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A STRUCTURALIST APPROACH TO THE TWO STATE ACTION DOCTRINES

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ABSTRACT: By all accounts, the constitutional and antitrust state-action doctrines are strangers. Courts and scholars see the constitutional state-action doctrine as about the applicability of constitutional rights in private disputes, and the antitrust state-action doctrine as a judicial negotiation between the scope of the Sherman Act and the demands of federalism. In this conventional view, the only thing the doctrines share in common is that they are both an awful mess. This Article challenges the conventional wisdom and argues that the two state-action doctrines are fundamentally connected, and when viewed in a certain light, not even that messy. It is not that the traditional readings of the two doctrines have been wrong, so much as they persistently fail to take notice of the political theory that threads the two doctrines together. That theory is liberal legalism, and in the context of liberalism the two state-action doctrines

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bear witness to a story about American "competition law" that is only half-told in the conventional fields of law and economics. To better understand the legal foundations of market society, as well as the requisites of market reform, we need something other than an "economic analysis of law," much less a singular focus on various forms of economic regulation. What is needed instead is an image of the structure of market society, and an understanding of the deep premises that make that image possible. In the service of that goal this Article maps the manner in which these underground notions inform the background rules of the market through the use of the constitutional state-action doctrine, and simultaneously manage the market through the use of regulatory devices like antitrust law. These are the premises of our liberal legalism, and a fruitful field of their study lies in the surprising connection between the two state-action doctrines.

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INTRODUCTION

In the conventional view, there are two state-action doctrines in American law. In constitutional law, the state-action doctrine is understood to police the boundary between governmental coercion of private individuals on the one hand, and market transactions between individuals, which are governed by private law, on the other. Constitutional state-action doctrine ("CSAD") teaches that where the Constitution regulates the first type of coercion, the latter behavior is typically beyond the reach of constitutional law.[1] The anti-

[1] For a sampling of work on constitutional state action doctrine, *see, e.g.*, David Barron, Privatizing the Constitution: State Action and Beyond in The Rehnquist Legacy (2006); Larry Alexander & Paul Horton, Whom Does the Constitution Command? A Conceptual Analysis with Practical Implications (1988); Lawrence A. Alexander, *Cutting the Gordian Knot: State Action and Self-Help Repossessio*n, 2 Hastings Const. L.Q. 893 (1975); Charles Black, *Foreword: State Action, Equal Protection, and California's Proposition 14*, 81 Harv. L. Rev. 69, 95 (1967); Erwin Chemerinsky, *Rethinking State Action,* 80 Nw. U. L. Rev. 503 (1985), Harold Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 Cal. L. Rev. 208 (1957); Wilson Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 Hofstra L. Rev. 1379 (2006); Alan R. Madry, *State Action and the Due Process of Self-Help*; *Flagg*

trust state-action doctrine ("ASAD"), in contrast, has the purpose of providing state actors with immunity when they engage in anti-competitive acts that would otherwise violate U.S. antitrust law. Unlike the broader sense about the applicability of constitutional state-action doctrine to various state actors, immunity from antitrust enforcement will attach to a state actor only when the government has "clearly articulated" and "actively supervised" the anticompetitive policy in question.[2]

This Article argues for a way of seeing the two state action doctrines as similarly shaped by an underlying legal structure.[3] In a

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Bros. Redux, 61 U. Pitt. L. Rev. 1 (2000); David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 Sup. Ct. Rev. 53 (1989); William W. Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action*, 1965 Duke L.J. 214; Michael L. Wells, *Identifying State Actors in Constitutional Litigation: Reviving the Role of Substantive Context*, 26 Cardozo L. Rev. 99 (2004); Jerre S. Williams, *The Twilight of State Action*, 41 Tex. L. Rev. 347 (1963).

[2] James Cooper & William Kovacic, *U.S. Convergence with International Competition Norms: Antitrust and Public Restraints on Competition*, 90 B.U. L REV. 1555, 1575 (2010). For work on antitrust state action doctrine *see generally* Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23 (1983); Andrew I. Gavil, *Reconstructing the Jurisdictional Foundation of Antitrust Federalism*, 61 GEO. WASH. L. REV. 658 (1993); Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203 (1997); Thomas M. Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 CAL. L. REV. 227, 229 n.16 (1987) ;William H. Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum*, 61 B.U. L. REV. 1099, 1109 (1981); John Shepard Wiley Jr., *Revision and Apology in Antitrust Federalism*, 96 YALE L.J. 1277, 1280 (1987); Jean Wegman Burns, *Embracing Both Faces of Antitrust Federalism: Parker and ARC America Corp.*, 68 ANTITRUST L.J. 29 (2000) (expressing approval for current doctrine because it permits experimentation in economic regulation); Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L.J. 486 (1987); D. Daniel Sokol, *Limiting Anticompetitive Government Interventions That Benefit Special Interests*, 17 GEO. MASON L. REV. 119 (2009).

[3] Though I haven't found any structuralist accounts of state action doctrine, there are good examples of legal scholarship bringing an economic perspective to the constitutional state-action doctrine. *See, e.g.*, Paul Brest, *State Action and Liberal Theory: A*

long-standing and staggering amount of literature on the constitutional and antitrust state-action doctrines (quite separate literatures, mind you), structuralism is wholly absent. Given this lack of prior analysis, it is tempting to figure that the doctrines really have nothing to do with each other, and that if they did, someone would have said so by now. After all, having the same last name does not mean we are related.

Casenote on Flagg Brothers v. Brooks, 130 U. PENN. L. REV. 1296 (1982); Frank I. Michelman, *The Bill of Rights, the Common Law, and the Freedom-Friendly State*, 58 U. MIAMI L. REV. 401 (2004); Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom,* 92 GEO. L.J. 779, 779 (2004); Mark V. Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 CHI. J. INT'L L. 435 (2002). However, my references to structuralism are not synonymous with legal realism or Neo-Marxist approaches to law. This Article relies on a theory of legal structuralism borrowed from the work of Roland Barthes, "The Structuralist Activity" *in* STRUCTURALISM AND SINCE: FROM LEVI-STRAUSS TO DERRIDA (John Sturrock, ed., 1979); MICHEL FOUCAULT, THE ARCHEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON LANGUAGE (1969); HAYDEN WHITE, METAHISTORY: THE HISTORICAL IMAGINATION IN NINETEENTH CENTURY EUROPE (1973); JONATHAN CULLER, STRUCTURALIST POETICS (1975). Varying precedents in law include Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979); Gerald Frug, *The City as a Legal Concept*, 93 HAR. L. REV. 1059 (1980); Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75 (1991); David Kennedy, *Theses About International Law Discourse*, 23 GERMAN YEARBOOK INT'L L. 353 (1980); David Kennedy, *Critical Theory, Structuralism, and Contemporary Legal Scholarship*, 21 NEW ENGLAND. L. REV. 209 (1986); Gary Peller, *The Metaphysics of American Law*; 73 Cal. L. Rev. 1151 (1985); Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1049 (2002). These works represent contrasting moments in the history of legal structuralism, and they shouldn't be confused for a precise rendering of the structuralist style at work in this article. In my view, legal structuralism is anti-representational in a Rortian sense, and as a consequence, far removed from "objective" accounts of "universal totalities." I don't believe that the early instances of legal structuralism were really after totalities, either, though its critics certainly did. For Rorty's account of anti-representationalism, see RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979). For the poststructuralist critique of the first wave of legal structuralism, see James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985). For a general discussion and argument in favor of a "second generation" of legal structuralism, see Justin Desautels-Stein, *The Rise and Fall of Legal Structuralism* (manuscript on file with the New York University Journal of Law & Liberty).

Nevertheless, if we ignore the pull of tradition and push forward with a thesis about a structural relation between the two state-action doctrines, we are confronted with more than the broad common sense among constitutional and antitrust lawyers that the doctrines are alien to one another. As scholars of constitutional and antitrust law have occasionally argued with more precision, there are at least three other arguments poised against a structural approach to state action:

(1) One of these arguments is political. When the state action problem attended by antitrust lawyers first emerged in the 1940s, the constitutional version was already in the midst of a full-on mid-life crisis. It was at this time, in the heady years building up to *Brown v. Board of Education*,[4] that the constitutional state-action doctrine was wrestling with the constitutionality of racially restrictive covenants on the transfer of property.[5] In contrast, the antitrust state-action doctrine was hatched in 1943 as a technical answer to a question about the political economy of the Sherman Antitrust Act.[6] The topic of the controversy was the price of raisins.

This is simply to say that the two doctrines are of different ages and sensibilities, have matured in the hands of very different generations of lawyers, and seem laden with very different sorts of political stakes. The constitutional state-action doctrine is a sexy, famous train wreck, "a conceptual disaster area"[7] that has lured in some of the greatest legal minds of the twentieth century. Antitrust state-action doctrine, in contrast, is hardly famous at all. Cloaked in the homely language of efficiency and expertise, antitrust plays the marginal supplement to the other, more self-important doctrine, teeming over with pomp and nonsense. Perhaps most importantly,

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[4] 347 U.S. 483 (1954).
[5] Shelley v. Kraemer, 334 U.S. 1 (1948).
[6] Parker v. Brown, 317 U.S. 341 (1943).
[7] Black, *supra* note 1, at 95.

the two doctrines also appear to be trained on very different targets. The one is about the deployment of a supreme power in the name of individual rights, while the other is about the inviolability of free markets. As Herbert Hovenkamp, an impressive scholar of both constitutional and antitrust law, has explained, "the two are rarely confused."[8]

(2) For many antitrust scholars, a second issue that might implicitly distinguish antitrust state-action doctrine from constitutional state-action doctrine is federalism.[9] As James Cooper and William Kovacic have recently re-stated the idea, "[a]t its core, the [antitrust] state action doctrine is about federalism. It attempts to resolve the extent to which a state, in a system of dual sovereigns, can pursue policies that conflict with the national policy in favor of competition."[10] In a slightly more jaundiced view, Richard Squire has argued that while federalism is indeed the animating basis of antitrust state-action doctrine, it is a basis that is deeply confused.[11] Squire's argument turns on the distinction between state actors (performing as market participants) that have violated federal antitrust law, and state actors (performing as lawmakers) that have violated federal antitrust law.[12] In the first type of case, Squire believes that state-action immunity might make sense,[13] but that in the latter cases, courts have habitually failed to see that these cases are governed by the Constitution's Supremacy Clause—if the question is simply whether state law should trump federal law, well, we know the an-

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[8] Herbert Hovenkamp, *Federalism and Antitrust Reform*, 40 U.S.F. L. REV. 627, 628 n. 15 (2006).

[9] *See generally* Daniel Crane, *Antitrust Antifederalism*, 96 CAL. L. REV. 1, 3 (2008).

[10] Cooper & Kovacic, *supra* note 2, at 1568.

[11] See generally Richard Squire, Antitrust and the Supremacy Clause, 59 STAN. L. REV. 77 (2006).

[12] *Id.* at 80–93.

[13] *Id.* at 85–87.

swer.[14] Consequently, Squire seemingly agrees with the majority view about antitrust state action doctrine being a doctrine of federalism. He just thinks it is a terrible mess.[15] The upshot: if antitrust state-action doctrine is all about federalism, we know that federalism is surely not the core of constitutional state-action doctrine, which has as its *raison d'être* the protection of individual rights.[16]

(3) A third ostensible basis for separating out the doctrines turns on the apparently very different problems they are understood to be addressing, as opposed to apparent differences in their conceptual cores. Writing more than twenty years ago, and in one of the few articles that explicitly talks of the two doctrines together, Einer Elhague argued that what was "really driv[ing]" decisions about the scope of antitrust review in state-action cases was a determination of whether private parties with financial interests in restraining trade were behind the regulations at issue.[17] Because of his advocacy of a process-oriented view of the interests at stake, it is easy to see Elhague as performing a kind of post-realist attack on formalistic theories of state action, hoping to do to antitrust law what Brainerd Currie did to conflict of laws.[18] The process view of financial interest, and the possibility of regulatory capture in economic decision-making, Elhague explained, proved to be a very

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[14] *Id.* at 78–79.

[15] *Id.*

[16] Interestingly, the very early cases dealing with constitutional state action doctrine were precisely about federalism. For the Court, the initial questions involved the relation between the Fourteenth Amendment and the state police power. *See, e.g.*, Mark Tushnet, *State Action in 2020*, *in* THE CONSTITUTION IN 2020, 73 (Jack Balkin & Reva Siegel, eds.) (2009) ("At its origin, the state-action doctrine was a federalism doctrine.").

[17] Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 683, 691 (1991).

[18] For an interesting spin on the familiar story, *see* Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*, 53 BUFF. L. REV. 973, 1009–18 (2005).

different playing field than that of constitutional law. Apparently in the constitutional context, worries of another sort were in play.[19] Looking for support from a footnote in *NCAA v. Tarkanian,*[20] Elhague emphasized how questions of "what constitutes state action under antitrust law are 'by no means identical' with its conclusions about 'state action' under constitutional law."[21] Very likely seeing that Justice Stevens was actually implying more of a similarity than a real difference between the doctrines, Elhague went on to chide the Court for "understat[ing] the degree of inconsistency."[22]

A decade later, and from what Elhague would likely criticize as precisely the kind of formalism he was out to wipe away, Steven Semeraro suggested that the two state-action doctrines are irrelevant to one another due to their very different senses about the nature of the infamous public–private distinction.[23] Thus, where Elhague critiqued the public–private distinction wholesale, Semeraro defended the coherence of a public–private distinction in the special context of antitrust law.[24] According to Semeraro, the state does not perform in the traditionally "public" role of the coercive regulator known to constitutional law when it is merely facilitating free competition in the marketplace. Thus, "state action" in the context of antitrust law is apparently very different from state

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[19] Wiley had made a similar argument a few years before. *See* John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713 (1986).

[20] NCAA v. Tarkanian, 488 U.S. 179, 194 n.14 (1988) ("Although by no means identical, analysis of the existence of state action justifying immunity from antitrust liability is somewhat similar to the state action inquiry conducted pursuant to § 1983 and the Fourteenth Amendment. In both contexts, for example, courts examine whether the rule in question is a rule of the State.").

[21] Elhauge, *supra* note 17, at 682.

[22] *Id.*

[23] Steven Semeraro, *Demystifying Antitrust State Action Doctrine*, 24 HARV. J.L. & PUB. POL'Y 203, 269 (2000).

[24] *Id.* at 266–72.

action in constitutional law, since state action in the former is "altruistic," while state action in the latter is "coercive."[25]

So there we have some of the initial worries from scholars like Hovenkamp, Cooper, Kovacic, Squire, Elhague, and Semeraro about seeing the two state-action doctrines as manifestations of a single legal style. There is the argument from tradition, which instructs us to see that a connection between the two doctrines is likely false since there have been few attempts to find such a connection. There is the argument from political history, teaching us about the very different circumstances and normative foundations of the doctrines. There is the argument about the contrasting conceptual cores of the two doctrines, in which antitrust state-action doctrine deals with the problem of federalism—a problem absent from constitutional state-action doctrine. Last, there is the argument about the relation between the state and the market, in which we see how the market and state play fundamentally different roles in the two doctrines.

This Article argues that these explanations and intuitions have either misconstrued or just missed the "bigger" picture. Indeed, when seen through the lens of legal structuralism, four significant insights about the relationship between the constitutional and antitrust state-action doctrines come into view:

(1) The apparently incoherent fields of state action begin to cohere quite sensibly when analyzed together. If the two state-action doctrines are often understood as demonstrably incoherent on their own, the present argument suggests that our understanding of the state action doctrines will be considerably deepened if we understand them as "utterances" of a single language-system.

(2) Another involves a novel understanding of the public–private distinction seemingly indigenous to both of the state-action

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[25] *Id.* at 270.

doctrines. In the wide literature on the public–private distinction,[26] the understanding is that a court's heavy reliance on a sharp distinction between the public and private spheres of government and society will lead it into an increasingly small domain of state action. And to be sure, this is precisely how the public–private distinction performs in the context of CSAD. The traditional conclusion is that a court's strong reliance on a public–private distinction will lead to politically "conservative" results. As argued below, in what is likely the most immediately striking aspect of a structuralist account of state action, the ASAD *flips* the traditional politics of the public–private distinction: in this context, courts often use a strong public–private distinction to generate "liberal" results, and rely on a weak distinction to generate "conservative" ones. The ultimate take-away here is that the public–private distinction does not actually have any pre-loaded political valence.

(3) An understanding of the relatedness of questions about constitutional and competition law inoculates us from the traditional story of the rise and fall of "Lochnerian" substantive due process.[27] In that old story, we are meant to remember how constitutional interpretation once engaged in a dangerous and unsavory affair with economic rights—an affair that thankfully came to an end before World War II. A singular focus on *Lochner*, however, blinds constitutional scholars to the much more basic and foundational economic role that the constitution plays in the construction of market soci-

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[26] *See, e.g.*, JOHN DAWSON, THE ORACLES OF LAW (1968); Karl Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358 (1982); John Merryman, *The Public Law-Private Law Distinction in European and American Law*, 17 J. PUB. L. 3 (1968); Francis Olsen, *The Family and the Market: A Study of Ideology and Market Reform*, 96 HARV. L. REV. 1497 (1983); Roscoe Pound, *Public Law and Private Law*, 24 CORNELL L. Q. 469 (1939).

[27] Lochner v. New York, 198 U.S. 45 (1905). For a recent attempt to defend *Lochner*, *see* DAVID BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011).

ety. Seeing the constitutional state action doctrine as of apiece with the antitrust state action doctrine pushes the *Lochner* story to the side, and instead emphasizes an economic role for the constitution that it still plays today.

(4) Finally, and perhaps most practically, a structuralist account of state action suggests a unified story about the nature of competition law in the United States—a story that is only half-told, at best, when the focus is only on antitrust law. The practical or operational aspect of this insight comes into focus once we take notice of the constant calls for market reform, which seem to be only increasing over time.[28] If scholars, pundits, and politicians are serious about the desirability of a major shift in the way in which we have structured our market society, it is absolutely essential that we train our sights not only on the regulatory apparatus that is meant to control and restrain market forces, but also on the background rules that presuppose the very existence of those "forces." Without due attention to the background rules of a competitive market, our hopes for reform will always be piecemeal.[29] A study of the alliance between

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[28] *See, e.g.*, Paul Krugman, *How Did Economists Get It So Wrong?*, N.Y. TIMES (Sept. 6, 2009), *available at* http://www.nytimes.com/2009/09/06/magazine/06; Llewellyn H. Rockwell, Jr., *What is Fascism?*, THE FREE MARKET, *available at* http://mises.org/journals/fm/FM_Fall_2011.pdf; L. Randall Wray, *Let's Make a Deal: The Bail-Out of Wall Street in Unusual and Exigent Circumstances*, HUFFINGTON POST (Feb. 16, 2012), http://www.huffingtonpost.com/l-randall-wray/lets-make-a-deal-the- bail_b_1283007 .html; James A. Kahn, *Can We Determine the Optimal Size of Government?*, *in* CENTER FOR GLOBAL LIBERTY & PROSPERITY DEVELOPMENT POLICY BRIEFING PAPER NO. 7 (Sept. 14, 2011), *available at* http://www.cato.org/publications/development-briefing-paper/can-we-determine-optimal-size-government.

[29] *See generally*, Justin Desautels-Stein, *The Market as a Legal Concept*, 60 BUFF. L. REV. 387, 395-396 (2012); BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS (2011). This point walks a very slippery slope. The intention in this article is to produce a "style" of state action. In that sense, it is not meant to track the "real world" in an empirical, representational way. Indeed, the article's conceptual apparatus rejects the theory of representationalism. This triggers the question, however, why it is that

the two state-action doctrines helps us see these two dimensions of competition law, and their deep connectedness.

In the discussion that follows, Part I surveys the "conceptual lens" that makes it possible to properly see the two state-action doctrines as a unity: liberal legalism.[30] It is argued that liberal legalism presents us with an image of market society, an image that is both constituted and regulated by law. In the aesthetic of liberal legalism, market society is *constituted* by the private law rules of property and contract, as interpreted by constitutional law, and *regulated* by a public law of which antitrust law is a canonical example. I refer to these constitutive rules of the market as "background rules," and the regulatory rules as "foreground rules." Part II explores constitutional state action doctrine through the lens of liberal legalism and the liberal dichotomy between background and foreground rules, and Part III does the same with antitrust state action doctrine. Part IV concludes, summarizing the deep alliance between the two state action doctrines.

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that an appreciation of the liberal style which is the object of study should be of any value. Following Barthes, my thinking here is that while it is a mistake to think of the structure of state action doctrine as a faithful representation of the "actual" legal universe, my presentation is still "interested" in the world. "We see, then, why we must speak of a structuralist activity: creation or reflection are not, here, an original 'impression' of the world, but a veritable fabrication of a world that resembles the first one, not in order to copy it but to render it intelligible. Hence one might say that structuralism is an activity of imitation, which is also why there is, strictly speaking, no technical difference between structuralism as an intellectual activity on the one hand and literature in particular, or art in general on the other: both derive from a mimesis…" Barthes, *supra* note, at 150.

[30] This term comes with a lot of baggage. All I intend to mean by it is the view of law espoused by liberal political theory. Among the best expressions of the idea is found in ROBERTO UNGER, KNOWLEDGE AND POLITICS (1975). To the extent that liberalism has many different views of law, then this simply suggests that liberal legalism has several faces. In my view, it has three of them: classic, modern, and pragmatic. *See* Justin Desautels-Stein, *Pragmatic Liberalism,* 77 LAW & CONTEMP. PROBS. __ (forthcoming 2014).

I. LIBERAL COMPETITION LAW

A. LIBERAL LEGALISM AND THE MARKET AS A LEGAL CONCEPT

In liberal political theory, markets are constituted and regulated through law.[31] Depending on the particular style of liberalism we are addressing, we might emphasize those rules that are doing the constitutive work in the background, or instead prefer the regulating rules that are in the foreground. Traditional examples of these sorts of background rules are those rules we associate with the private law of Anglo-American legal thought, such as property and contract law.[32] Examples of foreground rules include statutory regimes, such as a federal labor law, tax law, environmental or antitrust law.[33]

The key point to see at this stage, however, is that liberalism begins its portrait of market society with a legal medium. For markets to happen at all, they have to be legalized. The question that follows: if liberalism sees markets as legal concepts, what are the

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[31] *See, e.g.*, Roberto Mangabeira Unger, Law in Modern Society (1976); Roberto Unger, What Should Legal Analysis Become? (Verso 1996); Duncan Kennedy, Sexy Dressing etc. (1995); John Henry Schlegel, *On the Many Flavors of Capitalism, or Reflections on Schumpeter's Ghost*, 56 Buff. L. Rev. 965 (2008); David Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 Wis. L. Rev. 720 (1972); David Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 Yale L.J. 1 (1972); David Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 Stan. L. Rev. 575 (1984); David Trubek & Mark Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 Wis. L. Rev. 1062 (1974).

[32] *See, e.g.*, Richard Epstein, Skepticism and Freedom: A Modern Case for Classic Liberalism (2003); Hernando de Soto, The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else (2000); Richard Posner, *Creating a Legal Framework for Economic Development*, *in* The World Bank, Research Observer (Feb. 1998), *available at* siteresources.worldbank.org/.../Resources/LegalFramework.pdf;

[33] For great coverage of the world of regulation, *see* JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 175 (2008). A classic discussion is Charles Reich, *The Law of the Planned Society*, 75 YALE L. J. 1227 (1966).

relevant rules? In order to answer that question, we need to first choose a style of liberal legalism.

In the classic liberal style, the central requirement is the legalization of those rights classically understood to fill out a theory of individual will.[34] To take John Locke as a canonical illustrator of the style, the idea is to build an idea of free competition among autonomous market actors on the foundation of property and contract law.[35] For Locke, the chief purpose of constitutional government

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[34] *See, e.g.*, DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT (2006).

[35] With particular reference to Locke's Second Treatise, we see an image of competitive society populated by individuals who possess inalienable and fundamental rights. Among the key classic texts are DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING (Eric Steinberg ed., 2nd ed. 1993); JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 12 (Paul Negri & Tom Crawford eds., Dover Publications 2002) (1689); JOHN STUART MILL, ON LIBERTY (Paul Negri & Kathy Casey, eds., Dover Thrift Editions 2002); *see generally* JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY (W. J. Ashley ed. 1923) (1848); ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776) . For historical treatments, see ROBERT HEILBRONER, THE WORLDLY PHILOSOPHERS (Simon & Schuster eds., 7th ed. 1995); JOSEPH SCHUMPETER, A HISTORY OF ECONOMIC ANALYSIS (1954); JACOB VINER, ESSAYS ON THE INTELLECTUAL HISTORY OF ECONOMICS (Douglas A. Irwin, ed. 1991); LIONEL ROBBINS, A HISTORY OF ECONOMIC THOUGHT (Steven G. Medama & Warren J. Samuels eds., 1998); BERTRAND RUSSEL, THE HISTORY OF WESTERN PHILOSOPHY (1945). Most importantly, these rights include the right to own property and freely contract with others—rights which together form the liberal idea of liberty. LOCKE, *supra* note 35, at Chapter 5. In terms of "contract" representing a liberal progression from the feudal notion of "status," Henry Sumner Maine is likely the argument's most well-known advocate. HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 304 (4th ed. 1870). As he argued: "There are few general propositions concerning the age to which we belong which seem at first sight likely to be received with readier concurrence than the assertion that the society of our day is mainly distinguished from that of preceding generations by the largeness of the sphere which is occupied in it by Contract…Not many of us are so unobservant as not to perceive that in innumerable cases where old law fixed a man's social position irreversibly at his birth, modern law allow him to create for himself by convention…" *Id*. In order to first establish the requisite elements of this competitive society, and then to effectively maintain them, this natural law must

was to secure the freedom of these background rights.[36] Thus, Locke understood the most important role of constitutional law to be the insulation of property and contract rights from political interference. Of course, liberal theory would shift over the ensuing centuries, and constitutional law would be variously interpreted as having very different sorts of purposes.[37] In line with the broadening of this constitutional vision also developed alternative ways of thinking about market society, including the idea that markets required a great deal more than just the background rules of property and contract in order for them to operate effectively and fairly.[38]

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be off-set by the artificial creation of a political society. Thus, Locke establishes the importance of law in actually making market society work. LOCKE, *supra* note 35, at Chapter 5. Through the legalization of property and contract as background rules, market society is enabled in a manner that it was not in the state of nature. Constitutional law becomes important as a mechanism for protecting these background rules from improper political manipulation.

[36] Locke's "great and chief end", LOCKE, *supra* note 35, at 57, for establishing a government and political society: "[T]he preservation of the property of all the members of that society as far as is possible." *Id.* at 39. Indeed, Locke goes further, for it is not simply that government has the protection of property as its key purpose, but that political society cannot even *exist* "without having in itself the power to preserve the property, and in order thereunto, punish the offenses of all those of that society. . . ." *Id.*

[37] For two versions of the story, *see, e.g.*, LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW (2005); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY (1992).

[38] In the field of theories of capitalism, this shift is well-captured in the writings of thinkers like PAUL BARAN, THE POLITICAL ECONOMY OF GROWTH (1957); PAUL A. BARAN & PAUL M. SWEEZY, MONOPOLY CAPITAL (Pelican Publ'g Co. 1966); JOHN GAILBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER (1993);ABBA LERNER, THE ECONOMICS OF CONTROL: PRINCIPLES OF WELFARE ECONOMICS (1944). In politics, this is captured in the process of the New Deal establishment. *See, e.g.*, DANIEL YERGIN AND JOSEPH STANISLAW, THE COMMANDING HEIGHTS (1998). In law, legal realism probably embodies at least the critique of property and contract rights, if not the embrace of the welfare state. For discussion, see BARBARA FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ-FAIRE (First Harvard Univ.

Thus, in the modern liberal style, foreground rules came into vogue, whereby the state was generally perceived as deserving more leeway in its discretion to regulate market activity.[39]

In the last decades of the twentieth century, modern liberalism began to falter as a new, or neoliberal, view of the market came to dominance.[40] The neoliberal image of the market has much in com-

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Press 2001); JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1995).

[39] Desautels-Stein, *supra* note 31, at 421–42. Roberto Unger has described this approach in the following way: "First, its continuing commitment to the welfare state and to investment in the people, as both an end in itself and a condition of economic success; second, a desire to rid the regulated market economy of statist, corporatist, and oligopolistic constraints upon economic flexibility and innovation, especially in the transition to a postfordist style of industrial organization, accompanied by sympathy toward bottom-up association and participation by people in local government and social organization; and third, an unabashed institutional conservatism, expressed in skepticism about large projects of institutional reconstruction and in the acceptance of the current legal forms of market economies, representative democracies, and free civil societies." UNGER, *supra* note 32, at 10. Modern liberalism was just as concerned with economic development as was its classic ancestor, but where the classic style was preoccupied with how to establish a legal framework for market society (just as is today's development practitioner), the modern liberal style was created to deal with the consequences of the free competition model. The modern style sought to keep "present institutional arrangements while controlling their consequences: by counteracting, characteristically, through tax-and-transfer or through preferment for disadvantaged groups, their distributive consequences." *Id.* Thus, where the classic liberal image of the market involves a heavy reliance on background rules and almost no role for foreground rules, the modern liberal image of law is very different. Here, markets are seen as not only being constituted by legal rules, but as also requiring regulation and management through foreground rules. Any number of writers might be volunteered as exemplars of the modern liberal style, with Keynes as likely the first. What is interesting about modern liberalism, however, is its agnosticism about so many things. The modern liberal image of the market, and its preference for foreground rules over background rules, can be found in the works of scholars so different as Henry Carter Adams and Frank Knight. *See* Desautels-Stein, *supra* note 31, at 421–42.

[40] For discussions, *see* DAVID HARVEY, NEOLIBERALISM: A SHORT HISTORY (2005); DEEPAK LAL, REVIVING THE INVISIBLE HAND: THE CASE FOR CLASSICAL LIBERALISM IN THE TWENTY FIRST CENTURY (2006); THE ROAD FROM MONT PERELIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE (Philip Mirowski & Dieter Plehwe eds. 2009);

mon with the classic liberal style, and a chief illustrator is Friedrich Hayek.[41] For Hayek, the market took as a fundamental prerequisite an idea about the "Rule of Law."[42] This concept, which he also referred to as "rules of just conduct," evolved over time because they were successful—they beat out other rules or customs because they made for better lives.[43] But Hayek did not think that the elaborators of these customs ever consciously promulgated them, or may have even been able to articulate them. Customs were instead manifested in the regularity of practice. "The important point is that every man growing up in a given culture will find in himself rules, or may discover that he acts in accordance with rules—and will similarly recognize the actions of others as conforming or not conforming to various rules."[44]

What follows from this spontaneous and organic conception of rules is the idea that they cannot be attributed to any conscious, deliberate, human design.[45] For Hayek, these rules of conduct are therefore, by definition, "pre-political," just as in the same way that the growth of organic compounds or the arrangements of magnetic fields are wholly natural.[46] These customary rules form the core of the neoliberal "Rule of Law."

DANIEL YERGIN & JOSEPH STANISLAW, THE COMMANDING HEIGHTS: THE BATTLE FOR THE WORLD ECONOMY (2008).

[41] For an interesting discussion of Hayek that attempts to systematically situate his thought against the work of Harold Laski and JM Keynes, *see* KENNETH HOOVER, ECONOMICS AS IDEOLOGY (2003).

[42] Hayek's vision of the Rule of Law is similar to but analytically distinct from other, well-known arguments from the likes of AC Dicey and Lon Fuller. For a helpful map, *see* Alvaro Santos, *The World Bank's Uses of the 'Rule of Law' Promise in Economic Development, in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 253-300 (2006).

[43] FRIEDRICH HAYEK, THE ROAD TO SERFDOM 18 (1944).

[44] *Id*. at 19.

[45] *Id*. at 28.

[46] *Id*. at 39–40.

While the Rule of Law is the essence of the liberal legal order, Hayek reminds us that where "foreground rules" are necessarily distributive, the Rule of Law (or what I am calling "background rules") is "independent of purpose," blindly and equally applicable to all.[47] Real freedom, as a result, is therefore conditioned on a choice of background rules (the Rule of Law) over foreground rules (legislation), where the Rule of Law is understood as permissive and enabling, and legislation is prohibitive and coercive.

Hayek helpfully concludes that everything he has discussed with regard to the rules of conduct operating in the spontaneous order, and the willy-nilly legislative caprice of governmental organization, tracks exactly the distinction between private and public law, respectively.[48] Also, and again, Hayek says that with regard to constitutional law, its fame has been misconceived. Its job is simply to "secure the maintenance of *the law*,"[49] by which he means the common law of property and contract.[50]

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[47] *Id*. at 50.

[48] *Id*. at 132.

[49] *Id*. at 134.

[50] Roberto Unger underlines the point as well, when he explains that as a first way of protecting the liberal principles of property and contract, courts rely on interpretive methods to shift rules that have tended towards distributive, non-neutral policies back towards the Rule of Law. When this is not enough, "the back-up policing practice is constitutional invalidation, striking down those instances of redistribution through law that cannot be preempted through improving interpretation UNGER, *supra* note 32, at 42. Though Unger and Hayek have substantially similar descriptions of the liberal Rule of Law, they part ways when it comes to its evaluation. For Hayek, private law governance was the only way to guarantee a maximum of freedom and equality. For Unger and other critics, the abandonment of social organization to the private law is to acquiesce in persistent and entrenched hierarchies and stark inequalities; is to embrace an institutional fetishism proclaiming the naturalness of one set of legal, political, and economic arrangements; is to mask the political choices embedded in the liberal style of property and contract law, and the benefits these choices typically confer on the wealthy at the expense of the poor; is to indulge a fantasy in which the judiciary's job of ascertaining the Rule of Law is any less subject to political and moral capture than the legislature's job of rule creation; is to pretend

Though Hayek imagined the private law as non-coercive and pre-political in a very strong sense, he nevertheless did, like Locke before him, believe that the market brought with it more than a sustainable peace (essential as that was), but a just society as well. It was not that either of them thought that the moral content of property and contract would generate any particular constellation of social outcomes, but rather that it was the *process* of the private law that was just.[51] "In this respect what has been correctly said of John Locke's view on the justice of competition, namely, that 'it is the way in which competition is carried on, not its results, that count,' is generally true of the liberal conception of justice, and of what justice can achieve in a spontaneous order."[52]

B. THE TWO STATE ACTION DOCTRINES: A LIBERAL ALLIANCE

The styles of liberal legalism use two different kinds of rules to make markets work. There are the background rules of the private law, which are taken as abstract and foundational but with varying degrees of importance in the three liberal styles, and the foreground rules of legislation, which are emphasized in the modern style and nearly absent in the classic and neoliberal styles. In all cases, the liberal image of the market is defined by a distinction between public and private, state and market. That is, the liberal theory of the market depends on a concept of "state action" as distinguished from private or "non-state" action.

The central argument in this Article is that, in liberalism, the constitutional and antitrust state action doctrines are both generat-

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that the courts are somehow less arms of the state than other government agencies. *Id.*

[51] For two, non-complementary views of the claim, see generally, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1977) and MICHAEL SANDEL, THE LIMITS OF LIBERALISM (1993).

[52] HAYEK, *supra* note 44, at 38.

ed and governed by the same deep structure, and that when viewed together the two doctrines coalesce as part of a single theory of "competition law."[53] Insofar as liberal legalism instructs its adherents on the matter of building a market society, the elementary rules of the private law form the fundamentals of its law of competition. In particular, liberal competition law begins with an abstract commitment to property and contract. As a consequence, any comprehensive attempt to analyze liberal forms of competition law must begin with an identification of the relevant background rules of the private law. This is where competition law starts, and at least in the classic liberal style, that is pretty much where it ends. The only real additional factor is constitutional law, meant to serve as a guarantor of the private law's autonomy.

In liberal legalism, CSAD is a field of law essentially concerned with precisely these background rules—the first dimension of competition law.[54] It is a field of law wherein judges attempt to negotiate liberalism's crucial divide between what counts as "market" and what counts as "state." If the relevant act in a constitutional state action dispute is determined to be an act in the market, the judge will shield the defendant from constitutional challenge, and allow the private law rules to coerce the result. If the relevant act is deemed an act of "state," the plaintiff is granted constitutional powers capable of trumping the background private rules upon which the defendant had relied. As Gary Peller and Mark Tushnet have similarly explained, the constitutional state action doctrine is

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[53] I should be careful to avoid any confusion here about the term "competition law." As is well known, competition law is the preferred term in most of the rest of the world for what we call in the United States "antitrust law." My argument here has nothing to do with that terminological debate.

[54] *See supra* note 2 and accompanying text.

essentially about "the distribution of the background rights of property, contract, and tort."[55]

ASAD concerns the very same issue—the liberal image of market society. The major conceptual difference is that where constitutional state action doctrine is focused on the role of the Constitution in managing the rights of individual actors in the market, antitrust state action doctrine is focused on the role of antitrust law in managing the role of the *state* in its *regulation* of the market. Thus, where CSAD deals with the proper constitutional scope of competition among rights-holders, ASAD deals with the proper regulatory scope of the state in its management of the competitive process.

Of course, the tests are different, the relevant statutes are different, and so on. But the doctrines are united by their participation in a shared language-system, or to borrow a term from semiotics, a *langue*.[56] The core issue in neither doctrine is federalism but is rather the legal production and management of market society, and the public-private distinction is the very same distinction at work in constitutional state action jurisprudence. It *functions* differently, or if you like, it is *spoken* differently, but in both doctrines the decisive question is a question about the relation between "state" and "market." The two state action doctrines are deeply connected as aspects of a much broader project to constitute and regulate the liberal image of the market. CSAD operates at the level of background rules (the first dimension of liberal competition law), and the ASAD operates at the level of foreground rules (the second dimension of liberal competition law). When viewed through the lens of liberal legalism, the linguistic complementarity between the constitutional and antitrust state action doctrines becomes apparent. Together, the

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[55] PELLER & TUSHNET, *supra* note 2, at 779.

[56] *See, e.g.*, KENNEDY, *supra* note 34. For an introduction to semiotics, see FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS (1998). *See also* JONATHAN CULLER, FERDINAND DE SAUSSURE (Revised Edition, 1986).

doctrines are more comprehensible and more effective than when viewed in isolation.

	Classic Liberalism	*Modern Liberalism*	*Neoliberalism*
Background Rules	• CSAD: very strong. • Antitrust Law: strong.	• CSAD: weak. • ASAD: weak.	• CSAD: strong. • ASAD: strong.
Foreground Rules	• CSAD: N/A. • Antitrust Law: weak.	• CSAD: strong. • ASAD: strong.	• CSAD: weak. • ASAD: moderate.

Figure 1: Liberal Competition Law

A further point to be made about a structural approach to the two state action doctrines implicates our understanding of the public-private distinction. As will be discussed, there is a tendency to see the public-private distinction as tethered to a particular way of thinking about left-right politics. Traditionally, the "politics of the left" in constitutional law is associated with a *weak* public-private distinction. But when we put the two state action doctrines together, this association falters. Somewhat surprisingly, a "left" position is serviced through the use of a *strong* version of the public-private distinction in the context of the antitrust state action doctrine. These points are presented graphically here, and further examined below.

	Classic Liberalism	*Modern Liberalism*	*Neoliberalism*
CSAD	Sharp	Vague	Sharp
ASAD	N/A	Sharp	Vague

Figure 2: Public-Private Distinction

II. THE BACKGROUND RULES OF COMPETITION LAW: CONSTITUTIONAL STATE ACTION DOCTRINE

Conventionally, the notion of "constitutional rights" conjures the image of the injured individual, somehow harmed by the state in what should have been her protected claims to speech, religion, property, process, and the like. And indeed, much of modern state action jurisprudence has this flavor.[57] More important for present purposes, however, is the manner in which judges have tended at times to rule out constitutional claims when the operative restraints came from the common law (or what might also be called Hayek's Rule of Law.) That is, if a person claims that his individual rights have been violated, the court's "state action" requirement may threaten the enforcement of those rights if the violation in question fails to involve a state act that is other than and totally distinct from some rule of the common law.[58] At least in the classic and neoliberal

[57] For a recent canvass of the doctrine, *see Developments in the Law – State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248 (2010).

[58] Courts have developed a number of tests for identifying the limits of "state action." They include: the "Public Function Test," which requires a plaintiff to show that the defendant has exercised a kind of power traditionally reserved to the state, see Rendell-Baker v. Kohn, 457 U.S. 830 (1982); the "State Compulsion Test," which requires the plaintiff to show that their behavior was compelled by the state, see Blum v. Yaretsky, 457 U.S. 991 (1982); the "Nexus Test," which requires a sufficiently close connection between the state and the challenged activity, see Jackson v. Metro.

styles, judicial deployment of common law rules are not regarded as acts of the state—the judiciary becomes a kind of "non-state actor."

On this view, "state action" becomes the sole province of the legislature or executive, and acts that are somehow distinguishable from pre-existing rules of common law. Consequently, a better name for the classic liberal/neoliberal state action doctrine might actually be "*legislative* action doctrine." Predictably, this way of incorporating the classic/neoliberal style into the state action doctrine has not monopolized the field. As modern liberalism and the welfare state became dominant after WWII, the Supreme Court signaled a shift in its dialect with *Shelley v. Kramer*.[59] In this and other state action decisions of the era, the Court's economics leaned to the left, only to see a shift once again to the right in the late 1970s.

There is no shortage of scholarly commentary bemoaning the awful mess that is the state action doctrine.[60] Some of it is in the

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Edison, 419 U.S. 345 (1974); the "State Agency Test," which requires a showing that the challenged action was under the control of a state agency, see Pa. v. Bd. of Dirs., 353 U.S. 230 (1957); the "Entwinement Test," which requires obvious necessity, see Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001); the "Joint Participation Test," which requires a private actor to have been "cloaked with authority of the state," see United States v. Hoffman, 498 F.2d 879, 881 (7th Cir. 1974). For discussions, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1706 (1988); Ronald J. Krotoszynski, *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302, 317-321 (1995); Julie K. Brown, *Less is More: Decluttering the State Action Doctrine*, 73 MO. L. REV. 561 (2008).

[59] 334 U.S. 1 (1948).

[60] The fact that constitutional state action has been subject to decades of overwhelming critique should not be surprising when its history is viewed in light of the transition from classic to modern liberalism. In the modern style, the line between state and market, public and private, has been intentionally blurred. Keeping the line, but insuring its ambiguity is a defining trait of the welfare state. As such, *of course* it will be difficult to assign ostensibly neutral rules the task of defining the outlines of "state action." Thus, I make no attempt to "solve" the problem of state action. One possibility of moving forward is the one suggested by Mark Tushnet:

spirit of this Article, cataloguing early decisions as apiece with classical liberalism, mid-twentieth century decisions as an attack on that liberal tradition, and others as a resurgent liberalism.[61] Here, the intent is to highlight the economic dimensions of constitutional state action doctrine—the manner in which the use of constitutional rules to inoculate property and contract rules shifts in the light of the classic liberal style to modern liberalism, and then shifts again to the neoliberal style. In every case, the point is that constitutional state action doctrine encompasses a set of pivotal decisions about the extent to which private law rules should be left to generate market conditions. In the classic and neoliberal styles, private law rules are believed to deserve a great deal of deference in their constitution of the market, while in the modern liberal style, they receive less.

The bottom line is to demonstrate a structural view of US competition law that takes its background rules into account—background rules that can be studied in the context of constitutional state action doctrine.

A. PRELUDE: THE FOURTEENTH AMENDMENT

The 1870s were a key moment in the grand stylistic shift from classical to neoclassical economics (and from "political economy" to

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abolish the state action doctrine. MARK TUSHNET, STATE ACTION IN 2020, *in* THE CONSTITUTION IN 2020 (Jack Balkin & Reva Siegel eds., 2010).

[61] Recently members of the Harvard Law Review engaged in an exercise of this type, working phases of the constitutional state action doctrine into Duncan Kennedy's framework of the three globalizations. *See* HARV. L. REV., *Developments in the Law – State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248 (2010). *See generally* Duncan Kennedy, *Three Globalizations in Law and Legal Thought*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 63 (David M. Trubek & Alvaro Santos, eds., Cambridge Press 2006).

"economics"),[62] as well as in the beginnings of a sea change in elite thinking about the meaning of competitive society.[63] In line with this transformation in the attitudes of economists and politicians about the relationship between market and government, another shift was taking place in legal thought.[64] According to Duncan Kennedy, the liminal Supreme Court decision in the move from a pre-classical to a classical style of legal thought was *The Slaughterhouse Cases*.[65] Interestingly, the change occurring in economic culture was a step ahead of the legal one: where a classical reliance on the natural integrity of the private sphere was coming under shock in the former sphere, it was in the process of being shored up in the latter.

The trigger for the case, and constitutional state action doctrine that would develop later in *The Civil Rights Cases*, was the Fourteenth Amendment, adopted in 1868.[66] The text of section one reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, with-

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[62] *See generally* Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379 (1988) (discussing the evolution of American economic thought in the 1800s). For a compilation of reviews of the various threads in play, see A COMPANION TO THE HISTORY OF ECONOMIC THOUGHT (Warren Samuels et al. eds., 2003).

[63] *See generally* ERIC HOBSBAWM, THE AGE OF EMPIRE (Pantheon Books 1987); KARL POLANYI, THE GREAT TRANSFORMATION (1957).

[64] Kennedy, *supra* note 61.

[65] *Slaughter-House Cases*, 83 U.S. 36 (1872); DUNCAN KENNEDY, THE RISE AND FALL, *supra* note 34, at 77.

[66] While 1868 is a key year in locating the origins of the constitutional state action doctrine, this juridical beginning should not be confused for its much older economic birthday, which is at least as early as 1689.

> out due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[67]

From this point on, any citizen of the United States wishing to employ constitutionally delegated power against another person, be they a public official or private actor, would have the burden of showing that it had been the "state" which had abridged or deprived them of their privileges, immunities, or rights to life, liberty, or property.[68] If the claimant failed this burden, they were left with the weapons extant in the private law. The crucial determination would therefore be what sorts of acts could justifiably be linked up to the "state."[69]

The facts animating the Court's 1872 decision in *The Slaughterhouse Cases* should sound presumptively sharp to the ears of a Hayekian liberal. Louisiana's legislature sought to improve the health and safety of working conditions involved in the slaughtering of livestock in New Orleans through a set of sanitary regulations. Most intrusively, the statute required all slaughtering to happen in a single warehouse under fixed government rates. In this particular case, a private corporation had been tasked with running the warehouse under a charter monopoly, though the slaughterhouse policy was being worked out in a number of states where the government di-

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[67] U.S. CONST. amend. XIV, § 1.

[68] This discussion does not reach the "under color of state law" requirement in 1983 claims. For discussion, see G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility (Part II of II)*, 34 HOUS. L. REV. 665, 670-73 (1997). The Supreme Court has explained that "[l]ike the state-action requirement of the Fourteenth Amendment, the under-color-of-state-law element of § 1983 excludes from its reach 'merely private conduct, no matter how discriminatory or wrongful.'" Am. Mfrs. Mut. Ins. v. Sullivan, 526 U.S. 40, 50 (1999). Where, as in *Lugar*, deprivations of rights under the Fourteenth Amendment are alleged, these two requirements converge. *See* Lugar v. Edmondson Oil, 457 U.S. 922, 935, n. 18, (1982).

[69] Courts have developed a number of tests for identifying the limits of "state action." *See supra* note 58 and accompanying text.

rectly ran the warehouse. Quite clearly, the legislature hoped to intervene in what was ostensibly understood to be the poor outcomes of the slaughterhouse market, with or without the grant of a monopoly privilege. The question before the Court was whether local butchers, who wanted no part of the government program, had been deprived of their rights under the newly adopted Amendment. Or in other words, was this a case of arbitrary legislation interfering with the Rule of Law, or was it an example of a proper adjustment of the common law's natural rights?

The majority opinion began by identifying the butchers' property/liberty claim: the governmental privilege granted to the private monopoly was said to rob the butchers "of the right to exercise their trade, the business to which they have been trained and on which they depend for the support of themselves and their families, and that the unrestricted exercise of the business of butchering is necessary to the daily subsistence of the population of the city."[70] The court agreed that the butchers did indeed possess these rights, but in a move out of line with what would come with later judicial adherence to the ideology of *laissez-faire*, it found that the right of the legislature to limit the areas in which slaughtering could occur, how the slaughtering should be done, and who should be able to manage the enterprise, was so obviously correct that it needed "no argument to prove."[71] Even further, the simple existence of the monopoly hardly undermined the rights of the butchers in the fashion they claimed; they could still exercise their trade, support their families, and provide for the town.[72] As far as the states had always had the police power to enact such regulations, it had been uncontroversial.[73]

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[70] Slaughter-House Cases, 83 U.S. 36, 60 (1872).
[71] *Id.* at 61.
[72] *Id* at 60.
[73] *Id.* at 61.

It is with its placement of the police power in the hands of the *state* legislature, however (as opposed to the federal government), that we can detect the seeds of the classic liberal style (though not yet the state action doctrine). Listen to the majority's description of the state's police power:

> This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. 'It extends,' says another eminent judge, 'to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State; . . . and persons and property are subject to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State. Of the perfect right of the legislature to do this no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned.'[74]

When dressed in these colors, there is no mistaking the court's intention to situate the Louisiana legislature's slaughterhouse law as in line with the natural flavor of the Rule of Law, and not as apiece with the artificiality of governmental interventionism. Or to restate, the Court is identifying a critical distinction between private freedom and public restraint, but instead of placing the freedom-loving Rule of Law in the private sphere, as classic liberals would do, the Court is instead placing it in the police power of local government. What would signal the shift from the mood of the *Slaugh-*

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[74] *Id.* at 62.

terhouse Cases would be exactly the decision to displace this power from local legislatures and deliver it to the common law courts.[75]

Perhaps anticipating the classic liberal style that was just around the corner, the plaintiff butchers argued that the Court had gotten it wrong, and that the game had changed. Their argument was that state legislatures no longer held the unfettered power they once did, now that the federal constitution had been amended, granting individuals' new powers in the market.[76] If they suffered a loss of their property rights in the slaughterhouse trade, and that loss could be linked up with the state, the butchers believed that the Fourteenth Amendment empowered their right to compensation. But the Court was not convinced. The butchers clearly had a natural right to labor, and to the fruits of that labor. State legislatures also had a natural right to manage those rights. The *federal* government, however, could not actually create any new rights that did not already pre-exist it—the amendment simply codified the rights already ensured by state government, and with regard to the relation between the private claim and the police power, that balance was already struck in favor of Louisiana.[77]

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[75] The fact of legislative tinkering should be no bother in this case, for when it is remembered that Hayek outlined the rule of law as an evolving, organic system, subject to alterations, the desire to shape the slaughterhouse market should appease, not embarrass.

[76] Slaughter-House Cases, 83 U.S. at 89.

[77] "It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments, no claim or pretence was set up that those rights depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States-such, for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government." *Id.* at 77.

In terms of thinking about *The Slaughterhouse Cases* as a prelude to the state action doctrine, the court made a few moves familiar to the classic liberal style. The first was to recognize the natural rights of private people to engage in a trade and benefit in the market. At first blush, the way in which the court went on to reel in this right by way of granting a legislature wide discretion in its police functions might seem out of sync with the classic style. Notably, however, the court went on to characterize the state's police power in a deeply naturalistic way, in total harmony with Lockean rights and the Rule of Law. Second, it was federal government power that emerged in the opinion as the artificial and arbitrary aspect of political society about which the classic style is so nervous. Thus, the court situated the newly minted "privileges and immunities" of the Fourteenth Amendment as actually doing nothing new at all—these were nothing more than the privileges and immunities already enjoyed by the citizens of states. Because of this redundancy, the state legislature was simply rehearsing rules already extant in the common law.

What should be clear at this point is that classic liberalism emerged just as the judicial fascination with federalism was losing strength. In the *Slaughterhouse Cases*, the Court saw the public-private distinction that would become critical to the state action doctrine, but it did not actually frame it as a distinction between the "public" and the "private." Instead, the Court articulated a distinction between an organic, natural power, and an artificial and arbitrary power, and located this distinction in the distinction between state and federal government. In the transition to the classic liberal style, organic natural power shifts away from state legislatures and into the "private," and all legislative action, whether it is state or federal, becomes "public."

B. THE CLASSIC LIBERAL STYLE: THE CIVIL RIGHTS CASES

It is here that we meet the traditional beginnings of constitutional state action doctrine, as manifested in the classic liberal style.

Moving on from "privileges and immunities," the court took up the Amendment's "enforcement" clause eleven years later in *The Civil Rights Cases*.[78] Under the authority of Section 5, Congress enacted the Civil Rights Act of 1875, the purpose of which was to "protect all citizens in their civil and legal rights."[79] The plaintiffs claimed they had suffered racial discrimination (violation of freedom of contract) when they were denied access to a hotel and theater, and sought a remedy under the new Act.[80] The question before the court was whether the Fourteenth Amendment could be justifiably interpreted to authorize certain congressional powers in the Civil Rights Act, and the court decided that it could not.

The court initially set up a straightforward public-private distinction. The subject matter of the Amendment had been to destroy all forms of "state legislation, and state action of every kind," which impaired the rights of individuals to their liberty and property without due process.[81] "It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment."[82]

> "It does not invest congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation, or state action, of the kind referred to. It does not authorize congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state

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[78] Civil Rights Cases, 109 U.S. 3 (1873).
[79] *Id.* at 4.
[80] *Id.*
[81] *Id.* at 11.
[82] *Id.*

> officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment."[83]

Fair enough, but at this point the majority has not moved the law much beyond *The Slaughterhouse Cases*. There, a similar distinction was posited, though in the obscuring context of the federalism debate. What makes this decision noteworthy lies precisely in its shedding of that obscurity.

For *The Civil Rights Cases* majority, and unlike its prior decision in *The Slaughterhouse Cases*,[84] the Fourteenth Amendment *did* carry weight, legalizing a new set of powers that were now available to market actors in their claims against state governments. The Amendment was granted independent status and meaning, creating rights and duties that were not merely duplicative of the states' hallowed police powers. Looking to the constitutional restraint on any official limitation on freedom of contract, the majority used this as an analogy for how to understand the due process clause of the Fourteenth Amendment.[85] According to the Court, when the Constitution provided this prohibition, it set out a ground rule the purpose of which was to make the common law work at its best. It was facilitative, and entirely in concert with those just rules of conduct that pre-existed the Constitution, and which the Constitution was meant to protect. It was not, to be sure, an example of legislative caprice. Similarly, the Fourteenth Amendment provided a ground floor: no state can impair the rights of property and liberty, without due process. This rule, like the prohibition against interfering with contracts, should be understood to help facilitate a better market, where the free play of contract and property can go about organizing a free society.

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[83] *Id.*
[84] For discussion, *see* KENNEDY, *supra* note 34, at 77.
[85] Civil Rights Cases, 109 U.S. 3, 12 (1873).

In contrast to such an understanding, an erroneous interpretation of the Amendment which would allow government actors to interfere with private rights, by delegating constitutional powers to an individual any time someone told him to keep out of his hotel or theater, would reflect the worst type of governmental interventionism. Thus, with *The Civil Rights Cases* the classic liberal style of market-state was in full bloom, and in an effort to maintain the integrity of the private law, the Court struck down the Civil Rights Act as an unwarranted and unauthorized interference with the Rule of Law.[86]

Though not a state action case, it seems worth situating the classic liberal style of the market's background rules in the context of *Lochner v. New York*, the case most famously associated with the Supreme Court's adventures in economic due process.[87] As is well-known, the case involved a violation of New York's labor law in which a baker had allowed his employees to work for more than sixty hours in a week. As Justice Peckham explained, the New York statute was highly intrusive on the natural rights of individuals to earn a living:

> "[New York's labor law] is not an act merely fixing the number of hours which shall constitute a legal day's work, but an absolute prohibition upon the employer permitting, under any circumstances, more than ten hours' work to be done in his establishment. The employee may desire to earn the extra money which would arise from his working more

[86] *Id.* at 9–13. Two other representative cases in the classic style are U.S. v. Harris, 106 U.S. 629 (1883) (looking at the provision of the Civil Rights Act seeking to punish "private persons" for conspiring to deprive any one of equal protection exceeded Congress' power), and U.S. v. Cruikshank, 92 U.S. 542 (1896) (looking at indictments of white mob members who killed hundreds of blacks in the Colfax Massacre were improper because there was no state action).

[87] BERNSTEIN, *supra* note 27.

> than the prescribed time, but this statute forbids the employer from permitting the employee to earn it."[88]

In a canonical demonstration of the classic liberal style, Justice Peckham argued that the right of the state to regulate the market through restrictions on the abilities of employers and employees to freely contract with each other was of little value. Though the Court admitted there might be special cases where freedom of contract might go too far, the case of New York's labor law was surely not among them.

> The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action. They are in no sense wards of the state. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare, of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are

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[88] Lochner v. New York, 198 U.S. 45, 52-53 (1905). For discussion, *see* HORWITZ, *supra* note 37, at 24-36.

> engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground.[89]

Of course, the *laissez-faire* of "Lochnerism" would pass. As Justice Holmes predicted, "a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*."[90] Consequently, it is tempting to conflate the story of the demise of economic due process with the story of classic liberalism and the ground rules of the market. But tempting as it is, it is a mistake. *Lochner* is a fine example of a kind of *laissez-faire*,[91] but it is only one example of how background rules function in the classic liberal style. The key to seeing this lies in recognizing the differences in the sorts of claims arising in due process cases where there is no dispute over the state's involvement. These are cases in which the state is undeniably involved as a party in the dispute, and the controversy is centered on what sorts of rights an individual is afforded against the state under the due process clause. In the "state action" cases, in contrast, the controversy often turns on whether the state is implicated in the

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[89] *Id.* at 57.

[90] *Id.* at 75 (Holmes, J., dissenting).

[91] I do not mean to engage here with the debate about whether laissez-faire ever really existed. As liberals like Hayek, Wilhelm Roepke, and Deepak Lal have all argued, those out to attack laissez-faire have usually found themselves attacking straw men. The reason they distance themselves from laissez-faire is that they have seen it characterized as a vulgar view of the market in which market freedoms are believed to exist without any assistance from the state at all. My real engagement here is with classic liberalism, which takes as a baseline the need for background rules, and not with a caricature of laissez-faire. For the neoliberal critique of laissez-faire, see HAYEK, *supra* note 44; Wilhelm Roepke, *Economic Order and International Law*, 86 RECUEIL DES COURS 203 (1954); DEEPAK LAL, THE POVERTY OF 'DEVELOPMENT ECONOMICS' (First MIT Press Ed. 1985).

controversy at all, and the effort to answer that question turns on a theory of market and state—where does the one begin and where does the other end. Thus, with the disappearance of economic due process constitutional law writ large seemed to emerge in non-economic terms. Seeing CSAD as supplying the ground rules of competition law remedies this mistake, and brings focus to the notion that *Lochner* was only a single manifestation of the economic power of the constitution,[92] and hardly the only or even most effective one.

C. THE MODERN LIBERAL STYLE: SHELLEY AND REITMAN

If the classic liberal style of placing the Constitution at the behest of the private law is well illustrated by the early state action cases, the modern liberal style was at work in the well-known and well-criticized 1948 case of *Shelley v. Kraemer*.[93] As a clue to where

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[92] MICHELMAN, FRANK I., *Economic Power and the Constitution*, in THE CONSTITUTION IN 2020, 45 (Jack M. Balkin & Reva B. Siegel eds., Oxford University Press, 2009).

[93] 334 U.S. 1 (1948). Here is a sample of decisions in the modern style: Smith v. Allwright, 321 U.S. 649 (1944) (political parties, although "voluntary associations," cannot exclude blacks from voting in primary elections; doing so would be unconstitutional state action); Marsh v. Alabama, 326 U.S. 501 (1946) (prohibition in privately owned town held unconstitutional because town looked like governmental unit); Terry v. Adams, 345 U.S. 461 (1953) (extending Smith v. Allwright and holding that pre-primary election processes cannot exclude blacks); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (racial discrimination by restaurant located in state-owned building is unconstitutional state action; question is whether there is sufficiently close nexus with government, through relationship such as contract, authorization, or regulation, that court can attribute conduct to the government); Peterson v. City of Greenville, 373 U.S. 244 (1963) (convicting blacks for a restaurant sit-in sufficiently satisfied state action, regardless of whether the store managers' sole reason for reporting them was to comply with ordinances forbidding restaurants to seat whites and blacks together); Evans v. Newton, 382 U.S. 296 (1966) (holding that a privately owned park was still "municipal in nature" and therefore allowing only whites in the park was unconstitutional state action; New York Times Co. v. Sullivan, 376 U.S. 254, 288 (1964) (holding that enforcing a defamation suit that was

this decision was heading, the majority began its analysis of a cut-and-dried property law dispute with a radical proposition: "[b]asic constitutional issues of obvious importance have been raised."[94] The topic was restrictive covenants: the capacity of property owners to prospectively determine to whom their land could, and could not, eventually pass. The controversial aspect of these covenants, however, was that they excluded the possibility on the basis of race. After a black family took ownership of a home that had been subject to a racially restrictive covenant, a neighboring family brought an action to enjoin the purchasers from taking residence. The Missouri Supreme Court agreed with the neighbors and held the covenant to be effective and enforceable.

The purchasers appealed to the US Supreme Court, and argued that in its enforcement of Missouri's property and contract rules, the Missouri Supreme Court had impaired their constitutional rights to equal protection and due process under the Fourteenth Amend-

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against civil rights expression was a state violation of the 1st Amendment); Amalgamated Food Emps. Union v. Logan, 391 U.S. 308 (1968) (holding that a large, privately-owned shopping center was similar to a business district and therefore could not enjoin picketing); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972): (holding that it was ok to enjoin picketers in a similar case); Reitman v. Mulkey, 387 U.S. 369 (1967): (holding that a California landlord's racial discrimination in renting was state action because a California constitutional amendment, which was neutral on its face, authorized the discrimination); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969): (holding a private company's institution of a prejudgment garnishment order, consistent with a Wisconsin statute, to have violated Due Process); Fuentes v. Shevin, 407 U.S. 67 (1972): (holding that a creditor's violation of a debtor's due process rights by seizing property pursuant to Florida state procedures, was state action subject to the Due Process Clause); *see generally* Norwood v. Harrison, 413 U.S. 455 (1973) (finding that when the state gives textbooks or any other aid to private schools which discriminate based on race, it participates in unconstitutional state action); N. Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (holding that Georgia statutes allowing officers to issue writs of garnishment constituted state action, and violated the Due Process clause).

[94] *Shelley*, 334 U.S. at 4.

ment.[95] There should be no mistaking where this decision would have gone had it been in the hands of a judge speaking classic liberalism. If the new homebuyers are complaining about the effects of the private law, they are out of luck since judicial elaboration of the common law is not perceived as an act of state, thus putting their claim out of the Amendment's reach. But as this court framed it, "Participation of the State consists in the enforcement of the restrictions so defined. The crucial issue with which we are here confronted is whether this distinction removes these cases from the operation of the prohibitory provisions of the Fourteenth Amendment."[96]

In approaching the question, the court was appropriately modest as the modern style would indicate: the majority did not hold all private agreements to have the color of state action, even though our notions of "bargain" and "ownership" would be meaningless in the absence of some constituting legal regime.[97] Thus, the division between the independent market and the regulating state still held firm: "restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated."[98] That dividing line, though it would hold, was nevertheless about to take a beating: "But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state

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[95] *Id.* at 7-8.

[96] *Id.* at 13.

[97] FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY: VOLUME 2, 35 (1st ed. 1976).

[98] *Shelley*, 334 U.S. at 13.

courts of the restrictive terms of the agreements."[99] Voluntary agreements between individuals seeking to buy and sell land, the court explained, did not implicate the state. The judicial enforcement of those agreements, however, did.[100]

Though the decision might be confusing when read against its precedential contexts, it makes perfect sense when perceived as the work of a modern liberal. For such a writer, several points raise to the surface: (1) free competition in the market can have morally repugnant results; (2) government needs to intervene, aggressively if need be, to counteract those tendencies if the market is to be sustainable; (3) some amount of space, necessarily left undefined, should be left to the natural sphere of the market. *Shelley* brings it home: the court was deeply troubled by the social consequences of an unchecked property/contract matrix with respect to racial inequalities; the court argued for a more "realistic" view of the state, which definitively exercised its power not only through the executive and the legislature, but through its courts as well; the court still managed to carve out an area where the state was "absent."

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[99] *Id.* at 13-14.

[100] "Similar expressions, giving specific recognition to the fact that judicial action is to be regarded as action on the State for the purposes of the Fourteenth Amendment, are to be found in numerous cases which have been more recently decided. In *Twining v. New Jersey*, 211 U.S. 78, 90–91 (1908), the Court said, "The judicial act of the highest court of the state, in authoritatively construing and enforcing its laws, is the act of the state." In *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680 (1930) the Court, through Justice Brandeis, stated, "'The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government.' Further examples of such declarations in the opinions of this Court are not lacking." *Id.* at 15. The Court went on to clarify that even those judicial proceedings free from any irregularities should be understood as acts of state. "It has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process." *Id.* at 17.

Another Supreme Court decision emblematic of the modern liberal style is *Reitman v. Mulkey*,[101] decided in 1967. The question before the court was whether a section of the California Constitution denied California residents equal protection under the Fourteenth Amendment.[102] That section, submitted to the electorate as a proposition in 1964, prohibited any state official or agency from interfering with the unfettered discretion of property owners to sell, lease, or rent their property.[103] The question arose in the context of a black family whose application to rent an apartment had been rejected solely on the basis of their race.[104] Under the authority of the equal protection clause, the plaintiffs needed to show that the state was somehow implicated in the property owner's choice to exclude them on racial grounds. Depending on the legal style in which a judge approaches the requirement, this could be a piece of a cake for the plaintiff, or a piece of very heavy lifting.

Naturally, the classic jurist would easily dispose of the claim: nothing could be more central to the purpose of a constitution than to secure the rights of individuals to alienate their property on the market as they see fit, and once the constitution has set the ground rules in this way, there is no merit in finding any acts of state. This is simply what Hayek called "planning for competition." [105] In *Reitman*, however, the court was in a modern mood, and approached the California rule accordingly: "We first turn to the opin-

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[101] 387 U.S. 369 (1967).

[102] Article 1, section 26, in relevant part, reads: "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses." *Id.* at 388 (quoting CAL. CONST. art. I § 26, which was later held unconstitutional in Strauss v. Horton, 93 Cal. Rptr. 3d 591 (2009)).

[103] *Id.* at 371.

[104] *Id.* at 372.

[105] HAYEK, *supra* note 43, at 42.

ion of that court in *Reitman*, which quite properly undertook to examine the constitutionality of § 26 in terms of its 'immediate objective,' its 'ultimate effect' and its 'historical context and the conditions existing prior to its enactment.'"[106] By taking account of these broader social contexts, the court found it easy to bear down on the California rule, attacking its illegitimate purpose of seeking to "to overturn state laws that bore on the right of private sellers and lessors to discriminate,'—the Unruh and Rumford Acts—and 'to forestall future state action that might circumscribe this right.'"[107] The court explained that while it had never sought to solve the "impossible task" of finding the line between private and state action, it did believe that an ad hoc, case-by-case method was an appropriate methodology.[108] On the instant facts, the attempt by California's legislature to provide further empowerment to those market actors seeking to be racially selective in how they alienated their properties seemed to be enough.[109]

What is important to see about this decision is not that the court adopted a functionalist, case-by-case, balancing test. It is rather *how* the court adopted this approach, and though we cannot know the intimate thoughts of the justices, the inescapable message is that this court was not persuaded by the idea that the purpose of a constitution is only to plan for a competitive society. If the Constitution's singular function was to protect Lockean property and con-

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[106] Reitman v. Mulkey, 387 U.S. 369, 373 (1967). For a discussion of functionalism as a historical technology, see Robert Gordon, *Critical Legal Histories,* 36 STAN. L. REV. 57 (1984); Robert Gordon, *'Critical Legal Histories' Revisited: A Response*, 37 LAW & SOC. INQ. 200 (2012).

[107] *Id*. at 374.

[108] *Id*. at 378.

[109] *Id*. at 378–79. "Here the California court, armed as it was with the knowledge of the facts and circumstances concerning the passage and potential impact of § 26, and familiar with the milieu in which that provision would operate, has determined that the provision would involve the State in private racial discriminations to an unconstitutional degree. We accept this holding of the California court." *Id.*

tract rights, the *Reitman* court surely got this one wrong. On the other hand, a court persuaded that constitutional law has a deeper purpose than merely playing handmaiden to the organizational powers of the competitive society, and that this purpose may often entail a direct manipulation of competition itself, would have agreed with the result, if not the reasoning. To be sure, the modern view of constitutional purpose does not necessarily generate a balancing approach to legal decision-making. But that is not the point—the point is that in the modern style, balancing is at least available; in the classic style, it is not.

D. THE NEOLIBERAL STYLE: FLAGG BROTHERS, RENDELL-BAKER, AND MORRISON

The idea of social planning had gained in popularity after WWII to the point of having painted the classic style into a corner. By the late 1970s, however, modern liberalism had itself come under attack, and the classic image of market and state was enjoying a major comeback. With the ascent of Thatcher, Reagan, and a general program very much in line with a strict separation of private and public, and competition and intervention, the classic view was re-launched.[110] Unlike the Court's positively unfashionable com-

[110] As David Harvey has described it, this exploding new style of political economy proposed "that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices. . . . Furthermore, if markets do not exist...then they must be created, by state action if necessary. . . . State interventions in markets (once created) must be kept to a bare minimum because, according to the theory, the state cannot possibly possess enough information to second-guess market signals (prices) and because powerful interest groups will inevitably distort and bias state interventions (particularly in democracies) for their own benefit." HARVEY, *supra* note 40, at 2.

mitment to *laissez-faire* in the early twentieth century,[111] it was at this moment that William Rehnquist joined the neoliberal zeitgeist, resurrecting the classic style of state action jurisprudence.[112]

Decided in 1978, *Flagg Brothers v. Brooks*[113] involved a claim by an evicted tenant against the company storing the tenant's seized property. After a dispute between the company and the tenant over the proper amount of charges for the storage, the company sought to invoke a self-help mechanism in the New York Uniform Commercial Code enabling it to sell the goods to a third party.[114] The tenant argued that the company was barred by the Fourteenth Amendment from selling the goods without due process. In the classic style, the Supreme Court suggested that the storage company was merely exercising its right to creditor remedies existing at common law, and that as a result, "the conduct of private actors in relying on the rights established under these liens to resort to self-help remedies does not permit their conduct to be ascribed to the state."[115] Providing a little more nuance, the court attempted to justify this return to the old style by explaining that whereas prior decisions had affirmatively identified the state action element in the instance of a creditor being assisted by way of the threat of state sanction in its repossession of a debtor's property, this case was different. Here, New York's rule never engaged in any affirmative intervention; instead it permitted the storage company to dispose of

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[111] For a counter-story to the traditional narrative of the court's commitment to laissez-faire, *see* David Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1 (2003).

[112] *See generally* THE REHNQUIST LEGACY (Craig M. Bradley ed. 2006).

[113] 436 U.S. 149 (1978). For the classic review of *Flagg Brothers*, *see* Paul Brest, *State Action and Liberal Theory: A Casenote on* Flagg Brothers v. Brooks, 130 U. PENN. L. REV. 1296 (1982).

[114] *Flagg Brothers*, 436 U.S. at 153–54.

[115] *Id.* at 162 n.11.

the property that it had acquired without any assistance from the state.

Underlining just what was happening here, the court concluded, "[i]t would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of property law in a State, whether decisional or statutory, itself amounted to 'state action' even though no state process or state officials were ever involved in enforcing that body of law."[116] Thus, with a single shot, the Court brought back the tattered rags of a heavy public-private distinction, the idea that judicial elaboration of the common law was not state action in the relevant sense, and the belief that affirmative delegations of constitutional power to market actors would only be acceptable when the legislature had done something more than codify an existing common law rule.

Four years later, the Court decided *Rendell-Baker v. Kohn*,[117] this time with Chief Justice Burger writing for the majority. At issue in the case was a § 1983 claim on the part of dismissed teachers from an arguably private school in Brookline, Massachusetts. After vocalizing disagreements with the school's director over giving more representation to students on a student-staff council, the teachers were fired. The question was whether, in discharging the teachers for their statements in support of the students, the director was acting under color of state law—a question identical to state action analysis under the Fourteenth Amendment.[118] If the director's response could not be conceived as state action, the teachers would have failed to state a claim.

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[116] *Id.* at 160 n.10.
[117] 457 U.S. 830 (1982).
[118] *Id.* at 839.

The school was regulated by a Massachusetts law designed to provide children with physical or emotional disabilities individualized educational programs, specifically tailored to their special needs. According to the statute, such children were to be identified by school committees established in all Massachusetts towns. In providing this benefit, the committee could offer the programs either through public schools, or by contracting with private schools. Defendant New Perspectives School was such a private school, contracted through the school committees of Boston and Brookline to implement special education programs.[119] At the time of the controversy, all students at the school had been placed there through state program. Almost all of the school's funding came from both state and federal agencies, and due to the nature of the special education mandate, the bulk of the school's daily operations were intensively monitored and regulated by state actors.

Relying on its recent decision in *Blum v. Yaretsky*,[120] the Court had little trouble determining that this had not been a case of state action. First, New Perspectives was privately owned.[121] Just because a private business may receive state funding for its activities, even substantial amounts of such funding, this in and of itself would not represent the state's coercion of the private party. We can intuit from the Court's reasoning that so long as the private party retains a meaningful capacity for representing its will, the state's encouragement and support for the private party does not present the sort of state influence necessary to trigger 1983 or the Fourteenth Amendment. With respect to the claim that the school's operations were intensely regulated, the Court managed the problem in a similar way: there was no evidence that any state official had

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[119] *Id.* at 845.
[120] Blum v. Yaretsky, 457 U.S. 991 (1982).
[121] *Kohn*, 457 U.S. at 840.

influenced the school's director in her decision to fire the teachers.[122] Finally, the Court explained that while the school was clearly serving a public function as mandated under Massachusetts law, it was not a public function that had been the traditional prerogative of the state.[123] There was simply nothing that tied the school to the state in such a way that the powers imminent in a 1983 claim could be unlocked on behalf of the teachers.

The neoliberal revival continued, though not without interruption.[124] For example, *American Manufacturers Mutual Insurance Company v. Sullivan*,[125] decided in 1999, continued to teach the value of the classic masters: in its adjudication of a dispute between an employee and an insurance company, where the employee's benefits had been suspended by the company pursuant to Pennsylvania's complex and comprehensive worker compensation law and its attendant institutions, the court held that the state had not "exercised coercive power or…provided such significant encouragement, either overt or covert, that the choice [of the insurance company]

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[122] *Id.* at 841–42.

[123] *Id.* at 842.

[124] In the contemporary period, the Court has taken an eclectic approach to its style of state action jurisprudence. *See* Pleasant Grove City v. Summum, 555 U.S. 460 (2009); Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47 (2006); Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Mitchell v. Helms, 530 U.S. 793 (2000); Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374 (1995) (finding that Amtrak is a government entity and therefore could not prohibit political billboards from train stations since doing so would be a violation of free speech); Edmonson v. Leesville Concrete, 500 U.S. 614 (1991) (finding that a preemptory challenge to exclude jurors based on race was unconstitutional); DeShaney v. Winnebago Cnty., 489 U.S. 189 (1989) (finding that the state's failure to protect a four-year-old child when the Social Services office had received numerous complaints of abuse did not constitute State Action); NCAA v. Tarkanian, 488 U.S. 179 (1988) (finding that UNLV's suspension of a student was state action, but the NCAA was not the state, so the NCAA's rules would not be considered violative of the constitution).

[125] Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999).

must in law be deemed to be that of the State."[126] In 2000, the court decided the well-known Violence Against Women Act case, *U.S. v. Morrison*.[127] Going further in demonstrating the neoliberal style, the court rejected the argument that Congress was authorized under the Fourteenth Amendment to provide victims of gender violence a civil remedy. Citing the 1875 decision of *United States v. Cruikshank*,[128] the court emphasized that though the Amendment did establish a right to due process and equal protection "this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society."[129]

E. SUMMARY

This discussion of the constitutional state action doctrine had three aims. The first was to show how liberal legalism provides an extremely helpful way of making sense of the otherwise confusing terrain of constitutional state action doctrine. Though it is a commonplace in the literature to look at the doctrine and see a mess of disorder as a result of the law's reliance on an ultimately unworkable public-private distinction, liberal legalism gives us a roadmap that is both elegant and effective. As discussed, constitutional state action doctrine can be mapped into three discrete styles, and particularly when that map is read in the historical context of political change, the use of a particular style at a particular moment makes a lot of sense.

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[126] *Id.* at 52.
[127] United States v. Morrison, 529 U.S. 598 (2000).
[128] *Id.* at 622 (citing *Cruikshank,* 92 U.S. at 554).
[129] *Id.* (citing *Cruikshank,* 92 U.S. at 554).

The second aim was to show how these three styles had different ways of approaching the basic idea of the role of law in market society. In the classic liberal style, law was seen as generative of the market. Property and contract rules in particular were deemed as essential and apolitical ingredients in the constitution of the economic sphere. The purpose of constitutional law, in this view, was merely to shield these background rules from state intervention. The notion that markets might require foreground rules to function was not a notion with any appeal. This represented a very sharp distinction between the sphere of private law, doing all the work in making markets happen, and a public sphere, which had very little work to do at all. In the modern liberal style, this orientation towards the role of law in the market changed. Instead of putting a premium on the private law to do all the work, modern liberals welcomed the application of foreground rules by giving plaintiffs greater access to constitutional powers in private law disputes. In the modern liberal style, the notion of "state action" was expanded so as to allow more cognizance of the connection between the private and public spheres. Whereas modern liberals weakened the public-private distinction in their attempts to gain more "control" of the market, the neoliberal reaction turned back in nostalgia to the classic liberal fascination with background rules. The public-private distinction was shored up once again, and the idea that background rules were the appropriate area of concentration in forming market society was vindicated.

The third aim of this Part builds off of the second, which is to emphasize the economic character of constitutional state action doctrine. This is a character that is very different from the economic due process of *Lochner*, and an aspect of constitutional state action doctrine that persists to the present. Indeed, the constitutional interpretation of property and contract has played, and continues to play, a foundational role in the construction of American competition law. Or in other words, constitutional adjudications of property and contract provide the background rules of competition law—the rules against which the more popular foreground rules of competi-

tion law, namely antitrust, go about their business. This discussion of constitutional state action doctrine is therefore intended to set up the discussion of antitrust law in the next Part, and more particularly, anticipate the deep linkage between the constitutional and antitrust state action doctrines—a linkage that turns on a shared alliance with a view of market society.

III. THE FOREGROUND RULES OF COMPETITION LAW: ANTITRUST STATE ACTION DOCTRINE

According to the conventional story, Lochnerism was beheaded in 1937 with the Court's famous decision in *West Coast Hotel v. Parrish*.[130] There, Chief Justice Hughes explained that the Constitution's "guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards."[131] Five years later, the Court decided *Wickard v. Filburn*,[132] substantially augmenting federal power over all intrastate transactions that had an effect on interstate commerce, and six years after that, as discussed above, the Court decided *Shelley*, the proverbial bombshell which left commentators wondering if anything was really left of the private sphere.

Thus, it was in the wake of this post-1937 "constitutional revolution" that antitrust law was also seen as requiring a makeover.[133]

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[130] West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

[131] *Id.* at 392.

[132] Wickard v. Filburn, 317 U.S. 111, 121 (1942).

[133] Among the events surrounding this phase were the investigations of the Temporary National Economic Committee and the placement of Thurman Arnold as head of the new antitrust division. For discussion s*ee, e.g.*, ALAN BRINKLEY, THE END OF REFORM, NEW DEAL LIBERALISM IN RECESSION AND WAR (Vintage Books 1996); MERLE FAINSOD & LINCOLN GORDON, GOVERNMENT AND THE AMERICAN ECONOMY (1941); TONY FREYER, ANTITRUST AND GLOBAL CAPITALISM, 1930-2004 8-59 (2006); THOMAS MCCRAW, PROPHETS OF REGULATION (1984); ELLIS HAWLEY, THE NEW DEAL

In 1938, President Franklin Roosevelt inaugurated a new moment in the governmental commitment to antitrust enforcement in an anti-monopoly message proclaiming antitrust law as a shield against fascism and collectivism.[134] Likely the most apparent example of the fresh wave of energy injected into the antitrust enterprise was the selection of Thurman Arnold, a professor at Yale Law School who was associated by many with legal realism, to head up the newly minted antitrust division at the Department of Justice.[135] Arnold, along with Supreme Court justices like William Douglass and Hugo Black,[136] resuscitated the modern complaint that had stirred up an interest in making an antitrust law in the first place. Pushing the classic focus on property and contract rights to the periphery, the modern style of antitrust adopted once again the hope for managing market performance, and the provision of aid to the small business owner[137] and the consumer.[138] Social health, competitive pric-

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AND THE PROBLEM OF MONOPOLY (1974); WYATT WELLS, ANTITRUST AND THE FORMATION OF THE POSTWAR WORLD (2002).

[134] FREYER, *supra* note 134, at 8 n.1. *See also* DAVID M. KENNEDY, FREEDOM FROM FEAR, 1929-1945 (Oxford Univ. Press, 1999); ROBERT DIVINE, THE ILLUSION OF NEUTRALITY (Univ. of Chi. Press, 1962).

[135] *See generally* SPENCER WEBER WALLER, THURMAN ARNOLD: A BIOGRAPHY (2005).

[136] *See* RUDOLPH J. R. PERITZ, COMPETITION POLICY IN AMERICA, 1888–1992, 112, 173 (Oxford Univ. Press 1996).

[137] Fashion Organizers Guild of Am. v. F.T.C., 312 U.S. 457 (1941) represents the Court's focus on the small business owner as a key protected class under the antitrust laws. Here, consumer welfare would play second fiddle to a perceived need to protect the liberty of small entrepreneurs. As Justice Black explained, "While a conspiracy to fix prices is illegal, an intent to increase prices is not an ever-present essential of conduct amounting to a violation of the policy of the Sherman and Clayton Acts; a monopoly contrary to their policies can exist even though a combination may temporarily or even permanently reduce the price of the articles manufactured or sold . . . Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class and the absorp-

ing, and avoiding the "curse of bigness" were the new ideals of the modern liberal style.[139]

In many histories of antitrust law, the discussion at this point turns to well-known cases like *Fashion Organizers Guild of America* and *Socony Vacuum*. Though it is true that these and other cases illustrate the shift in thinking about the benefits of state intervention in the competitive process, the discussion here will focus instead on a string of cases associated with the antitrust state action doctrine,[140] dated to the 1943 Supreme Court decision in *Parker v. Brown*.[141] This more heterodox trajectory is helpful for two reasons: (1) it emphasizes the regulatory alliance between the two state action doctrines,

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tion of control over one commodity by an all powerful combination of capital." *Id* at 467.

[138] United States v. Socony-Vacuum Oil Co., Inc. 310 U.S. 150 (1940) illustrates the Court's mission, this time with the pen of William Douglas, of protecting the consumer at the expense of big and small business owners alike. It didn't matter for the court that small enterprises were helped out in the process of major oil companies stabilizing prices for the benefit of small producers stranded with excess capacity. The purpose of the law, according to the court, was to leave price control to the market, not to human beings. Price-fixing was per se illegal, and the Rule of Reason would have little to say about it.

[139] In a contemporary rendering of the goals of antitrust law, former chairman of the FTC, Tim Muris, has suggested that "Although disagreements exist in close cases, there is widespread agreement that the clearly articulated purpose of antitrust is to protect consumers, that economic analysis should guide case selection, and that horizontal cases, both mergers and agreements among competitors, are the mainstays of enforcement. Moreover, today there is bipartisan recognition that antitrust law is a way of helping to organize our economy. A freely functioning market, subject to the rules of antitrust, provides maximum benefits to consumers." Timothy J. Muris, *Principles for a Successful Competition Agency*, 72 U. Chi. L. Rev. 165, 168 (2005). *But see* John J. Flynn, *The Role of Rules in Antitrust Analysis*, 2006 UTAH L. REV. 605 (2006).

[140] Like the constitutional state action doctrine, the antitrust state action doctrine has also generated a long list of enemies.

[141] *Parker v. Brown*, 317 U.S. 341 (1943). As Herbert Hovenkamp has pointed out, the Court first dealt with a state action question in the context of an antitrust case in Northern Securities. The discussion, however, was quick. *See* Hovenkamp, *supra* note 8, at 628.

and (2) it illuminates an interesting and counter-intuitive use of the public-private distinction in the context of modern liberalism.

As for the first point about the alliance between the two state action doctrines, it should be recalled that there is a long-standing temptation to think about the fall of *laissez-faire* constitutionalism as the end of the line when it came to the judicial deployment of constitutional law as a factor in the legal conception of the market. As explained above, there is a persistent story about the Supreme Court's entanglement with "economic due process," an affair that was thankfully terminated in the years before WWII. What this story hides, however, and what is helpfully illuminated in the focus on state action cases, is that *laissez-faire* constitutionalism was just one variety, of the "economic constitution."

Of course, one might counter at this point that this is all well and good in the case of constitutional state action doctrine, but what does this have to do with antitrust state action? It must be admitted at the outset that, as Herbert Hovenkamp has explained, antitrust state action doctrine and the constitutional state action doctrine are not typically understood to have much to do with one another:

> "The antitrust 'state action' doctrine is different from and much narrower than the Fourteenth Amendment state action doctrine, and the two are rarely confused. The Fourteenth Amendment doctrine automatically extends to all states and government subdivisions, as well as their officials acting under color of state law and occasionally even private entities performing public functions. In contrast, the antitrust state action immunity applies only where the re-

> quirements of clear articulation and active supervision of private conduct have been met."[142]

No doubt, Hovenkamp is precisely right with respect to his description of the two doctrines, as well as the point that the two are rarely discussed together. But the impulse to keep the two doctrines at a distance—an impulse I do not mean to ascribe to Hovenkamp—inadvertently furthers the erroneous intuition that the constitutional state action doctrine has nothing to do with the making of the market. As the argument here has suggested, this is a mistake, at least in the context of liberal legalism. In that context, constitutional state action doctrine is fundamentally about how to arrange the competitive conditions of the market—just as is the antitrust state action doctrine. Thus, even with their admittedly differing scopes and sources, the two state action doctrines have a similar mission. Both doctrines have as their purpose a way of fixing a line between public and private in the larger project of guaranteeing a competitive market society. In the area of constitutional law, this happens in the background, but in antitrust law, the question is foregrounded to the extent a court is asked to decide whether the state, or an agent of the state, has been justified in its express tinkering with the competitive process. Thus, to understand constitutional state action doctrine without a view of the field of antitrust provides a limited understanding of the two complementary dimensions of competition policy in the modern liberal style.

The second reason for resisting the orthodox story and instead focusing on antitrust state action doctrine is of another sort. In generic antitrust cases decided in the 1940s and after, courts were typically focused on the competitive process, the wrongs private actors make against each other, and the unfair burden on small business

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[142] Hovenkamp, *supra* note 8, at 629 n.15.

owners in making their way through that process. These are largely cases looking at the scope of what was deemed to be fair play—a scope that began to shrink as courts came to the modern liberal style. In contrast, what is sharpened in the antitrust state action cases was the Court's distinct analysis of state actors engaged in activities that would otherwise be characterized as direct violations of the classic liberal background rules, or to put it in the contemporary vernacular, inefficient and anticompetitive state action. In these cases, state actors were doing things that had they been committed by private actors, would have been beyond the pale.

There is therefore a critical use of a public-private distinction going on in the antitrust state action cases which is nicely juxtaposed against the public-private distinction operating in the constitutional state action area. In the setting of modern liberalism, the public-private distinction in constitutional state action doctrine is weak. As demonstrated in the peak case of *Shelley*, private property claims took on a constitutional gloss when they were made in the context of judicially enforced restrictive covenants—a move that is hostile if not totally oblivious to the idea of a public-private distinction. In the modern liberal style of antitrust state action doctrine, however, the Court uses a powerful commitment to a public-private distinction, a commitment similarly motivated by a desire to curtail the free play of private law rules and give discretion to the state in arranging market outcomes. Thus, a key reason for coupling the two state action doctrines is that in doing so we are able to highlight the counter-intuitive idea that within modern liberalism it is possible to carry a brief for state interventionism either through a strong *or* a weak form of the public-private distinction. The upshot: a structural approach to state action doctrine demonstrates the linguistic aspect of legal thought. In this sense, the public-private distinction emerges as a relatively open way of speaking law, and less as a legal concept preexisting judicial analysis.

A. PRELUDE: THE SHERMAN ACT

The modern liberal style emerged in the late nineteenth century in the context of massive, popular discontent with entrenched political commitments to *laissez-faire*. This discontent had several sources, including a worldwide economic depression spanning the years from the 1870s to the 1890s, the rapid concentration of capital in and among the new trusts, and the apparently widening gap between the bourgeois and laboring classes.[143] As for the merger movement, it was aided by a combination of factors, including the acceleration of transportation and communication facilities, and the enlarged capacity to make and sell more products in wider swaths of marketable territory.[144] This capacity was in turn spurred on by technological innovations which generated more efficient manufacturing processes, along with revolutions in managerial control, making labor more efficient as well.[145] The upshot was an environment in which firms found it advantageous to get bigger and bigger, merging where possible to take advantage of economies of scale.[146] In Louis Brandeis' famous phrasing, this became known as the "Curse of Bigness."[147] Popular reaction against what was believed to be the true face of *laissez-faire* was both broad and deep.[148]

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[143] *See* ROBERT HEILBRONER, THE MAKING OF ECONOMIC SOCIETY (1985).

[144] *See* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW: 1836-1937, 241 (1991).

[145] *See* ALFRED CHANDLER, THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (1977).

[146] HOVENKAMP, *supra* note 144, at 241–42.

[147] LOUIS BRANDEIS, THE CURSE OF BIGNESS (1934).

[148] Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 50 (1911) (summing up the context for the Senate debates on the establishment of the antitrust act: "They conclusively show, however, that the main cause which led to the legislation was the thought that it was required by the economic condition of the times; that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations

Here is a common example, found in Upton Sinclair's anthology on social protest:

> The march of invention has clothed mankind with powers of which the boldest imagination a century ago could not have dreamed. But in factories where labor-saving machinery has reached its most wonderful development, little children are at work; wherever the new forces are anything like fully utilized, large classes are maintained by charity or live on the verge of recourse to it; amid the greatest accumulations of wealth, men die of starvation, and puny infants suckle dry breasts; while everywhere the greed of grain, the worship of wealth, shows the force of the fear of want. The promised land flies before us like the mirage.[149]

The United States government reacted in several ways to the crisis of *laissez-faire*, most obviously after the crash of the stock market and the Great Depression of the 1930s, though in important ways that predated the New Deal as well.[150] Among these responses, and the one most focused on the idea that something had somehow gone wrong with the competitive process itself, was the adop-

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known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally.").

[149] UPTON SINCLAIR, THE CRY FOR JUSTICE: AN ANTHOLOGY OF THE LITERATURE OF SOCIAL PROTEST 116-17 (1921).

[150] *See, e.g.*, DANIEL BELAND, SOCIAL SECURITY: HISTORY AND POLITICS FROM THE NEW DEAL TO THE PRIVATIZATION DEBATE (Univ. Press of Kansas 2005); RICHARD JOSEPH, THE ORIGINS OF THE AMERICAN INCOME TAX (2004); MICHAEL PARRISH, SECURITIES REGULATION AND THE NEW DEAL (1970); RICHARD D. STONE, THE INTERSTATE COMMERCE COMMISSION AND THE RAILROAD INDUSTRY: A HISTORY OF REGULATORY POLICY (1991); George Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557 (1996).

tion of a federal antitrust law.[151] In the late 1880s, Congress debated the central issue: did the concept of competition, so deeply embedded in the fabric of America's socio-political make-up, produce morally unacceptable consequences? For many, such a question was really hard on the ears, because if this was so, it could potentially implicate the classic liberal style of property and contract—an implication very few have ever been willing to seriously entertain. A more palatable way of looking at the curse of bigness was to ask whether the problem could be located in a handful of entrepreneurs who were cheating in a game that, at its bottom, was really and truly governed by a set of morally desirable ground rules.[152]

The result of the debate was less than satisfying for any legislator hopeful for a muscular response to the problem of the trusts.[153] The relevant text of the resulting Sherman Act made illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade," and threatened to criminalize "[e]very person who shall monopolize, or attempt to monopolize, or combine or

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[151] For histories of the federal anti-trust law see ROBERT BORK, THE ANTITRUST PARADOX (The Free Press 1993); TONY FREYER, ANTITRUST AND GLOBAL CAPITALISM, 1930-2004 (2006); Peritz, *supra* note 136; BRAITHWAITE & DRAHOS, *supra* note 33, at 175; Eleanor Fox, *The Modernization of Antitrust*, 66 CORNELL L. REV. 1140 (1981); Eleanor Fox, *The Sherman Antitrust Act and the World – Let Freedom Ring*, 59 ANTITRUST L.J. 109 (1990); Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 YALE L.J. 1017 (1988); Herbert Hovenkamp, *The Antitrust Movement and the Rise of Industrial Organization*, 68 TEX. L. REV. 105, 127 (1989); Robert Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982); James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis*, 50 OHIO ST. L.J. 257 (1989); Alan Meese, *Liberty and Antitrust in the Formative Era*, 79 B.U. L. REV. 1 (1999); William Page, *Legal Realism and the Shaping of Modern Antitrust*, 44 EMORY L.J. 1 (1995).

[152] *See* PERITZ, *supra* note 136.

[153] *Id.* at 286 n. 5 (citing Joseph Auerbach, *President Roosevelt and the Trusts*, 175 N. AM. REV. 877, 891 (1902) (describing the legislation as "crudely drawn, imperfectly, considered, hastily enacted")). For discussion, *see* Crane *infra*.

conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States."[154] It was up the courts to figure out just what these phrases were going to mean in the context of Upton Sinclair's America.

Antitrust scholars refer to the years from the Sherman Act's adoption in 1892 to 1911 as antitrust law's "formative" years.[155] What was formative about it was the idea that it was in these years that the Supreme Court wrestled with the Sherman Act's normative foundations.[156] Against the backdrop of intense social unrest, the question was how the Sherman Act would mobilize the judiciary against complaints about vulgar disparities between the giant combinations on the one side and the small businessman and poor la-

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[154] 15 U.S.C. §§1, 2.

[155] Rudolph Peritz explained, "The two decades between 1911 and 1933 can be understood as a series of efforts to make a place for cooperative associations, for the collective actions of economics and political groups, in a classical political economy and ideology founded in individualism. Classical theory and ideology were called upon to accommodate new social and economic practices." PERITZ, *supra* note 136, at 59. Peritz offers a useful counter-history, outlining how these early cases were more complicated than is typically suggested. *Id.* at 27. My discussion of these opposing views reverses Peritz' description of competition and property logics in the works of the literalist and Rule of Reason camps, but I believe my analysis is apiece with his. After *Standard Oil*, the rule of reason would become focused on "competitive effects" as a function of its allegiance to the classic liberal style of protecting the core of private law from state intervention. Thus, I would certainly agree that the Rule of Reason and the court's focus on "competition" belied its "real" basis in limiting the Court's hands in the work of social planning.

[156] Robert Bork argued in *The Antitrust Paradox* that the *Standard Oil* decision of 1911 was critical in pushing the Court out of a period where antitrust law was largely considered "unworkable or unintelligible, or more likely, both." BORK, *supra* note 151 at 34. Among the apparent assets of the decision were its acceptance of a Rule of Reason, an explicit connect of the Sherman Act to the common law, a choice about the Sherman Act's appropriate goal of maximizing consumer welfare. *Id.* Saddened by the fact that a classic liberal style of antitrust was short-lived, Bork lamented: "These were considerable accomplishments, and had they not been badly, perhaps fatally flawed, the Sherman Act might have remained our only antitrust statute and antitrust policy might have had an unambiguous career as a guarantor of free markets." *Id.*

borer on the other. Politically and economically, there was a growing sense that the old lines between the public and private needed to be relaxed, and that presumptions about the evil of state intervention needed to be thrown away.[157] The problem, as has been said, was that the very nature of the new modern liberal style had no answer for its own self-generated question about the role of the courts. After the Sherman Act, should the Supreme Court read into the act a legislative preference for abolishing all coercive restrictions immanent in the law of property and contract?[158] Or did a more appropriate route lie in the judicial analysis of competition and its consequences, guided by the common law's commitment to "reasonableness"?

B. THE CLASSIC LIBERAL STYLE: STANDARD OIL AND CHICAGO BOARD OF TRADE

In 1911, the Supreme Court pushed into the majority what had been in the previous couple decades a minority view about how to interpret the Sherman Act. Should all agreements in restraint of

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[157] In terms of legal consciousness, the United States was in a very different headspace. This is the time of laissez-faire Lochnerism. *See* HORWITZ, *supra* note 37. Herbert Hovenkamp has argued in this context that the early years of Sherman Act jurisprudence were a mix of waning and waxing aspects of classical and neoclassical theories of competition. *See* Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA L. REV. 1019 (1989).

[158] Robert Lande has suggested that the ultimate goals of the Act were neither to increase economic efficiency nor to address social concerns about the excess of individualism. Lande, *supra* note 151, at 68. For Lande, the point of the Act was to achieve a degree of distributive justice, where Congress "was concerned principally with preventing unfair transfers of wealth from consumers to firms with market power. Lande, *supra* note 151, at 68. Alan Meese, on the other hand, believes that the Sherman Act was adopted neither as a response to political and social concerns with *laissez-faire,* nor for reasons of economic efficiency or distributive justice. In his view, antitrust law from its very beginnings had as its purpose the protection of contract rights. Meese, *supra* note 151, at 10.

trade be prohibited,[159] or only those agreements that were "unreasonable" restraints?[160] The choice was clearly loaded with political

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[159] The case *U.S. v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897), represents the "literalist" view of the Sherman Act. In that case, Justice Peckham wrote for the majority that the freight association's fixed rates violated the ideal of "free and unrestricted" competition. *Id*. For Peckham, the only way of determining a fair price was through the competitive process itself, and the freight association was interfering with that process. *Id.* No judge could say, on his own, what could possibly constitute a reasonable price. *Id.*at 331–32. It was also out of the Judge's competence to say whether the consequence of any particular act in the marketplace was reasonable. *Id.* In dissent, Justice White emphasized the Sherman Act's appropriation of common law language, and the rightness of using a reasonableness test for the meaning of "competition." *Id.* at 343–74 (White, J., dissenting). Without recourse to a Rule of Reason, White argued, contract and property rights would be subject to an over-inclusive jurisprudence. *Id*. The freight association's rate decision, in this case, could rightly be seen as a reasonable act, within the confines of the competitive process. In his dissent, Justice White argued for a Rule of Reasonableness, and that a plain meaning approach to the Act would defy all common sense. *Id.*

[160] As Peritz explains, the Court's antitrust jurisprudence began to drift away from Justice Peckham's view and towards Justice White's position in *United States v. Joint Traffic Association*, 171 U.S. 505 (1898), *United States v. Addyston Pipe & Steel Company*, 175 U.S. 211 (1899), and *Northern Securities Company v. United States*, 193 U.S. 197 (1904). PERITZ, *supra* note 136, at 316–24. In *Addyston Pipe*, Justice Peckham wrote for the majority in a case involving several corporations engaged in the manufacture of cast iron pipe, and which were charged with bid-rigging and price fixing in violation of Section 1 of the Sherman Act. *See generally* U.S .v. Addyston Pipe & Steel, 175 U.S. 211 (1899). In response to the claim that their agreements were in conformity with common law practices, Peckham responded with a *per se* approach claiming that the practices at issue was illegal because it literally represented a restraint on trade tending towards monopoly, and it didn't matter how reasonable the agreements might have been. *Id.* In *Northern Securities*, a very controversial case, Justice Harlan wrote the majority decision. N. Sec. Co. v. U.S., 193 U.S. 197 (1904). Surveying a combination between competing railway lines, Harlan stated that the defendants railroad companies had created a "*combination in restraint of interstate and international commerce*; and that is enough to bring it under the condemnation of the act. The mere existence of such a combination, and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected." *Id.* at 327. But was this enough? Recalling the debate over the nascent Rule of Reason, Harlan asked, "Is the act to be construed as forbidding every combination or conspiracy in restraint of trade or commerce among the states or with

implications: one worry was about the extent to which the Sherman Act might be interpreted as being able to undermine the sanctity of individual rights of property and contract,[161] and a chief means for aligning what otherwise could have been a disastrous amount of social engineering would be to ask, as a threshold matter, whether we really wanted to scrutinize *all* contracts that posed real restraints

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foreign nations? Or, does it embrace only such restraints as are unreasonable in their nature?" *Id.* at 328. At this point, the answer was apparently easy: "It is sufficient to say that from the decisions in the above cases certain propositions are plainly deducible and embrace the present case. Those propositions are: That although the act of Congress known as the anti-trust act has no reference to the mere manufacture or production of articles or commodities within the limits of the several states, it does embrace and declare to be illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates *in restraint* of trade or commerce *among the several states or with foreign nations*; That the act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces *all* direct *restraints* imposed by any combination, conspiracy, or monopoly upon such trade or commerce…That *every* combination or conspiracy which would extinguish competition between otherwise competing railroads engaged in *interstate trade or commerce*, and which would *in that way* restrain *such* trade or commerce, is made illegal by the act; That the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promoting trade and commerce; That to vitiate a combination such as the act of Congress condemns, it need not be shown that the combination, in fact, results or will result, in a total suppression of trade or in a complete monopoly, but it is only essential to show that, by its necessary operation, it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition … No one, we assume, will deny that these propositions were distinctly announced in the former decisions of this court." *Id.* at 331–32.

[161] This, of course, was hardly what judges in the early twentieth century were eager to do. As James May has said, judges of the time "commonly perceived themselves as guardians of a free political and economic order that naturally tended to produce harmonious, just, and optimal results for both individuals and society at large. State and federal jurists believed that this political and economic order was potentially threatened by the rapid and profound changes of the era and sought to meet this threat through continual, close scrutiny of public and private developments potentially subversive of the essential bases of American freedom and prosperity." May, *supra* note 151, at 258–59.

on commerce. To view the Sherman Act is this light was to generate a great deal of hostility with respect to freedom of contract and private property rights, which in their essence are *always* about alienation. The view that would capture the majority and illustrate the classic liberal style of antitrust enforcement would hold that only unreasonable restraints would violate the Sherman Act.[162]

But how would the court know an unreasonable agreement from a reasonable one? According to the new majority, the analysis would be guided by the lights of "the most elementary conceptions of rights of property."[163] The exemplary cases are *Standard Oil v. United States*[164] and *Board of Trade of City of Chicago v. United States.*[165]

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[162] As mentioned, it had been coming. The new view is also on display in Justice Holmes' dissent in Northern Securities. *N. Sec. Co.*, 193 U.S. 197. Looking to the text of the Sherman Act, Holmes was convinced that the most natural reading of the language would militate in favor a more nuanced understanding of which kinds of agreements were really the target of antitrust law. "If the statute applies to this case it must be because the parties, or some of them, have formed, or because the Northern Securities Company is, a combination in restraint of trade among the states, or, what comes to the same thing, in my opinion, because the defendants, or some or one of them, are monopolizing, or attempting to monopolize, some part of the commerce between the states. But the mere reading of those words shows that they are used in a limited and accurate sense. According to popular speech, every concern monopolizes whatever business it does, and if that business is trade between two states it monopolizes a part of the trade among the states. Of course, the statute does not forbid that. It does not mean that all business must cease. A single railroad down a narrow valley or through a mountain gorge monopolizes all the railroad transportation through that valley or gorge. Indeed, every railroad monopolizes, in a popular sense, the trade of some area. Yet I suppose no one would say that the statute forbids a combination of men into a corporation to build and run such a railroad between the states." *Id.* at 406–07 (Holmes, J., dissenting). Holmes also suggested that the majority's view was hard to square with another early antitrust case, *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895); *Id.* at 410.

[163] *N. Sec. Co.*, 193 U.S. at 370. There is a large body of literature on the development of the Rule of Reason. *See, e.g.*, HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE (2005); Spencer Weber Waller, *Justice Stevens and the Rule of Reason*, 61 SMU L. REV. 693 (2009).

[164] 221 U.S. 1 (1911).

[165] 246 U.S. 231 (1918).

The problem at issue in *Standard Oil* was a concern that the Rockefeller-owned trust had attained monopoly control over the oil industry, enabling it to fix the price of crude and refined petroleum products, and restrain all of its interstate commerce.[166] In its application of the Sherman Act to the facts, the new majority led by Justice White began its analysis by plumbing English history for the Act's common law heritage.[167] In contrast to the notion that the Sherman Act was an instance of social planning, meant to tinker with competition's constitutive rules of property and contract and apiece with the modern liberal style, the Court instead articulated some new, counter-modern guideposts:

> 1. That by the common law, monopolies were unlawful because of their restriction upon individual freedom of contract and their injury to the public. 2. That as to necessaries of life, the freedom of the individual to deal was restricted where the nature and character of the dealing was such as to engender the presumption of intent to bring about at least one of the injuries which it was deemed would result from monopoly,-that is, an undue enhancement of price. 3. That to protect the freedom of contract of the individual, not only in his own interest, but principally in the interest of the common weal, a contract of an individual by which he put an unreasonable restraint upon himself as to carrying on his trade or business was void.[168]

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[166] *Standard Oil*, 221 U.S. at 32.
[167] *Id.* at 51.
[168] *Id.* at 54–55.

The purpose of the Act, it turned out, was not to alter property and contract at all.[169] Instead, antitrust law would have as its mission the adjustment of those contractual relations that tended towards remedying the "evils" produced by concentrations of capital, but letting alone the notion of concentration itself. The question before the Court was therefore whether Standard Oil's dominance of the oil industry was *reasonable* in light of background conceptions of property and contract.[170]

Though the Court held that Standard Oil's actions had been unreasonable, and consequently illegal, the *Standard Oil* decision was received as pro-business validation of monopoly capitalism.[171] After all, what had clearly been dispensed with in the idea of a deep-seated approach to "ruinous competition" was now replaced by a Rule of Reason that appeared to validate, as a matter of its ground rules, the very social condition causing so much protest. The political effect was Congress' response with the establishment of the Clayton Act, the Federal Trade Commission, and explicit legislative reference to the problem of "competition," a word absent from the Sherman Act.[172] As for the states, twenty of them enacted antitrust

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[169] *Cf.* Meese, *supra* note 151, at 7–15, for the view that *Standard Oil* was not an outlier and not the mark of a new approach at all. For Meese, *Standard Oil* continued a respect for freedom of contract that had been implicit from the beginning. *Id.*

[170] The Rule of Reason was further elaborated in cases like *United States v. Trenton Potteries*, 273 U.S. 392 (1927), which involved agreements among both individual and corporate manufacturers of various pottery fixtures in households. In responding to the defendants' claim that they should have been able to defend the practice on a basis of reasonableness, the majority argued that the Rule of Reason was only applicable in certain cases, and not to instances of blatant price-fixing like that found in the present case. The distinctions continued, as illustrated in *Appalachian Coals v. United States*, 288 U.S. 344 (1933), in which a unanimous court adopted the Rule of Reason in its analysis of the coal industry.

[171] For opposing views, see PERITZ, *supra* note 136, and Meese, *supra* note 151, at 7–15.

[172] PERITZ, *supra* note 136, at 334.

statutes over the next two years in the wake of the Court's Rule of Reason test.[173]

The new Rule of Reason approach gained ground with Justice Brandeis' famous decision in *Chicago Board of Trade*.[174] At issue in the case was a decision by members of the Chicago Board of Trade to adopt the "call rule" with respect to grain markets in Chicago. According to the rule as it was initially adopted, traders were not allowed to buy or sell any grain at a price other than the last price at the end of the day's session, until trading had resumed the next day. Antitrust regulators argued that the call rule was a case of price-fixing and illegal per se. The Board argued that the call's purpose was not to restrict prices or control competition, but instead it was an effort to break up a monopoly in the grain trade acquired by a handful of members.

Justice Brandeis explained that the federal government's efforts to enjoin the call rule were predicated on "the bald proposition, that a rule or agreement by which men occupying positions of strength in any branch of trade, fixed prices at which they would buy or sell during an important part of the day, is an illegal restraint of trade…" But this approach, Brandeis explained, made no sense. The question for antitrust enforcement could not be whether an agreement placed a restraint, since all agreements restrained trade in some way. The better approach, which would become a standard framework for thinking about the unreasonable restraint of trade, would be to try to understand what effects the proposed regulation would have on competition—is competition promoted or retarded?

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[173] *Id*.

[174] Brandeis and Holmes were again in opposition when the Court decided *American Column and Lumber v. United States*, 257 U.S. 377 (1921). Going in the other direction was *Maple Flooring Mfrs' Ass'n*, 268 U.S. 563 (1925). Around the same time, *U.S. Steel* was decided in favor of the defendant.

The appropriate posture of the Court would be for it to take a skeptical view of regulation, allowing it only to the extent that interference in the market could fairly be understood to actually have pro-competitive effects. These effects could be identified by the court through a functionalist jurisprudence fixed on particular facts, the purpose of the restraint and the purpose of the activity in question, and an understanding of as much context as possible. What was critical for a court's evaluation of competitive markets was not whether the state had determined it necessary to intervene—the question for Brandeis was about identifying all the facts that might help it "predict consequences." After applying the Rule of Reason to the question of the call rule, the Brandeis court concluded that the call rule was pro-competitive, and consequently dismissed the federal effort to restrain the Board's decision.

Chicago Board of Trade is interesting in part because Justice Brandeis was not after a crude defense of individual property and contract rights. If *Chicago Board of Trade* merely followed *Standard Oil*, it is not likely we would have seen the same kind of resort to a fairly new instrumental approach like this. After all, in the style of *Standard Oil,* there is little need for functionalism: property and contract rights are perceived as largely unadulterated goods, and it is unnecessary to ask whether they are good or less so in any particular context. Of course, that is not entirely what is happening in *Chicago Board of Trade* either. What is subject to contextual analysis is not the fair play of property and contract, but the appropriateness of governmental interference with property and contract.

It is easy to situate *Standard Oil* and *Chicago Board of Trade* as products of the Fuller Court's era of *laissez-faire* constitutionalism,[175]

[175] *See generally* Hovenkamp, supra note 62. *See also* James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis*, 50 OHIO ST. L.J. 257, 309 (1989) ("Both congressional and judicial analyses of early federal antitrust issues thus strongly reflected the same core perspectives of political

and as Robert Bork put it, had *Standard Oil* not crashed against the shores of modern liberalism, it might have entrenched antitrust law as the "guarantor of free markets," and not as the regulator it would become.[176] As we have seen, the Court adopted a classic liberal style of treating the Sherman Act as part of an effort to shield the common law from governmental intervention, and not, as some would have preferred, to use the new antitrust law as a means for manipulating the expanse of big business. Instead of using antitrust as a weapon against concentration, per se, antitrust would focus instead on unreasonable market effects.

It might be a little confusing, however, framing a period of "classic liberal antitrust law."[177] After all, constitutional state action doctrine in the classic liberal style would appear to be entirely at odds with the very notion of antitrust law. In that context, law is believed to have a central and constitutive relationship to market growth: the private law rules of property and contract provide the background rules for market competition, and without the protection of those rules, liberal markets do not happen. Thus, a classic liberal idea about the constitution is that its central mission is to ensure that state actors are prohibited from meddling in the free play of those rules. Consequently, constitutional claims will be nullified to the extent that they rely on acts taken in light of the private law itself.

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liberalism and classical economics that simultaneously played a fundamental role in contemporary laissez-faire constitutionalism.").

[176] BORK, *supra* note 151, at 34.

[177] Daniel Crane recognized the oddness of the question in *Lochnerian Antitrust*, 1 N.Y.U. J. L. & LIBERTY 496, 496 (2005), where he asked, "Is there room for antitrust in a Lochnerian world that strictly delimits the government's power to intervene in private market transactions?" Crane's answer is unlike the one presented here, insofar as Crane was making a case for a confluence of interest between classic liberals and antitrust lawyers.

In the modern liberal style, in contrast, there is the sensibility that constitutional protections are about quite a bit more than simply setting the ground rules of market competition. There is also a belief that the ground rules are often unfair, and that as a result, it is a mission of the state to intervene in the market on behalf of less-advantaged actors. The question then emerges, if antitrust law is emblematic of modern liberalism, how can there be a classic liberal style of antitrust?

As the discussion above pointed out, there was substantial disagreement both in Congress and the judiciary about just exactly what the new antitrust law was really supposed to be doing. The reason for its adoption, to be sure, was rooted in discontent with classic liberal *laissez-faire.* But how much discontent? And discontent with precisely what? These questions had been answered for some time in the Court's minority opinions with a quite modest view about governmental intervention in supposedly free markets—opinions which gained majority status in decisions like *Standard Oil* and *Chicago Board of Trade*. For present purposes, what this signaled was (1) an antitrust law generally in deference to the untouchable character of the private law, and (2) the idea that when regulation of the private law was considered at all, it would be considered with a skepticism about the state having a default privilege to shape the market. Instead, the Court would adopt a Rule of Reason for judicial determination about the correctness of regulation. This is the sense in which antitrust law experienced a classic liberal moment.

C. THE MODERN LIBERAL STYLE: *PARKER* AND *SCHWEGMANN BROTHERS*

This Section introduces the use of foreground rules, now in the style of modern liberalism, through a discussion of the antitrust state action doctrine. The doctrine conventionally begins with *Parker*, where the central question was whether an agricultural program adopted by the California legislature violated the Sherman

Act.[178] The purpose of the program was to fix the prices of various commodity sales in the state of California, and restrict competition among producers, so as to "conserve the agricultural wealth of the State" and to "prevent economic waste in the marketing of agricultural products."[179] In *Parker*, the appellee was a raisin producer and purchaser claiming that the program's rules on raisin production, and in particular the limitation on the actual amount of raisins a producer was permitted to privately sell, violated federal antitrust law.[180] The appellee claimed that he would be subject to the California program's criminal penalties if he fulfilled his contractual duties in the distribution of his 1940 (the year the program went into effect) raisin crop.[181]

The Supreme Court began its analysis of the state law by admitting that if this had been a private ordering of contracts between commercial producers, it would have violated the Sherman Act.[182] The Court was not long in elucidating the rationale for its conclusion that this particular instance of anti-competitive behavior was nevertheless a valid one: "[I]t is plain that the prorate program here was never intended to operate by force of individual agreement or combination. *It derived its authority and its efficacy from the legislative command of the state* and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose

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[178] Parker v. Brown, 317 U.S. 341, 344 (1943). The court also examined the legality of the state program under the Agricultural Marketing Agreement Act of 1937, as amended, 7 U. S. C. § 601, or the Commerce Clause of the Constitution.

[179] *Id.* at 346.

[180] *Id.* at 349.

[181] *Id.*

[182] "We may assume for present purposes that the California prorate program would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate." *Id.* at 350.

was to restrain a state or its officers or agents from activities directed by its legislature."[183] The critical point here is that the Court definitively concludes that nothing in the text of the Sherman Act, or in the Act's legislative history, can give a Court the warrant to impede a legislature when its regulations appear anticompetitive. In the classic liberal style, as we have seen, such a limitation on the judiciary's authority over the legislature would have been heretical.[184]

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[183] *Id.* at 350–51 (emphasis added). As the Supreme Court explained later in *E. R.R. Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127 (1961): "Insofar as [the Sherman] Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity. . . . The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation." *Id.* at 140–41.

[184] *Parker* can also be understood as an example of the break from classic to modern in light of the Court's decision in *Tyson & Bro. v. Banton*, 273 U.S. 418 (1927). The dispute was over the practice of ticket resale in New York under New York statutes that made the price of admission to theaters and similar venues a matter of "public interest" and therefore subject to state supervision. In relevant part, the statute prohibited the resale of tickets "at a price in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry." *Id.* at 427. Writing for the majority, Justice Sutherland held the statute in violation of the Constitution. "The authority to regulate the conduct of a business or to require a license, comes from a branch of the police power which may be quite distinct from the power to fix prices. The latter, ordinarily, does not exist in respect of merely private property or business, but exists only where the business or the property involved has become 'affected with a public interest.'" *Id.* at 430 (citation omitted). Finding the "public interest" to be a category of extraordinarily limited scope, the Court struck down New York's attempt to regulate ticket resale through a price-fixing scheme. With Holmes again in dissent, *Tyson* would eventually be explicitly overturned in *Olsen v. Nebraska ex rel. W. Reference & Bond Ass'n, Inc.*, 313 U.S. 236 (1941). Justice Douglas, writing for the majority, concluded: "In final analysis, the only constitutional prohibitions or restraints which respondents have suggested for the invalidation of this legislation are those notions of public policy embedded in earlier decisions of this Court but which, as Mr. Justice Holmes long admonished, should not be read into the Constitution. Since they do not find expression in the Constitution, we cannot give them continuing vitality as standards by which the constitutionality of the eco-

This is not to suggest, however, that modern liberalism is simply the reverse of classic liberalism. On the one hand, the fact that the Court interpreted the Act as only restraining private parties is a clear thumb of the nose at the classic style. As it will be recalled, the *first* job of classic regulation is to restrain the state itself from interfering with the natural work of competition in the market. Though antitrust law initially emerged through dissatisfaction with the classic style, decisions like *Standard Oil* rolled back the effect of the law to do little more than attach a new set of statutory liabilities to a set of very old common law claims. In the 1930s and '40s, the style shifted again, and as seen here in *Parker*, restraining the state itself appears far less vital than controlling the excess of private rights. That is a modern move. Thus, when the Court stated that it found nothing in the history of the Sherman Act debates to suggest that anticompetitive acts on the part of the state were within its scope, it explicitly rejected the view of the Court from prior decades that the law had been intended to shield property and contract rights, *period*. Consistent with the modern liberal style, the *Parker* court favored an image of the controlling, planning, intervening state.

On the other hand, *Parker* illustrates a modern and quite powerful commitment to a distinction between private actors and political society. As we have seen, this is the reverse of the modern liberal style of constitutional state action doctrine, which is committed to a very weak distinction between public and private. Yes, the goal of antitrust law was to manage market performance, and yes, consumer protection and the defense of the small business owner were critical. But *Parker's* strong public-private distinction was not *Shelley´s* weak public-private distinction, and hardly moved the Court towards a position where competition could be controlled through a

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nomic and social programs of the states is to be determined." *Id.* at 246–47 (citations omitted).

diagnosis of its constitutive rules. Instead, *Parker* merely stood for the proposition that when state actors adopt anticompetitive rules, these rules will be assumed to be legitimate and free of a Rule of Reason analysis, since in the modern liberal style courts will generally trust agencies to make such decisions.

Parker is not, to the contrary, instructing us that the private law itself is immoral or coercive or anything itself. *Parker* was an instance of controlling competition's consequences by way of distinguishing the freedom of private actors to make use of coercive restrictions granted them through the common law on the one hand, and regulatory forms of power exercised by the California legislature on the other. Or, in other words, the antitrust state action doctrine as illustrated in *Parker*, is a doctrine about *foreground rules*. It represents an argument for state power, not a critique of the market's background rules. Indeed, this is what the modern liberal style of controlling competition is all about. Thus, the constitutional and antitrust state action doctrines represent reverse images of the public-private distinction, but still within the language of the modern liberal style.

Schwegmann Brothers. v. Calvert Distillers,[185] decided eight years later and penned by one of the authors of the so-called antitrust makeover—William Douglas[186]—kept pace with *Parker*.[187] The ques-

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[185] Schwegmann Bros. v. Calvert Distillers, 341 U.S. 384 (1951).

[186] *See, e.g.*, C. Paul Rogers III, *The Antitrust Legacy of Justice William O. Douglas*, 56 CLEV. ST. L. REV. 895 (2008).

[187] A sister case to *Parker*, that precedes *Schwegmann*, is *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37 (1948). At issue was whether a salt manufacturer can set prices based upon quantity the retailer or wholesaler purchased. Because only the largest companies could purchase carloads of salt, which would avail them of the cheapest prices, the largest companies benefited from this arrangement. Additionally, the manufacturers granted special allowances to favored customers—the largest companies. Section 2 of the Clayton Act, which would have prevented this type of price differentiation, was so weakened "as to render it inadequate, if not almost a nullity." *Id.* at 43. To avoid this watering-down, Congress enacted the Robinson-

tion was whether a Louisiana state law enabling manufacturers and retailers to control resale prices and inoculating them from antitrust suits also extended to third parties that were not parties to the anti-competitive agreement. Central to the question was the 1937 Miller-Tydings Act,[188] a federal statute that allowed states to adopt laws requiring retailers to adhere to resale prices stipulated by manufacturers—an activity that would otherwise be a violation of the Sherman Act. In *Schwegmann*, whiskey distributors from Maryland and Delaware had entered into agreements with more than a hundred sellers in Louisiana, providing that the retailers would not sell the product at a price less than that determined by the distributors. The petitioners were whiskey retailers based in Louisiana, who had refused to sign the price-fixing agreement, and instead sold the respondents' whiskey at a lower price, eventually prompting the suit. The retailers' argument was that they could neither be bound by any price-fixing contracts or the Miller-Tydings Act, since they were

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Patman amendment to limit "the use of quantity price differential to the sphere of actual cost differences. Otherwise…such differentials would become instruments of favor and privilege and weapons of competitive oppression." *Id.* at 43–44. "In enacting the Robinson-Patman Act, Congress was especially concerned with protecting small businesses which were unable to buy in quantities, such as the merchants here who purchased in less-than-carload lots. To this end [Congress] undertook to strengthen this very phase of the old Clayton Act." *Id.* at 49. The Robinson-Patman Act, and the way it is construed by the Court, clearly reveals a modern liberal perspective. Instead of letting the market plays do as they want, and as dictated by the market, the government is given the ability to protect particular features of the market that they find desirable, small business. The classic liberal view would not protect small business for the sake of protecting small business or because it was beneficial to society—arguably the more important reason for protecting small business. Under the classical liberal style, the market would do what is best for society and there would not be any reason to interfere for the benefit of society.

[188] "That amendment provides in material part that 'nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale' of specified commodities when 'contracts or agreements of that description are lawful as applied to intrastate transactions' under local law." *Schwegmann*, 341 U.S. at 386 (1951).

neither parties to any agreements and the Act did not purport to extent federal control over the competitive decisions of third-parties.

The Supreme Court first asked whether this kind of price-fixing would be unlawful under the Sherman Act, which it easily answered in the affirmative.[189] Price-fixing of this sort, the Court assured, had been determined as a per se violation of the Sherman Act. Next, the Court asked whether the Louisiana statute satisfied the Miller-Tydings exemption to the Sherman Act, essentially legalizing the anticompetitive conduct of the whiskey distributors. The Court found that the law allowed for contracts to restrict retailers from re-selling except at the price stipulated by the vendor, and further, it also condemned failures to abide by the price-fixing agreements even when the retailers had not been parties to the contract.[190] Thus, the law allowed a distributor to effectively bring a claim against any reseller for pricing at a discount.

Justice Douglas explained that the Louisiana statute failed to conform to the Miller-Tydings Act.[191] For one thing, Miller-Tydings granted a limited immunity that was substantially expanded in the Louisiana statute, which made it illegal for retailers to adjust the price in any and all cases, even in regard to retailers that had never entered into agreements with the distributors. If the Court were to follow the respondents' lead and read into the Miller-Tydings Act an intent to compel retailers to follow the bidding of manufacturers, even in the absence of a price-fixing agreement, this would have forced upon the Court a "distinct legislative function by reading into the Act a provision that was meticulously omitted from it."[192]

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[189] *Id.*
[190] *Id.* at 386–87.
[191] *Id.*
[192] *Id.* at 388.

What is important to note about *Schwegmann Brothers* is not necessarily the result for the distributors, who failed to have their way in forcing the petitioners to sell at the fixed price. It is rather the implicit affirmation in 1951 of the Miller-Tydings Act itself, which had been adopted in 1937 as a measure for granting states more power to regulate their local markets and help small business owners in the wake of the Depression. What is apparent in the case is a belief in the appropriateness of regulators doing whatever they need to do "to get the job done," including engaging in core instances of "unfair" competition that would be clearly prohibited if found in the private sphere. Neither a deep respect for property and contract rights, nor a need to apply a court-centric Rule of Reason analysis to determine the appropriateness of state action—both of which are characteristic of the classic liberal style of antitrust enforcement—are apparent in the decision. Indeed, a year after *Schwegmann Brothers* Congress built out Miller-Tydings with the adoption of the McGuire Act, further expanding the permissibility of resale price maintenance.[193]

In the 1960s, antitrust state action cases evolved a separate but related branch of law known as the *Noerr-Pennington* doctrine.[194] In the first half of this eponymous field, *Eastern Railroad President Conference v. Noerr Motor Freight*[195] involved a suit by individual truckers and the Pennsylvania Motor Truck Association against an asso-

[193] The prohibition on resale price maintenance was overruled in *Leegin Creative Leather Prods, Inc.. v. PSKS*, 551 U.S. 877 (2007).

[194] The doctrine holds that private entities that attempt to influence government to pass or enforce laws that would benefit them are not engaged in illegal antitrust activity, even when the urged laws would have anticompetitive effects. Other cases in the doctrine include Professional Real Estate Investors v. Columbia Pictures Ind., 508 U.S. 49 (1993); Columbia v Omni Outdoor Advertising, 499 U.S. 365 (1991); FTC v. Superior Court Trial Lawyers Ass'n., 493 U.S. 411 (1990); Allied Tube & Conduit Corp. v. Indian Head, 486 U.S. 492 (1988); Cal. Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

[195] 365 U.S. 127 (1961).

ciation of railroad presidents for conspiring to retrain trade, monopolize the long-haul business, and ultimately destroy the trucking industry. The truckers alleged that at the heart of the illegal conduct was a public relations campaign "designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business."[196]

Writing for the Court, Justice Black recalled the modern liberal style of a public-private distinction: "the starting point for our consideration of the case [is] that no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws."[197] The Court continued, "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out."[198] For Justice Black, it was critical to keep in mind that the Sherman Act was intended to regulate the private sphere, and not shackle public actors themselves: "To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act."[199]

Likewise in *United Mine Workers v. Pennington*,[200] an independent coal operator complained that the union of mine workers and several leading coal companies had conspired to encourage the Secretary of Labor to establish minimum wages for coal miners, and also to pressure the Tennessee Valley Authority to cease making

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[196] *Id.* at 129.
[197] *Id.* at 135.
[198] *Id.* at 136.
[199] *Id.* at 137.
[200] 381 U.S. 657 (1965).

purchases of coal that were not free from the requirements of the Walsh-Healy Act. The upshot of all this was a concern that small coal companies would get pushed out of the market, since they were unable to compete with the higher minimum wage requirements offered by the big employers. After first resolving a question about the nexus between labor law and antitrust law,[201] Justice White explained in the majority opinion how *Noerr* had made clear that antitrust laws were constrained by a substantial public–private distinction. Nothing in the Sherman Act, Justice White argued, made illegal any acts that were intended to participate in the political process, even when those acts were animated by a clearly anticompetitive purpose. "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent of purpose."[202] In the case at hand, the smaller coal companies were barred from a good claim under the Sherman Act, since "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act."[203]

The modern liberalism of the *Noerr-Pennington* doctrine is subtle but important to highlight. As Rudolph Peritz has argued, the court began with an explicit commitment to a formal distinction between political (public) and economic (private) spheres. "There was no Rule of Reason, no balancing, just two spheres and two conclusions."[204] For Peritz, the cases are consequently a kind of glimpse into the neoformalism that would emerge towards the end of the 20th century.[205] In these and other cases,[206] Peritz sees the use of a

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[201] *Id.* at 664–66.
[202] *Id.* at 670.
[203] *Id.*
[204] PERITZ, *supra* note 136, at 207.
[205] *Id.* at 209.

"marketplace of ideas" in which political actors must remain unconstrained in their capacity to affect the political process. Thus, the Court shies away from a Rule of Reason approach since to do so would impermissibly bring a consequentialist analysis to a deontological question about the fundamental right of citizens to make political choices. Peritz does not frame his critique this way, but it sounds like he is pushing the *Noerr-Pennington* cases out of the modern liberal style, and into what Duncan Kennedy would call contemporary legal thought.[207]

One consequence of the insight into the connection between the two state action doctrines, as has already been stated, is that *within* the modern liberal style it is possible to see diverging uses of the public-private distinction. In the modern style of constitutional state action doctrine, the public-private distinction is weakened in an effort to make space for the more aggressive use of foreground rules in the regulation of the market. In contrast, the modern liberal style of antitrust state action doctrine seeks the very same goal but through the use of a strong public-private distinction: private actors are held to a very different standard of competitive engagement than are public actors. In the context of *Noerr-Pennington,* these cases can be read as safely in line with the modern liberal style of antitrust state action cases: a strong public-private distinction is used in the service of inoculating public actors from the constraints of the Sherman Act.[208]

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[206] *See, e.g.*, Am. Commc'n Ass'n v. Douds, 339 U.S. 382 (1950); Giboney v. Empire Storage, 336 US 490 (1949); Thornhill v. Alabama, 310 U.S. 88 (1940).

[207] Kennedy, *supra* note 61.

[208] It doesn't seem to me that the stakes are very high in being able to say anything definitively about whether these cases are, to use Kennedy's terminology, better suited to social legal consciousness than contemporary legal consciousness. My only interest is to show that within modern liberalism (or social legal consciousness) it is

D. THE NEOLIBERAL STYLE: GOLDFARB, CANTOR, AND MIDCAL

As will be recalled, constitutional state action doctrine took a wild turn in 1978, riding the neoliberal bandwagon back towards the notion that the Constitution's primarily competitive effect was to insure the free market against unwanted state intervention. Witnessing a similar turn in the domain of competition law's foreground rules, Eleanor Fox wrote in 1980 that "antitrust law is in search of a new equilibrium. It is torn between claims that it should limit the power of large corporations and claims that it should increase the efficiency of American business. Regard for efficiency is in the ascendancy."[209]

As far as state action went, the Supreme Court gradually generated a legal conception of the market that was less willing to allow the state to engage in apparently anticompetitive behavior: the modern liberal use of a strong public-private distinction, where private actors were forbidden to do what public actors were allowed to do, was in deep decline. The shift here, however, was not from a strong public-private distinction to a weak one—it was rather to a different but similarly powerful one. While the shift in style was not as dramatic here as it was in the context of constitutional state action doctrine, it happened nonetheless. The most significant shift after *Parker* came in the 1980 decision in *Midcal.* Before getting to *Midcal*, however, we might review a couple forerunners to the emerging neoliberal style.

In *Goldfarb v. Virginia State Bar*,[210] the plaintiffs brought a claim over what appeared to be price-fixing agreements between local attorneys, the county bar association, and the state bar association,

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possible to be in favor of the market's foreground rules either through the use of weak or strong forms of a public–private distinction.

[209] Fox, Modernization, *supra* note 151, at 1140.

[210] 421 U.S. 773 (1975).

and the Supreme Court had little difficulty pegging it as a state-sanctioned price-fixing scheme. The Court admitted that the state did have a cognizable interest in regulating lawyers and the legal profession, but whereas this interest might have been sufficient in a different style, the Court was unimpressed in 1975. The question for the Court was whether the state bar association, working under the authority of the Virginia Supreme Court, represented the kind of "sovereign activity" required by *Parker.* For Burger, the connection between the bar association, the Virginia Supreme Court, and "real" acts of state was simply too attenuated. "In our view that is not state action for Sherman Act purposes. It is not enough that, as the County Bar puts it, anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign."[211] The fact that the state bar was a state agency, and that the Virginia Supreme Court was, well, the Supreme Court of Virginia, just did not represent enough of the "state" to trigger immunity for blatantly anticompetitive action. *Parker* did not yet receive a makeover, but the Burger Court was certainly sending less generous signals about an allowance of heavy foreground rules.

A year later, the Court decided *Cantor v. Detroit Edison Company*.[212] The facts involved a mandate by the Michigan Public Service Commission regarding the provision of free light bulbs to Michigan residents. Though customers surely enjoyed the practice, retailers did not, and eventually a drug store brought an antitrust suit claiming unfair competition in the sale of the bulbs. Lower courts followed *Parker*, and found that the giving away of free light bulbs by utility companies was an exempted restraint on trade since the Commission was a state agency. As the Supreme Court noted, "A

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[211] *Id.* at 791.
[212] Cantor v. Detroit Edison, 428 U.S. 579 (1976).

Michigan statute vests the Commission with "complete power and jurisdiction to regulate all public utilities in the state . . . [The statute confers express power on the Commission] to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of such public utilities."[213]

Like in *Goldfarb*, the Court in *Cantor* was not quite ready to do too much to the state action doctrine, though the Court's trajectory was clear enough. Reviewing the very "narrow" holding in *Parker*, Justice Stevens explained that "the term state action may be used broadly to encompass individual action supported to some extent by state law or custom. Such a broad use of the term, which is familiar in civil rights litigation, is not, however, what Mr. Chief Justice Stone described in his *Parker* opinion. He carefully selected language which plainly limited the Court's holding to official action taken by state officials."[214] In the end, the Court concluded that while there was admittedly a state action element in the case, the sort of unambiguous effort by the state to regulate an area of the private sphere was lacking. There was too much blending of public and private initiative, and too much discretion for utilities to at once obey the Commission's mandate and still abide by the antitrust laws.[215]

The gradual pressure being exerted on the modern liberal style pushed forward a couple years later in *California Retail Liquor Dealer's Assn. v. Midcal Aluminum, Inc*.[216] Though not as visible in its ret-

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[213] *Id*. at 584.

[214] *Id*. at 590–91.

[215] *Id*. at 610. The dissent rightfully points out that the 'narrow' scope of the *Parker* opinion is new interpretation of it. *Id*. at 622 (Blackmun, J. dissenting).

[216] *See also* Bates v. State Bar of Arizona, 433 U.S. 350, 362 (1977) (holding that state rules against lawyer advertisements were immune from the Sherman Act because the rules articulated the state's policy with regard to professional behavior); Massachusetts Sch. of Law at Andover v. Am. Bar Ass'n, 107 F.3d 1026 (3d Cir. 1997) (hold-

ro flourishes as *Flagg Brothers*, *Midcal* undermined the *Parker* presumption that there existed a broadly legitimate field of state action that would be regarded as different in kind from similarly "anticompetitive" acts of private parties.

The problem in *Midcal* was that the California Business and Professions Code[217] required wine producers, wholesalers, and rectifiers to file fair trade contracts and price schedules with the state, and to sell wine only in accordance with those schedules.[218] To do otherwise, a wine merchant would have faced the revocation or suspension of her liquor license.[219] Subsequently, California's department of Alcohol Beverage Control brought an action against Midcal Aluminum for selling wine at prices less than that mandated in the pricing schedules, and Midcal argued in response that the Code forced upon California's residents a commitment to "resale price maintenance," a practice conventionally understood to violate the Sherman Act.[220] As in *Parker*, the Court agreed that California's scheme was anticompetitive, and that in the hands of the market, such a plan would be easily condemned.[221] Now, a court operating in the modern liberal style would not necessarily immunize California due to its presumed discretion to control its regional market. Modern liberalism tells us nothing about how to decide, only what language to speak.

Thus, *Midcal* could have continued in the modern style if it had foregrounded the necessity of state intervention. But it did not. In-

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ing the ABA to be immune from antitrust liability on the rationale that the ABA's law school accreditation decisions would not affect state bar admission requirements in the absence of state involvement).

[217] CAL. BUS. & PROF. CODE §§ 24866, 24862.

[218] Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc., 445 U.S. 97, 99 (1980).

[219] *Id.* at 100.

[220] *Id.*

[221] *Id.* at 103.

stead, the Court articulated a test to be used in determining whether the dispute in question was really a result of private or public law rules. The Court explained, "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself."[222] In its application of this test, the Court found that though California's rule had been clearly articulated, it had not been guided by a sufficient degree of state action—California enforced the rule, to be sure, but it had no direct involvement in the actual setting of the schedules. This absence of "active supervision" on the part of the state disclosed the true nature of the program: "a private price-fixing arrangement."[223] The upshot was a shift from an implicit *Parker* presumption in favor imagining the state as planning competition, to an image of the state as a potential wrench in the competitive works, and a "test" for determining when it had been just that.

After *Midcal* the Court continued to develop a neoliberal approach in *Jefferson County Pharmaceutical Ass'n v. Abbott Labs*.[224] At issue was whether the sale of pharmaceutical drugs to governments, which would end up back in the commerce stream and in competition with private retailers, was anticompetitive behavior. The petitioner was a retail pharmacist who sued pharmaceutical manufacturers and the University of Alabama, which was operating

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[222] *Id.* at 105.

[223] *Id.* at 106.

[224] 460 U.S. 150 (1983). Peritz argues that the Court imagines that there is "some sort of preexisting 'market' whose commercial nature turns all participants, short of entire states, into 'economic' actors – that is, subject to the antitrust laws . . . . [In *Jefferson County*] the Court imagined '*the* private retail *market*' that 'a State has chosen to compete in.'" PERITZ, *supra* note 136, at 275. Peritz's purpose is similar to ours, but differs in one regard. He imagines that all action is political and that by framing some issues as "economic" and not political allows some separation. Here, we are focusing not on political/economic, but on private/public.

two pharmacies. The defendants claimed, and the lower courts agreed, that they were protected by a state action immunity defense.

Lower courts held that the Robinson-Patman Act exempted all state purchases.[225] The Supreme Court found that the issue was narrower than lower courts had believed: "we are not concerned with sales to the Federal Government, nor with state purchases for use in traditional governmental functions. Rather, the issue before us is limited to state purchases for the purpose of competing against private enterprise – with the advantage of discriminatory prices – in the retail market."[226] As we have now repeatedly seen, the Court once again engaged in a narrowing tactic about what is and is not state action, and what are legitimately understood as "traditional governmental functions."[227]

Around the same time as *Midcal*, the Supreme Court began examining the antitrust state action doctrine in the context of cities and municipalities.[228] Starting in 1979, the Supreme Court began

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[225] *Jefferson County*, 460 U.S. at 154.

[226] *Id.* at 153–54.

[227] The first move is for the Court to examine the legislative history: "the Legislative history falls far short of supporting respondents' contention that there is an exemption for state sales of 'commodities' for 'resale.' There is nothing whatever in the Senate or House Committee Reports, the floor debates, focusing on the issue." *Id.* at 159. The Court disposes of the possibility that the Robinson-Patman Act exempted this type of state action by invoking the absence of any language supporting this type of action. The Court then states there is no judicial precedence allowing it either. *Id.* at 166–70. Then the Court shows its hand: "The Robinson-Patman Act has been widely criticized, both for its effects and for the policies that it seeks to promote…The legislative history is replete with references to the economic evil of large organizations purchasing from other large organizations for resale in competition with the small local retailers. There is no reason in the absence of an explicit exemption, to think that Congressmen who feared these evils intended to deny small businesses, such as the pharmacies of Jefferson County, Alabama, protection from the competition for the strongest competitor of them all." *Id.* at 170–71.

[228] The original *Parker* opinion exempts state action that are the official actions of governments that are acts of "the state or it's municipalities." 317 U.S. at 351–52.

constraining the ability of cities and municipalities to engage in price-fixing in *City of Lafayette v. Louisiana Power and Light Co*.[229] Since this opinion came several years after *Goldfarb* the Court was able to formalistically apply the rule created there, to find that the municipal action was not exempt from federal antitrust action because they are not sovereign.[230] Exemption must depend upon whether the state authorized the municipality to operate as it did or whether it "contemplated the kind of action complained of."[231] Requiring the state to authorize or contemplate a specific action to allow a city or municipality to benefit from the state action exemption was further refined in 1985. In *Town of Hallie v. City of Eau Claire*,[232] the Court held that the state does not need to supervise a city or municipality so they can be availed of the exemption, but there

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However, some contend that "it is clear, when the opinion is taken as a whole, that the Court intended to limit the Parker exemption to one specific category of governmental actors – states. . ." John T. Delacourt & Todd Zywicki, *The FTC and State Action: Evolving Views on the Proper Role of Government*, 6 (George Mason University School of Law, Working Paper Series, Working Paper No. 23, 2005).

[229] City of Lafayette, La. v. La. Power & Light Co., 435 U.S. 389 (1978).

[230] Another example of a formalistic application of a rule that constrains city/municipal ability is *Cmty. Commc'n Co. v. City of Boulder*, 455 U.S. 40 (1982). Unlike *Lafayette*, the *Boulder* opinion is unique in that Boulder is a home rule city, which means that in this jurisdictions the laws of the city are supreme to the state even when they conflict with the state. Boulder's anticompetitive cable ordinance prevented an incumbent from expanding their operations and this was found to illegal as against competition. The question should have been asked as to whether in a home rule city, the city operates as a sovereign or not. However, the court assumes away any consideration of the question: ""The ordinance cannot be exempt from such scrutiny unless it constitutes either the action of the State itself in its sovereign capacity or municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy. The Parker "state action" exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under the Federal Constitution. But this principle is inherently limited: ours is a "dual system of government" which has no place for sovereign cities." *Id.* at 40–41.

[231] *Id.* at 413.

[232] 471 U.S. 34 (1985).

must be a clear, articulated policy to replace competition with regulation. This would be satisfied when the state "has delegated to the cities the express authority to take action that foreseeably will result in anticompetitive effects."[233]

Just as with constitutional state action doctrine, the neoliberal revival did not come to achieve a dominant position in the competition among the styles of liberal legalism.[234] Modern liberal approaches would continue alongside the neoliberal style, weaving an eclectic pattern of decisions at once favorable to the idea of the state as social planner, and guarded against the inevitable tendency for governmental intervention to abuse the Rule of Law.

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[233] *Id.* at 43. Contrary to not requiring state supervision, the Court held in *S. Carriers Rate Conference v. United States*, 471 U.S. 48 (1985) that if a state has a policy to permit the anticompetitive activity and it supervises, then a private party seeking to benefit from the exemption does not need to be acting pursuant to the direction of the state. *See also Ticor Title Ins.*, *infra* note 235, at 172.

[234] Fisher v. City of Berkeley, 475 U.S. 260 (1986) (a restraint imposed unilaterally by government does not become concerted action needed before it can be characterized as in violation of the Sherman Act simply because it has a coercive effect); Fed. Trade Comm'n v. Ticor Title Ins. Co. 504 U.S. 621 (1992) (the court applied the Midcal two-part test for state action and held (for the first time) that the private firms had not been regulated adequately under a clearly articulated legislative policy, and were not protected by state action immunity); Snake River Valley Elec. Ass'n v. Pacificorp, 238 F.3d 1189 (9th Cir. 2001) (finding in favor of state action immunity); Trigen Oklahoma City Energy Corp. v. Oklahoma Gas & Elec. Co., 244 F.3d 1220 (10th Cir. 2001) (finding in favor of state action immunity); Elec. Inspectors, Inc. v. Village of East Hills, 320 F.3d 110 (2d. Cir. 2003) (finding in favor of state action immunity); Arroyo-Melecio v. Puerto Rican Am. Ins. Co., 398 F.3d 56 (1st Cir. 2005) (finding against state action immunity); Mothershed v. Justices of Supreme Court, 410 F.3d 602 (9th Cir. 2005) (finding against state action immunity); Sanders v. Brown, 504 F.3d 903 (2007) (finding in favor of state action immunity); Lafaro v. New York Cardiothoracic Grp, PLLC, 570 F.3d 471 (2009) (finding in favor of state action immunity).

E. SUMMARY

This Part discussed the antitrust state action doctrine in its modern and neoliberal styles, as well as an initial classic liberal idea about antitrust law. As mentioned, the very notion of classic liberal antitrust is a little odd, if we take antitrust law to itself be emblematic of a liberal commitment to the use of foreground rules in the regulation of market society. Nevertheless, it makes sense to see the early years of antitrust jurisprudence (and perhaps the neoliberal phase as well) in exactly this way. The truth is, antitrust law has *always* been subject to disagreement about its essential function: is it just the continuation of the common law by other means, or state-led regulation? To the extent we see it as the former, antitrust law is surely a mode of jurisprudence more in the spirit of a classic liberal focus on background rules. When we see it as the latter, we are seeing it in the modern liberal style.

Once the discussion turned to the emergence of antitrust state action doctrine in *Parker*, the argument developed two points. One was to show how the two state action doctrines share a common grammar. In this particular context, that grammar is about the legal construction and maintenance of liberal markets, where the one doctrine is focused on background rules while the other addresses rules in the foreground. Taken together, and when viewed in light of liberal legalism, the two doctrines provide a comprehensive and coherent simulacrum of US competition law. To look at one set of rules while ignoring the other is to see only a part of the story about how law both constitutes and regulates markets.

The other point was more focused specifically on the nature of the public-private distinction and its relation to liberal legalism. The well-known history of the public-private distinction is the history we have seen in the context of constitutional law. It begins strong, falters, and comes back fighting. The story in the context of foreground rules is different. In the classic liberal style of antitrust, we see the same public-private distinction at work: private individuals exercising property and contract rights in an autonomous sphere,

and a public sphere of artificial, arbitrary political power. But the modern liberal version of the distinction was different here—instead of the weakening we saw in *Shelley*, antitrust state action doctrine retained a strong form of the public-private distinction, though it was cast in a very different light. In this context, private actors were subjected to a new and aggressive style of regulation. The free play of property and contract could be seen as destructive and even immoral, and what was needed was a heavier managerial hand in the maintenance of the market. These new constraints on what was deemed appropriately "competitive" behavior, however, were not applicable in the public sphere. Whereas in the classic liberal style, it was pivotal to prohibit the *state* from mucking around in the market, in the modern liberal style it was the individual (person or corporation) that was prohibited from mucking around. The public-private distinction was functioning powerfully in both instances—it had just flipped.

IV. CONCLUSION

This Article has argued on behalf of a liberal distinction between competition law and antitrust law. The former consists in the legal structure of a market society, while the latter involves, at least in the United States, those judicial constructions of the Sherman Act and other related statutory regimes. In this sense, competition law is comprised of a broad language of ostensibly disparate legal dialetcs—it is the wide-ranging structure that enables and regulates transactions under the rubric of "free competition." That is, the very idea of free competition, in the liberal sense of the phrase, requires a legal framework, and that framework involves a great deal more than antitrust law.

In the terminology of this Article, the rules of antitrust were described as some of the market's foreground rules—rules that are responsive, regulatory, and managerial. They are utilized in an effort to control a pre-existing activity. Background rules, in contrast,

are those rules that constitute an activity, and bring it into being. In the classic liberal style of making a market, property rights and freedom of contract are essential background rules. To the extent that the constitutional state action doctrine has been used as an argument about the degree to which the deployment of those background rules are acts of state, it is a doctrine that is deeply implicated in the liberal legal structure of market society.

Indeed, as this Article has argued, it is in the broader context of liberal legalism and its use of background and foreground rules that we are able to see how seemingly disconnected fields of law are actually united. As mentioned at the beginning, the argument here is not that the traditional readings of the CSAD and ASAD have been wrong. It is rather that in having been determined to look at the two state action doctrines in isolation, we have failed to reap the benefits of seeing them together.