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THE LEGAL CULTURE OF THE FORMATIVE PERIOD
IN SHERMAN ACT JURISPRUDENCE*

WILLIAM P. LAPIANA**

The history of the formative era of antitrust jurisprudence has become the subject of extensive scholarly inquiry. Starting with Robert Bork's attempt to attribute specific economic motives to those who enacted the law,1 examinations of the course of events leading up to the creation of the rule of reason enunciated in Standard Oil Co. v. United States2 have unearthed relationships between contemporary economic and political theory and the drafting and enforcement of the Sherman Act.3 This article attempts to supplement these efforts by placing the language of the major Supreme Court opinions interpreting the Sherman Act in a context of thought about the nature of law. It is an attempt to begin to probe the legal culture of the period, but, of course, it is only an attempt. A full and complete picture of American legal culture at the turn of the century is yet to be written. The suggestions made here, however, are sufficient to allow the drawing of some conclusions about the relationship between antitrust jurisprudence and visions of the public good. If antitrust law is to be thought of as public interest law, current understanding can be enhanced by a clearer view of the past.

The first section of this article examines the familiar battle between the literalism view,4 exemplified by Justice Peckham's opinions in United

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2. 221 U.S. 1 (1911).
4. Literalism espoused the view that
when the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress.
United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 328 (1897).
States v. Trans-Missouri Freight Association,\(^5\) United States v. Joint Traffic Association,\(^6\) and Addyston Pipe & Steel Co. v. United States,\(^7\) and to some degree by Justice Harlan's plurality opinion in Northern Securities Co. v. United States,\(^8\) and the first articulations of the rule of reason in Justice White's dissent in Trans-Missouri\(^9\) and his opinion for the majority in Standard Oil. This section also examines the writings of three of the lawyers who argued the Joint Traffic case as an introduction to the vigorous debate over the nature of law which dominated American jurisprudence in the late nineteenth century. The second section of this article places these two opposing views—the literalist approach and the rule of reason—in the context of larger debates about the nature of law. Oliver Wendell Holmes, Jr. is given the third section as a representative of views which were his alone. The fourth section examines William Howard Taft's circuit court opinion in Addyston Pipe\(^{10}\) and certain scholarly reaction to court decisions to illustrate yet a third branch of legal culture closely related to the then-emerging case method of teaching law, and attempts to link this story to the present day.

I.

Justice Peckham’s opinions establishing the literalism interpretation of the Sherman Act rest on two striking assumptions. The first is that although “combinations of capital” may be more efficient than “the small dealers and worthy men whose lives have been spent” in a line of trade, superiority in that regard does not justify driving the small dealers out of business.\(^{11}\) The second is that once Congress “speaks upon a particular subject, over which it has constitutional power to legislate, public policy is what the statute enacts... whatever may have been theretofore decided by the courts to have been the public policy of the country on that subject.”\(^{12}\)

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5. See id.
6. 171 U.S. 505 (1898).
7. 175 U.S. 211 (1899).
8. 193 U.S. 197 (1904).
9. According to Justice White, “the true test whether a contract be in restraint of trade is not whether in a measure it produces such effect, but whether under all the circumstances it is reasonable.” Trans-Missouri, 166 U.S. at 349-50 (White, J., dissenting).
11. Trans-Missouri, 166 U.S. at 323.
12. Id. at 340-41.
Peckham’s admiration for the “general law of competition” was not unique. Similar views can be found in the congressional debates surrounding the passage of the Sherman Act and in contemporary economic literature. For Peckham, however, competition was not a completely impersonal force driving the economy according to ineluctable laws. Its effects did depend upon the moral character of the people involved in the competition. In *Joint Traffic*, Justice Peckham rejected arguments for a “reasonable” interpretation of the ban on contracts in restraint of trade in part because he rejected its proponents’ predictions of the dire consequences that would follow. Counsel for the railroads made much of the necessity of an agreement in their arguments before the Court. For example, James C. Carter’s argument in *Joint Traffic* discussed at great length the nature of the railroad business in the United States. The core of Carter’s argument asserted that “by the deliberate policy of all our governments, state and National, business has been, from the first, subjected to the severest involuntary competition [leading to] ruinous results.” Peckham rejected this argument. “Whether, in the absence of an agreement as to rates, the consequences described by counsel will in fact follow as a result of competition is matter of very great uncertainty.” It depends “upon many contingencies” and also on the “voluntary action of the managers of the several roads.” Justice Peckham was willing to assume that “good sense and integrity of purpose would prevail” and that “the managers of each road might yet make such reasonable charges for the business done by it” without making any agreement or entering into any combination. It seems that individual responsibility was important in Peckham’s view and may have led him to regard great corporations as similar to individual entrepreneurs. In so


15. See *Joint Traffic*, 171 U.S. at 577.

16. Id. at 568. Justice Peckham further stated, in Hopkins v. United States, 171 U.S. 578 (1898), that “the act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it.” Id. at 600.

17. Id. at 520 (argument of James C. Carter, counsel for the Joint Traffic Association).

18. Id. at 577.

19. Id.

20. Id.
doing, Peckham pierced the corporate veil to make the railroad business similar to a small-scale business.

Small-scale business itself held a high position in Peckham’s view of the economic order. Peckham conceded that progress would cause economic dislocation. For example, the change from stage coaches and canals to railroads “threw at once a large number of men out of employment,” as did the substitution of steam for manual power. “It is a misfortune, but yet in such cases it seems to be the inevitable accompaniment of change and improvement.” Peckham noted, however, that the situation is wholly different “when such changes are effected by combinations of capital, whose purpose in combining is to control the production or manufacture of any particular article in the market” and to dictate the price at which it can be sold. The effect is to drive out of business small dealers and to put the public at the mercy of the combination. In fact, it appeared to Peckham that trusts or similar combinations were always the product of “motives of individual or corporate aggrandizement as against the public interest.”

The desire to protect the small business against ever larger combinations of capital seems to have been widespread in the late nineteenth century. Justice Peckham’s view reveals the roots of such a perspective. For Peckham, individual moral responsibility was at the heart of the entire economic system and even the soulless corporation was managed by individuals who could be expected to live up to their responsibilities. Such a view may have been outdated by the 1890s but it was not without power.

Another feature of Peckham’s opinions was his vigorous assertion of congressional power to remedy the ills he saw in combinations. Of

21. See Trans-Missouri, 166 U.S. at 324 (expressing need to preserve the role of small, independent businesses).
22. Id. at 323.
23. Id.
24. Id.
25. Id. at 323-24.
26. Id. at 322-23.
27. See Halper, Christopher G. Tiedeman, ‘Laissez-Faire Constitutionalism’ and the Dilemmas of Small-Scale Property in the Gilded Age, 51 OHIO ST. L.J. 1349, 1357 (1990). According to Halper, “the view that . . . government non-intervention in the economy was the best guarantee of development was replaced by the demand for government intervention to ensure that small-scale enterprises could continue to function.” Id. at 1358.
30. See Trans-Missouri, 166 U.S. at 340. Peckham stated that “[i]f the law prohibit
course, no one could be a greater opponent of governmental power than Justice Peckham. He was responsible for the classic statement of the idea of freedom of contract in his opinion in Allgeyer v. Louisiana.\textsuperscript{31} When it came to protecting the freedom of contract of individuals from the evil effects of combinations, however, Peckham was willing to indulge legislative authority.\textsuperscript{32}

Justice Peckham may be drawing on republican ideas in formulating this literalist approach to the Sherman Act. A member of a family of lawyer-politicians and judges from upstate New York,\textsuperscript{33} Peckham’s roots were rural. Although his family was staunchly Democrat, they battled Tammany Hall for control of the party in New York.\textsuperscript{34} Perhaps an anti-urban bias led Justice Peckham to oppose the large-scale organization of economic life represented in part by the city of New York. The New England influence on upstate New York, settled first by the Yankee diaspora, may also show itself in his version of the commonwealth ideal.

According to Peckham, government could indeed promote the economic development of society for the good of all, but only by protecting individual economic activity.\textsuperscript{35} An aura of corruption hung about the

\begin{verbatim}
any contract or combination in restraint of trade or commerce, a contract or combination made in violation of such law is void, whatever may have been theretofore decided by the courts to have been the public policy of the country on that subject.” \textit{Id.} at 340-41.
\textsuperscript{31} 165 U.S. 578 (1897) (holding unconstitutional a state law restricting the right of its citizens to contract outside the state for insurance). In \textit{Allgeyer}, Justice Peckham said that the liberty protected by the fourteenth amendment includes the right to be free in the enjoyment of all [one’s] faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned. \textit{Id.} at 589.
\textsuperscript{32} In Addyston Pipe \& Steel Co. v. United States, 175 U.S. 211 (1899), Peckham, writing for the Court, went further and held that liberty of contract was subject to the commerce power, holding that Congress may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce. \textit{Id.} at 228.
\textsuperscript{33} 14 DICTIONARY OF AMERICAN BIOGRAPHY 385 (D. Malone ed. 1934).
\textsuperscript{34} \textit{Id.}
\textsuperscript{35} \textit{See Trans-Missouri}, 166 U.S. at 324. “Nor is it for the substantial interests of the country that any one commodity should be within the sole power and subject to the sole will of one powerful combination of capital.” \textit{Id.}
\end{verbatim}
corporation and its anonymous actions. The most important component of the American polity was the virtuous individual who, in Peckham's view, clearly deserved the protection of congressional statute.

Justice White's dissent in Trans-Missouri begins from a very different perspective. From the start, White was concerned with the application of "general principles of law" and "elementary principles of justice" which raised the inquiry to a universal level where the battle was between liberty and oppression. The inquiry itself was governed by reason which dictated that certain contracts embodying reasonable restraints were not "contracts in restraint of trade." Reason and principles led White to conclude that the Sherman Act must be interpreted in the light of congressional intent, which he saw as the preservation of freedom of contract and trade. Those rights—freedom of contract and trade—were at the mercy of "the mere caprice of judicial authority" unless reason permitted judges to move beyond the outmoded analysis to interpretations consonant with progress. According to White, "[p]rogress and not reaction was the purpose" of the Sherman Act. He believed that progress, the aid of which is the true aim of public policy, would lead to the fullest possible freedom of contract.

White's dissent was as freighted with cultural baggage as Peckham's formulations of the literalist approach. The roots of White's approach, however, may be somewhat more exotic than those of his brother Justice. A Louisianian and a Catholic, White was familiar both with the civil law through his practice and with the rigorous concepts of natural law through his education in Jesuit institutions. The readiness to turn to great general principles may have been facilitated by both of these experiences. On the other hand, White's language in Trans-Missouri closely echoed that of the counsel who argued the railroad's case before the court, language which

36. See id. at 322-23. "It is true the results of trusts, or combinations of that nature, may be different in different kinds of corporations, and yet they all have an essential similarity, and have been induced by motives of individual or corporate aggrandizement as against the public interest." Id.

37. Id. at 343 (White, J., dissenting).

38. Id. at 344. White saw the majority's construction of the Act as "a departure from the general principles of law, [which] by its terms destroys the right of individuals or corporations to enter into very many reasonable contracts." Id.

39. Id. at 351.

40. See id. at 355.

41. Id.

42. Id.

43. Id.

illustrated an approach to law quite different from that held by Peckham.\textsuperscript{45}

In presenting the railroad's argument in \textit{Joint Traffic}, James C. Carter argued that the private ordering embodied in the agreement among the railroads must be upheld because it was necessary to prevent ruinous competition and because no one else could supply a remedy.\textsuperscript{46} The alternative to private agreement was governmental ownership or thoroughgoing regulation and, Carter maintained, "we have no sovereign government possessing the requisite powers."\textsuperscript{47} This statement of governmental impotence exposes the heart of the view of law underlying the arguments like those made by Justice White to support the rule of reason. According to this view, law was transcendent, partaking of a permanence that mere political institutions could not alter. The writings of three of the lawyers who argued \textit{Joint Traffic}—James C. Carter,\textsuperscript{48} Edward J. Phelps,\textsuperscript{49} and John F. Dillon\textsuperscript{50}—help flesh out the portrait of a new approach to the nature of law.

James C. Carter was a successful practitioner, although he never held a judicial office.\textsuperscript{51} He was a graduate of Harvard Law School and active in its affairs.\textsuperscript{52} After a slow start, he became an enormously successful practitioner of the new style of corporate practice.\textsuperscript{53} He was also an unyielding opponent of codification in general and of the civil code

\textsuperscript{45} \textit{Compare} Trans-Missouri, 166 U.S. at 364-68 (White, J., dissenting) (citing reports of the Interstate Commerce Commission to Congress for support of his opinion that agreements among railroad competitors existed before and after the passage of the Interstate Commerce Act and such agreements were considered necessary for the industry to evolve) \textit{with id.} at 330 (Peckham, J. for the majority) ("if competing railroad companies be left subject to the way of free and unrestricted competition the results above foreshadowed necessarily happen from the nature of the case; that competition being the rule, each company will seek business to the extent of its power, and will underbid its rival in order to get business . . . .")


\textsuperscript{47} \textit{Id.} at 526.

\textsuperscript{48} \textit{See J. CARTER, LAW: ITS ORIGIN, GROWTH AND FUNCTION: BEING A COURSE OF LECTURES PREPARED FOR DELIVERY BEFORE THE LAW SCHOOL OF HARVARD UNIVERSITY} (1907).

\textsuperscript{49} \textit{See ORATIONS AND ESSAYS OF EDWARD JOHN PHELPS: DIPLOMAT AND STATESMAN} (J. McCullough ed. 1901) [hereinafter ORATIONS & ESSAYS].


\textsuperscript{51} 14 Dictionary of American Biography, \textit{supra} note 33, at 536-38.

\textsuperscript{52} \textit{Id.} at 536.

\textsuperscript{53} \textit{Id.} at 537.
proposed in New York in particular. His interest in the subject began when he was appointed to the committee of the Association of the Bar of the City of New York charged with opposing the proposed civil code. The need to refute the claims for the code so energetically made by its author, David Dudley Field, led him "into inquiries concerning the distinctions between written and unwritten law." From these inquiries came several important speeches and finally, at the end of his life, the lectures on the subject prepared for presentation at Harvard Law School, never delivered, but published posthumously as Law: Its Origin, Growth and Function.

Edward J. Phelps was a native of Vermont and a successful lawyer in that state for most of his life. He took an early interest in politics, served in the Fillmore administration, and ended his public career as minister to England, a post to which he was appointed by President Cleveland in 1885. Phelps was one of the founders of the American Bar Association and one of its first presidents. In 1881, he accepted the Kent Professorship at Yale and taught there, with the exception of his tenure in London, until his death in 1900. He remained in practice during his teaching career and was of counsel to a New York City law firm.

John F. Dillon followed an influential career on the state and federal benches with a successful private practice. In 1838, he left his home in upstate New York for Iowa. After receiving medical training at the state university, he practiced briefly before turning to law, which he felt would make fewer demands on his frail constitution. Dillon was appointed to

54. Id.
55. Id.
56. J. CARTER, supra note 48, at v.
57. Id. at vii.
58. J. CARTER, supra note 48.
60. Id. at xi.
62. Stewart, supra note 59, at xii.
63. Id. at ix.
65. Id. at 111.
66. Id.
serve on the Court of Appeals for the Eighth Circuit by President Grant, a position he held for ten years.\textsuperscript{67} In 1879, he accepted a position at Columbia University and moved to New York where he also became solicitor for the Union Pacific Railroad.\textsuperscript{58} His private practice grew, and within three years he left Columbia.\textsuperscript{69} "For many years he argued more cases before the Supreme Court of the United States than any other attorney, and until his death in 1914 was regarded as the leading railroad lawyer in the country."\textsuperscript{70} In the 1891-1892 academic year, he held the Storrs Professorship at Yale where he delivered the lectures published as \textit{The Laws and Jurisprudence of England and America}.\textsuperscript{71}

Dillon claimed to find worth in both the analytical and historical schools of jurisprudence.\textsuperscript{72} He praised John Austin for separating law from morality.\textsuperscript{73} Dillon had no use, however, for Austin's famous definition of law as the command of the sovereign.\textsuperscript{74} For Dillon there was much more to law than mere legislation.\textsuperscript{75} Dillon believed that law was derived, especially in modern times, more from the general sense of justice and right, as interpreted and ascertained by judges, than from custom in the usual sense of the word.\textsuperscript{76} This "general sense of justice and right" was based on a reading of the history of Anglo-American liberty.\textsuperscript{77} For Dillon the common law and the Constitution embodied the essence of Anglo-American liberty, which has at its heart the protection of property.\textsuperscript{78} The fullest exposition of this approach to law, however, was produced by another practitioner, James Carter.

The message of Carter's work is simple: all law is custom.\textsuperscript{79} Courts declare law,\textsuperscript{80} they do not make it.\textsuperscript{81} According to Carter, custom is

\begin{itemize}
\item 67. Id.
\item 68. Id. at 112.
\item 69. Id.
\item 70. Id.
\item 71. See J. Dillon, supra note 50.
\item 72. Id. at 3-28; see also Dillon, \textit{Bentham and His School of Jurisprudence}, 24 AM. L. REV. 724 (1890) (address of John F. Dillon before the State Bar Association of Ohio, discussing "Bentham's place in the history of our law").
\item 73. J. Dillon, supra note 50, at 6-7.
\item 74. See generally J. Austin, \textit{The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence} (I. Berlin, S. Hampshire & R. Wollheim eds. 1965) (John Austin's lectures on the nature of law).
\item 75. J. Dillon, supra note 50, at 9-11.
\item 76. Id. at 14.
\item 77. Id. at 22-23, 35-37, 57 n.1, 75-88.
\item 78. Id. at 8-9.
\item 79. J. Carter, supra note 48, at 65.
\item 80. Id. at 79.
\end{itemize}
gradually established through sanctions.82 First through informal ones including self-help, and later, with the growth of organized government, through societal enforcement of the decisions of acknowledged experts in what the customs are.83 At first, organized force is applied only "in the case of those breaches or alleged breaches of custom which endanger the peace of society."84 Eventually, however, "[a]s civilisation advances, and population, industry, and wealth increase, the social organisation expands and advances," and the job of ascertaining custom is lodged in "regular judicial tribunals . . . armed with the whole power of the State to directly enforce their decisions."85 The proceedings of these courts are recorded in permanent form and are regarded "as authoritative declarations of binding custom."86 In this way court proceedings become precedents and when litigation arises if "an apt precedent is found it is followed without further inquiry, and the precedents themselves are by the private work of jurists arranged in scientific form and go to make up the fabric of substantive law."87

According to Carter, the state itself enacts legislation only in a limited field dealing with the organization and procedure of the courts, the mechanism of government, and the classification of crimes as "mischievous acts which have not as yet been publicly punished."88 This legislation is not law because it is not designed to regulate directly the conduct of men in their dealings with each other.89 It is designed to simply carry out the business of the state which is in reality "a great corporation having many things to do."90 Even when the state legislates in relation to the conduct of its citizens, it affects conduct only indirectly, the "chief object being to create efficient instrumentalities for enforcing and aiding the fundamental law of custom."91

For Carter, then, not only was the public law completely separate from the private law, it was hopelessly inferior to it.92 Public law "is made by a single human person, or by a very few persons, and necessarily exhibits

81. Id. at 85.
82. Id. at 67.
83. Id. at 170.
84. Id.
85. Id.
86. Id.
87. Id. at 170-71.
88. Id. at 171.
89. Id. at 229.
90. Id.
91. Id. at 230.
92. Id.
the imperfection and error which attaches to all such works." The private law, however, "may justly be called Divine; for, being identical with custom which is the form in which human nature necessarily develops conduct, it can have no other author than that of human nature itself." Carter summed up his findings in just those terms:

The final conclusion of the inquiry, what rule or rules in point of fact governed human conduct, was that, so far as social conduct is concerned, custom is not simply one of the sources of law from which selections may be made and converted into law by the independent and arbitrary fiat of a legislature or a court, but that law, with the narrow exception of legislation, is custom, and, like custom, self-existing and irrepealable.

Carter’s basis for this conclusion was mainly historical; it was premised on a “survey of human life in all ages and in all stages of social progress.” These stages were several, and included

primitive man, the savage member of a wandering horde; man when he first adopts a fixed place of abode; man when he first consciously organizes a social state; man when he has first acquired the art of writing and when he first employs that art in the composition of laws; man as the subject of a conqueror imposing his dominion over realms not his own; man as the member of a conquered nation accepting submissively the rule of strangers; man in society where there is no power to protect him save his own right arm; man during the long period in which he seeks by the establishment of judicial tribunals to supplant the violence of self-help; man down to the period when judicial tribunals and legislatures have been established and perfected; man in the present enlightened age.

According to Carter, the problem with theories of law which find their essence in command was ignorance of the truth "that society, like every other phenomenon in nature, was a condition resulting from the operation of causes reaching back into periods infinitely remote."
Like Carter, Edward Phelps also believed in the primacy of principles which are an integral part of Anglo-American history. According to Phelps, lawyers should concern themselves not with cases but with "the foundation principles which underlie all propositions of law." These principles form part of what Phelps called "The Law of the Land" which is unalterable by the legislature. These principles are "inherent in the human conscience," and "[t]hey derive their authority from the spontaneous and universal recognition of intelligent humanity, as well as from divine revelation." The rights which are based on these principles—rights to life, liberty, and property—are therefore "placed beyond the reach of any department of the government."

Phelps found the primacy of these principles as the basis of law in Anglo-American history. In spite of the universal nature of these principles and the rights resting on them, they are also in some way the exclusive heritage of the Anglo-Saxon race, and are embodied in a unique way in "the common law of England, which is likewise the common law of the English-speaking race everywhere." In addition, the common law also includes certain "legal rights" which are the means of carrying out the enjoyment of the fundamental rights. These legal rights are the growing part of the law which changes as society changes.

custom, they cannot be changed or created overnight by legislative acts. Id. at 269.

100. E. Phelps, Law as a Profession, in ORATIONS & ESSAYS, supra note 49, at 71, 82.
101. E. Phelps, Law of the Land, in ORATIONS & ESSAYS, supra note 49, at 119, 120. For example, the Law of the Land would be "[t]he fundamental personal and political rights which may not be infringed are enumerated and set forth, and are placed beyond the reach of any department of the government." Id.
102. E. Phelps, The Relation of Law to Justice, in ORATIONS & ESSAYS, supra note 49, at 91, 95. Phelps believed in fundamental principles of justice, or "moral justice," which legal justice should attempt to approximate. Id. at 95.
103. E. Phelps, The Law of the Land, in ORATIONS & ESSAYS, supra note 49, 119, 120-21. By referencing the incorporation of inviolable "natural rights" into the American Constitution, Phelps defined a class of fundamental principles which may not be infringed upon. Id. at 120-23.
104. Id. at 121-22. Natural rights are antecedent to government. The Magna Carta and the American Constitution protect the inviolability of these rights, separate from the development of the common law. Id.
105. Id. at 122.
106. Id. at 124. "The fundamental law divides, therefore, into two branches—the principles that define human rights, and the machinery established for their security." Id. at 123.
107. Id.
cannot be created by any authority, and they are valid and enforceable only to the extent that they reflect the condition of society.

Belief in the organic nature of law led to and was nourished by a belief in historical jurisprudence. Except for John Dillon’s faint praise of John Austin, all these thinkers excoriated positivism, and exalted what they understood to be Sir Henry Maine’s contribution to jurisprudence. They were taking part in a vigorous debate over the nature of law and legal science which dominated late nineteenth century American jurisprudence. The background of that debate is a necessary predicate to further discussion of the legal culture exemplified by the early antitrust cases.

II.

This appeal to unchanging principles and the consequent inability of the state to change them rests on a particular view of history. The use of history to illuminate and defend the common law was not a new idea. Glorification of the common law as the embodiment of English liberty was a staple of that Whig history that justified opposition to Stuart tyranny. In 1861, however, the relationship of law and history entered a new era. In that year, Henry Sumner Maine published Ancient Law. Maine traced the origin of legal rules into the past, especially the Roman past, and tried to explain the mechanisms by which the law had changed in response to changes in society. Maine’s explanation of the worth of his enterprise clearly emphasized its scientific character:

If by any means we can determine the early forms of jural conceptions, they will be invaluable to us. These rudimentary ideas are to the jurist what the primary crusts of the earth are to

108. Phelps notes that worthwhile law comes by growth, not by arbitrary creation. Id. at 124.

109. See id.

110. See J. DILLON, supra note 50, at 382.

111. See infra notes 124-40 and accompanying text.


114. See id.
the geologist. They contain, potentially, all the forms in which law has subsequently exhibited itself.\textsuperscript{115}

Maine believed that ignorance of these early forms of law and rules was responsible for the "unsatisfactory condition in which we find the science of jurisprudence."\textsuperscript{116} By ignoring the facts of legal history, jurists place assumption over observation. The result is that

\textit{[t]heories, plausible and comprehensive, but absolutely unverified... enjoy a universal preference over sober research into the primitive history of society and law; and they obscure the truth not only by diverting attention from the only quarter in which it can be found, but by that most real and most important influence which, when once entertained and believed in, they are enabled to exercise on the later stages of jurisprudence.}\textsuperscript{117}

Maine hoped to break the hold of such \textit{a priori} concepts on legal thought and to replace them with a scientific understanding of the growth of law. Maine's chapter on the early history of property is a model of his method.\textsuperscript{118} He criticized the belief, given classic form by Blackstone, that occupancy is the foundation of private property.\textsuperscript{119} According to Blackstone, Maine stated, "[t]he earth and all things therein were the general property of mankind from the immediate gift of the Creator."\textsuperscript{120} The gradual development of permanent ownership thus appeared to be the natural progress towards modernity. Maine, however, denigrated this sort of reasoning:

These sketches of the plight of human beings in the first ages of the world are effected by first supposing mankind to be divested of a great part of the circumstances by which they are now surrounded, and by then assuming that, in the condition thus imagined, they would preserve the same sentiments and prejudices by which they are now actuated,—although, in fact, these sentiments may have been created and engendered by those very

\begin{itemize}
\item \textsuperscript{115} \textit{Id.} at 2-3.
\item \textsuperscript{116} \textit{Id.} at 3.
\item \textsuperscript{117} \textit{Id.}
\item \textsuperscript{118} \textit{See id.} at 237-94.
\item \textsuperscript{119} \textit{Id.} at 245-46.
\item \textsuperscript{120} \textit{Id.} at 244.
\end{itemize}
circumstances of which, by the hypothesis, they are to be stripped.\textsuperscript{121}

In Maine's view, occupancy or "mere possession" attained as a means of gaining ownership can arise only after the institution of property has been well established.\textsuperscript{122} Only after society accepts "a presumption, arising out of the long continuance of that institution, that everything ought to have an owner" can the person who asserts ownership acquire permanent, inviolable rights.\textsuperscript{123} In short, talk of the almost mystical primacy of private property is misplaced.

This philosophic aspect of \textit{Ancient Law} was overshadowed, however, by what was assumed to be the historical message of the work. It seemed that only one phrase in the entire book was important: "[W]e may say that the movement of the progressive societies has hitherto been a movement from status to contract."\textsuperscript{124} Although, as Frederick Pollock noted,

\begin{quote}
[It] is not clear how far Maine regarded the movement of which he spoke as a phase of the larger political individualism which prevailed in the eighteenth century and great part of the nineteenth, or what he would have thought of the reaction against this doctrine which we are now [in 1906] witnessing.\textsuperscript{125}
\end{quote}

The contrast between analytical and historical jurisprudence antedates the appearance of Maine's work. As early as 1840, James Reddie, a Scottish lawyer, had identified two distinct schools of jurisprudence—the analytical and the historical—associating the former with Jeremy Bentham and the latter with Gustav Hugo and F.C. von Savigny.\textsuperscript{126} In 1861, the year of the publication of \textit{Ancient Law}, James Fitzjames Stephen reviewed together Maine's work and Austin's recently republished \textit{The Province of Jurisprudence Determined}. He identified the works as representing the historical and the analytical schools respectively, and observed that both were indispensable to a thorough understanding of law.\textsuperscript{127} Similar views could be found in the United States. In 1890, John Dillon told the Ohio State Bar Association that there was truth in both the analytical and

\begin{itemize}
\item \textsuperscript{121} \textit{Id.} at 246-47.
\item \textsuperscript{122} \textit{Id.} at 249.
\item \textsuperscript{123} \textit{Id.}
\item \textsuperscript{124} \textit{Id.} at 165.
\item \textsuperscript{125} \textit{Id.} at 424.
\item \textsuperscript{126} \textit{See} J. \textit{REDDIE, INQUIRIES ELEMENTARY AND HISTORICAL IN THE SCIENCE OF LAW} 50 (1840 \& photo. reprint 1982).
\item \textsuperscript{127} \textit{See} W. \textit{MORISON, JOHN AUSTIN} 148-51 (1982).
\end{itemize}
historical schools of jurisprudence, "that properly understood the two schools are not antagonistic but complementary, and that the true course is to combine the logical or analytical with the historical and experimental, the former mainly supplying data for scientific arrangement, the latter mainly supplying the matter for a revised, improved, and systematic jurisprudence."\textsuperscript{128}

The more common view, however, at least in the United States, saw Ancient Law as an exemplary use of history to correct Austin’s errors. For example, William G. Hammond lamented that during his sojourn in Germany, Austin fell completely “under the influence of the so-called philosophical school of jurists”\textsuperscript{29} and, therefore, had ignored the historical school whose leader was F.C. von Savigny. Had the situation been reversed, “the study of scientific jurisprudence in England might have reached, a generation earlier, the point to which it has later been brought, under the guidance of jurists like Sir Henry Maine.”\textsuperscript{130}

What Maine himself thought of Austin’s work is not entirely clear. In his recent study of Austin, however, W.L. Morison suggests that “the substance of [Maine’s] view [of Austin] has to be boiled down from two long, and at times rambling, lectures” entitled Sovereignty and Sovereignty and Empire, both published in 1875.\textsuperscript{131} Near contemporaries came to different conclusions. Dillon, for example, did not accept the definition of law as command and considered the two lectures as having demolished Austin’s theory of command and sovereignty.\textsuperscript{132} Carter, on the other hand, in his intensely anti-Austinian Law: Its Origin, Growth and Function, inveighed against what he judged Maine’s approval of Austin’s theory of sovereignty evident in the same lectures.\textsuperscript{133} Frederick Pollock found in Ancient Law “a hint that the analysis of positive law laid down by Bentham and Austin (following Hobbes, though Bentham seems not to have been aware of it) cannot be made to fit archaic society.”\textsuperscript{134} Pollock went on to note that Maine worked out his position in the lectures on

\begin{enumerate}
\item[128.] J. Dillon, supra note 50, at 339.
\item[129.] Hammond, John Austin and His Wife, 1 Green Bag 47, 49 (1889).
\item[130.] Id. Modern scholarship indicates that Austin was not ignorant of the historical school of jurisprudence during his stay at the University of Bonn in late 1827 and early 1828, and that he in fact studied with a privatim docens who was himself a disciple of the historical school. See W. Morison, supra note 127, at 17-20.
\item[131.] W. Morison, supra note 127, at 152. For the Sovereignty and Sovereignty and Empire lectures, see H. Maine, Lectures on the Early History of Institutions 342-400 (1875 & photo. reprint 1966).
\item[132.] See J. Dillon, supra note 50, at 13 n.1.
\item[133.] See J. Carter, supra note 48, at 187-90.
\item[134.] H. Maine, supra note 113, at 389.
\end{enumerate}
sovereignty which he called “the foundation of sound modern criticism on the Hobbist doctrine.”

While Maine’s two lectures are long and ramble over a broad landscape, one plausible reading of them is that Maine was at most ambivalent about the work of his two great predecessors, Bentham and Austin. His attitude partakes a little of the sentiment that the enemy of my enemy is my friend. For example, Maine stated that “the Analytical Jurists failed to see a great deal which can only be explained by the help of history, they saw a great deal which even in our day is imperfectly seen by those who, so to speak, let themselves drift with history.” Moreover, Maine said that “Sovereignty and Law, regarded as facts,” were not always in the shape that corresponded to the ideas of them held by Hobbes, Bentham, and Austin, but by the time these thinkers wrote “the correspondence really did exist . . . and was tending constantly to become more perfect.” Thus, what they wrote was more true than not and was becoming more true as time went on. Their writings were never so far removed from fact as to be of no value, and indeed their value was great: “No conception of law and society has ever removed such a mass of undoubted delusion.” To these men “the world is indebted for the only existing attempt to construct a system of jurisprudence by strict scientific process and to found it, not on a priori assumption, but on the observation, comparison, and analysis of the various legal conceptions.” In short, the analytical jurists and Maine were engaged in the same endeavor to strip from law those plausible and comprehensive but false theories that dominated the study of jurisprudence.

Whatever Maine thought on the subject, the American theorists often invoke his name and appeal to history to show that law is not a command or the product of will, but rather the expression of something greater than individuals which is related to the collective experience of human life. In turn, this experience, especially in Carter’s version of history, is to a great degree uniform and progressive, a development to an ordained end. As a speaker before the American Bar Association put it in 1891, with specific reference to Maine’s work, “[I]n a modern industrial state, this freedom of

135. Id. Pollock believed that Maine “dealt rather tenderly with Bentham and Austin” out of reverence for their memories and from his own habit not “to exhibit the full consequences of his ideas.” Id. Pollock added that “[t]hose who come after [Maine] are free to push the conclusion home.” Id. at 390. For a modern treatment of the relationship between the works of Hobbes, Bentham, and Austin, see G. Postema, supra note 112, at 46-60, 314-17, 325-28.


137. Id. at 397.

138. Id.

139. Id. at 343.
individual contract, representing a long and toilsome progressive social development, becomes essential in any rational conception of individual liberty. 140

The appeal to history, therefore, was the proof of the existence of inescapable law. The course of history involved the liberation of the individual from the trammels of status, which the American thinkers equated with the power of the state. The American past provided support for such a belief. The Jacksonian tradition of privilege for none identified state action with invidious discrimination and the appropriation of public funds for private purposes, with class legislation, and special legislation. 141 The direct appeal to history, however, was something new, or at least thought to be something new. The contest between analytical and historical jurisprudence placed the entire enterprise on a new scientific basis. Positivism placed the ultimate source of law in power and therefore, at least by implication, in the hands of a political majority. That majority could then change the very bases of the law, especially the protection given private property, making real the threat of socialism and even communism that special and class legislation represented. 142 The majoritarian and therefore ultimately socialistic implications of positivism were disproved by Maine’s historical approach. Such a view was almost a caricature of its alleged sources, but it was powerful nonetheless.

The role this variety of American legal thought played in the triumph of laissez-faire in American constitutional law during the last quarter of the nineteenth century has often been described. 143 The popularity of such attitudes is usually explained by reference to the social and economic circumstances of the time. Economic dislocation and labor unrest were a constant theme of American life throughout this period. A series of strikes in major industries, often involving attempts to win recognition of the right to unionization, along with increasing immigration which seemed to bring advocates of radicalism to America, helped to fuel fears like those expressed by Dillon, Carter, and Phelps, the last of whom declared in 1886

142. Id. at 309-11, 330-31.
that advocacy of anarchy is "only appropriately met by the bullet and the rope." Legal ideas thus become the servants of economic interests.

This brief examination of some of the expressions of these ideas in the context of the formative period of Sherman Act jurisprudence, however, shows in addition to overt appeals to fear of economic change an elaborate intellectual basis to a new theory of law. In part because Austin's ideas were assumed to provide a theoretical basis for unlimited legislative power, the advocates of the preservation of property rights seized on the historical jurisprudence which they believed was first voiced by Maine to create an explanation of the nature of law which emphasized continuity and stability, and gave a new justification to the old idea that judges merely declare the law rather than make it.

The ability to appeal to history to support the unchanging principles of law was especially useful in the creation of an acceptable legal science because it appeared to link evolution to the science of the law. Carter blamed the seductive appeal of Bentham's foolishness on the ignorance of the pre-Darwinian world: "The law of Evolution so dominating in its influence upon recent thought, had not been stated." Once it is understood that society evolved, it becomes clear that legal rules are the product of causes which reach far back into time and cannot be changed by arbitrary legislation. One harried supporter of analytical jurisprudence humorously described his dilemma in a world dominated by ideas of slow change: "But quite certainly, in spite of all that can be urged, the cultivators of analytical jurisprudence will still be reproached with wanting historical mindedness, a graver charge in these days when evolution is in the very air,—it has been humorously said,—than heresy or even petty larceny."

III.

Not every judge who dealt with litigation under the Sherman Act followed the path supposedly marked out by Maine's insights. Indeed, some of these jurists drew on different views of the nature of law to inform their consideration of antitrust problems.

Oliver Wendell Holmes, Jr. was appointed to the United States Supreme Court in 1902. Two years later the Court decided Northern

146. Id. at 268-69.
Securities Co. v. United States,\textsuperscript{149} which upheld a decree in equity dissolving the holding company formed to control the Great Northern and Northern Pacific Railways.\textsuperscript{150} Justices Holmes and White filed dissenting opinions in this case, each joining the other’s.\textsuperscript{151} Chief Justice Fuller and, surprisingly, Justice Peckham joined in both dissents as well.\textsuperscript{152} William Letwin has described Holmes’s opinion as “great despite its flaws,”\textsuperscript{153} bringing the paradox within the policy of the antitrust law sharply into focus. Its greatness, according to Letwin, was exemplified by the fearlessness of confronting the contradictory impulses embodied in the Act, while its flaws included the Justice’s fast and loose treatment of the common-law precedents.\textsuperscript{154} The point to be made here, however, is a broader one. The opinion reveals much about Holmes’s beliefs about the nature of law and judging.

Holmes disclaimed any need “to fortify [his] conclusion by any generalities” about personal freedom, especially the freedom to own property.\textsuperscript{155} Rather, he maintained that his opinion rested solely on the words of the statute whose “meaning seem[ed] to [him] plain on their face.”\textsuperscript{156} Indeed, he admitted that sometimes judges need for their work the training of economists or statesmen, and must act in view of their foresight of consequences, yet when their task is to interpret and apply the words of a statute their function is merely academic to begin with—to read English intelligently—and a consideration of consequences comes into play, if at all, only when the meaning of the words used is open to reasonable doubt.\textsuperscript{157}

According to Holmes, the meaning of the words used in the Sherman Act could be gleaned from two, and only two, classes of cases: those dealing with and defining “contracts in restraint of trade,” and those

\textsuperscript{149} 193 U.S. 197 (1904).
\textsuperscript{150} Id. at 355-56, 360.
\textsuperscript{151} Id. at 364 (White, J., dissenting), 400 (Holmes, J., dissenting).
\textsuperscript{152} Id.
\textsuperscript{154} Id. According to Letwin, Congress wanted to both “preserve the benefits of competition” and enjoy “the benefits of consolidation,” and left the paradox of maintaining theses dual goals to the courts. Id.
\textsuperscript{155} Northern Securities, 193 U.S. at 403.
\textsuperscript{156} Id.
\textsuperscript{157} Id. at 401.
invoking "combinations or conspiracies in restraint of trade."\(^{158}\) While the former generally involved disputes between private parties to a contract restraining one party's business, the latter tended to create monopolies and were regarded as contrary to public policy.\(^{159}\) Contracts in restraint of trade are contracts with strangers to the contractor's business which restrict the contractor's freedom to carry on the business, while combinations or conspiracies are directed at keeping strangers to the agreement out of the business.\(^{160}\) Neither of these concepts has anything to do with abolishing competition "by any form of union."\(^{161}\) So long as "external restriction" is avoided, the agreement does not run afoul of the law.\(^{162}\) To hold otherwise, Holmes said, would be to sweep almost every sort of business arrangement into the ambit of the Act and that would mean "the universal disintegration of society into single men, each at war with all the rest."\(^{163}\) Holmes believed that Congress could not have intended such a result.\(^{164}\) If it had, the Act would not be a regulation of commerce but "an attempt to reconstruct society."\(^{165}\) Whatever the wisdom of such an attempt, Holmes pointed out that Congress did not have the power to effect this sort of change, nor had it tried to.\(^{166}\)

Holmes had no sympathy for the policies embodied in the Sherman Act.\(^{167}\) His understanding seems to have stopped with unbounded admiration for Malthus and the consequent conclusion that socialism was humbug.\(^{168}\) He is often labelled a social Darwinist, someone who believed that the struggle of life had to go on no matter what government tried to do to stop it.\(^{169}\) As his opinion in *Northern Securities* makes clear, however, Holmes did not believe that organization had no place in

\(^{158}\) *Id.* at 403-04.

\(^{159}\) *Id.*

\(^{160}\) *Id.*

\(^{161}\) *Id.* at 406.

\(^{162}\) *Id.* at 405. Holmes went on to say that "the provision has not been decided, and, it seems to me, could not be decided without perversion of plain language, to apply to an arrangement by which competition is ended through community of interest—an arrangement which leaves the parties without external restriction." *Id.* at 405-06.

\(^{163}\) *Id.* at 407.

\(^{164}\) *Id.*

\(^{165}\) *Id.* at 411.

\(^{166}\) *Id.*

\(^{167}\) See G. Aichele, supra note 148, at 140.

\(^{168}\) *Id.* (referring to Holmes as "a confirmed social Darwinist" who thought all socialist writers since Marx "talked drool").

\(^{169}\) *Id.*; see also W. Letwin, supra note 153, at 234 ("in private Holmes was a fairly stock Social Darwinist").
the struggle. In 1896, in his dissent in *Vegelahn v. Guntner*, Holmes argued that, absent any threats of physical injury, workmen should be allowed to peacefully picket their employer in their quest for a shorter work day and higher wages. In the modern world, Holmes said, “free competition means combination.” To Holmes, this included combinations of labor, as well as capital. Two years earlier he had written that attempts to end “combinations” might involve courts in “flying in the face of the organization of the world which is taking place so fast, and of its inevitable consequences.”

It may be surprising to see Holmes so emphatically reading his views of policy into the law, when he was perhaps most famous for refusing to go along with the extremes of substantive due process in the name of allowing the legislature the freedom to govern. Holmes claimed, however, to be merely interpreting a statute which was couched in the terms of the common law.

If, as Holmes claimed, the ruling consideration behind the development of law is “[t]he felt necessities of the time,” then good judicial decision making requires recognition of those necessities. Of course, such a formulation begs the question of how a wise judge recognizes a “necessity.” Holmes recognized that a fear of great combinations “somehow breathes from the pores of the [Sherman A]ct.” This “felt necessity,” however, could be ignored, because “it seem[ed] to be contradicted in every way by the words in detail,” as interpreted through the common law. To Holmes, the true necessity was the need to

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171. See id. at 108-09, 44 N.E. at 1081-82.
172. Id. at 108, 44 N.E. at 1081.
173. Id.
174. Holmes, Privilege, Malice, and Intent, 8 HARV. L. REV. 1, 89 (1894).
175. See generally G. AICHELE, supra note 148, at 133 (describing a tension in Holmes’s jurisprudence, between his insistence that judges accept the legislative nature of their task and assume greater responsibility for directing policy, and his frequent calls for deference to the will of democratically elected legislatures).
176. Northern Securities, 193 U.S. at 401; see also G. AICHELE, supra note 148, at 123. According to Aichele, Holmes indicated this in American Banana Co. v. United Fruit Co., 215 U.S. 347 (1909), where he said that “[t]he law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts.” Id. at 356.
179. Id.
organize to survive in the modern world, and the common law must develop to allow such survival.¹⁸⁰ Holmes’s dismissal of the fear of bigness as an interpretive guide to the Sherman Act¹⁸¹ came close to announcing that Congress enacted a fraud upon the public by passing the statute. According to Holmes, although Congress purported to attack the trusts, it had in fact merely legislated the common law, which had nothing to do with equating the size of commercial activity with evil.¹⁸² Holmes was perhaps cynical enough to intend such a reading of his words. In any event, he seized the opportunity to do the judge’s job¹⁸³ and further the development of law.

The use of the word “development,” of course, implicates a consideration of history,¹⁸⁴ and Holmes’s view of history was quite different from that of the anti-positivists.¹⁸⁵ The adherents of the transcendent or realist view of law saw history as teleological; recording the progress to a better way of life.¹⁸⁶ Government, society, and law must conform to the unfolding plan and human choice must be bounded by its parameters. A proper understanding of history will actually generate legal doctrines such as freedom of contract. As a consequence, these doctrines

¹⁸⁰. See O.W. HOLMES, supra note 177, at 1.
¹⁸¹. See Northern Securities, 193 U.S. at 407-08.
¹⁸². See id. at 405.
¹⁸³. G. AICHELE, supra note 148, at 124. According to Aichele, Holmes stressed in The Common Law that the judge’s job was “to impose an external standard of judgment that will result in the most desirable social consequences.” Id.
¹⁸⁴. See O.W. HOLMES, supra note 177, at 1. Holmes wrote that “[t]he law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.” Id.
¹⁸⁵. In fact, Harvard Law Professor Mark Howe considers Holmes the American father of legal positivism. See Howe, The Positivism of Mr. Justice Holmes, 64 HARV. L. REV. 529, 531 (1951). Legal positivism, as described by Howe, embodies the distinction between what the law is versus what the law ought to be. Id. (citing L. FULLER, THE LAW IN QUEST OF ITSELF 5 (1940)). According to Howe, the philosophy of natural law is the stark contrast to the positivist approach to law because it denies the rigid distinction between the is and the ought. Id.
¹⁸⁶. See E. PURCELL, THE CRISIS OF DEMOCRATIC THEORY 75-94 (1973). Legal realists think of law as a practical problem where judges decide issues according to what is socially desirable. Id. at 76. Realists believe judges are influenced by personal and class beliefs which are relative to their particular environments, and should be guided by sociological evidence. Id. at 76-77. Thus, realists focus on the legal process as it functions in practice. Id. at 77; see also Lucey, Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society, 30 GEO. L.J. 493 (1942) (discussing the development of legal realism and natural law and their respective influences on democratic societies and the law).
can and must be used to decide cases, whether they deal with the most
narrow questions of private law or with great issues of public policy.

Holmes draws nothing from history except the illustration of the felt
necessities of the time.\textsuperscript{187} Changing times mean changing law. While the
legislature can change the law as it likes—at least so long as it stops short
of reconstructing society—the conscientious and perceptive common-law
judge must change the law so that it agrees with the times.\textsuperscript{188} In doing
so, the judge is not merely promulgating historically dictated doctrine.\textsuperscript{189}
Holmes derided that view as believing the common law to be a “brooding
omnipresence in the sky” which is brought down to earth by the
courts.\textsuperscript{190}

Justice Peckham exemplifies yet a third view of history, one which is
almost static. Rather than drawing on the newer idea of historical
jurisprudence which Maine was supposed to have created,\textsuperscript{191} Justice
Peckham saw America as fulfilling a millennial dream, as a sort of
Protestant utopia, challenged by baleful economic change. An emphasis on
the religious mission of the nation was an important feature of pre-Civil
War republicanism when at least some Americans, as Dorothy Ross has
written, “assumed for the country a position somewhere between the
agrarian and commercial stages of development; they concluded that
America’s huge reservoir of land would preserve its agrarian character and,
together with republican institutions, insure its progress virtually in
perpetuity.”\textsuperscript{192} Justice Peckham thus exemplifies an older view of the
proper role of law in society.

There was yet another vision of legal science current at the time of the
first important decisions interpreting the Sherman Act. It is exemplified by
the work of yet another judge who would later become Chief Justice of the
United States Supreme Court, William Howard Taft.\textsuperscript{193}

\textsuperscript{187} See Holmes, Natural Law, 32 HARV. L. REV. 40, 41 (1918).
\textsuperscript{188} Id.
\textsuperscript{189} Id. at 40.
\textsuperscript{190} Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).
\textsuperscript{191} See H. MAINE, supra note 113, at 45. Maine states, in the first edition’s preface,
that “[t]he chief objective of the following pages is to indicate some of the earliest ideas of
mankind, as they are reflected in Ancient Law, and to point out the relation of those ideas
to modern thought.” Id.
\textsuperscript{192} Ross, Historical Consciousness in Nineteenth-Century America, 89 AM. HIST.
\textsuperscript{193} Taft is the only person who has served as both President of the United States and
Chief Justice of the Supreme Court. He was elected President in 1908 and lost his bid for
reelection in 1912. After leaving the presidency, Taft taught constitutional law at Yale Law
School and served as president of the American Bar Association for a year. President
Harding named Taft Chief Justice in 1921. See R. STONE, L. SEIDMAN, C. SUNSTEIN & M.
IV.

For all his reliance on the common law in *Northern Securities*, Holmes cited but a single case defining contracts in restraint of trade.\(^{194}\) The task of thoroughly restating the common law on this topic fell some years earlier to Taft, sitting on the Sixth Circuit Court of Appeals. His opinion in *Addyston Pipe*\(^{195}\) contains an elaborate discussion of an overwhelming number of precedents.\(^{196}\) Taft's conclusion was to draw a distinction between direct and ancillary restraints on trade, the former forbidden and the later allowed.\(^{197}\) The opinion is flavored with a quest for objectivity through the analysis of precedent. To do otherwise, it seems, would make the validity of contracts depend upon "the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition."\(^{198}\) Several times Taft indicated that a strict adherence to precedent reveals that courts should not impose their views of political economy on litigants.\(^{199}\)

Taft's discussion of the numerous cases he cited looks much like the case-briefing exercise of a beginning law student in a case-method law school.\(^{200}\) In fact, Amasa Eaton's 1890 article in the *Harvard Law Review*, setting forth the common law on contracts in restraint of trade, reads like a shortened version of the Taft opinion.\(^{201}\) Each case is discussed in a paragraph which is even more brief-like than Taft's discussions. It appears that both the judge and the lawyer sought to find answers not in great principles, but in the actual application of the common law to individual cases.

\(^{194}\) See *Northern Securities*, 193 U.S. at 403-04 (citing Mitchel v. Reynolds, 1 P. Wins. 181 (1711)).

\(^{195}\) 85 F. 271 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899).

\(^{196}\) Taft cited and discussed over twenty-five federal, state, Canadian, and British cases. See *id.* at 283-92.

\(^{197}\) *Id.* at 283. Professor Hovenkamp finds Taft's opinion to be "disingenuous" and maintains that the judge played somewhat fast and loose with the very cases he purported to so carefully analyze, an observation which does not, however, diminish the significance of the technique used. See H. HOVENKAMP, supra note 3, at 286-87.

\(^{198}\) *Addyston Pipe*, 85 F. at 283.

\(^{199}\) See *id.* at 283, 285-86.

\(^{200}\) Taft's analysis of the cases consists of a listing of the material facts, the legal issue or issues presented, and the holding. See *id.* at 284-92.

Taft was sympathetic to the new methods of teaching law that began with Christopher C. Langdell’s deanship at Harvard Law School. The legal theory behind those new methods found the law not in overarching general principles, but in cases. Langdell went so far as to banish jurisprudence from Harvard and to restrict law professors to teaching “the law,” which was narrowly defined as the holdings of the appellate courts. Taft’s opinion in Addyston Pipe illustrates one result of the application of this view to judging. The precedents present the law in such a way as to limit, and even exclude from the judicial process, judges’ ideas about policy.

A more radical result is illustrated by Langdell’s comments concerning the circuit court opinion in Northern Securities, which was later affirmed by the Supreme Court. The bulk of the article is devoted to arguing that the court’s decree was not authorized by the statute. Without positive legislative authority, the decree could only be sanctioned by the traditional doctrines of equity. Equitable doctrines were to be derived from an examination of precedent, much as the meaning of restraint of trade must be. Langdell found no precedents; thus, in his view, the decree was illegal.

The remarkable part of Langdell’s article, however, is the assertion that there was no need to apply the Sherman Act to railroads in order to prevent the evil the statute had been designed to prevent. Railways damage the public only by charging unreasonable rates, and “for such an

202. R. STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 61 (1983). When Taft reorganized the University of Cincinnati Law School in 1895, he implemented the case method. Id. at 61, 70.

203. Id. at 52-53. The case method was based on the assumption that legal principles were best derived from appellate court opinions, whose applicability was not bounded by state lines. This process helped to remedy judicial deviation from established principles. Id.

204. Id. Under Langdell’s influence, the case law method consisted of analyzing appellate decisions in terms of doctrinal logic. Id.

205. Appropriately enough, Theodore Dwight, whose “Dwight Method” of teaching law through reading treatises and classroom recitations was considered to be the principal alternative to Langdell’s case method, produced an analysis of the legality of trusts which mixed analysis of cases with appeals to the principles of liberty of contract and commercial freedom. See Dwight, The Legality of “Trusts”, 3 Pol. Sci. Q. 592, 610-11, 628-30 (1888).


207. 120 F. 721 (C.C.D. Minn. 1903), aff’d, 193 U.S. 197 (1904).

208. See Langdell, supra note 206, at 542-54.

209. Id. at 543.

210. Id. at 547-53.

211. See id. at 543-45, 553.
injury the state already had an incomparably better remedy than any which the Sherman Anti-Trust Act can furnish, in its unquestioned power to regulate and control railway rates.\textsuperscript{212} Additionally, competition was ruinous to railways, as well as the public, and would not result in "keeping prices within reasonable limits."\textsuperscript{213} According to Langdell, the only competition possible among railways is at "competing points" where lower rates are given to those who ship goods at those points at the expense of those who can only ship at noncompeting points.\textsuperscript{214}

The answer for Langdell was either governmental regulation or outright governmental ownership.\textsuperscript{215} He observed that "if the state were to undertake the duty of rendering to the public, the services which are rendered by railway companies, every one would agree that its monopoly of such service should be complete and absolute."\textsuperscript{216} Furthermore, "when the state delegates to railway companies the right to render these services, and imposes upon them the corresponding duties," the state must protect the railways against competition as if the state itself operated the railways.\textsuperscript{217} It must plan comprehensively and permit new construction only with its permission and only where new roads are needed.\textsuperscript{218} In fact, the "ideal railway system" would be a single system consisting of all of the roads in a state, controlled "either by the direct authority of the state, or by the direct authority of those by whom the system is owned, acting, however, under such rules and regulations as the state from time to time sees fit to make."\textsuperscript{219}

Langdell’s focus on law as nothing more than what is in the cases allowed him to exclude from consideration those great principles of ultimate right which so permeate the other perspectives examined in this article.\textsuperscript{220} Langdell’s consideration of the railway problem resulted in

\begin{itemize}
\item \textsuperscript{212} Id. at 553.
\item \textsuperscript{213} Id. at 553-54.
\item \textsuperscript{214} Id.
\item \textsuperscript{215} Id. at 553.
\item \textsuperscript{216} Id.
\item \textsuperscript{217} Id.
\item \textsuperscript{218} Id.
\item \textsuperscript{219} Id.
\item \textsuperscript{220} Langdell’s legal analysis of the substantive provisions of the Sherman Act involved the narrowly legal discussion of the common law of restraint of trade and an attempt to understand the language regarding monopolies in section 2 by applying its terms to the forming of a small partnership engaged in a small-scale business enterprise. See Langdell, \textit{The Northern Securities Case Under a New Aspect}, 17 HARV. L. REV. 41 (1903). The same analogy to partnership was used in J.C.G., \textit{The Merger Case}, 17 HARV. L. REV. 474 (1904). Professor Hovenkamp quite sensibly assumes that the author was Langdell’s colleague on the Harvard faculty, John Chipman Gray. H. HOVENKAMP, \textit{supra} note 3, at
\end{itemize}
severing the narrow legal questions from larger questions of public policy and approaching the latter from a point of view which does not hobble the powers of the state. For Langdell, history was relevant only in the form of decided cases, which were discussed without any reference to their historical context.

This "pure law" approach captured, for the case-method law school, its own science of law, separate from every other discipline. But it also stripped from the legal enterprise consideration of larger issues of public policy which other approaches to law considered in this article kept in clear sight. Those questions were left for other professionals trained in other disciplines. Justice Taft expressed this view in his opinion in Addyston Pipe, when he implied that judgments based on principles of political economy were better suited for economists than judges.

Not long after Langdell's death, legal thinkers describing themselves as realists would stridently, and somewhat unfairly, challenge Langdell's idea of law, denouncing it as a sterile formalism and promoting what they considered to be an interdisciplinary approach. In a sense, the realists strived, often vainly, to bring the greater good back into legal discourse. The problem, of course, was to find a basis on which the public good could be determined. At its most rigorous, Holmes's apparent submission to the force of history was too passive—too accepting of what fate brought. The search for the answers turned to the social sciences with scant results.

Decades later, however, a mature discipline of economics would be sufficiently rigorous to beguile legal thinkers into creating the most complete fusion of law and social science to date. The rise of law and economics is the return of the greater good to the discussion of the nature of law. The will of the market place—the invisible hand—simply has

416 n.71.

221. See Langdell, supra note 206, at 553.

222. R. STEVENS, supra note 202, at 51-54. Stevens notes that the science of law is intended to emphasize its practicality; law provides a system of doctrines that seems to provide consistent, mechanistic responses to legal questions. Id.

223. Addyston Pipe, 85 F. at 283 (referring to judges' opinions based on principles of political economy as "vague and varying").

224. See supra notes 185-86 and accompanying text.

225. See generally, e.g., Posner, The Future of Law and Economics: A Comment on Ellickson, 65 CHI.-KENT L. REV. 57 (1989). Judge Posner asserts that allowing legal thinkers to inject "random bits of information about human nature and society," which are acquired from the study of social sciences other than economics, into their law and economic models will give these thinkers too much freedom. Id. at 61. He asserts that the economic model should be as empirical (i.e., scientific) as possible. Id. Judge Posner considers the economic model of law to be the "most fruitful in the history of the social sciences." Id. at 62.
replaced the will of God, as revealed in history as the determining element, the one authority which human law cannot contradict. It may be that in some great overwhelming sense, no legal system can do without such ultimate authority—unabashed positivism is not for the faint hearted. We once again seem to be in an era in which the public interest is defined not by the will of the public but by a transcendent will greater than all of us.