NEW YORK UNIVERSITY
JOURNAL OF LAW & BUSINESS

VOLUME 20 SUMMER 2024 NUMBER 3

THE AMERICAN ANTIMONOPOLY TRADITIONS: ORIGINS, CONTRADICTIONS, AND TRANSFORMATIONS

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Proponents of antitrust reform argue for the rediscovery of an American antimonopoly tradition that predated the Sherman Act by centuries and suggests the reimagination of a more robust contemporary policy against concentrated economic power. But historically there have been a number of distinct and often contradictory strands of American antimonopoly. The American colonists inherited a weak, recent, and largely invented antimonopoly common law tradition focused on exclusive grants of privilege from the crown. In the nineteenth century, antimonopoly became a generative and ubiquitous concept in state legislatures and courts, but one with multiple, inconsistent meanings that evolved in the decades leading up to the Sherman Act. Initially, antimonopoly was primarily focused on the grant of exclusive privileges by legislatures and hence served as a limitation on state power. Later, antimonopoly became simultaneously statist and anti-statist, both a source of state regulatory power and an anti-regulatory doctrine. In parallel, the primary meaning of monopoly shifted from state intervention in the market to privately acquired economic power. Courts pivoted from defining monopoly as necessarily involving a state grant to necessarily not involving a state grant. The Sherman Act enacted this more recent sense of antimonopoly as federal law, but it did not terminate the contestation between the different senses of antimonopoly that continued into the twentieth century and beyond. There is not a unified American antimonopoly tradition, but rather a set of competing impulses or traditions loosely organized under the antimonopoly banner.

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Introduction

Ever since the Emperor Tiberius apologetically coined the word "monopolium" before the Roman Senate in the first century A.D.,[1] the word "monopoly" has been one of opprobrium, both politically and legally. In the seventeenth century, Lord Coke largely invented the idea that monopoly was prohibited by Magna Carta and against the common law, and the idea jumped the Atlantic to the American colonies and stuck.[2] On many occasions, American state and federal courts have repeated or paraphrased the maxim, enshrined in the constitution of three states, that "monopolies are odious" and "contrary to the spirit of a free government."[3] One could amend the West Virginia Supreme Court's 1880 assertion that "the spirit of the age is against monopolies"[4] by noting that the spirit of the *ages* is against monopoly. From the European colonization of North America to the present, an abhorrence of monopoly has played out as a central feature of American republicanism.

Today, at a moment of fierce backlash against the perceived growth of industrial concentration and market power in the United States, hegemony of Big Tech, and failure of antitrust policy, there have been renewed calls for rediscovering a historical antimonopoly tradition that is older, broader, and more vigorous than antitrust. On the political left, antimonopoly nostalgia stands for the dispersal of private economic power, anti-domination, and a robust check on wealth inequality.[5]

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1. Suetonius, The Lives of the Twelve Caesars: An English Translation, Augmented with the Biographies of Contemporary Statesmen, Orators, Poets, and Other Associates (J. Eugene Reed & Alexander Thomson, eds., Gebbie & Co. 1889).

2. William Letwin, Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act 19–32 (1965).

3. *E.g.*, Coombs v. MacDonald, 62 N.W. 41, 42 (Neb. 1895); Md. Const. of 1776, art. XXXIX (prohibiting monopolies because "monopolies are odious, contrary to the spirit of a free government, and the principles of commerce").

4. Mason v. Harper's Ferry Bridge Co., 17 W. Va. 396, 418 (1880).

5. *See, e.g.*, Amy Klobuchar, Antitrust: Taking on Monopoly Power from the Gilded Age to the Digital Age (2021) (arguing for a return to an antimonopoly tradition as old as the American founding); Matt Stoller, Goliath: The 100-Year War Between Monopoly Power and Democracy (2019) (arguing for a renewed understanding of an antimonopoly tradition associated with Thomas Jefferson and Louis Brandeis); Lina M. Khan, *The End of Antitrust History Revisited*, Harv. L. Rev. 1655, 1671 (2020) (reviewing Tim Wu, The Curse of Bigness: Antitrust in the New Gilded Age (2018)) (calling for "reinvigorating antitrust law as part of a broader antimonopoly project to structure private power to serve public ends"); Tim Wu,

At the same time, voices on the political right have called for re-familiarization with another side of the Anglo-American antimonopoly tradition, one focused on anticompetitive government policies.[6] Antimonopoly is thus expressed as both regulatory and deregulatory, and concerned with alternatively private and public power.

There is nothing new about these contradictions, nor are they historically illegitimate. To borrow from Kenneth Shepsle, the antimonopoly tradition is "They," not an "It."[7] In fact, there is not a single, unified antimonopoly tradition, but rather a web of often contradictory legal and political impulses rhetorically flying the antimonopoly banner. While at times these impulses converge on particular questions, they are more often apt to prescribe contradictory or mutually exclusive policies. Historically, antimonopoly could be directed exclusively against the government or exclusively against private firms, or could either limit or expand the government's powers. Antimonopoly was an adaptive and evolving ideal that took in a wide variety of political and ideological impulses.

This Article aims to excavate the origins and development of the American antimonopoly traditions, which took root as legal doctrines in the nineteenth century. It shows that antimonopoly began as a limitation on the grant of exclusive privileges by the sovereign state, transformed in the late nineteenth century into both a preoccupation with privately acquired economic power and a simultaneously pro- and anti-regulatory principle, shifted in the mid-twentieth century to focus nearly exclusively

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The Utah Statement: Reviving Antimonopoly Traditions for the Era of Big Tech, ONEZERO BY MEDIUM (Nov. 18, 2019), https://onezero.medium.com/the-utah-statement-reviving-antimonopoly-traditions-for-the-era-of-big-tech-e6bel98012d7 [https://perma.cc/FUV3-VTHM].

6. *See, e.g.*, Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J. L. & PUB. POL'Y 983 (2013) (analyzing constitutional antimonopoly tradition focused on government interventions in the market); Ben Sperry, *The Forgotten Strand of the Anti-Monopoly Tradition in Anglo-American Law* (Jan. 13, 2021), https://truthonthemarket.com/2021/01/13/the-forgotten-strand-of-the-anti-monopoly-tradition-in-anglo-american-law/ ("[T]oday's "anti-monopolists" focus myopically on alleged monopolies that often benefit consumers, while largely ignoring monopoly power granted by government. The real monopoly problem antitrust law fails to solve is its immunization of anticompetitive government policies. Recovering the older anti-monopoly tradition would better focus activists today.").

7. Kenneth A. Shepsle, *Congress is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

on privately acquired power, then shifted back toward a focus on the state's regulatory power in the later twentieth century. All of these movements were associated with a common aversion to something called "monopoly," a flexible, ambiguous, and changing concept.

The remainder of this Article proceeds as follows. Part I sets the stage by considering the prerevolutionary and founding era roots of the antimonopoly tradition. It shows Lord Coke's creative invention of a longstanding antimonopoly principle of the common law, its importation into the American colonies, its role in revolutionary ideology, and the debates over monopoly and corporate chartering that ignited some of the fiercest controversies between Federalists and Anti-Federalists during the founding era.

Part II analyzes the matter at the heart of this Article—the splintering and transformations of the antimonopoly tradition in American law that occurred during the nineteenth century. In brief, during the nineteenth century antimonopoly ideas became embedded in American law, mostly in state constitutions and judicial opinions. Initially, the predominant understanding of "monopoly" was an exclusive grant of governmental privilege. Courts and legislatures created legal doctrines to prevent such grants or limit their scope. Gradually, monopoly took on a different legal connotation as a market condition that the government could rightly regulate through its police power. Antimonopoly thus shifted from a limitation on the government to an affirmative grant of power to the state. But, at around the same time, courts began increasingly to deploy antimonopoly to invalidate not only explicit grants of exclusive privilege, but more general regulatory schemes that impeded competition or individual enterprise. Thus, even while antimonopoly was expanding the government's regulatory powers, it was simultaneously taking them away. Concurrently with these movements, the predominant understanding of monopoly was shifting away from a grant from the state to privately acquired market power, and the antimonopoly principle was increasingly deployed to constrain the power of private firms. By the close of the nineteenth century, all of these disparate meanings of antimonopoly had taken root in American law.

Part III considers the continuing lives of the antimonopoly traditions in the twentieth century and beyond. It begins with the triumph of antimonopoly as limitation on private power, reflected in the Sherman Act's focus on privately created trusts

and the Supreme Court's retreat from economic substantive due process and refusal to allow the Sherman Act to be deployed against the state. From the perspective of the late New Deal, the meaning of antimonopoly seemed to have inverted entirely within a century from a near-exclusive focus on public power to an exclusive focus on private power. Yet that turned out not to be the end of history either, and the older strands of state-focused antimonopoly returned in force in the later twentieth century as the Supreme Court contracted state action immunity from the Sherman Act and neo-liberal scholars argued that governmental intrusion in markets was the source of most monopoly problems. Part III concludes by observing that, although the possible meanings and implications of antimonopoly have shifted since the nineteenth century, the core set of preoccupations—with either public or private power, and with expanding or contracting the power of the state—remain durable features of the American legal, political, and ideological landscape.

I.
Prerevolutionary and Founding Era Roots

A. *The Inherited Antimonopoly Tradition*

The American colonists brought with them the belief that, as Englishmen, the common law was their patrimony. Largely through Lord Coke, who wrote the only published report on the landmark 1602 King's Bench decision *Darcy v. Allein*, "*The Case of Monopolies*," the American colonists inherited a belief that monopoly was contrary to Magna Carta and an unbroken line of common law cases and hence contrary to their ancient rights as Englishmen.[8] Both *The Case of Monopolies* and the Act of Parliament it spurred reflected a peculiar and limited genus of antimonopolism, but that did not prevent the adoption of a wider antimonopoly ideology in the American colonies.

The Case of Monopolies was hardly the first opinion to limit the power of monopolies,[9] but it stood out for its audacity

8. Darcy v. Allein (1602) (The Case of Monopolies), 77 Eng. Rep. 1260 (KB); 11 Co. Rep 84 a; Calabresi & Leibowitz, *supra* note 6, at 1007 (discussing American colonists' beliefs that anti-monopoly rights reflected in *Darcy v. Allein* applied to American colonists).

9. *See, e.g.*, Davenant v. Hurdis (1599), 72 Eng. Rep. 769 (KB) (invalidating ordinance of Company of Merchant Tailors requiring each member to

and novelty in challenging the Crown's prerogative to grant commercial monopolies.[10] Darcy had received from Queen Elizabeth an exclusive privilege via a "letter patent" to buy playing cards overseas and import them into England.[11] In exchange for this privilege, he remitted 100 marks to the Queen annually, thus sharing his monopoly profits with the Crown in an arrangement typical of many sovereign grants of exclusivity.[12] When Allein started importing playing cards, Darcy complained that he was doing so in violation of Darcy's patent and that this competition was making it impossible for him to remit the contracted payments to the Crown.[13]

The King's Bench struck down the exclusive privilege as "utterly void." In passing, it identified "three inseparable incidents to every monopoly:"

> (1) That the price will be raised.
> (2) After the monopoly grant, the commodity is not so good as it was before.
> (3) It tends to the impoverishment of divers artificers and others who before by their labour had maintained themselves and their families, who now will of necessity be constrained to live in idleness and beggary.[14]

Despite the breadth of this language, its suggestion of broad prohibition on monopoly, and its resonance with strands of the antimonopoly tradition, it would be a mistake to read *Darcy v. Allein* as a broad holding that monopolies were illegal as against the common law, as Coke inventively would have it.[15] The real point of the case was that Parliament, rather than the Crown, had the exclusive power to grant monopolies, a power Parliament happily exercised a few years after *Darcy v. Allein* by granting an identical exclusive right to the Company of

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send minimum of one-half the cloth sent out to be dressed to another member of the corporation).

10. *See generally* Thomas B. Nachbar, *Monopoly, Mercantilism, and the Politics of Regulation*, 91 VA. L. REV. 1313 (2005).

11. *Darcy*, 11 Co, Rep. at 84–85.

12. Sidney T. Miller, *The Case of the Monopolies: Some of its Results and Suggestions*, 6 MICH. L. REV. 1, 4 (1907).

13. *Id.*

14. *Darcy*, 11 Co, Rep. at 86.

15. LETWIN, *supra* note 2, at 30 (describing Coke's "powerful but inaccurate polemics" concerning the common law antimonopoly tradition).

Card Makers.[16] Rather than a full-blooded antimonopoly case, *Darcy v. Allein* was an important landmark in the continuing jurisdictional struggle between the Crown and Parliament. The playing card monopoly may have been unlawful since "[t]he Queen was deceived in her grant,"[17] but Parliament had every right to—and did—grant many such monopolies.[18]

In the early seventeenth century, a Whig campaign against state-issued monopolies yielded the 1624 Statute of Monopolies.[19] But, here again, the label had "a deceptive ring," since the statute was "based not on a preference for competition, but on constitutional objections to the power which the Crown presumed in granting monopolies and to the arbitrary reasons for which it had granted them."[20] Nonetheless, the idea of the Statute of Monopolies as a charter of freedom would grow in resonance over the years, particularly across the Atlantic. Over two centuries later, Chancellor Kent would refer to the Statute of Monopolies as "the Magna Charta [of] British Industry."[21] Coke himself had found an even earlier source—the Magna Carta itself. In his *Second Institute, Commentary on Magna Carta*, published in 1642, Coke listed among the great "liberties" guaranteed by Magna Carta a prohibition upon the creation of monopolies. Coke asserted that "[g]enerally all monopolies are against this great charter, because they are against the liberty and freedome of the subject, and against the law of the land."[22] That was certainly an exaggeration. The relevant provision of Magna Carta—Section 41—granted merchants the right to be "safe and secure … to buy and sell free from all maletotes [impositions] by the ancient and rightful customs,"[23] but had never been construed as a general prohibition on the grant of monopolies.

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16. *Id.* at 32.

17. *Id.* at 28.

18. Barbara Malament, *The "Economic Liberalism" of Sir Edward Coke*, 76 YALE L.J. 1321, 1351 (1967).

19. Statute of Monopolies, 1623, 21 Jac. 1, c. 3, § 1 (Eng.); Letwin, *supra* note 2, at 31.

20. LETWIN, *supra* note 2, at 31.

21. JAMES KENT, COMMENTARIES ON AMERICAN LAW 272 (Oliver W. Holmes, Jr. ed., 1873).

22. Edward Coke, *Second Institute, Commentary on Magna Carta* (1642), *reprinted in* ROSCOE POUND, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 150 (1957).

23. Magna Carta sec. 41, 1215, *reprinted in* JAMES C. HOLT, MAGNA CARTA 327 (1965).

That Coke largely invented the antimonopoly common law tradition did not prevent its lodging durably in English law and then jumping the Atlantic.[24] The American colonists, heavily schooled in Coke, took up his interpretation of British constitutionalism in their early antimonopolism. William Penn wrote in his *The Excellent Priviledge of Liberty & Property Being the Birth-Right of the Free-Born Subjects of England* that "[g]enerally all Monopolies are against this great charter because they are against the Liberty and Freedom of the Subject, and against the Law of the Land."[25] Even before the publication of Coke's Commentary, the 1641 Massachusetts Body of Liberties provided: "No monopolies shall be granted or allowed amongst us, but of such new Inventions that are profitable to the Countrie, and that for a short time."[26] Connecticut adopted a similar provision in 1672.[27]

To the early colonial ear, the term "monopoly" connoted exclusive royal privilege of the kind Queen Elizabeth accorded to the British East India Company for trading privileges east of the Cape of Good Hope and the Straits of Magellan.[28] By 1781 when Edmund Burke—a member of Parliament sympathetic to the American cause—famously lacerated the East India Company in Parliament for inefficiency, treachery, and corruption,[29] it was common ground among the American colonists that

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24. Donald O. Wagner, *Coke and the Rise of Economic Liberalism*, 6 Econ. Hist. Rev. 30, 35 (1935); *see* 4 W.S. Holdsworth, A History Of English Law 343–62 (1924); Jacob I. Corré, *The Argument, Decision, and Reports of* Darcy v. Allen, 45 Emory L.J. 1261, 12621262 (1996).

25. William Penn, *The Excellent Priviledge Of Liberty & Property* (1687), *as reprinted in* A.E. Dick Howard, The Road From Runnymede: Magna Carta And Constitutionalism In America 421 (1968).

26. The Body of Liberties of 1641; A Coppie of the Liberties of the Massachusets Colonie in New England, *in* The Colonial Laws Of Massachusetts 35 (William H. Whitmore ed., 1890).

27. The Laws Of Connecticut: An Exact Reprint Of The Original Edition Of 1673, at 52 (1865) ("It is ordered; That there shall be no Monopolies granted or allowed amongst us, but of such new Inventions as shall be judged profitable for the Country, and that for such time as the General Court shall judge meet.").

28. *See e.g.*, John Micklethwait & Adrian Wooldridge, The Company: A Short History of a Revolutionary Idea 22 (2003); *see also*, Letwin, *supra* note 2 at 62–63; *see also*, James Willard Hurst, The Legitimacy of the Business Corporation in the Law of the United States: 1780–1970 (1970).

29. Edmund Burke, *Speeches on the Impeachment of Warren Hastings*, *in* The Portable Edmund Burke 388 (Isaac Kramnick ed., 1999); *see generally* Mithi Mukherjee, *Justice, War, and the Imperium: India and Britain in Edmund Burke's*

state-granted monopoly was a threat not only to economic freedom, but to good government and social and political liberty. The theme of monopoly as political corruption and decadence would play out in American law for centuries to come.

B. *Antimonopoly as Revolution*

But there were economic costs as well. By the middle of the seventeenth century, the American colonists began unhappily to internalize the burden of English mercantilist policy with its guarantees to English merchants of exclusive trading rights in the colonies.[30] Things were to get worse. In the eighteenth century, Parliament intensified its restrictions on colonial trade, which showed that monopoly was not merely a corruption of royal prerogative, but of any sovereign ill-disposed to commercial freedom.[31] Parliament's mercantilist policies sowed bitter resentment in the colonies. As one historian has noted, "the efforts of the English government, backed by English merchants and manufacturers, to deny to the Americans the right to compete in foreign markets and to secure the benefits of foreign competition was one of the most potent causes of the American Revolution."[32] The Boston Tea Party arose out of a monopoly grant to the East India Company, "causing many historians to cite antimonopoly sentiments as one of the roots of the struggle for American independence."[33] In *The Rights of Man*, Thomas Paine criticized colonialist Britain as "cut up into monopolies," and asked "[i]s this freedom?"[34] Similarly, James Madison would complain "[t]hat is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations...."[35]

Prosecutorial Speeches in the Impeachment Trial of Warren Hastings, 23 L. & HIST. REV. 589 (2005).

30. Franklin D. Jones, *Historical Development of the Law of Business Competition*, 36 YALE L.J. 42, 49–50 (1926).

31. *Id.*

32. *Id.* at 52.

33. 1 THE ANTITRUST IMPULSE 5 (Theodore P. Kovaleff ed., M.E. Sharpe, Inc. 1994).

34. THOMAS PAINE, COLLECTED WRITINGS: COMMON SENSE, THE CRISIS, AND OTHER PAMPHLETS, ARTICLES AND LETTERS, THE RIGHTS OF MAN, THE AGE OF REASON 471 (Eric Foner ed., Literary Classics of the U.S. 1995).

35. James Madison, *Property*, *in* JAMES MADISON: WRITINGS 516 (Jack N. Rakove ed., 1999).

The fledgling republic would soon learn that monopoly was not solely the province of either the British Crown or Parliament, or the East India Company. During the Revolutionary period, rampant inflation and fluctuating commodity prices led to political agitation against domestic "forestallers and engrossers."[36] These pressures led to recommendations from the Continental Congress, passed by legislatures in New Jersey and Massachusetts, to "prevent monopoly and oppression" by fixing maximum prices for commodities.[37] These statutes were among the first instances in the early America Republic to think of antimonopoly in terms of privately acquired economic power—a perspective that would grow in importance over the course of the nineteenth century.[38]

Despite these legal innovations, antimonopoly remained primarily focused on grants of exclusive privilege by the state. As discussed further in Part II B 1, the post-Revolutionary constitutions of Maryland, North Carolina, and Massachusetts contained provisions prohibiting monopoly grants by the state.[39] For a moment, it seemed that antimonopoly might become a core constitutional principle, including in the federal constitution. As things worked out, it became no feature at all of the federal constitution, and one of few state constitutions until the end of the nineteenth century, when it became a very different kind of feature.

C. *Federalists, Antifederalists, and Corporate Charters*

Debates around the framing and ratification of the Constitution set off new rounds of antimonopoly discourse that would play out in domestic politics and constitutional law for at least half a century. During the Philadelphia constitutional convention in 1787, Madison introduced a proposal to grant Congress the power "[t]o grant charters of incorporation in cases where the Public good may require them, and the authority of a single

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36. *Id.* at 52–53.

37. *See generally* Daniel A. Crane & William J. Novak, Antimonopoly and American Democracy (2023).

38. Earlier colonial legal tradition focused on "forestalling" and "engrossing," essentially the wrong of cornering markets. *See* Franklin D. Jones, *Historical Development of the Law of Business Competition*, 36 Yale L.J. 42, 43–44 (1926).

39. *Infra* note 55, 56.

State may be incompetent."[40] When Benjamin Franklin later moved to grant Congress the power to cut canals, Madison reintroduced his own proposal to give Congress an even wider power to incorporate, and one not limited to common carriers or other lines of business affected with the public interest.[41] This proposal led to a sharp exchange between Federalist and Anti-Federalist delegates, with Federalists like James Wilson arguing that an explicit power to incorporate might be unnecessary because it was already inherent in the proposed commerce clause of what became Article I, Section 8, and Anti-Federalists like George Mason expressing horror of "monopolies of every sort, which he did not think were by any means already implied by the Constitution as supposed by Mr. Wilson."[42]

Madison's chartering proposal did not carry, but that was of cold comfort to the Anti-Federalists who had heard Wilson loud and clear on the Federalist interpretation of the commerce clause. George Mason and Elbridge Gerry refused to sign the proposed Constitution because "[u]nder their own Construction of the general Clause at the End of the enumerated Powers, the Congress may grant Monopolies in Trade & Commerce."[43] A slew of Antifederalist writers attacked the proposed Constitution on the ground that it permitted Congress to grant monopolies, and a number of state ratifying conventions, including Massachusetts, New Hampshire, and New York, sent instructions requesting that Congress include an antimonopoly provision in a Bill of Rights.[44] Jefferson wrote to Madison from Paris in 1787 complaining that the proposed constitution lacked, among other provisions, a "restriction against monopolies."[45]

And then came Hamilton's proposal for a national bank—the embodiment of corrosive monopoly to Jefferson, Madison,

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40. James Madison, *Notes on the Constitutional Convention* (Aug. 18, 1787) (proposal of James Madison), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 324, 325 (Max Farrand ed., 1966) [hereinafter Farrand's Records].

41. Daniel A. Crane, *Antitrust Antifederalism*, 96 CAL. L. REV. 1, 8 (2008).

42. Farrand's Records at 616.

43. 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 45 (Merrill Jensen ed., 1976).

44. 1 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 323, 326, 330, 337 (J. Elliot ed. 1866).

45. Letter from Jefferson to Madison (Dec. 20, 1787), *reprinted in* 12 THE PAPERS OF THOMAS JEFFERSON 438, 440 (J. Boyd ed. 1955) (emphasis added).

and their newly minted opposition party. Hamilton prevailed with Washington and got his "monster bank," which the vacillating President Madison granted a second term following the War of 1812.[46] The Supreme Court endorsed Hamilton's vision for muscular federal economic powers in *McCulloch v. Maryland*,[47] upholding the constitutionality of the bank. Andrew Jackson then vetoed the bank's second renewal charter, complaining of its "exclusive privilege under the authority of the General Government, a monopoly of its favor and support."[48] The Jacksonian movement against special charters and for general laws reacted to a particular pedigree of monopolism—the crony capitalist system of legislatures dispensing special economic privileges to favored citizens.[49] But, by the time of Jackson, antimonopoly sentiment was finding a variety of expressions in state legislatures and the courts—expressions that would grow in creative contradiction and evolution until the passage of the Sherman Act at the end of the century.

II.
Antimonopoly in Nineteenth Century Law: Transformation and Inversion

A. *Ideology and Law*

There is a tendency to reduce the American antimonopoly tradition to a unified and coherent ideology in tension with other ideologies, something like Coke's Whiggish account of antimonopoly embedded in Magna Carta and the common law. Thus, one could say that, in the nineteenth century, antimonopoly "was an expression of the producerist-republican tradition that emphasized the dangers of government in the private economy and critiqued the power of large aggregations of capital in corporations and banks."[50] Certainly, that was part of it.

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46. Crane, *supra* note 41, at 11.

47. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

48. Andrew Jackson, Bank Veto Message (July 10, 1832), https://avalon.law.yale.edu/19th_century/ajveto01.asp.

49. *See* Naomi R. Lamoreaux & John Joseph Wallis, *General Laws and the Mid-Nineteenth Century Transformation of American Political Economy*, https://ccl.yale.edu/sites/default/files/files/Lamoreaux%20and%20Wallis%2C%20General%20Laws%2C%202019-10-04.pdf.

50. Kenneth Lipartito, *The Antimonopoly Tradition*, 10 U. St. Thomas L. J. 991, 994 (2013).

But, in fact, antimonopoly ideology operated in a number of different registers. For instance, Richard John has identified four distinct strands of antimonopoly ideology spanning the eighteenth, nineteenth, and twentieth centuries, each associated with a different public intellectual.[51] For John Adams, "monopoly was a form of commercial domination that artful diplomacy could countermand."[52] For William Leggett, monopoly "was a legislatively mandated special privilege that a vigilant citizenry had an obligation to confront." For Henry George, "it was a social injustice that legislation could contain."[53] And for Walter Lippman, "it was an economic colossus that social movements could be mobilized to control."[54] All four versions showed up rhetorically in American political discourse and their influences appear in the major economic issues of the nineteenth century—banking, access to the corporate form, monetary policy, international trade, the railroads and the Granger movement, and the transition from an agrarian to an industrial economy.

What was distinctive about the antimonopoly principle in the nineteenth century was that it showed up with increasing frequency in law, operating concretely in constitutions, statutes, and adjudicated cases. To say that it operated concretely is not to say that it operated uniformly, consistently, or coherently, but rather that the antimonopoly principle invented by Coke and transported to the colonies became a ubiquitous feature of American law—a principle that could drive, or at least justify, legal outcomes. Over the course of the nineteenth century, legislatures and judges (with some exceptions) began with the premise that monopoly was disfavored by law, or downright abhorrent, and that it fell to them to deploy legal devices to control it.

B. *State Constitutions: From Antimonopoly, to General Laws, to Private Power*

Although an antimonopoly provision was never added to the federal constitution as the Anti-Federalists proposed, such

51. *See* Richard John, *Reframing the Monopoly Question: Commerce, Land, and Industry*, *in* ANTIMONOPOLY AND AMERICAN DEMOCRACY (Daniel A. Crane & William J. Novak, eds. 2023).
52. *Id.* at 37.
53. *Id.*
54. *Id.*

provisions did find their way into some states' constitutions. The evolution of state antimonopoly provisions over the course of the nineteenth century showcases the evolving meanings of the antimonopoly tradition. Early provisions were squarely directed against "monopoly" in its primary original sense—a grant of exclusive privilege by the state. During the Jacksonian Era, aversion to crony capitalism and legislative corruption prompted the passage of a different kind of antimonopoly provision requiring legislatures to act by general laws, which eventually consumed the space previously occupied by the antimonopoly provisions. In the later nineteenth century, yet a third form of antimonopoly provision, this one concerned with the state's responsibility toward *privately created* monopoly, began to infuse state constitutions.

1. *Constitutional Prohibitions on Grants of Exclusive Privileges*

In 1776, two states—Maryland and North Carolina—adopted antimonopoly constitutional provisions directed against grants of exclusive privileges by the state. Maryland's constitution provided that "monopolies are odious, contrary to the spirit of a free government, and the principles of commerce; and ought not to be suffered," while North Carolina's constitution read "that perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed."[55] Tennessee adopted a virtually identical provision in 1796.[56]

But these states were outliers. Another forty years would pass before a fourth state would adopt a similar provision—Arkansas, in its first constitution in 1836.[57] These antimonopoly provisions attracted little attention. Indeed, in 1884 the Arkansas Supreme Court complained that the Bouvier law dictionary had listed only Maryland, North Carolina, and Tennessee as have constitutional antimonopoly provisions, overlooking Arkansas.[58] Between 1838 and 1907, only five other states—Florida, Louisiana, Texas, Wyoming, and Oklahoma—adopted similar antimonopoly provisions directed against the state.[59]

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55. MD. CONST. of 1776, art. XXXIX; N.C. CONST. of 1776, Declaration of Rts., art. XXIII. Both have been retained.

56. TENN. CONST. of 1796, art. XI, § 23.

57. ARK. CONST. of 1836, art. II, § 19.

58. *Ex Parte* Levy, 43 Ark. 42, 52 (1884).

59. FLA. CONST. of 1838, art. I, § 24 ("That perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed.");

As discussed in Part II C 1 b below, the absence of an explicit constitutional prohibition on granting monopolies did not impede state courts from invalidating state grants of exclusive privileges throughout much of the nineteenth century, as the courts relied on other constitutional or common law principles. But antimonopoly as an explicit provision of state constitutionalism ran into two countercurrents: the general laws movement of the Jacksonian era and, later, the shift in antimonopolism toward a focus on privately acquired market power.

2. *General Laws Requirements*

One factor that blunted the spread of antimonopoly constitutional provisions focused on the state's grant of monopoly rights was the general laws movement of the mid-nineteenth century. These laws were animated by some of the same concerns as antimonopoly clauses, but gave expression to a separate legal principle that, in time, largely subsumed and replaced the state-focused antimonopoly principle.

Enacting special legislation was a regular legislative practice for nearly a hundred years following American independence, but one that fell out of favor politically during the Jacksonian period.[60] A provision barring special legislation was first adopted by Massachusetts's 1780 constitution, which declared:

> No man, nor corporation or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public; and this title being

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LA. CONST. of 1845, title VI, art. 125 ("The general assembly shall never grant any exclusive privilege or monopoly, for a longer period than twenty years."); TEX. CONST. of 1845, art. I, § 18 ("Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed: nor shall the law of primogeniture or entailments ever be in force in this State."); WYO. CONST. art. I, § 30 ("Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed. Corporations being creatures of the state, endowed for the public good with a portion of its sovereign powers, must be subject to its control."); OKLA. CONST. art. II, § 32 ("Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this State.").

60. Naomi R. Lamoreaux & John Joseph Wallis, *Economic Crisis, General Laws, and the Mid-Nineteenth-Century Transformation of American Political Economy*, 41 J. EARLY REPUBLIC 403, 407 (2021).

> in nature neither hereditary, nor transmissible to children, or descendants, or relations by blood, the idea of a man born a magistrate, law-giver, or judge, is absurd and unnatural.[61]

But Massachusetts's provision was a rarity. Early provisions barring special corporate legislation were most often aimed at preventing the *creation* of corporations by special legislation, not preventing the extension of benefits to already existing private companies (banking functions being an exception), and were largely adopted in the mid-1800s.[62] New York's 1846 constitution required that corporations be formed under general laws except where the legislature determined that special laws were required for the corporation to function, and many state constitutions had nearly identical provisions.[63]

With few exceptions, states began enacting provisions that barred special grants to existing corporations in the 1850s.[64] Some legislatures clearly intended these clauses to constrain both individuals and corporations. South Dakota's 1889 constitution provided: "No law shall be passed granting to any citizen, class of citizens, or *corporation*, privileges or immunities which upon the same terms shall not equally belong to all citizens or *corporations*."[65] Others, arguably most, were less explicit,[66] although state privileges or immunities clauses adopted in the mid-nineteenth century often did similar work.[67]

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61. MASS. CONST. Part the First, art. VI.

62. *See, e.g.*, LA. CONST. of 1845, title. VI, art. 122, which entirely banned the creation of corporations with banking or discounting privileges.

63. N.Y. CONST. of 1846, art. VIII, § 1. This language appears to be modeled after much earlier provisions barring the special incorporation of churches and other organizations. *See, e.g.*, FLA. CONST. of 1838, art. XIII, § 1.

64. However, Steven Calabresi and Larissa Leibowitz have argued that privileges or immunities clauses were commonly interpreted by courts to include corporations and used to combat monopolistic behavior. Calabresi & Leibowitz, *supra* note 6, at 1077–81.

65. S.D. CONST. art. VI, § 18 (emphasis added).

66. *See, e.g.*, ARK. CONST. art. II, § 3 ("The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity; nor exempted from any burden or duty, on account of race, color or previous condition.").

67. *See, e.g.*, VA. CONST. of 1776, ch. I, § 4; CONN. CONST. of 1818, art. I, § 1; TENN. CONST. of 1834, art. XI, § 7; TEX. CONST of 1845, art. I, § 2.; *see also* Woodward v. May, 5 Miss. (4 Howard) 389, 392 (1840) (purpose of state privileges or immunities clause was to "inhibit all those unjust and insidious exemptions from the burthens of government, and all those monopolies

For most states, bans on special corporate legislation emerged following Indiana's adoption of its 1851 constitution, and went hand-in-hand with provisions mandating the uniform application of general laws. In the 1840s, Indiana was one of several states to default on their bonded debt.[68] As Naomi Lamoreaux and John Wallis have shown, most of the debt obligations of northern states like Indiana stemmed from transportation projects.[69] One method by which states would obtain funding for these projects was to grant special privileges to groups in exchange for financial support or labor.[70] Indiana had enlisted the Morris Canal and Banking Company to sell state bonds on credit that would fund its $10 million canal, railroad, and turnpike project.[71] When the bank informed the state it could no longer make payments for the bonds, construction halted, property values and tax revenues shrunk, and the state defaulted, unable to pay the interest on the bonds.[72] In response, Indiana adopted provisions requiring the state to act through general laws in its 1851 constitution:[73]

Provisions banning special legislation were quickly adopted or copied by numerous states in the following years, likely because many engaged in the same practices that caused Indiana to default. By 1900, thirty-one states had adopted constitutional provisions modeled after Indiana's, often including the catch-all requirement: "In all other cases where a general law can be made applicable no SPECIAL law shall be enacted."[74] A number of states extended the language to bar grants of special corporate privileges or charters even where language mandating general laws had already been included. The nineteenth item in California's version was a prohibition on "granting to

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and encroachments of the few upon the rights and natural liberties of the many, which sprung up during the dark ages").

68. Lamoreaux & Wallis, *supra* note 60, at 417.

69. *Id.*

70. *Id.* at 418.

71. *Id.* at 419, 421.

72. *Id.* at 421.

73. *See* Mowrey v. Indianapolis & C.R. Co., 17 F. Cas. 930, 933 (C.C.D. Ind. 1866). Indiana also proposed an antimonopoly provision during its 1851 convention, but the measure failed and was not revisited.

74. *See, e.g.*, WYO. CONST., art. III, § 27; TEX. CONST., art. III, § 56 (amended 2001); MONT. CONST. of 1889, art. V, § 26; COLO. CONST., art. V, § 25 (amended 2000). Four more states would eventually adopt similar provisions.

any corporation, association, or individual any special or exclusive right, privilege, or immunity."[75]

While many of the constitutional restraints on corporations have weakened over time, virtually all of the states that enacted these particular types of provisions retain some version of them today. Thus, while explicit antimonopoly provisions remain a feature of a few state constitutions, almost every state but two has enacted and maintains constitutional provisions that either bar special legislation or mandate the uniform operation of general laws.

As noted, the general laws requirements arose from antimonopoly impulses similar to those that animated the antimonopoly clauses discussed in the previous section. As a New Jersey court asserted in 1888, "the purpose [of these provisions] was to deprive the legislature of the power of creating monopolies by requiring them to pass general laws. . . ."[76] But although general laws requirements might impede a legislature from creating a corporation with monopoly rights by special legislation, they would not prevent a state from legislating in anticompetitive ways or setting up companies with exclusive prerogatives through general laws.[77] General laws provisions reoriented the antimonopoly principle from *outcomes* to *processes*. Monopoly derived from the state would not necessarily be a forbidden outcome, so long as it was enacted in a democratic and transparent manner in a general law.

3. *Constitutional Provisions Empowering State Action Against Private Monopoly*

During the Reconstruction Era and early Gilded Age, a different kind of antimonopoly provision—one directed against private economic power rather than state grants—began to spring up in state constitutions. By the time of the Sherman Antitrust Act's adoption in 1890, twenty-five states had antimonopoly provisions, and over the next few decades, seven more would join. Overwhelmingly, these new provisions targeted

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75. *See* CAL. CONST., art. IV, § 25 (repealed 1966); *see also* COLO. CONST., art. V, § 25 (amended 2000); ILL. CONST. of 1870, art. IV, § 22.

76. Atl. City Water-Works Co. v. Consumers' Water Co., 44 N.J. Eq. 427, 436 (N.J. Ch. 1888).

77. *E.g.*, Talbot v. La. Highway Comm'n, 159 La. 909, 918 (1925) (holding that general law's requirement did not prohibit legislature from granting exclusive franchises through general laws).

combinations by private corporations, not state-sanctioned monopolies.

These new provisions were either generally applicable to all private monopolies or focused on particular industrial sectors. Some, like Kentucky, required the legislature to enact laws aimed at all monopolistic behavior: "It shall be the duty of the General Assembly from time to time, as necessity may require, to enact such laws as may be necessary to prevent all trusts, pools, combinations or other organizations, from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value."[78] Significantly, this type of provision extended bans not simply to monopolies but to monopolistic behavior, addressing concerns like price fixing or harm to competition.[79]

Of the thirty-two states that adopted antimonopoly provisions, many chose to enact provisions targeting specific industries the states recognized as conducive to monopoly. A minority of states, including Illinois, Michigan, and Pennsylvania, adopted industry-specific provisions alone.[80] Alabama's 1901 constitution, like a number of others, contained both types of antimonopoly provisions. The state retained an 1875 provision that preemptively blocked the monopolization of the telegraph industry:

> Any association or corporation organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph within this state, and connect the same with other lines; and the general assembly shall, by general law of uniform operation, provide reasonable regulations to give full effect to this section. No telegraph company shall consolidate with or hold a controlling interest in the stock or bonds of any other telegraph company owning a competing line, or acquire, by purchase or otherwise, any other competing line of telegraph.[81]

78. KY. CONST., § 198 (repealed 2002).

79. *See* S.D. CONST., art. XVII, § 20.

80. *See, e.g.*, ILL. CONST. of 1870, art. XI, § 11; MICH. CONST. of 1850, art. XIX–A, § 2 (1870); PA. CONST., art. XVI, § 12 (repealed 1966); *id.* art. XVII, § 4 (repealed 1967).

81. ALA. CONST. of 1901, art. XII, § 239.

Alabama also introduced a new provision that regulated monopolies generally:

> The Legislature shall provide by law for the regulation, prohibition or reasonable restraint of common carriers, partnerships, associations, trusts, monopolies, and combinations of capital, so as to prevent them or any of them from making scarce articles of necessity, trade or commerce, or from increasing unreasonably the cost thereof to the consumer, or preventing reasonable competition in any calling, trade or business.[82]

These provisions were often written in parallel with coordinating provisions that fixed the status of these corporations as common carriers and granted state government the power to regulate rates.[83] Some states, like Louisiana, enacted provisions that created regulatory boards, which were vested with the authority not only to enact regulations but also to investigate and punish industry offenders.[84] Many states also accompanied these provisions with ones intended to ward off bribes, barring corporations from passing along free or discounted tickets to elected officials.[85] Some states also enacted provisions to prevent these types of companies from gaining status as foreign corporations by combining with out-of-state companies. States like Louisiana, Mississippi, and Montana all included provisions that would allow their state courts to maintain jurisdiction over suits involving these companies.[86]

Today, twenty-four states retain provisions regulating or banning monopolies, whether general or industry-specific.[87]

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82. *Id.*, art. IV, § 103.

83. *See* WASH. CONST., art. XII, § 14 (repealed 1977).

84. *See, e.g.*, LA. CONST. of 1898, art. 284. For more information on these types of provisions, see J.D. Forrest, *Anti-Monopoly Legislation in the United States*, 1 AM. J. SOCIO. 411, 417–18 (1896).

85. *See, e.g.*, ALA. CONST. of 1875, art. XIV, § 23.

86. *See* MO. CONST. of 1875, art. XII, § 18; LA. CONST. of 1879, art. 246; MISS. CONST., art. VII, § 197 (repealed 1989).

87. *E.g.*, ARIZ. CONST., art. XIV, § 15 ("Monopolies and trusts shall never be allowed in this state and no incorporated company, co-partnership or association of persons in this state shall directly or indirectly combine or make any, ◦ prices, limit the production, or regulate the transportation of any product or commodity. The legislature shall enact laws for the enforcement of this section by adequate penalties, and in the case of incorporated companies, if necessary for that purpose, may, as a penalty declare a forfeiture of their franchises.").

Many provisions, particularly those regulating railroads, were repealed in the 1960s and 70s.[88]

In sum, the American antimonopoly tradition experienced evolutionary expression in state constitutional provisions during the nineteenth century, progressing through three overlapping stages. A first stage focused squarely on monopoly as grant of exclusive privilege by the state. A second stage, which largely subsumed the first, altered the relationship between legislatures, the courts, and the market by prohibiting special legislative acts and requiring that economic policy be formulated through general acts. This shift in emphasis may have strengthened good government and curtailed crony capitalism, but it also diluted antimonopoly as a limitation on the power of the state by generalizing the concept and relinquishing the distinctive focus on monopoly outcomes. Finally, when antimonopoly entered state constitutions in the third phase, the focus had flipped from the state to private actors and from limiting the state to empowering the state, thus contributing to the reversal of an antimonopoly tradition primarily focused on restraining public power to one primarily focused on restraining private power.

C. *Judicial Decisions: Four Strands of Antimonopoly*

In the century leading up to the passage of the Sherman Act, antimonopoly sentiment flowed through state and federal judicial opinions. Thousands of cases wrestled with claims concerning the law's abhorrence of monopoly. However, apart from the generality of view (occasionally honored in the breach) that the law disfavored monopoly, these cases instantiated distinct and often conflicting perspectives on the nature and implications of the antimonopoly principle. Based on a review of every nineteenth century state and federal decision concerning monopoly, I have classified these decisions into four buckets, the first three concerning state power and the last concerning private power. To introduce these classifications, it may be helpful to consider a typology illustrated by a well-known Supreme Court decision associated with each of the four varieties of antimonopoly ideology:

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88. For example, the 1850 provision of the Michigan Constitution prohibiting railroad mergers, MICH. CONST. of 1850, art. 19A, § 2, was not renewed in Michigan's 1962 Constitution.

Charles River Bridge:[89] In the *Charles River Bridge* case, the Court held that the Commonwealth of Massachusetts' grant of the right to build a bridge to one company did not imply an exclusive privilege that would prevent the state from granting a second company a similar right at a later date. The case is associated with antimonopoly as a limitation on the grant of exclusive privileges by the state, the dominant understanding of antimonopoly for most of the nineteenth century.[90]

Munn:[91] In *Munn*, the Court upheld an Illinois statute establishing price controls for grain elevators, observing that the defendants had a "practical monopoly" due to their control of fourteen elevators in Chicago.[92] Following *Munn*, "monopoly, and more generally market power, became the leading theory justifying nondiscriminatory access and rate regulation in the twentieth century."[93] *Munn* can thus be associated with a view of antimonopoly as a source of state police power, a view that increased in prominence in the late nineteenth century and into the early twentieth century and faded in the New Deal when the set of permissible justifications for the exercise of state regulatory power over economic matters expanded considerably.

Slaughter-House Cases:[94] In the *Slaughter-House* cases, the Court rejected a Fourteenth Amendment challenge to a Louisiana statute prohibiting the operation of slaughterhouses except at the Crescent City Live-Stock Landing and Slaughter-House Company. The arguments the Court rejected flowed from a strand of antimonopoly ideology concerned with limiting the state's regulatory power—antimonopoly as anti-regulation. Although these arguments were unsuccessful in *Slaughter-House*, similar arguments gained traction in scores of nineteenth century state court decisions and eventually the Supreme Court's *Lochner* decision, where the Supreme Court invalidated a

89. Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. 420 (1837).

90. William L. Barney, The Passage of the Republic: An Interdisciplinary History of Nineteenth-Century America 307 (1987).

91. Munn v. Illinois, 94 U.S. 113 (1877).

92. *Id.* at 131.

93. Thomas B. Nachbar, *The Public Network*, 17 Commlaw Conspectus 67, 96 (2008).

94. Slaughter-House Cases, 83 U.S. 36 (1872).

statute entrenching a baker's union at the expense of immigrant labor,[95] reflecting antimonopoly ideology.[96]

Standard Oil:[97] In its landmark *Standard Oil* decision, the Court found that Standard Oil had violated Sections 1 and 2 of the Sherman Act and ordered the company broken up. The Court acknowledged that monopoly, as understood by the common law, "embraced only a consequence arising from an exertion of sovereign power, [that] no express restrictions or prohibitions obtained against the creating by an individual of a monopoly as such," and that "nowhere at common law can there be found a prohibition against the creation of monopoly by an individual."[98] However, "as modern conditions arose, the trend of legislation and judicial decision came more and more to adapt the recognized restrictions to new manifestations of conduct or of dealing which it was thought justified the inference of intent to do the wrong which it had been the purpose to prevent from the beginning."[99] Hence, an antimonopoly tradition that had at first been directed against exclusive grants by the sovereign adapted over time to prohibit the same effect when undertaken by a private individual. In short, the antimonopoly principle operated as a limitation on privately acquired economic power.

1. *Anti-Monopoly as Limitation on Exclusive Privilege*

In the first half of the nineteenth century, monopoly was associated primarily with a legislative grant of an exclusive economic privilege or right—such as building a bridge or ferry—to a corporation in its chartering document. Judicial opinions wrestled with two sorts of related questions under this broad umbrella: (a) had a monopoly in fact been granted; and

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95. Paul Kens, Lochner v. New York: Economic Regulation on Trial (1998); and David E. Bernstein, *The Story of* Lochner v. New York: *Impediment to the Growth of the Regulatory State, in* Constitutional Law Stories 299 (Michael Dorf ed., 2d ed. 2009); Lochner v. New York, 198 U.S. 45 (1905).

96. Howard Gillman, The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence 120–29 (1993) (arguing that *Lochner* grew out of Jacksonian anti-monopoly tradition); Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 Yale L.J. 1784, 1795 n.38 (2020) (asserting that "*Lochner* and the legal culture that surrounded it" were influenced by Jacksonian anti-monopoly politics).

97. Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911).

98. *Id.* at 52, 55.

99. *Id.* at 57–58.

(b) was the grant constitutional. In both subcategories, the antimonopoly principle served to contract the power of the state or the scope of the monopoly grant.

a. Had a Monopoly Been Conferred in the Legislative Grant?

The *Charles River Bridge* case is of a type with numerous nineteenth century decisions determining whether a grant by the legislature to a corporation included an actual or implied right to freedom from competition. In some cases, the courts forthrightly held that a legislative grant constituted a monopoly.[100] Well into the nineteenth century, some courts continued to opine that monopoly rights are inherent in the charter of certain types of companies, such as railroads.[101] And, despite the steady drumbeat of antimonopoly rhetoric that grew in the courts as the nineteenth century progressed, the occasional judge continued to speak up in favor of monopoly. In 1871, the Chief Justice of the Georgia Supreme Court remarked that "[m]onopolies are evidences of civilization, and invoke no captious criticism at my hands."[102] Similarly, in 1874, the District of Columbia Supreme Court opined "modern political economists" believe that the granting of municipal monopolies for commodities like gas tends to improve quality and reduce prices.[103] (Economists would disagree).

But such pro-monopoly sentiments were by far the exception rather than the rule. Far more common was the sentiment that a monopoly "is a thing disfavored in law; an abuse, a public nuisance,"[104] and that "[c]hartered monopolies of every character are inimical to republican institutions."[105] Courts often equated granting monopolies with democratic corruption, oppression, and despotism, and derived various legal techniques to control monopoly. In 1855, the Florida Supreme Court, citing the Walker treatise on American law held: "A monopoly, as the name imports, is a special privilege conferred

100. Beekman v. Saratoga & Schenectady R.R. Co., 3 Paige Ch. 45 (1831) ("The grant of this railroad is a monopoly. The company have the exclusive use of it, for exclusive benefit").

101. Wilmington, Columbia & Augusta R.R. Co. v. Board of Com'rs, 72 N.C. 10 (1875)

102. S.C. R.R. Co. v. Steiner, 44 Ga. 546, 558 (1871).

103. Bates v. District of Columbia, 8 D.C. (1 MacArth.) 433, 445 (1874).

104. Knoup v. Piqua Branch of State Bank, 1 Ohio St. 603, 614 (1853).

105. Stein v. City of Mobile, 24 Ala. 591 (1854).

on one or more persons, to the absolute exclusion of others. In this sense it is deservedly odious, because it is essentially anti-republican."[106]

Chief among the legal doctrines employed to limit the spread of state-granted monopolies was the ubiquitous maxim that a monopoly could not be granted through implication but only through clear and express language in the corporate charter.[107] Grantees of governmental privileges wishing to claim that their charter excluded competition faced an uphill fight in the absence of express exclusivity language in the granting document. As a Connecticut court put it with characteristic feeling in 1860, "[a] grant of monopoly is odious in the eyes of the law making power, and therefore should never be inferred in a legislative grant when not plainly expressed."[108]

Already in the early decades of the nineteenth century, judges began to observe a shift in zeitgeist from early state

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106. Barbee v. Jacksonville & A. Plank Rd. Co., 6 Fla. 262, 269 (1855).

107. Tuckahoe Canal Co. v. Tuckahoe & J.R.R. Co., 38 Va. (11 Leigh) 42 (1840) ("A monopoly cannot be *implied* from the mere grant of a charter to a company to construct a work of public improvement . . . to give such a monopoly, there must be an express provision in the charter, whereby the legislature restrains itself from granting charters for rival and competing works."); Comm'rs of N. Liberties v. N. Liberties Gas Co., 12 Pa. 318, 321 (1849) (monopoly or exclusivity rights cannot be found by implication from legislative grant); Westfall v. Mapes, 3 Grant 198 (Pa. 1855) (grants of monopolies are strictly construed against the grantee); Michigan Cent. R. Co. v. Michigan S. R. Co., 4 Mich. 361 (Mich. 1856) (public grants strictly construed as against monopoly rights); Collins v. Sherman, 2 George 679 (Miss High Ct. Errors 1856) (monopoly cannot be granted by implication); Wetmore v. Atl. White Lead Co., 37 Barb. 70 (N.Y.Gen. Term 1862) (grants of privileges to be strictly construed against monopoly and in favor of the public); Chenango Bridge Co. v. Binghamton Bridge Co., 27 N.Y. 87 (1863) (monopoly cannot be created by inference, but only by express grant); City of San Francisco v. Spring Val. Waterworks, 39 Cal. 473 (1870) ("All grants of privileges are to be liberally construed in favor of the public, and, as against grantees of the monopoly franchise, to be strictly interpreted"); Philadelphia W. & B.R. Co. v. Bowers, 9 Del. (4 Houst.) 506 (1873) (exclusive privileges cannot be derived by implication from charter; monopolies strictly construed); De Lancey v. Rockingham Farmers' Mut. Fire Ins. Co., 52 N.H. 581 (1873) (presumption against grant of monopoly rights); State v. Vanderbilt, 37 Ohio St. 590 (1882) (grants of privileges construed strictly against grantee); Appeal of Scranton Elec. Light & Heat Co., 15 A. 446 (Pa. 1888) (stating that "monopolies are favorites neither with courts or people" and legislative grants must be strictly construed against grant of monopoly); N. Baltimore Pass. Ry. Co. v. N. Ave. Ry. Co., 23 A. 466 (Md. 1892) (monopoly cannot be created by implication); Jackson Cnty. Horse-R.R. Co. v. Interstate Rapid-Transit Ry. Co., 24 F. 306 (C.C.D. Kan. 1885) (monopoly cannot be created by implication).

108. Hartford Bridge Co. v. Union Ferry Co., 29 Conn. 210, 217 (1860).

legislation favoring cronyism and monopoly toward antimonopoly legislative sentiment. Toward the beginning of the Jacksonian Era, the Tennessee Supreme Court noted that Tennessee law had moved away from the "monopolizing spirit" of a prior act preventing anyone from operating a ferry within ten miles of a licensed ferry to a system of enhanced powers for counties to license competitive ferries.[109] At the tail end of that era, a Justice of the Vermont Supreme Court observed that he had "heard repeated complaints of the abuse and danger of monopolies and incorporations, and, on the other hand, of the danger of all their rights being prostrated before popular excitement; and I have no hesitation in saying, as my belief, that the principles of civil liberty are more regarded and individual and chartered rights more firmly secured and protected now, than when I first commenced active life."[110] Statements of this kind operated as self-prescribed mandates for judges to exercise their judicial power to curtail monopoly rights.

A definitional issue often arose concerning the meaning of "monopoly." Since monopoly was a term of opprobrium and its label invited judicial invalidation or curtailment of rights, companies often argued that the exclusive rights they claimed were not monopolistic at all since they involved correlative public obligations. These arguments were sometimes met with success. In a divided opinion in the *Charles River Bridge* case, the Massachusetts Supreme Court the court defined a monopoly as "a grant of a benefit without any burden."[111] Where the recipient of an exclusive governmental grant had a reciprocal obligation to provide a public service—as with respect to ferries and bridges—the grant should not be considered "monopoly" at all.[112] According to the court, "[a]ll the public improvements in the country have arisen from what the defendants call monopoly; from a grant by the public, of security for private benefits, for the benefit of using them."[113] Similarly, in 1845, the Connecticut Supreme Court of Errors had to decide whether the legislature's grant of an exclusive right to build a bridge was unconstitutionally encumbered by the legislature's subsequent grant to another of the right to build a railroad bridge

109. Blair v. Carmichael, 10 Tenn. 306, 308 (1829).
110. State v. Bosworth, 3 Vt. 402 (1841).
111. *Charles River Bridge*, 24 Mass. at 437.
112. *Id.*
113. *Id.*

in the same locale.[114] Finding that the railroad grant impaired the bridge company's contract and hence amounted to an unconstitutional taking requiring just compensation, the court observed that, although both contracts involved exclusivity, both existed to promote a public benefit and therefore neither involved "monopoly, in the odious sense of the term."[115]

An antimonopoly judicial technique lying somewhere between interpretation and invalidation was to construe monopoly grants as limited or narrow. Courts frequently described the legislative grant of exclusive privileges as circumscribed. As an Ohio court expressed in holding invalid a bank note drawn at an interest rate of greater than six percent, "[a] ll privileged associations should be watched with argus eyes. They should be regarded with distrust. It is the duty of courts to keep them within the bounds prescribed by the legislature. They are opposed to the genius of our government, and, if tolerated, should not be permitted to abuse the privileges with which they are intrusted."[116] Courts could also limit monopoly grants by limiting their duration, as a Tennessee court did in 1847 in holding that to construe a franchise as perpetual would violate the constitutional prohibition on perpetuities and monopolies.[117]

b. Was the Grant of a Monopoly Constitutional?

In addition to interpreting corporate charters in light of the antimonopoly principle, courts were frequently called upon to determine whether the state—either the legislature or a local government such as a town or county—had the constitutional power to grant monopoly rights. As discussed in Part II B 1 above, a number of state constitutions contained explicit prohibitions on the grant of monopoly rights. But even in the absence of such provisions, courts often drew on general constitutional principles such as enumerated powers and

114. Enfield Toll Bridge Co. v. Hartford & N.H.R. Co., 17 Conn. 40 (1845).

115. *Id.* at 55. On the other hand, monopoly could be equated with any exclusive privilege, whether or not it had any effect on competition. For example, in 1840, the Supreme Court of Missouri struck down an 1836 Missouri statute exempting members of the "central fire company" from jury service as an instance of "odious" monopoly. McGunnegle v. State, 6 Mo. 367 (1840).

116. Bank of Chillicothe v. Swayne, 8 Ohio 257, 260 (1838).

117. Franklin v. Armfield, 34 Tenn. (2 Sneed) 305 (1854).

due process, or even general principles of the common law, to challenge governmental grants of monopoly rights, particularly those granted by local governments.

As with all dimensions of antimonopoly, there was considerable ambiguity and diversity in the courts' treatment of antimonopoly arguments directed against the state. Some courts held the state's power to grant monopoly to be clear. In 1840, the Pennsylvania Supreme Court held that:

> It seems scarcely necessary to say that monopolies are not prohibited by the constitution; and that to abolish them, would destroy many of our most useful institutions. Every grant of privileges so far as it goes, is exclusive; and every exclusive privilege is a monopoly. Not only is every rail-road, turnpike, or canal such, but every bank, college, hospital, asylum, or church, is a monopoly; and the ten thousand beneficial societies incorporated by the executive on the certificates of their legality, by the attorney general and judges of the Supreme Court, are all monopolies.[118]

Again in 1843, the same court observed that the Pennsylvania constitution did not prohibit monopolies and that "not every preference or monopoly is illegal. On the contrary, we have a countless number of them which are entirely consistent with the constitution and the laws."[119] In 1863, the Supreme Court of California wrestled with whether the legislature had the power to grant monopolies, given that the state constitution neither expressly permitted nor prohibited such a grant.[120] The court opined that grants of franchises—such as to build a ferry—necessarily implied an exclusive right, since a subsequent grant of the same right to another person impairs the contractual rights of the first.[121] Hence, the power to grant public works franchises necessarily implied the power to grant monopolies.[122]

Yet, the more general tendency was to treat monopoly grants as at least disfavored by law, if not outright prohibited. In 1840,

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118. Case of Philadelphia & T.R. Co., 6 Whart. 25 (Pa. 1840).

119. Commonwealth *ex rel.* Leech v. Canal Comm'rs, 5 Watts & Serg. 388, 394 (Pa. 1843).

120. Cal. State Tel. Co. v. Alta Tel. Co., 22 Cal. 398, 423–25 (1863).

121. *Id.* at 422–23.

122. *Id.*

a New York court held that grants of exclusive privilege "should not be favored" and could "only be made in order to accomplish some important object of public good, not otherwise so well or fully attainable."[123] And even the Pennsylvania Supreme Court eventually came around to the view that monopoly was unlawful when granted for private gain as opposed to public benefit.[124]

Other courts showed little hesitation in invalidating monopoly grants. For example, in 1831 the Illinois Supreme Court invalidated a county's grant of an exclusive right to run a ferry, holding that the county had no express power to grant monopolies and that monopolies cannot be conferred by implied grants of power.[125] Courts struck down a New York City ordinance granting the privilege to lay a railroad track as an unconstitutional "perpetual monopoly,"[126] a North Carolina statute granting the perpetually exclusive right to erect a bridge over stream,[127] various municipal ordinances granting the exclusive privilege to lay gas pipes through city streets,[128] a city's exclusive contract with a water company for 25 years,[129] a contract between a city and developer to build a luxury hotel with exclusive rights to sell liquors within city limits, [130] a county's grant of an exclusive privilege to transport passengers across a river within three miles of town,[131] and a provision in a corporate charter granting the corporation an exclusive privilege of manufacturing and selling gas in St. Louis.[132]

As antimonopoly as a limitation on governmental power became an established principle, courts wrestled with

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123. Thompson v. People *ex rel.* Taylor, 23 Wend 537, 554 (N.Y. 1840).

124. Phila. Ass'n for Relief of Disabled Firemen v. Wood, 39 Pa. 73, 82–83 (1861).

125. Betts v. Menard, 1 Ill. (Breese) 395, 400 (1831); *see also* Gales v. Anderson, 13 Ill. 413 (1851) (holding that county commissioners had no authority to grant exclusive ferrying privileges).

126. Milhau v. Sharp, 9 How. Pr. 102, 109 (N.Y. Sup. Ct. 1853).

127. McRee v. Wilmington & Raleigh R.R. Co., 47 N.C. (2 Jones) 186 (1855).

128. Norwich Gas Light Co. v. Norwich City Gas Co., 25 Conn. 19 (1856); Parkersburg Gas Co. v. City of Parkersburg, 4 S.E. 650 (W. Va. 1887); Citizens' Nat. Gas & Mining Co. v. Town of Elwood, 16 N.E. 624 (Ind. 1888).

129. Altgelt v. City of San Antonio, 17 S.W. 75 (Tex. 1890).

130. Mayor of Jackson v. Bowman, 10 George 671 (Miss. High Ct. Err. & App. 1861).

131. Wash. Toll Bridge Co. v. Comm'rs of Beaufort, 81 N.C. 491 (1879).

132. St. Louis Gas-Light Co. v. St. Louis Gas, Fuel & Power Co., 16 Mo. App. 52 (Mo. Ct. App. 1884).

categorization questions: When was a governmental grant a prohibited monopoly? Courts distinguished between an unlawful grant of monopoly, which required "the right to exclude others from the exercise or enjoyment of like privileges or franchises," and the grant of special privileges, which might serve the public interest.[133] They held that, definitionally, a grant of exclusive privilege (such as a ferry company's rights to use a wharf) was not a monopoly within the Maryland Bill of Rights' prohibition, since a privilege to be exercised for the public benefit is not a monopoly.[134] They held that whatever general objections there may be to the creation of monopolies, those are overcome with respect to ferries which are necessary to the public advantage.[135] And they held that a general banking law that allowed entities to incorporate banks was not unconstitutional; although the incorporated banks had all the essential features of corporate bodies, they did not partake of "character of monopolies or special grants of privilege."[136]

A related set of judicial techniques straddled the line between direct confrontation with legislatures and municipal governments and the late-nineteenth century turn toward a focus on privately acquired power (discussed in Part II C 4). Courts sometimes construed legislative grants narrowly to prevent the acquisition of private power that, if derived from a grant by the state, might run afoul of constitutional limitations. Thus, foreshadowing the extensive use of the *quo warranto* action in the later nineteenth century,[137] some early nineteenth century cases narrowly construed corporate charters to prohibit actions by the firm that might extend corporate power. In 1819, the Kentucky Court of Appeals held that the Bank of the United States had no power to acquire a private note, observing that the powers of corporations with "extensive and monopolizing character" ought to be strictly construed.[138] Similarly, in 1844, the Supreme Court of Michigan held that a corporate charter allowing a bank to purchase land for the convenient transaction of its business did not permit the bank to buy and sell land

133. *In re* Application of Union Ferry Co., 98 N.Y. 139, 150 (1885).
134. Broadway & Locust Point Ferry Co. v. Hankey, 31 Md. 346 (1869).
135. Burlington & Henderson Cnty. Ferry Co. v. Davis, 48 Iowa 133 (1878).
136. Curtis v. Leavitt, 17 Barb. 309 (N.Y. Gen. Term 1853).
137. *See* Crane, *supra* note 41 at 14.
138. Bank of U.S. v. Norvell, 9 Ky, (2 A.K. Marsh) 101, 105 (1819).

for profit, which was necessary to "prevent monopolies, and to confine those powerful bodies strictly within their proper sphere."[139]

The antimonopoly principle limited the state's power to create monopolies, but also to undo them. For instance, when the Louisiana legislature tried to abrogate a gas-light monopoly previously granted, the state Supreme Court held that it had unlawfully impaired the obligation of contracts.[140]

2. *Antimonopoly as Police Power*

If the antimonopoly principle served to limit the power of the state, as just seen, it also served the opposite purpose—expanding the state's police power to regulate on economic matters. From early in the nineteenth centuries—decades before *Munn*—courts held that preventing monopoly was a legitimate reason for the exercise of state regulatory power.[141] Thus, for example, in 1839, the New York Supreme Court of Judicature rejected a challenge to a New York statute expanding the availability of licenses to establish offices of discount, deposit, and circulation—essentially, banks.[142] The court contrasted the legislative creation of monopolies which entailed "the attendant corruption of legislation," to legislative acts "opening the field to all," which could not be unconstitutional.[143] In 1858, the Wisconsin Supreme Court held that chartered monopolies such as a municipal gas service, being "repugnant to the genius and spirit of our republican institutions," could be held accountable to public regulation "to meet the convenience or necessity which tolerates their existence."[144]

The development of new technologies in the Civil War and Reconstruction eras led to an expansion of this antimonopoly police power.[145] Drawing on the common carrier tradition,

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139. Bank of Mich. v. Niles, 1 Doug. 401, 405 (Mich. 1844).

140. New Orleans Gas Co. v. La. Light Co., 115 U.S. 650 (1885).

141. Aldridge v. Tuscumbia, Cortland. & Decatur. R.R. Co., 2. Stew. & P. 199, 204 (Ala. 1832) ("The sovereign authority is frequently exerted over personal rights and private property. It is done in the enforcement of all quarantine regulations—for the prevention of monopolies . . . .")

142. Thomas v. Dakin, 22 Wend. 9 (N.Y. Sup. Ct. 1839).

143. *Id.* at 30–32.

144. Shepard v. Milwaukee Gas Light Co., 6 Wis. 539, 547 (1858).

145. The economic dislocations caused by the Civil War also prompted judicial decisions recognizing a broad legislative power to combat monopoly. For example, in 1869, the Georgia Supreme Court invoked the prevention of

courts held that monopoly power of railroads justified imposition of a non-discrimination obligation, such as prohibiting the charging of higher rates on freight to be carried on another route after reaching the railroad's terminus.[146] In an 1869 decision, Maine's highest court held that a railroad that had granted exclusive use of a separate apartment in a car attached to each of its passenger trains, for the purpose of transporting the express company's messenger and merchandise was liable for damages to another express carrier excluded by this arrangement.[147] "The very definition of a common carrier excludes the idea of the right to grant monopolies or to give special and unequal preferences."[148] The common carrier, being itself a species of monopoly, had no power to grant further monopolies of its own. The courts held that parties that accepted monopoly rights also had to accept regulation of their business conduct.[149]

As with respect to the cases limiting the state's power to grant exclusive privileges, one of the questions raised in these cases was what sort of economic power constituted a monopoly sufficient to justify the exercise of the state's police power. As discussed in greater detail below, many courts were uncertain until well into the nineteenth century whether economic power acquired through private conduct rather than the grant of exclusive rights from the state met the definition of monopoly. Following *Munn*, the courts began to hold that the state's regulatory power was not dependent upon the presence of "legal monopoly" but could also apply in a case of "practical monopoly."[150] The New York Court of Appeals considered

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monopoly as a justification for a reconstruction homestead measure preventing creditors from seizing distressed assets. Hardeman v. Downer, 39 Ga. 425 (1869).

146. Twells v. Pa. R.R. Co., 2 Walk. 450 (Pa. 1863); *see also* Buffalo E. Side R.R. Co. v. Buffalo St. R.R. Co., 19 N.E. 63 (N.Y. 1888) (upholding statute regulating street car rates); Currier v. Concord R.R. Corp., 48 N.H. 321 (1869) (upholding antimonopoly railroad legislation); *cf.* City of St. Louis v. Bell Tel. Co., 10 S.W. 197 (Mo. 1888) (conceding that telephone company was a monopoly, but holding that municipality had no power to regulate telephone rates).

147. New England Express Co. v. Me. Cent. R.R. Co., 57 Me. 188 (1869).

148. *Id.* at 196–97.

149. Laurel Fork & Sand Hill R.R. Co. v. W. Va. Transp. Co., 25 W. Va. 324 (1884) (citing Aldnutt v. Ingels, 12 East 537, for proposition that party who accepts a monopoly must "as an equivalent perform the duty attached to it").

150. People v. Budd, 22 N.E. 670, 675 (N.Y. 1889).

Munn's application to legislation fixing the maximum charge for elevating grain.[151]

This pro-regulatory turn in the antimonopoly tradition would perhaps have the widest implications for economic policy in the twentieth century. As Bill Novak has written, this sense of "American antimonopoly was first and foremost a question of the democratic distribution of power and authority in a supposedly self-governing republic" and "generated the template for a modern law of regulated industries."[152]

3. *Antimonopoly as Anti-Regulation*

A third strand of antimonopoly legal doctrine concerned constitutional limitations on the states' power to legislate on a class basis or in favor of narrowly defined interest groups.[153] Like the first category and unlike the second, this set of doctrines operated to constrain rather than expand state power, when successfully invoked.

The success of this line of antimonopoly argument has been underestimated given its failure in the *Slaughter-House Cases*. There, the butcher-plaintiffs explicitly positioned their argument on antimonopoly grounds, reading Coke's report of *Darcy v. Allein* to the Court,[154] and Justice Field's dissenting opinion expressed sympathy to their assertion of a constitutional antimonopoly tradition.[155] However, the majority rejected the butchers' interpretation of the Reconstruction Amendment, reading down the privileges and immunities clause of the Fourteenth Amendment to a narrow scope incapable of carrying the weight of the antimonopoly tradition.

But the success of antimonopoly as anti-regulation was more mixed in the state courts. Two years after *Slaughter-House*,

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151. *See also* City of Zanesville v. Zanesville Gas-Light Co., 23 N.E. 55, 60 (Ohio 1889) (holding a gas company's "virtual monopoly" of gas supply gives state power to regulate gas prices); Spring Valley Water Works v. City of San Francisco, 22 P. 910 (Cal. 1889) (upholding ordinance requiring water company to furnish water meter).

152. William Novak, New Democracy: The Creation of the Modern American State 183–84 (2022).

153. *See* Calabresi & Leibowitz, *supra* note 6 at 1023–42.

154. *Id.* at 1042–43.

155. *See also* Bartemeyer v. Iowa, 85 U.S. 129, 136 (1873) (Bradley, J., concurring) (arguing for a constitutional right to be free from "tyrannical and corrupt monopolies" that limit a person's right to pursue "such lawful avocation" as they choose).

the Illinois Supreme Court invalidated a similar slaughter-house ordinance, invoking antimonopoly principles.[156] Similarly, the Supreme Court of California held that an exclusive corporate franchise to lay down water pipes in San Francisco could not be granted by special legislation, but only by a general act.[157] The requirement of general legislation was necessary to prevent the past practice of "hasty or corrupt legislation" creating "great monopolies" where "[c]apital was aggregated in the hands of large corporations" with "[e]xtraordinary privileges [and] oppressive powers . . . denied to others engaged in the same business."[158] Such schemes might be tolerable if they could be corrected by subsequent legislatures, but given that legislative grants once made could not be repealed because of the Contracts Clause, democratic self-correction was not an available remedy.[159] Although the Supreme Court had upheld such a scheme in the *Slaughter-House Cases* as a matter of federal constitutional law, it could not pass muster under the California constitution. On the other hand, the Louisiana Supreme Court backed off, holding that "however odious monopolies may be," it was up to the people and their elected representatives to determine whether to exercise the "unwise, unfair, and arbitrary power" of granting exclusive rights.[160] The court subsequently upheld challenges to slaughter-house ordinances under the provision of the Louisiana constitution prohibiting special privileges and monopolies.[161]

Other courts took from the *Slaughter-House Cases* the moral that restrictions on commercial activity would be upheld only insofar as they involved "police regulation… necessary for the health and comfort of the people," and that otherwise the restrictions might still be invalidated as "odious" monopolies.[162]

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156. City of Chicago v. Turner, 80 Ill. 419 (1875); Tugman v. City of Chicago, 78 Ill. 405 (1875).

157. City & Cnty of San Francisco v. Spring Valley Water Works, 48 Cal. 493 (1874).

158. *Id.* at 511.

159. *Id.* at 511–12.

160. Crescent City Gaslight Co. v. New Orleans Gaslight Co., 27 La. Ann. 138, 146–47 (1875).

161. Commonwealth v. Whipps, 80 Ky. 269, 278 (1882).

162. Crescent City Live Stock Landing & Slaughter-House Co. v. City of New Orleans, 33 La. Ann. 934 (1881); *see also* Mueller v. State, 76 Ind. 310, 314 (1881) (affirming conviction of a hotel-keeper for selling cigars on Sunday in violation of a blue law and rejecting defendant's argument that the statute did not apply to an inn-keeper furnishing his own guests on the ground that

There was older precedent for the idea of applying antimonopoly as a constraint on regulations that did not serve the public interest and often involved political patronage or rent-seeking. In 1828, the Massachusetts Supreme Court had upheld a by-law of the City of Boston prohibiting anyone not licensed by the mayor or aldermen from removing dirt or offal from the city.[163] Rejecting arguments that the by-law was a "restraint of trade and operates as a monopoly," the court distinguished an English decision invalidating a London by-law requiring that carmen be licensed by paying a fee to a hospital warden as one involving "private benefit of the wardens of the hospital" as opposed to benefit to the public at large.[164] By contrast, the Boston by-law was made for the health of the inhabitants, and therefore was reasonable.[165]

Mid-to-late nineteenth century state courts showed themselves quite willing to invalidate regulations that limited market participation and entrenched incumbent economic interests. Courts read state constitutional prohibitions on "perpetuities and monopolies" as prohibiting all "partial and class legislation."[166] Liquor licensing provided a fount of antimonopoly claims. In 1855, the Indiana Supreme Court invalidated a state statute prohibiting the sale of liquors except by certain authorized county agents as an unconstitutional enactment of monopoly.[167] In 1884, the Arkansas Supreme Court applied the provision of its constitution prohibiting the grant of "perpetuities and monopolies" to hold that liquor licenses could not be arbitrarily withheld from qualified applicants.[168] While wrestling with the meaning of "monopoly," the court ultimately determined that monopoly consisted of the "sole power to sell," which amounted to an abuse recalling the "oppressive measures of the

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this would give inn-keepers a competitive advantage over keepers of boarding houses, restaurants, or other dealers in cigars, with the effect of creating "odious and intolerable monopoly"); State v. Ohmer, 34 Mo. App. 115 (1889) (upholding conviction under similar ordinance).

163. *In re* Vandine, 23 Mass. (6 Pick.) 187 (1828).

164. *Id.* at 191.

165. *Id.* at 192.

166. Simonton v. Lanier, 71 N.C. 498, 503 (N.C. 1874) (provision in bank charter allowing bank to lend at interest rates agreed between parties could not be read to immunize bank from statutory usury ceilings without running afoul of state constitutional prohibition on granting perpetuities and monopolies).

167. Beebe v. State, 6 Ind. 501 (1855).

168. *Ex parte* Levy, 43 Ark. 42, 52 (1884).

Tudors and Stuarts."[169] Even courts that upheld restrictions on liquor sales tipped their hats to the antimonopoly tradition. In upholding a liquor blue law, the Pennsylvania Supreme Court observed that "monopolies are odious. Freedom of trade is a natural right which government has no authority to interfere with, except under pressure of some great public exigency."[170] Similarly, in the context of upholding a heavy municipal tax on saloons, the Michigan Supreme Court observed that "[i]t has always been considered improper to pass by-laws in restraint of trade, as tending to discourage enterprise and create monopolies", except in circumstances where the conduct restrained was dangerous to the public—which liquor presumably was.[171]

Regulations on many other sectors of the economy fell prey to the antimonopoly principle: a municipality's effort to prevent private individuals from surveying city lots in order to protect the city surveyor;[172] a municipal ordinance restricting peddling;[173] municipal ordinances prohibiting sale of meat outside public markets;[174] and a statute regulating the issuance of insurance policies.[175] Representatively, in 1880, the New Jersey Supreme Court struck down a Long Branch ordinance requiring the licensure of hawkers and peddlers.[176] The court reasoned that the ordinance could not operate as a tax, since the legislature had not granted municipalities the power to tax trade, nor could it operate as a regulation, since it did not fall within the police power relating to public health, morals, and order. Consequently, the ordinance was "in restraint of trade" and its

169. *Id.* at 53.

170. Omit v. Commonwealth, 21 Pa. 426, 434 (1853).

171. Kitson v. City of Ann Arbor, 26 Mich. 325, 327 (1873).

172. City of Cincinnati v. Broadwell, 3 Ohio Dec. Reprint 286 (Ct. Com. Pl. Ohio 1857); *see also* Scribner v. Chase, 27 Ill. App. 36 (1886) (invalidating county regulation prohibiting private abstract and recordation companies from using abstractor's office).

173. Sipe v. Murphy, 31 N.E. 884 (Ohio 1892).

174. City of St. Paul v. Laidler, 2 Minn. 190 (1858) (invalidating ordinance); Town Council of Winnsboro v. Smart, 45 S.C.L. 551 (S.C. Ct. App. 1858) (upholding ordinance); *see also* Ash v. People, 11 Mich. 347 (1863) (upholding similar ordinance); City of Chicago v. Rumpff, 45 Ill. 90 (1867) (invalidating similar ordinance as creating monopoly); City of St. Louis v. Weber, 44 Mo. 547 (1869) (upholding similar ordinance); State v. Fisher, 52 Mo. 174 (1873) (rejecting argument that statute regulating trafficking in dead animal carcasses was in restraint of trade and creating a monopoly; statute well within police power).

175. Commonwealth v. Vrooman, 30 A. 217 (Pa. 1894).

176. Mülenbrinck v. Long Branch Comm'rs, 42 N.J.L. 364 (N.J. 1880).

"direct tendency [was] to create monopoly."[177] Particularly vulnerable to the antimonopoly axe were municipal ordinances that favored residents at the expense of non-residents.[178]

State courts frequently diverged on the application of the antimonopoly principle as applied to regulations ostensibly connected to health and safety. As already noted, the courts divided on regulations prohibiting the sale of meat outside of public markets.[179] In 1888, the Supreme Court upheld a Pennsylvania statute prohibiting the manufacture or sale of oleomargarine as within the state's police power.[180] But, three years before, the New York Court of Appeals struck down a similar statute on expressly antimonopoly grounds.[181] To the New York court, the legislation reflected an effort to protect butter manufacturers from competition and hence fell squarely within the common law's anti-monopoly principle running back to the *Case of Monopolies.*[182]

As with all antimonopoly questions, contestation over the shifting and controverted meaning of "monopoly" played a central role in these anti-regulatory battles. To apply antimonopoly to invalidate regulatory schemes required stretching the concept from a formal grant of an exclusive right to include state interventions in the market that had that same effect—to shift from a formal to a functional conception of monopoly. But the plasticity of the concept of monopoly equally permitted

177. *Id.* at 369.

178. *Ex parte* Frank, 52 Cal. 606 (1878) (invalidating ordinance setting a higher license fee for goods sold outside the city than for those sold within); Borough of Conshohocken v. Fennel, 5 Pa.C.C. 65 (Ct. Com. P. Pa. 1888) (invalidating higher fee charged to non-resident vendors than to residents); Village of Braceville v. Doherty, 30 Ill. App. 645 (1888) (invalidating ordinance permitting peddling only by residents); State v. Pennoyer, 18 A. 878 (N.H. 1889) (invalidating ordinance containing an exception requiring physicians who had not previously practiced in the town to obtain a license); State v. Pendegrass, 10 S.E. 1002 (N.C. 1890) (noting that municipalities may not regulate in ways that create monopolies or benefit one class of citizens over another); Simrall v. City of Convington, 14 S.W. 369 (Ky. Ct. App. 1890) (stating that municipal rules must preserve equality of right and avoid discrimination in order to prevent creation of monopoly); State v. Tenant, 14 S.E. 387 (N.C. 1892) (asserting that municipalities cannot use their power to create monopoly); City of Peoria v. Gugenheim, 61 Ill. App. 374 (1895) (invalidating ordinance discriminating against itinerant merchants).

179. *See supra* note 174.

180. Powell v. Pennsylvania., 127 U.S. 678 (1888).

181. People v. Marx, 2. N.E. 29 (N.Y. 1885).

182. *Id.* at 386.

movement in the opposite direction. In upholding a statute restricting the sale of liquor in 1894, the Supreme Court of South Carolina held that "[t]he doctrine of 'monopoly' cannot be applied to a state exercising its governmental functions."[183] This was a complete inversion of the earlier understanding that monopoly could *only* arise from an intervention by the state in the market, but it reflected an initially subtle and then dramatic shift that occurred over the course of the nineteenth from a preoccupation with public power to one with private power.

4. *Antimonopoly as Control of Privately Acquired Economic Power*

Though concerns with private economic power are traceable back to the common law roots of the antimonopoly tradition, throughout much of the nineteenth century the dominant understanding of what constituted a "monopoly" was a grant of exclusive privilege from the state. As late as 1878, jurist Thomas Cooley would devote ninety percent of his essay on monopolies to state-granted exclusive rights, before turning almost as an afterthought to "monopolies not created by the legislature."[184] Similarly, as late as 1886, Christopher Tiedeman would assert in his *Treatise on the Limitations of Police Power in the United States* that "i[t] is only in extraordinarily abnormal cases that any one man can acquire this power over his fellow-men, unless he is the recipient of a privilege from the government, or is guilty of dishonest practices."[185] In 1884, the Texas Supreme Court held that exclusive right or privilege conferred by government is "a very essential element to constitute a monopoly."[186]

Despite the predominant emphasis on monopoly as exclusive public charter, some early nineteenth century cases did recognize the potential for private agreements to create monopoly, although the tendency of the courts was to uphold private contracts restraining competition as against claims of monopoly. For instance, in an 1811 decision upholding an agreement

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183. State *ex rel.* George *v.* City Council of Aiken, 20 S.E. 221, 228 (S.C. 1894).

184. Thomas M. Cooley, *Limits to State Control of Private Business*, 1 Princeton Rev. 233 (1878).

185. Christopher G. Tiedeman, A Treatise on the Limitations of Police Power in the United States 242 (1886).

186. Macdonnell v. Int'l & Great N. R.R. Co., 60 Tex. 590 (1884).

for the defendant not to run his stagecoach on a particular road where the plaintiff was operating his own coach, the Massachusetts Supreme Court observed that "[b]onds to restrain trade in general are unquestionably bad, as tending to create a monopoly injurious to the public. But bonds to restrain trade in particular places may be good, if executed for a sufficient and reasonable consideration."[187] In an 1815 opinion, the same court referred to a private agreement to monopolize the selling of hats.[188] An 1825 Maine decision upheld as against claims of monopoly an agreement between printers and booksellers that the printers would not print extra copies of the book for their own use.[189] The New Jersey Supreme Court invalidated an agreement wherein a United States postmaster promised to pay another person $1,000 not to apply for the postmaster position in 1828.[190] In 1835, a New York court outlawed a conspiracy of journeymen workmen to raise wages as "a monopoly of the most odious kind."[191]

In the early nineteenth century, the general attitude of the courts expressed skepticism that private agreement could create anything like monopoly. Conversely, courts also questioned the value of competition, as the Massachusetts Supreme Court did in 1825 in upholding an agreement for exclusive carriage of the defendant's goods up and down the Connecticut river, accompanied by the stipulation that the defendant would not "encourage any other boat man to compete with the obligee in the business of boating."[192] The court opined that "[i]t would be extravagant to suppose that any one, by multiplying contracts of this kind, could obtain a monopoly of any particular trade," and cast doubt on the value of commercial competition altogether:

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187. Pierce v. Fuller, 8 Tyng 223, 225 (Mass. 1811).

188. Emerson v. Providence Hat Mfg. Co., 12 Tyng 237 (Mass.1815); *see also* Taylor v. Owen, 2 Blackf. 301 (Ind. 1830) (holding owner of a town permitted right of monopoly over vending merchandise in the town); Ratcliffe v. Allison, 3 Rand. 537, 54 (Va. 1825) (referring to tavern owner's desire to "monopolize" tavern business through control of real estate); Jones v. Watkins, 1 Stew. 81, 100 (Ala. 1827) (reporting that bill charged defendant with monopolizing money supply).

189. Williams v. Gilman, 3 Me. 276 (1825).

190. Gulick v. Ward, 10 N.J.L. 87 (N.J. 1828).

191. People v. Fisher, 14 Wend. 9, 19 (N.Y. Sup. Ct. 1835).

192. Palmer v. Stebbins, 3 Pick, 188 (Mass. 1825).

> Whether competition in trade be useful to the public or otherwise, will depend on circumstances. I am rather inclined to believe, that in this country at least, more evil than good is to be apprehended from encouraging competition among rival tradesmen or men engaged in commercial concerns. There is a tendency, I think, to overdo trade, and such is the enterprise and activity of our citizens that small discouragements will have no injurious effect in checking in some degree a spirit of competition.[193]

In one of the earliest opinions clearly identifying the private aggregation of economic power as a monopoly problem, the Supreme Judicial Court of Massachusetts invalidated a bond conditioned on the obligor's agreement never to participate in the iron founding business.[194] With resonances of *The Case Against Monopolies*,[195] but now focused not on government grants of exclusive privilege but rather on power obtained through purely private means, the court enumerated five evils of monopoly: (1) injury to the parties themselves through deprivation of livelihood; (2) deprivation to the public of the most suitable persons being in particular lines of business; (3) discouragement of industry, enterprise, ingenuity, and skill; (4) prevention of competition and enhancement of prices; and (5) particular "evils of monopoly" arising from "wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business and engross the market."[196]

Courts in the late Antebellum Era continued to wrestle with the meaning of monopoly as applied to private agreements. In 1851, the Supreme Court of Wisconsin upheld an exclusive dealing agreement between a group of warehousemen and a group of flour mills which effectively restricted the wheat business in Milwaukee to the parties to the agreement.[197] The court recognized that private monopoly agreements were unlawful, but held that the exclusive contract was not of a monopolistic nature because it only committed the parties

193. *Id.* at 192–93.
194. Alger v. Thacher, 19 Pick. 51, 54 (Mass. 1837).
195. The Case of Monopolies, *supra* note 8.
196. *Alger*, 19 Pick. at 54.
197. Kellogg v. Larkin, 3 Pin. 123 (Wis. 1851).

to exclusivity among themselves but did not restrict the rights of third parties to participate in the market.[198] Similarly, on the authority of *Mitchel v. Reynolds*,[199] the Georgia Supreme Court upheld a deed restriction prohibiting the property from being used as a tavern, observing that "special" as opposed to "general" restraints might be "beneficial to the public" by "keeping a particular place" from being "overstocked with persons engaged in the same business."[200] The Iowa Supreme Court upheld an identical restriction, finding that there could be no monopoly in a restraint on competition in a particular town, as there would if the restraint extended "throughout the kingdom."[201] Other opinions similarly rejected antimonopoly claims as to contractual restraints on competition that were local or geographically restricted in nature.[202] Contractual grants of exclusive rights by a single company to a single grantee were held not a monopoly.[203] Courts also distinguished between "partial restraints," which were upheld, and monopoly, which might be invalidated.[204]

Gradually, courts began to consider the antimonopoly principle as more broadly applicable. In *Taylor v. Blanchard*,[205] a significant 1866 decision, the Massachusetts Supreme Court invalidated a contract committing one of the parties "not to set up, exercise or carry on the trade or business of manufacturing shoe-cutters within the Commonwealth of Massachusetts." The court began by asserting that "[t]he law has always regarded monopolies as hostile to the rights and interests of the

198. *Id.* at 145–46 ("[A]ll the rest of Wisconsin was an open and unrestricted market for the sale of wheat. And even in Milwaukee, the market was open to the fiercest competition of all the world, except these obligors").

199. Mitchel v. Reynolds (1711) 24 Eng. Rep. 347 (KB).

200. Holmes v. Martin, 10 Ga. 503, 505 (1851).

201. Heichew v. Hamilton, 3 Greene 596, 598 (Iowa 1852).

202. Grasselli v. Lowden, 11 Ohio St. 349 (1860); Arnold Bros. v. Kreutzer & Wasem, 25 N.W. 138 (Iowa 1885) (upholding contract ancillary to sale of furniture business for seller not to sell furniture within two miles of former business); Diamond Match Co. v. Roeber, 13 N.E. 419 (N.Y. 1887) (upholding covenant not to compete in same line of business that was sold).

203. Cal. Steam Navigation Co. v. Wright, 6 Cal. 258, 262 (1856).

204. Laubenheimer v. Mann, 17 Wis. 542, 544 (1863); see also Brewer v. Lamar, 69 Ga. 656 (1882) (distinguishing between general and partial restraints of trade); Sutton v. Head, 5 S.W. 410 (Ky. Ct. App. 1887) (distinguishing between general restraints and special restraints); Newell v. Meyendorff, 9 Mont. 254, 259 (1890) (upholding exclusive contract to distribute particular brand of cigars in Montana).

205. Taylor v. Blanchard, 95 Mass. 370 (1866).

public."[206] One method of obtaining monopolies—the one with which the antimonopoly tradition had been most concerned—was "by grant from the sovereign to a particular individual of the sole right to exercise a particular trade."[207] But there was also a second method of obtaining the same disfavored result—"private contracts, in which one of the parties agreed not to engage in some specified trade or business."[208] As to these private restraints of trade, the court acknowledged that other courts had upheld them if only "partial and limited."[209] The plaintiff, who sought to enforce the contract, argued that this principle required upholding the Massachusetts-wide restriction, since it involved a single state and a "comparatively small" one at that.[210] The court demurred, observing that it saw no reason that "the extent of territory embraced in a state affects the principle," since even geographically limited restraints could have anticompetitive effects.[211]

Similarly, an 1871 decision of the Pennsylvania Supreme Court invalidated a cartel agreement between two coal companies involving the division of regions and a joint management committee to fix prices.[212] The court repeated the maxim that a restraint being merely "partial" was necessary to its legality, but added that the restraint must also satisfy an independent reasonableness criterion.[213] Conversely, contracts that operated

206. *Id.* at 372.
207. *Id.*
208. *Id.* at 373.
209. *Id.* at 374.
210. *Id.* at 375.
211. *Id.*
212. Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173 (1871).
213. *Id.* at 185; *see also* McBirney & Johnston White Lead Co. v. Consol. Lead Co., 8 Ohio Dec. Reprint 310 (1883) (stating that legality of contract restraining trade depends on whether it imposes reasonable limits and for a reasonable length of time); Bishop v. Palmer, 146 Mass. 469, 473 (1888) (stating that contracts in restraint of trade invalid if broader than necessary to protect party's legitimate interests); Wright v. Ryder, 36 Cal. 342 (1868) (invalidating agreement by steamboat purchaser not to run it in California for ten years as void as in restraint of trade); Crawford & Murray v. Wick, 18 Ohio St. 190 (1868) (invalidating provision in coal mine lease that lessee should not give or accept any order for goods or merchandise on any store other than lessor's); Indianapolis, Pittsburgh & Cleveland R.R. Co. v. Allen, 31 Ind. 394 (1869) (stating that contract never to carry on a particular line of business void as it "prevents competition, enhances prices, and exposes the community to all the evils of monopoly"); More v. Bennett, 41 Ill. App. 164 (1891) (invalidating agreement by members of stenographer association to be bound by association's rate schedule); Arnot v. Pittson & Elmira Coal Co.,

state-wide might survive reasonableness review.[214] On the other hand, courts began to uphold restraints on competition that extended even to the entire geographic area of a state when there was a bona fide reason for restricting competition in that broad an area.[215] In 1876, the New York Court of Appeals found nothing wrong with an agreement between two Civil War recruiters who had agreed not to compete with each other or to furnish recruits for less than $500.[216] Since neither party controlled recruits and there were many other recruiters, the purpose of the agreement was not shown to be monopolistic.[217] The advent of the railroads and telegraph precipitated ever-increasing efforts to consider dominant infrastructure firms as problems of monopoly. Courts routinely invalidated discriminatory rates and exclusive contracts by railroads as monopolistic without fretting over whether the railroad's economic power derived from a state grant, natural monopoly, or the railroad's sharp-elbowed practices.[218] A general pro-competition principle was working its way into the law.[219] In

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68 N.Y. 558 (1877) (stating that agreement between two coal mines that one would buy all of other's coal for resale void as in restraint of trade); Cent. Ohio Salt Co. v. Guthrie, 35 Ohio St. 666 (1880) (invalidating agreement of association of salt manufacturers to sell at prices fixed by a committee).

214. Herreshoff v. Boutineau, 21 A. 908 (R.I. 1890).

215. Beal v. Chase, 31 Mich. 490, 520 (1875).

216. Marsh v. Russell, 66 N.Y. 288 (1876).

217. *Id.* at 291–92.

218. Chi. & N.W. Ry. Co. v. People, 56 Ill. 365 (Ill. 1870) (invalidating railroad's grant of exclusive grain deliveries); Erie Ry. Co. v. Union Locomotive & Express Co., 35 N.J.L. 240 (N.J. 1871) (invalidating railroad contract to carry cargo for one shipper and not any other shipper); Messenger v. Pa. R. Co., 37 N.J.L. 531 (N.Y. Ct. Errors and Appeals 1874) (contract with railroad company giving certain persons exclusive access as against other shippers invalid on common carrier grounds); Scofield v. Lake Shore & M.S.R. Co., 43 Ohio St. 571 (Ohio 1885) (invalidating railroad's grant of rebate from published tariff to shipper that placed greater quantity of freights with railroad); Lake Shore & M.S.R. Co. v. Scofield, Shurmer & Teagle, 1 Ohio Cir. Dec. 5000 (Oh. Cir. Ct. 1887) (invalidating discriminatory rates granted to favored shipper); Christie v. Mo. Pac. Ry. Co., 94 Mo. 453 (Mo. 1888) (railroad may not offer lower rate to favored shipper); State *ex rel.* Kohler v. Cincinnati, W. & B. Ry Co., 47 Ohio St. 130 (Ohio 1890) (railroad has no right to discriminate in freight rates if discriminating will tend to create monopoly); Menacho v. Ward, 27 F. 529 (S.D.N.Y. 1886) (holding that common carrier cannot charge shippers a higher rate if they refuse to patronize the shipper exclusively).

219. *See, e.g.*, W. Union Tel. Co. v. Burlington & S.W. Ry. Co., 11 F. 1, 11 (D. Iowa 1882) (invalidating contract giving telegraph company a "practical monopoly" over "commodities, competition in the production and sale of

1855, the Pennsylvania Supreme Court invalidated a railroad's contract giving a shipping company exclusive access to its passenger trains (as opposed to its slower freight trains), holding that "[c]ompetition is the best protection to the public, and it is against the policy of the law to destroy it by creating a monopoly of any branch of business."[220] Similarly, the wave of Gilded Age corporate mergers led courts to search for new antimonopoly vocabulary to invalidate "combinations" that harmed competition.[221]

As courts began to reflect increasingly on the problem of privately created monopoly in the second half of the nineteenth century, they often borrowed conceptual rhetoric from the public antimonopoly tradition. Thus, for example, in 1857 a New York court found that the permanent keeping of a floating dock for vessel repair at Pike Sleep in the East River was an unauthorized nuisance, illegal because of its tendency to create a monopoly.[222] The court held that "[t]he assumption of a franchise or exclusive privilege, or, in other words, the setting up of a monopoly, unless sanctioned by the legislature, is, in law, a nuisance."[223] The idea of monopoly as "nuisance" had long been reflected in the case law limiting governmental power to grant monopolies. Now the concept was flipped, with a privately procured monopoly being a "nuisance" in the sense of tort law.

Similarly, in 1870 the Supreme Court of Washington (still then a Territory) transposed the tradition against publicly granted monopolies into a prohibition on private monopoly—in that case, an agreement between Washington citizens and an Oregon corporation not to run a steamboat or allow its

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which is essential to the well-being of the community); Sharp v. Whiteside, 19 F. 156 (E.D. Tenn. 1883).

220. Sanford v. Catawissa, 24 Pa. 378, 382 (Pa. 1855).

221. Richardson v. Buhl, 77 Mich. 632 (Mich. 1889) (finding illegal a company created to buy up match companies in order to create a monopoly); People *ex rel* Peabody v. Chi. Gas Trust Co., 130 Ill. 268 (Ill. 1889) (granting quo warranto writ against company formed for illegal purpose of buying up gas or electric companies); State *ex rel* Atty. Gen. v. Standard Oil Co., 49 Ohio St. 137 (Ohio 1892) (agreement of stockholders to transfer shares to trustee in consideration of agreement of shareholders of competitor companies to do the same illegal as tending to create monopoly); Distilling & Cattle Feeding Co. v. People, 156 Ill. 448 (Ill. 1895) (trust combination of distillery companies illegal as creating monopoly).

222. Hecker v. N.Y. Balance Dock Co., 13 How. Pr. 549, 551–52 (N.Y. Sup. Ct. 1857).

223. *Id.* at 551.

machinery to be employed on any other boat in any of the waters of the States of Oregon or California.[224] Citing English precedent the court began with the premise that "[t]he law always regarded monopolies as hostile to the rights and interests of the public," and that a prohibition on the grant of monopoly rights was as old as Magna Carta (which, as noted earlier, is an exaggeration).[225] A second means of obtaining the same effect—monopoly—arose from "private contracts."[226]

Courts often blended the publicly and privately facing strands of the antimonopoly tradition into a single, comprehensive principle. In 1882, the New Jersey Court of Chancery invalidated a railroad company's purchase of a rival railroad as ultra vires and against public policy.[227] In a lengthy note, the court strung together a series of propositions demonstrating that monopoly had always been prohibited at common law: legislatures were restricted in granting monopolies; monopolies could only be granted expressly, never through implication; municipalities lacked the power to grant monopolies; railroads lacked power to transfer property to other railroads or become their stockholders; and anticompetitive contracts between railroads or between railroads and other parties would not be enforced.[228] That historically these had been quite separate doctrines did not prevent their commingling into a unified antimonopoly principle when the occasion so required.

During the Reconstruction Era, courts gradually began to identify privately acquired economic power in a manner not granted or authorized by law as the primary, perhaps even exclusive, sense in which the law prohibited monopoly. In 1871, the Minnesota Supreme Court teased out this distinction in a case involving an exclusive railroad contract.[229] In the court's view, "a monopoly is not necessarily unlawful, for it may be created, permitted, or tolerated by law."[230] What the law condemned was "unauthorized monopoly," meaning monopoly created through private agreement.[231] On the other hand, "if the right

224. Or. Steam Nav. Co. v. Hale, 1 Wash. Terr. 283 (Wash. 1870).
225. *Id.* at 285.
226. *Id.*
227. Elkins v. Camden & A.R. Co., 36 N.J. Eq. 5 (N.J. Ch. 1882).
228. *Id.* at 5–7.
229. Stewart v. Erie & W. Trans. Co., 17 Minn 372 (Minn. 1871).
230. *Id.* at 395.
231. *Id.*

to exercise a monopoly be conferred by the public authority, that fact is conclusive upon the question of public policy."[232]

The Minnesota court's understanding showcases a stark inversion of the early nineteenth century antimonopoly tradition. In contrast to the dominant understanding of monopoly as an exclusive grant from the sovereign, the Minnesota court found private monopoly to be the primary sense of monopoly. Moreover, in contrast to the long line of cases restricting the state's power to grant monopolies, the Minnesota court thought the state's power clear. The Georgia Supreme Court said much the same in invalidating an agreement between two telegraph companies: "When such exclusive rights exist, or such monopolies are established, the same should be done by a legislative grant, and not by an individual contract."[233] The New Hampshire Supreme Court struck a similar note in holding that a railroad company had no power to enter into a joint management partnership agreement with another railroad: "The public policy of New Hampshire legislation is, and always has been, antagonistic to any and all contracts in any way creating combination, consolidation, or monopoly, without express legislative consent."[234] Here again, these courts inverted the prior sense of antimonopoly. If monopoly should be done at all, it must be done by the state.

With the growth of industrial and commercial activity accompanying the Second Industrial Revolution, courts began to speak of the increasing importance of an antimonopoly policy focused on private agreements. In 1878, in the context of invalidating an exclusive contract for a ferry to shuttle passengers and cargo across the Mississippi River for a railroad, the St. Louis Court of Appeals remarked that "[t]he odious nature of monopoly, early recognized by the English law, has become more apparent as commerce has increased."[235] "The tendency of competition is [] to cheapen values… and also to promote better and do away with inferior methods."[236] But even this was contested. In 1888, the New York Court of Appeals upheld a contract for one steamship line to discontinue running over

232. *Id.* at 395–396.
233. W.W. Tel. Co. v. Am. Union Tel. Co., 65 Ga. 160, 162 (Ga. 1880).
234. Burke v. Concord R.R., 61 N.H. 160, 184 (N.H. 1881).
235. Wiggins Ferry Co. v. Chi. & A.R. Co., 5 Mo. App. 347, 373 (St. Louis Ct. App. 1878).
236. *Id.* at 374.

another's routes, observing that the prior "severity" with which the law had treated contracts in restraint of trade was being gradually relaxed "due mainly to the growth and spread of the industrial activities of the world, and to enlarged commercial facilities, which render such agreements less dangerous as tending to create monopolies."[237] The court believed that there was little present danger of monopolization, except by grants of exclusive powers to corporations.[238]

Even with that public/private dichotomy, it remained to be worked out when a restraint was public or private. In 1871, the Michigan Supreme Court invalidated a contract between the Village of Kalamazoo and a private citizen giving the citizen a right to erect a market house for the Village and the Village then passing an ordinance restricting market activities to that market house.[239] The court invalidated the contract as unlawfully creating a monopoly—not the ordinance that followed.[240]

The transformation in the judicial conception of "monopoly" over the course of the nineteenth century proceeded unevenly. Even while increasingly embracing the view that privately acquired power was a legitimate target of the anti-monopoly principle, courts continued to echo the earlier view equating monopoly with exclusive prerogative granted by the state, as a New York court affirmed in 1862, opining that "[c]orporations, of necessity, are monopolies."[241] As late as 1880, a litigant appeared to persuade the Texas Supreme Court of a distinction between true "monopoly," which required "exclusion by the power of the government," from "virtual monopoly," which might arise by "peculiar advantages or facilities possessed by the monopolist and not susceptible of being acquired by others having equal or superior capital."[242] And, in 1885, the Supreme Court of Nebraska struggled to the observation that

237. Leslie v. Lorillard, 110 N.Y. 519, 532–33 (N.Y. 1888).

238. *Id.* at 533 ("At the present day there is not that danger, or at least it does not seem to exist to an appreciable extent, except, possibly, as suggested, in the case of corporations.").

239. *See* Chi. Gas-Light & Coke Co. v. People's Gas-Light & Coke Co., 13 N.E. 169 (Ill. 1887) (invalidating anticompetitive contract between two gas companies intended to perpetuate their expiring monopoly grants from municipality); State *ex rel.* Boardman v. Lake, 8 Nev. 276 (Nev. 1873) (party granted 10-year franchise by state to maintain toll bridge could not extend monopoly beyond term of grant by purchasing land adjacent to bridge).

240. Gale v. Kalamazoo, 23 Mich. 344 (Mich. 1871).

241. Burton v. Stewart, 62 Barb. 194, 209 (N.Y. S. Ct. 1862).

242. Ladd v. S. Cotton Press & Mfg. Co., 53 Tex. 172, 182 (Tex. 1880).

a telephone company might not be "possesse[d] of any special privilege under the statutes of the state," and therefore might not be subject to the "heavy obligations" of a common carrier, but might still be a monopoly by virtue of the "very nature and character of its business," of which "[n]o two companies will try to cover the same territory."[243] Even as the predominant meaning of "monopoly" shifted to privately acquired power, the earlier tradition associating monopoly with public power lingered.

D. *Antimonopoly in the Nineteenth Century: Summation*

The nineteenth century saw the establishment of antimonopoly as a set of contending and often contradictory principles in American law. Antimonopoly could limit the government's powers to grant exclusive privileges, curtail the scope of any such privileges granted, empower the government to regulate the market, limit the government from regulating the market, or directly regulate private firms. Within close geographic and temporal proximity, judges could confidently announce that antimonopoly applied only as against the government, only as against private firms, or simultaneously as to both.

The incidence of these respective ideas changed over the course of the century. Antimonopoly as limitation on exclusive privilege bestowed by the state was the predominant theme before the Civil War. After the Jacksonian Revolution curtailed that practice, and then with the Second Industrial Revolution and dramatic economic changes it precipitated in the later nineteenth century, emphasis shifted toward state regulation of infrastructure businesses and controls on privately acquired market power. At the same time, the rise of laissez faire political ideology gave expression to a new genus of anti-regulatory anti-monopolism.

All of these expressions of anti-monopolism remained live at the time of the political upheaval that gave rise to the Sherman Act in 1890. As discussed next, the Sherman Act selected one strand of the antimonopoly tradition—control of private market power—on which to place the imprimatur of federal law. The Sherman Act thus federalized antimonopoly and redirected it toward the trust problem. But it did not—could not—bury the contending senses of antimonopoly, which remained live well into the twentieth century and beyond.

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243. State v. Neb. Tel. Co., 17 Neb. 126, 133 (Neb. 1885).

III.
The Long Shadows of Antimonopoly

A. *The Sherman Act: The Federalization of Antimonopoly*

The Sherman Act codified the emerging strand of the antimonopoly tradition focused on controlling private economic power. Despite the occasional recognition in the legislative history of the older, state-focused sense of monopoly—such as Senator Stewart's comment that "'[m]onopoly'… is something created by law which gives a special privilege"[244]—the Act focused on trusts and monopolies created by private undertaking under the increasingly liberalized state corporate laws.[245] An article in the *Harvard Law Review* written shortly after the Sherman Act's passage observed that "[i]n the popular mind, and in judicial opinions, no clear distinction was made between monopolies with exclusive privileges, and business associations with no exclusive privileges, and all these, as well as business of magnitude carried on by individuals, were alike condemned as 'monopolies.'"[246] Another article in the same journal a year later observed that monopolies in their original sense "were nothing more than royal patents; and restriction of competition under them was effected, not by the act of the individual, but by the exclusive character of the grant," but that "[i]t is thus plain (1) that Congress could not have had in mind a 'monopoly' in the common law sense of the term; (2) that 'monopoly' at common law implied an exclusive control of one branch of industry, without legal right of any other person to interfere therewith by competition or otherwise." [247] The Supreme Court would later observe that "nothing in the language of the Sherman Act or in its history [] suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."[248]

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244. 21 Cong. Rec. 2644 (1890).

245. *See* Daniel A. Crane, *The Dissociation of Incorporation and Regulation in the Progressive Era and the New Deal*, *in* Corporations and American Democracy (Naomi R. Lamoreaux & William J. Novak eds., 2017).

246. S.C.T. Dodd, *The Present Legal Status of Trusts*, 7 Harv. L. Rev. 157, 160 (1893).

247. William F. Dana, *"Monopoly" Under the National Anti-Trust Act*, 7 Harv. L. Rev. 338, 341–42 (1894).

248. *Id.* at 350–51; *Cf.* Paul E. Slater, *Antitrust And Government Action: A Formula for Narrowing Parker v. Brown*, 69 Nw. U. L. Rev. 71, 83 (1974) ("In truth, a full reading of the legislative history of the Sherman Act is not likely to help answer the Parker question one way or the other .... [I]f the legislative history reveals anything, it is that the purpose of the act is to strike down

The Sherman Act thus enacted antimonopoly as a limitation on privately acquired economic power, completing the shift in emphasis from the earlier sense of antimonopoly as state intrusion in the market that had predominated earlier in the nineteenth century.

It has been widely recognized that the Sherman Act federalized *antitrust* insofar as it largely displaced state-level antitrust movements and laws.[249] By 1890, thirteen states had passed antitrust statutes, and another fourteen would add such provisions by the turn of the century.[250] Eventually, every state (excepting Pennsylvania) adopted its own antitrust law.[251] However, state antitrust laws became mere shadows of the Sherman Act as the courts interpreted the state statutes in conformity with federal precedent,[252] with the effect that state antitrust law added little to what was prohibited or permitted by federal law.[253]

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arrangements which have anti-competitive effects .... regardless of whether the state is a participant.").

249. *See, e.g.*, Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L.J. 960, 965–67 (2018); Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 352–53 (1997).

250. James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional Law and Conceptual Reach of State Antitrust Law*, 135 U. PA. L. REV. 495, 499 (1987).

251. *See* Michael A. Lindsay, *Repatching the Quilt: An Update on State RPM Laws*, 13-3 ANTITRUST MAG. ONLINE 1, 6 (Feb. 2014) https://advance-lexis-com.proxy.library.nyu.edu/api/document?collection=analytical-materials&id=urn%3acontentItem%3a5BPT-SBT0-02PM-W05J-00000-00&context=1519360&identityprofileid=9M4FW351751 (reporting that Pennsylvania is the only state that does not have an antitrust law).

252. Richard A. Duncan & Alison K. Guernsey, *Waiting for the Other Shoe to Drop: Will State Courts Follow Leegin?*, 27 FRANCHISE L.J. 173, 174 (2008) (finding that majority of states give their antitrust statutes same interpretation as Sherman Act).

253. In more recent decades have states begun to peel away from federal interpretation of the Sherman Act on such questions as indirect purchaser standing and resale price maintenance. *See generally* Robert H. Lande, *New Options for State Indirect Purchaser Legislation: Protecting the Real Victims of Antitrust Violations*, 61 ALA. L. REV. 447 (2010). Several states are currently considering antitrust reform legislation that would make state antitrust statutes considerably more aggressive than their federal analogues, *e.g.*, N.Y. Senate Bill S6748, N.Y. State Senate Bill 2023-S6748 (nysenate.gov), although there are also reform bills pending in Congress. *E.g.*, Press Release, Sen. Amy Klobuchar, Senator Klobuchar Introduces Sweeping Bill to Promote Competition and Improve Antitrust Enforcement (Feb. 4, 2001) https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement.

But there is a more general sense in which the Sherman Act may also have federalized *antimonopoly*. Many scholars view the passage of the Sherman Act as the terminus of a broad antimonopoly tradition and its replacement with a narrowly focused antitrust policy. Richard White argues that antitrust coopted and then swallowed antimonopoly, gutting the nineteenth century antimonopoly tradition by protecting consumers, stockholders and wageworkers at the expense of an egalitarian society of small producers.[254] Similarly, Kenneth Lipartito argues that antitrust law ended the antimonopoly tradition by sweeping aside "the old antimonopoly warnings about power, control, and equality."[255]

Care should be taken with such generalizations. Certainly, antimonopoly in other flavors continued outside of antitrust law—for example, in banking,[256] intellectual property,[257] and telecommunications law.[258] The Sherman Act may have federalized a particular strand of antimonopoly focused on certain problems of private market power, but it did not subsume antimonopoly in all of its contending historical manifestations. In particular, federal antitrust law did not directly address the libertarian versions of antimonopoly focused on limiting the regulatory power of the state. That task fell in the first instance to constitutional law and the battle over economic substantive due process in the early decades of the twentieth century.

B. *Closing the Door on Antimonopoly as Limitation on the State*

Nineteenth century state and federal courts drew on general antimonopoly principles to invalidate regulatory schemes that limited competition, often without precision on the legal grounds for judicial review. A representative example of the

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254. Richard White, *From Antimonopoly to Antitrust, in* ANTIMONOPOLY AND AMERICAN DEMOCRACY (Daniel A. Crane & William J. Novak, eds. 2023).

255. Kenneth Lepartito, *The Antimonopoly Tradition*, 10 U. ST. THOMAS L. J. 991, 1019 (2013).

256. Jamie Grischkan, *Banking and the Antimonopoly Tradition: The Long Road to the Bank Holding Company Act, in* ANTIMONOPOLY AND AMERICAN DEMOCRACY (Daniel A. Crane & William J. Novak, eds. 2023).

257. Thomas F. Cotter, *The Procompetitive Interest in Intellectual Property Law*, 48 WM. & MARY L. REV. 483 (2006).

258. Harvey J. Levin, *Competition, Diversity, and the Television Group Ownership Rule*, 70 COLUM. L. REV. 791 (1970).

courts' attitude can be found in an 1856 Connecticut Supreme Court opinion, which was clear on antimonopoly, but uncertain about its doctrinal home: "[A]lthough we have no direct constitutional provision against a monopoly, yet the whole theory of a free government is opposed to such grants."[259] Eventually, libertarian antimonopoly would find a doctrinal home in economic substantive due process. Contemporaneously with the passage of the Sherman Act and the federalization of antimonopoly focused on private power, the federal courts also federalized and broadened the libertarian stand of antimonopoly, eventually culminating in New Deal rejection of economic substantive due process.

In the *Slaughter-House Cases*, Justice Field had articulated a version of substantive due process grounded in the antimonopoly tradition.[260] Although Field's arguments were in dissent, the Supreme Court eventually adopted a version of Field's perspective. In *Allgeyer v. Louisiana*,[261] in the context of invalidating a statute designed to deter doing business with out-of-state insurance companies, the Court adopted Field's substantive due process, albeit one broader than antimonopoly.[262] Justice Peckham's *Lochner* opinion began with *Allgeyer*, and generally reflected the anti-monopoly strain concerned with special interest legislation promoting redistribution and monopoly.[263]

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259. *Norwich Gaslight Co.*, 25 Conn. at 38.

260. *Slaughter-House Cases*, 83 U.S. at 122 ("[A]ny law which establishes a sheer monopoly, depriving a large class of citizens of the privilege of pursuing a lawful employment, does abridge the privileges of those citizens...In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law."); Howard J. Graham, *Justice Field and the Fourteenth Amendment*, 52 YALE L.J. 851, 853 (1943); Charles W. McGurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897*, 61 J. AM. HIST. 970, 977–78 (1975).

261. Allgeyer v. Lousiana, 165 U.S. 578, 590 (1897).

262. FRANK STRONG, SUBSTANTIVE DUE PROCESS OF LAW 91 (1986) ("[I]n severing this right to freely contract from its tie with antimonopoly the Court . . . catapulted into an uncharted domain in which substantive due process could become the obstacle to endless instances of legal, economic and social reform.").

263. Gillman, *supra* note 96, at 120; Aaron R. Hall, *Class Jurisprudes: Free Labor Ideology and For-Profit Penal Labor in the Gilded Age Courts*, 43 LAW & SOC. INQUIRY 678, 679–80 (2018) ("A large body of literature has established that Lochner-era jurisprudence arose from free labor ideology and a corollary antipathy for monopoly, state privilege, and intervention for one class over another."); see *also* Editorial, *A Check to Union Tyranny*, THE NATION, May 4,

Of course, the Progressives disdained *Lochner* for interfering with economic reforms and substituting judges' economic views for those of the elected branches. In the New Deal constitutional revolution of the late 1930s, the Supreme Court announced that it would no longer invalidate legislation that enacted what the Justices considered poor economic policy.[264] This included the sorts of laws protecting discrete groups from competition that had been targeted in the nineteenth century antimonopoly case. In cases like *Williamson v. Lee Optical*[265] (fitting lenses), *Kotch v. Pilot Commissioners*[266] (harbor piloting), and *Ferguson v. Skrupa*[267] (debt adjustment services), legislatures acted to grant monopolies to special interests, but the Supreme Court declined to invalidate the scheme for fear of falling back into the habits of *Lochner*.[268]

The New Deal constitutional revolution showed up in antitrust as well. In *Parker v. Brown*[269] in 1943, the Supreme Court made clear that it would not permit the Sherman Act to be used to circumvent the anti-*Lochner* cases and draw the courts back into a form of substantive due process under the guise of federal antitrust law. *Parker* involved a Sherman Act challenge to California's Agricultural Prorate Act, which required farmers to participate in a marketing plan to limit raisin production.[270] Finding that the Sherman Act was not meant as a limitation on governmental power at all, the Court created a doctrine of state action immunity for anticompetitive state and local laws. As now-Attorney General Merrick Garland has observed, *Parker*

1905, at 346–47 (endorsing *Lochner* Court for stopping "the subterfuge by which, under pretext of conserving the public health, the unionists have sought to delimit the competition of non-unionists, and so to establish a quasi-monopoly of many important kinds of labor").

264. *See generally* 2 Bruce Ackerman, We the People: Transformations (1998).

265. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487 (1955).

266. Kotch v. Pilot Comm'rs, 330 U.S. 552, 564 (1947).

267. Ferguson v. Skrupa, 372 U.S. 726, 731–32 (1963).

268. Bernard Schwartz, The Rights of Property 90 (1965) ("[a]side from Dred Scott itself, Lochner ... is now considered the most discredited decision in Supreme Court history").

269. Parker v. Brown, 317 U.S. 341, 350–51 (1943) ("We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.").

270. *Id.* at 346–49.

is best understood as a continuation of the post-1937 jurisprudence rejecting *Lochner*.[271]

With *Parker*, antimonopoly's inversion from a limitation on state power to a limitation on private power seemed to be complete. "Monopoly" in the pejorative sense of the antimonopoly tradition would now be associated exclusively with privately acquired economic power, and not with market interventions by the state. Yet this was not a stable equilibrium. There were too many other deeply rooted strands of the antimonopoly tradition to reduce it all to a limitation on private power. Before too long, the libertarian version would reemerge.

C. *Reopening the Door to Antimonopoly as Limitation on the State*

The libertarian version reemerged most obviously in the 1970s with the narrowing of the *Parker* state immunity doctrine and the corresponding recasting of the Sherman Act as a limitation on state regulatory power. Contrary to the *Parker* Court's flat pronouncement that the Sherman Act was not intended to

271. Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and Political Process*, 96 YALE L.J. 486, 499–500 (1987) ("*Parker v. Brown* was much less a case about judicial faith in economic regulation than it was a case about judicial respect for the political process. *Parker* was indeed a child of its times, but the most salient element of that historical context was the Court's recent rejection of the *Lochner era* doctrine of substantive due process, under which federal courts struck down economic regulations they viewed as unreasonably interfering with the liberty of contract. Having only just determined not to use the Constitution in that manner, the Court was not about to resurrect *Lochner* in the garb of the Sherman Act."); *see also* James C. Cooper & William E. Kovacic, *U.S. Convergence with International Competition Norms: Antitrust Law and Public Restraints on Competition*, 90 B.U. L. REV. 1555, 1570 (2010) ("*Parker* then can be seen as a necessary concession to anticompetitive state regulation to avoid a return to the *Lochner* era .... Once the federal judiciary got out of the business of second-guessing the wisdom of states' economic regulation under substantive due process analysis, it could hardly reopen this line of attack under the guise of antitrust. *Parker* prevented this outcome."); Thomas M. Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 CALIF. L. REV. 227, 230 n.20 (1987) ("The Court's own unsatisfying experience with economic due process during the *Lochner* era, just prior to *Parker*, no doubt increased the Court's sensitivity to the importance of independent state economic choices."); William H. Page, *Interest Groups, Antitrust, and State Regulation:* Parker v. Brown *in the Economic Theory of Legislation*, 1987 DUKE L.J. 618, 624 ("*Parker* was decided largely on the ground that the Court was unwilling to reenter the political mire of the *Lochner* era under the guise of Sherman Act preemption analysis.").

preempt state interventions in the market, the Supreme Court eventually came to the view that anticompetitive state policies only qualify for state action immunity when they are "clearly articulated and affirmatively expressed as state policy" and actively supervised by agents of the state.[272] State regulations not meeting this test would be invalidated as unlawful monopolies. Thus, for example, a state dental board's prohibition on non-dentists providing teeth whitening services could be invalidated under federal antitrust law,[273] in a manner reminiscent of judicial invalidation of occupational restrictions in the nineteenth century. Not surprisingly, advocacy for a more aggressive antitrust policy focused on the state has come from quarters less interested in an aggressive antitrust policy focused on private actors.[274]

The narrowing of *Parker* immunity and reupping of the strands of the antimonopoly tradition focused on regulation coincided with the emergence of neo-liberal arguments that government regulation posed a greater risk than private behavior of creating durable monopoly power.[275] This view implied

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272. Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

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

274. Richard A. Epstein & Michael S. Greve, *Introduction* to Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy 13 (Richard A. Epstein & Michael S. Greve eds., 2004) (arguing for a narrowing of *Parker* immunity); Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. L. & Econ. 23 (1983), *reprinted in* Epstein & Greve, *supra* note 274 at 189 (arguing for cost externalization modification to Parker immunity); Timothy J. Muris, Chairman, Fed. Trade Comm'n, Remarks Before the Fordham Annual Conference on International Antitrust Law & Policy (Oct. 24, 2003) (detailing FTC program to challenge anticompetitive state regulations).

275. *See, e.g.*, Milton M. Friedman, Capitalism and Freedom 139–44 (1962) (arguing that firms could capture regulatory processes to obtain monopoly rents more durably than unregulated private monopolists could); George J. Stigler, *The Theory of Economic Regulation*, 2 Bell J. Econ. & Mgmt. Sci. 3, 3–6 (1971) (arguing that regulation can create durable monopoly power that private conduct cannot match, such as legal restrictions on entry); Robert Bork, The Antitrust Paradox, 347–64 (1978) (describing predation through governmental process as a serious and growing problem); Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. Pol. Econ. 807 (1975) (arguing that public regulation is a greater source of social costs and privately acquired monopoly); Howard P. Marvel, *Hybrid Trade Restraints: The Legal Limits of a Government's Helping Hand*, 2 Sup. Ct. Econ. Rev. 165, 180 (1983) ("Government may or may not be the source of all monopolies; it is clearly at the heart of a substantial number of monopolies."); Stephen A. Siegel, *Understanding the Lochner Era: Lessons from the Controversy Over Railroad and*

that antimonopoly should be again focused on the government rather than private actors. As was true in the nineteenth century, delineations between the public and private as sources of forbidden monopoly were not always clear. For instance, the Reagan Administration's 1982 consent decree breaking up AT&T,[276] the largest structural monopolization decree in American history,[277] came in an administration not otherwise known for its vigorous antitrust enforcement. But the Reagan Administration saw the core problem with AT&T as its status as a regulated monopoly and its ability to prey on regulatory processes to the detriment of consumers.[278] The AT&T break-up thus reflected intersecting lines of the antimonopoly tradition, targeting a private firm but due in substantial part to its status as a vassal of the government.

The fruits of this revived strand of antimonopoly appeared in the deregulatory trend of the late twentieth century. Of course, that same deregulatory trend is often blamed for increasing concentration in many markets.[279] As in the nineteenth century, twentieth century antimonopoly ideology could support arguments both for and against government regulation. Governmental regulation could be the source of monopoly or its foil. Both sides of the argument could legitimately claim roots

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Public Utility Rate Regulation, 70 VA. L. REV. 187, 202–03 (1984) (examining the neoclassical view that only monopolies created by law are durable).

276. United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131, 141–42 (D.D.C. 1982).

277. Edward Cavanagh, *Antitrust Remedies Revisited*, 84 OR. L. REV. 147, 196 (2005).

278. Lawrence A. Sullivan & Ellen Hertz, *The AT&T Antitrust Consent Decree: Should Congress Change the Rules?*, 5 HIGH. TECH. L. J. 233, 238 (1990). Assistant Attorney General Bill Baxter argued that price-regulated monopolists could engage in anticompetitive tying to extract monopoly rents from adjacent markets in which they did not face price regulation. *See* William F. Baxter, *Conditions Creating Antitrust Concern with Vertical Integration by Regulated Industries—"For Whom the Bell Doctrine Tolls"*, 52 ANTITRUST L. J. 243, 244 (1983); see generally Tim Wu, *Intellectual Property, Innovation, and Decentralized Decisions*, 92 VA. L. REV. 123, 138–39 (2006) (explaining that the doctrine described by William Baxter is referred to as Baxter's Law).

279. *E.g.*, Philip E. Strahan, *The Real Effects of U.S. Banking Deregulation*, 85 FED. RSRV. BANK ST. LOUIS REV. 111, 111, 114 (2003) (arguing that banking deregulation led to increase in concentration); Jan K. Krueckner & Pablo T. Spiller, *Economies of Traffic Density in the Deregulated Airline Industry*, 37 J. L. & ECON. 379 (1994) (finding that airline deregulation led to increases in airport and industry-wide concentration and increase in competition at the city-pair market level).

in the long arc of the American antimonopoly tradition, such is its plasticity and ambiguity.

Rounding into the twenty-first century, even Justice Field's version of libertarian antimonopolism seems poised for a potential comeback. In the last two decades, the Fifth and Sixth Circuits have invalidated state regulations restricting casket sales on the grounds that "protecting a discrete interest group from economic competition is not a legitimate governmental purpose" for purposes of equal protection analysis.[280] The Ninth Circuit has similarly held that "mere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review."[281] Although other courts have declined this invitation to reinvigorate the antimonopoly tradition as to state regulation,[282] its future in constitutional law remains up for grabs. Whether or not this particular doctrine receives the Supreme Court's blessing or otherwise enjoys a durable run in constitutional law, it exemplifies the continuing dialogue between contending versions of the antimonopoly tradition—really, between separate antimonopoly traditions—that took shape in legal doctrines in the nineteenth century.

D. *The Continuing Lives of Antimonopoly*

With all of the political attention being paid today to antitrust reform, antimonopoly as a historical tradition has naturally reentered the conversation. As with any high-stakes appeal to tradition, the meaning of the tradition itself will often be contested. Even in its concrete legal instantiation, antimonopoly has enough different historical senses to justify a wide variety of arguments about the tradition's relevance to ongoing legal, political, and regulatory debates.

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280. St. Joseph Abbey v. Castille, 712 F.3d 215 (5th Cir. 2013); Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002).

281. Merrifield v. Lockyer, 547 F.3d 978, 991 n.15 (9th Cir. 2008)

282. *See, e.g.*, Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 286 (2d Cir. 2015) ("We join the Tenth Circuit and conclude that economic favoritism is rational for purposes of our review of state action under the Fourteenth Amendment."); Powers v. Harris, 379 F.3d 1208, 1221 (10th Cir.2004) ("[A]bsent a violation of a specific constitutional provision or other federal law, intrastate economic protectionism constitutes a legitimate state interest.").

Some lines of argument are clearly off the table: the limitation of monopoly to a government-granted privilege; the denial that privately acquired power can constitute monopoly; or the government's need to justify economic regulation with reference to a monopoly problem are positions with no continuing salience. But many other lines remain viable and historically supported: whether government intervention in the market exacerbates or mitigates the monopoly problem; whether privately acquired market power, unsupported by governmental subsidy, tends to dissipate over time; and whether the greater threat to economic liberty, consumer interests, republican values, and the democratic order comes from the exercise of private or public power are all questions with enduring political and legal relevance. These questions were presented in the surge of antimonopoly activity in the courts and legislatures in the nineteenth century, and all remain part of the distinctively American antimonopoly tradition(s).

Conclusion

The idea of a unified and consistent American antimonopoly tradition is a myth, or at least an idea that takes as much license with history as Coke took in creating the English antimonopoly tradition. That it is an invented idea does not make it necessarily illegitimate, and certainly not without its fair uses. Strands of the antimonopoly tradition restrict the state; other strands empower it. Strands of the tradition restrict private enterprise; other strands empower it. Different strands have predominated over others at different moments in time, but no conclusive or durable equilibrium seems to have been reached. So antimonopoly rolls on as a coherent, useful, and meaningful concept, but one that can be appropriated for opposing ends.

Two preemptive comments in conclusion: *First*, responses to arguments of the sort made in this Article often take of the form of insisting that one strand of the relevant tradition is the legitimate one and that the others are imposters. Certainly, the label "antimonopoly" should not be appropriated for any purpose that does not fit. However, this Article has identified several separate legal strains with significant judicial or legislative adoption in the nineteenth century that were considered heirs to the English common law's antimonopoly doctrine. To that extent, all of them represent genuine denominations of the antimonopoly religion.

Second, a common reaction to the demonstration that a concept can mean opposite or contradictory things is to assume that it means everything and therefore nothing. It would be a mistake to take that view of antimonopoly. Its historical meanings are diverse and at times contradictory, but nonetheless discrete and identifiable. To be an antimonopolist of any denomination was to reject other positions that often garnered considerable support. For instance, it was to reject the claim that monopoly (whether privately or publicly obtained) was desirable as a hallmark of efficiency and civilization, or that that competition was inherently ruinous and undesirable. Antimonopoly is a heterogeneous and adaptive concept, but one with identifiable boundaries and predictive power. And it is therefore likely to continue to generate legal doctrines and political outcomes for a long time to come.