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# TOWARD A POSITIVE ECONOMIC THEORY OF ANTITRUST

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*Most economists associate antitrust policy with the Sherman and Clayton Acts. Nonetheless, there is in England and America a much older body of antitrust law, namely, the common law of restraint of trade. This regulation, like language and markets, evolved over a long period of time. This article examines whether the rules that the common law courts developed can be explained by a hypothetical wish to maximize social wealth and concludes that many of them can be. The last part of the article outlines a theory of legal evolution.*

## 1. MADE AND GROWN ORDERS

Economists could learn more about antitrust if they were less dismissive of common law cases.<sup>1</sup> If a committee of economists was asked to design an institution for allocating society's resources, and, even more farfetched, if the committee knew nothing about markets, it seems doubtful that the final report would propose anything as efficient as the market itself. The greatest triumphs of economics have been positive, not normative. Although economists have a positive theory of markets and of industrial organization, they generally have no positive theory of antitrust.<sup>2</sup> They have mostly assumed that a good positive theory of industrial organization will yield a reliable normative theory of antitrust. After many years of work, some have begun to doubt that the one will necessarily yield the other.<sup>3</sup>

Friedrich Hayek coined the terms "grown order" and "spontaneous order" to describe "a self-generating or endogenous order." Biological systems, language, markets, and the common law are the examples he gave. In Hayek's frame, the opposing idea was a "made order," which is "an exogenous order or an arrangement [which] may . . . be described as a construction, an

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<sup>1</sup> See Stigler [1968].

<sup>2</sup> The beginnings of such a theory are in Stigler [1968].

<sup>3</sup> Easterbrook [1984] advises courts to exercise restraint in antitrust cases. See also Hovenkamp [1985]; Arthur [1986]; Easterbrook [1986].

artificial order.”<sup>4</sup> Examples are an order of battle (the deployment of troops or fighting ships), a building, and, most significant here, statute law. To Hayek these two types of human institutions implied different explanatory principles. If one wants to understand a made order, it truly does make sense to inquire into the design of the maker. What did Napoleon imagine when he deployed his Zouaves at the Battle of Waterloo? Or, what did Congress intend when it passed the Sherman Act? For grown orders, conversely, there is no designer. It would not make sense to ask, “What did the nation’s supermarkets intend by the recent increase in the price of potatoes?” or “What did the common law courts design when they upheld naked restraints of trade?” Hayek argues that the sensible thing for grown orders is to devise a positive theory that explains the observations. The theory of evolution explains much about biological systems, just as modern price theory explains markets. Neither posits a human design. There is already the beginning of a literature that treats the common law as a grown order.<sup>5</sup>

Placing the common law courts beyond criticism is controversial among legal scholars as well as among economists. Indeed, both groups seem equally fascinated with the project of critiquing judicial opinions. In many modern economic articles the questions are: Did the court have a sensible theory of what it was trying to accomplish, did it give sensible reasons in its opinion, did it rely on sound data, and was the court’s solution to the problem a reasonable one? The traditional type of legal scholarship also takes this form. The largest difference is that modern economists use consumer welfare as the standard for judging the answers, whereas traditional legal scholars use mercantilist economics. This common analytical approach was developed by the Legal Realist school, which dates from the early 1920s, and the Yale Law School, and is now completely integrated into American popular culture.<sup>6</sup>

Despite the ascendancy of Legal Realism in popular culture and traditional legal circles, there is an even older tradition—the Legal Science movement which had its heyday between 1870 and 1920, and is now thoroughly out of date.<sup>7</sup> For all their faults, exhaustively cataloged by generations of Realists, the old Legal Scientists saw the common law as a grown order.

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<sup>4</sup> See Hayek [1973].

<sup>5</sup> Leoni [1972]; Aranson [1988]; Liggio and Palmer [1988]; Stigler [1968].

<sup>6</sup> Two good descriptions of the Legal Realist approach are Lewellyn [1931] and Cohen [1935].

<sup>7</sup> See White [1985].

Unfortunately-or else they might have discovered law and economics<sup>8</sup>-the Legal Scientists believed that science was the discovery of timeless forms of beauty and logic that inhere in messy real-world phenomena.<sup>9</sup> The calculation of the length of a hypotenuse using the Pythagorean Theorem was the quintessential example of their theory of science. Quite consistently the Legal Scientists argued that a contract is accepted only when the acceptance is read by the other party, because that rule expresses the logical essence of contract.<sup>10</sup> Indeed, some Legal Scientists professed to see in this principle a beauty as timeless as that contained in the Pythagorean Theorem.

The crusty Legal Scientists never expected that mere judges would have an accurate idea of the true rule for which a body of cases stand. That was for scientists. Therefore, they uncovered the rule not by reading the opinions, but by dividing the results-like so many butterflies into groups of liability and no liability. They then inducted the “true rule” from the different results resting on different facts, just as an old-time lepidopterist might induct a taxonomy from looking at hundreds of different specimens. The inducted rule would explain the case results as an empirical fitting of hypothesis to data. “Believe what courts do, not what they say.” This was the motto of the Legal Science movement. In contrast, the Legal Realists were-and those still writing in the tradition still are-fascinated by the judicial opinion. Theirs is a world of critiquing the reasoning of the court and the various rules and tests contained within the court’s written opinion. They now have their own language. A rule, for instance, has “prongs.” The Legal Realists have always viewed the common law as a made order handcrafted by judges according to self-conscious designs. As the reader already knows, this view prevails in the popular culture where the political composition of the judiciary supposedly makes a big difference for how all types of cases will be decided.

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<sup>8</sup> Indeed, Oliver Wendell Holmes, Jr., an unconventional Legal Scientist who had a modern idea of science, almost did discover law and economics. He wrote:

As a step toward the ideal it seems to me that every lawyer ought to seek an understanding of economics. The present divorce between the schools of political economy and law seems *to* me an evidence of how much progress in philosophical study still remains to be made. In the present state of political economy, indeed, we come again upon history on a larger scale, but there we *are* called on to consider and weigh the ends of legislation, the means of attaining them, and the cost. We learn that for everything we have to give up something else, and we are taught to set the advantage we gain against the other advantage we lose, and to know what we are doing when we elect. Holmes [1897, 474].

<sup>9</sup> See Grey [1983].

<sup>10</sup> See Grey [1983].

The modern positive economic theory of the common law, for which William Landes and Richard Posner deserve so much credit, also pays more attention to case results than to the logic and reasonableness of opinions.<sup>11</sup> In this sense, it is a throwback to Legal Science. Nonetheless, the modern economic theory of tort (personal injury law) departs from Legal Science by framing hypotheses that would never occur to someone considering logic and beauty. The idea that the law of tort seeks to maximize social wealth turns out to be highly unappealing to the current generation of judges and to many others, but nonetheless the hypothesis explains actual case results better than any other positive theory. The wealth maximization theory is probably as unappealing as quantum theory, yet both should be judged by how well they explain the phenomena relative to competing theories. Indeed, something may be learned from the attempt. The common law cases are interesting economic puzzles. To study the common law of antitrust is to examine a grown order that is much more analogous to a market than many of the antitrust subjects that economists have hitherto examined. Modern scholars have already begun to reexamine these older cases, but not from an Austrian point of view.<sup>12</sup>

## II. THE CENTRALITY OF *TRANS-MISSOURI* AND *ADDYSTON PIPE*

Aside from the popularity of the Legal Realist approach, there may be a more substantial reason why economists have thought that the critique of judicial opinions is the most appropriate form of antitrust scholarship. In the United States for a hundred years, the most important source of antitrust law has been a federal statute—one of Hayek’s examples of a made order. The Sherman Act is nonetheless different from most statutes in that the courts have not stressed the legislative intent. One of the earliest cases concluded that the legislative history was so conflicting that it was not a good guide for judicial decisions.<sup>13</sup> For over a hundred years now the courts have developed a case law of the Sherman Act in much the same way as they started to develop a common law of tort eight hundred years ago. Although widely accepted theories of

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<sup>11</sup> See Landes and Posner [1987].

<sup>12</sup> See Hovenkamp [1985; 1988a; 1988b; 1989].

<sup>13</sup> *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290 (1897).

common law evolution do not exist,<sup>14</sup> a good guess is that areas of doctrine become better the longer the courts work on them. In any event, this would help explain why economists have more often found efficient tort rules than Sherman Act ones. Also, the Sherman Act cases themselves seem to be improving as time passes.<sup>15</sup>

In the same case in which the Supreme Court decided that the legislative history of the Sherman Act was not a valuable aid, the Court took an equally fateful step—indeed, more fateful if the ambiguity of the Congressional design created the opportunity to have a well-developed grown order as the nation’s antitrust policy. In the famous *Trans-Missouri* case a bare majority of five held that the common law cases on restraint of trade would not be precedents in Sherman Act cases.<sup>16</sup> As a body of common law, antitrust had an ancient history even by 1890, dating from at least the 15th century. In the sections that remain, I will argue that this choice to create a Sherman Act jurisprudence out of whole cloth, and in disregard of the legal rules that had by that time evolved, was unwise.

Simply because the courts decided to write their ideas about antitrust policy on a blank slate does not mean that economists have to follow suit. Indeed, there are good reasons to suppose that economists can achieve better results when they are more modest in their methodology. To give one example, when Ronald Coase wrote his *Problem of Social Cost*<sup>17</sup> he proposed that in situations of high transaction costs, which include practically the entire subject matter of tort, the courts should place liability on the cheaper cost avoider. If that was the railroad, it should be liable; if the farmer, then he. Although Coase does not press this point as strongly as his main one—that the liability rule does not matter when transaction costs are low the strict liability recommendation is a significant claim of his article. In the past thirty years, through a detailed examination of common law decisions, economists have found that the courts’ actual solution to the accident problem is more sophisticated than the simple strict liability rule that Coase proposed.<sup>18</sup> For instance, the courts’ actual rules about railroad fires—that mainstay of

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<sup>14</sup> See, e.g., Holmes [1899]; Rubin, [1977]; Priest [1977]; Elliott [1984].

<sup>15</sup> See, e.g., *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 US. 1 (1979).

<sup>16</sup> *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290 (1897).

<sup>17</sup> Coase [1960].

<sup>18</sup> See Landes and Posner [1987]; Shave11 [1987].

economic recommendations on tort liability-yield a more finely tuned regulation of strategic behavior than any rule proposed by an economist based on speculative thinking.<sup>19</sup> Economic theory progresses best when it works against a difficult puzzle, not when it tries to create utopian institutions out of whole cloth. Even the traditional economic scholarship of antitrust has sought puzzles and achieved much of its success by solving them. They are the puzzles of individual market arrangements-whether an arrangement promotes monopoly or efficiency. The purpose of this article is to suggest a new puzzle-that of the common law of restraint of trade.

If we adopt the hypothesis that economists have used in tort, we should examine the common law restraint of trade cases to see whether their results reflect rules that maximize social wealth. For a large number of these cases, there is no problem. The court has decided the case the same way that Aaron Director would have, and from a remarkably early date. There are also puzzling cases, however, in which the common law courts enforced what a Sherman Act court would still strike down as a “naked restraint.” The common law courts did not enforce all naked restraints; many they refused to enforce. The question is whether their decisions enforcing and refusing to enforce various types of naked restraints reveal any economically sensible pattern, that is, whether the pattern observed can be explained by the wealth maximization hypothesis. Although that problem will not be solved here, I will outline its contours and suggest some approaches.

If there is a positive economic theory of the common law, a significant part of it will be based on the work of George Bittlingmayer,<sup>20</sup> Lester Telser<sup>21</sup> and William Sharkey.<sup>22</sup> That theory says that competition is unworkable under some conditions; that under these conditions the attempt to compete leads to ruin. This theory, like most, also has thoughtful critics.<sup>23</sup> The now received economic and legal theories say that horizontal restraints can serve the consumer interest only when they are “ancillary” to some other arrangement. In basic terms, this means that business people can fix prices only when they are doing something else at the same time, for

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<sup>19</sup> See Grady [1988].

<sup>20</sup> Bittlingmayer, [1982; 1983; 1985; 1989].

<sup>21</sup> Telser [1978].

<sup>22</sup> Sharkey [1982].

<sup>23</sup> Doubts about the theory's usefulness for antitrust are expressed in Liebler [1985] and in Wiley [1987].

instance, merging their productive resources into one enterprise. The newer theory suggests that some naked restraints can improve economic welfare. Although the precise contours of this theory are still developing, one example is a price fix among members of a geographically concentrated extractive industry, where fixed costs are high and demand variable. The new theory suggests that unless these coal mines (or cement factories, or salt processing facilities) are allowed to fix prices, there will be a ruinous competition among them that will ultimately harm consumers. Among other things, this heretical idea suggests that the case that did most to build modern antitrust doctrine-*Addyston Pipe*<sup>24</sup>-was itself wrongly decided.

Judge (later Chief Justice) Taft, who wrote the *Addyston Pipe* opinion, developed his distinction between naked and ancillary restraints only by disregarding the holdings of a large number of restraint-of-trade cases that American and English courts had decided under the common law. In fact, he frankly admitted he was doing this. Taft criticized the common law cases that enforced naked restraints, saying that "there are some cases in which the courts ... have set sail on a sea of doubt, and have assumed the power to say ... how much restraint of competition is in the public interest, and how much is not." Even before Taft wrote, the Supreme Court in *Trans-Missouri* had rejected the idea of building the new Sherman Act doctrine based on analogies and distinctions drawn to the older common law cases. Nonetheless, Taft's opinion discarding as unsound large parts of the common law really sealed the fate of an enormous body of early judicial work that has since had practically no influence on antitrust policy. In the actual event, Taft's chosen sea has hardly been Lake Como. Perhaps the cases that Taft rejected contain the key to the conceptual problems that have afflicted Sherman Act jurisprudence from the beginning.<sup>25</sup>

### III. THE CASES JUDGE TAFT REJECTED

The first case mentioned by Judge Taft as having been improperly decided is *Wickens v. Evans*<sup>26</sup> In this case the plaintiff, the defendant, and a third party, who were trunk manufacturers,

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<sup>24</sup> *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898).

<sup>25</sup> The leading modern work on common law restraint of trade is Trebilcock [1986].

<sup>26</sup> 148 English Reports 1201 (1829).



divided England into three exclusive territories. In a very sensible decision, notwithstanding Taft's critique, the court stressed how easy it would be for someone to enter this market in the event that the parties used their arrangement as the means to charge a monopoly price. Indeed, Baron Hullock said that since entry costs were low, if the parties attempted to restrict output, the market would soon expand production beyond the competitive level. This would punish the cartelists.<sup>27</sup> The court also found that the agreement would produce cost savings by ensuring that the parties did not engage in a wasteful duplication of effort. Contrary to modern interpretations of the antitrust laws, there is no a priori reason for supposing that this type of agreement would diminish consumer welfare; indeed, given the low entry costs that the court stressed, there is every reason to believe that the territorial division would improve consumer welfare. If a single manufacturer of trunks would find it efficient to create three sales territories so as to avoid duplication of effort, the matter is not changed if three manufacturers facing easy entry do the same.<sup>28</sup>

A more troublesome part of the *Wickens* agreement, which the court also enforced, was that none of the parties would purchase any tea chest or chests, black or green, at a higher price than *6d.*, or *8d.* each in Oxford.<sup>29</sup> This arrangement would be struck down as a monopsonistic cartel under current Sherman Act practice, and indeed it is difficult to think of an efficiency reason for it. Nevertheless, it seems equally difficult to imagine a monopolistic motive. Could the three national dealers have possessed a monopsonistic power in any local market for used tea chests? Perhaps they all handled a particular type of chest, and competition among them to purchase the best chests of this type would have dissipated the rent from an advantage in selling them that they all possessed. By analogy, if a Loew's or a DeBeers finds it economic to regulate oversearching by its own buyers, it is certainly conceivable that buyers themselves could increase economic welfare by making their own arrangement.<sup>30</sup> A bid ceiling would certainly

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<sup>27</sup> B. Hullock, said, "If the brewers or distillers of London were to come to the agreement suggested, many other persons would soon be found to prevent the result anticipated; and the consequence would, perhaps, be that the public would obtain the articles they deal in at a cheaper rate. Upon the whole, then, I cannot distinguish this case from any of those cited, in which an agreement for a partial restraint of trade has been supported." *Ibid*, 1206.

<sup>28</sup> *See* Goldberg [1986].

<sup>29</sup> In the event of violation, each party agreed to pay £40 if he infringed on the others' territories and £10 if he paid more than the agreed amount for tea chests in Oxford.

<sup>30</sup> *See* Kenney and Klein [1983].

reduce search for the most exquisite and prized tea chests. If the supply of antique tea chests cannot be increased, much of the search for them in organized markets by competing buyers would be rent dissipating.

In *Collins v. Locke*<sup>31</sup> the plaintiffs, who were stevedores in Melbourne, divided up the stevedoring business by assigning each responsibility for ships entering the port consigned to various merchants. If the merchant refused to use the assigned stevedore, and instead used one of the other parties to the agreement, the stevedore who actually did the work would have pay the assigned stevedore an amount of compensation determined by arbitration. Also, if a ship entering the harbor was not consigned to any of the merchants named in the agreement, the parties agreed to take turns. The dispute arose when a ship entered the harbor consigned for one of the named merchants and then passed into the hands of undesignated merchants for the outward voyage. The agreement seemed to provide that none of the stevedores could load the ship. The Privy Council held that insofar as the agreement allocated the business to the various stevedore companies, it was not a restraint of trade; but it was a restraint insofar as it purported to deny all stevedores the right to load a ship controlled by an undesignated merchant.

The stevedore industry is one in which ruinous competition might be especially likely under the Bittlingmayer/Telser theory. Demand is highly uncertain depending on when ships arrive, and the output of the industry is impossible to store. Fixed costs are high. Given a sufficiently sporadic arrival of ships, much of the stevedores' cost could be paying workers to stand ready to unload ships on short notice. The price that recovered total cost would be significantly higher than variable cost. If it were to stay in business, each stevedore firm would have to understand that it would not cut price below a certain level. Doubtless, given their similar situations, the sellers must have shared this understanding with each other. Nonetheless, each buyer would also have a powerful incentive to get stevedoring done for the lowest amount possible for variable cost if it could find a stevedore willing to agree to it. Allocating particular ships to particular stevedores could have been the means of cutting off unproductive higgling in an environment in which both shipper and stevedore would otherwise have an incentive to engage in it. Output could be restricted only if the agreement failed to allocate all comers to one stevedore or another or if entry was difficult. The court's order refused to enforce the agreement

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<sup>31</sup> 4 L.R. App. Cas. 674 (PC. 1879).

to the extent that it accomplished the former result (which may have been inadvertent), and entry cannot have been hard. Although the fixed cost of holding oneself out to serve a sporadic demand may be large relative to the variable cost of performing actual jobs, it is an expense that practically anyone can assume. Thus, unless the government or some quasi-governmental authority was restricting the entry of new stevedores, it seems unlikely that the arrangement would disserve consumers.<sup>32</sup> Therefore, it again seems that the common law result was more defensible than Judge Taft acknowledged. If it is procompetitive for firms implicitly to understand with each other that they will not cut price below the competitive level, it is unclear why an explicit arrangement to that effect should be unlawful. Indeed, if entry barriers are low, or the market thick, why should any horizontal arrangement be unlawful?

A third case rejected by Judge Taft as a basis for the new Sherman Act doctrine was *Ontario Salt Co. v. Merchants Salt Co.*<sup>33</sup> The plaintiff and the defendant were two salt producers that had agreed to organize a common selling agency. The court approved the agreement and stressed that there were other salt producers in the same province that were not part of the agreement and that foreign competition was also a factor. The court also stressed that the selling agent could not restrict output because of the outside competition and also because its obligation was to sell the salt that the association members provided. Unlike in a modern agricultural marketing order, the agent apparently did not have the ability to destroy "surplus" salt or to allocate it to lower valued uses, as is the objective of federal milk orders, for instance. The bad light in which the *Appalachian Coals* case<sup>34</sup> now stands might make some lawyers and economists doubt that the *Ontario Salt* case was an ancillary restraint. Indeed, Judge Taft rejected that possibility. Nonetheless, if other salt producers were selling in the same area, a more reasonable explanation of the arrangement would be that it avoided duplication of effort. Since salt is such a homogeneous commodity, it is hard to see the informational benefit from having two salespeople call on the same customer. Moreover, if the two agreeing salt producers

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<sup>32</sup> The Stevedores also agreed not to aid in the establishment of other stevedore companies, but for similar reasons it seems dubious that they would have monopolized the capital or other scarce resources needed to start such an enterprise.

<sup>33</sup> 18 Grant Ch. 540 (Ont. 1871).

<sup>34</sup> *Appalachian Coals v. United States*, 288 U.S. 344 (1933). This was a similar arrangement that the Supreme Court upheld in a decision that now seems dubious to many.

truly were price takers, it would be wasteful for them independently to determine the market price at any given time.

*Kellogg v. Larkin*<sup>35</sup> was an early Wisconsin case in which the plaintiff was a miller who leased a warehouse to the defendant, who in turn covenanted to store wheat for not less than a prescribed amount, to hold himself ready to store wheat at all times, and not to store anyone else's except at the miller's direction. The plaintiff sued for rent, and the defendant pleaded that this arrangement was part of a broader one between the millers and warehousemen of Milwaukee whereby the parties agreed to deal exclusively with each other and the millers agreed not to integrate vertically into warehousing. The court held that the covenant was lawful on its face and that nothing in it suspended the warehouseman's obligation to pay rent. Taft criticized the decision, because he thought that it really was a scheme to create a monopoly.

The Wisconsin court itself took a different view of the case. First, the court noted that the case came up on demurrer, which challenges only the sufficiency of legal papers, and said that if a jury were convinced that the covenant in practice created a monopoly, they could find for the defendants. Second, it doubted that anyone had any monopoly power. Finally, it said that the millers were in competition with eastern ones and seem to have been trying to protect themselves from the warehousemen. Indeed, the court suggested that the arrangement was a vertical one seeking to regulate mutual chances for opportunistic behavior. Since the millers accounted for a large portion of the Milwaukee demand, they were collectively in a position to capture part of the value of the warehousemen's specialized wheat storing assets. The warehousemen on the other hand, by threatening to send their wheat east, could capture a significant portion of the value of the defendant's specialized wheat mills. The covenant probably amounted to a regulation of these symmetrical opportunities.<sup>36</sup> If, as Taft believed, the arrangement was designed to create a monopoly whose rents the parties shared, why was the warehouseman complaining? It seems more

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<sup>35</sup> 3 Wis. Pinney's 123 (1851).

<sup>36</sup> The court said "The obligors possessed large facilities as warehousemen, vessel and dock owners, for storing and freighting the produce which came to that market. Their interests led them to deal in that produce in the bulk, because so it would pay the most storage and the most freight. On the other hand, to give employment to their mills, the obligees sought the same produce for manufacture. Here their interests clashed. The contract before us is the result of a compromise of those conflicting interests. And if the argument needed any such beggarly support, I think it might well be asked if the public interest were not promoted, rather than prejudiced by an arrangement which saved to the wealth of our state, the earnings from the manufacture of so large a quantity of wheat as we may reasonably suppose to have been floured in the Milwaukee mills, and which, but for this arrangement, would have been floured in the mills of some eastern state." Ibid, 145.

probable that the lawsuit itself was still another opportunistic gambit in a long series.<sup>37</sup> The case resembles Ben Klein's analysis of the relations between Fisher Body and General Motors.<sup>38</sup> In the Wisconsin wheat arrangement, because of the number of players on both sides, neither side could expropriate the other for long, but in the absence of a private arrangement there could be persistent and costly attempts.

Judge Taft also criticized *Leslie v. Lorillard*.<sup>39</sup> In that case the plaintiff sued as a shareholder to set aside an agreement entered by two steamship companies whereby one promised to pay the other to cease doing business over the Norfolk to New York route. The plaintiff's own complaint suggests that the earlier competition between the parties had been cutthroat. Moreover, steamship services like stevedoring services cannot be stored, and fixed costs are high. The situation seems to be an especially likely one for competition to fail. Taft also criticized *Mogul Steamship Co. v. McGregor, Gow & Co.*,<sup>40</sup> another steamship case which others have exhaustively analyzed.

Finally, Taft criticized *Central Shade Roller Co. v. Cushman*<sup>41</sup> and *Gloucester Isinglass & Glue Co. v. Russia Cement Co.*<sup>42</sup> One case involved three manufacturers that held separate patents on roller shades, and which agreed among themselves to form a fourth corporation to sell them at a specified price. The defendant was a cheater that sold shades on its own account, and the Massachusetts court upheld the lawsuit against him. The separate patents could have been mutually blocking and the arrangement merely a method of apportioning the patent rents to the various parties. The glue case was similar. There the parties had jointly ventured to exploit an idea to turn fish skins into glue. Again, the arrangement went sour when the Patent Office refused to issue the expected patent. At this point the defendant refused to deliver any more fish skins to the plaintiff, and the plaintiff sued for specific performance, which the Massachusetts

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<sup>37</sup> A similar case was *Fairbank v. Newton*, 50 Wis. 628, 7 N.W. 543 (1880), where the court found it inconceivable that the challenged arrangement among grain buyers affected the price paid in Waupun, Wis. and on that basis upheld it.

<sup>38</sup> See Klein [1988]. Ronald Coase criticized Klein's theory in Cow [1988].

<sup>39</sup> 110 N.Y. 519, 18 N.E. 363 (1888).

<sup>40</sup> [1892] App. Cas. 25.

<sup>41</sup> 143 Mass. 353, 9 N.E. 629 (1887).

<sup>42</sup> 154 Mass. 92, 27 N.E. 1005 (1891).

court awarded. It noted that the contract "had no relation to an article of prime necessity or to staple commodities ordinarily bought and sold in the market" and analogized the facts on this basis to those of *Central Shade Roller Co.*

Taft noted that the common law courts tended to uphold naked restraint if the articles were not necessities, and he was critical of this rule.<sup>43</sup> Nonetheless, it makes more sense than he imagined. If some naked restraints might go beyond regulating what would otherwise be ruinous competition-and might not-a good rule of thumb would be to take a harder view of the cases involving commodities with inelastic demands or, in a word, necessities. By and large the circumstances that lead to ruinous competition have little to do with the elasticity of demand. Thus, if there is the possibility that an arrangement goes beyond preventing cutthroat competition, the cost of approving the arrangement is higher for goods with inelastic demands. To think of the opposite case of nonnecessities-fish glue and roller shades-it is cheap to approve the arrangement even if it has some tendency to create a monopoly. Any possible consumer welfare loss will be small. Consumers can easily substitute other goods.<sup>44</sup> The cases criticized by Judge Taft fall into three categories. They are: services, transportation, and extractive industries. The following sections briefly review some other cases from these industries.

#### IV. SERVICES

A case similar to *Collins v. Locke* is *Herriman v. Menzies*<sup>45</sup> in which the California Supreme Court upheld an arrangement among San Francisco stevedores that fixed prices for their services. The court found nothing to indicate that the parties had control, or anything like the control, of

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<sup>43</sup> In *Addyston*, Taft wrote: "We think the cases hereafter cited show that the common law rule against restraint of trade extends to all articles of merchandise, and that the introduction of such a distinction only furnishes another opportunity for courts to give effect to the varying economical opinions of its individual members. It might be difficult to say why it was any more important to prevent restraints of trade in beer, mineral water, leather cloth, and wire cloth than of trade in curtain shades or glue. However this may be, the cases do not touch the case at bar, because the same court, in *Telegraph Co. v. Crane*, 160 Mass. 50, 35 N.E. 98 [1893], held that fire-alarm telegraph instruments were articles of sufficient public necessity to render unreasonable restraints of trade in them void, and certainly such articles are not more necessary for public use than water, gas, and sewer pipe."

<sup>44</sup> Compare *India Bagging Ass'n v. B. Kock & Co.*, 14 La. AM. 168 (1859) (cotton bagging cartel struck down) with *Skrainka v. Sharringhausen* 8 Mo. App. 168 (1880) (common selling agency among struggling stone quarries upheld). The cases are discussed in Dewey [1955].

<sup>45</sup> 115 Cal. 16, 46 P. 730 (1896).

that business in San Francisco to an extent to enable them to exclude competition or control the price of labor or business. The court stressed that the stevedores' market share had not been proven, and it distinguished price-fixing arrangements in other industries that had been held unlawful only on larger market shares.

In *Bowen v. Murdoch Matheson*<sup>46</sup> the Massachusetts court upheld a boycott by a sailor's union of a particular shipping company that refused its terms. Sailors, like stevedores, must hold themselves in stockpile if there is to be a reasonable availability to a shipping industry that contracts on a spot basis. Under these circumstances, without a union, the sailors could be subject to opportunistic behavior by individual shipping companies during periods of slack demand. No individual shipping company would have an incentive to pay the availability premium, even though each would benefit from the greater availability that higher wages would yield. The alternative solution to this problem would be longer-term employment contracts, but that would involve an industry structure that might then have been uneconomic for other reasons. In any event, unless courts or law enforcement officials impede strike breakers, as they did later on, there is little risk that a union of sailors could increase the wage to a monopoly level.

## V. TRANSPORTATION

In *Hearn v. Griffin*,<sup>47</sup> a case decided in 1815, the court approved an arrangement by which two coachmasters running over the same route agreed to a common schedule in which each would be allocated different days on which to run and also agreed that neither would charge more than the other. Chief Justice Ellenborough stressed that the agreement provided for maximum prices. He asked counsel, "How can you contend that it is in restraint of trade; they are left at liberty to charge what they like, though not more than each other? and by the agreement, particular days and times for each to run in the week are fixed. This is merely a convenient mode of arranging two concerns which might otherwise ruin each other."<sup>48</sup> The common schedule was an efficient method of coordination. Nonetheless, it also conferred a monopoly power on each,

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<sup>46</sup> 96 Mass. 499 (1867).

<sup>47</sup> 2 Chitty 407 (K.B. 1815).

<sup>48</sup> *Ibid*, 408.

which the parties sought to regulate. Indeed, the case is economically similar to *Arizona v. Maricopa County Medical*<sup>49</sup> except the English court achieved a more understandable result. Once the coach masters efficiently coordinated the schedule, each might have been tempted to raise price to a level that could attract inefficient new entry. Each coach master would then know that he would gain the whole profit from a unilateral price increase, whereas the risk of (inefficient) new entry would be divided between both. There was an externality or sharecropper problem that the price maximum solved.<sup>50</sup> In trenchant reasoning that the Sherman Act courts did not replicate until 162 years later,<sup>51</sup> Lord Ellenborough stressed that the coach masters' agreement could not restrict output: "[T]here [is no] limitation as to size of the coach; the defendant may have a long coach." Ellenborough also suggested that entry was easy and that the possibility of new entry would in any event prevent the parties from charging a monopoly price. Dewey [1955] reviewed this case and correctly concluded that Ellenborough had "an uneven grasp of the theory of monopolistic competition."

The common law courts were divided in their approach to profit-pooling arrangements in transportation industries. English courts upheld many of these arrangements in the railroad industry<sup>52</sup> while American courts tended to strike them down.<sup>53</sup> The English courts stressed that unless railroads were able to pool profits over routes over which they competed, competition

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<sup>49</sup> 457 U.S. 332 (1982).

<sup>50</sup> From this point of view the case is analogous on its facts to *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (newspaper publisher set price maxima for deliverers given exclusive territories). Contrary to Lord Ellenborough's precedent, the US. Supreme Court held *Albrecht* to be a case of liability.

<sup>51</sup> The output restriction test became prominent in Sherman Act cases starting with *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

<sup>52</sup> E.g., *Shrewsbury & Birmingham Ry. v. London & North Western Ry.*, 17 Q.B. 652 (1851), *aff'd*, 6 H.L. Cas. 114 (1857); *Hare v. London & North Western Ry.*, 70 Eng. Rep. 978, 2 J. & H. 80 (Ch. 1861).

<sup>53</sup> *Texas & P. Ry. Co. v. Southern Pac. Ry. Co.*, 41 La. Ann. 970, 6 So. 888 (1889); *Cleveland, C.C. & I. Ry. v. Closser*, 126 Ind. 348, 26 N.E. 159 (1890); *Chicago, M. & St. P. Ry. v. Wabash, St. L. & P. Ry.*, 61 F. 993 (8th Cir. 1894). But see *Central Trust Co. v. Ohio Central Ry.*, 23 F. 306 (C.C.N.D. Ohio 1885), *aff'd*, 133 U.S. 83 (1890) (rail profit pooling arrangement upheld); *Nashua & L.R.R. v. Boston & L. Ry.*, 136 U.S. 356 (1890) (ditto).



would be ruinous.<sup>54</sup> The courts also upheld price-fixing agreements among steamship companies,<sup>55</sup> which also seem to be industries that can lend themselves to ruinous competition.

## VI. EXTRACTIVE INDUSTRIES

The English courts upheld horizontal arrangements in extractive industries on the ground that competition in such industries tended to be ruinous.<sup>56</sup> The American courts on the other hand tended to hold such arrangements to be void.<sup>57</sup>

American courts sometimes upheld covenants to prevent competition in a single mineral deposit. For instance, in *Lanyon u. Garden City Sand Co.*,<sup>58</sup> the defendant owned ninety acres of land suitable for extracting fire clay. He wished to develop a mine, but lacked the expertise. So, the defendant contracted with the plaintiff who would operate the mine. The plaintiff agreed to give his full attention to this mine in return for a share of the profits, and the defendant agreed not to open any other fire clay mines on his land. When the defendant did open another mine, the plaintiff sued, and the court upheld his right of action.

## VII. VOIDED NAKED RESTRAINTS

If there is to be a positive economic theory of antitrust, it must not only explain the restraints that the common law courts approved, but also distinguish the restraints that the common law courts voided.

In *Cousins v. Smith*,<sup>59</sup> the English Court of Chancery struck down a cartel among all of the fruit importers in London. Defendants, members of “The Fresh Fruit Club,” imported fruit by

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<sup>54</sup> *Hare v. London Q North Western Ry.*, 70 Eng. Rep. 978, 2 J. & H. 80 (Ch. 1861) (“mistaken notion that the public is benefited by putting two railway companies against each other till one is ruined”).

<sup>55</sup> *St. John River Steamship Co. v. Star Line Steamship*, 40 N.B. 405 (1911).

<sup>56</sup> *Cade v. Daly*, 1910 I.R. 306; *Attorney General v. Adelaide Steamship Co., Ltd.*, [1913] A.C. 781 (P.C. Aust.); *North Western Salt Co. v. Electrolytic Alkali Co.*, [1914] App. Cas. 461 (H.L.).

<sup>57</sup> *Detroit Salt Co. v. National Salt Co.*, 134 Mich. 103, 96 N.W. 1 (1903); *Getz Bros. & Co. v. Federal Salt Co.*, 147 Cal. 115, 81 P. 416 (1905) (salt agreement violated California statute and Sherman Act).

<sup>58</sup> 223 Ill. 616, 79 N.E. 313 (1906).

<sup>59</sup> 13 Ves. 542 [1807].

the shipload, a quantity that no single wholesaler could distribute itself. The Club would buy the fruit in bulk, and resell to Club members (and others) after “deducting a reasonable profit for their trouble.” The plaintiff was a disgruntled buyer. The court struck down the arrangement. The arrangement is distinguishable from many upheld, because fixed costs in the fruit importing business are not high, the demand is not stochastic, and fruit—though perishable—can be stored more cheaply than, say, stevedoring services. In short, there was little likelihood of ruinous competition in the absence of the defendant’s arrangement, and any efficiency consequences seemed outweighed by the potential for monopoly.

In *Crawford & Murray v. Wick*<sup>60</sup> the court struck down an arrangement by which a coal mine agreed to pressure its workers to purchase from the plaintiff’s store. The plaintiff was also the lessor of the coal mine. It seems inconceivable that this type of arrangement was necessary to avoid ruinous competition or that it produced any efficiency. More likely, it was a way of appropriating the coal miners, who probably faced lower effective wages than they expected when they moved to work at the coal mine.

In *Richardson v. Buhl*<sup>61</sup> the plaintiff sold his Richardson Match Co. to the Diamond Match Co. with the understanding that the latter would monopolize the friction match business. The plaintiff, like others who sold out, agreed that they would not re-enter the match business. There was a side agreement between the plaintiff and the defendants, two of the Diamond Match principals, whereby the defendants would hold the plaintiff’s Diamond Match stock as security for certain of the plaintiff’s debts. The plaintiff and the defendants were to divide net earnings on the stock. The amount of these net earnings depended on whether the amounts paid to buy off competitors were treated as expenses, as the defendants wanted and as was actually done, or as a charge against capital, as the plaintiff wanted. If these amounts were properly treated as an expense, the defendants owed the plaintiff money. The plaintiff brought a bill in equity to enjoin the defendants from selling the stock held by them as security. In refusing to enforce, the court said: “It is difficult to conceive of a monopoly which can affect a greater number of people, or one more extensive in its effect on the country than that of the Diamond Match Company. It was

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<sup>60</sup> 1 Ohio St. 190 (1868).

<sup>61</sup> 77 Mich. 632, 43 N.W. 1102 (1889).

to aid that company in its purposes, and in carrying out its object that the contract in this case was made between these parties, and which we are now asked to aid in enforcing.”<sup>62</sup>

A similar case is *Diamond Match Co. v. Roeber*<sup>63</sup> where the New York court refused to enforce an agreement made by a match company seller with the Diamond Match Co. that he would not, at any time within ninety-nine years, directly or indirectly engage in the manufacture or sale of friction matches, except in the capacity of agent or employee of Diamond. The Diamond Match consolidation went beyond what was necessary to prevent ruinous competition, and there do not seem to be large fixed costs in this industry.

In *Craft v. McConoughy*<sup>64</sup> the court refused to order an accounting for a cartel that was composed of all Chicago grain merchants. The court found that all the warehouses in the city, as well as all the suitable land for construction of warehouses, was under the combination’s control and that “the combination ... effectively excluded all opposition in the purchase, sale, storage and shipment of grain in that market.” The case seems distinguishable from *Kellogg v. Larkin* on two grounds. First, in *Craft* the court thought that the arrangement did create a substantial monopoly power. Second, there was no issue in *Craft*, as there had been in *Kellogg*, that the arrangement regulated opportunistic dealings.

In *Central Ohio Salt Co. v. Guthrie*,<sup>65</sup> the court struck down a salt cartel. The arrangement seems dissimilar from the one upheld in *Ontario Salt Co. v. Merchants Salt Co.*<sup>66</sup> for two reasons. First, there was no integration of production in the Ohio case. The Ohio sellers continued to sell their own salt, but at prices established by the cartel. Second, there was an obvious intent to restrict output in the *Central Ohio* arrangement, and the apparent ability to do so. In the *Ontario Salt* case the court found that the defendants lacked market power.

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<sup>62</sup> Ibid, 657-58.

<sup>63</sup> 106 N.Y. 473, 13 N.E. 419 (1887).

<sup>64</sup> 75 Ill. 346 (1875).

<sup>65</sup> 35 Ohio St. 666 (1880).

<sup>66</sup> 18 Grant Ch. 540 (Ont. 1871).

## VIII. COMMON LAW EVOLUTION

The common law courts started in the early days by voiding practically every arrangement that came before them as a colorable restraint of trade. Over time they became more selective in what they regarded as unlawful. The Sherman Act courts reinvented this same history. Two theories of common law evolution are now prevalent. One is that the common law slowly conforms itself to the social and political views of the judges currently in office.<sup>67</sup> This can be called the Legal Realist theory of evolution; it is the one that journalists and many other contemporary observers espouse. Another theory more common in the economic literature is that the judges do not count at all. They will be guided to efficiency over time by an invisible hand.<sup>68</sup> Under one variant, if inefficient results are appealed more often than efficient ones, as might be true if inefficient results impose larger incentives to seek a reversal, then even a random judging process might produce efficiency.<sup>69</sup> Certainly the idea of a random judging process is attractive to many economists.

The Legal Realist theory predicts that the common law is efficient in proportion to the degree in which judges embrace that value. Nonetheless, it seems clear that efficiency is more widespread in case law than it is popular among judges. On the other hand, the “differential stakes” theory proves too much. It suggests that all bodies of common law will be found efficient, which is also false. For instance, the efficiency norm has nothing very obvious to say about how abortion cases should be decided.

A third theory of common law evolution is suggested by the writing of Oliver Wendell Holmes [1899], though what I am about to explain is not exactly Holmes’s theory. There are two realms that come into conflict as a body of common law develops: the realm of precedent and the realm of social values. A common law case, once accepted as a precedent, operates as a metaphor that attracts all factually analogous cases to the same result either liability or no liability. A later case can come to a different result only if it is factually distinguishable from the earlier precedent or if the later case overrules the precedent, which courts disfavor. Thus, if the *Addyston Pipe* facts cannot be distinguished from the *Trans-Missouri* ones, the later court (the

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<sup>67</sup> This theory is implicit in Llewellyn [1931] and Cohen [1935].

<sup>68</sup> Rubin [1977].

<sup>69</sup> Priest [1977].

*Addyston Pipe* court) is under some obligation to decide the later case in the same way as the earlier one (liability). Precedent obviously creates more coherence in case law systems than would otherwise exist.

The second realm that bears on common law evolution is what Holmes called “social desire.”<sup>70</sup> His notion was that social desires come into conflict, which the case decision process resolves.<sup>71</sup> Economists and a few others sometimes strive to think of social desires as commensurate with each other—perhaps this was Holmes’s notion, too. In any event, many conflicting social desires do not seem commensurate in any meaningful sense. For instance, the social desire that women should freely be able to have abortions seems incommensurate with the other social desire that they should not. There is no numeraire to equate the two. Moreover, to theorize that this type of social dispute arises from high transaction costs is unhelpful. Therefore, rather than speak of social desire, we could speak of “social myth.” By “myth,” I mean some more or less widely shared normative aspiration about the social order. Obviously many myths are true. Some have suggested to me that myth is an inappropriate word, because it suggests a fairy tale. Nonetheless, for purposes of the study that I am proposing, I think that even economists have to shed some of the partisanship invested in their favorite stories, such as the story of efficiency. In any event, the efficiency story vies with many others in the general culture, for instance, stories about what will happen if the government protects small business or encourages recycling. Economists have a natural commitment to the efficiency myth, just as many Biblical scholars have a commitment to the creation myth told in the Book of Genesis. Nevertheless, both can learn something by looking at their favorite myths as competitors with others, and functional equivalents to them from some points of view. Indeed, it seems ironical that Biblical scholars should have adopted this broadminded view before economists. Perhaps economists’ natural concerns, like those of old-fashioned Biblical scholars, could be allayed by the knowledge that the efficiency myth ultimately does well against its contenders. Certainly the history of restraint of trade law indicates that it does. Another reason why I like the word “myth”

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<sup>70</sup> See Holmes [1899]; Elliott [1984].

<sup>71</sup> Holmes wrote: “... whenever a doubtful case arises, with certain analogies on one side and other analogies on the other, ... what really is before us is a conflict between two social desires, each of which seeks to extend its dominion over the case, and which cannot both have their way. The social question is which desire is strongest at the point of conflict.”  
Holmes [1899, 460-61].

is precisely because it does suggest a story of which fairy tales are an important type. My own experience with the government suggests that regulators have many stories in mind when they do their work and that reform occurs when the stories change. The reason that John McGee's scholarship on predatory pricing was influential was because he debunked the core story about that supposed phenomenon, namely Ida Tarbell's history of how the Standard Oil Co. grew.<sup>72</sup> Ronald Coase also meant to destroy influential social stories when he wrote his history of the lighthouse,<sup>73</sup> and even earlier when he described relations on the range.<sup>74</sup> After Coase's work, it would be quite appropriate for a policymaker to ask: Which is the ruling myth about lighthouses, the one told by Paul Samuelson or the one told by Ronald Coase? Like great storytellers before him, Professor Coase also hoped that the significance of his tale would go beyond its literal meaning.

When judges develop a new body of law, they have to decide which social myths are relevant to the problem at hand. This is an extraordinarily difficult problem. Suppose a copyright act has just been passed for the first time and you are a judge. What are the relevant myths to be advanced by the case decisions? Nonetheless, with the Sherman Act, from a very early date the judges settled on two myths as relevant: "help small businesspeople" and "help consumers." In *United States v. Trans-Missouri Freight Ass'n*,<sup>75</sup> Justice Peckham wrote that the rail cartel before the Court was worrisome because of its effect on small business: "Trade or commerce ... may ... be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings." To suppose that small businesspeople would be adversely affected by a cartel seems distinctly odd, which is a point that Robert Bork and others have stressed. The case shows the confusion that often surrounds courts' first struggles to understand the social myths that are germane to a new body of law. An early example of the consumer protection myth is in *Chicago Board of Trade v. United States*,<sup>76</sup> where Justice Brandeis thought that the call rule,

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<sup>72</sup> See McGee [1958].

<sup>73</sup> See Coase [1974].

<sup>74</sup> See Coase [1960].

<sup>75</sup> 166 U.S. 290 (1897).

<sup>76</sup> 246 U.S. 231 (1918).

which limited bidding, should be upheld because it reduced the risks of being a country grain dealer. The reduced risk supposedly made it possible for these grain dealers “to pay more to farmers without raising the price to consumers.” Again the logic is opaque, but the Court’s theoretical commitment to the consumer protection myth is clear enough. Maybe the opaque reasoning in these early Sherman Act cases came from the Court’s hope that both myths could be understood in some way that would make them consistent with each other. Then the Sherman Act case law could congeal quickly and unproblematically.

The Legal Realists recommended that judges should be explicit about their “policies,”-in my terms, their social myths and decide cases by direct reference to them, without bothering too much about precedent. In this view, judges are social engineers, the common law is a made order, and every day is a potential revolution. The Realists celebrated the careers of judges whose opinions supposedly wiped out hundreds, if not thousands, of old cases. Nevertheless, the Realists underestimated how much the case decision process refines social myths and ultimately yields social knowledge that is distinct from social myth. It seems doubtful that any social engineer could give an accurate account of the purposes achieved by the law of tort, contract, restraint of trade, or any equally ancient body of common law. Indeed, the proof of this proposition is the Realist corpus, which has often professed not to understand what the courts seek to accomplish with their legal rules. Indeed, this is the most familiar and salient theme of Legal Realism.

Perhaps some Chicagoans have almost become social engineers themselves when they have recommended that courts should embrace efficiency as the guiding policy for Sherman Act cases.<sup>77</sup> Taken to an extreme, this would be a distinctly non-Austrian conception, which would deny the analogy of case law to language and markets. Indeed, as already noted, the origin of this type of legal scholarship is not Hyde Park at all, but New Haven, Connecticut. Obviously there can be Legal Realists of the right, as well as of the left.

Probably the case that has done most to change Sherman Act case law is *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*<sup>78</sup> (which was itself a Clayton Act case). Brunswick had purchased a number of failing bowling alleys, and its acquisitions were challenged by the smaller unacquired

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<sup>77</sup> Other Chicagoans, more consistently with the Austrian view, have stressed that courts should be agnostic about arrangements that the theory does not explain. See Easterbrook [1984; 1986]. See also Arthur [1986].

<sup>78</sup> 429 U.S. 477 (1977).

bowling alleys operating in the same market. The plaintiff bowling alleys argued that the mergers left them as “pygmies” in a market newly dominated by a “giant.” Obviously their rhetoric sought to tap into the “help small businesspeople” myth. Nevertheless, Justice Thurgood Marshall, who never has been known for his commitment to the economist’s idea of efficiency, rejected their claim. Writing for the Court, he held that the small bowling alleys had no standing, because the injury that they suffered was not the type that the Clayton Act was designed to prevent. Paradoxically, given the authorship of the opinion, the case seems to be the end of the “help small business” myth in merger law, and I think much more generally. Perhaps the reason why the case proved so catastrophic is its facts made all too clear that protecting small businesspeople is in many antitrust contexts exactly the same as hurting consumers. In Holmes’s terms, one social desire proved stronger at the point of conflict. What are we to make of a body of knowledge whose pivotal turn was most directly accomplished by someone hostile to it? The Legal Realist theories of evolution give no account of this phenomenon and generally overstress the importance of individual judges’ politics, social backgrounds, race, and the like.

Many myth collisions, for instance the one in *Brown Shoe*,<sup>79</sup> leave the losing myth relatively unimpaired, but the *Pueblo Bowl-O-Mat* case virtually destroyed the losing myth. The collision of the two myths was certainly starker in *Pueblo Bowl-O-Mat* than in *Brown Shoe* where the Court could have more readily believed that helping small business would ultimately help consumers. No one could believe that in *Pueblo Bowl-O-Mat*.

Under the theory of case law just outlined, one would predict that ruling myths would become fewer the longer a body of law has developed. The longer the period of time, the greater the likelihood that myth-breaking cases, like *Pueblo Bowl-O-Mat*, will have destroyed some of the ones originally attractive to judges. Of course judges could invent new myths faster than old ones are destroyed, but it is exceedingly difficult to find a new myth that no one has thought to apply to an old legal problem. Also, the longer a body of precedent has been under development, the less the influence of any kind of undigested social myth.

In retrospect the federal courts seem to have behaved unwisely when they decided that common law precedents should not apply to Sherman Act cases. Perhaps they thought that they could find social myths more appropriate to the new industrial era than those that had been refined in the common law. Nevertheless, they could have considered the common law

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<sup>79</sup> *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1961).



precedents in the early days of the Act without abandoning their search for new social myths. In the actual event, no new myths have been discovered.

## **IX. CONCLUSION**

The common law courts evolved a complicated body of antitrust law about which there are no positive theories. Some of the arrangements that the common law courts upheld seem to be efficiency producing in the classic sense, though until quite recently they were not recognized as such by courts enforcing the Sherman Act, and many still have not been so recognized. For a subset of the arrangements upheld, the purpose was actually to regulate the competitive process. In the easiest of these cases, the purpose seems to have been to regulate an opportunistic relationship. The common law courts placed much greater stress on the magnitude of entry barriers and, apparently, the elasticity of demand than have courts enforcing the Sherman Act. This stress seems sensible because, as the common law courts said, the possibility of consumer loss-even from a naked restraint-is low when entry is easy. The same is true when demand is elastic.

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