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ANTITRUST PRACTICE AND PROCEDURE IN THE FORMATIVE ERA: THE CONSTITUTIONAL AND CONCEPTUAL REACH OF STATE ANTITRUST LAW, 1880-1918

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INTRODUCTION

Antitrust scholars portray early antitrust decisionmaking as an intellectual realm in which serious policy errors were committed because populist approaches were allowed free rein in the absence of guidance from general economic theory. Yet, in striking respects, the history of early antitrust jurisprudence remains unexplored. Much of the relevant case law barely has been addressed, while the remainder has been pictured in a way that deemphasizes the variety of influences apparently shaping its development. This Article examines aspects of judicial analysis prior to the close of World War I that have received comparatively little attention from antitrust scholars and historians and seeks to suggest both the need for further study in these areas and its potential rewards. The Article's immediate focus is on the judicial treatment of constitutional challenges to state antitrust enforcement; its larger concern is with the diversity of factors affecting early antitrust jurisprudence. Within the broader social and constitutional context of state antitrust activity, the Article focuses particularly on the way in which economic theory influenced early antitrust reasoning. While important recent antitrust scholarship asserts that general economic theory played no significant role in shaping judicial analysis in the "formative" years

of antitrust development,¹ this Article finds that opinions addressing early constitutional challenges to state enforcement suggest a very different conclusion. Discovering strong indications of the shaping power of contemporary economic philosophy in early antitrust approaches previously dismissed as standardless, subjective populism, the Article goes on to consider the reasons why leading antitrust historians may have unduly minimized the early impact of general theory.

The first section of this Article details the nature and significance of state statutory and common law responses to late nineteenth and early twentieth century economic concentration and collusion. It argues that scholarly neglect of these responses rests on, and has helped to perpetuate, an erroneous assessment of their practical and symbolic importance. The second section addresses congressional and judicial delineation of the permissible scope of early state antitrust activity. It notes the apparent congressional intent to supplement but not limit state efforts and then goes on to describe in detail both the variety of constitutional challenges made to such early state initiatives and their judicial resolution. The Article relates how contemporary jurists repeatedly reaffirmed considerable state power over corporate charters and business privileges and indicates how that power gave states a flexible means to achieve not only corporate ouster but also the more certain payment of antitrust fines, even for activities that the states constitutionally could not have regulated directly. Following a review of the mixed success of commerce clause and territorial due process challenges to state legislation, the Article then describes how, in contemporary equal protection analysis, initial judicial hostility came to be replaced by substantial support for selective state attacks on anticompetitive behavior. After summarizing the judicial treatment of freedom of contract challenges and charges that various state penalties and procedures violated constitutional due process requirements, the Article then examines state and federal decisions addressing void-for-vagueness challenges to state antitrust legislation, the group of opinions that most strikingly suggests the power of contemporary economic theory and of competing visions of economic reality.

I. THE OTHER HALF OF ANTITRUST: STATE STATUTORY AND COMMON LAW, 1880-1918

Antitrust scholars and historians have examined in detail a great many aspects of federal antitrust development in the "formative era" of

¹ See *infra* notes 287-330 and accompanying text.

the late nineteenth and early twentieth centuries.² But the other half of antitrust activity during that period, the state complement to federal policy and practice, has received considerably less attention. While such relative deemphasis reflects the comparative importance of federal and state antitrust law during most of the last half century,³ it does not parallel the comparative social and economic importance of the two fields in the early formative period itself.

In 1961, a leading commentator could declare enforcement of state antitrust laws "virtually dead" and openly wonder "whether it would have been unethical in recent years for lawyers in most states to tell their clients to ignore them."⁴ In 1900 or 1910, businesses and business lawyers in several states could overlook the possibilities of state-level challenge to anticompetitive activity only at substantially greater risk.

Defensive challenge to private enforcement of contracts and combinations in restraint of trade was permitted in English and American common law long before the late nineteenth century.⁵ Moreover, beginning early in that century, American jurisdictions undertook common law and statutory⁶ prosecutions for conspiracies in restraint of trade, with early labor unions a frequent target.⁷ State statutory and common

² Important treatments include R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978); D. DEWEY, *MONOPOLY IN ECONOMICS AND LAW* (1959); R. HOFSTADTER, *What Happened to the Antitrust Movement?*, in *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 188 (1965); J. HURST, *LAW AND SOCIAL ORDER IN THE UNITED STATES* 245-66 (1977); W. LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT* (1965); H. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* (1955); J. WEINSTEIN, *THE CORPORATE IDEAL IN THE LIBERAL STATE: 1900-1918*, at 62-91 (1968); Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 *HASTINGS L.J.* 65 (1982). Scholars frequently have referred to this period as the "formative era" of modern antitrust law. See, e.g., R. BORK, *supra*, at 17; Rahl, *Toward a Worthwhile State Antitrust Policy*, 39 *TEX. L. REV.* 753, 753 (1961).

³ See, e.g., Project, *Reviving State Antitrust Enforcement: The Problems with Putting New Wines in Old Wine Skins*, 4 *J. CORP. L.* 547, 555 (1979). In recent years state-level legislative activity and litigation have increased, sparking renewed interest in legal and practical issues raised by dual federal and state antitrust efforts. See *id.*; see also Hovenkamp, *State Antitrust in the Federal Scheme*, 58 *IND. L.J.* 375, 377-78 & n.10 (1983).

⁴ Rahl, *supra* note 2, at 753.

⁵ See W. LETWIN, *supra* note 2, at 18-52; H. THORELLI, *supra* note 2, at 9-53.

⁶ New York, for example, as early as 1828, enacted legislation declaring: "If two or more persons shall conspire . . . [t]o commit any act injurious to . . . trade or commerce . . . [t]hey shall be deemed guilty of a misdemeanor." Act of Dec. 10, 1828, § 8(6), 2 *N.Y. REV. STAT.* 689, 691-92; see *NEW YORK STATE BAR ASSOCIATION, REPORT OF THE SPECIAL COMMITTEE TO STUDY THE NEW YORK ANTITRUST LAWS* 2a (1957).

⁷ See J. RAYBACK, *A HISTORY OF AMERICAN LABOR* 56-60, 81-82 (1959); Morris, *New Preface* to 3 & 4 *J. COMMONS & E. GILMORE, DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY* at i-xii (1958).

law activity increased greatly, however, in the late nineteenth and early twentieth centuries as new collective business arrangements proliferated by the thousands and economic concentration increased substantially.⁸ At least fourteen states inserted antimonopoly provisions into their state constitutions prior to July 2, 1890,⁹ the date of passage of the federal Sherman Act,¹⁰ and at least thirteen states enacted their own antitrust legislation prior to that date.¹¹ By 1900, the number of states and territories adopting such statutes rose to twenty-seven,¹² reaching a total of at least thirty-five states by 1915.¹³

State antitrust measures took many forms and frequently established more detailed prohibitions than did contemporary federal legislation. Numerous state provisions variously attacked monopoly,¹⁴ restraint of trade,¹⁵ restraint of competition,¹⁶ pooling,¹⁷ price fixing,¹⁸ output limitations,¹⁹ territorial divisions,²⁰ resale restraints,²¹ exclusive dealing,²² refusals to deal,²³ local price discrimination,²⁴ and predatory pricing.²⁵ Remedial provisions were similarly diverse. Statutes in at

⁸ See H. THORELLI, *supra* note 2, at 63-96, 254-308.

⁹ See H. SEAGER & C. GULICK, *TRUST AND CORPORATION PROBLEMS* 341 (1929). A number of provisions prior to 1887, however, apparently were directed more at publicly granted than privately established monopolies. See *Legislation, A Collection and Survey of State Antitrust Laws*, 32 COLUM. L. REV. 347, 347 n.2 (1932).

¹⁰ Sherman Antitrust Act, ch. 647, §§ 1-8, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1982)).

¹¹ See H. SEAGER & C. GULICK, *supra* note 9, at 341. Six of these states were among the fourteen that adopted antimonopoly provisions in their constitutions. See *id.* at 342.

¹² See *id.* at 343.

¹³ See J. DAVIES, *TRUST LAWS AND UNFAIR COMPETITION* 212 (1916). Although published in 1916, the date of this report by Joseph E. Davies, the Commissioner of Corporations, United States Department of Commerce, was March 15, 1915. By 1929, only eight states had adopted neither a constitutional nor a statutory antitrust provision. See H. SEAGER & C. GULICK, *supra* note 9, at 343.

¹⁴ See J. DAVIES, *supra* note 13, at 144-50.

¹⁵ See *id.* at 150-59.

¹⁶ See *id.* at 159-64.

¹⁷ See *id.* at 164-68.

¹⁸ See *id.* at 168-78.

¹⁹ See *id.* at 179-82.

²⁰ See *id.* at 182.

²¹ See *id.* at 183.

²² See *id.* at 184-85.

²³ See *id.* at 185-86.

²⁴ See *id.* at 187-91.

²⁵ See *id.* at 192-95. For still other areas of pre-World War I state antitrust legislation, including particular provisions relating to farming interests, labor, and holding companies, as well as sections reaffirming common law principles and addressing procedural and administrative matters, see *id.* at 196-211. See generally C. BEACH, *A TREATISE ON THE LAW OF MONOPOLIES AND INDUSTRIAL TRUSTS AS ADMINISTERED IN ENGLAND AND IN THE UNITED STATES OF AMERICA* (1898); J. JOYCE, *A TREATISE ON MONOPOLIES AND UNLAWFUL COMBINATIONS OR RESTRAINTS* (1911).

least thirty-five states authorized fines, imprisonment, or both²⁶ and often provided penalties significantly more severe than the one year, \$5000 limits established in the Sherman Act as passed by Congress in 1890.²⁷ Statutes in North Carolina,²⁸ South Carolina, Oklahoma, Tennessee, and Texas²⁹ authorized the longest prison terms for antitrust violations, each allowing a maximum sentence of ten years.³⁰ Authorized fines ranged up to \$25,000, and at least ten states declared each day of violation a separate offense.³¹ Iowa provided that corporate violators could be fined in an amount equal to twenty percent of the violator's capital stock.³² Nine states expressly allowed private parties injured by antitrust violations to recover actual damages,³³ two others authorized double damages,³⁴ and another nine permitted treble damage recovery.³⁵ In addition, at least thirty states provided that corporate charters and intrastate business privileges could be revoked in response to violations of state antitrust laws,³⁶ and at least four states declared that anyone purchasing from a seller doing business in violation of antitrust law would be freed from any obligation to pay for the purchased goods.³⁷

Even before enactment of the Sherman Act, six states brought actions to challenge the continued intrastate activity of particular major "trusts." The states won all six, leading to annulment of defendants' franchise or business privileges in some cases and the forced severance of corporate "trust" connections in others.³⁸ Between 1890 and 1902,

²⁶ See J. DAVIES, *supra* note 13, at 212.

²⁷ Ch. 647, §§ 1-3, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-3 (1982)).

²⁸ See H. THORELLI, *supra* note 2, at 155. The North Carolina provision was contained in an 1889 statute. See *id.* at 155 n.197. As noted below, see *infra* note 30, a 1913 North Carolina law set no maximum limit.

²⁹ See J. DAVIES, *supra* note 13, at 213 & n.1.

³⁰ A 1911 Wyoming law and a 1913 North Carolina law, however, set no maximum limits on prison terms. See *id.* at 213 n.3.

³¹ See *id.* at 213. Montana authorized the \$25,000 penalty. A 1911 Wyoming law and a 1913 North Carolina law established no upper limit on fines. See *id.* at 213 nn. 2-3.

³² See H. THORELLI, *supra* note 2, at 155.

³³ See J. DAVIES, *supra* note 13, at 216.

³⁴ See *id.*

³⁵ See *id.*

³⁶ See *id.* at 213.

³⁷ See *id.* at 214; see also *infra* note 140 and accompanying text.

³⁸ See California *ex rel.* Attorney Gen. v. American Sugar Ref. Co., 7 Ry. & Corp. L.J. 83 (Cal. Super. Ct. 1890) (ordering forfeiture of franchise); People *ex rel.* Peabody v. Chicago Gas Trust Co., 130 Ill. 268, 22 N.E. 798 (1889) (enjoining corporation from holding or selling stock of other gas companies); State v. Nebraska Distilling Co., 29 Neb. 700, 46 N.W. 155 (1890) (annulment of franchise); People v. North River Sugar Ref. Co., 121 N.Y. 582, 24 N.E. 834 (1890) (ordering forfeiture of

twelve states brought a total of twenty-eight antitrust actions,³⁹ while in the same period the United States Department of Justice instituted a total of nineteen antitrust suits.⁴⁰ Although federal activity increased dramatically in subsequent years,⁴¹ at least certain states simultaneously continued active enforcement efforts of their own for another decade or more.

State enforcement actions prior to the 1920's were not confined to minor traders or to purely local concerns. Combinations of multistate scope often were targeted,⁴² and a number of state cases challenged the local implementation of interstate arrangements that also were attacked by federal antitrust authorities. Thus, ten states and the Oklahoma Territory brought twenty-four cases against members of the Standard Oil Trust between 1890 and 1906,⁴³ and other state suits challenged activities of the sugar,⁴⁴ beef,⁴⁵ and tobacco⁴⁶ combinations.

The level of contemporary state activity also is reflected in the pattern of aggregate penalties imposed in federal and state antitrust cases. Through 1914, the Department of Justice brought 69 criminal and 83 civil antitrust cases; through 1919, the Department brought 94 criminal and 101 civil antitrust actions.⁴⁷ The aggregate amount of fines imposed in all federal criminal antitrust cases since passage of the Sher-

franchises and dissolution of corporation); *State ex rel. Attorney Gen. v. Standard Oil Co.*, 49 Ohio St. 137, 30 N.E. 279 (1892) (case filed May 8, 1890, prior to the enactment of the Sherman Act) (ordering severance of connections to the Standard Oil Trust). In addition to the actions addressed in these cases, Louisiana sought and obtained, in an unreported decision, an injunction banning intrastate business operations on the part of the Cotton Oil Trust. *See* H. THORELLI, *supra* note 2, at 79 & nn. 87-89, 615. For an earlier phase of that litigation, *see* *Louisiana v. American Cotton Oil Trust*, 1 RY. & CORP. L.J. 509 (La. Civ. Dist. Ct. 1887) (overruling defendant's exception and finding that the state had stated a cause of action sufficient to allow the matter to proceed to trial).

³⁹ *See* H. THORELLI, *supra* note 2, at 595. Defendants lost the great majority of these cases. *See id.* at 259-65.

⁴⁰ *See* Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 366 (1970).

⁴¹ *See id.*

⁴² *See* NEW YORK STATE BAR ASSOCIATION, *supra* note 6, at 7a; H. THORELLI, *supra* note 2, at 79-82, 259-66, 596; Project, *supra* note 3, at 553-54 & n.66.

⁴³ *See* B. BRINGHURST, *ANTITRUST AND THE OIL MONOPOLY: THE STANDARD OIL CASES, 1890-1911*, at 204 (1979); Project, *supra* note 3, at 553.

⁴⁴ *See* *California ex rel. Attorney Gen. v. American Sugar Ref. Co.*, 7 RY. & CORP. L.J. 83 (Cal. Super. Ct. 1890); *People v. North River Sugar Ref. Co.*, 121 N.Y. 582, 24 N.E. 834 (1890). For the federal suit, *see* *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895).

⁴⁵ *See, e.g., State ex rel. Barker v. Armour Packing Co.*, 265 Mo. 121, 176 S.W. 382 (1915); *State ex rel. Crow v. Armour Packing Co.*, 173 Mo. 356, 73 S.W. 645 (1903). For the federal suit, *see* *United States v. Swift & Co.*, 196 U.S. 375 (1905).

⁴⁶ *See, e.g., People v. Duke*, 19 Misc. 292, 44 N.Y.S. 336 (Ct. Gen. Sess. 1897). For the federal suit, *see* *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

⁴⁷ *See* Posner, *supra* note 40, at 385.

man Act amounted to \$219,875 by the end of 1909, \$619,965 by the close of 1914, and \$765,822 by the end of 1919.⁴⁸ The average fine per case, in federal suits where fines actually were imposed, amounted to a little over \$21,000 in the years between 1905 and 1914 and a little over \$11,000 between 1915 and 1919.⁴⁹ Yet, in a single pre-war case against the local Standard Oil affiliate, Texas collected over \$1.6 million in fines.⁵⁰ Moreover, in the combined years 1912 through 1918 and 1922 through 1924, Texas courts reportedly imposed an additional \$1.5 million in total fines in other state antitrust cases,⁵¹ and, by the end of 1915, courts in Missouri levied unsuspended fines of \$678,000 against defendants in five actions charging violations of that state's antitrust standards.⁵²

Nonetheless, historians often have downplayed the practical significance of early state antitrust activity, noting that a great many states did little or nothing to enforce antitrust standards⁵³ and declaring that court decisions in state public litigation did not effectively reverse economic concentration or restructure markets affected by antitrust violations.⁵⁴ Scholars have particularly stressed the increasing reluctance of state prosecutors and judges to revoke the charters or business privileges of corporate violators, a reluctance stemming in large part from a recognition of the potentially high cost of such relief, particularly if it might cause a violator's instate factories to close, unemployment to rise, and the number of local competitors actually to decline.⁵⁵

But the relative infrequency of judicial decrees effectively compel-

⁴⁸ See *id.* at 392.

⁴⁹ See *id.* An unsuspended prison sentence was imposed in only one federal case through 1914, this single instance being a sentence of four hours in a labor case. See *id.* at 391. Only three more jail terms were imposed in federal cases through 1919. See *id.*

⁵⁰ See *infra* text accompanying note 199.

⁵¹ See Legislation, *supra* note 9, at 366 n.150.

⁵² See State *ex rel.* Barker v. Armour Packing Co., 265 Mo. 121, 176 S.W. 382 (1915) (five defendants each fined \$25,000); State *ex rel.* Attorney Gen. v. Arkansas Lumber Co. (the Yellow Pine Mfrs. Ass'n case), 260 Mo. 212, 169 S.W. 145 (1913) (four defendants fined \$50,000 each; one fined \$30,000; one fined \$25,000; one fined \$20,000; two fined \$10,000 each; one fined \$8000; nine fined \$5,000 each; two fined \$3,000 each; and four fined \$1,000 each); State *ex rel.* Major v. International Harvester Co. of Am., 237 Mo. 369, 141 S.W. 672 (1911) (defendant fined \$25,000); State *ex rel.* Hadley v. Standard Oil Co., 218 Mo. 1, 116 S.W. 902 (1908) (three defendants each fined \$50,000); State *ex rel.* Crow v. Armour Packing Co., 173 Mo. 356, 73 S.W. 645 (1903) (four defendants each fined \$5000).

⁵³ See H. SEAGER & C. GULICK, *supra* note 9, at 365; H. THORELLI, *supra* note 2, at 265, 595.

⁵⁴ See B. BRINGHURST, *supra* note 43, at 7, 8; Legislation, *supra* note 9, at 364.

⁵⁵ See B. BRINGHURST, *supra* note 43, at 7, 67, 88; H. SEAGER & C. GULICK, *supra* note 9, at 365-66; McCurdy, *The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869-1903*, 53 BUS. HIST. REV. 304, 317, 339-41 (1979); Legislation, *supra* note 9, at 360.

ling ouster or restructuring markets does not necessarily demonstrate the insignificance of state antitrust efforts. Early federal enforcement itself sometimes has been criticized on somewhat similar grounds,⁵⁶ and even scholars generally critical of early state efforts note some striking successes.⁵⁷ Moreover, intensive recent reexamination of some previously criticized areas of early state antitrust enforcement has led at least one scholar to reach a dramatically more favorable assessment of the impact of regional antitrust enforcement, concluding that "anti-trust and the fear of anti-trust had a pervasive and far-reaching effect on the rise of oligopoly in oil."⁵⁸

In these same early years of antitrust development, private common law and statutory challenges to anticompetitive activity greatly increased,⁵⁹ vastly outnumbering state enforcement actions⁶⁰ and quite likely modifying economic behavior much more pervasively than did state government litigation.⁶¹ The importance of these state law private cases has not gone unnoted. Hans Thorelli, for example, has declared that the repeated legal frustration of efforts to enforce anticompetitive agreements in these cases "was one of the prime factors preventing the lapse of American industry into general cartelization of . . . the contemporary German type."⁶²

Contemporary Americans themselves typically considered state statutory and common law to be quite important responses to the

⁵⁶ See, e.g., B. BRINGHURST, *supra* note 43, at 180 (describing the "startling weakness" of the dissolution decreed in the federal antitrust suit against Standard Oil).

⁵⁷ See, e.g., H. THORELLI, *supra* note 2, at 263 (declaring a New York case against a "milk exchange" as important as many contemporary federal cases); Legislation, *supra* note 9, at 366 (noting the "considerable success" achieved in a few states).

⁵⁸ Pratt, *The Petroleum Industry in Transition: Anti-Trust and the Decline of Monopoly Control in Oil*, 40 J. ECON. HIST. 815, 831 (1980).

⁵⁹ See NEW YORK STATE BAR ASSOCIATION, *supra* note 6, at 4a.

⁶⁰ See H. THORELLI, *supra* note 2, at 265, 596.

⁶¹ A general indication of the growth of private litigation can be obtained, for example, by examining the cases reported in key sections of the *American Digest* and the *First and Second Decennial Digests* under the "Contracts" chapter subsection entitled "Restraint of Trade or Competition in Trade." See 11 AMERICAN DIGEST §§ 542-569 (Century Ed. 1899); 5 AMERICAN DIGEST §§ 115-120, 130, 132 (Decennial Ed. 1908); 5 AMERICAN DIGEST §§ 115-120, 130, 132 (2d Decennial Ed. 1919). These works collect cases in all American jurisdictions through 1916.

Although these sections do not note all cases in which arguably anticompetitive behavior or arrangements were challenged, their examination does suggest the overall direction and magnitude of the changes occurring in the late nineteenth and early twentieth centuries. The digests list less than 25 private cases decided in all jurisdictions before 1850, just over 20 for the period between 1850 and 1859, and not quite 30 decisions in all of the 1860's. For succeeding decades, the numbers increase dramatically: over 50 in the 1870's, over 70 in the 1880's, almost 150 in the 1890's, nearly 200 in the first decade of the twentieth century, and 100 between 1910 and 1914.

⁶² H. THORELLI, *supra* note 2, at 266.

threatening economic changes of the time. Congressional representatives repeatedly expressed this view in the legislative debates prior to the passage of the Sherman Act and made clear a pervasive congressional desire only to supplement, and not to inhibit, state authority and activity.⁶³ Leading legal treatises and surveys of the time focused prominently on state statutes and decisions, giving them at least equal,⁶⁴ and in some cases considerably more,⁶⁵ attention than federal developments. The public followed particular state antitrust cases with great interest.⁶⁶ Newspapers frequently featured coverage of important law enforcement and litigation developments,⁶⁷ and a number of state court decisions created substantial public excitement.⁶⁸

Contemporaries perceived state judges to be crucial players and at times expressed marked concern regarding judicial predispositions and actions. Thus, Standard Oil attorney S.C.T. Dodd declared starkly: "If some of the modern opinions of judges in trust cases are to be followed, we are relegated at once . . . to the dark ages, when business was necessarily carried on in defiance of law."⁶⁹ The populist judges of the Oklahoma Criminal Court of Appeals, on the other hand, agreed that state judges had tremendous power to affect the success of antitrust ef-

⁶³ See Hovenkamp, *supra* note 3, at 378-79. Thus, the House Judiciary Committee Report expressed the general congressional sentiment when it explained that by the proposed legislation

[n]o attempt is made to invade the legislative authority of the several States or even to occupy doubtful grounds. No system of laws can be devised by Congress alone which would effectually protect the people of the United States against the evils and oppression of trusts and monopolies. Congress has no authority to deal, generally, with the subject within the States, and the States have no authority to legislate in respect of commerce between the several States or with foreign nations.

It follows, therefore, that the legislative authority of Congress and that of the several States must be exerted to secure the suppression of restraints upon trade and monopolies. *Whatever legislation Congress may enact on this subject, within the limits of its authority, will prove of little value unless the States shall supplement it by such auxiliary and proper legislation as may be within their legislative authority.*

H.R. REP. NO. 1707, 51st Cong., 1st Sess. 1 (1890) (emphasis added).

⁶⁴ See, e.g., J. DAVIES, *supra* note 13; J. JOYCE, *supra* note 25.

⁶⁵ See, e.g., C. BEACH, *supra* note 25. This work is said to have been the most complete and possibly most widely read work of its kind around 1900. See H. THORELLI, *supra* note 2, at 327.

⁶⁶ See generally S. PIOTT, *THE ANTI-MONOPOLY PERSUASION: POPULAR RESISTANCE TO THE RISE OF BIG BUSINESS IN THE MIDWEST* (1985) (examining public response to monopolies and trusts during the period 1887-1913).

⁶⁷ See B. BRINGHURST, *supra* note 43, at 38, 48; S. PIOTT, *supra* note 66, at 120-24.

⁶⁸ See H. THORELLI, *supra* note 2, at 596.

⁶⁹ Dodd, *The Present Legal Status of Trusts*, 7 HARV. L. REV. 157, 165 (1893).

forts but feared a decidedly different judicial tendency:

Without intending in the least to be disrespectful to any court, yet it is a fact well known to the legal profession and to the country, that many of our appellate courts, both state and federal, have in the past been largely dominated by men, who, before their elevation to the bench and while they were practicing lawyers, were more or less under monopolistic influences. . . .

It is no secret that corporations and monopolies are active and tireless in their efforts to secure control of the appellate courts of this country and thereby by judicial construction defeat the will of the people as expressed in legislation. As these influences are powerful and well organized, they often succeed in securing the election or appointment of judges who are under obligations to them for past favors. This evil has been carried to such an extent and has become so open and notorious that many good people have almost lost hope and have largely ceased to have confidence in the fairness, impartiality, and integrity of the courts where corporations, trusts, and monopolies are concerned. This constitutes one of the most alarming conditions now existing in America. A judge may desire to be entirely honest, yet if he is under influences which are antagonistic to the rights of the people, he will make an exceedingly dangerous judge. . . . It may not be popular in some circles to say this, but we believe that it is the absolute truth and that this is the main cause of the manifest bias of many of our courts against all anti-trust legislation.⁷⁰

Yet, as previously noted, despite such indications of contemporary practical and symbolic importance, scholars rarely have examined state developments in much detail. Extended analyses of judicial reasoning in late nineteenth and early twentieth century cases involving state common law or statutory responses to anticompetitive behavior have been particularly scarce.⁷¹ Recently, however, some scholars have recognized

⁷⁰ *State v. Coyle*, 8 Okla. Crim. 686, 687-88, 130 P. 316, 316-17 (1913).

⁷¹ Important historical treatments include J. FLYNN, *FEDERALISM AND STATE ANTITRUST REGULATION* (1964); H. SEAGER & C. GULICK, *supra* note 9; H. THORELLI, *supra* note 2. Seager and Gulick, however, devote less than 30 pages to state antitrust enforcement and discuss court decisions in only Texas and Missouri. Although Thorelli's 600-page work also contains a survey of earlier common law doctrine, it devotes less than 20 pages to late nineteenth and twentieth century state antitrust and common law developments, covers only the years through 1902, and generally

the need for greater study of early state-level antitrust developments,⁷² and several important new works have appeared.⁷³ Such renewed examination is important in part because it provides a more complete picture of the nature, diversity, and historical importance of state antitrust efforts themselves at a time when late nineteenth and early twentieth century economic regulation, and judicial responses to it, have become the subject of renewed scholarly attention and reevaluation.⁷⁴ Such re-examination of state developments also is important, however, because it furnishes substantial additional insight and illumination with respect to both contemporary judicial reasoning in general and the early development of federal antitrust jurisprudence in particular.

Judges considering early federal antitrust issues did not operate in an intellectual environment divorced from state-related legal and economic concerns. Many of the Justices on the United States Supreme Court during antitrust's formative years had served as judges in the state courts before joining the Supreme Court bench.⁷⁵ The Justices not only were aware of state developments but also invoked recent antitrust-related state decisions as important supporting authority on a number of occasions in early federal antitrust cases.⁷⁶ Moreover, the

omits consideration of state "[c]ases against labor unions or public utilities and suits involving unfair competition or 'covenants in restraint of trade.'" *Id.* at 265 n.106. Leading studies of nineteenth century English and American common law have been concerned primarily with establishing the background to the enactment in 1890 of the Sherman Act and, thus, discuss only very few state cases after that date. *See, e.g.*, D. DEWEY, *supra* note 2, at 109-38; W. LETWIN, *supra* note 2, at 18-52, 77-95 (discussing the foundations and passage of the Sherman Act).

⁷² *See, e.g.*, S. PIOTT, *supra* note 66, at 4 (noting that prior studies focusing on the federal level have "missed the point" that contemporary antitrust activity primarily originated at the state and local level).

⁷³ *See, e.g.*, B. BRINGHURST, *supra* note 43 (investigating the state and federal effort to control the Standard Oil combination); S. PIOTT, *supra* note 66 (exploring popular reaction to corporate consolidation in the Midwest between the years 1887-1913); McCurdy, *supra* note 55 (discussing the *Knight* sugar decision of 1895 in the context of contemporary conceptions of state power over business corporations); Pratt, *supra* note 58 (analyzing the impact of Texas law enforcement efforts on the early twentieth century structure of the oil industry).

⁷⁴ *See, e.g.*, Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293 (1985); Urofsky, *State Courts and Protective Legislation during the Progressive Era: A Re-evaluation*, 72 J. AM. HIST. 63 (1985).

⁷⁵ Of the 25 United States Supreme Court Justices who served any part of their term between 1890 and 1920, at least 11 had previously served as state court judges, the great majority on their state's highest court. *See generally* 2 & 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969 (L. Friedman & F. Israel eds. 1969) (biographies of, among others, Justices John Marshall Harlan, Horace Gray, David Brewer, Henry Billings Brown, Edward Douglass White, Rufus Peckham, Oliver Wendell Holmes, William R. Day, Horace H. Lurton, Joseph Rucker Lamar, and Mahlon Pitney).

⁷⁶ *See* Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 405,

Justices developing early federal antitrust jurisprudence frequently were forced to consider the limits of permissible and appropriate government control of anticompetitive activity not only in connection with such federal litigation but also in a second context as well: in the course of numerous Supreme Court cases in which litigants raised constitutional challenges to the application of state antitrust law. In this second context, the Justices provided striking additional indications of their general views of not only the limits of government power but also of economic reality itself.

This Article seeks to contribute to a fuller understanding of antitrust in its formative era by examining the way in which both state and federal judges treated such constitutional challenges to state antitrust law. The next section of this Article reviews the overall picture of federal and state court litigation and places these developments within the broader framework of contemporary constitutional adjudication. The succeeding section then examines one particularly revealing area of contemporary constitutional analysis in greater detail and suggests how its close examination in light of contemporary economic thinking not only contributes to a broader understanding of the period's constitutional theory, but also it calls into question important aspects of leading recent interpretations of the intellectual origins of early antitrust jurisprudence.⁷⁷

II. CONSTITUTIONAL LIMITATIONS AND THE PRACTICAL AND POTENTIAL SCOPE OF STATE ANTITRUST ENFORCEMENT

The innovative expansion of varied forms of state and federal regulatory activity in the late nineteenth and early twentieth centuries sparked persistent opposition. Like other forms of business regulation,⁷⁸ state remedial responses to disturbing contracts, combinations, and con-

408 (Hughes, J., for the Court), 413 (Holmes, J., dissenting) (1911); *Northern Sec. Co. v. United States*, 193 U.S. 197, 339-41 (1904) (Harlan, J., for the Court); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 333-34 (Peckham, J., for the Court), 348-50 & n.1 (White, J., dissenting) (1897); *United States v. E.C. Knight Co.*, 156 U.S. 1, 18-33 (1895) (Harlan, J., dissenting).

⁷⁷ The specific ways in which state court judges developed and applied restraint of trade doctrine itself within the boundaries established by Congress and the courts will be more fully addressed in a forthcoming article by the author.

⁷⁸ See, e.g., A. KELLY, W. HARBISON & H. BELZ, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 399-444 (6th ed. 1983); J. SEMONCHE, *CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890-1920* (1978); Currie, *The Constitution in the Supreme Court: The Protection of Economic Interests, 1889-1910*, 52 U. CHI. L. REV. 324 (1985) [hereinafter Currie, *Supreme Court: 1889-1910*]; Currie, *The Constitution in the Supreme Court: 1910-1921*, 1985 DUKE L.J. 1111 [hereinafter Currie, *Supreme Court: 1910-1921*].

spiracies in restraint of trade repeatedly were attacked as violative of the United States Constitution, chiefly on commerce clause,⁷⁹ equal protection,⁸⁰ and due process⁸¹ grounds.⁸² As will be discussed below,

⁷⁹ U.S. CONST. art. I, § 8.

⁸⁰ U.S. CONST. amend. XIV, § 1.

⁸¹ *Id.*

⁸² See generally J. FLYNN, *supra* note 71, at 24-108 (discussing constitutional limits on state antitrust regulations); H. SEAGER & C. GULICK, *supra* note 9, at 339-66 (noting state antitrust provisions and related litigation); Hovenkamp, *supra* note 3, at 385-90 (discussing commerce clause limitations on state antitrust regulation); Legislation, *supra* note 9, at 354-56, 363-64 (reporting on equal protection, commerce clause, and due process restrictions on state enforcement); Project, *supra* note 3, at 554 (commenting on results of state antitrust legislation); Note, *The Commerce Clause and State Antitrust Regulation*, 61 COLUM. L. REV. 1469, 1478-81, 1483-85, 1488 (1961) (discussing judicial treatment of early commerce clause challenges to enforcement of state antitrust laws).

The general grounds noted, while the most important, were by no means the only federal and state constitutional bases on which state efforts were attacked. Both the United States Supreme Court and numerous state courts rejected claims that state antitrust laws operated to impair the obligation of contracts in violation of article I, § 10 of the United States Constitution or analogous state constitutional provisions. See, e.g., *Waters-Pierce Oil Co. v. Texas*, 177 U.S. 28, 43-47 (1900); *Ford v. Chicago Milk Shippers' Ass'n*, 155 Ill. 166, 180-81, 39 N.E. 651, 656 (1895); *Louisville & N.R.R. Co. v. Commonwealth*, 97 Ky. 675, 696-97, 31 S.W. 476, 479-80 (1895), *aff'd*, 161 U.S. 677 (1896); *State ex rel. Hadley v. Standard Oil Co.*, 218 Mo. 1, 378, 116 S.W. 902, 1018 (1909), *aff'd*, 224 U.S. 270 (1912); *State v. Virginia-Carolina Chem. Co.*, 71 S.C. 544, 559-60, 51 S.E. 455, 461 (1905). Courts similarly rejected contentions that state antitrust statutes amounted to unconstitutional "ex post facto" legislation, see, e.g., *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 107-08 (1909); *State ex rel. Jones v. Mallinckrodt Chem. Works*, 249 Mo. 702, 729-31, 156 S.W. 967, 975-76 (1913), *aff'd*, 238 U.S. 41 (1915); violated privileges and immunities protections, see, e.g., *Owen Co. Burley Tobacco Soc. v. Brumback*, 128 Ky. 137, 148-49, 107 S.W. 710, 713 (1908); *Attorney Gen. ex rel. Wolverine Fish Co. v. A. Booth & Co.*, 143 Mich. 89, 102, 106 N.W. 868, 872-73 (1906); *State v. Virginia-Carolina Chem. Co.*, 71 S.C. 544, 559, 51 S.E. 455, 460 (1905); or threatened unconstitutional "double jeopardy" because they condemned activity also unlawful under federal antitrust legislation, see, e.g., *Territory v. Long Bell Lumber Co.*, 22 Okla. 890, 894-99, 99 P. 911, 914-916 (1908). Moreover, courts repeatedly upheld the application of state antitrust discovery procedures in the face of objections that they violated constitutional protections against self-incrimination despite grants of immunity from state prosecution. See, e.g., *Jack v. Kansas*, 199 U.S. 372, 379-82 (1905), *aff'g* *State v. Jack*, 69 Kan. 387, 76 P. 911 (1904); *People ex rel. Akin v. Butler St. Foundry & Iron Co.*, 201 Ill. 236, 250-54, 66 N.E. 349, 353-55 (1903); *In re Bell*, 69 Kan. 855, 856, 76 P. 1129, 1129 (1904) (per curiam); *State ex rel. Jones*, 249 Mo. at 735-39, 156 S.W. at 977-78; *State ex rel. Hadley*, 218 Mo. at 375, 116 S.W. at 1017-18; cf. *Cumberland Tel. & Tel. Co. v. State*, 98 Miss. 159, 168-69, 53 So. 489, 490 (1910) (corporation not a "person" within meaning of constitutional provision protecting persons against self-incrimination in criminal cases); *Nekoosa-Edwards Paper Co. v. News Publishing Co.*, 174 Wis. 107, 113-17, 182 N.W. 919, 921-22 (1921) (same). But see *State ex rel. Attorney Gen. v. Simmons Hardware Co.*, 109 Mo. 118, 128-30, 18 S.W. 1125, 1127 (1892) (state provision requiring corporate officers to declare under oath whether the company had become involved in anticompetitive activity declared to be in violation of state constitution; no immunity grant indicated in the opinion); see also *Ex parte Andrews*, 51 Tex. Crim. 79, 85-86, 100 S.W. 376, 378-79 (1907) (witness not guilty of contempt for refusing to answer questions which might implicate him in violations of the antitrust

such attacks achieved some significant victories, prompting legislative and judicial alteration of some state antitrust provisions. But in the antitrust area as elsewhere,⁸³ federal and state courts generally upheld state efforts in the face of constitutional challenges; and later decisions in this period, at least in the equal protection area, significantly cut back on the impact of early adverse precedent. While some serious restrictions on permissible state activity remained, the states nevertheless were left with considerable room for variation and experimentation.

A. *The Territorial Scope of State Antitrust Activity*

The potential constitutional limitations on state enforcement most directly addressed in the congressional debates preceding passage of the Sherman Act in 1890 were those pertaining to state power over activities and arrangements occurring or having effects at least partly beyond the state's own borders. While a broad congressional consensus prevailed as to the desirability of preserving extant state antitrust authority, despite the adoption of new federal legislation in the field,⁸⁴ congressional representatives differed significantly in their assessments of the existing constitutional limits on the geographic and commercial scope of state power.⁸⁵ Such differences of perspective persisted in sub-

laws). Various additional, special state constitutional provisions also proved unavailing as grounds to invalidate statutes, for example, constitutional requirements that statutes not address more than one subject and that the subject be clearly indicated by the title. *See, e.g., In re Pinkney*, 47 Kan. 89, 94-96, 27 P. 179, 180-81 (1891); *State ex rel. Attorney General v. Arkansas Lumber Co.*, 260 Mo. 212, 294-95, 169 S.W. 145, 171 (1913); *Oklahoma Light & Power Co. v. Corporation Comm'n*, 96 Okla. 19, 21, 220 P. 54, 55 (1923).

⁸³ *See, e.g.,* L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 360-63 (2d ed. 1985); J. SEMONCHE, *supra* note 78, at 424-34; Urofsky, *supra* note 74 (discussing hours, wage, and other legislation designed to protect workers).

⁸⁴ *See supra* text accompanying note 63.

⁸⁵ *See* McCurdy, *supra* note 55, at 323-28. Senator Sherman, for example, the preeminent proponent of federal antitrust legislation, embraced a comparatively quite expansive view of federal power. He believed existing state power to be more limited than various other members of Congress believed it to be. *See id.*; Hovenkamp, *supra* note 3, at 383. Sherman's views have received particular attention not only because of Sherman's general importance in the congressional proceedings but also because they have been deemed an accurate description of the respective limits of state and federal power in 1890. *See id.* at 379. Unfortunately, Sherman's often dramatic speech was, at times, less than precise and suggested more severe limitations on state power than either existed at the time or than he himself actually envisioned. In frequently quoted language, Sherman declared, "If the combination is confined to a State, the State should apply the remedy; if it is interstate and controls any production in many States, Congress must apply the remedy." 21 CONG. REC. 2457 (1890). Such language, taken literally, might suggest that in Sherman's view an individual State was powerless to seek any remedy against even the local operation of an industrial combination, if it was interstate in scope. *See, e.g.,* Hovenkamp, *supra* note 3, at 379, 431. Yet, it seems instead that Sherman simply believed that individual state remedies would be too lim-

sequent state antitrust litigation as the limits of state power repeatedly were debated both in cases addressing state power over corporate charters and privileges and, more frequently, in actions involving various other forms of state regulation.

1. State Control Over Corporate Power and Privileges

Late nineteenth century case law gave the states considerable authority to cancel corporate charters or revoke intrastate⁸⁶ business privileges in response to ultra vires corporate misconduct and provided a particularly powerful basis for attacking corporate concentration, collusion, and predation.⁸⁷ In 1869, in the leading case of *Paul v. Vir-*

ited in such a situation and that an effective remedy, to eliminate the problem completely, would have to come from federal action. Thus, in discussing the recent case of *People v. North River Sugar Ref. Co.*, 7 N.Y.S. 406 (Sup. Ct. 1889), *aff'd*, 121 N.Y. 582, 24 N.E. 834 (1890), in which the New York Supreme Court had affirmed an order vacating and annulling a New York corporation's charter because of its participation in the sugar trust, Sherman related that, because the defendant was a New York corporation, the state court "could deal with that corporation alone, but the combination was between that company and sixteen others In the courts of the United States all of them might have been parties, but as a matter of course the Supreme Court of New York could not extend its jurisdiction beyond the limits of its own territory." 21 CONG. REC. 2459 (1890) (emphasis added).

⁸⁶ It was firmly established that states could not prevent corporations from engaging in commerce of an "interstate" nature within their borders. *See, e.g., Waters-Pierce Oil Co. v. Texas*, 177 U.S. 28, 41-42 (1900); G. HENDERSON, *THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW* 112-31 (1918). Many activities engaged in by companies operating in more than one state, however, were not considered to be part of interstate commerce, one of the most important such activities being local manufacturing. *See infra* text accompanying note 95.

⁸⁷ Government power to cancel corporate privileges had been established early in English law, and English procedures quickly were adapted to American circumstances. In England, by the twelfth century, a claimant's right to hold a franchise could be challenged by the special common law writ of *quo warranto*, summoning the claimant to indicate "by what authority" he claimed or exercised the franchise. Subsequently, during the reign of Henry VIII, this original procedure was replaced by the use of a simpler "information in the nature of a *quo warranto*." *See* J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 125 (2d ed. 1979); *see also* *Ames v. Kansas ex rel. Johnston*, 111 U.S. 449, 460-61 (1884) (discussing writ of *quo warranto* at common law). Although this newer procedure was initially a criminal action, it had evolved into a civil one in all but form in England prior to the American Revolution. *See* *Standard Oil Co. v. Missouri*, 224 U.S. 270, 282 (1912); *Ames*, 111 U.S. at 460-61.

After the Revolution, the procedure was widely adopted by American states, although a few states replaced it with other special forms of action. Such a new form of action was adopted, for example, by Kansas and considered by the United States Supreme Court in *Ames*, 111 U.S. at 460. In some states, antitrust legislation made available new procedures by which corporate forfeiture could be pursued, even while general *quo warranto* procedures remained available as well. *See, e.g., State ex rel. Jones v. Mallinckrodt Chem. Works*, 249 Mo. 702, 731-32, 156 S.W. 967, 976 (1913), *aff'd*, 238 U.S. 41 (1915). By the early twentieth century, the widely adopted English procedure, often referred to simply, if imprecisely, as a "*quo warranto*" proceeding, was considered a civil action in most states, although at least a few jurisdictions still deemed

ginia,⁸⁸ the Supreme Court declared that a corporation was not a citizen for purposes of the privileges and immunities clause⁸⁹ of the United States Constitution and upheld a Virginia statute requiring "foreign" (out-of-state) but not domestic insurance companies to deposit specified bonds with the state treasurer as a precondition to obtaining a license, which was needed to do business in the state. The defendant had proceeded to operate within the state as an agent for insurance companies that had not deposited the required bonds or obtained the requisite license; and, as a result, the defendant was indicted, convicted, and fined.

Justice Field, writing for the Court, sweepingly reaffirmed both the existence and appropriateness of state power, particularly with regard to foreign corporations seeking to do intrastate business. He reasoned:

The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. . . . The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their

it a criminal one for purposes of both procedure and relief. See *Standard Oil*, 224 U.S. at 283.

Determination of the civil or criminal status of such proceedings had important practical consequences. Based on a characterization as civil rather than criminal, state courts in antitrust cases held defendants not entitled to a jury trial as a matter of right. See *State ex rel. Attorney Gen. v. Arkansas Lumber Co.*, 260 Mo. 212, 275-77, 169 S.W. 145, 165 (1914). Further, the state courts declared that a reasonable doubt standard need not be applied. See *Waters-Pierce Oil Co. v. State*, 48 Tex. Civ. App. 147, 186, 106 S.W. 918, 929 (1907), *aff'd on other grounds*, 212 U.S. 86 (1909); *Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App. 1, 21, 44 S.W. 936, 946 (1898), *aff'd on other grounds*, 177 U.S. 28 (1900). In addition, because of such characterization, the Texas Court of Civil Appeals held that no statute of limitations applied against the state. See *Waters-Pierce*, 48 Tex. Civ. App. at 185, 106 S.W. at 929.

⁸⁸ 75 U.S. (8 Wall.) 168 (1869).

⁸⁹ See *id.* at 177 (interpreting U.S. CONST. art. IV, § 2). The case arose prior to ratification of the fourteenth amendment.

judgment will best promote the public interest. The whole matter is in their discretion.⁹⁰

In the decades both immediately before and after passage of the Sherman Act, the Supreme Court continued to support strongly this aspect of state authority. As Charles McCurdy has noted, such corporate law doctrine potentially gave the states tremendous power to reverse contemporary corporate consolidations, at least if sustained and united action on the part of the states could be achieved.⁹¹ If enough states acted to revoke the domestic corporation charters and intrastate business privileges of the companies joining in a particular consolidation, on the ground that the stock or asset transfers effecting the consolidation violated the conditions under which the charter or privileges were granted,⁹² the combination could be forced to restrict its manufacturing activity to so few states that its viability could be seriously threatened.⁹³ Indeed, as Professor McCurdy has argued, the Supreme Court's 1895 opinion in *United States v. E.C. Knight Co.*, which denied federal authority to challenge a monopolistic consolidation of sugar manufacturing,⁹⁴ may well have been not so much a laissez-faire defense of corporate wealth as an effort to buttress state authority over the intrastate operations of interstate combinations. By maintaining a sharp doctrinal distinction between manufacturing and commerce, Professor McCurdy suggests, the Court ensured continued freedom from commerce clause inhibitions that otherwise might have impeded state action barring local manufacturing on the part of companies violating state corporate policy.⁹⁵

Such state action in response to the formation of disquieting combinations had the advantage of making judicial analyses of potentially debatable and troublesome issues of economic theory or trade restraint doctrine unnecessary.⁹⁶ Charter revocation or license forfeiture could be predicated simply on the fact of an ultra vires transfer of stock or assets. But the significance of state authority in this area went beyond its potential to deter corporate transfers per se. State legislators frequently made adherence to more general substantive antitrust standards a con-

⁹⁰ *Id.* at 181.

⁹¹ See McCurdy, *supra* note 55, at 332, 338-40.

⁹² See, e.g., *People v. Ballard*, 134 N.Y. 269, 294-97, 32 N.E. 54, 59-60 (1892); *People v. North River Sugar Ref. Co.*, 121 N.Y. 582, 623-26, 24 N.E. 834, 839-41 (1890).

⁹³ See McCurdy, *supra* note 55, at 338.

⁹⁴ 156 U.S. 1, 16-18 (1895).

⁹⁵ See McCurdy, *supra* note 55, at 335-36.

⁹⁶ See, e.g., *People v. North River Sugar Ref. Co.*, 121 N.Y. 582, 626, 24 N.E. 834, 841 (1890).

dition for acquiring or retaining a charter or business privileges.⁹⁷ And contemporary state and federal judges repeatedly allowed states to annul charters or revoke privileges in situations where the imposition of other remedies for the same conduct would have been deemed unconstitutional.⁹⁸

The lengths to which state power over foreign corporations would be allowed to go were indicated as early as 1877 in *Doyle v. Continental Insurance Co.*⁹⁹ As a condition of doing business, Wisconsin had required the plaintiff, a Connecticut insurance company, to agree not to remove into federal court actions brought against it in state courts. Nonetheless, the plaintiff so removed a suit brought against it under one of its policies. As a result, the defendant Wisconsin Secretary of State threatened to revoke plaintiff's license to do business, and the plaintiff sought and obtained an injunction against such revocation. On appeal, the Supreme Court, per Justice Hunt, held that while a state could not constitutionally bar an individual or corporation from removing cases to federal court, the state constitutionally could revoke a corporation's license for breach of an agreement not to do so.¹⁰⁰ The Court denied that by so holding it was permitting the state to evade constitutional prohibitions and explained that its decision merely allowed the state to

compel the foreign company to abstain from the Federal courts, or to cease to do business in the State. It gives the company the option. This is justifiable, because the complainant has no constitutional right to do business in that State; that State has authority at any time to declare that it shall not transact business there. This is the whole point of the case, and, without reference to the injustice, the prejudice, or the wrong that is alleged to exist, must determine the question. No right of the complainant under the laws or Constitution of the United States, by its exclusion from the State, is infringed; and this is what the State now accomplishes. There is nothing, therefore, that will justify the interference of this court.¹⁰¹

⁹⁷ See *supra* text accompanying note 36.

⁹⁸ See *infra* notes 104-115 and accompanying text.

⁹⁹ 94 U.S. 535 (1877), *overruled*, *Terral v. Burke Constr. Co.*, 257 U.S. 529 (1922).

¹⁰⁰ See *id.* at 542.

¹⁰¹ *Id.* at 542. Justice Bradley dissented, in an opinion in which Justices Swayne and Miller joined. Justice Bradley rejected as fallacious the majority's reasoning that "the greater always includes the less, and, therefore, if the State may exclude the appellees without any cause, it may exclude them for a bad cause." *Id.* at 543. But behind

Between the time the Supreme Court's decision in *Doyle* was announced in 1877 and the time it was expressly overruled in 1922,¹⁰² a less sweeping view of state power to cancel charters and revoke privileges slowly gained acceptance, much of this doctrinal change occurring in the second decade of the new century. Increasingly, the Court declared certain grounds for state action constitutionally impermissible, despite the state's broad authority in the area.¹⁰³ But such a changing view was not evident in antitrust cases in either the Supreme Court or state courts prior to the 1920's, and both state power in general and some rather far-reaching applications of it were approved.

In 1900, in *Waters-Pierce Oil Co. v. Texas*,¹⁰⁴ the Supreme Court affirmed a revocation of intrastate business privileges in response to a violation of Texas antitrust statutes. Although retention of a permit to do business had been made conditional on compliance with such state laws, the defendant argued that revocation was improper because the Texas antitrust statutes limited the right to make contracts, took away property, and established invidious classifications among persons, all in

the dissenting Justice's approach lay also a different vision of the role of foreign corporations in the economic life of the states than had been reflected in Justice Field's earlier opinion in *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869). Justice Field's "intruding corporations," needing to be "repelled" in 1869, see *id.* at 182, had become Justice Bradley's beneficent visitors of 1877 in the latter's dissent in *Doyle*:

The conditions of society and the modes of doing business in this country are such that a large part of its transactions is conducted through the agency of corporations. This is especially true with regard to the business of banking, insurance, and transportation. Individuals cannot safely engage in enterprises of this sort, requiring large capital. They can only be successfully carried out by corporations, in which individuals may safely join their small contributions without endangering their entire fortunes. To shut these institutions out of neighboring States would not only cripple their energies, but would deprive the people of those States of the benefits of their enterprise. The business of insurance, particularly, can only be carried on with entire safety by scattering the risks over large areas of territory, so as to secure the benefits of the most extended average. The needs of the country require that corporations—at least those of a commercial or financial character—should be able to transact business in different States. If these States can, at will, deprive them of the right to resort to the courts of the United States, then, in large portions of the country, the government and laws of the United States may be nullified and rendered inoperative with regard to a large class of transactions constitutionally belonging to their jurisdiction.

94 U.S. at 544 (Bradley, J., dissenting). On changing perceptions of corporations, see generally McCurdy, *supra* note 55.

¹⁰² See *Terral v. Burke Constr. Co.*, 257 U.S. 529 (1922).

¹⁰³ See G. HENDERSON, *supra* note 86, at 111, 132-47 (1918); Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321, 329, 341-45 (1935); Merrill, *Unconstitutional Conditions*, 77 U. PA. L. REV. 879, 888-92 (1929); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1606-09 (1960).

¹⁰⁴ 177 U.S. 28 (1900).

contravention of the fourteenth amendment to the United States Constitution. Strongly reaffirming the broad principles previously announced in such cases as *Paul v. Virginia*, Justice McKenna, for the majority, upheld the state's action and declared irrelevant the corporate defendant's attacks on the constitutionality of the Texas antitrust statutes themselves. The Court stressed that corporations, unlike individuals, were only creatures of the legal authority prescribing their permitted purposes and means; the state had no obligation to permit them to do any intrastate business in the first place.¹⁰⁵

The Supreme Court's most striking defense of state power over corporations, however, came nine years later, in the case of *Hammond Packing Co. v. Arkansas*.¹⁰⁶ State authorities had sought both forfeiture of the defendant's permit to do intrastate business and \$30,000 in civil penalties on the basis of the defendant's purported participation in a price-fixing conspiracy not alleged to have been formed, to have operated, or to have had any effect within Arkansas itself. After counsel subsequently had stipulated that any awarded relief would be limited to a money recovery of not more than \$10,000, the defendant demurred to the complaint and declined to cooperate with requested discovery. Thereupon the trial court granted the state a default judgment for \$10,000, which the Arkansas Supreme Court later affirmed.¹⁰⁷

In the United States Supreme Court, the defendant challenged the Arkansas action as an unconstitutional attempt to assert extraterritorial power over activity in other states in violation of the due process clause of the fourteenth amendment. The Supreme Court disagreed. Justice White, for the majority, rejected the defendant's characterization of the Arkansas action, relying upon the state court's interpretation that the relevant antitrust statute did not purport to forbid or penalize acts done outside the state, but merely

forbade a corporation from continuing to do business within the State after it had done, either within or outside of the State, the enumerated acts. If the premise of the asserted proposition be that even although the statute addressed itself

¹⁰⁵ See *id.* at 43, 45. Thus, the Court found it unnecessary to consider or resolve the constitutional legitimacy of the state antitrust statutes as they might be applied in other contexts. Justice Harlan dissented without a written opinion. In *National Cotton Oil Co. v. Texas*, 197 U.S. 115 (1905), the Court, again per Justice McKenna, left unresolved the question of whether *Waters-Pierce* foreclosed the equal protection and due process challenges of another corporation whose business license was revoked for violation of Texas antitrust law, declaring such challenges groundless on their merits. See *id.* at 130-33.

¹⁰⁶ 212 U.S. 322 (1909).

¹⁰⁷ See *id.* at 330.

exclusively to the doing of business within the State under the circumstances stated, it nevertheless exerted an extraterritorial power, because it restrained the continuance of the business within the State by a corporation which had done the designated acts outside of the State, we think the proposition without merit. As the State possessed the plenary power to exclude a foreign corporation from doing business within its borders, it follows that if the State exerted such unquestioned power from a consideration of acts done in another jurisdiction, the motive for the exertion of the lawful power did not operate to destroy the right to call the power into play.

. . . [T]he power, and not the motive, is the test to be resorted to for the purpose of determining the constitutionality of the legislative action.¹⁰⁸

The defendant had been fined, the Court held, not for price fixing in another state, but only for the intrastate act of doing local business in violation of a state condition limiting eligibility to engage in such intrastate activity, a condition that just happened to be nonparticipation in a price-fixing conspiracy anywhere in the country.¹⁰⁹

State courts proved to be similarly supportive and repeatedly reaffirmed state *quo warranto*¹¹⁰ authority to revoke corporate privileges for antitrust violations, even where other remedies might not be constitutionally available.¹¹¹ Indeed, some courts approached the issue of *quo*

¹⁰⁸ *Id.* at 342-43. Chief Justice Fuller and Justice Peckham dissented without written opinions. In the formative period of federal antitrust jurisprudence, Justice Peckham and Justice White are well known as the chief proponents, respectively, of two differing approaches to developing Sherman Act interpretation, with Justice Peckham supporting the broader reading of the federal act's scope. *See, e.g.,* R. BORK, *supra* note 2, at 22-28; W. LETWIN, *supra* note 2, at 167-72. Thus, while Justice White took a comparatively less sympathetic view of sweeping federal antitrust power, he apparently embraced a comparatively more sympathetic view of sweeping state antitrust power, at least in the *Hammond* context, although, admittedly, the reasons for Justice Peckham's dissent in that case remain conjectural.

¹⁰⁹ *See Hammond*, 212 U.S. at 342-44.

¹¹⁰ *See supra* note 87.

¹¹¹ *See, e.g.,* Attorney Gen. *ex rel.* Wolverine Fish Co. v. A. Booth & Co., 143 Mich. 89, 102, 106 N.W. 868, 872 (1906) (citations omitted) (rejecting an out-of-state corporation's claim that ouster from the state would, *inter alia*, violate the privileges and immunities clause of the fourteenth amendment, the court broadly declaring: "The authority of a State to impose conditions upon the privilege of doing business by foreign corporations is well established, and is not affected by the Fourteenth Amendment to the Federal Constitution"); State *ex rel.* Hadley v. Standard Oil Co., 218 Mo. 1, 378-79, 116 S.W. 902, 1018-19 (1908), *aff'd*, 224 U.S. 270 (1912); Pierce Oil Corp. v. Weinert, 106 Tex. 435, 439, 167 S.W. 808, 809-10 (1914) (citing *Hammond*, 212 U.S. at 342-43, to the effect that "since the state has the right to entirely withhold its per-

warranto relief rather flexibly in antitrust cases and approved not only the imposition of a fine along with ouster¹¹² but also went on to declare that a substantial fine could be imposed with ouster suspended on condition of payment.¹¹³ In this way, *quo warranto* became available as an enforcement mechanism that would allow a state to collect a financial penalty for conduct that the state constitutionally could not seek to fine in other contexts. Seeking exclusively a financial sanction proved alluring as time went on, for as previously noted,¹¹⁴ state judges and officials became increasingly reluctant to lose the economic benefits of even an antitrust violator's continued intrastate presence.¹¹⁵

Although contemporary corporate law doctrine thus provided a particularly strong basis for state antitrust enforcement, much state antitrust activity was premised on other grounds, grounds offering potentially greater opportunities for litigants seeking to challenge state control of anticompetitive activity.

2. State Regulation in Other Areas

The scope of state authority where *quo warranto* power was not controlling was tested often during the formative years of antitrust jurisprudence. The permissible out-of-state impact of state activity quickly became the most frequently recurring subject of such constitutional debate in state antitrust litigation. Interested parties repeatedly contested the meaning and possible restrictive implications of both the commerce and due process clauses of the United States Constitution.¹¹⁶

mission for a foreign corporation to transact business within its limits it is within its power to provide that such permission shall be denied for such cause as it may prescribe, whether based upon acts within the state or out of it"); *State ex rel. Attorney Gen. v. Shippers' Compress & Warehouse Co.*, 95 Tex. 603, 611-12, 69 S.W. 58, 60-61 (1902) (discussed *infra* text accompanying notes 173-74).

¹¹² See, e.g., *Standard Oil Co. v. Missouri*, 224 U.S. 270 (1912) (discussed *infra* notes 201-08 and accompanying text).

¹¹³ See, e.g., *State ex rel. Major v. International Harvester Co. of Am.*, 237 Mo. 369, 400-02, 141 S.W. 672, 679 (1911), *aff'd*, 234 U.S. 199 (1914); *State ex rel. Hadley v. Standard Oil Co.*, 218 Mo. 1, 468-69, 116 S.W. 902, 1049 (1909), *aff'd*, 224 U.S. 270 (1912); *State ex rel. Crow v. Armour Packing Co.*, 173 Mo. 356, 393, 73 S.W. 645, 654 (1903).

¹¹⁴ See *supra* text accompanying note 55.

¹¹⁵ See, e.g., *International Harvester*, 237 Mo. at 400-02, 141 S.W. at 679. Moreover, at least some state judges were willing to employ suspended ouster to ensure attainment of still other forms of antitrust relief, including the disclosure of desired corporate information and the severance of particular corporate affiliations. See, e.g., *id.* at 417, 141 S.W. at 684 (Graves, J., concurring in part) (suggesting various requirements for defendant as a condition of suspension of judgment of ouster).

¹¹⁶ This area of litigation also is the area of contemporary constitutional challenge to state antitrust enforcement that has been most fully described and analyzed elsewhere. See J. FLYNN, *supra* note 71, at 48-53, 56-108; Hovenkamp, *supra* note 3, at 375; Legislation, *supra* note 9, at 354-64; Note, *supra* note 82, at 1478-88; Annota-

Federal and state jurists often declared that the states could not constitutionally regulate anticompetitive activity within interstate commerce,¹¹⁷ and some significant limitations on the scope of state antitrust provisions were established on this basis. In a number of cases, local purchasers sought to invoke state antitrust laws as a defense when out-of-state sellers sought payment for goods sold, hoping to avoid liability on the ground that the seller had participated in a conspiracy among out-of-state vendors in violation of state law. Contemporary courts consistently dismissed such defenses on the ground that any such application of state law would constitute impermissible state regulation of purchase and sale contracts that were part of interstate commerce.¹¹⁸ For the same reason, courts found state law powerless to aid defaulting purchasers who alleged a violation of local antitrust standards based not on a distant sellers' conspiracy but on an out-of-state seller's agreement to deal exclusively with the defendant buyer itself within a particular territory.¹¹⁹

The reach of state statutes was limited not only by commerce clause doctrine but also by due process theory, although territorial due process issues were squarely addressed on only few occasions. In a dramatic 1897 opinion subsequently vacated by the Supreme Court on jurisdictional grounds, the Federal Circuit Court for the Northern District of Texas condemned as constitutionally "absurd" a jurisdictional provision of the Texas antitrust statute that declared:

Persons out of the state may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this act, which do not in their commission, necessarily require a personal presence in this state, the object being to reach and punish all persons offending against its

tion, *Applicability of State Anti-trust Act to Interstate Transaction*, 24 A.L.R. 787 (1923).

¹¹⁷ See, e.g., *Hadley Dean Plate Glass Co. v. Highland Glass Co.*, 143 F. 242, 244 (8th Cir. 1906); *Gulf, C. & S.F. Ry. v. Miami S.S. Co.*, 86 F. 407, 420 (5th Cir. 1898); *Frank A. Menne Factory v. Harback Bros.*, 85 Ark. 278, 283-84, 107 S.W. 991, 992-93 (1908); *First Nat'l Bank v. Missouri Glass Co.*, 169 Mo. App. 374, 387-89, 152 S.W. 378, 381-82 (1912); *State v. Virginia-Carolina Chem. Co.*, 71 S.C. 544, 560-61, 51 S.E. 455, 461 (1905); *J.R. Watkins Medical Co. v. Johnson*, 162 S.W. 394, 396 (Tex. Civ. App. 1913); *Pulp Wood Co. v. Green Bay Paper & Fiber Co.*, 157 Wis. 604, 615-16, 147 N.W. 1058, 1062 (1914).

¹¹⁸ See, e.g., *Hadley Dean Plate Glass Co.*, 143 F. at 244; *Frank A. Menne Factory*, 85 Ark. at 282-84, 107 S.W. at 992-93; *First Nat'l Bank*, 169 Mo. App. at 387-89, 152 S.W. at 381-82; *Moroney Hardware Co. v. Goodwin Pottery Co.*, 120 S.W. 1088, 1091-92 (Tex. Civ. App. 1909).

¹¹⁹ See, e.g., *Albertype Co. v. Gust Feist Co.*, 102 Tex. 219, 222, 114 S.W. 791, 792 (1909); *Eclipse Paint & Mfg. Co. v. New Process Roofing & Supply Co.*, 55 Tex. Civ. App. 553, 553-55, 120 S.W. 532, 533-34 (1909).

provisions, whether within or without the state.¹²⁰

Six years later, the Supreme Court of Illinois asserted that the sweeping language of its state's antitrust statute had no extraterritorial effect, declaring that, despite broad terminology, the court was obligated to confine the measure to only "those matters upon which the General Assembly have power to act, viz., trusts, pools, combinations, etc., formed within the State of Illinois."¹²¹

But while some important limits were recognized, the scope of state antitrust activity by no means was confined to what today would be deemed purely local concerns. While the states could not "regulate" interstate commerce, for example, they nevertheless were allowed considerable freedom to affect it indirectly as a consequence of efforts categorized as mere *intrastate* regulation. Thus, in 1910, in *Standard Oil Co. of Kentucky v. Tennessee*,¹²² a unanimous United States Supreme Court upheld a state court order ousting a corporation from the state, despite the defendant's objection that it was being penalized for harming *interstate* competition and that state action therefore constituted an impermissible effort to regulate interstate commerce. The defendant had induced merchants in Gallatin, Tennessee to cancel purchase orders from a rival out-of-state oil company that was to ship oil to them from Pennsylvania. Such activity was found to have led to higher oil prices in Tennessee. The Court, per Justice Holmes, affirmed the state court's order, finding no constitutional difficulty raised by that order's incidental impact on interstate commerce: "The mere fact that it may happen to remove an interference with commerce among the States as well [as] with the rest does not invalidate it."¹²³ Justice Holmes continued:

It hardly would be an answer to an indictment for forgery that the instrument forged was a foreign bill of lading, or for assault and battery that the person assaulted was engaged in

¹²⁰ *In re Grice*, 79 F. 627, 638 (C.C.N.D. Tex. 1897), *rev'd on other grounds sub nom.* *Baker v. Grice*, 169 U.S. 284, 294 (1898) (finding insufficient ground for the exercise of the lower court's jurisdiction and declaring the whole case "clearly nothing but an attempt to obtain the interference of a court of the United States when no extraordinary or peculiar circumstances exist in favor of such interference"). For background on the case, see B. BRINGHURST, *supra* note 43, at 46-47.

¹²¹ *People ex rel. Akin v. Butler St. Foundry & Iron Co.*, 201 Ill. 236, 249, 66 N.E. 349, 353 (1903); *accord Chicago Wall Paper Mills v. General Paper Co.*, 147 F. 491, 495-96 (7th Cir. 1906). For a similar limiting construction of other state legislation, see *State v. Lancashire Fire Ins. Co.*, 66 Ark. 466, 472-73, 51 S.W. 633, 635 (1899).

¹²² 217 U.S. 413 (1910).

¹²³ *Id.* at 422.

peddling goods from another State. How far Congress could deal with such cases we need not consider, but certainly there is nothing in the present state of the law at least that excludes the States from a familiar exercise of their power.¹²⁴

Application of state antitrust law to activities and arrangements similar to the exclusive dealing inducement involved in *Standard Oil* had indeed become familiar by 1910. Both before and after that date, courts repeatedly allowed purchasers to escape contract liability when sued by out-of-state sellers if the sales contract forbade the defendant to carry the goods of the seller's competitors¹²⁵ or contained other vertical restrictions on the defendant's activity, such as territorial restraints¹²⁶ or resale price maintenance provisions.¹²⁷ Although the sale and shipment themselves were deemed to be part of interstate commerce, the appended local restrictions were not, and their invalidity under local antitrust law was held to render the entire contract void and unenforceable. For the same reason, an agent for an out-of-state company constitutionally could be prosecuted under state criminal law for selling merchandise on the condition that the buyer not purchase or deal in competing sellers' goods.¹²⁸

Commerce clause objections were overcome in situations involving other forms of anticompetitive behavior as well. Thus, in *Standard Oil Co. of Kentucky v. State ex rel. Attorney General*,¹²⁹ the mere fact that a foreign corporation manufactured its product out of state and shipped that product into Mississippi did not shield it from the imposition of penalties for predatory geographic price discrimination within the state. The Court stressed that the foreign company was involved in a conspir-

¹²⁴ *Id.* (citation omitted).

¹²⁵ See, e.g., *Fuqua v. Pabst Brewing Co.*, 90 Tex. 298, 301-03, 38 S.W. 29, 30-31 (1897); *W.T. Rawleigh Medical Co. v. Fitzpatrick*, 184 S.W. 549, 550 (Tex. Civ. App. 1916); *J.R. Watkins Medical Co. v. Johnson*, 162 S.W. 394, 395-97 (Tex. Civ. App. 1913).

¹²⁶ See *Pasteur Vaccine Co. v. Burkey*, 22 Tex. Civ. App. 232, 232-34, 54 S.W. 804, 805-06 (1899).

¹²⁷ See, e.g., *Segal v. McCall Co.*, 108 Tex. 55, 59-60, 184 S.W. 188, 189-90 (1916); *Pictorial Review Co. v. Pate Bros.*, 185 S.W. 309, 311 (Tex. Civ. App. 1916). But see *McCall Co. v. J.D. Stiff Dry Goods Co.*, 142 S.W. 659, 660-61 (Tex. Civ. App. 1911) (State legislation was not allowed to invalidate a contract with an out-of-state seller containing a vertical restriction where the contract was deemed to be a consignment, rather than a sales arrangement.). See *Cole Motor Car Co. v. Hurst*, 228 F. 280, 283-84 (5th Cir. 1915), *cert. denied*, 247 U.S. 511 (1917) (territorial restriction).

¹²⁸ See *Commonwealth v. Strauss*, 191 Mass. 545, 548, 78 N.E. 136, 136 (1906).

¹²⁹ 107 Miss. 377, 65 So. 468 (1914), *overruled on other grounds*, *Mladinich v. Kohn*, 250 Miss. 138, 164 So. 2d 785 (1964).

acy seeking at least partly to monopolize intrastate commerce and noted that its challenged sales were made after the goods were received by it in the state and "had become incorporated into the general mass of property therein."¹³⁰

Federal and state decisions affirming state power over charters and business privileges and defining the commerce clause and extraterritorial limits on state antitrust application thus left the states substantial room to challenge objectionable consolidation, collusion, and predation. But while quite important, such doctrinal areas did not, of course, comprise the only potential sources of constitutional impediment to regional antitrust enforcement. Early Supreme Court precedent in other areas proved less than entirely encouraging.

B. *Equal Protection of the Laws and the Balance of Economic Power*

Populist and Progressive Era state legislators and their constituents did not view all restraints of competition with equal alarm. Indeed, anticompetitive cooperation among certain groups was seen as not only tolerable but also a highly appropriate and desirable response to the economic power and believed manipulations of other actors. Thus, many state constitutional provisions and statutes attacking trade restraints expressly exempted from their operation the activities of agricultural producers¹³¹ or laborers.¹³² Other states focused their attacks

¹³⁰ *Id.* at 383, 65 So. at 470. Because states were left substantial room within which to regulate despite an effect on interstate commerce, "intrastate" and "interstate" aspects of the same overall conduct or arrangement could be subjected simultaneously to state and federal antitrust legislation respectively. Indeed, before new federal legislation made it clear that federal courts were to have exclusive jurisdiction over federal antitrust matters, see Clayton Act, ch. 323, §§ 4, 15, 16, 38 Stat. 730, 731, 736-37 (1914) (current version at 15 U.S.C. §§ 15, 25, 26 (1982)); see also *General Investment Co. v. Lake Shore & Mich. S. Ry.*, 260 U.S. 261, 286-88 (1922) (noting that federal courts have exclusive jurisdiction under the Clayton Act), federal antitrust claims sometimes were raised along with state claims in state court litigation. See, e.g., *Straus & Straus v. American Publishers' Ass'n*, 231 U.S. 222, 225 (1913); *First Nat'l Bank v. Missouri Glass Co.*, 169 Mo. App. 374, 389-92, 152 S.W. 378, 382-83 (1912). Finally, it should be noted that, under contemporary doctrine, certain types of interstate business were held not to be a part of commerce at all so that commerce clause inhibitions were not implicated when states sought to regulate in the area. See *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183-84 (1869) (issuance of an insurance policy not a transaction in commerce); *State v. Phipps*, 50 Kan. 609, 615, 31 P. 1097, 1098 (1893) (same). In 1944, the United States Supreme Court departed from such commerce clause analysis in the field of insurance, declaring that insurance companies conducting activities across state lines were subject to federal regulation under the commerce clause. See *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 543-53 (1944).

¹³¹ See J. DAVIES, *supra* note 13, at 195-97.

¹³² See *id.* at 197-99.

solely on producers and dealers of manufactured goods, thereby excluding providers of services and farm products.¹³³ Still other states chose to target or exempt on grounds reflecting other particular local concerns and interests.¹³⁴ Those adversely affected by the operation of state antitrust laws attacked such selective inclusion and exclusion as pernicious discrimination condemned by the equal protection clause of the fourteenth amendment to the United States Constitution, and the federal and state courts' response to such challenges formed an important part of the larger pattern of constitutional litigation in the years between 1880 and 1920. In those years, state and federal courts consistently rejected the overwhelming majority of equal protection challenges when issues of racial classification were not involved.¹³⁵ Ultimately, this pattern prevailed as strongly in the antitrust field as elsewhere. But the Supreme Court's first resolution of an equal protection attack on state antitrust legislation constituted one of its most important and striking exceptions to these long-run trends and left the permissible boundaries of state antitrust innovation initially in substantial doubt.

This first analysis came in the case of *Connolly v. Union Sewer Pipe Co.*¹³⁶ The Union Sewer Pipe Company brought suit on two negotiable promissory notes that the defendant had given in payment for materials purchased.¹³⁷ The defendant denied liability, asserting that the plaintiff, prior to making its contract with him, had entered into a combination in restraint of trade that was unlawful at common law and illegal under both the Sherman Act and the Illinois "trust statute" of 1893. The Court, per Justice Harlan, had little difficulty disposing of the defendant's common law and Sherman Act claims on nonconstitutional grounds.¹³⁸ But the Illinois statute¹³⁹ expressly declared that any

¹³³ See *International Harvester Co. of America v. Missouri*, 234 U.S. 199, 208-15 (1914).

¹³⁴ See generally *Legislation*, *supra* note 9 (setting out in detail the targeted and exempted activities within each of the various states).

¹³⁵ See J. SEMONCHE, *supra* note 78, at 115-16, 144-46; Currie, *Supreme Court: 1889-1910*, *supra* note 78, at 382 n.343; Currie, *Supreme Court: 1910-1921*, *supra* note 78, at 1131 n.103; Kay, *The Equal Protection Clause in the Supreme Court 1873-1903*, 29 BUFFALO L. REV. 667 (1980).

¹³⁶ 184 U.S. 540 (1902). The case ultimately was overruled in *Tigner v. Texas*, 310 U.S. 141, 145-46 (1940) (noting that "the differences between agriculture and industry call for differentiation in the formulation of public policy.").

¹³⁷ The company's action against Connolly had been consolidated with a second, parallel action by the company against another individual; the Court's equal protection analysis applied equally to each of the two actions. See *Connolly*, 184 U.S. at 544.

¹³⁸ The Court noted that the invalidity at common law of the plaintiff's participation in an anticompetitive combination provided no defense to the plaintiff's recovery on a sales contract that had "no necessary or direct connection with the alleged illegal combination." *Connolly*, 184 U.S. at 549. Similarly, the Court declared that a contract unconnected with the other party's alleged anticompetitive behavior could not be the

purchaser of any article from a corporation transacting business contrary to the statute's prohibitions on anticompetitive conduct was relieved from liability for the price and could plead the act as a defense in any suit for payment.¹⁴⁰ The Union Sewer Pipe Company asserted that the Illinois act could not aid the defendant, despite this clear provision, on the ground that another section of the statute provided that the act did not apply to "agricultural products or livestock while in the hands of the producer or raiser."¹⁴¹ This provision, the plaintiff asserted, was in violation of the fourteenth amendment and, as such, rendered the entire Illinois statute invalid, because the provision was interwoven with and inseparable from the rest of the act.

Justice Harlan declared that, contrary to the Illinois classification scheme, "persons engaged in trade or in the sale of merchandise and commodities . . . and agriculturalists and raisers of live stock, are all in the same general class, that is, they are all alike engaged in domestic trade."¹⁴² He added that, if anticompetitive "combinations of capital, skill, or acts, in respect of the sale or purchase of goods, merchandise, or commodities . . . are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products and livestock are not also hurtful."¹⁴³ Sustaining the plaintiff's challenge and invalidating the 1893 Illinois antitrust statute in its entirety, Justice Harlan summarily proclaimed such a disparate system of criminal punishment to be "so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."¹⁴⁴

grounds for a recovery or defense under the Sherman Act. *See id.* at 550-52. In stating the former proposition, the Court relied in part on two earlier cases announcing the same principle. *See id.* at 546-48 (citing with approval *Dennehy v. McNulta*, 86 F. 825, 827, 829 (7th Cir. 1898); *National Distilling Co. v. Cream City Importing Co.*, 86 Wis. 352, 355, 56 N.W. 864, 865 (1893)).

¹³⁹ 1893 ILL. LAWS 182. The statute prohibited price fixing, output limitations, and other collective restrictions in trade or competition. The act declared business violators punishable by forfeiture of corporate charter or revocation of privileges to do intra-state business and individuals punishable by fines of not less than \$2000 or more than \$5000. The statute further declared that any contract or agreement in violation of the act was "absolutely void and not enforceable either in law or equity." *See* 1893 ILL. LAWS 182, 184; *see also* 184 U.S. at 552-55 (setting out statute in full).

¹⁴⁰ *See* 1893 ILL. LAWS 182; *see also Connolly*, 184 U.S. at 555-56 (quoting the statute). This provision did not require the purchaser's *own* contract with the seller to be anticompetitive or unlawful or to be directly connected to any such misconduct; and Connolly's contract with the plaintiff was not. *See supra* note 138.

¹⁴¹ *Connolly*, 184 U.S. at 554, 556 (referring to § 9 of the Act).

¹⁴² *Id.* at 560.

¹⁴³ *Id.* at 563-64.

¹⁴⁴ *Id.* at 564. In so deciding, the Court held contrary to state court precedent upholding almost identical provisions of other state antitrust statutes. For example, in *State ex rel. Astor v. Schlitz Brewing Co.*, 104 Tenn. 715, 59 S.W. 1033 (1900), the

Thus, in its first major opinion addressing the constitutional legitimacy of a state policy penalizing some but not all occurrences of particular types of anticompetitive behavior, the Court held that a state statute, largely designed to provide regional agricultural interests with a weapon with which to redress an acutely perceived imbalance of economic power,¹⁴⁵ could not be used at all unless it was simultaneously aimed at those same agricultural producers themselves. While willing to support vigorously an across-the-board policy to promote competition in all fields,¹⁴⁶ Justice Harlan was not prepared to support a regional antitrust policy more selectively shaped to redistribute economic wealth or power among economic interests.¹⁴⁷

Tennessee Supreme Court had considered a provision that declared that the state antitrust act did not apply to "agricultural products or livestock while in the possession of the producer or raiser." Acts of 1897, ch. 94, § 4, *reprinted in id.* at 724, 59 S.W. at 1034. The Tennessee court declared that this classification was "not arbitrary and capricious, but natural and reasonable," *id.* at 734, 59 S.W. at 1037, noting that "[o]bviously those transactions that are excepted from the penalties of this Act, rarely, if ever result in evil to the public, while those upon which the penalties are imposed are believed to have that effect generally." *Id.* at 735, 59 S.W. at 1037. The court explained that "farmers and stock raisers in this State, when acting within their limited sphere of immunity from those penalties, have, at most, but few opportunities and slight facilities for impairing competition and controlling prices, while those of many of the other pursuits have such opportunities and facilities almost without limit." *Id.* Five years earlier, the Supreme Court of Texas had rejected an equal protection-based attack on the almost identical exemption for agricultural products and livestock that was contained in the Texas antitrust act. *See Anheuser-Busch Brewing Ass'n v. Houck*, 88 Tex. 184, 185, 30 S.W. 869, 870 (1895), *aff'g* 27 S.W. 692, 696-97 (Tex. Civ. App. 1894).

The few lower federal courts that had addressed similar issues had been less sympathetic. *See, e.g., In re Grice*, 79 F. 627 (C.C.N.D. Tex. 1897), *rev'd on other grounds sub nom. Baker v. Grice*, 169 U.S. 284 (1898) (declaring the Texas antitrust act's agricultural exemption violative of the equal protection clause of the fourteenth amendment); *cf. Niagara Fire Ins. Co. v. Cornell*, 140 F. 816 (C.C.D. Neb. 1901) (declaring a Nebraska antitrust statute unconstitutional because of its exemption in favor of laborers). The lower federal court in *Connolly*, like the United States Supreme Court, summarily sustained the constitutional challenges. *See Union Sewer-Pipe Co. v. Connolly*, 99 F. 354, 355 (C.C.N.D. Ill. 1900), *aff'd*, 184 U.S. 540 (1902).

¹⁴⁵ The Court in *Connolly* concluded, for example, that the Illinois legislature "would not have entered upon or continued the policy indicated by the statute unless agriculturalists and livestock dealers were excluded from its operation, and thereby protected from prosecution." *Connolly*, 184 U.S. at 565.

¹⁴⁶ *See, e.g., United States v. E.C. Knight Co.*, 156 U.S. 1, 18-46 (1895) (Harlan, J., dissenting).

¹⁴⁷ Such a view of the statute's purpose was indeed urged upon the *Connolly* Court by the defendants, who vigorously defended the Illinois classification as a reasonable means to further a legitimate state policy of opposition to accelerating inequality of wealth and growing impoverishment of both the agricultural sector and the middle class. *See* Brief for Plaintiffs in Error at 86, *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902). In part, the defendants argued that the Illinois provision was valid because it really did not discriminate as to persons but only as to "things." *See id.* at 84. Thus, if the Union Sewer Pipe Company went into agricultural pursuits, it would be safe from Illinois antitrust prosecution for such efforts, and if farmers pursued the

Today, the decision in *Connolly* is usually dismissed as a rather unreasoned, indeed capricious, departure from the general pattern of Supreme Court equal protection decisions rendered both before and after it. It is explained chiefly as indicative of a judicial reluctance to allow the defendants in the case the windfall that they appear to have been seeking.¹⁴⁸ Its significance as seen by contemporaries, however,

sewer pipe business, they would become potentially liable for anticompetitive activity. *See id.* But the defendants also stressed "the resistless drift . . . toward combinations and centralization of money . . . driving the great middle class . . . into positions of dependency upon such billionaires." *Id.* at 86 (emphasis removed). Because of such trends, they declared,

[P]roducers of agricultural products and raisers of livestock are being pushed more and more toward positions of dependency, tenantry, and employees. To counteract this, so far as can be done reasonably, is clearly the duty af [sic] every legislature; one method of counteracting it is to permit cooperation, and, if need be, combinations, by *everybody* in the protection of agriculturists and stock-raisers, while their products remain in their hands.

Id. at 86-87.

Justice Harlan, writing for the Court, found such asserted justifications worthy of neither mention nor rebuttal and simply condemned the Illinois classification as patently specious on its face. A restraint of trade was a restraint of trade, and, if worthy of criminal punishment when devised by manufacturers, it must similarly be against the public interest when pursued by farmers. No constitutionally permissible state interest conceivably could be served by punishing only restraints occurring in the nonagricultural sector. *See Connolly*, 184 U.S. at 556-65.

Only Justice McKenna dissented from the majority's opinion. *See id.* at 565-71 (McKenna, J., dissenting). Justice Gray did not participate. *See id.* at 571. Justice McKenna stressed that the very notion of classification implied the permissibility of something short of absolute universality of operation and that state legislatures "must be allowed a wide latitude of discretion and judgment." *Id.* at 567, 570 (McKenna, J., dissenting) (citations omitted). In his mind, the Illinois statute was essentially analogous to a previously upheld state law exempting planters and farmers from a license tax imposed upon persons carrying on the business of refining sugar and molasses, *see id.* at 567-68 (citing *American Sugar Ref. Co. v. Louisiana*, 179 U.S. 89 (1900)), an analogy that the majority pointedly denied. *See Connolly*, 184 U.S. at 561-63. Most fundamentally, Justice McKenna declared that the Illinois measure necessarily rested upon a knowledge of local conditions that the Court did not possess and an analysis of economic issues that legitimately was for the state and not the Court to make. *See id.* at 571 (McKenna, J., dissenting). Moreover, he noted that differences existed "in opportunities and powers between the classes in regard to the prohibited acts" and that the state legislature "had a right to consider" these differences in formulating its antitrust policy. *See id.* at 571 (McKenna, J., dissenting).

¹⁴⁸ *See* J. FLYNN, *supra* note 71, at 31; J. SEMONCHE, *supra* note 78, at 145 (discussing the Court's atypical approach in *Connolly*); Currie, *Supreme Court: 1889-1910*, *supra* note 78, at 382 n.343; Kay, *supra* note 135, at 716, 722 (noting the Court's "failure to articulate any reasoned basis" for its decision, and describing the opinion as a "generalized harangue" on the unfairness of the Illinois antitrust statute). As noted, *Connolly* had sought to escape liability entirely on his promissory notes on the basis of alleged antitrust violations not necessarily or directly connected to his own purchase contract with the plaintiff. *See supra* note 138. He also had demanded his own set-off recovery from the plaintiff, requesting \$56,970.44 in treble damages under the Sherman Act, \$17,323.48 in actual damages under the Illinois statute, and

was by no means so distinctly limited. Reactions to the opinion varied, of course, affected at least in part by differing political sympathies and economic concerns. Expressions of conservative support and appreciation, however, were declared almost immediately. The day after the opinion was announced, the *Chicago Tribune* heralded the demise of the Illinois antitrust act, openly wishing its eradication had come earlier, before it assertedly scared so many firms away from the state.¹⁴⁹ Most immediately, the paper reported, the consequence of the case was to settle in one stroke state "litigation involving at least \$10,000,000," the amount reportedly withheld by purchasers of "trust made goods" who had refused payment on the authority of the invalidated Illinois statute.¹⁵⁰ Levy Mayer, attorney for the Illinois Manufacturers Association, found the opinion "legally invigorating" and proclaimed the stricken provisions "bigoted, dishonest, unprogressive, uncommercial, and against the spirit of free and untrammelled business intercourse."¹⁵¹ Harry Rubens, a prominent Chicago corporation attorney, declared:

The law went the way that it should go You cannot prevent trade combinations. They are a growth of new conditions which demand new business methods. I believe there will be no rigid anti-combination law. You might as well try to pass laws forbidding the use of steam power.¹⁵²

Observers in other parts of the country also reacted quickly to the decision. Within a week of its announcement the *New York Times*, for example, reported: "There probably has never been anything of public importance that has aroused such great interest and received such uni-

\$17,323.48 for "money had and received by plaintiff of defendant contrary to law." See *Connolly*, 184 U.S. at 543.

¹⁴⁹ See *Chicago Tribune*, Mar. 11, 1902, at 4, col. 1. The paper noted concern over the stricken statute's long-term effects: "Whether or not it is too late to undo any of the harm done and regain the big plants and corporations lost to the state is a matter of grave doubt, according to well posted men." One such "well posted man," an official of one of the city's largest banks, reportedly feared that such was indeed the case: "[I]t is too late to remedy matters. Legislation has run the large companies out of the State, and new laws probably will be framed to meet the objections found in the old one, so that the harm will not be mended." *Id.*

¹⁵⁰ See *id.* The magnitude of the aggregate amount reportedly withheld and the fact that many of those withholding payment may not themselves have been the victims of anticompetitive conduct by the "trust" sellers, as indeed *Connolly* himself apparently was not, see *supra* note 138, arguably may have affected the Court's reaction to the Illinois statute, whether or not reluctance to allow *Connolly* himself a "windfall" may have been a major factor. No direct indication of either concern, however, is evident in the Court's opinion.

¹⁵¹ *Chicago Tribune*, Mar. 11, 1902, at 4, col. 1; *Chicago Daily News*, Mar. 10, 1902, at 1, col. 2.

¹⁵² *Chicago Tribune*, Mar. 11, 1902, at 4, cols. 1, 2.

versal approval on the part of the business and industrial element of Texas as the recent decision of the United States Supreme Court in the anti-trust case from Illinois"¹⁵³ The report noted speculation in Texas that the effect of *Connolly* would be to invalidate all three of the interrelated Texas antitrust statutes because two of the three contained agricultural exemptions.¹⁵⁴ "If this is true," said the *Times*, "Texas is now without an anti-trust law. This is why there is rejoicing among the business and industrial element of Texas."¹⁵⁵ The *Times* prophesied "a desperate effort . . . on the part of the Democratic politicians to re-enact an anti-trust law which will be constitutional, but this will be combatted by every conservative business man and manufacturer of the State" and further predicted that any new legislation applicable across the board would be objected to by "[t]he labor vote . . . and this element has a big influence on the politics of this State."¹⁵⁶

The *Connolly* decision's sweeping declaration that all those engaged in either agricultural or nonagricultural domestic trade were to be deemed in the same class for equal protection analysis potentially called into question any more selectively focused, and comparatively more politically popular, approach to contemporary state antitrust enforcement. Because the decision directly blocked new legislative efforts to allow farmers and cattle raisers the favored leeway provided by the Illinois statute and made at least somewhat more problematic the pursuit of other selectively-based approaches to contemporary problems of collusion and monopoly, it initially may have had some dampening effect on regional antitrust activity. In general, however, the holding was not embraced enthusiastically in subsequent federal and state cases re-

¹⁵³ N.Y. Times, Mar. 16, 1902, at 13, col. 3.

¹⁵⁴ See *id.* Others in Texas soon took issue with that analysis, however, including the editors of the *Houston Post*, who believed Texas legislation would remain operative even though the agricultural exemption would fall. See *Houston Post*, Mar. 11, 1902, at 1, col. 1; *id.*, Mar. 12, 1902, at 4, col. 1.

¹⁵⁵ N.Y. Times, *supra* note 153, at 13, col. 3.

¹⁵⁶ *Id.* Some other observers had less strong reactions to *Connolly*. Some, indeed, merely declared it the inevitable judicial reaction to precipitous and sloppy legislative drafting. See, e.g., *Chicago Record Herald*, Mar. 12, 1902, at 12, col. 2. Thus, the *Kansas City Star* explained:

Stringent enactments are frequently passed with a great hullabaloo to impress the voters, without regard to constitutional restrictions. At times such legislation is encouraged by trust agents as the best way to meet attacks against them. If trusts are to be restricted and regulated—and the great majority of people believe regulation necessary—legislators must go about their work carefully and calmly. They must pay attention to court decisions and to the probable attitude of judges. The slap dash methods of the political canvass are useless. This is the lesson of the decision of the Supreme Court on the Illinois law.

Kansas City Star, Mar. 11, 1902, at 6, cols. 1, 2.

viewing other grounds of selectivity, and its restrictive impact was considerably eroded by the time the United States entered the First World War.

Three years after its decision in *Connolly*, the Supreme Court, per Justice Holmes, upheld an Iowa statute that prohibited anticompetitive collusion among fire insurance companies.¹⁵⁷ The Court refused to second-guess the state legislature's determination that the activities of such companies presented an unusually severe threat to competition justifying special treatment. Five years later, in *Standard Oil Co. of Kentucky v. Tennessee*,¹⁵⁸ the Court, again per Justice Holmes, upheld a Tennessee antitrust statute providing a dual penalty system under which natural persons were subject exclusively to fine or imprisonment while corporations were subject to ouster from the state. The statute further required alleged violations by natural persons to be adjudicated using different procedures than those used to try violations by corporations.¹⁵⁹ Then, in 1912, in *Central Lumber Co. v. South Dakota*,¹⁶⁰ the Court, once again per Justice Holmes, rejected a challenge to a South Dakota "predatory geographic price discrimination" statute,¹⁶¹ despite

¹⁵⁷ See *Carroll v. Greenwich Ins. Co.*, 199 U.S. 401 (1905). In so holding, the Court affirmed that "if an evil is specially experienced in a particular branch of business, the Constitution embodies no prohibition of laws confined to the evil, or doctrinaire requirement that they should be couched in all-embracing terms." *Id.* at 411. Justice Harlan concurred, viewing the state act as a permissible effort to provide bargaining equality for consumers dealing with fire insurance companies. See *id.* at 414 (Harlan, J., concurring).

¹⁵⁸ 217 U.S. 413 (1910).

¹⁵⁹ Natural persons could only be tried through preliminary investigation by a grand jury, indictment or presentment, and jury trial. Moreover, natural persons had the benefits of the reasonable doubt standard and a one year statute of limitations. Corporations, on the other hand, were proceeded against by bill in equity on relation of the state attorney general. See *id.* at 420. Rejecting the defendant's claim that these differences denied it the equal protection of the laws, Justice Holmes characterized the defendant's argument, in frequently quoted language, as "one of the many attempts to construe the Fourteenth Amendment as introducing a factitious equality without regard to practical differences that are best met by corresponding differences of treatment." *Id.* at 420.

¹⁶⁰ 226 U.S. 157 (1912).

¹⁶¹ Such statutes more frequently have been labeled "local price discrimination" acts. The act subjected to a fine anyone

[e]ngaged in the production, manufacture, or distribution of any commodity in general use, that intentionally, for the purpose of destroying the competition of any regular, established dealer in such commodity, or to prevent the competition of any person who in good faith intends and attempts to become such dealer, shall discriminate between different sections, communities, or cities of this state, by selling such commodity at a lower rate in one section . . . than such person . . . charges for such commodity in another section, . . . after equalizing the distance from the point of production

Id. at 159 (quoting 1907 S.D. LAWS ch. 131); cf. Robinson-Patman Act, 15 U.S.C.

the defendant's objection that the act effectively imposed a special liability on dealers having two or more places of business.¹⁶²

Finally, in 1914, in *International Harvester Co. of America v. Missouri*,¹⁶³ the United States Supreme Court, per Justice McKenna, the lone dissenter in *Connolly*, rejected an equal protection challenge to a Missouri antitrust statute that targeted manufacturers and vendors of articles but not purchasers, laborers, or other providers of services. The Court readily conceded that combinations of laborers or of purchasers might restrain competition but declared that it was for the legislature of the state to determine whether local conditions called for repression of such combinations.¹⁶⁴ The Court expressly rejected the defendant's contentions that an appropriate classification necessarily would "include[] all the activities and occupations of life"¹⁶⁵ and that to be valid, any state antitrust law would have to "apply to all restraints, whatever

§ 13a (1982) (This section, the criminal penalty section of the present federal "price discrimination" statute, declares, in part, that it shall be unlawful "to sell . . . goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States.").

¹⁶² The defendant claimed that the statute

in real fact is a blow aimed at those who have several lumber yards along a line of railroad, in the interest of independent dealers. All competition, it is added, imports an attempt to destroy or prevent the competition of rivals, and there is no difference in principle between the prohibited act and the ordinary efforts of traders at a single place.

Central Lumber, 226 U.S. at 160. In dismissing the relevance of the defendant's economic theory, Justice Holmes noted, in passing, the contemporary prevalence of the "recoupment" theory of predation, as follows:

We must assume that the legislature of South Dakota considered that people selling in two places made the prohibited use of their opportunities and that such use was harmful, although the usual efforts of competitors were desired. It might have been argued to the legislature with more force than it can be to us that recoupment in one place of losses in another is merely an instance of financial ability to compete. If the legislature thought that that particular manifestation of ability usually came from great corporations whose power it deemed excessive and for that reason did more harm than good in their State, and that there was no other case of frequent occurrence where the same could be said, we cannot review their economics or their facts. That the law embodies a widespread conviction appears from the decisions in other States.

Id. at 161 (citations omitted). For a discussion of the "recoupment" theory of predation, its impact during the Progressive Era, and its asserted factual inaccuracy, at least as applied to the contemporary operations of the Standard Oil Company, see generally McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137 (1958); see also H. HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* § 6.12, at 187 (1985); E. SULLIVAN & H. HOVENKAMP, *ANTITRUST LAW POLICY AND PROCEDURE: CASES AND MATERIALS* 504 (1984).

¹⁶³ 234 U.S. 199 (1914).

¹⁶⁴ See *id.* at 210.

¹⁶⁵ *Id.* at 212.

their degree or effect or purpose."¹⁶⁶ In the Court's view, the classification made by the Missouri legislature could not be deemed "palpably arbitrary."¹⁶⁷ Hence, the statute could not be held invalid as an exercise of legislative power, however much the defendant might fault the act on grounds of social policy.¹⁶⁸ *Connolly* itself received only the briefest closing mention, in the last two sentences of the Court's opinion. There, the Court rejected the contention that the challenged statute came within its earlier holding by declaring simply, "[W]e do not think so. If it did we should, of course, apply that ruling here."¹⁶⁹

In general, state courts did not wait for the Supreme Court's broadly sympathetic opinion in *International Harvester* before adopting their own rather restrictive interpretations of *Connolly*. Following that earlier 1902 decision, the state Supreme Courts of Georgia¹⁷⁰ and Montana¹⁷¹ did invalidate state antitrust statutes in their entirety because they contained agricultural exemptions. The Texas Supreme Court, sitting in a state in which a federal circuit court estimated four-fifths of the state's population was "engaged in the business of producing and raising agricultural products and live stock,"¹⁷² also followed *Connolly*, but only grudgingly, and no further than it felt absolutely

¹⁶⁶ *Id.* The Court went on to suggest more pointedly the unsoundness of the proposition that only all-inclusive bans on restraints of trade should be upheld:

In the enumeration of those who, it is contended, by combination are able to restrain trade are included, among others, "persons engaged in domestic service" and "nurses," and because these are not embraced in the law, plaintiff in error, it is contended, although a combination of companies uniting the power of \$120,000,000 and able thereby to engross 85% or 90% of the trade in agricultural implements, is nevertheless beyond the competency of the legislature to prohibit. As great as the contrast is, a greater one may be made. Under the principle applied a combination of all the great industrial enterprises (and why not railroads as well?) could not be condemned unless the law applied as well to a combination of maidservants or to infants' nurses, whose humble functions preclude effective combination.

Id. at 213.

¹⁶⁷ *Id.* at 215.

¹⁶⁸ *See id.* at 214.

¹⁶⁹ *Id.* at 215.

¹⁷⁰ *See Brown v. Jacobs' Pharmacy Co.*, 115 Ga. 429, 41 S.E. 553 (1902). The court, nevertheless, still upheld the grant of an injunction against defendant retail druggists, who had sought to coerce manufacturers and wholesalers to refuse to sell to the plaintiff on the grounds that plaintiff was an aggressive price cutter. The court concluded that the injunction was supported by settled common law principles. *See id.* at 433-54, 41 S.E. at 554-64.

¹⁷¹ *See State v. Cudahy Packing Co.*, 33 Mont. 179, 82 P. 833 (1905). The exemption in question declared that the act did not apply to arrangements made by "persons engaged in horticulture or agriculture, with a view of enhancing the price of their products." *Id.* at 182, 82 P. at 833.

¹⁷² *In re Grice*, 79 F. 627, 647 (C.C.N.D. Tex. 1897), *rev'd sub nom. Baker v. Grice*, 169 U.S. 284, 294 (1898).

compelled to.¹⁷³ It declared that the state antitrust statute of 1895 still could support a proceeding to forfeit the charter of a Texas corporation, despite the statute's agriculture exemption, even though it conceded that the statute no longer could support a penalty action or serve as the basis of a defense in a civil suit.¹⁷⁴

The Supreme Court's initial equal protection analysis also led to state court condemnation of nonagriculturally-based selectivity. Less than a year after *Connolly* was announced, the Supreme Court of Illinois, relying on *Connolly*, summarily held unconstitutional an amendment to the 1891 state antitrust act that declared it not unlawful "in the mining, manufacture or production of articles of merchandise, the cost of which is mainly made up of wages" for persons and businesses "to enter into joint arrangements of any sort, the principal object or effect of which is to maintain or increase wages."¹⁷⁵ But others took a very different view of *Connolly*'s relevance to labor-related antitrust legislation. Thus, a decade later, the Oklahoma Criminal Court of Appeals,¹⁷⁶ noting that the United States Supreme Court had never directly considered the status of labor exemptions to state antitrust laws,¹⁷⁷ firmly upheld such an exemption¹⁷⁸ to its own state's act.¹⁷⁹ In

¹⁷³ See *State ex rel. Attorney Gen. v. Shippers' Compress & Warehouse Co.*, 95 Tex. 603, 611, 69 S.W. 58, 61 (1902) (referring to its earlier, pre-*Connolly* holding rejecting an equal protection challenge to another state antitrust statute declared to be without relevant difference from the statute involved in the case now before it and reiterating, "We believe that our decision is correct; that the law is not in contravention of the constitution . . . of the United States"; the court did, however, "recognize the superior authority of the Supreme Court of the United States" on the point).

¹⁷⁴ See *id.* at 611, 69 S.W. at 61 ("[T]o the extent that the statute of this state is not embraced in the decision of the Supreme Court of the United States, we shall adhere to our former decision that it is constitutional and valid, and therefore enforceable [sic] by the State."). Three years later, the United States Supreme Court quoted the Texas court's reasoning on this point without apparent disapproval. See *National Cotton Oil Co. v. Texas*, 197 U.S. 115, 131-32 (1905). As noted *infra* notes 255-57 and accompanying text, *Connolly* also prompted Kentucky jurists to adopt an interpretation of state antitrust law making its agricultural cooperative marketing exemption more generally available to those in all lines of commerce.

¹⁷⁵ *People ex rel. Akin v. Butler St. Foundry & Iron Co.*, 201 Ill. 236, 258, 66 N.E. 349, 356 (1903). The court's entire analysis and rationale for this holding was set out in a single sentence: "Under the decision in the *Connolly* case, it is clear that this amendment is unconstitutional and void, as being an unlawful discrimination in favor of the persons sought to be exempted by the amendment from the operation of the act of 1891, as amended by the act of 1893." *Id.*

¹⁷⁶ See *State v. Coyle*, 7 Okla. Crim. 50, 122 P. 243 (1912), *reh'g denied*, 8 Okla. Crim. 686, 130 P. 316 (1913).

¹⁷⁷ See *id.* at 79-80, 122 P. at 256.

¹⁷⁸ The Oklahoma exemption provided:

[N]o agreement, combination, or contract by or between two or more persons to do or procure to be done, or not to do or procure to be done, any act in contemplation or furtherance of any trade dispute between employers and employees in the state, shall be deemed as criminal, nor shall those

so doing, that court projected a vision of contemporary economic reality distinctly at odds with the conception underlying the Illinois Supreme Court's decision a decade earlier, which, without discussion, seemingly had declared it clear that labor and capital could not constitutionally be classified separately for antitrust treatment. The Oklahoma court's opinion expressed the pervasive antimonopoly sentiment of its region¹⁸⁰ and proclaimed a fundamental, naturally ordained *dissimilarity* of labor and capital.¹⁸¹

engaged therein be indictable or otherwise punishable for the crime of conspiracy, if such act committed by one person would not be punishable as a crime, nor shall such agreement, combination, or contract be considered as in restraint of trade or commerce, nor shall any restraining order or injunction be issued in relation thereto, provided that force or violence are not used.

Coyle, 8 Okla. Crim. at 694-95, 130 P. at 319-20 (opinion denying motion for rehearing).

¹⁷⁹ In concluding its holding on this point in the first *Coyle* case, the court declared that its decision was by no means a reluctant one, proclaiming that, "until compelled by direct judicial decision of the Supreme Court of the United States to the contrary, we shall esteem it a privilege and consider it a solemn obligation and duty to uphold the validity of our antitrust laws." 7 Okla. Crim. at 93-94, 122 P. at 262. In *National Cotton Oil Co. v. Texas*, 197 U.S. 115 (1905), a defendant's equal protection claim, involving, in part, a challenge to a labor exemption from Texas antitrust legislation, was not addressed because state court construction was held to have removed the discriminatory features from the legislation. An equal protection challenge to a state antitrust act's labor exemption also was raised, but neither addressed nor resolved, in *State v. Cudahy Packing Co.*, 33 Mont. 179, 82 P. 833 (1905).

¹⁸⁰ For a thorough recent discussion of popular sentiment in Oklahoma in this period, see G. BURBANK, *WHEN FARMERS VOTED RED: THE GOSPEL OF SOCIALISM IN THE OKLAHOMA COUNTRYSIDE, 1910-1924* (1976).

¹⁸¹ The court declared its view of economic relations as follows:

The assumption of counsel for appellees is that the rights of capital are equal to the rights of labor. Good morals do not sustain this assumption. While labor and capital are both entitled to the protection of the law, it is not true that the abstract rights of capital are equal to those of labor, and that they both stand upon an equal footing before the law. Labor is natural; capital is artificial. Labor was made by God; capital is made by man. Labor is not only blood and bone, but it also has a mind and a soul, and is animated by sympathy, hope, and love; capital is inanimate, soulless matter. Labor is the creator; capital is the creature. . . . The strength and glory of this country lies, not in its vast accumulations of capital, but it depends upon the arms that labor, the minds that think, and the hearts that feel. Labor is always a matter of necessity. Capital is largely a matter of luxury. Labor has been dignified by the example of God. The Saviour of mankind was called the "carpenter's son." We are told in the Bible that "the love of money is the root of all evil." This statement is confirmed by the entire history of the human race. The love of money is the cause of the organization of trusts and monopolies. With what show of reason and justice, therefore, can the advocates of monopoly be heard to say that capital is the equal of labor? But if we concede that the assumption of counsel for appellees is well founded, and if we arbitrarily and in disregard of good morals place capital and labor upon an absolute equality before the law, another difficulty confronts them. Capital organizes to accomplish its pur-

The Oklahoma approach was far more typical of the work of contemporary state judges than was the action of the Illinois court. Although *Connolly's* prohibition of the type of broad-based agricultural exemption found in the 1893 Illinois statute remained at least formally in force for several decades, state courts rejected the great majority of equal protection-based attacks made on state antitrust legislation prior to the First World War. Thus, for example, the state courts upheld legislation despite its limitation to dealers, mechanics, and artisans,¹⁸² to activities in the production, manufacture, or distribution of petroleum or petroleum products,¹⁸³ or to corporations,¹⁸⁴ and despite the exemption of certain special status corporations.¹⁸⁵ Furthermore, in the years prior to the United States Supreme Court's decision in *Central Lumber*,¹⁸⁶ state supreme courts repeatedly upheld state "predatory discrimination" statutes, whether addressed to sales¹⁸⁷ or purchases,¹⁸⁸

poses. Then, according to their own logic, it would be a denial of equal rights to labor to deny to it the right to organize and act without a breach of the peace to meet the aggression of capital.

Coyle, 8 Okla. Crim. at 695-96, 130 P. at 320 (opinion denying motion for rehearing). In thus rejecting the defendants' assertion that the state's classification violated the equal protection provision of the United States Constitution, the court also went on more succinctly to "deny that trusts and monopolies are entitled to protection as citizens of the United States," *id.* at 696, 130 P. at 320, without noting or discussing the United States Supreme Court's position, stated in *Santa Clara County v. Southern Pac. R.R. Co.*, 118 U.S. 394, 396 (1886) (preliminary remark by Waite, C.J.), that corporations were included among the "persons" guaranteed equal protection of the laws under the fourteenth amendment.

¹⁸² See *Knight & Jillson Co. v. Miller*, 172 Ind. 27, 87 N.E. 823 (1909).

¹⁸³ See *State ex rel. Young v. Standard Oil Co.*, 111 Minn. 85, 126 N.W. 527 (1910).

¹⁸⁴ See *People ex rel. Akin v. Butler St. Foundry & Iron Co.*, 201 Ill. 236, 66 N.E. 349 (1903).

¹⁸⁵ See *id.* at 256, 66 N.E. at 355 (noting that corporations "organized under the building, loan and homestead association laws of [the] state," which the court declared "differ essentially from corporations organized under the general statute for pecuniary profit," were exempt from a provision requiring corporations to file an affidavit of antitrust compliance); *cf. State ex rel. Crow v. Aetna Ins. Co.*, 150 Mo. 113, 134, 51 S.W. 413, 420 (1898) (antitrust legislation exempting collective insurance rate-setting in cities with population of 100,000 or more held not in violation of state constitutional provision banning local or special laws).

¹⁸⁶ *Central Lumber Co. v. South Dakota*, 226 U.S. 157 (1912).

¹⁸⁷ See, e.g., *State ex rel. Young v. Standard Oil Co.*, 111 Minn. 85, 126 N.W. 527 (sustaining predatory geographic price discrimination statute applying only to those engaged in the production, manufacture, or distribution of petroleum or petroleum products); *State v. Drayton*, 82 Neb. 254, 265-66, 117 N.W. 768, 772 (1908) (upholding general predatory geographic price discrimination statute over assertion of bias against those having two or more places of business; the court denied such limited scope for the statute on the ground that large corporations selling in multiple locales were within the act's coverage even where they maintained only a single "place of business"); *State v. Central Lumber Co.*, 24 S.D. 136, 157-59, 123 N.W. 504, 511-12 (1909) (citing *Drayton* approvingly and flatly declaring that the statute did not establish any classification, because it applied to any persons, partnerships, or corporations engaged

in spite of claims that the acts unconstitutionally discriminated against those they targeted.

Although *Connolly* itself was not formally overruled by the Supreme Court until 1940,¹⁸⁹ within a dozen years of its announcement its scope of application thus had been reduced substantially by subsequent federal and state cases. Its weakening force, even as applied to special agricultural legislation, soon became apparent in the efforts of both Congress and numerous state legislatures to enact cooperative marketing provisions to protect farmers, and frequently others as well, from the full application of antitrust statutes.¹⁹⁰

in the specified type of predatory conduct, a particular form of "malicious competition" that the legislature legitimately could attack by way of separate legislation), *aff'd*, 226 U.S. 157 (1912).

¹⁸⁸ In *State v. Fairmont Creamery Co.*, 153 Iowa 702, 133 N.W. 895 (1911), the Iowa Supreme Court upheld special legislative regulation of price discrimination in certain agricultural sectors, despite *Connolly's* 1902 condemnation of Illinois' exemption of farmers from the operation of a general antitrust statute. The legislation addressed in *Fairmont Creamery* forbade predatory geographic discrimination in purchasing by those "engaged in the business of buying milk, cream or butter fat for the purpose of manufacture, or of buying poultry, eggs or grain for the purpose of sale or storage." *Id.* at 704-05, 133 N.W. at 897. Neither targeting such commodities alone nor focusing solely on purchases made for those specified purposes was, in the court's view, constitutionally suspect. The court declared, for example, that the "temporary maintenance of artificial prices for the sole purpose of destroying a weaker competitor and creating a monopoly" was a threat peculiarly posed by large, financially well-endowed corporations buying cream "for the purpose of manufacture" and not practicably possible for the "multitude who buy for immediate consumption." *Id.* at 710, 133 N.W. at 899. The court found *Connolly* less relevant than later United States Supreme Court decisions, including *Carroll v. Greenwich Ins. Co.*, 199 U.S. 401 (1905), which, it concluded, supported the Iowa legislation.

Two months later, the Minnesota Supreme Court upheld a very similar Minnesota statute on similar reasoning, although without noting or discussing *Connolly*. See *State v. Bridgeman & Russell Co.*, 117 Minn. 186, 134 N.W. 496 (1912).

While the antidiscrimination acts involved in these two state cases specifically included certain activities in the agricultural sector, while *Connolly* had condemned a statute specifically exempting certain other activities in that same sector, it would appear that in all three cases, a major, if not sole, aim of the state legislature was to provide special protection to state farmers. In *Connolly*, this was achieved by leaving room for anticompetitive cooperation among farmers generally. In *Fairmont Creamery* and *Bridgeman & Russell*, it was accomplished by giving dairy farmers special protection against the illegitimate establishment of monopsony power in the hands of those buying their produce.

¹⁸⁹ See *Tigner v. Texas*, 310 U.S. 141 (1940) (upholding a Texas antitrust statute despite an exemption identical to that condemned in *Connolly*).

¹⁹⁰ See, e.g., Capper-Volstead Act, 42 Stat. 388 (1922) (codified as amended at 7 U.S.C. §§ 291-92 (1982)); Clayton Act, § 6, 38 Stat. 730, 731 (1914) (codified as amended at 15 U.S.C. § 17 (1982)); see also Hanna, *Cooperative Associations and the Public*, 29 MICH. L. REV. 148, 163 (1930) (describing state legislative efforts); Miller, *Farmers' Cooperative Associations as Legal Combinations*, 7 CORNELL L.Q. 293, 294-95, 304-06 (1922) (describing legislative efforts in New York). Such acts, however, typically offered protection on a less sweeping basis than the Illinois provision struck down by the Supreme Court in 1902. See, e.g., Hanna, *supra*, at 179; Miller, *supra*,

C. *Due Process of Law, Antitrust Innovation, and Visions of Economic Life*

As noted above, corporate law and commerce clause opinions demonstrated judicial sympathy for substantial state regulatory authority, and equal protection challenges to legislative classifications reflected the contours of an ongoing battle for relative economic power among major elements of American society. The due process clause provided yet another ground upon which to attack state antitrust efforts. The resulting due process cases marked both the extent of contemporary judicial tolerance for innovative antitrust methodology and the nature and power of contemporary visions of economic reality.

Charges that state antitrust efforts unconstitutionally deprived particular persons or corporations of due process of law were raised nearly as frequently as were equal protection challenges to the same initiatives, yet fared only slightly better. Due process attacks on the extraterritorial application of state power already have been noted.¹⁹¹ In other areas, critics variously complained that statutory coverage was so sweeping as to threaten freedom of contract or that state penalties were excessive, procedures unfair, or standards unduly vague. While some state legislation was struck down, the United States Supreme Court and the state courts generally rejected efforts to void state antitrust legislation on due process grounds. Among the opinions in this area the vagueness cases deserve the most extended attention. Those opinions, while few in number, did not simply raise basic issues concerning the practicability of various antitrust standards as guides for litigation and judicial elaboration; they also demonstrate unusually well the power and diversity of contemporary visions of economic life influencing antitrust analysis in turn-of-the-century America.

at 299-300. Early judicial assessment of equal protection attacks on such state cooperative marketing acts was mixed. *Compare* *Standard Engraving Co. v. Volz*, 200 A.D. 758, 762-66, 193 N.Y.S. 831, 835-37 (1922) (dicta declaring a 1918 New York provision unconstitutional on the basis of *Connolly*) with *Northern Wis. Coop. Tobacco Pool v. Bekkedal*, 182 Wis. 571, 197 N.W. 936 (1923), *reh'g denied*, 182 Wis. 592, 197 N.W. 943 (1924) (upholding Wisconsin Co-operative Marketing Law and questioning continued vitality of *Connolly*).

Connolly, however, was not wholly without residual force. *See* *Commonwealth v. Hatfield Coal Co.*, 186 Ky. 411, 417, 422, 426-28, 217 S.W. 125, 128, 130, 131-32 (1919) (striking down 1916 state antitrust legislation exempting all organizations or associations not engaged "in the business of mining, manufacturing or transporting any article or commodity," quoting *Connolly* at length and denouncing the measure as "class legislation of the most pronounced and offensive type" in violation of both the fourteenth amendment and the state constitution).

¹⁹¹ See *supra* text accompanying notes 120-21.

1. Freedom of Contract

In two early opinions unusually critical of state antitrust efforts, federal circuit courts declined to adopt a "rule of reason" interpretation of state legislation along the lines of the Supreme Court's eventual approach to Sherman Act analysis¹⁹² and declared that broadly worded state antitrust statutes, as thus literally construed, were unconstitutionally sweeping in their prohibition of contracts and combinations.¹⁹³ In other cases, however, the Supreme Court and the state courts generally had little, if any, difficulty rejecting the broad freedom of contract challenges mounted against various state antitrust legislation. Indeed, such attacks often were not deemed to merit much more than a summary reiteration of the general principle that freedom to contract was not an absolute right but one subject to reasonable police power regulation, which state antitrust legislation generally was held to be.¹⁹⁴ In one Supreme Court opinion, however, Justice Holmes did go somewhat further, indicating that totally uninhibited freedom to contract would itself conflict with the economic justifications supporting freedom of contract in general and, thus, that antitrust prohibitions were legitimate as a matter of economic as well as constitutional theory. In *Carroll v. Greenwich Insurance Co.*,¹⁹⁵ Justice Holmes, for the Court, explained:

There is no greater sanctity in the right to combine than in the right to make other contracts. Indeed, Mr. Dicey, in his recent work on Law and Public Opinion in England during the Nineteenth Century, indicates that it is out of the very right to make what contracts one chooses, so strenuously ad-

¹⁹² See *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). On the evolution of the "rule of reason" in early federal antitrust jurisprudence, see R. BORK, *supra* note 2, at 15-49; W. LETWIN, *supra* note 2, at 143-282.

¹⁹³ See *Niagara Fire Ins. Co. v. Cornell*, 110 F. 816 (C.C.D. Neb. 1901); *In re Grice*, 79 F. 627 (C.C.N.D. Tex. 1897), *rev'd on other grounds sub nom. Baker v. Grice*, 169 U.S. 284 (1898) (for further discussion of this case, see *supra* note 120); *cf. State ex rel. Star Publishing Co. v. Associated Press*, 159 Mo. 410, 60 S.W. 91 (1900) (rejecting newspaper's request, based in part on defendant's alleged state antitrust violations and purported status as a virtual monopoly, for mandamus to compel defendant to furnish news reports to it and declaring that such state interference, *inter alia*, would violate defendant's constitutionally protected liberty to enter or not enter into contracts as it deemed appropriate).

¹⁹⁴ See, e.g., *Central Lumber Co. v. South Dakota*, 226 U.S. 157 (1912); *Carroll v. Greenwich Ins. Co.*, 199 U.S. 401 (1905); *National Cotton Oil Co. v. Texas*, 197 U.S. 115 (1905); *Smiley v. Kansas*, 196 U.S. 447, 456-57 (1905); *Knight & Jillson Co. v. Miller*, 172 Ind. 27, 87 N.E. 823 (1909); *In re Opinion of the Justices*, 211 Mass. 620, 99 N.E. 294 (1912); *State ex rel. Monnett v. Buckeye Pipe-line Co.*, 61 Ohio St. 520, 56 N.E. 464 (1900); *Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App. 1, 44 S.W. 936 (1898), *aff'd*, 177 U.S. 28 (1900).

¹⁹⁵ 199 U.S. 401 (1905).

vocated by Bentham, that combinations have arisen which restrict the very freedom that Bentham sought to attain, and which even might menace the authority of the State. If then the statute before us is to be overthrown more special reasons must be assigned.¹⁹⁶

With broad freedom of contract challenges generally unsuccessful, defendants seeking such "special reasons" focused in part on the particulars of state penalties and procedures.

2. Penalties

As noted previously, state legislators provided a rather wide array of antitrust remedies.¹⁹⁷ Charges that some of these were unconstitutionally severe focused primarily on the imposition of monetary penalties. In *Waters-Pierce Oil Co. v. Texas*,¹⁹⁸ a unanimous Supreme Court firmly supported the application of substantial financial penalties for antitrust violations. In that case, the Court sustained the assessment of \$1,623,500 in penalties against the Texas affiliate of the Standard Oil Company over the company's objection that the fine was "so excessive as to constitute taking of the defendant's property without due process of law."¹⁹⁹ The Court found such a claim particularly unconvincing in light of the profitability of the defendant's Texas operations, which had generated dividends "as high as 700 per cent per annum," and the

¹⁹⁶ *Id.* at 410. For an extended state court analysis of a freedom of contract challenge to a state antitrust prohibition on exclusive dealing contracts, written shortly after the Supreme Court seemed to revive such ground of constitutional challenge in *Lochner v. New York*, 198 U.S. 45 (1905), see *Commonwealth v. Strauss*, 191 Mass. 545, 551-53, 78 N.E. 136, 138 (1906) (rejecting the challenge on the grounds that the statute was a proper exercise of the police power, given the contemporary use of exclusive dealing contracts "intended to drive ordinary competitors out of business" and the fact that the limited group of contracts forbidden were "only those which, in ordinary competition among equals, no one would have any interest or desire to make"), *appeal dismissed*, 207 U.S. 599 (1907).

¹⁹⁷ See *supra* text accompanying notes 26-37.

¹⁹⁸ 212 U.S. 86 (1909).

¹⁹⁹ *Id.* at 111. The penalty was calculated according to the rates established in two applicable state antitrust statutes. Under an act of 1899, the defendant, *Waters-Pierce Company*, was fined at a rate of \$1500 per day for the period from May 31, 1900 to March 31, 1903, a total of 1033 days of violation. This statute provided for penalties of not less than \$200 or more than \$5000 per day. See *id.* at 97, 100. Under an act of 1903, the defendant was fined at a rate of \$50 per day, the only daily rate allowed under this act, for the period from April 1, 1903 to April 29, 1907, a total of 1480 days of violation. See *id.* at 97, 100. Ultimately, the defendant paid 32% of the penalties, and Standard Oil of New Jersey, not a defendant in the case, contributed the remainder. See B. BRINGHURST, *supra* note 43, at 64. In the same suit, the jury also found that the defendant's permit to do intrastate business should be cancelled, and the trial court so ordered. See *Waters-Pierce*, 212 U.S. at 97.

value of the defendant's property, estimated to be worth more than \$40 million.²⁰⁰

Three years later, in *Standard Oil Co. of Indiana v. Missouri*,²⁰¹ the Court upheld the assessment of \$50,000 fines against each of three corporate defendants, including, again, the Waters-Pierce Oil Company, imposed in *quo warranto* proceedings instituted in the Missouri Supreme Court.²⁰² In doing so, the United States Supreme Court unanimously rejected a long series of constitutional claims proffered by two of the three defendants in the case.²⁰³ Contrary to the defendants' assertions, the Court found that the Missouri Supreme Court did have jurisdiction to impose fines in such a corporate ouster proceeding, even though the state treated such litigation as a purely civil action.²⁰⁴ The Court also rejected the defendants' contention that they had been deprived of due process because the state's prayer for relief never requested damages or fines. While the rules of practice might have required greater specificity in a civil proceeding, noted Justice Lamar for the Court, such a prayer for relief was not part of the notice demanded by the Constitution. Thus, the state court was entitled to grant relief in addition to that requested in the pleadings, as long as the judgment did not exceed the amount warranted by the plaintiff's original allegations.²⁰⁵ Moreover, because earlier Missouri precedent clearly established the state court's jurisdiction to impose fines in ouster cases, the defendants had sufficient opportunity to address questions of mitigation or reduction of sentence.²⁰⁶ In the same vein, the Court went on to declare that no constitutional difficulty was raised by the fact that no state statute established any maximum limit for fines in an ouster proceeding or any rule for their computation.²⁰⁷ The Court rejected as well the defendants' equal protection complaint that while they were fined

²⁰⁰ *Waters-Pierce*, 212 U.S. at 112.

²⁰¹ 224 U.S. 270 (1912).

²⁰² Justice Lamar, writing for the United States Supreme Court, noted that some members of the Missouri court thought the fine actually should have been \$1,000,000. *See id.* at 274, 282.

²⁰³ The case was appealed to the Supreme Court by the Standard Oil Company and Republic Oil Company. Waters-Pierce paid the fine and complied with other conditions and, accordingly, was allowed to continue to do intrastate business in Missouri. *See id.* at 274 (statement of the case by Lamar, J.).

²⁰⁴ *See id.* at 281.

²⁰⁵ *See id.* at 285.

²⁰⁶ *See id.* at 287-88.

²⁰⁷ The Court reasoned that fines in these circumstances were essentially punitive damages against the corporation for willful and wanton violation of its implied contract with the state. Such damages, said the Court, traditionally were not compensatory nor measured by any rule. While such damages generally were allowed only in tort cases, their extension to cases of this sort raised "no Federal question." *See id.* at 286.

\$50,000 in a *quo warranto* proceeding tried by the Missouri Supreme Court, corporations prosecuted for identical conduct in lower state courts under the state antitrust act were entitled to a trial by jury and, upon conviction, were subject to fines limited to \$100 per day during the pendency of the violation, in addition to cancellation of their corporate franchise.²⁰⁸

Challenges to monetary penalties imposed in state enforcement proceedings were treated with no greater sympathy by other courts. State judges consistently rejected claims that authorized or imposed penalties were so excessive as to be unconstitutional.²⁰⁹ Other fundamental challenges to state penalties similarly were dismissed. The Texas Court of Civil Appeals, for example, rejected a defendant's contention that an antitrust statute establishing widely varying minimum and maximum amounts for allowable fines was unconstitutionally vague and indefinite.²¹⁰ And the Indiana Supreme Court, in a case involving a specialized statute designed to prevent express companies from discriminating unfairly against their competitors, rejected a claim that the penalty provisions of the act violated a state constitutional provision requiring all penalties to be proportional to the offense. The court reasoned that the statute merely established a civil penalty; the constitutional section applied exclusively to criminal proceedings.²¹¹

²⁰⁸ The Court noted that simultaneous civil and criminal liability for the same conduct in separate proceedings was not uncommon in other areas of law, noting, as an example, the situation in which "an attorney is disbarred or ousted of his right to practice in the court because of conduct for which he may likewise be prosecuted and fined." *Id.* at 289. The defendants in *Standard Oil Co. of Indiana* did not specifically challenge the fine as excessive in and of itself. *See id.* at 288. Seven years earlier, in *National Cotton Oil Co. v. Texas* 197 U.S. 115 (1905), defendants claimed, in part because the penalties provided allegedly were excessive, that Texas legislation deprived corporations of property without due process of law. *See id.* at 118 (statement of the case by McKenna, J.). That specific issue, however, was not addressed by the Supreme Court in *National Cotton Oil*.

²⁰⁹ *See Knight & Jillson Co. v. Miller*, 172 Ind. 27, 87 N.E. 823 (1909); *Waters-Pierce Oil Co. v. State*, 48 Tex. Civ. App. 162, 106 S.W. 918 (1907), *aff'd*, 212 U.S. 86 (1909); *cf. Grenada Lumber Co. v. State ex rel. Attorney Gen.*, 98 Miss. 536, 542, 54 So. 8, 10 (1911) (After the state sought imposition of a penalty against each defendant in the amount of \$197,000, making a total for all defendants of \$14,184,000 and the defendants demurred, challenging, inter alia, the size of the penalties in question as confiscatory in violation of the due process clause of the fourteenth amendment, the court declared that that issue could not be considered "on bill and demurrer, where there is no allegation as to the property owned by the appellants. The statute . . . is valid on its face. Its enforcement might amount to confiscation in one case and not in another. This question must await the case on proof.").

²¹⁰ *Waters-Pierce*, 48 Tex. Civ. App. at 183-84, 106 S.W. at 928.

²¹¹ *Adams Express Co. v. State*, 161 Ind. 328, 343-44, 67 N.E. 1033, 1038-39 (1903). The court went on to say that, in any case, a mere \$500 penalty was not out of proportion to the offense charged. *See id.* at 344, 67 N.E. at 1039. Where collection of a penalty was sought not by the state but by a private party, in addition to the recovery

3. Procedures

The intensity of regional antimonopoly sentiment prompted legislators in particular areas to adopt various special procedures to make more effective their attack on anticompetitive arrangements and operations. Due process and other federal and state constitutional objections to such innovations prompted a mixed judicial response before and immediately after World War I. The number of reported opinions dealing with such issues is rather small, but the pattern that they suggest is worth noting. For example, the Supreme Court of Ohio struck down on due process grounds a section of state antitrust law that provided that, in prosecutions attacking a combination as a prohibited type of trust or combination, "[t]he character of the trust or combination alleged may be established by proof of its general reputation as such."²¹² Other special state procedures, however, either were not challenged or were upheld by courts considering them. Although the Missouri Supreme Court ultimately struck down a provision allowing the state attorney general to retain one-fourth of the fines collected in antitrust prosecutions, the court did not do so until the mid-1920's and then only on the basis of a state constitutional provision limiting increases in the salaries of state officials.²¹³ Other states²¹⁴ invoked similar prosecutorial incen-

of actual damages, the Texas Court of Civil Appeals proved somewhat less sympathetic to the claimant. In *Mason v. Adoue*, 30 Tex. Civ. App. 276, 70 S.W. 347 (1902), the plaintiff sought to recover \$12,500 paid for beer purchased from the defendant under a statute authorizing such recovery from companies involved in unlawful, anticompetitive activity. The court found that such recovery was a penalty and not compensation. Thus, the plaintiff could not recover, because the right to recover a penalty did not survive the demise of the corporation and because, in this case, since the time plaintiff instituted suit, the defendant had been found guilty in other litigation of antitrust violations and had had its charter revoked.

²¹² *Hammond v. State*, 78 Ohio St. 15, 19, 84 N.E. 416, 416 (1908). In addition, in *Oklahoma Operating Co. v. Love*, 252 U.S. 331 (1920), the United States Supreme Court considered a specialized state statute that allowed the state Corporation Commission to regulate the rates and practices of any company found to be a public business because of its near monopoly position, where such company was found not to have rendered service on reasonable terms and without discrimination. In response to a challenge brought by a laundry company whose rates had been regulated under this provision since 1913, the United States Supreme Court held that the act's enforcement provisions violated the fourteenth amendment's due process guarantee because Commission-mandated rates could be challenged and judicially reviewed only in contempt proceedings in which the noncomplying corporation was subject to penalties of \$500 per day. Such a public rate-setting case normally would not be considered an antitrust case, but it seems relevant to note here as an outgrowth of an antimonopoly approach taken toward companies, such as the plaintiff's laundry, not generally thought of as possessing the amount of economic dominance necessary to require public rate-setting.

²¹³ See *State ex rel. Barrett v. Boeckler Lumber Co.*, 302 Mo. 187, 257 S.W. 453 (1924).

²¹⁴ See J. DAVIES, *supra* note 13, at 212 n.1.

tives without challenge. Indeed, Texas prosecuting attorneys reportedly retained one quarter of the \$1.6 million fine imposed against the Waters-Pierce Oil Company²¹⁵ under a Texas provision parallel to the invalidated Missouri section.²¹⁶ In other instances, constitutional challenges to antitrust procedures were flatly rejected. Thus, for example, in 1913 the Supreme Court of Mississippi upheld a challenged evidentiary provision of a predatory geographic price discrimination statute.²¹⁷ That provision, attacked by defendants on federal constitutional grounds not clearly specified in the court's opinion, declared a prima facie violation established by proof that the defendant made a lower offer or charge in one part of the state than it did in another. The provision did not require direct evidence of the requisite predatory intent. The court found such evidentiary assistance untroubling, believing that it would be easy for an innocent defendant to show legitimate reasons for any price differentials.²¹⁸

One area of due process challenge still remains to be examined. That area generated a rather different, and ultimately much more revealing, pattern of judicial analysis, a pattern highly illuminating not only of contemporary constitutional theory but also of the intellectual origins of turn-of-the-century antitrust jurisprudence itself. It is to this pattern that we now turn.

III. VAGUENESS AND VISIONS OF ECONOMIC LIFE IN EARLY ANTITRUST JURISPRUDENCE

Vagueness-based attacks on newly devised substantive standards achieved somewhat more success than did the various other due process challenges just noted. Such attacks also raised substantially more profound questions of judicial role and economic analysis and accordingly require much more extended discussion.

The importance of the early antitrust vagueness cases has been noted in recent historical writing on early antitrust development. For example, in Chapter Three of *The Antitrust Paradox*, Judge (then Professor) Robert H. Bork argues that the proper goal of antitrust policy is largely determined by conceptions of "legitimate judicial roles and legitimate processes"²¹⁹ and that the judicial "need for standards is closely linked to the question of which organ of government shall make

²¹⁵ See *supra* notes 198-200 and accompanying text.

²¹⁶ See B. BRINGHURST, *supra* note 43, at 64.

²¹⁷ See *Standard Oil Co. v. State ex rel. Attorney Gen.*, 104 Miss. 886, 61 So. 981 (1913).

²¹⁸ See *id.* at 900, 61 So. at 982.

²¹⁹ R. BORK, *supra* note 2, at 72.

essentially political choices.”²²⁰ Judge Bork contends that the United States Supreme Court early and correctly addressed such fundamental questions of judicial role and standards not only in cases rejecting a “reasonable-price” defense for price fixing but also in an important series of opinions responding to vagueness-based challenges to both state and federal antitrust legislation.²²¹

These opinions clearly say much about contemporary judicial perceptions of the judicial function and of the adequacy of particular antitrust standards as guides for judges and juries. But the opinions also appear to reflect a significant influence on early judicial antitrust thinking not noted in leading accounts of antitrust history, either in connection with the vagueness cases themselves or in connection with other early opinions. In particular, the vagueness cases appear to reflect both the diversity and the continuing power and influence of certain late nineteenth century theoretical conceptions of the economy as a whole. The lack of scholarly discussion of the effect of such inherited general theories of economic reality on the predispositions and approaches of state and federal judges analyzing early antitrust issues is unfortunate. Because of it we have been left with an incomplete and, accordingly, somewhat misleading picture, one underemphasizing the variety of influences significantly affecting the initial development of modern antitrust doctrine.

A. *The Supreme Court Vagueness Decisions*

Since at least 1810, lower federal courts had considered claims that the vagueness of particular state or federal statutes unconstitutionally deprived affected parties of fair warning as to prohibited conduct or impermissibly failed to establish a sufficient standard to guide courts in applying the statutes’ prohibitions.²²² The United States Supreme Court did not have occasion squarely to address such an argument, however, until the early part of this century.²²³ At that time, prior to World War I, challenges to both federal and state antitrust legislation generated some of the most important, and earliest, Supreme Court analyses of statutory vagueness issues. At the same time, state courts

²²⁰ *Id.* at 74.

²²¹ *See id.* at 73-74.

²²² *See* *The Enterprise*, 8 F. Cas. 732 (C.C.D.N.Y. 1810) (No. 4499). For general discussions of the development and application of the “void-for-vagueness” doctrine, see Aigler, *Legislation in Vague or General Terms*, 21 MICH. L. REV. 831 (1923); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

²²³ *See* J. FLYNN, *supra* note 71, at 44 & n.134.

also undertook their own consideration of vagueness-based assaults on state economic legislation. The resulting federal and state opinions contributed substantially to the contemporary development of a significant body of constitutional theory. But the opinions, and the challenged statutes themselves, also suggest a great deal about the economic thought of lawyers and judges attempting to address contemporary problems of competition and monopoly at a time when "Pareto optimality" and other modern notions of allocative, as opposed to productive, efficiency, so prevalent in current antitrust philosophy, were barely more than a gleam in the eyes of academic economists, much less turn-of-the-century lawyers and legislators.²²⁴

The first time the Supreme Court evaluated an antitrust defendant's charge of undue statutory vagueness was in the 1909 *Waters-Pierce Oil Co. v. Texas* case,²²⁵ in which the Court also rejected the defendant's constitutional challenge to the size of the penalty imposed against it.²²⁶ The basis of the vagueness complaint was the somewhat similar wording contained in two separate state statutes, the first barring contracts and agreements "reasonably calculated" to fix and regulate prices and the second banning acts that might "tend to create or carry out restrictions in trade or commerce."²²⁷ The Court, per Justice Day, distinguished these statutes from legislation condemned in prior state and lower federal court cases, under which the jury was left free to determine the content of a standard requiring rates to be "reasonable."²²⁸ The Court found no such wide discretion left to the jury under the Texas acts, and, therefore, no deprivation of due process of law, noting that criminal statutes frequently punished not only a completed act but also attempts to achieve the forbidden result.²²⁹

²²⁴ See, e.g., Lande, *supra* note 2, at 88 n.97. The theory of "Pareto optimality," a major underpinning of modern notions of allocative efficiency, was not announced until 1909. See V. PARETO, *MANUAL D'ECONOMIE POLITIQUE* (1909). Thorough academic exploration of allocative efficiency came only decades later and then initially without regard to its potential significance in antitrust contexts. See generally Lande, *supra* note 2, a superb study of these and other aspects of early antitrust thinking, particularly in Congress.

²²⁵ 212 U.S. 86 (1909); see *supra* text accompanying notes 198-200.

²²⁶ Vagueness challenges were made but never directly addressed in *National Cotton Oil Co. v. Texas*, 197 U.S. 115, 118 (1905) (statement of the case by McKenna, J.), and in *Smiley v. Kansas*, 196 U.S. 447, 454-55 (1905).

²²⁷ *Waters-Pierce*, 212 U.S. at 98-99, 108-09.

²²⁸ See *id.* at 109. Specifically, the Court cited *Tozer v. United States*, 52 F. 917 (C.C.E.D. Mo. 1892); *Chicago & N.W. Ry. Co. v. Dey*, 35 F. 866 (C.C.S.D. Iowa 1888); *Louisville & N.R.R. Co. v. Commonwealth*, 99 Ky. 132, 35 S.W. 129 (1896).

²²⁹ See *Waters-Pierce*, 212 U.S. at 109. The Texas Court of Civil Appeals similarly had rejected the defendant's vagueness challenge, reasoning that the federal Sherman Act was no more definite than the state statute and yet had been invoked without condemnation on vagueness grounds in eight cited United States Supreme Court cases,

Four years later, the Court, per Justice Holmes, rejected a vagueness challenge to the Sherman Act itself in the well-known case of *Nash v. United States*.²³⁰ The defendant in that case did not object to the federal act's language prohibiting "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce."²³¹ Rather, the defendant complained that the Act had been rendered unconstitutionally indefinite, at least as a criminal statute, by the Supreme Court's 1911 opinions in *Standard Oil Co. v. United States*²³² and *United States v. American Tobacco Co.*,²³³ which established the "rule of reason" standard for Sherman Act application and interpretation. Justice Holmes noted that those cases had limited the act's prohibitions to "only such contracts and combinations . . . as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade."²³⁴ He conceded that, under such a standard, a jury might condemn actions taken by a businessman who had honestly believed his conduct was not unduly restrictive.²³⁵ But that possibility did not invalidate the Sherman Act as a criminal statute. Indeed, in Justice Holmes's view the case was "very nearly disposed of" by the Court's *Waters-Pierce* opinion.²³⁶ Rejection of the defendant's challenge was further explained, however, on the ground that such a liability standard was, in fact, quite common, both in the pre-Sherman Act common law on restraint of trade and elsewhere:

[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. "An act causing death may be murder, manslaughter, or misadventure according to the degree of danger attending it" by common experience in the circumstances known to the actor. "The very meaning of the fiction of implied malice in such cases at

beginning with *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895), and ending with *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904). See *Waters-Pierce Oil Co. v. State*, 48 Tex. Civ. App. 162, 179, 106 S.W. 918, 925 (1907), *aff'd*, 212 U.S. 86 (1909).

²³⁰ 229 U.S. 373 (1913).

²³¹ Sherman Antitrust Act, ch. 647, § 1, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1 (1982)).

²³² 221 U.S. 1 (1911).

²³³ 221 U.S. 106 (1911).

²³⁴ *Nash*, 229 U.S. at 376.

²³⁵ See *id.*

²³⁶ *Id.* at 377.

common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw." "The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct."²³⁷

Justice Holmes illustrated the operation of such principles by the example of a man unintentionally killing another by driving an automobile into a crowd. Such an act, he said, variously might be murder, manslaughter, or less, depending on a jury's assessment of social duty, regardless of the man's own assessment of his prudence.²³⁸

The import of Justice Holmes's reasoning and of the analogy he invoked is not completely clear. Since the defendant in *Nash* was charged with predatory pricing along with other misconduct, the relevant question of degree implicated in the case arguably might have been simply the troubling issue of when vigorous competition on the merits ends and low pricing becomes instead a prohibited threat to the competitive process itself.²³⁹ But Justice Holmes seems to suggest that *Standard Oil* and *American Tobacco* did not decree an inquiry into overall competitive effect and declare the Sherman Act violated whenever conduct is found to be anticompetitive on balance. Rather, he seems to say that those earlier opinions declared permissible some significant restriction of competition, as long as it was not "unduly" great as judged by a jury's sense of "common social duty." Holmes himself earlier had rejected competitive effect as an appropriate test for Sherman Act illegality in his dissenting opinion in *Northern Securities Co. v. United States*.²⁴⁰ In that case, involving the establishment of a holding company to acquire ownership of two competing interstate railroad companies, Holmes had flatly declared that "[t]he act says nothing about competition."²⁴¹ He rejected any view that the Sherman Act decreed "the universal disintegration of society into single men, each at war with all the rest, or even the prevention of all further combinations

²³⁷ *Id.* (citations omitted).

²³⁸ *See id.*

²³⁹ The question of appropriate standards by which to judge claims of unlawful predatory pricing has been much debated during the last ten years, both by courts and scholars. *See Cargill, Inc. v. Monfort of Colo., Inc.*, 107 S. Ct. 484, 493 n.12 (1986) (noting the variety of approaches commentators and lower courts have taken to predatory pricing issues); *Matsushita Elec. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1355 nn.8 & 9 (1986) (same); *see generally* Bradley & Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 CORNELL L. REV. 738 (1981); Hurwitz & Kovacic, *Judicial Analysis of Predation: The Emerging Trends*, 35 VAND. L. REV. 63 (1982).

²⁴⁰ 193 U.S. 197, 400-11 (1904) (Holmes, J., dissenting).

²⁴¹ *Id.* at 403.

for a common end.”²⁴² Instead, Holmes had declared that the Sherman Act merely echoed the previously established prohibitions of the common law. Those, he said, barred only two types of arrangements: contracts with a stranger to the contractor’s business, whereby the contractor’s business freedom was wholly or partially restricted (“contracts in restraint of trade”), and combinations or conspiracies intended to keep those outside the group out of the business (“combinations or conspiracies in restraint of trade”).²⁴³ But, Holmes believed, the Sherman Act did not extend to “the union of former competitors.”²⁴⁴ Indeed, he said, “It was the ferocious extreme of competition with others, not the cessation of competition among the partners, that was the evil feared.”²⁴⁵ Holmes’s view of the Sherman Act expressed in his *Northern Securities* dissent was to have little influence on the subsequent development of antitrust doctrine.²⁴⁶ But the somewhat mixed enthusiasm for competition reflected in that opinion may help to explain Holmes’s particular articulation of the relevant Sherman Act standard and his reasoning in rejecting the vagueness challenge made in *Nash*.²⁴⁷

²⁴² *Id.* at 407.

²⁴³ *See id.* at 403-04. Holmes declared that § 2 of the Sherman Act, banning monopolization, merely sought to make criminal the latter type of conduct when done by a single person rather than by a group. *See id.* at 404. For criticism that Holmes’s account of common law doctrine was seriously distorted, see W. LETWIN, *supra* note 2, at 233.

²⁴⁴ *Northern Sec. Co.*, 193 U.S. at 405.

²⁴⁵ *Id.*

²⁴⁶ *See* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 811, 814 (1965).

²⁴⁷ It has been suggested that the *Standard Oil* and *American Tobacco* cases actually established a less vague standard of Sherman Act interpretation, one more exclusively focused on the question of whether particular conduct on balance did or did not reduce competition in the general market and less concerned with questions of degree, than might be suggested by the Court’s discussion in *Nash*. *See, e.g.*, Bork, *supra* note 246, at 801-05. Although, since *Nash*, no court has seriously questioned the Sherman Act’s constitutionality, the generality of the statute has led some modern commentators to suggest that early vagueness objections were “not . . . without some merit” and were rejected only through “some convoluted reasoning” by the Court. *See* 1 E. KINTNER, *FEDERAL ANTITRUST LAW* § 5.14, at 284 (1980). Vulnerability of the Sherman Act to such an assault has been limited over the years by an enforcement policy restricting criminal prosecutions to types of conduct long established as unlawful under the Act, *see* *United States v. United States Gypsum Co.*, 438 U.S. 422, 439-40 & n.15 (1978) (describing Department of Justice enforcement policy), and by the judicial doctrine that defendants have standing to object to a statute’s vagueness only as applied to them, at least where first amendment overbreadth considerations are not implicated. *See, e.g.*, Note, *supra* note 222, at 102-04. Potential vagueness problems also have been mitigated by the Supreme Court’s decision in *Gypsum*, in which the Court declared that intent must be considered a necessary element of a criminal antitrust violation and that, specifically, a defendant’s challenged conduct must be “undertaken with knowledge of its probable consequences and hav[e] the requisite anticompetitive effects,” *Gypsum*, 438 U.S. at 444, or be “undertaken with the purpose of producing anticompetitive effects . . . even if such effects [do] not come to pass.” *Id.* at 444 n.21.

A year later, in *International Harvester Co. of America v. Kentucky*,²⁴⁸ Justice Holmes had occasion to explain further the Court's holding in *Nash* in the course of evaluating another antitrust defendant's claim of unconstitutional vagueness. The treatment of that defendant's claim in the state court and in the United States Supreme Court suggests a great deal about not only the constitutional but also the economic theories of the period. The relative lack of attention that has been paid to these opinions and to the themes they suggest is notable, for it seems to reflect a significant, more general characteristic of recent antitrust historical writing.

At issue in *International Harvester* was a liability standard established as a result of the Kentucky courts' efforts to save state antitrust legislation threatened by the Supreme Court's decision in *Connolly*.²⁴⁹ An 1890 Kentucky statute had prohibited collective price fixing and output limitations.²⁵⁰ This statute remained in force despite the adoption the following year of a new state constitution that directed the general assembly

from time to time, as necessity may require, to enact such laws as may be necessary to prevent all trusts, pools, combinations or other organizations, from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value.²⁵¹

Fifteen years later, in March of 1906, the state general assembly enacted a cooperative marketing act allowing farmers to pool their produce to get a better price than would be possible through individual,

²⁴⁸ 234 U.S. 216 (1914).

²⁴⁹ For a discussion of *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902), *overruled in Tigner v. Texas*, 310 U.S. 141, 147 (1940), see *supra* notes 136-56 and accompanying text.

²⁵⁰ See Act of May 20, 1890, ch. 1621, 1889-1890 Ky. ACTS 143 (codified at the time at KY. STAT. §§ 3915-3917 (Carroll 1894)) (providing that violations could be punished by imprisonment, by a fine of not less than \$500 and not more than \$5000, the exact amount left to the jury's discretion, or by both fine and imprisonment); see also *International Harvester*, 234 U.S. at 220 (construing statute); *American Seeding Mach. Co. v. Commonwealth*, 152 Ky. 589, 592, 153 S.W. 972, 974 (1913) (same), *rev'd*, 236 U.S. 660 (1915). In the course of litigation concerning the statute, the Kentucky Court of Appeals declared that each sale in violation of these sections constituted a separate offense. Therefore, the same company could be prosecuted separately in several counties on the basis of the unlawful sales within each of those jurisdictions. The court, however, did mitigate the potential impact of its "separate offense" interpretation by declaring that each county would be allowed "one prosecution . . . for the period covered by the indictment," leaving each county free to bring subsequent prosecutions if the defendant later committed the offense again. See *International Harvester Co. of Am. v. Commonwealth*, 144 Ky. 403, 413-14, 138 S.W. 248, 252-53 (1911) (Logan County).

²⁵¹ KY. CONST. § 198 (1891).

competing sales efforts.²⁵² That act was buttressed two years thereafter by another statute authorizing injunctive relief and fines if a participating farmer violated a cooperative marketing agreement.²⁵³ Such special relief for farmers encountered the spectre of *Connolly*, however, and soon was challenged on such equal protection grounds, as well as on grounds of alleged conflict with the state constitutional provision just quoted.²⁵⁴ To avoid invalidation of the state statutes, the Kentucky Court of Appeals devised an ingenious interpretation of their meaning, ostensibly removing their discriminatory impact in favor of farmers and confining their operations within state constitutional bounds. But the court's rescue of the state's antimonopoly legislation established only a short-lived victory, for those very same rescue techniques became the basis of the condemnation of the state legislation on due process grounds when reviewed by the United States Supreme Court several years later.

The Kentucky Court of Appeals conceded that discriminatory legislation aiding only farmers would be unconstitutional.²⁵⁵ The court noted, however, that the language of the 1906 cooperative marketing act did not *expressly* declare that the statute applied only to the agricultural producers actually mentioned in the legislation.²⁵⁶ Accordingly, the court declared that the state statute would be interpreted to confer cooperative marketing privileges equally on all persons in the state, thus negating any possible equal protection problems.²⁵⁷

²⁵² Act of March 21, 1906, ch. 117, 1906 KY. ACTS 429 (codified at the time, as amended, at KY. STAT. § 3941a (Carroll 1908)), *invalidated in International Harvester*, 234 U.S. at 220, 223. The Kentucky Court of Appeals declared the statute void in *Gay v. Brent*, 166 Ky. 833, 849, 179 S.W. 1051, 1058 (1915).

²⁵³ Act of March 13, 1908, ch. 8, 1908 KY. ACTS 38 (amending Act of March 21, 1906, *supra* note 252) (codified at the time in KY. STAT. § 3941a (Carroll 1908)), *invalidated in International Harvester*, 234 U.S. at 221, 223. The Kentucky Court of Appeals declared this statute void in *Gay*, 166 Ky. at 849, 179 S.W. at 1058.

²⁵⁴ See, e.g., *Owen County Burley Tobacco Soc'y v. Brumback*, 128 Ky. 137, 148-50, 107 S.W. 710, 713-14 (1908). The act also was challenged, *see id.* at 145, 107 S.W. at 712-13, as a violation of § 3 of the Kentucky Bill of Rights, which provided that "no grant of exclusive, separate public emoluments or privileges shall be made to any . . . set of men, except in consideration of public services." KY. CONST. § 3 (1891).

²⁵⁵ See *Owen County*, 128 Ky. at 147, 107 S.W. at 713; *see also* *Commonwealth v. International Harvester Co. of Am.*, 131 Ky. 551, 571-72, 115 S.W. 703, 710 (1909) (Hardin County), *overruled*, *Gay*, 166 Ky. at 849, 179 S.W. at 1058.

²⁵⁶ See *Owen County*, 128 Ky. at 147, 107 S.W. at 713; *see also International Harvester* (Hardin County), 131 Ky. at 571-72, 115 S.W. at 709, 710.

²⁵⁷ *International Harvester* (Hardin County), 131 Ky. at 571-73, 115 S.W. at 710. The court went on to declare that the same result would be reached even if such a view of legislative intent could not be maintained. The attempted discrimination in favor of farmers, the court reasoned, would be eliminated *automatically* by action of the fourteenth amendment, which would not operate to void the statute granting benefits to some but instead would extend the statute's coverage to bring the disfavored up to the

But what, then, would be left of the state's 1890 ban on price fixing and the state constitution's declared public policy against collusive price tampering? The Kentucky court's answer was that the cooperative marketing act did not, and constitutionally could not, permit collective action to enhance or decrease prices without limit or in all circumstances. Specifically, the court declared that the 1891 state constitution prohibited the legislature from authorizing collective private action "to enhance the cost of any article, *above its real value*" or to depress the price below that level.²⁵⁸ Thus, the cooperative marketing legislation, as now interpreted to apply equally to all persons in the state, would allow combinations to affect price, but only insofar as they kept within these same guidelines. Hence, cooperative action by farmers, for example, to raise abnormally and unfairly depressed prices up to the "real value" of their produce would be legal, whereas action to raise prices above that level would not be.²⁵⁹

State antitrust defendants quickly charged that this judicially formulated standard of liability was so vague and uncertain that it violated the due process clause of the fourteenth amendment. In response, the Kentucky Court of Appeals explained that "real value" meant market value "under fair competition, and under normal market conditions"²⁶⁰ and dismissed such vagueness contentions.²⁶¹ In 1914, however, the United States Supreme Court reversed the state court and upheld the vagueness challenge of a frequently sued state defendant, the recently formed International Harvester Company of America.²⁶²

level of the favored class. As a supporting analogy for its view of constitutional theory, the court cited a recent United States Supreme Court case in which a West Virginia statute making only white males eligible for jury service was extended to blacks by force of the fourteenth amendment. *See id.* (citing *Strauder v. West Virginia*, 100 U.S. 303 (1879)).

²⁵⁸ *See Owen County*, 128 Ky. at 151, 107 S.W. at 714 (emphasis added); *see also International Harvester* (Hardin County), 131 Ky. at 568-69, 115 S.W. at 709 (emphasis added).

²⁵⁹ *See Owen County*, 128 Ky. at 151, 107 S.W. at 714; *see also International Harvester* (Hardin County), 131 Ky. at 571, 115 S.W. at 709.

²⁶⁰ *International Harvester Co. of Am. v. Commonwealth*, 147 Ky. 564, 566, 144 S.W. 1064, 1065 (1912) (Bullitt County), *rev'd*, 234 U.S. 216 (1914).

²⁶¹ *See, e.g., American Seeding Mach. Co. v. Commonwealth*, 152 Ky. 589, 153 S.W. 972 (1913), *rev'd*, 236 U.S. 660 (1915); *International Harvester Co. of Am. v. Commonwealth*, 137 Ky. 668, 126 S.W. 352 (1910) (Logan County); *Commonwealth v. International Harvester Co. of Am.*, 131 Ky. 551, 115 S.W. 703 (1909) (Hardin County), *overruled, Gay*, 166 Ky. at 849, 179 S.W. at 1058.

²⁶² *See International Harvester Co. of Am. v. Kentucky*, 234 U.S. 216 (1914). The company had been formed in 1902 through a combination of competing manufacturers of agricultural machinery. *See International Harvester Co. of Am. v. Commonwealth*, 144 Ky. 403, 406-07, 138 S.W. 248, 250 (1911) (Logan County). At least five separate antitrust prosecutions were brought against the company in the Kentucky courts, based on allegedly illegal sales in as many counties. *See International Harvester*

The Supreme Court, per Justice Holmes, distinguished the Kentucky standard, as formulated and explained by the state court, from the federal antitrust standard approved the prior year in *Nash*.²⁶³ Under the federal standard, said Holmes, a company might be forced to predict whether the result of its actions would be deemed an undue restraint of trade in the eyes of a jury later examining those actions—a matter of degree evaluated in the context of actual market conditions at the time of the contemplated or undertaken action.²⁶⁴ But such “conditions are as permanent as anything human, and a great body of precedents on the civil side coupled with familiar practice make it comparatively easy for common sense to keep to what is safe.”²⁶⁵ In contrast, Holmes declared, the Kentucky “normal market,” real value standard demanded a much more difficult and much more hypothetical calculation concerning market conditions both real and imagined. It required the actor to guess at its peril, “what would have been the price in an imaginary world,”²⁶⁶ a world in which the challenged “combination had not existed and nothing else violently affecting values had occurred.”²⁶⁷ Value, said Holmes, is merely “the effect in exchange of the relative social desire for compared objects expressed in terms of a common denominator.”²⁶⁸ Value and price thus are determined by the relative intensity of community desire for various goods and services. But such desires, reflected in buyers’ comparative willingness to pay, are subject to constant change as external factors shift. Thus, said Holmes,

To compel [potential antitrust defendants] to guess, on peril

Co. of Am. v. Commonwealth, 148 Ky. 572, 572, 147 S.W. 1199, 1199 (1912) (mem.) (Grayson County; affirming judgment imposing \$1500 fine), *rev'd*, 234 U.S. 216 (1914); International Harvester Co. of Am. v. Commonwealth, 147 Ky. 795, 796, 146 S.W. 12, 13 (1912) (Todd County; affirming judgment imposing \$2500 fine), *rev'd*, 234 U.S. 216 (1914); International Harvester Co. of Am. v. Commonwealth, 147 Ky. 564, 564-65, 144 S.W. 1064, 1065 (1912) (Bullitt County; affirming judgment imposing \$5000 fine), *rev'd*, 234 U.S. 216 (1914); International Harvester Co. of Am. v. Commonwealth, 144 Ky. 403, 405, 138 S.W. 248, 249 (1911) (Logan County; reversing judgment imposing \$500 fine); International Harvester Co. of Am. v. Commonwealth, 137 Ky. 668, 670, 126 S.W. 352, 352-53 (1910) (Logan County; reversing judgment imposing \$2200 fine); Commonwealth v. International Harvester Co. of Am., 131 Ky. 551, 551, 115 S.W. 703, 705 (1909) (Hardin County; affirming lower court dismissal of an indictment of International Harvester for violating Kentucky antitrust laws), *overruled*, Gay v. Brent, 166 Ky. 833, 179 S.W. 1051 (1915).

²⁶³ For a discussion of *Nash v. United States*, 229 U.S. 373 (1913), see *supra* notes 230-47 and accompanying text.

²⁶⁴ See *International Harvester*, 234 U.S. at 223.

²⁶⁵ *Id.* It seems clear that by his reference here to “conditions,” Holmes had in mind actual prevailing market conditions and not, as Judge Bork contends, “the principles of economics.” R. BORK, *supra* note 2, at 75.

²⁶⁶ *International Harvester*, 234 U.S. at 222.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

of indictment, what the community would have given for [their wares] if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess.²⁶⁹

Accordingly, he declared the state standard unconstitutionally void for vagueness.²⁷⁰

Recent commentary groups *International Harvester* with subsequent Supreme Court cases, in particular *United States v. Cohen Grocery Co.*²⁷¹ and *Cline v. Frink Dairy Co.*,²⁷² that addressed other economic regulations purportedly raising analogous vagueness issues. In its 1921 decision in *Cohen Grocery*, the Supreme Court held invalid under the fifth and sixth amendments a federal criminal statute that declared it "unlawful for any person willfully . . . to make any *unjust or unreasonable rate or charge* in handling or dealing in or with any necessities; to conspire, combine, agree, or arrange with any other person . . . (e) to exact *excessive prices* for any necessities."²⁷³ Six years later, in *Cline*, the Court struck down Colorado antitrust legislation²⁷⁴ that exempted anticompetitive combinations where they merely sought to sell at a "*reasonable profit*" goods that could not generate such a level

²⁶⁹ *Id.* at 223-24.

²⁷⁰ Justices McKenna and Pitney dissented without written opinion. In explaining his opinion for the Court, Justice Holmes also repeatedly attacked the Kentucky statute as pro-farmer legislation applied unevenly in litigation to the disadvantage of business interests. Thus, Holmes charged, "The result seems to be that combinations of tobacco growers are held to do no more than restore an equilibrium that has been disturbed by a combination of buyers whereas if prices rise after a combination of manufacturers it very nearly is presumed that the advance is above the real value and that there is a crime." *Id.* at 221 (citations omitted).

The leading article on the Supreme Court's treatment of vagueness issues concludes that such concerns played an important role in the Court's decision, as did a more general conservative economic philosophy. See Note, *supra* note 222, at 74 & n.38, 75 & n.39, 77. Anthony Amsterdam, the Note's author, particularly stresses the wider impact of economic conservatism in the Court's early vagueness opinions, declaring, "The void-for-vagueness doctrine was born in the reign of substantive due process and throughout that epoch was successfully urged *exclusively* in cases involving regulatory or economic-control legislation. Vagueness contentions in free speech cases received short shrift at that time." *Id.* at 74 n.38 (citations omitted) (emphasis added).

²⁷¹ 255 U.S. 81 (1921).

²⁷² 274 U.S. 445 (1927).

²⁷³ *Cohen Grocery*, 255 U.S. at 86 (citing Lever Act, ch. 53, § 4, 40 Stat. 276, 277 (1917), amended by Food Control and the District of Columbia Rents Act, ch. 80, § 2, 41 Stat. 297, 298 (1919)) (emphasis added).

²⁷⁴ Colorado Antitrust Act, ch. 161, 1913 Colo. Sess. Laws 613, *invalidated in Cline*, 274 U.S. at 453-65.

of return if otherwise marketed.²⁷⁵

Judge Bork, for example, sees all three cases as involving essentially the same type of liability standard, a standard also considered in other early antitrust contexts and one that Judge Bork believes raises the most fundamental questions of appropriate antitrust policy and judicial role.²⁷⁶ In Judge Bork's view, the statutory tests in these three cases all embodied an approach akin to the rejected "reasonable-price" defense to price fixing²⁷⁷ and "very similar to" the open-ended balancing of multiple subjective preferences and sympathies, the arbitrary mediation between the interests of consumers and producers²⁷⁸ that he asserts was advocated, for example, by Justice Brandeis in *Chicago Board of Trade v. United States*²⁷⁹ and by Judge Learned Hand in later antitrust opinions.²⁸⁰ Such approaches he condemns as simply punishing whatever acts a court or jury might choose to find unjust and unreasonable.²⁸¹

Judge Bork declares that the reason early antitrust courts "necessarily" rejected a "reasonable-price" defense for cartel behavior and instead developed a rule of per se illegality was because they realized that what he terms a "complete consumer welfare stance"²⁸² offered "the only available firm criterion for deciding cases" other than blanket approval for all cartels.²⁸³ Similarly, he explains Holmes's opinion in *International Harvester* as a recognition that for "a 'real value' test, . . . like a reasonable-price test, there are no standards."²⁸⁴ The essential equivalence of these latter two tests in Judge Bork's mind is made strikingly apparent two pages later in his discussion when he directly describes *International Harvester* itself as a case that involved a statute expressly requiring "so uncertain a test" as whether prices are reasonable.²⁸⁵

²⁷⁵ See *Cline*, 274 U.S. at 456 (emphasis added).

²⁷⁶ See R. BORK, *supra* note 2, at 74-77.

²⁷⁷ See, e.g., *id.* at 24, 73, 75.

²⁷⁸ See *id.* at 75.

²⁷⁹ 246 U.S. 231 (1918); see R. BORK, *supra* note 2, at 41-47, 75, 76.

²⁸⁰ See R. BORK, *supra* note 2, at 51-53, 75, 76.

²⁸¹ See *id.* at 76 (quoting *United States v. Cohen Grocery*, 255 U.S. 81, 89 (1921)).

²⁸² Judge Bork later articulates more precisely the centrality of allocative efficiency theory to his vision of such a "complete consumer welfare stance" when he declares that the sole aim of antitrust is to enhance allocative efficiency without harming productive efficiency so severely "as to produce either no gain or a net loss in consumer welfare." R. BORK, *supra* note 2, at 91. Antitrust, he says, is not appropriately concerned with questions of wealth distribution. See *id.* at 90.

²⁸³ *Id.* at 73.

²⁸⁴ *Id.* at 75.

²⁸⁵ *Id.* at 77 (adopting language from *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927)).

Judge Bork's discussion suggests important historical questions that he never fully addresses. If early antitrust courts "necessarily" rejected the reasonable-price defense proffered by cartel defendants, by what process of reasoning was the Kentucky Court of Appeals able to justify its consistent rejection of the vagueness attacks mounted against a statutory test Judge Bork sees as essentially equivalent to the reasonable-price defense? If the act's unconstitutional uncertainty was so indisputably patent, why was Holmes's perception of the Kentucky statute not shared unanimously even among the Justices of the United States Supreme Court?

Examination of the Kentucky cases themselves suggests that an important part of the answer may be found in a contemporary influence on judicial thought not discussed in leading recent accounts of the antitrust philosophy of early twentieth century American judges.²⁸⁶ Specifically, the Kentucky opinions indicate that judges in that state found a "normal market," "real value" standard not unduly vague in significant part because those earlier jurists consciously or unconsciously operated within the boundaries of a still powerful overall theoretical conception of the economy within which notions of "real value" had greater apparent certainty and tangible meaning than they have for a judge today operating within the context of a very different model of economic life. In addition, those same Kentucky opinions further suggest that the practicability problems necessarily posed by that state's standard, as it actually was delineated by the state court, may have been significantly less severe than indicated by either Justice Holmes or Judge Bork and that the standard's condemnation in 1914 reflected in part Holmes's implicit rejection of the overall conception of economic life within which the test seemed most plausible.

How pervasive and how significant is the absence of modern discussion of such an influence on early judicial antitrust thinking? And what evidence is there to support the differing interpretation proposed here?

B. *Recent Commentary on the Development of Early Antitrust Jurisprudence*

Consider first the way in which leading recent commentary treats the influence of pre-twentieth century economic theory in general.²⁸⁷ Probably the two most highly acclaimed books of the last ten years

²⁸⁶ See *infra* notes 287-330 and accompanying text.

²⁸⁷ Earlier leading works take an approach similar to that of the recent scholarship highlighted here. See *infra* note 466.

exploring the antitrust thought of late nineteenth and early twentieth century judges are Judge Bork's landmark study, *The Antitrust Paradox*,²⁸⁸ published in 1978, and Thomas K. McCraw's masterful 1984 book, *Prophets of Regulation*,²⁸⁹ reviewing American regulatory thought since the 1870's and setting forth a careful and detailed examination of the antitrust philosophy of Louis D. Brandeis, focusing primarily on the period before his elevation to the Supreme Court bench. How do each of these works treat the influence of nineteenth century theory?

Throughout his discussion of early antitrust jurisprudence, Judge Bork deals with the impact of contemporary overarching theories of economic reality primarily by denying their existence. It is not that Judge Bork underplays the independent power of ideas as a general matter. Indeed, a central theme of his work is the continuing power of assertedly misguided intellectual approaches established in the formative early decades of antitrust ideology, following passage of the Sherman Act:

[T]he ideology remains, and its inner logic drives the antitrust enterprise—lawyers, economists, judges, and legislators—inexorably toward the conclusions implicit in the premises. . . . In all kinds of political weather the machinery of antitrust enforcement grinds steadily on, mindlessly reproducing both the policy triumphs and disasters of the past. Even when public and political enthusiasm for the harassment of business is at an ebb, the enforcement bureaucracy and the residual potency of the antitrust symbol remain strong enough to prevent the law's mistakes from being retracted.²⁹⁰

At the very beginning of Chapter One of his study, Judge Bork relates the value of historical inquiry into early antitrust thinking to the modern power of the approaches established in the formative years. "One of the uses of history is to free us of a falsely imagined past," he declares, for "[t]he less we know of how ideas actually took root and grew, the more apt we are to accept them unquestioningly, as inevitable features of the world in which we move."²⁹¹ Only by such historical understanding, he urges, can we free ourselves from old misguided notions and fully embrace modern scientific microeconomic theory, which, he

²⁸⁸ R. BORK, *supra* note 2.

²⁸⁹ T. MCCRAW, *PROPHETS OF REGULATION* (1984).

²⁹⁰ R. BORK, *supra* note 2, at 4.

²⁹¹ *Id.* at 15.

asserts, is the only basis for rational antitrust policy.²⁹²

But if a critical task is to more truly understand the past, how should we explain the initial establishment of the antitrust approaches that Judge Bork finds objectionable and that he feels have had such undeserved power ever since? Why did judges in the late nineteenth and early twentieth centuries follow the paths that they did? Judge Bork suggests a number of possibilities. As noted already, he concludes that judges rejecting a "reasonable-price" defense were driven by a fundamental need for firm standards to guide principled judicial action.²⁹³ In other instances, Judge Bork indicates, Justices established additional important approaches because of their strong concern for the welfare of consumers.²⁹⁴ But, at other times, certain Justices followed less completely "pro-consumer" paths either because their personal sympathies for the welfare of small producers or traders led them to endorse a "political" tradeoff of consumer versus producer interests²⁹⁵ or simply because those Justices were confused about the facts of a case before them or neglected to analyze the issues raised with sufficient logical rigor.²⁹⁶ Prominent among possible influences not stressed, however, is the continuing intellectual power of economic analyses and approaches established prior to the 1890 passage of the Sherman Act. Judge Bork does note one source potentially incorporating influential earlier ideas but minimizes its independent intellectual power in early antitrust jurisprudence, concluding that early Justices either explicitly departed from common law precedent²⁹⁷ or covertly did so by way of creative reinterpretation.²⁹⁸

Judge Bork's treatment of the possible influence of nineteenth century theories of the economy as a whole is even more striking than his minimal discussion of the possible continuing impact of earlier particularized economic analyses. In a work designed in large measure to contrast the scientific, disciplined nature of the modern antitrust economic philosophy endorsed by its author²⁹⁹ with early antitrust approaches at variance with that philosophy, Judge Bork does not simply criticize those differing approaches as resting on a less adequate, rigorous, or otherwise less satisfactory overall economic theory. Rather, he contends

²⁹² See, e.g., *id.* at 8.

²⁹³ See, e.g., *id.* at 23, 27, 73-77.

²⁹⁴ See, e.g., *id.* at 22-24, 27-30, 36.

²⁹⁵ See, e.g., *id.* at 24, 25, 41, 46, 47. Judge Bork labels such a tradeoff a "political" one on the ground that, in his view, no principles exist to guide it. See *id.* at 24.

²⁹⁶ See, e.g., *id.* at 30, 33, 35.

²⁹⁷ See, e.g., *id.* at 22-23, 36.

²⁹⁸ See, e.g., *id.* at 27.

²⁹⁹ See *id.* at 8.

that no guiding economic theory was available when the antitrust approaches he dislikes were first established. Thus, in speaking of such early developments, Judge Bork explains:

Law tends to arrive at basic answers before the right questions have been asked. Disputes that must be decided arise *before there is a theory to handle them*, so that the participants in the litigation often do not perceive the implications of a decision either way. By the time the *real* question is perceived, if it ever is, an answer has not only been given but has become dogma, and it is too late.³⁰⁰

The possibility that the architects of some of the criticized early approaches might have acted as they did partly because of the guiding influence of an overall economic theory, albeit one rather different from Judge Bork's, receives no mention, perhaps because Judge Bork believes that an economic model substantially different from the one at the heart of modern antitrust economics³⁰¹ should not be dignified by designation as a real theory. But a body of particularized ideas takes on added power when given larger meaning because of the overall context supplied by a unifying set of fundamental principles or by a fundamental explanatory model. For that reason, it seems appropriate to consider and refer to such a set of unifying principles or explanatory model as a real theory, however lacking in modern intellectual appeal, precisely because such terminology emphasizes the heightened intellectual power that such a body of ideas may wield.

Before exploring directly the nature of nineteenth century economic theories as thus defined and their possible influence on early antitrust analysis, consider first the treatment of theory in the second of the two leading studies previously cited, Thomas McCraw's *Prophets of Regulation*. Professor McCraw's innovative work provocatively probes major aspects of American regulatory thought and activity since the 1870's through extended discussions of four important regulatory activists³⁰² and essays examining more general aspects of economic history and regulatory development.³⁰³ His book provides a more complex

³⁰⁰ *Id.* at 16 (emphasis added).

³⁰¹ For a description of the underlying model central to Judge Bork's approach, see *id.* at 107-15.

³⁰² The four individuals discussed are Charles Francis Adams, Louis D. Brandeis, James M. Landis, and Alfred E. Kahn. See T. McCRAW, *supra* note 289.

³⁰³ Professor McCraw draws on a remarkably wide range of published and unpublished materials and stresses especially what he refers to as "the new research," particularly the contributions of Alfred D. Chandler, Jr., in discussing late nineteenth and early twentieth century economic developments. See *id.* at 74.

and detailed picture of the influences shaping late nineteenth and early twentieth century antitrust thinking than appears in Judge Bork's study, and he takes a somewhat more sympathetic view of the early theorists whose economic analyses he finds deficient.

McCraw believes that many factors have helped to shape regulatory activity over the last 100 years and highlights particularly, although by no means exclusively, the influence of certain dynamic individuals.³⁰⁴ At the same time, however, Professor McCraw, like Judge Bork, also clearly affirms the substantial power of ideas.³⁰⁵ McCraw moves further than Judge Bork towards a discussion of the possible impact of late nineteenth century economic theories and explanatory models. Yet he, too, ultimately fails to pursue the possibility that any pervasive contemporary conceptions of the economy as a whole might have influenced significantly either regulatory thought in general or the specific economic analyses of the early antitrust theorist that he spotlights as the "patron saint of the whole regulatory tradition"³⁰⁶ and the "most influential critic of trusts during his generation,"³⁰⁷ Louis D. Brandeis.

McCraw notes the frequent recurrence of certain major themes in the thinking of late nineteenth century Americans concerned about the rapid and dramatic economic changes occurring around them. "In the early years of industrialization," he relates, "the trusts seemed to be mysterious mutations, the consequences of some evil tampering with the natural order of things."³⁰⁸ But McCraw does not go on to suggest what power such "natural" imagery may have had; nor does he explore whether any systematic vision of a natural order supported some Americans' condemnation of the new aberrations or offered any guidance for remedial action. On the contrary, in noting the pervasiveness of the sense of "unnaturalness," he stresses the paucity of cultural and intellectual resources available to help give meaning or guide response:

[T]he central assumption shared by most contemporary critics was *simply* that trusts were *unnatural*, the bastard off-

³⁰⁴ See, e.g., *id.* at viii (declaring that "[i]ndividual regulators clearly made an enormous difference"); see also *id.* at ix, 303.

³⁰⁵ Thus, for example, while he stresses that ideas alone are not determinative of concrete historical developments, see *id.* at 304, he quotes approvingly the assessment offered by James Q. Wilson, declaring, in part, that an agency's actions are "importantly shaped by what its executives learned in college a decade or two earlier." *Id.* at 303 (quoting Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 393 (J. Wilson ed. 1980)).

³⁰⁶ T. McCRAW, *supra* note 289, at ix.

³⁰⁷ *Id.* at 82.

³⁰⁸ *Id.* at 77.

springs of unscrupulous promoters. Without the benefit of experience and of a [modern scientific economic] vocabulary that could clarify important distinctions in the business revolution—center firms compared with peripheral, productive efficiency compared with allocative, vertical integration compared with horizontal, and so on—those observers had *only* their *personal sensibilities* and traditional *political* ideologies to guide them.³⁰⁹

McCraw believes that such personal sensibilities and political viewpoints sometimes guided observers into error and unfortunate policy decisions.³¹⁰ But the key point to note here is that McCraw does not simply assert that Americans of the period lacked a sufficiently sophisticated and well-developed economic theory; for in a concluding chapter, he stresses that incorrect as well as correct economic ideas have marked power to guide understanding and action, citing for example, the impact Brandeis's "flawed" notions of competition had on the contemporary American public.³¹¹ In specifying an exhaustive, albeit short, list of intellectual resources available to guide anxious Americans alarmed by new economic arrangements, McCraw is not simply saying that established economic theory offered poor or misdirected guidance, but instead that no overall economic model or theory was available to offer any guidance at all.

McCraw's fascinating and much more detailed exploration of the antitrust thinking of Louis D. Brandeis ultimately reaches the same conclusion. Repeatedly stressing the consistency with which Brandeis condemned industrial "bigness" as unnatural,³¹² McCraw declares that the "absence of an adequate framework of economic theory"³¹³ did not simply cause theoretical guidance to be limited or improperly focused. Rather, it meant that Brandeis, like others, "had *only* his personal and political sensibilities to guide him."³¹⁴

For decades prior to his ascension to the United States Supreme Court, Brandeis not only commented on particular economic practices such as resale price maintenance³¹⁵ but also articulated an explanatory theory for major contemporary developments throughout the economy

³⁰⁹ *Id.* at 78 (the word "unnatural" emphasized in original, all other emphasis added).

³¹⁰ *See, e.g., id.* at 84, 94.

³¹¹ *See id.* at 304.

³¹² *See, e.g., id.* at 104, 108, 138.

³¹³ *Id.* at 108.

³¹⁴ *Id.* (emphasis added).

³¹⁵ *See, e.g., id.* at 101-05.

as a whole.³¹⁶ While McCraw finds Brandeis's broader perspectives very insightful in important respects,³¹⁷ he criticizes him for not going further and reaching a crucial insight illuminated by later researchers, particularly modern business historians. The key point Brandeis missed, says McCraw, was that while in all fields tighter forms of combination were attempted, their potential success ultimately depended on the technological and managerial limitations and possibilities uniquely inherent in each particular industry. In some industries, large, tight combinations had tremendous potential; in others, they were bound to fail under the pressure of competition.³¹⁸ Appalled by "bigness" and witnessing the failures among the trusts, Brandeis "too simply" inferred that bigness was inefficient as a general matter and failed to undertake a deeper, empirical investigation of the specific conditions and developments in various particular industries.³¹⁹ Positing a single "bigness"-based explanatory model for problems throughout the economy as a whole led Brandeis into serious policy misjudgments because it "doomed to superficiality both his diagnosis and his prescription."³²⁰ "Irresistably" and repeatedly, says McCraw, such a perspective forced Brandeis to condemn efficient new forms of large business organization and sacrifice the interests of consumers for the sake of small business welfare.³²¹

³¹⁶ McCraw reveals, for example, how, as early as the 1890's, Brandeis set forth an overall picture of the sequential historical evolution of four basic types of combinations, from informal cartels to full-blown mergers, described the relative merits or problems of each type of arrangement and offered a theory to explain the historical pattern toward tighter combinations that allowed him to assert the unnaturalness of this development in spite of its pervasiveness. Brandeis stressed, for example, the powerful effect of certain misguided legal rules. See, e.g., *id.* at 95-97, 104. The larger picture of Brandeis's theoretical view should be noted in connection with McCraw's comments here. In particular, one should note Brandeis's persistent tendency to rely on a small number of "artificial" influences to explain the persistence of business "bigness" despite its asserted foreignness to a believed natural economic order shaped by the operation of natural economic laws. See *infra* note 375.

³¹⁷ See T. McCRAW, *supra* note 289, at 97.

³¹⁸ See, e.g., *id.* at 74-77, 97-99. McCraw particularly stresses the distinction between two basic types of industries, characterized by the presence, respectively, of "center" or "peripheral" firms. Tighter forms of combination, he reports, offered tremendous opportunities in capital-intensive, technologically advanced "center" industries, such as oil, sugar refining, or steel, where substantial cost savings could be achieved through scale economies, vertical integration, and more complex managerial structures. Conversely, in labor-intensive "peripheral" industries, where no major scale economies were available, larger size proved to be disadvantageous and the larger combinations that were attempted frequently fell victim to competition from new entrants. See *id.* at 72-77, 97-99.

³¹⁹ See *id.* at 99, 139, 140.

³²⁰ *Id.* at 141.

³²¹ See, e.g., *id.* at 141. McCraw particularly points to Brandeis's condemnation of vertical integration and approval of resale price maintenance and cartels protecting

McCraw briefly notes in passing that contemporary Americans in general tended toward "monocausal" explanations of the major economic changes of their period³²² and concedes that economic observers of the time rather uniformly failed to reach the key insight that Brandeis missed.³²³ But McCraw feels that such a long-time, influential critic and analyst of trusts as Brandeis, somehow should have done better.³²⁴ McCraw attributes Brandeis's failure to the strength of his political values³²⁵ and to a preference for effective "sloganeering"³²⁶ and clever lawyer's tricks over careful analysis.³²⁷

McCraw almost goes on to explore an additional factor that may have influenced or supported the intellectual orientation of Brandeis and his contemporaries, but ultimately McCraw stops short. In a tantalizing passage, he notes briefly that turn-of-the-century Americans lived in a different intellectual universe than the economic analysts of the 1980's. But he raises the point simply as a reason to moderate criticism of earlier Americans' analytical deficiencies and not as an acknowledgment that it might be illuminating to explore contemporary structures of thought on their own terms or to consider the power such structures might have had in their own time. McCraw cautions that in applying the "new economic vocabulary," based on enormous research efforts by twentieth century economics and business administration scholars,

we are something like modern astronomers studying the pre-Copernican theories of Aristotle or Ptolemy. That is, we are *testing* the assumptions and insights of an earlier generation of observers through the use of methods developed in a sub-

small businesses. *See id.* at 101, 141.

³²² *See id.* at 139. *But see id.* at 114 (emphasis added) (referring to the "*Brandeisian*" tendency to lump all modern industrial ills together and seek one common cause for them").

³²³ *See id.* at 101 (noting, parenthetically, that Brandeis was joined in his inability to grasp basic economic distinctions by "most of his contemporaries"), 96-97 (noting Brandeis's failure to note various economic effects of horizontal combinations in "center" industries, but conceding that, in Brandeis's time, such "long-term economic effects were difficult to foresee"). McCraw notes, however, that some perceptive, pioneering economic analysts and journalists of the period realized much more clearly that the benefits and dangers of large-scale operation varied by industry. *See id.* at 139-40.

³²⁴ For example, McCraw accuses Brandeis of an "almost willful refusal to rethink the trust problem." *Id.* at 94. Also, McCraw marks Brandeis as a symbol for "one of the characteristic shortcomings of the American regulatory tradition: a disinclination to persist in hard economic analysis that may lead away from strong political preference." *Id.* at 142.

³²⁵ *See, e.g., id.* at 106, 108, 142; *see also supra* text accompanying note 314.

³²⁶ *See* T. McCRAW, *supra* note 289, at 94.

³²⁷ *See, e.g., id.* at 84, 86, 87, 94, 136, 137. McCraw finds the intensity of Brandeis's political beliefs, his characterization of large-scale business as unnatural, and his litigator's orientation all to have been interrelated. *See id.* at 138.

sequent scientific revolution to which they had no access. Although it may seem unfair to *judge* early twentieth century observers by standards of economic reasoning they themselves did not fully comprehend, that price must be paid in return for our own understanding of the trust question.³²⁸

But if modern economic analysts stand in relation to their turn-of-the-century counterparts in a way analogous to the relation of modern to earlier astronomers, might not the analogy be pursued further? If the particular approaches and explanations of earlier astronomers were influenced substantially by the overall explanatory model of the physical universe that they accepted,³²⁹ might it not be worth considering whether earlier antitrust analysts, including judges, might have been influenced by overall explanatory models of the *economic* universe in which *they* believed?

Antitrust historians repeatedly have noted the minimal direct role professional economists played in the early antitrust deliberations of Congress and the courts.³³⁰ Recognition of that fact, however, still leaves an important question regarding the extent to which Americans other than professional economists were concerned with or influenced by broad explanatory theories or overall "paradigms," however simple, prior to World War I. To suggest that early antitrust judges operated within an intellectual near-vacuum filled only by naked political preferences and "personal sensibilities" would appear to paint a somewhat incomplete picture, given the nature of contemporary thought in general.

C. *Economic Theory in the Formative Era*

If there have been periods in American cultural and intellectual life when sweeping, overarching theoretical conceptions of major areas of human thought and activity were in disfavor, the period of the late nineteenth and early twentieth centuries certainly was not one of

³²⁸ *Id.* at 68-69 (emphasis added). Although McCraw goes on to note the need to examine "the contemporaneous view" as well as modern perspectives, *see id.* at 69, he never goes on to explore larger visions of the economy as a whole as part of that "contemporaneous view."

³²⁹ *See generally* T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970) (the seminal work on the power of paradigms in scientific work and development).

³³⁰ *See, e.g.,* R. HOFSTADTER, *supra* note 2, at 200; W. LETWIN, *supra* note 2, at 77; H. THORELLI, *supra* note 2, at 120-21, 567; Lande, *supra* note 2, at 88-89 & n.98; Stigler, *The Economists and the Problem of Monopoly*, 72 AM. ECON. REV. 1, 3, 6 (1982), reprinted in G. STIGLER, *THE ECONOMIST AS PREACHER, AND OTHER ESSAYS* 41-42, 46-47 (1982).

them.³³¹ Indeed, scholarly and popular fascination with grand social and economic theory seems to have increased greatly during this period as Americans sought fervently to find understanding and ultimate meaning in the midst of the profound social and economic changes rapidly occurring around them.³³²

In significant particulars, contemporary theory displayed striking heterogeneity. Intensely felt differences were articulated by proponents of such popular ideologies as Spencerian Social Darwinism, the Protestant Social Gospel, Andrew Carnegie's Gospel of Wealth, Henry George's "Single Tax" doctrine, Edward Bellamy's Cooperative Utopianism, and various other forms of Christian or Marxist socialism, as well as by followers of popular and scholarly versions of "new school" economics or more traditional forms of classical economic theory.³³³ Yet, in the midst of such diversity, contemporary American social and economic theories often continued to share important common characteristics reflecting powerful tendencies in American intellectual thought prior to World War I. Among the general conceptual approaches followed in this period, some remained particularly powerful outside academic circles and seem particularly likely to have colored contemporary judicial perceptions of noncompetitive behavior and effective remedies for it.

Perhaps the single most prominent feature of much of contemporary theory was its highly deductive character. Despite increasing academic criticism of such an orientation,³³⁴ scholarly and popular theo-

³³¹ For important surveys of the varieties of late nineteenth and early twentieth century social and intellectual theory, see R. BANNISTER, *SOCIAL DARWINISM: SCIENCE AND MYTH IN ANGLO-AMERICAN SOCIAL THOUGHT* (1979); P. BOLLER, *AMERICAN THOUGHT IN TRANSITION: THE IMPACT OF EVOLUTIONARY NATURALISM, 1865-1900* (1969); H. COMMAGER, *THE AMERICAN MIND: AN INTERPRETATION OF AMERICAN THOUGHT AND CHARACTER SINCE THE 1880's* (1950); M. CURTI, *THE GROWTH OF AMERICAN THOUGHT* (3d ed. 1964); 3 J. DORFMAN, *THE ECONOMIC MIND IN AMERICAN CIVILIZATION* (1949); *EVOLUTIONARY THOUGHT IN AMERICA* (S. Persons ed. 1950); S. FINE, *LAISSEZ FAIRE AND THE GENERAL-WELFARE STATE: A STUDY OF CONFLICT IN AMERICAN THOUGHT 1865-1901* (1956); T. HASKELL, *THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE: THE AMERICAN SOCIAL SCIENCE ASSOCIATION AND THE NINETEENTH-CENTURY CRISIS OF AUTHORITY* (1977); R. HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* (rev. ed. 1959); E. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* (1973); M. WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* (1976); R. WIEBE, *THE SEARCH FOR ORDER 1877-1920*, at 133-63 (1967).

³³² See R. WIEBE, *supra* note 331, at 133-63.

³³³ See generally sources cited *supra* note 331.

³³⁴ On the early twentieth century as a transitional period in American intellectual thought in general, characterized by mounting scholarly criticism of prevailing deductive, a priori orientations in legal, economic, and other social science theory, see generally E. PURCELL, *supra* note 331, at 3-73.

rists continued heavily to pursue explanatory models premised on a few fundamental underlying principles, laws, or natural processes.³³⁵ Thus, for example, the deductive approach at the heart of contemporary legal formalism³³⁶ was paralleled by a similarly deductive approach in scholarly and popular versions of classical economics.³³⁷

Nineteenth century classical economic writing itself contained significant differences in detail.³³⁸ But again and again, such writers displayed a common belief that economic life ultimately could and had to be understood as arising from the operation of basic, natural economic laws.³³⁹ Indeed, many American³⁴⁰ scholars and popularizers believed such natural laws to be not only real but also divinely ordained—one aspect of an inherent order and purpose in the world established by God. Thus, much American classical economic writing was not only deductive but also *teleological*.³⁴¹

Henry Wood dramatically captured and articulated such common sentiments in two popular books of the late nineteenth century, *Natural Law in the Business World*³⁴² and *The Political Economy of Natural Law*.³⁴³ Wood assured his readers that "Natural Law is but another name for the methods of the Creator"³⁴⁴ and declared that "Natural Law in the economic realm is not different from that which runs through physics, morals, mechanics, and science. It is but one of the many subdivisions of Universal Natural Law, or the grand Unity of

³³⁵ See, e.g., *id.* at 133-63; see also sources cited *supra* note 331.

³³⁶ On legal formalism, see M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, at 253-66 (1977); E. PURCELL, *supra* note 331, at 74-76; Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, in 3 *RES. IN LAW & SOC.* 3 (1980); Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 *HARV. L. REV.* 513 (1974).

³³⁷ See P. BOLLER, *supra* note 331, at 71-77; S. FINE, *supra* note 331, at 52-56, 73; R. HOFSTADTER, *supra* note 331, at 144-46; Spengler, *Evolutionism in American Economics, 1800-1946*, in *EVOLUTIONARY THOUGHT IN AMERICA* 203, 211-49 (S. Persons ed. 1950); see also J. SCHUMPETER, *HISTORY OF ECONOMIC ANALYSIS* (1954). For a cogent recent exploration of the similarities and interrelationships between legal formalism and classical economics, see Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 *AM. U.L. REV.* 939 (1985).

³³⁸ See, e.g., J. SCHUMPETER, *supra* note 337, at 379-750 (reviewing the major economists and economic writings of the period 1790-1870).

³³⁹ See generally sources cited *supra* note 337; see also *infra* text accompanying note 350.

³⁴⁰ In this and other ways, American classical economic theory tended to be decidedly more optimistic in outlook than much of European classical economic theory. See, e.g., J. SCHUMPETER, *supra* note 337.

³⁴¹ See, e.g., Spengler, *supra* note 337, at 212-13, 218.

³⁴² H. WOOD, *NATURAL LAW IN THE BUSINESS WORLD* (1887).

³⁴³ H. WOOD, *THE POLITICAL ECONOMY OF NATURAL LAW* (1894).

³⁴⁴ *Id.* at 19.

Truth."³⁴⁵

Wood's asserted parallel to scientific theory was not an unusual claim at the time. Classical economic writers in general repeatedly proclaimed that the natural laws that they posited were not merely colorful metaphors or statements of bare statistical probabilities but rather were directly analogous to the fundamental forces that physical scientists had discovered in their fields and made classical economics a similarly scientific conception.³⁴⁶ As Wood explained:

The phenomena of electricity have been before the eyes of the world for all the past centuries, but until recently there was little systematic study of its laws. Now that these are beginning to be grasped, it ceases to be mere uninterpreted manifestation, and becomes a tamed and beneficent agent of utility. The world has been almost surprised to find that Natural Law can invariably be relied upon. In the whole illimitable cosmos, material and immaterial, there is nothing capricious or uncertain. At first glance, there is much that seems to happen; but it may be safely assumed, that no event ever took place without an endless chain of causation leading up to it, link by link.

The scope of orderly law being unlimited, it manifestly includes every side and phase of social economics. In the economic domain, statistics, tariffs, coinage, currency, capital, and labor have received abundant study; but all these are only the multiform visible expressions of the working of natural law.³⁴⁷

Similarly, Wayland and Chapin's economics textbook,³⁴⁸ the college economics textbook most widely read in later nineteenth century America,³⁴⁹ instructed students that

Political Economy is that branch of Social Science which treats the production and application of wealth to the well-being of men in society. It is a branch of true science.

By Science, as the word is here used, we mean a Systematic arrangement of the laws which God has established, so

³⁴⁵ *Id.* at 18.

³⁴⁶ See, e.g., P. BOLLER, *supra* note 331, at 71-73 (noting such proclamations among exponents of classical economics).

³⁴⁷ H. WOOD, *THE POLITICAL ECONOMY OF NATURAL LAW* 16-17 (1894).

³⁴⁸ F. WAYLAND, *THE ELEMENTS OF POLITICAL ECONOMY* (recast by A. Chapin 1886).

³⁴⁹ See R. HOFSTADTER, *supra* note 331, at 145.

*far as they have been discovered, of any department of human knowledge.*³⁵⁰

The text was quite explicit in specifying the key natural laws at work in the economy, going on to declare that economic science ultimately is based on a total of only "four fundamental laws."³⁵¹

Academic classical economists frequently stressed such analogies. Thus, Reverend Julian M. Sturtevant of Illinois College³⁵² declared that the natural laws of economics were "as far removed from the control of human wills as cohesion or electricity."³⁵³ Even Francis A. Walker, president of the Massachusetts Institute of Technology, first president of the American Economic Association,³⁵⁴ and a theorist whose work occupied a middle ground between classical tradition and "new school" economics,³⁵⁵ maintained that "rightly viewed, perfect competition would be seen to be the order of the economic universe, as truly as gravity is the order of the physical universe, and to be not less harmonious and beneficent in operation."³⁵⁶

In the late nineteenth and early twentieth centuries, many economists, particularly younger scholars, began to depart substantially from classical orthodoxy.³⁵⁷ But the continuing power of classical economic

³⁵⁰ F. WAYLAND, *supra* note 348, at 4.

³⁵¹ See *id.* at 4-6. In brief, the "four fundamental laws" stated were:

1. God has made man *a creature of desires* and constituted the material world in which he lives with qualities and powers available for the *gratification of those desires*. . . .

2. For desires above the very simplest wants of the animal, *man must, by Labor, force nature to yield her hidden resources*. . . .

3. *The exertion of labor establishes a right of PROPERTY* in the fruits of labor, and the idea of *exclusive possession* is a necessary consequence.

4. *With the right of property, comes also the possibility and the right of EXCHANGE*, or the mutual transfer of possessions between man and man, and between different communities and countries.

Id. at 4-5.

³⁵² See 3 J. DORFMAN, *supra* note 331, at 73.

³⁵³ Spengler, *supra* note 337, at 216.

³⁵⁴ See H. THORELLI, *supra* note 2, at 120.

³⁵⁵ See S. FINE, *supra* note 331, at 73; Spengler, *supra* note 337, at 218-20.

³⁵⁶ F. WALKER, *POLITICAL ECONOMY* 263 (3d ed. 1888). Walker differed from more orthodox classical economists partly in his view of how frequently actual market conditions departed from the conditions that would be produced by the entirely unimpeded operation of economic laws.

³⁵⁷ See, e.g., P. BOLLER, *supra* note 331, at 84-93; 3 J. DORFMAN, *supra* note 331; S. FINE, *supra* note 331, at 198-251; H. THORELLI, *supra* note 2, at 118-22; Spengler, *supra* note 337, at 211-49. Some of the most important points of departure were set forth in the statement of principles adopted upon the establishment of the American Economic Association in 1885. In opposition to prevailing orthodoxy, the younger economists declared in part:

theory was reflected in the intensity with which "new" or "historical" school economists repeatedly felt it necessary to attack the deductive, natural law approach of classical theory.³⁵⁸ Within the economics profession, the power of older visions remained strong throughout the years prior to the First World War. Indeed, while the American Economic Association was founded in 1885 in large part to promote the pursuit of new theoretical directions,³⁵⁹ it soon moderated its tone to attract more conservative colleagues, and conservative theorists came to dominate the organization by the early 1890's.³⁶⁰ Many prominent scholars who began as "new school" economists later adopted significantly more traditional perspectives.³⁶¹ In fact, John Bates Clark, one of the leading early advocates of new school approaches, ultimately gained renown as the "father" of American neoclassicism.³⁶²

Even when economists and other social theorists offered explanatory models self-consciously at variance with the older deductive, often teleological, approaches underlying the static model of classical theory, their work frequently continued to exhibit the strong contemporary pull of explanation in terms of fundamental natural principle or process, even if positing a different sort of principle or process than the natural laws of classical theory. Thus, leading new school economists such as Richard T. Ely and Simon Nelson Patten urged a more inductive approach, stressed the potential for human activity to improve economic conditions, and pictured the economy in much more dynamic terms than had classical theorists.³⁶³ At the same time, however, Ely and Patten posited an inherent process of social and economic evolution at work in the world somewhat akin to the natural process of biological evolution illuminated by Charles Darwin, a process naturally generating a series of distinct stages of economic organization.³⁶⁴

1. We regard the state as an agency whose positive assistance is one of the indispensable conditions of human progress.

2. We believe that political economy as a science is still in an early stage of its development [and] . . . we look, not so much to speculation, as to the historical and statistical study of actual conditions of economic life for the satisfactory accomplishment of that development.

P. BOLLER, *supra* note 331, at 86.

³⁵⁸ In addition to the sources cited *supra* note 357, see E. PURCELL, *supra* note 331, at 18-19, 21, 61, 62 (describing the continuation of such attacks into the 1920's).

³⁵⁹ See P. BOLLER, *supra* note 331, at 85.

³⁶⁰ See *id.* at 86; S. FINE, *supra* note 331, at 212-13, 215-16, 219-21.

³⁶¹ See H. THORELLI, *supra* note 2, at 121.

³⁶² See 3 J. DORFMAN, *supra* note 331, at 188; see also H. THORELLI, *supra* note 2, at 312.

³⁶³ See, e.g., 3 J. DORFMAN, *supra* note 331, at 161-64 (on Ely), 182-88 (on Patten).

³⁶⁴ Thus, Ely believed that an economy evolves through the following seven stages,

More traditional, deductive, natural law perspectives retained even greater strength in popular than in academic thinking.³⁶⁵ In part, this simply may be because intellectual perspectives learned and embraced early in life often continue to wield substantial power decades later, particularly for individuals relatively insulated from critiques developing within scholarly circles.³⁶⁶ Striking evidence of such "generational lag" can be found, for example, in an episode involving William Howard Taft who, as a United States Circuit Court of Appeals Judge, wrote one of the most important early federal antitrust opinions, in the case of *United States v. Addyston Pipe & Steel Co.*³⁶⁷ In a 1906 Yale University lecture, Taft pointedly recalled the training he had received at that institution in the 1870's and its continuing influence on him:

The tendency in my own case, and I think in that of most graduates of my time, was toward the *laissez faire* doctrine that the least interference by legislation with the operation of natural laws was, in the end, the best for the public; that the only proper object of legislation was to free the pathway of commerce and opportunity from the effect of everything but competition and enlightened selfishness; and that that being done, the Government had discharged all of its proper functions. When I graduated we looked upon the Post-office Department of the Government with great suspicion. . . . I do not know what may be taught in this respect now, and I am bound to say that I think these principles, which I may seem to have spoken of in a light way, are still orthodox and still sound, if only the application of them is not carried to such

finally reaching a cooperative Christian society: (1) hunting and fishing; (2) pastoral; (3) agricultural; (4) handicraft; (5) industrial-competitive; (6) industrial-concentrated; and (7) industrial-integrated. See R. ELY, *STUDIES IN THE EVOLUTION OF INDUSTRIAL SOCIETY* (1903). Patten pointed to an evolutionary process by which advanced civilizations finally had moved beyond a "pain or deficit economy" into a "pleasure or surplus economy" in the nineteenth century. He looked forward to an even higher state of civilization in the future that would be characterized by new forms of social control exhibiting and fostering greater idealism, altruism, and cooperation. See S. PATTEN, *THE NEW BASIS OF CIVILIZATION* 9-10, 25-27, 178-81 (1907). Robert Wiebe describes particularly well the continuing commonalities among both classical thinkers and their detractors in chapter six of his book, *The Search for Order*. See R. WIEBE, *supra* note 331, at 133-63.

³⁶⁵ See H. THORELLI, *supra* note 2, at 109 n.1, 315.

³⁶⁶ See, e.g., R. HOFSTADTER, *supra* note 331, at 49 (describing the continuing power of Herbert Spencer's ideas among older Americans into the early twentieth century). The dissenting views of new school economists reportedly had relatively little impact on popular imagination prior to World War I. See H. THORELLI, *supra* note 2, at 120-21.

³⁶⁷ 85 F. 271 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899).

an extreme as really to interfere with the public welfare.³⁶⁸

This is not to argue that large numbers of nonacademic Americans in this period were classical economic thinkers imbued with the details of orthodox theory. That certainly was not the case. What is suggested is that conceptual approaches to contemporary social and economic problems were influenced significantly by a pervasive faith in the reality of fundamental natural laws or processes; by a widespread belief that valid, scientific theory characteristically took the form of theoretical models explaining major areas of natural or human activity on the basis of only a few such fundamental laws, principles, or processes; and finally, by popular acceptance of many, if not all, of the main features of traditional economic theory itself.

Some contemporary Americans were substantially less affected by the operation of such influences than were others at the time. Moreover, even when all three factors operated powerfully, they still left room for tremendous diversity in theoretical analysis and remedial response. Yet, continued firm belief in natural law or process, grand theory, and traditional economic understandings tended to encourage adherence to approaches more closely in harmony with them and to discourage acceptance of perspectives calling them seriously into doubt.

Consider, for example, the similarities often evident in otherwise widely divergent contemporary analyses of the rise of the "trusts." Some observers acclaimed or accepted the new, more concentrated economic pattern as simply the natural product of a progressive evolutionary process unfolding over time. Some of these observers were pleased by the new development and felt no need for alarm. Thus, John D. Rockefeller spoke for many American businessmen³⁶⁹ when he explained the rise of big business as "merely a survival of the fittest, . . . the working out of a law of nature and a law of God."³⁷⁰ Andrew Carnegie concurred, describing economic concentration as simply "an evolution from the heterogeneous to the homogeneous, and . . . clearly another step in the upward path of development."³⁷¹ As such, it was not to be impeded by the efforts of man: "Oh, these grand, immutable, all-wise laws of natural forces, how perfectly they work if human legis-

³⁶⁸ W. TAFT, *FOUR ASPECTS OF CIVIC DUTY* 11-12 (1906).

³⁶⁹ For extended discussion of the social and economic theories embraced by American businessmen in this period, see A. THIMM, *BUSINESS IDEOLOGIES IN THE REFORM-PROGRESSIVE ERA, 1880-1914* (1976); see also S. FINE, *supra* note 331, at 96-125.

³⁷⁰ W. GHENT, *OUR BENEVOLENT FEUDALISM* 29 (1902).

³⁷¹ A. CARNEGIE, *Popular Illusions About Trusts*, in *THE GOSPEL OF WEALTH AND OTHER TIMELY ESSAYS* 80 (1933).

lators would only let them alone! But no, they must be tinkering."³⁷²

Other Americans also accepted heightened concentration as the inevitable product of a natural process but nevertheless decried the behavior of the men in charge of the giant combinations and called for nationalization—ownership by the people at large—or increased government regulation as the natural political development for this natural new stage of economic organization.³⁷³ In part, such a stance reflected many Americans' mixed reactions to the rise of the new combinations in general. While acknowledging apparent new productive efficiencies, these Americans continued to fear the "trusts'" power for economic and political abuse.³⁷⁴

Such tensions also appear to be reflected in the mixed explanatory models embraced by an increasingly important number of observers. Instead of declaring that "bigness" was either the glorious product of natural process or an alarming perversion of it—the Carnegie and Brandeisian "poles" of natural law analysis, respectively³⁷⁵—these ob-

³⁷² A. CARNEGIE, *TRIUMPHANT DEMOCRACY OR FIFTY YEARS' MARCH OF THE REPUBLIC* 48 (1886).

³⁷³ See, e.g., Andrews, *The Economic Law of Monopoly*, 26 J. SOC. SCI. 1, 12 (1890); Andrews, *The Trusts According to Official Investigations*, 3 Q.J. ECON. 117, 150 (1889); Hatfield, *The Chicago Trust Conference*, 8 J. POL. ECON. 1 (1899); Jenks, *Capitalistic Monopolies and Their Relation to the State*, 9 POL. SCI. Q. 486, 504-09 (1894); Seligman, *Railway Tariffs and the Interstate Commerce Law. II.*, 2 POL. SCI. Q. 369, 373-74 (1887).

³⁷⁴ See R. HOFSTADTER, *supra* note 2, at 192.

³⁷⁵ As noted previously, see *supra* note 316, Brandeis continually relied on a small number of "artificial" influences to explain the prevalence of business "bigness" in spite of its asserted foreignness to a believed natural economic order shaped by the operation of natural laws. Captivated by a vision of eternal, small-scale capitalism, he declared, "There are no natural monopolies today in the industrial world." L. BRANDEIS, *Shall We Abandon the Policy of Competition?*, in *THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS* 105 (O. Frankel ed. 1934) [hereinafter *PAPERS*]. He explained:

It will be found that wherever competition has been suppressed it has been due either to resort to ruthless processes, or by improper use of inordinate wealth and power. The attempt to dismember existing illegal trusts is not, therefore, an attempt to interfere in any way with *the natural law of business*. It is an endeavor to restore health by removing a cancer from the body industrial. It is not an attempt to create competition artificially, but it is the removing of the obstacle to competition.

L. BRANDEIS, *Competition*, in *PAPERS*, *supra*, at 115-16 (emphasis added). Similarly, he declared, "[E]xperience has . . . taught us that competition is never suppressed by the greater efficiency of one concern. It is suppressed either by agreement to form a monopoly or by those excesses of competition which are designed to crush a rival." L. BRANDEIS, *The Solution of the Trust Problem*, in *PAPERS*, *supra*, at 131.

Such firm confidence in the operation and product of natural law also supported faith in the efficacy of conduct-oriented antitrust action:

[N]o monopoly in private industry in America has yet been attained by efficiency alone. No business has been so superior to its competitors in the

servers created an alternative picture out of key elements of contemporary thought. Still holding that much "bigness" was the unexceptionable product of natural economic evolution, these analysts declared that much was also the abnormal product of artificial privilege or connivance.³⁷⁶

Whatever resemblance such contemporary distinctions between "natural" and "artificial" combinations may or may not have borne to the fundamental contrasts between "center" and "peripheral" industries stressed by Professor McCraw³⁷⁷ or other aspects of modern economic analysis, such distinctions did allow anxious Americans of the period who still believed in beneficent natural order or principle to maintain that belief in the face of a significant amount of seemingly contradictory evidence. The sources of the artificial intrusion responsible for such disturbing abnormal growths simply had to be identified and be dealt with, and natural forces again could be seen playing their normal determining role.

The need to explain the rise and persistence of increasing numbers of powerful combinations was particularly acute for those Americans who held on to a relatively static equilibrium model of the economy in which large enterprises with power to affect price had little or no natural place. This problem was faced early by classical economic theorists whose analyses were premised on just such a theoretical conception.³⁷⁸ Antistatist commentators influenced by such views often responded either by declaring that artificial government privilege, for example tariff and patent policy, was responsible for abnormal trust intrusion into the system,³⁷⁹ or by asserting that normal competitive processes still could

processes of manufacture or of distribution as to enable it to control the market solely by reason of its superiority. There is nothing in our industrial history to indicate that there is any need whatever to limit the natural growth of a business in order to preserve competition. We may emphatically declare: "Give fair play to efficiency."

.
Diagnosis shows monopoly to be an artificial, not a natural, product. Competition, therefore, may be preserved by preventing that course of conduct by which in the past monopolies have been established.

L. BRANDEIS, *Competition*, in PAPERS, *supra*, at 114-15, 123-24 (emphasis added).

³⁷⁶ See R. ELY, MONOPOLIES AND TRUSTS 87-88 (1912); R. ELY, PROBLEMS OF TO-DAY: A DISCUSSION OF PROTECTIVE TARIFFS, TAXATION, AND MONOPOLIES 201 (3d ed. 1888); W. LETWIN, *supra* note 2, at 71-77; W. WILSON, THE NEW FREEDOM 101-10 (1913).

³⁷⁷ See *supra* note 318.

³⁷⁸ See H. THORELLI, *supra* note 2, at 116.

³⁷⁹ See, e.g., CIVIC FEDERATION OF CHICAGO, CHICAGO CONFERENCE ON TRUSTS 166-71 (1900) (speech by Lawson Purdy at the conference, which took place September 13-16, 1899) ("[T]he combinations not protected by an iniquitous tariff are few in number. Of some four hundred trusts enumerated in the Commercial Year

be counted on to produce a state of natural economic equilibrium, even in concentrated industries, through the substantial power of *potential* competition acting to restrain big business behavior.³⁸⁰

Other observers, striving to maintain belief in the "naturalness" of a small-scale capitalist economy in the face of increasing economic concentration, took a less hostile view of governmental corrective action. Declaring concerted combination, predation, and discrimination abnormal and indeed immoral forms of the pursuit of self-interest and deeming them responsible for the disturbing distortions in the natural economic order, they called for direct action to prohibit and punish such behavior. Antitrust action against the aberrant conduct artificially creating "bigness" was what the times demanded and what was needed to restore the natural order, in the view of Americans embracing this vision of economic life.³⁸¹

But an important historical question regarding early antitrust development remains. What, if any, indication is there that contemporary theory actually influenced judicial reasoning in early antitrust cases?

D. International Harvester and the Real Value Test

Consider again *International Harvester Co. of America v. Kentucky*,³⁸² the opinion recently highlighted as an important early case invalidating on due process grounds an antitrust standard declared to have been equivalent to a reasonable-price defense for price fixing.³⁸³ How did the judges of the Kentucky Court of Appeals understand and explain the antitrust standard that they articulated and their rejection of vagueness objections to it? Did such early antitrust analysts believe a normal market, real value test was simply an invitation for a standardless case-by-case determination of an arbitrary reasonable price according to a judge or jury's gut sense of fairness?

Such a characterization was indeed urged by lawyers for International Harvester. They had good reason to hope that the Kentucky high court would strike down a "reasonable-price" standard, for that court previously had done precisely that in a case considering a state statute forbidding any railroad to charge "more than a just and reasonable rate

Book, more than two thirds are directly affected by the tariff, and there are very few which do not get some tariff assistance, directly or indirectly.").

³⁸⁰ See, e.g., Giddings, *The Persistence of Competition*, 2 POL. SCI. Q. 62, 65-67 (1887); see also *infra* text accompanying notes 405-06 (comments of Henry Wood).

³⁸¹ As previously indicated, Louis Brandeis was a preeminent exponent of this point of view. See, e.g., *supra* note 375.

³⁸² 234 U.S. 216 (1914).

³⁸³ See *supra* text accompanying notes 248-85.

of toll.”³⁸⁴ The Kentucky court clearly had understood and declared that such a “reasonable rate” test actually set “no standard whatever . . . by which the carrier may regulate its conduct.”³⁸⁵ The court had declared that such a statute contemplated a standard “erected by a jury . . . that . . . must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime.”³⁸⁶ The Kentucky Court of Appeals quoted and strongly reaffirmed these statements in its 1909 opinion in *Commonwealth v. International Harvester Co.*,³⁸⁷ but it found them wholly inapplicable to the Kentucky antitrust standard. “There is a marked difference,” the court declared, “between the qualities of the ‘real value’ of an article and ‘reasonable compensation’ for a service. The latter may depend alone upon the opinion of the trier of fact; the former is itself a fact susceptible of proof and exact ascertainment.”³⁸⁸ How could the Kentucky judges have believed that?

Consider the state of contemporary theory with regard to price or value. A good indication of both traditional orthodoxy and evolving scholarly critiques of it can be gleaned, for example, from the work of perhaps the most eminent American economist of the pre-war period, John Bates Clark. In his 1899 book, *The Distribution of Wealth: A Theory of Wages, Interest and Profits*,³⁸⁹ Clark detailed and critiqued the classical economic view of commodity value. A major theme of the work was the need to understand real world economics as the combined product of powerful, fundamental, natural law “static” forces complemented by the operation of various “dynamic” forces, and a large portion of the work was devoted to an exploration of the virtues and limitations of traditional value theory from precisely this perspective. The traditional theory that Clark noted was the theory of “natural” or “normal” prices.³⁹⁰

Such “natural” or “normal” prices were the levels to which rates naturally and relentlessly were thought to be pushed by the force of competition,³⁹¹ levels just corresponding to production cost and hence

³⁸⁴ See *Louisville & N.R.R. Co. v. Commonwealth*, 99 Ky. 132, 35 S.W. 129 (1896) (invalidating KY. STAT. § 816 (Carroll 1894)).

³⁸⁵ *Id.* at 137, 35 S.W. at 130.

³⁸⁶ *Id.*

³⁸⁷ 131 Ky. 551, 574-75, 115 S.W. 703, 711 (1909) (Hardin County), *overruled*, *Gay v. Brent*, 166 Ky. 833, 849, 179 S.W. 1051, 1058 (1915).

³⁸⁸ *Id.* at 575, 115 S.W. at 711.

³⁸⁹ J. CLARK, *THE DISTRIBUTION OF WEALTH: A THEORY OF WAGES, INTEREST AND PROFITS* (1899) [hereinafter J. CLARK, *DISTRIBUTION*].

³⁹⁰ See *id.* at 16.

³⁹¹ See *id.* at 16, 77.

not allowing any excess profit.³⁹² Thus, for example, Wayland and Chapin's college textbook informed students that in addition to temporary market values affected by changes in demand and supply, "[t]hings have also a permanent, or as it may be called, a Natural Value, to which the market value, after every variation, always tends to return; and the oscillations compensate for one another, so that on the average, commodities exchange at about their natural value."³⁹³ Similarly, the text explained that "[w]hen left free from artificial interference, demand and supply rush towards an *equilibrium*; and the condition of stable equilibrium is that things exchange for each other according to the cost of production, or as some express it, according to their *natural value*."³⁹⁴

Clark believed that such a conception of natural or normal prices was basically sound³⁹⁵ and that static forces determining such prices were not only powerful but decidedly dominant.³⁹⁶ Clark and other dissenting scholars, however, differed from more traditional theorists in their view of the frequency with which actual market prices corresponded with natural or normal prices, believing traditional theorists underestimated the power and impact of various dynamic factors.³⁹⁷ One "dynamic" force that otherwise differing theorists generally acknowledged to be an important cause of departures from natural or normal price was private monopoly or combination.

As noted above,³⁹⁸ antistatist observers influenced by static classical theory often tended to minimize the impact of the artificial intrusion of monopoly, asserting that its influence on normal price could only be temporary given the power of the natural law of competition. Henry Wood's discussion was a fairly typical, if particularly striking, expression of such sentiments. Although Wood expressed greater alarm over legislative than private interference with the market,³⁹⁹ he devoted substantial attention to the latter as well, making plain his moral condemnation of all anticompetitive combinations seeking to raise prices to ab-

³⁹² See *id.* at 16-17, 78-79. Clark stressed that such natural competitive prices not only guaranteed the absence of excess profit but also assured "[e]qual products everywhere per unit of labor and equal products per unit of capital," *id.* at 18, and led to equalized earnings per unit of capital or of labor, see *id.* at 17.

³⁹³ F. WAYLAND, *supra* note 348, at 268-69.

³⁹⁴ *Id.* at 14-15. The "artificial interference" referred to at this point in the text was monopoly, illustrated by an earlier Dutch monopoly of the pepper trade. See *id.* at 14.

³⁹⁵ See J. CLARK, *DISTRIBUTION*, *supra* note 389, at 78.

³⁹⁶ See *id.* at 30, 67.

³⁹⁷ See S. FINE, *supra* note 331, at 198-251.

³⁹⁸ See *supra* text accompanying notes 379-80.

³⁹⁹ See H. WOOD, *THE POLITICAL ECONOMY OF NATURAL LAW* 28 (1894).

normal levels.⁴⁰⁰ Wood declared that while trust combinations might be undertaken to pursue beneficial, productive efficiencies, "in accord with Natural Law," the "great majority" of trusts were not of that sort and sought primarily to establish "abnormal values" for their product.⁴⁰¹ Nonetheless, existing public alarm⁴⁰² over anticompetitive combinations was exaggerated, because such private efforts typically failed. Even where momentarily triumphant they could not long persist.⁴⁰³ "Whenever such combinations have temporarily succeeded," Wood explained, "the result has been brought about by peculiar conditions, and in a forcible manner, before Natural Law had time to assert itself. It was like lifting a heavy weight in spite of gravitation."⁴⁰⁴ Any such artificial price alteration necessarily would be short-lived, and the public accordingly need have little concern. "Consumers are safe because the most powerful combination can bolster up abnormal values only temporarily. Unseen and untiring forces are fighting against it. Demand falls off and competitive production is stimulated on every side."⁴⁰⁵ For Wood, the political implication of this optimistic conception of a self-correcting natural order was clear: "Natural Law punishes its offenders without the aid of courts or judges."⁴⁰⁶

Yet, as the years went by, events seemed to belie Wood's confident faith in the evanescence of economic combination and concentration, and other observers perceived greater power in the intrusive force of artificial monopoly. One such observer was John Bates Clark. In his 1899 work, *The Distribution of Wealth*,⁴⁰⁷ Clark discussed not only the traditional theory of natural value but also the extent to which real world and theoretical prices coincided and the salient reasons for existing discrepancies between the two. Clark explained, "A natural price is a competitive price. It can be realized only when competition goes on in ideal perfection—and that is nowhere. It is approximated, however, whenever prices are neither adjusted by a government nor vitiated by a monopoly."⁴⁰⁸ In a subsequent work, *Essentials of Economic Theory*,⁴⁰⁹

⁴⁰⁰ See *id.* at 61.

⁴⁰¹ *Id.* at 62-63.

⁴⁰² See *id.* at 29.

⁴⁰³ See *id.* at 28-29.

⁴⁰⁴ *Id.* at 29.

⁴⁰⁵ *Id.* at 64. Thus, said Wood, no combination can "violate Natural Law with impunity. If the transgression be of great magnitude the inevitable punishment will be in proportion. Retribution is inherent. The economic, no less than the physical law of gravitation is never suspended." *Id.* at 71.

⁴⁰⁶ *Id.* at 66.

⁴⁰⁷ J. CLARK, *supra* note 389.

⁴⁰⁸ *Id.* at 77.

⁴⁰⁹ J. CLARK, *ESSENTIALS OF ECONOMIC THEORY* (1907) [hereinafter J. CLARK, *ESSENTIALS*].

Clark reiterated such views, referring to monopoly as the chief "positive perversion" of the natural static economic forces tending to produce normal prices in the absence of dynamic influence.⁴¹⁰

Clark declared that classical theorists were on the right track in their conception of natural prices but had heroically ignored dynamic forces to concentrate on an idealized world in which only static forces prevailed.⁴¹¹ Theirs was "an imperfect, rather than an incorrect, theory."⁴¹² In the real world, however, the simultaneous influence of dynamic forces was not a rarity but the usual situation.⁴¹³ Nonetheless, Clark believed that the dynamic influences could be isolated and treated separately from the basic static forces:

In the markets of all parts of the world where competition rules the standards about which prices fluctuate are set by static forces, and the fluctuations are accounted for by dynamic ones. Actual prices are now above the standards and now below them, as a pendulum is now on one side of an imaginary vertical line and now on the other. This vertical line coincides with the position that the pendulum would hold, if it were under the influence of static forces only. The oscillations are due to dynamic forces; and these can be measured, if we first know the nature of the static forces and the position to which, if they were acting alone, they would bring the pendulum. The oscillations of prices about the natural standards can be accounted for only by a like method of study. . . . Static forces set the standards, and dynamic forces produce the variations.⁴¹⁴

Moreover, at least by 1907, Clark had come to believe that, once identified, the "dynamic force" of monopoly could be checked effectively wherever it appeared by the power of law. "In a country in which law held complete sway," he declared, "all objectionable monopolies would be held in repression."⁴¹⁵

But what, if any, theory did the judges of the Kentucky Court of Appeals have in mind when they articulated their distinctive test for price fixing? What did "real value" mean to those early antitrust analysts? Examination of the majority opinion in *Commonwealth v. Inter-*

⁴¹⁰ *Id.* at viii.

⁴¹¹ See J. CLARK, DISTRIBUTION, *supra* note 389, at 69.

⁴¹² *Id.* at 78.

⁴¹³ See *id.*

⁴¹⁴ *Id.* at 32.

⁴¹⁵ J. CLARK, ESSENTIALS, *supra* note 409, at viii; see J. CLARK, THE CONTROL OF TRUSTS (1901).

*national Harvester Co.*⁴¹⁶ reveals that "real value" was simply another phrase for the "natural value" or "normal value" of contemporary economic theory.

The Kentucky judges recognized that real world markets fluctuated and that evidence of market conditions offered in litigation might vary, but they firmly asserted that the legal standard in question, the "real value" test, was not itself uncertain and that that was the relevant constitutional issue.⁴¹⁷ Such a standard had a clear meaning, and its application depended not on subjective preference but on determination of external, objective, pre-existing fact.⁴¹⁸ "Real value" was simply "the market value"⁴¹⁹ or, more precisely, market value adjusted for the influence of intrusive forces:

[S]upply, demand, and competition are the principal factors in regulating prices. Where the conditions are natural, the open market would show the real value of any commodity. Where they are not natural, where either supply, demand, or competition are eliminated, or so controlled as to prevent its operation upon the market, then the commodity may or may not realize its real value. . . .

When the law endeavors to maintain the real value of an article, it has in contemplation the value of the thing as sold under ordinary, normal conditions, unaffected by any combination of producers or dealers whose object is to create an abnormal condition in that market.⁴²⁰

Such "normal" or "real" value, said the court majority, could be established in litigation by evidence of facts "acted upon every day in the commercial affairs of the world."⁴²¹ Specifically, "[w]hat the state of a market was immediately before an act, how it was affected by that act, the quantity of the commodity within reach of the market, the normal—that is, the usual—demand for it, are all facts susceptible of proof."⁴²²

⁴¹⁶ 131 Ky. 551, 115 S.W. 703 (1909) (Hardin County), *overruled in* *Gay v. Brent*, 166 Ky. 833, 849, 179 S.W. 1051, 1058 (1915).

⁴¹⁷ *See id.* at 576, 115 S.W. at 711.

⁴¹⁸ *See id.* at 577-78, 115 S.W. at 712.

⁴¹⁹ *Id.* at 576, 115 S.W. at 711.

⁴²⁰ *Id.* at 576-77, 115 S.W. at 711-12.

⁴²¹ *Id.* at 577, 115 S.W. at 712.

⁴²² *Id.* Moreover, the judges declared the standard in question was not a new one in law, citing Wharton's treatise on criminal law to the effect that the common law had made indictable the engrossing or absorption of "any particular necessary staple or constituent of life so as to impoverish and distress the mass of the community for the purpose of extorting, by terror or other coercive means, prices greatly above the real

The Kentucky high court repeatedly reaffirmed its 1909 analysis⁴²³ and spelled out in greater detail the practical application of the "real value" test in a series of opinions prior to the 1914 United States Supreme Court invalidation of the Kentucky standard.⁴²⁴ The Ken-

value." See *id.* at 578, 115 S.W. at 712 (citing 2 F. WHARTON, A TREATISE ON CRIMINAL LAW § 1851 (10th ed. 1896)).

Adoption and use of contemporary "normal" or "natural" value theory certainly did not mean such theory could not be flexibly refined to reflect local agrarian needs and sentiments. Thus, although cooperative arrangements among farmers were not at issue in the case before it, the court nonetheless went on to explain how collective reductions in producer output would not necessarily violate Kentucky antitrust standards or community welfare:

[O]versupply would reduce the selling value to a level below the normal. If a concerted action of producers resulted in only a normal supply of a commodity reaching the markets, the normal demand would maintain normal prices. Such action is necessary, or at least seems wise both as it affects the producer and the general public. Violent depressions of a market that result in heavy losses are hurtful to everybody, because they tend to disturb the natural equilibrium of business, and reflect harmfully, or are likely to, upon every other branch of commerce. The general public can not be benefited by disaster to any legitimate business. Conditions that are stable, assuring, and reasonably profitable are best for everybody.

Id. at 576-77, 115 S.W. at 711.

Three judges dissented. These judges had a rather different view of the possible meaning of the state antitrust standard and of the level of certainty provided by the theory embraced by the majority. They declared that "real value" could be defined in various ways; for example, as production cost plus "reasonable" profit and return on investment or as the actual "worth of the article to the consumer." *Id.* at 586-87, 115 S.W. at 714-15. But any such standards would be impermissibly indefinite, and invocation of the normal value theory, they declared, did not eliminate the difficulty:

To say that the expression means the market value of the article when not affected by abnormal conditions is only to add to the confusion; for what are abnormal conditions, and who is to judge whether the conditions are abnormal? The market value of an article may be determined with some certainty, but what its market value will be under other conditions than those that exist, is speculation pure and simple.

Id. at 587, 115 S.W. at 715.

⁴²³ See, e.g., *American Seeding Mach. Co. v Commonwealth*, 152 Ky. 589, 592, 153 S.W. 972, 974 (1913), *rev'd*, 236 U.S. 660 (1915); *International Harvester Co. of Am. v. Commonwealth*, 148 Ky. 572, 147 S.W. 1199 (1912) (mem.) (Grayson County case), *rev'd*, 234 U.S. 216 (1914); *International Harvester Co. of Am. v. Commonwealth*, 147 Ky. 795, 796, 146 S.W. 12, 13 (1912) (Todd County case), *rev'd*, 234 U.S. 216 (1914); *International Harvester Co. of Am. v. Commonwealth*, 147 Ky. 564, 565-67, 144 S.W. 1064, 1065-66 (1912) (Bullitt County case), *rev'd*, 234 U.S. 216 (1914); *International Harvester Co. of Am. v. Commonwealth*, 144 Ky. 403, 410, 138 S.W. 248, 251-52 (1911) (Logan County case); *Collins v. Commonwealth*, 141 Ky. 564, 569-70, 133 S.W. 233, 235 (1911), *rev'd*, 234 U.S. 634 (1914); *International Harvester Co. of Am. v. Commonwealth*, 137 Ky. 668, 671, 126 S.W. 352, 353 (1910) (Logan County case).

⁴²⁴ No dissents are noted in any of these later Kentucky cases, and, in one of them, the opinion of the court was written by Judge Lassing, one of the three judges who dissented in the 1909 *International Harvester* case. See *American Seeding Mach. Co.*, 152 Ky. at 589, 153 S.W. at 973. In his opinion for the court in this case, Judge Lassing voiced no uneasiness concerning the "real value" test, either in general or as

tucky court expressly acknowledged that a variety of factors continually operated to affect market prices, noting particularly the influence of altered raw material and labor costs, transportation improvements and rate changes, competing product development, shifts in the "sources of supply and demand,"⁴²⁵ and variations in the expense of sale.⁴²⁶ Nevertheless, the Kentucky jurists believed that in the absence of "such abnormalities as panics, widespread strikes, wars, and such, the conditions may be said to be normal."⁴²⁷ They further believed that under such normal conditions the force of competition and "the so-called 'law of supply and demand,' " if unimpeded, could be "depended on to regulate the price" and maintain rates at or near the natural or real value where price was not abnormally inflated above cost.⁴²⁸

Practical application of the "real value" test embodying these understandings required initial clarification of two basic procedural issues: first, the standard of proof of requisite anticompetitive purpose and, second, the burden of proof that price in fact had shifted away from the competitive, real value level and that it had done so as a result of the defendant's actions rather than because of various other changes that simultaneously might have affected market conditions. As an appropriate standard of requisite criminal intent, the Kentucky court adopted a test quite similar to the Sherman Act standard articulated by the United States Supreme Court in its 1978 opinion in *United States v. United States Gypsum Co.*⁴²⁹ The Kentucky court declared that, under the Kentucky act,

[w]here the design of the poolers is to so enhance the value of their product, or where, whatever their design, such is the natural effect of their action, and such as was necessarily foreseen because of its obviousness, the offense is completed. A party is presumed to have intended a result which is the logical and usual outcome of his willful act.⁴³⁰

applied in the case before him.

⁴²⁵ See *International Harvester* (Logan County), 137 Ky. at 677, 126 S.W. at 354; *International Harvester* (Bullitt County), 147 Ky. at 566, 144 S.W. at 1065.

⁴²⁶ See *International Harvester* (Logan County), 144 Ky. at 410, 138 S.W. at 252.

⁴²⁷ *International Harvester* (Logan County), 137 Ky. at 677, 126 S.W. at 355.

⁴²⁸ See *id.* The court recognized, however, that natural prices necessarily would be sufficiently high not only to cover the cost of labor and raw materials but also to provide a "living profit" to the producers, because otherwise, "save in exceptional callings, they would not [engage] in the business where there was a choice left [to] them to engage in some other." *Id.* at 678, 126 S.W. at 355.

⁴²⁹ 438 U.S. 422 (1978).

⁴³⁰ *International Harvester Co. of Am. v. Commonwealth*, 137 Ky. 668, 674, 126 S.W. 352, 354 (1910) (Logan County); accord *International Harvester Co. of Am. v.*

The Kentucky high court judges considered the state standard as so interpreted to be equally applicable to both loose and tight combinations, exhibiting a common contemporary suspicion of both cartels and full-blown horizontal mergers. Thus, the court declared that the requisite anticompetitive purpose would be demonstrated where the circumstances showed that competitors combined

for the purpose of selling the product of their respective factories or establishments, and thereafter the machinery or article was sold by a central agency or corporation owning or representing the various plants at a price fixed by it, or by its constituent parts. When the formation of the trust or combination is thus shown, it will be presumed to have been organized for the purpose of fixing, controlling and regulating prices.⁴³¹

The International Harvester Company of America, of course, was itself a combination of former competitors who had come together through a horizontal merger.⁴³²

The court next addressed the burden of proof that the defendants' actions had increased prices above the competitive, cost-covering "real" or "natural" value level. The court recognized not only that many factors simultaneously might influence market prices but also that evidence as to some such factors, for example, changes in production costs and selling expenses, particularly costs incurred in out-of-state factories, often would be much more readily available to a defendant than to the commonwealth.⁴³³ Accordingly, the court rejected any idea that the prosecution would have to "establish the existence or nonexistence of all the conditions naturally affecting market values of the article in

Commonwealth, 144 Ky. 403, 405, 409, 138 S.W. 248, 249, 251 (1911) (Logan County). As noted *supra* note 247, the Court in *Gypsum* held that in Sherman Act prosecutions, the government must show that the defendant's action was "undertaken with knowledge of its probable consequences and ha[d] the requisite anticompetitive effects," *Gypsum*, 438 U.S. at 444, or was "undertaken with the purpose of producing anticompetitive effects . . . even if such effects did not come to pass." *Id.* at 444 n.21.

⁴³¹ *International Harvester* (Logan County), 144 Ky. at 409, 138 S.W. at 251; cf. *supra* text accompanying note 401 (comments of Henry Wood).

⁴³² See *International Harvester Co. of Am. v. Commonwealth*, 147 Ky. 564, 567-68, 144 S.W. 1064, 1066 (1912) (Bullitt County), *rev'd*, 234 U.S. 216 (1914). The merged firm reportedly accounted for almost 85% of national harvester and reaper sales. On this and other aspects of International Harvester's early history, see A. CHANDLER, *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 409 (1977).

⁴³³ See *International Harvester* (Logan County), 144 Ky. at 410, 138 S.W. at 252.

question, before it can be said to have sustained its charge[.]”⁴³⁴ Instead, the court held:

when the Commonwealth has shown by evidence and legal presumption the combination to fix, control and regulate prices, . . . evidence of an advance in prices by the combination under substantially the same market conditions that existed before the advance is sufficient to sustain a verdict of guilty in the absence of evidence that the advance was justified by changed market conditions or a corresponding increase in the cost of production.⁴³⁵

Thus, the state need only “show that the general conditions affecting the market of that commodity were normal and that but for the combination complained of the competition would have been fair; that is, natural and usual.”⁴³⁶ Once shown, “the burden would shift to the defense to show such exceptional conditions affecting the particular commodity as naturally tended to produce the increase in market price which the prosecution had proved.”⁴³⁷

In short, the judicially formulated real value standard, which in these passages so strikingly appears to echo contemporary “natural value” theory, was a test that applied to both cartel and post-merger pricing. In essence, the standard established a price-fixing prohibition incorporating a cost or market justification defense and a requirement that the state show substantial constancy or “normalcy” in general market conditions at the time of the defendant’s price change.

However sound or misguided one finds the Kentucky approach, it seems apparent that it called for quite a different type of decisionmaking than entirely open-ended judge or jury subjectivity. This can be seen, for example, in the pattern and nature of state antitrust appellate deliberation. The relevant Kentucky Court of Appeals opinions in the years prior to Justice Holmes’s condemnation of the “real value” test did not consist of subjective pronouncements on reasonableness. Instead, these opinions were reviews of fairly detailed cost and market data introduced in half a dozen prosecutions under the real value standard, reviews seeking to determine whether such objective evidence either convincingly established a *prima facie* case or effectively rebutted one

⁴³⁴ *International Harvester Co. of Am. v. Commonwealth*, 137 Ky. 668, 677, 126 S.W. 352, 355 (1910) (Logan County).

⁴³⁵ *International Harvester Co. of Am. v. Commonwealth*, 144 Ky. 403, 411, 138 S.W. 248, 252 (1911) (Logan County).

⁴³⁶ *International Harvester Co. of Am. v. Commonwealth*, 137 Ky. 668, 678, 126 S.W. 352, 355 (1910) (Logan County).

⁴³⁷ *Id.* at 678-79, 126 S.W. at 355.

under the general standards just described.⁴³⁸

These opinions indicate more than simply the general character of the decisionmaking undertaken in the Kentucky courts. They also indicate that the appellate judges' more detailed analysis of the economic importance of specific types of evidence was apparently affected significantly by the same contemporary theoretical orientation reflected in the initial establishment of the real value test and in the court's general explanation of its operation. This is suggested particularly in the treatment of an issue that probably arose only because of the real value test's application to post-merger pricing, an issue not likely to have arisen as long as the court considered only cartel activity. How should the court treat merger activity that simultaneously reduced costs while raising prices? Indeed, how should the court react if the defendant's activity created a gap between costs and price even though it did *not* raise price above the level that would have prevailed in the absence of the merger?

It is useful to compare the Kentucky jurists' analysis with the current scholarly debate over appropriate merger policy. Present-day antitrust scholars disagree as to both the appropriate standards for judging the legality of mergers and the practicability of using particular standards in actual litigation.⁴³⁹ Much of the dispute arises because of the widespread belief that mergers frequently produce simultaneously both cost-saving productive efficiencies and an increase in market power potentially generating the distributional and allocative harms of increased prices and reduced output. Some scholars today urge a balancing of efficiency gains and losses and would permit mergers where proven aggregate cost savings are greater than the allocative efficiency "dead-weight loss" resulting from a post-merger output reduction, even though the merger leads to an increase in market power and in prices

⁴³⁸ See *American Seeding Mach. Co. v. Commonwealth*, 152 Ky. 589, 596-600, 153 S.W. 972, 976-78 (1913), *rev'd*, 236 U.S. 660 (1915); *International Harvester Co. of Am. v. Commonwealth*, 148 Ky. 572, 573, 147 S.W. 1199, 1199 (1912) (mem.) (Grayson County), *rev'd*, 234 U.S. 216 (1914); *International Harvester Co. of Am. v. Commonwealth*, 147 Ky. 795, 798-800, 146 S.W. 12, 14-15 (1912) (Todd County), *rev'd*, 234 U.S. 216 (1914); *International Harvester Co. of Am. v. Commonwealth*, 147 Ky. 564, 567-73, 144 S.W. 1064, 1066-68 (1912) (Bullitt County), *rev'd*, 234 U.S. 216 (1914); *International Harvester Co. of Am. v. Commonwealth*, 144 Ky. 403, 406-12, 138 S.W. 248, 250-52 (1911) (Logan County); *International Harvester Co. of Am. v. Commonwealth*, 137 Ky. 668, 674-78, 680-81, 126 S.W. 352, 354-56 (1910) (Logan County). Guilty verdicts and fines were affirmed by the Kentucky Court of Appeals in the first four opinions listed. Guilty verdicts were overturned by the Kentucky high court in the last two cases listed.

⁴³⁹ For a good short introduction to the debate, see H. HOVENKAMP, *supra* note 162, at § 11.2.

charged to consumers.⁴⁴⁰ Scholars have debated the factors that appropriately, as a matter of theory, would have to be considered in any such balancing, and many have raised grave doubts regarding the feasibility of proving efficiencies in litigation.⁴⁴¹ As a matter of basic policy or perceived legislative intent, other analysts reject any approach that would balance efficiency gains and losses without considering a merger's potential impact on prices. Some of these commentators even suggest that congressional intent might be read to require a merger policy rejecting an "efficiencies defense" unless the cost savings would be sufficiently great to insure that post-merger prices would remain at or below pre-merger rates, despite any increase in market power resulting from the merger.⁴⁴² No leading scholars, however, currently condemn mergers that reduce costs while leaving prices and output both unchanged and unthreatened. It appears, however, that prior to World War I the Kentucky Court of Appeals adopted a position similar to such a disfavored view and seemingly did so, at least in significant part, because of the power of a "natural" or "real" value orientation.

In a series of opinions, the Kentucky court analyzed the evidentiary record established in each of the several prosecutions challenging International Harvester's post-merger pricing and the single prosecution challenging the post-merger activity of the American Seeding Machine Company. The court reiterated that a post-merger price change was not by itself a sufficient basis for liability, because the cost-equating real value level necessarily shifted as changes occurred, for example, in labor and material costs.⁴⁴³ Much of the court's appellate review consisted of an evaluation of the evidence introduced by both defendants and the state in an effort to demonstrate that relevant costs either had or had not risen sufficiently to account entirely for whatever price increases had taken place.⁴⁴⁴ In analyzing the evidence submitted, the

⁴⁴⁰ See, e.g., Williamson, "Economies" as an Antitrust Defense: The Welfare Trade-Offs, 58 AM. ECON. REV. 18, 21-23 (1968); Williamson, *Economies as an Antitrust Defense Revisited*, 125 U. PA. L. REV. 699, 704-09 (1977).

⁴⁴¹ See, e.g., R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 112 (1976).

⁴⁴² See, e.g., Fisher & Lande, *Efficiency Considerations in Merger Enforcement*, 71 CALIF. L. REV. 1580, 1631-34, 1646, 1693-95 (1983). Fisher and Lande, however, do not themselves adopt this reading of legislative intent, believing that "Congress would have permitted some tradeoff between wealth transfers and efficiency effects." *Id.* at 1647; cf. H. HOVENKAMP, *supra* note 162, at 298-99 (declaring that a merger rule that considered efficiency gains but permitted "an actual output reduction and an actual price increase for consumers. . . . would undoubtedly be politically unacceptable").

⁴⁴³ See, e.g., *International Harvester Co. of Am. v. Commonwealth*, 147 Ky. 564, 565-66, 144 S.W. 1064, 1065 (1912) (Bullitt County), *rev'd*, 234 U.S. 216 (1914).

⁴⁴⁴ See cases cited *supra* note 438.

court repeatedly made it clear that it was essential to consider not only contemporaneous increases in labor and material costs but also any simultaneous cost savings made possible by the merger.⁴⁴⁵ Natural economic behavior required more than simply adherence to the price levels that would have prevailed with higher market costs but no merger. It also required compliance with price levels set as unimpeded natural law would set them, at the actual cost-equating real value level. Thus, a defendant's post-merger sales at the prices that would have been set by open competition in the absence of merger would be lawful if no demonstrable cost savings were achieved but would constitute a criminal offense if the merger simultaneously reduced production or selling expenses.

In the prosecution brought against International Harvester for sales in Todd County, the court explained such reasoning in the following particularly succinct terms:

The cost of putting an article on the market and selling it is entitled to as much consideration as the cost of its manufacture in determining the price at which the article should be sold. In other words, if there was an increase of \$5 in the cost of manufacturing an article, and a decrease of \$5 in the sale of it after it was manufactured, it is apparent that the increased cost of manufacture would not add anything to the real cost of the article to the manufacturer; and, so, in ascertaining whether or not an article is sold above or below its real value, the cost of sale as well as the cost of manufacture is to be taken into consideration⁴⁴⁶

⁴⁴⁵ See *American Seeding Mach. Co. v. Commonwealth*, 152 Ky. 589, 598-600, 153 S.W. 972, 977 (1913) (marketing cost savings, reductions in per unit production costs achieved through centralization, standardization, new plant construction), *rev'd*, 236 U.S. 660 (1915); *International Harvester Co. of Am. v. Commonwealth*, 147 Ky. 795, 798-99, 146 S.W. 12, 14 (1912) (Todd County) (reduced selling expenses), *rev'd*, 234 U.S. 216 (1914); *International Harvester* (Bullitt County), 147 Ky. at 568-71, 144 S.W. at 1066-67 (reduced selling expenses, reduced material costs through purchase from subsidiary steel plant, reduced cost of expert machine repairers on retainer); *International Harvester Co. of Am. v. Commonwealth*, 144 Ky. 403, 408-410, 138 S.W. 248, 250-51 (1911) (Logan County) (reduced expenses of sale and of money collection).

⁴⁴⁶ *International Harvester* (Todd County), 147 Ky. at 799, 146 S.W. at 14. The savings referred to by the court in this passage were savings in the cost of sale specifically attributable to the merger itself, in particular a reduction in the number of sales personnel from the number employed when the several merged companies had been independent competitors. The Kentucky court's general refusal to allow increases in the market price of needed inputs to be considered in calculating the output's real value, unless merger-produced cost savings were considered simultaneously, also was noted by Justice Holmes in the Supreme Court's 1914 *International Harvester* decision. See *International Harvester Co. of Am. v. Kentucky*, 234 U.S. 216, 222 (1914) (noting that

Proof of genuine savings became a reason *supporting* criminal punishment under the antitrust statute because, in such an event, the defendant, through horizontal combination, artificially would have established and taken advantage of an enlarged gap between the firm's actual costs and its prices. Such a gap did not simply produce popularly resented "excess," noncompetitive profits.⁴⁴⁷ It also violated the predicted relationship at the heart of the natural or normal value theory embraced in the Kentucky real value test. And whatever additional concerns may have influenced the court, it was on this latter basis that the Kentucky judges actually explained their willingness to punish post-merger sales in instances in which price, while not raised above the levels that would have prevailed in the absence of merger, had not been lowered to the full extent made possible by the new savings.⁴⁴⁸

E. *Justice Holmes and the Real Value Test*

Why did Justice Holmes reject the Kentucky real value test? Certainly, his justification was not that he deemed it necessarily equivalent to a reasonable-price standard. Never once in his 1914 opinion for the Court⁴⁴⁹ did he suggest any such parallel. Instead, as previously noted, Holmes justified his invalidation of the Kentucky approach on the distinctly different ground that, in his view, given the variety of factors constantly operating to affect market rates, it would be unmanageably difficult for potential antitrust defendants to predict what price would prevail in the absence of their own price-setting efforts.⁴⁵⁰ Yet, as actually applied, the Kentucky standard did not necessarily require prediction or proof of the particular price that otherwise might have prevailed

"in order to reach what is called the real value, a price from which all effects of the combination are to be eliminated, the plaintiff in error is told that it cannot avail itself of the rise in materials because it was able to get them cheaper through one of the subsidiary companies of the combination, and that the saving through the combination more than offset all the rise in cost").

⁴⁴⁷ See *American Seeding Mach. Co.*, 152 Ky. at 599, 153 S.W. at 977.

⁴⁴⁸ See *supra* note 446 & accompanying text. In comparing the Kentucky court's analysis with modern merger policy discussion, it is important to keep in mind that the latter primarily addresses the propriety of injunctive relief. The early Kentucky analysts, on the other hand, were considering the imposition of fines or imprisonment under a statute that did not authorize injunctions. See *International Harvester* (Logan County), 144 Ky. at 413-14, 138 S.W. at 253. Nevertheless, the practical potential impact of the Kentucky court's reasoning presumably would have been to make merger at least substantially less attractive in many cases, if not literally to prohibit it. The allure of increased earnings through new post-merger savings not fully reflected in new price reductions would be lessened by the potential liability of up to \$5000 per violation, particularly since each sale not at real value was declared to be a separate offense. See *supra* note 250.

⁴⁴⁹ *International Harvester Co. of Am. v. Kentucky*, 234 U.S. 216 (1914).

⁴⁵⁰ See *supra* text accompanying notes 264-70.

under normal conditions, but only prediction or proof that the defendant's activity would or did cause *some* variation from it. And the Kentucky court clearly indicated that defendants could rebut any prima facie case the state might establish by showing that their prices were net-cost justified, that is, taking into account both increases and decreases in firm expenses in the relevant time period. Such refinements, whether or not inevitably dictating a final result different from the one reached by Holmes, at least seem to suggest that the manageability problems posed may not have been quite as insuperable as he suggested.⁴⁵¹

Why might Holmes and a majority of the United States Supreme Court have perceived such a higher degree of vagueness in the real value test than did the Kentucky jurists or, apparently, Justices McKenna and Pitney, who dissented without written opinion? As previously mentioned,⁴⁵² it is possible that a part of the answer may be found in a difference in political perspective, reflected in Justice Holmes's open accusations that the Kentucky antitrust standard had been applied unevenly to penalize business conduct not intrinsically different from the farmer activity that the state courts had tolerated.⁴⁵³ But it also seems possible that in significant part Holmes and the Kentucky jurists may have differed in their perception of the definiteness and intelligibility of a normal market, real value standard because of the different overall conceptions of economic life with which they began their respective analyses.

If high court judges in Kentucky still believed that, despite constant activity, sufficient natural, beneficent stability inhered in the economy to allow practical isolation, identification, and correction of specific dynamic intrusions artificially creating abnormal deviations from normal market conditions, Holmes's view of social and economic life in general pointed in a decidedly different direction. Indeed, long before

⁴⁵¹ It should be recalled that forms of analysis somewhat similar to those required under the Kentucky tests or feared by Justice Holmes long have been employed and tolerated in other antitrust contexts. For example, the calculation of actual versus hypothetical prices rejected by Holmes is in fact commonly undertaken, at least after the fact, in the course of litigation whenever a private Sherman Act plaintiff seeks to establish the amount by which the defendant's price fixing increased prices, a necessary predicate to proof of damages if not to proof of liability. While it is, of course, fundamentally important that this context is one to which only less demanding due process requirements apply than those that apply to criminal prosecutions, it nonetheless provides a comparison worth noting. Recall also the Robinson-Patman context, in which cost justification for prices charged is a well-known and long established means of rebuttal by which defendants are invited to respond to a prima facie case established under the federal price discrimination statute. See 15 U.S.C. § 13 (1982).

⁴⁵² See *supra* note 270.

⁴⁵³ See *International Harvester Co. of Am. v. Kentucky*, 234 U.S. 216, 220-21 (1914).

1914, Holmes had developed and articulated a view of the world that seemingly rejected the basic beliefs underlying the Kentucky approach in nearly every major respect; with regard to natural law, the extent to which order and harmony normally or naturally characterized the world, the appropriate understanding and treatment of industrial combination, and the importance of competition itself.⁴⁵⁴

Rejecting natural law conceptions within legal thought as well as outside it, Holmes attacked "jurists who believe in natural law" as unjustifiably being "in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere."⁴⁵⁵ Embracing a "Social Darwinist" ideology,⁴⁵⁶ he emphasized not inherent natural harmonies or stability in social and economic life but instead the centrality of never-ceasing struggle, picturing social and economic relations at any particular instant as reflecting not so much an intrinsic natural order as a momentary and potentially unstable balance among contending powers.⁴⁵⁷ Indeed, in discussing economic relations, he went so far as to

⁴⁵⁴ Important explorations of the thought of Justice Holmes include P. BOLLER, *supra* note 331, at 148-74; G. GILMORE, *THE AGES OF AMERICAN LAW* 48-56 (1977); M. HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 1870-1882* (1963); S. KONEFSKY, *THE LEGACY OF HOLMES AND BRANDEIS: A STUDY IN THE INFLUENCE OF IDEAS* (1956); M. LERNER, *THE MIND AND FAITH OF JUSTICE HOLMES* (1943); H. POHLMAN, *JUSTICE OLIVER WENDELL HOLMES & UTILITARIAN JURISPRUDENCE* (1984); Gordon, *Holmes' Common Law as Legal and Social Science*, 10 HOFSTRA L. REV. 719 (1982); Touster, *Holmes a Hundred Years Ago: The Common Law and Legal Theory*, 10 HOFSTRA L. REV. 673 (1982); Tushnet, *The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court*, 63 VA. L. REV. 975 (1977); Vetter, *The Evolution of Holmes, Holmes and Evolution*, 72 CALIF. L. REV. 343 (1984); White, *Looking at Holmes in the Mirror*, 4 LAW & HIST. REV. 439 (1986).

⁴⁵⁵ Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1918), reprinted in O.W. HOLMES, *COLLECTED LEGAL PAPERS* 310, 312 (1920).

⁴⁵⁶ For discussion of Holmes's thought in these respects as a variant of Social Darwinism, see P. BOLLER, *supra* note 331, at 153-57; M. HOWE, *supra* note 454, at 43-50, 57-58, 173, 252; Gordon, *supra* note 454, at 739-41; Vetter, *supra* note 454, at 362-367.

⁴⁵⁷ Thus, for example, in a well-known passage, Holmes declared:

The struggle for life . . . does not stop in the ascending scale with the monkeys, but is equally the law of human existence. Outside of legislation this is undeniable. It is mitigated by sympathy, prudence, and all the social and moral qualities. But in the last resort a man rightly prefers his own interest to that of his neighbors. And this is as true in legislation as in any other form of corporate action. . . . [W]hatever body may possess the supreme power for the moment is certain to have interests inconsistent with others which have competed unsuccessfully. The more powerful interests must be more or less reflected in legislation; which, like every other device of man or beast, must tend in the long run to aid the survival of the fittest.

propose substitution of the phrase "free struggle for life" in place of the more familiar but assertedly equivalent term "free competition" in referring to the ongoing battles between labor and capital.⁴⁵⁸

Holmes's understanding of economic combination was very much related to this general view of life as struggle. While still a Justice of the Massachusetts Supreme Judicial Court, Holmes already had concluded that the new collective enterprises appearing with ever-increasing frequency could not appropriately be viewed as a peculiar temporary aberration but were, in fact, new, fitter forms of economic organization evolving out of the economic struggle for survival. As such, he believed it would be not only ill-conceived but quixotic to attempt to suppress them. Thus, in his famous 1896 dissent in *Vegehlahn v. Guntner*,⁴⁵⁹ Holmes declared:

[I]t is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on so fast, means an ever increasing might and scope of combination. It seems to me futile to set our faces against this tendency. Whether beneficial on the whole, as I think it, or detrimental, it is inevitable, unless the fundamental axioms of society, and even the fundamental conditions of life, are to be changed.⁴⁶⁰

Holmes's acceptance of combination was so strong, and his departure from conceptions of price naturally driven to desirable cost-equating levels through competition so marked, that at one point he even publicly questioned whether monopolistic pricing really was less socially justifiable than competitive pricing. In his 1911 dissent in the leading resale price maintenance case of *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,⁴⁶¹ while he assumed that the manufacturer's stipu-

O.W. HOLMES, *THE COMMON LAW* 38 (M. Howe ed. 1963).

[A]t the bottom of all private relations, however tempered by sympathy and all the social feelings, is a justifiable self-preference. If a man is on a plank in the deep sea which will only float one, and a stranger lays hold of it, he will thrust him off if he can. When the state finds itself in a similar position, it does the same thing.

Id. On such themes in Holmes's thinking, see P. BOLLER, *supra* note 331; G. GILMORE, *supra* note 454; Gordon, *supra* note 454; Touster, *supra* note 454.

⁴⁵⁸ See *Vegehlahn v. Guntner*, 167 Mass. 92, 106-07, 44 N.E. 1077, 1081 (1896) (Holmes, J., dissenting).

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.* at 108, 44 N.E. at 1081. For additional favorable comments by Holmes on the powerful economic interests of his time, see O.W. HOLMES, *Economic Elements*, in *COLLECTED LEGAL PAPERS*, *supra* note 455, at 279-82.

⁴⁶¹ 220 U.S. 373 (1911).

lated resale prices in fact had been reasonable,⁴⁶² he addressed larger economic policy issues as follows:

I think that, at least, it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear. What then is the ground upon which we interfere in the present case? . . . Perhaps it may be assumed to be the interest of the consumers and the public. On that point I confess that I am in a minority as to larger issues than are concerned here. I think that we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article (here it is only distribution), as fixing a fair price. What really fixes that is the competition of conflicting desires. We, none of us, can have as much as we want of all the things that we want. Therefore, we have to choose. As soon as the price of something that we want goes above the point at which we are willing to give up other things to have that, we cease to buy it and buy something else. Of course, I am speaking of things that we can get along without. There may be necessities that sooner or later must be dealt with like short rations in a shipwreck, but they are not Dr. Miles's medicines. With regard to things like the latter *it seems to me that the point of most profitable returns marks the equilibrium of social desires and determines the fair price in the only sense in which I can find meaning in those words.*⁴⁶³

It seems not entirely implausible to suggest that the Kentucky normal market, real value approach was particularly likely to be viewed with at least somewhat heightened initial skepticism when reviewed by a jurist like Holmes, who found combination both desirable and inevitable, the value of competition questionable, natural law mythical, and belief in characteristic stability and calm sharply at variance with social and economic reality.⁴⁶⁴

⁴⁶² See *id.* at 412 (Holmes, J., dissenting).

⁴⁶³ *Id.* at 411-12 (emphasis added).

⁴⁶⁴ To highlight such basic differences between the economic visions of Holmes and the Kentucky jurists is not to deny that, at least once, Holmes himself employed one of the same phrases that the state court judges used. In his 1921 dissent in *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921), in which the Supreme Court upheld injunctive relief restricting information exchange activity that was found to be in violation of the Sherman Act, Holmes argued that the activity in which the defendants participated should be permitted as a means of improving the functioning of the market. See *id.* at 412-13 (Holmes, J., dissenting). The activity, Holmes

F. *Antitrust Historians and Contemporary Theory*

It remains to be asked why leading accounts of early antitrust development do not pursue the possible influence of contemporary economic philosophy. For at least the last 150 years, important social and economic theorists in America rather consistently have proclaimed that their own theories were more truly scientific than those of their predecessors. While such claims often have rested to an important extent on genuine advances in scholarly achievement and sophistication, historians also have noted the symbolic and strategic significance of such declarations, pointing out the potential power and prestige of the imprimatur of "science" in American culture.⁴⁶⁵ In the light of the cases and interpretations discussed above, it would appear that at least some leading antitrust and regulatory writers carry the American tradition a step further and assert not only that modern theory is more scientific than the theoretical approaches taken, for example, by early antitrust judges, but also that the world of antitrust jurisprudence had no guiding theory at all until their own was born.⁴⁶⁶

argued, helped both buyers and sellers to obtain more complete market information and hence to make more intelligent market decisions. *See id.* at 412. In explaining the general difference between bad cartel activity and the activity engaged in by defendants in the instant case, Holmes wrote, "A combination in unreasonable restraint of trade imports an attempt to override normal market conditions. An attempt to conform to them seems to me the most reasonable thing in the world." *Id.* Given both the context of this particular case and of Holmes's thought in general, however, it is highly unlikely that this single-sentence reference to "normal market conditions" signified any endorsement of particular economic theories employing the phrase, particularly the "normal" or "natural" value theory reflected in the Kentucky approach, which he had rejected seven years earlier as an unacceptably indefinite standard for criminal liability. In his *American Column & Lumber* dissent, Holmes made no direct or indirect allusion to *International Harvester* or to any potential significance of the phrase "normal market conditions" beyond the limited meaning for which he apparently employed it. Rather than announcing a new reconsideration of basic theory, Holmes appears to have been making only a very general point about the believed innocent consistency of the defendants' activity with ordinary market activity and circumstances.

⁴⁶⁵ *See, e.g.*, M. HORWITZ, *supra* note 336, at 257-58; P. MILLER, *THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* 156-64 (1965); E. PURCELL, *supra* note 331, at 16-17, 27-28; R. WIEBE, *supra* note 331, at 147.

⁴⁶⁶ Although leading discussions of early antitrust jurisprudence published prior to the works of Judge Bork and Professor McCraw do not so explicitly deny the possibility that such jurisprudence may have been influenced significantly by the general economic theory of the time, they are similar in that they do not pursue such possibilities when analyzing the early antitrust cases, even though they elsewhere, in separate sections, sometimes do describe the state of contemporary social and economic theory. *See* W. LETWIN, *supra* note 2; H. THORELLI, *supra* note 2. Denial or disregard of the possible shaping influence of general economic theory on early antitrust jurisprudence remains a general interpretative norm in antitrust commentary, even in important work exploring the impact of changing economic models on more recent antitrust development. *See* Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511, 1560 (1984) (declaring that "[n]ot

Such an orientation appears to affect significantly such writers' historical analyses, influencing both the choice of avenues pursued and the treatment of the historical evidence examined. In addressing the history of early antitrust jurisprudence, such writers seem to view the world through historical lenses able to detect the presence of theory only if it corresponds to a theory they themselves find sound. Aspects of the historical record not so corresponding apparently come to be relegated to the historical dustbin of mere unsystematic political or personal rambling.

As already noted, such tendencies seem particularly striking in the landmark works of Professor McCraw and Judge Bork. Professor McCraw undertakes a careful, detailed, new examination of the antitrust thought of Louis Brandeis, zeroing in on Brandeis's persistent tendency to make sweeping interpretative declarations applying across the economy as a whole, and he relates this tendency to Brandeis's assertion of a fundamental economic pattern explainable in terms of basic, universal principle.⁴⁶⁷ Yet, McCraw sees no influence of contemporary theory in this, but only political preference, personal sensibility, and a litigator's strategic mentality,⁴⁶⁸ despite the striking similarities of much of Brandeis's economic vision to powerful tendencies in contemporary thought in general.⁴⁶⁹ McCraw notes the frequency with which Americans of the period spoke of particular economic developments as "unnatural" but does not pursue the possibility that, for any significant number of observers, such conceptions might have been part of any larger systematic theory of economic life.⁴⁷⁰

Judge Bork says even less regarding the contemporary significance of such terminology. Indeed, he never even notes its presence in the *International Harvester* litigation whose centrality he stresses. At one point elsewhere in his text,⁴⁷¹ Judge Bork does mention briefly an apparent preoccupation with unnatural or abnormal economic behavior in the different context of Chief Justice White's famous opinion for the Supreme Court in *Standard Oil Co. v. United States*.⁴⁷² But recognition of such a judicial preoccupation in that case does not prompt him to consider whether White's reasoning might have reflected any broader theoretical tendencies of the time. Citing this aspect of White's opinion

until the antitrust synthesis of the 1940s fused Populist ideology with oligopoly learning did economic models define legal norms").

⁴⁶⁷ See *supra* text accompanying notes 312-27.

⁴⁶⁸ See *supra* text accompanying notes 325-27.

⁴⁶⁹ See *supra* note 375 and accompanying text.

⁴⁷⁰ See *supra* text accompanying notes 306-09, 328-29.

⁴⁷¹ See R. BORK, *supra* note 2, at 38.

⁴⁷² 221 U.S. 1 (1911).

chiefly to point out its "capacity for mischief,"⁴⁷³ Judge Bork makes no mention of broader natural law or natural process perspectives in contemporary economic thought. Instead, he merely dismisses White's reference to unnatural or abnormal economic conduct as analogous to attempted twentieth century legal distinctions between natural and unnatural, or normal and abnormal sex.⁴⁷⁴

An even more striking treatment of contemporary theory is apparent in his analysis of the early void-for-vagueness cases. Identifying *International Harvester* as litigation raising fundamental historical and modern questions of appropriate antitrust policy and judicial role,⁴⁷⁵ Judge Bork stares straight at the Kentucky "real value" standard and finds nothing there at all. Since it does not match his own notions of "real" theory, Judge Bork concludes that such a standard must have constituted an intellectual near-void incorporating only purely subjective notions of "reasonable value."⁴⁷⁶ The possibility that it might prove instructive to examine how the contemporary proponents of the "real value" test actually explained its meaning seems not to have occurred to him.

Determined to draw a moral from early antitrust history, Judge Bork highlights *International Harvester* as early precedent indicating the policy and analytic errors judges commit when they have no theory to guide them, and throughout his work he calls for firm, exclusive adherence to the logic of basic microeconomic theory as the only safe and scientific antidote for policy error.⁴⁷⁷ Yet *International Harvester*

⁴⁷³ R. BORK, *supra* note 2, at 38.

⁴⁷⁴ *See id.*

⁴⁷⁵ *See supra* text accompanying notes 221, 276-85.

⁴⁷⁶ *See supra* text accompanying notes 277-85.

⁴⁷⁷ In calling for such an exclusive focus, *see, e.g.*, R. BORK, *supra* note 2, at 69, 71, 81, Judge Bork heavily stresses the scientific character of basic microeconomic theory, *see, e.g., id.* at 8, 90-91, but he rejects specific dependence on the often conflicting, more detailed empirical and theoretical work of professional economists themselves. *See, e.g., id.* at 109-15, 117-18, 123-33. He warns that

[t]he layman is likely to think that economic theory is what any economist theorizes, but of course it is not. If it were, we should have to believe that there are dozens or hundreds of mutually incompatible versions of economic theory, each as good as any other.

. . . [T]he judge, legislator, or lawyer cannot simply take the word of an economist in dealing with antitrust, for the economists will certainly disagree.

Id. at 117-18. While warning that simple economic models can be seriously misused, *see, e.g., id.* at 92, 95, 108, and conceding that errors readily can be made in their application, *see, e.g.*, 117-18, 123, Judge Bork nonetheless retains great faith in the manageability, appropriateness, and power of the careful, deductive application of basic economic principles, several of which he declares "derive from an aspect of the market system that often has been expressed in the analogy to the Darwinian theory of natural

itself appears to be litigation in which the jurists criticized by both Justice Holmes and Judge Bork took the path that they did, not because they knew nothing of contemporary theory but rather in significant part because they adhered so firmly to a contemporary economic theory they found congenial and that seemed to offer a scientific, if largely deductive, guide to the real world complexity around them.⁴⁷⁸ So understood, however, *International Harvester* would seem to suggest a cautioning moral somewhat different from the one Judge Bork asserts on the basis of his very different reading of the case, a moral with potentially somewhat different implications if translated into the intellectual context of present day policy formulation.

CONCLUSION

For three decades following the adoption of the Sherman Antitrust Act, state antitrust efforts constituted a practically and symbolically substantial response to late nineteenth and early twentieth century problems of industrial combination, collusion, and predation as well as an important complement to public and private litigation under federal antitrust law. If the magnitude and relative significance of state antimonopoly activity rapidly declined after World War I, it was not for want of substantial judicial support for such efforts during the pre-war decades of American economic transformation. Federal and state judges did condemn some applications of state power and certain state approaches. But, while important, such decisions were atypical. In the overwhelming majority of cases, Populist and Progressive Era courts firmly rejected the various commerce clause, equal protection, and due process challenges repeatedly raised against state antitrust enforcement

selection and physical evolution." *Id.* at 118. Thus, he declares:

The economic models involved are essential to all antitrust analysis, but they are simple and require no previous acquaintance with economics to be comprehended. Indeed . . . it is only the fact that the simple ideas of economics are powerful and entirely adequate to this field that makes it conceivable for the law to frame and implement useful policy.

Id. at 90. Describing the nature of the judicial reasoning required in this process, he explains, "Basic economic theory is an intensely logical subject, and much of it consists of a drawing out of the implications of a few empirically supported postulates." *Id.* at 117. The fact that such an approach may give others pause, Judge Bork declares, does not cause him to doubt its superiority:

It makes some people uneasy to have to rely entirely upon theory to infer the nature of a reality that is not directly observed. Yet I am convinced both that the theory is good enough to make the task doable and, equally important, that there is no other possible way to proceed.

Id. at 122.

⁴⁷⁸ See *supra* text accompanying notes 416-48.

and left state authorities considerable room in which to develop and implement antitrust policy.

Examination of the judicial analyses written in response to such challenges not only further illuminates the broader contours of late nineteenth and early twentieth century constitutional theory; it also provides striking indications of the influence of contemporary economic theory in the early development of antitrust and antitrust-related jurisprudence. Accordingly, such examination appears to call into question leading accounts of antitrust history, which proclaim the absence of such an influence. In this connection, the ill-fated approach taken by the Kentucky jurists who adopted and refined the "real value" test for price-fixing condemnation seems particularly revealing of aspects of both early and modern understanding. Rather than demonstrating the operation of only an open-ended subjective populism, such early cases instead appear to display dramatically the impact of general economic theory and simultaneously to demonstrate its potential for encouraging the adoption of analyses that, while faithful to one generation's economic vision, could subsequently be found not only faulty, but practically unintelligible, by a later generation of antitrust analysts influenced by a very different vision of the nature of economic reality.