

## NOTES

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# ENFORCING A WALL OF SEPARATION BETWEEN BIG BUSINESS AND STATE: PROTECTION FROM MONOPOLIES IN STATE CONSTITUTIONS

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### INTRODUCTION

In 2016, New York Times columnist Farhad Manjoo dubbed Amazon, Apple, Alphabet (the parent company of Google), Facebook, and Microsoft the “Frightful Five.”<sup>1</sup> Since then, Americans’ fear of monopoly has only grown. Headlines ask, “Should you be scared of Amazon?” (the answer, according to the author, is yes).<sup>2</sup> Academics have been celebrated for developing policies to tackle the problem of powerful companies that consumers generally like.<sup>3</sup> The 2020 Democratic presidential candidates tried to ride the antimonopoly wave. Senator Elizabeth Warren released a comprehensive plan to break up big tech.<sup>4</sup> Senator Bernie Sanders went even further—when asked if he would consider jailing CEOs who worked to restrict trade,

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1 Farhad Manjoo, *Tech’s Frightful 5’ Will Dominate Digital Life for the Foreseeable Future*, N.Y. TIMES (Jan. 20, 2016), <https://www.nytimes.com/2016/01/21/technology/techs-frightful-5-will-dominate-digital-life-for-foreseeable-future.html>.

2 Steve Kovach, *Should You Be Scared of Amazon?*, BUS. INSIDER (June 18, 2017), <https://www.businessinsider.com/should-you-be-scared-of-amazon-2017-6>.

3 See, e.g., David Streitfeld, *Amazon’s Antitrust Antagonist Has a Breakthrough Idea*, N.Y. TIMES (Sept. 7, 2018), <https://www.nytimes.com/2018/09/07/technology/monopoly-anti-trust-lina-khan-amazon.html?smtyp=cur&smid=tw-nytimesbits>.

4 Matt Stevens, *Elizabeth Warren on Breaking Up Big Tech*, N.Y. TIMES (June 26, 2019), <https://www.nytimes.com/2019/06/26/us/politics/elizabeth-warren-break-up-amazon-facebook.html>.

Sanders commented, “[d]amn right they should be [in jail].”<sup>5</sup> In the midst of the coronavirus pandemic, the House Subcommittee on Antitrust, Commercial, and Administrative Law virtually grilled tech executives and promised an end to their market power.<sup>6</sup>

Yet despite the monopoly-phobia that has captivated economic debate, few Americans think twice about the monopolies in their own backyards. Across the country, there are thousands of small-scale monopolies with the same attributes that the dreaded Silicon Valley giants supposedly have: the power to keep out competitors, raise prices, and mistreat customers. Take, for example, the story of Rafael Lopez, a restaurant owner in San Antonio, Texas.<sup>7</sup> Lopez wanted to open a second location that included a food truck and outdoor seating, but according to city law he had to get every brick-and-mortar competitor nearby to sign off.<sup>8</sup> Or consider the case of six-year-old Kyler Truesdell, who had to wait two hours for an ambulance in Kentucky.<sup>9</sup> Kyler’s cousin Hannah Howe runs an ambulance service a few minutes away in Ohio, but is unable to operate in Kentucky because she was denied the right to legally operate in the state.<sup>10</sup> Howe’s application was rejected—despite a declared ambulance shortage—when incumbent operators protested.<sup>11</sup>

If Google and the federal government openly teamed up to keep out competitors, it would be a national scandal. Yet when city hall joins forces with established restaurants, barber shops, optometrists, or even florists, the outrage is rather dull. There is reason, however, for those who fear private monopolies to question state-backed barriers to entry with equal force. Both the Obama and Trump administrations have complained that occupational licensing stalls economic growth, raises prices, and increases unemployment.<sup>12</sup> Yet beyond economic woes, allowing the state to pick economic winners is fundamentally contrary to the American scheme of government. Like how progressives have conflated the growth of private monopolies with the

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5 Ryan Grim, *Bernie Sanders Vows to Revive Criminal Prosecutions of CEOs for Unfair Trade Practices*, INTERCEPT (Oct. 23, 2019), <https://theintercept.com/2019/10/23/bernie-sanders-sherman-antitrust-act-monopolies/>.

6 See Bobby Allyn & Shannon Bond, *4 Key Takeaways from Washington’s Big Tech Hearing on ‘Monopoly Power’*, NPR (July 30, 2020), <https://www.npr.org/2020/07/30/896952403/4-key-takeaways-from-washingtons-big-tech-hearing-on-monopoly-power>.

7 *San Antonio Food Trucks*, INST. FOR JUST., <https://ij.org/case/san-antonio-vending/> (last visited Oct. 10, 2020).

8 *Id.* Due to legal pressure from the Institute for Justice, the City has reformed its burdensome food truck ordinance. *Id.*

9 John Stossel, *An Example of How Government Creates Problems*, DAILY SIGNAL (Dec. 2, 2019), <https://www.dailysignal.com/2019/12/02/an-example-of-how-government-creates-problems/>.

10 *Id.*

11 *Id.*

12 See Adam Thierer & Trace Mitchell, Opinion, *Occupational Licensing Reform Is Not a Partisan Issue*, WASH. EXAMINER (Sept. 12, 2019), <https://www.washingtonexaminer.com/opinion/op-eds/occupational-licensing-reform-is-not-a-partisan-issue>.

destruction of the American ideal of equality under the law,<sup>13</sup> so too does a state-granted monopoly fly in the face of this principle.

The goal of this Note is not to convince the reader to care more about regulatory monopolies than private ones. In fact, it is not to talk about private antitrust law at all. Instead, the goal is to put today's concern with monopolies in historical perspective. Part I traces the history of the antimonopoly spirit in the United States starting with the English tradition that was highly influential on the Founders. This Note then demonstrates that today's concern with private monopolies comes from a shift that took place during the progressive era. In Part II, this Note highlights the role state constitutional claims can have in protecting rights, as explained by Justice William Brennan. Finally, in Part III, this Note provides a blueprint for how state antimonopoly provisions may be used to target state-created monopolies in practice and reclaim America's Founding antimonopoly spirit.

## I. MONOPOLIES: A HISTORICAL PERSPECTIVE

This Part briefly outlines the history of American antimonopoly sentiment, which originated in England and was brought to the colonies. This spirit is relevant because it informed many of the state antimonopoly provisions that are the focus of this Note. Furthermore, it is important to recognize that the progressive focus on private antitrust law was an ideological shift. In order to reclaim the Founders' antimonopoly spirit to combat crony capitalism today, it is important to realize the historical trajectory.

### A. *The English Tradition*

The American antimonopoly spirit dates back to seventeenth-century England. According to Professors Calabresi and Leibowitz, two events during this century mark the first displays of public outrage over government-granted monopolies.<sup>14</sup> The first was the English common-law case *Darcy v. Allen*—famously called *The Case of Monopolies*.<sup>15</sup> During the reign of Queen Elizabeth I, the Queen frequently sold royal monopolies as a way to raise revenue.<sup>16</sup> In the case, Edward Darcy brought suit, claiming that haberdasher Thomas Allen infringed on his royal monopoly right to import and sell all trading cards in England.<sup>17</sup> The court invalidated the monopoly, not because monopolies were per se invalid, but because this type of monopoly had never been granted by the Queen before.<sup>18</sup> A monopoly in playing

13 See, e.g., TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* 30 (2018).

14 Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL'Y 983, 989 (2013).

15 *Id.* (citing *The Case of Monopolies* (1602) 77 Eng. Rep. 1260 (Q.B.)).

16 *Id.*

17 *Id.* at 991–92; William L. Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355, 363 (1954).

18 See Letwin, *supra* note 17, at 363.

cards was, according to the court, contrary to the common law as it “violated the right of others to carry on their trade.”<sup>19</sup> Furthermore, in his report on the case, influential seventeenth-century lawyer Edward Coke explained that the problem of the monopoly was that it hurt those who did not obtain an exclusive grant and “now will of necessity be constrained to live in idleness and beggary.”<sup>20</sup> Coke’s critique hinged on the monopoly infringing on a common right possessed by the other card sellers—this understanding was later adopted by many states in interpreting their antimonopoly provisions.<sup>21</sup>

The Queen died the year *Darcy* was decided and her successor, King James I, continued her practice of selling monopolies to pad the royal budget—leading to the second case of outrage over monopoly: a power struggle between the King, Parliament, and the courts.<sup>22</sup> The King fired Coke, then the Lord Chief Justice of England, for ruling against him in monopoly cases<sup>23</sup> and dissolved Parliament in the fight as well.<sup>24</sup> Finally, in 1624 the *Statute of Monopolies* was passed in Parliament, with the help of Lord Coke who joined Parliament after he was booted from the bench.<sup>25</sup> The statute was surprisingly broad in scope with Section One stating: “[A]ll monopolies . . . are altogether contrary to the laws of this realm, and so are and shall be utterly void and of none effect, and in no wise to be put in u[s]e or execution.”<sup>26</sup> While Lord Coke wrote the statute, it was mostly intended as a check on the King—Parliament could still grant monopolies as it saw fit.<sup>27</sup> In fact, Parliament later granted Darcy his exclusive right to playing cards.<sup>28</sup>

### B. *The Rise and Fall of the American Antimonopoly Spirit*

Ironically, the original thirteen colonies inherited the English antimonopoly sentiment despite being an outgrowth of the crown’s ability to grant royal charters in the colonies.<sup>29</sup> Lord Coke’s influence is especially noteworthy with his works being cited to oppose tyrannical actions by the crown.<sup>30</sup> Coke’s writings were “standard” reading in America and studied by “John

19 *Id.*

20 Calabresi & Leibowitz, *supra* note 14, at 993 (quoting *The Case of Monopolies*, 77 Eng. Rep. at 1263).

21 *See* Part III *infra*.

22 Calabresi & Leibowitz, *supra* note 14, at 994–95.

23 For a discussion of Lord Coke’s rulings in influential monopoly cases, see TIMOTHY SANDEFUR, *THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW* 18–23 (2010).

24 Calabresi & Leibowitz, *supra* note 14, at 995, 997.

25 *Id.* at 997–98.

26 *Id.* at 999 (quoting Statute of Monopolies, 1623, 21 Jac. 1, c. 3, § 1 (Eng.) (alterations in original) (emphasis omitted)).

27 Barbara Malament, *The “Economic Liberalism” of Sir Edward Coke*, 76 YALE L.J. 1321, 1351 (1967).

28 *Id.* at 1351 n.169.

29 Calabresi & Leibowitz, *supra* note 14, at 1004–05.

30 *Id.* at 1005–06.

Adams, John Marshall, James Wilson, and Thomas Jefferson.”<sup>31</sup> Additionally, some colonies adopted their own version of the *Statute of Monopolies*<sup>32</sup>—precursors to the antimonopoly provisions discussed in Part III.

The colonial concern with monopolies is evident in the writings of James Madison and Thomas Jefferson. During the debate over ratification, Jefferson wrote to Madison expressing his desire that the Constitution include a Bill of Rights which would include “restriction against monopolies.”<sup>33</sup> Madison responded with a recognition that monopolies were contrary to free government but “[w]here the power, as with us, is in the many not in the few, the danger can not be very great that the few will be thus favored.”<sup>34</sup>

While Jefferson did not get his wish, many scholars point to the Supreme Court’s early Contracts Clause jurisprudence as evidence of an “antimonopoly principle” retained in the Constitution.<sup>35</sup> In *Trustees of Dartmouth College v. Woodward*,<sup>36</sup> for example, the Court held that the College’s corporate charter—granted by King George III—was a contract between the state and the owners so the charter could not be altered without the owner’s consent under the Contracts Clause.<sup>37</sup> Thus, corporations “were no longer mere government privileges; they were private property that the government had to respect.”<sup>38</sup> The holding in *Woodward* empowered the growth of private corporations that “were no longer viewed as the monopoly recipients of special governmental grants of privilege.”<sup>39</sup> Private corporations, unlike royal charters, could not be granted and rescinded at the state’s whim.<sup>40</sup>

In some ways, the legal detachment of corporations from the state can be blamed for the eventual abandonment of the Founders’ antimonopoly sentiment. Scholar Timothy Sandefur explains that with the proliferation of private corporations and rapid industrialization, many Americans abandoned the free-labor ideology of Jacksonian democracy and instead called for a guarantee of economic opportunity from the government.<sup>41</sup> A reaction to the “growing influence and power of Standard Oil and other corporations,” for example, led to the Sherman Antitrust Act in 1890.<sup>42</sup>

Additionally, liberal state incorporation laws led to crony capitalism and abuses. The railroad monopolies of the late-1800s were especially despised

31 SANDEFUR, *supra* note 23, at 21.

32 Calabresi & Leibowitz, *supra* note 14, at 1008.

33 *To James Madison from Thomas Jefferson, 20 December 1787*, NAT’L ARCHIVES: FOUNDERS ONLINE (Thomas Jefferson), <https://founders.archives.gov/documents/Madison/01-10-02-0210> (last visited Nov. 6, 2020).

34 Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 1 THE FOUNDER’S CONSTITUTION 477, 478 (Philip B. Kurland & Ralph Lerner eds., 1986).

35 Calabresi & Leibowitz, *supra* note 14, at 1019.

36 17 U.S. (4 Wheat.) 518 (1819).

37 Calabresi & Leibowitz, *supra* note 14, at 1019.

38 SANDEFUR, *supra* note 23, at 29.

39 Calabresi & Leibowitz, *supra* note 14, at 1020.

40 *Id.*

41 SANDEFUR, *supra* note 23, at 44–45.

42 *Id.* at 45.

for corruption.<sup>43</sup> The Camden and Amboy Railroad of New Jersey, for example, was granted a monopoly on transit through New Jersey in exchange for railroad stock.<sup>44</sup> The intellectual movements that grew out of this period opposed “monopolies in general. . . . These groups feared that these trusts threatened liberty because they would corrupt politicians by seeking special benefits and government monopoly privileges.”<sup>45</sup> Once it was realized that big businesses were more effective at obtaining grants of special privilege, many determined that they should be opposed on principle—even when operating without special privilege. In time, the size of corporations was seen as a harm in and of itself, with Theodore Roosevelt writing in 1913 that “of all forms of tyranny, the least attractive and the most vulgar is the tyranny of mere wealth, the tyranny of a plutocracy.”<sup>46</sup> Corporations themselves, rather than the power of the state which they may try to harness, became the modern progressive’s enemy.

Today, progressive intellectuals claim that their theory is a rebirth of Founding-era concerns for equality. In his book, Columbia Law Professor Tim Wu argues that the “American tradition had . . . been defined by resistance to centralized power and monopoly.”<sup>47</sup> According to these intellectuals, the American entrepreneurial spirit and rebellion against monopoly can be traced from the Boston Tea Party, to Thomas Jefferson, to Teddy Roosevelt.<sup>48</sup> The growth of big business was then a rejection of the fundamental American principle of equality.<sup>49</sup> In a way, Wu and his followers are correct.<sup>50</sup> Yet modern progressives fail to recognize that the true evil the Founders feared was government-granted monopolies, not big private companies.

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43 Calabresi & Leibowitz, *supra* note 14, at 1057.

44 *Id.* at 1058.

45 *Id.* at 1062.

46 THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 464 (1913). In a 2000 speech, Ralph Nader credited Justice Brandeis as writing something similar—“[i]n 1941, Supreme Court Justice Louis Brandeis made a prescient observation when he wrote: ‘We can have a democratic society or we can have the concentration of great wealth in the hands of a few. We cannot have both’”—although it is unclear Justice Brandeis ever said this. Peter Scott Campbell, *Democracy v. Concentrated Wealth: In Search of a Louis D. Brandeis Quote*, 16 GREEN BAG 2D 251, 251 (2013) (quoting Ralph Nader, Acceptance Statement for the Green Parties’ Nomination for President of the United States (June 25, 2000)). Even if a misquote, it has been often repeated, *id.*, potentially demonstrating the intellectual trajectory from the progressive era to today’s distrust of big business.

47 WU, *supra* note 13, at 29.

48 David Leonhardt, Opinion, *The Monopolization of America*, N.Y. TIMES (Nov. 25, 2018), <https://www.nytimes.com/2018/11/25/opinion/monopolies-in-the-us.html>.

49 WU, *supra* note 13, at 30.

50 See also Leonhardt, *supra* note 48 (arguing that “[t]he Monopolization of America” must be fought with “another political movement, one that borrows from the Boston Tea Partiers, Jefferson, T.R. and the other defenders of the economic little guy”).

## II. A POTENTIAL SOLUTION FROM JUSTICE BRENNAN, AN UNLIKELY ADVOCATE FOR ECONOMIC LIBERTY

Despite the traditional fear of monopoly power framed in Part I, almost all federal challenges to state-granted monopolies, under both the Constitution and antitrust law, have been foreclosed by the Supreme Court.<sup>51</sup> This is unlikely to change anytime soon—the lack of protection for economic liberty under the Constitution is one area where both liberals and conservatives agree. In his well-known dissent in *Lochner*, an infamous case where the Supreme Court protected economic liberty under a theory of freedom of contract, progressive Justice Oliver Wendell Holmes argued that the “constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.”<sup>52</sup> Following in the footsteps of Holmes, Justice Scalia went so far as to say that “if the basic law [ ] so permits, the legislature may decide to replace the free market with central planning.”<sup>53</sup>

At the same time as the Supreme Court declared that economic liberty was not a protected interest, the Court expanded individual rights beyond what had typically been offered in state courts.<sup>54</sup> “Even the most progressive state courts” could not keep up with the Warren Court.<sup>55</sup> Yet with the replacement of Justice Warren with Justice Burger, the Supreme Court greatly slowed in its creation of new federal civil rights.<sup>56</sup> Interestingly, while Justice William J. Brennan, Jr. had been an influential member of the Warren Court and pushed for expanded federal civil liberties, he began to push for “relief by another name: a state constitution”—largely in response to the reduction in civil rights victories at the Supreme Court.<sup>57</sup> Justice Brennan called for states to embrace their role as “a font of individual liberties. . . . The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.”<sup>58</sup>

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51 See Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 EMORY L.J. 785, 786–89 (1982).

52 *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). While Holmes dissented in *Lochner*, his theory eventually won out, with the Supreme Court since adopting a deferential, rational basis test for economic regulations. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

53 Josh Blackman, *Scalia on the Judiciary and Economic Liberty*, JOSH BLACKMAN’S BLOG (May 31, 2013), <http://joshblackman.com/blog/2013/05/31/scalia-on-the-judiciary-and-economic-liberty/> (transcribing Antonin Scalia, Justice, U.S. Supreme Court, Address at Istituto Bruno Leoni (May 27, 2013) (recording available via link in blog post)).

54 JEFFERY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 14 (2018)

55 *Id.* at 15.

56 *Id.*

57 *Id.* at 175.

58 William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

Brennan's influential law review article marked the start of what many call the "New Judicial Federalism"—a return to state courts for constitutional issues in response to the Supreme Court's shortcomings.<sup>59</sup> The Justice later claimed that state courts heeded his call, citing 250 unpublished state court opinions which held that the state constitution had a more stringent requirement than federal law.<sup>60</sup> Yet many state courts, perhaps in response to their perception of overreach in the Warren Court, instead adopted the holdings of the Burger and Rehnquist Courts.<sup>61</sup> Further, instead of taking up Brennan's call, state courts oftentimes engage in what has been called "kneejerk lockstepping" and simply apply the federal rule for similar state constitutional provisions.<sup>62</sup> Little attention has been paid, however, to an area of true state independence: state constitutional provisions without a federal counterpart. While Justice Brennan likely would not have approved of state constitutions invalidating economic regulations, his theory cannot be applied only to favored liberties.

### III. STATE ANTIMONOPOLY PROVISIONS

The goal of this Part is to present an avenue for Justice Brennan's judicial federalism: state antimonopoly provisions. Twenty-one states specifically reference monopolies in their state constitutions,<sup>63</sup> a protection that is lacking entirely from the federal Constitution. This Note focuses on nine states—Maryland, North Carolina, Tennessee, Texas, Arkansas, Georgia, Wyoming, Oklahoma, and Ohio—which are written to prohibit state-granted monopolies.<sup>64</sup> Unlike New Deal-era state amendments, which were written to give the states trust-busting power, these amendments are written to prevent crony capitalism.<sup>65</sup> The focus on just these few provisions is not meant to suggest that the remaining states lack a remedy against government-granted monopolies. Rather, there is great overlap between explicit monop-

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59 Barry Latzer, *The Hidden Conservatism of the State Court "Revolution,"* 74 JUDICATURE 190, 190 (1991).

60 William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986).

61 Latzer, *supra* note 59, at 190.

62 Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1505–06 (2005).

63 See Steven Gow Calabresi, James Lindgren, Hannah M. Begley, Kathryn L. Dore & Sarah E. Agudo, *Individual Rights Under State Constitutions in 2018: What Rights Are Deeply Rooted in a Modern-Day Consensus of the States?*, 94 NOTRE DAME L. REV. 49, 106 (2018).

64 These states were pulled from the list of twenty-one states compiled by Calabresi et al. with wording specifically written to target state-granted monopolies rather than private monopolies. See *id.*

65 It is worth noting that two of these New Deal-style amendments have been interpreted by their state courts to protect against government-granted monopolies as well. See Calabresi & Leibowitz, *supra* note 14, at 1084 & n.632 (discussing applications of the South Dakota and New Mexico antimonopoly provisions).



oly provisions and provisions which ban so-called special laws or the granting of privileges that are not available to all citizens equally.<sup>66</sup>

### A. Maryland (1776)

*That monopolies are odious, contrary to the spirit of a free government and the principles of commerce, and ought not to be suffered.*<sup>67</sup>

Maryland was the first state to adopt an antimonopoly amendment as part of its state constitution.<sup>68</sup> Even before the state constitution was written in 1776, “[a]s early as 1648 *The General Lawes and Libertyes* of Massachusetts provided that ‘there shall be no Monopolies granted or allowed amongst us.’”<sup>69</sup> The origin of this provision is unclear. Some scholars argue that the amendment is taken from English common law and Lord Coke’s commentaries.<sup>70</sup> Others, however, argue that the amendment was written to express a general principle for equality or in reaction to the monopolistic British Navigation Acts.<sup>71</sup>

In one of the first cases under the Maryland antimonopoly provision, Section 41, the Maryland Court of Appeals, the state’s highest court, seemed to apply Lord Coke’s traditional definition of monopoly. In *Broadway & L.P. Ferry Co. v. Hankey*, the court upheld an exclusive grant to one person to use the end of the wharf for ferry purposes.<sup>72</sup> While not explicitly invoking Coke, the court made clear that the wharf was under “the dominion of the State over it” because “the wharf in question is a public highway.”<sup>73</sup> Then, the grant to the appellant was not of a common right. The court, however, also couched its reasoning in terms of the public interest, holding that the grant “is not a monopoly in any sense; but a privilege conferred on the company to be exercised for the public benefit; such a grant by this Legislature has never been considered as creating a monopoly, and no authority has been cited which sustains such a proposition.”<sup>74</sup> Thus, from the beginning, the Section 41 prohibition has been limited by the legislature’s determination that it was acting in the public good. From this early case, one can

66 See Calabresi et al., *supra* note 63, at 105–09.

67 MD. CONST. DECLARATION OF RIGHTS art. XLI. This amendment has retained the same language since 1776. Calabresi & Leibowitz, *supra* note 14, at 1073.

68 Compare Calabresi & Leibowitz, *supra* note 14, at 1073 (“The first states to ban monopolies in their state constitutions were Maryland and North Carolina.”), with Joshua C. Tate, *Perpetuities and the Genius of a Free State*, 67 VAND. L. REV. 1823, 1831–32 (2014). The Maryland provision was ratified on November 3, 1776, while the drafting committee of the North Carolina Constitution was not appointed until November 13, 1776. *Id.*

69 JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 22 (3d ed. 2008).

70 DAN FRIEDMAN, *THE MARYLAND STATE CONSTITUTION: A REFERENCE GUIDE* 305 n.257 (G. Alan Tarr ed. 2006).

71 *Id.*

72 31 Md. 346, 349–50 (1869).

73 *Id.* at 349.

74 *Id.*

already summarize the general exceptions to the prohibition on monopolies under Section 41: (1) the monopoly is reasonably required for the public good; (2) the monopoly is in exchange for a public service; and (3) the monopoly grant was not a common right.<sup>75</sup>

In almost every case under Section 41 since *Broadway*, Maryland courts have relied heavily upon Supreme Court precedent and federal antitrust law to guide its reasoning.<sup>76</sup> In *Wright v. State*, for example, the court held that a prohibition on butter substitutes did not create a monopoly because it applied equally to all producers.<sup>77</sup> The Maryland Supreme Court quoted the U.S. Supreme Court for Lord Coke's definition of a monopoly.<sup>78</sup> Then,

[t]o constitute a monopoly within the meaning of this definition, there must be an allowance or grant by the state to one or several of a sole right; that is, a right to the exclusion of all others than the grantee or grantees. Here is a grant to none, but a prohibition to all; and, if this statute is to be struck down, it cannot be done in the name of monopoly.<sup>79</sup>

This showcases a weakness in Lord Coke's definition of monopoly: while his definition protects against the power of the state being used to support a direct competitor *within* an industry, it does not necessarily protect against the power of the state favoring an *entire* industry at the expense of another.<sup>80</sup> Yet the prohibition on butter substitutes surely creates a monopoly in butter—an elimination of competition in substitute products—with all the attendant harms of monopoly, such as an increase in prices and decrease in quality.

The continued reliance on federal antitrust law has resulted in confused Section 41 jurisprudence. Scholars have previously noted that “[u]ncertainty as to the scope of the constitutional prohibition against monopolies has limited its effectiveness.”<sup>81</sup> The Maryland Court of Appeals analyzed a hospital

75 See FRIEDMAN, *supra* note 70, at 46.

76 This is further demonstrated in *Goldsmith*, where the Maryland Court of Appeals upheld a fair trade law—a statute which allows minimum prices on resale of trademarked products—by almost entirely relying on the U.S. Supreme Court's reasoning concerning a fair trade law challenged under Sherman. *Goldsmith v. Mead Johnson & Co.*, 7 A.2d 176 (Md. 1939) (citing *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*, 299 U.S. 183 (1936)). See *infra* notes 116–18 and accompanying text for the North Carolina Supreme Court's treatment of a similar law. While the North Carolina Supreme Court also discussed the Sherman Antitrust Act, the court's holding was entirely dependent on North Carolina law.

77 41 A. 795, 798 (Md. 1898).

78 *Id.* (quoting *United States v. E.C. Knight Co.*, 156 U.S. 1, 9–10 (1895)).

79 *Id.*; see also *Supermarkets Gen. Corp. v. State*, 409 A.2d 250, 251–52, 258 (Md. 1979) (holding that Sunday closing laws did not create a monopoly because the law applied uniformly despite the fact that the law had numerous exceptions for certain businesses like drug stores and bakeries).

80 This is in comparison with a line of North Carolina cases which prevent an industry from being favored but allow state-granted monopolies within the industry. See *infra* note 131 and accompanying text.

81 William L. Reynolds II & James D. Wright, *A Practitioner's Guide to the Maryland Antitrust Act*, 36 MD. L. REV. 323, 324 (1976) (footnote omitted).

medical board employment decision under Section 41 and the Sherman Antitrust Act in 1946.<sup>82</sup> While the decision did not implicate the provision, the court did not indicate that the rules and regulations of the medical board could never violate Section 41.<sup>83</sup> Since then, the court has been uncertain about whether Section 41 applies to conduct that does not fall within Lord Coke's traditional definition of a monopoly as an exclusive grant from the sovereign. In a 1970 case, for example, the court noted that "[t]here seems to be some question as to whether its ban extends to anything other than monopolies in the strict sense, that is, an exclusive right or privilege granted by the sovereign. We do not resolve that question here."<sup>84</sup>

The confusion over Section 41 may also arise from the Court of Appeals' most clear statement of the definition of monopoly, given in *Raney v. Montgomery County Commissioners*, in which the court determined that a broad definition of monopoly was proper because the Maryland constitution provides "no express protection against special and oppressive privilege."<sup>85</sup> Thus, the court determined that monopoly "was more often used to describe a condition which resulted from an exclusive privilege to engage in such commerce, but, it has long had a broader meaning . . . that of the exclusive possession or control of something."<sup>86</sup> Nevertheless, the court gave a typical explanation of when Section 41 prohibits state action—incorporating Lord Coke's definition and the public interest: a monopoly is invalid "unless it clearly appears that it is as to some matter not of common right, or . . . is in furtherance of the public welfare."<sup>87</sup>

In *Raney*, the court invalidated a law which required government notices be published in newspapers regarded as Montgomery County newspapers as long as the typesetting has taken place in the county for the past four years and paid for by the county.<sup>88</sup> The court determined that "it is apparent from an examination of the statute under consideration that its purpose was not in any way to promote the public welfare, or to serve any public purpose, but to grant a monopoly of the public advertising authorized by officials of Montgomery county."<sup>89</sup> Thus, because the regulation was wholly unreasonable, it was invalid.

While *Raney* is technically the only instance where a court has invalidated a statute for creating a monopoly in violation of Section 41, two early cases, like *Raney*, concern geographic restrictions which favor businesses in one area over another. In both cases, the court claimed that the classifica-

82 *Levin v. Sinai Hosp. of Balt. City*, 46 A.2d 298, 300 (Md. 1946).

83 *See id.* at 302–03.

84 *Grempler v. Multiple Listing Bureau of Harford Cnty. Inc.*, 266 A.2d 1, 3–4 (Md. 1970) (footnote omitted); *see also Supermarkets Gen. Corp.*, 409 A.2d at 258 (noting the question over the scope of Section 41, declining to clarify, but determining that the provision certainly did not apply to Sunday closing laws).

85 183 A. 548, 551 (Md. 1936).

86 *Id.* at 551–52.

87 *Id.* at 553.

88 *Id.* at 549–50, 554.

89 *Id.* at 553.

tion was not in the public interest, intended to create a monopoly, and was invalid without citing the antimonopoly provision.<sup>90</sup> In *Mercer*, the court invalidated a law that required auctioneer licenses for out-of-county or out-of-state residents only<sup>91</sup> and in *Johnson*, the court found that a taxi ordinance which limited business area and applied only to out-of-city residents was unreasonable and intended to create a monopoly rather than serve the public interest.<sup>92</sup>

In a 2007 case, however, the Court of Special Appeals found that a licensing regime for hospice caregivers which exempted care services from a certificate-of-need requirement if they had worked in the jurisdiction for a specified twelve-month period was easily distinguishable from *Mercer* and *Johnson*.<sup>93</sup> Those cases, according to the court, “involve discriminatory classifications based entirely on a company’s residency,” yet this law did “not afford hospice providers from one county an advantage over out-of-county hospices; rather, it grant[ed] the hospice providers that were providing services in [the county] the privilege of maintaining their licenses in those counties, regardless of residency.”<sup>94</sup> Because the court distinguished the *Mercer* and *Johnson* cases while analyzing the Section 41 claim, it is plausible that Maryland courts consider these decisions to be relevant in interpreting the provision.<sup>95</sup> Furthermore, the court distinguished this case from *Raney* because the place-of-business classification was reasonable and served the public interest of “ensuring that new health care services and facilities are developed only as needed, as measured by their cost effectiveness, quality, and geographical location.”<sup>96</sup>

Overall, Maryland has relatively limited precedent for applying Section 41 to protect entrepreneurs and consumers from government-created monopolies. The use of Lord Coke’s definition and the *Raney* line of cases dealing with licensing distinctions based on place of business do provide some insight. These cases clearly stand for the proposition that classifications between license applicants or potential businesspeople cannot be unreasonable in order to satisfy a public interest. Furthermore, in dicta, the court noted that in other states, when membership in a trade organization is required to do business (like the state bar association), “denial of membership has generally been held reviewable, and if the refusal is found to be

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90 See *State v. Mercer*, 103 A. 570, 572 (Md. 1918); *Mayor & City of Havre de Grace v. Johnson*, 123 A. 65, 67 (Md. 1923).

91 *Mercer*, 103 A. at 571.

92 *Johnson*, 123 A. at 65, 67.

93 *Dep’t of Health & Mental Hygiene v. VNA Hospice*, 933 A.2d 512, 526 (Md. Ct. Spec. App. 2007), *vacated*, 961 A.2d 557 (Md. 2008). This case was vacated by the Court of Appeals on procedural grounds and the merits of the constitutional claims were not reviewed.

94 *Id.*

95 *But see* FRIEDMAN, *supra* note 70, at 46 (stating that *Raney* is the only case to invalidate a law under Section 41).

96 *VNA Hospice*, 933 A.2d at 526. This reasoning is in contrast to a similar certificate of need case in North Carolina. See *infra* note 131 and accompanying text.

unjustified (e.g., in violation of state law or the association's by-laws), membership will be compelled."<sup>97</sup> This indicates that in future occupational licensing challenges, Maryland courts will be open to hearing claims about the unreasonableness of the licensure requirement or the treatment of a particular applicant. Furthermore, Maryland courts frequently cite rulings from other state courts, indicating that persuasive authority, perhaps discussed in the states that follow, could be useful in making a claim.

### B. North Carolina (1776)

*Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed.*<sup>98</sup>

North Carolina was the second colonial government to include an antimonopoly provision in its state constitution, and the provision has remained almost entirely unchanged in subsequent constitutions since 1776.<sup>99</sup> North Carolina's unique history as a proprietary colony gifted to eight men by King Charles II informed the state's rejection of unequal privileges.<sup>100</sup> Not only was the colony's antimonopoly sentiment inspired by English rule, but one of the state constitution's remedies was inherited from Great Britain as the English Statute of Monopolies was likely a model for Section 34.<sup>101</sup> Like in North Carolina, the problems of perpetuities and monopolies—both perceived to create an unjust accumulation of wealth—were targeted in the Statute of Monopolies.<sup>102</sup> As explained by the North Carolina Supreme Court in an early decision interpreting the provision, “[t]he meaning and purpose was to forbid and abolish all hereditary and perpetual monopolies as ‘contrary to the genius of a free State,’”<sup>103</sup> but the court later clarified that “[a] monopoly need not be a perpetuity, nor is a perpetuity necessarily a monopoly; but both, existing either jointly or severally, are within the constitutional prohibition.”<sup>104</sup>

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97 *Grempler v. Multiple Listing Bureau of Harford Cnty., Inc.* 266 A.2d 1, 6 (Md. 1970).

98 N.C. CONST. art. I, § 34.

99 See Tate, *supra* note 68. The current wording of “shall not be allowed” replaced “ought not to be allowed” in 1971 as an editorial change. John V. Orth, *Allowing Perpetuities in North Carolina*, 31 CAMPBELL L. REV. 399, 401 n.10 (2009).

100 See Tate, *supra* note 68, at 1824.

101 Steven J. Horowitz & Robert H. Sitkoff, *Unconstitutional Perpetual Trusts*, 67 VAND. L. REV. 1769, 1801 n.169 (2014).

102 *Id.*

103 *McRee v. Wilmington & Raleigh R.R.*, 47 N.C. (2 Jones) 186, 190 (1855); see also *Carolina Water Serv., Inc. v. Town of Pine Knoll Shores*, 551 S.E.2d 558, 561 (N.C. Ct. App. 2001) (“The provisions . . . that purport to give Carolina Water exclusive easements and exclusive rights to supply water to Pine Knoll Shores for an unlimited period of time cannot be enforced because they are in violation of our state’s public policy against monopolies and perpetuities.”).

104 *Thrift v. Bd. of Comm’rs*, 30 S.E. 349, 351 (N.C. 1898).

The North Carolina Supreme Court has struggled with applying the English origins of the law. In an 1898 decision, the court lamented that the definition of monopolies intended by the drafters—that a monopoly was “an exclusive right granted to a few of something which was before of common right”—led to “error” in judicial decisions.<sup>105</sup> Lord Coke framed his definition “while the judges were still under the spell of the feudal system.”<sup>106</sup> Yet under representative government, “all rights and privileges are primarily of common right, unless their restraint becomes necessary for the public good.”<sup>107</sup> The *Thrift* court went on to invalidate a thirty-year exclusive grant to a private waterworks provider largely because the municipal monopoly would have been “unjust and harmful in [its] results” as the contract “would place beyond its power for nearly a generation all opportunity of securing for its citizens the benefits and improvements of a progressive age.”<sup>108</sup> Essentially, the contract was contrary to the public good.

Thus, despite the absolutist language of Section 34, the prohibition on monopolies has always been cabined by the state’s valid exercise of the police power in pursuit of the common good. After *Thrift*, the state supreme court oftentimes merged the definition of monopoly with a valid exercise of the state’s police power so that when an anticompetitive law had no reasonable relationship to a necessary public good, it then created a monopoly.<sup>109</sup> The Fourth Circuit summarized that “[t]he Supreme Court of North Carolina has interpreted this clause to allow ‘reasonable regulations’ of commerce with a substantial relationship to public health, safety, or welfare.”<sup>110</sup> This rule has been applied to two types of state-granted monopolies: (1) regulations which act to restrain trade; and (2) occupational licensing. Both are addressed in turn.

## 1. Regulations Which Act to Restrain Trade

North Carolina courts have always accepted that some laws which restrain trade are acceptable as long as the act is in the public interest. In a 1909 case, for example, the North Carolina Supreme Court upheld the grant of a privilege to operate a market house because the facility was regulated and essentially controlled by the city.<sup>111</sup> The city had determined that the market house was necessary and thus the legislation was “entitled to liberal construction, and the scope, if within constitutional limits, is very largely within the discretion of the authorities, and not subject to judicial interference.”<sup>112</sup> Similarly, the court upheld a law which prevented entrepreneurs

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105 *Id.* (quoting *City of Memphis v. Memphis Water Co.*, 52 Tenn. (5 Heisk.) 495, 529 (1871)).

106 *Id.*

107 *Id.*

108 *Id.*

109 *See, e.g.*, *State v. Harris*, 6 S.E.2d 854, 866 (N.C. 1940).

110 *Cap. Associated Indus., Inc. v. Stein*, 922 F.3d 198, 211 (4th Cir. 2019).

111 *State v. Perry*, 65 S.E. 915, 917 (N.C. 1909).

112 *Id.*

from selling food and drinks at a fair unless he or she did regular business within the territory.<sup>113</sup> While the law certainly sounds like a classic case of incumbent industries using the law to keep out competitors, the court upheld the law largely because “large numbers of people congregate at their fairs, and from the very nature of such assemblies, regulations for the preservation of order are necessary.”<sup>114</sup> In addition to the public interest the court found in both cases, the reasoning also depended on the fact that neither law actually created a monopoly.<sup>115</sup> Neither case, however, explicitly defined what would constitute a monopoly.

In 1939, the North Carolina Supreme Court upheld the validity of a fair trade law which restricted the resale price of trademarked products bought in wholesale.<sup>116</sup> Citing past precedent and *Black’s Law Dictionary*, the court provided a definition of monopoly which was based on the company’s ability to fulfill the ill effects of monopoly: restrict competition and control prices.<sup>117</sup> Despite the fact that the court’s definition seemed far removed from Lord Coke’s original term, the holding still depended on the fact that no party was denied a common right by the law. In part of its reasoning, the court insisted that the law “does [not] deny to any member of the public a free and equal opportunity to do anything which he might theretofore have done as a matter of common right. The freedom to do as one may wish with the good will, brand, or trade-mark of another has never been conceded by the law.”<sup>118</sup>

In *American Motors Sales Corp. v. Peters*, the Supreme Court of North Carolina officially broke from Lord Coke’s definition for this line of cases.<sup>119</sup> Instead, the court upheld a provision of the Motor Vehicle Dealers and Manufacturers Licensing Law which regulates the establishment of new franchises

113 *State v. Stovall*, 8 S.E. 900, 900 (N.C. 1889).

114 *Id.* at 901.

115 See also *Tobacco Growers’ Co-op. Ass’n v. Jones*, 117 S.E. 174, 177–78 (N.C. 1923) (“[S]tipulations in partial restraint of trade were held not to be obnoxious to the law, unless they were unreasonable and likely to become monopolies which are obnoxious to our constitutional provisions.”).

116 *Ely Lilly & Co. v. Saunders*, 4 S.E.2d 528 (N.C. 1939), *overruled by Bulova Watch Co. v. Brand Distrib. of N. Wilkesboro, Inc.*, 206 S.E.2d 141 (N.C. 1974). The court in *Bulova Watch* found that the fair trade law was an unconstitutional delegation of legislative authority to a private corporation and a deprivation of “liberty and property otherwise than by the law of the land” in violation of the state constitution. *Bulova Watch*, 206 S.E.2d at 146. The court did not revisit the validity of the law under the Section 34.

117 *Ely Lilly & Co.*, 4 S.E.2d at 534–35.

118 *Id.* at 535. See *supra* note 76, *infra* note 164, and accompanying text for a discussion of how other states have upheld fair trade laws.

119 317 S.E.2d 351 (N.C. 1984). The court also broke from past precedent. In *Town of Clinton v. Standard Oil Co.*, 137 S.E. 183 (N.C. 1927), the court had invalidated a restriction which prevented any new gasoline filling stations in a geographic district. There, the court was persuaded by Standard Oil’s argument that monopoly originated from the Greek term “sole seller” and “that the six present sellers would be the sole sellers for all time in perpetuity, excluding the Standard Oil Company, and this was a monopoly.” *Id.* at 184.

that distribute the same line-make of automobiles in a geographic area.<sup>120</sup> The state Commissioner of Motor Vehicles enjoined the Jeep franchise of Hubert Vickers after James Pennell, who had already had a franchise in the area, requested a hearing.<sup>121</sup> Like in *Ely Lilly*, monopoly required control of such a large portion of the market that “competition is stifled,” “freedom of commerce is restricted,” and “the monopolist controls prices.”<sup>122</sup> For the court, being the only seller of Jeeps in the defined geographic area did not meet this definition. Rather, “[i]n order to monopolize, one must control a consumer’s access to new goods by being the *only* reasonably available source of those goods. . . . Logically, then, the market encompasses geographically at least all areas within reasonable proximity of potential customers.”<sup>123</sup>

According to the court, the harm that Section 34 was meant to prevent was surely not the danger of the state picking economic winners and losers, and the “attendant humiliation and insecurity”<sup>124</sup> inherent in such a system, but the evil of horizontal restraints on trade—restrictions between dealers rather than a vertical restraint on trade, which would run from the manufacturer down to the franchisee.<sup>125</sup> Essentially, in this vertical monopoly, franchises can still compete across geographic lines and are under pressure from automobile manufacturers to keep prices competitive. Restraint of trade was not enough to invalidate the law when residents in the geographic area could always flee the monopoly by crossing the “arbitrary lines”<sup>126</sup> set by the state to seek better business practices from the next vertical monopoly over.

The court’s conclusion that no monopoly was created was heavily influenced by the fact that for many consumers, there were other Jeep dealerships across geographic lines that were actually closer.<sup>127</sup> Thus, in a recent superior court decision, the court denied a defendant’s request for Judgment as a Matter of Law on the plaintiff’s Section 34 claim because the plaintiff sufficiently alleged a lack of reasonable substitutes.<sup>128</sup> Demonstrating that competitive pressure actually is lacking in a market is clearly more work for a plaintiff than simply demonstrating the existence of a restraint on trade, but it still gives plaintiffs a way to win claims against vertical monopolies.

While *American Motors* exempted many regulations that restrain trade from the Section 34 prohibition, there are still some business regulations that cannot withstand scrutiny. Notably, a 1979 case invalidating an equalization payment is still good law. The law at issue in *Arcadia Dairy* required produc-

120 Charles Noel Anderson, Jr., *American Motors Sales Corp. v. Peters: Green Light to Territorial Security for Automobile Dealers*, 63 N.C. L. REV. 1080, 1080 (1985).

121 *Id.* at 1080–81.

122 *Am. Motors Sales Corp.*, 317 S.E.2d at 356.

123 *Id.*

124 *State v. Harris*, 6 S.E.2d 854, 864 (N.C. 1940).

125 *Am. Motors Sales Corp.*, 317 S.E.2d at 357.

126 *Id.* at 356.

127 *Id.*

128 *DiCesare v. Charlotte-Mecklenburg Hosp. Auth.*, No. 16 CVS 16404, 2019 WL 984301, at \*9 (N.C. Sup. Ct. Feb. 27, 2019).



ers of reconstituted milk (milk made from a mixture of lacteal secretion, milk solids, and water) to make an equalization payment to regular milk producers.<sup>129</sup> The payment was meant to combat displacement of whole or low-fat milk producers by the reconstituted milk, which was sold at a lower price. In a short opinion, the North Carolina Supreme Court affirmed the trial court's finding that the law was invalid for, among other things, violating Section 34 because the law was intended to prohibit competition between reconstituted and whole milk producers.<sup>130</sup> Essentially, the law enforced a horizontal monopoly of milk producers by making it harder for a milk substitute to compete in the market.

In *Arcadia Dairy*, the court made clear the power of the state cannot, consistent with Section 34, be used to favor one industry or business over another because the backing of the state creates a monopoly.<sup>131</sup> *American Motors* relaxes this protection while allowing the state to favor one Jeep franchise over another, simply by virtue of being there first.

## 2. Occupational Licensing

Challenges to occupational licensing have been traditionally successful under Section 34.<sup>132</sup> While occupational licensing does not meet the modern conception of a monopoly, it clearly falls within Lord Coke's definition of a monopoly as a denial of a common right. Further, the state supreme court has held that the *American Motors* definition of monopoly does not apply to licensing questions because the cases do not concern regulation of a private market, but a category of licensure created by the state.<sup>133</sup> Moreover, occupational licensing regimes would create a horizontal monopoly, which is another distinguishing factor from *American Motors*.<sup>134</sup>

In an 1897 decision, the state supreme court laid out the general rule for occupational licensing regimes under Section 34: the licensing regime must be

129 *In re Arcadia Dairy Farms, Inc.*, 259 S.E.2d 368, 369 (N.C. 1979).

130 *Id.* at 370–72.

131 *See also In re Certificate of Need for Aston Park Hosp., Inc.*, 193 S.E.2d 729, 736 (N.C. 1973) The court held that a certificate of need requirement to build a new hospital was unconstitutional because “[t]he Constitution of this State does not, however, permit the Legislature to confer upon the Medical Care Commission the power of a guardian to protect Aston Park from possible bad financial judgment. Nor does it permit the Legislature to grant to the Medical Care Commission authority to exclude Aston Park from this field of service in order to protect existing hospitals from competition otherwise legitimate.” *Id.*

132 *See Calabresi & Leibowitz, supra* note 14, at 1087 (“Historically, North Carolina has been the state where challenges to occupational licensing schemes have had the most success. . .”).

133 *See Rockford-Cohen Grp., LLC v. N.C. Dep’t of Ins.*, 749 S.E.2d 469, 473 (N.C. 2013).

134 *American Motors* distinguished itself from licensing because these cases involved horizontal restraints on trade. *Am. Motors Sales Corp. v. Peters*, 317 S.E.2d 351, 358 (N.C. 1984).

an exercise of the police power for the protection of the public against incompetents and impostors, and is in no sense the creation of a monopoly or special privileges. The door [must] stand[ ] open to all who possess the requisite age and good character, and can stand the examination which is exacted of all applicants alike.<sup>135</sup>

Thus, there are two general rules for a licensing system to be constitutional: (1) the application must be open to all; and (2) there must be a reasonable public interest justification in licensing the industry.

In *Rockford v. Cohen Group*, the court relied on Lord Coke's definition of monopoly in 2013 to reaffirm the first rule.<sup>136</sup> The state law in question was a licensing system for bail bondsman training.<sup>137</sup> Previously, anyone could apply to the state commissioner of insurance to provide such training, but the law was changed so that only one agency could provide the licensure training.<sup>138</sup> By amending the law, the court determined that the commission had taken away the common right to apply creditable bail bondsman training.<sup>139</sup>

Similarly, in *State v. Sasseen*, the North Carolina Supreme Court evaluated a change to a law which took away the ability for taxi drivers to self-indemnify through personal surety.<sup>140</sup> Taking away the option would have "a tendency to create a monopoly and turn the business over to a privileged class without allowing personal surety or sureties, which was, until recent years, the kind of bond usually required and given."<sup>141</sup>

Additionally, the court has always required a reasonable justification for occupational licensing. As a result, there are "professions and skilled trades which in the public interest permit of regulation by licensing under the police power, and those ordinary lawful and innocuous occupations and trades which are protected from regulation by constitutional guarantees. The occupations and trades in the latter category constitute off-limits

135 *State v. Call*, 28 S.E. 517, 517 (N.C. 1897).

136 *Rockford-Cohen Grp., LLC*, 749 S.E.2d at 473.

137 *Id.*

138 *Id.*

139 *Id.* The court distinguished this case from *Madison Cablevision, Inc. v. City of Morganton*, 386 S.E.2d 200 (N.C. 1989), a case in which the city set up a municipal cable system and declined to grant franchises to any other competitors. The city did not create a monopoly because "it has not foreclosed for any period the possibility that franchises might be granted to other applicants." *Id.* 211. The holding in *Madison Cablevision* creates a potentially concerning loophole: all the state would have had to do is indefinitely claim that they may grant licenses or franchises to other applicants. This appears to be what the City of Morganton did—there is no evidence that the city ever opened up applications to other franchises. See *History of CoMPAS*, MORGANTON NORTH CAROLINA, <https://morgantonnc.gov/index.php/government/compas/history-of-compas> (last visited Oct. 10, 2020).

140 175 S.E. 142 (N.C. 1934).

141 *Id.* at 144; see also *Whaley v. Lenoir Cnty.*, 168 S.E.2d 411, 415–16 (N.C. 1969) (finding that grandfather clause which limited who could obtain an ambulance franchise based on prior operations was unconstitutional).

ground.”<sup>142</sup> These businesses in the off-limits category are “in essence, a private business unaffected in a legal sense with any public interest.”<sup>143</sup> Examples of licensing regimes which the North Carolina Supreme Court has determined are off limits are tile-laying,<sup>144</sup> photography,<sup>145</sup> and dry cleaning.<sup>146</sup> Additionally, even if a state may regulate an industry, it must do so reasonably and nondiscriminatorily. For example, in *State v. Warren*, the court invalidated a real estate licensing regime which applied only to certain counties in the state because it required real estate agents to obtain a state license and additional local licenses.<sup>147</sup>

In assessing the state’s justification, the court should watch for pretextual public interest justifications.<sup>148</sup> Yet the state courts have been deferential of regulation and licensure of professional occupations that require special skill or training “to protect the health, comfort, safety, and welfare of the people general acts have been passed and held constitutional, relating to professions and trades that require skill, learning, and training, such as attorneys at law, physicians, dentists, surgeons, accountants, osteopaths, chiropractors, opticians, cosmetologists, barbers, plumbers, etc.”<sup>149</sup> Thus, the courts have stated that reasonable regulation of occupations including lawyers,<sup>150</sup> real estate agents,<sup>151</sup> optometrists,<sup>152</sup> doctors,<sup>153</sup> barbers,<sup>154</sup> plumbers,<sup>155</sup> and pilots<sup>156</sup> are permissible under Section 34.

The main distinction between the two categories is not truly the existence of skill, as the court has occasionally claimed. In *State v. Ballance*, where the court invalidated a licensing regime of photographers, the court admitted that photography requires skill and training just like other regulated professionals. The real distinction was that photography was not tied up in the public interest. While a photographer must possess skill,

so [too] must the actor, the baker, the bookbinder, the bookkeeper, the carpenter, the cook, the editor, the farmer, the goldsmith, the horseshoer,

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142 *Roller v. Allen*, 96 S.E.2d 851, 859 (N.C. 1957).

143 *State v. Ballance*, 51 S.E.2d 731, 735 (N.C. 1949).

144 *See Roller*, 96 S.E.2d at 851.

145 *See Ballance*, 51 S.E.2d at 732.

146 *See State v. Harris*, 6 S.E.2d 854, 856 (N.C. 1940).

147 *See* 189 S.E. 108, 110 (N.C. 1937).

148 *See Harris*, 6 S.E.2d at 864.

149 *See Warren*, 189 S.E. at 110.

150 *See Cap. Associated Indus., Inc. v. Stein*, 922 F.3d 198, 202 (4th Cir. 2019).

151 *See Warren*, 189 S.E. at 111 (“The state can no doubt, in a state-wide act, make reasonable regulations in regard to the real estate business.”).

152 *See Palmer v. Smith*, 51 S.E.2d 8, 9 (N.C. 1948).

153 *See State v. Call*, 28 S.E. 517, 517 (N.C. 1897).

154 *See State v. Locky*, 152 S.E. 693, 693 (N.C. 1930); *see also Motley v. State Bd. of Barber Exam’rs*, 45 S.E.2d 550, 552 (N.C. 1947) (relying on *Locky* to hold that the state barbers board’s decision to admit veterans into the trade without undergoing the required training was not unconstitutional).

155 *See Roach v. City of Durham*, 169 S.E. 149, 150 (N.C. 1933).

156 *See St. George v. Hardie*, 60 S.E. 920, 921 (N.C. 1908).

the horticulturist, the jeweler, the machinist, the mechanic, the musician, the painter, the paper-hanger, the plasterer, the printer, the reporter, the silversmith, the stonemason, the storekeeper, the tailor, the watchmaker, the wheelwright, the woodcarver, and every other person successfully engaged in a definitely specialized occupation, be it called a trade, a business, an art, or a profession. Yet, who would maintain that the legislature would promote the general welfare by requiring a mental and moral examination preliminary to permitting individuals to engage in these vocations merely because they involve knowledge and skill?<sup>157</sup>

This list provides a starting point for professionals that likely could not be regulated under Section 34.

In future litigation, the best arguments against licensure under Section 34 are unequal application of the licensing regime so that it is a denial of a common right or regulation of an industry without any benefit to the common good.

### C. *Tennessee (1796)*

*That perpetuities and monopolies are contrary to the genius of a free state, and shall not be allowed.*<sup>158</sup>

The Tennessee Constitution of 1796 included an antimonopoly provision.<sup>159</sup> The provision had nearly identical language to the North Carolina provision, and this was likely no coincidence: “[T]he Tennessee Constitution of 1796 drew heavily upon the North Carolina example because the territory of Tennessee was previously part of North Carolina and thus subject to the North Carolina Constitution.”<sup>160</sup> Like North Carolina, Tennessee courts have used Lord Coke’s definition of monopoly in interpreting Section 22. Thus, in an early case concerning an exclusive grant to provide waterworks, the court determined that “[t]he question then is narrowed down to the inquiry, did the individuals composing the Memphis Water Company have the right, before their incorporation, in common with all others, to erect water works in Memphis. . . . ?”<sup>161</sup> Holding that the right to provide waterworks is not a common right, the grant was not a monopoly.<sup>162</sup> Lord Coke’s definition has been applied to many other cases to uphold government grants.<sup>163</sup> Also like other states, the court relied on Lord Coke’s definition to

157 *State v. Ballance*, 51 S.E.2d 731, 735–36 (N.C. 1949).

158 TENN. CONST. art. I, § 22; *see also id.* art. I, § 29 (“That an equal participation in the free navigation of the Mississippi, is one of the inherent rights of the citizens of this state; it cannot, therefore, be conceded to any prince, potentate, power, person or persons whatever.”).

159 TENN. CONST. of 1796, art. XI, § 23.

160 *Tate*, *supra* note 68, at 1824 n.2.

161 *City of Memphis v. Memphis Water Co.*, 52 Tenn. (5 Heisk.) 495, 529–30 (1871).

162 *Id.* at 530.

163 *See, e.g., Leeper v. State*, 53 S.W. 962, 964 (Tenn. 1899) (considering textbooks sold to public schools and finding that a monopoly was not created from the competitive bidding process).

uphold a fair trade act which set minimum prices for the resale of trademarked goods because the trademark holder already had a monopoly over the sale of their product.<sup>164</sup>

Additionally, the Tennessee court also adopted a conception of the police power which allowed the state to create monopolies which did not violate Section 22. Interestingly, in *Noe v. Town of Morristown*, the court held that while a municipality could not create a monopoly in one company to do all of the slaughtering of animals, the city could designate a single slaughterhouse where every person would have a right to slaughter animals there.<sup>165</sup> The court relied on the *Slaughterhouse Cases*, where the Supreme Court upheld a similar statute in New Orleans.<sup>166</sup> Once the antimonopoly provision has been weakened by an expansive view of the public good and state police power, it provided no more protection in this case than the Fourteenth Amendment. That contract was still invalid because the slaughterhouse had an exclusive right to slaughter the animals in addition to hosting the exclusive space.<sup>167</sup>

Yet in *Checker Cab Co. v. City of Johnson City*, the Tennessee Supreme Court found unconstitutional a licensing regime in which no new taxicabs were licensed until a certificate of public convenience and necessity was granted after a public hearing, a finding of additional need, and giving the existing operators in the city sixty days to provide the needed additional service.<sup>168</sup> The court determined that “[t]he monopoly of the taxi business in Johnson City granted to the appellants by the hereinabove quoted portion of Section 6 of this Private Act is just about as exclusive and complete as may be conceived.”<sup>169</sup> In order to be valid, the court held that the state-created monopoly must have a legitimate relation to the public purpose of the law.<sup>170</sup> In this case, the monopoly did not fulfill the public purpose of regulating the taxicab industry.<sup>171</sup>

In other cases—especially later ones—the court has been much more deferential to the legislative purpose. In *Nashville Mobilphone Co. v. Atkins*, a similar statute for telephone companies requiring a certificate of public convenience and necessity be granted to a new provider only after the existing company is given notice and a chance to provide adequate service was upheld.<sup>172</sup> Similarly, the Tennessee Supreme Court upheld a limitation on the number of liquor stores even though “[a]s a practical matter, such limita-

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164 *Frankfort Distillers Corp. v. Liberto*, 230 S.W.2d 971, 974 (Tenn. 1950). For a comparison of how other states have treated fair trade laws, see *supra* notes 76, 116 and accompanying text.

165 161 S.W. 485, 487 (Tenn. 1913).

166 *Id.* at 486 (citing the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873)).

167 *Id.* at 487.

168 216 S.W.2d 335, 337–38 (Tenn. 1948).

169 *Id.* at 336.

170 *Id.* at 337.

171 *Id.* 337–38.

172 536 S.W.2d 335, 340 (Tenn. 1976); see also *Dial-A-Page, Inc. v. Bissell*, 823 S.W.2d 202, 209 (Tenn. Ct. App. 1991).

tion has a tendency to accomplish that which is monopolistic” because “an incidental monopoly” does not “offend[ ] the anti-monopoly clause of our Constitution, if the actual and real tendency of such ordinance or statute is to effect the purpose of protecting the safety, health and morals of the public.”<sup>173</sup>

Perhaps the most deferential holding is found in two cases dealing with geographic monopolies for vehicle franchises. In a 1960 case, the state supreme court upheld a licensing regime for franchises which included consumer protection measures and administrative procedures for removal of licensure.<sup>174</sup> Because the act covered all aspects of the industry—dealers, distributors, and salesmen—the court determined it did not violate Section 22.<sup>175</sup> In 1983, the franchise act was challenged again after it was amended to “prohibit[ ] direct competition by a manufacturer with a franchised dealer, discrimination among franchisees and the granting of additional competitive franchises in a market area previously franchised to existing dealers.”<sup>176</sup> Unlike the lengthy North Carolina opinion finding similar geographic restrictions constitutional,<sup>177</sup> the court quickly concluded that “[w]e find no merit whatever in the suggestion of General Motors that the statutes in question purport to create a monopoly and do not consider that the matter warrants extended discussion.”<sup>178</sup>

For future litigation it is not clear how successful licensing challenges will be under Tennessee law. More recent cases have been very deferential to the legislature’s stated public purpose. The best litigation tactic is likely to challenge that purpose as pretextual, but no case besides the extreme example of *Checker Cab* has had success with this litigation strategy.

#### D. Texas (1836)

*Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this State.*<sup>179</sup>

The Texas antimonopoly provision is unique in its origin as it was originally included in the 1836 Constitution of the Republic of Texas.<sup>180</sup> Section 26 has remained in every state constitution since. The Section also contains a

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173 *Landman v. Kizer*, 255 S.W.2d 6, 7 (Tenn. 1953); *see also Ketner v. Clabo*, 225 S.W.2d 54, 56 (Tenn. 1949).

174 *See Ford Motor Co. v. Pace*, 335 S.W.2d 360 (Tenn. 1960).

175 *Id.* at 365.

176 *Gen. Motors Corp. v. Capitol Chevrolet Co.*, 645 S.W.2d 230, 232 (Tenn. 1983).

177 *See supra* notes 119–26 and accompanying text; *see also infra* notes 256–59 and accompanying text.

178 *General Motors Corp.*, 645 S.W.2d at 238.

179 TEX. CONST. art. I, § 26.

180 J.D. Forrest, *Anti-Monopoly Legislation in the United States*, 1 AM. J. SOC. 411, 413 (1896).

prohibition on primogeniture and entailment,<sup>181</sup> both of which had been prohibited in Spanish and Mexican law but were allowed under the English common law.<sup>182</sup> Despite these unique characteristics of the provision, there is evidence that the framers of the 1836 constitution would have been familiar with the North Carolina antimonopoly provision, which may explain the nearly identical first clause.<sup>183</sup>

Inclusion of the antimonopoly provision reflects the economic situation in the Republic of Texas. Most Texans were debtors and faced high prices for goods that were sold without much competition.<sup>184</sup> Building on this sentiment, the 1836 Texas Constitutional Convention had a majority of Jacksonian Democrat delegates—whose draft bill of rights became the basis of the 1845 constitution—and the 1875 convention was dominated by Granger delegates who “wanted a constitution that would curtail government power and prevent economic domination by large monopolies and expansive business interests.”<sup>185</sup> Additionally, Texas has a long history of antitrust law which has dominated litigation over monopolies.<sup>186</sup> Thus, there is not a very robust caselaw analyzing Section 26 as a restraint on government action. Most cases discuss exclusive grants of government duties, and only a few cases assess the constitutionality of regulations that may tend to create monopolies. Both are addressed in turn.

## 1. Exclusive Grants

While the Texas Bill of Rights certainly incorporated elements of the English common law,<sup>187</sup> there is no evidence that Texas courts ever fully adopted Lord Coke’s definition of monopoly in Section 26 analysis. In one of the first cases interpreting the provision, the court relied on the Greek meaning of the word “*monos*, alone, and *polio*, to deal, and is defined to be the sole power of making, dealing in, or being otherwise interested in anything.”<sup>188</sup> Further, the court cited Bouvier’s law dictionary to find that “a grant from the sovereign power of a state by commission, letters patent or otherwise, to any person or corporation, by which the exclusive right of buying, selling, making, working or using anything is given, constitutes a monop-

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181 These were devices which could limit the rules of inheritance. GEORGE D. BRADEN ET AL., *THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS* 79–80 (1977), <https://www.sll.texas.gov/assets/pdf/braden/the-constitution-of-the-state-of-texas-an-annotated-and-comparative-analysis.pdf>.

182 J. E. Ericson, *Origins of the Texas Bill of Rights*, 62 SW. HIST. Q. 457, 460 (1959).

183 Tate, *supra* note 68, at 1824 n.2.

184 John Cornyn, *The Roots of the Texas Constitution: Settlement to Statehood*, 26 TEX. TECH L. REV. 1089, 1129 n.239 (1995).

185 James C. Harrington, *Framing a Texas Bill of Rights Argument*, 24 ST. MARY’S L.J. 399, 402–04 (1993) (describing the development of the Texas Bill of Rights).

186 See Paul Womack, *Monopolies*, TEX. ST. HIST. ASS’N, <https://tshaonline.org/handbook/online/articles/jtmqu> (last visited Oct. 10, 2020).

187 Ericson, *supra* note 182, at 466.

188 *City of Brenham v. Becker*, 1 White & W. 714, 714–15 (Tex. Comm’n App. 1881).

oly.”<sup>189</sup> In that case, the court held that a city could not, in exchange for building a town hall, grant a monopoly on the sale of fresh meats and fish to a market owned by a man named Smith for ten years.<sup>190</sup> The court found that the contract was invalid because it allowed a monopoly and was an attempt by the legislature to abdicate its legislative power.<sup>191</sup>

Because Texas courts did not define monopolies to be an exclusive grant of a common right, the court has been more aggressive in policing municipal contracts. In *City of Brenham v. Brenham Water Co.*, the court invalidated a twenty-five-year contract for the exclusive right to sell water to its citizens.<sup>192</sup> Despite the court admitting that, “[i]t has been said . . . that there can be no monopoly in the use of a street to lay down gas or water mains or pipes, because it is not a matter of common right to use streets for such purpose,” the exclusive grant, even though it was limited in duration, was forbidden.<sup>193</sup> Thus, the general rule in Texas has been that exclusive franchises by municipalities for water, gas, and electric utilities are forbidden.<sup>194</sup> In order to be invalidated as an unconstitutional monopoly, however, the grant by the city must be unequivocally exclusive so that the city can be considered to have bartered away its police power.<sup>195</sup>

This strict limitation on exclusive grants to utility companies does not prevent a city from governing effectively. A municipality may enter into contracts for water or electricity that do not bind the city to an exclusive arrangement.<sup>196</sup> Furthermore, the rule against exclusive grants does not extend to all local government functions. The city may create exclusive offices to enforce rules or collect taxes because “[r]equiring an officer to perform some governmental function to the exclusion of all others is not the creation of a monopoly or perpetuity within the meaning of the Constitution.”<sup>197</sup> Most notably, in *Brenham Water Co.*, the court left open the possibility that there may be “certain classes of exclusive privileges which do not amount to monopolies.”<sup>198</sup> Since then, the Texas Supreme Court has held that exclu-

189 *Id.* at 715.

190 *Id.* at 716.

191 *Id.*

192 4 S.W. 143, 156 (Tex. 1887).

193 *Id.* at 153. See *supra* notes 72–74 and accompanying text for a comparison to public utility cases in Maryland.

194 See, e.g., *Jones v. Carter*, 101 S.W. 514, 517 (Tex. App. 1907) (finding exclusive right to streets and alleyways for street-railways, electricity poles and wires, and telegraph wires invalid).

195 See, e.g., *City of Garland v. Tex. Power & Light Co.*, 295 S.W.2d 925, 929 (Tex. App. 1956) (“An exclusive grant will not be declared or found unless given by express terms or by clear implication.” (citations omitted)).

196 See, e.g., *id.*

197 *Ex parte London*, 163 S.W. 968, 970 (Tex. Crim. App. 1913); see also *Ex parte Savage*, 141 S.W. 244, 247 (Tex. Crim. App. 1911) (holding that a city could give an official exclusive authority to regulate billboards).

198 *City of Brenham v. Brenham Water Co.*, 4 S.W. 143, 153 (Tex. 1887).



sive contracts for waste removal belong in this category because garbage is not “useful and innocent article[ ] to consumers.”<sup>199</sup>

Moreover, Texas courts have held that some exclusive contracts may not be broad enough to constitute a monopoly. In *Apani Southwest, Inc. v. Coca-Cola Enterprises, Inc.*, the Fifth Circuit found that the exclusive right to sell Coca-Cola products at twenty-seven city facilities “does not involve the degree of exclusivity required to constitute a ‘monopoly’ under the Texas Constitution.”<sup>200</sup> The court distinguished from the municipal contracts cases because in those cases “[t]he citizens of those cities were forced to purchase electrical, water or other utilities for their private consumption in their homes from a party the city chose to grant an exclusive franchise”—essentially, the contract created a city-wide monopoly.<sup>201</sup> Texas courts have also found that a contract to buy and use textbooks in public schools for five years<sup>202</sup> and a lease of lakes to a country club did not create monopolies.<sup>203</sup> It is not clear where Texas courts will determine that an exclusive contract has gone “too far” and becomes an unconstitutional monopoly. The best arguments that a contract is monopolistic likely will be based on the reasoning used in the *Brenham Water Co.* line of cases: that the contract will result in increased prices, leaves citizens without any meaningful alternative, and is abrogation of the legislative duty to regulate for the public good.<sup>204</sup>

In more recent cases, the court has “recognized four exceptions to the rule that exclusive contracts are prohibited monopolies.”<sup>205</sup> These were taken from antitrust cases but have since been given as a rule for Section 26 cases:

- (1) contract of agency wherein the agent is prohibited from dealing for himself or representing others besides his principal, (2) contract for the sale of a business in which the seller agrees for a limited time not to engage in a competing business within a limited territory, (3) lease contract where the lessee agrees on the leased premises to sell only certain products, and (4) cases in which an exclusive right or privilege is granted only upon the property or premises of the grantor.<sup>206</sup>

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199 See, e.g., *City of San Antonio v. San Antonio Irrigation Co.*, 12 S.W.2d 546, 549 (Tex. Comm’n App. 1929).

200 300 F.3d 620, 636 (5th Cir. 2002).

201 *Id.*

202 See *Charles Scribner’s Sons v. Marrs*, 262 S.W. 722, 723, 729–30 (Tex. 1924).

203 See *Henrietta Country Club v. Jacobs*, 269 S.W. 137, 137, 139 (Tex. App. 1924).

204 *Brenham Water Co.*, 4 S.W. at 153 (“Such an exclusive right prevents competition, and tends to high prices; all matters affecting which the contract before us surrenders the right further to regulate for a quarter of a century.”).

205 *Airport Coach Serv., Inc. v. City of Fort Worth*, 518 S.W.2d 566, 572 (Tex. App. 1974).

206 *Id.*

In *Airport Coach Services*, because the city exclusively owned the airport, it could make an exclusive contract for ground transportation services.<sup>207</sup> Exception four has been similarly applied to an exclusive right to broadcast from a high school football field.<sup>208</sup>

## 2. Regulation of Industry

Outside of the context of exclusive grants, regulations which restrain trade or limit the number of competitors are almost always upheld under Section 26. This is because the requirements to form a monopoly through regulation are more absolute in Texas than in other states. In fact, Texas has never invalidated a statute under Section 26 for creating a monopoly through regulatory measure. In *Lens Express, Inc. v. Ewald*, the appellate court adopted a rule for monopolies used in antitrust cases—the plaintiff must prove: “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.”<sup>209</sup> In rejecting *Lens Express*’s claim that “optometrists and ophthalmologists have a monopoly on the sale of contact lenses in Texas because a complete prescription is required in order for any other entity to sell the lenses to consumers,” the court reasoned that “[t]he existence of so many competing optometrists suggests that, absent a price-fixing conspiracy, competition will prevent them from charging outrageous sums for contact lenses.”<sup>210</sup> Thus, if any monopoly arose in the market, it would be a collusion under antitrust law, rather than a result of occupational licensing.

While this rule was not announced until 1995 for Section 26 claims, Texas courts essentially followed the *Lens Express* test in earlier cases—no regulation was found to create a monopoly under the first prong. For example, in an 1899 case, the Court of Criminal Appeals found that a law giving railroads the exclusive right to sell railroad tickets did not create monopoly<sup>211</sup> and in *City of Wichita Falls v. Roberson*, the court rejected claims that comprehensive butcher regulations which put smaller butchers out of business created a monopoly.<sup>212</sup> Additionally, the appellate court held that a monopoly was not created when a bond was required to operate a jitney or motorbus but not a taxi<sup>213</sup> nor when an ordinance prohibited jitneys from the city

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207 *Id.*; see also *Indep. Taxicab Drivers’ Emps. v. Greater Hous. Transp. Co.*, 760 F.2d 607, 613 (5th Cir. 1985) (taxi pickup at airport); *Continental Bus Sys., Inc. v. City of Dallas*, 386 F. Supp. 359, 368 (N.D. Tex. 1974) (bus pickup at airport).

208 *Sw. Broad. Co. v. Oil Ctr. Broad. Co.*, 210 S.W.2d 230, 233–34 (Tex. App. 1947).

209 907 S.W.2d 64, 70 (Tex. App. 1995) (quoting *Caller-Times Publ’g Co. v. Triad Commc’ns*, 826 S.W.2d 576, 580 (Tex. 1992)).

210 *Id.*

211 *Jannin v. State*, 51 S.W. 1126, 1128 (Tex. Crim. App. 1899).

212 283 S.W. 870 (Tex. App. 1926).

213 *Auto Transit Co. v. City of Fort Worth*, 182 S.W. 685, 692–93 (Tex. App. 1915).

center so that street railways were the sole provider of transportation.<sup>214</sup> The appellate court’s reasoning in *Gill* provides evidence of how deferential Texas courts will be towards regulatory measures that restrain trade:

The convenience, peace, health, and safety of the citizens necessarily determine the number and extent of similar competing utilities which are to be permitted to operate. While none may be given exclusive or monopolistic rights, it does not follow that all are entitled to enter upon the city streets. The officers of municipalities are charged with the responsibility of conserving the convenience of the citizens in such matters, as well as providing for their peace, health, and safety. *Whether they have fairly done so is obviously not a judicial question.*<sup>215</sup>

Similarly, an appellate court ruled that the state bar was not a monopoly because it “is the entity charged with regulating the practice of law for the protection of the public” as “[t]he practice of law is potentially harmful to the public if practiced by unqualified persons.”<sup>216</sup> Essentially, when a public interest is at stake—as it supposedly always is when the legislature acts—Texas courts will not second guess regulatory measures.

The prong one hurdle is so insurmountable to antimonopoly challenges that litigants facing burdensome occupational licensing or regulations would likely be better off bringing a claim under a different constitutional provision such as the due course of law clause.<sup>217</sup>

#### E. Arkansas (1836)

*Perpetuities and monopolies are contrary to the genius of a republic, and shall not be allowed; nor shall any hereditary emoluments privileges or honors ever be granted or conferred in this State.*<sup>218</sup>

The antimonopoly provision has been included in almost every Arkansas constitution since 1836. It was removed in the 1868 constitution for unknown reasons but was added back in 1874.<sup>219</sup> The Supreme Court of Arkansas explained the purpose and historical background of the clause in 1884:

The monopolies which in England became so odious as to excite general opposition, and . . . infuse a detestation which has been transmitted to the free States of America, were in the nature of exclusive privileges of trade, granted to favorites or purchasers from the crown, for the enrichment of individuals, at the cost of the public. They were supported by no considerations of public good. They enabled a few to oppress the community by undue charges for goods or services. The memory, and historical traditions, of abuses resulting from this practice, has left the impression that they are

214 *Gill v. City of Dallas*, 209 S.W. 209, 212 (Tex. App. 1919).

215 *Id.* at 212 (emphasis added).

216 *Favaloro v. Comm’n for Lawyer Discipline*, 994 S.W.2d 815, 823 (Tex. App. 1999).

217 *See, e.g., Patel v. Tex. Dep’t of Licensing & Reg.*, 469 S.W.3d 69, 74 (Tex. 2015).

218 ARK. CONST. art. II, § 19.

219 *N. Little Rock Transp. Co. v. City of N. Little Rock*, 184 S.W.2d 52, 54 (Ark. 1944).

dangerous to Liberty, and it is this kind of monopoly, against which the constitutional provision is directed.<sup>220</sup>

The court went on to define the scope of the antimonopoly provision in this historical context as prohibiting monopolies which, as those in England, “restrained the subject from the exercise of occupations, which otherwise [sic] would have been proper.”<sup>221</sup> The prohibition on monopolies, however, did not apply to regulations for the public good—the court upheld a municipality capping liquor licenses at eight and rejecting otherwise qualified applicants.<sup>222</sup>

Section 19 has been held to be a restraint on the legislature.<sup>223</sup> The ability for Section 19 to meaningfully constrain government power is thus dependent on the breadth of the police power. The Arkansas Supreme Court summarized the rule as follows:

Yet the courts of Arkansas, like those of all American states, have sustained these monopolistic grants of special privilege on the ground that it is within the competency of the legislature to determine under the police power what regulatory rules are needful in controlling a type of business fraught with perils to public peace, health and safety as is the liquor business.<sup>224</sup>

Regulations must be reasonable and designed solely for a legitimate public purpose.<sup>225</sup> Thus, courts have upheld liquor price caps<sup>226</sup> and an escrow fund requirement for certain tobacco companies,<sup>227</sup> a monopoly in trash collection,<sup>228</sup> a monopoly in the removal of deposits from unsewered privies,<sup>229</sup> and solid-waste service<sup>230</sup> based on the state’s valid exercise of its police power.

The police power limitation on Section 19 does not act as a blank check for government-granted monopolies. In many cases, the court has required a real public justification in order to sustain a monopoly incidental to regulation. For example, the court struck down parts of a regulatory scheme for

220 *Ex parte Levy*, 43 Ark. 42, 51 (1884).

221 *Id.* at 52. This is similar to Lord Coke’s definition of monopoly. The court applied Lord Coke’s definition in a 1901 case to find that an exclusive turnpike privilege was not a monopoly within the definition because it was not a common right. *Ratcliffe v. Pulaski Turnpike Co.*, 63 S.W. 70, 75 (Ark. 1901).

222 *Ex parte Levy*, 43 Ark. at 53.

223 *See Twin City Pipe Line Co., v. Harding Glass Co.*, 283 U.S. 353, 357 (1931). The Arkansas Supreme Court has even held that zoning applications may create a monopoly in an as-applied challenge. *See City of Little Rock v. Sun Bldg. & Dev. Co.*, 134 S.W.2d 582, 584 (Ark. 1939).

224 *Gipson v. Morley*, 233 S.W.2d 79, 83 (Ark. 1950).

225 *Dreyfus v. Boone*, 114 S.W. 718, 720–21 (Ark. 1908).

226 *See Gipson*, 233 S.W.2d at 83.

227 *See Grand River Enters. Six Nations Ltd. v. Beebe*, 418 F. Supp. 2d 1082, 1100 (W.D. Ark. 2006).

228 *See L & H Sanitation, Inc. v. Lake City Sanitation, Inc.*, 769 F.2d 517, 524 (8th Cir. 1985).

229 *See Dreyfus*, 114 S.W. at 721.

230 *See Massongill v. Cnty. of Scott*, 947 S.W.2d 749, 753 (Ark. 1997).

the delivery of ice “as the business of manufacturing and producing ice is a business not inherently dangerous to the public welfare or morals.”<sup>231</sup> Similarly, in *North Little Rock Transportation Co. v. City of North Little Rock*, the court struck down a statute which allowed the only taxicab operating in the city to receive an exclusive franchise after notice of a finding by the city council that there was a desire for better service and having sixty days to meet the requested improvements.<sup>232</sup> Here,

[m]erely because it was operating in North Little Rock on June 9, 1939, the Checker Cab Company received a valuable privilege created at the hands of the Legislature—and without any legislative finding in the Act, based on substantial reasoning that an exclusive taxicab business in cities of the first class was for the public welfare.<sup>233</sup>

Thus, the grant was unconstitutional.<sup>234</sup> The court has further invalidated occupational licensing regimes for plumbers,<sup>235</sup> barbers,<sup>236</sup> and a requirement for a union label on printing.<sup>237</sup>

Yet in other cases, the police power analysis is quite deferential. In *Brown v. Cheney*, the Arkansas Supreme Court found that a juke box regulatory regime was not in violation of Section 19 and other constitutional provisions.<sup>238</sup> First, the court determined that owning and operating a jukebox is a privilege and not a common right because juke boxes may be harmful—after all, they are used in “dance halls[ and] drinking places.”<sup>239</sup> Then, a provision of the act which only allows state residents of one year to sustain a license did not create a monopoly as the legislature gave good reasons for the requirement.<sup>240</sup>

In general, Arkansas courts are more likely to apply exacting review to regulations such as occupational licensing regimes which incidentally create monopolies. The best litigation strategies seem to be claims about the validity of the state’s postured reason for the regulation and the fact that the chosen regulatory regime is ineffective to achieve the desired ends.

231 *Cap F. Bourland Ice Co. v. Franklin Utils. Co.*, 22 S.W.2d 993, 997 (Ark. 1929).

232 184 S.W.2d 52, 54–55 (Ark. 1944). The Tennessee court handled a nearly identical statute similarly. See *supra* notes 168–69 and accompanying text.

233 *N. Little Rock Transp. Co.*, 184 S.W.2d at 55.

234 *Id.* at 56. But see *Bridges v. Yellow Cab Co.*, 406 S.W.2d 879, 880 (Ark. 1966) (upholding a narrow grant of monopoly—a limousine stand at the airport—after a legislative finding that there was not enough demand for competitive service to be maintained).

235 See *Replogle v. City of Little Rock*, 267 S.W. 353, 357 (Ark. 1924).

236 See *Noble v. Davis*, 161 S.W.2d 189, 192 (Ark. 1942).

237 See *Upchurch v. Adelsberger*, 332 S.W.2d 242, 244 (Ark. 1960).

238 350 S.W.2d 184, 187 (Ark. 1961).

239 *Id.* at 186.

240 *Id.*; see also *Potashnick Truck Serv., Inc. v. Mo. & Ark. Transp. Co.*, 157 S.W.2d 512, 515 (Ark. 1942) (finding that a certificate of public convenience and necessity requirement for truck lines did not create a monopoly “nor [did] it intend to permit competition not required by the public convenience and necessity”).

### F. Georgia (1877)

*The General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of encouraging a monopoly, which is hereby declared to be unlawful and void.*<sup>241</sup>

The 1877 version of the provision was similar to today's but limited to contracts or agreements with corporations "which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses, or to encourage monopoly; and all such contracts and agreements shall be illegal and void."<sup>242</sup> Additionally, the amendment limited the General Assembly's "power to authorize any corporation to buy shares, or stock, in any other corporation in this State, or elsewhere, or to make any contract, or agreement whatever, with any such corporation."<sup>243</sup> In the 1945 constitution, the provision was changed to look more like a progressive anti-trust amendment focused on anticompetitive contracts.<sup>244</sup> Then, in the 1976 constitution, the wording was kept the same but with the addition of a sentence authorizing legislative enforcement of the provision.<sup>245</sup> In 1983 the language of the provision was again changed to nearly match the current version.<sup>246</sup>

In 2010, Georgia voted on a ballot measure: "[T]o make Georgia more economically competitive by authorizing legislation to uphold reasonable competitive agreements?"<sup>247</sup> The ambiguously worded measure was approved by sixty-eight percent, and the current exceptions to the antimonopoly provision were added essentially to allow for judicial enforcement of noncompete clauses in employment contracts.<sup>248</sup>

Setting aside the 2010 amendment, there is not much evidence as to why the state first included the amendment or why it has been changed and amended so many times over the years. In an early case, the Supreme Court of Georgia held that the provision was meant to restrict the legislature to the common-law principle against restraints of trade "and thus put it beyond the

241 GA. CONST. art. III, § 6, para. V(c)(1). While the provision bans the legislative creation of monopolies, it further limits the authorization of contracts or agreements that defeat or lessen competition except for contracts or agreements for activities between employers and employees, distributors and manufacturers, lessors and lessees, partnerships and partners, franchisors and franchisees, sellers and purchasers of a business or commercial enterprise, and two or more employees in which the legislature may authorize such anticompetitive contracts. *See id.* para. V(c)(2).

242 GA. CONST. of 1877, art. IV, § 2, para. IV.

243 *Id.*

244 *See* GA. CONST. of 1945, art. IV, § 4, para. I.

245 *See* GA. CONST. of 1976, art. III, § 8.

246 *See* GA. CONST. of 1983, art. III, § 6, para. V(c).

247 Bill Crane, *Georgia View: Amending the Constitution*, GEORGIA TREND (Apr. 1, 2012), <https://www.georgiatrend.com/2012/04/01/georgia-view-amending-the-constitution/>.

248 *Id.*; *see supra* note 241 (discussing the exceptions the antimonopoly provision).

power of the legislature to grant any rights or privileges to corporations inconsistent with its terms.”<sup>249</sup>

The applicability of the provision has been severely cabined by Georgia courts. First, the provision is “limited expressly to contracts and agreements” and is interpreted according to a rule of reason where “contracts in partial restraint of trade are valid if they are reasonable and not injurious to the public interest; this applies to public-service corporations as well.”<sup>250</sup> Whether a contract is reasonable is a question of law for courts to determine.<sup>251</sup> In cases involving government contracts—the most obvious restriction based on a plain reading of the amendment—the court has upheld contracts as long as the government actor did not abuse their discretion.<sup>252</sup> Similarly, in cases involving government contracts for special privileges, Georgia courts have construed the scope of the grant narrowly to avoid finding the agreement unconstitutional. In *Harrison Co. v. Code Revision Commission*, the court held that the exclusive grant to a publisher to print the official Georgia code for ten years did not create a monopoly because the plaintiff could simply publish a competitive product such as a code with annotations by the Harrison Company.<sup>253</sup>

The constitutional provision has had teeth in limited circumstances involving contracts. In a 1900 case, the court invalidated an ordinance which required all printing done by the city to contain a union label.<sup>254</sup> While it is not clear if the ordinance was invalidated under the constitutional provision or under common law, the court made clear that a contract based on an ordinance that “tended to defeat competition and encourage monopoly” could not be valid.<sup>255</sup> Further, in *Georgia Franchise Practices Commission v. Massey-Ferguson, Inc.*, the state supreme court invalidated provisions of the Franchise Practices Act which “may have the effect, or be intended to have the effect to defeat or lessen competition, or to encourage monopoly.”<sup>256</sup> The law required any potential franchisor who wanted to establish a new franchise in a geographic area where there was an existing franchise of the same line-item vehicle give written notice to the existing franchise.<sup>257</sup> The

249 *State v. Cent. of Ga. Ry. Co.*, 35 S.E. 37, 41 (Ga. 1900).

250 *Exec. Town & Country Servs., Inc. v. Young*, 376 S.E.2d 190, 192 (Ga. 1989); *see also Ferrero v. Assoc. Materials, Inc.*, 923 F.2d 1441, 1447–48 (11th Cir. 1991) (“[T]he legislature may encourage narrowly tailored contracts, which do not unreasonably chill competition, based upon the legislature’s evaluation of the public interest.”).

251 *Exec. Town & Country Servs.*, 376 S.E.2d at 192.

252 *See Exposition Enters., Inc. v. George L. Smith II Ga. World Cong. Ctr. Auth.*, 338 S.E.2d 726, 729–30 (Ga. Ct. App. 1985).

253 260 S.E.2d 30, 34 (Ga. 1979). Similarly, in an extremely brief analysis, the court rejected the claim that a dentistry licensing regime would create a monopoly. *See Wrzesinski v. State*, 522 S.E.2d 461, 463 (Ga. 1999).

254 *City of Atlanta v. Stein*, 36 S.E. 932, 933 (Ga. 1900).

255 *Id.*

256 262 S.E.2d 106, 107 (Ga. 1979).

257 *WMW, Inc. v. Am. Honda Motor Co.*, 733 S.E.2d 269, 274 (Ga. 2012) (discussing *Massey-Ferguson*).

existing franchise could then enjoin the new competitor from opening unless the potential franchisee could demonstrate that the existing franchise was not adequately serving the public interest.<sup>258</sup>

In response to *Massey-Ferguson*, the Georgia Constitution was amended in 1992 to allow the legislature to regulate vehicle franchises.<sup>259</sup> After the amendment, the Georgia legislature reenacted the Franchise Practices Act.<sup>260</sup> While the end result is another weakening of the constitutional protection against monopoly, *Massey-Ferguson* does demonstrate that when the Georgia antimonopoly provision applies, it can be quite powerful.<sup>261</sup> In Georgia, a statute need only restrain trade to be unconstitutional.

Yet a 2017 case demonstrates that this potentially powerful check will only be used in considerably narrow circumstances. In *Women's Surgical Center, L.L.C. v. Berry*, the court defined the antimonopoly provision as only an “anti-competitive contracts clause” which did not apply to a statute requiring a certificate of need for new institutional health services in the state.<sup>262</sup> Then, even though the requirement was preventing the Center from entering into new contracts, the constitutional provision did not apply because “the requirement does not authorize contracts between service providers or anyone else that would encourage a monopoly.”<sup>263</sup> Thus, the provision only applies when state contracts affirmatively create a monopoly, rather than when state action prevents contracts and in effect restricts competition.

### G. Wyoming (1889)

*Perpetuities and monopolies are contrary to the genius of a free state, and shall not be allowed. Corporations being creatures of the state, endowed for the public good with a portion of its sovereign powers, must be subject to its control.*<sup>264</sup>

The Wyoming antimonopoly provision was adopted at a time when other state amendments targeted private monopolies.<sup>265</sup> While the language is

258 *Id.*

259 *See id.* at 273 & n.3; GA. CONST. art. III, § 6, para. II (“Notwithstanding the [antimonopoly provision,] the General Assembly in the exercise of its police power shall be authorized to regulate . . . new motor vehicle manufacturers, distributors, dealers, and their representatives doing business in Georgia, including agreements among such parties, in order to prevent frauds, unfair business practices, unfair methods of competition, impositions, and other abuses upon its citizens.”).

260 *WMW*, 733 S.E.2d at 273–74.

261 In *American Motors*, the North Carolina case upholding a similar franchise law against an antimonopoly challenge, the court declined to follow *Massey-Ferguson* because the Georgia Constitution “concerns legislation having ‘the effect . . . of defeating or lessening competition . . .,’ as well as ‘encouraging a monopoly.’” *Am. Motors Sales Corp. v. Peters*, 317 S.E.2d 351, 359 (N.C. 1984) (alteration in original).

262 806 S.E.2d 606, 611 (Ga. 2017).

263 *Id.* The court distinguished from *Massey-Ferguson* because in that case, the provisions of the act struck down authorized franchise agreements which restricted competition. *Id.*

264 WYO. CONST. art. I, § 30.

265 *See Calabresi & Leibowitz, supra* note 14, at 1067.



written like the older provisions targeting state-granted monopolies, there is a surprising lack of caselaw under the Wyoming antimonopoly provision. This may be because Wyoming has other provisions that may protect against crony capitalism like a prohibition on special laws.<sup>266</sup> In *Pirie v. Kamps*, plaintiffs challenged a law which required that any legal notice or advertisement printed to have a certain page size in order to have legal force.<sup>267</sup> The claims were brought under multiple provisions of the Wyoming Constitution including the special laws clause and the antimonopoly provision and the Fourteenth Amendment.<sup>268</sup> While the holding was primarily under the special law provision, the court determined that there was no reason “to give the publisher of an ordinary and standard newspaper a special privilege over that granted to the publisher of a tabloid newspaper . . . [and thus t]he provision of the statute here in question is [unconstitutional].”<sup>269</sup>

Finally, in a case similar to *Pirie*, the court found that a law which required a legal notice or advertisement be printed in a publication that had been issued at least once a week for fifty-two weeks prior in order to be valid did not violate the antimonopoly provision.<sup>270</sup> There, in a brief analysis, the court reasoned that “[t]he Legislature has undoubtedly the right, in exercising the sovereign or police power of the state, to make reasonable regulations in regard to legal notices.”<sup>271</sup>

For future litigants, there is plenty of space for argument under Section 30. The best sources of authority would likely be similarly worded antimonopoly provisions like that of North Carolina and Maryland.

#### H. Oklahoma (1907)

*Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this State.*<sup>272</sup>

The 1907 Oklahoma Constitution was written by farmers concerned with the threat of monopoly destroying small family farms.<sup>273</sup> Populist drafters of the constitution—a group of land speculators, Native Americans, cowboys, poor farmers, and coal miners—were primarily concerned with maintaining “individual ownership of resources, especially of the preservation and encouragement of individually owned and operated family-style farms.”<sup>274</sup> In

266 See, e.g., WYO. CONST. art. III, § 27.

267 229 P.2d 927, 928 (Wyo. 1951).

268 *Id.*

269 *Id.* at 932. The court held that the antimonopoly provision analysis would be the same as that for the special laws clause. *Id.* at 930.

270 See *In re Gillette Daily J.*, 11 P.2d 265, 266 (Wyo. 1932).

271 *Id.* at 268.

272 OKLA. CONST. art. II, § 32.

273 Rennard J. Strickland & James C. Thomas, *Most Sensibly Conservative and Safely Radical: Oklahoma's Constitutional Regulation of Economic Power, Land Ownership, and Corporate Monopoly*, 9 TULSA L.J. 167, 172 (1973).

274 *Id.* at 172–73, 190.

furtherance of this goal, some scholars have noted that the “most important protection” against economic power was the state antimonopoly provision.<sup>275</sup>

Yet the antimonopoly provision cannot be understood in isolation. The Oklahoma Constitution also empowers the state: “The Legislature shall define what is an unlawful combination, monopoly, trust, act, or agreement, in restraint of trade, and enact laws to punish persons engaged in any unlawful combination, monopoly, trust, act, or agreement, in restraint of trade, or composing any such monopoly, trust, or combination.”<sup>276</sup> The Oklahoma Supreme Court has held that the provisions should be read together and thus violations of Section 32 are determined by looking at state antitrust law—how the legislature has defined monopoly.<sup>277</sup> Additionally, in federal cases interpreting the provision, regulations concerning waste disposal and telephone lines have been exempt from Section 32.<sup>278</sup>

The state supreme court has also held that legislation with a real and substantial relation to the public interest will not be struck down under the antimonopoly provision. In *Public Service Co. of Oklahoma v. Caddo Electric Cooperative*, the supreme court held that a law prohibiting any electricity supplier from offering to supply electricity in an area already served by a supplier or which could be served by a supplier by an extension of 500-feet or less did not violate Section 32.<sup>279</sup> After finding that unrestrained competition could result in an overproduction of electricity, the 500-foot law was justified under the police power and not in violation of the constitution.<sup>280</sup>

Under this police-power limitation, Oklahoma courts have upheld regulations and licensing regimes as well. In *Ex Parte Tindall*, the court upheld a licensing regime for vehicles which required a bond but did not allow a cash bond<sup>281</sup> and in *Schwarze v. Clark* upheld a licensing regime for barbers which did not allow for students to be paid for services performed at barber school as reasonable regulations.<sup>282</sup> Similarly, the supreme court upheld a requirement that licensed abstractors of real estate must have their own set of record books<sup>283</sup> and a dental licensing requirement.<sup>284</sup>

### I. *Ohio (2015)*

*Restraint of trade or commerce being injurious to this state and its citizens, the power of the initiative shall not be used to pass an amendment to this constitution that*

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275 *Id.* at 207.

276 OKLA. CONST. art. V, § 44; *see also id.* art. IX, § 45.

277 *See Rice v. State*, 232 P. 807, 811 (Okla. 1924).

278 *See S. Disposal, Inc. v. Tex. Waste Mgmt.*, 161 F.3d 1259, 1264–65 (10th Cir. 1998); *City of Tulsa v. Sw. Bell Tel. Co.*, 5 F. Supp. 822, 826–28 (N.D. Okla. 1934).

279 479 P.2d 572, 581 (Okla. 1970).

280 *Id.* at 579.

281 *See* 229 P. 125, 133–34 (Okla. 1924).

282 *See* 107 P.2d 1018, 1020–22 (Okla. 1940).

283 *See In re Richardson*, 184 P.2d 642, 646 (Okla. 1947).

284 *Thrasher v. Bd. of Governors*, 359 P.2d 717, 724 (Okla. 1961); *see also Cryan v. State*, 583 P.2d 1122, 1125 (Okla. Crim. App. 1978).

would grant or create a monopoly, oligopoly, or cartel, specify or determine a tax rate, or confer a commercial interest, commercial right, or commercial license to any person, nonpublic entity, or group of persons or nonpublic entities, or any combination thereof, however organized, that is not then available to other similarly situated persons or nonpublic entities.<sup>285</sup>

The Ohio Constitution explicitly reserves a right for voters to amend the state constitution.<sup>286</sup> In 2015, voters narrowly passed a constitutional amendment which provides the only constitutional limit to future uses of the initiative process.<sup>287</sup> Despite the strong wording, the provision is not an absolute bar to potentially monopoly-creating amendments.<sup>288</sup> The Ballot Board is tasked with determining whether the proposed amendment is in conflict with the new standards.<sup>289</sup> The Board may also decide to put the provision on the ballot even if it violates the antimonopoly provision by asking:

Shall the petitioner, in violation of division (B) (1) of Section 1e of Article II of the Ohio Constitution, be authorized to initiate a constitutional amendment that grants or creates a monopoly, oligopoly, or cartel, specifies or determines a tax rate, or confers a commercial interest, commercial right, or commercial license that is not available to other similarly situated persons?<sup>290</sup>

While this sounds different from other state antimonopoly provisions, the Ohio Supreme Court has jurisdiction over determinations by the Ballot Board,<sup>291</sup> meaning that the court will ultimately decide when a monopoly is created—like in other state amendments which limit state action.<sup>292</sup> The Ohio amendment, however, starts out as a limit on private action and the kinds of referendums citizens can propose. The end target is a successful referendum that does not grant monopoly power in the state constitution.

The antimonopoly provision was largely in response to the perception that the referendum was being bought by powerful special interest groups.

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285 OHIO CONST. art. II, § 1e(B)(1). The amendment also provides a protection against the referendum being used to create unequal tax rates:

The powers defined herein as the “initiative” and “referendum” shall not be used to pass a law authorizing any classification of property for the purpose of levying different rates of taxation thereon or of authorizing the levy of any single tax on land or land values or land sites at a higher rate or by a different rule than is or may be applied to improvements thereon or to personal property.

*Id.* § 1e(A).

286 *Id.* § 1.

287 Steven H. Steinglass, *Constitutional Revision: Ohio Style*, 77 OHIO ST. L.J. 281, 326–27 (2016).

288 *Id.* at 327.

289 *Id.*

290 OHIO CONST. art. II, § 1e(B)(2)(a).

291 Steinglass, *supra* note 287, at 328.

292 *But see Ohio Says No to Monopolies: Now What?*, CITY CLUB CLEVELAND (Nov. 6, 2015), <https://www.cityclub.org/blog/2015/11/06/ohio-says-no-to-monopolies-now-what> (expressing concern that the amendment may just grant power to a different interest group: the Ballot Board, but noting that concerns are likely overstated).

Writing an op-ed supporting the initiative, state representatives remarked that “we are witnessing the hijacking of the citizen initiative process by certain rich special interests it is intended to thwart. Nationally, an entire industry has risen for the purpose of carving out portions of state constitutions for private gain.”<sup>293</sup> The referendum had been used in 2009 to grant a gambling monopoly to only four locations.<sup>294</sup> The issue was approved by only 53% of the popular vote after \$50 million was spent statewide on advertising.<sup>295</sup> Codifying these monopolies in the constitution is especially problematic because even simple changes, like moving one of the casinos, now requires a new constitutional amendment.<sup>296</sup>

Interestingly, the 2015 election presented a case study in the kind of monopoly power the amendment may work to prevent in the future. While the antimonopoly provision was Issue 2 on the ballot, Issue 3 on the same ballot would have actually granted a monopoly.<sup>297</sup> The proposal to legalize recreational and medical marijuana by granting ten companies monopoly power ultimately failed.<sup>298</sup>

The Ohio antimonopoly provision is clearly a response to the modern constitutional innovation of referendums and voter initiatives. Beyond that, the amendment demonstrates how the Founders, despite their antimonopoly spirit, underestimated the risk of special interest groups and crony capitalism.<sup>299</sup> The fact is that with monopoly profits on the line, corporations are willing to pay for signature collectors and advertisements.<sup>300</sup> Even if political power is vested in the many, only a few are needed to actually show up and pass a referendum. Thus, antimonopoly provisions like Ohio’s protect against the incentives for crony capitalism that can overpower a democratic institution.

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293 Mike Curtin & Ryan Smith, Opinion, *Reps: ‘Yes’ on Issue 2 Says ‘No’ to Monopolies*, CINCINNATI ENQUIRER (Oct. 25, 2015), <https://www.cincinnati.com/story/opinion/contributors/2015/10/25/repes-yes-issue-says-monopolies/74599860/>.

294 Jim DeBrosse, “Buckeye Democracy:” *Ohioans Can Amend Their Constitution by Going Directly to Voters*, SOAPBOX CINCINNATI (Apr. 30, 2019), <https://www.soapboxmedia.com/features/Civics-Essential-Ohio-Constitutional-amendments.aspx>.

295 *Id.* The amendment was largely promoted as a way to increase jobs and tax revenue—the monopolists have failed to deliver on these promises. *Id.*

296 *Id.*

297 *Ohio Votes Down Legalizing Pot, Passes Ban on Constitutional Monopolies*, WLWT5, <https://www.wlwt.com/article/ohio-votes-down-legalizing-pot-passes-ban-on-constitutional-monopolies/3559557> (Nov. 4, 2015).

298 *Id.* It is worth noting that the Ohio marijuana initiative was bankrolled and directed by the same man who spearheaded the 2009 casino initiative. Liz Essley Whyte, Ctr. For Pub. Integrity, *How an Ohio Ballot Measure Could Create a Marijuana Monopoly*, TIME (June 18, 2015), <https://time.com/3921751/ohio-marijuana-ballot-measure/>.

299 See *supra* note 34.

300 For a more detailed explanation of the problems of special interests and referendums, see Whyte, *supra* note 298.

## CONCLUSION

Current Supreme Court doctrine provides scant protection for economic liberty. This has allowed regulations such as occupational licensing regimes to run rampant and become a major impediment to economic growth. Further, such regulations put the state on the side of one economic actor over another. When Justice Brennan called state courts to action in 1977, it is doubtful that he wanted states to take up the cause of economic liberty. Yet this Note has demonstrated that many state constitutions are specifically written with economic protection in mind. The state antimonopoly provisions discussed in this Note provide one avenue to challenge regulations that are arbitrary, unreasonable, or just downright crony. The discussion in this Note, however, is only a starting point. There are countless other unique state constitutional provisions that can be utilized to provide greater economic liberty at the state level.

