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Constitutional Constraints on Federal Antitrust Law

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Abstract

America's antitrust laws have long held a special status in the federal statutory hierarchy. The Supreme Court of the United States, for example, has famously stated that the "[a]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise." However, various constitutionally based interests—such as federalism, freedom to petition the government, freedom of the press, freedom of speech, and freedom of religion—at times may seem to conflict with the economic-based goals of the antitrust laws. The courts have taken into account such interests in limiting the reach of antitrust. Whether they have struck an appropriate balance, however, is a matter of significant debate.

America's antitrust laws have long held a special status in the federal statutory hierarchy. The Supreme Court of the United States, for example, has famously stated that the "[a]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise."[1] Thus, a decision not to apply the antitrust laws to a particular type of conduct requires strong justification.

Nevertheless, various constitutionally based interests—such as federalism, freedom to petition the government, freedom of the press, freedom of speech, and freedom of religion—at times may be in tension with the economic-based goals of the antitrust laws. The courts have taken into account such interests in limiting the reach of antitrust. Whether they have struck an appropriate balance, however, is a matter of significant debate.

Key Points

- The U.S. antitrust laws seek to curb efforts by firms to reduce competition in the marketplace or to create or maintain monopolies.
- Two types of constitutionally influenced limitations on the federal antitrust laws are especially well established: limitations derived from federalism and limitations derived from the First Amendment right to petition the government for the redress of grievances.
- Judicial precedents have constrained the application of antitrust to certain forms of regulatory activity and private conduct that implicate constitutional concerns.
- Under certain limited circumstances, the "economic liberty" provisions of the Constitution may provide alternative means by which to vindicate the free market–oriented ends of the antitrust enterprise.
- Diverse and sometimes conflicting legal interests and constitutional protections will continue to be harmonized as effectively as possible through a federal common law process overseen by imperfect judges.

This paper, in its entirety, can be found at **http://report.heritage.org/lm143**

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Fundamental Antitrust Principles

The U.S. antitrust laws seek to curb efforts by firms to reduce competition in the marketplace or to create or maintain monopolies. As Professor Herbert Hovenkamp, author of the leading antitrust treatise, points out, the antitrust statutes' language is "vague and malleable."[2] For example, over a century of federal case law has been required to make sense of and cabin the Sherman Antitrust Act's literal prohibition on "every contract, combination ... or conspiracy in restraint of trade."[3] Even today, uncertainty about the likely antitrust treatment of many corporate contracts or mergers creates a continuing demand for antitrust counseling.

Until the past 50 years or so, antitrust was viewed by certain commentators as promoting a variety of goals—such as protecting small businesses and reducing the influence of large enterprises—in addition to improving the functioning of free markets. Such views, which also crept into case law, were not unreasonable. The antitrust statutes were enacted in the wake of populist and Progressive Movement concerns about "the trusts" and "big business" abuses, and given their lack of detail, it was natural that these laws might be interpreted in light of such a history. Since the 1970s, however, American federal courts have substituted economic reasoning for this "historical" approach, influenced by economics-based "Chicago School" and "Harvard School" scholarship.[4]

Today, American antitrust law generally is aimed at promoting consumer welfare and "economic efficiency." It pursues this goal by forbidding business behavior that harms the competitive process and that lacks countervailing efficiency justifications. Concern typically focuses on "bad" actions—business behavior that is not "competition on the merits"[5]—that reduce output and raise prices. Certain conduct—"naked" cartel activity lacking any efficiency justification, such as secret price fixing or bid rigging—is deemed categorically illegal, or unlawful "per se." Conduct that is not per se illegal is assessed under a "rule of reason," which requires detailed and often intrusive analysis of particular practices.

American antitrust law, however, does not prohibit the mere exercise of legitimately obtained market power—that is, the mere charging of "high" prices by firms that succeed through merits-based competition. As the Supreme Court emphasized in *Verizon v. Trinko*:

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.[6]

The antitrust laws cannot, of course, be applied in a manner that offends the Constitution. Two types of constitutionally influenced limitations on the federal antitrust laws are especially well established: limitations derived from federalism and limitations derived from the First Amendment right to petition the government for the redress of grievances. As we will see, both sorts of limitations are in tension with the purely materialist goals of antitrust. We will consider them in turn before addressing a few additional constitutional considerations.

1. United States v. Topco Assocs., 405 U.S. 596, 610 (1972).
2. Herbert Hovenkamp, Federal Antitrust Policy (4th ed. 2011).
3. 15 U.S.C. § 1.
4. *See, e.g.*, William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 Colum. Bus. L. Rev. 1.
5. Antitrust law prohibits mergers that, while otherwise involving perfectly legitimate business objectives, "may ... substantially lessen competition or ... tend to create a monopoly." Section 7 of the Clayton Antitrust Act, 15 U.S.C. § 7. Mergers, which play a prominent role in corporate conduct, are "bad acts" in an antitrust sense only if their effects raise these statutory concerns.
6. Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

The Antitrust State Action Doctrine

First, state laws or regulations that foster anticompetitive behavior are nevertheless exempt from federal antitrust scrutiny as long as the state law displacement of competitive activity is clearly articulated and actively supervised by the state.[7] This "state action" exemption was first pronounced in *Parker v. Brown*,[8] in which the Supreme Court upheld a California statute that limited the production of raisins by California farmers.

In *Parker*, private industry participants set raisin allocations, supervised by state officials. This was classic cartel behavior that raised prices, reduced output, and substantially harmed raisin consumers throughout the country. Such behavior would have been per se illegal absent the state law. Nevertheless, the Supreme Court found in *Parker* that federalism concerns trumped antitrust. The Court reasoned that in enacting the antitrust laws, Congress had never intended to undermine sovereign state decisions to displace competition. In short, federalism principles allow states to immunize grossly anticompetitive schemes from antitrust review.

Over the past 70-plus years, the state action doctrine has taken many a twist and turn. One interesting aspect of this rather complex set of judge-made principles is that this doctrine could be rendered irrelevant by a simple act of Congress that subjected all state regulatory enactments to the federal antitrust laws, consistent with the power of Congress to legislate under the Commerce Clause of the Constitution.[9] Given the breadth of Congress's Commerce Clause powers under modern Supreme Court jurisprudence,[10] very few state and local regulatory schemes would be antitrust-immune following the passage of such a law. Yet Congress has never seriously considered such legislation, nor is it likely to do so.

Such a sweeping federal law undoubtedly would give rise to objections that the threat of antitrust challenge would undermine state efforts to promote a host of regulatory goals unrelated to competition—and even efforts to carry out routine regulatory actions that are an inherent aspect of state sovereignty. Moreover, debate over such a law could well highlight the embarrassing fact that various antitrust-exempt federal regulatory schemes—schemes such as a federally sponsored raisin cartel similar to the one upheld in *Parker v. Brown*—are themselves highly anticompetitive.[11]

In a time of concern about federal overreach, it would appear to be unusual for Congress to condemn state regulatory restrictions while shielding analogous federal restrictions from legal scrutiny. Moreover, while federal preemption of state cartel-like schemes and congressional repeal of analogous federal regulatory restrictions would promote consumer welfare in the short term,[12] concerns about the long-term effects of such an unprecedented federal intrusion into traditional areas of state sovereignty would have to be addressed.

Four limitations on the state action doctrine merit highlighting.

First, a state cannot pass a law that merely authorizes private actors to carry out anticompetitive schemes. The Supreme Court has explained that a state statute may not authorize private actors to engage in clear federal antitrust violations, acting on their own, without state regulatory involvement; such a state law will be preempted by federal antitrust law.

As the Supreme Court emphasized in *Rice v. Norman Williams Company*,[13] a state statute challenged on its face "may be condemned under the antitrust laws … if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust

7. *See* Hovenkamp, *supra* note 2, at 793–815. The two-pronged "clear articulation" plus "active supervision" test was first fully articulated in California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).
8. 317 U.S. 341 (1943).
9. U.S. Const., art. I, § 8, cl. 3.
10. For a summary and analysis of Commerce Clause jurisprudence, *see* David F. Forte, *Commerce Among the States*, in The Heritage Guide to the Constitution 130–137 (2nd ed. 2014) ("Heritage Guide").
11. *See* Alden Abbott, The Ninth Circuit Rescues the Government Raisin Cartel, Truth on the Market (May 15, 2014), *available at* http://truthonthemarket.com/2014/05/15/the-ninth-circuit-rescues-the-government-raisin-cartel/.
12. *See* Alan J. Meese, *Competition Policy and the Great Depression: Lessons Learned and a New Way Forward*, 23 Cornell J.L. & Pub. Pol'y 255 (2013) (critiquing *Parker* and recommending that the state action shield for anticompetitive state laws be eliminated).
13. Rice v. Norman Williams Co., 458 U.S. 654, 661 (1982).

laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute." In *Rice,* the Court explained that the type of state law that would fail this test is one that enforces private arrangements that "lack ... any redeeming virtue" and are per se violations of the federal antitrust laws—arrangements such as price fixing schemes.[14]

Second, local governments may face potential antitrust exposure when they engage in business activities. In *City of Columbia*,[15] the Supreme Court suggested that antitrust "immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market." This comment reflects the reality that municipalities increasingly run businesses such as trash hauling and "municipal wi-fi" telecommunications services[16] that compete with private companies and sometimes use governmental rules to disadvantage their private-sector competitors.[17]

The Federal Trade Commission has recommended that courts make active supervision by the state a prerequisite to state action immunity for municipally run businesses[18] and has noted that some federal courts "have appeared willing to entertain the possibility" that such business should be subject to antitrust scrutiny.[19] Yet the extent of antitrust exposure that municipalities face when they act as "market participants" remains very much in doubt.

Third, the state itself—not a municipality or state subdivision—must authorize the displacement of competition, and such displacement must be enunciated clearly and with particularity. In 2013, for example, in *FTC v. Phoebe Putney*,[20] the Supreme Court held that the Federal Trade Commission had the authority to challenge a merger to monopoly of two neighboring hospitals in Georgia. The fact that this merger was implemented by a special-purpose hospital authority—a Georgia state political subdivision authorized to acquire public health facilities—was insufficient to meet the clear articulation standard, according to the Supreme Court.

Noting that the hospital authority's powers, including acquisition and leasing authority, mirrored general powers routinely conferred by states on private corporations, the Court stressed that state action immunity is disfavored and applies only when it is clear that the challenged conduct is undertaken pursuant to the state's own regulatory scheme. In this case, according to the Court, there was no evidence that Georgia had affirmatively contemplated that hospital authorities would displace competition by consolidating hospital ownership.

Fourth, active supervision by the state is not a mere ministerial or "rubber stamp" requirement. Thus, for example, in *Patrick v. Burget*,[21] the Supreme Court did not find active supervision in a state-authorized medical review program. Under state law, a state agency had the authority to suspend or revoke the licenses of hospitals that did not have state-mandated peer review processes, but it did not have the power to review the actual peer review decisions rendered by hospital peer review boards. The Court deemed this authority inadequate, holding that active supervision "requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy."

Furthermore, in *Ticor Title*,[22] the Supreme Court refused to find that state insurance regulation through rate bureaus constituted active supervision when privately agreed-to rates became official unless promptly objected to by the state. The Court explained that:

14. *Id.*
15. City of Columbia & Columbia Outdoor Advertising v. Omni Outdoor Advertising, 499 U.S. 365, 374–75 (1991).
16. *See* The Heartland Institute, Municipal Wi-Fi (2014), http://heartland.org/ideas/municipal-wi-fi.
17. *See* James F. Ponsoldt, *Balancing Federalism and Free Markets: Toward Renewed Antitrust Policing, Privatization, or a "State Supervision" Screen for Municipal Market Participant Conduct*, 48 SMU L. Rev 1783 (1995).
18. Office of Policy Planning, FTC, Report of the State Action Task Force 57 (2003), *available at* http://www.ftc.gov/sites/default/files/documents/advocacy_documents/report-state-action-task-force/stateactionreport.pdf.
19. *Id.* at 47.
20. Fed. Trade Comm'n v. Phoebe Putney Health System, Inc., No. 11-1160, 568 U.S. ___ (2013), *available at* http://www.supremecourt.gov/opinions/12pdf/11-1160_1824.pdf.
21. Patrick v. Burget, 486 U.S. 94, 101 (1988).
22. Fed. Trade Comm'n v. Ticor Title Ins. Co., 504 U.S. 621, 638 (1988).

> Where prices or rates are set as an initial matter by private parties, subject only to a veto if the State chooses to exercise it, the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or rate-setting scheme. The mere potential for state supervision is not an adequate substitute for a decision by the State.

Normally, subordinate state agencies and municipalities are not required to meet the active supervision requirement. The Supreme Court, however, will have the opportunity to put additional teeth into active supervision this term in *North Carolina Board of Dental Examiners v. FTC*,[23] oral argument for which was held on October 14, 2014. That case involves the North Carolina state agency that regulates dentistry. The North Carolina State Board of Dental Examiners, which is dominated by dentists, forbade retail stores from offering tooth whitening services that competed with and undermined dentists' monopoly over such treatments. The Federal Trade Commission, which found the board's practice illegal, has argued that where a state agency is composed of private market participants, it should be required to show active supervision by the state to obtain state action immunity.

A Supreme Court decision accepting this principle might help to curb special-interest favoritism conferred through state law. At the very least, it could complicate the efforts of special interests to protect themselves from competition through regulation.[24]

The Antitrust "Petitioning" Immunity

The process of petitioning federal, state, or local governments for legislative, executive, or adjudicative actions that have anticompetitive effects is also shielded from antitrust scrutiny under the *Noerr-Pennington* doctrine.[25] This doctrine means that businesses have the right to urge state legislatures to pass anticompetitive laws—for example, laws that effectively prevent potential rivals from entering the market. It also means that businesses can urge regulatory bodies to render decisions that will make it harder for rivals to compete, or that they can file lawsuits that impose onerous cost burdens on potential competitors.

The *Noerr-Pennington* doctrine even immunizes "misleading or untruthful claims ... to get the government to injure the petitioner's competitors."[26] (The Federal Trade Commission has argued that material misrepresentations of fact made to regulatory bodies that have an anticompetitive effect should not be shielded,[27] but the Supreme Court has yet to address this issue.)

The *Noerr* line of cases has been often cited as grounded in the First Amendment right to petition the government for redress of grievances, even though the Supreme Court has not explicitly stated that *Noerr-Pennington* immunity is constitutionally compelled. The harm to consumer welfare stemming from anticompetitive government decisions influenced by petitioning—for example, a law that unnecessarily limits entry into an industry—typically is far more severe and lasts longer than purely private efforts aimed at subverting competition. This is because government-imposed competitive restraints, unlike their purely private counterparts, are protected by force of law and thus are immune from correction by market forces.

The scope of petitioning immunity, like state action immunity, has been limited by the Supreme Court. Most notably, petitioning immunity does not extend to a mere "sham"—an action that is "nothing more than a subterfuge designed to harass a

23. North Carolina Bd. of Dental Examiners v. Fed. Trade Comm'n, 717 F.3d 359 (4th Cir. 2013), cert. granted, 82 U.S.L.W. (U.S. Mar. 3, 2014) (No. 13-534), *available at* http://www.scotusblog.com/case-files/cases/north-carolina-board-of-dental-examiners-v-federal-trade-commission/.

24. Prominent scholarship supports the proposition that self-interested firms may manipulate ("capture") regulatory processes to benefit themselves and undermine competition. *See generally* George J. Stigler, *The Theory of Economic Regulation*, 3 Bell J. Econ. & Mgmt. Science No. 3, 3–18 (1971).

25. This doctrine stems from Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961), and its progeny. It is discussed in Hovenkamp, *supra* note 2, at 749–764.

26. *Id.* at 750.

27. *See* FTC Staff Report, *Enforcement Perspectives on the Noerr–Pennington Doctrine* 37 (2006), http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-report-concerning-enforcement-perspectives-noerr-pennington-doctrine/p013518enfperspectnoerr-penningtondoctrine.pdf.

rival."[28] A sham might involve, for instance, costly litigation with no chance of success, designed merely to exhaust a rival's resources, or attempts to bribe an official.

Additionally, petitioning directed to achieving an anticompetitive end does not shield a private anticompetitive restraint designed to advance the same purpose. Thus, in *Superior Court Trial Lawyers*,[29] the Court upheld the Federal Trade Commission's condemnation of an agreement among private legal services lawyers to deny their services to the District of Columbia government until their hourly fee demands were met. The legal services attorneys' joint petitioning to the government for higher fees was a protected activity. The Court, however, found that the lawyers' separate agreement among themselves to carry out a boycott—an anticompetitive act—was separate and distinct from the petitioning.

In short, the state action and *Noerr-Pennington* doctrines illustrate that the courts are willing to imply federal antitrust immunities from the Constitution's establishment of a federal structure and its protection of the right to petition. Nevertheless, the courts are also aware of the potential for abuse of those immunities and thus have sought to limit somewhat the scope of their application.

Immunity for Speech Having an Incidental Anticompetitive Effect

Another core First Amendment protection, freedom of speech, also provides a shield against antitrust prosecution, although it seldom bears directly on a potential antitrust case. The leading precedent in this area is *NAACP v. Claiborne Hardware*.[30] In that case, the Supreme Court held that boycotts by a civil rights group directed at merchants who allegedly had engaged in racially discriminatory behavior were a form of constitutionally protected speech protected from antitrust assault.

Similarly, courts have held that the antitrust laws were not designed to be applied to noncommercial boycott-like activities, even when they have incidental commercial effects. For example, in *Missouri v. NOW*,[31] the Eighth Circuit held that the Sherman Act did not reach a boycott organized by the National Organization for Women and other groups, aimed at states that had not ratified the Equal Rights Amendment, and in *NOW v. Scheidler*,[32] the Seventh Circuit held that even if pro-life demonstrators' efforts to interfere with abortion clinic services were "boycotts," they were not the sort of boycotts that are covered by the Sherman Antitrust Act.

First Amendment Protection for Freedom of Religion

The First Amendment also, of course, protects the freedom of religion. One leading scholar, Professor Barak Richman of Duke University Law School, has argued that First Amendment religious freedoms would not be undermined by an antitrust challenge to what he terms a "rabbinic cartel" that affects clerical hiring decisions by American Jewish congregations affiliated with the Conservative movement.[33]

In particular, Richman pinpoints the activities of the Rabbinical Assembly, or RA, the only recognized body authorized to place rabbis in Conservative congregations. The RA administers a Joint Placement Commission charged with connecting RA members seeking employment and Conservative congregations searching to hire a pulpit rabbi. Professor Richman highlights four RA restrictions he finds problematic: (1) a congregation may search for a rabbi only through the offices of the commission, which decides whose resumes to forward; (2) a congregation served by the commission shall not advertise in the media for a rabbi, or else will face removal from the placement list; (3) a congregation may not interview a non-RA rabbi without the specific written approval of the commission, or else will face removal from the placement list; and (4) a congregation may not engage a non-RA rabbi without the specific written approval of the commission, or else will lose placement privileges for at least a year the next time it seeks a rabbi.

28. *See* Hovenkamp, *supra* note 2, at 755, *discussing*, *inter alia*, California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).
29. Fed. Trade Comm'n v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990).
30. NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), rehearing denied, 459 U.S. 898 (1982).
31. Missouri v. National Organization for Women, Inc., 620 F.2d 1301, 1309 (8th Cir. 1980), cert. denied, 449 U.S. 842 (1980).
32. National Organization for Women v. Scheidler, 968 F.2d 612 (7th Cir. 1992), reversed on non-antitrust grounds, 510 U.S. 249 (1994).
33. *See* Barak D. Richman, *Saving the First Amendment from Itself: Relief from the Sherman Act Against the Rabbinic Cartels*, 39 Pepperdine L. Rev. 1347 (2013). The following description of the rabbinic "cartels" is drawn from this article.

Professor Richman maintains that these "rules restrict the mutual preferences of hiring congregations and rabbis seeking employment." He concludes that the rules constitute an antitrust "illegal group boycott" of Conservative congregations and rabbis that refuse to adhere to the RA's placement policies. He also indicates that similar competitive problems affect rabbinical placement rules employed by Reform and Reconstructionist rabbinical associations representing the other two non-Orthodox American Jewish movements.

Even if one accepted Professor Richman's characterization of rabbinical placement organizations as "cartels," application of the antitrust laws to their placement rules would violate the First Amendment. In 2012, in *Hosanna Tabor Evangelical Lutheran Church and School v. EEOC*,[34] the Supreme Court held that a "ministerial exception" exempts religious organizations (in that case, a Lutheran church) from employment discrimination suits brought by ministerial employees. The Court based its decision on the First Amendment's Establishment of Religion and Free Exercise Clauses. It held that state imposition of an unwanted minister infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith through its own appointments, and that giving the state the power to determine which individuals will minister to the faithful involves the government in ecclesiastical decisions and thus violates the Establishment Clause.

Applying the logic of *Hosanna Tabor*, antitrust suits inevitably would displace the RA's carefully crafted rules for rabbinical placement and affect its ability to shape rabbinical appointments. This displacement would in turn interfere with the RA's free exercise of religion. Furthermore, antitrust-motivated changes in rules would entangle the state in the Conservative movement's rabbinical selection processes in violation of the Establishment Clause. In short, after *Hosanna Tabor*, any attempt to justify an antitrust challenge to the RA's rules would be a constitutional non-starter. This analysis would apply likewise to similar rabbinical placement rules employed by the other non-Orthodox American Jewish movements.

Professor Richman has argued, nevertheless, that Conservative Judaism is a "congregational" religion. As such, in his opinion, antitrust intervention that displaced restrictive RA rules would promote the First Amendment free exercise rights of individual Conservative congregations to make their own rabbinical selections freely. In short, antitrust intervention would enhance First Amendment values, not undermine them, if one accepts that line of reasoning.

It is not, however, the role of government to "referee" differences of opinion within a religious body, weighing theoretical future benefits to local congregations against harms to nationally based coreligionists. That is the very definition of entanglement between government and religion, raising intractable First Amendment Free Exercise and Establishment Clause problems.[35] Such government meddling inevitably would affect a religious organization's ministerial (in this case, rabbinical) selection processes, unconstitutionally trenching upon a core religious function: allowing the RA and similar rabbinical associations to further what they deem the best ministerial selection policies for their movements. Such policies are inherently a religious responsibility and thus, under the First Amendment, must be free from government interference, whether from antitrust or any other statutory scheme.

Local congregations that disagree with restrictive rabbinical association rules can disaffiliate or seek to have the rules reformed. Any such activities, however, should take place solely among coreligionists, free from government meddling.

Vindicating Economic Liberties Without Antitrust

In sum, judicial precedents have constrained the application of antitrust to certain forms of regulatory activity and private conduct that implicate constitutional concerns. This is as it should be. Antitrust doctrine is not embodied in constitutional text, and even if it were, it would have to be read in tandem with other provisions of the Constitution. On the whole, it appears that the Supreme Court has done a fairly good job of allowing "breathing space" for

34. Hosanna-Tabor Evangelical v. EEOC, 132 S. Ct. 694 (2012).

35. "The general rule is that courts are prohibited by the First Amendment from getting involved in intra-church disputes when doing so would require them to become entangled in religious affairs." 2 W. Cole Durham & Robert Smith, Religious Organizations and the Law § 10:44 (2011).

antitrust without offending federalism and First Amendment principles. However, there may be a role for other federal legal avenues, rooted in the Constitution, to challenge antitrust-immune state regulatory excesses that damage the competitive process and undermine economic liberties.

In granting Congress specific authority to regulate interstate commerce, the text of the Commerce Clause of the Constitution does not explicitly limit the power of the states to enact laws that affect such commerce. Nevertheless, for two centuries, since the time of Chief Justice John Marshall, the Supreme Court has held that there is a "dormant" or "negative" aspect of the Commerce Clause that trumps state enactments that "excessively" burden interstate commerce.[36]

A prominent justification for such an implied limitation on state authority is that the Commerce Clause was designed to deal with the problem of state trade barriers that had limited interstate commerce and harmed the American economy under the Articles of Confederation, which preceded the Constitution.[37] Understandably, however, the federal courts have been rather reluctant to overturn state enactments on negative Commerce Clause grounds, particularly since a huge number of state laws may have *some* constraining effect on interstate commerce. Laws that appear to discriminate between in-state and out-of-state commerce are highly vulnerable, but most statutes are not explicitly discriminatory.

Non-discriminatory enactments that impose "incidental" burdens on interstate commerce are generally subject to a sort of "balancing test" that weighs the burden on interstate commerce against state interests. This test is deferential to state government in that it places the burden of proof on parties that challenge laws and upholds the state law unless a burden is found "clearly excessive." Notably, the Supreme Court refused to condemn the raisin marketing scheme in *Parker v. Brown* under the dormant Commerce Clause, despite its major negative effect on raisin-related commerce throughout the country. The Court reasoned that, "on balance, the regulation should be sustained as a legitimate state attempt to deal with a peculiar local problem that Congress did not specifically address."[38]

In short, the dormant Commerce Clause is at best a slight constraint on competitively harmful state regulation.

The Takings Clause of the Fifth Amendment,[39] applied to the states through the Fourteenth Amendment, has been found applicable to "excessive" state and federal regulation. In deciding whether a regulation effects a taking of property, courts will weigh the character of the governmental action, the extent to which a regulation diminishes economic value, and whether it undermines investment-backed expectations.[40] Federal courts have been fairly hesitant to find regulatory takings. Regulatory actions that can be characterized as actual physical takings of property stand a much better chance of being deemed takings.

In one ongoing case, *Horne v. USDA*,[41] a raisin grower has petitioned the Supreme Court to review the Ninth Circuit's refusal to find a taking when an agent of the government failed to pay the grower adequately for a part of its crop. This matter arises out of the anticompetitive California raisin marketing order program administered by the U.S. Department of Agriculture.[42] A Supreme Court decision finding a compensable taking in this case could help to incentivize the government to do away with, or at least radically trim, agricultural cartels. The end result would be more vibrant competition and enhanced consumer welfare.

36. For a summary discussion of dormant Commerce Clause principles, *see* John E. Nowak & Ronald D. Rotunda, Constitutional Law, 334–392 (8th ed. 2010). Justice Thomas rejects the position that the courts have the authority to strike down state laws that burden interstate commerce, but his view is not shared by other Justices on the Supreme Court. *See* Ralph A. Rossum, *Clarence Thomas's Originalist Understanding of the Interstate, Negative, and Indian Commerce Clauses*, 88 Univ. of Detroit Mercy L. Rev 769 (2011).
37. *See* Nowak & Rotunda, *supra* note 36, at 335–36.
38. *Id*. at 374.
39. U.S. Const., amend. V.
40. For an overview of takings jurisprudence, *see* Nowak & Rotunda, *supra* note 36, at 537–594.
41. Horne v. U.S. Depart. of Agriculture, 750 F.3d 1128 (9th Cir.), petition for cert. filed, 2014 WL 4404781 (U.S. Sept. 8, 2014) (No. No. 14-275).
42. *See* Abbott, *supra* note 11.

The Equal Protection Clause of the Constitution,[43] which forbids state laws that deny "equal protection of the laws,"[44] has been applied in modern times in a manner that is deferential to state regulatory schemes. In recent years, however, there have been signs that the Fourteenth Amendment "rational basis" test that applies to economic regulation may be applied more expansively by the courts when it comes to analyzing anticompetitive licensing restrictions[45] and related affronts to one of the most basic civil rights of all: the right to earn a living.[46]

Specifically, in 2013, in *St. Joseph Abbey*,[47] the federal Fifth Circuit Court of Appeals ruled that Louisiana rules requiring all casket manufacturers to be licensed funeral directors—which prevented monks from earning a livelihood by making caskets—served no other purpose than to protect the funeral industry and thus violated the Fourteenth Amendment's Due Process and Equal Protection clauses. Notably, the Fifth Circuit held that protectionism, standing alone, does not provide a "rational basis" for a state law.

Since the Sixth[48] and Ninth[49] Circuit Courts of Appeals have also held that economic protectionism, standing alone, is insufficient to satisfy rational basis review but the Tenth Circuit has held to the contrary,[50] it may be time for the Supreme Court to review this issue and perhaps delegitimize pure economic protectionism. Such a development could help erode the legal foundations for protectionist, anticompetitive licensing schemes.

Conclusion

Constitutional limitations on the scope of antitrust law are and will continue to be significant. Under certain limited circumstances, the "economic liberty" provisions of the Constitution may provide alternative means by which to vindicate the free market–oriented ends of the antitrust enterprise. Diverse and sometimes conflicting legal interests and constitutional protections will continue to be harmonized as effectively as possible through a federal common law process overseen by imperfect, "non-angelic" judges.[51] Overall, this process appears preferable to precipitous and far-reaching federal legislative change.

*—**Alden F. Abbott** is Deputy Director of the Edwin Meese III Center for Legal and Judicial Studies and the John, Barbara, and Victoria Rumpel Senior Legal Fellow at The Heritage Foundation.*

43. U.S. Const. amend. XIV, § 1.
44. For a summary and evaluation of Equal Protection Clause jurisprudence, *see* David Smolin, *Equal Protection*, in Heritage Guide, *supra* note 10, at 511–515.
45. *See, e.g.*, Alden Abbott, Occupational Licensing, Competition, and the Constitution: Prospects for Reform? Truth on the Market (July 18, 2014), *available at* http://truthonthemarket.com/2014/07/18/occupational-licensing-competition-and-the-constitution-prospects-for-reform/.
46. *See* Barsky v. State Bd. of Regents, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting) ("The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property.").
47. St. Joseph Abbey v. Castille, 712 F.3d 215 (5th Cir. 2013).
48. Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002).
49. Merrifield v. Lockyer, 547 F.3d 978 (9th Cir. 2008).
50. Powers v. Harris, 379 F.3d 1208, 1221–23 (10th Cir. 2004).
51. "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." The Federalist No. 51 (James Madison), *available at* http://thomas.loc.gov/home/histdox/fed_51.html.