The "Rule of Reason" in Antitrust Law: Property Logic in Restraint of Competition

by
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Though modern antitrust scholars, policy makers, and judges agree on very little, they do concur on two fundamental propositions. First, they agree that "courts should refuse to validate any private arrangement restricting competition on the basis of a claim that the arrangement advances other social ends."[1] In short, "competition" constitutes the only legitimate policy basis for antitrust doctrine. Second, they agree that the Supreme Court's adoption of the "rule of reason" in 1911 represents the emergence of modern antitrust law.[2] That is, the "rule of reason" affords

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This Article constitutes the historical and theoretical foundation for a series of studies of modern antitrust law. The first, entitled *A Genealogy of Vertical Restraints Doctrine*, is forthcoming in 40 HASTINGS L.J. (1989) (March issue).

1. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 182 (1977); *see* P. AREEDA, ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES 5, 8, 7-43, 49-50 (3d ed 1981); C. KAYSEN & D. TURNER, ANTITRUST LAW: AN ECONOMIC AND LEGAL ANALYSIS 44 (1959); R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE ix (1976). At the same time, there is little agreement concerning the substance of the term "competition." *See, e.g.,* 1 P. AREEDA & D. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 5-44, 49-50 (3d ed. 1981); McNulty, *Economic Theory and the Meaning of Competition,* 82 Q.J. ECON. 639, 639-50 (1968); Peritz, *The Predicament of Antitrust Jurisprudence: Economics and the Monopolization of Price Discrimination Argument,* 1984 DUKE L.J. 1205, 1209-13.

2. Standard Oil Co. v. United States, 221 U.S. 1 (1911). For an early and well-respected rendition of this view of modern antitrust law, see REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY ANTITRUST LAWS 5 (1955) [hereinafter ATTORNEY GENERAL'S REPORT]. *Cf.* United States v. Aluminum Co. of Am., 148 F.2d 416, 429-33 (2d Cir. 1945) ("the old dispensation . . . ended with Standard Oil Co. v. United States"); R. BORK,

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the analytical tool for making judgments about the competitive effects of market conduct and in turn for identifying "unreasonable restraints of trade."

An orthodox history of early antitrust law provides the common ground for this consensus about the normative and analytical basis of modern antitrust doctrine. This standard account usually proceeds as follows. In the late nineteenth century, growing public concern about the consolidation of American industry was chronicled in the popular press, in political party platforms, and on state court dockets.[3] Whether to attack the trusts or merely to defuse civil unrest, Congress passed the Sherman Act of 1890.[4] Unfortunately, neither the Act's language nor the legislative history "is very illuminating about what specifically is allowed or prohibited."[5] As a result, some modern commentators accord the "legislative history of the antitrust laws . . . relatively little weight."[6] The language of the statute itself, which follows the general language of the common law, is viewed as "singularly opaque" and vague, particularly its first section.[7] Section one of the Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."[8] The

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THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 18-19 (1978) (rule of reason cases began modern antitrust law).

3. *See infra* notes 25-132 and accompanying text. Thoughtful treatments of the early history of antitrust law include R. HOFSTADTER, *What Happened to the Antitrust Movement?*, in THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 188 (1965); J.W. HURST, LAW AND SOCIAL ORDER IN THE UNITED STATES 245-66 (1977); W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT (1965); H. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION (1955); Flynn, *Rethinking Sherman Act Section I Analysis: Three Proposals for Reducing the Chaos*, 49 ANTITRUST L.J. 1593 (1980) [hereinafter *Rethinking Sherman Act*]; Flynn, *Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy—Introduction*, 125 U. PA. L. REV. 1182 (1977) [hereinafter *Antitrust Jurisprudence*]; Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981); Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982). For an insightful analysis of the state antitrust law of this period, see May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495 (1987).

4. S. 3445, 50th Cong., 2d Sess., 20 CONG. REC. 1120 (1889) (as amended) (codified at 15 U.S.C. § 1-7 (1985)); *see also* Senator Reagan's earlier Bill, S. 3440, 50th Cong., 1st Sess., 19 CONG. REC. 7512 (1888).

5. P. AREEDA & D. TURNER, *supra* note 1, at 14-15; *see also* J. AUERBACH, *President Roosevelt and the Trusts*, 175 N. AM. REV. 877, 891 (1902) (describing the legislation as "crudely drawn, imperfectly considered, hastily enacted . . . .")

6. P. AREEDA & D. TURNER, *supra* note 1, at 15.

7. *Id.* at 14; R. BORK, *supra* note 2, at 19-20.

8. Sherman Act, 15 U.S.C. § 1 (1982).

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Supreme Court struggled with the statute for twenty-one years, the familiar story continues, until they finally got it right by announcing the "rule of reason" in *Standard Oil v. United States.* [9] The "literalist" opinions that preceded *Standard Oil* "reveal some early confusion about the relationship of § 1's prohibition to common law notions of 'restraint of trade.' "[10] Indeed, a "literalist" strategy for interpreting the Sherman Act appears naive or stupid. How can *every* contract in restraint of trade be illegal? Such literalism would outlaw not only price fixing agreements, but also partnership agreements and even simple contracts for the sale of goods—certainly an unreasonable view of the statute.[11] In short, the "literalist" opinions marked a series of failed attempts to make sense of enigmatic statutory language.[12]

Is that what the "rule of reason" left behind? Did the old "literalist" majority on the Court really take such naive positions on statutory interpretation? This Article will show that they did not. Rather, their conflict with the new "rule of reason" majority centered on fundamental differences over whether competition should constitute antitrust's only normative ground. Consequently, the well-settled history of antitrust's formative years, by focusing primarily on competition, tells only half of the story.

A strikingly different history emerges from this Article's reformulation of legislative and judicial history. First, the legislative debates chronicle a conflict between commitments to fostering competition and commitments to protecting property rights, a tension that produced the Sherman Act of 1890. From the earliest moments of federal antitrust history, assuring competitive markets never constituted the sole concern of legislators or judges.[13] Second, it was this tension between competi-

9. 221 U.S. 1 (1911); L. SCHWARTZ, & J. FLYNN, ANTITRUST AND REGULATORY ALTERNATIVES 14-15 (5th ed. 1977). For an argument that the "literalists" were proto-price theorists, see R. BORK, *supra* note 2, at 22-23. For critiques of that claim, see *infra* note 22 and sources cited therein.

10. P. AREEDA, *supra* note 1, at 314.

11. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 351-56 (1897) (White, J., dissenting).

12. R. BORK, *supra* note 2, at 19-20.

13. Of course, numerous historical actors have participated in these struggles. The analysis that follows, however, is not interested in finding the authorial intent of particular opinion writers or opinions, legislators or legislatures, committees or lobbyists. What Senator Sherman had in mind or how Justice Holmes' antitrust jurisprudence developed is not this Article's concern. Instead, this Article looks at a series of statements that constituted the discourse of early antitrust law. This archive houses not only familiar articulations, but also forgotten statements about antitrust. Neither evolutionary nor chaotic legal doctrine emerges from this archival study. Rather, the documents put under this new light, the unremarkable debate transcripts in the *Congressional Record,* and the court opinions reinvigorated and so recovered

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tion and property, this struggle between two logics,[14] that motivated the well-known jurisprudential disagreement between the "literalist" and "rule of reason" factions on the Court. The literalists were not naive; they developed a scheme based on the familiar categories of direct and ancillary restraints, a scheme that we continue to use today.[15] Compromise with the proponents of the rule of reason was not possible, however, because the literalists' competition-driven views were profoundly incompatible with their colleagues' property-directed commitments. Third and most surprisingly, the emergence of the rule of reason represented the triumph of a property-driven logic, not the competition-directed analysis universally associated with the rule today.[16] Thus, when Justice Oliver Wendell Holmes wrote that the Sherman Act "says nothing about competition,"[17] he represented the rule of reason's position in the early battle over the foundations of antitrust law.

This Article's fundamental revision of early antitrust history is important for several reasons. First, the conventional learning, embedded in a competition paradigm, excludes half the legislative and doctrinal history of antitrust's formative years. Redefining the framework to reflect a tension between competition and property logics brings to light the other half of this history. Second, the so-called literalist opinions and their rule of reason successors make more sense reinterpreted within this new his-

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report a series of confrontations between opposing logics that have shaped modern antitrust law. By opening this archive of forgotten struggles and reconstructing the conflicts that produced early antitrust doctrine, we get a sense of their conditions of possibility. We are able to define what is unspoken in modern antitrust law, and why.

14. In describing the tension or conflict between "competition" and "property," this Article refers to those concepts as logics, rhetorics, or rhetorical modes. The three labels are treated as synonymous, each identifying a set of assumptions and beliefs about competition and property, as well as a system of logical relations among the assumptions and beliefs. They have been called competition and property paradigms or models as well.

15. R. BORK, *supra* note 2, at 22-23. For a recent opinion applying a distinction between direct and ancillary restraints, see Business Elec. Corp. v. Sharp Elec. Corp., 108 S. Ct. 1515, 1522 (1988).

16. The tension between competition and property insinuates a second tension—between commitments to liberty and equality. *See infra* notes 51, 255-61 and accompanying text. Until the early 20th century, competition seemed to allow for the illusion of equality.

> Why do so many [courts] force upon legislation an academic theory of equality in the face of practical conditions of inequality? Why do we find a great and learned court in 1908 taking the long step into the past of dealing with the relation between employer and employee in railway transportation, as if the parties were individuals—as if they were farmers haggling over the sale of a horse?

Pound, *Liberty of Contract*, 18 YALE L.J. 454, 454 (1909); *see also* J. BENTHAM, THE THEORY OF LEGISLATION 119-22 (Ogden ed. 1931) (tension between equality and security should be resolved in favor of security because perfect equality cannot be attained or maintained).

17. Northern Sec. Co. v. United States, 193 U.S. 197, 403 (1904).

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torical framework.[18] Third, and perhaps most importantly, the new framework allows us to understand modern antitrust law and its relationship to both the Sherman Act and the early cases.[19] Finally, in destabilizing the previously unquestioned link between antitrust and competition, and in authenticating the importance of property logic to antitrust law, this Article also raises a new set of questions about the relationship between competition and the efficiency norm. A full explication of these questions is beyond the scope of this Article. For now, there is only the caution that a deep understanding of modern antitrust doctrine and scholarship must include consideration of how the tension between competition and property logics produces the efficiency norm in its various forms.[20]

This Article takes as its point of departure the references to policy conflict articulated in the early legislative debates about the relationship between competition and combination[21] and discussed in Robert Bork's more recent rendition of an antitrust paradox—between free competition and protection of small business.[22] These two portrayals of competition's

18. This Article's methodology is informed by the work of Michel Foucault, a French philosopher. *See, e.g.,* M. FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS BY MICHEL FOUCAULT 1972-1977 (C. Gordon ed. 1980); M. FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (A. Sheridan trans. 1979); M. FOUCAULT, *Nietzsche, Genealogy, History,* in MICHEL FOUCAULT: LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS (Bouchard ed. 1977); M. FOUCAULT, MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON (R. Howard trans. 1973). M. FOUCAULT, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES (1973). One important implication of Foucault's work is that historians and other scholars must avoid placing responsibility either simply in the individual or in the economic. *See, e.g.,* C.C. LEMERT & G. GILLAN, MICHEL FOUCAULT, SOCIAL THEORY AS TRANSGRESSION 4-20 (1982).

19. *See* Peritz, *A Genealogy of Vertical Restraints Doctrine,* 40 HASTINGS L.J. (1989) (forthcoming) (examining doctrine of vertical restraints as exemplary case of modern antitrust law).

20. *See, e.g.,* Coleman, *Efficiency, Utility, and Wealth Maximization,* 8 HOFSTRA L. REV. 509, 512-26 (1980) (observing that the nexus between competition and efficiency is unclear); *cf.* Peritz, *supra* note 1, at 1280 (arguing that price theorists have promoted efficiency by inverting the traditional view that competition implies a constellation of values, one of which is efficiency).

21. *See infra* notes 25-132 and accompanying text.

22. This tension between the logics of competition and private property should not be confused with Robert Bork's claim of an antitrust paradox. His view is that efficiency (a proxy for *laissez-faire*) and protectionism are values that constitute a policy at war with itself. R. BORK, *supra* note 2, at 6-7.

First, persuasive historical analysis has already shown that Mr. Bork is mistaken about an impossibly early appearance of the efficiency norm. *See, e.g.,* Fox, *supra* note 3, at 1154 n.76; Hovenkamp, *Antitrust Policy After Chicago,* 84 MICH. L. REV. 213, 249-55 (1985); Lande, *supra* note 3, at 82-106; May, *supra* note 3, at 553-93; Peritz, *supra* note 1, at 1249 n.252.

Moreover, Mr. Bork's paradox makes no sense analytically. In current vertical restraints

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antagonists—large combinations of capital and "small dealers and worthy men"[23]—seem to contradict one another. This Article develops a concept of property that unravels the contradiction. It shows how seemingly antipodal commitments to large accumulations of capital and to Jeffersonian entrepreneurialism constitute two modes of a coherent property logic.

This new framework—the conflict between competition and property—also describes a significantly different mechanism at work in the production of antitrust doctrine. The position that there have always been two logics or rhetorics in productive conflict disputes the orthodox view that competition represents the only positive norm for antitrust and that combination, small business, or other "anticompetitive" commitments constitute negative values that can or must be subordinated.

This Article proceeds in the following manner. Section I returns to a recognized but unexplored gap in the Sherman Act's legislative history—the reticence accompanying the eleventh-hour redrafting of Senator Sherman's bill and quick passage of what amounted to an entirely

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doctrine, for example, efficiency and protectionism seem to be allied values rather than adversaries. The "free rider" rationale that Mr. Bork espouses and that the Supreme Court has embraced in Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 54-57 (1977) (citing, *inter alia,* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division,* 75 YALE L.J. 373, 403 (1966)), purports to legitimate a manufacturer's imposition of nonprice restraints on dealers or distributors. Such restraints on intrabrand competition are reasonable when they increase distributional efficiencies, thereby allowing the manufacturer to compete more effectively against other manufacturers. The restraints purport to serve distributional efficiency by encouraging dealers or distributors to promote the manufacturer's products. Restraints such as customer and territorial limitations encourage dealers or distributors to promote a product by protecting their customer base from other dealers. That is, they preclude dealers from appropriating the value of others' promotional activities. In short, they deter "free riders." Thus, distributional *efficiency* is effected by the court's *protectionist* attitude toward manufacturer's restraints. Though Mr. Bork defines them as antithetical, efficiency and protectionism go hand in glove down the path of Mr. Bork's "free rider" analysis. For excellent critiques of the "free rider" rationale within the context of resale price maintenance, see Flynn, *The "Is" and "Ought" of Vertical Restraints After* Monsanto v. Spray-Rite Service Corp., 71 CORNELL L. REV. 1095, 1131-42 (1986); Levmore, *Rescuing Some Antitrust Law: An Essay on Vertical Restrictions and Consumer Information,* 67 IOWA L. REV. 981, 984-86 (1982); Pitofsky, *In Defense of Discounters: The No-Frills Case for a* Per Se *Rule Against Vertical Price Fixing,* 71 GEO. L.J. 1487, 1492-94 (1983).

Not only does Mr. Bork's paradox make no sense, but the traditional antitrust value of Jeffersonian entrepreneurialism, or protectionism according to Mr. Bork, is produced by the interplay of competition and property logics, not by anti-efficiency sentiments. *See* Peritz, *supra* note 19.

Finally, the norm of efficiency as it has appeared in antitrust doctrine is a product of the fundamental conflict between the logics of property and competition. For a discussion of efficiency within the context of the "free rider" rationale for vertical restraints on distribution, see *id.* For a full analysis of the efficiency norm's production, see *id.*

23. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 338 (1897).

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new piece of legislation. This gap in the *Congressional Record* is emblematic of the tension between competition and property. Next, section II explains how the Court's literalist majority in the early antitrust cases applied a logic of competition to interpret the Sherman Act. Section III shows how the Court's shift to a "rule of reason" in *Standard Oil v. United States*[24] represented victory for the new majority's property logic. Finally, section IV maps the structure and dynamics of early antitrust history.

I. The Legislative Debates: Industrial Liberty and Fair Price

To set the context for the narrative that follows, a brief account of what happened in the congressional debates is appropriate. For more than two years, the Senate and the House debated a bill, originally introduced in 1888 with the following operative language: "*Be it enacted* . . . that all arrangements, contracts, agreements, trusts, or combinations . . . made with a view, or which tend, to prevent full and free competition . . . or which tend, to advance the cost to the consumer . . . are hereby declared to be against public policy, unlawful, and void. . . ."[25] While a number of amendments were offered and discussed, most of the congressional debate centered on three issues: the proper constitutional reach of congressional authority under the commerce clause, an explicit labor exemption, and the desirability of state court jurisdiction.[26] Eventually, the 1888 bill was referred to the Committee on the Judiciary for revision. Six days after the 1888 bill's referral, Committee Chairman Edmunds introduced an amended bill that was quite different from its predecessor. In place of the 1888 language of "full and free competition" and "cost to the consumer," the 1890 Bill substituted "contract . . . in restraint of trade or commerce," and "monopolize, or attempt to monopolize . . . trade or commerce."[27] The 1890 Bill was passed in a matter of days. Despite these changes, however, we now take for granted that there are, or should be, no significant differences between the two versions. We assume that proper antitrust policy is based on free competition and its connection to consumer prices, even though the language referring to these policies was jettisoned in the final bill. Neither logic nor history,

24. 221 U.S. 1 (1911).

25. S. 3445, 50th Cong., 2d Sess., 20 CONG. REC. 1120 (1889) (as amended); S. 3440, 50th Cong., 2d Sess.,19 CONG. REC. 7512 (1888) (as amended).

26. Hans Thorelli agrees with this assessment. *See* H. THORELLI, *supra* note 3, at 177-210.

27. S. 1, 51st Cong., 1st Sess., 21 CONG. REC. 2901 (1890); *see* S. 3445, 50th Cong., 2d Sess., 20 CONG. REC. 1120 (1889); *see also,* S.3440, 50th Cong., 1st Sess., 19 CONG. REC. 7512 (1888) (predecessor bill).

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however, compels this conclusion. This section explains why the Sherman Act cannot be viewed simply as a mandate for free competition and consumer sovereignty.[28]

A. The Competition Logic of Industrial Liberty

Given the nexus of modern antitrust doctrine with competition and given the wealth of scholarship on the Act's legislative history corroborating that nexus, we would expect to find numerous statements concerning competition in the floor debates about Senator Sherman's Bill. Following is a sampling of references to competition in the *Congressional Record.* Senator Sherman himself stated:

> This bill, as I would have it, has for its single object to invoke the aid of the courts of the United States . . . in dealing with combinations that affect injuriously the industrial liberty of the citizens. . . . It is the right of every man to work, labor, and produce in any lawful vocation. . . . This is industrial liberty and lies at the foundation of the equality of all rights and privileges. . . .
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> The sole object of . . . [a trust] is to make competition impossible. It can control the market, raise or lower prices, as will best promote its selfish interests, reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist. Its governing motive is to increase the profits of the parties composing it. The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer.[29]

Although Senator Sherman's references to competition sound familiar, his use of the term depended on a set of assumptions and beliefs that have grown unfamiliar to us in recent years. In talking about "full and free competition," Senator Sherman and others made frequent reference to something called "industrial liberty."[30] Although modern readers might understand this term to mean freedom from governmental regulation or other market intervention, Senator Sherman and his contemporaries were concerned with another kind of power. Their attentions focused on "combinations of capital" that "make competition impossible."[31] Such market power "advance[d] the cost to the consumer"[32] by

28. The clearest example of an attempt to connect free competition and consumer welfare is R. BORK, *supra* note 2, at 66.

29. 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman).

30. *Id.*

31. *Id.*; 21 CONG. REC. 1768 (1890) (Sen. George: extorted wealth); 21 CONG. REC. 2572 (1890) (Sen. Teller: predatory pricing).

The term "combination" was used to represent a wide range of agreements, trusts, corporate holding companies, and secret understandings. There were "loose" combinations, such as agreements to agree on price, and "tight" combinations, such as the Standard Oil Trust. Although today we tend to use the term less inclusively, this Article's use of the term will follow the more relaxed usage of the congressional debates. "Combination" will mean any

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the "ultimate fixing of a price."[33] The interest of the public was safe only so long as competition remained free of such market power.[34] In our terms, the primary strategy of Sherman and others was to limit market power and thereby to prevent monopoly pricing; their ultimate goal was to enhance the consumer's well-being.

While "full and free competition" may have been seen as the best way to protect consumers, the related notion of "industrial liberty" signified a broader set of assumptions and beliefs, which captured the congressional imagination. As Senator Sherman's statement above indicates, industrial liberty was valued not only for its potential downward push on prices. Senator Teller expressed as much when he said, "I do not believe that the great object in life is to make everything cheap."[35] Industrial liberty also embodied a sense of the public as competitors and employees of the new large combinations of capital, whose power rendered "the boasted liberty of the citizen . . . a myth."[36] Thus, in the House debate, Representative Mason pointed out that even if "trusts have made products cheaper, . . . [they] have destroyed legitimate competition."[37]

Senator Reagan first introduced his own antitrust bill[38] and later offered several amendments to Sherman's bill[39] to assure a cause of action for the small competitors injured by large combinations of capital—a realistic "remedy for the great mass of people."[40] Industrial liberty (whether enjoyed by capital or labor) was thought to require rivalrous marketplace participants, and perhaps some supervision and control of industries characterized by firms with large cumulations of assets. In sum, the idea of industrial liberty demanded conditions of rough compet-

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private agreement producing a cartel, pooling arrangement, trust, or merger. In contrast, "cartel," "pooling arrangement," "trust," and "merger" are used in their narrow senses.

32. S. 3445, 50th Cong., 1st Sess., 19 CONG. REC. 8483 (1888) (Sen. Sherman's original bill).

33. 21 CONG REC. 137 (1889) (statement of Sen. Turpie); *cf.* Kennedy, *The Role of Law in Economic Thought,* 34 AM. U.L. REV. 944 (1985) (describing the relationship between classical economic and legal thought).

34. 21 CONG. REC. 2458 (1890) (remarks of Sen. Sherman, quoting from Craft v. McConoughy, 79 Ill. 346, 350 (1875)); *see also* 20 CONG. REC. 1458 (1889) (statement of Sen. Jones) (these combinations of capital could "plunder the public").

35. 20 CONG. REC. 1457 (1889) (statement of Sen. Teller); 21 CONG. REC. 2726 (1890) (statement of Sen. Edmunds) (the "great monopolies . . . command everybody, laborer, consumer, producer, and everybody else.").

36. 21 CONG. REC. 2561 (1890) (statement of Sen. Teller).

37. 21 CONG. REC. 4100 (1890) (statement of Rep. Mason).

38. S. 3440, 50th Cong., 1st Sess., 19 CONG. REC. 7512 (1888).

39. *See, e.g.,* 21 CONG. REC. 2597 (1890).

40. *Id.* at 3146.

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itive equality.[41]

In congressional debates, a distinction was drawn between industrial liberty and unrestrained competition, the belief being that some competition impinges on industrial liberty. For example, in the heated debate just prior to the 1888 bill's referral to committee and radical redrafting, Senator Platt articulated a tension between industrial liberty and that bill's language of free competition; he noted that the "bill proceeds upon the false assumption that all competition is beneficent to the country . . . ."[42] Later, in House debate over the Conference Report on the 1890 bill as enacted, Representative Stewart stated his understanding of the new language: "It is just as necessary to restrict competition as it is to restrict combination . . . ."[43] Thus, the congressmen shared the belief that "unrestrained competition" is not free competition because it diminishes industrial liberty. Rather, "free and fair competition" was seen as the victim of both unrestricted competition and unrestricted combination. The trusts were seen as embodying the forces of both unrestricted extremes.

The concern for consumer and producer liberty also implicated political liberty. For example, Senator Jones argued that if the trusts were allowed to continue, "the boasted liberty of the citizen is a myth . . . and our Government is a farce and a fraud."[44] Senator Sherman echoed these sentiments in stating that industrial liberty is "the foundation of the equality of all rights and privileges."[45] He believed that rough competitive equality was important not only for economic or vocational liberty, but for political liberty in a democratic society as well.

> They had monopolies and mortmains of old, but never before such giants as in our day. You must heed their appeal or be ready for the socialist, the communist, and the nihilist. Society is now disturbed by forces never felt before.
>
> The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the ine-

41. *See, e.g., id.* at 2457 (statement of Sen. Sherman, arguing that a "corporation . . . [is] an artificial person without fear of death, without a soul to save or body to punish; but if other corporations can be formed on equal terms a monopoly is impossible."). For a discussion of the impulse toward equality, see *infra* notes 251-61 and accompanying text.

42. 21 CONG. REC. 2729 (1890) (statement of Sen. Platt).

43. *Id.* at 5956 (statement of Rep. Stewart).

44. 21 CONG. REC. 2457 (1890); *see, e.g.,* R. ELY, PROBLEMS OF TODAY: A DISCUSSION OF PROTECTIVE TARIFFS, TAXATION, AND MONOPOLIES 126 (2d ed. 1890) (asserting that honest government and monopoly were not compatible); *infra* text accompanying note 100.

45. 21 CONG. REC. 1457 (1890); *cf.* F. HAYEK, THE ROAD TO SERFDOM 25 (1944) (arguing that political freedom is dependent upon economic freedom); Stigler, *Wealth, and Possibly Liberty,* 7 J. LEGAL STUD. 213, 214-15 (1978) (analyzing personal liberty in terms of economic endowment).

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> quality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition.[46]

Given the commitment to industrial liberty and the identification of trusts as the threat to it, the solution seemed simple enough. Whether by forfeiture of assets to the government[47] or by private treble damage actions, political power in the form of antitrust legislation could protect the natural process of competition from the market power of unnatural combinations of capital.[48] This seemingly rational and natural alignment of legislation and competition, however, remained problematic even after the 1890 Bill's passage,[49] not because of concern over governmental intervention into some sacred arena called "the competitive market,"[50] but because of deep convictions about something else. The alliance between political power and competition was undercut by the imaginative force and normative appeal of something called "fair price."

The desire to assure fair prices was not the only source of tension in the relationship between industrial liberty and private agreements such as trusts and price fixing cartels. Another area of conflict was over the role of government in ensuring industrial liberty. On the one hand, industrial liberty was taken to mean rough competitive equality. In this sense, it called for the restraint of trusts and other powerful combinations. Thus, governmental action to dissolve private agreements in restraint of competition was a legitimate way to achieve industrial liberty. This impulse to equalize market power constituted a movement toward the ideal of perfect competition. At the same time, this impulse generated the ideal's demise. Under this view industrial liberty could suggest that private agreements were a means of achieving countervailing power

46. 21 CONG. REC. 2460 (1890) (remarks of Sen. Sherman).

47. Section six of the 1890 Bill, as enacted, afforded a brutal weapon for equalizing competition by seizing the offending firms' property upon finding a section one violation. S. 1, 51st Cong., 1st Sess., § 6, 21 CONG. REC. 2901 (1890). It stated that any property

> owned . . . by any combination . . . and being in the course of transportation from one State to another . . . shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

Id.; see 15 U.S.C. §§ 1-7 (Supp. IV 1986); *see also* 21 CONG. REC. 125 (1889) (Sen. Turpie offering resolution calling for seizure of trust goods).

48. Compare the ascendent 19th century view of corporations as natural organic groups. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory,* 88 W. VA. L. REV. 173, 178-83 (1985).

49. 21 CONG. REC. 6208 (1890) (Senate concurring in the SECOND CONFERENCE REPORT); 21 CONG. REC. 6314 (1890) (House adopting SECOND CONFERENCE REPORT).

50. Indeed, markets were seen as uniformly uncompetitive. *See* 21 CONG. REC. 2726-27 (1890).

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against trusts or cartels.[51] Thus, this impulse toward competitive equality could not provide an indisputable basis for deciding whether a private agreement in restraint of competition was a social evil.

On the other hand, industrial liberty was also taken to mean the freedom to enter into contracts to further one's own interests. This *laissez-faire* view of market conduct, unspoken in the debates, was founded in the social value of liberty. In this sense, industrial liberty involved freedom from political power and therefore, freedom from government dissolution of private agreements. Thus, industrial liberty could also mean enforcing private agreements, whether or not they restrained competition.

This tension in the notion of industrial liberty can be understood in two ways. First, "liberty" can mean either freedom from governmental power or freedom from market power. These views, with their radically different concerns, employed conflicting strategies to achieve their goals. The freedom from government power view required the government to enforce private agreements, whether or not they restrained competition. In contrast, where the goal was freedom from market power, the government was to intervene to enjoin private agreements that restrained competition. Second, the tension in industrial liberty can be understood in terms of two impulses—one toward equality and perfect competition and the other toward liberty and free competition (or *laissez-faire* competition). This tension between equality and liberty is developed more fully in the course of this study and is introduced at this juncture for the limited purpose of unpacking the notion of industrial liberty.

In spite of the tension, these two sides of industrial liberty did share one important tenet. For entirely different reasons, both views held that one benefit of industrial liberty was "fair price." Those who argued for equalization of market power called for governmental intervention to dissolve private agreements, such as trusts or price fixing cartels, in order to reinstate the "full and free competition" necessary to produce fair prices.[52] Those who claimed the liberty to enter into private agreements in restraint of competition characterized their combinations as contracts

51. A modern analogue of "industrial liberty" and its impulse toward equality is the notion of "workable competition," described as a pragmatic tool for judging whether a market is competitive. *See, e.g.,* Clark, *Toward a Concept of Workable Competition,* 30 AM. ECON. REV. 241, 253-56 (1940); Stocking, *The Rule of Reason, Workable Competition, and Monopoly,* 64 YALE L.J. 1107, 1108-12 (1955). Whereas the ideals of perfect competition and perfect monopoly are purely analytic tools rather than desirable and attainable market conditions, "workable competition" rather than "workable monopoly" is the appropriate antitrust goal. ATTORNEY GENERAL'S REPORT, *supra* note 2, at 320-39; P. AREEDA, *supra* note 1, at 40.

52. *See, e.g., infra* text at note 54.

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to charge fair prices in the face of ruinous competition.[53] Thus, each side of the industrial liberty tension claimed fair price as its own product.

B. The Property Logic of Fair Price

Both views of industrial liberty—freedom from market power and freedom from government power—had many proponents at the time. Yet, the congressional speeches employing the rhetoric of industrial liberty championed only the freedom from market power view. These speeches called for governmental intervention to dissolve trusts and other private agreements in restraint of competition. But other speeches by freedom from market power advocates deployed a very different form of argument. For example, Senator George stated:

> These trusts and combinations are great wrongs to the people . . . . They increase beyond reason the cost of the necessaries of life and business and they decrease the cost of the raw material, the farm products of the country. They regulate prices at their will . . . . They aggregate to themselves great, enormous wealth by extortion. . . . Then making this extorted wealth the means of further extortion from their unfortunate victims . . . they are fast producing that condition in our people in which the great mass of them are the servitors of those who have this aggregated wealth at their command.[54]

Senator Jones reiterated the negative impact of trusts on the public: "These commercial monsters called trusts . . . [are] preying upon every industry, and by their unholy combinations robbing their victims, the general public . . . ."[55] Senator Turpie agreed: "The conspirators of the trust . . . are hunting the prey, dividing the spoil in every market. . . . [If they] pirate upon the earnings of the people, justice may . . . strike down the offense and the offenders."[56]

Moreover, those speeches seeking enforcement of private agreements advanced the very same logic, founded in the notions of "fair profit" or "fair return." The following excerpts are examples of speeches using this logic. Senator Platt stated:

> The true theory of this matter is that prices should be just and reasonable and fair, that prices . . . should be such as will render a fair return to all persons engaged in its production, a fair profit on capital, on labor, and on everything else that enters into its production. . . . [E]very man in business . . . has a right, a legal and a moral right, to obtain a fair profit upon his business and his work; and if he is driven by fierce competition to a spot where his business is unremunerative, I believe it is his right to combine for the purpose of raising prices until

53. *See, e.g., infra* text at note 57.
54. 21 CONG. REC. 1768 (1890) (statement of Sen. George).
55. 20 CONG. REC. 1457 (1889) (statement of Sen. Jones).
56. 21 CONG. REC. 137 (1889) (statement of Sen. Turpie).

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> they shall be fair and remunerative.[57]

Representative Stewart also emphasized a notion of fair return on investment:

> A rate war between railroads is absolutely injurious to the community. Why, it cannot be otherwise. In the first place the doctrine of fair play requires, and everybody concedes, that the railroads should have a just compensation for their services. We ought not to ask them to do anything for less than will pay the interest on the investment and the running expenses. That is only reasonable and fair.[58]

Representative Morse echoed these concerns for a fair price:

> [If this Bill] proposes to deny to manufacturers and merchants the right to control the price at which their goods shall be sold, the right to say they shall not enter into ruinous competition, the right to exact a fair and living profit on the sale of their goods by the merchant who handles them, it will be unwise legislation and injurious to the manufacturer, to the merchant, to the consumer, and the whole people, and strike a blow at the business interests of the country, because it will violate a sound business principle, to "live and let live."[59]

These speeches representing the freedom from government view illustrate the workings of a logic very different from the competition rhetoric of industrial liberty. They describe the contours of a property rhetoric whose foundation is the notion of a "fair profit" or "fair return." Briefly, the argument is as follows: It is an independent social good that those who work, those who put their labor or capital into the market, should get a fair return on their input. This social good benefits both producers and consumers. "Fair profit" or "fair return" is a social good that the government should enforce, whether the evil be competition or combination and whether the harm be low profits or high prices. It is a social good to be enforced in much the same way that one's possession of property is protected from theft or extortion.

Like the competition rhetoric of industrial liberty, the property rhetoric of fair price embodied a tension. Fair price could be characterized as the consequence of competition as well as the consequence of combination. The following analysis of fair price focuses on two excerpts from the *Congressional Record* to develop the implications of this property logic seeking to argue the benefits of private agreements in restraint of competition: first, Representative Stewart's description of the grand struggle between competition and combination;[60] second, the concerns of

57. *Id.* at 2720-30 (1890) (statement of Sen. Platt).

58. *Id.* at 5957 (statement of Rep. Stewart).

59. *Id.* at 5954 (statement of Rep. Morse).

60. 21 CONG. REC. 5956 (1890) (FIRST CONFERENCE REPORT); *see also id.* at 5954 (statement of Rep. Morse).

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Representative Morse and Senator Platt that the new antitrust law not deny the legal and moral (property) right to obtain a fair profit.[61]

Representative Stewart described competition and combination as "two great forces . . . contending for . . . mastery."[62] They "are correctives of each other, and both ought to exist. Both ought to be under restraint."[63] Although competition was the acknowledged social good to be protected by restraining combinations of capital, Representative Stewart believed that "[i]t is just as necessary to restrict competition as it is to restrict combination . . . ."[64]

Representative Stewart continued his speech about these "two great forces" by offering two diverse examples of the need to allow some combination. First, he observed that there was "hardly a class in the country today that . . . is not in some form of combination."[65] "[W]here competition is excessive and becoming destructive . . . the laborer is justified in entering into combinations for self-protection."[66] In other words, when market conditions have destroyed the value of labor, and when market price has fallen below fair return, a combination can legitimately restore the fair and natural price to commodities or services.[67]

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61. *Id.* at 5954; *id.* at 2730 (Statement of Sen. Platt).

62. *Id.* at 5956 (FIRST CONFERENCE REPORT).

63. *Id.*

64. *Id.* Nonetheless, the image of combinations as a second force contending against the natural force of competition was seen as a problematic representation of nature, markets or society. There were at least two reasons for this. First, combinations were thought to effect great changes in established social and economic relationships. Second, the very presence of combinations suggested that there was a second natural tendency in addition to the natural tendency to compete. Were trusts "monsters" endangering the natural competitive state of markets, or were they evidence of a natural tendency to combine? Were they unnatural and to be restrained, or natural and perhaps beneficial? Both views of combination were articulated in the popular press and in scholarly writing of the times. Some opponents of trusts argued for governmental regulation and even public ownership, while proponents expressed faith in the notion of potential competition. *See generally* H. THORELLI, *supra* note 3, at 109-32. These responses to the problem of how to characterize the appearance of large combination are described in detail *infra,* text accompanying notes 103-32, in the context of classical economic and legal theory. For now, the tension between these tendencies to compete and to combine are presented as a context for describing the following excerpts about combinations as statements about the property logic of fair return or fair price.

65. 21 CONG. REC. 5956 (1890) (statement of Rep. Stewart).

66. *Id.*

67. There is a striking similarity to modern predatory pricing doctrine, founded in the cost accounting comparison of price to some measure of cost—whether marginal, average variable, or just average. The 19th century baseline of labor value has been expanded into a labor-and-capital based minimum for exchange value. *See* Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 113-19 (1986); Brodley, *The Goals of Antitrust—Pre-Trial Hearing No. 1: A Verbatim Account of an Imagined Proceeding,* 28 ANTITRUST BULL. 823, 826, 835-38 (1983) (setting out variants of cost-based predatory pricing doctrine); Brodley & Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards,* 66 CORNELL L. REV.

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Representative Stewart's second example of the need to allow some combination appears somewhat later in the debates, when the focus had shifted to the relationship between the 1890 Antitrust Bill and the recently enacted Interstate Commerce Act (ICA). The ICA saved the railroads from self-inflicted ruinous competition, by permitting them to form rate associations.[68] The ICA called for just and reasonable charges, proscribed territorial discrimination, and prohibited pooling. In response to Representative Bland's skepticism about the Antitrust Bill's effectiveness in controlling railroad combinations and rate agreements,[69] Representative Stewart argued that, whichever statute applied, "the doctrine of fair play requires . . . just compensation."[70] "What is the objection, if the rate is just and reasonable?"[71] In other words, both the ICA and the proposed Antitrust Bill should be interpreted to permit railroads to agree on rates that would stop rate wars and allow them to "pay the interest on the investment and the running expenses."[72]

Representative Stewart's references to "just compensation" and to covering interest and expenses echoed the rationale in earlier rate regulation cases, such as *Munn v. Illinois.*[73] Thirteen years earlier, *Munn* had addressed the fourteenth amendment due process question of "taking" private property in the public interest. The Illinois statute under scrutiny was one of the numerous "Granger laws" passed in the agricultural states of the Midwest and West to regulate the warehousing and transportation of grain.[74] The particular statute in *Munn* defined grain elevators as public warehouses and established maximum rates for storing grain. The crucial issue in the case involved the power of state government to regulate the owners' return on their business, thereby trumping private agreements regarding price and limiting the investment return on private property.[75] *Munn* and similar rate regulation cases stand for the proposition that constitutional protection of property demands only that

738, 741-42 (1981) (describing economic theories and judicial applications of predatory pricing).

68. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (1887); 21 CONG. REC. 5957 (1890).

69. 21 CONG. REC. 5953, 5957 (1890); *cf.* Stigler, *The Theory of Economic Regulation,* 2 BELL J. ECON. 3 (1971) (modeling firms as buyers in a market for government regulation).

70. 21 CONG. REC. 5957 (1890).

71. *Id.* at 5951.

72. *Id.* at 5957.

73. 94 U.S. 113 (1877).

74. *See, e.g.,* S. BUCK, THE GRANGER MOVEMENT: A STUDY OF AGRICULTURAL ORGANIZATION AND ITS POLITICAL, ECONOMIC AND SOCIAL RAMIFICATIONS, 1870-1880, at 123, 159, 166, 179, 194 (1913). All the "Granger" cases are in volume 94 of the United States Reports.

75. 94 U.S. at 114.

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an investor be able to receive a certain *minimum* fair profit and not the *maximum* profit possible through private agreement.[76]

The rationale of Representative Stewart's comments parallels the reasoning in these rate cases: just compensation to railroads and to labor requires some *minimum* rate of return. In all of these cases, some minimum protection of property rights "is only reasonable and fair."[77] Stewart's statements emphasize the value of combinations insofar as they could secure for the producer a fair profit or fair return on property, whether that return derives from capital or labor.[78] Moreover, it is clear that a fair return to the producer entails a fair price to the consumer—no more and no less.

In the same debate, Representative Morse recapitulated the view that combination is a legitimate means for assuring a fair return on property. He asserted that the Bill would destroy the " 'contract system' of selling goods, the intention of which is to fix a fair and living profit to the merchant . . . ."[79] The reference here is to resale price maintenance (a manufacturer's setting of retail prices).[80] Whatever our own view of a

76. Regarding state regulation of rates and the issue of just compensation, see, for example, Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n, 262 U.S. 679, 692-93 (1923) (stating that there is no constitutional right to profits such as are realized or anticipated in highly profitable enterprises); Missouri *ex rel.* Southwestern Bell Tel. Co. v. Public Serv. Comm'n, 262 U.S. 276, 291 (1923) (Brandeis, J., concurring) (describing methodology for determining a fair return on investment); Smyth v. Ames, 169 U.S. 466, 546 (1898) (stating that a company is entitled to no more than a fair return upon the value of that which it employs for the public convenience).

77. 21 CONG. REC. 5957 (1890).

78. For a recent analysis of constitutional law doctrine regarding fair price, see Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence,* 60 S. CAL. L. REV. 1 (1986).

79. 21 CONG. REC. 5954 (1890).

80. In 1937, Congress passed the Miller-Tydings Resale Price Maintenance Act, which granted state fair trade statutes an exemption from the federal antitrust laws. Act of Aug. 17, 1937, ch. 690, 50 Stat. 693 (codified as amended at 15 U.S.C. § 1 (1985)). In 1952, the McGuire Act was passed to strengthen the fair trade statutes, by allowing state sanctioned resale price maintenance, whether or not retailers agreed with the manufacturer. These provisions were repealed by the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, § 2, 89 Stat. 801. The position of Chicago School adherents is that vertical price restraints should not be illegal per se. Monsanto v. Spray-Rite Co., 465 U.S. 752, 761 (1984) (holding nevertheless that vertical price restraints remain illegal per se). They would apply a "rule of reason." *See, e.g.,* Baxter, *Vertical Restraints and Resale Price Maintenance: A "Rule of Reason" Approach,* 14 ANTITRUST L. & ECON. REV. 13, 13 (1982) (arguing that vertical price restraints should not be illegal per se); Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality,* 48 U. CHI. L. REV. 6, 31-32 (1981). For some reactions in trade journals against arguments to loosen the per se illegality of resale price maintenance, see, for example, Pertschuk & Correia, *Resale Price Maintenance—Why the* Per Se *Rule Should be Enforced,* 15 NAT. J. 1201, 1201-02 (1983); Taylor, *Congress Objects as Administration Seeks Relaxing of "Vertical Price-Fixing" Ban,* Wall St. J., May 16, 1983, at 12, col. 1. For scholarly critiques,

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price-fixing manufacturer's intent,[81] the value articulated is consistent with Representative Stewart's argument for allowing some combination—that is, protecting the value of one's property from competition, whether that property takes the form of labor, rolling stock, manufacturer's goods, or retailer's goodwill.

Senator Platt and some of his colleagues expressed a fear that the Bill would make all agreements between competitors illegal and would result in the "brutal warfare" of "unrestricted competition."[82] In an earlier Senate debate over the 1888 Bill, Senator Platt stated that:

> every man in business . . . has a right, a legal and moral right, to obtain a fair profit upon his business and his work; and if he is driven by fierce competition to a spot where his business is unremunerative, I believe it is his right to combine for the purpose of raising prices until they shall be fair and remunerative.[83]

Although no speaker argued against "breaking up the great monopolies which get hold of the whole of a particular business or production in the country and are enabled, therefore, to command everybody, laborer, consumer, producer, and everybody else,"[84] a number of congressmen agreed that unrestrained competition was the culprit. Senator Platt, for example, declared that "the great monopolies of this country are every one of them built upon the graves of weaker competitors that have been forced to their death by remorseless competition."[85] In the animated debate just prior to the introduction of the 1890 Bill, Senator Platt summarized this position:

> The true theory of this matter is that prices should be just and reasonable and fair, that prices, no matter who is the producer or what the article, should be such as will render a fair return to all persons engaged in its production, a fair profit on capital, on labor, and on everything else that enters into its production.[86]

These notions of fair return or fair profit appear alien in statements

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see Comanor, *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy,* 98 HARV. L. REV. 983, 990-1002 (1985); *supra* note 22 and sources cited therein.

81. Ever since the 1911 Supreme Court decision in Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373, 384-85 (1911), there had been little question that vertical price fixing was illegal per se. That is, the plaintiff need not show purpose, power, or competitive effects. Then, in 1977, the Court's decision in Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57-59 (1977), raised some questions regarding the continuing viability of a per se standard for vertical price fixing, though the case involved nonprice restraints, all of which were adjudicated under the "rule of reason." It was Monsanto v. Spray-Rite Co., 465 U.S. 752 (1984), that put those questions to rest.

82. 21 CONG. REC. 2729 (1890).

83. *Id.* at 2730.

84. *Id.* at 2726 (statement of Sen. Edmunds).

85. *Id.* at 2729 (statement of Sen. Platt).

86. *Id.* Underlying this theory is a problematic image of "natural" markets populated by

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about competition. In contrast, they comfortably inhabit statements about protecting the value of one's property—whether labor, rolling stock, manufacturer's goods, or retailer's goodwill. With this rehearsal of the tension between competition and property as an epilogue, debate on the 1888 Bill ended.

C. Property Logic and the Language of the Common Law

Six days after the debate's closure, Senator Edmunds introduced a new bill. The 1890 Bill replaced the previous Bill's language of "free competition" and "cost to the consumer" with language of the common law—"restraint of trade or commerce" and "monopolize."[87] One week after the new Bill's introduction, after only a few hours of floor debate, both Houses quickly passed the new Sherman Act.[88] Aside from Congress' well-known concerns about the earlier Bill's constitutionality,[89] what other significance can be attributed to the radical change in language?

There is much evidence to suggest that Congress intended to codify the common-law meaning of the terms used in the new Bill. For example, Senator Hoar, who first asked that the new Bill be taken up by the full Senate, immediately expressed hope for an early vote. His reason for anticipating such expedited treatment of an entirely new Bill was that the Bill was already "well understood."[90] The obvious implication of this assertion is that much off-the-record negotiation and compromise had accompanied the new Bill and had already familiarized everyone with the Bill's content. Beyond this familiarity with the Bill's language, however, there was also a common ground for the Senators' understanding of the new Bill's language. Apparently, it was taken for granted that there was a common law that would provide the groundwork for the development of a federal common law of monopoly and restraints of trade.[91] This assumption is suggested in Senator Hoar's statement in the *Congressional*

individuals—by equally powerful laborers and capitalists. *See, e.g., id.* at 2727 (statement of Sen. Edmunds).

87. *Id.* at 2901 (1890) (Chief Clerk reading substitute bill reported by the Committee on the Judiciary); *id.* at 3146, 3148, 3152 (monopoly "a technical term known to the common law").

88. *Id.* at 3153 (Senate passage, April 8, 1890); *id.* at 6314 (House passage, June 20, 1890). The delay in House action was due to an eleventh-hour attempt to include a specific reference in section one to transportation, in order to assure the Bill's priority over the Interstate Commerce Act. *Id.* at 4088-104, 5950-61, 5981-83, 6312-14.

89. *Id.* at 3148 (statement of Sen. Edmunds); H. R. REP. No. 1707, 51st cong., 1st Sess. 1 (1890) (report of the House Judiciary Committee).

90. 21 CONG. REC. 3145 (1890).

91. *See id.* at 3152 (statement of Sen. Hoar) ("I do not mean to say that [the committee]

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Record: "We have affirmed the old doctrine of the common law . . . and have clothed the United States courts with authority to enforce that doctrine . . . ."[92] Senator Edmunds later added that the Committee took the new Bill's language—"monopolize," for example—"out of terms that were well known to the law already."[93] In response to a question about an ingenious rancher's monopoly of short-horn cattle trade with Mexico, Senator Edmunds stated, "Anybody who knows the meaning of the word 'monopoly,' as the courts apply it, would not apply it to such a person at all . . . ."[94] He continued:

> "[M]onopoly" is a technical term known to the common law . . . . [A] man who merely by superior skill and intelligence . . . got the whole business because nobody could do it as well as he could was not a monopolist . . . . [Monopoly] involved something like the use of means which made it impossible for other persons to engage in fair competition . . . .[95]

This common-law "meaning" upon which Congress seemed to rely came from the states[96] or from sources outside the United States, as there was no federal common law of monopoly or restraints of trade prior to the Sherman Act.[97] Under the common law developed in the several states, price fixing agreements were generally void and unenforceable, though there were a few notable exceptions.[98] State governments attacked some of the more visible trusts, typically arguing that their corporate charters did not permit the formation of such trusts.[99] In one common-law case, the chief justice of the Michigan Supreme Court ventured even farther: "Monopoly in trade or in any kind of business in this country is odious to our form of government . . . . Its tendency is . . .

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stated what the signification was, but I became satisfied that they were right and that the word 'monopoly' is a merely technical term which has a clear and legal signification.").

92. *Id.* at 3146, 3152.

93. *Id.* at 3148.

94. *Id.* at 3151 (statement of Sen. Edmunds). It is interesting to note that this floor debate seemed to recognize a distinction between monopoly and monopolize—something that has been central to section two doctrine. The distinction has been made between a condition of monopoly and acts of monopolization. That is, the courts have called for some conduct evidencing predatory intent. *See, e.g.,* United States v. Griffith, 334 U.S. 100, 105-06 (1948); Standard Oil Co. v. United States, 221 U.S. 1, 61-62 (1911); United States v. Aluminum Co. of Am., 148 F.2d 416, 429-30 (2d Cir. 1945) (L. Hand, J.); United States v. Grinnell Corp., 236 F. Supp. 244, 248 (D.R.I. 1964) (Wyzanski, J.), *aff'd except as to decree,* 384 U.S. 563 (1966).

95. 21 CONG. REC. 3152 (1890). The example given of unfair means is merger—"the buying up of all other persons engaged in the same business." *Id.*

96. For thoughtful treatments of the state antitrust law context, see H. THORELLI, *supra* note 3, at 155-63; May, *supra* note 3.

97. *See, e.g.,* H. THORELLI, *supra* note 3, at 36-37.

98. *See, e.g.,* Central Shade-Roller Co. v. Cushman, 143 Mass. 353, 364, 9 N.E. 629, 631 (1887).

99. *Id.*, 9 N.E. at 630.

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destructive of free institutions, and repugnant to the instincts of a free people, and contrary to the whole scope and spirit of the federal Constitution."[100]

In contrast to the states' treatment of private agreements in restraint of competition, the most recent and best known case under the British common law espoused a radically different view. In *Mogul Steamship Co. v. McGregor, Gow & Co.,* a "shipping conference" or cartel was not dissolved, even though it financed a "fighting ship" to carry cargo at prices that "would not repay a shipowner for his adventure."[101] Although Lord Bowen declared that "intentionally to do that which is calculated . . . to damage, and which does, in fact, damage another in that other person's property or trade, is actionable," this agreement was not a common-law restraint of trade because it did "nothing more . . . than pursue to the bitter end a war of competition . . . ."[102] Thus, the British court protected the freedom to enter into private agreements in restraint of competition, characterizing the agreement as an acceptable form of competition.

Though there is no record of how these and other statements formulating restraints of trade doctrine engaged the imaginations of individual congressmen, a great deal can be said about what they took for granted concerning classical legal doctrine and economics. From a sketch of the contours of classical economics and then classical contracts and property doctrine, a good likeness (for our limited purposes) of the shared cultural context of the Fifty-First Congress emerges. That cultural context included some sense[103] of monopolies and restraints of trade. Perhaps

100. Richardson v. Buhl & Alger, 77 Mich. 632, 658, 43 N.W. 1102, 1110 (1889).

101. 23 Q.B.D. 598, 612 (1889), *aff'd,* 1892 A.C. 25.

102. *Id.* at 614-19. Taking a middle ground of sorts, the opinion later confided that a party to the agreement could challenge it. *Id.* at 620. The court deemed the agreement not void, but rather unenforceable. *Id.* at 632.

103. The classical economists were the strongest supporters of the view that the tendency to compete was natural and that competitive markets were inevitable. *See, e.g.,* A. WALKER, THE SCIENCE OF WEALTH: A MANUAL OF POLITICAL ECONOMY. EMBRACING THE LAWS OF TRADE, CURRENCY, AND FINANCE (1875); F. WAYLAND, THE ELEMENTS OF POLITICAL ECONOMY (1837); *cf.* 3 J. DORFMAN, THE ECONOMIC MIND IN AMERICAN CIVILIZATION 1865-1918 359-89 (1949) (demonstrating that there was a substantial relationship between the classical economists' work and the public perceptions of the times); R. HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT, 1860-1915, at 145 (1949) (observing that Francis Wayland's book was the most popular college textbook in political economy during the period).

The neoclassicists asserted that, although markets were not competitive, there was always potential competition lurking in the wings. Andrew Carnegie articulated this view most sublimely. *See* Carnegie, *The Bugaboo of Trusts,* 148 N. AM. REV. 141, 150 (1889). Scholarly renditions of the neoclassical position include J.B. CLARK, ESSENTIALS OF ECONOMIC THEORY viii (1907); Giddings, *The Persistence of Competition,* 2 POL. SCI. Q. 62, 65 (1887); Gunton, *The Economic and Social Aspects of Trusts,* 3 POL. SCI. Q. 385, 385-408 (1888). For a

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most salient here, it also included an account of the unnatural appearance of monopolies and restraints of trade in an otherwise lawfully and naturally competitive marketplace.

A naturalistic sense of lawfulness and rationality constituted the foundation of nineteenth century discourse, whether scientific, economic, or legal. Hence, when Representative Stewart spoke of "two great forces working in human society,"[104] he imagined competition and combination as two lawful and rational agencies contending with one another. This claim that there might be *two* natural tendencies—one to compete and the other to combine—rather than an unrivaled tendency to compete, was a recent development prompted by the changing face of American industry and labor.[105] The nineteenth century belief in natural law and its rationality animated a desire to characterize the tendency to combine as natural and rational, because the alternative—asserting the unnaturalness of the widespread practice of combination—would call into question the very belief in natural law and its rationality. At the same time, a profound ambivalence gripped the nineteenth century attitude toward combinations. The success of such combinations was at odds with classical legal and economic doctrines, which espoused the inevitability of competition.[106] Under these doctrines, if only the tendency to compete

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direct critique of this view, see Bullock, *The Trusts and Public Policy,* 87 ATLANTIC MONTHLY 737, 742 (1901) ("There can be no *potential* competition when *actual* competition is hopeless.").

The New School of Economics was an American response to the foregoing views of markets as inevitably competitive. Although the adherents to this school had differing solutions, they all agreed that the problem was the inevitability of combination. *See, e.g.,* A. HADLEY, RAILROAD TRANSPORTATION—ITS HISTORY AND ITS LAWS 124 (1885); Andrews, *Trusts According to Official Investigations,* 3 Q.J. ECON. 117 (1889); Clark, *The Limits of Competition,* 2 POL. SCI. Q. 45 (1887). Ultimately, the most influential New Schoolers asserted that competition and combination were both possible and that some industries tended toward combination, based on their characteristic of high fixed costs and low marginal costs. Adams, *The Relationship of the State to Industrial Action,* in 1 PUBLICATIONS OF THE AMERICAN ECONOMIC ASSOCIATION 471 (1887); *cf.* R. ELY, PROBLEMS OF TODAY, *supra* note 44.

104. 21 CONG. REC. 5956 (1890). For examples of contemporaneous views of concentration as the result of a natural evolutionary process, see Andrews, *The Economic Law of Monopoly,* 26 J. SOC. SCI. 1, 11-12 (1890); Jenks, *Capitalistic Monopolies and Their Relation to the State,* 9 POL. SCI. Q. 486, 503-09 (1894). For a recent analysis, see Horwitz, *supra* note 48, at 191 (portraying the development of the "inevitability of concentration" position).

105. This claim was prompted as well by the specter of European politics. 21 CONG. REC. 2460 (1890) ("be ready for the socialist, the communist, and the nihilist"). Regarding the influence of European schools of political economy and the emergence of a separate "American" economics, see Adams, *supra* note 103, at 471 (1887).

106. *See, e.g.,* F. WAYLAND, *supra* note 103, at 4; H. WOOD, THE POLITICAL ECONOMY OF NATURAL LAW 16-17 (1894). For recent surveys, see H. COMMAGER, THE AMERICAN MIND: AN INTERPRETATION OF AMERICAN THOUGHT AND CHARACTER SINCE THE 1880'S (1950); R. HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT (rev. ed. 1959); E.

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was natural, then competitive markets were inevitable, making governmental intervention unnecessary. In other words, the natural tendency to compete would overcome the current wave of combinations. In contrast, if Representative Stewart was correct, if there had evolved two natural tendencies and forces (competition and combination) then the prospects for competitive markets were indeterminable.

Representative Stewart's view was also tough to swallow because it challenged the classical view that a fair price derived from free exchanges between roughly equal individuals.[107] Under this labor theory of value, since commodities embody a worker's labor, it is labor that imparts market value.[108] Free exchanges among numerous independent trading partners produce "natural" or "market" prices.[109] Moreover, since each party to such idealized transactions was imagined as getting something in return that was proportional to his contribution, the prices and the process were seen as not only natural and free, but also fair and just.[110] Insofar as combinations charged prices higher or lower than the natural market price, classical economics considered them unnatural, and perhaps unjust, interlopers in the process of competitive markets.

Although classical economics permitted regulation of combinations, it required such governmental intervention to conform with the classical view of property law. Under this view, the state could interfere with an individual's property rights only in a very limited set of circumstances and through a very limited set of processes. This notion of property derived from the strongly held sentiment, still powerful today, that a person has a right to the product of her labor.[111] An example of the problem raised by these sentiments is presented by the hypothetical question already recounted about a short-horn cattle monopoly.[112] The issue

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PURCELL, THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE (1973).

107. *See supra* note 103 and sources cited therein.

108. If capital were expended, then, of course, the price naturally would reflect both kinds of input units. *See, e.g.*, J.B. CLARK, *supra* note 103, at 14-17; F. WAYLAND, *supra* note 103, at 4-5.

109. As Arthur T. Hadley observed in his well-known study of the railroad industry, "We accept almost without reserve the theory of Ricardo, that, under open competition in a free market, the value of different goods will tend to be proportional to their cost of production." A. HADLEY, *supra* note 103, at 69.

110. *See, e.g.*, J.B. CLARK, *supra* note 103, at 77; M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 109-39, 160-88, 253-66 (1977); Kennedy, *supra* note 33, at 943-45, 956.

111. See *supra* notes 76-78 and accompanying text for a discussion of the constitutional limits imposed on state regulation of that property right. For an exhaustive treatment of state antitrust regulation during this period, see May, *supra* note 3.

112. *See supra* notes 94-95 and accompanying text.

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was under what circumstances the state can rightfully interfere with the accumulation of property that would result from this cattle rancher's hard work and ingenuity (his labor). The response was given that the state can interfere only when the rancher has acted improperly by creating unnatural or "fictitious" prices.[113] This response, however, did not address the real problem. Even if nothing improper was done, a gap would appear between fair price and market price. That is, a monopoly price would be charged. Should the law characterize the monopoly profit as a property right or as a "fictitious" price?

This battle had already been fought on constitutional grounds. As discussed above, *Munn v. Illinois* (and other "Granger" cases) recognized a state's right to regulate profit when there was a public interest in the industry.[114] In that case, the Supreme Court upheld an Illinois statute that set maximum prices farmers could be charged for wheat storage in Chicago's grain elevators.[115] But what about all those industries that were not clothed in something called the "public interest"? What about short-horn cattle?[116] It was not clear that government could preserve or impose competitive conditions—that is, indirectly control monopoly pricing in those industries not clothed in the public interest.

Such controls would have to overcome strong commitments to the sanctity of property. In particular, any governmental intervention, even indirect price regulation by imposition of competition, would have to confront a justification for monopoly profit couched in clearly classical terms. This justification held that a monopoly price for short-horn cattle was a competitive reward fairly won by "superior skill and intelligence."[117] Rather than confront the hard case of monopoly earned in the meritocracy of the competitive process, Senator Edmunds hedged his response: "He has not bought off his adversaries. He has not got the possession of all the horned cattle in the United States."[118] Thus, Senator Edmunds failed to address what would happen if this gentleman rancher *had* gotten hold of all the horned cattle in the United States, using only his ingenuity, thus "prevent[ing] other men from engaging in fair competition with him."[119]

113. 21 CONG. REC. 4102 (1890) (statement of Rep. Fitnian).

114. 94 U.S. 113, 126 (1877).

115. *Id.* at 135-36.

116. *See* Williams v. Standard Oil Co., 278 U.S. 235, 240 (1929) (finding that the petroleum industry is not clothed with the public interest).

117. For an explication of the relationship between property and liberty, see *infra* text accompanying note 234.

118. 21 CONG. REC. 3151-52 (1890).

119. *Id.* at 3152 (statement of Sen. Hoar).

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The question was a difficult one, not only because of the problem of earned monopoly, but also because the reality of a national economy filled with combinations such as trusts and cartels called into question the classical economics founded in an unrivaled tendency to compete. This experience suggested that after the rancher dominated the market, his rivals might decide to cooperate rather than compete. They might choose, and even agree, to charge the price set by the dominant rancher. Given that the dominant rancher was interested in the monopoly profits his efforts allowed, he would not compete to the death. He would simply charge his monopoly price, knowing that his rivals would rather follow his lead than compete with his ingenuity and superior intelligence. The resulting market would not tend toward competition, but rather toward loose combination. Today, we might call this loose combination the price leadership of oligopoly. For those who believed in the natural tendency to compete embodied in classical economic theory, price leadership was irrational conduct.[120] The economic facts, however, did not seem to fit the classical theory.

The most ardent believer in the classical view had to concede that the tendency to compete would take time to emerge. Until it did, the ingenious rancher's rivals would enjoy unearned monopoly profits. Could the state legitimately restructure or otherwise regulate the entire industry, in the service of free exchange or fair profits? If the industry were regulated, all could be reassured that "they could safely embody their labor in commodities and freely exchange them."[121] In other words, the property value of their labor (and other input factors), embodied in commodities, would be protected by the contract law principle of free exchange. Everyone would get no more than a fair return—everyone, that is, except perhaps the ingenious and skilled gentleman rancher no longer receiving his hard-earned monopoly profits.[122]

120. Scholarly responses included the work of neoclassicists like John Bates Clark, who argued that "To regulate combinations is possible and, in some directions, desirable; to permanently suppress them is impossible; to temporarily repress them is either to force them into illegal forms, or to restore the internecine war from which a natural evolution has delivered us." Clark, *supra* note 103, at 61; *see* Northern Sec. Co. v. United States, 193 U.S. 197, 400-10 (1904) (Holmes, J., dissenting) (expressing similar fears).

121. Kennedy, *supra* note 33, at 956; F. WAYLAND, *supra* note 103, at 4-5 (describing four fundamental laws that create and protect the right to the fruits of one's labor).

122. These problems of reconciling monopoly profit with the idea of free exchange and with a labor theory of value become even more complex when viewed in the context of the new 19th century property right or entitlement to incorporate for general purposes (and thus to form trusts). One way to understand the evolution of corporations from the privileged products of special legislation, to corporations as creatures of the state, and then to corporations as "persons" for constitutional purposes is to think of each movement as a step in conceiving of the corporation as an entity rather than a combination. *See generally* Horwitz, *supra* note 48,

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It is easy to see why monopolies or combinations in restraint of trade were so problematic. Their very existence called into question one of the basic tenets of classical economics and legal doctrine—the fairness of market price as derived from free exchanges between roughly equal individuals. Because actual market prices could mean monopoly price, predatory price, or competitive price, actual market transactions no longer seemed constrained by the competitive ideal of the market. Given the ubiquity of trusts and other sorts of combinations, countless trades could not be characterized as free exchanges between roughly equal individuals.

This dissonance between combinations and the competitive ideal did not go entirely unnoticed. In a scholarly critique of the classical view, influential economist Henry Carter Adams wrote that combinations, and corporations in particular, were destroying the "strategic equality" among classically conceived competitors.[123] Making the imbalance even more pronounced, he wrote: "[T]hese corporations assert for themselves most of the rights conferred on individuals by the law of private property, and apply to themselves a social philosophy true only of a society composed of individuals who are industrial competitors."[124] Motivated by similar concerns, other scholars, the popular "literature of protest," farmer and labor groups, as well as both the Democratic and the Republican Parties' platforms called for some antitrust action.[125] Still, as Roscoe Pound has written, the classical economic vision continued to direct the production of legal doctrine:

> When in the last quarter of the nineteenth Century our courts were called upon with increasing frequency to pass on the validity of social legislation, in the transition from pioneer, rural, agricultural America

at 176-86 (discussing development of corporate personality). By then applying a labor theory of value to this entity, now treated as a private person, an argument can be made to limit the state's power over what could then be seen as vested property rights. The doctrinal watershed was the decision in Charles River Bridge v. Warren Bridge, 24 Mass. (7 Pick.) 344 (1829). The Sherman Act introduced the daunting task of distinguishing between groups that were "properly" entitled to treatment as entities from those that were combinations, whether by agreement or by merger, in restraint of trade. *See, e.g.,* 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman, describing corporations as creatures of law and portraying combinations as devices to prevent competition); *id.* at 2567 (statement of Sen. Hoar, commenting on the unconstitutionality of congressional legislation that would deprive a state corporation of its state charter and function); *id.* at 2570 (statement of Sen. George, asking: "As a combination, who else is to combine with it except its own stockholders in the corporation?"). The problem was particularly difficult, given the staying power of the classical economic and legal images of laboring and trading individuals.

123. Adams, *Publicity and Corporate Abuses,* in 1 PUBLICATIONS OF THE MICH. POL. SCI. ASS'N 109, 116 (1894), *reprinted in* H. THORELLI, *supra* note 3, at 320.

124. *Id.*

125. For an excellent overview, see H. THORELLI, *supra* note 3, at 108-52.

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> to the urban, industrial America of today, they turned to an idealized picture of the economic order with which they were familiar, the principles of which had been set forth by the classical political economists. They pictured an ideal society in which there was a maximum of abstract individual self-assertion. This was "liberty" as secured in the Fourteenth Amendment.[126]

This repression of the impulse toward equalizing market power and its effects on liberty were reinforced by unquestioned belief in the principle that greater size always entails greater efficiency.[127] Thus, the wave of industrial combination, whether trusts, cartels, or pools, raised deeply troubling questions about the classical view that combinations would dissipate because competition was inevitable.

The impulse toward equality could also be repressed by invoking the classical view of competition as free exchange. Supporters of monopoly and combinations in restraint of trade could call upon the powerful idea of liberty.[128] In much the same way that the individualist notion of liberty as "abstract individual self-assertion"[129] suppressed the tension within industrial liberty, it forged a connection between combinations and competition. In both instances, the impulse toward liberty overpowered a complementary commitment to equality. In both instances, this idealized notion of liberty legitimated private agreements, whether or not they restrained competition, by supporting the counterfactual image of typical market transactions as free exchanges between roughly equal parties. In this way, the impulse toward liberty constituted the foundation for a freedom of contract regime that relied on an ideal of equal competition and viewed social and economic reality as momentary aberrations from the ideal. Thus, the impulse toward liberty provided a powerful normative ground not only for the classical view of competition as free trade, but also for the freedom to enter into private agreements, without regard for their effects on competition. This idealized notion of liberty and its insinuation of equality within the classical view of competition as free trade was seen as justifying both competition and its restraint, both industrial liberty and fair price. It provided common ground for explaining and defending contradictory market conduct and conflicting social values.

126. Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641, 653 (1923).

127. *See, e.g.*, D. WELLS, RECENT ECONOMIC CHANGES AND THEIR EFFECT ON THE PRODUCTION AND DISTRIBUTION OF WEALTH AND THE WELL-BEING OF SOCIETY 73-75 (1896); Carnegie, *Popular Illusions About Trusts*, in THE GOSPEL OF WEALTH, AND OTHER TIMELY ESSAYS 81-82 (2d ed. 1933); *cf.* Clark, *supra* note 103, at 46 (all social classes benefit from increased efficiency achieved through industrialization).

128. *See infra* note 234 and accompanying text.

129. Pound, *supra* note 126, at 654.

These tensions produced profound economic and political implications. They encouraged the belief that monopolization and combinations in restraint of trade were justifiable. Not only could ingenious *individuals* win short-horn cattle monopolies in the free exchanges of competitive markets, but the freedom to contract (and the liberty interest associated with a fair return on one's property) was seen as legitimating agreements to *combine* one's capital or labor with another. In sharp contrast, perceptions of social and economic reality unconstrained by the classical images exploded popular and scholarly beliefs in naturally competitive markets and in natural connections between liberty and equality. Eventually, the loss of liberty itself became an issue:

> The power of groups of men organized by incorporation as joint-stock companies, or of small knots of rich men acting in combination, has developed with unexpected strength in unexpected ways, overshadowing individuals and even communities, and showing that the very freedom of association which men sought to secure by law when they were threatened by the violence of the potentates may, under the shelter of the law, ripen into a new form of tyranny.[130]

The Sherman Act passed through a Congress struggling with tensions between the political and economic mythology of artisans and local markets, and the reality of a new economic order of large scale enterprise and national markets.[131] Despite the classical image of competition as free trade and the underlying view of human nature as embodying an irresistible tendency to compete, unregulated markets in reality seemed to produce combinations of capital without bounds. Industrial liberty, characterized in the debates as freedom from private (market) power, authorized governmental intervention to reestablish the competitive markets overrun by powerful combinations of capital. But a return to the classical image of perfect competition was not seen as an unalloyed good. A contrasting rhetoric of fair price as well as a contrasting sense of human nature as embodying a tendency to combine provided the logic for arguments that some combination was a social good.

Congress' eleventh-hour turn to the common-law language of monopolization and restraints of trade represents a retreat from the 1888 Bill's explicit and unmediated imposition of competition as the only natural and legitimate form of commerce. The 1890 Bill's common-law language of monopolization and restraint of trade carried with it familiar and stable images drawn from classical economic and legal thought—

130. 2 J. BRYCE, THE AMERICAN COMMONWEALTH 407-08 (1889).

131. The balance between state and corporate power shifted noticeably with the passage of the 1889 New Jersey general incorporation statute, followed by the Delaware legislation. *See, e.g.*, E. JONES, THE TRUST PROBLEM IN THE UNITED STATES 30-31 (1923).

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powerful though counterfactual images of mythic proportion.[132] The classical views of economics and the common law proceeded on the assumption that competition was the natural state of society and markets. These classical ideals mediated the deeply felt fears engendered by the widespread experience of disruption in traditional social and economic patterns. The revised language proclaimed that trusts and restraints of trade, not competition, were the problem. Although criticism of the classical view of economics and departures from the common-law regime of freedom of contract began to appear, congressional repose in the traditional language of the common law suggests a retreat to the traditional doctrine and classical view. Moreover, economic and political impulses toward both liberty and equality were seen as best served by permitting this natural state to flourish. Finally, the idealized portrayal of commercial markets as free exchanges between roughly equal individuals also satisfied the social demand for a fair return on one's property or labor.

In the social and political turmoil of the new economic order, the Sherman Act's language of the common law sought shelter from, but only shifted the battleground for, the tension between the logics of competition and private property. As this Article brings to light, confrontations between the rhetorics of industrial liberty and fair price, as well as their relationships to the social values of liberty and equality, characterize both the Sherman Act and the 1888 Bill, as well as the arguments favoring and opposing each version and its amendments. The next section examines the antitrust doctrine that emerged from the Supreme Court as a result of these tensions embodied in the Sherman Act. It also discusses what positions the Court took in this conflict between the logics of competition and private property.

II. The "Literalists": Competition Logic and Equality

The Court's early antitrust opinions[133] interpreting the Sherman Act have been characterized as "literalist" constructions of the statute.[134] But as William Letwin warned more than twenty years ago, we should not allow the "literalist" label to obscure each succeeding opinion's drift away from the proposition that *all* restraints of trade violated the Sher-

132. The standard reference for the cultural apparatus of mythology is C. LEVI-STRAUSS, THE ELEMENTARY STRUCTURES OF KINSHIP (R. Needham ed., J. Bell & J. von Sturmer trans., rev. ed. 1969) (published first in France under the title LES STRUCTURES ELEMENTAIRES DE LA PARENTE (1949)).

133. Northern Sec. Co. v. United States, 193 U.S. 197 (1904); United States v. Addyston Pipe & Steel Co., 175 U.S. 211 (1899); United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

134. W. LETWIN, *supra* note 3, at 172-76.

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man Act.[135] Rather, the doctrinal movement evident in these early opinions marks successive approximations of the "rule of reason" developed in Justice White's early dissents and later adopted in his *Standard Oil v. United States* majority opinion.[136] Despite this apparently converging doctrine, *Standard Oil*'s New Majority thought the remaining distance important enough to shift to Justice White's rhetorical banner of reason. Indeed, some Justices and commentators portrayed the move as a radical shift.[137] Within a few weeks of the adoption of the "rule of reason," Congress reacted by holding private meetings and public hearings, which ultimately resulted in two major pieces of antitrust legislation—the Clayton and Federal Trade Commission Acts of 1914.[138]

This section explores the conditions that prompted the Court to shift to a "rule of reason." Three important observations emerge from considering the cases leading up to the decision in *Standard Oil.* First, the opinions reflect and often articulate a conflict between the logics of competition and property; despite what we might think today, competition policy was not the unrivaled major premise for early antitrust doctrine. Second, the lines were clearly drawn. The "literalist" or Old Majority took competition as its first principle, while the "rule of reason" minority and lower courts asserted the axiomatic nature of property protection. Third, those Justices who later constituted the "rule of reason" or New Majority saw the shift as significant precisely because, as Justice Holmes stated in his dissenting opinion in *Northern Securities Co. v. United States,* "[t]he act says nothing about competition."[139] As described in the last part of-this Article, Holmes' statement and the property logic accompanying it signaled impending victory for the New Majority under the "rule of reason."

A. *United States v. Trans-Missouri Freight Association*

The Old Majority first formulated its "literalist" interpretation of the Sherman Act in *United States v. Trans-Missouri Freight Associa-*

135. *Id.*

136. Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911).

137. *See, e.g., id.* at 100-03 (Harlan, J., dissenting); A.H. WALKER, THE "UNREASONABLE" OBITER DICTA OF CHIEF JUSTICE WHITE IN THE *Standard Oil* CASE 1-13 (1911) [hereinafter A.H. WALKER, OBITER DICTA]. Albert H. Walker also wrote the first account of the Sherman Act's legislative debates and early case law. A.H. WALKER, HISTORY OF THE SHERMAN LAW OF THE UNITED STATES (1910).

138. Clayton Act, ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12-44 (1982)); Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (current version at 15 U.S.C. §§ 41-77 (1982)).

139. 193 U.S. 197, 403 (1904).

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tion.[140] In *Trans-Missouri,* the Freight Association was accused of fixing uniform rates and terms in violation of the Sherman Act. The defendants convinced the trial and appellate courts that their agreement "regulated" rather than "suppressed" competition.[141] In particular, the trial court found that the Association had fixed "reasonable prices" to prevent "unhealthy competition" and "to avert personal ruin."[142] The court stated, "The public is not entitled to free and unrestricted competition, but what it is entitled to is fair and healthy competition . . . ."[143]

In the Supreme Court, the railroads claimed that "competition . . . simply leads in railroad business to financial ruin and insolvency . . . [and] to the destruction of innocent stockholders . . . ."[144] In short, the defendants' arguments and lower court opinions, couched in the common-law language of reasonable restraint, restated prior congressional speeches extolling the virtue of combination, the need to restrain competition, and the property right to a fair return on capital committed to the marketplace.[145]

The Supreme Court reversed the lower courts' holding that the Freight Association's fixing of uniform rates and terms was reasonable under the Act. Writing for the majority, Justice Peckham made it clear that all price fixing agreements were illegal, regardless of the reasonableness of prices fixed: "Competition . . . is a necessity for . . . securing in the end just and proper rates."[146] "Competition, free and unrestricted, is the general rule."[147] In response, Justice White wrote a dissenting opinion built upon the idea of reasonableness.[148] He argued that Congress intended to institutionalize the common law, which distinguished between reasonable and unreasonable restraints of trade.[149] Justice White concluded that whether sanctioned by the Interstate Commerce Act's mandate for just and reasonable rates or the Sherman Act's common-law ground for permitting reasonable restraints of competition, the railroads'

140. 166 U.S. 290 (1897).

141. 58 F. 58, 73 (8th Cir. 1893), *rev'd,* 166 U.S. 290 (1897); *see also* Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) (true test of legality is whether the restraint merely regulates rather than suppresses competition).

142. 53 F. 440, 451 (C.C.D. Kan. 1892), *aff'd,* 58 F. 58 (8th Cir. 1893), *rev'd,* 166 U.S. 290 (1897); *cf. In re* Greene, 52 F. 104, 112-13 (C.C.S.D. Ohio 1892) (holding that constitutionally, the federal government cannot regulate the property of a corporation created by a state).

143. 53 F. at 453.

144. 166 U.S. at 330.

145. *See supra* notes 47-67 and accompanying text.

146. *Trans-Missouri,* 166 U.S. at 333.

147. *Id.* at 337.

148. *Id.* at 343.

149. *Id.* at 346.

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ratemaking association was unobjectionable.[150] Either the majority's position outlawing a reasonable restraint was unreasonable, or the legislation itself was unreasonable. The consequence of this unreasonable interpretation or legislation, Justice White maintained, was a subjection of liberty of contract and freedom of trade "to the mere caprice of judicial authority."[151]

Although *Trans-Missouri* and the other early cases have been recognized as attempts to grapple with the proper relationship between the common law and the Sherman Act,[152] attention to the opinions' underlying logics permits an understanding of precisely what was at issue. To begin, it is useful to remember that the *Trans-Missouri* majority and dissenting opinions were arguing about the reasonableness of an agreement to fix prices, a debate already reported in the legislative record. The issue of reasonable price again precipitated a confrontation between the conflicting rhetorics of competition and property. On one side, the majority was quick to attribute to Congress an intent to prohibit all price agreements because it was impossible to determine whether any agreed price was reasonable.[153] Underlying the majority's position was a commitment to the sovereignty of competition—that is, to the belief that only competition can produce a reasonable price. Neither parties to an agreement nor judges are permitted to displace the pricing mechanism of competition.

On the other side, Justice White's four-man dissent believed that "[t]he plain intention of the [common] law was to protect the liberty of contract and the freedom of trade."[154] If the government intervened to stop private parties from entering into a reasonable contract, then unreasonable prices would be the consequence. Moreover, such judicial injunction interfered with the freedom to enjoy one's property in two ways. First, a contract between willing parties was voided; the impulse toward liberty was thwarted. Second, the value of the property involved was (unreasonably) diminished by virtue of (unreasonably) lower profits. As a result, unhealthy competition and unreasonable prices would prevail due to the illegitimate exercise of judicial authority.[155] Like the congressional speeches about fair price and the constitutional overtones of unrea-

150. *Id.*

151. *Id.*

152. *See, e.g.,* P. AREEDA, *supra* note 1, at 31; W. LETWIN, *supra* note 3, at 144-81.

153. *Trans-Missouri,* 166 U.S. at 331-32.

154. *Id.* at 355.

155. *Id.*

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sonable price, Justice White's dissent exhibited concern for the right to fix fair prices in order to assure a fair return on one's property.

Both Justices Peckham and White took the debate over competition beyond a concern for pricing effects. Consistent with the congressional debates about competition and combination, each argued that not only the economic effects, but also the social and political effects of the other's prescription would harm rather than help the peace and prosperity of American society. Justice Peckham saw the problem as "motives of individual or corporate aggrandizement as against the public interest."[156] Even if consumers benefit from lower prices, he wrote, private agreements in restraint of trade would drive "out of business the small dealers and worthy men whose lives have been spent therein . . . . Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class . . . of small but independent dealers."[157] It is clear that Justice Peckham's view of industrial liberty required roughly equal firms of relatively small size

> because it is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others.[158]

In this scenario, the problem was "combinations of capital [that] drive out of business all the small dealers in the commodity, and . . . render the public subject to the decision of the combination."[159] The solution to maintaining this important middle class of independent entrepreneurs was "competition, free and unrestricted."[160]

In contrast to this vision of industrial liberty practiced by numerous independent entrepreneurs, Justice White saw a different problem and, not surprisingly, a different solution. The problem for Justice White was "the danger of contract or combination by the few against the interest of the many and to the detriment of freedom."[161] For Justice White, the majority's commitment to free competition "strikes down the interest of the many to the advantage and benefit of the few."[162] To illustrate his

156. *Id.* at 322-23.
157. *Id.* at 323.
158. *Id.* at 324.
159. *Id.* at 323-24.
160. *Id.* at 337.
161. *Id.* at 355-56.
162. *Id.*

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point, Justice White referred to *In re Debs,*[163] in which the trial court's interpretation of the Sherman Act in issuing an injunction against the striking union in the infamous Pullman Company case "makes [the Act] embrace every peaceable organization or combination of the laborer to benefit his condition either by obtaining an increase of wages or diminution of the hours of labor."[164] In short, a prohibition of reasonable agreements to create the countervailing power necessary to bargain for fair wages—a fair return on labor—threatened industrial warfare. In much the same fashion, wrote Justice White, the "utmost liberty of contracting" was necessary to forestall the ruin that free competition between railroads would entail.[165] "Undue restraint of the liberties of the citizen," proscribing agreements in reasonable restraint of competition, would bring on a state of industrial warfare.[166]

As *Trans-Missouri* illustrates, the disagreement between the "literalist" and "rule of reason" factions involved much more than a lawyerly argument over proper techniques of statutory interpretation. Rather, the underlying conflict was normative and involved a choice between two competing visions of society. On the one hand, the literalists argued that the policy directing the antitrust laws should rest upon free and unrestricted competition between roughly equal market participants, whether or not the consequence in any particular transaction is fair or reasonable. On the other hand, the advocates of a rule of reason urged that antitrust policy should tolerate large consolidations of capital and allow private agreements that restrain trade when the agreements protect a fair return from property or some other reasonable exercise of freedom of contract. Supreme Court opinions in antitrust's formative period can be understood as a series of struggles to win this conflict between competing visions of society.

B. *United States v. Joint Traffic Association*

Justice Peckham's opinions in the two terms following *Trans-Missouri* showed movement toward the "rule of reason" position. Evidence of such movement is found in the *United States v. Joint Traffic Associa-*

163. 64 F. 724, 745-55 (C.C.N.D. Ill. 1894), *aff'd as to decree,* 158 U.S. 564 (1895).

164. *Trans-Missouri,* 166 U.S. at 356.

165. *Id.* at 355. It is important to keep in mind that Justice White attempted to justify accumulations of capital by reference to combinations of labor. *Cf.* 21 CONG. REC. 2728 (1890) (statement of Sen. Hoar, distinguishing combinations of labor from combinations of capital).

166. *Trans-Missouri,* 166 U.S. at 354.

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tion[167] concession that the Antitrust Act required a "reasonable construction." Moreover, the literalists shifted from the position that every contract in restraint of trade was illegal, to the position that only those contracts "whose direct and immediate effect" was to restrain interstate commerce were illegal.[168] Contracts with only an indirect effect on commerce did not violate the Act. While this new doctrine sounded very much like Justice White's formulation of an unreasonable restraint of trade, there remained an important difference. For Justice White, even a contract with a direct restraint on interstate commerce could still be deemed reasonable under certain circumstances.[169]

Although there was some convergence of the literalist and rule of reason views in *Joint Traffic Association,* there was no doctrinal movement on two critical points. First, the defendants claimed that the statute as interpreted would destroy fifth amendment rights of liberty and property by limiting their right to make contracts:

> A just freedom of contract . . . is one of the most important rights . . . of "liberty," for all human industry depends upon such freedom for its fair reward.
>
> The use of property is an essential part of it . . . . Its use is abridged when the owner is precluded from any contract that is necessary . . . to secure to him a just compensation for its employment.[170]

In response to this constitutional claim of fair return, Justice Peckham wrote that an argument "that private property shall not be taken for public use without just compensation . . . is, we think, plainly irrelevant," because Congress has the power to regulate private contracts that restrain interstate commerce.[171] Despite "general liberty of contract . . . there are many kinds of contracts which . . . may yet be prohibited."[172] The takings issue, however, was plainly relevant to the railroads, to Justice White and his colleagues, and to some members of the fifty-first Congress, all of whom produced statements making property-

167. 171 U.S. 505, 568 (1898) (quoting Hopkins v. United States, 171 U.S. 578, 600 (1898)).

168. *Id.* These statements also can be characterized as concessions to the dissenting Justices' property logic.

169. *Trans-Missouri,* 166 U.S. at 350.

170. *Joint Traffic Ass'n,* 171 U.S. at 533.

171. *Id.* at 571. Justice Peckham also refused to adopt the government's argument that the railroad industry was clothed with the public interest and was subject to government regulation as were the warehouses in Munn v. Illinois, 94 U.S. 113 (1877). *See supra* note 73-75 and accompanying text. Thus, the statement that the "taking" argument was irrelevant represents a refusal to acknowledge the legitimacy of a property logic, whatever its permissible conclusions about the price fixing conspiracy.

172. *Joint Traffic Ass'n,* 171 U.S. at 572.

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based arguments. The takings issue was irrelevant to Justice Peckham because his statements were competition-based.

The second point in *Joint Traffic Association* on which there was no doctrinal movement was the majority's position that competition is the only legitimate arbiter of what constitutes a reasonable price. Justice Peckham conceived of the Sherman Act as a congressional enactment of the natural laws of competition. "We do not think . . . that ordinary freedom of contract in the use and management of their property requires the right to combine . . . for the purpose of stifling competition among themselves, and of thus keeping their rates higher than they might otherwise be under the laws of competition."[173] Moreover, in sharp contrast to the defendants' constitutional claim that the statute destroys property, Justice Peckham wrote that the agreement "destroys competition" between the parties.[174] Thus, although the *Joint Traffic Association* majority's doctrine moved away from a literalist position and toward a rule of reason standard, an impasse remained. Both the majority and the dissent were committed to incompatible normative positions staked in competition and property logics.

C. *United States v. Addyston Pipe & Steel Co.*

In the Court's following term, Justice White actually joined Justice Peckham's majority opinion in *United States v. Addyston Pipe & Steel Co.*[175] The common ground for this apparent resolution of the conflict between Justices Peckham and White was the Sixth Circuit's reconstruction of the common law: it held that all reasonable and ancillary restraints were considered valid, because they promoted "the free purchase and sale of property."[176] Thus, the Sherman Act could be read as simply restating the common law in its proscription of all direct restraints.[177] Circuit Judge Taft's legerdemain seemed to bridge the gap between the positions of Justices Peckham and White. The relationship between the common law and the statute was presented in a new and acceptable way that promoted property interests. Moreover, in holding that the defendants' price agreement was direct and thus illegal, Judge Taft's opinion rested on a common law that served competition as well. To allow such agreements would entail the judicial "power to say . . . how much restraint of competition is in the public interest" and thus would require

173. *Id.* at 570-71.
174. *Id.* at 564-65.
175. 175 U.S. 211, 244 (1899), *aff'g* 85 F. 271 (6th Cir. 1898).
176. 85 F. 271, 281 (1899) (Taft, J.).
177. *Id.*

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courts to "set sail on a sea of doubt."[178] In short, competition remained for Judge Taft the final arbiter of what constitutes a reasonable price.

Despite the doctrinal confluence of Justice White's common-law position and Justice Peckham's statutory-law position in *Addyston Pipe,* the mediation between property and competition logics was illusory. Simply put, Judge Taft's assertion that competition was the only legitimate pricing mechanism precluded anything more than a momentary relaxation of tensions. The fact remained that a property logic, with its emphasis on freedom of contract and a fair return from property, recognized the legitimacy and reasonableness of some direct restraints of trade, including some agreements about price. Nonetheless, in Justice Peckham's opinion for a unanimous Court, a conflict between these two positions was averted because the prices were found to be unreasonable.[179] All participating Justices agreed that when "private contracts . . . result in the regulation of interstate commerce," Congress has the power to legislate, because the "liberty of the citizen . . . is limited by the commerce clause."[180] The uncontroversial logic was that given congressional power to trump state legislation that affects interstate commerce, there can be no question of the power to trump private regulation of interstate commerce.

D. *Northern Securities Co. v. United States*

Before long, the illusory coalition in *Addyston Pipe* evaporated in the heat of the notorious *Northern Securities Co. v. United States.*[181] *Addyston Pipe*'s fallout, however, created a new alliance, which found Justice Harlan writing a majority opinion that followed the interpretive practices of Justice Peckham's earlier opinions, but Justice Peckham joining in two dissenting opinions—one by Justice White and the other by Justice Holmes.[182] Moreover, Justice Brewer, while concurring in the Court's

178. *Id.* at 284.

179. 175 U.S. at 238.

180. *Id.* at 229.

181. 193 U.S. 197 (1904). The defendants included buccaneering financiers and captains of industry, J.P. Morgan, John S. Kennedy, and James J. Hill. President Theodore Roosevelt provided the government's trustbusting animus.

182. *Northern Securities* involved a "tight" combination, rather than the "loose" combinations or cartels attacked in the preceding government prosecutions. It seems appropriate to say something about the problem of a slippery slope between contracts among entities and contracts fusing multiple entities into one. First, "loose" combinations, such as price fixing cartels or profit pooling agreements were under attack, both in the state and federal courts. Though a few states prosecuted "tight" combinations, both United States v. E.C. Knight Co., 156 U.S. 1 (1895), which confined the Sherman Act to a narrow view of interstate commerce, and the Justice Department's prosecutorial neglect of the trusts, gave confidence to promoters

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holding, also announced his shift to a "rule of reason" analysis, a shift premised on "the inalienable right[] of every citizen" "to manage his own property and determine the place and manner of its investment."[183] In short, *Northern Securities* saw the Old Majority's literalist rhetoric of competition go up in smoke.

Still, Justice Harlan wrote for the Court in *Northern Securities;* Justice Brewer's defection to a rule of reason analysis did not impel him to disagree, as it did Justice Peckham, with the plurality holding that the Northern Securities Company's formation was an illegal combination.[184] Nonetheless, it was clear that a majority of the Court no longer agreed with the old Peckham-Harlan reliance on a competition-founded Sherman Act. The Old Majority disintegrated under the pressure of this paradigm case of an ancillary and thus reasonable restraint under the traditional common law. The defendants argued, with plausible support in the congressional debates, that the common-law meaning of restraint of trade was the basis for interpreting the Sherman Act. Thus, they contended, it is highly relevant that, under the common law, "[i]t has been held repeatedly that such restraints as result from the sale or the purchase of property are not within the provisions of [the] anti-trust statutes."[185] The common "law does not require competition. The business of a rival may be purchased for the purpose of being rid of his competition."[186] The defendants argued at great length that the common law authorized citizens or state corporations to dispose of their property and invest their money in any way they chose.[187] Characterizing this right in

and business owners who engaged in trustbuilding and other sorts of interstate merger activity. To the extent that trusts seemed less risky than cartels, the tendency to combine tended toward trustbuilding. Second, "loose" combinations were unstable and difficult to enforce. They were unstable for many reasons. Simply agreeing on a price was difficult, given the differing costs faced by different parties. An acceptable price for a more efficient firm might not be an adequate price for a less efficient one. In some sense, no one was entirely pleased with the agreed upon price. It is not surprising that some parties to such compromise agreements would give secret discounts or cheat in other ways. If the agreements were to have any value, they would require policing mechanisms. Even with such provisions, however, simple identification of noncomplying parties was of little value, because state courts typically refused to enforce the agreements. The greater the number of participating entities, the greater the transaction costs associated with reaching and privately enforcing an agreement to restrain competition. Thus, "tight" combinations or fusion of many entities into one entity can be understood as a rational response to the instability and high transaction costs associated with contracts between entities. *See, e.g.,* H. THORELLI, *supra* note 3, at 72-77; Washburn, *History of a Statute: The Sherman Antitrust Act of July 2, 1890,* 8 B.U.L. REV. 95, 97-98 (1928).

183. *Northern Sec.,* 193 U.S. at 361.

184. *Id.* at 360-64.

185. *Id.* at 293.

186. *Id.* at 275.

187. *Id.* at 237, 241, 245-46, 254, 264, 272, 275, 287, 290, 293-97.

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the fifth amendment terms that had already been rejected in earlier cases, the defendants concluded: "This constitutional provision protects the right to acquire property—equally with the right—to hold the same after it has been acquired."[188]

In the last battle won before losing the war, Justice Harlan took up the rhetoric of competition in the name of stare decisis. First, he posed the question directly: "[Does the Sherman Act forbid] every combination or conspiracy in restraint of trade . . . ? Or . . . only such restraints as are unreasonable . . . ? . . . Does the act of Congress prescribe . . . that the operation of the natural laws of competition . . . not be restricted or interfered with by any contract, combination or conspiracy? "[189] Justice Harlan answered the question straightforwardly, taking "certain propositions . . . plainly deducible" from the early literalist opinions, as well as the common law of the several states.[190] The major premise of the Court's earlier opinions was that "the act is not limited to restraints . . . that are unreasonable in their nature, but embraces *all* direct *restraints*."[191] In sum, he rejected a rule of reason analysis because "Congress has, in effect, recognized the rule of free competition by declaring illegal every combination or conspiracy in restraint of interstate and international commerce."[192]

Justice Harlan also addressed the constitutional challenge raised by the defendants. He wrote that "the constitutional guarantee of liberty of contract does not prevent Congress from prescribing the rule of free competition," because the "natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains . . . trade and commerce."[193] Justice Harlan noted that it was not necessary to deal directly with defendants' due process claim regarding property because the questions raised were too abstract and general.[194] This cavalier treatment of the property argument, however, was unconvincing, especially because the questions posed were neither abstract nor general. They dealt with material consequences of specific positions taken regarding the constitutional scope of congressional power. In concrete terms, the defendants were arguing that the government's interference with their reasonable strategy to limit the ru-

188. *Id.* at 295.

189. *Id.* at 328-29.

190. *Id.* at 331 (citing Hopkins v. United States, 171 U.S. 578 (1898); United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898)).

191. *Id.* (emphasis in original).

192. *Id.* at 337.

193. *Id.* at 331-32.

194. *Id.* at 333-34.

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inous effects of competition was an unconstitutional taking of their property. The government was preventing them from entering into agreements to preserve the reasonable value of their assets. The real problem for Justice Harlan was that he could not resolve questions about property rights with statements produced by a commitment to competition. He could only repeat that the rule of competition was paramount—not much of a response to arguments that the rule of property should prevail.

Little more could have been said to resolve this impasse between two logics in conflict. For Justice Harlan, whose thinking was inscribed with the logic of competition, and for his colleagues and the circuit court judge, it was enough to write, "If such combination be not destroyed, all the advantages that would naturally come to the public under the operation of the general laws of competition . . . will be lost."[195] For the defendants and the dissenting Justices, who were committed to a property logic, the issues took on a different character. For them, the majority's view would "deprive the individual of his freedom to acquire, own and enjoy property by descent, contract or otherwise, because railroads or other property might become the subject of interstate commerce."[196] In those words, and in Justice Holmes' dissent as well, we hear the sound of not-so-distant trumpets. The Old Majority's entrenchment in competition would soon be overrun. A New Majority, with recruits won under the banner of reason, would soon shift the balance in favor of the property logics of fair return on property and freedom of contract. Few memories of the long struggle would survive the last battle.

III. The "Rule of Reason": Property Logic and Liberty

Indeed, *Northern Securities* was the last great battle between the two factions. It is easy to see why this case splintered the Court, impelling Justices Peckham and Brewer to abandon their competition logics in favor of the rule of reason. Unlike the earlier cartel cases, this merger or trust presented two familiar themes. On one side, a trust was restraining competition and extracting unfair prices from consumers. On the other side, a merger appeared to be a sale of property whose effects on competition were tolerated at common law because they were seen as ancillary.

The circumstances under which the Northern Securities Company trust was formed offer a new perspective on the opening aphorism in Justice Holmes' *Northern Securities* dissent: "Great cases like hard cases

195. *Id.* at 327.
196. *Id.* at 377.

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make bad law."[197] This was a great case because "of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment"[198]—the involvement of men with (in)famous public personae, such as financier J.P. Morgan and, in the background, President Theodore Roosevelt. It was also a "hard case" because of the attendant economic problems, problems mentioned only in passing and only in Justice Harlan's opinion for the Court.

Justice Harlan dedicated several pages to recounting in minute detail the large sums of money involved in the consolidations and the huge expanses of competing railway roads, now merged, from the Great Lakes to the Pacific Ocean. "The Great Northern Railway Company and the Northern Pacific Railway Company owned . . . two lines, main and branches, about 9,000 miles in length, [which] were and are parallel and competing lines across the continent . . . and . . . were engaged in active competition for freight and passenger traffic . . . ."[199] In addition, the two companies purchased over 200 million dollars in capital stock of the Chicago, Burlington, and Quincy Railway Company, whose lines aggregated about 8000 miles. Following that, the principals filed articles of incorporation in New Jersey for the Northern Securities Company and authorized capital stock of 400 million dollars. Stock in this new corporation was exchanged for railroad company stock, which was held and voted by the Northern Securities Company board of directors. Thus, a holding company or trust had been formed to control over 17,000 miles of track (as well as rolling stock and other assets) covering the Western United States and to consolidate three railroads, two of which had parallel and competing lines. This series of transactions was easily portrayed as a combination in restraint of trade or a monopolization of the railroad transportation business in a substantial part of the country. These facts clearly supported the Court's finding of a Sherman Act violation.

There was, however, another side to these economic circumstances. Justice Harlan's opinion made brief mention of Northern Pacific's economic distress:

> Prior to 1893 the Northern Pacific system was owned . . . by the Northern Pacific Railroad Company . . . . That company becoming insolvent, its road and property passed into the hands of receivers appointed by the courts of the United States. In advance of foreclosure and sale a majority of its bondholders made an arrangement with the Great Northern Railway Company for a virtual consolidation of the

197. *Id.* at 400.

198. *Id.*

199. *Id.* at 320.

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two systems . . . .[200]

Only one further allusion was made to this agreement made in advance of foreclosure,[201] an agreement designed to save the value of the Northern Pacific shareholders' property from ruinous competition. Justice Harlan concluded that the decree ordering the trust's dissolution would "destroy, not the property interests of the original stockholders of the constituent companies, but the power of the holding corporation."[202] Perhaps he felt that another willing buyer could have been found. It was unlikely, however, that anyone other than Northern Pacific's parallel and overlapping rival would have found the 9000 miles of parallel and overlapping track attractive, especially given the recent history of fierce competition and the claims of overcapitalization.[203] Justice Harlan also might have believed that the overcapitalization claims were well-founded or that the Northern Pacific shareholders' alternative—selling assets for salvage value at a foreclosure sale—represented the natural and just workings of the laws of competition on private property put at risk in commerce. Indeed, there were those "who believe that [the rule of competition] is more necessary in these days of enormous wealth than it ever was in any former period of our history."[204] At the very least, Justice Harlan was persuaded to apply a rule of competition because, "as Congress has embodied that rule in a statute, that must be, for all, the end of the matter, if this is to remain a government of laws, and not of men."[205]

While Justice Harlan's opinion discussed all the issues raised in the case, the opinions of the two dissenting Justices, Justice White and Justice Holmes, divided the issues. Justice White's dissent addressed the fifth amendment question of congressional power to regulate or control ownership of state chartered railroads. He repeated the apocalyptic vi-

200. *Id.* at 320-21.

201. For doctrinal articulations of the modern failing company defense to antimerger actions, see United States v. General Dynamics Corp., 415 U.S. 486, 506-07 (1974); United States v. International Harvester Co., 564 F.2d 769, 773-74 (7th Cir. 1977).

202. *Northern Sec.,* 193 U.S. at 357-58.

203. For introductions to the natural monopoly cost structure that can provide the point of departure for a loss-minimizing logic of ruinous competition between railroads, see T. MORGAN, J. HARRISON, & P.R. VERKUIL, ECONOMIC REGULATION OF BUSINESS: CASES AND MATERIALS, at 15-17 (2d ed. 1985); R. POSNER & F. EASTERBROOK, ANTITRUST 4-11 (2d ed. 1984).

But there is another account of the railroads' financial plight: overcapitalization. In other words, the promoters raised much more capital than the firms required, either in anticipation of monopoly profits or in funding outrageously high promoters' fees. H. THORELLI, *supra* note 3, at 280-81, 315, 417, 422, 522, 540, 575. Justice White seemed to discount this claim. *Northern Sec.,* 193 U.S. at 366-67 (White, J., dissenting).

204. *Northern Sec.,* 193 U.S. at 337.

205. *Id.* at 338.

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sion of a literalist Court's "disregard [of] the great guaranty of life, liberty and property and every other safeguard upon which organized civil society depends."[206] Justice White also raised one argument that distinguishes *Northern Securities* from the earlier cartel cases. He asserted that governmental prohibition of mergers or "tight" combinations constitutes regulation of property ownership. "[T]he power of Congress to regulate commerce," he argued, does not entail the power "to regulate the ownership of stock in railroads, which is not commerce at all."[207] In separating the status of ownership from the conduct of commerce, Justice White's argument was the fifth amendment analogue of the familiar common law doctrine that restraints ancillary to the sale of a business were reasonable. Indeed, several defendants characterized the formation of the trust as the sale of a business to a competitor.[208]

Justice Holmes' dissent focused on the common-law notion of "combination." The Old Majority's refusal to recognize the Act's common-law foundation led Justice Holmes to conclude with a Hobbesian, literalist vision of the Sherman Act as keeper of the natural laws of competition: Justice Harlan's position "would make eternal the *bellum omnium contra omnes.*"[209] In Justice Holmes' view, Congress did not mean to enact as positive law Herbert Spencer's social darwinism. Rather, Congress was concerned with restraints of trade because of "their intended effect upon strangers to the firm."[210] That is, Congress feared "trusts, the objection to which, as every one knows, was not the union of former competitors, but the sinister power exercised . . . by the combination in keeping rivals out of the business and ruining those who already were in."[211] Clearly, Justice Holmes was taking up the "combination" and "fair price" side of the congressional debates—statements produced by the logic of property. "It was the ferocious extreme of competition with others, not the cessation of competition among the partners, that was the evil feared,"[212] he concluded. In short, the feared evil was the maintenance of market conditions destructive of the right to a fair price.

According to Justice Holmes, while predatory pricing and other such conduct should be enjoined under the Act, the Act does not require dissolution of combinations. The Act does not "require all existing competitions to be kept on foot, and . . . invalidate the continuance of old

206. *Id.* at 397.
207. *Id.* at 368.
208. *See, e.g., id.* at 275, 287, 293.
209. *Id.* at 411 (war of all against all).
210. *Id.* at 404.
211. *Id.* at 405.
212. *Id.*

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contracts by which former competitors united in the past."[213] Dissolution or disintegration introduced dangers even more threatening than governmental redistribution of property. For Justice Holmes, the Old Majority's competition-based rhetoric entailed "the universal disintegration of society into single men, each at war with all the rest, or even the prevention of all further combinations for a common end."[214] "If that were its intent I should regard calling such a law a regulation of commerce as a mere pretense. It would be an attempt to reconstruct society."[215]

Justice Holmes' turn to hyperbole suggests that he too was caught up in the heated struggle between property and competition logics. For example, Justice Holmes characterized the majority's commitment to competition as entailing a "universal disintegration of society" or a literal ban on combination.[216] Yet, the direct-indirect effects doctrine carried forward in Justice Harlan's opinion for the Court both evidenced compromise and allowed for the creation of some combinations. Nonetheless, Justice Holmes and the new rule of reason majority required more. They subordinated competition rhetoric to its property-based counterpart.[217] Most telling was his statement that "the Act says nothing about competition."[218] The ironic implication was that the old literalist majority should take seriously the *literal* language of the statute. In analyzing the common-law doctrine of "restraints of trade," rather than the meaning of "competition," Justice Holmes quipped, "I stick to the exact words used."[219] As if to emphasize the uncompromising nature of this

213. *Id.* at 410.

214. *Id.* at 407.

215. *Id.* at 411.

216. *Id.* at 407.

217. Although much has been made of the "great case" or interpersonal dimension of Justice Holmes' dissent, its language of hyperbole is more usefully understood as emerging from a commitment to the primary importance of property rights. W. LETWIN, *supra* note 3, at 229-37.

218. *Northern Sec.,* 193 U.S. at 403. Some commentators have trivialized this statement as disingenuous. That interpretation is based on the assumption that Justice Holmes' subjective intent was to jab at Theodore Roosevelt, who had appointed him and who, according to that view, expected his appointee to toe the line. *See, e.g.,* W. LETWIN, *supra* note 3, at 229-37. Whether or not this subjective intent was working, it (as Justice Holmes himself might have said) is not relevant here. What is relevant is the manner in which Justice Holmes articulated his intent, whatever it was. In other words, I take his statement seriously at an objective level: that he chose to make his statement in anti-"competition" terms is itself significant because of the force relations that produced it, and because of what it announces about the relative strength of those forces. For a brief analysis of Justice Holmes' freedom of contract view in a state antitrust law case, see May, *supra* note 3, at 536-37 (describing Justice Holmes' view of an overbroad state antitrust statute as an unconstitutional taking of property).

219. *Northern Sec.,* 193 U.S. at 403.

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demand, Justice Holmes characterized the railroad combination's effect on competition as immaterial:

> If such a remote result of the exercise of an ordinary incident of property and personal freedom is enough to make that exercise unlawful, there is hardly any transaction concerning commerce between the States that may not be made a crime by the finding of a jury or a court.[220]

Certainly the novelty, size, and complexity of this series of transactions and the resulting trust made them anything but ordinary. Moreover, the competitive effects of the three-way consolidation were immediate, rather than remote. But for Justice Holmes, it was the exercise of a property right that appeared proximate. In the process of portraying the Act's legislative history as a rehearsal of common-law property rights, he ignored precisely the statements serving competition upon which Justice Harlan relied.[221]

In tandem, the Harlan and Holmes opinions in *Northern Securities* carried forward the conflict between competition and property logics evident in congressional debates over the Sherman Act. Along with Justice Brewer's brief concurring opinion, the four dissenting Justices effected a shift of power on the Court. The formal announcement of doctrinal victory for the new rule of reason majority and its property logic was made several years later in the companion cases of *United States v. American Tobacco Co.*[222] and *Standard Oil v. United States.*[223] The remainder of this section examines the Court's new property logic as explicated in Justice White's opinions in *American Tobacco* and *Standard Oil.*

In *American Tobacco,* Justice White grounded the rule of reason not in its salutary effect on trade and commerce, but rather in a purpose "to prevent that act from destroying all liberty of contract and all substantial right to trade, and thus causing the act to be at war with itself by annihilating the fundamental right of freedom to trade . . . ."[224] In his *Northern Securities* dissent, Justice White had already expressed concern about the

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220. *Id.*

221. *See supra* notes 204-05 and accompanying text.

222. 221 U.S. 106 (1911).

223. 221 U.S. 1 (1911). *Standard Oil* also met Justice Holmes' definition of a great case. Like *Northern Securities, Standard Oil* was filed during Theodore Roosevelt's trustbusting administrations, in the same federal court in Minnesota, with virtually the same pleadings. *See* W. LETWIN, *supra* note 3, at 253. Though in *Standard Oil* a New Majority formed behind Justice White's "rule of reason," the results were the same as in *Northern Securities*: the Court affirmed a decree breaking up the trust.

224. *American Tobacco,* 221 U.S. at 180. For claims that policy conflict only arose at the time of the Clayton Act, see F. ROWE, PRICE DISCRIMINATION UNDER ROBINSON-PATMAN ACT xi (1962 & Supp. 1964) ("paradox of antitrust at war with itself"); Bork, *The Place of Antitrust Among National Goals,* in BASIC ANTITRUST QUESTIONS IN THE MIDDLE SIXTIES:

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consequences of governmental regulation of this fundamental right: "The principle that the ownership of property is embraced within the power of Congress to regulate commerce, whenever that body deems that a particular character of ownership . . . may restrain commerce, . . . is in my opinion in conflict with the most elementary conceptions of rights of property."[225] Justice White believed that the rule of reason would forestall the Sherman Act's unreasonable intrusion into the citizen's liberty to buy and sell property. His belief arose from the following jurisprudential context. In the cases preceding *Standard Oil,* the battle on the Court was waged at two levels of discourse. First, it was expressed in terms of the relationship between the Sherman Act and common-law restraints of trade. The "literalists" maintained that the Sherman Act prohibited every agreement in restraint of competition. The "rule of reason" faction argued that the common-law notion of liberty to contract sanctions such agreements to the extent that they fix prices that allow a fair return on property or labor put into the market. Second, the conflict in the Court was also expressed in terms of the relationship between congressional power to regulate interstate commerce and fifth amendment rights of liberty and property. For example, the literalists argued that the Constitution's commerce clause trumps an individual's right to buy railroad company stock when the transaction "directly" restrains interstate commerce. In contrast, the "rule of reason" faction insisted that the fifth amendment protects an individual's right to purchase railroad company stock, even if it eliminates competition between railroads in interstate commerce.

These common-law and constitutional arguments in the cases preceding *Standard Oil* set the terms of an ongoing conflict between those committed to "full and free competition" and those committed to individual rights of property. It is important to recognize, however, that the fifth amendment rhetoric of liberty introduced a new element into the conflict. The property logic of "fair price," heard in the congressional debates, was now joined by an aligned but independent rhetoric of liberty to contract. This new rhetoric made explicit a tension within the notion of industrial liberty. As shown in the earlier discussion of the legislative debates, references to industrial liberty were taken to mean markets characterized by rough competitive equality.[226] This image of freedom from (private) market power reappeared in the literalist jurisprudence of full

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FIFTH CONFERENCE ON THE IMPACT OF ANTITRUST ON ECONOMIC GROWTH 12 (Nat'l Indus. Conf. Bd. 1966); for a critique, see Peritz, *supra* note 1, at 1231-61.

225. *Northern Sec.,* 193 U.S. at 370.

226. *See supra* notes 29-46 and accompanying text.

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and free competition. The legislative debates, however, made no reference to the other aspect of industrial liberty—freedom from governmental intrusion into private agreements. This unspoken side of industrial liberty found voice in Justice White's constitutional rhetoric of liberty to contract. Thus, Justice White grounded the rule of reason in a constitutional rhetoric not heard in the congressional debates.[227]

Justice White's rule of reason separated the language of industrial liberty from its rhetorical moorings. Under the banner of reason, the *Standard Oil* opinion replaced the competition logic of "liberty to pursue any livelihood or vocation" with the property logic of "freedom to acquire, own, and enjoy property." For the literalists, the problem in merger cases such as *Standard Oil* was the accumulation of property to consolidate market power. Their Sherman Act solution entailed regulation of property rights when they restrained competition. For the rule of reason faction, the problem was a "literalist" Sherman Act with government intruding upon individual liberty and property rights. The rule of reason solution invited private regulation of competition to protect those individual rights. The clearest statement of this concern is found in Justice White's earlier *Northern Securities* dissent:

> For it would follow that if Congress deemed [that] the acquisition by one or more individuals engaged in interstate commerce of more than a certain amount of property would be prejudicial to interstate commerce, the amount of property held or the amount which could be employed in interstate commerce could be regulated.[228]

If Congress could regulate an individual's right to exchange or use property, Justice White believed, liberty of contract would be destroyed.

In the rule of reason opinions for the New Majority, Justice White abandoned explicit fifth amendment references. Instead, he returned to common-law discourse for a parallel property-liberty argument: "Monopolies were unlawful because of their restriction upon individual freedom of contract."[229] At common law as well, the argument's axiomatic point of departure was "freedom to contract [which] was the essence of freedom from undue restraint on the right to contract."[230] The rule of reason's deployment of this common-law rhetoric of liberty effected two important changes in antitrust jurisprudence. First, the New Majority was willing to allow some private agreements that restrain competition.

227. Justice White believed, of course, that there were numerous antecedents in legislative references to the common law of restraints of trade. *Standard Oil,* 221 U.S. at 50, 61.

228. *Northern Sec.,* 193 U.S. at 370 (White, J., dissenting).

229. It was this restriction on freedom of contract that caused "injury to the public." *Standard Oil,* 221 U.S. at 54.

230. *Id.* at 62.

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Second, it was an impulse toward liberty that animated that willingness. The rule of reason represented a diminished interest in equalizing (private) market power and a heightened concern for curbing governmental power. Although limiting governmental intrusion can be portrayed as expanding the domain of everyone's personal autonomy, inattention to market power would benefit the status quo of those already in positions to acquire or maintain market power.

Despite the New Majority's distaste for equalizing market power, liberty itself imposed some limitations on dominant firms. That is, under the rule of reason an exercise of the fundamental right to freedom of trade could sometimes amount to an unreasonable restraint of trade. In particular, the rule of reason allowed that market power could be exercised in some "unnatural" way, beyond the making of normal and usual contracts. Thus, "unusual and wrongful" acts, such as predatory pricing followed by purchases of rival firms, overstepped the bounds of freedom and properly called for governmental intervention.[231] In general, however, sovereign involvement was unreasonable since the "centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented if no extraneous or sovereign power imposed it and no right to make unlawful contracts having a monopolistic tendency were permitted."[232] Evidence of predatory pricing and other kinds of "fierce competition" provided the specific foundation for the New Majority's affirmances of decrees breaking up the Standard Oil and American Tobacco Companies. That instantiated the rule of reason's proscription of "unlawful contracts having a monopolistic tendency." Further, monopoly by sovereign grant was both familiar and unpopular. But what did Justice White mean by his reference to "extraneous power" imposing monopoly?

Examining Justice White's reference to "extraneous or sovereign power" imposing monopoly can elucidate the rule of reason's liberty-property logic and its relationship to the congressional debates' property logic of fair price. One way to approach the question is to think about the image of centrifugal and centripetal forces swirling around a nuclear "right to freely contract." The metaphor of two countervailing forces parallels Representative Stewart's image of two great natural forces in society—combination and competition—tempering one another.[233] Nonetheless, there are two significant differences between the views of Representative Stewart and Justice White. First, Representative Stew-

231. *Id.* at 181.
232. *Id.* at 62.
233. *See supra* notes 60-62 and accompanying text.

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art's central or meta-principle of fair price or fair return on property placed in the market represents a property logic committed to the principle of equality. In sharp contrast, Justice White's opinion deploys a property logic committed to the principle of liberty. It places freedom of contract at the nucleus of these natural forces: one pulls inward to consolidate or combine, while the other force pushes outward to disperse or atomize. These opposing energies "result[ ] from the right to freely contract."[234] Second, Representative Stewart's model of two contending forces calls for an occasional third force—governmental intervention to restrain extreme forms of competition or combination. Again in sharp contrast, Justice White's view entails only two natural forces resulting from liberty of contract. Moreover, should a third or extraneous force enter his equation, its presence could (or would) destroy the delicate balance of natural forces and thereby impose monopoly. In Justice White's allegory of natural reason, the literalists were an extraneous force foreign to this natural system. Their unreasonable imposition of competition would annihilate freedom of contract, the center of Justice White's imaginary system. Thus, under the rule of reason, government intervention was proper only when proscribing "unlawful contracts having a monopolistic tendency."[235] Hence, liberty of contract did not require equalization of market power, as did industrial liberty. Nor did it demand fair profits or fair return on property put into the market. Rather, liberty of contract meant freedom from governmental intervention, except to regulate unreasonable restraints of trade.

This category of monopolistic contracts was ambiguous, whether or not it was circumscribed by the traditional doctrines of common-law restraints. Still, both the Standard Oil and American Tobacco Companies were found to have made "unlawful contracts having a monopolistic tendency."[236] The Court upheld the decrees calling for dissolution in both cases. Given these harsh consequences, the Court's imaginative shift to the rule of reason should have had an immediate deterrent effect on trustbuilding. Despite ongoing factionalism on the Court, the *Standard Oil* and *American Tobacco Co.* cases stood as examples of a unified will to engage in trustbusting. The splintered Court in *Northern Securities* could no longer be relied on for the view that mergers were safe alternatives to price fixing cartels. Yet, no one took the new jurisprudence to be a threat to corporate mergers, particularly not those in the business community who were intent on merging with competitors. Indeed, by 1914, Senator

234. *Standard Oil,* 221 U.S. at 62.
235. *Id.*
236. *Id.*

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Thompson could read into the *Congressional Record* a list of 445 active trusts.[237]

Despite the fact that the 1911 opinions used the rule of reason to break up the great oil and tobacco trusts, this new rationale was widely perceived to be pro-big business. Why the public outrage? Though most Supreme Court opinions do not attain cultural significance, a few do become public currency. Like *Brown v. Board of Education*[238] and *Roe v. Wade,*[239] *Standard Oil* resolved an issue embedded in (ideo)logical controversy. Just as the two more recent opinions confronted questions of race and gender relations, *Standard Oil* can be understood as raising questions of class relations. The public's identification with Justice Peckham's image of a middle class of "small dealers and worthy men"[240] at the mercy of the powerful trusts provides the context for understanding how the "rule of reason" quickly became the protrust symbol that stirred public sentiment and congressional action, despite the apparently severe antitrust consequences of corporate dissolution (the antitrust version of capital punishment).[241] While it is unlikely that the lawyerly niceties of the shift to a "rule of reason" were widely known, it was easy to understand the difference between prohibiting every restraint of competition and prohibiting only *unreasonable* ones. Consumers, grangers, small businessmen, union members, muckrakers, politicians, financiers, and industrialists all could decide, in their own terms, who might benefit and who might lose from this shift. Indeed, no one has ever doubted that the 1914 antitrust legislation was passed in reaction to the rule of reason. What has not been clear before, however, is the significance for antitrust jurisprudence, of the 1914 statutes' explicit language of "competition," which is quite different from the Sherman Act's common-law language of restraint of trade and monopolization.[242] What becomes clear is the connection between Congress' legislation in reaction to the rule of reason and the literalist rhetoric of "full and free competition."

Reaction against the Court's rule of reason was widespread. Some in the legal community immediately expressed concern over a perceived weakening of the Sherman Act. Later reactions, including those in the

237. 51 CONG. REC. 14218-21 (1914) (statement of Sen. Thompson).

238. 349 U.S. 294 (1955).

239. 410 U.S. 113 (1973).

240. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 240, 323 (1897).

241. The image of individual entrepreneurism appeared in the labor union movement as well, particularly in their credo of equality of opportunity. *See* H. THORELLI, *supra* note 3, at 147.

242. For a discussion of Sherman Act legislative history and its references to competition, see *supra* notes 29-53 and accompanying text.

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business community, complained of the practical effects of the rule of reason—namely dissolution and its effect on competition.[243]

In particular, the practical effects of the *Standard Oil* case were distressing. Senator Reed reported during the Clayton Act debates that the so-called rivals created in the oil industry produced even more wealth for their shareholders in fragmented form than they did as the Standard Oil Company of New Jersey.[244] Moreover, both the oil and tobacco trusts' offspring were still engaging in predatory pricing and other forms of unfair competition against independents.[245] Much like the regional operating companies that have provided local telephone service since the 1982 agreement between AT&T and the Reagan Administration, Standard Oil's offspring enjoyed (unregulated) regional monopolies and were owned by a common pool of shareholders. In material terms, the dissolution was consistent with Justice White's dissenting opinion in *Northern Securities,* which argued against federal regulation of an individual's purchases of property, regardless of the effects on competition. Here, property ownership—holding shares of the Standard Oil Company—was not disturbed. Even more troubling was the fact that the 1911 Standard Oil miniatures were run by common management.[246] Thus, despite the dissolutions, there was no effective change in market power. Continued market domination protected the value of shareholders' property. Despite decrees requiring formalistic changes, there was no redistribution of wealth or market power from the miniatures to their trading partners and rivals. Given the continued predatory practices of the miniatures, the rule of reason had fostered no practical improvements in the quantity or quality of competition. In sum, the rule of reason decisions had no equalizing effects on market power or distribution of wealth. In practical terms, the *status quo ante* survived the dissolutions.

Legislative reaction to the Court's rule of reason appeared at both the state and federal levels. Between 1911 and 1913 twenty states quickly passed new antitrust laws.[247] Then in 1914 Congress passed two

243. 51 CONG. REC. 15864, 15866 (1914) (statement of Sen. Reed); *id.* at 14211-12 (1914) (statement of Sen. Shield); *id.* at 14520 (1914) (letter of J.T. Suter); *see* A.H. WALKER, *supra* note 137. For an interesting analysis of the Supreme Court's 19th century contract clause cases and the jurisprudence of "reason," see Siegel, *supra* note 78.

244. 51 CONG. REC. 9267, 14211-12, 14520, 15864, 15866 (1914).

245. *Id.; see also* E. JONES, *supra* note 131, at 46-87. *But see* McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case,* 1 J.L. & ECON. 137, 143 (1958) (arguing that the trial records contain no evidence of predatory pricing activities).

246. 51 CONG. REC. 14520 (1914).

247. A few state statutes actually preceded 1911. Moreover, the figure of 20 statutes is the arithmetic mean of two different figures that appear in the debates. *See* 51 CONG. REC. 15857 (1914) (Senate figure, 19 states); 51 CONG. REC. 9157 (1914) (House figure, 21 states).

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statutes. Though radically different in regulatory philosophy,[248] both statutes deployed the language of "competition" abandoned by the New Majority. The Clayton Act proscribed a set of specific practices whose effect "may be to substantially lessen competition,"[249] while the Federal Trade Commission Act called for a regulatory agency to determine and enjoin "unfair methods of competition."[250] Perhaps the requirements of substantiality and unfairness were in some sense concessions to the property position. Nonetheless, congressional choice of the term "competition" in reaction to the New Majority's rhetorics of "liberty" and "property" reintroduced the logic of competition as a powerful force in the production of antitrust law.

Justice White's rule of reason opinions elaborated upon Justice Holmes' stark statement in *Northern Securities* that the Sherman Anti-Trust Act says nothing about competition. Yet, by 1914 legislative activity in Congress and in the several states had produced explicit connections between antitrust and competition. At the very least, the tension between property and competition was recharged.

IV. The Logical Structure of Early Antitrust Law

The preceding history of early antitrust law chronicles a confrontation between property and competition logics. The tension between these two logics produced Senator Sherman's 1888 Anti-Trust Bill and its concern for the consumer, the debates over its provisions, and the break to the 1890 Bill's language of "restraint of trade." This same tension also was responsible for the Court's literalist period and the rule of reason that displaced it. While competition logic and an associated impulse toward equality were factors in the production of early antitrust discourse, deep commitments to liberty and property rights produced an opposing logic that later dominated competition logic.

In the course of describing the competition rhetorics of industrial liberty and full and free competition, a second tension emerged. Impulses toward liberty and equality were seen as forces animating a tension within the notion of industrial liberty. Later, these same impulses were shown to be working in the property rhetorics of fair return on property and liberty of contract. It is clear that commitments to liberty and equality participated in the very conflict between competition and property logics. While these tensions, and the interplay between them,

248. 51 CONG. REC. 16144 (1914).

249. Clayton Act, ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 18 (1982)).

250. Federal Trade Commission Act of 1914, ch. 311, 38 Stat. 717 (current version at 15 U.S.C. § 41 (1982)).

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are not necessarily stable over time, a structural analysis of the logic of early antitrust law can serve a clarifying function at this juncture. The following section presents such a stop-action description—a schematic mapping—of the structure and dynamics of early antitrust history.

While modern antitrust jurisprudence is the product of a history that does not stop in 1914, these fundamental tensions can help make sense of that history. Take for example the notion of industrial liberty and its conflicting impulses toward liberty and equality. The very same tension is evident in the modern idiom of "free competition." On the one hand, free competition can represent the belief that private restraints of competition are good because they are rational responses to market conditions. In this sense, governmental restraints are bad because they impinge upon individual liberty of contract, without which markets cannot function. The implication is that free competition and price fixing cartels are perfectly compatible. We have seen this logic at work in the *Mogul Steamship Co. v. McGregor, Gow & Co.*[251] opinion's view of competition as survival of the fittest, and in that court's refusal to enjoin a price fixing cartel from using predatory prices to protect its monopoly power. On the other hand, free competition or industrial liberty can also reflect the belief that private restraints are bad because they produce or apply monopoly power. In this sense, government restraints are good when they tend to dissolve monopoly power. The implication here is that free competition and price fixing cartels are incompatible. The literalists applied this logic in the railroad ratemaking association cases to break up price fixing cartels, thereby imposing "full and free competition," to benefit not only independent producers, but also consumers.[252]

Impulses toward liberty and equality have been seen in the workings of property logic as well. On the one hand, the property logic appearing in the congressional debates over the Sherman Act called for passage of a statute that would protect the fair profit of independent entrepreneurs from the extremes of competition and combination. This impulse toward equalizing market power to equalize wealth, not taken up in the early cases, seemed to authorize the courts to develop a common law of competitive torts to protect both consumers and independent entrepreneurs

251. 23 Q.B.D. 598, 614-15 (1889), *aff'd,* 1892 A.C. 25, 58-60; *see supra* notes 101-02 and accompanying text.

252. *See supra* notes 133-96 and accompanying text; Flynn, *Rethinking Sherman Act, supra* note 3, at 1608-19; Fox, *supra* note 3, at 1146-55; Kauper, *The "Warren Court" and the Antitrust Laws: Of Economics, Populism and Cynicism,* 67 MICH. L. REV. 325, 332 (1968); Note, *The Logic of Foreclosure: Tie-In Doctrine after* Fortner v. U.S. Steel, 79 YALE L.J. 86, 92-93 (1969) (authored by John C. Ladd).

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from cartels and trusts.[253] On the other hand, the property logic driving the rule of reason called for government protection of monopoly power and profit, unless acquired by unreasonable means. Criticized in Justice Harlan's *Northern Securities* opinion, this impulse toward liberty sometimes took the form of fundamental rights of contract, property, or liberty.[254]

To give a fuller view of the implications of these logics as they appeared in antitrust's formative years, these logics are reorganized below according to their relationships to equality and liberty. "Equality," as it is used here, means the following: Having many competitors with roughly equal market power is, in and of itself, a social good because it makes the process of competition more fair or just. In addition, regulating the extremes of competition and combination produces a more equitable distribution of wealth. Market participants can expect a fair return on capital or labor put into the market, and consumers can expect to pay a fair price for goods and services. Finally, as Justice Peckham wrote in *Joint Traffic Association,* having many competitors and an equitable distribution of wealth encourages civic virtue.[255] That is, a vibrant middle class of "small dealers and worthy men" is crucial to the workings of democratic government because their economic freedom allows them better opportunity to act independently in social and political matters.[256]

In contrast, the following is an abstraction of the notion of liberty as it appeared in antitrust's formative years: Liberty of contract and freedom in the use of one's property are, in and of themselves, fundamental rights in a democratic society.[257] Further, these fundamental rights allow individuals to combine in commercial ventures. Consequently, individuals are able to shelter from the ravages of ruinous competition a reasonable return from property or labor put into the market. Protecting these fundamental rights as well as the expectation of reasonable profits is necessary for the maintenance of some competitive markets.

Employing these logics of competition and property, as well as impulses toward equality and liberty, a snapshot of the logical structure of early antitrust law might look like this:

253. *Cf.* Lande, *supra* note 3, at 93-106; *supra* notes 51-86 and accompanying text.

254. Northern Sec. Co. v. United States, 193 U.S. 197, 333-34 (1904).

255. United States v. Joint Traffic Ass'n, 171 U.S. 505, 577 (1898).

256. *See, e.g.*, Kaysen, *The Corporation: How Much Power? What Scope?*, in THE CORPORATION IN MODERN SOCIETY 85-105 (E. Mason ed. 1959).

257. *Northern Sec.*, 193 U.S. at 239-95 (defendants' arguments); *id.* at 364-72, 397 (White, J., dissenting).

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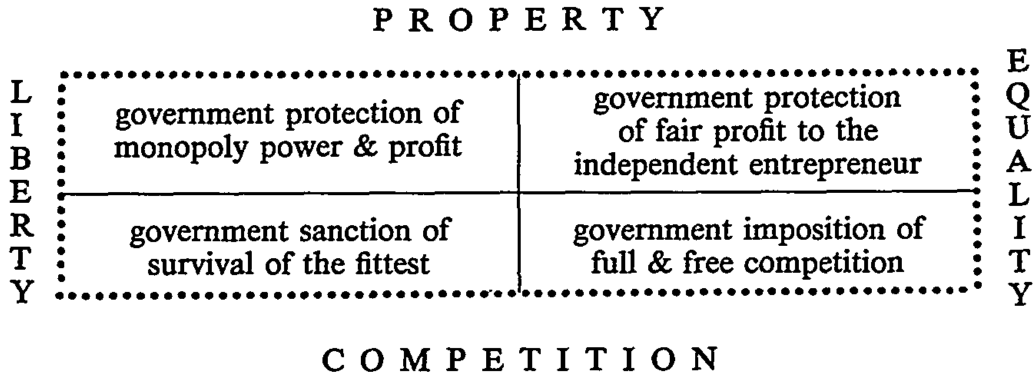

The field diagram represents relationships developed from the legislative debates, court opinions, and other textual materials from the early years of antitrust law. The top half of the diagram represents the domain of property and the bottom half represents the domain of competition. The line separating them, running across the diagram, can be thought of as the border, or battle line, between their incommensurate assumptions and beliefs. Whereas property logic evaluates market transactions according to their impact on individual ownership and exchange rights, competition logic judges market transactions based on their effects on the market process. The right half of the diagram reflects the impulse toward equality; the left half, the impulse toward liberty. The vertical line between them can be imagined as a barrier that both connects them and anchors their opposing impulses.

It is clear that *both* relationships—between property and competition, and between equality and liberty—are tensions, not simple oppositions. In other words, though property and competition logics have produced conflicting antitrust doctrine, they also support one another. For example, the rule of reason faction believed that protection of property rights drives competitive markets. The notions of liberty and equality share a similar relationship of tension, rather than simple opposition. For example, the literalists believed that a large class of individual entrepreneurs is better than a large class of middle managers because the rough equality associated with this large middle class of independent businesspeople tends to disperse the power required to enjoy liberty. The inequality inherent in answering to one's superiors in large corporate hierarchies tends to limit the ways in which those with less power can exercise liberty. Freedom to make a choice requires freedom from the imposition of another's choice. In sum, the idea of a tension suggests that there is both conflict and mutual support in the two relationships.

The field diagram is also divided into four quadrants, each of which grounds the early antitrust policy produced by an interaction between

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the two tensions. The upper left quadrant, where the commitment to liberty influences property logic, represents the policy of government protection of monopoly power and profit. The rule of reason and its concern for freedom of contract were products of the interaction of these two forces in this area. The lower left quadrant, where liberty influences competition logic, represents the policy of government sanction of survival of the fittest. The clearest example of this policy position is the British common-law case of *Mogul Steamship Co.*[258] The lower right quadrant, where competition logic acts instead on the impulse toward equality, represents the policy of government imposition of workable competition. Although Justice Holmes characterized this policy as atomization of rivals to impose perfect competition, the literalists countenanced some restraints, making their view closer to what we today might call workable competition.[259] Finally, the upper right quadrant, where equality sentiments shape property logic, represents the policy of government protection of fair profit to independent entrepreneurs. The congressional debates included numerous calls for fair return on capital or labor put in the market.[260]

While this field diagram was developed from antitrust's early years, it also represents the logical structure that supports modern antitrust law. As described in a forthcoming study on vertical restraints doctrine, the field diagram depicts a logical structure that makes sense of the seem-

258. 23 Q.B.D. 598 (1889), *aff'd,* 1892 A.C. 25.

259. Regarding the notion of "workable competition," see *supra* note 51 and sources cited therein.

260. A few words should be said about the diagram itself, which is a snapshot of a dynamic process. First, the boundaries between quadrants are porous. If the operators (competition, property, liberty, equality) were simple oppositions, there would be no seepage. But because the tensions between them include an element of mutual support as well as conflict, there may be doctrinal flow across lines. For example, liberty needs equality, competition needs property, and so on. Second, the quadrants need not be the same size, though the diagram shows them as equal. In other words, at any given moment in history, the productive capacities of all four quadrants need not remain equal. There are numerous ways to describe this phenomenon. Here are three variations: (1) One of the two intersecting lines (or axes) could rotate. For example, if the vertical line connecting PROPERTY and COMPETITION rotated in a clockwise direction, the P/C line could cut a 45 degree angle through the upper right and lower left quadrants. This rotation would extend the influence of liberty in the upper PROPERTY half of the field and constrict its influence in the lower COMPETITION section. (2) One axis could migrate, while remaining perpendicular to the other axis. For example, if the horizontal line connecting LIBERTY and EQUALITY moved up the page toward the PROPERTY operator, the upper PROPERTY half of the structure would decrease in size, and the lower COMPETITION section would grow larger. (3) Finally, one axis could levitate. The P/C line could rise from the page. With this movement, interactions between tensions might decrease in intensity. Each of these possibilities—rotation, migration, and levitation—carries the same implication: that the field diagram as presented is a snapshot of a dynamic historical process.

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ingly haphazard movements of current case law, as well as its misunderstood connections to doctrinal antecedents.[261] There may be other grounds for the production of antitrust law and for the production of other law or simply other discourse. Most likely, however, a statement located on another field diagram simply does not appear to us to be a statement about antitrust law, unless it also occupies a position on the diagram appearing above.

One thing this map does not tell us is *where* any particular statement is positioned. Nonetheless, we can identify *likely* locations, just as lawyers and scholars have always done, by making informed judgments about the relative strengths of particular legal arguments in local settings. What is clear now, however, are the logics supporting antitrust argument. Thus, modern antitrust law, whether court opinion, journal article, jury instruction, or legislative conference report, can be understood in terms of the interplay of these two tensions. Do the texts indicate strong commitments to liberty or equality? Do they deploy the logic of competition or property? What doctrinal changes tend to accompany shifts in commitments? Considering such questions not only helps to explain seemingly haphazard shifts in doctrine, but also reveals how modern antitrust law still embodies the same tension between competition and property, and the same impulses toward equality and liberty.

Conclusion

In antitrust's formative years, shifting balances of power between rhetorical modes were evident from the earliest moments of the Sherman Act's legislative history, through the history of struggle between the "literalist" and "rule of reason" factions, to passage of the twin 1914 statutes. But those battles settled nothing. Nor could they prove that one logic was somehow better or stronger. Rather, those confrontations represented the very conditions of possibility for early antitrust law.

As we approach the centennial of the Sherman Act's passage, policy issues and the doctrinal alternatives in antitrust can now be analyzed in terms that not only include competition, but also recognize the fundamental conflict with the common-law logic of property rights. Whether we imagine them as mutually constituted, or whether we imagine competition policy as embedded in a pre-existing common-law property regime, or whether we imagine common-law property rights as subject to competition policy, we can no longer ignore the property logic that produced

261. Peritz, *A Genealogy of Vertical Restraints Doctrine,* 40 HASTINGS L.J. (1989) (forthcoming).

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early antitrust doctrine. The right to a "fair profit," the liberty to combine, and the freedom to dispose of one's assets are all historical instances of property logic in restraint of competition.

Competition logic exhibits an internal tension as well, animated by commitments to liberty and equality. That tension continues to operate in the modern idiom of "free competition," which can be understood as freedom from private market power or from government intervention. Thus, competition free from private market power implies that governmental intervention is good when it equalizes market power. But competition free of sovereign power means that governmental intervention is bad because it impinges on individual liberty. The context for analyzing antitrust law is completed with the recognition that the same commitments to liberty and equality produced tensions in the logic of property rights as well.

Finally, it is important to make explicit an important implication regarding the relationship between competition and efficiency. This study introduces an analytical structure for understanding how the tension between the competition policy and property rights has produced the efficiency norm in its various forms. In short, it shows a different mechanism at work in the production of antitrust doctrine, sharply different from the orthodox view that competition represents the only positive norm for antitrust and contrary to today's neoclassical view that efficiency is a proxy for competition. Placing competition into its logical and historical context allows us to recapture the positive values associated with combinations, small businesses, fair profit, and other doctrinal formulations that we currently associate with negative values such as "anticompetitive" practices or "anti-efficiency" policies. With an analytical structure that recognizes antitrust doctrine as a series of sociopolitical choices, we can start the Sherman Act's second century by making better informed judgments about antitrust doctrine and policy.

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