

The IP Constitution: Private Power and State Power in IP Law

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In a recent article titled *The Antitrust Constitution*, Tom Nachbar has offered a powerful critique of contemporary antitrust law's almost exclusive economic orientation, whereby the courts evaluate the effect of business practices on economic efficiency to determine their legality. According to Nachbar, antitrust law's concern about harm to "competition" is better viewed as consisting of two distinct harms: the familiar "market harm", described and measured as a harm to efficiency, but also a "regulatory harm"-harm to the freedom of choice felt by those participating in the market. As such, "antitrust is of a piece with a much larger body of law that governs the proper exercise of regulatory authority, a body of law more closely associated with constitutional theory than economic theory. Although it does protect against harms to efficiency, antitrust also protects interests similar to those protected by the public/private distinction in constitutional law. Not merely a rule of economic regulation, antitrust is a rule against private regulation." This paper will discuss a similarly neglected aspect of IP law, and will show how different features of copyright and patent law can be better understood when the constitutional role of maintaining distinctions between public and private power are accounted for. One such feature is the frequent use of the term "monopoly" in copyright and patent case law, the use of which has generated considerable confusion, because it can be used to describe the grant of various commercial and industrial privileges to individuals or companies - the constitutional sense - as well as the control of markets in the sense used by modern antitrust lawyers and economists. The paper will show how many cases, the reasoning of which seems wanting from an economic perspective, become more compelling when considering the constitutional perspective. Other examples will include questions of copyrightable and patented subject matter, the scope of indirect liability, fair use, the first sale doctrine, and other exceptions. I will show how avoiding the extension of IP owners' regulatory powers over other activities has played a part in the development of such doctrines.

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