[Michigan Law Review](http://repository.law.umich.edu/mlr)

Volume 115 | Issue 3

2016

State-Action Immunity and Section 5 of the FTC Act

Daniel A. Crane
University of Michigan Law School, dancrane@umich.edu

Adam Hester
University of Michigan Law School

Recommended Citation

Daniel A. Crane & Adam Hester, *State-Action Immunity and Section 5 of the FTC Act*, 115 Mich. L. Rev. 365 (2016).
Available at: http://repository.law.umich.edu/mlr/vol115/iss3/2

STATE-ACTION IMMUNITY AND SECTION 5 OF THE FTC ACT

Daniel A. Crane & Adam Hester***

The state-action immunity doctrine of Parker v. Brown *immunizes anticompetitive state regulations from preemption by federal antitrust law so long as the state takes conspicuous ownership of its anticompetitive policy. In its 1943* Parker *decision, the Supreme Court justified this doctrine, observing that no evidence of a congressional will to preempt state law appears in the Sherman Act's legislative history or context. In addition, commentators generally assume that the New Deal court was anxious to avoid re-entangling the federal judiciary in* Lochner-*style substantive due process analysis. The Supreme Court has observed, without deciding, that the Federal Trade Commission might not be bound by the* Parker *doctrine but instead enjoys "superior preemption" authority under Section 5 of the FTC Act. Drawing on the FTC Act's legislative history and its institutional distinctiveness from Sherman Act enforcement, this Article makes an affirmative case for FTC super-preemption power over anticompetitive state laws*

Table of Contents

Introduction 366
I. The *Parker* Regime and the FTC 370
A. Parker *in the Shadow of* Lochner 370
B. *The* Midcal *Test and Representation Reinforcement* 373
C. *Does the* Parker *Regime Apply to the FTC?* 376
II. The FTC Act and Superior Preemption in Historical Context 381
A. *State Corporate Law Failure, Preemptive Federal Incorporation, and the FTC and Clayton Acts* 382
B. *The FTC, the ICC, and the* Shreveport Rate Case 389
1. The ICC and the *Shreveport Rate Case* 390
2. The Federal Trade Commission and the ICC 394
III. Differentiation and the *Parker* Doctrine 398
A. *The Ghosts of* Lochner *and the FTC* 399
B. *Institutional Constraints and Capacities* 401
IV. FTC Enforcement in a World without *Parker* Constraints 403
A. *Cost-Benefit Analysis* 404
B. *Heightened Means-Ends Rationality* 405
C. *Hard Look Review* 407
Conclusion 410

* Frederick Paul Furth Sr. Professor of Law, University of Michigan Law School.

** J.D., May 2016, University of Michigan Law School.

Introduction

Commercial regulations by state and local governments teem with restrictions on competition. Well-known examples include restrictive occupational licensing rules,[1] cartel-like limitations on transportation-service providers,[2] product-distribution rules limiting competition against automobile retailers,[3] restrictions on sharing services like Airbnb,[4] and municipal prohibitions on street-food vendors.[5] Often, these restrictions result from economic interest-group parochialism and asymmetries between the concentrated interests of incumbent producers and the diffuse interests of consumers.[6] The results can be pernicious. Anticompetitive regulatory restrictions raise prices to consumers and create barriers to entry and innovation.

The federal government is hardly immune from interest-group capture of its own, but it plays a limited role in policing the worst excesses of parochial state legislation. Three federal legal doctrines—two constitutional and one statutory—place some degree of constraint on anticompetitive state legislation.[7] State regulations may be unconstitutional under the dormant, or negative, commerce clause if they unjustifiably discriminate against out-of-

1. *See* Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. Pa. L. Rev. 1093, 1102–10 (2014).

2. Brishen Rogers, *The Social Costs of Uber*, 82 U. Chi. L. Rev. Dialogue 85, 87–88 (2015), https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/Dialogue/Rogers_Dialogue.pdf [https://perma.cc/53EJ-KWWT] (discussing regulations of Uber's Washington, D.C. operations).

3. *See* Daniel A. Crane, *Tesla, Dealer Franchise Laws, and the Politics of Crony Capitalism*, 101 Iowa L. Rev. 573, 574–75 (2016) [hereinafter Crane, *Tesla*].

4. Roberta A. Kaplan & Michael L. Nadler, *Airbnb: A Case Study in Occupancy Regulation and Taxation*, 82 U. Chi. L. Rev. Dialogue 103, 109–12 (2015), https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/Dialogue/Kaplan_Nadler_Dialogue.pdf [https://perma.cc/5XLG-6SB7].

5. *E.g.*, Beth Kregor, *Food Trucks, Incremental Innovation, and Regulatory Ruts*, 82 U. Chi. L. Rev. Dialogue 1, 7–10 (2015), https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/Dialogue/Kregor_Dialogue.pdf [https://perma.cc/B7HU-WYUC]; *National Street Vending Initiative*, Inst. for Just., http://ij.org/issues/economic-liberty/vending/ [https://perma.cc/Q6MN-Y6W6].

6. *See, e.g.*, Kenneth J. Arrow, Social Choice and Individual Values (3d ed. 2012) (describing social choice and outlining Arrow's Theorem); James M. Buchanan & Gordon Tullock, The Calculus of Consent: Logical Foundations of Constitutional Democracy (1962) (explaining public choice theory and how the public interest can be upset by strength of preference for a given choice); Anthony Downs, An Economic Theory of Democracy (1957) (describing an economic theory of decisionmaking that focuses on political and community ideology); Mancur Olson, The Logic of Collective Action (2d ed. 1971) (arguing that free riding will result in overrepresentation of concentrated, minority interests and underrepresentation of diffuse, majority interests).

7. Other federal constitutional, statutory, or regulatory provisions may also impose constraints on state regulation in particular ways. For example, the First Amendment's commercial speech doctrine may sometimes constrain state restrictions on advertising or other aspects of competition. *See* Note, *Dissent, Corporate Cartels, and the Commercial Speech Doctrine*, 120 Harv. L. Rev. 1892, 1908–11 (2007).

state commerce or burden commerce without legitimate justification.[8] State restrictions may fail rational basis review under the Fourteenth Amendment's equal protection clause if they have no objective basis other than to erect competitive barriers to protect economic special interests.[9] And, finally, under some circumstances, state regulations that delegate the power to restrict competition to nonstate actors must yield to the Sherman Act's pro-competition policy.[10]

Although federal law imposes *some* restraint on anticompetitive state and local regulation, its touch is relatively light and deferential. All three of the doctrines just discussed received a strong and lasting imprint of post-*Lochner* gun-shyness during the New Deal era, as the Supreme Court retreated from a period of perceived excess in federal judicial oversight of state socioeconomic regulation.[11] In the post-New Deal order, the three doctrines aligned to allow only modest federal inquiry into anticompetitive state and local restrictions, allowing many of the most parochial schemes to escape searching federal scrutiny.

This Article addresses the statutory prong—federal antitrust preemption of state law—in the wider context of constitutional and institutional history. In particular, it examines the assumed, but never decided, position that the United States Federal Trade Commission ("FTC") lacks any preemptive power over anticompetitive state and local regulations, apart from the relatively light preemptive reach of the Sherman Act. It asserts, to the contrary, that the best historically informed and institutionally sound reading of Section 5 of the Federal Trade Commission Act suggests that the FTC should

---

8. Hughes v. Oklahoma, 441 U.S. 322, 336 (1979); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). *See generally* 1 Laurence H. Tribe, American Constitutional Law § 6-5, at 1050–52 (3d ed. 2000).

9. St. Joseph Abbey v. Castille, 712 F.3d 215, 222–23 (5th Cir. 2013) ("[N]either precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose . . . ."); Merrifield v. Lockyer, 547 F.3d 978, 991 n.15 (9th Cir. 2008) ("[M]ere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review."); Craigmiles v. Giles, 312 F.3d 220, 224 (6th Cir. 2002) ("[P]rotecting a discrete interest group from economic competition is not a legitimate governmental purpose."). *But see* Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 286 (2d Cir. 2015) (rejecting precedent from other Circuits holding that pure economic protectionism lacks a rational basis); Powers v. Harris, 379 F.3d 1208, 1221 (10th Cir. 2004) ("[A]bsent a violation of a specific constitutional provision or other federal law, intrastate economic protectionism constitutes a legitimate state interest.").

10. *See, e.g.*, N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1117 (2015) (holding that North Carolina Dental Board's restriction on teeth-whitening services violated the Sherman Act).

11. *See* Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 Yale L.J. 486, 499–500 (1987) ("Having only just determined not to use the Constitution in that manner, the Court was not about to resurrect *Lochner* in the garb of the Sherman Act."); Paul R. Verkuil, *State Action, Due Process and Antitrust: Reflections on* Parker v. Brown, 75 Colum. L. Rev. 328, 331–34 (1975) (explaining the Court's decision in *Parker* through the lens of anti-*Lochner* sentiment).

enjoy what the Supreme Court has hypothesized as "superior preemption authority" over state and local regulations that unduly restrict competition.[12]

As a matter of legal doctrine, the question of the FTC's preemptive authority originates in the Supreme Court's seminal 1943 decision in *Parker v. Brown*.[13] In *Parker*, the Court held that "[t]here is no suggestion of a purpose to restrain state action in the [Sherman] Act's legislative history."[14] The resulting state-action immunity doctrine sharply limited any preemptive scope of the Sherman Act over anticompetitive state regulations.[15] *Parker* also rejected a dormant commerce clause challenge to the state regulation at issue.[16] The case thus showcased the Court's uniform reluctance to permit any strand of federal law—constitutional or statutory—to revive Lochnerism.

Neither *Parker* nor its progeny squarely addressed whether antitrust enforcement by the FTC should be bound by the same constraints. While occasionally asserting the possibility of a more preemptive scope of action,[17] the FTC has historically acquiesced in litigating state-action issues under the doctrinal framework established in *Parker* and its progeny.[18] In recent years, however, the FTC has shown renewed interest in challenging or otherwise discouraging the adoption of anticompetitive state or local regulations. It has succeeded in some cases, but the *Parker* doctrine keeps the FTC hamstrung from mounting a more robust set of challenges.

A reexamination of the FTC Act's context and history, as well as the commission's institutional distinctiveness, suggests that the *Parker* doctrine is misapplied to the FTC. Although federal preemption was not squarely addressed in the statute, important themes concerning the FTC's relationship to the Interstate Commerce Commission and state corporation law set a very different stage for the FTC Act than had been in existence two and a half decades earlier, prior to the Sherman Act. And, from the perspective of institutional design, the FTC shares few of the attributes of Sherman Act enforcement that lead to concerns about excessive federal judicial control over state economic regulation.[19] In short, despite decades of acquiescence, the case for application of the *Parker* doctrine to the FTC is weaker than generally assumed, and the benefits of not applying it are potentially strong. An FTC with greater preemptive power over state regulation could play a

12. FTC v. Ticor Title Ins. Co., 504 U.S. 621, 635 (1992).

13. 317 U.S. 341 (1943).

14. *Parker*, 317 U.S. at 351.

15. *See* Milton Handler, *Twenty-Fourth Annual Antitrust Review*, 72 Colum. L. Rev. 1, 6–8 (1972).

16. *Parker*, 317 U.S. at 368.

17. *See infra* notes 77–81 and accompanying text.

18. *See, e.g.*, N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 110–12 (2015); FTC v. Ticor Title Ins. Co., 504 U.S. 621, 635 (1992) ("We need not determine whether the antitrust statutes can be distinguished on this basis [i.e., whether *Parker* applies only to the Sherman Act but not FTC enforcement under section 5 of the FTC Act], because the Commission does not assert any superior pre-emption authority in the instant matter.").

19. *See infra* Sections III.A & III.B.

salutary role in policing nakedly or inconsiderately anticompetitive state regulations, and thereby promote good government, innovation, and consumer welfare.

The remainder of this Article proceeds as follows: Part I introduces the *Parker* state-action immunity doctrine in its historical context. It frames the doctrine as an offshoot of anti-*Lochner* reaction, doctrinally homogenized during the New Deal with the retreating "negative" Commerce Clause and equal protection and substantive due process doctrines as applied to socioeconomic regulation. It briefly surveys the emergence of a *Parker* state-action doctrine oriented toward the political process and reflects on its failure to check rampant anticompetitive regulation by state and local governments. Finally, Part I diagnoses the causes and consequences of the Federal Trade Commission's acquiescence in the application of the *Parker* doctrine to FTC enforcement.

Part II advances an argument based on historical context and legislative history against application of the *Parker* doctrine to the FTC. In particular, it draws on two distinctive background facets of the FTC's legislative history to show that, unlike the Sherman Act of 1890, the FTC Act of 1914 evidences a congressional concern with anticompetitive state regulation. First, the FTC Act emerged from a Progressive Era reaction to weaknesses in state corporation law and proposals for a preemptive federal incorporation regime. Although Congress ultimately rejected the federal incorporation model, it did so in the belief that the creation of a new federal commission could solve the problems created by state facilitation of anticompetitive behavior that had occurred in the previous decades through the race to the bottom in state corporate law. Second, the FTC Act's legislative history evidences a congressional belief that the FTC would have powers akin to that of the Interstate Commerce Commission.[20] Shortly before the Senate took up the FTC Act, the Supreme Court handed down its landmark decision in the *Shreveport Rate Case*, holding that the ICC enjoyed preemptive power over inconsistent state regulations.[21] The *Shreveport Rate Case* was highly salient at the time of the FTC Act's passage and was discussed—implicitly, if not explicitly—in the legislative history by both skeptics and proponents of the bill.[22] Hence, congressional references to the FTC as a generalist ICC for competition should be understood to imply a congressional understanding that the FTC would enjoy preemptive powers over state regulations that might facilitate anticompetitive behavior.

Part III articulates institutionally grounded reasons for reading Section 5 of the FTC Act as more preemptive than the Sherman Act—or "superior preempt[ive],"[23] in the Supreme Court's words. Unlike the Sherman Act, which is privately enforceable, the FTC Act is enforceable only by the FTC,

20. *See infra* Section II.A.

21. Houston, E. & W. Tex. Ry. v. United States (The Shreveport Rate Case), 234 U.S. 342, 358–59 (1914).

22. *See infra* Section II.B.2.

23. *Ticor Title Ins.*, 504 U.S. at 635.

and it entails no criminal liability, damages, or penalties. Further, allowing the FTC preemptive power raises fewer concerns about federal judges second-guessing the wisdom of state regulations than would arise under the Sherman Act. The FTC has economic expertise and institutional resources to analyze complex economic trade-off decisions, which the federal courts may lack.

Part IV provides a brief sketch of a world in which the FTC enjoyed superior-preemptive power under the unfair-methods-of-competition prong of Section 5 of the FTC Act. In particular, it provides some framing thoughts on the sorts of tests the commission might use to distinguish between permissible and anticompetitive state regulations.

I. The *Parker* Regime and the FTC

A. Parker *in the Shadow of* Lochner

Parker v. Brown involved a challenge by a California raisin farmer against an agricultural proration scheme established by the California Agricultural Prorate Act.[24] Under the Act, any group of ten California farmers could apply for the establishment of a prorate marketing plan for any crop grown in the state.[25] In 1940, a program committee constituted under the statute approved a seasonal proration marketing program for raisins.[26] The program required all raisin farmers to bring their crop to receiving stations, where the raisins were classified by quality; all substandard raisins, and at least 20 percent of the standard and substandard raisins, were placed into a "surplus pool" and effectively removed from the market.[27] Fifty percent of the crop was to be placed in a "stabilization pool," which the committee could market or withhold at its discretion in order to increase market prices.[28] The system amounted to, in effect, a mandatory, government-run raisin cartel.

Porter Brown, the gadfly farmer, argued that the program violated the Sherman Act and the negative commerce clause.[29] In an opinion by Chief Justice Stone, the Court rejected both arguments.[30] As to the antitrust claim, it acknowledged that the underlying cartel arrangement would have been illegal if privately arranged.[31] The Court also assumed, without deciding, that Congress could have made the Sherman Act preemptive of inconsistent

24. 317 U.S. 341, 344 (1943).

25. *See Parker*, 317 U.S. at 346.

26. *See id.* at 347.

27. *Id.* at 348.

28. *Id.*

29. *Id.* at 348–49.

30. *Id.* at 352, 368.

31. *Id.* at 350 ("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.").

state legislation if it so chose.[32] The Court nonetheless rejected Parker's challenge on statutory interpretation grounds. Finding "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature" and "no suggestion of a purpose to restrain state action in the Act's legislative history,"[33] but only a concern with purely private monopoly, the Court found that the Sherman Act did not preempt state regulation.[34]

The Court similarly rejected Parker's negative Commerce Clause challenge. Although noting that between 90 and 95 percent of the California raisin crop was ultimately sold outside of the state,[35] the court observed that the directly regulated activity—production and marketing of raisins in the state—was intrastate activity.[36] Since "the regulation [was] imposed before any operation of interstate commerce occur[red]," the State of California was not unconstitutionally attempting to regulate interstate commerce.[37]

In its immediate political and historical context, *Parker* reflects the Supreme Court's retreat from the economic substantive due process regime associated with *Lochner v. New York*[38] during the decades following the ostensible "switch in time that saved nine" of the mid-1930s.[39] The New Deal Court had pivoted dramatically from the Court's earlier substantive scrutiny of state legislation that interfered with business freedom, and it announced that it would defer to state legislative judgments on economic regulation.[40] Having recently abandoned an anti-regulatory agenda under the Due Process Clause, the *Parker* Court was reluctant to permit anti-regulatory challenges under other legal theories—whether antitrust or the Commerce Clause—to draw the federal courts back into substantive review of state economic regulations.[41] Stone, the author of the *Parker* decision, also authored

32. *Id.*

33. *Id.* at 350–51.

34. *See id.* at 350–52.

35. *Id.* at 359.

36. *Id.* at 361–63.

37. *Id.* at 361.

38. 198 U.S. 45 (1905).

39. *See generally* Barry Cushman, Rethinking the New Deal Court (1998) (critically assessing conventional wisdom of a politically motivated switch in time in 1937 and arguing instead for an evolution of the legal doctrine starting earlier than 1937).

40. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 397–400 (1937) (upholding a state statute regulating the hours and working conditions of women against a due process challenge); Nebbia v. New York, 291 U.S. 502, 537–39 (1934) (upholding a New York price-fixing statute against a substantive due process challenge).

41. *Parker* links the New Deal cases like *Nebbia* and *West Coast Hotel* with subsequent due process and equal protection challenges to economic regulation. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 730–32 (1963) (rejecting a due process challenge to a Kansas statute limiting debt adjusting to lawyers); Williamson v. Lee Optical Co., 348 U.S. 483, 487–91 (1955) (holding that an Oklahoma statute regulating opticians did not violate the due process clause).

the Supreme Court's landmark *United States v. Carolene Products Co.*[42] decision, which, in a famous footnote, suggested a regime of bifurcated constitutional scrutiny in which the Court would defer to legislative judgments on economic matters, but closely scrutinize state action marred by democratic failures or which impaired the rights of "discrete and insular minorities."[43] *Parker* kept company with a cluster of other decisions in the Stone Court that effectuated the *Carolene Products* vision, shifting constitutional jurisprudence away from protecting corporate and individual economic rights and toward protecting social and political rights.[44]

That *Parker* reflects an anti-Lochnerian judgment remains a fixed interpretive point in judicial and scholarly discussions of state-action immunity from the operation of the federal antitrust laws. For example, in a concurring opinion in a leading state-action immunity decision,[45] Justice Stevens expressed concern that a form of antitrust analysis that required courts to balance the community benefits of state and local laws against their anticompetitive effects would require courts to "engage in the same wide-ranging, essentially standardless inquiry into the reasonableness of local regulation that th[e] Court [ ] properly rejected" in terminating Lochnerism.[46] Similarly, in upholding a Massachusetts retail-liquor-license statute against a claim of Sherman Act preemption, the First Circuit observed that

42. 304 U.S. 144 (1938).

43. *Carolene Prods.*, 304 U.S. at 152 n.4. Owen Fiss described *Carolene Products*' footnote four as "[t]he great and modern charter for ordering the relations between judges and other agencies of government . . . ." Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1, 6 (1979); *see also* Lewis F. Powell, Jr., Carolene Products *Revisited*, 82 Colum. L. Rev. 1087, 1087 n.4 (1982) (collecting scholarship describing the importance to constitutional jurisprudence of footnote four).

44. *Valentine v. Chrestensen*, 316 U.S. 52 (1942), *abrogated by* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976), held that the First Amendment does not render unconstitutional a statute prohibiting the distribution of commercial advertising in public places. *United States v. Willow River Power Co.*, 324 U.S. 499 (1945), held that the Fifth Amendment's Takings Clause did not require compensation when the United States built an upstream dam on a river, which reduced the water flow to a power company's downstream dam. In *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), the Court found that an Arizona train-length law was not preempted by the Interstate Commerce Act or the negative Commerce Clause. *Wickard v. Filburn*, 317 U.S. 111 (1942), dramatically expanded the reach of the federal Commerce Clause power. *Skinner v. Oklahoma*, 316 U.S. 535 (1942), struck down laws requiring the compulsory sterilization of criminals as a violation of the equal protection clause. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), struck down a licensing fee for door-to-door solicitations on First Amendment grounds. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), invalidated the requirement that all students salute the American flag on First Amendment grounds. *Follett v. Town of McCormick*, 321 U.S. 573 (1944), held that sellers of religious materials could not be subject to the same taxes as sellers of commercial materials. *Marsh v. Alabama*, 326 U.S. 501 (1946), *abrogated by* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), held that the First Amendment applied to speech restrictions by a privately owned company town. *Tucker v. Texas*, 326 U.S. 517 (1946), invalidated the ordinance prohibiting the distribution of religious materials.

45. Cmty. Commc'ns. Co. v. City of Boulder, 455 U.S. 40, 58 (1982) (Stevens, J., concurring).

46. *Id.* at 67.

"[t]o allow federal judges to decide which of these legislative enactments should survive and which should be condemned comes close to reintroducing the kind of judgments that got the Supreme Court into so much trouble in the *Lochner* era."[47] The court acknowledged that more intensive judicial scrutiny of state legislation under the Sherman Act "might well [result in] more competition and greater consumer welfare," but feared that such improvements "would come at the cost of second-guessing the democratically elected legislature's decisions about the proper balance between competition and other social policies that are commonly reflected in such legislation."[48] Scholars routinely discuss *Parker* and its progeny as embodiments of anti-*Lochner* sentiment.[49]

B. *The* Midcal *Test and Representation Reinforcement*

Although the language of the *Parker* opinion suggested a categorical rejection of federal antitrust preemption of state regulation, the *Parker* state-action immunity doctrine that subsequently developed allowed room for federal preemption. The Supreme Court eventually settled on a two-part test for *Parker* immunity, which it articulated in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc*.[50] Under this *Midcal* test, the anticompetitive policy must be "clearly articulated and affirmatively expressed as state policy" and actively supervised by agents of the state.[51] Unless an anticompetitive state statute meets these requirements, it is preempted by the Sherman Act.

---

47. Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n, 197 F.3d 560, 565 (1st Cir. 1999).

48. *Id.*

49. *See supra* note 11 and accompanying text; *see also* James C. Cooper & William E. Kovacic, *U.S. Convergence with International Competition Norms: Antitrust Law and Public Restraints on Competition*, 90 B.U. L. Rev. 1555, 1570 (2010) ("*Parker* then can be seen as a necessary concession to anticompetitive state regulation to avoid a return to the *Lochner* era . . . . Once the federal judiciary got out of the business of second-guessing the wisdom of states' economic regulation under substantive due process analysis, it could hardly reopen this line of attack under the guise of antitrust. *Parker* prevented this outcome."); Thomas M. Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 Calif. L. Rev. 227, 230 n.20 (1987) ("The Court's own unsatisfying experience with economic due process during the *Lochner* era, just prior to *Parker*, no doubt increased the Court's sensitivity to the importance of independent state economic choices."); William H. Page, *Interest Groups, Antitrust, and State Regulation:* Parker v. Brown *in the Economic Theory of Legislation*, 1987 Duke L.J. 618, 624 [hereinafter Page, *Interest Groups*] ("*Parker* was decided largely on the ground that the Court was unwilling to reenter the political mire of the *Lochner* era under the guise of Sherman Act preemption analysis."); 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, 1104 (1981).

50. 445 U.S. 97 (1980).

51. *Midcal*, 445 U.S. at 105 (1980).

The instinct behind the *Midcal* test is grounded in a representation-reinforcement perspective that resonates with *Carolene Products*'s constitutional paradigm.[52] If states wish to displace competition, they may do so, but only in a way that creates political accountability. Citizens affected by the potentially higher prices and reduced quality that attends the lessening of competition must be able to easily trace the policy back to state politicians and hold them accountable at election time. Should the citizenry fail to see net gains from the exchange, state politicians will feel it at the polls. Competition between states for business assets, citizens, and interstate business mobility should, over time, weed out bad regulations, while permitting those regulations that serve the public interest to survive.[53]

This representation-reinforcement theory of antitrust federalism holds up in only a modest subset of cases. The account works reasonably well as to regulatory schemes that benefit local producers (or some subset of local producers) at the expense of local consumers. Thus, for example, a zoning ordinance that restricts billboard advertising in Columbia, South Carolina, benefits the incumbent billboard company, harms its would-be rivals, and imposes costs on Columbia residents who presumably have to pay more for goods and services—whether because of the increased cost of advertising or because of the decreased amount of information caused by the decrease in advertising.[54] The ordinance may also reduce obnoxious eyesores and crass commercialism. Local voters and community activists will have to balance the cost increases against the aesthetic benefits, all of which is the stuff of ordinary politics.

But this political accountability story runs into at least three significant obstacles in a wide swath of cases. First, it does not work well with anticompetitive regulations—the benefits of which are captured mostly by local producers and the costs of which are externalized to consumers who cannot vote in the jurisdiction that imposed the anticompetitive regulation. *Parker* itself provides the quintessential example of this cost-externalization problem.[55] As noted, at the time of *Parker*, half of the world's raisins, and almost all raisins sold in the United States, came from California.[56] Further, more than 90 percent of the raisins grown in California were shipped outside of the state.[57] Hence, California raisin producers were able to externalize the costs of their cartel on consumers who could not vote on or directly influence electoral outcomes in the regulating jurisdiction. Indeed, many anticompetitive schemes immunized from antitrust scrutiny under the *Parker*

52. *See* John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 75–77 (1980).

53. *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 310–11 (1932) (Brandeis, J., dissenting); Truax v. Corrigan, 257 U.S. 312, 343–44 (1921) (Holmes, J., dissenting).

54. *See* City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365 (1991).

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

56. *Id.* at 345.

57. *Id.*

doctrine impose costs primarily on consumers who cannot vote in the relevant jurisdiction.[58]

This cost-externalization objection to *Midcal's* implicit representation-reinforcement theory might be addressed by limiting *Parker* immunity to circumstances where voters within the relevant jurisdiction internalize most of the monopoly costs—a facet absent from the current state-immunity doctrine.[59] But cost externalization is only one of three significant challenges to the representation-reinforcement theory of state-action immunity. A second one—alluded to at the outset of this Article—is the collective-action problem that arises from the asymmetry between the concentrated benefit to producers and the diffuse harm to consumers that comes with a monopoly.[60] Democratic constraints on anticompetitive regulation are unlikely to be effective where the burden on millions of voters is relatively slight compared to the concentrated benefit that befalls a small number of producers willing to invest heavily in the political system to maintain their monopoly position.

It is not difficult to locate evidence of systematic competitive distortions arising from state regulations that favor a relatively small group of producers and impose diffuse costs on a large group of consumers. Automobile retailing is a prime example. State dealer-franchise statutes, in place since the mid-twentieth century, dramatically restrict retail competition through a hodgepodge of prohibitions on manufacturer-distribution decisions, including direct sales to consumers, competitive spacing of dealer locations, termination of ineffective dealers, and competitive warranty-reimbursement policies.[61] Dealers spend heavily in state and local elections to maintain these restrictions, and—until recently, at least—there has been relatively little investment of resources by consumer groups to mount political challenges.[62] These laws are probably impervious to antitrust challenge under the current

58. *See* Daniel A. Crane, *Judicial Review of Anticompetitive State Action: Two Models in Comparative Perspective*, 1 J. Antitrust Enforcement 418, 424–26 (2013).

59. 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, 1207 (1997). Inman and Rubinfeld would ask:

> 1) Does a state regulation generate significant monopoly spillovers onto nonresidents?; and 2) Was the state regulation decided without political participation of the affected nonresidents as evidenced by the lack of interstate regulatory agreement? If the answer to both questions is yes, then the state regulation fails the spillover test for economic efficiency, and a Sherman Act review of the regulation is appropriate.

Id.

60. *See, e.g.*, Garland, *supra* note 11; Page, *Interest Groups*, *supra* note 49; John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 Harv. L. Rev. 713 (1986).

61. *See* Crane, *Tesla*, *supra* note 3, at 606–07; Francine Lafontaine & Fiona Scott Morton, *State Franchise Laws, Dealer Terminations, and the Auto Crisis*, 24 J. Econ. Persp. 233, 242–46 (2010).

62. *See* Crane, *Tesla*, *supra* note 3, at 605.

constraints of the *Parker* doctrine, since the prohibitions emanate directly from state legislatures.[63]

And relying on overcharged consumers to mobilize to overturn anticompetitive regulations poses other problems—namely, the fact that existing laws benefit from inertia. Many state regulatory schemes currently being invoked to slow the competitive advent of new technologies were enacted many decades ago in very different economic and social circumstances.[64] The dealer-protection statutes being asserted to thwart Tesla Motors arose at a time when the market was dominated by the "Big Three" Detroit automobile manufacturers, and franchisees were perhaps justifiably concerned about unequal bargaining power and manufacturer exploitation;[65] the taxi cab regulations being asserted to limit competition from ride-sharing and house-renting services arose long before internet-based transacting alleviated consumer concerns over peak-load pricing, fare opacity, universal service, and many other potential consumer risks.[66]

Even if not originally enacted for anticompetitive purposes, many state regulations entrench incumbent technologies and firms and perpetuate entry barriers long after the original rationales for the regulations have died.[67] But, since it is much more difficult to overturn a regulatory regime than to protect it,[68] challenges to the status quo face formidable political obstacles. Incumbency and inertia thus amplify the already significant survival advantages that anticompetitive regulatory schemes enjoy due to cost externalization and the asymmetry between producer gains and consumer losses.

In sum, the representation-reinforcement theory of *Parker* immunity fails, in important respects, to capture the dynamics of state anticompetitive regulations. Anticompetitive regulatory schemes with few justifications other than special-interest-group protection come into being and persist for lengthy periods because of cost externalization, incentive asymmetries between producers and consumers, and incumbency advantages.

C. *Does the* Parker *Regime Apply to the FTC?*

Parker involved a federal antitrust challenge under the Sherman Act, which is enforceable by the U.S. Justice Department and by private plaintiffs.[69] It did not involve any consideration of whether a similar preemptive limitation might apply to the Federal Trade Commission, an independent federal agency that enforces a separate substantive statute—Section 5 of the

63. *Id.* at 602.

64. *See* Lafontaine & Morton, *supra* note 61, at 238–41.

65. Crane, *Tesla*, *supra* note 3, at 577–79.

66. *See* Rogers, *supra* note 2, at 87–89.

67. *See* Crane, *Tesla*, *supra* note 3, at 593–601 (arguing that original rationales for dealership regulations do not apply in the context of Tesla's direct-distribution model).

68. *See, e.g.*, McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 L. & Contemp. Probs. 3, 16–21 (1994) (describing impediments to overturning decisions).

69. Parker v. Brown, 317 U.S. 341 (1943); *see also* 15 U.S.C. § 15 (2012).

Federal Trade Commission Act, which prohibits "[u]nfair methods of competition."[70] As discussed in greater detail in Part III, a number of considerations might compel the conclusion that the Court's logic in *Parker* and its progeny does not apply with equal force to the FTC. Nonetheless, despite frequent FTC litigation over the *Parker* doctrine over many decades, that legal issue remains undetermined.

Though undetermined, the issue has not gone unremarked. In *FTC v. Ticor Title Insurance Co.*, the Supreme Court briefly acknowledged that the question of whether the FTC might have super-preemption authority beyond the preemptive reach of the Sherman Act remains an open question.[71] The Court noted that the commission had, at other times, argued that state-action immunity "does not apply to Commission action under § 5 of the Federal Trade Commission Act,"[72] citing a 1975 staff report to the Commission on Prescription Drug Price Disclosures[73] and a student note in the *Harvard Law Review*.[74] The Court also noted that the influential Areeda-Turner treatise "has expressed its skepticism of this view."[75] The Court found it unnecessary to determine whether state-action immunity applies to challenges brought by the FTC, because "the Commission does not assert any superior pre-emption authority in the instant matter." Thus the Court applied the generic *Parker* state-action immunity doctrine to the FTC's challenge.[76]

Only a few federal appellate decisions have addressed the super-preemption question, and all were decided prior to *Ticor*. Three circuits have concluded that the FTC may possess something like superior preemptive authority, although no decision to that effect would be binding today. In pre-*Parker* dictum, the Eighth Circuit recognized that the FTCA constitutionally vested the FTC with the power to blunt "[a]ny action by the state Legislature or any decision of the state courts" which "strikes at" Congress's power to regulate interstate commerce.[77] Post-*Parker*, the Fourth Circuit rejected the argument that business conduct that complies with a state's law prevents the FTC from regulating the conduct and "nullify[ing] a valid state statute."[78] Although the court ultimately found no conflict between the state law and the FTC's ruling, the Fourth Circuit accepted preemption within the

70. 15 U.S.C. § 45(a).

71. 504 U.S. 621, 635 (1992).

72. *Ticor Title Ins.*, 504 U.S. at 635.

73. FTC Bureau of Consumer Prot., Prescription Drug Price Disclosures: Staff Report to the Federal Trade Commission, chs. VI(B), (C) (1975).

74. Note, *The State Action Exemption and Antitrust Enforcement Under the Federal Trade Commission Act*, 89 Harv. L. Rev. 715 (1976) [hereinafter *State Action Exemption*].

75. *Ticor Title Ins.*, 504 U.S. at 635 (citing 1 Phillip Areeda & Donald F. Turner, Antitrust Law ¶ 218 (1978)).

76. *Id.*

77. Chamber of Commerce of Minneapolis v. FTC, 13 F.2d 673, 684 (8th Cir. 1926).

78. Royal Oil Corp. v. FTC, 262 F.2d 741, 743 (4th Cir. 1959).

FTC's "general grant of authority,"[79] in part by relying on the Supreme Court's interpretation of the FTC's jurisdiction in light of the McCarran-Ferguson Act.[80] The Seventh Circuit, citing the Fourth Circuit, reached the same conclusion (although, again, in dictum).[81]

On the other hand, the D.C. Circuit has upheld the applicability of the *Parker* defense in FTC enforcement actions after concluding that the FTC lacked the power to preempt state laws.[82] That court first questioned whether the state-action doctrine applied to FTC enforcement and regulation in 1980.[83] A decade later, it vacated an FTC rule declaring "certain state-imposed restrictions on the practice of optometry [to be] unfair acts or practices."[84] The court concluded that "[a]n agency may not exercise authority over States as sovereigns unless that authority has been unambiguously granted to it," so the lack of "explicit congressional authorization" in the FTC Act and the Magnuson-Moss Amendments (which gave the FTC rulemaking authority) meant the FTC had overstepped its boundaries.[85]

The academic analysis of the FTC's preemptive authority is similarly minimal, dated, and split. The author of the Harvard student note and Paul Verkuil both tried—and failed—to find any indication that Congress intended to grant preemptive authority to the FTC (at least prior to the passage of the Magnuson-Moss Act in 1975).[86] Nonetheless, both concluded

---

79. *Id.*

80. *Id.*; *see also* FTC v. Nat'l Cas. Co., 357 U.S. 560, 562–63 (1958) ("An examination of [the McCarran-Ferguson Act] and its legislative history establishes that the Act withdrew from the Federal Trade Commission the authority to regulate respondents' [insurance] advertising practices in those States which are regulating those practices under their own laws."). From this, the Fourth Circuit apparently concluded that the FTC could regulate noninsurance advertising practices (or any business practice), even when a state is also regulating that conduct. *Royal Oil*, 262 F.2d at 743.

81. *See* Peerless Prods., Inc. v. FTC, 284 F.2d 825, 827 (7th Cir. 1960) ("A local ordinance cannot here circumscribe the plenary power granted to the Commission to police unfair and deceptive practices in interstate commerce.").

82. *See* Cal. State Bd. of Optometry v. FTC, 910 F.2d 976, 980–82 (D.C. Cir. 1990).

83. *See* Am. Optometric Ass'n v. FTC, 626 F.2d 896, 910 (D.C. Cir. 1980) ("[T]he Commission's proposed pre-emption of state law is almost as thorough as human ingenuity could make it. Consequently, the Commission has at least approached the outer boundaries of its authority and may have infringed on that deference to the states' exercise of their police powers dictated by the principles of federalism. The rule therefore raises several interrelated issues: Did Congress authorize the Commission to pre-empt state laws? If so, did the scope of the Commission's delegated power permit it to pre-empt state laws to the extent of pre-empting the whole field of ophthalmic advertising? Does the state-action doctrine of *Parker v. Brown* forbid the agency to issue this rule? Has the Commission exceeded its jurisdiction in treating the states as persons under the Magnuson-Moss Act?" (citation omitted)).

84. *Cal. State Bd. of Optometry*, 910 F.2d at 979, 982.

85. *Id.* at 982. *Contra Peerless Prods., Inc.*, 284 F.2d at 827 ("Unless Congress specifically withdraws authority in particular areas, the Commission, upon its general grant of authority under [the FTC Act], can restrain unfair business practices in interstate commerce even if the activities or industries have been the subject of legislation by a state or even if the intrastate conduct is authorized by state law.").

86. *See* Paul R. Verkuil, *Preemption of State Law by the Federal Trade Commission*, 1976 Duke L.J. 225, 234–35; *State Action Exemption*, *supra* note 74, at 740–43.

that *Parker*'s federalism concerns could be avoided where a careful FTC challenges anticompetitive state laws. The student note—focusing more on the institutional competence of the commission—recognized that the commission can necessarily consider the public interest under Section 5 analysis,[87] presumably in a neutral manner (as compared with the states[88]), more competently than the courts,[89] and with only limited remedies (i.e., preemption) against the states.[90] After finding preemptive intent in the 1975 amendments to the FTC Act, Verkuil proposed several restraints on FTC preemptive conduct to limit "injury . . . to federal-state relations,"[91] including heightened judicial scrutiny, categorical limits on the types of "vital" state laws exposed to FTC regulation,[92] and the FTC's own "standard of self-restraint."[93]

Conversely, the Areeda treatise has consistently rejected the FTC as possessing the power of "superior-preemption."[94] Reviewing the same 1975 amendments as did the student note and Verkuil, the treatise rejects the "far-from-certain" reading of the amended rulemaking provisions as "empower[ing] the FTC to supersede virtually the entire corpus of state economic regulation."[95] Furthermore, while arguments based on the commission's sanctions and composition (i.e., those raised in the student note) "reduce the sting of preempting state law," Areeda and Turner found

87. *State Action Exemption*, *supra* note 74, at 733–34 ("The very breadth of the concept of an 'unfair' practice ensures that the Commission would have discretion to defer to noncompetitive modes of state regulation where important social purposes outweigh the value of free competition."); *see also* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972) ("[T]he Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.").

88. *Parker* is just one example of a state failing to internalize the effects of its anticompetitive regulation. *See supra* Section I.B.

89. *See State Action Exemption*, *supra* note 74, at 728–30.

90. *See id.* at 734–36.

91. Verkuil, *supra* note 86, at 247.

92. *Id.* at 243–47.

93. *Id.* at 243 (quoting FTC Bureau of Consumer Prot., *supra* note 73, at 74–192). For other evaluations of the constraints limiting FTC preemption, see generally Robert G. Badal, *Restrictive State Laws and the Federal Trade Commission*, 29 Admin. L. Rev. 239 (1977) (discussing the FTC's authority and the limits on its power to preempt state requirements), and John Hardin Young & Anthony F. Troy, *Federal Trade Commission Preemption of State Regulation: A Reevaluation*, 12 Suffolk U. L. Rev. 1248 (1978) (analyzing the FTC's assertions that self-imposed constraints will limit preemption issues).

94. *See* 1A Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 231b2, 231c (4th ed. 2013); 1 Phillip Areeda & Donald F. Turner, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 218c (1st ed. 1978).

95. *See* Areeda & Turner, *supra* note 94, ¶ 218c. It appears, though, that the treatise did not consider the amendments in light of the proposed, but rejected, amendments and other legislative history, which explicitly discusses preemption. *See* Verkuil, *supra* note 86, at 235–40.

(and Areeda and Hovenkamp still find) these arguments insufficient to "overcome . . . the considerations of federalism" in *Parker*.[96]

It is no accident that the scholarship surrounding the FTC and preemption came entirely during the late 1970s. It was during this period that the FTC showed interest in unleashing itself from *Parker*. In a 1975 staff report on proposed prescription drug price-disclosure regulations, the FTC staff concluded that the commission could "preempt state law in a particular area simply by clearly expressing its intent to that effect," even if "the state law is not repugnant to any specific provision of the Trade Regulation Rule."[97] In reaching that conclusion, the FTC argued that *Parker*'s limited statutory holding[98] does not apply to enforcement under Section 5.[99]

Since the D.C. Circuit's 1990 *California State Board of Optometry*[100] opinion, the FTC has not challenged *Parker*'s applicability in Section 5 actions. In establishing a "State Action Task Force," whose 2003 report recommended "clarification and re-affirmation of the original purposes of the state action doctrine,"[101] the FTC now seems content to allow *Parker* challenges to its investigative and enforcement actions.

For the most part, the FTC has not asserted superior-preemptive authority or regularly contested *Parker*'s applicability during enforcement and investigative actions, but has instead focused on pushing the boundaries of the *Parker* doctrine in a more precompetitive direction. At least in recent decades, much of the explanation for this acquiescence may lie in the agency's reluctance to differentiate itself from the Justice Department's Antitrust Division for political reasons. In particular, from the early 1980s until recently, the FTC largely acquiesced in the view that the substantive reach of Section 5 of the FTC Act was effectively identical to the substantive reach of the Sherman Act.[102] Although the Supreme Court has held that Section 5 has a broader prophylactic reach than the Sherman Act,[103] the FTC lost a series of Section 5 cases in the late 1970s and early 1980s,[104] at the same time the

96. *See* Areeda & Hovenkamp, *supra* note 94, ¶ 231b2; Areeda & Turner, *supra* note 94, ¶ 218c.

97. FTC Bureau of Consumer Prot., *supra* note 73, at ch. VI(B).

98. *See supra* note 14 and accompanying text.

99. FTC Bureau of Consumer Prot., *supra* note 73, at ch. VI(C).

100. Cal. State Bd. of Optometry v. FTC, 910 F.2d 976 (D.C. Cir. 1990).

101. Office of Policy Planning, Report of the State Action Task Force 1 (2003).

102. Daniel A. Crane, The Institutional Structure of Antitrust Enforcement 135–41 (2011) [hereinafter Crane, Institutional Structure].

103. FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 454 (1986) (holding that "[t]he standard of 'unfairness' under the FTC Act . . . encompass[es] not only practices that violate the Sherman Act and the other antitrust laws . . . but also practices that the Commission determines are against public policy for other reasons"); FTC v. Brown Shoe Co., 384 U.S. 316, 322 (1966) (holding that the FTC may go further than the reach of the Sherman Act and "stop in their incipiency acts and practices which, when full blown, would violate those Acts" (quoting FTC v. Motion Picture Advert. Serv. Co., 344 U.S. 392, 394–95 (1953))).

104. *See* Crane, Institutional Structure, *supra* note 102, at 136–38.

agency was facing serious political difficulties in Washington due to its perceived overreaching in its consumer protection mission.[105] A chastened FTC retreated in the 1980s and forward, tying its antitrust enforcement authority to the judicially determined meaning of the Sherman Act.[106] If the FTC Act was practically coextensive with the Sherman Act for substantive liability purposes, then the preemptive scope of the two statutes might as well be equivalent, too.

In recent years, the FTC has slowly begun to reassert an independent Section 5 power not tied to the meaning of the Sherman Act.[107] In the summer of 2015, the commission, for the first time, articulated guidance on the circumstances under which it might bring an independent Section 5 case.[108] Section 5 remains politically controversial, with critics fearing an unconstrained exercise of enforcement authority by the commission.[109] Nonetheless, the commission's renewed interest in the meaning of Section 5, coinciding with its growing interest in state regulations stifling competition—particularly competition arising from new technologies[110]—suggests that the time is ripe for reconsideration of the issue left open in *Ticor*: Does the *Parker* doctrine constrain the FTC in the assertion of its enforcement authority under Section 5?

II. The FTC Act and Superior Preemption in Historical Context

As noted earlier, the *Parker* court found "no suggestion of a purpose to restrain state action in the [Sherman] Act's legislative history."[111] Indeed, if anything, the Sherman Act's legislative history suggests that Congress had

105. *Id.* at 31 (discussing the FTC's political setbacks in the late 1970s and 1980s).

106. *E.g.*, Rambus Inc. v. FTC, 522 F.3d 456, 462 (D.C. Cir. 2008) (observing that the commission had expressly limited its theory of liability to conduct that would violate Section 2 of the Sherman Act).

107. *See, e.g.*, *In re* Motorola Mobility LLC, No. 121–0120, 2013 WL 3944149 (F.T.C. July 23, 2013); *In re* Intel Corp., No. 9341, 2010 WL 4542454 (F.T.C. Nov. 2, 2010); *In re* Negotiated Data Solutions LLC, No. 051–0094, 2008 WL 258308 (F.T.C. Jan. 22, 2008).

108. *See* Policy Statement, FTC, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015), https://www.ftc.gov/public-statements/2015/08/statement-enforcement-principles-regarding-unfair-methods-competition [https://perma.cc/3D7F-4AR8].

109. Thomas Dahdouh, *Section 5, the FTC and Its Critics: Just Who Are the Radicals Here?*, Competition J. Antitrust & Unfair Competition L. Sec. St. B. Cal., Fall 2011, at 1, 1–2 (2011) (collecting sharp criticisms of independent Section 5 enforcement).

110. The FTC has shown considerable interest in issues such as automobile distribution in the new economy, *see, e.g.*, *Auto Distribution: Current Issues & Future Trends*, FTC (Jan 19, 2016, 9:00AM), https://www.ftc.gov/news-events/events-calendar/2016/01/auto-distribution-current-issues-future-trends [https://perma.cc/4775-EKHY], and state regulation of the sharing economy, *see, e.g.*, *The "Sharing" Economy: Issues Facing Platforms, Participants, and Regulators*, FTC (Jun. 9, 2015, 8:30AM), https://www.ftc.gov/news-events/events-calendar/2015/06/sharing-economy-issues-facing-platforms-participants-regulators [https://perma.cc/2WKE-GDY4]).

111. Parker v. Brown, 317 U.S. 341, 351 (1943).

greater concerns about purely private restraints on competition and monopolies than restraints arising from state regulation.[112]

The situation is quite different when it comes to the FTC Act of 1914. While the historical context and legislative history of the FTC Act do not unambiguously suggest a congressional desire for the agency to wield preemptive power over state regulation, issues concerning conflicts between state and federal power were very much in the air in the period leading up to the passage of the FTC Act and in its immediate legislative history. In particular, there are two significant currents that should be relevant to any effort to divine the scope of the FTC's preemptive jurisdiction from the Act's historical context.

First, the FTC Act—which created a trade commission with broad prophylactic powers—evolved from earlier proposals for an expanded Bureau of Corporations with the power to require federal chartering and regulation of large interstate corporations, and that would effectively preempt the states' role in organizing and regulating interstate business organizations.[113] Though these legislative proposals ultimately failed, the fact that their impetus was resolved in the creation of the FTC supports the view that the FTC was intended to solve problems of state corporate law.

Second, and more directly, congressional debate over the FTC Act proceeded in the immediate aftermath of the highly salient *Shreveport Rate* decision, which upheld the Interstate Commerce Commission's preemptive power over state railroad-rate regulation. References to the ICC as a model for the FTC abound in the legislative history, and the *Shreveport Rate* decision was specifically invoked as a positive precedent for the new commission.[114]

A. *State Corporate Law Failure, Preemptive Federal Incorporation, and the FTC and Clayton Acts*

Consistent with the court's assertion in *Parker*, analysis of the preemptive scope of the Sherman and FTC Acts may turn in part on the legislative context of each statute with respect to federal–state power allocations. On that question, the two statutes' contexts differ significantly. On one level, both statutes addressed a common problem: the growing economic power of large industrial organizations and massive aggregations of capital occasioned by the Second Industrial Revolution. But, on another level, the statutes of 1890 and 1914 reflected very different background assumptions about the nature of the trust problem, federalism, state corporate law, and comparative institutional capacity.

---

112. *See* Richard Squire, *Antitrust and the Supremacy Clause*, 59 Stan. L. Rev. 77, 106 (2006) ("[W]e . . . have evidence that Congress intended to leave intact some state regulation it thought it could preempt. . . . includ[ing] Senator Sherman's intimations on the congressional record that private firms should enjoy less power than states to restrain economic competition.").

113. *See infra* notes 127–146 and accompanying text.

114. *See infra* Section II.B.

The Sherman Act arose in a context in which the Gilded Age trusts were widely accused of making end-runs around state corporate law to acquire and exploit undue levels of economic power.[115] The states unsuccessfully attempted to control the trusts by enforcing corporate law restrictions.[116] In particular, state attorneys general initiated quo writs to challenge as ultra vires the various corporate charter activities, such as doing business outside the state, conducting business outside the scope of the charter, and owning the shares of other corporations.[117] Efforts to control the trusts using existing corporate law limitations sometimes proved successful,[118] but state corporate law enforcement did little overall to stem the rising tide of the trusts,[119] in large part because the formal requirements and prohibitions of state corporate law could so easily be avoided by creative corporate lawyers.[120] Further, under the prevailing dualism of commerce clause jurisprudence, states could regulate only intrastate commerce and could not reach interstate activities.[121] Hence, state regulation was largely ineffective in addressing the trust problem.

The Congress that enacted the Sherman Act in 1890 spoke of the states largely as helpless victims of the trusts rather than as their facilitators. Senator Sherman in particular took a leading role in describing the states as willing, but ineffective, partners in the effort to control large aggregations of capital. For example, Senator Sherman cited New York's inability to control the Sugar Trust through litigation as evidence of the need for federal legislation.[122] Elsewhere, Sherman described the states as actively engaged in the effort to control the trusts, but practically unable to reign them in because

115. *See* Herbert Hovenkamp, Enterprise and American Law, 1836–1937, at 63–64 (1991).

116. *See id.*

117. *See id.* at 63. Before the liberalization of corporate law in the late nineteenth century, most states severely restricted corporate powers, for example, by limiting corporations to a single line of business and prohibiting stock ownership by a corporation. *See* Melvin I. Urofsky, *Proposed Federal Incorporation in the Progressive Era*, 26 Am J.L. Hist. 160, 161 (1982).

118. *See, e.g.*, State *ex rel.* Att'y Gen. v. Standard Oil Co., 49 Ohio St. 137 (1892); *see also* Bruce Bringhurst, Antitrust and the Oil Monopoly: The Standard Oil Cases, 1890–1911, at 14 (1979).

119. Hans B. Thorelli, The Federal Antitrust Policy 155–60 (1954).

120. Hovenkamp, *supra* note 115, at 249. In particular, organizing a business organization through a trust rather than a corporation allowed the organization to circumvent many of the strictures of corporate law. *See* Jonathan W. Singer, Broken Trusts: The Texas Attorney General Versus the Oil Industry, 1889–1909, at 7 (2002) (recounting maneuvers by Texas oil corporations to circumvent Texas's corporate restrictions by forming partnerships rather than corporations).

121. *See* Andrew I. Gavil, *Reconstructing the Jurisdictional Foundation of Antitrust Federalism*, 61 Geo. Wash. L. Rev. 657, 674–78 (1993); William L. Letwin, *Congress and the Sherman Antitrust Law: 1887–1890*, 23 U. Chi. L. Rev. 221, 250–51 (1956); James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880–1918*, 135 U. Pa. L. Rev. 495, 510 & n.86 (1987).

122. 21 Cong. Rec. 2568–69 (1890) (statement of Sen. Sherman).

of jurisdictional limitations.[123] The Act's sponsors described themselves as not supplanting, but bolstering, state law[124] by enacting the common law of restraints of trade and monopolies as a federal statute.[125] The Sherman Act's legislative history abounds with references to the states' willingness, but practical inability, to manage the trust problem and, hence, the need for a federal solution.[126]

Although the creation of the Interstate Commerce Commission in 1887 provided a potential administrative regulatory model for antitrust legislation, very little consideration was given in 1890 to an administrative model that might preempt state law.[127] Rather, the Sherman Act adopted a "crime-tort" corrective model concerned with identifying and punishing undesirable conduct through prosecutorial and judicial channels.[128] The Sherman Act's model expressed desired continuity with the substance of state law and its primarily judicial enforcement mechanisms.

By contrast, the FTC Act arose from a context in which political elites squarely blamed the continuation of the trust problem on the liberalization of state law. The federal legislative reforms marked a sharp departure from both the substance of state law and its institutional forms. Whereas preemption of state law was, as *Parker* notes, absent from the conversation in1890, it was clearly present in the years leading up to 1914.

From roughly the turn of the century until the passage of the FTC Act, and particularly following the great merger wave of 1895–1904,[129] a developing Progressive narrative laid much of the blame for the continuation of the

---

123. *See, e.g.*, Thorelli, *supra* note 119, at 181 (citing Senator Sherman's statement that "[t]he power of the State courts has been repeatedly exercised to set aside such combinations . . . but these courts are limited in their jurisdiction to the State, and, in our complex system of government, are admitted to be unable to deal with the great evil that now threatens us").

124. *See, e.g.*, *id.* (quoting Senator Sherman as saying, "[t]his bill, as I would have it, has for its single object to invoke the aid of the courts of the United States to . . . supplement the enforcement of the established rules of the common and statute law by the courts of the several States in dealing with combinations that affect injuriously the industrial liberty of the citizens of these States").

125. *Id.* at 228 ("There is ample evidence that not only the bills reported by Sherman in the 51st Congress but also the bill finally passed were intended by their sponsors primarily to be federal codifications of the common law of England and the several states.").

126. *See id.* at 181 (referencing Senator Sherman's description of the Sherman Act as a supplement to states' antitrust efforts); *id.* at 183 (referencing Senator Sherman's claim that state courts "have vigorously used the judicial power in subverting" unlawful trusts); Letwin, *supra* note 121, at 252–53 (describing Senator Sherman's endorsement of a Michigan Supreme Court opinion holding illegal a match monopoly, and explaining the need for federal legislation to bring about the effectiveness of common law restrictions on anticompetitive behavior).

127. Thorelli, *supra* note 119, at 229–30.

128. *See generally* Daniel A. Crane, *Antitrust Antifederalism*, 96 Calif. L. Rev. 1 (2008) [hereinafter Crane, *Antitrust Antifederalism*] (describing a historical aversion to direct federal regulation of corporations and preference for locating "bad acts" rather than creating an appropriate corporate structure).

129. *See generally* Naomi R. Lamoreaux, The Great Merger Movement in American Business 1895–1904 (1985) (exploring the causes of the wave of mergers which swept through the manufacturing sector during this period).

trust problem at the feet of the state legislatures, which had so liberalized corporate law as to remove any meaningful check on the exercise of corporate power.[130] Unlike the Sherman Act, the FTC Act grew out of a political context in which states often were described not as *victims* of the trusts, but, rather, as their *facilitators*. The FTC Act was thus directed at curbing anticompetitive market structures facilitated by the states themselves.

The story of state corporate law liberalization and its relationship to federal incorporation or licensing proposals and the antitrust problem is both lengthy and familiar;[131] an abbreviated version will suffice here. During the Jacksonian period, incorporation moved from a special incorporation model, where charters had to be procured by special legislative acts, to a general incorporation model, where any qualifying business could incorporate simply by registering and paying the required fee.[132] But as the corporate form became widely available, it remained widely restrictive in terms of the powers it gave corporations.[133] After the Civil War, many states began to liberalize their incorporation laws in an attempt to attract firms to incorporate in their state. And so started the "race to the bottom"—at least in the sense of removing many of the restrictions in state corporation law that state attorneys general had invoked in antitrust efforts during the pre–Sherman Act years.[134] States competing to become incorporation havens eventually permitted corporations to own stock of other companies and granted favorable tax treatment for out-of-state earnings.[135] In New Jersey, for example, the state allowed corporate charters "for any lawful business purpose whatsoever"; dispensed with requirements that directors be state residents and that corporate meetings be held within the state; allowed unlimited capitalization; eliminated shareholder liability for corporate debts; and stopped requiring public disclosure of annual reports.[136]

These liberalization movements in state corporate law were afoot in 1890, but had not yet been fully realized. During debates over the Sherman Act, some congressmen intimated that the trust problem was deeply grounded in state corporate law and, hence, that the solution must lie in state legislation.[137] The intense focus on the liberalization of state corporate

130. *See* Phillip I. Blumberg, *The Transformation of Modern Corporation Law: The Law of Corporate Groups*, 37 Conn. L. Rev. 605, 607–08 (2005).

131. Daniel A. Crane, *The Dissociation of Incorporation and Regulation in the Progressive Era and the New Deal*, *in* The Corporation and American Democracy (William Novak & Naomi Lamoreaux eds., forthcoming 2017) (on file with Michigan Law Review).

132. *See* Crane, *Antitrust Antifederalism*, *supra* note 128, at 2, 8–12.

133. *See id.* at 12.

134. *Id.*

135. Ernst Von Halle, Trusts or Industrial Combinations and Coalitions in the United States 94–95 (1900).

136. *Id.* at 96 (quoting William H. Corbin, An Act Concerning Corporations 8 (14th ed. 1908)).

137. *See* Thorelli, *supra* note 119, at 204 (reporting statements of Rep. Wilson that, since "the organization of a trust must have the corporation as a basis . . . the first and most effective blow at that organization must be struck, not by Congress, but by the States").

law as contributing to the trust problem, however, did not emerge until after the Sherman Act's passage. That was due in large part to the fact that the most dramatic movements toward state corporate law liberalization were still in progress in 1890.

The central player in this sweep toward liberalization was the State of New Jersey. Through the New Jersey Holding Company Act of 1889, the state facilitated the Standard Oil and Northern Securities trusts, among others, by permitting a corporation to own the stock of another corporation.[138] Although the Holding Company Act predated the Sherman Act, the full impact of New Jersey's enabling of large corporate scale and powers was realized in a succession of liberalizing statutes in the 1890s—in 1893, 1896, 1897, and 1898. The 1896 statute proved the most significant in creating a distinctive and nationally accessible New Jersey brand in corporate law.[139] From 1896 to the turn of the century, the liberalization of New Jersey corporate law wielded an irresistible, magnetic pull on American corporations and earned the State of New Jersey enormous economic benefits.[140]

The competitive pressures on other states occasioned by New Jersey's legislative reforms proved overwhelming. Within a few years, most states began to liberalize their corporate laws dramatically.[141] New Jersey's significant revenues came from its status as the least restrictive state of incorporation; in order to attract future business, other states would have to be less restrictive still.[142] The race to the bottom would not end before the majority of states had repealed the corporate restrictions that had previously helped control the trusts.[143] These corporate law reforms eliminated the possibility that state corporate law could function as an effective antitrust device.[144]

138. *See* Alfred D. Chandler, Jr., Strategy and Structure: Chapters in the History of the Industrial Enterprise 30 (1962) (discussing how the passage of the New Jersey law aided the Standard Oil Company); Blumberg, *supra* note 130, at 607 (describing the New Jersey law as "pathbreaking legislation" that facilitated Standard Oil's reorganization); Christopher Grandy, *New Jersey Corporate Chartermongering, 1875–1929*, 49 J. Econ. Hist. 677, 681 (1989) (detailing the liberalization of New Jersey corporate law in the late 1880s); Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 Antitrust L.J. 1, 6 (2003) (discussing the 1889 law and litigation that followed the formation of the Standard Oil and Northern Securities Trusts).

139. Charles M. Yablon, *The Historical Race: Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880–1910*, 32 J. Corp. L. 323, 349 (2007).

140. Between 1896 and 1901, corporate filing fees and franchise taxes in New Jersey swelled from $800,000 to $2,189,000, accounting for 60% of the state's revenues. Urofsky, *supra* note 117, at 164. By 1901, 95% of the nation's large corporations were incorporated in New Jersey. *Id.* By 1902, New Jersey had earned so much from corporate filing fees and franchise taxes "that it had paid off the state debt and abolished property taxes." *Id.* By 1905, it had a surplus of nearly $3 million in the treasury, mostly attributable to its corporate liberalization initiative. *Id.*

141. Crane, *Antitrust Antifederalism*, *supra* note 128, at 13.

142. *See id.* at 12–13 (detailing that, upon seeing New Jersey's gains from liberalization, other states followed suit "with an eye toward attracting firms to incorporate in their state").

143. *Id.* at 12.

144. *See id.* at 13.

As these corporate liberalization reforms proceeded, academics, lawyers, and politicians began to link the trust problem with a failure of state corporate law.[145] If state corporate liberalization was contributing to the acceleration of the trust problem notwithstanding the Sherman Act, the question naturally arose as to whether federal legislation to correct state corporate law was required. Around the turn of the century, the possibility of a federal incorporation statute became a popular topic among academics and leading members of the bar, with many prominent voices strongly in favor.[146] Proponents of federal incorporation argued that mandatory federal incorporation, or restrictive licensing for corporations engaged in interstate commerce, could allow the state—now conceived as the federal, rather than state, government—to reassert control over corporate entities.[147]

These indictments of state corporate law prompted a course of political action in Congress and the White House that ultimately culminated in the

145. For example, in 1895, the German economist Ernst Von Halle noted the irony of the simultaneous liberalization of corporate law and adoption of antitrust law: "We now have the strange spectacle of the enactment of the most severe laws against trusts and combinations on the one hand, and on the other of a transformation of the corporation law which facilitated the remodeling of the trusts, and their continued transaction of business in the state." Von Halle, *supra* note 135, at 95. In 1900, the treatise-writer Christopher Tiedeman would blame the entire trust problem on state corporate law and propose a return to incorporation by special legislation only. 1 Christopher G. Tiedeman, A Treatise on State and Federal Control of Persons and Property in the United States 609–10 (1900).

146. *See, e.g.*, E. Parmalee Prentice, The Federal Power Over Carriers and Corporations 149–55 (1907); Charles W. Bunn, *Federal Incorporation of Railway Companies*, 30 Harv. L. Rev. 589 (1917); James B. Dill, Address, *National Incorporation Laws for Trusts*, 11 Yale L.J. 273 (1902); E. W. Huffcut, Address, *Constitutional Aspects of the Federal Control of Corporations*, 34 Am. L. Rev. 186, 200–04 (1900); Walter S. Logan, Address, *National Incorporation and Control of Corporations*, 37 Am. L. Rev. 237 (1903); John E. Parsons, *Federal Regulation of Corporations: A Dangerous Departure*, 17 Green Bag 135 (1905); John Bell Sanborn, *Federal Control of Corporations*, 37 Am. L. Rev. 703 (1903); Thomas Thacher, *Federal Control of Corporations*, 14 Yale L.J. 301 (1905); H. L. Wilgus, *Need of National Incorporation Law*, 2 Mich. L. Rev. 358 (1904).

147. An 1899 Chicago Conference on Trusts, sponsored by the Chicago Civic Federation, led a number of prominent public figures to call for direct federal control of the trusts. *See, e.g.*, Urofsky, *supra* note 117, at 168–69. William Jennings Bryan advocated mandatory federal licensing for corporations doing business outside their home state and accompanying stringent requirements regarding capitalization and business policies. *Id.* at 166. James Garfield, in his first annual report to Congress as commissioner of the Bureau of Corporations, argued that competition between incorporating jurisdictions had led to "an inevitable tendency of State legislation toward the lowest level of lax regulation and of extreme favor toward this special class of incorporators, regardless of the interests of the other classes properly concerned." Dep't of Com. and Lab., Report of the Commissioner of Corporations, H.R. Doc. No. 165, at 40 (1904). University of Michigan Law Professor H. L. Wilgus asserted that, though states were the incorporating sovereigns, they had lost their practical—and, indeed, constitutional—power to regulate trusts operating in interstate power, thus requiring federal incorporation as an antidote. Wilgus, *supra* note 146, at 372. Even James Dill, the author of New Jersey's much-maligned Holding Company Act, argued that "[t]he country demands uniform corporate legislation, formulated upon the good of the country as a whole, and not sectional legislation, state against state." Dill, *supra* note 146, at 274.

passage of the FTC and Clayton Acts in 1914.[148] The first bill, introduced in 1900 by Congressman Edwin R. Ridgely of Kansas, would have established a federal licensing scheme for corporations operating in interstate commerce.[149] There followed a series of bills that would have required firms operating in interstate commerce to be federally licensed or incorporated and comply with federal regulatory requirements.[150]

Endorsing the view that the roots of the trust problem lay in the emasculation of state corporate law, President Theodore Roosevelt explicitly tied the power to incorporate to the power to regulate.[151] He achieved a modest step toward direct, federal superintendence of large corporations that operate in interstate commerce through a 1903 act of Congress that created a Bureau of Corporations with limited investigatory powers over corporations.[152] Throughout his administration, Roosevelt continued to press for legislation giving the federal government direct supervisory authority over interstate corporations.[153] He came closest to getting a corporate control bill when, on March 23, 1908, Congressman William Hepburn of the Committee on Interstate Commerce introduced what became known as the Hepburn Bill.[154] At a high level of generality, there were two competing options on the table: a commission model (in line with the Federal Trade Commission model ultimately adopted in 1914) and a federal-incorporation or corporate-registration-and-licensing model.[155] The Roosevelt Administration steered the proposal away from a commission model and toward corporate registration and licensing. Roosevelt himself eventually took over negotiations and pushed for a tough version of the bill that would grant the executive branch significant control over corporations operating in interstate commerce.[156]

148. *See* Herbert Hovenkamp, *Antitrust Policy, Federalism, and the Theory of the Firm: An Historical Perspective*, 59 Antitrust L.J. 75, 77 (1990).

149. Thorelli, *supra* note 119, at 513; Theodore H. Davis, Jr., Note, *Corporate Privileges for the Public Benefit: The Progressive Federal Incorporation Movement and the Modern Regulatory State*, 77 Va. L. Rev. 603, 623–25 (1991).

150. Gabriel Kolko, The Triumph of Conservatism 132–33 (1963).

151. Edmund Morris, Theodore Rex 73 (2001) ("It is no limitation upon property rights or freedom of contract to require that when men receive from government the privilege of doing business under corporate form . . . they shall do so upon absolutely truthful representations. . . . Great corporations exist only because they are created and safeguarded by our institutions; and it is therefore our right and duty to see that they work in harmony with these institutions.").

152. Act of Feb. 14, 1903, ch. 552, § 6, 32 Stat. 825, 827–28 (1903).

153. William Letwin, Law and Economic Policy in America 244–47 (1965).

154. *An Act to Regulate Commerce, Etc.: Hearings on H.R. 19745 in the H.R.*, 60th Cong. 15–17 (1908) (statement of Mr. Low). The story of the Hepburn Bill's initial momentum, languishment, and eventual defeat has been meticulously recounted by Martin Sklar. Martin J. Sklar, The Corporate Reconstruction of American Capitalism, 1890–1916, at 228–85 (1988).

155. *See* Sklar, *supra* note 154, at 228–85, 419–21.

156. *Id.* at 235–36.

The Hepburn Bill—which would have created a regime of federal registration to essentially replace state incorporation—initially attracted significant political support. But, for labor-regulation reasons largely unrelated to corporate regulation,[157] the bill lost traction after the Supreme Court's February 3, 1908, decision in *Loewe v. Lawlor* (the Danbury Hatters' case).[158] President Taft initially supported a federal-registration or incorporation bill, but shifted politically in the direction of a traditional law enforcement model following the Supreme Court's landmark *Standard Oil Co. v. United States*[159] decision.[160]

It was this history—a broad Progressive reaction against failures of state corporate law, political action in the direction of preemptive, federal-corporate legislation, and a subsequent period of conservative retrenchment during the Taft administration—that set the stage for the 1912 presidential election and the two antitrust reform statutes of 1914: the FTC and Clayton Acts.[161] Although Wilson and his antitrust guru, Louis Brandeis, would ultimately reject an incorporation or registration model and opt instead for a commission model, that decision came as the result of protracted contestation—spanning a decade and a half—over how to respond to a failure of state corporate law.[162] Between 1900 and 1914, the central political question concerning the trusts was what mode of federal regulation could effectively address the anticompetitive pathologies created by the liberalization of state corporate law. In contrast with 1890—when the trust problem was framed in terms of market failures that the states had dutifully, but unsuccessfully, attempted to remedy—the conversation leading up to 1914 was framed in terms of political failures occasioned by the race to the bottom in state corporate law.

B. *The FTC, the ICC, and the* Shreveport Rate Case

When Congress took up antitrust reform in 1914, it did so in the shadow of significant legal and regulatory developments concerning the scope of federal preemptive power and the Interstate Commerce Commission. The FTC Act's legislative history abounds with references to the ICC as a prototype for the new Federal Trade Commission. Congressional debates about the ICC and the scope and preemptive effect of the federal commerce power show a Congress deeply interested in the relationship between the

---

157. *Id.* at 204–05, 223, 232–33.

158. 208 U.S. 274 (1908) (upholding application of the Sherman Act to secondary labor boycotts), *superseded by statute*, 15 U.S.C. § 17 (2012).

159. 221 U.S. 1 (1911).

160. Letwin, *supra* note 153, at 252, 266–67.

161. *See* Sklar, *supra* note 154, at 309–23.

162. *See id.* at 325–28; Sidney M. Milkis, *The Federal Trade Commission and Consumer Protection: Regulatory Change and Administrative Pragmatism*, 72 Antitrust L.J. 911, 911–12 (2005).

FTC and state law. The landmark and highly salient *Shreveport Rate Case*,[163] decided on the cusp of the Senate's deliberation over the FTC Act, upheld the ICC's preemptive power over state railroad regulation. The ICC's historical trajectory on the question of state law preemption is particularly relevant to the interpretation of the FTC Act, because the ICC's preemptive power, in significant doubt for over two decades, crystalized just on the verge of the FTC Act's passage. In its immediate historical context, a congressional intent to model the FTC on the ICC fairly suggests a congressional will that the FTC enjoy preemptive power over inconsistent state regulation.

1. The ICC and the *Shreveport Rate Case*

Congress created the Interstate Commerce Commission in 1887 to solve the diametrically opposed problems of hyper-competition and rate discrimination.[164] The originating Act prohibited "every unjust and unreasonable charge."[165] Tasked with investigating alleged violations of the Act, the commission functioned more like a special master for Article III courts than the tribunals of the modern administrative state.[166]

The Supreme Court was initially hostile to the commission's assertion of extensive regulatory powers.[167] Thus, the Court found no authority in the Interstate Commerce Act to allow the ICC to prescribe rates based on its power to determine rate reasonableness.[168] While the commission's findings of fact were, by statute, prima facie evidence in a district court proceeding, the Supreme Court nonetheless determined that ICC fact-finding should be reviewed de novo.[169] The commission had fully endorsed collective ratemaking associations created and managed by the railroads (i.e., cartels), but courts found that such cartels violated the Sherman Act.[170] By 1903, the commission was acutely aware of its limited role in railroad regulation, noting that "[a]t present Commission can investigate and report. It has no

163. Houston, E. & W. Tex. Ry. v. United States (The Shreveport Rate Case), 234 U.S. 342 (1914).

164. *See* George M. Chandler, *The Interstate Commerce Commission—The First Twenty-Five Years*, 16 Transp. L.J. 53, 54–55 (1987). *But see* Randal C. Picker, *The Interstate Commerce Act and the Sherman Act: Playing Railroad Tycoon*, 95 Marq. L. Rev. 1135, 1139–40 (2012) (asserting that the Interstate Commerce Act left unresolved the basic question of whether it intended to encourage competition among railroad carriers). For a background on the state of the railway industry before the Interstate Commerce Act, see generally Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 Yale L.J. 1017 (1988).

165. Interstate Commerce Act of 1887, ch. 104, § 1, 24 Stat. 379.

166. *Id.* § 12.

167. *E.g.*, Cincinnati, New Orleans & Tex. Pac. Ry. Co. v. ICC, 162 U.S. 184, 196 (1896) (concluding that the Interstate Commerce Act did not expressly or impliedly give the Interstate Commerce Commission the power to set railroad rates), *superseded by statute*, Mann-Elkins Act, ch. 309, 36 Stat. 539 (1910).

168. *Id.*

169. ICC v. Ala. Midland Ry., 168 U.S. 144, 175 (1897).

170. Chandler, *supra* note 164, at 57.

power to determine what rate is reasonable, and such orders as it can make have no binding effect."[171]

Congress responded by passing several statutes significantly enhancing the ICC's rulemaking and preemptive authority.[172] The Elkins Act of 1903 required railroads to file rates with the commission.[173] In 1906, Congress legislatively overruled the *Interstate Commerce Commission v. Cincinnati, New Orleans and Texas Pacific Railway* decision[174] and granted the commission the power to prescribe rates that it found unreasonable.[175] The Mann-Akins Act of 1910 strengthened the commission's investigative powers by giving it the authority to enjoin rate changes until the investigation of a rate's reasonableness was complete.[176]

Even while hostile to federal railroad regulation by the ICC, the *Lochner*-era Supreme Court was also skeptical about the assertion of regulatory authority by the states. Even before the passage of the FTC Act, the Court limited state regulation of railroad activity to purely intrastate routes—routes that did not cross state borders.[177] The substantive reasonableness of any state-set rate was held reviewable by a federal court in a due process challenge.[178] After condemning a state-set maximum rate as too low to meet costs and allow for a reasonable rate of return,[179] federal courts faced a flood of substantive challenges to state-established rates.[180]

As the ICC's statutory powers grew to overlap with regulatory decisions by the states, the courts began to develop a preemption doctrine that clarified the respective spheres of federal and state regulatory authority over the railroads.[181] In 1912, the Court found that the Interstate Commerce Act was a "specific action" by Congress "covering the matters which [a North Carolina railroad regulation statute was] attempt[ing] to regulate," so Congress had "taken possession of the field" of railroad-rate regulation.[182] A year later, the Court reaffirmed Congress's preemption power, finding that the

171. 17 ICC Ann. Rep. 17 (1903).

172. *See* Hovenkamp, *supra* note 164, at 1067–68.

173. Elkins Act, ch. 708, § 1, 32 Stat. 847, 847 (1903) (codified as amended at 49 U.S.C. §11903 (2012)).

174. 167 U.S. 479 (1896).

175. Hepburn Act, ch. 3591, § 4, 34 Stat. 584 (1906).

176. Mann-Elkins Act, ch. 309, 36 Stat. 539 (1910).

177. Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557, 575–77 (1886).

178. *See* Chi., Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418 (1890).

179. Smyth v. Ames, 169 U.S. 466 (1898), *overruled by* Fed. Power Comm'n v. Nat. Gas Pipeline Co., 315 U.S. 575 (1942).

180. Hovenkamp, *supra* note 164, at 1059.

181. Stephen A. Gardbaum, *The Nature of Preemption*, 79 Cornell L. Rev. 767, 803–04 (1994).

182. S. Ry. Co. v. Reid, 222 U.S. 424, 437 (1912).

Hepburn Act, "from the moment that Congress" enacted it, rendered "impotent" those state regulations that governed the duty of common carriers to regularly furnish railcars.[183]

By 1914—specifically, in the months running up to congressional deliberation over the FTC and Clayton Acts—two significant questions relevant to the ICC's authority remained open: How far into *intrastate* commerce could Congress venture, and to what extent could Congress delegate its preemptive authority to a regulatory agency like the ICC? These questions were answered on June 8, 1914, when the Court issued its opinion in *Houston, East and West Texas Railway Co. v. United States*, more commonly known as the *Shreveport Rate Case*.[184]

The Court held that the ICC could force the Texas Railroad Commission to comply with a rate-setting order, even for purely intrastate rates.[185] Congress's Commerce Clause power allowed it to regulate purely intrastate commercial activity if that activity had "such close and substantial relation to" interstate commerce.[186] By virtue of the Supremacy Clause, "it is Congress, and not the State, that is entitled to prescribe the final and dominant rule."[187]

The Court then examined whether the ICC was acting within its delegated power in finding Texas's rate discrimination unreasonable and affirmatively setting reasonable rates. The Court recognized that Congress's grant of authority in Section 3 of the Interstate Commerce Act was "sweeping enough to embrace all the discriminations" which Congress could condemn, and the ICC's actions were fully consistent with the proffered purpose of the Act, which was to prevent unjust discrimination in transportation—the "paramount evil" of commerce.[188] The Court then observed a potential limit on the ICC's power in Section 1 of the Act (which was reenacted as part of the Hepburn Amendment): "the provisions of this act shall not" apply to transportation "wholly within one State."[189]

Building on a construction of the Section 1 limitation it had previously discussed in dicta,[190] the Court concluded that the ICC's actions were proper.[191] It reasoned that "[t]he powers conferred by the [A]ct are not thereby limited where interstate commerce itself is involved," but extend to situations where "unjust discrimination against interstate trade arises from the relation of intrastate to interstate rates as maintained by . . . carrier[s]

183. Chi., Rock Island & Pac. Ry. Co. v. Hardwick Farmers Elevator Co., 226 U.S. 426, 435 (1913).

184. 234 U.S. 342 (1914).

185. *See Shreveport Rate Case*, 234 U.S. at 353–54.

186. *Id.* at 351.

187. *Id.* at 351–52.

188. *Id.* at 355–56 (quoting S. Rep. No. 49–46, pt. 1, at 215 (1886)).

189. *Id.* at 356 (quoting Interstate Commerce Act of 1887, ch. 104, § 1, 24 Stat. 379 (1887)).

190. *See* Simpson v. Shepard (Minnesota Rate Cases), 230 U.S. 352, 419–20 (1913).

191. *See Shreveport Rate Case*, 234 U.S. at 357–59.

subject to the [A]ct."[192] Circling back to preemption, the Court closed the opinion by declaring that, "where the interests of the freedom of interstate commerce are involved, the judgment of Congress and of the agencies it lawfully establishes must control."[193]

The benefit of hindsight has drawn into doubt the decision's long-term influence on Commerce Clause jurisprudence leading up to the switch-in-time jurisprudence of the New Deal.[194] Nonetheless, the decision was popularly received as a landmark assertion of federal supremacy and preemption. The *Washington Post* ran a headline proclaiming that the ICC was "Above State Laws."[195] The *New York World* described the opinion as one supporting the "unrestricted power of the Interstate Commerce Commission over interstate commerce."[196] Many reports of the decision keyed in on Justice Hughes's assertion that "it was recognized from the beginning that the Nation could not prosper if interstate and foreign trade were governed by many masters."[197] The *New York Sun* reached out to members of the ICC, who emphasized the importance of the decision and noted that its effect "will be to concentrate authority in the Interstate Commerce Commission and reduce to a minimum the power of the State commissions."[198]

Whatever the long-term influence of the *Shreveport Rate Case*, speaking about the ICC in the latter half of 1914 necessarily meant talking about the fact that Congress could regulate intrastate commercial activity, that Congress could preempt state regulation over the same conduct while doing so, and that Congress could fully delegate this regulatory authority to its agencies.

---

192. *Id.* at 358.

193. *Id.* at 360.

194. *See* Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. Chi. L. Rev. 1089, 1130–31 (2000) (suggesting that *Shreveport* was inherently limited by the *Lochner* era's due process analysis and concluding that "[t]he due process context of *Shreveport* thus severely constrained the range of its application to intrastate matters. Here again, unless we restore *Shreveport* to its due process environment, we cannot appreciate its meaning. For if you Shepardize *Shreveport*, you will find that every case following it from its announcement in 1914 up to the mid-1930s involved regulation of a business affected with a public interest: railroads"). *But see* Richard D. Friedman, *The Sometimes-Bumpy Stream of Commerce Clause Doctrine*, 55 Ark. L. Rev. 981, 988 n.25 (2003) (recognizing that Justice Hughes's majority opinion "did not refer to [the Court's due process] standards" and further recognizing that "the applicability of *Shreveport* was not limited in theory" to industries "affected with a public interest," and that "when it did come to force [in 1937], its applicability did not depend on the overthrow . . . of the 'affected with the public interest' doctrine").

195. *Above State Laws*, Wash. Post, June 9, 1914, at 1.

196. *Highest Court Gives U.S. Power Over Railroad*, Evening World (N.Y.), June 8, 1914, at 2.

197. *Shreveport Rate Case*, 234 U.S. at 360; *Highest Court Gives U.S. Power Over Railroad*, *supra* note 196, at 2; *Nation Dominant Over State Rates*, N.Y. Times, June 9, 1914, at 4.

198. *U.S. May Control Railway Financing*, N.Y. Sun, June 10, 1914, at 4.

2. The Federal Trade Commission and the ICC

Legislation creating a new antitrust commission was already pending in Congress when the *Shreveport Rate Case* came down, but the legislative movements that shaped the ultimate form of the new commission occurred immediately in the wake of the Supreme Court's decision. Five days after the *Shreveport Rate Case* was decided, Senator Francis G. Newlands introduced to the Senate a bill to create a Federal Trade Commission.[199] Senator Newlands's bill was a substitute for a bill passed by the House, which had been overhauled by the Senate Committee on Interstate Commerce. The overhaul, according to Senator Newlands, was designed to "make the trade commission as useful and effective in building up a system of administrative law regarding trade as the Interstate Commerce Commission has been in matters of transportation."[200] The legislative history of the FTC—largely contained within a two-month Senate debate on the Newlands bill—evinces Congress's vision for an FTC largely modeled on the ICC.

The prelude to the Newlands bill began prior to the *Shreveport Rate Case* decision on April 14, 1914, when the House Committee on Interstate and Foreign Commerce recommended that Congress pass H.R. 15613, a bill to create an Interstate Trade Commission.[201] Seeking "the preservation of proper competitive conditions in our great interstate commerce,"[202] the bill created an investigative body "concerned with the maintenance of proper supervisory relations of the Federal Government over industrial corporations engaged in interstate commerce."[203] The House bill thus echoed the corporate reform themes, grounded in the failure of state corporate law, that had prevailed in Washington since the turn of the century.

From the start, the FTC (or the ITC, in the language of H.R. 15613) was designed in the shadow of the Interstate Commerce Commission. The House Committee's recommendation recognized the "singular success" of the ICC,[204] and the scope of the commission's investigatory powers were often discussed with reference to those of the ICC.[205] When the bill passed the House on June 5, it contained explicit references to the ICC and its investigatory powers as a model for the new trade commission.[206]

However, as Senator Newlands would later complain, H.R. 15613 contemplated insufficient powers for the new commission to be effective in reforming the practices of the great industrial corporations that had grown up

199. 51 Cong. Rec. 10,376–77 (1914) (statement of Sen. Newlands).

200. *Id.* at 10,376.

201. H.R. Rep. No. 63–533, at 1 (1914).

202. *Id.* at 2.

203. *Id.* at 8. The commission would also subsume the former Bureau of Corporations and its embrace its "broadest powers." *Id.* at 2.

204. *Id.* at 8.

205. *Id.* at 7 ("The powers of investigation conferred upon the commission in the reported bill are certainly broader than are those of the Interstate Commerce Commission . . . .").

206. 51 Cong. Rec. 14,921–22 (1914) (quoting H.R. 15613, 63rd Cong. § 16 (1914)).

since the passage of the Sherman Act.[207] The ITC subsumed the powers of the Bureau of Corporations and was given investigative powers "certainly broader than those of the [ICC]."[208] The House Report on the bill, created by the Committee on Interstate and Foreign Commerce and introduced by Representative Covington, teemed with references to the ITC's proposed powers of investigation: the information obtained could help Congress in creating new commerce legislation, or help the Department of Justice with their assault on the trusts.[209] But the report went out of its way to disclaim any power similar to the ICC's ability to evaluate and set reasonable rates,[210] making the distinction fairly explicit.[211] The proposed version of the trade commission thus resembled the ICC prior to the reforms of the previous decade, which had transformed the agency from an investigatory body to a preemptive regulator.

On June 13, 1914, less than a week after the decision in the *Shreveport Rate Case*, the Newlands bill issued from the Senate Committee on Interstate Commerce and substituted the House bill with a thoroughly overhauled version of the legislation.[212] Among the many changes that Senator Newlands (the bill's primary author) identified to the Senate on that date was the power to, "after hearing, . . . prevent unfair competition by order enforceable in the courts."[213] This power, introduced in Section 5 of the bill, was among the Senate's additions intended to make the bill as "useful and effective in building up a system of administrative law regarding trade as the [ICC had] been in matters of transportation."[214]

Federalism concerns—specifically about the anticompetitive effects of state corporate liberalization and the weakness of the federal response to date—remained front and center throughout the congressional deliberations on the bill. Supporters of the bill argued that the federal courts had been far too weak in response to the competitive problems created by state corporate law. In a lengthy speech, Senator Lewis decried the federal courts as offering a "safe haven" for business interests.[215] Using examples from state regulation

207. *Id.* at 10,376–77.

208. H.R. Rep. No. 63–533, at 7.

209. *Id.* at 5–6.

210. *Id.* at 7–8 ("There has been no attempt to deal with the question of maintenance of fixed prices. The commission has been given no power to pass orders in any way regulating production. It has not been clothed with authority to make a declaration as to the innocuousness of any particular corporation or agreement . . . .").

211. *Id.* at 7–8 ("Having regard for the singular success which the Interstate Commerce Commission has had upon the relation of the railroads to the public, *independently of the direct power it has exercised to regulate rates and practices*, it would seem that the country may rightfully feel that the interstate trade commission will perform services that will be of inestimable advantage to the business and the future of the country." (emphasis added)).

212. 51 Cong. Rec. 10,376–78 (statement of Sen. Newlands).

213. *Id.* at 10,376.

214. *Id.* at 10,376–77.

215. *Id.* at 11,303 (statement of Sen. Lewis).

of railroad rates ("instances of usurpation"),[216] including regulation relating to the *Minnesota Rate Cases*,[217] he argued that "business institutions" had used federal courts to "paralyz[e]" sovereign state governments.[218] He saw the FTC as a means to control these interests "to the end that democratic institutions may still survive."[219] Senator Thomas, who believed the bill might go too far in creating a commission, nonetheless asserted that monopolies are "the outgrowth of State legislation" and that it is Congress's duty to protect "powerless" states from pernicious, pro-monopoly legislation of other states.[220] The June 13 Senate Conference Report extolled the "value of such administrative oversight and control" to the banking and transportation industries.[221] Senator Newlands contrasted the "dignity, precision, consecutiveness, and power" of the ICC with the limited efforts by the Attorney General's Office in enforcing antitrust laws, and he concluded that the former was comparatively superior.[222]

The solution proposed by the Senate and eventually accepted by the House was to create an ICC for the general administration of commerce.[223] In its final form, the bill lost the explicit references to the ICC;[224] both the power of investigation (originally in the House version) and the Section 5 power were explained without reference to the ICC. The Senate Report on the bill, in discussing the FTC's "extensive powers of inquiry," recognized that these powers were "practically the same as those now granted to the [ICC] or the Bureau of Corporations."[225] The references to the ICC were removed, apparently, due to a preference by the House managers to have powers provided expressly, instead of by reference.[226] The Senate's major contribution to the bill—the Section 5 power—was introduced to the House by Representative Covington as granting the FTC a power "somewhat analogous" to the power of the ICC.[227]

When supporters debated Section 5, they argued that the section was constitutional because the power it conferred upon the FTC was be rooted in the same power as the ICC, which had been upheld by the Supreme Court "wherever [they] have passed upon it"[228]—including days before the start of the Senate debate in the *Shreveport Rate Case*. Senator Newlands summarized his position on Section 5 in an exchange with Senator Kern:

216. *Id.*
217. Simpson v. Shepard (Minnesota Rate Cases), 230 U.S. 352 (1913).
218. 51 Cong. Rec. 11,303 (statement of Sen. Lewis).
219. *Id.* at 11,307.
220. *Id.* at 12,868–69 (statement of Sen. Thomas).
221. S. Rep. No. 63–597, at 9 (1914).
222. 51 Cong. Rec. 12,031 (statement of Sen. Newlands).
223. *See id.* at 14,943 (recording votes for the House's adoption of the Senate bill).
224. *See id.* at 14,926 (statement by Rep. Covington).
225. S. Rep. No. 63–597, at 13.
226. 51 Cong. Rec. 14,926 (statement of Rep. Covington).
227. *Id.* at 14,928.
228. *Id.* at 11,180 (statement of Sen. Hollis).

> Mr. Newlands. . . . Briefly speaking, the only contention which can be made regarding the constitutionality of section 5 is that it is a delegation of legislative power; that Congress, instead of defining explicitly the offense that is unlawful, has left it to a commission to determine what acts come within the general phrase, and has thereby turned over to it one of its powers of legislation.
>
> Mr. Kern. The same as in the case of the Interstate Commerce Commission.
>
> Mr. Newlands: Yes.[229]

On June 27, Senator Robinson, a supporter of the bill, made a similar claim:

> Mr. President, the authority given in this bill to the trade commission is analogous to the authority already conferred by law on the Interstate Commerce Commission as to the establishment of reasonable rates and the prevention of discrimination between shippers. In the cases that I have cited that authority has been upheld as not constituting a[n unconstitutional] delegation of legislative power or authority.[230]

Throughout the congressional deliberations, supporters and critics of the bill held up the ICC as a model of what to expect from the FTC.[231]

Although FTC preemption of state laws was seldom discussed directly, the legislative history reveals some additional glimpses of a congressional assumption that the FTC would enjoy preemptive powers. The clearest example arose in a July 30 colloquy between Senator William Chilton of West Virginia and Senator Albert Cummins of Iowa regarding the effects of the proposed trade commission and the Clayton Act on property interests created by state law. Senator Chilton, a skeptic of the FTC bill, pressed Senator Cummins, a supporter, on the constitutional difficulties the bill might create if it resulted in the confiscation of corporate property.[232] In particular, Senator Chilton expressed a concern about the effect of potential retrospective rulings that one corporation's ownership of another's stock amounted to an

229. *Id.* at 11,112 (statements of Sen. Newlands and Sen. Kern). *But see id.* at 12,213 (statement of Sen. Sterling) ("I think it is clear that the powers conferred upon the Interstate Commerce Commission are not analogous to the powers proposed to be conferred by this bill on the trade commission.").

230. *Id.* at 11,231. But, Senator Robinson did not explicitly mention the *Shreveport Rates Case*, and instead focused on other cases relating to the scope of Congress's authority to delegate regulatory power (i.e., nondelegation doctrine jurisprudence). *Id.*

231. In some instances, members of Congress drew distinctions between the ICC and the FTC, but without undermining assumptions about the preemptive scope of the FTC's powers. In assuaging the concerns of many senators who saw the language of Section 5 as imprecise, if not impermissibly vague, Senator Hollis contrasted the ICC's power to determine whether acts are "unjust or unreasonable," *id.* at 11,180 (quoting Interstate Commerce Act), with the FTC's mandate to determine whether a party has engaged in competition that is "unfair." *Id.* Representative Covington suggested an additional distinction—the ICC had affirmative rate-setting authority, whereas the FTC only had the authority to negate unfair methods of competition. *See id.* at 14,791–92 (statement of Sen. Burton).

232. *Id.* at 12,988–90.

unfair trade practice.[233] Chilton pointed out that his home "State of West Virginia under its laws specifically authorizes one corporation to hold the stock of another."[234] He expressed doubt that Congress would have the constitutional authority to prohibit holding companies or corporate stock ownership if such corporate structures were permitted by state law.[235]

Senator Cummins responded unequivocally that Congress would have the constitutional authority to declare the state holding-company allowance preempted by federal law:

> I can not believe that there is any real doubt with regard to the power of Congress to prescribe a rule of that character. Otherwise, we have no power to regulate commerce; otherwise, our power to regulate commerce is subordinate to the legislation and sovereignty of the States. The Senator from West Virginia can not doubt our right to say that no monopoly shall exist, even if the law of a State permitted monopoly.[236]

Reflecting the then-prevailing scope of the federal commerce power, Senator Cummins went on to make clear that the preemptive power he envisioned did not extend to purely intrastate matters.[237] But he saw the supremacy of federal law over anticompetitive state regulations in interstate commerce as "so certain that it must be accepted as a fundamental proposition."[238] Senator Charles Thomas of Colorado then chimed in that this was "precisely the course which [he thought] this legislation should take."[239]

We do not wish to overstate what the FTC Act's legislative history shows on the issue of commission preemption of anticompetitive state regulation. Certainly, the sorts of questions raised in *Parker* and its progeny were not squarely raised in the 1914 congressional debates. Nonetheless, unlike in 1890, federalism and preemption issues were very much in the air in 1914—as was a decided congressional preference for a strong federal hand on the reigns of the interstate economy. Instead of overseeing national incorporation of businesses, the FTC would offer national regulation of unfair methods of competition, flexing administrative muscle not unlike the then-champion of federal supremacy: the Interstate Commerce Commission.

III. Differentiation and the *Parker* Doctrine

Part II explored the application of the *Parker* doctrine to the FTC on the terms enunciated in *Parker* itself—statutory backdrop and legislative history. It remains to consider the question from *Parker*'s unspoken but widely assumed perspective—its reaction to *Lochner*. To the extent that *Parker* and its doctrinal progeny reflect a federal judicial commitment to avoid second-

233. *Id.* at 12,989.

234. *Id.* at 12,988 (statement of Sen. Chilton).

235. *Id.* at 12,989 (statement of Sen. Cummins).

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* (statement of Sen. Thomas).

guessing state economic decisions and to play only a limited role in reinforcing democratic process, do those concerns apply with equal measure to preemptive enforcement by a federal agency, rather than a federal court?[240] In other words, would the FTC be "Lochnerizing" by substantively reviewing state regulatory regimes that suppress competition? And would the FTC's distinctive institutional position alleviate concerns about construing the federal antitrust laws as a broad, preemptive mandate?

A. *The Ghosts of* Lochner *and the FTC*

Whether allowing the FTC a superior-preemptive function with respect to anticompetitive state regulation would entail a return to subversive Lochnerism depends on what one views as the objectionable core of *Lochner*. As Cass Sunstein has noted, Lochnerism can be understood in two different ways: either as a judicial usurpation of democratic functions entrusted to other branches of government, or as an inflexible commitment to certain formal categories—such as common law baselines, the existing distribution of wealth and entitlements, and an arbitrary distinction between government action and inaction.[241] Although the FTC would be differently situated from federal judicial review of state law on either of these interpretations of *Lochner*, the concerns would not vanish altogether with heightened FTC preemptive powers.

As to the first category, the concern over Lochnerism and antitrust relates to the anti-democratic potential for federal judges to replace state legislative decisions with their own economic or regulatory preferences. Such concerns over judicial usurpation of democratic processes might have less force if the federal entity entertaining a preemptive decision were an administrative, rather than a judicial, body. Historically, at least, the political coalitions that opposed economic substantive due process during the Progressive and New Deal eras were comfortable with delegating extensive regulatory powers to federal administrative agencies.[242] Similarly, as William Eskridege and Gary Peller have noted, the legal process school rejected Lochnerism because of the political character of judicial activism by unelected judges, even while supporting activism by institutions, like the FTC, that are—at least in theory—more democratically accountable.[243]

240. *See* Susan A. Creighton & Thomas G. Krattenmaker, *Appropriate Role(s) for Section 5*, Antitrust Source, Feb. 2009, at 6 (recognizing that the demise of *Lochner* means that states have latitude in adopting anticompetitive regulations, but suggesting that enforcement of Section 5 of the FTC Act might be an appropriate antidote in egregious cases).

241. Cass R. Sunstein, Lochner*'s Legacy*, 87 Colum. L. Rev. 873, 874–75 (1987).

242. *Compare, e.g.*, Justin O'Brien, The Triumph, Tragedy and Lost Legacy of James M. Landis 73 (2014) *with* James M. Landis, The Administrative Process 47–88 (1938).

243. William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 Mich. L. Rev. 707, 723 (1991); *see also* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 437 (1987) (explaining the growth of the twentieth century administrative state as a reaction to Lochnerism). On the democratic accountability of the FTC, see Daniel A. Crane, *Debunking* Humphrey's Executor,

Whether the FTC is sufficiently democratic to assuage concerns about its checking of state regulations depends on one's view of the agency's functional character. The historical justification for the agency's technocratic independence from the executive branch rested on the agency's apolitical, expert character rather than its democratic responsiveness.[244] Nonetheless, work in social science has shown that the agency is, in fact, politically responsive to the will of Congress, and, in particular, to the committees with oversight authority over the agency.[245]

Even if the commission itself were considered sufficiently politically accountable to meet the first objection to *Lochner*, having an administrative agency, rather than a federal court, substantively review anticompetitive state regulation for conformity with a federal norm would not entirely alleviate concerns about a potentially activist judiciary. The federal appellate courts would still exercise judicial review over commission decisions,[246] meaning the courts would still potentially make substantive judgments about state regulatory decisions, albeit indirectly. Outside the context of state-action immunity, federal courts reviewing administrative agency decision are sometimes accused of Lochnerizing when they substitute their own regulatory preferences or economic perspectives for those of the agency.[247] The degree to which this concern would remain poignant in a world of super-preemption would depend, to a large degree, on the principles and attitudes federal appellate courts brought to the review of FTC preemption decisions.

As to the second understanding of *Lochner*—that it entrenches anti-redistributionist and laissez faire baselines—the question of FTC super-preemption is also mixed. On the one hand, a heightened preemptive power for the FTC in competition matters would have a decidedly deregulatory effect. Unlike its general antitrust enforcement authority—with which the commission can intervene to block competitive distortions created by private actors—the commission's preemptive power over state law could lead to dismantling state regulatory controls on business behavior. It should be no surprise that some of the strongest critics of the *Parker* immunity doctrine

83 Geo. Wash. L. Rev. 1835 (2015) [hereinafter Crane, *Debunking* Humphrey's Executor] (tracking the FTC's history in light of its original statutory design).

244. Crane, *Debunking* Humphrey's Executor, *supra* note 243, at 1836.

245. *Id.* at 1838, 1853; *see also* William E. Kovacic, *Congress and the Federal Trade Commission*, 57 Antitrust L.J. 869, 881–88 (1989) (describing the principal-agent model of FTC-congressional relations and emphasizing Congress's ability to exert control over the agency).

246. Appeals from FTC decisions may be lodged in any federal appellate court where the relevant method of competition was used, or where the business operates. 15 U.S.C. § 45(c) (2012). Commission determinations of fact are reviewed for substantial evidence, and determinations of law are reviewed *de novo*. McWane, Inc. v. FTC, 783 F.3d 814, 824–25 (11th Cir. 2015).

247. *See, e.g.*, Boise Cascade Corp. v. FTC, 837 F.2d 1127, 1163 (D.C. Cir. 1988) (Mikva, J., dissenting) (accusing the majority of substituting its own economic preferences with respect to price discrimination for those of the FTC, in a manner reminiscent of *Lochner*); Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. Chi. L. Rev. 653, 666–67 (1985) (expounding the Lochnerian view of the purposes of judicial review).

have been aligned with the anti-regulatory Chicago School,[248] nor that the recent resurgence in FTC enforcement against anticompetitive state regulations occurred during a generally pro-business Republican administration.[249]

On the other hand, the FTC's preemptive agenda would be unlikely to focus on entrenching established economic interests and, hence, preserving the status quo in the distribution of property and income. To the contrary, most anticompetitive state regulations have the effect of entrenching economic incumbents and denying entry to new firms and technologies. Although deregulatory, a superior-preemptive FTC enforcement agenda would hardly reflect the sort of legal and economic stultification concerns that Sunstein expresses about *Lochner*.[250]

In sum, transferring the substantive review of anticompetitive state laws from the courts to the FTC would not entirely answer the anti-Lochnerian concerns that underlay the *Parker* opinion, and which continue to manifest themselves in the development of the state-action immunity doctrine. The degree of concern over substantive due process resurrection one may feel depends in large measure on how one defines the objectionable core of *Lochner*—that is, whether one believes that agency supervision of state regulation bears similar risks to judicial supervision, and how FTC superior-preemptive authority would cash out operationally. Part IV provides some preliminary thoughts on how FTC superior preemption might work in practice, and thus contributes initial fodder for analysis on this latter question.

B. *Institutional Constraints and Capacities*

Beyond the core concerns about the anti-democratic and pro-laissez faire tendencies of economic substantive due process, there lurk questions about institutional constraints and capacities. Allowing the Sherman Act to become an aggressive anti-regulatory charter would pose considerable risks of unwieldy and excessive challenges to state regulatory regimes and state sovereignty, since the Sherman Act is privately enforceable.[251] Further, the

248. *See, e.g.*, Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & Econ. 23 (1983), *reprinted in* Competition Laws in Conflict 189 (Richard A. Epstein & Michael S. Greve eds., 2004) (arguing for cost externalization modification to *Parker* immunity); Richard A. Epstein & Michael S. Greve, *Introduction*, *in* Competition Laws in Conflict, *supra*, at 1, 13 (describing the *Parker* doctrine as enabling mutual exploitation of citizens by the states).

249. *See* Timothy J. Muris, Chairman, FTC, Remarks at the Fordham Annual Conference on International Antitrust Law & Policy (Oct. 24, 2003), https://www.ftc.gov/sites/default/files/documents/public_statements/state-intervention/state-action-u.s.perspective/fordham031024.pdf [https://perma.cc/UFL7-ZMN2] (outlining the FTC's positive program of attacking state restraints on competition); Melissa Lipman, *A Brief History of the FTC's State Action Battles*, Law360 (Feb. 26, 2015, 8:56 PM), http://www.law360.com/articles/625576/a-brief-history-of-the-ftc-s-state-action-battles [https://perma.cc/VQD3-YAXG] (describing a task force created in 2001 by Republican FTC Chair Tim Muris, which had a mandate to study *Parker* immunity issues with an eye to bringing more pro-competition cases).

250. *See* Sunstein, *supra* note 241, at 874–83.

251. *See* 15 U.S.C. § 15(a) (2012).

federal courts may lack the expertise and fact-finding processes to make well-informed decisions over whether state regulatory decisions reflect exercises of police power in the public interest, or, rather, naked pork-barreling for the benefit of concentrated economic interests. On these scores, FTC enforcement under Section 5 of the FTC Act enjoys a considerable advantage over the Sherman Act.

First, Section 5 of the FTC Act is enforceable only by the FTC, not by private plaintiffs.[252] Superior preemption under Section 5 would not lead to a flood of private challenges against state regulations, nor would it injure state interests by forcing the states to constantly defend anti-regulatory actions by private interests. (Recall that *Parker* itself involved a private challenge to state law, as have many of the important state-action immunity cases since).[253] Rather, preemption of state law would depend on an administrative decision by a majority of the FTC commissioners to bring an action or otherwise declare a state law preempted. Preemption would not flow directly from the statute, but from a decision of the FTC to enforce the statute in a particular context. The burden of the intrusion on federalism interests and state sovereignty would therefore be considerably lower than if the Sherman Act were read to directly preempt anticompetitive state laws, permitting private plaintiffs to seek invalidation of state laws whenever the laws infringed on competition.

Second, and relatedly, the FTC enjoys a much greater capacity to evaluate the range of competing interests entailed by state regulations than does a federal court. Not only does the commission employ a large staff of expert economists,[254] but it wields broad investigatory powers to investigate trade conditions through mandatory processes such as document requests and depositions.[255] The FTC already serves the states in a consultative capacity, giving advice on proposed legislation and engaging in competition advocacy by issuing reports on various competition issues or intervening as amicus curiae in litigation.[256] Unlike generalist federal courts, the FTC has the capacity to study the competitive effects and justifications for state regulatory

252. *Id.* § 45(a)(2). While some states permit private suits under their own mini–FTC Acts, such suits are limited to circumstances arising in each such state. Steven J. Cole, *State Enforcement Efforts Directed Against Unfair or Deceptive Practices*, 56 Antitrust L.J. 125, 126–27 (1987).

253. *See, e.g.*, City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365 (1991); Cmty. Commc'ns. Co. v. City of Boulder, 455 U.S. 40 (1982); Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

254. The FTC's Bureau of Economics employs approximately 80 full-time economists. *Bureau of Economics Biographies*, FTC, https://www.ftc.gov/about-ftc/bureaus-offices/bureau-economics/biographies [https://perma.cc/8ZH3-GGBP].

255. 15 U.S.C. § 46 (2012).

256. *Advocacy Filings*, FTC, https://www.ftc.gov/policy/advocacy/advocacy-filings [https://perma.cc/49U4-N9UK] ("When government bodies and other organizations consider cases or policy decisions that affect consumers or competition, the FTC may offer insight and expertise to decision makers by filing an advocacy letter.").

schemes, consult formally or informally with state officials and other interested parties, and bring to bear its economic expertise in mediating competing claims about the effects of regulations on consumers or other interests.

In practice, the texture of federal preemption of anticompetitive state laws would feel quite different if the FTC, rather than a federal court, were the primary decisionmaker. With FTC preemption, challenges would be fewer, built on a comprehensive pre-litigation record, and benefited by the comparative advantage that the FTC enjoys over both state legislatures and federal courts in economic and consumer-protection matters.

IV. FTC Enforcement in a World without *Parker* Constraints

This Article has developed an argument from legislative history, historical context, and institutional capacity for according the FTC a preemptive capacity superior to the representation-reinforcement approach reflected in the Sherman Act doctrine. The ultimate appeal of any such doctrinal shift would depend significantly on what sort of preemptive role the commission might play with respect to anticompetitive state regulation. The representation-reinforcement paradigm—insisting as it does on state political accountability, but not substantively scrutinizing the regulatory decision—exists on a spectrum of possible modes of engagement between state and federal law. Application of some of these modes to FTC superior preemption would involve a considerably more drastic realignment of state and federal power and a considerably greater aggrandizement of FTC powers than others.

Any plausible theory of superior preemption would need to avoid rendering the FTC Act to condemn every state regulatory scheme that reduces competition. As Frank Easterbrook has noted, regulation almost always displaces competition,[257] but it would be manifestly infeasible—not to mention fatal to the thesis of this Article—to hold the FTC Act preemptive of all statutes with anticompetitive effects. Rather, superior preemption would mean a firmer preemptive hand than the current *Midcal* representation-reinforcement regime, but would still need to allow ample room for pursuit of state regulatory interests other than pure consumer-welfare maximization—the commonly assumed goal of the FTC Act.[258] Otherwise, a wide variety of longstanding state regulations designed to pursue legitimate social and economic objectives could be in jeopardy.

The superior-preemption doctrine might develop in part along categorical lines—such as by prohibiting the externalization of large costs on consumers outside the relevant political jurisdiction or rejecting certain classes of state regulation as categorically incompatible with federal antitrust law. However, much of the work would probably be done on a case-specific basis under some pre-established analytical framework. This final Part provides a

---

257. Easterbrook, *supra* note 248, at 189.

258. The FTC describes its mission as "protecting America's consumers." FTC, https://www.ftc.gov/ [https://perma.cc/VSK9-AX7E].

framing perspective on three possible analytical approaches a superior-preemptive scheme might employ, independently or in some combination.

A. *Cost-Benefit Analysis*

The core of modern antitrust analysis—applicable in all but those cases ruled by principles of categorical legality or illegality—is an open-ended balancing test known as the rule of reason.[259] Rule-of-reason analysis ultimately asks whether the restraint on competition is welfare-enhancing or welfare-reducing.[260] It is such a familiar default form of analysis for antitrust institutions, that it would seem a reflexive reference point for an enhanced preemption regime. Rule-of-reason analysis is also a form of the cost-benefit analysis familiar from regulatory review of administrative agency decisions.[261] One plausible instantiation of superior preemption would be for the FTC to conduct an OIRA-like cost-benefit review of state laws displacing competition.[262] Laws would be preempted if their anticompetitive effects outweighed any legitimate state regulatory purposes.

Despite the appeal of some cost-benefit review of state laws suppressing competition, a full rule-of-reason-type approach for FTC superior preemption is fraught with risk. The FTC is a competition and consumer agency—it excels at analyzing the benefits and harms to competition and consumers from market behavior. But it has no comparative advantage or political legitimacy to measure or balance other kinds of state interests, such as the state's revenue-raising, social and moral, or health, hygiene, and safety interests.

Consider, for example, whether a state law restricting direct shipments of wine to consumers could pass rule-of-reason analysis.[263] The FTC would have little difficulty in concluding, as it has already done, that such laws reduce competition and increase prices to consumers.[264] But how would the commission assess a state's countervailing interests in controlling access to wine by minors, or limiting the sale of wine to licensed retail outlets, which could be more effectively monitored by the state? Or what if a state made a deliberate regulatory decision to suppress competition for wine distribution

259. 7 Areeda & Hovenkamp, *supra* note 94, ¶ 1502.

260. *See id.*

261. *See* Robert H. Frank & Cass R. Sunstein, *Cost-Benefit Analysis and Relative Position*, 68 U. Chi. L. Rev. 323, 323–24 (2001) (describing the widespread use of cost-benefit analysis in the modern administrative state).

262. *See* Daniel A. Farber, *Rethinking the Role of Cost-Benefit Analysis*, 76 U. Chi. L. Rev. 1355, 1361–62 (2009) (describing the historic centralization of cost-benefit analysis in the Office of Management and Budget's Office of Information and Regulatory Affairs).

263. *See, e.g.*, Granholm v. Heald, 544 U.S. 460, 493 (2005) (invalidating on constitutional grounds a Michigan statute prohibiting out-of-state direct wine shipments, but permitting in-state shipments).

264. FTC, Possible Anticompetitive Barriers to E–Commerce: Wine 5–7 (2003), http:// www.ftc.gov/ sites/default/files/documents/advocacy_documents/ftc-staff-report-concerning-possible-anticompetitive-barriers-e-commerce-wine/winereport2.pdf [https://perma.cc/67SV-A5QP].

in order to effectively impose a Pigovian tax, and thereby decrease wine consumption for sumptuary reasons? Antitrust courts have long resisted allowing "non-economic" justifications of these kinds to enter rule-of-reason analysis because they are not compatible with the sorts of economic-efficiency assumptions in which antitrust institutions trade.[265]

To be sure, circumstances could arise where a preemption analysis might soundly turn on cost-benefit analysis—particularly where the state statute was directly and uniquely concerned with competitive regulation, and, therefore, squarely within the zone of the FTC's expertise. As a general working principle, however, cost-benefit analysis seems a poor candidate for FTC superior preemption.

B. *Heightened Means-Ends Rationality*

A second potential model of superior-preemptive FTC review might involve something akin to heightened constitutional scrutiny—whether "intermediate" or "strict"—of state regulations that substantially burden competition. These familiar forms of means-ends rationality analysis—used, for example, with respect to content-neutral speech restrictions and gender classifications—typically require the challenged state regulation to satisfy a two-part test: (1) that the state action serves some compelling or at least important state interest; and (2) that it is narrowly tailored to meet the state's interest.[266] Such tests can be phrased in varying degrees of strictness (i.e., "compelling" or merely "important"), reflecting the degree of scrutiny the judiciary will impose on the state action.[267]

Translating this test into the competition context, the FTC might review state regulations that significantly burden competition by asking whether the restraint is justified by an important sovereign function of the state. If it is supported by a sovereign interest, the commission would then ask whether the restraint is overbroad in meeting the state's interest. Such an exercise would resemble versions of the rule of reason suggested by some courts and commentators, where a privately imposed anticompetitive restraint should be upheld so long as it serves some legitimate procompetitive interest and is reasonably well tailored to that end—without balancing the procompetitive

265. *See* Daniel A. Crane, *Antitrust and Wealth Inequality*, 101 Cornell L. Rev. 1171, 1226–28 (2016).

266. Erwin Chemerinsky, Constitutional Law: Principles and Policies 566–67 (5th ed. 2015). Means-ends tests are ubiquitous in constitutional analysis. The EU's means-ends test is often called a "proportionality" test, consistent with the general principle of proportionality in EU jurisprudence. Damien Chalmers et al., European Union Law 367–70 (2d ed. 2010).

267. *Compare* Grutter v. Bollinger, 539 U.S. 306, 327 (2003) (stating that a compelling interest is required for racial classification), *with* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189–90 (1997) (stating that content-neutral speech restrictions must serve an important state interest).

and anticompetitive effects.[268] Compared to open-ended cost-benefit analysis, such an inquiry would be less intrusive of state sovereignty and less prone to moving the FTC beyond its zone of comparative institutional advantage.

Outside the United States, there are precedents for such an analytical framework in which an agency reviews anticompetitive state regulations. Under current European Union law, the European Commission is directed to answer the questions that *Parker* and its progeny have directed courts to eschew: Whether member state action is justified by substantive policy considerations under a mean-ends rationality framework?[269] For example, in the *Italian Legal Fee Regulation* cases,[270] decided under Article 49 of the Treaty Establishing the European Community (the former version of Article 56 of the Treaty on the Functioning of the European Union (TFEU)), the European Court of Justice noted that restrictions on competition that produce anticompetitive effects may sometimes be justified given a sufficiently important state interest and a reasonable relationship between the restriction and the state's important goal.[271] Similarly, in the *Slovakian Hybrid Mail* case,[272] which involved comparable analysis under the TFEU's competition principles, the European Commission held that the Slovak Republic's extension of its postal monopoly to hybrid mail (mail electronically transmitted to a service provider and printed, put into an envelope, and delivered by the provider) conflicted with Article 86(1) and 82's requirement that member states comply with EU competition rules.[273] The commission required an

268. *See* C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 Colum. L. Rev. 927 (2016).

269. Some of these cases arise under Article 56 of the Treaty on the Functioning of the European Union (TFEU), which prohibits unjustified restrictions on the provision of cross-border services. Consolidated Version of the Treaty on the Functioning of the European Union art. 56, Oct. 26, 2012, 2012 O.J. (C 326) 70 (formerly EC Treaty art. 49); *see, e.g.*, Case C-212/08, Zeturf Ltd. v. Premier Ministre, 2011 E.C.R. I-5636, I-5657 (holding under Article 49 that "national legislation [creating gambling restrictions] is appropriate for ensuring attainment of the objective pursued"—combating criminal and fraudulent activities and protecting society—"only if it genuinely reflects a concern to attain it in a consistent and systematic manner"); Joined Cases C-94/04 & C-202/04, Cipolla v. Fazari, 2006 E.C.R. I-11455, I-11478 (ruling that an Italian statutory scale for lawyers' fees "constitute[d] a restriction on freedom to provide services laid down in Article 49 EC"). Others, like the *Slovakian Hybrid Mail Case*, see *infra* note 272 and accompanying text, arise under Article 106(2) and Article 102, which directly cover competition law.

270. *Cipolla*, 2006 E.C.R. I-11455.

271. *Cipolla*, 2006 E.C.R. at I-11475 ("In that respect, it must be pointed out that, first, the protection of consumers, in particular recipients of the legal services provided by persons concerned in the administration of justice and, secondly, the safeguarding of the proper administration of justice, are objectives to be included among those which may be regarded as overriding requirements relating to the public interest capable of justifying a restriction on freedom to provide services . . . on condition, first, that the national measure at issue in the main proceedings is suitable for securing the attainment of the objective pursued and, secondly, it does not go beyond what is necessary in order to attain that objective.").

272. Commission Decision, 2008 O.J. (C 322) (EC).

273. *Id.* at 31.

"objective justification" for anticompetitive regulatory restraints, meaning a tight relationship between the regulatory scheme and the state's legitimate interests.[274] After thoroughly scrutinizing the factual record and Slovakia's asserted justifications, the commission failed to find the required means-ends fit, and thus determined that the hybrid-mail monopoly was preempted by EU competition principles.[275]

The strictness of means-ends rationality tests can vary dramatically according to context. A superior-preemptive FTC jurisprudence based on means-ends rationality would need to develop with attention to the particulars of federalism and the FTC's comparative advantages. One potentially salutary function of FTC review might be critical evaluation of the economic theories and empirical claims used to justify state regulations. For example, a state's claim that prohibiting oil companies to own gasoline retailers (a "divorcement" law) is necessary to securing retail competition, and, hence, lower prices to consumers, might be answered by the FTC's economic expertise on vertical integration in the oil industry.[276] The restraint might fail means-ends review, because the economic theory purportedly adopted by the state was not grounded in sound economic evidence or theory.

C. *Hard Look Review*

A third potential approach to superior preemption—hard look review—would take its cues from administrative law and reflect a middle ground between full substantive review (i.e., cost-benefit analysis) and the political-process-focused orientation of the current *Parker* doctrine. The spirit of hard look review is to insist that agencies engage in thorough, reasoned decisionmaking without involving the courts in displacing the agencies' technical and political judgments with their own.[277] Hard look review involves a high degree of judicial engagement with regulatory decisions, but also a more restrained role for judicial review than characterizes the sort of substantive, balancing review described previously.[278]

The expression "hard look" describes two different features of the interaction between courts and agencies. First, the doctrine requires agencies to take a "hard look" at the regulatory question, considering all relevant data,

274. *Id.* at 23 (quoting Notice from the Commission, 1998 O.J. (C 39) (EC) 2).

275. *Id.* at 31.

276. *See, e.g.*, Letter from Ronald B. Rowe, Dir. for Litig., FTC, to the Hon. Alan A. Diamonstein, Chairman, Gen. Laws Comm., House of Delegates, Commonwealth of Va. (Mar. 2, 1990), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-hon.alan.diamonstein-concerning-virginia-s.b.235-prohibit-petroleum-refiners-owning-and-operating-retail-motor-fuel-stations/v900012.pdf [https://perma.cc/G5RN-5YRP] (offering an opinion on the FTC's expertise with anticompetitive effects of divorcement laws).

277. Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 851–52 (D.C. Cir. 1970). Judge Leventhal, one of the hard look doctrine's most distinguished expositors, described the doctrine as combining "judicial supervision with a salutary principle of judicial restraint." Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. Pa. L. Rev. 509, 511–12 (1974) (quoting *Greater Bos.*, 444 F.2d at 851).

278. *See* Leventhal, *supra* note 277, at 540–41.

alternatives, and public comments. Second, courts take their own "hard look" at the regulatory decision to ensure that the agency's decision was sufficiently deliberate.[279] The result is an iterative interaction between courts and regulators in which courts have halt-enforcement of an agency decision until the regulator takes a harder look at the problem, or in which they ultimately vacate the regulatory decision altogether.[280]

Translated into the context of FTC superior preemption, hard look review would mean extensive FTC engagement with state legislatures and regulatory agencies over regulations significantly burdening competition. Because hard look review, as an administrative law concept, relates to the relationship between a court and an administrative agency, it could not be transposed directly to the FTC–state law context, given the many structural differences in the relationship between the FTC and state legislatures or regulatory bodies. Nonetheless, the most significant features of hard look review might prove useful in the superior preemption context.

The most general and important feature of hard look review is its insistence that regulators explain their regulatory decisions in a thorough and reasoned fashion, with reference to factual predicates available in a public record.[281] Courts invalidate agency action when the agency fails to explain itself through logically consistent reasoning, with reference to verifiable public facts.[282] The requirement of reasoned decisionmaking on a public record can be justified as a mechanism for ensuring that regulators act for public-interested reasons, and not merely to patronize narrow special interests. When a regulator's true motivation is economic parochialism, the requirement that it justify its actions on public interest grounds may force the agency to come up with implausible, contradictory, or empirically unsupported justifications, in which event, a court may invalidate the agency action.[283]

Application of such a reasoned-decision/public-record requirement to instances of state action burdening competition could be valuable.[284] At a

279. *See* Merrick B. Garland, *Deregulation and Judicial Review*, 98 Harv. L. Rev. 505, 525–44 (1985).

280. *Cf.* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 56–57 (1983) (overturning an agency regulation as arbitrary and capricious).

281. *See* Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 Admin. L. Rev. 753, 761–63 (2006).

282. *See, e.g.*, *id.* at 761.

283. *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667, 1758 (1975) ("[T]he requirement that agencies give adequate consideration to all affected interests, and in particular, the interests of the intended beneficiaries of an administrative scheme, has been utilized by the courts with increasing frequency to redress perceived agency favoritism to organized interests."); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 Yale L.J. 2, 34–35 (2009) ("Hard look review was one of the main tools that the courts developed to ensure that agencies were looking at the statute and the evidence and were choosing answers that served the public good.").

284. In some contexts, courts predicate the constitutionality of legislation on the sufficiency of legislative findings regarding predicate facts. *See* Daniel A. Crane, *Enacted Legislative Findings and the Deference Problem*, 102 Geo. L.J. 637 (2014).

high level of generality, the state-action problem concerns the difficulty of determining when a regulation that limits competition is necessary to achieve the interests of the general public, as opposed to when it merely represents regulatory capture and rent-seeking behavior by the regulated entities. Hard look review could serve as an information-forcing device, requiring the regulating state to reveal to the FTC, if not its actual cards, at least a hand capable of rationally supporting the anticompetitive regulatory decision.[285] Since it would usually be politically unpalatable for states to justify anticompetitive regulations purely as bestowing economic rents on favored groups of producers,[286] the reasoned-decision/public-record requirement could erect a barrier to anticompetitive state action that does not have some plausible public interest explanation.

A second facet of hard look review is a requirement that agencies give explicit consideration to alternatives to the regulatory decision taken.[287] The consideration-of-alternatives requirement serves some of the same purposes as the narrow tailoring, or "least restrictive alternative," analysis discussed previously, but with the important difference that the reviewing body does not strike down a regulation just because it fails to achieve the regulatory objective in the most efficient, or least restrictive, way. Rather, the consideration-of-alternatives requirement merely forces the regulator to explain why obvious alternatives were inferior to the chosen solution. This ensures that the regulatory authority seriously considers alternative solutions, and that its reasoned justification for the chosen solution can be evaluated in comparison to other options. Analytical or factual flaws in the agency's explanation for the rejection of alternatives can themselves lead to judicial invalidation of the agency's action.

In the competition context, application of the consideration-of-alternatives requirement by the FTC could prompt state regulators to consider regulatory approaches that create fewer barriers to competition. In particular, where a state substitutes centralized planning for market-based determinations of production and distribution, the FTC could ensure that that the state articulates reasons why market-based solutions were inadequate to meet the regulatory objective.[288] This, in turn, would require the state to

285. Stephenson, *supra* note 281, at 755 (discussing hard look review as an information-forcing device).

286. As noted earlier, such naked economic protectionism may run afoul of constitutional equal protection principles. *See supra* text accompanying notes 7–10.

287. The leading case on the consideration-of-alternatives requirement is *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43, 50–51 (1983), in which the Supreme Court required the Department of Transportation to consider technological alternatives to its proposed automobile safety regulations concerning seatbelts and airbags.

288. For example, U.S. Presidential Executive Order 12866, issued in 1993 by President Clinton and continuing in force today, requires agencies to "identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public." Exec. Order No. 12,866, § 1(b)(3), 3 C.F.R. 638, 639 (Sept. 30, 1993).

explain not merely the market failures that prompted the regulatory decision, but also why those failures could not be corrected through less-intrusive regulatory actions.

A final important feature of hard look review is the requirement that any justifications for the regulatory decision be presented at the time of the regulatory decision, and not subsequently invented for litigation purposes.[289] The contemporaneousness rule stands in contrast to rational basis review, under which a regulatory action is upheld if it could be supported by any conceivable rational basis. Not only must the regulatory decision be empirically supported, as opposed to merely rational, but the agency must think through the justifications upon which it will rely before promulgating the regulation. The basis for the regulation should be decided by the state actors making the regulatory decision, not by lawyers subsequently brought in to defend it.

In the competition context, the contemporaneousness requirement could increase the likelihood that state legislatures or regulatory bodies consult with economic or technological experts when framing statutes or regulations that impair competition. It would diminish the likelihood that states would act solely to insulate special interests from competition and then rely on legal arguments to defeat challenges to the anticompetitive regulatory decision. It would also diminish the likelihood that states would rely on theoretical or potential, rather than documented, market failures to justify measures that suppress competition. In short, the contemporaneousness requirement could prompt states to take a more careful look at the competitive effects of their decisions before taking actions that reduce market competitiveness, knowing that a failure to do so could lead to preemption by federal antitrust law.

The FTC might exercise its superior-preemptive authority to bolster the accountability of state legislatures and regulators when they regulate in anticompetitive ways. By developing a reputation for declaring anticompetitive state laws preempted unless based on a contemporaneously reasoned public record, with due consideration of market-based alternatives, the commission might provide a backstop to the worst abuses of special interest group legislation and regulation.

Conclusion

In over a century of resolving appeals from FTC decisions, the Supreme Court has never decided whether the *Parker* doctrine applies wholesale to the FTC, or whether the commission enjoys superior-preemptive authority over anticompetitive state laws. The absence of agitation for a decision on the issue, and the FTC's guarded acquiescence in submitting to the *Parker* doctrine, is, itself, revealing. The courts may be wary of an imperialistic FTC

289. In administrative law, this is known as the "*Chenery* doctrine." *See* SEC v. Chenery Corp., 318 U.S. 80, 95 (1943) (holding that the validity of agency discretionary action must rise or fall based on the validity of the agency's contemporaneous explanation for its decision).

upsetting the delicate equilibrium of federalism, and the FTC itself may be concerned about the political and institutional repercussions of wielding a broad preemptive power.

Nonetheless, in recent years, the commission appears to be chafing at the bit: it has reacted to a new set of state regulations suppressing competition in the new economy; and it has felt the need to reclaim some function for Section 5 of the FTC Act and a distinctive institutional role on competition matters. Superior preemption would scratch both of these itches—giving the commission both an enhanced tool to promote competition and innovation in the new economy, and an avenue to find a distinctive function for Section 5.

This Article has focused heavily on the legislative history and context of the FTC Act, since the Supreme Court gave the same weight to the Sherman Act's history and context in *Parker*. It has also focused on the ghosts of *Lochner* in *Parker*, since that is how subsequent courts and commentators have understood the Court's concealed motivation in *Parker* and its progeny. Looking forward, however, the appeal of according the FTC superior-preemptive authority depends most importantly on articulating the affirmative institutional case based on the commission's expertise, resources, and constraints, and in specifying the mode of analysis the commission would employ in reviewing anticompetitive state regulations.