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LOCHNERIAN ANTITRUST

Daniel A. Crane*

Lochner's centennial anniversary is an appropriate moment to reflect on the relationship between antitrust and libertarianism. Is there room for antitrust in a Lochnerian world that strictly delimits the government's power to intervene in private market transactions? Perhaps the answer is unimportant, since *Lochner* perished in 1937 and spawned its own derivative verb ("Lochnerize"), roughly equal in dignity to "lobotomize."[1] Even such great "anti-precedents" as *Dred Scott*, *Plessy*, and *Korematsu* have not achieved the ignominious distinction of spawning their own verbs.[2] But although the constitutional doctrine of *Lochner* may be dead,[3] its spirit lives on in the anti-regulatory ideology of neoconservatism, which seeks to achieve Lochnerian goals through other legal doctrines such as the Takings and Contracts clauses as well as through more direct political action. So, for modern libertarians, the compatibility question is well worth asking.

Antitrust and the freedom of contract, two dominant ideologies in twentieth century American socio-political discourse, do not always coexist peacefully. It is enough to recall that a younger Alan Greenspan referred to antitrust as "reminiscent of Alice's Wonderland" and "utter nonsense"[4] and, as an economic adviser in

* Assistant Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University; J.D., University of Chicago, B.A., Wheaton College. Thanks to Eleanor Fox and the participants at the N.Y.U. Journal of Law & Liberty speaker series for helpful comments.

[1] BLACK'S LAW DICTIONARY 951 (7th ed. 1999) ("Lochnerize – to examine and strike down economic legislation under the guise of enforcing the Due Process clause . . .").

[2] In fairness, a WestLaw search reveals one use of "Dred Scotted" in a law review article, Richard K. Neumann, Jr., *On Strategy*, 59 FORDHAM L. REV. 299, 305 n.18 (1990), although that moniker has not yet found a home in *Black's Law Dictionary*. Grammatical intuition suggests that "Plessyed" or "Korematsued" would be an even harder sell.

[3] Or not. See Justice Stevens's dissent in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), worrying that the majority intends to bring back *Lochner*.

[4] Alan Greenspan, *Antitrust*, *in* CAPITALISM: THE UNKNOWN IDEAL 63, 66 (Ayn Rand ed., 1967). In characterizing the Sherman Act as "nonsense," Greenspan partook in a tradition at least as old as Oliver Wendell Holmes' remark to Solicitor General John W. Davis that "the Sherman law is damned nonsense." FRANCIS BIDDLE, JUSTICE HOLMES, NATURAL LAW, AND THE SUPREME COURT 9 (1961). Nonsense or not, Holmes was willing to enforce the Sherman Act, presumably since "the Fourteenth Amendment

the Ford administration, excused himself from antitrust discussions due to philosophical disagreement with the entire antitrust enterprise.[5] A sizeable, robust scholarship casts antitrust law as a monopolistic, rent-seeking activity whose primary function is to dole out pork to politically powerful interests under the guise of protecting the public.[6] Adherents to the antitrust-as-government-sanctioned-rent-seeking view may recall fondly that *Lochner* invalidated a New York statute that, in the name of public health and safety, protected the baker's union monopoly at the expense of new market entrants.[7] There is reason to believe, then, that the Lochnerian paradigm and those who continue to pay it homage should be hostile to antitrust law as applied to private action.

But there is another dimension to the Lochnerian paradigm that cautions against jettisoning antitrust in the name of freedom of contract and private enterprise. It is the freedom of the consumer, individual producer, artisan, or trader from the coercion of government-sanctioned monopolies. This theme is reflected amply in the pre-Sherman Act common law and in the antitrust ideology of the *Lochner* era. It helps to explain why the Supreme Court upheld the Sherman Act against substantive due process challenge in 1904 while invalidating a similar interference with the freedom of contract the next year in *Lochner*.

In this essay, I shall argue that modern libertarians who admire the spirit of Lochnerianism (even if not its juridical foundations)[8] need not be hostile to the antitrust enterprise. The kinds of concentrations of economic power with which the antitrust laws are concerned usually arise by virtue of the privileges granted by the state through the corporate charter. While these privileges may be socially desirable in that they permit stable aggregations of capital and efficiencies of scale and scope, the consequentialist argument for incorporation statutes does not entail the personal liberty and autonomy concerns that animate *Lochner*. Antitrust should not be categorically offensive to the libertarian mind to the extent that it acts as a limitation on the privileges and immunities bestowed upon corporations, the state's artificial creatures, which create the antitrust problem in the first place.

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does not enact Mr. Herbert Spencer's Social Statics." Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

[5] JEROME TUCCILLE, ALAN SHRUGGED: THE LIFE AND TIMES OF ALAN GREENSPAN, THE WORLD'S MOST POWERFUL BANKER 168-69 (2002).

[6] For a flavor, see THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC-CHOICE PERSPECTIVE (Fred S. McChesney & William G. Shughart II eds., 1995).

[7] *See infra* notes 15-19 and accompanying text.

[8] I do not argue here, nor do I believe, that *Lochner* was correctly decided as a matter of constitutional law. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 42-43 (1990). As one who believes that law should be governed by norms more specific than those governing politics generally, I have no difficulty in embracing the freedom of contract ideology of *Lochner* while generally agreeing with Justice Holmes's dissent as a matter of *law*. This essay is about political ideology generally, not about legal doctrine specifically. Apologies to those who find the distinction absurd.

This essay intertwines normative and descriptive elements. My ultimate purpose is normative—to convince the classical liberal or libertarian (or at least those that need convincing) that antitrust does not necessarily violate norms of personal autonomy and freedom of contract by intervening in consensual market transactions that do not entail force or fraud. To make this argument, I seek to explain, descriptively, how antitrust could have arisen in an era dominated by freedom of contract ideology. If freedom of contract and antitrust regulation were not viewed as necessarily inconsistent in the formative era of antitrust when freedom of contract ideology reached its peak, then perhaps modern libertarians who share the freedom of contract ideology of *Lochner* can find reasons to tolerate, or even embrace, certain aspects of antitrust.

Part I of this essay attempts to locate Lochnerianism, or at least the particular meaning of Lochnerianism that modern libertarians find congenial. Part II explores one significant strand of libertarian skepticism about antitrust—that it unduly interferes in private contractual relationships. Part III then explores the convergence of freedom of contract and antitrust ideologies that coincided during the *Lochner* era, with special reference to the role of the corporation in justifying antitrust. Finally, Part IV considers an alternative reconciliation of Lochnerianism and antitrust and shows the normative superiority of the corporatist model for modern libertarians.

I. Locating Lochnerianism

The conventional account views Lochnerianism as a social-Darwinian reaction to Progressive Era legislation intended to improve blue collar working conditions.[9] But Lochnerianism means different things to different people,[10] so I must begin by explaining my own understanding. And, although the protagonist of this essay is not so much the *Lochner* opinion itself but rather *Lochnerianism*, my account of the *ism* must begin with the *is*.

What actually happened in *Lochner*? In 1895, New York's legislature passed a Bakeshop Act, which specified sanitary and safety conditions for bakeshops and prohibited employing bakers more than ten hours per day or an aggregate of 60 hours per week.[11] Only the maximum hours provision was at issue in the *Lochner* litigation, and as is well known, it was invalidated by the Supreme Court.

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[9] *E.g.*, ARCHIBALD COX, THE COURT AND THE CONSTITUTION 135 (1987); FRANK R. STRONG, SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE 95 (1986).

[10] *See* David E. Bernstein, *Lochner Era Revisionism Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1 (2003); David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1 (2003).

[11] My historical account of the *Lochner* opinion and the Bakeshop Act derives primarily from HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993); PAUL KENS, LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL (1998); and

In thinking about *Lochner*'s implications for antitrust ideology, it is useful to consider the microeconomic structure of the baking industry at the turn of the century. At the time of *Lochner*, the bread-baking industry in New York was highly unconcentrated. Unlike the cracker industry, which saw consolidation to near-monopoly in 1898, the bread-baking industry existed on a small scale in basement workshops until 1910—well after *Lochner*—when bread trusts began to arise.[12] At the turn of the century, 78 percent of bakeries employed four or fewer bakers.[13] Journeyman bakers were employed by "master bakers" or "boss bakers" until they could break away and form their own bakeries.[14] Competition seems to have been as robust as any antitruster could have wanted.

Or at least competition was robust on the *production* side. The *labor* side was another matter. By the turn of the century, unionization was sweeping through the baking industry. Some labor organizers preferred collective bargaining to social legislation mandating working conditions and limiting working hours.[15] But not all workers could be, or necessarily wanted to be, unionized. In particular, the bakers unions faced an influx of competition from arriving immigrants who were willing to make it in the New World by working longer hours than the 10/60 maxima that labor sought through collective bargaining.[16] Bakers in the larger, generally unionized bakeries met little success in getting recent (and often Italian, French, or Jewish) immigrants to join the Bakery and Confectionary Workers' International Union.[17] The Bakeshop Act's maximum hours provision was prompted by organized labor to prevent end-runs around collective bargaining agreements and competition from "cheap" immigrant labor.[18]

It is thus not surprising that the *Lochner* prosecution was initiated by organized labor and not by Aman Schmitter, the ostensibly "injured" employee. Joseph Lochner, "an obscure owner of a small bakeshop in Utica, New York," apparently had a long-standing feud with the Utica branch of the journeyman baker's union.[19] In April, 1901, Lochner employed Schmitter in excess of 60 hours per week and shortly thereafter was arrested and indicted on misdemeanor charges. The com-

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David E. Bernstein, *The Story of* Lochner v. New York, *in* CONSTITUTIONAL LAW STORIES (Michael Dorf ed., 2003).

[12] KENS, *supra* note 11, at 7.

[13] *Id.*

[14] *Id.*

[15] *Id.* at 145.

[16] Bernstein, *supra* note 11, at 329. Bernstein notes that the larger, unionized bakeries tended to be staffed by bakers of German descent and came to face competition from "a hodgepodge of ethnic groups" working in smaller bakeries.

[17] *Id.* at 329-30. Even those unsympathetic to *Lochner* seem to agree that the baker's union had little success organizing recent immigrants among certain ethnic groups. *See* Sidney G. Tarrow, *Lochner Versus New York: A Political Analysis*, 5 LAB. HIST. 277 (1964) (asserting that "the union was not uniformly effective" because "the Italians and Jews . . . were poorly organized and easily exploited.")

[18] Bernstein, *supra* note 11, at 333.

[19] KENS, *supra* note 11, at 89-90.

plaint originated with the state factory inspector (deputized by the Bakeshop Act), but the impetus apparently came from the union.[20] Lochner chose not to contest the facts but rather to challenge the constitutionality of the Act. The New York Court of Appeals affirmed his conviction by a divided vote.

The Supreme Court reversed by a 5-4 margin, holding that the maximum hours portion of the Bakeshop Act violated the freedom of contract embodied in the Due Process Clause of the Fourteenth Amendment. But, importantly, Justice Peckham's majority opinion did *not* hold that the "freedom of contract" is absolute and inviolable by the state and indeed acknowledged that the state "has power to prevent the individual from making certain kinds of contracts."[21] Not even the most zealous libertarian would contend that the state should enforce a contract resulting in clear harm to third parties, such as a contract to commit murder. Beyond that extreme example, it was well-established at the time of *Lochner* that the state's police power permitted intervention in private contractual relations to prevent certain types of harm to the contracting parties themselves. Contemporaneous Supreme Court precedents had upheld exercises of state police power that truly were concerned with protecting public health, safety, or morals, even if the challenged statute could be said to interfere with the freedom of contract.[22] But, as Peckham saw it, the challenged portions of the Bakeshop Act were not motivated by a desire to protect health or hygiene. "[T]he real object and purpose were simply to regulate the hours of labor between the master and his employees . . . in a private business."[23] The state was seeking to "assume the position of a supervisor, or *pater familias*,"[24] not to protect the health of employees or of the bread-consuming public, but to redistribute power from employers to employees.

Further, the employees to whom power was redistributed might not be those directly implicated by the statute. As Peckham noted, "[t]he employee may desire to earn the extra money which would arise from his working more than the prescribed time, but this statute forbids the employer from permitting the employee to earn it."[25] Recall that the *Lochner* prosecution was likely prompted by the journeyman union, not by Aman Schmitter. The maximum hours provision could thus be understood as achieving class-based redistribution.[26] In the immediate

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[20] *Id.* at 90.
[21] Lochner v. New York, 198 U.S. 45, 53 (1905).
[22] Peckham cited three such cases: Holden v. Hardy, 169 U.S. 366 (1898) (upholding statute setting maximum hours for mine work except in cases of emergency); Atkin v. Kansas, 191 U.S. 207 (1903) (upholding maximum eight-hour work day for laborers employed on state projects); and Jacobson v. Massachusetts, 197 U.S. 11 (1905) (upholding compulsory vaccination law).
[23] 198 U.S. at 64.
[24] *Id.* at 62.
[25] *Id.* at 52-53.
[26] This is Howard Gillman's thesis. *See* GILLMAN, *supra* note 11, at 10 ("[T]he decisions and opinions that emerged from the state and federal courts during the *Lochner* era represented a serious, principled effort to maintain the central distinctions of nineteenth century constitutional law—the distinction between valid regulation, on the one hand, and invalid 'class' legislation, on the other."). *But see* Bernstein,

term, gains were redistributed from employers to employees, and in the longer term, from consumers to employees. It is against such legislation that the Lochnerian spirit stands.

Viewed through this lens, the Supreme Court's decision looks less like the barbaric outworking of Herbert Spencer's *Social Statics* than a fairly modern attempt to stymie interest-group politics. As Richard Epstein put it, "*Lochner's* maximum hour law allowed union bakeries to stifle competition from small nonunion firms run by recent immigrants—just as public choice theory predicts."[27] So understood, the Supreme Court's invalidation of the Bakeshop Act's maximum hours provision is consonant with the particular strand of "liberty" that libertarians find congenial. As a political norm, liberty of contract prohibits the state to interfere in private market bargaining for the purpose of redistributing the gains of trade that would obtain in a free, competitive market.

Of course, to speak of "redistribution" raises the question of baselines. In a limited sense, I agree with Cass Sunstein's conventional view that the *Lochner* Court acted as though "[m]arket ordering under the common law was . . . part of nature rather than a legal construct."[28] If all contractual relationships are merely constructs of the state, then there is no sense in speaking of a regulation as "redistributionist," except insofar as it changes the governmentally created status quo and therefore entails some wealth transfers during the transition to the new legal regime. The normative libertarian position does view the distribution of the gains of trade that occurs in an unregulated market as a baseline against which exercises of state power must be measured. As applied to contractual relations, a regulation is "redistributionist" if it assigns the gains of trade from one constituency to another differently than if the contract were merely enforced as agreed.

It is not my purpose here to defend the notion of pre-political baselines or Lochnerianism generally, but rather to speak about antitrust to those who believe that the government should not intervene in private market transactions solely to redistribute wealth. Having defined Lochnerianism as opposition to government intervention in contractual relations to redistribute wealth, we now turn from Lochnerianism generally to its implications for antitrust.

II. Antitrust as Interference with Freedom of Contract and Property

It is not hard to see that antitrust interferes with private contractual relations and is "redistributionist" in some sense of that word. But, as always, the difficulty in speaking about "redistribution" is ascertaining the baseline. On one view,

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Lochner's Legacy's Legacy, *supra* note 10 (disputing view that *Lochner* court believed that redistribution as compared to some common law baseline violated constitutional norms).

[27] Richard A. Epstein, *The Perils of Posnerian Pragmatism*, 71 U. CHI. L. REV. 639, 654 (2004).

[28] Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987).

the baseline for antitrust should be no different from the baseline for contractual relations generally. Thus, when the government prohibits Christie's and Sotheby's to agree between themselves on the commissions they will charge customers to auction valuable works of art,[29] the government mandates a distribution of the gains of trade more favorable to consumers and less favorable to producers than that which would obtain were the government simply to enforce as written (or, at least, fail to oppose) the agreements between Christie's and Sotheby's and between those firms and their customers. Much the same can be said for virtually any class of non-tortious conduct that antitrust law prohibits, such as tying, monopolistic merger, and market division agreements.[30] Thus, it is not difficult to articulate a Lochnerian argument that the entire antitrust enterprise is simply illegitimate.

With the benefit of price theory, it is possible to be generally suspicious of government intervention in consensual, non-fraudulent transactions and nonetheless believe that some forms of antitrust regulation are justified in order to maximize output and prevent deadweight losses.[31] But there are considerable obstacles to building a Lochnerian antitrust jurisprudence around neoclassical price theory, particularly the fact that the framers of the Sherman Act and the *Lochner*-era courts were probably unaware of price theory and its implications for antitrust analysis.[32] Further, consequentialist arguments for antitrust still must confront the Lochnerian argument that there is something morally troubling about government interventions in private transactions when those interventions have the effect of reallocating wealth to politically favored classes. Since virtually every antitrust intervention causes wealth redistributions,[33] the price theoretic arguments for antitrust do not meet a Lochnerian objection based on first principles of political economy.

It is thus not surprising that antitrust has long had vociferous libertarian critics. In *The Wealth of Nations*, Adam Smith poured cold water on state interference with collusive dealing. Smith's writing is often misunderstood to support government prohibition of dealer collusion because it begins with a statement on the harms of cartels: "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or

[29] *See* United States v. Taubman, 297 F.3d 161, 166 (2d Cir. 2002).

[30] Even under this view, certain forms of fraudulent or forceful conduct leading to monopoly—such as patent fraud or blowing up a competitor's factory—would be within the proper purview of government regulation, although query whether antitrust law would be necessary to police such wrongdoing.

[31] *E.g.*, RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 50-54 (1993) (defending antitrust regulation from libertarian perspective on wealth maximization grounds).

[32] *See* RUDOLPH J.R. PERITZ, COMPETITION POLICY IN AMERICA: 1888-1992: HISTORY, RHETORIC, LAW 203 (1996); Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 21 n.55 (1989); Louis Kaplow, *Antitrust, Law and Economics, and the Courts*, 50 LAW & CONTEMP. PROBS. 181, 207-08 (1987); David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1233-34 (1988); Frederick M. Scherer, *The Posnerian Harvest: Separating Wheat from Chaff*, 86 YALE L.J. 974, 977 n.20 (1977).

[33] Since demand is almost never perfectly elastic or perfectly inelastic, almost every reduction of monopoly power results in both redistribution of the gains of trade and a reduction in deadweight losses.

in some contrivance to raise prices."[34] The Government frequently quoted this passage to juries in price-fixing cases until the Second Circuit forbade it on the grounds that the jury would be confused into thinking that conspiracy can be inferred merely from the fact of a meeting of competitors.[35] A stronger ground for the ban would have been that the Government's reading from Smith left out the critical sentence that follows: "It is impossible indeed to prevent such meetings, by any law which could be executed, or would be consistent with liberty and justice."[36] For Adam Smith, prohibition of collusion—or at least meetings in which collusion would inevitably occur—could not be reconciled with the right to associate and contract free of governmental constraint.

Some, although surprisingly few, libertarian concerns were voiced at the time of the Sherman Act's framing. Senator William Stewart of Nevada complained that the bill interfered with "the sacred right of co-operation" and "strikes at the very root of self-preservation."[37] Senator Thomas C. Platt of New York opposed the bill on similar freedom of contract and association grounds:

> I believe that every man in business—I do not care whether he is a farmer, a laborer, a miner, a sailor, a manufacturer, a merchant—has a right, a legal and moral right, to obtain a fair profit upon his business and his work; and if he is driven by fierce competition to a spot where his business is unrenumerative, I believe it is his right to combine for the purpose of raising prices until they shall be fair and renumerative.[38]

Moving forward in time, a far more direct and virulent attack on the antitrust enterprise comes from Ayn Rand and Alan Greenspan in paired essays in Rand's collection of essays on capitalism.[39] Rand and Greenspan attack the Sherman Act and antitrust enforcement as an arbitrary, immoral, inefficient, and redistributionist regime. Rand articulates the general libertarian theory that "[t]he proper functions of a government are the police . . . the military forces . . . and the law courts to protect men's property and contracts from breach by force or fraud."[40] Measured against this libertarian baseline, the Sherman Act appears positively demonic:

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[34] ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 144 (R.H. Campbell & A.S. Skinner eds., Clarendon Press 1976) (1776).
[35] *Taubman*, 297 F.3d at 166.
[36] SMITH, *supra* note 34, at 144.
[37] HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 192 (1954). As Thorelli notes, Stewart's speech was somewhat confused since Stewart also argued that the bill "strikes at the very root of competition." *Id.* What Stewart appears to have meant is "that the best way to fight a combination is to set up a competing combination." *Id.*
[38] *Id.* at 198.
[39] *See* Ayn Rand, *America's Persecuted Minority: Big Business*, *in* CAPITALISM, *supra* note 4; Greenspan, *supra* note 4.
[40] *See* Rand, *supra* note 39.

> If I were asked to choose the date which marks the turning point on the road to the ultimate destruction of American industry, and the most infamous piece of legislation in American history, I would choose the year 1890 and the Sherman Act—which began that grotesque, irrational, malignant growth of unenforceable, uncompliable, unjudicable contradictions known as the antitrust laws.[41]

Rand then proceeds over the next few pages to inveigh against the Sherman Act with a series of epithets including "nightmare," "sophistry," "shocking," "gruesome," and "obscene." We are not left doubting as to her sentiments.

Greenspan's essay is somewhat less colorful but no less forceful in its condemnation of antitrust law in general and of Learned Hand's decision in the *Alcoa* case[42] in particular. Like Rand, Greenspan views antitrust as a series of unpredictable and irrational rules leading to post-hoc judgments that interfere with the ability of business people to enter into wealth-maximizing ventures. "To sum up: The entire structure of antitrust statutes in this country is a jumble of economic irrationality and ignorance."[43]

Even today, despite the significant gains of the Chicago School in reversing the most intrusive and economically unpopular antitrust doctrines, economic libertarians continue to complain about the very existence of antitrust law. Dominick Armentano complains that, "[t]he antitrust laws, by their very nature, appear to interfere with private-property rights. The antitrust prohibition of price-discrimination, merging, price-fixing, and even free-market monopolization prevents freely contracting parties who hold legitimate rights to property from making, or refusing to make, certain contractual arrangements that they believe to be in their best interests."[44] Armentano considers the possibility of an economic justification for antitrust in utilitarian wealth-maximization terms but rejects such a position because "from a strictly natural-rights perspective, the antitrust laws *are* inherently violative of property rights."[45]

From Adam Smith to the present, many libertarians have looked askance upon governmental intervention in consensual business transactions for the purpose of preventing monopolies or restraints of trade. They have tended to view antitrust as irrational and redistributionist interference with natural market forces. They have juxtaposed antitrust regulation to "liberty" in commercial transactions. They have assumed that this liberty protects not only the Joseph Lochners and

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[41] *Id.* at 49.
[42] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).
[43] Greenspan, *supra* note 4, at 70.
[44] DOMINICK T. ARMENTANO, ANTITRUST: THE CASE FOR REPEAL 99-100 (2d ed. 1999).
[45] *Id.* at 100 (emphasis in original).

Aman Schmitters but the John D. Rockefellers and Bills Gateses. We must now ask whether this should be so.

III. Antitrust as Limitation on Corporate Charter

A. The Ambiguous Meanings of "Liberty" and "Monopoly"

Lying at the core of the anti-anti-trust impulse is a commitment to personal liberty in commercial matters. But "liberty" is a slippery concept, and reconstructing the meaning of Lochnerian "liberty" is perilous. During the *Lochner* era, the word "liberty" had two distinct and often contradictory meanings: As Rudolph Peritz notes, "'[l]iberty' was taken to mean both freedom from governmental power and freedom from market power."[46] If we accept the latter definition, then "libertarianism" poses no obstacle to antitrust, which ostensibly "frees" consumers, competitors, and the public at large from the grip of undue economic concentrations. A large amount of turn-of-the-century "anti-trust" rhetoric assumes this meaning of "liberty." But freedom from concentrated economic power cannot be the meaning of "liberty" in the Lochnerian sense. After all, the Bakeshop Act ostensibly "liberated" journeyman bakers from the superior economic power of employers, and yet it was the employer's claim of contractual "liberty" that prevailed.[47] Lochnerianism views governmental power—not market power—as the threat to contractual liberty that must be checked.

Does this mean that the Lochnerian version of "liberty" entails hostility to antitrust law on the grounds that antitrust is governmental intermeddling in the operations of the free market? Not necessarily, for the market power may arise by virtue of governmental intervention in the market.[48] An important strand of anti-monopoly thought is libertarian in the Lochnerian sense—it traces the monopolistic evil to governmental distortions of market transactions.[49]

This strand of anti-monopoly ideology is historically significant. A persistent suspicion of governmentally-granted exclusive privilege permeates the common law and the rhetoric of the Framers. Sir Edward Coke argued that the common law forbade monopoly on the grounds that the Magna Carta—a constraint on the

[46] PERITZ, *supra* note 32, at 17.

[47] *See, e.g.*, Alan Meese, *Liberty and Antitrust in the Formative Era*, 79 B.U. L. REV. 1, 12 (1999) ("In Lochner . . . the conclusion that a maximum regulation was a 'labor law' designed to alter the economic balance between employer and employee was fatal to the enactment.").

[48] Both Rand and Greenspan acknowledge that the railroad trusts that provoked the public hostility leading to the passage of the Sherman Act were able to obtain such economic power due to "special privileges granted to them by the government." Rand, *supra* note 39, at 49; *see also* Greenspan, *supra* note 4, at 65.

[49] Even preceding the Sherman Act, there was a substantial literature claiming that long-term monopolies could not exist absent "artificial buttresses of governmental privilege and regulation." THORELLI, *supra* note 37, at 110. What I have in mind in this article is a much broader imputation of the monopoly problem to the government. The wide-spread dissemination of the corporate form, not simply interest-group regulation or special privilege, is responsible for the rise of monopolies.

crown—prohibited it.[50] The *Case of Monopolies*[51] (*Darcy v. Allen*), commonly identified as a significant common law precedent to the Sherman Act, invalidated a royal letter patent granting exclusive distribution rights over foreign-produced playing cards. When Adam Smith complained that "[m]onopoly . . . is a great enemy to good management . . . .",[52] he had in mind monopoly created by exclusive government privilege, not the aggregation of private market power.[53] The Founders similarly associated the evil of monopoly with governmental grant of exclusive privilege. During the Philadelphia constitutional convention, Madison's proposal to permit the federal government "to grant charters of incorporation" was defeated on the grounds that such charters would lead to "mercantile monopolies" (according to Rufus King of Massachusetts) and "monopolies of every sort" (according to George Mason of Virginia).[54]

It is well and good to say that the libertarian mind should find congenial limitations on governmentally sanctioned monopolies which are inconsistent with personal liberty, but how does that provide support for the Sherman Act? The Act prohibits monopolistic behavior without any requirement that the relevant market power arise by virtue of governmentally granted privilege. Many of the Act's proponents opposed concentrated market power regardless of its provenance. One answer is that the "antitrust problem"—the over-aggregation of economic power—arises because of state action of a particular kind: the grant of the corporate charter. This is true not only today but historically also. Indeed, as I shall argue, it was liberalization of state incorporation statutes that facilitated the rise of the great industrial trusts which led to the need for a federal antitrust regime.

B. The Rise of General Incorporation, Trusts, and Monopolies

The roots of the Sherman Act lie in the expansion of corporate powers following the Civil War. During Reconstruction, there was a "stampede" movement away from a special corporate charter model and toward general incorporation statutes.[55] By 1875, it was possible to incorporate under a general statute in almost every state, although significant restrictions on corporate scope and scale—including capitalization and asset ceilings, limitations on corporate purpose, and prohibitions against owning holding companies—remained in place.[56] In the dec-

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[50] William L. Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355, 356 (1954).
[51] 11 Coke 84, 77 Eng. Rep. 1260 (King's Bench 1602); *see also* United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 390 (1956) ("monopoly at common law was a grant by the sovereign to any person for the sole making or handling of anything so that others were restrained or hindered in their lawful trade").
[52] SMITH, *supra* note 34.
[53] Meese, *supra* note 47, at 17-18 ("According to Adam Smith, those who feared the creation of a monopoly without state aid might just as well fear witchcraft.").
[54] DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 141 (1990).
[55] Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 AM. U. L. REV. 81, 104 (1999).
[56] *Id.* at 107.

ades leading up to the passage of the Sherman Act in 1890, many states began to liberalize their general incorporation statutes to lift these restrictions and a "race toward the bottom" began.

Liberalization of state corporation law facilitated the rise of the great industrial trusts. At the same time that some states were passing anti-trust statutes aimed at preventing price-fixing and other restraints of trade, other states were liberalizing their corporate laws in an effort to attract large industrial firms to incorporate domestically.[57] For example, Kentucky and West Virginia adopted "corporation statutes [that were] marvels of alluring attractiveness for the incorporation of enterprises located in other states."[58] Among other things, states competing to become incorporation havens permitted corporations to own the stock of other companies, adopted favorable tax treatment for out-of-state earnings, permitted corporate charters to be obtained "for any lawful business or purpose whatsoever," dispensed with requirements that directors be state residents and that corporate meetings be held within the state, allowed unlimited amounts of capital stock, dispensed with shareholder liability for corporate debts, and did not require public disclosure of annual reports.[59] This corporate liberalization facilitated the very consolidation that many states, and eventually Congress, sought to stymie. As Ernst Von Halle reported in 1895: "We now have the strange spectacle of the enactment of the most severe laws against trusts and combinations on the one hand, and on the other of a transformation of the corporation law which facilitated the remodeling of the trusts, and their continued transaction of business in the state."[60]

It is perhaps too simplistic to say that lenient state incorporation laws were the sole root of the trust problem. After all, what Congress opposed was not *corporations* but *trusts*. Senator Sherman distinctly distinguished between the two:

> Associated enterprise and capital are not satisfied with partnerships and corporations competing with each other, and have invented a new form of combination commonly called 'trusts,' that seeks to avoid competition by combining the controlling corporations, partnership and individuals, and often under a the control of a single man called a trustee, a chairman or a president.[61]

In 1890, it was possible to view the distinctive *trust* problem as being one of private creation by contract, not one owing to the proliferation of state incorporation statutes following the Civil War.

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[57] ERNST VON HALLE, TRUSTS, OR, INDUSTRIAL COMBINATIONS AND COALITIONS IN THE UNITED STATES 92-97 (1896).
[58] *Id.* at 94.
[59] *Id.* at 94-96.
[60] *Id.* at 95.
[61] ALBERT H. WALKER, HISTORY OF THE SHERMAN LAW OF THE UNITED STATES OF AMERICA 13 (1910).

But even the "trust" problem was ultimately rooted in corporate law. The great trusts were themselves creatures of state law that permitted combinations of corporate stock and unified management and control of diverse corporations. The existence of such trusts and ultimately the existence of modern conglomerate corporate structure with chains of parent corporations and subsidiaries owes to state regulation of the corporate form. Unless state incorporation laws permitted corporations and holding companies to own the stock of other companies, the complex systems integrations achieved by the Rockefellers, Dukes, Morgans, and other industrial magnates of the Gilded Age could not have succeeded. For example, it was New Jersey's permissive regulations with respect to stock ownership by a corporation that facilitated the organization of the Standard Oil and Northern Securities trusts. Perhaps the earliest form of "anti-trust" enforcement in the United States was litigation against "holding companies and trusts for exceeding the privileges granted under state incorporation statutes."[62]

In short, at the foundational moments of American antitrust, it was easy to perceive that the antitrust problem was rooted in corporate liberalization and the opportunities for aggregating capital to exclusionary levels that such liberalization entailed.

C. Comparing *Lochner* and *Northern Securities*

Against this backdrop of corporate ascendancy, the Lochnerian mind distinguished between state interventions in contractual relations between private persons and state interventions in intra-corporate contracts resulting in undue aggregations of economic power. Such a distinction underlies the great *Northern Securities*[63] case, decided in 1904, the year before *Lochner*.

At issue in *Northern Securities* was an innovative merger between two railroad companies, the Great Northern, a Minnesota corporation, and Northern Pacific, a Wisconsin corporation, that ran competitive lines from the midwest to the Pacific northwest. In 1893, J.P. Morgan had sought to achieve the merger directly through a stock acquisition of Northern Pacific by Great Northern. In 1896, the Supreme Court upheld a Minnesota statute prohibiting any railroad corporation to acquire the stock of any competitive railroad, thus invalidating the merger.[64] Undeterred, Morgan formed a new corporation, Northern Securities, in New Jersey. As already mentioned, New Jersey had liberalized its corporate laws to permit holding companies, i.e. companies that merely owned the stock of other companies. Northern Securities then traded its own stock for controlling stock in Great Northern and Northern Pacific and, *voila!*, Morgan had outmaneuvered the Minnesota statute.

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[62] PERITZ, *supra* note 32, at 10.
[63] N. Sec. Co. v. United States, 193 U.S. 197 (1904).
[64] Pearsall v. Great N. Ry. Co., 161 U.S. 646 (1896).

He thought he had outmaneuvered the Sherman Act also, but the Supreme Court thought otherwise. A considerable portion of the voluminous *Northern Securities* opinion is consumed with demonstrating how the merger did (or did *not* to the dissenters) constitute a "combination in restraint of trade" and how it was (or was *not* to the dissenters) within the Congressional commerce power. Also interwoven throughout much of the majority and dissenting opinions is an issue of greater present relevance—whether application of the Sherman Act to prohibit the relevant purchases and sales of securities was an unconstitutional interference with the freedom of contract and property. The Court soundly rejected this argument, presaging Holmes's *Lochner* dissent: "Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine."[65]

It is important to note that, although the Court split 5-4, the alignment was different than the next year in *Lochner*. Holmes and White dissented in both *Lochner* and *Northern Securities*, Peckham and Fuller were in the majority in *Lochner* but dissented in *Northern Securities*, Harlan wrote the majority opinion in *Northern Securities* but dissented in *Lochner*, and Brewer, McKenna, and Brown were in the majority in both cases. It is also important to note that basis for the dissent was not Lochnerian opposition to interference with contractual freedom. Peckham had already authored the *Addyston Pipe*[66] opinion upholding the Sherman Act against a freedom of contract challenge. Dissenting in *Northern Securities*, Justice White did complain that the majority's reading of the Sherman Act "conflict[s] with the most elementary conceptions of rights of property,"[67] but the dissent did not speak in the voice of Lockean natural law. Rather, the dissenters complained of the extension of federal power over state property law matters. Even the dissenters had no doubt that the *states* had the power to prohibit such stock consolidations, as the Court had already held in *Pearsall*.[68]

What explains the Court's willingness to uphold a law prohibiting two railroads to merge into a single industrial entity while striking down a law limiting bakers' working hours? It was not that freedom of contract principles had application only to individual persons and not to corporations. The Supreme Court had long held that corporate charters are a species of contract subject to constitutional protection[69] and that corporations are "persons" for purposes of the due process clauses.[70] As a formal legal matter, corporations were free to assert the constitution-

[65] *N. Sec.*, 193 U.S. at 337.
[66] Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899); *see also* W.W. Montague & Co. v. Lowry, 193 U.S. 38 (1904) (another Peckham decision upholding application of Sherman Act).
[67] 193 U.S. at 370 (White, J., dissenting); *see also id.* at 372 (complaining about Court's "denial of rights of property").
[68] *See, e.g.*, *id.* at 398.
[69] Tr. of Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819).
[70] Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 189 (1888).

ally protected right to liberty of contract affirmed in *Lochner*, *Allgeyer*,[71] and *Adair*.[72] And, indeed, corporations were sometimes successful in such challenges.[73]

But though corporations were generally free to assert constitutional rights, this did not mean that these "artificial creatures"[74] of the states had due process right to *unfettered growth*. As Justice Brewer noted in his concurrence, a "corporation . . . is not endowed with the inalienable rights of a natural person. It is an artificial person, created and existing only for the convenient transaction of business."[75] Indeed, if the State of New Jersey had paused to think about it, the state would not have wanted those "who took advantage of its liberal incorporation laws . . . to destroy competition between two great railway carriers engaged in interstate commerce in distant states of the Union."[76] The Supreme Court had previously found in *Joint Traffic* that the liberalization of the corporate form created the evil the Sherman Act was intended to oppose: "It is the combination of these large and powerful corporations, covering vast sections of territory and influencing trade throughout the whole extent thereof . . . that constitutes the alleged evil" that Congress opposed.[77] Even the dissenters admitted that "the corporation is created by the state, and holds rights subject to the conditions attached to the grant, or to such regulations as the creator, the state, may lawfully impose upon its creature, the corporation."[78] Since the evil itself was a consequence of a governmental creation, the government was free to address the evil by limiting the powers of the corporations.[79]

It is here that we find an important difference between *Lochner* and *Northern Securities*. Joseph Lochner did not owe his superior economic position *vis à vis* the baker's union to any privilege granted by the state. The evil supposedly addressed by the Bakeshop Act did not arise by virtue of some power or immunity extended by a corporate charter. Joseph Lochner did not owe his commercial existence to the state. J.P. Morgan's corporations did. Absent New Jersey's liberal in-

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[71] Allgeyer v. Louisiana, 165 U.S. 578 (1897).
[72] Adair v. United States, 208 U.S. 161 (1908).
[73] The party that successfully invoked freedom of contract principles to ward off a restrictive Louisiana statute in *Allgeyer* was E. Allgeyer & Co.
[74] 193 U.S. at 333.
[75] *Id.* at 362 (Brewer, J., concurring).
[76] *Id.* at 345.
[77] *Id.* at 338 (quoting United States v. Joint Traffic Ass'n, 171 U.S. 505, 570 (1898)).
[78] 193 U.S. at 398 (White, J., dissenting).
[79] Of course, the government that created the evil was the state government that granted the certificate of incorporation, and the government addressing the evil through antitrust regulation was the federal government. Much of the *Northern Securities* decision turns on the jurisdictional question of whether the government that did not create the evil is the appropriate one to remedy it. As interesting as that question may be on federalism grounds, it is not of great interest to the freedom of contract question. In an ultimate normative sense, claims that an individual should be free to enter into consensual contractual relations without interference from the government are not much dependent on which government is seeking to interfere. As noted, even the *Northern Securities* dissenters acknowledged that the *states* would have had the authority to impose the kinds of restrictions on the use of the corporate form that the federal government sought to impose through the Sherman Act.

corporation statute, its grant of limited liability, perpetuation of existence, and fluidity in transfers of capital, and the many other advantages of incorporating over ordinary contracting,[80] the Northern Securities Company could not have posed a monopolistic threat to the northwestern railroad market. For Morgan to invoke due process rights to unlimited corporate size was not a request for the state to *leave him alone* but rather for the state *further to extend his privileges*. And that argument found little sympathy even in the *Lochner* era. As the leftist economist Henry Carter Adams wrote in 1894, "[a]t the bottom of every monopoly may be traced the insidious influence of the peculiar privileges which the law grants to corporations."[81] According to Adams, "corporations 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."[82]

Even in the *Lochner* era, the liberty of contract and of property did not entail a right to invoke the privileges of the corporate form and then insist on the right to be left alone by the government to expand the corporation to a monopolistic size. Antitrust law, as understood in *Northern Securities*, plays an important role in checking the occasional monopolistic tendencies that arise when the state creates an artificial person—a corporation—and endows it with super-human powers of aggregation, limited liability, and immortality.

IV. An Alternative Explanation and the Normative Superiority of the Corporatist Model

Were I to end here and conclude with the broad claim that Lochnerianism and antitrust can be reconciled simply because of the economic dislocations occasioned by the corporate form, I would be guilty of historical oversimplification and ignoring key features of the antitrust laws, particularly that the Sherman Act is not limited in scope to corporations. There is considerably more to the story, and it is told well by others. In a careful study of the coexistence between liberty of contract ideology and the rise of antitrust, Alan Meese shows that many lawyers, judges, and politicians in the formative era of antitrust were able to embrace both freedom of contract and antitrust ideology because "the competitive process, and the price

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[80] On the business advantages of the corporate form in the early Sherman Act era, see generally LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 511-31 (2d ed. 1985); JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970, at 24 (1970); RONALD E. SEAVOY, THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION, 1784-1855: BROADENING THE CONCEPT OF PUBLIC SERVICE DURING INDUSTRIALIZATION 50 (1982); and Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387 (2003).

[81] Henry Carter Adams, *Publicity and Corporate Abuses*, *in* 1 PUBLICATIONS OF THE MICH. POL. SCI. ASS'N 109, 116 (1894) (quoted in THORELLI, *supra* note 37, at 320). Adams, who served as chief statistician to the Interstate Commerce Commission, must not be mistaken for a defender of laissez-faire outside of the corporate environment. He wrote extensively against laissez-faire not only as applied to corporations, but as a political system in general. *See id.* at 131, 320.

[82] *Id.* at 320.

that it produced, were deemed 'natural,' even ordained by God."[83] Thus, natural law ideology could support both freedom of contract and restrictions on acts designed to distort the natural state of the competitive market.

While this account may be descriptively accurate in part, it does not provide a satisfactory *normative* reconciliation between Lochnerianism—the historical phenomenon and enduring ideology—and the enterprise of antitrust. As Meese notes, "such a conclusion [that the competitive market state is a natural law baseline] seems at odds with the anti-redistributional character of Lochner-era jurisprudence . . . ."[84] Market forces quite "naturally" produce both collusion and efforts to exclude competitors, and governmental efforts to stymie those phenomena lead to a different distribution of wealth than what would obtain in a free market.

The more modern account of contractual liberty focuses not on natural states in a Platonic sense but on the relationship between the individual and the government. Liberty, the baseline, is the state of being free from the coercive power of the state to enter into those agreements and projects that the individual prefers. This 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. Thus, at the risk of oversimplifying and possibly even being anachronistic, one can reconcile Lochnerianism and antitrust through a focus on the strand of turn-of-the-century thought that attributed the antitrust problem to the unique aggregations of capital enabled by the corporate form.

It is important to distinguish the view asserted here from the more general proposition that corporations should not be permitted to invoke any rights of liberty or autonomy.[85] The point made here is not that corporations lack any claim to "rights" in the classical liberal sense since they are artificial creatures created at the pleasure of the state, but rather that it is the very fact of incorporation and state-granted privilege that creates the substantive "evil" the antitrust laws are intended to prevent. Absent the power of corporations to perpetuate their existence intergenerationally, attract capital with the promise of limited liability, and aggregate large amounts of capital in the hands of unified management, there would be little need for the antitrust laws. While individuals are often the subjects of antitrust enforcement, at least today those individuals are generally organizers or executives of corporations. It is rare to discover an antitrust matter in which individuals uncon-

[83] Meese, *supra* note 47, at 91.
[84] *Id.*
[85] *See, e.g.*, Hale v. Henkel, 201 U.S. 43, 78 (1906) (Harlan, J., concurring) (since a corporation is "an artificial being, invisible, intangible, and existing only in the contemplation of law," it cannot claim any constitutional rights) (quoting Teachers of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819)).

nected to a corporation have aggregated a sufficient amount of economic power to threaten the competitiveness of a market.[86]

The antitrust-as-limit-on-government-sanctioned-monopoly thesis provides an attractive way for modern libertarians to shed some of their hostility toward antitrust. It does not, of course, entail an open-armed embrace of the entire culture and jurisprudence of modern or historical antitrust. There certainly remain redistributionist and protectionist strains in antitrust (the Robinson-Patman Act comes to mind) about which Lochnerianism has something to say. Rand and Greenspan's objection to the unpredictability of antitrust enforcement, the post facto nature of its standard-specification, and the *in terrorem* effects of treble damages lawsuits are all well taken. Perversely, the *Parker*[87] doctrine holds that state-sanctioned monopolies are immune from the reach of the Sherman Act, which turns on its head the original meaning of "monopoly" as a government-granted special privilege. And many Lochnerian libertarians will also be sympathetic with consequentialist critiques of certain aspects of antitrust as inefficient and burdensome.

Finally, the corporatist justification of antitrust raises the problem of unconstitutional conditions, which generally arises where the Government uses the power of the purse or the sword (funding with attached strings or granting conditional permission to do what is otherwise prohibited) to exact constitutionally troubling concessions.[88] The greater power does not always include the lesser. For example, highly redistributive taxation on corporations raises libertarian concerns, even though it is hard to see the libertarian claim to entitlement to a corporate charter from the state. In the takings context, the Supreme Court has rightly required a nexus in both *kind* and *degree* between the externality arising from the conduct the individual seeks permission to undertake and the concession exacted by the state in exchange for permission.[89] To the extent that the state attempts to use its status as progenitor of the corporate form to justify antitrust restrictions unrelated to the harms caused by over-aggregations of capital, a similar line of reasoning calls into question the legitimacy of the state's actions.

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[86] Although a few cases do come to mind. *But see, e.g.*, FTC v. Superior Trial Court Lawyers Ass'n, 493 U.S. 411 (1990) (finding unlawful agreement by trial lawyers to boycott indigent representation work until courts increased lawyers' fees).

[87] Parker v. Brown, 317 U.S. 341 (1943). As Richard Epstein argues, "[w]hat happens [under *Parker*] is that this legal regime marks a complete inversion of the proper approach. State-sponsored cartels in the aftermath of the New Deal legitimation are more permanent and more dangerous than privately-operated ones, but they are given complete immunity from the antitrust act." Symposium, *The Proper Goals of Antitrust: When Public and Private Interests Collide*, 9 LOY. CONSUMER L. REV. 112, 125 (1997).

[88] *See generally* Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1 (2001).

[89] *See* Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987). *See generally* Daniel A. Crane, *A Poor Relation? Regulatory Takings After* Dolan v. City of Tigard, 63 U. CHI. L. REV. 199 (1996).

Despite these critiques of the *substance* of antitrust, economic libertarians need not be critical of the mere *existence* of antitrust. If tomorrow the State of Delaware were to announce that any new business incorporated in that state would be limited to a certain market capitalization, prohibited from engaging in specified business practices, and could never merge with a horizontal competitor, it is hard to imagine the Lochnerian objection. Putting aside federalism issues, this is just the sort of function that antitrust may be understood to perform in the ordinary case. Viewed as a species of corporate limitation on creatures the state creates, antitrust is quite comfortable even in a Lochnerian world.

Conclusion

Defending a twenty-first century legal regime with late nineteenth century political ideology is an inherently slippery undertaking. Even during the founding era of antitrust, words such as "liberty" and "monopoly" had multiple and often conflicting meanings. And, of course, those meanings morphed considerably over time. Antitrust has come a long way since the early days—and so has freedom of contract and property.

Yet, despite the conflicting meanings and historical changes, there is sufficient commonality between the Lochnerian enterprise and modern economic libertarianism and between the antitrust of the founding era and today to make comparisons viable. A Lochnerian justification for antitrust, grounded in the unique dangers created by the corporatization of industry, should not sound too strange to modern libertarian ears. To the remnant still sympathetic to Lochnerianism, there are important lessons to be learned from antitrust in the era of *Lochner*.