

MONOPOLIES AND THE CONSTITUTION: A HISTORY OF CRONY CAPITALISM

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The authors thank Stephen Presser for his helpful advice and comments and Pegeen Bassett for her invaluable skill and help as their research librarian. This article is dedicated to Professor Richard Epstein, from whom the Authors have learned so much about economic liberty.

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Government-conferred monopolies granted by English kings and queens plagued England in the late sixteenth and early seventeenth centuries, leading to both *The Case of Monopolies* and the parliamentary Statute of Monopolies. Although today the word “monopoly” generally is used to refer to the private accumulation of economic power, this is not the meaning that was originally attached to the term. The original meaning of the word “monopoly” was an exclusive grant of power from the government—in the form of a “license” or “patent”—to work in a particular trade or to sell a specific good. The word “monopoly” comes from the Greek roots “mono,” meaning “single” or “one,” and “polein,” meaning “to sell.”¹ The Greek word “monopolion” referred to an exclusive legal right of sale issued by the government.² Sir Edward Coke defined monopolies in the early seventeenth century as being

Institution[s], or allowance[s] by the King by his [g]rant, [c]ommission, or otherwise to any person or persons, bodies politick or corporate, of or for the sole buying, selling, making, working, or using of any thing, whereby any person or persons, bodies politick or corporate, are sought to be re-

1. THE BARNHART DICTIONARY OF ETYMOLOGY 674 (Robert K. Barnhart ed., 1988).

2. *Id.*

strained of any freedom[] or liberty that they had before, or hind[e]red in their lawful trade.³

Samuel Johnson's dictionaries from the eighteenth century likewise defined a monopoly as "[t]he exclusive privilege of selling any thing."⁴

The 1828 first edition of Noah Webster's *An American Dictionary of the English Language* defined a "monopoly" as being:

The sole power of vending any species of goods, obtained either by engrossing the articles in market by purchase, or by a license from the government confirming this privilege. Thus the East India Company in Great Britain has a *monopoly* of the trade to the East Indies, granted to them by charter. *Monopolies* by individuals obtained by engrossing, are an offense prohibited by law. But a man has by natural right the exclusive power of vending his own produce or manufactures, and to retain that exclusive right is not a *monopoly* within the meaning of law.⁵

The American colonists thus shared English concerns that exclusive monopoly privileges issued by the government could impose enormous costs on the general public, and especially on consumers.⁶ George Mason, Thomas Jefferson, and several Antifederalists argued in favor of including an antimonopoly clause in the federal Constitution.⁷ Although no such clause was added at the federal level, constitutional drafters in two states recognized the danger of monopolies and prohibited government-granted monopolies in their state constitutions.⁸ More states added antimonopoly clauses to their constitutions in the first one hundred years after the federal Constitution was adopted.⁹ Others prohibited monopolies using different language, including clauses that forbade the giving of exclusive privileges to one class of citizens over another, or clauses that forbade the abridg-

3. EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 181 (1669).

4. SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. rev. 1768) (defined under heading "mon"); 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1766) (same).

5. 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (defined under heading "mon").

6. Regarding English attitudes toward monopoly, see generally Part I *infra*.

7. See Part II *infra*.

8. See Part III *infra*.

9. See *id*.

ing of the privileges or immunities of citizens.¹⁰ The Framers of the Fourteenth Amendment to the federal Constitution shared this concern with what they called “class legislation,” a concern that led four United States Supreme Court Justices to say that state-granted monopolies were unconstitutional in an important dissent in the *Slaughter-House Cases*.¹¹

This objection to government-granted monopolies and to forms of caste or class legislation is not merely a part of this country’s history; it is also relevant today. In a 2011 *Washington Post* opinion piece, George Will describes a legal challenge to the constitutionality of a monopoly granted by the state of Washington to a ferry boat company.¹² The ferry boat company has a legal monopoly on boat service to a town that can otherwise only be reached by plane.¹³ The challengers to the Washington state law creating the monopoly are residents of that remote town who wish to open a competing boat service to provide an easier way to access their town.¹⁴ But the problem of government-conferred monopolies is not unique to one town in the state of Washington, because it is now routine in many states for the government to require licenses for various industries, often for the purpose of bestowing economic favors.¹⁵ Licensing requirements of this kind sometimes take the form of a complete prohibition (as is the case in Washington), but they may also take the form of barriers to entry that prevent or reduce competition. Many local and state governments license businesses for no legitimate health or safety reason. For example, tourist guides, funeral attendants, and florists are all sometimes required to be licensed professionals despite the evident lack of a legitimate public health or safety reason for such laws.¹⁶

Local public schools provide another example of a government-sponsored monopoly provider of public services. Like most monopoly providers, many public schools provide poor

10. *See id.*

11. *See Slaughter-House Cases*, 83 U.S. 36, 84–85 (1872) (Field, J., dissenting).

12. George F. Will, *Taking Liberties with Liberty*, WASH. POST, Dec. 18, 2011, at A27, available at http://articles.washingtonpost.com/2011-12-16/opinions/35285778_1_economic-liberty-washington-state-brothers.

13. *Id.*

14. *Id.*

15. Chip Mellor & Dick Carpenter, *Want Jobs? Cut Local Regulations*, WALL ST. J., July 28, 2011, <http://online.wsj.com/article/SB10001424052702304911104576443881925941712.html>.

16. *See id.*

service to their consumers (parents and children) while diverting monopoly rents in the form of bloated salaries and benefits to the providers of education (bureaucrats and teachers' unions).¹⁷ Polls suggest that most Americans feel strong pressure to send their children to public schools because they are taxed to pay for public schools even if they ultimately choose to send their children to private schools or to home-school them.¹⁸ The public school monopoly is especially objectionable because it interferes with parents' control over raising and educating their own children.¹⁹ Since the New Deal, the Supreme Court has applied the very deferential rational basis test when reviewing the constitutionality of federal and state economic regulations, including those that grant monopoly status.²⁰ Such laws are rarely challenged and even more rarely struck down. This is a mistake. The post-New Deal case law on economic liberties, epitomized by *Williamson v. Lee Optical Co.*,²¹ is wrongly decided, and the right to be free from class legislation, monopolies, and grants of special privilege is deeply rooted in this nation's history and traditions.²² We therefore think this right is embodied in the Fourteenth Amendment to the U.S. Constitution and that it can only be trumped by just laws enacted for the good of the whole people.²³ We think George Will is right when he denounces government licensing schemes because they "lack[] constitutional warrant and repudiate[] the nation's foundational philosophy" and because they require entrepre-

17. See generally Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause* 162-92 (Nw. Pub. Law Research Paper No. 12-19, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2130038.

18. See *id.* at 180-82.

19. See *id.* at 162-76 (arguing that the public school system unconstitutionally discriminates against religious families).

20. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 204-05 (2003) (applying rational basis review to uphold congressional grant of monopoly under the Copyright Clause). Congress' exercise of its Copyright Clause authority is reviewed only to determine if it is rational. *Id.*

21. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

22. See Part III, *infra*; see also Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011); Melissa L. Saunders, *Equal Protection, Class Legislation, and Color Blindness*, 96 MICH. L. REV. 245 (1997).

23. Cf. *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230) (finding that a state may restrict the privileges and immunities protected by Article IV, Section 2, Clause 1 of the Constitution only if doing so is appropriate in pursuit of "the general good of the whole").

neurs to “approach government on bended knee to beg it to confer upon them a right—the right to compete.”²⁴

As John Tomasi argues in his new book, *Free Market Fairness*, economic liberties are just as important to freedom as are all of the other liberties embraced by modern liberals.²⁵ This Article helps to spell out the legal underpinnings and history of the economic liberties that Tomasi identifies; its analysis and Tomasi’s are mutually reinforcing. Tomasi defends economic liberty from the perspective of political philosophy to which we seek here to add the perspective of history and law.

Part I of this Article discusses the history of government-licensed monopolies in seventeenth century England and the landmark events limiting the King’s power to grant monopolies—*The Case of Monopolies* and Statute of Monopolies. Part I also discusses the spread of the English concern with government grants of monopoly to the American colonies and the role trade monopolies played in building support for the American Revolution in colonial America. Part II discusses the effort by some of the Framers of the U.S. Constitution to include an antimonopoly clause therein, an effort that ultimately failed. Part II then shows how antimonopoly ideas infused themselves into the Supreme Court’s early Contracts Clause case law and the central role they played in the emergence of the Fourteenth Amendment as a ban on class-based or caste-based legislation. Part II finally discusses the connection between the various federal antitrust laws and government-granted monopolies. Part III discusses the adoption of antimonopoly clauses in state constitutions, beginning at the Founding and continuing through the early twentieth century. Part III also considers the move toward general laws governing incorporation and away from special legislative charter grants and surveys how the monopoly concept came to reflect a concern with private economic power in some states, as well as the application of state antimonopoly provisions. The Article concludes with a few parting words about the decline in concern for the protection of economic liberty in modern American constitutional law.

24. Will, *supra* note 12.

25. See JOHN TOMASI, *FREE MARKET FAIRNESS*, at xi (2012).

I. A BRIEF HISTORY: HOW MONOPOLIES
CAME TO BE HATED

A. *The English Experience with Monopolies*

The English hatred of monopolies dates back to the reigns of Queen Elizabeth I and King James I. Two principal events—one coming from the common law courts and the other coming from Parliament—highlight the strong disapproval of government monopolies that existed in early seventeenth century England. The first event is the case of *Darcy v. Allen* commonly known as *The Case of Monopolies*, which was decided in 1603.²⁶ In this case, a common law court reviewed a royal grant of trade privileges and struck down the grant as being void under the common law.²⁷ The second key event is the passage in 1624 of the Statute of Monopolies,²⁸ which was the result of years of pressure by the House of Commons to prohibit the King or Queen from granting the same kinds of monopoly privileges as those that had been struck down in *Darcy*. These two events characterize a period when intellectuals and lawyers began to truly recognize the rights of Englishmen to work for a living and to compete with each other without interference from government grants of special economic privilege.²⁹

1. *Darcy v. Allen*

During Queen Elizabeth's very long reign she oftentimes found herself in need of more money than Parliament had allotted for her use. As a result, she sometimes tried to supplement her subsidy from Parliament by selling royal monopolies.³⁰ Some in Parliament criticized this practice because of the

26. *The Case of Monopolies*, (1603) 77 Eng. Rep. 1260 (Q.B.). The court delivered no written opinion in the case; the most famous written report, and the one found in the English Reports, was penned by Sir Edward Coke. Jacob I. Corré, *The Argument, Decision, and Reports of Darcy v. Allen*, 45 EMORY L.J. 1261, 1261 (1996).

27. See *The Case of the Monopolies*, 77 Eng. Rep. at 1262.

28. Statute of Monopolies, 1623, 21 Jac. 1, c. 3 (Eng.), available at <http://www.legislation.gov.uk/aep/Ja1/21/3>. Although the legislation is dated 1623 in the official English Acts, Parliament passed it in 1624. See Chris Dent, 'Generally Inconvenient': The 1624 Statute of Monopolies as Political Compromise, 33 MELB. U. L. REV. 415, 415 & n.2 (2009).

29. TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW 17 (2010).

30. E.F. Churchill, *Monopolies*, 41 L.Q. REV. 275, 276–77 (1925).

burden it imposed on subjects in addition to their preexisting tax burden.³¹ A royal grant of monopoly privileges meant that subjects suffered a loss of jobs: Some people were shut out of their trades, and consumers were forced to pay higher prices because legal monopolies allowed producers to drive up the price of goods. For example, in a speech at Parliament in 1571, Robert Bell argued for reform of the royal monopoly system on that grounds that “by Licences a few only were enriched, and the multitude impoverished.”³² As Adam Smith later described in *The Wealth of Nations*, the punishment for violating grants of monopoly privileges was sometimes severe:

Like the laws of Draco, these laws may be said to be all written in blood. . . . [T]he exporter of sheep, lambs or rams, was for the first offence to forfeit all his goods for ever, to suffer a year’s imprisonment, and then to have his left hand cut off in a market town upon a market day, to be there nailed up; and for the second offence to be adjudged a felon, and to suffer death accordingly.³³

Queen Elizabeth’s response to complaints about the monopolies she was granting was, at first, entirely dismissive: “We are to let you understand, her Majesty’s pleasure in that behalf that her Prerogative Royall may not be called in question for the validity of the letters patents.”³⁴ But opposition to exclusive trade privileges reappeared in 1597 when Parliament petitioned Queen Elizabeth I to stop the practice of granting royal monopolies.³⁵ Parliament gently requested “her Highness[’s] most gracious care and favour, in the repressing of sundry inconveniences and abuses practiced by Monopolies and Patents of priviledge.”³⁶ In addition, at the end of the ninth parliament, the Speaker raised the issue of monopolies in his closing speech—a

31. See Thomas B. Nachbar, *Monopoly, Mercantilism, and the Politics of Regulation*, 91 VA. L. REV. 1313, 1328 (2005).

32. *Id.* (quoting SIMONDS D’EWES, A COMPLEAT JOURNAL OF THE VOTES, SPEECHES AND DEBATES, BOTH OF THE HOUSE OF LORDS AND HOUSE OF COMMONS THROUGHOUT THE WHOLE REIGN OF QUEEN ELIZABETH OF GLORIOUS MEMORY 158 (Scholarly Resources 1974) (1693)).

33. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 700–01 (Edwin Cannan ed., Modern Library 1994) (1776).

34. Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550–1800*, 52 HASTINGS L.J. 1255, 1264–65 (2001) (quoting Edward C. Walterscheid, *The Early Evolution of the United States Patent Law: Antecedents (Part 2)*, 76 J. PAT. & TRADEMARK OFF. SOC’Y 849, 863 (1994)).

35. Nachbar, *supra* note 31, at 1329–30.

36. *Id.* at 1329 (quoting D’EWES, *supra* note 32, at 553) (alteration in original).

bold move given that such speeches were customarily ceremonial in nature, not substantive, and that they typically included the presentation of Parliament's subsidy to the Queen.³⁷ In response, Queen Elizabeth asked Parliament to let her continue the practice, thus seeming to acknowledge that Parliament possessed the ability to regulate her prerogative power to grant monopolies—a clear weakening of her earlier position:

[H]er Majesty hoped that her dutiful and loving Subjects would not take away her Prerogative, which is the chiefest Flower in her Garden, and the principal and head Pearl in her Crown and Diadem; but that they will rather leave that to her Disposition. And as her Majesty hath proceeded to Trial of them already, so she promiseth to continue, that they shall all be examined, to abide the Trial and true Touchstone of the Law.³⁸

However, it became clear that Queen Elizabeth had no intention of carrying out her promise to regulate the distribution and functioning of royal monopolies, despite her apparent recognition of Parliament's power in this area.³⁹ Accordingly, in 1601 the topic of royal power to grant monopolies was again heavily debated in Parliament, and a draft bill to outlaw royal monopolies was introduced.⁴⁰ But before a decision was made with regard to the draft bill, Queen Elizabeth offered Parliament a compromise. Traditionally, cases regarding royal monopolies could only be heard by the Court of Star Chamber, a fortress of royal power in which the common law of England did not apply. Queen Elizabeth proposed as a compromise both to cancel some of the least popular monopolies she had granted and, more importantly, to allow new cases involving the legality of monopolies to be heard in common law courts.⁴¹

This compromise paved the way for the famous 1603 case of *Darcy v. Allen*, often called *The Case of Monopolies*.⁴² Interestingly, *Darcy* did not involve a challenge to the legality of royal monopolies, but rather was brought by a monopoly-holder to protect his privilege. The suit was brought in 1602 by Edward Darcy, who claimed that Thomas Allen had infringed on his

37. *Id.*

38. *Id.* at 1330 (quoting 4 PARL. HIST. ENG. 420 (1598)).

39. *Id.*

40. *Id.* at 1330–31.

41. *Id.*

42. *The Case of Monopolies*, (1603) 77 Eng. Rep. 1260 (Q.B.).

monopoly right (through a royal patent granted by Queen Elizabeth) to produce, import, and sell all trading cards in England.⁴³ The court ruled for Allen, finding that Darcy's royal patent was void.⁴⁴ There was no written judicial opinion of the case,⁴⁵ and the extant records suggest that the justices explained little of the reasoning supporting their judgment in open court.⁴⁶ However, Sir Edward Coke, the most famous lawyer of his day, did write up a report on *Darcy v. Allen*.⁴⁷ Coke's report has been so influential that, with regard to *Darcy's* meaning in the common law today, it effectively can be treated as the official opinion in the case.⁴⁸ Interestingly, Coke represented Darcy in the case, as Coke was the Attorney General and was bound to defend the legality of the monopoly that was being challenged there.⁴⁹ Coke's report, which was written an entire twelve years after the case was decided,⁵⁰ describes the common law court's rationale as a strong statement about the importance of open and free trade. It states that the court struck down the royal monopoly because allowing people to work in their respective trades was not only beneficial for them, but was also necessary for the well-being of the whole country:

43. *Id.* at 1260–61.

44. Corr , *supra* note 26, at 1261, 1265, 1269.

45. *Id.* at 1261.

46. *See id.* at 1267–72.

47. *Id.* at 1261.

48. Corr  aptly summarizes *Darcy's* status in modern law:

Even by the standards reserved for great cases, *Darcy v. Allen* has proven exceptionally durable. Within living memory, England's Court of Appeal has cited Coke's report as good law. Judges in the United States have consistently recognized the authority of *Darcy v. Allen*. There was an extensive reference to the case in the famous *Slaughter-House Cases*, which upheld the validity of a state-sanctioned private monopoly and which still stands as one of the critical expositions of the post-Civil War amendments to the United States Constitution. As recently as 1991, Coke's report was quoted at length in the opinion of a United States Supreme Court Justice.

Id. at 1262 (footnotes omitted). This Article discusses *Darcy's* role in the *Slaughter-House Cases* in Part II.D *infra*. Although *Darcy* involved a state-granted monopoly, it also has proven influential in United States antitrust law. *See, e.g.*, *United States v. Line Material Co.*, 333 U.S. 287, 308 (1948) (citing *Darcy* for the proposition that "[p]ublic policy has condemned monopolies for centuries"); *Standard Oil Co. v. United States*, 283 U.S. 163, 169 n.2 (1931) (referring to "the general public policy against monopolies which developed from the Case of Monopolies and culminated in the Statute of Monopolies") (citation omitted).

49. Corr , *supra* note 26, at 1262.

50. *See id.*

All trades . . . which prevent idleness . . . and exercise men and youth in labour, for the maintenance of themselves and their families, and for the increase of their substance, to serve the Queen when occasion shall require, are profitable for the commonwealth, and therefore the grant to the plaintiff to have the sole making of them is against the common law, and the benefit and liberty of the subject.⁵¹

And the financial benefits of the royal monopoly were considerable, Coke's report suggests that the case was as much a statement about the negative consequences of exclusive trade privileges as it was about the individual right to economic liberty. In fact, it was critical to have the freedom to pursue one's livelihood—"[E]very man's trade maintains his life, and therefore he ought not to be deprived or dispossessed of it, *no more than of his life*."⁵²

Coke's report also discusses the many problems with monopolies, particularly the ways monopolies diminish wealth. First, monopolies serve only the interests of those who are granted the monopoly:

The sole trade of any mechanical artifice, or any other monopoly, is not only a damage and prejudice to those who exercise the same trade, but also to all other subjects, for the end of all these monopolies is for the private gain of the patentees; and although provisions and cautions be added to moderate them, yet . . . it is mere folly to think that there is any measure in mischief or wickedness.⁵³

More specifically, Coke discusses the undesirable effects trade of privileges on people who wish to enter a trade but who are prohibited from doing so because of the exclusive right to practice the trade that a royal monopoly furnishes on another:

[This leads] to the impoverishment of divers artificers and others, who before, by the labour of their hands in their art or trade, had maintained themselves and their families, who now will of necessity be constrained to live in idleness and beggary.⁵⁴

Further, but perhaps secondarily in Coke's mind and for others during the era, monopolies hurt the entire public because mo-

51. *The Case of Monopolies*, (1603) 77 Eng. Rep. 1260, 1262–63 (QB).

52. *Id.* at 1263 (emphasis added).

53. *Id.*

54. *Id.*

nopolies lead to higher prices and poorer quality goods and services:

[T]he price of the same commodity will be raised, for he who has the sole selling of any commodity, may and will make the price as he pleases [A]fter the monopoly [has been] granted, the commodity is not so good and merchantable as it was before: for the patentee having the sole trade, regards only his private benefit, and not the common wealth.⁵⁵

It is important to note that Coke's report in *The Case of Monopolies* has been challenged by some scholars who accuse Coke of exaggerating the free trade stance of the common law.⁵⁶ The primary evidence that Coke's report of the case was indeed an exaggeration is the continued practice of kings and queens to issue monopoly royal patents for many years after *Darcy*. Queen Elizabeth died the year *Darcy* was decided, whereupon King James I took the throne. James I was not nearly as well-liked in Parliament as Queen Elizabeth had been, which did not bode well for his ability to receive subsidies.⁵⁷ Unlike Queen Elizabeth, King James I pursued an aggressive and costly foreign policy, and he failed to exercise fiscal conservatism in his personal finances.⁵⁸ Because of King James I's extensive military engagements, his inability to control spending, and his poor relationship with Parliament, the new king found himself increasingly using his powers to issue royal patents as a means to raise money.⁵⁹

Because King James I continued to issue royal monopoly trade privileges, the House of Commons again pushed for adoption of a law to prohibit the King from granting monopolies.⁶⁰ Although King James resisted, some signs of change began to appear. For example, in 1610, King James issued his *Book of Bounty*, in which he stated that exclusive trade privileges were contrary to the common law and his own policies, that he

55. *Id.*

56. See, e.g., Corr e, *supra* note 26, at 1325; see also Nachbar, *supra* note 31, at 1333 & note 92 ("Coke made no distinction between the arguments of the defendants and the (undisclosed) reasoning of the court.").

57. Nachbar, *supra* note 31, at 1342–43.

58. *Id.*

59. *Id.* at 1343.

60. *Id.* at 1344.

intended to discontinue the privileges, and that he promised not to entertain any new suitors regarding monopolies.⁶¹

Despite the *Book of Bounty*, however, James continued to issue monopolies. For example, in 1614 Sir Edward Coke, who was by then the Lord Chief Justice of England struck down a guild incorporated under a royal charter.⁶² The King's actions apparently came as no surprise to Parliament. As one member of Parliament quipped, "Yet, as in a Garden, clean weeded, Weeds next Year; so here, by new Patents, Proclamations."⁶³ As a result, King James's relationship with Parliament continued to worsen, and the King dissolved Parliament whenever there was a disagreement.⁶⁴ Not surprisingly, Parliament decided in 1614 to discontinue King James's subsidy until resolutions regarding the granting of monopolies and impositions were reached.⁶⁵

These events after *Darcy v. Allen* raise a question about what we should make of Sir Edward Coke's report of the famous case. At least one scholar argues that at the time Coke published his report of *Darcy v. Allen* in 1615, his view on the royal patent power was no longer as controversial, and perhaps his views on the court's rationale evolved as a result of events in the twelve years between the case and his published report.⁶⁶ Further, even if Coke's report of *Darcy v. Allen* did exaggerate the common law's embrace of free trade principles (which cannot be known for sure as there is no official published opinion), it has been described as "exceptionally durable" and has been cited as good law for centuries in both England and the United States, including in some modern case law.⁶⁷ Sir Edward Coke's views on monopolies were also not unique to him—similar arguments were made at the same time, and even earlier, in the House of Commons. As previously mentioned, a few decades earlier, Robert Bell argued against granting monopolies in Parliament, stating that "by Licences a few only were enriched, and the multitude impoverished."⁶⁸ Even if Coke's report of the

61. *Id.* at 1345.

62. The Case of the Tailors, &c. of Ipswich, (1614) 77 Eng. Rep. 1218 (K.B.).

63. Nachbar, *supra* note 31, at 1345 n.148.

64. *See id.* at 1345–46.

65. *Id.*

66. Corr e, *supra* note 26, at 1266, 1324–25.

67. *See supra* note 48 and accompanying text.

68. Nachbar, *supra* note 31, at 1328 (quoting D'EWES, *supra* note 32, at 158).

case itself was an exaggeration, Coke's rationale and reasoning became the accepted rule of the common law. As will be discussed below, it was Sir Edward Coke's report of *The Case of Monopolies*—and no other report—that influenced some of the Founding Fathers, the Antifederalists, and the American state governments when they adopted or amended their own constitutions. Thus, even if Coke's views were idiosyncratic or wrong about the law of England, the Framers of the United States Constitution took them as true. Founding-generation Americans might very well have believed there was an ancient English right to be free of monopolies.

2. *The Statute of Monopolies*

By 1614, the relationship between the King and Parliament had significantly deteriorated, an important precursor to the assertions of Parliamentary authority that helped lead to the English Civil War in the 1640's.⁶⁹ King James I abused the royal prerogative and dissolved his first two Parliaments, leading Parliament to refuse to give King James a royal subsidy.⁷⁰ Without such a subsidy, the King was forced to find other sources of revenue, turning in large part to the granting of monopoly trade privileges. In the process, however, the entire system of the granting of such privileges broke down:

The . . . system was regulatory chaos . . . Patents were granted, routinely revoked . . . and re-issued to someone else. Eventually, revocation became so common that patents being issued included language permitting revocation by vote of the Privy Council. Increasingly desperate for revenue, James granted broad supervisory control over whole industries and with it broad powers to search and arrest infringers. These powers were predictably subject to frequent and profound abuse by the patentees, who were commonly unpopular favorites of James . . . further fomenting public scorn for both the monopolies and the monopolists. The administrative mechanism for controlling the patents having broken down, their use was completely unmanaged. The patents were economically burdensome and politically unpopular, but their use was so poorly administered that

69. *Id.* at 1353.

70. *See id.* at 1344–45.

James received very little of the economic rents they generated.⁷¹

King James I called his third Parliament in 1621, a point at which the issue of royally granted monopolies was prominent on the agenda in the House of Commons.⁷² The increased attention to the issue was attributed in part to a severe economic depression at that time, even though the monopolies themselves did not appear to be the primary cause of the depression.⁷³ The House of Commons established a Committee of Grievances, with Sir Edward Coke, by then a Member of Parliament, as chairman.⁷⁴ Coke had been fired as Lord Chief Justice of England by King James for his unwillingness to decide legal cases as the King wished.⁷⁵ He entered Parliament as a foe to the King, and, by 1621 was an outspoken critic of royally granted monopolies. A draft bill banning monopolies was quickly reported in Parliament.⁷⁶ However, the bill did not pass the House of Lords at that time, in part because of concern among the Lords that the bill would overly constrain the royal prerogative.⁷⁷ In an effort to appease the House of Commons, King James issued yet another proclamation cancelling some patents and submitting others to common law courts.⁷⁸ He also later established a committee by royal proclamation to hear and address grievances regarding monopolies.⁷⁹

Between 1621 and 1624, debate over foreign policy consumed much of Parliament's time.⁸⁰ However, eventually a bill, which became the Statute of Monopolies passed the House of Commons with language that was largely the same as that in the 1621 bill.⁸¹ When the bill reached the House of Lords, the Lords proposed a number of exceptions to the general prohibition on

71. *Id.* at 1346.

72. *Id.*

73. Dent, *supra* note 28, at 430 & n.111.

74. Nachbar, *supra* note 31, at 1346.

75. See Martha Andes Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135, 137.

76. Nachbar, *supra* note 31, at 1346-47.

77. *Id.* at 1347 n.157.

78. *Id.* at 1348.

79. *Id.*

80. James proposed for his son to Charles to marry Infanta Maria of Spain to create an alliance. When that failed, anticipation of war with Spain consumed much of Parliament's time. *Id.* at 1349.

81. *Id.*

monopolies, such as for the granting of patents and for the chartering of corporations.⁸² Sir Edward Coke did not ultimately object to the exception for chartering corporations, because he did not think the Statute of Monopolies applied to them.⁸³ Further, Parliament wanted to maintain full employment, which the guilds (also exempted from the Statute of Monopolies) and corporations were both thought to have an interest in protecting.⁸⁴ The guilds exerted an enormous amount of political power at this time.⁸⁵ As a result, during the same term that Parliament passed the Statute of Monopolies, it also passed a seemingly conflicting statute, which permitted only free members of the Cheesemongers and Tallow-chandlers guilds to purchase cheese and butter for resale in London.⁸⁶ For the Statute of Monopolies to pass the House of Lords, it also was necessary to alter the act to include exceptions for glassmaking and for alum mines.⁸⁷

Guilds were not necessarily monopolies *per se*. Historically, guilds had been fraternal associations, which in this context were joined together by a shared craft or trade.⁸⁸ However, by obtaining patents or charters within the city in which they operated, the guilds often gained monopoly control over their respective crafts or trades.⁸⁹ Because English guilds held more sway with Parliament than with the Crown, the guilds sought support from Parliament to protect them from the royally granted monopolies, which sometimes conflicted with their control of a particular market.⁹⁰

The Statute of Monopolies, as amended by the House of Lords and approved by the House of Commons in 1624, is strongly worded and broad in scope, reaching all types of roy-

82. *Id.* at 1349–50.

83. *Id.* at 1350.

84. Dent, *supra* note 28, at 449 (“[I]t has been argued that the ‘official protection’ of companies throughout the Stuart period stemmed ‘directly from an employment policy [despite bearing] the superficial marks of being concerned solely with private or strategic interests.’” (quoting B.E. SUPPLE, COMMERCIAL CRISIS AND CHANGE IN ENGLAND 1600–1642, at 243 (1959)) (second alteration in original).

85. Nachbar, *supra* note 31, at 1355.

86. *Id.* at 1350.

87. Dent, *supra* note 28, at 450.

88. See, e.g., GERALD HARRISS, SHAPING THE NATION: ENGLAND 1360–1461, at 289 (2007).

89. See Nachbar, *supra* note 31, at 1320–21.

90. See *id.* at 1322, 1355.

ally granted monopolies. As Chancellor of New York James Kent later described the law, it was the “‘Magna Charta of British Industry,’ because it ‘contained a noble principle, and secured to every subject unlimited freedom of action, provided he did no injury to others, nor violated statute law.’”⁹¹ In Section One it provides that:

[A]ll monopolies and all commissions, grants, licences, charters and letters patents heretofore made or granted, or hereafter to be made or granted to any person or persons, bodies politic or corporate whatsoever, of or for the sole buying, selling, making, working or using of any thing within this realm or the dominion of Wales, or of any other monopolies, or of power, liberty or faculty, to dispense with any others, or to give licence or toleration to do, use, or exercise any thing against the tenor or purport of any law or statute . . . and all proclamations, inhibitions, restraints, warrants of assistance, and all other matters and things whatsoever, any way tending to the instituting, erecting, strengthening, furthering, or countenancing of the same or any of them, are *altogether contrary to the laws of this realm, and so are and shall be utterly void and of none effect, and in no wise to be put in u[s]e or execution.*⁹²

Section Two makes it clear that litigation involving monopolies was subject to trial in the common law courts.⁹³ Section Six of the Statute contains exceptions for invention patents, which were subject to a time limit:

[A]ny declaration before mentioned shall not extend to any letters patents and grants of privilege for the term of fourteen years or under, hereafter to be made, of the sole working or making of any manner of new manufactures within this realm to the true and first inventor and inventors of such manufactures, which others at the time of making such letters patents and grants shall not use.⁹⁴

91. SANDEFUR, *supra* note 29, at 20 (quoting 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 271 n.(c) (Charles M. Barnes ed., Little, Brown and Company 12th ed. 1884)).

92. Statute of Monopolies, 1623, 21 Jac. 1, c. 3, § 1 (Eng.) (emphasis added), available at <http://innovation.hoover.org/media/file/ppl/English%20Statute%20of%20Monopolies%201623.pdf>.

93. *Id.* § 2 (“[A]ll monopolies, . . . commissions, grants, licences, charters, letters patents, proclamations, inhibitions, restraints, warrants of assistance . . . shall be for ever hereafter examined, heard, tried, and determined, by and according to the common laws of this realm, and not otherwise.”).

94. *Id.* § 6.

Interestingly, Section Seven exempts grants of monopoly privileges by Parliament:

[T]his act or anything therein contained shall not in any wise extend or be prejudicial to any grant or privilege, power, or authority whatsoever heretofore made, granted, allowed, or confirmed by any act of parliament now in force, so long as the same shall so continue in force.⁹⁵

As previously mentioned, Sections Nine through Fourteen provide exceptions for corporations and specific patents.⁹⁶

King James's response to Parliament's passage of the Statute of Monopolies was predictably negative:

Touching my Patents in general, I am grieved that you have called them in and condemned them upon so short examination. I confess I might have passed some upon false suggestion and wrong information, but you are not to recall them before they be examined by the judges. . . . Therefore I advise you to be careful, that you have a good ground before you call for your patents, that you do not defraud patentees. . . . I say to you when you judge of patents, hear patiently, say not presently, it is against the law, for patents are not to be judged unlawful by you.⁹⁷

Thus, again King James questioned Parliament's authority to enact the statute, although he "begrudgingly" assented to it.⁹⁸ However, given King James's views, it is perhaps unsurprising that despite the statute's sweeping language, monopoly royal trade privileges continued to be granted well past King James I's reign (which ended with his death in 1625) and through the reign of King Charles I.⁹⁹

Parliament continued to complain and protest against royal monopolies after the adoption of the Statute of Monopolies. For example, monopolies were one of the main issues that confronted the Long Parliament, which lasted from 1640 to 1648,¹⁰⁰

95. *Id.* § 7.

96. *See id.* §§ 9–14. As discussed above, some of these exceptions have been attributed to the influence of special interests on Parliament. *See* notes 84–87 *supra* and accompanying text.

97. Mossoff, *supra* note 34, at 1271–72 (quoting Walterscheid, *supra* note 34, at 873) (alterations in original).

98. *Id.* at 1271.

99. *See* Nachbar, *supra* note 31, at 1353; Conant, *infra* note 102.

100. *See* BLAIR WORDEN, THE RUMP PARLIAMENT 3–4 (1974).

and one of the most famous statements criticizing royal monopolies was made at this time:

They are a nest of wasps—a swarm of vermin which have overcrept the land. Like the frogs of Egypt they have gotten possession of our dwellings, and we have scarce a room free from them. They sup in our cup; they dip in our dish; they sit by our fire. We find them in the dye-fat, wash-bowl, and powdering-tub. They share with the butler in his box. They will not bait us a pin. We may not buy our clothes without their brokage. These are the leeches that have sucked the commonwealth so hard that it is almost hectical.¹⁰¹

Eventually, Parliament successfully cancelled some monopolies and, in 1691 abolished the Court of Star Chamber, the primary court that had enforced and protected the royally granted monopoly privileges.¹⁰² The Statute of Monopolies came eventually to be seen as a declaration by Parliament of its authority to legislate against royally granted monopolies and as expressing Parliament's strong support for the common law courts.¹⁰³ Indeed, Parliament's exercise of power in opposing royal monopolies eventually led to the exertions of parliamentary power that culminated in the English Civil War and the Glorious Revolution of 1688, which took place just decades later.¹⁰⁴ The adoption of the English Bill of Rights of 1689, which ended the king's claim that he could ignore or alter statutory law, confirmed for all time Parliament's power to bind the King by making statutory law.¹⁰⁵

In some sense the struggle over the Statute of Monopolies was as much a struggle over political power as it was a statement about free trade, as Section Seven of the Statute made monopolies issued by the crown illegal, but permitted such monopolies when issued by Parliament.¹⁰⁶ King James I may only have assented to the Statute of Monopolies because Eng-

101. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 47 (1872) (quoting speech of Sir John Culpeper during the Long Parliament).

102. Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 EMORY L.J. 785, 796 (1982).

103. See Mossoff, *supra* note 34, at 1272 (describing the Statute of Monopolies as "an incredible assertion of parliamentary order and rule by common law").

104. See Nachbar, *supra* note 31, at 1353. See generally MICHAEL BRADDICK, *GOD'S FURY, ENGLAND'S FIRE* 113–55 (discussing interactions between the Long Parliament and the monarchy).

105. See Conant, *supra* note 102.

106. Nachbar, *supra* note 31, at 1354–55.

land was then at war with Spain, making the King more willing to concede power to Parliament to ensure funding for the impending war.¹⁰⁷ In any event, the Statute received the royal assent and so it became part of the supreme law of England.

The debate over monopolies should also be viewed in light of the efforts during the late 1620s of King James I's son, King Charles I, to tax Englishmen without parliamentary approval.¹⁰⁸ King Charles I's preferred way of doing so was to arrest wealthy individuals and then say he would only release them in exchange for a forced loan.¹⁰⁹ Outraged, Sir Edward Coke led Parliament in forcing Charles I to sign the Petition of Right, which "protested martial law, billeting, arbitrary taxation, and arbitrary imprisonment."¹¹⁰ The belief of colonial Americans that they could not be taxed by an English parliament in which they were not represented in part dates back to Parliament's successful efforts in the 1620s to stop monopolies and to prevent the King from taxing his subjects without Parliament's consent.¹¹¹

Although the Statute of Monopolies was a tremendous accomplishment from a constitutional perspective, it had some serious shortcomings because of its various exceptions and its reservation to Parliament of the power to grant monopolies. Why did the Statute pass in the form in which it did? First, members of Parliament had to make compromises for the sake of political expediency as part of the lawmaking process, which necessitated the inclusion of exceptions for politically powerful special interest groups, such as the various guilds.¹¹² In addition, the guilds who were leading advocates of the Statute of Monopolies because of the power it took away from the Crown, exerted a huge influence on the drafting of the Statute.¹¹³ The guilds obviously did not support the Statute of Monopolies because it stood for free trade, but rather because the

107. *See id.* at 1352–53.

108. For the Proposition that Charles I taxed in the absence of parliamentary approval, see Steve Bachmann, *Starting Again with the Mayflower . . . England's Civil War and America's Bill of Rights*, 20 QUINNIPIAC L. REV. 193, 202 (2000).

109. *See* GEORGE MACAULAY TREVELYAN, ENGLAND UNDER THE STUARTS 138–39 (1922).

110. Bachmann, *supra* note 108; accord CHRISTOPHER HILL, THE CENTURY OF REVOLUTION: 1603-1714, at 11–12 (1961); TREVELYAN, *supra* note 109, at 142–44.

111. Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American revolutionary Thought*, 30 STAN. L. REV. 843, 870 (1978).

112. *See* notes 84–87 *supra* and accompanying text.

113. Nachbar, *supra* note 31, at 1350, 1355.

Statute would help them economically by protecting the guilds from royal monopolists.¹¹⁴ Second, the theoretical underpinnings for the benefits of free trade had not yet been expounded by Adam Smith and other modern economists: England was dominated by mercantilism at the time the Statute of Monopolies was enacted.¹¹⁵ Adam Smith's *The Wealth of Nations*—the fundamental work in classical economics—was not published until 1776, over 150 years after the Statute.¹¹⁶ Britain's free trade era did not begin until the mid-nineteenth century.

Nonetheless, the negative effects of monopolies were already recognized by the early seventeenth century,¹¹⁷ and monopolies were in fact limited in post-Revolutionary England relative to Tudor and early Stuart rule.¹¹⁸ The limits set on monopolies both in the common law and in the Statute of Monopolies show an awareness of the costs monopolies impose. This concern with the evils of monopolies traveled with Englishmen when they crossed the Atlantic Ocean to settle the New World.

B. *Colonial America*

The North American colonists generally considered themselves Englishmen, and they believed that English statutes and common law rights and privileges should extend to them as they had applied to their English ancestors.¹¹⁹ Their inability to vindicate these same rights and privileges was one of the many grievances expressed by the colonists around the time of the writing of the Declaration of Independence:

[T]he respective colonies are entitled to the common law of England . . . [and] they are entitled to the benefit of such of the English statutes as existed at the time of their colonization; and which they have, by experience, respectively found to be applicable to their several local and other circumstances.¹²⁰

114. *Id.* at 1355.

115. *Id.* at 1358.

116. *Id.*

117. *See, e.g.*, note 101 *supra* and accompanying text.

118. *Id.* at 1361.

119. *See* BENJAMIN LEWIS PRICE, *NURSING FATHERS* 2, 190 (1999).

120. 1 *JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789*, at 69 (Worthington Chauncy Ford ed., 1904).

In practice, courts would find that English statutes applied to the colonies only if the statute so specified.¹²¹ As for application of the common law to the colonists, matters were complicated by the fact that the colonies' interpretation of the "common law" did not always correspond to the English interpretation, and, in any event, the common law in the North American colonies varied according to local circumstances.¹²² Moreover, although some language in the thirteen colonial charters suggested that the common law of England extended to the North American colonies, it is unlikely that the King's lawyers who drafted the charters meant to extend full common law rights to the colonies.¹²³

The Statute of Monopolies did not state explicitly that it extended to the colonies, so it did not apply, and common law precedents were of questionable application as well.¹²⁴ As a result, the colonies enacted their own versions of the Statute of Monopolies both to grant patents for economic development purposes and to place restrictions on the issuance of patents. For example, Massachusetts's 1641 Body of Liberty provided that "[n]o 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."¹²⁵ Connecticut passed a similar law in 1672.¹²⁶ Compared to the Statute of Monopolies, these acts have been described as "mainly declaratory" and the text of these provisions was much less comprehensive.¹²⁷ The assembly was generally left to determine on a case-by-case basis whether to grant a patent and under what terms.¹²⁸

It is essential to note that, if it were not for the Crown's ability to grant royal charters, the colonies themselves would not have existed. All of the original thirteen colonies were estab-

121. Edward C. Walterscheid, *Understanding the Copyright Act of 1790: The Issue of Common Law Copyright in America and the Modern Interpretation of the Copyright Power*, 53 J. COPYRIGHT SOC'Y U.S.A. 313, 320 (2006).

122. *See id.* at 320–27.

123. *Id.* at 322; *see also* Brown, *infra* note 130, at 96.

124. *See id.* at 323.

125. Oren Bracha, *The Commodification of Patents 1600–1836: How Patents Became Rights and Why We Should Care*, 38 LOY. L.A. L. REV. 177, 214 (2004) (quoting *The Body of Liberties of 1641; A Coppie of the Liberties of the Massachusetts Colonie in New England*, in *THE COLONIAL LAWS OF MASSACHUSETTS* 33, 34–35 (Boston, William H. Whitmore ed., 1890)).

126. *Id.* n.209.

127. *Id.* at 214.

128. *Id.*

lished through the grant of royal charters, by which the King established and empowered their respective governments.¹²⁹ However, it was the language in the charters that the colonists relied on as their relationship with England deteriorated. For instance, Virginia's charter of 1611–1612 established an assembly to meet four times per year to create laws “[s]o *always*, as the same be not contrary to our Laws and Statutes of this our Realm of *England*.”¹³⁰ Colonial charters were similarly written in the other North American colonies.¹³¹

On this point, it is important to recognize the influence of Sir Edward Coke, who may be thought of as a hero for the colonists, especially the Puritans who settled in Massachusetts and Connecticut. Discussing the colonists' reliance on Coke for their understanding of the English common law, Theodore Plucknett wrote in a 1927 article that the common law was the “palladium of their civil liberties.”¹³² Coke proclaimed in *Bonham's Case* that the common law governed parliamentary acts,¹³³ and the colonists repeatedly relied on this declaration to argue that the colonies could use common law to oppose British regulations.¹³⁴ For example, the Massachusetts Bay Colony relied directly on Coke when King James II abrogated its original colonial charter in 1684 and attempted to consolidate all the

129. See BURKE AARON HINSDALE, *THE OLD NORTHWEST* 70 (New York, Townsend MacCoun 1888), available at <http://books.google.com/books?id=vMMrAAAYAAJ>; see also Steven G. Calabresi, *The Historical Origins of the Rule of Law in the American Constitutional Order*, 28 HARV. J.L. & PUB. POL'Y 273, 277–78 (2004). See generally HINSDALE, *supra*, at 70–119 (discussing the various royal charters that constituted the thirteen colonies).

130. Walterscheid, *supra* note 121, at 322 (quoting Elizabeth Gaspar Brown, *British Statutes in the Emergent Nations of North America: 1606–1949*, 7 AM. J. LEGAL HIST. 95, 97 (1963)) (internal quotation marks omitted).

131. *Id.* at 321.

132. Theodore F.T. Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30, 62 (1926).

133. Bernard H. Siegan, *Protecting Economic Liberties*, 6 CHAP. L. REV. 43, 50 (2003).

134. See, e.g., Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 668 (2009) (“Coke’s higher law constitutionalism was deployed by the American colonists in their revolutionary struggle against Britain and incorporated into their constitutional thinking, as evidenced by their revolutionary rhetoric, their conceptualization of their new state constitutions as primarily frames of government that recognized but did not create fundamental rights, and their conflict over the lack of a bill of rights in the federal Constitution.”); Siegan, *supra* note 133, at 50 (“The American colonists often cited Coke as proclaiming the supremacy of the common law, and many political leaders invoked Coke in opposition to regulation.”).

New England colonies, along with the colonies of New York and New Jersey, in a so-called Dominion of New England. This event “provoked an outspoken claim [of] independence” and Bostonians were said to “hold forth a law book, & quote the Authority of the Lord Cook [sic] to Justifie their setting up for themselves; pleading the possession of 60 years against the right of the Crown.”¹³⁵ Sir Edward Coke’s name and authority were also used by James Otis in *Paxton’s Case*, challenging the writs of assistance that provided general search warrants, often in customs cases.¹³⁶ In fact, it is fair to say that Otis’s entire argument in *Paxton’s Case* relied upon Coke and *Bonham’s Case*.¹³⁷

Another example of the hold that Sir Edward Coke had on the legal thinking of colonial Americans comes from the controversy over the Stamp Act of 1765. This Act taxed the colonists without their consent, which elicited the complaint that the Act “violated ‘Magna Carta and the natural rights of Englishmen, and therefore[,] according to Lord Coke[,] [was] null and void.’”¹³⁸ Samuel Adams expressed a similar view when he said that “whether Lord Coke has expressly asserted it or not, . . . an act of parliament made against Magna Charta in violation of its essential parts, is void.”¹³⁹ As the Royal Governor of Massachusetts, Thomas Hutchinson, complained, the colonists took “advantage of a maxim they find in Lord Coke that an Act of Parliament against Magna Carta or the peculiar rights of Englishmen is *ipso facto* void.”¹⁴⁰ In addition to relying on *Bonham’s Case*, when John Adams, writing under the pseudonym “Novanglus,” asserted in 1774 that Parliament had no authority over the colonies and that each was a separate realm

135. Plucknett, *supra* note 132, at 62–63 (footnote omitted) (internal quotation marks omitted).

136. *Id.* at 63.

137. *See id.* (discussing reliance on Lord Coke’s arguments).

138. Siegan, *supra* note 133, at 50 (quoting Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 970 (1990)) (first and second alterations in original).

139. 1 Vernon Louis PARRINGTON, *MAIN CURRENTS IN AMERICAN THOUGHT: THE COLONIAL MIND 1620-1800*, at 244 (Harcourt, Brace 1954) (1927) (quoting 2 SAMUEL ADAMS, *THE WRITINGS OF SAMUEL ADAMS* 194 (The Echo Library 2006) (Harry Alonzo Cushing ed., 1906)), available at http://xroads.virginia.edu/~hyper/parrington/vo11/bk02_03_ch04.html.

140. Plucknett, *supra* note 132, at 63 (citation omitted) (internal quotation marks omitted).

under the king with its own independent legislature, he started his analysis with an argument from Coke's *Institutes*.¹⁴¹

Thus, the American colonists, relying in part on Coke, believed that all the constitutional protections afforded to Englishmen also applied to them—including the protections conferred by the Statute of Monopolies¹⁴² and by *Darcy v. Allen*.¹⁴³ For example, William Penn, the founder of the Province of Pennsylvania and a proponent of the idea that the rights of Englishmen extended to those in the colonies,¹⁴⁴ wrote about the evil of monopolies and the harm they caused. In a section of a 1687 pamphlet called *The Excellent Priviledge of Liberty & Property Being the Birth-Right of the Free-Born Subjects of England*, William Penn summarized the Statute of Monopolies and *Darcy v. Allen*, writing: "Generally all Monopolies are against the great charter because they are against the Liberty and Freedom of the Subject, and against the Law of the Land."¹⁴⁵ Thus, Thomas Barnes is quite right when he says: "Do not examine too closely the extent to which Sir Edward Coke fell in behind Citizen Sam. Scores of others of our Founding Fathers had no doubt which side Lord Coke was on, and none questioned the magnitude of the aid he gave them."¹⁴⁶

England's continued practice of issuing monopolies was a direct cause of the American Revolution. England enacted an extensive set of laws granting English merchants monopolies in colonial trade for a variety of markets—from manufactured goods to all kinds of raw materials.¹⁴⁷ Black markets arose in the colonies as a response to England's mercantilist trade pol-

141. Thomas G. Barnes, *Introduction to Coke's "Commentary on Littleton"* (1995), in *LAW, LIBERTY, AND PARLIAMENT: SELECTED ESSAYS ON THE WRITINGS OF SIR EDWARD COKE* 1, 25 (Allen D. Boyer, ed., 2004).

142. Conant, *supra* note 102, at 798–99.

143. *Id.* at 798.

144. Penn drafted the Frame of Government of Pennsylvania in 1682, which safeguarded some of the rights of Englishmen. See Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1566–67 (1989).

145. Conant, *supra* note 102, at 798 (quoting WILLIAM PENN, *THE EXCELLENT PRIVILEGE OF LIBERTY & PROPERTY* (1687), as reprinted in A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 421 (1968)).

146. THOMAS G. BARNES, *SHAPING THE COMMON LAW: FROM GLANVILLE TO HALE*, 1188–1688, at 135 (2008).

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

icy.¹⁴⁸ As a result, the English mercantile laws were enforced with great intrusiveness, which in turn had grave consequences for England's relationship with the American colonies.¹⁴⁹ For instance, although the main point of protest in Boston over the Tea Act was taxation without representation, the Boston Tea Party was an act against the British government *and the East India Company*, which had a monopoly over tea importations to the colonies.¹⁵⁰ The havoc wreaked by the English monopoly system on England's relationship with the American colonies cannot be overstated:

[T]he 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. The spirit of monopoly which had permeated English business life for centuries and worked injury in so many ways now wrought irreparable harm to the British Empire by bringing about the loss of invaluable dominions and the irrevocable division of the English people.¹⁵¹

Thus, the English experience with monopolies influenced colonial America in two ways. First, some colonies adopted their own versions of the Statute of Monopolies, because the English Statute of Monopolies and common law were generally thought not to extend to the colonies.¹⁵² Second, England's monopolistic trade laws led to protest by the colonists and eventually the American Revolution, just as King James I's monopolies had so outraged Englishmen in Parliament in the 1620s and led to the English Civil War in the 1640s.¹⁵³ In both instances, complaints were made about taxation without representation, and in both instances monopolies were in part to blame. King George III, like James I, imposed a double burden on his people by both taxing his people directly *and* by indirectly taxing them through the issuance of royal monopolies. The colonists were both taxed on imports and subjected to British control over foreign trade without representation in Parliament.

148. *Id.* at 51.

149. *See id.* at 51–52.

150. *Id.* at 51.

151. *Id.* at 52.

152. *See* notes 124–28 *supra* and accompanying text.

153. Regarding the role of monopolies in the English Civil War, *see* notes 100–04 *supra* and accompanying text.

II. MONOPOLIES IN THE UNITED STATES

A. *At the Founding*

The evils of the English monopolies and their impact on the American colonists guaranteed that the right to be free from monopolies would merit attention during the drafting and ratifying of the federal Constitution. Several of the Founders themselves, as well as the Antifederalists and the state ratifying conventions, took the position that the United States Constitution should have an antimonopoly clause.¹⁵⁴

George Mason and Thomas Jefferson led the way in urging that the new U.S. Constitution contain an antimonopoly clause.¹⁵⁵ Mason's concern about the evils of monopoly coupled with the grants of power to Congress in the Commerce Clause and the Necessary and Proper Clause partly explains his refusal to sign the proposed Constitution after the Philadelphia Convention.¹⁵⁶ Mason was concerned that the Commerce Clause and the Necessary and Proper Clause might be used to regulate navigation in favor of the northern and eastern states by granting monopolies in trade:

By requiring only a Majority to make all commercial and navigation Laws, the five Southern States (whose Produce and Circumstances are totally different from that of the eight Northern and Eastern States) will be ruined; for such rigid and premature Regulations may be made, as will enable the Merchants of the Northern and Eastern States not only to demand an exorbitant Freight, but to monopolize the Purchase of the Commodities at their own Price, for many years: to the great Injury of the landed Interest, and Impoverishment of the People: and the Danger is the greater, as the Gain on one Side will be in Proportion to the Loss on the other

Under their own Construction of the general Clause . . . the Congress may grant Monopolies in Trade and Commerce¹⁵⁷

154. See Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 84 J. PAT. & TRADEMARK OFF. SOC'Y 909, 925-27 (2002).

155. See *id.*

156. *Id.* at 926-27. Elbridge Gerry of Massachusetts refused to sign the proposed Constitution for similar reasons. *Id.* at 927.

157. Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 339 (2004) (quoting George Mason, *Objections to the Constitu-*

George Mason's concern was not exactly far-fetched given that the English colonial government had misused its powers over trade in precisely this way.¹⁵⁸ Indeed, the English abuse of power is similar to the federal government's abuses of power in the nineteenth century—after 1861, the newly ascendant Republican Party protected northern manufacturing interests to the disadvantage of the South with a policy of extremely high protectionist tariffs.¹⁵⁹

Thomas Jefferson also hated monopolies and believed that they should be constitutionally banned.¹⁶⁰ In a letter to James Madison, complaining about the lack of a Bill of Rights in the proposed Constitution, Jefferson put the principle of freedom from government monopolies on par with all of the other rights now enshrined in the Bill of Rights, such as the freedom of the press and of religion:

I will now add what I do not like. First the omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, *restriction against monopolies*, the eternal and unremitting force of the habeas corpus laws, and trials by jury Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference.¹⁶¹

Specifically on the issue of monopolies, Jefferson later wrote:

[It] is better to . . . abolish . . . Monopolies, in all cases, than not to do it in any. . . . [S]aying there shall be no monopolies lessens the incitements to ingenuity . . . but the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression.¹⁶²

tion of Government Formed by the Convention (1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 11, 12–13, para. 2.2.11 to 2.2.12 (Herbert J. Storing ed., 1981) (first alteration in original)).

158. See notes 149–53 *supra* and accompanying text.

159. See Benjamin O. Fordham, Protectionist Empire: Trade, Tariffs, and United States Foreign Policy, 1890–1914, at 8–10 (Mar. 11, 2011) (unpublished manuscript), available at http://government.arts.cornell.edu/assets/psac/sp11/Fordham_PSAC_Mar11.pdf.

160. See Ochoa & Rose, *supra* note 154, at 925.

161. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), reprinted in 12 THE PAPERS OF THOMAS JEFFERSON 438, 440 (Julian P. Boyd ed., 1966) (emphasis added).

162. Letter from Thomas Jefferson to James Madison (July 31, 1788), reprinted in 13 THE PAPERS OF THOMAS JEFFERSON 440, 442–43 (Julian P. Boyd ed., 1966).

In response, Madison argued that monopolies should be allowed in the limited circumstances where they were beneficial, and that it was thus necessary not to have an outright prohibition against them:

With regard to Monopolies, they are justly classed among the greatest nuisances in Government. But is it clear that as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced? Would it not suffice to reserve in all cases a right to the public to abolish the privilege at a price to be specified in the grant of it?¹⁶³

In fact, Madison proposed during the Philadelphia convention to give the federal government the power to grant “charters of incorporation.”¹⁶⁴ However, this proposal was voted down because, as Rufus King of Massachusetts argued, it might lead to “mercantile monopolies,” as had happened in England before the American Revolution.¹⁶⁵ George Mason also objected to giving Congress the power to grant charters of incorporation, arguing that this power would lead to “monopolies of every sort.”¹⁶⁶

Jefferson refused to give in after reviewing a draft of the Bill of Rights, and he wrote to Madison again saying that he would have liked to have seen the following provision added to the Bill of Rights:

Art. 9. Monopolies may be allowed to persons for their own productions in literature and their own inventions in the arts for a term not exceeding ___ years but for no longer term and for no other purpose.¹⁶⁷

Jefferson did not say what he meant by the word “monopoly,” but Samuel Johnson’s dictionary at the time defined the term as “the exclusive privilege of selling any thing.”¹⁶⁸

163. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), reprinted in 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: DOCUMENTARY HISTORY* 614, 617–18 (1971).

164. Daniel A. Crane, *Lochnerian Antitrust*, 1 N.Y.U. J.L. & LIBERTY 496, 506 (2005) (quoting DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 141 (1990)) (internal quotation marks omitted).

165. *Id.*

166. *Id.*

167. Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), reprinted in 15 *THE PAPERS OF THOMAS JEFFERSON* 364, 368 (Julian P. Boyd ed., 1958).

168. 2 SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* 147 (6th ed. 1785).

Interestingly, Jefferson also opposed the creation of the federal Post Office¹⁶⁹—perhaps the most venerable monopoly in American history. Jefferson wrote to James Madison that he thought the newly created Post Office was “a source of boundless patronage to the executive” and would provide

[J]ob[s] to members of Congress & their friends, and a bottomless abyss of public money. You will begin by only appropriating the surplus of the post office revenues; but the other revenues will soon be called into their aid, and it will be a scene of eternal scramble among the members, who can get the most money wasted in their State; and they will always get most who are meanest.¹⁷⁰

As will be discussed in more depth below, Jefferson’s opposition to the postal monopoly was shared by Lysander Spooner, the radical political reformer and abolitionist who challenged the federal postal monopoly in the mid-nineteenth century by creating a direct competitor, the American Letter Mail Company.¹⁷¹

Jefferson was not the only Framer to express concern about the Constitution and grants of monopoly privilege; the Antifederalists also spoke out about the evils and dangers of monopoly. The most outspoken of the Antifederalists on this topic was Agrippa.¹⁷² Looking to Europe’s experience with monopolies in trade, Agrippa recognized that the main threat to competition in most countries did not come from the market, but, rather, from the government itself:

In most countries of Europe, trade has been confined by exclusive charters. Exclusive companies are, in trade, pretty much like an aristocracy in government, and produce nearly as bad effects. . . . [I]n the British islands all these circumstances together have not prevented them from being injured by the monopolies created there. Individuals have been enriched, but the country at large had been hurt . . . because they consequentially defeat the trade of the out-ports,

169. Letter from Thomas Jefferson to James Madison (Mar. 6, 1796), reprinted in 8 THE WORKS OF THOMAS JEFFERSON 223, 226 (Paul Leicester Ford ed., 1904), available at http://files.libertyfund.org/files/805/0054-08_Bk.pdf.

170. *Id.*

171. See Part II.C *infra*.

172. See, e.g., Agrippa IX, MASS. GAZETTE, Dec. 28, 1787 (“[Congress] ought to be restrained from creating any monopolies.”), available at <http://www.constitution.org/afp/agrippa.htm>; Agrippa X, MASS. GAZETTE, Jan. 1, 1788 (“The United States shall not . . . create any monopolies or exclusive companies”), available at <http://www.constitution.org/afp/agrippa.htm>.

and are also injurious to the general commerce, by enhancing prices and destroying that rivalry which is the great stimulus to industry.¹⁷³

Other Antifederalists voiced the same concerns about monopolies. “A Son of Liberty” feared that “monopolies in trade, [would be] granted to the favorites of government, by which the spirit of adventure will be destroyed, and the citizens subjected to the extortion of those companies who will have an exclusive right, to engross the different branches of commerce.”¹⁷⁴ The Federal Farmer, likewise wrote that “[a]s monopolies in trade perhaps, can in no case be useful, it might not be amiss to provide expressly against them.”¹⁷⁵

Agrippa called for strong restraints on the ability of the federal government to grant monopolies in the new Constitution, recognizing that the “unlimited power over trade, domestic as well as foreign, is another power that will more probably be applied to a bad than to a good purpose.”¹⁷⁶ Echoing Adam Smith, whose book, *The Wealth of Nations*, was fittingly first published in 1776, Agrippa argued:

The freedom that every man, whether his capital is large or small, enjoys of entering into any branch that pleases him, rouses a spirit of industry and exertion, that is friendly to commerce. It prevents that stagnation of business which generally precedes public commotions. Nothing ought to be done to restrain this spirit.¹⁷⁷

Six states wanted to include provisions banning monopolies and grants of special privilege in the U.S. Constitution: New Hampshire, Massachusetts, New York, North Carolina, Virginia, and Rhode Island.¹⁷⁸ Massachusetts’s proposal on February 6, 1788, was that the Constitution be amended to state “[t]hat Congress erect no company with exclusive advantages

173. James P. Philbin, *The Political Economy of the Antifederalists*, 11 J. LIBERTARIAN STUD. 79, 104 (1994) (quoting 4 THE COMPLETE ANTI-FEDERALIST 80, 81, 104 (Herbert J. Storing ed., 1981)).

174. *Id.* at 104–05 (quoting 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 173, at 492) (internal quotation marks omitted).

175. *Id.* at 105 (quoting LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 131 (Walter Hartwell Bennett ed., 1978)) (internal quotation marks omitted).

176. *Id.* (quoting 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 173, at 104).

177. *Id.* (quoting 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 173, at 104).

178. See Conant, *supra* note 102, at 800; see also Donald S. Lutz, *The States and the U.S. Bill of Rights*, 16 S. ILL. U. L.J. 251, 256–57 (1992) (cataloging amendments proposed by ratifying states); Ochoa & Rose, *supra* note 154, at 927.

of commerce.”¹⁷⁹ New Hampshire and North Carolina proposed similar amendments.¹⁸⁰ New York recommended “[t]hat the congress do not grant monopolies or erect any Company with exclusive Advantages of Commerce.”¹⁸¹ Rhode Island’s belated ratification of the Constitution in 1790 recommended the same language as New York, although it was too late to have an influence.¹⁸² Virginia’s proposal was “[t]hat no man or set of men are entitled to separate or exclusive public emoluments or privileges from the community, but in consideration of public services, which not being descendible, neither ought the offices of magistrate, legislator, or judge, or any other public office, to be hereditary.”¹⁸³ All of these proposed antimonopoly amendments to the Constitution came from the state ratifying conventions, but since the task of writing the federal Bill of Rights in response to the requests for amendments from the States fell to newly elected Congressman James Madison, an antimonopoly clause was omitted from the federal Bill of Rights.¹⁸⁴ Madison was stubborn, persistent, and successful in keeping an antimonopoly clause out of the Founders’ Constitution! This omission is remarkable since even Alexander Hamilton, a notorious proponent of a strong central government and of mercantilism, acknowledged the pressure from the States for an antimonopoly clause. As Hamilton said regarding the constitutionality of a national bank:

It is remarkable that the State conventions, who had proposed amendments in relation to this point, have most, if not

179. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 177 (Jonathan Elliot ed., 1827), available at http://files.libertyfund.org/files/1906/1314.02_Bk.pdf.

180. See Ochoa & Rose, *supra* note 154, at 927.

181. Ratification of the Constitution by the State of New York, reprinted in DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 1034, 1040 (Charles C. Tansill ed., 1927), available at <http://www.teachingamericanhistory.org/ratification/tansill/ratification-newyork.html>; see also Ochoa & Rose, *supra* note 154, at 927.

182. See Conant, *supra* note 102, at 800 & n.76.

183. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 657 (Jonathan Elliot ed., 1827), available at http://files.libertyfund.org/files/1907/1304.03_Bk.pdf.

184. See Herbert Mitgang, *Handwritten Draft of a Bill of Rights Found*, N.Y. TIMES, July 29, 1987, <http://www.nytimes.com/1987/07/29/us/handwritten-draft-of-a-bill-of-rights-found.html> (noting that a prohibition on monopolies appeared in a draft of the Bill of Rights authored by Roger Sherman, and that Madison omitted to include that prohibition in the final Bill of Rights); see also Ochoa & Rose, *supra* note 154, at 27 (discussing Madison’s opposition to an antimonopoly provision).

all of them, expressed themselves nearly thus: Congress shall not grant monopolies, nor erect any company with exclusive advantages of commerce! Thus, at the same time, expressing their sense, that the power to erect trading companies or corporations was inherent in Congress, and objecting to it no further than as to the grant of exclusive privileges.¹⁸⁵

Interestingly, only one of the states that sought a federal anti-monopoly clause (North Carolina) actually banned monopolies in its own state constitution.¹⁸⁶ The scarcity of state bans suggests that there was greater concern about monopoly abuses at the federal level than at the state level. This fact makes some sense when we remember that colonial America had been confronted with English monopolies backed by a powerful central government.¹⁸⁷ It must also be noted that, in drafting their own state constitutions, the States focused more on the structures of state government than on producing state bills of rights.¹⁸⁸ Only seven states had separate state bills of rights at the Founding, while four others included some protection of rights within their constitutions.¹⁸⁹

Of course, no ban on monopolies made its way into the federal Constitution or Bill of Rights. This is probably in large part due to Madison's view that representational government at the federal level would prevent a repeat of the English experience with monopolies:

Is there not also infinitely less danger in this abuse in our Governments than in most others? Monopolies are sacrifices of the many to the few. Where the power is in the few it is natural for them to sacrifice the many to their own partialities and corruptions. Where the power as with us is in the many not in the few the danger cannot be very great that the

185. Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239, 1304 n.381 (2007) (quoting Opinion of Alexander Hamilton, on the Constitutionality of a National Bank, reprinted in LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 95, 111 (M. St. Clair Clarke & D.A. Hall eds., Washington, Gales & Seaton 1832), available at <http://books.google.com/books?id=BwIDAAAIAAJ>).

186. See Part III *infra*.

187. See Part I.B *supra*.

188. Conant, *supra* note 102, at 799.

189. *Id.*

few will be thus favored. It is much more to be dreaded that the few will be unnecessarily sacrificed to the many.¹⁹⁰

Madison made it clear elsewhere that the right to be free of monopolies was of vital importance.¹⁹¹ He expressed his recognition of the importance of the right of individuals to earn a living in their trade when he proclaimed:

That 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, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called.¹⁹²

B. *Monopolies and the Original Federal Constitution*

There are two provisions in the federal Constitution that relate closely to the English history with monopolies. First, the Patent and Copyright Clause in Article 1, Section 8 provides that “Congress shall have the Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹⁹³ As discussed above, Thomas Jefferson criticized the inclusion of this clause in his correspondence with James Madison.¹⁹⁴ Just as the Statute of Monopolies in 1624 explicitly left some monopolies in place,¹⁹⁵ so too did the Framers of the U.S. Constitution allow for monopolies in the form of copyrights and patents for new writings and inventions so as to promote industry and creativity.¹⁹⁶

190. Letter from James Madison to Thomas Jefferson, *supra* note 163, reprinted in SCHWARTZ, *supra* note 163, at 618.

191. See, e.g., IRVING BRANT, *THE BILL OF RIGHTS: ITS ORIGIN & MEANING* 423 (1965) (citing Madison’s attack on ecclesiastical monopolies as a violation of the separation of church and state).

192. James W. Ely, Jr., “To Pursue Any Lawful Trade or Avocation”: *The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 U. PA. J. CONST. L. 917, 931 (2006) (quoting James Madison, Property (Mar. 29, 1792), reprinted in 1 *THE FOUNDER’S CONSTITUTION: MAJOR THEMES* 598, 598 (Phillip B. Kurland & Ralph Lerner eds., 1987)).

193. U.S. CONST. art. I, § 8, cl. 8.

194. Statute of Monopolies, 1623, 21 Jac. 1, c. 3, §§ 6–9 (Eng.) (emphasis added), available at <http://innovation.hoover.org/media/file/ppl/English%20Statute%20of%20Monopolies%201623.pdf>.

195. An Act concerning Monopolies and Dispensations with Penal Laws, and the Forfeitures thereof (Statute of Monopolies), 21 Jac. 1, c. 3 (1624) §§ 5–6.

196. See, e.g., Ochoa & Rose, *supra* note 154, at 925–26.

The other provision in the original Constitution that was relevant to the monopoly issue was the Privileges and Immunities Clause of Article IV, Section 2, which states that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”¹⁹⁷ Similar privileges and immunities clauses had also been included in many of the colonial charters and in the Articles of Confederation, which was in some respects America’s first constitution.¹⁹⁸ It is clear from an early draft of the Articles of Confederation that the “privileges”

197. U.S. CONST. art. IV, § 2, cl. 1. The Privileges and Immunities Clause of Article IV and the Privileges or Immunities Clause of the Fourteenth Amendment have been the subject of recent scholarly attention. Modern scholarship on the original meaning of the Privileges or Immunities Clause began with John Harrison’s article *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1393 (1992), which argued that the Clause was intended to be an antidiscrimination guarantee rather than a font of substantive due process individual rights. Philip Hamburger reaches the same conclusion in *Privileges or Immunities*, 105 NW. U. L. REV. 61, 133 (2011). Akhil Reed Amar and Randy Barnett read the Clause both as protecting against discrimination and as conferring unenumerated individual rights. See AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 157 (2012); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 62–66 (2004). Kurt Lash argues in a series of three law review articles that the Privileges or Immunities Clause both protects against discrimination and protects enumerated but not unenumerated individual rights. See Kurt T. Lash, *The Constitutional Referendum of 1866: Andrew Johnson and the Original Meaning of the Privileges and Immunities Clause* 67–68 (Aug. 6, 2012) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2125363; Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: “Privileges and Immunities” as an Antebellum Term of Art*, 98 GEO. L.J. 1241, 1300–01 (2010); Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329, 334 (2011). Robert Natelson argues for the John Harrison and Philip Hamburger interpretation of the Privileges and Immunities Clause of Article IV, Section 2. See Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GA. L. REV. 1117, 1190–91 (2009). Our own view of the Privileges or Immunities Clause of the Fourteenth Amendment is that it protects: (1) against laws that discriminate on the basis of class or caste and that are not just laws enacted for the good of the whole people; and (2) both enumerated individual rights and unenumerated individual rights that are deeply rooted in history and tradition, subject always to the caveat that the states can override such rights if they pass a just law that is enacted for the general good of the whole people. See Part II.C *infra*. Our reading grows out of the foundational case of *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

198. The Articles of Confederation provided in Article IV:

The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from Justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states.”

ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1.

and “immunities” that the Articles of Confederation protected were the traditional rights that the American people had always possessed as Englishmen. This early draft of the Articles provided that “[t]he Inhabitants of each Colony shall henceforth always have the same Rights, Liberties, Privileges, Immunities and Advantages in the other Colonies, *which the said Inhabitants now have . . .*”¹⁹⁹ Of course, those traditional rights of Englishmen included the right to be free from monopolies,²⁰⁰ so this right was conferred on Americans through the Articles of Confederation, and it informs the original meaning of the Privileges and Immunities Clause of Article IV.

This interpretation of the Article IV Privileges and Immunities clause as banning monopolies was recognized in the years following the adoption of the Federal Constitution. While riding circuit in 1823, Justice Washington explained the meaning of the Privileges and Immunities Clause of Article IV in *Corfield v. Coryell*.²⁰¹ *Corfield* involved a challenge to a New Jersey law forbidding nonresidents from gathering oysters and clams.²⁰² Although Justice Washington upheld the law, he explained that the Privileges and Immunities Clause protected a large number of fundamental rights:

We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit

199. Conant, *supra* note 102, at 813 (quoting 5 JOURNALS OF THE CONTINENTAL CONGRESS 547 (1906)) (emphasis added).

200. See Part I.A *supra*.

201. 6 F. Cas. 546.

202. *Id.* at 548.

of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) 'the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.'²⁰³

Justice Washington's dictum seems to recognize federal constitutional protection for broad economic rights, including the right to choose a trade or profession. As we will discuss shortly, Justice Washington's definition of privileges and immunities strongly influenced the drafters of the Privileges or Immunities Clause of the Fourteenth Amendment,²⁰⁴ and later the Justices of the U.S. Supreme Court in their landmark decision in the *Slaughter-House Cases*,²⁰⁵ which interpreted that clause.

The antimonopoly principle was also evident early in our federal constitutional history in the Supreme Court's Contracts Clause case law. Nineteenth-century Contracts Clause cases, like *Trustees of Dartmouth College v. Woodward*²⁰⁶ in 1819 and *Charles River Bridge v. Warren Bridge*²⁰⁷ in 1837, reflect concerns about monopoly. In *Woodward*, the Marshall Court held that Dartmouth College's corporate charter, which was granted by King George III in 1769, was a private contract between two parties and was protected by the Contracts Clause in Article I, Section 10.²⁰⁸ Thus, although the state argued that the charter was in fact a license to do business that the state could subse-

203. *Id.* at 551–52.

204. See Part II.C *infra*.

205. 83 U.S. (16 Wall.) 36 (1872).

206. 17 U.S. (4 Wheat.) 518 (1819).

207. 36 U.S. (11 Pet.) 420 (1837).

208. 17 U.S. at 644.

quently alter,²⁰⁹ the Supreme Court held that the New Hampshire legislature could not alter the corporation's charter by changing the identity of the corporation's trustees, because doing so impaired a private contract among private individuals.²¹⁰ The *Woodward* case was thus crucial in empowering private corporations, because once corporations were created, the state could not subsequently take away their corporate charter rights.²¹¹ The reasoning of the Court's opinion applied to for-profit corporations, as well as to non-profit corporations like Dartmouth College,²¹² and made it clear that while the English government could revoke corporate "monopoly" powers,²¹³ the State governments in the United States could not do so without running afoul of the Contracts Clause.²¹⁴ This holding greatly empowered U.S. corporations and contributed substantially to U.S. economic growth in the nineteenth century.²¹⁵ Once corporations were no longer viewed as the monopoly recipients of special governmental grants of privilege, they were able to play a "rapidly growing part in the economy."²¹⁶

In 1837, the Taney Court modified and limited the *Woodward* decision in *Charles River Bridge v. Warren Bridge*.²¹⁷ Massachusetts had contracted in 1785 with the Charles River Bridge Company to build and maintain a toll bridge across the Charles River and, in 1792, the state legislature extended the charter grant to the Charles River Bridge Company from forty to seventy years.²¹⁸ The population in Boston grew extremely rapidly, and in 1828 the state legislature changed its mind about the seventy-year charter and allowed another company to build a competing bridge nearby—the Warren Bridge.²¹⁹ This new bridge would initially charge a fee but would eventually become free for trav-

209. *See id.* at 603–04.

210. *Id.* at 643–44.

211. JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES: 1780–1970*, at 62–63.

212. *See id.*

213. *See Woodward*, 17 U.S. at 643.

214. *See HURST*, *supra* note 211.

215. *See id.* at 63 (“[B]usiness corporations were playing a rapidly growing part in the economy, in great measure because their charters gave them operational utilities similar to those which [Justice] Marshall’s opinion noted as making the college an effective, continuing organization.”).

216. *Id.*

217. 36 U.S. (11 Pet.) 420 (1837).

218. *Id.* at 536–37.

219. *Id.* at 537.

elers to use.²²⁰ Once the Warren Bridge became free to use, the value of the Charles River Bridge, its owners alleged, would be destroyed.²²¹ The Charles River Bridge Company sued, arguing that the Contracts Clause protected its corporate charter monopoly.²²² The company argued that the state of Massachusetts could not breach its contract with the Charles River Bridge Company that gave the latter exclusive rights to operate a toll bridge over the Charles River by allowing another company to manage a competing free bridge.²²³

Chief Justice Roger B. Taney, a Jacksonian, held that in cases in which a corporation has an agreement with the government for exclusive monopoly-like privileges, the terms of the agreement should be construed as narrowly as possible, because monopolies were disfavored as a matter of both constitutional history and public policy.²²⁴ Chief Justice Taney held that the charter merely granted the Charles River Bridge Company the right to build a bridge but not necessarily the exclusive privilege of maintaining the only bridge across the river.²²⁵ This view would undoubtedly have surprised the original builders of the Charles River Bridge had they known as much back in 1785 when the bridge was built. Chief Justice Taney was particularly concerned that upholding the charter as a grant of exclusive privilege would promote monopoly, which he viewed as contrary to English law and to American law by adoption:

Borrowing, as we have done, our system of jurisprudence from the English law; and having adopted, in every other case, civil and criminal, its rules for the construction of statutes; is there any thing in our local situation, or in the nature of our political institutions, which should lead us to depart from the principle where corporations are concerned? . . . We think not; and it would present a singular spectacle, if, while the courts in England are restraining, within the strictest limits, the spirit of monopoly, and exclusive privileges in nature of monopolies, and confining corporations to the privileges plainly given to them in their charter; the courts of this country should be found enlarging these privileges by implication; and construing a statute more unfavourably to

220. *Id.*

221. *Id.* at 537–38.

222. *Id.*

223. *Id.* at 522.

224. *Id.* at 545–468.

225. *Id.* at 548–49.

the public, and to the rights of community, than would be done in a like case in an English court of justice.²²⁶

Chief Justice Taney explained that if the charter given to the Charles River Bridge company were construed broadly as a grant of an exclusive privilege to operate a bridge for seventy years, it would become difficult for courts to draw a line as to how far that right should extend.²²⁷ For example, charters for turnpike roads were by 1837 facing competition from charters issued to newly created railroads.²²⁸ If turnpike charters were interpreted broadly by the courts, then the holders of turnpike charters might use their old charters to prevent technological change by challenging the competing railroad charters.²²⁹ As Stanley Kutler explains in his book on the *Charles River Bridge* case, the Charles River Bridge Company was viewed as a monopoly “imposed upon the communities because of special legal privileges.”²³⁰ Jacksonians, like Chief Justice Taney, were ardently opposed to government grants of monopoly and special privileges to the powerful and wealthy²³¹—a phenomenon that Americans today call “crony capitalism.”

Justice Joseph Story, the closest ally of then-deceased Chief Justice John Marshall, concurred in the decision in the *Woodward* case but wrote a scathing dissent in *Charles River Bridge*. He argued that the Charles River Bridge Company’s exclusive privilege should be protected by the Contracts Clause.²³² Despite his association with the Democratic-Republican Party, Justice Story was greatly influenced by Alexander Hamilton and Chief Justice John Marshall, and thus believed that private property rights should be strongly protected and that commerce should be promoted. He saw the *Charles River Bridge* case not as a defeat for crony capitalism, but as a violation of private property rights.²³³ Justice Story was opposed to Jacksonian democracy because he feared that popular majorities would invade the private property rights of the wealthy and

226. *Id.* at 545–46.

227. *Id.* at 551.

228. *Id.* at 551–52.

229. *Id.*

230. STANLEY I. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE 156 (1978).

231. *See id.*

232. *Charles River Bridge*, 36 U.S. at 603–04 (Story, J., dissenting).

233. *See Charles River Bridge*, 36 U.S. at 640–41.

would hurt private businesses. The tension between the views of Justices Taney and Story—the protection of corporate property rights granted by the state versus an aversion to special laws and monopoly privileges—helped to shape the debate over the Fourteenth Amendment in the three decades after the *Charles River Bridge* case was decided.

Importantly, the *Charles River Bridge* case had an “immediate and widespread impact at the state level.”²³⁴ As Stanley Kutler notes in his book about the case, it “opened the floodgates and courts now directly confronted and denied exaggerated implied claims of vested rights. The state court reports for the next two decades are replete with cases implementing the *Charles River Bridge* doctrine.”²³⁵ For example, in *Mohawk Bridge Co. v. Utica & Schenectady Rail Road Co.*,²³⁶ a New York court applied *Charles River Bridge*’s rule of strict construction to hold that a bridge proprietor’s charter did not prohibit competition from a ferry.²³⁷ Similarly, in *Tuckahoe Canal Co. v. Tuckahoe & James River Rail Road Co.*,²³⁸ the Supreme Court of Appeals of Virginia held that a canal company’s charter did not give the canal company an exclusive right of way, and that a railroad company could construct bridges that would compete with the canal.²³⁹ Fearing the tendency of holders of special privileges to claim more exclusive rights than had originally been intended, the court noted that “monopoly is very ingenious in extending its rights and enlarging its pretensions.”²⁴⁰

C. *The Fourteenth Amendment:
A Ban on Class-Based Legislation*

Chief Justice Taney’s concern with the creation of monopolies in the *Charles River Bridge* case was part of a movement beginning in the early nineteenth century to ban special or partial laws.²⁴¹ During this period, many states amended their constitutions to restrict the state’s ability to grant special privileges or

234. KUTLER, *supra* note 230, at 135.

235. *Id.* at 137.

236. 6 Paige Ch. 554 (N.Y. Ch. 1837).

237. *See id.* at 564–65.

238. 38 Va. (11 Leigh) 42 (1840).

239. *Id.* at 70, 81.

240. *Id.* at 71.

241. *See* KUTLER, *supra* note 230, at 22.

monopolies.²⁴² Prominent legal commentators, such as Chancellor Kent and later Thomas Cooley, argued that laws must be general and not class-based.²⁴³ There was widespread opposition to class legislation, to the granting of exclusive privileges, and to government-conferred monopolies.²⁴⁴ This Jacksonian concern, which was eventually adopted by Abolitionists and Republicans, helped lead to the adoption of the second sentence of Section One of the Fourteenth Amendment in 1868, which provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.²⁴⁵

We think the Fourteenth Amendment has its roots in part in the Jacksonian fear of monopolies and grants of special privilege, and that the Amendment bans not only systems of caste but also all special or partial laws that single out certain persons or classes for special benefits or burdens. This is essentially the view that was taken by the four dissenters in the *Slaughter-House Cases*.²⁴⁶

If there was one thing that all Jacksonians hated, it was government-conferred monopolies or special privileges, also known as “class legislation.” Class legislation in this sense means any legislation that singles out groups, individuals, or classes of people and grants them special privileges or imposes on them special burdens that are not shared by the rest of soci-

242. See HURST, *supra* note 211, at 138.

243. See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 393 (1868) (“Equality of rights, privileges, and capacities unquestionably should be the aim of the law; and if special privileges are granted, or special burdens or restrictions imposed in any case, it must be presumed that the legislature designed to depart as little as possible from this fundamental maxim of government.”); WILLIAM KENT, MEMOIRS AND LETTERS OF JAMES KENT, LL.D. 163 (Boston, Little, Brown & Co. 1898) (quoting Chancellor Kent’s 1816 holding that laws should “have a general and equal application” and be “impartial in the imposition which [they] create”).

244. HURST, *supra* note 211, at 37–38.

245. U.S. CONST. amend. XIV, § 1.

246. See 83 U.S. 36, 87–89 (1873) (Field, J., dissenting). Justice Field was joined by Justices Swayne and Bradley and by Chief Justice Chase. See *id.* at 111. Justices Swayne and Bradley also filed separate dissents stating similar views. See *id.* at 111–12 (Bradley, J., dissenting); *id.* at 124 (Swayne, J., dissenting).

ety.²⁴⁷ The Jacksonian aversion to class legislation is broader than an aversion to “caste,” a term that refers only to hereditary class traits which may be immutable (such as race, or other physical features) or which are theoretically mutable but practically immutable because of social attitudes. A well-known example of theoretically mutable but practically immutable characteristics is the traditional Hindu caste system of the nineteenth century wherein a hereditary social order was created that distinguished Brahmins from Untouchables, with several other castes in between.²⁴⁸ Notably, nineteenth-century dictionary definitions of caste described it as not only being based on physical or racial features but as also including a “tribe or class of the same profession”²⁴⁹ or people with “fixed occupations”²⁵⁰ or with “the same rank, profession, or occupation.”²⁵¹ The view that class or caste legislation was reprehensible came to be widely held in the 1860s by the Framers of the Fourteenth Amendment.²⁵²

Importantly, opposition to class legislation was not a new idea invented by the Jacksonians, but was instead deeply rooted in John Locke’s belief that the role of government is to protect individuals’ natural rights.²⁵³ Locke believed that laws should have equal application to everyone in society and that the government should not use its power to create laws that favor or burden particular groups.²⁵⁴ The opposition to special interest laws, however, was not due solely to Lockean philosophical ideas on the proper role of government. There were also important practical reasons to oppose class legislation: Favoritism and discrimination undermine the democratic process and

247. Saunders, *supra* note 22 at 247–48.

248. See Calabresi & Rickert, *supra* note 22, at 17 & n.72 (discussing Indian caste system and stating that a caste system exists when one person “claim[s] hereditary rank and privilege” while another is “doomed to hereditary degradation and disability” (alteration in original) (quoting CHARLES SUMNER, THE QUESTION OF CASTE 10 (Boston, Wright & Potter, Printers 1869)) (internal quotation marks omitted)).

249. CHAUNCEY A. GOODRICH, A PRONOUNCING AND DEFINING DICTIONARY OF THE ENGLISH LANGUAGE 64 (1856); see also *id.* at 128 (defining “class”).

250. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 152 (Philadelphia, J.B. Lippincott & Co. 1857) (defining “caste”).

251. JOSEPH E. WORCESTER, A UNIVERSAL AND CRITICAL DICTIONARY OF THE ENGLISH LANGUAGE 107–08 (Boston, Wilkins, Carter, & Co. 1849); see also *id.* at 128 (defining “class”).

252. See Part II.C *infra*.

253. Saunders, *supra* note 22, at 253.

254. *Id.* at 255–61.

encourage corruption.²⁵⁵ The Framers of the original Constitution sometimes expressed this view; for example James Madison said that the state should be “neutral between different parts of the Society,”²⁵⁶ and that “equality . . . ought to be the basis of every law.”²⁵⁷

There is ample support in the text of the original federal Constitution for the idea that there should be generality in lawmaking and equality before the law. As one of the Authors has pointed out in an article with Abe Salander, there are many instances where the Constitution requires that the laws be general and not class-based.²⁵⁸ First, the preamble to the Constitution states that the purpose of the Constitution is to “provide for the *common* defence” and “promote the *general* Welfare.”²⁵⁹ Likewise, Article I, Section 8 empowers Congress “[t]o establish an [sic] *uniform* Rule of Naturalization, and *uniform* Laws on the subject of Bankruptcies throughout the United States.”²⁶⁰ The Full Faith and Credit Clause allows Congress to pass only “*general* Laws.”²⁶¹ The Constitution’s ban on bills of attainder,²⁶² *ex post facto* laws,²⁶³ and titles of nobility²⁶⁴ may also be viewed as bans on various forms of class legislation.

President Andrew Jackson’s famous hatred for the Bank of the United States stemmed in part from the fact that the Bank was a private institution that enjoyed special privileges above and beyond those enjoyed by ordinary banks. In his message to Congress in 1832 vetoing a statute that would have renewed

255. *Id.* at 254–55.

256. *Id.* at 256 (quoting Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), reprinted in 5 JAMES MADISON, THE WRITINGS OF JAMES MADISON 17, 32 (Gaillard Hunt ed., 1904), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch17s22.html>) (internal quotation marks omitted).

257. *Id.* (omission in original) (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments* (1985), reprinted in THE SUPREME COURT ON CHURCH AND STATE 18, 20 (Robert S. Alley ed., rev. ed. 1988)) (internal quotation marks omitted).

258. Calabresi & Salander, *supra* note 17, at 35–38.

259. U.S. CONST. pmb. (emphasis added).

260. *Id.* art. I, § 8, cl. 4 (emphasis added).

261. *Id.* art. IV, § 1 (emphasis added) (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”).

262. *Id.* art. I, § 9, cl. 3.

263. *Id.*

264. *Id.* art. I, § 9, cl. 8.

the Bank's corporate charter—a veto message which Roger B. Taney helped to draft²⁶⁵—President Jackson repeatedly referred to the bank as a monopoly because it was the only bank allowed to operate under a charter from the federal government and because it had significant control over the foreign and domestic exchange.²⁶⁶ Pointing to the Patent and Copyrights Clause, which gives Congress the power to grant monopolies in the limited instances of patent and copyright, President Jackson wrote that any other grant of monopoly was the equivalent of a legislative amendment to the Constitution:

Every act of Congress, therefore, which attempts by grants of monopolies or sale of exclusive privileges for a limited time, or a time without limit, to restrict or extinguish its own discretion in the choice of means to execute its delegated powers is equivalent to a legislative amendment of the Constitution, and palpably unconstitutional.²⁶⁷

For Jackson, the Bank of the United States, as a monopoly, was contrary to the principle of the equal protection of the laws:

Many of our rich men have not been content with equal protection and equal benefits, but have besought us to make them richer by act of Congress. By attempting to gratify their desires we have in the results of our legislation arrayed . . . interest against interest, and man against man, in a fearful commotion which threatens to shake the foundations of our Union. . . . If we can not at once, in justice to interests vested under improvident legislation, make our Government what it ought to be, we can at least take a stand against all new grants of monopolies and exclusive privileges, against any prostitution of our Government to the advancement of the few at the expense of the many . . .²⁶⁸

Rather than accede to the requests of rich men, the government should “confine itself to equal protection, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor.”²⁶⁹ Jackson's hatred of banks was not unique, however; there were similar challenges brought to the special

265. See JON MEACHAM, *AMERICAN LION: ANDREW JACKSON IN THE WHITE HOUSE* 200–01 (2008).

266. See Andrew Jackson, *Veto Message* (July 10, 1832), reprinted in 2 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1902*, at 576, 576 (James D. Richardson ed., 1907).

267. *Id.* at 584.

268. *Id.* at 590–91.

269. *Id.* at 590.

privileges granted to banks in some state courts during the nineteenth century, as well. For example, in 1813, the special debt recovery rules for a state bank in North Carolina were challenged as a violation of North Carolina's constitution, which provided that "no man, or set of men, are entitled to any exclusive or separate emoluments or privileges from the community, but in consideration of public services."²⁷⁰ Similarly, in 1856 a state bank charter in Indiana was challenged under that state's privileges or immunities clause because it was exempt from certain forms of taxation.²⁷¹

The antimonopoly cause also influenced opposition to the federal government's postal monopoly. In 1844, Lysander Spooner, the famous political reformer and abolitionist, founded the American Letter Mail Company with the primary purpose of challenging the constitutionality of the Post Office.²⁷² Spooner argued that the federal postal monopoly exceeded the grant of power given to Congress in Article I, Section 8, Clause 7 "[t]o establish Post Offices and post Roads,"²⁷³ and alleged that the Post Office charged exorbitantly high postage rates due to its monopoly power.²⁷⁴ Spooner's constitutional argument, with which Justice Joseph Story agreed,²⁷⁵ was that the constitutional grant of power to establish post offices and post roads is narrower than the power given to Congress under the Articles of Confederation, which granted Congress the "sole and exclusive right [of] . . . establishing and regulating post offices."²⁷⁶ Like Sir Edward Coke, Spooner understood the creation of monopolies as a practice of arbitrary and despotic governments:

The idea, that the business of carrying letters is, *in its nature*, a unit, or monopoly, is derived from the practice of arbitrary governments, who have either *made* the business a monopoly in the hands of the government, or granted it as a

270. *Bank of Newbern v. Taylor*, 6 N.C. (2 Mur.) 266, 267 (1813) (internal quotation marks omitted). The North Carolina Supreme Court upheld the debt recovery rules because "the consideration for [the rules] is the public good." *Id.*

271. *Wright v. Defrees*, 8 Ind. 298, 304 (1856).

272. Kelly B. Olds, *The Challenge to the U.S. Postal Monopoly, 1839–1851*, 15 *CATO J.* 1, 12 (1995), available at <http://www.cato.org/pubs/journal/cj15n1/cj15n1-1.pdf>.

273. U.S. CONST. art. I, § 8, cl. 7.

274. Lucille J. Goodyear, *Spooner vs. U.S. Postal System*, *AM. LEGION MAG.*, Jan. 1981, at 20–21.

275. Olds, *supra* note 272, at 13.

276. *Id.* at 12–13 (alteration and omission in original) (quoting ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4) (internal quotation marks omitted).

monopoly to individuals. There is nothing in the nature of the business itself, any more than in the business of transporting passengers and merchandise, that should make it a monopoly, either in the hands of the government or of individuals. Probably one great, if not the principal motive of despotic governments, for maintaining this monopoly in their own hands, is, that in case of necessity, they may use it as an engine of police, and in times of civil commotion, it is used in this manner. The adoption of the same system in this country shows how blindly and thoughtlessly we follow the precedents of other countries, without reference to the despotic purposes in which they had their origin.²⁷⁷

Spooner concluded that:

the only absolute *constitutional* guaranty, that the people have against all these evils and dangers, is to be found in the principle, that they have the right, at pleasure, to establish mails of their own. And if the people should now surrender this principle, they would thereby prove that their minds are most happily adapted to the degradation of slavery.²⁷⁸

As discussed earlier, Thomas Jefferson—who was also opposed to monopolies—was wary of Congress’s power to create postal roads and wrote to Madison that he thought this would be “a source of boundless patronage to the executive, jobbing to members of Congress & their friends, and a bottomless abyss of public money.”²⁷⁹ Jefferson’s concerns, voiced nearly fifty years prior, thus resurfaced in Spooner’s efforts to challenge the federal government’s postal monopoly. Due to a combination of fines, government seizure of its mail, and competition from other mail-delivery providers, however, Spooner’s American Letter Mail Company was forced out of business.²⁸⁰ Nonetheless, Spooner is credited with significantly lowering the postage rates—indeed, the *New York Times*’s obituary described him as the “Father of Cheap Postage in America.”²⁸¹

277. LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF THE LAWS OF CONGRESS, PROHIBITING PRIVATE MAILS 7–8 (New York, Tribune Printing Establishment 1844), available at http://files.libertyfund.org/files/2231/Spooner_1486_Bk.pdf.

278. *Id.* at 17.

279. Letter from Thomas Jefferson to James Madison, *supra* note 161.

280. Olds, *supra* note 272, at 13.

281. *Father of Cheap Postage*, N.Y. TIMES, May 15, 1887, available at <http://query.nytimes.com/mem/archive-free/pdf?res=F20716FC3C5413738DDDAC0994DD405B8784F0D3>.

As Professor Melissa Saunders explains in her article, *Equal Protection, Class Legislation, and Colorblindness*, at least two esteemed legal commentators and treatise writers prior to 1868—Chancellor Kent and Thomas Cooley—adopted and endorsed the Jacksonian idea that the laws must be general and that they may not be class- or caste-based.²⁸² For example, Chancellor Kent wrote in 1816 that “laws should ‘have a general and equal application’ and be ‘impartial in the imposition which [they] create[.]’”²⁸³ Thomas Cooley similarly wrote about “unequal and partial legislation” that was invalidated in various state court cases.²⁸⁴ Cooley considered it axiomatic in state constitutional law that

[E]very one has a right to demand that he be governed by general rules, and a special statute that singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but an arbitrary mandate, unrecognized in free government. . . . “[Those who make the laws] are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor”²⁸⁵

Cooley also wrote that “[e]quality of rights, privileges, and capacities unquestionably should be the aim of the law” and that “[s]pecial privileges are obnoxious, and discriminations against persons or classes are still more so.”²⁸⁶ This view found its way into several state constitutions, as will be discussed in more detail below. A number of states had adopted constitutional provisions aimed at prohibiting special or partial laws prior to the ratification of the Fourteenth Amendment in 1868.²⁸⁷

There was an important exception to the ban on class legislation, however: a law would be upheld if it could be shown to serve a “public purpose.” As Justice Field later explained in the 1885 case of *Barbier v. Connolly*,²⁸⁸ the Fourteenth Amendment

282. Saunders, *supra* note 22, at 259–60.

283. *Id.* at 259 (alteration in original) (quoting KENT, *supra* note 243).

284. *Id.* (quoting COOLEY, *supra* note 243, at 389) (internal quotation marks omitted).

285. COOLEY, *supra* note 243, at 391–92 (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT 323, § 142 (1689), available at http://files.libertyfund.org/files/222/0057_Bk.pdf).

286. *Id.* at 393.

287. See Part III *infra*.

288. 113 U.S. 27.

prohibits “[c]lass legislation, discriminating against some and favoring others,” but does not prohibit “legislation which, in carrying out a public purpose, is limited in its application” to certain individuals or groups.²⁸⁹ Importantly, the *purpose* of the law cannot be to grant a special benefit to a particular individual or group; the purpose must be to promote an important public purpose.²⁹⁰ The Fourteenth Amendment thus only permits laws that discriminate between individuals if the laws “are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, *with as little individual inconvenience as possible*, the general good.”²⁹¹ This idea was expressed as well in *Corfield v. Coryell*,²⁹² in which Justice Washington indicated that fundamental rights could always be trumped by just laws enacted for the good of the whole people.²⁹³

Opposition to class legislation and the need for generality in lawmaking were expressed in state court decisions throughout the country in the period from the 1820s to the 1860s. In 1825, for instance, the Maine Supreme Court stated that “it can never be within the bounds of legitimate legislation, to enact a special law . . . granting a privilege and indulgence to one man” that is not granted to “all other persons.”²⁹⁴ Rather, laws should be “prescribed for the benefit and regulation of the whole community” because all individuals “have an equal right” to their protection.²⁹⁵ Similarly, in 1851, the Pennsylvania Supreme Court reasoned that “when . . . general laws are enacted, which bear . . . on the whole community, if they are unjust and against the spirit of the constitution, the whole community will be interested to procure their repeal.”²⁹⁶

In an 1831 decision, the Tennessee Supreme Court of Errors struck down a law prohibiting suits from being brought by an Indian reservee if the suit was prosecuted for the benefit of another party.²⁹⁷ The state law applied only to a small amount of

289. *Id.* at 32.

290. *See id.*

291. *Id.* at 31–32 (emphasis added).

292. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

293. *See id.* at 551–52.

294. *Lewis v. Webb*, 3 Me. 326, 336 (1825).

295. *Id.* at 335–36.

296. Saunders, *supra* note 22, at 255 n.37 (omissions in original) (quoting *Ervine’s Appeal*, 16 Pa. 256, 268 (1851)).

297. *See Wally’s Heirs v. Kennedy*, 10 Tenn. (2 Yer.) 554, 554–55 (1831).

land that was established under treaties between the Cherokees and the U.S. government.²⁹⁸ Because the treaties secured to the reservees the right of citizenship, they were entitled to the same constitutional protections as the citizens of the state.²⁹⁹ The court explained that “no free man shall be disseized of his freehold, or deprived of his property, but by the judgment of his peers *or the law of the land*.”³⁰⁰ Further, “every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void.”³⁰¹ Because the law applied only to a small amount of land granted to reservees under the treaty, the court ruled that the law was unconstitutional and void as a partial law.³⁰²

In another Tennessee case in 1844, the state Supreme Court ruled that a law that allowed trustees of a particular trust to receive a donation made to an unincorporated association was void because of the constitutional requirement that legislators may not suspend a general law for the benefit of particular individuals.³⁰³ According to the Constitution:

[T]he legislature shall have no power to pass any law, for the benefit of individuals, inconsistent with the general laws of the land, *nor to pass any law granting to any individuals rights, privileges, immunities, or exemptions other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of this law.*³⁰⁴

Similarly, in 1859 the Wisconsin Supreme Court explained the need for generality in lawmaking in the course of striking down a law that taxed some property at a lesser rate than other property within a city.³⁰⁵ In doing so, the court noted:

The theory of our government is, that socially and politically all are equal, and that special or exclusive, social or political privileges or immunities, cannot be granted, and ought not to be enjoyed. In consonance with this theory . . . the burdens of supporting the government should be borne equally by all the

298. *See id.*

299. *Id.* at 555.

300. *Id.*

301. *Id.*

302. *See id.* at 557.

303. *See Green v. Allen*, 24 Tenn. (5 Hum.) 169, 171–78, 209–10 (1844).

304. *Id.* at 209 (emphasis added) (internal quotation marks omitted).

305. *See Knowlton v. Bd. of Supervisors of Rock Cnty.*, 9 Wis. 410, 419–21 (1859).

individuals composing it, in proportion to the benefits conferred This principle of justice and equality . . . lies at the foundation of our political system; and, in our opinion, it was to give to it a greater permanency and force, and to secure its more rigid observance, that the section [at issue] was introduced into the constitution [of this state].³⁰⁶

Likewise, in an 1859 Ohio Supreme Court case, the dissent argued against a law that established separate schools for blacks and whites³⁰⁷ on the grounds that such “caste-based legislation” is

[T]he inveterate vice of absolute governments, and is inconsistent with the theory and spirit of a free and popular government like ours; asserting in its bill of rights the equality of all men. A free government like ours must be presumed, so far as practicable, to avoid class-legislation; and rather to trust and favor the natural liberty and right of individuals to form and regulate their own social circles and classification according to their respective predilections and prejudices.³⁰⁸

Recognizing a change in the law over the past decade, the justice concluded, “[I]t seems to me alike unwise and wholly out of character with the progress, the general intelligence, and liberality of the age, at this time—more than ten years after the repeal of the ‘black laws,’ . . . to give an extent and effect to those disabling statutes”³⁰⁹

In a habeas corpus proceeding in the Supreme Court of Georgia in 1859, the court ruled that a law requiring a license to sell goods in the market—which the court described as class legislation—did not prohibit a man from selling goods outside the market.³¹⁰ The justice remarked that “[e]xcessive legislation—the vice of all free governments—is, perhaps, the fault of the State. Through haste, inadvertence, and other causes . . . class legislation is to be found frequently upon our statute book[s]. Something should be done to arrest this evil. The dearest rights of the people are jeopardized.”³¹¹ Further, “[a] peaceable citizen, who discharges punctually all his public du-

306. *Id.* at 419.

307. *Van Camp v. Bd. of Educ. of Inc. Vill. of Logan*, 9 Ohio St. 406, 415 (1859) (Sutliff, J., dissenting).

308. *Id.*

309. *Id.* at 425.

310. *See Bethune v. Hughes*, 28 Ga. 560, 565 (1859).

311. *Id.*

ties, and respects scrupulously the rights of others, should be left free and untrammelled as the air he breathes, in the pursuit of his business and happiness,"³¹² and, the justice said,

The best sympathies of my heart are, and always will be, interested for one who is, or may be, incarcerated, because, in the proud consciousness of a freeman, he claims the right to offer for sale . . . any commodity he may possess, the traffic in which is not forbidden by the laws of the land.³¹³

By the 1840s and 1850s, opposition to special and partial laws was so widespread among Jacksonian Democrats that even their Abolitionist opponents began to borrow the Jacksonian idea. Abolitionists argued—quite rightly—that the “Slave Power” in the South had seized the government and was using it to create an oligarchy that oppressed African-Americans.³¹⁴ The famous abolitionist Lysander Spooner is an example of someone who understood this connection. Spooner was both an early opponent of monopolies—as evidenced in his opposition to the federal postal monopoly in the 1840s³¹⁵—and one of the most outspoken abolitionists of this time period. In 1860, Spooner argued in *The Unconstitutionality of Slavery*, that the institution of slavery was contrary to the Constitution.³¹⁶ Further, the Constitution should be read to be consistent throughout and “the right to send and receive letters by post [which he believed to be the case], is a right inconsistent with the idea of a man’s being a slave.”³¹⁷

The Abolitionists’ Slave Power argument was attractive to many erstwhile Jacksonian Democrats, a number of whom eventually joined the antislavery cause.³¹⁸ For example, Representative Norton Townshend, a Democrat from Ohio, spoke out against slavery in the following terms on the House floor:

I protest against all these interpolations into the Democratic creed, and against any such interpretation of Democracy as makes it the ally of slavery and oppression. Democracy and

312. *Id.*

313. *Id.*

314. See Saunders, *supra* note 22, at 265–66.

315. See notes 272–81 *supra* and accompanying text.

316. See LYSANDER SPOONER, *THE UNCONSTITUTIONALITY OF SLAVERY* 20 (Boston, Bela Marsh 1860), available at http://files.libertyfund.org/files/2206/Spooner_1487_Bk.pdf.

317. *Id.* at 96.

318. See Saunders, *supra* note 22, at 266.

slavery are directly antagonistic. Democracy is opposed to caste, slavery creates it; Democracy is opposed to special privileges; slavery is but the privilege specially enjoyed by one class—to use another as brute beasts and take their labor without wages; Democracy is for elevating the laboring masses to the dignity of perfect manhood; slavery grinds the laborer into the very dust. . . . [S]lavery is but the extreme of class legislation. . . . [S]lavery is nothing more than the privilege some have of living out of others. . . .³¹⁹

Representative John F. Farnsworth, who associated at times with the Democratic Party but who allied himself with the Radical Republicans, similarly said:

As a moral being, as a man, I hate slavery in the States of this Union as I hate serfdom in Russia—which, by the way, is about to be abolished in that Empire, while we are quarrelling over the extension of slavery in this—just as I hate caste in India; just as I hate oppression everywhere.³²⁰

Indeed, as Saunders explains, by the mid-1850s “thousands of these heirs of the Jacksonian political tradition left the Democratic Party for the Republican Party, driven by the belief that the former was ‘no longer the champion of popular rights that it had been in Jackson’s day’s but had become ‘the tool of a slave-holding oligarchy.’”³²¹ The radical Republican, Senator Sumner, explained the connection between slavery and monopoly as follows:

The Rebellion began in two assumptions . . . first, the sovereignty of the States, with the pretended right of secession; and, secondly, the superiority of the white race, with the pretended right of Caste, Oligarchy, and Monopoly, on account of color. . . . The second showed itself at the beginning, when South Carolina alone, among the thirteen States, allowed her Constitution to be degraded by an exclusion on account of color³²²

In fact, for Sumner, slavery was a system of caste:

319. CONG. GLOBE, 32d Cong., 1st Sess. app. 713 (1852) (statement of Rep. Norton S. Townshend).

320. CONG. GLOBE, 36th Cong., 2d Sess. app. 120 (1861) (statement of Rep. John F. Farnsworth).

321. Saunders, *supra* note 22, at 266 (quoting ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 177 (1970)).

322. CONG. GLOBE, 39th Cong., 1st Sess. 686 (1866) (statement of Sen. Charles Sumner).

A Caste cannot exist except in defiance of the first principles of Christianity and the first principles of a Republic. It is Hea-thenism in religion and tyranny in government. The Brahmins and the Sudras in India, from generation to generation, have been separated, as the two races are now separated in these States. If a Sudra presumed to sit on a Brahmin's carpet he was punished with banishment. But our recent rebels undertake to play the part of the Bramhins, and exclude citizens, with better title than themselves, from essential rights, simply on the ground of Caste, which, according to its Portuguese origin, *casta*, is only another term for race.³²³

Sumner went as far as to propose legislation banning all systems of caste, class, and monopoly in the Senate in 1866.³²⁴ The language he used for the proposed statute was extremely broad:

[T]here shall be no Oligarchy, Aristocracy, Caste, or Monop-oly invested with peculiar privileges and powers, and there shall be no denial of rights, civil or political, on account of color or race anywhere within the limits of the United States or the jurisdiction thereof; but all persons therein shall be equal before the law³²⁵

The connections between the Abolitionist movement, disenfranchisement of blacks, and opposition to class-based laws generally were drawn in a series of 1857 Maine Supreme Court decisions that were reached on the same day. These cases rejected the Supreme Court's decision in *Dred Scott*³²⁶ and concluded that free black men have the right to vote as citizens of the state of Maine.³²⁷ The decisions in Maine were in response to an inter-rogatory from the Maine State Senate asking whether "'free col-ored persons, of African descent, having a residence established in some town in this state . . . ' are men, women, children, pau-pers, persons under guardianship, or unnaturalized foreigners" and, thus, whether they have the right to vote.³²⁸

In an opinion from Judge Appleton, the court makes clear its views on *Dred Scott* and its reading of the Privileges and Im-

323. *Id.* at 683.

324. *See id.* at 674.

325. *Id.*

326. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

327. *See* Opinion of the Supreme Judicial Court, 44 Me. 507, 515–16 (1857); Opin-ion of Judge Appleton, 44 Me. 521, 575–76 (1857).

328. *Opinion of the Supreme Judicial Court*, 44 Me. at 507.

munities Clause in Article IV. Judge Appleton began by proclaiming that “[t]he constitution of Maine recognizes as its fundamental idea, the great principle upon which all popular governments rest—the equality of all before the law. It confers citizenship and entire equality of civil and political rights upon all its native born population.”³²⁹ The court relied on historical evidence: original state constitutions, the Declaration of Independence, and state court decisions recognizing the freedom of inhabitants without regard to ancestry or color.³³⁰ It concluded that “colored freemen were regarded as citizens, and entitled to the right of suffrage, in most of the states, during the whole period of the revolution.”³³¹ It said as well that *Dred Scott* was not “obligatory” on the state courts.³³² Since the federal Constitution does not impose restrictions as to who might become citizens of a state, and because the people of Maine did not make distinctions on the basis of status or class, but instead “formed a constitution upon principles of the purest democracy, making no distinctions and giving no preferences, but resting upon the great idea of equality before the law,” black men must and do have the right to vote.³³³ As Judge Davis also explained in a third opinion, if the federal government really were able to define certain classes as either citizens or non-citizens under the guise of construing Article IV’s Privileges and Immunities Clause, then the federal government would effectively be “establishing privileged classes, in violation of [the Constitution’s] letter and spirit.”³³⁴

Immediately after the end of the Civil War, many southern states adopted a set of racially discriminatory laws that came to be known as the Black Codes. These laws limited the rights to contract, own property, travel, and testify in court of all the former slaves. The Black Codes:

[P]erpetuated or created many discriminations in the criminal law by applying unequal penalties to Negroes for recognized offenses and by specifying offences for Negroes only. Laws which prohibited Negroes from keeping weapons or from selling liquor were typical of the latter. Examples of

329. *Id.* at 522.

330. *See id.* at 521–37.

331. *Id.* at 538.

332. *Id.* at 559.

333. *Id.* at 574.

334. Opinion of Judge Davis, 44 Me. 576, 583 (1857).

discriminatory penalties were the laws which made it a capital offence for a Negro to rape a white woman or to assault a white woman with intent to rape

In addition to the discriminations of the criminal laws, post-war black codes hedged in the Negroes with a series of restraints on their business dealings of even the simplest form. Though in many states the Negro could acquire property, Mississippi put sharp limitations on that right. But most restrictive were the provisions concerning contracts for personal service. Many statutes called for specific enforcement of labor contracts against freedmen, with provisions to facilitate capture should a freedman try to escape. Vagrancy laws made it a misdemeanor for a Negro to be without a long-term contract of employment; conviction was followed by a fine, payable by a white man who could then set the criminal to work for him until the benefactor had been completely reimbursed for his generosity.³³⁵

The Black Codes were widely criticized as being a forbidden form of class legislation that sought a monopoly over black labor. For example, an 1866 editorial in the *Chicago Tribune* warned that "if the several States can practi[c]e class legislation, as between whites and blacks . . . they can also create class distinctions in the future between . . . rich and poor, or between any other divisions of society."³³⁶

The Thirty-Ninth Congress responded to the Black Codes by enacting the Civil Rights Act of 1866.³³⁷ The Civil Rights Act required that there be no discrimination in civil rights or immunities among the inhabitants of any state or territory of the United States on account of race, color, or "previous condition of slavery."³³⁸ Despite the broad language, it was explained by the bill's drafters that the Act only applied to "civil" rights enumerated in the Bill of Rights (and not "political" rights, such as the right to vote).³³⁹ This included the right to make and enforce contracts, to sue, to be parties, to own land and personal property, and to be subject to the same criminal punishments.³⁴⁰

335. John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 1972 WASH. U. L.Q. 421, 445-46 (1972) (footnotes omitted).

336. Editorial, *Class Legislation*, CHI. TRIB., Jan. 12, 1866, at 2.

337. 14 Stat. 27.

338. *Id.* § 1.

339. See Saunders, *supra* note 22, at 270.

340. See 14 Stat. at 27, § 1.

After the Civil Rights Act of 1866 was passed, however, there was still fear among supporters of Reconstruction that the Act would be struck down as an unconstitutional exercise of congressional power to enforce the Thirteenth Amendment. As a solution, Congress began working on the Fourteenth Amendment to write the Civil Rights Act into the Constitution. This would protect it from challenge in the courts or from changes to the law by a later Congress.³⁴¹ However, the purpose of the Fourteenth Amendment went beyond merely enshrining in the Constitution the protections of the Civil Rights Act. As Professor Saunders explains, the support for legislation to guarantee the civil rights of blacks among the Republicans and Jacksonian Democrats was based primarily on opposition to class legislation and the spirit of monopoly more generally.³⁴² As Senator Howard stated in support of the Fourteenth Amendment, "Ought not the time to be now passed when one measure of justice is to be meted out to a member of one caste while another . . . is meted out to the member of another caste, both castes being alike citizens of the United States . . . ?"³⁴³ The Black Codes themselves were objectionable because they violated Blackstone's maxim that "the restraints introduced by the law should be equal to all," as Senator Lyman Trumbull, co-sponsor of the Civil Rights Act, explained.³⁴⁴ Thus, the purpose of the Fourteenth Amendment went beyond eliminating discrimination against blacks and to include within its reach all class-based legislation.

Popular accounts of the Amendment also understood it to be far reaching. For example, the *San Francisco Daily Evening Bulletin* characterized it as an "opportunity . . . for the masses to break down the domination of caste and aristocracy,"³⁴⁵ and the *Boston Daily Advertiser* described its purpose as "compel[ling] the States to . . . throw the same shield over the black man as over the white, over the humble as over the powerful."³⁴⁶ Similarly, the *Cincinnati Commercial* noted that the Amendment constitutionalized "the great Democratic principle of equality be-

341. See generally WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT* (1990).

342. See Saunders, *supra* note 22, at 269–70.

343. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Jacob Howard).

344. *Id.* at 474 (statement of Sen. Lyman Trumbull).

345. Editorial, *Southern Experiment*, S.F. DAILY EVENING BULL., Nov. 9, 1866, at 2.

346. Editorial, *Reconstruction*, BOS. DAILY ADVERTISER, May 24, 1866, at 1.

fore the law” and invalidated all “legislation hostile to any class.”³⁴⁷ As one of the authors has argued:

By connecting the old-world problems of aristocracy and feudalism with race discrimination and caste in America, these commentators provide more evidence that the American public conceived of the word caste at a higher level of generality than the word *race*. The Framers and ratifiers of the Fourteenth Amendment would have understood it to ban European feudalism or the Indian caste system, as well as the special-interest monopolies that so outraged Jacksonian Americans.³⁴⁸

The meaning of the Privileges or Immunities Clause itself grew out of the Privileges and Immunities Clause of Article IV. Article IV was well-understood at the time of the Fourteenth Amendment to be a ban on discrimination against nonresidents of a state, as the Supreme Court laid out in the *Corfield* case discussed above.³⁴⁹ Similarly, then, the Fourteenth Amendment’s Privileges or Immunities Clause was a ban on discrimination, but in this case it was a ban on class or caste discrimination. As one of the authors has explained elsewhere,³⁵⁰ the Amendment’s references to “privileges or immunities” together with the verb “abridge” is a legal term of art.³⁵¹ The Fourteenth Amendment’s use of the word “abridge” makes this point clearer. Abridge means to shorten or abbreviate. In banning abridgments of privileges or immunities, the Fourteenth Amendment banned the Black Codes, which shortened or lessened the civil rights of African Americans as compared to white citizens.³⁵² The Black Codes would fall because they were an example of the Slave Power trying to perpetuate itself by giving its supporters monopoly power over the lives of the freed African-Americans.³⁵³ In fact, President Andrew Johnson argued in his December 1865 State of the Union address that the Black Codes were objectionable because “‘*there is no room for favored classes or monopolies,*’ for ‘the principle of our Gov-

347. Editorial, *The Constitutional Amendment*, CINCINNATI COM., June 21, 1866, at 4.

348. Calabresi & Rickert, *supra* note 22, at 36.

349. See notes 201–03 *supra* and accompanying text.

350. Steven G. Calabresi & Julia T. Rickert, *Sex Equality and Original Meaning: A Response to Jack Balkin*, BALKINIZATION, (Dec. 15, 2011, 8:07 PM), <http://balkin.blogspot.com/2011/12/sex-equality-and-original-meaning.html>.

351. See *id.*

352. *Id.*

353. *Id.*

ernment is that of equal laws,' which 'accord equal and exact justice to all men, special privileges to none.'"³⁵⁴ Johnson shared a similar view regarding slavery, which he said was "a monopoly of labor."³⁵⁵ Thus, "abridge" is meant to be synonymous with discrimination, similar to its use in the Fifteenth Amendment,³⁵⁶ which states that "[t]he right of citizens of the United States to vote shall not be denied or *abridged* by the United States or by any State on account of race, color, or previous condition of servitude."³⁵⁷

The intellectual, legislative, and judicial history leading up to the adoption of the Fourteenth Amendment thus confirms what the text of Section 1 of that Amendment implies. The Fourteenth Amendment is a ban not only on racially discriminatory laws but also on all class-based legislation and certainly on any legislation that sets up a caste system or monopoly. This includes the right to be free from unreasonable government interference in one's trade. Representative John Bingham, the primary author of the Privileges or Immunities Clause, understood the Clause to protect "the liberty . . . to work in an honest calling and contribute by [one's] toil in some sort to the support of yourself, to the support of [one's] fellowmen, and to be secure in the enjoyment of the fruits of [one's] toil."³⁵⁸ Similarly, another representative asked during the Amendment's draft-

354. Saunders, *supra* note 22, at 273 (quoting 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789-1897, at 361-62 (James D. Richardson ed., 1896)) (emphasis added).

355. As President Johnson explained in full in 1866:

Slavery was essentially a monopoly of labor, and as such locked the States where it prevailed against the incoming of free industry. Where labor was the property of the capitalist, the white man was excluded from employment, or had but the second best chance of finding it; and the foreign emigrant turned away from the region where his condition would be so precarious. With the destruction of the monopoly, free labor will hasten from all parts of the civilized world to assist in developing various and immeasurable resources which have hitherto lain dormant. . . . The removal of the monopoly of slave labor is a pledge that those regions will be peopled by a numerous and enterprising population, which will vie with any in the Union

CONG. GLOBE, 39th Cong., 1st Sess. 3 (1866) (message of President Andrew Johnson).

356. See Calabresi & Rickert, *supra* note 22.

357. U.S. CONST. amend. XV, § 1 (emphasis added).

358. SANDEFUR, *supra* note 29, at 41 (omission in original) (quoting CONG. GLOBE, 42d Cong., 1st Sess. app. 2765 (1866) (Statement of Rep. John Bingham)) (internal quotation marks omitted).

ing: “[H]as not every person a right, to carry on his own occupation, to secure the fruits of his own industry, and appropriate them as best suits himself . . . ?”³⁵⁹ Thus, grants of monopoly would certainly be prohibited under Section 1 unless they were somehow just laws enacted for the general good of the whole people. The original public meaning of the words of Section 1 of the Fourteenth Amendment in 1868 would have been understood to be a ban on caste, monopoly, and on systems of class legislation.

D. *Economic Liberty Cases: Slaughter-House, Lochner, & the New Deal Cases*

The meaning of the Fourteenth Amendment quickly became the subject of controversy in 1872 in the *Slaughter-House Cases*.³⁶⁰ In that case, a group of Louisiana butchers challenged the constitutionality of a state statute that incorporated and granted a twenty-five year monopoly to the Crescent City Live-Stock Landing and Slaughter-House Company to have and maintain slaughterhouses within certain states parishes.³⁶¹ The butchers challenged the statute as violating the Thirteenth and Fourteenth Amendments.³⁶² Importantly, the butchers also argued at length that the Louisiana slaughtering monopoly violated the common law rule of *Darcy* and the Statute of Monopolies³⁶³—in fact, counsel for the butchers read Sir Edward Coke’s report of *Darcy* to the Court and cited it in full in the brief.³⁶⁴ Emphasizing that the English creation of monopolies had helped give rise to the American Revolution, the butcher’s counsel then pointed out:

It was from a country which had been thus oppressed by monopolies that our ancestors came. And a profound conviction of the truth of the sentiment . . . that every man has a right to his own faculties, physical and intellectual, and that this is a right, one of which no one can complain, and no one deprive him—was at the bottom of the settlement of the country by them. Accordingly, free competition in business,

359. *Id.* (alteration in original) (quoting 2 CONG. REC. app. at 363 (1874) (statement of Sen. W.T. Hamilton)) (internal quotation marks omitted).

360. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

361. *Id.* at 59.

362. *Id.* at 58.

363. *See id.* at 65.

364. *Id.* at 48 (reporter’s note describing oral argument of the case).

free enterprise, the absence of all exactions by petty tyranny, of all spoliation of private right by public authority—the suppression of sinecures, monopolies, titles of nobility, and exemption from legal duties—were exactly what the colonists sought for and obtained by their settlement here, their long contest with physical evils that attended the colonial condition, their struggle for independence, and their efforts, exertions, and sacrifices since.³⁶⁵

Counsel for the butchers explained that several state courts recognized this common law right before the adoption of the Fourteenth Amendment in 1868.³⁶⁶ For example, in 1856, Connecticut's Supreme Court of Errors relied on the Statute of Monopolies to strike down a law that granted a franchise to a corporation giving it an exclusive privilege to use streets to lay gas pipe.³⁶⁷ In 1837, the New York Chancery Court refused to enforce a city ordinance that would have prohibited a manufacturer of pressed hay from erecting a wooden frame building while allowing another manufacturer to do so.³⁶⁸ And in a case with facts remarkably similar to those in the *Slaughter-House Cases*, the Supreme Court of Illinois struck down a Chicago ordinance that limited the ability to slaughter animals to a single firm.³⁶⁹ Referring to the city's municipal laws, the court stated that such a law "impairs the rights of all other persons, and cuts them off from a share in not only a legal but a necessary business."³⁷⁰ Additionally, such laws "must be reasonable, and such as are vexatious, unequal or oppressive, or are manifestly injurious to the interest, of the corporation, are void. *And of the same character are all by-laws in restraint of trade, or which necessarily tend to create a monopoly.*"³⁷¹ As Justice Field declared in his dissenting opinion in the *Slaughter-House Cases*, "In all these cases there is a recognition of the equality of right among citi-

365. *Id.*

366. *See id.*

367. *The Norwich Gaslight Co. v. The Norwich City Gas Co.*, 25 Conn. 19, 38 (1856) (cited by the butchers' counsel in the *Slaughter-House Cases*, 83 U.S. at 48).

368. *The Mayor of Hudson v. Thorne*, 7 Paige Ch. 261, 263 (N.Y. Ch. 1838) ("[T]he common council cannot make a by-law which shall permit one person to carry on the dangerous business, and prohibit another, who has an equal right, from pursuing the same business") (cited by the butchers' counsel in the *Slaughter-House Cases*, 83 U.S. at 48).

369. *City of Chicago v. Rumpff*, 45 Ill. 90, 98 (1867) (cited by the butchers' counsel in the *Slaughter-House Cases*, 83 U.S. at 48).

370. *Id.* at 97.

371. *Id.* at 96 (emphasis added).

zens in the pursuit of the ordinary avocations of life, and a declaration that all grants of exclusive privileges, in contravention of this equality, are against common right, and void."³⁷² Significantly, although none of the above-mentioned states had provisions in their constitutions prohibiting monopolies, the local ordinances were still struck down.

The butchers' counsel in the case also argued that the Privileges or Immunities Clause of the Fourteenth Amendment embodied an unenumerated right to be free from monopolies that went beyond *Darcy v. Allen* and the Statute of Monopolies. As the butchers' counsel explained, the rights protected under the Privileges or Immunities Clause "are undoubtedly the personal and civil rights which usage, tradition, the habits of society, written law, and the common sentiments of people have recognized as forming the basis of the institutions of the country."³⁷³ Justice Field, in his dissenting opinion for four members of the Court, agreed with the butchers. Citing *Corfield v. Coryell*,³⁷⁴ Justice Field adopted Justice Washington's definition therein of the term "privileges and immunities" as encompassing a number of unenumerated rights that he deemed fundamental.³⁷⁵ Thus, because Article IV's Privileges and Immunities Clause prohibited discriminatory legislation against nonresidents, the Fourteenth Amendment likewise functioned to prohibit such discriminatory class legislation by residents of one state against other residents of the same state:

What the clause in question did for the protection of the citizens of one State against hostile and discriminating legislation of other States, the fourteenth amendment does for the protection of every citizen of the United States against hostile and discriminating legislation against him in favor of others, whether they reside in the same or in different States. If under the fourth article of the Constitution equality of privileges and immunities is secured between citizens of different States, under the fourteenth amendment the same equality is secured between citizens of the United States.³⁷⁶

Justice Field argued that Justice Washington's definition of "privileges and immunities" in *Corfield* should be taken as de-

372. *Slaughter-House Cases*, 83 U.S. at 109 (Field, J., dissenting).

373. *Id.* at 55 (note describing argument of the butchers' council).

374. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

375. *Slaughter-House Cases*, 83 U.S. at 97 (Field, J., dissenting).

376. *Id.* at 100-01.

finitively informing the meaning of the Privileges or Immunities Clause of the Fourteenth Amendment.³⁷⁷ He then explained why he thought that the right to be free from partial laws was a fundamental right of United States citizens:

This equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others of the same age, sex, and condition. . . . This is the fundamental idea upon which our institutions rest, and unless adhered to in the legislation of the country our government will be a republic only in name. The fourteenth amendment, in my judgment, makes it essential to the validity of the legislation of every State that this equality of right should be respected.³⁷⁸

Justice Field also quoted Adam Smith's *Wealth of Nations* at length (as did the butchers in their briefs).³⁷⁹ He emphasized the idea that a person's labor is his property and is the foundation for all other property:

"The property which every man has in his own labor," says Adam Smith, "as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper."³⁸⁰

Thus, in a sense Justice Field's dissenting opinion merged the previously opposing views in *Charles River Bridge v. Warren*

377. See *id.* at 97–98.

378. *Id.* at 109–10.

379. See *id.* at 110 & n.*.

380. *Id.* at n.* (quoting 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 151 (2d ed. 1778) (1776)); see also Supplemental Brief and Points of Plaintiffs in Error at 6, *Slaughter-House Cases*, 83 U.S. 36, 1871 WL 14607, at *6 (quoting the same passage).

Bridge.³⁸¹ For Chief Justice Taney, what was offensive in *Charles River Bridge* was the state's grant of a monopoly to the bridge company. However, for Justice Story, it was paramount to protect the bridge company's *property right* in what he saw as its contract with the state.³⁸² Justice Field folded both of these views into his dissenting opinion in the *Slaughter-House Cases*, recognizing both the right to be free from monopolies *and* the right to one's property in his or her labor.

Nevertheless, a majority of the Supreme Court in the *Slaughter-House Cases* rejected the butchers' arguments, holding that the state-granted monopoly was constitutional and nearly writing the Privileges or Immunities Clause out of the Fourteenth Amendment. In his opinion for the Court, Justice Miller limited the Privileges or Immunities Clause to apply only to those rights that "owe their existence to the Federal government, its National character, its Constitution, or its laws."³⁸³ This included things like the ability to assert claims against one's government, free access to seaports, protection while on the high seas and when within the jurisdiction of a foreign government.³⁸⁴

Interestingly, Louisiana later amended its constitution to ban monopolies like that in the *Slaughter-House Cases*. The monopolist butchers, who had won in federal court, challenged the amendment to the state constitution under the Contracts Clause—just as the Charles River Bridge Company had done thirty-five years earlier in *Charles River Bridge*. Once again the Supreme Court held that a state could abolish a monopoly without violating the Contracts Clause, so it upheld Louisiana's constitutional amendment, eliminating the butchers' slaughtering monopoly.³⁸⁵ The *Slaughter-House* dissenters returned to their arguments in *Slaughter-House*, again arguing that the grant of monopoly violated the Fourteenth Amendment and *Darcy* in the first place.³⁸⁶ However, the majority

381. 36 U.S. 420 (1837).

382. THOMAS W. MERRILL & HENRY E. SMITH, *THE OXFORD INTRODUCTIONS TO AMERICAN LAW: PROPERTY* (2010).

383. *Slaughter-House Cases*, 83 U.S. at 79.

384. *Id.*

385. *See* *Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 754 (1884).

386. *See id.* at 761–64 (Bradley, J., concurring); *id.* at 755–56 (Field, J., concurring).

ruled on a narrower ground that Louisiana did not have the power to make the state-granted monopoly irrevocable.³⁸⁷

The *Slaughter-House Cases* closed a door on reading the Privileges or Immunities Clause to strike down grants of economic privilege and of monopoly, and other cases—such as *Munn v. Illinois* in 1877³⁸⁸ and *Barbier v. Connolly* in 1885³⁸⁹—further weakened the protection of economic liberty and constraints on the state police power under the Fourteenth Amendment. Yet later Court decisions reached different conclusions. The idea that the Fourteenth Amendment bans class legislation and embodies the protection of economic rights was revived at the turn of the twentieth century with the 1897 case *Allgeyer v. Louisiana*,³⁹⁰ and in 1905 in *Lochner v. New York*.³⁹¹ Justice Field's *Slaughter-House* dissent clearly inspired the Supreme Court majority in both *Allgeyer* and *Lochner*. As one legal scholar has written, “[i]n 1873, a bare majority resisted the dissenters’ appeal to social compact and natural law and vested rights ideology; but a generation later, a new majority embraced substantive due process.”³⁹² In *Lochner*, Justice Rufus Peckham held that a law which limited bakers’ hours to ten-hour days and sixty-hour weeks violated the liberty of contract, which he viewed as protected by the Due Process Clause of the Fourteenth Amendment.³⁹³ Justice Peckham’s view was that the purpose of the regulation was to equalize bargaining power

387. See *id.* at 752–54 (majority opinion); see also Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & LIBERTY 334, 338–39 (2005).

388. 94 U.S. 113, 125–26 (1877) (holding that the Fourteenth Amendment did not prohibit the state from regulating businesses involved in serving the public interest).

389. 113 U.S. 27, 31 (1885) (holding that the Fourteenth Amendment did not constrain the state’s police power).

390. 165 U.S. 578, 589 (1897) (“The liberty mentioned in [the Fourteenth] amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.”) (emphasis added).

391. 198 U.S. 45 (1905).

392. Frank R. Strong, *Unraveling the tangled threads of substantive due process*, in POWER AND POLICY IN QUEST OF LAW 73, 118 (Myres S McDougal & W. Michael Reisman eds., 1985) (quoting GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 507 (10th ed. 1980)).

393. *Lochner*, 198 U.S. at 57, 64.

between employers and employees, and that it was not a just law enacted for the good of the whole people and to promote health and safety concerns as was claimed by the state.³⁹⁴ *Lochner* rendered constitutionally suspect at least some forms of redistribution of wealth,³⁹⁵ and the opinion seemed to imply that the sixty-hour work week for bakers was motivated by a desire to protect big bakeries from competition from smaller, harder-working immigrant competitors.³⁹⁶ There was thus an element of state-enforced special privilege or monopoly to the case. As a result of the *Lochner* opinion, a wave of “liberty of contract” cases were decided in federal and state courts. Ultimately, the whole period of time between 1905 and 1937 became known as the *Lochner* era.³⁹⁷

Justice Peckham’s opinion in *Lochner*, like the *Slaughter-House* dissent, became famous for its robust conception of constitutionally protected economic liberties. One scholar has argued that many of the laws struck down during the *Lochner* era were in fact the result of rent-seeking behavior.³⁹⁸ Both the *Lochner* decision and *Slaughter-House* dissent show an interest in one’s right to work freely. But the decision in *Lochner* can also be distinguished from the decision in the *Slaughter-House Cases*. Whereas *Lochner* announced a right to liberty of contract in all contexts, the *Slaughter-House Cases* dealt with a different and arguably distinct issue—the Fourteenth Amendment’s prohibition on grants of monopoly or special privilege. And although some laws aimed at restricting economic liberty may be discriminatory class-based legislation, such as exemptions for one industry and not for another, it is not always the case that laws that restrict economic liberty are class based.

In the wake of the Great Depression and of President Franklin D. Roosevelt’s New Deal, the Supreme Court eventually retreated from the holding and opinion in *Lochner*, and rejected the idea that the Constitution protected a broad liberty of con-

394. *Id.* at 57.

395. See Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1, 92 (1996).

396. For a good history of the case, see DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (2011).

397. *Id.*

398. See Douglas W. Kmiec, *Property and Economic Liberty as Civil Rights: The Magisterial History of James W. Ely, Jr.*, 52 VAND. L. REV. 737, 740 (1999) (reviewing *PROPERTY RIGHTS IN AMERICAN HISTORY* (James W. Ely Jr. ed., 1997) (six volume series)).

tract. First, the Supreme Court significantly weakened *Lochner* in 1934 when it relaxed the level of scrutiny it would apply in cases of economic regulation in *Nebbia v. New York*.³⁹⁹ Although the Court in *Nebbia* did not explicitly repudiate *Lochner*, it held that a price control setting the minimum price for milk was constitutional so long as (1) it was nondiscriminatory and (2) bore a reasonable relationship to a legitimate governmental purpose.⁴⁰⁰ In 1937, however, the Supreme Court radically repudiated *Lochner* and its progeny in *West Coast Hotel Co. v. Parrish*.⁴⁰¹ In that case, the Court overturned a prior decision in *Adkins v. Children's Hospital*,⁴⁰² and upheld a state minimum wage law for women.⁴⁰³ *West Coast Hotel* thus proved to be a decisive repudiation of the entire line of *Lochner* cases.

Lochner had been decided on the belief that an individual's liberty of contract could only be overcome by a reasonable exercise of the police power, and the *Lochner* Court evaluated reasonableness using a standard that readers today might call intermediate scrutiny.⁴⁰⁴ The New Deal Supreme Court never abolished liberty of contract, but it reduced the level of scrutiny for state regulations of the police power from *Lochner*-era intermediate scrutiny to a deferential form of rational basis review. In its landmark 1938 holding in *United States v. Carolene Products Co.*,⁴⁰⁵ the Supreme Court stated that economic regulations are presumed to be constitutional and will be upheld unless they are irrational, even if the legislators' actual intent cannot be proven.⁴⁰⁶ The Court expressed no interest whatsoever in determining whether a law created exclusive privileges or whether it reflected monopolistic class legislation. To the *Carolene Products* Court, all economic and social legislation was constitutional unless it discriminated against a discrete and insular minority, or closed off the channels of political change, or vio-

399. 291 U.S. 502 (1934).

400. *See id.* at 537.

401. 300 U.S. 379, 392 & n.1 (1937); *see also id.* at 397–98 (citing *Nebbia* for “the true application of the principles governing the regulation by the State of relation of employer and employed”).

402. 261 U.S. 525 (1923).

403. *West Coast Hotel*, 300 U.S. at 400.

404. A classic case employing intermediate scrutiny is *Craig v. Boren*, 429 U.S. 190 (1976) (applying intermediate scrutiny to gender classifications).

405. 304 U.S. 144 (1938).

406. *Id.* at 152.

lated one of the first eight amendments in the Bill of Rights.⁴⁰⁷ *Lochner* was officially dead.

This new, highly deferential rational basis review did not, however, immediately take hold in all the cases decided by the New Deal Supreme Court after 1937. As Professor Victoria Nourse explains in her book *In Reckless Hands: Skinner v. Oklahoma and the Near Triumph of American Eugenics*, the New Deal Supreme Court decided at least one important case using the old nineteenth-century idea that the Fourteenth Amendment banned forms of arbitrary class legislation.⁴⁰⁸ *In Reckless Hands* recounts the use of eugenics in the 1920s and 1930s in asylums and prisons across the United States, and the challenge to one eugenics law in the famous New Deal-era case *Skinner v. Oklahoma*.⁴⁰⁹ In *Skinner*, an Oklahoma law was challenged by a man who was sentenced to sterilization for being a repeat offender—he had stolen chickens and had also been convicted of armed robbery.⁴¹⁰ The goal behind the Oklahoma statute, like other eugenics laws, was to “weed out” criminals from society by sterilizing repeat offenders who violated many criminal statutes; however, it provided exceptions for repeat violations of “prohibitory laws, revenue acts, embezzlement, [and] political offenses.”⁴¹¹

Clarence Darrow, the famous lawyer from the Scopes Monkey Trial, had earlier commented on Oklahoma’s imposition of sterilization for robbers but not embezzlers, asserting that it was not only “senseless and impudent,” but also that it “impos[ed] a ‘caste system.’”⁴¹² Indeed, a lawyer on the case argued:⁴¹³

I have wondered upon what rational basis the Legislature could have arrived at the conclusion that all those committing minor offenses would transmit to their progeny only vices; while the dishonest financier who appropriates trusting depositor’s monies in the banks, or trustees who convert

407. *See id.* n.4.

408. *See* VICTORIA F. NOURSE, *IN RECKLESS HANDS: SKINNER V. OKLAHOMA AND THE NEAR TRIUMPH OF AMERICAN EUGENICS* 67–68, 126, 148–49 (2008) (discussing Justices’ deliberations in *Skinner v. Oklahoma*).

409. 316 U.S. 535 (1942).

410. *Id.* at 537–39.

411. *Id.* at 537.

412. NOURSE, *supra* note 408, at 56 (quoting Clarence Darrow, *The Eugenics Cult*, *AMER. MERCURY*, June 1926, at 130, 137 (1926) available at <http://unz.org/Pub/AmMercury-1926jun-00129?View=PDF>).

413. *Id.* at 140–41.

funds of confiding clients, and the saboteur, and the inciter of treason could spew from his loins only progeny blessed with virtues. The terms of the Act exclude from its penalties the Capones, the Ponzis and the Benedict Arnolds.⁴¹⁴

In an opinion by Justice Douglas, the Supreme Court struck down the eugenics law, reasoning that, under the traditional pre-1937 understanding of the Equal Protection Clause, laws that draw arbitrary lines were unconstitutional as a form of class legislation or a grant of an exclusive privilege.⁴¹⁵ As Professor Nourse points out, arbitrariness was the “basic test for equal protection claims,” even into the 1930s,⁴¹⁶ and that laws which provided arbitrary exemptions for certain classes of people showed unconstitutional legislative favoritism.⁴¹⁷

Class legislation, under the traditional understanding, is, as Professor Nourse describes it, a “theory of failed governance.”⁴¹⁸ In so arguing, Professor Nourse draws correctly on the work of John Hart Ely in his work *Democracy and Distrust*.⁴¹⁹ When a legislature draws a line between classes and provides exemptions, it favors the exempted group and discriminates against a class. In *Skinner*, the legislature protected those convicted of “high class” crimes, such as political or financial criminals, and burdened those guilty of “low class” crimes, such as chicken thieves, who were subject to sterilization if they were repeat offenders.⁴²⁰ Such laws create an “aristocracy of crime,” as one of Skinner’s lawyers described it, by violating the “rule of generality” that was promoted by Thomas Cooley, who in turn had borrowed the same ideas from John Locke.⁴²¹ As Cooley stated, there ought to be “one law for rich and poor, for the favorite at court and the countryman at plough.”⁴²² As Professor Nourse concludes:

Contrary to conventional wisdom, *Skinner* fits standard legal models that put the prohibition of “caste” legislation at the

414. *Id.* (quoting Petition for Writ of Certiorari at 23, *Skinner*, 316 U.S. 535 (No. 782)).

415. *See id.* at 148–49; *see also Skinner*, 316 U.S. at 538–42.

416. *Id.* at 149.

417. *Id.*

418. *Id.*

419. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

420. NOURSE, *supra* note 408, at 149.

421. *Id.* at 149–50.

422. *Id.* (quoting COOLEY, *supra* note 243, at 392).

core of constitutional equality protections. The problem in *Skinner* was not with the distinction between the chicken thieves and embezzlers *simpliciter*. The problem was with a criminal law as a rule of genetics, as a rule of blood—this was class made permanent. . . . Oklahoma's law created a line between privileged and unprivileged blood, the sign of caste and aristocracy.⁴²³

Professor Nourse also notes that that from 1868 until 1937, equal protection cases were usually about "property, taxes, and the right to work" rather than being about race or sex as they commonly are today.⁴²⁴ The traditional concern with class legislation, exclusive privileges, and monopoly "focused on exemptions in statutes as a proxy for political favoritism, on the theory that the law should be general, not partial."⁴²⁵ Such principles "reach[] as far back as the founding generation," and it is "clear" that the founders "aimed to prevent aristocracy, [and] rule by blood. . . . The theory of 'class legislation' has always been about the fight against aristocracy."⁴²⁶

Skinner v. Oklahoma proved to be a temporary backward glance by the Justices of the Supreme Court to the nineteenth century-era when the Fourteenth Amendment was understood to ban class legislation and associated monopolies. The 1937 decision in *West Coast Hotel* and the 1938 decision in *Carolene Products* foretold the future of the Fourteenth Amendment, which was to be about strict scrutiny of racial classifications and rational basis scrutiny for almost everything else. While not mentioning *Lochner* by name, the Court made clear, in its 1949 decision in *Railway Express Agency v. New York*,⁴²⁷ that *Lochner*-style review for economic regulations was no longer available. The Court noted:

We do not sit to weigh evidence . . . in order to determine whether the regulation is sound or appropriate; nor is it our function to pass judgment on its wisdom. We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City.⁴²⁸

423. *Id.* at 166–67.

424. *Id.* at 167.

425. *Id.*

426. *Id.* at 167–68.

427. 336 U.S. 106 (1949).

428. *Id.* at 109 (citation omitted).

The new standard of rational basis review of economic and social legislation, in fact “looked more like judicial abdication than judicial review.”⁴²⁹

In 1955, *Williamson v. Lee Optical*⁴³⁰ demonstrated the emptiness of the new rational basis review standard, holding that if there were any *hypothetical rationale* that the justices could imagine for a law, even if it was not the actual rationale of the legislature, the law would be upheld.⁴³¹ The facts in *Williamson* are troubling. An Oklahoma law prohibited anyone who was not a licensed optometrist or ophthalmologist from dispensing lenses or fitting lenses into frames except where there was a prescription from a licensed optometrist or ophthalmologist.⁴³² The law also prohibited solicitation for sale of eyeglass frames by those did not have the required license.⁴³³

Justice Douglas could not point to the legislature’s rationale behind this law, but he finally hypothesized that perhaps the law would encourage people to get needed eye exams.⁴³⁴ The law in *Williamson* was a clear example of special interest legislation enacted to financially benefit optometrists and ophthalmologists by forcing patients to get a potentially unwanted and unneeded eye exam every time they wanted to buy a new pair of glasses. The fact the Supreme Court upheld it sent a signal that anything goes in the area of economic and social legislation. The Fourteenth Amendment may have been meant to bar caste- and class-based legislation, exclusive privileges, and monopolies, but after *Williamson* that was all moot.

In 1963, the Court finally explicitly overruled *Lochner* in *Ferguson v. Skrupa*,⁴³⁵ holding that “[t]he doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been

429. *Hettinga v. United States*, 677 F.3d 471, 481 (D.C. Cir. 2011) (Brown, J., concurring) (arguing that the Court “abdicated its constitutional duty to protect economic rights completely” with the adoption of rational basis review); accord Paul E. McGreal, *Alaska Equal Protection: Constitutional Law or Common Law?*, 15 ALASKA L. REV. 209, 241 (1998).

430. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955).

431. *See id.* at 488.

432. *Id.* at 485 & n.1.

433. *Id.* at 388 n.3.

434. *Id.* at 487.

435. 372 U.S. 726 (1963).

discarded."⁴³⁶ Ironically, just two years later, in *Griswold v. Connecticut*,⁴³⁷ the Supreme Court reinvented substantive due process with respect to certain social matters, but not to economic regulation. This doctrine ultimately led to the Court's invalidation of abortion laws in *Roe v. Wade*⁴³⁸ and to its invalidation of sodomy laws in *Lawrence v. Texas*.⁴³⁹ The modern Supreme Court has shied away from economic substantive due process, but it has enforced the Takings Clause with a pre-1937 vigor in such cases as *Dolan v. City of Tigard*,⁴⁴⁰ *Lucas v. South Carolina Coastal Council*,⁴⁴¹ and *Nollan v. California Coastal Commission*.⁴⁴² The Supreme Court also abandoned the New Deal Court's use of the rational basis test for sex-discrimination cases in *Goesaert v. Cleary*⁴⁴³ and *United States v. Virginia*,⁴⁴⁴ and it has struck down a law targeted at homosexuals using the rational basis test in *Romer v. Evans*.⁴⁴⁵ It also struck down an ordinance that burdened persons with mental retardation using the rational basis test in *City of Cleburne v. Cleburne Living Center, Inc.*⁴⁴⁶ The Court has further held that alienage and illegitimacy are suspect classes.⁴⁴⁷

In short, the Supreme Court's current case law interpreting the Fourteenth Amendment is a mess. The Court has made exceptions to New Deal rational basis scrutiny in discrimination cases involving sex, sexual orientation, mental retardation, alienage, and illegitimacy, while it has also abandoned the rational basis

436. *Id.* at 730.

437. 381 U.S. 479 (1965).

438. 410 U.S. 113 (1973).

439. 539 U.S. 558 (2003).

440. 512 U.S. 374 (1994).

441. 505 U.S. 1003 (1992).

442. 483 U.S. 825 (1987).

443. 335 U.S. 464 (1948).

444. 518 U.S. 515 (1996).

445. 517 U.S. 620 (1996). Although *Romer* ostensibly applied rational basis review, commentators widely agree that the Court in fact applied, without acknowledging that it was doing so, a developing form of heightened scrutiny that applies to sexual orientation-based classifications. See, e.g., Jeremy B. Smith, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 *FORDHAM L. REV.* 2769, 2770 (2005); Matthew Coles, *The Meaning of Romer v. Evans*, 48 *HASTINGS L.J.* 1343, 1344 (1997).

446. 473 U.S. 432 (1985).

447. See *Plyler v. Doe*, 457 U.S. 202 (1982) (alienage); *Trimble v. Gordon*, 430 U.S. 762 (1977) (illegitimacy); *Gomez v. Perez*, 409 U.S. 535 (1973) (illegitimacy); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) (illegitimacy).

test with respect to abortion laws, laws governing contraception, laws banning sodomy, and the incorporated federal Bill of Rights. Recent takings cases reviewing zoning regulations seem clearly contrary to the post-1937 New Deal understanding. The Supreme Court should abandon the tiers of scrutiny and focus on the original meaning of the Fourteenth Amendment. That is, it should remember that the Fourteenth Amendment bans class legislation, the granting of exclusive privileges, and grants of government monopoly power. In a recent concurring opinion, Judge Janice Rogers Brown of the United States Court of Appeals for the District of Columbia Circuit described current protections of economic liberty since the New Deal in frank terms: "America's cowboy capitalism was long ago disarmed by a democratic process increasingly dominated by powerful groups with economic interests antithetical to competitors and consumers. And the courts, from which the victims of burdensome regulation sought protection, have been negotiating the terms of surrender since the 1930s."⁴⁴⁸

The Court's approach to economic liberty cases is at war with the original meaning of the Constitution and the Fourteenth Amendment. The Framers of the Constitution understood the shortcomings of the democratic process, and they foresaw the development of factions (special interest groups) who would game the legislative process to gain monopoly or oligopoly rents.⁴⁴⁹ The Constitution was written to empower the courts to protect the Republic from the worst excesses of factions. In other words, the Constitution was designed, as Judge Brown says, to "thwart more potent threats to the Republic: the political temptation to exploit the public appetite for other people's money—either by buying consent with broad-based entitlements or selling subsidies, licensing restrictions, tariffs, or price fixing regimes to benefit narrow special interests."⁴⁵⁰ The Founders envisioned a government that was capable of preventing grants of special privileges and, in extreme cases, preventing the conferral of outright monopolies, just as Sir Edward Coke argued almost four centuries ago. The responsibility for striking down infringements on economic lib-

448. *Hettinga v. United States*, 677 F.3d 471, 480 (D.C. Cir. 2011) (Brown, J., concurring).

449. See THE FEDERALIST NO. 10, at 78–81 (James Madison) (Clinton Rossiter ed., 1961).

450. *Hettinga*, 677 F.3d at 480 (Brown, J., concurring).

erty falls to the courts.⁴⁵¹ Over the last half-century, the courts have failed to meet this responsibility. Judicial abdication over the last half century is troubling in light of the overwhelming evidence summarized in this paper—from English and colonial history, the debates on the federal Constitution and its ratification, and the legislative history on the Fourteenth Amendment—that people have a right to be free from monopolies and grants of special privilege.

E. *“Private” Monopolies and Federal Antitrust Law*

There remains a final wrinkle in this analysis of the federal government and the problem of monopolies: How did the monopoly problem come to be seen after 1890 as a problem that stemmed mostly from private concentrations of economic power and not from corrupt government grants of power and licenses? The answer is that there was a growing concern with private monopolies—those that developed without special grants from the state—in the late nineteenth century, in part because of what we would today call “crony capitalism.” With the establishment of general incorporation laws in many states, parties for the first time became able to establish separate corporate entities.⁴⁵² Prior to the adoption of general incorporation laws, corporations were created, one at a time, by an act of the legislature, or else in England by a charter from the King. This system of private incorporation lent itself to corruption and abuse and to the granting of special privileges or monopolies.⁴⁵³ As a result, it was replaced in the United States by general laws beginning in the early nineteenth century that allowed incorporation whenever certain preexisting conditions were met.⁴⁵⁴

General incorporation laws, however, led to abuses. In some cases, these laws consolidated capital in the hands of a few players.⁴⁵⁵ As Thomas Cooley warned in 1874, “[T]he most enormous and threatening powers in our country have been created; some of the great and wealthy corporations actually

451. See THE FEDERALIST NO. 78, *supra* note 449, at 467 (Alexander Hamilton); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

452. SANDEFUR, *supra* note 29, at 27.

453. Henry N. Butler, *Nineteenth-Century Jurisdictional Competition in the Granting of Corporate Privileges*, 14 J. LEGAL STUD. 129, 138, 141 (1985).

454. See Part III.A *infra*.

455. See Daniel A. Crane, *Antitrust Antifederalism*, 96 CALIF. L. REV. 1, 13 (2008).

[have] greater influence in the country at large and upon the legislation of the country than the States to which they owe their corporate existence."⁴⁵⁶

As a result, there was a growing fear among members of the general public after the Civil War that corporate monopolists would work to ensure that the state served only their private economic interests rather than the general interests of the public at large.⁴⁵⁷ For example, as early as 1880, the Greenback and Anti-Monopoly parties began speaking out against the "land, railroad, money and other gigantic monopolies."⁴⁵⁸ Even the patent system was called into question for conferring private monopolies that undermined the public's well-being. For example, General Ben Butler, the presidential candidate for the Greenback and Anti-Monopoly parties, criticized the sewing machine monopoly, which benefited from the protection of a patent.⁴⁵⁹ The Union Labor Party (a coalition of the Greenback Party, the Knights of Labor, and the farmer movement) declared in 1888 that "[t]he paramount issues to be solved in the interests of humanity are the abolition of usury, monopoly, and trusts, and we denounce the Democratic and Republican parties for creating and perpetuating these monstrous evils."⁴⁶⁰

The railroads were one of the most despised industries. In fact, as early as the Civil War period, the railroad monopoly was recognized as a problem. The industry was a hotbed of crony capitalism, thanks to land grants from the federal government to build railways in the West. Even during the Civil War, the federal government seized some railroads for the war effort.⁴⁶¹ In 1864, the House of Representatives found it necessary to pass a bill to authorize every railroad company in the country to carry government supplies, freight, mails, troops,

456. *Id.* (second alteration in original) (quoting COOLEY, *supra* note 243, at 279 n.2 (3d ed. 1875)) (internal quotation marks omitted).

457. 3 AMERICAN LANDMARK LEGISLATION: PRIMARY MATERIALS 5 (Irving J. Sloan ed., 1976).

458. *Id.* at 8.

459. William L. Letwin, *Congress and the Sherman Antitrust Law: 1887–1890*, 23 U. CHI. L. REV. 221, 234 (1956).

460. *Id.* at 247 (quoting Union Labor Platform (1888), reprinted in THE NATIONAL CONVENTIONS AND PLATFORMS OF ALL PARTIES, 1789 TO 1901: CONVENTION, POPULAR, AND ELECTORAL VOTE 249, 251 (Thomas Hudson McKee ed., 4th ed. 1901), available at <http://books.google.com/books?id=Sj2HAA AAMA AJ>) (internal quotation marks omitted).

461. See The Second Confiscation Act, 12 Stat. 589 (1862); see also *United States v. Miller*, 78 U.S. (11 Wall.) 268 (1870) (upholding the constitutionality of the seizures).

and passengers notwithstanding any contrary monopoly.⁴⁶² The bill's not-so-hidden goal was to abolish one railroad monopoly granted by the State of New Jersey in particular.⁴⁶³ The Camden and Amboy Railroad of New Jersey held a monopoly on the right of transit through New Jersey (including transportation *outside* the state to New York City and Philadelphia).⁴⁶⁴ The State granted the monopoly charter in exchange for stock in the railroad.⁴⁶⁵ Senators who were in favor of the bill to abolish the New Jersey state monopoly included none other than Charles Sumner, the radical Republican who decried monopolies and grants of special privilege in his support of the Civil Rights Act of 1866 and the Fourteenth Amendment.⁴⁶⁶

In the 1865 Senate debates on the bill, Senator Sumner referred to the English history and the historic ban on monopolies while explaining his support of the federal override of the New Jersey state monopoly.⁴⁶⁷ Senator Sumner also approvingly quoted Daniel Webster's argument against the monopoly granted by the State of New York in *Gibbons v. Ogden* as support for the constitutionality of Congress's using the Commerce Clause to override a state granted monopoly. He stated, "Now I think it very reasonable to say that *the Constitution never intended to leave with the States the power of granting monopolies* either of trade or of navigation; and therefore, that as to this, the commercial power is exclusively in Congress."⁴⁶⁸ Then again he says: "I insist that the nature of the case and of the power did imperatively require that such important authority as that of granting monopolies of trade and navigation *should not be considered as still retained by the states.*"⁴⁶⁹ Sumner even likened the

462. 10 GREAT DEBATES IN AMERICAN HISTORY: ECONOMIC & SOCIAL QUESTIONS: PART ONE 202 (Marion Mills Miller ed. 1913).

463. *Id.*

464. See *The Camden and Amboy Railroad Monopoly*, N.Y. TIMES, Feb. 4, 1864, available at <http://www.nytimes.com/1864/02/04/news/the-camden-and-amboy-railroad-monopoly.html>.

465. *Id.*

466. See *id.* at 210; Part II.C *supra*.

467. CONG. GLOBE, 38th Cong., 2d Sess. 792 (1865) (statement of Sen. Charles Sumner).

468. *Id.* (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 10 (1824) (reporter's summary of Daniel Webster's statements at oral argument)) (internal quotation marks omitted).

469. *Id.* (quoting *Gibbons*, 22 U.S. at 14 (reporter's summary of Daniel Webster's statements at oral argument)) (internal quotation marks omitted).

New Jersey monopoly to Apollyon in *Pilgrim's Progress*,⁴⁷⁰ with New Jersey as the Valley of Humiliation "through which all travelers north and south must pass, and the monopoly, like Apollyon, claims them all as 'subjects,' saying 'for all that country is mine, and I am the prince and god of it.'"⁴⁷¹

Sumner described the monopoly not only as hostile "to the Union," but, importantly, "as hostile to the spirit of the age, which is everywhere overturning the barriers of commerce."⁴⁷² Painting a graphic picture of what would occur if New Jersey were not checked in its grant of monopoly, Senator Sumner feared other states would soon follow:

The taste of revenue is to a Government like the taste of blood to a wild beast, quickening and maddening the energies, so that it becomes too deaf to all suggestions of injustice; and the difficulties must increase where this taxation is enforced by a far-reaching monopoly. The State, once tasting this blood, sees only an easy way of obtaining the means it desires; and other States will yield to the same temptation. . . .

A profitable Usurpation, like that of New Jersey, would be a tempting example to other states. . . . Let this Usurpation be sanctioned by Congress, and you hand over the domestic commerce of the Union to a succession of local imposts. . . . Each State will play the part of Don Quixote, and the Union will be Sancho Panza, compelled to receive on his bare back the lashes which were the penance of his master.⁴⁷³

Senator Sumner further tied his opposition to the railroad monopoly to his hatred of the institution of slavery—which, as discussed previously in this article, he also argued was a government-granted monopoly over the labor of African-Americans:

The present pretension of New Jersey belongs to the same school with that abhorred and blood-bespattered pretension of South Carolina.

470. *Pilgrim's Progress* is a 1678 Christian allegory written by John Bunyan. Apollyon is a demon that attacks the protagonist, Christian, as he attempts to cross the Valley of Humiliation. After a vicious half-day battle, Christian wounds Apollyon and Apollyon finally flies away.

471. *Id.* at 793.

472. *Id.*

473. *Id.*

. . . The monopoly which was founded on the hideous pretension of property in man obtained a responsive sympathy in that other monopoly which was founded on the greed of unjust taxation, and both were naturally upheld in the name of State rights. Both must be overthrown in the name of the Union. South Carolina must cease to be a slave State, and so must New Jersey. All hail to the genius of universal emancipation! All hail to the Union, triumphant over the Rebellion, triumphant also over a Usurpation which menaces the unity of the Republic!⁴⁷⁴

Despite Senator Sumner's colorful arguments, and despite other efforts by advocates of the bill, the measure was not brought to a vote in the Senate because of a lack of the votes to pass it.⁴⁷⁵

Opposition to railroad monopolies did not end with the federal opposition to the New Jersey railroad monopoly, however. As it turned out, the 1864 debate foreshadowed public hostility toward the railroads in the coming years. By the 1870s, the Grange Movement was formed by a group of farmers, who rallied primarily against monopolies and whose motto was, in part, the phrase "Down with monopolies."⁴⁷⁶ The "Grangers," as they were called, were mostly opposed to the railroad industry, which had driven up the price of transportation for grain. Although the railroad companies were private companies and had not necessarily received exclusive privileges to operate railways, they did receive substantial benefits from the government, which helped them establish monopoly economic power. Indeed, railroad companies received "tremendous" government subsidies, including both state and federal land grants, vast eminent domain powers, special tax treatment, and government bonds.⁴⁷⁷ These special benefits or privileges were well known both by Congress and by some members of the general public in the late nineteenth century. Railroads may well be natural monopolies, but the railroads in the United States had also received substantial government aid in securing the very land on which to lay their tracks. There was undoubtedly an element of crony capitalism at work in the building of the American railroads.

474. *Id.*

475. 10 GREAT DEBATES, *supra* note 462, at 226.

476. Letwin, *supra* note 459, at 232–33.

477. Danaya C. Wright & Jeffery M. Hester, *Pipes, Wires, and Bicycles: Rails-To-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries*, 27 *ECOLOGICAL L.Q.* 351, 365 (2000).

In the early debates regarding regulation of the railroad industry, speakers drew on several newspaper articles to support their positions before the House Committee on Commerce regarding the railroad industry:

“Sooner or later the people will understand their rights and will maintain them, if this is their government and not one of the railroad fools and rings.” —*New York Journal of Commerce*.

“[The railroad companies] have been hedged in and protected on every side by statutes in their interests, while the people, who have nourished them until they have grown to the stature of giants, and in many cases the insolence and despotism of tyrants, are left almost wholly at their mercy. It is surely time that the people began to look after their own interests.” —*Rochester Morning Gerald*, December 21, 1881.

“No people in the world have welcomed the railroad era so joyfully as Americans; no other people have done so much, by land-grants and corporate aid, to build railroads. . . .” —*Buffalo Express*.⁴⁷⁸

Special treatment for railroads was justified on the grounds that railroads provided a public benefit by enabling people and goods to be transported across the country, which was surely true. As for the railroad companies’ eminent domain powers, takings of land on which to lay tracks were consistently upheld during the antebellum era because the land would be used for the public purpose of providing transportation, even though the direct benefits accrued to the private railroad companies.⁴⁷⁹ But the Grange Movement’s proposed solution to the railroads’ vast accumulation of economic power was more regulation—and more government power—rather than less regulation and a more free-market solution.⁴⁸⁰ The public came to think that the railroad industry in Europe was highly regulated from the early stages of its development, and that it did not suffer from the same rate-abuse problems as did the railroad system in the

478. HOUSE COMM. ON COMMERCE, 47TH CONG., ARGUMENTS AND STATEMENTS BEFORE THE COMMITTEE ON COMMERCE IN RELATION TO CERTAIN BILLS REFERRED TO THAT COMMITTEE PROPOSING CONGRESSIONAL REGULATION OF INTERSTATE COMMERCE 39 (1882) (statement of Francis B. Thurber, Nat’l Bd. of Trade).

479. James W. Ely Jr., *Can The “Despotic Power” Be Tamed?: Reconsidering the Public Use Limitation on Eminent Domain*, PROB. & PROP., Nov.–Dec. 2003, at 33.

480. See Letwin, *supra* note 457, at 233.

United States.⁴⁸¹ As a result, the Interstate Commerce Act was passed in 1887, primarily to regulate railroad rates.

The Grangers, however, along with many others during this period in American history, such as the Greenback and Anti-monopoly Parties, not only opposed the railroads, but monopolies in general.⁴⁸² This included the big trusts, such as the Standard Oil and U.S. Steel trusts. These groups feared that these trusts threatened liberty because they would corrupt politicians by seeking special benefits and government monopoly privileges.⁴⁸³ The trusts did indeed benefit enormously from the very high protective tariffs which late nineteenth-century politicians enacted into law and which protected the trusts' industries from foreign competition.⁴⁸⁴ The trusts sought, and received, from politicians a very high tariff during this era, which directly benefitted American manufacturers at the expense of consumers.⁴⁸⁵ The trusts were also accused of both driving out competitors and driving up prices—thus hurting other businesses and consumers.⁴⁸⁶ The Sherman Antitrust Act, passed in 1890, was largely aimed at prohibiting these kinds of privately established restraints on trade, as well as regulating the various railroad cartels.⁴⁸⁷

In his landmark book critiquing the state of federal antitrust law in the 1970s, *The Antitrust Paradox*, Judge Robert H. Bork argued that the 1890 Sherman Act's primary aim was the promotion of consumer welfare.⁴⁸⁸ Similarly, the original 1914 Clayton Antitrust Act and the 1914 Federal Trade Commission Act were both passed, according to Judge Bork, to reinforce the

481. *See id.* (citing a Granger resolution that read "the railways of the world, except in those countries where they have been held under strict regulation and supervision of the government, have proved themselves arbitrary, extortionate, and . . . opposed to free institutions and free commerce . . .").

482. Letwin, *supra* note 459, at 233.

483. *Id.* at 235.

484. *Id.* at 225, 250.

485. *See* S.J. BUCK, *THE GRANGER MOVEMENT: A STUDY OF AGRICULTURAL ORGANIZATION AND ITS POLITICAL, ECONOMIC AND SOCIAL MANIFESTATIONS 1870-1880*, at 21 (1913) ("the high customs tariff [was] adopted during the [Civil] [W]ar primarily for the purpose of raising revenue but continued as a measure of protection to American manufacturers.").

486. *Id.* at 235.

487. *See generally* Letwin, *supra* note 459.

488. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 61 (The Free Press 1993) (1978); *see also* Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. LAW & ECON. 7, 7 (1966).

consumer welfare protections of the Sherman Act.⁴⁸⁹ The concern in the Progressive Era with protecting consumer welfare called for prohibitions on predatory business tactics and on horizontal mergers aimed at creating monopolies and cartels.⁴⁹⁰ Wide discretion was left to the courts to develop specific rules.⁴⁹¹ Another stated purpose of the Sherman Act's sponsor, Senator John Sherman, was to codify at the federal level the common law rule, which existed in many states, outlawing private contracts that operated as restraints on trade.⁴⁹² However, as Judge Bork points out, the common law doctrine on restraints of trade and monopolies had been quite "diverse" and "contradictory" and did not consistently promote competition.⁴⁹³ For example, Senator Sherman relied on cases suggesting that the common law prohibited Standard Oil's railroad rebates, cartel agreements, and horizontal mergers aimed at the creation of a monopoly, while ignoring other cases that might have suggested a contrary conclusion.⁴⁹⁴ That said, Senator Sherman and other supporters of the Sherman Antitrust Act of 1890 were quite clear about their version of the common law.⁴⁹⁵ Judge Bork describes that version as an "an artificial construct, made up for the occasion out of a careful selection of a few recent decisions from different jurisdictions, plus a liberal admixture of the senators' own policy prescriptions."⁴⁹⁶

The English Statute of Monopolies inspired, at least in small part, the Sherman Antitrust Act of 1890. For example, both the Statute of Monopolies and the Sherman Act gave common law courts the power to hear cases regarding alleged monopolies and provided for the same remedies: treble damages and costs to the aggrieved parties.⁴⁹⁷ In addition, while arguing for passage of the law, Senator Sherman said that the trusts "smacked of tyranny, 'of a kingly prerogative,' and a nation that 'would not submit to an emperor . . . should not submit to an autocrat of

489. See BORK, ANTITRUST PARADOX, *supra* note 488, at 63.

490. *Id.* at 20.

491. *See id.*

492. 3 AMERICAN LANDMARK LEGISLATION, *supra* note 457, at 12.

493. BORK, ANTITRUST PARADOX, *supra* note 488, at 20.

494. *Id.*

495. *See id.*

496. *Id.*

497. Jay Dratler, Jr., *Does Lord Darcy Yet Live? The Case Against Software and Business-Method Patents*, 43 SANTA CLARA L. REV. 823, 825 (2003).

trade."⁴⁹⁸ Recognizing, at least in part, that the government itself might be involved with the trusts' monopoly power, Sherman agreed that "[i]f the combination is aided by our tariff laws they should be promptly changed, and, if necessary, equal competition with all the world should be invited in the monopolized article."⁴⁹⁹ It is doubtful that Senator Sherman was sincere regarding tariff policy, however; shortly after the Sherman Act was passed, he supported the highly protectionist McKinley Tariff in 1890, which raised the average duty on imports to nearly fifty percent!

The Sherman Antitrust Act did break with the traditional English and American concern about monopolies in one critical regard. By its plain language, the Act applies to all monopolies, regardless of their source: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."⁵⁰⁰ Nonetheless, notwithstanding a few rare cases involving governments outside the United States,⁵⁰¹ antitrust policy in the United States has been aimed primarily at prohibiting only private monopolies, which is ironic because the most effective monopolies are undoubtedly those that are backed by government power. In addition, under the current *Parker* doctrine, state-sanctioned monopolies today are immune from scrutiny under the Sherman Antitrust Act, in recognition of state sovereignty and the importance of federalism.⁵⁰² The *Parker* doctrine has rightly been critiqued as a "complete inversion of the proper approach."⁵⁰³ As Professor Richard Epstein argues, "State-sponsored cartels in the aftermath of the New Deal legitimation are more permanent and more dangerous than privately-operated ones, but they are

498. 3 AMERICAN LANDMARK LEGISLATION, *supra* note 455, at 12 (omission in original) (quoting 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman)) (emphasis added).

499. 21 CONG. REC. at 2457.

500. Sherman Antitrust Act, ch. 647, 26 Stat. 209, § 1 (1890).

501. *See, e.g.,* Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927).

502. *See Parker v. Brown*, 317 U.S. 341, 351 (1943).

503. Richard Epstein, Symposium, *The Proper Goals of Antitrust: When Public and Private Interests Collide*, 9 LOY. CONSUMER L. REV. 112, 125 (1997).

given complete immunity from the antitrust act. This is not the way we want the system to operate.”⁵⁰⁴

Also, whereas the common law historically disfavored contracts operating as restraints on trade, such contracts were unconnected to the central concern regarding government-created monopolies. For example, in *Rogers v. Parrey*,⁵⁰⁵ decided in 1613, a carpenter sued another carpenter for violation of an agreement to cease to practice carpentry for a period of twenty-one years in exchange for payment.⁵⁰⁶ Sir Edward Coke held that although absolute restraints on trade were invalid at common law, because this was a restraint for a certain time and place for valuable consideration, it was a valid agreement.⁵⁰⁷ Nowhere in the case does Coke mention *Darcy v. Allen*,⁵⁰⁸ which was decided just ten years prior in 1603. Further prohibiting the abuse of royal monopolies was a priority for Coke at the time, as King James I was a great abuser of the royal prerogative in this area.⁵⁰⁹ That Coke was willing to weaken the common law rule to allow consensual agreements among private parties in restraint of trade while at the same time seeking to strengthen the rule prohibiting royal monopolies suggests that the danger posed by monopolies, in Coke’s view, primarily stemmed from government grants of monopoly power. Thus, the two rules do not appear to be linked, except to the extent that both reflect the underlying common law interest in efficiency.

Corporations are, however, unlike wholly private actors in one crucial way: corporations derive their very existence from the state. Further, although there are general corporate laws in place today (such that anyone may establish a corporation), corporations benefit from legal rights that individuals do not, including limited liability and perpetual life. This fact has not gone unnoticed by supporters of antitrust policy in the United States. As one leftist economist, Henry Carter Adams, argued in 1894:

At the bottom of every monopoly may be traced the insidious influence of the peculiar privileges which the law grants

504. *Id.* See generally MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* (2012) (showing how New Deal constitutionalism led to government support for cartels at both the federal and state level).

505. (1613) 80 Eng. Rep. 1012.

506. *Id.* at 1012–13.

507. *Id.* at 1013.

508. (1603) 72 Eng. Rep. 830.

509. See Part I.A *supra*.

to corporations. . . . [C]orporations assert for themselves rights conferred on individuals by the law of private property, and apply to themselves a social philosophy true only of a society composed of individuals.⁵¹⁰

In an attempt to reconcile the Supreme Court's upholding of the constitutionality of the Sherman Antitrust Act in 1904 in *Northern Securities Co. v. United States*⁵¹¹ with its decision in *Lochner* in 1905, Daniel Crane similarly writes that the "conception of liberty as freedom from government coercion is hard to reconcile with the antitrust project until one sees that the evil that antitrust addresses is caused by a governmental dislocation of the market."⁵¹²

The argument, however, that private monopolies were possible only due to the development of general corporate laws is not persuasive. General incorporation law, enabling virtually all people to form corporations, is an option available to all and thus is not a special privilege given only to a few monopolists. Moreover, general incorporation laws can be defended on the ground that such laws merely lower the transaction costs of forming what were previously complex partnerships by substituting partnership agreements with a standard corporate form. It is doubtful that merely lowering the transaction costs for the creation of certain types of business associations, which largely could still exist absent general incorporation laws, led to the development of trusts.

Although the Privileges or Immunities Clause is a near dead letter in the U.S. Constitution⁵¹³ and the *Lochner* era ended with the New Deal, the States are still free to protect liberty in their own respective state constitutions to a greater degree than does the federal government. Indeed, Louisiana amended its constitution after the *Slaughter-House Cases* to prohibit monopolies.⁵¹⁴ Louisiana did not act alone; other states have adopted antimopoly provisions as well.⁵¹⁵ Part III explores the several state

510. Crane, *supra* note 164, at 511 (quoting Henry Carter Adams, *Publicity and Corporate Abuses*, in 1 PUBLICATIONS OF THE MICH. POL. SCI. ASS'N 109, 116, 320 (1894)) (internal quotation marks omitted).

511. *N. Sec. Co. v. United States*, 193 U.S. 197, 356–57 (1904).

512. Crane, *supra* note 164, at 512.

513. *But see* McDonald v. City of Chicago, 130 S. Ct. 3020, 3060–63 (2010) (Thomas, J., concurring) (discussing the history and purpose of the Privileges or Immunities Clause and arguing that the Second Amendment should be incorporated through the Privileges or Immunities Clause, not the Due Process Clause).

514. *See* LA. CONST. of 1879, art. 46.

515. *See, e.g.*, MD. CONST. Declaration of Rights, art. 41.

constitutional provisions that prohibit monopolies and the early state cases interpreting and applying these provisions. Part III also reviews the applications and limitations of these provisions in modern state constitutional law and discusses why many states have not adopted such provisions in their constitutions.

III. MONOPOLIES AND STATE CONSTITUTIONAL LAW

Though the federal Constitution does not have an explicit antimonopoly provision, such provisions are included in nineteen state constitutions today.⁵¹⁶ Only two states had antimonopoly provisions at the Founding.⁵¹⁷ By 1868, five states included antimonopoly provisions, and several others included prohibitions on the granting of exclusive privileges or immunities.⁵¹⁸ Provisions were also added in state constitutions after 1868, including in the Progressive Era.⁵¹⁹ Some of the more recently added provisions appear to be primarily, or even exclusively, concerned with prohibiting private monopolies;⁵²⁰ however, many states use similar language to that found in the provisions between the time of the Founding and 1868, when a ban on monopoly meant only a ban on a government grant of privilege.⁵²¹

516. See ALA. CONST. art. IV, § 103; ARIZ. CONST., art. XIV, § 15; ARK. CONST. art. 2, § 19; CONN. CONST., art. I, § 1; GA. CONST. art. 3, § 6, ¶ V; MASS. CONST. pt. 1, art. VI; MD. CONST. Declaration of Rights, art. 41; MINN. CONST. art. 13, § 6; N.H. CONST. pt. 2, art. 83; N.J. CONST. art. 4, § 7, ¶ 9; N.M. CONST. art. 4, § 38; N.C. CONST. art. I, § 34; OKLA. CONST. art. 5, § 44; S.D. CONST. art. 17, § 20; TENN. CONST. art. 1, § 22; TEX. CONST. art. 1, § 26; UTAH CONST. art. 12, § 20; WASH. CONST. art. 12, § 22; WYO. CONST. art. 1, § 30.

517. See Part III.B.1 *infra*.

518. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 73 (2008); see also Part III.B.2 *infra*.

519. See Part III.B.3 *infra*.

520. See, e.g., WASH. CONST. art. 12, § 22 (“Monopolies and trusts shall never be allowed in this state, and no incorporated company, copartnership, or association of persons in this state shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders, or the trustees or assignees of such stockholders, or with any copartnership or association of persons, or in any manner whatever for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity. The legislature shall pass laws for the enforcement of this section by adequate penalties, and in case of incorporated companies, if necessary for that purpose, may declare a forfeiture of their franchises.”).

521. See, e.g., WYO. CONST. art. 1, § 30 (adopted in 1889 and providing that “[p]erpetuities and monopolies are contrary to the genius of a free state, and shall

Some of the state constitutional provisions banning monopoly are broadly worded to prohibit any unequal grant of privileges or immunities to certain citizens or classes of citizens.⁵²² Others, however, are more narrowly worded and prohibit only the grant of monopolies or of exclusive privileges. We will focus here on the narrower state provisions, which expressly ban monopolies and exclusive privileges.

This Part discusses the roots of the state constitutional tradition of bans on monopolies, which derives in part from the Jacksonian aversion to monopolies and grants of special privilege discussed below.⁵²³ We then discuss the adoption of state constitutional provisions in three distinct periods: (1) at the Founding,⁵²⁴ (2) during the nineteenth century,⁵²⁵ and (3) during the progressive era.⁵²⁶ Next, we will discuss the interpretation of these state constitutional provisions in state courts during the twentieth century and the influence of federal constitutional law and treatment of economic liberty cases on state court decisions.⁵²⁷ Finally, this section concludes by discussing potential reasons not all states have included provisions prohibiting monopolies and grants of special privilege today.⁵²⁸

A. *A Tradition Rooted in Jacksonian Democracy and Changes in Corporate Law*

State constitutional prohibitions on monopolies and the granting of exclusive privileges are closely tied to the States' traditional prohibition of partial and special laws which developed during the antebellum era,⁵²⁹ as discussed in Part II.C above. During this period, state courts routinely struck down laws granting special benefits or imposed special burdens on persons or classes of people.⁵³⁰ Prohibitions on partial or special laws in some form were included in nearly every state constitu-

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.").

522. Saunders, *supra* note 22, at 258.

523. See Part III.A *infra*.

524. See Part III.B.1 *infra*.

525. See Part III.B.2 *infra*.

526. See Part III.B.3 *infra*.

527. See Part III.C *infra*.

528. See Part III.D *infra*.

529. See *id.* at 251–52.

530. *Id.* at 252.

tion during the first half of the nineteenth century.⁵³¹ This state constitutional tradition was closely tied to the Jacksonian conception of democracy.

A central tenet of Jacksonian democracy was that the state should not establish monopolies or grant special privileges to particular individuals or classes of people.⁵³² President Jackson opposed the second Bank of the United States in part because it had monopoly powers. Jackson argued that “great evils to our country and institutions . . . might flow from such a concentration of power in the hands of a few men irresponsible to the people.”⁵³³ One of Jackson’s journalists wrote that “[a]ll Bank charters, all laws conferring special privileges, with all acts of incorporations [sic], for purposes of private gain, are monopolies, inasmuch as they are calculated to enhance the power of wealth, produce inequalities among the people, and subvert liberty.”⁵³⁴ Another wrote, “To have the land scattered over with incorporated companies, is to have a class of privileged, if not titled, nobility.”⁵³⁵

However, President Jackson’s opposition to corporations in the 1820s and 1830s should not be viewed by modern readers as an opposition to corporations as they exist today. As a matter of corporate law history, it is important to note that it was not until the late nineteenth century that most states passed general incorporation laws.⁵³⁶ Before that time, people were obligated to obtain a special grant from the legislature—or, in England, from the King—to establish a corporation.⁵³⁷ The thirteen colonial charters from which the thirteen original States grew were all in essence simply special licenses from various English Kings.⁵³⁸

531. *Id.* at 258.

532. *Id.* at 256–57.

533. 3 AMERICAN LANDMARK LEGISLATION, *supra* note 457, at 2.

534. *Id.* at 4.

535. *Id.*

536. *Id.* at 3.

537. *Id.*; *see also* HURST, *supra* note 211, at 15.

538. *See, e.g.*, Charter of Connecticut (1662), *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 252, 252 (Ben Perley Poore ed., 2d ed. 1878) [hereinafter FEDERAL AND STATE CONSTITUTIONS], available at http://books.google.com/books/about/The_Federal_and_State_Constitutions_Colo.html?id=hNrlAAAAMAA; CHARTER OF DELAWARE, *reprinted in* FEDERAL AND STATE CONSTITUTIONS, *supra*, at 270, 270.

Special grants of corporate status from a legislature were referred to as statutory charters and were not limited merely to being licenses for a corporation to exist.⁵³⁹ Rather, statutory corporate charters were more like constitutions establishing a corporation's internal structure.⁵⁴⁰ These grants by definition gave special privileges to the incorporators, as not everyone was able to obtain a charter from the legislature.⁵⁴¹ Common benefits of corporate status included limited liability from claims against the corporation, immunity from debts, and the ability to sue and be sued.⁵⁴² Early on, corporate charters primarily were issued to what today may be considered public utilities, including businesses involved in transportation, water supply, insurance, and banks.⁵⁴³ As one New England politician and lawyer, Theodore Sedgwick, pointed out in 1835, "Corporations can only obtain existence . . . by a special grant from the legislature. Charters of incorporation are therefore grants of privilege, to be exclusively enjoyed by the corporators Every grant of exclusive privilege, strictly speaking, creates a monopoly."⁵⁴⁴

In his book on the history of corporations in the United States, James Willard Hurst points out that often the Jacksonian attack on corporations was much less an attack on the corporate status of such entities than it was a complaint about the special privileges or immunities some businesses enjoyed that were denied to other similar businesses and individuals.⁵⁴⁵ Special privileges or immunities were commonplace for legislatively chartered corporations in the early nineteenth century. For example, these privileges or immunities included the ability to issue bank notes—a power generally limited to incorporated banks—and to exercise the power of eminent domain—a power which was given to some railroads.⁵⁴⁶ For instance, The Society for Establishing Useful Manufactures, a New Jersey corporation: (1) was exempt from having to pay taxes on much

539. HURST, *supra* note 211, at 15–16.

540. *Id.* at 16.

541. *See id.*

542. *Id.* at 19.

543. *Id.* at 17.

544. 3 AMERICAN LANDMARK LEGISLATION, *supra* note 455, at 13 (omissions in original).

545. HURST, *supra* note 211, at 33.

546. *Id.* at 20.

of its property; (2) was given authority to conduct lotteries; (3) could exercise the power of eminent domain; and (4) enjoyed a subsidy that exempted its workmen from all taxes and military service.⁵⁴⁷

It was not until the development of general incorporation laws, beginning in the mid-nineteenth century, that corporate law in the United States ceased to be a field of special grants of privilege to a few individuals. In fact, the development of general incorporation laws itself was closely tied to the Jacksonian abhorrence for monopolies and for what we would today call crony capitalism.⁵⁴⁸ General incorporation acts within the States were developed to correspond to the various state constitutional bans on special privileges, including antimonopoly provisions and bans on exclusive privileges.⁵⁴⁹ In fact, in his book on the American business corporation, Ronald Seavoy describes general incorporation statutes for business as a “major aspect of the social and political forces that democratized American society” during what Seavoy calls the “Age of Jackson, 1825–1855.”⁵⁵⁰ For example, when the 1846 New York Constitution was adopted, it provided that corporations were to be formed under general laws of incorporation and that special charters were banned except in certain limited instances.⁵⁵¹ Historian Gordon Wood notes that these laws

[O]pened up the legal privileges to all who desired them . . . [and w]ithin a few years most of them became very different from their monarchical predecessors: they were no longer exclusive monopolies and they were no longer pub-

547. 3 AMERICAN LANDMARK LEGISLATION, *supra* note 455, at 3.

548. See HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836–1937, at 2 (1991) (“[J]ackson’s regime . . . stood for economic growth, unobstructed by ‘artificial’ constraints. . . . The modern business corporation had its origin in the general corporation acts, one of the most important legal accomplishments of a regime bent on democratizing and deregulating American business.”).

549. RONALD E. SEAVOY, THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION, 1784–1855, at 180–81 (1982).

550. *Id.* at 182.

551. *Id.* at 183. The New York Constitution provided that

Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed.

N.Y. CONST. of 1846, art. VIII, § 1.

lic. They became private property and what Samuel Blodget in 1806 called “rivals for the common weal.”⁵⁵²

General incorporation laws were critical to preventing the States from granting special economic advantages to one group over another, and they democratized all the benefits of having corporations by allowing anyone to set up a corporation if he followed the right procedures. Limited liability for corporations might also be considered part of the democratization of corporate law because it lessened the risks associated with investment, thus making investments a possibility for people with fewer assets. General incorporation laws thus were answers to the “Jacksonian outcry against corporations . . . that all should have reasonably equal access to the benefits of incorporation.”⁵⁵³ As Ronald Seavoy explains in *The Origins of the American Business Corporation*, general incorporation laws were at the core of *laissez faire* and of Jacksonian thought.⁵⁵⁴ The goal was to remove the government from involvement in the formation of corporations by making the benefits of forming a corporation available to all.⁵⁵⁵

As constitutional lawyer Timothy Sandefur describes this change in incorporation law during the nineteenth century, “[T]he corporation was shorn of its special monopolistic status and became instead what contemporaries called ‘self-created societies’ whose existence was merely certified or recognized by the state’s ministerial act.”⁵⁵⁶ The privatization, so to speak, of corporations meant that the new corporations were not defined by government decree, but rather by the contractual obligations and rights established by investors or by the directors of the corporation.⁵⁵⁷ Indeed, today it is incorrect to refer to corporations as “creatures of the state” because general incorporation statutes typically provide that corporations exist automatically once the necessary filings have been made.⁵⁵⁸ The

552. SANDEFUR, *supra* note 29, at 27–28 (quoting GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 321 (1992)).

553. HURST, *supra* note 211, at 120; accord SEAVOY, *supra* note 540, at 181.

554. SEAVOY, *supra* note 540, at 181.

555. *Id.*

556. SANDEFUR, *supra* note 29, at 28.

557. *Id.* at 29.

558. See *id.*

government need not grant any special permission for a corporation to be formed.⁵⁵⁹

B. *The Adoption of Antimonopoly Provisions*

1. *Provisions Adopted at the Founding*

The first states to ban monopolies in their state constitutions were Maryland and North Carolina. Both state constitutions included essentially the same language. Maryland's Bill of Rights provided (and, in fact, still provides to this day) "[t]hat monopolies are odious, contrary to the spirit of a free government, and the principles of commerce; and ought not to be suffered."⁵⁶⁰ Similarly, North Carolina's Constitution provides that "[p]erpetuities and monopolies are contrary to the genius of a free state and shall not be allowed."⁵⁶¹

Though only a few early cases interpreted these provisions, the North Carolina Supreme Court did interpret and apply its antimonopoly provision in 1855.⁵⁶² At issue in the case was the question whether a railroad could build a bridge over a stream even though another company possessed an exclusive right from the state to operate a toll bridge across the same stream.⁵⁶³ The court ruled that the railroad could build the bridge because the state could not grant perpetuities or monopolies to private parties.⁵⁶⁴ In interpreting the North Carolina Constitution, which prohibited both exclusive privileges *and* monopolies, the court noted that:

"[T]he people" who were then exercising the highest act of sovereignty—that of making a government for themselves, forbade the creation of monopolies and put an end to all such as then existed.

559. *Id.*

560. MD. CONST., Declaration of Rights, art. 41. For the same language in the Maryland Constitution of 1776, see MD. CONST. of 1776, Declaration of Rights, art. XXXIX, reprinted in FEDERAL AND STATE CONSTITUTIONS, *supra* note 538, at 817, 820.

561. N.C. CONST., art. I, § 34. The provision's original language had only minor stylistic differences. See N.C. CONST. of 1776, Declaration of Rights, art. XXIII, reprinted in 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 538, at 1409, 1410, available at <http://books.google.com/books?id=uL8cAQAAAMAJ> ("That perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed.").

562. *McRee v. Wilmington & Raleigh R.R. Co.*, 47 N.C. 186 (1855).

563. *Id.* at 188.

564. *Id.* at 191.

The meaning and purpose was to forbid and abolish all hereditary and perpetual monopolies as “contrary to the genius of a free State,” and to put in motion the “new State” they were then organising, as a free representative republican government, relieved from all fetters and trammels previously existing by which its action might be cramped or circumscribed, and fully authorised to do every thing necessary and proper to accomplish its mission, i.e. promote the general welfare.⁵⁶⁵

As this passage illustrates, the provisions in both constitutions firmly reflect the traditional concerns about state-created monopolies.

In addition, eight states at the time of the Founding had Privileges and Immunities Clauses. Those states included: Connecticut, Massachusetts, North Carolina, New Hampshire, New Jersey, New York, Rhode Island, and Virginia.⁵⁶⁶ For example, Massachusetts’s constitution of 1780 provided that “no subject shall be . . . deprived of his property, immunities, or privileges . . . but by the judgment of his peers, or the law of the land,”⁵⁶⁷ and “[n]o 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.”⁵⁶⁸ North Carolina’s constitution of 1776, which also banned monopolies, stated that “no man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.”⁵⁶⁹ Similarly, Virginia’s Bill of Rights of 1776 stated “[t]hat no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public

565. *Id.* at 190 (citing N.C. CONST. of 1776, art. 1, §§ 22, 23, & Declaration of Rights, § 3 (Section 22 stated “[t]hat no hereditary emoluments, privileges, or honors, ought to be granted or conferred in this State” and Section Three of the Declaration of Rights provided “[t]hat no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services.”)).

566. Steven G. Calabresi, Sarah E. Agudo, & Kathryn L. Dore, *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451, 1528 (2012).

567. MASS. CONST. of 1780, pt. 1, art. XII, reprinted in FEDERAL AND STATE CONSTITUTIONS, *supra* note 538, at 956, 958.

568. *Id.* art. IV.

569. N.C. CONST. of 1776, Declaration of Rights, art. III, reprinted in 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 538, at 1409, 1409.

services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge to be hereditary."⁵⁷⁰ These clauses all would seem to ban monopolies under any plausible reading of their language.

2. *The Middle to Late Nineteenth Century*

By 1868, five states had adopted explicit antimonopoly provisions in their constitutions.⁵⁷¹ The new states to include antimonopoly provisions by the time of the adoption of the Fourteenth Amendment were Tennessee and Texas.⁵⁷² Arkansas and Georgia followed shortly thereafter.⁵⁷³ At least four states (Connecticut, Massachusetts, Mississippi, and New Jersey) also had prohibitions on exclusive privileges by 1868.⁵⁷⁴ Others, including South Dakota, Colorado, and Louisiana, followed shortly thereafter.⁵⁷⁵

Tennessee's Constitution of 1834 provided "[t]hat perpetuities and monopolies are contrary to the genius of free State, and shall not be allowed."⁵⁷⁶ Texas also adopted an antimonopoly provision in 1868, which similarly read, "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."⁵⁷⁷ In an early Texas case striking down a law that granted a businessman the exclusive right to sell meat and fish within the city limits in exchange for building a town hall facility, the court determined the purpose of the antimonopoly provision to be as follows:

570. Virginia Bill of Rights, (1776), reprinted in 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 538, at 1908, 1909, § 4.

571. Calabresi & Agudo, *supra* note 556, at 73.

572. TENN. CONST. of 1834, art. I, § 22; TEX. CONST. of 1868, art. I, § 18.

573. ARK. CONST. of 1874, art. II, § 19; GA. CONST. of 1877, art. IV, § 2.

574. CONN. CONST. of 1818, art. I, § 1; MASS. CONST. of 1780, Pt. 1, art. VI, reprinted in 1 FEDERAL AND STATE CONSTITUTIONS 956, 958; MISS. CONST. of 1832, art. I, § 1; N.J. CONST. of 1844, art. IV, § 7.11.

575. COLO. CONST. of 1876, art. II, § 11; LA. CONST. of 1879, art. 46; S.D. CONST. of 1885, art. VI, § 18. Mississippi's constitution retained its prohibition on exclusive privileges until Mississippi adopted a new constitution in 1868. Compare MISS. CONST. of 1868, art. I, § 1 ("All persons resident in this State, citizens of the United States, are hereby declared citizens of the State of Mississippi"), with MISS. CONST. of 1832, art. I, § 1 ("[N]o man, or set of men, are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services.").

576. TENN. CONST. of 1834, art. I, § 22.

577. TEX. CONST. of 1868, art. I, § 18.

To place the people of the city, with respect to fresh meats and fish, at the mercy of [the businessman], or any other person, would be to allow a most dangerous monopoly, notwithstanding the prohibition in the bill of rights, which was intended to protect the people against just such monopolies, and to give them the right to have fair competition in the markets to which they must resort to purchase the necessities of life. And this is one of the most important bulwarks thrown around the liberties of the people. Whatever tends to evade or destroy the effect of it should be denounced as void by the courts of the country.⁵⁷⁸

In the years shortly following the adoption of the Fourteenth Amendment, two more states—Arkansas and Georgia—amended their Constitutions to ban monopolies.⁵⁷⁹ Arkansas's Constitution of 1874, which mirrored its earlier constitutions (except the constitution of 1868),⁵⁸⁰ banned monopolies by providing, "Perpetuities and monopolies are contrary to the genius of a republic, and shall not be allowed . . ."⁵⁸¹ Relatedly, the Arkansas Constitution also provided that "[t]he General Assembly shall not grant to any citizen nor class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."⁵⁸² In 1877, Georgia's constitution provided that "[t]he General Assembly of this State shall have no power to . . . make any contract, or agreement whatever, with any such corporation, which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses, or to encourage monopoly; and all such contracts and agreements shall be illegal and void."⁵⁸³ Both states' constitutions contain antimonopoly provisions today. Georgia changed the wording of its provision, however, an alteration that seems to have weakened its language. The Georgia constitution now reads that monopolies are unlawful and void, but statutes that lessen competition may be permissible in several circumstances.⁵⁸⁴

578. *City of Brenham v. Becker*, 1 White & W. 714, 716 (Tex. Comm'n App. 1881).

579. ARK. CONST. of 1874, art. II, § 19; GA. CONST. of 1877, art. IV, § 2.

580. See *N. Little Rock Transp. Co. v. City of North Little Rock*, 184 S.W.2d 52, 54 (Ark. 1944) (discussing the history of the clause in Arkansas constitutions).

581. ARK. CONST. of 1874, art. II, § 19.

582. ARK. CONST. of 1874, art. II, § 18.

583. GA. CONST. of 1877, art. IV, § 2.

584. GA. CONST., art. III, § 6, ¶ V(c)(2) (providing exceptions for laws concerning "(A) Employers and employees; (B) Distributors and manufacturers; (C) Lessors

Though some states passed antimonopoly clauses, others included prohibitions on granting exclusive privileges, which arguably provide even broader protection against government favoritism than is provided by a monopoly ban. New Jersey, for instance, adopted a clause prohibiting the granting of exclusive privileges in 1844. It provided that “[t]he legislature shall not pass . . . laws in any of the following enumerated cases; . . . Granting to any corporation, association or individual any exclusive privilege, immunity, or franchise whatever”⁵⁸⁵ Connecticut’s Exclusive Privileges Clause provided in 1818 that “no man, or set of men are entitled to exclusive public emoluments or privileges from the community.”⁵⁸⁶ Other states to have privileges or immunities provisions by 1868 included Arkansas,⁵⁸⁷ Georgia,⁵⁸⁸ Indiana,⁵⁸⁹ Iowa,⁵⁹⁰ Oregon,⁵⁹¹ South Carolina,⁵⁹² Tennessee,⁵⁹³ and Texas.⁵⁹⁴ South Da-

and lessees; (D) Partnerships and partners; (E) Franchisors and franchisees; (F) Sellers and purchasers of a business or commercial enterprise; or (G) Two or more employers”).

585. N.J. CONST. of 1844, art. IV, § 7.11.

586. CONN. CONST. of 1818, art. I, § 1.

587. “The General Assembly shall not grant to any citizen or class of citizens, privileges or immunities which, upon the same terms shall not equally belong to all citizens.” ARK. CONST. of 1868, art. I, § 18.

588. “All persons born, or naturalized, in the United States, and resident in this State, are hereby declared citizens of this State, and no laws shall be made or enforced which shall abridge the privileges or immunities of citizens of the United States, or of this State. . . .” GA. CONST. of 1868, art. I, § 2.

589. “The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.” IND. CONST. of 1851, art. I, § 23.

590. “All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.” IOWA CONST. of 1857, art. I, § 6.

591. “No law shall be passed granting to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens.” OR. CONST. of 1857, art. I, § 20.

592. “Representation shall be apportioned according to population, and no person in this State shall be disfranchised or deprived of any of the rights or privileges now enjoyed, except by the law of the land or the judgment of his peers.” S.C. CONST. of 1868, art. I, § 34.

593. “The legislature shall have no power to suspend any general law for the benefit of any particular individual; nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunities, or exemptions, other than such as may be, by the same law extended to any member of the community who may be able to bring himself within the provisions of such law. . . .” TENN. CONST. of 1834, art. XI, § 7.

kota,⁵⁹⁵ Colorado,⁵⁹⁶ and Louisiana's⁵⁹⁷ provisions, which were added after 1868, are similarly worded.

The text of the states' privileges and immunities clauses, however, varied greatly. For example, Georgia's simply stated that "[t]he social status of the citizen shall never be the subject of legislation."⁵⁹⁸ Arkansas's more typical language was that "[t]he General Assembly shall not grant to any citizen or class of citizens, privileges or immunities, which upon the same terms shall not equally belong to all citizens."⁵⁹⁹ Likewise, Iowa's clause provided that "[a]ll laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens."⁶⁰⁰ South Carolina's Reconstruction-era constitution explicitly referred to race, stating that "[d]istinction on account of race or color, in any case whatever, shall be prohibited, and all classes of citizens shall enjoy equally all common, public, legal and political privileges."⁶⁰¹ Reference to a social contract theory of government is found in both Texas and Kentucky's privileges and immunities clauses. Kentucky's Constitution of 1850 stated that "all freemen, when they form a social compact, are equal, and that no man, or set of men, are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services,"⁶⁰² and Texas's Constitution of 1845 provided that "[a]ll freemen, when they form a social compact have equal rights; and no man or set of men is entitled to exclusive separate, public emoluments or

594. "All freemen, when they form a social compact, have equal rights; and no man or set of men is entitled to exclusive, separate public emoluments or privileges. . . ." TEX. CONST. of 1845, art. I, § 2.

595. "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." S.D. CONST. of 1885, art. VI, § 18.

596. "That no . . . law . . . making any irrevocable grant of special privileges, franchises or immunities, shall be passed by the General Assembly." COLO. CONST. of 1876, art. II, § 11.

597. "The General Assembly shall not pass any local or special law . . . [g]ranting to any corporation, association, or individual any special or exclusive right, privilege, or immunity." LA. CONST. of 1879, art. 46.

598. GA. CONST. of 1868, art. I, § 11.

599. ARK. CONST. of 1868, art. I, § 18.

600. IOWA CONST. of 1857, art. I, § 6.

601. S.C. CONST. of 1868, art. I, § 39.

602. KY. CONST. of 1850, art. XIII, § 1.

privileges. . . .⁶⁰³ All of these clauses were supplemented as well by bans in some form on titles of nobility and on feudalism in both the federal Constitution and in many state constitutions.⁶⁰⁴

A review of the case law suggests that prohibitions on state government grants of exclusive privileges functioned in much the same way as did the antimonopoly provisions. For instance, in 1856 when striking down a law which granted the exclusive right to use city streets to lay gas pipes to provide gas to the city, the Supreme Court of Connecticut held:

[A]lthough we have no direct constitutional provision against a monopoly, yet the whole theory of a free government is opposed to such grants, and it does not require even the aid which may be derived from the Bill of rights, the first section of which declares "that no man or set of men, are entitled to exclusive public emoluments, or privileges from the community," to render them void.⁶⁰⁵

Thus, for the court, the right to be free from monopolies was central to the existence of a free government, much as the North Carolina court had held in the case mentioned above.⁶⁰⁶ For the Connecticut court, the prohibition on exclusive privileges was sufficient to render the law void. The Supreme Court of Massachusetts's 1814 explanation of the provision, however, suggests that the prohibition on exclusive privileges is broader than a ban on monopolies:

It is manifestly contrary to the first principles of civil liberty and natural justice . . . that any one citizen should enjoy privileges and advantages which are denied to all others under like circumstances; or that anyone should be subjected to losses, damages, suits or actions, from which all others, under like circumstances, are exempted.⁶⁰⁷

Privileges and immunities clauses in the States have also been useful for striking down state grants of monopoly. For example, the Washington Supreme Court struck down a Seattle ordinance taxing vending machines, but not in-person sales,

603. TEX. CONST. of 1845, art. I, § 2.

604. See, e.g., U.S. CONST. art. I, § 9, cl. 8; KY. CONST. of 1850, art. XIII, § 28; S.C. CONST. of 1868, art. I, § 39.

605. *Norwich Gaslight Co. v. Norwich City Gas Co.*, 25 Conn. 19, 38 (1856) (cited by the butchers' counsel in the *Slaughter-House Cases*, 83 U.S. 36, 48 (1873)).

606. *McRee v. Wilmington & Raleigh R.R. Co.*, 47 N.C. 186 (1855); see also Part III.B.1, *supra*.

607. *Holden v. James*, 11 Mass. 396, 404 (1814).

because “[t]he tendency of this kind of an ordinance is to foster monopolies, for a monopoly exists when the manufacture and sale of any commodity is restrained to one or a certain number. . . . If this ordinance can be sustained, . . . the constitutional guaranty . . . [of the privileges and immunities provision] becomes a dead letter.”⁶⁰⁸ Similarly, the Oregon Supreme Court held in 1904 that the state’s refusal to grant a license to operate a sailors’ boarding house for the purpose of maintaining only one boarding house “upon the theory that the issuance of only one license at the port of Portland would advance the shipping interests, improve the condition of seamen, and promote the welfare of the public” violated the Oregon Constitution’s privileges and immunities clause.⁶⁰⁹ Importantly, the court noted that although Justice Miller ruled in the *Slaughter-House Cases* that states have the ability to grant exclusive rights to carry on certain businesses under the Fourteenth Amendment, this was not the case under the privileges and immunities clause of the Oregon Constitution.⁶¹⁰ Despite the *Slaughter-House* ruling, the court decided that “under a Constitution like ours, we feel satisfied that [granting exclusive rights] cannot be done.”⁶¹¹

Still, some states struck down similar laws during this period without reference to the protection of any economic rights, but rather because the exercise of that power was not within a city’s charter. This was the situation in the 1856 case, cited in *Slaughter-House* and discussed above, in Connecticut. Connecticut’s Supreme Court of Errors relied on *Darcy v. Allen* and the Statute of Monopolies to strike down a law which granted a franchise to a corporation giving it an exclusive privilege to use streets to lay gas pipe.⁶¹² Similarly, in an 1837 New York case, the chancery court refused to enforce a city ordinance which would have prohibited a manufacturer of pressed hay from erecting a wooden frame building, while allowing another manufacturer to do so.⁶¹³ In a third case, the Supreme Court of

608. *City of Seattle v. Dencker*, 108 P. 1086, 1087 (Wash. 1910).

609. *White v. Holman*, 74 P. 933, 934 (Or. 1904).

610. *Id.* at 934–35.

611. *Id.* at 935.

612. *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 Conn. 19 (1856) (cited by the butchers’ counsel in *Slaughter-House Cases*, 83 U.S. 36, 48 (1873)).

613. *Mayor of Hudson v. Thorne*, 7 Paige Ch. 261, 263 (1838) (“[T]he common council cannot make a by-law which shall permit one person to carry on the dangerous business, and prohibit another, who has an equal right, from pursuing the same business.”) (cited by the butchers’ counsel in *Slaughter-House*, 83 U.S. 36, at 48).

Illinois in 1867 struck down a Chicago ordinance which limited the ability to slaughter animals to only one firm.⁶¹⁴ In reference to the city's municipal laws, the court stated that such a law "impairs the rights of all other persons, and cuts them off from a share in not only a legal, but a necessary business."⁶¹⁵ The court warned that a city's bylaws "must be reasonable, and such as are vexatious, unequal or oppressive, or are manifestly injurious to the interest, of the corporation, are void. *And of the same character are all by-laws in restraint of trade, or which necessarily tend to create a monopoly.*"⁶¹⁶

3. *The Progressive Era*

The popular fear of the so-called "robber barons" of the Industrial Era made people concerned with the consequences of privately created monopolies.⁶¹⁷ As discussed in greater detail in Part II.E above, with the adoption of the Sherman Antitrust Act in 1890,⁶¹⁸ and the Clayton Antitrust Act in 1914,⁶¹⁹ the Progressive-era provisions in state constitutions similarly reflect a shift away from concerns with directly state-granted monopolies to a fear of private monopolies, perhaps facilitated by crony capitalism. For example, the Alabama Constitution of 1901 provided that:

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.⁶²⁰

Similarly, the Minnesota Constitution stated in 1888 that:

614. *City of Chicago v. Rumpff*, 45 Ill. 90, 96 (1867) (cited by the butchers' counsel in *Slaughter-House*, 83 U.S. 36, at 48).

615. *Id.* at 97.

616. *Id.* at 96 (emphasis added).

617. Cf. MATTHEW JOSEPHSON, *THE ROBBER BARONS: THE GREAT AMERICAN CAPITALISTS 1861–1901*, at 446 (2010). *But see generally* BURTON W. FOLSOM, *THE MYTH OF THE ROBBER BARONS: A NEW LOOK AT THE RISE OF BIG BUSINESS IN AMERICA* (1991).

618. Sherman Antitrust Act, 26 Stat. 209, 15 U.S.C. §§ 1–7 (2006).

619. Clayton Antitrust Act, 38 Stat. 730, 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53 (2006).

620. ALA. CONST. of 1901, art. IV, § 103.

Any combination of persons, either as individuals or members or officers of any corporation to monopolize the markets for food products in this state, or to interfere with, or to restrict the freedom of such markets, is hereby declared to be a criminal conspiracy and shall be punished in such manner as the Legislature shall provide.⁶²¹

In 1911, the New Mexico Constitution provided that “[t]he legislature shall enact laws to prevent trusts, monopolies and combinations in restraint of trade.”⁶²² Other states to include these types of provisions in the same time period were Washington,⁶²³ Kentucky,⁶²⁴ Utah,⁶²⁵ South Dakota,⁶²⁶ New Hampshire,⁶²⁷ and Arizona.⁶²⁸

621. MINN. CONST. of 1857, art. IV, § 35 (amended 1888).

622. N.M. CONST. of 1911, art. IV, § 38.

623. WASH. CONST. of 1889, art. XII, § 22:

Monopolies and trusts shall never be allowed in this state, and no incorporated company, copartnership, or association of persons in this state shall directly or indirectly combine or make any contract . . . for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity. The legislature shall pass laws for the enforcement of this section by adequate penalties, and in case of incorporated companies, if necessary for that purpose, may declare a forfeiture of their franchises.

624. KY. CONST. of 1891, § 206:

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.

625. UTAH CONST. of 1895, art. XII, § 20:

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

626. S.D. CONST. of 1912, art. XVII, § 20 (amended 1896) (note that South Dakota also prohibited exclusive privileges granted by the state):

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 contract . . . to fix the prices, limit the production or regulate the transportation of any product or commodity so as to prevent competition in such prices, production or transportation or to establish excessive prices therefor. . . . The legislature shall pass 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.

627. N.H. CONST. of 1912, art. LXXXIII (amended 1903):

The Oklahoma Constitution of 1907 provided that the state legislature “shall *define* what is an unlawful combination, monopoly, trust, act, or agreement, in restraint of trade”⁶²⁹ and “enact laws to punish persons engaged in any unlawful combination, monopoly, trust, act, or agreement, in restraint of trade, or composing any such monopoly, trust, or combination.”⁶³⁰ Perhaps more so than all other state provisions during this period, Oklahoma’s constitution reflects the shift from concern over government abuse of power in granting monopolies to a fear of the power of private companies.

It is important to note that not all changes to state constitutions regarding monopolies during this period were concerned with private monopolies. For example, when Wyoming’s constitution was adopted in 1889, it provided that “[p]erpetuities and monopolies are contrary to the genius of a free state, and shall not be allowed.”⁶³¹ Thus, Wyoming included language that was nearly identical to the older provisions prohibiting state-granted monopolies during a period when most state

Free and fair competition in the trades and industries is an inherent and essential right of the people and should be protected against all monopolies and conspiracies which tend to hinder or destroy it. The size and functions of all corporations should be so limited and regulated as to prohibit fictitious capitalization and provision should be made for the supervision and government thereof.—Therefore, all just power possessed by the state is hereby granted to the general court to enact laws to prevent the operations within the state of all persons and associations, and all trusts and corporations, foreign and domestic, and the officers thereof, who endeavor to raise the price of any article of commerce or to destroy free and fair competition in the trades and industries through combination, conspiracy, monopoly, or any other unfair means; to control and regulate the acts of all such persons, associations, corporations, trusts and officials doing business within the state; to prevent fictitious capitalization; and to authorize civil and criminal proceedings in respect to all the wrongs herein declared against.

628. ARIZ. CONST. of 1910, art. XIV, § 15:

Monopolies and trust 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 contract . . . to fix the 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.

629. OKLA. CONST. of 1907, art. V, § 44 (emphasis added).

630. *Id.*

631. WYO. CONST. art. I, § 30.

constitutional amendments were including provisions to prohibit *private*, not state-granted, monopolies.

C. *The Application of State Antimonopoly Provisions*

A survey of the case law regarding antimonopoly provisions in state constitutions demonstrates, not surprisingly, that states whose amendments were adopted in the period between the Founding and the 1870s provide the strongest protections against state-granted monopolies. However, there are at least two instances in which courts in states with Progressive-era provisions aimed at so-called private monopolies indicated that these provisions might also be used to protect against state-granted monopolies.⁶³² Regardless, these provisions have proven to be an important method for the protection of economic rights. State courts have recognized the English roots from which the concern about monopolies arose. For example, as the Arkansas Supreme Court pointed out:

The monopolies which in England became so odious as to excite general opposition, and infuse a detestation which has been transmitted to the free States of America, were in the nature of exclusive privileges of trade, granted to favorites or purchasers from the crown, for the enrichment of individuals, at the cost of the public. They were supported by no considerations of public good. They enabled a few to oppress the community by undue charges for goods or services. The memory, and historical traditions, of abuses resulting from this practice, has left the impression that they are dangerous to Liberty, and it is this kind of monopoly, against which the constitutional provision is directed.⁶³³

This Section discusses four principle areas where statutes have been struck down under antimonopoly provisions in state constitutions: (1) industry licensing requirements; (2) taxes designed to benefit preferred industries; (3) monopolies to do business with the government itself; and (4) price controls designed to benefit insiders. These twentieth-century cases sug-

632. See *Schmitt v. Nord*, 27 N.W.2d 910 (S.D. 1947) (upholding a tax on butter substitutes but stating that if the tax was used to subsidize the butter industry, it would be unconstitutional); *Arnold v. Bd. of Barber Exam'rs*, 109 P.2d 779 (N.M. 1941) (upholding a statute which required minimum price levels for barbers but acknowledging that the antimonopoly provisions required the state legislature to avoid monopolies).

633. *N. Little Rock Transp. Co. v. N. Little Rock*, 184 S.W.2d 52, 54 (Ark. 1944) (quoting *Ex parte Levy*, 43 Ark. 42, 51 (Ark. 1884)).

gest that antimonopoly provisions—along with other economic liberty enhancing provisions such as Lockean provisos, equal protection, due process, and privileges and immunities clauses—may be useful for challenging preferential economic regulations today. Despite their usefulness, Subsection 4 explores potential reasons why most states have not adopted antimonopoly provisions.

1. Challenging Licensing Requirements

The first, and most promising, area for antimonopoly provisions to be used concerns the prohibition of licensing requirements to work in a specific trade. A survey of the case law yields the conclusion that antimonopoly provisions have been used to strike down licensing requirements relating to building hospitals,⁶³⁴ providing ambulance services,⁶³⁵ tile placing,⁶³⁶ car dealerships,⁶³⁷ photography,⁶³⁸ dry cleaning,⁶³⁹ gas stations (notably a victory for none other than Standard Oil),⁶⁴⁰ and taxi cabs.⁶⁴¹

Important to the occupational licensing decisions is the level of skill that is required. If a trade is a relatively easy trade to learn, the court is more likely to strike down an occupational licensing law as this would be an impermissible extension of the state's police power. For example, in *Roller v. Allen*, where the Supreme Court of North Carolina struck down a licensing regulation for those in the tile-placing industry, the court emphasized that the trade was "simple, easy to learn, and requires no special skill" and thus there was an absence of a public interest in regulating the trade.⁶⁴²

Because professions such as law and medicine tend to require much more specialized skill and training than other occupations (such as placing tile, photography, and dry cleaning),

634. *In re Certificate of Need for Aston Park Hosp.*, 193 S.E.2d 729 (N.C. 1973).

635. *Whaley v. Lenoir Cnty.*, 168 S.E.2d 411 (N.C. 1969).

636. *Roller v. Allen*, 96 S.E.2d 851 (N.C. 1957).

637. *Georgia Franchise Practices Comm'n v. Massey-Ferguson, Inc.*, 262 S.E.2d 106 (Ga. 1979).

638. *State v. Ballance*, 51 S.E.2d 731 (N.C. 1949) (the court also struck this statute down for violating its "Lockean Proviso" in Art. I, § 1 of the state constitution and due process under Art. 1, § 17).

639. *State v. Harris*, 6 S.E.2d 854 (N.C. 1940).

640. *Clinton v. Standard Oil, Co.*, 137 S.E. 183 (N.C. 1927).

641. *Checker Cab Co. v. Johnson City*, 216 S.W.2d 335 (Tenn. 1948); *N. Little Rock Transp. Co. v. N. Little Rock*, 184 S.W.2d 52 (Ark. 1944).

642. *Roller v. Allen*, 96 S.E.2d 851, 854 (N.C. 1957).

the imposition of licensing requirements in these industries can be justified as valid exercises of the state's police power. The primary problem with licensing requirements which have been struck down under state anti-monopoly clauses is that there was little to no concern in those cases about public health and safety considerations that might justify occupational licensing. Rather, the impetus for imposing occupational licensing requirements in those cases almost exclusively was to promote special interests—the interests of photographers and dry cleaners already working in the industry to limit the entry of others in an attempt to stifle competition and to maximize their rents.

By contrast, in areas such as law and medicine, considerable skill and training are generally required to practice in the industry. If someone is holding herself out to be a doctor, but does not actually have the qualifications normally expected of a doctor, the consequences very well could be tragic. However, there is little harm that can be done to another's health if a photographer is not specially trained under the requirements set up to obtain a license to be a photographer. It is undoubtedly true that lawyers and doctors do encourage limitations on the granting of licenses to limit the number of entrants into their respective industries, but the concern with public safety underlying licensing requirements for industries requiring unusual expertise outweighs such anticompetitive tendencies.

This is not to say, however, that licensing requirements for more highly trained professions, such as engineering, medicine, and law, are absolutely necessary. Given the self-regulation of many industries, there is good reason to believe that self-regulation (and even self-imposed licensing requirements) would guard against many of the health and safety concerns that give rise to legally mandated licensing requirements by the state. However, because the primary justification for licensing requirements in more highly skilled professions is health and safety concerns—not the protection of special interests—occupational licensure is more easily justifiable in those professions.

Who controls the distribution of licenses is an important consideration for courts. If a state licensing board is controlled by those who already work in the industry, the statute requiring occupational licensing is less likely to be upheld. This is because the board is more likely to promote a monopoly when the distribution of licenses is controlled by the same people who are already working in the industry. This rationale is the

same as the rationale used in *Dr. Bonham's Case*, the seventeenth-century English case famous for Sir Edward Coke's holding that the common law controlled acts of Parliament.⁶⁴³ In *Dr. Bonham's Case*, the court struck down a patent granted by King Henry VIII, later confirmed by statute, which gave the Royal College of Physicians the power to impose fines on physicians who had not been licensed by the College to practice medicine.⁶⁴⁴ The fact that the Royal College of Physicians received half of all fines meant that the doctors were "not only judges but also actual parties to any cause of action before them," and was a key part of the reason Sir Edward Coke gave for striking down the law.⁶⁴⁵ Similarly, in *Roller*, the aforementioned North Carolina case, all the members of the occupational licensing board came from the tile-placing industry itself.⁶⁴⁶ This was also an important consideration in *State v. Harris*, in which the Supreme Court of North Carolina struck down a law creating a "State Dry Cleaners Commission."⁶⁴⁷ Noting that such boards are the equivalent of private trade guilds, the court suggested that the boards were even more damaging to the public once sanctioned by the state since they had the force of the criminal courts behind them.⁶⁴⁸

Historically, North Carolina has been the state where challenges to occupational licensing schemes have had the most success. Perhaps not surprisingly, North Carolina was one of the only two states since the Founding that had adopted an antimonopoly provision in its state constitution.⁶⁴⁹ However, recent case law in North Carolina suggests that its antimonopoly provision may provide less protection today. In *American Motors Sales Corp. v. Peters*, for example, North Carolina's Supreme Court held that a statute that made it unlawful for a car manufacturer to grant a franchise in what the state had determined to be a trade area that was already sufficiently served by a dealer or dealers did not violate the state's antimonopoly

643. 77 Eng. Rep. 646 (1610).

644. *Id.*; see also George P. Smith, II, *Dr. Bonham's Case and the Modern Significance of Lord Coke's Influence*, 41 WASH. L. REV. 297, 302 (1966).

645. Smith, *supra* note 644, at 304.

646. *Roller v. Allen*, 96 S.E.2d 851, 857 (N.C. 1957).

647. 6 S.E.2d 854, 856 (N.C. 1940).

648. *Id.* at 859.

649. See Part III.B.1, *supra*.

clause even though there was only one dealer in the area.⁶⁵⁰ The court distinguished the case from an almost identical law that was struck down in Georgia on the grounds that Georgia's constitution (at the time) also prohibited laws that lessen competition, while the North Carolina Constitution prohibits only monopolies.⁶⁵¹ However, this recent holding is difficult to reconcile with other cases in North Carolina, since the laws in the other cases (*Roller v. Allen* and *State v. Harris*) also tended to lessen competition but did not create outright monopolies.

Another consideration calling into question the effectiveness of antimonopoly provisions today is that many of these cases were brought forty or more years ago, and thus it is unclear how courts would treat similar challenges under these clauses today. Challenges are still being brought under state antimonopoly provisions to strike down occupational licensing laws. For example, two recent cases challenged licensing requirements under antimonopoly provisions, among other claims, in Maryland and Texas.⁶⁵² However, both regulations were struck down on other grounds. In Texas, the trial court struck down a law prohibiting non-veterinarians from "floating" (grinding down) horses' teeth.⁶⁵³ The court ultimately found that it violated Texas administrative law procedures.⁶⁵⁴ In Maryland, the trial court granted summary judgment to an owner of a horse massage business (who had worked in the industry for more than thirty years) when the Board of Chiropractic Examiners sought to ban her from the trade.⁶⁵⁵ The court held that Mary-

650. 317 S.E.2d 351, 351-54 (N.C. 1984).

651. *Id.* at 359 (citing Georgia Franchise Practices Comm'n v. Massey-Ferguson, Inc., 262 S.E.2d 106 (Ga. 1979)).

652. See *Mitz v. Texas State Bd. of Veterinary Med. Exam'rs*, 278 S.W.3d 17 (Tex. App. 2008); Case Record, *Clemens v. Md. State Bd. of Veterinary Med. Exam'rs*, No. 296766-V (Md. Circ. Ct. 2008), available at <http://casesearch.courts.state.md.us/inquiry/inquiryDetail.js?caseId=296766V&detailLoc=MCCI> (last visited Mar. 27, 2013).

653. *Mitz v. Texas State Bd. of Veterinary Med. Exam'rs*, 278 S.W.3d 17 (Tex. App. 2008).

654. *Id.* at 20.

655. See Case Record, *Clemens v. Md. State Bd. of Veterinary Med. Exam'rs*, No. 296766-V (Md. Circ. Ct. 2008), available at <http://casesearch.courts.state.md.us/inquiry/inquiryDetail.js?caseId=296766V&detailLoc=MCCI> (last visited Mar. 27, 2013); see also *Fighting Maryland's Veterinary Cartel*, INST. FOR JUSTICE, <http://www.ij.org/economicliberty/2203> (last visited Jan. 26, 2013).

land's Board of Chiropractic Examiners had no authority to regulate the horse massage industry.⁶⁵⁶

2. *Striking Down Taxes that Benefit Preferred Industries*

Another area in which state constitutional antimonopoly clauses have been used is in challenging the validity of laws that impose taxes on some parties to benefit others. For example, in *In re Appeal of Arcadia Dairy Farms*, the Court of Appeals of North Carolina struck down a statute which provided tax and equalization payments to North Carolina milk producers as invalid under the state constitution's antimonopoly clause.⁶⁵⁷ In discussing the statute's lack of a public purpose, the court pointed out that the statute's entire goal was to require dairy producers to pay competitors—not to improve the quality of milk for consumers.⁶⁵⁸

However, as an example of the application of a Progressive-era antimonopoly provision, the Supreme Court of South Dakota refused to strike down a law which taxed margarine but not butter.⁶⁵⁹ Although the court acknowledged that if the funds received went directly to the butter industry the law would have contravened the antimonopoly provision, because the funds went to a general pool, the court upheld that the law as constitutional.⁶⁶⁰

Nevertheless, with the application of a bit of economic theory, it is easy to see that the distinction drawn by the South Dakota Supreme Court should not really have mattered. To the extent margarine is a substitute for butter (which in many cases it is), a tax on margarine will raise its cost to consumers. Thus, at the margin, consumers will switch to other substitutes, such as butter. This will tend to encourage a monopoly for the butter industry because an increase in the price of margarine will encourage consumers to switch to consuming butter instead. Of course, the economic effects likely would not be as drastic as if the taxes charged to the margarine industry were used directly to pay the butter industry. However, the law's tendency to cre-

656. See *Fighting Maryland's Veterinary Cartel*, *supra* note 655, at 1; Email correspondence with Clark Neily at the Institute for Justice (Mar. 15, 2011) (on file with author).

657. 259 S.E.2d 368 (N.C. Ct. App. 1979).

658. *Id.* at 372.

659. *Schmitt v. Nord*, 27 N.W.2d 910 (S.D. 1947).

660. *Id.* at 916.

ate a monopoly would still remain, and the motivation for the law in this case was undoubtedly to benefit the butter industry at the expense of its main competitor.

3. *Challenging Monopolies for Doing Business with the Government*

Both Maryland's and Arkansas's antimonopoly provisions have been used to strike down laws that give private parties a monopoly over doing business with the government. Like Maryland's constitution, Arkansas's constitution provides the traditional anti-monopoly language: "[M]onopolies are contrary to the genius of a republic, and shall not be allowed."⁶⁶¹

For example, in *Raney v. County Commissioners of Montgomery County*, the Court of Appeals of Maryland (the state's highest court) struck down a law granting a monopoly on public notices in newspapers.⁶⁶² Importantly, when discussing Maryland's antimonopoly provisions, the court emphasized that because Maryland's constitution otherwise did not denounce special privileges, it was necessary to interpret the antimonopoly language broadly so as to "safeguard the citizen in the enjoyment of privileges and immunities which were regarded as of common right."⁶⁶³

The antimonopoly provision similarly was relied on in *Alphin v. Henson*.⁶⁶⁴ There, the United States District Court for the District of Maryland dealt with the issue of whether the city of Hagerstown could grant the power to one individual to conduct all negotiations at a municipal regional airport under the Sherman and Clayton Antitrust Acts.⁶⁶⁵ In granting an injunction, the court relied on *Raney*, noting that Maryland's constitutional prohibition on monopolies weighed in favor of its decision.⁶⁶⁶ Similarly, in *Upchurch v. Adelsberger*, the Supreme Court

661. ARK. CONST. of 1874, art. II, § 19.

662. 183 A. 548, 554–55 (Md. 1936).

663. *Id.* at 551. The court continued, noting that, "when the meaning to be given the word 'monopoly' as used in article 41 is considered, great weight is to be given to the fact that but for that article the Constitution affords to the citizen no express protection against special and oppressive privilege" and, further, that "in determining the sense in which it is used in that instrument, it should be given that meaning that its general intent may be served, rather than thwarted or confined by any narrow or overnice construction." *Id.*

664. 392 F. Supp. 813 (D. Md. 1975).

665. *Id.* at 826–27.

666. *Id.* at 829 (quoting *Raney*, 183 A. at 551).

of Arkansas struck down a city ordinance that required that materials printed for the city bear a specific labor union's label—thus giving all of its printing work to one labor union—under the state's antimonopoly provision.⁶⁶⁷

Although antimonopoly provisions may be used to strike down monopolies on doing business with local governments, it is generally permissible for local governments to enter into contracts with private parties that give those parties the exclusive right to provide public services, such as utilities like water, gas, and electricity.⁶⁶⁸ This may be defended on the grounds that these kinds of public services are considered “natural monopolies,” industries where capital costs are especially high and unusually high barriers to entry for other firms exist. Thus, large economies of scale make it socially optimal to only have one supplier in the industry.

The existence of natural monopolies has been challenged by some free-market economists,⁶⁶⁹ who suggest that the need for grants of monopoly for public utilities is unwarranted. Regardless, the justification for granting these kinds of monopolies appears to be based on an economic rationale rather than a desire to protect special interests. Thus, the rationale for striking down laws under antimonopoly provisions (to guard against states granting privileges in order to protect special interests) does not appear to be implicated when local governments grant monopolies for public utilities.

4. Combating Price Controls

The Supreme Court's decisions in *West Coast Hotel Co. v. Parrish*,⁶⁷⁰ upholding the constitutionality of a minimum wage law, and *Nebbia v. People of New York*,⁶⁷¹ upholding the constitutionality of a state board that fixed the price of milk, enabled states

667. 332 S.W.2d 242, 243–44 (Ark. 1960).

668. See, e.g., *Memphis v. Memphis Water Co.*, 52 Tenn. 495, 530–31 (1871).

669. See, e.g., MURRAY ROTHBARD, *POWER AND MARKET: GOVERNMENT AND THE ECONOMY* (1970); Thomas J. DiLorenzo, *The Myth of Natural Monopoly*, 9 REV. OF AUSTRIAN ECON. 43–44 (1996).

670. 300 U.S. 379, 398 (1937) (asking, “[i]f the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end?”).

671. 291 U.S. 502, 537 (1934).

to justify their own minimum wage and fee laws.⁶⁷² However, two states with antimonopoly provisions were faced with the question of whether these types of regulations were constitutional under their state constitutions' antimonopoly provisions.

In 1941, the Supreme Court of New Mexico in *Arnold v. Board of Barbers* upheld the validity of a statute that established a "Board of Barbers" and set minimum price requirements for paying barbers.⁶⁷³ In noting that great deference must be given to the legislature in determining whether the law serves a public purpose, the court held that requiring minimum prices for barber services is related to the sanitary conditions of barber shops and thus was not unconstitutional.⁶⁷⁴ Interestingly, however (because this was a Progressive-era provision) the court acknowledged that the antimonopoly provision in the state constitution "enjoins upon the legislature a policy opposed to trusts, monopolies and combinations in restraint of trade."⁶⁷⁵ Thus, New Mexico's antimonopoly clause may be interpreted broadly to prohibit state-granted monopolies. Nonetheless, the court failed to find that the statutes tended to confer monopoly rents, although members of the board came "exclusively from those engaged in the profession or business of barbering."⁶⁷⁶

However, in the 1942 case *Noble v. Davis*, the Supreme Court of Arkansas, relying on a more traditional antimonopoly provision adopted at a time when such provisions were aimed at state grants of monopoly, struck down a nearly identical statute to the New Mexico statute establishing minimum prices for barbers, which were determined by the State Board of Barber Examiners.⁶⁷⁷ The plaintiff charged twenty-five cents for a haircut while the Board mandated a fee of at least forty cents.⁶⁷⁸ Looking at the long history of the barber industry, dating back to the time of the Romans, the Supreme Court of Arkansas found that the profession was one historically of common right—echoing Sir Edward Coke—and thus could not be regu-

672. See, e.g., *Brd. of Barber Exam'rs v. Parker*, 182 So. 485 (La. 1938); *Jarvis v. State Bd. of Barber Exam'rs*, 83 P.2d 560 (Okla. 1938); *Herrin v. Arnold*, 82 P.2d 977 (Okla. 1938).

673. 109 P.2d 779 (N.M. 1941).

674. *Id.* at 787.

675. *Id.* at 786.

676. *Id.* at 784.

677. 161 S.W.2d 189 (Ark. 1942).

678. *Id.* at 189.

lated except as required under the police power of the state.⁶⁷⁹ The Court held that where the Board only regulated with respect to economic issues—such as minimum prices and opening hours—such regulations could not be upheld as serving the public purpose under the state’s police power.⁶⁸⁰

The use of an antimonopoly provision to strike down a law that merely imposes price requirements requires an expansive view of the clause’s language and history. The historical concern with state-granted monopolies suggests that state constitutional antimonopoly clauses were intended primarily to prohibit outright prohibitions on entering an industry rather than indirect barriers to entering an industry, such as minimum price requirements. The Board of Barbers may have recognized that strict licensing requirements would have been easily struck down under the Arkansas Constitution’s ban on monopolies, and thus it might have sought to circumvent that constitutional prohibition through an indirect barrier to entry. The Board of Barbers was also undoubtedly helped by the U.S. Supreme Court’s ruling in *West Coast Hotel*, which upheld a minimum wage law and overruled *Adkins v. Children’s Hospital*.⁶⁸¹ However, the Supreme Court of Arkansas court correctly saw the intended consequences of the minimum pricing law—to indirectly establish barriers to enter the barber industry for no other reason than to protect the interests of barbers already working in the industry.

D. *Why Have So Few States Adopted
Antimonopoly Provisions?*

Many states have adopted antimonopoly provisions and similar prohibitions on exclusive privileges in the past. *The Case of Monopolies* and the Statute of Monopolies were very important in English legal history, and the consequences that flowed from allowing state-granted monopolies were especially feared by the English people. Those concerns carried over to America, as shown by a number of statements from the Founders and Antifederalists.⁶⁸² Thus, it is perhaps surprising that so few states have explicit antimonopoly clauses in their state constitutions today.

679. *Id.* at 190.

680. *Id.* at 191.

681. 300 U.S. 379, 398 (1937).

682. See Part II.A, *supra*.

One potential explanation is that many states probably did not feel compelled to adopt antimonopoly clauses because their constitutions already included provisions which protected economic liberty in other ways and dealt with many of the same concerns against which the antimonopoly clauses were intended to protect. Other provisions that tend to protect economic liberty include: 1) privileges and immunities clauses; 2) due process clauses; 3) takings clauses; 4) Lockean provisos (broad guarantees of inalienable, natural, or inherent rights);⁶⁸³ 5) free speech clauses; and 6) equal protection clauses.

The addition of an antimonopoly clause alongside, for example, the protection of an individual's privileges and immunities, may appear superfluous. For instance, in *State v. Ballance*, the Supreme Court of North Carolina struck down a law requiring licenses for photographers under the due process clause and the state constitution's Lockean proviso, as well as the antimonopoly provision.⁶⁸⁴ Another example is the Maryland Supreme Court's decision in *Raney*. In that case, the Court found it persuasive that Maryland's constitution, unlike the constitutions of other states, contained no other clauses except for the antimonopoly clause, which would protect against the granting of special privileges.⁶⁸⁵ Thus, a desire for simplicity and brevity might cause a state constitution's drafter to see little reason to add an antimonopoly provision to its constitution when other provisions already protect similar bundles of rights.

Another probable reason as to why not all states have currently adopted constitutional antimonopoly clauses is that, since the New Deal, concern with protecting economic liberty has greatly diminished. As a result of the New Deal, economic liberties are subjected to what some have called "toothless"⁶⁸⁶

683. A typical example can be found in Virginia's constitution, which states:

That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

VA. CONST. BILL OF RIGHTS § 1 (1864); see also Steven G. Calabresi & Sofia Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Provisos* (draft as of June 12, 2011) (unpublished manuscript) (on file with author).

684. *State v. Ballance*, 51 S.E.2d 731 (N.C. 1949).

685. *Raney v. Cnty. Comm'rs of Montgomery Cnty.*, 183 A. 548, 551 (Md. 1936).

686. See, e.g., *In re Agnew*, 144 F.3d 1013, 1014 (7th Cir. 1998) (per curiam) (noting that although the "clear error or abuse of discretion is deferential, it is not toothless

rational basis review. Courts are now extremely reluctant to strike down economic regulations, and legislatures are especially eager to impose economic regulations at the state level. Moreover, the shift in Progressive-era state constitutions to prevent privately created monopolies instead of state-granted monopolies also reflects a change in popular views about where power should be concentrated. Perhaps this is also a reflection of public sentiment (or complacency) in the area of protecting economic liberty.

As discussed above, although several states have provisions that ban state-created monopolies in their constitutions, these clauses have not regularly been used and state courts have become increasingly less likely to strike down laws under these clauses.⁶⁸⁷ As the recent challenges in Maryland (involving horse massage) and Texas (involving horse teeth grinding) illustrate, courts may be more likely to strike down such laws on other grounds. That is, it is perhaps easier—and less controversial—to strike down laws as violations of administrative rule-making requirements than as violations of the more expansive prohibition on state-granted monopolies, which would in turn call into question the validity of many other economic regulations. Thus, although state constitutions are amended much more frequently than is the federal constitution, it is unlikely that an antimonopoly provision would be a priority for drafters of modern state constitutions.

CONCLUSION

Although the evils of state-granted monopolies in England did not lead to the enactment of an antimonopoly provision in the federal Constitution, there is ample evidence that the right to be free from government monopolies is deeply rooted in this country's history and tradition. The English fear of monopolies was a fear that Americans experienced under colonial rule, and it provided one of many justifications put forward for American independence. The Antifederalists spoke out against monopolies, and Federalists such as James Madison discussed the issue with Thomas Jefferson and George Mason during the debates on the Constitution. During the ratification of the federal

after the fashion of review for a rational basis"); see also Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J. L. & LIBERTY 898 (2005).

687. See Part III.C, *supra*.

Constitution, six states even requested the inclusion of an antimonopoly clause as an amendment to the Constitution. In addition, Congress is given the enumerated power to create monopolies only in the patent and copyright context, which implies that Congress lacks such power in other contexts. Moreover, the Privileges and Immunities Clause of Article IV may very well have recognized a constitutional right to be free from partial or discriminatory laws. At the time of the Founding, two states had antimonopoly provisions in their constitutions, and many more states added antimonopoly provisions to their constitutions during the nineteenth century, reflecting the Jacksonian concern about monopoly power. This thread of Jacksonian thought was adopted by the Abolitionists and then by Reconstruction-era Republicans, who argued that the institution of slavery was itself a particularly perverse monopoly. The antimonopoly argument thus played an important role in the writing of the Fourteenth Amendment, which for the Radical Republicans was a ban on all systems of class-based legislation, of exclusive privileges, and of monopolies. All of this evidence—from seventeenth century England, from the colonial period, from the experience in the States, and from the framing of the Fourteenth Amendment—makes it clear that there is a strong antimonopoly tradition in U.S. constitutional law.

The fact that in recent times the federal courts have mostly relegated cases involving economic regulations to limited “rational basis” review, however, has meant that, until recently, challenges to laws on antimonopoly grounds were unlikely to be successful. This may change now that the rational basis test has been employed to strike down classifications on the basis of sex, sexual orientation, and mental retardation, and now that the Takings Clause is experiencing a revival at the level of the U.S. Supreme Court. Despite the post-New Deal rational basis mindset, this Article has shown that state antimonopoly clauses in particular have played an important role in striking down a number of economic regulations that grant special privileges to some at the expense of others—licensing requirements, taxes designed to benefit preferred industries, monopolies on doing business with the government, and price controls designed to benefit insiders. Antimonopoly clauses can also be used to strike down laws such as licensing requirements where the court finds that the laws grant special privilege absent any significant health and safety concerns. Indeed, challenges to state laws on antimonopoly grounds have been made recently, in-

cluding to a law governing Maryland horse massages and in the Texas horse-floating cases discussed in Part III.

The right to compete, and, more fundamentally, the right to earn an honest living, is a basic right embodied in U.S. constitutional law. There is substantial evidence, from the English and colonial history, from debates on the federal Constitution and its ratification, from the history of the Fourteenth Amendment, and from state constitutional law, to support this thesis. However, the longstanding use of rational basis review has meant that the courts have too often surrendered to a legislative process that is dominated by well-entrenched interest groups seeking monopoly rents from the state. It means that fundamental economic liberties too often go unprotected by the courts. In short, the use of rational basis review has meant that “property is at the mercy of the pillagers.”⁶⁸⁸ As this Article has shown, however, “the constitutional guarantee of liberty deserves more respect—a lot more.”⁶⁸⁹

688. *Hettinga v. United States*, 677 F.3d 471, 483 (D.C. Cir. 2012).

689. *Id.*