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Free Market State (of Mind): Antitrust Federalism, John J. Flynn and the Utah Constitution's Free Market Clause

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FREE MARKET STATE (OF MIND): ANTITRUST FEDERALISM, JOHN J. FLYNN AND THE UTAH CONSTITUTION'S FREE MARKET CLAUSE

Jorge L. Contreras[*]

Abstract

The Utah Constitution states that "[i]t is the policy of the state of Utah that a free market system shall govern trade and commerce in this state to promote the dispersion of economic and political power and the general welfare of all the people." Utah's so-called Free Market Clause, adopted in 1992, is unique among the constitutions of the fifty states. Through an excavation of the historical record and contemporary literature, this Article shows that the Free Market Clause owes its existence to the influence of Professor John J. Flynn of the University of Utah, whose pioneering work on antitrust federalism was rooted in Rawlsian notions of distributive justice and economic equality. One of the early critics of the Chicago School's output-based economic approach to antitrust analysis, Flynn actively sought to infuse antitrust regulation, primarily at the state level, with the consideration of wealth inequality, distributive justice, and individual liberty. Yet, in recent years, conservative groups have taken up the Free Market Clause as a potential deterrent to progressive regulation. And in the three decades since it was enacted, the courts of Utah have all but forgotten the origin and purpose of this unique and empowering constitutional pronouncement, finding it to be non-self-executing and thereby non-justiciable. This Article, for the first time, unearths the forgotten intellectual history of Utah's Free Market Clause and explores its three principal applications as: (1) an interpretive aid to Utah's Antitrust Act, which was modeled on the federal Sherman Antitrust Act; (2) a standalone constitutional claim against anticompetitive state

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regulations and private conduct; and (3) an alternative approach to federal antitrust analysis that supplements neoclassical economics with concerns over wealth inequality, distributive justice, and individual liberty.

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INTRODUCTION

Against the backdrop of some of the largest antitrust enforcement actions in U.S. history,[1] a debate is being waged among policymakers, scholars, and courts over the fundamental purpose of antitrust law. On the one hand, adherents of the conservative Chicago School of economic analysis, as well as some post-Chicago centrists, argue that the gravamen of antitrust law is, and should remain, a measure of "consumer welfare" that is tied exclusively to output and prices.[2] On the other hand, progressives, sometimes referring to themselves as Neo-Brandeisians, have argued for a more inclusive view of welfare that variously accounts for corporate size, labor practices, innovation, market entry, wealth inequality and human well-being.[3]

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[1] *See, e.g.*, John Koetsier, *Google Antitrust: The 14 Most Explosive Allegations*, FORBES (Feb. 4, 2022, 11:50 AM), https://www.forbes.com/sites/johnkoetsier/2022/02/04/google-antitrust-the-14-most-explosive-allegations/?sh=503950d13252 [https://perma.cc/FJ4D-9RED] (outlining the most consequential allegations in an antitrust case brought against Google by seventeen U.S. states); *see also* Makenzie Holland, *Long, Costly Road Ahead for FTC Antitrust Case Against Meta*, TECHTARGET (Apr. 7, 2022), https://www.techtarget.com/searchcio/news/252515715/Long-costly-road-ahead-for-FTC-antitrust-case-against-Meta [https://perma.cc/EU7V-TU26] (explaining the Federal Trade Commission's antitrust case against Meta, the owner of Facebook and Instagram).

[2] *See, e.g.,* Jonathan B. Baker, *Finding Common Ground Among Antitrust Reformers* 4 n.15 (Antitrust L.J., Working Paper 2022), https://ssrn.com/abstract=4141668 [https://perma.cc/N3MK-SDG4] (identifying competing schools of thought and collecting sources); Herbert J. Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. PENN. L. REV. 1843 (2020) (tracing the historical roots of Chicago School theories); A. Douglas Melamed & Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, 54 REV. INDUS. ORG. 741 (2019) (defending a consumer welfare standard in the context of platform economics); 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 (2019) (critiquing progressive antitrust theories deviating from the consumer welfare standard).

[3] *See, e.g.*, JONATHAN B. BAKER, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY (2019) (arguing for greater antitrust attention to the prevention of market exclusion and enabling new market entry); TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018) (criticizing antitrust theory that fails to take corporate size into account); Leon B. Greenfield, Perry A. Lange & Nicole Callan, *Antitrust Populism and the Consumer Welfare Standard: What Are We Actually Debating?*, 83 ANTITRUST L.J. 393 (2020) (describing historical and recent populist antitrust movements); A. Douglas Melamed, *Antitrust Law and Its Critics*, 83 ANTITRUST L.J. 269 (2020) (surveying populist critiques of antitrust); Mark Glick, *The Unsound Theory Behind the Consumer (and Total) Welfare Goal in Antitrust*, 63 ANTITRUST BULL. 455 (2018) (arguing that economic performance is not tied to human well-being or welfare); Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235 (2017) (exploring the role of market power in fostering economic inequality).

One of the catalysts for the rise of the Chicago School approach in U.S. courts was the 1978 publication of Robert Bork's influential book *The Antitrust Paradox,*[4] which summarized and popularized a number of his earlier writings dating from the 1960s.[5] In *The Antitrust Paradox*, Bork was highly critical of the development of antitrust law since the mid-twentieth century.[6] He argued that courts, and the Supreme Court, in particular, had lost sight of the core value by which all commercial conduct should be measured: what he termed "consumer welfare."[7] Tracing this vision back to the writings of Senator John Sherman himself, Bork argues that consumer welfare depends exclusively on prices and output.[8] He then criticizes Justice Louis Brandeis and others who, in his view, inappropriately sought to introduce the concept of "small business welfare" or "producer welfare" into antitrust law by giving weight to considerations such as market entry, the competitive landscape, and market concentration.[9] These considerations, he argued, had no place in an antitrust analysis properly tied to the maximization of consumer welfare, as he defined it.[10]

Accordingly, Bork urged courts to treat with leniency a variety of corporate practices that had previously been viewed as anticompetitive, including many collusive arrangements and horizontal mergers.[11] Finally, Bork criticized what he perceived to be over-zealous and politically motivated antitrust enforcement by

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[4] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (Bork Publ'g 2021) (1978).

[5] *See* Hovenkamp & Morton, *supra* note 2, at 1849–50; Greenfield et al., *supra* note 3, at 396.

[6] *See* BORK, *supra* note 4 *passim*; *see also* William E. Kovacic, *The Chicago Obsession in the Interpretation of US Antitrust History*, 87 U. CHI. L. REV. 459, 471–72 (2020) ("In *Antitrust Paradox*, Bork excoriated the US antitrust regime, especially as it had developed since the mid-1940s.").

[7] BORK, *supra* note 4, at 48 ("The responsibility of the federal courts for the integrity and virtue of law requires that they take consumer welfare as the sole value that guides antitrust decisions."). Bork's concept of the "consumer" was, as one commentator drily observes, rather "specialized." Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 437–38 (2009) (noting that Bork includes a "monopoly and its owners" within his definition of "consumers" and appears indifferent as to wealth transfers between these two consumer groups.).

[8] *See* BORK, *supra* note 4, at 59.

[9] *Id.* at 13; *see also id.* at 51 ("These notions, which are examples of the theory of the 'social and political purposes of antitrust,' are, to put the matter kindly, a jumble of half-digested notions and mythologies.").

[10] *See id.* at 53 (explaining "conflicts" between goals of "small-producer welfare" and "consumer welfare").

[11] *See* Kovacic, *supra* note 6, at 472 (citing BORK, *supra* note 4) ("Bork proposed an antitrust program that would intervene only to ban collusive arrangements among direct rivals, horizontal mergers that left three or fewer firms in a relevant market, a handful of dominant firm exclusionary practices, and business efforts to misuse government regulatory processes to forestall competitors."). For a refutation of some of the underlying economic theories relied on by Bork, see, e.g., Elhauge, *supra* note 7.

federal agencies and advocated for a more hands-off approach to economic regulation.[12]

Bork's critiques and recommendations were taken to heart by U.S. courts and enforcement agencies, helping to shape antitrust law in the United States for the next half century.[13] As Utah Senator Mike Lee wrote in 2021, "[w]hat [Bork] published in 1978 as an argument for what the law sh*ould be* is now simply what the law *is*."[14]

Yet, Bork's book and the economic theories that it advanced were criticized from the outset, including by Professor John J. Flynn at the University of Utah, a major voice in mid-twentieth century antitrust theory.[15] Flynn disputed both Bork's economic analysis as well as his historical assessment of the Sherman Act.[16] Flynn watched with apparent dismay as the federal government and the courts began to embrace Bork's view of antitrust theory and enforcement. He observed that "few who have read the history of the major antitrust laws hold the view that Congress meant to enshrine a policy of exclusive reliance upon neoclassical price theory and its normative assumptions for defining the means and ends of antitrust policy analysis."[17]

Flynn's major theoretical contribution to the literature of his day was mapping the terrain of antitrust federalism—the interaction between federal and state antitrust laws and enforcement. His 1964 book, *Federalism and State Antitrust Regulation*,

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[12] BORK, *supra* note 4, at 432–33 ("The [Department of Justice] Antitrust Division and the [Federal Trade] Commission . . . must continually press on to fresh territory, seeking theories that broaden the application of the law and make violations easier to establish.").

[13] *See* WU, *supra* note 3, at 90–91; Greenfield et al., *supra* note 3, at 396–97. *But see* Kovacic, *supra* note 6, at 464–66 (questioning the actual influence of Bork and the Chicago School on contemporary antitrust policy).

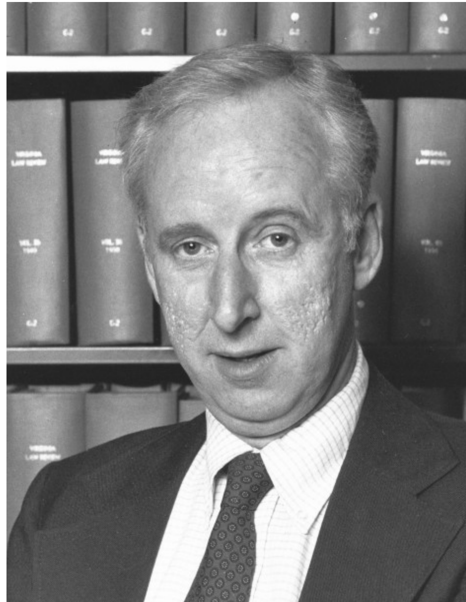
[14] Sen. Mike Lee, *New Introduction*, *in* BORK, *supra* note 4, at ix.

[15] *See generally* Albert A. Foer, *Civil Liberties and Competition Policy: A Personal Essay Dedicated to John J. Flynn*, 56 ANTITRUST BULL. 731 (2011). Though Flynn was not a native of Utah, he joined the law faculty at the University of Utah in 1963 and remained there for the next 42 years. *See John J. Flynn*, J. WILLARD MARRIOTT DIGIT. LIBR., https://collections.lib.utah.edu/details?id=723539 [https://perma.cc/NMN2-SMVP] (last visited Oct. 11, 2022).

[16] *See* John J. Flynn, *Reaganomics and Antitrust Enforcement: A Jurisprudential Critique,* 1983 UTAH L. REV. 269, 269 (1983) [hereinafter Flynn, *Reaganomics and Antitrust Enforcement*] ("[T]he so-called 'Chicago school of economics' . . . emphasizes one form of economic analysis, the neoclassical approach, and advocates that this approach be made the exclusive premise of antitrust enforcement. It is a school of thought whose basic assumptions are under substantial attack and whose methodology for analyzing the facts of real cases is open to serious question."); John J. Flynn, *The Reagan Administration's Antitrust Policy, Original Intent and the Legislative History of the Sherman Act*, 33 ANTITRUST BULL. 259, 271 (1988) [hereinafter Flynn, *The Reagan Administration's Antitrust Policy*] (critiquing Bork's "patently distorted rewrite" of "the legislative history of the Sherman Act to make that history conform with his ingoing ideology.").

[17] Flynn, *The Reagan Administration's Antitrust Policy*, *supra* note 16, at 262; *see also* John J. Flynn, *Antitrust Protection of The Consumer: Myth or Reality?*, 13 FORUM 939, 940–41 (1978) [hereinafter Flynn, *Antitrust Protection of The Consumer*] (challenging "ideology" of neoclassical economics as applied to regulation).

was the first serious scholarly treatment of the subject and remains a classic in the field today.[18] Flynn's interest in federalism was motivated by a desire to empower states to regulate their economic affairs without undue intervention by federal authorities—to "serve as laboratories for social and economic experiments" and to "choose different means for ordering economic life within the state."[19]



Professor John J. Flynn, courtesy of S.J. Quinney College of Law

Specifically, Flynn advocated the promotion of pro-consumer state regulation and the protection of this regulation from attack under the federal antitrust laws—attacks grounded in the doctrine of federal substantive due process that had been deployed in earlier decades to dismantle a host of socially progressive state

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[18] *See* Jonathan Rose, *State Antitrust Enforcement, Mergers, and Politics*, 41 WAYNE L. REV. 71, 72 n.2 (1994) (referring to Flynn's 1964 book as "the initial, and perhaps seminal, work in the field.").

[19] John J. Flynn, *Trends in Federal Antitrust Doctrine Suggesting Future Directions for State Antitrust Enforcement*, 4 J. CORP. L. 479, 508 (1979) [hereinafter Flynn, *Trends in Federal Antitrust Doctrine*]. Flynn echoes the words of Justice Louis Brandeis: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New States Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see also* John J. Flynn, *The Crisis of Federalism: Who Is Responsible*? 51 ABA J. 229 (1965) [hereinafter Flynn, *The Crisis of Federalism*].

regulations.[20] Among his chief concerns were regulations promoting distributive justice, reducing wealth inequality, and ensuring a fair competitive landscape for all. As Flynn wrote in 1975:

> The great and growing inequalities of distribution in America and the world can no longer be justified to most members of our society. One indication of the unjust distribution of goods is the persistent and growing maldistribution of wealth. Although measurement of the degree of economic inequality is crude in light of the countless factors which must be considered, research to date indicates a grossly unjust and unjustifiable distribution of wealth.[21]

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[20] *See* Flynn *Antitrust Protection of The Consumer*, *supra* note 17, at 948–94; Flynn *Trends in Federal Antitrust Doctrine*, *supra* note 19, at 480, 489. Flynn's view of government was not one of excessive intervention or economic planning. Rather, he seems to have adopted the view of Professor Hans Thorelli, whose landmark history of the Sherman Act Flynn excerpts in his casebook on antitrust law. Thorelli writes:

> The government's natural role in the system of free private enterprise was that of a patrolman policing the highways of commerce. It is the duty of the modern patrolman to keep the road open for all and everyone and to prevent highway robbery, speeding, the running of red lights and other violations that will endanger and hence, in the end, slow down the overall movement of the traffic. Translated into the terms of commerce this means that occupations were to be kept open to all who wished to try their luck, that the individual was to be protected in his "common right" to choose his calling and that hindrances two equal opportunity were to be eliminated. Government intervention should remove obstacle for the free flow of commerce, not itself become an additional obstacle.

HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 226 (1955).

[21] John J. Flynn & Piero Ruffinengo, *Distributive Justice: Some Institutional Implications of Rawls 'A Theory of Justice,'* 1975 UTAH L. REV. 123, 124 (1975) [hereinafter Flynn & Ruffinengo, *Distributive Justice*]. He writes:

> [T]he giant corporation has become a principal engine of distributive injustice in our society and a growing threat to individual liberty. It has become such by distributing increments of wealth to those who have done nothing to earn that wealth, contrary to the original legal assumptions of the corporate institution; it has become a source of undue political and economic power on the national and international scene, and its internal organization is leading to a denial of individuality and a rebirth of status rights and liabilities reminiscent of feudalism.

Id. at 154. Further:

> We have lost a consensus on an ethic of distributive justice in our culture and, as a result, we risk sinking into a new form of fuedalism [sic] where the rights and

In Flynn's view, a key element necessary to the "preservation of liberty and equality of opportunity" was a properly operating "free market system."[22] This linkage of a free market to economic and personal liberty was manifestly in the air during the early 1970s. As Justice Thurgood Marshall famously wrote in *United States v. Topco Associates*: "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[23]

These sentiments were echoed by contemporary political theorist John Rawls, who reimagined the political and economic landscape in his monumental 1971 work, *A Theory of Justice*.[24] Flynn particularly admired Rawls's view of the free market as a means to achieve "equal liberties and fair equality of opportunity"[25] and supported Rawls's view that, in terms of institutional design, "[c]onsiderations of efficiency are but one basis of decision and often relatively minor at that."[26]

> dignity of the individual are made subservient to monolithic institutions, a political or economic elite, or a mindless and onrushing technocracy. In grappling with the conundrum of preserving individualism in an ever more complex and interdependent society, which is currently under great economic stress, we need a renewed consensus of justice - one which does not exalt efficiency, meritocracy, or group utility as the primary end of social and economic justice. Rather, we need a consensus which guarantees just institutions capable of restricting inequalities to those inequalities for the reasonable benefit of all, while preserving individual liberty.

Id. at 157.

[22] *Id.* at 156. The protean term "free market" is susceptible of multiple, sometimes opposing, meanings. The term today is most closely associated with a *laissez faire* approach to markets that seeks to minimize governmental intervention, as promoted by the Free Market Study established at the University of Chicago in 1946 and more fully realized by Frederich Hayek's Mont Pèlerin Society founded in 1947. *See* ANGUS BURGIN, THE GREAT PERSUASION: REINVENTING FREE MARKETS SINCE THE DEPRESSION 56, 125 (2012); Robert Van Horn, *Chicago's Shifting Attitude Toward Concentrations of Business Power (1934–1962),* 34 SEATTLE U. L. REV. 1527, 1537–40 (2011). Robert Bork, too, invokes the term "free market" as a condition of limited governmental intervention. BORK, *supra* note 4, at 435 ("Antitrust was originally conceived as a limited intervention in free and private processes for the purpose of keeping those processes free. It tempered *laissez faire* in order to preserve a free-market system. . . . The conception was one of free markets with minimal government involvement.").

[23] 405 U.S. 596, 610 (1972).

[24] JOHN RAWLS, A THEORY OF JUSTICE (Harvard Univ. Press rev. ed. 1999) (1971).

[25] Flynn & Ruffinengo, *Distributive Justice*, *supra* note 21, at 155 ("Rawls sees a free market system as efficient in the economic sense and, 'given the requisite background institutions . . . consistent with equal liberties and fair equality of opportunity.'" (alteration in original) (quoting RAWLS, *supra* note 24, at 240–41)).

[26] John J. Flynn, *Antitrust Policy and the Concept of a Competitive Process*, 35 N.Y.L. SCH. L. REV. 893, 893 [hereinafter Flynn, *Antitrust Policy and the Concept of a Competitive Process*] (quoting RAWLS, *supra* note 24, at 229).

Moving from political theory to law, Flynn advocated on-the-ground legislative reform, particularly in the realm of antitrust law, to promote the economic equality and competitive landscape that could be brought about by an open and contestable market—what he considered a free market system, despite the term's contrary valence today.[27] Flynn belonged to that rare breed of scholars who are equally comfortable in the ivory tower of academia and the mosh pit of governmental policymaking. In addition to his academic position, he served from 1969 to 1976 as Counsel to Senator Phil Hart (D-Mich.), Chairman of the Senate Judiciary Committee's Antitrust Subcommittee,[28] and played an important role in shaping antitrust law both at the federal and state levels during the height of federal antitrust enforcement.[29]

Flynn was also keenly aware of the absence of legislative guidance regarding the intended purpose and goals of the federal Sherman Antitrust Act.[30] As a result, it is not surprising that Utah's 1979 Antitrust Act,[31] which replaced an antiquated statute dating from 1896, included the following prefatory language, seemingly lifted from the pages of Flynn's contemporaneous writings:

> The legislature finds and determines that competition is fundamental to the *free market system* and that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions.[32]

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[27] *See supra* note 22 and accompanying text.

[28] *See Philip A. Hart: A Featured Biography*, U.S. SENATE, https://www.senate.gov/senators/FeaturedBios/Featured_Bio_Hart.htm [https://perma.cc/K9UQ-XVLF] (last visited Sept. 2, 2022) ("As the chairman of the Antitrust Subcommittee he took on big business even when it contradicted his own political interests. Senator Hart's commitment to such causes earned him the moniker, 'The Conscience of the Senate.'").

[29] Tim Wu refers to this period as "peak antitrust." WU, *supra* note 3, at 78. The early 1970s witnessed some of the largest antitrust enforcement actions in history, including the Department of Justice's final case against AT&T. *See id.* at 93–98; *see also* AMY KLOBUCHAR, ANTITRUST: TAKING ON MONOPOLY POWER FROM THE GILDED AGE TO THE DIGITAL AGE 126, 138–44 (First Vintage Books ed., 2022) (2021).

[30] Flynn, *The Reagan Administration's Antitrust Policy*, *supra* note 16, at 260 ("Today, there is no general consensus on the question of the legislative goals of antitrust policy; instead, there are many conflicting views concerning the goals Congress had in mind when it enacted the Sherman Act."); *see also* Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CALIF. L. REV. 263, 267 (1986) ("According to the conventional wisdom, the statute's language conveys little, if anything, of value. . . . Indeed, proponents claim that the legislative history reveals almost nothing that might settle any Sherman Act question.").

[31] Utah Antitrust Act of 1979, 1979 Utah Laws 448 (codified as amended at UTAH CODE §§ 76-10-3101 to 3118).

[32] *Id.* § 2, UTAH CODE § 76-10-3102 (emphasis added).

Thus, in addition to the "consumer welfare" goal of antitrust law espoused by Bork and the Chicago School (frequently distilled to the goal of lowering prices without reducing output) and general economic welfare (high-quality products and "material progress"), the Utah statute expresses goals directed toward distributive justice ("favorable" allocation of resources) and institutional reform. The clause thus links economic power to political power and seeks to preserve democratic principles by ensuring that economic concentration does not lead to political dominance.[33] As such, this state statute goes well beyond the scope of the emerging federal consensus about the purpose of antitrust law and the "consumer welfare" lodestone by which it would soon be measured.

A little over a decade later, at the urging of Flynn and others,[34] Utah amended the outdated provisions of the Corporations Article of its original 1895 Constitution. Section 20 of that article relates to antitrust. The amended version of Article XII, Section 20, approved by the state's voters in 1992, contains the following preamble: "It is the policy of the state of Utah that *a free market system* shall govern trade and commerce in this state to promote the dispersion of economic and political power and the general welfare of all the people."[35]

Here, as in the writings of Flynn and Rawls, the "free market system" is expressly linked not to economic efficiency or pricing but to de-concentrating economic power, distributive justice, and general public welfare. The Free Market Clause of the Utah Constitution thus exemplifies Flynn's progressive tendencies and his vision of state economic regulation as an effective means for achieving social and economic goals.

More importantly, the enshrinement in the Free Market Clause of an express link between free markets and the "dispersion of economic and political power" and "general welfare" offers a clear pathway for the enforcement of antitrust law unfettered by the constraints imposed by the Chicago School's narrow focus on consumer price effects and output. It is, in fact, an invitation to Utah's antitrust authorities and courts to look to a broader range of social and economic considerations when considering what business practices should be permitted and condemned under its state antitrust laws. Utah's Free Market Clause was precisely the type of progressive legislative initiative envisioned by Justice William Brennan when he wrote that "[s]tate constitutions . . . are a font of individual liberties, their

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[33] *See* KLOBUCHAR, *supra* note 29, at 79 ("If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity." (quoting Sen. John Sherman)); WU, *supra* note 3, at 54, 138–39 (warning about "the possibility of a concentrated private power that might come to rival the public's" and "businesspeople with more influence than government officials"); Khan & Vaheesan, *supra* note 3, at 236 (explaining that "extreme economic inequality subverts political equality and threatens American democracy").

[34] *See infra* Part II.

[35] UTAH CONST. art. XII, § 20 (emphasis added).

protections often extending beyond those required by the Supreme Court's interpretation of federal law."[36]

But despite efforts in other states (efforts which, as discussed in Part III, seem inimical to Flynn's original intentions), Utah's Free Market Clause remains unique within the United States.[37]

What's more, it appears that in the three decades since the adoption of the Free Market Clause, both the Utah courts and its practicing bar have lost sight of the origin, meaning, and potential of this unique constitutional guaranty. The most telling sign of this institutional lapse of memory is evidenced by *Tesla Motors v. Utah Tax Commission*, in which the Utah Supreme Court denied the justiciability of the Free Market Clause itself.[38]

In 1992, John Flynn laid the groundwork for substantive market reform and the enhancement of economic equality and distributive justice, offering Utah as a model for the power of antitrust federalism across the country. Yet, the innovative legislative tools that he helped to fashion were never used, and today, they have been largely forgotten or, worse, rejected. It may be that Flynn's innovations were simply ahead of their time. Today's calls for an antitrust jurisprudence that accounts for wealth inequality, distributive justice, and civil rights[39] resonate with Flynn's

[36] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

[37] Though no other U.S. state has adopted a constitutional "free market" clause similar to Utah's, the Mexican Constitution of 1917 includes a clause authorizing its Federal Economic Competition Commission to "issue orders to remove competition barriers and free access to the marketplace" ("ordenar medidas para eliminar las barreras a la competencia y la libre concurrencia"). Constitución Politica de los Estados Unidos Mexicanos, CP, Art. 28, Pfo. 14, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 28-05-2021, *translated in* Political Constitution of the United Mexican States, Art. 28, Para. 14 (1917, with reforms and additions through Oct. 2015), https://www2.juridicas.unam.mx/constitucion-reordenada-consolidada/en/vigente [https://perma.cc/3PPF-9XN9]. The current state of Utah was part of Mexico until the territory was ceded to the United States in 1848 under the Treaty of Guadalupe Hidalgo, which ended the U.S.-Mexican War. *See* Treaty of Peace, Friendship, Limits and Settlement with the Republic of Mexico, Mex.-U.S., Feb. 2, 1848, 9 Stat. 922. Though Mexico's 1857 Constitution contained a prohibition against monopolies, it did not include language concerning free markets. Constitución Politica de los Estados Unidos Mexicanos, CP, art. 28, Diario Oficial de la Federación [DOF] 05-02-1857. The earlier Mexican Constitution of 1824 does not contain any prohibition against monopolies. *Cf.* Constitución Politica de los Estados Unidos Mexicanos, CP, Diario Oficial de la Federación [DOF] 4-10-1824.

[38] 398 P.3d 55, 66 (Utah 2017).

[39] *See, e.g.*, I. Bennett Capers & Gregory Day, *Race-Ing Antitrust*, 121 MICH. L. REV. (forthcoming 2023); KLOBUCHAR, *supra* note 29, at 231 ("Tilting the economic playing field against entrepreneurs, small-market participants individual consumers, and those who have faced historical discrimination in favor of monopolists, cartels, and billionaire corporate titans is not only unfair; it is unconscionable."); Joshua P. Davis, Eric L. Cramer, Reginald L. Streater & Mark R. Suter, *Antitrust as Antiracism: Antitrust as a Partial Cure for Systemic Racism (and Other Systemic "Isms")*, 66 ANTITRUST BULL. 359, 360 (2021); John Mark

writings of the 1970s. Flynn's Rawlsian reimagination of the "free market system" can inform today's debates over the proper meaning and interpretation of the antitrust laws and offer both legislative and judicial tools for infusing antitrust law with the progressive agenda that Flynn championed.

The remainder of this Article proceeds as follows: Part I summarizes the history of the Utah Free Market Clause as adopted in the Utah Constitution and 1979 Antitrust Act, along with John Flynn's conceptualization of the free market system. Part II then examines the fate of the Free Market Clause over the last two decades, including its co-option by anti-regulation groups and the Utah Supreme Court's determination of its non-justiciability. Part III concludes with an analysis of the three principal applications of the Free Market Clause: as (A) an interpretive aid to Utah's Antitrust Act; (B) a standalone constitutional claim against anticompetitive state regulations and private conduct; and (C) an alternative approach to federal antitrust analysis that supplements neoclassical economic principles with concerns over wealth inequality, distributive justice, and individual liberty.

I. UTAH'S FREE MARKET CLAUSE(S)

A. Antitrust in the States

Though U.S. antitrust law is often regarded primarily as the domain of federal statute—namely the Sherman Antitrust Act of 1890[40]—there is a history of state-level competition regulation that predates the enactment of the Sherman Act by nearly seven decades.[41] But antitrust laws, as we know them today, were responses to the accumulation of market power by large business combinations known as trusts.[42] These massive, vertically integrated combinations controlled pricing and output along multiple points in the supply chain in industries ranging from oil and coal to steel and railroads to cotton and sugar.[43] Public and legislative concerns over the aggressive business practices of large trusts reached a significant level by the

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Newman, *Racist Antitrust, Antiracist Antitrust*, 66 ANTITRUST BULL. 384, 385 (2021); WU, *supra* note 3, at 139 (explaining the Brandeisian view that the purpose of antitrust is to "enable human flourishing in a nation of rough economic equals").

[40] Pub. L. No. 55-647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1–38).

[41] The earliest state laws prohibiting conspiracies in restraint of trade were enacted in the 1820s to quell the activity of labor unions, which were (ironically) characterized by business owners as anticompetitive conspiracies. James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880–1918*, 135 U. PA. L. REV. 495, 498, nn. 6–7 (1987).

[42] *See* KLOBUCHAR, *supra* note 29, at 41–43, 113; WU, *supra* note 3, at 24–28; Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 FORDHAM L. REV. 2279, 2334 (2013); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 437–39 (4th ed. 2019); William L. Letwin, *Congress and the Sherman Antitrust Law: 1887–1890*, 23 U. CHI. L. REV. 221, 222–23 (1956).

[43] *See* KLOBUCHAR, *supra* note 29, at 41–42; WU, *supra* note 3, at 24–28; Collins, *supra* note 42, at 2317.

early 1880s.[44] And though the enactment of the federal Sherman Act in July 1890 is the best-known response to the rise of the trusts, numerous state legislatures also sought to curb their growing power. Thus, by the time Congress enacted the Sherman Act, fourteen states had already incorporated anti-monopoly provisions into their state constitutions,[45] and thirteen had enacted separate antitrust statutes,[46] imposing civil and criminal penalties on various forms of anticompetitive conduct.[47] Today, all fifty U.S. states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands have some form of antitrust legislation on their books,[48] and nineteen include antitrust provisions in their state constitutions.[49]

Federal and state antitrust legislation have thus co-existed in the United States for more than a century, and there is broad judicial recognition that the federal antitrust laws do not preempt state legislation, except to the extent solely directed to the regulation of interstate commerce.[50] State antitrust regulation thus serves two

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[44] David Millon, *The First Antitrust Statute*, 29 WASHBURN L.J. 141, 142–43 (1990); Letwin, *supra* note 42, at 222–23.

[45] A number of state Constitutional provisions adopted prior to 1887 prohibited the granting of state monopolies rather than the accumulation of monopoly power by private businesses. *See A Collection and Survey of State Anti-Trust Laws*, 32 COLUM. L. REV. 347, 347 n.2 (1932); Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J. L. & PUB. POL'Y 983, 1073–81 (2013). Only six states (Idaho, Montana, North Dakota, South Dakota, Washington, and Wyoming) enacted constitutional prohibitions on anticompetitive combinations. Millon, *supra* note 44, at 145 n.20.

[46] *See A Collection and Survey of State Anti-Trust Laws*, *supra* note 45, at 347 (citing earlier compilations). Scholars differ slightly over these numbers. *See, e.g.*, Millon, *supra* note 44, at 141 ("Kansas enacted the first general antitrust law in 1889. No less than eleven other states passed various forms of antitrust legislation before Congress approved the Sherman Act in 1890."); 1 ABA SECTION OF ANTITRUST LAW, STATE ANTITRUST PRACTICE AND STATUTES 1-1 (Rocky C. Tsai et al. eds. 5th ed. 2014) ("Before Congress enacted the Sherman Act in 1890, 12 states had enacted their own antitrust statutes and at least 14 additional states had in force some other type of antitrust prohibition.").

[47] *See* May, *supra* note 41, at 499–500 (cataloging prohibited activities and penalties).

[48] 1 ABA SECTION OF ANTITRUST LAW, *supra* note 46, at 1-28. In addition to "antitrust" laws that prohibit agreements in restraint of trade and monopolization, all states have also adopted "little FTC Acts" that emulate the "proscription of 'unfair methods of competition' and/or 'unfair or deceptive acts or practices' contained in Section 5 of the Federal Trade Commission (FTC) Act." *Id.* at 12.

[49] *See* Calabresi & Leibowitz, *supra* note 45, at 1067.

[50] *See* California v. ARC Am. Corp., 490 U.S. 93, 100–01 (1989) ("When Congress legislates in a field traditionally occupied by the States, [the Court] start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. Given the long history of state common-law and statutory remedies against monopolies and unfair business practices, it is plain that this is an area traditionally regulated by the States." (citations omitted)); Rice v. Norman Williams Co., 458 U.S. 654, 661 (1982) (establishing framework for determining whether a particular state statue is preempted by the Sherman Act); *see also*

general purposes: reaching conduct not prohibited by federal antitrust law[51] and covering intrastate conduct beyond the reach of federal law.[52] During the late nineteenth and early twentieth centuries, states, armed with their new antitrust laws, aggressively prosecuted perceived violations in both of these contexts.[53] Today, the antitrust laws of states like California offer remedies that are largely unavailable under the federal antitrust laws.[54]

B. Utah's 1895 Constitution

1. The Road to Statehood

Utah's road to statehood was a long and rocky one.[55] Though already home to a substantial indigenous population, the territory that today is Utah was first "settled" in 1847 by Mormon pioneers fleeing religious persecution in the eastern United

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May, *supra* note 41, at 509 (observing that during Congressional debates over the Sherman Act, "a broad congressional consensus prevailed as to the desirability of preserving extant state antitrust authority, despite the adoption of new federal legislation in the field . . . ."); *id.* at 518–21 (discussing Commerce Clause challenges to state jurisdiction over antitrust matters); 1 ABA SECTION OF ANTITRUST LAW, *supra* note 46, at 1-3 ("[V]irtually all of these [constitutional challenges to state antitrust enforcement] have been resolved in favor of state enforcement.").

[51] For example, numerous states, including Utah, had at one time enacted prohibitions on below-cost sales—a practice not prohibited by federal antitrust laws or the federal Robinson-Patman Act. *See* Leon R. Goodrich, *Minnesota Price Discrimination and Sales-Below-Cost Statutes: Should They Be Repealed, Amended, or Left Alone?*, 5 WM. MITCHELL L. REV. 1, 83–107 (1979) (surveying state statutes); Jonathan A. Dibble & James S. Jardine, *The Utah Antitrust Act of 1979: Getting into the State Antitrust Business*, 1980 UTAH L. REV. 73, 77 (1980) (discussing the Utah Unfair Practices Act, enacted in 1953).

[52] *See* Dibble & Jardine, *supra* note 51, at 78.

[53] *See* May, *supra* note 41, at 500–02 (discussing significant activity of state antitrust authorities before 1920: "Between 1890 and 1902, twelve states brought a total of twenty-eight antitrust actions, while in the same period the United States Department of Justice instituted a total of nineteen antitrust suits . . . ten states and the Oklahoma Territory brought twenty-four cases against members of the Standard Oil Trust between 1890 and 1906, and other state suits challenged activities of the sugar, beef, and tobacco combinations." (citations omitted)).

[54] *See, e.g.*, Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898 (N.D. Cal. 2021) (finding liability under California Unfair Competition law but not the Sherman Antitrust Act).

[55] As Flynn describes it: "No other territory experienced the difficulties that Utah encountered in obtaining statehood, for no other territory was settled under such unusual circumstances." John J. Flynn, *Federalism and Viable State Government—The History of Utah's Constitution*, 1966 UTAH L. REV. 311, 314 (1966) [hereinafter Flynn, *Federalism and Viable State Government*].

States.[56] When they arrived, the territory was part of Mexico, but in 1848, it was ceded to the United States under the Treaty of Guadalupe Hidalgo, which ended the Mexican-American War.[57] In 1849, the Utah settlers drafted a constitution and sought admission to the Union as a state.[58] The request was denied by Congress, which instead created the Utah Territory, a large region including modern Utah, most of Nevada, and parts of California, Wyoming, Colorado, Oregon, New Mexico, and Arizona.[59]

Utah's territorial legislature drafted further constitutions in 1856, 1862, 1872, 1882, and 1887, each in support of a new bid for statehood.[60] But issues surrounding polygamy, slavery, and religion effectively blocked Utah's admission to the Union for the first half-century of its territorial existence.[61] In a final effort to appease critics in Congress, the leaders of the Mormon church officially rejected the practice of polygamy in 1890, and the Utah Territory outlawed it in 1892.[62] This concession led (after two more unsuccessful attempts) to the passage of the Utah Enabling Act by Congress in July 1894,[63] authorizing a new constitutional convention in Utah.[64] In early 1895, the convention drafted a new constitution that borrowed language from the state constitutions of Nevada, Washington, Illinois, and New York.[65] The new constitution was approved by the voters of the Utah Territory in November 1895,[66] and on January 4, 1896, President Grover Cleveland admitted Utah to the Union as the 45th state.[67]

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[56] For a classic secular account of the Mormon settlement of the Utah Territory, see WALLACE STEGNER, THE GATHERING OF ZION: THE STORY OF THE MORMON TRAIL (1964). The term "Mormon" refers to members of the Church of Jesus Christ of Latter-Day Saints. It is also worth remembering that numerous native peoples occupied the Utah Territory long before the arrival of the Mormon settlers. *See* NED BLACKHAWK, VIOLENCE OVER THE LAND: INDIANS AND EMPIRES IN THE EARLY AMERICAN WEST 226–66 (2009).

[57] Treaty of Peace, Friendship, Limits and Settlement, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922.

[58] *See* JEAN BICKMORE WHITE, CHARTER FOR STATEHOOD: THE UTAH STATE CONSTITUTION 16, 20–21 (1996).

[59] *Id.* at 21–22.

[60] *See* Flynn, *Federalism and Viable State Government*, *supra* note 55, at 314–21; WHITE, *supra* note 59, at 4–12.

[61] *See* Flynn, *Federalism and Viable State Government*, *supra* note 55, at 314–21; WHITE, *supra* note 59, at 4–12; Daniel J. H. Greenwood, Christine Durham & Kathy Wyer, *Utah's Constitution: Distinctively Undistinctive*, *in* THE CONSTITUTIONALISM OF AMERICAN STATES 649, 653–54 (George E. Connor & Christopher W. Hammons, eds., 2008).

[62] *See* Flynn, *Federalism and Viable State Government*, *supra* note 55, at 321–22.

[63] *Id.* at 323.

[64] Enabling Act, ch. 138, 28 Stat. 107 (1894). The Enabling Act required that certain provisions of the new constitution, such as a prohibition on polygamy, be "irrevocable without the consent of the United States." *Id.* at § 3.

[65] Flynn, *Federalism and Viable State Government*, *supra* note 55, at 323; WHITE, *supra* note 58, at 12.

[66] Flynn, *Federalism and Viable State Government*, *supra* note 55, at 324.

[67] Proclamation No. 382, 29 Stat. 876 (Jan. 4, 1896).

2. Antitrust and the 1895 Constitution

Economic issues played a major role in the deliberations over Utah's 1895 Constitution.[68] The national economic depression of the 1890s had a severe effect on employment and income in the agricultural and mining sectors—the Territory's principal industries.[69] In response, the constitutional delegates sought to foster in Utah a legal and business environment that would "attract eastern capital and build industrial prosperity."[70] Part of this framework was deemed worthy of constitutional stature, and Article XII of the Utah Constitution, which concerned corporations, included a variety of provisions pertaining to the issuance of stock and other corporate matters.[71]

On the other hand, reflecting national concerns, the Utah delegates feared the growing power of the trusts and thus sought to equip the legislature to "deal with the powerful corporations they hoped to attract."[72] Accordingly, the new constitution included numerous provisions in Article XII limiting the power of corporations by authorizing the use of eminent domain to take corporate property (Section 11), prohibiting the corporate use of "armed bodies or individuals" (i.e., Pinkertons) (Section 16), and banning the "blacklisting" of employees (Section 19).[73]

Another area addressed by Article XII was the regulation of business combinations—what is now referred to as antitrust law. As noted above, several years before the federal Congress enacted the Sherman Antitrust Act of 1890, a number of states had adopted antitrust provisions in their state constitutions and legislation.[74] Though the Utah Constitution was approved after the enactment of the federal Sherman Act, the Utah delegates nevertheless wished to incorporate protections against the growing power of the trusts in their new constitution. The railroad trusts, in particular, were of concern, given their critical role in transporting

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[68] WHITE, *supra* note 58, at 12.

[69] *Id.* at 12–13 (reporting an unemployment rate close to 50% in these sectors).

[70] *Id.* at 12. This pro-business attitude was not uncommon among constitutional drafters in the Western states during the late nineteenth century. *See generally* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 116 (1998).

[71] UTAH CONST. art. XII (amended 1992). Like many nineteenth-century constitutional drafters, those in Utah filled their constitution with substantive legal rules more akin to legislation than high-level constitutional principles. *See* Roger H. Thompson, *The Theory of State Constitutions*, 1966 UTAH L. REV. 542, 546–47 (1966); *id.* 547 n.37 (citing the "notorious" example of the Oklahoma constitution, which "contains eleven pages of legislation relating to the subject of corporations alone . . . ." (quoting CARL J. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY: THEORY AND PRACTICE IN EUROPE AND AMERICA 144 (rev. ed. 1950))).

[72] WHITE, *supra* note 58, at 74.

[73] UTAH CONST. art. XII, § 11 (repealed 1992); *id.* § 16 (repealed 1992); *id.* § 19 (amended 1992); *see also* Greenwood et al., *supra* note 61, at 658–59 (discussing provisions added to Article XII in response to specific cases and issues of the day). Similar provisions seeking to limit the power of corporations were included in several late nineteenth century state constitutions. *See* TARR, *supra* note 70, at 115–16.

[74] *See supra* notes 45–47 and accompanying text.

goods, natural resources, and passengers to and from the remote western territory. But some delegates feared that regulating trusts too severely could hurt growing Utah industries such as sugar production.[75] Economic issues were thus among the most divisive at the constitutional convention,[76] resulting in "a patchwork of compromises" in the final text.[77]

Two sections within Article XII of the 1895 Constitution related to antitrust law. Section 13 contained a blanket prohibition on the consolidation of competing railroad lines.[78] Section 20, however, offered a more general prohibition on business combinations seeking to control prices:

> *Trusts and combinations prohibited*. Any combination by individuals, corporations, or associations, having for its object or effect the controlling of the price of any products of the soil, or of any article of manufacture or commerce, or the cost of exchange or transportation, is prohibited, and hereby declared unlawful, and against public policy. The Legislature shall pass laws for the enforcement of this section by adequate penalties, and in case of incorporated companies, if necessary for that purpose, it may declare a forfeiture of their franchise.[79]

Sections 13 and 20 evidence a strong concern with concerted action by businesses—the type of conduct prohibited by Section 1 of the Sherman Act.[80] The antitrust provisions of the 1895 Constitution do not address unilateral conduct—monopolization or attempted monopolization—the subject of Section 2 of the Sherman Act.[81]

The 1895 Utah constitutional antitrust clause borrows heavily from earlier state constitutions—notably those of Idaho (1890)[82] and Montana (1889),[83] both of which use similar language to prohibit combinations and contracts entered for the purpose

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[75] *See* WHITE, *supra* note 58, at 20, 155–56. By the early 1890s, more than 98% of the nation's sugar refineries were controlled by the American Sugar Refining Company. *See* United States v. E.C. Knight Company, 156 U.S. 1, 3 (1895). For a history of the sugar industry in Utah, see MATTHEW C. GODFREY, RELIGION, POLITICS, AND SUGAR: THE MORMON CHURCH, THE FEDERAL GOVERNMENT, AND THE UTAH-IDAHO SUGAR COMPANY, 1907–1921 (2007).

[76] *See* WHITE, *supra* note 58, at 13.

[77] *Id*. at 20.

[78] UTAH CONST. art. XII, § 13 (repealed 1992).

[79] UTAH CONST. art. XII, § 20 (amended 1992).

[80] 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

[81] 15 U.S.C. § 2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .").

[82] IDAHO CONST. art. XI, § 18.

[83] MONT. CONST. of 1889, art. XV, § 20.

of fixing prices or regulating production. Like Utah's constitution, they omit any prohibition of monopolization or other anticompetitive unilateral conduct. Commentators have suggested that the failure of early state legislatures to condemn anticompetitive unilateral conduct may have stemmed not from any tacit approval of such conduct, but from the widely-held assumption (at the time) that single-firm monopolies were impossible without state-conferred privileges, or simply from the belief that limiting the power of the trusts was sufficient to protect local interests.[84] Thus, in Utah, five years after passage of the Sherman Act, the constitutional delegates omitted any prohibition of monopolistic conduct from Article XII of the state constitution, leaving that concern, if it was considered at all, to the state legislature or to federal law.

C. The 1896 Act to Prevent Pools and Trusts

Utah's 1895 Constitution directed the new state legislature to pass laws for the enforcement of Article XII, Section 20.[85] Accordingly, on March 9, 1896, the Utah legislature enacted a statute commonly referred to as the Act to Prevent Pools and Trusts.[86]

Specifically, Section 2 of the 1896 Act made it illegal to create any combination, pool, agreement, or trust to fix prices or limit production of any article manufactured, mined, produced, or sold in the state, while Section 3 also made it illegal to "monopolize any part of the trade or commerce" within the state.[87] Thus, one year after the enactment of Article XII, Section 20 of the 1895 Constitution, the Utah legislature expanded the scope of Utah's antitrust law to condemn not only concerted conduct but also unilateral conduct in the form of monopolization. In this regard, the 1896 Act more closely hewed to the contours of the federal Sherman Act and leapfrogged other state antitrust statutes that omitted prohibitions on unilateral conduct.[88] Violations were punishable by fines between $100 and $15,000, depending on the number of offenses, and by "confinement in the county jail not to exceed one year."[89]

Despite its explicit emphasis on price fixing and output reduction, the 1896 Act still lacked the statutory breadth of the Sherman Act's prohibition on agreements in "restraint of trade."[90] As a result, the 1896 Act arguably failed to condemn several forms of conduct that courts later ascribed to the prohibitions of the Sherman Act,

[84] Millon, *supra* note 44, at 147–48.

[85] UTAH CONST. art. XII, § 20 (amended 1992) ("The Legislature shall pass laws for the enforcement of this section . . . .").

[86] Act to Prevent Pools and Trusts, 1896 Laws of Utah 125 (repealed 1979).

[87] *Id.* at §§ 2–3.

[88] *See, e.g.*, Millon, *supra* note 44, at 146–47 (discussing Kansas, Iowa, and Maine antitrust statutes).

[89] Act to Prevent Pools and Trusts, §§ 4–5, 1896 Laws of Utah 125, 126.

[90] *Cf.* 15 U.S.C. § 1.

such as attempted monopolization, group boycotts, refusals to deal, exclusive dealing arrangements, and vertical non-price restraints.[91]

Another weakness of the 1896 Act was its failure to expressly authorize private antitrust suits. While Section 10 provided that a violator "shall be liable to the person or persons injured thereby for treble the amount of damages sustained in consequence of any such violation,"[92] mirroring the treble damages provisions of the Sherman Act,[93] Sections 8 and 9 of the Utah statute only outline procedures under which the Attorney General is authorized to bring suit under the Act.[94]

D. The Utah Antitrust Act of 1979

1. Reinvigorating State Antitrust Law

Despite the trust-busting fervor with which Utah's 1896 Act was enacted, relatively few actions were brought under it. Of those that were brought, many challenged not private conduct but state laws that sought to regulate commerce.[95] The scarcity of actions under the Utah antitrust laws contrasts starkly with the number of actions brought in Utah under the federal antitrust laws, which offered clearer avenues for private recovery, larger damages awards, and recovery of costs and fees.[96] As one pair of commentators put it, the notable lack of activity under the 1896 Act and related statutes "show[ed] both the inadequacy and inertia of that body of law."[97] John Flynn was surely referring to Utah when he wrote:

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[91] Dibble & Jardine, *supra* note 51, at 76. *But see* General Elec. Co. v. Thrifty Sales, Inc., 301 P.2d 741,748 (Utah 1956) (equating Utah statutory scope to that of the Sherman Act).

[92] Act to Prevent Pools and Trusts, § 10, 1896 Laws of Utah 125, 127.

[93] 15 U.S.C. § 15(a) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.").

[94] Act to Prevent Pools and Trusts, §§ 8–9, 1896 Laws of Utah 125, 127.

[95] *See, e.g.*, Don A. Stringham, *Antitrust and Unfair Trade Practice Regulation in Utah*, 8 UTAH L. REV. 339, 341 (1963) (summarizing Utah Supreme Court cases interpreting the Antitrust Act between 1932 and 1961); Flynn, *Trends in Federal Antitrust Doctrine*, *supra* note 19, at 479–80 (discussing how occasionally, "state antitrust constitutional provisions were employed by the courts to invalidate state legislation restraining trade or erecting entry barriers into a specific line of business.").

[96] *See* Stringham*, supra* note 95, at 353–55 (noting the large number of federal antitrust cases brought in Utah federal district courts since 1952).

[97] Dibble & Jardine, *supra* note 51, at 78; *see also* Flynn, *Trends in Federal Antitrust Doctrine*, *supra* note 19, at 479–80. The lack of state antitrust activity was not unique to Utah. In 1961, Rahl declared that "few state laws were vigorously enforced" and "since before World War I, most of them have been virtually dead." James A. Rahl, *Toward a Worthwhile State Antitrust Policy*, 39 TEX. L. REV. 753, 753 (1961).

> [M]any state antitrust statutes are inadequate in substantive scope, jurisdictional reach, enforcement tools and/or remedies. [They] phrase substantive standards in the quaint but vague and underdeveloped language of a bygone era; limit the prohibition of restraints of trade to those involving goods and commodities; provide awkward or inappropriate tools for investigation and discovery, or limit remedies in such a way as to severely restrict the necessary flexibility of prosecutor and court in rectifying or responsibly serving the public interest.[98]

Against this backdrop, Flynn referred to most state antitrust laws as "a confused and tangled mass of regulation."[99]

Responding to criticisms like these, in 1979, the Utah legislature repealed the 1896 Act prohibiting pools and trusts and replaced it with the Utah Antitrust Act,[100] a statute "designed to vitalize state antitrust law."[101]

Substantively, the 1979 Act more closely mirrors the language of Sections 1 and 2 of the federal Sherman Act,[102] eliminating prior uncertainty regarding the types of conduct prohibited. It also clarified the standard of liability for certain types of conduct, for example, by codifying the "dangerous probability" standard for attempted monopolization[103] (clarifications from which the Sherman Act itself might still benefit).

The 1979 Act also introduced a number of procedural clarifications and improvements concerning private rights of action and enforcement actions by the Attorney General.[104] Overall, the Act provided a necessary update to and modernization of Utah's antitrust laws. But the most notable feature of the 1979 Act appears in its preamble.

2. The Free Market Clause of 1979

As discussed in the Introduction to this Article, the 1979 Act includes a preamble explicitly linking the existence of a "free market system" in Utah to economic advancement, lower prices, allocative equity, and the preservation of

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[98] Flynn, *Trends in Federal Antitrust Doctrine*, *supra* note 19, at 481; *see also* JOHN J. FLYNN, FEDERALISM & STATE ANTITRUST REGULATION 249 (1964) [hereinafter FLYNN, FEDERALISM & STATE ANTITRUST REGULATION] ("Each state having an antitrust law should undertake a thorough review of its legislation . . . . Some state laws are inadequate for the task at hand . . . .").

[99] Flynn, *Trends in Federal Antitrust Doctrine*, *supra* note 19, at 503.

[100] Utah Antitrust Act of 1979, 1979 Utah Laws 448 (codified as amended at UTAH CODE §§ 76-10-3101 to 3118).

[101] Dibble & Jardine, *supra* note 51, at 79.

[102] *Compare* UTAH CODE §§ 76-10-3101 to 3118 *to* 15 U.S.C. §§ 1–2.

[103] Utah Antitrust Act of 1979, § 3(1), UTAH CODE § 76-10-3103(1).

[104] *Id.* §§ 6–9, UTAH CODE §§ 76-10-3106 to 3109; *see also* Dibble & Jardine, *supra* note 51, at 80–81.

democratic, political, and social institutions.[105] This framing is in stark contrast to the federal Sherman Act, which, to the consternation of courts and commentators alike, contains no preamble language and scant legislative history.[106] What, then, was the intellectual source of Utah's Free Market preamble?

In his seminal 1971 work, *A Theory of Justice*, political theorist John Rawls lays out the foundations for a just society. His focus is not on economics, but he addresses economic matters briefly "to illustrate the content of the principles of justice."[107] As compared to socialist and command economies, Rawls finds that, in theory, market-based systems can be both more efficient and more supportive of "equal liberties and fair equality of opportunity."[108] He explains, without endorsing the particular market economies of his day, that properly functioning market systems can both decentralize the "exercise of economic power" and obviate the need for direct governmental control—features tending to enhance individual liberty.[109]

John Flynn, writing with a student four years later, considered the implications of Rawls's theories on the practical achievement of distributive justice.[110] They agreed with Rawls that a key element necessary to the preservation of liberty and equality of opportunity was a properly operating "free market system."[111] Nevertheless, viewing the social, political, and economic disarray of the early 1970s,[112] Flynn expressed "considerable doubt as to the existence of a free market system . . . in vast sectors of the American economy."[113] He pointed to the emergence of "giant corporations,"[114] the capture of regulation by private interests, and the concentration of wealth as "imposing inefficiencies, limiting equality of opportunity, and posing substantial risks to the equality of individual liberties."[115] Flynn presages the progressive critiques of the second decade of the twenty-first century when he concludes that

> [w]here the unchecked growth of concentrated economic power converts the economy from one of free choice to dictated choice, individual mobility, freedom of choice, and individual liberty are greatly lessened. Recent events in the political and economic sphere,[116] when coupled with

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[105] *See supra* note 32 and accompanying text.

[106] *See* Arthur, *supra* note 30.

[107] RAWLS, *supra* note 24, at 234.

[108] *Id.* at 240–41.

[109] *Id.* at 241.

[110] *See* Flynn & Ruffinengo, *Distributive Justice*, *supra* note 21.

[111] *Id.* at 156.

[112] *Id.* at 123 (pointing to the civil rights movement, the war in Southeast Asia, the distortions of election finance and the consumer movement).

[113] *Id.* at 155.

[114] *Id.* at 154.

[115] *Id.* at 155–56.

[116] The "[r]ecent events" to which Flynn refers include "[t]he civil rights movement, the national perception that our participation in the war in Southeast Asia was wrong, the

> the pervasive scope of economic concentration in the American economy, clearly indicate the need either to reestablish a competitive market economy in the United States and other major areas of the world or to pay an ever increasing price in the form of resource misallocations, arbitrary wealth transfers, overall economic inefficiencies, and a decline in equality of opportunity and individual liberty.[117]

Flynn thus advocates a restoration of the free market as envisioned by Rawls, rather than Hayek, Bork, and the Chicago School—a market in which all can participate without distortions introduced by wealth inequality and corporate power. And the means for achieving this desirable market condition, Flynn argued in a 1979 article, is a reinvigoration of state economic regulation—regulation intended to restrict not only anticompetitive corporate practices but also to address public interests such as "[e]nvironmental pollution, energy, and raw materials shortages, uncontrolled inflation, and unfair economic exploitation."[118]

A second major current underlying Flynn's advocacy during this period was his vocal opposition to the neoclassical economic approach to antitrust law espoused by Bork and the Chicago School.[119] Flynn, in his work on antitrust federalism, had long believed in "permitting states to serve as laboratories for social and economic experiments."[120] Yet by the 1970s, federal courts and enforcement agencies were increasingly restricting the ability of states to enact regulations intended to address these issues by relying on broad interpretations of the Commerce Clause, the Supremacy Clause, Due Process, Equal Protection, and even the First Amendment.[121] Part of the problem, Flynn found, was the cramped view that the Chicago School held of the purpose of antitrust law—"removing private arrangements restricting output" to the exclusion of any other market regulation.[122] In Flynn's view, in order for antitrust regulation to achieve its broader social and

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manifest disaffection with a political process dependent upon and distorted by privately raised campaign funds, the growing realization that our penal systems are not only inhumane but ineffective, and the consumer movement . . . ." *Id.* at 123.

[117] *Id.* at 156.

[118] Flynn, *Trends in Federal Antitrust Doctrine*, *supra* note 19, at 508. Flynn's vision of the "free market" was one of enlightened regulation and not of *laissez-faire*, which he described as "an ideology that may not serve all industries, circumstances, or perceptions of what is in the public interest at a particular time or place or the long-run needs of a society." *Id*.

[119] *See, e.g.*, *id.* at 508; Flynn, *Reaganomics and Antitrust Enforcement*, *supra* note 16, at 269–70; Flynn, *The Reagan Administration's Antitrust Policy*, *supra* 16, at 263–71.

[120] Flynn, *Trends in Federal Antitrust Doctrine*, *supra* note 19, at 508.

[121] Flynn, *The Crisis of Federalism*, *supra* note 19; Flynn, *Trends in Federal Antitrust Doctrine*, *supra* note 19, at 483–93; May, *supra* note 41, at 513–14.

[122] Flynn, *Reaganomics and Antitrust Enforcement*, *supra* note 16, at 270.

economic potential, it must break free from this "neo-classical model of economic theorizing."[123]

The insertion of the Free Market Clause into Utah's 1979 Antitrust Act was a step toward recognizing this broader scope. It expressly establishes that the purpose of the statute includes (in addition to lower prices) economic advancement, allocative equity, and the preservation of democratic, political, and social institutions. The Utah statute thus seems to reject the constraints on antitrust law espoused by the Chicago School, and instead adopts the broader view embraced by progressives such as Flynn.

3. The Interpretation Clause

One potential impediment to interpreting the Free Market Clause of the 1979 Antitrust Act as resisting prevailing interpretations of federal antitrust law is found in Section 16 of the Act. This Section provides:

> The legislature intends that the courts, in construing this act, will be guided by interpretations given by the federal courts to comparable federal antitrust statutes and by other state courts to comparable state antitrust statutes.[124]

Thus, rather than seeking to establish an independent body of jurisprudence under the Utah Antitrust Act, the statute links the Utah law to interpretations of both federal law and other state statutes. There are several possible reasons for this deference to federal law. First, it is not uncommon for state courts throughout the country to defer to federal decisions in the area of antitrust law, given the federal courts' greater experience and history with such issues.[125] This reasoning applies particularly in Utah, where the only antitrust statute for most of the state's history

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[123] Flynn, *Trends in Federal Antitrust Doctrine*, *supra* note 19, at 508. Flynn found that even when the Supreme Court referred to the "free market," its view was unnecessarily restrictive. For example, in *City of Lafayette v. Louisiana Power & Light Co.*, the Court reasoned that "the regime of competition embodied in the antitrust laws is thought to engender" not broad economic and social goals, but "the *efficiency* of free markets." 435 U.S. 389, 408 (1978) (emphasis added); *see also* Flynn, *Trends in Federal Antitrust Doctrine*, *supra* note 19, at 489–93 (criticizing the decision in *Lafayette*).

[124] Utah Antitrust Act of 1979, § 16, UTAH CODE § 76-10-3118.

[125] *See* WILLIAM T. LIFLAND, STATE ANTITRUST LAW § 1.05[2], at 1-31 to -35 (release 33, 2017) ("The interpretation of state antitrust law is heavily influenced by federal precedents. A number of state antitrust statutes have provisions that explicitly direct state courts to consider federal court decisions construing the federal antitrust laws as persuasive or controlling authority. Other states have adopted a harmonization provision based in common law, which typically recognizes the general applicability of federal antitrust precedents to state antitrust cases. Even in the absence of a statutory or common-law harmonization provision, state courts often consult federal antitrust decisions because they are more numerous than state precedents, and are thus more likely to be pertinent to the particular facts before the court.").

was the simple price fixing prohibition of the 1896 law. Second, and perhaps more important, is the long shadow of Utah's peculiar history (e.g., religious rule, polygamy, etc.) and the legislature's desire, in the modern era, to appear to hew to mainstream legal and economic norms—in short, not to seem too "weird." What better way to remain in the good graces of federal authorities than to expressly acknowledge the primacy of federal jurisprudence in this area of federal-state overlap?

That being said, the Interpretation Clause of the 1979 Act is not absolute. It does not require state courts to *abide* by federal (or other state) decisions, only to be "guided by" them. The Utah Supreme Court has shown its willingness to deviate from this "guidance" by federal courts in appropriate cases.[126] Even Justice William Brennan recognized that, with respect to state constitutional provisions guaranteeing individual rights, "examples abound where state courts have independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme Court they find unconvincing, even where the state and federal constitutions are similarly or identically phrased."[127] What's more, there is no analog to the Free Market Clause in the federal Sherman Act or other antitrust legislation, so at least with respect to this clause, there is no controlling federal legislation or judicial interpretation thereof.

E. Amending the Utah Constitution

By the mid-twentieth century, there was a growing consensus that many provisions of Utah's 1895 Constitution required updating.[128] One of the chief proponents of this view was John Flynn, who joined the law faculty of the University of Utah in 1963 and published his major work on antitrust federalism in 1964.[129] That year, he broadened his focus beyond antitrust law and undertook a review of Utah's constitution more broadly. He found it sorely lacking, denigrating it as a "'horse and buggy' constitution"[130] and observing that its complex patchwork of

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[126] *See* Summit Water Distrib. Co. v. Summit County, 123 P.3d 437, 444 (Utah 2005) ("[W]e believe that the mandate in our Antitrust Act that we be guided by other courts' interpretations requires us to rely on the principles underlying those interpretations, rather than on the courts' particular word choice."); *see also* 3 ABA SECTION OF ANTITRUST LAW, STATE ANTITRUST PRACTICE AND STATUTES 48-2 (Rocky C. Tsai et al. eds. 5th ed. 2014) ("[T]here is no mandate under [Section 16] that federal law be strictly followed.").

[127] Brennan, *supra* note 36, at 500.

[128] The Utah Constitution had been amended many times since 1900; many early amendments effected minor updates, such as changes to bond interest rates and legislator salaries, as well as national issues such as the enactment and repeal of prohibition. *See Historical Development of the Utah Constitution*, ADAM R. BROWN https://adambrown.info/p/research/utah_constitution [https://perma.cc/PY2J-DJT9] (last visited Sep. 2, 2022) (listing all proposed and adopted amendments); WHITE, *supra* note 58, at 22–25 (summarizing principal amendments).

[129] FLYNN, FEDERALISM & STATE ANTITRUST REGULATION, *supra* note 98.

[130] John J. Flynn, *Constitutional Difficulties of Utah's Executive Branch and the Need for Reform*, 1966 UTAH L. REV. 351, 351 (1966).

pseudo-legislative provisions offered "a basic framework of government designed to prevent government from governing."[131]

Around the same time, the University of Utah held a symposium to explore the possibility of a new constitutional convention in Utah.[132] The keynote speaker was Michigan's governor George Romney, who oversaw Michigan's successful constitutional convention and amendment in 1962.[133] Romney, too, argued that outdated state constitutions acted as "roadblocks to orderly and effective" state government and invited Utah to "join in [the] crusade" to overhaul its constitution.[134]

In his January 1965 address to the joint houses of the Utah Legislature, Governor Calvin Rampton urged the legislature to call for a new constitutional convention, referring to Utah's 172-page 1895 Constitution as "a relic of the 19th Century."[135] Shortly thereafter, the Utah Senate and House each passed a resolution to place a constitutional convention on the Utah ballot.[136] However, in 1966, the voters rejected the proposal by a wide margin of 85% to 15%.[137]

As an alternative to convening a full constitutional convention, the Utah Constitution may also be amended through a specially-constituted commission that submits its recommended amendments to the legislature and then to the voters for approval.[138] At the urging of Flynn and others,[139] Utah created a temporary

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[131] Flynn, *Federalism and Viable State Government*, *supra* note 55, at 311.

[132] *See* Dale A. Kimball, *The Constitutional Convention, Its Nature and Powers – And the Amending Procedure*, 1966 UTAH L. REV. 390, 390 (1966) ("Recent interest shown by government officials and research commissions in Utah concerning the reorganization of state government makes it appropriate to examine one means through which this reorganization could be accomplished—constitutional revision by constitutional convention.").

[133] George W. Romney, who served as Michigan's governor from 1963 to 1969, was raised in Salt Lake City and briefly attended the University of Utah; he ran unsuccessfully against Richard Nixon for the Republican presidential nomination in 1968 and is the father of Utah Senator Mitt Romney. *Gov. George Wilcken Romney*, NAT'L GOVERNORS ASS'N, https://www.nga.org/governor/george-wilcken-romney/ [https://perma.cc/82ZP-G6XJ] (last visited Sep. 7, 2022).

[134] George Romney, *Introduction*, 1966 UTAH L. REV. 307, 309–10 (1966).

[135] Senate Journal, 1965 Leg., 36th Sess. 42, 50 (Utah 1965) (address by Gov. Calvin L. Rampton).

[136] *Id.* at 136, 186 (noting the passage of H.J.R. No. 1 and S.J.R. No. 3, which call for a constitutional convention).

[137] *Utah Proposition No. 2: Constitutional Convention Call (1966)*, BALLOTPEDIA, https://ballotpedia.org/Utah_Proposition_No._2:_Constitutional_Convention_Call_(1966) [https://perma.cc/7D9M-M8AT] (last visited Sept. 2, 2022).

[138] *See* UTAH CONST. art. XXIII; Kimball, *supra* note 132, at 393 (discussing the Utah Constitutional Commission).

[139] *See* Holographic Letter from John Flynn to Rita Fordham & Jefferson Fordham (Mar. 4, 1969) (on file with the University of Utah Marriott Library) ("All is well—the Utah legislature notwithstanding. We still manage to stir up trouble locally, from time to time; and keep the establishment guessing. We even managed to sneak through a Constitutional Revision commission with power to suggest article by article revisions!").

Constitutional Revision Study Commission in 1969,[140] which was given permanent status in 1977.[141] The purpose of the 16-member Commission was to "make a comprehensive examination of the constitution of the state of Utah . . . and thereafter to make recommendations to the governor and the legislature as to specific proposed constitutional amendments."[142]

1. Proposals to Repeal the Antitrust Clause

Numerous constitutional amendments were approved by Utah voters following the creation of the Commission, including major revisions to the structure of the legislative and executive branches of government.[143] The formal process for amending Article XII of the Utah Constitution—which pertains to corporations—however, did not begin until the 1987 General Session of the legislature,[144] eighteen years after the formation of the Commission and eight years after enactment of the 1979 Antitrust Act.

The Commission began a comprehensive study of Article XII in June 1988 and recommended that most of its provisions be repealed as unnecessary and duplicative of statutory law.[145] For various reasons, the Legislature failed to act on the Commission's recommendations during its 1989 General Session.[146] Instead, the Legislature asked the Commission to study the issues further. It did so, and in late 1989 the Commission recommended, among other things, that the price-fixing prohibition contained in Section 20 be repealed,[147] probably due to its overlap with Utah's 1979 Antitrust Act. The repeal of Article XII, Section 20, would have

[140] Act to Establish a Utah Constitutional Revision Study Commission; Providing for the Method of Appointment Thereof; Prescribing the Powers and Duties of the Commission; and Providing an Appropriation for Said Commission, 1969 Utah Laws 482 (1969).

[141] Act Amending Sections 1 and 7 of Chapter 89, Laws of Utah 1969, as Amended by Chapter 107, Laws of Utah 1975; Relating to the Constitutional Revision Study Commission; Removing the Expiration Date of the Commission and Making it a Permanent Commission; Replacing the Director of the Legislative Council with the Legislative Research Director as a Commission Member; Providing for Appointment of new Members to the Commission and for their Terms of Office; and Providing an Effective Date, 1977 Utah Laws 693 (1977).

[142] 1969 Act to Establish a Utah Constitutional Revision Study Commission § 3. Expert commissions charged with reviewing and proposing amendments to state constitutions became the norm during the 1970s. *See* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 386 (2009).

[143] *See* WHITE, *supra* note 58, at 22–25 (providing an overview of Utah constitutional amendments and noting that "[s]ince 1970, proposed amendments have had a success rate of 84 percent").

[144] CONST. REVISION COMM'N, REPORT OF THE CONSTITUTIONAL REVISION SUBMITTED TO THE GOVERNOR AND THE 49TH LEGISLATURE OF THE STATE OF UTAH 15 (Jan. 1992).

[145] *Id.* at 15.

[146] Among other things, there was legislative opposition to proposed amendments to the Labor Article that were presented at the same time. *Id.*

[147] *Id.*

resulted in the removal of any antitrust provision from the Utah Constitution, an approach taken by other states.[148]

The repeal of Section 20, however, was opposed by the new Antitrust Unit of the Utah Attorney General's Office, as well as "a University of Utah College law professor" (undoubtedly John Flynn).[149] As reported by the Commission, these advisors argued that the prohibition against price fixing contained in the 1895 Constitution provided "a fundamental protection of the competitive market system, an economic system upon which the nation is founded, and therefore should be retained in the constitution."[150]

Members of the Commission were divided, some arguing that the price-fixing prohibition of the 1895 clause was too narrow to merit inclusion in the constitution, others arguing that a broader antitrust provision would hamper changes to the law that might be necessitated by changing economic conditions.[151] Finally, others—the prevailing group—argued that the narrow 1895 price fixing provision should be replaced by a broader prohibition on anticompetitive activity, along the lines of the federal Sherman Act and the 1979 Utah Antitrust Act.[152]

A subcommittee of the Commission was formed to draft language to this effect; it submitted its proposal to the full Commission in September 1990.[153]

2. *Text of the Draft Amendment*

The September 1990 subcommittee redraft of Section 20 replaced the 1895 ban on price fixing with substantive provisions broadly prohibiting anticompetitive concerted and unilateral conduct along the lines of the Sherman Act and the 1979 Utah Antitrust Act:

> Each contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is prohibited. It is also prohibited for any person to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of trade or commerce.[154]

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[148] For example, Montana included an anti-monopoly clause similar to Utah's in its 1889 constitution. *See* MONT. CONST. of 1889, art. XV, § 20. But it removed this provision upon enacting comprehensive antitrust legislation in 1973. *See* MONT. CODE ANN. §§ 30-14-101 to -142.

[149] CONST. REVISION COMM'N, *supra* note 144, at 15. A letter dated Nov. 7, 1989, from Professor Flynn to the Chair of the Commission is listed among the records of the Commission. *Id.* at 17.

[150] *Id.* at 15–16.

[151] *Id.*

[152] *Id.* at 16.

[153] *Id.*

[154] Draft S.J. Res. 7, § 20, 49th Leg., 1991 Gen. Sess. (Utah Sept. 4, 1990, 9:14 AM), https://image.le.utah.gov/imaging/bill.asp [https://perma.cc/TFX7-STWE] (enter "SJR007" to the "Bill" search bar, and "1991" to the "Session" search bar).

In addition to the substantive prohibitions of the draft amendment to Section 20, which did not change over several subsequent drafts of the amendment, the subcommittee experimented with multiple versions of the first sentence of Section 20. As shown in *Table 1* below, this language, as well as the proposed title of Section 20, changed several times as the proposal was discussed and marked-up in committee, and between the 1990 and 1992 legislative sessions.

Table 1: Evolution of Drafts of Amendment to Article XII, Section 20 of the Utah Constitution

Draft Date	**Title of Section 20**	**Text**
1990 Legislative Session		
Sept. 4, 1990, 9:14 am[155]	Trusts and combinations prohibited	It shall be the policy of the state of Utah that a competitive process governs trade and commerce in this state in order to ensure the dispersion of economic power, the freedom and opportunity to compete on the merits, the satisfaction of consumers, and the protection of the competitive process as market governor.
Sept. 4, 1990, 5:05 pm[156]	**Competition and opportunity as state policy – Restraint of trade and monopolies** prohibited	It shall be the policy of the state of Utah that a competitive process governs trade and commerce in this state in order to ensure the dispersion of economic power, the freedom and opportunity to compete on the merits, the satisfaction of consumers, and the protection of the competitive process as market governor.
Oct. 29, 1990[157]	Competition and opportunity as state policy – Restraint of trade and monopolies prohibited	It ~~shall be~~ **is** the policy of the state of Utah that a competitive ~~process~~ **free market system shall** govern~~s~~ trade and commerce in this state in order to ~~ensure~~ **promote** the dispersion of economic **and political** power, ~~the freedom and opportunity to compete on the merits, the satisfaction of consumers, and the protection of the~~

[155] *Id.*

[156] Draft S.J. Res. 7, § 20, 49th Leg., 1991 Gen. Sess. (Utah Sept. 4, 1990, 5:05 PM), https://image.le.utah.gov/imaging/bill.asp [https://perma.cc/TFX7-STWE] (enter "SJR007" to the "Bill" search bar, and "1991" to the "Session" search bar).

[157] Draft S.J. Res. 7, § 20, 49th Leg., 1991 Gen. Sess. (Utah Oct. 29, 1990, 9:45 AM), https://image.le.utah.gov/imaging/bill.asp [https://perma.cc/TFX7-STWE] (enter "SJR007" to the "Bill" search bar, and "1991" to the "Session" search bar).

		~~competitive process as market governor~~ **and the general welfare of all the people.**
Nov. 19, 1990[158] and Jan. 18, 1991[159]	Competition and opportunity as state policy – Restraint of trade and monopolies prohibited	It is the policy of the state of Utah that a ~~competitive~~ free market system shall govern trade and commerce in this state ~~in order~~ to promote the dispersion of economic and political power and the general welfare of all the people.
1992 Legislative Session		
Nov. 18, 1991[160] and Jan. 13, 1992[161]	Competition and opportunity as state policy – Restraint of trade and monopolies prohibited	It is the policy of the state of Utah that a free market system shall govern trade and commerce in this state to promote the dispersion of economic and political power and the general welfare of all the people.
1992 enrolled copy[162]	~~Competition and opportunity~~ **Free market system** as state policy – Restraint of trade and monopolies prohibited	It is the policy of the state of Utah that a free market system shall govern trade and commerce in this state to promote the dispersion of economic and political power and the general welfare of all the people.

[158] Draft S.J. Res. 7, § 20, 49th Leg., 1991 Gen. Sess. (Utah Nov. 19, 1990, 4:15 PM), https://image.le.utah.gov/imaging/bill.asp [https://perma.cc/TFX7-STWE] (enter "SJR007" to the "Bill" search bar, and "1991" to the "Session" search bar).

[159] Draft S.J. Res. 7, § 20, 49th Leg., 1991 Gen. Sess. (Utah Jan. 18, 1991, 6:27 PM), https://image.le.utah.gov/imaging/bill.asp [https://perma.cc/TFX7-STWE] (enter "SJR007" to the "Bill" search bar, and "1991" to the "Session" search bar).

[160] Draft S.J. Res. 7, § 20, 49th Leg., 1991 Gen. Sess. (Utah Nov. 18, 1991, 12:53 PM), https://image.le.utah.gov/imaging/bill.asp [https://perma.cc/B6PH-8HPQ] (enter "SJR007" to the "Bill" search bar, and "1992" to the "Session" search bar).

[161] Draft S.J. Res. 7, § 20, 49th Leg., 1991 Gen. Sess. (Utah Jan. 13, 1992, 8:00 AM), https://image.le.utah.gov/imaging/bill.asp [https://perma.cc/B6PH-8HPQ] (enter "SJR007" to the "Bill" search bar, and "1992" to the "Session" search bar).

[162] Enrolled Copy S.J. Res. 7, 49th Leg., § 20, 1992 Gen. Sess. (Utah), https://image.le.utah.gov/imaging/bill.asp [https://perma.cc/B6PH-8HPQ] (enter "SJR007" to the "Bill" search bar, and "1992" to the "Session" search bar).

3. Dispersion of Power

This introductory, framing sentence of Section 20 bears a strong resemblance to the preamble of the 1979 Antitrust Act.[163] Both, for example, point to a series of economic and social goals of antitrust law going well beyond the price and output emphasis of the Chicago School and the federal courts of the day. But the most significant difference between the two clauses is the operative mechanism that they each invoke to achieve these goals. Whereas the 1979 Act invokes "the free market system," the early 1990 drafts refers to "a competitive process." These concepts, as discussed below, are subtly different, yet both emerge from the writings and thoughts of John Flynn.

Table 2, below, compares the language of the preamble clause of the 1979 Antitrust Act and the September 1990 draft of Section 20. The 1979 Act contemplates that a well-functioning competitive system can address more issues than the September 1990 draft constitutional provision, including broader social and political institutions. Nevertheless, the September 1990 draft makes an important acknowledgment that the "dispersion of economic power" is a primary goal of the antitrust law, consistent with the view of New (and Old) Brandeisians. This language echoes that of the 1979 Act, which refers to the "best allocation of economic resources," but the notion of "dispersion" has a more populist valence than "allocation." "Dispersion" evokes ideals of distributive justice and a direct attack on monopolies and other concentrations of economic power, which extend beyond mere economic efficiency and the neoliberal notion of the "best allocation" of resources. The dispersion of economic power also evokes calls for greater democratic representation and distribution of political power, a sentiment entirely absent from the Chicago analysis (and one that would become explicit in the 1992 constitutional amendment, discussed below).

4. The "Competitive Process"

It is particularly notable that the September 1990 draft refers to "a competitive process" as governing trade and commerce in the state. This focus on a well-functioning "competitive process" reflects a longstanding emphasis in antitrust law.[164] The Supreme Court's concern with the competitive process can be traced to

[163] Utah Antitrust Act of 1979, § 2, UTAH CODE § 76-10-3102 ("The legislature finds and determines that competition is fundamental to the free market system and that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions.").

[164] *See* Herbert J. Hovenkamp, *The Slogans and Goals of Antitrust Law*, PENN. CAREY LAW: LEGAL SCHOLARSHIP REPOSITORY, 44 (2022), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3856&context=faculty_scholarship [https://perma.cc/7V5X-2GLK] ("While consumer welfare may be the most commonly stated goal of the antitrust

Justice Brandeis's 1918 opinion in *Board of Trade of Chicago v. United States*, which states that "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[165] In 1958, Justice Black wrote, in *Northern Pacific Railway Co. v. United States*, that the Sherman Act is "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."[166] The Court later explained in *Brown Shoe Co. v. United States* that the Sherman Act protects "competition, not competitors."[167] Drawing on these precedents, in 1959, Professors Carl Kayson and Donald Turner identified the protection of competitive processes as the most important goal of antitrust law.[168] Justice Stevens confirmed the importance of the competitive process in *National Society of Professional Engineers v. United States,* noting that the antitrust rule of reason "focuses directly on the challenged restraint's impact on competitive conditions."[169]

Like the free market system, the "competitive process" was also of interest to John Flynn. In a 1988 article rebutting the theories advanced by Bork in *The Antitrust Paradox*, Flynn mentions the competitive process more than twenty times.[170] He contrasts Bork's narrow construction of consumer welfare with the goal that markets should really seek to achieve—an effective competitive process:

> 'Consumer welfare' in [Bork's] sense and in the context of reality is a paternalistic concept premised upon a belief in preexisting and absolute property and contract rights and the presumed 'rationality' of producers

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laws, 'protection of the competitive process' is very likely a close second."); *see also* Warren Grimes, *A Post-Chicago Debate: Is Protecting the Competitive Process Antitrust's Overarching Goal?*, 35 ANTITRUST 72 (2021) (summarizing the history of competitive process considerations in antitrust law); WU, *supra* note 3, at 137 (". . . a return to 'protection of competition' [is] the recognized goal of American antitrust law"). Douglas Melamed even attempts to recast the "consumer welfare" standard as one intended to protect the competitive process. Melamed, *supra* note 3, at 271–72 ("Antitrust law is . . . about protecting the competitive process in order to promote economic welfare. This is commonly known as 'the consumer welfare standard.'"). *But see* Einer Elhauge, *Should the Competitive Process Test Replace the Consumer Welfare Standard?*, PROMARKET (May 24, 2022), https://www.promarket.org/2022/05/24/should-the-competitive-process-test-replace-the-consumer-welfare-standard/ [https://perma.cc/QA8G-6KH9] (expressing skepticism about usefulness of competitive process standard); Hovenkamp, *supra* note 164*,* at 38–44 (criticizing the lack of a consistently applied definition).

[165] 246 U.S. 231, 238 (1918).

[166] 356 U.S. 1, 4 (1958).

[167] 370 U.S. 294, 344 (1962); *see also* Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 ANTITRUST L.J. 713, 726–43 (2014) (collecting and discussing rule of reason cases).

[168] CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 44–45 (1959).

[169] 435 U.S. 679, 688 (1978).

[170] *See* Flynn, *The Reagan Administration's Antitrust Policy*, *supra* note 16.

> and sellers, rather than consumer welfare in the sense of unfair wealth transfers caused by a breakdown in the competitive process and the denial to every individual of equality of opportunity in access to and fairness in the operations of the market.[171]

Thus, as in his discussions of the "free market system," Flynn equates the competitive process with broader goals of social equality and distributive justice. In other writings, he refers to the competitive process as an "ideal" and "the rule of trade" by which market conduct should be measured.[172] In a 1990 speech commemorating the centennial of the Sherman Act and titled "Antitrust Policy and the Concept of a Competitive Process," Flynn further expanded on his theory of competition as a process.[173]

The shift from the "free markets" language of the 1979 Act to the "competitive process" in the September 1990 draft constitutional amendment may reflect Flynn's growing awareness that, by the 1980s and the Reagan era, the term "free market" had come to signify in the minds of many people the *laissez-faire*, anti-regulation approach embraced by Hayek and the Chicago School.[174] As such, Flynn's advocacy of markets that were open to competition without distortion by dominant players or protectionist regulation could have been confused with that other "free market" philosophy. The substitution of "competitive process" for "free market" in the September 1990 draft may have been Flynn's attempt to correct that erroneous impression. Yet, as discussed in the next subsection, the attempt did not succeed.

5. The 1992 Amendment and the Free Market Clause

The September 1990 subcommittee draft revisions to Article XII, Section 20 of the Utah Constitution went through several subsequent revisions by the full Constitutional Revision Study Commission.[175] As shown in *Table 1*, both the title and the text evolved throughout subsequent drafts.

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[171] *Id.* at 284.

[172] John J. Flynn, *Rethinking Sherman Act Section 1 Analysis: Three Proposals for Reducing the Chaos*, 49 ANTITRUST L.J. 1593, 1610–11 (1980) [hereinafter Flynn, *Rethinking Sherman Act Section 1 Analysis*].

[173] Flynn, *Antitrust Policy and the Concept of a Competitive Process*, *supra* note 26, at 901 ("Instead of using the reified meanings for the concept of competition supplied by per se analysis and the fixed definitions and deductions of neoclassical thought, with their accompanying discredited methodologies reminiscent of nineteenth century formalism, the concept of 'competition' should be understood as originally intended when the antitrust laws were adopted—competition as a process."); *see also* Foer, *supra* note 15, at 732 (noting Flynn's emphasis on "the important role of a competitive process that provides for a free and competitive market wherever possible" (internal quotation marks omitted)).

[174] *See supra* note 22.

[175] *See supra* Part I.E.2.

The original title of Section 20 as a prohibition on trusts and combinations was carried over from the 1895 Constitution.[176] This historical language was quickly supplemented with an acknowledgement that "competition and opportunity" were state policies, mirroring the text stating that "a competitive process governs trade and commerce" in the state.[177] The title including "competition and opportunity" was retained until the final enrolled draft of the amendment that was finally approved, which replaced "competition and opportunity" with "free market system."[178]

The text of the preamble to Section 20 also evolved to emphasize free markets over the competitive process. In October 1990, "a competitive process" was replaced with "a competitive free market system."[179] Then, in November 1990, the word "competitive" was struck, leaving only "a free market system."[180] The October 1990 draft also eliminated the stated purposes of the section referring to *competition*, striking the language: "the freedom and opportunity to compete on the merits, the satisfaction of consumers, and the protection of the *competitive process* as market governor."[181]

The amendments to Section 20 were finalized in January 1992, when the Commission submitted its proposed revision of Article XII to the General Legislature. This time, it was accepted and filed as a Senate Joint Resolution, which was approved by both houses of the Legislature on February 6.[182] The amendment was then included as Proposition 2 on the ballot of the November 1992 general election, along with proposed amendments to the Legislative and Executive Articles of the Constitution and various other matters.[183] The amendments proposed in 1992 passed by comfortable margins[184] and became effective as of January 1, 1993.

6. Assessing the Free Market Clause

In its adopted form, the first sentence of Article XII Section 20 reads as follows: "It is the policy of the state of Utah that *a free market system* shall govern trade and

[176] *See supra* Table 1.
[177] *See supra* Table 1.
[178] *See supra* Table 1.
[179] *See supra* Table 1.
[180] *See supra* Table 1.
[181] *See supra* Table 1 (emphasis added).
[182] A Joint Resolution of the Legislature Proposing to Amend the Utah Constitution; Clarifying Certain Provisions of the Corporations Article, Including the Antitrust Provision, and Repealing Others; and Providing an Effective Date, 1992 Laws of Utah 1521 (1992).
[183] W. Val Oveson, Utah State Legis., Utah Voter Information Pamphlet: General Election, November 3, at 4 (1992).
[184] *Utah Proposition No. 2: Corporation Article Revision (1992)*, BALLOTPEDIA, https://ballotpedia.org/Utah_Proposition_No._2:_Corporation_Article_Revision_(1992) [https://perma.cc/JX6C-5JVH] (last visited Sept. 2, 2022) (showing that Proposition 2 passed by a margin of 70.73% to 29.27%).

commerce in this state to promote the dispersion of economic and political power and the general welfare of all the people."[185]

As noted above, the remainder of Section 20 simply mirrors the prohibitions on agreements in restraint of trade and monopolization contained in the Sherman Act.[186] Yet the Free Market Clause does more, and intentionally so. As explained by Senator Haven Barlow, who sponsored the amendment, "the commission went a step further [than the language borrowed from federal law]."[187]

As noted above, the 1992 version replaces earlier draft references to the "competitive process" with the "free market" terminology from the 1979 Antitrust Act. Thus, despite Flynn's likely misgivings about the term "free market," which had largely been co-opted by the political right and invested with an anti-interventionist sense, it was included in the 1992 draft, possibly because it was familiar and had its pedigree in the earlier Utah statute.

The remainder of the preamble, however, reflects Flynn's approach to antitrust—perhaps as an attempt to salvage it from the ambiguous "free market" language. Notably, the 1992 amendment goes beyond the original 1990 draft in that it embraces the dispersion of "political" power in addition to "economic" power. This addition is significant as it recognizes the explicit relationship between economic concentration and political clout[188] and infuses the Utah Constitution not only with a remedy against economic concentration (the traditional purview of antitrust law) but also undue political influence by commercial interests.

Another important feature of the 1992 language is its shift from seeking to achieve "satisfaction of consumers," which smacks of the "consumer welfare" standard, to language that emphasizes the "general welfare of all the people," which focuses more broadly on the distribution of benefits across all levels of the economy—addressing issues such as wealth inequality and economic disparity.[189]

Finally, unlike Utah's 1979 Antitrust Act, the 1992 Amendment to the Utah Constitution does not contain an Interpretation Clause that aligns its interpretation with that of federal or other state courts.[190] Thus, at least with respect to the constitutional purpose of Utah's antitrust laws, Utah courts need not look abroad for guidance.

Table 2 compares the different elements of the "free market" clauses of the 1979 Antitrust Act, the September 1990 subcommittee draft, and the adopted 1992 Constitutional amendment.

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[185] UTAH CONST. art. XII, § 20 (emphasis added).

[186] *See supra* note 154.

[187] *See* Senate Floor Debate, S.J.R. 7 (Utah Jan. 22, 1992) (statement of Sen. Haven Barlow); *see also Senate – Day 10*, UTAH STATE LEGISLATURE, at 1:05:00 to 1:07:30 (Jan. 22, 1992), https://le.utah.gov/av/floorArchive.jsp?markerID=84905 [https://perma.cc/WV23-NJVE].

[188] *See supra* note 33.

[189] *See supra* Table 1.

[190] *See supra* notes 124–126 and accompanying text.

Table 2: Comparison of 1979, 1990, and 1992 Free Market Provisions

1979 Antitrust Act	**1990 Subcommittee Draft Constitutional Provision (not adopted)**	**1992 Constitutional Amendment**
competition is fundamental to *free market system* and unrestrained interaction of competitive forces yields:	*competitive process* is a market governor and ensures:	It is the policy of the State of Utah that *a free market system* shall govern trade and commerce in this state to promote:
best allocation of economic resources	dispersion of economic power	the dispersion of economic and political power
lowest prices	satisfaction of consumers	
highest quality	freedom to compete on the merits	
greatest material progress		general welfare of all the people
preservation of democratic, political, and social institutions		

As shown in *Table 2*, when taken together, the 1992 Amendment and the 1979 Antitrust Act define the scope of Utah's antitrust laws as encompassing goals of distributive justice and the preservation of democratic, political, and social institutions, in addition to more traditional economic goals associated with consumer prices, product quality, progress, and general welfare. As such, the antitrust laws of Utah clearly bear the fingerprints of John Flynn, who was instrumental in their development and enactment.

II. THE DOWNWARD SPIRAL OF THE FREE MARKET CLAUSE

One can imagine the Free Market Clauses of the Utah Antitrust Act and the Antitrust Clause of the Utah Constitution as experiments set in motion by antitrust federalism's great innovator, John Flynn. Could an express statement of broad social and distributive justice goals embedded within the text of a state's antitrust legislation persuade courts interpreting those statutes to broaden their focus beyond the narrow consumer welfare standard espoused by the Chicago School? Could such statements free Utah's and other states' antitrust laws from the shackles imposed by the federal courts' narrow readings of the Sherman Act, a statute that lacks any such explanatory text or legislative history of its own? And, if so, might those broader interpretations eventually come to fill the interpretive vacuum of the Sherman Act

itself, eventually supplanting the cramped reading given to the federal antitrust laws by the Chicago School and the courts?[191]

Regrettably, more than thirty years later, these questions have still not been answered, as the enforcement of state antitrust laws did not experience the revival for which Flynn and others had hoped, and the Free Market Clause has gone down a road with several unexpected turns. After providing a brief background on state antitrust enforcement in section A, section B discusses recent efforts to reimagine the Utah Free Market Clause as a regulation-limiting measure and to export it to other states. Section C then details the Utah Supreme Court's recent reluctance to enforce (or even interpret) the Utah Free Market Clause.

A. State Antitrust Enforcement versus State Antitrust Law

Despite the lack of state antitrust activity from the end of World War I through the 1960s, beginning in the 1970s, state antitrust enforcement expanded significantly across the United States.[192] Various explanations have been offered for this expansion, including the enactment of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, which authorizes states to bring federal antitrust claims on behalf of their citizens *parens patriae*,[193] and the concurrent decline in federal enforcement during the Reagan-Bush era.[194] In 1983, the National Association of Attorneys General (NAAG) formed a Multistate Antitrust Task Force, which facilitated the coordination of joint investigations and antitrust enforcement actions

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[191] *Cf.* PAUL NOLETTE, FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA 210 (2015) (quoting Maryland Attorney General Joseph Curran, who notes in terms of consumer protection and antitrust litigation, "the states are good laboratories. Let us do our thing, and if it's a good solution, make it federal law").

[192] *See* James May, *The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History*, 59 ANTITRUST L.J. 93, 97 (1990) [hereinafter May, *The Role of the States*]; Juan A. Arteaga & Jordan Ludwig, *The Role of US State Antitrust Enforcement*, *in* PRIVATE LITIGATION GUIDE 112, 113–14 (Nicholas Heaton & Benjamin Holt eds., 2019), https://www.crowell.com/files/201912-12_Interactions-with-US-State-Attorneys.pdf [https://perma.cc/29RC-LQ8M]; 1 ABA SECTION OF ANTITRUST LAW, *supra* note 46, at 1-27.

[193] Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), Pub. L. 94-435, 90 Stat. 1394 (codified at 15 U.S.C. § 15c); *see also* 1 ABA SECTION OF ANTITRUST LAW, *supra* note 46, at 1-4 to 1-5. The HSR Act was the first in a long list of federal statutes that enabled state agencies to enforce federal laws in their *parens patriae* capacities. *See* NOLETTE, *supra* note 191, at 38–41.

[194] *See* Arteaga & Ludwig, *supra* note 192 ("The rise in the level and prominence of state antitrust enforcement during this period was largely due to a perceived enforcement void at the federal level."); May, *The Role of the States, supra* note 192, at 98–99 ("[S]tate efforts intensified partly in response to the believed inadequacy of federal enforcement efforts.").

taken by the participating states.[195] Thus, by 1993, forty-five states and the District of Columbia brought monopolization claims against a group of cable operators,[196] twenty states joined the DOJ's massive antitrust case against Microsoft in 1998,[197] and in the last three years, nearly every state, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands have gotten involved in investigating Google and Facebook over a variety of alleged antitrust law violations.[198]

But with a few exceptions, the significant growth of state antitrust *enforcement* over the past thirty years has not led to a comparable increase in the assertion of state antitrust *law*. This discrepancy may exist because state attorneys general participating in federal antitrust cases often focus on the enforcement of federal antitrust laws. Likewise, multistate actions requiring cooperation and coordination among multiple states could emphasize common elements of state claims (i.e., those that are derivative of federal law) rather than doctrines and interpretations that are unique to a particular state. Thus, even in cases in which state law claims accompany federal law claims, the state law claims are often viewed as subsidiary and are not the focus of significant independent analysis or argumentation. All of these reasons have led one commentator to observe that "competitive federalism in antitrust is on life support or worse."[199]

This is not to say, however, that there are not some areas in which state antitrust law differs substantively from federal law. For example, according to one recent report, twenty-five states and the District of Columbia have enacted legislation overriding the Supreme Court's decision in *Illinois Brick Co. v. Illinois*,[200] which prohibits recovery by indirect purchasers under the federal antitrust laws.[201] Likewise, a number of states continue to view resale price maintenance as *per se* illegal under state antitrust laws,[202] notwithstanding the Supreme Court's application of the "rule of reason" to this practice under the Sherman Act in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*[203]

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[195] 1 ABA SECTION OF ANTITRUST LAW, *supra* note 46, at 1-13 to 1-14; Joseph F. Zimmerman, *Interstate Cooperation: The Roles of the State Attorneys General*, 28 PUBLIUS: J. FEDERALISM 71, 74–78 (1998); New York v. Primestar Partners, L.P., 1993 WL 720677, at *1 (S.D.N.Y. Sept. 14, 1993).

[196] New York v. Primestar Partners, L.P., 1993 WL 720677, at *1 (S.D.N.Y. Sept. 14, 1993).

[197] New York v. Microsoft Corp., 224 F. Supp. 2d 76, 86 n.4 (D.D.C. 2002), *aff'd* 373 F.3d 1199 (D.C. Cir. 2004); United States v. Microsoft Corp., 253 F.3d 34, 47 (D.C. Cir. 2001).

[198] *See* sources cited *supra* note 1.

[199] Alan J. Meese, *Antitrust Regulation and the Federal-State Balance: Restoring the Original Design*, 70 AM. U. L. REV. 75, 97 (2020).

[200] 431 U.S. 720 (1977).

[201] Arteaga & Ludwig, *supra* note 192, at 120.

[202] 1 ABA SECTION OF ANTITRUST LAW, *supra* note 46, at 1-15.

[203] 551 U.S. 877, 882 (2007); *see also* Joseph Conrad, *In Defense of State Enforcement: A Positive Perspective on State and Federal Cooperation*, CPI ANTITRUST CHRON., 6–7 (Aug. 2020), https://www.competitionpolicyinternational.com/wp-content/uploads/2020/08

Nevertheless, to date, no federal or state case has invoked the Free Market Clauses of the Utah Constitution or Antitrust Act to challenge or supplement the Chicago School's consumer welfare standard that has been adopted by the federal courts.

B. Free Markets as Anti-Regulation: ALEC and Tennessee

Despite the dearth of litigation over Utah's Free Market Clause, it has attracted notice outside of the state. The American Legislative Exchange Council (ALEC), founded in 1973, is, according to its website, "America's largest nonpartisan, voluntary membership organization of state legislators dedicated to the principles of limited government, free markets and federalism."[204] One of ALEC's principal activities is the drafting and promotion of "model" legislation that can be introduced in state legislatures. The creation of model legislation is a time-honored practice that arose long before ALEC. For example, the non-profit Uniform Law Commission (ULC), founded in 1892, has drafted numerous model laws, such as the Uniform Commercial Code, that have been adopted in nearly all states. But in recent years, the production of model legislation has become controversial as partisan organizations (often right-leaning) have facilitated state adoption of laws relating to hot issues, including abortion, gun ownership, asbestos litigation, education, immigration, environmental protection, and taxation.[205]

ALEC is among the most prolific and successful of these organizations.[206] According to one study, between 2010 and 2018, bills based on ALEC model legislation were introduced in state legislatures and the U.S. Congress "nearly 2,900

/8-In-Defense-of-State-Enforcement-A-Positive-Perspective-on-State-and-Federal-Cooperation-Joseph-Conrad.pdf [https://perma.cc/6SQD-SRH5].

[204] *About ALEC*, AM. LEGIS. EXCH. COUNCIL, https://www.alec.org/about/ [https://perma.cc/9NC3-CUWE] (last visited Sept. 2, 2022).

[205] *See* Rob O'Dell & Nick Penzenstadler, *You Elected Them to Write New Laws. They're Letting Corporations Do It Instead*, CTR. FOR PUBLIC INTEGRITY (Apr. 4, 2019), https://publicintegrity.org/politics/state-politics/copy-paste-legislate/you-elected-them-to-write-new-laws-theyre-letting-corporations-do-it-instead/ [https://perma.cc/RKX3-GZJ8].

[206] *See* Yvonne Wingett Sanchez & Rob O'Dell, *What Is ALEC? 'The Most Effective Organization' for Conservatives, Says Newt Gingrich*, CTR. FOR PUB. INTEGRITY (Apr. 4, 2019), https://publicintegrity.org/politics/state-politics/copy-paste-legislate/what-is-alec-the-most-effective-organization-for-conservatives-says-newt-gingrich/ [https://perma.cc/9QJN-7ZQU]; Mike McIntire, *Conservative Nonprofit Acts as a Stealth Business Lobbyist*, N.Y. TIMES (Apr. 21, 2012), https://www.nytimes.com/2012/04/22/us/alec-a-tax-exempt-group-mixes-legislators-and-lobbyists.html [https://perma.cc/ZR3W-RJHG]; Nancy Scola, *Exposing ALEC: How Conservative-Backed State Laws Are All Connected*, THE ATLANTIC (Apr. 14, 2012), https://www.theatlantic.com/politics/archive/2012/04/exposing-alec-how-conservative-backed-state-laws-are-all-connected/255869/ [https://perma.cc/6FR8-DFLP]; John Nichols, *ALEC Exposed*, THE NATION (Jul. 12, 2011), https://www.thenation.com/article/archive/alec-exposed/ [https://perma.cc/2CCZ-6PFA].

times . . . with more than 600 becoming law."[207] ALEC is also unabashedly in favor of reducing governmental regulation, bemoaning the heavy financial burdens on businesses of regulatory compliance and attributing slowed economic growth, among other things, to "regulatory accumulation."[208]

ALEC has long had an affinity with the traditionally conservative state of Utah. In 2012, ALEC held its annual meeting in Salt Lake City and named Utah as the state having "the strongest economic outcome in the nation," an honor the state has received multiple times.[209] In 2009, ALEC adopted a model "Free Market Constitutional Amendment." The model clause is nearly identical to the preamble of Article XII, Section 20, of the Utah Constitution: "It is the policy of the state of ___________ that a free enterprise system shall govern trade and commerce in this state to promote the dispersion of economic and political power and the general welfare of all the people."[210]

ALEC's model amendment also gained some traction in the Tennessee legislature. Indeed, Tennessee State Representative Susan Lynn, then Chair of the ALEC Commerce Task Force, drafted the ALEC model amendment and sought to have it adopted as an amendment to the Tennessee Constitution.[211] Lynn explained that:

> By definition, a free enterprise economy is an economic system controlled chiefly by individuals and private companies; not the government. Characteristics include economic freedom which allows people to decide how they will earn and spend their income; goods and services are produced and allocated through supply and demand by voluntary

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[207] Sanchez & O'Dell, *supra* note 206. In addition to drafting model legislation, ALEC also has an active campaign of submitting amicus briefs in litigation concerning issues that it follows, such as education reform. *See* Maria M. Lewis, Julie F. Mead & Daniella Hall, *The American Legislative Exchange Council as a "Friend of the Court" in Education Cases*, 20 U. PA. J.L. SOC. CHANGE 305, 313–27 (2017).

[208] *Regulatory Reform*, AM. LEGIS. EXCH. COUNCIL, https://www.alec.org/issue/regulatory-reform/ [https://perma.cc/9DY9-LGMQ] (last visited Sept. 2, 2022).

[209] Ron Scheberle, *ALEC Members Gather to Advance Economic Work in the States*, DESERET NEWS (Jul. 24, 2012, 12:00 AM) https://www.deseret.com/2012/7/24/20425613/alec-members-gather-to-advance-economic-work-in-the-states [https://perma.cc/J9XV-RH3D]. Utah has been so recognized numerous times in ALEC's annual *Rich States, Poor States* report. *See, e.g.*, Arthur B. Laffer, Stephen Moore & Jonathan Williams, *Rich States, Poor States: ALEC-Laffer State Economic Competitiveness Index* (2022), https://www.richstatespoorstates.org/app/uploads/2022/04/2022-15th-RSPS.pdf [https://perma.cc/UNW7-LF3T] (ranking Utah's economic outlook first amongst states).

[210] *Free Market Constitutional Amendment*, AM. LEGIS. EXCH. COUNCIL, https://www.alec.org/model-policy/free-market-constitutional-amendment/ [https://perma.cc/C3G5-BB72] (last visited Sept. 2, 2022).

[211] Susan Lynn, *Free Enterprise Constitutional Amendment*, CANNON COURIER (Feb. 16, 2010, 11:22 AM), https://www.cannoncourier.com/free-enterprise-constitutional-amendment-cms-1789 [https://perma.cc/D934-RQ8E].

> exchanges; private ownership of property and of the means of production is the key; and profit is not a bad word but greeted [sic] by freedom.[212]

She further noted that "[t]o date, only Utah has such a reassuring clause in their state Constitution."[213] The Tennessee amendment appears to have died in committee in 2010,[214] and no other state has yet taken up the ALEC model amendment or adopted a Free Market Clause similar to Utah's.

The Center for Media and Democracy, which publishes a feature known as "ALEC Exposed," characterizes ALEC as "a secretive collaboration between Big Business and 'conservative' politicians" that "ghostwrite[s] 'model' bills to be introduced in state capitols across the country."[215] ALEC Exposed has taken specific aim at the Free Market clause, claiming that it:

> is likely intended to provide a basis for overturning state policies that conflict with right-wing ideology. For example, minimum wage laws, zoning and land use laws, race or gender-conscious policies, housing subsidies or rent controls, and perhaps even environmental standards may all arguably interfere with the "free market" and be found unconstitutional if this proposed Amendment were adopted.[216]

In response to a question about whether ALEC's Free Market clause was intended to eliminate all regulation of business, Tennessee's Representative Lynn responded that it was not. "Do we approve of stealing, of fraud, or abuse of natural resources[?] No, whether done by an individual or a business such actions clearly violate the Constitutional rights of others."[217] Instead, Rep. Lynn clarified that the Free Market clause that she introduced was intended only to curb "the free-market killing regulations we see being enacted today."[218]

However one wishes to interpret ALEC's or Rep. Lynn's intentions with respect to the Free Market Clause, it seems abundantly clear that the ideals of distributive justice and social equality espoused by John Rawls and John Flynn do not enter into their calculus. Rather than promoting positive state regulation to ensure that all people have equal access to the fruits of the market, ALEC and Lynn appear to interpret the Free Market Clause as *discouraging* positive economic

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[212] *Id.*

[213] *Id.*

[214] *H.J.R. 0722*, TENN. GEN. ASSEMBLY, http://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=HJR0722&GA=106 [https://perma.cc/J726-QEDA].

[215] Ctr. for Media and Democracy, *About ALEC Exposed*, ALEC EXPOSED, https://www.alecexposed.org/wiki/About_ALEC_Exposed [https://perma.cc/X7EP-AJRL] (last updated Oct. 13, 2017, 5:27 PM).

[216] Ctr. for Media and Democracy, *Free Market Constitutional Amendment Exposed*, ALEC EXPOSED, https://www.alecexposed.org/wiki/Free_Market_Constitutional_Amendment_Exposed [https://perma.cc/3URK-JJX5] (last updated Oct. 13, 2017, 7:39 PM).

[217] Lynn, *supra* note 211.

[218] *Id.*

regulation.[219] In this, they would likely go even further than the Chicago School in eviscerating not only antitrust law but all regulation intended to advance social goals.

C. Tesla Motors v. Utah Tax Commission*: Descent into Non-Justiciability*

If the ALEC interpretation of the Free Market Clause is ironic, at least it is an interpretation. In a recent case, the Utah Supreme Court declined even to interpret the clause, holding that it was too vague "to sustain a justiciable constitutional standard."[220] This outcome is clearly at odds with the legislative intent behind the Free Market Clause of the Utah Constitution and represents a lost opportunity for Utah to lead in the enforcement of progressive state antitrust law.

1. A Free Market for Auto Sales?

In *Tesla Motors v. Utah Tax Commission*,[221] a wholly-owned subsidiary of the California-based electric vehicle manufacturer applied to the Utah Motor Vehicle Enforcement Division for a license to sell new Tesla vehicles from a retail showroom in Salt Lake City. The Division denied the application on the basis that the proposed arrangement violated two Utah statutes prohibiting a vehicle manufacturer from owning an interest in its retail franchisee.[222] The Utah Tax Commission upheld the denial.

Tesla appealed the final agency action to the Utah Supreme Court, challenging the Commission's decision, among other things, on the ground that it violated the Free Market Clause of the Utah Constitution.[223] Tesla argued as follows:

> By prohibiting Tesla from selling new cars in the Utah retail new car market unless it enters into franchise agreements with local independent dealers, the Commission has significantly interfered with the free market, constrained consumer freedom and entrenched incumbent economic

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[219] It is not clear whether the anti-regulation interpretation given by ALEC and others to the Utah Free Market Clause is a deliberate or unintentional misinterpretation of the documented intent of the Clause. As noted *supra* note 22, the term "free market" is susceptible to multiple interpretations.

[220] Tesla Motors UT, Inc. v. Utah Tax Comm'n, 398 P.3d 55, 66 (Utah 2017).

[221] *Id*. at 55–68.

[222] *Id*. at 58 ("In denying Tesla UT's application, the Division determined that the application implicates both the Motor Vehicle Business Regulation Act (Licensing Act) and the New Automobile Franchise Act." (citations omitted)). The issues faced by Tesla in Utah are not unique to the company or the state. *See* Daniel A. Crane, *Tesla, Dealer Franchise Laws, and the Politics of Crony Capitalism*, 101 IOWA L. REV. 573 *passim* (2016); *id.* at 574 ("Among other things, the dealer laws in many states prohibit a manufacturer from opening its own showrooms or service centers-from dealing directly with consumers.").

[223] *Tesla Motors UT, Inc.*, 398 P.3d at 65. Tesla also challenged the ruling on statutory interpretation grounds as well as violation of the Due Process and Equal Protection Clauses of the Utah and U.S. Constitutions and the Commerce Clause of the U.S. Constitution. *Id.* at 59, 65.

> interests. This type of clear interference with the free market can only be sustained if the [Division] can demonstrate it furthers a legitimate state interest. The MVED did not show any legitimate interest at the hearing, nor can it. The only purpose of forbidding a non-franchising manufacturer from selling directly to consumers is to protect local independent dealers from competition from a manufacturer selling a different brand of automobile, a policy that inevitably leads to less consumer choice and higher prices among different automobile brands.[224] Because there is no legitimate justification for excluding Tesla from the retail new car market, the Commission's Final Decision and its interpretation and application of the Acts must be rejected as violating the Free-Market Provision of the Utah Constitution.[225]

Tesla also introduced evidence that prohibiting it from selling vehicles directly to consumers (i.e., through its wholly-owned subsidiary) would likely have the effect of increasing consumer prices, reducing consumer choice, adversely impacting the environment, and reducing jobs for Utah residents.[226] Tesla concluded that the only apparent purpose of the restrictions was "economic protectionism for local independent dealers," an impermissible justification for violating the Free Market Clause.[227]

The Utah Supreme Court was not sympathetic. Without considering Tesla's substantive arguments regarding the Free Market Clause, it unanimously held that the clause was nonjusticiable on the basis of the constitutional self-execution doctrine. The Court explained:

> Not every provision of the constitution states an enforceable limitation on our government. Some provisions are non-justiciable: They are stated

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[224] Interestingly, this argument seeks to shift the focus of analysis from intrabrand competition (between different outlets for Tesla automobiles) to intrabrand competition (between Tesla automobiles and other automobile brands), responding, most likely, to the Supreme Court's observation in State Oil Co. v. Khan, 522 U.S. 3 (1997) ("the primary purpose of the antitrust laws is to protect interbrand competition").

[225] Brief of Petitioner/Appellant at 38, Tesla Motors UT, Inc. v. Utah Tax Comm'n, 398 P.3d 55 (Utah 2017) (No. 20150792), 2016 WL 9021762, at *38 (citation omitted).

[226] Brief of Petitioner/Appellant at 46–48, Tesla Motors UT, Inc. v. Utah Tax Comm'n, 398 P.3d 55 (Utah 2017) (No. 20150792), 2016 WL 9021762, at *46–48 (citing testimony of Dr. Fiona Scott Morton, former Deputy Assistant Attorney General for Economic Analysis at the Antitrust Division of the U.S. Department of Justice).

[227] *Id*. at 48. Though the Court avoided any discussion of the merits of Tesla's arguments, the Utah automobile franchise regulation, on its face, appears to be the type of regulation that "directly regulate[s] the operation of markets in ways that foreclose entry and competition by otherwise qualified entities." *See* Peter C. Carstensen, *Controlling Unjustified, Anticompetitive State and Local Regulation: Where Is Attorney General "Waldo"?*, 56 ANTITRUST BULL. 771, 782, 782–89 (2011) (drawing on examples including airport taxi service and parking regulations).

at so high a level of generality or aspiration that they require legislation to establish a limitation enforceable in our courts.

The quoted language of the Free Market Clause is such a provision. This clause articulates only a "policy." And it frames the policy in terms that identify only a "general principle" with no justiciable standard or "means for putting [it] into effect." We know from the Free Market Clause that our charter for state government is in favor of a "free market." But we know little more than that.

The general aspiration for a "free market" is too vague a policy to sustain a justiciable constitutional standard. So without any implementing legislation, we deem this provision non-justiciable.[228]

2. *Self-Execution of Constitutional Clauses*

The Utah Supreme Court's rationale for avoiding interpretation of the Free Market Clause—a constitutional question of first impression—is as remarkable as it is disappointing. The self-execution doctrine of constitutional interpretation,[229] which the Court here misapplies, is a venerable one that dates to the earliest days of the republic.[230] In Utah, it was invoked during the first years of statehood. In *Mercur Gold Mining & Milling Co. v. Spry*, the Utah Supreme Court acknowledged the general rule that "where a constitutional provision furnishes no rule for its own enforcement, or where it expressly or impliedly requires legislative action to give effect to the purposes contemplated, it is not self-executing."[231] In that case, the Court considered Article XIII, Section 4 of the Utah Constitution, which provided that "the net annual proceeds of mines and mining claims shall be taxed as provided by law."[232] This provision, which did not specify the rate of tax or the procedure for taxation, was deemed not to be self-executing and thus could not be enforced directly. It was not until after the passage of the Revenue Act in April 1896, four

[228] Tesla Motors UT, Inc., 398 P.3d at 66 (alteration in original) (citations omitted). Though Tesla lost its appeal at the Utah Supreme Court, it eventually prevailed by securing the passage of legislation amending Utah's motor vehicle dealer statute. Auto Dealership License Amendments, H.B. 369, 2018 Gen. Sess., Reg, Sess. (Utah 2018). As reported by news outlets, Tesla secured passage of the bill, among other things, by offering test drives of its new vehicles to legislators. Fred Lambert, *Tesla Takes a Win for Direct Sales in Utah, Bill to Allow Operating Its Own Stores Goes to the Governor*, ELEKTREK (Mar. 9, 2018, 5:58 AM), https://electrek.co/2018/03/09/tesla-direct-sales-win-utah-bill/ [https://perma.cc/7RQU-UZP2].

[229] In addition to state and federal constitutional clauses, the doctrine of non-self-execution has been applied in the context of international treaties. *See, e.g.*, John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999).

[230] *See* José L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question*, 17 HARV. ENVT'L. L. REV. 333, 335–39 (1993) (discussing eighteenth and nineteenth century state and federal cases).

[231] 52 P. 382, 384 (Utah 1898).

[232] *Id.* (quoting UTAH CONST. art. XIII, § 4 (amended 1908)).

months after the effectiveness of the Constitution, that taxes on mining revenue could legally be levied.[233] Constitutional taxation clauses, it seems, are prime examples of clauses that lack sufficient detail to be considered self-executing.[234]

In contrast, even broadly worded statements of fundamental rights and principles may be considered self-executing, so long as additional detail is not essential to their interpretation or enforcement. For example, the sweeping command of the U.S. Constitution that "Congress shall make no law . . . abridging the freedom of speech"[235] is universally viewed as self-executing,[236] and the courts have devoted myriad pages to its construction, interpretation, and enforcement, absent any other implementing legislation.

In recent years, however, the non-self-execution doctrine has been invoked with some regularity, particularly with regard to state constitutional provisions promoting environmental protection.[237] The Utah Supreme Court's most recent analysis of the doctrine prior to *Tesla Motors* occurred in *Bott v. DeLand* in connection with the state's constitutional prohibition on "cruel and unusual punishment."[238] In *Bott*, the Court held that the constitutional provision was self-executing, notwithstanding its broad language. It reasoned that the "provision does more than state general principles; it prohibits specific evils that may be defined and remedied without implementing legislation."[239] Importantly, the Court also observed that "the history of the provision indicates that the framers most likely intended it to have immediate effect without implementing legislation."[240]

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[233] *Id*. at 385.

[234] *See* Oliver A. Pollard, III, *A Promise Unfulfilled: Environmental Provisions in State Constitutions and the Self-Execution Question*, 5 VA. J. NAT. RESOURCES L. 351, 355 (1986) (discussing how and why the U.S. Constitutional provision granting the power of Congress to tax is non-self-executing).

[235] U.S. CONST. amend. I.

[236] *See* Pollard, *supra* note 234, at 355.

[237] *See* Tammy Wyatt-Shaw, *The Doctrine of Self-Execution and the Environmental Provision of the Montana State Constitution: 'They Mean Something,'* 15 PUB. LAND L. REV. 219 (1994) (considering the application of the self-execution doctrine in Montana and other state Constitutional provisions and advocating for a different theory of self-execution); Fernandez, *supra* note 230 (discussing the application of the self-execution doctrine to state Constitution environmental provisions and the reasoning behind the application); Pollard, *supra* note 234 (analyzing the use of the non-self-execution doctrine in various state Constitution environmental protection provisions).

[238] Bott v. DeLand, 922 P.2d 732 (Utah 1996) (analyzing Article I, Section 9 of the Utah Constitution).

[239] *Id*. at 737.

[240] *Id*.

3. The Free Market Clause as Self-Executing

Given the above precedent and reasoning, the Free Market Clause of Article XII, Section 20 of the Utah Constitution should be deemed to be self-executing.[241] First, in *Summit Water Distribution Co. v. Summit County*, the Utah Supreme Court recognized the importance of the Free Market Clause, holding that the state's deference to the "strong public policy disfavoring anticompetitive practices" must be "particularly strong" in light of it.[242]

Second, the language of the clause—guaranteeing that a "free market system shall govern trade and commerce" in the state—is no more vague than many phrases used in the Federal Constitution, such as "unreasonable searches and seizures," "due process of law," and "equal protection of the laws."[243] While these broad terms lack the specificity of administrative regulations, their metes and bounds have been carefully established over the years by the courts engaging in the legitimate and essential exercise of constitutional interpretation.

Antitrust law need not be specified with the level of detail contained in a tax code. The Sherman Act itself is cast in general terms, prohibiting broadly drawn conduct such as "restraints of trade" and "attempted monopolization." And while the language of the Sherman Act does not convey the precise contours of these terms, the courts have never shied away from interpreting them.[244]

Third, the legislative history of the Free Market Clause clearly indicates that it was intended to be directly executed. It was an express goal of the Utah legislature in amending the Constitution in 1992 to *simplify* the Corporations Article. The legislature explained to the voters that "[t]oo much detail in a state constitution results in the overfrequent need to amend the document. This revision removes all language relating to corporations that is not fundamental to the basic government charter of the state."[245]

Thus, despite the conclusion of the Utah Supreme Court in *Tesla Motors*, the legislature and the voters of Utah supported the use of broad and non-specific language in the state constitution. There is no indication, however, that their effort to simplify the outdated and overly-complex language of the 1895 Constitution was an effort to adopt language that was not self-executing. Quite the contrary.

When assessing the self-executability of a constitutional provision, the Utah Supreme Court held in *Bott* that "[a] constitutional provision is self-executing if it

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[241] In addition to the legal arguments presented in this section, it appears that at least ALEC and some of its members believe the Free Market Clause to be self-executing and enforceable, as suggested by their promotion of the clause as described in Part II.B, above.

[242] 123 P.3d 437, 445 (Utah 2005) (citing City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 398 (1978)).

[243] *See* U.S. CONST. amends. IV, XIV.

[244] Some critics view the Sherman Act as being *too* "constitutional" in its scope, and thus offering insufficient detail to be enforced consistently. *See generally* Arthur, *supra* note 30.

[245] Oveson, *supra* note 183, at 15 (providing arguments for the amendments to Proposition 2 from Sen. Haven J. Barlow).

articulates a rule sufficient to give effect to the underlying rights and duties intended by the framers."[246] The guiding principle is whether "the framers intended the provision to have immediate effect."[247] In the case of the Free Market Clause, the intention of the "framers" who drafted and approved it cannot have been more clear.

As described throughout Part I, John Flynn, who advised the Constitutional Revision Study Commission, wrote extensively about the need to shield progressive state regulation against attack and how a broader view of the purposes of antitrust law could promote social equality and distributive justice. In 1990, Utah Assistant Attorney General Art Strong, director of the Attorney General's Fair Business Enforcement Unit, is reported to have referred to the Free Market Clause as the "most important" element among the proposed constitutional amendments that year.[248] According to Strong, a constitutional guarantee of a free market system was essential to prevent future legislatures from enacting new laws "favorable to one monopolistic group."[249] Likewise, during the floor debate on the 1992 Constitutional amendments, Senator Haven Barlow, one of the bill's sponsors, noted that, in addition to mirroring the language of the federal Sherman Act, the Commission "went a step further" than federal law.[250] The 1992 ballot submitted to the voters for approval of the amendments to Article XII, Section 20 leads with a description of the Free Market Clause, indicating its importance to the proposal.[251]

Senator Barlow further explained the purpose of the clause to the voters: "It . . . contains a policy affirmatively stating that a free market system governs trade and commerce in Utah. This would result in a more effective control over unfair practices while leaving the state economy to continue to operate under the general principles of a free market."[252]

These statements, alone and taken together, indicate that the framers of the Free Market Clause intended that it would have "immediate effect" without the adoption of implementing legislation.[253] Nothing in their statements, nor those of any contemporary commentator that have been identified, indicates that the framers of the 1992 amendments to the Antitrust Clause of the Utah Constitution intended them to be precatory or otherwise dependent on the enactment of implementing legislation.

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[246] Bott v. DeLand, 922 P.2d 732, 737 (Utah 1996) (citing Davis v. Burke, 179 U.S. 399, 403 (1900)).

[247] *Id*. (citing *In re* Montello Salt Co., 53 P.2d 727, 729 (Utah 1936)).

[248] Bob Bernick Jr., *Utah Commission Aims to Expand Antitrust Law to Include Services*, DESERET NEWS (Dec. 2, 1990, 12:00 AM), https://www.deseret.com/1990/12/2/18894129/utah-commission-aims-to-expand-antitrust-law-to-include-service [https://perma.cc/TEJ6-U2DF].

[249] *Id*.

[250] *See* sources cited *supra* note 187.

[251] Oveson, *supra* note 183, at 13.

[252] *Id.* at 15 (providing arguments for the amendments to Proposition 2 from Sen. Haven J. Barlow).

[253] Bott v. DeLand, 922 P.2d 732, 737 (Utah 1996) (citing *In re* Montello Salt Co., 53 P.2d 727, 729 (Utah 1936)).

In fact, this cannot have been the case, as the Utah Antitrust Act (which includes its own Free Market Clause) had already been in place for more than a decade when the amendments to Article XII, Section 20 were proposed and approved. Thus, the legislature and voters *cannot* have expected that further legislation would be enacted to implement the constitutional Free Market Clause because this legislation already existed.[254] Instead, as explained by Assistant Attorney General Strong, the framers acted for just the opposite reason: they included the Free Market Clause in the Constitution to *strengthen* the protections already embodied in statute and to ensure that subsequent legislators could not easily eliminate them.[255]

It is well within the capability and competency of the Utah courts to interpret the language of the Utah Constitution's Free Market Clause. The Clause is no less self-executing than many of the most important constitutional and statutory guarantees in the United States and Utah Constitutions, and its framers clearly intended that the Clause have immediate effect without the necessity for implementing legislation.

Given these considerations, it appears that the Utah Supreme Court was mistaken in *Tesla Motors* when it held that the Free Market Clause was non-self-executing and thereby nonjusticiable. Giving effect to this important constitutional guarantee would honor the wishes of its framers and the voters and would confer on the state the benefits that they hoped to achieve.[256] As Chief Justice Marshall famously wrote in *Marbury v. Madison*, "It is emphatically the province and duty of the judicial department to say what the law is."[257] It is thus incumbent on the Utah Supreme Court to acknowledge this important duty and search more deeply for meaning in the Utah Free Market Clause at the next available opportunity. Part III below offers suggestions regarding this search for meaning.

III. THE MEANING OF FREE MARKETS

Utah is unique in its adoption of a free market clause in its state constitution. Yet even with a lack of federal and state precedent to guide courts, the interpretation of Utah's Free Market Clause should not present major interpretive difficulties. John Flynn, for one, left behind a roadmap for its interpretation and application. Part III offers suggestions regarding the meaning and application of the Free Market Clause in both the Utah Antitrust Act and the state constitution. It concludes by briefly

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[254] The Court in *Bott* also noted that "the fact that the legislature may enact supplementary legislation to further protect or regulate a right in a constitutional provision does not prevent the provision from being self-executing." 922 P.2d at 737 (citing People v. Western Air Lines, 268 P.2d 723, 732 (1954), *appeal dismissed* by Western Air Lines, Inc. v. People of State of California, 348 U.S. 859 (1954); General Agriculture Corp. v. Moore, 534 P.2d 859, 862 (1975)).

[255] Bernick, *supra* note 248.

[256] The author expresses no opinion regarding the effect that the Free Market Clause, if rendered justiciable, would have on the Utah motor vehicle franchise statutes at issue in Tesla Motors UT, Inc. v. Utah Tax Comm'n, 398 P.3d 55 (Utah 2017).

[257] 5 U.S. 137, 177 (1803).

observing that free market principles can also inform federal antitrust law, helping to ease it out of the vise formed by current economic theories of antitrust law.

A. Free Markets Under the Antitrust Act—An Interpretive Aid

As described in Parts I.D and I.E above, both the Utah Antitrust Act and the Utah Constitution contain free market clauses. As discussed in Part I.E.3, the wording of these two clauses is slightly different, though both embody the principles of distributive justice and economic equality espoused by John Flynn. Beyond these relatively modest textual differences, however, is a more important structural difference that separates these two clauses.

The Free Market Clause contained in the 1979 Antitrust Act resides in an initial statutory section titled "Legislative Intent." It sets out legislative findings and describes the "purpose" of the act ("to encourage free and open competition in the interest of the general welfare and economy").[258] Statutory declarations of legislative intent, such as this, are common,[259] and courts routinely look to such declarations as important aids to statutory interpretation.[260] As such, the Free Market Clause of the 1979 Antitrust Act can shed light on the interpretation of the substantive provisions that follow (i.e., the statutory prohibitions on anticompetitive collusion and monopolization)[261] but does not itself create additional substantive rights or prohibitions.

As an interpretive aid, the Free Market Clause of the 1979 Antitrust Act is invaluable. It signals to courts and enforcers that, at least in Utah, the "preservation of democratic, political and social institutions" and the Rawlsian ideals of "individual mobility, freedom of choice, and individual liberty" espoused by John Flynn[262] should inform the interpretation of Utah's antitrust laws. These laws, as Flynn envisioned them, are intended to curtail the "unchecked growth of concentrated economic power" such as monopolies and monopsonies, which limit these fundamental attributes of free markets and the individual liberties that they safeguard.[263]

Specifically, Utah's statutory Free Market Clause sets out five concrete goals: a favorable allocation of resources, low prices, high quality, material progress, and the preservation of "democratic, political, and social institutions."[264] Thus, in addition to the "consumer welfare" goal of antitrust law espoused by Bork and the

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[258] Utah Antitrust Act of 1979 § 2, UTAH CODE § 76-10-3102.

[259] *See* Liav Orgad, *The Preamble in Constitutional Interpretation*, 8 INTL. J. CONST. L. 714, 723–24 (2010); *see also* Milton Handler, Brian Leiter & Carole E. Handler, *A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation*, 12 CARDOZO L. REV. 117, 125 (1990).

[260] Handler et al., *supra* note 259, at 126–27.

[261] Utah Antitrust Act of 1979, § 4, UTAH CODE § 76-10-3104.

[262] Flynn & Ruffinengo, *Distributive Justice*, *supra* note 21, at 156; *see also supra* text accompanying notes 110–117 (discussing Flynn's philosophy of free markets).

[263] Flynn & Ruffinengo, *Distributive Justice*, *supra* note 21, at 156.

[264] Utah Antitrust Act of 1979 § 2, UTAH CODE § 76-10-3102.

Chicago School (frequently reduced to the single goal of reducing prices)[265] and general economic welfare (high-quality products and "material progress"), the Utah statute expresses goals directed toward distributive justice ("favorable" allocation of resources) and institutional reform.

The Free Market clause of the 1979 Antitrust Act can also be interpreted in light of the subsequent 1992 constitutional amendment, which contains its own Free Market clause. In addition to the principles set forth in the statutory clause, the constitutional Free Market Clause establishes "the dispersion of economic and political power" as an integral element of a free market system.[266] The dispersion of economic power, a direct invocation of the distributive justice approach advocated by Flynn, appears nowhere in the federal antitrust statute or canon.[267] Yet its enshrinement in the Utah Constitution clearly indicates that the Utah Antitrust Act must be interpreted with this goal in mind.

The interpretive lens of the Free Market Clause adds substantially to the purely economic price-based analysis currently deployed by the federal courts when interpreting the Sherman Act.[268] Applying this lens in the analysis of challenged conduct in Utah has the potential to expand the scope and reach of Utah's antitrust laws well beyond those of the federal antitrust laws to address the issues of distributive justice and individual liberty championed by John Flynn.

B. The Constitutional Free Market Clause—A New Substantive Right

Unlike the Free Market Clause contained in the 1979 Antitrust Act, the Free Market Clause of Utah's 1992 constitutional amendment is not merely a statement of legislative intent. Rather, by its own terms, it affirmatively establishes state policy.

1. A Clause of Three Sentences

As already noted, Article XII, Section 20 of the Utah Constitution contains three sentences that read, in their entirety:

> It is the policy of the state of Utah that a free market system shall govern trade and commerce in this state to promote the dispersion of economic and political power and the general welfare of all the people. Each contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is prohibited. Except as otherwise provided by statute, it is also prohibited for any person to monopolize, attempt to

[265] *See supra* notes 4–12 and accompanying text.

[266] UTAH CONST. art. XII, § 20.

[267] These sentiments did, however, enter the discussion of the federal statutes when originally enacted. *See supra* note 33.

[268] *See supra* notes 4–12, and accompanying text.

> monopolize, or combine or conspire with any other person or persons to monopolize any part of trade or commerce.[269]

The three sentences of Section 20 perform the following functions:

> *Sentence 1*: Establishes a Free Market System as state policy.
> *Sentence 2*: Prohibits anticompetitive collusion.
> *Sentence 3*: Prohibits monopolization and attempted monopolization.

Sentences 2 and 3 mirror the operative provisions of Sections 1 and 2 of the federal Sherman Act, which are also reflected in the Utah Antitrust Act. Sentence 1, however, is found nowhere in the federal antitrust statutes. It is unique to Utah, as described in Part I.E above.

Formally speaking, this sentence can be classified in one of two ways: as a preamble to the rest of the section or as a standalone constitutional provision. As shown below, the classification is largely immaterial to the substantive effect of this sentence.

2. Preamble versus Standalone Clause

As a formal matter, it should be noted that the Free Market Clause is not, either standing alone or in combination with other language, part of the preamble to the Utah Constitution. Preambles typically occur at the beginning of a constitutional document and lay out certain core principles and historical background to the document.[270] The Utah Constitution has contained such a preamble since 1895, and it is plainly labeled as such.[271]

Given these considerations, it is fairly clear that the Free Market Clause of the Utah Constitution, buried in Section 20 of Article XII, does not qualify as a constitutional preamble. Nevertheless, this clause could be viewed as a preamble to the rest of Article XII, Section 20 of the Constitution. Given the widespread recognition of Sentences 2 and 3 of Section 20 as derived from the federal Sherman Act, the classification of Sentence 1 as a preamble to these well-known recitations is not implausible.

Yet even if Sentence 1 of Section 20 is viewed as a "preamble" to the rest of the section, this does not disqualify it from having substantive meaning.[272] Nothing in Sentence 1 purports to modify, clarify, or qualify Sentences 2 or 3. The statement

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[269] UTAH CONST. art. XII, § 20.

[270] *See* Orgad, *supra* note 259, at 716–17.

[271] UTAH CONST. pmbl. ("Grateful to Almighty God for life and liberty, we, the people of Utah, in order to secure and perpetuate the principles of free government, do ordain and establish this CONSTITUTION.").

[272] *See* Orgad, *supra* note 259, at 722–27 (identifying three categories of constitutional preambles: ceremonial, interpretive and substantive). *But see* Handler et al., *supra* note 259, at 127 (arguing, based on common law rules of statutory interpretation, that "preambles are not independent sources of obligations or rights").

of policy contained in Sentence 1 makes no reference at all to the two sentences that follow (just as those two sentences each standalone without reference to the other). Thus, if Sentence 1—the Free Market Clause—does have substantive meaning, then that meaning is *additive* to the meanings of Sentences 2 and 3 rather than serving as an interpretive aid to Sentences 2 and 3. That is, standalone claims for redress made under the Free Market Clause need not sound in antitrust law, or at least not the core antitrust doctrines stated in Sentences 2 and 3 (i.e., anticompetitive collusion and monopolization). Such claims may be sustained purely on the basis of a violation of the Free Market Clause.

3. State Action versus Private Conduct

Another important difference between the Free Market Clause and the other two sentences of Section 20 is the conduct that they target. Sentences 2 and 3, which mirror the Utah Antitrust Act and the federal Sherman Act, condemn *private* conduct that is anticompetitive. Sentence 1—the Free Market Clause—speaks to "the policy of the state." As such, violations of this clause can be committed not only by private actors who violate this policy but also by the state.[273] That is, a state may violate the policy established by the constitution by enacting or enforcing statutes or regulations that do not comply with the policy. In short: a constitutional claim lies against the state itself if it fails to provide the requisite free market system.

This focus on the state and its regulatory landscape is entirely consistent with John Flynn's focus on state antitrust regulation and questions of antitrust federalism.[274] It also serves to draw a clear line between claims brought under the Free Market Clause and antitrust claims. Not all Free Market claims are simply antitrust claims by a different name. They can be directed to an entirely different sphere of activity—state regulation rather than private conduct—offering further evidence that the Free Market Clause is intended to be read independently and not merely as an interpretive aid to the second and third sentences of Section 20.

What, then, is the substantive content of the Free Market Clause? The free market system envisioned by the Clause has two stated goals: to promote (a) the dispersion of economic and political power, and (b) the general welfare of all the people. Thus, state regulations implicating "trade and commerce in the state" that harm one of these two interests may be condemned under the Free Market Clause.

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[273] Unlike the U.S. Constitution, the guarantees of which apply only to interactions between the state and the people (the so-called "state action" doctrine), state constitutions are not necessarily bound by the state action doctrine and may define rights that individuals may have as against one another. *See* Shirley S. Abrahamson, *Divided We Stand: State Constitutions in a More Perfect Union*, 18 HASTINGS CONST. L.Q. 723, 735–36 (1991). The second and third sentences of Article XII, Section 20 of the Utah Constitution clearly apply to private, not state, action.

[274] Flynn's principal concern in the area of antitrust federalism was protecting progressive state regulations from challenge under federal law. *See supra* notes 18–20. The Free Market Clause is mostly concerned with reining in anticompetitive state regulation.

4. Dispersion of Economic and Political Power

Dispersion can be viewed as the inverse of concentration. As such, this prong of the Free Market Clause seems to establish a presumption against economic concentration, the "curse of bigness" identified by Justice Louis Brandeis[275] and equally decried by John Flynn.[276] Business combinations, arrangements, or practices that unduly concentrate economic power may thus be condemned under the first prong of the Free Market Clause.

The precise magnitude of such impermissible concentration, and its effect on the market, remains to be worked out by the courts. At a minimum, it seems clear that the purpose of the Free Market Clause is not to condemn any business that acquires "market power," as that term is widely understood under antitrust law,[277] because the Free Market Clause is not intended to supplant existing antitrust prohibitions against unlawful combinations and monopolies (though some monopolies would certainly run afoul of the clause). Most likely, something more than mere market power, as currently understood, is required. Whether that "something more" is assessed based on size alone (e.g., a "super market" power) or whether it requires market power, as currently defined, plus other conduct remains to be determined by the courts.

Moreover, as noted above, the 1992 amendment also establishes the dispersion of political power as a goal, heeding the warnings of reformers since the late nineteenth century that the amassment of economic power invariably leads to undesirable concentrations of political power.[278] The question—still unanswered—posed by these words of the Free Market Clause is whether the imperative to disperse political power is linked to concentrations of economic power or whether the dispersion of political power is a free-standing policy of the state. If the latter, then hitherto unexplored doors may be opened to challenge established political structures that are based not only on economic strength but also on race, gender, and other factors.[279]

5. General Welfare of All the People

The second prong of the Free Market Clause invites challenges to economic regulations that harm the "general welfare of all the people." The wording of this clause is important in that it eschews the narrowly construed "consumer welfare" standard for a broader "general welfare" standard. Arguably, the "general welfare of all the people" includes constituencies other than "consumers," including workers, neighbors (e.g., of factories), family members, service providers, environmentalists, concerned citizens, and others. In effect, any harm that an economic regulation does

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[275] *See* WU, *supra* note 3, at 36–44.
[276] *See supra* note 21.
[277] *See, e.g.*, Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006).
[278] *See supra* note 33.
[279] *Cf.*, sources cited *supra* note 39.

to any affected individual or class can and should be considered under the Free Market Clause.

The term "general welfare" has a long constitutional history, appearing both in the Preamble and the Spending Clause of the U.S. Constitution.[280] While there has been little judicial interpretation of the "general welfare" clause of the Preamble,[281] some courts have opined on the meaning of "general welfare" in the context of the Spending Clause, largely concluding that determinations of welfare are best left to the discretion of Congress.[282]

But even if either of these federal constitutional clauses were the subject of significant judicial interpretation, it is not clear that they would be particularly illuminating for the Utah Free Market Clause, as the Utah clause concerns not only the "general welfare" but that "of *all* the people."[283] As such, the Utah clause appears to be directed toward the economic well-being of the entire polity rather than a generalized public benefit. It is thus expressly, rather than implicitly, inclusive—further evidence of an attempt to address Rawlsian distributive justice and wealth inequality concerns raised by John Flynn.[284]

Like the dispersion prong of the Free Market Clause, the contours of the general welfare prong remain to be hammered out by the courts. Also, as with the dispersion prong, it cannot be the case that any business activity that disadvantages any individual deserves condemnation. By the same token, there must be some threshold above which certain forms of regulation that disadvantage identifiable individuals can be condemned.

6. *Structural Free Market Claims*

It is worth bearing in mind that the dispersion and general welfare prongs of the Free Market Clause are not its exclusive routes to redress. The language of the Clause declares that it is the policy of the state that a "free market system shall govern trade and commerce." The purposes of that system are to promote the

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[280] U.S. CONST. pmbl. ("We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."); *id.* art. I, § 8 ("The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.").

[281] *See* Handler et al., *supra* note 259, at 120 n.14 (discussing sparse case law interpreting "welfare" clause of the Preamble).

[282] *See, e.g.*, Helvering v. Davis, 301 U.S. 619, 640 (1937) (Cardozo, J.) ("The line must still be drawn between one welfare and another, between particular and general . . . . The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment."); David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 62–63 (1994).

[283] UTAH CONST. art. XII, § 20 (emphasis added).

[284] *See supra* notes 22–23 and accompanying text.

dispersion of economic and political power and the general welfare, leading to the two-pronged approach discussed above. But it is also possible that a claim may be brought challenging particular regulations that compromise the very existence of a "free market" without evidence of particular harms—what I term *structural* free market claims.

This is the type of claim seemingly brought by the petitioners in *Tesla Motors*, who challenged the Utah Tax Commission's application of Utah's motor vehicle franchise statutes on the basis that they "significantly interfered with the free market, constrained consumer freedom and entrenched incumbent economic interests."[285] These three appeals to the Free Market Clause are worth considering in turn. First, the petitioners argued that the motor vehicle statute "significantly interfered with the free market." This argument is essentially tautological (the statute violates the Free Market clause because it interferes with the free market) and can thus be disregarded.

The second argument at first appears to appeal to notions of price-based consumer welfare,[286] echoing the Chicago antitrust analysis, but also encompasses notions of consumer *freedom,* meaning freedom of choice.[287] This argument resonates with the idea of a market in which players, large and small, incumbents and new entrants, may compete unimpeded by oppressive or discriminatory regulations. Thus, while adopting a consumer orientation, this argument also speaks to competitors and keeping the market open to new entrants. Its focus on consumers, however, adds an additional element to the free market analysis, making clear that the benefits of a free market do not merely seek to advance "producer welfare" (the position for which Bork criticized Brandeis)[288] but a facet of consumer welfare not encompassed by the Chicago rubric of price and output.

The petitioners' third argument attacks the statutes' protectionist perpetuation of "entrenched incumbent economic interests"—the state's existing automobile franchises. Here, the petitioners appear to appeal to the "dispersion" prong of the Free Market Clause, urging the court to condemn the statute on the basis that it tends to concentrate economic and political power and that the Constitution demands that such power be dispersed. The petitioners' claim that the motor vehicle statutes have an adverse impact on employment in the state[289] further seeks to consider effects on constituencies not traditionally protected under the antitrust laws.

Though relatively lean, given the stage of litigation and the dearth of precedent, these arguments cogently engage the Free Market Clause.[290] But the petitioners also

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[285] Brief of Petitioner/Appellant at 38, Tesla Motors UT, Inc. v. Utah Tax Comm'n, 398 P.3d 55 (Utah 2017) (No. 20150792), 2016 WL 9021762, at *38; *see also supra* Part II.C.1.

[286] *See id.* at 38, 48.

[287] *See id.* at 46–48; Carstensen, *supra* note 227 and accompanying text.

[288] *See* BORK, *supra* note 4, at 51.

[289] *See* Brief of Petitioner/Appellant at 48, Tesla Motors UT, Inc. v. Utah Tax Comm'n, 398 P.3d 55 (Utah 2017) (No. 20150792), 2016 WL 9021762, at *48.

[290] It is tempting to speculate about how John Flynn would have viewed the petitioners' arguments in *Tesla Motors*. On one hand, the Utah statutes effectively barred Tesla from entering the automotive sales market in Utah, the kind of protectionist market barrier that

realize that, as with most constitutional guarantees, a statute's infringement of protected interests must, to some degree, be balanced against the benefits sought to be achieved by the statute. In the case of fundamental rights, such statutes are reviewed with strict scrutiny. Still, economic and business regulations that do not involve discrimination or the infringement of fundamental rights generally receive the strongest presumptions of validity and are thus reviewed under a more lenient "rational basis" test.[291] The petitioners in *Tesla Motors* thus invited the court to undertake a rational basis analysis of the Utah motor vehicle franchise statute, arguing that its alleged interference with the free market (as they defined it) "can only be sustained if the [Division] can demonstrate it furthers a legitimate state interest."[292] Given that the state failed to advance any legitimate state interest supporting the statutes' provisions, the petitioners argued that the statutes failed even the lenient rational basis test.

Yet even with a rational basis standard, the Utah Supreme Court declined to evaluate the petitioners' Free Market Clause claim on its merits, instead holding that the Free Market Clause is not self-executing. This reasoning is suspect, as discussed in Part II.C.3, given the many possible routes toward adjudication of challenges under the Free Market Clause. The Utah Supreme Court should correct its error at the next possible opportunity and begin to interpret the contours of this important state policy and constitutional cause of action.

C. Free Markets and Federal Antitrust Law

John Flynn's writings of the 1960s and '70s are remarkably consonant with today's progressive calls for a more inclusive view of consumer welfare that accounts for corporate size, fair labor practices, innovation, market entry, wealth inequality, and human well-being.[293] And the emphasis of antitrust law on preservation of the competitive process, a key tenet of Flynn's approach, has found renewed currency among scholars and enforcement authorities.[294] As such, Utah's

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Flynn would likely have opposed. Yet these statutes were originally enacted to protect small automotive dealers from abuses by large auto manufacturers (e.g., forcing them to buy inventory and then undercutting their prices through direct sales). *See* Crane, *supra* note 222, at 579. From this vantage, Flynn might have seen the statutes as protecting small businesses from oligopolists and thereby increasing healthy competition in the state.

[291] *See* Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401, 403 (2016).

[292] Brief of Petitioner/Appellant at 38, Tesla Motors UT, Inc. v. Utah Tax Comm'n, 398 P.3d 55 (Utah 2017) (No. 20150792), 2016 WL 9021762, at *38.

[293] *See supra* note 4.

[294] *See, e.g.*, *Assistant Attorney General Jonathan Kanter Delivers Remarks at New York City Bar Association's Milton Handler Lecture*, U.S. DEP'T OF JUST. (May 18, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association [https://perma.cc/RK7A-ETYF] ("Antitrust law protects competition and the competitive process in service of both prosperity and freedom."); *see also* sources cited *supra* note 164.

Free Market Clauses can, and should, inform federal antitrust analysis by courts and enforcement agencies. Specifically, the introduction of free market principles to federal antitrust analysis can help to wean the courts from the purely economic price and output-based analysis that is currently utilized when interpreting the Sherman Act.[295] Applying this free market lens to conduct challenged under the federal antitrust laws has the potential to expand the scope and reach of the antitrust laws to address the issues of distributive justice and individual liberty championed by John Flynn.

CONCLUSION

The Free Market Clause of the Utah Constitution expressly links a free market system with the achievement of goals relating to distributive justice and the preservation of democratic, political, and social institutions. As such, this clause reflects the thinking of progressive antitrust theorist John Flynn, who sought to orchestrate a direct assault on the cramped reading given to the antitrust laws by the Chicago School and the federal courts. By expanding the express scope of the antitrust laws in Utah beyond neoclassical economic analysis, Flynn may have hoped to influence not only state jurisprudence but the broader interpretation of antitrust law, particularly the Sherman Act, throughout the United States.

While the Utah enactments have all but faded into obscurity due to an unfortunate combination of changing national enforcement priorities and the increasing homogenization of state antitrust enforcement, not to mention the Utah Supreme Court's abdication of its interpretive role in *Tesla Motors*, the Free Market Clause, and the progressive ideals that it represents, need not disappear entirely. On the contrary, the time is ripe for the revival of these principles when the debate over the fundamental purpose of the antitrust laws is being waged with a new intensity.

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[295] *See supra* notes 4–12 and accompanying text.

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