

Antimonopoly and American Democracy

Edited By Daniel A. Crane and William J. Novak

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INTRODUCTION: Democracy and the American Antimonopoly Tradition

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This book was written at an important generational moment in the American politics of monopoly, market power, and economic dominance. For the first time in decades, antitrust law and policymaking has again achieved political saliency among political and cultural elites as well as ordinary citizens. Some of this state of affairs is driven by the growing power that specifically Big Tech companies now wield in American society. But other concerns include a more general tide of economic concentration across many sectors of the economy, the widening spread of wealth inequality, and increasing monopsony power held by employers in labor markets. In consequence, a new generation of monopoly critics has emerged, arguing that economic concentration leads to increased prices, diminished innovation, depressed wages, economic stagnation, and misallocation of social resources.¹

One of the most worrisome charges currently laid at the feet of monopoly is that it undermines democracy.² This is certainly not a new claim,³ but it is one that has largely been

¹ Some of the most recent antimonopoly voices include Matt Stoller, *Goliath: The 100-Year War Between Monopoly Power and Democracy* (New York: Simon and Schuster, 2020); Barry Lynn, *Cornered: The New Monopoly Capitalism and the Economics of Destruction* (Hoboken: Wiley, 2011); Zephyr Teachout, *Break 'Em Up: Recovering Our Freedom from Big Ag, Big Tech, and Big Money* (New York: St. Martin's Publishing, 2020); Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (New York: Columbia Global Reports, 2018); and Lina Khan, "Amazon's Antitrust Paradox," *Yale Law Journal* 126 (2017): 710–805.

² Joseph E. Stiglitz, "America Has a Monopoly Problem—and It's Huge," *The Nation*, October 23, 2017; Elizabeth Kolbert, "Who Owns The Internet?" *New Yorker*, August 28, 2017; Franklin Foer, *World Without Mind: The Existential Threat of Big Tech* (New York: Penguin Press, 2017).

³ See, for example, Robert Pitofsky, *The Political Content of Antitrust*, 127 U. Pa. L. Rev. 1051 (1979).

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suppressed by the prevailing Chicago School paradigm that has focused antitrust and competition policy on economic efficiency and consumer welfare. But now voices across the spectrum, from right to left, again are complaining that monopoly power erodes democracy itself. Political antagonists Donald Trump and Elizabeth Warren agree on very little, but both have cited the preservation of democracy as reasons to enforce the antitrust laws.⁴ The Open Markets Institute argues that popular obsession with the Supreme Court’s *Citizens United* decision—the subject of an earlier book on which we collaborated⁵—ignores the equally antidemocratic effects of corporate consolidation brought about by lax antitrust enforcement.⁶ The congressional Democrats assert that “concentrated market power leads to concentrated political power,”⁷ while centrist policy groups like the Brookings Institution argue that stronger antitrust is necessary to prevent Big Tech from “wield[ing] excessive influence in our democracy.”⁸ The House Judiciary

⁴ Editorial, *Trump’s Comments Create a Lose-Lose Position for Justice*, WASH. POST (Nov. 13, 2017), https://www.washingtonpost.com/opinions/trumps-comments-create-a-lose-lose-position-for-justice/2017/11/13/6fd7b28e-c596-11e7-aae0-cb18a8c29c65_story.html

Senator Elizabeth Warren Delivers Remarks on Reigniting Competition in the American Economy, ELIZABETH WARREN (June 29, 2016),

https://www.warren.senate.gov/?p=press_release&id=1169 [<https://perma.cc/AAD7-HBHW>].

⁵ *Corporations and American Democracy* (Harvard Univ. Press 2017) (Naomi R. Lamoreaux & William J. Novak, eds.).

⁶ *Democracy & Monopoly*, OPEN MARKETS, <https://openmarketsinstitute.org/explainer/democracy-and-monopoly/> [<https://perma.cc/Y7J7-3X6B>].

⁷ U.S. House of Representatives Democratic Leadership, *Crack Down on Corporate Monopolies & the Abuse of Economic and Political Power*, BETTER DEAL, <https://abetterdeal.democraticleader.gov/the-proposals/crack-down-on-abuse-of-power/> [<https://perma.cc/G8LJ-TVHB>].

⁸ Clara Hendrickson & William A. Galston, *Big Technology Firms Challenge Traditional Assumptions About Antitrust Enforcement*, BROOKINGS INST.: TECHTANK (Dec. 6, 2017), <https://www.brookings.edu/blog/techtank/2017/12/06/big-technology-firms-challenge-traditional-assumptions-about-antitrust-enforcement/> [<https://perma.cc/5GDX-SMNV>].

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Committee’s report on digital markets asserts that the effect of Google, Facebook, Amazon, and Apple’s enduring market power is “a weakened democracy.”⁹ President Biden’s Executive Order on Competition begins with the premise that “excessive market concentration threatens . . . democratic accountability.”¹⁰ The leadership of the Justice Department’s Antitrust Division and the Federal Trade Commission have pledged to reorient antitrust toward preserving democracy.¹¹

This concurrence of rhetoric presents a challenge in analyzing the democracy-reinforcing nature of the antimonopoly tradition. When people with such widely different understandings about democratic values converge in opposing monopoly because of its corrosive effects on democracy, one has to suspect that they have very different understandings about *how* monopoly corrodes democracy and *what* is to be done about it.

Despite considerable public interest in the emergence of new monopolies and their implications for American democracy, the dominant intellectual framework for concentrated economic power has focused narrowly on antitrust policy as a tool and on consumer welfare as a goal. This approach overlooks not only the broader democratic significance of monopolies, but also the fact that antitrust law is just one part of a highly contested American antimonopoly

⁹ Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee of the Judiciary (2020), <https://int.nyt.com/data/documenttools/house-antitrust-report-on-big-tech/b2ec22cf340e1af1/full.pdf>.

¹⁰ Executive Order on Promoting Competition in the American Economy, July 9, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

¹¹ Assistant Attorney General Jonathan Kanter Delivers Remarks on Modernizing Merger Guidelines, January 18, 2022 (“The FTC and DOJ are fighting on the front lines to preserve competitive markets, which are essential to a vibrant and healthy democracy.”); <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-modernizing-merger-guidelines>.

tradition concerned with managing concentrations of private and public power. For centuries, Americans have championed competing views about “bigness” and its democratic implications. Jeffersonian-era antimonopolists were averse to large scale in both business and government. To them, preventing the emergence of democracy-distorting monopolies entailed restraining the power of the state to dispense commercial favors, which they believed corrupted both industry and government. In contrast, some subsequent antimonopoly regimes were based on the notion that a stronger government was necessary to control aggrandizing private power. Theodore Roosevelt, for example, believed that the rise of trusts was economically inevitable and that the goal of policy should be to constitute government agencies with sufficient countervailing authority. Since then, others, such as influential jurist and scholar Robert Bork, have argued that the development of a government strong enough to control private power would itself pose an existential threat to free markets and personal liberty.¹²

Historians, economists, and legal scholars have examined aspects of American antimonopoly law and policy, but understanding of the historical relationship between the antimonopoly tradition and American democracy remains limited. To address this gap, we launched this initiative with the Tobin Project to synthesize analyses of how Americans have institutionalized the broader antimonopoly tradition to control both business and government power for the benefit of democracy, and how these actions have shaped democratic outcomes. The fruit of that initiative—this volume—endeavors to ground ascendant debates in the historical

¹² Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 50 (1978).

record and contribute to better informed decision making and policy. Recovering this history requires careful attention to the many competing approaches to the monopoly problem across time and close examination of the antimonopoly tradition through judicial opinions; federal, state, and local laws; strategic business behavior; and political culture.

This volume on democracy and the antimonopoly tradition represents a collaboration among a group of distinguished social scientists working in history, economics, law, and political thought. Our authors tackle a range of angles in the American antimonopoly tradition from the late-eighteenth century to the present day. Their contributions address a variety of industries—such as news media, banking, manufacturing, defense, and Big Tech—and the perspectives of a variety of stakeholders—such as labor organizers, public intellectuals, military officials, bureaucratic regulators, and state and national political leaders. Collectively, their chapters weave together the story of an American antimonopoly tradition deeply, but complexly, concerned with problems of democracy.

To set the stage, this Introduction offers some background perspective on the antimonopoly tradition and its relationship to democratic values. We begin with a presentation of the key themes and tensions regarding the relationship between democracy and antimonopoly that our chapters consider. We then offer a brief historical account of the antimonopoly tradition from its oldest roots into the nineteenth century, when our authors pick up the story in greater detail. Finally, we provide a brief roadmap to the chapters to come.

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I. CENTRAL THEMES AND TENSIONS IN THE AMERICAN ANTIMONOPOLY TRADITION

Together, the chapters in this volume make the case for a new history of antimonopoly and antitrust. They are part of a historiographical revision pushing beyond conventional and received wisdom, generating a new narrative arc within which to interpret the American antimonopoly tradition. These chapters articulate a much longer and deeper history of antimonopoly in the United States, de-centering conventional narratives that usually hover somewhere around 1890 and 1914 and feature an almost exclusive focus on things like the Sherman Act, New Nationalism vs. New Freedom, Roosevelt vs. Brandeis, and the Federal Trade Commission and Clayton Antitrust Acts. In contrast, the histories in this volume range broadly from the divergent antimonopoly perspectives of John Adams and Henry George to the rise of the Chicago School and America’s current “Curse of Bigness.”¹³ Relatedly, this volume also puts on display a more variegated and diverse history of antimonopoly. There is no single or sacred or unbroken American antimonopoly tradition. Rather, American antimonopoly is a history marked by complexity, contest, contingency, and change over time – populated by a wide variety of shifting constituencies, coalitions, and beneficiaries. Perhaps most refreshingly, this historical revision attempts to challenge the main components of prevailing antitrust orthodoxies of both right and left. The chapters that follow push well beyond preoccupation with some kind of fixed consumer welfare or single economic efficiency standard, and they challenge an older

¹³ Richard R. John, “Rethinking the Monopoly Question: Commerce, Land, Industry,” *infra*, __=__; Tim Wu, *The Curse of Bigness*.

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and outmoded political history consumed by demarcating the historic limits of American regulation and statecraft. But these essays also press beyond the strict confines of a recently revitalized “New Brandeisian” project dedicated primarily to smallness through a simple strategy of “break ‘em up.”¹⁴ Finally, this more socio-legal history of American antimonopoly attempts to methodologically transcend doctrinal histories of antitrust law per se that focus almost exclusively on high courts, canonical cases, and comparatively infrequent incidences of judicial review.

Democracy and Antimonopoly

Thematically, this substantive revision begins with a re-centering of the history of American democracy. This volume highlights antimonopoly policymaking as an institution of democratic politics – that is, as a political rather than a solely economic or legal institution. The chapters in this book all take issue with approaching American antitrust through an exclusively law and economics lens and attempt instead to re-establish priority for what Robert Pitofsky called the “political content” of antitrust. Rather than see economic consumer welfare or a timeless quest for “smallness” as sole measures of the American antimonopoly tradition, these essays begin to recover a somewhat lost or forgotten history of antimonopoly’s diverse democratic origins and aspirations.

Here, questions of politics, power, and inequality return front-and-center to the history of American antimonopoly and antitrust. And antimonopoly reappears as a political movement for

¹⁴ Zephyr Teachout, *Break ‘Em Up*; Gerald Berk, “The New Brandeisians in Retrospect and Prospect: Possibilities for Redressing Economic Domination in the US.” See also Matt Stoller, *Goliath*; Barry Lynn, *Cornered*.

increasing democratic control over a constantly changing economy and society. In these histories, antimonopoly emerges as a key battleground where larger issues of political power and socio-economic inequality were joined and fought. These chapters reveal a long-standing American tradition wherein concentrations of unregulated power were perceived as threats to democracy and the project of collective self-government. The systemic problem of the concentration of private economic power in a democracy was a driving question of the long history of American antimonopoly, highlighting a special concern for the way in which private concentrations of unchecked power could undermine democratic political processes and exacerbate socio-economic inequality. Pitofsky himself claimed that “excessive concentration of economic power” fostered “anti-democratic political pressures,” and thus one of the goals of antitrust was “reducing the range within which private discretion by a few in the economic sphere controls the welfare of all.”¹⁵ In their pioneering text on *The Modern Corporation and Private Property*, Berle and Means argued similarly that “economic power in the hands of a few persons who control a giant corporation is a tremendous force which can harm or benefit a multitude of individuals, affect whole districts, shift the currents of trade, bring ruin to one community and prosperity to another. The organizations which they control have passed far beyond the realm of private enterprise – they have become more nearly social institutions.”¹⁶ From Southern slaveocracy to 19th-century land monopoly to the first American industrial trusts

¹⁵Robert Pitofsky, “The Political Content of Antitrust,” 127 U. Pa. L. Rev. 1051 (1979). 1051.

¹⁶ Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property*, rev. ed. (New York: Harcourt, Brace and World, 1967), 46.

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and beyond, concentrations of socio-economic power were seen as the equivalent of private governments or sovereignties threatening to the foundations of America's public democracy.

Now, of course, concerns about oligopoly and oligarchy – inequality and aristocracy – distorting processes of self-government have an ancient pedigree. Aristotle famously worried about the potentially corrupting effects of private interest on commonwealth: “The true forms of government, therefore, are those in which the one, or the few, or the many, govern with a view to the common interest; but governments which rule with a view to the private interest . . . are perversions.”¹⁷ In the American antimonopoly tradition, such concerns reached something of a fever pitch as reformers like Henry Demarest Lloyd decried “Wealth Against Commonwealth” in a series of historic crusades against private enterprises corrupting democratic politics.¹⁸ Over and over again in this long American tradition, anti-monopolists asserted the primacy of democracy over and against economic concentration, economic corruption, and economic inequality. Concerned with both unequal power relations in society as well as potential economic distortion of the political process, American antimonopolists advocated the priority of politics over economics, the priority of public democracy over private economy. Oliver Wendell Holmes implicated the case famously in dissent in *Lochner v. New York*, “This case is decided upon an economic theory which a large part of the country does not entertain. If it were a

¹⁷ Aristotle, *The Politics and the Constitution of Athens* (New York: Cambridge University Press, 1996), Book III, 71. Socrates too decried “the corruption of society” where “the guardians of the laws and the government are only seemingly and not real guardians” who “turn the State upside down” and destroy it. Plato, *The Republic* (New York: Vintage Books, 1991), Book IV, 129-30

¹⁸ Henry Demarest Lloyd, *Wealth Against Commonwealth* (New York: Harper & Brothers, 1894); Richard L. McCormick, “The Discovery that Business Corrupts Politics: A Reappraisal of the Origins of Progressivism,” *American Historical Review*, 86 (1981): 247-274.

question whether I agreed with that theory I should desire to study it further and longer before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.”¹⁹ Here Holmes tapped directly into the anti-formalism and critical realism of his time, scrutinizing legal-economic policies and theories with an emphasis on experience over logic and pragmatic policy outcomes over abstract principles. Holmes was also in tune with a longer antimonopoly commitment to the priority of democracy – a preference for the many over the few; an equal rather than unequal demos, and the basic, historic, and fundamental right of a self-governing people to embody their opinions and remedies in laws and legislation.²⁰

The priority of democracy over economy bequeathed the American antimonopoly tradition another focus as well – an on-going concern with the distribution or disaggregation of power and the establishment of alternative sites and legal-political levers of countervailing democratic power and authority. The problem of unchecked and unaccountable concentrations of power was the problem of American antimonopoly, and a focus on a more equitable redistribution and dispersal of accountable authority and countervailing power was often the American antimonopoly response. Legal historian Willard Hurst placed this particular value at the very heart of American democratic constitutionalism: “Any kind of organized power ought to be measured against criteria of ends and means which are not defined or enforced by the

¹⁹ *Lochner v. New York*, 198 U.S. 45 (1905), 75.

²⁰ For a recent history of this overarching progressive commitment, see William J. Novak, *New Democracy: The Creation of the Modern American State* (Cambridge, MA: Harvard University Press, 2022).

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immediate power holders themselves. It is as simple as that: We don't want to trust any group of power holders to be their own judges upon the ends for which they use the power or the ways in which they use it." "All forms of organized power," Hurst contended, "should in some way be accountable to serve ends of broader concern than the purpose of the power holders."²¹ From early battles over commercial and land monopolies to the long struggle of the American labor movement for a seat at the table to Thurman Arnold's indictment of a "dictatorial industrial power" against democracy, the quest for new mechanisms to check and countervail concentrations of power and authority has long been a central part of the American antimonopoly tradition.²²

The Deep and Diverse Roots of American Antimonopoly

The second interpretive theme that unites these essays is an awareness that the antimonopoly tradition runs both deeper and wider in American history than is commonly thought. In contrast to various attempts to distill an original, uniform, permanent, and consistent set of principles and goals that have governed American antitrust since inception, these essays cast a broader net in search of historic American antimonopoly. In terms of depth, beyond the common-law, English, and colonial origins explored in this Introduction, we also begin early as Richard John and Richard White explore the "small-d" democratic antimonopoly traditions that

²¹ James Willard Hurst, "Legal History: A Research Program," *Wisconsin Law Review* (1942), 331-332.

²² Kate Andrias and Benjamin I. Sachs, "Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality," *Yale Law Journal* 130 (2021): 546-777; Thurman Arnold, "An Inquiry into the Monopoly Issue," *New York Times*, August 21, 1938. See also Elizabeth Anderson, *Private Government: How Employers Rule Our Lives (and Why We Don't Talk About It)* (Princeton: Princeton University Press, 2017); Joshua Cohen and Joel Rogers, *Associations and Democracy* (New York: Verso, 1995).

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sprung up as early as the late 18th century to do battle with ancient “land monopolies” and, later, more modern “industrial monopolies.”²³ Here, new behemoth concentrations of economic power were seen as explicit threats to the republic and its earliest expectations of independent production, free labor, financial independence, and access to capital. These attributes were seen as central to early American conceptions of citizenship and as preconditions to successful democratic participation by householders, producers, and proprietors. Early American antimonopoly, in other words, was suffused with “political content,” and democratic aspirations fueled early antimonopoly rhetoric as well as action from the first days of the republic. It is simply impossible to fully understand the historical trajectory and general import of the American antimonopoly tradition devoid of these early democratic vistas.²⁴

In terms of the breadth of American antimonopoly, we feel the contribution of this volume is even more original and significant. All of our authors focus their inquiries through the lens of an American antimonopoly tradition, broadly construed, and not just through the doctrines of antitrust law per se. As already suggested, the historic American antimonopoly tradition, from the late 18th century through the New Deal and Postwar periods, consisted of a wide range of different legal technologies and policy orientations, from an early producerist and free labor perspective aimed at preserving a self-governing republic to the massive legal and

²³ John, “American Antimonopoly Tradition”; Richard White, “Antimonopoly/Antitrust,” *infra*, __-__.

²⁴ For an examination of the pitfalls of ignoring historical context, see the controversy over Robert H. Bork “Legislative Intent and the Policy of the Sherman Act,” *Journal of Law & Economics*, 9 (1966): 7-48; Herbert Hovenkamp, “Antitrust’s Protected Classes,” *Michigan Law Review*, 88 (1989): __-__; Daniel A. Crane, “The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy,” *Antitrust Law Journal*, 79 (2014): 835-853.

regulatory innovations of progressive reformers concerned with unfair competition, public utility regulation, labor administration, and tax reform²⁵ to a similarly sprawling New Deal and Postwar antimonopoly synthesis that predominated until the ascendancy of the Chicago School.²⁶ The historical recovery of the full scale and scope of the democratic American antimonopoly tradition requires moving well beyond the tried-and-true canon of great Supreme Court antitrust case-law. Consequently, the essays in this volume produce fuller histories of the role of the common law and antimonopoly legislation *before* the Sherman Act as well as the continuing importance of state and local antimonopoly policies which remained important sites of democratic action and policymaking from the late 19th century to the present. We also get a more complete historical account of the interrelationship of local, state, national, and even international policymaking.²⁷

In place of ideologically charged narratives that primarily aim to make normative arguments about the proper scale and scope of antitrust action, the essays in this volume are more pragmatically geared toward revealing the actual historical mechanics of the American antimonopoly tradition across all of its diverse manifestations. We are interested in demonstrating effects – i.e., in actually showing how antimonopoly has differently worked across American history and to what ends. Accordingly, the essays that follow reveal an antimonopoly tradition defined by what at first might look like an unwieldy assemblage of divergent legal technologies, and policies. But our goal is to emphasize just how broad and

²⁵ See the chapters by Novak, Andrias, and Avi-Yonah in Parts II & IV of this volume.

²⁶ See the chapters by Grischkan, Crane, and Sparrow in Parts II & III of this volume.

²⁷ See the chapters by Lamoreaux and Phillips-Sawyer in Parts II & III of this volume.

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diverse the American antimonopoly toolkit actually was. In contrast to conventional narratives highlighting patchwork, ineffectiveness, and a seemingly endemic American state incapacity,²⁸ these essays together document the robust legal and institutional accomplishments of the long American antimonopoly movement in developing new techniques and tools of control that yielded by the mid-20th century a more mixed economy and a more organized and regulated form of corporate capitalism. Beyond the doctrinal confines of antitrust law per se (and its supposed original intent or telos), the historical American antimonopoly tradition has boasted a wide array of sources and methods (as well as constituencies and coalitions). In these pages, we unpack a diverse antimonopoly toolkit beyond antitrust that still brims with future possibilities: tax policy, regulated industries, common carriage, public utility, *quo warranto* suits, corporation commission regulation, state constitutional amendment, corporate governance, entry restrictions, holding company reorganization, unfair competition, universal service, structural separations, procurement policy, small business policy, interconnection mandates, public options, public provision, and even public ownership. Beyond well-worn themes of “consumer welfare,” “economies of scale,” or the “curse of bigness,” lies an actual American historical tradition of

²⁸ For some of the more negative assessments of the efficacy of regulation in the antimonopoly field and the most narrow understanding of the purview of antitrust, see Robert H. Bork, “Legislative Intent and the Policy of the Sherman Act,” *The Journal of Law & Economics*, 9 (1966): 7-48; William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (Chicago: University of Chicago Press, 1956); Frank H. Easterbrook, “Antitrust and the Economics of Federalism,” *The Journal of Law and Economics*, 25 (1983): 23-50; Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (New York: Cambridge University Press, 1982).

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antimonopoly embracing a staggering variety of techniques of legislation, regulation, and administration.

Change Over Time – Towards a Developmental History of American Antimonopoly

The first two central themes of this volume thus underscore a certain continuity in the American antimonopoly tradition in terms of a) the priority of democracy and b) the proliferation of legal-political techniques and technologies of antimonopoly policymaking. But the third central theme of this book emphasizes discontinuity or what historians talk about as change over time. Indeed, together, the essays in this volume bring into stark relief a new periodization of American antimonopoly divided into three distinct historical periods or phases.

The first essays in this book delineate some of the earliest origins of American antimonopoly in an original political movement wherein economic democracy was seen as an essential prerequisite to political democracy. For much of the 19th century, the earliest incidence of monopoly threat was viewed in terms of a threat to producerist citizenship and the control of households and proprietors over their own work and employment. Antimonopolists in the early part of the century fought to protect small producers, who they saw as crucial to cultivating the independent citizens central to democracy. From early critics of land monopoly to the earliest instantiations of the American labor movement in the Knights of Labor, this democratic vision of a smaller-scale producerist-controlled political economy fueled radical crusades against economic inequality and concentrated power in general. A crusading and moralistic spirit accompanied this first wave of antimonopoly sentiment as producers, agrarians, and populists aimed a “visceral revulsion” at the strange new co-mingling of “progress” with “poverty” in the earliest stages of capital accumulation and industrialization.

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The second set of essays in this book, however, highlight a different set of voices and priorities that captured the American antimonopoly tradition from the Gilded Age to the Progressive era. As American political economy transformed away from a republic of independent producers and small-holders into a nation of consumers and wage laborers, the American antimonopoly tradition again adjusted its primary objectives and technologies. Here, antimonopoly reformers shifted their energies from policing all forms of incorporated consolidation via state charters and common law categories to a more regulated industries model, focused on controlling private concentrations of new industrial powers according to certain characteristics (size and structure) or nature (public necessity, public utility, or infrastructure) or behavior (unfair or illegal economic practices). In sync with what historian Samuel Hays once called a general “upward shift in decision-making power,” the locus of antimonopoly action laddered slowly but surely from lower to higher levels of government authority over time, from state to municipal to federal to international regulation. Though local and state action would remain crucial parts of any antimonopoly project throughout, the legal-political technologies of antimonopoly increasingly migrated from the local regulatory world of common law categories and state charters to the distinctively modern forms of legislative, administrative, and regulatory power that reached something of a peak in the dramatic reconstructions that accompanied the Great Depression and World War II.

Finally, in producing the main categories of debate that preoccupy our own current antimonopoly moment, the New Deal and Postwar settlement itself began to unravel in the wake of a new set of concerns (hailing from both Right and Left) about things like regulatory capture, interest-group politics, inflation, and the limits of American statism. The rise of the Chicago

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School and the onset of a more neoliberal political economy seemed to call into question much of the American antimonopoly tradition, reversing the priority of democracy over economy, and depoliticizing American antitrust.²⁹ So thorough-going was some of the evisceration of Progressive and New Deal antimonopoly presumptions and categories, that the most recent entrants to contemporary antimonopoly debate have returned to Louis Brandeis in the hopes of resuscitating a vital American historical tradition.

While the ultimate outcome of this last stage in the development of our current American antimonopoly tradition remains the subject of intense debate, this volume offers a less tentative conclusion about the relationship of the 19th-century and Progressive-New Deal legacies. The volume endorses the need for a developmental history of the American antimonopoly tradition. That is, this collective history foregoes common narrative tropes of either whiggish progress or decline and fall from some earlier era, by attempting to trace and identify points of specific change as well as general continuities. The history is complex and does not lend itself readily to easy conjecture about which version of the American antimonopoly regime is original, superior, or permanent. The shift from 19th century antimonopoly to Progressive-New Deal legislation and regulation is marked by dramatic changes in objectives and orientation. But there is one clear continuity. Both versions of the tradition defended their initiatives in the name of

²⁹ For two of the best statements of this early and self-conscious re-prioritization of the market over government and economy over democracy within the so-called Chicago School, see Gary S. Becker, “Competition and Democracy,” *Journal of Law and Economics*, 1(1958), 105-109, 109; and Friedrich A. Von Hayek, *Freedom and the Economic System* (Chicago, 1939). Both Hayek and Becker contended that government imperfections were a greater threat than market imperfections. As Becker viewed the problem of monopoly, “It may be preferable not to regulate economic monopolies and to suffer their bad effects, rather than to regulate them and suffer the effects of political imperfections.”

economic and political democracy. The meaning and import of American democracy changed substantially from the 19th to the 20th century – as John Dewey reminded us, democracy is a history rather than a concept or ideal. Dewey also understood the importance of substantive economic democracy to anything resembling political democracy: “the problem of democracy was seen to be not solved, hardly more than externally touched, by the establishment of universal suffrage and representative government.”³⁰ The recent attempts of current American antimonopolists – in the brave new age of Amazon, Facebook, Apple, and Google – to revisit the entirety of the early American antimonopoly tradition in a quest for new democratic solutions to the age-old problem of concentrations of private economic power suggests something of the versatility, dexterity, and adaptability of the American antimonopoly tradition. That tradition has ancient legal-historical roots.

II. THE ANTIMONOPOLY TRADITION IN HISTORICAL PERSPECTIVE

Ancient Roots

Ever since the Emperor Tiberius apologetically coined the word “monopolium” before the Roman Senate,³¹ the word “monopoly” has been one of opprobrium. Indeed, the idea that it is not fair for a single person to control an entire segment of the economy, or for a group of people to agree not to compete with each other, has ancient roots, stretching back to the earliest recorded

³⁰ John Dewey, “Liberalism and Social Action,” in Jo Ann Boydston, ed., *John Dewey: The Later Works, 1925- 1953*, vol.11 (Carbondale: University of Southern Illinois Press, 1987), 1-65, 25.

³¹ Suetonius, *The Lives of the Twelve Caesars: An English Translation, Augmented with the Biographies of Contemporary Statesmen, Orators, Poets, and Other Associates* (J. Eugene Reed & Alexander Thomson, eds., Gebbie & Co. 1889).

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legal codes. Some accounts find a prohibition on monopolistic practices in The Code of Hammurabi (circa 1754 B.C.E.).³² Aristotle wrote in his *Politics* of Thales cornering the market for oil presses and iron, and then selling olive oil at high prices at times of urgent demand.³³ A price fixing case against grain dealers appears in fourth-century-B.C.E. Athens, with the death penalty possibly imposed.³⁴ An antimonopoly sentiment finds expression in ninth century B.C.E. Chinese thought,³⁵ early Islamic law,³⁶ and in a fifth century decree of the Byzantine Emperor Zeno and the Justinian Code.³⁷ From Thomas Aquinas riffing on Aristotelian just price theory to Martin Luther’s jeremiads against price fixing cartels and predatory pricing,³⁸ an antimonopoly thread runs through the scholastic and reformed Christian traditions as well.

The antimonopoly tradition is ancient, but not uncontested. For every example of a law prohibiting monopolies or cartels, there are many examples of kings, legislative councils, and judges doing just the opposite—creating exclusive commercial rights to raise revenue for the crown, requiring participation in self-regulatory guilds, creating barriers to competition by outsiders, and limiting competitive freedom. From ancient roots until the present day, the antimonopoly tradition has had to contend with an equal and opposite tradition that has viewed

³² Fritz Machlup, *The Political Economy of Monopoly* 185 (1952).

³³ 1 *The Politics of Aristotle* 21-22 (B. Jowett trans., Oxford, Clarendon Press 1885).

³⁴ Lambros E. Kotsiris, *An Antitrust Case in Ancient Greek Law*, 22 *Int’l Law.* 451, 454–55 (1988).

³⁵ Chen Huan-Chang, 2 *The Economic Principles of Confucius and His School* 534 (1911).

³⁶ Arvie Johan, *Monopoly Prohibition According to Islamic Law: A Law and Economics Approach*, 27 *Mimbar Hukum* 166, 167 (2015), <https://jurnal.ugm.ac.id/jmh/article/viewFile/15904/10513> (“Whoever withholds food (in order to raise its price), has certainly erred.” (citation omitted)).

³⁷ S. P. Scott, 13 *The Civil Law* 120 (1932) (translating book IV, title 59 of the Code of Our Lord the Emperor Justinian) (prohibiting monopolies and cartels upon pain of confiscation and banishment).

³⁸ See Kenneth Elzinga & Daniel A. Crane, *Christianity and Antitrust*, in *Christianity and Market Regulation* (Daniel A. Crane & Samuel Gregg, forthcoming Cambridge University Press 2021).

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the dispensation of monopolistic privilege as the prerogative of the sovereign and preferred markets to be organized by fiat or coordination rather than competition.

To trace an antimonopoly tradition to early human civilization is also to recognize that antimonopoly exists apart from democracy. The tradition precedes democratic stirrings in Ionian civilization and finds expression in many decidedly undemocratic or anti-liberal regimes. Thus, while this book narrates a linkage between democracy and antimonopoly and excavates lines of argument that vibrant democracy necessarily entails vigorous antimonopoly, it is also important to acknowledge the separate lineage of the two traditions.

The English Common Law

The framers of the Sherman Act of 1890 insisted that they were merely codifying the common law on restraints of trade and monopoly.³⁹ Although jurists would later contest the relevance of the common law to Sherman Act interpretation,⁴⁰ the English common law on the virtues of competition and evils of monopoly undoubtedly exerted a considerable influence on attitudes in the colonies and early American Republic. It is through the common law that Americans inherited antimonopoly.

³⁹ 21 CONG. REC. 2456 (1890) (remarks of Sen. Sherman).

⁴⁰ Compare *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007) (“We reaffirm that “the state of the common law 400 or even 100 years ago is irrelevant to the issue before us: the effect of the antitrust laws upon vertical distributional restraints in the American economy today.”) with *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 731 (1988) (“[W]e do not ignore common-law precedent concerning what constituted ‘restraint of trade’ at the time the Sherman Act was adopted.”).

The English tradition on competition has venerable roots. Sir Edward Coke argued that all monopolies—understood as special privileges granted by the Crown—were against the Magna Carta because they stood against liberty and freedom.⁴¹ William Blackstone found the common law’s abhorrence of monopoly to be grounded in older Roman and Byzantine principles.⁴²

From at least the fifteenth century forward, English cases expressed a policy in favor of free competition and against agreements in restraint of trade. Two early fifteenth century cases expressed the bookend principles that competition is not a wrong, and that restraining competition is. In the “*Schoolmasters case*,”⁴³ the Court of Common Pleas held a schoolmaster who opened a new grammar school at Gloucester and caused tuition prices to fall by two thirds had not caused legal injury to the incumbent grammar school monopolist. The idea that competition is a good rather than a wrong may not have been obvious, as evidenced by the dissenting opinions in the *Schoolmasters case*, but it was essential to social and economic progress. As the U.S. Supreme Court held much later in the *Charles River Bridge* case, if the law implied a right to exclusivity as against competition, we would “be thrown back to the improvements of the last century, and obliged to stand still.”⁴⁴

The flip side of the *Schoolmasters case*—the recognition that *restraining* competition is a wrong—also had entered the common law by the fifteenth century. In the *Dyer case* of 1415, the court held that an agreement to discharge a debt if the debtor refrained from competing with the

⁴¹ Edward Coke, *The Third Part of the Institutes of the Laws of England* 181 (1669).

⁴² 4 Blackstone Commentaries on the Laws of England 426.

⁴³ “Schoolmaster Case,” Court of Common Pleas, Hilary Term, 1410, Y.B., 11 Hen, IV, f. 47, pl. 21.

⁴⁴ *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 552-53 (1837).

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creditor was not only void as against common law, but also an offense against the Crown.⁴⁵

Treating collusive agreements as of interest to the Crown marked an important realization that the public has an interest in private anticompetitive agreements. Still, the question of whether agreements in restraint of trade were merely unenforceable or capable of subjecting the parties to liability or even criminal responsibility remained unresolved for a long time. As late as 1889—the year before the passage of the Sherman Act making antitrust offenses federal crimes—an English court held that a price-fixing agreement among steamship companies was void as against common law, but not actionable for damages by persons not parties to the contract, nor creating criminal liability.⁴⁶ In this view, competition among parties was mostly a private contractual matter, not one in which outsiders to the contract had any say.

The ambiguity of the common law with respect to competition and monopoly is best framed in a landmark seventeenth century case, *Darcy v. Allein*,⁴⁷ nicknamed “The Case of Monopolies.” Darcy had received from Queen Elizabeth an exclusive privilege via a “letter patent” to buy playing cards overseas and import them into England. In exchange for this privilege, Darcy remitted 100 marks to the Queen annually, thus sharing his monopoly profits with the Crown in an arrangement typical of many sovereign grants of exclusivity. When Allein started importing playing cards, Darcy complained that he was doing so in violation of Darcy’s patent and that this competition was making it impossible for him to remit the contracted payments to the Crown.

⁴⁵ “Dyer Case,” Y.B., 2 Hen. V, vol. 5, pl 26 (1415).

⁴⁶ *Mogul Steamship Co. v. McGregor, Gow & Co.*, (1889) 23 Q.B.D. 598.

⁴⁷ Court of King’s Bench, 1602, 11 Coke 84, 77 Eng. Rep. 1260.

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The King’s Bench struck down the exclusive privilege as “utterly void.” In a classic statement of the harms attendant to monopoly the court identified “three inseparable incidents to every monopoly:”

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

However, it would be a mistake to read *Darcy v. Allein* as a broad holding that monopolies were illegal as against the common law. Understood in context, the case is more about *who* could grant a monopoly—the Crown or Parliament—rather than *whether* monopolies could be granted at all. In the late sixteenth century, Parliament had begun to inveigh against the grant of royal monopolies as an abuse of the Crown’s privileges.⁴⁸ *Darcy v. Allein* was an important landmark in the continuing jurisdictional struggle between the Crown and Parliament. The playing card monopoly may have been unlawful since “[t]he Queen was deceived in her grant,” but Parliament had every right to—and did—grant many such monopolies. Indeed, a few years after the King’s Bench struck down Queen Elizabeth’s playing card monopoly, Parliament granted a playing card monopoly of its own.

There is indubitably an antimonopoly strand in the English common law, but one always in tension with a tradition fiercely protective of the sovereign’s grant of monopoly rights. Adam Smith described the punishment for violating royal monopolies in violent terms:

⁴⁸ Steven G. Calabresi & Larissa C. Liebowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 Harv. J. L. & Pub. Pol’y 983, 990 (2013).

“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.”⁴⁹

Despite its ambiguities, the English common law indubitably exerted an important influence on the formation of U.S. attitudes and law. For example, *Mitchel v. Reynolds*, decided in 1711,⁵⁰ laid the groundwork for a “rule of reason” to adjudge agreements in restraint of trade—a framework that the U.S. Supreme Court controversially adopted two hundred years later in *Standard Oil*.⁵¹ Yet, as the antimonopoly tradition took root in the New World, it also assumed a distinctively American flavor.

The American Colonies and Early Republic

To the early colonial ear, the term “monopoly” connoted exclusive royal privilege of the kind Queen Elizabeth accorded to the British East India Company for trading privileges east of the Cape of Good Hope and the Straits of Magellan.⁵² Largely through Coke, who wrote the only published report on *Darcy v. Allein*, the American colonists inherited a belief that monopoly was

⁴⁹ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* 700-01 (Edwin Cannan ed., Modern Library 1994) (1776).

⁵⁰ 1 P.Wms. 181, 24 Eng. Rep. 347 (K.B. 1711).

⁵¹ *Standard Oil Co. v. U.S.*, 221 U.S. 1 (1911).

⁵² John Micklethwait & Andrew Wooldridge, *The Company: A Short History of a Revolutionary Idea* 22 (2003); William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* 62-63 (1965); James Willard Hurst, *The Legitimacy of the Business Corporation in the Law of the United States: 1780-1970* (1970).

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contrary to Magna Carta and hence contrary to their ancient rights as Englishmen. Thus, William Penn wrote in his *The Excellent Priviledge of Liberty & Property Being the Birth-Right of the Free-Born Subjects of England* that “[g]enerally all Monopolies are against the great charter because they are against the Liberty and Freedom of the Subject, and against the Law of the Land.”⁵³

By the middle of the seventeenth century, the American colonists unhappily began to internalize the burden of English mercantilist policy with its guarantees to English merchants of exclusive trading rights in the colonies.⁵⁴ Things were to get worse. In the eighteenth century, Parliament intensified its restrictions on colonial trade, which showed that monopoly was not merely a corruption of royal prerogative, but of any sovereign ill-disposed to commercial freedom. Parliament’s mercantilist policies sowed bitter resentment in the colonies. As one historian has noted, “the efforts of the English government, backed by English merchants and manufacturers, to deny to the Americans the right to compete in foreign markets and to secure the benefits of foreign competition was one of the most potent causes of the American Revolution.”⁵⁵

The fledgling republic would soon learn that monopoly was not solely the province of either the British Crown or Parliament. During the Revolutionary period, rampant inflation and

⁵³ 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)).

⁵⁴ Franklin D. Jones, *Historical Development of the Law of Business Competition*, 36 *Yale L. J.* 42, 49-50 (1926).

⁵⁵ *Id.* at 52.

fluctuating commodity prices led to political agitation against domestic “forestallers and engrossers.”⁵⁶ These pressures led to recommendations from the Continental Congress, passed by legislatures in New Jersey and Massachusetts, to “prevent monopoly and oppression” by fixing maximum prices for commodities.⁵⁷ The new state constitutions embedded an anti-monopoly principle as fundamental law. Maryland proclaimed “[t]hat monopolies are odious, contrary to the spirit of a free government, and the principles of commerce, and ought not to be suffered;” North Carolina that “perpetuities and monopolies are contrary to the genius of a free state and ought not be allowed;” and Massachusetts that “[n]o man, or 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.”

But, as always, the indigenous American antimonopoly tradition was not without its counterweights. Debates around the framing and ratification of the Constitution set off new rounds of antimonopoly discourse that would play out in domestic politics and constitutional law for at least half a century. During the Philadelphia constitutional convention, James Madison introduced a proposal to grant Congress the power to “[t]o grant charters of incorporation in cases where the Public good may require them, and the authority of a single State may be incompetent.”⁵⁸ When Benjamin Franklin later moved to grant Congress the power to cut canals,

⁵⁶ *Id.* at 52-53.

⁵⁷ *Id.*

⁵⁸ James Madison, Notes on the Constitutional Convention (Aug. 18, 1787) (proposal of James Madison), in 2 *The Records of the Federal Convention of 1787*, at 324, 325 (Max Farrand ed., 1966).

Madison reintroduced his own proposal to give Congress an even wider power to incorporate, and one not limited to common carriers or other lines of business affected with the public interest.⁵⁹ This proposal led to a sharp exchange between Federalist and Anti-Federalist delegates, with Federalists like James Wilson arguing that an explicit power to incorporate might be unnecessary because it was already inherent in the proposed commerce clause of what became Article I, Section 8, and Anti-Federalists like George Mason expressing horror of “monopolies of every sort, which he did not think were by any means already implied by the Constitution as supposed by Mr. Wilson.”⁶⁰

Madison’s chartering proposal did not carry, but that was of cold comfort to the Anti-Federalists who had heard Wilson loud and clear on the Federalist interpretation of the commerce clause. George Mason and Elbridge Gerry refused to sign the proposed Constitution because “[u]nder their own Construction of the general Clause at the End of the enumerated Powers, the Congress may grant Monopolies in Trade & Commerce.”⁶¹ A slew of Antifederalist writers attacked the proposed Constitution on the ground that it permitted Congress to grant monopolies, and a number of state ratifying conventions, including Massachusetts, New Hampshire, North Carolina, and New York, sent instructions requesting that Congress include a

⁵⁹ Daniel A. Crane, *Antitrust Antifederalism*, 96 Cal. L. Rev. 1, 8 (2008).

⁶⁰ Farrand’s Records at 616.

⁶¹ 8 The Documentary History of the Ratification of the Constitution of the United States of America 45 (Merrill Jensen ed., 1976).

antimonopoly provision in a Bill of Rights. In private correspondence to Madison, Jefferson endorsed the idea of an antimonopoly amendment.⁶²

And then came Hamilton’s proposal for a national bank—the embodiment of corrosive monopoly to Jefferson, Madison, and their newly minted opposition party. Hamilton prevailed with Washington and got his “monster bank,” which the vacillating President Madison granted a second term following the War of 1812. The Supreme Court endorsed Hamilton’s vision for muscular federal economic powers in *McCulloch v. Maryland*, upholding the constitutionality of the bank. Andrew Jackson then vetoed the bank’s second renewal charter, complaining of its “exclusive privilege under the authority of the General Government, a monopoly of its favor and support.”⁶³ The Jacksonian movement against special charters and for general laws reacted to a particular pedigree of monopolism—the crony capitalist system of legislatures dispensing special economic privileges to favored citizens.⁶⁴

In the early nineteenth century antimonopoly “was an expression of the producerist-republican tradition that emphasized the dangers of government in the private economy and critiqued the power of large aggregations of capital and banks.”⁶⁵ Over the course of that

⁶² Letter from Jefferson to Madison (Aug. 28, 1789), in 15 *The Papers of Thomas Jefferson* 368 (Julian P. Boyd ed., 1958) (proposing a provision that “[m]onopolies 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”).

⁶³ Andrew Jackson, Bank Veto Message (July 10, 1832).

⁶⁴ See Naomi R. Lamoreaux & John Joseph Wallis, *General Laws and the Mid-Nineteenth Century Transformation of American Political Economy*, <https://ccl.yale.edu/sites/default/files/files/Lamoreaux%20and%20Wallis%2C%20General%20Laws%2C%202019-10-04.pdf>.

⁶⁵ Kenneth Lipartito, *The Antimonopoly Tradition*, 10 *U. St. Thomas L. J.* 991, 994 (2013).

century, antimonopoly would diverge into two separate threads—one concerned with governmental economic intervention and the other with private economic power.

The first strand of antimonopoly concerned constitutional limitations on the states' power to legislate on a class basis or in favor of narrowly defined interest groups.⁶⁶ These arguments met with some success in state courts over the course of the nineteenth century. For example, an 1855 decision of the Indiana Supreme Court invalidated a state statute prohibiting the sale of liquors except by certain authorized county agents as an unconstitutional enactment of monopoly.⁶⁷ Such anti-regulatory deployments of the anti-monopoly principle continued to have some traction in state courts through the end of the nineteenth century, but ultimately lost traction under the federal constitution's Reconstruction Amendments. In the Slaughter-House Cases of 1872,⁶⁸ the Supreme Court rejected a group of Louisiana butchers' Thirteenth and Fourteenth Amendment challenge to a state statute that granted a twenty-five year monopoly to the Crescent City Live-Stock Landing and Slaughter-House Company to maintain slaughterhouses in certain state parishes. The butchers explicitly positioned their argument on antimonopoly grounds, reading Coke's report of *Darcy v. Allein* to the Court.⁶⁹ Justice Field's dissenting opinion expressed sympathy to their assertion of a constitutional antimonopoly tradition. However, the majority rejected the butchers' interpretation of the Reconstruction

⁶⁶ Calabresi & Leibowitz, 36 Harv. J. L. & Pub. Pol'y at 1028-42.

⁶⁷ *Beebe v. State*, 6 Ind. 501 (1955).

⁶⁸ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

⁶⁹ Calabresi & Leibowitz, 36 Harv. J. L. & Pub. Pol'y at 1042-43.

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Amendment, reading down the privileges and immunities clause of the Fourteenth Amendment to a narrow scope incapable of carrying the weight of the antimonopoly tradition.

After the *Slaughter-House* cases, the constitutional antimonopoly narrative concerned with the limits of the state police power and economic regulation is largely subsumed within the familiar story of economic substantive due process, which passes through opinions like *Munn v. Illinois*⁷⁰ upholding the states' police power to regulate businesses affected with the public interest, *Lochner v. New York*,⁷¹ striking down maximum hour legislation for bakers, and the New Deal settlement cases rejecting active scrutiny of state economic legislation by the federal judiciary.

But just as the constitutional antimonopoly tradition was fading, a second strand of the antimonopoly tradition, concerned more with private than with public power, was reemerging. This concern with economic power obtained without any special grant from the state certainly was not new. We have already seen that concerns with private economic power are traceable back to the earliest roots of the antimonopoly tradition, and nineteenth century cases did sometimes police monopolies or restraint of trade of a private character. But, throughout much of the nineteenth century, the dominant social understanding of what constituted a “monopoly” was a grant of exclusive privilege from the state. As late as 1878, the Michigan Law dean, eminent treatise writer, and jurist Thomas Cooley would devote ninety percent of his essay on monopolies to state-granted exclusive rights, before turning almost as an afterthought to

⁷⁰ 94 U.S. 113 (1877).

⁷¹ 198 U.S. 45 (1905).

“monopolies not created by the legislature.”⁷² Similarly, as late as 1886, Christopher Tiedeman would assert in his *Treatise on the Limitations of Police Power in the United States* that “[t] is only in extraordinarily abnormal cases that any one man can acquire this power over his fellowmen, unless he is the recipient of a privilege from the government or is guilty of dishonest practices.”⁷³

But social and political changes brought about by Reconstruction and economic and technological changes brought about by the Second Industrial Revolution were beginning to challenge the predominant understanding of monopoly as a creature of state dispensation. As business and legal entrepreneurs began to stretch the boundaries of state corporate law to create massive aggregations of capital, antimonopolists rediscovered or recreated the strands of their tradition concerned with undue economic power, whatever its source. Over time, the predominant meaning of monopoly shifted from the state grant of privilege to privately obtained power. By 1890 and the passage of the Sherman Act, Congress could prohibit agreements in restraint and monopolization without having to specify that it meant the private rather than public variety.

This brief sketch of the antimonopoly tradition sets the stage for the stories our chapter authors will narrate beginning in the mid-nineteenth century. Thus far, we have said little about the place of democracy in the arc of antimonopoly, and even less about antitrust. This is because, in historical perspective, antimonopoly is not always tied to democracy, which is an old

⁷² Thomas M. Cooley, *Limits to State Control of Private Business*, Princeton Review 1 (1878): 233-71.

⁷³ Christopher G. Tiedeman, *A Treatise on the Limitations of Police Power in the United States*, Section 95, 242 (1886).

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idea, nor antitrust, which is a new idea. Nonetheless, from the founding era on, Americans linked the success of democracy to the fight against monopoly, and with the rise of the Trusts as a powerful form of business consolidation in the Gilded Age, the thematic linkage of democracy, antimonopoly, and antitrust becomes unavoidable.

III. CONTRIBUTIONS AND CONTRIBUTORS

Part I of this book is devoted to establishing the deep roots of an antimonopoly tradition in American history. Paired with this Introduction, the chapters by Richard John and Richard White reconstruct the main lineaments of this democratic tradition from the American Revolution through the Gilded Age. Richard John’s “Reframing the Monopoly Question: Commerce, Land, Industry” uncovers the main pillars of antimonopoly thought in the United States from the 1773 Boston Tea Party to the establishment of the Federal Trade Commission in 1914. John’s history challenges a conventional historiography of American antimonopolism centered on a movement from 19th century producerism to 20th century consumerism. Instead, John unearths a more continuous tradition in the policy pronouncements of three antimonopoly visionaries—John Adams, who contested British commercial monopoly as an obstacle to national independence, Henry George, who opposed the private ownership of natural resources as a violation of natural rights, and Walter Lipmann, who deplored the wastefulness of the industrial corporation. Through the analysis of these three figures, John captures both the breadth and radicalism of historical antimonopolism, to which the ideals of national independence, natural rights, and public utility acted as a fulcrum.

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Richard White’s “Antimonopoly/Antitrust” reinforces this theme of the original radicalness of the original 19th century American antimonopoly tradition. White specifically addresses the emergence of antitrust law from within this broader American antimonopoly tradition. He posits that U.S. antimonopoly and antitrust were distinct traditions with the latter as a more technocratic synthesis emanating from the legal-political difficulties of the Gilded Age. Orienting his chapter particularly around the Interstate Commerce Act and Sherman Antitrust Act, White argues that the narrow, empirical focus on the economic consequences of antitrust undercut broader antimonopolist messaging about the threat of monopoly to the values of equality and democratic producerism in a democratic republic. The resulting antitrust laws, he concludes, were not so much the embodiment of American antimonopoly as blunting instruments deployed against more radical proposals.

Together, the chapters in Part II of this volume attempt a revisionist reframing of the much-discussed Progressive and New Deal antimonopoly traditions. Naomi Lamoreaux’s “Antimonopoly Regulation and State Law in the Late Nineteenth and Early Twentieth Century” revises conventional ideas about a) the role of state governments in regulating the economy in the late nineteenth-century; b) the effect of New Jersey’s charter mongering in other states’ efforts to counter the “trusts”; and c) the shift in the arena of antitrust policy from the states to the federal government in the early-twentieth century. Lamoreaux counters the idea that the laws enacted during this period evidence some kind of triumph of laissez faire and instead argues that these laws were highly regulatory and surprisingly effective. Overall, antimonopolist activity at the state level was considerably heterogeneous and context-dependent. The strong antitrust agenda pursued by state attorneys general in the West, particularly in the Plains states, was

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encouraged by the presence of strong antitrust groups in the area, while the entrenchment of big business in the East provided less fertile ground to state attorneys general to pursue vigorous antitrust action.

Picking up where Lamoreaux leaves off, William Novak’s “American Antimonopoly and the Rise of Regulated Industries Law” traces the development of this distinctly regulatory antimonopoly tradition from the late 19th century to the New Deal. Novak investigates the important role of antimonopoly and antitrust in the larger progressive-era effort to develop new techniques and technologies of control over American business in the immediate wake of the declining efficacy of 19th century common-law and state charter-based mechanisms for regulating corporations. From the perspective of legal history, Novak emphasizes the crucial role of American antimonopoly and antitrust in the long, steady, and momentous expansion and nationalization of American police power in the early 20th century. Beyond the specific problem of monopoly per se, Novak’s chapter probes the role of the Sherman Act, the Clayton Act, and the creation of the FTC in the larger expansion of federal police power control over corporations and economic activities formerly dealt with by states through charters and more local police regulations. As was the case for public utility, exactly at the point when an earlier regulatory regime began to falter, the American antimonopoly tradition galvanized a new set of federal initiatives aimed at expanding public control over a rapidly transforming American economy, ultimately giving rise to a new and potent law of regulated industries.

In “Banking and the Antimonopoly Tradition: The Long Road to the Bank Holding Company Act,” Jamie Grischkan traverses the themes introduced by Lamoreaux and Novak in tracing the continued legal-economic problem of the holding company in American democracy.

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Specifically, Grischkan’s chapter follows the history of the U.S. bank holding companies and the movement to prevent the monopolistic expansion in American finance that led to the Bank Holding Company Act in 1956. The antimonopoly movement in the banking industry, Grischkan argues, was a wide umbrella of divergent interests that encompassed small bankers, commercial businesses, agrarians, Southern and Western Jacksonian Democrats, and Northeast Progressive Republicans. The shape of antimonopoly reform was as much molded by the clashes between these groups as by the general struggle between the big banks and those who wished to regulate them. Grischkan’s history of bank holding companies refutes the narrative that antimonopoly reform ended with World War II and the New Deal. Instead, the compromises and disagreements of that age continued to inform the meaning of antimonopoly activity into the postwar period – a theme that takes center stage in Part III of this volume.

Chapters by Daniel Crane, Laura Phillips Sawyer, and James Sparrow document the transformations in the American antimonopoly tradition as the U.S. navigated war, postwar, and the rise of a new global era in political economy. In “De-Nazifying by De-Cartelizing: the Legacy of the American Decartelization Project in Germany,” Dan Crane addresses the legacy of the post-World War II Decartelization Branch, a U.S. military-affiliated antitrust team tasked with uncovering the role that highly concentrated economic power played in the rise and atrocities of the Third Reich. The work of the Decartelization Branch, while not wholly successful according to Crane, worked to forever link the themes of political democracy to economic democracy in the postwar era. Indeed, Crane credits the initiative with fostering a formidable anti-cartel ethos in the United States galvanizing a complex web of interests behind antimonopoly reform with political consequences both at home and abroad.

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Laura Phillips Sawyer’s “Jurisdiction Beyond Our Borders: The Long Road to *U.S. v. Alcoa* and Extraterritorial Antitrust, 1909-1945,” continues this exploration of an emerging international context to the development of modern American antitrust. In particular, Phillips Sawyer explores the motivating factors behind the watershed U.S. Supreme Court opinion in *United States v. Alcoa* (1945). The decision reversed the preceding decade’s suspension of antitrust enforcement, establishing the extraterritorial reach of US antitrust laws and providing greater judicial leeway to antimonopoly activism by the federal government. The chapter paints the moment as something of a culmination of both internal and external pressures. The preceding decades witnessed the erosion of a strict territoriality doctrine for antitrust in both judicial decisions and congressional policies. Simultaneously, there was a growing popular concern with the well-documented connection between fascism and cartelization in Europe that revived demands for enhanced antitrust in the United States.

In “From Market Power to State Capture: The Fateful Shift in Postwar Antimonopoly,” James Sparrow catalogs the fate of antimonopolism after the shift of domestic alliances within the antimonopoly coalition following World War II. Sparrow argues that the war changed who the antimonopolists were and what they were fighting against. The coalition transformed from a populist-progressive coalition of farmers and unions to a liberal one of independent businesses, trade associations, and consumer welfare advocates confronted with expanded global markets and a cartelistic defense industry. While this new coalition notched major wins, particularly against corporate mergers into the 1960s, it failed to withstand an anti-establishment assault on antitrust. Using the consumer welfare language of the antimonopoly in conjunction with

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established fears of state capture and Vietnam-era paranoia about the machinations of big government, critics of antimonopoly were able to capture the future of American antitrust policy.

The final section of this volume highlights some crucial issues and sectors in the development of contemporary American antimonopoly policymaking: tax, labor, and mass media. In “Antitrust and the Corporate Tax, 1909-1928,” Reuven Avi-Yonah examines a 20th century antitrust measure that lay outside the Sherman Act per se — the corporate tax act of 1909. After the enactment of the Clayton Act and the creation of the FTC in 1914, the corporate tax’s antimonopoly reputation faded somewhat. Between 1919 and 1928 most of its antitrust features were eliminated and were not revived during the New Deal. Nevertheless, Avi-Yonah argues that the corporate tax still retains some potential to contribute to limiting the power of monopolies, especially if the progressive corporate tax rate structure adopted in the 1930s and abolished in 2017 is revived.

Kate Andrias’s “Beyond the Labor Exemptions: U.S. Labor’s Antimonopoly Tradition and the Vision of a Democratic Political Economy,” traces the relationship between labor and antimonopolism from the late 19th century to the decades after World War II. These two activist traditions, Kate Andrias posits, were neither distinct from nor fundamentally incompatible with each other. Throughout the period, left-leaning industrial unions repeatedly and insistently used the language of antimonopoly to argue that private concentrations of economic power posed a grave threat to workers and to democracy. In labor’s view, however, the cure for monopoly power was not necessarily decentralization or smaller business organization. Rather, antimonopolism demanded that firms’ autonomy and power be democratically constrained by the

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firm’s workers and by a more democratic state. Ultimately, a commitment to antimonopolism meant a commitment to a more democratic political economy.

Finally, Sam Lebovic’s “Anti-Monopoly in the Media Industries: A History,” narrates the history of antimonopolism in the media industries of newspaper, radio, and television since the late nineteenth-century. Lebovic argues that, while concerns about media consolidation arose repeatedly across the century, efforts to address it were always partial and inadequate. The media industry’s convoluted economy made regulation difficult, and the industry fiercely resisted regulation, alleging statist censorship of the public sphere. As a result, while the middle decades of the twentieth century did see some experimentation with anti-monopolistic regulation in the media industries, these were never very effective or widespread. Media consolidation continued, largely unchecked, across the twentieth century and into the twenty-first.

IV. CONCLUSION

We suggest, then, that the time is more than ripe for a thorough reexamination of American antimonopoly and antitrust from the perspective of American democracy, broadly construed. Such a perspective recovers the broadest contours of a historic American antimonopoly tradition focused on the underlying problem of concentrations of private and public power in a self-governing democracy. And it simultaneously guards against the tendency to de-politicize American antitrust or competition policy as mere technical matters of law or economics.

In recent years, voices across American public life have suggested with increasing urgency that current policy has failed to sufficiently control economic concentration and has permitted the rise of powerful private firms that threaten to undermine American democracy.

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The essays in this volume make clear that such claims are anything but new. Throughout history, Americans have worried about the problems monopoly might pose for democracy and debated how best to regulate concentrations of economic power in order to protect and enable self-rule. At some points, antimonopoly pressures have produced measures designed to strengthen government's ability to limit or control private monopolies. At other times, they have reflected fears that a government strong enough to actually control such businesses might pose similar threats to democratic institutions and values.

Across this history there are several through-lines connecting democratic institutions, concentrated market power, and popular mobilizations. In this final section of the introduction, we offer some tentative hypotheses about these relationships in hopes that future scholarship might investigate them as part of the important scholarly work that remains to be done on the antimonopoly tradition in the political and economic development of the United States.

One through-line concerns the relationship between federalism and antimonopoly activism. As we have noted above, antimonopoly regulation has, at one time or another, been undertaken at every level of government: municipal, state, and federal. This broad and varied terrain has meant that even when antimonopoly action is stymied within one level of government or jurisdiction, it has often been possible in another. Further, the success of an antimonopoly technique in one domain can encourage emulation in others. For example, as Naomi Lamoreaux recounts in her chapter on antimonopoly amendments to state constitutions, actions in one state have at times become templates for actions elsewhere.

Another pattern related to variations across local, state, and national scales is that the reduction of market concentration at one level has at times failed to address concentration, or

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even exacerbated it, at others. Similarly to how the possibilities for antimonopoly activity have varied across jurisdictions, the impacts of anti-concentration actions have been disparate as well. For example, as Jamie Grischkan’s chapter suggests, state and federal prohibitions on branch banking (aimed at reducing concentration in banking) generally made it easier for unit banks to gain municipal-level monopolies on lending.⁷⁴ Throughout the volume, we see economic concentration as a hydra-headed problem—forcing decisions for prioritization of democratic pushback, as well as creating different ripple effects across jurisdictions.

Another thread running through this volume is that amid the near omnipresence of antimonopoly activity in American democracy, the coalitions that have organized to resist concentration have been dynamic and constantly shifting. Across the history surveyed in this book, we see groups unite against concentrated economic power but split over their diagnoses of the problems concentration creates and the policies they imagine to address them. Key players have included large businesses (big banks, plantation owners, conglomerates, Big Tech); small proprietors (including yeoman farmers, shopkeepers, unit bankers); and labor (individual workers and, eventually, organized labor).⁷⁵ Consumer groups, too, become important actors, especially in recent decades.⁷⁶ Understanding better when and why different interest groups have made common cause, why they’ve broken apart, and when individuals have acted on some of these identities over others—as consumers rather than as workers, for example—would be an

⁷⁴ “Banking and the Antimonopoly Tradition,” *infra* at ___

⁷⁵ See Kate Andrias, “Beyond the Labor Exemption” and Richard White, “From Antimonopoly to Antitrust,” *infra* at _

⁷⁶ See especially James Sparrow, “From Market Power to State Capture,” *infra* at ___

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important step forward in understanding the history (and imagining the future) of antimonopoly. As a starting point, it seems plausible that big business, small business, and labor have often been the most important coalitional elements and that when two of these groups have agreed, their coalitions have tended to carry the day.

Lastly, this history suggests that antimonopolism may have been a crucially important contributor to both prosperity and democracy in America. By creating countervailing forces against monopolies and concentrated economic power, antimonopolists may have helped to ensure that the American markets remained relatively free and fair, and that the wealth generated by them was distributed widely enough to enable greater innovation in the long run. To be sure, much work remains to be done to demonstrate whether and when this is so. But the stories in this volume suggest that Antimonopoly politics, which have countered anticompetitive concentration and expanded access to economic agency for long periods of American history, may have contributed to the exceptional long-term health of the American economy.⁷⁷ We hope future work will investigate this possibility.

⁷⁷ See Luigi Zingales, “Towards a Political Theory of the Firm,” *Journal of Economic Perspectives*, 31 (3): 113-30. Zingales argues that as firms amass economic resources rivaling those of national governments, they inevitably channel their wealth towards affecting political change to promote their further enrichment; thus results a “Medici vicious cycle” wherein firms’ economic and political power reinforce each other until neither economic nor political structures are competitive. Might the existence of robust antimonopoly organizing serve to counterbalance such tendencies in healthy political economies? See also ongoing debates among business scholars about the “Theory of the Firm,” exploring the contradiction that seems to emerge from Milton Freidman’s suggestion that shareholder value should be the sole goal of firms and the Stiglerian capture thesis. These are clearly articulated in Healy, Henderson, Moss, and Ramanna, “A Crisis in the Theory of the Firm,” October 13, 2015, available at <https://www.hbs.edu/faculty/Shared%20Documents/conferences/2015-crisis-in-theory-of-firm/Crisis%20in%20the%20Theory%20November%202015.pdf> Including a democracy’s antimonopoly activity in the model may help to resolve this apparent paradox while adding another important dynamic

Perhaps even more importantly, the histories in this book suggest that the influence of the antimonopoly tradition has protected American self-government and democracy. From the founding era⁷⁸ through the Cold War,⁷⁹ antimonopoly movements mobilized against the threats that economic concentrations posed to self-government. Across time, perceptions of how and why concentrations jeopardized democracy have varied – from diminishing the independence of individual citizens as political actors to directly abetting fascist coups. Absent this long tradition, American democratic institutions would certainly be different, and could quite plausibly be less effective, than they are today.

The time is more than ripe for this comprehensive and historical reexamination of the fraught relationship between democracy and American antimonopoly. This volume attempts to provide a much-needed historical reassessment of the development of the American antimonopoly tradition from its earliest incarnations to its most pressing present problems. It attempts to move beyond the interpretive boundaries of one particular school or another just as it attempts to broaden the range of antimonopoly inquiry beyond a concern with antitrust law per se. The host of different legal technologies and substantive policy orientations cataloged in this volume transcend the tried-and-true canon of great Supreme Court cases and mythic American trust-busters. With chapters organized along both periodic and thematic lines, this volume attempts to create an overall account that is both historically comprehensive and topically and

to consider: approaches to firm governance that seem benign in periods where countervailing power (through antimonopoly activism, among other potential mechanisms) is great may become pernicious when that power is attenuated.

⁷⁸ See Richard John, pg TK

⁷⁹ See Dan Crane, pg TK; James Sparrow pg TK.

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institutionally inclusive. It provides an alternative synthesized analysis of how Americans have instantiated the broader antimonopoly tradition in attempts to control both business and government power for the benefit of democracy and how these actions have shaped subsequent democratic outcomes. The chapters below detail the story and context of antimonopoly's many successes as well as its failures and inadequacies as a resource for those re-assessing the costs of "bigness" today. We hope this collaborative endeavor can help ground ascendant policy debates in a more diverse and reflective historical record and contribute to better informed decision- and policy-making going forward.

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