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HOW CHIEF JUSTICE WHITE HAMPERED DEVELOPMENT OF LIMITING PRINCIPLES FOR SECTION 2 OF THE SHERMAN ACT AND WHAT CAN BE DONE ABOUT IT NOW

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The Sherman Act is a cornerstone of U.S. economic policy.[1] As the Supreme Court noted, it "has a generality and adaptability comparable to that found to be desirable in constitutional provisions,"[2] which "compelled the courts to work out its meaning from case to case."[3] Section 1 prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of [U.S.] trade or commerce."[4] Section 2 declares it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of" U.S. trade or commerce.[5]

The first judicial review of a Section 2 claim began with the observation that: "It is not very clear what [C]ongress meant."[6] It and other early Section 2 decisions found it necessary to identify limiting principles cabining the legal concept of "monopolization." The lower courts had made substantial progress before their efforts were undermined by Chief Justice Edward D. White, Jr.'s 1911 opinions in

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[1] "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972). "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958). "The Sherman Act is a Magna Charta among the statutes of the United States." ALBERT H. WALKER, HISTORY OF THE SHERMAN LAW OF THE UNITED STATES OF AMERICA, at iv (1910).

[2] Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360 (1936).

[3] United States v. Hutcheson, 312 U.S. 219, 230 (1941).

[4] Sherman Act, 15 U.S.C. § 1 (2012).

[5] 15 U.S.C. § 2 (2012).

[6] *In re* Greene, 52 F. 104, 115 (C.C.S.D. Ohio 1892) (This was the assessment of Judge Howell E. Jackson who was elevated to the Supreme Court just six months later).

American Tobacco[7] and *Standard Oil.*[8] This article documents how Chief Justice White set back the orderly development of Section 2 limiting principles in ways that the Supreme Court still has not fully corrected.

Part I compiles history relevant to identifying the evil Section 2 addresses and recounts its legislative history. Part II examines the meaning of the verb "to monopolize" when the Sherman Act was written, and recounts earliest judicial efforts to articulate limiting principles for Section 2. Part III reviews *American Tobacco* and *Standard Oil*, contrasting the interpretation of Section 2 in Chief Justice White's opinions with those of the lower courts, and documenting his impact on the articulation of Section 2 principles. Part IV sketches how the law could have developed differently. Part V concludes with suggestions for how 21st Century Section 2 decisions can complete the work begun in the 19th Century.

I. EVENTS LEADING TO SECTION 2 OF THE SHERMAN ACT

A. *Events Motivating Section 2 of the Sherman Act*[9]

John D. Rockefeller entered the infant oil business in 1865; he took on partners in 1867; and they incorporated Standard Oil Co. of Ohio in 1870.[10] In less than a decade, Standard Oil achieved a dominant market position[11] through superior efficiency and preferential freight rates negotiated with railroads.[12] An 1879 report by a special committee of the New York State Assembly first drew the public's attention to the terms Standard Oil had secured from railroads in New York and Pennsylvania.[13] Standard Oil was not just paying low rates,

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[7] United States v. Am. Tobacco Co., 221 U.S. 106 (1911).
[8] Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911).
[9] This subsection is an attempt to recreate what members of Congress would have known when the Sherman Act was written, relying mainly on sources that would have been readily available to them.
[10] GILBERT HOLLAND MONTAGUE, THE RISE AND PROGRESS OF THE STANDARD OIL COMPANY 1–7 (1903).
[11] *Id.* at 1, 12, 63.
[12] *Id.* at 10–65.
[13] REPORT OF THE SPECIAL COMMITTEE ON RAILROADS, APPOINTED UNDER A RESOLUTION OF THE ASSEMBLY TO INVESTIGATE ALLEGED ABUSES IN THE MANAGEMENT OF RAILROADS CHARTERED BY THE STATE OF NEW YORK 40–46 (N.Y. 1879) (Hepburn Report). The report found that: "The history of this corporation is a unique illustration of the possible outgrowth of the present system of railroad management, in giving preferential rates, and also showing the colossal

it also was receiving from the railroads a portion of what its rivals paid them to ship their oil.

Muckraking journalist Henry Demarest Lloyd asserted in 1881 that "the means by which [Standard Oil] achieved monopoly was by conspiracy with the railroads."[14] He claimed that the New York Central Railroad paid Standard Oil "rebates [of] millions of dollars, which have enabled it to crush out all competitors."[15] And he charged that the Pennsylvania Railroad's discriminatory rates and rebates resulted in a "heavy profit" for Standard Oil on every barrel of oil it shipped and a "heavy loss" for its competitors on every barrel they shipped.[16]

The foregoing preceded the January 2, 1882 formation of the Standard Oil Trust, from which we got the word "antitrust." The shares of nearly forty separate corporations were placed under the control of nine trustees empowered to operate the companies as a cartel.[17] A few other trusts on the same model were formed, notably in sugar and whiskey, and many other from industrial combinations arose as well.[18] The word "trust" soon was "popularly applied to all methods of

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proportions to which monopoly can grow under the laws of this country." *Id.* at 40–41. Evidence compiled in the investigation was summarized by John C. Walsh, *The Standard Oil Company*, 136 N. AM. REV. 191 (1883).

[14] H.D. Lloyd, *Story of a Great Monopoly*, 47 ATLANTIC MONTHLY 317, 322 (1881); *see also* HENRY DEMAREST LLOYD, WEALTH AGAINST COMMONWEALTH (1894) (later book on Standard Oil). This conspiracy theory has supporters: Benjamin Klein, *The Hub-and-Spoke Conspiracy That Created the Standard Oil Monopoly*, 85 S. CAL. L. REV. 459 (2012); Elizabeth Granitz & Benjamin Klein, *Monopolization by "Raising Rivals' Costs": The Standard Oil Case*, 39 J.L. & ECON. 1 (1996).

[15] Lloyd, *supra* note 14, at 323.

[16] *Id.* at 325.

[17] RALPH W. HIDY & MURIEL E. HIDY, PIONEERING IN BIG BUSINESS, 1882–1911: HISTORY OF THE STANDARD OIL COMPANY (NEW JERSEY) 40–49 (1955). The cartel was imperfect as it held only a minority stake in some companies. The Standard Oil Trust was reorganized as a holding company in 1892. *Id.* at 219–32. The Supreme Court of Ohio precipitated the reorganization by ruling that the Standard Oil Co. of Ohio could not be controlled by a trust. State v. Standard Oil Co., 30 N.E. 279 (Ohio 1892). In 1899, the stock of all of the held companies was transferred to the Standard Oil Company of New Jersey. HIDY & HIDY, *supra*, at 306–13.

[18] ELIOT JONES, THE TRUST PROBLEM IN THE UNITED STATES 20–22 (1921) (detailing other trusts on the Standard Oil model); Luther Conant, Jr., *Industrial Consolidations in the United States*, 7 PUBL'NS AM. STAT. ASS'N 1, 2–3 (1901) (listing all 1880's consolidations by year). For a history of the trust movement and the response see Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 FORDHAM L. REV. 2279 (2013).

effecting a combination in trade."[19]

Exclusionary conduct by the "trusts" was a matter of concern to editorial writers by 1887. A legal publication asserted that a trust first "serves notice upon" a competitor that he must join or the trust "will destroy him," and if he refuses, the trust "proceeds to sell the commodity in his market and to his customers for less than he can afford to manufacture it for and for less than what its manufacture costs the 'trust.'"[20] And the *New York Times* charged that a trust "aims to obtain a monopoly in some branch of industry, and when its power has been sufficiently developed it becomes an oppressor and a tyrant, crushing weak competitors who do not accept its terms and excluding from its chosen field manufacturers and merchants who may desire to do an independent business in it."[21] The *Times* later declared that the "infamous methods of the Standard Oil Trust cannot be too severely denounced" and that its "history is full of iniquity."[22]

The *New York Times* also called for action: "The multiplication of great trade conspiracies called Trusts . . . sets before the people of this country a problem which, in defense of their rights, they must soon undertake to solve."[23] And trusts quickly became a significant political issue. President Grover Cleveland's annual message to Congress, delivered December 6, 1887, declared that "competition is too often strangled by combinations quite prevalent at this time, and frequently called trusts, which have for their object the regulation of the supply and price of commodities made and sold by members of the

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[19] WILLIAM W. COOK, "TRUSTS" THE RECENT COMBINATIONS IN TRADE 4 (1888). *See* CHARLES WHITING BAKER, MONOPOLIES AND THE PEOPLE 7 (1889) (The word "trust" was "rather loosely used to denote any combination formed for the purpose of restricting or killing competition."); E. Benjamin Andrews, *Trusts According to Official Investigations*, 3 Q.J. ECON. 117, 119 (1889) ("The most diverse species of joint undertakings are popularly stigmatized as 'trusts'. . . ."). By the turn of the 20th Century, the word "trust" also embraced "any corporation that is big enough to be menacing." John Bates Clark, *The Necessity of Restraining Monopolies while Retaining Trusts*, CHICAGO CONFERENCE ON TRUSTS 404 (Franklin H. Head, ed. 1899); *see* JEREMIAH WHIPPLE JENKS, THE TRUST PROBLEM 8 (rev. ed. 1903) ("'Trusts' are taken to mean manufacturing corporations with so great capital and power that they are at least thought by the public to have become a menace to their welfare, and to have, temporarily at least, considerable monopolistic power.").

[20] *The So-Called "Trusts,"* 21 AM. L. REV. 976, 976–77 (1887).

[21] *The People and the Trusts*, N.Y. TIMES, June 3, 1887, at 4.

[22] *The Oil Trust and the Knights*, N.Y. TIMES, Oct. 11, 1887, at 4.

[23] *"Trust" Conspiracies*, N.Y. TIMES, July 5, 1887, at 4; *see also The People and the Trusts*, *supra* note 21, at 4 ("The concentration of power by the creation of so-called Trusts presents a problem which will soon demand and receive the attention of courts and legislative bodies.").

combination."[24]

On January 25, 1888, the U.S. House of Representatives adopted a resolution directing its Committee on Manufacturers to investigate trusts.[25] In hearings on the sugar trust, a witness charged that: "The Standard Oil people will run its market down to nothing in one section of the country in order to break down and get control of that particular market, while in other sections they would be getting full profits."[26] The subsequent hearings on the Standard Oil Trust devoted much attention to Standard's preferential railroad rates and rebates, and the attendant harm to small refiners.[27]

The Committee's report on the hearings reproduced much of the trial record from recent cases involving charges of exclusionary conduct against the Standard Oil Trust.[28] In February 1886, Hiram B. Everest and his son Charles M. Everest, officers of Trust member Vacuum Oil Co., had been indicted for conspiring "to obtain, maintain, and continue a monopoly of the business of producing, refining, manufacturing, buying and selling petroleum."[29] The defendants were charged with furthering the Trust's interests by attempting to destroy the Buffalo Lubricating Oil Co.[30] The indictment specifically alleged that the defendants bribed a Buffalo Lubricating employee to sabotage its refinery so it "could not be successfully operated, but would blow

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[24] 19 CONG. REC. 1, 11 (1887). Written messages then fulfilled the requirement of U.S. Const., art. II, § 3, cl. 1, which now is fulfilled by the State of the Union Address (except at the outset of a presidential administration).

[25] 19 CONG. REC. 719–23 (1888).

[26] *Trusts*, H.R. REP. NO. 50-3112, at 63 (1888) (testimony of wholesale grocer Francis B. Thurber). Whether Standard Oil engaged predatory pricing under current standards is in dispute. A modern account based on original source material states that Standard Oil routinely priced *at cost* where it faced competition. RON CHERNOW, TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR. 258 (1998). Only below-cost pricing, however, is deemed predatory. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222 (1993). But below-cost pricing is precisely what the government argued Standard Oil had done. Brief for the United States, Vol. 1: Summary of the Facts and Brief of the Law at 351, Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911) (No. 10-398).

[27] *See The Standard Oil Trust*, H.R. REP. NO. 50-3112, at 116–265 (1888). Relying on this sort of evidence, prominent economist Richard T. Ely asserted that Standard Oil "obtained a monopoly through an alliance with the railroads of the country, and this gave it special freight rates which no one else could secure." RICHARD T. ELY, PROBLEMS OF TO-DAY: A DISCUSSION OF PROTECTIVE TARIFFS, TAXATION, AND MONOPOLIES 202 (3d ed. 1890).

[28] *The Standard Oil Trust*, H.R. REP. NO. 50-3112, at 801–951 (1888).

[29] *Id.* at 801 (text of indictment).

[30] *Id.* at 802, 867.

up and explode."[31] The refinery did not explode, but the defendants were convicted,[32] and their convictions were upheld on appeal.[33]

B. *The Legislative History of Section 2*

The Democratic Party platform for the 1888 election (adopted June 5) proclaimed: "Judged by Democratic principles, the interests of the people are betrayed when, by unnecessary taxation, trusts and combinations are permitted to exist, which, while unduly enriching the few that combine, rob the body of our citizens by depriving them of the benefits of natural competition."[34] The Republican Party platform (adopted June 19) more boldly declared the Party's "opposition to all combinations of capital, organized in trusts or otherwise, to control arbitrarily the condition of trade among our citizens."[35]

Benjamin Harrison was elected president on the latter platform, and his first annual message to Congress delivered December 3, 1889 included this plea:

> Earnest attention should be given by Congress to a consideration of the question how far the restraint of those combinations of capital commonly called "trusts" is a matter of Federal jurisdiction. When organized, as they often are, to crush out all healthy competition and to monopolize the production or sale of an article of commerce and general necessity, they are dangerous conspiracies against the public good, and should be made subject of prohibitory and even penal legislation.[36]

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[31] *Id.* at 802–03.

[32] *See A Standard Oil Conspiracy*, N.Y. TIMES, May 16, 1887, at 4. A damages suit against Standard Oil established the liability of a corporation for damages resulting from a conspiracy. *See* Buffalo Lubricating Oil Co. v. Standard Oil Co., 12 N.E. 825 (N.Y. 1887); *see also* CHARLES FISK BEACH SR., A TREATISE ON THE LAW OF MONOPOLIES AND INDUSTRIAL TRUSTS 235 (1898) (citing this as the "leading case on this subject").

[33] People v. Everest, 3 N.Y.S. 612, 617 (1889).

[34] Gerhard Peters & John T. Woolley, THE AMERICAN PRESIDENCY PROJECT, Democratic Party Platforms: 1888 Democratic Party Platform (June 5, 1888), *availible at* http://www.presidency.ucsb.edu/node/27318.

[35] Gerhard Peters & John T. Woolley, THE AMERICAN PRESIDENCY PROJECT, Republican Party Platforms: Republican Party Platfrom of 1888 (June 19, 1988), *available at* https://www.presidency.ucsb.edu/node/273311.

[36] 21 CONG. REC. 84, 87 (1889).

When the 51st Congress convened the next day, Senator John Sherman introduced S. 1 which would have prohibited "all arrangements . . . to prevent full and free competition."[37] In the floor debate on his bill, Sherman mentioned that trusts gained market dominance through predatory pricing,[38] and he cited Standard Oil's extraction of preferential rates and rebates from the railroads as a means of undermining its competitors.[39] But Sherman did not include anything like Section 2 in his bill.

After much floor debate, S. 1 was referred to the Judiciary Committee, which rewrote the bill, and reported it back on April 2 with a new Section 2. Senator Sherman grudgingly supported the Committee's version, declaring it "the best under all the circumstances that the Senate is prepared to give."[40] The Committee's versions of Sections 1 and 2 were enacted,[41] and history credits it's Chairman, George F. Edmunds, with authorship of both Section 2 and most of Section 1.[42] Section 2 was debated in the Senate on April 8, 1890,

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[37] S. 1, 51st Cong. (1889).

[38] 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman) (trusts "reduce prices in a particular locality and break down competition").

[39] *Id.* at 2457–58. Sherman cited *Handy v. Cleveland & Marietta R.R. Co.*, 31 F. 689, 692 (C.C.S.D. Ohio 1887), which indicated that one small refiner was charged 250% more for shipping than Standard Oil, with all of the difference paid to Standard Oil. Sherman also cited evidence of railroad rate discrimination by railroads from an investigation by a special master appointed by the Supreme Court of Pennsylvania. That evidence was included in the 1888 report of the House Committee on Manufacturers. *The Standard Oil Trust*, H.R. REP. NO. 50-3112, at 119–23 (1888). Based on this evidence, John D. Rockefeller and eight other individuals were indicted on April 20, 1879, with the state-law charges resembling those could later have been made under Section 2. An influential book on Standard Oil termed the resolution of the case "the compromise of 1880." IDA M. TARBELL, THE HISTORY OF THE STANDARD OIL COMPANY 239–62 (1904).

[40] 21 CONG. REC. 3145 (1890).

[41] *Compare* Sherman Act, 14 U.S.C. §§ 1–2 (2018), *with* S. 1, §§ 1–2, 21 CONG. REC. 2901, 3145 (1890).

[42] *See* WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICAN: THE EVOLUTION OF THE SHERMAN ACT 94 (1965); HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY 151, 210–13 (1954). Another Committee member, George F. Hoar, claimed credit thirteen years after the event. *See* 2 GEORGE F. HOAR, AUTOBIOGRAPHY OF SEVENTY YEARS 363–64 (1903); Letter from Hoar to Senator Joseph B. Foraker (May 28, 1903), *reprinted in* M.H. BRUMPHREY, AUTHORSHIP OF THE SHERMAN ANTI-TRUST LAW 2 (1912) (report by staffer Marvin Hale Brumphrey at the direction of Senator Foraker). This claim was repeated by WALKER, *supra* note 1, at 27–28. After reading Walker's book, Edmunds suggested that he inspect the Judiciary Committee's records. Doing so led Walker to credit Edmunds in two open letters. Letter to Senator Moses E. Clapp (July 21, 1911), *reprinted at* 47 CONG. REC. 3485–86 (1911); *Who Wrote the Sherman Law*,

when Chairman Edmunds and Committee member George F. Hoar responded to questions posed by fellow Senators.[43]

Senator John E. Kenna asked whether Section 2 criminalized success "by virtue of . . . superior skill."[44] Edmunds answered that it did not because that was not "monopoly" under the law.[45] Still unsure about what Section 2 prohibited, future Third Circuit judge, Senator George Gray, proposed an amendment that would have made Section 2 condemn only a "person who shall combine or conspire with any other person or persons to monopolize."[46] Hoar addressed Gray's uncertainty. He advised "that 'monopoly' is a technical term known to the common law . . . which has a clear and legal signification, and this is it: It is the sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him."[47] He asserted that a "monopoly" did not exist when "the whole business" in some field was obtained through "superior skill and intelligence."[48] As an example of what did constitute "monopoly," he cited control over "the whole business" in a field achieved through "the use of means which made it impossible for other persons to engage in fair competition," such as "buying up of all other persons engaged in the same business."[49]

Senator Kenna asked whether monopoly was prohibited at common law, and if so, why Section 2 was needed.[50] Hoar explained that Section 2 was needed "to extend the common-law principles, which protected fair competition in trade in old times in England."[51] Edmunds then read *Webster's* definitions of the verb "to monopolize":

> 1. To purchase or obtain possession of the whole of, as a commodity or goods in market, with the view to appropriate or control the exclusive sale of; as, to monopolize sugar or tea.

NEW YORK PRESS, Sept. 24, 1911, at 4, *reprinted in* 73 CENT. L. J. 257 (1911). Walker's attribution was supported by Francis E. Leupp, *The Father of the Anti-Trust Law*, 99 OUTLOOK 271, 274 (1911).

[43] The even briefer House debate consisted of a few comments by floor manager David B. Culberson when the House considered S. 1 as passed by the Senate. *See* 21 CONG. REC. 4090 (1890).

[44] 21 CONG. REC. 3151 (1890).

[45] *Id.* at 3151–52.

[46] *Id.* at 3152.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

> 2. To engross or obtain by any means the exclusive right of, especially the right of trading to any place, or with any country or district; as, to monopolize the India or Levant trade.[52]

Edmunds explained that the Judiciary Committee's members were in agreement that "if one person instead of two, by a combination" were to monopolize "it was just as offensive and injurious to the public interest as if two had combined to do it."[53] The last thing the Senate did before passing S. 1 was reject the Gray amendment, thus clearly opting to supplement the concerted conduct prohibition in Section 1 with a unilateral conduct prohibition in Section 2.

II. THE FIRST EFFORTS TO CRAFT LIMITING PRINCIPLES FOR SECTION 2

A. *The Meaning of the Verb "to Monopolize" in 1890*

Section 2 had no common law antecedent,[54] and Senator Edmund's relied on *Webster's* because the verb "to monopolize" had no technical meaning in law.[55] Before 1890, the Supreme Court had used the verb "to monopolize" in a handful of cases, always to mean to concentrate

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[52] *Id*. These definitions are found in CHAUNCEY A. GOODRICH & NOAH PORTER, DR. WEBSTER'S UNABRIDGED DICTIONARY OF ALL THE WORDS IN THE ENGLISH LANGUAGE 855 (1864).

[53] 21 CONG. REC. 3152 (1890) (statement by Sen. Edmunds). Most commentary citing the Section 2 debate for the meaning of its text is over a century old. *See* WALKER, *supra* note 1, at 27–28; Edward A. Adler, *Monopolizing at Common Law and under Section Two of the Sherman Act*, 31 HARV. L. REV. 246, 247–51 (1917). After reviewing highlights from the debate, Professor Hovenkamp much more recently concluded that: "The only thing that seems clear is that the monopolizing offense refers to someone who acquires or attempts to acquire all of the business in the market, and that this acquisition could not be the result of superior skill or industry." Herbert Hovenkamp, *The Monopolization Offense*, 61 OHIO ST. L.J. 1035, 1035–36 (2000). The Supreme Court only once cited the Section 2 debate to inform the meaning of the text but drew no conclusions. *See* United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 390–91 & n.15 (1956).

[54] *See* William F. Dana, *"Monopoly" under the National Anti-Trust Act*, 7 HARV. L. REV. 338, 342 (1894) ("*at common law*, there was no such offence as 'monopolizing'").

[55] No law dictionary contemporary with the Sherman Act defined the verb "to monopolize." *See* WILLIAM C. ANDERSON, A DICTIONARY OF LAW (1889); HENRY CAMPBELL BLACK, A DICTIONARY OF LAW (1891); J. KENDRICK KINNEY, A LAW DICTIONARY AND GLOSSARY (1893); STEWART RAPALJE & ROBERT L. LAWRENCE, A DICTIONARY OF AMERICAN AND ENGLISH LAW (1888).

control over property, privilege, or power.[56] Similar usage of the word appears in decisions of the old circuit courts.[57] Many decisions aptly described the effect of a patent, trademark, or copyright using the verb "to monopolize."[58] The Corpus of Historical American English (COHA) records 89 examples of "to monopolize" during the period 1860–89.[59] They divide in roughly equal numbers between usages with and without reference to commerce.

1880s circuit court decisions used the verb "to monopolize" in describing how powerful railroads harmed the public. A decision enjoining discriminatory railroad rates based on volume opined that the discrimination could "extinguish all petty competition, monopolize business, and dictate the price of coals and every other commodity to consumers."[60] A decision enjoining a railroad's discrimination among customers in service sought to deny the railroad the power to "exterminate or very materially cripple competition, and in large measure monopolize and control these several branches of useful commerce, and dictate such terms as avarice may suggest."[61] In a third case, a railroad had organized an express company and the court enjoined the termination of its long-standing arrangement with another express company, observing that railroads, if unchecked, could "monopolize the business, and dictate oppressive rates, while affording less safety, celerity and convenience to customers."[62]

State courts used the verb "to monopolize" much as federal courts,

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[56] *See* Cowell v. Springs Co., 100 U.S. 55, 59 (1879); United States v. Mayor, Alderman, & Inhabitants of Cities of Phila. & New Orleans, 52 U.S. (11 How.) 609, 650 (1850); Wheaton v. Peters, 33 U.S. 591, 613 (1834); Pennock v. Dialogue, 27 U.S. (2 Pet.) 1, 23 (1829).

[57] *See, e.g.*, Louisville & Nashville R.R. Co. v. Railroad Comm'n of Tenn., 19 F. 679, 689 (C.C.M.D. Tenn. 1884); Adams Express Co. v. Denver & Rio Grande Ry. Co., 16 F. 712, 713 (C.C.D. Colo. 1883); McCoy v. Cincinnati, Indianapolis, St. Louis & Chi. R.R. Co., 13 F. 3, 6 (C.C.S.D. Ohio 1882); United States v. Kochersperger, 26 F. Cas. 803, 809 (C.C.E.D. Pa. 1860).

[58] *See, e.g.*, Yale Lock Mfg. Co. v. Berkshire Nat'l Bank, 17 F. 531, 532 (C.C.D. Mass. 1883) (patent); Hubbell v. De Land, 14 F. 471, 472 (C.C.E.D. Wisc. 1882) (patent); Burton v. Stratton, 12 F. 696, 699 (C.C.E.D. Mich. 1882) (trademark); Root v. Lamb, 7 F. 222, 226 (C.C.D. Mass. 1881) (patent); Wooster v. Calhoun, 30 F. Cas. 610, 611 (C.C.S.D. N.Y. 1873) (patent); Webb v. Powers, 29 F. Cas. 511, 517 (C.C.D. Mass. 1847) (copyright).

[59] COHA contains more than 400 million words from over 100,000 texts from 1810 to the present. Corpus of Historical American English, https://corpus.byu.edu/coha.

[60] John Hays & Co. v. Pa. Co., 12 F. 309, 314 (C.C.N.D. Ohio 1882).

[61] Coe v. Louisville & Nashville R.R. Co., 3 F. 775, 779 (C.C.M.D. Tenn. 1880).

[62] Dinsmore v. Louisville, Cincinnati & Lexington Ry. Co., 2 F. 465, 471 (C.C.D. Ky. 1880).

most often referring to actions that concentrated control over property, privilege, or power,[63] and sometimes in the closely related sense of physically occupying property in a manner denying its use to others.[64] Just a few decisions used the word in relation to competition.[65] Two 1889 decisions are illustrative, and Senator Sherman quoted both in his March 21, 1890 floor speech in support of his bill.[66] The Supreme Court of Michigan refused to enforce a contract entered into by officers of the Diamond Match Co. as part of an "odious" scheme.[67] The company had been organized "to monopolize and control the business of making all the friction matches in the country."[68] The Supreme Court of Illinois held that Chicago Gas Trust Co. could not lawfully hold stock (all majority interests) in the four gas companies serving Chicago.[69] The court declared that the company "intended to bring the four companies under its control, and, by crushing out competition, to monopolize the gas business in Chicago."[70]

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[63] *See, e.g.*, Bailly v. Nashawannuck Mfg. Co., 10 N.Y.S. 224, 224 (1890); Melendy v. Barbour, 78 Va. 544, 557 (1884); Commonwealth v. Bearse, 132 Mass. 542, 551 (1882); Drake v. Rogers, 13 Ohio St. 21, 37 (1861); Herman v. State, 8 Ind. 545, 549 (1855); Harris v. Tysons, 24 Pa. 347, 362 (1855).

[64] *See, e.g.*, A.C. Conn Co. v. Little Suamico Lumber & Mfg. Co., 43 N.W. 660, 663 (Wisc. 1889); Newell v. Minneapolis, L. & M. Ry. Co., 27 N.W. 839, 840 (Minn. 1886); Buchanan v. Grand River Log Co., 12 N.W. 490, 492 (Mich. 1882); Stetson v. City of Bangor, 60 Me. 313, 320 (1872); Atl. & Pac. R.R. Co. v. City of St. Louis, 66 Mo. 228, 235 (1877).

[65] *See, e.g.*, Goodman v. Henderson, 58 Ga. 567, 570 (Ga. 1877); Craft v. McConoughy, 79 Ill. 346, 349 (Ill. 1875); Stewart v. Erie & W. Transp. Co., 17 Minn. 372, 397 (Minn. 1871); People v. N. River Sugar Refining Co., 3 N.Y.S. 401, 412 (N.Y. Civ. Ct. 1889); Leslie v. Lorillard, 18 N.E. 363, 366 (N.Y. 1888); Barnard v. Roane Iron Co., 2 S.W. 21, 24 (Tenn. 1886); Murray v. Buell, 41 N.W. 1010, 1012 (Wis. 1889).

[66] 21 CONG. REC. 2458–59 (1890) (statement by Sen. Sherman).

[67] Richardson v. Buhl, 43 N.W. 1102, 1110 (Mich. 1889). Russell A. Alger, a rival of Sherman for the 1888 Republican presidential nomination, was a defendant. Sherman believed that improper conduct by his supporters and others had denied him the nomination. *See* 2 JOHN SHERMAN, JOHN SHERMAN'S RECOLLECTIONS OF FORTY YEARS IN THE HOUSE, SENATE AND CABINET 1029–30 (1895).

[68] Richardson, 43 N.W. at 1102.

[69] People *ex rel.* Peabody v. Chicago Gas Tr. Co., 22 N.E. 798, 801 (Ill. 1889).

[70] *Id.* at 802. A few years later, the Supreme Court of Iowa refused to enforce a contract through which grocers in Storm Lake ceded the butter trade to a single firm. Chaplin v. Brown, 48 N.W. 1074, 1075 (Iowa 1891). That firm sought damages for a breach by one of those grocers. *Id.* The contract was deemed unenforceable as "against public policy" because it "plainly tends to monopolize butter trade at Storm Lake, and destroy competition in the business." *Id.* at 1075.

B. *The Early Articulations of Limiting Principles for Section 2*

The first judicial interpretation of Section 2 came very quickly in a case that did not arise under the Sherman Act.[71] American Biscuit and Manufacturing Co. (now Nabisco, known for Oreos and Ritz Crackers), acquired thirty-five cookie and cracker bakeries, including one from the defendant, who refused to cede possession and wanted the sale rescinded.[72] American Biscuit sought appointment of a receiver, but was rebuffed by the court on the basis that the Sherman Act clouded the legitimacy of the sale and of American Biscuit's entire business.[73] The court opined that "the word 'monopolize'" meant "'to aggregate' or 'concentrate' in the hands of few" and commented that "the evil" to which Section 2 was directed was "the hindrance and oppression in trade and commerce wrought by its absorption in the hands of the few."[74]

The most extensive early interpretation of Section 2 came in a challenge to an indictment of individuals involved with the whiskey trust.[75] The 1892 decision granted the habeas corpus petition of Louis H. Greene.[76] He was charged with violations of Section 1 and Section 2, and the Section 2 allegation was an attempt to monopolize based on the use of sales contracts with rebates conditioned on the purchaser not buying from any other supplier, and on not selling at less than specified list prices.[77] The court ordered the prisoner discharged after finding the indictment deficient.[78]

The court began its discussion of Section 2 by asserting that Congress did not "declare that, when the accumulation or control of property by legitimate means and lawful methods reached such magnitude or proportions as enabled the owner or owners to control the traffic therein . . . a criminal offense was committed by such owner or owners."[79] Relying on the legal definition of "monopoly" and the

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[71] Am. Biscuit & Mfg. Co. v. Klotz, 44 F. 721 (C.C.E.D. La. 1891).
[72] *Id.* at 723–24.
[73] *Id.*
[74] *Id.* at 724–25.
[75] *In re* Greene, 52 F. 104, 108 (C.C.S.D. Ohio 1892).
[76] *Id.* at 119. For related opinions involving other individual defendants in the same case, see *In re* Corning, 51 F. 205, 212 (N.D. Ohio 1892) (holding with little explanation that the indictment was "insufficient to make out the crime covered by" Section 2) and *In re* Terrell, 51 F. 213, 215 (C.C.S.D.N.Y. 1892) (concurring with the reasoning of *Corning*).
[77] *In re Greene*, 52 F. at 109–10.
[78] *Id.* at 119.
[79] *Id.* at 115.

second definition of "monopolize" read by Senator Edmunds in the April 8 Senate debate, the court perceived "two leading elements" to monopoly: "an exclusive right or privilege . . . and a restriction or restraint . . . which will operate to prevent the exercise of a right or liberty open to the public before the monopoly was secured."[80] The court concluded that an "'attempt to monopolize' . . . must be an attempt to secure or acquire an exclusive right . . . by means which prevent or restrain others from engaging therein."[81] The court evidently had in mind something like exclusive dealing, which denies others access to certain customers. The court emphatically held that the whiskey trust itself did not offend Section 2 by controlling three-quarters of production.[82] And the court held that the rebate scheme described in the indictment did not offend Section 2 because every purchaser was free to do as he pleased.[83]

The court was right to take guidance from the April 8 Senate debate but wrong to think it supported the court's crabbed view of Section 2.[84] The legal definition of monopoly was not directly relevant, and the first definition that Senator Edmunds read did not refer to an "exclusive right."[85] Nor was an exclusive right part of Senator Hoar's explanation that "monopoly" entailed "the use of means which made it impossible for other persons to engage in fair competition," such as "buying up of all other persons engaged in the same business."[86]

On a more productive track was an 1893 ruling on the sufficiency of a Sherman Act indictment returned against executives of National Cash Register Co. (NCR), charged with violating both Section 1 and Section 2 by conspiring with the object of driving rivals out of business.[87] The court initially noted that it could not "take the views or

[80] *Id.* at 116.
[81] *Id.*
[82] *Id.*
[83] *Id.* at 116–18.
[84] *Cf.* Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983). In this respect, the court relied on the debates in the manner seen as the vice of relying on legislative history for indications of legislators' intentions. Judge Wald attributed to her D.C. Circuit colleague Harold Leventhal the observation that citing legislative history can be like "looking over a crowd and picking out your friends." *Id.*
[85] *See supra* text accompanying note 52.
[86] 21 CONG. REC. 3152 (1890) (statement by Sen. Hoar). *See supra* text accompanying note 49.
[87] United States v. Patterson, 55 F. 605, 606 (C.C.D. Mass. 1893). The government argued that "to monopolize" meant "preventing" rivals from competing: "The evil

purposes expressed in debate as supplying the construction of statutes" but it could "gather from the debates in [C]ongress, as . . . from any other source, the history of the evil which the legislation was intended to remedy."[88] The court held that "it is not sufficient simply to allege a purpose to drive certain competitors out of the field by violence, annoyance, intimidation, or otherwise" if it is not alleged that result would be "engrossing or monopolizing or grasping the market."[89] On this basis, the court quashed all but the four counts of the indictment containing "allegations of an intent to engross, monopolize, and grasp, and of means clearly unlawful, and adapted to accomplish this intent."[90]

The first two Supreme Court decisions under the Sherman Act came in 1895 and 1897. The first addressed only what commerce was within the Act's scope.[91] The second construed Section 1 but not Section 2.[92] In doing so, the Court related the approach to statutory construction articulated in the NCR case. It declared that "debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body" because it is "impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it" and that "the only proper way to construe a legislative act is from the language used in the act, and upon occasion, by resort to the history of the times when it was passed."[93]

Much the same issue as in the whiskey trust case was presented in a private damages case decided in 1903. The defendant tobacco products manufacturer refused to sell products to the plaintiff on terms

is not the enlargement of one person's trade, but the destruction of the trade of all other persons in the same commodity." *Id.* at 611.

[88] *Id.* at 641.

[89] *Id.*

[90] *Id.*

[91] United States v. E.C. Knight Co., 156 U.S. 1 (1895).

[92] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 312, 343–55 (1897). In a dissent joined by three other justices, Justice Edward D. White argued for an interpretation grounded in the common law, under which only unreasonable restraints were prohibited.

[93] *Id.* at 318–19; *see* United States v. Union Pac. R.R. Co., 91 U.S. 72, 79 (1875) ("In construing an act of Congress, we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage. The act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it.").

that would allow him to make a profit unless he refrained from selling products of competing tobacco manufacturers.[94] The plaintiff argued that this constituted an attempt to monopolize in violation of Section 2.[95] The court took the view that "every sale . . . is a successful attempt to monopolize . . . . An attempt by each competitor to monopolize a part of interstate commerce is the very root of all competition," but that to read Section 2 to stifle competition itself "is unreasonable and inconsistent with the object and spirit of the law."[96] The court opined that the purpose of Section 2 was "to prevent the restriction of competition," not "to prohibit or to punish the customary and universal attempts of all manufacturers, merchants, and traders" to enlarge their trade while leaving "their competitors free to make successful endeavors of the same kind."[97] The court added that Section 2 did not prohibit conduct if its "main purpose and chief effect are to increase the trade and foster the business of those who" engage in it.[98]

The foregoing decisions identified the need for limiting principles for Section 2 then tried to articulate them. All of the decisions began with the insight that Section 2 should be read to prohibit only conduct that could be objectively viewed as improper, and most focused on whether the alleged conduct would improperly impair rivals' abilities to compete. The NCR decision additionally rejected charges that recited improper conduct but failed to explain how it would unduly concentrate the market.

The whiskey and tobacco decisions were the first attempts to articulate the key principle that winning business, even the lion's share of business, by offering a better bargain than rivals is lawful competition on the merits. The whiskey decision held that: "The promise of a rebate, as an inducement for exclusive trading certainly does not constitute an 'attempt to monopolize,' when the purchaser is left at liberty to buy where he pleases, and when all other sellers of the article are left unrestrained in offering the same, or greater, inducements."[99] The tobacco decision held that the conduct at issue did not violate Section 2 because it "evidenced nothing but the legitimate efforts of traders to secure for themselves as large a part of interstate trade as possible, while they left their competitors free to do the same."[100] In the absence of evidence to the contrary from the

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[94] Whitwell v. Cont'l Tobacco Co., 125 F. 454, 455–56 (8th Cir. 1903).
[95] *Id.* at 456.
[96] *Id.* at 462.
[97] *Id.* at 462–63.
[98] *Id.* at 463.
[99] *In re Greene*, 52 F. at 117.
[100] *Whitwell*, 125 F. at 462.

plaintiffs, both courts presumed that the defendants' rivals could successfully compete on the merits by making similar offers.

C. *The* Northern Securities *Decision*

By a bare majority, the Supreme Court's *Northern Securities* decision held that the merger of two competing railroads violated Section 1.[101] Comments on the meaning of Section 2 were included in the dissent written by Justice Oliver Wendell Holmes and joined by Chief Justice Melville Fuller, future Chief Justice Edward D. White, Jr., and Justice Rufus W. Peckham.[102] Holmes had published a short article on interpreting legal texts.[103] It argued that the task is not a matter of determining what the author meant, but rather of determining what the "words would mean in the mouth of a normal speaker of English."[104] With statutes, the article asserted: "We do not inquire what the legislature meant; we ask only what the statute means."[105] In *Northern Securities*, Holmes observed: "According to popular speech, every concern monopolizes whatever business it does . . . . Of course, the statute does not forbid that. It does not mean that all business must cease."[106]

Holmes read Section 1 to be co-extensive with common law and, argued that Section 2 was "more important as an aid to the construction of § 1 than it is on its own account. It shows that "whatever is criminal when done by way of combination is equally criminal if done by a single man."[107] He supported this view by asserting that Section 1

> was suggested by the trusts, the objection to which, as every one knows, was not the union of former competitors, but the sinister power exercised or supposed to be exercised by the combination in keeping rivals out of the business and ruining those who already were in. It was the ferocious extreme of competition with others, not the cessation of competition among the partners, that was the evil feared.[108]

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[101] N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904).
[102] *See Id.* at 406 (Holmes, J., dissenting).
[103] *See* Oliver W. Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1899).
[104] *Id.* at 417.
[105] *Id.* at 419.
[106] *N. Sec. Co.*, 193 U.S. at 406 (Holmes, J., dissenting).
[107] *Id.* at 404.
[108] *Id.* at 405.

Finally, he cited the provision of the Sherman Act giving injured parties the right to sue for damages,[109] and he asserted that this must refer to persons "who are injured in their attempt to compete with a trust."[110]

The upshot was that Holmes interpreted the Sherman Act to prohibit only the exclusionary conduct attributed to trusts, and not contracts, combinations, and conspiracies producing cartels:

> [I]n my opinion there is no attempt to monopolize, and what, as I have said, in my judgment amounts to the same thing, that there is no combination in restraint of trade, until something is done with the intent to exclude strangers to the combination from competing with it in some part of the business which it carries on.[111]

III. THE *STANDARD OIL* AND *AMERICAN TOBACCO* CASES

Edward D. White, Jr. was elevated to Chief Justice on December 19, 1910. In January he presided over seven days of argument in *American Tobacco* and *Standard Oil*, and he wrote the lengthy opinions the Court issued in May. In between, the Court issued eighteen other opinions that he authored. White could not have had much time to think and write about Section 2. Although his findings of Section 2 violations in the two cases arguably rested on sound limiting principles, he did not articulate them. And by not articulating any principles or acknowledging efforts by courts to do so, White effectively hit the reset button.

A. Standard Oil[112]

The *Standard Oil* case focused on the 1899 consolidation of the many companies in the Standard family into Standard Oil of New

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[109] Sherman Act, ch. 647, § 7, 26 Stat. 209, 210 (1890) (current version at 15 U.S.C. § 15(a) (2012)).
[110] *N. Sec. Co.*, 193 U.S. at 405.
[111] *Id.* at 409; *see also id.* at 408 (opining that Section 1 prohibited only agreements "formed for the purpose of excluding others from the field").
[112] United States v. Standard Oil Co. of N.J., 173 F. 177 (C.C.E.D. Mo. 1909), *aff'd*, 221 U.S. 1 (1911). A useful account of the case is provided by James May, *The Story of Standard Oil Co. v. United States*, *in* ANTITRUST STORIES 7 (Eleanor M. Fox & Daniel A. Crane eds., 2007).

Jersey. That company's charter was amended to give it vast new powers, including the power to hold shares in other companies, and its capital stock was increased by $100 million, then its stock was exchanged for the shares of the companies.[113] In November 1906, the Attorney General petitioned for dissolution of the consolidation, alleging that it violated Section 1 and Section 2 of the Sherman Act.

The defendants contended that this final consolidation did not really affect competition, but the trial court held that it allowed "the power . . . to fix the prices" to be "more easily and quickly exercised."[114] The court recited five categories of alleged anticompetitive conduct, including preferential railroad rates and predatory pricing, but declared that the "gist" of the alleged Section 2 violation was "the combination and conspiracy of the numerous defendants, many of them formerly competitors, to restrain trade and to monopolize that commerce."[115] In short, the consolidation itself was alleged to violate Section 2.

The trial court opined that every sale "evidences a successful attempt to monopolize" that small part of commerce but agreed with the defense that Section 2 was not violated "unless unlawful means are used."[116] The court held that Section 2 must be construed so "as to abate the mischief it was passed to destroy," and because the Sherman Act "was enacted, not to stifle, but to foster, competition, . . . legitimate competition, however successful, [is] not denounced by the law."[117] The court, thus, squarely held that "legitimate competition," i.e., competition on the merits, did not violate Section 2. But the court also held that "combination and conspiracy" were unlawful means of obtaining monopoly, so Section 2 was violated even without any of the "other unlawful means" alleged by the government.[118]

As provided by the law at the time,[119] Standard Oil appealed directly to the Supreme Court. The briefs occupied more than two thousand pages, and the case was argued over three days in March 1910, then reargued over four days in January 1911. Between those

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[113] *Standard Oil*, 173 F. at 182; Brief for Appellants, Vol. I–Law at 13–14, Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911) (No. 10-398).
[114] *Standard Oil*, 173 F. at 189.
[115] *Id.* at 190.
[116] *Id.* at 191.
[117] *Id.*
[118] *Id.* at 191–92.
[119] Expediting Act, ch. 544, § 2, 32 Stat. 823 (1903) (the right of direct Supreme Court appeal in government antitrust cases was eliminated by the Antitrust Procedures and Penalties Act of 1974, Pub. L. 93-528, § 5, 88 Stat. 1709 (1974)).

arguments, White was promoted to Chief Justice upon the death of Melville Fuller, and three new Justices took their seats on the Court. Chief Justice White's *Standard Oil* opinion remains a foundation stone of Section 1 law. In a 5-4 decision, *Trans-Missouri Freight Association* had held that Section 1 did not apply a rule of reason, with Justice White authoring a lengthy dissent.[120] In *Standard Oil*, however, Chief Justice White wrote for a nearly unanimous Court holding that Section 1 does apply a rule of reason.[121] The rule of reason is considered White's "single greatest legal contribution."[122]

White recited the rule that "debates may not be used as a means for interpreting a statute" and observed that the rule "is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law, that is, the history of the period when it was adopted."[123] He relied on the Senate debate for the proposition that both Section 1 and Section 2 were written in terms that "took their origin in the common law, and were also familiar in the law of this country prior to and at the time of the adoption of the" Sherman Act.[124] White was "guided by the principle that where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary."[125] On that basis, he read Section 1 to employ a rule of reason as did the common law.[126]

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[120] *See generally* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897). White's dissent cogently reviewed the common law and made the case for interpreting Section 1 to adopt its content. *See id.* at 343–56. The lucidity of the opinion places it is stark contrast to his turgid opinion in *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911).

[121] *Standard Oil.*, 221 U.S. at 61–62. Justice Harlan concurred in the judgment, but argued that the text of the statute and the Court's precedent both precluded adoption of the rule of reason. *Id.* at 86–105.

[122] THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 1087 (Kermit L. Hall et al. eds., 2d ed. 2005).

[123] *Standard Oil*, 221 U.S at 50.

[124] *Id.* at 50–51.

[125] *Id.* at 59.

[126] *Id.* at 60, 66. Restraints of trade were never indictable at common law; rather, the law merely declared unenforceable private contracts deemed contrary to public policy. English courts enforced many sorts of contracts that would were made unlawful by Section 1. *See* W. ARNOLD JOLLY, CONTRACTS IN RESTRAINT OF TRADE 41–55 (1900). In 1889 Chief Justice Fuller described U.S. common law on "contracts in restraint of trade" this way: "Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is, whether,

Chief Justice White followed a parallel path with Section 2. He asserted that "attempt to monopolize and monopolization," "at least in their rudimentary meaning, took their origin in the common law, and were also familiar in the law of this country prior to and at the time of the adoption of the [Sherman Act]."[127] He began with the common law meaning of "monopoly," which was a crown grant of exclusivity.[128] He then related "monopoly" to the offense of "engrossing,"[129] which once had been prohibited by English law governing middlemen:[130]

> Forestalling, ingrossing, and regrating was the offence of buying up large quantities of any article of commerce for the purpose of raising the price. The forestaller intercepted goods on their way to market and bought them up, so as to be able to command what price he chose when he got to the market. The ingrosser or regrator—for the two words had much the same meaning—was a person who, having bought goods wholesale, sold them again wholesale. This was regarded as a crime.[131]

White argued that "the principal wrong" of both monopoly and engrossing was "enhancement of the price," and

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under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is, or is not, unreasonable." Gibbs v. Consol. Gas Co. of Baltimore, 130 U.S. 396, 409 (1889). The Supreme Court relied on *Gibbs* in holding resale price maintenance contrary to public policy. *See* Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 406 (1911). Judge William Howard Taft restated the private welfare prong as the ancillary restraint doctrine. *See* United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899).

[127] *Standard Oil*, 221 U.S. at 51.

[128] *Id.* at 51–52.

[129] *Id.* at 52–53.

[130] These laws were repealed in 1844. 7 & 6 Vict., c. 24 (Eng. 1844). The repealing statute was read into the record of the S. 1 Senate debate at the request of Senator William M. Stewart, who had issues with Sherman's version of S. 1. 21 CONG. REC. 2,564–65 (1890). No reported state court decision after 1844 recognized a common-law offense of forestalling, engrossing, and regrating. An 1876 Missouri appeals court decision held that public policy no longer considered forestalling, engrossing, and regrating contrary to public policy. Koehler v. Feuerbacher, 2 Mo. App. 11, 14 (1876).

[131] JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 199 (London, Macmillan & Co. 1883). *See* Adler, *supra* note 53, at 251–57; Dana, *supra* note 54, at 343–47; Wendell Herbruck, *Forestalling, Regrating, and Engrossing*, 27 MICH. L. REV. 365 (1929).

> it came to pass that monopoly and engrossing were regarded as virtually one and the same thing. In other words, the prohibited act of engrossing, because of its inevitable accomplishment of one of the evils deemed to be engendered by monopoly, came to be referred to as being a monopoly or constituting an attempt to monopolize.[132]

Similar to Holmes' dissent in *Northern Securities*, which White joined,[133] he declared Section 2 to be a mere "supplement" to Section 1,[134] and asserted that any "ambiguity" about what Congress meant by "monopolize" "is readily dispelled in the light of the previous history of the law of restraint of trade."[135] To White, viewing Section 2 as "the complement of" Section 1 made obvious that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of [Section 2] have been committed, is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act and thus the public policy which its restrictions were obviously enacted to subserve.[136] He additionally observed that Section 2 contains no "direct prohibition against monopoly in the concrete."[137]

White saw "no cause to doubt the correctness of" the trial court's holding that the 1899 consolidation brought "about a perennial violation" of Section 2.[138] The "unification of power and control over petroleum and its products" resulting from the consolidation gave rise to a presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by new means of combination which were resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed.[139]

And this presumption was "made conclusive by considering" Standard Oil's conduct and its history.[140] White used the "numerous charges of wrongdoing" made by the government relevant "solely as

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[132] *Standard Oil*, 221 U.S. at 53. *See* William L. Letwin, *English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355, 368 (1954) (citing an English decision from 1685).
[133] *See supra* text accompanying notes 101–111.
[134] *Standard Oil*, 221 U.S. at 60.
[135] *Id.* at 61.
[136] *Id.* at 61–62.
[137] *Id.* at 62.
[138] *Id.* at 74.
[139] *Id.* at 75.
[140] *Id.*

an aid for discovering intent and purpose,"[141] and found the requisite anticompetitive intent in proof that Standard Oil had not pursued the "development of business power by usual methods," but rather acted "to drive others from the field and to exclude them from their right to trade."[142]

In articulating Section 2's meaning, White's only reference to limiting principles was a vague reference to "the rule of reason," but he said a bit more in upholding the lower court's holding that Standard Oil violated Section 2.[143] Much as the lower court, he characterized what Section 2 made unlawful as conduct designed "to drive others from the field and to exclude them from their right to trade" by employing something other than "normal methods" or "usual methods" of competition.[144] Thus, he condemned only conduct that impaired the abilities of rivals to compete through means that were not legitimate competition on the merits,[145] and this must be what he meant by the rule of reason under Section 2.[146]

B. American Tobacco

Two weeks after the Supreme Court decided *Standard Oil*, it decided *American Tobacco*.[147] American Tobacco Co. was formed in 1890 through the consolidation of companies accounting for about 95% of U.S. cigarette production, and it grew through what the government termed "ferocious" and "unfair trading methods" that drove rivals out of business or allowed American Tobacco to absorb them.[148] In a July 1907 petition, the Attorney General sought to break

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[141] *Id.* at 76.
[142] *Id.*
[143] *Id.* at 62, 74–77. We are left to speculate about why Chief Justice White did not explicitly articulate any limiting principles he applied because he left no papers for scholars to examine. *See* ALEXANDRA K. WIGDOR, THE PERSONAL PAPERS OF SUPREME COURT JUSTICES: A DESCRIPTIVE GUIDE, 221 (1986). White likely was concerned about taking the focus off of the rule of reason, and he might have been unable to forge consensus among the justices on the meaning of Section 2.
[144] *Standard Oil*, 221 U.S. at 75–76.
[145] *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 606, at 6–11 (rev. ed. 1996).
[146] *Standard Oil*, 221 U.S. at 62.
[147] United States v. Am. Tobacco Co., 221 U.S. 106 (1911).
[148] Brief for the United States at 130, 243, United States v. Am. Tobacco Co., 221 U.S. 106 (1911) (No. 10-118).

up the company. Four circuit court judges sat in the district court[149] and issued four separate opinions.[150] Three found a Section 1 violation. Just two of the four mentioned Section 2, and neither found a Section 2 violation.

Judge Walter Chadwick Noyes ruled for the government and began his Section 2 analysis by asking whether American Tobacco possessed what we now call monopoly power, and he found that it did.[151] He noted that American Tobacco accounted for at least 70% of U.S. production of six types of tobacco products and several tobacco-related products, such as the foil used in cigarette packages.[152] He noted that American Tobacco controlled "most of the well-established and popular brands" and that significant difficulties attended establishment of a new brand.[153] He found that American Tobacco could dictate prices both to tobacco farmers and to users of tobacco products.[154] But he nevertheless declined to hold American Tobacco in violation of Section 2 because he doubted that Section 2 condemned the mere possession of monopoly power and little in the record demonstrated "elements of oppression and coercion" by American Tobacco in achieving its dominance.[155]

Judge Henry G. Ward ruled against the government and began his analysis of Section 2 by stating that it "cannot be literally construed" because the Sherman Act would then "prohibit commerce altogether."[156] He opined that Section 2 "must be understood to prohibit monopolies or attempts to monopolize brought about . . . by preventing competition and preventing others from participating in it."[157] He found no proof of a Section 2 violation because American Tobacco and its codefendants merely "strove, as every business man

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[149] As in *Standard Oil*, the Attorney General invoked the Expediting Act, ch. 544, § 2, 32 Stat. 823 (1903) (the right of direct Supreme Court appeal in government antitrust cases was eliminated by the Antitrust Procedures and Penalties Act of 1974, Pub. L. 93-528, § 5, 88 Stat. 1709 (1974)), under which at least three circuit court judges heard the case in the trial court if the circuit had that many.
[150] United States v. Am. Tobacco Co., 164 F. 700 (C.C.S.D.N.Y. 1908).
[151] *Id.* at 719–20. Noyes had previously published scholarly works relating to the Sherman Act and later proposed trust legislation. WALTER CHADWICK NOYES, A TREATISE ON THE LAW OF INTERCORPORATE RELATIONS 546–88 (1902), Walter C. Noyes, *Possible Federal Trust Legislation*, 7 COLUM. L. REV. 93 (1907).
[152] *American Tobacco*, 164 F. at 719.
[153] *Id.*
[154] *Id.* at 720–21.
[155] *Id.* at 721–22.
[156] *Id.* at 727 (Ward, J., dissenting).
[157] *Id.*

strives, to increase their business, and that their great success is a natural growth resulting from industry, intelligence, and economy, doubtless largely helped by the volume of business done and the great capital at command."[158]

Both sides appealed to the Supreme Court, and the briefs were nearly as long as those in *Standard Oil*. The case was argued over four days in January 1910, and reargued over four days in January 1911. As with *Standard Oil*, Chief Justice White wrote the opinion for the nearly unanimous Court.[159] He found that the defendant's course of conduct violated both Section 1 and Section 2 without parsing what conduct violated which prohibition.[160]

White set out six findings establishing that American Tobacco's "dominion and control over the tobacco trade" was associated with "wrongful purpose and illegal combination" and therefore violated the Sherman Act.[161] Two seem relevant to Section 2: American Tobacco acted to "monopolize the trade in tobacco by means of trade conflicts designed to injure others, either by driving competitors out of the business or compelling them to become parties to a combination."[162] And American Tobacco made the "persistent expenditure of millions upon millions of dollars in buying out plants, not for the purpose of utilizing them, but in order to close them up and render them useless for the purposes of trade."[163] These findings suggest that American Tobacco was condemned under Section 2 for impairing the abilities of rivals to compete through methods that were not legitimate competition on the merits. Chief Justice White's *American Tobacco* opinion, however, avoided any affirmative statement on the meaning of Section 2.

C. *The Aftermath of* American Tobacco *and* Standard Oil

A 1912 ruling on the sufficiency of an indictment charging exclusionary conduct in violation of Section 2 took guidance on its meaning mainly from *Standard Oil*.[164] In setting aside the convictions

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[158] *Id.* at 728.

[159] United States v. Am. Tobacco Co., 221 U.S. 106, 142 (1911). Again, Justice Harlan concurred in the judgment but took issue with the rule of reason. *Id.* at 189–93.

[160] *Id.* at 183–84.

[161] *Id.* at 182–83.

[162] *Id.* at 182.

[163] *Id.* at 183.

[164] United States v. Patterson, 201 F. 697, 711–14 (S.D. Ohio 1912).

resulting from the ensuing trial, the Sixth Circuit's *Patterson* decision was written as if the Section 2 slate was clean.[165] The circuit court pronounced that: "The word 'monopolize' is used in [Section 2] in a legal and accurate sense. Its root idea is to exclude. To monopolize trade or commerce, or a part thereof, is to exclude persons therefrom. It is not, however, to exclude all persons."[166] The court declared that Section 2 "does not cover every monopolizing by the acts of individuals. A monopolizing by efficiency in producing and marketing a better and cheaper article than any one else is not within it."[167] The court explained:

> But, though but one competitor can make a sale, all competitors can enjoy the free opportunity of approaching each and every prospective purchaser on equal terms, with the chance of making a sale if he can persuade him to buy. For one competitor to exclude all or substantially all other competitors from such opportunity—i.e., drive them from the field of freely offering their goods, so as to have that field to himself—is to monopolize according to the legal and accurate sense of the word.[168]

These well-formed limiting principles might have borrowed from earlier lower court decisions, but none were cited because *Standard Oil* had undermined their authority.

During the quarter century following the Sixth Circuit's *Patterson* decision, the only important Section 2 case was *United States Steel*.[169] United States Steel was a huge holding company created in 1901. The lower court found that "there was no evidence that it attempted to crush its competitors or drive them out of the market" through localized price cutting or vertical restraints.[170] The Supreme Court affirmed judgment

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[165] Patterson v. United States, 222 F. 599 (6th Cir. 1915). Like the 1893 case of the same name, *see supra* text accompanying notes 87–90, this case involved allegations against National Cash Register Co. In this case, twenty-seven individuals were sentenced to terms of imprisonment averaging just under a year, but the convictions were overturned on appeal, and none were retried.

[166] *Id.* at 619.

[167] *Id.*

[168] *Id.* at 620–21.

[169] United States v. U.S. Steel Co., 251 U.S. 417 (1920).

[170] *Id.* at 440–41.

in the company's favor largely on the basis that the Sherman Act "does not make mere size an offense" but rather "requires overt acts."[171]

The 1941 district court decision in *Alcoa* relied on *United States Steel* for the proposition that an element of a Section 2 violation was the use of monopoly power "to keep out or with the purpose of keeping out competitors,—which keeping out is identical in significance and meaning with 'excluding.'"[172] The court additionally cited *Patterson* for the proposition that "in order to establish monopolization it must be shown that the accused excluded or attempted or by his conduct intended to exclude his competitor or competitors."[173]

Learned Hand's appellate decision in *Alcoa* took a more expansive view of Section 2's prohibitions.[174] His feeble limiting principle was that Section 2 was not violated when monopoly was "thrust upon" the defendant "by automatically operative economic forces."[175] He held that merely building capacity to keep up with demand did violate Section 2.[176] The following year, the Supreme Court endorsed passages from Hand's *Alcoa* opinion and applied his feeble limiting principle in observing that monopoly had not been "thrust upon" the defendant.[177]

The 1951 *Lorain Journal* decision held that a newspaper's efforts to "destroy threatened competition" violated Section 2, without articulating any standard.[178] The 1956 *Cellophane* decision read *Standard Oil* to hold that Section 2 "declared illegal" "acts bringing

[171] *Id.* at 451. Later Supreme Court decisions cast some doubt on this holding. *See* United States v. Griffith, 334 U.S. 100, 106–07, 110 n.10 (1948).

[172] United States v. Aluminum Co. of Am., 44 F. Supp. 97, 155 (S.D.N.Y. 1941).

[173] *Id.* at 157–58. The court viewed *Patterson* as authoritative because the Supreme Court recently had cited it. *Id.* at 158 (citing United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 225–26 (1940)). The Supreme Court, however, had not cited *Patterson* on Section 2 law.

[174] United States v. Aluminum Co. of Am., 148 F.2d 416, 429–31 (2d Cir. 1945). On direct appeal from the district court, the Supreme Court first postponed consideration of the case because four Justices disqualified themselves, leaving the Court without the quorum of six necessary to act. United States v. Aluminum Co. of Am., 320 U.S. 708 (1943). Congress then created a procedure for dealing with such cases. Act to amend the Expediting Act, ch. 239, 58 Stat. 272 (1944) (current version at 28 U.S.C. § 2109 (2012)). Three days later, the Supreme Court certified the case to the Second Circuit. *See* United States v. Aluminum Co. of Am., 322 U.S. 716 (1944).

[175] *Alcoa*, 148 F.2d at 429–30. *See* United States v. United Shoe Mach., 110 F. Supp. 295, 341–42 (D. Mass. 1953) (analyzing Section 2 law after *Alcoa*).

[176] *Alcoa*, 148 F.2d at 430–31.

[177] American Tobacco Co. v. United States, 328 U.S. 781, 786, 811–14 (1946).

[178] Lorain Journal Co. v. United States, 342 U.S. 143, 154 (1951).

the evils of" monopoly.[179] The Court observed that it had previously "left as an undecided possibility" the scenario in which monopoly was the lawful consequence of competition on the merits, and again left the issue undecided.[180] After *Cellophane*, Section 2 law was less clear than in had been before *Standard Oil*.

The Supreme Court began to clarify Section 2 law in 1966, borrowing from the government's brief in *Grinnell* the dictum that the offense of monopolization under Section 2 had "two elements: (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 historic accident."[181]

In 1985 the Supreme Court articulated the current understanding of Section 2. The Court held that Section 2 prohibits only conduct "fairly characterized as 'exclusionary' or 'anticompetitive' . . . or 'predatory.'"[182] And the Court quoted the leading treatise explaining that "'exclusionary' comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way."[183]

IV. HOW SECTION 2 LAW COULD HAVE DEVELOPED DIFFERENTLY

A. *Courts Could Have Relied on History*

Chief Justice White wrote in *Standard Oil* that the Court could glean the meaning of the Sherman Act from "the history of the period when" it was enacted,[184] but he elected not to examine that history.

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[179] United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 389 (1956) (citing Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 56, 60–62 (1911)).
[180] *Id.* at 390–91 (citing 21 CONG. REC. 3152 (1890) and *Alcoa*).
[181] United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966). The quoted passage was the first sentence in the argument section of government's brief, although with citations and a few words omitted. *See* Brief for the United States at 41, United States v. Grinnell Corp., 384 U.S. 563 (1966) (Nos. 73-77). The *Grinnell* dictum was endorsed in the Court's most recent Section 2 decision. Verizon Comm. Inc. v. Law Off. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).
[182] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602 (1985).
[183] *Id.* at 605 n.32 (quoting 3 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 626b, at 78 (1978)).
[184] *See supra* text accompanying note 123.

Nor had earlier Section 2 decisions endorsing reliance on history[185] investigated the relevant history in any depth. Holmes' dissent in *Northern Securities* correctly identified exclusionary conduct as the evil that inspired Section 2, although he was incorrect to think that the same evil animated Section 1.[186] Trusts were condemned as buying and selling cartels, harming both their suppliers and their customers.[187] This evil was directly addressed by Section 1's prohibition of "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint" of trade.[188]

The conduct for which Standard Oil had been condemned provided the best guide to what was unlawful exclusionary conduct rather than lawful competition on the merits. By juxtaposing the comments of Senators Edwards and Hoar with the conduct attributed to Standard Oil, courts could have drawn the rough contours of Section 2's prohibitions. Extracting rebates or discriminatory rates from railroads was exclusionary, but enjoying cost-justified rate differences was not. Predatory pricing was exclusionary, but not merely charging different prices depending on the degree of competition was not. And sabotaging a rival's factory was exclusionary without qualification. Chief Justice White had a unique opportunity to examine "the history of the period when" Section 2 was enacted because exclusionary conduct attributed to Standard Oil was chronicled in the government's Supreme Court brief.[189] In addition, the fledgling Bureau of

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[185] *See supra* text accompanying notes 88, 93.
[186] *See supra* text accompanying notes 107–10.
[187] As Senator Sherman put it, trusts "operate as a double-edged sword. They increase beyond reason the cost of necessaries of life and business, and they decrease the cost of raw material, the farm products of the country. They regulate prices at will, depress the price of what they buy and increase the price of what the sell." 21 CONG. REC. 2461 (1890) (quoting Senator James Z. George).
[188] Holmes incorrectly read the damages provision of the Sherman Act to provide a remedy only to victims of exclusionary conduct. Victims of cartels made unlawful by Section 1 were given the right to sue for damages, and the first reported decisions in such suits predated the *Northern Securities* decision. City of Atlanta v. Chattanooga Foundry & Pipe Co., 101 F. 900 (C.C.E.D. Tenn. 1900), *rev'd*, 127 F. 23 (6th Cir. 1903).
[189] The extensive briefing in the cases detailed many things, including the railroad rebates before 1882. *See* Brief for the United States, Vol. 2: Detailed Statement of Facts at 159–96, Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911) (No. 10-398); *see also* Brief for Appellants, Vol. II–Facts at 42–59 (Standard Oil's view of the history), Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911) (No. 10-398).

Corporations had documented the history in lengthy reports available to the Court.[190]

B. *Courts Could Have Relied on Scholarship*

The earliest Section 2 decisions could not have drawn on legal and economic literature. Economists, in particular, were disengaged from the public discussion that led up to the Sherman Act.[191] And during the Act's first decade, economists' contribution to the literature on antitrust was mainly to condemn the Sherman Act. Richard T. Ely argued that the Act "has produced harm and can produce nothing but harm."[192] He found that its effect had been to "increase centralization and to strengthen monopoly"; by outlawing trusts and less formal attempts to cartelize, the Sherman Act had led to a great wave of

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[190] *See, e.g.*, U.S. BUREAU OF CORPORATIONS, REPORT OF THE COMMISSIONER OF CORPORATIONS ON THE PETROLEUM INDUSTRY, PART I: POSITION OF THE STANDARD OIL COMPANY IN THE PETROLEUM INDUSTRY 24 (1907) ("The fact can not be too strongly emphasized that the corner stone of the Standard Oil Company's power to-day was contributed by the railroads in the form of the enormous rate concessions given that company at the beginning of its career."); U.S. BUREAU OF CORPORATIONS, REPORT OF THE COMMISSIONER OF CORPORATIONS ON THE PETROLEUM INDUSTRY, PART II: PRICES AND PROFITS 39 (1907) ("The evidence is, in fact, absolutely conclusive that the Standard Oil Company charges altogether excessive prices where it meets no competition, . . . and that, on the other hand, where competition is active, it frequently cuts price to a point which leaves even the Standard little or no profit, and which more often leaves no profit to the competitor, whose costs are ordinarily somewhat higher.").

[191] "A careful student of the history of economics would have searched long and hard, on July 2 of 1890, the day the Sherman Act was signed by President Harrison, for any economist who had ever recommended the policy of actively combatting collusion or monopolization in the economy at large." George J. Stigler, *The Economists and the Problem of Monopoly*, 72 AM. ECON. REV. (PAPERS & PROC.) 1, 3 (1982). The leading British economist in the field, Cambridge professor Alfred Marshall, commented in 1890 that Section 2 was "perhaps intended to be the expression of a sentiment that may help to guide public opinion, rather than an enactment which will bear much direct fruit." Alfred Marshall, *Some Aspects of Competition*, 53 J. ROYAL STAT. SOC'Y 612, 628 (1890). A review of pre-Sherman Act economists' writings on trusts is provided by Sanford D. Gordon, *Attitudes of Economists Toward Industrial Combinations in the Decade Preceding Passage of the Sherman Act*, 2 ECON. INQUIRY 24 (1963).

[192] Richard T. Ely, *The Nature and Significance of Monopolies and Trusts*, 10 INT'L J. ETHICS 273, 283 (1900). The Sherman Act also got no respect from economists early in the 20th Century. Harvard professor Frank W. Taussig called it "slap-dash legislation." F.W. Taussig, *What Next?*, *in* PROCEEDINGS OF THE NATIONAL CONFERENCE ON TRUSTS AND COMBINATIONS 374, 379 (National Civic Federation 1908).

mergers.[193] The situation changed substantially by the time *American Tobacco* and *Standard Oil* were decided by the Supreme Court, but neither government briefs nor Supreme Court opinions in antitrust cases had begun to cite scholarship, and there is scant evidence that it was consulted.[194] Nevertheless, Justice Holmes observed in his *Northern Securities* dissent that "at times judges need for their work the training of economists,"[195] and Holmes corresponded regularly with Richard T. Ely.[196]

During the first quarter century of antitrust in the United States, John Bates Clark "wrote more extensively on the trust problem than did any other contemporary economist."[197] His early writings on trusts argued that a direct attack on them was unnecessary because potential competition would keep them in check.[198] He then became the "leader of the school which thought that banning unfair competition was all that was needed to make potential competition effective."[199]

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[193] RICHARD T. ELY, MONOPOLIES AND TRUSTS 240–46 (1900). By 1900 all trusts on the *Standard Oil* model were long gone. "In their place manufacturers in a great variety of industries [were] taking or ha[d] taken the final step of actual consolidation." CHARLES WHITING BAKER, MONOPOLIES AND THE PEOPLE 269 (3d ed. 1899). On average, 301 firms per year disappeared through merger during 1895–1904, with a peak of 1208 in 1899. RALPH L. NELSON, MERGER MOVEMENTS IN AMERICAN HISTORY 1895–1956, at 37 (1959).

[194] Correspondence between Ely and Holmes indicates that Justice Joseph McKenna likely consulted Ely's book *Monopolies and Trusts*, *supra* note 193, in writing the Court's opinion in *National Cotton Oil Co. v. Texas*, 197 U.S. 115 (1905), and that Holmes later read the book. *See* Benjamin G. Rader & Barbara K. Rader, *The Ely–Holmes Friendship, 1901–1914*, 10 AM. J. LEGAL HIST. 128, 138–40 (1966).

[195] N. Sec. Co. v. United States, 193 U.S. 197, 401 (1904).

[196] *See* Rader & Rader, *supra* note 194.

[197] Benjamin J. Klebaner, *Trusts and Competition: A Note on John Bates Clark and John Maurice Clark*, 29 SOC. RES. 475, 475 (1962).

[198] John Bates Clark, *The "Trust": A New Agent for Doing an Old Work: Or Freedom Doing the Work of Monopoly*, 52 N. ENGLANDER & YALE REV. 223, 225–26 (1890) ("potential or latent competition" serves as a "check on the extortions" of trusts); John Bates Clark, *Capital and its Earnings*, PUBLICATIONS AM. ECON. ASS'N, May 1888, at 9, 63 ("a very effective competition survives the formation of these seeming monopolies").

[199] Benjamin J. Klebaner, *Potential Competition and the American Antitrust Legislation of 1914*, 38 BUS. HIST. REV. 163, 172 (1964). One member of this school was Attorney General Philander C. Knox, who espoused Clark's position in reply to an inquiry from Senator Hoar on antitrust issues. REPLY OF THE ATTORNEY-GENERAL DATED JANUARY 3, 1903, TO A COMMUNICATION DATED DECEMBER 20, 1902, FROM THE HON. GEORGE F. HOAR, CHAIRMAN OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, S. DOC. NO. 57-73 (1903). Knox argued that "a monopoly in any industry would be impossible in this

Beginning in 1899, Clark contended that trusts posed a danger because their exclusionary practices stifled the competition that otherwise could keep them in check. He identified three practices of serious concern: discriminatory freight rates of railroads; predatory pricing localized to particular products or places but financed by sales of other products or in other places; and vertical restraints hampering rivals' distribution.[200] The first two practices were attributed to Standard Oil before 1890, and the third was used later and in other sorts of industries.[201]

Clark's early writings found no merit in antitrust legislation, but, in a 1904 lecture, he declared:

> It is possible to suggest laws, which, if made and enforced, would take the monopolistic character out of the trust while leaving unimpaired its great power of production. That policy would leave it in a condition to make things cheaply, export them freely and give us a certain dominance in the markets of the world; but it would take away the power to drive competition out of the field.[202]

Clark influentially advocated new legislation between 1910 and 1914,[203] when the Clayton Act[204] and Federal Trade Commission

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country . . . if competition were assured of a fair and open field and protected against unfair, artificial, and discriminating practices." *Id.* at 16.

[200] *See, e.g.*, JOHN BATES CLARK, THE CONTROL OF TRUSTS: AN ARGUMENT IN FAVOR OF CURBING THE POWER OF MONOPOLY BY A NATURAL METHOD 12–14, 33–34 (1901); John Bates Clark, *The Real Dangers of the Trusts with Some Suggestions as to Remedies*, 68 CENTURY MAG. 954, 957 (1904); John Bates Clark, *Trusts*, 15 POL. SCI. Q. 181, 190–92 (1900); Clark, *supra* note 19, at 404, 408–09. Clark's most complete statement on the issue was JOHN BATES CLARK & JOHN MAURICE CLARK, THE CONTROL OF TRUSTS 71–127 (1912).

[201] Clark specifically referred to "factors' agreements," which made a distributor or retailer the agent or "factor" of the manufacturer and contained provisions controlling prices, rewarding loyalty, and punishing disloyalty. The text of some actual factors' agreements, including some used by the American Tobacco Co. and Dr. Miles Medical Co., are provided by WILLIAM S. STEVENS, INDUSTRIAL COMBINATIONS AND TRUSTS 118–59 (1913). Only one of the agreements reproduced by Stevens pre-dated the Sherman Act.

[202] JOHN BATES CLARK, THE PROBLEM OF MONOPOLY: A STUDY OF A GRAVE DANGER AND OF THE NATURAL MODE OF AVERTING IT 29 (1904).

[203] *See* Luca Fiorito, *When Economics Faces the Economy: John Bates Clark and the 1914 Antitrust Legislation*, 25 REV. POL. ECON. 139 (2013).

[204] Clayton Act, ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53 (2012)).

Act[205] became law.

Early in the 20th Century, the writings of John Bates Clark could have supplemented the historical material available to the courts and clarified the nature of the unilateral conduct threatening the competitive process. For the most part, this was conduct had been attributed to Standard Oil. But distribution contracts, akin to those at issue in the whiskey trust and tobacco cases, came to prominence after 1890, and also were seen to threaten the competitive process.

Legal commentary on Section 2 began to appear while *American Tobacco* and *Standard Oil* were pending at the Supreme Court. A law review article argued that the "term 'to monopolize'" applied only when "control of commerce was concentrated to such an extent as to put an end to reasonably competitive conditions," which required control of at least "one-half of the commerce in an article."[206] A book argued that violating Section 2 entailed controlling "part of . . . commerce . . . by the aid of impediments placed . . . in the paths of . . . competitors."[207] When ex-Senator Edmunds was finally credited with Section 2's authorship, just after the *American Tobacco* decision, he explained that Section 2 had been "designed and framed to check and so far as possible, prevent" efforts "to crush out fair and useful competition, and so dominate and monopolize the industries and trade of the Republic."[208] And a 1913 treatise asserted that: "As used by the [Sherman Act,] the verb 'to monopolize' means to destroy reasonably competitive conditions in a branch of trade."[209]

C. *The Supreme Court Could Have Borrowed from Lower Court Decisions*

Before the *American Tobacco* and *Standard Oil* cases arrived at the Supreme Court, the makings of sound limiting principles for Section 2 could be found in lower court opinions. Had the Court freely borrowed from these readily available sources, it could have pieced together in 1911 roughly what it articulated much later.

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[205] Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (current version at 15 U.S.C. §§ 41–58 (2012)).

[206] Victor Morawetz, *The Supreme Court and the Anti-Trust Act*, 10 COLUM. L. REV. 687, 697–98 (1910).

[207] WALKER, *supra* note 1, at 58.

[208] George F. Edmunds, *The Interstate Trust and Commerce Act of 1890*, 194 N. AM. REV. 801, 815–16 (1911).

[209] W.W. THORNTON, A TREATISE ON THE SHERMAN ANTI-TRUST ACT 368–69 (1913).

The 1966 *Grinnell* dictum is that "to monopolize" in violation of Section 2 requires the acquisition or maintenance of monopoly power by means other than "a superior product, business acumen, or historic accident."[210] The monopoly power element had been hinted at in the 1893 National Cash Register case,[211] and the conduct element's critical limiting principle was well stated in the 1903 tobacco decision.[212] The 1985 *Aspen Skiing* standard is that Section 2 prohibits only conduct "fairly characterized" as "exclusionary" in that it is not competition on the merits and tends to exclude rivals.[213] The idea that only objectively exclusionary conduct violates Section 2 was hinted at by the 1892 whisky decision,[214] and it was the central rationale of the 1903 tobacco decision.[215]

The Supreme Court perhaps should not have been expected to cast a wide net in reviewing lower court decisions interpreting Section 2, but Chief Justice White's opinions did not even recount what the judgments under review in *American Tobacco* and *Standard Oil* had opined on the meaning of Section 2. The lower court decision in *Standard Oil* had squarely held that "legitimate competition," i.e., competition on the merits, did not violate Section 2.[216] One of the opinions in *American Tobacco* had admirably articulated the requisites of monopoly power,[217] and another usefully asserted the principle that Section 2 is violated only by "preventing competition and preventing others from participating in it."[218]

After Chief Justice White effectively dismissed the first two decades Section 2 jurisprudence, the lower courts reconstructed it. The 1915 *Patterson* decision defined the verb "to monopolize" and explained that Section 2 does not condemn success achieved through superior "efficiency in producing and marketing a better and cheaper article than anyone else" because Section 2 does not protect competitors, but rather the right to compete.[219] This idea was well stated, although not put into practice, in Learned Hand's *Alcoa*

[210] United States v. Grinnell Corp., 384 U.S. 563, 571 (1966).
[211] *See supra* text accompanying notes 87–90.
[212] *See supra* text accompanying notes 94–97.
[213] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602, 605 n.32 (1985).
[214] *See supra* text accompanying notes 75–83.
[215] *See supra* text accompanying notes 94–97.
[216] *See supra* text accompanying notes 116–18.
[217] *See supra* text accompanying notes 151–54.
[218] *See supra* text accompanying notes 156–58.
[219] *See supra* text accompanying notes 165–68.

opinion.[220] The Supreme Court never endorsed this limiting principle, and the Court's 1956 *Cellophane* decision explicitly declined to do so.[221]

Substantial insight into the meaning of Section 2 was free for the taking in lower court decisions, but the Supreme Court consistently declined to borrow from lower courts. The result was to leave Section 2 law undeveloped. The Court's failure to borrow from lower courts is particularly conspicuous in retrospect because the standards the Court eventually did articulate in 1966 and 1985 were borrowed, just not from lower courts.

V. CONCLUSION

In contrast to Section 1, Section 2 of the Sherman Act was not grounded in common law and therefore presented a puzzle.[222] The Supreme Court took nearly a century to articulate what Section 2 does and does not prohibit and still has not crystalized the limiting principles courts have groped for since 1891. The next time the Supreme Court considers Section 2, it could then undertake an intensive, historic examination akin to that of Justice Scalia's opinions in *Crawford*[223] and *Heller*.[224] Justice Gorsuch, who has proclaimed his textualist philosophy,[225] might be inspired by the opportunity, which modern technology has vastly simplified. Historical research that once

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[220] "A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that, although, the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: finis opus coronat. The successful competitor, having been urged to compete, must not be turned upon when he wins." United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945).

[221] United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956).

[222] Antitrust scholarship on the early cases elides these differences and slights Section 2. *See, e.g.*, Martin J. Sklar, *Sherman Antitrust Act Jurisprudence and Federal Policy-Making in the Formative Period, 1890–1914*, 35 N.Y. L. SCH. L. REV. 791, 817 (1990) (accepting the courts' treatment of the monopolization and attempt to monopolize offenses as "a subtype" of restraints of trade).

[223] Crawford v. Washington, 541 U.S. 36 (2004).

[224] District of Columbia v. Heller, 554 U.S. 570 (2008).

[225] *See* Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 909 (2016) ("assiduous focus on text, structure, and history is essential to the proper exercise of the judicial function").

took months now takes only hours or just minutes.[226]

A thorough review of the relevant history would make clear that Section 2 focuses on the character of the defendant's conduct and that Section 2 never prohibits competition on the merits. A firm's marketplace conduct is objectively competition on the merits when it advances the firm's interests in no way other than by reducing its cost or better serving its customers. Examples of conduct that invariably and unquestionably constitutes competition on the merits are investment in cost-reducing plant and equipment and the introduction of a genuinely new product. The Supreme Court can clarify Section 2 law by classing additional conduct as competition on the merits and by empowering the lower courts to do so.

In sharpest contrast to competition on the merits, a firm's conduct is inherently exclusionary when it advances the firm's interests in no way other than by impairing its rivals' abilities to compete or by depriving its rivals of opportunities to compete. Examples of inherently exclusionary conduct are a firm's efforts to get a supplier or distributor with which it does not do business to cease its dealings with a rival. Such conduct is inherently exclusionary both when the efforts involve the use of carrots and when the efforts involve the use of sticks. When inherently exclusionary conduct can materially contribute to maintaining a dominant market position or has a dangerous probability of creating a dominant market position, it violates Section 2. The Supreme Court can clarify Section 2 law by classing additional conduct as inherently exclusionary and by empowering the lower courts to do so.

Neither the text of the Sherman Act nor the history that led to it lends support for result-oriented standards. The legality of conduct under the Sherman Act should turn on the challenged conduct's impact on competition and not its impact on consumer welfare or any other bottom-line measure of market performance. An evaluation of the character of the conduct at issue often is much easier than an evaluation of its bottom-line effects, and that is what the Sherman Act called for.

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[226] In researching this article, the author took advantage of: AbeBooks (on-line access to inventories of used book dealers); Cornell University's Making of America Collection (19th Century serials); corpus.byu.edu (bodies of writings for determining how words and phrases were used); Gale Databases from CENAGE Learning (Supreme Court records and briefs, 1832–1978); HathiTrust Digital Library (over 15 million volumes); HeinOnLine (almost 12,500 legal classics, *Congressional Record*, over 2,400 law reviews); JSTOR (nearly 2,500 academic journals); ProQuest Congressional (federal legislative material); UNZ.org (many once popular serials).