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"SOVEREIGN" STATE POLICY AND STATE ACTION ANTITRUST IMMUNITY

JOHN F. HART*

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INTRODUCTION

THE modern state action doctrine, derived from *Parker v. Brown*, gives antitrust immunity under certain circumstances both to regulatory actions of state and local governments and to private conduct regulated by state or local government. For a decade, the Supreme Court has determined the scope of state action immunity using a formal, procedural test that requires that an anticompetitive restraint implement state regulatory policies and that private anticompetitive conduct be governmentally supervised. The doctrine's purpose is to "resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws, unfettered competition in the marketplace." The resulting resolution is important to federalism because the regulatory autonomy of state and local governments is at stake. The resolution is important to antitrust goals because state and local regulation can serve as an especially effective device for facilitating cartelization and for protection of monopoly profits.

2. 317 U.S. 341 (1943).
3. The Court has referred to the effect of the state action doctrine as "immunity," e.g., *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 55 (1985); *Parker v. Brown*, 317 U.S. 341, 351 (1943), and as "exemption," e.g., *Southern Motor Carriers*, 471 U.S. at 55 n.18; *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 45 (1985); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978). This Article uses the term immunity. The point of the doctrine is that the Sherman Act was not intended to apply to a certain class of state regulatory restraints. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790 (1975) (grant of immunity depends on whether "an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe"); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 393 n.8 (1978). This Article will not attempt to treat authoritatively the related "preemption" doctrine, whose precise relation to the state action doctrine is still uncertain. See infra note 78.
4. See, e.g., *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) ("First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." (citing *City of Lafayette*, 435 U.S. at 410)). In the last decade, the Court has substantially eased the requirements for immunity—particularly the policy requirement. See infra notes 85-89 and accompanying text.
6. In addition to the legislatures, supreme courts and agencies of each state, there are tens of thousands of units of local government whose regulatory decisionmaking potentially is affected by this doctrine. See *City of Lafayette*, 435 U.S. at 407 & n.34 (1972 survey by the census bureau indicated 62,437 county, municipal and special district governmental units in United States). In the Supreme Court's cases, questions of the doctrine's application have arisen in such contexts as state regulation of lawyers' advertising, liquor pricing, truckers' rates and relocation of automobile dealerships, municipal regulation of cable television service and municipal provision of electricity and sewage services. See infra notes 64-66, 120, 219-235, 116, 126 & 136 and accompanying text.
7. A former Commissioner of the Federal Trade Commission has stated that "anticompetitive acts by state and local governments represent one of the most significant examples of the effective creation and maintenance of monopoly power in the U.S. economy." Douglas & Mullenix, *Cities and States as Agents in Restraint of Trade*, 31 Antitrust Bull. 505, 505 (1986). Government regulation can insulate monopolists and cartels.
A prominent theme in recent scholarship is evaluation of the state action doctrine in terms of its impact on economic efficiency. Not all state and local regulation ultimately threatens antitrust goals, because regulatory displacement of competition is sometimes efficient. In this context the Sherman Act is viewed as expressing a preference for efficiency, satisfiable in certain markets by efficient regulation, rather than a categorical preference for competitive markets over regulation. Thus, it is inefficient state and local regulation that raises the direct policy conflict between antitrust objectives and state and local self-determination. Inefficiency in state and local regulation is attributed principally to two factors. First, regulated entities may influence or “capture” the regulatory process in ways that benefit themselves instead of consumers. For example, a regulated industry may persuade regulators to implement measures that effectively raise entry barriers or limit price competition. Second, a divergence between the territorial limits of the regulating body and the market in which the regulatory impact is felt may mean that the regulatory process “exports” externalities to those beyond its boundaries. For example, an effectively self-regulating municipal utility that serves beyond the municipal boundaries may implement practices that benefit its own citizens at the expense of noncitizens.

Proposals to realign the scope of state action immunity according to concepts of efficiency vary widely in the degree to which they would displace state and local regulatory autonomy. Perhaps most comprehensive is Professor Cirace’s proposal to deny immunity where state or local regulation is “broader than the scope of substantial market failure” presented or “whose implementation involves . . . official misconduct, from problems they otherwise would face and thus permit much more stable enjoyment of monopoly profits than in an unregulated sector. See R. Posner, Economic Analysis of Law 497 & n.2 (3d ed. 1986); Douglas & Mullenix, supra, at 509-12; infra notes 199-200, 326-30 and accompanying text.


11. “Capture” is said to occur when a regulatory agency, supposedly established to regulate a given industry in the public interest, falls under the influence of and benefits the regulated industry at the expense of the public welfare. See Wiley, supra note 8, at 723-26; infra notes 326-28 and accompanying text.

12. See infra notes 329-30 and accompanying text.

discrimination, or conflict of interest.”14 Professor Wiley proposes denying immunity to state or local regulation that “restrains market rivalry” and “does not respond directly to a substantial market inefficiency” if it is “the product of capture in the sense that it originated from the decisive political efforts of producers who stand to profit from its competitive restraint.”15 Hovenkamp and MacKerron urge that the scope of immunity for state and local regulation should depend only upon the federal court’s “determination of which unit of government is the optimal economic regulator in a certain market.”16 Judge Easterbrook proposes to give immunity to all state and local regulation, “so long as the residents of the state that adopts the regulation also bear the whole monopoly overcharge.”17

These proposals all share an unfortunate disability: they rely on substantive criteria that the Supreme Court has conclusively rejected in determining the scope of state action immunity. The Court briefly applied substantive criteria over a decade ago,18 before adopting its exclusively procedural paradigm. In applying this paradigm, the Court has refused to consider the substantive merits of the design or performance of state or local regulatory institutions19 or to make distinctions based on private

14. Cirace, supra note 8, at 498. An exception is made for displacement of competition by a public monopoly created and operated by the state government itself. In such cases “the intent of the state legislation is almost certainly to benefit the public in general as opposed to a narrow special interest.” Id. at 497. Public monopolies operated by local governments would not come within this exception. Id. at 497 n.100; see Brennan, supra note 8, at 406 n.6, 410-19.

15. Wiley, supra note 8, at 743; see id. at 745, 762-73. This test applies to regulation not subject to an independent antitrust exemption. See id. at 745.

16. Hovenkamp & Mackerron, supra note 8, at 724; see id. at 774-77. The optimal regulator, if entitled to regulate, “should be entitled to determine the nature and scope of the regulation, subject only to preemption by an explicit federal regulatory statute.” Id. at 767-68.

17. Easterbrook, supra note 8, at 45; see id. at 49 (“if a state chooses to allow its municipalities to export overcharges elsewhere within the state, it is hard to see why that should be any concern of the antitrust laws”); Levmore, Interstate Exploitation and Judicial Intervention, 69 Va. L. Rev. 563, 627 (1983) (“the state action exemption should be reformulated to exclude circumstances ripe for interstate exploitation”). Professor Jorde, who generally endorses the Supreme Court’s procedural test, nonetheless recommends denying immunity where state or local regulations impose substantial extraterritorial burdens. See Jorde, supra note 10, at 253-56.

18. See, e.g., Cantor, 428 U.S. at 597 (immunity must be “necessary in order to make the regulatory Act work, 'and even then only to the minimum extent necessary'” (quoting Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963))); Cantor, 428 U.S. at 610 (Blackmun, J., concurring) (“state-sanctioned anticompetitive activity must fall like any other if its potential harms outweigh its benefits”). In granting immunity to disciplinary rules of a state supreme court in Bates v. State Bar of Ariz., 433 U.S. 350 (1977), the Court suggested that it was important that such regulation was essential to “the State's power to protect the public,” id. at 361, and that attorney discipline was a traditional subject of state regulation. See id. at 360-62; infra notes 65-72 and accompanying text.

19. For example, in Parker, state-sanctioned price supports for raisins imposed pursuant to a California statute received immunity, although the impact of the price increases fell largely on consumers outside California. The fact that the Court continues to treat Parker as a paradigmatic example of state action meriting immunity, see, e.g., Southern
control of, or influence over, regulatory decision making.\textsuperscript{20}

The Court's insistence on using exclusively procedural criteria for state action immunity is now well-enough established to suggest that it will be permanent. Given such a posture, a practical choice confronts those who criticize the procedural test on efficiency grounds: whether to tinker with the Court's procedural paradigm to make it more responsive to efficiency concerns or to give up on efficiency goals in this area and yield to more deferential solutions proposed in the name of federalism.\textsuperscript{21} If indeed the critics are correct in their assessment that the procedural paradigm utterly fails to advance antitrust's efficiency objectives, then, if substantive criteria are impermissible, there would seem to be no reason not to readjust the current balance greatly in favor of principles of federalism.\textsuperscript{22}

This Article advances a contrary argument: that the procedural paradigm is capable of advancing antitrust's efficiency objectives to a worthwhile extent, albeit less than explicitly substantive criteria. Within the constraints posed by the Court's procedural paradigm, this Article proposes a more stringent version of the state policy requirement that would deny immunity to much of the state and local regulation that is most inefficient. This effort focuses on the Court's distinction between sovereign and nonsovereign policymaking. The distinction is meant to confine immunity to restraints that implement policy of the "[s]tate acting as sovereign," giving only derivative immunity to agencies, local governments and regulated private parties.\textsuperscript{23} The proposed version of the state policy requirement reinforces this distinction by requiring a much closer fit than the current test requires between the expression of state policy and nonsovereign regulation. If the Court intends to remain within the

\textit{Motor Carriers}, 471 U.S. at 56-57, suggests that the Court will not consider extraterritorial externalities to be a relevant factor. \textit{See Parker}, 317 U.S. at 345.

Although the procedural paradigm effectively restricts the institutional mechanism available to states for displacing competition, it does not otherwise put any outside limit on the state's power to regulate or evaluate the impact of such regulation. \textit{See Southern Motor Carriers}, 471 U.S. at 56 & n.19, 57 n.21.

20. In \textit{Goldfarb} the Court observed that the state bar association, a state agency, "voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act." 421 U.S. at 792. In \textit{Bates}, however, the Court rejected the argument that "no immunity should result from the bar's success in having the Code adopted by the State." 435 U.S. at 360. Further, in \textit{City of Lafayette} the Court declared, commenting on \textit{Goldfarb}, that "the fact that the ancillary effect of the State Bar's policy, or even the conscious desire on its part, may have been to benefit the lawyers it regulated cannot transmute the State Bar's official actions into those of a private organization." 435 U.S. at 411 n.41; \textit{see Town of Hallie}, 471 U.S. at 45 (city government, unlike private parties, can be presumed to function in the public interest).


24. \textit{See infra} notes 79-84 and accompanying text.
confines of its current procedural paradigm, as seems likely, a reinvigorated, nontrivial policy requirement may achieve a worthwhile degree of efficiency nonetheless.

Part I provides a setting for this argument. It briefly introduces the Supreme Court's state action doctrine and the doctrine's recent evolution, particularly that of the state policy requirement on which this Article will concentrate. Part I emphasizes that when the Court speaks of "state policy" in this context, it means a policy of the state legislature or supreme court (the "sovereign" parts of state government), as opposed to one of an agency or local government (the "nonsovereign" parts).25 Despite the clarity of the distinction, the Court's opinions demonstrate exceptional ambiguity as to the specificity with which a nonsovereign restraint must correspond to sovereign policy. The Court has gone from requiring that "the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'"26 to its current standard that the policy element requires only a showing that the responsible sovereign body "clearly intends to displace competition in a particular field with a regulatory structure" (the "displacement-of-competition" standard).27

Part I also considers the attacks on the Court's distinction between sovereign and nonsovereign policymaking in the test for immunity. The main criticisms are that the sovereign/nonsovereign distinction has no basis in the Sherman Act, that it offends federalism, and that it is irrelevant to the Court's objectives. Although the Local Government Antitrust Act of 198428 is invoked freely in support of such criticisms, this Part shows that this statute and its legislative history support, rather than undercut, the Court's sovereign policymaking concept.29

In contrast to the evolving standard used to implement the state policy requirement, the Court's apparent underlying objectives for the requirement have remained fairly stable. Part II identifies the Court's objectives as confining immunity to restraints that implement sovereign policy, while protecting the usefulness of cities and state agencies as instruments of such policy.30 Evaluation of the displacement-of-competition standard reveals its failure to achieve these objectives. Part II argues that the laxity of the displacement-of-competition standard reflects an imprecise and inaccurate concept of state policy, as the Court has used that term.31 Accordingly, it gives immunity to nonsovereign restraints that cannot plausibly be said to implement regulatory policy formulated by the sover-

25. See infra notes 79-84 and accompanying text.
26. Midcal, 445 U.S. at 105 (quoting City of Lafayette, 435 U.S. at 410); see infra notes 76-78 and accompanying text.
27. Southern Motor Carriers, 471 U.S. at 64.
29. See infra notes 142-51, 161-63 and accompanying text.
30. See infra notes 183-87 and accompanying text.
31. See infra notes 196-215 and accompanying text.
eign level of state government. Part II also demonstrates the inaccuracy of the Court's assertion that any version of the policy requirement more exacting than the displacement-of-competition standard would disrupt the functioning of agencies and local government as instruments of state policy.

Part III proposes a version of the state policy requirement that serves both of the Court's purposes. The proposed standard would give a nonsovereign regulatory restraint immunity only when a sovereign-level part of state government has affirmatively expressed a policy to displace competition in the pertinent field in the form and magnitude presented by the challenged restraint. This version of the policy requirement protects the flexibility of state and local government as tools of sovereign state policy, while giving immunity only to nonsovereign restraints that implement sovereign state policy.

This standard would leave agencies and local government with considerable freedom of action, while confining antitrust immunity to restraints that, in a meaningful sense, implement an affirmative policy of the state. Applying this standard to the cases decided by the Court yields results consistent with virtually all of the results in the Court's opinions, thus addressing the Court's concern for maintaining continuity in this area. Last, because such a standard would tend to deny immunity to some of the most inefficient state and local regulation, its impact on social welfare would be substantially superior to that of the existing standard.

I. DOCTRINAL DEVELOPMENT

A. Overview

The modern state action antitrust doctrine originated with the Supreme Court's opinion in Parker v. Brown in 1943. Under a California statute, the state Agricultural Prorate Advisory Commission approved a program of marketing controls for Raisin Proration Zone No. 1, according to which all raisins grown in that zone—virtually all of the raisins consumed in America—had to be delivered to the program committee for grading and allocation into pools. The committee variously performed or controlled the marketing of the subject crop, effectively determining the timing and volume of all sales and, to a large extent, the price. An affected raisin grower brought an antitrust action against the

32. See infra note 216 and accompanying text.
33. See infra notes 257-63 and accompanying text.
34. See infra notes 266-74 and accompanying text.
35. See infra notes 280-88 and accompanying text.
36. See infra notes 291-325 and accompanying text.
37. See infra notes 326-52 and accompanying text.
38. 317 U.S. 341 (1943).
39. Id. at 347-48.
40. Id. at 346.
state's Director of Agriculture, the Commission, the Raisin Proration Zone, and the program committee.\textsuperscript{41} The Supreme Court held that the Sherman Act did not prohibit these marketing controls.\textsuperscript{42}

Not surprisingly, interpretations of \textit{Parker v. Brown} have varied widely. The opinion identified a category of conduct that is immune from the Sherman Act\textsuperscript{43} and determined that the marketing program of Raisin Proration Zone No. 1 fell within this category, but otherwise provided little guidance. Certain language in \textit{Parker} suggests that any conduct of any part of state government constitutes state action.\textsuperscript{44} Overall, however, the opinion suggests that the administrative supervision of the growers and the involvement of the legislature were critical to the Court's holding, indicating a much more qualified definition of state action.\textsuperscript{45} The opinion's ambiguity indeed suggests that the Court was not

\begin{enumerate}
\item \textit{Id.} at 344.
\item See \textit{id.} at 350-52.
\item The category is "state action," or more precisely, "state action or official action directed by a state." \textit{Id.} at 351; cf. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 411-12 (1978) (plurality opinion).
\item See, e.g., Parker, 317 U.S. at 352 ("prohibition of individual and not state action"). One interpretation of \textit{Parker} is that all non-"private" action is state action qualifying for immunity. \textit{See City of Lafayette}, 435 U.S. at 429 (Stewart, J., dissenting) (\textit{Parker} distinguished between "private action and governmental action," not between "actions of a state legislature and those of other governmental units."); Jorde, \textit{supra} note 10, at 229 (construing \textit{Parker} as applying Sherman Act only to private parties). Professor Wiley interprets \textit{Parker} even more broadly, finding in \textit{Parker} a states' rights premise of no pre-emption, even in circumstances where the state simply authorizes anticompetitive conduct without any regulatory supervision. \textit{See Wiley, supra} note 8, at 717-23; cf. Page, \textit{supra} note 10, at 1127-28 (supervision requirement inconsistent with \textit{Parker}).
\item Taking the view that \textit{Parker} stands for giving immunity to all non-private action, however, renders other statements in the opinion surplusage. First, the opinion distinguishes between "a state" and "its officers and agents," and between "state action" and "official action directed by a state." 317 U.S. at 350-51. Second, the opinion states that the Sherman Act was not intended to "restrain a state or its officers or agents from activities directed by its legislature." 317 U.S. at 350-51 (emphasis added), or to "restrain state action or official action directed by a state," \textit{id.} at 351 (emphasis added). Third, the opinion emphasizes how the pertinent actions of the agency followed and fit the legislative command. The marketing program "derived its authority and its efficacy from the legislative command." \textit{Id.} at 350. The statute was a "state command to the Commission and to the program committee." \textit{Id.} at 352. "The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application." \textit{Id.} The "state . . . as sovereign, imposed the restraint as an act of government." \textit{Id.}

These remarks, taken together, suggest that the pronounced legislative role in \textit{Parker} was essential, rather than incidental, to the Court's rationale. \textit{See Town of Hallie v. City of Eau Claire}, 471 U.S. 34, 38 (1985) (\textit{Parker} "refused to construe the Sherman Act as applying to the anticompetitive conduct of a State acting through its legislature"); \textit{City of Lafayette}, 435 U.S. at 412 (plurality opinion) (\textit{Parker} limited immunity to "'official action directed by a state' " (quoting \textit{Parker}, 317 U.S. at 351)); Cantor v. Detroit Edison Co., 428 U.S. 579, 591 (1976) (\textit{Parker} contains "carefully selected language which plainly limited the Court's holding to official action taken by state officials").

\textit{Parker} asserts that a state "does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." 317 U.S. at 351. Professor Wiley views this statement as "antitrust federalism's first suggestion of a doctrinally restricted definition of 'state' policy," \textit{Wiley, supra} note 8, at 730, and as inconsistent with "\textit{Parker}'s premise of deferring to state and local decisionmak-
trying to state a conclusive, detailed rule, but only trying to define the concept of state action antitrust immunity to the limited extent necessary to resolve the case before it. The particular indeterminacy of Parker is illustrated by the fact that the Court, in its varied approaches to the state action issue, uniformly has claimed to be acting consistently with Parker. The Court still treats this vague opinion, over forty years later, as the "starting point in any analysis involving the state action doctrine."

The Court did not elaborate substantially on the state action doctrine until over thirty years later, in Goldfarb v. Virginia State Bar. There, state and county bar associations sought immunity for an advisory minimum fee schedule issued by the county bar and patterned after the state bar's fee schedule, which was indirectly enforced by the state bar's ethical pronouncements regarding fee-setting. In denying immunity, the Court cited Parker for the proposition that "[t]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign." The state supreme court con

Id. Instead of identifying an unqualified states' rights premise in Parker that is contradicted within the same opinion, however, it makes more sense to infer from the context that no such unqualified premise was intended, especially when this purported premise was "[s]urprisingly" ignored by two succeeding opinions, id. at 720, and "trampled[!]" by the rest of the Court's opinions. Id. at 722; see 1 P. Areeda & D. Turner, Antitrust Law ¶ 213, at 71-79 (1978) (regulatory supervision essential to result in Parker); Patrick v. Burget, 108 S. Ct. 1658 (1988) (same).

Furthermore, dictum in United States v. South-Eastern Underwriters Ass'n. undercuts the view that a supervision requirement is inconsistent with Parker. 322 U.S. 533, 542 (1944). There the Court, in determining that the insurance business fell within the reach of the Sherman Act, considered the argument that this would disrupt existing state regulation: "The argument that the Sherman Act necessarily invalidates many state laws regulating insurance we regard as exaggerated. Few states go so far as to permit private insurance companies, without state supervision, to agree upon and fix uniform insurance rates." 322 U.S. at 562 (emphasis added) (citing Parker, 317 U.S. at 350-52).

46. See 1 P. Areeda & D. Turner, supra note 45, ¶ 212c, at 70.


48. Town of Hallie, 471 U.S. at 38; Hoover, 466 U.S. at 567.

49. 421 U.S. 773 (1975). In Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951), the Court stated that "when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids." Id. at 389 (citing Parker, 317 U.S. at 350). In Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962), the Court applied Parker, but with no further elucidation of the test for immunity. Id. at 706.

50. See Goldfarb, 421 U.S. at 778 n.6, 782-83, 791 n.21.

51. Id. at 790 (citing Parker, 317 U.S. at 350-52 and Continental Ore Co., 370 U.S. at 706-07).
stituted the state acting as sovereign in this context. The state bar association was a state agency but did not share this sovereign status; its actions did not qualify for immunity any more than those of the county bar association because they were not compelled by the supreme court.

This distinction between sovereign and nonsovereign parts of government has endured as a fundamental part of the Court's analysis. The actions of the legislature and supreme court, each an "ultimate body wielding the State's power" in its respective sphere, are regarded as those of "the State itself," "the State as sovereign," and "the sovereign itself." In contrast, the state's subordinate bodies, such as state agencies and local government, are nonsovereign.

Parker suggests an essentially procedural inquiry into what actions of state government constitute "state action or official action directed by a state." Goldfarb defines the compulsion requirement as a threshold criterion of state action, but does not explore what further criteria might apply if that threshold were attained. The Court's next two opinions, however, explicitly identify substantive, as well as procedural, factors bearing on immunity.

In Cantor v. Detroit Edison Co., a private utility regulated by a state public service commission sought immunity. A plurality held that because the case did not "call into question the legality of any act of the State of Michigan or any of its officials or agents," it was not controlled by Parker. Immunity would depend on the same test applied to claims of immunity based on federal regulation: whether "exemption was necessary . . . to make the regulatory Act work."

In Bates v. State Bar of Arizona, the Court reaffirmed the Goldfarb sovereign compulsion requirement in granting immunity to a disciplinary

52. See id. at 790-92. The Court also observed that the legislature had "authorized its highest court to regulate the practice of law." Id. at 789.
53. See id. at 790-92.
55. Southern Motor Carriers, 471 U.S. at 63.
56. Id. at 64 (citing Goldfarb, 421 U.S. at 790) (emphasis omitted).
57. Hoover, 466 U.S. at 569.
58. See id. at 568-69 (citing City of Boulder, 455 U.S. at 54).
59. Parker, 317 U.S. at 351. That is, Parker focused on who approved and implemented the challenged restraint, rather than on the impact, merits or traditional status of the restraint.
60. See Goldfarb, 421 U.S. at 790-92.
62. See id. at 582-83. At issue was the utility's program of providing lightbulbs to consumers at cost. See id. at 581-82. Because this program was set forth in a tariff approved by the commission, it was binding on the utility. See id.
63. Id. at 591-92; see Bates, 433 U.S. at 361 & n.13. The Court has since tacitly rejected this distinction. See infra notes 77-78 and accompanying text.
64. Cantor, 428 U.S. at 597. The Court has reexplained denial of immunity in Cantor by the fact that "the Michigan Legislature had indicated no intention to displace competition in the relevant market." Southern Motor Carriers, 471 U.S. at 64.
rule forbidding advertising by attorneys. The rule had been proposed by the state bar association, but once adopted, it became "the affirmative command of the Arizona Supreme Court . . . the ultimate body wielding the State's power over the practice of law" and was thus "compelled by direction of the State acting as a sovereign." The Court also suggested additional criteria for Parker v. Brown immunity: the regulation was essential to "the State's power to protect the public;" the practice of law was a traditional subject of state regulation; and the state supreme court's policy was "clearly and affirmatively expressed" and its "supervision" of the state bar was "active." The substantive criteria for state action immunity identified in Cantor and Bates warrant greater displacement of state regulatory autonomy than any other version of the Court's test for immunity.

The Court's retreat from such intrusive scrutiny began in City of Lafayette v. Louisiana Power & Light Co. in 1978. Since then, the Court has expressed the test for state action immunity in purely procedural terms, looking to a restraint's institutional pedigree rather than to its substantive merits. In California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., the Court expressed this procedural test in the two-part paradigm that since has governed, in some form, the Court's immunity analysis: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." The Court's most

66. See id. at 360-63. The Court summarized Parker as holding that "the Sherman Act was not intended to apply against certain state action." Id. at 359 (emphasis added).

67. Id. at 360.

68. Id. (quoting Goldfarb, 421 U.S. at 791).

69. Id. at 361; see id. at 360 n.11 (denying immunity in that case would have "undesired effect" of diminishing state's authority to regulate professions).

70. See id. at 362.

71. Id. The Arizona state bar seems to have been constituted as a state agency under the supervision of the supreme court, see id. at 353 n.3, as in Goldfarb. See 421 U.S. at 776 n.2.

72. Professor Wiley asserts that since the 1970's, the Court's state action cases have "intruded more and more on state and local regulatory policy." Wiley, supra note 8, at 714; see id. at 728. The Court's opinions in Goldfarb, Cantor and Bates roughly fit this pattern, but City of Lafayette inaugurates an exclusively procedural test, and the Court's application of this test has become increasingly lax. See infra notes 85-89, 174-76 and accompanying text. At the same time, City of Lafayette, as the Court's first application of the antitrust laws to cities, may seem to mark an expanded intrusion. Its rationale, however, fits within the sovereign/nonsovereign parameters established by the Court in Goldfarb and Bates. See supra notes 51-58, 67 and accompanying text; infra notes 79-84 and accompanying text.

73. 435 U.S. 389 (1978) (plurality opinion).

74. The Court has since expressly renounced inquiry into the necessity for challenged state regulation. See Southern Motor Carriers, 471 U.S. at 57 n.21. This and other cases applying exclusively procedural criteria are discussed individually in the following section. See infra notes 101-136 and accompanying text.


76. Id. at 105 (citing City of Lafayette, 435 U.S. at 410 (plurality opinion)). See generally P. Areeda & H. Hovenkamp, Antitrust Law ¶¶ 212.1-212.9 (Supp. 1987).
recent cases have reaffirmed the Midcal test as the proper approach to state action analysis, whether the defendant is a part of state or local government or a private party regulated by state or local government.

The Court's use of the term "state policy" in the policy requirement carries a specialized meaning. State policy means policy set by one of the sovereign parts of state government, as opposed to a nonsovereign part. Conduct that is "in fact that of the state legislature or supreme court" is deemed, without further inquiry, to represent state policy and to satisfy that criterion for immunity. The policy element of the Midcal test be-

77. See 324 Liquor Corp. v. Duffy, 107 S. Ct. 720, 725 (1987) (quoting Midcal, 445 U.S. at 105); Southern Motor Carriers, 471 U.S. at 57 (quoting Midcal, 445 U.S. at 105); Town of Hallie, 471 U.S. at 39 (referring to the City of Lafayette "two-pronged test").

78. See Southern Motor Carriers, 471 U.S. at 56-57; see, e.g., Town of Hallie, 471 U.S. at 38; Cantor, 428 U.S. at 591-92.

A related doctrine is that of "preemption." In Fisher v. City of Berkeley, 475 U.S. 260 (1986), the appellant landlords argued that a city rent-control ordinance constituted a price-fixing violation under the Sherman Act. Id. at 265. The Court held that irreconcilable conflict between the state or local legislation and the antitrust laws, an established condition of preemption, required a showing of concerted action, and that without this showing, it was not necessary for the government defendant to show it was entitled to state action immunity. Id. at 264-70. The Berkeley ordinance was not preempted because there was no showing of concerted action between the city and the landlords. Id. at 269-70. The Court also noted, however, that some apparently unilateral government regulations may constitute "hybrid" restraints, in which regulatory "nonmarket mechanisms merely enforce private marketing decisions." Id. at 267-68.

It is not clear how much the preemption doctrine, so explained, alters the state action doctrine. Compare id. at 274-76 (Brennan, J., dissenting) (Fisher "discards" conventional state action doctrine) and Gifford, The Antitrust State-Action Doctrine After Fisher v. Berkeley, 39 Vand. L. Rev. 1257, 1281-86 (1986) (Fisher substantially alters prior state action doctrine) with Garland, supra note 21, at 503-07 (the preemption and state action tests ultimately converge); see also Wiley, The Berkeley Rent Control Case: Treating Victims as Villains, 1986 Sup. Ct. Rev. 157 (offers two explanations for Court's "apparent nonsense"). This article addresses only the conventional subject matter of the state action doctrine, without attempting to predict what inroads on its scope the preemption doctrine may effect.

79. See, e.g., Southern Motor Carriers, 471 U.S. at 63-64; Town of Hallie, 471 U.S. at 38-39; Hoover, 466 U.S. at 569-70; City of Boulder, 455 U.S. at 50-52. The word "state" has two different meanings in the Midcal test: state policy must come from a "sovereign" part of the state government, but "state" supervision does not have to be conducted by a "sovereign" part of the state government. See infra notes 90-93 and accompanying text. It is the supervision requirement that has changed in this respect, however, not the policy requirement. The language of both the policy and supervision requirements derives from Bates, 433 U.S. at 362, where it was the state supreme court that expressed the policy and supervised the pertinent conduct of the state bar. The supreme court, being "the ultimate body wielding the State's power" over the field in question, constituted "the State acting as a sovereign." Id. at 360 (quoting Goldfarb, 421 U.S. at 791).

80. See Hoover, 466 U.S. at 568-69.

81. The actions of the legislature and supreme court are regarded as those of "the State itself," Southern Motor Carriers, 471 U.S. at 63, "the State as sovereign," id. at 64 (emphasis in original) (citing Goldfarb, 421 U.S. at 790); see Goldfarb, 421 U.S. at 790 (citing Parker, 317 U.S. at 350-52 and Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 706-07 (1962)), and "the sovereign itself," Hoover, 466 U.S. at 569. A state supreme court's actions have sovereign status when it is "acting legislatively rather than judicially." Id. at 568. The Court has reserved the question of whether "the Governor of a State stands in the same position as the state legislature and supreme court
comes an issue only if the pertinent anticompetitive government conduct is that of a "nonsovereign state representative"—a "state instrumentality," such as an agency or local government. These "representatives" must be shown to be implementing state policy—policy of the legislature or supreme court. The Court's state action doctrine thus reflects deference to the legislative judgment of the sovereign states; its application to agencies and cities is only derivative.

The Court gradually has refined various aspects of the Midcal two-part procedural paradigm in ways that simplify and ease the requirements for immunity. The Court now construes the Midcal policy requirement as a displacement-of-competition standard, which is satisfied "[a]s long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure." It is not necessary for immunity that a legislature "expressly state in a statute or its legislative history that it intends for the delegated action to have anticompetitive effects." It is not sufficient, however, merely to show that a regulatory restraint is lawful under state law. Although Goldfarb indicated that immunity depended on compulsion by the state legislature or supreme court of the challenged conduct of nonsovereign parts of state government or of private parties, the Court now disclaims ever having required this; cur-

for purposes of the state-action doctrine." Id. at 568 n.17; cf. Deak-Perera Hawaii, Inc. v. Department of Transp., 745 F.2d 1281, 1282 (9th Cir. 1984) (Parker doctrine applicable to state executive branch action), cert. denied, 470 U.S. 1053 (1985); Jorde, supra note 10, at 241 n.89 (state governor should receive ipso facto immunity, but executive agencies should be treated like legislative agencies); Lopatka, The State of "State Action" Antitrust Immunity: A Progress Report, 46 La. L. Rev. 941, 1040 (1986) (executive branch action should be immune if within powers defined by state Constitution).

82. Hoover, 466 U.S. at 569 (citing City of Boulder, 455 U.S. at 54).
83. City of Lafayette, 435 U.S. at 411 n.41 (plurality opinion); see id. at 417.
84. See, e.g., Fisher v. City of Berkeley, 475 U.S. 260, 263 (1986) ("The ultimate source of [state action] immunity can be only the State, not its subdivisions"); Hoover, 466 U.S. at 567 (Parker, "principles of federalism and state sovereignty, . . . declined to construe the Sherman Act as prohibiting the anti-competitive actions of a State acting through its legislature"); City of Boulder, 455 U.S. at 50 ("the Parker exemption reflects the federalism principle that we are a Nation of States, a principle that makes no accommodation for sovereign subdivisions of States") (emphasis in original); infra notes 180-86 and accompanying text.
85. Southern Motor Carriers, 471 U.S. at 64; See Town of Hallie, 471 U.S. at 44; infra notes 133-36 and accompanying text.
86. Town of Hallie, 471 U.S. at 43.
87. See City of Lafayette, 435 U.S. at 414 n.44, 415 n.45 (plurality opinion).
88. In Goldfarb the Court stated that the "threshold inquiry" in state action cases was "whether the activity is required by the State acting as sovereign." 421 U.S. at 790. The Court denied immunity for restraints effected by a state agency (the state bar) and a private group (the county bar association) because the state supreme court had not "required the anticompetitive activities of either respondent." Id. In Bates, granting immunity, the Court stated that the challenged restraint, a disciplinary rule, was "the affirmative command of the Arizona Supreme Court" and that "the restraint is compelled by direction of the State acting as a sovereign." 433 U.S. at 360; see City of Lafayette, 435 U.S. at 411 n.41 (plurality opinion) ("anticompetitive actions of a state instrumentality not compelled by the State acting as sovereign are not immune from the antitrust laws").
rently, the state policy relied on for immunity may be permissive rather than mandatory. 89

The other half of the Midcal test, the active supervision requirement, does not apply where "the actor is a municipality." 90 Although the Court has hesitated to say so, 91 the supervision requirement also would seem to be a dead letter as applied to agency conduct. 92 In contrast, a private defendant seeking immunity still must show that its pertinent anticompetitive conduct has received active governmental supervision. 93 Thus, it seems the active supervision requirement now applies only to private conduct. What facts are necessary to satisfy this prong, however,

89. See Southern Motor Carriers, 471 U.S. at 59-61. The Court stated that compulsion had not been an issue in Goldfarb because the state bar had "compelled Fairfax County lawyers to adhere to a minimum-fee schedule." Id. at 60. In fact, however, no such compulsion existed. The fee schedule was formally advisory, and although the actions by the state bar comprised "a substantial influencing factor," Goldfarb, 421 U.S. at 778 n.6, the Court found that "the desire of attorneys to comply with announced professional norms," id. at 781, and "the assurance that other lawyers would not compete by underbidding," id. at 782, were other "factors" that "coalesced" to produce adherence to the fee schedules. Id. at 783.

90. Town of Hallie, 471 U.S. at 46. It will not be required that the legislature supervise a municipality's anticompetitive conduct. As the Court noted, application of this requirement to cities was suggested by the City of Lafayette plurality. Id.; see City of Lafayette, 435 U.S. at 410. In City of Boulder, the Court expressly left undecided whether the active supervision requirement should apply to municipal conduct. See 455 U.S. at 51 n.14.

91. See Town of Hallie, 471 U.S. at 46 n.10 (where "the actor is a state agency, it is likely that active state supervision [of the agency] would . . . not be required, although we do not here decide that issue").

92. See P. Areeda & H. Hovenkamp, supra note 76, ¶ 212.7, at 144; Jorde, supra note 10, at 245; Lopatka, supra note 81, at 1040-41.

Several earlier opinions suggest that the activities of agencies must be supervised by the legislature or supreme court to qualify for immunity. In Goldfarb the Court observed that although the state bar apparently was authorized to issue opinions interpreting disciplinary rules, it was not shown "that the Virginia Supreme Court approves the opinions." 421 U.S. at 791. In Bates, holding a disciplinary rule immune, the Court emphasized that the state bar performed its part in enforcing the rules under the "continuous supervision" of the supreme court. 433 U.S. at 361. In Hoover, the Court noted that it had "found the degree to which the state legislature or supreme court supervises its representative to be relevant to the inquiry." 466 U.S. at 569.

However, this purported requirement was not even mentioned in Southern Motor Carriers, and it does not appear in that case that there was any legislative supervision of the respective public service commissions. See 471 U.S. at 51. Nor did the Court mention a requirement of legislative supervision of the respective agencies in Midcal, 445 U.S. at 105-06, or in 324 Liquor Corp. v. Duffy, 107 S. Ct. 720, 725-26 (1987). In Parker itself, which the Court has always treated as an archetypal case of immune state action, the restraint "derived its authority and its efficacy from the legislative command of the state," 317 U.S. at 350, but there was no suggestion that the legislature supervised the work of the state Agricultural Prorate Advisory Commission. See id. at 345-48.

The Court's rationale for relieving local government of this form of scrutiny, whether persuasive or not, would also seem to apply to state agencies, although perhaps to a lesser degree. See Town of Hallie, 471 U.S. at 45 & n.9 (municipality may be presumed to act in the public interest, unlike private party, because of greater likelihood of exposure to public scrutiny).

93. See id. at 46 n.10.
remains unclear. The Court has never defined the minimum threshold constituting active supervision, but a token degree of supervision seems to suffice.\footnote{44. In Southern Motor Carriers, where it was deemed established that the common carriers' rate-making activities were actively supervised by the respective states, 471 U.S. at 62, the filed rates automatically took effect if the commission did not act within a specified period of time. See id. at 50-51; see also Town of Hallie, 471 U.S. at 46 ("the requirement of active state supervision serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy").}

B. The State Policy Requirement: A Study in Ambivalence

The policy requirement proposed in this Article essentially revives and clarifies the Midcal version.\footnote{95. Midcal suggests a stricter supervision requirement. There the Court held that the state's resale price maintenance and price posting program for the wholesale wine market was not actively supervised by the state. 445 U.S. at 105-06. The Court observed that the statute "simply authorizes price setting and enforces the prices established by private parties" and that the state did not establish the prices, review their reasonableness, regulate the terms of the fair trade contracts, monitor market conditions or "engage in any 'pointed reexamination' of the program." Id. The Court, however, did not specify a requisite minimum degree of supervision. The Court also found a lack of active supervision in 324 Liquor Corp. v. Duffy, 107 S. Ct. 720, 729 (1987). In Patrick v. Burget, 108 S. Ct. 1658, 1663-66 (1988), the Court held that, to satisfy the supervision requirement, state officials must have and exercise power to review private anticompetitive actions. See infra notes 266-78 and accompanying text.}

While the Court itself emphatically claims to be following Midcal,\footnote{96. E.g., Southern Motor Carriers, 471 U.S. at 58, 62.} the cases demonstrate the duality in the Court's development of the state policy requirement. Although since City of Lafayette the Court repeatedly has required a clear and affirmative expression of state policy,\footnote{97. E.g., City of Lafayette, 435 U.S. at 410 (plurality opinion); Southern Motor Carriers, 471 U.S. at 57; 324 Liquor Corp., 107 S. Ct. at 725.} it has wavered between two main, alternative versions of what satisfies this requirement. The stricter standard, articulated in Midcal, requires that the challenged restraint itself must identifiably implement state policy;\footnote{98. See Midcal, 445 U.S. at 105.} the other, the displacement-of-competition standard, is satisfied by a state policy to displace competition with regu...
lation in that field. The Court finally avoided choosing between these alternatives by asserting that the latter satisfies the former.00

*City of Lafayette v. Louisiana Power & Light Co.*01 foreshadows the major developments in the policy requirement. It establishes analysis of immunity in purely procedural terms and contains language from which the Court subsequently fashioned the familiar two-part test in *Midcal.*02 It defines the outer boundaries of the policy requirement: "specific, detailed legislative authorization" is not necessary,03 but mere lawfulness under state law will not suffice.04 Most important, the plurality and dissenting opinions in *City of Lafayette* openly confront the issue of how specifically state policy must comprehend the challenged restraint05—an issue that often has been obscured in subsequent opinions.06 On this point, moreover, the plurality opinion corresponds to the later *Midcal* version of the policy requirement, while the dissenting opinions correspond to the displacement-of-competition version;07 the Court now asserts that these two versions are equivalent.08

In *City of Lafayette*, the plurality conceded that "the actions of municipalities may reflect state policy,"09 but it declined to grant immunity simply because municipal conduct was engaged in "pursuant to state policy to displace competition with regulation or monopoly public service."10 The plurality feared that such a general standard11 would give immunity to actions that reflected merely municipal, as opposed to state,09. See Hoover, 466 U.S. at 569; *City of Boulder*, 455 U.S. at 51; New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 109 (1978).

100. *Southern Motor Carriers*, 471 U.S. at 64-65; see infra notes 133-35 and accompanying text.

101. 435 U.S. 389 (1978). The state action issue in *City of Lafayette* was raised by two municipalities operating electric utilities. State law authorized municipal operation of utilities, but did not otherwise address the exclusionary conduct alleged. See *id.* at 392 n.6; *id.* at 403-05 (plurality opinion). The cities argued that by virtue of their governmental status, their actions necessarily constituted state action within the scope of *Parker* immunity. See *id.* at 408. A plurality of the Court denied immunity. *Id.*

102. *See id.* at 410. The state policy and active supervision language is derived from *Bates*, 433 U.S. at 362. *Bates*, however, also contains other criteria. See *supra* notes 67-70 and accompanying text.

103. *See City of Lafayette*, 435 U.S. at 415 (plurality opinion); accord *Southern Motor Carriers*, 471 U.S. at 64.

104. *See City of Lafayette*, 435 U.S. at 414 n.44, 415 n.45 (plurality opinion).

105. *See id.* at 413-14, 416; *id.* at 426-27 (Stewart, J., dissenting).

106. *See infra* notes 116-32 and accompanying text.

107. *See infra* notes 135-36 and accompanying text.

108. *See infra* notes 133-36 and accompanying text.

109. *City of Lafayette*, 435 U.S. at 413 (plurality opinion).

110. *Id.*

111. The rejected standard is effectively equivalent to the displacement-of-competition standard now used. The phrase "pursuant to" might be taken to suggest a more precise connection between the restraint and the state policy than the *Southern Motor Carriers* displacement-of-competition standard, which is satisfied if a sovereign branch of government "clearly intends to displace competition in a particular field with a regulatory structure." 471 U.S. at 64. *Southern Motor Carriers*, however, also uses the phrase "pursuant to" in referring to the policy requirement, *id.* at 65, and the context of the opinion makes
Instead, to restrict immunity to municipal conduct "directed or authorized" by the legislature, the plurality held that "an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.'" This test is far more concrete than the rejected alternative; like the later Midcal test, it makes a court relate the nonsovereign body's actual conduct to state policy, not just find that it took place within a field chosen for regulation.

In its next state action case, New Motor Vehicle Board of California v. Orrin W. Fox Co., the Court ignored the City of Lafayette test. In granting immunity, the Court chose language functionally equivalent to the displacement-of-competition test it had rejected in City of Lafayette: it was "dispositive" that "the [controlling statute's] regulatory

clear that no such qualifying effect is intended. The same is true of Town of Hallie. See infra note 136.

112. See City of Lafayette, 435 U.S. at 414 (plurality opinion). Regulation imposed by local governments might represent "economic choices counseled solely by their own parochial interests" rather than state policy, especially in light of their role as "owners and providers of services . . . fully capable of aggrandizing other economic units with which they interrelate." Id. at 408. Such a broad rule of immunity "would impair the goals Congress sought to achieve by [the antitrust] laws . . . without furthering the policy underlying the Parker 'exemption.'" Id. at 415.

113. See id. at 416. The plurality declared that without "evidence that the State authorized or directed a given municipality to act as it did, the actions of a particular city hardly can be found to be pursuant to 'the state[s]' command,' or to be restraints that 'the state . . . as sovereign' imposed." Id. at 414 (quoting Parker, 317 U.S. at 352); see id. at 410 ("for purposes of the Parker doctrine, not every act of a state agency is that of the State as sovereign") (citing Goldfarb v. Virginia State Bar, 421 U.S. 773, 790, 792 (1975)).

114. 435 U.S. at 415 (quoting opinion below, 532 F.2d 431, 434 (5th Cir. 1976)); cf. id. at 425 n.6 (Burger, C.J., concurring) (requiring the cities to prove "that the exemption was not only part of a regulatory scheme to supersede competition, but that it was essential to the state's plan" (emphasis in original)).

115. See infra note 123. Thus, Town of Hallie's reference to a "suggestion" in City of Lafayette "that a municipality must show more than that a state policy to displace competition exists," 471 U.S. at 40, is misleading. This was not merely a suggestion, but an explicit point in the plurality opinion. Compare City of Lafayette, 435 U.S. at 408-17 (plurality opinion) (Parker does not exempt all governmental agencies simply by reason of their status as such; state legislative mandate for relevant anticompetitive activities must be proven) with id. at 426 (Stewart, J., dissenting) (Parker applies because petitioners are governmental bodies, not private persons, and their actions are acts of government).

116. 439 U.S. 96 (1978). The New Motor Vehicle Board was a state agency constituted under a statute requiring the board's approval prior to establishment or relocation of automobile dealerships within the market area of an existing franchise, if the latter protested. See id. at 98 & n.1. The agency's challenged action—advising the manufacturer of this requirement and noticing a hearing—was taken pursuant to this statute. See id.; infra note 293.

117. See 435 U.S. at 413 (plurality opinion) (that the city had acted "pursuant to state policy to displace competition with regulation or monopoly public service" held insufficient).
scheme is a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships."\(^\text{118}\) This summary ignores the extra condition, imposed by City of Lafayette, that the legislature must have contemplated the kind of action in issue.\(^\text{119}\)

In California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.,\(^\text{120}\) the unanimous Court distilled from its previous opinions the now familiar two-part test\(^\text{121}\) and denied immunity because of the lack of "active supervision" of market participants by government regulators.\(^\text{122}\) In defining the policy requirement, the Court shifted back towards the stricter formulation set out in City of Lafayette,\(^\text{123}\) stating that "the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy.'"\(^\text{124}\)

Although Midcal was a unanimous decision and since 1985 has been invoked by the Court as the governing standard,\(^\text{125}\) the Court's next two opinions fail to treat it as such. In Community Communications Co. v.

\(^{118}\) 439 U.S. at 109.

\(^{119}\) See 435 U.S. at 415; supra note 114 and accompanying text.

\(^{120}\) 445 U.S. 97 (1980). A wine wholesaler brought suit challenging a state statute that required wholesalers to sell at prices designated in either a fair trade contract or a price schedule filed with the state. See id. at 99-100.

\(^{121}\) "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." Id. at 105 (quoting City of Lafayette, 435 U.S. at 410 (plurality opinion)).

\(^{122}\) 445 U.S. at 105-06.

\(^{123}\) City of Lafayette, 435 U.S. at 415 (plurality opinion); see Town of Hallie, 471 U.S. at 39 (Midcal "applied the Lafayette two-pronged test"); City of Boulder, 455 U.S. at 51 n.14 (Midcal "explicitly adopted the principle, expressed in the plurality opinion in City of Lafayette, that anticompetitive restraints engaged in by state municipalities or subdivisions must be 'clearly articulated and affirmatively expressed as state policy' in order to gain an antitrust exemption") (citing Midcal, 445 U.S. at 105).

Like City of Lafayette, Midcal focuses the policy inquiry on the type of restraint presented, not merely on the existence of a regulatory system. Both instruct courts to relate the nonsovereign body's actual conduct to prior state policy, not just to find that it took place within a field chosen for regulation. Midcal says that "the restraint" must be expressed as state policy. See Midcal, 445 U.S. at 105; City of Lafayette, 435 U.S. at 415 (plurality opinion). Taken together with the premise that "specific, detailed legislative authorization is not required," City of Lafayette, 435 U.S. at 415 (plurality opinion), however, Midcal really refers to a type of regulation, Midcal, 445 U.S. at 105, like the "kind of action" which City of Lafayette says must be "contemplated." 435 U.S. at 415 (plurality opinion).

That the two cases stand for essentially equivalent versions of the policy requirement is indicated by the parallels in the opinions. City of Lafayette analogizes cities to state agencies, see 435 U.S. at 410 & n.40 (plurality opinion), id. at 412 n.42; Midcal, a state agency case, in turn cites City of Lafayette as authority for its policy requirement. 445 U.S. at 105. The Midcal policy language is taken directly from the City of Lafayette plurality opinion. Compare Midcal, 445 U.S. at 105 ("the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'") with City of Lafayette, 435 U.S. at 410 (plurality opinion) ("the state policy requiring the anticompetitive restraint . . . was one clearly articulated and affirmatively expressed as state policy" (emphasis added)).

\(^{124}\) Id. at 105 (quoting City of Lafayette, 435 U.S. at 410 (plurality opinion)).

\(^{125}\) See supra note 77 and accompanying text.
City of Boulder, the Court’s summary and application of the policy standard was ambiguous. The Court painstakingly mischaracterized City of Lafayette as extending immunity to any municipal conduct engaged in “‘pursuant to state policy to displace competition with regulation or monopoly public service,’” and claimed that this truncated version of the City of Lafayette holding had been adopted in Midcal. In places, however, it also seemed to acknowledge the more restrictive version of the policy requirement. The Court remarked, for example, that “[a] state that allows its municipalities to do as they please can hardly be said to have ‘contemplated’ the specific anticompetitive actions for which municipal liability is sought.”

In Hoover v. Ronwin, the Court’s recapitulation of the case law confirmed the displacement-of-competition standard as interpreted in City of Boulder.

This point in the rule’s development exhibited an unresolved tension between the displacement-of-competition standard stated in Hoover and City of Boulder, and the more restrictive standard from the unanimous Midcal opinion, the Court’s two conflicting statements of how specifically nonsovereign government action must correspond to sovereign-level policy to receive immunity. None of these opinions, as we have seen, addressed or explained the disparity.

126. 455 U.S. 40 (1982). A city, which had imposed a moratorium on expansion of cable television networks, sought state action immunity based on its home-rule status under the state constitution; the Court denied immunity under the “state policy” requirement. Id. at 52-56.

127. Id. at 51 (quoting City of Lafayette, 435 U.S. at 413 (plurality opinion)). This rendering expurgates City of Lafayette’s further insistence “that the legislature contemplated the kind of action complained of,” 435 U.S. at 415 (plurality opinion) (quoting opinion below, 532 F.2d 431, 434 (5th Cir. 1976)). That is, City of Boulder cites City of Lafayette in support of the displacement-of-competition standard that a majority of the Court had specifically rejected in that case. See City of Lafayette, 435 U.S. at 413 (plurality opinion); id. at 425 n.6 (Burger, C.J., concurring).


129. 455 U.S. at 55; see id. at 51 n.14.

130. 466 U.S. 558 (1984). The Court granted immunity to the actions of the Arizona Supreme Court’s Committee on Examinations and Admissions in setting standards for grading the state bar examination, based on a determination that the pertinent conduct was that of the state supreme court itself. See id. at 569-73; infra note 291.

131. In “cases involving the anticompetitive conduct of a nonsovereign state representative, the Court has required a showing that the conduct is pursuant to a ‘clearly articulated and affirmatively expressed state policy’ to replace competition with regulation.” 466 U.S. at 568-69 (citing City of Boulder, 455 U.S. at 54). Hoover cites Midcal but does not quote its policy requirement. Id. at 569. The Hoover opinion refers to the City of Lafayette contemplation language but neutralizes its meaning by equating it with the less restrictive Boulder standard. See id. at 568-69.

Hoover states that nonsovereign restraints must be carried out “pursuant to” a state policy to displace competition. Id. at 569. This usage vaguely suggests a restrictive qualification: the restraint must somehow follow from or reflect a particular state policy, rather than merely occur subsequent to the expression of such a policy. In Southern Motor Carriers and Town of Hallie, in contrast, the use of the phrase “pursuant to” gives it no such independent meaning. See infra notes 135, 136 and accompanying text.

132. See Town of Hallie, 471 U.S. at 40 (Court had “never fully considered . . . how
In *Southern Motor Carriers Rate Conference v. United States*, the Court finally resolved the issue, not by choosing one position or the other, but by denying the existence of a disparity. *Southern Motor Carriers* repeatedly states that the *Midcal* test supplies the governing standard, yet it also declares that the displacement-of-competition standard satisfies the *Midcal* policy test: "As long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied." Subsequent cases have not elaborated further on the content of the policy requirement.

C. Criticism of the Distinction Between Sovereign and Nonsovereign State Action

The next section expands on the Court's distinction between sovereign and nonsovereign government policymaking as a foundation from which to criticize the current displacement-of-competition version of the policy clearly a state policy must be articulated for a municipality to be able to establish that its anticompetitive activity constitutes state action’).


134. See id. at 58, 62.

135. Id. at 64. This is hard to take seriously, of course, in light of the split between the plurality and dissenting opinions in *City of Lafayette*. See supra notes 107-114 and accompanying text. For an argument that the Mississippi Public Service Commission's approval of collective filing in *Southern Motor Carriers* does not satisfy the *Midcal* policy requirement, see infra notes 223-35 and accompanying text.

The quoted language indicates that the Court's use of the phrase "pursuant to" elsewhere in the opinion, *Southern Motor Carriers*, 471 U.S. at 62, 65, implies no qualification.

136. In *Town of Hallie*, the Court was presented with an issue of municipal conduct reminiscent of that in *City of Lafayette*, but having a sounder statutory basis. The defendant city participated in, rather than regulated, the water sewage transportation and treatment market, and it was accused of harming a potential competitor in that market. See id. at 36-37. The city had refused to supply sewage treatment services to adjacent unincorporated townships, except by tying provision of treatment services to sewage collection and transportation services, together with annexation by the city. See id. The Court granted state action immunity using language similar to that of *Southern Motor Carriers*: “the Wisconsin statutes evidence a 'clearly articulated and affirmatively expressed' state policy to displace competition with regulation in the area of municipal provision of sewage services.” 471 U.S. at 44; see id. at 47. *Town of Hallie*, too, recognizes the *Midcal* test as the governing standard, though it calls it the "*Lafayette* twopronged test." 471 U.S. at 39.

The policy requirement in *City of Boulder* stated the alternative rejected by the *City of Lafayette* plurality: the conduct must be “pursuant to” a state policy to displace competition. Compare *City of Lafayette*, 435 U.S. at 413 (plurality opinion) with *City of Boulder*, 455 U.S. at 51. The Court's use of the phrase "pursuant to" in *Town of Hallie* gives it no independent significance. The Court said the town's actions "were taken pursuant to a clearly articulated state policy to replace competition in the provision of sewage services with regulation," 471 U.S. at 47 (emphasis added), but, in context, this formulation implicitly equates with parallel formulations that lack the phrase "pursuant to." *Town of Hallie* restates the *City of Boulder* test as whether a state policy to displace competition "exists." Id. at 40.
requirement as unresponsive to the Court's objectives. Before arguing for an expanded, stronger emphasis of the sovereign policy concept, this section considers attacks on this distinction by those who believe that even the displacement-of-competition standard intrudes too much on the sovereignty of the state.

1. Statutory Basis: Significance of the Local Government Antitrust Act

Perhaps the most fundamental criticism of the Court's sovereign policymaking distinction is that it is invalid because it has no basis in the Sherman Act. Parker, while inferring a category of action that Congress did not intend to restrain, did not explain why the Sherman Act should apply to state conduct at all. Certainly the legislative history does not illumine the precise contours of this category. With so little to go on, the Court's effort to follow presumed congressional intent perhaps unavoidably devolved into "an attempt to resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws, unfeathered competition in the marketplace," according to the Court's own sense of what was appropriate.

The statutory invalidity argument makes little sense, however, in light of the Local Government Antitrust Act of 1984 (the "Act"). Although this statute essentially eliminates the private damages remedy against local governments and their officials for antitrust violations, injunctive relief against local governments and officials remains unaffected. Local government conduct, therefore, continues to be fully

137. See City of Lafayette, 435 U.S. at 428-30 (Stewart, J., dissenting); Easterbrook, supra note 8, at 36-37; Garland, supra note 21, at 502.

138. See Parker, 317 U.S. at 351 (neither Sherman Act nor its legislative history indicated intention "to restrain state action or official action directed by a state"); Southern Motor Carriers, 471 U.S. at 56 & n.19.


140. Southern Motor Carriers, 471 U.S. at 61.

141. Cf. House Report, supra note 139, at 4608 ("The failure of Congress to provide even indirect guidance on this question [immunity for local government action] ... has left the Court free—or constrained—to use state sovereignty as the determinative principle."). In such circumstances, perhaps the best foundation for the state action doctrine was "over 40 years of congressional acquiescence." Southern Motor Carriers, 471 U.S. at 55 n.18.


143. See id. For example, nothing in the Act would upset the result in City of Boulder, where a preliminary injunction against a city's regulatory program was upheld. 455 U.S. at 47-48. Victorious plaintiffs in suits for injunctive relief still are entitled to attorney's fees. See House Report, supra note 139, at 4620.

As for the conduct of private parties, the Act states that "no damages ... may be recovered ... in any claim against a person based on any official action directed by a local
subject to antitrust scrutiny unless it meets the Court's test for state action immunity. This tacitly confirms the Court's application of the antitrust laws to nonsovereign action.\textsuperscript{144} If Congress had not intended local governments to be subject to the antitrust laws, it would have eliminated the possibility of injunctive relief as well.

The legislative history of the Act further supports the Court's sovereign policymaking distinction. It suggests that Congress acted primarily to relieve local government and officials of the potential for catastrophic loss,\textsuperscript{145} not to vindicate local government autonomy. The House of Representatives committee report contradicted the Court's original inference of congressional intent regarding state regulation in \textit{Parker} and criticized the Court's immunity test as uncertain in its application.\textsuperscript{146} It emphasized, however, that it was not altering the content of the state action doctrine as applied to local government.\textsuperscript{147} The Committee had no quarrel with the Court's use of "state sovereignty as the determinative principle,"\textsuperscript{148} or with the position that "\textit{Parker} immunity could be extended to a municipality only if its action were in furtherance of a 'clearly articulated and affirmatively expressed' state policy."\textsuperscript{149}

Moreover, in rejecting a ban on all actions against local government the Committee specifically expressed reluctance to defer to local regulatory autonomy. "If Congress were confident that the actions of local governments and their officials were always in the public interest or never would work unnecessary anticompetitive injury, it could simply exclude them from the application of the antitrust laws entirely. The record does not support such action . . . ."\textsuperscript{150} Rather than administering "a stiff con-


\textsuperscript{144}. The distinction between sovereign and nonsovereign parts of state government had been made emphatically in Hoover v. Ronwin, 466 U.S. 558 (1984), issued almost five months before final enactment of the Act and noted in the committee report. House Report, \textit{supra} note 139, at 4608 n.6.

\textsuperscript{145}. See \textit{id.} at 4613, 4619.

\textsuperscript{146}. See \textit{id.} at 4606, 4608.

\textsuperscript{147}. See \textit{id.} at 4603, 4615.

\textsuperscript{148}. \textit{Id.} at 4608.

\textsuperscript{149}. \textit{Id.} at 4607 (citing \textit{City of Boulder}, 455 U.S. 40, 52 (1982); \textit{Midcal}, 445 U.S. 97, 105 (1980); New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96, 109 (1978)). See also House Report, \textit{supra} note 139, at 4603 ("The Committee understands that the substantive law [of state action immunity] has changed, and will continue to change, based on court interpretations.").


\textsuperscript{150}. House Report, \textit{supra} note 139, at 4619. Indeed, the Committee took care to
gressional rebuke to judicial intrusion upon local policymaking," the Local Government Antitrust Act confirms the basic elements of state action doctrine, including the state policy requirement's distinction between sovereign and nonsovereign parts of state government.

2. Federalism

A second fundamental attack on the sovereign/nonsovereign distinction is that it is incompatible with, or at least a highly dubious manipulation of, the tenets of federalism. Federalism has multiple meanings. Its status as a source of limitation on the legislative branch's commerce power is governed by Garcia v. San Antonio Metropolitan Transit Authority. There the Court concluded that "the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action." This conception of federalism would seem to foreclose attack on the Court's state action antitrust doctrine as constitutionally invalid. The Court has premised the state action doctrine on an inference of what Congress had intended to do in using its commerce power to enact the antitrust laws, and in passing the Local Government Antitrust Act of 1984, Congress endorsed the Court's results.

Federalism also represents a political ideal. In this sense the term is aspirational, conveying the notion that organs of the national government should not use the full extent of the power granted to them under

154. Id. at 556. The Court overruled National League of Cities v. Usery, 426 U.S. 833 (1976), in determining that the defendant public mass transit authority was bound by the minimum wage and overtime requirements of the Fair Labor Standards Act. The Court declared that "[w]ith rare exceptions, like the guarantee . . . of state territorial integrity, the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace." Garcia, 469 U.S. at 550. Furthermore, the Court noted:

[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. Any substantive restraint on the exercise of Commerce Clause powers . . . must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy." Id. at 554 (citation omitted).

155. See supra notes 143-51 and accompanying text.
the Constitution, but rather should accommodate state autonomy while pursuing national objectives. Clearly, certain proposed rules are more federalist than others, but given that both the Court and its critics purport to follow federalism, the analytical contribution of this concept to the argument is suspect. In effect, both sides agree that some accommodation of state autonomy should be made; the real issue is the appropriate extent of that accommodation in the context of antitrust immunity.\textsuperscript{156}

The Court's restrictive equation of the state with the actions and policies of the state's legislature and supreme court is not compelled by the idea of federalism, but it is not excluded by it, either. In other areas of law raising issues of federalism, local government sometimes is treated like state government and sometimes not.\textsuperscript{157} The fact that the Court has used a more expansive concept of sovereignty in other contexts\textsuperscript{158} does not invalidate this usage. The variation in the Court's usage unquestionably reflects concrete notions of what constitutes an appropriate balancing of national and state concerns in specific types of settings.\textsuperscript{159}

A second weakness diminishes the invocation of federalism to criticize the Court's differentiation of sovereign and nonsovereign state policymaking. Implicit in the criticism of this distinction, especially as applied to municipal regulation, is the categorical assumption that each state wants to minimize the role of federal antitrust law in its regulatory sector.\textsuperscript{160} The testimony presented to Congress before passage of the Local Government Antitrust Act strongly contradicts such a view. The National Conference of State Legislatures argued that "local governments are not... a third sovereign form of government," and urged that any corrective federal legislation "should be limited in recognition of the constitutional responsibility of the states to define the degree of autonomy enjoyed by their local governments."\textsuperscript{161} The National Association of Attorneys General similarly asserted that the Supreme Court's clear articulation/active supervision test "maintained" "the principle of federalism."\textsuperscript{162} Federalism primarily addresses the opposition between na-

\textsuperscript{156} See Kennedy, Of Lawyers, Lightbulbs, and Raisins: An Analysis of the State Action Doctrine Under the Antitrust Laws, 74 Nw. U.L. Rev. 31, 43 (1979) ("The question is not really one of state sovereignty but comity, which in this instance means the deference properly owing to the action of subordinate but nonetheless important governmental entities.").

\textsuperscript{157} See Easterbrook, supra note 8, at 36 & n.31.

\textsuperscript{158} See Garland, supra note 21, at 502 n.90.


\textsuperscript{160} See, e.g., City of Lafayette, 435 U.S. at 438-39 (Stewart, J., dissenting); Wiley, supra note 8, at 720-23.

\textsuperscript{161} Senate Hearing, supra note 149, at 240-41 (statement of state legislator Dick Hemstad), quoted in House Report, supra note 139, at 4614 n.19; see House Report, supra note 139, at 4614 n.19 ("in a federal system of dual sovereigns, immunization decisions properly belong to the States").

\textsuperscript{162} Senate Hearing, supra note 149, at 146 (statement of Gerald L. Baliles, Atty. General of Virginia); see id. at 159-60 (National Ass'n of Attorneys General, Report and Recommendation of the Antitrust Subcommittee to Study Local Governmental Immunity
tional and state interests. By extension, it concerns the conflict of national and local interests. Federalism seems irrelevant, however, to issues of governmental autonomy pitting local interests against state interests.163

3. Relevance to the Court’s Concerns

A third criticism of the Court’s distinction between sovereign and non-sovereign policymaking is that it fails to serve the Court’s own professed purposes.164 Because cities and state agencies are created by and receive their powers from the state, it is argued that they should be presumed to act for the state as much as the sovereign parts of the state government that created them.165 Additionally, if agencies and cities sometimes act in ways not anticipated by the legislature, arguably the latter has tacitly endorsed any such deviation by failing to take corrective action or, more probably, by failing to make any investigation suggesting the need for corrective action.166 From this perspective, the requirement that a chal-

(1982) [hereinafter, NAAG Report] (“[T]he Parker exemption does not permit treatment of municipal [sic] action as state action. Indeed no other conclusion could be reached consistent with our federalist system.”).

163. Testimony sponsored by local government organizations shows that they desired federal legislation partly to override the contrary views of state legislatures on the role of antitrust law in the regulated sector. See Senate Hearing, supra note 149, at 27 (statement of Joseph Riley, Mayor of Charleston, South Carolina, for the National League of Cities) (“We do not believe that a matter of such fundamental importance to every city in the Nation should be left to . . . the State legislatures.”); id. at 37 (opposing proposal to have states delegate antitrust immunity to local government for fear it would result in “some states electing not to pass the necessary state legislation, others establishing only limited antitrust protections”); id. at 52 (statement of James C. Leventis, for National Ass’n of Counties) (“Counties would be forced to go to their state legislatures to obtain immunity. . . . Congress cannot force the legislatures to act, or control the extent of their immunity action.”). William J. Althaus, appearing on behalf of the U.S. Conference of Mayors, stated:

The state and the local groups disagree on the source of the immunity, whether it flows from the states or the federal law, and on the question of burden. Whose burden is it either to arrange appropriate protections for local governments from the antitrust laws, or to clarify the extent to which and the means by which local governments must comply with the antitrust laws?

. . . Boulder . . . simply fails to comport with 20th Century notions of inter-governmental relationships—that throughout the United States the home rule movement has sought to return as much control as is possible to the levels of government closest to the people, cities and counties. Senate Hearing, supra note 149, at 64; see NAAG Report, supra note 162, at 164 (“cities dislike the prospect of being required to petition the state legislature for legislation conferring antitrust immunity”).

164. E.g., Wiley, supra note 8, at 736.

165. See City of Lafayette, 435 U.S. at 429 (Stewart, J., dissenting) (“[municipal corporations] have only such powers as are delegated them by the State . . . , and when they act they exercise the State’s sovereign power”) (citation omitted).

166. In hearings prior to the enactment of the Local Government Antitrust Act, however, the National Conference of State Legislatures sponsored testimony endorsing the requirement that local government’s antitrust immunity depend on affirmative state authorization. See Senate Hearing, supra note 149, at 240-41 (statement of state legislator
lenged restraint implement sovereign policy may appear to be a paternalistic effort to enforce a certain way of delegating power— to achieve a consistency that the legislature either does not know about or does not care about.

The Court's sovereign policymaking distinction, however, has another logic. The state action immunity doctrine reflects a balancing of competing interests, not unqualified deference towards the states. The Court's procedural test replaced earlier efforts to evaluate the necessity or importance of individual regulatory restraints and represents a shift from substantive examination to identification of state concerns as the mechanism for balancing national and state interests. Accompanying the shift is the premise that the antitrust laws should not be set aside except in circumstances that directly further the state's regulation of its domestic commerce.

The question then arises how to identify circumstances in which regulation directly furthers the state's regulatory program. The Court might have determined to defer to state autonomy at all costs, treating all government action as implementing state policy to eliminate the chance that a state policy could be thwarted simply because it was undetectable. The Court's decision not to assume casually that a restraint furthers state policy reflects two main considerations. First, agency and city actions may not implement any policy the state knows about or cares about. Second, the national policies behind the antitrust laws are of particular importance.

The Court's purpose in imposing an articulation requirement identifying restraints implementing state policies is not to protect the state from

Dick Hemstad), quoted in House Report, supra note 139, at 4614 n.19; supra notes 161-63 and accompanying text.

167. See Community Communications Co. v. City of Boulder, 455 U.S. 40, 71 (1977) (Rehnquist, J., dissenting) ("It is nothing less than a novel and egregious error when this Court uses the Sherman Act to regulate the relationship between the States and their political subdivisions."); Easterbrook, supra note 8, at 36; Garland, supra note 21, at 502; Page, supra note 10, at 1101; Wiley, supra note 8, at 733, 735.


169. See id.; City of Lafayette, 435 U.S. at 415.

170. See, e.g., City of Lafayette, 435 U.S. at 414 (anticompetitive policy adopted by a city "may express its own preference, rather than that of the State"); id. at 416 (city policy may reflect "purely parochial interests"); Cantor v. Detroit Edison Co., 428 U.S. 579, 585 (1976) ("the State's policy is neutral on restraint approved by public service commission"); Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975) (state bar association had joined in "essentially a private anticompetitive activity").

171. In enacting the Sherman Act, "Congress, exercising the full extent of its constitutional power, sought to establish a regime of competition as the fundamental principle governing commerce in this country . . . [T]he antitrust laws establish overarching and fundamental policies . . . ." City of Lafayette, 435 U.S. at 398-99 (plurality opinion) (footnote omitted); see id. at 406 (Sherman Act "mandated competition as the polestar by which all must be guided in ordering their business affairs"); id. at 419-20 (Burger, C.J., concurring) (Sherman Act expresses "fundamental national economic policy"); City of Boulder, 455 U.S. at 56 & n.19 (Sherman Act is "the Magna Carta of free enterprise" (quoting United States v. Topco Assoc., 405 U.S. 596, 610 (1972))).
itself; it is to vindicate the importance of the federal policy by making sure it is set aside only if the state manifests a minimal threshold of concern, showing that the policy is not trivial or "parochial." The point of the Court's distinction is not that more precise delegation achieves substantive antitrust goals or supplies a requisite political legitimacy, but that antitrust goals are worth preserving unless the state has a perceptible regulatory policy to the contrary. The Court has decided to set aside the antitrust laws for state-sanctioned regulatory restraints, even if inefficient or otherwise misguided, but not for those to which the state seems indifferent. The Court leaves the determination of what is trivial or nontrivial in the hands of the state. The procedural test for immunity is not a difficult test to satisfy, if indeed the state legislature or supreme court intends to endorse the challenged conduct. If the immunity inquiry yields the "wrong" answer, the state need only supply the requisite statement of policy.

II. THE FAILURE OF THE DISPLACEMENT-OF-COMPETITION STANDARD TO ACHIEVE THE COURT'S OBJECTIVES

The displacement-of-competition standard trivializes the sovereign/nonsovereign distinction of the state policy requirement. Because of this, the Court fails to achieve the stable pair of objectives underlying the development of its highly mutable policy requirement: that immunity should go only to restraints implementing sovereign policy and that the utility to the state of agencies and cities as tools for such policies should be protected. The Court's displacement-of-competition standard violates the Court's objective of confining immunity to regulatory restraints implementing state policy as expressed by sovereign branches of state government. This reflects the Court's fallacious concept of regulatory policymaking; properly understood, this objective would pose a much more substantial constraint on immunity. In addition, the Court's objective of preserving the usefulness of agencies and local government as tools of state policy does not require adherence to the displacement-of-competition standard.

172. See City of Boulder, 455 U.S. at 50-51 (quoting City of Lafayette, 435 U.S. at 412-13 (plurality opinion)); cf. Cantor, 428 U.S. at 637 (Stewart, J., dissenting) (endorsing "isolating those areas of state regulation where the State's sovereign interest is, by the State's own judgment, at its strongest").

173. Admittedly, the sovereign/nonsovereign policy distinction is a rough, heuristic tool for identifying matters of state concern, carrying with it costs of requiring interpretation of state statutes and some resulting uncertainty as to outcomes. But to identify costs does not mean that the costs are not worth paying, unless one posits that any burden on the state interest is too much. The 1984 congressional testimony given by state government witnesses suggested that state governments prefer the accompanying uncertainty. See, e.g., Senate Hearing, supra note 149, at 147-48 (statement of Gerald L. Baliles, Atty. General of Virginia), quoted in House Report, supra note 139, at 4612 n.15.
A. Blurring of the Sovereign/Nonsovereign Distinction

The scrutiny of regulatory restraints under the displacement-of-competition standard is trivial. The displacement-of-competition standard does not address the particular restraint itself; indeed, it removes any inquiry into the content of state policy beyond the simple question of whether the legislature or supreme court intended to displace competition in that field. Thus, the intention to displace competition may be inferred from sovereign-level authorization of any regulatory restraint in that field. Based on a legislative decision to displace competition in a particular way, this standard gives immunity to the agency's or city's decision further to displace competition in that field in any way it chooses. For agencies, and for those regulated by them, the policy requirement now amounts to a virtual rubberstamp, since the statute creating any agency will suffice to signify intent to displace competition throughout the agency's purview. This standard equally will support immunity for any restraints imposed by local government, as long as the legislature has authorized any form of intervention in a given field.

Under the displacement-of-competition standard, the only situation in which governmental conduct would not satisfy the policy requirement would be one in which an agency or city imposes an anticompetitive restraint in a field that the legislature has not expressed an intention to regulate. Cantor v. Detroit Edison Co. furnishes an example. In that case the public service commission had approved tariffs filed by an electric utility that restrained competition in the sale of lightbulbs, but the legislature had never expressed an intention to regulate the market for lightbulbs. This type of case is important because it represents the only practical difference between the Court's current displacement-of-competition policy requirement and a proposed version that would not distinguish at all between sovereign and nonsovereign parts of government but merely distinguish state action from private conduct.

174. Cf. Jorde, supra note 10, at 240 ("Hoover-Hallie-SMC trilogy" requires "only a lenient process review"); Wiley, supra note 8, at 737 ("clear-statement enforcement [in Southern Motor Carriers and Town of Hallie is] both shallow and more selective"). This is not surprising, since what was an issue under Midcal becomes a presumption under the displacement-of-competition standard. Midcal gives immunity only when "the challenged restraint" is "‘clearly articulated ... as state policy.’" California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (quoting City of Lafayette, 435 U.S. at 410). The Midcal inquiry does not infer this condition from the mere intention to displace competition; implicitly, some nonsovereign restraints may not implement state policy.


176. This is the Court's revised explanation for denial of immunity in Cantor. See Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 64 (1985) (citing Cantor, 428 U.S. at 584-85); cf. Cantor, 428 U.S. at 597-98 (exemption denied because not necessary to working of Michigan's regulatory statute).

177. See City of Boulder, 455 U.S. at 69-70 (Rehnquist, J., dissenting); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 428-30 (1978) (Stewart, J., dissenting); Garland, supra note 21, at 487. Indeed, Garland seems to characterize the Court's actual policy requirement as equivalent to the version he proposes, which merely distin-
proposed redefinition of the policy requirement fails to recognize the respective functions of the two prongs of the Midcal test. The active supervision half of the test distinguishes regulated conduct from effectively private conduct.\textsuperscript{178} The state policy requirement distinguishes between government action that implements a sovereign policy and government action that does not. Were the Court to further dilute the policy requirement by ignoring the sovereign policy distinction, there would seem to be no reason for having a separate policy requirement at all.\textsuperscript{179}

**B. The Court's Objectives Closely Defined**

This Article's contention that the current version of the policy requirement is inconsistent with the Court's objectives requires precise definition of those objectives. A starting point is the Court's invocation of federalism.\textsuperscript{180} The Court consistently has respected regulatory action under-

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\textsuperscript{178} The active supervision requirement conditions immunity upon the actual "exercise of regulatory oversight" of private anticompetitive conduct by government. Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48, 62 n.23 (1985) (quoting 1 P. Areeda & D. Turner, supra note 45, ¶ 213a, at 73).

\textsuperscript{179} Garland says "the 'clear articulation' [policy] requirement ensures that ... the challenged scheme does not simply represent unsanctioned private conduct." Garland, supra note 21, at 501. This, however, is accomplished by the active supervision requirement. If the requisite authorization could come from any part of government, including the regulating entity, then any restraint satisfying the supervision requirement would necessarily satisfy the policy articulation requirement. This would turn the two-part Midcal test into a tautology. Cf Midcal, 445 U.S. at 105 ("First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself.").

\textsuperscript{180} See Southern Motor Carriers, 471 U.S. at 61 (purpose of state action doctrine is
taken directly by a state legislature or supreme court, and increased concern for federalism would seem to account for the change in the policy requirement from the strict sovereign policy standard of City of Lafayette and Midcal to the minimal displacement-of-competition standard of Southern Motor Carriers and Town of Hallie. The terms in which the Court has addressed this issue, however, reflect a narrower concept of federalism in this context than recent commentary would suggest.

In a general sense, the Court's policy requirement is intended to protect the states' ability to regulate their commerce. It is the state as sovereign, however, rather than the state and local political process generally, to which deference is owed under the Court's concept of federalism. The Court views cities and agencies as nonsovereign instruments of state policy, whose importance lies in their usefulness to the state. By itself, the objective of maintaining the usefulness of agencies and cities to the state still does not account for the Court's policy requirement. If this were the Court's only goal, it would be logical to immunize all agency or local government action simply to avoid even the most remote possibility of interfering with a state purpose. The constraining objective underlying the policy requirement is to compromise antitrust goals only

"to resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws, unfettered competition in the marketplace"); cf. 324 Liquor Corp. v. Duffy, 107 S. Ct. 720, 725 (1987) (Parker reflects "principles of federalism and state sovereignty"); Town of Hallie, 471 U.S. at 38 (same).

181. See supra notes 79-80 and accompanying text.

182. See supra notes 109-15, 132-36 and accompanying text.


184. Even the opinions that articulate the deferential displacement-of-competition standard affirm this long-standing distinction. See Southern Motor Carriers, 471 U.S. at 63-64; Town of Hallie, 471 U.S. at 38-39 (citing City of Lafayette, 435 U.S. at 412-13 (plurality opinion)); supra notes 79-81 and accompanying text. The Court also notes the "danger" that even under the displacement-of-competition standard, a city might "seek to further purely parochial public interests at the expense of more overriding state goals." Town of Hallie, 471 U.S. at 47.

185. E.g., Southern Motor Carriers, 471 U.S. at 64 ("States . . . implement through regulatory agencies their anticompetitive policies"); Town of Hallie, 471 U.S. at 39 (Parker doctrine permits states to use their municipalities "to administer state regulatory policies" (quoting City of Lafayette, 435 U.S. at 415 (plurality opinion))); Community Communications v. City of Boulder, 455 U.S. 40, 51 (1982) ("a State may frequently choose to effect its policies through the instrumentality of its cities and towns").

186. See Southern Motor Carriers, 471 U.S. at 61 (opposing reducing "the range of regulatory alternatives available to the State"); id. at 64 (assessing doctrinal impact on "usefulness" of state agencies).

The Court also expressed concern that "requiring . . . explicit authorization by the State might have deleterious and unnecessary consequences" detrimental to "municipalities' local autonomy and authority to govern themselves." Town of Hallie, 471 U.S. at 44; see Southern Motor Carriers, 471 U.S. at 64. In context, the point seems to be that impinging on local autonomy would interfere with the way the state intends municipalities to operate.
in order to realize sovereign state policies. Since before City of Lafayette, the Court repeatedly has insisted that a regulatory restraint must implement policy of a sovereign branch of state government.\textsuperscript{187} The cases of the last decade, in particular, reflect the tension between the two objectives.\textsuperscript{188}

Merrick Garland characterizes the policy requirement as expressing "respect for the political process at the state or municipal level."\textsuperscript{189} But if the Court intended its policy requirement to avoid interference with state or municipal policy, one would expect any government involvement to satisfy it.\textsuperscript{190} Instead the Court insists that state or local government actions must implement policy of a sovereign part of state government.\textsuperscript{191}

\textsuperscript{187.} See supra notes 51-54, 66-67 and accompanying text; cf. Page, supra note 10, at 1115 ("state must clearly articulate the policy alleged to conflict with the antitrust laws"). In Page's view, the Court's approach "dictates judicial restraint as long as the 'process of representation' affords interested parties an opportunity to influence the formulation of policy," id. at 1107, but denies immunity when "the presumption of popular consent . . . is unwarranted." Id. at 1113. "The resulting distinction between administrative and legislative policy," id. at 1101, does not seem to account for the Court's treatment of municipal restraints. Legislative as well as administrative components of city government are treated like state agencies in the Court's analysis. See supra notes 79-84 and accompanying text. In City of Boulder, for example, the offending municipal conduct was an ordinance enacted by the city council. 455 U.S. at 45-46.

\textsuperscript{188.} See supra notes 120-36 and accompanying text. Professor Wiley asserts that since the 1970's, the Court's state action cases have "intruded more and more on state and local regulatory policy," in "a largely unarticulated . . . response to growing fears of regulatory capture." Wiley, supra note 8, at 714, 728; cf. Easterbrook, supra note 8, at 27 (state action doctrine reflects Court's assumption that "state regulatory laws are anticompetitive dispensations to politically powerful groups, are deleterious to consumers, and therefore ought to be strictly controlled to preserve at least some of the benefits of competition"). The Court's apparent concern with regulatory capture, however, was temporary. Among the Court's majority or plurality opinions, the most recent statement cited by Wiley that expresses concern with private influence over regulatory decisions is now a decade old. See Wiley, supra note 8, at 727-28 (citing City of Lafayette, 435 U.S. at 406, 408 (plurality opinion)). By the time of City of Lafayette, however, the Court was already retreating from substantive criteria for immunity. See supra notes 73-78 and accompanying text. The Court had already turned a blind eye towards the anticompetitive effects of direct regulatory action by sovereign parts of state government. See supra notes 52-57, 66-67 and accompanying text. Indeed, since City of Lafayette, sovereign authorization or contemplation of any nonsovereign regulatory restraint supports immunity regardless of any impact on competition. See City of Lafayette, 435 U.S. at 407 n.33, 417 (plurality opinion); supra note 19 and accompanying text. Furthermore, the Court refused to look at other indicia of private domination of the regulatory apparatus. See City of Lafayette, 435 U.S. at 411 n.41; supra note 20 and accompanying text. See also Garland, supra note 177, at 1291 n.3; Garland, supra note 21, at 490-93; Wiley, Reply, Revision and Apology in Antitrust Federalism, 96 Yale L.J. 1277, 1277-80, 1282 & n.29 (1987).

\textsuperscript{189.} Garland, supra note 21, at 508. In Garland's analysis, this objective is balanced in the overall test by the active supervision requirement, which expresses "respect for Congress' mandate in the Sherman Act." Id.; see id. at 501 (Court intends to protect true state regulation and bar mere state authorization of private anticompetitive conduct).

\textsuperscript{190.} Even if a city or agency displaced competition in a field not chosen for regulation by the legislature or state supreme court, a principle of respect for the political process would seem to dictate allowing immunity anyway.

\textsuperscript{191.} The Court will not grant immunity to regulatory intervention by an agency or a
Similarly, Professor Jorde's view that because "Parker requires some vehicle for separating state from private activity,"192 the current policy requirement achieves the "needed balance between economic federalism and antitrust values"193 does not quite suffice as an explanation. If the Court merely wanted to distinguish state or regulated activity from private activity, the policy requirement would seem to be redundant because the active supervision requirement serves that purpose.194 The Court's policy requirement, then, is not an unalloyed expression of deference to state and local regulation, nor is it meant to deny immunity only to private behavior.

C. Implementation of State Policy

1. Fallacious Presumption of Consistency with State Policy

The Court repeatedly has expressed the objective of confining immunity to regulatory restraints that implement state policy.195 The Court now asserts that the displacement-of-competition standard uniformly achieves this objective—that all restraints satisfying the displacement-of-competition version of the policy requirement will satisfy the Midcal version.196 In effect, the Court presumes that once a sovereign-level branch of the state has displaced competition in a field with regulation, any and all restraints carried out thereafter in that field by an agency or city will implement state policy.

This presumption overlooks the disparity between sovereign policy and nonsovereign conduct that can arise from a combination of vague statutory delegation197 and the tendency of agencies and cities to expand city unless the subject field has been chosen for regulation by the legislature or supreme court. See supra notes 176-77 and accompanying text.


193. Id.

194. The policy requirement would have no function independent of the supervision requirement if all forms of genuine regulation, regardless of the institutional source of the policy, satisfied the policy requirement. See supra notes 178-79 and accompanying text.

Professor Jorde also more broadly relates the state action doctrine to "the values of economic federalism: citizen participation in government, efficiency in government, creative experimentation, and diffusion of power." Jorde, supra note 10, at 230-31. The test for state action immunity effects "a balance between antitrust and economic federalism values." Id. at 247. It is unclear, however, to what extent these values "play an important role in the modern state action doctrine." Id. at 234. The proposed values would seem to dictate rejection of even the requirement that sovereign parts of state government must decide when competition is to be displaced with regulation in a particular field. See supra notes 176-77 and accompanying text.

195. See supra notes 79-84 and accompanying text.

196. "As long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the Midcal test is satisfied." Southern Motor Carriers, 471 U.S. at 64; see supra notes 133-35 and accompanying text; cf. Town of Hallie, 471 U.S. at 47 (actions of city taken pursuant to a clearly articulated state policy to replace competition with regulation are immune).

197. E.g., 1 F. Cooper, State Administrative Law 32-33 (1965); B. Owen & R. Braeutigam, The Regulation Game 3 (1978) (broad enabling statutes "can be used to rationalize virtually any degree of intervention").
their jurisdiction and otherwise exceed the legislative mandate. Agencies and cities may damage competition in ways not contemplated by the legislature because they do not recognize, or are indifferent to, the impact on competition that their actions may impose, especially when that impact falls outside the line of commerce or geographical area with which the regulatory body is primarily concerned. This problem can be particularly serious when a regulated industry dominates the regulatory process or when a city effectively regulates its own activities as a market participant.

The presumption that any and all nonsovereign restraints imposed in a field chosen by the state for regulation will further state policy clearly is incorrect for instances in which the state also has expressed a policy inconsistent with the particular nonsovereign restraint in question.

198. This phenomenon has been recognized by the Court. See, e.g., Town of Hallie, 471 U.S. at 47 (cities may "seek to further purely parochial public interests at the expense of more overriding state goals"); City of Lafayette, 435 U.S. at 414 (plurality opinion) (anticompetitive policy adopted by a city "may express its own preference, rather than that of the State"); id. at 414 n.44 ("state policy may be contrary to that adopted by a political subdivision, yet, for a variety of reasons, might not render the local policy unlawful under state law"); id. at 415-16 (city policy may reflect "purely parochial interests"); id. at 410 (in Goldfarb the "State Bar, though acting within its broad powers . . . was not executing the mandate of the State"); Cantor, 428 U.S. at 585 ("the State's policy is neutral" on restraint approved by public service commission); see also 1 F. Cooper, supra note 197, at 32-33, 41-42 (administrative agencies tend to use discretionary powers to expand their jurisdiction beyond what the legislature intended, and commonly adapt policies extending beyond or even conflicting with the legislature's intent); Aranson, Gellhorn & Robinson, A Theory of Legislative Delegation, 68 Cornell L. Rev. 1, 6 (1982) (systematic analysis of delegation includes "agency costs," defined as "costs engendered by a divergence of the agent's goals and those of the principal"); id. at 48 ("jurisdictional expansion historically has been an important objective of most regulatory agencies"); id. at 62; Easterbrook, supra note 8, at 31 ("because employees of a regulatory apparatus have goals of their own, they may turn the agency to pursuits unanticipated by the legislature").

199. See, e.g., 1 P. Areeda & D. Turner, supra note 45, ¶ 214, at 86 ("few state agencies are sensitive . . . to the possibly harmful effects of the stated utility practice on other markets"); 2 A. Kahn, The Economics of Regulation 28 (1971) (regulation limiting competition tends to become progressively more extensive in order to prevail over continuing competitive pressures); id. at 114-15 (regulatory process has anticompetitive bias); infra notes 326-30 and accompanying text.

200. See, e.g., City of Lafayette, 435 U.S. at 408 (plurality opinion) ("as owners and providers of services, [local governments] are fully capable of aggrandizing other economic units with which they interrelate"); 2 A. Kahn, supra note 199, at 5; Barron, Business and Professional Licensing—California, A Representative Example, 18 Stan. L. Rev. 640, 644, 649-57 (1966); Flynn, Trends in Federal Antitrust Doctrine Suggesting Future Directions for State Antitrust Enforcement, 4 J. Corp. L. 479, 503-05 (1979); Jordan, Producer Protection, Prior Market Structure and the Effects of Government Regulation, 15 J.L. & Econ. 151, 153-54, 174-76 (1972); Rose, Occupational Licensing: A Framework for Analysis, 1979 Ariz. St. L.J. 189, 199-200; Note, Antitrust Immunity for State Agencies: A Proposed Standard, 85 Colum. L. Rev. 1484, 1490-91, 1494-96 (1985); infra notes 328, 330 and accompanying text; see also Goldfarb, 421 U.S. at 792 (bar association, a state agency, had joined in "essentially a private anticompetitive activity").

201. This is not to say, of course, that the restraint is unlawful as a matter of state law. See, e.g., City of Lafayette, 435 U.S. at 414 n.44 (plurality opinion) ("state policy may be
Goldfarb v. Virginia State Bar provides an example. In such cases, the displacement-of-competition standard will support immunity because of its concern solely with the fact that the sovereign body has displaced competition in the field with regulation. By looking only to the intention to regulate and disregarding more specific expressions of sovereign-level policy running contrary to the particular restraint, however, the displacement-of-competition rule confounds, rather than respects, state policy. This result could be avoided if the displacement-of-competition rule were modified so as to apply only in the absence of contrary sovereign-level policy, thus operating as a rebuttable, rather than an irrebuttable, presumption.

More common is the case in which a statute has authorized some form of regulation in the same field as the challenged restraint, but is silent regarding the particular type of restraint created by the agency or the city. The Court's explanation for construing legislative authorization of some form of regulation as affirmative support for any other restraint conceived by an agency or local government is that both the legislature's intention to displace competition and the nonsovereign restraint are "anticompeting." The Court seems to reason that this common trait of anticompetitiveness insures consistency of content, so that any further innovation by an agency or city always will follow logically from the sovereign-level policy as an unstated "detail." The Court's own previous experience strongly suggests that the Court is incorrect in conclusively presuming consistency with sovereign policy in all such circumstances.

contrary to that adopted by a political subdivision, yet, for a variety of reasons, might not render the local policy unlawful under state law).

202. See Goldfarb, 421 U.S. at 790-92. There the state supreme court clearly displaced competition in the field of lawyers' services (and indeed, with respect to the pricing of such services), id. at 789, but it also expressed a policy contrary to the impact of the alleged price-fixing scheme concerted by the state and county bar associations. See City of Lafayette, 435 U.S. at 410 (plurality opinion) (state bar in Goldfarb, "though acting within its broad powers, . . . was not executing the mandate of the State"); infra notes 313-14 and accompanying text; see also City of Lafayette, 435 U.S. at 416 (dissent's approach "would hold anticompetitive municipal action free from federal antitrust enforcement even when state statutes specifically provide that municipalities shall be subject to the antitrust laws of the United States").

203. See supra notes 135, 174 and accompanying text.
204. See Southern Motor Carriers, 471 U.S. at 64-65.
205. See id. at 64 (given that the legislature had chosen an "inherently anticompetitive rate-setting process," permitting collective rate-making fell within the scope of "details" left to the commission's discretion); id. at 65 ("if the State's intent to establish an anticompetitive regulatory program is clear, . . . the State's failure to describe the implementation of its policy in detail" will not exclude it from immunity).

206. The City of Boulder and Hoover opinions, which articulate a displacement-of-competition standard, rather awkwardly avoid Midcal's contradictory import. See supra notes 126-32 and accompanying text. Furthermore, in City of Lafayette, a majority of the Court took the position that the displacement-of-competition standard could not ensure that municipal restraints would be consistent with legislative policy. See supra notes 101-15 and accompanying text.
To posit consistency on the basis of such abstraction is nonsensical. Certainly, all forms of regulatory intervention displace competition, but in such widely varying degrees as to undermine the usefulness of this basis for classification. The displacement-of-competition standard covers too wide a range of phenomena for it to be a meaningful description of state policy. The monopoly franchise and the simple regulation of entry into a market are both anticompetitive and are treated as indistinguishable by the broad brush of the displacement-of-competition standard, yet they stand far apart in terms of the extent to which they displace competition. In between lies an extensive and varied middle ground of regulatory structures that might implement any combination of restraints on entry, price and other aspects of competitive conduct.  

It is unreasonable to assume that state legislatures are insensitive or indifferent to the distinctions among the wide range of regulatory forms. Whether one perceives the legislature's ultimate goal to be furthering some vision of the public interest or conferring benefits upon the highest-bidding special interest group, legislatures presumably displace competition in a given field in order to address a concrete problem. Any regulatory solution the legislature considers must balance the advantages and disadvantages of competition and government intervention for the field concerned. There is reason to presume that a legislature intends to preserve competition to the extent it does not disrupt it, even in sectors of the state's economy in which it has authorized regulation.

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207. See, e.g., Hovenkamp & Mackerron, supra note 8, at 767.
208. Cf. Southern Motor Carriers, 471 U.S. at 64.
209. Under the traditional view, a legislature displaces competition in a market because it perceives that the market is a natural monopoly or otherwise presents a failure of competition, so that some form of regulatory intervention is needed to protect consumers. See, e.g., Cantor, 428 U.S. at 595-96 & n.33 (quoting Otter Tail Power Co. v. United States, 410 U.S. 366, 389 (1973)). See generally S. Breyer, Regulation and Its Reform 15-19 (1982); B. Mitnick, The Political Economy of Regulation 296-310 (1980).
211. The Court's explanation of its displacement-of-competition standard tacitly ignores the residuum of competition existing in most regulated markets. The Court uses the terms "regulation" and "competition" as if they were incompatible phenomena, referring, for example, to the "perfectly efficient" unregulated market (a theoretical microeconomic model) as the alternative to "a regulatory program." See Southern Motor Carriers, 471 U.S. at 65 n.25. But the great middle ground among regulatory structures really constitutes combinations of regulation and competition; regulation entirely "displaces" competition, if at all, only in the case of franchise monopoly. See, e.g., 2 A. Kahn, supra note 199, at 28-30, 113-14. The portion of a firm's decisionmaking that is not regulated will follow competitive incentives. See, e.g., City of Lafayette, 435 U.S. at 405 n.31 (plurality opinion); Cantor, 428 U.S. at 596.
212. Otherwise regulatory statutes might be analogized to letters of marque, or hunting licenses. See Senate Hearing, supra note 149, at 145 (statement of Gerald L. Baliles, for National Association of Attorneys General) ("we should not lose sight of the reason for the federal antitrust laws—a national policy of competition in the marketplace"); NAAG Report, supra note 162, at 168 (noting "the interests of the states in providing a consistent approach to the marketplace within their boundaries"); Douglas & Mullenix, supra note 7, at 521 ("many state laws are intended only to restrict one aspect of competi-
Indeed, states sometimes count on federal antitrust law as a useful residual constraint even in regulated sectors.\textsuperscript{213} The precise degree to which to displace competition\textsuperscript{214} lies at the heart of the legislature's choice from among the "range of regulatory alternatives available to the State."\textsuperscript{215}

The widely differing forms of regulation are not fungible. Whatever the legislature's purpose, that purpose will not be satisfied equally by the regulation of service quality and the granting of a monopoly franchise. Furthermore, a legislature's choice of one type of regulation does not

\textsuperscript{213} See \textit{City of Lafayette}, 435 U.S. at 416 (plurality opinion); \textit{Senate Hearing, supra} note 149, at 147 (statement of Gerald L. Baliles, for National Association of Attorneys General) ([G]ranting city government blanket antitrust immunity "would not be a wise policy decision . . . . [T]o exclude allegedly anticompetitive actions entirely from judicial review may leave an injured party without adequate recourse and allow such actions to go unchecked."). A committee of the National Association of Attorneys General stated:

Anticompetitive municipal actions . . . may not necessarily reflect state policy, but may in fact be directly contrary to expressed or implied state policy favoring competition . . . . Permitting thousands of governmental entities to become regulators of our economy without restraint and without consideration of the broader goals of national economic policy goals is not consistent with the principles underlying the enactment of the Sherman Act.

\textsuperscript{214} See 2 A. Kahn, \textit{supra} note 199, at 113-14. "The decision to regulate never represents a clean break with competition. . . . The determination of the proper mixture of competitive rivalry and government orders in the formula for social control is or ought to be the central, continuing responsibility of legislatures and regulatory commissions." \textit{Id.} (citations omitted).

\textsuperscript{215} See \textit{Southern Motor Carriers}, 471 U.S. at 61.
imply approval of the alternatives; if anything, it implies the opposite. Nonsovereign conduct that displaces competition in a different way from that affirmatively indicated by the state does not further state policy; it conflicts with state policy. To treat anything an agency or city does as a "detail" of the legislature's policy is to ignore any such distinctions.  

The Court's assertion that the displacement-of-competition and *Midcal* versions of the policy requirement are equivalent, then, must be regarded as wishful thinking. Simply because a sovereign part of the state government has displaced competition with regulation, it does not follow that any restraint thereafter conceived in that field by an agency or city implements the state's policy. Legislatures are not incapable of conceiving regulatory policy in terms more precise than regulation and competition, and the fact that the many forms of regulation are anticompetitive does not suffice to make them fungible from a policymaking perspective. A regulatory restraint that has an impact on competition other than what the legislature intended should not be deemed to further the legislature's policy. The displacement-of-competition standard, in supporting immunity for a substantial class of restraints instituted by state agencies or local government that cannot plausibly be said to implement state policy, defeats the Court's objective of confining immunity to those restraints that implement state policy.

2. Illustrative Cases

The Court's recent cases reflect a presumption that once a sovereign-level branch of the state has displaced competition in the field with regulation, any and all restraints carried out thereafter in that field by an agency or city will implement state policy. The preceding discussion showed, in general terms, that this presumption is inaccurate. This section uses three of the Court's own cases to illustrate instances of nonsovereign government action, undertaken in areas chosen by the state for regulation, which do not implement sovereign policy.

a. *Southern Motor Carriers Rate Conference, Inc. v. United States*

In *Southern Motor Carriers*, associations of private motor carriers received immunity for their practice of filing collective tariffs with public service commissions in four states. In three of the states, statutes ex-  

216. See supra notes 204-05 and accompanying text; see also Note, supra note 200, at 1496-97 (application of lax immunity test to state agencies facilitates anticompetitive activity which may conflict with state policy).

217. Compare *Midcal*, 445 U.S. at 105 ("the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'" (quoting *City of Lafayette*, 435 U.S. at 410 (plurality opinion))) with *Southern Motor Carriers*, 471 U.S. at 64 ("As long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied . . . . ").

218. See infra note 261 and accompanying text.

219. 471 U.S. at 65-66. Motor carriers were required to file tariffs of their intrastate rates with the respective public service commissions for approval. *Id.* at 50. In these
pressly permitted such collective filing. In the fourth, Mississippi, the public service commission permitted the practice, but the only pertinent expression of Mississippi legislative policy was the statute directing the commission to prescribe "just and reasonable" rates for motor carriers. The Mississippi legislature plainly had displaced competition in the trucking field with a regulatory structure. The Court's effort, however, to show that collective rate making itself was "clearly articulated and affirmatively expressed as state policy," as Midcal requires, is unconvincing.

The Court conceded that the Mississippi legislature had "not specifically addressed collective ratemaking" and referred to "the State's failure to describe the implementation of its policy in detail." But what evidence suggests that collective ratemaking was part of the Mississippi legislature's policy? Midcal requires, after all, that the challenged restraint itself must be "one clearly articulated and affirmatively expressed as state policy." Certainly the apparent intent of the other three legislatures to "achieve the desired balance between the efficiency of collective ratemaking and the competition fostered by individual submissions" establishes nothing about the Mississippi legislature's intent. The Court, however, merely observed that the legislature chose an "inherently anticompetitive ratesetting process" and asserted that permitting collective ratemaking fell within the scope of "details" left to the commission's discretion.

These contentions do not plausibly link the commission's action to the legislature's policy. Because the Court concretely identified only a legislative policy to institute regulatory ratemaking, we can dismiss the notion that collective ratemaking was "necessary to effectuate state policy." Can collective ratemaking otherwise be classified as an unexpressed detail of the Mississippi statute? While any broadly worded grant of regulatory authority leaves "details" to the Commission's discretion, such a delegation hardly constitutes meaningful evidence of legislative policy in favor of collective ratemaking. Rate regulation does not imply collective ratemaking any more than it implies requiring all truckers to join in bureau rates or awarding a monopoly franchise to a single trucking firm. Collective ratemaking displaces competition substantially more than

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220. Id. at 51 & n.4, 63 & n.24.
221. Id. at 63.
222. See id. at 64.
223. Id. at 57 (quoting Midcal, 445 U.S. at 105 (quoting City of Lafayette, 435 U.S. at 410 (plurality opinion))).
224. 471 U.S. at 63.
225. Id. at 65.
226. 445 U.S. at 105 (quoting City of Lafayette, 435 U.S. at 410 (plurality opinion)).
228. Id. at 64.
229. Id.
mere rate regulation. While the legislatures in the other three states found it appropriate to supplement their rate regulation statutes with collective ratemaking statutes, Mississippi's did not. As intuition would suggest, the Mississippi legislature had not "clearly sanctioned" something it had not "addressed." Collective ratemaking, not rate regulation, was the challenged restraint. In Mississippi, that restraint was not, as Midcal requires, "one clearly articulated and affirmatively expressed as state policy." The Mississippi commission was indeed "[a]cting alone" in permitting it.

b. City of Lafayette v. Louisiana Power & Light Co.

In City of Lafayette, two Louisiana cities that owned and operated electrical utilities sought state action immunity for various exclusionary conduct. State statutes authorized municipal ownership and operation of electrical utilities, but more detailed statutory support for the restraints in question was lacking. The displacement-of-competition rule would grant immunity based on the legislature's displacement of competition in the provision of electrical service. In Town of Hallie v. City of Eau Claire the Court suggested that City of Lafayette comported with this position. In fact, however, the City of Lafayette plurality held these facts were insufficient to warrant a finding of

230. As would be expected, collective rate-making tends to generate higher rates. See Southern Motor Carriers, 471 U.S. at 54 (Court of Appeals finding); id. at 77 n.20 (Stevens, J., dissenting) (quoting S. Rep. No. 641, 96th Cong., 2d Sess. 13 (1980)); see also Garland, supra note 21, at 493 & n.41 (noting scholarly criticism of trucking regulation as a classic instance of inefficient regulation). This distinction provided the rationale for the government's suit, which did not attack rate regulation itself. Southern Motor Carriers, 471 U.S. at 52-53.

231. 471 U.S. at 63. This issue obviously was foreseeable to, and within the competence of, the other three legislatures.

232. See id. (immunity warranted "only if collective ratemaking is clearly sanctioned by the legislatures of the four States").

233. Id.

234. Midcal, 445 U.S. at 105 (quoting City of Lafayette, 435 U.S. at 410 (plurality opinion)).

235. See 471 U.S. at 62-63 ("Acting alone," Mississippi commission "could not immunize private anticompetitive conduct.").

236. 435 U.S. at 392 n.6, 403-05. A private utility alleged that the cities conspired to engage in sham litigation to interfere with the utility's construction of a nuclear power plant, and conspired to exclude competition by the use of covenants and long-term supply agreements, and by requiring customers in some areas to buy electricity in order to receive water and gas service. Id. at 392 n.6.


238. Cf Town of Hallie, 471 U.S. at 44 (Wisconsin statutes showed clear policy to "displace competition with regulation in the area of municipal provision of sewage services"). Like the City of Eau Claire in Town of Hallie, the Louisiana cities pointed to enabling statutes from which "anticompetitive effects logically would result" in this area. See id. at 42.


240. See id. at 39-40.
immunity.241

c. Goldfarb v. Virginia State Bar

In Goldfarb the Court, applying the now-disclaimed compulsion requirement, denied immunity to the efforts of state and county bar associations to secure adherence to minimum fee schedules.242 The Midcal test would also deny immunity.243 The displacement-of-competition standard, however, would support immunity based on the legislature's and supreme court's clear intention to regulate the practice of law.244 In Southern Motor Carriers, the Court purported to reconcile Goldfarb with the displacement-of-competition standard on the ground that "the State as sovereign did not intend to do away with competition among law-

241. See supra notes 109-15 and accompanying text. The City of Lafayette plurality required a clear showing that "the legislature contemplated the kind of action complained of." 435 U.S. at 415 (quoting City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976) (footnote omitted)).

242. 421 U.S. at 792-93. The challenged restraint was a county bar association's advisory minimum fee schedule, modelled after a fee schedule promulgated by the state bar association and indirectly enforced by the state bar association. Id. at 776-77. The state bar association was the administrative agency through which the state supreme court regulated the practice of law in the state. Id. at 776.

The county bar's fee schedule technically was advisory, id. at 776, but the state bar had published reports endorsing the concept of fee schedules and proposing specific fees, id. at 777 n.4, which "provided the impetus" for the county association to adopt almost identical fee schedules. Id. at 777 n.4, 791 n.21. The state bar also issued ethical opinions warning that attorneys could not ignore fee schedules in setting their own fees. See id. at 776-78. In an ethical opinion the state bar declared that for an attorney habitually to charge "less than the suggested minimum fee schedule adopted by his local bar Association" would raise a presumption of misconduct. Id. at 778, 782-83. In one of its reports recommending the advisory fee schedules, the state bar warned that a lawyer who regularly billed less than the customary charges in order to increase his own business would be engaging in "a form of solicitation contrary to Canon 27 and also a violation of Canon 7, which forbids the efforts of one lawyer to encroach upon the employment of another." 421 U.S. at 777 n.4 (quoting minimum-fee schedule report of Virginia State Bar (1962)). In another report, the state bar warned that to "publicly criticize lawyers who charge more than the suggested fees ... might in itself be evidence of solicitation." Id.

The Court found that because of the prospect of professional disciplinary action against attorneys charging a lower fee, "the desire of attorneys to comply with announced professional norms," and the assurance that other attorneys would not undercut those prices, the activities relating to the fee schedule constituted price fixing. Id. at 781-82; see id. at 778 n.6, 782 n.9, 791 n.21.


244. The state supreme court was authorized by statute to "regulate the practice of law" and had "inherent power to regulate the practice of law." Goldfarb, 421 U.S. at 789 & n.18. The state bar was "the administrative agency through which the Virginia Supreme Court regulate[d] the practice of law in that State." Id. at 776 (footnote omitted). The state bar's disciplinary function was confirmed by statute, id. at 776 n.2, and it was authorized by the state supreme court to issue opinions interpreting the court's ethical rules. Id. at 791. The regulated nature of this service market is shown perhaps most clearly in the restriction of entry; to take an example pertinent in Goldfarb, only an attorney, and only one licensed in Virginia, could "legally examine a title." 421 U.S. at 782.
The Court also said that "Virginia 'as sovereign' did not have a 'clearly articulated policy' designed to displace price competition among lawyers." This reasoning is contradicted by both Southern Motor Carriers itself and Goldfarb. It is inconsistent with the holding in Southern Motor Carriers because the standard applied there is whether the legislature clearly intended to "displace competition in a particular field with a regulatory structure," not whether it intended to eradicate competition entirely or displace a certain kind of competition. The Court's characterization of Goldfarb is inaccurate because there the state supreme court did not authorize the restraints effected by the state and county bar associations, but it certainly displaced competitive freedom in pricing legal services. This characterization parallels the Court's analysis of the Mississippi case in Southern Motor Carriers. In Goldfarb, the Court's point was that the supreme court had not approved the particular type of price restraint at issue, not that the defendant agency had interfered with perfect pricing freedom.

245. 471 U.S. at 64 (emphasis in original).
246. Id. at 61.
247. Id. at 64.
248. The usage of this phrase in Southern Motor Carriers shows that the Court uses "displace" to refer to the partial displacement of competition. See, e.g., 471 U.S. at 65 & n.25. None of the four states entirely displaced competition in intrastate trucking; indeed, none of them displaced even price competition entirely, for even firms which were members of the rate bureaus were free to file their own rates. Id. at 51.
249. It did not "direct" either bar association to issue fee schedules or "require the type of price floor which arose from [their] activities," and it advised attorneys not to be guided exclusively by such schedules. Goldfarb, 421 U.S. at 790 & 789 n.19.
250. In rules issued in 1938, the Virginia Supreme Court prescribed to attorneys a "procedure for setting fees" using enumerated factors, among which was "customary charges of the Bar for similar services," and approved consultation of bar association advisory minimum fee schedules for this purpose. Id. at 789 n.19 (quoting Rules for the Integration of the Virginia State Bar, 171 Va. xvii, xxiii (1938)). In 1970 the court adopted a rule stating that "[s]uggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees." 421 U.S. at 789 n.19 (quoting Code of Professional Responsibility, 211 Va. 295, 302 (1970)).
251. See supra notes 221-28 and accompanying text. There, the Court inferred that "the legislature intended to displace competition in the intrastate trucking industry with a regulatory program" from the lack of a "discernible relationship" between the actual prices and "the prices that would be set by a perfectly efficient and unregulated market." Southern Motor Carriers, 471 U.S. at 65 n.25. Given the Virginia Supreme Court's rules, the state bar would not have been free, any more than the public service commission in Mississippi, to "choose free market competition" in pricing. See id.
252. Goldfarb, 421 U.S. at 789-91; see Southern Motor Carriers, 471 U.S. at 60 ("focal point of the Goldfarb opinion was the source of the anticompetitive policy" (emphasis in original)).

These three cases stand as concrete examples, drawn from the Court’s own experience, of nonsovereign government action that occurred in areas selected for regulation by the legislature or supreme court yet cannot plausibly be said to implement sovereign state policy. These cases demonstrate that the current displacement-of-competition version of the policy requirement is less demanding than the Midcal version, and that it fails to achieve the Court’s objective of confining immunity to restraints implementing state policy.

Of course, the mere fact that prior cases cannot be harmonized with current doctrine is not remarkable. What is interesting here is the Court’s explicit assertion that its displacement-of-competition standard version of the policy requirement, as applied in Southern Motor Carriers, is equivalent to the Midcal version and comports with the results in Goldfarb and City of Lafayette. The Court clearly intends not to com-

as an analogy. See Continental Ore, 370 U.S. at 706-07. In Continental Ore, the Court denied Parker v. Brown immunity to defendant’s Canadian subsidiary, which had been duly delegated to act as a purchasing agent of the Canadian government and, in the lawful exercise of its discretion, had eliminated its competitor, Continental Ore, from the vanadium ore market. Id. As a wartime measure, the Canadian government had established the Office of Metals Controller and given it “broad powers to regulate the procurement of the materials and to allocate them to industrial users.” Id. at 702 n.11. This agency in turn delegated to Electro Met “the discretionary agency power to purchase and allocate to Canadian industries all vanadium products required by them.” Id. Electro Met, in exercising this discretion, refused to purchase any ore from plaintiff. Id. at 695. Such delegation and exercise of discretion did not violate Canadian law. Id. at 702 n.11, 706.

The Court observed that “there is no indication that the Controller or any other official within the structure of the Canadian Government approved or would have approved of joint efforts to monopolize the production and sale of vanadium or directed that purchases from Continental be stopped.” Id. at 706. This lack of any affirmative policy on the part of the higher authorities supporting the agent’s anticompetitive action would likewise dictate denial of immunity under Midcal. Cf. Midcal, 445 U.S. at 105.

The displacement-of-competition standard, however, would lead to a contrary result. The Canadian government clearly intended to displace competition in the vanadium market with a regulatory structure. Cf. Southern Motor Carriers, 471 U.S. at 64 (state intended to displace competition among common carriers). The “details” of the “inherently anticompetitive” metals allocation program were left to the discretion of the Office of Metals Controller, which in turn duly delegated discretion to the purchasing agent. Continental Ore, 370 U.S. at 702 n.11; cf. Southern Motor Carriers, 471 U.S. at 63-64. The lack of higher government authorization, and indeed the patent unlikeliness that such anticompetitive conduct would have been countenanced, would be irrelevant under the displacement-of-competition analysis.

Although Continental Ore has not been mentioned in the Court’s recent state action opinions, it was cited by the Court as authority bearing on the scope of state action immunity in Goldfarb, 421 U.S. at 789-90, and Cantor, 428 U.S. at 593.

253. Of course, immunity would today depend upon a finding that both the policy and supervision requirements of Midcal are satisfied. The purpose of discussing these three pre-Midcal cases has to do with the policy requirement. According to the interpretation of the Court’s current supervision requirement presented here, see supra notes 90-94 and accompanying text, however, it too would be satisfied in Goldfarb and in Continental Ore. As for City of Lafayette, the Court no longer applies the supervision requirement where a local government is the defendant. See Town of Hallie, 471 U.S. at 47.

promise what it required in Midcal. Despite the result in *Southern Motor Carriers*, these assertions suggest that the Court is committed firmly to the distinctive feature of the Midcal standard: that a nonsovereign government restraint must implement sovereign state policy in order to support immunity.\textsuperscript{255}

D. The Utility of Agencies and Cities to the State

The Court’s second objective for the policy requirement—preserving the usefulness of agencies and local government to the sovereign parts of government—now merits attention.\textsuperscript{256} This objective recognizes the state’s need to delegate discretion to subordinate bodies in a way that permits flexibility in the execution of state policies. It is plain that the displacement-of-competition standard satisfies this objective: it supports antitrust immunity for any actions that agencies or local government could possibly conceive of or endorse, as long as those actions stay within the designated sectors of the economy. In light of the foregoing conclusion that the displacement-of-competition standard violates the court’s other objective—confining immunity to regulatory restraints that implement state policy—it is important to examine how much of a constraint this second objective poses on the first. This Article’s effort to reconcile both of the Court’s primary objectives can succeed only if a less deferential version of the policy requirement could still satisfy the Court’s desire to preserve the utility of agencies and cities as instruments of state policy.

The Court’s declaration that “[i]f more detail than a clear intent to displace competition were required of the legislature, States would find it difficult to implement through regulatory agencies their anticompetitive policies”\textsuperscript{257} is unrealistic. The Court’s assertion rests on two premises. First, the Court reasons that requiring from the legislature “more detail than a clear intent to displace competition” means necessarily requiring “express authorization for every action that an agency might find necessary to effectuate state policy.”\textsuperscript{258} This is a false dichotomy in that it excludes the role of inference in interpreting legislative purpose. For example, the *City of Lafayette* plurality stated that “specific, detailed legislative authorization” was not necessary for it to be “found ‘from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.’”\textsuperscript{259} In recognizing implied, as well as express, authorization, then, the *City of

\textsuperscript{255} This discussion, in contrasting abstract statements and concrete rules and results, treats the Court’s statements about its objectives as primary, rather than as rationalization put together to support a rule. The Court’s expression of its objectives has changed little in the past decade, while the policy requirement has changed greatly. See *supra* notes 180-88 and accompanying text.

\textsuperscript{256} See *supra* notes 184-86 and accompanying text.

\textsuperscript{257} *Southern Motor Carriers*, 471 U.S. at 64.

\textsuperscript{258} Id.

\textsuperscript{259} *City of Lafayette*, 435 U.S. at 415 (quoting opinion below, 532 F.2d 431, 434 (5th Cir. 1976)).
Lafayette standard exemplifies a version of the policy requirement falling between the displacement-of-competition standard and an express authorization standard.

Second, the Court has suggested that policy decisions more detailed than whether or not to displace competition in a particular field with regulation fall within the realm of "problems unforeseeable to, or outside the competence of, the legislature." If this were true, the phrase "intent to displace competition" properly would be viewed not as an abstract description of legislative intent, but as a precise, concrete characterization of that intent. It is wildly unrealistic, however, to imagine that legislatures confine their policymaking to the general decision whether or not to institute regulation, delegating the resolution of every question more specific than that. The Court's own opinions are replete with instances of regulatory statutes whose detail reflects substantially deeper deliberation than this. Since the Court never has suggested any dissatisfaction with the results of its previous cases, it would seem that this apprehension of interfering unduly with the implementation of state policies is substantially exaggerated. There are, of course, "problems unforeseeable to, or outside the competence of, the legislature," but it is highly counter-intuitive to say that this class of problems begins where the decision whether or not to regulate a market ends.

In sum, it would appear that the displacement-of-competition version of the policy requirement does too little for one of the two opposing objectives the Court seeks to achieve with its policy requirement, and more than is needed for the other. A basic premise underlying the Court's procedural test is that antitrust goals should be compromised only to the extent necessary to realize sovereign state policies. The Court has asserted that the displacement-of-competition standard accomplishes this objective. The extreme liberality of the displacement-of-competition standard, however, supports immunity for restraints which do not implement state policy. Although the Court's displace-

260. Southern Motor Carriers, 471 U.S. at 64.
261. See 324 Liquor Corp., 107 S. Ct. at 722-23 & nn. 1, 3 (statute provided detailed system for resale price maintenance among wholesalers and retailers of liquor); Midcal, 445 U.S. at 99-100 & nn. 1-2 (same); Southern Motor Carriers, 471 U.S. at 63 & n.24 (three of the four states concerned had statutes specifically authorizing collective rate-making among common carriers); New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 98 & n.1 (1978) (statute provided for agency review of proposed retail automobile dealerships to be located in an area of existing franchise); Parker, 317 U.S. at 346-47 (statute set forth procedures and substantive criteria for establishment of programs controlling agricultural marketing). The cases also demonstrate that state supreme courts conceive and express their regulatory intentions in terms far more detailed than monolithic concepts of competition and regulation. See Hoover v. Ronwin, 466 U.S. 558, 561-64 (1984); Bates, 433 U.S. at 355 & n.5; Goldfarb, 421 U.S. at 789 & n.19.
262. Southern Motor Carriers, 471 U.S. at 64.
263. See supra notes 207-15 and accompanying text.
264. See supra note 169 and accompanying text.
265. See Southern Motor Carriers, 471 U.S. at 64; supra notes 195-96 and accompanying text.
ment-of-competition standard satisfies the Court's other principal objective—to protect the states' ability to use agencies and local government as tools of state regulatory policy—it goes too far. A less generous version of the policy requirement could satisfy this objective, while staying within the confines of the first objective.

III. RECONCILIATION

A. A Proposed Standard

The previous section has shown that the Court's displacement-of-competition version of the policy requirement is premised upon a misconception of its practical context. The Court has underestimated the degree of restriction needed to confine immunity to restraints implementing state policy. At the same time, the Court has overestimated the danger of frustrating the necessary delegation of state authority to state agencies and local government by rejecting out-of-hand any version of the policy requirement more demanding than the displacement-of-competition standard.

The goal of this Article is to state a version of the policy requirement that can satisfy both of the Court's objectives: granting immunity only where the regulatory restraint furthers state policy and simultaneously permitting the use of agencies and cities as flexible tools for state policy. The *Midcal* policy requirement—"the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy,'" is a good starting point. It needs to be clarified, however, so that courts do not interpret it as giving carte blanche to agency and municipal anticompetitive initiatives based on a simple finding that the state intended to displace competition with regulation. The policy requirement should ask not simply whether the state intended to impose regulation in this field, but whether it intended to impose in that field the type of regulation in issue.

The proposed test requires that the pertinent sovereign policy must indicate not only that regulation is to displace competition in the particular field, but also must indicate affirmatively a policy to displace competition *in the form and magnitude* presented by the challenged restraint. This fundamental question of the intended impact on competition must be resolved if the *Midcal* policy requirement is to fulfill its purpose. If the restraint imposed by the city or agency displaces competition in a way or to a degree not articulated by the state, it should not be deemed to satisfy the policy requirement.

266. See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 415 (1978) (plurality opinion)); see also City of Lafayette, 435 U.S. at 415 (plurality opinion) (requiring that "the legislature contemplated the kind of action complained of") (quoting opinion below, 532 F.2d 431, 434 (5th Cir. 1976)).

267. See supra notes 206-17 and accompanying text.
The Court's opinions provide examples of an appropriate level of generalization in characterizing the state's regulatory policy. In *Midcal* itself, the challenged regulation satisfied the policy requirement for immunity because the legislature's policy was "forthrightly stated and clear in its purpose to permit resale price maintenance."268 In *324 Liquor Corp. v. Duffy*,269 too, the Court identified the State's policy of "re¬
sale price maintenance."270 In contrast, in *Goldfarb*, because the state supreme court had not acted to "authorize binding price fixing,"271 that form of regulatory restraint was denied immunity. And in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, the Court denied immunity because no government policy permitted an agency to participate in "joint efforts to monopolize" the industry in question.272

Although a court should consider "'all evidence which might show the scope of legislative intent,'"273 inferences should be drawn narrowly. State policy relied on to validate nonsovereign regulatory restraints should be affirmatively discernible in the governmental entity's grant of authority. Certain canons of interpretation inevitably would play a part, but these should not rubberstamp agency or city innovations as implementing state policy. As Professors Areeda and Turner have suggested, a court should apply "the presumption that competition serves a state's interests unless it has fairly clearly expressed a contrary view."

*City of Lafayette* and *Town of Hallie* may be usefully compared. In *City of Lafayette*, where the statute merely provided for municipal operation of utilities,275 the plurality distinguished between authorization "to provide

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268. 445 U.S. at 105.
270. Id. at 725.
271. 421 U.S. at 789. The Court had displaced purely competitive pricing, however, in other respects. See supra notes 249-52. A similar degree of precision in characterizing state regulatory policy is found in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). There the Court noted that states regulated the insurance business, but it observed that few states permitted unsupervised insurance companies to fix uniform rates and that no states authorized "combinations of insurance companies to coerce, intimi¬date, and boycott competitors and consumers in the manner here alleged." Id. at 562, (quoted in *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 55 n.18 (1985)); see infra notes 308-17 and accompanying text.
273. *City of Lafayette*, 435 U.S. at 394 (quoting opinion below, 532 F.2d 431, 435 (5th Cir. 1976)).
274. 1 P. Areeda & D. Turner, Antitrust Law ¶ 214, at 81 (1978); see id. at 83 (construes *Cantor* to hold that "unless the state is explicit about which activities are part of its regulatory plan, the Court will assume that activities which conflict with the antitrust laws are not part of the plan for purposes of antitrust immunity"); *Douglas & Mullenix*, supra note 7, at 521 (when evidence of legislative intent is "equally consistent with a state purpose that is not in conflict with federal law," a purpose to displace the antitrust laws should not be found); id. at 520 (principles of federalism "run in both directions: just as an intent to preempt state laws is not lightly inferred from congressional action, so an anticompetitive policy that would undermine federal law should not be lightly inferred from state laws").
275. 435 U.S. at 391.
services on a monopoly basis” and “predatory conduct not itself directed by the State.”

In Town of Hallie, in contrast, statutes not only authorized the defendant city to operate sewage services, but specifically permitted it to refuse to extend services to adjacent unincorporated areas. It was thus appropriate to grant immunity. To be consistent with Midcal, the Court in Southern Motor Carriers should not have inferred that Mississippi’s legislature intended to authorize collective rate filing among motor carriers when it had only explicitly authorized rate regulation. Collective rate filing is hardly necessary to rate regulation and has a separate and substantial incremental impact on competition.

The proposed version of the policy requirement would confine antitrust immunity to restraints that, in a meaningful sense, implement policy of a sovereign part of the state and would thus eliminate the unnecessary concession of immunity to anticompetitive innovation by agencies and local governments. It must also be determined whether the proposed standard would hamper the use of agencies and local government as tools of state policy. Indeed, it was concern that the City of Lafayette and Midcal versions of the policy requirement would not sufficiently protect this objective that seems to have motivated the Court to evolve the displacement-of-competition standard.

The proposed standard would not require express authorization for specific regulatory actions. It would not require that the legislature or supreme court approve the details of individual actions or mean that state action would be found only where the sovereign parts of government makes all policy decisions and the nonsovereign none. The proposed standard would permit the delegation of considerable discretion, including policymaking power, to agencies and local government, as long as the legislature or other pertinent sovereign body has answered the very fundamental question of the kind of anticompetitive impact permitted by the regulation.

It is unrealistic to assume that legislatures are incapable, unwilling or unlikely to consider regulatory issues in any more depth than the black and white issue of whether or not to introduce regulation or that states

276. 435 U.S. at 405 n.31. See supra notes 236-41 and accompanying text.
277. Town of Hallie, 471 U.S. at 41; see infra notes 304-09 and accompanying text.
278. See supra notes 223-34 and accompanying text.
279. To authorize rate regulation does not suggest an intention to authorize collective rate filing any more than it suggests an intention that a single firm be granted a monopoly in the field. Rate regulation simply means that providers file their rates with a regulatory commission for whatever review the latter chooses to administer. Where collective rate filing is permitted, groups of competitors agree in advance to charge the same rates, and file these rates collectively.
280. See supra notes 185-86, 256-63 and accompanying text.
281. This substantially differs from the nondelegation doctrine in administrative law, which opposes the delegation of any legislative power to agencies. See 1 K. Davis, Administrative Law Treatise §§ 204-06 (2d ed. 1978); B. Schwartz, Administrative Law 52-55 (2d ed. 1984).
282. See supra notes 260-63 and accompanying text.
generally would wish to eliminate completely the place of federal antitrust laws in the regulatory sector. As is demonstrated below, almost all of the regulatory actions of state or local government to which the Court has granted immunity also would receive immunity under the proposed test. It therefore seems most unlikely that the proposed standard would make it "difficult" for states "to implement through regulatory agencies their anticompetitive policies," or reduce "the range of regulatory alternatives available to the State," or "compromise the States' ability to regulate their domestic commerce." It would leave a state "no less able to allocate governmental power between itself and its political subdivisions."

B. Consistency With Precedent

Aside from its substantive objectives, the Court also has emphasized the value of maintaining consistency within its state action cases. The proposed version of the policy requirement yields results consistent with those of virtually all of the Court's state action cases.

A number of the Court's cases can be treated very briefly. Restraints imposed by a sovereign part of state government—a legislature or supreme court—are deemed to represent state policy without further in-

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283. See supra notes 212-13 and accompanying text.
284. See infra notes 291-322 and accompanying text.
285. See Southern Motor Carriers, 471 U.S. at 64.
286. See id. at 61; Community Communications Co. v. City of Boulder, 455 U.S. 40, 56-57 (1982).
287. See Southern Motor Carriers, 471 U.S. at 56. The proposed rule would frustrate only those hypothetical legislative policies that are so vaguely expressed as to be indiscernible. If this should occur, legislatures would be able to circumvent the problem by expressing themselves somewhat more clearly in delegating discretion. The proposed test would, of course, frustrate those anticompetitive restraints formulated by an agency or city on its own, with no substantial basis in expressed legislative policy. This follows from the restrictive concept of state action immunity repeatedly expressed by the Court: agency and city action must implement sovereign-level policy. See supra notes 82-84 and accompanying text.
288. Community Communications Co. v. City of Boulder, 455 U.S. 40, 57 (1982) (quoting City of Lafayette, 435 U.S. at 416). As explained by the Court in City of Boulder, an inquiry into whether nonsovereign restraints implement state policy does not threaten the legitimate exercise of governmental power, nor does it preclude municipal government from providing services on a monopoly basis. Parker and its progeny make clear that a State properly may . . . direct or authorize its instrumentalities to act in a way which, if it did not reflect state policy, would be inconsistent with the antitrust laws . . . . Assuming that the municipality is authorized to provide a service on a monopoly basis, these limitations on municipal action will not hobble the execution of legitimate governmental programs.
Id. at 57 (quoting City of Lafayette, 435 U.S. at 416-17).
289. That this is an independent objective is suggested by instances in which the Court has substantially distorted the language or facts of its own prior cases in order to preserve the appearance of doctrinal continuity. See supra notes 48, 88-89, 125-32, 134-35, 240-41, 245-52 and accompanying text.
Therefore, the proposed modification of the policy requirement would not affect the reasoning in the cases in which the Court determined that the restraint was imposed directly by a state supreme court. The Court's policy requirement essentially applies only when the challenged restraint is nonsovereign—that is, imposed by an agency or a city. The proposed version would not disturb the state policy aspect of cases in which a statute entirely defined the challenged restraint. Nor is an issue raised by the proposed standard regarding the cases in which agency or city regulation fails to meet even the displace-

290. See supra notes 79-80 and accompanying text.

291. See Hoover v. Ronwin, 466 U.S. 558 (1984); Bates v. State Bar of Arizona, 433 U.S. 350 (1977). In Bates the challenged restrictions on attorney advertising were contained in disciplinary rules explicitly approved by the state supreme court. See id. at 360; see also supra notes 66-71 and accompanying text.

In Hoover, the Court granted immunity to the actions of the Arizona Supreme Court's Committee on Examinations and Admissions relating to the scoring of a bar examination failed by plaintiff. 466 U.S. at 560-67. It based this ruling on a not altogether convincing determination that the pertinent conduct was that of the state supreme court itself. Compare id. at 561-65, 570-90 (Committee's recommendation cannot "be divorced from the [state] Supreme Court's exercise of its sovereign powers") with id. at 593-96 (Stevens, J., dissenting) (supreme court did not even have a "clearly articulated state policy" sufficient to uphold anticompetitive ruling). Although the committee was supposed to file its grading formula with the supreme court for its approval, it apparently had not done so for the examination in question. See id. at 562 & n.6, 572 & n.22.

The same result, however, might also be reached in another way. The supreme court had formed the committee and given it certain powers, id. at 561-62 & n.4; like the bar association in Bates v. State Bar of Arizona, "its role [was] completely defined by the court." Bates, 433 U.S. at 361. Treating the committee like any other agency, the policy requirement would be met as long as the committee's actions, if not reviewed in this instance, were at least of the type specified by the supreme court in its delegation of authority to the committee. Apparently they were. See Hoover, 466 U.S. at 594 (Stevens, J., dissenting) (supreme court "may have permitted petitioners to grade and score respondent's bar examination as they did"). This conclusion would follow under the proposed version of the policy requirement as well as under the displacement-of-competition version.

292. See supra notes 82-84 and accompanying text.


In New Motor Vehicle Board, the challenged actions of the agency followed procedures set forth in a detailed statute providing for regulatory review of the establishment or relocation of retail automobile dealerships within the market area of an existing franchisee of the same manufacturer. See 439 U.S. at 98 & n.1; supra notes 116-18 and accompanying text. The Court subsequently has referred to New Motor Vehicle Board as an example of regulatory discretion. See Hoover, 466 U.S. at 568; Town of Hallie, 471 U.S. at 42. Plaintiff's suit, however, apparently only challenged the delay pending review, rather than the review itself. See New Motor Vehicle Board, 439 U.S. at 109 (appellees "argue that by delaying the establishment of automobile dealerships whenever competing dealers protest, the state scheme gives effect to privately initiated restraints on trade"); id. at 112 (Marshall, J., concurring) ("[t]his litigation arises because of the delay necessarily incident to the Board's inquiry"). Only one of the 117 protests filed under the Act had ever been sustained by the Board, id. at 110 n.14, so the Act's function in practice was delay rather than prohibition. The due process issue, similarly, concerned only the delay without prior hearing. See id. at 106-09; 440 F. Supp. 436 passim (C.D. Cal. 1977) (opin-
The challenged restraint held immune in *Parker v. Brown* was enforcement of a regional raisin marketing program developed under a California statute. Although *Parker* sometimes is referred to as if the restraint were formulated entirely by the legislature, the opinion shows that the regulatory program received its final form from an agency and that the Court analyzed it as such. The statute delegated to an agency, the Agricultural Prorate Advisory Commission, policymaking discretion as to whether to develop marketing programs for particular commodities and the precise form and scale such programs should assume. The Court read the statute as a "state command to the Commission and to

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296. *Hoover*, 466 U.S. at 588 (Stevens, J., dissenting); *City of Boulder*, 455 U.S. at 52; Jorde, *supra* note 10, at 241.


298. *Id.* at 346-47. This included the tasks of determining what were reasonable profits and determining the reasonableness of a committee’s proposed marketing program and of any proposed subsequent modification. *Id.* at 348-49. Approval depended upon a finding that the program was “reasonably calculated to carry out the objectives of the Act.” *Id.* at 347; *see Brown v. Parker*, 39 F. Supp. 895, 901 (S.D. Cal. 1941) (refers to “‘Stabilization Pool Sales Policy’ set up by the Committee”)

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the program committee." 299 As the Court noted, the Commission was responsible for the final form of the programs. 300 Using the Court’s terminology, the restraint in question was “official action directed by a state,” rather than “state action” in the narrower sense. 301

At the same time, however, the challenged restraints approved by the agency followed parameters clearly defined by the statute and thus would satisfy the proposed version of the policy requirement. The legislature established the general form and content of the challenged restraint in the statute, setting forth detailed procedures leading up to the approval of an agricultural marketing plan and defining the structural elements from which the plans might be composed. 302 Notwithstanding the Commission’s discretion, the anticompetitive impact of the Commission’s programs fell within a range authorized by the legislature. In approving the particular anticompetitive restraints embodied in the marketing program of Raisin Proration Zone No. 1, the Commission did not add any form of anticompetitive restraint not contemplated by the legislature. 303

The proposed standard would also support granting immunity to the defendant city in Town of Hallie v. City of Eau Claire, as the Supreme Court did. 304 At issue was the city’s refusal to furnish sewage treatment service to adjoining unincorporated townships unless they agreed to become annexed to the city and thus accept sewage collection and transportation service along with the sewage treatment service. 305 A combination of state statutes specifically permitted the city to refuse to extend sewage

299. 317 U.S. at 352. The Agricultural Prorate Advisory Commission was to pass upon and oversee marketing programs initiated by committees of agricultural producers. Id. at 346. If statutorily prescribed economic criteria were met, including a finding by the Commission that development of a program would not allow producers “unreasonable profits,” a “program committee” was to be named, principally from nominees proposed by the producers. Id. The program committee then would formulate a particular proration marketing program for the designated commodity in the defined zone and submit it for review to the Commission, which had the power to modify it. Id. at 347.

300. 317 U.S. at 347. See Midcal, 445 U.S. at 104 (“The Court emphasized [in Parker] that the Advisory Commission, which was appointed by the Governor, had to approve cooperative policies . . . .”).

301. Parker, 317 U.S. at 351. The Court characterized the pertinent statute as authorizing “the establishment, through action of state officials, of programs for the marketing of agricultural commodities.” Id. at 346 (emphasis added).

302. The primary administrative task of the marketing committee was the grading of the crop and its allocation into pools. Id. at 347-48. Marketing of the raisins was to be controlled or performed by the committee through control of the pools. Id. at 348. Even for free tonnage, which a producer was allowed to sell through ordinary commercial channels, the producer had to purchase a “secondary certificate” authorizing sale; certification permitted the committee to control the “time and volume of movement.” Id.

Definition of, and plans for, the administration of the pools were to be specified in the proposal a committee submitted to the Commission. See 1939 Cal. Stat. 2497.

303. The interpretation that Parker embodies the displacement-of-competition standard is implicitly rebutted by the detail the Court devotes to explaining how closely commission action fit expressed legislative policy. The Court’s detailed discussion of these points would be superfluous under the displacement-of-competition standard.

304. 471 U.S. at 47.

305. Id. at 37.
service to areas that would not accept annexation. The conclusion that the legislature had contemplated municipal action of precisely the type challenged was supported by a state supreme court decision rendered in a similar case.

The proposed standard would support the Court’s denial of immunity in Continental Ore Co. v. Union Carbide & Carbon Corp. Defendant’s subsidiary had been duly delegated to act as a purchasing agent of the Canadian government; its choice of suppliers technically fell within the range of its discretion. Although some displacement of competition was inherent in a program of government purchasing and allocation, none of the higher authorities had ever expressed any policy that would support the agent’s actions in systematically excluding a rival from the Canadian vanadium market. The Court relied on this point in denying immunity.

The proposed standard also would confirm the Court’s denial of immunity in Goldfarb v. Virginia State Bar and in Lafayette v. Louisiana Power & Light Co. In Goldfarb, the state supreme court had displaced competition to the extent of directing attorneys to consider enumerated factors, including bar association advisory fee schedules, in determining their fees. The bar association’s active discouragement of offering prices below those suggested in the schedules, however, did not warrant immunity because this additional anticompetitive conduct had not been authorized by the state supreme court. In City of Lafayette, the pro-

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306. See id. at 41. The basic statutory grant of authority to cities to construct and enlarge sewer systems permitted cities to determine their own service districts. Id. A more detailed statute recited that a city would have no obligation to serve unincorporated areas beyond the boundary the city chose for its service district. Id. A third statute, which authorized the state’s Department of Natural Resources to order a city to provide sewage connections to areas outside its district, specifically provided that such an order would be void if the area refused to accept annexation. Id. Thus, even if the townships had applied to the state’s Department of Natural Resources for relief, the statute specifically forbade the agency to order a connection in the circumstances. See id.

307. 471 U.S. at 44 & n.8.

308. 370 U.S. at 704.

309. See supra note 252.

310. The Court observed that “there is no indication that the Controller or any other official within the structure of the Canadian Government approved or would have approved of joint efforts to monopolize the production and sale of vanadium or directed that purchases from Continental be stopped.” 370 U.S. at 706.

311. 421 U.S. at 791. The Court denied immunity in this case, reasoning that anticompetitive conduct of the bar associations had not been compelled by the state supreme court. Id. at 790. Its factual discussion, however, went well beyond what would have been necessary merely to support this rationale and drew attention to factors that support denial of immunity under the proposed rule. See infra note 314 and accompanying text.

312. 435 U.S. at 413-17 (plurality opinion).

313. See 421 U.S. at 778 n.6, 782-83, 791 n.21; see supra note 250 and accompanying text. At issue was an advisory minimum fee schedule issued by a county bar association patterned after a state bar’s fee schedule and indirectly enforced by the state bar’s ethical pronouncements on the topic of fees.

314. The state bar association issued opinions and reports that indicated that pricing below the advisory fee schedule was a violation of professional ethics meriting discipli-
posed standard leads to the same result reached by the Court for essentially the reasons relied on by the plurality.\textsuperscript{315} The legislature had displaced competition to the extent of authorizing cities to own and operate electrical utilities,\textsuperscript{316} but there was no further showing that it had intended municipal utilities to undertake rivalrous exclusionary practices with respect to neighboring utilities as alleged.\textsuperscript{317}

In \textit{Southern Motor Carriers Rate Conference, Inc. v. United States}\textsuperscript{318} alone, application of the proposed standard yields results that deviate slightly from the Court's decision. In \textit{Southern Motor Carriers}, the proposed policy requirement would grant immunity, as the Court did, for the activities of the rate bureaus in three of the four states, because the statutes explicitly permitted the specific type of anticompetitive restraint presented—collective filing of tariffs by associations of motor carriers.\textsuperscript{319} The proposed standard would deny immunity in the case of Mississippi, however, because of the lack of legislative policy supporting collective rate filing.\textsuperscript{320} By permitting collective rate filing, the Mississippi commission displaced competition to a substantially greater extent than was indicated by the legislative direction to set "just and reasonable" rates for motor carriers.\textsuperscript{321} At the same time, because this opinion vigorously invokes the \textit{Midcal} version of the policy requirement, much of its reasoning supports the version proposed here.\textsuperscript{322}

This survey demonstrates that the proposed policy requirement does

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\textsuperscript{315} See 435 U.S. at 413-16 (plurality opinion); \textit{supra} notes 109-14 and accompanying text. The Court emphasized that there was no indication that the supreme court approved the bar's opinions. 421 U.S. at 791. Indeed, the supreme court had affirmatively expressed policy contrary to that of the state bar. Whereas the bar's opinions and reports threatened that undercutting the advisory schedules could constitute misconduct, the court downplayed the importance of the schedule. The court's rule mentions fee schedules only as evidence of "customary charges," and customary charges formed only one of six factors a lawyer was to consider in setting his fee. \textit{Id.} at 789 n.19. Moreover, the court's rules expressly warned that "no lawyer should permit himself to be controlled" by a fee schedule or to "follow it as his sole guide in determining the amount of his fee." \textit{Id.} (emphasis in quotation added by Supreme Court). Similarly, the bar's ethical opinion warning lawyers not to criticize publicly other lawyers who charged in excess of the recommended fees, \textit{id.} at 777 n.4, may be contrasted with the state supreme court's rule against charging "excessive" fees, \textit{id.} at 789 n.19.

\textsuperscript{316} 435 U.S. at 413-92.
\textsuperscript{317} \textit{Id.} at 414-15. No evidence demonstrated that the legislature had "'contemplated the kind of action complained of.'" \textit{Id.} at 415 (quoting City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976)). For a discussion of the exclusionary conduct in issue, see 435 U.S. at 392 n.6, 403-05; \textit{see supra} notes 236-37 and accompanying text.

\textsuperscript{318} 471 U.S. 48 (1985).
\textsuperscript{319} \textit{Id.} at 63.

\textsuperscript{320} As the Court itself stated, the public service commission, "'[a]cting alone . . . could not immunize private anticompetitive conduct.'" \textit{Id.} at 62-63.

\textsuperscript{321} \textit{Id.} at 63.

\textsuperscript{322} \textit{See supra} notes 134-35 and accompanying text.
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not disturb the results in the Court's state action cases except as to one of the four states in Southern Motor Carriers. In contrast, as was shown above, the Court's current displacement-of-competition standard contradicts the results reached in City of Lafayette, Goldfarb and Continental Ore,\textsuperscript{323} and in Southern Motor Carriers clashes with the Midcal policy requirement it purports to construe.\textsuperscript{324} Thus from the standpoint of the Court's implicit objective of maintaining consistency among its own precedents,\textsuperscript{325} the proposed version of the state policy requirement is superior to the displacement-of-competition standard.

C. Efficiency Consequences

This Article has demonstrated that the displacement-of-competition version of the policy requirement fails to satisfy the Court's objective of confining immunity to regulatory restraints that implement state policies and has proposed in its place a stronger version that nonetheless meets the Court's countervailing objective of permitting agencies and cities to function effectively as tools of state policy. It remains to be shown that what is doctrinally feasible is worthwhile—that the proposed version of the policy requirement would yield an improvement in efficiency over the Court's displacement-of-competition standard. The following discussion demonstrates that the proposed standard would deny immunity to some of the inefficient types of agency and city restraints that have provoked the most concern among proponents of substantive criteria in this area.

In the context of the state action doctrine, scholarship addressing the inefficiencies generated by regulation points to two principal problems.\textsuperscript{326} First, there are efficiencies caused when regulated entities are able to exercise sufficient influence over the regulatory apparatus to obtain benefits at the expense of the consuming public. Government regulation can function as a valuable aid to, or substitute for cartelization, providing regulated entities with such benefits as heightened entry barriers and the discouragement of price competition.\textsuperscript{327} The opportunity for securing

\textsuperscript{323} See supra notes 236-53 and accompanying text.
\textsuperscript{324} See supra notes 223-35 and accompanying text.
\textsuperscript{325} See supra note 289 and accompanying text.
\textsuperscript{326} This is not to claim that all state and local regulation is inefficient, or more inefficient than federal regulation, or that it is a homogeneous category, or that identifying and measuring such inefficiency is a straightforward task. Considerable controversy attends the empirical study of regulatory inefficiency. See, e.g., Hovenkamp & Mackerron, supra note 8, at 759-60. Description or prescription in this area presupposes generalization over a highly disparate range of lines of commerce and state and local government institutions. But the need to impose a categorical treatment is in part imposed by the sweep of the Sherman Act itself and by the desire to avoid overly complex or subtle legal rules.
\textsuperscript{327} See Easterbrook, supra note 8, at 23-24, 28-30; B. Owen & R. Braeutigam, The Regulation Game 6 (1978); Page, supra note 10, at 1108-09; Werden & Balmer, Conflicts Between State Law and the Sherman Act, 44 U. Pitt. L. Rev. 1, 5 (1982); Wiley, supra note 8, at 723-26. See also Aranson, Gelhorn & Robinson, supra note 198, at 63 ("The delegation of legislative authority to agencies . . . facilitates the regulatory production of private benefits and the satisfaction of high demanders' preferences at collective cost").
such private benefits arises especially when producer groups obtain effective self-regulation under government auspices; occupational licensing programs are a notorious example.\textsuperscript{328}

Second, there are inefficiencies that occur because the territory of the regulating government body is substantially smaller than the market on which the costs of its inefficient regulation are imposed.\textsuperscript{329} In effect, a government unit's regulatory activities or its own conduct as a market participant may benefit its citizens at the expense of noncitizens by "exporting" costs beyond its borders. The opportunity to impose such inefficiencies is greatest when a government unit acts as a market participant and effectively regulates its own proprietary operations.\textsuperscript{330}

In the context of state and local regulation, axiomatic points of the Court's state action doctrine put much of this inefficiency out of reach, even under the proposed version of the policy requirement. Regulation directly carried out by a state legislature or supreme court, a sovereign part of the state government, automatically is deemed immune under the state action doctrine, regardless of any inefficiency.\textsuperscript{331} By extension, inefficient regulation that fits entirely within the scope of affirmatively identifiable policies of the state legislature or supreme court also would be deemed to satisfy the policy requirement.\textsuperscript{332} But, a very substantial portion of inefficient state and local regulation would be denied immunity under the proposed version of the policy requirement because it displaces competition in a way not supported by identifiable state regulatory policy.

This last category of regulatory restraints—those that exceed the scope of the legislative mandate—includes the instances in which the benefits of regulation\textsuperscript{333} have been captured through decisive influence or, in the case of self-regulating producer groups and governmental proprietary operations, outright control over the regulatory process rather than through the legislative process. The displacement-of-competition version of the policy requirement is well-suited to securing those benefits of inefficient regulation: if the legislature can be persuaded to initiate any form of regulation, any subsequent regulatory restraint in that market will satisfy the policy requirement.\textsuperscript{334} Such a pattern also enables legislators to

\textsuperscript{328} See Donnem, Federal Antitrust Law Versus Anticompetitive State Regulation, 39 Antitrust L.J. 950, 953-55 (1970); Werden & Balmer, supra note 327, at 4-5; Note, supra note 200, at 1495-96.

\textsuperscript{329} See Easterbrook, supra note 8, at 46-49; Hovenkamp & Mackerron, supra note 8, at 768-71; Levmore, supra note 17, at 627-28.

\textsuperscript{330} Although proprietary government operations most commonly are associated with local government, some state agencies function as market participants. Werden & Balmer, supra note 327, at 3; Note, supra note 200, at 1490.

\textsuperscript{331} See supra notes 79-81 and accompanying text.

\textsuperscript{332} See supra notes 266-74 and accompanying text. Of course, the portion of the inefficiency problem attributable to sovereign action or policy would be equally unreachable using the displacement-of-competition version of the policy requirement.

\textsuperscript{333} See supra notes 327-28 and accompanying text.

\textsuperscript{334} See supra notes 174-76 and accompanying text. The enjoyment of such benefits
pursue a "strategy of ambiguity" in their enactment of statutes. By denying immunity to these regulatory restraints, the proposed standard would remove these inefficiencies.

The existence of a substantial overlap between agency and city regulation that is inefficient and regulation that would be reachable under a reinvigorated version of the Court's procedural test for immunity should not be surprising in view of the origins of the policy requirement. Although the Court's recent opinions have stressed the need to avoid burdening the operation of agencies and cities as instruments of state policy, the earlier decisions out of which the policy requirement arose express concern with the harmful potential of autonomous regulatory policymaking by such nonsovereign entities.

What is called for, of course, is an assessment of the likely net impact of the proposed change in the policy requirement. If the stricter standard were implemented, beneficiaries of such inefficient regulation could receive state action immunity only by obtaining from the state legislature or supreme court a statute or rule affirmatively endorsing the desired anticompetitive aspects of the regulation. If such beneficiaries were uniformly able to obtain the same benefits from the legislature, there would be no practical benefit to implementing the more restrictive version of the policy requirement. Therefore, it is necessary to assess the relative amenability of the legislative process to providing the kind of inefficiency benefits currently being derived from agencies and local government.

Professor Wiley suggests that "state legislatures are no less prone to

receives further protection when the burden to seek a contrary resolution from the legislature falls on a dispersed class of persons with little individual incentive to join together. Page, supra note 10, at 1112-13.

335. See Aranson, Gellhorn & Robinson, supra note 198, at 39, 60.

336. Restraints imposed by cities or agencies in fields not chosen for regulation by the state would be denied immunity under either the proposed version of the policy requirement or the Court's displacement-of-competition version. See supra note 176 and accompanying text. Here, as elsewhere, this discussion makes no effort to predict the Court's ultimate reconciliation of the relation between the state action doctrine and the preemption doctrine. See supra note 78.

337. See supra notes 257-58 and accompanying text.

338. In Goldfarb, the Court rejected a standard that would have given the bar association, a state agency, "an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members." 421 U.S. at 791. See also Asheville Tobacco Bd. of Trade v. Federal Trade Comm'n, 263 F.2d 502, 509-10 (4th Cir. 1959) (action of tobacco board of trade, although technically action of state agency, was effectively "individual action masquerading as state action") (cited in Midcal, 445 U.S. at 105 n.8). In Cantor, considering a tariff submitted by a utility company and approved by a state public service commission, the Court noted that "the option to have, or not to have, such a program is primarily respondent's, not the Commission's." 428 U.S. at 594 & n.31. In City of Lafayette, the Court commented at length on local governments' capacity "as owners and providers of services" for "aggrandizing other economic units with which they interrelate," 435 U.S. at 408, each dedicated to "realizing maximum benefits to itself without regard to extra-territorial impact." Id. at 404. This impact would fall most directly on "[m]ulticled consumers" living outside the city boundaries and on "unfairly displaced competitors," id. at 406, and might also impair "regional efficiency." Id. at 404; see id. at 403.
producer capture than are administrative agencies. Under the Court’s current displacement-of-competition test, however, the relative vulnerability of legislative and regulatory processes to capture is hardly put to the test. Captors do not need legislative endorsement for any aspect of their program beyond the idea of a program—that is, endorsement of some kind of regulation in the given field. Any agency or city restraint ordinarily presupposes that minimal degree of legislative support. There are reasons, however, to expect that state legislatures would be substantially less prone than agencies or cities to endorse the specific type and magnitude of the desired regulatory displacement of competition, as required by the proposed version of the policy requirement.

The Local Government Antitrust Act hearings are suggestive on this point. Both local government witnesses and state government witnesses indicated that state legislatures had given immunity to a narrower scope of municipal restraints than local government wished and that they would continue to do so. State government witnesses endorsed the goals of the antitrust laws and indicated that the states themselves would be sensitive to the benefits of competition in regulated markets. Whatever disinclination legislatures might have felt to rubberstamp municipal regulatory policies before enactment of the Local Government Antitrust Act, would likely be even greater today. At the time, local governments apparently were liable for antitrust damages, which ultimately would be borne by their citizens, and it might be expected that consideration of this risk would have been given some weight by the legislature. Today, in contrast, only injunctive relief is at stake. Moreover, if directly elected city governments experience such limited success in securing legislative endorsement of their policies, the regulatory bureaucracies, especially those most closely identified with industry interests, arguably would meet with even less sympathy.

More generally, certain features of the regulatory process associated with capture would not carry over into the legislative process. Perhaps the most obvious such feature is that much bureaucratic regulation is essentially self-regulation. A municipal utility or a profession governed by its own occupational licensing board does not have to persuade outside bureaucrats to adopt favorable policies. The proposed test would

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339. Wiley, supra note 8, at 733. He reasons that the superior effectiveness of concentrated producer groups “logically applies with at least as much force to the capture of legislators as to the capture of bureaucrats” and that the “host of... capture mechanisms... can work as least as well on elected as [on] appointed officials.” Id. at 732 & n.92; see also Wiley, supra note 188, at 1280 n.18.
340. See supra notes 174-77, 334-35 and accompanying text.
341. See supra note 163.
342. See supra notes 161-62.
343. See supra notes 142-44 and accompanying text.
344. Cf. Town of Hallie, 471 U.S. at 45 & n.9 (municipalities subject to mandatory disclosure regulations and whose officers are elected are subject to public scrutiny that may protect against antitrust abuses).
345. See supra notes 327-30 and accompanying text.
force self-governing professions and industries and government units functioning as market participants to shift from self-persuasion to persuading a legislature, a considerable leap. Even for producer groups that obtain their inefficient regulation the hard way, in the sense that outsiders regulate them, it should be more difficult to persuade a legislature to endorse specific anticompetitive conduct than to persuade an agency to do the same.\textsuperscript{346} Regulatory agencies commonly develop a solicitude for the interests of the industry they regulate and a propensity for extending the displacement of competition\textsuperscript{347} that would have no counterpart among legislators. Aside from sympathy for, or influence by, the regulated producers, regulatory agencies tend to develop a symbiosis with their industries that legislators, again, would not have.\textsuperscript{348}

It has been suggested that vague legislative delegation of policymaking power is essential to the regulatory conferral of private benefits.\textsuperscript{349} To the extent that this is true, producers unable to secure more specific legislation of the type that would satisfy the proposed version of the policy requirement would lose their private benefits.\textsuperscript{350} Legislative inertia, therefore, would work against the seekers of anticompetitive benefits, rather than against those who seek to have the legislature affirmatively restrict the regulators' power to confer such benefits.\textsuperscript{351} The point is not that legislatures could never be persuaded to support inefficient regulatory restraints desired by private interests, but that a very substantial portion of such restraints could be expected not to receive this endorsement. The proposed version of the policy requirement thus would result in a substantial improvement over the Court's displacement-of-competition version in terms of efficiency.\textsuperscript{352}

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\item \textsuperscript{346} See Page, supra note 10, at 1110-13; supra notes 334-35 and accompanying text.
\item \textsuperscript{347} See 2 A. Kahn, supra note 199, at 111-12.
\item \textsuperscript{348} See B. Mitnick, supra note 209, at 209-14 (proposes a model of regulatory capture that emphasizes industry's power over regulators through its control of needed information).
\item \textsuperscript{349} See Aranson, Gellhorn & Robinson, supra note 198, at 60-62; Page, supra note 10, at 1111-12.
\item \textsuperscript{350} See Aranson, Gellhorn & Robinson, supra note 198, at 64 ("[D]elegation provides a principal means for the legislative production of private goods. Enforcing more rigorous standards for delegation will increase the marginal cost and, other things being equal, reduce the supply of private-interest legislation." (emphasis in original)). Producer groups should value legislation specifically authorizing the desired regulatory benefits much more than vague legislation; aside from state action immunity considerations, specific legislation would make the hoped-for benefits more certain and durable. When benefits are conferred pursuant to a vague statute, it might well be because this was the best the private interests could hope to obtain from the legislature. See id. at 60-61. Certainly the legislative strategy of ambiguity that contributes to regulation conferring private benefits would be much less feasible under the proposed version of the policy requirement. See id. at 60; see also B. Mitnick, supra note 348, at 331 (special interests may find it impossible to achieve aims in legislature and seek delegation of power to an agency to permit greater influence over regulatory decisionmaking there).
\item \textsuperscript{351} See Page, supra note 10, at 1112-13.
\item \textsuperscript{352} There probably are some actions undertaken by agencies or cities, going beyond state regulatory policy, that may constitute efficient regulatory solutions to genuine mar-
CONCLUSION

The state action doctrine is intended to reconcile the conflicting directives of federal antitrust law and principles of federalism in the state and local regulatory sector. The Court’s insistence on framing its state action immunity test entirely in procedural terms prompts the question of how substantive antitrust goals can best be achieved within the procedural paradigm. This Article answers the question by proposing a strict version of the policy requirement of the procedural test, adopting the axiomatic points of the Court’s doctrine as constraints on the proposed revision. These constraints are that immunity should be extended only to restraints implementing state policy set by a sovereign part of state government and that the usefulness of agencies and local government as instruments of state policy should be protected. Although the Court’s displacement-of-competition version of the policy requirement is intended to achieve both these objectives, close examination of its practical context shows that it does not succeed.

A fundamental principle underlying the Court’s procedural test for state action immunity is that in balancing “principles of federalism and the goal of the antitrust laws, unfettered competition in the marketplace,”353 neither should be impaired more than necessary.354 The displacement-of-competition standard impairs antitrust goals more than is necessary to accommodate the implementation of sovereign-level state regulatory policy. The proposed standard, in contrast, would not substantially burden the formulation and execution of state policies and would deny immunity to many of the most inefficient types of regulation imposed by state agencies and local government. In application, the proposed standard would yield results more consistent with the Court’s decisions than does the current displacement-of-competition standard. Although an explicitly substantive test could, of course, impose an even greater degree of efficiency, the proposed standard represents a much improved balancing of antitrust and federalism goals within the Court’s settled doctrinal parameters.

ket imperfections, rather than devices for conferring private benefits. It can be expected that these actions would have a markedly easier time obtaining a legislative consensus than exploitative regulatory restraints. See Aranson, Gellhorn & Robinson, supra note 198, at 64-65.

354. See id.; City of Lafayette, 435 U.S. at 415-16.