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## "The Magna Carta of Free Enterprise" Really?"

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# “The Magna Carta of Free Enterprise” Really?

Daniel A. Crane\*

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In *U.S. v. Topco Associates, Inc.*, Justice Thurgood Marshall announced that “[a]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise.”<sup>1</sup> In *The Antitrust Constitution*, Thomas Nachbar takes seriously the idea that federal antitrust laws serve a constitutional function.<sup>2</sup> He argues that, contrary to common assumptions, the antitrust laws cannot be understood merely as a form of economic utilitarianism.<sup>3</sup> Rather, they serve the additional purpose of preventing “regulatory harm,” the assertion of law-like control over the conduct of others outside the sphere of one’s own property interests.<sup>4</sup>

Nachbar’s argument is original and provocative, but dubious. For one, he does not make it clear whether his argument is positive or normative, which makes it hard either to refute or substantiate the claim. Either way, there are serious problems. If the argument is positive, there are much more plausible explanations for the current U.S. antitrust system. If the argument is normative, it is ultimately unappealing and could seriously threaten economic efficiency. Despite the rhetoric of constitutionalism that is sometimes invoked, antitrust is best understood as an instrumental tool of economic regulation whose oddities and quirks are better explained by its peculiar institutional context rather than by a generalized ideological commitment to constitutional values.<sup>5</sup>

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

2. Thomas B. Nachbar, *The Antitrust Constitution*, 99 IOWA L. REV. 57 (2013).

3. *Id.* at 60–61.

4. *Id.* at 69, 77–79.

5. See DANIEL A. CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT xii–xv (2011).

## I. ANTITRUST AS POSITIVE CONSTITUTIONALISM

In order to agree with Nachbar that the Sherman Act has something like constitutional status, one would need a theory of what it means for a body of law to be constitutional. Although constitutional theories are not in short supply, Nachbar does not offer such a theory.<sup>6</sup> Rather, Nachbar seems to assume that antitrust law is constitutional if it behaves in parallel with certain constitutional values. By that logic, the interpretation of wills would become constitutional if it turned out that courts tended to use similar interpretive tools on wills and constitutional texts. Thematic parallelism between two bodies of law is a weak reason to think of them as unified. In any event, I would be reluctant to start thinking about antitrust law in constitutional terms without a broader inquiry into the criteria for constitutional inclusion.

Nachbar puts emphasis on the Supreme Court's repeated assertion that that the Sherman Act is akin to the Magna Carta.<sup>7</sup> Fair enough, but one should take into account not only what the Court says but what it does. The last invocation of the "Magna Carta" language was by Justice Scalia in *Trinko*, who followed the quote immediately with the disjunctive "but."<sup>8</sup> It's hard to think of *Trinko*, which is widely considered one of the most antitrust-skeptical opinions ever written, as furthering a constitutional theory of antitrust. The Court held that a monopolist has no antitrust duty to share its telecommunications infrastructure with rivals.<sup>9</sup> One could try to make this fit Nachbar's property/regulatory distinction by noting that Verizon was allowed to fully exploit its property interest—except that Verizon no longer had a classic property interest. The 1996 Telecommunications Act created

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6. If one wants to think seriously about what it means for a body of law to be constitutional, a large and complex literature awaits. See Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1083 (2013) (arguing that "constitutional rules exhibit a mix-and-match variety of characteristics" instead of a "single attribute [] essential for constitutional status"); see also WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010); SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988) (exploring the problems and issues with defining American identity by accepting the Constitution and constitutional ideals); KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999) (examining the Constitution not as a limiting or enforcing document, but as one that empowers political actors to formulate policy); K. N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1,3 (1934) (arguing that the constitution should be thought of "not [as] a document, but a living institution").

7. It is a little strange to think that the invocation of a constitutional document from Britain stands as the central metaphor for U.S. antitrust constitutionalism. Perhaps the Bill of Rights would have been a better reference point.

8. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415–16 (2004) ("The Sherman Act is indeed the 'Magna Carta of free enterprise,' . . . but it does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition.").

9. *Id.* at 407–11.

an affirmative obligation on the part of local incumbent exchange carriers to share their infrastructure with new entrants. In the language of Calabresi and Melamed,<sup>10</sup> Congress has shifted the governance of telecom infrastructure from property rules to liability rules. By affirming Verizon’s antitrust right to exclude, the Court was effectively reinstating a property right that Congress and the Federal Communications Commission had taken away. One could argue that this itself points to the constitutional value at stake—the Court was protecting against uncompensated takings of property by Congress—but that doesn’t work either, since the Court has otherwise upheld the Telecommunications Act’s infrastructure sharing obligations.<sup>11</sup> *Trinko* is best understood as an opinion that reflects the cobbling together of an uneasy coalition of free-market and technocratic Justices who managed to agree on an outcome given the alignment of institutional and substantive considerations.

*Trinko* is just one example. One can certainly find cases that can be made to do some of the things that Nachbar wants them to. But it is difficult to credit the paper’s theory that the property/regulatory distinction supplies a general, positive theory of U.S. antitrust doctrine. Indeed, it would be quite surprising if one could locate *any* general, positive theory of U.S. antitrust doctrine. Over the 120-some years that we have had a federal antitrust law, there have been a number of radical paradigmatic shifts. For what does Nachbar’s theory account? Late nineteenth century classicism, early twentieth-century Progressivism, the associationalism of the 1920s, the collectivism of the early New Deal, the Brandeisian atomistic competitionism of the mid-New Deal, the business commonwealth ideas that dominated the late New Deal, post-War structuralism, the Chicago School, post-Chicago, etc.<sup>12</sup> At most, Nachbar’s positive account could be made to correlate with some strand of U.S. antitrust law.

But which one? Nachbar acknowledges that his theory of antitrust constitutionalism tracks somewhat with the Brandeisian tradition, which he labels “societal antitrust.”<sup>13</sup> It’s quite difficult to make the Brandeisian tradition do the work of prohibiting private regulation in Nachbar’s sense. As Nachbar acknowledges in a footnote,<sup>14</sup> Brandeis’s landmark definition of the rule of reason in *Chicago Board of Trade* asserts that restraints that “merely

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10. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

11. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999).

12. See generally DANIEL A. CRANE & HERBERT HOVENKAMP, *THE MAKING OF COMPETITION POLICY: LEGAL AND ECONOMIC SOURCES* (2013).

13. Nachbar, *supra* note 2, at 66–67.

14. *Id.* at 78 n.67.

regulate[]” competition are permissible.<sup>15</sup> Nachbar argues that the “regulation” in question was actually the mere control over property rights within the scope of the joint venture and hence not “regulatory” in his sense. But Justice Brandeis justified the rule as having “regulatory” effects on a whole host of activities outside the direct scope of trading on the Board of Trade. Among other things, the call rule supposedly broke up a wholesaler’s monopoly and allowed for better prices for distant country dealers and farmers—people who weren’t directly participating on the Board.<sup>16</sup>

It’s not hard to think of other arrangements that antitrust law tolerates although they’re regulatory in Nachbar’s sense. For example, antitrust law allows significant latitude for self-regulation by professional organizations. In *California Dental*, the dental association was permitted to stop its members from advertising about price or quality on the theory that such advertising tended to be fraudulent.<sup>17</sup> That sounds an awful lot like “a form of control most commonly observed through the operation of law—the means through which governments operate on private interests.”<sup>18</sup>

An even more paradigmatic example is private standard-setting organizations (“SSO”), which antitrust law polices but does not prohibit. The members of an SSO come together to create norms that govern property interests that are not their own—they specify a standard that applies in the market to things built by other people. Indeed, the one time that antitrust law becomes most concerned is when certain members of the SSO try to propertize the standard by drafting it to read on patents that they own.<sup>19</sup> Even though members of SSOs are regulating property other than their own, antitrust law generally tolerates it because industry players often have better technical knowledge than do government regulators.<sup>20</sup> This type of consequentialist reasoning, which is inconsistent with an a priori conception of rights and obligations, explains much of modern antitrust law.

15. *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (“The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”).

16. *Id.* at 240–41.

17. *See, e.g., Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 771–74 (1999).

18. Nachbar, *supra* note 2, at 70.

19. *See, e.g., Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 314 (3d Cir. 2007) (holding that patentee had unlawfully monopolized by reneging on a commitment to a SSO to license its patents on fair, reasonable, and non-discriminatory terms); Guido Dartmann et al., *Research Project: Standard Setting Organizations (SSO) in an Area of Tension Between Antitrust Law, Intellectual Property (IP) Law and Innovation*, HUMTEC RWTH AACHEN U., [http://www.humtec.rwth-aachen.de/index.php?article\\_id=274&clang=1](http://www.humtec.rwth-aachen.de/index.php?article_id=274&clang=1) (last visited Jan. 29, 2014).

20. *Cf. U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION* 53–55 (2007), available at <http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf> (regulatory action from SSOs is also tolerated because it can be precompetitive).

In sum, it is not impossible to find examples that fit Nachbar’s paradigm, there are enough counterexamples that the paradigm is difficult to generalize as a description of positive U.S. law.

## II. ANTITRUST AS NORMATIVE CONSTITUTIONALISM

What about the normative argument? Would it be normatively appealing to frame antitrust law as a system designed to allow the exploitation of property rights but not to regulate the conduct of others? I remain skeptical.

Although Nachbar’s argument is original as to U.S. antitrust law, one could consult other systems that have flirted with constitutionalizing antitrust principles along the line that Nachbar proposes. In particular, post-war European competition law owes a great deal to the Freiburg “ordoliberal” school that explicitly considered competition law as part of the constitutional value structure of a liberal democratic state.<sup>21</sup> For the ordoliberals, competition was a fundamental requirement of social justice and a well-functioning society.<sup>22</sup> Free economic participation by all citizens was the primary channel for achieving liberal and humane values.<sup>23</sup> Market power by individuals or firms stood in the way of this goal. Accordingly, the state had an affirmative obligation to promote market competition in order to secure liberal goals. The ordoliberals understood the promotion of individual economic freedom as a core obligation of the state. Similar to Nachbar’s conception of regulatory control, freedom in this lexicography meant the absence of arbitrary control by private actors. Even if concentrations of market power could advance economic efficiency, the government could not permit such concentrations without compromising the liberal interest in personal freedom.

The central problem with this sort of normative conception of antitrust law—one that ultimately contributed to the erosion of ordoliberal influence in Europe<sup>24</sup>—is that private control over others is ubiquitous and antitrust law is ill-suited to govern it. People and firms control each others’ behavior through contract all of the time. For example, employers control the behavior of employees in regulatory ways, directing activity and specifying workplace rules. Purchasers often control the behavior of their suppliers by specifying not only quality standards for the goods but also production or

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21. Nicola Giocoli, *Competition Versus Property Rights: American Antitrust Law, the Freiburg School and the Early Years of European Competition Policy*, 5 J. COMPETITION L. & ECON. 747, 771, 776–80 (2009).

22. *Id.* at 769–70.

23. *See id.* at 770–71.

24. In the last decade, European competition law has shifted considerably toward effects-based analysis, meaning analysis of whether a challenged activity results in market harms. *See* Daniel Crane, *Ordoliberalism and the Freiburg School*, in *THE MAKING OF COMPETITION POLICY: LEGAL AND ECONOMICS SOURCES* 254 (Daniel A. Crane & Herbert Hovenkamp eds., 2013).

factory conditions. Franchisors also exercise some control over their franchisees—for instance, franchisors regulate a franchisee’s property as well as property that the franchisor never owned—in order to ensure quality and uniformity.

Not all of these circumstances entail the exercise of market power in a conventional sense, although most involve bilateral monopoly. Franchisees who are locked into a long-term franchise relationship may complain that the franchisor is exploiting its monopoly power to control their business freedom, but there are good economic reasons to allow restrictive franchising relationships.<sup>25</sup> Contemporary antitrust law is generally skeptical that labels like “tying” make much sense in this context.<sup>26</sup> Leading antitrust scholars would hold that this sort of post-contract market power shouldn’t even be relevant to antitrust law.<sup>27</sup>

Then there is the problem of prohibiting the exercise of regulatory market power only if it is the kind of control ordinarily exercised by the state through the instrumentality of law. This might have made more sense in a prior time in which the state exercised relatively light control over markets and the lines between sovereign and private functions were more clearly delineated. But how could such an idea be implemented in a time when the state’s regulatory hand touches virtually every sphere of economic activity? Consider, again, the problem of standard setting. The state frequently engages in standardization—for example by enacting mandatory specifications for electrical wiring.<sup>28</sup> But it is often desirable to leave standard-setting to industry participants or other private actors—even though the effects of their decisions will be to regulate the conduct of other producers, retailers, and consumers who have no seat at the standardization bargaining table. There may be good reasons to prohibit certain kinds of activities by SSOs on consequentialist grounds, but the deployment of the “regulatory harm” paradigm seems to add little of value to any such analysis.

The case for a “regulatory harm” theory of antitrust would be more compelling if both market harm and regulatory harm were necessary to

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25. See Antony W. Dnes, *The Economic Analysis of Franchise Contracts*, 152 J. INSTITUTIONAL & THEORETICAL ECON. 297 (1996).

26. See, e.g., *Rick-Mik Enters. Inc. v. Equilon Enters., LLC*, 532 F.3d 963, 971–72 (9th Cir. 2008) (“[T]he justification for the challenge [against ties] rested on either an assumption or a showing that the defendants position of power in the market for the tying product was being used to restrain competition in the market for the tied product.”) (quoting *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 34 (2006)).

27. HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 309–10 (2005).

28. See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 495–96 (1988) (noting that states frequently adopt the code setting standards “for the design and installation of electrical wiring systems”); Karim Jamal & Shyam Sunder, *Monopoly or Competition: Standard Setting in the Private and Public Sector* (Univ. of Alta. Sch. of Bus., Research Paper No. 2013-1005, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1075705](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1075705).

show an antitrust violation. But Nachbar appears to argue that a regulatory harm, standing alone, might suffice. For example, in discussing tying law, he notes that the “one monopoly rent theorem” suggests that monopoly leverage through tying does not result in a market harm in the tied market.<sup>29</sup> However, since tying without loss of market competitiveness still results in regulatory harm, Nachbar would apparently continue to recognize tying as problematic. Taken to its logical conclusion, such an approach would seriously threaten efficiency, since many efficiency-enhancing arrangements require precisely the types of regulatory controls by private actors with which Nachbar is concerned.

To be sure, constitutional rights are often inefficient in an economic sense. A few minority dissenters stubbornly refusing to conform to majoritarian norms may bring a greater loss of utility to the majority than gains to the dissenters, and yet our moral and ethical commitments may require us to accord the dissenters their space. Freedom from private regulatory control, however, does not bear the moral force that motivates most constitutional rights. We live in a world of ubiquitous regulatory control. Outside of scrutinizing its market effects, antitrust has little to contribute on the optimal amount of such control.

#### CONCLUSION

I have written elsewhere that “[a]lthough the U.S. Supreme Court has described the Sherman Act as the ‘magna carta of free enterprise,’ the U.S. antitrust laws are not understood as constitutional in any meaningful sense.”<sup>30</sup> Although Tom Nachbar has made a valiant effort to challenge assumptions of this kind, his theory comes up short on both positive and normative grounds. Antitrust is still best understood as a consequentialist body of law designed to maximize economic efficiency and consumer welfare.

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29. Nachbar, *supra* note 2, at 99.

30. See Crane, *supra* note 24, at 253 (footnote omitted).