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SHERMAN ANTITRUST ACT JURISPRUDENCE AND FEDERAL POLICY-MAKING IN THE FORMATIVE PERIOD, 1890-1914*

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By the late 1880s, it had become increasingly evident, and a commonplace at law, that liberty of contract neither implied nor yielded unfettered competition. The market activity of capitalists brought the two principles into growing conflict. Common-law doctrine, in upholding both liberty of contract and the right to compete, permitted reasonable restrictions of competition among contracting parties.

On its face, the Sherman Antitrust Act, in a manner similar to state antitrust laws, superseded the common law procedurally in two respects: (1) It made restraints of trade that were held to contravene public policy criminally illegal, as misdemeanors, punishable by the government. (2) It rendered such restraints liable to private, civil suits for treble damages.[1] The question remained whether the Sherman Act sustained or superseded the common law substantively, that is, whether or not it enacted the common-law distinction between reasonable and unreasonable restraint of trade in determining the validity or illegality of contracts, agreements, and combinations. The great debate over the meaning of the Sherman Act within the federal judiciary revolved around this question from 1890 until

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1. *Cf. In re* Greene, 52 F. 104, 111 (C.C.S.D. Oh. 1882).

> The act of July 2, 1890 . . . goes a step beyond the common law, in this: that contracts in restraint of trade, while unlawful, were not misdemeanors or indictable at common law. It adopts the common law in making combinations and conspiracies in restraint of . . . trade and commerce criminal offenses, and creates a new crime.

Id.; *see also* U.S. v. American Tobacco Co., 164 F. 700, 711 (C.C.S.D.N.Y. 1908); *Amendment of Sherman Antitrust Law: Hearings on S.6331 & S.6440 Before the Subcomm. of the Senate Comm. on the Judiciary*, 60th Cong., 1st Sess. (1908), in *Hearings Before the Subcomm. of the Comm. on the Judiciary, U.S. Senate, During 60th, 61st, 62nd Congress, Compiled for Consideration of H.R. 15657*, 63d Cong., 2d Sess. 330, 331 (1914) (memorandum of Herbert Knox Smith, Commissioner of Corporations) [hereinafter *Smith Memorandum*].

the matter was definitively settled in 1911 with the Supreme Court rulings in the *Standard Oil* and *American Tobacco* cases.

It was not until 1897, with its decisions in the *Trans-Missouri* case, that the Supreme Court first construed the Sherman Act as recognizing no distinction between reasonable and unreasonable restraints of trade. The Court declared both types of restraint illegal, and thereby construed the Sherman Act as reversing or superseding the common law with respect to restraints of trade and monopoly, not only procedurally but substantively as well.[2] The high Court, nevertheless, remained sharply and closely divided over such construction of the Sherman Act. From 1897 to 1911 the Justices engaged in a running dispute among themselves, grouping variously around Justice John M. Harlan on the one side and Justices Edward D. White and (from 1902) Oliver Wendell Holmes, Jr., on the other, whenever they undertook to adjudicate cases brought under the Sherman Act. Central to the dispute, and around which the decisions, dissents, lawyers' arguments and briefs, always turned, stood the question of whether the Sherman Act was to be interpreted in the light of common law and therefore interpreted as permitting reasonable restraints of trade or whether the act had superseded the common law and thereby prohibited all restraints, reasonable or unreasonable.

The leading case, and the case in which the Supreme Court made its first comprehensive interpretation of the Sherman Act, was *United States v. Trans-Missouri Freight Association*, argued 8-9 December 1896 and decided on 22 March 1897.[3]

The railroads' attorneys, in accord with previous lower court decisions in Sherman Act cases, including the lower court decisions in this case by Judges Riner and Sanborn, urged "with much amplification of argument" that the Act reached only those contracts "unlawful at common law," and that it only meant "to declare illegal any such contract which is in *unreasonable* restraint of trade, while leaving all others unaffected." They argued "that when terms . . . known to the common law are used in a Federal statute those terms are to be given the same meaning that they received at common law."[4]

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2. *Cf. Smith Memorandum*, *supra* note 1, at 348.

> It will be observed that there was a period from 1890, when the [Sherman] law was passed, to 1897 (at which time the Supreme Court ruled the question of reasonableness or unreasonableness out of the matter entirely), during which time the consideration of the law in the more important cases practically inserted the word 'reasonable' . . . .

Id.

3. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

4. *Id.* at 327-28 (Peckham summarizing defense argument). *Cf.* Standard Oil v. United States, 221 U.S. 1, 87-89 (1911) (Harlan, J., concurring in part and dissenting in part).

But by a five-to-four decision, written by Justice Rufus W. Peckham, the Court rejected defense pleas and reversed the lower court. After affirming that the Sherman Act applied to common carriers, it held that since the law declared illegal "every contract" in restraint of interstate or foreign trade, it thereby superseded the common law and covered reasonable and unreasonable restraints alike. "By the simple use of the term 'contract in restraint of trade,'" wrote Peckham for the Court, "all contracts of that nature, whether valid [at common law] or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable [at common law] as being in unreasonable restraint of trade."[5] Although a contract in restraint of trade might "still be valid at common law," reasoned Peckham, "it is nevertheless a contract in restraint of trade, and would be so described either at common law or elsewhere." By passing the Sherman Act, Congress had made illegal all contracts in restraint of trade, "whether valid or otherwise . . . and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade." Should the Court rule otherwise, Peckham concluded, it would amount to "a process of judicial legislation wholly unjustifiable" and hence it was something the Court "cannot and ought not to do."[6]

With the concurrence of Justices Stephen J. Field, Horace Gray, and George Shiras, Jr., Justice Edward D. White wrote a sharply dissenting opinion insisting upon common-law construction of the Sherman Act. He denied the majority contention that at common law the words, "restraint of trade," embraced all contracts restraining trade, whether reasonable or unreasonable, and that the Act had therefore proscribed all such contracts. White held that "only such contracts as unreasonably restrain trade are violative of the general law." Accordingly, he argued,

> a brief consideration of the history and development of the law on the subject will not only establish the inaccuracy of this proposition, but also demonstrate that the words "restraint of trade" embrace only contracts which unreasonably restrain trade, and, therefore, that reasonable contracts, although they, in some measure, "restrain trade," are not within the meaning of the words.[7]

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5. *Trans-Missouri*, 166 U.S. at 311-13, 325-26, 327-28. *Cf. Standard Oil*, 221 U.S. at 87-89 (Harlan, J., concurring in part and dissenting in part). In 1895, Peckham had succeeded Howell E. Jackson on the Court. Concurring in Peckham's decision were Chief Justice Fuller and Associate Justices David J. Brewer, Henry B. Brown, and Harlan.

6. *Trans-Missouri*, 166 U.S. at 328, 340. Peckham quoted at length from the dissenting opinion of Judge Oliver P. Shiras in the lower appeals court. *See id.* at 335-37.

7. *Id.* at 344, 346 (White, J., dissenting).

White's opinion in *Trans-Missouri* would, in essence, become the majority opinion fourteen years later, after he had succeeded Fuller as Chief Justice. Until then, however, in case after case brought before it under the Sherman Act, the Court, although closely divided, consistently maintained the position that all restraints of trade, whether reasonable or unreasonable at common law, were illegal.

The case of *United States v. Joint Traffic Association*, argued 24-25 February 1898, was decided by the Supreme Court on 24 October 1898, about a year and a half after its decision in the *Trans-Missouri* case.[8] Counsel for the defense, including ex-Senator Edmunds, had argued in the lower court that the Sherman Act must be construed as the embodiment of the common law, that otherwise the Act would be unconstitutional, and that, accordingly, the Court's *Trans-Missouri* decision had been in error.[9] With White again dissenting, joined by Gray and Shiras, the Supreme Court by a five-to-three decision specifically rejected these contentions.[10] Peckham, for the Court, reaffirmed its *Trans-Missouri* decision, declaring that the latter had been "intentionally and necessarily decided." Noting that the two cases were essentially the same, and quoting from his decision in *Trans-Missouri*, Peckham stated that "while this is not strictly an application for a rehearing in the same case, yet in substance it is the same thing." He then pointed out that the Court had heard and reheard the *Trans-Missouri* case: "And now for the third time the same arguments are employed and the court is again asked to recant." In maintaining its initial decision, therefore, the Court had ruled uniformly on the question for the third successive time.[11] As Harlan was to state in his partial dissent in the *Standard Oil* case in 1911, these decisions "show so clearly as to admit of no doubt that this court, . . . upon the fullest consideration, interpreted the Anti-Trust Act as prohibiting and making illegal . . . *every* contract or combination, in whatever form, which was in restraint of interstate commerce, without regard to its reasonableness or unreasonableness."[12]

Subsequently, the lower federal courts "throughout the entire country" as well as the Supreme Court, enforced the Sherman law "according to the interpretation given in the *Freight Association* case."[13] The litigation in

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8. United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898).

9. *Id.* at 527-45 (argument of E.J. Phelps, for N.Y. Central and Hudson River R.R. Co., and George F. Edmunds, for Pennsylvania R.R. Co.).

10. Field had died in 1897. Joseph McKenna succeeded to his seat in 1898 after the Court had heard argument in the case, and he took no part in it.

11. *Joint-Traffic*, 171 U.S. at 573-74.

12. Standard Oil Co. v. United States, 221 U.S. 1, 91-94 (1911) (Harlan, J., concurring in part and dissenting in part).

13. *Id.* at 90.

Addyston Pipe provides a pertinent illustration.[14] In February 1897, prior to the Supreme Court's *Trans-Missouri* decision, Judge Clark in the Sixth Circuit Court in Tennessee had dismissed the government's bill against the manufacturers' pool, relying heavily upon the Supreme Court decisions in *E. C. Knight* and *In re Greene* and on the lower court decisions by Judges Riner and Sanborn in *Trans-Missouri*. The appeal reached the Sixth Circuit Court of Appeals in early 1898, after the Supreme Court's *Trans-Missouri* decision. Ruling for a unanimous appeals court, Judge William Howard Taft, on 8 February 1898, reversed the lower court and held the pool in violation of the Sherman Act. Taft undertook an extensive review of British and American common-law cases to distinguish between direct and ancillary restraints, finding that the defendants' restraint of trade was a direct one. He noted that under the common law, contracts in unreasonable and direct restraint of trade were void, that the defendants' pool was an unreasonable direct restraint, but that whether reasonable or unreasonable, it must be ruled illegal, because in its intervening *Trans-Missouri* decision, the Supreme Court had held that "contracts in restraint of interstate transportation were within the statute, whether the restraints could be regarded as reasonable at common law or not."[15]

In addressing the question of direct and indirect restraints, Taft had, in effect, reaffirmed an area in which the common law could still aid in the construction of the Sherman Act. In the course of his ruling, he noted that a restraint of trade may be enforced, or remain legal under the act, when the covenant that embodies it is "merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party."[16] With this point as central to the *Addyston Pipe* case, and given Taft's ruling that the contract in question was an unreasonable restraint, the Supreme Court sustained Taft and in doing so reached its first unanimous decision in a case based exclusively on the Sherman Act. Peckham once again delivered the opinion of the Court. In *Joint Traffic* the year before, he had already stipulated that "the statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce." Hence, he continued,

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14. *See* Addyston Pipe & Steel Co. v. United States, 78 F. 712 (C.C.E.D. Tenn. 1897), *rev'd*, 85 F. 271 (6th Cir. 1898), *modified*, 175 U.S. 211 (1899).

15. *Addyston Pipe*, 85 F. at 278, 279-83, 302. Sitting with Taft in the Sixth Circuit Court of Appeals and concurring in his opinion were Justice Harlan and Judge Horace H. Lurton, whom Taft as president appointed to the Supreme Court in 1909. *See also* United States v. Coal Dealers' Association of California, 85 F. 252, 262, 264 (C.C.N.D. Cal. 1898), where it was held that whether a contract or combination "imposes only a fair and reasonable restraint upon trade and commerce" was irrelevant.

16. *Addyston Pipe*, 85 F. at 282.

> to treat the act as condemning all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. The effect upon interstate commerce must not be indirect or incidental only.[17]

In reiterating this principle, Peckham now affirmed Taft's decision, except to hold that the defendants might combine for selling pipe *within* their own state, which action, Peckham held federal law could not reach.[18]

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17. United States v. Joint Traffic Ass'n, 171 U.S. 505, 568 (1898). Peckham here cited to the same effect the Court's decisions, on the same day as *Joint Traffic*, 24 Oct. 1898, in Hopkins v. United States, 171 U.S. 578 (1898), and Anderson v. United States, 171 U.S. 604 (1898). *Hopkins* and *Anderson* are often ranked with other leading Sherman Act cases because they were brought under the Act, but they are of subsidiary relevance to the construction of federal law on restraint of trade in general, to the construction of the Sherman Act in particular, and to the bearing of the two on corporate enterprise. In each case, the defendants were an unincorporated association of Kansas City livestock dealers organized in the form of a livestock exchange providing services to buyers and sellers, and in each case, the Supreme Court held that the association's business did not constitute interstate trade or commerce, but had only an ancillary effect on it, if any, and hence did not fall within the reach of the Sherman Act, a federal law. Peckham delivered the Court's decision in both cases. In each case, the Court held that there had been no restriction of competition or restraint of trade. In *Hopkins*, Peckham noted that the members of the Kansas City Livestock Exchange of Kansas City, Missouri, and Kansas City, Kansas, "still continued their individual business in full competition with each other," and the association itself conducted no business whatever; hence the case had no bearing at all on the controversy over reasonable and unreasonable restraints of trade in the form of combinations or otherwise. Peckham here also invoked the ancillary principle, for which usually *Hopkins* and *Anderson* are cited in relation to Sherman Act construction (*Hopkins* involved defendants residing in two states), noting that the Sherman Act "must have a reasonable construction," in the sense that it applied to direct restraints of interstate trade or commerce, not to any and all business arrangements that could be shown to affect or restrain interstate trade or commerce only "indirectly or remotely." *Hopkins*, 171 U.S. at 587, 590, 603. In *Anderson*, involving the Traders' Live Stock and Exchange of Kansas City, Missouri, Peckham delivered a similar decision, noting that "[t]his suit is somewhat similar to the *Hopkins suit*, just decided." *Anderson*, 171 U.S. at 605, 615-16, 619. In each case, Harlan alone dissented, but without opinion, and McKenna took no part.

18. *Addyston Pipe*, 175 U.S. at 248. In otherwise affirming Taft's decision, the Court put particular emphasis on the distinction between direct and indirect restraints. In Peckham's words:

> Congress . . . may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce.

Id. Peckham added: "[T]he power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts

In limiting the reach of the Sherman Act to direct restraints of interstate or foreign commerce, however, Peckham took the occasion of the *Addyston* decision to enlarge upon Fuller's *E.C. Knight* ruling regarding Congress's power to limit contractual liberty in regulating interstate or foreign commerce. Invoking the authority of Chief Justice John Marshall and specifically citing his landmark decision in *Gibbons v. Ogden* (in 1824), Peckham for a unanimous Court declared Congress's "power to regulate interstate commerce" to be "full and complete," not only as against the states but also with "no limitation" as against "private contracts" that might directly "regulate to any substantial extent interstate commerce."[19] More than this, Peckham continued, distinguishing the issues here from those he had addressed with respect to liberty in *Allgeyer*, "[w]e do not assent to the correctness of the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts limits the power of Congress and prevents it from legislating upon the subject of contracts" that directly and substantially affected interstate or foreign commerce. "Nor is any such limitation contained in that other clause of the Constitution which provides that no person shall be deprived of life, liberty or property without due process of law." Noting that in *Allgeyer* the Court had held "liberty" as found in the Constitution to be not "confined to the mere liberty of person" but to include as well "a right to enter into certain classes of contracts for the purpose of enabling the citizen to carry on his business," Peckham declared that nevertheless

> it has never been, and in our opinion ought not to be, held that the word included the right of an individual to enter into private contracts upon all subjects, no matter what their nature and wholly irrespective (among other things) of the fact that they would, if performed, result in the regulation of interstate commerce and in the violation of an act of Congress.

The liberty of the citizen did not include the right to make a contract directly and substantially restraining or regulating interstate or foreign commerce, a power that Congress reserved exclusively to itself and denied alike to the states and to private persons. Accordingly, Peckham concluded, "the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution."[20]

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which directly and substantially, and not merely indirectly, remotely, incidentally and collaterally, regulate to a greater or less degree commerce among the States." *Id.* at 228-29.

19. *Addyston Pipe*, 175 U.S. at 228. Peckham here also stated: "And when we speak of interstate we also include in our meaning foreign commerce." *Id.*

20. *Id.* at 228-29. *Cf.* Peckham's further remarks:

Subsequent cases brought in federal courts under the Sherman Act fell in line with the leading decisions in the *Trans-Missouri*, *Joint Traffic*, and *Addyston Pipe* cases of 1897-1899. In *Chesapeake & Ohio Fuel Co. v. United States*, the Sixth Circuit Court of Appeals in Cincinnati, in 1902, upheld the lower federal court's decision against the company. Relying on the three prior leading decisions, the three-judge panel unanimously ruled that

> Congress has seen fit to prohibit all contracts in restraint of trade. It was not left to the courts the consideration of the question whether such restraint is reasonable or unreasonable, or whether the contract would have been illegal at common law or not. The act leaves for consideration by judicial authority no question of this character.[21]

That same year, the Supreme Court ruled similarly in *Bement v. National Harrow Co.* While holding that restrictions of competition that resulted from patent rights were not illegal under the Sherman Act, Peckham for the Court, citing the three leading cases, stated, "It has been held by this court that the act included any restraint of commerce, whether reasonable or unreasonable."[22]

In two cases in 1904, the Supreme Court reiterated and reaffirmed its construction of the Sherman Act as determined in *Trans-Missouri*, *Joint*

> Commerce is the important subject of consideration, and anything which directly obstructs and thus regulates that commerce which is carried on among the States, whether it is state legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce.
>
> The power of Congress over this subject seems to us much more important and necessary than the liberty of the citizen to enter into contracts of the nature above mentioned, free from the control of Congress, because the direct results of such contracts might be the regulation of commerce among the States, possibly quite as effectually as if a State had passed a statute of like tenor as the contract.

Id. at 230. Reiterated and reaffirmed by Harlan in Northern Securities Co. v. United States, 193 U.S. 197, 350-52 (1904).

21. Chesapeake & Ohio Fuel Co. v. United States, 115 F. 610, 619 (6th Cir. 1902). This was the same court in which Taft had delivered his *Addyston Pipe* decision four years earlier. Judge William R. Day delivered the opinion of the court, with Judges Lurton and Henry F. Severens concurring. In 1903, Day, who had been a close friend and political ally of McKinley and had served as McKinley's Secretary of State in the interim between Sherman and Hay, was appointed to the Supreme Court by President Theodore Roosevelt. In 1911, Justice Day, as well as Justice Lurton, joined the White majority in restoring the common-law (Rule of Reason) construction of the Sherman Act.

22. Bement v. Nat'l Harrow Co., 186 U.S. 70, 92 (1902). Justices Harlan, Gray, and White took no part in the case. There was no recorded dissent.

Traffic, and *Addyston Pipe*. In *Montague & Company v. Lowry*, the Court held that in spite of the defendant's contention that the trade had been so small as to be negligible, the contract was nevertheless a direct and substantial restraint of interstate trade and therefore illegal, since the Sherman Act prohibited all such restraints.[23] In the celebrated *Northern Securities Company v. United States*, Harlan, speaking for the closely divided Court, ruled that "the act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces *all* direct *restraints*."[24] Again, in April 1908, in *Shawnee Compress Company v. Anderson*, the Court declared that "it has been decided that not only unreasonable, but all direct restraints of trade are prohibited, the law being thereby distinguished from the common law."[25] Two months earlier, in *Loewe v. Lawlor*—the famous Danbury Hatters' case brought by the company against the labor union for treble the damages incurred in the union's boycott campaign—the Supreme Court, citing *Trans-Missouri*, *Joint Traffic*, and *Northern Securities*, declared it settled that "the Anti-Trust Law has a broader application than the prohibition of restraints of trade unlawful at common law."[26]

It is plain, then, that at the end of the first decade of the twentieth century the federal courts since 1897 had consistently required that the Sherman Act be regarded as having superseded the common law with respect to restraints of trade and monopoly insofar as the critical distinction between reasonableness and unreasonableness was concerned. Although the Supreme Court remained sharply divided over this construction of the Sherman Act, nevertheless, as Commissioner of Corporations Herbert Knox Smith pointed out, "[o]ne of the few propositions upon which the entire court agreed was on the common-law distinction between reasonable and unreasonable restraint of trade."[27]

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23. Montague & Co. v. Lowry, 193 U.S. 38, 44-48 (1904). The case involved California manufacturers of and dealers in tiles, mantels, and grates. Peckham delivered the opinion of the Court, with no recorded dissent.

24. Northern Securities Co. v. United States, 193 U.S. 197, 331 (1904). Harlan delivered the opinion of the Court, in which he was joined by Justices Brown, Day, and Joseph McKenna, with Brewer concurring in a separate opinion but holding that the Northern Securities corporation constituted an unreasonable restraint of trade. White and Holmes each delivered a separate dissent, each concurring in the other's, with Fuller and Peckham concurring in both dissents.

25. Shawnee Compress Co. v. Anderson, 209 U.S. 423, 434 (1908). This was an appeal from the Supreme Court of the Territory of Oklahoma. Justice McKenna delivered the opinion of the Court, with no recorded dissent.

26. Loewe v. Lawlor, 208 U.S. 274, 297 (1908). Chief Justice Fuller delivered the opinion of the Court, with no recorded dissent.

27. *Smith Memorandum*, *supra* note 1, at 342.

Even in the period 1897-1911, however, two traditional features of jurisprudence with respect to restraint of trade and monopoly remained in effect as implicitly embodied in the Sherman Act.

First, restraints of trade or restrictions of competition incidental to an otherwise lawful contract or agreement continued to be regarded as legal; or, in common-law terms, restraints ancillary to a valid contract or agreement were legal. For a contract to come within the ban of the statute it had necessarily, naturally, directly, and immediately to result in, lead to, or constitute a substantial restraint of trade.[28] But whereas at common law the court would then have proceeded to examine whether such a direct and substantial restraint was reasonable or unreasonable, under the Sherman Act during this period such inquiry stood moot: Any direct and substantial restraint constituted a prima facie violation of the law.

This distinction between direct and ancillary restraints arose from a long-established recognition that by the very nature of competition, each successful competitor restrained to a degree the trade of one or more other competitors. Peckham for the Supreme Court had invoked this principle in the *Joint Traffic* decision.[29] Similarly, in writing the opinion of the Court in *Northern Securities* Harlan reiterated the principle that only direct restraints of interstate trade or commerce fell within the proscription of the Sherman Act.[30]

The second feature of traditional jurisprudence that the federal courts retained in construing the Sherman Act was the principle that a literal monopoly of manufacture or production achieved by a person or firm or corporation through superior efficiency, or through effective and otherwise lawful competition, or through expansion by the purchase of property, remained unobjectionable. At no time before the Rule of Reason decisions of 1911 did the Court construe either combination or bigness as such to be in violation of the Sherman Act. In this respect, the Rule of Reason decisions left previous judicial interpretation untouched.

The distinction between manufacture or production and trade or commerce, as affirmed in *E.C. Knight*, remained in effect at all times. For example, in its decision in the *Addyston Pipe* case, which is sometimes cited as having reversed *Knight*, the Supreme Court distinguished between the two cases. It pointed out that in the earlier case, although the American Sugar Refining Company had obtained "a practical monopoly of the business of manufacturing sugar," the Sherman Act "did not touch the case," because the combination "only related to manufacture and not to

28. The word "substantial" was taken in its qualitative, not quantitative, sense.

29. United States v. Joint Traffic Ass'n, 171 U.S. 505, 568 (1898); to similar effect, see Hopkins v. United States, 171 U.S. 578, 600 (1898), cited by Peckham in *Joint Traffic*, 171 U.S. at 568; *see also supra* note 17.

30. Northern Securities Co. v. United States, 193 U.S. 197, 331 (1904).

commerce among the States or with foreign nations." Peckham insisted on "the plain distinction between manufacture and commerce," holding that "a contract or combination which directly related to manufacture only was not brought within the purview of the act."[31] Indeed, as Peckham noted in his *Joint Traffic* decision, "the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce."[32] Not even Harlan disputed this principle, as may be seen in his *Northern Securities* decision for the Court.[33]

The distinction between manufacture or production and interstate trade or commerce was dictated less by logic or abstract principle than by historical and political circumstances in the United States, in particular the post-Reconstruction agreement to leave "domestic" (race) relations to the states, combined with the constitutional separation of state and federal jurisdictions,[34] but it also found some reinforcement in the common-law distinction between direct and ancillary restraints. In American jurisprudence, these elements of politics and constitutional and common law became mutually intertwined, and they reinforced each other to yield a greater protection to contractual liberty in practice than might otherwise have been the case. Accordingly, the purchase by one competitor of the plant or stock of another for the purpose of legitimate expansion or greater efficiency, although it might incidentally restrict competition, at no time before 1911, or thereafter, constituted a violation of the Sherman Act as construed by the federal courts.[35] Similarly, such a practice as "the sale of a good will of a business with an accompanying agreement not to engage in a similar [competing] business," noted Peckham in both his *Trans-Missouri* and *Joint Traffic* decisions, was to be construed as legal "within the meaning of the [Sherman] act."[36] "Monopolize" or "attempt

31. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 238 (1899). *Cf.* J. DAVIES, TRUST LAWS AND UNFAIR COMPETITION 74-75 (1916); E. JONES, THE TRUST PROBLEM IN THE UNITED STATES 397 (1926).

32. *Joint Traffic*, 171 U.S. at 567.

33. *See Northern Securities*, 193 U.S. at 331:

> [A]lthough the act of Congress . . . has no reference to the mere manufacture or production of articles or commodities within the limits of the several States, it does embrace and declare to be illegal every contract, combination or conspiracy . . . which directly or necessarily operates *in restraint* of trade or commerce *among the several States or with foreign nations.*

Id.

34. *See* United States v. E.C. Knight Co., 156 U.S. 1, 12, 16 (1895); Kidd v. Pearson, 128 U.S. 1, 20-22 (1888); Coe v. Erroll, 116 U.S. 517 (1886).

35. *Cf.* United States v. American Tobacco Co., 164 F. 700, 718 (C.C.S.D.N.Y. 1908); J. DAVIES, *supra* note 31, at 84.

36. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 329 (1897); United

to monopolize" were still taken to mean unfair methods designed to eliminate existing competitors or prevent the appearance of potential competitors.[37]

It would be inaccurate, then, to say that from the *Trans-Missouri* case of 1897 to the *Standard Oil* and *American Tobacco* cases of 1911 the Supreme Court and lower federal courts applied no "standard of reason" to the interpretation and enforcement of the Sherman Act. As Justice Peckham stated for the Supreme Court in 1898 in the *Hopkins* case, decided on the same day as *Joint Traffic*, "[t]he act of Congress must have a reasonable construction or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce and possibly to restrain it."[38] Between 1897 and 1911 the Court, before declaring that a restriction of competition constituted a restraint of trade or an attempt to monopolize in violation of the Sherman Act, had always first to determine whether the contract, agreement, or combination in question (1) constituted a direct as against an indirect or incidental restraint, and (2) directly and substantially affected and restrained interstate or foreign commerce as against production or the purchase and sale of property as such.

In other respects, the majority view that reigned within the Supreme Court from 1897 to 1911 represented a substantial departure from traditional United States jurisprudence on restraints of trade and monopoly. The traditional jurisprudence had been in effect not only under common law before the enactment of the Sherman Act, but also for seven years thereafter. Contrary to Justice Harlan's partial dissent in the *Standard Oil* and *American Tobacco* cases of 1911,[39] it was his (and Peckham's), not White's (and Holmes's), construction of the Sherman Act that constituted new judicial doctrine, which "upset the long-established interpretation" of the courts. If anything, White's construction in the 1911 cases represented not an "upset" but a restoration.

States v. Joint Traffic Ass'n, 171 U.S. 505, 568 (1898).

37. *Cf. American Tobacco*, 164 F. at 702, 709; United States v. Standard Oil Co., 173 F. 177, 191, 195-96 (1909).

> [W]hile unlawful means to monopolize and to continue an unlawful monopoly of interstate and international commerce are misdemeanors and enjoinable under [the Sherman Act] . . . , monopolies of part of interstate and international commerce by legitimate competition, however successful, are not denounced by the law, and may not be forbidden by the courts.

Id. at 191.

38. Hopkins v. United States, 171 U.S. 578, 600 (1898).

39. Standard Oil Co. v. United States, 221 U.S. 1, 83, 90 (1911) (Harlan, J., concurring in part and dissenting in part); United States v. American Tobacco Co., 221 U.S. 106, 191 (1911) (Harlan, J., concurring in part and dissenting in part).

For the traditional judicial doctrine that reasonable restrictions of competition in interstate trade were legal, the Court's majority had substituted the doctrine that no direct restrictions of competition were legal; for the traditional doctrine upholding the right to compete and contractual liberty as distinguished from a compulsion to compete, the Court's majority had substituted a doctrine that set compulsory competition against contractual liberty. As against calculative attempts by capitalists to regulate the market in order to maintain the remunerative nature of pecuniary pursuits, the Court now asserted the natural, impersonal rule of the unfettered market, enforced where necessary by government regulation of capitalists' behavior. Commerce, Harlan held, "must be allowed to flow in its accustomed channels, wholly unvexed and unobstructed by anything that would restrain its ordinary movement."[40] As he ruled for the Court in *Northern Securities*, "[t]he natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promotes trade and commerce."[41] Hence "[t]he constitutional guarantee of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in *interstate and international* commerce."[42]

Interwoven with the learned disputes in the federal courts over legal theory as it related to the Sherman Act were ideological differences among jurists over the desirable and just nature of the market and its relation to the "good society." Harlan and his like-minded colleagues gave judicial expression to the older natural-liberty doctrine of a market composed predominantly of independent, self-employed proprietors as the guarantor of economic welfare, social justice, and small-producer democracy. For them, this doctrine was self-evident, beyond the scrutiny of economic fact or historical inquiry, and to that extent it assumed the essential characteristics of what Veblen would have called metaphysical prescription.

It was a doctrine that, for them, transcended consideration of market efficiencies or lower costs to society for goods or services. Justice Peckham made this clear in his extended defense of the small enterpriser in his *Trans-Missouri* decision. Referring there to "combinations of capital, whose purpose in combining is to control the production or manufacture of any particular article, and by such control dictate the price at which the article shall be sold," Peckham argued that it was not "for the substantial interests of the country that any one commodity should be within the sole

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40. *Standard Oil*, 221 U.S. at 96.

41. Northern Securities Co. v. United States, 193 U.S. 197, 331 (1904).

42. *Id.* at 332; *see also* National Cotton Oil Co. v. Texas, 197 U.S. 115, 129 (1905); *cf.* Peckham to same effect in United States v. Joint Traffic Ass'n, 171 U.S. 505, 569 (1898), and in Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 228-31 (1899); *see also supra* notes 19-20 and accompanying text.

power and subject to the sole will of one powerful combination of capital." Beyond this, however, Peckham noted that the effect of such combination "being to drive out of business all the small dealers in the commodity and to render the public subject to the decision of the combination as to what price shall be paid for the article," it was, he insisted, "not material that the price of an article may be lowered," for the end result must be "unfortunate for the country by depriving it of the services of a large number of small but independent dealers who were familiar with the business and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein." It was also "not so material," Peckham continued, that "they be able to find other avenues to earn their livelihood," because it was

> not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it may be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others.[43]

Sheer *obiter dicta* though it may have been, here was a classic statement of small-producer antipathy to corporate enterprise.

Justices White and Holmes and their like-minded colleagues rejected such doctrine as ill-suited to modern business conditions, as oblivious of the necessity of combination and consolidation in an industrially developed economy, as destructive of contractual liberty and profitable enterprise suited to modern technology, and hence as detrimental to social progress in an urban-industrial age. For them, contractual liberty, regulated in the public interest and adapted to modern business conditions, constituted the preeminent self-evident principle. Neither side in the dispute, it will be noted, embraced a doctrine of laissez-faire; both sides affirmed a strong regulatory role for government in subjecting the market to social policy, but for different purposes. There was, however, this further significant difference: To the Harlan side, only government, a presumably neutral agency outside the market, should regulate it; to the White-Holmes side, both government outside the market and capitalists within the market should share authority in regulating it.

In upholding their respective positions, Harlan and Peckham departed from traditional common-law jurisprudence to reestablish the earlier small-producer version of natural liberty, while White and Holmes invoked the traditional common law to vindicate new economic theory and a legal

43. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 323-24 (1897).

positivism suited to the mature industrial capitalism of the late nineteenth and early twentieth centuries. As common-law doctrine was not committed to unrestricted competition, it was peculiarly fitted to adjusting judicial process to the "common sense" of the market. Its juridical permanence, therefore, guaranteed the facilitating of change, the adaptation of the legal order to evolving economic conditions.[44] By interpreting the Sherman Act as having superseded, rather than as having embodied, common-law principles on restraint of trade and monopoly, Harlan and those in agreement with him were, in the view of those like White and Holmes, invoking a visionary theory that was as destructive of social stability in an industrial society as it was ill-suited to modern business conditions.

Justice Holmes made this argument forcefully in his *Northern Securities* dissent of 1904. He opened his opinion with the now famous aphorism "great cases like hard cases make bad law." After insisting that "[c]ontracts in restraint of trade are dealt with and defined by the common law," Holmes, author of the celebrated treatise on the common law, argued squarely in the common-law tradition that there was no restraint of trade or monopoly "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." The Sherman Act should "not be construed to mean the universal disintegration of society into single men, each at war with all the rest, or even the prevention of all further combinations for a common end." Such a construction of the Sherman Act "would make eternal the *bellum omnium contra omnes* and disintegrate society so far as it could into individual atoms. If that were its intent," Holmes objected, "I should regard calling such a law a regulation of commerce as a mere pretense. It would be an attempt to reconstruct society." Whatever might be "the wisdom of such an attempt," Holmes declared, "I believe that Congress was not entrusted by the Constitution with the power to make it and I am deeply persuaded that it has not tried."[45]

The judges on the federal bench were jurists first, social theorists second. Disagree as some might with the Supreme Court majority view from 1897 to 1911, as "true and upright" jurists, the lower federal judges

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44. *Cf.* P. RUBIN, BUSINESS FIRMS AND THE COMMON LAW: THE EVOLUTION OF EFFICIENT RULES 21-22 (1983); H. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 13, 51 (1955).

45. *Northern Securities*, 193 U.S. at 400, 404, 409, 407, 411 (Holmes, J., dissenting). Holmes here also noted the significance of the Sherman Act's title in dictating its construction as the enactment of the common law. *Id.* at 405. Holmes's opinion, of course, flatly contradicted the majority view that Congress had full constitutional power, under the commerce clause, to regulate interstate and foreign commerce as it saw fit, against both the states and the contractual liberty of private parties, as Harlan specifically ruled for the Court in this case, reiterating Peckham's prior rulings. *Id.* at 350-52; *see also supra* notes 19-20, 42.

nevertheless upheld the interpretation of the Sherman Act dictated by the high Court's majority, while some of them prudently suggested from time to time that the remedy for unwise public policy lay with Congress, in the absence of a change in the Court's majority view itself. This attitude was perhaps nowhere more dramatically expressed than in the apparently pained decision handed down by the lower federal court against the American Tobacco Company in 1908, and similarly, although less dramatically, in the decision written in 1909 by Judge Sanborn of the lower federal court against the Standard Oil Company.

Sanborn had delivered a common-law construction of the Sherman Act in the *Trans-Missouri* case, which the Supreme Court subsequently reversed. In the *Standard Oil* case, on 20 November 1909, he was obliged to reject the common-law distinction between reasonable and unreasonable combinations as no longer operative. Citing *Addyston Pipe*, *Joint Traffic*, *Hopkins*, and *Northern Securities*, Sanborn ruled that the parties to the combination "are presumed to intend the inevitable results of their acts, and neither their actual intent nor the reasonableness of the restraint imposed may withdraw it from the denunciation of the statute."[46] He further held that it was the "purpose" of the Sherman Act "to keep the rates of transportation and the prices of articles of interstate and international commerce open to free competition." Hence, any contract or combination that transferred "the control of such rates or prices . . . from separate competitors in that trade and vested [them] in a person or an association of persons, necessarily restricts competition and restrains that commerce," in violation of the Act.[47]

In the *American Tobacco* case, the Circuit Court of the Southern District of New York, on 7 November 1908, by a three-to-one majority, decided against the company in the suit brought under the Sherman Act.[48] Both the opinion of the court, delivered by Judge E. Henry Lacombe, and the separate concurring opinions of Judges Walter C. Noyes and Alfred C. Coxe–the latter two having been appointed to the circuit court by Roosevelt–in essence amounted to an apology for interpreting the Act as destructive of the corporation. They asserted, however, that they had no

46. United States v. Standard Oil Co., 173 F. 177, 179-92, 179 (8th Cir. 1909). The court was unanimous, Judges Adams and Van Devanter concurring in Sanborn's opinion, Judge Hook concurring in a separate opinion. Willis Van Devanter was appointed to the Supreme Court by Taft the next year, 1910, and served to 1937. In 1914, after the Rule of Reason decisions, Sanborn resumed his common-law view of the Sherman Act, holding the International Harvester Company to be a reasonable combination. E. JONES, *supra* note 31, at 435-36.

47. *Standard Oil*, 173 F. at 184.

48. United States v. American Tobacco Co., 164 F. 700 (C.C.S.D.N.Y. 1908). Each of the judges of the majority wrote a separate opinion, with Lacombe's designated as for the court. Judge Henry G. Ward dissented.

alternative in the face of persistent Supreme Court decisions, short of congressional alteration of the law, or modification by the Supreme Court itself of its construction of the law.[49]

Lacombe stated that the Act was "no longer open to construction in the inferior federal courts." In view of the decisions handed down by "successive majorities of the Supreme Court," he noted, the Act "is to be construed as prohibiting any contract or combination whose direct effect is to prevent the free play of competition and thus tend to deprive the country of the services of any number of independent dealers however small." In a manner reminiscent of Justice Holmes's words, Lacombe continued, "[a]s thus construed, the statute is revolutionary." He hastened to add, however, in deference to the Supreme Court, that he did not intend thereby to imply that the construction was incorrect in point of law. "The act may be termed revolutionary," he explained, "because, before its passage, the courts had recognized [as legal] a 'restraint of trade' which was held not to be unfair, but permissible, although it operated in some measure to restrict competition." Lacombe noted that "by insensible degrees, under the operation of many causes, business manufacturing and trading alike, has more and more developed a tendency toward larger and larger aggregations of capital and more extensive combinations of individual enterprise." He then cited with approval the contention that "under existing conditions," only thus could "production be increased and cheapened, new markets opened and developed, stability in reasonable prices secured, and industrial progress assured." The record in the case, he wrote, did not indicate that the company had increased the price of tobacco to the consumer, or had resorted to unfair competition or improper practices to drive out or absorb competitors. But all this, as well as the question of whether benefits had accrued to the public from the merger, was immaterial under the Supreme Court's construction of the law, which the lower court was bound to accept. That the merger involved contracts and combinations directly "in restraint of a competition existing" before was sufficient, held Lacombe, "to bring it within the ban of this drastic statute."[50]

The concurring opinions of Judges Noyes and Coxe demonstrated the extent to which the construction of "this drastic statute" remained qualified by traditional doctrine on the distinction between direct and indirect

49. With respect to possible modification of the Sherman Act by Congress, the judges may well have been referring to the Hepburn and other bills then pending in Congress. See M. SKLAR, *supra* note *, at 179-332. On the appointments of Noyes (1907) and Coxe (1902), see Solomon, *The Politics of Appointment and the Federal Courts' Role in Regulating America: U.S. Courts of Appeal Judgeships from T.R. to F.D.R.*, 1984 AM. B. FOUND. RES. J. 285, 306-07, 311.

50. *American Tobacco*, 164 F. at 701-03.

restraints and by the technical-legal meaning of monopoly.[51] But Noyes made it clear that given the Supreme Court's decisions, a combination with sufficient market power, derived from the merger of previously competing firms, to regulate supply and prices, however reasonably, in interstate or foreign commerce constituted an illegal restraint of trade under the Sherman Act. The American Tobacco Company, as Noyes explained, did not confine its operations to intra-state commerce. The *Knight* case was therefore not germane to its case: "[I]n view of the world-wide business of these defendants," he ruled,

> of the constant reaching out for new markets in new countries, of the many different industries in many different states involved, of the constant shipment of materials from state to state, and of the control of the disposition of the manufactured product, . . . the defendants are engaged in interstate commerce, and that which the combination directly affects is interstate commerce.[52]

Judge Noyes, however, found himself unable to contain his disagreement with the given construction of the Sherman Act, offering a not altogether discreet set of *obiter dicta*. Because his opinion illustrates the temper and character of arguments then being advanced from the bench by federal jurists who were chafing under the Harlan construction of the Sherman Act, it is worth quoting from at length. Noyes wrote:

> The modern tendency of business is toward cooperation, instead of competition. This tendency, while of earlier inception, has developed with phenomenal activity in this country during the past 20 years—especially during the past decade. Concentration of

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51. For example, Judge Coxe emphasized that

> [t]he statute was not intended to strike down enterprise or to prevent the restraint of trade by destroying it. . . . [I]t has never been held that the mere fact that a business is large and is extended over a wide territory renders its promoters amenable to the statute. Success is not a crime. . . . Prosperity is the premium which has always been awarded to earnest and intelligent endeavor. The statute was never intended to punish success or reward incompetency.

Id. at 709-10. In the same vein, see Sanborn a year later in his *Standard Oil* decision, 173 F. at 191.

52. *American Tobacco*, 164 F. at 716 (Noyes, J., concurring). Judge Henry Ward, however, based his dissent both on *Knight* and on grounds, not formally in conflict with the Harlan majority in the Supreme Court, that the purpose of the combination was not to restrain trade or prevent competition, "although competition was incidentally prevented," but to increase volume and profits of the business "by intelligent economies." *Id.* at 722-28, 726 (Ward, J., dissenting). Ward was, like Noyes and Coxe, a Roosevelt appointee. Sólomon, *supra* note 49, at 310-11.

> interests and unification of control have taken the place of separate and independent operation. Important industrial corporations, formerly competing, have been combined into greater companies of wider scope, and these, in turn have been united into combinations with vast resources, embracing as their fields of operation, whole branches of industry.
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> And yet this economic development toward the elimination of competition has taken place in the face of statutes and judicial decisions declaring that "competition is the life of trade" and must be preserved. . . .
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> Insofar as combinations result from the operation of economic principles, it may be doubtful whether they should be stayed at all by legislation. It may be that the evils in the existing situation should be left to the remedies afforded by the laws of trade. On the other hand, it may be that the protection of the public from the operations of combinations of capital—especially those possessing the element of oppression—requires some measure of governmental intervention. It may be that the present anti-trust statute should be amended and made applicable only to those combinations which unreasonably restrain trade—that it should draw a line between those combinations which work for good and those which work for evil. But these are all legislative, and not judicial, questions. It cannot be too clearly borne in mind that this court has nothing to do with the wisdom, justice, or expediency of the statute. Equally true is it that this court, in applying the statute, must follow the decisions of the Supreme Court. If the decisions of that court have been too broad, it is for that court alone to modify them. The only right and duty of this court is to take the statute as it finds it, and, as it finds it, apply it in accordance with the interpretation placed upon it by the highest tribunal. That this course may lead to results believed by many persons to be prejudicial to the public welfare cannot affect our action. This court can neither refuse to enforce a constitutional act of Congress nor ignore the decisions of the Supreme Court of the United States.
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> . . . Concede that the present statute goes too far. Concede, even, that no enactments are now necessary. Yet all must agree that conditions may arise in the future requiring legislative action which shall be both uniform and effective. Congress alone could take such action. . . .[53]

Noyes's opinion is significant not only because it represented the view of a considerable body of federal jurists who regarded the Harlan

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53. *American Tobacco*, 164 F. at 711-12, 716-17 (Noyes, J., concurring).

construction of the Sherman Act as bad public policy, but also because it demonstrated the general agreement among jurists as to the meaning of the Harlan construction, whatever their opinion of it as a matter of policy. At the same time, on the other hand, Noyes's opinion represented what by 1910 had become a powerful current of opinion among corporate and political leaders, particularly "progressives" among them. In their view, the corporate reorganization of the property system and of the market constituted the modern mode of business enterprise, to which the law and public policy must adapt, by legalizing reasonable combinations and restrictions of competition while providing by legislation for appropriate government supervision.

II. RESTORATION

By 1911, the stage had already been set for the return to the common-law construction of the Sherman Act that the Supreme Court, in the *Standard Oil* and *American Tobacco* cases, was to declare. Not only had many federal judges expressed dissatisfaction with the public policy embodied in the prevailing construction of the Sherman Act, but also public criticism of that construction had been building throughout the period 1897-1911. The criticism came from economists, such political leaders as Theodore Roosevelt and William Howard Taft, capitalists, labor leaders, farm leaders, and not least of all from the Bureau of Corporations, established in 1903 as a "progressive" measure intended as a first step toward a more effective federal regulatory policy.[54]

The Supreme Court's decisions in the *Standard Oil* and *American Tobacco* cases, therefore, in restoring a common-law construction of the Sherman Act, did not rise as a phoenix from the void suddenly to proclaim a novel doctrine. On the contrary, the decisions had been presaged by traditional jurisprudence before 1897, by persistent minority opinions within the Supreme Court, and by qualifications and *obiter dicta* of judges in the lower federal courts after 1897. The Rule of Reason decisions came after a decade or more of demands by political leaders, corporate capitalists, government officials, and intellectuals in public forums, for a new policy to correspond alike with traditional jurisprudence and modern business conditions.

As Joseph E. Davies, the first chairman of the Federal Trade Commission, put it, "The decision of the United States Supreme Court in the Standard Oil case made it evident that the words 'restraint of trade' in the Sherman Act should be construed as declaratory of the common law so far as the meaning of that term was concerned. This view had been taken by the dissenting members of the Court in the Trans-Missouri

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54. *See* M. SKLAR, *supra* note *, at 179-332.

case."[55] In technical-legal terms, the distinguishing characteristic of the Rule of Reason decisions of 1911 was not, as sometimes assumed, that now size or bigness no longer came under proscription. As already observed, never under the Sherman Act, even during 1897-1911, was size or bigness as such considered by the courts as a valid criterion for determining the illegality of a corporation or combination. Instead, in reestablishing the principle that common-law doctrine had been embodied in the Sherman Act, the Supreme Court rehabilitated the juridical principle that restriction of competition did not necessarily constitute or imply an illegal restraint of trade or attempt to monopolize. Private persons, including corporations, could lawfully restrict competition in the market; to that extent, private persons, and not the federal government alone, could lawfully regulate interstate or foreign commerce.

In essence the Court ruled definitively that the Sherman Act prohibited unreasonable restraints of trade and monopoly as defined at common law. Unreasonable restraints of trade or monopoly thus defined meant (1) unfair, oppressive methods designed to eliminate, damage, or destroy competitors; and (2) business practices, the purpose or necessary effect of which was to enhance or depress prices unduly, or affect trade or distribution or transportation unduly, that is, to the detriment of the public interest.

Accordingly, in the Supreme Court's *Standard Oil* decision, the corporation's offense was not its size or market power as such, but the intent and purpose "to exclude others" and to "drive others from the field and to exclude them from their right to trade and thus accomplish the mastery which was the end in view."[56] By the same token, the Court declared that its decision did not preclude "agreements between one or more of the subsidiary [Standard Oil] corporations" subsequent to the ordered dissolution.[57]

Consistent with common-law doctrine, the Court, moreover, made it explicit that freedom of contract and the right to compete ("the legitimate purpose of reasonably forwarding personal interest"), as distinguished from unrestricted competition, or the obligation to compete, constituted the controlling *desideratum* under the Sherman Act. By corollary, the Court went on to state that to compel unrestricted competition must necessarily

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55. J. DAVIES, *supra* note 31, at 24; *see also* Standard Oil Co. v. United States, 221 U.S. 1, 57, 60-61 (1911). The Court's opinion, written by Chief Justice White, defined "monopolize" and "attempt to monopolize" as synonymous with "restraint of trade," that is, as a subtype, natural consequence, or intended effect of a restraint of trade. Hence the observation by Davies applies to the Sherman Act as a whole with respect to the meaning of the act's two prohibitive sections (sections 1 and 2). *Cf.* G. HENDERSON, THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE 6 (1924).

56. *Standard Oil*, 221 U.S. at 76.

57. *Id.* at 80.

infringe free trade, liberty of contract, and rights of property, precisely which, it insisted, the Sherman Act had been designed to protect:

> The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint.[58]

In this connection, in the *American Tobacco* case, the Court, reaffirming its *Standard Oil* decision, elaborated its view:

> Applying the rule of reason to the construction of the statute, it was held in the *Standard Oil case* that as the words "restraint of trade" at common law and in the law of this country at the time of the adoption of the Anti-Trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly obstructing the due course of trade or which, either because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. . . . In other words, . . . the words restraint of trade should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect . . . . Indeed, the necessity for not departing in this case from the standard of the rule of reason which is universal in its application is . . . plainly required in order to give effect to the remedial purposes which the act . . . contemplates, and to prevent that act from destroying all liberty of contract and all substantial right to trade, . . . thus causing the act to be at war with itself by annihilating the fundamental right of freedom to trade which, on the very face of the act, it was enacted to preserve.[59]

58. *Id.* at 58, 60. See also the Court's statement that implicit in the principles embodied in common law and in the Sherman Act lay the "instinctive recognition of the truisms that the course of trade could not be made free by obstructing it, and that an individual's right to trade could not be protected by destroying such right"; that "freedom to contract and to abstain from contracting and to exercise every reasonable right incident thereto became the rule in English law"; and that U.S. law "simply followed the line of development of the law of England." *Id.* at 55-56, 58-59. Harlan concurred with the dissolution of the company, but dissented in the Court's reasoning. *Id.* at 83 (Harlan, J., concurring in part and dissenting in part).

59. United States v. American Tobacco Co., 221 U.S. 106, 179-80 (1911). Chief Justice

In subsequent cases, the Supreme Court followed through consistently with concrete applications of the meaning of its Rule of Reason decisions. Less than a year after the *American Tobacco* decision, a unanimous Supreme Court, without Harlan, who had died in the interim, in the case of *United States v. Terminal Railroad Association of St. Louis*, held that a combination unreasonably and therefore illegally in restraint of trade might, by modification of its provisions, become a lawful combination. Since the test of legality was the reasonableness of the restraint, the mere combining of several independent concerns, the Court held, did not necessarily constitute an illegal restraint.[60]

Again, in 1912, in the case of *Standard Sanitary Manufacturing Company v. United States*, the Supreme Court voided a patent agreement the company had entered into, but left the corporation itself untouched, although it comprised a consolidation, effected in 1910, of sixteen previously competing corporations, and controlled at least 50 percent of the nation's total production of bathroom fixtures. All that was necessary, the Court held, was the enjoining of certain unfair practices.[61] One month after this decision, the Supreme Court in the Anthracite Coal Combination case, voided as unfair or unreasonable practices certain price and distribution pools among coal operators in Pennsylvania and New Jersey, but upheld as reasonable consolidations the acquisition in January 1898 by the Erie Railroad of the New York, Susquehanna and Western Company and in 1899 of the Pennsylvania Coal Company and its allied railroads, and the acquisition in 1901 by the Reading Company of a majority of the stock of the Central Railroad of New Jersey.[62]

The next year, 1913, in the case of *United States v. Winslow*,[63] a criminal suit brought by the government under the Sherman Act against the president and other officers of the United Shoe Machinery Company, the Supreme Court held in a brief and unanimous decision that although the corporate consolidation, effected in 1899, controlled 70 to 80 percent of the nation's total production of essential shoe manufacturing machinery, it did not in itself constitute a violation of the antitrust act, (1) because it

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White again delivered the opinion of the Court, with Harlan again concurring in part and dissenting in part, as in the *Standard Oil* case. The *Standard Oil* decision came down 15 May 1911, the *American Tobacco* decision on 29 May 1911; Harlan died the following October.

60. United States v. Terminal R.R. Ass'n of St. Louis, 224 U.S. 383 (1912). Justice Lurton delivered the opinion of the Court, with no dissent.

61. Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20 (1912). Justice McKenna delivered the opinion of the Court, with no dissent.

62. United States v. Reading Co., 226 U.S. 324, 371-73 (1912). Justice Lurton delivered the opinion of the Court, with no dissent.

63. 227 U.S. 202 (1913).

represented a legal exercise of patent rights, (2) because "the combination was simply an effort after greater efficiency" through integration of related processes, and (3) because the companies combined had not been competitors before the consolidation. The Court made it clear, as it was to do in the subsequent *United States Steel* case seven years later, that consolidation for the purposes of integration and the achievement of greater efficiency possessed no element of unreasonableness nor, therefore, of illegality under the Sherman Act. The statute, the Court explained, did not aim at "reducing all manufacture to isolated units of the lowest degree."[64] Five years later, the Court again upheld the United Shoe Machinery Company as a legal consolidation on essentially the same grounds, although here the question of patent rights assumed the central position in the outcome of the case.[65]

The case of *United States v. United States Steel Corporation*,[66] decided by the Supreme Court in 1920 after ten years of litigation, delivered the coup de grace, in the series of cases from 1911 to 1920, to any remaining vestiges of the Harlan construction. As in its decision in the *Shoe Machinery* case, the Court, in upholding the lower court's decision in favor of United States Steel, reiterated the principle that a merger controlling all or a substantial proportion of an industry could not be construed, on that account, as in violation of the Sherman Act, provided it was not at the time harassing or oppressing its remaining rivals with unfair practices or excluding others from entering the industry. Finding that since the termination of the price-setting "Gary Dinners," which, the Court held, were illegal, the Steel Corporation had not resumed such practices, the Court pointed out that the desire for, and achievement of integration and greater efficiency, which the Court recognized as an important element in the establishment of the corporation, in no way violated the Sherman

64. *Id.* at 215-18, 217. Justice Holmes delivered the opinion of the Court.

65. United States v. United Shoe Mach. Co., 247 U.S. 32 (1918). Justice McKenna delivered the opinion of the Court, with Justice Day dissenting, concurred in by Justices Mahlon Pitney and John H. Clarke. Justices James C. McReynolds and Louis D. Brandeis took no part in the case. McReynolds had served as U.S. Solicitor General in the prosecution of the earlier case. Brandeis had been counsel, organizer, and a director of the company from before the consolidation in 1899 to 1906, and thereafter attorney for the independent manufacturers who had pressed the government to bring the earlier case against the Company. *Cf.* S. WINSLOW, BRANDEIS AND BRANDEIS (1912) (pamphlet in State Historical Society of Wisconsin, Madison) (the second "Brandeis" is printed backward and upside down).

66. 251 U.S. 416 (1920). Justice McKenna delivered the opinion of the Court, concurred in by Chief Justice White and Justices Van Devanter and Holmes. Justice Day dissented, joined by Justices Pitney and Clarke. Justice McReynolds and Brandeis took no part in the case.

Act. The Court therefore rejected the government's plea for dissolution as contrary to the public interest, and it acquitted the corporation.[67]

In tone and content, the opinion of the Court had all the features of a lay polemic against the doctrine of unrestricted competition that had prevailed in the Court from 1897 to 1911. It argued that only a common-law Rule of Reason construction of the Act could guarantee contractual liberty, the right to compete, and the rights of property, the very objective of the statute; that the doctrine of unrestricted competition was, in its application, destructive of these and of competition itself. In pressing its argument, the Court took judicial notice of the movement toward integration of the steel industry from ore to finished product, which had obtained at and shortly after the turn of the century. Industrial integration, observed the Court, although perhaps not an absolute necessity, "had certainly become a facility of industrial progress." But, the Court objected, the government was "reduced to the assertion that the size of the Corporation . . . is an abhorrence to the law," and that the corporation, through the power consequent upon its size, unduly and thus unlawfully restrained competition, "regardless of purpose." "To assent to that," the Court asked derisively, "to what extremes should we be led? Competition consists of business activities and ability—they make its life; but there may be fatalities in it. Are the activities to be encouraged when militant, and suppressed or regulated when triumphant because of the dominance attained?" It was "the inevitable logic of the Government's contention" that competition not only must be free, "but that it must not be pressed to the ascendancy of a competitor." The regression was admittedly extreme, "but short of it the Government cannot stop. The fallacy it conveys is manifest." Restoring the principle enunciated in *Trans-Missouri* by Judge John A. Riner in the lower court twenty-eight years earlier in his common-law rendering of the Sherman Act, that "the public is not entitled to free and unrestricted competition, but . . . to . . . fair and healthy competition,"[68] the Supreme Court had since 1911 come full circle in affirming that the act "does not compel competition nor require all that is possible."[69]

Dissolution proceedings and consent decrees, after the 1911 decisions, in cases that affected prominent corporate consolidations, as well as looser arrangements, consistently reinforced the meaning of the Sherman Act under the restored common-law construction. In dissolution proceedings the Supreme Court (1) invariably required that stock held by the "parent" corporation in its constituents be redistributed from the "parent" corporation itself to its stockholders, so that the constituent corporations

67. *Id.* at 417, 436-57. The lower court decision in this case is at 223 F. 55 (D.N.J. 1915).

68. United States v. Trans-Missouri Freight Ass'n, 53 F. 440, 453 (1892).

69. United States v. U.S. Steel Corp., 251 U.S. 417, 442, 450-51 (1920).

would be left nominally independent; (2) seldom required atomizations of the constituent corporations, which themselves were often combinations; (3) prohibited the use of specified unfair practices in the future; but (4) did not prohibit the constituent corporations or the "parent" corporation from entering subsequent contracts of cooperation or association with one another or with others, which could be considered reasonable. The consent decrees entered into between the Department of Justice and various associations or corporate consolidations by and large prohibited particular practices and enjoined their repetition in the future. After the Rule of Reason decisions of 1911, and particularly during Woodrow Wilson's presidency, the consent decree or agreements informally negotiated by the Justice Department with corporations became a common method of settling antitrust cases.[70]

Among the corporations that submitted to consent decrees were the American Coal Products Company, the American Thread Company, S.F. Bowser & Company, the Burroughs Adding Machine Company, the Central West Publishing Company, the General Electric Company, the Otis Elevator Company, the American Corn Products Company, and the International Harvester Corporation. In Elliot Jones's words, "in no instance were the aforementioned companies required to submit to physical dissolution [except that International Harvester and Corn Products were ordered to divest themselves of certain units]; the decree merely enjoined certain objectionable practices, though in a few instances it ordered the dissolution of a few subsidiary companies or the sale of some securities."[71]

Alongside the large corporation, the trade association developed in the first two decades of the twentieth century not simply as a lobbying or promotional agency but also as a device for regulating the market. The idea of the "new cooperation" took hold and found application in the corporation and trade association alike. By 1912, regional and national trade associations had emerged in most industries, some of them implementing the less formalized practice of exchanging information among companies about prices and costs, as well as about orders, inventories, and the like, for the purpose of stabilizing prices by modulating supply and reducing price competition. Consistent with the

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70. *Cf.* E. JONES, *supra* note 31, at 490: "In very few instances, if any, have these consent decrees involved the physical division of the plants or assets of the companies. Instead they have dealt with the future conduct of the trust or combination." *Id.*; *see also* A. LINK, WOODROW WILSON AND THE PROGRESSIVE ERA, 1910-1917, at 76 (1954).

71. E. JONES, *supra* note 31, at 492. For discussion and analysis of dissolution proceedings involving the Standard Oil Co., the American Tobacco Co., the Du Pont "Powder Trust," the United Shoe Machinery Co., the National Cash Register Co., and the "Beef Trust" (a pool among Armour, Cudahy, Swift, Morris, and Wilson corporations), and of consent decrees mentioned in the text above, see *id.* at 445-98.

Rule of Reason doctrine, in a series of trade-association cases initiated after the 1911 decisions and decided in the early 1920s, the Supreme Court ruled that competitors might legally exchange price and other information if in so doing they did not explicitly agree to raise prices or to control production or distribution, and did not attempt to injure or exclude outside competitors by unfair practices.[72] Similarly, in 1919, the Supreme Court upheld the "resale price maintenance" device whereby manufacturers required dealers to maintain prescribed prices and refused to sell to those not complying.[73]

In effect and at law, the restored common-law construction of the Sherman Act in the decisions of 1911 and thereafter meant that unreasonable, and hence illegal, restraints of trade (of which "monopolize" or "attempt to monopolize" remained a subtype or a necessary or intended consequence) became synonymous not with the restriction of competition by private parties, but (a) with unfair methods of competition designed to oppress or eliminate competitors, and (b) with the use of market power to dictate prices or norms of trade or distribution deemed unreasonable, as prejudicial to the public interest. The two categories were doctrinally interrelated: Unfair practices were ipso facto against the public interest, which by definition included the right of enterprisers to compete unharassed by illegitimate means, while the "undue" fixing of prices, trade, or distribution constituted in itself an unfair practice obnoxious to the public interest. Accordingly, the remedy under the law resided not in the prohibition of combinations, associations, or loose arrangements, but in the prohibition of unfair practices as determined in each case on its merits. Neither the size or market power of a business enterprise, nor reasonable arrangements among business units, whether competitors or not, to stabilize markets or guarantee profitability, nor the necessary effects of these conditions on the market or on the competitive capability of less favorably disposed business units, came under the ban of the Sherman Act as now construed.[74]

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72. By the end of World War I, of about 1000 trade associations operating on a nationwide basis, more than 100 were experimenting with the "open-price policy" in the form of each member posting its prices with the association, which in turn circulated them, along with other pertinent information, in letters and periodicals. *See* T. COCHRAN, THE AMERICAN BUSINESS SYSTEM, 1900-1955, at 57-58, 61-62 (1962). In agriculture, farmer's cooperatives and exchanges designed to regulate supply and prices also emerged in the first two decades of the century. The Capper-Volstead Act of 1922 expressly exempted them from the provisions of the Sherman Act. *See* S. HAYS, THE RESPONSE TO INDUSTRIALISM, 1885-1914, at 59-62 (1973).

73. *See* United State v. Colgate & Co., 250 U.S. 300 (1919). *Cf.* C. ROHLFING, E. CARTER, B. WEST & J. HERVEY, BUSINESS AND GOVERNMENT 143 (5th ed. 1949).

74. *Cf.* T. COCHRAN, *supra* note 72, at 57; H. THORELLI, *supra* note 44, at 4-5; Bain, *Industrial Concentration and Anti-Trust Policy*, in THE GROWTH OF THE AMERICAN

III. THE CORPORATE-LIBERAL ALTERNATIVE

If the state of the law on restraint of trade cannot be said to have caused the resort to tight combinations of capital in the United States, it nevertheless played an important role of a different sort. The Harlan construction of the Sherman Act placed the corporate reorganization of industry in jeopardy to an incongruous legal order. On the one hand, the law of restraint of trade represented a menacing counterattack of the small-producer and anti-corporate populist forces against corporate regulation of the market. On the other hand, the law of property as promulgated in the Supreme Court's construction of liberty and due process protected the corporate form of property as such; this the small-producer partisans could not gainsay without hazarding a serious challenge to private-property rights in general, and their own in particular. Yet, if enforced by a populist President and Attorney General with broad-ranging prosecutions, the Sherman Act under the Harlan construction threatened to prevent the corporate form of property from fulfilling its raison d'etre, that is, from actuating corporate-directed regulation of the market. Given the intensity of popular animosity toward the large corporations, there was always the risk that even nonpopulist Presidents and political leaders, either from legalistic principle or from pursuit of electoral success, might enforce, or "play politics" with, the Sherman Act, or enact other disabling legislation at the expense of corporate power.

The crux of the matter was that the Harlan construction held the law to prohibit any substantial regulation of the interstate or foreign market by private persons, that is, by any agency other than the federal government. It faced two ways at once: toward unrestricted competition, and toward exclusive regulation by the nation-state. Potentially, then, it placed the corporate reorganization of industry beyond the pale of the law, and by the same token it intensified those tendencies that forced the trust question—the corporate reconstruction of the economy—into the center of American party politics. The twofold objective of the pro-corporate movement was to change the law and get the corporation question "out of" politics. This twofold objective the Rule of Reason decisions of 1911, coupled with the Federal Trade Commission (FTC) Act of 1914, eventually accomplished, but not without about fifteen years of protracted, sharp, and bitter political conflict that culminated in the temporary splitting of one of the two major parties.

The Rule of Reason decisions of 1911 and after applied to an economy dominated by corporate consolidations, not, however, because of the Sherman Act but because of the corporate movement among capitalists

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ECONOMY 625 (H. Williamson ed. 1951); Raymond, *The Federal Anti-Trust Act*, 23 HARV. L. REV. 353, 375 (1910).

along with pro-corporate political policy of the federal executive. In restoring a common-law construction of the Sherman Act, and thereby establishing an "antitrust" doctrine essentially similar to the relatively "lax" doctrine of Britain and continental Europe, the Rule of Reason legalized corporate consolidations as well as cartelization on a "higher basis." With respect to the latter, it sanctioned looser types of arrangements among large corporations no less than among smaller units for the restriction of competition, through such informal devices as trade associations or price leadership, or, less frequently, through formal contract, so long as such arrangements could be construed as reasonable and not contrary to the public interest.

It is, then, inaccurate to claim that had the Rule of Reason operated throughout the period after the enactment of the Sherman Act, it would have preserved a smaller-business organization of industry in the United States instead, coming when it did, of legitimizing and regulating the "new cooperation" among large corporate enterprises, to which myriad smaller business units were obliged to adjust. But with the Rule of Reason decision, as Thomas C. Cochran observed, the federal law now "served to define certain rules for 'monopolistic' competition." Or, following Chandler's phrase, the law now accorded with the replacement of the Invisible Hand by the Visible Hand. Large corporations could share a market and regulate investment and prices, as well as production, so long as they did not contravene the public interest by overtly rigging unreasonable prices, or by taking unfair action to destroy existing competitors or prevent new ones from entering the field. Now that great corporations dominated industry, the laws "dictated a live-and-let-live policy among the largest firms, since attempts to devour each other might lead to prosecution."[75] As opposed to conditions in Britain and continental Europe, cartelization proceeded in the United States with a diffidence, largely through informal arrangements. The huge corporations provided the basic structure for the restriction of competition and regulation of the market, subject to government supervision, desired by those in predominant control of the nation's industrial processes. The "new cooperation" sprang from the new corporatization.

In summary, from 1890 to 1920, and beyond, judicial construction of United States federal law on restraint of trade passed through three distinct periods: (1) that of common-law construction, from 1890 to 1897; (2) that of the superseding of common-law construction, from 1897 to 1911, during which the Sherman Act was held to prohibit reasonable as well as

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75. T. COCHRAN, *supra* note 72, at 58; *cf.* R. BRADY, BUSINESS AS A SYSTEM OF POWER 189-220 (1943); U.S. ATTORNEY GEN., REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 5-11, 80-81 (1955) (Stanley N. Barnes and S. Chesterfield Oppenheim, co-chairmen).

unreasonable restrictions of competition in interstate or foreign commerce; and (3) that of the restoration of common-law construction, beginning with the Rule of Reason decisions of 1911. The restoration rested, however, upon a new basis: an economy reorganized along corporate lines. It came to apply both to corporate consolidations and to looser arrangements among corporations and other business entities. Precisely in this application, based upon common-law construction, the law, while regulating corporate administration of the market to keep it within the bounds of reasonableness and the claims of the public interest, sanctioned and legitimized it. That, however, is only one part of the story. Another part resides in the way and the form in which the corporate reorganization found sanction and legitimacy and, here in particular, in the role of the common law in reaching the denouement.

To construe the Sherman Act as having embodied the common law was in effect to assign to judge-made law a leading authority in regulating the market, and to give it legislative sanction. That, in turn, meant permitting private law, and hence private parties, to determine to a large extent the regulation of the market, within a framework of judicial process, that is, substantially through contractual relations and contractual law. Hence, the common-law construction of the Sherman Act embodied the policy of allocating to private parties the primary role, the initiative, in regulating the market, and to government, through executive oversight and judicial process, a secondary, reactive role. It meant, in the specific historical context of the time, a policy of permitting and regulating a corporate-administered market.[76] Conversely, to construe the Sherman Act as having superseded the common law was in effect to hold that only the federal government, through public law, that is, through legislation and executive administration, could regulate the market—either to the exclusion, or with only a secondary role, of private parties and private law. Because it was politically all but certain that Congress in the years 1897-1911 could not be brought to pass legislation expressly permitting corporations or other private parties to regulate the market, nor could Congress be brought to repeal, amend, or supplement the Sherman Act, the Court's construction of the Sherman Act as having superseded the common law meant that either American business in interstate and foreign commerce must remain entirely and compulsively competitive, or it must be regulated, if at all, by the federal government to the exclusion of both the states and private parties. The alternatives, in short, were unrestricted competition or statist command.

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76. On common law and private party regulation, *see* G. WHITE, THE AMERICAN JUDICIAL TRADITION 113-15 (1976); Horwitz, *The Emergence of an Instrumental Conception of American Law, 1780-1820*, 5 PERSP. AM. HIST. 285, 288 (1971).

Although it expressed pro-small-producer proclivities, the Court's position was neither doctrinally laissez-faire in substance nor anti-regulation in intent. On the contrary, in his decisions for the Court in *Trans-Missouri, Joint Traffic*, and *Addyston Pipe*, Justice Peckham, who had delivered *Allgeyer*, substantially qualified the latter's liberty and due process principles, in effect, and indeed explicitly, subordinating them to Congress's power to regulate the interstate and foreign market. The Court's position in these cases, and in all subsequent Sherman Act cases until the Rule of Reason decisions of 1911, held that the Sherman Act superseded the common law and thereby made illegal reasonable as well as unreasonable restraints of trade. Its position was, therefore, that Congress had, under the commerce clause of the constitution, full power to regulate interstate and foreign commerce, and to limit liberty to the extent thereby implied; that in enacting the Sherman law, Congress had decided to retain exclusive power to regulate the interstate and foreign market by forbidding such regulation to private parties (the states being constitutionally excluded); and that for the duration, until it might decide otherwise, Congress had chosen to exercise its regulatory power through the hidden hand of unrestricted competition. Such, in the Court's view, was the public policy enacted by Congress.

Put somewhat differently, the Sherman Act as construed by the Court took regulatory authority out of the market, where one-dollar-one-vote ruled, and placed it in the political arena, where (theoretically) one-person-one-vote ruled. Hence, just as with the national banking and currency laws (before the Federal Reserve Act of 1913), which kept ultimate control of the money supply in the hands of the national state (Congress and the Treasury Department), subject to electoral politics, and out of the control of private parties, so with the law regulating commerce and industry: Regulation was to remain lodged with the federal government and forbidden to private parties; it was to remain "politicized," that is, subject to electoral politics and public law.

The Court's construction of the Sherman Act readily reached tight corporate consolidations, as well as those of the looser sort, as its *Trans-Missouri* decision indicated, and as the *Northern Securities* case, and the decision of the lower federal courts in the *American Tobacco* and *Standard Oil* cases, clearly demonstrated. Hence, the construction of the Sherman Act by the Court from 1897 to 1911 put the nonstatist corporate reconstruction of American capitalism, then in process, beyond the pale of the law. The corporate reorganization of the economy in those years went forward within the framework of an incongruent legal order. Because the law and the market in a modern capitalist society are so intimately interrelated, the legal incongruity directly translated itself into a political conflict that became central to national politics.

It does not seem to be historically accurate to describe Congress's action in passing the Sherman Act in 1890 as either laggard, inept, or ineffective, nor as an attempt to preserve or enforce a "free-competition" market. By 1890, corporate consolidation on a scale large enough to regulate the market was still in an inchoate state in industry, finance, and commerce; even among railroads, where "natural monopoly" added to the regulatory capacities of large-scale corporate organization, competition still raged. The states retained full power, unequivocally affirmed by the United States Supreme Court, to break up inter-firm combinations domiciled within their respective jurisdictions.[77] Passage of the Sherman Act in 1890, then, should be viewed as a rather prompt response of the federal legislative branch to constituents' opinion and to changing conditions. The drafting of the bill was, indeed, a matter of multifaceted contention and negotiation among small-producer and pro-corporate partisans, and it was further complicated by the constitutional law of federal-state jurisdiction, but the result, the Act as passed, was neither vague nor inept. Its terms, rather, constituted a sophisticated embodiment of a definite policy of permitting and regulating, through judicial process, corporate combination and enterprise.[78]

It is, of course, the Supreme Court's (and in general the judiciary's) routine and proper function, within the United States constitutional system, to interpret the meaning of a law in cases brought before it. Judicial interpretation, however, is not necessarily equivalent to policy-making. From 1890 to 1911 (and thereafter), the Supreme Court acted as the principal interpreter of the meaning of the Sherman Act, and it is in that sense accurate to say that from 1890 to 1897, it shared with Congress and the executive branch the role of a "principal maker" of policy. But from 1897 to 1911, the principal maker of government policy on the trust question was neither Congress nor the Supreme Court (or the judiciary), but the executive. Presidents McKinley, Roosevelt, and (to a lesser extent) Taft refused to accept the Court's non-common-law construction of the

77. D. MORGAN, CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY 140-59 (1966); McCurdy, *The* Knight *Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869-1903*, 53 BUS. HIST. REV. 304 (1979).

78. For an evaluation of Senate debate and deliberation on the Sherman Act as having been of a "high caliber" and at a "high level" of thought and legal expertise, see D. MORGAN, *supra* note 77, at 140-59, especially at 149, 157. The famous statement of Republican Senator Orville H. Platt (Conn.) that "the whole effort has been to get some bill headed 'A bill to punish trusts' with which to go to the country," 23 CONG. REC. 2731 (1890), has been cited time and again as evidence of the fraud or ineptness of the Sherman Act. But Platt, who in Senate debate argued in favor of permitting reasonable restraints of trade, made that statement about and during the debate on, Sherman's original bill, not the Judiciary Committee bill, that is, not the Act as passed, which he voted for. *Cf.* W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 53 n.3 (1965); H. THORELLI, *supra* note 44, at 197-99, 201; Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 23 & n.43 (1966).

Sherman Act as sound policy, and by controlling the prosecutorial process and, in Roosevelt's case, by establishing a rival, executive, agency (the Bureau of Corporations), and entering extralegal understandings with corporate executives, they took determination of antitrust policy away from the judiciary and, in the face of Congress's inability to act, lodged it with the executive.[79] The Rule of Reason decisions of 1911 together with the legislation of 1914 (FTC and Clayton Acts) during the first Wilson administration restored a stable equilibrium of policy-making sharing among the three branches of the federal government, along with an effective clarification of the law.

In the meantime, however, although the executive assumed the principal policy-making role on the trust question from 1897 to 1911, nevertheless, throughout this period the executive and the Court were at loggerheads and engaged in a running battle over the nature of policy with respect to the regulation of the market. This made for uncertainty of the law, the bane of commerce, and hence for a crisis, or at any rate a crisis psychology, in the market and in politics that made the resolution of the trust question the single most important issue in the nation's politics. Corporate executives, investment bankers, small enterprisers, labor unionists, could not know for certain where they stood with respect to the law of market relations and practices, in the near or far future, and therefore in the present as well: The Court's majority might change; the next election might bring a President with a different policy, or a Congress ready to act in an unwanted way.

Under pressure to resolve the crisis of the legal order, President Roosevelt came, in effect, to accept the Court's definition of the alternatives, namely, either a freely competitive market or statist regulation. In an evolving but by no means premeditated policy, first through executive action via the Bureau of Corporations (established 1903), then through introduction of the Hepburn amendments to the Sherman Act in 1908, and culminating with Roosevelt's public statements and writings, private policy-planning, and presidential campaigning over the next four years, Roosevelt ultimately sought to legalize the corporate reorganization of the economy under direct state command: a statist solution, although not necessarily the equivalent of a corporate state in either practical or strict theoretical terms.[80] His efforts proved unsuccessful, and many earlier supporters of the policy backed off as they perceived more clearly the statist implications of Roosevelt's position. President Taft opposed the statist solution, as did Woodrow Wilson. This was the essence of the difference in policy between Roosevelt and Taft, as it was between

79. On the extralegal understandings, see Wiebe, *The House of Morgan and the Executive, 1905-1913*, 65 AM. HIST. REV. 49 (1959).

80. *See* M. SKLAR, *supra* note *, at 334-64.

Roosevelt's New Nationalism and Wilson's New Freedom—not the Tweedledee, Tweedledum of "regulated monopoly" versus "regulated competition."

In restoring the common-law construction of the Sherman Act, in its Rule of Reason decisions of 1911, the Supreme Court laid the juridical basis of what may be called the corporate-liberal solution of the trust question, that is, of a nonstatist accommodation of the law to the corporate reorganization of capitalism, a solution that Taft and Wilson affirmed and sought as Presidents, in different ways, to strengthen and develop, with ultimate success, Wilson with considerably greater political success than Taft. It was a solution capped by the legislation of 1914. Historians have long noted and often puzzled over the suddenness with which the trust question thereafter receded from the center of national politics, if not disappearing altogether. Some have thought that the American people grew tired of the issue or that the legislation of 1914 lulled them into complacency. With the Rule of Reason decisions of 1911 and the legislation of 1914, however, the American people (or the major American political forces) had not become tired with, or complacent about, the issue; they had settled it. It was a settlement, that is, sufficiently satisfactory to the major concerns and interests among them, however unsatisfactory it may have been to the concerns and interests of historians.

IV. CONCLUSION

For its normal functioning and development, capitalism requires both certainty and predictability in the sociopolitical environment, and particularly in the law and the legal order. At the same time, capitalism requires openness to rapid change ("development," "growth"). Hence, the law must provide for the play of continuous change on a field of relative certainty and predictability. The strength of common-law jurisprudence lay precisely in its flexibility composed of these two virtues intertwined. That is, judge-made law, based on precedent and rational-instrumental reasoning rooted in experience, has allowed for both predictability and change. By its very nature, moreover, it is a predictability and change that has corresponded in general with the outlook, values, and interests of the litigants (with all the conflicts, contradictions, or inconsistencies implied therein), and hence with those propertied and contracting parties making regular use of the courts. Judge-made law in a capitalist society, then, has normally tended to express, arbitrate, and enforce the social dominance of capitalist property and capitalists as a class, but in the United States in particular, it has tended ultimately to validate that form of capitalist property and those capitalists that were ascending in the market and the society at large.

This result has been a matter not of a special American teleology of Progress but of capitalists deploying their liberty in aid of their interests, and knowing in their bones if not in their heads that the market is as much a realm of law and politics as of economics. The common law and, even better, its legislative embodiment, as in the Sherman Act properly construed, have thereby facilitated change as American capitalism has developed, while validating the certainty and security of capitalist property and social relations as such. It has had one other virtue: It has sustained the principle and practice of a large autonomy of the market from party politics and state command, and hence the principle and practice of the supremacy of society over the state. Capitalists in America have long understood that politics are not limited to, or simply coterminous with, party politics and the state. As long as the capitalists in general feel secure in their dominance in society, they may be expected to affirm, and act to sustain, the supremacy of society over the state. It was a sense of insecurity along these lines within a sector of the corporate wing of the capitalist class in the early twentieth century that led some of them to back, or flirt with, Roosevelt's statist tendency. In the end, they came back to the common law, which has been peculiarly suited to serve as a powerful ally of the liberal form of capitalism, while no less amenable to serve, in a similar manner, the needs of a liberal form of socialism.

The corporate-liberal alternative, as embodied in the Rule of Reason decisions and as fleshed out in the legislation of 1914 and since, accomplished two basic conditions: It "depoliticized" the market in the sense of removing the regulation of the market from determination by electoral politics or by the exclusive or paramount power of the state. Second, apart from common carriers, public utilities, or "natural monopolies," it assured primary regulation of the market by private parties and private law, that is, by private parties subject to judicial process while assigning to the state, in its legislative and executive capacities, the secondary role through regulatory laws authorizing prosecutory action or administrative policing, but again, subject to judicial review, and in either case, judicial review based on common-law doctrine and precedent.

The adaptation of the legal order to corporate capitalism was an integral phase of the corporate reconstruction of American capitalism in general. It stands as a signal achievement of the Progressive Era. The adaptation was based, in part, upon the recognition of the corporation as a person at law, both in constitutional constructions of the Supreme Court and in the Sherman Act itself and subsequent antitrust legislation. The adaptation was also based upon the ultimate judicial construction of the Sherman Act as embodying the common law and the shaping of subsequent antitrust legislation by such construction. Antitrust law and jurisprudence represented one among a number of areas in the adaptation of the law to corporate capitalism, areas that included transportation and communication, banking, labor, agriculture, and foreign relations. Neither in its realization nor in its form was the adaptation a foregone conclusion. It was an outcome of political contention stretching over twenty-five years (and beyond), a contention that saw the rise of significant populist and socialist party-politics, the temporary splitting apart of both major parties (the Democrats in the 1890s, the Republicans in 1910-1914), and more lasting political realignments. It was, finally, an outcome of a great social movement for corporate capitalism that rejected a statist for a liberal form.