The Modern Antitrust Relevance of Oliver Wendell Holmes

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INTRODUCTION

Justice Oliver Wendell Holmes played as important a part in the development of United States antitrust law as he played in the development of constitutional law for which he enjoys a reputation as a giant in American law. Yet, for the more than sixty years since Holmes's retirement, there has been no comprehensive analysis of his contributions to the regulation of competition in this country. Now there are two.

Almost simultaneously, Professor Alfred Neely of the University of Missouri Law School and I have each published separate articles seeking to unravel whether Holmes had any substantial philosophy underlying his many opinions in a field of law that he found both silly and personally repugnant, and whether Holmes was faithful to his often-articulated view of the role of judges in upholding and implementing statutes with which they personally disagreed.¹ I now revisit the area of Holmes and the antitrust laws as Professor Neely and I disagree in the basic conclusions we draw, and to extend my earlier analysis to suggest that Holmes has a profound relevance for modern antitrust policy which Professor Neely overlooks.

Professor Neely reaches two overreaching conclusions, both of which I challenge. First, although he correctly identifies the many different jurisprudential and philosophical influences on Holmes and the different ways Holmes can be read in light of

those movements, Professor Neely ultimately concludes that Holmes had no coherent philosophy of his own in approaching antitrust cases. Professor Neely’s second conclusion is that in his antitrust opinions, Holmes remained faithful to his view that judges should not impose their personal views on the constitutionality and interpretation of legislation, but should implement the wishes of the legislature that drafted the legislation. Professor Neely, however, does concede that Holmes had a somewhat idiosyncratic view of what the legislature intended to accomplish in drafting the Sherman Act and subsequent antitrust legislation.

Professor Neely further alludes to Holmes’s influence on modern movements in antitrust such as Law and Economics. But he fails to analyze critical limitations on the often-asserted view of Holmes as the father of the Law and Economics movement and overlooks two additional modern movements for which Holmes can be claimed as a more direct ancestor—namely theories of countervailing power usually associated with John Kenneth Galbraith and the antitrust abolitionists currently represented by Lester Thurow and others. Professor Neely incorrectly suggests that Holmes is a marginal historical figure for antitrust purposes, when in fact his overarching philosophy, rather than his doctrinal contributions, continues to animate much of current antitrust debate.

I intend to address three important issues where I disagree with Professor Neely or where he has stopped short, in order to assess more fully Justice Holmes’s contributions to antitrust law and policy, a body of law that has been hailed as a charter of economic freedom of nearly constitutional dimension, but one that Holmes viewed with great antagonism:

1. Did Justice Holmes have a coherent antitrust philosophy?
2. Can any such philosophy be squared with Holmes’s

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2 Neely, supra note 1, at 7-22.
3 Id. at 64-65.
4 Id. at 62.
5 Id.
6 Id. at 19-21.
7 See generally Northern Pac. Ry. v. United States, 356 U.S. 1, 7 (1958); Socony-Vacuum Oil Co. v. United States, 310 U.S. 150, 221 (1940); Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933).
views about deference to legislation? and
(3) What, if any, is Holmes's relevance and legacy for modern antitrust law and policy?

My conclusions go beyond the mere eclecticism identified by Professor Neely and suggest that Holmes had a coherent, but limited, view of antitrust as the federalization of a common law designed to protect and enhance the value and use of private property. Justice Holmes’s views, advocated primarily in dissents and private writings, did not rise to the lofty standards that he otherwise advocated regarding a judge’s duty to implement personally distasteful legislation.

Despite all this, I believe Justice Holmes remains a figure of importance and relevance for modern antitrust scholars and policymakers. While Holmes’s views do not survive in antitrust doctrine, his narrow and negative view of antitrust is reflected both directly and indirectly in powerful arguments that oppose the contemporary antitrust mainstream and remain important forces to be reckoned with in the definition of the future of antitrust.

I. THE ANTITRUST OPINIONS OF JUSTICE HOLMES

There is no need for a lengthy retelling of the antitrust opinions of Justice Holmes. Professor Neely has done an admirable job of describing this body of work.² For my purposes, a discussion of four opinions will suffice to sketch the antitrust vision of Justice Holmes.

A. Northern Securities Co. v. United States

In Northern Securities Co. v. United States,³ Justice Holmes set forth a comprehensive, but limited, vision of the antitrust laws which he followed for his thirty years on the Supreme Court.⁴ Holmes dissented from the invalidation of a railroad consolidation under Section 1 of the Sherman Act. Holmes operated from the premise that even if every step of

² Neely, supra note 1, at 23-61; see also Waller, supra note 1, at 286-314.
³ 193 U.S. 197 (1904).
⁴ Id. at 400. Chief Justice Fuller and Justices White and Peckham joined Holmes's dissent. Holmes also joined Justice White's dissent, which focused on the lack of interstate commerce. Id. at 364.
the merger was done "with the single intent of ending competition between the companies," that competition was "totally unimportant" to any part of the proper interpretation of the Sherman Act.

Holmes contended that the Sherman Act was not concerned with competition at all, but only prohibited contracts, combinations and conspiracies in restraint of trade, as those terms were understood at common law. For Holmes, contracts in restraint of trade consisted of what modern parlance generally refers to as restrictive covenants in connection with the sale of a business or the formation of a partnership. Such contracts were prohibited under certain circumstances at common law to protect medieval communities from the burden of supporting persons who had contracted away the right to practice their livelihood, and only incidentally to protect the community from the loss of competition. In Holmes's view, the objections to such contracts had nothing to do with competition, except in the limited circumstances in which they amounted to an actual monopoly.

Holmes viewed combinations or conspiracies in restraint of trade as agreements to keep third parties out of a business or trade. Holmes contended that at common law:

> The objection to them was not an objection to their effect upon the parties making the contract, the members of the combination or firm, but an objection to their intended effect upon strangers to the firm and their supposed consequent effect upon the public at large.

Holmes followed the natural implication of his reasoning in concluding that the Sherman Act did not require that existing

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11 Id. at 401.
12 Id.
13 Id. at 403-04. For a critique of Holmes's analysis of the common law of restraints of trade, see William Letwin, Law and Economic Policy in America 233 (1965).
15 Northern Sec., 193 U.S. at 404.
16 Id. Holmes further relied on the wording of the private right of action given to persons "injured in [their] business or property" as necessarily meaning outsiders to the combination and not the participants themselves. Id. at 405. Holmes also addressed in passing his view that § 2 of the Sherman Act did not prohibit any additional types of behavior, but merely condemned the type of behavior unlawful under § 1 if done unilaterally. Id. at 404-05.
competition be maintained but "simply requires that a party's freedom in trade between the States shall not be cut down by contract with a stranger."\(^{17}\)

B. Dr. Miles Medical Co. v. John D. Park & Sons

Holmes applied a similarly narrow view of the antitrust laws in his dissent in *Dr. Miles Medical Co. v. John D. Park & Sons.*\(^{18}\) In *Dr. Miles*, the plaintiff was a manufacturer of proprietary medicines that were sold through distributors and retailers who had agreed contractually to maintain certain, minimum resale prices that they would charge their customers for the medicines. The Dr. Miles Medical Company ("Dr. Miles") sought to enjoin a wholesaler outside of its group of dealers who had obtained the medicine from reselling it for less than the specified minimum resale price.

The Supreme Court held that Dr. Miles's conduct was unlawful to the extent that it constituted a restraint on alienation of goods that Dr. Miles had sold rather than consigned.\(^{19}\) The Court rejected the plaintiff's claim that the proprietary nature of the formula entitled it to control resale prices,\(^{20}\) or that a manufacturer was generally entitled to control the prices on the sales of its products.\(^{21}\)

In dissent, Holmes characterized Dr. Miles's conduct as seeking to "restrain the defendant from inducing, by corruption and fraud, agents of the plaintiff and purchasers from it to break their contracts not to sell its goods below a certain price."\(^{22}\) He ridiculed the majority for allowing price conditions to be used in consignment arrangements, but not outright sales, since the plaintiff could simply restructure its distribution network and satisfy the concerns of the majority.\(^{23}\)

Holmes reserved his harshest criticism for the portions of

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\(^{17}\) *Id.* at 406.

\(^{18}\) 220 U.S. 373 (1911).

\(^{19}\) *Id.* at 404.

\(^{20}\) *Id.* at 402-03; see also *Straus v. Victor Talking Mach. Co.*, 243 U.S. 490, 501 (1917) (Holmes dissenting against application of exhaustion doctrine in patent antitrust case involving both resale price maintenance and tying restrictions).

\(^{21}\) *Dr. Miles*, 220 U.S. at 406-08.

\(^{22}\) *Id.* at 409.

\(^{23}\) *Id.* at 411.
the majority opinion that condemned resale price maintenance as injurious to competition and consumers. He contended that the Sherman Act did not apply to such agreements at all, and that the Court had not set forth any persuasive reasons to interfere with the principle of letting people manage their businesses as they see fit. He stated:

I think that we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article . . . as fixing a fair price. What really fixes that is the competition of conflicting desires. We, none of us, can have as much as we want of all the things that we want. Therefore, we have to choose. As soon as the price of something that we want goes above the point at which we are willing to give up other things to have that, we cease to buy it and buy something else. Of course, I am speaking of things that we can get along without. There may be necessaries that sooner or later must be dealt with like short rations in a shipwreck, but they are not Dr. Miles's medicines. With regard to things like the latter it seems to me that the point of most profitable returns marks the equilibrium of social desires and determines the fair price in the only sense in which I can find meaning in those words. The Dr. Miles Medical Company knows better than we do what will enable it to do the best business.

He then reiterated his view from *Northern Securities* that such a contract should be enforced since it does not exclude any third parties from a business naturally open to them.

C. Vegelahn v. Guntner

Holmes wrote one of his most illuminating antitrust opinions while still serving on the Massachusetts Supreme Court. In *Vegelahn v. Guntner*, Holmes dissented from the grant of an injunction against the peaceful picketing of an employer in a labor dispute. Holmes argued that even if the defendants' actions would injure the economic interests of the

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24 Id.
25 Id. at 412.
26 Id. at 413; see also United States v. A. Schrader's Sons, Inc., 252 U.S. 85, 100 (1920) (Holmes, J., dissenting); Boston Store v. American Gramaphone Co., 246 U.S. 8, 28 (1918) (Holmes, J., dissenting).
27 For additional discussion of the few relevant state competition cases and their influence on Holmes's later work on the United States Supreme Court, see Waller, supra note 1, at 308-12.
28 44 N.E. 1077 (Mass. 1896).
plaintiff, such damage was justified by recourse to "considerations of policy and social advantage."

Holmes chose as an example the principle that a man was free to set up a shop in a small town that he knew was only large enough to support one such establishment, and compete with a preexisting establishment. Any injury to the incumbent shopkeeper was justified because "free competition is worth more to society than it costs."

Holmes extended this principle to all conflicts of "temporal interests," including that of labor and management. Holmes stated:

[It] is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on so fast, means an ever increasing might and scope of combination. It seems to me futile to set our faces against this tendency. Whether beneficial on the whole, as I think it, or detrimental, it is inevitable, unless the fundamental axioms of society, and even the fundamental conditions of life, are to be changed.

One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.

D. Swift and Co. v. United States

Holmes's most significant interpretation of Section 2 of the Sherman Act came in Swift and Co. v. United States. Swift is generally cited for the proposition that the offense of attempted monopolization is proved through a showing of a spe-

29 Id. at 1081 (Holmes, J., dissenting); see also May v. Wood, 51 N.E. 191, 192 (Mass. 1898) (Holmes, J., dissenting) (stating that competition in trade as justifiable cause for economic injury to others).
30 Vegelahn, 44 N.E. at 1077; see also Oliver Wendell Holmes, Jr., The Common Law 144-45 (1881) [hereinafter Holmes, The Common Law]; Oliver Wendell Holmes, Jr., Privilege, Malice, and Intent, 8 Harv. L. Rev. 1, 3 (1894) [hereinafter Holmes, Privilege, Malice, and Intent].
31 Vegelahn, 44 N.E. at 1081.
32 Id. at 1081; see also Plant v. Woods, 57 N.E. 1011 (Mass. 1900).
33 196 U.S. 375 (1905).
specific intent to monopolize and a dangerous probability of success, normally demonstrated through proof of a market share approaching that of monopoly power.34 *Swift* also provided an opportunity for Holmes to redefine Section 2 of the Sherman Act in his own unique, common-law terms.

Professor Neely makes the mistake of other antitrust commentators35 in seeking to view *Swift* primarily as a case about antitrust doctrine, and not a case about the meaning of attempt crimes at common law. *Swift* is best viewed as part of the continuation of Holmes's reformulation of the law of attempt based on the proximity to dangerous outcomes, rather than a reliance on intent as the governing standard.36 As Professor Morton Horowitz has noted: "If there is a single, overriding and repetitive theme running through Holmes's writing, it is the necessity and desirability of establishing objective rules of law, that is, general rules that do not take the peculiar mental or moral state of individuals into account."37

The requirement of a dangerous probability of success cannot be dismissed as unclear prose since Holmes repeatedly used this phraseology both before and after *Swift* in discussing attempted monopolization. In 1904, Holmes stated in *Northern Securities* that the defendants' conduct was "too remote" to constitute an offense, and used language that proved to be a trial run for his later holding in *Swift*: "There must be a certain nearness to the result. It is a question of proximity and de-

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Holmes used similar language in United States v. Winslow: "Until the one intent is nearer accomplishment... no intent could raise the conduct to the dignity of an attempt." While Holmes generally sought to steer the general law of attempt crimes and torts away from a purely subjective intent basis and towards an objective standard based on conduct, his formulation has survived only in the antitrust area.

II. FINDING HOLMES'S ANTITRUST PHILOSOPHY

Professor Neely reads these cases and the other Holmes antitrust opinions and finds that no consistent patterns emerge. For Professor Neely, Holmes's antitrust record cannot accommodate "human yearning for certainty and precision" and "is most usefully understood by abandoning efforts to shape it into a consistent whole." Nonetheless Professor Neely does conclude that Holmes's "interpretation left him able to respect the will of Congress, as he saw it, without choking on his own sense of the matter."

I think both of these conclusions are wrong. The fact that Holmes was erratic in the antitrust area does not mean that clear patterns do not emerge from his judging and his private writings. First, Holmes saw the process of combination as both inevitable and desirable. Combination was the result of a

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39 227 U.S. 202 (1913).
40 Id. at 218. Holmes had the opportunity to clarify or change his holding in Swift, if he had so desired, in Buckeye Powder Co. v. DuPont Powder Co., 248 U.S. 55 (1918), where a losing plaintiff challenged jury instructions regarding the distinction between monopolization and attempted monopolization. Holmes was content to note that the instructions correctly stated that the plaintiff was entitled to recover if the defendant's acts "were done in the course of an attempt to monopolize, whether or not they were crowned with success." Id. at 62; see also United States v. United States Steel Corp., 251 U.S. 417, 443 (1920); Hyde v. United States, 225 U.S. 347, 387-88 (1912).
42 Neely, supra note 1, at 65.
43 Id. at 64.
44 Id. at 62.
45 Waller, supra note 1, at 291.
ruthless process of economic struggle which would produce both clear winners and total losers.\textsuperscript{46} It was inconceivable to Holmes that Congress would seek to legislate against such irresistible forces, or that it thought that the Sherman Act would be successful against such forces of nature.

Second, he saw the Sherman Act solely in common law terms. From \textit{Northern Securities} to his final opinions for the Supreme Court, he interpreted the Sherman Act as the federalization of the terms "restraint of trade" and "monopolization," as he understood those terms at common law. For Holmes, restraints of trade were unlawful at common law for reasons that had little to do with the preservation of competition between parties to a collusive agreement, but instead merely prevented agreements to exclude a third party from a trade or business. Thus interpreted, the Sherman Act would not affect voluntary transfers of property even if competition was diminished or eliminated between the parties, or if buyers, consumers or labor were injured as a result.

Restraints of trade at common law became an accepted part of the legal landscape in order to enhance the value of property rights and to promote their transfer. Holmes was prepared to uphold restraints in connection with the creation and transfer of property rights whenever reasonable to accomplish the purposes of the property owner. Thus, there was no reason to apply the Sherman Act to consolidations and mergers of the nature of \textit{Northern Securities}. Similarly, there was no reason to apply the Sherman Act to vertical restrictions relating to the sale of property such as in \textit{Dr. Miles}.

In this regard, Holmes undoubtedly was influenced by the way the common law had developed in Great Britain, which Holmes both admired and followed closely. By Holmes's time, Great Britain had eliminated completely the preservation of competition as the underlying policy of the law of restraints of trade.\textsuperscript{47} Cartels and related agreements often were enforced as reasonable for the needs of the parties and society as a whole.\textsuperscript{48} At the worst, British courts held unreasonable re-

\textsuperscript{46} Id.
\textsuperscript{48} Thorsten Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co., 1894 A.C. 35.
straints unenforceable. Even in such cases, however, this meant only the parties to the agreement could not invoke the courts to compel a recalcitrant participant. There remained no remedy for the victims of such anticompetitive behavior or for consumers. Holmes could view the direction taken by Great Britain, reported to him by long-time correspondent Sir Frederick Pollock, only with a tinge of admiration and jealousy.

Holmes's common law, property-based view of the antitrust laws also emerged from his unique reformulations of American common law, which consumed his scholarly writings at all stages of his legal career. He used antitrust cases to implement his theories of the conditionality of rights, the need for objective standards of liability, the grounding of legal duties in the contemporary needs of society, and the redefinition of attempt crimes away from a subjective bad intent towards a proximity to a forbidden result. Viewed in this light, cases like *Northern Securities* and *Swift* become excellent predictors for Holmes's future antitrust decisions, rather than the "ambiguous signals" and "uncertain barometer" suggested by Professor Neely.

Holmes's preferred solution to the humbug of antitrust was equally unambiguous. He found it perfectly reasonable for the other side of the battle to combine to engage better the combinations of capital in an even greater conflict. Thus, labor unions, cooperatives, and buying cartels were all perfectly reasonable responses to the initiatives of capital.

Professor Neely correctly identifies the diverse ways that Holmes can be viewed. Ultimately, though, he refuses to choose among the options. Under this view, Holmes's antitrust jurisprudence becomes a jumbled mess, but one Professor Neely can argue is consistent with Holmes's reputation as a deferential judge capable of enforcing legislation he found personally repugnant. Highlighting the patterns that do exist

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49 See FREYER, supra note 47, at 77-79.
52 Neely, supra note 1, at 31.
53 Id. at 34.
unfortunately also challenge Professor Neely's conclusion as to Holmes's deference as well.

The fact that Holmes occasionally was erratic does not mean that he did not have a philosophy. Moreover, that he wrote to uphold the constitutionality of the Sherman Act meant little. As Professor Neely acknowledges, Holmes's core belief was the constitutionality of economic legislation regardless of the wisdom of the underlying policy decision. To hold otherwise would have explicitly undermined a life's work. Thus, to uphold the constitutionality of a statute says nothing about the interpretation of the statute, where Holmes's consistency emerged. Interpretations of the scope and jurisdiction of the Sherman Act also reveal little about its central meaning. Finally, Holmes's constitutional and interpretative opinions regarding state antitrust statutes fails to inform about the core issue—the meaning of the federal Sherman Act. In that critical regard, Holmes was faithful only to the preservation and enhancement of property rights and not necessarily Congress' intent.

Virtually all of Holmes's thinking in the antitrust area can be traced back to his work on the common law as a scholar and as a state court judge. For thirty years on the Supreme Court, Holmes contended that the Sherman Act had nothing to say about the enhancement or preservation of competition. Prior to 1914, such an interpretation was peculiar, but defensible. After 1914, however, neither Professor Neely nor Holmes should have been able to maintain this interpretative charade. In 1914, Congress passed both the Clayton Act and the Federal Trade Commission Act, each of which required the explicit consideration of the effect of various restrictive business practices on competition.

Under Professor Neely's generous view of Holmes as a

54 Nash v. United States, 229 U.S. 373 (1913).
58 Id. §§ 41-46, 47-58.
reluctant but deferential judge, this should have been a defining moment in Holmes's antitrust opinions. But it was not. If anything, Holmes's public and private antitrust rhetoric became more inflamed\(^5\) and put to rest the image of judicial restraint that Holmes more faithfully executed in other areas of the law.

III. HOLMES AND MODERN ANTITRUST MOVEMENTS

A reasonably consistent Holmes antitrust philosophy would be of little but historical interest unless it can be linked with the issues and philosophies animating the law today. While most of the specific holdings of Holmes's opinions do not survive in modern doctrine, their philosophical underpinnings remain at the center of the current debate over the purposes and limits of antitrust today.

Professor Neely only hints at the modern relevance of Justice Holmes to antitrust policy. While he notes some of the links between Holmes and the Law and Economics movement,\(^6\) he fails to analyze the flaws in associating Holmes's views with the sophisticated price theory and game theory models underlying most current economic analyses of the law. Neely also fails to analyze the links with other modern antitrust movements that make Holmes an important figure for contemporary antitrust debates.

A. The Law and Economics Movement

At a superficial level, Holmes is the father of the Law and Economics movement usually associated with the University of

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\(^6\) Neely, supra note 1, at 19-21.
Chicago. Holmes himself stated in *The Path of the Law* that the legal man of the future would be the man who masters economics. The connection would be more significant had Holmes enjoyed a more profound grasp of the economics he urged others to master.

The traditional Law and Economics view of antitrust holds that the purpose of antitrust law is the enhancement of consumer welfare through wealth maximization, and that combinations between competitors, other than output-reducing price or production restrictions, are often beneficial to consumers and society. All other types of agreements generally are viewed as either benign or affirmatively procompetitive. Law and Economics proponents condemn antitrust rules, especially *per se* rules—which go beyond the prohibition of output-reducing, price-enhancing conduct, and attack conduct with plausibly efficient justifications—as counterproductive, anti-competitive and injurious to consumers.

The outcome, if not the reasoning, of Holmes's antitrust opinions matches quite closely these views. As a result, Holmes often is claimed by key figures in the Law and Economics field as an important ancestor of the movement. In-
deed, in an intuitive way, Holmes does provide a precursor to many of the themes of the Law and Economics movement when applied to antitrust. Holmes emphasized the inevitability and the desirability of most forms of combination and economic integration, hard competition by efficient, large-scale enterprise at the expense of the less efficient, smaller competitor, strengthening real, personal and intellectual property rights and permitting the owner of such rights to limit contractually rights conveyed by license, and the toleration of vertical re-

For example, more than one commentator has noted the similarity of Holmes's position on the permissibility of resale price maintenance to the more recent arguments of the University of Chicago school. Both Holmes and the Law and Economics movement contend that the seller is in a superior position to determine the best way to promote interbrand competition through price or nonprice restrictions, and that the consumers have the ability to punish sellers who impose unpopular price and nonprice features by substituting other goods or services.

note 1, at 5-6.

65 International Harvester Romanty Co. v. Kentucky, 234 U.S. 216, 233 (1913) ("if business is to go on, men must unite to do it").

66 United States v. Winslow, 227 U.S. 202 (1913); HOLMES, THE COMMON LAW, supra note 30, at 144-45; Holmes, Privilege, Malice, and Intent, supra note 30, at 3.

67 See Neely, supra note 1, at 53-61; Waller, supra note 1, at 298-99.

68 See Neely, supra note 1, at 55-58; Waller, supra note 1, at 296.


Philosophically, the Law and Economics movement also relies on Holmes's view as to the purpose of the Sherman Act as the federalization of the common law of restraint of trade. This key assertion is the modern version of Holmes's contention that the Sherman Act did no more than incorporate common law terms with a distinct meaning rooted in the preservation and enhancement of property, rather than a promotion of competitive, political, or social concerns.

Holmes emphasized a form of wealth maximization that the Law and Economics movement has adopted as the sole goal of antitrust policy. He viewed the economy as the sum of consumption regardless of its distribution. Holmes expressed these views repeatedly in both his judicial opinions and his private correspondence.

71 See, e.g., 1 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 106 (1978).
72 The Reagan Administration, which incorporated key concepts and key players from the Law and Economics movement in both the judiciary and the Executive Branch, strongly echoed much of Holmes's antitrust jurisprudence at a practical level in its antitrust enforcement policy. Holmes's philosophy that size was a virtue and not a vice was repeated nearly verbatim by Reagan Administration officials chanting the mantra that "bigness is not badness." ABA Antitrust Section Examines Deregulation, Enforcement Shifts, 49 Antitrust & Trade Reg. Rep. (BNA) No. 1224, at 156 (July 18, 1985) (Statement of then-Secretary of Commerce Malcolm Baldrige); Nell Henderson, Baldrige Merger Plan Criticized; Changes in Law Called Unnecessary, WASH. POST, Mar. 3, 1985, at F1 (Statement of then-Assistant Attorney General J. Paul McGrath); Alex S. Jones, F.C.C. Raises Limit on Total Stations Under One Owner, N.Y. TIMES, July 27, 1984, at A1 (Statement of then-F.C.C. chairman Mark Fowler); Mark Potts, The FTC, Staff Reports Shift in Past 3 Years, WASH. POST, Nov. 22, 1984, at A25 (Statement of then-FTC chairman James C. Miller); Antitrust Chief Baxter Resigns, FACTS ON FILE WORLD NEWS DIGEST, Dec. 23, 1983, at 966 E1 (Statement of then-Assistant Attorney General William Baxter).


73 Oliver Wendell Holmes, Jr., Economic Elements, in COLLECTED LEGAL PAPERS 279 (1920).
74 Plant v. Woods, 57 N.E. 1011 (Mass. 1900).
75 See Waller, supra note 1, at 315-17 nn.179-93 and accompanying text.
In the end, however, the Law and Economics movement has gone further than Holmes was ever capable of going. The technical sophistication in the application of price theory, game theory and the profusion of empirical analyses of antitrust issues are a quantum leap above Holmes's rough-hewn economic intuitions. Holmes did not share the concern of most economically oriented antitrust scholars that true monopoly power does have negative consequences for allocative efficiency and societal welfare. The Law and Economics movement also depends on fundamental assumptions of economic rationality and utility-maximization that Holmes simply did not believe or assimilate into his antitrust philosophy or his political economy. In contrast to the assumption of the rational utility-maximizing actor underlying an economic analysis of the law, Holmes relied on an instinctive view of the "mob" as a group of foolish individuals incapable of understanding or satisfying their true needs and desires. Ultimately, to the extent that the Law and Economics movement has achieved coherence and acceptance, it is not to Holmes's credit, but to those he inspired.

B. Holmes and Countervailing Power

Holmes's notions of political economy may have inspired another branch of economics not directly related to the Law and Economics movement. Holmes's preferred solution for the economy and the antitrust laws was to embrace combination rather than oppose it. In so doing, Holmes's views regarding the inevitability and desirability of combination provide a his-

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71 See supra notes 27-32 and accompanying text.
torical antecedent to theories of countervailing power most often associated with John Kenneth Galbraith.

Galbraith first set forth a comprehensive theory of countervailing power in *American Capitalism: The Concept of Countervailing Power.* Although the concept of countervailing power has wide-reaching consequences when applied to antitrust law, that does not appear to have been Galbraith's original goal. Galbraith's *American Capitalism* is a historical work that was a direct reaction to both the Great Depression, the cataclysmic economic event of his generation, and the uneasy prosperity that reigned in America in the decade after the end of World War II. Galbraith discusses the inevitable consolidation of the economy into giant industrial corporations and the demise of the model of perfect competition as an accurate descriptive model of the economy or an automatic mechanism for ensuring prosperity.

Galbraith's solution to both the problem of oligopoly power and the need to promote prosperity is the widespread development of countervailing power and an active governmental role in fostering and preserving such power. Galbraith argues:

The fact that a seller enjoys a measure of monopoly power, and is reaping a measure of monopoly return as result, means that there is an inducement to those firms from whom he buys or those to whom he sells to develop the power with which they can defend themselves against exploitation. It means also that there is a reward to them, in the form of a share of the gains of their opponents' market power, if they are able to do so. In this way the existence of market power creates an incentive to the organization of another position of power that neutralizes it.

In more pithy Holmesian terms, Galbraith later states: "[P]ower on one side of a market creates both the need for, and the prospect of reward to, the exercise of countervailing power from the other side." Galbraith contends that the creation and preservation of

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79 Id. at 7-8.
80 Id. at 12-17.
81 Id. at 111-12.
82 Id. at 113 (footnote omitted).
countervailing power will promote social serenity and protect both labor and consumers from concentration of power in industrial corporations. Galbraith's vision of continued domestic tranquility calls for an active federal government to create and protect such countervailing power in labor, agricultural, and consumer markets through unions, buying and selling cooperatives, and large retailers who can restrain market power at the manufacturing level of the economy. Galbraith would limit antitrust policy to the attack on destructive "original" power rather than this beneficial countervailing power.

Galbraith continues the development of his model of countervailing power in *The New Industrial State,* arguing that the antitrust laws are "anachronistic" and "at odds with reality." Galbraith contends that the antitrust laws are ineffective to the extent that they cannot adequately contend with oligopoly, which he regards as the dominant form of industrial organization in the American economy.

He also believes that the antitrust laws are pernicious, and not merely ineffective, since they deny market power to those who do not have it, while according substantial immunity to those already possessing it. To Galbraith, the prohibition against collusive agreements between competitors provides no constraint on large powerful corporations who do not need to resort to such tactics to maintain market power in an oligopolistic industry.

Galbraith criticizes the failure to promote countervailing power as well as the promotion of a disguised exemption for those firms not needing such overt tactics to increase or main-

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83 Id. at 134-53.
84 Accordingly, Galbraith is quite critical of the price discrimination provisions of the Robinson-Patman Act as attacking the wrong half of the market power equation. Id. at 141-44.
85 JOHN KENNETH GALBRAITH, THE NEW INDUSTRIAL STATE (2d ed. 1971).
86 Id. at 187-88.
87 Id. at 182-85.
88 Id. at 186.
89 Galbraith uses the automobile industry as an example. Through intense study of the responses of their rivals, the three largest automobile manufacturers can reach beneficial price and output decisions without the need for overt collusion and are effectively immune from antitrust scrutiny. Id. at 186-87. Instead, the antitrust laws prohibit the type of direct agreement that would be necessary for small parts suppliers to cooperate in exerting countervailing power against the manufacturers. Id.
tain market power. Galbraith carries this theme to its logical conclusion in *Economics and the Public Purpose*,90 where he proposes a general exemption for small business from all antitrust prohibitions against combinations to stabilize price and output.91

Outside of providing support for the existing labor92 and agricultural cooperative exemptions93 to the antitrust laws, Galbraith's countervailing power theory has played little role in the development of antitrust case law. This is not altogether surprising since Galbraith primarily was interested in the reform of the antitrust laws only as a secondary goal to preventing the recurrence of the Great Depression, which was the unforgettable economic catastrophe of his generation.

The weakness of Galbraith's theory as a unifying principle for competition policy also helps explain its relative dormancy. The theory itself is subject to two serious theoretical criticisms, which Galbraith only partially acknowledges. First, countervailing powers theories cannot accurately predict the outcomes of bargaining between two groups possessing bilateral monopoly power. The outcome is normally indeterminate.94

Second, Galbraith fails to acknowledge fully the many circumstances in which two parties to a negotiation can reach an outcome that benefits both to the disadvantage of a third party. Such negotiations are no longer zero sum games where one side gains in proportion to the other side's losses. They are instead non-zero sum games where both sides can "win" by

91 *Id.* at 256.
94 Galbraith attempts to distinguish countervailing power from bilateral monopoly by stating:

[I] have rejected the terminology of bilateral monopoly in characterizing this phenomenon. As bilateral monopoly is treated in economic literature, it is an adventitious occurrence. This, obviously, misses the point and it is one of the reasons that the investigations of bilateral monopoly, which one would have thought might have been an avenue to the regulatory mechanisms here isolated, have in fact been a blind alley. However, this line of investigation has also been sterilized by the confining formality of the assumptions of monopolistic and (more rarely) oligopolistic motivation and behavior with which it has been approached. . . .

GALBRAITH, *supra* note 78, at 113 n.2.
passing off losses to some group or individual not part of the negotiation. Galbraith does concede that wage negotiations between labor and capital in times of high demand can produce such a result and lead to serious inflation, but fails to realize the other opportunities for such behavior in the economy or where one side can wrest concessions from the other, enjoy the fruits of the concession, but not pass them along to the constituency ostensibly represented.

Most recently, notions of countervailing power have appeared as a defense in merger litigation under Section 7 of the Clayton Act. Section 7 bars mergers and acquisitions that may tend to lessen substantially competition or create a monopoly in a relevant product and geographic market. Some courts have begun to focus on the existence of “power buyers” as proof of a lack of any tendency to affect competition adversely. Under this rationale, the existence of powerful buyers would negate the newly merged firm from raising price and restricting output and, therefore, indicate that the merger would not have the tendency to injure competition. While an increasing number of courts have been willing to entertain such arguments in both merger and non-merger cases, the theory can be criticized on exactly the same grounds as the general theories of countervailing power, which form the background for the power buyer rationale. Theories of countervailing power have also surfaced in the various health care reform

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55 Id. at 133-34.
60 Because of these weaknesses, few have attempted systematically to apply notions of countervailing power to general antitrust jurisprudence. One scholar who attempted such a synthesis working from a traditional Law and Economic's perspective is Professor Barbara Ann White. Barbara Ann White, Countervailing Power- Different Rules for Different Markets? Conduct and Context in Antitrust Law and Economics, 1992 DUKE L.J. 1045.
packages proposed by the Clinton Administration and by mem-
bers of Congress.101 While such theories often are criticized
and viewed as outside the antitrust mainstream, it is the theo-
ry of countervailing power, and not the Law and Economics
movement, which is the modern and more direct offspring and
legacy of Holmes's embrace of combination.

C. The Modern Antitrust Abolitionists

Another modern Holmesian offspring is the loose coalition
of critics on both the right and the left seeking the outright
abolition of the antitrust laws. There is a striking similarity of
Holmes's views of the futility of antitrust law with the more ad
hoc movement, which has argued that the United States anti-
trust laws are a luxury that we can no longer afford in interna-
tional trade matters. While the rationales advanced differ
among the antitrust abolitionists, they all echo Holmes's char-
acterization of the antitrust laws as dangerous nonsense.102

The principal academic advocate of abolition has been
Lester Thurow.103 Over the past dozen years, the abolition of
antitrust has become a major theme of Thurow's writings and
his role as policy adviser to segments of the Democratic Party.
Thurow's attacks on the antitrust laws began as a relatively
minor digression in his 1980 book The Zero Sum Society.104
Thurow principally sought to address the problems of skyrock-
eting energy costs and shortages, slow economic growth and

101 The details of the competing health care plans are compared in Ann M.
Murphy & Richard H. Sanders, Appendix: Major Health System Reform Proposals
102 See Letter from Oliver Wendell Holmes, Jr. to Sir Frederick Pollock (Nov. 7,
1914), in 3 HOLMES-POLLOCK LETTERS, supra note 51, at 223; Letter from Oliver
Wendell Holmes, Jr. to Sir Frederick Pollock (Apr. 23, 1910), in 2 HOLMES-
POLLOCK LETTERS, supra note 51, at 163; Letter from Oliver Wendell Holmes, Jr.
to Sir Frederick Pollock (May 28, 1906), in 2 HOLMES-POLLOCK LETTERS, supra
note 51, at 128-25; Letter from Oliver Wendell Holmes, Jr. to Lewis Einstein
(Aug. 1, 1908), in THE HOLMES-EINSTEIN LETTERS (James Bishop Peabody ed.,
1964); Letter from Oliver Wendell Holmes, Jr. to Lewis Einstein (Aug. 1, 1908), in
103 While Thurow may be the most prominent modern abolitionist, he is by no
means alone. For an extreme Law and Economics argument for the abolition of
the antitrust laws with libertarian and natural law overtones, see DOMINICK T.
ARMENTANO, ANTITRUST AND MONOPOLY: ANATOMY OF A POLICY FAILURE (2d ed.
1990); DOMINICK T. ARMENTANO, ANTITRUST POLICY: THE CASE FOR REPEAL (1986).
inflation which simultaneously plagued the United States in a particularly virulent fashion in the 1970s. Thurow argued that these problems are all essentially zero sum games whose solutions required making some segment of society worse off in order to make another segment better off. He suggested that the United States political system was ill-suited to addressing directly the distributional aspects of government economic policies and, instead, disguised those distributional choices in subsidies, regulations, tax policy, and protectionism.

Thurow proposed an explicit recognition of distributional aims and goals and that "all economic solutions require decisions about the distribution of income." In order to implement his own normative vision, Thurow proposed an abolition of protectionism, regulations and subsidies that prevent the deployment of assets to more productive means. He further suggested that the government take a more active role in promoting disinvestment in relatively unproductive sectors, directing investment in more productive economic sectors, and directly compensating those individuals made worse off by these choices.

The attack on antitrust is all the more curious since it appeared as a collateral issue in a chapter entitled "Spreading Rules and Regulations," and barely figured in any of his policy prescriptions. Thurow contended that the antitrust laws are outmoded in light of the realities of world competition and that the focus on price competition and big case structural antitrust litigation is ineffective or counterproductive. Thurow ultimately suggested abolishing international trade barriers as an alternative to continued reliance on an antitrust system that he characterizes as "not applicable in getting ready for the twenty-first century." Thurow subsequently has reiterated and expanded his attacks on antitrust, particularly in his more popular writings in newspapers and magazines, in which he tends to feature antitrust more prominently as a danger to the United States' prosperity.

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105 Id. at 213.
106 Id. at 144-50.
107 Id. at 210.
108 Id. at 125-27.
109 Id. at 145.
110 Lester C. Thurow, Should Institutional Investors Revolt?, FORTUNE, June 17,
Thurow's rhetoric initially appears to leave room for a narrow version of antitrust law not that far removed from that proposed by the Law and Economics movement. Thurow states in *The Zero Sum Society*:

> Given our modern economic environment, antitrust regulations should be stripped back to two basic propositions. The first would be a ban on predatory pricing. Large firms should not be allowed to drive small firms out of business by selectively lowering their prices in submarkets while they maintain high prices in other submarkets. The second proposition would be a ban on explicit or implicit cartels that share either markets or profits. Firms can grow by driving competitors out of business or by absorbing them, but they cannot agree not to compete with each other.  

Even this cramped and limited vision of the antitrust laws proves to be illusory. Thurow defines market power in such a way that it can never exist. Thurow contends that market power does not exist in markets for luxury goods where consumers are really choosing between an unlimited choice of items like vacation homes, swimming pools and Rolls Royces. On the opposite end of the economic spectrum, he also contends that no firm can earn supracompetitive profits for items like breakfast cereal, given the unlimited choices of breakfast alternatives. Finally, Thurow expansively defines potential competition as the ultimate check on market power through the activity of sophisticated financial conglomerates searching for excessive rates of return as the basis of their investment decisions.

Under such a system, there is no reason ever to take action under the antitrust laws, or to preserve them at all. Under Thurow's assumptions, no predatory conduct or collusive agreement would be likely to succeed, and no injury to consumers would ever ensue. In Thurow's world, the costs of antitrust
enforcement will inevitably outweigh any benefits, which, by his definition, are next to zero.\(^\text{115}\)

Regardless of the correctness of Thurow's analysis,\(^\text{116}\) he is certainly not alone in his antitrust views. The fear and loathing of antitrust has always been a staple of the business community. From the inception of the Sherman Act, the antitrust laws have been condemned on a variety of moral, economic, and libertarian grounds. Most recently, the business community has focused on the antitrust laws as an important cause of the lack of international "competitiveness" of United States firms, the supposed advantage of foreign firms without such restrictions on their behavior, and the trade deficit itself.\(^\text{117}\)

These views found favor in both the Reagan and Bush administrations. Among the most outspoken champions of this point of view have been the senior officials of the United States Department of Commerce and, in particular, the late Secretary of Commerce Malcolm Baldrige, who contended that the antitrust laws should be either reformed or eliminated in order to allow the United States to compete successfully in world markets.\(^\text{118}\)

\(^{115}\) Id. at 127.


\(^{117}\) Adams & Brock, supra note 116, at 1518-20.

\(^{118}\) See Malcolm Baldrige, Leading the Way to 2000, 10 BUS. AM. May 11, 1987, at 7 (supporting relaxation of antimerger laws); Study Shows Low-Value Imports Responsible for U.S. Telecommunications Trade Deficit, 7 Int'l Trade Rep. (BNA) 1309 (Aug. 22, 1990) (recommending reforming antitrust laws to assist U.S. competitiveness); High-Tech, Computer Literacy, Deregulation Called Crucial for U.S. Survival in Trade, 3 Int'l Trade Rep. (BNA) 825 (June 25, 1986) (Assistant Secretary of Commerce calling for revision of antitrust laws to promote capital formation and increased trade); Baldrige Says Trade Deficit Outlook for 1986 is "Clouded," Could Be About the Same as 1985, 3 Int'l Trade Rep. (BNA) 301 (Mar. 5, 1986) (Secretary of Commerce discussing need to make antitrust laws "compatible with today's world"); Administration Unveils Reform Package Aimed at Revised Import Relief, Foreign Trade Law, 3 Int'l Trade Rep. (BNA) 268 (Feb. 6, 1986); Customs-F.A.S. Deficit For November Expands $12.3 Billion, Commerce Department Reports, 3 Int'l Trade Rep. (BNA) 62 (Jan. 8, 1986) (Secretary of Commerce Baldrige urging updating antitrust laws); August Merchandise Trade Deficit Narrows as Imports Decline, Exports Hold Steady, 2 Int'l Trade Rep. (BNA) 1241 (Oct. 2, 1985) (Secretary of Commerce Baldrige requesting presidential review of out-
Congress also has traditionally expressed concern that the antitrust laws have hindered United States firms in achieving full technological innovation and true competitiveness in export markets. As early as 1918, Congress passed the Webb-Pomerene Act allowing United States to create export associations with their competitors to counter the perceived influence of foreign cartels and government-owned industries. But by 1982, Webb-Pomerene associations were perceived as an inadequate tool of export promotion. Congress modified and weakened the antitrust laws in two additional ways to assist United States companies engaged in international trade. Congress changed both the jurisdictional requirements for applying the antitrust laws to agreements relating to exports and created a certification procedure whereby firms could receive immunity from government prosecution and limitation of private suits to single damages, again in the belief that the antitrust laws were a principal cause of the inability to compete in international markets.

...
Similarly, Congress has relaxed the antitrust laws regarding joint ventures. Congress passed the National Cooperative Research Act of 1984 ("NCRA") at the request of the Reagan Administration to clarify further the antitrust laws. The Act mandates the application of a full rule-of-reason analysis to antitrust claims involving joint research and development. The Act also permits persons to register a research and development joint venture with the Department of Justice and the Federal Trade Commission in return for reducing the risk of treble damage liability. Conduct properly described in a registration is judged under the rule of reason. If the conduct in a registration is found to violate the rule of reason, the defendant is liable only for actual, rather than treble, damages. A prevailing defendant is entitled to an award of attorneys' fees if the claim was frivolous, unreasonable, without foundation, or in bad faith. Most recently, the NRCA has been amended to expand these protections to most production joint ventures as well.


125 While the Act defines joint research and development venture broadly, id. § 4301(b)(6), it is not applicable to production joint ventures and specifically excludes from its protection the exchange of information not reasonably required for research and development. Id. § 4301(b)(1). The Act further does not apply to any agreements regarding the production or marketing of the results of the joint venture other than the protection of the intellectual rights necessary to protect the research and development itself. Id. § 4301(b)(2).
126 Id. § 4305. A person wishing to register such an agreement with Department of Justice and the Federal Trade Commission must do so within ninety days of the formation of the joint venture. The notification must disclose the identities of the participants and the nature and objectives of the joint venture. The parties must file an additional notification within ninety days if the participants change. The parties may file additional notifications if the nature or membership of the joint venture is changed. Id. § 4305(a).

The government remains free to investigate or challenge a joint venture registered pursuant to the Act. A private party may sue for treble damages for unlawful conduct outside the scope of the registration. A private party also may sue for actual damages under the Act for conduct that is covered in the registration. The Justice Department and the Federal Trade Commission neither approve the joint venture nor certify that the notified conduct is covered by the Act. The protections of the Act are determined only if the joint venture is later challenged on antitrust grounds.

127 Id. § 4302.
128 Id. § 4303.
129 Id. § 4304 (Supp. 1994). The attorney fees section is not dependent on notification of the joint venture.
130 The National Cooperative Production Amendments of 1993, Pub. L. No. 103-
History suggests that during a period of rising trade deficits, this pattern of fragmentation will continue with the antitrust laws being progressively weakened to support a variety of claims, both specious and valid, regarding the necessities of the international business world and the "competitiveness" of the United States within that system. Holmes and the modern abolitionists share the uncertainty of bad economic times. Antitrust as villain typically appears at the nation's economic low points. These themes tend to fade away, but never disappear, in times of expansion when output-restricting agreements are most pernicious in terms of consumer welfare and economic opportunity, and other social goals appear less pressing.

CONCLUSION

Holmes's reputation in the antitrust arena stands in marked distinction to his towering reputation in other areas of the law. Antitrust casebooks feature his dissents primarily as historical oddities, and scholarly analysis until now has been scant. Professor Neely and I disagree about much regarding Justice Holmes and the antitrust laws. I am certainly not the first critic of the greatness of Justice Holmes's contribution to a particular area of the law.\textsuperscript{131} What is important is that Justice Holmes's work in antitrust finally is receiving its proper and long overdue attention.

His views regarding the inevitability and efficacy of combination and cooperation among competitors resonate in modern day arguments regarding Law and Economics, countervailing power, industrial policy, international trade, and modern world markets. Holmes's view of the specifics of antitrust doctrine may be idiosyncratic and out of touch with the mainstream, but the policy behind these decisions has a decidedly modern ring in times of economic uncertainty.

As the cycle of antitrust continues, undoubtedly such views eventually will retreat as the current trauma of the

\textsuperscript{131} See Waller, supra note 1, at 327; G. Edward White, The Rise and Fall of Justice Holmes, 39 U. Chi. L. Rev. 51 (1971); see also Milton Handler, Antitrust in Perspective: The Complementary Roles of Rule and Discretion 13-17 (1957).
economic system ends and the system comes to depend on principles of free competition and trade. However, such ideals will surface again as turbulent and changing times resurrect the call for size, cooperation, and a system with a focus on other values besides the enhancement of the competitive process.