STATE POWER AND ANTICOMPETITIVE CONDUCT

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Abstract

States can and do suppress competition when it harms marginalized communities. For example, states have monopolized prison markets, forcing society's least powerful to pay high prices for medicine, snacks, and other goods. It is also common for states to organize licensing agencies who can protect incumbent interests by refusing to grant licenses to immigrant entrepreneurs such as African hair braiders, street vendors, and more. From current and historical perspectives, anticompetitive practices have quietly entailed one of the most effective methods of oppressing marginalized people.

That said, states are exempted from antitrust review due to federalism, which concerns constitutional power sharing between state and federal bodies. While the Sherman Act lacks express language about state action, the Supreme Court held in *Parker v. Brown* that antitrust scrutiny would deprive states of their sovereign right to promote public policies via restricting some competition. Key to this ruling is that the threat of elections should incentivize states to suppress competition when the public would benefit. The Court has thus ruled that the Sherman Act does not apply to states.

This Article argues that state action immunity was errantly premised on federalism and political accountability. The Supreme Court promoted *Parker*'s framework on the grounds of elections, yet states encounter incentives to monopolize markets comprised of inmates, immigrants, and others who lack resources, voting rights, or the ability to hold leaders accountable. In fact, antitrust law was founded on the common law of competition, which was exclusively fixated on state action and its likelihood of oppressing society's least powerful. Due to the importance of historical sources in interpreting modern antitrust law, the dangers of state monopolies are not only engrained in the historical record but also rebut *Parker*'s rationales of federalism and congressional intent. While antitrust is considered a "colorblind" body of law, this Article seeks to expose how states harm marginalized people as consumers and competitors, resulting in the inequitable distributions of real estate,

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healthcare, labor, and other necessities—a danger that existed when the English established the common law of competition and that remains true today.

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INTRODUCTION

Some states require manicurists to pass a licensing exam administered exclusively in English, which has effectively prevented Vietnamese immigrants from entering the field.[1] Even though this language condition lacks a health or safety goal but rather suppresses competition,[2] antitrust law is seldom able to intervene. The crux is that state action is immune from antitrust enforcement,[3] enabling towns, cities, and states to use anticompetitive practices as a way of excluding people of color, immigrants, and marginalized persons.[4]

It is notable that the Sherman Act's text is silent about state action. In fact, the statute was in place for nearly sixty years before the U.S. Supreme Court exempted states from antitrust review as a matter of federalism. To the Court in *Parker v. Brown*,[5] the Constitution treats states as sovereign entities that must sometimes restrict competition in order to promote the public's welfare; in essence, the Court relied on non-statutory sources of authority to exclude states from antitrust review.[6] A critical aspect of *Parker* immunity (or "state action immunity") is that states should primarily restrain trade when society benefits due to the threat of elections.[7] Because states are autonomous sovereigns and elections should ostensibly protect society, the Supreme Court has consistently embraced state action immunity.[8]

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1. Maya N. Federman et al., *The Impact of State Licensing Regulations on Low-Skilled Immigrants: The Case of Vietnamese Manicurists*, 96 AM. ECON. REV. 237, 237–38 (2006).

2. *See* Alex Nowrasteh, *Why Cuomo's Nail-Salon Crackdown Will Harm Immigrants*, CATO INST. COMMENT. (May 13, 2015), https://www.cato.org/commentary/why-cuomos-nail-salon-crackdown-will-hurt-immigrants [https://perma.cc/V5ZE-8VKT] ("At best, licensing enforcement will decrease the health and wage violations only by decreasing the number of manicurists—a worse outcome for poor workers and immigrants. New health regulations will also raise the cost of employing manicurists. There's a trade-off between healthy working conditions and higher wages."); Federman et al., *supra* note 1, at 240–41 (noting that English proficiency requirements impose barriers to entry, leading to increased prices of manicures and reduced options for consumers).

3. *See infra* Part III.

4. *See, e.g.*, David North, *Georgia Legislature Makes It Easier for Illegals to Get Professional Licenses*, CTR. FOR IMMIGR. STUD. (Apr. 21, 2021), https://cis.org/North/Georgia-Legislature-Makes-It-Easier-Illegals-Get-Professional-Licenses [https://perma.cc/96XL-EP5C] (discussing with approval how Georgia has historically barred undocumented workers from participating in the professional labor market).

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

6. *Id.* at 350–52.

7. N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 508 (2015) (noting that municipalities are "electorally accountable and lack the kind of private incentives characteristic of active participants in the market").

8. *Parker*, 317 U.S. at 351 ("The Sherman Act . . . gives no hint that it was intended to restrain state action.").

Another reason why the Sherman Act lacks language about state action is because Congress enacted "anti-trust law" to curb private sources of power. A problem during the Gilded Age was that corporations, magnates, and robber barons formed "trusts" to skirt competition, which drove up prices, harmed labor, and concentrated political power.[9] Since the Sherman Act's impetus was to prevent large firms from dominating industry, private enterprises remain the focus of today's antitrust laws.[10]

Recently, though, states have emerged as prominent monopolists due in significant part to privatization. Whereas states could historically regulate markets, states began to find it difficult to enact new laws and bureaucracies after a series of scandals in the 1970s caused people to view government as corrupt and inefficient.[11] A solution was for states to privatize government and participate in markets themselves as a way of regulating markets.[12] But what if allowing private enterprise and market mechanisms to run government has not only encouraged states to restrain trade but do so in ways that may disproportionally harm marginalized people?

For example, prisons once allowed incarcerated people to buy items from competing sellers; but now that states grant exclusive rights to private firms, incarcerated people must frequently pay monopoly prices for commissary goods, medicine, and more.[13] In fact, some prisons issue only a handful of feminine pads per month, forcing women to buy additional tampons at monopoly rates—and those who cannot afford high prices will often risk their health by fashioning "jailhouse tampons" out

9. *See generally* Daniel A. Crane, *Antitrust Antifederalism*, 96 CALIF. L. REV. 1, 12–13 (2008) (describing antitrust's emergence in the Gilded Age).

10. *See, e.g.*, Brock E.W. Turner, *Could the FTC Derail Big Tech's Healthcare Ambitions?*, DIGIT. HEALTH BUS. & TECH. (Feb. 13, 2023, 3:30 PM), https://digitalhealth.modernhealthcare.com/mergers-acquisitions-ma/ftc-derail-amazon-one-medical-united-CVS [https://perma.cc/A2TL-YAWY].

11. Jon D. Michaels, *We the Shareholders: Government Market Participation in the Postliberal U.S. Political Economy*, 120 COLUM. L. REV. 465, 474–75 (2020) ("Mounting disaffection with big, intrusive government coupled with new or renewed enthusiasm for markets prompted a major shift in the direction of deregulation and privatization. These initiatives, beginning in earnest in the late 1970s and early 1980s and extending into the twenty-first century—roughly, the Deregulation and Privatization period—resulted in the State ceding (or, again, *returning*) considerable authority, discretion, and responsibility to the private sector.").

12. *Id.*

13. *See* Stringham v. Hubbard, No. S-05-0898, 2006 WL 3053079, at *2 (E.D. Cal. Oct. 26, 2006) (involving allegations that the state of California violated the Sherman Act by establishing a monopolization of the market for trade goods entering the prison system by limiting packages prisoners could receive to one per quarter from approved vendors only).

of foreign sources.[14] While these anticompetitive acts would ordinarily draw antitrust's scrutiny, *Parker* empowers states to extract wealth from incarcerated people—"basically squeezing a profit from the most marginalized and poorest of society."[15]

This Article argues that state action immunity is misguided, rendering a hidden form of oppression. It shows that the dangers of state monopolies are engrained in the historical record in creating tension with *Parker*'s rationale. For starters, the Sherman Act is an inarticulate statute—only a few lines long—because its architects embraced the common law of competition.[16] By leaving little guidance in the Act's text, it was Congress's goal for future courts to decide which actions should constitute an antitrust offense in reference to the traditional rules of competition.[17] The common law, however, was fixated on *state action*

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14. Samantha Michaels, *Jail Is a Terrible Place to Have a Period. One Woman Is on a Crusade to Make It Better*, MOTHER JONES (Feb. 21, 2019), https://www.motherjones.com/crime-justice/2019/02/jail-california-tampons-menstruation-paula-canny-sanitary-pads/ [https://perma.cc/BH2U-NKM2]; Erin Polka, *The Monthly Shaming of Women in State Prisons*, PUB. HEALTH POST (Sept. 4, 2018), https://www.publichealthpost.org/news/sanitary-products-women-state-prisons/ [https://perma.cc/L9G9-DV6Z]; Eleanor Goldberg, *Women Often Can't Afford Tampons, Pads in Federal Prisons. That's About to Change*, HUFFINGTON POST (Dec. 20, 2018, 12:22 PM), https://www.huffpost.com/entry/the-new-criminal-justice-bill-provides-free-tampons-pads-in-federalprisons_n_5c1ac0a0e4b08aaf7a84ac38#:~:text=In%20Federal%20Prisons.-,That's%20About%20To%20Change.,products%20to%20inmates%20for%20free [https://perma.cc/T5VA-YTHT].

15. Mei-Ling McNamara, *US States Move to Stop Prisons Charging Inmates for Reading and Video Calls,* GUARDIAN (Jan. 13, 2020, 2:00 AM), https://www.theguardian.com/global-development/2020/jan/13/us-states-move-to-stop-prisons-charging-inmates-for-reading-and-video-calls#:~:text=US%20states%20move%20to%20stop%20prisons%20charging%20inmates%20for%20reading%20and%20video%20calls,-This%20article%20is&text=Lawmakers%20in%20three%20US%20states,an%20hour%20for%20prison%20labour [https://perma.cc/4QTT-MD9R]; *see, e.g.*, Michael Lieberman, *The Cost of Reading in Prison: In West Virginia It's 5 Cents a Minute*, BOOK PATROL (Feb. 5, 2020), https://bookpatrol.net/the-cost-of-reading-in-prision-in-west-virginia-its-5-cents-a-minute/ [https://perma.cc/WK56-NGVK] (describing how one prison contracted to provide free tablets to inmates with access to e-books in the public domain, yet charged inmates five cents a minute to read when inmates only earn thirty cents an hour); *see also infra* Section II.B (providing other examples of anticompetitive government practices affecting society's most vulnerable).

16. *See* Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 688 (1978) ("The legislative history makes it perfectly clear that [Congress] expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.").

17. M. Laurence Popofsky & Mark S. Popofsky, *Vertical Restraints in the 1990s: Is There a "Thermidorian Reaction" to the Post-*Sylvania *Orthodoxy?*, 62 ANTITRUST L.J. 729, 732 n.17 (1994) ("The Supreme Court has characterized the Sherman Act as a 'delegation' of jurisdiction to the federal courts to create a 'common law' of competition policy."); *see also* Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940) (noting that "the courts have been left to give content to" the Sherman Act and that they "should interpret its word in the light of its legislative history"); *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 687–88 (remarking that the Sherman Act "cannot mean what it says" due to its overly broad language, but rather courts were meant to shape it).

and its likelihood of oppressing society's least powerful.[18] This dynamic, as the research shows, was well known to early Americans who sought to deprive federal and state entities of monopoly powers as well as antitrust's founders who weaved the common law of competition into the Sherman Act.[19] Since government was long the danger animating competition law, *Parker* immunity is not only divorced from antitrust's foundation but it was perhaps unworkable from its inception.[20]

While the Supreme Court has justified *Parker* immunity on the grounds that people can remedy state action at the ballot box, this Article shows that states face incentives to monopolize markets comprised of inmates,[21] immigrants,[22] and others who lack resources, influence, or even voting rights.[23] It seems that states target marginalized people—such as with the monopolization of prisons, exclusion of Vietnamese manicurists, and others[24]—precisely due to a person's inability to hold leaders accountable.[25] By revealing monopolies as an unchecked form of abuse, this Article dispels *Parker*'s foundations of electoral accountability and original intent; the complicating factor is perhaps American federalism.

Instead of a *de minimis* issue, the concept of federalism—especially as it relates to antitrust law—implicates disputes that have historically divided this country. Indeed, the public has long complained of how states may oppress marginalized people within a void of federal oversight in terms of Jim Crow laws, voting restrictions, and uneven policing;[26] yet it is seldom noticed that states can achieve this same end using anti-competitive practices under the guise of states' rights. By delving into the Eleventh Amendment and sources of federalism, this Article reveals the failures of federal antitrust law to challenge oppression or recognize its potential as a remedy.

Lastly, it is important to note that antitrust law has so far ignored matters of race and class. Hardly an accident, scholars and courts have often insisted that antitrust is a "colorblind" or "neutral" regime.[27] A goal

18. *See infra* Section IV.B.1.

19. *See infra* Sections IV.B.2–3.

20. *See infra* Section IV.B.4.

21. *See infra* notes 94–99 and accompanying text.

22. *See infra* Section II.B.1.

23. *See infra* Sections II.B.1, IV.A.

24. *See infra* Section II.B (tracing the numerous ways in which states' use of anticompetitive practices harms marginalized people as intended and unintended consequences).

25. *See infra* Section IV.A.

26. *See, e.g.*, *infra* note 74 and accompanying text.

27. Bennett Capers & Gregory Day, *Race-ing Antitrust*, 121 MICH. L. REV. 523, 543 (2023) (highlighting antitrust law's blindness to race in light of the general view that "consumer welfare reflect[s] the 'total welfare' of society 'as a class,' meaning that the analysis is supposed to

of this Article is thus to explain how states harm marginalized people as consumers and competitors, resulting in the inequitable distributions of real estate, healthcare, labor, and other necessities—a danger that existed when the English established the common law of competition and remains true today.[28]

This Article proceeds in four parts. Part I discusses how modern antitrust arose from debates about the Sherman Act's text and history. Part II illustrates numerous ways in which states suppress competition and oppress marginalized people. Part III explains why the Supreme Court exempted states from antitrust review. This analysis explores the concept of antitrust federalism, demonstrating that the Sherman Act and *Parker* immunity implicate important and historical debates about the extent of state power. Part IV uses historical, textual, and practical sources to expose *Parker*'s follies. It begins by showing that the Court was misguided when it justified *Parker* on the grounds of political accountability. It then sheds light on the forgotten history of state monopolies, which should affect modern interpretations of antitrust. It explains that a monopoly in Tudor England was viewed as a source of governmental oppression—rendering restraints against labor, indigenous people, and foreigners, among others. Although this legacy formed antitrust's basis, modern courts, scholars, and enforcers are only concerned with private sources of power. Then, after dispelling *Parker*'s premise of federalism, this Article finds that the Court paved the way for states to oppress marginalized people when it errantly instituted *Parker* immunity.

I. A BRIEF DISCUSSION OF MODERN ANTITRUST AND THE CONSUMER WELFARE STANDARD

The activities that offend antitrust law are largely a product of judge-made precedents. Because the Sherman Act is only a few lines long, it has long caused confusion about the scope of antitrust enforcement. To make antitrust more rigorous, courts and scholars relied on competition law's history—a longstanding way of interpreting the Sherman Act—to reform enforcement in the 1970s and, in turn, establish today's

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tabulate everyone's change in welfare to determine whether a net gain or loss occurred. In this sense, antitrust law is intended to gauge all consumers in the same colorblind way." (footnote omitted) (quoting Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 ANTITRUST L.J. 713, 720 (2014))); *see, e.g.*, ROBERT H. BORK, THE ANTITRUST PARADOX 66 (1978) ("There is no indication of any congressional decision to sacrifice consumer welfare in *any* case to *any* other value." (emphasis added)); *see also* Herbert Hovenkamp, *Antitrust Harm and Causation*, 99 WASH. U. L. REV. 787, 811 (2021) ("Antitrust policy, in contrast to legal policy generally, is not the appropriate tool for pursuing particular goals of social equality . . . .").

28. *See generally* Capers & Day, *supra* note 27 (describing the use of anticompetitive practices as a way of monopolizing necessities on racial lines).

"consumer welfare" standard. This Part briefly outlines antitrust's evolution through a discussion of the Sherman Act's text and history, in order to set the stage for later analyses of why courts have exempted states from antitrust review despite a lack of statutory guidance.

Before the Sherman Act's enactment in 1890, competition had eroded in critical industries such as sugar and railroads.[29] This was largely because firms during the Gilded Age sought to avoid competing by forming trusts; to do so, they pooled majority shares of each firm into a singular corporation, run by a board or trustee who could divide markets, restrict output, and raise prices.[30] Another danger involved political influence, as magnates such as J.P. Morgan, J.D. Rockefeller, and Cornelius Vanderbilt had grown powerful enough to manipulate government's levers to solidify their (market) power.[31]

These dangers prompted Congress to debate an "anti-trust" law, but the proposal posed difficult questions about what types of conduct should be banned.[32] To assuage the bill's enactment, Senator John Sherman

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29. *See* Molly Ebraheim, Comment, *Antitrust and Hospital Mergers: Uniqueness and Consistency in Market Definition Analysis*, 48 U. TOL. L. REV. 337, 342 (2017) ("During the mid- and late-nineteenth century, large businesses, known as trusts, controlled whole industries within the economy. The two largest of those trusts, U.S Steel and Standard Oil, owned monopolies in railroads, oil, steel, and sugar." (footnote omitted)).

30. Wixt Television, Inc. v. Meredith Corp., 506 F. Supp. 1003, 1017 (N.D.N.Y. 1980) ("These combinations or 'trusts' were highly distrusted by the public, who perceived the economic power possessed by these entities as dangerous to society as a whole. In fact, the trusts were using their wealth and power to fix prices, restrict production, divide markets, eliminate smaller competitors, and to restrain and monopolize trade."); 21 CONG. REC. 2457 (1890) (statement of Sen. John Sherman) ("[A]ssociated enterprise and capital are not satisfied with partnerships and corporations competing with each other, and have invented a new form of combination commonly called trusts, that seeks to avoid competition by combining the controlling corporations, partnerships, and individuals engaged in the same business, and placing the power and property of the combination under the government of a few individuals, and often under the control of a single man called a trustee, a chairman, or president.").

31. *See* Carl T. Bogus, *The New Road to Serfdom: The Curse of Bigness and the Failure of Antitrust*, 49 U. MICH. J.L. REFORM 1, 7 (2015) ("The parallels between the Gilded Age—when the nation was greatly concerned about the power amassed by Andrew Carnegie, J.P. Morgan, John D. Rockefeller, Sanford Dole, Cornelius Vanderbilt, and their 'trusts'—and our present era are striking. For example, John D. Rockefeller started the Standard Oil trust through a 'buying spree' of oil refineries." (footnote omitted)).

32. *See* Charles S. Dameron, Note, *Present at Antitrust's Creation: Consumer Welfare in the Sherman Act's State Statutory Forerunners*, 125 YALE L.J. 1072, 1080–81 (2016) ("For many years, courts and commentators have understood the Sherman Act's operative terms as common-law terms that should be interpreted in light of preexisting state case law, such as the Michigan Supreme Court's decision in *Richardson v. Buhl*, of which Senator John Sherman took particular notice on the floor of the Senate. Federal courts read these state common-law precedents into the Sherman Act on the understanding that Congress intended to prohibit interstate trusts to the same extent as they had been prohibited at the intrastate level by state law. But those same courts have long relied solely on state judicial opinions to understand the state-law landscape at the time of the Sherman Act's adoption." (footnotes omitted)).

insisted that an antitrust law would not create new offenses but only codify competition's common law.[33] In essence, the traditional rules of monopolies would still apply—for example, invention patents should remain legal.[34] To give courts enough freedom to construe antitrust's scope, a short and open-ended statute was codified: Section 1 of the Sherman Act condemns "*every* contract" that restrains "commerce" or "trade,"[35] while Section 2 prohibits actors from monopolizing "*any* part of" the market.[36] Given the Sherman Act's vague and expansive language, a belief was that historical sources should aid the courts' interpretation of antitrust law.[37]

Over the years, though, confusion over the Sherman Act's text had supposedly been causing poor results.[38] The Supreme Court observed the Act's lack of precision, remarking that the statute "cannot mean what it says" because a literal reading would ban almost every type of business activity.[39] One problem was that more competition was assumed to be better in each instance; as a result, some courts condemned firms when their low prices drove rivals out of business, which mistook competition for anticompetitive conduct.[40] Firms could also suffer liability for merely

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33. 21 CONG. REC. 2456 (1890) (statement of Sen. John Sherman) ("[T]he object of this bill, as shown by the title, is 'to declare unlawful trusts and combinations in restraint of trade and production.' It declares that certain contracts are against public policy, null and void. It does not announce a new principle of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government."); *see also* Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 B.Y.U. L. REV. 1265, 1297 ("Significantly, the Senators and Representatives debated the crucial role that the common law was to play in courts' analysis of antitrust cases. The legislators realized that they could not define 'the precise line' between 'lawful combinations in aid of production' and 'unlawful combinations to prevent competition and in restraint of trade.' That task was 'left for the courts to determine in each particular case.' But the courts were not without guidance; in particular, they were to turn to the 'old and well recognized principles of the common law.'" (footnotes omitted)).

34. 21 CONG. REC. 2457 (asserting that invention patents would be an exception to the Sherman Act's prohibition against monopolistic practices).

35. 15 U.S.C. § 1 (emphasis added).

36. *Id.* § 2 (emphasis added).

37. *See* Am. Steel Erectors v. Loc. Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers, 815 F.3d 43, 61 (1st Cir. 2016) ("Because *all* agreements 'restrain trade' in some respect, Section 1 only prohibits 'those classes of contracts or acts which the common law had deemed to be undue restraints of trade and those which new times and economic conditions would make unreasonable.'" (quoting Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 211 (1959))).

38. *See generally* Richard D. Cudahy & Alan Devlin, *Anticompetitive Effect*, 95 MINN. L. REV. 59, 59–61 (2010) (discussing the controversies over antitrust's goals).

39. Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 687–88 (1978).

40. *See, e.g.*, Harry First, *Bork and* Microsoft*: Why Bork Was Right and What We Learn About Judging Exclusionary Behavior*, 79 ANTITRUST L.J. 1017, 1021 (2014).

being "too large."[41] It seemed that antitrust law was exacerbating problems.[42]

This landscape inspired scholars from most notably the University of Chicago ("Chicago School") to advocate for antitrust's reform.[43] A key contribution came from Professor Robert Bork who explored historical sources such as the Sherman Act's debates and common law—both of which were conventional methods of interpreting antitrust's scope—to assert that enforcement was exclusively meant to promote "consumer welfare" defined in economic terms.[44] To Bork, the Act should only remedy economic harms such as restricted output, an approach that the Supreme Court adopted in 1979.[45] Today's courts can no longer assume that less competition is necessarily bad but rather judges must ask whether exclusionary conduct has caused consumers to suffer an economic injury—i.e., the "consumer welfare" standard.[46]

Another reform involved recalibrating the two ways of spotting an antitrust violation. The Chicago School asserted that most exclusionary acts create efficiencies and thus antitrust's primary test, the rule of reason,[47] should err against finding offenses.[48] A Section 2 claim follows

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41. *Id.* at 1018 & n.6.

42. *See id.* at 1017–18.

43. Douglas H. Ginsburg, *Judge Bork, Consumer Welfare, and Antitrust Law*, 31 HARV. J.L. & PUB. POL'Y 449, 450–52 (2008); Alan J. Meese, *Justice Scalia and Sherman Act Textualism*, 92 NOTRE DAME L. REV. 2013, 2020–21 (2017) ("Among other things, Bork contended that congressional debates articulated and endorsed a fictitious version of the common law concerned solely with consumer welfare as Bork defined it."); *see also* Jonathan B. Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws*, 77 N.Y.U. L. REV. 135, 138 (2002) (explaining the Chicago School's criticisms of the structural approach to antitrust, which assumed that consumers will always benefit from more firms competing).

44. BORK, *supra* note 27, at 66.

45. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'" (quoting BORK, *supra* note 27, at 66)); *see also* Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 133–34 (2011) ("All antitrust lawyers and economists know that the stated instrumental goal of antitrust laws is 'consumer welfare,' which is a defined term in economics.").

46. *See, e.g.*, Verizon Commc'ns v. Law Offs. of Curtis V. Trinko, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.").

47. The rule of reason is essentially a balancing test that enables a defendant to justify an act's anticompetitive effects by citing its procompetitive benefits. *See, e.g.*, Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 688–89 (1978).

48. *See* John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 IND. L.J. 501, 506 (2019) (explaining the uses of procompetitive justifications in the rule of reason analysis).

a similar approach to the rule of reason.[49] The other standard, per se illegality, condemns a small list of acts such as price fixing that harm consumers in almost all scenarios.[50] In effect, the rule of reason exculpates most defendants whereas per se illegality finds a violation in every instance.[51]

Absent from the Sherman Act's text, however, is its application to state action. This omission is remarkable because states do engage in otherwise per se illegal acts such as dividing markets and fixing prices. In fact, the incentives to adopt anticompetitive practices have bolstered as states embrace entrepreneurial strategies—and when states restrain trade, the brunt of harm has often fallen on marginalized people. Part II makes these points.

II. THE ROAD TO PRIVATIZATION, MONOPOLIES, AND OPPRESSION

Despite sparse attention, the rise of privatization has encouraged states to restrain trade. Whereas states have traditionally regulated markets as only sovereigns could do—e.g., eminent domain and taxation—the analysis shows that scandals in the 1960s and 1970s diminished public trust and, as a result, inspired a belief that private enterprise and market incentives could best run government. This development has not only eroded checks and balances meant to keep government honest but incentivized states to restrain trade when society's least powerful suffers.

A. *The Marketization of Government*

States began to embrace privatization after Watergate and similar events caused people to view "big government" as corrupt and inefficient.[52] This decline in support made it difficult for states to

49. *See generally* Alan J. Meese, *Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act: How Harvard Brought Us a Total Welfare Standard and Why We Should Keep It*, 85 N.Y.U. L. REV. 659, 728–30 (2010) (reviewing how Section 2 claims are analyzed).

50. Nw. Wholesale Stationers v. Pac. Stationery & Printing, 472 U.S. 284, 289 (1985) ("This *per se* approach permits categorical judgments with respect to certain business practices that have proved to be predominantly anticompetitive.").

51. *See* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 828 (2009) ("Courts dispose of 97% of cases at the first stage, on the grounds that there is no anticompetitive effect. They balance [pro- and anti-competitive effects] in only 2% of cases."); Albert A. Foer, *The Political-Economic Nature of Antitrust*, 27 ST. LOUIS U. L.J. 331, 337–38 (1983) ("[W]hen the rule of reason is applied, the defendant virtually always wins.").

52. Justin Lahart, *The Era of Big Government Is Back*, WALL ST. J. (June 25, 2021, 12:58 PM), https://www.wsj.com/articles/the-era-of-big-government-is-back-11624636813 [https://perma.cc/E8XZ-26ZB]; Nikita Lalwani, *When Americans Get Good Government Service, They Mistakenly Give the Credit to the Private Sector*, WASH. POST (Aug. 29, 2019, 6:00 AM), https://www.washingtonpost.com/politics/2019/08/29/when-americans-get-good-government-

formally regulate markets, though privatization offered a solution: states could hire private firms to execute duties of government—not as faithful public servants but as profit-minded actors.[53] The theory was that private actors must operate efficiently to survive and, in turn, could better run government than government itself.[54] Related to this trend, states have increasingly allowed private actors to regulate their own markets in the form of licensing agencies.[55] A third and similar phenomenon capitalizing on entrepreneurialism involves states competing in markets by organizing their own banks, farms, hospitals, and more.[56]

The marketization of government has proven popular despite a lack of checks and balances.[57] As a prominent scholar noted, the "privatization of public responsibilities satisfies today's fervent call to run government like a business and also serves as a bit of a cheat."[58] Due to the burdens of passing laws or incurring judicial oversight, a state "can shift playing fields—and run its operations *through* businesses."[59] An effect is that states may evade obstacles derived with formal regulations by competing in markets themselves or using private firms to regulate industry.

Another criticism of privatization is that it tends to promote public welfare as an externality rather than as a primary goal.[60] A theory of democratic governance is that elections should force representatives to consider a larger spectrum of people and thereby render public goods

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service-they-mistakenly-give-credit-private-sector/ [https://perma.cc/2NZT-SNF9] (citing interview with book author Amy Lerman); *Public Trust in Government: 1958–2022*, PEW RSCH. CTR. (June 6 2022), https://www.pewresearch.org/politics/2021/05/17/public-trust-in-government-1958-2021/ [https://perma.cc/6YQV-56FD].

53. *See* Jon D. Michaels, *Running Government Like a Business . . . Then and Now*, 128 HARV. L. REV. 1152, 1171 (2015) (book review).

54. *Id.* at 1172 ("Privatization advocates insist that private actors have the financial incentives to outperform salaried government workers. . . . [T]here are built-in, and quite explicit, incentives to strive.").

55. *See, e.g.*, Green Sols. Recycling v. Reno Disposal Co., 814 F. App'x 218, 220 (9th Cir. 2020) (involving a city's granting of monopoly rights over waste collection to a private company).

56. Gregory Day, *Antitrust Federalism and the Prison-Industrial Complex*, 107 MINN. L. REV. (forthcoming 2023) ("Today, states are relentlessly participating in markets by forming banks, telecommunication providers, farms, shopping centers, utility companies, and more." (internal quotation marks omitted)).

57. *See* Michaels, *supra* note 11, at 528 ("[F]or the public to support (or readily support) some government interventions today, those interventions must have commercial packaging. That is to say, the government may need to appear entrepreneurial—as a savvy market participant rather than as a meddlesome regulator . . . ." (footnote omitted)).

58. Michaels, *supra* note 53, at 1171 (footnote omitted).

59. *Id.*

60. *See* Edward Rubin, *The Possibilities and Limitations of Privatization*, 123 HARV. L. REV. 890, 913 (2010) (reviewing GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (2009)) ("[C]ritics argue either that privatization achieves efficiency at the expense of other values, or that it fails to do so because the contractors are inadequately monitored." (citations omitted)).

such as parks and clean water.[61] But when private parties run government, they can profit from suppressing competition instead of enacting health or safety policies. This has generated a fear that profit-maximizing individuals may place their self-interest above the public's.[62]

It is perhaps unsurprising that marginalized people have unevenly suffered because an anticompetitive act typically requires a power disparity to succeed—after all, a dominant party such as a state or its agency must wield enough power to exclude smaller firms or individuals from the market.[63] And when a state's or locale's power to restrict competition is combined with profit-minded entities, the results can be devastating.

B. *Today's Anticompetitive States, Cities, and Municipalities*

To show the (potential) oppressiveness of when states (or their municipalities) restrain trade or monopolize markets, consider the cases of professional licensing, market participation, and legislative exclusion. In each instance, states have favored local firms or entered relationships with them with the goal of creating private wealth rather than promoting public welfare—often at the expense of society's least powerful.

1. Professional Licensing and Exclusion

An increasingly popular and problematic manner of regulating competition involves professional licensing whereby a state vests private parties with the power to govern their own industries.[64] Contrary to how licensing had traditionally affected only a small number of "learned

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61. *See* Bruce E. Cain, *Election Law as a Field: A Political Scientist's Perspective*, 32 LOY. L.A. L. REV. 1105, 1108 (1999) (describing public choice theory, which links elections and public goods).

62. *Prepared Statement of the Federal Trade Commission: "License to Compete: Occupational Licensing and the State Action Doctrine," Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of S. Comm. On the Judiciary*, 114th Cong. 1 (Feb. 2, 2016) (statement of Maureen K. Ohlhausen, Former Comm'r, Fed. Trade Comm'n), https://www.ftc.gov/system/files/documents/public_statements/912743/160202occupationallicensing.pdf [https://perma.cc/K3C3-WALY] ("The risk is that the board will make regulatory decisions that serve the private economic interests of its members and not the policies of the state. These private interests may lead to the adoption and application of occupational restrictions that discourage new entrants, deter competition among licensees and from providers in related fields, and suppress innovative products or services that could challenge the status quo.").

63. *See, e.g.*, Bio-Rad Lab'ys v. 10X Genomics, Inc., 483 F. Supp. 3d 38, 52 (D. Mass. 2020) (explaining that anticompetitive conduct requires superior power over competition to be successful).

64. *See* Alexander Volokh, *Antitrust Immunity, State Administrative Law, and the Nature of the State*, 52 ARIZ. ST. L.J. 191, 194–95 (2020) (discussing licensing agencies as market participants).

professions" such as lawyers and doctors,[65] private actors are now gatekeeping fields such as cosmetology, taxidermy, interior design, beekeeping, and fortune telling.[66] Not only has licensing across the United States increased 560% since the 1950s but licensing agencies are now more pervasive than labor unions.[67]

The problem is that a state agency of private parties can restrict competition and shield its members' markets under the mirage of health and safety. For example, state agencies of beauticians have declared that the act of hair braiding qualifies as hairdressing to prevent (cheaper) immigrants from offering the service.[68] To receive a license, a hairdresser's curriculum can cost over $17,000 and require 1,200 hours, none of which involve hair braiding.[69] In Tennessee, inspectors appeared "daily" at braiding shops as hair braiders darted out the back: "The raids kept coming, and [they] kept braiding and running."[70] In effect, market participants acting on a state's behalf excluded the most common hair braiders—i.e., Black female immigrants.[71]

Further, politicians and political groups have stated that licensing's goal should be to bar immigrants from competing. One anti-immigration organization advocated against a rule in Georgia that would allow immigrants to obtain professional licenses.[72] The group's intent was not to improve health or safety, but to impede "massive flows of illegal aliens into the labor market" that would ostensibly threaten the "livelihood" of

65. *See* Beth Redbird & Angel Alfonso Escamilla-García, *Borders Within Borders: The Impact of Occupational Licensing on Immigrant Incorporation*, 6 SOCIO. RACE & ETHNICITY 22, 23 (2020) ("Licensing was once considered a tool of professionals, such as lawyers, doctors, and engineers.").

66. Volokh, *supra* note 64, at 194; *see also, e.g.*, Allibone v. Tex. Med. Bd., No. A-17-CA-00064-SS, 2017 WL 4768224, at *1–2 (W.D. Tex. Oct. 20, 2017) (involving an antitrust challenge to a medical board consisting of active market participants), *appeal voluntarily dismissed*, No. 17-50984, 2018 WL 11447584 (5th Cir. May 29, 2018).

67. Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1096, 1102 (2014).

68. *See* ANGELA C. ERICKSON, INST. FOR JUST., BARRIERS TO BRAIDING: HOW JOB-KILLING LICENSING LAWS TANGLE NATURAL HAIR CARE IN NEEDLESS RED TAPE (2016), https://ij.org/wp-content/uploads/2016/07/Barriers_To_Braiding-2.pdf [https://perma.cc/6TG5-M9FT].

69. Tayna A. Christian, *Twisting the Dream*, ESSENCE (Oct. 9, 2019), https://www.essence.com/feature/natural-hair-braiding-regulations/ [https://perma.cc/B3NQ-BPFJ]; *see also New Report Shows Professional Licenses Out of Reach for New York's African Hair Braiders*, AFR. CMTYS. TOGETHER (Dec. 8, 2020), https://africans.us/new-report-shows-professional-licenses-out-reach-new-york%E2%80%99s-african-hair-braiders [https://perma.cc/43VL-87W8] (mentioning that many hair braiders prohibited from the market are undocumented and illiterate).

70. REBECCA HAW ALLENSWORTH, BOARD TO DEATH (forthcoming 2023).

71. *See New Report Shows Professional Licenses Out of Reach for New York's African Hair Braiders*, *supra* note 69.

72. North, *supra* note 4.

U.S. citizens.[73] Consider also the Jim Crow South where workers were required to belong to a labor union even though, or precisely because, many unions denied membership to people of color and immigrants.[74] The effect was labor's monopolization on racial lines.[75]

In fact, the entire licensing regime seemingly arose as a way for states to impede competition from marginalized people. As three justices on the Supreme Court of Texas found, states ramped up licensing when "women, minorities and immigrants—those lacking power—entered the labor market," which caused "incumbent interests [to] lobb[y] politicians to erect barriers to thwart newcomers."[76] They cited, for instance, California's efforts to repel "the Chinese Menace" in referring to Chinese immigrant workers.[77] The justices concluded that "cheaper labor costs and thus cheaper goods and services [were] intolerable to incumbent interests, who imposed severe barriers to entry."[78]

Even if it is unclear whether a licensing requirement was meant to oppress marginalized people, the outcome can remain the same. A recent dispute involved street vendors who offered cheaper goods than brick-and-mortar stores.[79] The *New York Times* told the story of Lucio González who sold three-dollar tacos in defiance of New York's "strict limits" on licensing.[80] When the City targeted, fined, and shuttered unlicensed vendors, undocumented workers such as Mr. González were harmed the most.[81] Notably, legacy proprietors who disliked, as they

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73. *Id.*

74. David. E. Bernstein, *Licensing Laws: A Historical Example of the Use of Government Regulatory Power Against African-Americans*, 31 SAN DIEGO L. REV. 89, 90 (1994).

75. Capers & Day, *supra* note 27; *see also* Bernstein, *supra* note 74, at 89–90 (discussing the connection between Jim Crow laws, licensing schemes, and harm to the economic prospects of Black Americans).

76. Patel v. Tex. Dep't of Licensing and Regul., 469 S.W.3d 69, 102 n.53 (Tex. 2015) (Willett, J., concurring).

77. *Id.*

78. *Id.*; TIMOTHY SANDEFEUR, THE RIGHT TO EARN A LIVING 146 (2010) (noting that a goal of licensing has thus been "to hamper [marginalized people] in every way that human ingenuity could invent").

79. Annie Correal, *He Stayed Afloat Selling $3 Tacos. Now He Faces $2,000 in Fines*, N.Y. TIMES (Sept. 28, 2021), https://www.nytimes.com/2021/08/17/nyregion/ny-street-vendors-crackdown.html [https://perma.cc/R29M-F28S].

80. *Id.*; *see, e.g.*, Luke Fortney, *City Officials Shut Down Another Bronx Street Vendor, Prompting Outcry*, EATER N.Y. (Sept. 27, 2021, 12:56 PM), https://ny.eater.com/2021/9/27/22696165/nyc-unlicensed-street-vendor-bronx-diana-hernandez-cruz [https://perma.cc/GT4R-Z9PZ] (describing the paltry number of licenses available and the thousands of people on the waiting list).

81. *See* Olivia Heffernan, *NYC Street Vendors Protest Exorbitant Fines as City Reopens*, COUNTER (July 19, 2021, 2:51 PM), https://thecounter.org/nyc-street-vendors-protest-exorbitant-fines-as-city-reopens/ [https://perma.cc/5MY4-498H] (noting that most street vendors are undocumented); *accord* Correal, *supra* note 79.

described it, "unfair" competition, spurred New York's crackdown.[82] One business insisted that "[t]hey're taking jobs."[83] Efforts to prevent immigrants from acting as street vendors is far from isolated to New York City.[84]

The point is that professional licensing has often entailed a modern way of insulating an incumbent's power and excluding competition; other fields where private actors rely on licensing to impede marginalized people include childcare,[85] teaching,[86] lawyering,[87] nursing,[88] and more.[89] According to the former head of the Federal Trade Commission (FTC), Maureen Olhausen, licensing constitutes a "particularly egregious example of . . . erosion of economic liberty," questioning whether these regulations should even exist if they constitute "regulatory capture, replacement, and overreach."[90] But despite the dangers of allowing private actors to choose who may compete against themselves, licensing

82. Correal, *supra* note 79 ("The complaints, she said, have come from business owners, Business Improvement Districts, elected officials and others, who point to street congestion, noise and the unfair competition the vendors pose to brick-and-mortar businesses and to licensed vendors.").

83. Melanie Gray, *Mayhem in the Streets: Illegal Vendors Are Overtaking NYC*, N.Y. POST (Dec. 26, 2020, 4:28 PM), https://nypost.com/2020/12/26/mayhem-in-the-streets-illegal-vendors-are-overtaking-nyc/ [https://perma.cc/4MFA-FNP7] (quoting a vendor).

84. *See, e.g.*, David Garrick, *San Diego Prepares for Street Vendor Crackdown as Merchant Complaints Intensify*, SAN DIEGO UNION-TRIB. (Aug. 31, 2021, 5:00 AM), https://www.sandiegouniontribune.com/news/politics/story/2021-08-31/san-diego-crafting-second-attempt-at-street-vendor-crackdown-as-merchant-complaints-intensify [https://perma.cc/6D2E-76RC] (explaining similar efforts to exclude street vendors in San Diego).

85. *See* Bente Birkeland & Jenny Brundin, *Colorado's Undocumented Immigrants Have Been Shut Out of Benefits and Licensed Jobs for 15 Years. A New Bill Would Change That*, CPR NEWS (Feb. 22, 2021, 4:00 AM), https://www.cpr.org/2021/02/22/colorados-undocumented-immigrants-have-been-shut-out-of-benefits-and-licensed-jobs-for-15-years-a-new-bill-would-change-that/ [https://perma.cc/LX6D-BQH7].

86. *See* Liz Robbins, *For Undocumented Immigrants, A License to Teach*, N.Y. TIMES (May 31, 2016), https://www.nytimes.com/2016/06/01/nyregion/new-freedom-to-advance-for-a-new-york-teacher-born-abroad.html [https://perma.cc/3YFD-4YVB].

87. *See* Lee Davidson, *Utah 'Dreamers' Can Go to Law School, But Can't Sit for the Bar Exam. The Legislature May Change That*, SALT LAKE TRIB. (May 16, 2018, 1:13 PM), https://www.sltrib.com/news/politics/2018/05/16/utah-dreamers-can-go-to-law-school-but-cant-sit-for-the-bar-exam-the-legislature-may-change-that/ [https://perma.cc/PWP9-UHCJ].

88. *See* Tony Cook, *Dreamers Can Once Again Get Licenses to Work in 70 Occupations in Indiana*, INDYSTAR (Mar. 21, 2018, 7:33 PM), https://www.indystar.com/story/news/politics/2018/03/21/dreamers-can-once-again-get-licences-work-70-occupations-indiana/447443002/ [https://perma.cc/LC4G-5G8C].

89. *See* Eric Boehm, *This Mississippi Bill Could Be the Beginning of the End of Occupational Licensing Cartels*, REASON (Mar. 31, 2017, 8:35 AM), https://reason.com/2017/03/31/mississippi-bill-end-licensing-cartels/ [https://perma.cc/K7PG-P524].

90. Maureen K. Ohlhausen, Acting Chairman, U.S. Fed. Trade Comm'n, Address at George Mason Law Review's 20th Annual Antitrust Symposium: Advancing Economic Liberty 3, 5 (Feb. 23, 2017), https://www.ftc.gov/system/files/documents/public_statements/1098513/ohlhausen_-_advancing_economic_liberty_2-23-17.pdf [https://perma.cc/EQK6-R65W].

has prevailed.[91] These same incentives arise when states compete in markets themselves.

2. Market Participation

It is increasingly common for states to organize conventional businesses and do so as monopolists. Akin to privatization, market participation offers a tenable way for states to fill their coffers and regulate industries given the modern challenges of enacting new laws and bureaucracies.[92] As an example, the end of Prohibition forced states to reconsider how they should regulate alcohol; for some states, they monopolized liquor sales in the form of "ABC stores" as a way of raising revenue and (de facto) regulating alcohol prices.[93] Or a state could sell exclusive rights to a private firm whereby both split the monopoly profits.

No industry illustrates the oppressiveness of state monopolies better than prisons. Today, states outsource carceral markets to private firms on an exclusive basis whereby both entities may accrue monopoly profits off people of color, low-income persons, and others who are overrepresented in prisons. For instance, companies can become the exclusive providers of e-tablets that incarcerated people must rent to read books or email. They can and do set the rental price anywhere from five cents per minute of reading, to twenty-five cents per written message, to an entire dollar per video attachment, even though incarcerated people earn less than one dollar per hour.[94] E-tablets have also constituted the sole means for incarcerated persons to talk with friends or family, as several states have terminated in-person visits.[95]

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91. *See, e.g.*, Roger A. Fairfax, Jr., *Outsourcing Criminal Prosecution?: The Limits of Criminal Justice Privatization*, 2010 U. CHI. LEGAL F. 265, 267 & n.1 (noting that government still "engages in a substantial amount of privatization," which "is unlikely to cease in the near future").

92. *See* Michaels, *supra* note 11, at 532 (noting that states avoid "the 'hassles' (not to mention democratic and legal safeguards) we associate with more conventional forms of sovereign public administration" when regulating markets as participants).

93. *See generally* Nicholas Mancall-Bitel, *State Owned Liquor Stores, Explained*, THRILLIST (Apr. 26, 2018, 4:41 PM), https://www.thrillist.com/culture/state-owned-liquor-stores [https://perma.cc/H39N-EWYG] (describing state owned liquor stores, why they exist, and what state control means for consumers).

94. Whitney Kimball, *Bloodsucking Prison Telecom Is Scamming Inmates with 'Free' Tablets*, GIZMODO (Nov. 26, 2019), https://gizmodo.com/bloodsucking-prison-telecom-is-scamming-inmates-with-fr-1840056757 [https://perma.cc/3T4F-S4KP]; Lieberman, *supra* note 15.

95. Kimball, *supra* note 94; Debra Cassens Weiss, *Another Jail Eliminates In-Person Visit and Adopts 50-Cent-a-Minute Video Visitation*, ABA J. (July 24, 2018, 6:00 AM), https://www.abajournal.com/news/article/another_jail_eliminates_free_in_person_visits_and_adopts_video_visitation [https://perma.cc/3YLH-B5CC]; Eric Markowitz, *Making Profits on the Captive Prison Market*, NEW YORKER (Sept. 4, 2016), https://www.newyorker.com/business/currency/making-profits-on-the-captive-prison-market [https://perma.cc/7Y2M-5NE8].

With respect to commissary items, not only do prisons charge high prices for non-essential items but some states are said to undersupply necessities to compel incarcerated persons to pay monopoly rates for shoes and medicine.[96] Some observers have even alleged that prisons forgo turning on sufficient heat during the winter to force incarcerated persons to buy coats at monopoly rates.[97] Rather than a simple wealth transfer, high prices for incarcerated people in prison are linked to recidivism, starvation, and violence.[98] After all, incarcerated persons are more likely to reoffend or instigate fights when it is prohibitively expensive to maintain one's dignity or communicate with friends and family.[99]

Prisons are far from the only example. Lotteries were traditionally operated by private firms such as the Louisiana Lottery Company (which competed nationally despite its stately name),[100] though states have since

96. *See* Priti Krishtel, *How High-Priced Drugs Cripple Prison Health Care—And Reform*, PRISON LEGAL NEWS (Nov. 4, 2019), https://www.prisonlegalnews.org/news/2019/nov/4/how-high-priced-drugs-cripple-prison-health-care-and-reform/ [https://perma.cc/5UMM-UC8E] (discussing the high prices of medicine in prison); *see also* Katherine Rohde, et al., *Reforming Health Care for Patients in Prison*, THE REGUL. REV. (Feb. 12, 2022), https://www.theregreview.org/2022/02/12/saturday-seminar-reforming-health-care-patients-prison/ [https://perma.cc/V248-R9ED] (discussing inadequate healthcare in prisons and its relationship to privatization); Patrick Irving, *Prisoners Like Me Are Being Held Hostage to Price Hikes*, N.Y. TIMES (Nov. 2, 2022), https://www.nytimes.com/2022/11/02/opinion/inflation-prison.html [https://perma.cc/69CD-LRAS].

97. *See* Tracy Meadows, *The Big Chill*, MARSHALL PROJECT (Nov. 29, 2018, 10:00 PM), https://www.themarshallproject.org/2018/11/29/the-big-chill [https://perma.cc/Z8BG-FQ88] (recounting an inmate's experience with extreme cold in a Tennessee prison).

98. *See* Tara O'Neill Hayes, *The Economic Costs of the U.S. Criminal Justice System*, AM. ACTION F. (July 16, 2020), https://www.americanactionforum.org/research/the-economic-costs-of-the-u-s-criminal-justice-system/ [https://perma.cc/GXW5-D49U] (discussing incarceration and recidivism); Jeanne Hirschenberger, *"Imprisonment is Expensive"—Breaking Down the Costs and Impacts Globally*, PENAL REFORM INT'L (July 24, 2020), https://www.penalreform.org/blog/imprisonment-is-expensive-breaking-down-the-costs-and/ [https://perma.cc/3V9S-6PAU] ("Deteriorating living conditions of people in prison, coupled with degrading working conditions of staff, often lead to rising tensions, violence and ultimately deaths within prisons. Where prison budgets are not enough to provide a conducive environment for rehabilitation, imprisonment becomes a cycle almost impossible to break, with high rates of recidivism and long-lasting impacts on people and society.").

99. *See* Morgan Godvin, *What Money Can Do in Prison*, MARSHALL PROJECT (May 28, 2019), https://givingcompass.org/article/what-money-can-do-prison/ [https://perma.cc/HL7L-5ZXF] ("Having no money in prison destroys your social ties and perpetuates criminality.").

100. *See* Scope of Exemption Under Federal Lottery Statutes for Lotteries Conducted by a State Acting Under the Authority of State Law, 32 Op. O.L.C. 129, 130 (2008) ("State-chartered lotteries were prevalent during the colonial period and the early years of the Republic. In the nineteenth century, public sentiment shifted against gambling, and by the end of the century most states had banned lotteries of any sort, public or private. The State of Louisiana, however, continued to permit the Louisiana Lottery Company, a powerful private concern, to operate under

seized this market to raise over $70 billion annually as the exclusive sellers of "scratchers" and similar games.[101] Along this journey, states and their municipalities have cracked down on potential competition by driving rival lotteries and numbers games—often those operated by Black and Jewish proprietors—out of business.[102] Today, critics allege that lotteries offer lower payouts than would occur under competition. For example, only fifteen percent of West Virginia's lottery revenue is allocated to contestants,[103] enabling states to generate monopoly profits off the backs of lower-income people.[104] Hardly an accident, the *Wall Street Journal* reported that states target poorer communities by advertising their lottery monopolies to "coincide with the distribution of government benefits, payroll, and Social Security."[105]

Other markets where states compete and restrain trade include waste services,[106] healthcare,[107] liquor,[108] labor (e.g., states pay inmates less than one dollar per hour to work for, in many instances, private companies),[109] and parking. Indeed, Chicago sold seventy-five years' worth of monopoly rights over the City's parking to a private firm,

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a monopoly from the State. Largely unregulated by Louisiana, the Louisiana Lottery Company made significant profits by promoting and selling tickets to the citizens of other states where lotteries were illegal.").

101. *See* Jake Rossen, *A Revealing History of Lotto Scratch-Offs*, MENTAL FLOSS (Mar. 27, 2016), https://www.mentalfloss.com/article/77601/revealing-history-lotto-scratch-offs [https://perma.cc/C38Q-5QT3] (explaining the rise of lottery scratch cards in the 1970s).

102. *See* Matthew Vaz, *"We Intend to Run It": Racial Politics, Illegal Gambling, and the Rise of Government Lotteries in the United States, 1960-1985*, 101 J. AM. HIST. 71, 71–73 (2014).

103. Steve Tripoli, *Lotteries Take In Billions, Often Attract the Poor*, NPR (July 16, 2014, 5:39 PM), https://www.npr.org/2014/07/16/332015825/lotteries-take-in-billions-often-attract-the-poor [https://perma.cc/78R4-8FR2].

104. *See* Alvin Chang, *4 Ways the Lottery Preys on the Poor*, VOX (Jan. 13, 2016, 4:00 PM), https://www.vox.com/identities/2016/1/13/10763268/lottery-poor-prey [https://perma.cc/88TM-4UD7] (discussing the inequities of state lotteries).

105. Arthur C. Brooks, *Powerbull: The Lottery Loves Poverty*, WALL ST. J. (Aug. 27, 2017, 5:11 PM) (internal quotation marks omitted), https://www.wsj.com/articles/powerbull-the-lottery-loves-poverty-1503868287 [https://perma.cc/BF8Q-HSMK].

106. *See supra* note 55.

107. *See infra* Section II.B.3.

108. *See supra* note 93 and accompanying text.

109. German Lopez, *Slavery or Rehabilitation? The Debate About Cheap Prison Labor, Explained*, VOX (Sept. 7, 2015, 11:01 AM), https://www.vox.com/2015/9/7/9262649/prison-labor-wages [https://perma.cc/LFE3-CC7J]. Over 19.7 million people are employed by state and local governments. *See* Adam Grundy, *Education, Hospitals, Police Protection Are Largest Government Employment Categories*, U.S. CENSUS BUREAU (Oct. 7, 2020), https://www.census.gov/library/stories/2020/10/2019-annual-survey-of-public-employment-and-payroll-is-out.html [https://perma.cc/JB3Z-587N]. States have violated antitrust law in that labor market by entering illegal no-poaching deals. *See, e.g.*, Seaman v. Duke Univ., No. 15-CV-462, 2018 WL 671239, at *1 (M.D.N.C. Feb. 1, 2018) (describing a no-poaching agreement between the University of North Carolina and Duke University concerning each other's faculty).

Chicago Parking Meter, LLC (CPM), in exchange for $1.15 billion.[110] This deal netted CPM almost $87 million in 2020 alone after it "price-gouge[d]" those who rely on meters and incentivized the City to forego improving its public transit system.[111] The Better Government Association criticized this deal as a "lesson in worst practices"[112] while an exposé emphasized its impact,[113] yet antitrust enforcers cannot intervene (as Part III explains).

As such, not only are states increasingly likely to participate in markets akin to private firms but when they do so, they respond to the same incentives to monopolize markets. Another way in which states protect incumbent interests at society's expense relates to classic forms of legislative and executive exclusion.

3. Legislative and Executive Exclusion

It is common for a state to favor certain firms while harming rivals and consumers by using its legislative or executive powers to ban competition. In many instances, this type of restraint injures some consumers more than others. For example, states have created the "certificate of competitive advantage" (COPA), which permits hospitals to merge even when a monopoly would result.[114] While mergers have improved healthcare in affluent areas, they can strip low-income regions of hospitals and facilities entirely.[115] COPAs may also raise prices, reportedly forcing uninsured people into choosing whether to pay monopoly rates out of pocket or decline receiving treatment, yet hospitals and providers have successfully persuaded states to enact COPAs.[116]

Similarly, Kentucky has created the "Certificate of Need" (CON) for an entity aspiring to operate a nursing home.[117] To receive a CON,

110. Dave Byrnes, *Federal Judge Dismisses Antitrust Suit over Chicago Parking Meters*, COURTHOUSE NEWS SERV. (Jan. 24, 2022), https://www.courthousenews.com/federal-judge-dismisses-antitrust-suit-over-chicago-parking-meters/ [https://perma.cc/5HBH-VZU3].

111. *See id.*

112. *Chicago's Parking Meter Deal a Lesson in 'Worst Practices*,*'* BGA POL'Y (Nov. 16, 2010) (internal quotation marks omitted), https://www.bettergov.org/2010/11/16/chicagos-parking-meter-deal-a-lesson-in-worst-practices/ [https://perma.cc/3WNS-XXHA].

113. MATT TAIBBI, GRIFTOPIA (2010).

114. *FTC to Study the Impact of COPAs*, FED. TRADE COMM'N (Oct. 21, 2019), https://www.ftc.gov/news-events/news/press-releases/2019/10/ftc-study-impact-copas [https://perma.cc/D7DJ-YKBN].

115. *Key COPA Facts*, FED. TRADE COMM'N, https://www.ftc.gov/system/files/ftc_gov/pdf/Key_COPA_Facts.pdf [https://perma.cc/6DLG-SGSP].

116. *See* FED TRADE COMM'N, FTX POLICY PERSPECTIVES ON CERTIFICATES OF PUBLIC ADVANTAGE 2–3 (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/COPA_Policy_Paper.pdf [https://perma.cc/2MJN-JUY2].

117. David R. Garcia & Joseph Antel, *Sixth Circuit Questions Efficacy of State "Certificate of Need" Laws, Question Whether Reduces Competition*, NAT'L L. REV. (Mar. 7, 2022),

applicants must show that a certain threshold of people "need" elderly care, though critics allege that this policy is actually intended to insulate legacy interests and preserve high prices.[118] Far from harming consumers at-large, CONs make it difficult for insular communities to receive specialized care. In 2022, a facility unsuccessfully challenged Kentucky's CON law, noting that its consumer base of Nepalese-speaking immigrants lacked a facility due to this policy alone.[119]

Plenty of other instances exist.[120] In 2021, Oregon's executive branch promulgated a rule forbidding real estate agents from offering rebates.[121] Its purpose was allegedly to impede upstarts in light of the difficulty of attracting consumers away from legacy interests without low prices.[122] The rule also seems especially harmful to people of color because legacy interests in real estate have historically discriminated on racial lines.[123] Even though the rule excluded competitors who are most likely to serve people of color from the market, antitrust failed to intervene.[124]

In sum, government's marketization has inspired states to suppress competition, often at the expense of marginalized people. And the Sherman Act's silence about its application to state action complicates whether antitrust may intercede. Notably, when the Supreme Court established *Parker* immunity in 1947, the Supreme Court revolutionized constitutional power sharing in the process. As will be discussed, longstanding tensions between federal and state actors over who may regulate commerce led the *Parker* Court to strike a bargain in hopes of settling generations of dispute.

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https://www.natlawreview.com/article/sixth-circuit-questions-efficacy-state-certificate-need-laws-question-whether [https://perma.cc/LM2R-FUQ4].

118. *Id.*

119. *Id.*

120. For example, one city sought to protect a local billboard company's monopoly through regulations preventing the building of new advertising. *See* W.C. Bunting, *Curbing the Anticompetitive Impact of Commercial Land Use Regulation: An Administrative Approach*, 66 VILL. L. REV. 681, 697 (2021) (discussing City of Columbia v. Omni Outdoor Advert., 499 U.S. 365 (1991)).

121. REX – Real Est. Exch. v. Brown, No. 20-cv-02075, 2021 WL 5855660, at *1 (D. Or. Dec. 9, 2021).

122. *Id.* at *2.

123. *Id.* at *2 ("REX asserts that the Agency's anti-rebate policies bar new entrants to the brokerage market and protect incumbent brokers who benefit from artificially high commissions . . . REX alleges that the Agency's policies restrict competition and 'injure buyers and sellers of property throughout Oregon' by depriving them of price discounts, including cash rebates . . . REX also claims that Oregon's anti-rebate policies violate its and its customers' due process rights and equal protection rights.").

124. *See id.* at *6 ("In summary, any alleged anti-competitive actions by the Governor, the Commissioner, the Agency, and the Board were taken to enforce an anti-rebate law enacted by the state legislature. All such actions are those of the State itself, and thus fall squarely within the protection from antitrust liability justified by the reasoning in *Parker*.").

III. ANTITRUST FEDERALISM AND STATE ACTION

Federalism—which refers to the constitutional division of power between federal and state actors—has rendered hot button disputes involving "ObamaCare,"[125] integration,[126] school prayer,[127] and others.[128] But perhaps no subject has more altered federalism's contours than the longstanding issue of whether states may govern commerce or competition.[129] In fact, *Parker* immunity arose as a way of preserving state autonomy given the (perceived) threats of subjecting sovereign states to federal antitrust laws.[130] To understand the saliency of "antitrust federalism," Section III.A reviews the judiciary's attempts over the course of two hundred years to determine who may restrict competition, and how this dynamic has produced state action immunity. Section III.B explores *Parker*'s evolution, which is now grounded in federalism and, more recently, administrative law. Then, Section III.C delves into the social costs of state action immunity.

A. *Antitrust Federalism*

Because commerce and interstate competition are inextricably linked—e.g., states may regulate commerce by restricting competition—courts have long relied on monopoly disputes to interpret the extent of state power and its impact on interstate borders.[131] For example, in the antebellum era before the Sherman Act, a prominent theory was that the Constitution vests commerce power in federal actors and thereby deprives states of this authority.[132] A rival theory was that states are

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125. *See generally* Sara Rosenbaum, *Can This Marriage Be Saved? Federalism and the Future of U.S. Health Policy Under the Affordable Care Act*, 15 MINN. J.L. SCI. & TECH. 167 (2014).

126. *See* Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2124 (1993).

127. Erwin Chemerinsky, Address at the Tenth Circuit Judicial Conference: The Federalism Revolution (June 29, 2000), *in* 31 N.M. L. REV. 7, 7 (2001).

128. *See, e.g.*, Elmsford Apartment Assocs. v. Cuomo, 469 F. Supp. 3d 148, 161–62 (S.D.N.Y. 2020) (discussing pandemic regulation as a matter of federalism).

129. *Accord* Rebecca Haw Allensworth, *The New Antitrust Federalism*, 102 VA. L. REV. 1387, 1389 (2016) ("Antitrust federalism may be less familiar than its constitutional cousin, but it is just as important—if not more so—to the [state–federal] balance of power.").

130. *See infra* notes 142–145 and accompanying text.

131. *See* Day, *supra* note 56.

132. *E.g.*, Gibbons v. Ogden, 22 U.S. 1, 17–18 (1824) (appellant's argument) ("This doctrine of a general concurrent power in the States, is insidious and dangerous. If it be admitted, no one can say where it will stop. The States may legislate, it is said, wherever Congress has not made a plenary exercise of its power. But who is to judge whether Congress has made this plenary exercise of power? Congress has acted on this power; it has done all that it deemed wise; and are the States now to do whatever Congress has left undone? Congress makes such rules as, in its judgment, the case requires; and those rules, whatever they are, constitute the system." (emphasis omitted)).

autonomous sovereigns which must sometimes regulate local commerce.[133] In hopes of resolving this debate, the Supreme Court ruled in *Gibbons v. Ogden*[134]—about seventy years before the Sherman Act—that the Constitution bestows greater commerce powers in federal actors when the Court invalidated a monopoly created by the state of New York.[135]

Federalism's relationship with competition grew even more heated after Congress passed the Sherman Act in 1890, potentially encroaching on the state's commerce authority. Then in 1895, the Supreme Court used an antitrust case to erode federal authority: it held in *United States v. E. C. Knight Co.*[136] that antitrust law can only govern interstate commerce, which manufacturing does not entail. The implication is that states wield certain powers over local markets.[137] However, the Court ruled in 1952's *Wickard v. Filburn*[138]—a landmark Commerce Clause case—that conduct need not qualify as commerce or interstate for federal actors to intervene so long as interstate commerce was *affected*.[139] Inspired by this expansion of federal power, the Supreme Court in *Mandeville Farms* enlarged antitrust's definition of commerce to resemble *Wickard*.[140] Not only did *Mandeville Farms* and *Wickard* combine to *de facto* negate *E.C. Knight*, but federal power grew significantly at the expense of states; the decision usurped the states' authority to govern their own markets and relocated it in federal antitrust enforcers—for a year anyway.[141]

But in light of *Wickard*, the Supreme Court sought to preserve a degree of state sovereignty by striking a compromise in the form of *Parker v. Brown*.[142] In *Parker*, a case about California's "blatantly

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133. *E.g.*, *id.* at 60–61 (respondent's argument).

134. 22 U.S. 1.

135. *Id.* at 1, 220–21.

136. 156 U.S. 1 (1895), *abrogated by* Wickard v. Filburn, 317 U.S. 111 (1942).

137. *Id.* at 16–18; *see* Alan J. Meese, Wickard *Through an Antitrust Lens*, 60 WM. & MARY L. REV. 1335, 1336 (2019) ("Initially, and famously, the Court read the Act in light of the Court's Commerce Clause precedents, holding that the Act did not reach a merger to monopoly because such intrastate activity only impacted interstate commerce 'indirectly.'" (citing *E. C. Knight Co.*, 156 U.S. at 17–18)).

138. 317 U.S. 111.

139. *Id.* at 125 ("But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . . .").

140. *See* Meese, *supra* note 137, at 1341–42.

141. Day, *supra* note 56 ("To preserve state sovereignty, the Supreme Court instituted a state's antitrust immunity just one year after *Mandeville Island Farms* which, as discussed next, has sparked even greater debates.").

142. *Id.*; Allensworth, *supra* note 129, at 1393 (making this point and adding that "[s]tates fix prices, restrict competitive entry, and even prohibit categories of transactions. And states regularly make monopolists out of market actors and otherwise insulate industries from

anticompetitive" plan to fix raisin prices,[143] the Court held that the Sherman Act was never meant to regulate state action.[144] According to the *Parker* Court, applying antitrust law to the states would deprive them of sovereignty that the Constitution guarantees.[145] Based upon federalism and congressional intent, *Parker*'s bargain was that federal actors may substantially regulate competition occurring within a state's borders but not the actions of states themselves. The goal was to maintain a state's right to disrupt competition as a way of achieving internal policies while subjecting private actors to antitrust review.

It would become apparent, though, that *Parker*'s framework required more nuance. An emerging issue was that towns and private actors can and do restrain trade on a state's behalf, which forced the Supreme Court to develop two rules for the modern era.

B. *The Modern Contours of State Action Immunity*

Parker has continuously evolved whereby the doctrine is now based on administrative law in addition to federalism. Spurring this event, hard questions emerged over whether state action immunity should shield towns or even private parties who restrain trade on a state's behalf. As a solution, the Court implemented two rules: the first applies to both private parties and municipalities while the second concerns only private actors. A key part of today's doctrine is that municipalities and their leaders should, as the Supreme Court theorized, seldom engage in anticompetitive conduct because they are electorally accountable.[146]

Shortly after the Court decided *Parker*, the issue of whether towns or cities can assert antitrust immunity prompted the Supreme Court to levy the first rule: a town's conduct must derive from a state's "clearly

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competition. If the Sherman Act and the decades of case law interpreting it were applied against these regulatory activities, they could obliterate state autonomy as we know it." (footnotes omitted)).

143. Volokh, *supra* note 64, at 193 ("California had established a blatantly anticompetitive scheme to keep raisin prices up by restricting how much could be sold. If an identical scheme had been organized by the raisin growers themselves, that would have been a per se violation of the Sherman Act." (footnote omitted)); *see* Parker v. Brown, 317 U.S. 341, 345–49 (1943) (discussing the facts of the case).

144. *See Parker*, 317 U.S. at 352 (ruling that California had "imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit").

145. *See* Allensworth, *supra* note 129, at 1395–96 ("*Parker*, therefore, is better understood as being more about the affectation doctrine," that is, the doctrine that Congress can regulate any activity affecting interstate commerce, "than about the intent behind or text of the Sherman Act. Federal antitrust liability for state laws and regulations would so disrupt the [state–federal] balance of power as it stood in the 1940s as to render the affectation doctrine questionable under the federalist principles enshrined in the Constitution. Thus, to preserve the viability of *Wickard*, the Court created a compromise that would leave states a relatively free hand to regulate without federal oversight, and *Parker* immunity was born." (footnote omitted)).

146. *See infra* note 158 and accompanying text.

articulated policy."[147] Because the Constitution says nothing of municipalities, the Court remarked that "[c]ities are not themselves sovereign; they do not receive all the federal deference of the States that create them."[148] In *FTC v. Phoebe Putney Health System*,[149] the state of Georgia created a Hospital Authority tasked with combining hospitals in the State.[150] The issue was that an acquisition threatened to impose a near-monopoly in Albany, Georgia, the Supreme Court denied immunity; even though Georgia intended for the Authority to merge hospitals, it was not the state's policy for anticompetitive effects to arise.[151]

Parker took its modern form during the last decade when the Court announced the second rule: *private actors* must not only follow a state's clearly articulated policy but also act under the state's supervision. The Court set this groundwork in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*[152] and then solidified it in *North Carolina State Board of Dental Examiners v. FTC*.[153] In the latter case, North Carolina regulated dentistry using a licensing board of active practitioners who declared that the act of teeth whitening constituted dentistry.[154] The alleged purpose was to capture the market from non-dentists and drive up prices.[155] In denying immunity, the Court found that the board had followed a state's policy—as North Carolina intended to restrict entry—but failed the supervision prong because *dentists* decided that teeth whitening qualified as dentistry rather than the state.[156]

"*North Carolina Dental*" is considered a landmark case because, according to Professor Rebecca Haw Allensworth, it embraced administrative law.[157] The Court could have strictly relied on federalism

147. *See* Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) ("[T]he challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy.'" (quoting City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 410 (1978) (opinion of Brennan, J.))).

148. City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 412 (1978) (plurality opinion of Brennan, J.).

149. 568 U.S. 216 (2013).

150. *Id.* at 220–21.

151. *Id.* at 221–22, 227–36.

152. 445 U.S. 97; *see id.* at 103–06.

153. 574 U.S. 494 (2015).

154. *Id.* at 499–501.

155. *See id.* at 500–01.

156. *Id.* at 504 ("While North Carolina prohibits the unauthorized practice of dentistry, however, its Act is silent on whether that broad prohibition covers teeth whitening. Here, the Board did not receive active supervision by the State when it interpreted the Act as addressing teeth whitening and when it enforced that policy by issuing cease-and-desist letters to nondentist teeth whiteners.").

157. Allensworth, *supra* note 129, at 1390–91 ("The model for power sharing no longer comes from constitutional federalism, but from administrative law where courts use procedural

to rule that the agency was an arm of North Carolina yet private actors changed everything. A majority justified the supervision prong by noting that "municipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market."[158] This framework embraced administrative law whereby courts defer to a state's decision-making when based on a sound process and free of conflicts of interest.[159] As Allensworth observed, "power sharing means some deference; a federal court hearing an antitrust case will defer to a state's regulatory choices, but only where states adhere to certain decision-making procedures."[160] While the wisdom of *North Carolina Dental* is debatable, the case expanded *Parker* beyond purely federalism.

Lastly, *Parker* is plenary. When the city of Columbia, South Carolina, limited the erection of new billboards to protect a local company's market, plaintiffs pleaded for a "corruption" exception to state action immunity.[161] The Supreme Court refused to recognize this exception and held that because most laws favor native businesses, any investigation into motives would be unworkable.[162] *Parker*, as a result, shields states regardless of intent or effects.[163] This framework has notably created perverse outcomes.

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review to control agency decision making. As in administrative law, power sharing means some deference; a federal court hearing an antitrust case will defer to a state's regulatory choices, but only where states adhere to certain decision-making procedures. I call this mode of review 'accountability review' because the procedures imposed by the Court are designed to maximize states' exposure to political heat for the regulation's adverse effects on competition.").

158. *N.C. State Bd. of Dental Exam'rs*, 574 U.S. at 508 ("'[W]here the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals.' . . . . [M]unicipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market." (quoting Hallie v. Eau Claire, 471 U.S. 34, 47 (1985))).

159. Allensworth, *supra* note 129, at 1390–91.

160. *Id.*

161. City of Columbia v. Omni Outdoor Advert., 499 U.S. 365, 367–69, 374, 376 (1991).

162. *Id.* at 377 ("A conspiracy exception narrowed along such vague lines is similarly impractical. Few governmental actions are immune from the charge that they are 'not in the public interest' or in some sense 'corrupt.' The California marketing scheme at issue in *Parker* itself, for example, can readily be viewed as the result of a 'conspiracy' to put the 'private' interest of the State's raisin growers above the 'public' interest of the State's consumers. The fact is that virtually all regulation benefits some segments of the society and harms others; and that it is not universally considered contrary to the public good if the net economic loss to the losers exceeds the net economic gain to the winners. *Parker* was not written in ignorance of the reality that determination of 'the public interest' in the manifold areas of government regulation entails not merely economic and mathematical analysis but value judgment, and it was not meant to shift that judgment from elected officials to judges and juries.").

163. Day, *supra* note 56, at 20–22 (noting the plenary nature of *Parker* immunity).

C. *Consequences*

Due to *Parker*, states may freely suppress competition and extract wealth from people of color, low-income communities, and marginalized groups. In instances of carceral monopolies, courts have dismissed lawsuits as "frivolous" because states empowered agencies and private vendors to restrict competition, blanketing each in antitrust immunity.[164] This framework has likewise allowed states to oppress immigrants in the cases of hairdressers, street vendors, and more.[165] The same is true of when antitrust has failed to challenge COPAs and CONS.[166] And in the majority of instances, courts have paid little attention to the social costs or even disproportional consequences due to their irrelevance in *Parker*'s analysis. That said, a couple of courts did note that a state monopoly seemingly arose from "kickbacks"[167] or served no legitimate purpose but to raise monopoly profits before dismissing each case as a clear application of *Parker* immunity.[168]

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Is *Parker* wrong or has it become wrong? A state's exclusionary practices are supposed to foster public welfare because of electoral accountability but what if this was neither a realistic expectation nor a proper interpretation of antitrust law? The next Part casts doubt on *Parker*'s logic. While the Supreme Court insists that antitrust was "never" intended to apply to states,[169] the common law of competition—which is incorporated into the Sherman Act to some degree—was fixated on state action and its impact on society's least powerful. By revealing how state-sponsored monopolies create the same problems that inspired Parliament and English courts to establish the common law of competition, it becomes apparent that the Supreme Court has set modern antitrust law on an improper foundation.

164. *See, e.g.*, Torres v. Cate, No. 12-6236, 2013 WL 1097997, at *2 (N.D. Cal. Mar. 15, 2013) ("Because actions taken by or at the direction or approval of state governmental bodies or state executives are exempt from the antitrust laws set forth in the Sherman Act, Plaintiff's claim under the Sherman Act is legally frivolous and fails to state a claim upon which relief may be granted.").

165. *See supra* Section II.B.1.

166. *See supra* text accompanying notes 114–119.

167. Wheeler v. Beard, No. 03-4826, 2005 WL 1217191, at *2, *5 (E.D. Pa. May 19, 2005); Stringham v. Hubbard, No. S-05-0898, 2006 WL 3053079, at *2 (E.D. Cal. Oct. 26, 2006).

168. *Wheeler*, 2005 WL 1217191, at *5; *Stringham*, 2006 WL 3053079, at *3–4.

169. Parker v. Brown, 317 U.S. 341, 350 (1943).

IV. CURING THE DANGERS OF *PARKER* IMMUNITY

The Supreme Court erred when it based *Parker* on federalism, congressional intent, and political accountability. This Part explores antitrust's intellectual foundation and history to assert that states can present greater dangers when excluding competition than private enterprise—and this legacy is engrained in modern antitrust. To make this case, Section IV.A casts doubt on the Court's faith in electoral remedies, showing that states have often restrained trade when it affects marginalized people due to their dearth of power. Section IV.B asserts that Congress might have implicitly intended to subject states to antitrust review. In actuality, the Sherman Act embraced the common law of competition, which was meant to restrict the Crown's ability to grant monopolies. By exploring this poorly understood legacy and its impact on early Americans, the analysis concludes that the Court has misconstrued antitrust law and state action immunity. Finally, Section IV.C explains why federalism never mandated *Parker*.

A. *Oppression and the Political Science of State Power*

Parker's rationale of political accountability makes less sense under closer inspection. It has been said that states tend to enact regulations to benefit privileged individuals while dismissing marginalized persons who lack political or voting power.[170] Politicians are also expected to pass laws to benefit large groups of citizens who could ultimately vote out disfavored politicians.[171] This dynamic is expected to encourage leaders to extract rents from smaller and marginalized groups.[172] A corollary is that elites tend to reap political favors due to the resources required to influence politicians.[173] A prison monopoly is thus an expected method

170. *See* Zachary D. Baumann et al., *Party Competition and Policy Liberalism*, 21 ST. POL. & POL'Y Q. 266, 269 (2021) (explaining the political favors given to "haves" and "have-nots").

171. BRUCE BUENO DE MESQUITA ET AL., THE LOGIC OF POLITICAL SURVIVAL 31, 58 (2003) (explaining that leaders in democracies have incentives to pursue "public goods" because they can appease the most voters using this strategy).

172. Roger Meiners, *Money for Nothing: Politicians, Rent Extraction, and Political Extortion by Fred McChesney*, FOUND. FOR ECON. FREEDOM (Apr. 1, 1998), https://fee.org/articles/money-for-nothing-politicians-rent-extraction-and-political-extortion-by-fred-mcchesney/ [https://perma.cc/2HYD-VT2M].

173. *See* Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPS. ON POL. 564, 570–72 (2014); *see also* Andrew Prokop, *Study: Politicians Listen to Rich People, Not You*, VOX (Jan. 28, 2015, 4:15 PM), https://www.vox.com/2014/4/18/5624310/martin-gilens-testing-theories-of-american-politics-explained [https://perma.cc/2G8J-RQZ4] (summarizing Gilens and Page's study and stating that "[w]hen the authors look only at the preferences of average citizens, it appears that they do have a pretty big effect on policy change. But when they add the preferences of economic elites and interest groups to the analysis, the impact of average citizens vanishes entirely. Basically, average citizens only get what they want if economic elites or interest groups also want it.").

for states to fill coffers since incarcerated people entail a small and powerless group.

Further, a state's anticompetitive activities are more robust and coercive than those of private enterprises. With private actors, monopolies and cartels are expected to last temporarily even without antitrust's help.[174] This is because high prices should incentivize competitors to enter a monopolized market and thereby drive prices back downward, shedding light on the rule of reason's deference to defendants.[175] Cartels are similarly considered fragile because each member of a conspiracy should encounter incentives to undersell its partners, making cartels susceptible to implosion.[176] A state, though, can use its legislative powers to foreclose competition in its entirety—for example, no one may lawfully undersell a carceral monopoly. And without the threat of competition, states can raise prices more than private monopolists.

It is thus predictable that states have restrained trade when smaller groups are unlikely to seek recourse—and this finding undermines the Court's justification of political accountability. In fact, there is a long tradition of oppression deriving from state monopolies dating back to the sixteenth century. As explained next, the Crown had historically used monopolies to fuel colonialism, abuse foreigners, and harm labor, a landscape that meaningfully influenced U.S. law.

B. *The Hidden Importance of Historical State Monopolies*

This Section weaves together a forgotten story about state power, oppression, and competition law's genesis. It explains that the common law arose as a way of curtailing the Crown's right to issue patents, which was described as a type of oppression. This landscape influenced Early Americans who sought to deprive state and federal governments of monopoly power. Given the continuing role of history in American antitrust law, this Section finds that courts must revisit the wisdom and foundation of state action immunity.

1. Royal Monopolies and the Common Law Response

Tudor courts and Parliament fought the English Crown's monopoly power, which resulted in the common law of competition. Back then, all

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174. *See* H. Stephen Harris, Jr., *An Overview of the Draft China Antimonopoly Law*, 34 GA. J. INT'L & COMPAR. L. 131, 139 (2005) ("Monopoly 'rents,' as economists call them, are powerful incentives that draw in new competitors to sell at lower prices or to develop superior products.").

175. *Id.*

176. *See* Ctr. Video Indus. Co. v. United Media, Inc., 995 F.2d 735, 738 (7th Cir. 1993) (reviewing the incentives for cartel members to cheat).

monopolies stemmed from a patent that only the Crown could issue.[177] Four types of patents existed; the first exempted a company from regulations, the second rewarded inventions, the third granted the right to collect tariffs and fines, and the fourth resembled a traditional monopoly where a firm could exclusively compete in a market.[178] Whereas modern courts interpret antitrust law as a remedy against private power, this analysis explains that competition law was originally meant to address governmental abuses.

The rate of monopolies increased during Queen Elizabeth's reign from 1558 to 1603[179] because Parliament provided her with an allowance, which she buttressed by selling patents to markets such as glass and wool.[180] In fact, she selectively issued corporate charters accompanied with exclusive rights whereas, today, government freely grants charters (without privileges).[181] One area where monopolies were especially common involved trade groups, known as artisan guilds, which wielded

177. OREN BRACHA, OWNING IDEAS 15–16 (2016); *see id.* at 25 n.54 ("Letters Patent was the technical term designating one of the forms of the royal prerogative exercised by the Crown and its agents.").

178. *See* Ariel Katz, *Intellectual Property, Antitrust, and the Rule of Law: Between Private Power and State Power*, 17 THEORETICAL INQUIRIES L. 633, 641–42 (2016) ("Monopolies took different forms, serving different purposes and functions. The first type resembled today's patents: exclusive rights granted to inventors of new technologies, or those who introduced foreign technologies into England. The second type were *non obstante* patents, namely patents exempting the patentees from certain regulations and prohibitions. While sometimes justified as a method for fine-tuning regulation, those patents were increasingly granted as a means of favoritism or as a way of raising revenue for the Crown. The third type were monopolies granting regulatory authority over particular trades, allowing the grantee to license and supervise other trades. Another variant involved the right to collect fines for violations of trade regulations." (footnotes omitted)).

179. BRACHA, *supra* note 177, at 15–16.

180. Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL'Y 983, 989 (2013); Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550-1800*, 52 HASTINGS L.J. 1255, 1264–65 (2001).

181. WILLIAM MAGNUSON, FOR PROFIT: A HISTORY OF CORPORATIONS 77 (2022) ("[C]orporations could only be created by petitioning the crown (or, occasionally, the Parliament) for a charter: it was not a right to form a corporation; it was a privilege."); *see also* Philip J. Stern, *The English East India Company and the Modern Corporation: Legacies, Lessons, and Limitations*, 39 SEATTLE U. L. REV. 423, 432–33 (2016) ("Thus, there emerges a great chasm between the East India Company and its later heirs if one considers that the Company's most salient feature—a monopoly backed by a politically issued charter—no longer remains a normative feature of the modern corporation. As Ron Harris has argued, it was in fact only the severing of the connection between monopoly and incorporation, not least through debates over the East India Company's trade between 1813 and 1833, which permitted the emergence of the modern form of joint-stock corporations." (footnote omitted)).

exclusive authority to regulate work standards and competition within their own markets.[182]

It is notable that the public detested monopolies. When the Crown issued a patent, the recipient could drive up prices while reducing quality.[183] Emphasizing the social and economic costs of monopolies, Robert Bell told parliament that "by Licenses a few only were enriched, and the multitude impoverished."[184] Despite this sentiment, the Queen asserted her supremacy over Parliament by refusing to concede her patenting power: "We are to let you understand, her Majesty's pleasure in that behalf that her Prerogative Royall may not be called in question for the validitie of letters patents."[185]

Antimonopoly sentiment picked up steam in 1597 when the Speaker of Parliament advocated against monopolies during a speech that was traditionally ceremonial in nature.[186] This drew a tame response from the Queen who asked that "her dutiful and loving Subjects would not take away her Prerogative."[187] By responding meekly, Queen Elizabeth seemed to acknowledge that Parliament had gained enough power to limit her authority.[188] When Parliament proposed a bill to ban monopolies, she sought a compromise by transferring judicial review of monopolies from the Court of Star Chamber, known as "a fortress of royal power," to the common law courts.[189] After she continued to frustrate judicial review—

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182. Lucas v. Wis. Elec. Power Co., 466 F.2d 638, 659 (7th Cir. 1972) (en banc) (Sprecher, J., dissenting) ("The original common law distinction between a public and a private business depended upon whether the enterprise was monopolistic or competitive. Whatever in medieval England was in short supply, such as doctors, became publicly regulated; an example is the regulation of doctor's fees as early as 1359. The trade guilds fostered occupational monopolies." (footnote omitted)); Thomas B. Nachbar, *Monopoly, Mercantilism, and the Politics of Regulation*, 91 VA. L. REV. 1313, 1320 (2005) ("[M]ercantilist trade regulation was originally carried out at the local level by the traditional institutions of trade regulation: the guilds. Guilds—and their direct control over the means of production—were an important instrument in the administration of the English regulatory state for over five centuries."); *see also* Gregory Day, *Anticompetitive Employment*, 57 AM. BUS. L.J. 487, 497 (2020) (describing the difficulty of switching trades during the guild era).

183. Marvin Ammori, Note, *The Uneasy Case for Copyright Extension*, 16 HARV. J.L. & TECH. 287, 305 (2002) (discussing the high prices and abuses arising from the Queen's grant of monopolies); Katz, *supra* note 178, at 642–43.

184. Xiaoren Wang, *Aesthetic Functionality at a Crossroads: What A Troublesome Doctrine Can Learn from Its Past*, 19 CHI.-KENT J. INTELL. PROP. 357, 364 (2020).

185. Mossoff, *supra* note 180, at 1264–65.

186. Nachbar, *supra* note 182, at 1329.

187. *Id.* at 1330 ("[H]er Majesty hoped that her dutiful and loving Subjects would not take away her Prerogative, which is the chiefest Flower in her Garden, and the principal and head Pearl in her Crown and Diadem; but that they will rather leave that to her Disposition. And as her Majesty hath proceeded to Trial of them already, so she promiseth to continue, that they shall all be examined, to abide the Trial and true Touchstone of the Law.").

188. *See id.* at 1329–30; Calabresi & Leibowitz, *supra* note 180, at 991.

189. Calabresi & Leibowitz, *supra* note 180, at 991.

again threatening a legislative response—Queen Elizabeth invalidated many of her patents in recognizing "[t]hat my grants should be grievous to my People, and Oppressions to be privileged under Colour of our Patents."[190]

The legality of monopolies reached an inflection point in 1602. A haberdasher named T. Allein infringed a patent for playing cards, prompting the patentee, Darcy, to sue.[191] While *Darcy v. Allen* lacks a written opinion, a report by Lord Edward Coke issued twelve years after the case has served as the official record despite potential inaccuracies in his telling of events.[192] According to Lord Coke, a reason why the court struck down Allen's patent concerned low quality and high prices because "he who has the sole selling of any commodity, may and will make the price as he pleases."[193]

But perhaps the most pressing rationale animating *Darcy* concerned labor. In addition to high prices, monopolies prevented people from practicing their trades, which allowed only patentees to work in specific industries.[194] This was considered oppressive because artisans could seldom switch trades or skill sets during the midst of their careers,[195] which created "idleness"[196] and impoverished workers.[197] In fact, Section 1 of the Sherman Act prohibits "restraint[s] of trade,"[198] which is derived from the common law violation of restraining labor or "trade."[199]

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190. Nachbar, *supra* note 182, at 1331.

191. Nathan B. Oman, *A Pragmatic Defense of Contract Law*, 98 GEO. L.J. 77, 88 (2009).

192. Calabresi & Leibowitz, *supra* note 180, at 992 ("There was no written judicial opinion of the case, and the extant records suggest that the justices explained little of the reasoning supporting their judgment in open court. However, Sir Edward Coke, the most famous lawyer of his day, did write up a report on *Darcy v. Allen*. Coke's report has been so influential that, with regard to *Darcy*'s meaning in the common law today, it effectively can be treated as the official opinion in the case." (footnotes omitted)).

193. The Case of Monopolies (1603) 77 Eng. Rep. 1260, 1263 (K.B.).

194. *Id.* at 1262–63.

195. *See* Day, *supra* note 182, at 497; Nachbar, *supra* note 182, at 1336 ("The apprentice and guild system perpetuated by the Statute of Artificers made it extremely difficult to switch between different trades. It was nearly impossible for a tallow-chandler to become a haberdasher if the entire candle industry were handed over to a monopolist who didn't plan on doing any outside hiring. Even in the face of a local (rather than a national) monopoly, most workers could not move to another city in response to the granting of a new exclusive trade privilege.").

196. The Case of Monopolies, 77 Eng. Rep. at 1262–63 ("All trades, . . . which prevent idleness . . . and exercise men and youth in labor, for the maintenance of themselves and their families, and for the increase of the substance, to serve the Queen when occasion shall require, are profitable for the commonwealth, and therefore the grant to the plaintiff to have the sole making of them is against the common law, and the benefit and liberty of the subject." (footnote omitted)).

197. *Id.*

198. 15 U.S.C. § 1.

199. *See, e.g.*, The Case of Monopolies, 77 Eng. Rep. at 1264 (finding that no person can be "restrained from exercising any trade" except by Parliament).

Darcy inspired more monopoly litigation. In *The Case of the Tailors of Ipswich*,[200] a guild known as the Corporation of the Tailors set a rule that tailors must serve a seven-year apprenticeship before entering the trade.[201] The court invalidated this condition as well as similar practices for restraining trade.[202] As Lord Coke illustrated using the example of manufacturing, a patent "turn[ed] so many labouring men to idleness."[203]

It is meaningful that English monopolies provoked anger *toward government* as the source of poverty and social decline.[204] While private actors were the ones charging high prices, the ability to do so hinged on the Crown's authority to foreclose competition. Without much dispute, patents impoverished parts of England by favoring powerful firms at the expense of those who bought monopolized goods or, worse, worked in monopolized industries.[205] This created desperation, as "every man's trade maintains his life, and therefore he ought not to be deprived or dispossessed of it, no more than of his life."[206] Further, workers lost the ability to "maintain[] themselves and their families," and thus "of necessity be constrained in *idleness and beggary*."[207] While the Queen argued that patents benefitted England, the people grew wary of her claim.

Other oppressions arising from patents included colonialism and attacks on foreigners. An original problem of monopolies was that King John excluded foreign traders and, as a result, starved England of inventions and goods made abroad.[208] Hardly an accident, foreigners lacked legal protection under English law in making them a target of

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200. (1619) 77 Eng. Rep. 1218 (K.B.).

201. *Id.* at 1218–19.

202. *Id.* at 1219–20.

203. John F. Duffy, *Inventing Invention: A Case Study of Legal Innovation*, 86 TEX. L. REV. 1, 29 (2007) (quoting EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 183 (William S. Hein Co. 1986) (1641)).

204. *See* Nachbar, *supra* note 182, at 1328 ("Others quickly jumped on the reform bandwagon, suggesting a host of abuses (ranging from misuse of Crowd funds by the treasurers to the practice of purveyance to the fees charged by the Exchequer) . . . ."). *But see id.* at 1332 (noting that Queen Elizabeth's decision to transfer judicial review of monopolies to common-law courts "shifted the attention of the public away from her own role in granting the patents").

205. *See id.* at 1328.

206. The Case of Monopolies, 77 Eng. Rep. at 1263.

207. *Id.*

208. Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments:* Slaughter-House Cases *Re-Examined*, 31 EMORY L.J. 785, 792–93 (1982) ("The tradition against governmental grants of domestic monopolies in England seems to have begun with Chapter 41 of the Magna Carta. This Chapter was designed to protect one small sector of competition, that of foreign merchants. Since these merchants had not been protected by the common law of the land, King John had extracted large tolls from them, impeding the introduction to England of types of goods not previously known there or not amenable to efficient production there. Chapter 41 guaranteed them safe conduct, liberty to buy and sell, and confirmation of the ancient rates of 'customs.'" (footnote omitted)).

abuse.[209] An inference is indeed that monopolists sought to frustrate immigrants since "English craftsmen [would be] 'greatly empoverished' and 'likely in short time to be utterly undone for lack of occupation' because of foreign competition."[210]

Also consider the relationship between colonialism and patent rights. The East India Company scored a monopoly canvassing "all trade beyond the Atlantic Ocean,"[211] which allowed it to grow "'an empire within an empire,' with the power to make war or peace anywhere in the East."[212] Other firms who received monopolies to colonize foreign lands included the Royal African Company, Hudson's Bay Company, and Virginia Company.[213] Because each firm relied on patents and enslaved labor,[214] colonial lands incurred the harshest costs.[215] Even when indigenous people were paid, monopoly power harmed workers, created "dysfunctional markets," and "amounted to a formula for economic disaster."[216]

Parliament finally sought to limit monopolies when King James continued to grant patents upon taking the throne in 1603.[217] The King's

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209. *Id.* at 792.

210. William L. Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355, 364 (1954) (quoting Act Against Strangers Artificers, 1 Ric. III, c. 12 (1483)).

211. Bogus, *supra* note 31, at 40; *see also id.* at 41 ("The small clique of East India stockholders remained people with close ties to the Crown, and the Company worked assiduously at fending off parliamentary regulation by granting favors to members of Parliament and allying them with the company and its interests.").

212. William Dalrymple, *The Original Evil Corporation*, N.Y. TIMES (Sept. 4, 2019), https://www.nytimes.com/2019/09/04/opinion/east-india-company.html [https://perma.cc/E4XD-9NK5] (quoting one of the Company's directors); *see also* Bogus, *supra* note 31, at 40 ("Following the Glorious Revolution the company was reorganized. Parliament granted the company a new charter and refashioned it into a modern-styled stock corporation."). This monopoly enabled "the East India Company [to] control[] 281,412 square miles of the Indian subcontinent, employing an army of 60,000 for that purpose." *Id.*

213. Jenny S. Martinez, *New Territorialism and Old Territorialism*, 99 CORNELL L. REV. 1387, 1409 (2014) ("In the early modern period, chartered trading companies of this sort were numerous: the Royal African Company, the Dutch West India Company, the French East India Company, the Portuguese East India Company, the Virginia Company, the Massachusetts Bay Company, the Hudson's Bay Company, and the Real Compañia de Comercio de Barcelona, to name just a few."); Janet McLean, *The Transnational Corporation in History: Lessons for Today?*, 79 IND. L.J. 363, 365 (2004).

214. *See* Bonnie Pinkston, *Documenting the British East India Company and Their Involvement in the East Indian Slave Trade*, 7 SLIS Connecting, no. 1, 2018, at 3.

215. *See, e.g.*, William Dalrymple, *The East India Company: The Original Corporate Raiders*, GUARDIAN (Mar. 4, 2015, 12:59 AM), https://www.theguardian.com/world/2015/mar/04/east-india-company-original-corporate-raiders [https://perma.cc/JYN3-U74X] ("One of the very first Indian words to enter the English language was the Hindustani slang for plunder: loot.'").

216. Matthew Lange et al., *Colonialism and Development: A Comparative Analysis of Spanish and British Colonies*, 111 AM. J. SOCIO. 1412, 1443 (2006).

217. Nachbar, *supra* note 182, at 1344–49.

motivation, akin to Elizabeth, was to increase his allowance. He routinely issued patents, revoked them, and vested these grants in other companies.[218] Turmoil resulted and inspired Parliament to enact the Statute of Monopolies in 1623.[219] The law banned most patents,[220] with exceptions for invention monopolies and guilds.[221] The goal of England's anti-monopoly movement was essentially to prohibit government from issuing harmful patents while preserving those that benefitted society.[222]

In short, the common law of competition emerged as a way of curtailing the Crown—and it was this understanding of market power that traveled to the New World and seeped into America's burgeoning legal system. As the next Subsection explains, colonialists feared government's ability to grant monopolies and, in turn, incorporated the English common law into state charters, constitutions, and even antitrust law.

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218. Nachbar, *supra* note 182, at 1346.

219. *See* Amber L. Hatfield, *Life After Death for Assignor Estoppel: Per Se Application to Protect Incentives to Innovate*, 68 TEX. L. REV. 251, 255 n.29 (1989).

220. 21 Jac. 1, c.3, § 1 (1623) ("[A]ll monopolies and all commissions, grants, licenses, charters and letters patents heretofore made or granted, or hereafter to be made or granted to any person or persons, bodies politic or corporate whatsoever, of or for the sole buying, selling, making, working or using of anything within this realm or the dominion of Wales, or of any other monopolies, or of power, liberty or faculty, to dispense with any others, or to give license or toleration to do, use, or exercise anything against the tenor or purport of any law or statute[,] . . . and all proclamations, inhibitions, restraints, warrants of assistance, and all other matters and things whatsoever, any way tending to the instituting, erecting, strengthening, furthering, or countenancing of the same or any of them, are altogether contrary to the laws of this realm, and so are and shall be utterly void and of none effect . . . .").

221. *Id.* at §§ 6, 9; *see also* Nachbar, *supra* note 182, at 1366 ("Viewing the Statute of Monopolies as an attempt to restrict regulatory authority to governmental rather than private actors eliminates the apparent inconsistency between the attack on monopolies in Section 1 and the preservation of the guilds' exclusive trade privileges in Section 9. The guilds themselves were political institutions and acted in many ways as local governments, rendering their exercise of regulatory authority largely unobjectionable, unlike private regulation by royal favorites." (footnote omitted)).

222. *See* Conant, *supra* note 208, at 793 ("The right of the English sovereign to grant monopolies to inventors and to persons introducing new goods from abroad as a reward for benefit given to the community was always recognized as part of the common law prerogative. In theory, a monopoly could not be granted by the crown without some consideration moving to the public, since monopolies were considered to be in derogation of the common right to freedom of trade." (footnote omitted)); *see also* Duffy, *supra* note 203, at 27 ("Yet perhaps because the Statute of Monopolies was directed primarily at ending the long controversy over abusive royal monopolies, it did not focus on innovation policy nor attempt to articulate intellectual justifications for the award of innovation monopolies. Rather, the Statute had an effect on innovation law only through a single proviso, which exempted patents for inventions from the Statute's general prohibition on royal patent monopolies." (footnote omitted)).

2. The Early American Experience

It is hard to understate the impact of the *Case of Monopolies* and Statute Against Monopolies on American government. As background, the English interpreted the common law as applying only to England unless a statute mentioned foreign lands; this allowed the Crown to grant harmful and extractive patents in the New World.[223] The tea monopoly was a chief source of frustration, which created a "panic"[224] due to high prices and the colonialists' fear of attracting a notable monopolist: the East India Company. Indeed, "soldiers of the [East India] Company, having plundered India, were now casting their eyes on America as a new theater whereon to exercise their talents of rapine, oppression and cruelty."[225] Illustrating their distress, one colonialist wrote that "[t]he revenues of mighty kingdoms have centered in [the East India Company's] coffers. . . . [T]hey have, by the most unparalleled barbarities, extortions *and monopolies*, stripped the miserable inhabitants of their property and reduced whole provinces to indigence and ruin."[226]

Not only was monopoly power described as oppression in directly causing the American Revolution, but it impacted the colonies' nascent legal systems.[227] Many colonists—aware of England's experiences in addition to their own plights—sought to ban government-granted monopolies in state charters and constitutions. The namesake of Pennsylvania, William Penn, wrote a pamphlet in 1687 insisting that "[g]enerally all Monopolies are against this great Charter, because they are against the Liberty and Freedom of the Subject, and against the Law of the Land."[228] When states such as North Carolina ratified their

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223. *See* Calabresi & Leibowitz, *supra* note 180, at 1004 ("In practice, courts would find that English statutes applied to the colonies only if the statute so specified. As for application of the common law to the colonists, matters were complicated by the fact that the colonies' interpretation of the 'common law' did not always correspond to the English interpretation, and, in any event, the common law in the North American colonies varied according to local circumstances. Moreover, although some language in the thirteen colonial charters suggested that the common law of England extended to the North American colonies, it is unlikely that the King's lawyers who drafted the charters meant to extend full common law rights to the colonies." (footnotes omitted)).

224. *See id.* at 1007–08; David Leonhardt, *The Monopolization of America*, N.Y. TIMES (Nov. 25, 2018), https://www.nytimes.com/2018/11/25/opinion/monopolies-in-the-us.html [https://perma.cc/VT2U-CH5E].

225. Dalrymple, *supra* note 212 (internal quotation marks omitted); Calabresi & Leibowitz, *supra* note 180, at 1007–08; Leonhardt, *supra* note 224.

226. WILLIAM MAGNUSON, FOR PROFIT: A HISTORY OF CORPORATIONS, 97 (2022).

227. *See id*.

228. WILLIAM PENN, THE EXCELLENT PRIVILEDGE OF LIBERTY & PROPERTY BEING THE BIRTH-RIGHT OF THE FREE-BORN SUBJECTS OF ENGLAND (1687), *as reprinted in* A. E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 412, 421 (1968).

constitutions,[229] these documents included language such as: "Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed."[230]

Anxieties existed on the federal level too. Not only did the *Federalist Papers* discuss the dangers of monopolies,[231] but Thomas Jefferson wrote to James Madison that the Constitution should outlaw them.[232] Instead of a specific provision, the Framers inserted an intellectual property clause in the Constitution to guarantee invention patents, a type of patent that the English accepted as virtuous.[233] Another sign of the colonialist's antimonopoly tradition was the belief that states cannot selectively issue corporate charters—which, again, represented a type of monopoly—but rather the grant must be made freely available.[234] In fact, the Constitutional Convention voted down a clause to vest the federal government with the power to issue charters out of fear that monopolies would result.[235]

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229. *See* Steven G. Calabresi et al., *The U.S. and the State Constitutions: An Unnoticed Dialogue*, 9 N.Y.U. J.L. & LIBERTY 685, 717–18 (2015) ("Two states in 1791, Maryland and North Carolina, did bar monopolies in their State constitutions. By 1868, five states out of thirty-seven banned monopolies in their state constitutions, and by 2010 eleven states: Arizona, Arkansas, Colorado, Georgia, Idaho, Kentucky, Maryland, Minnesota, North Carolina, Tennessee, and Texas had banned monopolies in their state constitutions.").

230. Jon Guze, *Understanding the Anti-Monopoly Clause of the N.C. Constitution, Part One*, LOCKE (Feb. 14, 2019), https://www.johnlocke.org/understanding-the-anti-monopoly-clause-of-the-n-c-constitution-part-one/ [https://perma.cc/3FVH-RJ84] (quoting N.C. Const. art. 1, § 34). This language is still found in North Carolina's constitution. *Id.*

231. *E.g.*, THE FEDERALIST NO. 35, at 397 (Alexander Hamilton) (Barnes & Noble Inc. 2012).

232. *See* Alexandra K. Howell, Note, *Enforcing a Wall of Separation Between Big Business and State: Protection from Monopolies in State Constitutions*, 96 NOTRE DAME L. REV. 859, 863 (2020).

233. U.S. CONST. art. I, § 8, cl. 8 (granting Congress the power to "secur[e] for limited times to authors and inventors the exclusive right to their respective writings and discoveries"). *See generally* Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 GEO. L.J. 1771, 1785–86 (2006) (canvassing the theories of the Intellectual Property Clause in the Constitution relative to monopolies). *See also* Edward C. Walterscheid, *Conforming the General Welfare Clause and the Intellectual Property Clause*, 13 HARV. J.L. & TECH. 87, 96 (1999) (mentioning that the Framers understood patents as monopolies in their construction of the Constitution).

234. *See* Calabresi & Leibowitz, *supra* note 180, at 1020; *see also* Steven G. Calabresi, *The Right to Buy Health Insurance Across State Lines: Crony Capitalism and the Supreme Court*, 81 U. CIN. L. REV. 1447, 1490 (2013) ("Prior to 1787, English Kings and Queens had frequently conferred monopolies on their favorite courtiers by issuing them exclusive corporate charters to conduct a certain kind of business or to do business in a certain place. There was no general law of incorporation so if someone, for example, wanted to get a corporate charter to be the exclusive seller of playing cards in London or to form the Massachusetts Bay Colony or to incorporate Dartmouth College, he had to go to the King of England to get such a corporate charter.").

235. Ben Sperry, *The Forgotten Strand of the Anti-Monopoly Tradition in Anglo-American Law*, TRUTH ON MKT. (Jan. 13, 2021), https://truthonthemarket.com/2021/01/13/the-forgotten-strand-of-the-anti-monopoly-tradition-in-anglo-american-law/ [https://perma.cc/3E2W-NP8M].

This landscape led to a belief (pre–Sherman Act) that a state's grant of monopoly rights might already be unconstitutional under the Thirteenth or Fourteenth Amendment.[236] For example, in 1873's *Slaughter-House Cases*,[237] four Justices wrote that a monopoly granted by the state of Louisiana violated the Privileges or Immunities Clause.[238] To the Justices, the Clause shielded "every citizen of the United States against hostile and discriminating legislation against him in favor of others."[239] The dissent defined monopolies as a right deriving from the sovereign power of "*the State*,"[240] citing the common law as evidence that states cannot lawfully grant them: "All monopolies . . . are an invasion of these privileges, for they encroach upon the liberty of citizens to acquire property and pursue happiness, and were held void at common law in the great *Case of Monopolies*, decided during the reign of Queen Elizabeth."[241] Not only is "[t]he common law of England . . . the basis of the jurisprudence of the United States,"[242] but banning monopolies was "one of the most important" protections adopted from England.[243]

A related fear was that recipients of a state's monopoly could gain quasi-sovereign powers. By vesting a private firm with exclusive rights, it can generate fortunes at the public's expense by making anticompetitive regulations for an entire industry.[244] This portends the criticisms of modern licensing agencies. A monopolist's power could even exceed the state's. When England sought to rein in the East India

236. *See, e.g.*, Calabresi & Leibowitz, *supra* note 180, at 986 ("The Framers of the Fourteenth Amendment to the federal Constitution shared this concern with what they called 'class legislation,' a concern that led four United States Supreme Court Justices to say that state-granted monopolies were unconstitutional in an important dissent in the *Slaughter-House Cases*.").

237. 83 U.S. 36 (1872).

238. *Id.* at 93 (Field, J., dissenting).

239. *Id.* at 100–01.

240. *Id.* at 102 (defining a monopoly as "an institution or allowance from the sovereign power of the State by grant").

241. *Id.* at 101–02.

242. *Id.* at 104; *see also id.* at 104–05 ("[The common law of England] was brought to this country by the colonists, together with the English statutes, and was established here so far as it was applicable to their condition. That law and the benefit of such of the English statutes as existed at the time of their colonization, and which they had by experience found to be applicable to their circumstances, were claimed by the Congress of the United Colonies in 1774 as a part of their 'indubitable rights and liberties.' . . . The immortal document which proclaimed the independence of the country declared as self-evident truths that the Creator had endowed all men 'with certain inalienable rights, and that among these are life, liberty, and the pursuit of happiness; and that to secure these rights governments are instituted among men.'").

243. *Id.* at 105; *see also id.* ("[N]o privilege was more fully recognized or more completely incorporated into the fundamental law of the country than that every free subject in the British empire was entitled to pursue his happiness by following any of the known established trades and occupations . . . .").

244. Martinez, *supra* note 213, at 1411–12.

Company, its Chairman Josiah Child ignored the edict in calling English law "a heap of nonsense."[245] This state of affairs led Adam Smith to write that colonial corporations vested with a monopoly could not help but use their quasi-sovereign powers to extract supracompetitive revenue at the people's behest: "a company of merchants are, it seems, incapable of considering themselves as sovereigns, even after they have become such."[246] Because "government by corporation was not good government,"[247] Smith asserted that regulatory powers should lie in "legitimate bodies."[248]

In light of case law, scholarship at the time, and other events, it became clear that the United States required an antitrust statute rather than an unwritten common law of competition. While the rise of private trusts inspired Congress to act,[249] the Sherman Act's drafters knew, referenced, and embraced the traditional rules of competition.

3. The Role of Common Law and History in Antitrust

Historical sources such as the common law of competition and Sherman Act's congressional debates continue to shape antitrust law. In 1890, Congress compared trusts to monarchies when debating an antitrust statute. Senator John Sherman described monopolies as a "*a kingly prerogative*, inconsistent with our form of government . . . . If we will not endure a king as a political power we should not endure a king over . . . production."[250] Another Senator noted that trusts "oppressed and distressed" the people,[251] which mirrored Senator Sherman's language of trusts accruing "great, enormous wealth by extortion which makes the people poor."[252] To remedy these harms, Senator Sherman proposed codifying the common law of competition.[253]

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245. MAGNUSSON, *supra* note 226, at 91.

246. ADAM SMITH, THE WEALTH OF NATIONS 264 (T. Nelson & Sons 1852) (1776).

247. Martinez, *supra* note 213, at 1412.

248. Nachbar, *supra* note 182, at 1370 ("That principle, that regulatory authority must be limited to politically legitimate bodies, is the same one embodied in the Statute of Monopolies.").

249. *See* Laura Phillips Sawyer, *US Antitrust Law and Policy in Historical Perspective* 4 (Harvard Bus. Sch., Working Paper No. 19-110, 2019) (describing the transition from concern about "state-granted special privileges" to "industrial corporate consolidations").

250. 21 CONG. REC. 2457 (1890) (statement of Sen. John Sherman) (emphasis added).

251. 21 CONG. REC. 2469 (1890) (statement of Sen. John Reagan).

252. 21 CONG. REC. 2461 (1890) (statement of Sen. John Sherman).

253. 21 CONG. REC. 2456 (1890) (statement of Sen. John Sherman); *see supra* notes 33–34 and accompanying text; *see also* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 731 (1988) ("In resting our decision upon the foregoing economic analysis, we do not ignore common-law precedent concerning what constituted 'restraint of trade' at the time the Sherman Act was adopted."); Apex Hosiery Co. v. Leader, 310 U.S. 469, 494–95 (1940) ("For that reason the phrase 'restraint of trade' which, as will presently appear, had a well-understood meaning at common law, was made the means of defining the activities prohibited.").

Importantly, England's legacy of competition law has guided antitrust since its genesis to modern times. In a dissent, Justice Stevens wrote that "[s]ince the statute was written against the background of the common law, reference to the common law is particularly enlightening."[254] In a separate case, Justice Stevens observed that "[t]he repeated references to the common law in the debates that proceeded the enactment of the Sherman Act make it clear that Congress intended the Act to be construed in the light of its common-law background."[255] He quoted the Act's debates to explain that the Drafters meant for antitrust law to exercise "old and well recognized principles of the common law to the complicated jurisdiction of the State and Federal Government."[256] Recall that the prohibition trade restraints—a term lifted directly from the common law—was originally meant to curtail the Crown's power to restrict competition.[257] The point is indeed that the Supreme Court has repeatedly relied on the common law to establish key antitrust doctrines.[258]

In fact, historical sources were instrumental in the adoption of the modern standard of consumer welfare. Consider that Bork had principally explored the congressional debates to argue that the Drafters' goal was to promote consumer welfare.[259] He even invoked English history as part of

254. Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 785 (1984) (Stevens, J., dissenting) (footnote omitted). In numerous cases, the Court has asserted that a "restraint of trade" derives from the common law predating the Sherman Act. *See, e.g.*, *id.*

255. Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters, 459 U.S. 519, 531 (1983).

256. *Id.* (quoting 21 CONG. REC. 2456).

257. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 56–57 (1911).

258. *See Apex Hosiery*, 310 U.S. at 499–500 ("[T]he restraint of trade contemplated by § 1 of the Act took its origin from the common law, and . . . the Sherman Act was adapted to the prevention, in modern conditions, of conduct or dealing effecting the wrong, at which the common law doctrine was aimed. . . . The Court declared that 'the statute was drawn in the light of the existing practical conception of the law of restraint of trade,' and drew the conclusion that the restraints which were condemned by the statute are those which, following the common law analogy, are 'unreasonable or undue.' . . . '[A]s the words "restraint of trade" at common law and in the law of this country at the time of the adoption of the antitrust act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition, or unduly obstructing the due course of trade, or which, either because of their inherent nature or effect, or because of the evident purpose of the acts, etc., injuriously restrained trade, . . . the words as used in the statute were designed to have and did have but a like significance.' In thus grounding the 'rule of reason' upon the analogy of the common law doctrines applicable to illegal restraints of trade the Court gave a content and meaning to the statute in harmony with its history and plainly indicated by its legislative purpose." (citation omitted) (first quoting *Standard Oil Co.*, 221 U.S. at 59; and then quoting United States v. Am. Tobacco Co., 221 U.S. 106, 179 (1911)).

259. *See supra* notes 43–46 and accompanying text; *see also* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175, 204 (2021) ("Interpretations

the congressional record, animating the importance of common law precedents to modern jurisprudence.[260] Based upon the importance of English law within today's antitrust, the next analysis finds that the Court erred in establishing state action immunity.

4. Undermining State Action Immunity

The Supreme Court might have gotten *Parker* wrong. Since the Sherman Act embraced the common law, one cannot ignore that antitrust's purpose was at least partially to curtail state power. To the degree that the Supreme Court based *Parker* on historical sources—gleaning what Congress intended—the record indicates that antitrust must scrutinize state action. Indeed, the oppressiveness of monopolies was a key concern of colonialists who implemented England's ban as one of the most important checks on U.S. government.[261] Due to *Parker* immunity, the types of harms that gave rise to the common law of competition have reemerged today; reminiscent of how the Crown vested the East India Company with monopoly rights to plunder indigenous lands, modern states have combined with private firms to monopolize prisons at the expense of society's least powerful. And akin to the Crown allowing guilds to impede competition from labor and especially foreigners, states empower licensing agencies to exclude immigrant hair braiders, street vendors, caregivers, and more. Hardly a modern problem, it was Adam Smith in 1776 who asserted that a state's grant of monopolies created the dangers of "government by corporation."[262] If antitrust was to abide by its premise as well as remedy the injuries necessitating competition law, courts must recognize the dangers that arise when governments suppress competition. The problem is that the Court has seemingly forgotten the history of state power.

But merely exposing *Parker*'s problems is a far cry from solving them. Even if one accepts that state action immunity is divorced from antitrust's foundation, this landscape is perhaps inescapable if subjecting states to antitrust review would create worse problems or interfere with key principles of federalism. The next Section assuages these anxieties, arguing that *Parker*'s abrogation would adhere to federalism while providing a meaningful yet restrained safeguard.

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of the Sherman Act's legislative history in recent decades have often revolved around Robert H. Bork's highly influential reading of the genesis of the Sherman Act as aiming at (what he called) 'consumer welfare.'").

260. *See* James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880–1918*, 50 OHIO ST. L.J. 257, 395 (1989).

261. *See supra* notes 223–35 and accompanying text.

262. *See supra* notes 246–48 and accompanying text.

C. *Antitrust Federalism in the Eleventh Amendment's Shadow*

Courts should abridge *Parker* for, at a minimum, a state's commercial activities. Doing so would add oversight to an unchecked source of abuse as well as conform antitrust with similar bodies of law. In important part, exposing states to antitrust review would not create unworkable liability but, based upon principles of immunity, grant only federal actors the right to contest a state's anticompetitive practices. And history suggests that the Department of Justice (DOJ) or Federal Trade Commission (FTC) would use this power with restraint.

1. The Eleventh Amendment's Effect on Antitrust Law

Abrogating *Parker* would comply with accepted tenets of federalism, as states would face lawsuits from the DOJ or FTC while generally shrugging off antitrust actions initiated by private parties. This would reflect an important yet limited check on state power. To trace the ideal scope of enforcement, consider the liability of states when confronted with securities litigation in the shadow of the Eleventh Amendment.

The Eleventh Amendment bars private actors from suing states.[263] When a court ordered the state of Georgia to compensate individuals in 1793, the Eleventh Amendment was ratified as a way of shielding themselves from federal courts.[264] It reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[265] While this text may not seem like a grant of plenary immunity, the Court has repeatedly insisted that Congress intended it to codify the common law of sovereign immunity—and this source of authority mandates a bar against private litigation.[266]

Over the past few decades, the Supreme Court has updated this doctrine. In *Seminole Tribe of Florida v. Florida*,[267] the Court struck down a law designed to subject states to private lawsuits.[268] Though the Court did recite a caveat: the Fourteenth Amendment's text hints of private parties suing states and, as a result, an individual's lawsuit may

263. *E.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 448 (1976).

264. *See* John V. Orth, *The Interpretation of the Eleventh Amendment, 1798-1908: A Case Study of Judicial Power*, 1983 U. ILL. L. REV. 423, 427–28, 428 n.41 (discussing the ratification of the Eleventh Amendment following the controversial decision in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793)).

265. U.S. CONST. amend. XI.

266. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996).

267. 517 U.S. 44.

268. *Id.* at 72–73.

assert a Due Process or Equal Protection claim.[269] Then in 1999's *Alden v. Maine*,[270] the Court ruled that Congress cannot compel states to hear private lawsuits in its own courts even though a state could likely expect a home field advantage.[271] This ruling was, again, based on the Eleventh Amendment's common law foundation:

> [S]overeign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution. . . .
>
> . . . .
>
> Nor can we conclude that the specific Article I powers delegated to Congress necessarily include, by virtue of the Necessary and Proper Clause or otherwise, the incidental authority to subject the States to private suits as a means of achieving objectives otherwise within the scope of the enumerated powers.[272]

With the Eleventh Amendment, federal enforcers should be able to challenge states. Evidence comes from securities law where a federal agency can sue states even if this rarely occurs.[273] With little attention, the Securities and Exchange Commission (SEC) initiated a lawsuit against the state of New Jersey in 2010, alleging that the state defrauded investors.[274] The complaint asserted that New Jersey promised a certain payout but the state omitted that it would need to raise taxes or cut spending to do so.[275] Neglecting to mention this fact was, to the SEC, fraudulent.[276] After New Jersey settled, the SEC brought similar actions

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269. *See id.* at 59 ("In *Fitzpatrick*, we recognized that the Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution. We noted that § 1 of the Fourteenth Amendment contained prohibitions expressly directed at the States and that § 5 of the Amendment expressly provided that 'The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.'" (citations omitted)).

270. 527 U.S. 706 (1999).

271. *See id.* at 759–60.

272. *Id.* at 728, 732.

273. *See* Maggie Guidotti, Comment, *Seeking "the SEC's Full Protection": A Critique of the New Frontier in Municipal Securities Enforcement*, 82 U. CHI. L. REV. 2045, 2060 (2015) ("In 2010, New Jersey entered into an administrative settlement with the SEC, making it 'the first state ever charged by the SEC for violations of the federal securities laws.'" (quoting *SEC Charges State of New Jersey for Fraudulent Municipal Bond Offerings*, U.S. SEC. & EXCH. COMM'N (Aug. 18, 2010), https://www.sec.gov/news/press/2010/2010-152.htm [https://perma.cc/N6JK-2ENE])).

274. *See id.*

275. *SEC Charges State of New Jersey for Fraudulent Municipal Bond Offerings*, U.S. Sec. & Exch. Comm'n (Aug. 18, 2010), https://www.sec.gov/news/press/2010/2010-152.htm [https://perma.cc/N6JK-2ENE].

276. *Id.*

against Kansas and Illinois.[277] It is meaningful that only the SEC can bring these lawsuits because the Eleventh Amendment blocks private actions against states.

Notice that little differentiates securities and antitrust laws in terms of federalism. Both regimes entail a federal law enforced by federal agencies that govern a type of marketplace activity. Antitrust, however, grants states a form of immunity whereas the SEC may initiate litigation under similar facts. The SEC has notably avoided suing states except for a few instances, perhaps because states rarely violate securities law or enforcers have chosen to defer unless something truly egregious arises. The inference is that federalism does not compel state action immunity despite the Court's insistence.

In fact, *Parker* is more of a policy rationale than a constitutional rule. Per Part III,[278] the Supreme Court established *Parker* immunity as a way of reining in federal power on the heels of *Wickard*; nowhere did the Sherman Act's text or Constitution necessitate this decision but it was meant to settle a political dispute in 1943 (i.e., the division of commerce powers between state and federal bodies). This form of immunity exists only in antitrust law whereas the SEC and other federal agencies wield the right to sue states.[279] Moreover, the *Parker* Court suggested that Congress *could have* subjected states to antitrust review but the Act's silence nudged the Court to infer that states were meant to be immune.[280] Courts may thus terminate *Parker* without an act of Congress or constitutional amendment, which the next Subsection discusses.

2. Judicial Power to Alter Antitrust Law

An important element of antitrust jurisprudence is that courts or Congress possess the power to abrogate state action immunity. Recall that antitrust is mostly judge-made law due to the Sherman Act's lack of text.[281] Since the common law, economic theory, and other sources have

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277. Guidotti, *supra* note 273, at 2060 & n.93.

278. *See supra* Section III.A.

279. Another example is that a federal agency, the Equal Employment Opportunity Commission, may sue states when their employment practices violate Title VII of the Civil Rights Act. *E.g.*, *EEOC Sues Maryland Department of Transportation State Highway Administration for Pay Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Jan. 11, 2022), https://www.eeoc.gov/newsroom/eeoc-sues-maryland-department-transportation-state-highway-administration-pay [https://perma.cc/UV55-FTGC].

280. Parker v. Brown, 317 U.S. 341, 351 (1943) ("The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. . . . [These are] conclusions derived not from the literal meaning of the words 'person' and 'corporation' but from the purpose, the subject matter, the context and the legislative history of the statute.").

281. *See, e.g.*, *In re* Wellbutrin XL Antitrust Litig. Indirect Purchaser Class, 868 F.3d 132, 163 (3d Cir. 2017) (describing antitrust law as "judge-made").

guided antitrust's interpretation, this landscape provides courts with a significant freedom to reform enforcement as problems emerge.[282] This was the scenario in the 1970s when courts leaned on scholarship to institute the consumer welfare standard.[283] And because neither statute nor the Constitution requires *Parker*, the judiciary or Congress may abrogate it. Even a role exists for the Executive branch: a primary source of antitrust policy has come from the DOJ and FTC, which have successfully advocated for antitrust's reforms via speeches and creative lawsuits.[284] To this end, the FTC has recently sought to target COPAs and other conduct protected by *Parker* immunity.[285]

But knowing that courts, Congress, or enforcers could abridge state action immunity is different than doing so. If all branches of government may abrogate *Parker* or take significant steps leading to its reform, the critical issues are how and by how much.

D. *Curtailing (or Recalibrating) State Action Immunity*

The ideal proposal is to overrule *Parker* in its entirety. While this may seem like a radical step, it would actually entail a restrained and efficient way of remedying oppression, construing principles of federalism, and conforming antitrust law to its historical and intellectual foundations. First, in a world without *Parker*, only the DOJ and FTC could sue states. Given the paucity of similar securities lawsuits, the inference is that the federal government would use its litigation powers sparingly. But second, if federal enforcers initiated a litany of lawsuits exercising the rights of those who have suffered at a state's hands, it is hard to conclude that this outcome is undesirable.

Further, suing states for interfering with commerce is a duty of the federal government. Backed by the Commerce Clause, the DOJ has often

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282. *See* Note, *Antitrust Federalism, Preemption, and Judge-Made Law*, 133 HARV. L. REV. 2557, 2569 (2020) (remarking on the freedom of the judiciary to interpret antitrust based on the common law due to the "shockingly short" nature of the Sherman Act).

283. *See* Andrew S. Oldham, *Sherman's March (in)to the Sea*, 74 TENN. L. REV. 319, 345, 351–52 (2007) (showing that antitrust is largely judge-made law and, as a result, courts enjoyed significant freedom to institute Bork's consumer welfare standard).

284. The DOJ asserted in speeches that privacy should entail a focus of antitrust law. Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Just., "Blind[ing] Me With Science:" Antitrust, Data, and Digital Markets (Nov. 8, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-harvard-law-school-competition [https://perma.cc/2Z6L-XNQT]. Shortly afterward, the FTC and DOJ initiated lawsuits against Facebook and Google, respectively, which included allegations of privacy harms. *See, e.g.*, Complaint for Injunctive and Other Equitable Relief at 12–15, FTC v. Facebook, Inc., 20-cv-03590 (D.D.C. Jan. 13, 2021).

285. *See supra* notes 114–19 and accompanying text; *see also, e.g.*, *FTC Staff Provides Public Comment and Testimony in Tennessee Opposing Certificate of Public Advantage Application*, FED. TRADE COMM'N (Nov. 23, 2016), https://www.ftc.gov/news-events/news/press-releases/2016/11/ftc-staff-provides-public-comment-testimony-tennessee-opposing-certificate-public-advantage [https://perma.cc/2Y9F-2DTM].

litigated against states for impeding interstate commerce.[286] Especially because the Commerce Clause allows the federal government to sue when a state has discriminated against out-of-state interests,[287] this would hardly revolutionize constitutional power sharing if federal actors could also sue states for discriminating against actors within a state. Based on this framework, overruling *Parker* would add a check by the branch of government vested with commerce power. This proposal would also bring antitrust in line with other bodies of law such as securities.

A potential problem is that states may lose some authority to achieve local objectives. While perhaps true, a point of the Commerce Clause and Reconstruction Amendments[288] was to recognize that states may unduly injure local and interstate interests.[289] This is one explanation for why federal actors have historically been tasked with enforcing civil rights.[290] Importantly, ending *Parker* would not prevent states from governing competition, but would only allow federal actors to serve as an important check. If the DOJ sued states over, for instance, the monopolization of liquor, such a restraint would unlikely offend antitrust law; indeed, the benefits would seemingly outweigh any anticompetitive harms—especially given the rule of reason's deference.[291] In other words, states would remain largely able to govern local markets.

A wise way for the DOJ to determine whether to involve itself in a state's activity is to assess the scope of people harmed. If a state's policy affects most of its population—such as an alcohol monopoly—the restraint would more likely foster the public's interest. After all, the logic in *North Carolina Dental* suggests that voters can punish leaders if a wide-ranging monopoly eroded welfare, indicating that the DOJ should

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286. *Cf., e.g.*, United States v. Texas, 566 F. Supp. 3d 605, 620, 641 (W.D. Tex. 2021) (involving DOJ's challenge to Texas's ban on abortions in part based on the ban's interference with interstate commerce).

287. *Cf.* United States v. Lopez, 514 U.S. 549, 553 (1995) ("For nearly a century [after *Gibbons v. Ogden*, 22 U.S. 1 (1824), was decided], the Court's Commerce Clause decisions dealt but rarely with the extent of Congress' power, and almost entirely with the Commerce Clause as a limit on state legislation that discriminated against interstate commerce.").

288. U.S. CONST. amends. XIII–XV.

289. *See, e.g.*, Jessie Shaw, Note, *Commandeering the Indian Child Welfare Act: Native American Rights Exception to Tenth Amendment Challenges*, 42 CARDOZO L. REV. 2007, 2032 (2021) (noting that "the Supreme Court has upheld legislation passed under the Commerce Clause [and applying to the states] when the legislation's purpose was to combat historically discriminatory practices").

290. *See* G. Edward White, *The Origins of Civil Rights in America*, 64 CASE W. RSRV. L. REV. 755, 780 (2014) (discussing the development of civil rights and that federal actors were intended to be the primary enforcement mechanism).

291. *See, e.g.*, Stephen J. Matzura, Comment, *Will Maple Bats Splinter Baseball's Antitrust Exemptions?: The Rule of Reason Steps to the Plate*, 18 WIDENER L.J. 975, 1011 (2009) (noting that deference is "[i]nherent in the [r]ule of [r]eason").

defer.[292] But if a state's anticompetitive policy caused harm to only a small, insular, or powerless group, it may indicate that the monopoly qualifies as an oppressive policy of rent extraction. While this would not mandate a lawsuit, the DOJ or FTC should pay closer attention to restraints of trade that disproportionally impact marginalized people.

1. Alternative Options

It should be noted that other options exist for abridging state action immunity such as scrutinizing exclusively commercial acts or stripping only private actors of immunity. While each alternative is tempting, the judiciary or Congress should dismiss them in favor of a complete abrogation.

The first alternative involves carving out a market participant exception.[293] Here, a state fulfilling a commercial role (such as operating a bank) rather than a sovereign task (such as eminent domain) would implicate antitrust review.[294] This proposal is supported by the Dormant Commerce Clause, which courts interpret as banning states from overly burdening interstate commerce but have created an exception for states competing in markets.[295] The logic is that federalism divides *governing* powers, a quality that is absent when states act as private firms.[296] If sovereignty drives federalism, it would thus make sense to insulate a state in only its governmental capacity. The DOJ has supported such an exception.[297]

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292. *See supra* note 158 and accompanying text.

293. A.D. Bedell Wholesale Co. v. Philip Morris Inc., 263 F.3d 239, 265 n.55 (3d Cir. 2001) ("The commercial or market participant exception, however, is a concept made familiar by Dormant Commerce Clause jurisprudence. State actions are immune from the Dormant Commerce Clause when they are regulatory actions but not where the state acts as a market participant just as in Sherman Act antitrust cases. Dormant Commerce Clause cases have found the market participant exception appropriate where the state action 'constituted a direct state participation in the market.'" (citation omitted) (quoting Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 593 (1997))).

294. *See, e.g.*, Statement of Interest of the United States of America at 11–13, Seaman v. Duke Univ., No. 15-CV-462, 2019 WL 13193731 (M.D.N.C. Mar. 7, 2019) (arguing that the university should lose immunity's cover when acting as a market participant).

295. *See* Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 809–10 (1976) (implementing a marketplace exception to the Dormant Commerce Clause).

296. *See id.* at 808 ("In realizing the Founders' vision this Court has adhered strictly to the principle 'that the right to engage in interstate commerce is not the gift of a state, and that a state cannot regulate or restrain it.' But until today the Court has not been asked to hold that the entry by the State itself into the market as a purchaser, in effect, of a potential article of interstate commerce creates a burden upon that commerce if the State restricts its trade to its own citizens or businesses within the State." (citation omitted) (footnote omitted) (quoting H. P. Hood & Sons v. Du Mond, 336 U.S. 525, 535 (1949))).

297. *See supra* note 294 and accompanying text.

One issue is that states can govern markets by acting as market participants. Even though this dynamic may raise prices, competitive rates are not always in the public's best interest. Consider lotteries, where greater competition would seem to lower prices and lead more people to gamble at higher rates, which scholars claim could result in an undesirable outcome.[298] While raising prices to discourage people from consuming a good is certainly paternalistic, so is government. The point is that states acting as market participants are not necessarily worse than a state excluding competition in its sovereign capacity. As a result, subjecting commercial ventures to antitrust scrutiny would entail a half measure.

It is also hard to determine if an act is sovereign or commercial in nature. With prisons, lines are blurred between whether selling medicine or phone services entails a governmental function—after all, a state cannot lawfully evade providing certain services—versus an instance of market participation.[299] While not an Achilles' heel, this factor suggests that a complete abrogation of *Parker* would present a cleaner solution.

A second alternative involves a total elimination of *Parker* for private actors while preserving it for states. A benefit of this proposal is that it would not raise federalism issues—because a state's treasury would remain free of liability—and would discipline the types of market actors who seem to pose the greatest problems. But the overwhelming issue is that this theory would put private companies in unworkable situations. When a firm's monopoly stems from a state's legislative or executive act, or if a state law commands private actors to take certain anticompetitive steps, it seems impossible to fault private enterprise. Said differently, this proposal would subject private actors to antitrust liability when the root of anticompetitive conduct enjoys immunity. For this reason, a complete elimination of state action immunity is best.

2. Filling Gaps in the Fourteenth Amendment

A purpose of this Article is to aid the Fourteenth Amendment. Currently, the Equal Protection Clause[300] provides the typical route for private actors to seek a remedy against state-sponsored oppression. But scholars have been crestfallen about the failure of Equal Protection to

298. *See generally* Daniel A. Crane, *Harmful Output in the Antitrust Domain: Lessons from the Tobacco Industry*, 39 GA. L. REV. 321 (2005) (recognizing that antitrust enforcement in vice markets could create socially undesirable outcomes if more people took part in the more competitive market).

299. *See* Markowitz, *supra* note 95.

300. *See* U.S. CONST. amend. XIV, § 1. ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

meet its potential.[301] An issue is that the Clause intervenes primarily when a state has expressly classified people by race or sex.[302] Thus, the Equal Protection has often allowed states to harm immigrants, people of color, and others so long as a rule or policy lacks an express goal of discriminating.[303]

Eliminating state action immunity would help to fill Equal Protection gaps. Because a common method of discrimination is rooted in anticompetitive behaviors—as Part II traced[304]—an abridgment of *Parker* would offer a way for marginalized people to remedy disparate impact. After all, antitrust lawsuits are not focused on the nature of discrimination akin to Equal Protection but rather the effect on consumer welfare. A hair braider or street vendor could win an antitrust lawsuit by showing that a state law impaired consumer welfare, but the same lawsuit may fail under Equal Protection unless the challenged policy was expressly meant to create a racial classification. In this sense, antitrust could provide an important mechanism against state-sponsored oppression.

3. The (Nascent) Conversation on Race and Antitrust

It is also important to note that a dialogue about race has just begun in antitrust circles. Helping to explain this development, antitrust has long been prided as a "colorblind" or "neutral" body of law.[305] In fact, the consumer welfare standard is designed to scrutinize an act's effects on consumers at large.[306] In this context, the plights of small groups would inherently fail to affect antitrust's analysis unless the challenged conduct had similarly harmed majority groups. Additionally, if a majority group gained while a marginalized community lost, the act would likely survive the rule of reason given its supposed net positive impact on society—despite specifically harming insular communities. As a recent article described, "if a specific minority group incurs net costs when the majority

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301. *See, e.g.*, Darren Lenard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 FLA. L. REV. 1 (2017).

302. *See id.* at 9 ("The Court, however, tends to validate state action that, though facially neutral with respect to race, causes pervasive patterns of racial inequality."); *id.* at 16 ("When persons of color challenge facially neutral governmental practices that cause statistically significant racial disparities, courts normally treat these inequities, standing alone, as insufficient evidence of intent.").

303. *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997) ("When the state regulates on the basis of 'facially neutral' criteria that have injurious effects on minorities or women, the Court presumes the regulation is constitutional and reviews it in a highly deferential manner.").

304. *See supra* Section II.B.1.

305. *See supra* note 27 and accompanying text.

306. *See generally* Capers & Day, *supra* note 27 (explaining the harm to people of color in how the consumer welfare standard aggregates people into a singular group).

group has gained wealth, then antitrust's framework would declare that the conduct is legal. It is, in other words, a mere numbers game in which antitrust values majorities over minorities."[307]

It has only been in the past couple of years that scholars have begun to question antitrust's role in promoting structural racism, though this literature is still in its infancy. This Article contributes to the dialogue by shedding light on the government's ability to oppress via exclusionary conduct. This is also, as this Article makes clear, hardly a new phenomenon; it is important to recognize that anticompetitive conduct has constituted a source of governmental oppression dating back to the sixteenth century.

CONCLUSION

This Article sheds light on one of the most pressing sources of state oppression: monopoly power. This issue has largely gone unnoticed due to the Supreme Court's insistence that antitrust was never intended to review state action. The justification of state action immunity is severalfold: federalism, political accountability, and congressional intent. Rather than an isolated doctrine, antitrust federalism has notably helped to define American government since the country's founding. The effect is that private actors may restrain trade on a state's behalf within a zone of immunity.

But this landscape lacks justification. This Article argues that antitrust's foundation—the common law of competition—was almost exclusively concerned with private parties that the Crown empowered. This source of oppression, as the English and American colonists viewed it, demanded intervention. But when Congress enacted the Sherman Act in 1890, the object of anxiety had shifted to private trusts. Over the next fifty years, courts have seemingly forgotten the role of state power. This Article argues that courts or Congress must abrogate state action immunity for the precise reasons why Tudor England enacted the Statute of Monopolies—which again is part of the Sherman Act's foundation. It shows that collusions among private actors and states have not only oppressed marginalized communities, but also imposed society's most durable monopolies. To uphold principles of federalism, but also rectify state oppression, courts or Congress must abrogate state action immunity in its entirety.

307. *Id.* at 550.