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XENOPHOBIA AND PAROCHIALISM IN THE HISTORY OF AMERICAN LEGAL PROCESS: FROM THE JACKSONIAN ERA TO THE SAGEBRUSH REBELLION

HARRY N. SCHEIBER*

Until recently, scholarship on the history of public law in the United States concentrated upon analysis of "output," studies of legal development tending to focus upon the policy decisions of legislatures and the judicial decisions of courts. From this evidentiary basis historians of the law developed theories of legal change that emphasized the history of doctrines and the continuity or discontinuity in policy content.¹ As a result of advances in historical scholarship of the last two decades, however, the "input" side of legal process has come to receive increasing attention.

Included in the study of inputs are institutional variables in law-making: the constitutional structures, changing organization of courts, and the emergence of new institutional elements such as legislative staff organizations and the burgeoning structures of administrative law. Also on the input side is a concern with the character of specific pressures on lawmakers; the changing organization of pressure groups in lobbying, in legal representation, and interest group and trade associations; and the content of demands from what Stewart Macaulay calls "the consumers of law."² Another variable in the range of inputs is public opinion more broadly defined, whether in a Tocqueville-esque sense as to "spirit," or in the sense of *mentalité* or *Volksgeist* involving widely shared values

* Professor of Law, University of California, Berkeley, School of Law (Boalt Hall). A.B., Columbia University; M.A., Ph.D., Cornell University.

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1. For an analysis of historic legal process in terms of input and output, compare Scheiber, *At the Borderland of Law and Economic History: The Contributions of Willard Hurst*, 75 AM. HIST. REV. 744, 746-50 (1970).

2. S. MACAULAY, *LAW AND THE BALANCE OF POWER passim* (1966).

and assumptions, shared beliefs as to legitimacy of various uses of power and law, and the like.³ Indeed, some of the most intensely contested interpretations of the nineteenth-century American legal process center on whether there was a "consensus" in American political dialogue and what weight historians properly ought to give to such manifest "exceptions" to any consensus as the Civil War crisis.⁴

This Article is concerned with an element of the input side of legal process which has been given little attention in historical studies. It is termed here the "xenophobic factor," and it refers to the particularistic, parochial, sometimes paranoid argumentation found in much of the debate over policy and law in the states from 1830 to the present.

Unlike the rational pursuit of self-interested objectives by pressure groups, or what some historians are prone to see as the conspiratorial achievements of judges and legislators who set out to aggrandize the powerful and wealthy at the expense of the already downtrodden, or other types of rhetoric and behavior and law identified by legal history students, what I propose to explore here is partly in the realm of the irrational.⁵ Sincerely held belief is dif-

3. See, e.g., J. HURST, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN, 1836-1915*, at 106-07, 171-72, 203 (1964) (that it was "common belief" among Americans that to maximize productivity of the economy in the short run, at least, was common sense "and it was good"); J. HURST, *LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY* 26, *passim* (1960); J. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956).

4. My own objections to Hurst's assumptions about "common belief" or *Volksgeist* are set forth in Scheiber, *supra* note 1, at 746, 752-53. Later critics include Morton Horwitz and Wythe Holt, and the whole record of the controversy is usefully and dispassionately analyzed in Diamond, *Legal Realism and Historical Method: J. Willard Hurst and American Legal History* (Book Review), 77 MICH. L. REV. 784 (1979). See M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at xiv (1977); Holt, *Now and Then: The Uncertain State of Nineteenth-Century American Legal History*, 7 IND. L. REV. 615 (1974). But see Hurst's reply to his critics in *Old and New Dimensions of Research in United States Legal History*, 23 AM. J. LEGAL HIST. 1, 9-18 (1979). On how suspicion of constitutionalism as a value links with rejection of the idea of consensus in critiques of a consensuarian conception of nineteenth-century *Volksgeist*, see Scheiber, *American Constitutional History and the New Legal History: Complementary Themes in Two Modes*, 68 J. AM. HIST. 337, 342-43 (1981).

5. This is not to suggest that elements of the irrational, other than xenophobia of various sorts, have been neglected altogether in the study of legal process in American history. Thus "drift and default," and even "mindlessness and chaos in experience" and "primitive fears of what lies in the surrounding murk and muddle," are given a place by Willard Hurst in his

ficult to sort from disingenuous rhetoric in any scholarly inquiry of political argumentation, judicial reasoning, or the like. No one can say precisely when a piece of rhetoric—whether expressing parochialism in a policy debate or constitutional ideals in a judicial opinion, or even proclaiming an “objective” economic interest in a policy matter—accurately reflects belief or, instead, is merely a convenient instrument of persuasion or propaganda.⁶ Nonetheless, in a variety of contexts, debates of law and policy in the states produced expressions of xenophobia and parochialism. The states pursued particularistic interest, at the expense of their sister states, in myriad ways through legislation and judicial decision.

Indeed, our constitutional law's landmarks include a great variety of decisions and doctrines, especially in commerce clause and privileges and immunities clause adjudication, by which the Supreme Court limited the power of the states to extend privileges to in-state interests while discriminating against out-of-state interests.⁷ In many such cases the legislation reviewed by the Court represented the product of legal processes in the states in which the xenophobic element was a major influence in policy decisions.

The purpose of this Article is to examine selected episodes of

portrayal of lawmaking in the nineteenth century. Hurst, *supra* note 4, at 18-20. On the whole, however, legal historians who dwell on consensus, historians who take a very different tack by stressing deception and conspiracy of the most powerful elements, and also those like myself who portray legal process as a pattern of tension, typically tend to subordinate the irrational except insofar as various kinds of “realists” have pointed out that wherever one identifies myths, one implicitly finds self-delusion on the part of those who accept such myths.

Important to note, too, is that parochialism and particularism, as xenophobic elements, need not be irrational. They may express a picture of state or local self-interest that correctly views competing jurisdictions as engaged in a struggle for scarce resources. See Scheiber, *Federalism and the American Economic Order, 1789-1910*, 10 L. & Soc'y Rev. 57, 97-100 (1975); note 61 & accompanying text *infra*.

6. Students of, say, abolitionism, or populism or, indeed, of proslavery rhetoric face similar problems. No one contends that the preamble to legislation necessarily is an accurate guide to motivation or purpose although in the hands of courts it may become the legal touchstone. Legal Realists long ago disposed of the notion that assertions of constitutional principle are to be taken as inscriptions on the Ark of the Covenant. For an interesting commentary on this and related themes in a modern context, see Belz, *New Left Reverberations in the Academy: The Antipluralist Critique of Constitutionalism*, 36 Rev. Pol. 265 (1974). See also Tushnet, *Post-Realist Legal Scholarship*, 1980 Wis. L. Rev. 1383.

7. For a discussion of commerce clause and privileges and immunities clause decisions, considered in both an historical context and an incisive analytical framework, see Varat, *State “Citizenship” and Interstate Equality*, 48 U. CHI. L. REV. 487 (1981).

lawmaking in which this xenophobic element manifested itself. The scope of the Article is not comprehensive, and no grand theory is proffered. Instead, exemplary periods and incidents are discussed, with emphasis mainly on the Western states. The Article's modest purpose is to suggest some of the various ways in which particularism, even a sort of paranoia, may color policy debates and dialogues on law, and how at times they demonstrably influence policy choices and legal process generally.

I. ANTI-FOREIGNISM AND PUBLIC POLICY: THE JACKSONIAN ERA

An important legacy in Jacksonian thought from its Jeffersonian and Madisonian intellectual forebears was a robust and consistent Anglophobia. The Jeffersonians in the 1790's denounced the First Bank of the United States as an instrument created by Alexander Hamilton and the Federalist majority in Congress to cement a new Anglo-American economic connection.⁸ The Jacksonian leadership in the 1830's, confronted with implacable opposition from Nicholas Biddle and his Bank of the United States—and the extensive business interests that rose to the bank's defense—similarly declaimed against the bank and its political allies for selling out to the British commercial and financial interests they associated with the bank. Moreover, the Jacksonian leadership eventually generalized their Anglophobia to embrace all banks, not only the Bank of the United States. Thus Amos Kendall declared in 1837 that “now every man, woman, and child in this vast Republic, is taxed in his lands, his bread and his labor, to pay off the debts of Banks, brokers and merchants to that proud Isle,” Great Britain. Kendall deplored “this degrading thralldom” as a tragic reversal of the gains

8. “In the opinion of the Virginians, the Bank of the United States was another milestone on the road to monarchism, centralization, and the Leviathan State.” J. MILLER, *TOWARD A MORE PERFECT UNION: THE AMERICAN REPUBLIC, 1783-1815*, at 99 (1970). In fact, the first Bank of the United States attracted extensive investment from Great Britain in its stock as its charter intended, a fact often adverted to by Madison and other critics. The serious constitutional and political consequences of the Anglophobia of the Republicans and the Francophobia of the Federalists, culminating in the terrible crisis of the Alien and Sedition Acts and their enforcement, is reviewed in the magisterial study by J. SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* (1956). How Anglophobia intensified Republican fears of Federalists motives vis-à-vis the warring European powers in the crisis that preceded American entry into the War of 1812, is considered in R. BROWN, *REPUBLIC IN PERIL: 1812* (1964).

won by the American Revoution.⁹ Similarly, Senator Robert Walker of Mississippi attacked "the creation of this great bank power, to become the ally of the British bank [the Bank of England] and bankers." It was, Walker declared, "a question not only affecting the forms of our Government here, but a question whether these States shall be recolonized."¹⁰

How broadly generalized this sort of charge might become was well illustrated by a political letter written in 1840 by the jurist, then Secretary of the Treasury, and future Supreme Court Justice, Levi Woodbury, stating:

[True Democrats] can well distinguish also and as well describe the folly of changing one foreign political yoke for another; or of separating our dependence in politics from George the Third and his Parliament and of not separating it from a still more potent king and oligarchy, composed of monied corporations, whether on this or the other side of the Atlantic.¹¹

Given a free hand in the political arena, Woodbury warned, the financial institutions and their British connection constituted a dreadful threat to Americans as a free people, for the bankers would "prostrate them and their independence."¹²

This sort of Anglophobic sentiment—"twisting the lion's tail," as it was known in contemporary political parlance—can be explained partly by the heritage not only of Jeffersonian politics but also by the legacy of the War of 1812 and other manifestations of Anglo-American confrontation.¹³ The fight over the Bank of the United

9. Letter from Amos Kendall to John Thompson and others (July 1, 1837) (Amos Kendall Manuscripts, Dartmouth College Library).

10. Address of Mr. Walker, Senate of the United States (Jan. 21, 1840), *reprinted in* CONG. GLOBE, 26th Cong., 1st Sess. 139 app. (1839-40). In 1836, Walker had declared that a policy of hard currency must substitute for issuance of interest-bearing Treasury notes because the latter would "find their way to England and . . . result in debt to a foreign power." J. SHENTON, ROBERT JAMES WALKER: A POLITICIAN FROM JACKSON TO LINCOLN 27 (1961).

11. Letter from Levi Woodbury to Robert Rantoul, Jr. et al. (June 12, 1840) (Levi Woodbury Manuscripts, New Hampshire Historical Society (Concord)).

12. *Id.* On rhetoric and belief of the Jacksonian leaders, see B. HAMMOND, BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR ch. 12 (1957); A. SCHLESINGER, JR., THE AGE OF JACKSON (1945) (particularly useful in this regard because it takes Jacksonian rhetoric seriously).

13. These confrontations included: the "newspaper war" and travellers' accounts in which British condescension toward the Republic and its accomplishments and pretensions found

States gave Anglophobia new significance in American political debates. Anglophobia, or at least expressions of it, became even more intense after the 1837 Panic and during the depression of 1839-1843, as people looked for easy explanations of their economic distress. Not only did the Jacksonians charge the nation's bankers with subordinating American interests to their desire to maintain credit and trade connections with Great Britain; the Democratic leadership and press frequently voiced charges that "British money mongers" were trying to buy a Whig victory in the 1840 presidential election.¹⁴

When the depression crisis caused several American states to suspend interest payments on bonds held in large part by British investors, and even to repudiate in a few instances,¹⁵ some English bankers were prompted to warn that future investment across the Atlantic might well depend on the outcome of the 1840 voting. When made public, such views evoked a great outcry from Democratic spokesmen who denounced such blatant efforts to undermine the integrity of the American electoral process.¹⁶ Escalation of rhetoric followed. Thus Daniel Webster was denounced, when he was negotiating the 1842 treaty with Great Britain,¹⁷ as a "rank old Federalist" who took "servile delight in subserving the interests of the British Aristocracy."¹⁸ Similar rhetorical missiles were hurled

expression; the crisis over the 1837 rebellion in Canada, the McLeod affair, and the Maine boundary dispute, settled by the Webster-Ashburton Treaty in 1842; and the long-standing legacy of the War of 1812. Texas and California issues, each involving some confrontation with British ambitions apart from the direct clash of claims in Oregon, fed the animosities. See R. BILLINGTON, *THE FAR WESTERN FRONTIER 1830-1860*, at 144-45 (1956); N. GRAEBNER, *EMPIRE ON THE PACIFIC* 39 (1955); S. SIEGEL, *THE POLITICAL HISTORY OF THE TEXAS REPUBLIC 1836-1845*, at 250 (1973).

14. One noisy outlet for such charges was the radical Jacksonian paper of Columbus, *The Ohio Statesman*, Dec. 7, 1840. See, e.g., W. SHADE, *BANKS OR NO BANKS: THE MONEY ISSUE IN WESTERN POLITICS 1832-1865* (1972).

15. See R. Hidy, *THE HOUSE OF BARING IN AMERICAN TRADE AND FINANCE, 1763-1861* (1949); L. JENKS, *THE MIGRATION OF BRITISH CAPITAL TO 1875* (1927); R. McGRANE, *FOREIGN BONDHOLDERS AND AMERICAN STATE DEBTS* (1935).

16. The major incident centered on a letter of Frederick Huth & Company, English bankers, to the president of the State Bank of Missouri, on June 3, 1834, leading to resolutions of the Missouri legislature condemning this alleged attempt to interfere with the 1840 election. (The letter is in *Missouri Argus*, Nov. 25, clipped in *The Ohio Statesman*, (Columbus) Dec. 7, 1840.)

17. That is, the Webster-Ashburton Treaty.

18. *The Ohio Statesman* (Columbus), Apr. 12, 1842.

at other Whig leaders.¹⁹

Ironically, the Whigs also capitalized on some of the advantages in posing as the Republic's defenders against perfidious British influence! In attempting to turn the tables on the Jacksonians and implicitly acknowledging the potency of such rhetoric as political argument, they attacked James K. Polk, inheritor of the Jacksonian mantle, as "a man who came from Tory stock and, being a free trader, was tied to Britain's chariot wheels."²⁰ More generally, the Whigs traded on parochialism and chauvinism by contending that the protective industrial tariffs they espoused, in the face of Jacksonian opposition, served as ample rejoinder to the charge that they subordinated nationalistic interests to those of their trans-Atlantic friends.²¹

A. Anglophobia, "Anti-Foreignism," and the Jacksonian Nexus—The Ohio Life Insurance & Trust Company

Jacksonian Anglophobia, especially its premise that the banking community in particular and the business community in general were linked with antirepublican causes, apparently inspired and reinforced "antiforeignism" at the state level of politics and law-making. The evidence from rhetoric alone is instructive: in political dialogue of the 1830's, the term "foreign" applied not only to alien but also to out-of-state investors and business interests, whether individual or corporate. This meaning was common throughout the nineteenth century, especially in the West.²² In the 1830's, parochialism and paranoia about "foreign" business interests and the threat they posed to local interests—or even to the integrity of republican government—was a potent force in the legal process of many states.

How the antiforeignism of that day could affect both input and

19. See, e.g., G. VAN DEUSEN, *THE JACKSONIAN ERA, 1828-1848* (1959).

20. *Id.* at 187.

21. E.g., *Western Reserve Chronicle* (Warren, Ohio), Apr. 25, 1843. An even more effective preemption of Jacksonian rhetoric and posture existed in the Whigs' "log cabin and hard cider" campaign in 1840. "We have taught them to conquer us!" the *Democratic Review* cried distressfully; it was "the out-Heroding of Herod." G. VAN DEUSEN, *supra* note 19, at 148 (quoting 7 *DEMOCRATIC REV.* 486 (1840)).

22. Even to the present day, of course, "foreign" is used in legal terminology to describe a corporation domiciled outside the state, as in diversity jurisdiction usage.

output in legal process is exemplified by the history of the Ohio Life Insurance & Trust Company. It was chartered by the Democrat-controlled Ohio legislature in early 1834; its first president was Micajah Terrell Williams of Cincinnati, one of the founders of the Jacksonian Democratic party in Ohio, and considered to be a Jackson stalwart.²³ Most of the capital for the bank, as well as the initiative for its organization and design of its charter, came from a group of investment bankers in New York. Most prominent among them were members of the Bronson family, leading figures in the New York Life Insurance & Trust Company. Their New York institution served as the model for the Ohio venture, which at the time of its organization was one of the largest privately capitalized business ventures in the nation and certainly the largest in Ohio. This fact alone made the company a potential target of anticorporate Democratic radicals, despite the prominence of Williams and other party leaders in its officers' ranks.²⁴

What makes the Ohio company's history interesting is the way in which the men who engineered the charter anticipated antiforeignism as a problem. Opponents of this venture—which, as a large bank, drew criticism similar to that directed against the Bank of the United States—traded on antiforeign sentiment when they attacked it as an intolerable monopoly and demanded repeal of its charter in 1835.²⁵

The New York banker group employed Williams as their principal organizer in Ohio.²⁶ The group entrusted Williams with the task of mustering votes in the Ohio legislature for the special charter and, equally important, lining up a roster of Ohio business notables to invest in the corporation's stock and to serve as directors. From the outset, Williams advised the New Yorkers to maintain a

23. For a history of the Trust Company in brief compass, see Scheiber, *Entrepreneurship and Western Development: The Case of Micajah T. Williams*, 37 BUS. HIST. REV. 345 (1963).

24. *Id.* at 356-57; see also J. HAEGER, *THE INVESTMENT FRONTIER: NEW YORK BUSINESSMEN AND THE ECONOMIC DEVELOPMENT OF THE OLD NORTHWEST 18-38* (1981).

25. See F. WEISENBURGER, *THE PASSING OF THE FRONTIER, 1825-1850*, at 303, 326, 336, *passim* (1941); Scheiber, *supra* note 23, *passim*.

26. Some dispute exists on this point, but in my view the Williams manuscript correspondence indicates that while the charter measure was before the legislature Williams held the reins. For a different view, emphasizing New York control, see J. HAEGER, *supra* note 24, at 45-47.

low profile, even suggesting in May 1833 that a visit to Ohio would be unwise while the charter was being considered:

I am of opinion that it will be *bad policy* for it to be *understood* that N. York [superscribed "foreign"] capitalists have any *direct* agency in getting up the project . . . With men of liberal and enlightened views I admit this could have no influence, —but . . . in these days our Legislative bodies are not composed entirely of men of this description. Prejudiced minds, men of narrow and illiberal views, predominate too much in all such bodies. It would at once be cried [sic] . . . that the whole scheme was one got up by foreign capitalists (or possibly by N.Y. politicians) with a view to a stock speculation, or something worse, and in this way, . . . a prejudice against it would be got up which might prevent the passage of the bill, or cause it to be *so restricted* in its provisions as to defeat . . . its object.²⁷

Williams's strategy was to portray the Trust Company instead as an Ohio project, "without any apparent connection with or agency of eastern capitalists," to head off excessive speculation on the stock as well as antiforeign political attacks.²⁸ This state of affairs outraged some of the New York group. Lot Clark of Buffalo, for example, replied by lecturing Williams sternly: "If your people should begin their operations by a jealousy and distrust of the only men that could benefit them [that is, the large New York capitalists] . . . , they may as well give it up first as last."²⁹ But the key figure in the New York group, Arthur Bronson, accepted as "co-gent and correct" the advice Williams proffered as to "the impolicy of our residents appearing as advocates in your state."³⁰

The Trust Company charter episode indicates that antiforeignism was more than empty rhetoric lacking political consequences or impact on the lawmaking process. Eastern investors seeking charters for a banking venture in a Western state regularly sought out persons who could mobilize political influence by drawing upon

27. Letter from Micajah T. Williams to Arthur Bronson (May 4, 1833) (Micajah T. Williams Manuscripts, Ohio Historical Society (Columbus)).

28. *Id.*

29. Letter from Lot Clark to Micajah T. Williams (June 6, 1833) (Micajah T. Williams Manuscripts, Ohio Historical Society (Columbus)).

30. Letter from Arthur Bronson to Micajah T. Williams (June 4, 1833) (Micajah T. Williams Manuscripts, Ohio Historical Society (Columbus)).

their local business and public connections. Williams was only one of numerous such business leaders in Ohio who engineered charters or served as officers in the directorates of financial institutions largely controlled by Easterners.³¹ Moreover, precisely the same use of Western representatives-on-the-scene later characterized Eastern railroad investment strategy in the West.³²

That the Trust Company experience in 1834 was not unique with regard to antiforeignism is revealed by other evidence from Ohio. At the very time the Trust Company charter was being introduced, one of Ohio's leading newspapers reported that when the legislature considered another bill to incorporate a state-run bank, the proposal raised the spectre of foreign or Eastern control. Both opponents and advocates of the measure expressed alarm when an amendment was offered to empower the bank to take subscriptions in the form of mortgages. Some wondered whether the bank would become a mechanism for mortgaging Ohio farms to out-of-state financiers. One opponent said that he did not want to encourage "either Atlantic or transatlantic speculators" to play such a role in the Ohio economy; another declared that foreigners might be induced to come to Ohio "and eventually engross all the wealth and landed property of the state."³³

In later years, the Trust Company fell into the vortex of bitter partisan politics. Its cause scarcely was helped, as the radical-Jacksonian press launched tirades against it, when the real nature of the company's financial backing soon was discovered. As a serious effort to repeal the company's charter arose in December 1834, the firm's enemies reminded the public that the charter was obtained with help from "Wall Street Agents . . . in the persons of some of the 'trust-worthy' of Cincinnati [the residence of Micajah Williams]."³⁴ The institution was a "*pet monster*" no less than the Bank of the United States had been, declared the Trust Com-

31. For examples in banking, see Scheiber, *A Jacksonian as Banker and Lobbyist: New Light on George Bancroft*, 37 NEW ENG. Q. 363 (1964), and Scheiber, *The Commercial Bank of Lake Erie, 1831-1843*, 40 BUS. HIST. REV. 47 (1966) (on the role of New England capital in Ohio and Michigan ventures).

32. A. JOHNSON & B. SUPPLE, *BOSTON CAPITALISTS AND WESTERN RAILROADS* 81-104 (1967).

33. *Western Hemisphere* (Columbus, Ohio), Feb. 5, 1834.

34. *Id.* Dec. 30, 1834.

pany's chief enemy in the legislature, Robert Lytle.³⁵ When the Trust Company became deeply involved in Ohio state finance as an underwriter of the state's canal bonds during the 1839-1843 depression, it found itself subject to even more intense attack. When \$200,000 in specie was sent to the East by the Trust Company in the summer of 1839, one of the institution's most prominent political critics charged it with subversion of American interests:

The plan at New York is to ship the whole of the specie in the Bank vaults there to Europe at once, to save the Bank of England from suspension! And why is this scheme of treason against the United States put on foot? Simply to save the vampyres of MONOPOLY in *cotton* and in *stocks*.³⁶

By way of conclusion, one may say with confidence that anteforeignism colored the debates over the Trust Company and, perhaps more important, actually influenced the tactics of its corporate promoters as they sought to gain a charter and get the enterprise afloat. Less certain is whether such expressions of parochialism, Anglophobia, and anteforeignism were sincerely held, or were invoked instead merely to manipulate political symbolism. That actors in the legal process believed it efficacious to use the symbolic language of anteforeignism, that the promoters of the Trust Company feared and respected the effectiveness of such political rhetoric, and that the lawmaking process was infused with concern about "foreign" influence seems irrefutable. A remaining question is whether this was an isolated, unique incident or something reflective of a larger, more pervasive element in legal process during the Jacksonian era.

B. *Administrative Behavior and the Xenophobic Factor*

Further evidence from the Jacksonian era lies in the history of

35. *Id.* Mar. 12, 1836. Williams had warned the leading New York investors that "occasional manifestations of hostile feelings against '*monied monopolies*' may be expected from Editors and 'Letter writers.' The Trust Company as one of the most prominent of these monopolies in Ohio will probably be conspicuous in these manifestations." Letter from Micajah T. Williams to Arthur Bronson (Dec. 16, 1834) (Micajah T. Williams Manuscripts, Ohio Historical Society (Columbus)).

36. Letter from Samuel Medary in *The Ohio Statesman* (Columbus), Aug. 2, 1839 (spelling as in original).

the Old Northwest states, the scene from the 1820's until the Civil War of waves of migration and settlement, transport innovation, agricultural commercialization, industrial development, and extensive Eastern and foreign investment.³⁷ Such investment occurred not only in banking institutions such as the Trust Company, but also in other forms of business enterprise, including transportation corporations, and in the securities issued by state governments of the Old Northwest. The leading role of European and Eastern investment in the securities issued by these states for canal and other transport construction between 1825 and 1845 meant that state officials had to face the politically difficult task of asserting the autonomous interest of their states and maintaining public support in an atmosphere often hostile to "foreign" influence.

State officials consequently had to take account of antiforeignism, just as Williams and the Trust Company promoters had done, in the delicate administrative functions they had to perform. Such functions were especially delicate in the depression years, from 1839 to 1843, when revenues from public works failed to keep pace with construction or even operating expenditures, tax revenues could not meet the deficits, and state finances teetered on the brink. Michigan moved toward divesting itself of the railroads it had undertaken to build as state enterprises; the canal fund commissioners of Ohio resorted to extraordinary expedients to tide their state through the crisis; and Indiana and Illinois were forced to cut back drastically on their construction commitments and to negotiate with bondholders. In these situations, the state officials seemingly operated under a cloud of xenophobia. The framework of political realities in which they performed administratively embraced a pervasive Western hostility to Eastern and foreign interests.³⁸

Thus in Ohio, when the state nearly defaulted on its bonds, the Whig-dominated fund board negotiated temporary loans on harsh terms and accepted sales of long-term bonds at devastating discounts to tide the state through the crisis. Radical Democrats were

37. A. JOHNSON & B. SUPPLE, *supra* note 32, ch. 4; H. SCHEIBER, OHIO CANAL ERA: A CASE STUDY OF GOVERNMENT AND THE ECONOMY, 1820-1861 *passim* (1969).

38. See, e.g., R. McGRANE, *supra* note 15, *passim*. For Ohio, see C. GOODRICH, GOVERNMENT PROMOTION OF AMERICAN CANALS AND RAILROADS, 1800-1890 (1960); H. SCHEIBER, *supra* note 37, ch. 6.

quick to portray the fund board's relationship with Eastern and English bankers as typical of "coon [Whig] financiering. This is the way they take money out of the pockets of the people of Ohio . . . and put it in the hands of their friends, the British lords and capitalists."³⁹

In a dramatic confrontation between the Auditor of State, a radical Democrat, and the Whig canal fund board, the Auditor resorted to xenophobic rhetoric. He charged that the financial machinations of the fund commissioners, involving both Ohio and "foreign" bankers in the midst of the depression crisis, would undermine the very autonomy of the state. In language clearly derived from the Anglophobia of Amos Kendall, Levi Woodbury, and other national party leaders,⁴⁰ the Auditor declared that with the state debt largely in the hands of outside investors free government was endangered. He likened their financial control to virtual sovereignty over Ohio's public affairs.⁴¹ At the least the fund commissioners walked a narrow plank, their critics always ready to hurl charges of conspiracy with English and Eastern bankers.

A similar strain in legislative and public policy debates in Michigan is evident in the correspondence of officials there during the depression crisis. The Auditor of State wrote to an intermediary to warn that the New York financier Charles Butler should use utmost caution in lobbying on behalf of bondholders for a bill in Michigan that would institute new taxes to provide for the debt. "Discretion will require," the Auditor wrote, "that the agency of Mr. Butler in producing this result will not be trumpeted. Our people are jealous of foreign and out-of-door influence, and the people

39. *St. Mary's Sentinel* (Ohio), Sept. 27, 1843. See also *The Ohio Statesman* (Columbus), Feb. 20, 1840 (on the fund board's "foolish and extravagant" measures).

40. See text accompanying notes 9-12 *supra*.

41. [1840] Ohio Auditor Ann. Rep. 32-33. In 1842 a special commission on bank suspension and failures reported:

Every bank reorganized since 1837, has failed. These institutions were mostly under the control of non-residents, with a nominal directory of our own citizens. The individuals principally engaged in reviving them, were foreigners [i.e., easterners] of doubtful character and circumstances . . . [The] nominal directors either neglected to discharge, with fidelity, their duties to the public, or quietly acquiesced in the fraudulent proceedings of those who placed them in power.

State of Ohio, 40th General Assembly 10-11 (July 25, 1842) [hereinafter cited as Bank Commissioners' Report].

should have all the credit that can be bestowed upon them consistently."⁴² Later, when the Michigan legislature moved to dispose of the Central Railroad, a state work, to private investors from the East, opposition immediately expressed itself in antiforeign terms. One member of the legislature even wished to entitle the act "a bill to transfer the sovereignty of the State of Michigan to a company of Yankee speculators."⁴³

Xenophobic argumentation was a sword in the hands of state administrative officers in another context later in the antebellum period, when privately controlled railroads, building quickly across the Old Northwest in the 1850's, threatened the survival of the canals remaining under state control. Thus the Ohio Board of Public Works opened what amounted to a full-scale publicity campaign against railroads in the early 1850's. The antiforeign tone of the argument was evident in the Board's appeals for state regulation of rates and public control of operating practices:

If these rail roads would be content with doing their legitimate business, both they and the canals might prosper, but unfortunately they are owned and controlled mostly by foreign capitalists, who feel no sympathy with the people of the State or its prosperity, and are guided only by the hope of large dividends. Against the efforts of these capitalists the State should erect barricades, and carefully guard them, or it will soon find, when too late, the public works of the State entirely at their mercy.⁴⁴

Similarly, much of the debate in Southern and Western states as to state promotion or regulation of banking centered on the need for autonomy and attention to state interests. Investigations of banking irregularities and failures led in one instance to blaming "foreign" influence and irresponsibility. Interestingly, in this instance the state commission's report included testimony by the

42. Letter from C.J. Hammond (Auditor) to George Griswold (1843), *quoted in* G. PRENTISS, *THE UNION THEOLOGICAL SEMINARY IN THE CITY OF NEW YORK WITH A SKETCH OF THE LIFE AND PUBLIC SERVICES OF CHARLES BUTLER, LL.D.* 451 (1899).

New light on Butler's prominent role in shaping Indiana legislation to pay off bondholders is provided by Gray, *The Canal Era in Indiana*, in *TRANSPORTATION & THE EARLY NATION* 113, 123-26 (Indiana Historical Society 1982).

43. A. JOHNSON & B. SUPPLE, *supra* note 32, at 91.

44. Ohio Board of Public Works Special Report (Mar. 10, 1852) OHIO GEN. ASSEMBLY DOCUMENT No. 39, I, 642 (1852).

president of a Western bank controlled by Eastern stockholders. He had personal experience in resisting the Easterners' pressures for favors or for policy measures that he, as president, had deemed inimical to local interests.⁴⁵

C. *Private-Sector Promotion*

The infusion of anteforeignism into public policy, legislative debates, and legislative decisionmaking also was reflected in private enterprise. A leading example again is provided by the New York investment group that sponsored the Ohio Life Insurance & Trust Company enterprise. On the heels of his Ohio charter experience, Arthur Bronson—joined in writing by Charles Butler, encountered in another context already⁴⁶—showed a keen awareness of potential Western hostility to Eastern penetration when he pursued the idea of financing a major canal or railroad enterprise in Michigan in 1833. Writing to Lucius Lyon, a leading public figure singled out by the New York group to do in Michigan and Illinois what Williams had done in Ohio, Bronson and Butler urged their project upon Lyon, promised generous financial support to “the right people” if they would seek a legislative charter, and warned of “the importance of keeping *Eastern* influence out of view in this matter.”⁴⁷ At about the same time, the Butler-Bronson group scouted possibilities for urban land speculation in the West. One of their informants, an army paymaster who apparently “moonlighted” as a land-looker and adviser to investors, confirmed views Bronson already had endorsed, writing of antispeculator feeling in the Michigan region: “The people are *violently* prejudiced against the whole class of speculating Landholders, and consider it meritorious to fleece them by every means in their power, as well as by Legisla-

45. Bank Commissioners' Report, *supra* note 41. Reference is to Leonard Case, who as president of the Commercial Bank of Lake Erie had resisted vigorously pressures from the Eastern stockholders to pay dividends or extend them credit in the midst of a specie-suspension crisis in the West. Letter from Leonard Case to William Dwight (Mar. 8, 1838) (Commercial Bank of Lake Erie Letter Books, Western Reserve Historical Society (Cleveland)).

46. See text accompanying note 42 *supra*.

47. Letter from Arthur Bronson and Charles Butler to Lucius Lyon (Aug. 17, 1833) (Lucius Lyon Manuscripts, Clements Library, University of Michigan (Ann Arbor)); Letter from Arthur Bronson to Lucius Lyon (Sept. 7, 1833) (Lucius Lyon Manuscripts, Clements Library, University of Michigan (Ann Arbor)).

tive enactment imposing onerous taxes on the lands of nonresidents as by wasting and destroying the timber upon them."⁴⁸

Railroad investors in the West both encountered and employed antiforeign rhetoric in great variety. For example, the historian of municipal government aid to railroads in Illinois reported finding frequent reference in promoters' literature to the desirability of minimizing outside control of new lines. Voting on some local referenda seems to have been influenced by the argument that, unless public aid was forthcoming for locally promoted railroads, outsiders would impose their own transport design.⁴⁹ The conventional wisdom was that a railroad would be "more satisfactorily managed, probably both to the people of the country and the stock holders, by a Board of Directors composed, in a large proportion, of gentlemen residing in its vicinity."⁵⁰

When private railroad promoters sought local aid, or indeed when they found themselves engaged in competition with other promoter groups for charters or funds to build in a particular locale, they were quick to draw upon antiforeignism. In one such case, the Marietta & Cincinnati Railroad Company's engineer belittled a rival line's report concerning the best route through southern Ohio. The gentleman "who boasts of a three-month residence in Ohio," the Marietta & Cincinnati report declared, purports "with one blow of his goose quill . . . to strike down a resident Railroad company composed of the most reputable pioneers of the country."⁵¹ Similarly, another railroad promotion in southern Ohio seeking local public support by bond issues was urged to use a local engineer rather than an Easterner. To do otherwise would arouse suspicion among potential stockholders and voters "that this Eastern man would come here with Eastern habits, feelings, associations, and *interests*, the effects of which must be, to give everything an Eastern aspect."⁵²

48. Major Kirby, quoted in letter from Brown to Lucius Lyon (Oct. 23, 1833) (Lucius Lyon Manuscripts, Clements Library, University of Michigan (Ann Arbor)).

49. K. Jacklin, *Local Aid to Railroads in 1848-1870*, at 63-64 (1958) (unpublished M.A. thesis in Cornell University Library).

50. Quincy Whig (Illinois), Aug. 18, 1852, *quoted in* K. Jacklin, *supra* note 49, at 64.

51. Engineer's Report, 1850, *quoted in* J. PIXTON, JR., *THE MARIETTA & CINCINNATI RAILROAD, 1845-1883*, at 12 (1966).

52. Letter from Samuel Carpenter to John T. Brasee (May 17, 1851) (Samuel Brasee

That such an effect would be damaging seemed to be a working premise of railroad promoters of the day. The available evidence suggests that in the legal process, as it mobilized private interests in transport or banking promotion, such sentiments also must have influenced actual behavior in significant ways. Public officials no less than private promoters, at least in the initial stage of railroad building before integration of lines took hold in the 1850's, traded on the rhetoric of xenophobia. The argument of the Governor of South Carolina in 1853, calling upon the state legislature to extend public aid in order to avoid recourse to "foreign" investment "and in the way to secure to the citizens residing in this state the control, . . . where trade and commerce are to be [managed] for our benefit,"⁵³ was a commonplace sentiment. The sentiment was reflected in a debate in the Georgia House of Representatives, in 1847, on a proposed charter for a railroad to connect Charleston, South Carolina, with the Georgia Central's line. The proposed new road obviously would divert to the South Carolina port traffic headed from Atlanta to Savannah. One of the Georgia legislators denounced the idea roundly, saying he "hoped to live long enough to see an impassable gulf or Chinese Wall between Georgia and South Carolina, that we may be forever separated from her arrogant meddlers [sic]."⁵⁴

A Michigan-Ohio rivalry surfaced in 1845 when promoters of a Michigan railroad serving an area north of Toledo, across the state line, adopted a gauge (track width) different from those of Ohio railroads to prevent connecting freight and thereby to protect the commercial position of the town of Monroe, Michigan. A Toledo editor deplored this tactic as well as the Michigan promoters' defense of their actions by their

meanly resorting to the slang that it [an Ohio railroad, seeking a uniform gauge for connecting freight] is a foreign corporation. Ohio and Michigan are not foreign states, in relation to each other, nor is there any clashing interest to render it the duty of either to make the boundary line that separates them a wall

Manuscripts, Ohio Historical Society (Columbus)).

53. Governor of South Carolina, Message on the Blue Ridge Railroad, *reprinted in* 1 RAILROAD REC. 693 (1853).

54. Quoted in R. SHRYOCK, *GEORGIA AND THE UNION IN 1850*, at 60 (1926).

over which their citizens must not be allowed to pass, for purposes of trade.⁵⁵

Once consolidation and integration of railroads began in the West in the 1850's, those lines left out or damaged by this development promptly resorted to antiforeignism in making the case for their own interests. The Marietta & Cincinnati, one of those railroads hurt by competition in this new context, called upon the state to protect it and other railroads "wantonly assailed or endangered by combinations designed to advance new or private foreign interests, rather than promote the general good."⁵⁶ Interestingly, one of the arguments adduced for protective legislation was that laws of neighboring states had damaged locally owned Ohio railroads' aspirations and interests; retaliation therefore was a legitimate as well as a logical response.⁵⁷ In 1858 this same company, the Marietta & Cincinnati, offered another glimpse into the worlds of railroad promotion and legal process when its own bondholders, nearly exclusively British, moved to foreclose on the railroad. The Ohio management condemned the bondholders as "an odious speculative combination" who had allied themselves with a team of "hungry adventurers," including Millard Fillmore and other New York lawyers, and attempted avariciously to undermine the Ohio local interests for which the railroad had been chartered and built.⁵⁸

Other aspects of private-sector activity also illustrate the range and variety of influences of antiforeignism. Although manufacturing enterprise has not been studied extensively in the antebellum

55. Toledo Blade (Ohio), May 16, 1845. The entire controversy is reflective of the uses of gauge as a device of interstate and interurban rivalries, the most prominent example of which was the notorious gauge change required by state law and affecting a great volume of through traffic at Erie, Pennsylvania. See G. TAYLOR & I. NEU, *THE AMERICAN RAILROAD NETWORK, 1861-1890*, at 31-32 (1956); Kent, *The Erie War of the Gauges*, 15 PA. HIST. 253 (1948).

56. Marietta & Cincinnati Railroad, Sixth Annual Report 21-22 (1856).

57. *Id.* Of particular concern to the officials of this Ohio railroad was the "selfish and restrictive legislation" of other states, that is, Pennsylvania and Virginia, with regard to the Wheeling Bridge. *Id.* These maneuvers culminated in three great cases before the Supreme Court in the 1850's: *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1851); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 50 U.S. (9 How.) 647 (1850).

58. J. PIXTON, JR., *supra* note 51, at 32.

West or South, at least not from the standpoint of legal-economic history, a few scholars have probed issues of Western manufacturing that relate to the input side of the legal process. For example, Margaret Walsh observes that a demand for "self-sufficiency" was a major theme in promotional rhetoric and policy debate, and perhaps a serious motivation of entrepreneurs as well, in Wisconsin during the antebellum years. Walsh reports that when public policy on manufacturing was discussed or enterprise undertaken, "the parochialism of the local community" was a foremost theme. She writes that "[I]t was almost as if Western newcomers regarded the older Eastern states as a foreign country."⁵⁹ Similarly, another historian who examined Western antebellum industry writes:

[A] barrier [to interregional investment] was interposed by the general distrust of "foreignness." Any amount of evidence can be marshalled to support the existence of an anti-foreign sentiment [in political rhetoric] . . . It is possible that in the nineteenth century information about foreign investment was often suppressed to avoid the stigma attached to such outlays, and the information was thus lost to the researcher of today. But this is only my general impression. Explicit evidence has not been found.⁶⁰

The data assembled in this Article constitutes a start toward the analysis of "explicit evidence" on anteforeignism and permits us to go beyond general impressions in the quest to better understand the forces which influenced law and policy in our history.

II. STATE MERCANTILISM AND THE XENOPHOBIC ELEMENT

A. *Rivalry and Rhetoric*

One caveat is in order, lest the foregoing be interpreted as evidence only of irrational behavior and thought: some, indeed much, of the anteforeignism in state government legal process was the obverse, sometimes perverse, side of a well-known and well-studied phenomenon, state mercantilism. Prior to 1860 in the antebellum

59. M. WALSH, *THE MANUFACTURING FRONTIER: PIONEER INDUSTRY IN ANTEBELLUM WISCONSIN, 1830-60*, at 13-14 (1972).

60. Olsen, *A Representative Study of Capital Origins*, 6 *ECON. DEV. & CULTURAL CHANGE* 204, 205 (1958).

states, active government intervention to aid state economic interests and growth was a leading feature of law and policy.⁶¹ The premise on which lawmakers based interventionist policy, whether promotional, regulatory, or outright state enterprise, was that the "commonwealth" interests of the state required collective efforts lest other states win in the struggle for limited resources, investment, immigration, and trade. It was not, withal, a generous premise except insofar as it was founded on the optimistic notion that the entire economy would grow, thereby enlarging opportunity and wealth in the competitive system for every state. Entirely representative of the reasoning and rhetoric to be found in decisionmaking processes was the declaration in 1881 of a New Hampshire spokesman for laws that would promote industry, bring immigration, and develop the "power and prestige" of the Granite State: New Hampshire was "a community by itself" and so it "must have a *political economy of its own*" or else succumb to competition and "go down in the mighty sweep of events."⁶²

In the context of state mercantilism in a rivalistic political system, anteforeignism was not necessarily or invariably irrational, let alone paranoid. In a sense, anteforeignism was the philosophy of competitive mercantilism cut to its essence. In some instances, anteforeignism merely was a rhetorical weapon, rationally and with great consistency harnessed to a larger goal; in other instances it was a logical extension of the original philosophical and policy foundations of specific laws and programs.

There must be room left, however, in our analysis of this legal process phenomenon, for its irrational side. The "foreigner," whether an out-of-state interest or an alien-foreign interest, was not necessarily The Enemy—either in narrow economic terms, especially when a quest for outside investment was under way, or in the often-heard broad political terms, as an enemy of republican government or state autonomy. Moreover, the phrase "foreign in-

61. For full discussion of state mercantilism in theory and action, see O. HANDLIN & M. HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774-1861* (rev. ed. 1969); Scheiber, *Government and the Economy: Studies of the "Commonwealth" Policy in 19th-Century America*, 3 J. INTERDISCIPLINARY HIST. 135 (1972); Scheiber, *Public Economic Policy and the American Legal System: Historical Perspectives*, 1980 WIS. L. REV. 1159 (1980).

62. C. COFFIN, *THE FUTURE OF NEW HAMPSHIRE* 6-7, 21-23 (1881).

fluence" could be imputed to almost anything that was convenient; the Jacksonians developed to a high art the depiction of foreign influence as a scapegoat, and the latter-day agrarian radicals also learned their lessons well on that score.⁶³

Whatever one's conclusions may be on the elusive matter of antifoignism's impact on policy debate and legal process on the input side, there is a harder evidentiary aspect: statutes, judge-made law, and administrative policies from 1830 to the present have revealed antifoignism in action. Before turning to this evidence, however, we must consider what is commonly termed "discriminatory" law in economic policy.

B. *Discrimination and Xenophobia*

The literature of legal-economic history⁶⁴ provides solid documentation of many features of American law that reveal interstate rivalries and state mercantilism—that is, state actions sometimes were successfully or unsuccessfully challenged in the federal courts but at other times were pursued without legal challenge. In all instances, these laws were designed to extend advantages to in-state or local interests, to the disadvantage of out-of-state or "foreign" competing interests.

The real motivation behind these laws probably varied, however, and it seems plausible that prejudice or fear—or whatever other sentiment underlay antifoignism—played a part in the process that produced some of this law.

We cannot interpret every example of discrimination to be evidence of antifoignism-as-paranoia; many such examples instead may illustrate the most calculating, rational, self-interested pursuit of antifoignism-as-quest-for-advantage! As a theoretical proposition, however, the following seems to be a sensible analytical premise: in influencing public opinion or conditioning the attitudes of policy planners⁶⁵ and lawmakers to gain support for highly ra-

63. See, e.g., R. HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO FDR* (1955).

64. The various articles in the festschrift for Willard Hurst, 1980 *WIS. L. REV.* 1093-1442 contain the best introduction to the methodology and substantive literature of legal-economic history. See also Scheiber, *Regulation, Property Rights, and Definition of "the Market": Law and the American Economy*, 41 *J. ECON. HIST.* 103 (1981).

65. To speak of "policy planning" in reference to American state governments in an earlier era, especially their operations prior to the 1890's, may seem anachronistic; in fact, I do

tional, self-interested measures against "foreign" interests, champions of such measures could appeal to the irrational elements of anteforeignism. The generalized and not always rational prejudice against out-of-state and overseas interests became, in sum, a useful instrument for reinforcing political effectiveness, or for giving a certain bent to judicial or other lawmaking processes, despite the cold and self-interested nature of the "real" goals.

The notion that there should be autonomous local control over a local economy's destiny is nothing new in American law and policy debate. Every major purchase of a downtown urban complex, absorption of an American bank by a foreign (say, Saudi Arabian or Japanese) investment complex, or acquisition of large areas of farmland by a foreign, or even out-of-state, syndicate, typically evokes immediate comment in the local press or state political circles. Abundant evidence exists of interstate rivalries and anteforeignism in contemporary American law and in our present political and cultural life.⁶⁶ In terms of motivation, whether a particular policy or law gains public support, or is fashioned by its designers, *because of anteforeignism*, must be investigated by close analysis of the process that produced each law or policy, the debate that surrounded it, and other elements of input. Discrimination, retaliation, and pursuit of autonomy through law in state or local affairs, for purposes which are entirely defensible in rational economic terms if not necessarily in principled constitutional terms, ideally should be distinguished from similar activity and uses of law that are justified and motivated merely by a blind antforeign animus. Sorting out these differences is not easy when seeking to analyze even contemporary situations; making the proper distinctions in nineteenth-century episodes is a demanding task for the political historian, and perhaps even more demanding for the legal or legal-economic historian.

not mean to suggest that planning in earlier times truly was comparable to planning in modern American government. Yet in some areas of lawmaking, especially in the fields of transportation investment, construction, and program design, there was significant activity similar to modern planning. See Scheiber, *supra* note 61.

66. See section III *infra*.

C. *Evidence of Variety and Ingenuity, 1825-1900*

We already have discussed some evidence from the history of private-sector corporate promotion and from public policy illustrating the potency and salience of anteforeignism in the antebellum era.⁶⁷ We now will examine a few areas of law and policy that enlarge our range of inquiry. Some of these examples illustrate fairly clear-cut connections between generalized anteforeignism—which involved prejudice, even paranoia—and policy. Other examples are more ambiguous; they illustrate the difficulty of identifying motivations or purposes in clear-cut terms.

The rate-setting policies of state canal officials in the antebellum canal era offer a prime example of discriminatory policy initiated by administrative officials. We find that in the 1820's, 1830's, and 1840's—prior to the rise of effective railroad competition, when state-owned public canal enterprises enjoyed a virtual monopoly of heavy freight transport in many regions of the interior—state officials virtually allocated markets by rigging the structure of canal tolls.⁶⁸ Despite the mandate of John Marshall's Supreme Court on interstate commerce, and contrary to the usually accepted view of legal historians that a "free market" prevailed in internal trade, the canal officials erected significant barriers to interstate commerce. They did so, moreover, on a discriminatory basis. For example, on many products, tolls were set at a much lower level for in-state producers or manufacturers than were imposed on identical out-of-state producers. The commissioners of one of the canal states explained the practice as follows:

Each State finds a justification on the score of interest . . . in furnishing to its own citizens the cheapest transportation of the surplus products of its industry to a market; while, as a rule of compensation and revenue, the importations [from out of state] are burdened with as heavy a tax as their value will bear.⁶⁹

Burdening out-of-state competitors with the heaviest tax the market would bear thus was acknowledged publicly and relied

67. See notes 8-60 & accompanying text *supra*.

68. H. SCHEIBER, *supra* note 37, ch. 10.

69. Ohio Board of Public Works Special Report (Jan. 29, 1848), *quoted in* H. SCHEIBER, *supra* note 37, at 254-55.

upon as a touchstone of legitimate policy; to pursue the interests of one's own state economy at the expense of others was accepted. Indeed, discriminatory toll policies were so extensively accepted that the policies adopted by New York, Indiana, Ohio, and Pennsylvania, which together controlled a large segment of national commerce in farm products and manufacturing at the height of the canal era, apparently never were challenged in federal courts. To what degree a generalized antiforeignism reinforced the legitimacy of these policies in the public mind and in the thinking of canal officials, the legislators who supported them,⁷⁰ and even the lawyers who apparently did not choose to challenge the policy through commerce clause litigation, is an intriguing question.

My impression, from studying petitions of hundreds of merchants, farmers, millers, and manufacturers in the archives of one of the canal states, is that the discriminatory policy did indeed gain legitimacy—and even urgency, in a political sense—from contemporary debates which expressed antiforeignism, in the virulent form we examined earlier, on the Bank of the United States, the Ohio Life Insurance & Trust Company, the railroads, and other institutions.⁷¹ Not only was antiforeignism “in the air”; it was made an article of faith by the Jacksonians, and its theme was adopted by the Whigs. Public officials had to contend with antiforeignism in a variety of ways and on a fairly continuous basis. Thus, to find that discriminatory economic policies such as the tolls policy were considered legitimate does not seem surprising.

Unrestrained, virulent antiforeignism of the most prejudiced sort, that based on racism, was present only a few years after the canal era peaked in the laws which California adopted to discriminate against racial minorities on the mining frontier.⁷² The infa-

70. In New York State, for example, the subsidy and discriminatory effect of tolls policy resulted in legislative as well as administrative action; the same was true in Ohio. See New York, Superintendent of the Onondaga Salt Springs, Annual Report, 1849; Ohio Board of Public Works Special Report in Relations to the Tolls on Salt, Feb. 5, 1842.

71. “If it is politic for N. York to enlarge the business of her people, it is equally important to Ohio to do the same thing,” wrote one salt works owner to the Ohio board about the need for discriminatory tolls. New York was “just like the British or any foreign government competing for our domestic markets.” Quoted in H. SCHEIBER, *supra* note 37, at 255.

72. Although the Chinese question, with related antiforeignism directed against the Mexicans, is singled out for special attention here because it involved (1) a newly formed State and (2) an immigrant racial group little known in the rest of the nation side by side with

mous Foreign Miners Tax⁷³ was imposed upon all foreigners engaged in gold digs but actually was enforced against only Mexicans and Chinese. In subsequent years, agitation against the Chinese continued in California, and even became a "reform" issue for the Workingmen's Party and other radical groups associated with skilled labor and opposed to Chinese competition for jobs. The agitation culminated in the 1879 constitutional provisions imposing limitations upon corporations' use of Chinese labor.⁷⁴ Indeed, for many years thereafter the federal courts were kept busy seeking to assure some minimum standard of justice for beleaguered Chinese Californians. Unremitting racial prejudice was present, as well as ingenious statutory devices and violence—withal, a virulent racism

another (the Mexican) known well only in Texas, it is important to note that the 1840's had witnessed a strong nativist movement in the older-settled regions. In the East, nativism had been directed against European immigrants generally; the Catholic Irish and German newcomers were most prominently attacked, and they constituted, of course, the majority of the immigrants outside the stream from Great Britain. See R. BILLINGTON, *THE PROTESTANT CRUSADE, 1800-1860* (1938); O. HANDLIN, *BOSTON'S IMMIGRANTS* (1959); and, for the postbellum period, J. HIGHAM, *STRANGERS IN THE LAND: AMERICAN NATIVISM, 1860-1925* (1955). How nativism intersected with suppression of dissent and jingoism, or super-patriotism, in wartime, at the end of the period Higham considers, is a theme in H. SCHEIBER, *THE WILSON ADMINISTRATION AND CIVIL LIBERTIES, 1917-1921* (1960).

73. The California legislature passed a law in 1850 for a prohibitive \$20 monthly tax on foreign miners. The tax was repealed in 1851, but in 1852 the legislature instituted a \$3 tax which was raised to \$4 in 1853. 1850 Cal. Stat. 222; 1852 Cal. Stat. 84; 1853 Cal. Stat. 62. For discussion of the discriminatory taxes, see W. GREEVER, *THE BONANZA WEST: THE STORY OF THE WESTERN MINING RUSHES, 1848-1900*, at 71-72 (1963).

A select committee in the first legislature recommended the foreign miners tax on grounds that (1) the foreigners were of low moral character; (2) California had been won for Americans, and no others (not even Mexicans!) should be allowed to profit from its resource bounty; and (3) in time of war foreigners might prove dangerous to American security. California Legislature Journals, 1850, at 802-16 (1850), cited in Ellison, *The Mineral-Land Question in California, 1848-1866*, 30 Sw. Hist. Q. 34, 36-39 (1926).

74. CAL. CONST. of 1879 art. XIX, §§ 1-4 (prohibiting employment of Chinese by corporations or public works; authorizing cities and towns to remove Chinese residents from city or town limits). "Unless the Chinamen is driven from the state," one delegate contended in support of these provisions, "the white man will be forced to leave the state . . . I ask on behalf of the young men of this State, that they not be obliged to compete with Mongolian slave labor." DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 647 (Willis & Stockton eds. 1880). See generally C. SWISHER, *MOTIVATION AND POLITICAL TECHNIQUE IN THE CALIFORNIA CONSTITUTIONAL CONVENTION, 1878-1879* (1930).

In *re* Parrott, 6 Sawyer 349 (C.C.D. Cal. 1880) invalidated legislation enacted to enforce provisions of the California Constitution banning employment of Chinese by corporations or governmental agencies; the decision effectively rendered those constitutional provisions a dead letter.

that constituted an extreme example of antforeignism as a force in legal process.⁷⁵ No inquiry into xenophobia can neglect this grievous situation, one that imposed devastating costs upon a minority population. Moreover, it seems plausible that the race-focused agitation directed against the Chinese may have served to reinforce the legitimacy in California public opinion of proposals for other, more benign forms of discriminatory "antforeign" legislation in areas such as insurance regulation.

The third example of active antforeignism concerns the leading issue in nineteenth-century American law and politics: "the land question." The terms upon which the vast public domain should be managed—the goals of land disposal, the place (if any) for conservation, the desirability of revenue-maximization versus social-reform aims such as maximum dispersion of landed wealth, and the establishment of maximum limits upon land acquisition by private individuals or firms—were burning questions which agitated Congress, the political parties, and public opinion for many decades.⁷⁶ Perhaps in no other area of economic policy and law did foreign examples, fear of foreign influence, interstate rivalries, and the like come so explicitly into policy debate or elicit such specific legislation. A brief analysis of the record must suffice for our purposes.

"The developing frontier," as Mary Young has written, "has always served Americans as a metaphor of their nation's unique potentialities."⁷⁷ The vision of a nation of sturdy agrarian freeholders—of generous, wide distribution of the landed heritage held as the public domain—continuously was promoted by those who demanded reform of the land laws. Although there was a tension, to be sure, between simple economic individualism and more truly

75. The most notable case, of course, concerned the discriminatory enforcement against Chinese of a franchise requirement for laundries in San Francisco; the Supreme Court invalidated the ordinance in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). See also A. SAXTON, *THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* (1971); Sandmeyer, *California Anti-Chinese Legislation and the Federal Courts: A Study in Federal Relations*, 5 PAC. HIST. REV. 189 (1936).

76. Full analysis of land policy and its enforcement, as well as the politics of land reform, is in P. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* (1968). Also valuable is H. ZAHLER, *EASTERN WORKINGMEN AND THE NATIONAL LAND POLICY, 1829-1862* (1941).

77. Young, *Congress Looks West: Liberal Ideology and Public Land Policy in the Nineteenth Century*, in *THE FRONTIER IN AMERICAN DEVELOPMENT: ESSAYS IN HONOR OF PAUL WALLACE GATES* 74 (D. Ellis ed. 1969).

egalitarian ideals, the champions of land-law reform nonetheless promoted and drew upon this vision.⁷⁸

A negative image of Europe, especially Great Britain and Ireland, was as fully a part of the land-reform vision as the positive, optimistic portrayal of American potentialities. Thus, land-reform advocates pointed to vestiges of feudalism in Europe; to large aristocratic landholdings and grinding tenancy; to the inaccessibility of land for the dispossessed; and to the absence of the republican spirit that is natural to the freeholder, with "his home, his fireside, and his personal liberty and security, to protect and defend."⁷⁹ A basic premise of Jacksonian reform leaders was that maldistribution of land was one of "the props to uphold the monarchies of the Old World."⁸⁰ From the 1830's through the end of the nineteenth century, political dialogue and policy debate over land law were infused with contentions that large aggregates of land-holdings, or "monopoly," as it commonly was termed, could all too easily become an instrument enabling "the few to bind the many in chains of arbitrary and despotic rule," precisely as had happened in Europe.⁸¹

When the largest landowners proved to be aliens, such fears had all the more intensity and plausibility. In the 1840's, and again in the early Civil War years, culminating in enactment of the Homestead Law for "free farms," the land-reform debate produced positive legislation which provided for more liberal land distribution and alienation.⁸² Later in the century, however, antiforeignism

78. How one type of frontier organization, the claims club (typically organized by squatters who moved into a district before land auctions and sales by the government), could use antiforeignism and egalitarian rhetoric to mask the basest kind of pecuniary motives—for they were land speculators rather than farm-makers, in many instances—is the subject of the iconoclastic study in Bogue, *The Iowa Claim Clubs: Symbol and Substance*, 45 *MISS. VALLEY HIST. REV.* 231 (1958). Further exploration of myth and reality in the land-policy story is provided brilliantly in LeDuc, *Public Policy, Private Investment, and Land Use in American Agriculture, 1825-1875*, 37 *AGRICULTURAL HIST.* 3 (1963).

79. Rep. Orlando B. Ficklin of Illinois, in Congress, Dec. 19, 1844, *quoted in* Young, *supra* note 77, at 93.

80. Rep. James Bowlin of Missouri, in Congress, July 6, 1846, *quoted in* Young, *supra* note 77, at 92.

81. Rep. Thomas Metcalfe of Kentucky, in Congress, Feb. 26, 1821, *quoted in* Young, *supra* note 77, at 95-96.

82. 12 Stat. 392 (1862). That the 160-acre grants were not literally "free," though the \$1.25 standard minimum was waived, is sometimes forgotten. See P. GATES, *supra* note 76,

brought forth policy with a more negative content, seeking to limit foreigners' rights.

Absentee land ownership and large-scale speculation, especially by out-of-state or alien owners, had long been a source of outrage and an object of reform sentiment in the West. In some instances, tax policy had been designed to penalize the absentee. Thus from 1804 to 1825, Ohio tax law provided that levies be rated by the quality (fertility) of farmland rather than by market value of land and improvements.⁸³ The impact was exactly as designed: such a tax fell heavily on the absentees. Not until the state legislature decided in 1825 to commit the state to construction of a massive canal system, financing for which manifestly required tax reform, was the system abandoned and an *ad valorem* law adopted.⁸⁴ Some years later in Iowa, a political imbroglio arose involving large-scale landowners and absentees, on one side, and township and county governments, on the other. The speculators responded to heavy assessments on absentee-owned land by litigating extensively, and with considerable success, as local officials commonly committed procedural errors that led courts to suspend tax collections or force reappraisals. Finally, the legislature enacted changes in the tax laws to cope with this situation, with the weight of the new legislation being thrown against the absentees.⁸⁵ In Kansas in 1860, a crusading rural editor demanded reforms to assure that "the land of non-residents who never intend to live here, will be taxed so steeply and the owners harassed so vigorously that they will be glad to dispose of [it]."⁸⁶

at 394. On the reform movement of the 1830's, and particularly the successful drive for the Preemption Act, 5 Stat. 456 (1841), see R. ROBBINS, *OUR LANDED HERITAGE: THE PUBLIC DOMAIN, 1776-1936*, at 72, *passim* (1942).

83. Ohio Laws, Statutes (Chase ed.), I: 414 (1804), 588 (1806). See W. UTTER, *THE FRONTIER STATE, 1803-1825*, at 40-41, 324 (1942).

H. GRAHAM, *EVERYMAN'S CONSTITUTION: HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE "CONSPIRACY THEORY," AND AMERICAN CONSTITUTIONALISM* (1968) ch. 11 ("'Acres for Cents': The Economic and Constitutional Significance of Frontier Tax Titles, 1800-1890"), discusses discrimination in Illinois against nonresident landowners. Graham contends that, at times, up to 90% of state governmental costs in the Old Northwest states were being met by taxation of absentees. *Id.* at 500.

84. H. SCHEIBER, *supra* note 37, at 28-30; W. UTTER, *supra* note 83, at 324-26.

85. Iowa Laws: Fifth General Assembly 246 (1855); Seventh General Assembly 320 (1858), cited in P. GATES, *THE FARMER'S AGE: AGRICULTURE, 1815-1860*, at 88 (1960).

86. Neosho Valley Register (Kansas), Feb. 21, 1860, quoted in P. GATES, *supra* note 85, at

Antiforeignism was kept alive in the West throughout the Civil War by the continuing agitation of other issues, even when alien or absentee land ownership receded as a public issue. There were frequent complaints, for example, that the Eastern states were discriminating against Western commercial interests by using public canal tolls and corporate control of railroad rate structures. Charges anticipating later-day Granger and Populist arguments thus were heard even during the war years—as when the Columbus, Ohio *Crisis*, a Copperhead anti-Republican paper, declared that the West was the helpless victim of the “skinning, brutally skinning despotism of Eastern railroads, [which would] make us Western people paupers and slaves forever.”⁸⁷ A major Western railroad corporation’s president vividly expressed similar sentiments in his private correspondence: W. H. Osborn of the Illinois Central wrote in 1863 that the West was “held by the throat . . . to enrich Albany and Buffalo.” Eastern mainline railroad rates, he declared, like Erie Canal tolls, reflected the New York concept of a “fair division of the spoils of the products of the prairies— $\frac{7}{8}$ s to the forwarders and $\frac{1}{8}$ to the poor devil who raises the corn.”⁸⁸ The Populist spokeswoman who said farmers should raise less corn and more hell thus had a shadowy and improbable ally in the region’s earlier history!

Conspiracy theories directed against Eastern interests also were heard in banking, especially when the national policy and the structure of power in the private banking sector shifted radically during the war.⁸⁹ Ample continuity existed, then, in suspicion and hostility directed against Eastern capitalist interests in the West from the Jacksonian era to the 1870’s. By the 1870’s, constitutional conventions in the Granger states and legislative halls in the Midwest rang steadily with cries against what was seen as a new economic colonialism.⁹⁰

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87. *Crisis* (Columbus, Ohio), Jan. 28, 1863, quoted in Klement, *Middle Western Copperheadism and the Genesis of the Granger Movement*, 38 MISS. VALLEY HIST. REV. 679, 686 (1952).

88. *Id.* at 688.

89. See Jones, *Agrarian Radicalism in Illinois’ Constitutional Convention of 1862*, 48 J. ILL. ST. HIST. SOC’Y 271-82 (1955).

90. See G. MILLER, *RAILROADS AND THE GRANGER LAWS passim* (1971); Fairman, *The So-*

The notorious record of railroad bond and mortgage aid in the West also lent continuity and intensity to regional sentiment against "foreign capital." From the 1850's to the 1870's, capital-hungry Western communities authorized the issuance of bonds to support and subsidize private railroad construction. Many of these lines failed, or were absorbed into interregional long-line systems controlled by Wall Street or Philadelphia bankers, or were not built and consequently left the local Western communities with enormous debts to pay.⁹¹ In Wisconsin, the situation was especially embittered by the financial expedient used to extend railroad subsidies: farmers exchanged mortgages on their lands for railroad stock and then faced foreclosure by Eastern investors when the railroad companies failed. The Wisconsin legislature therefore enacted stay laws and laws that made corruption of public officials a plea for voiding mortgages; the courts invalidated these laws, however, and the farmers lost their land.⁹²

The railroad bond-aid issue reached its zenith in 1864 when, in *Gelpcke v. Dubuque*,⁹³ the Supreme Court reversed an Iowa decision that held railroad-aid bonds retroactively invalid, thus denying bondholders the right to collect interest or principal. "We shall never immolate truth, justice, and the law," Justice Swayne declared angrily in his opinion, "because a State tribunal has erected the altar and decreed the sacrifice."⁹⁴ Despite the apparently unequivocal language of *Gelpcke*, a remarkably persistent and prolonged effort continued in the West to resist payment of the local-aid bonds. Although anteforeignism characterized much of the rhetoric of debate, the issue finally focused on basic questions of federalism—on what an Iowa editor charged was "the evidence of the growing disposition of the federal government to absorb all the power unto itself," especially insofar as the federal judiciary was

called *Granger Cases*, Lord Hale, and Justice Bradley, 5 STAN. L. REV. 587 (1953).

91. A full legal analysis of the railroad bond-aid controversies stemming from this activity is in C. FAIRMAN, RECONSTRUCTION AND REUNION, 1864-88, PART ONE 918-1116 (1971). For a summary of action in the states, see C. GOODRICH, *supra* note 38.

92. P. GATES, AGRICULTURE AND THE CIVIL WAR 343-44 (1965); F. MERK, ECONOMIC HISTORY OF WISCONSIN DURING THE CIVIL WAR DECADE (1916).

93. 68 U.S. (1 Wall.) 175 (1864).

94. *Id.* at 206-07. On the constitutional and policy context of this episode, see Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, 5 PERSPECTIVES AM. HIST. 329, 393-98 (1971).

trampling state and local prerogatives.⁹⁵ Moreover, intersecting with this controversy was another controversy, in which state rights and anticentralism became an expression of Western parochialism and interregional tensions: the fight over extension of federal jurisdiction, especially in corporation law.⁹⁶

Public debate over all these interrelated law and policy issues intensified the mood of confrontation when alien land ownership re-emerged as a leading issue in the West during the 1880's. Uncertain economic conditions for farmers in many areas of the Midwest, evidence of rising farm tenancy (taken as evidence of the failure of land policy to produce the yeomanry-freeholder republic long championed by land reformers), and especially the new prominence of aliens in the land-investment picture all helped make alien ownership a visible and increasingly troubled issue.⁹⁷ On the one hand, virulent antforeignism marked the attacks on owners of large holdings—men such as "Landlord William Scully" of Ireland, who held nearly 200,000 acres of land, putting tenants on most of it, in 1888; or corporations like the Matador and Prairie companies in the ranching country, with Prairie alone, owned by British capitalists, controlling an estimated one million acres of land in 1884.⁹⁸ On the other hand, even the poor tenants of operators such as Scully became the object of antforeign sentiment. Midwestern newspapers denounced Scandinavians, Poles, Bohemians, and other immigrants as "in a state of serfdom under [Scully's] heartless alien rule, mostly 'transients' raising nothing but corn, year after year, from the same ground."⁹⁹ From the early 1880's until the mid-1890's, all agrarian political organizations pressed for antialien landholding legislation. The drumfire against "land monop-

95. Keokuk Constitution (Iowa), May 22, 1869, *quoted in* C. FAIRMAN, *supra* note 91, at 972-73.

96. This fascinating subject is dealt with authoritatively in Freyer, *The Federal Courts, Localism, and the National Economy, 1865-1900*, 53 BUS. HIST. REV. 343 (1979).

97. Clements, *British-Controlled Enterprise in the West between 1870 and 1900, and Some Agrarian Reactions*, 27 AGRICULTURAL HIST. 132 (1953).

98. H. SOCOLOFSKY, LANDLORD WILLIAM SCULLY 77, *passim* (1979); Clements, *British Investment and American Legislative Restrictions in the Trans-Mississippi West, 1880-1900*, 42 MISS. VALLEY HIST. REV. 207, 208-09 (1955). See also P. GATES, FRONTIER LANDLORDS AND PIONEER TENANTS (1945) (the earliest scholarly effort to analyze the antialien landholding movement in the context of tenancy and "land monopoly").

99. Contemporary commentary is quoted in P. GATES, *supra* note 98, at 193-94.

oly," and especially against the foreigner, was unremitting. The apprehensions of Western farmers "were heightened by the special terrors which the British name conjured up," writes the chief historian of the antialien movement in this period:¹⁰⁰

"British" stood for the subjection of other peoples, for financial power, and for aristocratic institutions. It was believed dangerous for American soil to pass into the hands of foreigners "whose birth and education create and foster sentiments inimical to the country from which they are attempting to drive wealth" [as a Colorado editor wrote in 1892] A reported transfer of ownership of a large tract of land, including irrigation canals, to an English syndicate in 1892 was regarded in Kansas as an exemplification of the oft-repeated comment that "England by strategem and purchase [is] getting back what she lost in war."¹⁰¹

Just as the railroad bond-aid repudiation movement produced both legislation and litigation against "foreign capital," so now did the antialien movement produce a burst of legislation and court action. National debate on the issue reached a climax in 1884 with the inclusion of antialien planks in both major party platforms. Following extensive debate, Congress enacted a bill forbidding any absentee alien or resident alien who had not recorded a declaration of intent to become a citizen from acquiring any real property in the federal territories. The statute also imposed limitations on alien stock ownership in corporations acquiring land in the territories and placed a five thousand acre limit on corporate ownership except for communications companies.¹⁰² Congress resisted, however, pressures to extend the prohibitions to include land within existing states—which would have been an astonishing enlargement of federal authority—and in 1897 amended the law to permit alien mortgagees to possess real property for up to ten years in order to enforce contracts.¹⁰³

The movement against alien ownership extended to the states,

100. Clements, *supra* note 98, at 213.

101. *Id.*

102. 24 Stat. 476 (1887). See also Clements, *supra* note 98, *passim*; Nelson, *The Alien Land Law Movement of the Late Nineteenth Century*, 10 J. WEST 46-59 (1971).

103. 29 Stat. 618 (1897); see text accompanying note 107 *infra*.

and in 1877 Colorado, Illinois, Wisconsin, Nebraska, and Minnesota enacted bills placing limits on foreign ownership rights.¹⁰⁴ By 1891, Kansas (where a referendum produced a fourteen to one vote favoring restrictions on alien land ownership) and Washington had joined the ranks of states imposing limitations. By 1895, Texas, Idaho, and Missouri also had enacted such legislation. Ironically, in many of these states the reform required repeal of laws which earlier had guaranteed land ownership rights to aliens as a means of ensuring that foreign capital would be attracted to these states.¹⁰⁵ In two instances, a constitutional guarantee of alien property rights had to be repealed.¹⁰⁶

Finally, concern that capital investment was being choked off by these measures, together with the changes in economic conditions and highly specific pressures from the mining states and urban-based pressure groups, converged to set a repeal movement in motion. The 1897 federal statute affecting the territories served as a practical reversal of policy insofar as aliens no longer were required to show intent to become a citizen in order to obtain property. Within a few years, most of the alien land measures had been significantly amended or repealed.¹⁰⁷

The reversal of the trend toward harsh limitation of alien landholding reminds us of the conflict of goals typically generated when antiforeign sentiment gave rise to specific legislative action: stemming the tide of investment to head off a perceived regional or international economic colonialism also reduced the availability of capital to local business and ultimately put a brake on economic expansion. This harsh reality spiked the wheels of several of the antiforeign programs we have reviewed. Thus in the Granger states, the desire for new railroad investment in substate regions not yet served by railroad lines tempered the harshness of regulatory legislation. The quest for new capital subordinated "antiforeign" considerations in lawmaking when banking capital moved westward and when railroad investment followed. It was much the same in other arenas of legal and policy debate touched

104. Statute citations are given in Clements, *supra* note 98.

105. See Sullivan, *Alien Land Laws: A Reevaluation*, 36 TEMP. L.Q. 29 (1962).

106. This was the case in California and Kansas.

107. 29 Stat. 618 (1897); see text accompanying note 103 *supra*. For discussion of repeal, see Clements, *supra* note 98, *passim*.

only in passing here, such as with extending federal courts' jurisdiction in business law—the desire for uniformity of law and the necessity of moving capital across regional lines to achieve development ultimately undermining parochialism in many areas of the country.¹⁰⁸

In other words, anteforeignism was a reality in politics, not just a rhetorical screen; it had results. Even in the most extreme cases, however, economic imperatives seemed to work against its effects, as even in the case of the California Chinese, for example, the corporate employers welcomed the actions of federal judges in tempering the effects of harsh state legislation. It is not resorting too much to metaphor, I think, to conclude that anteforeignism was an instrument at hand—something politicians, reformers, and interest groups could reach for—which appeared, receded from sight, and reappeared periodically in the West, and more generally in the United States, to influence policy debate and lawmaking. In the range of “inputs” in the state legal process, this parochial element in our nineteenth-century history ought not be underestimated. At the very least, well-known Supreme Court action against blatant legislative examples of state parochialism—such as the Court's decisions in the anti-drummer cases,¹⁰⁹ in insurance regulation,¹¹⁰ or

108. B. HAMMOND, SOVEREIGNTY AND AN EMPTY PURSE: BANKS AND POLITICS IN THE CIVIL WAR *passim* (1970); G. MILLER, RAILROADS AND THE GRANGER LAWS, *supra* note 90, *passim*; Freyer, *supra* note 96.

109. *Robbins v. Shelby County Taxing Dist.*, 120 U.S. 489 (1887); *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1871).

By 1890, as Charles McCurdy has established, the Supreme Court had “adopted and explained a fully developed doctrinal position vis-à-vis state and local taxation of commercial traffic,” with the anti-drummer-law decisions only a part of a much larger Court effort to mark distinctions that delineated commerce clause protection of licenses and other taxes. McCurdy, *The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869-1903*, 53 BUS. HIST. REV. 304, 312-13 (1979). An excellent analysis of the antidrummer legislation and pressure group activity for litigation and repeal is contained in Hollander, *Nineteenth Century Anti-Drummer Legislation in the United States*, 38 BUS. HIST. REV. 479 (1964).

110. *New York Life Ins. Co. v. Deer Lodge County*, 231 U.S. 495 (1913); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869). Insurance-regulation laws debates in the states evoked strong anteforeignism, reminiscent of the Jacksonian and agrarian-reform rhetoric, and rhetoric of law and policy debates in corporate chartering and alien landholding.

M. KELLER, *THE LIFE INSURANCE ENTERPRISE, 1885-1910* (1963), offers an insightful analysis of insurance and the regulatory problem. “Reciprocity” and “retaliation” in state insurance-regulation law became endemic in the late nineteenth century. Over Justice Harlan's

in cases involving discrimination against foreign corporations¹¹¹—should be understood in the context of the much larger, somewhat protean, and enormously diversified record of antiforeignism in American legal process.

III. MODERN PERMUTATIONS: SUNBELT VS. SNOWBELT AND THE SAGEBRUSH REBELLION

The last decade has witnessed the emergence of a new regionalism in American politics, a regionalism that inherits and invokes the historic, traditional rhetoric of sectionalism but also expresses anew the sort of antiforeignism we have considered historically here. As in earlier periods of our national history, regionalism represents the dynamic struggle for economic advantage, a struggle now rendered more intense by the energy crisis, the emergence of the modern system of grants-in-aid, the changing structure of defense spending, and the rising sense (as the economy has slowed) that both the economic pie and the federal cornucopia are finite.

Once again, parochialism has harnessed self-interest to rivalry, a tendency intensified and channelled by the existence of states in a federal system. The new tone is exemplified by statements of the new Western governors elected in the mid-1970's. Montana's chief executive, for example, declared in 1974 that a Mountain States alliance for energy development was necessary, or "the Eastern banks and corporations, helped by the Ford Administration, will pick us off one by one."¹¹² Similarly, Governor Lamm of Colorado,

dissenting objections that "a species of commercial warfare by one state against another" was being legitimated, the Court held to its view that insurance was not commerce, which enabled the states to continually engage in such practices. *Philadelphia Fire Assoc. v. New York*, 119 U.S. 110, 129 (1886). For background, see G. HENDERSON, *THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW* 106-07 (1918).

Recent research by B. Michael Pritchett has illuminated the insurance regulation record of Southern states. Under pressure in the progressive era, the Southern states required companies operating within their borders to invest funds in the state in proportion to premiums collected in-state. Pritchett, *Northern Institutions in Southern Financial History: A Note on Insurance Investments*, 41 J.S. HIST. 391 (1975). One state's colorful insurance regulation (and retaliatory measures) record is contained in S. KIMBALL, *INSURANCE AND PUBLIC POLICY: A STUDY IN THE LEGAL IMPLEMENTATION OF SOCIAL AND ECONOMIC PUBLIC POLICY, BASED ON WISCONSIN RECORDS, 1835-1959* (1960).

111. *E.g.*, *Western Union Tel. Co. v. Kansas*, 216 U.S. 1 (1909). See also G. HENDERSON, *supra* note 10; note 121 *infra*.

112. Tom Judge, *quoted in* L.A. Times, Nov. 27, 1974, § 2, at 5.

who subsequently would emerge as the chief spokesman for a conservation-slanted Rocky Mountain regionalism, endorsed an OPEC-like organization of energy-rich states while denying they should be regarded as outsiders in the United States. Lamm, however, felt constrained to add, "But we're saying that there are certain things that happen to colonies—whether they are Colorado or the Congo—if there is not some assertiveness on the part of their leaders. And we are not going to be colonized."¹¹³ Governor Briscoe of Texas later used similar rhetoric in asserting that Texans "feel often that we have . . . been in some instances the victim of a certain insidious colonialism, that sometimes we are looked upon primarily as a market for industrial goods produced from outside our region and a source for cheap oil, gas and agricultural products."¹¹⁴ In turn, United States Senator Max Baucus of Montana singled out Texas as a greedy "have" state while Montana was a "have-not" trying to redress some of the balance by imposing a severance tax on its coal. "While the coffers of the state of Texas overflow with oil and gas money," Baucus declared, "Montanans are being asked to sacrifice on the altar of an indulgent America."¹¹⁵ To complete the circle, the leading spokesmen for the Eastern and Midwestern states—the Frostbelt, in the emergent confrontation with the Sunbelt, or what the press widely termed the New Civil War¹¹⁶—attacked what they perceived as distortions and inequities in federal spending patterns that favored the rival region.¹¹⁷

Meanwhile, the states were reported as conducting "raiding parties" across their boundary lines in search of runaway industry money, and angry charges were exchanged that piratical behavior

113. *Id.* Lamm wrote later: "In the 'Second War between the States,' the west is very much involved. In fact the west appears to be the chief area under attack. A new Mason-Dixon line is being drawn along the 100th meridian by eastern and midwestern Congressmen, and its implications are severe indeed." Lamm, *Some Reflections on the Balkanization of America* (Aug. 18, 1978) (unpublished address to the 8th Annual Vail Symposium, Vail, Colorado).

114. *Quoted in* *Jeans, North vs. South*, 5 S. EXCHANGE: DIG. NEWS & OPINION 6 (No. 4, 1978).

115. Baucus, *Taxation of Natural Resources*, 46 VITAL SPEECHES DAY 332.33 (1980).

116. Or, more commonly, the Second War Between the States, as on the cover of *BUS. WEEK*, May 17, 1976. In 1977, the *Los Angeles Times* headlined the article *Frostbelt, Sunbelt Arming for an Economic Civil War*. Sept. 27, 1977, at 1.

117. Peirce, *Northeast Governors Map Battle Plan for Fight over Federal Funds Flow*, 8 NAT'L J. 1695 (1976).

by state industrial-development officials, armed with tax exemptions and a host of other inducements, was the hard steel sword that was sheathed in the political rhetoric of parochialism.¹¹⁸ Most strident of all, perhaps, in this cacaphony of modern voices, speaking the many tongues of antiforeignism and pursuing old-style state mercantilism in new modes, were the sounds of the Sagebrush Rebellion.¹¹⁹ Ironically, cutting through all the new coalition-building efforts and kaleidoscope alliance-changing is the enduring force of state jealousy and suspicion. Thus, even while the Northeast and Midwest states seek to work together to change the balance of distribution in federal largess, New Jersey's state development commission mercilessly contributes to New York City's fiscal problems by enticing corporate offices and industry, Massachusetts and New Hampshire conduct a border war on excise-taxed commodities, and the announcement of a shipyard closing by the Navy Department is enough to make short work of any alliance or brotherly concern between, say, Maine and Pennsylvania.¹²⁰ Meanwhile, the continuing efforts of the states to discriminate against nonresidents, either through manipulating the terms of access to markets or through policies affecting the management of public resources, have generated a series of important cases in the modern Supreme Court.¹²¹

Withal, parochialism—with its chief political and legislative product, fragmentation—continues to animate the dynamics of American federalism and gives expression to local consciousness in the United States. Its antecedents are worth pondering.

118. See, e.g., *Dow's Pullout Haunts California*, BUS. WEEK, Feb. 7, 1977, at 38-39 ("raiding parties").

119. *The Angry West vs. The Rest*, NEWSWEEK, Sept. 17, 1979, at 31-40; Scheiber, *Regionalism . . . Will Sway Policy*, San Diego Union, Dec. 14, 1980, § C, at 1. A legal study offering an historical overview is Clayton, *The Sagebrush Rebellion: Who Should Control the Public Lands?*, 1980 UTAH L. REV. 505.

120. See Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 U. Tol. L. Rev. 619, 673-75 (1978); Scheiber, *Federalism and Legal Process*, 14 L. & Soc'y Rev. 663, 687-89 (1980); *Bidding for Business: Corporate Auctions and the Fifty Disunited States* (1979) (mimeo; Public Interest Research Group, Washington, D.C.).

121. E.g., *Hicklin v. Orbeck* 437 U.S. 518 (1978) (requirement that companies extracting or piping state-owned oil and gas give employment preference to state's residents held unconstitutional); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) (creation of preferential trade area for milk held unconstitutional); *Toomer v. Witsell*, 334 U.S. 385 (1948) (discriminatory license charges for taking of shrimp held unconstitutional).