"Constitutional Quibbles"

Natural Law and Constitutional Issues in the Standard Oil Antitrust Case

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HIUS 713

Toward the end of 1905, a little-known businessman by the name of Edward M. Wilhoit was set to testify in Missouri against Rockefeller's Standard Oil Company in what would later evolve into the *Standard Oil of New Jersey v. United States* Supreme Court case. Wilhoit presented his testimony that the Standard Oil Company, as a matter of common practice, was using corrupt dealings and bribes in order to orchestrate a monopoly over the entire crude oil market in America.[1] Wilhoit's narrative was one that was becoming increasingly familiar to the American people in what would later become known as "The Progressive Era." Political cartoons throughout the nation depicted obese and greedy businessmen using their money and power to build ever-increasing corporate empires at the expense of the common good. (See Figure 1) In the 21st century, the power of the United States Federal Government to legislate and regulate private property is a matter of course, but this was not always the case. In fact, property was once so sacred a right that it would have been unthinkable to the Framers that the federal government would one day have jurisdiction over such a precious natural right. So it was that, in 1911, when the government established control over one citizen's private property, that it essentially established the precedent necessary to subsequently extend its control over all.[2]

Within the American legal system, there are two essential structures which theoretically operate largely independent of one another. The first and supposedly highest law in the country is known as Constitutional law, which is founded upon natural law principles and, within

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[1] "SAY OIL COMPANIES FOUGHT INDEPENDENTS: STANDARD EMPLOYES TESTIFY IN MISSOURI INVESTIGATION. COMPETITION WAS STIFLED NO CONFIRMATION OF REPORT THAT OFFICIALS IN THIS CITY ARE EVADING SUBPOENAS -- ROCKEFELLER IN CLEVELAND." *New York Times (1857-1922)*, Nov 25, 1905. 4

[2] Friedersdorf, Conor. "The Injustice of Civil-Asset Forfeiture." *The Atlantic,* May 12, 2015. Friedersdorf's article details a process known as "civil-asset forfeiture" whereby the DEA (Drug Enforcement Agency) is capable of confiscating cash from any citizen without due process and with very little evidence that the individual is even involved in criminal activity. According to one agent, "We don't have to prove that the person is guilty, It's that the money is presumed to be guilty."

American history, is essentially structured in a negative sense; prescribing exactly the extent of the power of the federal government by clearly defining its scope and jurisdiction. The 10th and final Amendment of the Bill of Rights addressed the scope exactly by prescribing that all powers not "delegated to the United States. . .are reserved to the States respectively, or to the people."[3] It was therefore always understood by the Founders that the right to individual property, which is nowhere allowed to be regulated or controlled by the federal government, was essentially reserved to State law. Therefore there is, without some sort of redefinition of the Constitution, no circumstance in which the federal government should be able to legislate or regulate personal property. It was created to be, in that sense, truly *laissez faire* in nature.

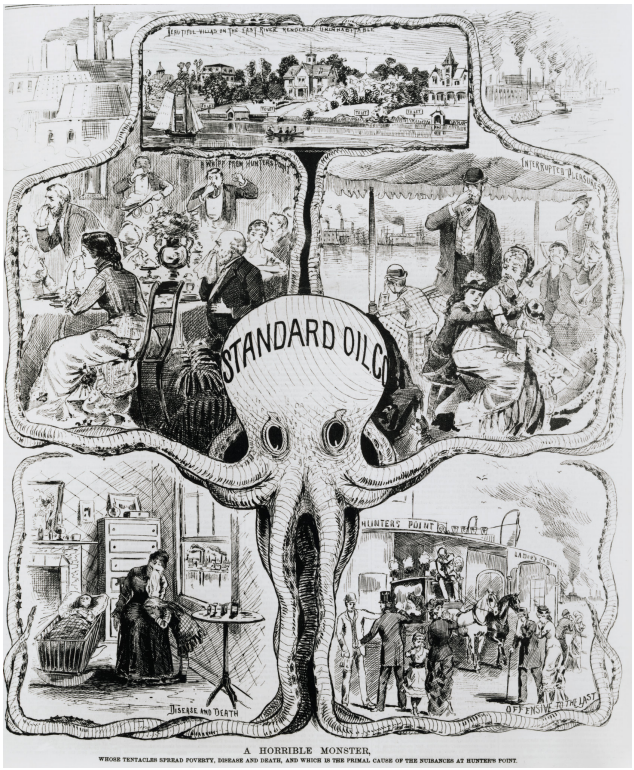

Figure 1[4]

[3] *10th Amendment to the United States Constitution,* 1791.

[4] "A Horrible Monster" *The Daily Graphic,* 1880. The political cartoon caption reads "whose tentacles spread poverty, disease, and death, and which is the primal cause of the nuisances at Hunter's Point." The claim by the artist is clearly cast in populist tones, accusing Standard Oil of spreading disease and death and economic ruin throughout a community. Political cartoons often depicted Standard Oil, in particular, as an octopus.

However, there is a second system of positive law, regarded as "common law" within the American and British legal traditions, which over time has enabled civil law to grow and be redefined. In common law practice, court rulings establish precedents which, over time, come to evolve and update certain legal principles. Common law is intended to grow.[5] However, according to William Letwin, common law can sometimes not only grow in a linear directional sense, but occasionally can be twisted to the point where it comes to mean the opposite of what it used to.[6] Letwin identified specifically that common law treatment of monopolies within the British (and American) common law tradition began upon the assumption that government involvement within business was a given, came to be fundamentally turned beginning in the 17th century with Sir Edmund Coke, and eventually changed again in the mid-19th century.[7] Within the framework of American jurisprudence, the common law is restrained by constitutional law.[8]

What makes this significant is that the constitutional philosophy of the Founders, which rested on a classic liberal tradition of natural law theory, was founded upon the interpretation of natural law begun by Coke. Most modern interpretations of Coke's statements regarding monopoly fall victim to the anachronistic assumption that the contemporary definition of "monopoly" was the same as it was during Coke's time. In his "The Case on Monopolies (1602), Coke stated,

> "And our lord the King that now is in a Book which he in zeal to the Law and Justice commanded to be printed Anno 1610. intituled *A Declaration of his Majesties pleasure, &c.* p. 13. hath published, That Monopolies are things against the Lawes of this Realm, and therefore expressly commands that No Suitor presume to move him to grant any of them."[9]

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[5] Letwin, William L. "The English Common Law Concerning Monopolies." *The University of Chicago Law Review, Vol. 21.* 1953. 335.

[6] Letwin, "The English Common Law Concerning Monopolies," 335.

[7] Friedersdorf, Conor. "The Injustice of Civil-Asset Forfeiture." 2015.

[8] See *Marbury vs. Madison (1803).*

[9] Coke, Edmund. "The Case of Monopolies, 1602" in *Selected Writings of Sir Edmund Coke, vol. 1 (1600)*. Ed. Sheppard, Steve. Liberty Fund: Indianapolis. 2003.

Throughout the entire commentary, Coke used the words "charter" and "grant" in conjunction with monopolies, making it clear that within a 17th century context, "monopoly," was something that a government establishes by positive action; not something to be prevented from occurring naturally.[10] In many cases, it was cited that the government doesn't have authority to establish a monopoly because that would infringe on personal property rights of individuals. Therefore, to Coke, government intervention in business was viewed as being at odds with the principle of property as a natural right.[11]

In delivering the majority opinion, in *E.C. Knight vs. The United States,* Justice Fuller quoted Coke's definition of monopoly, that,

> "a monopoly is an institution, or allowance by the king by his grant, commission, or otherwise to any person or persons, bodies politique, or corporate, of or for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politique, or corporate, are sought to be restrained of any freedome or liberty that they had before, or hindred in their lawfull trade. . ." [12]

In his definition of "monopoly," again within Coke's historical context, one can see that it was an allowance by the king's grant or commission. It might be argued that Coke's "otherwise" would be an "allowance" of *laissez faire* economic policy that allowed one company to out-compete all others.[13] This is clearly not what later American jurists had in mind. Rather, there

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[10] Coke, "The Case of Monopolies". Deuteronomy 24:6 (NIV) "Do not take a pair of millstones--not even the upper one--as security for a debt, because that would be taking a person's livelihood as security." Coke cited this verse as the general principle governing his position on monopoly, meaning that the government had an obligation to ensure that by its own actions, people's livelihoods were not stripped from them.

Gordon, Thomas and Trenchard, John. *Cato's Letters Vol. 1 (1720-1721)*. Indianapolis: The Liberty Fund, 1995. Coke's view of monopoly, as being established by government action, is also clearly demonstrated in Gordon and Trenchard's series published against the South Seas Company, which they viewed to be a monopoly which was established by government action. Trenchard and Gordon were not concerned that the monopoly existed, but that the government would bail it out rather than allow it to reap the ruinous consequences of its own business practices. Their fundamental argument was against government intervention in monopoly.

[11] Coke, Edmund. "The Case of Monopolies." Coke even cited *Davenant & Hurdis Trin. 41 Eliz. Rot 92* where he stated that "for every subject by the Law hath freedom and liberty to put his cloaths to be dressed by what Clothworker he pleaseth, and cannot be restrained to certain persons, for that in effect shall be a Monopoly."

[12] Fuller, Melville. *E.C. Knight vs. United States.* US Supreme Court, 1895. Section 19-22.

[13] Lao, Marina. "IDEOLOGY MATTERS IN THE ANTITRUST DEBATE." *Antitrust Law Journal* 79, no. 2 (2014). Lao recognizes a conservative (or non-interventionist) and liberal (interventionist) approach to antitrust

seems to have been a willing adoption and reading into Coke's opposition of monopoly that these were monopolies in the contemporary, rather than historic, sense. In fact, the enduring aspect of Coke's definition of monopoly would be the second half of his definition, that monopolies are wrong because they would restrain some liberty that an individual had previously. Supreme Court citations of moral justification for antitrust action typically included the claim that the monopoly was violating the rights of others, although the specifics of how and whose rights were being violated were often left unspecified.

One can see the consistency in Coke's approach toward natural law theory only when applying his idea of monopoly within its historic context, since there was no way to balance one citizen's right to property against another's. The transfer of market share (i.e. property) is the essence of economic competition. What was a violation of natural law, in Coke's mind, was for the government to intervene through the establishment of preferential economic or legal

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government action. "Combined with a strong faith in the robustness of free markets, antitrust conservatives tend to have serious doubts about the competence of U.S. anti-trust institutions." (Lao, 667) Conversely, "Antitrust liberals also have greater confidence in the government's ability to intervene successfully to improve consumer welfare, and do not believe as a matter of course that government (antitrust) action is usually clumsy, inefficient, and counter- productive." (Lao, 668). Lao's distinction is especially important given the popular usage of the terms "liberal" and "conservative" in conjunction with specific political parties. Within this framework, it is possible to argue that most Republicans and Democrats have been anti-trust liberal in their approach to business. This shift toward the dominance of anti-trust liberals is characteristic of the attitudes of most politicians during and after the Progressive Era, and should not be constrained strictly to anti-trust action, but economic regulation in general.

Theodore Voorhees Jr. concurs with this conclusion, having stated his conclusion that "From my perspective, partisan politics plays little role in the actual enforcement of the antitrust laws." He also claimed that what drove antitrust legislation forward was common law framework, never mentioning any potential constitutional issues. (Voorhees, Theodore. "THE POLITICAL HAND IN AMERICAN ANTITRUSTINVISIBLE, INSPIRATIONAL, OR IMAGINARY?" *Antitrust Law Journal* 79, no. 2 (2014): 557-58.)

Frederick Rowe proposed a middle ground "compromise" between these two viewpoints gave birth to the Sherman anti-trust legislation. He claimed that "From an ideological perspective, the Sherman Act became an historic compromise: it abandoned the orthodoxies of laissez-faire, but it deflected state socialism by enacting flexible legal bans on monopolization, combinations, and restraints of trade." Rowe's view tends to fit the general belief that legislation is not only possible, but necessary for economic expansion. He would then, best be understood as a cautious anti-trust liberal, and his perspective of the "compromise" is really just that the government didn't immediately take over all private property. (Rowe, Frederick M. "COMMENTARY: ANTITRUST AS IDEOLOGY." *Antitrust Law Journal* 50, no. 3 (1981): 726.

conditions in a way that negated competition. Put simply, Coke believed that the government should never take action against competition, but it also should not take action to ensure the outcome of competition.

This libertarian economic tradition was begun within British jurisprudence by Coke, and was adopted as a foundational principle of Locke's *Second Treatise.*[14] According to Marxist historian and political philosopher C. B. Macpherson, Locke used as a foundational principle of natural law that acquisition of personal property was and should be, unlimited.[15] Sir William Blackstone then synthesized the ideas of Coke and the philosophy of Locke in his own work, which was of vital significance to the Founder's understanding of the relationship between property and government regulation.[16] It was Blackstone who enshrined "property" as one of the sacred triumvirate of natural rights[17] that came to be incorporated into American natural law theory. As Raoul Berger noted, "When Samuel Adams claimed 'the primary, absolute, natural rights of Englishmen,' he listed the Blackstonian trio, 'Personal Security, Personal Liberty and Private Property.'"[18] During the first Continental Congress, the Founders proclaimed that they were " entitled to life, liberty, & property, and they have never ceded to any sovereign power whatever, a right to dispose of either without their consent" and that they had been given this

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[14] Since Locke generally, and his *Second Treatise* in particular, is so universally revered within American jurisprudence, and since interventionism is so entrenched within our modern political and economic context, it requires the assessment of a Marxist political historian to accurately assess Locke's attitude toward personal property. Pointing out that antitrust law is at odds with Lockean thought in a basic, philosophical sense, is not a part of modern public policy.

[15] Macpherson, C.B. "Locke, the Political Theory of Appropriation." (194-262) in *The Political Theory of Possessive Individualism: Hobbes to Locke*. Oxford University Press, 1962.

To Macpherson, as a Marxist, this was ultimately meant to be a criticism of the entire philosophy upon which the American political system was built, but his scholarship on the philosophical underpinnings of Locke's *Second Treatise* are impeccable, and one does not need to agree with Macpherson's moral position to appreciate his historical tracing of Locke's ideas and their implications.

[16] Sir William Blackstone. "Of the Absolute Rights of Individuals" (1766). Indianapolis: Liberty Fund, 2013.

[17] Blackstone argued that all natural rights can be essentially reduced to life, liberty, and property.

[18] Berger, Raoul. *Government by Judiciary: The Transformation of the Fourteenth Amendment.* Liberty Fund: Indianapolis. 1977.

power by the "immutable laws of nature."[19] Thomas Jefferson listed "restriction against monopolies" in his proposal for a Bill of Rights in conjunction with habeas corpus, jury trials, and freedom of the press and religion.[20] This sort of statement only makes sense in the context of fearing government intervention in violation of a natural right in the Blackstonian sense. Had Jefferson intended the meaning of "monopoly" to be interpreted in the late 19th century sense, it would be very odd in a list of clear natural right protections against government encroachment. However, divorced from its original historical context and meaning, all of these statements against monopoly became powerful precedent to justify antitrust action by economic interventionists of the Progressive Era.

According to Berger, the 14th Amendment was intended to further protect these liberties by guaranteeing equal access to the protection of these rights within the greater Founder's tradition of protecting individual property from government interference.[21] It was never intended as a mandate for the government to regulate property or rights, simply to ensure due process of all natural property rights, including the right to sue, own, and dispose of property in a manner that one sees fit.[22] If Berger's interpretation is correct, and his extensive review of the debate surrounding the passage of the *Civil Rights Act (1866)* and 14th Amendment certainly suggest a degree of authority to his interpretation, then as late as 1870, federal legislators were very careful to not expand federal regulatory powers in such a manner as was eventually used in the formation of the Sherman Antitrust Act twenty years later.[23]

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[19]First Continental Congress, *Declaration of Rights and Grievances,* October 14, 1774.

[20]Jefferson, Thomas. "Letter to James Madison 20 December, 1787." Letter. December 20, 1787.

[21] Berger, *Government By Judiciary*.

[22] Ibid.

[23]May, James. "THE ROLE OF THE STATES IN THE FIRST CENTURY OF THE SHERMAN ACT AND THE LARGER PICTURE OF ANTITRUST HISTORY." *Antitrust Law Journal* 59, no. 1 (1990): 95.

According to James May's summary of Hans Thorelli's perspective of the *Sherman Act*, which was typical of the interpretation through the 1950's, "Congress sought to promote both economic opportunity and

Therefore, it should come as no surprise that the debates which eventually led to the passage of the *Antitrust Act (1890)* commonly referred to as the *Sherman Antitrust Act*, there was a lack of constitutional argument or justification for the passage of the act. John Sherman, the Senator, for whom the legislation was named, frankly admitted in his speech during the debate of the act that "I for one do not intend to be turned from this course by fine-spun constitutional quibbles."[24] Since Sherman seems to have recognized that constitutional principles would have potentially interfered with the legislation, he found his justification for federal antitrust legislation in common law, rather than constitutional law. Sherman claimed that the legislation, "aims only at unlawful combinations. . .tested by the rules of common law and human experience. . .unlawful by the code of any law of any civilized nation of ancient or modern times."[25]

Sherman made the case that that a monopoly was essentially a king over commerce, and that since the American governmental system was set up to prevent kingly power, that the same principle should be applied to monopolies.[26] He demurred as to having any specific company in mind for the proposed legislation, but the examples given by Sherman made it clear that Standard Oil was a primary target, even in 1890. As an example of this, Sherman cited Judge Baxter in *Handy et. al. Trustees vs. Cleveland and Marietta Railroad Company* where the judge claimed that the Standard Oil Company had used the threat of building a pipeline in order to exact a significant discount from the railroad company as opposed to what a competitor had to

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competition and was concerned not only with efficiency, but also with wealth distribution and political freedom." It is the argument of this paper that this is precisely what Congress and the Supreme Court sought to do, and that they did so with no reference to constitutional issues regarding private property.

[24] Sherman, John. "Trusts." Speech. Senate of the United States. Washington, D.C. March 21, 1890. 6

[25] Ibid. 6-7.

[26] Ibid. 8.

pay.[27] In another example, Sherman also alleged that Standard Oil had received $5,480,000 in rebates from the Pennsylvania Railroad in 1878.[28] Standard Oil represented 80% of the traffic on the railroad, and therefore, according to Sherman, had arbitrary power over the railroad and the rates that it charged.

Sherman went on to cite different cases from several different states that established that many states had anti-trust laws and had taken such action, and therefore he was merely seeking to codify in federal law, cases which had previously been ruled in the state courts.[29] Sherman's basic argument was contrary to the nature of the 10th and 14th Amendments. The *E.C. Knight Case (1895)* and *Pollock vs. Farmers' Loan & Trust (1895)* also made it clear that the right to make laws concerning property (including monopoly and taxes) were specifically reserved to the states, except in a limited number of cases.[30]

There is simply no logic to follow that state common law precedent should influence federal government within a federalist system which was set up specifically to protect state sovereignty from federal encroachment. The basic argument that federal laws should be passed to be concurrent with state laws in the case of unanimous state legal agreement undermined the constitutional premise of natural rights and natural law. The intent of the Framers was to create a governmental system which reserved specific rights, including property, to jurisdictions which were closer to the individual, in this case the state governments. Founders like George Mason were very concerned that the commerce clause would enable the Congress to "grant monopolies

[27] Sherman, "Trusts." 8. The price differential was $0.25 per barrel, which was a significant price reduction.

[28] Ibid.

[29] Ibid. 11. At one point, Sherman actually claimed in direct response by a colleague in debate that all states had antitrust laws.

[30] Fuller, "Majority Opinion," *Pollock vs. Farmers' & Trust Co.* (1895). 157, U.S. 582.

in Trade & Commerce" to northern businesses.[31] Once again, one observes that the Founders' concern was not for a lack of government intervention, but that government intervention would lead to monopolies. In Mason's case, it was believed that the law to regulate commerce and property needed to be carefully restrained so that a Northern Bloc of voting states wouldn't override the interests of the less numerous Southern states.[32] It was precisely this fear that eventually found its expression in the Nullification Crisis in the 19th century over tariffs, which eventually asserted state sovereignty. Therefore, the existence or non-existence of state laws about anything do not constitute authority on the part of the federal government to establish jurisdiction. These were not "fine-spun Constitutional quibbles" as Sherman called them, but issues foundational to the American Framer's understanding of limited governance. Sherman used common law principles extracted from certain state rulings to justify overriding Constitutional law. The narrow margin in the *Pollock* case supporting federal limitation, and the overwhelming margin in the *Sherman Antitrust Act* passage made it clear that the Supreme Court and Congress were both becoming more willing to place more authority in the federal government regarding the legislation of private property.[33]

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[31]Mason, George. "George Mason's Objections, September 1787." Transcription of Speech. Constitutional Congress. 1787.

[32]Mason, "Mason's Objections." 1787.

"By requiring only a Majority to make all commercial & navigation Laws, the five Southern States (whose Produce & Circumstances are totally different from that of the eight Northern & Eastern States) will be ruined: for such rigid & premature Regulations may be made, as will enable the Merchants of the Northern & Eastern States not only to demand an exorbitant Freight, but to monopolize the Purchase of the Commodities at their own Price, for many years: to the great Injury of the landed Interest & Impoverishment of the People: and the Danger is the greater, as the Gain on one Side will be in Proportion to the Loss on the other. Whereas requiring two thirds of the members present in both Houses would have produced mutual moderation, promoted the general Interest, and removed an insuperable Objection to the Adoption of the Government. Under their own Construction of the general Clause at the End of the enumerated Powers, the Congress may grant monopolies in Trade & Commerce, constitute new Crimes, inflict unusual & severe punishments, and extend their Power as far as they shall think proper; so that the State Legislatures have no Security for their Powers now presumed to remain to them; or the People for their Rights."

[33] *The Sherman Act* passed the Senate 50-1, and *Pollock* was a narrow 5-4 ruling.

Berger argued that the original intent of the 14th Amendment was to enshrine equal access to the rights of life, liberty, and property, as they existed within Anglo-American natural law theory, within the American Constitution so as to protect them from future encroachment by future Congresses. They were essentially procedural in nature and codified the Civil Rights Act of 1866 into Constitutional Law. However, according to Berger, "no one in the 39th Congress intimated that the due process clause would incorporate the Bill of Rights."[34] This is a really important revelation about the Constitutional thought process of the country in general just two decades before the passage of the Sherman Anti-Trust Act. As Berger goes on to point out, eventually the 14th Amendment was reinterpreted in order to grant the federal government the authority to regulate and legislate issues which were previously regarded as reserved rights to the states, or to the citizens under the 10th Amendment. That property was one of these natural rights which were reserved to the citizen and the states within the British and American political tradition has already been demonstrated.

It is not a bridge too far to argue, as Berger did, that the redefinition of the 14th Amendment to incorporate political rights as part of the 14th Amendment, essentially circumvented the 10th Amendment and established the current legal precedent for federal legislation of liberty, which was regarded by the Framers as a natural right reserved to the States or to the people. Likewise, it follows that the Sherman Antitrust Act, and its subsequent application within the Supreme Court, established the same legal precedent to circumvent the previously "reserved" status of property. The question which remains to be answered is, "How did this eventually take place if the Supreme Court's primary role is to interpret legislation like the *Sherman Antitrust Act* through a constitutional lens?"

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[34] Berger, *Government by Judiciary*.

Although passed in 1895, the *Sherman Antitrust Act* was initially stripped of much of its power in the 1895 case between a sugar refinery and the United States known as *E.C. Knight vs. The United States*. Chief Justice Fuller and the majority that ruled against the government, would come back to Sherman's "constitutional quibbles" and at least for a time, rob the legislation of much of its power. Fuller summarized the main issue regarding the interpretation of the *Sherman Antitrust Act* as a question of federal jurisdiction. The majority opinion[35] argued that, "the fundamental question is whether, conceding that the existence of a monopoly in manufacture is established by the evidence, that monopoly can be directly suppressed under the act of congress in the mode attempted by this bill."[36] Rather than fully reviewing the constitutionality of the act, Fuller chose instead to reintroduce one of the Constitutional quibble initially circumvented by Sherman; chiefly that manufacture was a process that was intrastate in nature, and therefore although it was unquestionably a monopoly, the government had no standing because the Interstate Commerce clause couldn't apply to an intrastate activity.

Justice Fuller recognized that the essential question related to the issue of monopoly was whether or not it was the role of the federal government, or the state governments to intervene in the regulation of a monopoly. To Fuller, there were a lot of incidentals that were not really consequential to the case, including the relative importance of the item being distributed.[37] The prosecutors had argued that sugar was an essential commodity, and therefore a monopoly would

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[35] 8:1 ruled in favor of the manufacturing monopoly.

[36] Fuller. *E.C. Knight vs. United States.* Section 25

[37] C.J. Sherwood, a judge cited by Sherman in his speech, disagreed with Fuller's conclusion, and it is possible that Fuller was not only aware of this, but wished to set the record straight. Sherwood Claimed that the defendant controlled both the supply and the price of goods, because they manufactured a sufficient quantity to supply the United States and Canada. Ruled that because the item was considered to be a necessity by the "60 millions" of people in the country, it was thus legitimate for the court to intervene. (Sherwood, C.J. *David M. Richardson vs. Russell A. Alger et. al. (1889),* Supreme Court of the State of Michigan in Sherman, John. "Trusts." Speech. 9-10. Senate of the United States. Washington, D.C. 1890.

not be in the interests of the people. To Fuller, the importance of the commodity was not important, it was a Constitutional question of whether the regulation of this particular product is under the purview of the federal government or not. He concluded that:

> Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed, or whenever the transaction is itself a monopoly of commerce."[38]

This section of the ruling essentially meant that the government did not have the authority to regulate monopolies strictly because they are monopolies, but only because they are related to interstate commerce.

Despite citing Coke's definition of monopoly, Fuller and the Court failed to identify the natural law principle which, in theory, should have protected property from a federal economic interventionist strategy. By the ruling in *E.C. Knight,* the *Sherman Antitrust Act* was not constrained by constitutional and natural law principles *per se,* merely by constitutional procedure; namely that monopoly could only be destroyed by the government if its scope was national, because only then could the interstate commerce clause of the Constitution grant jurisdiction to the company. *E.C. Knight* protected the American Sugar Refining Company, but it would not protect Standard Oil, which operated its business across state lines.

At the time of the *Standard Oil* case, the Court acknowledged the limitation set by *E.C. Knight* by stating "The application of the Anti-Trust Act to combinations involving the production of commodities within the States does not so extend the power of Congress to subjects *dehors* its authority as to render the statute unconstitutional."[39] The Supreme Court concluded that it did have the authority to hear the case, based on the fact that the subsequent

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[38] Fuller. *E.C. Knight vs. United States.* Section 27.

[39] *Standard Oil Company of New Jersey vs. United States.* United States Supreme Court. 1911. 221 U.S. 3

distribution of manufactured goods by Standard Oil represented interstate commerce, and therefore the limitation placed on the Sherman Act by *E.C. Knight* did not apply. The court also stated as justification for its jurisdiction that, "The early struggle in England against the power to create monopolies resulted in establishing that those institutions were incompatible with the English Constitution"[40] but this justification has already been shown to be an anachronistic understanding of "monopoly."

The successful prosecution of the Standard Oil Company and its subsequent dismemberment under the auspices of the *Sherman Antitrust Act* not only granted the federal government a legal precedent for future invasions of a natural right, but it failed to even meet its own standards for intervention in several important ways. The opening syllabus in *Standard Oil Company of New Jersey v United States* stated that,

> "the debates in Congress on the Anti-Trust Act of 1890 show that one of the influences leading to the enactment of the statute was doubt as to whether there is a common law of the United States governing the making of contracts in restraint of trade and the creation and maintenance of monopolies in the absence of legislation."[41]

As has already been argued, common law within the separate states does not constitute the same thing common law within the United States, due to the Framer's intention to retain separate spheres of political power in a federalist system.

Not only this, but the Supreme Court clearly adopted a modern definition of "monopoly" and applied it broadly to be established in the common law of both Britain and America. Curiously, although the British common law context prior to the Founding would seem relevant, the court chose to cite a recent case in British court.[42] A late 19th century British antimonopoly

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[40] *Standard Oil Company of New Jersey v United States*. 221 U.S. 2

[41] Ibid. 221, U.S. 2.

[42] Ibid. The case cited was *Mogul Steamship Co. v. McGregor,* 1892, A.C. 25.

case should have had little or no standing in the United States Supreme Court. Such an invocation only makes sense as an attempt to justify the anachronistic application of a modern concept of "monopoly" by establishing that both nations had co-opted Coke's anti-interventionist sentiment to establish the precedent of interventionist action of the late 19th and early 20th centuries.

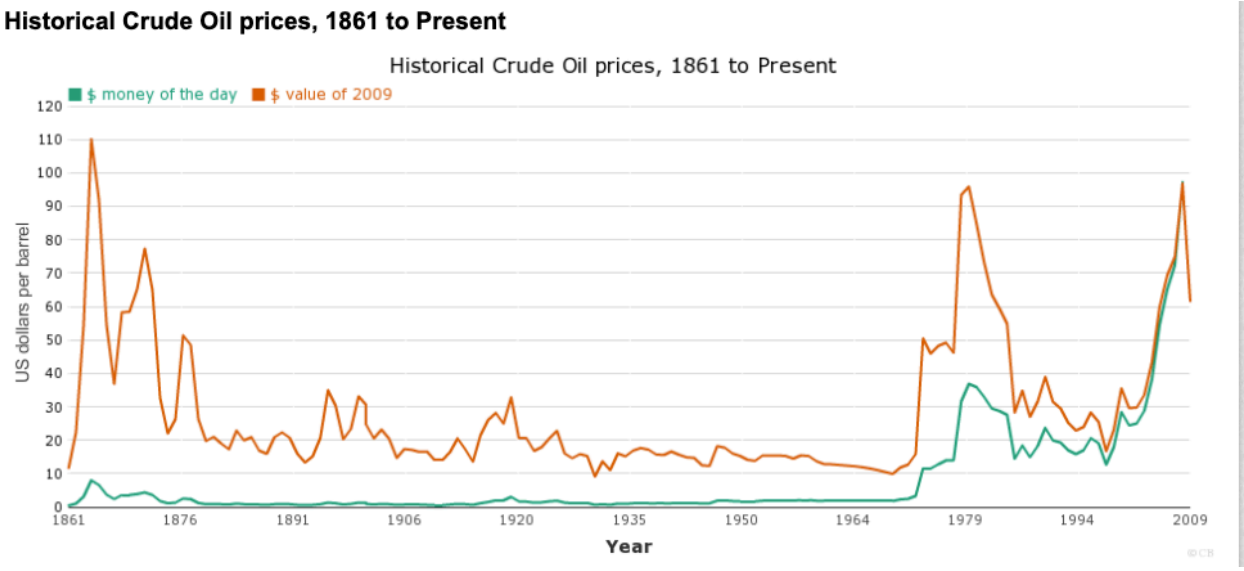

Figure 2[43]

Chief Justice Edward White summarized the facts of the case, claiming that Standard Oil was using its size to obtain beneficial rail rates related to the distribution of its crude oil, in order to limit or end competition.[44] The result of this action was that Standard Oil controlled 90% of the crude oil market share and was hence able, according to White's summary, to set the price of crude oil at whatever price it wanted.[45] In reality, even though this may have been a true statement theoretically speaking, there is little statistical data to support White's claim that price

[43]ChartsBin statistics collector team 2014, *Historical Crude Oil prices, 1861 to Present*, ChartsBin.com.

[44]White, Edward D. "Majority Opinion" in *Standard Oil Co. of New Jersey v. United States, (1911).* 221. U.S. 33

[45] Ibid.

fixing was occurring on the consumer-side. (See Figure 2) In reality, Standard Oil's growth to monopoly seems to have corresponded with a price declination during the 1870's and then a relatively stable period with moderate fluxuations in price that settled around $20 per barrel. Even more interestingly, in the years following the break-up of Standard Oil, there was no corresponding decrease in price or even a shift in price pattern behavior. Simply put, if Standard Oil was guilty of price fixing, as the government argued and the Supreme Court accepted, they did so at a market value that had no impact on the price paid by the American consumers. Therefore, from a commonwealth perspective based on common law principles, the government did not have cause to act against Standard Oil in order to establish fair consumer pricing, but clearly used those justifications anyway. It is possible that the data was misrepresented, but further investigation into the majority opinion makes it clear this was not true.

White claimed that "reference was made to what was alleged to be the 'enormous and unreasonable profits' earned by the Standard Oil Trust and the Standard Oil Company as a result of the alleged monopoly," during the course of the trial.[46] According to White's summary of the defendant's case, Standard Oil presented the view that

> that the origin and development . . . was but the result of lawful competitive methods, guided by economic genius of the highest order, sustained by courage, by a keen insight into commercial situations, resulting in the acquisition of great wealth, but at the same time serving to stimulate and increase production, to widely extend the distribution of the products of petroleum at a cost largely below that which would have otherwise prevailed, thus proving to be, at one and the same time, a benefaction to the general public as well as of enormous advantage to individuals.[47]

In other words, Standard Oil didn't dispute that it was making more money than any other business, or even that it was putting others out of business, it merely claimed that it had developed procedures and processes that were superior to any other business. Rockefeller's

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[46] White, "Majority Opinion" in *Standard Oil vs. United States (1911).* 221, U.S. 43.
[47] Ibid. 221, U.S. 48

empire did not threaten the consumer market, it threatened the businesses that were operating less efficiently and being outcompeted by Standard Oil. The testimony by Standard Oil's competitors were often bolstered by accusations of dishonest business practices[48] although the Court dismissed these claims as being exceptions rather than the rule of business. E.M. Wilhoit had motive to testify against Rockefeller's company, because his entire company operated only two small gas stations at the time of his 1905 testimony.[49] Rockefeller's influx of profits were coming from being able to extract better prices within the supply chain, which gave his company a large competitive advantage over companies like Wilhoit's. Wilhoit's (and businesses like his) only option was to try to use federal legislation to give an unfair competitive advantage to his company, and to frame it in populist, common law terms.

The government chose to focus on commonwealth principles, whereby Standard Oil was violating the interests of the public. The government's argument presented the view that,

> the facts establish that the assailed combination took its birth in a purpose to unlawfully acquire wealth by oppressing the public and destroying the just rights of others, and. . .the public. . .is strewn with the wrecks resulting from crushing out, without regard to law, the individual rights of others[50]. . .the Standard Oil Company of New Jersey . . . is an open and enduring menace to all freedom of trade, and is a byword and reproach to modern economic methods.[51]

As it has already been shown, there was no "oppression" of the public by price-fixing, and it is doubtful that the government case was meant to insinuate a different type of oppression. There

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[48]"ACCUSE OIL TRUST: FORMER EMPLOYES TESTIFY TO BUSINESS METHODS. BRIBERY OF RAILROAD MEN THREE GRADES OF OIL SOLD FROM SAME TANK, ONE AGENT SAYS. SWEARS IN INTERSTATE COMMERCE COMMISSION HEARING AT CHICAGO THAT HE WAS EXPECTED TO SELL 205 TO 208 GALLONS OF OIL FROM A 200-GALLON WAGON -- RESORT TO FRAUD IN SECURING OIL LEASES ALLEGED -- SANTA FE AND THE TRUST." *The Washington Post (1877-1922)*, May 11, 1906. 1

[49]"Wilhoit, Edward M. and Della C. House", National Register of Historic Places, US Department of the Interior, 2004.

[50] White even acknowledged that the cases of corrupt dealings, as alleged by some, seemed to be the "rather the exception than the rule" and the result of individual action rather than a reflection of actual corporate policy. In fact, the corrupt deals and bribery could have been used to argue for less government intervention, since the accusations of Wilhoit and others tended to focus on bribery of government officials. (White, "Majority Opinion" in *Standard Oil vs. United States (1911).* 221, U.S. 48.)

[51]White, "Majority Opinion" in *Standard Oil vs. United States (1911).* 221, U.S. 47-48.

was no restriction of the "freedom of trade," since all had equal access to sell their goods on the open market.[52] From a factual sense, the only truth in the general government narrative was that there were a lot of "wrecks" of other businesses within the oil industry, but those were not caused by a violation of anyone's rights, but rather by Standard Oil doing business better than their competitors. When set against constitutional issues, the particular case against Standard Oil should have been easy to find in the company's favor. The only way the government could move forward was by refusing to consider constitutional implications.

The Court decided to accept as a matter of fact that the Sherman Anti-Trust Act was constitutional, without examining any of the particular constitutional issues that may have been addressed in the case. Justice White stated that

> Duly appreciating the situation just stated, it is certain that only one point of concord between the parties is discernable, which is that the controversy in every aspect is controlled by a correct conception of the meaning of the first and second sections of the Anti-Trust Act.[53] We shall therefore -- departing from what otherwise would be the natural order of analysis -- make this one point of harmony the initial basis of our examination of the contentions. . .[54]

The Court, therefore, made the *Standard Oil* case into an arbitration hearing rather than a matter of Constitutional law, despite the fact that it had vast implications for the power of the federal government . That he chose to do so made the Court guilty of the very thing against which Chief

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[52]Lao, Marina. "IDEOLOGY MATTERS IN THE ANTITRUST DEBATE." 650. According to Lao, this concept is contrary to current economic policy within American jurisprudence. "There is also a general consensus that, as the Supreme Court declared *in Brunswick Corp. v. Pueblo Bowl-O- Mat , Inc.*, the purpose of federal antitrust law is to protect competition, and not to protect competitors against the rigors of competition."

[53] *Sherman Antitrust Act (1890).* 51st Congress of the United States. 1890.

As it relates to the Standard Oil case, only the first two clauses of the Sherman Antitrust Act were determined to be relevant in the case, based on the majority opinion. Article 1 of the Antitrust Act states that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."
Article 2 states that "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof; shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

[54] White, "Majority Opinion" in *Standard Oil vs. United States (1911).* 221, U.S. 49.

Justice Marshall had warned in *Marbury vs. Madison (1803)* when he stated that considering laws without examining their constitutional implications "subvert[ed] the very foundation of all written Constitutions."[55]

The 14th Amendment stated that "nor shall any State deprive any person of life, liberty, or property, without due process of law" and therefore also would have been a valid constitutional concern.[56] It is significant to note that prior to this excerpt of section 1, the amendment was directed toward "citizens" as opposed to "persons." This is not merely an attempt to use synonyms in order to avoid repetition but is meant to express the natural law principle that these rights, which were essentially Blackstonian in nature, were reserved to the people themselves, and therefore exist even outside of citizenship requirements. The Supreme Court was depriving John Rockefeller of his property, despite the fact that property was clearly seen as a natural right over which the federal government had limited jurisdiction within very carefully defined parameters. It is also important to note that there was a provision for the deprivation of property by the "due process of law." This means that, from both a constitutional and natural law perspective, there was already a vehicle whereby a State might deprive a person of their property. Antitrust action by a State was not prohibited by the 14th Amendment, provided that it was applied equally and consistently to all people. This meant that the application of state common law decisions, as Sherman had done to justify the *Antitrust Act* was beyond a

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[55]Marshall, John. "Majority Opinion" in *Marbury vs. Madison (1803).* 5, U.S. 178.

"If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.

This doctrine would subvert the very foundation of all written Constitutions."

[56] *Fourteenth Amendment to the Constitution of the United States.* 1868.

"constitutional quibble" and should have been unconstitutional. Action could be taken against Standard Oil, but constitutionally, it needed to be done by the States, and only through the application of due process. Given Berger's commentary on the ratification debate surrounding the 14th Amendment, it is equally clear that the federal government can only intervene in cases of unequal access to due process, and there was no evidence that due process was being interfered with by Standard Oil.

Even as common law, the facts of the case only bore the interpretation that a relatively small number of wealthy businessmen were being put out of business by Standard Oil. That they individually stood to lose a lot from Standard Oil's ascendance is unquestioned, but whether it constituted a violation of their individual property rights is doubtful. That the cost of oil to the general public and therefore that it was an issue of public interest was even more dubious.

Whether or not they were aware of it, the rhetoric employed by the government attorneys and adopted by Justice White make it easy to see the constitutional implications.[57] Simply by asserting the rights of the individuals who were being put out of business by Standard Oil, it became enshrined into subsequent case law that business owners had some basic right to continue to operate their businesses despite competition. Competition could infringe on the rights of others, if the competitive advantage was gained by monopolizing the market. And the government could be mobilized by a special interest lobby of businessmen in order to protect themselves from the competitive advantage gained by a monopolistic business which had options

[57]Orbach, Barak. "WAS THE CRISIS IN ANTITRUST A TROJAN HORSE?" *Antitrust Law Journal* 79, no. 3 (2014): 882.

Robert Bork claimed that they were aware of it, and that the government used the *Sherman Antitrust Act* and its subsequent applications in the Supreme Court as a "consumer welfare prescription" and that the Supreme Court did so without evaluating its implications. Although his interpretation has been provocative and largely disputed, given the facts presented about the Court proceedings and the total lack of apparent consideration as to the constitutional consequences, it is difficult to dismiss his interpretation.

that were not available to them. In Wilhoit's case, the dissolution of Standard Oil led to a massive expansion of his own personal business.[58] However, there was an even larger benefactor of the expansion of governmental regulatory power.

Bertrand de Jouvenel[59] argued that governmental entities tend to seek the expansion of their power throughout time. While not exactly linear or exponential in nature, Jouvenel argued that with a long enough view of history, one could see that Power always seeks to expand its influence within society. He also noted that within the British historical narrative, Power had been especially held in check by an aristocratic class which maintained its own privileges and powers (usually through Parliament) as an effective check on the expansion of governmental power. This legacy of limited government transferred to the American political system and functioned in much the same way. However, by the late 1800's, there was no aristocracy to speak of in the sense of nobility within American society, but there was a growing class of powerful industrialist and banking moguls. Carnegie, Vanderbilt, Morgan, and Rockefeller had amassed so much wealth and power that they presented a real threat to Power's hegemony within the sphere of social influence.

According to Jouvenel, Power normally seeks to work with the people in order to justify an expansion of its own influence. It is easy, in the case of antitrust legislation within America, to see that this was exactly the tactic employed against the industrialist aristocracy. The populist appeal of the political cartoons, the allegations of price fixing and sensational accusations of corporate robbery to cheat the people all served to mobilize public opinion against monopolies. Everyone, including the courts, employed rhetoric that individual freedoms were being

[58] "E.M. Wilhoit Building." National Register of Historic Places, US Department of the Interior, 2004.
[59] de Jouvenel, Bertrand D. *On Power: The Natural History of Its Growth*. Liberty Fund, 1993.

threatened by the evil of monopoly. Freedom itself was at stake. That these allegations were overstated or simply without merit scarcely mattered. That the government used legal precedents and definitions anachronistically was scarcely noted by the public. That the government then used common law to change constitutional law was even less noted. These changes foundationally erased private property as a natural right within the American legal system and as the case of civil asset forfeiture illustrate, the Progressive Era interventionist attitude and the *Standard Oil vs. United States* case opened the floodgates wide opened for future invasions of private property by a regulatory state.

Bibliography

Primary Sources

"ACCUSE OIL TRUST: FORMER EMPLOYES TESTIFY TO BUSINESS METHODS. BRIBERY OF RAILROAD MEN THREE GRADES OF OIL SOLD FROM SAME TANK, ONE AGENT SAYS. SWEARS IN INTERSTATE COMMERCE COMMISSION HEARING AT CHICAGO THAT HE WAS EXPECTED TO SELL 205 TO 208 GALLONS OF OIL FROM A 200-GALLON WAGON -- RESORT TO FRAUD IN SECURING OIL LEASES ALLEGED -- SANTA FE AND THE TRUST." *The Washington Post (1877-1922)*, May 11, 1906. 1

A Horrible Monster" *The Daily Graphic,* 1880

Deuteronomy 24:6 (NIV)

Sir William Blackstone. "Of the Absolute Rights of Individuals" (1766). Indianapolis: Liberty Fund, 2013.

Sir Edward Coke. "The Case of Monopolies, 1602" in *Selected Writings of Sir Edmund Coke, vol. 1 (1600)*. Ed. Sheppard, Steve. Liberty Fund: Indianapolis. 2003.

First Continental Congress, *Declaration of Rights and Grievances,* October 14, 1774.

Fourteenth Amendment to the Constitution of the United States. 1868.

Fuller, Melville. "Majority Opinion" in *E.C. Knight vs. United States.* US Supreme Court, 1895.

Fuller, Melville. "Majority Opinion" in *Pollock vs. Farmers' & Trust Co.* US Supreme Court, 1895.

Gordon, Thomas and Trenchard, John. *Cato's Letters Vol. 1 (1720-1721)*. Indianapolis: The Liberty Fund, 1995.

Jefferson, Thomas. "Letter to James Madison 20 December, 1787." Letter. December 20, 1787.

Marshall, John. "Majority Opinion" in *Marbury vs. Madison (1803).*

Mason, George. *"George Mason's Objections, September 1787."* Transcription of Speech. Constitutional Congress. 1787.

"SAY OIL COMPANIES FOUGHT INDEPENDENTS: STANDARD EMPLOYES TESTIFY IN MISSOURI INVESTIGATION. COMPETITION WAS STIFLED NO CONFIRMATION OF REPORT THAT OFFICIALS IN THIS CITY ARE EVADING

SUBPOENAS -- ROCKEFELLER IN CLEVELAND." *New York Times (1857-1922)*, Nov 25, 1905. 4

Sherman Antitrust Act (1890). 51st Congress of the United States. 1890.

Sherman, John. "Trusts." Speech. Senate of the United States. Washington, D.C. March 21, 1890.

Sherwood, C.J. *David M. Richardson vs. Russell A. Alger et. al. (1889),* Supreme Court of the State of Michigan in Sherman, John. "Trusts." Speech. 9-10. Senate of the United States. Washington, D.C. 1890.

"Syllabus." *Standard Oil Co. of New Jersey v. United States, (1911).*

10th Amendment to the United States Constitution, 1791.

White, Edward D. "Majority Opinion" in *Standard Oil Co. of New Jersey v. United States, (1911).*

Secondary Sources

Berger, Raoul. *Government by Judiciary: The Transformation of the Fourteenth Amendment.* Liberty Fund: Indianapolis. 1977.

Calabrisi, Steven G. "Monopolies and the Constitution: A History of Crony Capitalism." Northwestern University School of Law Scholarly Commons, 2012.

ChartsBin statistics collector team 2014, *Historical Crude Oil prices, 1861 to Present*, ChartsBin.com.

"E.M. Wilhoit Building." National Register of Historic Places, US Department of the Interior, 2004.

Friedersdorf, Conor. "The Injustice of Civil-Asset Forfeiture." *The Atlantic,* May 12, 2015.

Granitz, Elizabeth and Benjamin Klein. "Monopolization by 'Raising Rivals' Costs': The Standard Oil Case." *The Journal of Law and Economics.* Vol 39. (1). 1996. 1-47.

de Jouvenel, Bertrand D. *On Power: The Natural History of Its Growth*. Indianapolis: Liberty Fund, 1993.

Lao, Marina. "IDEOLOGY MATTERS IN THE ANTITRUST DEBATE." *Antitrust Law Journal* 79, no. 2 (2014): 649-85.

Letwin, William L. "The English Common Law Concerning Monopolies." *The University of Chicago Law Review, Vol. 21.* 1953. 335.

Macpherson, C.B. “Locke, the Political Theory of Appropriation.” (194-262) in *The Political Theory of Possessive Individualism: Hobbes to Locke*. Oxford University Press: Oxford. 1962.

May, James. "THE ROLE OF THE STATES IN THE FIRST CENTURY OF THE SHERMAN ACT AND THE LARGER PICTURE OF ANTITRUST HISTORY." *Antitrust Law Journal* 59, no. 1 (1990): 93-107.

Orbach, Barak. "WAS THE CRISIS IN ANTITRUST A TROJAN HORSE?" *Antitrust Law Journal* 79, no. 3 (2014): 881-902.

Rowe, Frederick M. "COMMENTARY: ANTITRUST AS IDEOLOGY." *Antitrust Law Journal* 50, no. 3 (1981): 721-29.

Voorhees, Theodore. "THE POLITICAL HAND IN AMERICAN ANTITRUSTINVISIBLE, INSPIRATIONAL, OR IMAGINARY?" *Antitrust Law Journal* 79, no. 2 (2014): 557-76.

“Wilhoit, Edward M. and Della C. House”, National Register of Historic Places, US Department of the Interior, 2004.