Article

Reconstruction, and the Unfulfilled Promise of Antitrust

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Wealth inequality remains as wide, and as troubling, as it was a half-century ago. While scholars have offered various explanations, there is a contributor that has escaped serious scrutiny: state monopoly power. It is not just that there is a long history of states and municipalities using their monopoly power to protect dominant interests, from enacting Black Codes to shuttering Chinese laundries to barring women, immigrants, and minorities from certain professions. It is also that states continue to use their monopoly power in ways that entrench inequality, from zoning restrictions to eminent domain to regulations that, in effect, bar Black women from braiding hair, Latino immigrants from operating food trucks, and more. To raise revenue, states even monopolize markets primarily patronized by vulnerable communities. And yet for the most part, antitrust law—concerned

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only with efficiency and consumer welfare—has ignored state monopolies. In fact, the Supreme Court has ruled that states are immune from antitrust review even though there is nothing in the Sherman Antitrust Act's text to support this position.

This Article takes a different tack. It recovers the Sherman Antitrust Act's neglected connection to anti-state monopolism, and to the Reconstruction Amendments, to show that righting the wrongs of slavery and the Black Codes—both a type of monopoly, a type of price fixing—was a core motivation for the Sherman Antitrust Act. Far from believing states should be able to use their monopoly power with impunity, the Act's sponsor and namesake saw antitrust as a way to rein in discriminatory state monopolies.

In short, this Article makes the case for bringing Reconstruction to bear on antitrust. Doing so would not only bring antitrust law closer to its original goal of economic opportunity for all. It would also help fulfill the lost promise of Reconstruction. We say this because, given how the courts have weakened the Fourteenth Amendment, enabling antitrust law to scrutinize a state's discriminatory monopolies would achieve an original purpose of the Reconstruction Amendments.

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INTRODUCTION

On December 8, 2023, the Bureau of Labor statistics touted a ray of good news: the unemployment rate the prior month had "edged down to 3.7 percent."[1] But buried below the lede was the all too familiar reminder about racial disparities: overall unemployment rates were not distributed equally. The rate for whites was 3.3 percent.[2] For Hispanics it was 4.6 percent.[3] Then for Blacks, 5.8 percent.[4]

And of course, when it comes to economic justice, race matters beyond employment. Education, once thought to be the great equalizer, results in unequal outcomes, as young white men without college education still earn about double their Black counterparts.[5] While the gap is narrower for Blacks and whites with college degrees, there's still a gap.[6] Beyond the income inequality gap is the wealth gap: "The median Black household in America has around $24,000 in savings, investments, home equity, and other elements of wealth. The median White household: around $189,000 . . . ."[7] This gap is even more staggering when switching from the median to the average household, where the wealth gap mushrooms to $840,000.[8] For Blacks nearing the retirement age, the disparity is dispiriting—as recently as 2018, Blacks between 50 and 65 years old "had only about 10

1. News Release, U.S. Bureau of Lab. Stat., The Employment Situation -- November 2023 (Dec. 8, 2023), https://www.bls.gov/news.release/archives/empsit_12082023.htm [https://perma.cc/2HSJ-LEYY].

2. *Id.*

3. *Id.*

4. *Id.*

5. *See* Byeongdon Oh et al., *Inequality Among the Disadvantaged? Racial/Ethnic Disparities in Earnings Among Young Men and Women Without a College Education*, 9 SOCIO. RACE & ETHNICITY 342, 343–48 (2022) (noting that non-college-educated white young men make about $22,056 on average, while non-college-educated black young men make about $12,573 on average).

6. *See id.* at 343 ("Compared to college-educated workers, the white-Black earnings gap is more noticeable among less educated workers.").

7. Doug Irving, *What Would It Take to Close American's Black-White Wealth Gap*, RAND (May 9, 2023), https://www.rand.org/pubs/articles/2023/what-would-it-take-to-close-americas-black-white-wealth-gap.html [https://perma.cc/3DJK-E47M].

8. *Id.*

percent of the wealth of whites in the same age group."[9] Especially given that the wealth gap has remained just as wide as it was generations ago, it is little wonder that Dr. Martin Luther King, Jr. turned to economic justice in his last years, emphasizing that the "inseparable twin of racial injustice is economic injustice."[10] The wonder is why, decades later, we as a society do not give economic justice more attention.[11]

While scholars have offered various explanations for the wealth gap—from the compromises made during Reconstruction to unequal schools to the persistence of racial biases, both explicit and implicit—there is another contributor that has escaped serious scrutiny: state monopoly power. Consider a handful of examples and how they perpetuate inequality. States and locales use their monopoly power via eminent domain as the singular buyer to seize, in many instances, minority property.[12] The state uses its monopoly power to create a licensing system that chills minority and immigrant entrepreneurship.[13] The state uses its monopoly power to forego cleaning the water system in a largely minority community where, even after the water is declared undrinkable, residents must pay above-market rates of

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9. Angela Hanks et al., *Systematic Inequality: How America's Structural Racism Helped Create the Black-White Wealth Gap*, CTR. FOR AM. PROGRESS (Feb. 21, 2018), https://www.americanprogress.org/article/systematic-inequality [https://perma.cc/2PRW-ZFK5].

10. MARTIN LUTHER KING, JR., *Pilgrimage to Nonviolence*, *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 30 (James M. Washington ed., 1986). For more generally on Dr. King's turn to economic injustice, see MICHAEL K. HONEY, TO THE PROMISED LAND: MARTIN LUTHER KING AND THE FIGHT FOR ECONOMIC JUSTICE (2018); Rebecca E. Zietlow, *"Where Do We Go From Here?" Dr. Martin Luther King, Jr. and Workers' Rights*, 14 HARV. L. & POL'Y REV. 47, 48 (2019).

11. *See* Ellora Derenoncourt et al., *Wealth of Two Nations: The U.S. Racial Wealth Gap, 1860–2020*, 139 Q.J. ECON. 693, 694 (2023) (addressing the lack of scholarship on the "evolution of the wealth gap over the full post-Emancipation period").

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

13. *See* Jenni Bergal, *A License to Braid Hair? Critics Say State Licensing Rules Have Gone Too Far*, STATELINE (Jan. 30, 2015), https://stateline.org/2015/01/30/a-license-to-braid-hair-critics-say-state-licensing-rules-have-gone-too-far [https://perma.cc/998Y-8CEC] ("But Earl has done no advertising and has been running Twistykinks only through word of mouth. That's because what she is doing is illegal under Arkansas law, where she needs a cosmetology license to braid hair. That would mean 1,500 hours of training, passing two exams and paying thousands of dollars to attend a cosmetology school that doesn't even teach hair braiding.").

$100 to $200 a month.[14] The state uses its monopoly power so that incarcerated people must pay astronomical prices for phone usage, toothpaste, and even toilet paper.[15] At the same time, the state uses its monopsony power to extract labor from inmates for pennies.[16] Yet the Supreme Court has ruled that states are immune from antitrust review even though the Sherman Antitrust Act is largely silent about states.[17] Calling attention to the roles state monopoly power and state antitrust immunity play in furthering inequality is our first contribution.

This Article's second contribution is to surface a neglected history. Indeed, the tugs and pulls of history, between racial inequality and discriminatory state monopoly power. Traditionally, state monopolies were treated much differently than today, viewed as a potential abuse of government power.[18] A monopoly

14. Laura Bliss, *Flint Has Been Looking at Water All Wrong*, BLOOMBERG L. (Jan. 20, 2016), https://www.bloomberg.com/news/articles/2016-01-20/flint-s-water-crisis-is-a-reminder-that-clean-affordable-water-is-a-human-right [https://perma.cc/4GA5-G5AY] ("The city's pipes have suffered hundreds of millions of dollars of damage. And yet, after nearly two years of living with poisonous water and astonishing government negligence, Flint residents still pay between $100 and $200 a month for their water bills. For a predominantly low-income community, those bills add insult to injury.").

15. *See, e.g.*, Joseph Darius Jaafari, *In Pa. Jails, Women Are Paying More than Double for the Same Tampons They'd Get on the Outside*, WITF (Feb. 5, 2020), https://www.witf.org/2020/02/05/in-pa-jails-women-are-paying-more-than-double-for-the-same-tampons-theyd-get-on-the-outside [https://perma.cc/8PC4-9FX9] (discussing the price gouging perpetuated by two companies—Keefe Group and Oasis Management Systems—contracted to provide basic necessities not guaranteed to inmates by the prison).

16. Marsha Mercer, *Advocates Seek to Make Prison Work Voluntary*, STATELINE (Sept. 7, 2022), https://stateline.org/2022/09/07/advocates-seek-to-make-prison-work-voluntary [https://perma.cc/J8QS-69KA] (highlighting how, in the United States, 800,000 incarcerated workers perform jobs like cooking and serving food, mopping floors, mowing lawns, and cutting hair, usually with little choice and minimal compensation); Lan Cao, *Made in the USA: Race, Trade, and Prison Labor*, 43 N.Y.U. REV. L. & SOC. CHANGE 1, 3 (2019) ("Justified on redemptive and rehabilitative grounds, prison industries are thriving in the United States. . . . [The United States has] amassed a large captive workforce of men and women that can be put to work for little or no pay."); Andrea C. Armstrong, *Beyond the 13th Amendment – Captive Labor*, 82 OHIO ST. L.J. 1039, 1039, 1052–53 (2021) (describing the unfair compensation rates for incarcerated workers).

17. Parker v. Brown, 317 U.S. 341, 351–52 (1943) (discussing state immunity under the state action doctrine from antitrust liability).

18. *See* Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL'Y 983,

was even *defined* as a special privilege derived from government and conferred to powerful firms.[19] And for centuries, the public detested state grants of monopolies, viewing them as on par with the King issuing an economic windfall to his favorites.[20]

But in the South, this attitude changed with the end of slavery and the realization that the newly freed Blacks would now compete for jobs. This led Southern states to pass Black Codes to protect white interests in anticompetitive ways.[21] For example, states barred Blacks "from hunting or fishing to ensure that they could not live without entering *de facto* reenslavement as sharecroppers."[22] Blacks were banned from holding a variety of jobs,[23] even prohibited from practicing law.[24] And as racially-targeted anticompetitive laws were passed, Southern states began to view a state's monopoly power as serving the public's welfare by, uncoincidentally, reimposing de facto slavery.

1009–16, 1056–60 (2013) (discussing legislative concern with state-granted monopolies in both the Founding and Reconstruction periods).

19. *See id.* at 984–85 (comparing seventeenth-, eighteenth-, and nineteenth-century definitions of the term "monopoly").

20. *See* Marvin Ammori, Note, *The Uneasy Case for Copyright Extension*, 16 HARV. J.L. & TECH. 287, 305 (2002) (noting the high prices and harm that stemmed from the Queen's prerogative of granting monopolies).

21. *See* Darrell A.H. Miller, *White Cartels, the Civil Rights Act of 1866, and the History of* Jones v. Alfred H. Mayer Co., 77 FORDHAM L. REV. 999, 1029 (2008) ("Planters used a variety of anticompetitive schemes to keep blacks in line—wage fixing, model contracts, labor market division, capital boycotts, service tying . . . . Sometimes these combinations were overt, sometimes they were tacitly accepted by the local Freedmen's Bureau, and sometimes they were unspoken but understood.").

22. Students for Fair Admissions, Inc. v. President of Harvard Coll., 143 S. Ct. 2141, 2266 (2023) (Jackson, J., dissenting).

23. *See* Danyelle Solomon et al., *Systemic Inequality and Economic Opportunity*, CTR. FOR AM. PROGRESS (Aug. 7, 2019), https://www.americanprogress.org/article/systematic-inequality-economic-opportunity [https://perma.cc/KAU9-ZS27] ("States such as South Carolina enacted strict 'Black Codes' that fined Black people if they worked in any occupation other than farming or domestic servitude. If they broke these laws or abandoned their jobs after signing a labor contract, they could be arrested and, thanks to a loophole in the 13th Amendment, forced back into unpaid labor on white plantations." (footnote omitted)).

24. *See infra* notes 61–65 and accompanying text; *see also* David Kenneth Pye, Legal Subversives: African American Lawyers in the Jim Crow South 27–30 (2010) (Ph.D. dissertation, University of California, San Diego) (on file with Minnesota Law Review).

Congress responded to the South's resistance to equality by enacting legislation, and ultimately, the Reconstruction Amendments. Indeed, we show that a lost goal of Reconstruction, especially through the Fourteenth Amendment's Privileges or Immunities Clause, was to strike down discriminatory state monopolies.[25] We call this a lost goal due to *The Slaughter-House Cases*.[26] When the biracial legislature of Louisiana tried to replace a white cartel of butchers with a slaughterhouse that would be open to everyone, the cartel challenged Louisiana's power in a dispute that rewrote the Amendment.[27] Likely sympathetic to the biracial legislature's goals, the Supreme Court upheld Louisiana's use of monopoly power.[28] But in doing so, it also rendered the Privileges or Immunities Clause a dead letter.[29] And thus, the Fourteenth Amendment ceased being a tool to remedy state monopolies.[30]

In light of this link between economic inequality and state monopoly power, the question is what can be done. Perhaps unsurprisingly, given who we are—a race scholar and an antitrust scholar—we think that antitrust enforcement might do a lot. Part of this involves recovering the anti-state monopoly tradition built into antitrust law, starting with its common law origins and continuing through Reconstruction. It wasn't just the Trust Movement—think John D. Rockefeller and John Pierpont Morgan—that motivated the Sherman Act.[31] Some of the Act's sponsors seemed concerned with righting the wrongs of inequality

25. *See infra* Part III.

26. *See infra* Part III.C.

27. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

28. *Id.* at 76–79, 82–83; *see also* MICHAEL A. ROSS, JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA 202 (2003) (discussing Justice Miller's sympathies to the sanitation movement and the slaughterhouse law after his career as a physician).

29. Calabresi & Leibowitz, *supra* note 18, at 1047 ("The *Slaughter-House Cases* closed a door on reading the Privileges or Immunities Clause to strike down grants of economic privilege and of monopoly . . . .").

30. United States v. Wence, No. 3:20-cr-0027, 2021 WL 2463567, at *1 (D.V.I. June 16, 2021) (illustrating the intent requirement that undermines many Equal Protection claims that could otherwise tackle state-granted monopolies).

31. *Cf.* Carl T. Bogus, *The New Road to Serfdom: The Curse of Bigness and the Failure of Antitrust*, 49 U. MICH. J.L. REFORM 1, 42 (2015) ("There were concerns that the titans who controlled these industries—J.P. Morgan, John D. Rockefeller, Cornelius Vanderbilt, and others—could gouge consumers; but there was even greater concern about their exploiting workers.").

and building an egalitarian society.[32] After all, they were writing against the backdrop of the recently fought Civil War, fought to end what many abolitionists compared to a racial monopoly.[33] They were also writing against the promise of the Privileges or Immunities Clause, which its author John Bingham associated with "the right 'to work in an honest calling'"[34]—a right borrowed from antitrust's common law.[35] And they were writing against the backdrop of the clause's evisceration in *The Slaughter-House Cases* and the eventual failure of Reconstruction. As we reveal, the Fourteenth Amendment *and* the Sherman Act were enacted—largely by the same people—with the common law of competition in mind.[36] And while the Fourteenth Amendment has been weakened, there is no reason why the Sherman Act cannot pick up some of the slack. Put differently, this forgotten relationship between Reconstruction and the Sherman Act could enable courts and enforcers to scrutinize a state's monopoly power when it discriminates.

Part of using antitrust to address state monopoly power is about the flexibility inherent in the Sherman Act. It is no accident that the Sherman Act's text is written broadly, prohibiting "every" combination in restraint of trade and monopolizations of "any" part of trade.[37] The drafters intended to vest courts with the ability to craft rules to promote the Act's broad goal of competition.[38] Antitrust has thus been called "the paradigmatic 'common-law statute.'"[39] The language of the Federal Trade

32. *Infra* notes 297–303 and accompanying text.

33. *Infra* notes 173–76 and accompanying text.

34. Damon Root, *The Supreme Court Fails to Protect Economic Liberty, Again*, REASON FOUND. (Jan. 11, 2012), https://reason.com/2012/01/11/the-supreme-court-fails-to-protect-econo [https://perma.cc/3J6W-VPT4].

35. *See infra* notes 218–26 and accompanying text.

36. *See infra* Part IV.

37. Sherman Act, 15 U.S.C. §§ 1–2.

38. 21 CONG. REC. 2456 (1890) (statement of Sen. 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.").

39. Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175, 180 (2021); *see also* Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1678 (2020) (reviewing TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018))

Commission Act is even more capacious, authorizing the Federal Trade Commission (FTC) to pursue all "unfair methods of competition in or affecting commerce."[40] Given this open-ended language, courts have relied on historical sources like the common law to interpret antitrust's scope.[41] But what scholars and courts have missed is antitrust's connection to Reconstruction. And this connection suggests that the Court was misguided to immunize states from antitrust scrutiny.

A few more points about the scope of our proposals. We are not suggesting that all state monopolies are problematic. Far from it. Indeed, many of them benefit the public. Rather, our goal is to provide enforcers and litigants with a tool to challenge discriminatory state and local monopolies, especially those that involve delegations of power to private interests. Our objective isn't to ensure anyone's success but to promote honest competition so that businesses and individuals may succeed or fail on the merits. Presumably, our goal is similar to Senator Sherman's. Sherman, after all, was not only the namesake and principal author of the nation's first antitrust act. He was also a key figure in the Fourteenth Amendment and Civil Rights Act of 1866.[42] It speaks volumes, too, that his brother was General William Sherman, who played a key role in defeating the Confederacy, ending slavery, and proposing the allocation of 40 acres to freed Black families.[43] Our recovered evidence suggests Senator Sherman may have believed monopolies *on behalf of states* and

("[S]cholars and judges have long argued that lawmakers who passed the Sherman Act delegated to the judiciary broad powers to craft the substantive rules of antitrust law.").

40. Federal Trade Commission Act § 5, 15 U.S.C. § 45.

41. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940) ("In consequence of the vagueness of its language, perhaps not uncalculated, the courts have been left to give content to the statute, and in the performance of that function it is appropriate that courts should interpret its words in the light of its legislative history and of the particular evils at which the legislation was aimed." (footnote omitted)).

42. *See infra* notes 227–30 and accompanying text.

43. DeNeen L. Brown, *40 Acres and a Mule: How the First Reparations for Slavery Ended in Betrayal*, WASH. POST (Apr. 15, 2021), https://www.washingtonpost.com/history/2021/04/15/40-acres-mule-slavery-reparations [https://perma.cc/N8JD-SQUJ] ("Four days after the meeting, Sherman would issue Special Field Order, No. 15, confiscating Confederate land along the rice coast. Sherman would later order '40 acres and a mule' to thousands of Black families, which historians would later refer to as the first act of reparations to enslaved Black people.").

against ordinary people violated common law rights *and* that a true Reconstruction meant welcoming freedmen into the labor market.[44] In short, he would have likely opposed the type of state monopolies that benefitted a dominant group at the expense of a vulnerable community.

It's also important to mention what we mean by a state's "monopoly power." As latter parts of this Article discuss more thoroughly, there's a thin line between a state's monopoly versus a state's police power—even though both can render anticompetitive effects.[45] Further complicating this distinction, the definition of a monopoly has evolved over time: historically, a monopoly was characterized as a *state grant of special privileges* to favored parties.[46] For this reason, our discussion canvasses many acts of states, such as eminent domain, that wouldn't ordinarily be described as anticompetitive even when they discriminate against certain parties and benefit others by undermining competition.

Another point is about the limits of our proposal. We acknowledge that bringing antitrust to bear on discriminatory state monopolies will not ensure equality on its own. That said, antitrust could entail an important tool, as a few scholars have begun to recognize.[47] Indeed, the view we take is decidedly different from those scholars who believe "[a]ntitrust policy, in contrast to legal policy generally, is not the appropriate tool for pursuing particular goals of social equality."[48] We opened this Article by focusing on economic inequality, but of course the

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44. Calabresi & Leibowitz, *supra* note 18, at 1063 ("Another stated purpose of the Sherman Act's sponsor, Senator John Sherman, was to codify at the federal level the common law rule, which existed in many states, outlawing private contracts that operated as restraints on trade.").

45. *See infra* Part I.A.

46. Calabresi & Leibowitz, *supra* note 18, at 1070 ("Corporations can only obtain existence . . . by a special grant from the legislature. Charters of incorporation are therefore grants of privilege, to be exclusively enjoyed by the corporators . . . . Every grant of exclusive privilege, strictly speaking, creates a monopoly." (alteration in original) (quoting 3 AMERICAN LANDMARK LEGISLATION: PRIMARY MATERIALS 33 (Irving J. Sloan ed., 1976))).

47. *See generally* Hiba Hafiz, *Antitrust and Race*, 100 WASH. U. L. REV. 1471 (2023); John Mark Newman, *Racist Antitrust, Antiracist Antitrust*, 66 ANTITRUST BULL. 384 (2021); Felix B. Chang, *Ethnically Segmented Markets: Korean-Owned Black Hair Stores*, 97 IND. L.J. 479 (2022); Daria Roithmayr, *Racial Cartels*, 16 MICH. J. RACE & L. 45 (2010).

48. Herbert Hovenkamp, *Antitrust Harm and Causation*, 99 WASH. U. L. REV. 787, 811 (2021).

problem goes beyond income and wealth. This is because income and wealth undergird almost every other type of inequality, from where people live, to whether they rent or own, to the schools they attend, to access to health care, to the persons they marry, to the social capital they have.[49] That is why harnessing every tool possible, including the tool of antitrust enforcement, is important.

With those points made, this Article proceeds as follows. Part I provides more examples of state monopoly power, including state and local grants of monopolies, and how, in ways large and small, state monopoly power has contributed to racial wealth inequality. Part II offers a brief primer on antitrust and then turns to the Supreme Court's decision in *Parker v. Brown,*[50] which exempted states from antitrust scrutiny notwithstanding the absence of anything in the Sherman Act's text to suggest its inapplicability to states. Part II also explains why the Court got this wrong. Part III and Part IV then turn to the work antitrust can do. Part III begins by recovering the forgotten history of how the public and antitrust law originally viewed state monopolies as abuses of power, and how that view shifted as states began to use their monopoly power to lock in white economic advantage. Part III then shows how Reconstruction—both its promises and its failures—informed the Sherman Act's drafters, many of whom were committed to righting the wrongs of economic inequality. Finally, Part IV shows how the Sherman Act's broad language and legislative history make it a perfect vehicle for addressing some of the lingering effects of slavery. It then returns to today to show the work that true antitrust enforcement could do to address state monopoly power that discriminates.

I. ANTICOMPETITIVE DISCRIMINATION IN THE SHADOW OF STATE AND FEDERAL POWER

All stages of American bureaucracy rely heavily on issuing monopolies. Indeed, state monopolies are so common that they tend to be taken for granted or not noticed at all. At a time when

49. *See* Dhruv Khullar & Dave A. Chokshi, *Health, Income, & Poverty: Where We Are & What Could Help*, HEALTH AFFS. (Oct. 4, 2018), https://www.healthaffairs.org/content/briefs/health-income-poverty-we-could-help [https://perma.cc/E6FW-9DNU] (linking income inequality to an array of socioeconomic outcomes).

50. Parker v. Brown, 317 U.S. 341, 351–52 (1943).

antitrust scholars are increasingly turning their attention to Amazon, Google, and the "curse of bigness,"[51] state monopolies are usually given a pass. We take a different tack, calling attention to this form of government power, how it entrenches inequality, and the role that antitrust law can play. This Part addresses the first two points: Section A shows just how omnipresent state monopoly power is. Section B then explores how state monopolies can, and often do, have troubling inequality effects. Nonetheless, even when they discriminate, states enjoy antitrust immunity, an immunity which we explore and question in Part II.

A. STATE MONOPOLIES

State monopolies and grants of monopolies are everywhere. Drive down a public road, or pay a toll to cross a bridge, or turn on a light switch, and state monopoly power is likely involved. Some of this is in the form of direct monopoly power—the state itself is the sole supplier of a good or service, like a lottery ticket. Other times, it entails a grant of monopoly power where a state might vest one company with the exclusive right to provide electricity to a particular area, or water or gas, subject to some regulation.[52] We use the terms "monopoly" and "restraint of trade" in both their limited modern and expansive pre-modern contexts (which Part III explains in detail).

States also flex their monopoly power in other ways. While modern thinking would typically view a state's monopoly of criminal justice as a police power, we point out that the power to

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51. *See generally* WU, *supra* note 39. The phrase was originally coined by Justice Brandeis. Louis D. Brandeis, *A Curse of Bigness*, HARPER'S WKLY., Jan. 10, 1914, at 18 ("Bigness has been an important factor in the rise of the Money Trust. Big railroad systems, Big industrial trusts, Big public service companies; and as instruments of these Big banks and Big trust companies, J. P. Morgan & Co. (in their letter of defence to the Pujo Committee) urge the needs of Big Business as the justification for financial concentration.").

52. *See* Wayne Winegarden, *The Rising Costs from Monopoly Utilities and Excessive Energy Mandates*, FORBES (Jan. 1, 2024), https://www.forbes.com/sites/waynewinegarden/2024/01/01/the-rising-costs-from-monopoly-utilities-and-excessive-energy-mandates [https://perma.cc/BQ5Y-YX5R] ("The troubles facing Hawaiians exemplify the growing national problem. Hawaii imposes both burdensome renewable energy mandates and perpetuates a monopoly model for generating electricity. Both regulations foster the declining quality and rising costs plaguing our electricity generation system. The monopoly model is the traditional way the government has regulated electric utilities.").

arrest, prosecute, and punish[53] can collaterally translate into the power to remove someone from the labor market.[54] In fact, philosophers have long defined "government" as a monopoly on the legitimate use of violence.[55] While this wouldn't fit the modern definition of a monopoly, it is important to note the anticompetitive potential of police powers.[56] States may also exercise monopoly power over labor more broadly, deciding qualifications before someone can hold themself out as, say, an electrician, or a fireman, or a hairdresser.[57] One could even say that government wields a monopoly over where people live and work, from the creation of zoning ordinances to the power to take away people's homes outside of the market system.[58] After all, the capacity of the state, and the state alone, to name itself the singular buyer of property through eminent domain is a type of anticompetitive power.[59]

The point of this concededly brief discussion is not to exhaust the ways the state is, or resembles, a monopolist. Rather, we call attention to the state monopoly power that is all around us, and too often taken for granted. There is another thing taken

53. I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1604–07 (2020) (critiquing the state's monopoly on criminal prosecutions).

54. *See* Talmon Joseph Smith, *Ex-Prisoners Face Headwinds as Job Seekers, Even as Openings Abound*, N.Y. TIMES (July 11, 2023), https://www.nytimes.com/2023/07/06/business/economy/jobs-hiring-after-prison.html [https://perma.cc/5ETF-PUL7] (discussing the employment effects on not just prisoners but also ex-prisoners seeking employment after being released).

55. F. Patrick Hubbard, *The Value of Life: Constitutional Limits on Citizens' Use of Deadly Force*, 21 GEO. MASON L. REV. 623, 625 (2014) ("Because the government is 'the one entity that retains a monopoly over legitimate violence,' 'the right to use physical force is ascribed to other institutions or to individuals only to the extent to which the state permits it . . . [and] [t]he state is considered the sole source of the "right" to use violence.'" (alteration in original) (footnote omitted) (first quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-2, at 1306 (2d ed. 1988); and then quoting Max Weber, *Politics as a Vocation*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 78 (H.H. Gerth & C. Wright Mills eds. & trans., 1946))).

56. *Id.*

57. *See* Jennifer Huddleston, *If You Want to Fight Monopolies, Fight Occupational Licensing*, REASON FOUND. (Jan. 21, 2022), https://reason.com/2022/01/21/want-to-fight-monopolies-fight-occupational-licensing [https://perma.cc/EHM9-3F8A] (noting that "[t]he fragmented, state-level control of quasi-governmental occupational licensing boards exacerbates the problem" of occupational licensing obstacles for various professions).

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

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

for granted: sometimes, as explored below, state monopolies discriminate.

B. WHEN STATE MONOPOLIES DISCRIMINATE

In October 2023, Edward Garrison Draper was finally admitted to the Maryland Bar. "Finally," because his admission came 166 years after he was qualified to be admitted.[60] The reason he was not admitted when he first qualified is simple. True, he had a degree from Dartmouth College after having passed the entrance examination in Greek, Latin, mathematics, English grammar, and geography—giving himself a pedigree that surpassed most attorneys in his state.[61] True, he had apprenticed himself to established lawyers.[62] And true, a judge had examined him on his knowledge of law and issued him a certificate stating he was "qualified in all respects to be admitted to the Bar in Maryland, if he was a free white citizen of this State."[63]

But Draper was not a free white citizen. He was Black. And Maryland, which through its licensing had a monopoly on who could practice law, excluded Blacks.[64]

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60. Sydney Trent, *Black Lawyer Admitted to the Maryland Bar—166 Years After His Denial*, WASH. POST (Oct. 26, 2023), https://www.washingtonpost.com/history/2023/10/26/edward-garrison-draper-maryland-bar [https://perma.cc/VQ56-M86E].

61. *Id.* ("Edward Garrison Draper was more prepared to be a lawyer than most White attorneys in the mid-19th century. He was one of the first Black graduates of Dartmouth College, when fewer than half of attorneys in his home state of Maryland held college degrees."); *see also* David S. Bogen, *The Transformation of the Fourteenth Amendment: Reflections from the Admission of Maryland's First Black Lawyers*, 44 MD. L. REV. 939, 980 (1985) ("The education Edward Draper received [at a public school for Black students] was sufficient to enable him to pass the entrance examination at Dartmouth College in 1851 in Greek, Latin, mathematics, English grammar and geography. Indeed, he finished his first year of college in the top third of his class." (footnote omitted)).

62. *See* Trent, *supra* note 60 ("[Draper] had somehow finagled apprenticeships with established lawyers . . . .").

63. *See* Bogen, *supra* note 61, at 983–84.

64. Act of Mar. 10, 1832, ch. 268, § 2, 1831 Md. Laws, at cccxl (requiring bar applicants to be a "free white male citizen of Maryland" effectively codifying a ban on bar admission for people of color).

Draper's story is far from unique.[65] In fact, the history of government using its monopoly power to protect dominant interests and labor by restraining competition is a long one. States passed Black Codes in the wake of Emancipation,[66] and then Jim Crow laws that gave monopoly power to private actors who excluded or discriminated against Blacks;[67] San Francisco enacted an ordinance against wooden laundries to restrain competition from Chinese launderers[68] and then later Chinese restaurants;[69] New York enforced a law impeding immigrant bakers from competing against native bakers;[70] and localities in the North created tests to keep fire departments white.[71]

Nor was this discriminatory wielding of monopoly power limited to states and locales. Consider labor unions. Historically,

65. Daria Roithmayr, *Barriers to Entry: A Market Lock-in Model of Discrimination*, 86 VA. L. REV. 727, 755 (2000) (explaining the monopoly maintained by white cartels on law schools, which effectively barred people of color from entering the legal profession regardless of qualifications).

66. Calabresi & Leibowitz, *supra* note 18, at 1038 (describing the Black Codes as a use of a state's monopoly power).

67. *See* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 97 (1992) ("In order to sustain the basic position that cultural and social norms are sufficient to sustain Jim Crow, it becomes necessary to abstract away from these pervasive threats [of violence] and to ask whether Jim Crow would have survived if southern whites had voluntarily relinquished their control over the ballot, the police force, the courts, and the other instruments of state domination. The prolonged fight to wrest control of these powers away from local majorities shows that they did not believe that it could.").

68. Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (referencing the San Francisco laundry ordinance's intent to exclude Chinese launderers from the market by targeting their construction). *See generally* Evelyn Atkinson, *Frankenstein's Baby: The Forgotten History of Corporations, Race, and Equal Protection*, 108 VA. L. REV. 581, 586–87 (2022) (discussing the role of Chinese immigrants in modern understandings of Equal Protection litigation).

69. *See* Gabriel J. Chin & John Ormonde, *The War Against Chinese Restaurants*, 67 DUKE L.J. 681, 683–84 (2018) ("Chinese restaurants were considered 'a serious menace to society' for two reasons. First, by employing Chinese workers and successfully competing with other restaurants, white union members claimed the restaurants denied '[their] own race a chance to live.'" (alteration in original) (footnote omitted) (first quoting REPORT OF PROCEEDINGS OF THE THIRTY-THIRD ANNUAL CONVENTION OF THE AMERICAN FEDERATION OF LABOR HELD AT SEATTLE, WASHINGTON NOV. 10-22, INCLUSIVE 1913, at 370 (1913); and then quoting *Card to the Public,* TONOPAH BONANZA (Nev.), Jan. 17, 1903, at 6)).

70. *See* Lochner v. New York, 198 U.S. 45 (1905) (reversing the holdings of New York courts by holding that a labor law restricting the number of hours

at the same time organized labor enlisted only white workers (or even then only some white workers, since many unions sought to exclude immigrants from certain European countries), many states conditioned public contracts on union membership. This bore the effect of allowing white people to monopolize labor markets along racial and ethnic lines.[72] But the federal government also helped: when Congress passed the Davis-Bacon Act in 1950 to mandate that federal contracts pay the "local prevailing wage," it did so at least in part to prevent Black labor from competing against white workers.[73] As one of the Bill's sponsors remarked about Black workers—which he called "bootleg labor"—"it is labor of that sort that is *in competition* with white labor throughout the country."[74] Despite the anticompetitive genesis of the Davis-Bacon Act, it remains in force.[75]

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that bakers may work was unconstitutional); *see also* David E. Bernstein, Lochner v. New York*: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469, 1477 (2005) ("Union bakers believed that competition from basement bakery workers drove down their wages. An article in the bakers' union's weekly newspaper, the *Baker's Journal*, condemned the 'cheap labor of the green hand [a euphemism for recent immigrants] from foreign shores.'" (alteration in original) (quoting *Now for the Ten-Hour Day*, BAKER'S J., Apr. 20, 1895, at 1)).

71. *See, e.g.*, Lewis v. City of Chicago, 560 U.S. 205, 208–09 (2010) (describing the test required by the fire department that disproportionately failed African Americans, thereby disqualifying Black applicants from the department's hiring and promotion practices).

72. *See* Bennett Capers & Gregory Day, *Race-ing Antitrust*, 121 MICH. L. REV. 523, 530–31 (2023) (explaining the uneven effects of anticompetitive practices in labor markets). *See generally* Herbert Hill, *The Problem of Race in American Labor History*, 24 REVS. AM. HIST. 189, 197–99 (1996) (tracing the historical presence of racism in labor unions).

73. David E. Bernstein, *Roots of the 'Underclass': The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85, 115 (1993) ("Indeed, the remarks of various Representatives demonstrate that Davis-Bacon gained support as a protective measure for white labor. In hearings on labor and public works in 1930, Representative John J. Cochran of Missouri said, 'I have received numerous complaints in recent months about southern contractors employing low-paid colored mechanics getting work and bringing the employees from the South.'" (quoting *Employment of Labor on Federal Construction Work*: *Hearing on H.R. 7995 and H.R 9232 Before the H. Comm. on Lab.*, 71st Cong. 26–27 (1930) (statement of Rep. John J. Cochran))).

74. Joseph Dean, *The Racist History of Minimum Wage*, MEDIUM (Aug. 17, 2018) (emphasis added) (citing 74 CONG. REC. 6513 (1935) (statement of Rep. Miles Clayton Allgood)), https://medium.com/the-enclave-of-others/the-racist-history-of-minimum-wage-5dd71ebf0770 [https://perma.cc/C25K-XXD3].

75. 40 U.S.C. § 3142 (corresponds to Davis-Bacon Act, ch. 411, 46 Stat. 1494 (1931)).

The Davis-Bacon Act is hardly the only historical federal law meant to insulate white workers and businesses from competition. In 1890, the Chinese Exclusion Act jettisoned Chinese labor[76]—which unionists described as "unfair competition"[77]—while legislatures used racist tropes to exclude Japanese persons and Latin Americans.[78] As a congressman stated on the U.S. House floor, "Mexican laborers come here in competition with American workmen, and those who come in from that country are less desirable citizens."[79] Another Senator complained that Mexicans "take the places of American citizens in the factories and on the farm . . . because of the unfair competition of cheap Mexican labor."[80]

These examples may already be familiar. What is probably less known is how state monopoly power continues to

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76. Darren Lenard Hutchinson, *"With All the Majesty of the Law": Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 CALIF. L. REV. 371, 390–91 (2022) ("Employing the racist political rhetoric of the law's proponents, the Court purported to find that Chinese laborers were typically 'industrious and frugal' and not 'accompanied by families, except in rare instances.' The Court also described Chinese immigrants as being 'content with the simplest fare,' which 'would not suffice for our laborers and artisans.' These characteristics of Chinese immigrants gave 'them' a comparative advantage when they competed with 'our people.'" (footnotes omitted) (quoting Ping v. United States, 130 U.S. 581, 596 (1889)).

77. Stephanie Hinnershitz, *The Chinese Exclusion Act*, BILL OF RTS. INST., https://billofrightsinstitute.org/essays/the-chinese-exclusion-act [https://perma.cc/K57E-54LS].

78. Lesley Solomon, *Japanese Exclusion and the American Labor Movement: 1900 to 1924*, EDUC. ABOUT ASIA, Winter 2012, at 1 (tracing the use of racist rhetoric to justify the Japanese Exclusion Clause provisions found in the Immigration Act of 1924 and other efforts to oppose Japanese immigration); Eric S. Fish, *Race, History, and Immigration Crimes*, 107 IOWA L. REV. 1051, 1071 (2022) (discussing how Chairman Albert Johnson of the House Committee on Immigration and Naturalization and other restrictionists sought to expand deportations as a way of removing Latin American immigrants); *see also* Off. of the Historian, *Chinese Immigration and the Chinese Exclusion Acts*, U.S. DEP'T OF STATE, https://history.state.gov/milestones/1866-1898/chinese-immigration [https://perma.cc/2LCS-6SA4] ("As the numbers of Chinese laborers increased, so did the strength of anti-Chinese sentiment among other workers in the American economy. This finally resulted in legislation that aimed to limit future immigration of Chinese workers to the United States . . . .").

79. 70 CONG. REC. 3557 (1929) (statement of Rep. William Hastings); *see also* Fish, *supra* note 78, at 1088 ("Congressman John Box then entered the debate and made the racial subtext explicit . . . . [Box observed] that Mexicans were criminals, and that they brought in tuberculosis and other diseases.").

80. 70 CONG. REC. 3619 (1929) (statement of Rep. John Schafer).

discriminate. While many of these examples wouldn't ordinarily be characterized as a modern monopoly or trigger antitrust scrutiny, that is also the point.

For starters, it is common for states to select competitors in a market to form a licensing agency and bestow them with the state's power to regulate competition.[81] Under the pretext of health and safety, these agencies can impede "outsiders" like immigrants and people of color from competing against them.[82] Indeed, cosmetology agencies have excluded African women from braiding hair,[83] while immigrants operating food trucks and carts have been denied licenses because, as a longstanding business owner exclaimed, "they're taking jobs."[84] The Supreme

81. *See* Gregory Day, *Antitrust for Immigrants*, 109 CORNELL L. REV. 911, 916 (2024) ("Key to this story is government's role: it is indeed common for state and federal actors to exclude foreign-born people from markets in order to protect citizens and their businesses. For instance, states empower private actors to form licensing agencies tasked with regulating their own markets under the justification of health and safety."). *See generally* Rebecca Haw Allensworth, *The New Antitrust Federalism*, 102 VA. L. REV. 1387, 1421 (2016) ("Most state statutes establishing professional licensing bodies delegate rulemaking and enforcement to a board that must be comprised of a majority of currently-licensed professionals, putting the reins of competition into the hands of those who stand to gain the most from anticompetitive restrictions. This authority to make professional entry and practice rules—powerful tools to deal rents to incumbent practitioners and to raise prices to consumers—has been abused." (footnote omitted)).

82. Day*, supra* note 81, at 916 ("[I]n actuality, many of their rules happen, or are intended, to shield incumbents from competition by barring immigrants from braiding hair, manicuring nails, providing child care, and operating food trucks." (footnotes omitted)).

83. Tayna A. Christian, *Twisting the Dream*, ESSENCE (Oct. 9, 2019), https://www.essence.com/feature/natural-hair-braiding-regulations [https://perma.cc/LNB5-WRA8] (describing licensing requirements that place "unnecessary and expensive" regulations on beauticians, often beauticians of color, seeking to braid natural hair).

84. Melanie Gray, *Mayhem in the Streets: Illegal Vendors Are Overtaking NYC*, N.Y. POST (Dec. 26, 2020), https://nypost.com/2020/12/26/mayhem-in-the-streets-illegal-vendors-are-overtaking-nyc [https://perma.cc/HC6P-45KH]; *see also* Joseph Pileri, *Who Gets to Make a Living? Street Vending in America*, 36 GEO. IMMIGR. L.J. 215, 218–19 (2021) (describing how perceptions of "unfair competition" can drive sentiments against food trucks and street vendors, resulting in licensing and zoning systems that favor the interests of traditional brick-and-mortar retailers); Andrew Meleta & Alex Montgomery, *Barriers to Business: How Cities Can Pave a Cheaper, Faster, and Simpler Path to Entrepreneurship*, INST. FOR JUST. 22 (Feb. 2022), https://ij.org/wp-content/uploads/2021/12/Barriers-to-Business-WEB-FINAL.pdf [https://perma.cc/2RBN-GD9V]

Court of Texas minced no words about what it saw: "As women, minorities and immigrants—those lacking political power—entered the labor market, incumbent interests lobbied politicians to erect barriers to thwart newcomers."[85] An effort to exclude rivals to protect legacy businesses is indeed a classically anticompetitive act.

Consider also zoning decisions: while agreements among landowners to blackball Blacks and immigrants are no longer legally enforceable, states and local governments remain free to use zoning to cartelize land and its benefits.[86] For example, cities have zoned Black neighborhoods as exclusively residential to force people to shop in white areas; in essence, preventing Black businesses from competing.[87] As Professor Stephen Clowney remarked, "It is hardly surprising that as land use regulations proliferate, the health of small black businesses deteriorates relative to their white competitors."[88] Cities have even imposed lot requirements to bar low-income persons from competing for property in affluent areas, and zoned industrial activity and waste facilities in Black neighborhoods.[89] In effect, the

(arguing that licensing requirements of street vendors "aren't designed or even intended to protect public health and safety, but instead seek to prevent food trucks from competing with existing restaurants").

85. Patel v. Tex. Dep't of Licensing & Regul., 469 S.W.3d 69, 102 n.53 (Tex. 2015).

86. Jabari Simama, *The Troubling Connection Between Zoning and Racism*, GOVERNING (Oct. 2, 2023), https://www.governing.com/community/the-troubling-connection-between-zoning-and-racism [https://perma.cc/96Q5-A8AX] ("That form of land-use regulation has its roots in another form of covenant. When zoning practices largely based on race were struck down by courts, class-restrictive covenants mandating a certain lot size or price point performed the same function. The effects of those policies can be felt today in areas where homeowners protect the 'character' of their neighborhoods by pressuring public officials to prevent large lots from being subdivided or multifamily housing to be built.").

87. *See* Jade A. Craig, *"Pigs in the Parlor": The Legacy of Racial Zoning and the Challenge of Affirmatively Furthering Fair Housing in the South*, 40 MISS. C. L. REV. 5, 52–53 (2022) (discussing the discriminatory enforcement of a California zoning ordinance that prevented a black business owner from operating out of his home).

88. Stephen Clowney, *Invisible Businessman: Undermining Black Enterprise with Land Use Rules*, 2009 U. ILL. L. REV. 1061, 1076 (2009).

89. *See, e.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 257–58 (1977); Moore v. City of East Cleveland, 431 U.S. 494, 508–10 (1977) (Brennan, J., concurring) (highlighting the harmful effect of family-based

ordinances deny minorities the equal opportunity to compete for premier land, which collaterally impacts education, employment, and healthcare.[90]

There is also education. Local governments in rich areas have monopolized public education and its funding to the exclusion of Black and Brown pupils.[91] For example, the nine thousand-person enclave of Highland Park in central Dallas—which *lacked a Black homeowner until 2003*—created its own school district to weed out students of color.[92] Given the role of government in segregating and thus excluding marginalized persons from the markets for high-end education and housing, Highland

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lot restrictions on minority families); M. Nolan Gray, *Apartheid by Another Name: How Zoning Regulations Perpetuate Segregation*, NEXT CITY (July 4, 2022), https://nextcity.org/urbanist-news/apartheid-by-another-name-how-zoning-regulations-perpetuate-segregation [https://perma.cc/KJ6G-PKXF] ("[E]xclusionary zoning can now be found in affluent neighborhoods across the country . . . . Through a witch's brew of tight density restrictions, sweeping prohibitions on apartments, and high minimum lot sizes, among other zoning regulations, these neighborhoods and suburbs effectively preserve their economic exclusivity and high-quality services to the detriment of everyone else."). Since *Arlington*, courts have held that zoning regulations will only violate equal protection upon proof of racially discriminatory intent. *E.g.*, Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 140 (3d Cir. 1977); Lo v. Cnty. of Siskiyou, 558 F. Supp. 3d 850, 867 (E.D. Cal. 2021).

90. *See* Gray, *supra* note 89 ("Zoning reserves the best parts of every town for an elite few—not only the best housing, but also often the best school districts, the best public services, and the best access to jobs."); Allison Shertzer et al., *Race, Ethnicity,* and *Discriminatory Zoning* 26–27 (Nat'l Bureau of Econ. Rsch., Working Paper No. 20108, 2014), https://www.nber.org/system/files/working_papers/w20108/w20108.pdf [https://perma.cc/9TQ6-QTMR] (finding that exclusionary zoning practices have potentially negatively affected the health of Black and immigrant residents relative to white residents); Craig, *supra* note 87, at 51–52 (summarizing a failure to provide protective zoning for southern Black communities, instead consolidating them to industrial or commercial zones).

91. *See* Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382, 2428–30 (2021) ("Across the country, affluent, predominantly white municipalities are seceding from racially diverse school districts . . . . The secessions have the effect of creating predominantly white and affluent school district enclaves situated next to districts that are predominantly minority and low income.").

92. *See* Laura Moser, *This Voter Measure Wasn't Just About School Funding. It Was About Segregation and Racism in a White, Wealthy Dallas Enclave*, SLATE (Nov. 4, 2015), https://slate.com/human-interest/2015/11/dallas-highland-park-votes-for-361-million-school-bond-here-s-how-ugly-racist-and-crazy-the-vote-was.html [https://perma.cc/32RW-JHSZ] (highlighting the separate, predominantly white school district in Highland Park).

Park reflects a Jim Crow-style of anticompetitive discrimination.[93]

Further, states have relied on eminent domain to target marginalized families, depriving them of millions of dollars in equity.[94] Eminent domain is an anticompetitive act, as it prevents people from selling their land within a competitive marketplace—often on discriminatory grounds—but allows a monopsonist to pay an uncompetitive price.[95] According to one study, 90% of the farmland owned by Black families in 1910 was taken by government via eminent domain.[96] A few personal examples: in Georgia, the state displaced a Black community, paying residents 56% of their land's value, to add to the University of Georgia where one of us teaches.[97] The other one of us teaches at a school that owes its prime real estate location in Manhattan to eminent domain and the displacement of a Latine community—known as San Juan Hill—that once thrived.[98] The area now houses both Fordham Law School and Lincoln Center.[99]

Add to this that states *themselves* may monopolize markets in ways that take advantage of vulnerable minorities. This has occurred in vice markets where states sell lottery tickets by setting prices and excluding competition, achieved by prohibiting the numbers games that Black and Jewish people had

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93. *Cf.* Chris McNary, *Texas Leaders, Educators and Courts Grapple with Segregated Public Schools*, DALL. MORNING NEWS (May 3, 2013), https://www.dallasnews.com/news/education/2013/05/03/texas-leaders-educators-and-courts-grapple-with-segregated-public-schools [https://perma.cc/LH5L-5GLR] (discussing Texas schools, including the Highland Park district, in the shadow of Jim Crow).

94. Audra D.S. Burch, *A New Front in Reparations: Seeking the Return of Lost Family Land*, N.Y. TIMES (June 14, 2023), https://www.nytimes.com/2023/06/08/us/black-americans-family-land-reparations.html [https://perma.cc/2S38-9PKR].

95. Matthew Wills, *Segregation by Eminent Domain*, JSTOR DAILY (June 2, 2023), https://daily.jstor.org/segregation-by-eminent-domain [https://perma.cc/362F-TMCY] (examining the discriminatory history of eminent domain).

96. *See* Burch, *supra* note 94 ("Black families lost millions in wealth when their lands were seized through eminent domain.").

97. *Id.*

98. *See* Keith Williams, *How Lincoln Center Was Built (It Wasn't Pretty)*, N.Y. TIMES (Dec. 21, 2017), https://www.nytimes.com/2017/12/21/nyregion/how-lincoln-center-was-built-it-wasnt-pretty.html [https://perma.cc/U7QV-3DJV] (discussing the displacement of San Juan Hill residents).

99. *Id.*

historically run.[100] Not only do states monopolize lotteries to pay below-market winnings, but they also target vulnerable populations by timing lottery ads around welfare and social security payments.[101] In addition, it is common for states to outsource carceral markets on an exclusive basis, allowing private firms to charge monopoly prices for phone calls, commissary goods, and even debit cards used to return an inmate's money.[102] At the same time, monopsony power allows a state to extract labor from inmates for pennies.[103] Especially problematic, courts, agencies,

100. *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) (discussing the establishment of state lotteries targeting participants in prohibited numbers games).

101. *See, e.g.*, Arthur C. Brooks, *Powerbull: The Lottery Loves Poverty*, WALL ST. J. (Aug. 27, 2017), https://www.wsj.com/articles/powerbull-the-lottery-loves-poverty-1503868287 [https://perma.cc/XLB9-3Z4V] ("Scholars have dug up evidence that states intentionally direct such [lottery] ads at vulnerable citizens."); Steve Tripoli, *Lotteries Take in Billions, Often Attract the Poor*, NPR (July 16, 2014), https://www.npr.org/2014/07/16/332015825/lotteries-take-in-billions-often-attract-the-poor [https://perma.cc/ZSY6-VPSP] (noting that there is a correlation between poverty rates and lottery play).

102. *See* 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/QFV8-TMH8] (describing Global Tel Link's monopoly over prison telecommunications—amounting to "over three-quarters of the U.S. prison population"—and its profiteering from content accessed via tablets that impose hefty by-the-minute fees for prisoners to "text, stream music, play games, make video calls, and read books, among other things"); Michael Lieberman, *The Cost of Reading in Prison: In West Virginia It's 5 Cents a Minute*, BOOK PATROL (Feb. 5, 2020), https://www.bookpatrol.net/the-cost-of-reading-in-prision-in-west-virginia-its-5-cents-a-minute [https://perma.cc/YWS9-FFGQ] (discussing the per-minute charge system for books imposed by a contract involving the West Virginia Division of Corrections and Rehabilitation); 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/6N3U-T6YP] (examining private firms' collusion with and lobbying of governments to "capitalize on a captive market," including through prison telecommunications, healthcare, and commissary goods); Stephen Raher, *Insufficient Funds: How Prison and Jail "Release Cards" Perpetuate the Cycle of Poverty*, PRISON POL'Y INITIATIVE (May 3, 2022), https://www.prisonpolicy.org/blog/2022/05/03/releasecards [https://perma.cc/MEH6-75BB] (analyzing the "fee-laden prepaid debit cards" provided to newly released individuals by correctional facilities).

103. *See* Mercer, *supra* note 16 ("Unlike other workers, though, the incarcerated have little say, if any, in what jobs they do. They face punishment if they refuse to work and are paid pennies per hour—if that.").

and observers have exposed a "cesspool of unconstitutional and inhuman acts and conditions"[104] when states allow private firms on a monopoly basis to incarcerate people—for a cut of the monopoly profits.[105]

States have also responded to lobbying efforts by enacting laws to suppress competition among critical service providers, such as reducing the number of hospitals in a region to a monopoly or oligopoly.[106] And as hospitals shutter and competition diminishes, low-income persons have not only paid disproportionally higher prices but also foregone visiting the doctor, further contributing to health disparities.[107] For example, the "certificate of need" (CON) is a condition imposed by states to squelch competition among healthcare providers to the detriment of vulnerable people.[108] A Kentucky CON requires nursing homes to show that a threshold number of people need the service to

104. Madison Pauly, *A Brief History of America's Private Prison Industry*, MOTHER JONES (July–Aug. 2016), https://www.motherjones.com/politics/2016/06/history-of-americas-private-prison-industry-timeline [https://perma.cc/5TWD-FKPH]; *see also* OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., REVIEW OF THE FEDERAL BUREAU OF PRISONS' MONITORING OF CONTRACT PRISONS, at i (2016) (noting the Department of Justice's finding that private prisons "incurred more safety and security incidents per capita" than prisons run by the government).

105. *See* Jaafari, *supra* note 15 (mentioning that Pennsylvania counties receive as much as forty-six cents per dollar).

106. *See* Press Release, Fed. Trade Comm'n, FTC to Study the Impact of COPAs (Oct. 21, 2019), https://www.ftc.gov/news-events/news/press-releases/2019/10/ftc-study-impact-copas [https://perma.cc/77M5-SEC8] (announcing the Federal Trade Commission's scrutiny of certificates of public advantage "adopted by state governments . . . to displace competition among healthcare providers"); David R. Garcia & Joseph Antel, *Sixth Circuit Questions Efficacy of State 'Certificate of Need' Laws, Question Whether Reduces Competition*, NAT'L L. REV.: ANTITRUST L. BLOG (Mar. 7, 2022), https://www.natlawreview.com/article/sixth-circuit-questions-efficacy-state-certificate-need-laws-question-whether [https://perma.cc/DH86-RASW] (discussing a practice of states to create a hospital monopoly by issuing "certificates of need").

107. *See* Theodosia Stavroulaki, *The Healing Power of Antitrust*, 119 NW. U. L. REV. (forthcoming 2025) (manuscript at 3) (on file with Minnesota Law Review) ("For people of color, life in rural America is even harder. Racial and ethnic minorities in rural areas are less likely to receive primary care due to the prohibitive cost, and they are more likely to die from a severe health condition, such as diabetes or heart disease." (footnote omitted)).

108. *See* Garcia & Antel, *supra* note 106 (highlighting the anticompetitive effects of CONs on healthcare markets).

receive a license.[109] The effect is that Kentucky can block facilities aimed at insular communities—such as Nepalese people—from entering the market.[110]

All of this contributes to economic inequality.[111] So, if states can wield their monopoly power in a way that inflicts greater burdens on a vulnerable community, shouldn't antitrust intervene? And when government is the source of anticompetitive conduct, doesn't it seem appropriate for antitrust to redress this harm? The next Part discusses a judge-made doctrine that excludes states from antitrust scrutiny and its implication for constitutional federalism and economic equality.

II. ANTITRUST LAW AND STATE-SPONSORED DISCRIMINATION

Faced with the prevalence of state-sponsored discrimination, courts initially wrestled with whether antitrust should apply to states or, alternatively, whether government may freely impede competition. It's notable that the Sherman Act's text is only a few lines long and lacks express language about its application to government.[112] This silence enabled the Supreme Court to establish state action immunity in 1943—over fifty years after the Act's passage—claiming that immunity stemmed from core issues of constitutional power sharing; the logic was that states must wield sovereign authority to regulate local markets and

109. *See* Sarah Ladd, *What to Know About the Certificate of Need Debate in Kentucky*, KY. LANTERN (Jan. 22, 2024), https://kentuckylantern.com/2024/01/22/what-to-know-about-the-certificate-of-need-debate-in-kentucky [https://perma.cc/AE5Z-D738] (explaining the need-based certification process of a Kentucky CON).

110. *See* Marianne Proctor & Jaimie Cavanaugh, *Certificate of Need Laws Create Medical Monopolies and Hurt Kentucky's Most Vulnerable*, COURIER J. (Jan. 11, 2024), https://www.courier-journal.com/story/opinion/2024/01/11/health-care-businesses-certificate-of-need-government-permission/72173864007 [https://perma.cc/7DJD-2EDA] ("CON laws are about money. They limit competition for established providers, clearing the field for health care monopolies. . . . CON laws are bad for vulnerable populations everywhere. Nepali-speaking refugees in Louisville suffer when the state limits health care access, and so do rural Kentucky families.").

111. *See* MANNING MARABLE, HOW CAPITALISM UNDERDEVELOPED BLACK AMERICA 1 (2d ed. 2000) ("The most striking fact about American economic history and politics is the brutal and systemic underdevelopment of Black people.").

112. Sherman Act, 15 U.S.C. §§ 1–7 (originally enacted as Act of July 2, 1890, ch. 657, 26 Stat. 209).

thus suppress some competition.[113] While state monopolies have disparately harmed or even targeted marginalized persons—as Part I explained—the Supreme Court never expressly considered this dynamic. It instead assumed that states face few incentives to price-gouge and, if people are aggrieved, the ballot box offers a remedy. This Part discusses the federalism events that led to the Supreme Court's decision in *Parker v. Brown*, immunizing states from antitrust scrutiny, and exposes the flaws in the Court's reasoning.

The Sherman Act is notoriously brief. Part of this is because, when debating the Sherman Act, Congress struggled to define which acts, trusts, and monopolies should be prohibited.[114] They settled on a broadly worded statute meant to give courts enough power to define antitrust's purview: Section 1 condemns "every" restraint of trade while Section 2 bans the monopolization of "any" part of the market.[115] Since the Act's broadness could seemingly prohibit most types of contracts and practices, the statute's drafters suggested that the common law and other sources should inform antitrust's scope.[116]

Significantly, the Act's text doesn't expressly exempt state monopolies.[117] Hardly a *de minimis* issue, whether or when a state may restrict competition raises salient, longstanding

113. *See* Parker v. Brown, 317 U.S. 341, 351 (1943) ("In a dual system of government in which, under the Constitution, the states are sovereign . . . an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress. 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.").

114. *See* Am. Steel Erectors, Inc. v. Loc. Union No. 7, 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))).

115. 15 U.S.C. §§ 1–2; *see also* Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters, 459 U.S. 519, 531 (1983) ("The repeated references to the common law in the debates that preceded 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.").

116. Gregory Day, *State Power and Anticompetitive Conduct*, 75 FLA. L. REV. 637, 642 (2023) ("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.").

117. *See* 15 U.S.C. §§ 1–2.

issues about how the Constitution divides power between state and federal bodies. After all, states have traditionally restricted competition in local markets, yet Article I of the Constitution vests Congress with commerce power.[118] Faced with this tension, the Supreme Court has repeatedly been called upon to decide the Act's reach via state monopolies and, in the process, reassess the nature of American federalism.

The issue was raised soon after Congress enacted the Sherman Act in 1890, surfacing fears that antitrust would overly expand federal power to meddle in state affairs. The Supreme Court responded by ruling in *United States v. E.C. Knight Co.* that the act of manufacturing doesn't qualify as interstate commerce and thus federal antitrust law cannot regulate it; in adopting such a narrow view, the Supreme Court sought to protect state power to govern local markets.[119] In 1942, though, the Court retreated somewhat when it decided *Wickard v. Filburn*.[120] *Wickard* held that Congress can regulate any act *affecting* commerce, even if it's neither commerce nor interstate.[121] The Court then imported *Wickard*'s vision of commerce into antitrust law to *de facto* overrule *E.C. Knight*.[122] For antitrust, the implication was that *Wickard* restored the power of federal actors to review anticompetitive acts occurring entirely within a state—even perhaps if the perpetrator is a state—and seemingly usurped much of the states' authority to regulate their own

118. *See, e.g.*, Nicholas Mancall-Bitel, *State Owned Liquor Stores, Explained*, THRILLIST (Apr. 26, 2018), https://www.thrillist.com/culture/state-owned-liquor-stores [https://perma.cc/2SZ7-7SQG] (examining state control of liquor sales); Vaz, *supra* note 100, at 71–73 (chronicling state control of gambling via state lotteries).

119. United States v. E.C. Knight Co., 156 U.S. 1, 12, 16 (1895); 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*, 156 U.S. at 17–18)).

120. 317 U.S. 111 (1942).

121. *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 . . . .").

122. Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 230 (1948) (referring to *Wickard* in the Court's discussion of the development of antitrust law).

markets.[123] The federal government again had the ability to regulate intrastate anticompetitive acts against states. This ability, however, did not last.

Given *Wickard's* impact on federalism, an important bargain was struck in the form of *Parker* immunity. In California, producers of raisins sought in a "blatantly anticompetitive scheme" to reduce their output and raise prices.[124] In early 1942 during the first stages of *Parker*'s litigation, the parties ignored antitrust since *E.C. Knight* suggested that manufacturing and production lay beyond the Sherman Act's scope.[125] But when *Wickard* was decided at the end of 1942, the Supreme Court asked for a supplemental briefing about antitrust's potential role.[126] To the plaintiffs, whether a state had initiated an anticompetitive act was irrelevant since "[t]here is no immunity for state officers who violate a federal law."[127] However, the Supreme Court ruled that this scheme, which the raisin producers set in motion, existed beyond antitrust's bounds; key was that California's *legislature* implemented the price and output

123. *See* Day, *supra* note 116, at 660 ("[T]he Supreme Court in *Mandeville Farms* enlarged antitrust's definition of commerce to resemble *Wickard*. 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." (footnote omitted)).

124. Alexander Volokh, *Antitrust Immunity, State Administrative Law, and the Nature of the State*, 52 ARIZ. ST. L.J. 191, 193 (2020) ("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)).

125. *See* Brief of Appellee at 62, Parker v. Brown, 317 U.S. 341 (1943) (No. 46), 1942 WL 53736, at *62 ("Counsel for the offending corporations strongly urged that the Sherman Act had no application because the acts complained of were not acts of interstate or foreign commerce, nor direct and immediate in their effect on interstate or foreign commerce, but primarily affected manufacturing and not commerce.").

126. Supplemental Brief for Appellee at 1–2, Parker v. Brown, 317 U.S. 341 (1943) (No. 46), 1942 WL 53738, at *1–2 ("During the oral presentation of the above case to the court, it was suggested by members of the court that the Sherman Anti-Trust Law . . . might be applicable and that it would be desirable to have the case argued upon any and all applicable federal laws. Later the court made an order for reargument, to include a due consideration of applicable federal laws.").

127. *Id.* at 24.

controls.[128] Even though Congress could enact a law to nullify California's system, as the Court remarked, the Sherman Act's legislative history and text lack express language to trump a state's sovereignty.[129]

Behind the scenes, scholars assert that *Parker* was actually meant to vest states with a measure of control over local commerce.[130] Since *Wickard* empowered Congress to regulate almost all business activities occurring within a state, the ruling seemed to usurp a state's authority to govern their own markets. *Parker's* bargain was that the United States may scrutinize the anticompetitive activities of private actors occurring entirely within a state, but states themselves would be insulated from antitrust review; this balancing act would allow states to regulate their own markets via suppressing some competition while permitting federal actors to pursue private monopolists.[131]

Since *Parker*, the Supreme Court has offered a few justifications for why states—and oftentimes, towns, agencies, and private companies acting on a state's behalf—should enjoy antitrust immunity.[132] One is that states encounter fewer incentives

128. *Parker*, 317 U.S. at 352 ("Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy.").

129. *Id.* at 351 ("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. The Act is applicable to 'persons' including corporations, and it authorizes suits under it by persons and corporations. A state may maintain a suit for damages under it, but the United States may not—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." (citations omitted)).

130. *See, e.g.*, Day, *supra* note 116, at 660–61 (noting the Supreme Court's objective of preserving state sovereignty over internal policies).

131. *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"); *see also* Day, *supra* note 116, at 661 ("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.").

132. In terms of the rules, states are essentially free to restrain trade or monopolize a market. A municipality may do so when following a policy of the state.

to extract monopoly profits than private actors and instead are typically motivated by the public's welfare.[133] A related justification is that abusive state monopolies will be addressed through elections: "'[W]here the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement'. . . . [M]unicipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market."[134] Elections should thus prevent "bad" state monopolies—without antitrust's help—by allowing people to vote leaders out of office.[135]

While the Supreme Court insisted that states would primarily restrain trade for the public's good due to elections, this justification assumes that political processes can or will redress harms imposed on vulnerable persons.[136] Elections are of course majoritarian by definition, leaving racial minorities in particular without recourse when a state monopoly discriminates.[137] Making *Parker* immunity even more totalizing, some targets of a state's anticompetitive acts such as undocumented immigrants and incarcerated persons lack any ability to vote.[138] The case of

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Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980); *see also* N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n, 574 U.S. 494, 507–08 (2015) (observing that municipalities must comply with a state's policy but are not held to the same standard of supervision as private actors). And a private actor receives immunity when the anticompetitive conduct follows a state's policy and receives some supervision of the state. *N.C. State Bd. of Dental Exam'rs*, 574 U.S. at 503–04.

133. *See N.C. State Bd. of Dental Exam'rs*, 574 U.S. at 508 (asserting that towns and municipalities are "electorally accountable and lack the kind of private incentives characteristic of active participants in the market" (citing Town of Hallie v. City of Eau Claire, 471 U.S. 34, 45 n.9 (1985))). For a critique of this view, see generally Steven Semeraro, *Demystifying Antitrust State Action Doctrine*, 24 HARV. J.L. & PUB. POL'Y 203 (2000).

134. *See N.C. State Bd. of Dental Exam'rs*, 574 U.S. at 508 (quoting *Hallie*, 471 U.S. at 47, 45 n.9).

135. *Id.*

136. *See* Day, *supra* note 116, at 665–66 (interrogating the political accountability justification for state antitrust immunity).

137. For more on the majoritarian problem, see generally LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994).

138. *See* Brandon Hasbrouck, *Prisons as Laboratories of Antidemocracy*, 133 YALE L.J. 1966, 1972 (2024) ("[I]ncarcerated persons are typically excluded from voting."); Sean Morales-Doyle, *Noncitizen Voting Isn't Affecting State or Federal Elections — Here's Why*, BRENNAN CTR. FOR JUST. (Apr. 12, 2024), https://

carceral monopolies speaks volumes: courts have dismissed antitrust disputes while acknowledging the state extracted wealth from marginalized people without providing a public benefit.[139]

But a larger flaw in the Court's *Parker* decision is its inconsistency with the common law of competition on which the Sherman Act was based. As we demonstrate next, the common law of antitrust was routinely invoked to prevent monarchs and governments from restraining trade.[140] The longstanding fear was that sovereigns would grant monopolies to powerful allies while subjugating ordinary persons. This anxiety animated much of the Reconstruction Amendments, including the Fourteenth Amendment's Privileges or Immunities Clause, and in turn impacted the Sherman Act. What scholars have missed is that the Sherman Act was influenced by Reconstruction, which sought to dismantle slavery and instantiate racial equality through, among other things, economic autonomy and freedom of labor. Ultimately, we argue that this forgotten history should shape how courts and enforcers understand modern antitrust law, and could even allow antitrust to reclaim some of the Fourteenth Amendment's lost promise. To make this argument, we first explore how Reconstruction informed the Sherman Act.

III. STATE MONOPOLIES, RACE, AND RECONSTRUCTION

As Part I found, state monopoly power is everywhere and generally accepted without question. But this was not always the case. The common law viewed state monopolies—particularly grants of special privileges to favored corporations—with skepticism. But eventually, state monopolism came to be seen as a public good. At least by some. And why this view changed has much to do with race.

This Part uncovers the racial history of state monopolies. It also situates this history against Reconstruction, specifically the Fourteenth Amendment's Privileges or Immunities Clause,

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www.brennancenter.org/our-work/analysis-opinion/noncitizens-are-not-voting-federal-or-state-elections-heres-why [https://perma.cc/ZYX8-UF27] ("It's a federal crime for noncitizens to vote in federal elections. It's also a crime under every state's laws.").

139. *See, e.g.*, Stringham v. Hubbard, No. CIV S-05-0898, 2006 WL 3053079, at *2 (E.D. Cal. Oct. 26, 2006) (explaining a monopoly over prisoners' receipt of packages created by the California Department of Corrections and Rehabilitation).

140. *See infra* Part III.A.

which many of its drafters viewed as barring discriminatory monopolies. Our analysis then turns to the "monopoly" dispute that eviscerated that clause, *The Slaughter-House Cases*. Finally, this Part argues that this history impacted many drafters of America's first antitrust statute. And since the goals of antitrust come into full view against the promises and failures of Reconstruction, the analysis sets the stage for Part IV, which argues that this forgotten history should not only broaden antitrust enforcement—it can also reclaim Reconstruction's promise.

A. FROM TUDOR ENGLAND TO ANTEBELLUM AMERICA: THE LONGSTANDING SKEPTICISM OF STATE GRANTS OF MONOPOLIES

Before Congress enacted an antitrust statute, and even before the Civil War, anticompetitive discrimination *on behalf of states* was thought to violate common law principles. While this legacy may at first seem like little more than a historical curiosity, its impact is with us today. These common law principles were adopted by some abolitionists and informed Congress's design of the Fourteenth Amendment as a way of fostering economic liberty.[141] And when the Supreme Court stripped Reconstruction of its antimonopoly power a few years later,[142] the same common law and principles seemed to influence Congress to enact the Sherman Act.[143] To situate this common law and the racial history of monopolies—and ultimately the Sherman Act—it helps to begin before race, or at least at a time when the concern about statist monopolies was intra-racial rather than inter-racial.

Well before the Civil War—before the British slave trade even began—there was a popular distrust of state monopolies. One could trace this distrust to Tudor England where first Queen Elizabeth and then King James I sold "patents" to private actors as a way of bolstering their allowances.[144] While Queen Elizabeth claimed that issuing patents would benefit the realm,

141. *See infra* Part III.B.2 (discussing the initial economic implications of the Fourteenth Amendment).

142. *See infra* Part III.C (chronicling the effect of *The Slaughter-House Cases*).

143. *See infra* Part IV (detailing the enactment of the Sherman Act against its common-law background).

144. Calabresi & Leibowitz, *supra* note 18, at 989, 994.

it turned out that monopolies increased prices and unemployment.[145] This gave birth to the common law of competition.[146] It produced the initial anti-monopoly cases at the Queen's bench and led Parliament to pass the Statute of Monopolies in 1623, prohibiting many royal grants of monopolies other than monopolies for patents involving novel inventions.[147] An American court summarized the Crown's penchant for oppressively granting monopolies to society's elite, and Parliament's response, this way:

> [T]he king had immemorially exercised a supreme and unlimited control over both the foreign and domestic trade of the nation; and on that foundation rested the whole multitude of exclusive privileges which had been granted to powerful associations or mercenary individuals. This statute abolished all that were deemed unjust or oppressive, and provided an effectual remedy against the recurrence of similar evils, for it left the crown only the naked right to grant to ingenious men the exclusive use of their own inventions . . . .[148]

Significantly, distrust of state-granted monopolies was not limited to England. Outrage against statist monopolies catalyzed the American Revolution. The Boston Tea Party, at bottom, was a revolt against a tea monopoly vested in the East India Company by the Crown.[149] As a colonist described it, "[t]he revenues of mighty kingdoms have centered in their coffers. . . . [The East India Company has,] by the most unparalleled barbarities, extortions *and monopolies*, stripped the miserable inhabitants of their property and reduced whole provinces to indigence and ruin."[150] To Senator Amy Klobuchar, America's split from

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145. *See id.* at 990 ("A royal grant of monopoly privileges meant that subjects suffered a loss of jobs: Some people were shut out of their trades, and consumers were forced to pay higher prices because legal monopolies allowed producers to drive up the price of goods."); Thomas B. Nachbar, *Monopoly, Mercantilism, and the Politics of Regulation*, 91 VA. L. REV. 1313, 1327 (2005) (discussing the negative impact on prices and employment).

146. *See* Day, *supra* note 116, at 667–72 (discussing the events resulting in the common law of competition).

147. *Id.*

148. Thompson v. Haight, 23 F. Cas. 1040, 1043 (C.C.S.D.N.Y. 1826) (No. 13,957) ("[A]buse of the prerogative at length exhausted the patience of the people and awakened a spirit of resistance.").

149. BARRY E. HAWK, MONOPOLY IN AMERICA 82–83 (2022); *see also* John J. Flynn, *Criminal Sanctions Under State and Federal Antitrust Laws*, 45 TEX. L. REV. 1301, 1302–03 (1967) (describing the early history of antimonopolism).

150. WILLIAM MAGNUSON, FOR PROFIT: A HISTORY OF CORPORATIONS 97 (2022) (emphasis added).

England was not only "a political Declaration of Independence from a foreign country but also an act of economic rebellion against monopoly power."[151]

While Independence freed Americans from the Crown, it didn't free Americans from the oppressive use of monopoly power by its own government. After the country was settled, a much-criticized source of monopoly power came from corporate chartering.[152] It was not uncommon for states to selectively issue charters to political allies,[153] sparking complaints about favoritism and inequality.[154] Unlike today's framework, the granting of special privileges was seen, in many instances, as a monopoly.[155]

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151. AMY KLOBUCHAR, ANTITRUST: TAKING ON MONOPOLY POWER FROM THE GILDED AGE TO THE DIGITAL AGE 21 (2022).

152. *See* Henry Hansmann & Mariana Pargendler, *The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption*, 123 YALE L.J. 948, 950–51 (2014) (discussing state-granted corporate charters as a form of monopoly).

153. *See id*. ("In the late eighteenth and early nineteenth century, the main economic evil linked to the corporate form was not managerial or controlling-shareholder opportunism toward small shareholders, but rather Adam Smith's first concern: monopoly. Prior to 1860, most corporate charters were granted by special acts of the state legislature, and as a consequence often had a degree of monopoly power conferred on them."); Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 256–57 (1997) (noting Jeffersonian Republicans' criticism of Federalists for "granting special privileges to business interests").

154. Eric Hilt, *Early American Corporations and the State* ("Critics recoiled at the prospect of granting exclusive legal privileges to those businesses. Corporate charters, which were accessible only to those politically connected enough to persuade the legislature to pass a law on their behalf, were seen as creating powerful enterprises whose dominant positions in their industries were all but permanently established. The legal privileges granted to business corporations sometimes included monopoly franchises, such as the right to build and operate a bridge . . . ."), *in* CORPORATIONS AND AMERICAN DEMOCRACY 37, 41 (Naomi R. Lamoreaux & William J. Novak eds., 2017); *see also* Note, *Congress's Power to Define the Privileges and Immunities of Citizenship*, 128 HARV. L. REV. 1206, 1209–14 (2015) (discussing how, throughout the American colonial and antebellum periods, privileges and immunities were for legislatures to regulate, and how state constitutions limited states' power to grant privileges to corporations, among other entities).

155. The term monopoly changed from all power to charge high prices to something more specific. *See* TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW 44 (2010) ("Originally, the word 'monopoly' referred to businesses that enjoyed legal immunity from competition. But today, the word is often applied simply to large, successful businesses that have no such privileges."); WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN

The distrust of such monopolies was particularly acute with respect to the charters issued within public industries such as for bridges, utilities, and banks, which gave corporations a sovereign power over public services.[156] In other words, these grants of monopolies enabled corporations, akin to governments, to distribute or withhold critical services on a whim, removed from democratic oversight. To help limit the parameters of monopolies, states required charters to list a corporation's purpose—a requirement that remains today.[157] Another limitation adopted from the English common law was the common carrier, which mandated corporations engaged in certain public services to operate in non-exclusionary ways.[158] But even with those limitations, grants of monopolies were still often viewed on par with the Crown issuing royal patents to favored insiders and incompatible with the actions of a legitimate government.[159] It even inspired colonists to seek to ban monopolies in state constitutions[160] as well as in the U.S. Constitution.[161]

AMERICA 64 (1965) ("[A]ll incorporations imply a privilege given to one order of citizens which others do not enjoy, and are so far destructive of that principle of equal liberty which should subsist in every community.").

156. *See* Hilt, *supra* note 154, at 41 (highlighting frustration with monopolies over bridge operation and banking).

157. Hansmann & Pargendler, *supra* note 152, at 987.

158. Phil Nichols, Note, *Redefining "Common Carrier": The FCC's Attempt at Deregulation by Redefinition*, 1987 DUKE L.J. 501, 506–08 (1987); *see also* James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMMC'NS L.J. 225, 251 (2002) ("The English common law imposed special duties on certain professions to serve all who sought service, on just and reasonable terms, and without discrimination.").

159. *See generally* Daniel Crane, *The American Antimonopoly Traditions: Origins, Contradictions, and Transformations*, N.Y.U. J.L. & BUS. (forthcoming 2024) (on file with Minnesota Law Review); SANDEFUR, *supra* note 155, at 23–25 (highlighting how, during the American Revolution, monopolies were viewed as antithetical to the natural "right to earn a living").

160. *See* LETWIN, *supra* note 155, at 59 (noting that the Massachusetts Bay Colony's constitution forbade monopolies except for invention patents); HAWK, *supra* note 149, at 24–33 (providing further examples of colonial opposition to monopolies, most notably in Virginia); Saunders, *supra* note 153, at 258 (noting that Indiana forbade the legislature from granting "to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens").

161. *See* LETWIN, *supra* note 155, at 60. States also proposed amendments to the U.S. Constitution to block federally-granted monopolies, using language along the lines of "that the Congress do not grant monopolies" and "that the Congress erect no company of merchants with exclusive advantages of commerce." *Id.*

In fact, long before an antitrust statute or the ratification of the Reconstruction Amendments, it was assumed that the common law of competition—adopted from England—provided some recourse against monopolies in America. In England, monopolies tended to violate the common law when they stripped a person of their right to earn a living via a lawful trade.[162] While guilds were often allowed to impose anticompetitive regulations within their trades, the original English cases from the sixteenth century were primarily concerned that monopolies impeded labor and thereby caused "idleness," starvation, and poverty.[163] As an English court wrote in 1614, "at the common law, no man could be prohibited from working in any lawful trade."[164] This is where the term a "restraint of trade" derives.[165]

An array of early U.S. judges used this same common law to condemn monopolies, here, invoking the right to work (and this framework, as we'll see shortly, influenced how anti-slavery Senators drafted the Fourteenth Amendment).[166] A nineteenth-century New Jersey court remarked that "[i]t is one of the natural

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162. Thompson v. Haight, 23 F. Cas. 1040, 1043 (C.C.S.D.N.Y. 1826) (No. 13,957) (quoting Lord Coke in remarking that, at English common law, a monopoly "is an institution or allowance by the king, by his grant, commission, or otherwise, to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using of any thing, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade"); *id.* (quoting Hawkins as defining a monopoly as "an allowance by the king, to any person, for the sole making, selling, &c., any thing so that no person be restrained in what he had before, or in using his lawful trade").

163. *See, e.g.*, The Case of Monopolies (1602) 77 Eng. Rep. 1260, 1262–63 (KB).

164. SANDEFUR, *supra* note 155, at 17–18 (quoting The Case of the Tailors of Ipswich (1615) 77 Eng. Rep. 1218, 1219 (KB)); *see also id.* ("As with many of the rights that Americans take for granted today, the right to earn a living without unreasonable interference was won mostly as a result of conflict between English nobles and the Crown . . . . Throughout the 17th and 18th centuries, this right was widely acknowledged by courts, although it was often violated in practice.").

165. *See The Case of Monopolies*, 77 Eng. Rep. at 1264 (ruling that no one may be "restrained from exercising any trade" except by Parliament).

166. *See* Rakestraw v. Lanier, 30 S.E. 735, 737 (Ga. 1898) ("Some question has arisen as to the proper construction of our Code, which declares that 'contracts in general in restraint of trade are void,' and as to whether the proper interpretation of these words would have the effect to declare that contracts in general restraint of trade are void, or that contracts generally in restraint of trade are void." (citation omitted)).

rights of every citizen of this state to use his skill and labor in any useful employment . . . and I think it may be regarded as very certain that the courts will never deprive any one of this right, or even abridge it, except in obedience to the sternest demands of justice."[167] Likewise, the Supreme Court of Ohio ruled in 1851 that Ohio's attempt to grant special privileges to a foundry constituted an illegal monopoly since it benefitted a particular company "*as opposed to the natural right of the citizen*."[168] Plenty of examples exist.[169] Even founding fathers such as Thomas Jefferson and James Madison wrote that individuals enjoyed a "natural right" to select their professions and thus, "the primary evil of monopolies was that they restricted an individual's natural right to earn a living."[170] Alexander Hamilton also assumed state grants of special privileges were inconsistent with the common law right to work: "[M]onopoly implies a legal impediment to the carrying on of the trade by others than those to whom it is granted."[171]

This understanding of the common law was even taken up by abolitionists who argued slavery constituted an illicit monopoly.[172] As Calabresi and Leibowitz note, "Abolitionists argued—quite rightly—that the 'Slave Power' in the South had seized the

167. Mandeville v. Harman, 7 A. 37, 41 (N.J. Ch. 1886).

168. Hall v. State, 20 Ohio 7, 12 (1851) (emphasis added).

169. *See, e.g.*, City of Carrollton v. Bazette, 42 N.E. 837, 841 (Ill. 1896) ("Such an occupation is a natural right, as legitimate as is that of either of these appellants. [sic] And in *Kinsley v. City of Chicago*, 124 Ill. 363, 16 N. E. 260, [the court held] that the license fee should be such fee only as will legitimately assist in . . . regulation . . . ."); *see also* City of Cincinnati v. Bryson, 15 Ohio 625, 651 (1846) (Read, J., dissenting) ("To talk of granting a license to a man for the privilege of pursuing honest labor, is an insult to the age, and belongs to a period of despotic barbarism, and is fit only to be addressed to vassals and salves. Every person, by natural right and under our constitution, has the right to pursue honest labor without permission or license to do so from any source, except from that great and good God who gives him health and strength.").

170. SANDEFUR, *supra* note 155, at 24.

171. Daniel Francis, *Making Sense of Monopolization*, 84 ANTITRUST L.J. 779, 802 (2022).

172. *See* Peter Hughes, Note, *School Choice: The Landscape After* Espinoza v. Montana Department of Revenue *and Contemporary Political Polarization*, 45 U. ARK. LITTLE ROCK L. REV. 145, 167 (2022) ("[T]he Constitution's vitally important Fourteenth Amendment Section One has roots in anti-monopolist thought. Abolitionists and Republicans supported nineteenth-century Jacksonian ideology against 'class legislation, . . . the granting of exclusive privileges,' and government-granted monopolies." (alteration in original) (footnote omitted) (quoting Calabresi & Leibowitz, *supra* note 18, at 1024)).

government and was using it to create an oligarchy that oppressed African-Americans."[173] Senator Charles Sumner, himself an abolitionist, criticized southern states for their belief in the supposed "superiority of the white race, with the pretended right of Caste, Oligarchy, and Monopoly, on account of color."[174]

In short, there was originally plenty of skepticism about state monopoly power, especially grants of privileges that benefited elites at the expense of everyone else—and this view influenced many abolitionists who insisted slavery entailed an illicit monopoly. But then the public attitude towards state monopolies changed dramatically, at least in the South. And one thing that seemed to prompt this change was the end of slavery, which had legalized a type of "racial capitalism."[175] To borrow from the historian Khalil Gibran Muhammad, "In a moment equivalent to a historical blink of the eye, four million people were transformed from property to human beings to would-be citizens of the nation."[176] The "slavery problem [was now] the Negro Problem."[177] What followed was Reconstruction—and in lingering ways, this would shift public sentiment about state monopoly power. The next Section explains that some abolitionists achieved their initial goal of writing anti-monopolism into the new Fourteenth Amendment. But they also generated a pro-monopoly backlash.

B. ANTI-MONOPOLISM FOLLOWING THE CIVIL WAR

The historian Eric Foner has described Reconstruction as "the second founding," one where the United States made its first attempt, "flawed but truly remarkable for its time, to build an egalitarian society on the ashes of slavery."[178] This period—

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173. Calabresi & Leibowitz, *supra* note 18, at 1034–36 ("The famous abolitionist Lysander Spooner is an example of someone who understood this connection. Spooner was both an early opponent of monopolies . . . and one of the most outspoken abolitionists . . . .").

174. CONG. GLOBE, 39th Cong., 1st Sess. 686 (1866) (statement of Sen. Charles Sumner).

175. For more on racial capitalism, see Capers & Day, *supra* note 72, at 555–57.

176. KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 16 (2010).

177. *Id.* at 20.

178. *See* Sania Anwar, *Paradise Lost: Book Review of *The Second Founding* by Eric Foner*, COLUM. L. SCH.: ABOLITION DEMOCRACY 13/13 (Nov. 12, 2020) (quoting ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND

generally understood as lasting between 1865 and 1877, perhaps into the 1880s and beyond[179]—was a period of tugs and pulls, of steps towards equality, and steps to maintain white supremacy. It was a period when General Sherman (Senator John Sherman's brother) conferred with Black leaders in Savannah, Georgia and issued Special Field Order No. 15, setting aside 400,000 acres of formerly confederate land for the newly freed slaves to be allocated per family in forty-acre plots.[180] And it was a period when Lincoln's successor President Johnson overturned General Sherman's order, and in doing so gave the land back to southern planters, the very people who had fought to maintain slavery.[181] It was a time of the Freedmen's Bureau on one hand, opening hospitals and schools and even colleges,[182] and a time of the Ku Klux Klan on the other.[183] After Congress mandated voting rights for Black men in the South, it was a time when two Black men were elected to the Senate, fifteen Black men were elected to the House of Representatives, and over 1,400 Blacks were elected to office at the state and local level.[184] But again it was a time of terror, often in response to the election of Blacks, resulting in the creation of the Department of Justice (DOJ) to rein in white terror,[185] and a Supreme Court's response by reining in the DOJ.[186] And it was a time of the Reconstruction

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RECONSTRUCTION REMADE THE CONSTITUTION, at xix (2019)), https://blogs.law.columbia.edu/abolition1313/sania-anwar-paradise-lost-book-review-of-the-second-founding-by-eric-foner [https://perma.cc/A94J-WTZ8].

179. FONER, *supra* note 178, at xx.

180. MAJOR GENERAL W.T. SHERMAN, SPECIAL FIELD ORDERS NO 15 (1865), https://tile.loc.gov/storage-services/service/gdc/gdccrowd/mss/mss83434/256/256.txt [https://perma.cc/ZC3W-DM79]; *accord* Nadra Kareem Nittle, *The Short-Lived Promise of 40 Acres and a Mule'*, HISTORY (Jan. 3, 2024), https://www.history.com/news/40-acres-mule-promise [https://perma.cc/SV46-MRC2].

181. *See* ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION 78 (2014).

182. *See* Adam Harris, *How Reconstruction Created Public Education*, ATLANTIC (Nov. 13, 2023), https://www.theatlantic.com/magazine/archive/2023/12/reconstruction-education-black-students-public-schools/675816 [https://perma.cc/CHG9-C8TZ].

183. *See generally* ELAINE FRANTZ PARSONS, KU-KLUX: THE BIRTH OF THE KLAN DURING RECONSTRUCTION (2015).

184. ERIC FONER, FREEDOM'S LAWMAKERS: A DIRECTORY OF BLACK OFFICE HOLDERS DURING RECONSTRUCTION, at xiv (1993).

185. *See* Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931, 1957–68 (2008) (describing DOJ's founding during Reconstruction).

186. *See, e.g.*, United States v. Cruikshank, 92 U.S. 542 (1876).

Amendments, providing for citizenship and equal protection, and Black suffrage. In short, it was a time when building a radically more egalitarian America seemed possible, and yet was met with resistance, and more resistance, and more resistance. The Black Codes, which many abolitionists described as a monopoly, are just one example of this resistance.[187] The following Section discusses: (1) the anticompetitive context of Black Codes and other state laws following the Civil War and, (2) how, in response, anti-monopolism played a key role in the framing of Reconstruction.

1. Black Codes and Anticompetitive Discrimination in Post-Civil War America

Reconstruction was America's first attempt to create an egalitarian society, but it was also a period that created a shift in how state monopoly power was viewed—especially in the South. Consider again the end of slavery. Suddenly, four million people who had been subject to centuries of a wage-fixing cartel that paid them nothing "leapt at the chance to control their own labor and to build their own financial security."[188] Whereas before, Southern states had barred even free Blacks from various professions—in South Carolina, they could not work as clerks; in Maryland, they could not sell "wheat, corn or tobacco without a state license"; in Georgia, they could not even own property[189]—now, freed Blacks in theory could start their own farms and businesses. And these farms and businesses were viewed as threats. As Darren Hutchinson observes, "[m]uch of the violence during Reconstruction related to economic competition between freed Blacks and southern Whites."[190] Southern states responded by flexing their monopoly power to restrain competition and economic autonomy.[191]

Nowhere was this more evident than in the Black Codes. The South owed its very economy to slave labor, and now with Emancipation, their ability to compel that labor without

187. *See, e.g.*, Calabresi & Leibowitz, *supra* note 18, at 1034–36 (outlining the response of prominent abolitionists to the Black Codes).

188. Students for Fair Admissions, Inc. v. President of Harvard Coll., 143 S. Ct. 2141, 2265 (2023) (Jackson, J., dissenting).

189. MANNING MARABLE, RACE, REFORM, AND REBELLION: SECOND RECONSTRUCTION AND BEYOND IN BLACK AMERICA, 1945–2006, at 4 (3d ed. 2007).

190. Hutchinson, *supra* note 76, at 385.

191. *See infra* notes 210–21 and accompanying text.

payment—a type of price fixing at zero—was over.[192] Many white Southerners were convinced that coerced labor and racial subordination were essential to restoring the South and their place in it. To this end, Southern states immediately began passing laws that came to be known as Black Codes. As Justice Miller would later observe, "[a]mong the first acts of legislation adopted by several of the States in the legislative bodies . . . were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value."[193] Although the Codes granted some rights to Blacks, these rights were secondary to their real goal: "stabiliz[ing] the black work force and limit[ing] its economic options."[194] As Darren Hutchinson writes about the social and economic goals of Black Codes:

> Some provisions in Black Codes explicitly discriminated against Blacks by restricting where they could live, denying them the right to own property, subjecting them to exploitative contractual relations, not permitting them to sue on any matter . . . . Other provisions were facially neutral, but they were still effective instruments of racial domination. For example, Blacks were often sentenced to hard labor for crimes, including minor offenses, like failing to honor debts or perform contracts and lacking employment.[195]

Notice that Black Codes fit the traditional definition of a trade restraint, which would later influence the Sherman Act. Mississippi's Black Codes required all adult Blacks to carry written evidence of employment.[196] Moreover, breaking an employment contract would result not only in forfeiture of already earned wages, but criminal prosecution.[197] South Carolina's Black Codes imposed an exorbitant tax on any Black person who sought work outside of farm work or as a servant, forcing former

192. Miller, *supra* note 21, at 1024 ("Racial discrimination is a form of cartel behavior. Groups, knitted together by ties of kinship, race, culture, or custom—and holding levers of power desired by other groups—agree formally or informally to minimize competition by these other groups." (footnote omitted)).

193. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 70 (1873).

194. FONER, *supra* note 181, at 93.

195. Hutchinson, *supra* note 76, at 383.

196. FONER, *supra* note 181, at 93.

197. *See, e.g.*, Bailey v. Alabama, 219 U.S. 219 (1911) (providing an example of a case where a Black worker was prosecuted for failing to perform an employment contract).

slaves into the former slave economy.[198] Black Codes even authorized "the 'apprenticing' of minors who were orphans, who were born out of wedlock, or whose parents could no longer care for them."[199]

As Risa Goluboff has documented, Southern states also "turned . . . aggressively to vagrancy laws as racial regulation" and as a type of Black Code.[200] Even when vagrancy laws were race-neutral, their understood target was Black persons.[201] Among other things, vagrancy laws were a way "to keep African Americans in economic place—to thwart efforts to move out of back-breaking and poorly paid agricultural work."[202] Again, a restraint of trade in the traditional sense. W.E.B. DuBois put it this way:

> Negroes were liable to a slave trade under the guise of vagrancy and apprenticeship laws; to make the best labor contracts, Negroes must leave the old plantations and seek better terms; but if caught wandering in search of work, and thus unemployed and without a home, this was vagrancy, and the victim could be whipped and sold into [de facto] slavery.[203]

Though hardly remarked upon, these Codes shifted how at least white Southerners understood state monopoly power. Instead of viewing state monopoly power with skepticism, state monopoly power became a way of protecting white interests. This is not to say that Reconstructionists stood idle. Congress responded to this blatant use of discriminatory monopoly power by, among other things, passing the Fourteenth Amendment.[204] Specifically, the Republicans hoped the Privilege or Immunities Clause would rein in discriminatory state monopolies, backed by the common law of competition.[205]

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198. FONER, *supra* note 181, at 93.

199. Hutchinson, *supra* note 76, at 384.

200. RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S, at 116 (2016).

201. *Id.* ("[T]he whites who enforced [vagrancy laws] knew they were aimed at African Americans.").

202. *Id.*

203. W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 1860-1880, at 167 (First Free Press 1998) (1935).

204. *See infra* Part III.B.2.

205. *See infra* Part III.B.2.

2. Anti-Monopolism Enters the Reconstruction Process

In many respects, the Fourteenth Amendment's Privileges or Immunities Clause was the Republican response to the Black Codes, which were likened to restraints of labor.[206] Again, Reconstruction was about tugs and pulls, steps forwards and steps backwards, and then steps forwards again. The hope was that the Fourteenth Amendment could represent a giant step forward. Part of this was to usher in citizenship and a guarantee of civil rights. And civil rights meant economic rights—"the Fourteenth Amendment was economic by design."[207] Herbert Hovenkamp describes the saliency of economic freedom this way: "The freedmen did not need the freedoms of speech or religion or even the fair administration of the criminal process so much as they needed jobs and security."[208] And the Republicans hoped to protect these economic rights in part through the Fourteenth Amendment's new Privileges or Immunities Clause, called "Privileges *or* Immunities" to avoid confusion with Article IV's "Privileges *and* Immunities" clause. To make sure that everyone would benefit—since states had refused to grant citizenship to Black persons in order to withhold Privileges *and* Immunities—Section 1 of the Amendment provided that persons born in the United States were now "citizens of the United States and the State wherein they reside."[209] And the new Privileges or

206. *See, e.g.*, Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 4–5 (2011) ("[T]he text of the Fourteenth Amendment was meant, as an original matter, to forbid class-based legislation and any law that creates a system of caste. The Black Codes, enacted by the Southern States in 1865 in an attempt to relegate the freed slaves to second-class citizenship, created the paradigmatic example of such a caste system or system of class legislation. Congress legislated to overturn the Black Codes when it adopted the Civil Rights Act of 1866." (footnote omitted)).

207. HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836–1937, at 94 (1991); *see also* James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257, 289 (1989) ("Republican congressmen next focused not on such 'political' or 'social' issues as voting or segregation, but on basic economic 'civil rights,' which they firmly believed to be more fundamental.").

208. HOVENKAMP, *supra* note 207, at 94.

209. *See* Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61, 105–06 (2011) ("In this context, the antislavery demands for the privileges and immunities of citizens of the United States concerned not *what* was protected by the Comity Clause but *who* was protected. To resolve this question, antislavery Americans interpreted the Comity Clause to protect citizens of the United

Immunities Clause prohibited states from *internally* denying its citizens of certain rights.[210] This was thought to vest the United States with the ability to enforce the Clause against states.[211] In many ways, the hope was that the Clause would be able to do some of the work to guarantee freedmen economic autonomy *and* cabin discriminatory state monopolies like the Black Codes.[212]

The speeches and writings of Reconstruction's advocates help paint a picture of the anti-monopoly ambitions for the Clause as well as for the rest of the Fourteenth Amendment.[213] From the floor of Congress Senator Sumner stumped for the Fourteenth Amendment by asserting that Privileges or Immunities would bar "Oligarchy, Aristocracy, Caste, *or Monopoly* invested with peculiar privileges and powers . . . but all persons

States, including free blacks. Giving support to this interpretation of the Comity Clause, the Fourteenth Amendment later would define who was a citizen of the United States and would bar states from abridging the privileges or immunities of citizens of the United States.").

210. *See* Kurt Lash, Slaughterhouse *and the Privileges or Immunities Clause*, LAW PRAWFSBLAWG (Sept. 12, 2009), https://prawfsblawg.blogs.com/prawfsblawg/2009/09/slaughterhouse-and-the-privileges-or-immunities-clause.html [https://perma.cc/SYV5-5RZL] ("Historical accounts of the Privileges or Immunities Clause of the Fourteenth Amendment generally assume that the author of the text, John Bingham, based the Clause on Article IV of the original Constitution. This view assumes that Bingham and the other Republican members of the Thirty-Ninth Congress embraced Justice Bushrod Washington's opinion in Corfield v. Coryell as the authoritative statement on the meaning of Article IV."); *see also* Hamburger, *supra* note 209, at 112 ("The citizens of each State, all the citizens of each State, being citizens of the United States, shall be entitled to 'all privileges and immunities of citizens in the several States.' Not to the rights and immunities of the several States; not to those constitutional rights and immunities which result exclusively from State authority or State legislation; but to 'all privileges and immunities' of citizens of the United States in the several States." (quoting CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859) (statement of Rep. John Bingham))).

211. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 998 (1995) ("Senator John Sherman of Ohio, who had been a leading supporter of the Fourteenth Amendment, provided a similar constitutional analysis, likewise relying on Congress's power to enforce the Privileges or Immunities clause.").

212. *See generally id.*

213. *See* Miller, *supra* note 21, at 1029 ("At its most insidious, private discrimination manifested itself in collective behavior that later Congresses would come to call 'anticompetitive,' 'monopolistic,' or 'cartel.'").

therein shall be equal before the law."[214] He elaborated about why state monopolies constituted an invalid act of government:

> [We] must declare that a State . . . which lodges power exclusively with an Oligarchy, Aristocracy, Caste or Monopoly, cannot be recognized as a "Republican government" . . . a country which sets its face against all monopolies as unequal and immoral. *If any monopoly deserves unhesitating judgment, it must be that which absorbs the rights of others* . . . .[215]

One of the amendment's leading proponents, Senator John Sherman—who later spearheaded the first antitrust law—added that the Privileges or Immunities Clause would ensure the rights of all citizens, including the unenumerated civil rights derived from the common law that discriminatory state monopolies abridged.[216]

Significantly, Privileges or Immunities was often thought to codify the common law right to earn a living via a lawful trade—perhaps the foremost economic right adopted from England—which the state grant of a discriminatory monopoly threatened.[217] The Amendment's author, John Bingham, emphasized

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214. CONG. GLOBE, 39th Cong., 1st Sess. 674 (statement of Sen. Charles Sumner) (emphasis added).

215. *Id.* at 675–76 (emphasis added).

216. *See* Timothy Sandefur, *Privileges, Immunities, and Substantive Due Process*, 5 N.Y.U. J.L. & LIBERTY 115, 144 n.163 (2010) ("Senator John Sherman, for example, explained that the Privileges or Immunities Clause would protect the 'privileges, immunities, and rights (because I do not distinguish between them, and cannot do it,) of citizens of the United States, such as are recognized by the common law, such as are ingrafted in the great charters of England, some of them ingrafted in the Constitution of the United States, some of them in the constitutions of the different States, and some of them in the Declaration of Independence.' Courts applying the clause would 'look first at the Constitution,' and '[i]f that does not define the right they will look for the unenumerated powers [sic] to the Declaration of American Independence, to every scrap of American history, to the history of England, to the common law of England . . . . There they will find the fountain and reservoir of the rights of American as well as of English citizens.'" (alteration in original) (quoting CONG. GLOBE, 42d Cong., 2d Sess. 844 (1872))); *see also* Cristopher R. Green, *Incorporation, Total Incorporation, and Nothing but Incorporation?*, 24 WM. & MARY BILL RTS. J. 93, 130–31 (2015) (listing Republicans who interpreted the Privileges or Immunities Clause as a basis for the Civil Rights Act of 1875).

217. *See, e.g.*, Ilan Wurman, *Reconstructing Reconstruction-Era Rights*, 109 VA. L. REV. 885, 902 (2023) ("Most antebellum courts drew the line between civil and political rights. In 1797, the Maryland General Court 'agreed' that Article IV does not extend to 'the right of election, the right of holding offices, the right of being elected,' but only to personal rights, like the right to acquire property." (quoting Campbell v. Morris, 3 H. & McH. 535, 553–54 (Md. 1797))).

that one goal of the Clause was freedom from restraints of trade, as the phrase was understood at the common law, in terms of "the right to work in an honest calling and contribute by your toil in some sort to the support of your fellowmen and to be secure in the enjoyment of the fruits of your toil."[218] Even President Andrew Johnson noted during Reconstruction that "Slavery was essentially a monopoly of labor, and as such locked the states where it prevailed against the incoming of free industry . . . . Here there is no room for favored classes or monopolies; the principle of our government is that of equal laws and freedom of industry."[219] Similar sentiments were expressed by those who cared little about Black equality per se; for them, racial monopolies simply violated their free market ideals.[220]

Not only did monopolies infringe on one's common law right to practice a trade but, importantly, they did so on discriminatory grounds. Some senators maintained that monopolies created a type of "caste" discrimination, which Reconstruction

218. Patel v. Tex. Dep't of Licensing & Regul., 469 S.W.3d 69, 98 n.40 (Tex. 2015) (quoting CONG. GLOBE, 42d Cong., 1st Sess., 86 app. (1871)) ("Slaughter–House involved special-interest favoritism masquerading as a public-health measure, a law granting a private corporation an exclusive benefit at the expense of hundreds of local butchers. A few years earlier, when the Fourteenth Amendment was adopted to counter the Black Codes and other oppressive state laws, the amendment's author, antislavery Representative John Bingham, confirmed the liberties it protected included 'the right to work in an honest calling and contribute by your toil in some sort to the support of your fellowmen and to be secure in the enjoyment of the fruits of your toil.'" (quoting CONG. GLOBE, 42d Cong., 1st Sess., 86 app. (1871))); *see also* Calabresi & Leibowitz, *supra* note 18, at 1041–42 (reviewing the speeches of Rep. Bingham to conclude that "grants of monopoly would certainly be prohibited under Section 1 unless they were somehow just laws enacted for the general good of the whole people. The original public meaning of the words of Section 1 of the Fourteenth Amendment in 1868 would have been understood to be a ban on caste, monopoly, and on systems of class legislation").

219. Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude, and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207, 215 n.35 (1992).

220. Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195, 211 (2014) ("Their open-market principles developed from the democratic and antislavery legacy of the earlier nineteenth century: Jacksonian attacks on monopolies and other forms of legally enshrined economic privilege, the Republican and Abolitionist war on slavery, and the Fourteenth Amendment's promise of equal citizenship for all Americans.").

sought to ban.[221] Sen. Lyman Trumbull insisted that Privileges or Immunities would shield economic rights against discrimination,[222] noting that "Monopolies, perpetuities, and class legislation are contrary to the genius of free government, and ought not to be allowed. Here there is no room for favored classes or monopolies; the principle of our Government is that of equal laws and freedom of industry."[223] Rep. Norton Townshend argued in favor of the Fourteenth Amendment by citing tenets of equality taken from the common law of competition: "Democracy is opposed to caste, slavery creates it; Democracy is opposed to special privileges; slavery is but the privilege specially enjoyed by one class—to use another as brute beasts and take their labor without wages."[224] Since monopolies were often understood at the time as grants of special rights, monopolies by definition tended to offend the equality goals of the Privileges or Immunities Clause. As Professor Evan Zoldan points out:

> [T]he grant of monopoly rights to particular companies was criticized for according favored status to some at the expense of other, less favored, members of the population. Similarly, the Black Codes, which laid legal and social disadvantages on former slaves, were criticized because they subordinated black people as a class to white people as a class.[225]

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221. Miller, *supra* note 21, at 1031 (providing examples of the anticompetitive nature of racial discrimination in the post-Civil War era); *id.* ("Whites would not sign contracts to permit blacks to work. In one telling instance, a Freedmen's Bureau official reported that a local ordinance required a bond for $500 before a person could work as a drayman, but that 'the white citizens refuse[d] to sign any bonds for the freedmen.'" (alteration in original) (quoting CARL SCHURZ, REPORT ON THE CONDITION OF THE SOUTH, S. EXEC. DOC. NO. 39-2 (1865), *reprinted in* 1 CARL SCHURZ, SPEECHES, CORRESPONDENCE AND POLITICAL PAPERS OF CARL SCHURZ 279, 327 (Frederic Bancroft Ed., 1913)).

222. Randy E. Barnett & Evan D. Bernick, *The Privileges or Immunities Clause, Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 NOTRE DAME L. REV. 499, 583 n.481 (2019) ("'[T]he right to enforce contracts; the right to convey his property; the right to buy property' and other 'common law right[s], regarded as a right appertaining to the individual as a citizen.'" (quoting CONG. GLOBE, 42d Cong., 2d Sess. 3191 (1872) (statement of Sen. Lyman Trumbull))).

223. Thomas H. Burrell, *Justice Stephen Field's Expansion of the Fourteenth Amendment: From the Safeguards of Federalism to A State of Judicial Hegemony*, 43 GONZ. L. REV. 77, 105 n.146 (2007) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 322-23 (1866) (statement of Sen. Lyman Trumbull)).

224. Calabresi & Leibowitz, *supra* note 18, at 1034–35.

225. Evan C. Zoldan, *The Equal Protection Component of Legislative Generality*, 51 U. RICH. L. REV. 489, 507–08 (2017) ("Class legislation was criticized

Moreover, the Civil Rights Act of 1866—which would become the basis for the Fourteenth Amendment[226]—originally demanded that "there shall be no Oligarchy, Aristocracy, Caste, or Monopoly invested with peculiar privileges and powers . . . but all persons therein shall be equal before the law."[227] To Senator Sherman, who advocated for the Civil Rights Act and the Fourteenth Amendment, *economic* equality was the goal in that everyone "should have equal rights before the law; that is all there is to it . . . to make contracts, to sue and be sued, to contract and be contracted with."[228] The equal right to work advanced the Fourteenth Amendment's economic purpose.[229]

Note that anti-monopolism animated the rest of the Reconstruction Amendments as well. For example, many thought that the Equal Protection Clause would prohibit discriminatory

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in the years leading up to, and after, the Civil War for creating classes of citizens that bear burdens, or receive benefits, because of their membership in a group."); *see also* Ilan Wurman, *Constitutional Laboratories: Some Reflections on COVID-19 Litigation in Arizona*, 15 N.Y.U. J.L. & LIBERTY 792, 817–18 (2022) ("[T]he discriminations in the Black Codes . . . sought to prevent certain citizens from exercising the very same right that other citizens were allowed to exercise. *A monopoly* is also a classic example of discrimination: it is a grant of exclusive privileges to one set of persons, and there are no regulations to which those excluded can conform in order to participate." (emphasis added)).

226. SANDEFUR, *supra* note 155, at 40 ("Republicans therefore drafted the Civil Rights Act of 1866 . . . . When the constitutionality of the act was called into question, the Republicans responded by preparing the Fourteenth Amendment."); Hamburger, *supra* note 209, at 123 ("It is well-known that the Fourteenth Amendment's clauses on equal protection and due process gave constitutional force to positions Congress had earlier taken in the Civil Rights Act. This statute had secured equality in various natural rights and the due process enjoyed under law. Echoing the statute, the Fourteenth Amendment guaranteed equal protection of the laws and due process, and in both ways it also established a foundation for enforcement legislation such as the Civil Rights Act.").

227. Calabresi & Leibowitz, *supra* note 18, at 1036 (citing CONG. GLOBE, 39th Cong., 1st Sess. 674 (1866) (statement of Sen. Charles Sumner)).

228. Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-67*, 68 OHIO ST. L.J. 1509, 1575 n.223 (2007).

229. HOVENKAMP, *supra* note 207, at 94 ("The freedmen did not need the freedoms of speech or religion or even the fair administration of the criminal process so much as they needed jobs and security."); May, *supra* note 207, at 276 ("Security of the natural rights of labor, property, and exchange required state enforcement of the legal rights of liberty, property, and contract.").

monopolies as an illicit form of "caste discrimination."[230] To scholars such as Melissa Saunders[231] and Evan Bernick,[232] monopolies were a type of caste discrimination that Equal Protection contested.[233] Hardly cabined to the Fourteenth Amendment, it was thought that the Thirteenth Amendment could also prohibit Black Codes and racial monopolies.[234] With respect to the Thirteenth Amendment, Sen. Sumner hoped the amendment would mean that "colored persons [would] enjoy the same civil rights as white persons; in other words, that, with regard to civil rights, there shall be no Oligarchy, Aristocracy, Caste, or Monopoly, but that all shall be equal before the law without distinction of color."[235] Another Congressman understood that the Thirteenth Amendment "would guarantee the slave's right 'to till the soil, to earn his bread, to enjoy the rewards of his own labor'" in reference to the common law of competition.[236]

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230. Hughes, *supra* note 172, at 167 ("These groups, having helped write the Fourteenth Amendment, saw it as a 'ban on all systems of class-based legislation, of exclusive privileges, and of monopolies.' In the 1865 State of the Union Address, President Andrew Johnson spoke out against monopolies in explaining racial equality under the law. President Johnson later added that 'slavery . . . was "a monopoly of labor."'" (alteration in original) (quoting Calabresi & Leibowitz, *supra* note 18, at 1041)).

231. *See* Saunders, *supra* note 153, at 255 (arguing that the majority interpretation of the Equal Protection Clause in racial gerrymandering cases is inconsistent with the Fourteenth Amendment).

232. *See* Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 GEO. L.J. 1, 32 (2021) (arguing that the Equal Protection Clause guarantees both nondiscriminatory law enforcement and nondiscriminatory laws).

233. Saunders, *supra* note 153, at 255 ("The nineteenth-century judicial hostility to partial or special laws had deep roots in Anglo-American legal and political thought. Since the early seventeenth century, the English common law courts had been invalidating royal grants of monopolies and other special privileges in domestic and foreign trade, on the ground that government should use its power only to advance the general welfare of the community as a whole, rather than the special interests of a favored few.").

234. *See generally* Miller, *supra* note 21, at 1032 (providing context about the original belief that the Thirteenth Amendment banned more than a limited view of slavery).

235. Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 951 (2013) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 684 (1866) (statement of Sen. Charles Sumner)).

236. McConnell, *supra* note 219, at 215 n.35 (1992) (quoting CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864) (statement of Rep. Ebon Ingersoll)).

What undergirded the Privileges or Immunities Clause, along with the rest of the Reconstruction Amendments, was a general concern for protecting the economic autonomy of Blacks who were now, on paper at least, citizens.[237] It was the common law of competition—the same common law that would later underpin the Sherman Act—underpinning the Fourteenth Amendment, which sought to end the Black Codes and other discriminatory monopolies.[238] The "Black Codes would fall because they were examples of the slave power trying to perpetuate itself by giving its supporters monopoly power over the lives of the freed African-Americans."[239]

But again, the story of Reconstruction is one of fits and starts, tugs and pulls, steps forwards and backwards. And in an ironic twist, what followed was a large step backwards in the form of *The Slaughter-House Cases*, a decision that provided a temporary win for freed Blacks but also guaranteed that almost no one would benefit from the Privileges or Immunities Clause again.

C. THE SLAUGHTER-HOUSE CASES AND THE END OF PRIVILEGES OR IMMUNITIES

Five years after the Fourteenth Amendment's ratification, the Supreme Court was, in the words of Justice Miller, "called upon for the first time to give construction to" the Privileges or Immunities Clause.[240] Perhaps bad facts make bad law. Notably, the opportunity to interpret the Clause was not brought by aggrieved Black freedmen suffering from the Black Codes. Instead,

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237. HOVENKAMP, *supra* note 207, at 94 (asserting that the focus of the Fourteenth Amendment and Civil Rights Act of 1866 was not on "political or social issues such as voting or segregation, but on basic economic civil rights, which Congress firmly believed to be more fundamental"). For more on the contingent and second-class nature of this citizenship, see I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653 (2018).

238. *See supra* Part III.B.1.

239. Calabresi & Rickert, *supra* note 206, at 7; *see also id.* at 4–5 ("Our analysis leads to the conclusion that the text of the Fourteenth Amendment was meant, as an original matter, to forbid class-based legislation and any law that creates a system of caste. The Black Codes, enacted by the Southern States in 1865 in an attempt to relegate the freed slaves to second-class citizenship, created the paradigmatic example of such a caste system or system of class legislation." (footnote omitted)).

240. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 67 (1873).

the case was brought by aggrieved white butchers who themselves were a cartel.[241]

The case arose when Louisiana, long frustrated by the public health hazards resulting from New Orleans butchers slaughtering animals in their shops and disposing offal directly into the streets or city's water,[242] gave a "monopoly" to the Crescent City Live-Stock Landing and Slaughter-House Company to create and run a single slaughterhouse. The law provided that the slaughterhouse would be open to all upon a small payment of reasonable compensation and prohibited any other abattoirs.[243]

While public health and safety was the primary goal of the "monopoly," there was also a secondary goal. At the time, Louisiana and the city of New Orleans were a model of what Reconstruction could accomplish. About a third of Louisiana's state legislature was Black, as was the state's Lieutenant Governor;[244] in New Orleans, Blacks were serving as police officers and detectives, serving on juries, and the city was moving towards integrated public schools.[245] But the butchers remained all white.[246] Moreover, the butchers had essentially formed a cartel to deny entry to outsiders.[247] As such, the secondary goal of the law was

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241. *Id.* at 43.

242. As the President of the New Orleans Board of Health testified, "it is not uncommon to see intestines and portions of putrified animal matter lodged immediately around the [suction pipes from which the city drew its water]. The liquid portion of this putrified matter is sucked into the reservoir." Michael A. Ross, *Justice Miller's Reconstruction:* The Slaughter-House Cases*, Health Codes, and Civil Rights in New Orleans*, *1861-1873*, 64 J.S. HIST. 649, 654 (1998) (quoting State *ex rel.* Belden v. Fagan, 22 La. Ann. 545, 553 (1870)).

243. *Slaughter-House*, 83 U.S. at 59–60.

244. CHARLES VINCENT, BLACK LEGISLATORS IN LOUISIANA DURING RECONSTRUCTION 71 (1976).

245. *See* MELVIN I. UROFSKY, DISSENT AND THE SUPREME COURT 83–86 (2015) (discussing the underlying hostility towards the regulation of the butchers in *The Slaughter-House Cases*).

246. FONER, *supra* note 178, at 132 (noting that all of the existing butchers were white).

247. UROFSKY, *supra* note 245, at 85 ("The butchers had long been unregulated and had defeated earlier efforts to create a central slaughterhouse because of their organization and political clout . . . ."); Ross, *supra* note 242, at 656 (noting that the butcher trade was controlled "by the tightly knit community of Gascon butchers (immigrants and descendants of immigrants from southwestern France), who jealously guarded their monopoly"). It was also understood that the butchers had long conspired to keep meat prices high. Ross, *supra* note 242, at 664.

to open the trade to "the public" and "to all butchers"; the law even included a penalty if any butcher was turned away.[248] In other words, the problem presented in *The Slaughter-House Cases* was not another Black Code, or a monopoly created by a white supremacist government to maintain a racial hierarchy. It was the opposite: a "monopoly" created by a bi-racial legislature to supplant the race-based cartel that currently existed.[249] It was the members of the race-based cartel who were aggrieved and sued to invalidate the state's "monopoly." It also speaks volumes that the lead lawyer for the plaintiffs, John Campbell, was a former Supreme Court justice who had voted with the *Dred Scott* majority, resigned from the Court to serve as Secretary of War for the Confederacy, and had since committed his legal career to fighting efforts that put Blacks on an equal footing with whites.[250] And for him, the monopoly at the heart of *The Slaughter-House Cases* presented such an effort.

In an opinion authored by Justice Miller, a Lincoln appointee who disliked Campbell and who had manumitted his own slaves and then paid them wages instead,[251] the Court ruled five-four against the white plaintiffs.[252] The state's authorization of a single slaughterhouse was well within its police powers, the

248. *Slaughter-House*, 83 U.S. at 40–41; *see also* UROFSKY, *supra* note 245, at 85; Ross, *supra* note 242, at 656 (noting the statute was a "bitter pill" to white New Orleans butchers in part because the law "permitted African Americans and others who had previously been excluded by a lack of money to become butchers").

249. Ross, *supra* note 242, at 656 (remarking that before the slaughter-house law was passed, the white butchers "had forcibly driven off black competitors").

250. *Id.* at 665; UROFSKY, *supra* note 245, at 85–86. Urofsky writes that Campbell took the case, "at least in part, because he was a bitter and hate-filled man." UROFSKY, *supra* note 245, at 86. Of New Orleans during Reconstruction, he complained that there were "Africans in place all about us. They serve as jurors, post office clerks, custom house officers and day by day they barter away their obligations and duties." *Id.* Among other things, he attacked plans to create integrated public schools, and defended the right of a New Orleans theater to segregate patrons, notwithstanding that Louisiana had passed a statute forbidding such discrimination. *Id.* at 87.

251. Ross, *supra* note 242, at 651.

252. *See Slaughter-House*, 83 U.S. at 83.

Court held.[253] Perhaps the case could have ended there.[254] But instead, Justice Miller went on to reject the plaintiffs' Fourteenth Amendment claims, most notably their claim that Louisiana's law infringed their right to labor as they saw fit and by doing so violated the Privileges or Immunities Clause.[255]

Unfortunately, Justice Miller rejected their argument in a way that not only made the clause unavailing to the white butchers. It also made the clause unavailing to almost anyone else. Although the Amendment provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," Justice Miller essentially found that the plaintiffs had misapprehended the operative words.[256] The Fourteenth Amendment, Justice Miller decided, protected only those privileges or immunities that derived from *national* citizenship, such as the right to use the nation's "navigable waters."[257] It did not apply to rights individuals may have as *state* citizens.[258] And by so deciding, the Privileges or Immunities Clause "ceased to have constitutional meaning."[259]

The dissent, written by a Unionist Democrat in Justice Field, argued that the Clause was meant to protect pre-existing common law rights to work in a lawful trade,[260] which state-

253. *Id*. at 63–66 ("The regulation of the place and manner of conducting the slaughtering of animals, and the business of butchering within a city and the inspection of the animals to be killed for meat, and of the meat afterwards, are among the most necessary and frequent exercises of this [police] power.").

254. For an illustration of how the case could have been decided to preserve the Privileges or Immunities Clause *and* uphold Louisiana's right to create a monopoly to counter the whites-only cartel that existed, see Francisco Valdes, *The Slaughterhouse Cases*, *in* CRITICAL RACE JUDGMENTS: REWRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW 118–47 (Capers et al. eds., 2022).

255. *See Slaughter-House*, 83 U.S. at 74–79 (rejecting the butchers' argument that relied on the violation of the Privileges or Immunities Clause).

256. *Id*. at 74.

257. *Id*. at 74–80 (describing the distinction between federal citizen rights and state citizen rights).

258. *Id*. at 75 ("[T]here is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such the latter . . . are not embraced by [the Privileges or Immunities Clause].").

259. FONER, *supr*a note 178, at 136.

260. *Slaughter-House*, 83 U.S. at 97–98 (Field, J., dissenting) ("The privileges and immunities designated are those *which of right belong to the citizens of all free governments*. Clearly among these must be placed the right to pursue

sponsored monopolies violated by granting a favored party unjustified power over others.[261] Latching on to the arguments put forward by the plaintiffs, Justice Field noted that compelling a person to work for another's benefit mirrored slavery.[262] He cited abolitionists and Senator Trumbull's speech on the Senate floor to describe Louisiana's monopoly as a "caste."[263] To the dissent, the supposed use of discrimination to erode equality was critical—notwithstanding that the plaintiffs were a cartel of white butchers.[264] Bringing this back to the ills of *state-granted* monopolies, Justice Field insisted in his *Slaughter-House* dissent:

> All monopolies in any known trade or manufacture 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.
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> A monopoly is defined 'to be an institution or allowance from the sovereign power of the State by grant, commission, or otherwise, to any person or corporation, for the sole buying, selling, making, working, or

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a lawful employment in a lawful manner, without other restraint than such as equally affects all persons.").

261. *Id.* at 88–89 ("The act of Louisiana presents the naked case, unaccompanied by any public considerations, where a right to pursue a lawful and necessary calling, previously enjoyed by every citizen, and in connection with which a thousand persons were daily employed, is taken away and vested exclusively for twenty-five years, for an extensive district and a large population, in a single corporation, or its exercise is for that period restricted to the establishments of the corporation, and there allowed only upon onerous conditions.").

262. *Id.* at 90–91 ("A prohibition to him to pursue certain callings, open to others of the same age, condition, and sex, or to reside in places where others are permitted to live, would so far deprive him of the rights of a freeman, and would place him, as respects others, in a condition of servitude. . . . The compulsion which would force him to labor even for his own benefit only in one direction, or in one place, would be almost as oppressive and nearly as great an invasion of his liberty as the compulsion which would force him to labor for the benefit or pleasure of another, and would equally constitute an element of servitude.").

263. *Id.* ("The counsel of the plaintiffs in error therefore contend that 'wherever a law of a State, or a law of the United States, makes a discrimination between classes of persons, which deprives the one class of their freedom or their property, or which makes a caste of them to subserve the power, pride, avarice, vanity, or vengeance of others,' there involuntary servitude exists within the meaning of the thirteenth amendment.").

264. *Id.* at 98 ("No discrimination can be made by one State against the citizens of other States in their enjoyment, nor can any greater imposition be levied than such as is laid upon its own citizens. It is a clause which insures equality in the enjoyment of these rights between citizens of the several States whilst in the same State.").

> using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade.' All such grants relating to any known trade or manufacture have been held by all the judges of England, whenever they have come up for consideration, to be void at common law as destroying the freedom of trade, discouraging labor and industry, restraining persons from getting an honest livelihood . . . .[265]

Given the dissent's powerful argument—which was right about the law but conveniently misrepresented the facts about who was being discriminated against[266]—the majority may have believed narrowing the Privileges or Immunities Clause was the easiest response. It is possible that Justice Miller decided as he did because the majority was uncomfortable with how sweeping the Clause might otherwise be. After all, many in Congress had maintained "they were establishing broad federal oversight over the states,"[267] and that the Privileges or Immunities Clause comprised those rights contained in the Bill of Rights as well as common law rights, including the rights associated with free labor. For others, and perhaps Justice Miller, this went too far.[268]

However, there is another possible explanation for his decision. Justice Miller may have thought that limiting the clause to protecting the few inconsequential rights associated with national citizenship was the easiest way to rule against the white butchers and in favor of Louisiana's biracial legislature—which had, after all, created a "monopoly" to end a racial cartel that excluded non-whites.[269] He might have also thought it was the easiest way to counter the arguments put forward by the plaintiffs, and adopted by the dissent. Simply put, Justice Miller may have thought his opinion would contribute "to the goal of

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265. *Id.* at 101–02.

266. *Cf.* Ross, *supra* note 242, at 661 (noting that the "charges of monopoly and corruption served as useful rhetorical devices for . . . lawyers intent on thwarting every effort, beneficial or otherwise, of a legislature that contained black elected officials").

267. FONER, *supra* note 178, at 134.

268. *See* Ross, *supra* note 242, at 651 (observing that many historians suspect "*Slaughter-House* reflected a growing disgust among northerners with Radical Reconstruction").

269. *Id.* at 652 ("[W]hen viewed within the social, economic, and political context of the early 1870s, the *Slaughter-House Cases* may be read as a progressive attempt to affirm the authority of the biracial government of Louisiana, to grapple with horrible sanitary conditions in New Orleans, and to thwart conservatives, such as Justice Stephen J. Field, who hoped to defeat state regulation of private property.").

protecting the civil and political rights of the freedpeople,"[270] who were the supporters and beneficiaries of the state monopoly.[271] He may have even thought that the rest of the Reconstruction Amendments were sufficient to achieve equality. In many respects, he gave a robust, even progressive, interpretation to the Amendments. Consider the following excerpt:

> We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.[272]

Justice Miller even intimated that, because the purpose of the Amendments was so tied to the newly freed enslaved persons, "that a strong case would be necessary for its application to any other."[273]

Had Reconstruction succeeded, Justice Miller's faith in the rest of the Amendment might have come to fruition.[274] In the end, though, Reconstruction failed, and *The Slaughter-House Cases* left Blacks and other minorities with no recourse at all under the Privileges or Immunities Clause and permitted Southern states to replace Black Codes with Jim Crow. It even led to the rise of "sundown towns," which prevailed into the 1980s.[275]

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270. FONER, *supra* note 178, at 136; *see also* Ross, *supra* note 242, at 667 (arguing that the opinion can be read as "a vote of confidence for a biracial Reconstruction government then struggling to overcome the forces of reaction").

271. In other words, the move towards a bi- or multi-racial democracy would have ensured that states themselves protected everyone. Already, "Equality—expressed in such language as equal liberty, equal justice, equal rights, and equal citizenship—was the hallmark of antebellum black politics." FONER, *supra* note 178, at 13.

272. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1873).

273. *Id*. at 81.

274. FONER, *supra* note 178, at 136.

275. *See* Sam Metz, *Former Nevada "Sundown Town" Stands by Siren Amid Racial Reckoning*, DENV. POST (July 26, 2021), https://www.denverpost.com/2021/07/26/nevada-sundown-town-siren-racial-reckoning [https://perma.cc/SVY4-NTEM] ("A red siren perched atop a small town's volunteer fire department sounds every night at 6 p.m., sending a piercing noise echoing through the ranches and towns of northern Nevada's Carson Valley . . . . The town siren has blared since 1921. Until 1974, it served as a warning to non-white people that they were

The "crown jewel" of the Reconstruction Amendments had been nullified. A day after deciding *Slaughter-House*, Justice Miller used the same reasoning in *Bradwell v. Illinois* to reject a challenge to an Illinois law limiting the practice of law to men.[276] Myra Bradwell asserted that the law barring her, as a married woman, from legal practice violated her privileges and immunities under the Fourteenth Amendment.[277] Justice Miller again wrote the majority opinion and again ruled that the clause was inapplicable since the practice of law was not a right of national citizenship.[278] Similarly, when Charles Taylor, a Black lawyer admitted to practice in federal court, sued to be admitted to practice in Maryland, he encountered the same roadblock.[279] Although Taylor based his claim on Equal Protection, for the Maryland Court of Appeals, Taylor was really claiming that the right to engage in a profession of his choosing was guaranteed by the Privileges or Immunities Clause. For that, *Slaughter-House* was controlling. His petition was denied.[280]

In the end, *Slaughter-House* is emblematic of the tugs and pulls, the steps forwards and backwards, that was Reconstruction. The step forward was that the Court upheld Louisiana's monopoly power to create a centralized slaughterhouse that was open to everyone, regardless of race. The step backward was that

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required to leave town before the sun faded behind the rugged mountaintops of the Carson range.").

276. *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 142 (1873). Although Justice Miller may have been committed to racial equality, it is clear that he was not yet committed to sexual equality. He wrote: "It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator." *Id.* at 141–42.

277. *Id.*

278. *Id.* at 139 ("[T]he right to control and regulate the granting of license to practice law in the courts of a State is one of those powers which are not transferred for its protection to the Federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license.").

279. In re Taylor, 48 Md. 28, 31–32 (1877) (citing Justice Miller's opinions in *The Slaughterhouse Cases* and *Bradwell v. Illinois* to construe the application of the Fourteenth Amendment).

280. *Id.* at 33 ("But the Court decided that the right to admission to practice law in the Courts of a State, was not one belonging to citizens of the United States *as such*, and consequently was not within the protection of the 14th Amendment; but depended on the laws and regulations of the State.").

the majority, to reach this result, eviscerated the Privileges or Immunities Clause, which was intended to prohibit discriminatory state monopolies. And this evisceration in turn paved the way for Jim Crow, "a system that was, as much as anything else, a comprehensive scheme of economic exploitation to replace the Black Codes."[281] And it was a system committed to locking in the "assumptions, privileges, and benefits that accompany the status of being white," assumptions which "automatically ensured higher economic returns in the short term, as well as greater economic, political, and social security in the long run."[282] As Cheryl Harris cogently put it, whiteness itself became a "treasured property in a society structured on racial caste."[283] The larger point, however, is this: All of this—the original understanding of the Privileges or Immunities Clause, the Court's response in *The Slaughter-House Cases*, and indeed the entire goal of righting the wrongs of slavery—fed into how the Senators who supported the Sherman Act understood its reach.

To be sure, after *Slaughter-House*, some supporters of Reconstruction shifted their hopes to the Fourteenth Amendment's guarantee of "equal protection."[284] But others, like Senator Sherman, would later shift to an antitrust act. Part of their goal was seemingly to accomplish through the Sherman Act what the Fourteenth Amendment had failed to do.[285] They intentionally settled on a deliberately broad Act.[286] And as we argue next, it is precisely this broadness, along with the expansive language of the FTC Act, that gives enforcers and private litigants the tools to challenge racially inequitable state monopolies. For too long, the Sherman Antitrust Act has been interpreted through only a

281. Students for Fair Admissions, Inc. v. President of Harvard Coll., 143 S. Ct. 2141, 2266 (2023) (Jackson, J., dissenting).

282. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1713–14 (1993).

283. *Id.* at 1713.

284. FONER, *supra* note 178, at 142 ("Given the Court's evisceration of the Privileges or Immunities Clause, some supporters shifted to the Fourteenth Amendment's guarantee of 'equal protection.'").

285. Miller, *supra* note 21, at 1037 ("The idea of legislating against private parties as a mechanism to preserve 'economic opportunity, security of property, freedom of exchange, and political liberty,' found its antecedent in Congress's 'efforts to safeguard the fundamental rights of former slaves through the Reconstruction Amendments and related legislation.'" (footnote omitted) (quoting May, *supra* note 207, at 288–89)).

286. *See supra* notes 37–41 and accompanying text.

narrow sliver of its history, one that focuses on the rise of trusts during the Gilded Age. But this selective history ignores the Sherman Act's connection to Reconstruction, the Fourteenth Amendment, and its reliance on the common law of competition. Of course, statutes from the Progressive Era like the Sherman Act were intended to *vest the federal government* with tools to reign in private abuses of power. But this wasn't to the exclusion of *state abuses*. The federalism goals of the Sherman Act were, as we show, aligned with Reconstruction. By shedding light on this historical blind spot, we argue that antitrust could achieve much of what the Fourteenth Amendment sought, but has yet, to do.

IV. FULFILLING ANTITRUST'S PROMISE THROUGH THE LESSONS OF RECONSTRUCTION

Thus far, this Article has excavated the forgotten history of anti-monopolism during Reconstruction which, as we suggest, influenced the Sherman Act. It has shown that for much of pre-Civil War history, the common law tended to cast suspicion on *state* monopolies—typically defined as an official grant of special privileges—which discriminated and harmed economic autonomy.[287] Post-Civil War, the Black Codes amounted to grants of special privileges to whites, and prompted Congress to respond by drafting the Fourteenth Amendment's Privileges or Immunities Clause (and other parts of the Reconstruction Amendments).[288] But in a complex case pitting a progressive Louisiana legislature against a cartel of white butchers, the Supreme Court stripped the Fourteenth Amendment of its antimonopoly provision. From this void—and the rise of private trusts—emerged the Sherman Act in which many of the same Senators tried again to ban unjustified monopolies.

On one level, our goal in excavating this history has been a modest one. It has been to show that history matters. Or to borrow from Justice Jackson, "History speaks."[289] It has been to complicate the typical story told about the Sherman Antitrust Act—that it was enacted in response to the rise of anticompetitive trusts such as Standard Oil. It is to say that the Sherman

287. *See supra* notes 216–18 and accompanying text.

288. *See supra* notes 216–18 and accompanying text.

289. Students for Fair Admissions, Inc. v. President of Harvard Coll., 143 S. Ct. 2141, 2268 (2023) (Jackson, J., dissenting).

Act was also informed by a common law that viewed state grants of monopolies with suspicion, and by the promises and failures of Reconstruction, including the evisceration of the Privileges or Immunities Clause in *The Slaughter-House Cases*. And it has been to begin a conversation, between scholars *and* antitrust enforcers, about how this history should influence our understanding of the Sherman Act.

Indeed, both the language of the Sherman Act and the intent of its drafters support this turn to this longer history. Recall that Congress strategically declined to specify which activities should violate the Sherman Act. Instead, they drafted a broadly worded statute so that courts would have the flexibility to define antitrust's reach.[290] To provide courts with some guidance, the drafters suggested that the Act wouldn't bar historically valid monopolies—such as invention patents.[291] On the other hand, antitrust judges could consider, among other authorities, the common law of competition.[292] And courts have accepted this invitation by referencing the Sherman Act's legislative history and the common law to define the Act's metes and bounds. Per Justice Stevens, "[t]he repeated references to the common law in the debates that preceded 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."[293] Further to Justice Stevens, "[s]ince the statute was written against the background of the common law, reference to the common law is particularly enlightening."[294] What courts have missed, however, is another part of the Sherman Act's history: the Act's connection to both the Fourteenth Amendment's concern about discriminatory state monopolies and economic autonomy more broadly. And an understanding of this history can change how courts apply antitrust law to advance an original purpose of the Reconstruction Amendments.

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290. *See supra* notes 114–16 and accompanying text.

291. 21 CONG. REC. 2457 (1890) (statement of Sen. John Sherman) ("A limited monopoly secured by a patent right is an admitted exception, for this is the only way by which an inventor can be paid for his invention.").

292. *See id.* (noting that the antitrust legislation was intended to target unlawful combinations, as tested by common law rules).

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

294. Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 785 (1984) (Stevens, J., dissenting) (footnote omitted).

When enacting the Sherman Act, Congress cited the common law of competition, just as they had done with the Fourteenth Amendment's Privileges or Immunities Clause.[295] In fact, the Act's drafters drew on similar concepts of economic equality and labor. A ratifier of the Fourteenth Amendment insisted the purpose was to "abolish[] all class legislation in the States and do[] away with the injustice of subjecting one caste of persons to a code not applicable to another."[296] When Congress debated the proposed Antitrust Act, Senator Sherman used similar language of "industrial liberty . . . [which] lies at the foundation of the equality of all rights and privileges."[297] He seemed to advocate for the common law's right to work, the same right that had so motivated the Reconstruction Amendments: "it is the right of every man to work, labor, and produce in any lawful vocation and to transport his production on equal terms and conditions . . . ."[298] This language, in fact, fits a greater movement of the time to ban "special," "class," and "caste" legislation designed to impede one type of party while privileging others (*including monopolies*), inspiring clauses in state constitutions as well as interpretations of the Equal Protection Clause;[299] a seminal case about class legislation was even decided by the Supreme Court about five years before the Sherman Act's passage.[300] Evan C. Zoldan has detailed the longstanding assault of special legislations like monopoly grants, from the country's founding to

295. *See* 21 CONG. REC. 2457 (1890) (statement of Sen. John Sherman) (discussing the right to work and speaking of the detrimental effects of unlawful combinations).

296. Bernick, *supra* note 232, at 32 (quoting Cong. Globe, 42d Cong., 2d Sess. 2766 (statement of Sen. Jacob Howard)).

297. 21 CONG. REC. 2457 (1890) (statement of Sen. John Sherman).

298. *Id.*

299. Calabresi & Salander, *supra* note 235, at 914 ("The antidiscrimination command of the Fourteenth Amendment would ban discrimination on the basis of religion even if the Fourteenth Amendment did not incorporate the Establishment and Free Exercise Clauses. Discrimination on the basis of religion is a forbidden form of class legislation even when it is sanctioned in state constitutions, and it is always unconstitutional.").

300. Barbier v. Connolly, 113 U.S. 27, 31–32 (1884) (ruling that a laundries ordinance was a proper use of a state's police powers under the Fourteenth Amendment because it advanced health and safety without prejudicing a special group or class).

Reconstruction.[301] It is thus not a coincidence that the Sherman Act and the Fourteenth Amendment both drew on similar concepts. As Senator Sherman emphasized, antitrust "does not announce a new principle of law but applies old and well recognized principles of the common law . . . ."[302]

In enacting the Sherman Act, Congress's view of monopolies included not only private trusts and monopolies but also the common law's notion of special privileges granted by states.[303] Senator Sherman emphasized the dangers of *states* issuing special privileges or immunities to corporations.[304] He observed that "corporations were special grants to favored companies, but now the principle is generally adopted that no private corporation shall be created with exclusive rights or privileges."[305] In proclaiming that discriminatory chartering constituted a monopoly, Senator Sherman suggested that acts of government could offend antitrust law, but that non-discriminatory charters would

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301. Evan C. Zoldan, *Due Process and the Right to an Individualized Hearing*, 13 U.C. IRVINE L. REV. 1399, 1423–34 (2023) (describing courts' longstanding aversion to "class" legislation that benefits one group at the expense of another).

302. 21 CONG. REC. 2457–58 (1890) (statement of Sen. John Sherman); *see also* Earl M. Maltz, *The Concept of Incorporation*, 33 U. RICH. L. REV. 525, 534 (1999) ("Sherman claimed that the privileges and immunities of citizenship protected by the Fourteenth Amendment were to be found in the Declaration of Independence and the common law of England."); Alfred Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 COLUM. L. REV. 873, 885–86 (1966) (noting that Senator Sherman claimed the protections afforded by the Fourteenth Amendment were common-law rights).

303. William L. Letwin, *Congress and the Sherman Antitrust Law: 1887–1890*, 23 U. CHI. L. REV. 221, 226 (1956) ("'Monopoly,' as the word was used in America, meant at first a special legal privilege granted by the state; later it came more often to mean exclusive control that a few persons achieved by their own efforts; but it *always meant some sort of unjustified power, especially one that raised obstacles to equality of opportunity*." (emphasis added)). To Richard White, the historical view of monopolies as a chief source of inequality had "remained fairly constant" from Antebellum American to the Gilded Age. Richard White, *From Antimonopoly to Antitrust*, *in* ANTIMONOPOLY AND AMERICAN DEMOCRACY 83, 83 (Daniel A. Crane & William J. Novak eds., 2023).

304. *See* 21 CONG. REC. 2457 (1890) (statement of Sen. John Sherman) ("The combination of labor and capital in the form of a corporation to carry on any lawful business is a proper and useful expedient, especially for greater enterprises of a quasi public character . . . but these corporate rights should be open to all upon the same terms and conditions.").

305. *Id.*

not.[306] In another part of the debates, Sherman discussed charters associated with railroads to note "corporate rights open to all are not in any sense a monopoly, but tend to promote competition."[307] Notice that he placed a condition on state laws "*open to all*."

Again, it is not a coincidence that the drafters of the Sherman Act and Fourteenth Amendment shared many of the same concerns about discriminatory state monopolies. In considering the history and meaning of the Sherman Act, it should matter that the Act's main proponent and namesake was an advocate for righting the wrongs of slavery, as were many of the Act's other supporters.[308] It should matter that, following the Civil War, Sherman championed the Fourteenth Amendment with its Privileges or Immunities Clause, stating, "We are bound by every obligation, by [Black Americans'] service on the battlefield, by their heroes who are buried in our cause, by their patriotism in the hours that tried our country, we are bound to protect them and all their natural rights."[309] And that Senator Sherman was one of the early advocates for Black suffrage.[310] Indeed, he was an invested proponent of the Civil Rights Act of 1866 and

306. *Id.*

307. *Id.*

308. Miller, *supra* note 21, at 1037–38 ("Congress did not fashion this new regulation of private collectives from whole cloth. . . . The namesake of the Sherman Antitrust Act, Senator John Sherman, for instance, was himself a member of the Reconstruction Congress . . . . Senator George Edmunds, the primary drafter of the Sherman Antitrust Act had managed the Reconstruction-era Ku Klux Klan Act for the Senate. And Senator George Frisbie Hoar, another principal draftsman of the Antitrust Act, had personally petitioned President Ulysses S. Grant to seek civil rights legislation when Hoar served as the Republican representative from Massachusetts. As if to emphasize the point, legislators used shopworn metaphors of 'slavery' and 'liberty' when talking about the effect of economic centralization, just as they had used these terms to describe Southern oppression in the 1860s and 70s. Senator John Sherman 'proclaimed his proposal "a bill of rights, a charter of liberty" designed to protect "the industrial liberty of the citizens of these States."'" (footnotes omitted) (quoting May, *supra* note 207, at 289–90)).

309. *Speech of Sen. John Sherman (R-OH), Cincinnati, OH* (Sept. 28, 1886), *in* 2 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS 276 (Kurt T. Lash ed., 2021).

310. FONER, *supra* note 178, at 103 (noting Senator Sherman's support for universal suffrage).

1871.[311] Similarly, it should matter that he was vocal in his criticism of the Court's evisceration of the Privileges or Immunities Clause;[312] and that Senator Sherman's brother was none other than General William Tecumseh Sherman, who tried to advance economic autonomy for the newly emancipated freedmen with his Special Field Order No. 15, which would have provided forty acres to each emancipated family.[313] And again, it was not just Senator Sherman who was committed to righting the wrongs of slavery. The Reconstruction Amendments and the Sherman Act involved many of the same people espousing similar goals of economic egalitarianism.[314]

Again, this Article's first ambition is relatively modest. It is simply to call attention to this history, and to begin a conversation about how this history can inform our understanding of the Sherman Act. While certainly the rise of trusts spurred Congress to enact a statute meant to govern private monopolies and restraints of trade—following a greater theme in the Progressive era—it is unlikely Congress intended to place states beyond antitrust's reach. But suggesting that the Supreme Court missed key facts when creating *Parker* immunity isn't the same as saying *Parker* should be entirely overruled. An overturning of *Parker* would create complex questions about when a state has exercised *monopoly* versus *police* powers—especially given the prevalence of states regulating markets via competition. Courts, in fact, struggled to differentiate insidious class legislations from proper exercises of police power for generations up to Reconstruction (and beyond).[315] For instance, while eminent domain

311. *See, e.g.*, Gary S. Gildin, *Redressing Deprivations of Rights Secured by State Constitutions Outside the Shadow of the Supreme Court's Constitutional Remedies Jurisprudence*, 115 PENN ST. L. REV. 877, 892–93 (2011) (discussing how Senator Sherman proposed a Sherman Amendment to the Civil Rights Act of 1871 that would have required states to protect Black persons from privilege violence); *The Civil War: The Senate's Story*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/civil_war/VictoryTragedyReconstruction.htm [https://perma.cc/W44P-TZ8R].

312. *See* Calabresi & Liebowitz, *supra* note 18, at 1063–64 (noting Senator Sherman's remarks that the trusts "smacked of tyranny" and that the government itself might be involved in the trusts' monopoly power).

313. Brown, *supra* note 43.

314. *See* Miller, *supra* note 21, at 1037 (identifying political figures involved in both the Reconstruction Amendments and the Sherman Act).

315. Zoldan, *supra* note 301, at 1417 (distinguishing the reasoning of the *Londoner* and *Bi-Metallic* courts).

forces an anticompetitive sale (i.e., the homeowner must only sell to the state even if other buyers would pay more), it is also considered a sovereign activity since it is exclusively a state that may compel this act.[316] Since antitrust governs trade and commerce, perhaps eminent domain is properly described as a police power rather than an antitrust problem. Given the difficult questions and effects of revisiting *Parker*, our contribution, at a minimum, is an exposé of antitrust's lost history with Reconstruction, suggesting that states should never have been draped in such power.

But perhaps this history indicates that enforcers and courts could cite to Reconstruction to breathe new life and meaning into antitrust law. Below, we provide some examples of what this would mean. But first, it is important to point out the weaknesses of *Parker*. As the Sherman Act's link to the goals of Reconstruction may suggest, the Court made mistakes when it decided *Parker* and ruled that states are immune from antitrust scrutiny.[317] It was precisely the concern about discriminatory state monopolies that motivated Congress to reference the common law of competition in drafting the Privileges or Immunities Clause and, years later, the Sherman Act. With respect to both the Fourteenth Amendment and the Sherman Act, their goal involved, among other things, prohibiting states from bestowing "special grants to favored companies"[318] and to ensure "that no private corporation shall be created with exclusive rights or privileges."[319]

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316. *See* Wills, *supra* note 95.

317. We are not the first scholars to be critical of the Court's decision. *See, e.g.*, Alexander Volokh, *Are the Worst Kinds of Monopolies Immune from Antitrust Law?*: FTC v. North Carolina Board of Dental Examiners *and the State-Action Exemption*, 9 N.Y.U. J.L. & LIBERTY 119, 136 (2015**)** ("[A]ny doctrine that privileges government action through extra immunities should be viewed with skepticism and limited as far as possible—especially where . . . the government action involved is monopolization of the most pernicious kind."); Earl W. Kintner & Daniel C. Kaufman, *The State Action Antitrust Immunity Defense*, 23 AM. U. L. REV. 527, 545 (1974) (noting that state action immunity should be applied narrowly to avoid serious diminution of the effect of antitrust laws).

318. *See supra* notes 152–61 and accompanying text.

319. To be sure, there is still the issue of federalism on which *Parker* immunity is grounded. Hardly incidental to this Article, both antitrust and Reconstruction implicate longstanding questions of constitutional power sharing. However, the Constitution does not vest states with broad authority to regulate local competition as *Parker* suggested. For instance, federal actors can regulate the

In terms of what scrutinizing discriminatory state monopolies might mean, a solution that balances a state's sovereignty, tenets of federalism, and antitrust's scope of "trade" or "commerce" could involve inquiring into whether a state has acted as a market participant or delegated its power to private entities. Since federalism—which is the ostensible concern of *Parker*—involves the sharing of *sovereign* powers, it is common for constitutional doctrines to ask whether a state has exercised a unique power of government as opposed to an activity that a private party may do. In fact, the point of Reconstruction was to increase federal power vis-à-vis the states' penchant for discrimination, suggesting that our proposal would only further a purpose of Reconstruction and antitrust. But so long as the state itself has exercised a sovereign power such as eminent domain, it would remove that state action from antitrust's scope even if it renders effects on competition.

By contrast, if a state has, first, delegated its power to private industry, then this should per se become a matter for antitrust law. In many instances, states allow private industry to run prisons or create licensing regimes in their states—oftentimes bearing anticompetitive effects. Or if a state suppresses the competition of certain hospitals to benefit favored ones, this should expose the state to antitrust review since it has sought to manipulate a market in which it competes. This approach would empower states to opt into, or out of, antitrust scrutiny (by whether it has delegated power to private industry or permitted an intermingled market). It would also advance Congress's federalism goals since only non-sovereign activities would be reviewable; in essence, the plan would preserve a state's police power such as eminent domain, zoning, and policing itself (so

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discriminatory acts of states via the Dormant Commerce Clause. *See* Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 809–10 (1976) (outlining the limits that the Commerce Clause places on state power when Congress is silent). The Department of Justice may also charge a state with securities fraud, indicating that Congress can enact laws to scrutinize states action in markets. *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) (quoting Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges State of New Jersey for Fraudulent Municipal Bond Offerings (Aug. 18, 2010), https://www.sec.gov/news/press/2010/2010-152.htm [https://perma.cc/UK98-QBQ4]) ("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.").

long as the state hasn't delegated its actual police authority to private forces in creating a conventional market). And importantly, our approach would scrutinize types of state monopolies when the greatest incentives exist to extract wealth from marginalized people.

Within this limited scope, courts could assess whether an act of state power—again, limited to when the state enters a private market as a participant or delegates monopoly power to a private entity—disproportionately allocates utility to a dominant population, or unevenly extracts wealth from an insular group. Significantly, this would not necessitate a new test. Rather, it would permit antitrust courts to rely on preexisting mechanisms such as the market definition process.[320] Currently, courts define a market to see whether consumers tend to benefit or not from an exclusionary act within that market.[321] A consequence, though, is that the welfare of a majority group can trump minorities as a function of arithmetic.[322] Our proposal would permit antitrust courts to define markets via internal communities to assess whether the procompetitive efficiencies (and anticompetitive effects) disparately harm vulnerable communities. In addition, agencies could prioritize targeting a state's delegated exclusionary practices that tend to render greater harms on vulnerable people. There might even be a burgeoning appetite for this proposal, given recent statements in an executive order and comments from FTC Commissioner Rebecca Slaughter.[323]

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320. *See generally* Louis Kaplow, *On the Relevance of Market Power*, 130 HARV. L. REV. 1303, 1305 (2017) (explaining the importance of the market definition question).

321. *See* Capers & Day, *supra* note 72, at 560 (describing the consumer welfare standard).

322. *Id.* at 550 ("By measuring the welfare of consumers collectively, a court would likely find a challenged act to be procompetitive if the majority of consumers benefitted.").

323. Lauren Feiner, *How FTC Commissioner Slaughter Wants to Make Antitrust Enforcement Antitracist*, CNBC (Sept. 26, 2020), https://www.cnbc.com/2020/09/26/ftc-commissioner-slaughter-on-making-antitrust-enforcement-antiracist.html [https://perma.cc/V2TB-7J6L]; *Fact Sheet: Executive Order on Promoting Competition in the American Economy*, THE WHITE HOUSE (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy [https://perma.cc/2DKX-AVWM] (discussing the uneven effects of market power in "communities of color").

Again, our proposal is relatively modest. Instead of subjecting to antitrust scrutiny all state action that is anticompetitive or restrains trade, it would only review state grants of monopolies or states acting as private market participants, and even then it would only subject anticompetitive conduct to review pursuant to a deferential standard. In other words, consistent with *Parker*, states qua states would be immune from antitrust liability. However, states acting as market participants or having delegated authority to private actors would not be immune. Moreover, we anticipate antitrust's predominant test, the rule of reason, would find no offense in most scenarios.[324] In fact, state treasuries would largely be immune from monetary damages in federal courts given the Eleventh Amendment. But where there is evidence of racial discrimination, agencies would be able to intervene against delegations of power to private actors and municipalities.[325]

Before exploring how our proposal would apply using contemporary examples, consider a comparison of the initial cases that tested Privileges or Immunities. As we traced earlier, the monopoly in *the Slaughter-House Cases*—which involved a delegation of monopoly power to a private entity—sought to eliminate a racial cartel, replacing it with an egalitarian framework. Rather than an unjustified exercise of state power, Louisiana intended to *remedy a restraint of trade*. And this exercise of power should have survived the common law, Privileges or Immunities Clause, and our proposal for today. But *Bradwell* a couple days later—in which the state acted as a market participant—illustrates the dangers of state monopoly power. There, the Supreme Court asserted that the "timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."[326] With this, the Court ruled that "a married woman is incapable, without her husband's consent, of making contracts . . . . This very incapacity was one circumstance which the

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324. *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.").

325. *See* Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 HARV. L. REV. 1639, 1650 n.56 (1993) ("It makes sense to read the Fourteenth Amendment as trumping the Eleventh, because the point of the Fourteenth Amendment was to increase the power of the federal government over the states . . . .").

326. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873).

Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counsellor."[327] Here, the Supreme Court should have deemed this monopoly to be illegal; after all, the state empowered a dominant group (i.e., private lawyers acting as the bar association) to shield themselves from the competition of women. This was a restraint of trade that the common law, baked into the Privileges or Immunities Clause, condemned until *The Slaughter-House Cases*.

Now consider modern examples of the work that antitrust could do. As noted earlier, under the pretext of health and safety, state agencies acting as market participants have excluded African women from braiding hair—allegedly to protect legacy interests—by imposing onerous regulations.[328] Our proposal would allow antitrust enforcers to at least scrutinize these regulations to see if the state, through its agencies comprised of private actors, is using anticompetitive practices in a way that discriminates. This could mimic the rule of reason where courts assess whether an act's anticompetitive effects—or here, discriminatory effects—are justified by the procompetitive efficiencies. It would also empower the DOJ and FTC to review state laws meant to create, for instance, an oligopoly of healthcare providers, which tends to allocate treatment and care in affluent communities while stripping minority communities of the same.[329] In fact, antitrust agencies are already sounding alarms about healthcare CONs yet are largely powerless due to *Parker*.[330] The agencies could also review a state or locale's facially neutral regulation that overwhelmingly applies to minority businesses and, in the process, frustrates those businesses' ability to compete.[331]

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327. *Id.*

328. REBECCA HAW ALLENSWORTH, BOARD TO DEATH (forthcoming) (manuscript at 2) (on file with Minnesota Law Review) (explaining that licensing regulations require braiders to expend hundreds of hours of instruction in beauty schools and receive permission from state government to braid hair); *see also* Day, *supra* note 81, at 932 (explaining how licensing regulations have effectively barred African women from braiding hair).

329. *See supra* notes 106–10 and accompanying text.

330. *See* Proctor & Cavanaugh, *supra* note 110 (noting that the FTC has issued orders to some insurance companies and health care providers to provide information to allow the agency to study the effects of "certificates of public advantage").

331. *See., e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (referring to the intent of a laundries ordinance to exclude Chinese launderers from the market).

Our proposal would thus allow antitrust enforcers to take a "second look" to see whether a state has discriminatorily allocated benefits to a dominant population and seek appropriate relief available under the FTC Act.

Perhaps most importantly, because challenges based on Equal Protection require evidence of intent—often an insurmountable burden given the prevalence of unconscious racism[332]—our proposal provides another avenue that is not dependent on intent. We should note the extent to which scholars bemoan the Fourteenth Amendment's inability to foster equality in the shadow of numerous court decisions. In addition to the Court's elimination of Privileges or Immunities, the erosion of Equal Protection has been just as pressing. Indeed, the Court has imposed onerous requirements to show an intent to discriminate; when a facially neutral law bears the disparate impact of harming marginalized individuals, courts have often turned a blind eye.[333] The Supreme Court has also held that the Fourteenth Amendment doesn't apply to private action and that an attempt to remedy historical discrimination can violate the Clause.[334] As recently as 2023, the Supreme Court cited the Fourteenth Amendment to rule that schools may no longer use affirmative action to diversify, and yet they can rely on facially neutral policies to advantage affluent students via legacy admissions.[335] But antitrust could help to fulfill this lost promise, especially if *Parker* is amended or overruled: the sole issue would

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332. *See, e.g.*, Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) ("We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions."); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1490 (2005) ("Recent social cognition research has provided stunning evidence of implicit bias against various social categories.").

333. *See generally* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 495 (2003) (describing the challenges of a disparate impact claim under an Equal Protection claim).

334. *See* United States v. Cruikshank, 92 U.S. 542, 559 (1876).

335. Students for Fair Admissions, Inc. v. President of Harvard Coll., 143 S. Ct. 2141, 2175 (2023) ("For the reasons provided above, the Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. Both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points. We have never permitted admissions programs to work in that way, and we will not do so today.").

be whether a state action is anticompetitive in a way that harms consumer welfare and unfairly benefits a dominant group or extracts wealth from a minority group without mining intent. That would allow courts to condemn acts of state discrimination, as the Fourteenth Amendment intended, and thus promote some of Reconstruction's original goals.

To be sure, this Article has not attempted to answer every question. Although we have limited our proposal to scrutinizing states when they enter the market as market participants or delegate monopoly power to private entities, the line is not always clear. Since one of us teaches and writes a lot about criminal justice and race, consider policing, which on its face seems to reflect a state acting solely, and classically, as a sovereign. But even in policing, the state also acts like a market participant, dictating who can work as a policeman, and who cannot.[336] Even here, the state is acting in ways that restrain trade. Ditto for prosecutors, especially since most states prohibit private prosecutions.[337] Beyond this, sovereign acts can bear downstream effects that restrain trade and commerce. Consider policing again. As scholars have pointed out, policing is often done in a way to maintain residential segregation, bearing economic effects.[338] Even at the level of punishment, state monopoly power has anticompetitive effects—e.g., a state can set punishments that are disproportionally imposed against minorities, with the collateral "benefit" of excluding them from the labor market. Indeed, this was one of central the points of Michelle Alexander's book *The New Jim Crow*—states have used policing to re-instantiate a racial caste system that, among other things, makes employment discrimination "perfectly legal."[339] All of this begs the question of whether all state action, to the extent it is anticompetitive or restrains trade, should be subject to antitrust oversight. While this

336. *See* Robert M. Bloom & Nina Labovich, *The Challenge of Deterring Bad Police Behavior: Implementing Reforms That Hold Police Accountable*, 71 CASE W. RSRV. L. REV. 923, 969 (2021) ("The majority of states require police officers to obtain licenses or certifications to serve in law enforcement.").

337. Capers, *supra* note 53, at 1573 (describing the historical transition from private prosecutions to public prosecutions).

338. *See, e.g.*, I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43 (2009) (arguing that all aspects of policing contribute to residential segregation); Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 655 (2020) (describing a "mutually constitutive relationship" between the daily practices of urban policing and residential segregation).

339. MICHELLE ALEXANDER, THE NEW JIM CROW 2 (2010).

may strike readers as going beyond antitrust's scope—after all, it currently is—recall that the common law was largely concerned with how grants of monopolies affected the *sovereign administration* of services.[340] Should antitrust scrutiny extend to all discriminatory state actions, even when a state is acting in a traditional state capacity? Maybe, since the scrutiny we envision is still limited to anticompetitive acts. And maybe this is the most important ambition of this Article. To ask these larger questions. And to encourage all of us to attempt to answer them.

CONCLUSION

Wealth inequality continues to plague this country, as does inequality more broadly. And discriminatory state monopolies are part of the problem. But change is possible. We have mined the history of antitrust and Reconstruction to argue for a more expansive approach to antitrust enforcement, one that taps into Reconstruction's promise and has the potential to make that promise real. The task, now, is to begin.

340. *See supra* notes 153–56 and accompanying text.