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## Accommodating Competition: Harmonizing National Constitutional and Antitrust Commitments

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ACCOMMODATING COMPETITION: HARMONIZING  
NATIONAL ECONOMIC COMMITMENTS

JONATHAN B. BAKER\*

ABSTRACT

*This Article shows how the norm supporting governmental action to protect and foster competitive markets was harmonized with economic rights to contract and property during the 19th century, and with the development of the social safety net during the 20th century. It explains why the Constitution, as understood today, does not check the erosion of the entrenched but threatened national commitment to assuring competitive markets.*

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## INTRODUCTION

At two critical moments, the United States worked out ways to harmonize a national commitment to protect and foster competitive markets with other deep public commitments affecting economic regulation. In the nineteenth century, the Supreme Court confronted the problem of whether a government that is required to protect contract and property rights could also act to prevent the exercise of market power.<sup>1</sup> Any restraint on a seller's ability to charge monopoly prices, after all, would necessarily limit its contractual freedom and constrain how it uses its private property.<sup>2</sup> Later, in the mid-twentieth century, the political system had to reconcile the important public role in assuring competitive markets with the government's ability to displace competition in order to protect the vulnerable.<sup>3</sup> This Article will examine those critical moments, with a focus on the way the legal and political system accommodated the competition norm.

The first of the three public commitments involving economic regulation, the protection of property and contract rights, is recognized in the Constitution.<sup>4</sup> The other two commitments, to assuring competitive markets and to preventing economic hardships to vulnerable market participants through social insurance and regulation, lack direct textual support in the Constitution. They nevertheless have become deeply entrenched norms of the type that William Eskridge and John Ferejohn refer to as "superstatutory."<sup>5</sup> Accordingly, the nineteenth century harmonization problem required the Supreme Court to construe the constitutional mandate for public protection of economic rights so that it would accommodate what was then an emerging norm of permitting governmental

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1. See *infra* Part II.

2. See *Munn v. Illinois*, 94 U.S. 113, 142-43 (1877) (Field, J., dissenting) (stating that legislative determination of the price that an owner will receive for the use of his property is the practical equivalent of a deprivation of private property).

3. See *infra* Part III.

4. See U.S. CONST. art. I, § 10, cl. 1; *id.* amend. V.

5. See WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 16-17 (2010).

action to protect competition.<sup>6</sup> The twentieth century harmonization problem was worked out by the political system as a whole, not just the courts, after the Supreme Court accepted that economic rights did not prevent wide-ranging regulation and redistribution.<sup>7</sup>

One might think that the judiciary would resolve any conflict between a constitutionally recognized commitment and a subconstitutional commitment—the harmonization issue that arose during the nineteenth century—by allowing the former to trump the latter.<sup>8</sup> That did not happen. Rather, the commitment to competitive markets probably had more protection in the courts in the late nineteenth century than it does today, after the mid-twentieth century resolution of the conflict between subconstitutional commitments.<sup>9</sup> That is one reason why the public commitment to assuring competitive markets is now endangered.<sup>10</sup>

Part I of this Article sketches the three entrenched public commitments involving economic regulation. Parts II and III explain how the commitments were accepted and harmonized in the nineteenth and twentieth centuries. Part III also explains why the Constitution does not stand in the way of the erosion of competition commitment. Part IV concludes with a brief skeptical discussion of the possibility of constitutionalizing a commitment to competition.

### I. THREE PUBLIC COMMITMENTS

Three broad public commitments—entrenched norms accepted and enforced by public institutions—underlie the modern U.S. economy: (1) the protection of private economic rights to property and contract,<sup>11</sup> (2) the protection or fostering of competition among firms,<sup>12</sup> and (3) a social safety net to protect those vulnerable to

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6. Cf. William J. Novak, *Law and the Social Control of American Capitalism*, 60 EMORY L.J. 377, 398 (2010) (stating that police power regulation saw “insistent expansion” from 1877 to 1932).

7. See *infra* notes 92-94, 107-10 and accompanying text.

8. See U.S. CONST. art. VI, cl. 2. (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land.”).

9. See *infra* notes 39-42, 80-82 and accompanying text.

10. See *infra* notes 124-25 and accompanying text.

11. See *infra* Part I.A.

12. See *infra* Part I.B.

hardship from market forces.<sup>13</sup> The first of these commitments has explicit constitutional protection.<sup>14</sup> The others can be understood today as supra-constitutional norms.<sup>15</sup> The three commitments will be sketched, but on the whole this Article will take them as given. The Article is concerned primarily with the way the competition commitment has been implemented and protected, not with the contours of the three commitments or how they were established.

### A. *Private Economic Rights*

The Constitution recognizes protection of both contract and property rights as public commitments. The states may not impair the obligation of contracts.<sup>16</sup> The Fifth Amendment forbids the federal government from taking private property for public use without just compensation.<sup>17</sup> The Takings Clause was extended to the states by incorporation through the Due Process Clause of the Fourteenth Amendment.<sup>18</sup> During the late nineteenth century, the Supreme Court famously interpreted the latter provision to protect the “liberty of contract.”<sup>19</sup>

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13. See *infra* Part I.C.

14. See *infra* notes 16-19 and accompanying text.

15. See ESKRIDGE JR. & FEREJOHN, *supra* note 5, at 16-17 (regarding both antitrust and social insurance as fundamental norms found in “federal superstatutes”). If the commitment to a social safety net has a constitutional hook, it would be the Income Tax Amendment, ratified in 1913, which made it practical for the federal government to engage in redistribution. U.S. CONST. amend XVI. But Social Security, the most important marker of the public commitment to a social safety net, was not placed on firm constitutional footing until a quarter-century later. See *infra* note 94.

16. U.S. CONST. art. I, § 10, cl. 1. The Supreme Court has declined to apply Contract Clause principles to the federal government through the Fifth Amendment Due Process Clause. *Pension Benefit Guar. Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 731-34 (1984) (holding retroactive federal economic legislation constitutional and refusing to apply heightened judicial scrutiny regardless of the Contract clause standard); *cf.* *United States v. Winstar Corp.*, 518 U.S. 839, 875-76 (1996) (suggesting the possibility of some due process protection for vested rights created by federal legislation, but describing due process standards as “less exacting” than contract clause standards and the scope of their protection as “obscure”).

17. U.S. CONST. amend. V.

18. U.S. CONST. amend. XIV, § 1; see, e.g., *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 241 (1897) (holding that the Due Process Clause of the Fourteenth Amendment required Illinois to award just compensation when taking private property for public use); *Mo. Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 417 (1896) (holding that a state order requiring a railroad to surrender part of its land was a taking that violated the Fourteenth Amendment).

19. See, e.g., *Lochner v. New York*, 198 U.S. 45, 53-54, 61 (1905) (holding that a New York

### *B. Competitive Markets*

The Supreme Court has frequently described the antitrust laws in near-constitutional terms. It has called the Sherman Antitrust Act,<sup>20</sup> the first and most important federal antitrust statute, “the Magna Carta of free enterprise,”<sup>21</sup> and “a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.”<sup>22</sup> “The heart of our national economic policy,” the Court has stated, “long has been faith in the value of competition.”<sup>23</sup>

During the nineteenth century, as detailed below, the Supreme Court construed economic rights to permit public protection of competition.<sup>24</sup> But competition was not fully established as an entrenched norm until the twentieth century.<sup>25</sup> Eskridge and Ferejohn view it as established not in 1890, when Congress passed the Sherman Act, but in 1914, with congressional passage of the Clayton Act on the heels of a presidential election fought over the economic role of large firms.<sup>26</sup> But the contours of the competition norm were strongly contested in domestic politics through the

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statute limiting the hours bakers could work interfered with the right of contract and thus violated the Due Process Clause of the Fourteenth Amendment); *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (holding that a Louisiana statute prohibiting foreign insurance companies from conducting intrastate business without maintaining at least one place of business and an authorized agent in the state violated the Due Process Clause of the Fourteenth Amendment).

20. 15 U.S.C. §§ 1-7 (2012).

21. *United States v. Topco Assocs. Inc.*, 405 U.S. 596, 610 (1972).

22. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958); *see also Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 415 (2004); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933).

23. *Nat'l Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (quoting *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951)).

24. *See infra* Part II.

25. *See infra* Part III.

26. *ESKRIDGE JR. & FEREJOHN, supra* note 5, at 123-34. For Eskridge and Ferejohn, a superstatutory principle or policy becomes entrenched when a statute is prompted by an important public need, implemented successfully to further its goals, able to attract enthusiastic and growing public support, and ratified by a subsequent legislature. *Id.* at 17; *see also* TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* 77 (2018) (describing the 1914 enactment of federal antitrust legislation as “arguably of Constitutional significance”).

1930s,<sup>27</sup> and the antitrust laws were effectively suspended for a time during the early New Deal.<sup>28</sup> For that reason, I view the public commitment to a competition norm as established later, during the 1940s.<sup>29</sup>

### C. Social Safety Net

The federal programs we think of today as creating a social safety net were mainly established in their modern form during the New Deal, though they had Populist and Progressive predecessors, including in the states, and they have been augmented since the 1930s. These programs include government-run insurance (such as Social Security, Medicare, the Affordable Care Act, and unemployment insurance), direct governmental provision of services (including the welfare system and Head Start), and tax policy (including deductions for expenditures on child care, education, and job training).<sup>30</sup> The safety net also includes various regulatory programs

27. See Jonathan B. Baker, *Competition Policy as a Political Bargain*, 73 ANTITRUST L.J. 483, 499 (2006).

28. See National Industrial Recovery Act, Pub. L. No. 67, §§ 2-3, 48 Stat. 195, 195-97 (1933) (creating the National Recovery Administration allowing them to create judicially enforceable “codes of fair competition”); Jason E. Taylor, *Cartel Code Attributes and Cartel Performance: An Industry-Level Analysis of the National Industrial Recovery Act*, 50 J.L. & ECON. 597, 598, 600 (2007) (describing the National Industrial Recovery Act as “a 23-month experiment in government-sponsored cartels” that allowed “businesses ... to engage in collusive behavior”). A contemporaneous Supreme Court decision adopted a lax attitude toward price fixing among rivals. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 373-75 (1933).

29. See Baker, *supra* note 27, at 501-02 (noting that the regulation of “large firm conduct ... became the basis of national regulatory policy” during this time); see also Jonathan B. Baker, *Economics and Politics: Perspectives on the Goals and Future of Antitrust*, 81 FORDHAM L. REV. 2175, 2182-83 (2013) [hereinafter Baker, *Economics and Politics*]; Jonathan B. Baker, *Preserving a Political Bargain: The Political Economy of the Non-Interventionist Challenge to Monopolization Enforcement*, 76 ANTITRUST L.J. 605, 607-08, 630-31 (2010) [hereinafter Baker, *Preserving a Political Bargain*]. Eskridge and Ferejohn might say that I have described what they term a cycle of entrenchment and disentanglement, followed by entrenchment. See ESKRIDGE JR. & FERREJOHN, *supra* note 5, at 303-04.

30. See *What Are the Major Federal Safety Net Programs in the U.S.?*, U.C. DAVIS CTR. FOR POVERTY RES., <https://poverty.ucdavis.edu/article/war-poverty-and-todays-safety-net-0> [<https://perma.cc/J2TD-AL4M>]. Owners of firms are insulated from the vagaries of the market to some extent too, through the limited liability accorded to corporate shareholders. See Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479, 483 (2001) (arguing for the abolishment of a prominent exception to general limitation on shareholder liability for corporate debts or tortious actions). But the U.S. has not created a general safety net for producers.



offering protection against economic hardship to vulnerable groups, such as agricultural price supports,<sup>31</sup> minimum wage legislation,<sup>32</sup> and requirements that certain businesses provide service to all comers on nondiscriminatory terms.<sup>33</sup>

Two decades after the enactment of Social Security, President Eisenhower—the leader of the political party that was home to many opponents of social insurance—recognized that social safety net programs had come to reflect an entrenched public norm.<sup>34</sup> In private correspondence with his brother, Eisenhower observed, “Should any political party attempt to abolish social security, unemployment insurance, and eliminate labor laws and farm programs, you would not hear of that party again in our political history.”<sup>35</sup> The appropriate and constitutionally permissible extent of the safety net continues to be debated, as reflected in legal and political battles over the Affordable Care Act.<sup>36</sup> But as Eisenhower recognized sixty-five years ago, a substantial social safety net is now an accepted superstatutory norm.

#### *D. Commitments in Tension*

The three public commitments shaping the governmental role in economic life have an obvious potential for tension. A thoroughgoing effort to protect economic rights could insulate the exercise of market power from government intervention. For example, one might say it encroaches on property and contract if a firm is prevented from charging a monopoly price to a willing buyer,<sup>37</sup> or

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31. See generally GEOFFREY S. BECKER, CONG. RESEARCH SERV., 96-900 ENR, FARM COMMODITY LEGISLATION: CHRONOLOGY, 1933-2002 (2002).

32. E.g., 29 U.S.C. § 206 Supp. II 2015 (establishing a federal minimum wage).

33. RICHARD J. PIERCE, JR. & ERNEST GELLHORN, REGULATED INDUSTRIES 165-67, 217-18 (4th ed. 1999) (discussing prohibitions on undue discrimination in rate-setting by regulated utilities and obligations of regulated utilities to provide service); 47 U.S.C. § 202 (2012) (setting forth common carrier obligations of communications providers).

34. Letter from Dwight David Eisenhower to Edgar Newton Eisenhower (Nov. 8, 1954), in 15 THE PAPERS OF DWIGHT DAVID EISENHOWER 1386, 1386 (Louis Galambos et al. eds., 1996).

35. *Id.*

36. See generally Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (deciding the constitutionality of the individual mandate and Medicaid expansion provisions of the Affordable Care Act).

37. See *Munn v. Illinois*, 94 U.S. 113, 142-43 (1876) (Field, J., dissenting) (stating that

prevented from making exclusive agreements with suppliers or distributors that benefit both contracting parties but have the effect of limiting competition by excluding rivals from access to customers or the market. Thoroughgoing protection of economic rights could also inhibit the development of social insurance by precluding the progressive taxation required for redistribution, or by blocking other safety net programs on the argument that the public may not regulate in ways that restrict the way firms exercise their property rights.<sup>38</sup> One could also imagine the reverse, where an exclusive focus on protecting competition or implementing a strong social safety net would be said to undermine economic rights.

The other pair of commitments, to competition and a social safety net, could also be in tension. Competition leads to losers as well as winners, while social insurance ameliorates losses. Hence a thoroughgoing commitment to protecting vulnerable farmers, workers, and families from the vagaries of the marketplace could lead to the adoption of policies that limit competition. Conversely, strong protections for competition, letting the chips fall as they may, would limit the tools available for strengthening the social safety net.

## II. HARMONIZING COMPETITION WITH PRIVATE RIGHTS

During the nineteenth century, the commitment to protection of private economic rights had to be harmonized with the emerging, but not fully established, commitment to competition (as well as with an early aspect of the safety net, the need for health and safety regulation). Doing so was importantly a problem for the courts because contract and property were accorded constitutional protection.<sup>39</sup> The doctrinal solution was found in the police power, which functioned as an exemption to that protection for government efforts to assure competitive markets.<sup>40</sup> The key judicial landmarks,

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legislative determination of the price that an owner will receive for the use of his property is the practical equivalent of a deprivation of private property).

38. Cf. Leo P. Martinez, "To Lay and Collect Taxes": *The Constitutional Case for Progressive Taxation*, 18 YALE L. & POL'Y REV. 111, 113-14 (1999) (disputing the claim that progressive federal taxation violates the Takings Clause).

39. See U.S. CONST. art. I, § 10, cl. 1; *id.* amend. V.

40. By contrast, before the New Deal, the police power was generally thought not to permit redistribution, a key building block for the modern social safety net. See James May,

discussed below, were two Supreme Court decisions: *Munn v. Illinois*, an 1877 decision holding that the Constitution permitted state regulation of monopolies,<sup>41</sup> and *Addyston Pipe & Steel Co. v. United States*, an 1899 decision that confirmed the constitutionality of the federal antitrust laws.<sup>42</sup>

### A. *Munn*

Forty years before *Munn*, the Supreme Court famously confronted the tension between private economic rights and competition in *Charles River Bridge v. Warren Bridge*.<sup>43</sup> The case was brought by the owners of a toll bridge chartered by the Massachusetts legislature in 1785.<sup>44</sup> They argued that in 1828, the legislature had impaired the constitutional obligation not to undermine contract rights by permitting another firm to construct a second bridge next to the first.<sup>45</sup> The constitutional issue depended on the scope of the property right conferred by the first bridge's charter—that is, on whether the charter gave the first bridge the exclusive right to span the river, and if so for what distance?<sup>46</sup>

The Court held that the state legislature had not granted the first bridge a right that excluded the second bridge, and so it had not

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*Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1800-1918*, 50 OHIO ST. L.J. 257, 263-65 (1989).

41. 94 U.S. 113.

42. 175 U.S. 211 (1899).

43. 36 U.S. (11 Pet.) 420 (1837). Ten years earlier, the Court had upheld the constitutionality of a prospective debtor relief law enacted by New York under the Contract Clause. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 313 (1827). *Ogden* created space for states to address pressing public needs by establishing that states could legislate prospectively in ways that affected contracts. *Id.* at 260-61, 267. States eventually began to condition new corporate charters on the acceptance of future regulation, thereby effectively removing the terms of such charters from Contract Clause protection over the course of the ensuing century. See Jonathan B. Baker, *Has the Contract Clause Counter-Revolution Halted? Rhetoric, Rights, and Markets in Constitutional Analysis*, 12 HASTINGS CONST. L.Q. 71, 80 (1984).

44. *Charles River Bridge*, 36 U.S. (11 Pet.) at 536.

45. *Id.* at 537. The Contract Clause was implicated because corporate charters are understood to be contracts between the firm's owners and the state. Baker, *supra* note 43, at 80. At the time, corporations were chartered individually by state legislatures for specified and limited purposes. See *Charles River Bridge*, 36 U.S. at 543-44 (comparing the right to operate a ferry granted under one charter with the rights given to build a bridge in its place, granted under a different charter).

46. *Charles River Bridge*, 36 U.S. (11 Pet.) at 539-40.

acted inconsistently with its constitutional obligation.<sup>47</sup> The legal issue was entwined with the policy question of whether competition or monopoly was more important for promoting economic progress. Chief Justice Taney, writing for the court, worried that a decision for the first bridge would allow turnpikes and canals to block the development of railroads along the same line of travel.<sup>48</sup> Justice Story, who dissented, thought that failing to protect property rights would discourage investment because firms would fear that if rival investments succeeded, new competitors would appropriate the return properly accruing to the initial investor.<sup>49</sup>

The *Charles River Bridge* decision ameliorated the tension between economic rights and competition by making clear that the Supreme Court would not assume a legislative intent to displace competition; an express and unambiguous statutory mandate would be required.<sup>50</sup> *Munn* went further by establishing that the states had the inherent police power to respond to the exercise of market power by regulating prices.<sup>51</sup> Viewed more broadly, it established that constitutional protections for private property did not prevent regulation in the service of the public good when markets did not perform competitively.

The Illinois law at issue in *Munn* set a maximum price that warehouses (grain elevators) could charge for grain storage in Chicago.<sup>52</sup> Chicago was the central transportation hub for grain shipped from farms across the Midwest to large port cities along the Atlantic, where it would be sent to Europe.<sup>53</sup> The grain trade was described as “form[ing] the largest part of inter-state commerce,” linking “seven or eight of the great States of the West with four or

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47. *Id.* at 548-49.

48. *Id.* at 552-53.

49. *Id.* at 608 (Story, J., dissenting).

50. *See id.* at 549 (majority opinion).

51. *Munn v. Illinois*, 94 U.S. 113, 125, 133-34 (1877). The reserved police powers doctrine arguably derives from *Charles River Bridge*. JAMES WILLARD HURST, LAW AND MARKETS IN UNITED STATES HISTORY 84-85 (1982). Nineteenth century Contract Clause decisions often relied on the police power. *See, e.g.*, *Stone v. Mississippi*, 101 U.S. 814, 821 (1879); *Fertilizing Co. v. Hyde Park*, 97 U.S. 659, 670 (1878); *W. River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 531-32 (1848).

52. *Munn*, 94 U.S. at 123.

53. *Id.* at 130.

five of the States lying on the sea-shore.”<sup>54</sup> Chicago had fourteen “immense” grain warehouses, all centrally located between the rail terminal and river harbor.<sup>55</sup> The fourteen warehouses were controlled by nine firms that fixed prices annually, potentially making them “a ‘virtual’ monopoly.”<sup>56</sup>

The plaintiff warehouses had argued that the state’s price regulation was inconsistent with the Fourteenth Amendment’s prohibition against depriving any person of property “without due process of law.”<sup>57</sup> The Court held that this constitutional provision did not limit the state, in the exercise of its police power to protect the public from injurious activities, from regulating private property “affected with a public interest,” including by regulating the maximum price.<sup>58</sup> The grain warehouses were affected with a public interest because they stood “in the very ‘gateway of commerce,’ and take toll from all who pass.”<sup>59</sup> This reasoning authorized state regulation of prices in response to the exercise of market power throughout the economy, at least in industries playing an important role in interstate commerce. It harmonized the protection of competition with private economic rights by allowing a state to regulate when private markets demonstrably failed to confer the benefits of competition.<sup>60</sup>

The dissent in *Munn* argued that the majority’s test for whether private property was affected with a public interest had no bounds, and would permit a state to regulate all business without limitation.<sup>61</sup> The dissent foreshadowed the *Lochner* era of constitutional interpretation by seeking to demarcate a sphere of purely private activity free from governmental interference.<sup>62</sup>

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54. *Id.* at 130-31.

55. *Id.* at 131.

56. *Id.*

57. *Id.* at 123.

58. *Id.* at 125-126, 133-34.

59. *Id.* at 132.

60. Commentators debate the practical scope of the state regulatory power authorized by *Munn*. See Novak, *supra* note 6, at 400-04 (arguing that *Munn* permitted wide-ranging state regulation of economic activity, in contrast with the view of “most historians” that it circumscribed state regulation by limiting it to businesses affected with a public interest).

61. *Munn*, 94 U.S. at 140, 148 (Field, J., dissenting).

62. *Cf.* May, *supra* note 40, at 267 (discussing criticism of “formalistic techniques of boundary definition” employed by the *Lochner*-era Court).

*B. Addyston Pipe*

During the *Lochner* era, which began in the late 1890s and ended in the 1930s,<sup>63</sup> the Supreme Court identified and protected a substantive due process right to the “liberty of contract” against state interference through economic regulation.<sup>64</sup> The Court feared the misuse of state power to advance private economic interests.<sup>65</sup> But it did not fear state efforts to protect competition. Rather, it saw the Constitution as a bulwark against the use of state regulatory power to engage in redistribution to further the parochial interests of favored social groups.<sup>66</sup>

In *Coppage v. Kansas*, decided in 1915, the Court invalidated a state law that prevented firms from insisting that their employees not join a union on the view that Kansas had simply been acting to prefer one interest group, labor unions, over another, employers.<sup>67</sup> The Court would not accept interference with private economic rights—here the right of an employer and employee to set the terms of employment by contract—absent a reasonable public welfare justification.<sup>68</sup> The Court expressly rejected the view that the state could regulate in order to level “inequalities of fortune,” on the ground that doing so would serve one group of private interests without promoting the general welfare.<sup>69</sup> Although the Court had previously taken the view that a state could institute a worker

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63. The *Lochner* era is commonly dated from *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), though it takes its name from *Lochner v. New York* (1905). See Alan J. Meese, *Standard Oil as Lochner’s Trojan Horse*, 85 S. CAL. L. REV. 783, 792 (2012) (stating that the same due process protection granted to the liberty of contract recognized in *Lochner* was first recognized eight years earlier in *Allgeyer*).

64. *E.g.*, *Lochner*, 198 U.S. at 53, 61 (invalidating a New York law preventing bakeries from allowing bakers to work more than ten hours per day).

65. *See, e.g., id.* at 62-64.

66. Routine governmental activities—taxation, regulation, protection of public safety, procurement, and the like—necessarily have distributional consequences but were not prohibited on that account. The *Lochner*-era Court upheld progressive state and federal inheritance taxation as constitutional, however. *Magoun v. Ill. Trust & Sav. Bank*, 170 U.S. 283, 300-01 (1898); *Knowlton v. Moore*, 178 U.S. 41, 109 (1900). Alan Meese suggests that the *Lochner*-era Court would even have accepted state use of the tax system to make direct transfers to the poor. Alan J. Meese, *Will, Judgment, and Economic Liberty: Mr. Justice Souter and the Mistranslation of the Due Process Clause*, 41 WM. & MARY L. REV. 3, 51 (1999).

67. 236 U.S. 1, 6, 16 (1915).

68. *Id.* at 14.

69. *Id.* at 17-19.

compensation program for on-the-job injuries and deaths to advance a public interest in preventing “pauperism,” which led to “vice and crime,”<sup>70</sup> the Court’s hostility to redistribution that would benefit society’s losers, evident in *Coppage*, would have made it difficult to expand that rationale to support the development of an increasingly robust social safety net.<sup>71</sup>

At the same time, the *Lochner*-era Supreme Court was sympathetic to antitrust. It had no problem accommodating an initially circumscribed, but increasingly wide-ranging, federal competition policy (enforcement of the Sherman Act) with protecting contract and property rights, even as it balked at permitting redistribution, because it objected to all artificial interference with the market, public or private.<sup>72</sup> Not surprisingly, an Oklahoma law limiting entry into the manufacturing and distribution of ice—a governmental act that had the effect of protecting a monopoly from competition—was held repugnant to the Due Process Clause of the Constitution.<sup>73</sup> Perhaps less predictably, the Court took the view, in *Addyston Pipe & Steel Co. v. United States*, that the Sherman Act—which interdicted private interference with the market—actually enhanced the liberty of contract.<sup>74</sup>

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70. N.Y. Cent. R.R. Co. v. White, 243 U.S. 188, 207 (1917).

71. See generally R.R. Ret. Bd. v. Alton R.R., 295 U.S. 330 (1935) (holding that a federal retirement plan for railroads violated the Due Process and Commerce Clauses). Although this decision was handed down when the Court was transitioning away from its *Lochner* era jurisprudence, the majority opinion was joined by the Justices most sympathetic to the *Lochner* period’s perspective.

72. See May, *supra* note 40, at 275-78, 301-03, 305, 308-09; Alan J. Meese, *Liberty and Antitrust in the Formative Era*, 79 B.U. L. REV. 1, 9-13 (1999) (highlighting the difficulty of reconciling *Lochner* -era judicial hostility to redistributive legislation with the views of some commentators that antitrust law during its formative era was concerned with preventing wealth transfers); Meese, *supra* note 63, at 787-801 (describing how the Supreme Court’s antitrust decision in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), applied *Lochner* to antitrust policy).

73. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 278-79 (1932).

74. See 175 U.S. 211, 229-30 (1899); see also *Smiley v. Kansas*, 196 U.S. 447, 456-57 (1905) (upholding state prohibition against an agreement among rivals to limit purchases of wheat on the ground that the state statute barring private contracts that prevent competition was within the state’s police power); cf. William H. Page, *Ideological Conflict and the Origins of Antitrust Policy*, 66 TUL. L. REV. 1, 47 (1991) (“The coercive elements of the restraints [in *Addyston Pipe*] themselves inhibited liberty of contract and the application of the statute preserved it.”). But cf. Meese, *supra* note 72, at 61-67 (concluding that the Court, in *Addyston Pipe*, harmonized its liberty of contract jurisprudence with its construction of the Sherman Act by viewing the prohibited cartel as a direct restraint on commerce that could be prohibited

*Addyston Pipe* involved a government suit under the Sherman Act to forbid an express agreement among six manufacturers of iron pipe to eliminate competition by dividing markets.<sup>75</sup> Writing for the Court, Justice Rufus Peckham, who famously supported expansive substantive due process protection for contract and property rights,<sup>76</sup> declared that the liberty of contract did not “include a right to make a contract which in fact restrained and regulated interstate commerce” after Congress had acted to prohibit the contract.<sup>77</sup> The Sherman Act was not at odds with the Constitution because the private contracts it forbade “may in truth be as far reaching in their effect upon interstate commerce as would the legislation of a single [s]tate of the same character.”<sup>78</sup>

*Addyston Pipe* insulated the antitrust laws against constitutional claims of interference with property and contract rights. When the *Lochner*-era Court found that the Constitution limited the reach of the Sherman Act, its concern was with circumscribing the scope of federal power relative to state power under the Commerce Clause, not with protecting private economic rights under the Due Process Clause.<sup>79</sup>

### III. HARMONIZING COMPETITION WITH THE SOCIAL SAFETY NET

During the twentieth century, the political system had to harmonize all three economic commitments: to protect private economic rights and to secure competitive markets while instituting a social

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without abridging personal liberties); Nicola Giocoli, *Neither Populist nor Neoclassical: The Classical Roots of the Competition Principle in American Antitrust* (June 20, 2018) (unpublished manuscript), <https://ssrn.com/abstract=3199703> [<https://perma.cc/P9KN-NR8Q>] (same).

75. See 175 U.S. at 235-37.

76. See May, *supra* note 40, at 303-04.

77. *Addyston Pipe*, 175 U.S. at 229. Alan Meese observes that Justice Peckham’s views about the constitutionality of cartel regulation differed from those he had expressed a decade earlier, when serving on the New York Court of Appeals, and attributes that change to his recognition that entry would not necessarily counteract supracompetitive cartel pricing. Meese, *supra* note 72, at 10-12, 30-32, 35-36, 63 n.319, 65-67; cf. Baker, *supra* note 43, at 83-84 (tying constitutional decisions about the appropriate scope of economic regulation to judicial views about the appropriate scope of public and private spheres and about the extent to which markets perform well absent government intervention).

78. *Addyston Pipe*, 175 U.S. at 229-30.

79. See *United States v. E. C. Knight Co.*, 156 U.S. 1, 16-17 (1895).



safety net.<sup>80</sup> Doing so required first that the Supreme Court overturn nineteenth century constitutional prohibitions against redistribution. This was accomplished through the constitutional revolution of the 1930s.<sup>81</sup> In addition, the political system had to assure that neither private economic rights nor redistributive impulses undercut the laws protecting competitive markets. That accommodation took place during the 1940s, through an informal political bargain reflected judicially in important antitrust decisions.<sup>82</sup>

### A. *The New Deal-Era Constitutional Revolution*

The well-known shift in constitutional interpretation during the New Deal will be described briefly. It took place in two stages, the first in 1934<sup>83</sup> and the second in 1937.<sup>84</sup>

In 1934, the Supreme Court rejected the classification methodology relied upon by the *Lochner*-era Court.<sup>85</sup> That Court had sought to determine whether the economic legislation under review operated within the public sphere of the police power, hence constitutional, or within the private sphere of contract and property, hence repugnant to the Constitution.<sup>86</sup> Instead of demarcating spheres, the New Deal-era Court sought to harmonize individual rights and public interests.<sup>87</sup> It did so by asking whether the legislation pur

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80. See *supra* Part I (describing the three public commitments).

81. See *infra* Part III.A.

82. See *infra* Part III.B.

83. See *infra* notes 84-91 and accompanying text.

84. See *infra* notes 92-94 and accompanying text. These decisions were issued before President Franklin Roosevelt had the opportunity to appoint any Justices. Cf. Barry Cushman, *The Place of Economic Crisis in American Constitutional Law: The Great Depression As a Case Study*, in LIBERAL CONSTITUTIONS IN FINANCIAL CRISES (Tom Ginsburg, Mark Rosen, & Georg Vanberg eds., forthcoming 2019), <https://ssrn.com/abstract=3253353> [<https://perma.cc/R8A3-FAQQ>] (attributing the Supreme Court's change of course to a judicial recognition that legislation responding to the Great Depression could be sustained under prior constitutional doctrines that recognized the relevance of conditions of economic crisis).

85. See Baker, *supra* note 43, at 85-86.

86. See, e.g., *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 473 (1934) (Sutherland, J., dissenting) (dissent by four Justices associated with the *Lochner* majority arguing that if the law infringes on private sphere, it violates the Constitution, emergency or not, and if it is in the public sphere it should be upheld); cf. Baker, *supra* note 43, at 93-95 (describing a shift from analytic to conclusory tests in contract clause jurisprudence).

87. See *Blaisdell*, 290 U.S. at 435 (majority opinion) (noting "progressive recognition" by

sued a legitimate end through reasonable and appropriate means.<sup>88</sup> Previously, the Court's constitutional review of economic legislation had been concerned primarily with preventing special interest rent-seeking.<sup>89</sup> Now, during an economic emergency (the Great Depression), the Court also sought to avoid paralyzing the state from acting to address pressing social needs.<sup>90</sup>

Notwithstanding these doctrinal changes, some wide-ranging New Deal regulatory initiatives were found constitutionally invalid in 1935 and 1936.<sup>91</sup> In 1937, the Court went further. It relaxed the scrutiny of the connection between means and ends by deferring to legislative judgments,<sup>92</sup> and it treated redistribution as a legitimate public end.<sup>93</sup> For decades after 1937, in consequence, the Court gave

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the courts that Contract Clause protections must be "harmoniz[ed]" with state police power); *id.* at 439 (stating that the constitutional limitation must be construed "in harmony" with the reserved police power); *id.* at 442 (observing that fundamental state interests are directly affected by private contracts in modern society, requiring a "rational compromise" between individual rights and public welfare); *see also* *W. B. Worthen Co. v. Thomas*, 292 U.S. 426, 433 (1934) (describing *Blaisdell* as extending the scope of state police power to include laws regulating injurious business practices); *Nebbia v. New York*, 291 U.S. 502, 525 (1934); *cf. Blaisdell*, 290 U.S. at 448 (applying the same analysis to the Due Process Clause).

88. *Blaisdell*, 290 U.S. at 437-38; *Nebbia*, 291 U.S. at 525, 537 (stating that means must "have a have real and substantial relation" to ends, which must be a proper legislative purpose).

89. *E.g.*, *Coppage v. Kansas*, 236 U.S. 1, 6, 16, 17-19 (1915).

90. *Blaisdell*, 290 U.S. at 439-40, 443-44. The connection between the way courts articulate (rhetorically) the distinction between appropriate and inappropriate exercises of public power and their views about effectiveness of private markets in allocating resources is discussed in *Baker*, *supra* note 43, at 92-93, 103.

91. *E.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 238, 308-10 (1936) (invalidating legislation that authorized labor regulation as outside the federal commerce power); *United States v. Butler*, 297 U.S. 1, 68 (1936) (invalidating legislation that used the federal tax and spending power to pay farmers to curtail production); *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935) (holding that the National Industrial Recovery Act unconstitutionally delegated legislative power, and that its application to intrastate activities exceeded the federal commerce power); *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 360 (1935) (holding federal railroad retirement legislation unconstitutional under the due process and commerce clauses).

92. *See* *W. Coast Hotel v. Parrish*, 300 U.S. 379, 399-400 (1937) (upholding a Washington State law setting a minimum wage for women and minors and indicating that the legislature is entitled to make the policy judgment that the law would help women and the community by reducing demands for relief during the Depression); *see also* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152, 154 (1938) (engaging in highly limited rational basis review of economic legislation).

93. In 1937, the Supreme Court upheld the taxation and benefits aspects of Social Security as constitutional. *Steward Mach. Co. v. Davis*, 301 U.S. 548, 582-83, 585-89 (1937)

only cursory constitutional scrutiny to state and federal economic regulatory legislation.<sup>94</sup>

### *B. Competition Policy as a Political Bargain*

In an important respect, the constitutional revolution of the 1930s undermined the ability of public authorities to assure competitive markets. It did so by offering constitutional protection to a wider range of regulatory approaches. In its wake, Oklahoma was constitutionally permitted to adopt regulations that protected optometrists and ophthalmologists against competition from opticians, for example.<sup>95</sup> California could create a marketing program for raisins that had the effect of cartelizing an agricultural product grown only in that state, thereby raising the price of raisins to consumers throughout the nation.<sup>96</sup> To similar effect, Congress has enacted exemptions to the antitrust laws for certain industries.<sup>97</sup> The antitrust laws remain on firm constitutional footing, but Congress and the states have greater scope to regulate in ways that displace competition today than they did a century ago.

The public commitment to competitive markets was not constitutionalized, so has been left to governmental actors to embrace and enforce.<sup>98</sup> That happened during the 1940s, through the involvement

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(taxation); *Helvering v. Davis*, 301 U.S. 619, 640 (1937) (benefits).

94. *E.g.*, *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488-91 (1955). Commerce Clause limitations on federal regulatory power were also relaxed, beginning in 1937. *See* *NLRB v. Jones & Laughlin Steel Corp.* 301 U.S. 1, 37-38, 49 (1937); *see also* *Gonzales v. Raich*, 545 U.S. 1, 22, 32-33 (2005); *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942); *United States v. Darby*, 312 U.S. 100, 114, 118-19 (1941).

95. *Lee Optical*, 348 U.S. at 486-87.

96. *Parker v. Brown*, 317 U.S. 341, 350-51, 367-68 (1943) (holding that in the absence of an express Congressional prohibition, states may regulate products shipped in interstate commerce, and that the Sherman Act does not prevent states from authorizing conduct that would violate the antitrust laws if undertaken by private parties). Later decisions limit “state action” immunity to state regulatory schemes that clearly articulate an intention to displace competition and are actively supervised by the state. *See* *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-06 (1980).

97. *See* ANDREW I. GAVIL ET AL., *ANTITRUST LAW IN PERSPECTIVE* 1345-47 (3d ed. 2017); ABA SECTION OF ANTITRUST LAW, *HANDBOOK ON THE SCOPE OF ANTITRUST* 275 (2015). In addition, the Supreme Court has implied antitrust immunity for the activities of regulated firms when antitrust enforcement would be incompatible with a federal regulatory scheme. *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 279, 285 (2007).

98. *See supra* Part I.B.

of all three branches of the federal government. The executive branch, through the leadership of Thurman Arnold at the helm of the Justice Department's Antitrust Division, expanded antitrust enforcement.<sup>99</sup> In his five years on the job, Arnold "brought almost as many antitrust suits as the Division had in the previous fifty."<sup>100</sup> His blockbuster price-fixing case against the oil industry,<sup>101</sup> and a major monopolization case against the dominant aluminum producer that Arnold enthusiastically pursued through trial and appeal,<sup>102</sup> resulted in landmark judicial opinions on price-fixing (*Socony-Vacuum*<sup>103</sup>) and monopolization (*Alcoa*<sup>104</sup>) respectively. *Socony-Vacuum* took away virtually all defenses to price-fixing,<sup>105</sup>

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99. See generally Spencer Weber Waller, *The Antitrust Legacy of Thurman Arnold*, 78 ST. JOHN'S L. REV. 569 (2004). Arnold built on the work of his predecessor, future Justice Robert H. Jackson. See Robert H. Jackson, *The Struggle Against Monopoly*, Address at the Georgia Bar Association Annual Meeting (May 28, 1937), in GA. B.A. REP., Dec. 1937, at 203, 203, 205-06. See generally Robert H. Jackson, *Should the Antitrust Laws be Revised?* 71 U.S. L. REV. 575 (1937).

100. William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587, 610 (1982). See generally Waller, *supra* note 99. Distinctively, Arnold often brought multiple enforcement actions targeted at industry-specific bottlenecks to competition, and the cases were often resolved by consent-decree. ESKRIDGE JR. & FERREJOHN, *supra* note 5, at 137-38. The outcome of litigation is a better indicator of the level enforcement strictness than the number of cases brought, cases investigated, or settlements accepted, however. Increased agency litigation can be interpreted as signaling that enforcement is growing more stringent (that is, as an indicator of the direction of change). In the long run, though, the number of cases brought should recede as well-counseled firms adjust to the movement of the line between lawful and unlawful conduct toward greater restriction of firm conduct. See Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 235, 245 (Robert Pitofsky ed., 2008) (discussing the appropriate interpretation of merger enforcement statistics).

101. Daniel A. Crane, *The Story of United States v. Socony-Vacuum: Hot Oil and Antitrust in the Two New Deals*, in ANTITRUST STORIES 91, 92, 108-09 (Eleanor M. Fox & Daniel A. Crane eds., 2007).

102. Waller, *supra* note 99, at 590-91. The case was filed 11 months before Arnold took office. See *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 421 (2d Cir. 1945) ("The plaintiff filed its complaint on April 23, 1937."); Waller, *supra* note 99, at 577 ("Arnold was sworn in on March 21, 1938.").

103. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218-20, 224 (1940).

104. *Alcoa*, 148 F.2d at 432. The appeal was heard by a special panel set up by Congress when the Supreme Court lacked a quorum and the decision is treated as though it were a Supreme Court precedent. See *Am. Tobacco Co. v. United States*, 328 U.S. 781, 811-12 (1946).

105. *Socony-Vacuum*, 310 U.S. at 224 n.59. The Court also specifically rejected the prevention of ruinous competition as a justification for price-fixing because that defense would be antithetical to spirit of Sherman Act, which it termed a charter of freedom. *Id.* at 221.

and *Alcoa* came close to making monopoly illegal per se.<sup>106</sup> In 1950, Congress ratified the public commitment to assuring competitive markets by strengthening the statute prohibiting anticompetitive mergers,<sup>107</sup> and the Supreme Court responded by reframing and bolstering merger law in *Brown Shoe Co. v. United States*.<sup>108</sup> In that opinion, the Court emphasized that Congress sought to arrest trends toward lessening competition in a market in their incipency,<sup>109</sup> and was concerned with probabilities not certainties.<sup>110</sup>

I have called the informal social understanding adopting competition as national economic policy a “political bargain.”<sup>111</sup> In brief summary, the bargain bridged an important political cleavage over the role of the government in regulating large firms between two large and diffuse interest groups: “consumers” (a group that historically also included farmers and small business) and producers (large firms).<sup>112</sup> The two groups compromised their parochial interests—consumers in regulating large firms and redistributing their rents, and producers in remaining free from governmental supervision and thereby potentially obtaining rents from the exercise of market power—and reached an accommodation that allowed them to split the social gains arising in competitive markets.<sup>113</sup> The economy could capture efficiencies that would be unavailable through the systematic adoption of microeconomic

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106. *Alcoa*, 148 F.2d at 427-28.

107. Celler-Kefauver Antimerger Act of 1950, Pub. L. 81-89, 64 Stat. 1125-26; see *Brown Shoe Co. v. United States*, 370 U.S. 294, 311-23 (1962) (reviewing the 1950 Celler-Kefauver Act amendments to Clayton Act § 7 and their legislative history). The enactment of the Celler-Kefauver Act may not count as a moment of public deliberation and legislative ratification of the sort that Eskridge and Ferejohn look to when identifying a superstatute, but the collective efforts of the three branches of government resolved a bitter political debate that had gone on for half a century after the Sherman Act was passed. Baker, *supra* note 27, at 502.

108. 370 U.S. at 315-23.

109. *Id.* at 317.

110. *Id.* at 323.

111. This paragraph summarizes the argument in Jonathan B. Baker, *Competition Policy as a Political Bargain*, 73 ANTITRUST L.J. 483, 485-93 (2006); see also Baker, *Economics and Politics*, *supra* note 29, at 2182-84; Baker, *Preserving a Political Bargain*, *supra* note 29, at 628-33.

112. See Baker, *supra* note 27, at 483, 486. This perspective is consistent with Populist and Progressive accounts of domestic politics as a struggle between “the people” and “the interests.” See *id.* at 495.

113. See *id.* at 483-84, 490-91.

policy approaches that would instead rely primarily on direct regulation or laissez-faire.<sup>114</sup>

Perhaps the welfare gains from competition would have been sufficient to induce political acceptance of the informal competition bargain on its own terms. More likely, it required sweeteners, which economists call “side payments,” for the consumer group.<sup>115</sup> The most important side payment was the contemporaneous development and later expansion of a more substantial social safety net.<sup>116</sup> The safety net headed off some of the political pressure to regulate large firm conduct directly by limiting the downside risk to consumers, workers, and their families from participating in a competitive market economy.<sup>117</sup> On this account, competition policy could not have become an entrenched public commitment before the constitutional revolution of the 1930s made it possible to complement it with social insurance, allowing the full development of a modern social safety net.<sup>118</sup>

The antitrust rules that the courts developed and enforced during the 1940s through 1970s were consistent with the political bargain.<sup>119</sup> So, too, were the less interventionist rules developed by the Supreme Court beginning during the late 1970s.<sup>120</sup> The Chicago-oriented reworking of antitrust rules did not undermine the fundamental character of the informal understanding, as rejecting laissez-faire and direct regulatory approaches in favor of competition policy.<sup>121</sup> But it pushed the rules so that, taken as a whole, they now

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114. *See id.* at 483-84, 490-91, 493; Baker, *Economics and Politics*, *supra* note 29, at 2183.

115. Baker, *Economics and Politics*, *supra* note 29 at 2186-87.

116. *See id.*

117. *See id.*

118. *See id.*; *supra* Part II.

119. *See* Baker, *supra* note 27, at 484, 505-15.

120. *See id.* The transition from antitrust’s structural era to the Chicago School era that began during the late 1970s is described in Jonathan B. Baker, *A Preface to Post-Chicago Antitrust*, in *POST-CHICAGO DEVELOPMENTS IN ANTITRUST LAW* 60, 65-67 (Antonio Cucinotta et al. eds., 2002). *But cf.* Jack M. Balkin, *The Recent Unpleasantness: Understanding the Cycles of Constitutional Time*, 94 *IND. L.J.* (forthcoming 2018), <https://ssrn.com/abstract=3222311> [<https://perma.cc/T557-VCPE>] (describing the post-1980 period as a distinct regime in American constitutional history, replacing the New Deal/Civil Rights regime that had dominated politics between 1932 and 1980).

121. *See* Baker, *supra* note 27, at 484, 505-15.

approach the noninterventionist (*laissez-faire*) edge of the permissible spectrum.<sup>122</sup>

From today's vantage point, the current antitrust rules, as a group, have proved inadequate.<sup>123</sup> Over recent decades, recent evidence makes clear, the exercise of market power in the U.S. economy has widened and become substantial.<sup>124</sup> The political bargain is now endangered: unless antitrust rules are strengthened, the bargain will be rejected by stealth. The threat to the informal political compromise is heightened by the fraying of the social safety net in response to political pressure from advocates of a smaller government, as that restricts a side payment that facilitated consumer acceptance of the political bargain. In the short run, rejection of the bargain would empower firms able to exercise market power to do so free of governmental restraints. Over time, a political mobilization by the victims of market power could lead to a reaction that favors extensive regulation over policies to restore competition.

In short, the public commitment to competition is threatened and, if current trends continue, it would be abandoned. This outcome has become possible, in part, because competition policy is no longer understood as furthering constitutional values. During the late nineteenth century, legislative protection of competition was seen as complementary to the constitutional protection of economic rights in preventing artificial interference with the market.<sup>125</sup> The present constitutional scheme instead treats competition as a policy choice that could be discarded, notwithstanding its extensive pedigree, if the political system chose to focus exclusively on protecting property and contract by giving large firms free reign or if the political system chose to adopt an extensive program of economic regulation in place of competition.

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122. Baker, *Economics and Politics*, *supra* note 29, at 2184-86; Baker, *Preserving a Political Bargain*, *supra* note 29, at 632.

123. The argument in this paragraph is developed more fully in chapters 1 and 2 of JONATHAN B. BAKER, *THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY* (forthcoming 2019); *see also* Jonathan B. Baker, *Market Power in the U.S. Economy Today*, WASH. CTR. FOR EQUITABLE GROWTH (Mar. 20, 2017), <http://equitablegrowth.org/market-power-in-the-u-s-economy-today> [<https://perma.cc/K39G-HDJ5>] (setting forth evidence of growing market power in the U.S. economy).

124. *See* BAKER, *supra* note 123 (manuscript at 9-41); Baker, *supra* note 123.

125. *See supra* Part II.B.

## IV. CONSTITUTIONALIZING COMPETITION?

The problem of harmonizing the three public commitments that underlie the modern economy—to economic rights, competition, and the social safety net<sup>126</sup>—cannot be solved by constitutionalizing those commitments. Constitutional protection to just one of the commitments could privilege it, creating the possibility that the courts would unduly circumscribe the other two. That nearly happened during the nineteenth century, when the constitutional protections for economic rights came close to inhibiting competition policy (before *Charles River Bridge*) and prevented the redistribution necessary for increasingly extensive social insurance.<sup>127</sup> Protecting all three as constitutional norms simply shifts the problem of harmonization from the political branches to the courts.

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126. See *supra* Part I.

127. See May, *supra* note 40, at 263-65.



Nor would it be practical to protect competition constitutionally.<sup>128</sup> Doing so would place an affirmative obligation on the federal government or the states to assure competitive markets. But the courts are usually better suited to reviewing whether the political branches have violated prohibitions than to enforcing affirmative obligations imposed on those branches.

Were the courts to seek to interpret the Constitution to assure competition, moreover, that would be unlikely to make much practical difference to the way the competition commitment is enforced. The resulting constitutional jurisprudence would probably look like the judicial elaboration of the antitrust laws. If so, judicial

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128. To the extent the Constitution protects a competition commitment today, it is in the dormant Commerce Clause, which bars some protectionist state legislation. U.S. CONST. art. I, § 8, cl. 3; see *Wyoming v. Oklahoma*, 502 U.S. 437, 454-55 (1992) (“[W]hen [a] state statute amounts to simple economic protectionism, a ‘virtual *per se* rule of invalidity’ has applied.” (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978))). But it is hard to see how that provision could be interpreted to mandate government assurance of competitive markets economy-wide. *But cf.* Alan J. Meese, *Competition Policy and the Great Depression: Lessons Learned and a New Way Forward*, 23 CORNELL J.L. & PUB. POL’Y 255, 333 (2013) (advocating an interpretation of the Dormant Commerce clause that would overrule state action immunity). It is possible to imagine the Supreme Court expanding its protection for commercial speech to prevent Congress or the states from limiting entry or otherwise restricting competition. See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (invalidating a state prohibition on the provision of accurate information about retail prices); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976) (preventing a state from completely suppressing the dissemination of truthful information by sellers proposing a lawful commercial transaction); *cf.* *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 579 (2011) (acknowledging that “the government’s legitimate interest in protecting consumers from ‘commercial harms’ explains ‘why commercial speech can be subject to greater governmental regulation than noncommercial speech’” in a decision finding that a state law impermissibly restricted commercial expression). Were the Court to establish that principle, it would not necessarily require federal or state governments to prevent private restrictions on competition. But this possibility is merely hypothetical: protections for commercial speech probably do not bear at all on public commitments concerning economic regulation. See Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1156-58 (2012) (arguing that First Amendment protection for commercial speech should apply only to aspects of the expression beyond proposing the terms of transaction that would be protected if freestanding). *But see* Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1971-72 (2018) (arguing that as economic activity is increasingly imbued with communicative content, it is becoming more difficult to maintain the distinction between economic and expressive activity). To the extent they do, moreover, they may be better understood as recognizing economic rights than as protecting competition. Steven C. Begakis, *Rediscovering Liberty of Contract: The Unnoticed Economic Right Contained in the Freedom of Speech*, 50 LOY. L.A. L. REV. 57, 59, 64, 90 (2017) (arguing that commercial speech protection should be understood as establishing the liberty to form a contract).

enforcement of a constitutional mandate for competitive markets would turn out to be no more protective of the competition commitment than is the interpretation and enforcement of the antitrust statutes. The national economic commitment to assuring competitive markets must be protected, and antitrust enforcement needs to be strengthened, but we should look to the political branches and judicial interpretation of the antitrust statutes as the vehicle for doing so, not to the Constitution.