ANTITRUST FOR IMMIGRANTS

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Immigrants and undocumented people have often encountered discrimination because they compete against "native" businesses and workers, resulting in protests, boycotts, and even violence intended to exclude immigrants from markets. Key to this story is government's ability to discriminate as well: it is indeed common for state and federal actors to enact protectionist laws and regulations meant to prevent immigrants from braiding hair, manicuring nails, operating food trucks, or otherwise competing. But antitrust courts have seldom mentioned a person's immigration status, much less offered a remedy.

This Article shows that antitrust's "consumer welfare" standard has curiously ignored the plight of immigrants. Part of the reason is that antitrust law is characterized as a "colorblind" regime benefitting consumers collectively, meaning that it isn't supposed to prioritize insular groups such as immigrants. Courts and scholars have also described matters of inequality and discrimination as "social harms" existing beyond antitrust's scope. In fact, antitrust lawsuits have successfully sought to drive immigrants out of markets, alleging that competitors gained an "unfair" advantage from employing undocumented workers. Under this view of antitrust law, the exclusion of immigrants is an appropriate way of promoting competition.

This Article argues that anti-immigrant discrimination creates the exact types of harms that antitrust was meant to remedy. Since excluding immigrants can misallocate resources on citizenship or racial lines as opposed to their most productive usages, certain acts of discrimination should entail "conduct without a legitimate business purpose," even when based

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solely on racial animus. A hidden type of market power is revealed in that foreign-born people are less able to employ self-help remedies to correct market failures. In addition to analyzing antitrust's purpose and economic foundation, this Article delves into antitrust's history to show that an original function of competition law was to protect foreigners. By demonstrating how incumbents can inflict greater levels of harm on immigrants while wielding less market power, this Article reimagines the consumer welfare standard and its colorblind approach as well as reveals how marginalized communities defy antitrust's assumptions of self-help remedies.

INTRODUCTION

Antitrust law could offer an effective remedy against anti-immigrant discrimination. When immigrants and undocumented people suffer abuse due to their race,[1] religion,[2] or national origin,[3] it has often shrouded an additional goal: to prevent immigrants from competing.[4] Since immigrants are thought to work longer hours, accept less money, and undersell longstanding businesses, their presence has engendered harassment,[5] protests,[6] boycotts,[7] and even violence meant to exclude immigrants from markets for goods, services, and labor.[8] Given antitrust's goal of fostering competition, why hasn't enforcement been generally willing to scrutinize discrimination as anticompetitive behavior?

To use a few examples, "native" businesses have inspired boycotts of competitors who employ undocumented workers, insisting that their goal is to protect American jobs[9] as well as

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1 *See* Reema Ghabra, *Black Immigrants Face Unique Challenges*, HUMAN RIGHTS FIRST (Feb. 17, 2022), https://humanrightsfirst.org/library/black-immigrants-face-unique-challenges/ [https://perma.cc/GPK6-YYM4].

2 *See* Laila Lalami, *I'm a Muslim and Arab American. Will I Ever Be an Equal Citizen?*, N.Y. TIMES (Sept. 17, 2020), https://www.nytimes.com/2020/09/17/magazine/im-a-muslim-and-arab-american-will-i-ever-be-an-equal-citizen.html [https://perma.cc/T9J9-VSSR] (last updated, Sept. 18, 2020) ("But in practice, Arabs are often treated as nonwhite—for instance, by the I.N.S. special registration program that targeted immigrants from majority-Muslim nations following the Sept. 11 attacks.").

3 *See, e.g.*, Melanie Gray, *Mayhem in the Streets: Illegal Vendors Are Overtaking NYC*, N.Y. POST, https://nypost.com/2020/12/26/mayhem-in-the-streets-illegal-vendors-are-overtaking-nyc/[https://perma.cc/8NN4-P3PJ] (last updated, Dec. 26, 2020).

4 *See* Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 518 F. Supp. 993, 1001–02 (S.D. Tex. 1981).

5 *See id.* at 1001–04.

6 *See infra* notes 10–13 and accompanying text.

7 *See id.*

8 *See* Christine Haughney, *Assault on Mexicans Shakes Long Island Town*, WASH. POST (Nov. 28, 2000), https://www.washingtonpost.com/archive/politics/2000/11/28/assault-on-mexicans-shakes-long-island-town/79eec830-5c09-48c9-8f89-eb6c63a76bae/ [https://perma.cc/3W7A-HMWD] ("[They held] signs with the slogan 'Illegal Aliens Are Criminals not Immigrants' across the street from groups of 50 to 70 day laborers waiting to be picked up by employers. The rallies have attracted attention from national anti-immigration advocates—and since the beatings, larger crowds of Suffolk County residents decrying bigotry.").

9 Madeline Montgomery, *Local Carpenters Protest Builders Who They Claim Use Illegal Immigrants*, WPDE (Mar. 3, 2018), https://wpde.com/news/local/local-carpenters-protest-builders-who-they-claim-use-illegal-immigrants [https://perma.cc/3AXT-M6LA].

"our laws, sovereignty, and justice system."[10] Restaurants have likewise sought to avoid competition by driving food trucks operated by immigrants out of their markets.[11] Companies have also pledged to reject "illegal immigrant" labor as a way of boosting the competitiveness of American workers.[12] When Vietnamese shrimpers entered the Texas market, local fishermen partnered with the Ku Klux Klan to harass them and their businesses.[13]

In situations where protectionism leads to discrimination, sentiments about immigrants "stealing" American opportunities can play a role.[14] Using a historical example, Congress passed the Chinese Exclusion Act on the pretense that Chinese immigrants would usurp "American jobs" and deteriorate society.[15] Even labor unions sought to impede immigrants from

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10 Mike Stotts, *Boycott Contractors Who Employ Illegal Immigrants*, GOLD COUNTRY MEDIA (June 15, 2007), https://goldcountrymedia.com/news/109305/boycott-contractors-who-employ-illegal-immigrants/ [https://perma.cc/HJB3-QLH8]; *cf.* Chantelle Jannelle, *Anti-Illegal Immigrant Groups Call for Boycott of Bank of America*, WIS NEWS 10 (Mar. 9, 2007), https://www.wistv.com/story/6201818/anti-illegal-immigrant-groups-call-for-boycott-of-bank-of-america [https://perma.cc/SE62-WJSR] (last updated, Mar. 10, 2007) (describing consumer boycott of a bank due to its "offering credit cards to people without Social Security numbers, many of whom are illegal immigrants.").

11 *See* Joseph Pileri, *Who Gets to Make a Living? Street Vending in America*, 36 GEO. IMMIGR. L.J. 215, 238–39, 243 (2021) (describing how perceptions of "unfair competition" can drive sentiments against food trucks and street vendors); *Not So Mobile: How Local Protectionism Curbs Food-Truck Entrepreneurs*, INST. FOR JUST., https://ij.org/report/barriers-to-business/business/foodtruck/ [https://perma.cc/G4TD-BDWS] (arguing that licensing requirements of street vendors "are not designed or even intended to protect public health and safety, but instead seek to prevent food trucks from competing with existing restaurants.").

12 Stephen Gurr, *Companies Pledge Not to Hire Illegal Immigrants*, GAINESVILLE TIMES, (Feb. 13, 2008), https://www.gainesvilletimes.com/news/companies-pledge-not-to-hire-illegal-immigrants/ [https://perma.cc/WV7S-AMP6] (last updated, Feb. 25, 2008).

13 *See* Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 518 F. Supp. 993, 1001–04 (S.D. Tex. 1981).

14 Timothy P. Green, *Senate GOP Continues Support for Employers Hiring Illegal Workers*, GREEN WIRE, https://www.senate.mo.gov/06info/members/newsrel/d13/042506.pdf [https://perma.cc/5EUR-72MS] (asserting that a state senator "seems intent on protecting these employers who want to hire illegal, undocumented workers to steal jobs from tax-paying Missourians."); *see also* Chae Chan Ping v. United States, 130 U.S. 581, 595 (1889) (opining that Chinese people "remain[] strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people . . . .").

15 *See* OFF. OF THE HISTORIAN, DEP'T OF STATE, CHINESE IMMIGRATION AND THE CHINESE EXCLUSION ACTS, https://history.state.gov/milestones/1866-1898/chinese-immigration [https://perma.cc/W4YC-PG8W] ("As the numbers of Chinese laborers increased, so did the strength of anti-Chinese sentiment among other workers

competing for employment by characterizing immigrants as undesirables, refusing to hire foreign-born people, as well as petitioning Congress for restrictive immigration laws.[16]

But antitrust courts have hardly ever mentioned a person's immigration status, much less offered a remedy when immigrants were targeted by anticompetitive conduct. The reason is that antitrust's "consumer welfare" standard has seemingly ignored marginalized people.[17] To offend antitrust law, an exclusionary act must have economically harmed consumers across a market; a commonly stated goal is to promote efficiency.[18] But due to antitrust's focus on consumers writ large and systemic effects, immigrants can rarely state a claim. In fact, antitrust has been described as a "colorblind" body of law, meaning that enforcement isn't supposed to focus on insular groups like immigrants.[19] Courts have even ruled that anticompetitive conduct stemming from racial animus—as opposed to profit maximization—is a type of a non-economic injury and, thus, inappropriate for antitrust review.[20]

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in the American economy. This finally resulted in legislation that aimed to limit future immigration of Chinese workers to the United States . . . .").

16 *See* Herbert Hill, *The Problem of Race in American Labor History*, 24 REVS. AM. HIST. 189, 189–90 (1996) (discussing the history of racism as it relates to labor unions).

17 Gregory Day, *State Power and Anticompetitive Conduct*, 75 FLA. L. REV. 637, 686–87 (2023).

18 Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1339 (11th Cir. 2010) ("Higher prices alone are not the 'epitome' of anticompetitive harm . . . . Rather, consumer welfare, understood in the sense of allocative efficiency, is the animating concern of the Sherman Act. By 'anticompetitive,' the law means that a given practice both harms allocative efficiency *and* could 'raise[] the prices of goods above competitive levels or diminish[] their quality,' in addition to other possible anticompetitive effects such as those above. In turn, the ability to raise prices above the competitive level corresponds to a firm's market power.") (alterations in original) (citations omitted); Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1444 n.15 (9th Cir. 1995) ("As we have noted previously, allocative efficiency is synonymous with consumer welfare and is the central goal of the Sherman Act.") (citation omitted).

19 ROBERT H. BORK, THE ANTITRUST PARADOX 110–12 (1978) (writing that antitrust "treat[s] all members of society equally" and also assesses consumers "as a class"); Bennett Capers & Gregory Day, *Race-ing Antitrust*, 121 MICH. L. REV. 523, 543 (2023) (writing that "Bork's view of antitrust" is that it "treat[s] all members of society equally" and also assesses consumers "as a class . . . .") (alteration in original).

20 *See* Rowe Ent., Inc. v. William Morris Agency, Inc., No. 98 CIV. 8272(RPP), 1999 WL 335139, at *6 (S.D.N.Y. May 26, 1999) ("[N]o reasonable inference of a conspiracy to restrain trade can be drawn here because, based on the allegations in the Complaint, no rational economic motive can be discerned for a booking agency to conspire with white concert promoters to restrain trade by not dealing with black concert promoters."). *See generally* Daria Roithmayr, *Barriers to Entry:*

Key to this story is government's role: it is indeed common for state and federal actors to exclude foreign-born people from markets in order to protect citizens and their businesses. For instance, states empower private actors to form licensing agencies tasked with regulating their own markets under the justification of health and safety.[21] But in actuality, many of their rules happen, or are intended, to shield incumbents from competition by barring immigrants from braiding hair,[22] manicuring nails,[23] providing child care,[24] and operating food trucks.[25] Notably, state-sponsored discrimination is generally cloaked in antitrust immunity because, the Supreme Court insisted, elections should spur states to restrict competition when society would benefit.[26] Yet this remedy is ineffective for many

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A Market Lock-in Model of Discrimination, 86 VA. L. REV. 727, 728–38, 796–99 (2000); Will Yepez, *Elizabeth Warren's Delusional Antitrust Crusade*, WASH. EXAM'R (Jan. 21, 2022), https://www.washingtonexaminer.com/opinion/elizabeth-warrens-delusional-antitrust-crusade [https://perma.cc/MB9P-NTTC] (calling combatting racism a "social goal," suggesting it is beyond the purview of antitrust law).

21 REBECCA HAW ALLENSWORTH, BOARD TO DEATH (forthcoming).

22 *See* Tayna A. Christian, *Twisting the Dream*, ESSENCE, https://www.essence.com/feature/natural-hair-braiding-regulations/ [https://perma.cc/ZM63-WCHT] (last updated, Oct. 9, 2019); Assefash Makonnen & Erin Markman, *New Report Shows Professional Licenses Out of Reach for New York's African Hair Braiders*, AFR. COMTYS. TOGETHER (Dec. 8, 2020), https://africans.us/new-report-shows-professional-licenses-out-reach-new-york%E2%80%99s-african-hair-braiders [https://perma.cc/3E7Q-T68F] (mentioning that many hair braiders prohibited from the market are undocumented and illiterate).

23 *See* Beth Redbird, PhD & Angel Alfonso Escamilla-García, *Borders Within Borders: The Impact of Occupational Licensing on Immigrant Incorporation*, 6 SOCIOLOGY RACE & ETHNICITY 22, 25 (2020) ("Local educational requirements and licensing exams also place an additional burden on individuals with limited language skills. For example, the English proficiency requirement has been shown to have a negative impact on rates of employment among Vietnamese manicurists.") (citation omitted).

24 *See* Bente Birkeland & Jenny Brundin, *Colorado's Undocumented Immigrants Have Been Shut Out of Benefits and Licensed Jobs for 15 Years. A New Bill Would Change That*, CPR NEWS (Feb. 22, 2021), https://www.cpr.org/2021/02/22/colorados-undocumented-immigrants-have-been-shut-out-of-benefits-and-licensed-jobs-for-15-years-a-new-bill-would-change-that/ [https://perma.cc/GB7L-XUS8].

25 *See* Annie Correal, *He Stayed Afloat Selling $3 Tacos. Now He Faces $2,000 in Fines*, N.Y. TIMES (Aug. 17, 2021), https://www.nytimes.com/2021/08/17/nyregion/ny-street-vendors-crackdown.html [https://perma.cc/L35C-SD35] (last updated, Sept. 28, 2021) ("The complaints, she said, have come from business owners, Business Improvement Districts, elected officials and others, who point to street congestion, noise and the unfair competition the vendors pose to brick-and-mortar businesses and to licensed vendors.").

26 *See* Parker v. Brown, 317 U.S. 341, 350–51 (1943); N. C. State Bd. of Dental Examr's v. FTC, 574 U.S. 494, 503, 508 (2015) (noting that "municipalities[, as agents of State governments,] are electorally accountable and lack the kind of private incentives characteristic of active participants in the market.").

immigrants who lack voting rights or a meaningful way of influencing the political process.

Far from a controversial landscape, scholars have insisted that antitrust cannot properly remedy discrimination or foster equality, calling these "essential policy goals [but] . . . best left to the constitutional and statutory institutions intended to address them."[27] Courts and scholars have similarly described discrimination as a "social harm" that exists beyond antitrust's scope.[28] Antitrust has, in fact, been used to exclude immigrants from markets: for example, companies have successfully alleged that rivals gained an "unfair" advantage from employing undocumented workers.[29] Courts have also ruled that the hiring of undocumented workers was anticompetitive because it depressed the wages of citizens.[30] Under this vision of antitrust, the exclusion of undocumented people is an appropriate way of promoting competition.[31]

However, nothing in the Sherman Act requires courts to ignore discrimination against immigrants and undocumented people. Since markets are said to self-correct, antitrust law is only supposed to intervene when anticompetitive conduct has caused an inefficiency harming consumer welfare like high prices or restricted output.[32] But notice that excluding

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

28 *See* Kirk Victor, *Slaughter's Tweets on Antitrust and Race Spark Backlash*, FTC WATCH (Sept. 21, 2020), https://www.mlexwatch.com/articles/9223/print?section=ftcwatch [https://perma.cc/3JXK-PAZ4] ("No. That's not what the antitrust tools are to be used for.").

29 *See* Rios v. Marshall, 530 F. Supp. 351, 357–58, 360 (S.D.N.Y. 1981) ("[T]he defendant apple growers and their agents conspired to restrain the domestic job market for the annual New York apple harvest during the years 1975 to 1979 by offering wage rates that were below competitive rates in the relevant market . . . . The complaint therefore states a viable claim of a conspiracy to depress employment conditions in violation of § 1 of the Sherman Act.") (footnote omitted).

30 *See, e.g.*, Mendoza v. Zirkle Fruit Co., 301 F.3d 1163, 1171 (9th Cir. 2002) (upholding a complaint by lawfully present migrant workers that the hiring of undocumented workers could offend antitrust law by depressing wages).

31 *See, e.g.*, El Dorado Meat Co. v. Yosemite Meat & Locker Serv., Inc., 58 Cal. Rptr. 3d 590, 592 (Ct. App. 2007) (alleging "reduced labor costs by employing undocumented immigrants, practices El Dorado claimed made it uncompetitive and drove it out of business.").

32 United States v. Syufy Enters., 903 F.2d 659, 663 (9th Cir. 1990) ("While much has been said and written about the antitrust laws during the last century of their existence, ultimately the court must resolve a practical question in every monopolization case: Is this the type of situation where market forces are likely to cure the perceived problem within a reasonable period of time? Or, have barriers been erected to constrain the normal operation of the market, so that the problem is not likely to be self-correcting? In the latter situation, it might well

immigrants can misallocate resources on citizenship or racial lines as opposed to their most productive usages. Since the exclusion of (undocumented) immigrant businesses may eliminate low-priced goods or services and thereby lessen output, it can erode the efficiency goals of consumer welfare; after all, consumers might buy a more expensive service, nothing at all, or a poor substitute. Also, threats of deportation and arrest can lead (undocumented) immigrant labor to accept lower salaries or work in hazardous conditions, enabling dominant parties to generate above-market profits based upon suppressing competition. A hidden type of market power is revealed in that foreign-born people are less able to employ self-help remedies to correct market failures. As such, this Article asserts that certain forms of discrimination should entail "conduct without a legitimate business purpose" even when based solely on racial animus.[33] To make this case, the Article delves into antitrust's legacy—a key source of authority—to show that competition law had historically protected immigrants and foreigners. By explaining how incumbents can inflict greater levels of harm on immigrants while wielding less market power, this Article 1) exposes flaws in antitrust's consumer welfare standard, 2) reveals how marginalized communities can defy antitrust's assumptions of self-help remedies, 3) promotes the efficient allocation of resources, and 4) fills in gaps left by Equal Protection.

An important point of clarification: this Article is not advocating for the non-enforcement of immigration policies or any alteration of immigration laws. Antitrust's stance is that violating *a different* body of law doesn't turn a valid form of competition—such as underselling a rival—into an anticompetitive act; in this situation, the remedy lies in the other regime rather than turning to antitrust.[34] Indeed, whether an

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be necessary for a court to correct the market imbalance; in the former, a court ought to exercise extreme caution because judicial intervention in a competitive situation can itself upset the balance of market forces, bringing about the very ills the antitrust laws were meant to prevent."); *see also* William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981) ("The term 'market power' refers to the ability of a firm (or a group of firms, acting jointly) to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded. Market power is a key concept in antitrust law.").

33 Merced Irrigation Dist. v. Barclays Bank PLC, 165 F. Supp. 3d 122, 142 (S.D.N.Y. 2016) (quoting *In re* Adderall XR Antitrust Litig., 754 F.3d 128, 133 (2d. Cir. 2014)).

34 *Infra* Part II.D.

actor creates friction with a utilities regulation,[35] intellectual property rule,[36] immigration law, or other statute is typically irrelevant for antitrust's purposes; for this reason, antitrust is meant to promote consumer welfare in terms of low prices, increased output, and enhanced quality without eyeing, or enforcing, another body of law.[37] By taking an agnostic approach about the wisdom of modern immigration laws and how they're applied—in following antitrust's precedent—this Article shows that discrimination against (undocumented) immigrants can frustrate antitrust's goals of promoting economic efficiency and consumer welfare in terms of output, prices, and quality. If U.S. immigration policy is suboptimal, this burden falls to lawmakers and immigration officials to enforce or alter immigration laws; but antitrust isn't supposed to consider the implications of other laws and policies in turning a valid form of competition such as offering low prices or high quality into an anticompetitive act.

Lastly, there is no perfect term to describe foreign-born noncitizens residing in a country. While many foreign-born persons are extended citizenship, others are permitted to live in the United States either temporarily or permanently. And another 11,000,000 people qualify as "undocumented," meaning that they lack legal authority to reside or work in the country; and again, many state and federal policies have provided ways for undocumented people to remain domestically.[38] This Article tends to use the imperfect, blanket term of "immigrant" since it is defined broadly as one that leaves one place to settle in another.[39] While the word "immigrant" may fail to convey some of the differences between naturalized citizens, types of

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35 Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 411 (2004). ("Respondent believes that the existence of sharing duties under the 1996 Act supports its case. We think the opposite: The 1996 Act's extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access. To the extent respondent's 'essential facilities' argument is distinct from its general § 2 argument, we reject it.").

36 FTC v. Qualcomm Inc., 969 F.3d 974, 997 (9th Cir. 2020) (ruling that, since a patent holder is ordinarily allowed to refuse to license their patent, a holder's contract breach to license standard essential patents is best remedied by patent or contract law rather than antitrust).

37 *See infra* Part II.D.

38 S*ee generally* Pratheepan Gulasekaram, Rick Su & Rose Cuison Villazor, *Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV., 837, 845–46, 848 (2019) (discussing the role of sanctuary cities and other laws intended to allow undocumented people in the United States).

39 *Immigrant*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/immigrant [https://perma.cc/AQD7-MC6P]; *see also Profile of the Unauthorized Population: United States*, MIGRATION POL'Y INST. https://www.migrationpolicy.org/

visa holders, and undocumented people, each group may harbor similar fears as well as face discrimination; nevertheless, there is no ideal way of discussing foreign-born people in the United States without losing some nuance.

The Article proceeds in four parts. Part I shows that discrimination against foreign-born people has typically mirrored immigrations laws, which had historically provided only Anglo-Saxon persons with a route to citizenship or even residency. This exclusion was often driven by both bigotry and anticompetitive goals. Part II delves into antitrust law's history and modern framework. The discussion shows that Congress codified a sparsely worded statute in the form of the Sherman Act to give courts a measure of freedom to interpret antitrust law. The result, though, is that courts have narrowed antitrust's scope whereby enforcement is seldom able to remedy acts oppressing immigrants. Part III discusses the intersectionality of immigration and race, read through the scope of belonging. It shows that dominant groups have used citizenship or even race as a shorthand method to exclude immigrants as undeserving competitors. Then Part IV proposes reforms to this framework where antitrust law may not only achieve its purposes of economic efficiency but do so in ways that promote the welfare of consumers and immigrants. A section of this Analysis includes discussions about its implications for Equal Protection, state-action immunity, and matters of race in antitrust.

I
A Brief History of Immigration and Anticompetitive Discrimination

The historical treatment of foreign-born people has often been rooted in economic anxiety or even xenophobia. For generations after the United States' founding, Congress drafted immigration laws to favor white individuals from Anglo-Saxon countries while expressly withholding residency and citizenship from people of Asian, Latin American, African, and Eastern European origins, among others. Driving this exclusion, citizens have frequently expressed fears of immigrants who compete in markets for labor, goods, and services. Then once in this country, many immigrants have continued to face anticompetitive discrimination at the hands of government and private actors. To make these points, Section A explores the history of racially exclusionary immigration policies to set the

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data/unauthorized-immigrant-population/state/US [https://perma.cc/B8H5-ZPJY] (estimating that 11,000,000 undocumented people reside in the United States).

stage for Section B, which analyzes how private parties and government actors have constructed tropes about immigrants in pursuit of anticompetitive ends.

A. The Tradition of Racism and Exclusion in U.S. Immigration Laws

Xenophobia against foreign-born people living and working in the United States has traditionally mirrored immigration laws, which had long disfavored non-Anglo-Saxon persons in express terms. To help explain when and why certain groups of immigrants have faced discrimination as workers or businesses, this Section reviews the ways in which citizenship, immigration, and naturalization laws have historically excluded people of color.

At the country's outset, early Americans entered western lands, known as "manifest destiny."[40] Settlers treated indigenous people as subordinate outsiders by depriving them of citizenship or even forcing them to relocate elsewhere.[41] The persons making the rules about residency and citizenship were, in essence, recent arrivals themselves.

When the Constitution's Framers embarked on a uniform policy of immigration, they vested naturalization powers in Congress[42] as well as permitted immigrants to hold federal offices except for the Presidency.[43] Congress—with this grant of authority—initially believed that a pledge of allegiance offered a better condition of citizenship than a person's birthplace; after all, suspicions persisted about English colonizers who had been born in the United States.[44] Since the "desire of America,"

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40 Brenda Jones Quick, *Special Treatment Is Fair Treatment for America's Indigenous Peoples*, 3 DET. COLL. L. MICH. ST. U. L. REV. 783, 789 n.38 (1997) (describing the concept of "[m]anifest [d]estiny," which espoused that "not only did whites have the right to expand westward, but it was God's will that they do so.").

41 *See* Kaitlyn Schaeffer, *The Need for Federal Legislation to Address Native Voter Suppression*, 43 N.Y.U. REV. L. & SOC. CHANGE 707, 709 (2019) (explaining that Native Americans were not considered citizens of the United States until conferred by the Indian Citizenship Act in 1924).

42 U.S. CONST. art. I, § 8, cl. 4 ("Congress shall have Power . . . To establish an uniform Rule of Naturalization . . . .").

43 *See id.* art. II, § 1, cl. 5 ("No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.").

44 *See* Andrew M. Baxter & Alex Nowrasteh, *A Brief History of U.S. Immigration Policy from the Colonial Period to the Present Day*, CATO INST. (Aug. 3, 2021), https://www.cato.org/policy-analysis/brief-history-us-immigration-policy-colonial-period-present-day#pre-ratification-period [https://perma.cc/D7C9-2MKP] ("[W]hen the

Thomas Jefferson asserted, was to promote "rapid population, by as great importations of foreigners as possible," hordes of immigrants flooded into the United States.[45]

That said, the Naturalization Act of 1790 granted citizenship to *only white people* of "good character" who had lived in the country for two years and pledged an allegiance.[46] As a result, the United States in the late 1700s consisted primarily of Anglo-Saxon individuals[47] and enslaved African people who represented 20% of U.S. citizens.[48] A related effect of racially exclusionary policies was that flows of immigration from Asia and Latin America remained non-existent.

In the ensuing years, distrust of foreigners caused immigration laws to enter an era of flux. Congress in 1798 increased the waiting period for naturalization to fourteen years via the Alien and Sedition Acts,[49] but then the Naturalization Law of 1802 reduced one's wait to five years.[50] Given this easy path to citizenship (for Anglo-Saxon people), Congress sought to impede *poor* immigrants from entering the country by restricting boat tonnages; the logic was that lessening a boat's load would increase travel's price, making immigration a privilege for wealthy people.[51] When Catholics began to arrive in greater numbers,[52] it created resentment and also catalyzed

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American Founders feared that the British would punish their disloyalty with death, that loyalty trumped one's birth country or bloodline as a matter of importance. Thus, a pledge of allegiance was the ticket to receive the full panoply of political rights in a new and struggling nation.").

45 *Id.*

46 B. Ryan Byrd, Comment, *On Behalf of an Ungrateful Nation?: Military Naturalization, Aggravated Felonies and the Good Moral Character Requirement*, 15 Scholar 603, 607, 610 (2013) ("The Act of March 26, 1790 required that an applicant for citizenship prove two years residency, a showing of good character and was only available to free white persons.").

47 *U.S. Immigration Timeline*, HIST. (Dec. 21, 2018), https://www.history.com/topics/immigration/immigration-united-states-timeline [https://perma.cc/ZV8X-ZFQ2] (last updated, Aug. 23, 2022).

48 Baxter & Nowrasteh, *supra* note 44.

49 Burt Neuborne, *The Role of Courts in Time of War*, 29 N.Y.U. REV. L. & SOC. CHANGE 555, 557 (2005) (discussing the waiting period's increase in the Alien and Sedition Acts).

50 Jonathan David Shaub, *Expatriation Restored*, 55 HARV. J. ON LEGIS. 363, 377 n.100 (2018).

51 Baxter & Nowrasteh, *supra* note 44 ("This legislation lowered the carrying capacity of passenger ships and increased the price of travel, consequently reducing the number of poor immigrants who could afford passage.").

52 *Cf.* Erika Lee, *Xenophobia Powers the United States*, PUBLIC BOOKS (June 15, 2022), https://www.publicbooks.org/xenophobia-powers-the-united-states/ [https://perma.cc/VDB4-5H5C] ("Our history, politics, and laws have also

anti-immigration groups like the Know Nothing Party who advocated for raising citizenship's waiting period to twenty-one years.[53] Despite their efforts, New York, California, and other states had become primarily composed of foreign-born people by the 1850s.[54]

Immigration exploded during the Reconstruction Era to include Asian people yet remained steeped in xenophobia. The United States signed a treaty in 1868 to accept Chinese workers who were only granted residency rather than a route to citizenship.[55] Most Asian laborers toiled in gold mines and garment factories as well as worked on farms and built railroads.[56] While some senators thought that Native Americans and Asians should qualify for citizenship, Congress continued to limit this privilege to "white persons, and to aliens of African nativity and to persons of African descent."[57]

Anti-immigrant sentiment gained additional steam in the late 1800s as greater numbers of Eastern European and Asian people arrived. While a widely held belief was that certain immigrants were incapable of assimilating into American culture[58] and thereby "impeded the achievement of an ideal society," a key source of hostility was that foreign-born people competed against citizens.[59] This spurred Congress to pass the Chinese Exclusion Act of 1882, which banned Chinese people from entering the country.[60] Hardly a new brand of discrimination, the Page Act of 1875 rewrote immigration laws to "end the danger

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revealed that an irrational hostility towards immigrants has been a constant and enduring force in the United States. Germans were seen as a threat in colonial America. In the 19th century, anxiety directed at Irish Catholics fueled an anti-immigrant political movement.").

53 Ian Iverson, *"Purifying Politics": Illinois Know Nothings and the Perplexities of the Paranoid Style*, 15 U. ST. THOMAS J.L. & PUB. POL'Y 457, 460 (2022).

54 Baxter & Nowrasteh, *supra* note 44.

55 *Id.*

56 *U.S. Immigration Timeline*, *supra* note 47.

57 Deenesh Sohoni, *Unsuitable Suitors: Anti-Miscegenation Laws, Naturalization Laws, and the Construction of Asian Identities*, 41 L. & SOC'Y REV. 587, 601 (2007) (quoting *In re* Saito, 62 F. 1894 (C.C.D. Mass. 1894)).

58 Angela M. Banks, *Respectability & the Quest for Citizenship*, 83 BROOK. L. REV. 1, 20–21 (2017).

59 Baxter & Nowrasteh, *supra* note 44.

60 Hawaii v. Trump, 878 F.3d 662, 695 n.22 (9th Cir. 2017), *rev'd and remanded*, 585 U.S. 667 (2018) (describing the origins of the Chinese Exclusion Act);*see also* Banks, *supra* note 58, at 19–20 ("The 1882 Chinese Exclusion Act stated, 'hereafter no State court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed.' . . . As of 1870 only immigrants who were 'free white persons' or persons of 'African descent' or 'African nativity' were permitted to naturalize. In 1878 the Circuit Court

of cheap Chinese labor and immoral Chinese women"[61] while California amended its constitution to ban Chinese laborers as a way of protecting native jobs.[62] Pursing the same goals, the United States signed the Gentlemen's Agreement in 1907, which restricted Japanese people from entering and working in the country.[63] Eric Fish has detailed Congress' efforts to prevent Mexicans and other Latin Americans from entering the United States, based largely upon their capacity to undersell American labor.[64] Other efforts to limit immigration included literacy tests, civics classes, and deportation.[65]

A quota system based on eugenics was implemented in 1924, given beliefs that certain immigrants were racially superior or inferior.[66] As such, the Immigration and Nationality Act altered quotas to admit more Europeans but fewer Jewish, Asian, and African people.[67] When Mexican laborers began to enter the United States in significant numbers, they were initially ineligible for citizenship as "mixed breeds" until courts

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for the District of California held that Chinese immigrants were not white, and were thus ineligible to naturalize.") (footnote omitted).

61 Keith Aoki, *The Yellow Pacific: Transnational Identities, Diasporic Racialization, and Myth(s) of the "Asian Century"*, 44 U.C. DAVIS L. REV. 897, 911 n.48 (2011) (quoting George Anthony Peffer, *Forbidden Families: Emigration Experiences of Chinese Women Under the Page Law, 1875-1882*, 6 J. AM. ETHNIC HIST. 28 (1986)); *see also* Stewart Chang, *Racial Contagion: Anti-Asian Nationalism, the State of Emergency, and Exclusion*, 9 BELMONT L. REV. 486, 490 (2022).

62 *See* Timothy Sandefur, *Is Economic Exclusion a Legitimate State Interest? Four Recent Cases Test the Boundaries*, 14 WM. & MARY BILL RTS. J. 1023, 1049 (2006) ("Hostility toward immigrants and immigration routinely has been predicated on competition for jobs. Among the most extreme examples is the California Constitutional Convention of 1878, called in large part to protect white European immigrants from competition from Chinese immigrants.").

63 *U.S. Immigration Timeline*, *supra* note 47 (in return for Japan's help, California agreed that its schools would no longer segregate American and Japanese students).

64 *See* Eric S. Fish, *Race, History, and Immigration Crimes*, 107 IOWA L. REV. 1051, 1086–87 (2022).

65 Mattie L. Stevens, Student Article, *Recognizing Gender-Specific Persecution: A Proposal to Add Gender as a Sixth Refugee Category*, 3 CORNELL J.L. & PUB. POL'Y 179, 180 n.5 (1993) (a mechanism in the Immigration Act of 1882 allowed officials to deport immigrants who had committed a crime during a five-year probationary period).

66 Hawaii v. Trump, 878 F.3d 662, 695 n.22 (9th Cir. 2017) *rev'd and remanded*, 585 U.S. 667 (2018) ("The Page Law, passed in 1875, banned immigration of women—primarily Asian women—who were presumed, simply by virtue of their ethnicity and nationality, to be prostitutes. The Page Law was followed in quick succession by the Chinese Exclusion Act in 1882 and the Scott Act in 1888. These laws were justified on security grounds.") (citations omitted).

67 Baxter & Nowrasteh, *supra* note 44. (increasing the "ethnic exclusions of Jews, Asians, and Africans").

declared Mexican people to be white in the 1930s[68]—a "privilege" that was not extended to persons from India in *United States. v. Thind*.[69] That said, the United States withheld citizenship from many Mexican arrivals[70] and deported others who had been naturalized.[71]

When eugenics fell out of favor at the end of World War II, the acceptance of non-white foreigners increased during the Civil Rights Era—at least until the 2000s.[72] The quota system ended in 1965, replaced by policies prioritizing certain skills and professions as well as the reunification of families.[73] Immigration increased in the 1990s, as more visas were extended to Latin Americans and refugees.[74]

The backlash against immigration has been pronounced, animated by demands to build a wall as a way of "preserv[ing] jobs" among other goals.[75] And like prior versions

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68 Cybelle Fox & Irene Bloemraad, *Beyond "White by Law": Explaining the Gulf in Citizenship Acquisitions Between Mexican and European Immigrants, 1930*, 94 Soc. Forces 181, 184 (2016); *see also* Ariela J. Gross, Comment, *Texas Mexicans and the Politics of Whiteness*, 21 L. & Hist. Rev. 195, 198–200 (2003).

69 United States v. Thind, 261 U.S. 204, 211 (1923) (ruling that "the average well informed white American would learn with some degree of astonishment that the race to which he belongs is made up of such heterogeneous elements.").

70 *See* Fox & Bloemraad, *supra* note 68, at 185.

71 Ediberto Román & Ernesto Sagás, *Birthright Citizenship Under Attack: How Dominican Nationality Laws May Be the Future of U.S. Exclusion*, 66 Am. U. L. Rev. 1383, 1414–15 (2017) ("[T]he basis for our roundups and eventual deportations were that the individuals looked foreign, or something other than American—i.e., Mexican . . . . Operation Wetback began in the mid-1950s, and was purportedly established to 'monitor the presence of Mexicans in the United States and deport any Mexican who resided unlawfully in the United States.' . . . [T]he U.S. government deported over one million Mexican immigrants, U.S. citizens of Mexican ancestry, and undoubtedly other Hispanic U.S. Citizens."); *see also* Abby Budiman, *Key Findings About U.S. Immigrants*, Pew Rsch. Ctr. (Aug. 20, 2020), https://www.pewresearch.org/short-reads/2020/08/20/key-findings-about-u-s-immigrants/#:~:text=Overall%2C%20a%20majority%20of%20Americans,jobs%2C%20housing%20and%20health%20care [https://perma.cc/7ND4-F9RJ]. (showing an increasing belief that immigrants strengthen the United States).

72 *See generally* Rachel F. Moran, *Dreamers Interrupted: The Case of the Rescission of the Program of Deferred Action for Childhood Arrivals*, 53 U.C. Davis L. Rev. 1905, 1908–09 (2020).

73 Anita Ortiz Maddali, *Left Behind: The Dying Principle of Family Reunification Under Immigration Law*, 50 U. Mich. J.L. Reform 107, 111–13 (2016) (describing the impact of the Hart-Celler Act of 1965).

74 *See generally* Peter H. Schuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 Yale J. Int'l L. 243, 285 (1997).

75 Luke O'Neil, *We Talked to the Sheriff Who Wants Inmates to Build Trump's Wall*, Esquire (Jan. 6, 2017), https://www.esquire.com/news-politics/a52073/inmates-build-mexican-wall/ [https://perma.cc/7GBY-MNUY] (describing the goals of building a wall on the southern border, including protecting jobs); *see also* Uriel J. García, *Texas Awards $307 Million in Contracts for 14 Miles of New Border*

of anti-immigration ire, the federal government seemed to target non-whites; as examples, the program of "Dreamers" (officially known as Deferred Action for Childhood Arrivals) was initially terminated while Executive Order 13769 implemented a "Muslim ban" that attempted to end immigration from an enumerated list of predominantly Muslim countries.[76] This narrative, however, has yet to cover discrimination once an immigrant has relocated into the United States. As explained next, acts of discrimination against immigrants and undocumented people have—akin to immigration policies—been rooted in anticompetitive goals.

B. Anticompetitive Discrimination

Immigrants settling in the United States have traditionally suffered discrimination because they compete against native businesses and workers. This Section canvasses modern and historical efforts to exclude immigrants from markets, often in partnership with state and federal actors. Not all of the following instances qualify as "anticompetitive" under current antitrust law but that is also the point.

Over the past few years, movements have surfaced to boycott companies that enable immigrants to compete in labor and product markets. One protest targeted Bank of America for issuing credit cards to individuals who lack social security numbers because it enabled undocumented people to compete against U.S. workers and companies.[77] A notable boycott involved Starbucks, which announced a policy in 2017 to hire 10,000 refugees over the course of five years; a common critique was that Starbucks was favoring immigrants over veterans and citizens.[78] A day after unveiling this initiative,

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Wall, TEXAS TRIB. (Sept. 29, 2022), https://www.texastribune.org/2022/09/29/texas-border-wall-contracts/ [https://perma.cc/QCJ9-UM9M].

76 *See* Jihan Abdalla, *'Empty Promises': The US's 'Muslim Ban' Still Reverberates*, AL JAZEERA (Feb. 4, 2022), https://www.aljazeera.com/news/2022/2/4/empty-promises-the-us-muslim-ban-still-reverberates [https://perma.cc/XAT6-3XNJ].

77 Jannelle, *supra* note 10 ("[S]ome Bank of America customers have closed their accounts in protest while others are calling for a nationwide boycott, saying the banks are . . . 'using credit cards, home mortgages to aid and abet, induce and encourage illegal aliens to both enter the United States and remain here unlawfully.'").

78 Janet I. Tu, *Starbucks Plan to Hire 10,000 Refugees Spurs Calls for Boycott*, SEATTLE TIMES (Jan. 30, 2017), https://www.seattletimes.com/business/starbucks/starbucks-plan-to-hire-10000-refugees-spurs-calls-for-boycott/ [https://perma.cc/LAF6-RLCW] (last updated, Jan. 31, 2017).

#BoycottStarbucks became the top-trending hashtag.[79] When Chobani sought to hire refugees, the company attracted hostility directed at its CEO, Hamdi Ulukaya, a Kurdish immigrant from Turkey, claiming that Mr. Ulukaya endeavored to harm American workers.[80]

It is especially common for immigrants and undocumented people to encounter anticompetitive discrimination in their capacity as workers (since employment is said to exist in a market in which firms "buy" the labor of workers).[81] For example, a cartel of chicken processors exchanged data in 2020 about their workers' compensation rates as a way of diminishing salaries.[82] Making this conspiracy especially effective, most victims were undocumented people who, due to their fears of attracting immigration officials, seldom initiate lawsuits.[83] This exercise of market power permitted large firms to deprive undocumented workers of over $84,000,000.[84] Similar schemes have targeted

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79 Julie Jargon, *Starbucks' Pledge to Hire Refugees Meets Boycott Threat*, WALL ST. J. (Jan. 30, 2017), https://www.wsj.com/articles/starbucks-pledge-to-hire-refugees-meets-boycott-threat-1485816486?mod=article_relatedinline [https://perma.cc/LA9Y-FGQM].

80 Elizabeth Chuck, *Chobani Founder Gets Threats, Calls for Boycott for Employing Refugees*, NBC NEWS (Nov. 1, 2016), https://www.nbcnews.com/business/business-news/chobani-founder-gets-threats-calls-boycott-employing-refugees-n676776 [https://perma.cc/22AE-HPFM] (last updated, Nov. 2, 2016); David Gelles, *For Helping Immigrants, Chobani's Founder Draws Threats*, N.Y. TIMES (Oct. 31, 2016), https://www.nytimes.com/2016/11/01/business/for-helping-immigrants-chobanis-founder-draws-threats.html [https://perma.cc/5M6H-WVP9].

81 *See* 2A PHILLIP E. AREEDA, ROGER D. BLAIR, HERBERT HOVENKAMP & CHRISTINE PIETTE DURRANCE, ANTITRUST LAW ¶ 352c, at 254–55 (3d ed. 2007) ("Antitrust law addresses employer conspiracies controlling employment terms precisely because they tamper with the employment market and thereby impair the opportunities of those who sell their services there. Just as antitrust law seeks to preserve the free market opportunities of buyers and sellers of goods, so also it seeks to do the same for buyers and sellers of employment services. It would be perverse indeed to hold that the very object of the law's solicitude and the persons most directly concerned—perhaps the only persons concerned—could not challenge the restraint.") (footnote omitted).

82 Deena Shanker & Polly Mosendz, *U.S. Chicken Industry Accused of Conspiring to Keep Immigrant Wages Down*, L.A. TIMES (Sept. 3, 2019), https://www.latimes.com/business/story/2019-09-03/u-s-chicken-industry-accused-of-conspiring-to-keep-immigrant-wages-down [https://perma.cc/DFV2-E7XQ]; DOJ, *Justice Department Files Lawsuit and Proposed Consent Decrees to End Long-Running Conspiracy to Suppress Worker Pay at Poultry Processing Plants and Address Deceptive Abuses Against Poultry Growers*, (July 25, 2022), https://www.justice.gov/opa/pr/justice-department-files-lawsuit-and-proposed-consent-decrees-end-long-running-conspiracy [https://perma.cc/7BAH-2RVV].

83 Shanker & Mosendz, *supra* note 82.

84 Diane Bartz & Tom Polansek, *U.S. Settles Claims Against Poultry Producers over Worker Treatment*, REUTERS (July 25, 2022), https://www.reuters.com/world/us/us-settles-claims-against-poultry-producers-over-

foreign-born pharmacists,[85] meat processors,[86] shepherds,[87] nurses, and more as well as levied a disparate impact on undocumented workers in the fast-food industry.[88]

Indeed, many chains of fast-food restaurants have inserted labor restraints into their franchising agreements that disproportionately restrict the mobility and salaries of immigrant and undocumented labor—as one scholar noted, immigrants find themselves "at the mercy of colluding employers [and] . . . fast-food franchisees."[89] When Jimmy John's[90] or McDonald's[91] enter a no-poaching agreement, they can depress wages by secretly promising not to solicit or hire each other's workers.[92] Non-compete agreements present, as scholars have shown, similar problems borne from restraining the trade of, in many cases, vulnerable communities.[93]

Anti-immigrant protectionism can even threaten lives. One of the few antitrust cases discussing immigration involved fisherman from Vietnam who sued the Ku Klux Klan.[94] Citing fears of "[overfishing]" and losing business, Texas fisherman organized rallies with the Klan to urge white people to "'fight[,] fight[,] fight' and see 'blood[,] blood[,] blood,'" providing a tutorial about how

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worker-treatment-2022-07-25/ [https://perma.cc/BD4Y-ZJA4] (last updated, July 25, 2022).

85 Dandamudi v. Tisch, 686 F.3d 66, 69 (2d Cir. 2012) (challenging a New York Law preventing immigrants from obtaining a pharmacist license).

86 *See supra* notes 74–76 and accompanying text.

87 Llacua v. W. Range Ass'n, 930 F.3d 1161, 1173 (10th Cir. 2019).

88 *See, e.g.*, Sandeep Vaheesan, *How Antitrust Perpetuates Structural Racism*, THE APPEAL (Sept. 16, 2020), https://theappeal.org/how-antitrust-perpetuates-structural-racism/ [https://perma.cc/HZW3-2CLB] ("Fast-food franchises are an important source of work and income for people of color, especially immigrants.").

89 *Id.*; *see* Dani Kritter, *Antitrust as Antiracist*, CAL. L. REV. (Mar. 2021), https://www.californialawreview.org/online/antitrust-as-antiracist [https://perma.cc/VN74-Y34F] (describing the usage of no-poaching agreements in fast-food franchising agreements, and the uneven effects on immigrants and people of color).

90 Mike Leonard, *Jimmy John's No-Poach Antitrust Case Ends with Confidential Deal*, BLOOMBERG L. (Nov. 16, 2021), https://news.bloomberglaw.com/antitrust/jimmy-johns-no-poach-antitrust-case-ends-with-confidential-deal [https://perma.cc/37PH-J4PF].

91 Daniel Wiessner, *Judge Rejects Nationwide Class in McDonald's No-Poach Case*, REUTERS (July 29, 2021)., https://www.reuters.com/legal/litigation/judge-rejects-nationwide-class-mcdonalds-no-poach-case-2021-07-29/ [https://perma.cc/J8C7-AT6S] (last updated, July 29, 2021).

92 Gregory Day, *Anticompetitive Employment*, 57 AM. BUS. L.J. 487, 521–22 (2020).

93 *See generally* Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 ANTITRUST L.J. 165 (2020).

94 Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 518 F. Supp. 993, 1001–02 (S.D. Tex. 1981).

to burn a Vietnamese person's boat.[95] Violent threats ensued, as local shrimpers brandished firearms and aimed cannons at Vietnamese fishermen as well as hung effigies.[96] This vitriol, the court noted, was rooted in bigotry as much as protectionism: "some American fishermen believe there are just too many Vietnamese people."[97] When a local woman allowed Vietnamese fishermen to rent her dock, phone calls "asked if she knew where her children were; the second was a threat to burn her boat; the third[] stated that she would die that night."[98] The judge, in the end, didn't rule on the merits—only giving antitrust a brief treatment—but did issue a temporary injunction.[99]

Notably, efforts to exclude immigrants had historically come from labor unions, which feared that immigrants would erode wages, bust strikes, and usurp jobs.[100] This spurred unions to cast doubts about whether Chinese and Eastern European people could, as "inferior races," assimilate into American life as a way of squelching competition.[101] Since many public contracts required union membership, organized labor was able to monopolize employment markets on racial and citizenship lines.[102]

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95 *Id.* at 1001.

96 *Id.* at 1002.

97 *Id.*

98 *Id.* at 1004

99 *Id.* at 1016–17; *see also* John Mark Newman, *Racist Antitrust, Antiracist Antitrust*, 66 ANTITRUST BULL. 384, 388 (2021) ("The antitrust analysis is notable for its clarity and brevity—indeed, to the contemporary observer, it is perhaps most remarkable for what it does *not* say. Although Judge McDonald began by stating that 'the anti-trust laws' forbid a 'lessening of competitive conditions in the relevant market,' she went on to explain that plaintiffs could prove such a 'lessening' by demonstrating an actual marketplace effect. No formal market definition was required. Nor did the opinion engage in a protracted attempt to fit the defendants' conduct into a particular analytical category before deciding on the appropriate legal treatment.") (footnotes omitted).

100 *See generally* Hill, *supra* note 16, at 189–90 (reviewing the history of racism in labor unions).

101 Oyama v. California, 332 U.S. 633, 651 (1948) (Murphy, J., concurring) ("Beginning in 1850, with the arrival of substantial numbers of Chinese immigrants, racial prejudices and discriminations began to mount. *Much of the opposition to these Chinese came from trade unionists, who feared economic competition, and from politicians, who sought union support.*") (emphasis added); Don Gonyea, *How the Labor Movement Did a 180 on Immigration*, NPR (Feb. 5, 2013), https://www.npr.org/2013/02/05/171175054/how-the-labor-movement-did-a-180-on-immigration/ [https://perma.cc/WPF7-46UD] ("For decades, labor saw illegal workers as the enemy. The AFL-CIO wanted them kept out, believing that an expansion of the available pool of workers was bad for unions. The low wages that undocumented immigrants earned made it even worse.").

102 Els de Graauw & Shannon Gleeson, *Labor Unions and Undocumented Immigrants: Local Perspectives on Transversal Solidarity During DACA and DAPA*, 47 CRITICAL SOCIO. 941, 943 (2021) ("The labor movement in the United States has

Consider a powerful example: Gabriel Chin and John Ormonde described a "war against Chinese restaurants."[103] The issue, per their research, was that "by employing Chinese workers and successfully competing with other restaurants, white union members claimed the restaurants denied '[their] own race a chance to live.'"[104] These sentiments produced an anticompetitive backlash against the rise of Chinese restaurants in America.

In fact, unions received help from the government, which passed laws restricting the competition of immigrants. Consider the Davis-Bacon Act of 1931, which pursues a seemingly noble goal of requiring employers involved in federal works to pay "the local prevailing wage."[105] The law's purpose, though, was to raise salaries to a point where firms wouldn't opt to hire immigrants or people of color, all things being equal.[106] A house member argued in favor of this statute by asserting that it impedes people who are "*in competition* with white labor throughout the country."[107] And the Davis-Bacon Act has advanced this goal by raising salaries to "union wages," thereby "preventing non-unionized black and immigrant laborers from competing with unionized white workers for scarce jobs."[108]

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had an uneven relationship with undocumented workers. Rampant xenophobia and anti-immigrant sentiment among leadership and rank-and-file union members are well documented, stemming from racism, fears of labor competition, and an aversion to the challenges of organizing undocumented and other immigrant workers.").

103 *See* Gabriel J. Chin & John Ormonde, *The War Against Chinese Restaurants*, 67 DUKE L.J. 681, 683–84, 683 n.2 (2018).

104 *Id.* at 683–84 (alteration in original) (quoting *Card to the Public*, TONOPAH BANANZA (Nev.), Jan. 17, 1903, at 6).

105 Joseph Dean, *The Racist History of Minimum Wage*, MEDIUM (Aug. 17, 2018), https://medium.com/the-enclave-of-others/the-racist-history-of-minimum-wage-5dd71ebf0770 [https://perma.cc/PE63-MPLH].

106 *See id.*

107 Scott Bullock & John Frantz, *Davis Bacon Act*, INST. FOR JUST., https://ij.org/case/brazier-construction-co-inc-v-reich/[https://perma.cc/28EG-6263] (emphasis added) (quoting 74 CONG. REC. 6513) ("The [Davis-Bacon] Act was passed with the specific intent of preventing non-unionized black and immigrant laborers from competing with unionized white workers for scarce jobs during the Depression . . . . [And the] devastating discriminatory effects [persist], as minorities tend to be vastly underrepresented in highly unionized skilled trades, and over-represented in the pool of unskilled workers who would [have greater access to work] . . . if the prevailing wage laws were abolished.").

108 D. Aaron Lacy, *The Aftermath of Katrina: Race, Undocumented Workers, and the Color of Money*, 13 TEX. WESLEYAN L. REV. 497, 501 (2007) (second quoting JAMES SHERK, HERITAGE FOUND., DAVIS-BACON WAGES IN SENATE IMMIGRATION BILL WOULD KEEP IMMIGRANTS IN THE UNDERGROUND ECONOMY 1, (2006), https://www.heritage.org/

Hardly limited to federal regulations, *states* have also passed laws to prevent immigrants from competing.[109] Consider a historical example. In the infamous case of *Lochner*, New York sought to help unions compete against immigrants who operated small bakeries.[110] By capping the number of weekly hours a baker may work, the law attempted to deprive immigrants of their comparative advantage:

> [T]he bakers unions faced an influx of competition from arriving immigrants who were willing to make it in the New World by working longer hours . . . . Bakers in the larger, generally unionized bakeries met little success in getting recent (and often Italian, French, or Jewish) immigrants to join the Bakery and Confectionary Workers' International Union. The Bakeshop Act's maximum hours provision was prompted by organized labor to prevent end-runs around collective bargaining agreements and competition from "cheap" immigrant labor.[111]

Remarkably, anticompetitive laws had often made little attempt to appear neutral, endeavoring to "protect free white labor against competition with Chinese . . . labor."[112] An Arizona law privileged "citizens of the United States in their employment against non-citizens" by requiring firms that employ more than five people to hire 80% of their workforces from "native-born citizens."[113] A California law cited federal immigration policies that disfavored "non-white [immigrants]" to withhold fishing licenses from foreign-born people of color, though only "alien Japanese" were initially banned from making a living by fishing.[114] In 2004,

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immigration/report/davis-bacon-wages-senate-immigration-bill-would-keep-immigrantsin-the/[https://perma.cc/U9UZ-D82M]).

109 Chang, *supra* note 61, at 492 ("However, since Chinese laborers represented an alternative to the domestic labor pool that was increasingly becoming organized and unionized, domestic workers and small farmers viewed them as competition and a threat to domestic wages. Growing resentment against the Chinese among labor groups eventually spurred a movement to exclude and expel them. The anti-Chinese movement, at this stage, was almost exclusively regional to the West coast, and focused on the issue of labor competition.") (footnote omitted).

110 *See* Patel v. Texas Dep't of Licensing & Regul., 469 S.W.3d 69, 99 (Tex. 2015) (emphasis added).

111 Daniel A. Crane, *Lochnerian Antitrust*, 1 N.Y.U. J.L. & LIBERTY 496, 499 (2005) (footnotes omitted).

112 Lin Sing v. Washburn, 20 Cal. 534, 535 (1862) (reviewing the Anti-Coolie Act) (quoting 1862 Cal. Stat. 462 *invalidated by Lin Sing*, 20 Cal. 534 (1862)).

113 Truax v. Raich, 239 U.S. 33, 35 (1915).

114 Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 412–13 (1948) (second quoting 1943 Cal. Stat. 3040).

the U.S. Court of Appeals for the Ninth Circuit described a law "giving job preferences to its residents, and protecting the wages and conditions of resident workers" as serving "reasonable" and "important" goals.[115] This case, as a scholar found, validated "explicitly discriminatory labor laws" because it sought to "protect[] some laborers against [immigrant] competition."[116]

In fact, states have recently increased a formidable way of excluding immigrants: professional licensing. For generations, a few of the "learned professions" like lawyers and doctors were permitted to regulate their own industries, justified as a way of fostering health and safety. A problem, though, is that market actors who compose licensing agencies can exclude competition in order to protect their markets.[117] The demand for licensing has notably mounted as native businesses insist that immigrants "tak[e] jobs"[118] and constitute "unfair competition."[119] Justices on the Supreme Court of Texas found that states embraced licensing as a way of frustrating "women, minorities and immigrants—those lacking political power" because "cheaper labor costs and thus cheaper goods and services[] [were] intolerable to incumbent interests."[120]

For instance, some state agencies administer licensing exams for manicurists exclusively in English, which excludes Vietnamese people from this market.[121] Other agencies have captured the hairdressing profession by barring African women from braiding hair.[122] Licensing has also pressured street

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115 Sagana v. Tenorio, 384 F.3d 731, 741 (9th Cir. 2004).

116 Sandefur, *supra* note 62, at 1025.

117 *See generally* Rebecca Haw Allensworth, *The New Antitrust Federalism*, 102 VA. L. REV. 1387, 1401 (2016) (describing the anticompetitive nature of licensing agencies).

118 Gray, *supra* note 3; David North, *Georgia Legislature Makes It Easier for Illegals to Get Professional Licenses*, CTR. FOR IMMIGR. STUD. (Apr. 21, 2021), https://cis.org/North/Georgia-Legislature-Makes-It-Easier-Illegals-Get-Professional-Licenses/[https://perma.cc/36RM-A745] (advocating for using licensing to stop the "massive flows of illegal aliens into the labor market").

119 Correal, *supra* note 25 ("The complaints, she said, have come from business owners, Business Improvement Districts, elected officials and others, who point to street congestion, noise and the unfair competition the vendors pose to brick-and-mortar businesses and to licensed vendors.").

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

121 Maya N. Federman, David E. Harrington & Kathy J. Krynski, *The Impact of State Licensing Regulations on Low-Skilled Immigrants: The Case of Vietnamese Manicurists*, 96 AM. ECON. REV. 237, 240 (2006) (describing the exclusionary role of English in licensing exams).

122 ALLENSWORTH, *supra* note 21.

vendors who threaten restaurants[123]—e.g., as one business said about food trucks, "[t]hey're taking jobs"[124]—as well as immigrants working in schools, pharmacies, dentist offices, and child or senior care.[125] Advocates of licensing have even stated that their express goal is to impede undocumented immigrants from competing.[126]

In addition to labor restraints, (undocumented) immigrants are often excluded as consumers of goods and services, including public[127] and private education.[128] Another example is real estate where restrictive covenants mandated that certain lands "shall never be used or occupied by" Black or "Semitic" people in addition to immigrants of Chinese, Polish, Middle Eastern, and Irish descent.[129] In light of this market power, segregation's

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123 Kinjo Kiema, *The Criminalization of Unlicensed Street Vendors Fuels State-Sanctioned Violence*, PRISM (Jan. 26, 2022), https://prismreports.org/2022/01/26/the-criminalization-of-unlicensed-street-vendors-fuels-state-sanctioned-violence/ [https://perma.cc/T7U2-MGQS]; Serena Dai, *NYC's Food Cart System Is Preying on Working Class Immigrants, Report Finds*, EATER N.Y. (June 14, 2016), https://ny.eater.com/2016/6/14/11933424/food-cart-immigrants [https://perma.cc/6JJY-V99H].

124 Gray, *supra* note 3.

125 Mark Swartz, *Bringing Unlicensed Care out of the Shadows*, EARLY LEARNING NATION (Jan. 13, 2022), https://earlylearningnation.com/2022/01/bringing-unlicensed-care-out-of-the-shadows/ [https://perma.cc/GC53-NGP4]; Dhwani Kharel, *Immigrant Care Providers Have Been Ignored for Too Long*, NAT'L WOMEN'S L. CTR. (Aug. 11, 2021), https://nwlc.org/title-immigrant-care-providers-have-been-ignored-for-too-long/ [https://perma.cc/G9FP-U9P8]; Theresa Vargas, *Young Undocumented Immigrants in Maryland Can't Grow up to Be Whatever They Want. This Graduate Student Is Trying to Change That*, WASH. POST (Feb. 16, 2022), https://www.washingtonpost.com/dc-md-va/2022/02/16/undocumented-immigrants-barrier-success/ [https://perma.cc/JUA6-ELYY].

126 Siri Bulusu, Claire Hao & Erin Mulvaney, *Worker License Rules Emerge as FTC Competition Oversight Priority*, BLOOMBERG L. (July 12, 2021), https://news.bloomberglaw.com/antitrust/worker-license-rules-emerge-as-ftc-competition-oversight-priority [https://perma.cc/9H3W-U88T] ("Licensing particularly hurts foreign nationals with temporary work visas whose immigration status impedes them from seeking a license to work within their specialty."); North, *supra* note 118.

127 Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382, 2388–89 (2021) (explaining the monopolization of public education on racial lines).

128 Rebecca Onion, *The Stories of 'Segregation Academies,' as Told by the White Students Who Attended Them*, SLATE (Nov. 7, 2019), https://slate.com/news-and-politics/2019/11/segregation-academies-history-southern-schools-white-students.html [https://perma.cc/VPV4-TM86].

129 Justin Wm. Moyer, *Racist Housing Covenants Haunt Property Records Across the Country. New Laws Make Them Easier to Remove*, WASH. POST (Oct. 22, 2020), https://www.washingtonpost.com/local/racist-housing-covenants/2020/10/21/9d262738-0261-11eb-8879-7663b816bfa5_story.html [https://perma.cc/NC9X-VC73]; *accord* Michael Jones-Correa, *The Origins and Diffusion of Racial Restrictive Covenants*, 115 POL. SCI. Q. 541, 548 (2000); Simón Rios, *Racist Covenants Still Stain Property Records. Mass. May Try to Have Them Removed*, WBUR

legacy has deprived the average inhabitant of a "redlined" neighborhood of over $200,000 in equity.[130]

The point is that discrimination has traditionally reflected immigration policies, driven by a combination of anticompetitive goals and xenophobia. But if immigrants are prevented from competing, why hasn't antitrust offered a meaningful remedy? Part II delves into antitrust's history to explain why the consumer welfare standard has largely ignored injuries to marginalized people.

II
Antitrust and Marginalized Communities

Antitrust law scrutinizes illegitimate uses of market power, yet it has rarely remedied anti-immigrant discrimination. An issue is a judge-made doctrine called "consumer welfare" that arose from generations of debate about antitrust's goals. This standard, which is often said to lack a textual basis in the Sherman Act,[131] has apparently deprived marginalized groups of protection. Sections A and B explore the historical events resulting in consumer welfare to shed light on which acts violate modern antitrust law. Section C discusses why antitrust has been seemingly incapable of protecting marginalized people such as immigrants (which is specifically discussed in Part III). Then Section D briefly explains why antitrust law is not typically supposed to consider other laws and regulatory schemes, like immigration policies, when detecting anticompetitive conduct.

A. The First 80 Years of Antitrust

Courts have long relied on antitrust's history as a source of authority, which portends the rise of consumer welfare. As

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(Jan. 22, 2022), https://www.wbur.org/news/2022/01/22/racist-land-records-discrimination-massachusetts [https://perma.cc/YB2P-SY3X].

130 Brenda Richardson, *Redlining's Legacy of Inequality: Low Homeownership Rates, Less Equity for Black Households*, Forbes (June 11, 2020), https://www.forbes.com/sites/brendarichardson/2020/06/11/redlinings-legacy-of-inequality-low-homeownership-rates-less-equity-for-black-households/?sh=257a079d2a7c [https://perma.cc/3724-C2SP] ("The typical homeowner in a neighborhood that was redlined for mortgage lending by the federal government has gained 52% less—or $212,023 less—in personal wealth generated by property value increases than one in a greenlined neighborhood over the last 40 years."). *See generally* Sheryll Cashin, White Space, Black Hood (2021).

131 Christopher R. Leslie, *Antitrust Made (Too) Simple*, 79 Antitrust L.J. 917, 923–25 (2014). *But see* Herbert Hovenkamp, *The Antitrust Text*, 99 Ind. L.J. 1063, 1066 (2024) (suggesting that aspects of consumer welfare are derived from the statutory text of antitrust laws).

a starting point, Congress enacted the Sherman Act in 1890 to combat "trusts" and concentrated power. To form a trust, rivals placed majority shares of each of their firms in a shell corporation or trust run by a board or trustee; this enabled a central figure to limit output and raise prices rather than competing.[132] That said, trusts might have already been illegal before the Sherman Act's passage since states had adopted the English common law of competition at the United States' founding.[133] An issue, however, was that individual states struggled to regulate multistate trusts, inspiring Congress to propose a federal competition bill.[134]

But Congress needed to discern what an "anti-trust" statute should achieve. Rather than offering a nuanced answer, Senator Sherman asserted that a federal statute would not create new violations but perhaps codify the common law of competition and rely on other sources.[135] The plan was to leave enough room in the Act's text for courts to construe antitrust's scope.[136] As a result, Section 1 of the Sherman Act prohibits

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132 WIXT Television, Inc. v. Meredith Corp., 506 F. Supp. 1003, 1017 (N.D.N.Y. 1980) ("'[T]rusts' were highly distrusted by the public, who perceived the economic power possessed by these entities as dangerous to society as a whole. In fact, the trusts were using their wealth and power to fix prices, restrict production, divide markets, eliminate smaller competitors, and to restrain and monopolize trade."); *see also* 21 CONG. REC. 2457 (1890) ("[A]ssociated enterprise and capital are not satisfied with partnerships and corporations competing with each other, and have invented a new form of combination commonly called trusts, that seeks to avoid competition by combining the controlling corporations, partnerships, and individuals engaged in the same business, and placing the power and property of the combination under the government of a few individuals, and often under the control of a single man called a trustee, a chairman, or a president.").

133 Andrew I. Gavil, *Reconstructing the Jurisdictional Foundation of Antitrust Federalism*, 61 GEO. WASH. L. REV. 657, 658–59 (1993) ("State regulation of the trusts, however, quickly proved to be inadequate to the task. . . . With the ability to structure and restructure their conduct around states whose laws and law enforcers proved hostile, the trusts could evade attempts at condemnation and remedial restructuring with relative ease at the state level. . . . Senator Sherman cited New York's inability to redress the conduct of the Sugar Trust as evidence of the need for national legislation.").

134 *Id.*

135 21 CONG. REC. 2456 (1890) ("[T]he object of this bill, as shown by the title, is 'to declare unlawful trusts and combinations in restraint of trade and production.' It declares that certain contracts are against public policy, null and void. It does not announce a new principle of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government.").

136 *See* Am. Steel Erectors v. Loc. Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers, 815 F.3d 43, 61 (1st Cir. 2016) ("Because *all* agreements 'restrain trade' in some respect, Section 1 only prohibits 'those classes of contracts or acts which the common law had deemed to be undue

"every" restraint of trade while Section 2 makes it illegal to monopolize "any" part of the market.[137] By drafting such vague language, courts could implement sources of authority such as the common law of competition.[138]

This landscape, though, created a predictable sum of confusion. Because the Act's text could literally be interpreted as banning most forms of business activities, the Supreme Court remarked that "the Sherman Act . . . cannot mean what it says."[139] Judges would thus have to figure out antitrust's purpose.

Along this journey, critics began to contend that courts were fumbling antitrust's interpretation. One issue was that companies could suffer liability for merely being large, as some judges felt that antitrust law should protect small firms even when high prices may result.[140] The central problem concerned antitrust's goals: some courts assumed that more competition was always better (which helps smaller firms), but on the other hand, a company offering higher quality goods at cheaper prices should drive rivals out of business (which helps consumers by lowering prices).[141] In other words, questions arose about who was supposed to benefit from antitrust and what acts should be outlawed. This confusion inspired a movement.

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restraints of trade and those which new times and economic conditions would make unreasonable.'"); Day, *supra* note 17, at 646 (explaining the open-ended language in the Sherman Act).

137 15 U.S.C. §§ 1–2.

138 *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940) ("[C]ourts should interpret [the Sherman Act] . . . in the light of its legislative history . . . ."); Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1297 (1999) ("The legislators realized that they could not define 'the precise line' between 'lawful combinations in aid of production' and 'unlawful combinations to prevent competition and in restraint of trade.' That task was 'left for the courts to determine in each particular case.' But the courts were not without guidance; in particular, they were to turn to the 'old and well recognized principles of the common law.'") (footnotes omitted); 21 CONG. REC. 2460 (1890) ("I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law, as the courts of England and the United States have done for centuries.").

139 Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 687 (1978).

140 *See, e.g.*, Brown Shoe Co., Inc. v. United States, 370 U.S. 294, 344 (1962) (explaining that higher prices are sometimes necessary in order to protect small firms). *See generally* Richard D. Cudahy & Alan Devlin, *Anticompetitive Effect*, 95 MINN. L. REV. 59, 59–60 (2010) (reviewing the debates about antitrust's purpose).

141 Jonathan B. Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws*, 77 N.Y.U. L. REV. 135, 138–40 (2002).

B. The Rise of Consumer Welfare

Scholars, most notably from the University of Chicago (the "Chicago School" or "Chicago") and Harvard University, sought to expose antitrust's follies as well as advocate for reform. The Chicago School emphasized economic efficiency and micro-economic theory which, they insisted, would comport with the Act's original goals and best promote competition. Their scholarship convinced courts in the 1970s to reframe antitrust law as an economic doctrine grounded in consumer welfare. Key to this new approach, as explained below, is whether a defendant wielded enough power to systemically exclude rivals.

One of Chicago's core contributions was a rejection of the belief that more firms competing was always better.[142] To this end, a Chicago stalwart, Robert Bork, argued that antitrust law was harming markets by imposing liability on desirable forms of business and competition.[143] His book, the *Antitrust Paradox*, explored the Sherman Act's origins to conclude, among other things, that enforcement should no longer resolve political or social issues.[144] In fact, it was Chicago's position that restraints of trade—instead of harming consumers—tend to create efficiencies such as innovation and investment.[145]

The Supreme Court adopted Chicago's stance in 1977, turning antitrust into an exclusively economic doctrine.[146] Today, a plaintiff must show that anticompetitive conduct degraded consumer welfare in economic terms like raising prices

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142 Christopher S. Yoo, *The Post-Chicago Antitrust Revolution: A Retrospective*, 168 U. PA. L. REV. 2145, 2168 (2020) (describing how the Chicago School embraced an "empirical" approach rather than the "structural" approach that had dominated antitrust law).

143 BORK, *supra* note 19.

144 *Id.* at 65–66; *cf.* Leslie, *supra* note 131, at 924–25 (explaining how "Bork's misrepresentation of the legislative history of the Sherman Act was exposed").

145 *See* Warren S. Grimes, *Brand Marketing, Intrabrand Competition, and the Multibrand Retailer: The Antitrust Law of Vertical Restraints*, 64 ANTITRUST L.J. 83, 87 (1995) ("Chicago theorists stress the procompetitive benefits of distribution restraints and the costs of antitrust intervention as arguments for laissez faire . . . . A premise of Chicago thinking has been that producers will act in a manner that protects consumer interests."); *see also* Jayma M. Meyer, *Relaxation of the Per Se Mantra in the Vertical Price Fixing Arena*, 68 S. CAL. L. REV. 73, 89 (1994) ("The Chicago School adherents not only reject the interventionists' anticompetitive arguments, but argue that retail price maintenance generally is procompetitive for varying reasons. Their arguments rest on faith that the manufacturer's self-interested behavior is also the most efficient and effective behavior for retailers and consumers.").

146 Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977); Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405, 2406 (2013) (discussing the importance of *GTE Sylvania*).

or restricting output.[147] Since markets are typically thought to self-correct—e.g., monopoly prices should naturally attract rivals seeking to undersell the monopolist by lowering prices—antitrust is only supposed to intervene when an anticompetitive act was based on such illegitimate power that competition cannot arise or correct the inefficiency.[148]

That said, no consensus exists about what precisely consumer welfare is. There are several ways of viewing it. Most judges interpret "consumer welfare" literally, meaning that *consumers* must suffer an injury to state a claim.[149] This is supposed to promote a form of efficiency by creating surplus for buyers (e.g., it lowers a good's price below what consumers were willing to spend on it).[150] But to Bork, consumer welfare is a term of art referring to "the wealth of the nation."[151] In his view, a court must measure the "total welfare" of everyone, i.e., *buyers and sellers*. The implication of this approach is that consumers must incur greater costs than producers gained in wealth, creating a net harm, to violate antitrust law.[152] If surplus was increased—even if a monopolist grew rich and consumers poorer—it wouldn't offend the total welfare view of antitrust law because societal wealth was "efficien[tly]" enhanced (often referred to as allocative efficiency).[153]

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147 *See* Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 133–34 (2010) ("All antitrust lawyers and economists know that the stated instrumental goal of antitrust laws is 'consumer welfare,' which is a defined term in economics.").

148 *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 897 (2007) ("When only a few manufacturers lacking market power adopt the practice, there is little likelihood it is facilitating a manufacturer cartel, for a cartel then can be undercut by rival manufacturers.").

149 *See* John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 IND. L.J. 501, 510 (2019) (noting the difficulties in the term consumer welfare).

150 *See generally* John M. Newman, *The Output-Welfare Fallacy: A Modern Antitrust Paradox*, 107 IOWA L. REV. 563, 572, 578–79 (2022) (discussing the theorized relationship between output and efficiency).

151 *See* Douglas H. Ginsburg, *Bork's "Legislative Intent" and the Courts*, 79 Antitrust L.J. 941, 951 (2014) ("In sum, judicial endorsement of the consumer welfare standard has no doubt led to a more efficient allocation of scarce resources, thereby increasing, just as Bork predicted in 1978, 'the wealth of the nation.'") (quoting BORK, *supra* note 19, at 90).

152 *See* Peter J. Hammer, *Antitrust Beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs*, 98 MICH. L. REV. 849, 852 (2000) (discussing Bork's belief in "total welfare").

153 *See, e.g.*, Thomas A. Lambert, *Appropriate Liability Rules for Tying and Bundled Discounting*, 72 OHIO ST. L.J. 909, 940, 945 (2011) ("If the printer monopolist's price discrimination generated greater printer output by expanding sales to lower-valuation consumers who would not purchase the product at the uniform monopoly price, and if the welfare gains among those new customers exceeded

It's worth mentioning how antitrust law treats labor in light of immigrant workers. Anticompetitive practices in an employment market can produce a monopsony whereby employers pool their *buying* power to underpay workers, whereas a monopoly refers to *selling* power. While a monopsony may not conventionally harm consumers (since it may lower prices by reducing labor costs), resources are still misallocated via underpaying workers.[154] Not only might anticompetitive conduct lower salaries but also push people into other professions and even diminish output, potentially creating inefficiency and deadweight loss. As such, the Supreme Court has insisted that antitrust's standard analysis should apply to monopsonies.[155]

Despite differing views of consumer welfare, antitrust law is concerned about illegitimate uses of power. Due to antitrust's faith in self-correcting markets, an exclusionary act must degrade a market's structure; after all, antitrust is only supposed to intervene when a firm has employed "wrongful" conduct to bar competition from arising.[156] In fact, monopoly profits are thought to reflect a temporary reward of efficiency and innovation lasting until rivals can enter the market, shedding light on why defendants must employ illicit means of excluding competition to offend antitrust law.[157] So how has the consumer welfare standard done apparent harm to the claims of immigrants and other minority groups?

C. Antitrust's Myopathy to Marginalized People

Consumer welfare has reportedly dismissed the claims of minority groups. To courts and scholars like Bork, a feature of antitrust is that it "treat[s] all members of society equally," meaning that enforcement must assess consumers collectively

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the welfare losses by high-valuation customers who cut back on purchases in response to higher effective prices, then the price discrimination scheme would enhance total welfare.").

154 Day, *supra* note 92, at 522 (discussing that restraining wages can allow a firm to lower its prices by reducing costs, which theoretically benefits consumers).

155 Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 322–23 (2007) (treating predatory bidding as the "mirror[]" of predatory pricing, remarking that courts should consider monopsonies to be functionally the same as monopolies).

156 *See* Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

157 *See* SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 965 (10th Cir. 1994) (describing the concept of market power).

without special attention to any group.[158] But antitrust's "color-blindness" has *de facto* fostered the interests of dominant parties while subjugating minority communities.

Consider the mechanics of consumer welfare: it measures the welfare of all consumers as a collective unit. If more consumers benefitted than suffered harm, it wouldn't produce an offense because consumers gained wealth—even if losses were concentrated in a small community. After all, the consumer welfare standard is generally a numbers game whereby majorities prevail over minorities. In fact, the total welfare approach takes a monopolist's welfare into account, suggesting that minorities must suffer more costs than the wealth gained by the monopolist plus the majority group.[159]

Predictably, enforcers and commentators have tended to pay little mind to marginalized groups. One scholar insisted that "[a]ntitrust policy . . . is not the appropriate tool for pursuing particular goals of social equality."[160] Another said that even if enforcers wanted to remedy discrimination, "[i]t would not be enough for the FTC to articulate a goal of making markets fairer or less discriminatory. . . . . We have [non-antitrust] . . . statutes and programs aimed at directly countering the effects of racism. . . . ."[161] Others have remarked that no mechanism exists for antitrust to value one group's welfare differently than another's.[162] For example, exclusionary practices in healthcare have disproportionally harmed low-income people yet antitrust cannot prioritize "vulnerable populations," that is "unless the Agencies adopt[] an alternative notion of consumer welfare."[163]

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158 Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 ANTITRUST L.J. 713, 720 (2014).

159 Capers & Day, *supra* note 19, at 546–48.

160 Hovenkamp, *supra* note 27, at 811.

161 Victor, *supra* note 28.

162 Joseph Farrell & Michael L. Katz, *The Economics of Welfare Standards in Antitrust*, 2 COMPETITION POL'Y INT'L 3, 11 (2006) ("[C]onsider how a consumer surplus standard handles distributional issues. Consumer surplus can provide a very a poor approximation to a welfare measure that weights impacts using ordinary notions of distributional preferences. One reason is that rich and poor consumers may be differentially affected by an antitrust decision; distributional concerns would suggest weighting the impact on the poor more heavily, but a consumer surplus standard insists that they count equally. If a central goal of antitrust enforcement is to redistribute income, then why treat rich and poor consumers alike?").

163 Theodosia Stavroulaki, *Mergers That Harm Our Health*, 19 BERKELEY BUS. L.J. 89, 120 (2022).

Further, discrimination is often viewed as a "social harm" beyond antitrust's economic scope.[164] Considering that the Sherman Act limits enforcement to "trade" and "commerce," courts have textually dismissed cases in which dominant groups conspired against racial minorities because the anticompetitive act was grounded in bigotry rather than profit maximization.[165] This landscape has been justified on the theory that discrimination is "economically irrational"—after all, a refusal to sell to the highest bidder based strictly on the buyer's race harms the seller—prompting commentators to describe discrimination as a type of social behavior.[166] While the inefficiency of discrimination could resemble a classic offense, it has also lead scholars to conclude that discrimination must not actually be rampant.[167] One article about boycotts against Korean producers of hair extensions found that the movement was likely driven by social goals and, as a result, was probably removed from antitrust's scope.[168] Acts of discrimination against marginalized groups have thus evaded antitrust scrutiny when founded on a social ill like racial animus.[169]

Moreover, *states* can exclude insular groups from markets through conduct that would ordinarily offend antitrust law. In *Parker v. Brown*,[170] the Supreme Court ruled that states, as sovereign entities, must occasionally restrict competition in order to

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164 *See, e.g.*, Yepez, *supra* note 20 (describing anti-racist enforcement as exercising social goals).

165 Rowe Ent., Inc. v. William Morris Agency, Inc., No. 98 CIV. 8272(RPP), 1999 WL 335139, at *6 (S.D.N.Y. May 26, 1999) ("Furthermore, no reasonable inference of a conspiracy to restrain trade can be drawn here because, based on the allegations in the Complaint, no rational economic motive can be discerned for a booking agency to conspire with white concert promoters to restrain trade by not dealing with black concert promoters."); *see also* Allied Int'l, Inc. v. Int'l Longshoremen's Ass'n, AFL-CIO, 492 F. Supp. 334, 338 (D. Mass. 1980) (ruling that the act provided the boycotter "no apparent economic benefit" and thus failed to qualify as trade or commerce under the antitrust laws).

166 *Rowe Ent., Inc.*, 1999 WL 335139, at *4 (describing antitrust's purpose of promoting economic goals yet discrimination did not seem to fit this framework).

167 ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH 237 (1st ed. 1996) ("It is doubtful . . . that much discrimination occurs . . . . Any fair-minded observer would have to admit that this country has undergone a drastic decline in racism. Discrimination is alleged much more often than it exists.").

168 Felix B. Chang, Anisha Rakhra & Janelle Thompson, Essay, *Racially Collusive Boycotts: African-American Purchasing Power in the Wigs and Hair Extensions Market*, 102 B.U. L. REV. 1277, 1283 (2022) (discussing the importance of political and social expression as part of boycotts against the Korean community).

169 *See* FTC v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 412 (1990) (rejecting a justification of conduct as social and thus, beyond antitrust's purview).

170 Parker v. Brown, 317 U.S. 341, 352 (1943).

achieve public objectives. To justify "state-action immunity," the Supreme Court attempted to reassure observers that elections should typically compel states to restrict competition in welfare-enhancing ways.[171] But in actuality, states encounter incentives to restrain trade when it harms marginalized communities who lack political power.[172] For instance, it is common for states to combine with private actors to monopolize all aspects of the prison experience, forcing incarcerated people to pay supracompetitive prices for commissary goods, phone services, and more.[173] An inmate's remedy is ostensibly voting, yet most felons lack a right to participate in elections, freeing states of accountability.

And when exclusionary conduct aids marginalized people, judges have expressly dismissed their welfare. In *FTC. v. Superior Court Trial Lawyers Association*, public defenders refused to accept cases unless Washington, D.C. increased their rates.[174] According to the facts, not only did the low wages prevent public defenders from serving poor clients but perhaps the boycott was the lawyers' best means of helping.[175] Nevertheless, the Supreme Court ruled that the protest amounted to an antitrust offense, remarking that "[t]he social justifications proffered for respondents' restraint of trade thus do not make it any less unlawful."[176] The welfare of indigent people could not and did not factor into antitrust's analysis.

That said, the past two or three years have witnessed a nascent discussion about antitrust's relationship with race. In 2020, Commissioner Rebecca Slaughter of the FTC insisted—a first for a federal enforcer—that antitrust's colorblind framework is "bizarre," and that enforcement must become "antiracist."[177] Then an executive order stated that antitrust

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171 N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 505, 508 (2015) (asserting that state actors are "electorally accountable and lack the kind of private incentives characteristic of active participants in the market").

172 *See generally* Gregory Day, *Antitrust Federalism and the Prison-Industrial Complex*, 107 MINN. L. REV. 2193, 2227–29 (2023) (showing the incentives for states to monopolize prison markets).

173 *Id.*

174 *Superior Ct. Trial Laws. Ass'n*, 493 U.S. at 414.

175 *Id.* at 421; Newman, *supra* note 99, at 385.

176 *Superior Ct. Trial Laws. Ass'n*, 493 U.S. at 412; *see also* Newman, *supra* note 99, at 390.

177 Lauren Feiner, *How FTC Commissioner Slaughter Wants to Make Antitrust Enforcement Antitracist*, CNBC (Sept. 26, 2020), https://www.cnbc.com/2020/09/26/ftc-commissioner-slaughter-on-making-antitrust-enforcement-antiracist.html [https://perma.cc/KYR4-8VTF] ("Antitrust law is clearly about economic structure, and economic structure in this country has a pretty profoundly racialized effect . . . . There is a direct connection between

could help "[c]ommunities of color."[178] Not only has this dialogue sparked blowback—"I'm disappointed that she [(Slaughter)] felt the need to do this[,] . . . [i]f there are race issues that need to be resolved here, I'd find other ways to address them" and "[n]o . . . [t]hat's not what the antitrust tools are to be used for"[179]—but it has also omitted meaningful discussions about immigrants and undocumented people despite the intersectionality of race, competition, and immigration (which Part III explores).

D. A Brief Discussion on Immigration Law's Non-Effect on Antitrust

It should be briefly discussed why courts cannot dismiss an antitrust claim on the grounds that the injured party had improperly entered the country. In fact, while observers have equated undocumented labor to a form of "unfair competition," this is not supposed to be antitrust's concern under current precedent.

Indeed, antitrust has refused to impose liability on the grounds of violating a regulatory scheme. The seminal case is *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, which questioned whether Verizon committed an antitrust offense by refusing to lend its network to competitors as required by the Telecommunications Act of 1996.[180] The Supreme Court said no. It ruled that a regulatory regime compelling cooperation and competition creates a duty under that regulatory regime but does not turn an otherwise legitimate act (such as offering lower prices) into an anticompetitive conduct under the Sherman Act.[181] In fact, the opposite is true. Since the Telecommunications Act creates an obligation and provides a remedy, the Supreme Court ruled that antitrust need not intervene in the

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antitrust law and the enforcement of antitrust law and the economic structures that tend to systemically and systematically under-privilege people of color.").

178 *Fact Sheet: Executive Order on Promoting Competition in the American Economy*, THE WHITE HOUSE (Jul. 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/ [https://perma.cc/48BZ-HAVK] ("Over the past four decades, the United States has lost 70% of the banks it once had, with around 10,000 bank closures. Communities of color are disproportionately affected, with 25% of all rural closures in majority-minority census tracts. Many of these closures are the product of mergers and acquisitions.").

179 Victor, *supra* note 28.

180 *See generally* Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

181 *Id.* at 411.

matter.[182] When Uber drove taxis out of the Philadelphia market by allegedly violating a statute,[183] the district court refused to call this conduct anticompetitive because Uber's low prices promoted antitrust's goal of consumer welfare[184]—"if Uber were able to cut costs by allegedly violating PPA regulations, Appellants cannot use the antitrust laws to hold Uber liable for these violations absent proof of anticompetitive conduct."[185] In other words, violating the PPA does not make low prices anticompetitive or an antitrust offense (after all, low prices are the hallmark of valid competition), but rather a matter for the PPA. The point is that antitrust law cannot alone deem qualities of undocumented labor to be anticompetitive; if an immigration law has been broken, the remedy is supposed to lie in that regime.

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Consider the totality of antitrust's framework. By describing racism as non-economic, courts have placed discrimination beyond antitrust's scope. And since an anticompetitive act must injure consumers in the aggregate, it has implicitly subjugated the welfare of minorities. In fact, the notion of "color-blindness" allows, or even requires, courts to prioritize dominant groups while dismissing the costs inflicted on vulnerable communities.[186] While an assumption in antitrust is that consumers suffer uniformly, the next Part explores race, power, and belonging to illustrate how the plight of citizens can diverge from those of immigrants and undocumented people—and the unforeseen effects for antitrust enforcement.

III
THE OTHERING OF IMMIGRANTS: A NEW (OR PERHAPS OLD) TYPE OF MARKET POWER

Anti-immigrant xenophobia can confer market power based upon citizenship, ethnicity, and belonging. By employing

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182 *Id.* ("Respondent believes that the existence of sharing duties under the 1996 Act supports its case. We think the opposite: [t]he 1996 Act's extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access. To the extent respondent's 'essential facilities' argument is distinct from its general § 2 argument, we reject it.").

183 Phila. Taxi Ass'n v. Uber Techs., Inc., 886 F.3d 332, 336–37 (3d Cir. 2018).

184 *Id.*

185 *Id.* at 340.

186 Hiba Hafiz, *Antitrust and Race*, 100 WASH. U. L. REV. 1471, 1489 (2023) ("The antitrust agencies have equally operated as if the design of market rules selectively allowing and disfavoring competitive strategies were color-blind and have either ignored, failed to challenge, or actively reinforced exclusions and anticompetitive harms on people of color.").

tropes, as an example, dominant groups have justified the exclusion and exploitation of immigrants. This Part explores how characteristics such as race are able to form a relationship with belonging to show that immigration status can create a form of market power unknown to antitrust law; in many instances, the anticompetitive effects haven't impacted consumer welfare *writ large* but specifically harmed documented and undocumented people.

Anti-immigrant xenophobia can rely on notions of power and belonging whereby dominant groups may drum up divisions of "otherness" to characterize foreign-born people as unworthy of competing.[187] For instance, unions had long used race to justify excluding immigrants, as "Chinese were understood as *competition* because race was central to worker identity. . . . Workers were defined as white, and therefore unions were geared accordingly."[188] Also illustrating the othering of foreign-born people, white immigrants have similarly suffered exclusion tied to racial belonging. When Eastern European and Mediterranean people began to work in American factories, they were deemed "inferior white races."[189] As one scholar described European arrivals, they "had to *become* white, and many who are still perceived as not *really* white."[190] And since traits like skin color and language can enable dominant groups to establish subordinate classes propelled by citizenship status,[191] this dynamic has ushered immigrants into lower rungs of racial hierarchies.[192]

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187 *See* Levi Gahman & Elise Hjalmarson, *Border Imperialism, Racial Capitalism, and Geographies of Deracination*, 18 INT'L J. FOR CRITICAL GEOGRAPHIES 107, 110 (2019).

188 Robin Jacobson & Kim Geron, *Unions and the Politics of Immigration*, 22 SOCIALISM & DEMOCRACY 105, 109 (2008) (emphasis added) (footnote omitted) (also stating that with unions "self-interest and market forces are read through the lens of belonging; race and ethnicity are central to that lens.").

189 *See, e.g.*, Bruce Baum, *On the History of American Whiteness*, 39 REVS. AM. HIST. 488, 491 (2011) (book review).

190 Capers & Day, *supra* note 19 (footnotes omitted); *see generally* DAVID R. ROEDIGER, WORKING TOWARD WHITENESS: HOW AMERICA'S IMMIGRANTS BECAME WHITE (2005) ; *accord* Adam Serwer, *'Anglo-Saxon' Is What You Say When 'Whites Only' Is Too Inclusive*, THE ATLANTIC (Apr. 20, 2021), https://www.theatlantic.com/ideas/archive/2021/04/anglo-saxon-what-you-say-when-whites-only-too-inclusive/618646/ [https://perma.cc/T2HB-Q36Y].

191 *See* Gahman & Hjalmarson, *supra* note 187, at 110 ("That is, race is further engraved into bodies, at the behest of racial hierarchy, capitalist production, and class division—by borders. Borders which simultaneously deracinated constructed Others via their imposition.").

192 Diego Thompson, *"Keeping Things Under the Rug": Racial Dynamics in the Context of Large Immigration Raids in Rural Mississippi*, 88 RURAL SOCIO. 1193, 1193–95 (2023).

The othering of immigrants has not only led to exploitation but has also created a market power based upon fear and retaliation. Whereas antitrust assumes that actors can freely navigate markets (e.g., if Brand X raises widget prices, consumers are expected to switch to a cheaper rival), immigration status may prevent foreign-born persons from utilizing self-help remedies. Indeed, threats of arrest and deportation can make it unlikely that undocumented workers or even legal residents will challenge underpayment or hazardous working conditions.[193] Even immigrants possessing a legal right to live and work in the United States may harbor fears of deportation affecting their willingness to seek a remedy. For refugees, deportation can mean physical harm, imprisonment, or death.[194] Hardly an irrational fear of retaliation, ICE raids targeting immigrants working in a Mississippi poultry plant were, as commentators have suggested, instigated by their employer as a way of squelching sexual harassment complaints.[195] This not only deported foreign-born victims and their claims but may also deter future victims from complaining about various abuses.

An effect of this market power is that employers can more easily exploit immigrants.[196] Consider how low-paying jobs are often the most dangerous because employers have sought out immigrants using the signal of low pay, "essentially price-fix[ing] a suboptimal wage for . . . [certain] jobs so they will

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193 Sandeep Vaheesan & Claire Kelloway, *A Fair Labor Market for Food-Chain Workers*, THE AM. PROSPECT (Nov. 21, 2019), https://prospect.org/labor/a-fair-labor-market-for-food-chain-workers/ [https://perma.cc/F4HX-ZLMM] ("Today, food and agriculture employers take advantage of a cruel, two-tiered labor pool. Comparatively privileged citizens and permanent residents have secure status and full labor and employment rights, while vulnerable guest workers, refugees, and undocumented immigrants exist at the periphery. This marginalized fringe has few legal protections and a precarious tie to their new home, making them highly exploitable.").

194 *See id.*

195 Will Bunch, *That Heartless Mississippi ICE Raid Also Revealed the Cruelty Behind Modern U.S. Capitalism*, PHILA. INQUIRER (Aug. 13, 2019), https://www.inquirer.com/opinion/mississippi-ice-raids-trump-koch-foods-sexual-harassment-20190813.html [https://perma.cc/J2Z6-45TH].

196 *See also* LAWRENCE MISHEL & JOSH BIVENS, ECON. POL'Y INST., IDENTIFYING THE POLICY LEVERS GENERATING WAGE SUPPRESSION AND WAGE INEQUALITY 42 (2021), https://www.epi.org/unequalpower/publications/wage-suppression-inequality/ [https://perma.cc/7X2P-EZ2E] ("Employers have increasingly hijacked immigration policy to create zones in the labor market where workers' ability to obtain enforceable basic labor standards is compromised by their immigration status."). *See generally* Daria Roithmayr, *Racism Pays: How Racial Exploitation Gets Innovation off the Ground*, 28 MICH. J. RACE & L. 145 (2023)

attract few U.S. workers."[197] As one scholar put it, immigrants "are actively recruited for hazardous work . . . thereby justifying and encouraging the construction of such work as 'low-skill' and dangerous."[198] During COVID-19's zenith, immigrants working in meatpacking plants died at disproportional rates due to a lack of protection.[199]

Along this line, the *Texas Tribune* told the story of companies such as, reportedly, Target that contract for undocumented immigrants who are paid less than minimum wage, work over forty hours per week, and receive no overtime—even after being locked into stores at night.[200] One worker remarked that "[w]e've realized that [employers] prefer us for being undocumented because we just keep our heads down . . . . [We] can't afford to complain."[201] Even Big Tech companies like Uber have been said to exploit their monopsony power over immigrants.[202]

It's also incomplete to assess this landscape exclusively through the lens of labor. There is a litany of markets in which

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197 Eric M. Gibbons, Allie Greenman, Peter Norlander & Todd Sørensen, IZA Inst. Lab. Econ., Monopsony and Guest Worker Programs 25 (2019), https://docs.iza.org/dp12096.pdf [https://perma.cc/TWB9-FNVH] ("[B]ecause 50-70% of agricultural workers are undocumented, employers can suppress wages prior to survey administration by employing non-native workers to be included in the survey.").

198 Prashasti Bhatnagar, *Deportable Until Essential: How the Neoliberal U.S. Immigration System Furthers Racial Capitalism and Operates as a Negative Social Determinant of Health*, 36 Geo. Immigr. L.J. 1017, 1022 (2022).

199 Shae Frydenlund & Elizabeth Cullen Dunn, *Refugees and Racial Capitalism: Meatpacking and the Primitive Accumulation of Labor*, 95 Pol. Geography 1, 1–2 (2022) ("People displaced by civil war and conflict in Myanmar, Somalia, South Sudan, Ethiopia and other locations are now a vital source of workers for the meatpacking industry, and without an ongoing flow of refugee labor, the meatpacking industry can no long function. This puts refugees in a curious position: they are both *essential* and *prohibited* . . . ."); *see also* Ruqaiijah Yearby & Seema Mohapatra, *Law, Structural Racism, and the COVID-19 Pandemic*, 7 J. L. & Biosciences 1, 2 (2020) ("Specifically, racial and ethnic minorities face increased risk of exposure because they work in low wage jobs that do not provide the option to work at home and they cannot afford to miss work even when they are sick.").

200 Travis Putnam Hill, *Big Employers No Strangers to Benefits of Cheap, Illegal Labor*, Tex. Trib. (Dec. 19, 2016), https://www.texastribune.org/2016/12/19/big-name-businesses-exploit-immigrant-labor/ [https://perma.cc/HHP5-ECRE].

201 *Id.* (second and third alterations in original)

202 *See* Roithmayr, *supra* note 196, at 165–66 ("When it comes to immigration status, both immigrants and undocumented workers are peculiarly exploitable given their lack of outside options." Undocumented workers are the poster child for potential exploitation—they "can be identified on the basis of a particular trait—their immigration status—as having limited outside options for employment."); *see also* Morgan Meaker, *Undocumented Workers Protest Uber Eats Crackdown*, WIRED (Sept. 12, 2022), https://www.wired.com/story/uber-eats-paris-protests/ [https://perma.cc/Y4N6-UR5N] (explaining the exploitation of immigrants by Uber, depending on the company's need, or lack thereof, before and after the pandemic).

immigrants pay monopoly prices for goods and services due to the market power noted above. For instance, companies have targeted immigrants for predatory loans due to this community's lack of competing options.[203] Another example is the monopsonization of real estate: as discussed earlier, historically, restrictive covenants were used to refuse rent or sell land to immigrants and people of color.[204]

That said, the Sherman Act is supposed to remedy improper exercises of market power, yet antitrust courts have seldom mentioned an immigrant's exploitation. Illustrating this blind spot, Peruvian shepherds on temporary-worker visas asserted in 2019 that employers colluded to underpay them, though the district court dismissed their case because the shepherds failed to prove an actual agreement was struck.[205] While the court indicated that the employers might have agreed to restrain the workers' pay, equally plausible was that the employers had independently decided to underpay the foreign-born workers—who lacked an alternative source of income—because the employers wielded enough power to do so.[206]

In fact, antitrust can be used *against immigrants*. Consider how commentators and courts have declared immigrants themselves to be anticompetitive. With labor markets, it's been said that immigrants "undermine the bargaining power of incumbent workers" and thus their employment is "better understood as

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203 *See* Lesley Fair, *FTC Says Bronx Honda Discriminated Against African-American and Hispanic Consumers*, FED. TRADE COMM'N (May 27, 2020), https://www.ftc.gov/business-guidance/blog/2020/05/ftc-says-bronx-honda-discriminated-against-african-american-and-hispanic-consumers [https://perma.cc/R8AL-XH24] (alleging that a car dealership sought out Hispanic and Latino consumers with deceptive loans).

204 *See supra* notes 125–27 and accompanying text (describing the history of racially restrictive covenants). *See generally* Derek Christopher, Seeking Sanctuary: Housing Undocumented Immigrants, (2022) (unpublished manuscript), http://www.derekachristopher.com/Seeking%20Sanctuary%20Current.pdf [https://perma.cc/8EEL-TD5V]; Jana Kasperkevic, *The American Dream: How Undocumented Immigrants Buy Homes in the U.S.*, MARKETPLACE (Sept. 11, 2017), https://www.marketplace.org/2017/09/11/american-dream-how-undocumented-immigrants-buy-homes-us/ [https://perma.cc/Q9RR-55TZ].

205 Llacua v. W. Range Ass'n, 930 F.3d 1161, 1173–75 (10th Cir. 2019) ("The Shepherds assert communications between the Association Defendants and their members corroborate that these joint ventures fix wages at the minimum level—as opposed to the ranchers instructing the Associations to make offers to shepherds at that level.").

206 *Id.* at 1175–76 ("[T]he district court noted the Shepherds did not address the fact very low wages paid to shepherds are just as likely to result from individual decisions to use the DOL's minimum wage and H-2A program or that the legal minimum wage for H-2A shepherds was so low that adding 'nominal amounts' would not attract domestic shepherds to fill the jobs.").

an anticompetitive action."[207] Antitrust plaintiffs have successfully made this claim.[208] Lawsuits have even moved forward on the theory that hiring undocumented labor constitutes an anticompetitive act because it allows companies to lower costs and thus undersell competitors.[209] As one scholar insisted about the ostensible anticompetitiveness of "illegal alien workers":

> In the case of sustained above-normal profits resulting from the hiring of illegal alien workers, such above-normal profits are driven by distorted, below-market labor costs. Such below-market labor costs ultimately create single-firm market power sufficient to jeopardize and threaten several of the perfectly-competitive model's underlying conditions . . . . From a purely economic perspective, the unlawful act of hiring illegal alien workers at below-market wage rates at a very minimum discourages, if not eliminates competition.[210]

In this view, the exclusion of immigrants is a proper use of antitrust.

Further, *government* can lawfully employ anticompetitive conduct against immigrants. Recall how states enact regulations to drive immigrants out of markets—e.g., hair-braiders and street vendors.[211] While much of this protectionism would ordinarily violate antitrust law, states enjoy *Parker* immunity.[212] In an ironic twist, the Supreme Court justified *Parker* on the

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207 IOANA MARINESCU & ERIC A. POSNER, ROOSEVELT INST., A PROPOSAL TO ENHANCE ANTITRUST PROTECTION AGAINST LABOR MARKET MONOPSONY 16 n.28 (2018), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_ProposalToEnhanceAntitrustProtection_workingpaper_201812.pdf [https://perma.cc/Q6UR-XNWJ] ("An interesting possible example is the hiring of undocumented workers in order to undermine the bargaining power of incumbent workers. Interestingly, this practice has been challenged under RICO, but it is better understood as an anticompetitive action that should be evaluated under antitrust law.").

208 *See* Rios v. Marshall, 530 F. Supp. 351, 357–58, 360 (S.D.N.Y. 1981); *see also* Nichols v. Mahoney, 608 F. Supp. 2d 526, 544 (S.D.N.Y. 2009) ("Plaintiffs here allege that defendants committed an antitrust violation by hiring illegal workers to depress wages.").

209 *See, e.g.*, Trollinger v. Tyson Foods, Inc., 543 F. Supp. 2d 842 (E.D. Tenn. 2008).

210 Kevin S. Marshall, *The Unfair Trade Practice of Hiring Illegal Alien Workers*, 11 U. PA. J. BUS. L. 49, 80, 87 (2008).

211 *See, e.g.*, Luke Fortney, *City Officials Shut Down Another Bronx Street Vendor, Prompting Outcry*, EATER N.Y. (Sept. 27, 2021), https://ny.eater.com/2021/9/27/22696165/nyc-unlicensed-street-vendor-bronx-diana-hernandez-cruz [https://perma.cc/5YRH-YN53] (describing the difficulty of obtaining one of the few licenses for street vendors.).

212 Parker v. Brown, 317 U.S. 341, 352 (1943) (ruling that California had "imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.").

grounds that elections should compel states to restrict competition when society would benefit, yet undocumented people cannot typically vote.[213] Even naturalized citizens, as minorities, would generally fail to muster electoral majorities.[214]

In fact, foreign-born people may face antitrust scrutiny after pooling their bargaining power against companies, oftentimes as a group boycott. For instance, Latin American immigrants driving trucks at the port of Los Angeles sought to increase their wages by participating in a wildcat strike.[215] This attracted the FTC's attention, which investigated the truckers for price-fixing their salaries.[216] This is far from a lone example, as antitrust has similarly prevented immigrants from using countervailing power against prominent corporations.[217]

In essence, dominant groups have created concepts of belonging based upon immigration and race, and this dynamic can serve as a type of market power. But in many instances, antitrust courts have failed to recognize discrimination as wrongful conduct, describing it as a social injury. Part IV plots a new course: it relies on antitrust's history, economic foundation, and purpose to suggest that certain efforts to exclude immigrants—even if based purely upon animus—should constitute an illegal exertion of market power. This revision of antitrust should make sense since anti-immigrant discrimination is often derived from classic forms of competition.

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213 N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 508 (2015) ("'[W]here the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals.' . . . [M]unicipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market.") (quoting Town of Hallie v. City of Eau Claire, 471 U.S. 34, 45–47 (1985)).

214 Day, *supra* note 17, at 643 (explaining the ineffectiveness of elections as a remedy when immigrants or inmates lack voting rights).

215 *See* Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 971–72 (2016).

216 *Id.* at 971.

217 *See, e.g.*, Carl T. Bogus, *The New Road to Serfdom: The Curse of Bigness and the Failure of Antitrust*, 49 U. MICH. J.L. REFORM 1, 98 (2015) ("Power wants to suppress countervailing power. Tyson [Foods] does not want chicken growers to be capable of organizing, bargaining collectively, or hiring lawyers or lobbyists."); Amy Crawford, *Sanjukta Paul Brings Expertise on Antitrust and Labor to the Michigan Law Faculty*, MICH. L., https://michigan.law.umich.edu/new-faculty-member-sanjukta-paul [https://perma.cc/384Q-LWKB] ("Some of the worker leaders were investigated by the Federal Trade Commission—the agency established in 1914 to enforce antitrust law—on the grounds that, because they were considered independent businesses, their efforts represented collusion at the expense of their customers.").

IV
Reimagining Antitrust in the Shadow of Anti-Immigrant Discrimination

This Part revisits antitrust law by investigating who is often exploited or excluded from markets. At issue is that antitrust law measures the welfare of consumers collectively and thereby misses the greater harms inflicted on immigrants and undocumented immigrants. It suggests that antitrust's assumptions about homogenous consumers and self-help remedies make little sense with foreign-born people, causing enforcement to ignore discrimination as an anticompetitive act. For antitrust to achieve its promise of consumer welfare, this Part argues that courts and enforcers must recognize how discrimination misallocates resources on citizenship lines rather than by their most productive usages. In this sense, antitrust miscalculates consumer welfare by prefiguring people as citizens. Far from a radical reimagining of antitrust law, the research explores the Sherman Act's intellectual foundation and history—a long-standing source of authority—to show that competition had, at times, originally benefitted immigrants and foreigners who were frequently targets of abuse. It becomes evident that antitrust law may consider protecting immigrants and society's least powerful from a pernicious yet poorly understood type of anticompetitive conduct.

Section A sheds light on errant assumptions in antitrust's framework about how immigrants and undocumented workers are supposedly able to mitigate anticompetitive practices. Section B argues that antitrust law must treat forms of discrimination as illegitimate economic behavior by revealing not only how anti-immigrant discrimination helped to inspire the common law of competition but also how it remains an implicit feature of antitrust's framework. Then Section C delves into this proposal's implications, including its effects on Equal Protection, state action immunity, and matters of race in antitrust's purview.

A. The Follies in Antitrust's Approach to Foreign-Born People

Antitrust's colorblind stance treats consumers as homogenous, which fails to recognize how immigrants are uniquely susceptible to exclusion and exploitation. Since antitrust views consumers as a collective group, a plaintiff must typically show that anticompetitive effects spanned an entire market. But this ignores how discrimination can depress salaries or raise

prices in ways affecting consumers as well as immigrants as a specialized class. In other words, antitrust prefigures people as citizens, thereby failing to account for certain effects of market power. If the term "consumer" was disaggregated, antitrust could better understand how anticompetitive discrimination misallocates resources and creates tension with antitrust's framework.

To make this point, consider the role of market power. As explained in Part II, antitrust law assumes that markets are self-correcting, meaning that actors can switch among competitors in search of lower prices, higher salaries, or better services. Given this freedom, antitrust cases have been dismissed unless the defendant exercised enough power to restrict competition using conduct "not on the merits."[218] In other words, antitrust is about systemic effects: a firm must wield enough power for exclusionary conduct to deteriorate a market's structure whereby rivals cannot compete and, in turn, consumer welfare erodes. If one store exists in a town, it wouldn't offend antitrust law because monopoly prices should attract new stores into the market, correcting the high prices—unless the monopolist has erected an artificial barrier to entry.[219]

Illustrating how this framework has failed (undocumented) immigrants, labor is helpful given the prevalence of discrimination against foreign-born workers. Due to antitrust's faith in self-correcting markets, enforcement is designed to err against liability because workers may simply, as the theory goes, switch jobs; take Richard Epstein's description:

> [T]here is no reason to think that workers are bound to apply their skills only within a given class of productive activities . . . . For high-skilled workers, their grasp of abstract and

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218 *See* Stearns Airport Equip. Co. v. FMC Corp., 170 F.3d 518, 525 (5th Cir. 1999); Herbert Hovenkamp, Antitrust Presumptions for Digital Platforms 10 (2023) (unpublished manuscript) ("[M]arket power is an economic requirement for all antitrust violations, even those under the per se rule, such as price fixing. However, for per se situations the market power is presumed from the characterization of a particular practice. That is, once we have characterized a practice as 'naked price fixing,' we do not properly say that market power is irrelevant. Clearly it is relevant to the success of a cartel, which could not succeed without it.").

219 Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.").

> general principles makes it highly likely that they can take key management and data skills with them to other industries. For low-skilled workers who provide janitorial, catering, or clerical services, for example, movement across market sectors is a relatively easy matter because the current skills are easily transferrable. In both these occupational groupings, it is implausible—if for somewhat different reasons—to say that there are "only a few employers in town."[220]

Based upon this analysis, Epstein concluded that antitrust's "traditional approach was—and is—correct," asserting that labor restraints should seldom warrant antitrust review.[221]

But it's worth recognizing an immigrant's lack of power in especially labor markets. Antitrust law presumes that workers can switch employers and thereby nullify trade restraints, as "hotel clerks, janitors, and waiters usually have a higher degree of mobility because their skills are not firm, or even industry, specific."[222] However, as Part III suggested, immigrants are less able to mitigate damages by switching jobs due to their lack of options and resources, or fear of retaliation[223]—research has concluded that even citizens tend to struggle to overcome labor restraints.[224] Because fears of deportation or arrest can restrain wages and produce implicit structures of market power, antitrust errs by treating consumers as a homogenous group. And since antitrust law views consumers as citizens who can access self-help remedies, this form of market power defies antitrust's faith in self-correcting markets.[225] But antitrust courts could define markets based on the prominence of certain types of workers such as immigrants, temporary laborers, or undocumented people—after all, markets can be primarily or almost entirely composed of foreign-born labor—making it logical for courts to define a specific market based on immigrant welfare. To do so, antitrust courts could understand how illicit practices

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220 Richard Epstein, *Richard Epstein: "The Unwise Extension of Antitrust Law to Labor Markets"*, NETWORK L. REV. (Feb. 8, 2022), https://www.networklawreview.org/epstein-antitrust-labor/ [https://perma.cc/3VH8-MC8P].

221 *Id.*

222 Richard A. Epstein, *The Application of Antitrust Law to Labor Markets – Then and Now*, 15 N.Y.U. J.L. & LIBERTY 327, 383 (2022).

223 *See* JULIE L. HOTCHKISS & MYRIAM QUISPE-AGNOLI, FED. RSRV. BANK OF ATLANTA, WORKING PAPER NO. 2008-07C, THE LABOR MARKET EXPERIENCE AND IMPACT OF UNDOCUMENTED WORKERS 23–24 (2008) (finding that undocumented workers have less labor market elasticity than resident workers and citizens).

224 *See generally* Hiba Hafiz, *Labor Antitrust's Paradox*, 87 U. CHI. L. REV. 381 (2019) (discussing the realities of labor markets and anticompetitive practices).

225 *See supra* Part III.

may specifically diminish the wages of immigrants and erode their working conditions as a specialized class.

In fact, the Supreme Court has noted that companies can generate monopoly power by making it difficult for people to leave a market. In *Eastman Kodak Co. v. Image Technical Services, Inc.*, Kodak charged supracompetitive prices to repair some of its products, knowing that unhappy consumers would seldom buy a rival good to avoid the repair fees.[226] Consumers were essentially "locked in[to]" the repairs market due to high switching costs, potentially bestowing Kodak a type of market power.[227] As such, antitrust courts could acknowledge that some types of consumers and labor—especially (undocumented) immigrants—are effectively "locked into" their jobs, conferring an abnormal type of market power.

Supporting this position, a prominent goal of antitrust is to foster economic efficiency, which anti-immigrant discrimination degrades.[228] A reason why high prices and restricted output are antitrust's lodestar is that they reflect deadweight loss while a monopolist may capture wealth for itself.[229] This is a structural issue in which resources are poorly allocated based upon anticompetitive conduct. For instance, an artificial limitation of licenses to immigrant competitors such as food trucks removes a low-priced yet highly demanded product from the market, often causing consumers to choose whether to pay more for an expensive substitute or buy nothing at all; here, the result is restricted output, higher prices, and deadweight loss, diminishing consumer welfare in the exact ways that antitrust is currently meant to prevent. Likewise, labor discrimination represents an inefficiency based on illegitimate power because threats of arrest, retaliation, and deportation can enable firms to reduce wages, force "locked in" immigrants to work in unconscionable conditions, or underpay them for goods and services. To this end, incumbent interests may use "wrongful conduct" to capture surpluses that a competitive market wouldn't allow. As the Texas Supreme Court explained in a non-antitrust context, acts of discrimination against immigrants have effectively

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226 Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 476 (1992).

227 *Id.* at 476–77.

228 *Supra* Part II.

229 Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 65, 70 (2019) (describing how output and surplus relate).

allowed firms to maintain high prices or underpay labor by squelching competition.[230]

Notably, it matters little whether immigrant labor is excluded as opposed to exploited. While the former situation reflects a conventional type of anticompetitive act, the latter implicates monopsony power (again, buying power). With exploitation, the underpayment of immigrants or prevalence of substandard working conditions allows a firm as a buyer of labor to diminish the labor market's quality and reap artificially high revenue off the backs of foreign-born persons while rendering deadweight loss. Both scenarios implicate antitrust law because enforcement is meant to protect people as the beneficiaries of competitive labor and products markets.

Even in scenarios where antitrust could provide a remedy to immigrants and undocumented people, a greater problem is perhaps a lack of awareness among enforcers. The merger guidelines state that communities may suffer differentiated effects—and courts and enforcers could view these as distinct markets—but enforcers have so far demonstrated a lack of will to pursue such cases. This landscape could, in fact, shed light on Commissioner Slaughter's comments that the agencies must enforce antitrust laws in ways that recognize historical discrimination; perhaps the issue involves the agencies' discretion to pursue some cases but not others. In essence, there's a dual problem: antitrust law and *the enforcement* of antitrust.

The point is that dominant parties can accrue market power over undocumented workers and immigrants that, as shown here, creates a type of deadweight loss condemned by antitrust law. Explaining the refusal of courts and scholars to adopt this viewpoint—so far, at least—there's been apprehension about conceiving of discrimination as anticompetitive conduct as opposed to a social problem.

B. Discrimination, Antitrust's Purpose, and the History of Competition Law

Commentators assert that antitrust law is not "to be used for" remedying acts of discrimination or that "other" bodies of law should intervene.[231] Perhaps due to the unwieldly nature of antitrust before the consumer-welfare era, scholars and courts have rejected using enforcement to cure non-economic

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

231 Victor, *supra* note 28.

harms and thus declined to characterize discrimination as anticompetitive conduct.[232] But this line of thinking may receive pushback on textual, economic, and historical fronts.

1. *Discrimination as Wrongful Conduct*

At the outset, antitrust offers a better remedy against anti-immigrant abuse than enacting a new type of discrimination statute. This is since, first, Congress can hardly be expected to pass more civil rights legislation. Because antitrust law exists, and because its statutory language is so open-ended, the enterprise is preferrable to the unlikely odds of enacting a new statute. But the primary reason is logical: immigrants suffer discrimination because they compete, making certain acts of anti-immigrant discrimination a form of anticompetitive conduct. The primary obstacle, as this Part shows, involves reconditioning how many scholars view discrimination (i.e., as a social harm) rather than its actual effect (an economic injury).

It is often said that antitrust law was not intended to worry about discrimination or equality, leading courts to dismiss cases on the basis that racial animus levied a social harm.[233] In fact, antitrust has distinguished between acts meant to generate a profit (i.e., an offense) as opposed to an act designed *only to harm others* (no offense).[234] For instance, a court dismissed an antitrust suit alleging collusion against Black concert performers because no economic benefit was conferred to the cartel of concert promoters.[235] This holding garners support from the belief that racism makes little economic sense and thus is better described as a social behavior.[236] Along this line, firms are generally free to refuse to deal with others, meaning that antitrust doesn't consider discrimination to be a wrongful

232 *See* Joshua D. Wright, Elyse Dorsey, Jonathan Klick & Jan M. Rybnicek, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293, 294 (2019) (arguing that dispatching of consumer welfare would create renewed dangers of populism).

233 *See* Chang, Rakhra & Thompson, *supra* note 168, at 1293 (describing how a political or social boycott based upon racial lines would likely survive antitrust review even if it bore an economic impact).

234 *See, e.g.*, Rowe Ent., Inc. v. William Morris Agency, Inc., No. 98 CIV. 8272(RPP), 1999 WL 335139, at *6 (S.D.N.Y. May 26, 1999) ("[N]o rational economic motive can be discerned for a booking agency to conspire with white concert promoters to restrain trade by not dealing with black concert promoters.").

235 *Id.*

236 BORK, *supra* note 167, at 237.

behavior.[237] A person can even cite their racism as an antitrust defense—according to Hiba Hafiz:

> [U]nder current doctrine, the mere allegation of race-based discrimination could make it *even more difficult* for a plaintiff to prove an agreement because each colluder's refusal to deal with the plaintiff could be explained as the result of firms' independent racial animus as opposed to the result of an agreement with their competitors.[238]

Discrimination has thus been characterized as a personal matter for which no antitrust court or enforcer should have "any concern."[239]

But this paradigm doesn't necessarily derive from the Sherman Act's text or antitrust's foundation, but instead from the consumer welfare movement of the 1970s. Textually, the Sherman Act limits enforcement's scope in only a few ways, namely, conduct affecting "trade" and "commerce." The implication is that discrimination intended to economically harm a rival can and should fulfill the Act's text. Further, the insistence that antitrust must turn a blind eye to immigrants ignores not only the economics of discrimination (as just laid out in Section A) but also an original characteristic of competition law, which involved remedying abuses against foreigners and immigrants. Since it is common for courts to interpret antitrust law using its history, this record—which spans from Tudor England through the consumer welfare standard—suggests that enforcement should perhaps redress anti-immigrant discrimination.

2. *Competition Law's History of Protecting Foreigners*

The common law of competition dates back to Tudor England in which all monopolies stemmed from a patent issued by the Crown.[240] As the number of patents increased, anger

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237 Erik Hovenkamp, *The Antitrust Duty to Deal in the Age of Big Tech*, 131 YALE L.J. 1483, 1487 (2022) ("[T]he default rule is that a firm can lawfully refuse to deal with rivals, so long as this choice is unilateral.")

238 Hafiz, *supra* note186, at 1498 (emphasis added).

239 Baran v. Goodyear Tire & Rubber Co., 256 F. 571, 573 (S.D.N.Y. 1919); *accord* Great Atl. & Pac. Tea Co. v. Cream of Wheat Co., 227 F. 46, 49 (2d Cir. 1915) (ruling that "the result of whim, caprice, prejudice, or malice" is insufficient including "because he had some personal difference with him, political, racial, or social."); *see also Rowe Ent., Inc.*, 1999 WL 335139, at *6 (finding a lack of economic motivation in dismissing an antitrust allegation based upon racial discrimination).

240 Oren Bracha, *The Commodification of Patents 1600–1836: How Patents Became Rights and Why We Should Care*, 38 LOY. L.A. L. REV. 177, 211 n.189 (2004)

mounted about high prices, monopolistic patent holders, and revenue conferred to the Queen, who padded her allowance by selling monopolies to private industry.[241] The patent system survived generations of dissent until courts began to invalidate the Queen's patents in 1602.[242] Soon after, Parliament enacted the *Statute Against Monopolies* to ban harmful monopolies.[243] Helping to spur the common law of competition, restraints of trade are shown to levy a disproportionate harm on immigrants and foreigners.[244]

First off, England's anti-monopoly tradition had already taken root in Chapter 41 of Magna Carta, which protected immigrants and foreign merchants from the King's efforts to extort them via both unfair taxes and monopoly rents.[245] It specifically stated that "[a]ll merchants shall have safe and secure exit from England, and entry to England, with the right to tarry there and to move about as well by land as by water, for buying and selling by the ancient and right customs, quit from all evil

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("Letters patent . . . were a form of the exercise of the royal prerogative and hence only the King could grant them.").

241 Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL'Y 983, 989–90 (2013); Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History*, 1550-1800, 52 HASTINGS L.J. 1255, 1264–65 (2001).

242 *See, e.g.*, Darcy v. Allein (*The Case of Monopolies*) (1602) 77 Eng. Rep. 1260, 1263 (KB).

243 John F. Duffy, *Inventing Invention: A Case Study of Legal Innovation*, 86 TEX. L. REV. 1, 27 (2007) ("Yet perhaps because the Statute of Monopolies was directed primarily at ending the long controversy over abusive royal monopolies, it did not focus on innovation policy nor attempt to articulate intellectual justifications for the award of innovation monopolies.").

244 1483, 1 Rich. 3 c. 12 (Eng.); *see also* William L. Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355, 364 (1964) ("A typical statute of this sort, the 'Act against Strangers Artificers,' passed in 1484, recited the complaint of certain English craftsmen that they were 'greatly empoverished' and 'likely in short time to be utterly undone for lack of occupation' because of foreign competition, and proceeded to limit importation of certain goods.") (footnote omitted) (quoting 1483, 1 Rich. 3 c. 12 (Eng.)).

245 MAGNA CARTA ch. 41 (1215) (Eng.), *translated in* MAGNA CARTA 1215 (The Avalon Project, Yale L. Sch., 2008), https://avalon.law.yale.edu/medieval/magframe.asp [https://perma.cc/VSH6-D287]; *see also* Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments:* Slaughter-House Cases *Re-Examined*, 31 EMORY L.J. 785, 792–93 (1982) ("The tradition against governmental grants of domestic monopolies in England seems to have begun with Chapter 41 of Magna Carta. This Chapter was designed to protect one small sector of competition, that of foreign merchants. Since these merchants had not been protected by the common law of the land, King John had extracted large tolls from them, impeding the introduction to England of types of goods not previously known there or not amenable to efficient production there. Chapter 41 guaranteed them safe conduct, liberty to buy and sell, and confirmation of the ancient rates of 'customs.'") (footnote omitted).

tolls . . . ."[246] Given that an original definition of a monopoly was a government granted privilege benefitting a powerful firm, an initial mechanism to combat monopolies was apparently meant to benefit foreigners and immigrants.

Further evidencing the turning tide against monopolies, English courts began to reject arguments that the exclusion of immigrants entailed a valid purpose of monopoly rights.[247] For example, the plaintiffs in *Davenant v. Hurdis* failed to persuade the Queen's Bench that their patent should not be condemned as an illegal monopoly because it achieved the "legitimate" goal of excluding foreign competition.[248] The patent holder argued in vain that:

> if this by-law were really a monopoly, then all the privileges and customs of cities and boroughs, *tending to exclude foreigners and to give the sole trading within the city or borough to its own freemen*, could be called monopolies and illegal; from which would ensue the decay of all cities and boroughs in the realm.[249]

In other words, the services, labor, and goods of foreign-born people and immigrants were often understood as competition, which monopolies could illicitly frustrate.

Another way in which abuse of foreigners inspired the common law of competition involved the Queen's granting of patents to the East Indian Company.[250] As the Crown's official importer, patents helped the East India Company to ravage foreign lands.[251] Monopolies levied such costs on indigenous persons and foreigners that scholars have cited Adam Smith to insist that "government by corporation was not good government," inspiring a brand of anti-monopolism.[252] In addition, England had refused to grant patents to foreigners and

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246 MAGNA CARTA, *supra* note 245, at ch. 41 (1215)

247 *See* Letwin, *supra* note 244, at 361–62 (discussing a case in which lawyers defended a monopoly on the grounds of its impact on foreign merchants).

248 Davenant v. Hurdis (1599) 72 Eng. Rep. 769, 775–76(QB).

249 *Id.*

250 William Dalrymple, *The East India Company: The Original Corporate Raiders*, THE GUARDIAN (Mar. 4, 2015), https://www.theguardian.com/world/2015/mar/04/east-india-company-original-corporate-raiders [https://perma.cc/6RHJ-UMW5] ("One of the very first Indian words to enter the English language was the Hindustani slang for plunder: 'loot'.").

251 Philip J. Stern, *The English East India Company and the Modern Corporation: Legacies, Lessons, and Limitations*, 39 SEATTLE U. L. REV. 423, 432–33 (2016).

252 Jenny S. Martinez, *New Territorialism and Old Territorialism*, 99 CORNELL L. REV. 1387, 1412 (2014).

immigrants as a way of insulating English companies and guilds from competition.[253] When courts began to sympathize with immigrants—and against patent holders—it's been said that judges sought to promote foreign inventions and goods against English monopolies.[254] The abuse of foreigners had likewise spurred anti-monopoly movements in other countries.[255]

Importantly, the manner in which patents injured foreigners and immigrants influenced early Americans.[256] Colonialists hated monopolies granted to English companies in the New World—e.g., the tea monopoly was especially detested.[257] This should come as little surprise because "a major motivation of those sailing to the New World was to leave their monopoly handcuffs."[258] Hardly ignorant of how patents harmed foreigners and immigrants, colonialists—as immigrants themselves—feared that concentrated power would deny them the benefits of competition.[259] One source of anxiety concerned a notable monopolist of foreign lands, the East India Company, whose soldiers were "casting their eyes on America as a new

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253 Thomas B. Nachbar, *Monopoly, Mercantilism, and the Politics of Regulation*, 91 VA. L. REV. 1313, 1356 (2005) ("[M]onopolies were used to defeat guild control as a means of introducing change. That is why the pre-industrial English did not distinguish between patents for inventions and those for technology that was well-established elsewhere and merely imported. Many of the technologies introduced from overseas were introduced by foreigners, and in order for a foreigner to practice in a particular industry, they needed exemption from the requirement of guild membership, which was not granted to foreigners. Because guilds controlled entire industries, they had control over whether and how any single technology would be applied to that industry.") (footnotes omitted).

254 Conant, *supra* note 245, at 793.

255 *See* Tom C. Hodge, *Compatible or Conflicting: The Promotion of a High Level of Employment and the Consumer Welfare Standard Under Article 101*, 3 WM. & MARY BUS. L. REV. 59, 67 (2012) ("Returning to the nineteenth century origins of modern competition law, it is worth noting that cartels were not unique to the United States. Cartels were prevalent across Europe. In the German Empire they were positively encouraged, as the government believed cartelisation would protect Germany from foreign competition.") (footnotes omitted).

256 Carrier, *supra* note 138, at 1295 ("The public was dismayed that trusts were supported by tariffs, which limited foreign competition, and by instances of graft and political corruption.").

257 David Leonhardt, *The Monopolization of America*, N.Y. TIMES (Nov. 25, 2018), https://www.nytimes.com/2018/11/25/opinion/monopolies-in-the-us.html [https://perma.cc/H8LN-UA29].

258 AMY KLOBUCHAR, ANTITRUST 20 (2021).

259 BARRY E. HAWK, MONOPOLY IN AMERICA 25 (2022) ("[T]here was self-selection of the emigrants who chose to leave their homes and start a new life in the colonies. These were the pioneers whose spirit of individualism and risk-taking was antithetical to the idea of monopoly and exclusive trading . . . . Second, *the colonists were at the receiving end of the English trading monopolies* . . . and viewed themselves more harmed than helped by monopoly.") (emphasis added).

theater whereon to exercise their talents of rapine, oppression and cruelty.'"[260] In fact, a prominent colonialist cited the East India Company's oppression of people residing in foreign lands to call for revolution, stating that "by the most unparalleled barbarities, extortions and monopolies, stripped the miserable inhabitants of their property and reduced whole provinces to indigence and ruin."[261] England's abuses of foreigners and foreign lands were, as scholars have found, a catalyst of the American Revolution.[262]

Anti-monopoly sentiments did not end at the war, inspiring America's adoption of the common law of competition.[263] When the United States won independence, an initial act of many courts was to embrace the *Statute Against Monopolies* and English monopoly cases as legal authorities.[264] Since Congress enacted the Sherman Act with the common law partially in mind, an inference is that antitrust may appropriately remedy discrimination against foreigners and immigrants.[265]

In fact, Senator Sherman, who almost seemed to speak about the plight of undocumented immigrants, asserted that "[i]t is the right of every man to work, labor, and produce in any lawful vocation . . . on equal terms and conditions."[266] And since a "restraint of trade" had originally referred to restrictions on one's ability to work, he exclaimed that the worst monopolies harmed civil society by increasing "inequality of condition, of wealth, and opportunity."[267] Indeed, the debates—which would later undergird consumer welfare—highlighted goals of fair competition in labor markets, as exclusionary

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260 William Dalrymple, *The Original Evil Corporation*, N.Y. TIMES (Sept. 4, 2019), https://www.nytimes.com/2019/09/04/opinion/east-india-company.html [https://perma.cc/FRE7-HJM9].

261 WILLIAM MAGNUSON, FOR PROFIT 97 (2022) (quoting 2 LIFE AND WRITINGS OF JOHN DICKINSON 460 (Paul Leicester Ford, ed., 1895).

262 KLOBUCHAR, *supra* note 258, at 22–23 ("But the Tea Act sought to change things to favor the East India Company's monopoly. . . . The Tea Act was extremely unpopular. And when George III and Lord North insisted on handing over control to one enterprise—the East India Company—it was the proverbial last straw."); *see also* MAGNUSON, *supra* note 261, at 97 (stating that English monopolies became a "rallying cry" to the revolution).

263 *See generally* Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*, 77 OR. L. REV. 1383, 1386 (1998).

264 *See generally* Day, *supra* note 17 (explaining the American embrace of the common law at the country's founding).

265 21 CONG. REC. 2456 (1890) ("[The Act] does not announce a new principle of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government.").

266 *Id.* at 2457.

267 *Id.* at 2460.

activities have often amassed wealth to the detriment of less powerful workers.

As a result, the claim that antitrust is not supposed to remedy discrimination against immigrants or foreign-born people could receive pushback from the Sherman Act's text, modern economic foundation, and competition law's historical record. After all, since the few lines in the Sherman Act leave a lot for interpretation, scholars, courts, and enforcers have continuously mined antitrust's history to ascertain its goals; this record shows a tradition of protecting foreigners and immigrants as the targets of anticompetitive conduct. While courts may certainly adapt the common law to fit modern concerns, antitrust's history of remedying discrimination could inform modern enforcement.

C. Antitrust Law as Anti-Discrimination Legislation

Antitrust has so far missed that it takes less market power to exclude immigrants and especially non-citizens, defying antitrust's faith in self-help remedies—even though antitrust courts have acknowledged that monopoly power can potentially derive from "locking in" market participants and labor. This is important because enforcement is supposed to promote the efficient allocation of resources yet discrimination against immigrants frustrates competition and creates a type of deadweight loss lying at the heart of antitrust law. But by gauging consumers *writ large* instead of acknowledging the greater costs inflicted on marginalized people, antitrust law is currently unable to consider immigrants and undocumented workers even though foreign-born persons have often suffered abuse because they compete.

But nothing in the Sherman Act demands that enforcement remains colorblind. Because consumer welfare is said to be a judge-made standard derived from academia, courts may generally reassess whether or when discrimination against immigrants should violate antitrust law. Enforcers have even begun to insist, as Part II noted, that enforcement must become anti-racist.[268] Adding support to this proposition is antitrust's history, considering that competition law arose, in part, from the shadow of discrimination against foreign-born people. But for whatever reason, courts and scholars have remained steadfast that antitrust law is not meant to remedy discrimination.

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[268] *See supra* notes 174–78 and accompanying text (discussing the government's mounting discussion of race in relation to antitrust enforcement).

A goal of this Article is thus to show that economic exclusion grounded in animus can create the precise type of deadweight loss and inefficiencies that lie at antitrust's remedial core.

It is also important to dispel antitrust's assumption that consumers suffer harms in homogenous ways. For certain behaviors, this framework may perhaps make sense—e.g., if a firm monopolizes the soda market and charges $10 per can, everyone must pay the premium. But in other instances, marginalized individuals like (undocumented) immigrants cannot as freely navigate markets or mitigate costs. Other times, immigrants are targeted as a class specifically due to their dearth of power. This is evidenced by how some firms use low wages to attract undocumented workers as a way of hiring an exploitable class. For antitrust to fulfil its promise, the term "consumer" must be disaggregated so that courts and enforcers can acknowledge the unique harms inflicted on consumer welfare through excluding marginalized people by defining markets based upon the foreseeable effects on them.

As examples, it could offend antitrust law for employers to threaten locked-in undocumented labor with deportation or arrest in order to underpay them or erode working conditions; not only do these tactics allow a firm to depress wages below competitive levels while keeping surpluses for itself, but also undocumented workers can seldom rely on self-help remedies assumed to correct markets. Another instance is when companies retaliate against valid claims such as sexual harassment—a common danger affecting undocumented women[269]—which should constitute an illegal exercise of market power that degrades a labor market's quality. Or it could violate antitrust law for firms to boycott competitors who employ undocumented people or businesses run by immigrants. Perhaps most importantly, the DOJ and FTC should scrutinize licensing agencies that pass rules and regulations intended to impair the competition of immigrants (which is discussed in the next Section). In these and other examples, discrimination against immigrants misallocates resources to a dominant party's benefit, indicating that racial animus could garner scrutiny in the same ways as do price-fixing, sham litigation, and other exclusionary behaviors.

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269 *See US: Sexual Violence, Harassment of Immigrant Farmworkers*, HUMAN RIGHTS WATCH (May 15, 2012), https://www.hrw.org/news/2012/05/15/us-sexual-violence-harassment-immigrant-farmworkers [https://perma.cc/ZMK7-XJPP].

It is also important, though, to discuss the potential dangers of redressing matters of discrimination. Recall that the consumer welfare standard arose because antitrust had previously been able to pursue social and political goals, a landscape that had ostensibly harmed competition. As such, courts, scholars, and enforcers may legitimately fear that enlarging antitrust's scope into areas approaching social or political policy would return antitrust to its populist era. But rather than seeking to expand antitrust law, this Article demonstrates how certain acts of anti-immigrant discrimination meet the economic, textual, and historical guideposts of antitrust's remedial scope. Indeed, the goal of this research is to rethink antitrust's assumptions instead of fundamentally changing enforcement by suggesting modest yet important ways of reconceiving how courts, scholars, and enforcers view anticompetitive acts and market definitions. This Article's proposal would also affect related areas of antitrust and discrimination laws, as the next Section explains.

D. Implications

Focusing antitrust on anti-immigrant discrimination would impact constitutional doctrines such as state action immunity and Equal Protection as well as shed light on antitrust's relationship with race. This Section delves briefly into each area.

1. *Government Immunity and Oppression*

The Supreme Court should consider revisiting or even dispatching with *Parker* immunity, which is a judge-made doctrine based on a belief in political accountability. Recall that anticompetitive practices on behalf of a state, local, or federal government have often targeted foreign-born people. For instance, locales allow licensing agencies—composed of active participants in a market—to regulate their own competition and thereby exclude immigrants in the business of braiding hair, manicuring nails, and operating food, among other professions.[270] *Parker*'s justification is that states have fewer incentives to pursue private goals, as opposed to promoting the public's welfare, given the force of elections.[271]

Considering the inequity of cloaking discrimination in immunity, the question of whether *Parker* makes sense should

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270 *See supra* notes 121–26 and accompanying text.

271 N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 508 (2015).

be readdressed. If the defendant is a municipality or private party acting on a state's behalf, *Parker* is currently conditioned on two rules: a restraint of trade must 1) advance a state's "clearly articulated . . . policy" and 2), for private entities only, be supervised by the state.[272] This framework prevents a licensing agency from creating its own rules meant to suppress competition unless it can reasonably be traced to a goal of the state—which is often the case.[273] The problem is that the Supreme Court has underestimated a state's incentives to oppress undocumented people and immigrants; it theorized that the power of voting should limit abusive policies, yet states can and do target undocumented workers who lack voting rights.[274]

The question is thus what should become of *Parker*? One option is an overruling or alteration.[275] A benefit of scrapping or modifying *Parker* is that states, as opposed to municipalities and licensing agencies, would often seemingly remain free of monetary liability due to the Eleventh Amendment.[276] And while federal agencies are not free of political motives, it could bolster the times when the DOJ or FTC is able to advocate for undocumented workers and immigrants in the shadow of government-sponsored discrimination. In fact, the Fourteenth Amendment suggests that federal agencies are equipped at overseeing a state's discriminatory acts against particularly immigrants. Further, the Constitution vests Congress with the power to regulate immigration, indicating that the Framers believed that federal actors rather than states should primarily create policies affecting the welfare of immigrants. Since *Parker* arose from a political compromise—as opposed to a constitutional mandate—the tradeoff of allowing federal antitrust litigants to review certain types of state action seems worthwhile.[277]

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272 Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) ("[T]he challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy.'") (quoting City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 410 (1978) (Brennan, J., plurality opinion)).

273 *See* Day, *supra* note 172, at 2203–07 (discussing the decision of states to grant private corporations the power to suppress competition in carceral markets).

274 *N.C. State Bd. of Dental Exam'rs*, 574 U.S. at 508 (ruling that states are "electorally accountable and lack the kind of private incentives characteristic of active participants in the market.").

275 *See* Day, *supra* note 17, at 682.

276 U.S. CONST. amend. XI; Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 69 (1996) (applying the common law history to the Eleventh Amendment's interpretation).

277 *See* Allensworth, *supra* note 117, at 1395–96 ("*Parker*, therefore, is better understood as being more about the affectation doctrine than about the intent behind or text of the Sherman Act. Federal antitrust liability for state laws and

In sum, the Supreme Court possesses the power to strike down *Parker*, which would allow federal agencies to review state discrimination. Hardly an invitation for unwieldy litigation, this discussion shows that only the DOJ or FTC could litigate against a state or its municipalities. While not the goal of this Article, the research indicates that revoking or modifying *Parker* immunity would potentially add necessary guardrails. And in light of Equal Protection's limitations, into which the next analysis delves, abrogating *Parker* could provide an effective remedy against an unchecked type of discrimination against immigrants and undocumented people.

2. *Complementing Equal Protection*

Antitrust enforcement could complement the Equal Protection Clause, which is the primary means of challenging discrimination on behalf of government. Congress ratified the Clause during the Reconstruction Period as part of the Fourteenth Amendment—finding inspiration in the Fifth Amendment—using the language of "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."[278] Despite appearing like a mandate of equality, the Clause has unevenly helped immigrants.

First off, the Amendment's language applies only to state actions, meaning that private actors cannot typically run afoul of Equal Protection. Thus, a benefit of applying antitrust to anti-immigrant discrimination is that it would scrutinize a large array of private behaviors lying beyond Equal Protection's scope.

It is additionally said that Equal Protection has done little to remedy state-sponsored abuse of immigrants. This is curious since courts have asserted that "the right to earn a living 'is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure,'"[279] prompting the Supreme Court to insist that the exclusion of immigrants cannot count as a valid interest of state

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regulations would so disrupt the state-federal balance of power as it stood in the 1940s as to render the affectation doctrine questionable under the federalist principles enshrined in the Constitution. Thus, to preserve the viability of *Wickard*, the Court created a compromise that would leave states a relatively free hand to regulate without federal oversight, and *Parker* immunity was born.") (footnote omitted).

278 U.S. CONST. amend. XIV.

279 Sandefur, *supra* note 62, at 1050 (quoting Truax v. Raich, 239 U.S. 33 (1915)) (alteration in original).

action.[280] But more commonly, state-sponsored discrimination has evaded the Fourteenth Amendment (and antitrust review in light of *Parker* immunity) because plaintiffs must generally present evidence of an *intent or purpose* to discriminate rather than disparate impact.[281] If a plaintiff cannot overcome this hurdle, courts tend to assess discrimination under the rational basis test, which affirms almost all state policies.[282]

For example, in 2021, immigrants contested a 1952 federal statute criminalizing aspects of immigration on the grounds that it harmed people of color.[283] While likely true, the district court upheld the law under the rational basis test because the suit could not show a discriminatory intent.[284] This was despite several Senators in 1952 who unsuccessfully sought

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280 Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 416 (1948) ("The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality.") (quoting *Truax*, 239 U.S. at 42); *Truax*, 239 U.S. at 41–42 ("If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words. It is no answer to say, as it is argued, that the act proceeds upon the assumption that 'the employment of aliens unless restrained was a peril to the public welfare.' The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labor is necessarily involved. It must also be said that reasonable classification implies action consistent with the legitimate interests of the State, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power. The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government."); Sandefur, *supra* note 62, at 1048 ("In several cases, the Court has held that merely protecting natives against competition from immigrants is not a legitimate state interest.").

281 *See, e.g.*, United States v. Wence, No. 3:20-cr-0027, 2021 WL 2463567, at *1 (D.V.I. June 16, 2021) (reciting Equal Protection case law under both the Fifth and Fourteenth Amendments).

282 *Id.* at *1–2 ("If a discriminatory purpose is found to be a motivating factor for the government's decision, a court must apply the strict scrutiny test, as it would to a law involving a facial classification on the basis of race.").

283 *Id.* at *1 ("Wence argues that 8 U.S.C. § 1326 violates the Fifth Amendment's guarantee of equal protection. Specifically, Wence argues that 8 U.S.C. § 1326 was enacted with the intent to discriminate against Mexican citizens and has a disparate impact on Mexican and other Latinx individuals, and therefore is unconstitutional.").

284 *Id.* at *10.

to insert a "wetback amendment"[285] into the law.[286] While the court noted that the law levies disparate harms on people of color—"immigration laws will almost always disproportionately affect Mexican and Latin American defendants"—the plaintiffs were unable to show how the law was *specifically* designed to harm certain racial groups.[287] Likewise, the Supreme Court decided a case in which a real estate developer sought to rezone land as a way of providing low-income housing to "racially integrated" families, which a local town forbid.[288] There, the Supreme Court upheld the town's action because it was ostensibly based upon maintaining property values rather than specifically excluding people of color.[289]

Harkening back to the prior discussion about *Parker*, the deference in Equal Protection and *Parker* is hardly an accident. One scholar noted that courts have been "gun-shy" about striking down protectionist measures using constitutional remedies ever since *Lochner*.[290] In fact, the Supreme Court remarked that states receive "wide latitude" to create economic policies and regulations, free from Equal Protection and antitrust scrutiny *for the same reasons*:

> the imposition of antitrust liability on the activities of municipal governments will allow the sort of wide-ranging inquiry into the reasonableness of state regulations that this Court

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285 Unfortunately, this offensive language appears in the Congressional record. 82 CONG. REC. 8122 (1952).

286 *Wence*, 2021 WL 2463567, at *7 ("Rhetoric of this vein was employed by seven senators throughout the debate immediately preceding the override of President Truman's veto, wherein proposed amendments to the 1952 Act were discussed, including the 'wetback amendment.' 82 CONG. REC. 8122 (June 26, 1952). However, this 'wetback amendment' was voted down by a count of 11 'yeas' to 65 'nays.' 82 CONG. REC. 8123 (June 26, 1952).").

287 *Id.* at *9; *see also* United States v. Machic-Xiap, 552 F. Supp. 3d 1055, 1072 (D. Or. 2021) (dismissing a case brought by a Guatemalan national who showed disparate impact against Latin Americans and Mexicans); United States v. Novondo-Ceballos, 554 F. Supp. 3d 1114, 1122–23 (D.N.M. 2021) (rejecting noncitizen's motion to dismiss because "even though a higher percentage of individuals of Latinx origin are prosecuted for § 1326 violations, it does not automatically follow that they are disparately impacted"); United States v. Muñoz-De La O, 586 F. Supp. 3d 1032, 1049 (E.D. Wash. 2022) (noting that potential discriminatory intent by lawmakers "*is speculative and fails to sufficiently establish . . . a discriminatory motivation by Congress as a whole*.") (emphasis added).

288 Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 252–57 (1977).

289 *Id.* at 270.

290 Daniel A. Crane, *Scrutinizing Anticompetitive State Regulations Through Constitutional and Antitrust Lenses*, 60 WM. & MARY L. REV. 1175, 1178 (2019).

> has forsworn. For example, in *New Orleans v. Dukes*, a city ordinance which, to preserve the character of a historic area, prohibited the sale of food from pushcarts unless the vendor had been in business for at least eight years, was challenged under the Equal Protection Clause of the Fourteenth Amendment. The Court upheld the constitutional validity of the ordinance. *But it now appears that if Dukes had proceeded under the antitrust laws and claimed that the ordinance was an unreasonably anticompetitive limit on the number of pushcart vendors*, he might well have prevailed unless New Orleans could establish that the Louisiana Legislature "contemplated" the exclusion of all but a few pushcart vendors from the historic area. The "wide latitude" of the States "in the regulation of their local economies," exercised in *Dukes* by the city to which this power to regulate had been delegated, could thus be wholly stifled by the application of the antitrust laws.[291]

This illustrates a prominent belief that a state's law intended to exclude immigrants should receive deference in both an Equal Protection or antitrust analysis.

While this Article is not meant to review the wisdom of modern Equal Protection jurisprudence, it does argue that antitrust's treatment of state action immunity should be reconsidered. So long as constitutional remedies are seldom expected to aid immigrants and undocumented people, a utility of antitrust is that it could promote some competition in the shadow of anti-immigrant discrimination. In other words, antitrust could redress a form of state-sponsored discrimination as well as compliment Equal Protection litigation. Antitrust courts must also wrestle with matters of race more broadly as discussed next.

3. *Race in Antitrust*

Many of this Article's discussions are inseparable from issues of race. Only in the past few years have enforcers and scholars noted how anticompetitive acts can disproportionally harm people of color or that competition may not benefit marginalized people in the same ways.[292] For instance, mergers of grocery stores have lessened competition in delivering bigger, cheaper, and more efficient stores to affluent areas but also

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[291] City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 439–40 (1978) (Stewart, J., dissenting) (quoting City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976)) (footnote omitted) (citation omitted) (emphasis added).

[292] Capers & Day, *supra* note 19, at 548.

shuddered stores in low-income communities.[293] The effect is that people of color are more likely to live in food deserts as a result of exclusionary practices, though this landscape has generally evaded antitrust review because only a minority of consumers would suffer the costs.[294] The same dynamic has also been found in the markets for healthcare, banks, real estate, labor, and more.[295]

This realization has generated a nascent discussion about whether antitrust law should incorporate matters of race. While a litany of scholars continue to assert that antitrust cannot regulate discrimination or promote equality and fairness,[296] others are beginning to insist that no law is truly colorblind.[297] A belief is that colorblind rules are implicitly designed to benefit dominant groups, and antitrust law is no different.[298] The implication is that refusing to acknowledge disparate treatments and impacts bears the effect of locking structural inequities into place, making antitrust law complicit in discrimination. To actually treat people on even grounds, race must affect antitrust enforcement.[299]

As such, this Article has sought to advance antitrust's dialogue about race by explaining how immigration status fits into antitrust's regime—especially since race has often been a factor in the economic exclusion and exploitation of many immigrants.[300] The research shows how matters of race and immigration can create unique forms of market power, turning exclusionary conduct into an effective method of monopolizing markets and generating above-market revenue. The unique and interrelated effects of immigration status should thus entail an important part of the story.

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293 Christopher R. Leslie, *Food Deserts, Racism, and Antitrust Law*, 110 CALIF. L. REV. 1717, 1727–31 (2023).

294 *Id.* at 1727–28.

295 Capers & Day, *supra* note 19, at 530.

296 *See, e.g.*, *supra* notes 27–28 and accompanying text.

297 *See, e.g.*, Hafiz, *supra* note 186.

298 *See generally* Francisco Valdes, Jerome McCristal Culp & Angela P. Harris, *Battles Waged, Won, and Lost: Critical Race Theory at the Turn of the Millennium*, *in* CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 1 (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris eds., 2002) (discussing structural inequalities engrained in the law).

299 *See generally* Capers & Day, *supra* note 19.

300 *See supra* notes 183–186 and accompanying text.

CONCLUSION

Each year, 1,000,000 non-citizens are permanently allowed to live in the United States.[301] About 40 million foreign-born individuals live in the country, representing one-fifth of the world's immigrant population.[302] The number of foreign-born people swells to about 14% of the U.S. population when taking into account America's 11,000,000 undocumented workers.[303] In total, over 100,000,000 people have immigrated to the United States since its founding.[304]

For much of this history, recent arrivals have suffered abuse based upon a combination of xenophobia and anticompetitive goals. Since it's common for people to immigrate to countries where they can accept a competitive wage or undersell native businesses, immigrants and undocumented workers have been excluded from markets or exploited as workers and consumers. This has indeed drawn the ire of native citizens who not only feel threatened by competition but also drum up rhetoric about why foreign-born people are undeserving of competing.

This Article seeks to convince courts, scholars, and enforcers that certain acts of discrimination are anticompetitive. It shows that the exclusion of immigrants creates a hidden yet dangerous type of market power, considering that foreign-born persons tend to lack resources, options, or legal remedies on par with native consumers and businesses who can avail themselves of self-help remedies.

In the process of exploring discrimination as anticompetitive conduct, this Article makes several contributions. None is more important than reinvigorating a debate about antitrust's purpose. It is often said that antitrust is not intended to remedy racism and discrimination or promote matters of equality.

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301 *See* OFF. OF IMMIGR. STAT., DEP'T HOMELAND SEC., 2020 YEARBOOK OF IMMIGRATION STATISTICS, 12 (2022), https://www.dhs.gov/sites/default/files/2022-07/2022_0308_plcy_yearbook_immigration_statistics_fy2020_v2.pdf [https://perma.cc/T34U-48P6].

302 Budiman, *supra* note 71.

303 *Fact Sheet: Immigrants in the United States*, AM. IMMIGR. COUNCIL (Sept. 21, 2021), https://www.americanimmigrationcouncil.org/research/immigrants-in-the-united-states#:~:text=In%202019%2C%2044.9%20million%20immigrants,percent%20of%20the%20national%20population [https://perma.cc/7EKF-3MN2]; Abby Budiman, Luis Noe-Bustamante & Mark Hugo Lopez, *Naturalized Citizens Make Up Record One-in-Ten U.S. Eligible Voters in 2020*, PEW RSCH. CTR. (Feb. 26, 2020), https://www.pewresearch.org/hispanic/2020/02/26/naturalized-citizens-make-up-record-one-in-ten-u-s-eligible-voters-in-2020/ [https://perma.cc/W7GS-KLXU].

304 David J. Bier, *Over 100 Million Immigrants Have Come to America Since the Founding,* CATO INST. (Oct. 4, 2018), https://www.cato.org/blog/over-100-million-immigrants-have-come-america-founding [https://perma.cc/X4JP-EZGE].

This view has notably prompted courts and scholars to withhold antitrust remedies when discrimination is characterized as non-economic conduct. A goal of this Article is thus to show how anti-immigrant discrimination can advance anticompetitive goals and create types of economic harms condemned by antitrust law. Namely, it misallocates resources based on citizenship or racial lines as opposed to their most productive usages, allowing a dominant party to capture above-market revenue while creating deadweight loss.

Another contribution comes from highlighting the problems of calculating the welfare of all consumers collectively. Currently, antitrust is considered a "colorblind" body of law that "treats everyone equally," which assumes that exclusionary acts harm or benefit consumers in the same ways. But this misses the disproportional costs levied on immigrants and undocumented people. In this sense, antitrust prefigures consumers and competitors as citizens—a myopathy that is especially troubling since foreign-born people are excluded because they compete.

Along this line, courts, scholars, and enforcers must address the freedom by which states oppress immigrants via anticompetitive conduct. Due to *Parker* immunity, it is common for states to favor native interests by preventing immigrants from competing in product and labor markets. But antitrust enforcement has rarely been able to intervene in light of *Parker* while the Equal Protection Clause has often failed due to the task of showing a discriminatory intent. A secondary purpose of this Article is not only to shed light on state-sponsored discrimination but also to propose the revisiting of *Parker*. The greater hope is that discrimination against immigrants and undocumented people can be understood as type of anticompetitive conduct fitting within antitrust's economic framework. By doing so, it could allow federal agencies to enforce the antitrust laws where Equal Protection has left gaps.