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The Forgotten Strand of the Anti-Monopoly Tradition in Anglo-American Law
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Admirers of the late Supreme Court Justice Louis Brandeis and other antitrust populists often trace the history of American anti-monopoly sentiments from the Founding Era through the Progressive Era's passage of laws to fight the scourge of 19th century monopolists. For example, Matt Stoller of the American Economic Liberties Project, both in his book *Goliath* and in other writings, frames the story of America essentially as a battle between monopolists and anti-monopolists.

According to this reading, it was in the late 20th century that powerful corporations and monied interests ultimately succeeded in winning the battle in favor of monopoly power against antitrust authorities, aided by the scholarship of the "ideological" Chicago school of economics and more moderate law & economics scholars like Herbert Hovenkamp of the University of Pennsylvania Law School.

It is a framing that leaves little room for disagreements about economic theory or evidence. One is either anti-monopoly or pro-monopoly, anti-corporate power or pro-corporate power.

What this story muddles is that the dominant anti-monopoly strain from English common law, which continued well into the late 19th century, was opposed specifically to *government-granted monopoly*. In contrast, today's "anti-monopolists" focus myopically on alleged monopolies that often benefit consumers, while largely ignoring monopoly power granted by government. The real monopoly problem antitrust law fails to solve is its immunization of anticompetitive government policies. Recovering the older anti-monopoly tradition would better focus activists today.

## Common Law Anti-Monopoly Tradition

Scholars like Timothy Sandefur of the Goldwater Institute have written about the right to earn a living that arose out of English common law and was inherited by the United States. This anti-monopoly stance was aimed at government-granted privileges, not at successful business ventures that gained significant size or scale.

For instance, 1602's *Darcy v. Allein*, better known as the "Case of Monopolies," dealt with a "patent" originally granted by Queen Elizabeth I in 1576 to Ralph Bowes, and later bought by Edward Darcy, to make and sell playing cards. Darcy did not innovate playing cards; he merely had permission to be the sole purveyor. Thomas Allein, who attempted to sell playing cards he created, was sued for violating Darcy's exclusive rights. Darcy's monopoly

ultimately was held to be invalid by the court, which refused to convict Allein.

Edward Coke, who actually argued on behalf of the patent in *Darcy v. Allen*, wrote that the case stood for the proposition that:

> All trades, as well mechanical as others, which prevent idleness (the bane of the commonwealth) and exercise men and youth in labour, for the maintenance of themselves and their families, and for the increase of their substance, to serve the Queen when occasion shall require, are profitable for the commonwealth, and therefore ***the grant to the plaintiff to have the sole making of them is against the common law***, and the benefit and liberty of the subject. (emphasis added)

In essence, Coke's argument was more closely linked to a "right to work" than to market structures, business efficiency, or firm conduct.

The courts largely resisted royal monopolies in 17th century England, finding such grants to violate the common law. For instance, in *The Case of the Tailors of Ipswich*, the court cited *Darcy* and found:

> …at the common law, no man could be prohibited from working in any lawful trade, for the law abhors idleness, the mother of all evil… especially in young men, who ought in their youth, (which is their seed time) to learn lawful sciences and trades, which are profitable to the commonwealth, and whereof they might reap the fruit in their old age, for idle in youth, poor in age; and therefore ***the common law abhors all monopolies***, which prohibit any from working in any lawful trade. (emphasis added)

The principles enunciated in these cases were eventually codified in the Statute of Monopolies, which prohibited the crown from granting monopolies in most circumstances. This was especially the case when the monopoly prevented the right to otherwise lawful work.

This common-law tradition also had disdain for private contracts that created monopoly by restraining the right to work. For instance, the famous *Dyer's case* of 1414 held that a contract in which John Dyer promised not to practice his trade in the same town as the plaintiff was void for being an unreasonable restraint on trade.The judge is supposed to have said in response to the plaintiff's complaint that he would have imprisoned anyone who had claimed such a monopoly on his own authority.

Over time, the common law developed analysis that looked at the reasonableness of restraints on trade, such as the extent to which they were limited in geographic reach and

duration, as well as the consideration given in return. This part of the anti-monopoly tradition would later constitute the thread pulled on by the populists and progressives who created the earliest American antitrust laws.

## Early American Anti-Monopoly Tradition

American law largely inherited the English common law system. It also inherited the anti-monopoly tradition the common law embodied. The founding generation of American lawyers were trained on Edward Coke's commentary in "The Institutes of the Laws of England," wherein he strongly opposed government-granted monopolies.

This sentiment can be found in the 1641 Massachusetts Body of Liberties, which stated: "No monopolies shall be granted or allowed amongst us, but of such new Inventions that are profitable to the Countrie, and that for a short time." In fact, the Boston Tea Party itself was in part a protest of the monopoly granted to the East India Company, which included a special refund from duties by Parliament that no other tea importers enjoyed.

This anti-monopoly tradition also can be seen in the debates at the Constitutional Convention. A proposal to give the federal government power to grant "charters of incorporation" was voted down on fears it could lead to monopolies. Thomas Jefferson, George Mason, and several Antifederalists expressed concerns about the new national government's ability to grant monopolies, arguing that an anti-monopoly clause should be added to the Constitution. Six states wanted to include provisions that would ban monopolies and the granting of special privileges in the Constitution.

The American anti-monopoly tradition remained largely an anti-government tradition throughout much of the 19th century, rearing its head in debates about the Bank of the United States, publicly-funded internal improvements, and government-granted monopolies over bridges and seas. Pamphleteer Lysander Spooner even tried to start a rival to the Post Office by appealing to the strong American impulse against monopoly.

Coinciding with the Industrial Revolution, liberalization of corporate law made it easier for private persons to organize firms that were not simply grants of exclusive monopoly. But discontent with industrialization and other social changes contributed to the birth of a populist movement, and later to progressives like Brandeis, who focused on private combinations and corporate power rather than government-granted privileges. This is the strand of anti-monopoly sentiment that continues to dominate the rhetoric today.

## What This Means for Today

Modern anti-monopoly advocates have largely forgotten the lessons of the long Anglo-American tradition that found government is often the source of monopoly power. Indeed, American law privileges government's ability to grant favors to businesses through licensing, the tax code, subsidies, and even regulation. The state action doctrine from *Parker v. Brown* exempts state and municipal authorities from antitrust lawsuits even

where their policies have anticompetitive effects. And the Noerr-Pennington doctrine protects the rights of industry groups to lobby the government to pass anticompetitive laws.

As a result, government is often used to harm competition, with no remedy outside of the political process that created the monopoly. Antitrust law is used instead to target businesses built by serving consumers well in the marketplace.

Recovering this older anti-monopoly tradition would help focus the anti-monopoly movement on a serious problem modern antitrust misses. While the consumer-welfare standard that modern antitrust advocates often decry has helped to focus the law on actual harms to consumers, antitrust more broadly continues to encourage rent-seeking by immunizing state action and lobbying behavior.

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