NOTE
INTERSTATE BURDENS AND ANTITRUST FEDERALISM: A RE-EXAMINATION OF *PARKER* IMMUNITY

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INTRODUCTION

The Sherman Act has been described as the "Magna Carta" of the American economic system.[1] Since 1890, it has been used to punish individuals and corporations that engage in unreasonable restraints of trade.[2] The Act has been described as the Bill of Rights for American economic liberties.[3] And as the Constitution sought to build a Union of States, the Sherman Act should seek to build a unified national economy. Although the Sherman Act has been successful in policing the U.S. economy, it has not been without its critics.[4] Specifically, the *per se* immunity for certain state-created monopolies has been widely

* J.D., Duke Law School, Class of 2022, B.S. University of Michigan, 2019. I want to express thanks to Professor Neil Siegel, Professor Barak Richman, and all those who contributed to helping me write this piece.

1. United States v. Topco Assocs., 405 U.S. 596, 610 (1972).
2. *See* 15 U.S.C. § 1 (2018); *see also* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007) (scrutinizing certain price restrictions under rule of reason analysis).
3. City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 398 (1978) (plurality opinion) ("[A]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."); *see also* United States v. U.S. Gypsum Co., 438 U.S. 422, 439 (1978) ("Simply put, the Act has not been interpreted as if it were primarily a criminal statute; it has been construed to have a 'generality and adaptability comparable to that found to be desirable in constitutional provisions.'").
4. *See generally* Fed. Trade Comm'n, Office of Policy Planning, Report of the State Action Task Force (2003), https://www.ftc.gov/sites/default/files/documents/reports/report-state-action-task-force-recommendations-clarify-and-reaffirm-original-purposes-state-action/stateactionreport_0.pdf [hereinafter Task Force Report]. I will refer to the doctrine as "state action immunity" and "*Parker* immunity," as the Court has.

criticized.[5] Despite the criticism, the doctrine has remained largely unchanged since its inception in *Parker v. Brown* nearly eighty years ago.[6] One of the *Parker* doctrine's most common critiques is its failure to consider the interstate burdens state-implemented restraints can create.[7] Although the U.S. federal system must permit states to regulate within a wide berth, state-created restraints erect the same barriers that the Sherman Act sought to eliminate.[8]

Despite the *Parker* doctrine's faults, it still serves a valuable purpose in respecting the federal balance, and it "embod[ies] in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution."[9] Even though the Court has declined to revisit the doctrine, the development of the Court's commerce clause jurisprudence and its new understanding of federalism require a revision of the *Parker* doctrine.[10]

Specifically, courts should balance the interstate effects and potential for collective action problems with the state's interest in the regulation. Although states should have the authority to regulate conduct inside their boundaries, this authority should not be extended to create economic conditions that burden neighbor states or the nation as a whole. Once the federalism motivations behind the *Parker* doctrine disappear, all that is left is a restraint on trade. A state wishing to create interstate friction and promote economic insularism should not receive immunity to do so.

Part I will first outline the doctrine, from its beginnings in *Parker v. Brown* to its modern doctrinal framework. Part II will then discuss the rationale behind the doctrine, ranging from Congress's understanding of the Commerce Clause and federalism in 1890 to the modern justifications. The state's role in regulation plays a large part in why the doctrine survives, because holding a state liable for all of its regulation, as the Sherman Act would otherwise require, would effectively destroy the state's power to regulate altogether.[11] Part III will expound critiques of the doctrine. Scholars have long voiced concerns about the

5. *Id.*
6. 317 U.S. 341 (1943).
7. Task Force Report, *supra* note 4, at 40–44.
8. *See Parker,* 317 U.S. at 350 (assuming that the raisin prorate program at issue would be illegal if done by private parties).
9. N.C. State Bd. of Dental Examiners v. Fed. Trade Comm'n, 574 U.S. 494, 503 (2015).
10. *See* Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007) (stating that developments in economic conditions counsel an evolving view of the Sherman Act).
11. Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 133 (1978).

doctrine and whether it comports with the principles of federalism. Furthermore, Part IV will propose solutions, along with their respective costs and benefits. Namely, this paper will argue that the best solution is to allow the Sherman Act to preempt state action when state action creates excessive interstate conflict. It is a constitutional goal to promote harmony among the states, minimize interstate burdens, and discourage isolationism and favoritism.[12] The Constitution strives to create a more perfect political union, and in that same spirit the Sherman Act should strive to create a more perfect economic union as well.[13]

I. DOCTRINAL BACKGROUND

A. *General Overview*

The Sherman Act prohibits unreasonable restraints on trade, whether by a single individual or a combination of competitors.[14] Analysis of possible Sherman Act violations typically proceeds on a case-by-case basis, employing the "rule of reason" to determine whether a restraint of trade is unreasonable or if it has sufficient pro-competitive effects to be ruled valid.[15] All restraints on trade fall under the purview of the Sherman Act, as long as the restraint affects interstate commerce and does not otherwise qualify for immunity.[16]

The Sherman Act's scope has broadened greatly since its passage in 1890. In 1890, Congress's power under the Commerce Clause was interpreted narrowly.[17] Just two years prior to the passing of the Sherman Act, the Court held in *Kidd v. Pearson* that even though a manufacturer's output was eventually sold in several other states, he was not involved in interstate commerce.[18] The Court explicitly constrained the reach of the Sherman Act in *United States v. E.C. Knight*

12. United Bldg. & Const. Trades Council of Camden Cnty. & Vicinity v. Mayor & Council of City of Camden, 465 U.S. 208, 220 (1984).

13. *See* N.C. State Bd. of Dental Examiners v. Fed. Trade Comm'n, 574 U.S. 494, 502 (2015) (describing federal antitrust law as important to the preservation of economic freedom and our free enterprise system).

14. State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) ("[T]his Court has long recognized that Congress intended to outlaw only unreasonable restraints.").

15. *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 606–07 (1972).

16. Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 102 (1980); *see, e.g.*, McCarran-Ferguson Act, 15 U.S.C. §§ 1011–15 (1976) (granting federal antitrust immunity for the "business of insurance") (repealed 2021).

17. Kidd v. Pearson, 128 U.S. 1, 20 (1888).

18. *Id.* at 22–23 (1888).

Co.[19] In *E.C. Knight*, the American Sugar Refining Company had sought to acquire a number of sugar manufacturing plants, granting it near complete control of the United States sugar market.[20] However, the Court held that manufacturing sugar was not interstate commerce, as the Court drew a formal line between the "manufactur[ing]" of a good and the "disposition" of that same good.[21] This distinction would not last.

The Court ended that distinction in *Wickard v. Filburn*.[22] The appellee owned a small farm in Ohio, part of which was a small acreage of wheat.[23] He objected to penalties imposed by a federal wheat quota, arguing that Congress lacked the power under the Commerce Clause to regulate his entire wheat crop because a portion of his wheat did not enter interstate commerce.[24] However, the Court held that the Commerce Clause granted Congress the power to regulate any activity, the aggregate of which exerts a substantial effect on interstate commerce.[25] The Court cast away old formalist distinctions between "direct" and "indirect" effects on interstate commerce, and instead adopted a functionalist approach that expanded Congress's regulatory authority.[26]

Wickard v. Filburn's expansion of Congress's power under the Commerce Clause extended to the Sherman Act as well.[27] As it pertained to the Sherman Act, "[t]he artificial and mechanical separation of 'production' and 'manufacturing' from 'commerce,' without regard to their economic continuity, . . . no longer suffice[d] to put either production or manufacturing and refining processes beyond reach of Congress' authority or of the statute."[28]

The substance of the Sherman Act has changed over time as well. Even Justice Scalia, well-known for his formalist, textualist reading of statutes, understood that the Sherman Act not only invoked the common law term "restraint of trade" as it was understood in 1890, but the common law itself.[29] Federal courts handling antitrust issues behave

19. 156 U.S. 1 (1895).
20. *Id.* at 9.
21. *Id.* at 12.
22. 317 U.S. 111 (1942).
23. *Id.*at 114.
24. *Id.* at 113–14.
25. *Id.* at 127–28.
26. *Id.* at 125–26.
27. Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 229 (1948).
28. *Id.*
29. Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 732 (1988).

more like common-law courts than most other areas governed by federal statutes.[30] The term "restraint[s] of trade" evolves as courts adapt to modern understanding and greater experience, and as the nature of economic conditions change.[31] The main method of interpretation under the Sherman Act, the rule of reason, shirks formal categorization of certain types of conduct and instead proceeds on a case-by-case basis, examining whether the conduct at issue is unreasonably anti-competitive.[32] This functional analysis further confirms the adaptability of the Sherman Act: Instead of being bound by formalist categories, the court may assess the conduct at hand and analyze its anti-competitive effects within the greater context of the national economy.[33] This formulation allows the Sherman Act to change as economic conditions change, and, as new problems arise, courts are empowered to interpret the Sherman Act to adapt to new problems.[34]

B. Genesis of the State Immunity Doctrine: Parker v. Brown

The state action immunity doctrine, which insulates states from liability under the Sherman Act, began with *Parker v. Brown*.[35] In 1940, California enacted a program restricting the amount of raisins that each producer could sell on the open market, seeking to "conserve the agricultural wealth of the state."[36] Under the program, producers were required to give their entire crop to the state, who would then classify and store seventy percent of the raisins, allowing farmers to only sell thirty percent of the crop they intended to market.[37] The Court assumed for the sake of argument that this arrangement would violate the Sherman Act if undertaken by private businesses.[38] Appellee, a raisin farmer, challenged the validity of the program under both the Sherman Act and the Commerce Clause.

The Court held that the Sherman Act did not apply to California's

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30. Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 98 n.42 (1981).
31. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007).
32. *See id.* at 885–86.
33. *Id.* at 899–900.
34. *Id.*
35. 317 U.S. 341, 350–51 (1943).
36. *Id.* at 346.
37. *Id.* at 348.
38. *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.").

prorate program for raisin production.[39] The arrangement never operated by force of individual agreement or combination of agreements, but was specifically enacted by the state legislature.[40] The Court noted that nothing in the Sherman Act's text suggested that its purpose was to restrain a state or its officers from acting under legislative directive.[41] Further, the legislative history of the bill showed that it was never intended to reach *state*-created restraints of trade. The Sherman Act's sponsor declared that it would only prevent "business combinations."[42] In fact, the legislative history bears no mention of state action; rather, legislators were focused solely on private conduct.[43]

Beyond *Parker*'s statutory holding, important concerns about federalism also underlaid the Court's decision to insulate state action from antitrust scrutiny. State regulation often restricts trade to achieve a public goal. For example, cities may use restrictive zoning, or a state may have mandatory licensing laws that could reasonably qualify as restraints of trade.[44] Federal antitrust law broadly prohibits such conduct among private actors,[45] and although federal law is supreme over state law, the Sherman Act never meant to displace the state's sovereign power to regulate within its borders.[46]

States are presumed competent to regulate local conduct, but in the wake of *Wickard v. Filburn*, the scope of both Congress's commerce clause and Sherman Act powers expanded.[47] Faced with the prospect that numerous state regulations could come within the ambit of the Sherman Act, the Court in *Parker* was tasked with how to confront

39. *Id.* at 352.

40. *Id.*

41. *Id.* at 350–51.

42. *Id*. at 341 (citing 19 Cong. Rec. 6041).

43. *Parker*, 317 U.S. at 351 (1943).

44. City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 439 (1978) (Stewart, J., dissenting).

45. *Id.*

46. *Parker*, 341 U.S. at 351–52. The Court also went on to hold that the prorate program did not violate the Dormant Commerce Clause for two reasons: First, the legislation, which intended to stabilize the price of raisins, was a matter of both state and national concern. But because Congress had not acted, it was a solution "peculiarly within the province of the state." *Id.* at 367. The program did not target, nor did it discriminate against, interstate commerce. Rather, the state merely raised prices and lowered quantities, which impacted interstate commerce only incidentally. And second, Congress's implementation of other marketing regulations similar to the California prorate program demonstrated that Congress had implicitly accepted California's regime. *Id.* at 367–68.

47. *See* Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 743 n.2 (1976) ("[D]ecisions by this Court have permitted the reach of the Sherman Act to expand along with expanding notions of congressional power.").

them. The Court first noted that states are sovereign in the American dual system of federalism, unless the constitution or Congress strips that power away.[48] So because the Sherman Act did not explicitly take away states' power to regulate in effectively anti-competitive ways, the Sherman Act simply could not apply to state conduct.[49] The underlying federalism motivation has continued to develop, and the Court continues to emphasize that federalism is an important part of the *Parker* doctrine.[50]

C. Modern State Immunity Doctrine

The Court has since developed a more thorough doctrine consistent with *Parker*'s original holding. Under the current doctrine, in order to be entitled to state action immunity, the challenged restraint must first be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself.[51] If the restraint is managed by a municipality instead of a private party, only the "clear policy" prong must be satisfied.[52]

A clearly articulated state policy helps courts to ensure the state is not merely rubber-stamping a private restraint on trade.[53] For example, in *Goldfarb v. Virginia State Bar*, a state bar instituting a minimum fee schedule without any guidance from the Virginia Legislature or the Virginia Supreme Court was not a "clearly articulated state policy."[54] Nor was Michigan taking a "neutral" stance towards a lamp exchange program sufficient for antitrust immunity in *Cantor v. Detroit Edison Co*.[55] The nature of the regulation also matters. Activities related to the "core of the State's power to protect the public" are more likely to be

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

49. *Id.*

50. *See, e.g.*, N.C. State Bd. of Dental Examiners v. Fed. Trade Comm'n, 574 U.S. 494, 503 (2015) (re-affirming federalism as an essential factor to the existence of the *Parker* doctrine); Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 103–04 (1980) (same); *see also City of Lafayette*, 435 U.S. at 415 (1978) (same).

51. *Id.*

52. Town of Hallie v. City of Eau Claire, 471 U.S. 34, 47 (1985). The Court did not require clear articulation because "[o]nce it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function." *Id.* Because cities only exist under the sovereign authority of the state, it is presumed they act in the public interest and do not need to be supervised. *Id.*

53. Peter Hettich, *Mere Refinement of the State Action Doctrine Will Not Work*, 5 DEPAUL BUS. & COM. L.J. 105, 118–19 (2006) (quoting Bates v. State Bar of Ariz., 433 U.S. 350, 361 (1977)).

54. 421 U.S. 773, 790 (1975).

55. 428 U.S. 579, 598 (1976).

entitled to immunity, whereas *Cantor*'s restraint was merely regulating the additional services an electric company could offer, which is not a primary government function.[56]

Additionally, the Court requires "active supervision" of the regulation by a state to ensure that the restraint is still part of a state's sovereign authority.[57] If the state is merely shielding private conduct from the purview of antitrust law, the restraint is not entitled to immunity.[58] It is further assumed that, without the requisite supervision, there is "no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests."[59]

These requirements developed as a way to distinguish between a state managing an anti-competitive restraint and a state effectively authorizing private actors to violate the Sherman Act. This distinction helps ensure that anti-competitive conduct comes from a state directive in the public interest—not simply a private actor using the power of the state to become a monopoly.[60] Unless the state actively observes, reviews or re-examines the program, the state cloaks otherwise unlawful, private restraints of trade as state action, immunizing such restraints from challenge.[61] Such a thinly veiled distinction cannot be justified under the law.[62]

III. DOCTRINAL CRITICISM

Although the Court has continued to re-affirm *Parker v. Brown*'s central holding, many have criticized the *Parker* doctrine. Both scholars and the Federal Trade Commission (FTC) have highlighted problems with the doctrine and offered a number of solutions for how to remedy its faults.[63]

The first common critique of the doctrine is that it does not account for out-of-state economic effects. Unless a regulation runs afoul of another constitutional barrier, no consideration of interstate spillovers

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56. Hettich, *supra* note 53, at 119.
57. Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).
58. N.C. State Bd. of Dental Examiners v. Fed. Trade Comm'n, 574 U.S. 494, 505 (2015).
59. Patrick v. Burget, 498 U.S. 94, 100–01 (1988).
60. *See Midcal Aluminum*, 445 U.S. at 105–06.
61. *Id.*
62. *Id.* at 105.
63. *See generally* Task Force Report, *supra* note 4 (describing a number of academic criticisms of the *Parker* doctrine).

applies.[64] One need not look farther than *Parker* itself to see how the state action doctrine can impose costs on out-of-state residents, even though those residents have diminished political capital in the state. At the time *Parker* was decided, between 90 and 95 percent of raisins produced in California entered interstate commerce and California provided almost all of the nation's raisins.[65] Most American raisin consumers lived outside of California and had no political means to oppose the state's legislative program, yet they bore the costs of California's state-sanctioned monopoly.[66]

Second, similar concerns about political representation animate critiques of *Parker* immunity. The policy at issue in *Parker* restricted output and artificially raised prices, two results federal antitrust law generally seeks to prohibit.[67] Although the benefits of such a program were borne almost exclusively by California, the costs of the program were incurred by raisin consumers across the nation.[68] The political incentives to promote such a program follow closely with economic costs and benefits.[69] California raisin producers have a strong incentive to lobby their own government to install such a program, but it would be nearly impossible for non-California residents to challenge such a policy through the normal political channels.[70] The government of California is not the appropriate body to properly weigh the benefits to in-state raisin producers with the costs to out-of-state consumers, yet the *Parker* doctrine grants California *per se* immunity on federalism grounds.[71] Although the California program was implicitly endorsed by Congress, one is just as likely to find similar programs with no similar

64. *See* Hoover v. Ronwin, 466 U.S. 558, 567–69 (1984) (holding activity by a legislature or state supreme court is *per se* immune from antitrust scrutiny with no analysis of out-of-state effects).

65. *Parker*, 317 U.S. at 345.

66. *See* Alan J. Meese, *Antitrust Federalism and State Restraints of Interstate Commerce: An Essay for Professor Hovenkamp*, 100 IOWA L. REV. 2161, 2188 (2015) (describing the harms of the prorate program at issue).

67. *See* Buckley v. Valeo, 424 U.S. 1, 263 (1976) (White, J., dissenting) ("[T]he antitrust laws are aimed at preventing monopoly profits and price fixing, which gouge the consumer.").

68. *See Parker*, 317 U.S. at 345 (describing how most raisins were shipped into interstate commerce).

69. 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, 1235–38 (1997) [hereinafter *Efficiency in Regulatory Federalism*]; *see also* Daniel A. Farber Philip, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 890–901 (1987) (describing an economic approach to public choice theory).

70. John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 724 (1986) (describing the free rider problem).

71. *Parker*, 317 U.S. at 352 (1943).

implicit endorsement.[72]

The U.S. Constitution embodies a system of federalism where the federal government is sovereign in some respects, and the several states are sovereign in others.[73] This system of federalism gives states the power to regulate local matters and the federal government the power to regulate issues that states are less suited to regulate.[74] When costs spill over into other states, the national government becomes the appropriate body to regulate the costs and benefits of such a program.[75] The Court has recognized such spillover effects, and how political actors, even government entities, can act solely in self-interest.[76] Such state self-interest can directly harm consumers outside of its territorial jurisdiction.[77]

Parker immunity, as it stands, runs counter to longstanding ideals of national unity that harken back to the Founding era. The law has long prohibited states from imposing excessive costs on the nation as a whole, solely for the purpose of furthering its own intrastate policy interests. *McCulloch v. Maryland* illustrates the Court's wariness of self-serving state action.[78] In *McCulloch*, Chief Justice Marshall held that states may not tax the national bank, as they would be wielding power against the whole of the United States, even though the whole of the United States is not represented by each state.[79] Similar to a state tax being problematic since it is the part acting on the whole, anti-competitive restraints by the states would unduly impose costs on the nation. The people of the United States, acting through Congress, christened competition and free markets through the Sherman Act.[80]

72. *See* Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 102–03 (1980) (describing how Congress repealed legislation granting immunity to the conduct at issue).

73. Gregory Ablavsky, *Empire States: The Coming of Dual Federalism*, 128 YALE L.J. 1792, 1794–95 (2019) (describing American dual federalism).

74. *Cf.* Missouri v. Holland, 252 U.S. 416, 433 (1920) (applying this idea to the treaty power).

75. *See* Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 138 (2010) (describing how interstate externalities should be handled by federal governments).

76. *See* City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 404 (1978) (plurality opinion) ("Moreover, a municipality conceivably might charge discriminatorily higher rates to such captive customers outside its jurisdiction without a cost-justified basis. Both of these practices would provide maximum benefits for its constituents, while disserving the interests of the affected customers.").

77. *Id.*

78. 17 U.S. 316 (1819)

79. *Id.*

80. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) ("[T]he Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.").

Just as one state could not tax the resources of the United States, one state should not be allowed to use state policy to burden the national economy. Because the potential costs to state-created monopolies are so high,[81] federal policy should prohibit states from allocating those costs beyond their borders. Any state that wishes to impose monopoly costs outside of its borders to benefit itself and undermine competition should be carefully scrutinized when it does so. This scrutiny would not be fatal-in-fact for the legislation, but it should be enough for states to second-guess an attempt to enrich itself to the detriment of its sister states.

IV. PROPOSED SOLUTIONS

The Sherman Act, and specifically *Parker* immunity, should be interpreted in light of the above concerns. After all, the Sherman Act is the standard-bearer for the U.S. free market system, and so our interpretation of it should evolve with our understanding of constitutional principles and economic conditions.[82] Justice Burger's concurrence in *City of Lafayette* elaborates on this point:

> Our conceptions of the limits imposed by federalism are bound to evolve, just as our understanding of Congress' power under the Commerce Clause has evolved. Consequently, since we find it appropriate to allow the ambit of the Sherman Act to expand with evolving perceptions of congressional power under the Commerce Clause, a similar process should occur with respect to "state action" analysis under Parker. That is, we should not treat the result in the Parker case as cast in bronze; rather, the scope of the Sherman Act's power should parallel the developing concepts of American federalism.[83]

As states impose costs on each other through state-sanctioned monopolies, the Court's understanding of federalism and the Commerce Clause counsels scrutiny of the *Parker* doctrine. An entirely new doctrine is not necessary to curtail *Parker* immunity. Rather, the issue can be resolved by applying *Parker* immunity in light of the American dual system of federalism and the Commerce Clause.

Modern scholarship critiques the lack of concern for interstate spillovers. By that token, the modern *Parker* doctrine fails to account for economic efficiency and undermines political representation values

81. Meese, *supra* note 66, at 2188.
82. United States v. Topco Assocs., 405 U.S. 596, 610 (1972).
83. 435 U.S. 389, 421 n.2 (Burger, J. concurring).

meant to be protected by federalism.[84] So while scholars almost universally recognize that interstate economic spillovers are problematic, there is no consensus on what remedy is most appropriate.

A. Substantive Review of State Regulations

The first of these solutions is to add *substantive* review of state regulations. The current doctrine requires only procedural clearance before a court will grant state action immunity.[85] Courts do not inquire if the regulation is substantively reasonable, nor do courts apply any "rule of reason" analysis present in most other antitrust cases. Justice Blackmun proposed a test that would insert a substantive barrier to claims of immunity: State-sanctioned anticompetitive activity must be declared void if its potential harms outweigh its benefits.[86] His test is a modified rule of reason analysis. It assesses the justifications for anticompetitive activity in the same way courts assess justifications in equal protection cases: where "justifications are at all substantial," then a court should not find the restraint unreasonable.[87]

Justice Blackmun applied his test to the regulation in *Cantor*. The anticompetitive practice at issue was an alleged tie of electricity service and lightbulbs offered by the Detroit Edison Company.[88] In this case, the allege tie was providing, at no cost, new residential customers with lightbulbs and replacing burned-out bulbs. Detroit Edison's rates, both for electricity and the omission of any charge for lightbulbs, had to be approved by the Michigan Public Service Commission and could not be changed without the Commission's approval.[89] Detroit Edison claimed that they had received no profit from the distribution of bulbs, and stated the intended purpose was to increase the consumption of electricity.[90] On the other hand, the petitioner, a retail druggist selling light bulbs, claimed that the policy's real purpose was to foreclose a substantial portion of the lightbulb market.[91] Because the Court only addressed the applicability of *Parker*, the Court did not address the

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84. Task Force Report, *supra* note 4, at 44.

85. *See* N.C. State Bd. of Dental Examiners v. Fed. Trade Comm'n, 574 U.S. 494, 495 (2015) (describing the current test).

86. Cantor v. Detroit Edison Co., 428 U.S. 579, 610 (1976).

87. *Id.* at 611.

88. *See* FED. TRADE COMM'N, *Tying the Sale of Two Products*, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/tying-sale-two-products (last visited Mar. 7, 2021) (describing antitrust ties).

89. *Cantor*, 428 U.S. at 582–83.

90. *Id.* at 583–84.

91. *Id.* at 584.

merits of the underlying antirust claim.[92] Nevertheless, in his concurrence, Justice Blackmun applied a substantive rule of reason analysis and found the tie to be unreasonably anti-competitive and thus not entitled to immunity.[93] He stated that while the tie originated as a way to allow people to use more electricity, there were other less restrictive means to achieve that same result, like a promotional lightbulb sale.[94] Michigan's interest in the tie—having lightbulbs being sold by a regulated producer—was rejected as an inadequate state objective because no evidence suggested that a competitive lightbulb market created instability or raised any other traditional concerns with competitive markets.[95] In short, Justice Blackmun's proposed test is slightly stricter than rational basis review.[96]

Justice Blackmun's test offers a number of benefits that the current *Parker* doctrine does not account for. First, it would require states to articulate the intent behind the regulation that abrogates the free-market scheme. In *Cantor*, Justice Blackmun took note of the lack of evidence that the Michigan Public Service Commission had even considered the light-bulb tie that it had endorsed for the private Detroit Edison Company to use.[97] A state enacting an anti-competitive regulation or scheme should be incentivized to develop a rich legislative history in order to properly defend their scheme in court. In other words, they should have to show that deliberative process led to the challenged policy. This, in turn, would incline regulators to more critically review regulations before they are enacted.[98] Second, it would allow courts to stay well within their wheelhouse of antitrust law: applying the rule of reason. Justice Blackmun's test is consistent with the common practice of federal courts in antitrust cases, and the more specific problem of assessing state interests against federal dictates, also familiar to federal courts.[99] Such a test would allow most legitimate state restraints to continue lawfully, and only those with significant competitive harms or no justification at all would be invalidated.

While such a system would address some political concerns about the doctrine, it does not go far enough to solve federalism concerns

92. *Id.* at 581–82.
93. *Id.* at 612 (Blackmun, J., concurring).
94. *Id.*
95. *Id.* at 613.
96. *Id.* at 611.
97. *Id.* at 610.
98. *Id.*
99. *Id.* at 612.

inherent in the modern *Parker* doctrine. Justice Blackmun's solution does not explicitly outline what justifications he would find sufficient to allow a program to succeed, nor does he explicitly mention what costs may doom a program. Further, it only connects the state interest in the regulation to its effectiveness in achieving that objective. Few courts have engaged in any meaningful analysis as to state policy goals underlying a restraint on trade, and no analysis goes specifically to the interstate effects of such a policy.[100] However, creating a solution to address federalism does not involve re-inventing the wheel, as existing doctrines and proposals can be slightly altered to best police the doctrine.

B. Dormant Commerce Clause Fills the Gap

Another proposed solution would leave the *Parker* doctrine unaltered but instead let the Dormant Commerce Clause handle state restraints that create spillovers. Dormant Commerce Clause analysis proceeds in two main ways. First, if a state regulation is facially discriminatory towards out-of-state commerce, or if it is not discriminatory on its face but still creates discriminatory effects, it is virtually *per se* invalid.[101] Such regulations include mandating waste to be processed in certain in-state facilities,[102] prohibiting the importation of out-of-state waste,[103] and prohibiting the exportation of in-state minnows.[104] Only if the regulation has a legitimate objective, and that objective cannot be achieved by non-discriminatory means, can the regulation survive.[105] Such regulations are not typically challenged in *Parker* cases, but restraints on trade could fall into this category.[106] Second, if a regulation is nondiscriminatory and its effects on interstate commerce are incidental, the regulation is valid unless the "burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[107] This approach has been used to strike down a number of regulations, including Arizona fruit-labeling requirements,[108] an Illinois statute requiring certain mudguards on

100. Hettich, *supra* note 53, at 149.
101. Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or., 511 U.S. 93, 99 (1994).
102. C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383, 386 (1994).
103. Philadelphia v. New Jersey, 437 U.S. 617, 629 (1978).
104. Hughes v. Oklahoma, 441 U.S. 322, 324–25 (1979).
105. Maine v. Taylor, 477 U.S. 131, 151–52 (1986) (holding Maine's restriction on out-of-state live baitfish valid because no workable alternatives existed to protect Maine's fisheries).
106. *See* Granholm v. Heald, 544 U.S. 460, 466 (2005).
107. *Id.*
108. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

trailer trucks,[109] and an Iowa statute barring long trucks on their highways.[110] However, this analysis has rather lenient results when state action merely "affects" interstate commerce but does not explicitly discriminate against it. [111] This lenient approach is not enough to appropriately police states that enact anti-competitive schemes that create interstate burdens.

Academics have developed multiple different methods for determining how significant a spillover problem must be in order for the federal government to preempt otherwise valid state regulations. Judge Frank Easterbrook, prominent Law and Econ Scholar,[112] proposed an extreme solution. He proposed that *any* state regulation would lose *Parker* immunity unless the residents of that state bear the entire monopoly overcharge.[113] In his view, "states could have any rules they want, so long as he who calls the tune also pays the piper."[114] In other words, a state regulation should only be entitled to *Parker* immunity if the state can internalize all of the externalities generated by a monopoly-creating regulation. However, such approach would likely eliminate a significant portion of state regulation. Most notably, such an approach would render the regulations in *Parker* itself invalid, as nearly all of the raisins were shipping in interstate commerce.[115] Furthermore, that kind of restriction would overly burden certain industries that rely on exports consumed nationally. For example, a significant amount of agriculture crosses state lines.[116] It cannot be the case that *any* restraint on agriculture production would be an unreasonable restraint of trade. Imposing Easterbrook's "any effect" standard would wipe out states' regulatory authority—especially for agriculture. On the other hand, Easterbrook's approach would bode well for certain local restrictions, such as power companies with limited territorial reach or specific regulations on intrastate trucking rates.[117]

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109. Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959).

110. Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662 (1981).

111. *See, e.g.*, Parker v. Brown, 317 U.S. 341, 367 (1943) (holding the prorate program merely affected interstate commerce).

112. *Frank H. Easterbrook*, UNIV. CHI. L. SCHOOL, https://www.law.uchicago.edu/faculty/easterbrook (last visited Feb. 22, 2021).

113. Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23, 45 (1983).

114. *Id.*

115. *Id.*

116. *See*, *e.g.*, California Agricultural Exports, https://www.cdfa.ca.gov/statistics/PDFs/2017-18AgExports.pdf (stating that California's agricultural exports totaled over $20 billion in 2017).

117. Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 50–52.

Some academics have proposed middle ground approaches. For example, Alan Meese proposed that the analysis should focus on whether the restraint truly affects interstate commerce and that Dormant Commerce Clause preemption should apply only to anticompetitive state statutes that result in significant spillovers.[118] Such a proposal would eliminate most of the tension between federal antitrust law and local regulation.[119] However, such an approach fails to appreciate the state's interest in regulation. While Meese's proposal focuses on the spillover effects currently neglected by the *Parker* doctrine, it fails to give any weight to the state's interest in regulating.

C. The Middle Ground: A Way Forward

The test proposed here adopts a similar middle ground approach. It balances the states' interest in regulation with federal interests in promoting competition and avoiding economic sectarianism. Restraints that impose unreasonable costs on out-of-state consumers should not be entitled to Parker antitrust immunity. Rather, courts should balance the interstate effects and potential for collective action problems with the state's interest in the regulation.[120] While a more formal demarcation of what is and is not permissible would be desirable, the realities of economics and markets, as well as our original understanding of the Sherman Act, do not allow for bright-line rules.[121] Instead, the Court should use the tools it has already developed in the antitrust realm to determine whether a state action is immune from antitrust enforcement.

This proposed test assumes a fairly basic doctrinal framework. The plaintiff must first demonstrate the restraint has out-of-state effects. Once the plaintiff has demonstrated those effects, the burden then shifts to the state to show that its interest in regulating is sufficiently strong to overcome the burdens placed on out-of-state citizens. Courts should consider a number of factors, including any parallel federal regulations, the necessity and of a restraint, and if the restraint is in an area of traditional state competence. This is not an exhaustive list of considerations but rather a starting point. If a plaintiff successfully shows that a regulation imposes unreasonable costs on out-of-state

118. Meese, *supra* note 66, at 2192.
119. *Id.* at 2191.
120. Such a test borrows from Justice Blackmun's approach in *Cantor* and from the Court's Commerce Clause jurisprudence.
121. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007) (describing how enforcement of the Sherman Act evolves with changing economic times).

citizens, the federalism concerns that would normally endow the state with immunity are gone. All that is left is a restraint on trade, undeserving of protection on federalism grounds.

States can offer a number of rationales to defend their legislation. These rationales might include economic analyses. But the test should not constitute a purely economic cost-benefit analysis. Courts are not to only consider economic benefits, but also respect for states as sovereigns. For example, similar to the balancing test in *Pike*, the court should consider the local benefits generated by state regulation.[122] *Pike* itself concerned the labeling of cantaloupes.[123] The Court recognized food labeling as an area of traditional state competence, as part of promoting public health and safety, and thus an extension of state sovereignty.[124]

Both the existence of a state interest and the strength of that interest ought to factor into the interest-balancing calculus.[125] If states are regulating in areas where they have a legitimate interest, they should be better insulated from antitrust scrutiny. However, if a state is regulating in such a way that imposes externalities on other states and does not serve a legitimate state interest, the state should not be shielded from antitrust scrutiny.[126] On the other hand, if the restraint is the least restrictive means for achieving a state goal, or the restraint is particularly effective at achieving a goal, a greater showing of out-of-state effects could be required to hold the restraint invalid.[127]

Further, a state may argue that its legislation restraining trade serves the national interest. That national interest can be demonstrated by examples of federal cooperation with the program or parallel federal legislation. This consideration was present in *Parker* but has been largely ignored by the Court since.[128] If, as was the case in *Parker*, a state restraint mirrors federal legislation in a particular area, then the federal goal of promoting competition is pre-empted by *another* federal goal, and the state restraint stands on stronger ground. Because California's

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122. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142–44 (1970).

123. *Id.* at 138.

124. *Id.*

125. If no legitimate state interest exists, as suggested in Cantor v. Detroit Edison Co., 428 U.S. 579, 613 (Blackmun, J., concurring), the balancing test will be rather simple, with the test likely finding the regulation invalid.

126. Bates v. State Bar of Ariz., 433 U.S. 350, 361 (1977).

127. *See* Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 99 (1980) (noting a retail price maintenance scheme for wine did not achieve either of the interests the state offered).

128. 317 U.S. 341, 367 (1943).

program in *Parker* was analogous to the federal agricultural price stability program, the federal pro-competitive policy embodied by the Sherman Act was superseded by another federal interest, and the state's policy thus did not disturb that superseding federal goal.

However, while parallel federal legislation would significantly bolster a state regulation's position, it is not necessary to show parallel federal legislation to prevail. For instance, if the state restraint remedies a market failure or otherwise improves economic efficiency, the restraint stands on firmer ground. California was faced with a national problem in *Parker* but was nevertheless competent to solve the problem on its own.[129] The federal government should not displace state legislation when the legislation properly solves a national issue. If the crux of a national issue, like fluctuating raisin prices, can be adequately solved by one state, there is no need for federal interference in the issue. Indeed, not all externalities are negative.

On the other hand, a regulation's out-of-state effects may weigh against the state. These can take the form of spillover costs, collective action problems, and other burdens on interstate commerce. States are, almost by definition, incompetent to solve collective action problems that extend beyond their borders. A state restraint is more vulnerable to invalidation the more it imposes burdens on other states. Such burdens and collective action are not unique to localized regulations, so this balancing test would largely serve to protect states' interest in regulating local matters. For example, recent Court decisions concerning *Parker* involved peer-review proceedings at a single hospital,[130] sewage treatment surrounding one city in one state,[131] and cable TV regulations in one city.[132] Each was local enough to stave off concerns of out-of-state effects.

But the absence of an interstate collective action problem should not end the analysis. Simply because a market failure or some sort of interstate collective action problem does not exist does not mean the state regulation should automatically prevail. If the regulation's negative interstate effects outweigh any local benefit, even if not in a "significant way," the regulation still ought to lose antitrust immunity. However, this side of the test should not consider intrastate effects of a regulation, or a collective action problem that occurs within a single

129. *Parker*, 317 U.S. at 367 (1943).
130. Fed. Trade Comm'n v. Ticor Title Ins. Co., 504 U.S. 627 (1992).
131. Town of Hallie v. City of Eau Claire, 471 U.S. 36 (1985).
132. Community Comm. Co., Inc. v. City of Boulder, 455 U.S. 40 (1982).

state. These burdens are entrusted to a state's political system. If a state decides to displace competition within its borders, and the effects do not cross state lines, it is up to the citizens to hold their representatives accountable if they disagree with that decision.[133]

V. DISCUSSION

For a test case, consider *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, where state regulations set "an effective price schedule or effective fair-trade contract" for wine being sold in certain transaction areas.[134] At the time, such resale price coordination (by private actors) was *per se* illegal under the Sherman Act.[135] The Court rejected a *Parker* immunity defense because the state had not actively supervised the price maintenance.[136] However, assuming a similar scenario where California does actively supervise the resale price maintenance, the policy is still unlikely to survive the proposed test. Applying this test, a Court would first note any out-of-state effects the regulation has. While the specific scope of out-of-state effects were undetermined, there was no dispute that the California statute had at least *some* out-of-state effects. The Court would need to consider the specific facts of a case in order to properly balance the countervailing interests. The Court would also take into account the State's interest in the regulation. In *Midcal*, the state offered "promoting temperance and orderly market conditions" as the relevant state interests.[137] The first interest, temperance (or reducing people's alcohol consumption), is not promoted by such a scheme.[138] Further, the Supreme Court noted findings by the California Supreme Court that fair trade laws enjoyed little justification to continue.[139] The state enacted the resale price maintenance scheme in order to protect small licensees from predatory pricing policies of large retailers.[140] However,

133. Fed. Trade Comm'n v. Ticor Title Ins. Co., 504 U.S. 621, 636 (1992) ("[S]tates must accept political responsibility for the actions they intend to undertake.").

134. 445 U.S. 97, 99 (1980).

135. *Id.* at 102–03; *but see* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007) (holding resale price maintenance schemes no longer *per se* illegal). Resale price maintenance schemes involve resellers agreeing to sell a manufacturers' product either above a price floor or below a price ceiling.

136. *Midcal*, 445 U.S. at 105–06.

137. *Id.* at 112.

138. *Id.* (noting liquor consumption went up 42% while resale price maintenance was in effect).

139. *Id.* at 113.

140. *Id.* at 112–13. Predatory pricing schemes involve a company charging below some unit of cost, hoping to create an unsustainable market condition that causes other competitors to exit

the state interest itself was not advanced by such a scheme.[141]

Additionally, no federal legislation paralleled the California scheme.[142] This case would thus be an easy one for balancing concerns. The state has no legitimate, practical interest in maintaining the resale price maintenance scheme, and the federal interest in competition and burdens on out-of-state citizens outweigh the non-existent state interest. A more difficult case would arise where the wine pricing scheme actually did achieve state objectives. But if that were the case, the plaintiff would still have strong grounds to challenge the pricing scheme. For instance, they could first present less restrictive means to accomplish those goals, since the temperance movement in the United States is not short on methods to discourage alcohol consumption.[143] Moreover, "orderly market conditions" could possibly be achieved by a number of different strategies with less negative impact out-of-state.

Under this proposed test, if a state restraint impermissibly imposes its costs on other states, it merely loses its *Parker* immunity. The statute would then be subject to general review under antitrust law. Although many of the restraints mentioned would likely violate general review in antitrust courts,[144] states will still have an additional opportunity to defend their regulations under rule of reason analysis. Such cases are not likely to be successful for the state, however. Rule of reason analysis only covers competitive harms and benefits, not general social welfare benefits.[145] Once a state statute is shown to impermissibly burden interstate commerce, it is likely going to be held invalid under any antitrust scrutiny. This is a feature of this test, not a bug. Once the federalism principles underlying *Parker* have been undermined or shown to be outweighed by the interest in national unity and competition, all that is left is a restraint on trade. It ceases to become a state regulation worthy of protection on federalism grounds and

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the market, where the company can then reap the benefits of a more concentrated market.

141. *See id.* (describing findings of fact by the California Supreme Court that showed California's scheme did not achieve its intended objective).

142. *See id.* at 110–13 (offering no federal interest in the state regime).

143. *See* Alice W. Campbell, *Temperance Movement*, VCU LIBRARIES SOC. WELFARE PROJECT (2017), https://socialwelfare.library.vcu.edu/religious/the-temperance-movement/ (describing a number of ways temperance was promoted in the United States).

144. *See, e.g.*, Parker v. Brown, 317 U.S. 341, 350 (1943) (assuming that the raisin prorate program would be illegal if done by private parties).

145. *See* Nat'l Soc'y of Prof'l Engineers v. United States, 435 U.S. 679, 692 (1978) ("In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress").

becomes a restraint subject to rule of reason review.

Such review would not transform antitrust courts into *Lochner* era tribunals passing judgment on the wisdom of state restraints.[146] The goal of a courts' review of this proposed test would not be to ask, "is this statute economically efficient?" but rather "does this statute offend the principles of national unity and impermissibly burden interstate commerce?" Principles of national unity underpin a number of existing constitutional doctrines. This approach to the *Parker* doctrine, where state regulations that create significant collective action problems fall under antitrust scrutiny, best aligns with the constitutional ideal of interstate harmony.

Outside of the antitrust sphere, constitutional doctrine exists in order to foster harmony within the union and between states. In fact, a number of state economic regulations inspired the creation of a national commerce clause.[147] The cycle of states abusing their discretion to support their economic self-interest is as old as the Union itself. For example, while not a monopoly, New York's independence in setting tariff rates that benefitted New York is one cited reason for a Constitution granting a strong commerce power in the federal government.[148] The Constitution set up a national market to defeat economic provincialism.[149] The Sherman Act, the free market charter for the United States, should do the same.[150] While state regulation and sovereignty are crucial to a healthy system of federalism, the Court has not shied away from enforcing limits on state's abilities to harass each other as co-equal sovereigns. By preventing state-action immunity from covering restraints that create excessive interstate conflicts, the Sherman Act can promote constitutional ideals and interstate harmony as well.

The primary remedy to a violation of the proposed test should not be treble damages, but an injunction prohibiting the conduct from continuing. One of the hallmarks of antitrust enforcement is the

146. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 166 (1996) (describing the vices of the Lochner era).

147. *See* South Dakota v. Wayfair, Inc., 138 S.Ct. 2080, 2089 ("[T]he Commerce Clause 'reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.'").

148. GEORGE WILLIAM VAN CLEVE, WE HAVE NOT A GOVERNMENT: THE ARTICLES OF CONFEDERATION AND THE ROAD TO THE CONSTITUTION 260–64 (2017).

149. Reeves, Inc. v. Stake, 447 U.S. 429, 453 (1980) (Powell, J., dissenting).

150. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940).

possibility of treble damages.[151] However, while concerns with antitrust law mainly focus on harm to consumers and the competitive process, this paper's concerns with the *Parker* doctrine involve constitutional issues of national unity and free markets. Because states should not be subject to the threat of treble damages for every statute they pass, the adequate remedy would be to prohibit the state from continuing to burden out-of-state citizens, not pay those citizens triple damages. A state legislating for the public good, which then burdens interstate commerce, invokes very different concerns than a group of competitors conspiring to fix prices. Where treble damages seek to punish profit-maximizing individuals from benefiting from anti-competitive activities,[152] the balancing test proposed above seeks to preserve the federal balance rather than demarcate and penalize states. Further, threatening public bodies with treble damages might deter states from passing legitimate local legislation for fears that the state would need to pay treble damages.[153]

This revision of the *Parker* doctrine better aligns it with modern economic theory. As a general principle, the more a sovereign is able to internalize the benefits and costs of some regulation, the more efficient the economic regulation will be.[154] While the current *Parker* doctrine does not consider the internalization principle at all, this proposed solution allows antitrust suits to correct interstate burdens that become too severe. Congress has already legislated and made its policies clear through the Sherman Act: namely, promoting free markets and competition.[155] Thus, if a state restraint places burdens onto other states where the restraining state is not politically accountable, the body that can best internalize those costs, Congress, has decided to promote competition.[156] The policy promoting competition would then overrule

151. 15 U.S.C. § 15 ("[A]nd shall recover threefold the damages by him sustained").

152. Wiley Jr., *supra* note 70, at 789 n.287.

153. *Id.*

154. Herbert Hovenkamp & John A. MacKerron III, *Municipal Regulation and Federal Antitrust Policy*, 32 UCLA L. REV. 719, 720 (1985); *see also* Cooter & Siegel, *supra* note 75, at 137–38 (describing the theory of the internalization principle).

155. City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 398 (1978) (plurality opinion) ("[A]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.")

156. Standard Oil Co. v. Fed. Trade Comm'n, 340 U.S. 231, 253–54 (1951) (Reed, J., dissenting) ("The public policy of the United States fosters the free-enterprise system of unfettered competition among producers and distributors of goods as the accepted method to put those goods into the hands of all consumers at the least expense.").

any state interest in regulation. The state could lobby Congress to codify antitrust immunity, in which case the whole nation, which would bear the costs and benefits of such a program, could decide if it was in its best interest through their elected Congressional representatives.

CONCLUSION

The *Parker* doctrine exists to ensure that states may regulate and impose anti-competitive restraints without fear of antitrust scrutiny. In this sense, it represents a reverse preemption where a state's regulation preempts the federal interest in promoting competition. Beginning with the immunity of a raisin cartel in the 1940s, the doctrine has largely remained intact without many alterations to present day. However, the doctrine is not without problems. From an economic standpoint, it shields regulations that are not efficient and allows a small number of producers to accrue benefits at the cost of many consumers. Further, the doctrine also encourages inefficient results from a political standpoint. Not only do spillovers create incentives for political actors to off-load costs to citizens that cannot vote them out, but those who bear the costs have no other redress to resolve their issues. Even if consumers did have a method of redress, a free-rider problem prevents groups from effectively advocating for solutions. These problems have been noted by a number of scholars, and many solutions have been presented.

This paper proposes that the Supreme Court adopt a balancing test to determine whether or not a restraint on trade ought to be entitled to *Parker* doctrine immunity. Courts should balance the necessity and efficacy of a state regulation against the severity of out-of-state spillovers and collective action problems that regulation creates. If a court determines that the benefits of such a regulation are not outweighed by the potential harms to out-of-state consumers and interstate commerce, the court should permit the regulation to stand. If a state regulation is not entitled to immunity, the state may still petition Congress to grant antitrust immunity to the conduct in question. This balancing test would still allow states to regulate issues that arise within their borders but would curtail their ability to impose excessive costs across the nation in pursuit of those efforts. In turn, this harmonizes the *Parker* doctrine with America's unique federalist system, while also promoting economic and political efficiency.