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THE MODERN ANTITRUST RELEVANCE OF OLIVER WENDELL HOLMES

*Spencer Weber Waller**

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

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¹ Alfred S. Neely, "A Humbug Based on Economic Ignorance and Incompetence"—*Antitrust in the Eyes of Justice Holmes*, 1993 UTAH L. REV. 1; Spencer Weber Waller, *The Antitrust Philosophy of Justice Holmes*, 18 S. ILL. U. L.J. 283 (1994).

those movements,² Professor Neely ultimately concludes that Holmes had no coherent philosophy of his own in approaching antitrust cases.³ 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.⁴ 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.⁵

Professor Neely further alludes to Holmes's influence on modern movements in antitrust such as Law and Economics.⁶ 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,⁷ 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

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.⁸ 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*,⁹ Justice Holmes set forth a comprehensive, but limited, vision of the antitrust laws which he followed for his thirty years on the Supreme Court.¹⁰ 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

⁸ Neely, *supra* note 1, at 23-61; see also Waller, *supra* note 1, at 286-314.

⁹ 193 U.S. 197 (1904).

¹⁰ *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,"¹¹ that competition was "totally unimportant" to any part of the proper interpretation of the Sherman Act.¹²

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.¹³ 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.¹⁴ 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.¹⁵

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.¹⁶

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

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).

¹⁴ See *Mitchel v. Reynolds*, 24 Eng. Rep. 347 (K.B. 1711).

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

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.²⁴ 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 necessities 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.²⁵

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.²⁶

C. *Vegelahn v. Guntner*

Holmes wrote one of his most illuminating antitrust opinions while still serving on the Massachusetts Supreme Court.²⁷ In *Vegelahn v. Guntner*,²⁸ 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

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 Gramophone 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."²⁹

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."³⁰

Holmes extended this principle to all conflicts of "temporal interests," including that of labor and management.³¹ Holmes stated:

[I]t 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.³²

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*.³³ *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 *Vegeahn*, 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 *Vegeahn*, 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).

cific 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-

³⁴ See *Spectrum Sports, Inc., v. McQuillan*, 113 S. Ct. 884, 892 (1993).

³⁵ See Mark E. Roszkowski & Ralph Brubaker, *Attempted Monopolization: Reuniting a Doctrine Divorced from its Criminal Law Roots and the Policy of the Sherman Act*, 73 MARQ. L. REV. 355 (1990).

³⁶ See HOLMES, *THE COMMON LAW*, *supra* note 30, at 65-68; Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40 (1918); Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, 12 HARV. L. REV. 443 (1899); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897) [hereinafter Holmes, *The Path of the Law*]; Holmes, *Privilege, Malice and Intent*, *supra* note 30; Oliver Wendell Holmes, Jr., *Agency*, 4 HARV. L. REV. 345 (1891). See generally Patrick J. Kelley, *Holmes on the Supreme Judicial Court: The Theorist as Judge*, in *ESSAYS COMMEMORATING THE TRICENTENNIAL OF THE MASSACHUSETTS SUPREME JUDICIAL COURT* (Russell Osgood ed., 1993).

For a discussion of Holmes's development of the clear and present danger test and the evolution of his free speech jurisprudence out of the common law of attempt, see G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CAL. L. REV. 391 (1992).

³⁷ MORTON HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 110 (1992).

gree."³⁸ Holmes used similar language in *United States v. Winslow*.³⁹ "Until the one intent is nearer accomplishment . . . no intent could raise the conduct to the dignity of an attempt."⁴⁰ 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,⁴¹ 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"⁴² and "is most usefully understood by abandoning efforts to shape it into a consistent whole."⁴³ 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."⁴⁴

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.⁴⁵ Combination was the result of a

³⁸ *Northern Sec. Co. v. United States*, 193 U.S. 197, 409 (1904).

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).

⁴¹ HOLMES, *THE COMMON LAW*, *supra* note 30, at 56; Yosai Rogat, *Mr. Justice Holmes: Some Modern Views—The Judge as a Spectator*, 31 U. CHI. L. REV. 213, 215 (1964); Comment, *Holmes, Peirce and Legal Pragmatism*, 84 YALE L.J. 1123 (1975).

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.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 *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 *Northern Securities*. Similarly, there was no reason to apply the Sherman Act to vertical restrictions relating to the sale of property such as in *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.⁴⁷ Cartels and related agreements often were enforced as reasonable for the needs of the parties and society as a whole.⁴⁸ At the worst, British courts held unreasonable re-

⁴⁶ *Id.*

⁴⁷ See generally TONY FREYER, *REGULATING BIG BUSINESS: ANTITRUST IN GREAT BRITAIN AND AMERICA, 1880-1990* (1992).

⁴⁸ *Thorsten Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, 1894 A.C. 35.

straints unenforceable.⁴⁹ 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.⁵⁰ Holmes could view the direction taken by Great Britain, reported to him by long-time correspondent Sir Frederick Pollock,⁵¹ 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"⁵² and "uncertain barometer"⁵³ 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

⁴⁹ See FREYER, *supra* note 47, at 77-79.

⁵⁰ *Mogul S.S. Co. v. MacGregor, Gow & Co.*, 1892 A.C. 25.

⁵¹ See, e.g., Letter from Sir Frederick Pollock to Oliver Wendell Holmes, Jr. (Dec. 29, 1896), in 1 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND FREDERICK POLLOCK, 1874-1932, at 71-72 (Mark DeWolfe Howe ed., 1944) (discussing *Mogul S.S.*) [hereinafter HOLMES-POLLOCK LETTERS].

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.⁵⁴ 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 Act⁵⁵ also reveal little about its central meaning. Finally, Holmes's constitutional and interpretative opinions regarding state antitrust statutes⁵⁶ 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 Act⁵⁷ and the Federal Trade Commission Act,⁵⁸ 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).

⁵⁵ See *Federal Baseball Club, Inc. v. National League*, 259 U.S. 200 (1922); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

⁵⁶ See *McFarland v. American Sugar Ref. Co.*, 241 U.S. (1916); *International Harvester Co. v. Kentucky*, 234 U.S. 216 (1914); *Central Lumber Co. v. South Dakota*, 226 U.S. 157 (1912); *Standard Oil Co. v. Tennessee*, 217 U.S. 413 (1910); *Carroll v. Greenwich Ins. Co.*, 199 U.S. 401 (1905).

⁵⁷ 15 U.S.C. §§ 12, 13, 14-21, 22-27 (1973).

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 inflamed⁵⁹ 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,⁶⁰ 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

⁵⁹ *American Column & Lumber Co. v. United States*, 257 U.S. 377, 412 (1921) (Holmes, J., dissenting); *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 519-21 (1917) (Holmes dissenting and ignoring effect of passage of § 3 of the Clayton Act); Letter from Oliver Wendell Holmes, Jr. to Sir Frederick Pollock (Oct. 16, 1916), in 1 HOLMES-POLLOCK LETTERS, *supra* note 51, at 238 (antitrust cases as "things I loathe"); Letter from Oliver Wendell Holmes, Jr. to Sir Frederick Pollock (Nov. 17, 1914), in 1 HOLMES-POLLOCK LETTERS, *supra* note 51, at 223-24 (Sherman Act "absurd"); Letter from Oliver Wendell Holmes, Jr., to John Henry Wigmore (Nov. 1915), reprinted in Thomas A. Reed, *Holmes and the Paths of the Law*, 3 AM. J. LEGAL HISTORY, 273, 291 (1993) (persons who think universe is no longer predatory make him nauseous).

⁶⁰ 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.⁶¹ 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.⁶² 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 plausible efficiency 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.⁶³ As a result, Holmes often is claimed by key figures in the Law and Economics field as an important ancestor of the movement.⁶⁴ In-

⁶¹ Holmes, *The Path of the Law*, *supra* note 36, at 469.

⁶² RICHARD A. POSNER, *ANTITRUST LAW* (1976); *see also* ROBERT H. BORK, *THE ANTITRUST PARADOX* (1978).

⁶³ Even outside the field of antitrust, key judges within the Law and Economics movement praise and often cite with approval Holmes's views of the common law and the social forces that animate it. For example, Judge Richard Posner views Holmes as one of the "two greatest judges in our history," RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 292 (1988), and "the most illustrious figure in the history of American law." RICHARD A. POSNER, *THE ESSENTIAL HOLMES* at ix (1992). Many opinions also reflect such praise. *See, e.g.*, *International Union v. Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989); *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191 (7th Cir. 1987); *Northern Indiana Pub. Serv. Co. v. Carbon Country Coal Co.*, 799 F.2d 265 (7th Cir. 1986); *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370 (7th Cir. 1986); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986); *United Beverage Co. v. Indiana Alcoholic Beverage Comm'n*, 760 F.2d 155 (7th Cir. 1984); *Alliance to End Repression v. City of Chicago*, 733 F.2d 1187 (7th Cir. 1984); *Marrese v. American Acad. of Orthopedic Surgeons*, 726 F.2d 1150 (7th Cir. 1984); *Omega Satellite Prod. Co. v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982); *Marrese v. American Acad. of Orthopedic Surgeons*, 692 F.2d 1083 (7th Cir. 1982).

⁶⁴ On the other hand, as Professor Neely and others have noted, the same can be said for just about every important twentieth century jurisprudential movement that can find support in Holmes's vast body of opinions and writings. Neely, *supra*

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;⁶⁵ hard competition by efficient, large-scale enterprise at the expense of the less efficient, smaller competitor;⁶⁶ strengthening real, personal and intellectual property rights and permitting the owner of such rights to limit contractually rights conveyed by license;⁶⁷ and the toleration of vertical restraints given the seller's superior knowledge of marketing opportunities and the consumer's ability to substitute other goods and services if the vertical restrictions prove to be undesirable.⁶⁸

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.⁶⁹ 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.⁷⁰

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.

⁶⁹ David R. Barnhizer, *Prophets, Priests, and Power Blockers: Three Fundamental Roles of Judges and Legal Scholars in America*, 50 U. PITT. L. REV. 127 (1988); Victor H. Kramer, *The Supreme Court and Tying Arrangements: Antitrust as History*, 69 MINN. L. REV. 1013 (1985).

⁷⁰ William F. Baxter, *The Viability of the Vertical Restraints Doctrine*, 75 CAL. L. REV. 933 (1987); Robert Bork, *Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception*, 22 U. CHI. L. REV. 157 (1954); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984); Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135 (1984); Herbert Hovenkamp, *Chicago and Its Alternatives*, 1986 DUKE L.J. 1014, 1016; Richard A. Posner, *An Economic Theory of Criminal Law*, 85 COLUM. L. REV. 1193 (1985); Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981).

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.⁷¹ 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.⁷² He viewed the economy as the sum of consumption regardless of its distribution.⁷³ Holmes expressed these views repeatedly in both his judicial opinions⁷⁴ and his private correspondence.⁷⁵

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); Neil 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).

The language of the 1982, 1984 and 1992 Merger Guidelines, see Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, Apr. 2, 1992, 4 Trade Reg. Rep. (CCH) ¶ 13,104; 1984 U.S. Department of Justice Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,103; 1984 U.S. Department of Justice Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,104, the now-withdrawn 1985 Vertical Restraints Guidelines, see 1985 U.S. Department of Justice Vertical Restraint Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,105, and the faith in the creation of efficiency through vertical restraints, joint ventures, mergers and certain horizontal combinations all reflect a view very similar to Holmes's dissent in *Northern Sec. Co. v. United States*, 193 U.S. 197, 364 (1903).

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.⁷⁶ 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.⁷⁷ In so doing, Holmes's views regarding the inevitability and desirability of combination provide a his-

⁷⁶ *Id.* at 320; Letter from Oliver Wendell Holmes, Jr. to Sir Frederick Pollock (May 25, 1906), in 2 HOLMES-POLLOCK LETTERS, *supra* note 51, at 123-25; Letter from Oliver Wendell Holmes, Jr. to Sir Frederick Pollock (Aug. 10, 1908), in 2 HOLMES-POLLOCK LETTERS, *supra* note 51, at 141; Sheldon M. Novick, *Justice Holmes's Philosophy*, 70 WASH. U. L. REV. 703, 726 (1992), *citing* Letter from Oliver Wendell Holmes, Jr. to Felix Frankfurter (Aug. 10, 1916), in OLIVER WENDELL HOLMES JR. PAPERS, (on file with the Harvard Law School Library); see also Stephen R. Diamond, *Citizenship, Civilization, and Coercion: Justice Holmes on the Taxing Power*, in THE LEGACY OF OLIVER WENDELL HOLMES, JR. 115 (Robert Gordon ed., 1992). For a discussion of the shifts in nineteenth century mainstream economics and the evolution of the consensus views underlying the antitrust laws, see Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA L. REV. 1019 (1989).

⁷⁷ 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*.⁷⁸ Although the concept of countervailing power has wide-reaching consequences when applied to anti-trust 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 corporations⁷⁹ and the demise of the model of perfect competition as an accurate descriptive model of the economy or an automatic mechanism for ensuring prosperity.⁸⁰

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.⁸¹

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."⁸²

Galbraith contends that the creation and preservation of

⁷⁸ JOHN KENNETH GALBRAITH, *AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER* (rev. ed. 1956). The original edition of *AMERICAN CAPITALISM* appeared in 1952.

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.⁸³ Galbraith would limit antitrust policy to the attack on destructive "original" power rather than this beneficial countervailing power.⁸⁴

Galbraith continues the development of his model of countervailing power in *The New Industrial State*,⁸⁵ arguing that the antitrust laws are "anachronistic" and "at odds with reality."⁸⁶ 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.⁸⁷

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.⁸⁸ 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.⁸⁹

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-

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 anti-trust 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

⁹⁰ JOHN KENNETH GALBRAITH, *ECONOMICS AND THE PUBLIC PURPOSE* (1973).

⁹¹ *Id.* at 256.

⁹² 15 U.S.C. §§ 17 & 52 (1973).

⁹³ 7 U.S.C. §§ 291-92 (1980).

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,⁹⁵ 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.⁹⁶ 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.⁹⁷ While an increasing number of courts have been willing to entertain such arguments in both merger⁹⁸ and non-merger cases,⁹⁹ 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.¹⁰⁰ Theories of countervailing power have also surfaced in the various health care reform

⁹⁵ *Id.* at 133-34.

⁹⁶ 15 U.S.C. § 18 (1973).

⁹⁷ *United States v. Baker Hughes, Inc.*, 908 F.2d 981 (D.C. Cir. 1990).

⁹⁸ *Id.*; *United States v. Archer-Daniels-Midland Co.*, 781 F. Supp. 1400 (S.D. Iowa 1991); *United States v. Country Lake Foods, Inc.*, 754 F. Supp. 669 (D. Minn. 1990); *F.T.C. v. R.R. Donnelley & Sons Co.*, 1990-2 Trade Cas. (CCH) ¶ 69,239 (D.D.C. 1990); see also Mary Lou Steptoe, *The Power-Buyer Defense in Merger Cases*, 61 ANTITRUST L.J. 493 (1993).

⁹⁹ *United States v. Syufy Enter.*, 903 F.2d 659 (9th Cir. 1990); *National Cable Television Ass'n v. Broadcast Music, Inc.*, 772 F. Supp. 614 (D.D.C. 1991); *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 619 F. Supp. 441 (N.D. Cal. 1985); see also Michael S. Jacobs, *The New Sophistication in Antitrust*, 79 MINN. L. REV. (forthcoming 1994).

¹⁰⁰ 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 members of Congress.¹⁰¹ While such theories often are criticized and viewed as outside the antitrust mainstream, it is the theory 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 antitrust laws are a luxury that we can no longer afford in international trade matters. While the rationales advanced differ among the antitrust abolitionists, they all echo Holmes's characterization 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 skyrocketing 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 Comparative Analysis*, 27 J. HEALTH & HOSP. L. 15 (1994).

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 25, 1906), in 2 HOLMES-POLLOCK LETTERS, *supra* note 51, at 123-25; 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 THE HOLMES-EINSTEIN LETTERS, *supra*, at 39-41.

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).

¹⁰⁴ LESTER C. THUROW, THE ZERO SUM SOCIETY (1980).

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."¹⁰⁵ 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,"¹⁰⁶ and barely figured in any of his policy prescriptions.¹⁰⁷ 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.¹⁰⁸ 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."¹⁰⁹ 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.¹¹⁰

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.¹¹¹

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.¹¹² 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.¹¹³ 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.¹¹⁴

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

1991, at 131; Lester C. Thurow, *A World Class Economy: Getting Back in the Ring*, TECH. REV., Aug. 1985; Lester C. Thurow, *Is Our Economy Strangled by Our Laws*, INC., June 1981, at 16; Lester C. Thurow, *Let's Abolish the Antitrust Laws*, N.Y. TIMES, Oct. 19, 1980, § 3, at 2; *Thurow versus Gilder: A Debate*, NEWSWEEK, May 4, 1981, at 63; *Antitrust Grows UnPopular*, BUS. WK., Jan. 12, 1981, at 90.

¹¹¹ THUROW, *supra* note 104, at 150.

¹¹² *Id.* at 147.

¹¹³ *Id.*

¹¹⁴ *Id.* at 147-48.

enforcement will inevitably outweigh any benefits, which, by his definition, are next to zero.¹¹⁵

Regardless of the correctness of Thurow's analysis,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.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.¹¹⁸

¹¹⁵ *Id.* at 127.

¹¹⁶ See Walter Adams & James W. Brock, *The "New Learning" and the Euthanasia of Antitrust*, 74 CAL. L. REV. 1516 (1986); Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust-Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 937 (1987); Robert G. Harris & Lawrence A. Sullivan, *Horizontal Merger Policy: Promoting Competition and American Competitiveness*, 31 ANTITRUST BULL. 871 (1986).

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.¹¹⁹ But by 1982, Webb-Pomerene associations were perceived as an inadequate tool of export promotion.¹²⁰ 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 exports¹²¹ and created a certification procedure whereby firms could receive immunity from government prosecution and limitation of private suits to single damages,¹²² again in the belief that the antitrust laws were a principal cause of the inability to compete in international markets.¹²³

moded aspects of antitrust laws); *High Tech Frontier*, The MacNeil-Lehrer NewsHour, June 26, 1989, available in LEXIS, News Library Transcript File (statements of Secretary of Commerce Mosbacher recommending easing of antitrust laws to aid U.S. competitiveness in world markets); cf. White House Briefing, FED. NEWS SERV., Sept. 20, 1993, available in LEXIS, Curnws Library, Fednews File (discussing more nuanced modifications of antitrust law in Clinton Administration's plan for reinventing government) (available on Lexis).

¹¹⁹ 15 U.S.C. §§ 61-65 (1973).

¹²⁰ Webb-Pomerene Associations never achieved widespread acceptance in the marketplace in part because of the limitations in the scope of the immunity conferred by the Act. The Webb-Pomerene Act applies solely to the export of goods and not services. Also, the Act requires a degree of disclosure and scrutiny by the Federal Trade Commission, which deterred certain exporters. See *id.* §§ 61-65. The scope of Webb-Pomerene immunity has been further restricted by judicial interpretation. See, e.g., *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. Mass. 1950).

Two studies conducted by the Federal Trade Commission have confirmed the limited impact of the Webb-Pomerene Act. A 1977 study showed a gradually declining number of both registered and active associations. The vast majority of the associations were short-lived, had between 2 and 16 members and were shrinking in size. While Webb-Pomerene Associations accounted for 2.3% of export trade in 1962, they accounted for only 1.5% of export trade in 1976. *But see International Raw Materials, Ltd. v. Stauffer Chem. Co.*, 898 F.2d 946 (3d Cir. 1990) (granting immunity under Webb-Pomerene for joint operation of terminal facility), *on remand*, 767 F. Supp. 687 (E.D. Pa. 1991).

¹²¹ 15 U.S.C. § 6a (1973).

¹²² *Id.* § 4013.

¹²³ See Spencer Weber Waller, *The Failure of the Export Trading Company Pro-*

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.¹²⁴ The Act mandates the application of a full rule-of-reason analysis to antitrust claims involving joint research and development.¹²⁵ 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.¹²⁶ Conduct properly described in a registration is judged under the rule of reason.¹²⁷ 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.¹²⁸ A prevailing defendant is entitled to an award of attorneys' fees if the claim was frivolous, unreasonable, without foundation, or in bad faith.¹²⁹ Most recently, the NRCA has been amended to expand these protections to most production joint ventures as well.¹³⁰

gram, 17 N.C. J. INT'L L. & COMM. REG. 239 (1992).

¹²⁴ 15 U.S.C. §§ 4301-05 (Supp. 1994).

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 dependant 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.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

42, 107 Stat. 117.

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.

