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THE ROLE OF THE STATES IN THE FIRST CENTURY OF THE SHERMAN ACT AND THE LARGER PICTURE OF ANTITRUST HISTORY

JAMES MAY*

I. INTRODUCTION

It is particularly appropriate that we pause this morning to consider the role of the states in the first century of the Sherman Act.¹ In this centennial year we find ourselves in the midst of a strong revival not only of state antitrust activity,² but also of scholarly inquiry into antitrust history in general. While deepening our understanding of the growth of federal antitrust law, these ongoing scholarly efforts also demonstrate the considerable importance of state-level activity in the past, both in its own right and as a powerful source of additional insight into federal law developments.

This morning I would like to address four main points: first, the evolving pattern of historical interpretation; second, the relevance of antitrust history to current practice and thinking; third, the parallels between recent, revitalized state efforts and the state developments of a century ago; and fourth, the nature and significance of one particularly important difference between early and modern antitrust analysis.

II. THE PAST AND PRESENT OF HISTORICAL SCHOLARSHIP

Antitrust scholars and practitioners of otherwise widely differing views long have shared a common interest in the historical origins, nature, and development of American antitrust law, recognizing the central

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¹ Sherman Antitrust Act, ch. 647, §§ 1-8, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1982)). The Act became effective July 2, 1890.

² See, e.g., ABA ANTITRUST SECTION: MONOGRAPH NO. 15, ANTITRUST FEDERALISM: THE ROLE OF STATE LAW 4-5; Abrams, *Developments in State Antitrust Enforcement*, 62 N.Y.U. L. REV. 989 (1987); Farmer, *Introduction: Dual Enforcement of State and Federal Antitrust Laws*, 58 ANTITRUST L.J. 197 (1989); R. Stephan, Attorney General, Kansas, Remarks at the 23d Annual New England Antitrust Conf.: Antitrust and a New Administration—Winds of Change? 1 (1989).

importance of this history as a guide to legislative intent and the meaning of particular doctrinal developments. Currently, we are witnessing a renewed outpouring of scholarship in this area by professional historians, legal scholars, and economists.³ Collectively, this new work is greatly expanding our knowledge of the practical and intellectual forces that have shaped the action or inaction of legislators, judges, and enforcement officials in the antitrust field over the last one hundred years.

Not surprisingly, scholars continue to focus heavily, although by no means exclusively, on the formative antitrust era of the late nineteenth and early twentieth centuries. This period, of course, produced not only a series of foundational federal and state antitrust statutes, but also the series of well-known, seminal antitrust cases that have been so greatly influential in shaping antitrust thinking to the present day. As the body of historical scholarship has grown and the concerns of antitrust scholars and practitioners have shifted with changing economic and intellectual climates, historical interpretations have changed as well. In his massive

³ See, e.g., M. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916: THE MARKET, THE LAW AND POLITICS* (1988); Arthur, *Farewell to the Sea of Doubt: Jetisoning the Constitutional Sherman Act*, 74 CALIF. L. REV. 263 (1986); Carey, *The Sherman Act: What Did Congress Intend?*, 34 ANTITRUST BULL. 337 (1989); Cheffins, *The Development of Competition Policy, 1890-1940: A Re-Evaluation of a Canadian and American Tradition*, 27 OSGOOD HALL L.J. 449 (1989); Flynn, *The Reagan Administration's Antitrust Policy, "Original Intent" and the Legislative History of the Sherman Act*, 33 ANTITRUST BULL. 259 (1988); Hovenkamp, *The Antitrust Movement and the Rise of Industrial Organization*, 68 TEX. L. REV. 105 (1989); Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1 (1989) [hereinafter Hovenkamp, *Antitrust's Protected Classes*]; Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 67 (1982); May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257 (1989) [hereinafter May, *Antitrust in the Formative Era*]; May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495 (1987) [hereinafter May, *Antitrust Practice and Procedure*]; Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219 (1988); Peritz, *A Genealogy of Vertical Restraints Doctrine*, 40 HASTINGS L.J. 511 (1989) [hereinafter Peritz, *Genealogy of Vertical Restraints Doctrine*]; Peritz, *The "Rule of Reason" in Antitrust Law: Property Logic in Restraint of Competition*, 40 HASTINGS L.J. 285 (1989) [hereinafter Peritz, *The "Rule of Reason"*]; Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511 (1984).

In recent months, this growing body of scholarship has been expanded still further by the publication of an important law review symposium issue devoted to antitrust history. See Carstensen, *How to Assess the Impact of Antitrust on the American Economy: Examining History or Theorizing?*, 74 IOWA L. REV. 1175 (1989); Ernst, *The Labor Exemption, 1908-1914*, 74 IOWA L. REV. 1151 (1989); Freyer, *The Sherman Antitrust Act, Comparative Business Structure, and the Rule of Reason: America and Great Britain, 1880-1920*, 74 IOWA L. REV. 991 (1989); Hawley, *Herbert Hoover and the Sherman Act, 1921-1933: An Early Phase of a Continuing Issue*, 74 IOWA L. REV. 1067 (1989); Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA L. REV. 1019 (1989) [hereinafter Hovenkamp, *Classical Theory of Competition*]; Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105 (1989).

landmark work of the mid-1950s, Hans Thorelli, for example, concluded that the Sherman Act reflected a contemporary philosophy of "economic egalitarianism" echoing various major currents of late nineteenth century thinking.⁴ In Thorelli's view, Congress sought to promote both economic opportunity and competition and was concerned not only with efficiency, but also with wealth distribution and political freedom.⁵ While Thorelli believed that consumers were the ultimate beneficiaries of the new antitrust act, he declared that Congress likely had small businesses in mind as the intended immediate beneficiaries.⁶

In the 1970s, partly in reaction to the antitrust jurisprudence of the Warren Court, Professor and later Judge Robert H. Bork, in another landmark book,⁷ offered a quite different interpretation. Judge Bork strongly de-emphasized the influence of general political and economic theory in formative era antitrust thinking.⁸ Simultaneously, he downplayed congressional concerns for small business opportunity and equitable wealth distribution.⁹ Instead, Judge Bork stressed an original congressional concern for economic efficiency or "consumer welfare maximization."¹⁰ He then invoked this historical view to promote an antitrust approach premised on this single general goal.¹¹ More recently, numerous scholars have continued to examine the formative period and have reemphasized early congressional concerns for opportunity and distribution along with efficiency.¹² At the same time, recent scholarship increasingly has highlighted the centrality of contemporary economic and political theory in early antitrust analysis and the pervasive late nineteenth century concern for individual rights, in addition to consumer welfare more narrowly defined.¹³

⁴ See H. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* 564-72 (1955).

⁵ See *id.* at 225-30, 570-72.

⁶ See *id.* at 227.

⁷ R. BORK, *THE ANTITRUST PARADOX* (1978) [hereinafter R. BORK, *ANTITRUST PARADOX*].

⁸ See May, *Antitrust Practice and Procedure*, *supra* note 3, at 553-56, 589-92 (discussing this aspect of Judge Bork's work).

⁹ See R. BORK, *supra* note 7, at 56-66.

¹⁰ See *id.*

¹¹ See *id.* at 51, 57.

¹² See, e.g., Flynn, *supra* note 3; Hovenkamp, *Antitrust's Protected Classes*, *supra* note 3, at 21-30; Lande, *supra* note 3; May, *Antitrust in the Formative Era*, *supra* note 3, at 258-300; Millon, *supra* note 3; Peritz, *The "Rule of Reason," supra* note 3, at 291-313.

¹³ See, e.g., M. SKLAR, *supra* note 3; Hovenkamp, *Classical Theory of Competition*, *supra* note 3; May, *Antitrust in the Formative Era*, *supra* note 3; May, *Antitrust Practice and Procedure*, *supra* note 3, at 541-93; Millon, *supra* note 3; Peritz, *The "Rule of Reason," supra* note 3; Peritz, *Genealogy of Vertical Restraints Doctrine*, *supra* note 3.

III. THE MODERN IMPORTANCE OF ANTITRUST HISTORY

Evolving understandings of antitrust history affect current activity and analysis in a variety of ways. As the recent California Supreme Court opinion in *State ex rel. Van de Kamp v. Texaco, Inc.*¹⁴ dramatically demonstrates, historical reinterpretation—particularly of formative era antitrust development—can at times have a very immediate and practical consequence, directly determining the outcome of modern litigation and rendering moot the resolution of other, more familiar issues of constitutional or antitrust analysis. In that case, of course, the court decided that California's Cartwright Act¹⁵ did not extend to mergers.¹⁶ In doing so, however, it found it unnecessary to engage in a long-anticipated preemption analysis.¹⁷ Instead, the court resolved the case through an extended new examination of the history of state antitrust legislation and case law as it had developed around the country by the time the Cartwright Act was passed in 1907.¹⁸ On the basis of this record the court concluded that the state legislature had not expected or intended that the key statutory term "combination" would cover mergers.¹⁹ Accordingly, the court found it needless to address the constitutional issues that might be posed by a state challenge to a merger previously consented to by federal antitrust enforcement authorities.²⁰

More generally, improved historical understanding clarifies the continuities and discontinuities between current antitrust developments and those of earlier generations. This in turn can usefully contribute to the further refinement of modern antitrust perspectives, which repeatedly are justified or colored by modern interpretations of earlier developments.²¹ Such understanding also can help us to appreciate more fully the place of antitrust law within the larger picture of twentieth century American legal history.

Finally, a more adequate appreciation of antitrust history has considerable relevance for broader issues of modern legal methodology as well.

¹⁴ 46 Cal. 3d 1147, 762 P.2d 385, 252 Cal. Rptr. 221 (1988).

¹⁵ CAL. BUS. & PROF. CODE §§ 16720 et seq. (West 1987).

¹⁶ See 46 Cal. 3d at 1153, 762 P.2d at 387, 252 Cal. Rptr. at 223.

¹⁷ *Id.* at 1151, 762 P.2d at 386, 252 Cal. Rptr. at 222. For an extended discussion of the constitutional issues raised by the case written when the case was still pending before the state supreme court, see, for example, Oliver, *Federal and State Antitrust Enforcement: Constitutional Principles and Policy Considerations*, 9 CARDOZO L. REV. 1245 (1988).

¹⁸ See 46 Cal. 3d. at 1153-63, 762 P.2d at 387-95, 252 Cal. Rptr. at 223-31.

¹⁹ *Id.* at 1163, 762 P.2d at 394-95, 252 Cal. Rptr. at 230-31.

²⁰ *Id.* at 1151, 762 P.2d at 386, 252 Cal. Rptr. at 222.

²¹ See May, *Antitrust in the Formative Era*, *supra* note 3, at 260, 298-99, 394-95 (discussing this tendency).

This is particularly true, for example, with regard to the current theoretical debates over original intent jurisprudence. Is antitrust law today a good example of close adherence to original understanding? Or, alternatively, does the history of antitrust law in the formative era and in the years since indicate a substantial evolution over time and reveal important differences between current understandings of the Sherman Act's general language and the prevailing understanding of those same words one hundred years ago? Such questions are likely to remain the subject of considerable discussion for some time.²² This is particularly likely in light of the orientation that modern scholars often have taken toward constitutional and antitrust law, respectively.²³ Repeatedly, some of the most eminent antitrust scholars of recent years have insisted strongly upon a nonevolutionary, "original understanding" approach to constitutional interpretation while firmly embracing an evolved, late twentieth century, neoclassical interpretation of the Sherman Act itself.²⁴

IV. STATE DEVELOPMENTS AND THE LARGER PICTURE OF ANTITRUST HISTORY

With these current trends of renewed state enforcement and expanding historical understanding in mind, I would like to focus on certain key similarities and differences between early and modern state activity within the more general context of antitrust development over the course of the Sherman Act's first one hundred years. We can usefully think of state antitrust-related activity as falling roughly into four general periods: first, the nineteenth century common law era; second, the vibrant late nineteenth and early twentieth century "formative" period of active legislative, executive, and judicial response to tremendously rapid and far-reaching economic change; third, the comparatively quiescent period from the close of the First World War to the 1970s; and fourth, the recent and ongoing period of modern state antitrust revitalization.

Throughout these four periods, state legislation, enforcement, and adjudication have expressed and addressed the changing intensity—and the changing particulars—of prevailing local sentiments regarding

²² For recent discussions of antitrust history and its relevance for original intent or original understanding approaches, see, for example, Flynn, *supra* note 3; May, *Antitrust in the Formative Era*, *supra* note 3; Millon, *supra* note 3; and Peritz, *The "Rule of Reason," supra* note 3.

²³ See, e.g., Millon, *supra* note 3, at 1290–92.

²⁴ Compare, e.g., R. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 5, 218 (1990) (declaring that any constitutional or statutory provision should be interpreted and applied according to the meaning of the provision's wording as it was generally understood at the time it was adopted) with R. BORK, *ANTITRUST PARADOX*, *supra* note 7 (undertaking no examination of the meaning of "restraint of trade" within the

anticompetitive, exclusionary, or monopolistic market behavior. State efforts have fulfilled this general function in differing ways at differing times, for the role of state as well as federal antitrust activity has been defined in substantial part by the changing economic, intellectual, and legal contexts in which state and federal actors have operated.

A. STATE ACTIVITY IN THE FORMATIVE AND MODERN ERAS

This impact of changing context is strikingly evident when one compares developments in the two active periods of state enforcement—at the beginning and at the end of the Sherman Act's first century, respectively. To stress the differences between these two periods is not to deny, of course, that there are important parallels between today's reinvigorated state efforts and those of a century ago, even if current concerns and initiatives frequently appear to be somewhat less dramatic versions of their turn-of-the-century counterparts. In both periods, for example, state antitrust activity expanded greatly.²⁵ Significant state-level antitrust efforts not only began prior to the enactment of the Sherman Act in July of 1890,²⁶ they also remained a highly important part of the overall pattern of Progressive Era antitrust activity up to the time of American entry into the First World War.²⁷ Moreover, in both the formative and modern eras, state efforts intensified partly in response to the believed inadequacy of federal enforcement efforts²⁸ in the face of disturbing

broader contemporary context of late nineteenth century economic and political theory and urging that modern Sherman Act analysis should be developed in accordance with modern microeconomic thinking).

²⁵ In response to increasing cartelization and concentration, at least a dozen states adopted antitrust measures prior to the enactment of the Sherman Act, at least 27 had done so by 1900, and the number of states with new antitrust provisions reached at least 35 by 1915. See, e.g., May, *Antitrust Practice and Procedure*, *supra* note 3, at 499. In many states, legislators turned to antitrust issues repeatedly and enacted a series of antitrust acts throughout the formative era. See, e.g., May, *Antitrust in the Formative Era*, *supra* note 3, at 331–32, 337 & n.655 (noting legislation in New York and Missouri). As noted below, this new legislation laid the foundation for a substantial volume of contemporary public and private antitrust litigation. See May, *Antitrust Practice and Procedure*, *supra* note 3, at 500–03. Expanded state enforcement since the 1970s similarly has been accompanied by a significant new wave of antitrust legislation. See, e.g., ABA ANTITRUST SECTION: MONOGRAPH NO. 15, *supra* note 2, at 4–5.

²⁶ See, e.g., H. THORELLI, *supra* note 4, at 79–82, 155–57.

²⁷ See S. PIOTT, *THE ANTI-MONOPOLY PERSUASION: POPULAR RESISTANCE TO THE RISE OF BIG BUSINESS IN THE MIDWEST* (1985); May, *Antitrust in the Formative Era*, *supra* note 3, at 331–91; May, *Antitrust Practice and Procedure*, *supra* note 3; Pratt, *The Petroleum Industry in Transition: Anti-Trust and the Decline of Monopoly Control in Oil*, 40 J. ECON. HIST. 815 (1980).

²⁸ On this factor during the formative era, see, for example, May, *Antitrust in the Formative Era*, *supra* note 3, at 335. On this factor in more recent years, see, for example, Abrams, *supra* note 2, at 990; Stephan, *supra* note 2, at 5, 7.

contemporary currents of economic change—particularly, but not limited to, growing merger activity.²⁹

Many of the same forms of loose and tighter combinations and vertical restraints that were targeted by state enforcers in the 1970s and 1980s were also addressed in formative era state litigation. In addition, state officials in both periods repeatedly challenged successfully not only small enterprises and local conspiracies, but also major national corporations and the local aspects of far-ranging interstate arrangements and activities. These state efforts in the Progressive Era, moreover, repeatedly implicated basic issues of competition, efficiency, opportunity, wealth distribution, and political freedom that in one form or another have remained an important point of reference for diverse schools of antitrust thinking down to the present day.³⁰

State antitrust supporters one hundred years ago, as well as in the 1970s and 1980s, repeatedly sought to reassert various older perspectives and approaches while promoting important new substantive and procedural innovations. State officials in the 1980s, for example, frequently asserted sympathy for perspectives that were more prominent before the Chicago School ascendancy of the Reagan years³¹ and invoked long-established statutory provisions even while embracing new antitrust legis-

²⁹ See, e.g., H. THORELLI, *supra* note 4, at 63–96, 254–308 (on Progressive Era developments); Abrams, *supra* note 2, at 990 (on recent developments).

³⁰ On the focus, scope, and results of formative era state activity, see, for example, H. THORELLI, *supra* note 4, at 155–57, 259–67; May, *Antitrust in the Formative Era*, *supra* note 3, at 331–89; May, *Antitrust Practice and Procedure*, *supra* note 3. On recent state efforts, see, for example, ABA ANTITRUST SECTION: MONOGRAPH NO. 15, *supra* note 2; W. HAYNES, JR., *STATE ANTITRUST LAWS* (1989); Abrams, *supra* note 2; Lipnick & Gibbs, *An Overview of the Last Decade of State Antitrust Law, Including "Little FTC Acts," Unfair Trade Practice Legislation, Franchise, and Business Opportunity Legislation, RICO and the Rejection of Illinois Brick*, 6 *TOLEDO L. REV.* 929 (1985); Stephan, *supra* note 2.

Like their modern counterparts, early state enforcers amassed a substantial number of victories. Many more state than federal antitrust actions were brought in the first dozen years following the passage of the Sherman Act, and a number of states continued active enforcement activity for another decade or more. State remedies often were more substantial than the relief obtained in many federal cases. In the years prior to the First World War, active states repeatedly obtained judicial decrees of ouster against corporate antitrust violators and garnered fines in individual state jurisdictions that were equivalent to or greater than the total amount of fines collected in all federal antitrust cases in the same period. See May, *Antitrust Practice and Procedure*, *supra* note 3, at 500–02. At the same time, private antitrust and restraint of trade litigation greatly increased in state courts in these years and may have had as important an impact as public litigation in checking contemporary cartel activity. See, e.g., H. THORELLI, *supra* note 4, at 265–66.

³¹ See, e.g., Barnes, *Federal and State Philosophies in the Antitrust Law of Mergers*, 56 *GEO. WASH. L. REV.* 263 (1988); Stephan, *supra* note 2, at 6.

lation, perspectives, and tactics at the same time.³² Formative era approaches similarly exhibited an often striking blend of older and newer elements.

For example, as Professor Hovenkamp notes, the states in that earlier period ultimately faced serious impediments to the effective use of state corporate law as a weapon against mergers. Accordingly, as Professor Hovenkamp observes, state corporate law increasingly was abandoned for these purposes and emphasis instead was placed on antitrust legislation and analysis.³³ Many states, however, did not abandon corporate law as an antitrust tool altogether but instead adapted it to serve new antitrust ends. For example, state legislators often made adherence to state antitrust law a prerequisite for retaining a corporate charter or intrastate business privileges.³⁴ This innovative harnessing of older corporate law powers effectively extended the regulatory reach of the states in dramatic fashion. This was because contemporary case law, prior to the fuller development of the "unconstitutional conditions" doctrine, allowed states to annul charters or revoke privileges in situations where the states would not have been able to regulate disfavored conduct more directly.³⁵

Perhaps the most striking example of such an extension came in the 1909 Supreme Court case of *Hammond Packing Co. v. Arkansas*.³⁶ In that case the United States Supreme Court held that the state of Arkansas could fine a corporation for engaging in a price-fixing conspiracy not alleged to have been formed, to have operated, or to have had any effect within the state. The Court found that this was not an unconstitutional attempt to assert extraterritorial power over activity in other states. Instead, it was deemed to be a legitimate state response to the intrastate act of doing local business in violation of a state corporate law condition limiting eligibility for intrastate activity. The relevant local condition for intrastate privileges just happened to be nonparticipation in a price-fixing conspiracy anywhere in the country.³⁷

Finally, throughout the last century, prevailing constitutional principles have established the boundaries for the permitted exercise of state antitrust law and accordingly have been an important focus of attention

³² See, e.g., Abrams, *supra* note 2; Brockmeyer, *Report on the NAAG Multi-State Task Force*, 58 ANTITRUST L.J. 215 (1989); Farmer, *supra* note 2; Lipnick & Gibbs, *supra* note 30; Stephan, *supra* note 2.

³³ See Hovenkamp, *Antitrust Policy, Federalism, and the Theory of the Firm: An Historical Perspective*, 59 ANTITRUST L.J. 75 (1990).

³⁴ See J. DAVIES, TRUST LAWS AND UNFAIR COMPETITION 213 (1916).

³⁵ See May, *Antitrust Practice and Procedure*, *supra* note 3, at 510-14.

³⁶ 212 U.S. 322 (1909).

³⁷ See *id.* at 342-44.

for parties interested in the possible application of such measures. Yet in both the formative era and in the last two decades, constitutional case law has left the states substantial room for antitrust enforcement and experimentation.³⁸

B. THE ALTERED CONTEXT OF FEDERAL AND STATE ANTITRUST ACTIVITY

As previously noted, however, while there have been important continuities in both federal and state antitrust enforcement over the last one hundred years, substantial changes in economic and intellectual context since the time the Sherman Act was passed have produced major discontinuities as well between the antitrust world of the formative era and our own.³⁹ Early antitrust law arose in a setting of tremendous economic and political change.⁴⁰ In the decades following the Civil War, an expanded national transportation and communications network aided the geographic extension of markets. This, in turn, made it increasingly possible for firms in a wide variety of fields to reap the benefits of the greater economies of scale that resulted from the dramatic technological innovations of the nineteenth and early twentieth centuries. While these developments produced very important new economic gains, they repeatedly also posed severe problems of overproduction in many industries and often led to a great intensification of competitive rivalry. In response to such changes, contemporary American businesses widely sought protection, and more satisfactory returns, through various forms of loose or tighter combination.⁴¹ As cartelization and consolidation accelerated, and as large-scale corporate capitalism increasingly replaced the more decentralized, small business economy that had long been familiar to nineteenth century Americans,⁴² conflicts between business and labor also intensified sharply.⁴³

³⁸ The constitutional law limits on state enforcement in the formative era are addressed at length in J. FLYNN, *FEDERALISM AND STATE ANTITRUST REGULATION* (1964) and in May, *Antitrust Practice and Procedure*, *supra* note 3. For recent treatments of current constitutional issues, see, for example, *California v. ARC America Corp.*, 109 S. Ct. 1661 (1989) (rejecting preemption challenge to state indirect purchaser laws); ABA ANTITRUST SECTION: MONOGRAPH NO. 15, *supra* note 2, at 9–30; W. HAYNES, JR., *supra* note 30, at 23–25; Hovenkamp, *State Antitrust in the Federal Scheme*, 58 IND. L.J. 375 (1983).

³⁹ This section is based on the much more extended discussion of early federal and state antitrust law recently set out in May, *Antitrust in the Formative Era*, *supra* note 3. The points noted here are developed in much more detail in that longer article.

⁴⁰ See, e.g., M. SKLAR, *supra* note 3; H. THORELLI, *supra* note 4, at 54–96, 235–308.

⁴¹ See, e.g., T. McCRAW, *PROPHETS OF REGULATION* 65–73 (1984); H. THORELLI, *supra* note 4, at 63–85.

⁴² See M. SKLAR, *supra* note 3.

⁴³ See, e.g., M. KELLER, *AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA* 188–91, 394–95 (1977).

Americans viewing these major developments widely believed that they posed fundamental questions about the future of American economic and political life.⁴⁴ Accordingly, it is not surprising that these changes sparked a large and varied assortment of responses from late nineteenth and early twentieth century Americans. Strongly held differences were expressed, for example, by the proponents of such popular philosophies as Spencerian Social Darwinism, the Protestant Social Gospel, Henry George's "single tax" program, and various forms of Christian or Marxist socialism, as well as by popular proponents of more traditional outlooks. Simultaneously, within academic circles, prevailing classical economic perspectives came under challenge first by the "new" school approaches of the 1880s and then by the early stirrings of American neoclassicism, which often heavily embraced traditional perspectives even while adding to them in ways that would become increasingly important as time went on.⁴⁵

In the midst of such diversity, however, contemporary social and economic analyses repeatedly displayed striking commonalities as well.⁴⁶ In particular, legislators, judges, and other Progressive Era Americans strongly tended to develop and apply their varied approaches within a widely shared general frame of reference that incorporated certain fundamental perspectives on politics, economics, and judicial methodology.

Americans heavily influenced by the interrelated general themes of classical economics and nineteenth century political liberalism commonly believed that American economic and political life ultimately rested on basic natural rights of labor, property, and exchange. When these rights were duly safeguarded from illegitimate forms of interference, it was thought, the operation of natural economic laws would tend to maximize the benefits received by both individual citizens and society as a whole.

⁴⁴ See, e.g., M. SKLAR, *supra* note 3, at 34.

⁴⁵ On the diversity of American popular and academic responses to late nineteenth and early twentieth century economic change, see, for example, 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); 3 J. DORFMAN, *THE ECONOMIC MIND IN AMERICAN CIVILIZATION* (1949); S. FINE, *LAISSEZ FAIRE AND THE GENERAL-WELFARE STATE: A STUDY OF CONFLICT IN AMERICAN THOUGHT 1865-1901* (1956); R. HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* (rev. ed. 1959); W. LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 54-77* (1965); E. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* (1973); R. WIEBE, *THE SEARCH FOR ORDER 1877-1920*, at 133-63 (1967); May, *Antitrust in the Formative Era*, *supra* note 3, at 281-82, 284-87; May, *Antitrust Practice and Procedure*, *supra* note 3, at 561-62.

⁴⁶ See May, *Antitrust in the Formative Era*, *supra* note 3, at 282-83, 284-87; May, *Antitrust Practice and Procedure*, *supra* note 3, at 562-71.

The protection of free labor, or economic opportunity, promoted efficient specialization of efforts and greater innovation. Protection of natural property rights in each individual's own labor or in the products of that labor in turn laid the foundation for the related possibility and right of free exchange. Free exchange made possible great increases in wealth. Both parties to any freely-willed bargain, it was stressed, ended up better off or else would not have participated in the exchange. Social wealth in the aggregate grew as the number of such transactions increased, and free exchanges greatly multiplied through expansion of the free labor specialization and division of efforts already noted, which dramatically boosted overall output, thereby laying the foundation for a maximum number of exchange transactions.⁴⁷

Competition played a critical role in this general economic vision. The prevailing labor theory of value posited that competition would tend to produce long-run equilibrium prices proportional to direct and indirect labor inputs. As a result, the operation of natural economic law powerfully tended to foster not only efficiency and prosperity, but also fair distribution and consequent social harmony.⁴⁸

If, however, the state departed from its proper role as a neutral guardian of these basic rights of labor, property, and exchange and, for example, enacted discriminatory legislation favoring some groups at the expense of others, it would become a dangerous source of oppression and economic decline. Such artificial, redistributive favoritism was widely deemed to be at once politically offensive, morally objectionable, and economically pernicious. Moreover, contemporary theorists warned that such a distortion of the government's role inevitably would spur an intergroup battle for control of the state itself, leading to the ultimate destruction of liberal republican government. Accordingly, the late nineteenth and early twentieth century doctrines of laissez-faire constitutionalism sought to protect these basic interrelated rights of labor, property, and exchange from governmental impropriety through an assertedly "nondiscretionary" application of the corresponding constitutional principles of economic liberty, substantive due process, and liberty of contract.⁴⁹

Today, we tend to view antitrust and constitutional law as very separate and quite different fields of analysis.⁵⁰ I would like to suggest, however,

⁴⁷ For a more detailed statement and explanation of these theoretical tendencies, see May, *Antitrust in the Formative Era*, *supra* note 3, at 269–71.

⁴⁸ *See id.* at 271–74.

⁴⁹ *See id.* at 262–69, 274–81.

⁵⁰ *See, e.g.,* Fox, *The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window*, 61 N.Y.U. L. REV. 554, 555 (1986).

that for a great many formative era Americans concerned about contemporary concentration and collusion, formative era antitrust law constituted the essential logical complement to laissez-faire constitutionalism. While laissez-faire constitutionalism targeted the potential dangers arising from the most prominent governmental innovations of the time, antitrust analysis addressed the potential dangers to these same basic rights of labor, property, and exchange that were thought to be posed by the most profoundly disturbing private innovations of the time.⁵¹

These general theoretical perspectives heavily, if not universally, influenced not only popular thought, but also legislative and judicial activity throughout the formative era. As I recently suggested at length in an article delineating these themes in much greater detail, evidence of the power of this general political and economic orientation appears repeatedly throughout the congressional debates preceding passage of federal antitrust legislation in 1890 and 1914.⁵² Current perspectives on competitive pricing, efficiency, economic opportunity, and political freedom substantially reflect a dominant, late twentieth century, neoclassical paradigm emphasizing allocative efficiency, consumers' surplus, marginal cost, and marginal revenue. In the formative era, however, understanding of these same general principles took form under the influence of a distinctly different general vision emphasizing interconnected natural rights of labor, property, and exchange and the labor theory of value. The congressional debate commentary, indeed, repeatedly reveals a strong and widespread congressional desire to reaffirm these traditional economic and political principles at a time when major economic changes increasingly threatened the older patterns of economic and political life on which these perspectives were premised. The embrace of such views, I believe, affected early congressional antitrust intentions in a highly important way. Specifically, the continuing vitality of traditional general theory powerfully encouraged a congressional belief that antitrust law simultaneously could protect economic opportunity, efficiency, competition, fair distribution, and political liberty through a process of largely nondiscretionary adjudication.⁵³

In the very different economic and intellectual climate of late twentieth century America, no school of antitrust philosophy can or does accept this optimistic antitrust vision in its most full-blown formative era form. Today, antitrust analysts quite generally accept the need for tradeoff

⁵¹ For an extended development of this view, see May, *Antitrust in the Formative Era*, *supra* note 3, at 258–88.

⁵² *See id.* at 288–300.

⁵³ *See id.*

choices emphasizing some of these goals and values over others.⁵⁴ Yet it is important to stress that the reason that the early congressional debates paid so little attention to such tradeoff questions was not because congressmen were ignorant of general economic theory. Instead, I believe this absence of attention resulted largely because of the strong influence of a traditional economic and political theory that powerfully declared that in general no tradeoffs were necessary or desirable.

These nineteenth century economic and political perspectives influenced greatly not only congressional deliberations, but also the seminal Sherman Act jurisprudence of the Progressive Era. In their respective approaches to antitrust analysis, Justice Rufus Peckham, Justice Edward Douglass White, and Judge William Howard Taft all heavily emphasized the importance of the traditional rights of economic opportunity, property, and free exchange and the related ideal of "nondiscretionary" adjudication.⁵⁵ The nature and power of this general orientation appeared perhaps most clearly in Taft's own 1914 book, *The Anti-Trust Act and the Supreme Court*.⁵⁶ In that work, Taft declared the Sherman Act to be an exceptionally important measure that both protected and appropriately qualified these basic economic rights while safeguarding political freedom. Before turning to a discussion of the Supreme Court Sherman Act cases themselves, Taft strongly reiterated the core tenets of late nineteenth century liberal political and economic theory. He stressed that these principles formed the essential context for understanding the passage and application of the Sherman Act during the preceding quarter century. In so doing, he took pains to note, moreover, that Sherman Act jurisprudence had accordingly evolved within the same general conceptual framework that was simultaneously embodied and reinforced in contemporary constitutional jurisprudence.⁵⁷

Formative era state legislation and adjudication similarly displayed the substantial impact of contemporary economic and political philosophy. Indeed, the record of early state developments, which is today the focus of increasing scholarly attention, provides considerable new insight not only into the history of state antitrust activity, but also into the broader theoretical dimensions of federal antitrust developments as well.⁵⁸

⁵⁴ See *id.* at 391–95 (discussing the changes in economic and political theory since the First World War, the current acceptance of the need for tradeoffs, and the policy implications of these developments.)

⁵⁵ For a detailed discussion, see *id.* at 300–09, 375–78.

⁵⁶ W. TAFT, *THE ANTI-TRUST ACT AND THE SUPREME COURT* (1914).

⁵⁷ See *id.* at 2–4, 27, 37–38, 41–47.

⁵⁸ See May, *Antitrust in the Formative Era*, *supra* note 3, at 309–91; May, *Antitrust Practice and Procedure*, *supra* note 3, at 541–93.

Consider, for example, the report of New York's famous Lexow Committee,⁵⁹ whose hearings and recommendations spurred the 1897 adoption of new antitrust legislation⁶⁰ that, with some modifications, would be reenacted two years later as the Donnelly Act of 1899.⁶¹ In explaining the need for new legislation, that well-known report⁶² systematically articulated and embraced the basic precepts of late nineteenth century theory and employed those principles to assess the nature and significance of recent "trust" activity.⁶³ Thus, for example, the Committee acknowledged and stressed that "[t]he right of contract coexists with and is incidental to the right of liberty and property, and is recognized in the natural law as the very foundation of human progress and development."⁶⁴ The Committee then went on to emphasize that new antitrust restrictions on the formation and operation of "trusts" were consistent with these core principles, noting that unlike an ordinary combination of capital, a "trust" was "designed to and does operate against the natural law."⁶⁵

One of the most striking examples of the influence of contemporary economic theory appears in the record of antitrust development in Progressive Era Kentucky.⁶⁶ In the early years of the twentieth century, the highest court in Kentucky interpreted the state's antitrust law to ban price-fixing only when the resulting prices deviated from the "real value" of the good in question.⁶⁷ While modern commentators sometimes have thought that this formula was equivalent to a "reasonable price" test for cartelization,⁶⁸ the Kentucky high court clearly and emphatically explained that this was not the case.⁶⁹ Instead, the "real value" formula established a purportedly objective standard directly corresponding to the "natural" or "normal" prices posited in nineteenth century economic theory. Nineteenth century writers explained that natural prices were

⁵⁹ See JOINT COMM. OF THE SENATE AND ASSEMBLY APPOINTED TO INVESTIGATE TRUSTS, REPORT AND PROCEEDINGS (1897) [hereinafter LEXOW REPORT].

⁶⁰ Act of May 7, 1897, ch. 383, 1897 N.Y. Laws 310.

⁶¹ Act of May 25, 1899, ch. 690, 1899 N.Y. Laws 1514.

⁶² See, e.g., H. THORELLI, *supra* note 4, at 354-55.

⁶³ See May, *Antitrust in the Formative Era*, *supra* note 3, at 332-36.

⁶⁴ LEXOW REPORT, *supra* note 59, at 31.

⁶⁵ *Id.* at 10.

⁶⁶ For an extended examination, see May, *Antitrust Practice and Procedure*, *supra* note 3, at 541-43, 547-88.

⁶⁷ See *Commonwealth v. International Harvester Co.*, 131 Ky. 551, 115 S.W. 703 (1909), *overruled in Gay v. Brent*, 166 Ky. 833, 849, 179 S.W. 1051, 1058 (1915); *Owen County Burley Tobacco Soc'y v. Brumback*, 128 Ky. 137, 151, 107 S.W. 710, 714 (1908).

⁶⁸ See, e.g., R. BORK, *ANTITRUST PARADOX*, *supra* note 7, at 75-77.

⁶⁹ See *Commonwealth v. International Harvester Co.*, 131 Ky. 551, 574-75, 115 S.W. 703, 711 (1909).

the levels, equivalent to production cost, to which rates naturally tended to be pushed by the unimpeded operation of competition.⁷⁰ Accordingly, Kentucky antitrust litigation under the "real value" test did not center on subjective judge or jury assessments of "reasonableness." Instead, these cases focused on the market conditions and costs prevailing at the time that particular combinations had acted in an effort to establish whether the defendant combinations had forced prices to deviate from the market value of the relevant commodities "as sold under ordinary, normal conditions."⁷¹

V. CONCLUSION

In this year marking the centennial of the enactment of the Sherman Antitrust Act, it is fitting that we focus our attention increasingly on aspects of antitrust history that repeatedly have been underemphasized in many modern accounts of antitrust development. As we do so, our expanding historical understanding of theory and practice likely will affect current analysis and activity significantly and, in particular, is likely to raise important new questions about the nature and possible limits of original understanding methodologies in the antitrust field. Within this broader current context of ongoing historical inquiry, state activity necessarily must be a major focus, for as a substantial part of early and modern practice, and as a source of illumination for antitrust history in general, state activity has played and continues to play a quite important role.

⁷⁰ See, e.g., J. CLARK, *THE DISTRIBUTION OF WEALTH: A THEORY OF WAGES, INTEREST AND PROFITS* 16-17, 77-79 (1899); F. WAYLAND, *THE ELEMENTS OF POLITICAL ECONOMY* 269-70 (recast by A. Chapin 1878).

⁷¹ *Commonwealth v. International Harvester Co.*, 131 Ky. 551, 577, 115 S.W. 703, 712 (1909). See *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*, 148 Ky. 572, 147 S.W. 1199 (1912) (mem.), *rev'd* 234 U.S. 216 (1914); *International Harvester Co. of Am. v. Commonwealth*, 147 Ky. 795, 146 S.W. 12 (1912), *rev'd*, 234 U.S. 216 (1914); *International Harvester Co. of Am. v. Commonwealth*, 147 Ky. 564, 144 S.W. 1064 (1912), *rev'd*, 234 U.S. 216 (1914); *International Harvester Co. of Am. v. Commonwealth*, 144 Ky. 403, 138 S.W. 248 (1911); *International Harvester Co. of Am. v. Commonwealth*, 137 Ky. 668, 126 S.W. 352 (1910).