and the Separation of Powers*, 23 ARIZ. L. REV. 1267 (1981) (arguing that OMB is institutionally more competent to weigh costs and benefits than the courts). For a discussion of the possible effects of executive rules on political participation and the need for this dimension to be included in the analysis, see Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES L. 1, 31-32 (1984) (arguing that OMB-industry contact limits public participation).

299. First, impact assessments are required when government regulations affect land. Specifically, Executive Order 12,630 says agencies must review actions and regulations to see if they have takings implications. See Exec. Order No. 12,630, 3 C.F.R. 554 (1989), *reprinted in* 5 U.S.C. § 601 (1994). If they do, the agency must explore less intrusive alternatives and estimate the costs to the government if courts hold the actions to be a taking. The agency must summarize these findings in a Takings Impact Assessment, and OMB has oversight. See *id.* §§ 4-5. Second, Executive Order 11,821 created the Inflation Impact Statement (IIS). Exec. Order No. 11,821, 3 C.F.R. 203 (1975), *extended by* Exec. Order 11,949, 3 C.F.R. 161 (1976) (expiring on Dec. 31, 1977). Under the Order, major federal proposals for legislation and rules had to be accompanied by an IIS assessing the impact on market costs, competition, and supply of products. IISs were reviewed by the Council on Wage and Price Stability. See Keith Boyum & Samuel Krislov, *Judicial Impact Statements: What's Needed, What's Possible?*, 66 JUDICATURE 136, 141, 141-42 (1982) (noting that judicial impact analyses made on behalf of the Veterans Administration and the Social Security Administration "have been regarded as relatively precise and well-founded"); Paul Nejelski, *Judicial Impact Statements: Ten Critical Questions We Must Not Overlook*, 66 JUDICATURE 122, 131-43 (1982) (describing impact statements made on behalf of the Department of Justice and the Veterans Administration); Susan M. Olson, *Judicial Impact Statements for State Legislation: Why So Little Interest?*, 66 JUDICATURE 147, 147 (1982) (indicating that 17 of 23 states surveyed in 1978 regularly undertook projections of caseload increases). Finally, a 1975 amendment to the Arms Control and Disarmament Act created Arms Control Impact Statements, which detail the likely effect of proposed weapons systems on arms control and disarmament policy and negotiations. See Foreign Relations Authorization Act, Fiscal Year 1976, Pub. L. No. 94-141, § 146, 89 Stat. 756, 758 (1975) (current version at 22 U.S.C. § 2576 (1994)). See generally Nancy-Ann E. Min, *Toward More Intelligent National Security Policy Making: The Case For Reform of Arms Control Impact Statements*, 54 GEO. WASH. L. REV. 174 (1986) (discussing the practical and theoretical weaknesses of Arms Control Impact Statements and suggesting methods of improvement).

If FIST can be implemented, will it succeed in limiting inefficient congressional regulations, particularly those intrusive to state and local policymaking? Past U.S. experience and recent successes with a form of FIST in the European Union suggest reasons to be optimistic. The two major applications of impact statements in the U.S. have been in environmental and regulatory policymaking. In both cases, the effects on policy appear to have been significant. Studies of the effects of Environmental Impact Statements (EIS) show the impact statements to have affected both the process and outcomes of federal agency policymaking. Agencies already familiar with environmental policy issues—for example, the Corps of Engineers and the Forest Service—were the most receptive; new and environmentally more responsive decisions were the result.<sup>300</sup> Agencies not familiar with environmental issues found the EIS more of a burden and their compliance was more spotty.<sup>301</sup> Yet even in these agencies, the EIS gave environmental groups a formal means to make their case to agency officials, thereby raising decisionmakers' awareness of a policy's environmental consequences.<sup>302</sup> Evaluations of executive orders requiring agencies to do a cost-benefit impact analysis of new regulations also find a significant effect on policymaking. The required impact statements appear to have checked the flow of proposed regulations, and to have done so at a moderate cost and with reasonably short delays.<sup>303</sup> We conclude from

300. See Stark Ackerman, *Observations on the Transformation of the Forest Service: The Effects of the National Environmental Policy Act on U.S. Forest Service Decision Making*, 20 ENVTL. L. 703, 708-10 (1990) (noting that the Forest Service has integrated NEPA into its basic decisionmaking process, resulting in an interdisciplinary approach, expanded public information and involvement, better-staffed and documented decisions, and increased centralization); see also SERGE TAYLOR, *MAKING BUREAUCRACIES THINK: THE ENVIRONMENTAL IMPACT STATEMENT STRATEGY OF ADMINISTRATIVE REFORM 150-62* (1984) (arguing that NEPA's EIS requirement has caused the Forest Service and the Corps of Engineers to change their behavior positively, for example, in considering low cost environmental mitigation strategies, and occasionally blocking environmentally harmful actions).

301. See generally Hanna J. Cortner, *A Case Analysis of Policy Implementation: The National Environmental Policy Act of 1969*, 16 NAT. RESOURCES J. 323, 323 (1976) (arguing that on the whole, agencies "reluctantly and incompletely complied with NEPA's [EIS] requirements").

302. See H. Paul Friesema & Paul J. Culhane, *Social Impacts, Politics, and the Environmental Impact Statement Process*, 16 NAT. RESOURCES J. 339, 349-51 (1976) (finding that the EIS process has been positive because it has increased access to agencies); see also Paul J. Culhane, *NEPA's Impacts on Federal Agencies, Anticipated and Unanticipated*, 20 ENVTL. L. 681, 690-93 (1990) (arguing that agencies at least now consider environmental impacts, and EISs have increased the number of environmentalists on staffs and public participation in agency decisionmaking).

303. See Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1088 (1986) ("The minor costs resulting from briefly delaying the implementation of regulations that OMB ultimately approves as cost-effective . . . are a small price to pay for avoiding the huge costs of issuing ill-considered regulations."). But see Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1062-63, 1065 (1986) (describing the purpose of impact statements as to "cut back significantly, if not destroy the regulatory system established by Congress," but noting that "the Administration has imposed a significant price on the public resulting from the delay it causes in adoption of needed protections").

this brief survey of the U.S. experience that impact statements can have significant effects on the process and outcomes of policymaking, largely by raising the saliency of valued outcomes previously neglected when policies were chosen. This is exactly what we hope FIST might do for federalism when the national government sets regulations.

A procedure very similar to FIST is now at work in the European Union. The 1992 Maastricht Treaty on European Union has made a principle for protecting decentralized policymaking—known as “subsidiarity”—a central tenet for the new Union. According to subsidiarity, the European Community (the “central” government of the Union) should refrain from acting on policy, even if the Treaty allows such actions, if the objectives of the policy could be effectively served by one of the member states. In November 1993, the European Commission (the “executive” branch of the Union) produced a report entitled “Adaptation of Community Legislation to the Subsidiarity Principle,” outlining how the subsidiarity principle might be implemented within Community decisionmaking.<sup>304</sup> In effect, the report recommended a version of FIST.<sup>305</sup> Initial analysis by the Commission shows that meeting the subsidiarity guidelines of the Adaptation Report has led the Commission to curtail several legislative initiatives previously favored by the Commission.<sup>306</sup>

The Court’s role in FIST is to ensure that the FIST process works effectively. As a process check the Court should ask: Does each national regulation approved by Congress have an accompanying FIST, and does that FIST answer the seven questions posed in Figure 6? *We do not see the Court reviewing the substantive merits of the proposed national regulation.* Rather, we prefer the role the Court has assigned to itself in environmental policymaking. In this arena, the Court has avoided any substantive interpretation of the National Environmental Policy Act and the accompanying Environmental Impact Statements, choosing instead to focus on ensuring that agencies follow NEPA-approved procedures.<sup>307</sup> In this

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304. Report to the European Council on the Adaptation of Community Legislation to the Subsidiarity Principle from the Commission on European Communities, COM(93)545 final.

305. Indeed, Professor Bermann, in an extensive commentary on the application of subsidiarity in the European Community, calls the implementation requirement a “subsidiarity impact analysis.” Bermann, *supra* note 1, at 379.

306. *See id.* at 381.

307. *See, e.g.,* Strycker’s Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980) (per curiam) (“[O]nce an agency has made a decision subject to NEPA’s procedural requirements, the only role for a court is to ensure that the agency has considered the environmental consequences . . . .”); Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, 435 U.S. 519, 548 (1978) (holding that a court cannot review and overturn an agency rulemaking proceeding so long as the agency has complied with statutorily prescribed procedural minima). Taylor summarizes what seems to be the prevailing view on the role of the Court in NEPA litigation: “The court rulings show a reluctance on the part of courts to read substantive duties into the NEPA statute, rather less restraint in regard to ‘burden of proof’ and ‘level of detail’ rules, and a general willingness to invent, elaborate, and review ‘procedural’ duties.” TAYLOR, *supra* note 300, at 232.

role, the Court has been successful; agencies have generally complied with NEPA's requirements. We would hope for a similar success in the enforcement of FIST reviews.

If approved, implemented, and successfully enforced, FIST has the potential to move our regulatory economy closer still to its "Federalism Frontier."<sup>308</sup> FIST should do so by protecting the valid contribution of state policymaking to political participation while still allowing the national government to adopt business regulations that improve economic efficiency. FIST's contribution is shown in Figure 5 by the dashed arrows radiating from point *ESD* (or *ESD'*). FIST's central contribution is to expose potentially inefficient national regulations to public debate. Hopefully, the debate will lead to the abandonment of policies that threaten to lower efficiency ( $\Delta$ ) below the levels made possible through our extended state-action doctrine alone. Hence, no FIST "arrows" point down from *ESD* (or *ESD'*). FIST will allow political participation in regulatory policymaking to decline, but only if there are potential efficiency gains. Increasing efficiency ( $\Delta$ ) but declining participation ( $\Phi$ ) may be a common outcome of a FIST review as congressionally approved and FIST-sanctioned national policies pre-empt state policies. In those cases, the FIST "arrow" points upward but back to the left (northwest) in Figure 5. In certain special cases, FIST might improve both efficiency and participation—for example, if the FIST-sanctioned national policy encourages interstate Coasian bargains to resolve *interstate* regulatory spillovers.<sup>309</sup> In this case, the FIST "arrow" points outward (northeast) from *ESD* (or *ESD'*).

We are cautiously optimistic about the successful implementation of the FIST outlined in Figure 6. Previous government experience with impact statements in the U.S. and Europe suggests that FIST can provide Congress with better information about the effects of proposed regulations. Better information will not guarantee better regulatory outcomes, but it may help us to avoid highly inefficient regulations, and it could substantially improve the quality of the decisionmaking process.

## VII. Conclusion

The conflict between state and federal interests in the design and implementation of the regulation of business has a longstanding U.S. constitutional history. The conflict has typically been resolved, through application of the Supremacy Clause, in favor of federal regulation. However, with the Court's landmark 1943 decision in *Parker v. Brown*,

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308. See *supra* Figure 5.

309. In these cases the FIST review would answer Question 1 as NO, Question 2 as NO, Question 3 as YES (Coasian agreements are encouraged), Question 4 as YES, and Question 7 as YES (there is no loss in participation).

which exempted certain state regulatory actions from the Sherman Act, the tide turned. Unfortunately, the Court's evolving antitrust state-action doctrine in *Parker* and its progeny appears to many legal commentators to be at best confused, and at worst, seriously misguided.

The problems with the present doctrine can be traced to the lack of a clearly articulated conceptual framework for the Court's thinking on matters of regulatory federalism. Part II of this Article has sought to provide that framework by spelling out a theory of federalism that draws the clear connection between the structure of government decisionmaking and the valued federalist goals of political participation and economic welfare. In contrast to alternative theories of federalism grounded solely in economics, our theory is explicitly *political*, showing how the number of governments and their legislative and executive institutions enhance, or diminish, participation and efficiency.

Parts III and IV applied our conceptual framework to show the strengths and weaknesses of the Court's present state-action doctrine. Part III has shown the present doctrine to be an important first step toward achieving regulatory federalism's full participatory and economic potential. In the light of our federalism theory, the Court's present two-pronged *Midcal* test—granting exemptions from federal antitrust laws to “clearly articulated” and “actively supervised” state regulations—was seen to make a potentially significant contribution towards maximizing the valued federalist goal of political participation. Part IV argued that more can be done, however. Moving beyond *Midcal*'s focus on political participation, we offered our own two-pronged economic spillover test—denying exemptions to state regulations with “significant state spillovers” unsupported by a “negotiated interstate agreement”—to encourage the second federalist goal of economic efficiency.

Adding our spillover test to the Court's current *Midcal* test creates our extended state-action doctrine, which (as Part V argued) moves the federalist regulatory economy a significant way towards its full potential. Importantly, the extended state-action doctrine will not require the courts to choose explicit regulatory outcomes or regulatory institutions. The extended doctrine seeks to improve local and state regulatory policymaking and, in the case of monopoly spillovers, to prevent state regulations from circumventing the central government's efforts toward economic efficiency.

But the extended doctrine provides no protections for state policymaking. Part VI sought to restore the federalist balance. Consistent with the Court's Commerce Clause/Tenth Amendment jurisprudence in *Garcia* and *Lopez*, Part VI offered a seven-step guide to congressional decision-making—called a Federalism Impact Statement, or FIST—to improve national regulatory policymaking and, in the case of national regulatory inefficiencies, to prevent such regulations from overriding more

participatory local and state policies. The courts would enforce the application of FIST.

By monitoring but also protecting the municipal, state, and national political institutions that set business regulations, courts can play an essential role in the design of good regulatory policies. The judiciary should set and enforce the rules for the *process* of policymaking—ideally our extended state-action doctrine plus FIST—but it should leave to the elected branches of government in our federalist democracy the task of actually choosing the policies that regulate the business economy.

