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Liberty and Antitrust in the Formative Era

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INTRODUCTION

Antitrust law, many have said, is the "Magna Carta of Free Enterprise," a sort of Bill of Rights protecting the liberty of businesses and consumers. ¹ To

¹ See, e.g., United States v. Topco Assoc., 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom
anyone familiar with the Anglo-American notion of a Constitution, this assertion might sound a bit strange. The Magna Carta and the Bill of Rights, after all, place limits on the actions of governments, not individuals. Moreover, the dominant political ideology of the nineteenth century—when the antitrust movement began—mirrored the Constitution's concern with state infringements of liberty. Antitrust regulation, by contrast, applies only to private behavior, notably contracts, leaving states and the federal government free to create or approve the very impediments to competition that these laws forbid. California can set up and enforce a cartel of all raisin growers in the State, but private physicians in one department of one hospital in Los Angeles cannot collectively agree to raise their fees. How can antitrust laws, which only limit private freedom of action, be usefully characterized as enhancements of "liberty," analogous to, say, the First Amendment?

Indeed, far from providing a justification for antitrust law, the conception of liberty dominant in the nineteenth century would seem to call the legitimacy...
macy of such regulation into question. After all, the formative era for antitrust law—1890-1903—when courts were interpreting newly-enacted antitrust statutes, largely overlapped with the “formative era” for liberty of contract doctrine. During this period, in decisions leading up to *Lochner v. New York*, courts maintained that the Due Process Clause of the Fifth and Fourteenth Amendments prevented states and the federal government from interfering with private agreements. Any argument that antitrust regulation was originally understood as an enhancement of liberty must first explain how such intervention in the market flourished in a constitutional regime zealous to protect private contracts.

Scholars have spilled a considerable amount of ink articulating and defending competing constructions of the original meaning of early antitrust statutes, particularly the Sherman Act. In so doing, these scholars have offered various accounts of the caselaw produced by the formative era, accounts that reinforce the competing interpretations of the statutes themselves. Each of these accounts, of course, necessarily rests upon an explanation, sometimes only implicit, of how courts squared antitrust regulation with liberty of contract. The refutation of such an explanation, it seems, would call the associated account of formative era caselaw into question.

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6 198 U.S. 45 (1905).

7 See, e.g., Allgeyer v. Louisiana, 165 U.S. 578, 592-93 (1897) (holding that Louisiana statute regulating contracts with out-of-state insurance companies was an unconstitutional limitation on the freedom to contract); infra notes 70-136 and accompanying text (analyzing the relationship between the Due Process Clause and the police power).

8 See infra notes 9-32 and accompanying text (discussing competing schools of antitrust thought and their respective accounts of the role of liberty of contract in the formative era).
One, so-called "Populist" camp, wholeheartedly embraces the notion of antitrust as Magna Carta. From the beginning, Populists say, courts declared contracts unlawful whenever they "unduly" interfered with the "liberty" of customers or traders, even if the agreements did not lead to increased prices. Under this approach, tying contracts, vertical distribution restraints, and group boycotts should all be unlawful per se, without any showing of anticompetitive effect, because they infringe in one way or another on the "freedom" of firms and consumers to participate fully in the marketplace. Indeed, many in the Populist camp have gone so far as to


10 See, e.g., Peritz, supra note 5, at 18-26 (discussing early support for such an "industrial liberty" approach to antitrust); David Millon, The Sherman Act and the Balance of Power, 61 S. Cal. L. Rev. 1219, 1223-24 (1988); Eleanor M. Fox, The Modernization of Antitrust, 66 Cornell L. Rev. 1140, 1147 (1981) (contending that the Sherman Act was designed in part to enhance liberty from the power of trusts); Robert Pitofsky, The Political Content of Antitrust, 127 Pa. L. Rev. 1051, 1053-57 (1979) (arguing that antitrust statutes were designed to check concentrated economic power and enhance individual freedom); Schwartz, supra note 1, at 3-5 (describing antitrust's concern with concentrated economic power)\; Lawrence Sullivan, Antitrust 11 (1977) (arguing that antitrust is grounded in a populist tradition emphasizing decentralized economic power and individual freedom); Harlan M. Blake & William K. Jones, Toward a Three-Dimensional Antitrust Policy, 65 Colum. L. Rev. 422, 422-23 (1965) (contending that antitrust is grounded in a populist tradition that preferred decentralized economic power and individual freedom); Harlan M. Blake & William K. Jones, In Defense of Antitrust, 65 Colum. L. Rev. 377, 384 (1965) (advocating antitrust policy that protects individuals against economic power). Indeed, according to one scholar, anyone who disagrees is incompetent: Every competent and objective study of the legislative history of the antitrust laws indicates that they were passed with a series of qualitative political, social and economic goals or values in mind to guide their implementation. The overall goal is that a "competitive process" not the quantitative concept of competition, be the rule for big and small.


11 See Alan J. Meese, Tying Meets the New Institutional Economics: Farewell to the Chimera of Forcing, 146 U. Pa. L. Rev. 1, 9 (1997) (hereinafter Meese, Tying Meets the New Institutional Economics) (describing Populist objection to tying contracts as grounded in concerns about the "coercion" of buyers and independent sellers of the tied product); Alan J. Meese, Price Theory and Vertical Restraints: A Misunderstood Relation, 45 UCLA L. Rev. 143, 176-83 (1997) (describing Populist approach to vertical restraints); William Page, Legal Realism and the Shaping of Modern Antitrust, 44 Emory L.J. 1, 35-38 (1995) (describing Populist approach to tying contracts); Joseph P. Bauer, A Simplified Approach to Tying Analysis, 33 Vand. L. Rev. 283, 297-305 (1980) (describing and advocating Populist approach to tying contracts); Fox, supra note 10, at 1184 ("The per se rule against vertical price fixing reflects the value that sellers of goods should have the freedom to charge the price they see fit. . . . "). Some commentators have even argued
argue that certain contractual infringements on liberty, for instance, maximum resale price maintenance, should be unlawful even if they ultimately enhance the welfare of consumers by lowering prices.\textsuperscript{12} For over a generation, the Supreme Court explicitly embraced such a Populist approach to the antitrust laws.\textsuperscript{13} More recently, however, the Court has reversed course, narrowing or overruling many decisions premised upon a concern for the "liberty" of individual traders and consumers.\textsuperscript{14}

that restraints ancillary to otherwise legitimate joint ventures should be condemned if they are broader than necessary to achieve their objectives, regardless whether they lead to higher prices. See \textit{Ross}, \textit{supra} note 9, at 157-58.

\textsuperscript{12} See \textit{Jean Wegman Burns, Vertical Restraints, Efficiency, and the Real World}, 62 \textit{Fordham L. Rev.} 597, 651 (1993) (arguing that all vertical price fixing should be per se unlawful); \textit{Fox}, \textit{supra} note 10, at 1184 (same); see also \textit{Sullivan}, \textit{supra} note 10, at 390-91 (approving ban on maximum resale price maintenance). These scholars echo the dicta of Judge Hand to the effect that certain monopolies should be unlawful even if they lead to lower prices:

We have been speaking only of the economic reasons which forbid monopoly; but, as we have already implied, there are others, based on the belief that great industrial consolidations are inherently undesirable, regardless of their economic results. In debates in Congress Senator Sherman himself . . . showed that among the purposes of Congress in 1890 was a desire to put an end to the great aggregations of capital because of the helplessness of the individual before them . . . . Throughout the history of the statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other. United States v. Aluminum Co. of America, 148 F.2d 416, 428 (2d Cir. 1945); see also Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) ("Congress appreciated that occasional high costs and prices might result from the maintenance of fragmented industries and markets. It resolved these considerations in favor of decentralization."); Fashion Originators' Guild of America v. Federal Trade Comm'n, 312 U.S. 457, 467 (1941) ("[A] monopoly contrary to [the policies of the Sherman and Clayton Acts] can exist even though a combination may temporarily or even permanently reduce the price of the articles manufactured or sold.").

\textsuperscript{13} See, e.g., United States v. Topco Assoc., 405 U.S. 596, 611-12 (1972) (declaring horizontal restraints ancillary to joint venture per se unlawful because they limited the freedom of traders); Albrecht v. Herald Co., 390 U.S. 145, 153 (1968) (declaring maximum resale price maintenance per se unlawful because it interfered with the freedom of traders to price as they saw fit); Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) (concluding that Congress meant to sacrifice consumer welfare to ensure fragmented industries and markets); Klor's, Inc. v. Broadway-Hales Stores, 359 U.S. 207, 212-13 (1959) (declaring group boycott per se unlawful because it limited the "freedom" of dealers); Fashion Originators' Guild of America v. Federal Trade Comm'n, 312 U.S. 457, 465-67 (1941) (finding an unlawful conspiracy despite absence of any showing of an effect on prices).

\textsuperscript{14} Recent decisions inconsistent with Populists' solicitude for the liberty of traders include: \textit{State Oil Co. v. Khan}, 118 S. Ct. 275, 285 (1997) (holding that maximum resale price maintenance should be analyzed under the Rule of Reason); \textit{Atlantic Richfield Co. v.
Many Populists have recognized that their account of antitrust, and its concomitant view of formative era caselaw, is facially inconsistent with liberty of contract doctrine, as well as the economic ideology that informed it. These advocates readily admit that classical political economy, the dominant approach to regulation in the nineteenth century, defined "liberty" as the absence of state interference with a purportedly private sphere. Still, they assert, this paradigm collapsed toward the end of that century, as citizens, political economists, and politicians realized that private economic power can threaten liberty as much as any state enactment. Antitrust laws in general involve a range of practices, including tying agreements, exclusive dealing, and price discrimination, which can be analyzed under the Rule of Reason. See, e.g., *USA Petroleum*, 495 U.S. 328, 339 (1990) (holding that competing dealer harmed by price-reducing effect of maximum resale price maintenance cannot maintain damage action); *Jefferson Parish Hosp. v. Hyde*, 466 U.S. 2, 30-31 (1984) (stating that tying contracts obtained by firms without market power are analyzed under the Rule of Reason); *Continental T.V., Inc. v. G.T.E. Sylvania Inc.*, 433 U.S. 36, 53 n.21 (1977) (holding that agreements creating exclusive territories should be analyzed under the Rule of Reason, even though they interfere with the discretion of dealers); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 216, 229 (D.C. Cir. 1986) (Bork, J.) (stating that horizontal ancillary restraints are lawful absent proof of market power); *Polk Bros. v. Forest City Enters.*, 776 F.2d 185, 189 (7th Cir. 1985) (Easterbrook, J.) (same); *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 266 (7th Cir. 1984) (Posner, J.) (ruling that replacement of one monopolist by another cannot be unlawful, even if accomplished through unfair means); *Products Liab. Ins. Agency, Inc. v. Crum & Forster Ins. Co.*, 682 F.2d 660, 663-65 (7th Cir. 1982) (Posner, J.) (ruling boycott lawful absent anticompetitive effect). It should be noted that adoption of the Populist emphasis on liberty from private power does not necessarily lead to an embrace of each of the doctrinal changes sought by this school. More precisely, many Populist prescriptions depend not only upon the normative premise that private coercion ought to be condemned, but also upon certain purely economic assumptions about the presence of coercion. Cf. Jacobs, supra note 9, at 226 ("In almost every era of antitrust history, policymakers have employed economic models to explain or modify the state of the law and the rationale for its enforcement."). So, for instance, Populists would outlaw all tying contracts, because, they believe that all such agreements are necessarily imposed through an exercise of market power. See Meese, *Tying Meets the New Institutional Economics*, supra note 11, at 5 n.22 (documenting this claim); Bauer, *supra* note 11, at 285-86. However, because tying contracts need not be "imposed" through an exercise of market power, but may instead be examples of purely voluntary integration, acceptance of Populist normative premises does not require the conclusion that all such contracts should be unlawful. See Meese, *Tying Meets the New Institutional Economics*, supra note 11, at 10.

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15 See, e.g., *Peritz, supra* note 5, at 10-12; Millon, *supra* note 10, at 1257-63.
16 See, e.g., *Peritz, supra* note 5, at 10-12, 14-18 (arguing that changed economic conditions led Congress to pass Sherman Act so as to enhance "freedom from undue market power"); Millon, *supra* note 10, at 1234-37 (arguing that concerns about the coerciveness of economic power shaped the Sherman Act); William Page, *Ideological Conflict and the Origins of Antitrust Policy*, 66 Tul. L. Rev. 1, 28-36 (1991) [hereinafter Page, *Ideological Conflict*] (describing role that concerns over private power played in the passage of the Sherman Act). As Professor Schwartz put it:
and the Sherman Act in particular were, under this view, manifestations of this concern and thus were meant to sweep more broadly than the scope of regulation implied by the classical paradigm. Of course, to the extent that liberty from contract supplies a sufficient justification for regulation under the Populist approach, very little is left of liberty of contract and the classical paradigm. All contracts, after all, restrain someone's liberty—that is the point of contract.17

According to the Populists, formative era courts were faithful to this intent, abandoning the classical paradigm's concern for liberty of contract in favor of policies that "enhance" liberty from private contracts.18 In so doing, they maintain, courts rejected liberty of contract challenges to the Sherman Act, holding that the commerce power overrode private contractual freedom, a view shared by many outside the Populist camp.19 All this changed, Populists say, in Standard Oil Co. v. United States where the Supreme Court adopted the so-called "Rule of Reason," under which a contract did not "restrain trade" unless it led to higher prices by means of an "illegitimate"

Expressing, therefore, a quasi-constitutional principle, the antitrust law is not inhibited by any perceived conflict with freedom of contract. Not only contract law, but also the law of property, of freedom of association, of agency, and of patent must yield to the principle that legal rights may not be so massed and exercised as to trammel the equally respected freedom of others.

Schwartz, supra note 1, at 5; JOHN M. BONHAM, INDUSTRIAL LIBERTY 83-84 (New York, G.P. Putnam's Sons 1888) (arguing that, like the State, private parties ought not be allowed to interfere with liberty of contract).

17 See Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) ("Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence."); CHARLES FRIED, CONTRACT AS PROMISE 14 (1981) (noting that contract, as promise, necessarily restricts an individual's options).

18 See Peritz, supra note 5, at 26-37; Millon, supra note 10, at 1271; Fox, supra note 10, at 1148; Blake & Jones, Toward a Three-Dimensional Antitrust Policy, supra note 10, at 423-24 (contending that early caselaw was concerned with protecting trader liberty); cf. United States v. Aluminum Corp. of America, 148 F.2d 416, 428 (2d Cir. 1945) (Hand, J.) ("In the debates in Congress, Senator Sherman himself . . . showed that among the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them."). Indeed, some outside the Populist camp share this view of formative era caselaw. See, e.g., MARTIN J. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM 138 (1988) (arguing that early interpretations of the Sherman Act were a repudiation of classical views on liberty of contract).

19 See Peritz, supra note 5, at 35-37. As noted in the text, some outside the Populist camp share the view that Congress' Commerce Power "trumped" liberty of contract. See, e.g., SKLAR, supra note 18, at 132-43 (arguing that formative era caselaw constricted liberty of contract in favor of an expansive view of the commerce power); infra notes 325-26 (describing similar views held by other scholars).
method of competition. By confining the reach of the Sherman Act to those instances in which contracts had demonstrated economic effects, Populists say, the Standard Oil Court improperly reversed the course set in the formative era, reading its own laissez-faire views into the Act, in the same way it had improperly read such views into the Constitution in *Lochner.*

The Populist account of the goals of antitrust and formative era caselaw has not gone unchallenged. Indeed, the now-dominant approach holds that antitrust laws were designed to enhance allocative efficiency. Under this approach, antitrust law should cut a narrow swath, outlawing only those contracts that, on balance, destroy wealth, regardless whether they interfere with the liberty of traders or, for that matter, increase prices. Tying con-

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20 See Standard Oil Co. v. United States, 221 U.S. 1, 49-62 (1911); American Tobacco Co. v. United States, 221 U.S. 106, 180 (1911) (reaffirming Standard Oil's Rule of Reason); see also PERITZ, supra note 5, at 50-58 (arguing that Standard Oil ushered in a new era of antitrust analysis driven by the Rule of Reason); Millon, supra note 10, at 1288 n.314 (arguing that Standard Oil departed from earlier decisions that read the Sherman Act broadly); May, Antitrust in the Formative Era, supra note 5, at 307-08 (same). At least one scholar who does not fall into the Populist camp shares this view. See SKLAR, supra note 18, at 146-54 (arguing that Standard Oil departed from early formative era decisions that had sublimated liberty of contract in favor of the Commerce Power). Moreover, this view is not of modern origin. See Corwin, The Antitrust Acts and the Constitution, supra note 5, at 368-70 (contending that Standard Oil repudiated formative era precedent via a "strong infusion of . . . the novel doctrine of 'liberty of contract'"); ALBERT H. WALKER, THE UNREASONABLE OBITER DICTA OF CHIEF JUSTICE WHITE IN THE STANDARD OIL CASE 1-21 (1911) (arguing that Standard Oil departed from formative era precedent); Standard Oil, 221 U.S. at 85-106 (Harlan, J., dissenting) (same).
21 See PERITZ, supra note 5, at 56-58 ("The Standard Oil (1911) opinion's Rule of Reason can be understood as closing Lochner's circle of individual liberty, its vision of a private sphere defined in opposition to a public, majoritarian domain."); May, Antitrust in the Formative Era, supra note 5, at 306-09 (treating Standard Oil decision as inconsistent with previous formative era decisions); see also SKLAR, supra note 18, at 146-49 (concluding that Standard Oil decision rejected earlier constructions of the Sherman Act and "made it explicit that freedom of contract and the right to compete . . . constituted the controlling desideratum under the Sherman Act").
22 See, e.g., Jacobs, supra note 9, at 226-27; ROSS, supra note 9, at 3; see also ROBERT BORK, ANTI-TRUST PARADOX 107-15 (1978); Robert H. Bork, Legislative Intent and the Policy of the Sherman Act, 9 J.L. & Econ. 7 passim (1966) [hereinafter Bork, Legislative Intent] (arguing that legislative history of the Sherman Act requires an approach directed toward allocative efficiency).
23 See BORK, ANTI-TRUST PARADOX, supra note 22, at 107-15 (stating that antitrust law should be primarily concerned with the maximization of total consumer welfare); Bork, Legislative Intent, supra note 22, at passim (analyzing legislative history and concluding that Congress intended the Sherman Act to forbid only those restraints that, on balance, destroy more wealth than they create); PHILIP AREEDA & DONALD TURNER, ANTI-TRUST LAW ¶ 111 (1978) (arguing that Populist goals should not be given significant consideration in antitrust analysis); Frank Easterbrook, Workable Antitrust Policy, 84 Mich. L.
tracts, vertical distribution restraints, and group boycotts should all be analyzed under the Rule of Reason, or even declared per se lawful under this approach. Like the Populists, scholars who adhere to this view have claimed that formative era caselaw supports their reading of the Sherman Act. Unlike some Populists, however, advocates of the allocative efficiency approach have not attempted to explain how such regulation survived in a regime zealous to protect liberty of contract, choosing to ignore the apparent conflict between antitrust regulation and contractual freedom. Still, this account implies a (relatively limited) justification for interference with private contract, a justification that does not depend upon any collapse of the classical paradigm. Liberty of contract, after all, was never absolute: even in the heart of the *Lochner* era, courts sustained interference with this liberty whenever such interference fell within the police power, that is, was necessary to eliminate externalities. The contracts against which antitrust laws were initially directed—cartel agreements—created such externalities by distorting the allocation of resources and destroying wealth. Thus, proponents of this approach might argue, antitrust law, and the early caselaw that declared such agreements unlawful, fit comfortably within the paradigm that informed the recognition and protection of liberty of contract.

"Populism" and "allocative efficiency" do not exhaust the possible approaches to antitrust; some scholars have suggested a third "wealth transfer"
According to this school of thought, the Sherman Act was designed to prohibit any arrangement that drove prices above the competitive level, regardless whether it generated productive efficiencies. Cartels, then, were condemned not because they reduced liberty or distorted the allocation of resources, but instead because they “transferred” wealth from consumers to producers. Like the Populist and allocative efficiency camps, the wealth transfer school sees no role for liberty of contract in the development of early antitrust doctrine.

Despite their difference on other matters, those in the Populist, allocative efficiency and wealth transfer camps share one piece of common ground: none sees any meaningful role for classical liberty of contract doctrine in formative era caselaw. This Article challenges this conventional wisdom, demonstrating that, since the beginning, liberty of contract has played a substantial role in shaping antitrust caselaw at both the federal and state level. By 1890, classical political economy had found expression in an emerging jurisprudence protecting liberty of contract from state regulations that did not fall within the police power. Within the classical paradigm, the state could only abridge liberty if necessary to prevent some harm to the public, and competitive pricing was not considered a harm. Indeed, in 1889, dissenting in People ex rel Annan v. Walsh and Budd v. New York, then-Judge Rufus Peckham, who would author many of the Supreme Court’s early Sherman Act opinions, argued that cartels should be immune from price regulation.


Lande, Wealth Transfers, supra note 29, at passim (marshaling legislative history supporting this interpretation); Herbert Hovenkamp, Antitrust’s Protected Classes, 88 Mich. L. Rev. 1, 21-24 (1989) (endorsing Professor Lande’s reading of the Sherman Act’s legislative history).

Professor Lande, for instance, nowhere attempts to square the “wealth transfer” approach with liberty of contract doctrine or classical political economy. Professor Hovenkamp concludes that courts reconciled this approach with liberty of contract by holding that Congress’ commerce power essentially overrode private contractual liberty. See Hovenkamp, Enterprise and American Law, supra note 3, at 293-95.

22 N.E. 671 (N.Y. 1889), aff’d, 143 U.S. 517 (1892). While Peckham concurred in Judge Gray’s Budd dissent, he did not issue his own written opinion. See 22 N.E. at 680-82. However because Walsh and Budd were companion cases presenting identical issues the court chose not to issue a written opinion in the former. See 22 N.E. at 682. For reasons not stated in the opinion, Peckham chose to issue a written dissent in Walsh. See id. To minimize confusion, this Article will treat Justice Peckham’s dissent in Walsh as a dissent in Budd.
because free entry by potential competitors would prevent incumbent firms from setting prices above the competitive level.\(^{35}\) The one exception he admitted was for those instances in which the state had interfered with the liberty of firms to enter the market, thus allowing cartels to set supra-competitive prices with impunity.\(^{36}\) Antitrust regulation of cartels that did not receive such aid, it seemed, would pose a unique challenge to courts sympathetic to liberty of contract.

In fact, during the formative era, defendants would lodge several liberty of contract challenges to the Sherman Act and state antitrust statutes, often in cartel cases. While courts almost always rejected these challenges, they did so by interpreting the statutes in question narrowly in a manner that saved them from constitutional infirmity. In so doing, courts rejected the assertion, often made by counsel supporting such statutes, that antitrust laws should be interpreted broadly so as to protect liberty from contract. Instead, courts held that the state could only outlaw contracts whose primary effect was to restrain liberty in a manner that led to prices higher than those that would otherwise be produced by the "natural" state of economic affairs, that is, a competitive market with no barriers to entry.

Courts generally reached this result through two different formulations. Some simply held that high prices were a "harm" to the consuming public that, like other externalities, justified regulation of cartels under the police power.\(^{37}\) Others, notably the Supreme Court when interpreting the Sherman Act, did not invoke the police power. Instead, these courts held that only "ordinary" contracts fell within the protection of liberty of contract in the first place, and that the state required no justification for outlawing contracts that were not deemed "ordinary."\(^{38}\) Only contracts that were primarily designed to confer market power on the parties to them were not "ordinary" and accordingly outside the protection of liberty of contract.

Admittedly, the results produced by this early caselaw—particularly the conclusion that the state could regulate purely private cartels—were different from those suggested by traditional articulations of the classical paradigm. On the surface, this expansion of state authority gives support to Populists and others who believe that formative era courts repudiated liberty of contract and abandoned the classical paradigm altogether. Closer analysis, however, demonstrates that the principle applied by formative era courts was the very same principle that, for instance, then-Judge Peckham had announced and defended so forcefully in Budd. Far from evincing any collapse of the classical paradigm, the expansion of state authority validated by formative caselaw was consistent with the underlying principles of the classical paradigm.

\(^{35}\) 22 N.E. at 682-95 (Peckham, J., dissenting).

\(^{36}\) See id. at 693.

\(^{37}\) See infra notes 344-433 and accompanying text (describing liberty of contract challenges to state antitrust statutes in state and lower federal courts).

\(^{38}\) See infra notes 194-343 and accompanying text (analyzing formative era Sherman Act caselaw).
era caselaw instead followed from an application or "translation" of that paradigm in light of changed circumstances, namely, the ability of private cartels to price above the competitive level. Far from repudiating the classical paradigm, formative era caselaw actually reinforced it, adapting it to apply in light of changed economic conditions.

Properly understood, then, formative era caselaw provides no support for the Populist or "liberty from contract" approach to antitrust law. To the contrary, formative era precedent held that a contract cannot be deemed "in restraint of trade" unless it produced prices above the competitive or "natural" level. The Standard Oil decision was no outlier, but instead was consistent with earlier decisions that had been influenced by liberty of contract doctrine and the classical paradigm that informed it.

The mere fact that formative era courts rejected a liberty from contract approach to antitrust did not signal an embrace of an allocative efficiency standard. Indeed, the apparent conclusion of formative era courts that the state could abridge any contract producing prices above the competitive level implies a broader scope for antitrust law than is implied by the allocative efficiency approach. Under the latter approach, of course, a practice that leads to higher prices will be deemed benign if it produces offsetting efficiency gains. Formative era caselaw, on the other hand, would seem to condemn any conduct leading to higher prices, regardless whether such conduct creates wealth on balance, thus lending support to a "wealth transfer" approach.

Why, however, did the prevention of "wealth transfers" justify interference with contractual liberty? Perhaps formative era courts viewed prices above the competitive level as a harm visited upon consumers and thus an "externality" subject to regulation under the classical paradigm. This approach, while inconsistent with the modern economist's definition of "externality," may have been coherent in a world that predated modern welfare economics. Still, the conclusion that high prices justified interference with contractual freedom because of their distributional consequences does not fit neatly within the structure of liberty of contract jurisprudence. After all, courts routinely rejected as justification for interference with contracts the claim that such interference was necessary to redress an inequality of bargaining power between parties. In Lochner, for instance, the conclusion that a maximum hour regulation was a "labor law" designed to alter the economic balance between employer and employee was fatal to the enactment. If the state could not act to redistribute wealth from employer to employee, why could it redistribute wealth from businesses to consumers?

Each of the formulations on which formative era courts relied to justify the abridgment of cartel agreements suggests its own justification for treating high prices as a "harm" subject to regulation. Reliance by some courts upon

39 See infra notes 194-343 and accompanying text.
40 See BORK, ANTITRUST PARADOX, supra note 22, at 107-10 (concluding that merger can both produce higher prices and create net benefits).
the characterization of high prices as an injury to consumers perhaps reflected the powerful hold that the classical model of the economy, and the "natural," competitive price that it produced, had on the judges involved. Unlike, for instance, wage bargains, which were generally negotiated in the context of highly competitive employment markets, the prices produced by cartels attacked during the formative era were the result of a negotiating process that departed from the "natural" one implied by the classical model. Thus, these prices more readily qualified as "harms," as a purely distributional matter, subject to regulation.

Reliance by some courts upon the distinction between "ordinary" and other contracts, however, suggested a non-distributional justification for regulating prices that departed from the competitive level. After all, the natural competitive process that classicists embraced did more than assure low prices. It also led to, for instance, a proper allocation of labor and capital. More precisely, these courts, particularly the Supreme Court, apparently recognized that treating high prices as distributional harms subject to regulation proved too much as it justified regulation of any number of garden variety contracts, including partnerships, ancillary restraints, and exclusive dealing contracts, all of which might exert some stabilizing effect on price. Indeed, the Supreme Court explicitly stated on at least two occasions that a contract could be "ordinary" and thus protected by liberty of contract even if it incidentally led to higher prices. This approach to justification of cartel regulation suggested a definition of "natural" or "ordinary" contracts ultimately unrelated to distributional effects and instead more consistent with an allocative efficiency approach.

The Article proceeds in four parts. Part I reviews the classical ideology that dominated nineteenth-century thought about the appropriate limits on state regulation of private economic activity, as well as the liberty of contract jurisprudence that this ideology spawned. According to the classicists, markets naturally tended to be highly competitive, and barriers to entry were non-existent. Thus, the state could not infringe upon a firm's liberty to set prices alone or in concert with others unless it had encouraged incumbent firms to price above the natural level by creating some barrier to entry. Moreover, common law courts often enforced price fixing agreements, but refused to enforce so-called "general restraints" ancillary to the sale of a business, because they threatened to make the obligor a public charge. The mere existence of a contractual infringement on liberty, then, did not ipso facto justify regulation. Instead, the infringement had to produce prices above the competitive level or some other cognizable harm. While the classical paradigm and concomitant liberty of contract jurisprudence did contemplate the regulation of harmful activity under the "police power," competitive prices produced by the "natural" state of affairs were not deemed harmful.

41 See infra notes 194-343 and accompanying text.
Part II reviews and analyzes formative era attempts by federal courts to reconcile the apparent conflict between liberty of contract, on the one hand, and the newly-passed Sherman Act, on the other. Although courts uniformly rejected assertions that the Sherman Act was unconstitutional, they did so without invoking the police power and without relying upon the argument, often made by counsel, that such regulation was necessary to enhance liberty from contract. Moreover, courts avoided a finding that the Act was unconstitutional by construing the Act narrowly, avoiding abridgment of those contracts deemed "ordinary" or "proper." Contracts were deemed "ordinary" or "proper" so long as they were not primarily designed to interfere with the competitive process and lead to prices above the competitive level.

Part III addresses the role that liberty of contract played in the interpretation of state antitrust laws, in the federal and state courts. Here again, advocates sometimes sought to justify the interference with liberty of contract worked by antitrust regulation as a means of protecting the liberty of firms and consumers. Again, however, courts rejected this justification, holding explicitly or implicitly that a contract's restraining effect on liberty did not, without more, place it beyond constitutional protection. Moreover, unlike courts interpreting the Sherman Act, which had abjured reliance on the "police power" as a source of regulatory authority, these courts relied heavily upon this power, holding that contracts were protected unless they led to harm in the form of higher prices to the consuming public. Indeed, a few courts voided state laws outright because they purported to outlaw contracts that could not lead to increased prices and thus exceeded the scope of the police power. Others, including the Supreme Court, refrained from such drastic action, by construing the statutes in question narrowly so as to prohibit only those agreements that led to higher prices and thus caused the sort of "harm" that rendered them subject to police power regulation.

Part IV examines the implications of formative era caselaw for the modern controversy over how to interpret the Sherman Act. Decisions issued shortly after a statute is passed are, of course, important evidence of the statute's meaning. This Article demonstrates that the Populist, or "liberty from contract," approach to the Act does not find support in formative era caselaw. The allocative efficiency approach would also appear inconsistent with the price-based standard adopted by formative era courts. These courts, it seems, assumed that consumers were somehow "entitled" to prices at the competitive level, an assumption consistent with the "wealth transfer" approach. To the classical mind, which viewed highly competitive markets as natural, even ordained by God, prices different from those produced by such a market may have been viewed as departures from the natural order and thus harmful to consumers. The allocative efficiency approach, in contrast, views the distributional effects of high prices with indifference, choosing only to condemn those contracts that both lead to higher prices and, on balance, destroy wealth.
Closer analysis, however, suggests that the price-based standard employed by formative era courts was not necessarily premised upon a belief that prices above the competitive norm were a "distributional" harm to consumers. Other considerations, including the belief that a highly competitive market led to the proper allocation of labor and capital, may have been the dominant normative justification for treating the outcome of a competitive market as "natural." Indeed, as suggested above, not all courts relied upon the conclusion that the creation of prices above the status quo ante by itself justified regulation. To the contrary, in the Sherman Act context, courts conceded explicitly or implicitly that the mere fact that a contract raised prices did not, by itself, place it outside the protection of liberty of contract.

I. THE CLASSICAL PARADigm AND LIBERTY OF CONTRACT

Though sometimes characterized as simply an apology for the status quo, the laissez-faire ideology of the nineteenth century consisted of a well-considered system of political economy that rested upon a blend of political philosophy and empirical assumptions about the natural workings of the American economy.42 This system provided a coherent framework for evaluating the appropriateness of state interference with private economic decisions. While this framework counseled a "hands off" policy in many instances, it ultimately rested on the assumption that the state should, when necessary, enhance the rights of liberty and property by protecting each from private interference. By the late nineteenth century, this framework began to take on constitutional significance, as courts read the classical paradigm into the Due Process Clause of the Fifth and Fourteenth Amendments.

A. The Classical Approach to Regulation

In the world portrayed by the classicists, markets were ordinarily populated by numerous small firms of roughly equal size.43 Competition between such firms would lead to a "natural" price, equal to the cost of production plus a reasonable profit.44 If a firm or firms sought to price above that level,

42 See, e.g., Loren P. Beth, The Development of the American Constitution 138-66 (1971); Arnold M. Paul, The Conservative Crisis and the Rule of Law 4 (1969) (defining laissez-faire ideology as dedicated to economic freedom and the absence of legislative interference): see also Peritz, supra note 5, at 51-52 (arguing that liberty of contract jurisprudence as reflected in the Standard Oil decision was a means of protecting the status quo and "gross inequalities of wealth").


44 Sidney Fine, Laissez Faire and the General Welfare State 55 (1956) ("As long as the state did not interfere with competition, demand and supply could be relied upon to bring wages, interest, rent and profits to their proper level."); see also George Stigler, Perfect Competition, Historically Contemplated, 65 J. Pol. Econ. 1, 1-5 (1957).
other market participants would increase their production, driving the price back to the natural point.45 Even if every firm in the market did combine to reduce output and increase prices, firms operating outside the market, sensing the prospect of higher than average returns, would quickly enter, again driving prices and returns back to their natural level.46 This model of the world, as well as the wages, prices, and rates of return that it produced, was so entrenched in the classical mind that it was associated with the laws of nature or even of God.47

45 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 129 (Kathryn Sutherland ed., Oxford Univ. Press 1993) (1776) [hereinafter SMITH, NATURE AND CAUSES OF THE WEALTH OF NATIONS] ("In a free trade an effectual combination cannot be established but by the unanimous consent of every single trader."); George J. Stigler, The Economists and the Problem of Monopoly, in THE ECONOMIST AS PREACHER AND OTHER ESSAYS 38, 40 (1982) (concluding that, for most of the nineteenth century "the weakness of collusion [was] a widely accepted belief of economists").

46 See HOVENKAMP, ENTERPRISE AND AMERICAN LAW, supra note 3, at 282-83 ("Within the classical paradigm, monopoly prices could never be earned unless people were artificially restrained from entering."); Millon, supra note 10, at 1264-65 ("According to classical theory, monopoly would always be elusive if the state allowed natural processes to flow."); Theodore W. Dwight, The Legality of "Trusts," 3 POL. SCI. Q. 592, 631 (1888) ("'Trusts' as a rule are not dangerous. They cannot overcome the law of demand and supply nor the resistless power of unlimited competition."); George Gunton, THE ECONOMIC AND SOCIAL ASPECTS OF TRUSTS, 3 POL. SCI. Q. 385, 403 (1888) ("If the gates for the admission of new competitive capital are always open, the economic effect is almost the same as if the new competitor were already there. . . ."); Franklin H. Giddings, The Persistence of Competition, 2 POL. SCI. Q. 62, 65 (1887) (describing the inherent instability of combination and the inevitable trend toward competition); SIMON NEWCOMB, PRINCIPLES OF POLITICAL ECONOMY 246 (New York, Harper & Brothers 1886) ("If the makers [of a product] charge too much for it, other makers will compete and lower the price."); FRANCIS BOWEN, THE PRINCIPLES OF POLITICAL ECONOMY APPLIED TO THE CONDITIONS, THE RESOURCES, AND THE INSTITUTIONS OF THE AMERICAN PEOPLE (Boston, Little, Brown, and Co. 1863) ("If the gains in one department of enterprise are notoriously above the average . . . more capital is at once attracted into the employment, till, by the competition of the capitalists with each other, the rate of Profit is reduced to the common standard in other enterprises."); ADAM SMITH, LECTURES ON JURISPRUDENCE 363 (R.L. Meek et al. eds. 1978) ("[I]f any trade is overprofitable all throng into it until they bring it to the natural price, that is, the maintenance of the person and the recompense of the risque he runs.").

47 See FINE, supra note 44, at 52-56; ARTHUR LATHAM PERRY, ELEMENTS OF POLITICAL ECONOMY 92 (New York, Charles Scribner and Co. 1866) (detailing God's "benevolent law of production"); BOWEN, AMERICAN POLITICAL ECONOMY, supra note 43, at 15 (arguing that "the laws affecting the creation and production of wealth . . . are, in truth, as constant and uniform as those which bind the material universe together"); see also HERBERT SPENCER, THE PROPER SPHERE OF GOVERNMENT, IN THE MAN VERSUS THE STATE 186 (Liberty Classics ed. 1981) (1843) (arguing that State should not regulate trade because "the laws of society are of such a character," that "natural evils will rectify themselves" following "that beautiful self-adjusting principle").
Thus, according to the classical paradigm, the exercise of market power was a rarity. Firms could only exercise such power if other firms were somehow prevented from entering the market and competing on an equal footing, either by government fiat or predatory conduct. Indeed, the notion of a "private" monopoly was a contradiction in terms. According to Adam Smith, those who feared the creation of a monopoly without state aid might

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48 See Hovenkamp, Enterprise and American Law, supra note 3, at 282-83 ("Within the classical paradigm, monopoly prices could never be earned in an industry unless people were artificially restrained from entering. . . . A mere agreement among sellers to fix prices was of little concern, provided that neither the price fixers nor the state forbade others from entering the field. If the cartel members sought to charge monopoly prices, new competition would immediately frustrate their attempt."); Fine, supra note 44, at 12-14; Thomas Cooley, Limits to State Control of Private Business, I PRINCETON REVIEW (n.s.) 233, 259 (1878) (concluding that combinations to raise prices could only be successful if "accomplished through means which are no part of any regular business"); see id. at 260 (arguing that firms could only achieve a true monopoly by means of sovereign grant, combination, or violence and terror); see also Herbert Spencer, Special Administration, in MAN VERSUS THE STATE, supra note 47, at 456-57 (asserting that the state should confine itself to "negatively regulative" activities—preventing individuals only from interfering with the rights of others); Francis Wayland, The Elements of Political Economy 142 (New York, Sheldon & Co. 1875). As Professor Millon has put it:

The very existence of governmental power presented the danger that selfish elements might capture the state machinery and use it to promote their private goals. Because of the central importance of property, the greatest threat of all was the coercive re-distribution of wealth for the benefit of some faction. Therefore, governmental power had to be sharply limited so as to eliminate opportunities to seize one person's wealth in order to bestow a benefit on someone else. Strictly limiting governmental power to appropriate functions would result in greater general welfare as well as individual liberty.

Millon, supra note 10, at 1237; see also James William Hurst, The Legitimacy of the Business Corporation in the United States, 1780-1970, at 42-43 (1970) (pointing out that most of the concern about concentration of market power arose from government grants such as right-of-way monopolies, toll grants, and limited bank charters); cf. Webb v. Baird, 6 Ind. 11, 16 (1854) (rejecting claim that state could require lawyers to render pro bono services because "[i]n this state, the profession of the law was never much favored by special pecuniary emoluments . . . . The reciprocal obligations of the profession to the body politic, are slender in proportion. Under our present constitution, it is reduced to where it always should have been, a common level with all other professions and pursuits. . . . The practitioner, therefore, owes no honorary services to any other citizen, or to the public.").

just as well fear witchcraft. So long as capital was mobile, i.e., firms and individuals were at liberty to enter or exit the market as they pleased, labor and capital would flow to its best use, and prices would remain at the competitive level. Indeed, price regulation would be counterproductive, interfering, as it would, with the natural order.

Unless it had banned competition altogether or advantaged some competitors through a grant of the power of eminent domain, the state generally had no power over prices or agreements to fix them. The mere fact that a contract or practice limited the liberty of traders did not justify regulation, unless that limitation was of the sort that would likely lead to prices above the competitive level. So, for instance, nineteenth-century courts often enforced cartel agreements, so long as they did not involve coercion against strangers to the agreement that undermined free entry. The "liberty" protected by the classical paradigm from state or private interference consisted solely of that freedom of action necessary to ensure prices at the natural level.

51 See Smith, Lectures on Jurisprudence, supra note 46, at 365-66 (contending that policies that caused departures from the competitive price led labor and capital into the wrong industries and "overturned the natural balance of industry").  
52 See Fine, supra note 44, at 54-55; Bowen, American Political Economy, supra note 43, at 18 ("The attempts of legislators to . . . establish a maximum of price . . . are almost invariably productive of harm. Laissez faire; 'these things regulate themselves,' in common phrase; which means, of course, that God regulates them by his general laws, which always, in the long run, work to good.").  
53 See Cooley, Limits to State Control of Private Business, supra note 48, at 249-54; see also Hovenkamp, Enterprise and American Law, supra note 3, at 282-83.  
54 Cf. May, Antitrust in the Formative Era, supra note 5, at 299 ("Classical economic theory centrally and strongly asserted that the various economic, social, and political elements now conceived of as largely independent and inevitably conflicting were in fact naturally in harmony and crucially interdependent. . . .").  
55 See Hovenkamp, Enterprise and American Law, supra note 3, at 282-83 (discussing reluctance of classical jurists to interfere with cartels); Central Shade-Roller Co. v. Cushman, 9 N.E. 629, 631 (Mass. 1887) (enforcing an agreement whereby manufacturers pooled patents and other assets so as to control production because the parties to the arrangement "did not look to affecting competition from outside . . . but only to restrict competition in price between themselves"); Dolph v. Troy Laundry, 28 F. 553, 555 (C.C.N.D.N.Y. 1886) (enforcing market division agreement because it did not contemplate suppression of output by third parties); Skrainka v. Scharringhuusen, 8 Mo. App. 522, 527 (1880) (same); Kellog v. Larkin, 3 Pin. 123, 143-48 (Wis. 1851) (enforcing horizontal arrangement because it did not attempt to control entire market, which remained "open to the fiercest competition of all the world, except those obligors"); Diamond Match Co. v. Roeber, 13 N.E. 419, 422-23 (N.Y. 1887) (suggesting that even general restraints of trade could be reasonable given absence of barriers to entry); see also Cooley, Limits to State Control of Private Business, supra note 48, at 268 (concluding that, absent grant of special privilege, the state could not interfere with price fixing so long as firms "limit[ed] their actions to fixing prices by peaceable means").
The classical paradigm applied beyond the field of price regulation. Indeed, the maintenance of liberty and property cherished by the classicists required at least the threat of state intervention in the form of enforcement of the common law baseline. This, according to the classicists, was the purpose of government, viz., to protect liberty and property from interference by others. That enforcement, of course, ensured that these rights were as meaningful as possible.

Against this background, all firms were subject to two forms of regulation, regardless whether they received any special aid from the state. First, like anyone else's liberty, the liberty of firms was circumscribed by the duty not to interfere with someone else's rights, summed up by the ancient maxim "sic utere tuo ut alienum non laedas,"—one ought not use one's property to harm another. This duty, in turn, gave rise to the police power, which authorized the state to prevent such harms. Chancellor Kent, writing in 1827, summarized the scope of the police power in this way:

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56 See Simon Newcomb, The Let-Alone Principle, 110 N. Am. Rev. 3-5 (1870) (opining that an individual's rights could be curtailed insofar as to prevent him from interfering with the rights of others); Spencer, The Proper Sphere of Government, supra note 47, at 185-87 (arguing that the necessary role of government is to preserve the natural rights of man); John Locke, Second Treatise of Civil Government ¶ 124 (Gateway Editions, Ltd. 1955) (contending that the purpose of government is to preserve property).

57 See Bonham, supra note 16, at 28 ("Industrial liberty consists in the freedom of each individual citizen, guarded by such delegated authority, contributed by each, as is necessary to preserve this individual freedom equally to each; and this liberty includes the freedom of each individual citizen to contract, and sanctity of contract."); Baker v. City of Boston, 29 Mass. (12 Pick.) 183 (1831) (justifying nuisance law because "[t]he law presumes that [the property owner] is compensated by sharing in the advantages of such beneficial regulations").

58 See Newcomb, The Let-Alone Principle, supra note 56, at 3; Spencer, The Proper Sphere of Government, supra note 47, at 187; Cooley, Limits to State Control of Private Business, supra note 48, at 237. As Chief Justice Shaw put it:

We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, not injurious to the rights of the community. Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 84-85 (1853).

59 See III William Blackstone, Commentaries 216-19 (Garland Publishers, Inc. 1978) (1783). But cf. Leonard Levy, The Law of the Commonwealth and Chief Justice Shaw 250-52 (1957) (arguing that police power as conceived by Chief Justice Shaw extended beyond the authority to regulate harms that would constitute nuisances at common law): Levy does not, so far as it appears, suggest that Shaw's conception of the police power extended beyond the authority to eliminate market failure. See infra notes 60-67 and accompanying text (arguing that police power consisted of the authority to regulate externalities).
Though property be protected, it is still to be understood that the law-giver has the right to prescribe the mode and manner of using it, so far as may be necessary to prevent the abuse of the right to the injury or annoyance of others, or of the public. The government may, by general regulations, interdict such uses of property as would create nuisances and become dangerous to the lives, or health, or peace, or comfort of the citizens. Unwholesome trades, slaughterhouses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may be interdicted by law, in the midst of dense masses of population, on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community.60

This, of course, is classic externality-based regulation, later associated with the Pigouvian tradition.61 Thus, the state could not confiscate an individual’s property and give it to someone else, and could not prevent individuals from exercising their liberty to pursue an otherwise lawful calling by, for instance, entering a market. It could, however, ensure that one did not use one’s property or exercise one’s calling in a way that interfered with another’s enjoyment of property or exercise of liberty. Each man had an “equal freedom” to employ his faculties, freedom that was enhanced by such regulation.62


62 See Bonham, supra note 16, at 23-28 (recognizing that limited government regulation may enhance individual liberty); Spencer, Social Statics, supra note 60, at 77-103; see also Newcomb, The Let-Alone Principle, supra note 56, at 3 (stating that permissible government regulation did not involve any surrender of natural rights).
Second, and again like everyone else, firms were regulated indirectly by contract law. Firms that entered contracts were expected to perform them, and the state would provide a remedy against those who failed to perform.\textsuperscript{63} Not all contracts were enforceable, however. In particular, like modern courts, nineteenth-century courts refused to enforce contracts that were "in restraint of trade." So-called general restraints, that is, contracts that prevented an individual from carrying on a trade anywhere in the jurisdiction, were per se void, while partial restraints were enforced if reasonably necessary to accomplish a legitimate objective.\textsuperscript{64}

Courts gave various justifications for voiding general restraints, including the claim that they prevented competition, enhanced prices and exposed the public to the evils of monopoly.\textsuperscript{65} This statement of policies, however, did not fit comfortably within the classical paradigm. After all, absent any state-conferred advantages, or predatory conduct, it is not clear how such contracts could create a monopoly or lead to higher prices. Not surprisingly, then, by the middle of the nineteenth century, some courts were abandoning this rationale, recognizing that the concern that general restraints would lead to higher prices was an anachronism, arising as it did in an era when state grants of monopoly or other impediments to entry were frequent.\textsuperscript{66} Chang-

\textsuperscript{63} See Bonham, supra note 16, at 28 ("Industrial liberty ... includes the freedom of each individual citizen to contract, and the sanctity of contract."); see also id. at 37 (arguing that true liberty required that all contracts entered for a "lawful purpose" "shall be binding"); Newcomb, The Let-Alone Principle, supra note 56, at 4-5 ("The enforcement of contracts in no way violates the let alone principle ... the act of binding himself by contract is the work of the individual himself, and not of society"); see also id. at 7 (arguing that enforcement of contracts actually enhances liberty, so long as the contract causes no injury to a third person).

\textsuperscript{64} See Alger v. Thacher, 36 Mass. (19 Pick.) 51, 54 (1837). The rule, it should be mentioned, survived into the early twentieth century in some jurisdictions. See Union Strawboard Co. v. Bonfield, 61 N.E. 1038, 1040 (Ill. 1901) (invalidating contract which prohibited company from doing business in state for twenty-five years on grounds that it was a general restraint of trade).

\textsuperscript{65} The classic and oft-quoted American statement is found in Alger v. Thacher.

The unreasonableness of contracts in restraint of trade and business, is very apparent from several obvious considerations. (1) Such contracts injure parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions. And they expose such person to imposition and oppression. (2) They tend to deprive the public of services of men in the employments and capacities in which they may be most useful to the community as well as themselves. (3) They discourage industry and enterprise, and diminish the products of ingenuity and skill. (4) They prevent competition and enhance prices. (5) They expose the public to all the evils of monopoly.

\textsuperscript{66} See Diamond Match Co. v. Roeber, 13 N.E. 419, 421 (N.Y. 1887) ("The laws no longer favor the granting of special privileges, and, to a great extent, business corpora-
ing economic conditions, then, required a different rationale for the rule against general restraints.

What emerged was a rationale for the prohibition of general restraints that was simply an application of the police power to contracts ancillary to the sale of a business. By refusing to enforce such restraints, courts ensured that individuals who sold their businesses could continue to practice their vocation within the jurisdiction.\(^{67}\) Otherwise, sellers bound by general restraints would be forced to exit the jurisdiction, taking their labor and skills with them; if they remained, they might support themselves through a life of crime or become public charges, thus burdening the public purse.\(^{68}\) As with
the classical approach to price regulation, the mere existence of a contractual restraint did not justify intervention. Only contracts that restrained liberty in a manner that injured the public were deemed void.69

B. Constitutionalizing the Classical Paradigm

For most of the nineteenth century, laissez-faire ideology remained only an ideology. While the classical approach to regulation dominated the minds of politicians and judges, it did so largely within the realm of policy, without any pretense of constitutional status.70 The Fourteenth Amendment's Due

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69 The reduction in wealth that might attend an overbroad restraint was not a harm in the same sense as the storage of gunpowder in a crowded area. See Commonwealth v. Tewksbury, 52 Mass. (11 Met.) 55, 57 (1846) (employing this example of an activity that the state could regulate via the police power); Kent, supra note 60, at 276 (same). Still, it did constitute the sort of foregone benefit that would justify state intervention under the classical paradigm. The most devoted advocates of the classical paradigm believed that lighthouses, for instance, were a proper subject for state expenditure precisely because the benefits of their construction and operation would not be internalized by a private firm. See John Stuart Mill, Principles of Political Economy, in 3 Collected Works of John Stuart Mill 968 (1965) ([It] is a proper office of government to build and maintain lighthouses, establish buoys, &c. for the security of navigation: for since it is impossible that ships at sea which are benefited by a lighthouse, should be made to pay a toll on the occasion of its use, no one would build lighthouses from motives of personal interest, unless indemnified and rewarded from a compulsory levy made by the state.); see also Henry Sidgwick, The Principles of Political Economy 442-84 (London, Macmillan and Co. 1885) (listing situations of acceptable government interference in the economy). Similarly, the common law's hostility toward general restraints was implicitly premised on the view that an individual's labor is a collective good.

70 See Hovenkamp, Enterprise and American Law, supra note 3, at 1-7 (describing importance of classical political economy to nineteenth century legal thought); II James Bryce, The American Commonwealth 421 (London, Macmillan and Co. 2d ed. 1891) ([Laissez-faire] is the orthodox and accepted doctrine in the sphere both of Federal and of State Legislation); David P. Currie, The Constitution in the Supreme Court 158 (1985) (noting that, by 1825, the Supreme Court had refused the invitation to engage in natural law constitutionalism). There were, of course, outliers. See People v. Wyne-
Process Clause changed all that. Though the “plain language” of the clause seemed only to govern the procedures by which liberty or property could be deprived, scholars and advocates worked hard to impress classical political economy upon it. According to Cooley, “liberty” ought to be defined to include not only the absence of physical restraint, but also, for instance, the right to pursue a calling or vocation. Any law not within the police power that abridged such liberty, he concluded, would be unconstitutional.

Although advocates began relying upon Cooley almost immediately, the Supreme Court initially declined to adopt his brand of substantive due process. In the Slaughterhouse Cases, litigated just four years after the amendment was ratified, the Court refused to nullify a monopoly that Louisiana had granted over the business of conducting slaughterhouse operations in...
In powerful dissents, however, Justices Field and Bradley, without citing Cooley, echoed his conclusions. In powerful dissents, however, Justices Field and Bradley, without citing Cooley, echoed his conclusions. Just five years later, in *Munn v. Illinois*, the Court had occasion to confront more directly the extent to which the Due Process Clause might void legislation inconsistent with the classical paradigm. There Ira Munn and George Scott, partners who owned a grain elevator in Chicago, argued that Illinois' regulation of charges for the storage of grain violated the Due Process Clause by preventing the partners from charging whatever the market would bear. They emphasized that their customers consented to the prices they charged and that they had received no special advantage from the state, with the result that the traditional justification for price regulation under the classical paradigm was absent.

The Supreme Court of Illinois rejected the constitutional challenge, holding that Munn and Scott had no property interest in the prices charged be-

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76 See 83 U.S. 36, 57-83 (1873) (rejecting the butchers’ claim that state grant of monopoly contravened the Fourteenth Amendment).

77 See id. at 110 & n.39 (Field, J., dissenting) (quoting Adam Smith, *Wealth of Nations*, bk. 1, ch. 10, pt. 2., for the proposition that an individual maintains a substantial liberty interest in his labor); id. at 110 (“The State may prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order and advance the general prosperity of society, but when once prescribed the pursuit or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations.”); see also id. at 114-17 (Bradley, J., dissenting) (arguing that citizens possessed fundamental right to choose their own calling); id. at 119-20 (Bradley, J., dissenting) (detailing where police power regulation is appropriate, and concluding that law preventing butchers from performing their trade is not within this sphere of acceptable regulation). It should be noted that these Justices did not relent. Six years later, when the Court sustained legislation repealing the grant of the slaughterhouse monopoly, each issued a concurring opinion reiterating his position that such monopolies were inconsistent with the due process clause. See Butchers’ Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co., 111 U.S. 746, 754-60 (1884) (Field, J., concurring); see also id. at 760-66 (Bradley, J., concurring); see also Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129, 138 (1874) (Field, J., concurring) (invoking *Slaughterhouse* dissent).

78 94 U.S. 113 (1876).

79 See Brief for Plaintiffs in Error (Goudy) at 31-32, Munn v. Illinois, 94 U.S. 113 (1876) (No. 99) (“The legislature have fixed a price less than the price before, which was satisfactory to the warehousemen and their customers, and it is evident there is a difference of opinion as to what is a fair compensation.”).

80 See id. at 46 (“The right of control [over ferries and mills] is incidental to the right to create the franchise; and in the making of the grant, it is entirely competent to affix to it such conditions as the grantor may deem proper. But there is no such origin or history in respect of the right to keep a warehouse. . . . The business is in its nature a private business. There are not and never were any exclusive privileges associated with it.”); see also supra note 53 and accompanying text (describing traditional justification for price regulation).
cause they were part of a cartel: “an organized combination of monopo-
lists . . . with but one heart, and that palpitating for excessive gains.”
Because of this conspiracy, “it [was] idle to talk about the consent of their cus-
tomers, [who] . . . had no protection against the monopolists and no consent
to give.” Thus, it was appropriate for the legislature to provide protection
against such “oppression and extortion.” Without relying explicitly upon
the police power, the court concluded that the legislature, who were
“familiar with the course of trade” had the authority to counteract such ex-
tortion, thus achieving “the greatest good of the greatest number.”
There was no suggestion that the restraining effect of the cartel agreement itself
justified regulation.

The Supreme Court affirmed. Unlike the Illinois Supreme Court, which
had emphasized the absence of a property right to charge prices above the
competitive level, Chief Justice Waite relied explicitly upon the police
power. All property, he said, was held subject to the limitation that it not be
used to injure another, a limitation which gave rise to the police power.
Relying in part upon the work of Lord Chief Justice Hale, the Court claimed
that this authority had been understood since time immemorial to include the
power to regulate prices charged by those firms “affected with a public inter-
est,” even if no special advantage had been conferred by the State.
The business of shipping and storing grain, the Court held, was so affected be-
cause it had a large effect on the community, and the fourteen elevators in
Chicago had formed and maintained a cartel among themselves creating a
“virtual monopoly.” Accordingly, the Court left open the possibility that
regulation of firms not imbued with such characteristics would be subject to
due process challenge. Moreover, like the Supreme Court of Illinois, the

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81 Munn v. Illinois, 69 Ill. 80, 93 (1873); see also id. at 89 (referring to elevators as
“an organized body of monopolists, possessing sufficient strength in their combination,
and by their connection with the railroads of the State, to impose their own terms upon the
producers and the shippers of these cereals. . . .”).
82 Id. at 90.
83 Id. at 89.
84 Id. at 88, 92.
85 See Munn v. Illinois, 94 U.S. 113, 124-25 (1876) (“[The state may require] each
citizen to so conduct himself, and so use his property, as not unnecessarily to injure an-
other. This is the very essence of government, and has found expression in the maxim sic
utere tuo ut alienum laedas.”).
86 See id. at 124-29.
87 See id. at 131; see also Edmund Kitch & Clara Ann Bowler, The Facts of Munn v.
Illinois, 1978 Sup. Ct. Rev. 314, 316 (noting that rates for storage were set collectively).
88 Thus, according to Professor Currie:
[T]he majority nowhere took issue with Field’s crucial assumption [i.e., that the due
process clause protected substantive rights of property]. By stressing the public inter-
est in grain elevators, the Court seemed to imply that they were extraordinary, and
that similar regulation of other businesses might not pass muster. By employing the
Court did not even suggest that the regulation could be justified as an attempt to enhance "liberty of contract."

Justice Field issued a long and vigorous dissent based squarely upon the classical paradigm. The police power, he said, only empowered the State to regulate uses of property that interfered with the rights of others. Thus, while the State could—and should—act to ensure that each person could equally enjoy his property without interference, it could not regulate the prices charged and thus the "compensation" that an individual might receive for use of that property, unless it had conferred some special advantage on the owner. Because the elevator operators had not received such an advantage from the State, Field concluded that Illinois had no right to interfere with prices defendants charged for the storage of grain.

Invoking the traditional articulation of the classical paradigm, treatise writers condemned *Munn* as wrongly decided, and the fight to constitutionalize the classical paradigm soon shifted from the field of property to that of liberty. Influenced by these writers, and the dissenting opinions of Justices Field and Bradley, state courts, without questioning *Munn* directly, began to find that the liberty protected by the Due Process Clause included the right to "pursue happiness" by exercising one's faculties, an exercise that included the right to contract and dispose of property. This right was not absolute, rhetoric of substantive due process without ever having justified its acceptance, moreover, [the Court] made it easy for [its] successors to argue that the principle had already been established—and thus to invalidate laws on the basis of the purely factual and always arguable judgment that the subject was not "affected with a public interest."

CURRIE, supra note 70, at 373; see also Kitch & Bowler, supra note 87, at 340-43 (suggesting limited reading of *Munn*); *Munn*, 69 Ill. at 89 (noting that elevators were able to exercise their power partly due their to connection with the railroads).

89 See *Munn*, 94 U.S. at 136-54 (Field, J., dissenting).
90 See id. at 145-48.
91 See id. at 139-40.
92 See id. at 149.
93 See COOLEY, CONSTITUTIONAL LIMITATIONS, supra note 60, at 742-46 (criticizing *Munn* and arguing that price regulation should only be sustained where the regulated entities possess state granted privileges or are operated on public property); 2 J.I. CLARK HARE, AMERICAN CONSTITUTIONAL LAW 771 (Boston, Little, Brown, and Co. 1889) (criticizing *Munn*); CHRISTOPHER TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES 233-38 (De Capo Press 1971) (1886) (applauding Field's dissent regarding the limits of the state's power to fix prices for purely private corporations).
94 See *In re Jacobs*, 98 N.Y. 98, 106-07 (1885); see also id. at 107 (citing Justice Field's concurrence in *Butchers' Union Co.*); id. at 106-07 (voiding prohibition of cigar manufacture in tenement houses); Commonwealth v. Perry, 28 N.E. 1126, 1127 (Mass. 1891) (voiding law prohibiting imposition of fines on employees); *Ex parte Kubach*, 24 P. 731 (Cal. 1890) (voiding mandate of eight hour day on public works projects); State v. Goodwill, 10 S.E. 285, 288 (W. Va. 1889) (voiding law forbidding payment in script);
but was, instead, subject to the police power. However, regulation designed simply to transfer wealth from one class to another fell outside this power and was deemed illegitimate.

Emboldened by these precedents, property owners renewed their challenges against state authority to regulate the prices charged by cartels. In *Budd v. New York*, for instance, the New York Court of Appeals evaluated a state statute "fixing the maximum charge for elevating grain." Defendants, the owners of so-called "floating elevators" that had formed a cartel, conceded that *Munn* was binding as a matter of federal constitutional law, but argued that a different meaning should be placed on New York's own due process clause.

The court rejected the defendants' constitutional challenge, painting a much clearer picture of the limits of state authority over prices than the Supreme Court had painted in *Munn*. The court began with the assumption that the state could not regulate the prices charged by those engaged in "common pursuits," that is, occupations that involved neither special state aid nor franchise. This general rule, however, contained an exception for "special..."
conditions and circumstances" that rendered private firms analogous to those that were recipients of state protection and thus subject to price regulation under the police power. Such circumstances were present with respect to floating grain elevators, the court said. The elevators in question stood astride the Erie Canal, New York's great artery of commerce. Moreover, in light of the limited area suitable for the construction of elevators, incumbent firms were readily able to collude so as to form a "virtual monopoly" which could not be undermined by new entry, raising prices for a necessary of life well above the competitive level. Thus, they were able to exact what amounted to a tax on all commerce passing through the canal, a tax that "forced the trade in grain into channels outside the state." 

Dissenting in a companion case, People ex rel Annan v. Walsh, Judge Rufus Peckham rejected Munn outright, finding the decision inconsistent with the classical paradigm. While the police power was necessary to protect the right of property, Peckham contended that it did not include the "far greater and more dangerous power" to determine the compensation or price that one received for the use of property. He flatly rejected Munn's assertion, as well as that of the majority, that there was a "virtual monopoly" in either case of the sort that could justify price regulation. "Virtual monopoly," he said, rested upon the State's infringement of the liberty of others to compete on an equal footing with the putative monopolist. "So long as..."
every one is free to go into the same business, and invest his capital therein with the same rights and privileges as those who are already engaged in it, there can be no monopoly in legal acceptance of the term, virtual or otherwise." While Peckham respected the views of Lord Hale, he emphasized that the learned jurist had presided over trials in which "old women" were convicted of witchcraft and sentenced to death. Changing times and circumstances, Peckham argued, required different conceptions of the scope of state authority.

This distinction between state-maintained monopolies, on the one hand, and purely private "monopolies," on the other, Peckham maintained, was not simply a formal one: it was based on economic fact. Absent state impediments to entry, the liberty of individuals to deploy their capital into any market they pleased would defeat an attempt to maintain prices above the natural level, as such prices would attract capital from industries where the return on investment was at or below average.

If it be said that the effect is the same, the answer is that it is not the same. In the one case the monopoly exists by reason of the action of the government, and no other citizen can come in and devote his capital and energy to such use. In the other the monopoly exists only so long as other citizens choose to keep out of the business, and just as soon as it is seen that the least degree over the ordinary profit can be realized by an investment in elevator property just that moment capital will flow

\[ Munn\] in which they made use of the term 'virtual monopoly,' and where they held the owners had devoted their property to a public use, were cases where such owners were receiving from the government some special privilege or franchise, by accepting which they did thereby so devote their property.

\[ Id. at 684.\] Later in the opinion he would write:

A monopoly in a business where the persons engaged in it have no exclusive privileges, and into which business the whole world is at liberty to enter, and upon which they will be possessed of precisely the same rights and privileges, as the others engaged in it, is a contradiction in terms.

\[ Id. at 693.\]

\[ 110 \] See id. at 686; see also id. at 686-87 ("The habits, customs and general intelligence of the people of those days were far different from those of today; and laws which might possibly be pardoned on account of ignorance, sparseness of population, difficulties of communication and rural and unsettled habits of life, can have no such justification in our times."); cf. Smith, Nature and Causes of the Wealth of Nations, supra note 45, at 334 (comparing fear of monopoly to fear of witchcraft).

\[ 111 \] See Walsh, 22 N.E. at 686 (Peckham, J., dissenting) (rejecting the use of eighteenth-century paternalistic principles in an age that has a greater understanding of political economy, and the proper, more limited, role of government).

\[ 112 \] See id. at 693-95 (distinguishing between a state maintained monopoly, which shuts out new market entrants, and a private monopoly, which essentially invites new entrants).
into that channel, and probably away from some industry where the average rate of profit has ceased to be made.\(^{114}\)

Although a firm could, "loosely speaking," become a monopolist by becoming more efficient than its competitors, Peckham echoed Thomas Cooley in his assertion that the State could not regulate a monopolist or any other firm because of its size.\(^{115}\) Any attempt, even by a natural monopolist, to charge prices yielding more than "an ordinary profit" would immediately attract new entry.\(^{116}\) Thus, while true virtual monopolies could not be defeated "excepting by action of the sovereign," purely private monopolies would be defeated "by the action of the ordinary laws of trade."\(^{117}\)

At any rate, Peckham noted, there was no monopolist of any sort in the present case. Instead, as the majority had emphasized, several elevators were engaged in a conspiracy to stabilize prices, a conspiracy that certainly limited the "liberty" of the participants.\(^{118}\) Peckham conceded that this sort of conspiracy might be illegal if it set unreasonable prices, but he dismissed the possibility of this eventuality.\(^{119}\) For, if the cartel price did generate above average returns,

\[\text{every one having the same right to build an elevator or warehouse that}\]
\[\text{these defendants have . . . if allowed absolute freedom and legal protection, will flow into the business until there is enough invested to do all or more than all the work offered, and then, by the competition of capital, the rate of compensation will come down to the average.}\(^{120}\)

\(^{114}\) Id. at 693.

\(^{115}\) Peckham remarked:

Loosely speaking, a person or corporation is said to have a virtual monopoly of a business when, on account of its great extent and the facilities it has for transacting it, arising from its large proportions, the article it manufactures or sells substantially takes possession of the market. Such, for instance, is the case with the manufacture and sale of matches. One company does an enormous business, and has almost what is called a 'monopoly' in some parts of the country, arising not from any special privilege or right granted to or exercised by it, but because of its facilities, and it is therefore enabled to make the article cheaper and sell it cheaper than its competitors.

\(^{116}\) See Walsh, 22 N.E. at 693 (Peckham, J., dissenting).

\(^{117}\) Id.

\(^{119}\) See id. (citing Hooker v. Vandewater, 4 Denio 349 (NY Sup. Ct. 1847) and Stanton v. Allen, 5 Denio 435 (NY Sup. Ct. 1848)).

\(^{120}\) Walsh, 22 N.E. at 695 (Peckham, J., dissenting).
It made no real difference to Peckham that grain elevators were expensive to build and maintain, or that the incumbent firms had advantageous locations: these facts simply "tend[ed] to make the inevitable result a trifle more slow in its approach than in other cases requiring a smaller outlay."\footnote{Id.}

The state's attempt to set prices below the market rate, then, prevented firms from obtaining reasonable returns sufficient to justify investment in the business and altered the normal allocation of capital.\footnote{See id. (spurning government interference because "it may ruin or greatly impair the value of the property of wholly innocent persons").} For, without the agreements in question to maintain a reasonable, remunerative rate, the "general laws of trade" would lead capital to flee from the elevator business to markets where returns were reasonable.\footnote{See id.; cf. SMITH, LECTURES ON JURISPRUDENCE, supra note 46, at 365 (contending that interference with natural price would "overturn [...] the natural balance of industry").} At best, Peckham concluded, the regulation could replicate the price that would have occurred in an unrestrained market; at worst, it would eventually drive firms out of the market, confiscating their wealth in the process.\footnote{See Walsh, 22 N.E. at 695 (Peckham, J., dissenting).}

Such a regulation of price was "vicious in its nature, communistic in its tendency."\footnote{Id.} Importantly, Peckham's lengthy and passionate dissent masked his agreement with the majority over several fundamental issues regarding the constitutional status of price regulation. Both Peckham and the majority, for instance, made it plain that the Due Process Clause generally prevented price regulation. Additionally, they agreed that such regulation could be justified where a seller had a state-conferred monopoly, and thus could drive price above its natural level. What mattered to both majority and dissent, then, was not the extent to which the cartel limited the liberty of its participants, but instead whether that limitation allowed the participants to obtain power over price.\footnote{Id.}

Both Peckham and the majority began with the same legal premises: only economic facts, or, more precisely, the perception of them, divided them.

The Supreme Court affirmed the decision, in an unilluminating opinion by Justice Blatchford.\footnote{See Budd v. New York, 143 U.S. 517, 528-48 (1892).} Justice Brewer, joined by Justices Field and Brown,
dissented, proceeding along the lines suggested by Judge Peckham.\footnote{See id. at 548-49 (Brewer, J., dissenting) (criticizing Court’s decision as a reaffirmation of Munn).} Undoubtedly, Justice Brewer wrote for the dissent, the State could ensure that an individual did “not use [property] to his neighbor’s injury.”\footnote{Id. at 550 (listing the permissible limitations on individual use of property); see also David J. Brewer, Protection to Private Property from Public Attack 11, Address Delivered Before the Graduating Classes, Yale Law School (June 23, 1891) (describing limits on the police power).} This did not mean, however, that an individual “must use it for his neighbor’s benefit.”\footnote{Budd, 143 U.S. at 550 (Brewer, J., dissenting).} By setting a price lower than that which obtained in the marketplace, the State had attempted to require the latter.\footnote{See id. at 551.} The purported presence of a monopoly, he said, did not justify “legislative interference” under this principle, because the “monopoly” in question was not one “of law,” created by the sovereign, but was instead one “of fact.”\footnote{Id. at 550.} The time was not distant, he said, when courts would recognize “the evils resulting from this assumption of a power on the part of the government to determine the compensation a man may receive for the use of his property.”\footnote{Id. at 552.} At that time, he said courts would “hasten to declare that government can prescribe compensation only when it grants a special privilege.”\footnote{Id.}

To anyone following the composition of the Supreme Court, Brewer’s prediction would have appeared prophetic. Within four years of Budd, the composition of the Court had changed significantly with the addition of Peckham and Edward White. By 1895, then, the holding of Munn appeared to be on shaky ground: Brewer and Peckham had a working majority for the position they had each expressed in Budd, and Peckham would lead the way as the Court gave protection to liberty of contract in other arenas.\footnote{That majority consisted of Justices Peckham, Brewer, Field, Brown and White. Peckham, of course, would author the Court’s opinions in Allgeyer v. Louisiana, 165 U.S. 578 (1897) and Lochner v. New York, 198 U.S. 45 (1905). At the}
same time, states and the federal government were busily drafting and passing antitrust legislation designed to prohibit cartels of the sort involved in *Munn* and *Budd*. A collision seemed imminent between the proverbial irresistible force—antitrust regulation—and the immovable object—liberty of contract. How the courts would reconcile these competing impulses is the subject of the balance of this article.

II. THE COLLISION: LIBERTY OF CONTRACT MEETS THE SHERMAN ACT

While opinions about the original meaning and purposes of the Sherman Act ("the Act") vary widely, all scholars agree that Congress meant to outlaw purely private cartels regardless whether they have received special competitive advantages from the state. Such an expansion of regulatory authority beyond that countenanced by the classical paradigm raises an important question: how could antitrust laws survive the jurisprudence of liberty of contract that was emerging in the 1880s-1890s? As noted earlier, regardless of their views on the purposes of antitrust and the proper interpretation of formative era caselaw, scholars have concluded—implicitly or explicitly—that liberty of contract played no role in shaping early antitrust doctrine. Moreover, the current approaches to antitrust suggest three possible—but distinctly different—bases for concluding that antitrust regulation did not offend liberty of contract. According to one, "Populist" position, the antitrust laws were designed to enhance the liberty of traders from private agreements, even where the restraining contract produced no public harm in the form of higher prices. Formative era caselaw, it is said, was consistent with this approach, repudiating the classical paradigm’s requirement that some economic harm be present in order to justify regulation of private con-

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136 See *infra* notes 137-42, 344-48 and accompanying text (describing origins of the Sherman Act and its state law counterparts).

137 Judge Bork, for instance, concluded that Judge Taft’s opinion for the Sixth Circuit in *United States v. Addyston Pipe*, 85 F. 271 (6th Cir. 1898), which suggested that price fixing was per se unlawful, "must rank as one of the greatest, if not the greatest, antitrust opinions of all time." *Bork, Antitrust Paradox*, *supra* note 22, at 26. Other scholars who agree that the Act was designed to outlaw cartels include Millon, *supra* note 10, at 1282-87 (describing congressional intent to prohibit private cartels); Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 Cal. L. Rev. 266, 284-89 (1986) (same) and; Lande, *Wealth Transfers*, *supra* note 29, at 93-96 (same).

138 See *supra* notes 9-31 and accompanying text.

139 See, e.g., *Peritz, supra* note 5, at 15 ("This strong sentiment in favor of protecting industrial liberty, of assuring a person’s right to work, surpassed even the abhorrence of higher prices."); Millon, *supra* note 10, at 1276-87 (characterizing the Sherman Act framers as driven primarily by a desire to reduce economic concentration); see also *supra* notes 11-31 and accompanying text.
The allocative efficiency approach, in contrast, holds that these laws, particularly the Sherman Act, were designed to prevent only those contracts that imposed harm on society by reducing output and distorting the allocation of resources. A third, "wealth transfer" approach, contends that antitrust was designed to assure consumers competitive prices.

A careful consideration of formative era decisions arising under the Sherman Act demonstrates that, contrary to conventional wisdom, liberty of contract played an important role in shaping early Sherman Act doctrine. More precisely, courts adopted a narrowing construction of the Act in response to claims that a broad interpretation of the statute would interfere with contractual freedom. In so doing, courts—particularly the Supreme Court—made it clear that interference with the liberty of sellers to contract could not be justified simply because such interference enhanced the liberty from contract of those bound or injured by contractual restrictions. Instead, courts concluded that the state could only abridge liberty of contract when the primary effect of the agreement was to produce prices above the natural level. This result was consistent with that suggested by the classical paradigm and the common law of trade restraints, each of which deemed some economic harm a necessary predicate to interference with liberty of contract.

Courts interpreting the Sherman Act, however, did not invoke the police power; nor did they suggest that high prices were a "harm" that the state could redress. Instead, these courts bottomed their narrow interpretation of the Act on the distinction between "ordinary" contracts and those that were not deemed ordinary. Contracts were ordinary if they served a purpose other than the acquisition of power over prices, even if they might "indirectly" increase prices.

The conclusion that the state could abridge liberty for the purpose of preventing cartel-imposed prices did not signal an abandonment of the classical paradigm as applied by then-Judge Peckham in *Budd*. Instead, the repudiation of the result urged in that dissent flowed from an application of the clas-

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140 See supra note 18 and accompanying text (summarizing the Populist contention that formative era caselaw countenanced regulation that was not justified by the classical paradigm).


143 See infra notes 144-343 and accompanying text.

144 See infra notes 145-343 and accompanying text.
sical paradigm in light of a changed perception of the economic facts that had driven particular applications of it. More precisely, as judges began to realize that purely private cartels could raise prices well above the competitive level, regulation of such arrangements fell comfortably within the classical paradigm.

A. Early Lower Court Decisions

The earliest Sherman Act cases, of course arose in the lower federal courts. Scholars who have analyzed these cases have generally downplayed the role played by liberty of contract. Others have concluded that, whatever role liberty of contract did play, these decisions were inconsistent with the approach soon to be taken by the Supreme Court. Close consideration of several early cases filed under the Act reveals that concerns over liberty of contract played an important role in early caselaw. Even before the Supreme Court first had occasion to interpret the Sherman Act, these early cases set the stage for limiting the reach of the statute so as not to offend liberty of contract.

The lack of scholarly attention to the role of liberty of contract in this era is perhaps attributable to the fact that some early decisions either did not involve facts conducive to liberty of contract challenges or presented alternate grounds for decision. For instance, one early decision, United States v. Patterson, did not involve a contract at all, but instead a claim that defendants had monopolized the cash register market by, among other things, assaulting and injuring their competitors. Of course, even the most doctri-

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145 Professor Peritz, for instance, argues that “for the most part,” lower federal courts did not take account of liberty of contract in interpreting the Sherman Act. See Peritz, supra note 5, at 30. Similarly, Hans Thorelli, deemed by some the most complete historian of the antitrust laws, in a chapter entitled Judicial Interpretations Under the Sherman Act from 1890-1905, does not discuss the role that liberty of contract played, either in decisions, or in arguments to the various courts in question. See HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY 432-500 (1955). Professor Thorelli only briefly mentions the Supreme Court’s treatment of liberty contract in a couple of cases. See id. at 600.

146 See SKLAR, supra note 18, at 168-69 (arguing that the Supreme Court subordinated liberty of contract to Congress’ power to regulate interstate commerce); WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA 147-55, 167-72 (1965) (highlighting the differences between Supreme Court’s early antitrust decisions and lower court decisions employing freedom of contract analysis).

147 55 F. 605 (D. Mass. 1893).

148 See id. at 638. More precisely, the defendants had allegedly monopolized the market for cash registers by, inter alia, “preventing others from engaging in business by means of harassing and intimidating competitors, by threatening them, by causing them or their agents to be assaulted and injured . . . by harassing and intimidating purchasers, by inducing purchasers to break their contracts and refusing to pay sums owed to competitors. . . .” Id. at 606-07. The defendants went to great lengths to argue that the Sherman Act applied only to contracts, and thus not to their alleged behavior. See id. at 622 (“The
naire classical conception of liberty admitted that the state could regulate such tortious conduct.149 Additionally, in United States v. Greenhut,150 the court declined to consider a constitutional challenge to indictments issued against the defendants who had formed the so-called whiskey trust and induced dealers to maintain certain resale prices.151 The court held that the indictment did not properly charge an offense of monopolization as recognized by the Act with the result that it was unnecessary to reach certain "important questions" such as "whether congress has the constitutional authority to declare such acts to be unlawful and criminal."152

Other decisions, however, plainly rested upon liberty of contract or the classical paradigm. In In re Greene;153 for instance, the court dismissed another indictment of the whiskey trust, applying a standard derived from the classical paradigm. The trust had unified by purchase seventy previously independent firms and gained a 75% share of the distilling market.154 Yet, the court said, this conduct did not even constitute "attempted monopolization" under the Act, because "all other persons who chose to engage (in the whiskey business) were at liberty to so," and the defendants had made no effort,

act of 1890 was aimed at the growing tendency to combination by voluntary contract, in derogation of public right and public safety. It was at this, only, that the legislation was aimed; and it is this, only, which its words are to be construed to cover. Attacks upon commerce by mere fraud and violence, it is thus far left to the states to punish.”).

149 See supra notes 59-62 and accompanying text (explaining that police power authorizes state to prevent harmful uses of property); see also COOLEY, CONSTITUTIONAL LIMITATIONS, supra note 60, at 572 (defining the police power to include the ability to "preserve public order"); BOWEN, AMERICAN POLITICAL ECONOMY, supra note 43, at 19 (opining that prevention of crime was legitimate function of the state); Spencer, Special Administration, supra note 48, at 187 (acknowledging that government should protect an individual and his property from aggression); HOVENKAMP, ENTERPRISE AND AMERICAN LAW, supra note 3, at 280-81 (stating that the Patterson court held that the mere attempt to control the cash register business did not violate the Act); Cooley, Limits to State Control of Private Business, supra note 48, at 267 (concluding that the State can regulate monopolies created by threats and violence because such acts are independently illegal). While the defendants did lodge constitutional challenges, they centered almost exclusively upon a claim that the conduct involved did not constitute interstate commerce. See Patterson, 55 F. at 630-32. While the defendants did suggest (vaguely) that the Act improperly interfered with vested rights of property in the form of trademarks and patents, they did not refer to liberty of contract or even claim that they had suffered such interference. See id. at 630.

150 50 F. 469 (D. Mass. 1892).

151 See id. at 470-71.

152 Id.; see also THORELLI, supra note 145, at 438 (calling the opinion in Greenhut "a magnificent example of judicial sophistry").

153 52 F. 104 (C.C.S.D. Ohio 1892).

154 See id. at 116.
by contract or otherwise, to limit the production of other firms. Although it did not say so explicitly, the court may have believed that the unrestrained “liberty” of other whiskey makers would counteract any tendency of the defendants to price above the competitive level. Or, the court may have believed that market power achieved by tactics equally available to others was not, ipso facto, justification for governmental interference with the contracts in question. There was no need to invoke liberty of contract explicitly; the court had given the statute a construction derived directly from the classical paradigm reminiscent of Peckham’s Budd dissent.

Greene was not the first decision to construe the act to avoid interfering with the liberty implied by the classical paradigm. In United States v. Nelson, the United States indicted several Minneapolis lumber dealers for agreeing to increase prices by 50 cents per thousand foot. The district court dismissed the indictment, however, because it did not allege that every dealer serving the market was party to the agreement. Without such universal participation, “competition in the commodity would soon bring the price down, unless there were fraudulent or coercive means resorted to for the purpose of restraining other dealers, and preventing them from exercising their own judgment as to prices.” Again, without actually invoking liberty of contract, a court had read the Act so as not to infringe it.

In another early case, liberty of contract was squarely presented and explicitly shaped the scope of the Act. In Dueber Watch-Case Manufacturing Co. v. E. Howard Watch & Clock, plaintiff, a watch manufacturer, alleged that several competitors had conspired to raise prices and attempted to induce the plaintiff to go along. When plaintiff refused, defendants attempted to drive it out of business by, inter alia, entering exclusive arrangements that

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155 See Letwin, supra note 146, at 150 (arguing that the court believed that, even in light of the trust’s tactics “enough competitors, actual or potential, would always be available to destroy the monopoly or limit its power to set prices”); People ex rel Annan v. Walsh, 22 N.E. 682, 693 (N.Y. 1889) (Peckham, J., dissenting) (same).

156 Cf. Walsh, 22 N.E. at 693 (Peckham, J., dissenting) (asserting that the state had no authority to regulate prices charged by efficient monopolist); Cooley, Limits to State Control of Private Business, supra note 48, at 268-69 (same).

157 See also In re Corning, 51 F. 205, 211 (C.C.N.D. Ohio 1892) (finding no violation of the Act because defendants’ distillery combinations were intended to increase trade, and did not limit the customer’s freedom to deal with others).

158 52 F. 646 (C.C.D. Minn. 1892).

159 See id.

160 See id., at 647.

161 Id.; cf. supra notes 43-45, 55 and accompanying text (describing similar approach suggested by the classical paradigm and taken by various common law courts).

162 Id.; cf. supra notes 43-45, 55 and accompanying text (describing similar approach suggested by the classical paradigm and taken by various common law courts).

163 55 F. 851 (C.C.S.D.N.Y. 1893), aff’d, 66 F. 637 (2d Cir. 1895).

164 See id., at 851-52.
obliged watch dealers not to deal with the plaintiff. The lower court dismissed the complaint without mentioning liberty of contract.

In the Second Circuit, the plaintiff offered a liberty-based rationale for construing the statute to outlaw defendants’ price fixing and the exclusive dealing designed to enforce it. According to the plaintiff, the statute was designed to enhance liberty, including its own liberty and that of its employees to “pursue that avocation and calling which seems best to him to promote his happiness and prosperity.” This freedom, “secured to them by the Declaration of Independence and by the Constitution of the United States,” plaintiff argued “had been interfered with by the contracts in question,” which limited plaintiff’s freedom to sell its wares to certain dealers.

In response, the lead defendant deployed its own liberty-based arguments. The challenged conduct, it said, was “a mere case of ordinary business competition,” and the defendants did not “constitute the whole, or even the major part of the manufacturers of the goods concerned.” Though admitting that it wanted to gain a larger share of the market, defendant argued that any attempt to prohibit such “ordinary” commercial methods would make the statute a “means of controlling and directing the private concern of individuals, and of depriving them of their legal right to management of their own business.” Such an interpretation of the Act would, the defendant said, be beyond the statute’s “constitutional scope.”

The Second Circuit affirmed, narrowing the Act so as not to abridge liberty of contract. Announcing the judgment of the court, Judge Lacombe largely adopted the defendants’ reasoning, implicitly rejecting plaintiff’s liberty from contract argument. Any agreement to fix watch prices, he said, was beyond the scope of the Act: “[e]ach one of the defendants had an undoubted right to determine for himself the price at which he would sell the goods he made, and he certainly does not lose that right by deciding to sell

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165 See id. at 852-53.
166 See id. at 853 (holding that the complaint did not properly allege that defendants were engaged in interstate commerce or, in any event, that they had “intended to absorb the entire trade” or “that the rights of the general public had been invaded”).
167 Brief for Plaintiff at 30.
168 Id. at 30-31.
169 Brief for Defendant in Error at 24-25.
170 Id. at 26.
171 Id. at 26.
172 Dueber Watch-Case Mfg. Co. v. E. Howard Watch & Clock, 66 F. 637, 641-46 (2d Cir. 1895) (concluding that plaintiff’s allegations did not state a claim under the Act). Lacombe, it should be noted, spoke only for himself. While Judge Shipman concurred in the result, he did so because the complaint did not properly allege that defendants’ conduct injured the plaintiff or restrained interstate commerce. See id. at 646-48 (Shipman, J., concurring). Unless otherwise indicated, citation of this decision will be to Judge Lacombe’s opinion.
them at the same price at which a dozen or so of his competitors sell the
goods which they make." If the agreement produced unreasonable prices,
Lacombe said, "the public will buy the goods it wants, not from them but
from their competitors." Moreover, the exclusive dealing arrangements,
which purportedly interfered with the dealers' and plaintiff's liberty, did not
involve items of prime necessity and thus, despite Munn and its progeny,
were constitutionally protected and beyond the reach of state regulation.

An individual manufacturer or trader may surely buy from or sell to
whom he pleases, and he may equally refuse to buy from one or sell to
any one with whom he thinks it will promote his business interests to
refuse to trade. This is entirely a matter of his private concern, with
which government paternalism has not as yet sought to interfere, except
when the property he owns is 'devoted to a use in which the public has
an interest;' and such public interest in the use has as yet been found to
exist only in staple commodities of prime necessity.

While Lacombe did not explain just how far this private liberty extended,
some language in his opinion did suggest some possible limits. For instance,
he pointed out that the exclusive dealing arrangements amounted to only a
partial restraint. Although the restraint limited the plaintiff's trade, it in­
creased the defendants' by a corresponding amount; in other words, the re­
straint did not reduce output. Thus, the scheme could not be "injurious
to the public, which has all the rest of the trade to deal with." Moreover,
echoing the lead defendant's assertion that the exclusive arrangements were
"ordinary" business practices designed to increase business in a legitimate
way, Lacombe asserted that the conduct appeared to be "a reasonable busi­
ness device to increase the trade of one set of competitors at the expense, no
doubt, of their business rivals." Why was it reasonable? Just as the dis­
trict court had emphasized in Greene, and Peckham had emphasized in Budd,
Lacombe stressed that the defendants' competitors were "equally free to
avail themselves of similar devices to secure their own trade." The con­
tracts certainly restrained the "liberty" of dealers to purchase from the plain­

\[173\] Id. at 644.
\[174\] Id.
\[175\] See id. at 645 (quoting Munn v. Illinois, 94 U.S. 113 (1876) and Budd v. New
York, 143 U.S. 517 (1893)).
\[176\] See id. at 645; cf. Brief for Defendant in Error at 25 ("There was no aim, so far as
appears, to engross all the trade . . . .").
\[177\] See Dueber Watch-Case, 66 F. at 645.
\[178\] Id. at 645-46.
\[179\] Id. at 646.
\[180\] Id.; cf. Brief for Defendants in Error at 25 ("Defendants concluded, exactly as
plaintiff might have concluded, that if they could induce their customers to deal exclu­sively with them it would be to their profit. . . . This policy of exclusive dealing might as
well have been beneficial to plaintiff as to defendants.").
tiff and interfered with the plaintiff's liberty to sell, but Lacombe nevertheless concluded that the defendants had a right to enter them, so long as they did not restrain liberty in a way that reduced output and led to higher prices. While he did not say so explicitly, Lacombe apparently believed that the defendants could not obtain market power unless they interfered with the ability of others to adopt similar contracts.

Judge Wallace dissented. Unlike Lacombe, he did not believe that the conduct before the court found shelter within liberty of contract. Instead, he concluded that, taken together with the scheme to fix prices, the exclusive dealing arrangements violated the Act because they "tended to coerce a competing manufacturer to join [defendants] and sell his goods at a price to be fixed by them." This coercion, he continued, necessarily had the effect of interfering with the liberty of dealers to purchase from the plaintiff. Liberty from contract, it seemed, was the touchstone of his analysis.

Closer examination, however, suggests that, in fact, Wallace actually rejected a liberty from contract standard. Wallace did not argue that all exclusive dealing or price fixing agreements were "coercive" and thus illegal. Instead, he agreed with Judge Lacombe that the Act was to be interpreted so as not to disturb defendants' liberty of contract. This liberty, he said, ordinarily included the right to fix prices and enter exclusive dealing arrangements that by their nature abridged the "liberty" of others:

I do not question the right of the defendants to combine for their own protection against unfair competition, and in that behalf, their commodity not being one of prime necessity, to agree not to sell to those who do not buy exclusively of them, or who buy of the complainant or some other obnoxious competitor. . . .

The defendants, however, were not acting out of "motives of self-protection, but oppressively." Apparently Wallace drew a distinction between conduct designed to protect defendants from destructive competition, and that aimed at driving prices above the natural level. The conduct of defendants was "oppressive" because they had attempted to induce the plaintiff to enter exclusive dealing agreements.

181 See Dueber Watch-Case, 66 F. at 646.
182 See id. at 648-52.
183 Id. at 651 (Wallace, J., dissenting) (emphasis added).
184 See id. at 650.
185 See id. at 652 (recognizing the right of the defendants to combine for their own protection); cf. Thorelli, supra note 145, at 482 (asserting—falsely in light of the analysis offered here—that "Judge Wallace disagreed with the majority on all points").
186 Dueber Watch-Case, 66 F. at 652 (Wallace, J., dissenting).
187 Id.
to "sell his goods at their prices," not the natural ones. 188 This, of course, was exactly the distinction Peckham had drawn in Budd. 189

Wallace's apparent embrace of the classical paradigm was consistent with his opinion, less than a decade earlier, in Dolph v. Troy Laundry & Machine Co. 190 There he enforced a market division agreement between two manufacturers of washing machines, an agreement that plainly deprived the parties of their "freedom" to sell where they wished. 191 Anticipating Peckham's approach in Budd, he concluded that such a contract could not prejudice the public:

Those who might be unwilling to pay the prices asked by the parties could find plenty of mechanics to make such machines, and the law of demand and supply would effectually counteract any serious mischief likely to arise from the attempt of the parties to get exorbitant prices for their machines. 192

The only exception, he suggested, was where the agreement in question "contemplate[d] suppressing the manufacture or sale of machines by others," thus leading to higher prices. 193

According to Judge Wallace, then, the mere fact that a contract restrained parties' freedom of action, or interfered with the freedom of sellers such as the plaintiff, did not place it beyond constitutional protection. Like Judge Lacombe, Judge Wallace apparently would have allowed abridgment of contracts only where they were found to be attempts to obtain market power. He merely disagreed with Lacombe about the proper explanation of the contracts in question.

Thus, just five years after Congress passed the Sherman Act, and ten years before Lochner v. New York, the Second Circuit believed that the Sherman Act had to be interpreted in light of liberty of contract. This liberty included the right to engage in "ordinary" commercial practices, even those that interfered with the opportunities of others. A contract was "ordinary" if, despite such interference and its restraining effect on the parties to it, it did not lead to prices above the competitive level. Like the majority and dissent in Budd, Lacombe and Wallace agreed about the principle to be applied.

188 Id.
189 See supra notes 106-25.
190 28 F. 553 (C.C.N.D.N.Y. 1886).
191 See id. at 554-55.
192 Id.; see also id. ("It is quite legitimate for any trader to obtain the highest price he can for any commodity in which he deals. It is equally legitimate for two rival manufacturers or traders to agree upon a scale of selling prices for their goods, and a division of their profits."); cf. Dueber Watch-Case, 66 F. at 645 ("An individual manufacturer or trader may surely buy from or sell to whom he pleases, and he may equally refuse to buy from or sell to any one with whom he thinks it will promote his business interest to refuse to trade.").
193 Dolph, 28 F. at 555.
Disagreement over the proper result in the particular case before them, then, simply followed from their different appraisals of the likely effects of the conduct involved.

B. The Supreme Court

Conventional wisdom has characterized decisions such as Dueber Watch-Case, Nelson and Greene as outliers—stubborn exemplars of the classical paradigm. Under this view, these courts ignored the original meaning of the Sherman Act, reading their own economic philosophy into the statute. Only the Supreme Court, the story continues, resisted this temptation, reading the Act to effectuate Congress's actual intent to abandon the classical paradigm. As shown below, conventional wisdom has mischaracterized the relationship between decisions such as Dueber Watch-Case, on the one hand, and subsequent Supreme Court precedent, on the other. Far from repudiating the framework employed by lower courts, the Supreme Court actually embraced it, holding that some impact on price was necessary before a contract could be deemed a direct restraint, contrary to the Act.

1. Trans-Missouri, Joint Traffic, and Hopkins

One of the first Sherman Act cases to reach the Supreme Court provided an apparently excellent vehicle for a consideration of the statute's implications for liberty of contract. In United States v. Trans-Missouri Freight Association, the Court faced a straight-forward cartel agreement among railroads serving St. Louis, memorialized in a written contract that was administered by a board appointed by the cartel's membership. Unlike the conduct at issue in Patterson, the agreement did not involve any tortious acts clearly within the police power. Moreover, because railroads had received no franchise from the state, it seemed that they were beyond regulation under the pure formulation of the classical paradigm. Finally, because the railroads admitted that the Interstate Commerce Act applied to their conduct, there could be no serious claim—as there was in Greene and Greenhut—that

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194 See supra note 143 and accompanying text; see also THORELLI, supra note 145, at 480-82 (arguing that Judge Lacombe's opinion in Dueber Watch-Case exemplified a "common law" approach to the Sherman Act); id. at 456-57 (arguing that, during the formative era, the Supreme Court rejected this common law approach).
195 166 U.S. 290 (1897).
196 See id. at 310.
198 See Munn v. Illinois, 94 U.S. 113, 154 (1876) (Field, J., dissenting); People ex rel Annan v. Walsh, 22 N.E. 682, 693 (N.Y. 1889) (Peckham, J., dissenting); COOLEY, CONSTITUTIONAL LIMITATIONS, supra note 60, at 575-77.
the Sherman Act as applied to these defendants was outside the scope of Congress' commerce power.199

Surprisingly, however, the defendants lodged no constitutional attack.200 Instead, they pressed two arguments: first, that the Act did not apply to railroads, who were instead regulated by the Interstate Commerce Act and second, that even if the Act did apply to railroads, it was not meant to forbid the sort of contracts they had entered, which merely set reasonable rates and prevented the type of destructive competition endemic to the industry.201 No monopoly of rail traffic existed or was possible, defendants claimed, because they had received no exclusive privileges, and had made no attempt to "absorb" their competitors.202 Such contracts to fix reasonable prices were legal at common law, defendants asserted, and thus were not "in restraint of trade" within the meaning of the statute.203

The Court rejected the railroads' arguments in an opinion drafted by Justice Peckham.204 According to the conventional account embraced by scholars of all stripes, Justice Peckham held that every contract "in restraint of trade," no matter how reasonable, violated the Act.205 The only possible ex-

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199 See Trans-Missouri Freight, 166 U.S. at 314-20; cf. United States v. E.C. Knight Co., 156 U.S. 1 (1894) (finding that creation of a monopoly in sugar did not restrain interstate commerce and thus was beyond the scope of the Act).

200 According to one scholar, "[t]he argument against the constitutionality of the Anti-Trust Law had hardly been pressed in the Trans-Missouri Freight Association [case], for an adverse decision [on the meaning of the statute] had not been expected." Twiss, supra note 71, at 195; see also Brief for the New York Central and Hudson River R.R. Co. at 38, United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898) ("This [constitutional] point was not made on the argument of the Trans-Missouri case, because no such construction of the act was anticipated by counsel.").

201 See Trans-Missouri Freight, 166 U.S. at 311-48; see also, e.g., Brief for the New York Central and Hudson River R.R. Co. at 25-27, Trans-Missouri Freight, 166 U.S. 290 (1897) (defending the agreement because it merely suppressed unlawful and destructive competition); see also id. at 37 (summarizing the likely destructive effects of unrestrained competition).

202 See Brief for the Burlington & Missouri River Railroad Company in Nebraska at 21-22.

203 See id. This argument found significant support in the common law. See Dolph v. Troy Laundry Mach. Co., 28 F. 553 (C.C.N.D.N.Y. 1886); Skrainka v. Scharringhausen, 8 Mo. App. 522 (1880); Kellog v. Larkin, 3 Pin. 123 (Wisc. 1851).

204 See Trans-Missouri Freight, 166 U.S. at 312-27 (rejecting argument that the Act was not intended to apply to railroads); see id. at 327-42 (rejecting argument that arrangement in question was not "in restraint of trade" within the meaning of the Act).

205 See, e.g., SKLAR, supra note 18 at 128-29 (concluding that the Trans-Missouri opinion declared all "restraints of trade" unlawful); Arthur, supra note 137, at 294-95 (noting Peckham's rejection of a reasonableness inquiry); BORK, ANTITRUST PARADOX, supra note 22, at 23 (arguing that Peckham "framed a rule of per se illegality for cartel price fixing"); SULLIVAN, supra note 10, at 168 (stating Justice Peckham's view that the Act condemned every restraint of trade without regard to reasonableness); LETWIN, supra
ception was for covenants ancillary to the sale of a business of the sort that would be valid at common law. At a minimum, scholars argue, Peckham meant to outlaw all naked horizontal restraints, regardless whether the firms in question had received any special benefits from the state. Moreover, scholars sympathetic to the Populist approach contend that such a construction was driven, at least in part, by Justice Peckham’s concern, expressed in obiter dicta, about the fate of “small dealers and worthy men” at the hands of large trusts. It was not “for the real prosperity of the country,” Peckham said, that a once independent man should become “a mere servant or agent of a corporation . . . having no voice in shaping the business policy of the country and bound to obey orders issued by others.” None of these scholars, however, has attempted to reconcile this result with Justice Peckham’s opinion in Budd, which deemed private cartels and natural monopolies beyond the scope of permissible regulation. Closer analysis suggests a much narrower holding, and one consistent with Peckham’s Budd dissent.

After concluding that the Act did apply to railroads, Peckham rejected the argument that it was meant to outlaw only those restraints that were

note 146, at 167-68 (same); Thorelli, supra note 145, at 456-57 (same); see also id at 455 (concluding that identical approach taken by the dissent in lower court was “plainly nothing but a restatement of the old idea that price fixing is unlawful per se”); May, Antitrust in the Formative Era, supra note 5, at 307 (arguing that Peckham believed every “direct” restraint violated the Act).

206 See Letwin, supra note 146, at 168-69; Bork, Antitrust Paradox, supra note 22, at 23; Arthur, supra note 137, at 294-95.

207 See, e.g., Peritz, supra note 5, at 30; Hovenkamp, Enterprise and American Law, supra note 3, at 293; Bork, Antitrust Paradox, supra note 22, at 22-23; Letwin, supra note 146, at 169.


209 Trans-Missouri Freight, 166 U.S. at 324. This language, of course, touched upon a question not before the Court, namely, whether a combination that aggrandized the market by “driving out of business” smaller firms would be deemed a “combination in restraint of trade” if it drove prices below the previously prevailing level. Id. at 322-24. There was, however, no assertion that the railroads had employed such tactics, or that their association had accomplished any reduction in prices. To the contrary, the United States asserted, and the Court assumed, that the purpose and effect of the Association was to increase prices. See id. at 331-39.

210 Professor May, it should be noted, does discuss Peckham’s Budd dissent. However, he treats the approach articulated there as consistent with Peckham’s dicta in Trans-Missouri Freight regarding small dealers and worthy men, even though that dicta would apparently condemn private cartels and monopolists of the sort Peckham defended in Budd. See May, Antitrust in the Formative Era, supra note 5, at 303-04.
"unreasonable" at common law. Instead, he suggested, the "plain meaning" of the statute indicated that the intent was to outlaw all contracts that "restrained trade," regardless how reasonable. He conceded, without explanation, that covenants ancillary to the sale of a business might not be "within the letter or the spirit of the [Sherman Act]." Peckham seemed to suggest two possible readings of the statute: one that outlawed all contracts that restrained trade, and another that left ancillary restraints outside its scope. Both readings, of course, would doom horizontal price fixing, regardless whether defendants had received special benefits from the state.

Ultimately, however, Peckham did not rely upon either reading of the Act in holding that the contracts before him restrained trade. Instead, he carefully distinguished the activities of the Association from agreements entered by truly private business. Unlike private businesses, he argued, the railroads were "public corporations organized for public purposes, granted valuable franchises and privileges." The most important such privileges, he said, were the right to take the property of private citizens by eminent domain, and the special gifts of land and money that defendants had received from states and municipalities. Without these privileges, he said, the defendants could not conduct business. Moreover unless the state granted similar privileges to others, members of the Association were immune from competition.

Finally, and again unlike "private" corporations, the business of the railroads, he emphasized "is of a public nature, closely affecting almost all classes in the community—the farmer, the artisan, the manufacturer and the trader."

[There is a] difference which exists between a private and a public corporation—that kind of a public corporation which, while doing business for remuneration, is yet so connected in interest with the public as to give a public character to its business—and it is seen that while, in the

211 See Trans-Missouri Freight, 166 U.S. at 327-28.
212 See id.
213 Id. at 329.
214 Id. at 332.
215 See id. at 332-33 (describing privileges conferred on the railroads); cf. Cooley, Limits to State Control of Private Business, supra note 48, at 249-55 (concluding that, when state granted a business a subsidy or the power of eminent domain, it obtained the power to regulate the firm's prices).
216 See Trans-Missouri Freight, 166 U.S. at 335 (noting that railroads had received "privileges and franchises ... in order that they might transact business . . . .").
217 Cf. Thomas Cooley, State Regulation of Corporate Profits, 137 N. AM. REV. 205, 209 (1883) (asserting that "legislative permission to build and operate a railroad is commonly a necessary prerequisite" to entry).
218 Trans-Missouri Freight, 166 U.S. at 333; see also id. at 333-34 (citing Gibbs v. Baltimore Gas Co., 130 U.S. 396, 408 (1888), for the proposition that even partial restraints by public utilities contravene public policy).
absence of a statute prohibiting them, contracts of private individuals or corporations touching upon restraints of trade must be unreasonable in their nature to be held void, different considerations obtain in the case of public corporations like those of railroads where it may be that any restraint upon a business of that character as affecting its rates of transportation must thereby be prejudicial to the public interests.\textsuperscript{219}

According to Peckham, this distinction between truly private businesses, on the one hand, and railroads, on the other, confirmed that Congress must have meant the Sherman Act to outlaw every restraint between competing railroads, without investigation into the reasonableness of the resulting price.\textsuperscript{220} This language suggested a much narrower reading of the opinion than commonly advanced by antitrust scholars, and a reading that gave no doctrinal effect to concerns regarding the fate of "small dealers and worthy men."\textsuperscript{221} Indeed, without even mentioning the Constitution, Peckham had drawn a distinction between horizontal restraints by purely private businesses, which would be sustained if the resulting price was reasonable, and similar restraints by firms that had received state aid and conducted businesses affected with a public interest. This was exactly the distinction he advanced in his Budd dissent.\textsuperscript{222}

Though susceptible to a narrow construction, many in the private bar chose to characterize the Trans-Missouri decision very broadly, using such a construction as a springboard for a constitutional attack on the Sherman Act.\textsuperscript{223} In so doing, of course, they would not have to rely simply upon

\textsuperscript{219} Id. at 334.
\textsuperscript{220} See id. at 335.
\textsuperscript{221} Id. at 323 (observing that combinations might drive "small dealers and worthy men" out of business) (dicta).
\textsuperscript{222} See People ex rel. Annan v. Walsh, 22 N.E. 682, 693 (N.Y. 1889) (Peckham, J., dissenting) (limiting permissible state regulation of business to those who received state aid).
\textsuperscript{223} See, e.g., Albert Stickney, State Control of Trade and Commerce 177-78 (New York, Baker, Voorhis & Co. 1897) (characterizing the opinion as fundamentally inconsistent with American and English law); William Royall, The "Pool" and the "Trust" 45-47 (Richmond, VA, George M. West 1897) (arguing that the decision was overbroad and infringed on contractual liberty); P.C. Knox, The Law of Labor and Trade, 45 Am. L. Reg. & Rev. 417, 434-35 (1897) (arguing that Trans-Missouri formulation would interfere with the constitutional freedom to make contracts in partial restraint of trade); William Guthrie, Constitutionality of the Sherman Antitrust Act, 11 Harv. L. Rev. 80, 80 (1897) (contending that the Trans-Missouri formulation would outlaw "[n]early every commercial contract"). Other authors employed similar arguments against state statutes with apparently broad prohibitions. See William Collier, The Trusts 314-16 (1900) (arguing that prohibition of reasonable restraints by "sweeping" state statutes infringed on liberty of contract); David Wilcox, Unconstitutionality of Recent Antitrust Legislation, 23 Forum 107, 107-18 (Sept. 1897) (questioning the constitutionality of New York legislation prohibiting all contracts that "may" restrain trade); S.C.T. Dodd, The
treatise writers and state decisions for the proposition that the Constitution protected liberty of contract.\textsuperscript{224} In addition, there was Justice Peckham’s opinion three weeks before \textit{Trans-Missouri} in \textit{Allgeyer v. Louisiana}.\textsuperscript{225} There the Court had unanimously voided, as violative of liberty of contract, a Louisiana statute that forbade citizens of the state from making contracts with insurance companies outside the state, unless those companies had met various regulatory requirements.\textsuperscript{226} The statute, Peckham said, infringed upon the liberty to enter a “proper” contract and did not fall within the police power.\textsuperscript{227}

Led by William Guthrie, who had served as lead counsel for the \textit{Trans-Missouri} defendants, these critics set up a useful straw man. Ignoring the distinction Peckham had drawn between “private” and “public” corporations, these esteemed members of the bar construed the \textit{Trans-Missouri} opinion to prohibit all contracts that “restrain trade,” no matter “how reasonable such a contract may be, how necessary for the protection of the property rights of the contracting parties, how beneficial to the community at large.”\textsuperscript{228} Under this formulation, Guthrie asserted, “the people may be arbitrarily and unreasonably deprived of liberty to trade and freedom of contract in the pursuit of their ordinary avocations by what were heretofore entirely legitimate business methods.”\textsuperscript{229} The mere fact that an agreement restrained the freedom of action of the parties to it could not—as the \textit{Trans-Missouri} formulation purportedly suggested—justify its abridgment: “nearly every commercial contract to some extent restrains and limits trading on the

\textit{Present Legal Status of Trusts}, 7 \textit{HARV. L. REV.} 157, 164-65 (1893) (arguing that, if given a literal construction, various state antitrust statutes would render business impossible and violate the Constitution).

\textsuperscript{224} See \textit{supra} notes 71-74, 93-96 and accompanying text (describing role of treatise writers and state courts in developing liberty of contract doctrine).

\textsuperscript{225} 165 U.S. 578 (1897).

\textsuperscript{226} See \textit{id.} at 593.

\textsuperscript{227} See \textit{id.} at 589 (declaring that the Fourteenth Amendment protects the right to enter into all proper contracts in order to pursue any lawful calling); \textit{see also id.} at 589-90 (quoting Butchers’ Union Co. v. Crescent City Co., 111 U.S. 746, 762 (1883) (Bradley, J., concurring), for the proposition that all citizens have a right to pursue a calling of their choice).

\textsuperscript{228} Guthrie, \textit{supra} note 223, at 80; \textit{see also Knox, supra} note 223, at 431-32 (“All contracts, reasonable or unreasonable, upon good consideration or upon none, necessary or unnecessary for the interests of the parties, all alike are forbidden if they in any way or to any extent restrain trade or have that tendency.”); \textit{ROYALL, supra} note 223, at 45-46 (criticizing the opinion because it prohibited even the most “ordinary” business contracts); Dodd, \textit{supra} note 223, at 165 (wondering whether Sherman Act would be interpreted to outlaw even reasonable, partial “restraints of trade”).

\textsuperscript{229} Guthrie, \textit{supra} note 223, at 80; \textit{see also Knox, supra} note 223, at 434 (“The innocuous [contract] cannot be made [invalid] without infringing liberty of contract.”).
part of the contracting parties.”

Other writers also argued that the Trans-Missouri formulation proved too much: according to one, it would outlaw the “ordinary contract of partnership . . . which fetters a man’s freedom, and prevents competition between the partners.”

Another pointed out that it would criminalize partial restraints ancillary to the sale of a business.

Ironically, Guthrie conceded that Congress had the authority to regulate the rates of “railroads and other quasi-public corporations or monopolies.” Still, he said, the Act, as construed by the Trans-Missouri court, did not distinguish between such firms and “private trading companies,” but instead purported to outlaw “every restraint” by every firm, no matter how reasonable.

Because these potential applications of the statute clearly deprived individuals of liberty of contract by preventing them “from entering into reasonable contracts which may be proper, necessary and essential to carrying on a legitimate business,” Guthrie concluded that the Supreme Court should void the statute in its entirety, even in a case involving a railroad or other firm that had received a special advantage from the state.

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230 Guthrie, supra note 223, at 80. Indeed, according to Guthrie, this “despotic and arbitrary measure,” was akin to socialism or even communism. See id. at 81; cf. People ex rel Annan v. Walsh, 22 N.E. 680, 695 (N.Y. 1889) (Peckham, J., dissenting) (arguing that the regulation of elevator charges was “communistic in its tendency”).

231 STICKNEY, supra note 223, at 159; see also ROYALL, supra note 223, at 45 (“It does not follow because an agreement between men may put restrictions upon some sort of traffic somewhere that such agreements necessarily operate as 'restraints upon trade' . . . . It is not possible to have trade without restrictions of some sort upon some sort of trade. Trade is nothing but a vast aggregation of contracts, and contracts necessarily involve restrictions. The very life of a contract is that the contractor shall do nothing that is inconsistent with that which he agrees to do.”). Similar arguments were made against state antitrust legislation in New York and Texas. See Wilcox, supra note 223, at 110-11 (arguing that, under interpretations of New York law “the most ordinary and customary contracts or arrangements may incidentally restrain trade or prevent competition [and thus be deemed unlawful]”); COLLIER, supra note 223, at 314-15 (arguing that state antitrust statutes were “almost always” overbroad). Similarly, other authors argued that antitrust regulation was constitutional so long as it only outlawed those contracts that were unenforceable at common law. See THOMAS C. SPELLING, A TREATISE ON TRUSTS AND MONOPOLIES 74-75 (Fred Rothman & Co. 1981) (1893); TIEDEMAN, supra note 93, at 245-48. Finally, other members of the bar deemed the Sherman Act constitutional precisely because they read the Trans-Missouri opinion to incorporate a “rule of reason.” See Edward B. Whitney, Constitutional Questions Under the Federal Anti-Trust Law, 7 Yale L.J. 285, 289-90 (1898); Wilcox, supra note 223, at 112, n.6 (noting that a court must examine an agreement for effect to determine its legality under the statute).

232 See Knox, supra note 223, at 430.

233 Guthrie, supra note 223, at 90 (citing Munn v. Illinois, 94 U.S. 113 (1876)).

234 See id. at 91.

235 Id. Guthrie further stated:

The test of constitutionality is not what may be legitimate as to the particular individuals or corporations before the court, but what may be done within the scope and
The railroads did not have to wait long to test these constitutional theories. Just two years later, the Court addressed a case almost identical to *Trans-Missouri: United States v. Joint Traffic Association*. Thirty-one railroads, forming "most (but not all)" of the companies engaged in rail transportation between Chicago and the East Coast, formed the "Joint Traffic Association," which had jurisdiction over the rates charged by its members over certain designated lines. The Association exercised that "jurisdiction" by dividing competitive traffic among members, setting rates, and punishing deviations from its edicts.

The defendants fervently pressed their liberty of contract argument. They conceded that the state could abridge this liberty if acting pursuant to the police power. Relying upon the work of Christopher Tiedeman, however, they contended that such authority did not include the ability to "abolish rights the exercise of which does not involve an infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare." The application of the Act sought by the government, they said, did not fall within the police power so defined, but simply redistributed income from railroads to customers through price regulation. Such redistribution did not protect any "right" of the public, but instead was an attempt by one part of the community to obtain a benefit at the expense of another. Outlawing the activities of the Association, then, would ensure that one class (consumers) was "entitled to be protected in the opportunity to rob another."

The railroads were not, it should be emphasized, arguing for a constitutional right to charge cartel prices above the "natural" level. Echoing Justice

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intention of the statute, or be asserted under its authority. If unconstitutional as to one, the lowliest or the richest, it is unconstitutional as to all. We must judge the law by what it purports to ordain as to individuals engaged in private business pursuits.

Id. *But cf. Dodd*, supra note 223, at 164 (arguing that "[i]t is possible that a construction can be put upon [state antitrust statutes] which will render them compatible with ordinary transactions of bargain and sale, and with the existence of partnerships, corporations, and other business combinations").

236 171 U.S. 505 (1898).

237 See id. at 505-06.

238 See id. at 506-08.

239 Brief for the New York Central and Hudson River R.R. Co. at 51, *Joint Traffic Ass'n* (No. 341) (quoting TIEDEMAN, supra note 93, at 4); see also id. at 47-50 (invoking various decisions, including Allgeyer, protecting liberty of contract); cf. Guthrie, supra note 223, at 81-87.

240 See Brief for the New York Central and Hudson R.R. Co. at 51-55.

241 See id at 52; see also Guthrie, supra note 223, at 93 ("The pretence of public policy [as embodied in the Court's *Trans-Missouri* decision] is ever the mask of the reckless politician competing for the unthinking vote. It is the deadly weapon of socialism and communism.").

242 Brief for the New York Central and Hudson R.R. Co. at 53; see also id. at 54.
Peckham's opinion in *Budd*, they maintained that competitive conditions made such supra-competitive pricing impossible, and that the Association was needed to guarantee its members a competitive price and thus a "natural" rate of return.\(^{243}\) Absent such collective action, they contended, destructive competition would drive rates below cost, and thus below the price that would obtain in a competitive market, giving consumers an unjust windfall.\(^{244}\) Thus, the "unjust loss" that would follow application of the *Trans-Missouri* standard was not foregone monopoly profits, but simply a normal, reasonable rate of return.

The defendants did not rest solely upon the claim that their own conduct—horizontal price fixing—was a constitutionally protected liberty. They also raised what in modern parlance is an overbreadth challenge, an assertion that the statute was unconstitutional as applied to others.\(^{245}\) Echoing the argument that had been made by William Guthrie and others, they contended that the *Trans-Missouri* formulation was unconstitutional in that it outlawed all sorts of everyday contracts not hitherto thought to be unenforceable, let alone criminal.\(^{246}\) David Willcox, Counsel for the Central Railroad Company of New Jersey, repeated nearly verbatim an argument he had recently made against a broad construction of New York's Antitrust Act:

\(^{243}\) See *id.* at 52 (rejecting the assertion that "the public" is entitled to have maintained by law, by a prohibition of the only agreements that could prevent it, a competition which, however destructive to the carriers, is likely to result in affording to shippers of freight, rates of transportation that are less than reasonable and just*); *id.* at 59 ("If there were no legislation whatever in restraint of rates of transportation, it still would be impossible, under the conditions that prevail that unreasonable rates could be exacted by the railroad companies.").

\(^{244}\) See *id.* at 52-53; see also *id.* at 54-57 (describing financial harm to railroads and the public that would result from destructive competition); *Budd v. New York*, 143 U.S. 517, 550 (1892) (Brewer, J., dissenting) (arguing that police power did not empower State to force one person to use his property so as to benefit another).

\(^{245}\) See, e.g., *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76 (1981) (sustaining challenge by nude dancers to prohibition of "live entertainment" because the law swept within its ambit constitutionally-protected expression such as "plays, concerts, musicals, and dances," regardless whether nudity was involved).

\(^{246}\) See Brief for The Central R.R. Co. of New Jersey at 9; Brief for the Pennsylvania R.R. Co. at 17-18; see also Guthrie, *supra* note 223, at 80 ("In view of [the *Trans-Missouri* formulation], it is now the legal presumption that it was the intention of Congress to prohibit and render criminal every contract in restraint of trade or commerce among the several States or with foreign nations. It matters not how reasonable such a contract may be, how necessary for the protection of the property rights of the contracting parties, how beneficial to the community at large,—all alike are prohibited."); *Knox, supra* note 223, at 430 (arguing that reasonable restraints ancillary to the sale of a business were protected by the Due Process Clause); *Royall, supra* note 223, at 45-46 (arguing that the *Trans-Missouri* decision construed the Act too broadly in prohibiting a wide range of contracts).
The extent to which [the Trans-Missouri formulation] limits the freedom and destroys the property of the individual can scarcely be exaggerated. For it needs no argument to show that contracts and combinations which are most ordinary and indispensable have the effect of restraining trade. As examples may be suggested all organizations of mechanics engaged in the same business for the purpose of limiting the number of persons employed in the business, or of maintaining wages; the formation of a corporation to carry on any particular line of business by those already engaged therein; a contract of partnership or of employment between two persons previously engaged in the same line of business; the appointment by two producers of the same person to sell their goods on commission; the purchase by one wholesale merchant of the product of two producers; the lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop; the withdrawal from business of any farmer, merchant or manufacturer; a sale of the good-will of a business with an agreement not to destroy its value by engaging in similar business; a covenant in a deed restricting the use of real estate. The effect of most business contracts or combinations is to restrain trade in some degree. 247

Because the statute outlawed such reasonable contracts, defendants concluded, it was void and should be struck down in its entirety, even if Congress had the authority to outlaw the sort of agreements they had entered. 248

The government responded at some length. Initially, the government suggested that, regardless of its effect on prices, the agreement in question should be forbidden, "in order to preserve competition, and thereby, as far as possible, freedom of action in industrial and commercial life." 249 The government quickly changed course, however, contending that the maintenance of competition was necessary because it would "lower the cost of production of the commodity to the benefit of the public." 250

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247 Brief for The Central R.R. Co. of New Jersey at 18-19; cf. Willcox, supra note 223, at 110-11 (emphasizing the broad sweep of the New York Act to include any agreement which might restrain trade); Stickney, supra note 223, at 159 (arguing that, by its terms, Trans-Missouri formulation would outlaw ordinary contracts).

248 See Brief for The Central R.R. Co. of New Jersey at 19-20; see also Guthrie, supra note 223, at 91 (arguing that the Act was unconstitutional because of its broad prohibition of ordinary contracts).

249 Brief for the United States of America at 2; see also Peritz, supra note 5, at 35 (noting Solicitor General’s purported reliance upon republican concerns for independent traders).

250 Brief for the United States of America at 5; see also id. at 8 ("The interest of the public lies not in maintaining but in reducing rates, and to effect such reduction competition is essential.").
fore the Court would have the opposite effect: "The natural result of pre­
venting competition is to keep up rates."251

In the portion of the brief devoted to the constitutionality of the Act, the
United States made no mention of the necessity to protect the liberty of citi­
zens or traders. Instead, in a mere two pages, the government emphasized
that the railroads were essentially operating as public highways and per­
forming a governmental function.252 Their facilities, therefore, were devoted
to a public use, and thus subject to regulation under the rule of Munn.253

Justice Peckham again delivered the opinion of the Court. Dealing first
with the overbreadth challenge, Peckham responded directly to the assertion
that the Trans-Missouri standard would criminalize what he called "ordinary
contracts and combinations" such as the formation of a partnership or a
covenant not to compete.254 Conceding that the Fifth Amendment placed
limits on Congress's commerce power, Peckham asserted that the statute did
not exceed those limits.255 Most of the ordinary contracts and combinations
cited by the defendants had never been deemed "in the nature of a contract in
restraint of trade or commerce."256 While these agreements "might restrain
trade" in some sense, Peckham asserted that the statute had to be given "a
reasonable construction."257 Otherwise, "there would scarcely be an agree­
ment or contract among business men that could not be said to have, indi­
rectly or remotely, some bearing upon interstate commerce, and possibly to
restrain it."258 Despite any language to the contrary in Trans-Missouri, he
explained that only "direct" restraints violated the Act, and that the sort of
"ordinary contracts and combinations" posited by the defendants were

251 Id. at 6; see also id. at 8 ("[F]or natural [the arrangement] substitutes arbitrary
change. The [railroads'] protest against any change in rates is a protest against progress.
The history of railroads shows a constant tendency toward cheaper rates. This has
resulted from improvements forced by competition. The interest of the public lies not in
maintaining but in reducing rates, and to effect such reduction competition is essential.").
252 See id. at 24.
253 See id. at 25.
254 See United States v. Joint Traffic Ass'n, 171 U.S. 505, 568 (1898) ("To suppose . . .
that the effect of the decision in the Trans-Missouri case is to render illegal most business
contracts or combinations . . . is to make a most violent assumption and one not called for
or justified by the decision. . . .").
255 See id. at 571; see also id. at 572 (concluding that application of the Act did not in­
fringe defendants' liberty of contract).
256 Id. at 567-68.
257 Id. at 568 (quoting Hopkins v. United States, 171 U.S. 578, 600 (1898)); cf. Dodd,
supra note 223, at 164 (arguing that courts should construe antitrust statutes narrowly so as
to avoid charge that they would outlaw "ordinary" business transactions); Whitney, su­
pra note 231, at 289-90 (expressing doubt that the Supreme Court would interpret the Act
to prohibit restraints of trade which were merely ancillary to some other lawful purpose).
258 Joint Traffic, 171 U.S. at 568 (quoting Hopkins, 171 U.S. at 568).
merely "indirect."\textsuperscript{259} Importantly, Peckham emphasized that, even if such a contract increased "the cost of conducting an interstate commercial business," it did not violate the Act unless it also directly restrained trade.\textsuperscript{260} Confronted with the overbreadth challenge issued by the Bar and repeated by the defendants, Peckham construed the Act narrowly, so as not to abridge those "ordinary" contracts that were "necessary and indispensable."\textsuperscript{261}

Peckham next addressed the critical question of whether the activities of the Freight Association were direct restraints of trade and thus fell outside the shelter of liberty of contract.\textsuperscript{262} The contract before the Court, Peckham said, was not an ordinary one that only interfered with commerce indirectly, but was instead a restraint that "directly affects and of course is intended to affect the cost of transportation of commodities."\textsuperscript{263} True to its intent, the agreement did "affect interstate commerce by destroying competition and by maintaining rates above what competition might produce."\textsuperscript{264} Congress certainly had the authority "in the case of railroad corporations" to declare unlawful contracts or combinations which so restrained commerce "by shutting out the operation of the general law of competition."\textsuperscript{265} The railroads' fears of destructive competition were overstated: the "natural, direct and immediate effect" of competition was "to lower rates, and to thereby increase demand for commodities, the supplying of which increases commerce."\textsuperscript{266}

In concluding that Congress had the authority to so regulate "in the case of railroad corporations," Peckham did not accept the government's invitation to interpret the Act broadly so as to maximize "the freedom of action in industrial and commercial life."\textsuperscript{267} Nor did he, as many scholars have suggested, rely solely upon the horizontal character of the agreement in ques-

\begin{footnotes}
\footnotetext{259}{Id.}
\footnotetext{260} {Id. (emphasis added).}
\footnotetext{261} {See id.; see also Hooper v. California, 155 U.S. 648, 657 (1895) (construing statute narrowly so as to avoid constitutional difficulties); John Copeland Nagle, Delaware & Hudson Revisited, 72 Notre Dame L. Rev. 1495, 1495-97 (1997) (arguing that in the nineteenth century, courts routinely interpreted statutes to avoid holding them unconstitutional).}
\footnotetext{262} {See Joint Traffic, 171 U.S. at 568-69.}
\footnotetext{263} {Id. at 569.}
\footnotetext{264} {Id. (emphasis added).}
\footnotetext{265} {Id. at 577; see also id. at 576 ("There can be no doubt that the general tendency of competition among competing railroads is towards lower rates for transportation, and the result of lower rates is generally a greater demand for the articles so transported, and this demand can only be gratified by a larger supply, the furnishing of which increases commerce.").}
\footnotetext{266} {Brief for the United States at 2-3 (arguing that Congress outlawed monopolies and trusts to preserve this freedom).}
\end{footnotes}
Instead, picking up on the distinction he had drawn in the Trans-Missouri decision, he (re)emphasized that, unlike ordinary private individuals or corporations, railroads had received special advantages from the state, particularly the power of eminent domain, which rendered them public franchisees. These advantages, he suggested, conferred upon the companies enhanced power over competition and thus the ability to exercise market power. In so doing, he refused the government's invitation to rely upon Munn. Instead, in giving the statute a "reasonable construction," he relied upon reasoning more reminiscent of Cooley, Tiedeman, or his own dissent in Budd. The agreements were "direct restraints" of interstate commerce, and thus subject to regulation under the Act, precisely because they fell outside the "liberty of contract" protected under the classical paradigm.

We do not think, when the grantees of this public franchise are competing railroads seeking the business of transportation of men and goods from one State to another, that ordinary freedom of contract in the use of and management of their property requires the right to combine as one consolidated and powerful association for the purpose of stifling competition among themselves, and of thus keeping their rates and charges higher than they might otherwise be under the laws of competition. And this is so, even though the rates provided for in the agreement may for the time be not more than are reasonable. They may easily and at any time be increased.

The ability of the railroads to set prices higher than those that would obtain under "the laws of competition," an ability derived from special advantages conferred by the State, distinguished the contracts before the Court

268 See Peritz, supra note 5, at 30; Bork, Antitrust Paradox, supra note 22, at 23-24; Sullivan, supra note 10, at 169; Letwin, supra note 146, at 179-81.

269 See Joint Traffic, 171 U.S. at 569-70 (describing extent and necessity of government involvement in establishing railroads).

270 See id. at 570-71. Although he did not say so explicitly, Peckham presumably believed that, without such a state grant of eminent domain power, a firm could not enter the railroad business. See Page, Ideological Conflict, supra note 16, at 46-47 (noting that franchises granted defendants in Joint Traffic "effectively precluded new entry"); Cooley, State Regulation of Corporate Profits, supra note 217, at 210 (noting that legislative permission was a prerequisite to railroad construction and operation).

271 Joint Traffic, 171 U.S. at 570-71 (emphases added); see also id. at 570 ("Where the grantees of this public franchise are competing railroad companies for interstate commerce, we think Congress is competent to forbid any agreement or combination among them by means of which competition is smothered."); cf. Cooley, State Regulation of Corporate Profits, supra note 217, at 209-11 (arguing that special privileges received by railroads rendered them subject to price regulation); Cooley, Limits to State Control of Private Business, supra note 48, at 249-55 (same); Barry Cushman, Rethinking the New Deal Court 143-44 (1998) (contending that, during the late nineteenth century, the Court's Commerce Clause jurisprudence was infused with concepts developed in the liberty of contract context).
from those indirect restraints that would find shelter in "ordinary freedom of contract." While liberty of contract did place limits on Congress's authority to regulate commerce, those limits had not been passed in this case.272

On the very same day, the Court released another decision—not often discussed by antitrust scholars—that shed even more light on the Court's thinking regarding the interrelation between liberty of contract doctrine and the Sherman Act: Hopkins v. United States.273 The United States challenged bylaws of the Kansas City Live Stock Exchange which prevented its members from sending telegrams to cattle farmers in other states, and limited the numbers and salaries of agents that could be employed to solicit consignment sales from those farmers.274 Similar limits on freedom of action imposed by the State, the United States argued, would infringe liberty of contract.275 By parity of reasoning, the government contended, the bylaws, though creatures of contract, deprived members of their liberty to conduct business as they saw fit, burdened the flow of cattle from state to state, and thus were direct restraints of interstate commerce in violation of the Act.276

272 See Joint Traffic, 171 U.S. at 571. It should be noted that other scholars have offered differing interpretations of the holding in Joint Traffic. Professor Hovenkamp, for instance, argues that Peckham concluded that the terms of the railroads' franchises and corporate charters did not "entitle them to behave anticompetitively." Hovenkamp, Enterprise and American Law, supra note 3, at 294. Such an approach would have been consistent with Peckham's suggestion in Budd that the State could condition the privilege of incorporation upon a firm's agreement to subject itself to price regulation. See People ex rel Annan v. Walsh, 22 N.E. 682, 693 (N.Y. 1889) (Peckham, J., dissenting) (implying that the state could condition such privileges upon agreement to regulation); see also Cooley, State Regulation of Corporate Profits, supra note 217, at 210-12 (recognizing that state could regulate railroads because state involvement was a prerequisite to their establishment). However, nowhere in the Joint Traffic opinion does Peckham quote or refer to the charters in question, or otherwise suggest that the application of the Sherman Act depended upon the terms of state corporate charters. Cf. Northern Secs. Co. v. United States, 193 U.S. 197, 332-33 (1904) (state cannot immunize merger from Sherman Act scrutiny). Professor Page, on the other hand, contends that Peckham adopted a "liberty from contract" approach. See Page, Ideological Conflict, supra note 16, at 47 ("The coercive elements of the restraints themselves inhibited liberty of contract and the application of the statute preserved it."). As shown herein, however, Peckham rejected such an approach in Addyston Pipe and Hopkins.

273 171 U.S. 578 (1898).
274 See id. at 578.
275 See Brief for the United States of America at 128-29, Hopkins, 171 U.S. 578 (1898).
276 See id. at 132, 180-89; see also id. at 190 ("It is the right and privilege of any man to engage in the commission business at the Kansas City stock yards, or, having engaged in that business, it is his right to continue. A combination whose efforts are directed to prevent him from transacting such business is one which the law will not tolerate.") (citing The Slaughterhouse Cases, 83 U.S. 36 (1873)).
The Court, per Justice Peckham, disagreed, rejecting this “liberty from contract” approach to interpreting and justifying the Sherman Act. Peckham acknowledged that statutes that prevented the transmission of telegrams between states or placed limits on the number of solicitors a member could employ may well violate liberty of contract and impermissibly restrain interstate commerce. Nonetheless, contracts facially identical to such statutes did not necessarily restrain the “liberty” of the parties to them, even if they “greatly restrained and limited” the freedom of action of parties. While a citizen possessed the “right” to send telegrams or employ solicitors, he also had the right “for what he thinks good reason [to] contract to curtail that right.” So long as “voluntary” such an agreement found shelter in liberty of contract, even if it “greatly restrained” the contracting parties’ freedom of action with respect to interstate commercial activity. Only contracts that had the effect of directly restraining such commerce, he said, fell outside liberty of contract and offended the Act. Those before the Court were merely indirect. As in Joint Traffic, then, the definition of direct restraint was derived from the scope of liberty implied by the classical paradigm.

277 See Hopkins, 171 U.S. at 602-03.
278 Id. at 603 (emphasis added). Justice Peckham further remarked:

We say nothing against the constitutional right of each one of the defendants and each person doing business at the Kansas City stock yards to send into distant States and Territories as many solicitors as the business of each will warrant. This original right is not denied or questioned. But cannot the citizen, for what he thinks good reason, contract to curtail that right? To say that a State would not have the right to prohibit a defendant from employing as many solicitors as he might choose, proves nothing in regard to the right of individuals to agree upon that subject in a way which they may think the most conducive to their own interests. What a State may do is one thing, and what parties may contract voluntarily among themselves is quite another thing.

The liberty of contract, as referred to in Allgeyer v. Louisiana, 165 U.S. 578, is the liberty of the individual to be free, under certain circumstances, from the restraint of legislative control with regard to all his contracts, but the case has no reference to the right of individuals to sometimes enter into those voluntary contracts by which their rights and duties may properly be measured and defined and in many cases greatly restrained and limited.

Id. at 602-03; see also id. at 599 (“The [hypothetical] statute might be illegal as an improper attempt to interfere with the liberty of transacting legitimate business enjoyed by the citizen, while the agreement among business men for the better conduct of their own business, as they think is protected . . . . There is no similarity between the two cases, and the principle existing in the one is wholly absent in the other. The private agreement does not, as we have said, regulate commerce or impose any impediment or tax upon it.”).

279 Id. at 603 (citing Allgeyer, 165 U.S. 578 (1897)).
280 See id.
281 See id.
282 See id. at 590-604.
283 Indeed, in Swift & Co. v. United States, 196 U.S. 375 (1905), the Supreme Court unanimously suggested that the outcome in Hopkins would have been different if “the
Thus, by 1898, the reach of the Sherman Act was far narrower than most have supposed, reflecting as it did, the influence of the classical paradigm and liberty of contract. In *Dueber Watch-Case*, the Second Circuit read the Act only to prohibit the sort of illegitimate methods of competition that would lead to prices above the competitive norm, regardless of their restraining effect.²⁸⁴ A stout devotee of liberty of contract, Justice Peckham had written the *Trans-Missouri Freight* opinion quite narrowly, justifying application of the Sherman Act in a manner consistent with the classical paradigm.²⁸⁵ Responding to the overbreadth challenge in *Joint Traffic*, he had made it clear that the Act would not prevent so-called "indirect" restraints of interstate commerce.²⁸⁶ The line between "direct" and "indirect" restraints was derived from the distinction between ordinary contracts, on the one hand, which found shelter within liberty of contract, and other agreements, on the other.²⁸⁷ Contracts might be indirect, it should be emphasized, even if they increased the "cost of conducting an interstate commercial business."²⁸⁸ Moreover, while Peckham made it clear that Congress had the authority to prevent horizontal restraints by firms that received special state aid, he had left open the question whether, in fact, horizontal price fixing by businesses that had received no such aid—seemingly a "direct restraint" in common parlance—was protected by "ordinary freedom of contract."²⁸⁹ Not only had Justice Peckham refused the government's invitation to rely upon *Munn*, but he had drafted the opinion in a way that called the continuing validity of that decision into question.

Finally, in *Hopkins* Justice Peckham had confirmed the Second Circuit holding in *Dueber Watch-Case* and what was implicit in *Joint Traffic*: the mere fact that a contract restrained the "liberty" of private parties did not thereby render it a direct restraint beyond constitutional protection.²⁹⁰ While contracts might *appear* to have the same restraining effect as statutes, they

²⁸⁴ See *Dueber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co.*, 66 F. 637, 646 (2d Cir. 1895).
²⁸⁵ See *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 332-35 (1897).
²⁸⁷ See *Hopkins v. United States*, 171 U.S. 578, 603 (1898).
were fundamentally different when entered "voluntarily." Contracts were "voluntary" so long as they did not have the effect of directly restraining trade. Some justification beyond "liberty from contract" was needed before a contract lost constitutional protection.

2. Addyston Pipe

Just one year later, in Addyston Pipe & Steel Co. v. United States, the Court faced the question it had left open in Joint Traffic: whether the Due Process Clause deprived Congress of the authority to prohibit horizontal price fixing by firms that were not protected by state-created barriers to entry. In Addyston Pipe, the United States challenged a naked cartel of cast iron pipe producers who regularly rigged bids for, among other things, pipe used in municipal water projects in numerous states. Reversing the district court's dismissal of the action, the Sixth Circuit, in an opinion by William Howard Taft, suggested that the Act outlawed all horizontal price fixing contracts, even those that set reasonable prices. At any rate, he said, evidence submitted at trial indicated that the prices fixed by the cartel in question were well above the cost of producing the pipe plus a reasonable rate of return and thus were not reasonable.

In the Supreme Court, the defendants argued, inter alia, that the application of the Act sought by the government was unconstitutional, relying upon two interrelated arguments suggested by Hopkins and Joint Traffic. First, they claimed that the Commerce Clause did not confer on Congress the authority to regulate purely private contracts, but instead merely empowered Congress to preempt state statutes that interfered with liberty of contract and thus obstructed such commerce. Unlike statutes that Congress could preempt, defendants argued, purely private contracts could not be characterized as "regulations of commerce." In so doing, the defendants relied upon

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See id. at 226-27.

292 175 U.S. 211 (1899).

293 See id. at 211.

294 85 F. 271, 291 (6th Cir. 1898). Judge Taft stated:

We can have no doubt that the association of the defendants, however reasonable the prices they fixed, however great the competition they had to encounter . . . was void at common law, because in restraint of trade, and tending to create a monopoly. But the facts of this case do not require us to go so far as this, for they show that the attempted justification of this association on the grounds stated is without foundation.

Id. at 291.

See id.

296 See Brief and Argument for Appellants at 48, Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899) (No. 269).

297 See id. at 47-48 ("It is substantially a different thing whether a state prohibits a person from making a contract or whether the person by his own contract restrains himself. In the one case there is prohibited the freedom of contract, and if the subject matter is interstate commerce the legislation is avoided by the commerce clause of the constitution; in
Hopkins, and the distinction it recognized between contractual restraints on liberty and those imposed by statute.298

Second, the defendants argued that, even if the Commerce Clause authorized Congress to regulate private contracts, that authority could not be employed to abridge the sort of contracts they had entered, in light of the principle of liberty of contract articulated in Allgeyer and similar cases.299 While acknowledging Joint Traffic's holding that Congress had the authority to regulate price fixing agreements by certain firms, defendants contended that such authority did not extend to agreements, such as their own, by purely private businesses to set reasonable prices.300

The result is that the anti-trust act should be construed as not intended to include private contracts. True, the act was held to be constitutional in the Joint Traffic case. But the contract in that case was between quasi-public agencies concerning quasi-public property which was acquired and held and used to transport interstate commerce. . . . The reason for the anti-trust act is to be found in the need for constant regulation of the great public instruments of commerce among the states, but there is no need for the act to regulate purely private contracts; and to construe it as designed for that purpose is to ascribe to congress an intent to invade the citizen's freedom of contract. . . .301

Unable to rely on any claims that the defendants were public franchisees, the government directly confronted the assertion that liberty of contract included the right of a purely private business to fix prices. Conceding the existence of the freedom to trade, the government argued that the interpretation of the Act it sought did not abridge liberty but, in fact, enhanced it.302 Indeed, as it had done in Hopkins, the government asserted that the Act enhanced liberty from contract, analogizing the restraint in question to a similar restraint imposed by a state.303 The Constitution, the government continued, empowered Congress to remove restraints on commerce, whether they were imposed by states, or individuals; the antitrust laws were an exercise of this

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298 See id. at 48-50; see also Hopkins v. United States, 171 U.S. 578, 599-600 (1898) (distinguishing private contractual agreements from restraints on liberty imposed by a statute).


300 See id. at 26 (arguing that the quasi-public nature of the railroads justified regulation in Joint Traffic); see also id. 31, 33-37 (distinguishing the permissible regulation of common carriers from impermissible regulation of purely private parties).

301 Id. at 26.

302 See Brief for the United States at 50-51 ("Congress intended to preserve the freedom of trade and commerce among the several states.").

303 See id. at 50-51.
power vis a vis private contracts, an exercise that promoted liberty.\textsuperscript{304} Regardless of the source of the restraint, it concluded, liberty was equally infringed: "Congress, by the antitrust law, sought to take care of restraints put there by persons and corporations, through combination and conspiracy. If you suppress competition, you no longer have freedom, but restraint."\textsuperscript{305}

The Government conceded that the Due Process Clause did protect liberty of contract, but, it asserted, the "liberty contended for [by the defendants], is the liberty to destroy liberty."\textsuperscript{306} Indeed, the government likened the defendants to those who had trumpeted the "liberty" to purchase and own slaves:

[The defendants' argument] suggests the sacred right of self government, contended for by Senator Douglas and described by Mr. Lincoln: 'This sacred right of self government amounts to this, that when two men agree to enslave another no third man shall interfere.' So with [defendants'] sacred liberty of contract. It means that when six shops agree with one another to destroy their individual freedom of contract and of competition, and to put themselves in slavery to the pool, the government cannot interfere.\textsuperscript{307}

In a unanimous opinion, again by Justice Peckham, the Court rejected the defendants' challenge and affirmed the judgment of the Sixth Circuit.\textsuperscript{308} Citing Joint Traffic and Allgeyer, Peckham conceded that liberty of contract placed limits on Congress's power over interstate commerce.\textsuperscript{309} This liberty, however, was not absolute. Defendants were forced to concede, he said, that Congress could nullify those state enactments that directly restrained and hence regulated commerce.\textsuperscript{310} If so, there was no reason why private liberty should shield contracts that produced the very same effects as an unconstitutional statute.

If certain kinds of private contracts do directly, as already stated, limit or restrain, and hence regulate interstate commerce, why should not the

\textsuperscript{304} See id. at 50. The government argued:

The right to trade among the several States, without restriction or imposition, is guaranteed by the Constitution. This right includes, indeed is primarily based on, the right to sell goods for delivery from one State to another. The antitrust law was passed to preserve this freedom to persons and corporations and strike down all restraints put upon it by combinations or conspiracies. The right of persons and corporations to sell their goods in other States and to ship them there, freely and without restraint, is one in which not only the seller but the public is interested.

\textsuperscript{305} Id. at 51.

\textsuperscript{306} Points for the United States in Reply at 8.

\textsuperscript{307} Id.

\textsuperscript{308} See Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 226 (1899) (relying upon Judge Taft's opinion).

\textsuperscript{309} See id. at 228-29.

\textsuperscript{310} See id. at 229-30.
power of Congress reach those contracts just the same as if legislation of some State had enacted the provisions contained in them? The private contracts 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.\textsuperscript{311}

As a result, such an arrangement could not find shelter in liberty of contract: citizens did not have the liberty to impose direct restraints that had the same effect as those that states could not impose by statute.\textsuperscript{312}

Having reiterated that "direct" restraints of interstate commerce were outside the protection of liberty of contract, Peckham next turned to provide a definition of "direct restraint." He quickly dismissed defendants' assertion that the prices produced by the restraint in question were reasonable, relying upon Judge Taft's conclusion that the prices charged by the association well exceeded the cost of production plus a reasonable return on investment.\textsuperscript{313} In some cases, he noted, the pipe in question had been sold at over a 25% mark up.\textsuperscript{314} Implicitly adopting as a benchmark the "natural" price that would have been produced by a competitive market, he found that the defendants' prices were unreasonable.\textsuperscript{315}

Mere rejection of defendants' "reasonable price" defense did not make restraints "direct," however. And, in fact, defendants asserted that there was no direct restraint, because, despite any price increase, the restraint in question had not reduced the quantity of pipe sold.\textsuperscript{316} Responding to this assertion, Peckham noted that the locations of the bidders made it difficult for non-members to compete in the market in question due to the costs of transportation.\textsuperscript{317} Additionally, it was not simply the "volume" of trade that mattered, but the fact that the combination restricted the right of the members to engage in business in the ordinary way.\textsuperscript{318}

\textsuperscript{311} Id.
\textsuperscript{312} See id. at 230-31.
\textsuperscript{313} See id. at 238.
\textsuperscript{314} See id. (emphasizing that the cost of producing and delivering pipe to Atlanta, including a reasonable profit, was $17 or $18 per ton, while the agreement required a minimum bid of $24.25).
\textsuperscript{315} See id.; see also People ex rel Annan v. Walsh, 22 N.E. 682, 693 (N.Y. 1889) (Peckham, J., dissenting) (stating that "ordinary laws of trade" would produce natural price); cf. supra note 44 and accompanying text (describing classical belief that competitive market produced "natural" price equal to cost of production plus a risk-adjusted reasonable rate of return).
\textsuperscript{316} See Brief for the Addyston Pipe & Steel Co. at 2.
\textsuperscript{317} See Addyston Pipe & Steel Co., 175 U.S. at 243.
\textsuperscript{318} Id. at 245. According to Peckham:
Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade. \textit{It is the effect of the combination in limiting and restricting the right of each of the members to do business in the ordinary way, as
By invoking the "right" of firms to conduct business in the "ordinary" way, Peckham seemed to echo the government's claim that the contracts in question infringed personal liberty and thus should be deemed restraints of trade. On its face, this approach seems inconsistent with the Justice's approach in Budd, which involved similar restrictions on liberty. Closer inspection, however, suggests that Peckham gave no independent weight to liberty from contract in concluding that the restraints before him were "direct." For instance, early in the opinion, he concluded that private contracts were subject to congressional regulation because they "may in truth be as far reaching in their effect upon interstate commerce"—not in their effect on personal liberty—as "state statutes of the same character." Moreover, he later made it clear that his approach to defining "direct restraint" followed from Hopkins, where he held that a contract did not qualify as a "direct" restraint simply because it placed a "great" restraint upon the parties to it. Thus, Peckham adopted a standard for defining direct restraints that excluded any inquiry into an agreement's effect on individual liberty.

While Peckham did not attempt an explicit and comprehensive definition of "ordinary," he did suggest that "directness" and, by implication, its opposite "ordinariness," were to be defined according to the effect that the restraint had upon prices. The only purpose of the contracts in question, he had already noted, was to reduce competition between the parties: this was their "immediate" (not incidental) effect. Thus, in determining whether the scheme took away the "right" to do business in the "ordinary way," Peckham emphasized that "[t]he question is as to the effect of such combination upon the trade in the article, and if that effect be to destroy competition and thus advance the price, the combination is one in restraint of trade."

well as its effect upon the volume or extent of the dealing in the commodity, that is regarded.

Id. at 244-45 (emphasis added).

319 At least two scholars have explicitly argued as much. See PERITZ, supra note 5, at 43 ("In the price fixing cases, [Peckham held that] the liberty to conduct one's business must be protected."); Page, Ideological Conflict, supra note 16, at 47-49 ("Peckham's approach to cartel cases thus emphasized the coercive mechanisms directed toward both members of the cartel and their competitors"). As argued herein, however, the "coercion" directed at the members in Addyston Pipe was no different from that directed at the cartelists in Budd. What had changed, in Peckham's mind at least, was the ability of the "ordinary laws of trade"—the free flow of capital—to counteract the effects that such coercion had upon prices.

320 Addyston Pipe & Steel Co., 175 U.S. at 229-30 (emphasis added).
321 See id. at 244.
322 See id. at 243-44.
323 Id. at 245 (emphases added). Peckham added:

We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of
As suggested in Joint Traffic and Hopkins (and, for that matter, Peckham's dissent in Budd), then, not all restrictions on the "liberty" of the contracting parties were deemed direct restraints of trade. Instead, only those contracts that limited the right to do business in the "ordinary" way were deemed "direct" restraints. Whether or not a method of doing business was "ordinary," in turn, depended not on the extent to which the agreement limited private freedom of action, but instead upon the effect the contract had on prices. Contracts that had the immediate and necessary effect of producing prices higher than those that would be produced by "the general law of competition," were deemed direct restraints. Those that were "ordinary" had no effect, or only an incidental effect, on the natural price, and were deemed "indirect" restraints, regardless of their restraining effect on individual freedom of action. The effect on commerce (price)—not on "liberty"—was dispositive.324

Admittedly, the interpretation of Addyston Pipe offered here is different from that uniformly adopted by scholars who have considered the question. These scholars have all asserted that Peckham rejected any independent role for liberty of contract in giving meaning to the Sherman Act, and held instead that an agreement otherwise protected by liberty of contract found no shelter in the Due Process Clause, so long as it fell within Congress's commerce power.325 Thus, they conclude that Peckham abandoned his commitment to liberty of contract in favor of Congress's authority over the national market, giving the federal government more authority to regulate purely private contracts than possessed by individual states.326

trade in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made.

Id. at 244.

324 Cf. United States v. Joint Traffic Ass'n, 171 U.S. 505, 569-71 (1898) (characterizing restraints as direct because they led to higher prices and reduced trade).

325 See, e.g., Hovenkamp, Enterprise and American Law, supra note 3, at 295 (arguing that, under Addyston Pipe, "the Constitution's commerce clause itself defined the limits of liberty of contract"); Sklar, supra note 18, at 132-33 (concluding that Peckham found liberty of contract limited by the Commerce Clause); Page, Ideological Conflict, supra note 16, at 47 (arguing that, in Addyston Pipe, "Peckham again resorted to his analogy to governmental restrictions on commerce to find the agreement illegal"); Letwin, supra note 146, at 179-80 (concluding that Peckham employed a "constitutional criterion—the limits of the commerce power—to distinguish between reasonable and unreasonable restraints"); Peritz, supra note 5, at 36-37 (emphasizing Justice Peckham's remarks that freedom of contract was limited by the commerce power; if private contracts regulated interstate commerce, then they were subject to regulation); Duker, supra note 208, at 62-64; see also May, Antitrust in the Formative Era, supra note 5, at 305 (concluding that holding in Joint Traffic rested upon a determination that the Commerce Clause trumped liberty of contract).

326 See sources collected supra note 325.
Ultimately, this reading of *Addyston Pipe* is off the mark, particularly if one considers the decision in light of *Joint Traffic*. In *Joint Traffic*, after all, the defendants had conceded that Congress had authority under the Commerce Clause to regulate the activities of the Association, going so far as to claim that Congress had authorized the agreements in question under the Interstate Commerce Act.\(^{327}\) Despite this (necessary) concession that Congress had the authority to regulate price fixing of rates for interstate transportation, Peckham nevertheless separately entertained the liberty of contract challenge.\(^{328}\) In so doing, he did not hold that liberty of contract was subordinate to the scope of the commerce power. To the contrary, he stated that liberty of contract did place limits on the commerce power, protecting “ordinary contracts and combinations” but not “direct restraints.” Finally, his conclusion that the activities of the Joint Traffic Association were a “direct” restraint, beyond the protection of liberty of contract, did not in the end depend upon any independent theory about the scope of the Commerce power, but instead upon his conclusion that “ordinary freedom of contract” did not extend to the activities of the Association.\(^{329}\) This conclusion, in turn, depended upon an application of the classical paradigm and a determination that the railroads received special benefits from the state, benefits that gave them power to price above the competitive level.\(^{330}\)

There is no indication that Peckham meant, in *Addyston Pipe*, to jettison the approach he had taken in *Joint Traffic*. To the contrary, in *Addyston Pipe*, Peckham cited *Joint Traffic* for the proposition that the “liberty” protected by the Due Process Clause included liberty of contract.\(^{331}\) Further, in holding that “direct restraints” fell within the Commerce Clause and “thus” outside the scope of liberty of contract, Peckham borrowed a term—direct restraint—the meaning of which depended upon liberty of contract doctrine and the classical paradigm that informed it. Contracts were “direct” restraints if they were not “ordinary;” the *Addyston Pipe* bid-rigging scheme was inconsistent with the “ordinary” right of contract and thus a “direct” restraint because it drove prices above the natural, competitive level.\(^{332}\) Put another way, the very same factual conclusion that subjected defendants’ scheme to regulation under the classical paradigm also produced the holding

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\(^{327}\) *See* Brief for The New York Central and Hudson River Railroad Co. at 19-21, 29-33.

\(^{328}\) *See Joint Traffic*, 171 U.S. at 568-69.

\(^{329}\) *See id.* at 570-71; *see also supra* notes 262-72 and accompanying text (describing link between liberty of contract and the definition of “direct restraint” in *Joint Traffic*).

\(^{330}\) *See Joint Traffic*, 171 U.S. at 569-72 (discussing governmental intervention in support of railroads).

\(^{331}\) *See Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 228 (1899).

\(^{332}\) *See id.* at 238.
that the scheme was a "direct restraint" and within the commerce power.\footnote{333} In a sense, it seems, scholars have things exactly backwards: the scope of the commerce power did not control liberty of contract, rather, liberty of contract seemed to control the scope of the commerce power. Finally, it should be noted that, within two years of \textit{Addyston Pipe}, two state supreme courts relied upon that decision and \textit{Joint Traffic} for the proposition that state antitrust statutes did not infringe liberty of contract.\footnote{334} In so doing, these courts rejected, implicitly or explicitly, the assertion that the commerce power gave Congress special authority to nullify private contracts.\footnote{335} Moreover, these courts relied upon \textit{Joint Traffic} and \textit{Addyston Pipe} to draw the very same line between permissible and impermissible state regulation of private contract that had been drawn under the Sherman Act. Enhancing liberty from contract was not a justification for abridging private contract, only contracts that directly led to higher prices fell outside the protection of contractual liberty.\footnote{336} The Supreme Court would soon agree: the Commerce Clause conferred no authority over interstate commerce that states did not possess with respect to their internal commerce.\footnote{337}

By validating the regulation of purely private cartels, Peckham exposed himself to the charge that he abandoned the classical paradigm in favor of a more expansive conception of the scope of state authority.\footnote{338} Closer examination, however, suggests that the principle applied in \textit{Addyston Pipe}, for instance, was entirely consistent with the approach taken by the \textit{Budd} dissenters, as well as lower federal courts that first had occasion to interpret the Sherman Act. In \textit{Budd}, after all, Peckham and Brewer had assumed that, even in the presence of horizontal price fixing, the "ordinary laws of trade," \textit{i.e.}, the propensity of capital to move quickly into markets characterized by

\footnotesize{\begin{itemize}
\item The approach taken in \textit{Hopkins} confirms the argument in the text. There, it will be recalled, the bylaws of the Kansas City Livestock Association were merely "indirect" restraints \textit{because} the parties had a "right" to enter such voluntary agreements. Thus, it seems, liberty of contract, and the classical paradigm that informed it, informed the meaning of "direct restraint" and thus the scope of congressional authority over private contracts. \textit{See} Hopkins v. United States, 171 U.S. 578, 601-02 (1898).
\item \textit{State v. Smiley}, 69 P. 199, 206 (Kan. 1902); \textit{State ex rel Crow v. Firemen’s Fund Ins. Co.}, 52 S.W. 595, 608-09 (Mo. 1899).
\item \textit{See Smiley}, 69 P. at 205-06 (recounting and rejecting defendant’s attempt to distinguish \textit{Joint Traffic} and \textit{Addyston Pipe} on these grounds).
\item \textit{See infra} notes 395-433 and accompanying text (analyzing state court responses to liberty of contract challenges to state antitrust statutes).
\item \textit{See Carroll v. Greenwich Ins. Co.}, 199 U.S. 401, 410 (1905) (rejecting assertion that Commerce Clause conferred on Congress special authority over private contracts); \textit{see also Smiley}, 69 P. at 206 ("The grant to Congress was not of anything different in nature from what the states possessed. It was a grant of the same thing; no more; only to be exercised in a different sphere.")).
\item \textit{See}, \textit{e.g.}, \textit{Sklar}, supra note 18, at 169-70 (suggesting that decisions in \textit{Joint Traffic} and \textit{Addyston Pipe} were inconsistent with the classical paradigm).
\end{itemize}}
supra-competitive prices, would prevent firms from pricing above the natural, competitive level, provided the state did not interfere with those laws by erecting barriers to entry. 339 Similarly, in Dueber Watch-Case, Nelson, and Greene, the courts had assumed that, absent any attempt to interfere with the ability of others to adopt similar tactics, the contracts at issue could not lead to market power. 340 The facts in Addyston Pipe, however, illustrated what economists were beginning to understand: that purely private cartels could drive prices above the competitive level without state assistance or private restraints on the behavior of third parties. 341 In light of these facts, Peckham could no longer cling to the result he had advocated so forcefully in Budd. 342 The principle was the same, but changing times required changing applications of it. 343 Far from suffering any collapse, the classical paradigm was alive and well and had been read into the Act.


340 See supra notes 148-187 and accompanying text; see also United States v. Nelson, 52 F. 646, 647 (C.C.D. Minn. 1892) ("An agreement between a number of dealers and manufacturers to raise prices, unless they practically controlled the entire commodity, cannot operate as a restraint upon trade, nor does it tend to injuriously affect the public.").

341 See Millon, supra note 10, at 1271-75 (detailing these developments in the economics profession in the late nineteenth century); Hovenkamp, Enterprise and American Law, supra note 3, at 276-93.

342 See Lawrence Lessig, Understanding Changed Readings: Fidelity and Theory, 47 Stan. L. Rev. 395, 441 (1995) ("As an institution, a court cannot resist 'reality' as it appears to all—or what is the same thing, a court cannot resist the facts of uncontested discourse. Fidelity is pursued by courts subject to the constraints of an uncontested discourse."). By 1899, the "fact" that purely private cartels could price above the "natural" or competitive level had become uncontested. See Millon, supra note 10, at 1275.

343 See Walsh, 22 N.E. at 687 (Peckham, J., dissenting) (arguing that changing conditions demanded changing conceptions of the scope of state authority); Lawrence Lessig, Fidelity in Translation, 71 Tex. L. Rev. 1165, 1166-1240 (1993) (sketching "two step" originalist approach to interpretation under which judges may legitimately apply original constitutional principles in new ways in light of changing circumstances). This approach, it should be noted, was consistent with that taken by the Court in other economic due process contexts. See, e.g., Adkins v. Children's Hosp., 261 U.S. 525, 561 (1923) ("[T]he line beyond which the power of interference [with liberty of contract] may not be pressed is neither definite nor unalterable but may be made to move, within limits not well defined, with changing need and circumstance."); William Howard Taft, The Antitrust Act and the Supreme Court 47-48 (1914) (arguing that "changes of social and business conditions" should lead the Court to "qualify" rights of property and contract in light of the Sherman Act).
III. STATE ANTITRUST LAWS

The Sherman Act was not the only regulation of trade restraints that courts interpreted during the formative era. Even before the Act was passed, at least thirteen states enacted antitrust legislation, and fourteen more would do so by 1900. Some of these statutes closely mirrored the Sherman Act, but others bore little resemblance. Indeed, while modern scholars often view state antitrust regulation as a backwater, it was, in some respects, more important than the Sherman Act.

While federal courts were wrestling with the constitutionality of the Sherman Act, state supreme courts, lower federal courts, and ultimately the Supreme Court grappled with liberty of contract challenges to state antitrust regulation. Although states could not rely upon the commerce power to justify interference with private agreements, these courts reached the same accommodation between antitrust regulation and liberty of contract as had the Second Circuit in Dueber Watch-Case and Justice Peckham in Joint Traffic, Hopkins, and Addyston Pipe. Thus, these courts held that contracts were protected from abridgment so long as they were not designed simply to produce prices above the "natural" or "ordinary" level. Importantly, however, courts justified these results with a rationale that was different, at least rhetorically, from that employed in Joint Traffic, Hopkins, and Addyston Pipe. Whereas Peckham's opinions in these cases did not rely upon the police power in sustaining regulation, opinions scrutinizing state statutes did, in fact, rest their decisions upon an interpretation of the scope of this power, most notably, the conclusion that prices above the natural level constituted a "harm" that could be redressed by the State.

A. Federal Decisions Voiding State Statutes

One of the earliest challenges to a state antitrust statute predated the Supreme Court's decisions in Trans-Missouri, Addyston Pipe, Hopkins, and Joint Traffic. In 1894, the State of Texas charged John D. Rockefeller and others with "creating a trust, by combination of their capital, skill and, acts... for the purpose, design, and effect to carry out restrictions of


345 See id.

346 See May, Antitrust Practice and Procedure, supra note 5, at 500-01 (noting that, between 1890 and 1902, twelve states brought a total of twenty-eight antitrust suits, while the United States Department of Justice brought nineteen); see also id. at 501-02 (showing that, between 1890 and 1919, states collected several times more in antitrust fines than did the federal government).

347 See, e.g., infra notes 362-64, 371-77, 383-84 and accompanying text.

348 See, e.g., infra notes 402, 411-12 and accompanying text.
trade," in violation of the Texas Antitrust Act of 1889.349 One Grice, an alleged co-conspirator in jail awaiting trial, sought a writ of habeas corpus in federal court, alleging that the Texas Act violated, among other things, his liberty of contract.350

Writing just eight days before the Supreme Court announced Allgeyer, the court declared the Texas statute unconstitutional.351 The Due Process Clause, it said, protected the "liberty" of the citizen to make, buy or sell "articles of general use," to determine the prices at which such articles were sold, and to make "usual and necessary" contracts for such purposes.352 This liberty to pursue by contract "ordinary business affairs," included the right of forming business relations between man and man, which included the right of two or more individuals to combine their capital.353 "Neither the state nor the national legislature" the court said, "possesses any right to limit these natural privileges of contracting or conducting business."354 Texas could, however, prohibit "oppressive or unreasonable combinations," including contracts that "infringed upon the rights of others" or threatened the "public welfare and general security."355 Anticipating the overbreadth argument deployed by the corporate bar after Trans-Missouri, the court held that statutes regulating such conduct would be unconstitutional if they "extend[ed] beyond the threatened evil, and prohibit[ed] that which

350 See id. at 639. The petitioner also alleged that the Act denied him equal protection of the laws, because it exempted from its operation several industries in the state, including agriculture. See generally May, Antitrust Practice and Procedure, supra note 5, at 521-34 (discussing fate of equal protection challenge to state antitrust laws during the formative era).
351 See Grice, 79 F. at 644-45.
352 See id. at 640. According to the court, the Due Process Clause protected the right to:
raise, produce, and manufacture articles of general use; buy and sell; to fix and limit the amount of any article which he will produce or manufacture; to increase or reduce the amount so produced or manufactured at his own will, within the limits of his ability; to fix and limit the price at which he will buy and sell; to bargain and agree with others upon prices, so far as it may be necessary in the business of buying and selling; in fact, to do anything and enter into all contracts usual and necessary in the ordinary avocations of production, manufacture, and trade.
Id; see also id. ("All of the rights of contract which are necessary for the carrying on of ordinary business affairs are protected by the [c]onstitution, and are not capable of being restrained by legislative action.").
353 See id. at 641 (citing TIEDEMAN, supra note 93, at 233).
354 Id. at 640.
355 Id. at 640-41.
involves no threatened danger to the public." 356 "Ordinary," or "usual" contracts, the court implied, could not threaten such danger. 357

According to the court, the Texas Act was overbroad because it prohibited any combination between two businessmen which eliminated competition between them. 358 Again anticipating the bar's attack on the Trans-Missouri formulation, the court emphasized that, as written, the Texas statute would criminalize the "ordinary business partnership" and necessarily deprive the partners of their freedom to price separately. 359 The right to form and maintain such arrangements, however, was an essential part of liberty:

The right to combine, to form partnerships and joint-stock associations; the right to agree as to prices and productions; the right to fix prices, to

356 Id. at 641; cf. supra note 223 and accompanying text (detailing overbreadth challenge to the Trans-Missouri formulation).

357 See Grice, 79 F. at 640-41 (detailing the constitutional right to freedom of contract and limiting restriction of this right to situations where the contract threatened public welfare, infringed on the rights of others, or produced unreasonable combinations).

358 See id. at 641-44 (arguing that the statute could not be limited to oppressive combinations and thus applied, on its face, to all ordinary business contracts). The court was apparently referring to the language in the statute that forbade any "combination of capital or skill by two or more persons . . . to prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities." Id. at 637.

359 See id. at 642-43; cf. Stickney, supra note 223, at 153-54 (arguing that state could only ban unreasonable combinations); Royall, supra note 223, at 28-29, 45-47; Wilcox, supra note 223, at 110-11 (asserting that New York antitrust legislation was unconstitutional because it prohibited ordinary business contracts); Dodd, supra note 223, at 163-65 (arguing that various state statutes, including the Texas Act, were unconstitutionally overbroad). Dodd, it should be noted, represented Grice, at least on appeal. See Grice, 169 U.S. at 290. The court explained in excruciating detail how the creation and maintenance of a partnership would violate the plain language of the statute:

We will assume that A. and B. agree to combine their capital, skill, and acts, or, in other words, enter into partnership, for the purpose of manufacturing and dealing in certain commodities. They must first necessarily determine the extent of their production, and the price at which they can sell their commodities. Having determined as near as possible the costs of their manufactured products, and the minimum profit necessary to justify the carrying on of the business, they agree that they will not sell their commodities below this common standard figure. They fix a figure on which they commence their sales, agreeing to graduate the price up or down as the cost of production may vary. Finding, after a time, their prices too high, and that competitors are underselling their commodities, they lower their prices, and this they may do solely for the purpose of holding their market against competitors. There may be, after a time, an increase in wages, and they agree to increase their prices. There comes an era of hard times. Their stock accumulates and is unsalable, and they agree to limit or reduce the production of their commodities. All this they must be able to do, or they cannot carry on their business as partners, yet every one of these agreements, arrangements, undertakings, or acts are made criminal by this act. It is absolutely impossible to carry on a partnership business without violating it.

Grice, 79 F. at 642-43.
raise and lower them as business men may require,—is not oppressive to the public, nor unjust to the individual, nor contrary to public policy. It is an essential right, as part of the liberty of the citizen, of which no legislature can deprive him.360

Because it outlawed these ordinary arrangements, the court concluded, the statute was void.361

The court did not hold that the formation of a partnership or corporation was ipso facto immune from regulation. Some such combinations were oppressive and unreasonable and thus subject to regulation.362 Any arrangement that either did not increase prices or had the effect of reducing them, however, was constitutionally protected. The vice of the Texas Act was that it did not distinguish between contracts that increased prices, and those that did not.

[The Act] not only prevents persons from using their capital, skill, and acts for the purpose of increasing prices; it reaches the very acme of absurdity, in preventing persons from uniting their capital, skill, and acts for the purpose of reducing prices.363

As in Joint Traffic, Hopkins, and Addyston Pipe, then, antitrust regulation was constitutional only to the extent that it prevented contracts that directly increased prices.364 Though the Supreme Court would reverse the decision, it did so only on the grounds that the court should have abstained from issuing the writ as the state courts had not yet passed on the constitutional question.365

360 Grice, 79 F. at 643.

361 See id. at 650.

362 See id. at 641 ("Combinations are beneficial as well as injurious, according to the motives and aims with which they are formed. It is therefore impossible to prohibit all combinations. The prohibition must rest upon the objectionable character of the object of the combination.") (quoting TIEDEMAN, supra note 93, at 244).

363 Id. at 645 (emphasis added); see also id. at 644-45 ("[The Act] not only prevents competitors from oppressing the public by unreasonable agreements as to production and prices; it also prevents persons associated in interest, joint owners and co-partners, from making any agreement about their production and prices.").

364 But cf. WALTER CHADWICK NOYES, A TREATISE ON THE LAW OF INTRACORPORATE RELATIONS § 420, at 796 n.2 (2d ed. 1909) ("In view of later decisions of the Supreme Court this decision cannot be regarded as of authority."). As shown earlier, however, the "later decisions" were not, in fact, inconsistent with Grice.

365 Grice, 169 U.S. at 294 ("We come to this decision irrespective of the question of the validity of the state statute and without passing upon the same or expressing any opinion in regard thereto."). The state courts soon did pass on the question, sustaining the statute against constitutional attack, without mentioning or addressing the overbreadth argument suggested in Grice. See Waters-Pierce Oil Co. v. State, 44 S.W. 936, 940-43 (Tex. Civ. App. 1898). In so doing, the court relied upon Section 96 of the treatise of Christopher Tiedeman for the proposition that the state could exercise its police power to
A similar but more succinct approach was adopted in two decisions post­
dating the Joint Traffic-Hopkins-Addyston Pipe trilogy. In Niagra Fire In­
surance Co. v. Cornell, the court addressed the constitutionality of two 
Nebraska antitrust statutes. One, aimed solely at fire insurance compa­
nies, prohibited agreements by such firms relating to (1) the rates charged 
for fire insurance, (2) the commissions to be charged by agents to their com­
panies and (3) the manner of transacting the business of fire insurance. 
A second statute was aimed at all businesses, and was similar to the Texas statute voided in In re Grice.

Several fire insurance companies who (1) employed a common actuary to 
set premiums and (2) agreed upon the commissions to be paid their agents, 
sought a declaration that the statute was unconstitutional. The court 
voided both statutes. "[I]n its general scope," it said, the statute relating to 
fire insurance violated the defendants’ liberty of contract. The court con­
ceded that the State likely had the authority to outlaw agreements that raised prices. However, the Act also prohibited agreements that reduced rates, agreements the court thought protected by liberty of contract. Similarly, 
the provisions of the Act voiding agreements on agent commissions and on 
"the manner of transacting business" were broader than necessary to prevent 
any harm to the public and thus could not fall within the police power. Harm to the public, in turn, was defined as an increase in insurance premiums:

Possibly that phase of the law [preventing horizontal price fixing] is valid. But it is beyond my comprehension how the legislature can in­
hbit the making of contracts as to the amounts to be paid agents for se­
curing insurance. The amount paid agents does not increase the cost to

\[\text{\ldots}\]

\text{\ldots}
the insured. The cost to the insured is controlled by too many other factors. . . . How is such a provision the exercise of the police power?374

These contracts certainly infringed on the "liberty" of the parties involved. Still, they were beyond the State's authority because they did not lead to higher prices.

The other, more general statute, was also inconsistent with the Constitution. Echoing the opinion in Grice, the court noted that, under the plain terms of the statute, which prohibited any agreement to fix prices, "two men in the same line of business in the same town or village cannot form a partnership if it tends to maintain prices. . . . Neither can a stock company nor a corporation be formed by two or more if, by so doing, the price is maintained."375 Such a statute, the court concluded, was "a long stride,—hundreds of years,—backward, when monarchs, cabinet officers, and even parliament decreed the price to be paid for a day's labor, and the cost of all the necessaries of life, even to the loaf of bread."376 As Justice Peckham had suggested in Joint Traffic, the mere fact that a contract, e.g., a partnership agreement, had the indirect effect of raising prices did not, ipso facto, place it outside the protection of liberty of contract.377

Two years later, a similar challenge was lodged to an Iowa statute nearly identical to the one voided in Niagra. Again, insurance companies who employed a common actuary for the purpose of determining rates and agreed on agent commissions sought a declaration that the statute abridged liberty of contract and was thus void.378 Echoing the liberty from contract argument advanced by the United States in Hopkins and Addyston Pipe, Iowa claimed that the Act actually enhanced liberty, by preventing the companies from entering contracts "whereby their rights to enter into lawful contracts with those desiring fire insurance is [sic] abridged and restrained."379

Sitting now in Iowa, the same judge that had issued the decision in Niagra voided the Iowa statute.380 Explicitly refusing to consider the section of the statute aimed at the horizontal fixing of premiums, the court focused instead on the prohibition of the use of a common actuary and the fixing of commissions for agents.381 Both practices, it said, were necessary to the very con-
duct of the business of insurance. Unmoved by the State's claim that the statute enhanced liberty, the court held that the State had improperly deprived the companies of their right to "make the usual contracts that all other persons and corporations may make."\(^{383}\) Naked agreements on premiums were not "usual" and thus not subject to protection.\(^{384}\) As Justice Peckham had done in *Addyston Pipe*, the court rejected a liberty-based justification for abridging liberty of contract, instead distinguishing protected from unprotected contracts on the basis of direct or immediate price effects.

Iowa petitioned the Supreme Court, repeating its argument that regulation of horizontal restraints was necessary to enhance the liberty of traders by outlawing restrictions on the ability to contract.\(^{385}\) In so doing, however, it repeatedly emphasized that the contracts in question also had the effect of increasing the price consumers paid for insurance.\(^{386}\) In response, the insurance companies echoed the lower court's assertion that, as written, the statute was overbroad, prohibiting agreements as to agents' commissions, the use of a common actuary, and the use of a common adjuster.\(^{387}\)

The Supreme Court reversed, but without questioning the lower court's conclusion that "usual" contracts—agreements that do not directly lead to higher prices—were protected by the Due Process Clause. Writing for eight

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\(^{382}\) See *id.* at 128 ("In short, the business cannot be carried on for a day without making contracts, not alone with the insured, but with other companies, and with persons employed by other companies.").

\(^{383}\) *Id.* at 130.

\(^{384}\) See *id.* ("Of course, I do not hold that insurance companies can combine, and thereby enter into a conspiracy to accomplish any desired purpose. But no such question is involved in this case. I am only holding that insurance companies may make the usual contracts.").

\(^{385}\) See Brief for the State of Iowa at 23, *Carroll v. Greenwich Ins. Co.*, 199 U.S. 401 (1905) (No. 5) (arguing that the statute was intended to protect the liberty of insurance companies); see also *id.* at 24 ("If the Iowa statute goes no further than to prevent such corporations from entering into an agreement whereby their liberty to contract with citizens of the state is restricted or abridged, the legislature has not exceeded its constitutional power, and the statute is valid.").

\(^{386}\) See *id.* at 23 ("The purpose of the statute is . . . to prevent fire insurance companies doing business therein from entering into a contract or combination whereby the right of such companies to enter into lawful contracts with those desiring fire insurance would be restricted and abridged, and whereby competition would be prevented and the cost of fire insurance increased within the state.") (emphasis added); see also *id.* ("It may be fairly assumed that an evil existed which was sought to be remedied by the enactment of the Iowa statute, and that the evil was the combination of fire insurance companies in the state for the purpose of increasing the cost of insurance."); *id.* at 24 (describing defendants as "an illegal combination to increase the cost of fire insurance"); *id.* at 42 (arguing that the effect of the combination "would be to compel the people of Iowa to pay an unreasonable cost for fire insurance").

\(^{387}\) See Appellees' Brief at 60-63.
members of the Court, Justice Holmes first turned to that section of the statute forbidding agreements on premiums. The Court's precedents, he said, established that statutes forbidding combinations "between rivals in trade may be constitutional. . . [w]hatever may be thought of the policy of such attempts." Construing the State's argument as a concession that the statute did not prevent the mere use of a common actuary or an agreement on agent commissions, Holmes claimed that the companies' argument to the contrary rested upon an "exaggerated" view of the scope of the statute. The statute did not, Holmes said, prohibit an arrangement whereby the firms would "obtain and use each other's experience, or [] employ the same person to work up the results." Ignoring the section of the Act that explicitly prevented agreements on commissions, Holmes claimed that the statute was designed only "to keep up competition" in the setting of premiums and thus was constitutional. In a brief concurrence, Justice Harlan agreed, concluding that the State had an interest in making sure that insurance companies and customers bargained on terms of relative equality.

Although he reversed the lower court, Holmes had not suggested that States could prohibit contracts simply because of their restraining effect. Indeed, in his bid to narrow the statute so as to reach only horizontal conspiracies likely to increase prices, he misread the State's argument and disregarded one section of the statute. As in Addyston Pipe and Joint Traffic, then, the Supreme Court confined the permissible scope of antitrust regulation, approving only regulation of those contracts that directly led to higher prices.

B. Decisions Originating in State Courts

Unlike the lower federal courts, state courts did not go out of their way to void antitrust legislation passed by their legislatures. Refusing to consider the sort of overbreadth challenges mounted in Grice, Niagra and Greenwich, these courts sustained antitrust statutes as applied to naked horizontal restraints in the face of liberty of contract challenges. Like Peckham's decision in Addyston Pipe, the outcomes of these decisions were inconsistent with the outcomes suggested by traditional articulations of the classical paradigm. Also like Addyston Pipe, however, these decisions were consistent with the principle underlying the classical paradigm, namely, that the state could abridge liberty of contract for the purpose of regulating prices above the competitive level.

388 See Carroll, 199 U.S. at 407-09.
389 Id. at 409.
390 See id. at 411.
391 Id.
392 See id. at 411-13.
393 Id. at 412.
394 See id. at 414 (Harlan, J., concurring).
In *State ex rel. Crow v. Firemen's Fund Insurance Co.*, for instance, several fire insurance companies created a "social club" through which they monitored each other's rates, and were charged with violating Missouri's antitrust statute, which outlawed the formation of any "pool, trust, [or] agreement . . . to regulate or fix the price or premium to be paid for insuring property against loss or damage." The Supreme Court of Missouri found that the defendants had, in fact, formed a "trust" within the meaning of the statute, which it defined as "a contract, combination, confederation, or understanding, express or implied, between two or more persons, to control the price of a commodity or service for the benefit of the parties thereto, and to the injury of the public." Defendants argued that, even if they had formed such a "trust," the statute was unconstitutionally overbroad. Like the courts in *Grice, Niagara*, and *Greenwich*, which had construed the applicable statutes to outlaw "price fixing" by partners, the defendants claimed that the Missouri statute abridged their liberty of contract by preventing a company's agents from agreeing among themselves as to rates. The court rejected this argument, holding that it was premised upon "a total misapprehension of the Act" which, it said, merely prevented two or more independent competitors from agreeing with each other about the terms under which they would do business with the public. Such a prohibition, the court continued, did not violate the defendants' liberty of contract. That liberty, it maintained, consisted simply of the right of a seller to bargain with a buyer over the terms of sale; liberty which the statute actually enhanced. As the court put it: "[the statute] protects the company against the temptations of a trust or monopoly by refusing to permit it to strip itself of the power to freely contract." Freedom of contract, the court held, could not justify the negotiation of an agreement that abridged another's freedom, here the freedom of a company to negotiate with third party customers. Moreover, unlike *Addyston Pipe, Joint Traffic*, and *Hopkins*, which had not relied upon the police power, the court concluded that such regulation was "the corner stone of the police power."
Like Addyston Pipe's similar definition of "direct restraint," which had invoked the "right" of firms to do business "in the ordinary way," the Missouri Supreme Court's invocation of freedom from contract could have been taken to justify the restriction of any contract that reduced the autonomy of contracting parties. Yet, the court held that the statute did not prevent individual companies from bargaining, and presumably contracting, with individual insureds. Moreover, the court was quick to qualify its suggestion that the statute was constitutional simply because it enhanced the defendants' liberty from contract. The real motivation of the statute, the court said, was not "tender consideration for the insurance company," but instead protection of the consumer from exploitation. Such protection, the court said "incidentally preserves what it is here claimed it denies—the free, unstrained power to contract by both parties to it." Concerns over liberty from contract, then, played no independent role in reconciling antitrust regulation with liberty of contract.

The Ohio Supreme Court rejected a similar overbreadth challenge in State ex rel. Monnett v. Buckeye Pipe-Line Co. There nineteen oil companies charged with fixing petroleum prices above the competitive level lodged several objections, apparently of an overbreadth variety, against Ohio's antitrust act. The court declined, however, to consider constitutional objections that did not relate to the section of the statute prohibiting defendants' conduct, holding that that section was severable from any possibly unconstitutional provisions.

The Ohio court rejected defendants' assertion that their cartel found shelter in liberty of contract. While conceding the existence and importance of this freedom, the court held that it was "limited by the public welfare or the exercise of the police power." The police power, of course, was not unlimited: "the legislature can prohibit only those uses of property which are hurtful to the public, and the inhibited use must be hurtful in a legal sense." After finding that the agreement "had no purpose" but to raise prices above the competitive level, the court, relying on Trans-Missouri Freight, Joint Traffic and Addyston Pipe, determined that the contract was "clearly hurtful

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403 See Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 244-45 (1899).
404 See Firemen's Fund Ins. Co., 52 S.W. at 608.
405 See id. (asserting that the statute actually enhanced freedom of contract).
406 Id.
407 Id.
408 56 N.E. 464, 464 (Ohio 1900).
409 See id. at 465-67 (noting the defendants' argument that the statute was unconstitutional and refusing to consider arguments not related to defendants' conduct).
410 See id. at 464.
411 Id. at 467.
412 Id.
in a legal sense." There was no mention of liberty from contract. Instead, the existence of prices above the competitive norm supplied the harm that justified interference with contractual liberty.

Finally, in State v. Smiley, the Supreme Court of Kansas entertained a challenge to its antitrust law by a participant in a price fixing arrangement among several grain dealers in Bison, Kansas. Relying upon Grice and Niagra Insurance, the defendants argued that the Kansas Act—apparently similar to the Texas Act disapproved in Grice—was unconstitutional because it reached conduct that was protected by liberty of contract, including the formation of partnerships and the like. The court, however, refused to void the statute. If the act reached such legitimate methods of doing business, the court said, it would follow the lead of the Grice and Niagra courts and "declare it to be violative of the most fundamental principles of constitutional right." However, although admitting that the "general words of the act" might "outwardly manifest" an intent to prohibit ordinary business arrangements, the court "restrained" the statute to avoid such a result. The legislature, the court said, most likely only meant to outlaw those contracts that led to non-competitive, higher prices. According to Trans-Missouri Freight and Joint Traffic, which involved "agreements . . . to fix and maintain non-competitive traffic rates" the court said, the State had the authority to prohibit such contracts. At any rate, the defendant had not been convicted of forming a partnership, but instead of participating in a scheme to fix prices, and could not raise objections based upon hypothetical applications of the statute.

The defendant did not, however, rely solely upon the overbreadth argument. He also claimed that Kansas only had the authority to outlaw contracts that produced monopoly. The court disagreed, holding that an agreement lost the protection of liberty of contract even if it did not create a monop-

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413 Id. (citing United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897), United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898), and United States v. Addyston Pipe & Steel Co., 175 U.S. 211 (1899)); see also id. (finding that the agreement had "no purpose whatever except to prevent competition . . . to the end that there may be received from the consumers of [the cartel's] products higher prices than would prevail under the condition of open competition") (emphasis added).
414 See 69 P. 199, 199 (1902).
415 See id. at 200-01.
416 See id. at 208.
417 Id. at 201.
418 See id. at 204.
419 See id. at 204-05.
420 Id. at 205.
421 See id. at 201.
422 See id. at 206.
The court did not reach this conclusion because the legislature had the authority to outlaw any contract that infringed on the freedom of action of the parties to it. Instead, the court found, the legislature had the authority to outlaw those contracts that might lead to monopoly. If, however, the legislature should claim that a certain type of agreement led to monopoly "which, the general sense of mankind perceived could not have that effect" a court could "disapprove the act on the constitutional grounds of interference with the freedom of citizen." Despite its refusal to void the statute on overbreadth grounds, then, the court ultimately agreed with the Niagara and Grice courts that legislatures could not abridge contracts unless they directly led to higher prices. Other state courts would reach similar conclusions.

The Supreme Court affirmed in an opinion by Justice Brewer, but on grounds even narrower than those adopted by the Kansas Supreme Court. Like that court, the Supreme Court refused to consider the defendant's claim that certain applications of the statute were unconstitutional, instead focusing on the authority vel non of Kansas to outlaw the sort of agreement defendant had entered. Acknowledging that liberty of contract allowed parties to "further their business interests," the Court conceded that it was difficult to draw the line between contracts subject to the police power and those that were not. Without citing Joint Traffic, Hopkins, or Addyston Pipe, and without mentioning the distinction between "ordinary" and other contracts, the Court held that the contract at issue was within the police power because it was one that allowed buyers of grain to exercise market power over grain sellers, without any accompanying economic integration.

It may not be always easy to draw the line between those contracts which are beyond the reach of the police power and those which are subject to prohibition or restraint. But a secret arrangement, by which,

423 See id.
424 See id.
425 Id.
426 See, e.g., Walter Wood Mowing & Reaping Co. v. Greenwood Hardware Co., 55 S.E. 973, 974 (S.C. 1906) (construing antitrust statute to avoid unnecessary infringement on freedom of contract); Yazoo & M.V.R. Co. v. Searles, 37 S. 939, 944 (Miss. 1905) (stating that a statute would invade "the inherent right of the citizen to deal with his own as he pleases" if it sought to control all contracts without regard to effect); State ex rel Astor v. Schlitz Brewing Co., 69 S.W. 1033, 1035 (Tenn. 1900) (interpreting antitrust statute to apply only to agreements producing anticompetitive effects). Similarly, in Waters-Pierce Oil Co. v. State, 44 S.W. 936, 941 (Tex. Civ. App. 1898), the court rebuffed a liberty of contract challenge to the state's antitrust statute by relying upon the work of Christopher Tiedeman. As noted earlier, Tiedeman had argued that states could only proscribe unreasonable combinations. See supra note 365.
428 See id. at 454.
429 See id. at 456.
under penalties, an apparently existing competition among all dealers in
a community in one of the necessaries of life is substantially destroyed,
without the merging of interests through partnership or incorporation, is
one to which the police power extends. This is as far as we need to go
in affirming the judgment in this case. 430

Responding to defendant’s argument that there were dealers of wheat in
towns not far from Bison, to whom farmers could turn, 431 the Court es­
chewed any reliance upon the liberty-restraining effects of the arrange­
ment. 432 Instead, in a statement anticipating modern geographic market
analysis, the Court opined that farmers nearer to Bison would find Bison a
more attractive outlet for their grain, with the result that the presence of
neighboring dealers would not prevent the conspiring dealers from exploiting
sellers. 433

IV. IMPLICATIONS FOR MODERN INTERPRETATION OF THE SHERMAN ACT

By the turn of the century, courts had made it plain that antitrust statutes
implicated liberty of contract, with the result that some justification for such
regulation was required. In several cases, advocates seeking to sustain these
laws claimed that they actually enhanced liberty, by voiding contractual re­
straints on the “freedom” of the parties to them, as well as the opportunities
of third parties. While some courts employed rhetoric that appeared to re­
fect acceptance of this justification, no court actually adopted it in practice.
To the contrary, courts uniformly held that the mere fact that a contract re­
strained the freedom of action of the parties to it could not justify its abridg­
ment. Instead, the state could only abridge those contracts that restrained
freedom of action in a way that led to prices above the competitive level.
This conclusion presaged the result in Standard Oil and was consistent with
that suggested by the classical approach to price regulation and the common
law doctrine of trade restraints, each of which required some threat of tangi­
ble economic harm before the state could interfere with private contracts. 434

430 Id. at 456-57.
431 See Brief for Plaintiffs in Error at 10 (“No monopoly could have been established at
Bison for the other competitive points were in easy wagon reach, and all provided with
elevators, grain houses, and buyers.”); id. at 29-30 (complaining that “it is just as great a
crime under the statute for two persons, each owning one dollar’s worth of sugar, to agree
that they will not sell their sugar for less than a dollar and a half, when there is plenty of
other sugar to be had next door for ninety cents”).
432 See Smiley, 196 U.S. at 456-57.
(defining relevant geographic market as that area to which purchasers could reasonably
turn for supplies).
434 See Standard Oil Co. v. United States, 221 U.S. 1, 49-62 (1911); Taft, supra note
343, at 89-91 (concluding that Standard Oil was consistent with formative era precedents);
see also supra notes 43-46, 54-56 and accompanying text (describing classical paradigm
It is certainly true that many of these decisions reached results different from those counseled by traditional articulations of the classical paradigm, and, for that matter, the common law. For example, courts uniformly held that cartel agreements were beyond the protection of liberty of contract, even absent any attempt by the state or private parties to place limitations on entry. This expansion of the scope of permissible regulatory authority, however, did not reflect a repudiation of the classical paradigm in favor of a Populist, "liberty from contract" approach. Instead, decisions upholding state regulation of private cartels rested upon a straight-forward application or "translation" of that paradigm in light of changed circumstances. More precisely, these decisions rested upon a belief that purely private cartels could, in fact, drive prices above the competitive level, and were, therefore, subject to regulation under the classical paradigm.

To the extent that formative era caselaw sheds light upon the original design of antitrust legislation, the analysis offered here tends to rebuff the Populist assertion that antitrust regulation was meant as a "Magna Carta of Free Enterprise," outlawing private restrictions on "liberty" regardless of their economic consequences. Instead, formative era courts sustained only that interference with liberty of contract necessary to prevent prices from rising above the competitive level. "Liberty from contract," then, played no independent role during this era.

The conclusion that concerns over liberty of contract led courts to reject the Populist approach may seem beside the point. Liberty of contract, after all, is a defunct constitutional doctrine, having been repudiated over five decades ago. Why, one might ask, should it be relevant to our current understanding of antitrust law? Indeed, to the extent that formative era courts rejected liberty from contract as an independent statutory value because they gave credence to liberty of contract, the repudiation of Lochner perhaps suggests that modern courts should read "trader freedom" back into the Sherman Act.

Such reasoning, however, would rest upon a misinterpretation of most of the cases discussed in this article. To be sure, decisions such as Grice, Niagara, and Greenwich rested squarely upon determinations that legislatures had attempted to reach beyond their constitutional authority, by outlawing contracts that did not drive prices above the competitive level. Accordingly, the modern repudiation of liberty of contract would require the abandonment of these decisions, and the concomitant conclusion that states do, in fact, have the authority to outlaw "ordinary contracts and combinations," like partnerships, if they were so inclined.

and its conclusion that states could only regulate supra-competitive pricing); supra note 55 and accompanying text (describing common law decisions enforcing cartel agreements).

435 See West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937) (overruling Adkins v. Children's Hosp., 261 U.S. 525 (1923) and Lochner v. New York, 198 U.S. 45 (1905)).
Most decisions discussed in this article, however, did not rest upon conclusions that Congress or state legislatures overstepped their bounds. To the contrary, courts generally presumed that, in enacting antitrust legislation, legislatures intended to remain within constitutional boundaries.436 For instance, Justice Peckham's determination in *Joint Traffic* that "ordinary contracts and combinations" were beyond the scope of the Act rested upon a "reasonable construction" of Congress's intent in passing the Sherman Act, a construction that did not purport to outlaw contracts protected by liberty of contract.437 Similarly, the definition of "direct restraint" employed in *Addyston Pipe*, while informed by the classical paradigm underlying liberty of contract, was again imputed to the Congress that passed the Sherman Act.438 Moreover, decisions such as *Dueber Watch-Case*, *Greene*, and *Nelson* all rested upon a conclusion that Congress had meant the Sherman Act to reach only as far as the classical paradigm would allow. Finally, decisions such as *Smiley* and *Firemen's Fund Insurance* rested upon determinations that the legislature had not meant to outlaw contracts solely because of their liberty-restraining effect, but instead had meant to outlaw only those contracts producing prices above the competitive level.439 While modern legislatures certainly have the authority to reach beyond the scope of regulation permissible under the (now defunct) doctrine of liberty of contract, these decisions, reached shortly after the statutes in question were passed, concluded that late-nineteenth-century legislatures, jealous of constitutional guarantees, had chosen not to do so.440

The mere conclusion that "trader freedom" in the form of liberty from contract should play no independent role in giving content to antitrust doc-

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436 Cf. Public Citizen v. United States Dept. of Justice, 491 U.S. 440, 465-67 (1989) ("[W]e are loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils."); Crowell v. Benson, 285 U.S. 22, 62 (1932) ("[I]t is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question [of its constitutionality] may be avoided."); Hooper v. California, 155 U.S. 648, 657 (1895) ("The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.").

437 See supra notes 256-72 and accompanying text (discussing *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898) and its refusal to interpret the Sherman Act to prohibit ordinary contracts).

438 See supra notes 309-23 and accompanying text (discussing *United States v. Addyston Pipe*, 175 U.S. 211 (1899)).

439 See supra notes 395-407, 414-21 and accompanying text (analyzing *Smiley* and *Firemen's Fund Insurance* and their conclusion that state legislatures intended to prohibit only those agreements that produced supracompetitive prices).

440 Cf. *Public Citizen*, 491 U.S. at 466 (noting that decision to construe statute so as to avoid constitutional infirmities depends upon presumption that legislature intended to follow the constitution); SKLAR, supra note 18, at 112-17 (arguing that Congress abandoned initial drafts of the Sherman Act due to perceived constitutional infirmities).
trine does not necessarily establish that the Modern "allocative efficiency" approach to antitrust law is the correct one. Indeed, the conclusion that prices above the competitive baseline justify regulation is not entirely consistent with the allocative efficiency approach. That approach, as mentioned earlier, would shield from regulation those contracts that, on balance, enhanced total wealth, even those that increase prices. A conclusion that formative era caselaw adopted a price-based standard, therefore, points away from the standard sought by proponents of the allocative efficiency approach.

Before jettisoning the allocative efficiency approach in favor of a price-based standard, one must grapple with one more puzzle: a price-based standard seems inconsistent with the hostility of *Lochner v. New York* and its progeny toward redistributionist justifications for interfering with contractual liberty. Some scholars have made a strong case that, like the common law of trade restraints, as well as the scope of regulation permitted by the classical paradigm, the scope of the *Lochner*-era police power was determined by a theory of externalities. So, for instance, while the state ordinarily had no power to regulate the hours that employees worked, it could so regulate when long hours would threaten the physical safety of the workers involved.

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441 See supra notes 22-28 and accompanying text (summarizing the focus of the allocative efficiency approach to antitrust); see also Lande, *Wealth Transfers*, supra note 29, at 142-50 (describing difference between price-based and allocative efficiency approach to the antitrust laws).

442 See *HOVENKAMP, ENTERPRISE AND AMERICAN LAW*, supra note 3, at 283 ("One consequence of the neoclassical revolution in economic theory was a change in the legal definition of 'coercion' to encompass the loss of market opportunities that competition would have afforded. When the neoclassical revolution was complete, even the customer forced to pay a high price because of cartelization or monopolization was legally 'coerced.' The Sherman Act itself reflected this emergent neoclassicism."); *see also id.* at 294-95 (arguing that the Court adopted a "neoclassical" approach to antitrust during the formative era); *PERITZ, supra note 5*, at 51-52 (arguing that Court's focus on price effects of restraints was consistent with *Lochner*-era jurisprudence).

443 See, e.g., *HOVENKAMP, ENTERPRISE AND AMERICAN LAW*, supra note 3, at 200-03 ("Both [Thomas] Cooley and the Supreme Court read into substantive due process doctrine a theory of externalities much like Pigou's. The Court approved regulatory legislation if it was convinced that market exchanges produced externalities for which the bargaining parties would not account."); Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 442 (1988) (explaining that *Lochner*-era courts sustained regulations designed to combat externalities); *LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW* 570-71 (1988) (remarking that "the underlying philosophy [of the *Lochner* era] held that the only legitimate goal of government in general, and of the police power in particular, was to protect individual rights and otherwise enhance the total public good"); *EPSTEIN, supra note 27*, at 107-12 (1985) ("The sole function of the police power is to protect individual liberty and private property against force and fraud.").
and thus the "strength" of the community at large. Thus, the state could regulate hours worked by women, because they did not fully internalize the effects that their poor health might have on their children and thus future generations. Moreover, workmen's compensation laws, which limited the ability of individuals to contract away their right to sue employers for negligence, were sustained because absent such schemes, injured parties would become charges of the state. Thus, they did not fully internalize the harms associated with accidents, and would, when negotiating over the standard of care to be used in the workplace, undervalue the appropriate standard, too readily contracting away their rights. Finally, land use regulation was also regularly sustained when it prevented hazards to neighboring property.

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444 See Holden v. Hardy, 169 U.S. 366, 396-97 (1898) (noting that employment in the mines involved exposure to "poisonous gases, dust and impalpable substances . . . [with] morbid, noxious and often deadly effects in the human system" and that, even if an individual might voluntarily choose to work in such conditions "[t]he state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer."); Jacobson v. Massachusetts, 197 U.S. 11, 39 (1904) (sustaining compulsory vaccinations because "public safety [is] confessedly endangered by the presence of a dangerous disease").

445 See Muller v. Oregon, 208 U.S. 412, 421-22 (1908) ("[A woman] becomes an object of public interest and care in order to preserve the strength and vigor of the race . . . [and she thus] may be placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained."); see also S. P. Breckinbridge, Legislative Control of Women's Work, 14 J. POL. ECON. 107, 108-09 (1906) (noting that the primary justification for regulating women's employment was their status as either current or eventual mothers, on whose well being the survival of the community ultimately depended).

446 See New York Central R.R. Co. v. White, 243 U.S. 188, 206 (1917) ("The subject matter in respect of which freedom of contract is restricted is the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare.").

447 See HOVENKAMP, ENTERPRISE AND AMERICAN LAW, supra note 3, at 203-04 ("The Supreme Court land-use opinions are filled with citations of possible externalities justifying state intrusion); Soon Hing v. Crowley, 113 U.S. 703, 708 (1885) (sustaining a San Francisco ordinance outlawing nighttime operation of laundries which required "continuous fires" within a certain portion of the city which was, according to the Court, subject "to high winds, and composed principally within the limits designated of wooden buildings, [such] that regulations of a strict character should be adopted to prevent the possibility of fires"). Even Justice Field, the most ardent defender of laissez-faire conceded:

If one construct a building in a city, the State, or the municipality exercising a delegated power from the State, may require its walls to be of sufficient thickness for the uses intended; it may forbid the employment of inflammable materials in its construction, so as not to endanger the safety of his neighbors; if designed as a theatre, church, or public hall, it may prescribe ample means of egress, so as to afford facility for escape in the case of accident; it may forbid the storage in it of powder, nitroglycerine, or other explosive material; it may require its occupants daily to remove
The apparent conclusion by formative era courts that prices above the competitive level constituted a "harm" justifying the abridgment of contracts, however, is inconsistent with this externality-based view of the scope of state power. After all, the Lochner Court made it clear that a law designed to re­dress inequality of bargaining power between employer and employee did not fall within the police power because it was simply an attempt to redis­tribute wealth.\textsuperscript{448} How then, one might ask, could an increase in prices be deemed an "externality," any more than a low wage?; the first merely alters the allocation of wealth among firms and consumers, and the second alters the allocation among employees and employers.\textsuperscript{449} Was the Lochner-era Court drawing arbitrary distinctions between redistributive legislation that it approved, and that which it disdained?

If the distributive consequences of prices above the natural level do not themselves constitute externalities subject to public power regulation, what justified the conclusion that the state could abridge price fixing agreements? This question provides an opening for devotees of the allocative efficiency approach to antitrust. The real "harm" from high prices, they say, is not any "transfer" of wealth from consumers to producers, but, instead, the re­duction in society's total welfare that results when cartels reduce output and

\textsuperscript{448} See HOVENKAMP, ENTERPRISE AND AMERICAN LAW, supra note 3, at 201-02 (noting that, under liberty of contract doctrine, the presence of "unequal bargaining power" did not ordinarily justify a regulation of wages or prices because "[i]nequality of bargaining power between capitalists and laborers affected the distribution of wealth between the bargaining parties, but [had] no effect on anyone else"); CASS SUNSTEIN, THE PARTIAL CONSTITUTION 46 (1993); TRIBE, supra note 443, at 571 ("Laws aimed at redistributing resources would by their very nature fall outside of the legislative function."). Professor Hovenkamp does not recognize the apparent tension between this conclusion and his assertion that the Supreme Court gave the Sherman Act a "neoclassical interpretation." See HOVENKAMP, ENTERPRISE AND AMERICAN LAW, supra note 3, at 285-95 (discussing formative era Sherman Act decisions and concluding that the Court ultimately settled on a "neoclassical" antitrust policy). Such an interpretation, of course, outlaws horizontal price fixing and thus protects a certain distribution of the fruits of economic activity.

\textsuperscript{449} Compare Adkins v. Children's Hosp., 261 U.S. 525, 545 (1923) (holding that Congress cannot redress unequal bargaining power between employer and employee); Coppel v. Kansas, 236 U.S. 1, 17-18 (1915) (same); Lochner v. New York, 198 U.S. 45, 64 (1905) (same) with Smiley v. Kansas, 196 U.S. 447, 456 (1905) (finding that Kansas could act to protect farmers from collusion by dealers); State ex rel Crow v. Firemen's Fund Ins. Co., 52 S.W. 595, 608 (Mo. 1899) (holding that Missouri could act to protect the "helpless insured" from colluding insurance companies).
distort the allocation of resources.\textsuperscript{450} Congress, they continue, could not have intended to outlaw restraints simply because of their distributional effects, but instead intended to regulate a different externality, the allocative losses produced by the output limitations associated with higher prices.\textsuperscript{451} Such losses, of course, constitute externalities in the sense that they would not occur absent bargaining and information costs.\textsuperscript{452} While these scholars have not said so explicitly, elimination of such externalities would fall within the \textit{Lochner}-era conception of the police power.\textsuperscript{453}

The suggestion that allocative losses constitute the "harm" that placed price fixing contracts outside the protection of liberty of contract, while theoretically appealing, poses problems of its own. According to several scholars, at least, the concept of "allocative efficiency" that leads to the conclusion that cartels reduce total wealth was foreign to the lawyers and judges of the nineteenth century, and thus could not have informed a conclusion that supra-competitive prices create externalities in the modern sense.\textsuperscript{454} If this is the case, there is still no satisfactory way to distinguish the state's authority to prevent high prices from its inability to prevent low wages.

There are, it seems, two possible ways to reconcile price regulation with the anti-redistributional character of liberty of contract doctrine. First, one
could begin by recognizing that a conclusion that an act (or failure to act) constitutes a "harm" depends critically upon the "baseline" of the analysis. A punch in the nose or "theft" of an automobile is not an externality unless one believes that the nose or the car "belongs" to someone other than the invader. Similarly, A's broadcast of radio waves on a frequency over which B would also like to broadcast is only an "externality" if that frequency has, through the common law or otherwise, been assigned to B. "All property is theft," the adage goes; no one owns anything unless the law says they do.

Against this background, it is easier to understand why formative era courts could have viewed prices above the "natural," competitive level as an externality and thus a public harm, without doing violence to the classical paradigm and liberty of contract doctrine. After all, that paradigm rested upon a purely descriptive belief that, absent intervention by the state, markets would be populated by several small sellers, surrounded by negligible barriers to entry. Moreover, this state of affairs was more than empirically verifiable: it was natural and inevitable, indeed, some said, ordained by the Creator himself. State attempts to create monopoly or otherwise abridge liberty of entry were suspect precisely because they departed from this natural state of affairs, interfering with the "ordinary laws of trade" or the "general laws of competition." As shown earlier, the determination that antitrust regulation did not necessarily interfere with liberty of contract rested upon the realization that private contracts could, in some cases, interfere with the operation of the "ordinary laws of trade" as much as any state enactment. Thus, the market outcomes produced by the operation of such contracts were as distorted as those

455 See Sunstein, supra note 448, at 46 (emphasizing the importance of a baseline in determining whether a statute deprives one of liberty); Frank Michaelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1167 (1967) (noting the necessity of constructing a baseline before analyzing takings issues); Joseph Sax, Takings, Private Property, and Public Rights, 81 Yale L.J. 149, 150 (1971) (rejecting the traditional view of property rights in favor of one which recognizes the interconnectedness of property); Joseph Sax, Takings and the Police Power, 74 Yale L.J. 36, 61 (1964) (developing such a framework in defining property).

456 Cf. Sunstein, supra note 448, at 46 ("We do not say that someone who is forced to return [stolen] property is being forced to 'subsidize' the person from whom the property was taken.").

457 See supra notes 42-47 and accompanying text.

458 See supra note 47 and accompanying text; see also Fine, supra note 44, at 52-56 (noting link in classical mind between competitive system, resulting prices, and the Deity).

459 See supra notes 48-52 and accompanying text.

460 See supra notes 308-12 and accompanying text (discussing Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 226 (1889), and its conclusion that exclusively private conduct could produce direct restraints that fell outside of the protections of liberty of contract).
produced by a state grant of special privilege. Perhaps, then, cartel-generated prices were deemed "harms" as a distributional matter because they departed from the prices that would have been produced by the "natural" workings of the market.\footnote{See supra notes 43-52 and accompanying text.} Such a conclusion, while not logically compelled, could be consistent with the more general determination that the state could not act to, for instance, upset wage bargains. Bargains between employer and employee were usually the result of the protection and distribution of entitlements associated with the "natural" common law baseline, in which the "ordinary laws of trade" would function well. Mr. Lochner's bakery, for instance, had no power in the employment market.\footnote{See Alan J. Meese, Will, Judgment and Economic Liberty: Mr. Justice Souter and the Mistranslation of Liberty, 41 WM. & MARY L. REV. (forthcoming 1999) (arguing that labor markets that produced bargains protected in Lochner era were generally highly competitive); SIEGAN, supra note 70, at 116 (reporting that, in 1905, there were over three thousand bakeries in New York State).}

Indeed, where the labor markets in question were not competitive, the Lochner-era court did allow regulation of employment conditions. In Holden v. Hardy,\footnote{169 U.S. 366 (1898).} which post-dated Allgeyer, the Court sustained a maximum hour law for miners because, among other things, employers and employees "do not stand upon an equality and . . . proprietors lay down the rules and the laborers are practically constrained to obey them."\footnote{Id. at 396-97; TRIBE, supra note 443, at 572 (asserting that the Supreme Court apparently believed the miners in Holden were a captive labor force).} Similarly, the bargains between cartel and consumer voided by antitrust statutes were distorted by departures from the market process associated with the classical model. Under the classical market paradigm, it could be argued, the prevention of price fixing merely restored the status quo ante, and was no more "redistributive" than are laws preventing theft.

The conclusion that high prices were harms because they differed from those generated by the "natural" workings of the market, however, does not necessarily establish that the "harm" was a distributional one. After all, the assumption that a highly competitive market and the price that it generated was "natural" ultimately had to rest on some normative justification for this competitive process of production and exchange. While classicists assumed that the natural competitive process had certain distributional consequences, they also believed that it would ensure that capital flowed to its highest valued use.\footnote{See SMITH, LECTURES ON JURISPRUDENCE, supra note 46, at 365-66 (contending that departures from the competitive price led labor and capital into the wrong sectors and "overturned the natural balance of industry").} Then-Judge Peckham found that laws mandating prices below the natural level were unjust as a distributional matter—"communistic in their
tendency." He also deemed them harmful insofar as they would drive capital out of the regulated business. Indeed, four years later, the New York Court of Appeals would unanimously echo the same concern, reluctantly holding that price fixing agreements were per se unlawful, while at the same time opining that the "general interests" of society required that producers receive a fair price. There is no reason, a priori, to assume that one (distributional) or the other (allocational) of these two attributes of the "natural" competitive process was dominant in the mind of those courts that viewed prices that departed from the "natural" level to be harmful. Indeed, even Holden v. Hardy did not depend solely upon the presence of unequal bargaining power, but also upon the fact that long workdays resulted in more injuries to miners and thus ultimately harmed the state.

Some basis for choosing between the allocational and distributional conception of harm that justified abridgment of cartel agreements can be found in those cases that did not rely upon the police power in sustaining such regulation. As noted earlier, in Joint Traffic, Hopkins and Addyston Pipe, for instance, the Court did not mention the police power. Instead, Justice Peckham held that Congress could abridge contracts not deemed ordinary, defining as ordinary those agreements that did not directly interfere with liberty and thus market processes in a way that led to higher prices. Although this approach produced the same result in cartel cases as those state court decisions that did invoke the police power, none of the opinions adopting it stated that prices above the natural level "harmed" consumers. Thus, it seems possible that the standard adopted was premised upon a definition of "ordinary" or "natural" decoupled from purely distributional concerns.

To say that the second approach did not necessarily depend upon distributive concerns does not establish that it did not. Still, several considerations point toward a conclusion that the line between "ordinary" and other contracts was not to be drawn solely or even primarily based upon distributional concerns. First, as just noted, none of the cases that adopted this approach

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466 People ex rel Annan v. Walsh, 22 N.E. 682, 695 (N.Y. 1889) (Peckham, J., dissenting).
467 See id.
468 See People v. Sheldon, 34 N.E. 785, 789 (N.Y. 1893).
469 See 169 U.S. at 397; see also Lochner v. New York, 198 U.S. 45, 54-55 (1905) (distinguishing Holden on the ground that the occupation of mining presented true threats to health); David Currie, The Constitution in the Supreme Court: The Protection of Economic Interests, 1889-1910, 52 U. CHI. L. REV. 324, 380 n.334 (1985) (speculating that Justice Peckham was able to distinguish Lochner from Holden because he regarded mining as a more dangerous industry than baking).
470 See supra note 348 and accompanying text.
471 See supra notes 322-24 and accompanying text (discussing distinction drawn by Justice Peckham in Addyston Pipe between ordinary contracts and direct restraints).
suggested that it was necessary to protect consumers from the "harm" associated with high prices. Second, these decisions made it clear that contracts could be "ordinary," and thus within the protection of liberty of contract, even if they increased prices. Partnerships and ancillary restraints, for instance, were deemed ordinary, even if they had the incidental effect of eliminating competition and increasing prices. By implication, then, the state did not have the authority, in the face of liberty of contract, to outlaw a contract simply because it led to higher prices. Third, consistent with the classical paradigm, decisions preceding Joint Traffic, Hopkins, and Addyston Pipe held that practices that could be explained on grounds other than interference with the price mechanism were protected, apparently even if they tended toward monopoly in the case at hand. Whether consciously or unconsciously, then, the Sherman Act decisions recognized that the mere characterization of high prices as a harm could not, by itself, provide the basis for interfering with contractual freedom. A contract or practice could be "natural" or "ordinary" and still lead to prices above the status quo ante.

In the end, however, these two approaches to defining the scope of liberty of contract as against antitrust regulation may have been complementary. After all, those courts that invoked the police power, and the concomitant conclusion that high prices constituted harms subject to regulation, did so while scrutinizing cartel agreements which, given the existence of barriers to entry, could only be explained as attempts to produce a market result different from one governed by the "ordinary laws of trade." Indeed, none of these courts suggested that "legitimate" practices, such as the formation of a partnership, could be abridged simply because they led to higher prices than had previously obtained.

Thus, whether courts relied upon the police power or the distinction between "ordinary" contracts and direct restraints, the ultimate result seemed to be the same. The mere fact that a contract led to higher prices did not, ipso facto, place it outside the protection of liberty of contract. Instead, only those contracts that could only be explained as designed to achieve this effect, i.e., those contracts that had an "immediate" and "direct" effect on prices, were beyond the shelter of liberty of contract. Contracts that could be explained as "legitimate" methods of competition were consistent with the

473 See Dueber Watch-Case Mfg. Co. v. Howard Watch Co., 66 F. 637, 646 (2d Cir. 1895); In re Greene, 52 F. 104 (C.C.S.D. Ohio 1892); see also People ex rel Annan v. Walsh, 22 N.E. 682, 693 (N.Y. 1889) (Peckham, J., dissenting); Cooley, Limits to State Control of Private Business, supra note 48, at 268-69 (concluding that the state could not regulate a monopoly achieved through superior diligence and industry).
474 See, e.g., Carroll v. Greenwich Ins. Co., 125 F. 121, 130 (C.C.S.D. Iowa 1903) (recognizing that a state could not abridge the formation of ordinary contracts); State v. Smiley, 69 P. 199, 204 (Kan. 1902) (reading the challenged statute to avoid prohibition of ordinary contracts).
natural workings of the competitive process and thus found shelter within liberty of contract. The results, flowing as they did from operation of the "ordinary laws of trade," were "natural" even if prices were higher, and thus did not constitute "harms" subject to regulation.

At bottom, the conclusion that contracts that could be explained absent any expectation of higher prices are "ordinary" rests upon a normative judgment that consumers are not always "entitled" to prices at the current level. By associating contracts that might "indirectly" lead to higher prices with the "natural" or "ordinary" workings of the market, formative era courts apparently allowed some standard other than the distribution of income to drive the permissible scope of interference with private contract and thus antitrust regulation. These judges may never had read Alfred Marshall or explicitly understood the nature of "allocative efficiency." They did, it seems, act as though they did.

CONCLUSION

One cannot fully appreciate the meaning of formative era caselaw without viewing those decisions through the lens of liberty of contract. Such a consideration demonstrates that courts rejected a "liberty from contract" justification for the interference with private contract worked by antitrust laws. Instead, state and federal courts held that the state could only abridge those trade restraints that "directly" or immediately produced prices above the competitive level. Thus, formative era caselaw does not support the proposition that the antitrust laws were designed to outlaw those agreements that "infringed" on liberty for contract, without regard to their effect on prices.

The adoption by formative era courts of a price-based justification for abridging contractual freedom suggests that courts viewed prices above the competitive level as a distributional harm, a harm redressable by antitrust regulation. Although such a conclusion seems at odds with the anti-redistributitional character of Lochner-era jurisprudence, it is explicable in light of the powerful influence that the classical paradigm's model of a highly competitive economy had on the minds of formative era judges. Within this model, the competitive process, and the price that it produced, were deemed "natural," even ordained by God. It is thus not difficult to understand how the lawyers and judges of the formative era could have viewed prices above the competitive level as an illegitimate transfer of wealth from producers to consumers.

There is, however, an alternate explanation for the formative era conclusion that supracompetitive prices were a "harm," an explanation more consistent with the allocative efficiency approach to antitrust. The competitive process associated with the classical paradigm did more than simply assure a "natural" price; it also ensured that all firms earned the "natural" return, and that capital was allocated properly. Thus, formative era courts may well have treated high prices as a harm for reasons unrelated to their distributional consequences. Indeed, some formative era courts, including the Supreme
Court itself, stated that an agreement did not lose the protection of liberty of contract simply because it led to higher prices. Such an approach, which countenanced various forms of integration that might "indirectly" lead to higher prices, was consistent with an approach to antitrust that emphasized the creation of wealth, and not its distribution. Robert Bork may have been right after all.