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James May

Washington College of Law, The American University

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HISTORICAL ANALYSIS IN ANTITRUST LAW*

JAMES MAY**

I. INTRODUCTION

This centennial symposium fittingly highlights the long-standing, central role of historical as well as economic analysis in the antitrust field. Today, in the midst of continuing debate concerning the recent past and desirable future of American antitrust law, historical perspectives powerfully continue to affect antitrust reasoning and development at a time when renewed historical scholarship is adding greatly to our knowledge of the antitrust past.

In this article I would like to address four main issues: first, the uses of history and the variety of questions posed by long-run changes in perceptions of the public interest in antitrust law; second, the changing pattern of scholarly writing on the antitrust past; third, the potential benefits of expanded thinking about antitrust history in general; and fourth, the key importance of certain long-neglected aspects of the historical record as sources of insight into the origins, nature, and development of American antitrust law.

II. THE USES OF HISTORY AND THE PATTERN OF PUBLIC INTEREST THINKING IN ANTITRUST LAW

Since the first antitrust laws were passed in the late nineteenth century, antitrust scholars, judges, and practitioners continually have turned to history as a fundamental source of guidance, insight, and justification. Judges and lawyers throughout this period have relied on historical research and analysis to illuminate both original legislative intent and the meaning of earlier case law. The Supreme Court and other courts today frequently continue to base important antitrust opinions substantially or even entirely on historical evidence and interpretations.¹ At the same time,

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** Professor of Law, Washington College of Law, The American University.

1. *See, e.g.*, *California v. Am. Stores Co.*, 110 S. Ct. 1853, 1861-66 (1990) (relying substantially on an examination of formative era antitrust thinking and activity in holding that Congress authorized divestiture as a remedy in private antitrust litigation challenging mergers); *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S. Ct. 1884, 1903 (1990)

historical perceptions heavily continue to influence much broader debates over basic antitrust philosophy as well.

Advocates of competing general antitrust approaches repeatedly have appealed to the past for essential support. Very often, they particularly have stressed historical inquiry designed to identify core goals that appropriately and usefully might guide current antitrust policy and the systematic, coherent development of antitrust doctrine.² The dramatic changes in prevailing antitrust philosophy and enforcement practice since the 1970s³ offer a striking recent example of this tendency. Scholars,

(Stevens, J., dissenting) (criticizing the majority's decision as a violation of both original congressional antitrust aims and longstanding perceptions of the antitrust past, declaring that "[t]he Court, in its haste to excuse illegal behavior in the name of efficiency, has cast aside a century of understanding that our antitrust laws are designed to safeguard more than efficiency and consumer welfare, and that private actions not only compensate the injured, but also deter wrongdoers" (footnotes omitted)); *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 731, 731-33 (1988) (supporting pathbreaking vertical restraint decision not only through economic analysis but also on the ground that Congress in 1890 understood that the common-law meaning of the term "restraint of trade" had changed over time and intended to retain such a "dynamic potential" when it passed the Sherman Act; accordingly, the Court declared, "[t]he term 'restraint of trade' in the statute, like the term at common law, refers not to a particular list of agreements, but to a particular economic consequence, which may be produced by quite different sorts of agreements in varying times and circumstances"); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342-44 (1979) (finding formative era legislative history supportive of consumers' right to sue for money damages for injuries allegedly resulting from illegal price fixing); *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958) (articulating a classic statement of the historic purpose of the Sherman Act to buttress the Court's condemnation of a challenged tying arrangement); *Standard Oil Co. v. United States*, 221 U.S. 1, 50, 49-62 (1911) (basing seminal "rule of reason" interpretation of the Sherman Act heavily on an examination of both "the history of the period when [the Act] was adopted" and the history of relevant common-law development up to the time the Act was passed); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 428-29 (2d Cir. 1945) (interpreting the Sherman Act's ban on monopolization in the light of a perception that Congress historically had sought to promote both economic and noneconomic goals); *State ex rel. Van de Kamp v. Texaco, Inc.*, 46 Cal. 3d 1147, 1153-63, 762 P.2d 385, 387-95, 252 Cal. Rptr. 221, 223-31 (1988) (rejecting the possibility of a merger challenge under the state's antitrust statute on the basis of an extended examination of the development of state antitrust legislation and case law around the country prior to 1907).

2. See, e.g., May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257, 260, 394-95 (1989) [hereinafter May, *Antitrust in the Formative Era*] (discussing this tendency).

3. On the general nature and extent of these changes, see, for example, Flynn, *The Reagan Administration's Antitrust Policy, "Original Intent" and the Legislative History of the Sherman Act*, 33 ANTITRUST BULL. 259, 262-63 (1988); Kovacic, *The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, 36 WAYNE L. REV. 1413, 1442-60 (1990) [hereinafter Kovacic, *Antitrust Paradox Revisited*]; Lande, *The*

judges, and enforcement officials embracing these newer approaches generally did not claim that in the absence of new legislation the logical and practical virtues of these methodologies were sufficient to justify their adoption, even if they were genuinely inconsistent with the historic intentions and understandings underlying the original passage of currently existing antitrust statutes. Accordingly, while proponents of these far-ranging changes heavily emphasized the economic logic⁴ and procedural strengths⁵ of their position, they ultimately also justified these general developments in large measure through explicit or implicit appeals to goal-centered historical interpretations echoing the analysis offered by Professor and later Judge Robert Bork in his landmark 1978 book *The Antitrust Paradox*.⁶ Repeatedly, proponents asserted that Congress historically contemplated that judicial interpretation of federal antitrust law would evolve substantially over time with changing factual circumstances and new economic thinking in order to carry out more effectively a fundamental original congressional aim to advance consumer welfare through the promotion of economic efficiency.⁷ Conversely, as

Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust, 33 ANTITRUST BULL. 429, 430-32, 435, 465 (1988) [hereinafter Lande, *Rise and Fall*]; Millstein & Kessler, *The Antitrust Legacy of the Reagan Administration*, 33 ANTITRUST BULL. 505, 506-07 (1988); Pitofsky, *Antitrust in the Next 100 Years*, 75 CALIF. L. REV. 817, 818 (1987).

4. See, e.g., R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978) [hereinafter R. BORK, *ANTITRUST PARADOX*]; R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976).

5. Claims of superior administrability have contributed substantially to the wide acceptance of efficiency-centered approaches since the 1970s. See, e.g., Kovacic, *Antitrust Paradox Revisited*, *supra* note 3, at 1439, 1451, 1462-63; Lande, *Rise and Fall*, *supra* note 3, at 436-38; Sullivan, *The Viability of the Current Law on Horizontal Restraints*, 75 CALIF. L. REV. 835, 852-53 (1987).

6. R. BORK, *ANTITRUST PARADOX*, *supra* note 4, at 15-79. On the central importance of Judge Bork's historical analysis as a foundation for his proposals for modern antitrust policy and practice, see, for example, Kovacic, *Antitrust Paradox Revisited*, *supra* note 3, at 1416, 1461, 1470-71; Kovacic, *Comments and Observations*, 59 ANTITRUST L.J. 119, 120 (1990) [hereinafter Kovacic, *Comments*]; Lande, *Rise and Fall*, *supra* note 3, at 432-35. On the widespread influence of Judge Bork's historical views among other proponents of efficiency-focused antitrust policy, see, for example, Flynn, *supra* note 3, at 263; Lande, *Rise and Fall*, *supra* note 3, at 432 & n.10, 435. For an important assessment of the historic significance and impact of *The Antitrust Paradox*, see Kovacic, *Antitrust Paradox Revisited*, *supra* note 3.

7. See, e.g., R. BORK, *ANTITRUST PARADOX*, *supra* note 4, at 20, 56-66; Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 692-94, 702-03 (1982); Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1702-05 (1986). Certain other leading scholars have posited a more open-ended congressional delegation of authority to the federal courts but then have gone on to argue that as a matter of sound antitrust policy courts should only seek

considerable debate over appropriate antitrust policy and goals continued,⁸ advocates of other approaches prominently invoked historical analysis to challenge the soundness and legitimacy of efficiency-centered views.⁹ Simultaneously, these dissenting advocates offered alternative historical interpretations in support of their own methodologies.¹⁰

Historical investigation not only has played a major role in influencing specific judicial decisions and general policy debate; it also has been used to highlight long-term patterns in antitrust thinking and activity¹¹ and particular practical deficiencies in antitrust enforcement.¹² Such developed historical perspectives, in turn, have laid the foundation for commentary warning judges and lawyers of the possible recurrence of various earlier

to promote basic economic objectives and not a broader range of "populist" goals. See 1 P. AREEDA & D. TURNER, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶¶ 105-113 (1978).

8. See, e.g., Flynn, *supra* note 3, at 260-61 (noting this continuing debate).

9. See, e.g., Kovacic, *Antitrust Paradox Revisited*, *supra* note 3, at 1461-62 (noting the centrality of historical perspectives in critiques of Judge Bork's efficiency-centered prescriptions for antitrust law).

10. See, e.g., Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CALIF. L. REV. 263 (1986); Flynn, *supra* note 3; Fox, *The Battle for the Soul of Antitrust*, 75 CALIF. L. REV. 917 (1987) [hereinafter Fox, *Battle*]; Handler, *Is Antitrust's Centennial a Time for Obsequies or for Renewed Faith in Its National Policy?*, 10 CARDOZO L. REV. 1933, 1944-46 (1989); Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 67 (1982) [hereinafter Lande, *Wealth Transfers*]; Sullivan, *supra* note 5, at 853. Indeed, history recently has been invoked not only by advocates of competing general philosophies of antitrust law but also by proponents of its outright elimination. See, e.g., DiLorenzo, *The Origins of Antitrust: Rhetoric v. Reality*, REGULATION, Fall 1990, at 26.

11. See, e.g., R. HOFSTADTER, *What Happened to the Antitrust Movement?*, in THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 188 (1965); Fox & Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936, 937-56 (1987); Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105 (1989) [hereinafter Kovacic, *Failed Expectations*]; Millstein & Kessler, *supra* note 3, at 510-14; Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263 [hereinafter Peritz, *Counter-History*]; Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511 (1984).

12. See, e.g., Kovacic, *Comments*, *supra* note 6, at 119; Kovacic, *Failed Expectations*, *supra* note 11.

problems.¹³ These perspectives also have prompted important proposals for specific improvements in antitrust enforcement.¹⁴

Observers both within and outside of the legal profession, moreover, often have invoked history for still further purposes less immediately related to everyday antitrust practice. Historians and antitrust scholars commonly have looked to the past to clarify the place of antitrust law within various larger contexts.¹⁵ In addition, such writers have turned to history to illuminate the sources and magnitude of earlier changes in antitrust activity¹⁶ and to evaluate the long-run impact of antitrust developments

13. See, e.g., Kovacic, *Failed Expectations*, *supra* note 11 (exploring the problems with antitrust deconcentration efforts in the past and the possibilities for their recurrence in the future); Millstein & Kessler, *supra* note 3, at 512 (cautioning that "the history of antitrust law has been riddled by the efforts of extremists on both sides of the spectrum to take economic models" too far in substitution for individual case-by-case analysis and declaring that "[i]t is this distortion of the valid use of economic models which has led to periodic excesses in our antitrust policy"); Rowe, *supra* note 11, at 1559 (warning that general economic models reflect the particular historical circumstances of their own time of origin and that their continued use "distorts legal norms when conditions change").

14. See, e.g., Kovacic, *Comments*, *supra* note 6, at 119 (noting the impact of historical perspectives in spurring federal deconcentration initiatives in the late 1960s and early 1970s and in prompting proposals for major changes in the operations of the Federal Trade Commission).

15. See, e.g., E. FOX & L. SULLIVAN, *CASES AND MATERIALS ON ANTITRUST* (1989); E. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY* (1966); J. HURST, *LAW AND SOCIAL ORDER IN THE UNITED STATES 245-66* (1977); T. KOVALEFF, *BUSINESS AND GOVERNMENT DURING THE EISENHOWER ADMINISTRATION: A STUDY OF THE ANTITRUST POLICY OF THE ANTITRUST DIVISION OF THE JUSTICE DEPARTMENT* (1980); W. LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT* (1965); S. PIOTT, *THE ANTI-MONOPOLY PERSUASION: POPULAR RESISTANCE TO THE RISE OF BIG BUSINESS IN THE MIDWEST* (1985); *REGULATION IN PERSPECTIVE: HISTORICAL ESSAYS* (T. McCraw ed. 1981); M. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916: THE MARKET, THE LAW, AND POLITICS* (1988); H. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* (1955); Brietzke, *The Constitutionalization of Antitrust: Jefferson, Madison, Hamilton, and Thomas C. Arthur*, 22 VAL. U.L. REV. 275 (1988); Kramer, *The Supreme Court and Tying Arrangements: Antitrust as History*, 69 MINN. L. REV. 1013 (1985); Scherer, *Efficiency, Fairness, and the Early Contributions of Economists to the Antitrust Debate*, 29 WASHBURN L.J. 243 (1990).

16. See, e.g., J. HURST, *supra* note 15; M. SKLAR, *supra* note 15; H. THORELLI, *supra* note 15; Kovacic, *Failed Expectations*, *supra* note 11. Such scholarly efforts recently have extended to attempts to evaluate the substantiality and causes of the major changes in antitrust thinking and activity that have occurred since the 1970s. See, e.g., Kovacic, *Antitrust Paradox Revisited*, *supra* note 3; Lande, *Rise and Fall*, *supra* note 3; Millstein & Kessler, *supra* note 3.

on American economic,¹⁷ political,¹⁸ and intellectual¹⁹ life more generally. Such efforts have informed assessments of both the symbolic²⁰ and practical²¹ importance of antitrust law and have formed a basis for predictions about future antitrust development.²² At the same time, historical understanding also has helped to shape the sense of role held by legal professionals who view their activities as a continuing part of a larger antitrust tradition.²³

The title of this conference's panel on "Using Historical Analysis to Formulate the Public Interest" highlights numerous important questions for such continuing historical reflection. What does the historical record tell us, for example, with regard to the continuities and discontinuities in public interest formulations in antitrust thought since the late nineteenth century? Why were public interest concerns for political, economic, and moral values beyond allocative efficiency once so prominent in antitrust thinking? Should we attribute this phenomenon to an absence of widely available, relevant economic theory in the late nineteenth century? To a powerful, prevailing attraction to unsystematic "populism"? Or, alternatively, to the presence and strength of theoretical tendencies decidedly different from those that currently are dominant?

17. See, e.g., A. CHANDLER, *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 332-33 (1977); Carstensen, *How to Assess the Impact of Antitrust on the American Economy: Examining History or Theorizing?*, 74 *IOWA L. REV.* 1175 (1989); Freyer, *The Sherman Act, Comparative Business Structure, and the Rule of Reason: America and Great Britain, 1880-1920*, 74 *IOWA L. REV.* 991, 991-92, 1011, 1016-17 (1989); Pratt, *The Petroleum Industry in Transition: Anti-Trust and the Decline of Monopoly Control in Oil*, 40 *J. ECON. HIST.* 815, 831 (1980).

18. See, e.g., R. BORK, *ANTITRUST PARADOX*, *supra* note 4, at 10-11, 425; T. Kauper, Remarks at United States Department of Justice Commemoration of the 100th Anniversary of the Passage of the Sherman Act, *reprinted in* 136 *CONG. REC.* S10,141, S10,142 (daily ed. July 20, 1990) [hereinafter T. Kauper, Remarks].

19. See, e.g., R. BORK, *ANTITRUST PARADOX*, *supra* note 4, at 10, 418, 420-22, 425.

20. See, e.g., *id.* at 418; H. THORELLI, *supra* note 15, at 608; T. Kauper, Remarks, *supra* note 18, at S10,142, S10,143; Kovacic, *Failed Expectations*, *supra* note 11, at 1150.

21. See, e.g., R. BORK, *ANTITRUST PARADOX*, *supra* note 4, at 425; H. THORELLI, *supra* note 15, at 604-09; Carstensen, *supra* note 17; T. Kauper, Remarks, *supra* note 18, at S10,142.

22. See, e.g., Fox, *The Future of the Per Se Rule: Two Visions at War with One Another*, 29 *WASHBURN L.J.* 200, 201 (1990); Kauper, *The Justice Department and the Antitrust Laws: Law Enforcer or Regulator?*, 35 *ANTITRUST BULL.* 83, 120 (1990); Kovacic, *Antitrust Paradox Revisited*, *supra* note 3, at 1467; Kovacic, *Failed Expectations*, *supra* note 11, at 1139, 1144, 1150.

23. See, e.g., J. Rill, Remarks at United States Department of Justice Commemoration of the 100th Anniversary of the Passage of the Sherman Act, *reprinted in* 136 *CONG. REC.* S10,138, S10,139 (daily ed. July 20, 1990).

Why did nonefficiency-focused views of the public interest become so disfavored in antitrust law after the 1960s? Should we see this development solely or predominantly as a testament to the intellectual power of late twentieth century economic perspectives? To what extent might we usefully see it as an indication of the weakness of later twentieth century theory in general, unable to provide more compelling theoretical means to incorporate systematically a broader range of values and concerns? Alternatively, to what degree is it appropriate to attribute the antitrust changes since the 1960s not to intellectual developments but instead to particular major changes in the economic and political environment?

Historical questions of this sort currently are receiving substantially increased consideration from historians, antitrust scholars, and economists.²⁴ I would like to highlight certain aspects of this new writing and then mention some of the promising possibilities for further analytical refinement that are presently gaining greater attention from various authors focusing on the antitrust past.

III. THE ONGOING DEVELOPMENT OF SCHOLARLY WRITING ON ANTITRUST HISTORY

Within the antitrust field, as elsewhere, historical approaches and interpretations have changed over time. In his monumental study published in the mid-1950s, Hans Thorelli, for example, relied upon a broad range of primary and secondary materials to explore numerous interrelated developments bearing on early antitrust activity and analysis.²⁵ As a result of these efforts, Thorelli concluded that the Sherman Act reflected a general philosophy of "economic egalitarianism" incorporating various major elements of nineteenth century thinking.²⁶ More specifically, he found that in passing the Act, Congress hoped to protect not only competition and efficiency, but also economic opportunity, wealth distribution, and political liberty.²⁷

In the 1970s and 1980s, antitrust scholars strongly influenced by analytical concerns raised by modern neoclassical economic scholarship repeatedly took a very different approach to antitrust history. In the historical sections of his 1978 book²⁸ and related earlier articles,²⁹ Judge

24. See, e.g., Kovacic, *Comments*, *supra* note 6, at 120 (noting this trend); May, *The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History*, 59 ANTITRUST L.J. 93, 94 (1990) [hereinafter May, *Antitrust History*] (same).

25. See H. THORELLI, *supra* note 15.

26. See *id.* at 564-72.

27. See *id.* at 225-30, 570-72.

28. R. BORK, *ANTITRUST PARADOX*, *supra* note 4.

Bork, for example, looked intensively but nearly exclusively at congressional debate materials and leading judicial opinions and proposed a more narrowly focused interpretive thesis than had earlier commentators on antitrust development. Strongly downplaying any influence of general political and economic theory in early antitrust thinking,³⁰ Judge Bork minimized possible congressional concerns for small business opportunity or equitable wealth distribution and instead emphasized early congressional desires to promote economic efficiency or "consumer welfare maximization."³¹

Today, in a new revival of writing about antitrust history, antitrust scholars, economists, and historians are once again enlarging the focus of historical inquiry and analysis.³² In the last several years, numerous scholars have explored at length various practical and intellectual aspects of antitrust development over the last one hundred years.³³ In large measure these newly published works usefully complement one another. At the same time, however, some significant differences of method and perspective also recently have appeared in this growing body of historical scholarship. Let me offer a few examples by way of illustration.

In my own recent writing on the formative era, for example, I have tried to look broadly at the late nineteenth and early twentieth century American context and have focused particularly on the nature and impact of contemporary economic, political, and legal theory. In exploring both federal and state antitrust developments, I have emphasized the continuing

29. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (pts. I & II), 74 YALE L.J. 775 (1965), 75 YALE L.J. 373 (1966).

30. 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, 553-56, 587-92 (1987) [hereinafter May, *Antitrust Practice and Procedure*] (discussing this feature of Judge Bork's analysis).

31. See, e.g., R. BORK, *ANTITRUST PARADOX*, *supra* note 4, at 56-66. On the use of the latter term, see, for example, Fox, *Battle*, *supra* note 10, at 918 & n.7; Lande, *Rise and Fall*, *supra* note 3, at 434-35.

32. In significant part, this development has occurred in reaction to the work of Judge Bork and other similarly minded observers. See Kovacic, *Antitrust Paradox Revisited*, *supra* note 3, at 1469. Antitrust writers and other scholars widely have perceived serious flaws in the historical analysis of congressional intent that has been used to support recent efficiency-focused approaches to antitrust law. See, e.g., *id.* at 1461 (noting the broad scholarly consensus on this point); see also *id.* at 1471 (noting that "Bork's conclusion that efficiency guided the enactment of the antitrust laws rested substantially upon the type of 'falsely imagined past' that he said was a major source of undue antitrust expansionism" (footnote omitted)).

33. For a partial listing of recent works, see, for example, May, *Antitrust History*, *supra* note 24, at 94 n.3.

power of traditional general theory in the face of contemporary changes eroding the older patterns of economic and political life on which those perspectives initially were premised.³⁴

Simultaneously, many other authors recently have addressed key issues of theory and practice in antitrust history in general and in the formative era in particular. As already noted, while much valuable new work has appeared, these studies sometimes have presented strikingly diverse approaches and interpretations. For example, Professor Thomas Arthur, in his extended exposition of a "statutory" approach to antitrust law, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*,³⁵ and Professor Martin Sklar, in his landmark book *The Corporate Reconstruction of American Capitalism, 1890-1916: The Market, the Law, and Politics*,³⁶ both deem the Supreme Court's opinion in *Standard Oil Co. v. United States*³⁷ to have been a crucial turning point in antitrust history. Professor Arthur, however, declares it to have been a crucial turn away from the dominant mainstream of nineteenth century common law on restraints of trade,³⁸ while Professor Sklar finds it a crucial restoration of such mainstream approaches after almost a decade and a half of Supreme Court deviation under the leadership of Justice Peckham.³⁹

Disagreement also has continued with regard to formative era congressional thinking. Professor Robert Lande, for example, in a well-known 1982 article dissenting from efficiency-centered views of antitrust history, has posited a predominant congressional concern for wealth distribution and the prevention of unfair wealth transfers.⁴⁰ Other writers, however, have stressed a simultaneous, comparably important congressional concern for other basic values and goals as well.⁴¹

34. See May, *Antitrust History*, *supra* note 24; May, *Antitrust in the Formative Era*, *supra* note 2; May, *Antitrust Practice and Procedure*, *supra* note 30.

35. Arthur, *supra* note 10.

36. M. SKLAR, *supra* note 15.

37. 221 U.S. 1 (1911).

38. See Arthur, *supra* note 10, at 279-84, 298-302.

39. See M. SKLAR, *supra* note 15, at 127-39. This debate, of course, rests heavily on perceptions of the nature and consistency of American common law over the course of the nineteenth century. For a recent attempt to clarify this picture somewhat, suggesting that, at least in the important states of New York and Missouri, the pattern of common-law decision making was strikingly different in the 1880s than it had been for most of the nineteenth century, see May, *Antitrust in the Formative Era*, *supra* note 2, at 311-31.

40. See Lande, *Wealth Transfers*, *supra* note 10.

41. See, e.g., Flynn, *supra* note 3; May, *Antitrust in the Formative Era*, *supra* note 2, at 258-300; Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219 (1988) [hereinafter Millon, *Balance of Power*]; Peritz, *The "Rule of Reason" in Antitrust Law: Property Logic in Restraint of Competition*, 40 HASTINGS L.J. 285 (1989) [hereinafter

In wide-ranging recent writing addressing both antitrust legislation and jurisprudence, Professor Herbert Hovenkamp has de-emphasized the continuing power of traditional classical economic perspectives in formative era antitrust thinking and, instead, has posited a sudden, pervasive importance of new, neoclassical theory in early antitrust analysis,⁴² asserting that traditional nineteenth century thinking exhibited only limited appreciation of the nature and importance of horizontal competition.⁴³ Professor David Millon, in his major article *The Sherman Act and the Balance of Power*,⁴⁴ on the other hand, has offered a quite different picture of nineteenth century thought, focusing on republican and liberal concerns for the threats to individual liberty posed by concentrated economic and political power and positing that such concerns provided the motivation for congressional passage of the Sherman Act in 1890.⁴⁵

Other scholars recently have focused on the broader sweep of antitrust history and have offered important new assessments of the long-run patterns and impact of antitrust activity. Professor William Kovacic, for example, has examined at length the factors influencing the recurring rise and fall of antitrust deconcentration efforts and the practical effects of such initiatives.⁴⁶ Professor Peter Carstensen has reevaluated the historic economic impact of antitrust developments more generally and has raised key questions regarding the methodologies frequently employed in recent years to make such assessments.⁴⁷ At the same time, leading scholars such as Thomas McCraw,⁴⁸ Ellis Hawley,⁴⁹ and Morton Keller⁵⁰ have

Peritz, *The "Rule of Reason"*].

42. See Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA L. REV. 1019 (1989) [hereinafter Hovenkamp, *Classical Theory*]; Hovenkamp, *Labor Conspiracies in American Law, 1880-1930*, 66 TEX. L. REV. 919 (1988) [hereinafter Hovenkamp, *Labor Conspiracies*].

43. See Hovenkamp, *Classical Theory*, *supra* note 42, at 1027; Hovenkamp, *Labor Conspiracies*, *supra* note 42, at 935-37, 965. Additional explorations of antitrust history by the same author include Hovenkamp, *Antitrust Policy, Federalism, and the Theory of the Firm: An Historical Perspective*, 59 ANTITRUST L.J. 75 (1990); Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1 (1989); Hovenkamp, *The Antitrust Movement and the Rise of Industrial Organization*, 68 TEX. L. REV. 105 (1989).

44. Millon, *Balance of Power*, *supra* note 41.

45. See *id.*; see also Millon, *The First Antitrust Statute*, 29 WASHBURN L.J. 141 (1990).

46. See Kovacic, *Failed Expectations*, *supra* note 11.

47. See Carstensen, *supra* note 17.

48. See, e.g., T. McCRAW, *PROPHETS OF REGULATION* (1984).

49. See, e.g., Hawley, *Herbert Hoover and the Sherman Act, 1921-1933: An Early Phase of a Continuing Issue*, 74 IOWA L. REV. 1067 (1989).

50. See, e.g., M. KELLER, *REGULATING A NEW ECONOMY* (1990).

continued to enlarge our understanding of the relationship of antitrust activity to broader developments in business and economic regulation.

The work of the other participants in this conference session provides still further important examples of the variety to be found in recent scholarship on antitrust history. Professor Sklar's previously noted 1988 book, for instance, examines extensively the ways in which turn-of-the-century Americans came to terms with the rise of large-scale corporate capitalism and focuses at length not only on congressional and judicial antitrust efforts but also on the differing regulatory philosophies adopted by Presidents Roosevelt, Taft, and Wilson respectively.⁵¹ In a series of recent articles,⁵² Professor Daniel Ernst has furthered considerably our understanding of the early legal treatment of labor. Professor Ernst's work has explored insightfully, for example, the decline of older individualistic conceptions of employer-employee relations and the ongoing battle of ideas reflected in the 1914 enactment of the labor provisions of the Clayton Act.⁵³ Professor William LaPiana, in his article for this conference, thoughtfully has explored the language of major early antitrust opinions, placing them within the larger context of Progressive Era jurisprudential philosophy.⁵⁴ Professor Rudolph Peritz creatively has broken substantial new ground in a number of related works urging that we draw insight from the approaches of the French philosopher Michel Foucault and understand antitrust law over the last one hundred years as the product of a continued tension between two fundamental rhetorics of "property" and "competition," respectively, in interaction with ongoing basic concerns for liberty and equality.⁵⁵

The diversity in this growing body of new work on antitrust history poses important questions regarding the relative merits of various approaches to historical interpretation and the supportability of various historical conclusions. Such general issues of historical methodology and

51. See M. SKLAR, *supra* note 15.

52. See D. ERNST, *THE WOODTRIM WAR: A CASE STUDY IN THE HISTORY OF LABOR ACTIVISM, ANTITRUST LITIGATION, AND LEGAL CULTURE, 1910-1917* (Institute for Legal Studies Working Paper No. LH2-7, 1988); Ernst, *The Closed Shop, the Proprietary Capitalist, and the Law, 1897-1915*, in *MASTERS TO MANAGERS* 132 (S. Jacoby ed. 1991); Ernst, *The Labor Exemption, 1908-1914*, 74 *IOWA L. REV.* 1151 (1989).

53. Clayton Act, ch. 323, § 6, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 17 (1988)); Clayton Act, ch. 323, § 20, 38 Stat. 730, 738 (1914) (current version at 29 U.S.C. § 52 (1988)).

54. See LaPiana, *The Legal Culture of the Formative Period in Sherman Act Jurisprudence*, 35 *N.Y.L. SCH. L. REV.* 827 (1990).

55. See Peritz, *Counter-History*, *supra* note 11; Peritz, *A Genealogy of Vertical Restraints Doctrine*, 40 *HASTINGS L.J.* 511 (1989); Peritz, *The "Rule of Reason"*, *supra* note 41.

analysis have been much more extensively discussed outside of the antitrust field than within it and long have been central in professional historical scholarship. As a result, expanded consideration of the methods and insights of professional historians can contribute greatly to the ongoing efforts to develop historical thinking further within the antitrust field itself.

IV. ANTITRUST LAW AND THE LARGER REALM OF HISTORICAL SCHOLARSHIP

Antitrust law always has drawn upon perspectives and knowledge from outside of the legal profession itself.⁵⁶ In recent years, antitrust observers have paid heightened attention to the principles, knowledge, and methods of professional economists in an effort to render economic analysis in antitrust law more sophisticated and supportable.⁵⁷ Despite substantial continued reliance on historical as well as economic analysis, however, antitrust scholars, judges, and practitioners generally have not paid similar attention to the parallel benefits to be gained from increased sensitivity to the logical principles, detailed knowledge, and methodological concerns of professional historians. As a result, antitrust scholars and practitioners frequently have foregone valuable opportunities for more effective realization of the full benefits of historical study.

Careful historical research and analysis can help to free us from erroneous conceptions of the past, which can seriously limit and distort our thinking.⁵⁸ As the historian Stephen Vaughn, for example, has cautioned in his instructive anthology, *The Vital Past: Writings on the Uses of History*:⁵⁹ "We do not have to believe Santayana when he said that those

56. Understandings of American history and of general political and economic theory repeatedly informed the enactment, enforcement, and interpretation of antitrust legislation throughout the formative era, as well as in later decades. See May, *Antitrust in the Formative Era*, *supra* note 2; see also Hovenkamp, *Classical Theory*, *supra* note 42; May, *Antitrust Practice and Procedure*, *supra* note 30, at 541-93; Millon, *Balance of Power*, *supra* note 41; Peritz, *The "Rule of Reason"*, *supra* note 41.

57. See, e.g., Lande, *Rise and Fall*, *supra* note 3, at 444, 457; Millstein & Kessler, *supra* note 3, at 506, 524, 525, 528, 531, 538; R. Schmalensee, Remarks at United States Department of Justice Commemoration of the 100th Anniversary of the Passage of the Sherman Act, reprinted in 136 CONG. REC. S10,143 (daily ed. July 20, 1990); see also ANTITRUST POLICY IN TRANSITION: THE CONVERGENCE OF LAW AND ECONOMICS (E. Fox & J. Halverson eds. 1984); R. BLAIR & D. KASERMAN, ANTITRUST ECONOMICS (1985); ECONOMIC ANALYSIS AND ANTITRUST LAW (T. Calvani & J. Siegfried 2d ed. 1988); H. HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW (1985).

58. See, e.g., R. BORK, ANTITRUST PARADOX, *supra* note 4, at 15; Butterfield, *The Dangers of History*, in THE VITAL PAST: WRITINGS ON THE USES OF HISTORY 224, 226, 228-30 (S. Vaughn ed. 1985).

59. THE VITAL PAST, *supra* note 58.

who fail to remember the past are doomed to repeat it. Still, those who do not remember are in jeopardy of suffering at the hands of those who say they do."⁶⁰

Improved historical study not only can further clarify specific legislative, judicial, and executive-branch understandings and activities during earlier decades, but it also can shed additional light on the broader social and intellectual meaning of antitrust developments more generally. Judge Bork, for example, strikingly affirmed the widely accepted importance of such broader historical perspectives in his 1978 book on antitrust law.⁶¹ In that work, Judge Bork declared that antitrust developments should be evaluated not only as law, but also as economics and as politics,⁶² and he emphasized that antitrust thinking should be understood as an important, special "subcategory of ideology"⁶³ exercising a "unique symbolic and educative influence over public attitudes toward free markets and capitalism."⁶⁴ Judge Bork noted that antitrust usefully can be viewed as a microcosm reflecting and reinforcing larger intellectual movements in American life.⁶⁵ In this connection, he particularly stressed the need to understand the interrelationship between long-run developments in antitrust thought and broader trends in American thinking about four fundamental issues: the appropriate roles of courts and legislatures, the legitimate extent of government involvement in economic life, the emphasis to be placed on general social welfare versus special interest protection, and the interpretation to be given to the general ideals of liberty and equality.⁶⁶

Expanded investigation and analysis of such historic interrelationships can provide substantial new insights into antitrust-related experience and can help to ensure that modern antitrust thinking is respectable not only as law, economics, and politics,⁶⁷ but as history as well. Intensified scholarly efforts of this sort can help us to see more accurately the diversity as well as the commonalities present in the thought and activity of particular prior time periods. They also can help us to appreciate more fully the extent and sources of both continuities and discontinuities in antitrust experience over the course of the Sherman Act's first century.

60. Vaughn, *History: Is It Relevant?*, in *THE VITAL PAST*, *supra* note 58, at 1, 11.

61. R. BORK, *ANTITRUST PARADOX*, *supra* note 4.

62. *See id.* at 418.

63. *Id.* at 3, 10.

64. *Id.* at 425.

65. *See id.* at 10.

66. *See id.* at 10-11, 418-25.

67. *See generally id.* at 418 (expressing concern that in substantial degree antitrust law by the 1970s had become "no longer intellectually respectable" as law, as economics, or as politics).

The focused methodological sensitivities of professional historians can provide helpful practical guidance for antitrust analysts' own thinking about the past. Such understandings can warn us, for example, of the numerous ways that historical as well as economic analysis can be flawed by various forms of oversimplification.⁶⁸ Such methodological perspectives also can make us more aware of the ways in which an excessive preoccupation with current concerns, perspectives, and values can severely limit and distort historical understanding.⁶⁹ Increased attention to the techniques of careful, more thorough historical analysis not only can help us to steer clear of misleading "reductionism" and "presentism";⁷⁰ it also can help us to avoid the danger of becoming overwhelmed, conversely, by the perceived complexity of the past.⁷¹ In so doing, it can help us to avoid the unwarranted view that if the past cannot be reduced to a single, narrowly reductionist meaning, it should be viewed as fundamentally indeterminate, with all interpretations being equally possible, so that in effect history is taken to offer little or no identifiable meaning at all for modern practice and thinking.

Modern scholarship focused specifically on legal history, which has grown dramatically in recent decades,⁷² offers particularly valuable insights. This scholarship, for example, usefully has highlighted key ways in which the general approaches to historical analysis taken by lawyers have tended to differ from those adopted by historians⁷³ and has clarified

68. See, e.g., D. FISCHER, *HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT* (1970).

69. See, e.g., *id.* at 314-15; Dozer, *History as Force*, in *THE VITAL PAST*, *supra* note 58, at 276.

70. See generally D. FISCHER, *supra* note 68, at 172-75 (discussing the reductive fallacy), 135-40 (discussing the fallacy of presentism). For an extended discussion of such problems in leading antitrust works addressing the legislative history of the Sherman Act, see Flynn, *supra* note 3.

71. As historian Michael Kammen, for example, has noted, while one of the benefits of history is "[t]o enhance our awareness of the complexity of historical causation—the unanticipated intertwining of opinion and events," it is also "the historian's vocation to provide society with a discriminating memory," so that one can "avoid the tendency to ascribe equal value to all relationships and events. Worse than no memory at all is the indiscriminating memory that cannot differentiate between important and inconsequential experiences." Kammen, *On Knowing the Past*, in *THE VITAL PAST*, *supra* note 58, at 55, 57.

72. See, e.g., K. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* at vii (1989); *THE LITERATURE OF AMERICAN LEGAL HISTORY* (W. Nelson & J. Reid eds. 1985); Friedman, *American Legal History: Past and Present*, 34 *J. LEGAL EDUC.* 563 (1984).

73. See, e.g., *THE LITERATURE OF AMERICAN LEGAL HISTORY*, *supra* note 72, at 28, 32, 38, 185, 235, 242.

the analytical limitations of much of "lawyers' legal history."⁷⁴ Legal history writing in recent decades also has greatly expanded our knowledge of the nature, development, and impact of law in general during historical periods of intense interest to antitrust observers, and consideration of this body of knowledge can add immensely to the depth, sophistication, and supportability of our interpretations of the antitrust past.⁷⁵

Finally, I would like to suggest that we can garner especially great rewards by focusing on developments in one field of law in particular outside the antitrust realm. As I previously have emphasized elsewhere,⁷⁶ the field of law that I have in mind is that of constitutional law.

V. ILLUMINATION FROM CONSTITUTIONAL LAW DEVELOPMENTS

From the middle of the nineteenth century to the First World War, Americans experienced a series of dramatic developments that repeatedly focused attention on the fundamentals of American political, economic, and social life. A bloody civil war successfully preserved the union itself and freed black Americans from the bonds of slavery, paving the way for Reconstruction Era efforts to secure these achievements through new constitutional amendments and civil rights legislation.⁷⁷ In subsequent decades, geographic markets expanded and American firms increasingly took advantage of the greater economies of scale made possible by the

74. *Id.* at 235, 269, 273. On this point, see especially Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1981); Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEGAL HIST. 275 (1973).

75. Leading scholars such as Michael Les Benedict and Charles McCurdy, for example, have contributed greatly to a substantially revised understanding of the nature of laissez-faire constitutional jurisprudence in the late nineteenth and early twentieth centuries, a new understanding which offers considerable rewards for scholars and lawyers interested in a better appreciation of the more general legal and intellectual climate of opinion out of which antitrust law first arose. See, e.g., Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293 (1985); McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970 (1975). For an example of a recent effort to extend this constitutional-history scholarship and relate it to an expanded understanding of early antitrust history, see May, *Antitrust in the Formative Era*, *supra* note 2, at 262-88. Conversely, scholars primarily interested in aspects of legal history outside the antitrust field potentially can benefit substantially from increased consideration of antitrust-history scholarship.

76. See May, *Antitrust in the Formative Era*, *supra* note 2; May, *Antitrust History*, *supra* note 24. The following section is based heavily on the much more extended discussion of early antitrust law set out in the former of these works. The points made here are explored in much greater detail in that longer article.

77. See generally E. FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877* (1988); J. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* (1988).

numerous technological innovations of the nineteenth and early twentieth centuries. These changes reduced costs and boosted productivity but also generated repeated crises of overcapacity that intensified competitive struggles and losses in many industries. These developments, in turn, spurred an increasing recourse to various forms of loose and tighter business combinations as American businesses widely sought greater security and more favorable returns.⁷⁸ In the decades immediately preceding the First World War, large-scale corporate capitalism rapidly displaced the familiar patterns of a more decentralized, smaller-business economy⁷⁹ while conflict between labor and business prominently continued⁸⁰ and state and federal regulation increased substantially.⁸¹

Americans understood and responded to these major developments in varied ways.⁸² In large measure, however, legislators, judges, and other observers tended to formulate and apply their diverse approaches within a broadly shared general frame of reference that incorporated certain basic perspectives on politics, economics, and judicial methodology.⁸³

Americans heavily influenced by nineteenth century liberal political and economic perspectives believed that the health of American political and economic life critically depended upon protection of the fundamental, interrelated rights of labor, property, and exchange. When these rights were duly safeguarded, it was thought, natural processes would tend to maximize the benefits gained by both individuals and society at large and, indeed, simultaneously would tend to ensure economic opportunity, efficiency, prosperity, distributional justice, social harmony, and political freedom.⁸⁴ Protection of these fundamental rights of labor, property, and exchange was a chief concern of Reconstruction Era congressmen⁸⁵ and became a

78. See, e.g., T. McCRAW, *supra* note 48, at 65-73; H. THORELLI, *supra* note 15, at 63-85.

79. See M. SKLAR, *supra* note 15, *passim*.

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

81. See, e.g., L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 439-63 (2d ed. 1985).

82. See, e.g., May, *Antitrust in the Formative Era*, *supra* note 2, at 281-87 (surveying these varied responses).

83. See *id.* at 258-88, 391-92.

84. See *id.* at 269-81.

85. See *id.* at 288-89. On congressional reconstruction efforts, see, for example, H. BELZ, *EMANCIPATION AND EQUAL RIGHTS: POLITICS AND CONSTITUTIONALISM IN THE CIVIL WAR ERA* 47-150 (1978); M. CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986); E. FONER, *supra* note 77, at 228-80; H. HYMAN & W. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875*, at 295-303, 309-13, 386-426, 439-72 (1982); E. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869* (1990); W. NELSON, *THE FOURTEENTH*

central preoccupation of both state court judges and the Justices of the United States Supreme Court as they elaborated the laissez-faire constitutional jurisprudence of the late nineteenth and early twentieth centuries.⁸⁶

Today, antitrust scholars and lawyers perceive constitutional law and antitrust law as quite separate and sharply distinct fields of analysis.⁸⁷ As I have sought to suggest at length elsewhere,⁸⁸ however, Progressive Era Americans perceived a very different relationship between these two bodies of law. For a great many Americans of those years, antitrust law seemed the essential logical complement to laissez-faire constitutionalism. While the latter sought to protect the key rights of labor, property, and exchange from the potential threats posed by the leading governmental innovations of the era, the former sought to protect these same core rights from the threats thought to be posed by the most profoundly disturbing private innovations of the time.⁸⁹

As a result of this complementarity, close examination of constitutional developments from the Civil War to the First World War powerfully illuminates the theoretical foundations not only of contemporary constitutional thinking but also of early antitrust analysis as well. Such a focus clarifies, for example, contemporary Americans' own understandings of the full significance and interrelation of economic opportunity, efficiency, competition, fair distribution, and political liberty and their view of the crucial proper roles of courts and legislatures.⁹⁰ Close attention to constitutional developments and contemporary theory also helps us to appreciate more fully why nineteenth century congressmen did not feel a greater need to resolve the tensions that later observers increasingly would perceive among the multiple values implicated in section one of the

AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 1-147 (1988).

86. See May, *Antitrust in the Formative Era*, *supra* note 2, at 262-69, 275-81. On laissez-faire constitutional jurisprudence, see also, for example, Benedict, *supra* note 75; Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379 (1988); Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751 (1967); McCurdy, *supra* note 75; Urofsky, *State Courts and Protective Legislation During the Progressive Era: A Reevaluation*, 72 J. AM. HIST. 63 (1985).

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

88. See May, *Antitrust in the Formative Era*, *supra* note 2.

89. See *id.* at 258-88.

90. See *id.* at 258-300.

fourteenth amendment⁹¹ and among the various concerns implicated in section one and section two of the Sherman Act,⁹² enacted less than a quarter-century later.

Focusing on the late nineteenth and early twentieth century importance of the basic rights of labor, property, and exchange in both constitutional and antitrust analysis also clarifies the adaptability and continuing power of such general perspectives in a period of dramatic economic and political change.⁹³ Simultaneous scrutiny of both constitutional and antitrust thinking sheds especially great light on the adaptation and modification of general theory in formative era antitrust jurisprudence. As I have tried to suggest elsewhere in detail, such a dual focus strikingly reveals, in particular, how the same basic theoretical perspectives heavily influenced both the constitutional and antitrust analyses of the three leading architects of early Sherman Act jurisprudence—Justice Rufus Peckham, Justice Edward Douglass White, and Judge William Howard Taft.⁹⁴

Understanding the nature and interrelation of constitutional and antitrust thinking in late nineteenth and early twentieth century America also allows us to see more clearly the magnitude and significance of the changes that have occurred in both constitutional jurisprudence and antitrust analysis over the course of the twentieth century. This long-run history helps to explain further why the Supreme Court and other observers repeatedly asserted parallels between the two fields over the last one hundred years.⁹⁵ Simultaneously, it also helps to explain why such assertions and the Supreme Court's renewed emphasis on individual rights in both civil rights and antitrust cases in the 1960s became increasingly problematic for antitrust analysts operating in an intellectual context

91. U.S. CONST. amend. XIV, § 1. For a discussion of the incomplete resolution of these tensions, see, for example, W. NELSON, *supra* note 85, at 7-8, 79-81, 85-90, 110-47 (exploring the reasons why congressmen in 1866 did not more fully resolve the potential tensions present in their simultaneous concerns to safeguard equal protection of the law, absolute rights, and largely traditional patterns of federalism).

92. Sherman Antitrust Act, ch. 647, §§ 1-8, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1988)). For an analysis of congressional treatment of these concerns, see May, *Antitrust in the Formative Era*, *supra* note 2, at 288-300 (exploring the reasons why congressmen in 1890 did not more fully resolve the potential tensions posed by their simultaneous concerns for economic opportunity, efficiency, competition, fair distribution, and political liberty).

93. See May, *Antitrust in the Formative Era*, *supra* note 2, at 281-300; May, *Antitrust Practice and Procedure*, *supra* note 30, at 561-71.

94. See May, *Antitrust in the Formative Era*, *supra* note 2, at 300-09.

95. See, e.g., *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933); May, *Antitrust in the Formative Era*, *supra* note 2, at 392.

differing greatly from the general theoretical environment of the Progressive Era.⁹⁶

Increased consideration of general theory in that formative period of American antitrust law, moreover, illuminates the reasons why advocates of differing fundamental goals for modern antitrust law readily have been able to find some historical support for each of their divergent positions. It also suggests how the recurring lack of consideration of early general theory in modern antitrust scholarship has impeded the more adequate resolution of these debates.⁹⁷

Finally, simultaneous scrutiny of both constitutional and antitrust thought in the decades from the Civil War to the First World War allows us more fully to address parallel issues regarding the interaction of legal theory and history in these two fields today. Greater appreciation of the similarities and interconnections between the theoretical understandings and purposes underlying congressional promulgation of the Reconstruction Era constitutional amendments and civil rights legislation on the one hand and congressional passage of the Sherman Act on the other, for example, poses more sharply questions regarding the meaning and merits of various "original intent" or "original understanding" approaches to constitutional and antitrust law, respectively.

For instance, as Professor Millon recently has stressed,⁹⁸ along with Professor John Flynn⁹⁹ and others,¹⁰⁰ one of the most striking aspects of Judge Bork's influential writing has been his insistence upon a nonevolutionary "original intent" or "original understanding" approach to constitutional analysis at the same time that he simultaneously has embraced a strongly evolutionary methodology for antitrust jurisprudence.¹⁰¹ Recognition of the substantial interrelationship and

96. See May, *Antitrust in the Formative Era*, *supra* note 2, at 391-94.

97. See *id.* at 260, 394-95. On the frequent scholarly disregard or minimization of the influence of general theory in formative era antitrust thinking, see, for example, *id.* at 259-60; May, *Antitrust Practice and Procedure*, *supra* note 30, at 553-61, 589 & n.466.

98. See Millon, *Balance of Power*, *supra* note 41, at 1290-92.

99. See, e.g., Flynn, *supra* note 3, at 271.

100. See, e.g., Boyle, *A Process of Denial: Bork and Post-Modern Conservatism*, 3 *YALE J.L. & HUMANITIES* 263, 278-81 (1991); Lande, *Rise and Fall*, *supra* note 3, at 451 n.8; May, *Antitrust History*, *supra* note 24, at 97; Sullivan, *supra* note 5, at 852 n.76.

101. Compare, e.g., R. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 5, 218 (1990) [hereinafter R. BORK, *TEMPTING OF AMERICA*] (stating that interpretation and application of any constitutional or statutory provision should be constrained by the meaning of the provision's wording as it was generally understood at the time it was adopted) with R. BORK, *ANTITRUST PARADOX*, *supra* note 4 (urging that modern Sherman Act jurisprudence should evolve in accordance with modern microeconomic thinking).

similarity between late nineteenth century constitutional and antitrust thinking offers us a valuable opportunity to evaluate further the consistency of such a stance and the possible difficulties with original intent or original understanding methodologies more generally in each of these two fields.¹⁰²

To what extent does solid historical scholarship, for instance, support the view that Congress clearly contemplated and intended a substantial evolution of jurisprudence under the general nineteenth century language of the Sherman Act, to take account of new factual contexts and changing economic thinking, but that Congress neither contemplated nor intended a similarly substantial evolution of jurisprudence under the general nineteenth century language of section one of the fourteenth amendment, to take account of new factual settings and changing civil rights thinking? If we are to look either to the original thinking of congressmen themselves or instead to more broadly prevailing contemporary understandings of the meaning of constitutional and statutory provisions at the time they were adopted, at what point is doctrinal development to be deemed no longer the mere elaboration of originally understood purposes and theoretical principles but instead the adoption of significantly altered goals and differing theoretical precepts?

To what extent does historical study reveal a genuine original consensus either within or outside of Congress concerning the meaning of particular broad constitutional or antitrust provisions, and what was the level of generality at which any partial or general consensus operated? To what degree do modern constitutional or antitrust analysts ahistorically continue to seek the original resolution of specific legal issues that earlier actors simply never resolved themselves?¹⁰³ To what extent does the magnitude of change over time in general intellectual and practical contexts make it impossible now to adopt a current jurisprudence fully incorporating basic original understandings?¹⁰⁴

102. On original intent and original understanding approaches in general, see, for example, R. BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987); R. BORK, *TEMPTING OF AMERICA*, *supra* note 101; L. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* (1988); Bittker, *The Bicentennial of the Jurisprudence of Original Intent: The Recent Past*, 77 CALIF. L. REV. 235 (1989); Boyle, *supra* note 100; Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988); Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Presser, *The Original Misunderstanding: The English, the Americans, and the Dialectic of Federalist Constitutional Jurisprudence*, 84 NW. U.L. REV. 106 (1990).

103. See, e.g., W. NELSON, *supra* note 85, at 6.

104. See, e.g., May, *Antitrust in the Formative Era*, *supra* note 2, at 395; Millon, *Balance of Power*, *supra* note 41, at 1291.

A clearer, more integrated picture of nineteenth and early twentieth century constitutional and antitrust thought and a better understanding of the change over time in both constitutional and antitrust jurisprudence can further substantially the consideration of such general issues and usefully can help us to assess the compatibility and limitations of original intent or original understanding methodologies in the constitutional and antitrust fields.

VI. CONCLUSION

Historical analysis remains a vibrant and essential component of antitrust thinking and activity as the Sherman Act enters its second century. The current renewal of antitrust history scholarship offers us valuable opportunities to refine our approaches to historical analysis and to deepen our understanding of the antitrust past. This ongoing process of refinement and increasing illumination can be greatly enriched by continued, more systematic consideration of the developed knowledge and methods of professional historians. Expanded historical research and analysis potentially can provide especially valuable insights if antitrust observers focus on key aspects of the historical record that too often have been underemphasized in recent years. In this connection, the parallels and interrelations between constitutional and antitrust law in the formative era and in the years since offer a particularly promising field of study still awaiting further exploration by scholars and lawyers interested in the meaning of the antitrust past.

