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# The Supreme Court and the Trusts: Antitrust and the Foundations of Modern American Business Regulation from *Knight* to *Swift*

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*The period from 1870-1920 was a turning point in modern history. It was during this time that the contours of the modern industrial state were formed. A "Great Merger Movement" occurred right in the middle of this period across most of the industrialized nations of the world. The trend toward industrial concentration, which was known at the time as the "trust problem," generated considerable public alarm. Some have argued that it was caused by antitrust policy and the Supreme Court's early antitrust decisions. Indeed, the idea has become the conventional wisdom among some antitrust scholars, especially those connected with the law and economics movement, and it has contributed to a growing skepticism about the efficacy of antitrust law more generally. This Article analyzes the development of the Supreme Court's antitrust jurisprudence from E.C. Knight through Swift and attempts to offer a more balanced overview of the interplay between the economic transformation that occurred around the turn of the twentieth century and the formative developments in American antitrust law. From this perspective, both the merger movement and the Supreme Court's early antitrust decisions were responses to the same underlying economic forces. There is little, if any, reason to believe that the Supreme Court's decisions actually caused the Great Merger Movement. In fact, the Court's decisions were considerably more coherent than some scholars have recognized. One of the unfortunate consequences of all the attention that has been devoted to the effect of the Supreme Court's decisions on industrial concentration is that it has distracted attention from the role that the decisions played in the development of constitutional doctrine. The economic*

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*forces that created the trust problem also compelled the Supreme Court to extend the scope of federal commerce powers and bring a wide range of new business activities within the reach of federal regulations. Ironically, the same Court that handed down Lochner also laid the foundations of the modern American system of business regulation.*

#### TABLE OF CONTENTS

INTRODUCTION.....	86
I. THE CONVENTIONAL LAW AND ECONOMICS THESIS.....	92
II. THE SUPREME COURT'S EARLY ANTITRUST DECISIONS.....	96
A. E.C. Knight and the Manufacturing/Commerce Distinction .....	98
B. Trans-Missouri and the Plain Meaning Doctrine.....	101
C. An Elaboration on the Manufacturing/Commerce Distinction ...	104
D. Joint Traffic: An Elaboration on the Plain Meaning Doctrine ..	107
E. Restraints of Competition v. Restraints of Commerce .....	111
F. Railroad Consolidations After Trans-Missouri and Joint Traffic .....	114
G. Addyston Pipe: The Plain Meaning Doctrine Applies to Manufacturers .....	115
H. Consolidations After Addyston Pipe.....	117
I. Northern Securities: The Sherman Act Applies to Holding Companies.....	118
J. Swift and the Current of Commerce Doctrine.....	126
K. Summary.....	130
III. ANTITRUST AND THE FOUNDATIONS OF MODERN AMERICAN BUSINESS REGULATION .....	132
CONCLUSION.....	144

*The trouble with all explanations of historical causes is the absence of quantification: you can never say how much of the given cause was necessary to provide how much effect, or how much of the cause there was.*

*Oliver Wendell Holmes<sup>1</sup>*

#### INTRODUCTION

The period from 1870-1920 is widely regarded as a turning point in modern history. Indeed, the industrial and technological developments

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<sup>1</sup> Letter from Oliver Wendell Holmes to Frederick Pollock (Sept. 24, 1904), in HOLMES-POLLOCK LETTERS 118 (Mark DeWolfe ed., 1941) (emphasis added).

that occurred during this period were so important and wide-sweeping that many historians have characterized them as constituting the “Second Industrial Revolution.”<sup>2</sup> This major industrial and technological transformation occurred in conjunction with wide-ranging changes in the social, political, and legal institutions of most of the industrialized world.<sup>3</sup> With the acuity of hindsight, we can now see that it was during this time that the contours of the modern industrial state began to emerge as governments and private actors grappled with the new problems raised by the modern industrial economy and as the social, political, and legal institutions began to congeal around the solutions they devised.

An enormous wave of industrial mergers occurred in the center of this important transitional period across most, if not all, of the then industrialized nations of the world — a wave that was so large and ubiquitous that it has become known as the “Great Merger Movement.”<sup>4</sup> The Great Merger Movement was more pronounced in some nations than in others and induced varying social and legal responses, but it was significant enough to raise serious concerns, and in many cases alarm, in most of Western Europe and North America.<sup>5</sup> At the time, many observers believed that the mergers were a natural consequence of the ongoing industrial developments. Many also believed that the mergers were themselves shaping the direction and pace of industrial developments and feared the social and political consequences. But there was widespread confusion and disagreement at the time, both about the causes of the Great Merger Movement and about the appropriate ways for government to respond.

The Sherman Act was enacted in 1890, and the first Supreme Court decisions interpreting its scope and legal effect were handed down before 1900.<sup>6</sup> The foundations of the modern American system of

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<sup>2</sup> See, e.g., THOMAS P. HUGHES, *AMERICAN GENESIS: A CENTURY OF INVENTION AND TECHNOLOGICAL ENTHUSIASM, 1870-1970*, at 16 (1989) (referring to second industrial revolution that began at end of nineteenth century).

<sup>3</sup> For broad overviews, see THOMAS P. HUGHES, *NETWORKS OF POWER: ELECTRIFICATION IN WESTERN SOCIETY, 1880-1930* (1983), DAVID C. MOWERY & NATHAN ROSENBERG, *TECHNOLOGY AND THE PURSUIT OF ECONOMIC GROWTH* (1989), and DAVID F. NOBLE, *AMERICA BY DESIGN: SCIENCE, TECHNOLOGY, AND THE RISE OF CORPORATE CAPITALISM* (1977).

<sup>4</sup> The origins of the term “Great Merger Movement” are unclear, although NAOMI LAMOREAUX, *THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895-1904* (1985) certainly deserves much of the credit for popularizing it.

<sup>5</sup> The public’s reaction is discussed by Lamoreaux. *Id.* at 5.

<sup>6</sup> 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (2005)).

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competition law and business regulation were thus laid in the midst of the tumult and turmoil of the Second Industrial Revolution and the confusion and controversy surrounding the Great Merger Movement. It is clear that we cannot understand the origins of the complex web of federal and state laws that define the modern American system of business regulation without first understanding the context in which it developed. But it is equally clear that the legal developments at the turn of the twentieth century themselves played an important part in the emergence of the modern industrial economy, and, in attempting to unravel the twines, it has been difficult to separate cause and effect.

Some writers — primarily law and economics scholars — have theorized that the Great Merger Movement was caused by the Sherman Act and the Supreme Court's early antitrust jurisprudence.<sup>7</sup> In their view, the Supreme Court unwittingly caused the mergers by interpreting the Sherman Act to make price-fixing agreements illegal, while at the same time also holding that consolidations were beyond its reach. Instead of restraining cooperation through price-fixing agreements, therefore, firms chose to consolidate.<sup>8</sup> This theory has been enormously influential on the economics profession and has helped to color the views of many antitrust scholars, particularly those associated with the law and economics movement.<sup>9</sup> In some circles, it has become the accepted wisdom of antitrust scholarship. Indeed, some well-known antitrust casebooks and reference materials cite the theory without even mentioning any of the alternative hypotheses.<sup>10</sup>

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<sup>7</sup> The theory is often attributed to George Bittlingmayer, *Did Antitrust Policy Cause the Great Merger Wave?*, 28 J.L. & ECON. 77 (1985), although Bittlingmayer himself does not take credit for the idea. Indeed, a careful reading of Bittlingmayer's article reveals that he clearly understood the complexities and nuances surrounding the Great Merger Movement and that his evaluation of the evidence in favor of the theory was quite guarded. While it is certainly not true that every law and economics scholar subscribes to this view, it is probably fair to say that it has become the conventional wisdom among law and economics scholars.

<sup>8</sup> *Id.* at 77.

<sup>9</sup> See *infra* Part I.

<sup>10</sup> See CHARLES J. GOETZ & FRED S. MCCHESENEY, *ANTITRUST LAW: INTERPRETATION AND IMPLEMENTATION* 668 (1998) (“[E]nforcement in antitrust’s early years focused more on price-fixing than mergers . . . . Indeed, one scholar argues persuasively that it was the government’s pursuit of price fixing while paying less attention to mergers that actually caused the Great Merger Wave.”); HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 56 (1994) (“The period 1895-1905 witnessed an enormous wave of mergers, caused in part by the Sherman Act itself. Many entrepreneurs believed that the Act would prohibit cartels but be quite tolerant of tighter combinations involving asset acquisitions or holding companies.”). Of course, neither Hovenkamp nor

The view that the Supreme Court's early antitrust decisions were so inconsistent and incoherent that they caused an enormous wave of anticompetitive mergers has contributed to a pervasive skepticism among many scholars about the efficacy of antitrust law more generally.<sup>11</sup> Since the Great Merger Movement caused by far the most significant discrete increase in the concentration of industry in American history,<sup>12</sup> many scholars understandably believe it is difficult to reconcile the initial consequences of the Sherman Act with its purported objectives. Indeed, skepticism about the Sherman Act has long and distinguished roots. Oliver Wendell Holmes, for instance, once famously asserted that the Sherman Act was nothing more than "humbug based on economic nonsense," and his general disapproval of antitrust law was well-known.<sup>13</sup> Many modern scholars have expressed similar skepticisms.<sup>14</sup>

Some scholars have, however, recently made much more systematic and sophisticated critiques of the motives for antitrust regulation as well as its ultimate effects, and they have drawn on the conventional law and economics theory about the Great Merger Movement to support their endeavors. McChesney and Shughart, for instance, have attempted to recast the entire agenda of antitrust scholarship by bringing together a series of articles that challenge its basic premises.<sup>15</sup> One of the

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Goetz and McChesney were attempting to present balanced studies of the Supreme Court's early antitrust jurisprudence or its consequences. Nonetheless, their comments illustrate the extent to which the conventional view has insinuated itself into the thinking of some prominent antitrust scholars.

<sup>11</sup> See FRED S. MCCHESENEY & WILLIAM F. SHUGHART II, *THE CAUSES AND CONSEQUENCES OF ANTITRUST*, at ix (1995).

<sup>12</sup> See LAMOREAUX, *supra* note 4, at 2.

<sup>13</sup> Alfred S. Neely, *A Humbug Based on Economic Ignorance and Incompetence — Antitrust in the Eyes of Justice Holmes*, 1993 UTAH L. REV. 1, 1-2 (1993).

<sup>14</sup> See, e.g., D. ARMENTANO, *ANTITRUST MONOPOLY: ANATOMY OF A POLICY FAILURE* (1982) (arguing that theory and practice of antitrust are fundamentally flawed); Harold Demsetz, *Dialogue*, in *INDUSTRIAL CONCENTRATION: THE NEW LEARNING* 235-36 (Harvey J. Goldschmid et al. eds., 1974) (advocating need for significant reform of antitrust laws to enable efficient mergers). Not everyone has agreed. Peter C. Carstensen, for instance, described some of the prominent critics of antitrust as "nattering nabobs of negativism" for their broad claims that antitrust imposed efficiency costs on the economy. See Peter C. Carstensen, *How to Assess the Impact of Antitrust on the American Economy: Examining History or Theorizing*, 74 IOWA L. REV. 1175, 1175 (1988-89).

<sup>15</sup> As they explain, they seek not to ask "What should antitrust do? . . . [But instead,] . . . [w]hat has antitrust done, and why?" See MCCHESENEY & SHUGHART, *supra* note 11. In their view, the answers undermine the legitimacy of antitrust enforcement. *Id.* The hallmark of success for their book will be whether it will "return the attention of antitrust scholars to first principles, forcing them to consider seriously whether antitrust has any

contributors to their book, Bruce Yandle, summarizes a well-known article by George Bittlingmayer<sup>16</sup> that presents the conventional law and economics view as establishing that “it was the Sherman Act itself and its attack on beneficial cooperative arrangements that sparked the merger wave.”<sup>17</sup> McChesney and Shughart themselves summarize Bittlingmayer’s article as showing how “the Great Merger Wave that dramatically increased industrial concentration at the turn of the century, was in fact *caused* by antitrust enforcement.”<sup>18</sup> Indeed, the view that the Supreme Court’s early antitrust decisions actually caused significant anticompetitive behavior is the accepted wisdom among critics of antitrust law today.<sup>19</sup>

The causes of the Great Merger Movement are therefore more than merely an academic matter. And they are still open to serious debate. Although the conventional law and economics view has the sheen of plausibility, a careful review of the evidence reveals that it rests on an improbable reading of the Supreme Court’s early antitrust decisions and dubious conjectures about their consequences. While there may be many legitimate reasons for critiquing modern antitrust regulation, there is little reason to believe that antitrust policy caused the Great Merger Movement. Indeed, many contemporary observers at the turn of the twentieth century viewed cause and effect from almost exactly the opposite perspective.<sup>20</sup> As they saw it, the Great Merger Movement was a natural response to the business conditions that had driven a slough of earlier price-fixing and market-sharing agreements and was therefore part of the same “trust problem.”<sup>21</sup>

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legitimate place in a market-based economy.” *Id.*

<sup>16</sup> Bittlingmayer, *supra* note 7.

<sup>17</sup> Bruce Yandle, *The Positive Economics of Antitrust Enforcement*, in MCCHESENEY & SHUGHART, *supra* note 11, at 123.

<sup>18</sup> MCCHESENEY & SHUGHART, *supra* note 11, at 4.

<sup>19</sup> Many of the contributors to MCCHESENEY & SHUGHART, *supra* note 11, as well as McChesney and Shughart themselves, are among the leading modern critics of antitrust.

<sup>20</sup> *See infra* Part IV.

<sup>21</sup> Some leading modern economic and business historians agree. *See, e.g.*, THOMAS MCCRAW, PROPHETS OF REGULATION 65-66 (1984) (“The trust movement . . . grew out of . . . the problem of periodic industrial overcapacity . . . progress in the technology of production far outran similar developments in . . . consumer purchasing power . . . . The response among businessmen . . . was to combine with one another in schemes designed to limit the total output of their plants, maintain the price levels of their goods, and discourage the entry of new companies into the lines of businesses.”). Alternatively, see NATHAN ROSENBERG & L.E. BIRDZELL JR., HOW THE WEST GREW RICH: THE ECONOMIC TRANSFORMATION OF THE INDUSTRIAL WORLD 215-16 (1986) (“Between 1880 and 1900, the United States was increasing its industrial capacity and altering manufacturing technology

The novelty and unprecedented scale of manufacturers' attempts to forestall competition in the earliest phase of the trust movement during the 1880s incited so much public alarm that Congress was virtually compelled to respond.<sup>22</sup> Congress's response was to enact the Sherman Act.<sup>23</sup> The controversy surrounding the Great Merger Movement then set the context in which successive administrations enforced the Act and in which the Supreme Court ruled in early antitrust cases. But the correlation between those cases and the mergers arose from their common roots in the problematic business conditions that gave birth to the "trust problem," not from the fact that the Supreme Court's decisions caused the mergers.

This Article attempts to offer a more balanced view of the interplay between business conditions at the turn of the twentieth century and the formative developments in American antitrust law. From this perspective, both the Great Merger Movement and early American antitrust jurisprudence were, at their roots, responses to dramatic technological changes and related business innovations that completely transformed the economic foundations of American society in the latter part of the nineteenth century.<sup>24</sup> Indeed, the Supreme Court's earliest antitrust opinions were hardly ill-informed blunders: they were important decisions about the scope of the federal government's powers, and they played a pivotal role in establishing the legal framework for the modern American system of business regulation.<sup>25</sup> In this respect, the debate about whether the Supreme Court's early antitrust opinions caused the Great Merger Movement has only misdirected our attention

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in ways that required extensive replacements of obsolete plants, often with plants of considerably greater size . . . . There was a serious need for new forms of enterprise better able to attract capital . . . . [T]he plausible expedients were tried many times: incorporation, formation of trusts, and, after 1894, mergers, which peaked in 1900 or 1901. Although these produced many enterprises that failed, they also produced a number of large enterprises that proved able to raise the capital required for reconstruction and expansion . . . and a burgeoning American economy emerged from the merger movement ready to take off on a second industrial revolution.").

<sup>22</sup> According to LAMOREAUX, *supra* note 4, at 5, at least 15 books or reports of official investigations and over 35 articles in important periodicals were published on the subject of the trust problem between 1887 and 1890.

<sup>23</sup> For a persuasive argument that the Sherman Act was a response to the widespread alarm over the growing imbalance of power between the large, new corporations and the public interest in the late 19th century, see David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1256, 1276-77 (1988).

<sup>24</sup> See generally HUGHES, *supra* note 2; HUGHES, *supra* note 3; MOWERY & ROSENBERG, *supra* note 3; NOBLE, *supra* note 3.

<sup>25</sup> See *infra* Part IV.

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from the much more important role those opinions played in clarifying and expanding the role of the federal government in the social and economic life of the nation during the twentieth century.

The next section of this Article presents a summary of the conventional law and economics view. The second section reviews the development of the Supreme Court's early antitrust jurisprudence and argues that a careful reading of the cases reveals that the Supreme Court's decisions were considerably more consistent and coherent than some critics have suggested. Unless business firms grossly misunderstood their legal implications, the Supreme Court's decisions simply could not have had the effects that many law and economics scholars have suggested. Indeed, a careful reading of the cases reveals that the central issues had less to do with the interpretation of the Sherman Act than they did with the scope of the federal government's regulatory powers. The third section draws on recent scholarship in economic and business history to offer an alternative, and much more compelling, perspective on the social and economic transformation that occurred around the turn of the twentieth century. From this vantage point, the correlation between the Supreme Court's early antitrust decisions and the Great Merger Movement was largely coincidental. Both the trust movement and the Supreme Court's antitrust decisions were compelled by the same underlying technological and economic forces.

#### I. THE CONVENTIONAL LAW AND ECONOMICS THESIS

The idea that important judicial interpretations of the Sherman Act caused an upswing in merger activity at the turn of the twentieth century has been around almost since the mergers occurred.<sup>26</sup> It has been refined and restated by a number of authors since then, some of whom have

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<sup>26</sup> The roots of the idea reach back to comments made by contemporaneous observers. Tony Freyer, *The Sherman Antitrust Act, Comparative Business Structure, and the Rule of Reason: America and Great Britain 1880-1920*, 74 IOWA L. REV. 991, 1006 (1989), asserts that "[a] leading contemporary lawyer observed that for nearly a decade following [E.C. Knight,] lawyers generally believed that the holding company and other forms of corporate merger were valid under the Sherman Act." The leading contemporary lawyer that Freyer was referring to was probably Robert L. Raymond. See Robert L. Raymond, *The Federal Antitrust Act*, 23 HARV. L. REV. 353, 355 (1910); see also George F. Canfield, *Is a Large Corporation an Illegal Combination or Monopoly Under the Sherman Anti-trust Act?*, 9 COLUM. L. REV. 95, 113 (1909); Gilbert Holland Montague, *The Defects of the Sherman Anti-Trust Law*, 19 YALE L.J. 88, 90 (1909-10). It is interesting to note that Montague was an economist at Harvard. The idea, therefore, has deep roots in the economics profession as well as the legal profession.

relied on increasingly sophisticated theoretical and empirical analyses to elaborate on the basic argument.<sup>27</sup> The basic idea, however, is quite simple and rooted in the notion of economies of scale and the obvious correlation between the timing of certain Supreme Court antitrust decisions and the intensity of turn-of-the-twentieth-century merger activity.

The most compelling and well-known statement of the thesis was made by George Bittlingmayer.<sup>28</sup> Bittlingmayer's articulation of the theory and evaluation of the evidence is, however, far more sophisticated and nuanced than most subsequent authors have acknowledged.<sup>29</sup> As he explained, his "primary aim. . . [was merely]. . . to see whether a reasonable theoretical foundation . . . [could]. . . be constructed for the view that changes in antitrust policy caused the large year-to-year variations in merger activity that took place in the late nineteenth and early twentieth centuries."<sup>30</sup> The first cornerstone of the theoretical foundation that he laid was based on a postulate about antitrust policy: according to Bittlingmayer, *United States v. E.C. Knight*<sup>31</sup> made merger legal, at least in the minds of many lawyers.<sup>32</sup> It presumably led prominent government officials to believe that mergers were legal too, and, therefore, antitrust enforcement after *E.C. Knight* was directed at price-fixing agreements rather than mergers.<sup>33</sup>

Bittlingmayer recognized that the theory requires some explanation as to why so many business firms continued to participate in price-fixing cartels even after *E.C. Knight* was handed down.<sup>34</sup> His explanation was quite nuanced. As he points out, one obvious reason why many business firms might have continued to cooperate through cartels instead of merging, even after *E.C. Knight*, was because cartels were more profitable. As he explained, "firms will prefer cartels to mergers if

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<sup>27</sup> As Bittlingmayer, *supra* note 7, at 91, 99, and 107, notes, early proponents of the idea included JOHN M. CLARK, *SOCIAL CONTROL OF BUSINESS* (1939), LEWIS HANEY, *BUSINESS ORGANIZATION AND COMBINATION* (1913), and ELIOT JONES, *THE TRUST PROBLEM IN THE UNITED STATES* (1921).

<sup>28</sup> Bittlingmayer, *supra* note 7, at 77-78.

<sup>29</sup> Subsequent authors have often summarized Bittlingmayer to imply that the Sherman Act and antitrust enforcement caused the Great Merger Movement. MCCHESENEY & SHUGHART, *supra* note 11, at 4.

<sup>30</sup> Bittlingmayer, *supra* note 7, at 78.

<sup>31</sup> 156 U.S. 1 (1895).

<sup>32</sup> Bittlingmayer, *supra* note 7, at 86.

<sup>33</sup> *Id.* at 87.

<sup>34</sup> *Id.* at 78.

the gains are greater. If there are diseconomies from merger and if the available monopoly gains are not large, the preferred choice may very well be cartelization."<sup>35</sup> In his view, however, this was still too simplistic to explain the motives for cooperation in the late nineteenth century, and so he offered an elaboration on the argument.<sup>36</sup>

Bittlingmayer acknowledged that competition in many manufacturing industries in the late nineteenth century was problematic because significant new technologies had left many business firms in situations where they could avail themselves of economies of scale in production, but only by investing in new capital and expanding their facilities.<sup>37</sup> Unfortunately, if they had all tried to expand the scale of their production facilities simultaneously, their aggregate productive capacity would have been much greater than necessary to supply their markets and, their prices would have fallen even more than their average costs. This was, at heart, a problem of fixed costs: business firms had to sink fixed costs in new plants and equipment or else become uncompetitive; yet if they had all sunk investments in new plants and equipment, none would be able to recoup an acceptable return. Thus, it was not so much the prospect of monopoly profits that compelled them to cooperate as it was the need to seek respite from competition.<sup>38</sup> They initially sought to restrain competition through price-fixing and market-sharing agreements because these offered a more efficient way of doing so than mergers.<sup>39</sup>

Bittlingmayer contends that *E.C. Knight* tipped the balance away from cartels and in favor of mergers.<sup>40</sup> He notes that *E.C. Knight* was immediately "followed by three successive quarters of increased merger

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> This paraphrases Bittlingmayer's argument in more concrete terms than he used in his article. He actually bases his discussion of the problem on the theory of the core, see LESTER G. TELSER, *ECONOMIC THEORY AND THE CORE* (1978), and cites earlier studies of his own on the *Addyston Pipe* case, see George Bittlingmayer, *Decreasing Average Cost and Competition: A New Look at the Addyston Pipe Case*, 25 *J.L. & ECON.* 201 (1982) and George Bittlingmayer, *Price Fixing and the Addyston Pipe Case*, 5 *RES. IN L. & ECON.* 57 (1983).

<sup>38</sup> This description of the business conditions at the turn of the 20th century accords with the views of many contemporaneous observers as well as those of some leading economic and business historians. See MCCRAW, *supra* note 21, at 65-66; ROSENBERG & BIRDZELL, *supra* note 21, at 215-16.

<sup>39</sup> In the end, Bittlingmayer's explanation is more nuanced, but hardly any less tautological.

<sup>40</sup> Bittlingmayer, *supra* note 7, at 97.

activity.”<sup>41</sup> He also notes, however, that the number of mergers per annum abated in 1896 and remained at a relatively modest level in 1897, before increasing dramatically in 1898 and 1899.<sup>42</sup> This coincided almost exactly with the timing of *United States v. Trans-Missouri Freight Ass’n*<sup>43</sup> and *United States v. Joint Traffic Ass’n*,<sup>44</sup> which, according to Bittlingmayer, were the first Supreme Court cases to make price-fixing illegal.<sup>45</sup> Bittlingmayer notes that *Trans-Missouri* was announced in the first quarter of 1897 and that shortly thereafter, merger activity increased to “unprecedented levels.”<sup>46</sup> Although the rate of merger activity tapered off somewhat immediately before the circuit court of appeals’ decision in *United States v. Addyston Pipe & Steel Co.*,<sup>47</sup> it surged with renewed vigor after the decision was announced.<sup>48</sup> Bittlingmayer notes further that merger activity decreased substantially while *United States v. Northern Securities Co.*<sup>49</sup> was being litigated and dropped off significantly after the decision was announced.<sup>50</sup>

It would be entirely wrong to claim that the theory is without empirical support. Indeed, figures compiled by Naomi Lamoreaux show that the number of consolidations in the manufacturing sector rose from four in 1895 to a peak of sixty-three in 1899 before declining again to three in 1904.<sup>51</sup> Moreover, there is some anecdotal evidence that prominent business attorneys may have actually advised their clients to restrain competition through mergers rather than price-fixing cartels in the wake of *E.C. Knight* and *Addyston Pipe*.<sup>52</sup> But there is contradictory evidence as well. In fact, the weight of the evidence against the conventional law and economics view is strong.<sup>53</sup> Moreover, a careful

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<sup>41</sup> *Id.* at 96-97. Bittlingmayer’s merger data are from RALPH L. NELSON, MERGER MOVEMENTS IN AMERICAN INDUSTRY 1895-1956, at 144-53 (1959).

<sup>42</sup> Bittlingmayer, *supra* note 7, at 97.

<sup>43</sup> 166 U.S. 290 (1897).

<sup>44</sup> 171 U.S. 505 (1898).

<sup>45</sup> Bittlingmayer, *supra* note 7, at 77. It is not at all clear, however, that the Supreme Court considered these to be simple price-fixing cases. See *infra* Part III.D.

<sup>46</sup> Bittlingmayer, *supra* note 7, at 97.

<sup>47</sup> 85 F. 271 (6th Cir. 1898).

<sup>48</sup> Bittlingmayer, *supra* note 7, at 97.

<sup>49</sup> 193 U.S. 197 (1904).

<sup>50</sup> Bittlingmayer, *supra* note 7, at 116-17.

<sup>51</sup> LAMOREAUX, *supra* note 4, at 2.

<sup>52</sup> See Freyer, *supra* note 26, at 1004-09.

<sup>53</sup> As Bittlingmayer, *supra* note 7, at 107-10, himself acknowledges, the theory was not the prevalent view among the mainstream of the economics profession at the time he published his article. Prominent studies by leading economists had all cast skepticism on

analysis of the Supreme Court's early antitrust cases brings into question any simple assertions about the role they played in causing the Great Merger Movement.

## II. THE SUPREME COURT'S EARLY ANTITRUST DECISIONS

As James W. Ely, Jr. aptly describes, "the Sherman Act was a compromise written in ambiguous language that provided no guidance as to practical application."<sup>54</sup> As with all ambiguous statutes, therefore, it conferred significant discretionary authority on the judiciary.<sup>55</sup> The ambiguity inherent in the wording of the statute was not, however, the primary cause of uncertainty about antitrust law in the first fifteen years after it was enacted. What is most striking about the Supreme Court's early antitrust decisions is that they primarily addressed constitutional questions.<sup>56</sup> Indeed, the Supreme Court's early antitrust decisions were a watershed in the history of American constitutional law that in many ways laid the groundwork for the expansive role the federal government would later take in regulating the social and economic life of the nation. Ironically, they were decided by the same Court that launched the *Lochner v. New York*<sup>57</sup> era in constitutional jurisprudence. What is most fascinating of all is that some of the challenges to the Sherman Act that the Supreme Court rejected in its early antitrust cases were based on the same type of liberty of contract argument that the Court accepted in *Lochner*.<sup>58</sup>

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the idea. See generally NELSON, *supra* note 41; GEORGE J. STIGLER, *THE ORGANIZATION OF INDUSTRY* (1968); HANS THORELLI, *THE FEDERAL ANTITRUST POLICY* (1955); Jesse W. Markham, *Survey of the Evidence and Findings on Mergers*, in *BUSINESS CONCENTRATION AND PRICE POLICY: A CONFERENCE OF THE UNIVERSITIES — NATIONAL BUREAU COMMITTEE FOR ECONOMIC RESEARCH* (1955).

<sup>54</sup> JAMES W. ELY, JR., *THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888-1910*, at 128 (1995).

<sup>55</sup> The idea that ambiguous statutes confer discretionary authority on the judiciary is an old one. ROBERT COOTER, *THE STRATEGIC CONSTITUTION* 225-31 (2000), has recently given it a new twist: if an ambiguous statute reflects a bargain between legislators who could not agree on more precise language, the judiciary will have significant discretion over the interpretation of the statute because the same legislators will not be able to agree on any revisions that would be necessary to overrule controversial judicial interpretations.

<sup>56</sup> OWEN M. FISS, *8 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910*, at 107 (Stanley N. Katz ed., 1993).

<sup>57</sup> 198 U.S. 45 (1905).

<sup>58</sup> In *Lochner*, of course, the liberty of contract argument was based on a Fourteenth

Prior to the Sherman Act and similar state antitrust legislation, competition between business firms was governed by the common law.<sup>59</sup> Under the common law, only those restraints that the courts determined to be unreasonable were invalid.<sup>60</sup> Restraints that accorded with the public interest were considered reasonable and, therefore, lawful. There was no per se prohibition against price-fixing or other cartel agreements, and even attempts to monopolize were generally valid as long as they fell short of actually preventing or attempting to prevent other firms from competing in the same line of business.<sup>61</sup> The underlying principle was that the law needed only to protect the rights of business owners to compete freely, not that it needed to protect the public from the exercise of market power.<sup>62</sup> The common law jurisprudence was, in these respects, consistent with the priority that many jurists, academics, and elected officials placed on private property rights and the principles of the liberty of contract and laissez-faire economics in the late nineteenth century.<sup>63</sup>

Indeed, it was not at all clear when the Sherman Act was initially enacted whether it would truly revise the common law antitrust standards.<sup>64</sup> Given the Act's ambiguous wording, the only ways in which it clearly superseded the common law were by establishing criminal penalties for certain antitrust violations and allowing civil suits for treble damages.<sup>65</sup> It was far less clear whether the Act was intended to replace the common law reasonableness standard with a stricter rule. Interestingly, Werner Troesken has found that the passage of the Sherman Act had little, if any, impact on the trusts' stock prices.<sup>66</sup> If the

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Amendment right, since the case involved a challenge to a state law. In the Sherman Act cases it was based on a Fifth Amendment due process right, since the Act was a federal statute.

<sup>59</sup> See WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTI-TRUST ACT 18-46* (1965).

<sup>60</sup> *Id.*

<sup>61</sup> As Herbert Hovenkamp, *The Antitrust Movement and the Rise of Industrial Organization*, 68 *TEX. L. REV.* 105, 130 (1989), notes, several state courts in the late 19th century held price-fixing agreements to be valid if the cartel members had acted on a legitimate fear of ruinous competition, and others accepted the ruinous competition defense in challenges to mergers.

<sup>62</sup> MARTIN J. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916*, at 105 (1988).

<sup>63</sup> *Id.* at 104-05.

<sup>64</sup> *Id.* at 105-06.

<sup>65</sup> *Id.*

<sup>66</sup> Werner Troesken, *Did the Trusts Want a Federal Antitrust Law? An Event Study of State Antitrust Enforcement and Passage of the Sherman Act*, in *PUBLIC CHOICE*

Act had been widely expected to impose stricter standards on the trusts' allegedly anticompetitive practices, then their stock prices should have fallen. Troesken argues that many observers felt the Sherman Act would have little effect.<sup>67</sup> It is no surprise, therefore, that the passage of the Sherman Act also appears to have done little to abate the trend toward consolidation.

A. *E.C. Knight and the Manufacturing/Commerce Distinction*

The first serious challenge to a combination under the Sherman Act was not until *United States v. E.C. Knight Co.*<sup>68</sup> In *E.C. Knight*, the government alleged that the American Sugar Company, under the direction of John Searles, Jr., violated the Sherman Act by purchasing the stock, machinery, and real estate of its major four competitors and thus "monopolized the manufacture and sale of refined sugar in the United States, and controlled the price of sugar."<sup>69</sup> By the time the case came up before the Supreme Court, both the circuit court<sup>70</sup> and the circuit court of appeals<sup>71</sup> had already rejected the government's case and held that the Sherman Act did not apply. It should have come as no great surprise, therefore, when the Supreme Court also rejected the government's case.

Chief Justice Fuller wrote the majority opinion for the Court. His opinion did not address whether the Sherman Act's prohibition against "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade. . . ." should be interpreted according to a rule of reason. It simply held that the Sherman Act was intended to apply only so far as the federal government's commerce powers allowed, that the activities at issue in *E.C. Knight* involved the manufacture of sugar, not commerce, and that regulatory control over the manufacture of a product did not fall within the federal government's commerce

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INTERPRETATIONS OF AMERICAN ECONOMIC HISTORY 77, 78 (Jac C. Heckleman et al., eds., 2000).

<sup>67</sup> Werner Troesken, *The Letters of John Sherman and the Origins of Antitrust*, 15 REV. AUSTRIAN ECON. 275, 290 (2002). Troesken cites, for example, an editorial in the *Commercial and Financial Chronicle* on June 8, 1889 that expressed serious concerns about a new Missouri antitrust statute, but noted that "[i]n spite of the fact that [the Sherman Act] is now awaiting the President's signature, little importance seems to be attached to it, as the dealings in Trust stocks have been unusually large this week, and prices in some cases have advanced greatly."

<sup>68</sup> *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

<sup>69</sup> *E.C. Knight* 156 U.S. at 4-5.

<sup>70</sup> *United States v. E.C. Knight Co.*, 60 F. 306 (C.C.E.D. Pa. 1894).

<sup>71</sup> *United States v. E.C. Knight Co.*, 60 F. 934 (3d Cir. 1894).

powers.<sup>72</sup> Thus, the Court strictly bifurcated all economic activities into two categories: manufacturing and commerce. Manufacturing involved the “transformation of raw materials into a change of form for use, . . . [whereas commerce involved] . . . the buying and selling, and the transportation incidental thereto.”<sup>73</sup> The implication was that the Sherman Act did not apply to any contracts, combinations, or conspiracies involved only in the manufacture of a product. In drawing such a sharp distinction between manufacturing and commerce, the Court was, in fact, simply using the words as they were commonly understood in the nineteenth century<sup>74</sup> and in a manner consistent with its own precedents.<sup>75</sup>

Much of the commentary seems to presume that the legal effect of *Knight* was to place all mergers beyond the reach of the Sherman Act, but to leave open the question of its application to price-fixing agreements and other arms-length restraints<sup>76</sup> to be decided in future cases.<sup>77</sup> This is not a logical reading of the case. First of all, the opinion clearly placed any contract, combination, conspiracy, or other restraint against trade beyond the reach of the Sherman Act if it involved only the manufacture of a good, regardless of whether it involved a merger.<sup>78</sup> Thus, any arms-length restraints between competing business firms that extended only to the manufacture of their goods and not to their sale or distribution would clearly have been beyond the reach of the Sherman Act after *E.C. Knight*.

Second, any merger of competing business firms that were clearly engaged in interstate commerce would have fallen within the reach of

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<sup>72</sup> As Justice Fuller summarized in the penultimate paragraph of his opinion, “[t]he subject-matter of the sale was shares of manufacturing stock, . . . yet the act of Congress only authorized the circuit courts to . . . [prevent and restrain] . . . contracts, combinations, or conspiracies in restraint of interstate or international trade or commerce.” *E.C. Knight Co.*, 156 U.S. at 17.

<sup>73</sup> *E.C. Knight*, 156 U.S. at 14 (quoting *Kidd v. Pearson*, 128 U.S. 1, 20 (1888)).

<sup>74</sup> FISS, *supra* note 56, at 114.

<sup>75</sup> *See, e.g.*, *Kidd v. Pearson*, 128 U.S. 1 (1888) (holding that state has right to prohibit manufacture of intoxicating liquors within its borders and that exercise of this right does not conflict with federal commerce powers).

<sup>76</sup> The term “arms-length restraints” refers to looser forms of cooperation, such as price-fixing agreements or producer association agreements that do not involve a merger of the parties’ property interests.

<sup>77</sup> *See, e.g.*, Bittlingmayer, *supra* note 7, at 87 (“One widespread interpretation of *Knight* was that merger was legal”). Bittlingmayer is careful to point out, however, that this may not be the correct interpretation of the case. *Id.*

<sup>78</sup> *E.C. Knight Co.*, 156 U.S. at 10.

the Sherman Act, unless its reach was limited by some other constitutional doctrine (such as the liberty of contract) or by a rule of reason interpretation of the wording of the Sherman Act.<sup>79</sup> Thus, a merger of two competing interstate retailers or, perhaps more importantly for the time, two competing interstate railroad companies,<sup>80</sup> would have fallen within the reach of the Sherman Act, assuming it was not immune by virtue of some other constitutional argument. Of course, it was not clear whether the Sherman Act would have made such mergers unlawful, since the Court left the interpretation of the Sherman Act's wording open to be decided in future cases.<sup>81</sup>

Finally, although *E.C. Knight* drew a sharp line between manufacturing and commerce and held that manufacturing was not interstate commerce, it did not hold that all commerce was *interstate* commerce.<sup>82</sup> Logically, therefore, *E.C. Knight* implied that any contracts, combinations, conspiracies, or other restraints of trade that extended only to local commerce and not interstate commerce would also be beyond the reach of the Sherman Act.

Some writers have made too much of *E.C. Knight's* distinction between manufacturing and commerce.<sup>83</sup> As William Letwin has observed, Justice Fuller's opinion actually suggested that the real problem with the government's case was the manner in which it had tried to prove a violation of the Sherman Act.<sup>84</sup> The government attempted to prove its case merely by adducing evidence of a merger of manufacturing plants.<sup>85</sup> If it had also adduced evidence of the direct effect of the merger on the companies' commercial activities, it might have defeated the constitutional challenge and won the case. As Justice Fuller wrote,

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<sup>79</sup> As Fuller explained, "the monopoly and restraint denounced by the act are the monopoly and restraint of interstate and international trade or commerce . . . . The fundamental question is whether . . . monopoly can be directly suppressed under the act of Congress in the mode attempted by this bill." *Id.* at 10-11.

<sup>80</sup> The Court had already determined that railroads were instruments of interstate commerce. See discussion *infra* Part III.A.

<sup>81</sup> As Fuller explained, "[i]n the view which we take of the case, we need not discuss whether . . . because . . . aggregations of capital may reduce prices, . . . the objection to concentration of power is relieved; or, because others were theoretically left free to go into the business, . . . no objectionable restraint was imposed." *E.C. Knight Co.*, 156 U.S. at 10-11.

<sup>82</sup> Indeed, Fuller explicitly acknowledged the power of the states to regulate restraints of trade in intrastate commerce. *Id.*

<sup>83</sup> This is particularly the case among proponents of the conventional law and economics theory about the Great Merger Movement. See Bittlingmayer, *supra* note 7, at 88.

<sup>84</sup> LETWIN, *supra* note 60, at 165.

<sup>85</sup> *Id.*

“[t]here was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact . . . that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree.”<sup>86</sup> It is reasonable to surmise, therefore, that Justice Fuller’s opinion “depended strictly on the facts of the case”<sup>87</sup> and was not intended to construe the scope of the Sherman Act as narrowly as some writers have suggested.

There is little, if any, evidence that contemporary observers believed *E.C. Knight* would make all mergers immune from antitrust prosecution. The *New York Times* reported on the decision the day after it was announced in an article subtitled, *Congress May Not Regulate Those Acts of Corporations Done Wholly Within A Single State*.<sup>88</sup> The article stated the holding accurately and quoted from the opinion at length. Moreover, although the *Times* provided substantial coverage of the business and financial news at the time, it did not subsequently print any articles that suggested *E.C. Knight* caused an upswing in merger activity. Of course, even the clearest of opinions can be subjected to ill-informed criticism, and so it was inevitable that some ambiguity about the legal effect of the case would persist. Nonetheless, there was probably less confusion about the legal effect of *E.C. Knight* than some writers have assumed.<sup>89</sup> As Augustine L. Hines succinctly summarized in the *Harvard Law Review* just after the turn of the century, “nothing more was decided than that a monopoly of manufacture was not within the statute [the Sherman Act] and, therefore, was not void.”<sup>90</sup>

### B. Trans-Missouri and the Plain Meaning Doctrine

*United States v. Trans-Missouri Freight Ass’n* was the next Supreme Court antitrust case.<sup>91</sup> In *Trans-Missouri*, the government alleged that several competing railway companies formed an association for the

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<sup>86</sup> *E.C. Knight Co.*, 156 U.S. at 17 (emphasis added).

<sup>87</sup> LETWIN, *supra* note 60, at 165.

<sup>88</sup> *A Sugar Trust Victory*, N.Y. TIMES, Jan. 22, 1895, at 16.

<sup>89</sup> Bittlingmayer’s claim that *E.C. Knight* was widely interpreted to mean that mergers were legal seems highly dubious. See Bittlingmayer, *supra* note 7, at 87-88. Indeed, the contemporary sources that he cites appear to have been fully aware that the Court’s decision in *E.C. Knight* rested on the manufacturing/commerce distinction and that the opinion did not, therefore, imply that all mergers were beyond the scope of the Sherman Act or that they would necessarily be legal if they were within its scope. *Id.* at 88.

<sup>90</sup> Augustine L. Hines, *The Power of Congress over Combinations Affecting Interstate Commerce*, 17 HARV. L. REV. 83, 90 (1903-04).

<sup>91</sup> 166 U.S. 290 (1897).

express purpose of “maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local.”<sup>92</sup> The circuit court for the district of Kansas dismissed the complaint,<sup>93</sup> and the Eighth Circuit affirmed.<sup>94</sup> Justice Peckham, who wrote the majority opinion for the Court, summarized the case as presenting two questions: “first, whether the . . . [Sherman Act] . . . applies to and covers common carriers by railroad; and . . . second, does the agreement set forth in the bill violate any provision of that act?”<sup>95</sup>

The response to the first question was a resounding “yes.” In its defense, Trans-Missouri Freight argued that railroad transportation was not interstate commerce<sup>96</sup> and that, even if it was, it was exempted from the reach of the Sherman Act by the Interstate Commerce Act. Of course, the fact that the federal government had already used the Interstate Commerce Act to regulate the railroads undermined Trans-Missouri Freight’s argument. Justice Peckham put the matter bluntly: “Railroad companies are instruments of commerce, and their business is commerce itself.”<sup>97</sup> Thus, if railroad companies engaged in transportation across state lines, they were then engaged in interstate commerce and their activities would be within the reach of the Sherman Act.<sup>98</sup> This was perfectly consistent with *E.C. Knight* as well as the prior Supreme Court cases construing railroad companies as instruments of commerce.<sup>99</sup>

Trans-Missouri Freight argued further that, even if interstate railroad transportation did fall within the scope of the federal government’s commerce powers, the Interstate Commerce Act had authorized the agreement at issue and Congress could not have intended to repeal that authorization through the Sherman Act.<sup>100</sup> More specifically, since Congress must have been aware of agreements similar to the one that involved the Trans-Missouri Freight Association, and since Congress did not explicitly repeal any part of the Interstate Commerce Act when it enacted the Sherman Act, Congress must have intended to exclude

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<sup>92</sup> *Trans-Missouri Freight Ass’n*, 166 U.S. at 292.

<sup>93</sup> *United States v. Trans-Missouri Freight Ass’n*, 53 F. 440 (C.C.D. Kan. 1892).

<sup>94</sup> *United States v. Trans-Missouri Freight Ass’n*, 58 F. 58 (8th Cir. 1893).

<sup>95</sup> *Trans-Missouri Freight Ass’n*, 166 U.S. at 311-12.

<sup>96</sup> *Id.* at 312.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 313.

<sup>99</sup> Peckham cited *Tel. Co. v. Texas*, 105 U.S. 460 (1881), and *State Freight Tax Case*, 15 U.S. 232, 275 (1873).

<sup>100</sup> *Trans-Missouri Freight Ass’n*, 166 U.S. at 314.

agreements of that type from the Sherman Act's reach.<sup>101</sup> In response to this argument, Justice Peckham simply denied that the Interstate Commerce Act had authorized agreements of the type that the Trans-Missouri Freight Association had made.<sup>102</sup> This was also completely uncontroversial.

Justice Peckham then turned to the second question — whether the Trans-Missouri Freight Association had violated the Sherman Act. Here the dispositive issue was if the wording of the Act would be construed according to its plain meaning, or if it would be construed against the backdrop of the common law, which traditionally applied a reasonableness standard in determining whether contracts in restraint of trade were unlawful.<sup>103</sup> As Peckham noted, the lower courts had proceeded on the theory that Congress intended the Sherman Act to follow the common law and had made an exhaustive investigation into the general rules that should guide courts in determining whether contracts unreasonably restrain trade and, therefore, violate public policy.<sup>104</sup> Peckham observed, however, that even under the theory that Congress had not intended to supplant the common law reasonableness standard, the railroad companies were still “public corporations . . . [that had been] . . . granted valuable franchises and privileges” to provide services of a “public nature,”<sup>105</sup> and for that reason “Congress . . . might . . . have deliberately decided to prohibit all agreements and combinations in restraint of trade or commerce [among railroad companies], regardless [of] . . . whether such agreements were reasonable.”<sup>106</sup>

Ultimately, however, further consideration of the matter was unnecessary, because Peckham decided that the wording of the Sherman Act should be interpreted literally.<sup>107</sup> He argued that if a literal interpretation of the Act would result in the collapse of the railroads, it

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<sup>101</sup> *Id.* at 314.

<sup>102</sup> As Peckham bluntly put it, “in our opinion the commerce act does not authorize an agreement of this nature.” *Id.* Peckham elaborated on the Court's opinion in some detail, addressing the nuances of statutory interpretation, but concluding that the Court saw nothing that could lead it to believe railroads were excluded from the Sherman Act. *Id.* at 314-26.

<sup>103</sup> *Id.* at 327.

<sup>104</sup> *Id.* at 328.

<sup>105</sup> *Id.* at 332-33.

<sup>106</sup> *Id.* at 335.

<sup>107</sup> As Peckham explained, “when the lawmaking power speaks upon a particular subject, over which it has constitutional power to legislate, public policy . . . is what the statute enacts.” *Id.* at 340.

was Congress's responsibility to amend it. In Peckham's view, "Congress may, and very probably did share in the belief . . . [that] . . . when the lawmaking power speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such a case is what the statute enacts."<sup>108</sup> Since there was no doubt that the effect of the association's agreement was to put a direct and immediate restraint upon trade<sup>109</sup> and since the plain meaning of the Sherman Act made such restraints illegal, the matter was sealed. Peckham dispensed with a few remaining procedural matters and remanded the case back to the circuit court.

Peckham's application of the plain meaning doctrine in *Trans-Missouri* was the only truly novel legal development in the case. The Court's holding that railroad companies that engaged in interstate transportation were involved in interstate commerce and therefore within the reach of the Sherman Act was entirely predictable.<sup>110</sup> The legal effect of *Trans-Missouri*, therefore, was to imply that all contracts, combinations, conspiracies, and other restraints of trade were illegal if they were between parties involved in interstate commerce and therefore within the reach of the Sherman Act. Presumably, this made all mergers between horizontal competitors involved in interstate commerce illegal, as well as all price-fixing agreements and other arms-length restraints of trade. For some reason, however, many commentators have treated *Trans-Missouri* as if it was merely a price-fixing case.<sup>111</sup> Indeed, some commentators have mistakenly concluded that the legal effect of *Trans-Missouri* was to establish a per se rule against price-fixing agreements.<sup>112</sup>

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<sup>108</sup> *Id.*

<sup>109</sup> It was significant that Justice Peckham used the words "direct" and "immediate" to characterize the manner in which the association restrained trade. *Id.* at 342. It is not clear whether he meant this to limit the reach of the Court's holding, but it is interesting that he subsequently used the same words to qualify the Court's holding in *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 560-61 (1998). See discussion *infra* Part III.D.

<sup>110</sup> Peckham explained this in the simplest terms: "Transporting commodities is commerce, and if from one State to or through another it is interstate commerce." *Trans-Missouri Freight Ass'n*, 166 U.S. at 325. It was indisputable that railroads had already been the subject of federal legislation; indeed, *Trans-Missouri* had argued that prior federal legislation exempted the railroads from the Sherman Act. *Id.* at 314.

<sup>111</sup> See Bittlingmayer, *supra* note 7, at 77.

<sup>112</sup> Most of the adherents to the conventional law and economics view, for instance, assume that the legal effect of *Trans-Missouri* was to make price-fixing agreements and cartels illegal per se. See Bittlingmayer, *supra* note 7, at 77. This view, however, is not confined to law and economics scholars. For instance, Sklar argues that *Trans-Missouri* inaugurated a period in antitrust jurisprudence in which all restraints of trade, including price-fixing agreements, were illegal per se. See SKLAR, *supra* note 63, at 128-29.

It is important to emphasize that *Trans-Missouri* did not extend the reach of the Sherman Act to restraints of trade in local commerce, and so price-fixing agreements would have still been legal (assuming they were not in violation of a state law) as long as they did not affect interstate commerce. This is hardly an academic point, as the next case illustrates.

C. *An Elaboration on the Manufacturing/Commerce Distinction*

On the same day that the Supreme Court announced its decision in its next famous antitrust case, *United States v. Joint Traffic Ass'n*,<sup>113</sup> it also announced its decision in a much less well-known case, *Hopkins v. United States*.<sup>114</sup> *Joint Traffic* is usually regarded as an important further step in the Supreme Court's early antitrust jurisprudence, but *Hopkins* usually goes overlooked.<sup>115</sup> That is unfortunate because *Hopkins* helps to put both *Trans-Missouri* and *Joint Traffic* in a clearer focus. *Hopkins* involved a suit against members of the Kansas City Livestock Exchange that alleged that some of the rules governing the exchange were intended to restrain trade and create a monopoly.<sup>116</sup> The suit alleged that members of the exchange refused to trade with nonmembers and forced livestock owners who would not trade through exchange members to ship their livestock elsewhere, in order to sustain exorbitant commissions.<sup>117</sup>

Justice Peckham once again wrote the majority opinion. He began by noting that the Sherman Act only prohibited restraints of trade in interstate commerce.<sup>118</sup> Peckham noted further that the Kansas City Livestock Exchange operated in Kansas City and its members were in the business of buying and selling livestock only as commission merchants.<sup>119</sup> In his view, therefore, the nature of the defendants' business needed to be determined entirely from their activities in Kansas City.<sup>120</sup> He then asked whether the members of the exchange, acting as

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<sup>113</sup> 171 U.S. 505 (1898).

<sup>114</sup> 171 U.S. 578 (1898).

<sup>115</sup> That may be because *Hopkins* requires a more complicated theory. In the conventional view, *E.C. Knight* exempted mergers from the Sherman Act and *Trans-Missouri* and *Joint Traffic* made price-fixing illegal per se. *Hopkins* requires a more nuanced theory. Bittlingmayer, *supra* note 7, at 87-88 n.17, summarizes *Hopkins* as a case that "followed" *E.C. Knight*. That is certainly true, but it involved price-fixing rather than a merger, and the defendants were commission merchants, not manufacturers.

<sup>116</sup> *Hopkins*, 171 U.S. at 581-82.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 586.

<sup>119</sup> *Id.* at 588.

<sup>120</sup> *Id.*

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commission merchants in Kansas City for out-of-state livestock owners, could be said to be engaged in interstate commerce.<sup>121</sup> His answer: “We think not. On the contrary, we regard the services as collateral to such commerce; . . . and an agreement among those who render the services . . . is not a contract in restraint of interstate trade or commerce.”<sup>122</sup>

Peckham elaborated by attempting to draw the line between restraints of trade in interstate and local commerce. He argued that, while the sale of an article that has been sent into the state from another state might be regarded as an interstate sale, the services of a commission merchant involved in the sale should not be considered a part of interstate commerce.<sup>123</sup> As he explained, “Charges for services of this nature do not immediately touch or act upon, nor do they directly affect, the subject of the transportation . . . . [T]hey may enhance the cost to the owner of the cattle in finding a market, or they may add to the price paid by a purchaser, but they are not charges which are directly laid upon the article . . . .”<sup>124</sup> In Peckham’s view, the Sherman Act condemned only those restraints of trade whose direct and immediate effect was upon interstate commerce, and to condemn restraints of trade in the provision of services which were only collateral to interstate commerce “would enlarge the application of the act far beyond the fair meaning of the language used.”<sup>125</sup>

Having dispensed with the suit on Commerce Clause grounds, Peckham declined to address the defendants’ liberty of contract challenge to the suit or the substance of the allegations.<sup>126</sup> *Hopkins* is important nonetheless because it clearly illustrates that the definition of interstate commerce by the Fuller Court was not simply “everything other than manufacturing,” and that there was, in fact, an important distinction between local and interstate commerce that potentially placed many other types of business activities beyond the reach of the Sherman Act. In this light, it is simply wrong to think that the Sherman Act provided a per se rule against price-fixing after *Trans-Missouri*. Since the line between restraints of trade that directly affected interstate commerce and those merely collateral to it was less than crystal clear, in many cases it may not have been obvious whether *Trans-Missouri* made a particular

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 590.

<sup>124</sup> *Id.* at 591.

<sup>125</sup> *Id.* at 592.

<sup>126</sup> *Id.* at 603-04.

price-fixing agreement illegal. In some cases, business firms that were parties to price-fixing agreements may have wondered whether they too might have been able to convince a court that their activities were only collateral to, and therefore not in direct restraint of, interstate commerce.

It is interesting how little attention *Hopkins* received in comparison to the Court's decision in *Joint Traffic*, which was announced on the same day.<sup>127</sup> This is probably due in some part because the Court's decision in *Hopkins* was completely consistent with its earlier holding in *E.C. Knight*, but it is probably due in larger part because railroad competition at the turn of the twentieth century was a far more important matter to almost everyone than the commissions earned by livestock traders.<sup>128</sup> Regardless, the Court's legal holding in *Hopkins* was simply not controversial.

#### D. Joint Traffic: An Elaboration on the Plain Meaning Doctrine

According to the conventional view, *Joint Traffic* entrenched the per se rule against price-fixing even deeper and thus provided a further stimulus to mergers.<sup>129</sup> But nothing could be further from the truth. For one thing, nothing in the opinion should have led anyone to believe that it pertained only to price-fixing agreements and not also mergers. Moreover, nothing in the opinion suggested the Court would interpret the scope of the federal government's commerce powers more broadly than in *E.C. Knight* or *Hopkins* and, therefore, extend the reach of the Sherman Act. In fact, *Joint Traffic* was perfectly consistent with both *E.C. Knight* and *Hopkins*. That should be no surprise, since it was announced on the same day as *Hopkins* and both opinions were written by Justice Peckham. The only plausible reading of *Joint Traffic* indicates that, if anything, it actually interpreted the wording of the Sherman Act less literally and, therefore, more forgivingly than *Trans-Missouri*.

The case involved an agreement between thirty-one railroad

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<sup>127</sup> The *New York Times* reported on *Hopkins* in a single column that also reported on the Court's decision in *Anderson v. United States*, 171 U.S. 604 (1898). The same edition of the newspaper was awash with coverage of the Court's decision in *Joint Traffic*. See *The Anti-Trust Law*, N.Y. TIMES, Oct. 25, 1898, at 8.

<sup>128</sup> In his *Trans-Missouri* opinion, Justice Peckham specifically noted that "[t]he business which the railroads do is of a public nature, closely affecting almost all classes in the community — the farmer, the artisan, the manufacturer, and the trader." *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 333 (1897).

<sup>129</sup> As Bittlingmayer, *supra* note 7, at 90, explains, however, *Joint Traffic* had less impact, probably either because it was expected or because legislation authorizing railroad cartels was expected.

companies that operated between Chicago and the Atlantic coast.<sup>130</sup> Although the preamble to the agreement stated that its objective was to “aid in fulfilling the purpose of the Interstate Commerce Act,”<sup>131</sup> the suit alleged that the association formed by the agreement exercised control over the members’ rates, fares, and charges in restraint of trade.<sup>132</sup> Any member that deviated from the rates, fares, and charges mandated by the association was liable for a fine of an amount in proportion to the gross receipts earned by the member in deviating.<sup>133</sup> The Joint Traffic Association made three arguments in its defense: first of all, that its agreement was different than the one in *Trans-Missouri* and that the *Trans-Missouri* precedent therefore should not control; second, that the Sherman Act, as construed in *Trans-Missouri*, interfered with the “liberty of the individual” and violated the due process rights guaranteed by the Fifth Amendment of the U.S. Constitution; and third, that the holding in *Trans-Missouri* was “plainly erroneous” and would have “far-reaching and disastrous” consequences, and should therefore be reconsidered.<sup>134</sup>

Justice Peckham began by rejecting the argument that *Trans-Missouri* should not control the case.<sup>135</sup> He then moved to the defendant’s constitutional challenge to the Sherman Act. This was the only novel legal question raised by the case. Peckham astutely noted, however, that the fact the liberty of contract argument had not been raised in *Trans-Missouri*, in spite of the similarities between the two cases, was “strong evidence that the reasons showing the invalidity of the act as construed do not lie on the surface.”<sup>136</sup> Nonetheless, Peckham addressed the issue at some length.<sup>137</sup> In response to the claim that, as construed in *Trans-Missouri*, the Sherman Act would prohibit contracts as innocuous as a partnership agreement or the sale of the goodwill of a business with a noncompetition clause, Peckham cited *Hopkins*:

[W]e have said that the statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce . . . . The effect upon interstate commerce must not be indirect or

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<sup>130</sup> United States v. Joint Traffic Ass’n, 171 U.S. 505, 506 (1898).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 508.

<sup>134</sup> *Id.* at 559.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 566.

<sup>137</sup> As Peckham noted, although the argument was not obvious, the fact that it had not been raised in *Trans-Missouri* meant there was no controlling authority on the question. *Id.*

incidental only . . . . To suppose, as is assumed by counsel, that the effect of the decision in the *Trans-Missouri* case is to render illegal most business contracts or combinations . . . is to make a most violent assumption, and one not called for or justified by the decision mentioned . . . .<sup>138</sup>

This is important because it clearly indicates that Justice Peckham believed that *Hopkins* significantly restricted the application of the Sherman Act. According to the Court's plain meaning interpretation of the Act, all contracts within its reach and in restraint of trade were illegal, but the Act reached only those contracts that had a direct, rather than merely an incidental, effect on interstate commerce. At the time, the scope of the Act's reach was hardly clear, but there was certainly no question, especially after *Trans-Missouri*, that it applied to an association of railroad companies engaged in interstate railroad transportation.<sup>139</sup> Although the scope of the federal government's commerce powers was not really an issue in the case, Peckham's dicta nonetheless suggests that the limits on the federal government's commerce powers provided a check against the Court's otherwise sweeping application of the Act.<sup>140</sup>

Peckham's aside on the scope of the Sherman Act did not, however, address the main thrust of Joint Traffic's liberty of contract argument. In rebutting it, Peckham cited established constitutional doctrine: the power to regulate commerce had no limitation other than those prescribed in the constitution, but it did not imply the right to destroy or impair other guarantees which had also been placed in the constitution or any of the amendments to it.<sup>141</sup> Justice Peckham noted that there were many kinds of contracts not protected by the liberty of contract rights guaranteed under the constitution.<sup>142</sup> The question, in his view, therefore, was ultimately "whether the statute under review was a legitimate exercise of the power of congress over interstate commerce."<sup>143</sup> If it was, then it superceded any liberty of contract rights. Since the Court had already established that the Sherman Act was a legitimate

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<sup>138</sup> *Id.* at 568.

<sup>139</sup> See discussion *supra* Part III.B.

<sup>140</sup> Peckham noted that, in *Hopkins*, the Court held that "the statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce, and that to treat the act as condemning all agreements . . . would enlarge the application of the act far beyond the fair meaning of the language used." *Joint Traffic Ass'n*, 171 U.S. at 568.

<sup>141</sup> *Id.* at 571.

<sup>142</sup> *Id.* at 572-73.

<sup>143</sup> *Id.* at 573.

exercise of federal commerce powers, Peckham thus dispensed with the liberty of contract defense.<sup>144</sup> Of course, it is well to keep in mind that the Court's holding would have precluded the use of that defense in a suit against any restraint of trade in interstate commerce, whether the restraint was in the form of a price-fixing agreement or a merger.

Having dispensed with the liberty of contract argument, Justice Peckham then turned to a reconsideration of the literal interpretation of the Sherman Act in *Trans-Missouri*.<sup>145</sup> He noted that it was unusual for the Court to reconsider a question it had decided so recently, but that the decision had been a close one, with four members dissenting.<sup>146</sup> He also noted, however, that because the decision had been close, the Court had carefully reconsidered its holding subsequent to *Trans-Missouri Freight's* petition for a rehearing and denied the petition.<sup>147</sup> Peckham observed that Joint Traffic had not presented any new arguments on the matter, but merely argued that the Court had made an error.<sup>148</sup> Although it was highly unusual for the Court to reconsider the same arguments for a third time, it did so because of the "eminence of the counsel engaged, their earnestness and zeal, their evident belief in the correctness of their position, and . . . the very grave nature of the questions argued."<sup>149</sup>

As a formal matter, the Court declined to modify its literal interpretation of the Sherman Act.<sup>150</sup> Justice Peckham's reasoning, however, is particularly interesting. He noted that counsel for Joint Traffic were ready to concede that the agreement would have been in restraint of trade, and therefore illegal, if competition and commerce were identical — that is, merely alternative words for the same thing.<sup>151</sup> They contended, however, that competition and commerce were not identical and that an agreement such as the one in the case could restrain competition without restraining commerce.<sup>152</sup> The Court "entirely" agreed.<sup>153</sup> As Peckham explained, "[t]he material considerations

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<sup>144</sup> This was especially compelling because Peckham, who was appointed to the Court after it handed down its decision in *E.C. Knight*, brought to it one of the strongest commitments to the liberty of contract of any of the Justices. See FISS, *supra* note 56, at 119.

<sup>145</sup> *Joint Traffic Ass'n*, 171 U.S. at 573.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 574.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 575.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 575-76.

<sup>153</sup> *Id.* at 575.

therefore turn upon the effects of competition upon the business of railroads — whether they are favorable to the commerce in which the railroads are engaged, or unfavorable, and in restraint of that commerce.”<sup>154</sup>

Peckham thus acknowledged that the Sherman Act was directed at restraints of commerce and not restraints of competition. He also acknowledged that the distinction was meaningful and that a restraint of competition might not be a restraint of commerce.<sup>155</sup> He then undertook a careful critique of the argument that the association in *Joint Traffic* was not a restraint of commerce. According to the association’s counsel, competition between the railroads was “ruinous” and would only result in the “utter destruction . . . of the weaker roads,” after which the lone survivor of the competition would raise its rates.<sup>156</sup> Peckham argued, however, that “[t]he natural, direct, and immediate effect of competition is . . . to lower rates, . . . and an agreement whose first and direct effect is to prevent this play of competition restrains, instead of promoting, trade and commerce.”<sup>157</sup> He then noted that whether competition between the railroads would be destructive and lead to a “war to the death” was uncertain and stated the Court’s holding: “[A]n agreement of the nature of this one, which directly and effectually stifles competition, must be regarded under the statute as one in restraint of trade, notwithstanding there are possibilities that a restraint of trade may also follow competition . . . .”<sup>158</sup> This was an important rejection of the ruinous competition argument.

Nonetheless, the Court’s holding in *Joint Traffic* hardly seems like a per se prohibition against price-fixing agreements or, for that matter, a per se prohibition of any kind at all. For one thing, the wording was qualified — it only made restraints that *directly and immediately* lessened competition illegal, and it did not clarify exactly how far the holding would extend to other cases. In this respect, Peckham’s opinion was

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<sup>154</sup> *Id.* at 575-76.

<sup>155</sup> The distinction, in Peckham’s view, turned on “the effects of competition upon the business of railroads — whether they are favorable to the commerce in which the roads are engaged, or unfavorable, and in restraint of that commerce.” *Id.* at 575. Thus, Peckham implicitly recognized the legitimacy of the ruinous competition argument. As he explained it, “A ruinous competition is . . . apt to be carried on until the weakest of the combatants goes to destruction. After that the survivor . . . proceeds to raise its price as high as the business will bear.” *Id.* at 576.

<sup>156</sup> *Id.* at 577.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

consistent with his opinion in *Trans-Missouri*, in which he also used the words “direct” and “immediate” to characterize the nature of the illegal restraints in that case.<sup>159</sup> Moreover, although the opinion appears to have clearly rejected the argument that a restraint of competition was not a restraint of commerce on the grounds that competition would be ruinous or destructive, it seemed to leave the door open to other arguments that restraints of competition might not be restraints of commerce.

*E. Restraints of Competition v. Restraints of Commerce*

As it turned out, on the same day that Justice Peckham delivered the opinions of the Court in *Hopkins* and *Joint Traffic*, he also delivered the Court’s opinion in another less well-known case, *Anderson v. United States*.<sup>160</sup> *Anderson* bore a striking resemblance to *Hopkins* and also arose out of activities at the Kansas City stockyards, but it was actually decided as a matter of statutory interpretation rather than on constitutional grounds.<sup>161</sup> In *Anderson*, the government sued a voluntary unincorporated association called the Traders’ Livestock Exchange that had been formed for the stated purpose of “organizing and maintaining a business exchange, not for pecuniary profit or gain, but to promote and protect all interest connected with the buying and selling of livestock at the Kansas City stock yards.”<sup>162</sup> The government alleged that the real purpose of the exchange was to prevent nonmembers from buying or selling livestock at the Kansas City yards and that this “interfered with, hindered, and restrained”<sup>163</sup> trade in cattle. Its allegations were supported by affidavits from cattle traders who had been prevented from trading in the Kansas yards because they were not members of the exchange.<sup>164</sup> Other affidavits introduced into evidence testified that the exchange had improved the integrity of stock trading in the Kansas yards and, therefore, actually increased the volume of trades.<sup>165</sup>

The Court held that it was unnecessary to decide whether the

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<sup>159</sup> William Letwin argues that, in spite of the common wording, *Joint Traffic* probably did signal a loosening of the Court’s literal interpretation of the Sherman Act in *Trans-Missouri*. See LETWIN, *supra* note 60, at 180.

<sup>160</sup> 171 U.S. 604 (1898).

<sup>161</sup> As Peckham explained, the case was decided based upon “the plain and obvious construction upon the act.” *Id.* at 616.

<sup>162</sup> *Id.* at 611.

<sup>163</sup> *Id.* at 607.

<sup>164</sup> *Id.* at 608.

<sup>165</sup> *Id.* at 609-10.

agreement was within the reach of the Sherman Act on constitutional grounds because it was not one in restraint of trade.<sup>166</sup> Justice Peckham drew an analogy between a state's right to take actions that affected interstate commerce without regulating it (and, therefore, encroaching on the federal government's commerce powers) and the right of persons engaged in the same line of business to regulate their conduct without restraining trade.<sup>167</sup> As he put it, "[i]f an agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though only indirectly and unintentionally, affect interstate trade or commerce, . . . we think the agreement would be good."<sup>168</sup> Justice Peckham distinguished the agreement among the livestock exchange members from the agreements in other cases that the courts had found illegal under the Sherman Act on the grounds that the others all involved price-fixing (it is interesting, however, that Justice Peckham did not list either *Trans-Missouri* or *Joint Traffic* among these price-fixing cases).<sup>169</sup> In contrast, he noted "[t]his association does not meddle with prices" and "has no direct tendency to diminish, or in any way impede or restrain, interstate commerce."<sup>170</sup>

*Anderson* illustrated that the Court's limitation of the Sherman Act to *direct* restraints of trade in interstate commerce was substantive. It corroborated the distinction the Court had drawn in *Joint Traffic* between restraints of competition and restraints of interstate commerce.<sup>171</sup> Justice Peckham's dicta seemed to imply that price-fixing agreements were always direct restraints of trade and, therefore, illegal *per se*, but the opinion did not otherwise help to distinguish where the Court would draw the line between direct and indirect restraints.<sup>172</sup> *Anderson* also

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<sup>166</sup> *Id.* at 615.

<sup>167</sup> *Id.* at 616.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 617.

<sup>170</sup> *Id.*

<sup>171</sup> In *Joint Traffic*, the Court acknowledged that agreements to restrain "ruinous" competition were conceptually different from and therefore, at least arguably, not necessarily in restraint of commerce. *Joint Traffic Ass'n*, 171 U.S. at 576-77. It nonetheless held, on the weight of the arguments, that they should always be considered in restraint of commerce and thus rejected the ruinous competition defense. *Id.* at 577. In *Anderson*, the Court acknowledged that agreements to restrain dishonest and unethical dealing through the rules and regulations of an association of traders were also, at least arguably, not necessarily in restraint of commerce. *Anderson*, 171 U.S. at 615-16. Indeed, it held that the agreement was not in restraint of commerce in that case. *Id.* at 617.

<sup>172</sup> Peckham noted that the case differed "radically" from those which "provided for fixing the prices of the articles dealt in" and emphasized that the association in *Anderson*

suggests, however, that the Court did not regard either *Trans-Missouri* or *Joint Traffic* as simply price-fixing cases since Peckham did not include them among the examples of price-fixing cases he cited in the opinion.<sup>173</sup> In fact, Peckham did not use the terms “price-fixing” or “cartel” in either of those opinions. More importantly, there was nothing in Peckham’s *Trans-Missouri*, *Joint Traffic*, or *Anderson* opinions to suggest that mergers would not also be considered direct restraints of trade or that the Sherman Act would apply less ruthlessly to mergers than to any other direct restraints of trade.

In the wake of *Joint Traffic*, therefore, the Supreme Court interpreted the Sherman Act to mean that all direct restraints of trade that directly affected interstate commerce were illegal. This would have excluded contracts, combinations, and conspiracies in direct restraint of trade that extended only to manufacturing activities or local (not interstate) commerce, as the Court had held in *E.C. Knight* and *Hopkins*, but it would have included any contracts, combinations, and conspiracies that directly restrained trade and directly affected interstate commerce. Dicta in *Anderson* implied that all price-fixing agreements would be construed as direct restraints on trade, but it also implied that neither *Trans-Missouri* nor *Joint Traffic* had been construed as simply price-fixing cases. Nonetheless, the Court clearly held that the association agreements in question in each of those cases directly restrained trade. The cumulative effect of all the Supreme Court cases from *E.C. Knight* through *Joint Traffic* was to establish that any price-fixing agreements, association agreements like the ones in *Trans-Missouri* and *Joint Traffic*, or any other direct restraints of trade would be illegal if they directly affected interstate commerce.

#### F. *Railroad Consolidations After Trans-Missouri and Joint Traffic*

By the time *Trans-Missouri* and *Joint Traffic* were announced, the Great Merger Movement was well under way.<sup>174</sup> Bittlingmayer contends that “[a]lthough some railroad consolidations had been undertaken in the mid-1890s, their number increased sharply after the *Trans-Missouri* and *Joint Traffic* decisions.”<sup>175</sup> He observes that this was consistent with the

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“does not meddle with prices.” *Anderson*, 171 U.S. at 617.

<sup>173</sup> *Id.*

<sup>174</sup> LAMOREAUX, *supra* note 4, at 1, identifies the first year of the Great Merger Movement as 1895. This is also the first year for which Ralph Nelson began collecting data on the turn-of-the-century mergers. See NELSON, *supra* note 41, at 13.

<sup>175</sup> Bittlingmayer, *supra* note 7, at 100.

view that the Supreme Court drove the railroads (and presumably others) away from looser forms of cooperation, such as the association agreements in *Trans-Missouri* and *Joint Traffic*, and toward tighter forms of cooperation, such as mergers.<sup>176</sup> It is certainly true that there was a correlation between the timing of these decisions and the crest of the merger movement, but that hardly justifies the assumption that the Court's holdings in *Trans-Missouri* and *Joint Traffic* caused an upswing in railroad mergers. As the foregoing analysis of the cases indicates, there was nothing in the holdings themselves that should have caused anyone to think that a merger between competing railroads was less likely to be illegal under the Sherman Act than the association agreements.

*Trans-Missouri* clearly established that railroads engaged in interstate transportation were within the reach of the Sherman Act. *Joint Traffic* established that any direct restraint of trade that directly affected interstate commerce was illegal. The Court had not, at that point, addressed the question of whether a merger between competing railroads would have directly restrained trade, but the rather broad application of the plain meaning doctrine in those cases clearly should have made any reasonable person wonder whether a merger would have been much safer than an association agreement.<sup>177</sup> Whether it did or not, what is most noticeably lacking from the record is a smoking gun. There is not a single citation in the historical literature to any newspaper editorial, journal article, or other contemporaneous source that suggests the Supreme Court's decisions in *Trans-Missouri* and *Joint Traffic* caused the steep rise in merger activity around the turn of the twentieth century.<sup>178</sup> In light of all the attention that was focused on the "trust

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<sup>176</sup> *Id.* at 102.

<sup>177</sup> This is not to deny that there was still considerable uncertainty about the legality of mergers, especially when organized through a holding company. Some argued that holding companies would be immune from antitrust prosecution on liberty of contract grounds. See *Railway Concentration*, N.Y. TIMES, July 8, 1899, at 6. Others recognized that *Trans-Missouri* and *Joint Traffic* made the legality of most railroad mergers doubtful. See *The Joint Traffic Decision: Solicitor General Richards' View of the Probable Effect Upon the Railroads and Legislation*, N.Y. TIMES, Oct. 29, 1898, at 9.

<sup>178</sup> References to statements by attorneys that suggested the Supreme Court's decisions caused the mergers have always been somewhat vague and usually seem to refer to statements made some time after the merger movement ended. See Freyer, *supra* note 26. The author has spent many hours researching primary and secondary sources and has never found a single contemporaneous newspaper editorial or journal article that directly attributed the merger movement to *Trans-Missouri* or *Joint Traffic*. On the other hand, newspaper and journal articles that suggested other causes were quite common, even at the peak of the merger wave. For instance, a *New York Times* article at the height of the Great Merger Movement reported on Jeremiah Jenks' investigation of the trust problem in

problem" at the time, this raises serious questions about the conventional law and economics view.

G. Addyston Pipe: *The Plain Meaning Doctrine Applies to Manufacturers*

*Addyston Pipe & Steel Co. v. United States*<sup>179</sup> was decided a year after *Joint Traffic*. The case arose when the government sought an injunction against six companies that manufactured, sold, and transported iron pipe from their factories on the grounds that they had formed an association for the purpose of restraining competition in all of the thirty-six states in which they did business.<sup>180</sup> The companies admitted that they had formed the association to restrain competition, but argued that the agreement was necessary to avoid succumbing to ruinous competition.<sup>181</sup> They asserted in their defense a liberty of contract claim similar to the one in *Joint Traffic*<sup>182</sup> and a Commerce Clause claim based on *E.C. Knight*.<sup>183</sup> The Court rejected both arguments and upheld the injunction.

Justice Peckham once again wrote the majority opinion. He began by rejecting the defendants' liberty of contract argument in sweeping terms.<sup>184</sup> He noted that the Constitution clearly assigned the power to regulate interstate commerce to Congress. That power included the right to enact any legislation necessary to prohibit contracts or combinations that directly restrained trade and had a direct effect on interstate commerce.<sup>185</sup> Peckham thus essentially limited citizens' liberty of contract rights to those that did not conflict with the federal government's commerce powers. As he explained, "the power of Congress to regulate interstate commerce comprises the right to enact a

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Europe for his report to the Industrial Commission. See *Trust Problem in Europe*, N.Y. TIMES, Sept. 23, 1900, at 24. After several months of study, Jenks concluded that the trust situation in Europe was "about the same as in this country" and that "[i]ndustrial consolidation in Europe has been forced by the same causes, . . . namely, severe competition and small profits." *Id.*

<sup>179</sup> 175 U.S. 211 (1899).

<sup>180</sup> *Id.* at 213.

<sup>181</sup> *Id.* at 213-14.

<sup>182</sup> *Id.* at 226-27.

<sup>183</sup> *Id.* at 236.

<sup>184</sup> Peckham wrote that the liberty of contract provision "does not . . . exclude Congress from legislating with regard to contracts of the [relevant] nature . . . . On the contrary, we think the . . . liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution." *Id.* at 229.

<sup>185</sup> *Id.* at 228.

law prohibiting the citizen from entering into those private contracts which directly and substantially . . . regulate . . . commerce among the states.”<sup>186</sup> One would think that, in conjunction with the Court’s rejection of the liberty of contract argument in *Joint Traffic*, this should have dispensed with it once and for all, although that turned out not to be the case.

Justice Peckham then turned to the defendants’ Commerce Clause challenge.<sup>187</sup> In accordance with the doctrine enunciated for the Court by Justice Fuller in *E.C. Knight*, this boiled down to whether the agreement between the pipe manufacturers was a direct restraint of interstate commerce. At this point, Justice Peckham deferred to the opinion written by Judge Taft for the circuit court of appeals and actually quoted from Judge Taft’s opinion at great length to establish that the agreement had substantially raised prices.<sup>188</sup> Justice Peckham then carefully distinguished *E.C. Knight*: “The direct purpose of the combination in . . . *Knight* . . . was the control of . . . manufacture. . . . There was no . . . agreement . . . regarding the future disposition of the manufactured article.”<sup>189</sup> Although contracts involving only the manufacture of products were beyond the reach of the Sherman Act, “contracts for the sale and transportation to other states of specific articles were proper subjects for regulation.”<sup>190</sup> In Peckham’s view, the case in *Addyston Pipe* involved an agreement that extended not just to the manufacture of iron pipe, but also to its sale and transportation across state lines.<sup>191</sup> The Court thus clarified, if there had ever really been any doubt, that *E.C. Knight* placed agreements involving only manufacturing activities beyond the reach of the Sherman Act, but not all agreements involving manufacturers.

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<sup>186</sup> *Id.* at 229.

<sup>187</sup> *Id.* at 236.

<sup>188</sup> Judge Taft would later become the 27th President of the United States, and, subsequently, the Chief Justice of the Supreme Court. Ironically, his opinion in *Addyston Pipe* is probably as famous as any opinions he later wrote while he served on the Supreme Court. While it probably confounded the common law, it was nonetheless one of the most clearly reasoned and articulated antitrust opinions in the years immediately after the passage of the Sherman Act. LETWIN, *supra* note 60, at 172-78.

<sup>189</sup> *Addyston Pipe*, 175 U.S. at 240.

<sup>190</sup> *Id.*

<sup>191</sup> As Peckham noted, whereas the agreement in *E.C. Knight* did not extend to “the future disposition of the manufactured article,” in *Addyston Pipe* “[t]he business of defendants is carried on by obtaining particular contracts for the sale, transportation, and delivery of iron pipe.” *Id.* at 240, 242.

#### H. Consolidations After Addyston Pipe

Bittlingmayer observes that another upsurge in merger activity followed *Addyston Pipe*.<sup>192</sup> Since the Supreme Court had already rejected the liberty of contract defense in *Joint Traffic*, the only plausible way that the ruling in *Addyston Pipe* could have actually caused the upsurge in mergers was by signaling that the Court would subsequently read *E.C. Knight* more narrowly and interpret the reach of the Sherman Act more broadly. Even then, this would make sense only under the assumption that *Addyston Pipe* would apply to looser combinations, but not also to mergers. In light of Justice Fuller's dicta in *E.C. Knight* that suggested the government lost merely by failing to prove that the agreement extended beyond manufacturing,<sup>193</sup> any argument that *Addyston Pipe* signaled the Court would begin to interpret the scope of the Sherman Act more broadly seems dubious. Moreover, there is absolutely nothing in Justice Peckham's *Addyston Pipe* opinion that suggested it would apply only to looser combinations and not also to mergers. Once again, however, what is most striking is that there is not a single citation in the literature to any contemporaneous source that suggests the Supreme Court's decision in *Addyston Pipe* caused the merger movement.<sup>194</sup>

#### I. Northern Securities: *The Sherman Act Applies to Holding Companies*

The next important development in the Supreme Court's antitrust jurisprudence was not until *Northern Securities Co. v. United States* in 1904.<sup>195</sup> *Northern Securities* was a hotly debated case that the government

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<sup>192</sup> Bittlingmayer, *supra* note 7, at 97.

<sup>193</sup> See discussion *supra* Part III.A.

<sup>194</sup> Bittlingmayer, *supra* note 7, at 91, cites an editorial in a trade publication called *Iron Age*, that stated: "The new decision is one which may gravely affect some of the arrangements now in force among manufacturers in different lines . . . . At first sight it looks as though this decision must drive them to actual consolidation." As Bittlingmayer acknowledged in a related footnote, however, there was a widespread breakdown of cartel agreements well before *Addyston Pipe* and even before *Trans-Missouri*. *Id.* at 91 n.31. More importantly, he does not cite any newspaper or journal articles that retrospectively attributed the merger wave to any of the Supreme Court's decisions. There were, however, newspaper and journal articles suggesting other causes. See, e.g., *Trust Problem in Europe*, *supra* note 179 (presenting Jeremiah Jenks' conclusion that severe competition and small profits drove mergers in Europe as well as United States).

<sup>195</sup> 193 U.S. 197 (1904). In the meantime, the Court had decided *W.W. Montague & Co. v. Lowry*, 193 U.S. 38 (1904), but *Montague* merely affirmed the Court's holding in *Addyston Pipe* that an agreement between manufacturers that affected the sale of an item (in this case, tiles) between the states was within the reach of the Sherman Act. *Id.* at 47-48. It was not a

planned very carefully under the direction of President Roosevelt's Attorney General, Philander Knox.<sup>196</sup> Knox anticipated a prolonged legal battle, and so he invoked the newly enacted Expediting Act to certify the case to the court of appeals directly and skip trial at the district court level.<sup>197</sup> The case involved two competing railroad companies, the Northern Pacific and the Great Northern, whose major stockholders had agreed to merge their interests by creating the Northern Securities Company and transferring their stock to its control.<sup>198</sup> Northern Securities thus came to hold ninety-six percent of Northern Pacific's stock and seventy-six percent of Great Northern's stock.<sup>199</sup>

Since this was the first case to involve a merger between competing firms engaged in interstate commerce, one might have imagined that it would present difficult new legal questions. Thus, it is interesting to observe that the court of appeals reached a decision easily and unanimously, holding that the Northern Securities Company had violated the Sherman Act.<sup>200</sup> It is especially interesting to note that the form of the combination, a merger of corporate interests through a holding company, rather than an arms-length agreement between distinct legal entities, posed no particular problem for the court. As the court explained, "the law . . . looks always at the substance of things . . . rather than upon the particular devices or means by which it accomplished."<sup>201</sup> This corroborates the point that nothing in the Supreme Court's previous antitrust decisions had done anything to suggest that mergers would be exempt from the Sherman Act's reach.

Nonetheless, the case did raise some important new questions and so the Supreme Court granted certiorari. Justice Harlan wrote the opinion for a plurality of the Justices, although the Court was sharply divided, and the case is probably more famous for Justice Holmes' dissenting opinion than for Justice Harlan's.<sup>202</sup> Harlan began by stating all the

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significant case.

<sup>196</sup> Knox was actually a holdover from the McKinley administration. For an overview of his preparation and prosecution of the case, see LETWIN, *supra* note 60, at 207-17.

<sup>197</sup> *Id.* at 216.

<sup>198</sup> *N. Sec. Co. v. United States*, 193 U.S. 197, 320-21 (1904).

<sup>199</sup> LETWIN, *supra* note 60, at 218.

<sup>200</sup> *United States v. N. Sec. Co.*, 120 F. 721, 731 (C.C.D. Minn. 1903).

<sup>201</sup> *Id.* at 726.

<sup>202</sup> Holmes' opinion is probably more famous for its stirring prose than its reasoning. His dictum, "[g]reat cases, like hard cases, make bad law" is probably one of the most widely quoted sentences ever written by a Supreme Court Justice. *N. Sec. Co.*, 193 U.S. at 364.

relevant legal principles that the Court had clearly established in its prior Sherman Act cases.<sup>203</sup> His summary left no doubt that, absent any new legal objections, the prior cases had clearly made all direct restraints of trade in interstate commerce illegal, whether they involved an arms-length agreement, such as price-fixing, or an outright merger.<sup>204</sup> As he emphasized, “[n]o one, we assume, will deny that these propositions were distinctly announced in the former decisions of this court.”<sup>205</sup> Since railroad carriers were clearly engaged in interstate commerce, *Northern Securities* clearly fell within the scope of those decisions unless “the special objections . . . to the present case” exempted it.<sup>206</sup>

The first “special objection” addressed by the Court was Northern Securities’ argument that it was a state corporation regulated under state law and that it should, therefore, have been outside the scope of the federal government’s commerce powers.<sup>207</sup> Since the scope of the Sherman Act was limited by the federal government’s commerce powers, Northern Securities should have been beyond its reach. Justice Harlan dispensed with this argument summarily. As he explained, there was no reason to believe the Sherman Act interfered with the states’ powers since, by its own terms, it regulated only interstate commerce or commerce with foreign nations, and these were clearly within the scope of federal commerce powers.<sup>208</sup>

The second “special objection” addressed by the Court was more difficult. Northern Securities argued that the constitutional guarantee of the liberty of contract prohibited Congress from interfering with individuals’ rights to transfer their stock, which was their own private property, to a private corporation.<sup>209</sup> Enforcing the Sherman Act to void the transaction would, therefore, constitute an unconstitutional interference with the freedom of all citizens to dispose of their personal property in the manner of their choosing.<sup>210</sup> As Justice Harlan observed, however, Northern Securities was trying to rephrase the question in the case to ask “whether Northern Securities Company can acquire and hold

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<sup>203</sup> Harlan referred to them as “plainly deducible” from the prior cases. *Id.* at 331 (plurality opinion).

<sup>204</sup> *Id.* at 331-32.

<sup>205</sup> *Id.* at 332.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 333.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

stock in other state corporations,”<sup>211</sup> when the government’s contention was merely that it had the constitutional authority to regulate interstate commerce and that the Northern Securities Company had illegally restrained interstate commerce.<sup>212</sup>

Justice Harlan’s response to this second objection was resolute: Congress has the authority to exercise all its powers and rights to regulate interstate commerce in any manner it chooses.<sup>213</sup> The fact that the Northern Securities Company was created under a state law was irrelevant. In fact, as Justice Harlan noted, when Congress passed the Sherman Act it merely sought to regulate interstate commerce in a manner similar to which the states had commonly regulated their intrastate commerce for many years.<sup>214</sup> To that end, he cited numerous cases in which state courts had held business combinations, including holding companies such as the one in *Northern Securities*, to be illegal under state laws.<sup>215</sup> “If a state may strike down combinations that restrain its domestic commerce,” he asked, “what power, except that of Congress, is competent to protect . . . interstate . . . commerce . . . ?”<sup>216</sup> He observed that if Northern Securities was to prevail with this argument there would be nothing to prevent all the railroads in the nation from merging into a single holding company.<sup>217</sup>

Finally, the defendants argued that the regulation of their transaction by the federal government would violate the Tenth Amendment’s reservation of powers not granted to the United States to the states or the people.<sup>218</sup> Justice Harlan’s response was almost contemptuous: “We cannot conceive how it is possible for anyone to seriously contend for such a proposition. It means nothing less than that Congress . . . must act in subordination to the will of the states when exerting their power to create corporations.”<sup>219</sup> As he bluntly asserted, “[n]o such view can be entertained for a moment.”<sup>220</sup> Rather, the Court was free to issue any order necessary to dissolve or suppress an illegal combination and could do so without infringing any state rights. As to the argument that the

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<sup>211</sup> *Id.* at 334.

<sup>212</sup> *Id.* at 335.

<sup>213</sup> *Id.* at 336-37.

<sup>214</sup> *Id.* at 339.

<sup>215</sup> *Id.* at 339-41.

<sup>216</sup> *Id.* at 342.

<sup>217</sup> *Id.* at 343.

<sup>218</sup> *Id.* at 344.

<sup>219</sup> *Id.* at 345.

<sup>220</sup> *Id.*

Northern Securities Company's stock purchases had merely been an investment that was legal under its state charter and therefore could not be made illegal under federal law, Justice Harlan was equally contemptuous: "This view is wholly fallacious, and does not comport with the actual transaction . . . all the stock it held or acquired in the constituent companies was acquired and held to be used in suppressing competition . . ."<sup>221</sup>

Justice Harlan wrote, however, only for a plurality of the Court, which included, in addition to himself, Justices Brown, McKenna, and Day.<sup>222</sup> They were joined by Justice Brewer in a separate concurring opinion. Although Justice Brewer concurred with the plurality's holding, he did not concur with its reasoning. It therefore turned out that Brewer's opinion played a pivotal role in defining where American antitrust law stood at the start of the twentieth century.<sup>223</sup> Justice Brewer began by reversing his own position on the rule of reason in *Trans-Missouri, Joint Traffic*, and *Addyston Pipe*.<sup>224</sup> As he now viewed matters, the rulings in those cases should not have been that the contracts were illegal merely because they were direct restraints of trade, but rather that they were illegal because they were *unreasonable*, direct restraints of trade.<sup>225</sup> The purpose of the Sherman Act had not been to make restraints of trade that had been deemed reasonable under the common law illegal, but to prohibit only those contracts or combinations that "were in direct restraint of trade, unreasonable, and against public policy."<sup>226</sup>

Although he reversed himself on the application of the plain meaning doctrine and adopted a rule of reason standard, Justice Brewer nonetheless concluded that the Northern Securities Company was in violation of the Sherman Act.<sup>227</sup> Although Congress did not have the power to limit the rights of an individual citizen to make whatever stock purchases he pleased, the Northern Securities Company was an organization of many private individuals and hence merely an "artificial person, created . . . only for the convenient transaction of business."<sup>228</sup> If

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<sup>221</sup> *Id.* at 353-54.

<sup>222</sup> The case states that Justice Harlan "announced the affirmance . . . of the circuit court" and delivered an "opinion," but does not state that he speaks for the majority. *Id.* at 317.

<sup>223</sup> See discussion *infra* Part III.I.

<sup>224</sup> *N. Sec. Co.*, 193 U.S. at 360-61 (Brewer, J., concurring).

<sup>225</sup> *Id.* at 361.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 363.

<sup>228</sup> *Id.* at 362.

an artificial person, such as the Northern Securities Company, was to have the unfettered right to purchase stock, it could easily come to control the nation's entire railway system. In his view, such an outcome could not be "a reasonable or lawful restraint of trade."<sup>229</sup> More to the point, perhaps, the Northern Securities Company unreasonably restrained interstate trade and was therefore illegal under the Sherman Act.<sup>230</sup>

The nature of Justice Brewer's concurrence and the rationale for his opinion were much more significant for antitrust jurisprudence than some scholars have seemed to acknowledge.<sup>231</sup> Justice Brewer's separate concurrence and his adoption of a rule of reason meant that only four of the Justices stood ready to hold that all mergers that directly restrained interstate commerce were illegal per se under the Sherman Act. It meant that, in effect, mergers would be adjudicated under a rule of reason. It may also have cast some doubt on whether arms-length restraints, such as the ones in *Trans-Missouri* or *Joint Traffic*, would still be adjudicated under a per se rule.<sup>232</sup> Justice Brewer clearly understood that this was the consequence of his separate concurring opinion. Indeed, it appears that this was a consequence he intended to effect. He was apparently concerned that a blanket prohibition on mergers might have an unsettling effect on the business sector. As he explained, he "felt constrained to make these observations for fear that the broad and sweeping language of the opinion of the court might tend to unsettle legitimate business enterprises, stifle . . . wholesome business activities,

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<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 363.

<sup>231</sup> For instance, Sklar argues that a per se prohibition against restraints of any kind applied from 1897-1911, when the Supreme Court adopted a rule of reason in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). SKLAR, *supra* note 63, at 127-35. Sklar failed to appreciate that Harlan's opinion was not a majority opinion and therefore assumed that *Northern Securities* simply extended the Court's literal interpretation of the Sherman Act to holding companies.

<sup>232</sup> Owen Fiss contends that "Brewer spoke for himself in *Northern Securities*, but together with the [four] dissenters . . . his concurrence meant that *Trans-Missouri*, *Joint Traffic*, and *Addyston Pipe* were, in effect, reopened." FISS, *supra* note 56, at 141. This seems dubious. Justice White had rendered the only dissenting opinion in *Trans-Missouri*. Only three new Justices had been added to the Court since then —Justices Day, Holmes, and McKenna. Of these three, two — Day and McKenna — joined Harlan's plurality opinion in *Northern Securities*. Unless both Chief Justice Fuller and Justice Peckham, the author of the majority opinions in *Trans-Missouri* and *Joint Traffic*, were prepared to reverse their previous positions in favor of a literal reading of the Sherman Act, the rule of reason could only have extended to mergers. There is no reason to believe that both Fuller and Peckham would have reversed themselves.

. . . and invite unnecessary litigation.”<sup>233</sup>

Justice Brewer’s logic and the pivotal importance of his separate concurrence were also clearly understood by sophisticated observers. In an article the day after the *Northern Securities* decision was announced, the *New York Times*, which had consistently railed against the sweeping literal interpretation of the Sherman Act that the Supreme Court had handed down in *Trans-Missouri*, reported that stocks had risen sharply after the decision was announced and attributed the effect to Justice Brewer’s concurrence.<sup>234</sup> As the article noted, Justice Brewer “abstained from the extremes indulged by both the majority and minority, and took his stand by himself.”<sup>235</sup> This was significant, because “[n]o reasonable restraints of trade can be punished without his vote, and his vote cannot be had . . . Justice Brewer’s position frees us from capricious and partial enforcement of an indefensible statute for political reasons.”<sup>236</sup>

Indeed, according to the *Times*, Wall Street was pleasantly surprised by the outcome of the case. In an article published two days after the decision was announced, the *Times* observed that the decision had relieved some of the uncertainties that plagued the large class of trusts that could ostensibly meet a rule of reason test.<sup>237</sup> As the writers noted, Wall Street had never been particularly concerned with Northern Securities’ fate.<sup>238</sup> But the decision in the case offered reasonable combinations “a long respite if not permanent relief” from the fear of a capricious prosecution that had hung over them ever since the Supreme Court applied a plain meaning interpretation to the Sherman Act in *Trans-Missouri*.<sup>239</sup> Brewer’s concurring opinion offered “a golden bridge over which the court could pass to a more lenient interpretation of the statute, while preserving its consistency and standing upon its precedents.”<sup>240</sup> In that regard, the *Times* saw the *Northern Securities* decision as “a reversal of the court’s previous position.”<sup>241</sup> Its importance was in the consequence that “the sheep and goats among the trusts are to

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<sup>233</sup> *N. Sec. Co.*, 193 U.S. at 364 (Brewer, J., concurring).

<sup>234</sup> *The Financial Markets: Stocks Rise Sharply, but the Reason Obscure — Further Effect of the Northern Securities Decision*, N.Y. TIMES, Mar. 16, 1904, at 10.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *The Financial Markets: The Stock Market Gains Activity and Loses Tone — Northern Securities Still the Factor*, N.Y. TIMES, Mar. 17, 1904, at 12.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

be separated.”<sup>242</sup>

The *Northern Securities* decision thus marked a significant departure from the Supreme Court’s prior antitrust jurisprudence.<sup>243</sup> By the time the circuit court of appeals’ decision was announced, most observers probably believed that the Supreme Court would affirm it and that a literal reading of the Sherman Act would be extended to all mergers within the scope of the federal commerce powers.<sup>244</sup> Indeed, this fear was the cloud hanging over the trusts to which the *New York Times* article cited in the previous paragraph referred.<sup>245</sup> Ironically, the Supreme Court’s decision was actually welcomed by many in the business community. Even though it clarified that the reach of the Sherman Act extended to mergers conducted through the formation of holding companies, Justice Brewer’s concurrence in effect meant that it would be applied according to a rule of reason standard rather than a

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<sup>242</sup> *Id.*

<sup>243</sup> The *Northern Securities* decision marked a more significant departure from the Court’s prior decisions than some scholars have recognized. Letwin, for instance, summarized *Northern Securities* as establishing the rule that “‘restraint of trade’ meant any direct interference with competition.” LETWIN, *supra* note 60, at 227 (emphasis omitted). SKLAR, *supra* note 63, completely missed the legal effect of Brewer’s separate concurrence and characterized *Northern Securities* as extending the jurisprudence of *Trans-Missouri* and *Joint Traffic* to mergers.

<sup>244</sup> In an article published the day after the circuit court’s decision in the government’s favor, the *New York Times* wrote, “[t]hree times the Supreme Court of the United States has, in its reasoning and conclusions affirmed the principles now enunciated in the Northern Securities case, leaving no room for doubt that this latest decision will be sustained on appeal.” *The Practical Effect*, N.Y. TIMES, Apr. 11, 1903, at 8. Not everyone agreed with this assessment. Hovenkamp contends that most scholars in the 1890s thought holding companies, such as Northern Securities, were outside the scope of the Sherman Act because they were single entities rather than “combinations.” See HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937, at 263-64 (1991). Indeed, well before the Supreme Court’s decision, one of the leading legal scholars of the time, Harvard’s C.C. Langdell, wrote a scathing critique of the court of appeals’ opinion that was premised largely on this objection. C.C. Langdell, *The Northern Securities Case and the Sherman Anti-Trust Act*, 16 HARV. L. REV. 539 (1903). Langdell was hardly alone in his convictions. But he was probably not in the majority either. His article was quickly rebutted by D.H. Chamberlain, the ex-governor of South Carolina, in D.H. Chamberlain, *The Northern Securities Company Case: A Reply to Professor Langdell*, 13 YALE L.J. 1 (1903-04). Chamberlain harshly contradicted Langdell’s critique of the circuit court of appeals: “opinion and decision in the case met the approval, with very few exceptions, of those best qualified to pass judgment upon it.” *Id.* at 57-58. He claimed to stake his entire professional reputation on his view of the case, asserting that in “the view of the general professional, and lay mind as well, the case must have been decided, by an honest and intelligent court, as it was decided.” *Id.* at 65.

<sup>245</sup> See *The Stock Market Gains Activity and Loses Tone — Northern Securities Still the Factor*, *supra* note 238.

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per se prohibition. This was good news for the captains of American industry, not bad, and it may explain why the New York Stock Exchange jumped rather than dropped when the decision was announced.

The “good news” was augmented by public pronouncements from the Roosevelt administration that it did not intend to begin an onslaught of new prosecutions. Indeed, in a *New York Times* article titled, *Government Will Not Run Amuck, Says Knox*, the day after the *Northern Securities* decision was announced, Attorney General Knox attempted to allay the fears of investors and industrialists by emphasizing that the government’s enforcement actions would remain cautious.<sup>246</sup> The *Times* attributed the unexpectedly favorable response of investors to the *Northern Securities* decision in part to Knox’s assurances, which were widely taken to “mean there would be no further prosecutions by the government.”<sup>247</sup>

In sum, the evidence clearly contradicts any suggestion that the Supreme Court’s decision in *Northern Securities* should have struck fear into the hearts of American industrialists and put an immediate end to the Great Merger Movement. Yet this is exactly what the conventional law and economics view would have us believe.<sup>248</sup> Given the legal effect of the *Northern Securities* decision and the overwhelming evidence about how it was received, if merger decisions at the turn of the twentieth century had been nearly as sensitive to developments in antitrust law as the conventional law and economics view assumes, *Northern Securities* should have accelerated the rate of merger activity. The fact that merger activities declined suggests that the mergers were driven primarily by other forces and were not nearly as sensitive to the Supreme Court’s antitrust decisions as the conventional wisdom assumes.

It is important to remember that the holding in *E.C. Knight* had nothing to do with the nature of the consolidation in that case, but rather, with the Supreme Court’s narrow interpretation of the federal government’s commerce powers. There is nothing in Harlan’s *Northern Securities* opinion to suggest that the Court had modified the distinction it laid down in *E.C. Knight* between manufacturing and commerce or that it had revised where the line would be drawn. It had long been established that railroads were instrumentalities of interstate commerce

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<sup>246</sup> *Government Will Not Run Amuck, Says Knox*, N.Y. TIMES, Mar. 15, 1904, at 2.

<sup>247</sup> *Wall Street Topics: Bears Disappointed*, N.Y. TIMES, Mar. 16, 1904, at 10.

<sup>248</sup> Bittlingmayer, *supra* note 7, at 117, is actually much more restrained, although he notes that the number of consolidations did decrease after *Northern Securities*. The idea has, however, become quite pervasive. See *infra* text accompanying note 269.

and the companies involved in the *Northern Securities* case were competitors in interstate transportation. The case simply did not test the scope of the federal government's commerce powers. Nonetheless, by the time the *Northern Securities* decision was handed down, most contemporary observers seemed to believe that mergers between manufacturing firms that were engaged in interstate commerce would also lie within the reach of the Sherman Act.<sup>249</sup>

This corroborates the view that *E.C. Knight* had never carved out as large an exception to the reach of the federal commerce powers as some writers seemed to believe.<sup>250</sup> Its legal effect was not to place all mergers beyond the reach of the Sherman Act. This may not have been understood by all contemporary observers at the time, but it was clearly understood by many.<sup>251</sup> Although the manufacturing/commerce distinction did not loom as an important impediment to the reach of the Sherman Act after *Northern Securities*, or even as a particularly significant legal issue, the scope of the federal commerce powers and the full reach of the Sherman Act remained unclear.

#### J. *Swift and the Current of Commerce Doctrine*

Any lingering questions about the scope of the federal commerce powers and the reach of the Sherman Act were resolved in *Swift & Co. v. United States*.<sup>252</sup> *Swift* involved a suit under the Sherman Act against a combination of meatpacking companies for conspiring to restrain

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<sup>249</sup> This was implicit in many newspaper articles, such as the ones cited *supra*, notes 235 and 245, as well as the writings of legal scholars. See J.H. Benton, *The Sherman Act*, 18 YALE L.J. 311 (1909); Montague, *supra* note 26; Victor Morawetz, *Should the Anti-Trust Act Be Amended?*, 22 HARV. L. REV. 492 (1909).

<sup>250</sup> Bittlingmayer, *supra* note 7, at 87, is careful not to offer an opinion about the legal effect of *E.C. Knight*, but he states that "[o]ne widespread interpretation of *Knight* was that merger was legal." He quotes from two late 19th century writers directly: J.D. Forrest, *AntiMonopoly Legislation in the United States*, 1 AM. J. SOC. 411, 424 (1896), who wrote only that *E.C. Knight* left "the regulation of the acquisition and control of the property that is merger to the states," and Edward B. Whitney, *Constitutional Questions under the Federal Anti-Trust Law*, 7 YALE L.J. 285, 285 (1898), who wrote, "while combinations in . . . [agricultural and manufacturing] industries might have a great indirect effect upon commerce, that was not sufficient foundation for Congressional interference." Even Whitney qualified his statement, however, by noting that *E.C. Knight* placed "many or most" of the "trusts" beyond the reach of the Sherman Act, not all. *Id.* Very few 19th century observers attributed such a sweeping effect to the case.

<sup>251</sup> Even the subtitle from the *New York Times* article that reported on the case succinctly and accurately summarized the holding. See *A Sugar Trust Victory*, *supra* note 89; discussion *supra* Part III.A.

<sup>252</sup> 196 U.S. 375 (1905).

competition and monopolize interstate trade in dressed meats.<sup>253</sup> The defendants were involved in buying livestock at markets in Chicago, Omaha, St. Joseph, Kansas City, East St. Louis, and St. Paul.<sup>254</sup> They would slaughter the livestock at those locations and ship the meats elsewhere, often across state lines.<sup>255</sup> Among other things, the government alleged that the meatpackers prevented their agents from bidding against one another in buying livestock and fixed the prices of their meats to their dealers.<sup>256</sup>

Justice Holmes wrote the opinion for the Court, which this time was unanimous. The case bore a close resemblance to *Hopkins*, in which the Court held that the local business of the commission stockyard traders was not interstate commerce and was therefore beyond the reach of the Sherman Act, and so Holmes carefully addressed the commerce powers issue in his opinion.<sup>257</sup> Holmes began by distinguishing the case from *E.C. Knight*. He observed that the subject matter of *E.C. Knight* was a combination of manufacture and that “[h]owever likely monopoly of commerce was to follow from the agreement it was not a necessary consequence nor a primary end.”<sup>258</sup> This seemed to imply that if the primary purpose of a merger in manufacture was to effect monopoly in interstate commerce it would be within the scope of the federal commerce powers. It also corroborates Letwin’s suggestion that if the government had prosecuted *E.C. Knight* differently, it might have been able to construe the case as one involving interstate commerce.<sup>259</sup> Holmes distinguished *Swift* from *E.C. Knight* on the grounds that the subject matter in *Swift* was sales and the “very point of the combination was to restrain and monopolize commerce among the states.”<sup>260</sup>

Holmes then addressed the much finer distinction between *Swift* and *Hopkins*. He noted that the defendants in *Hopkins* were themselves neither buyers nor sellers on the livestock exchange.<sup>261</sup> They merely furnished certain facilities for the sales.<sup>262</sup> Thus, “the effects of the combination of brokers upon the commerce was only indirect, and not

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<sup>253</sup> *Id.* at 391.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 392-93.

<sup>257</sup> *Id.* at 397.

<sup>258</sup> *Id.*

<sup>259</sup> See LETWIN, *supra* note 60, at 165.

<sup>260</sup> *Swift*, 196 U.S. at 397.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

within the [Sherman] Act.”<sup>263</sup> Holmes noted that in *Swift*, the defendants were charged with restricting competition between their agents when purchasing livestock in the stockyards.<sup>264</sup> The purchasers, the slaughtering facilities, and the sellers of the livestock were usually located in different states. Thus, the “intent of the combination was not merely to restrict competition among the parties, but . . . to aid in an attempt to monopolize commerce among the states.”<sup>265</sup> With that, Holmes adopted the current of commerce doctrine:

Commerce among the states is not a technical, legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when, in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce.<sup>266</sup>

It seems clear that the current of commerce doctrine, as Homes stated it, could easily have been used to affirm the government’s prosecution of the livestock brokers in *Hopkins*.<sup>267</sup> Ironically, the term “stream of commerce” had first been coined by District Judge Cassius Foster in upholding the government’s prosecution of the livestock brokers in that same case, and on appeal, the Supreme Court had rejected the doctrine unanimously.<sup>268</sup> Regardless, if there were any lingering doubts about the reach of the Sherman Act to mergers of manufacturers that were engaged in interstate sales, *Swift* cleared the air. In fact, it probably also brought within the reach of the Act many activities that might have previously been beyond its grasp, such as those in *Hopkins*.

*Swift* is widely regarded as one of the most important Commerce

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<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 398.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 398-99.

<sup>267</sup> See David Gordon, *Swift & Co. v. United States: The Beef Trust and the Stream of Commerce Doctrine*, 28 AM. J. LEGAL HIST. 244, 275-79 (1984).

<sup>268</sup> *Id.*; see also Barry Cushman, *A Stream of Legal Consciousness: The Current of Commerce Doctrine from Swift to Jones & Laughlin*, 61 FORDHAM L. REV. 105, 114 (1992).

Clause decisions ever handed down by the Supreme Court.<sup>269</sup> Yet, it has been virtually ignored by antitrust scholars and particularly by the critics of antitrust who have argued (or accepted as a matter of faith) that the Supreme Court's early antitrust decisions caused the Great Merger Movement.<sup>270</sup> Some scholars seem to assume that *Northern Securities* brought mergers of manufacturers within the reach of the Sherman Act, perhaps because of the decline in merger activity at around the time the *Northern Securities* decision was announced.<sup>271</sup> But *Northern Securities* was a railroad case and did nothing to extend the scope of federal commerce powers. If *E.C. Knight* had in fact carved such a large safe harbor around mergers of manufacturers, it was *Swift* that should have precipitated the decline in merger activity, not *Northern Securities*.

Well-informed people at the time knew that *Swift* was an important case. Shortly after the decision was announced, the Outlook observed that *Swift* marked "an important step in our elaboration of a system of Federal control over commerce."<sup>272</sup> In an article written for the *New York Times*, Edward A. Bradford wrote: "The significance of the decision is that it condemns . . . an entire series of acts taken together . . . Under the modern principles of 'integrating' industries . . . there is scarcely one which is wholly limited to the boundaries of a single State, and which is

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<sup>269</sup> The Supreme Court itself would later characterize the decision as "a milestone in the interpretation of the commerce clause of the Constitution." *Bd. of Trade v. Olsen*, 262 U.S. 1, 35 (1923). Gordon, *supra* note 268, at 279, claims the decision "laid the foundation for much of twentieth century constitutional history."

<sup>270</sup> Bittlingmayer, *supra* note 7, at 88 n.17, states in a footnote that *Swift*, "a merger case, is cited as the most important link in the chain by which manufacturing activity came to be included under the Sherman Act." He does not adequately explain, however, why mergers of manufacturers declined before the decision was announced. Modern antitrust casebooks, such as PHILLIP AREEDA & LOUIS KAPLOW, *ANTITRUST ANALYSIS* (1997), or ANDREW I. GAVIL ET AL., *ANTITRUST LAW IN PERSPECTIVE* (2002), scarcely mention *Swift* at all, no doubt because it has little relevance to modern antitrust doctrine.

<sup>271</sup> For example, Hovenkamp, a leading antitrust scholar recently wrote, "[t]he ambiguity left by *Northern Securities* was that it appeared to condemn all mergers, just as *Trans-Missouri* and the other decisions of the late 1890s appeared to condemn all price fixing." Hebert Hovenkamp, *The Cultural Crises of the Fuller Court*, 104 *YALE L.J.* 2309, 2334-35 (1995). As an example of how widespread the presumption has become, Janet Yellen, the Chair of the Council of Economic Advisers during the Clinton Administration, stated in her testimony before the Senate Judiciary Committee on the merger wave of the 1990s that "[t]he sharp decline in merger activity during 1903 and 1904 was probably related to the onset of a severe depression and the legal precedent for prohibiting market-dominating mergers . . . that was established by the *Northern Securities* Case." *Prepared Testimony of Dr. Janet L. Yellen, Chair, Council of Economic Advisers Before the Senate Judiciary Committee*, *FED. NEWS SERV.*, June 16, 1998.

<sup>272</sup> Gordon, *supra* note 268, at 278-79.

not therefore inter-State and subject to the principles declared in the Beef Trust case."<sup>273</sup> In a review of the important developments in law affecting big business during 1905, Athelstan Vaughan noted that *Swift* was "the United States Supreme Court case which attracted the most public attention" and that, after *Swift*, "it does not matter that . . . a combination primarily embraces monopoly . . . in but a single State if . . . also directed against commerce among the States."<sup>274</sup>

In spite of its importance, both for the reach of the Sherman Act and the scope of federal commerce powers, the reaction to *Swift* was muted. The stock market remained, in the words of the *New York Times*, "feverishly strong."<sup>275</sup> The case itself received little attention in the law reviews and was not the subject of a single law review article in any of the succeeding years.<sup>276</sup> Indeed, the decision in the case seems to have been expected. Perhaps intelligent observers knew that a narrow interpretation of the federal commerce powers could not stand in the face of the pressures and challenges of a modern industrial economy. Or perhaps, as Edward A. Bradford suggested in his *New York Times* article shortly after the decision was announced, business leaders took "courage from the fact that threatened trusts live long, and ignore litigation where the death rate is so small."<sup>277</sup>

#### K. Summary

It is evident from the record that the Supreme Court's early antitrust decisions simply could not have had the dramatic consequences for the organization of American business that the conventional law and economics theory implies. *E.C. Knight* did not limit the reach of the Sherman Act nearly as much as many scholars have imagined. To the extent that it did limit the reach of the Sherman Act, its limits applied as much to arms-length restraints as to combinations that achieved mergers of separate business interests. *Trans-Missouri* and *Joint Traffic* certainly implied that a literal interpretation of the Act would apply to any contracts or combinations within the Act's reach, but they also implied that mergers would be subjected to the same literal interpretation of the

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<sup>273</sup> Edward A. Bradford, *The Financial Situation*, N.Y. TIMES, Feb. 5, 1905, at 13.

<sup>274</sup> Athelstan Vaughan, *Decisions and Legislation Affecting Corporations*, N.Y. TIMES, Jan. 7, 1906, at AFR13.

<sup>275</sup> *The Financial Markets: Stocks Feverishly Strong*, N.Y. TIMES, Feb. 1, 1905, at 11.

<sup>276</sup> Gordon, *supra* note 268, at 278.

<sup>277</sup> Bradford, *supra* note 274.

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Act that price-fixing and other arms-length agreements would be subjected to. Business leaders may have doubted whether many mergers would be within the reach of the Sherman Act. But by the time the Supreme Court's decision in *Northern Securities* was announced, most observers seemed to expect that the Act would extend to mergers of railroads.

Ironically, many business leaders welcomed the *Northern Securities* decision because it meant that a rule of reason rather than a per se prohibition would be applied to any mergers within the Sherman Act's reach. Nonetheless, *Northern Securities* was still a railroad case, and it did nothing to extend the reach of the Sherman Act beyond the limits imposed in *E.C. Knight*. The scope of federal commerce powers was not extended until *Swift*. Yet, there was a significant decline in merger activity well before *Swift* was decided. Moreover, the business community's response to *Swift* was muted. Business leaders had always believed that mergers of manufacturers were within the reach of the Sherman Act, or they had come to expect that mergers of manufacturers would be brought within the reach of the Act or they simply did not care because the threat of prosecution was still so remote.

It is clear from a careful reading of the Supreme Court cases and the responses to them that the consolidation movement at the turn of the twentieth century was driven primarily by other forces. Indeed, the merger movement was essentially a global phenomenon and certainly not restricted to the United States. Nations such as Germany and Great Britain that had no statutory antitrust laws and were not similarly focused on antitrust prosecutions also experienced significant waves of merger activity during the same years.<sup>278</sup> The questions that therefore remain to be answered are what were those other primary driving forces and how did they interact with developments in the Supreme Court's antitrust jurisprudence? Perhaps most important of all, what permanent stamp did they leave on the American system of business regulation in its formative stage?

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<sup>278</sup> Great Britain had common law antitrust prohibitions, but these were comparatively lax. Germany had no antitrust prohibitions whatsoever. In fact, German law allowed private parties to use the courts to enforce some anticompetitive agreements. This unquestionably lessened the pressures on firms to merge, and the merger movement in Germany was therefore not as pronounced, but that is not evidence that antitrust law exacerbated the merger movement in the United States. See ALFRED D. CHANDLER, *SCALE AND SCOPE: THE DYNAMICS OF INDUSTRIAL CAPITALISM* 423-27 (1990); Leslie Hannah, *Mergers in British Manufacturing Industry, 1880-1918*, 26 OXFORD ECON. PAPERS 1, 14-15 (1974).

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III. ANTITRUST AND THE FOUNDATIONS OF MODERN AMERICAN BUSINESS  
REGULATION

The “trust problem” began well before the turn of the century — indeed, the Sherman Act was primarily a response to public fears about the growing number of business combinations and consolidations.<sup>279</sup> Many contemporary observers believed that the trend toward consolidation was an inevitable and natural consequence of the contemporary business conditions.<sup>280</sup> Indeed, there was undoubtedly a great deal of truth to this conviction. The U.S. economy was altered in fundamental ways by ongoing developments in transportation and communication technologies that began in the middle of the nineteenth century.<sup>281</sup> With transportation costs so much lower, the potential size of the markets for many types of products increased dramatically.<sup>282</sup> Business firms in industries that produced these products were able to avail themselves of mass-production technologies that previously would have been unprofitable. Indeed, many of the famous titans of American industry from this period achieved their fame and fortune by developing and refining the mass-production technologies necessary to take advantage of the new opportunities.<sup>283</sup>

The period from about 1870-1920 was therefore one which featured an unprecedented rate of technological advancement.<sup>284</sup> Indeed, it was

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<sup>279</sup> It has been suggested that the Sherman Act may have been in some part a response to the political influence of smaller business interests seeking protection from their big business competitors. See Troesken, *supra* note 68, at 291. The prevailing view by far is that the legislation was primarily a response to the public’s demand for a legal check on the expanding power and influence of the “trusts.” See Millon, *supra* note 23, at 1276-77.

<sup>280</sup> These included many leading economists, such as John Bates Clark, Arthur Hadley, and Richard Ely, as well as leading jurists, such as Oliver Wendell Holmes and Louis Brandeis. See FISS, *supra* note 56, at 143; MCCRAW, *supra* note 21, at 96-97; Michael Perelman, *Fixed Capital, Railroad Economics and the Critique of the Market*, 8 J. ECON. PERSP. 189, 189-90 (1994).

<sup>281</sup> For background on these developments and their impact on American business firms, see generally ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* (1977), and DAVID C. MOWERY & NATHAN ROSENBERG, *TECHNOLOGY AND THE PURSUIT OF ECONOMIC GROWTH* (1989).

<sup>282</sup> See CHANDLER, *supra* note 282, at 207-08.

<sup>283</sup> A list of the innovative entrepreneurs from this period would have to include Carnegie, Rockefeller, the du Pont cousins, Edison, and many others. *Id.* at 256, 266-69, 426-28, and 439-42.

<sup>284</sup> See *supra* text accompanying notes 2-3.

during this period that the foundations of the modern economy were laid. Electric power generation and utilization, the internal combustion engine, the modern skyscraper, and numerous other technological innovations were all developed around the turn of the twentieth century.<sup>285</sup> Almost every industry and facet of life was transformed in some way by important technological breakthroughs. Manufacturing plants were redesigned and retooled, labor was replaced by capital, and the new machines were harnessed to important new sources of industrial power.<sup>286</sup> The companies that were the first to develop or take advantage of the new technologies tended to achieve a distinct edge over their competitors, especially if they proved to be proficient at maintaining their technological lead through subsequent refinements of the technologies. The companies that fell behind in the race to adopt the new technologies were left in the dust and often faced dissolution or bankruptcy.<sup>287</sup>

Companies competed, therefore, not only through their prices, but also by attempting to innovate faster and more effectively than their competitors and thus produce a better product at lower costs.<sup>288</sup> But to implement important technological innovations the companies usually had to make significant investments in new capital. They had to build new plants and fit them with the latest equipment and machinery, or

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<sup>285</sup> See generally HUGHES, *supra* note 2; MOWERY & ROSENBERG, *supra* note 282.

<sup>286</sup> See RICHARD B. DUBOFF, *ELECTRIC POWER IN AMERICAN MANUFACTURING, 1899-1958*, at 95 (1979).

<sup>287</sup> The TWELFTH CENSUS OF MANUFACTURES, published in 1902, attempted to survey the amount of manufacturing capital forced into idleness through technological obsolescence on the grounds that "some account must be taken of the enormous capital which is annually and irretrievably lost in the struggle for the survival of the fittest." U.S. CENSUS OFFICE, *THE TWELFTH CENSUS OF MANUFACTURES* pt. 1, at lxv (1902). According to the authors, the readiness with which machinery that was only slightly antiquated was consigned to the scrap heap was one of the most striking characteristics of the American manufacturing industries at the turn of the 20th century. *Id.* at xcvi. As they explained, "The conditions of modern manufacture are such that the machinery must be kept in the highest condition of efficiency, in order to meet competition successfully. The mills that are abandoned are either those with a disadvantageous location for manufacturing, or those whose equipment is obsolete, and whose proprietors are either financially unable to re-equip them, or are convinced that such a re-equipment is not economically wise." *Id.*

<sup>288</sup> Consider the following description of competition in the sugar industry by John Searles, *American Sugar*, in *ONE HUNDRED YEARS OF AMERICAN COMMERCE* 257, 259 (Chauncey M. Depew ed., 1968): "[W]ith equal advantages in the matter of machinery, one refiner, by the discovery of some simple fact and its application in the matter of method, obtained a decided advantage over another . . . . Sugar refining became a thing of mysteries, each refiner seeking to discover for himself the method of treatment which would enable him to improve upon that of his competitor." *Id.*

they had to completely redesign and retool their existing plants so that they could convert them from the use of steam or water power to electricity.<sup>289</sup> This required considerable amounts of financial capital. And the investments were often risky, especially if the company was engaged in fierce competition with its rivals.

These business conditions often made competition problematic well before the Sherman Act was enacted.<sup>290</sup> In their rush to succeed, competing firms often made simultaneous capital investments that, in the face of the rising productivity and the limits on consumer demand, could not possibly provide a reasonable rate of return. Therefore, overinvestment and excess capacity was a common problem.<sup>291</sup> The problem was exacerbated by the size of the stakes. Big business was new and so were investments on the scale required for modern, new plants equipped with relatively sophisticated machine tools and driven by electric power. The potential rewards to companies that could innovate successfully and entrench themselves as the industry leader were huge. But the risks were equally great. Companies that lost in the competitive struggle might face financial collapse and not only lose tens of millions of dollars in investments (a huge sum for the time), but also have to lay off thousands of employees as well.<sup>292</sup>

The pressures on firms to escape from the competition and alleviate some of the uncertainties arose in many industries well before the Sherman Act was passed.<sup>293</sup> Their efforts to restrain competition tended

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<sup>289</sup> THE TWELFTH CENSUS OF MANUFACTURES made particular note of the economies being introduced in American manufacturing by electric power utilization. U.S. CENSUS OFFICE, *supra* note 288, at cccxxvii. The Special Report of the Census of Manufactures in 1905 noted that “[p]ractically all the newer factories and shops in the U.S. of any size, constructed within the past five years, have an electrical drive either exclusively or for most purposes . . . .” DUBOFF, *supra* note 287, at 95.

<sup>290</sup> Perelman, *supra* note 281, at 193-94.

<sup>291</sup> This was reflected in the observations of innumerable contemporary business leaders. See Andrew Carnegie, *The Bugaboo of Trusts*, 148 N. AM. REV. 141, 141-42 (1889); Thomas K. McCraw & Forest Reinhardt, *Losing to Win: U.S. Steels Pricing, Investment Decisions, and Market Share, 1901-1938*, 49 J. ECON. HIST. 593, 600 (1989) (quoting Elbert Gary); Perelman, *supra* note 281, at 193-94; Searles, *supra* note 289. It was also the conclusion reached in a number of important contemporary industry studies. See PAUL L. VOGT, *THE SUGAR REFINING INDUSTRY IN THE UNITED STATES* 34 (1908); Charles E. Edgerton, *The Wire-Nail Association of 1895-96*, 12 POL. SCI. Q. 246, 269-70 (1897); Jeremiah W. Jenks, *The Michigan Salt Association*, 3 POL. SCI. Q. 78, 80-81 (1888).

<sup>292</sup> MCCRAW, *supra* note 21, at 66-67.

<sup>293</sup> As McCraw observes, firms always have an incentive to lessen competition, but at the turn of the century the usual tendencies “seemed mild when compared with the manic compulsions stimulated . . . by the revolution in productivity, which made the potential rewards of industrial success far greater . . . [and] . . . had the same magnifying effect on the

to begin with looser, arms-length forms of cooperation, such as price-fixing agreements or cartels.<sup>294</sup> These commonly failed, however, and were usually succeeded by tighter forms of control, often ending in a consolidation of the competitors' legal interests through some form of merger.<sup>295</sup>

By happenstance, Louis Brandeis delivered a series of lectures at the Massachusetts Institute of Technology in the early years of the twentieth century on the topic of the trusts.<sup>296</sup> His lectures provide an important insight into the prevailing views about the merger movement among educated people at the time. Brandeis distinguished four types of trusts:<sup>297</sup> 1) the cartel: an agreement among manufacturers not to sell their products below certain prices; 2) the trade association: an agreement establishing a central body charged with regulating prices; 3) the trust: a device by which the owners of competing firms transferred their stock to a group of trustees who would then manage their businesses cooperatively; and 4) the merger: a consolidation of the firms into a single entity, often through the formation of a holding company.

Brandeis observed that attempts to restrain competition usually began with cartel agreements or trade associations.<sup>298</sup> These looser forms of cooperation usually failed, however, when economic hardship or self-interest caused members to deviate from the agreements.<sup>299</sup> When firms were able to rally together again after these breakdowns in their agreements they usually attempted a tighter form of cooperation, such as a trust or a merger.<sup>300</sup> The trust device eventually ran afoul of the law, however, and so in the end, mergers were the only real alternative to ineffectual cartel or trade association agreements.<sup>301</sup> Brandeis thus concluded that "the legal limitation on loose combinations promoted tighter combinations," but the legal limitation he was referring to had nothing to do with *Trans-Missouri* or *Joint Traffic*.<sup>302</sup> In fact, Brandeis was referring to the challenges to the trust device under state corporation laws. These were first made in New York by the state government

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potential cost of failure." *Id.* at 66.

<sup>294</sup> CHANDLER, *supra* note 282, at 318-19.

<sup>295</sup> *Id.*

<sup>296</sup> See MCCRAW, *supra* note 21, at 94-142.

<sup>297</sup> *Id.* at 95-96.

<sup>298</sup> *Id.* at 95.

<sup>299</sup> *Id.* at 96-97.

<sup>300</sup> *Id.* at 97.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

before the Sherman Act was even enacted.<sup>303</sup>

Brandeis's observations have been corroborated by other contemporaneous accounts as well as more systematic historical studies. Alfred Chandler, the most important business historian of the twentieth century, has noted that the pressures to escape from competition were "particularly strong in the new capital- and energy-intensive industries where several entrepreneurs had simultaneously adopted innovative technologies of production."<sup>304</sup> According to the Twelfth Census of Manufactures, technological competition among firms at the turn of the century was so severe that it caused capital investments to become technologically obsolescent at an extraordinary rate.<sup>305</sup> Prominent business leaders commonly attested to this as well, although often for the purpose of justifying their attempts to restrain competition.

John Searles, for example, the first Secretary Treasurer of the American Sugar Refining Company, wrote that "[s]ugar refining became a thing of mysteries, each refiner seeking to discover for himself the method of treatment which would enable him to improve upon that of his competitor. These changes of methods involved the practical remodeling of the older refineries, and so great was the advantage of the more modern houses that the older and weaker ones were driven to the wall . . . . [The competition was so fierce], it became a question of the survival of the fittest."<sup>306</sup> Elbert Gary, Chairman of U.S. Steel, described conditions in the steel industry in similar terms: "There was a competition that was bitter, fierce, [and] destructive. If it did not absolutely drive competitors out of business, it so harassed and injured them as to prevent them from extending their business . . . and at times

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<sup>303</sup> Ironically, the first trust to be challenged under state law was a predecessor in interest to the American Sugar Refining Company, one of the defendants in *E.C. Knight*. In July 1888, the Attorney General of the state of New York sued the North River Sugar Refining Company to revoke its corporate charter on the grounds that its membership in the Trust violated its New York franchise. *People v. N. River Sugar Ref. Co.*, 3 N.Y.S. 401 (1889). The suit was upheld by the New York Court of Appeals in 1890. *People v. N. River Sugar Ref. Co.*, 121 N.Y. 582, 626 (1890); see also ALFRED S. EICHNER, *THE EMERGENCE OF OLIGOPOLY* 5-15 (1969).

<sup>304</sup> CHANDLER, *supra* note 282, at 72.

<sup>305</sup> In the TWELFTH CENSUS the U.S. Census Office attempted to survey the amount of manufacturing capital that had become technologically obsolete because the authors felt "some account must be taken of the enormous capital which is annually and irretrievably lost in the struggle for the survival of the fittest." U.S. CENSUS OFFICE, *supra* note 288, at lxxv. According to the authors, the rate at which machinery that was only slightly antiquated was consigned to the scrap heap was striking around this time. *Id.* at xcvi.

<sup>306</sup> Searles, *supra* note 289, at 259-60.

compelled them to close their mills [and] discharge their employees."<sup>307</sup> Gary's business rival, Andrew Carnegie, described the steel industry in almost exactly the same terms.<sup>308</sup>

Indeed, many prominent academics at the time, including many leading young economists, adhered to the theory of "ruinous competition" and viewed cartels, trade associations, and other forms of combination as a reasonable and practical response. In a study of the salt cartel, for instance, Jeremiah Jenks concluded that the motivation behind the cartel was not to charge monopoly prices, but to prevent ruinous competition.<sup>309</sup> Paul Vogt reached similar conclusions in a study of the sugar trust, and so did Charles Edgerton in a study of the wire nail association.<sup>310</sup> Indeed, the prevalent view among economists around the turn of the twentieth century was that competition was often problematic and that combinations and other restraints of trade were often socially beneficial.<sup>311</sup>

The theory of ruinous competition was, in fact, invoked by some courts to enforce certain price-fixing agreements.<sup>312</sup> Some courts cited the theory in upholding mergers as well.<sup>313</sup> The Supreme Court itself relied on the ruinous competition rationale to protect a private waterworks company from competition in *City of Walla Walla v. Walla Walla Water Co.*,<sup>314</sup> although this was not an antitrust case and did not involve the Sherman Act. Some of the defendants in early Sherman Act cases did raise the theory in their defense, but the Supreme Court expressly rejected the defense in *Trans-Missouri*.<sup>315</sup> The argument came up again in both *Joint Traffic* and *Addyston Pipe* and was again rejected in both cases.<sup>316</sup> Nonetheless, the theory continued to have strong proponents long after the turn of the century and figured prominently in

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<sup>307</sup> McCraw & Reinhardt, *supra* note 292, at 600.

<sup>308</sup> HAROLD LIVESAY, ANDREW CARNEGIE AND THE RISE OF BIG BUSINESS 114-17 (1975). See also Carnegie, *supra* note 292, at 141-42.

<sup>309</sup> Jenks, *supra* note 292, at 98.

<sup>310</sup> VOGT, *supra* note 292, at 34; Edgerton, *supra* note 292, at 270-72.

<sup>311</sup> Michael Perelman describes the prevailing view as comprising a "corporatist" school of political economy. See Perelman, *supra* note 281, at 193-94.

<sup>312</sup> See *Cont'l Ins. Co. v. Bd. of Fire Underwriters*, 67 F. 310, 316-22 (C.C.N.D. Cal. 1895); *Cent. Shade Roller Co. v. Cushman*, 9 N.E. 629, 630-31 (Mass. 1887); *Shrainka v. Scharringhausen*, 8 Mo. App. 522, 523-27 (Mo. Ct. App. 1880).

<sup>313</sup> See *Barr v. Pittsburgh Plate Glass Co.*, 51 F. 33, 33 (C.C.W.D. Pa. 1892); *Diamond Match Co. v. Roeber*, 106 N.Y. 473, 483 (1887).

<sup>314</sup> 172 U.S. 1, 17-18 (1898).

<sup>315</sup> See discussion *supra* Part III.B.

<sup>316</sup> For an overview, see Hovenkamp, *supra* note 62.

contemporaneous explanations about the causes of the “trust problem.”<sup>317</sup> Although some observers may also have felt that the Supreme Court’s Sherman Act cases had an important tilting effect on the trend toward consolidation, this was not the prevalent view about the underlying causes of the trust problem around the turn of the twentieth century.<sup>318</sup>

Regardless of the underlying causes, many consolidations came to wield significant economic and political power.<sup>319</sup> Even when mergers were compelled in large part by the prospects of ongoing, ruinous competition, they still often had significant anticompetitive effects.<sup>320</sup> There is no question that they generated significant public alarm.<sup>321</sup> Indeed, the Sherman Act is probably best understood as a highly compromised response to the political crisis that the trust movement created for federal politicians. Federal politicians were compelled to show the public that they were prepared to do something about the trusts, but it was far from clear that all the trusts were harmful or how to distinguish the good ones from the bad. Congress thus drafted a statute that, in effect, delegated the real task of defining the nation’s antitrust laws to the courts.<sup>322</sup>

The courts themselves, and least of all the Supreme Court, were not, and have never been, immune from political influences. All of the Supreme Court’s early antitrust decisions were handed down during the Chief Justiceship of Mellville W. Fuller. Fuller’s own values have been described as “distinctly Jeffersonian,” and he was known to embrace the ideas of a limited government, laissez-faire capitalism, and liberty of contract.<sup>323</sup> Indeed, on balance, the entire Fuller Court was decidedly conservative, even for its time.<sup>324</sup> Most of the Justices’ social values and

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<sup>317</sup> See, e.g., Spurgeon Bell, *Fixed Costs and Market Price*, 32 Q. J. ECON. 507 (1918) (arguing that high fixed costs may encourage cutthroat competition); Oswald Knauth, *Competition and Capital*, 30 POL. SCI. Q. 378 (1915) (arguing that capital investments may lead to excessive competition); Perelman, *supra* note 281 (arguing that high fixed costs stimulated ruinous competition in railroad industry).

<sup>318</sup> Comments by Jeremiah Jenks in the *New York Times* near the turn of the century, *Trust Problem in Europe*, *supra* note 179.

<sup>319</sup> For an example of the contemporaneous concerns about the growing political influence of the trusts, see Edward F. Adams, *The Trust in Politics*, 34 OVERLAND MONTHLY OUT W. MAG. 120, 120 (1899).

<sup>320</sup> LAMOREAUX, *supra* note 4, at 2.

<sup>321</sup> Millon, *supra* note 23, at 1225.

<sup>322</sup> ELY, *supra* note 54, at 129.

<sup>323</sup> *Id.* at 14.

<sup>324</sup> *Id.* at 82.

judicial philosophies were rooted in the mid-nineteenth century and ill-adapted to the changes that were transforming the nation as it turned the corner into the twentieth.<sup>325</sup> Yet the record suggests that the Fuller Court was not only a “product of its time and place . . . [but] . . . acted in accordance with the main currents of public opinion.”<sup>326</sup>

Chief Justice Fuller recognized that constitutional decisions were highly political and ultimately derived their force from the public’s willingness to accept them.<sup>327</sup> Indeed, before he became Chief Justice, he once suggested that important constitutional questions could be put to the public at the ballot box.<sup>328</sup> Although Fuller wrote relatively few opinions himself and, after *E.C. Knight*, wrote none of the Court’s other antitrust opinions, he played an important role in maintaining a high degree of collegiality on the Court and in shaping as wide a range of agreement as possible among its members.<sup>329</sup> Moreover, in spite of the Court’s social conservatism, its members understood that the days of atomistic capitalism were quickly succumbing to the powerful new forces of industrial capitalism.<sup>330</sup> The early antitrust decisions of the Fuller Court thus reflect the contradictions inherent in its efforts to balance big business interests and the rights of property against the public’s fears of the trusts and monopolies and to identify the appropriate role for the federal government in regulating the new industrial economy without usurping the traditional authority of the states.<sup>331</sup>

In spite of the tensions, the Fuller Court’s antitrust decisions were remarkably coherent. In fact, there was considerably more coherence to the Fuller Court’s antitrust jurisprudence than some scholars have recognized. The decision in *E.C. Knight* has been widely criticized, but it is important to remember that it was made on constitutional rather than statutory grounds. The Court appears to have been deeply concerned about the encroachment by federal statutes on spheres of state authority.<sup>332</sup> Chief Justice Fuller, who wrote the opinion, worried that if

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<sup>325</sup> *Id.* at 14.

<sup>326</sup> *Id.* at 3.

<sup>327</sup> *Id.* at 15-16.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> According to Ely, “[t]he Supreme Court under Fuller was more receptive to the new realities of American economic life than many other sectors of the polity.” *Id.* at 82.

<sup>331</sup> *Id.*

<sup>332</sup> FISS, *supra* note 56, at 116.

the federal commerce powers extended to local manufacturing activities there would be little left for the states.<sup>333</sup> In any case, Fuller believed that local manufacturing activities were a matter rightly subject to state control and that consolidations of manufacturing plants would only have an indirect effect on interstate commerce — certainly not enough of an effect to implicate the federal government's commerce powers.<sup>334</sup> Given the prevailing views about the appropriate balance of federal and state powers at the time, the decision in *E.C. Knight* was not particularly controversial.<sup>335</sup>

The Trans-Missouri Freight Association subsequently also challenged its prosecution under the Sherman Act on Commerce Clause grounds, but its constitutional argument was decisively rejected. The most striking aspect of Justice Peckham's opinion was its literal interpretation of the Sherman Act. But the outcome of the case was not particularly controversial.<sup>336</sup> In fact, the outcome was virtually compelled by the public's concerns about the growing power of the trusts. To that point, the Supreme Court had not upheld a single prosecution under the Sherman Act. If it had declined to uphold the government's case in *Trans-Missouri*, the public would have rightly wondered whether the Sherman Act had any teeth at all.<sup>337</sup>

The Court's application of the plain meaning doctrine was much more controversial. But even that was not out of line with public sentiment. The *New York Times* frequently expressed concerns about the consequences of a literal interpretation of the Sherman Act.<sup>338</sup> Nonetheless, it was understanding and supportive of the Supreme Court's position. As the *Times* noted in an article about two weeks after

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<sup>333</sup> ELY, *supra* note 54, at 130.

<sup>334</sup> *Id.*

<sup>335</sup> The *New York Times* reported the decision in an article subtitled, *Congress May Not Regulate Those Acts of Corporations Done Wholly Within a Single State*. See *A Sugar Trust Victory*, N.Y. TIMES, Jan. 22, 1895, at 16. The article itself was matter-of-fact and quoted extensively from the opinion. *Id.* The *Times* wrote no other articles or editorials criticizing the decision.

<sup>336</sup> As a leading corporate attorney was quoted two days after the opinion was handed down, there was no startling novelty in the Court's condemnation of railway pools and traffic arrangements, and if the Court had held otherwise, the Sherman Act would have been no act at all. See *The Decision No Surprise*, N.Y. TIMES, Mar. 27, 1897, at 8.

<sup>337</sup> *Id.*

<sup>338</sup> In an article published after the *Joint Traffic* decision was announced, for instance, the *Times* predicted that a literal interpretation of the Sherman Act would lead to rate-cutting and the solvent railroads ultimately buying out the insolvent ones, either before or after their bankruptcy. *The New Railroad Era*, N.Y. TIMES, Oct. 27, 1898, at 6.

*Trans-Missouri* was handed down, the Court's literal reading of the Act was consonant with the layman's interpretation of the Act.<sup>339</sup> Indeed, the Court needed to maintain some consistency in the application of the law.<sup>340</sup> The problem was not with the Court, but with Congress. There was nothing wrong with the Court's interpretation of the law; it was the law that was wrong, and Congress needed to change it.<sup>341</sup> When the Court's decision in *Joint Traffic* was handed down and reinforced a slightly modified but still very literal reading of the Sherman Act, the *Times* observed that "the language of the decision is simple, its reasoning convinces."<sup>342</sup>

Nonetheless, there was considerable concern about the possibility that a per se prohibition would apply to any contracts or combinations within the reach of the Sherman Act. Henry Clews, for instance, writing from a Wall Street insider's perspective, feared that it might make almost any kind of business transaction illegal.<sup>343</sup> The *New York Times* would later write that the ruling created a cloud of doubt that hung over many large scale business concerns.<sup>344</sup> Nonetheless, when the court of appeals' decision in *Northern Securities* was announced, the *Times* correctly predicted that it would be upheld on appeal to the Supreme Court and shrewdly observed that "[j]udges, no less than legislators, have their eyes on the moving currents of public opinion."<sup>345</sup> Public opinion was still decidedly in favor of further restraints on the growing power of corporate business. Indeed, Henry Clews not only predicted that *Northern Securities* would be upheld on appeal, but that if it was not, "the feeling of the country is such that . . . the law will be so amended that such combinations will be prevented."<sup>346</sup>

The principal issue in *Northern Securities* was not whether the federal commerce powers extended to the railways, but whether the federal government could regulate transactions intended to create holding companies under state corporate laws. The Supreme Court's disposition of the issue was almost a foregone conclusion. It was well established

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<sup>339</sup> *Compulsory Competition*, N.Y. TIMES, Apr. 5, 1897, at 6.

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> See *The New Railroad Era*, *supra* note 339.

<sup>343</sup> HENRY CLEWS, *THE WALL STREET POINT OF VIEW* 160-68 (1900).

<sup>344</sup> *The Stock Market Gains Activity and Loses Tone — Northern Securities Still the Factor*, *supra* note 238.

<sup>345</sup> *The Merger Decision*, N.Y. TIMES, Apr. 10, 1903, at 8.

<sup>346</sup> *Minnesota Not Balked*, N.Y. TIMES, Feb. 25, 1902, at 3.

long before the Sherman Act was passed that corporate law was within the scope of state authorities, and that the states had the power to regulate and control anticompetitive mergers conducted under their corporation laws.<sup>347</sup> Nonetheless, by the time the federal government brought its case against Northern Securities, most observers had become convinced that it would be futile to wait for the states to use their powers to regulate large corporate mergers.<sup>348</sup> For one thing, the states were locked in a prisoner's dilemma in which their incentives to attract incorporations (and incorporation fees) away from other states undermined their resolve to exercise their regulatory powers.<sup>349</sup> Thus, the states' corporate laws were the product of a "race to the bottom" and came to reflect corporate interests more than the public's.<sup>350</sup> To make matters worse, consolidations often occurred through holding companies that were created under "foreign" states' incorporation statutes and, therefore, could not be regulated in the states where the stocks came from.<sup>351</sup>

At the time the Sherman Act was enacted in 1890, the holding company device was still relatively new.<sup>352</sup> It was not yet clear whether the states would exercise their powers to control its use for anticompetitive consolidations. Moreover, it is unlikely that federal legislators had thought much about holding companies in drafting the Sherman Act.<sup>353</sup> Indeed, most observers initially thought that holding companies would be outside the reach of the Sherman Act because they were not "combinations," but were rather comprised of merely a single corporate individual.<sup>354</sup> This presumption had faded by the time *Northern Securities* was litigated, but it remained an important legal argument in the case. Nonetheless, the Supreme Court would have stood against the tide of public opinion if it had upheld any of the challenges to the government's case.<sup>355</sup> Given the states' dereliction in

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<sup>347</sup> Charles W. McCurdy, *The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869-1903*, 53 BUS. HIST. REV. 304, 316 (1979).

<sup>348</sup> *Id.* at 305-06.

<sup>349</sup> Christopher Grandy, *New Jersey Corporate Chartermongering, 1875-1925*, 49 J. ECON. HIST. 677, 678 (1989).

<sup>350</sup> *Id.* at 681.

<sup>351</sup> HOVENKAMP, *supra* note 245, at 261-62.

<sup>352</sup> The first general incorporation laws were enacted in New Jersey in 1888. See CHANDLER, *supra* note 282, at 319.

<sup>353</sup> See LETWIN, *supra* note 60, at 53-99.

<sup>354</sup> HOVENKAMP, *supra* note 245, at 263-64.

<sup>355</sup> See discussion *supra* Part IV.

the matter, if the Court had upheld Northern Securities' appeal there would have been no effective legal checks against the economic and political power of the trusts, and the public's growing concerns would have almost certainly mandated new federal legislation.<sup>356</sup>

It is important to keep in mind that *Northern Securities* was not a Commerce Clause case. Thus, even though it clearly brought the holding company device within the reach of the Sherman Act, it did nothing to resolve the lingering questions about the constitutional scope of federal powers. By the time the *Northern Securities* decision was announced, most observers probably already felt that the federal commerce powers would extend to prosecutions of manufacturing holding companies as well as railroad holding companies, but the question still had not been addressed by the Supreme Court.<sup>357</sup> When it did address the question in *Swift*, the Court was virtually compelled to extend the scope of federal commerce powers for the same reason that it had been compelled to bring the holding company device within the reach of the Sherman Act in *Northern Securities*. If it had not extended the scope of federal powers, there would have been a legal void. The holding company device could have been used by manufacturers to create larger and larger consolidations, completely unchecked by any effective regulatory control. The Court needed a rationale for extending the reach of the Sherman Act, and the stream of commerce doctrine provided that rationale. Although *Swift* has not received much attention from antitrust scholars, it was the last logical step in the Supreme Court's early antitrust jurisprudence.

*Swift* was also a watershed in American constitutional law. Although it was merely an antitrust case, the stream of commerce doctrine that Justice Holmes laid down in his opinion provided the guiding light for the Court's interpretation of the federal government's commerce powers, at least until President Roosevelt's court-packing plan in the 1930s.<sup>358</sup> Although Holmes did not invent the doctrine, he did persuade the rest of

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<sup>356</sup> See the comments attributed to Henry Clews in *Minnesota Not Balked*, *supra* note 347.

<sup>357</sup> This is why the *New York Times* referred to a "cloud" of doubt hanging over many trusts prior to the Supreme Court's decision in *Northern Securities*. *The Stock Market Gains Activity and Loses Tone — Northern Securities Still the Factor*, *supra* note 238. As a subsequent article noted, the circuit court opinion had ostensibly extended the literal interpretation of the Sherman Act in *Trans-Missouri* and brought within reach "innumerable business agreements, contracts, and combinations not harmful in their results . . ." *Judge Made Law*, N.Y. TIMES, Apr. 14, 1903, at 8.

<sup>358</sup> Cushman, *supra* note 269, at 156, argues that it remained the guiding light until the 1940s.

the Court to adopt it, even though they had previously rejected it in *Hopkins*.<sup>359</sup> This is somewhat ironic, for Holmes was very skeptical about the Sherman Act and antitrust in general.<sup>360</sup> Along with many other academics and intellectuals at the time, he believed that the days of atomistic competition had passed and that the trend toward industrial concentration, and even monopolization, was inevitable.<sup>361</sup> Nonetheless, Holmes was a pragmatist, and he recognized that constitutional doctrine needed to be brought into line with the realities of the modern industrial economy.<sup>362</sup>

#### CONCLUSION

Antitrust law remains as controversial today as ever. Indeed, the controversy over the government's early enforcement of the Sherman Act and the Supreme Court's early antitrust jurisprudence is still important to the way we view antitrust law today. The conventional law and economics view of antitrust policy and the Supreme Court's early antitrust decisions casts a dour light on the entire antitrust agenda. But theories need to be scrutinized and tested. It is all too easy to accept the conventional wisdom as a matter of faith and simply cant hollow orthodoxies.

A careful reading of the Supreme Court's earliest antitrust opinions in their historical context casts considerable doubt on the thesis that either antitrust policy or the Supreme Court's antitrust decisions caused the Great Merger Movement. To be sure, there was considerable confusion and uncertainty about the legal implications of many, if not most, of the Court's decisions. But we should keep in mind that there are diverse opinions about many settled matters of law today. A hundred years from now, the diversity of opinions today about *Roe v. Wade*<sup>363</sup> or *Bakke v. Regents of the University of California*<sup>364</sup> might be misread as a widespread disagreement about the law. The Supreme Court's earliest antitrust opinions were not opaque, and they did not defy understanding. Moreover, people at the turn of the twentieth century were not fools. If the *New York Times* was able to decipher the meaning of the Supreme

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<sup>359</sup> Gordon, *supra* note 268, at 279.

<sup>360</sup> Neely, *supra* note 13, at 2, 22.

<sup>361</sup> FISS, *supra* note 56, at 143.

<sup>362</sup> Gordon, *supra* note 268, at 278.

<sup>363</sup> 410 U.S. 959 (1973).

<sup>364</sup> 438 U.S. 265 (1978).

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Court's opinions (and all the evidence indicates that it was able to do so), then so could sophisticated corporate attorneys and business leaders.

The trend toward consolidation in American business began before the Sherman Act was passed. In fact, the Sherman Act was passed in response to the public's concerns about the trend toward consolidation and the growing economic and political power of large industrial combinations. The trust movement was driven by powerful economic forces. The transportation revolution had dramatically increased the potential size of the markets for many manufactured goods, and manufacturing firms were able to avail themselves of important new technologies in adjusting to meet the demands. The new technologies generated economies of scale and required significant capital investments. But competition often resulted in overinvestment and excess capacity. Hence the investments were often very risky, and business leaders sought ways of alleviating the uncertainty and ensuring high rates of return. They usually attempted to restrain competition initially through some form of arms-length cooperation, such as a price-fixing or trade association agreement. These usually broke down, however, when the parties succumbed to the temptation to deviate from the agreements in the face of severe hardship or simple greed. Thus, their efforts to restrain competition usually drove the parties into some form of consolidation. In the end, the preferred manner of consolidation was a merger through the holding company device.

Antitrust jurisprudence in the years immediately after the Sherman Act was enacted is better understood as a reaction to these powerful new economic forces and the trust movement than as a cause of them. The Supreme Court's first antitrust decision in *E.C. Knight* has been widely criticized. To be sure, the Court's distinction between manufacturing and commerce was anachronistic. But a careful reading of the case indicates that it did not constrain the scope of the Sherman Act nearly as much as the conventional wisdom suggests. Moreover, it clearly applied to all restraints of trade and not just mergers. This was later made evident by *Hopkins*, which was construed as a matter of local commerce and, therefore, beyond the reach of the Sherman Act even though it did not involve a merger. Somewhat after the fact, some observers attributed the start of the Great Merger Movement to the Court's holding, but their grounds for doing so were weak at the time and are just as weak today.

Public pressures virtually compelled some kind of legislative response to the trusts. Congress thus enacted the Sherman Act. But the Sherman

Act remained toothless for some time, and the public pressure for successful prosecutions grew. The federal government initially focused its resources on price-fixing cases, mainly because they were easier to prosecute. The Supreme Court's literal interpretation of the Sherman Act in *Trans-Missouri* did take many observers by surprise and was the subject of considerable criticism. Yet the public was anxious for action, and the Court's literal reading of the Sherman Act was consistent with the layman's understanding of what its words meant. The conventional wisdom is that *Trans-Missouri* established a per se prohibition against price-fixing agreements at a time when most mergers were believed to be immune from prosecution. *Trans-Missouri* and, to a lesser extent, *Joint Traffic* have thus been credited with precipitating the steepest rise in merger activity throughout the entire period.

The "credit" is misplaced. Both *Trans-Missouri* and *Joint Traffic* were railroad cases. The Court's sweeping literal interpretation of the Sherman Act applied to all direct restraints of interstate trade — not just price-fixing agreements. Hence, it applied to any consolidations within the Act's reach, as well as any other restraints that went beyond simple price-fixing agreements. It is not clear whether the Court even considered *Trans-Missouri* and *Joint Traffic* to be price-fixing cases. It had long been established that railways were engaged in interstate commerce. Therefore, absent any other limits on the Sherman Act's reach, *Trans-Missouri* and *Joint Traffic* implied that railroad consolidations would be subject to the same per se prohibition that price-fixing agreements were subject to. It quickly became clear to most observers that *Trans-Missouri* and *Joint Traffic* created a cloud of legal doubt that hung over many consolidations just as darkly as it did over less tightly integrated combinations. It is difficult to see how these decisions alone could have precipitated the dramatic upswing in merger activity at the turn of the twentieth century.

By the time the court of appeals' decision in favor of the government in *Northern Securities* was handed down, most observers believed it would be upheld by the Supreme Court. Thus, there was no particular reason why the Supreme Court's decision should have prompted an abrupt end to the Great Merger Movement. Moreover, *Northern Securities* was yet another railroad case, and the Court's decision did nothing to extend the reach of the Sherman Act beyond the railways. In fact, the Court did not extend federal commerce powers until it handed down its decision in *Swift*, but by that time the great rush of merger activity had already ended. People may have never believed that the

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Court would define the Commerce Clause so narrowly that it would place most mergers of manufacturers beyond the Sherman Act's reach, or they may have come to doubt whether the Court would continue to interpret the Commerce Clause as narrowly as some scholars have implied, or they may have simply not cared. There is evidence to support all three possibilities. All three cast doubt on the conventional law and economics view.

It is impossible, therefore, to tell a coherent story relating merger activity at the turn of the twentieth century to the Supreme Court's early antitrust decisions. If sophisticated corporate attorneys and business leaders understood the developments in antitrust law as well as the *New York Times*, there is no way the cases could have generated such sharp responses. People knew the risks of prosecution were slight. They knew that criminal penalties were unlikely. The reality is that the consolidation movement was compelled by underlying technological and economic forces. Those same underlying forces influenced the way the Supreme Court responded to the legal questions raised in its early antitrust cases. Most of the important questions were constitutional, and the Supreme Court, therefore, handed down some very important constitutional decisions. These no doubt influenced the subsequent evolution of American constitutional law and the American polity.

One of the unfortunate consequences of all the attention that scholars have given to the effect of antitrust on the Great Merger Movement is that it has distracted attention from the role that the Court's early antitrust decisions played in the development of constitutional doctrine. The underlying technological and economic forces that gave rise to a national economy also created pressures for a regulatory response. In the absence of any possibility of effective state control, the Supreme Court was virtually compelled to extend the scope of the federal government's commerce powers and bring a wide range of business activities within the scope of federal regulation. The irony in the end is that the same Court that handed down *Lochner*, which came to stand for the principles of limited government and the rights of private property, was instrumental in expanding the scope of federal power and helping to lay the foundations of the modern American system of business regulation.