

Winter 1988

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Recommended Citation

Paul H. Brietzke, *The Constitutionalization of Antitrust: Jefferson, Madison, Hamilton, and Thomas C. Arthur*, 22 Val. U. L. Rev. 275 (1988).

Available at: <https://scholar.valpo.edu/vulr/vol22/iss2/2>

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THE CONSTITUTIONALIZATION OF ANTITRUST: JEFFERSON, MADISON, HAMILTON, AND THOMAS C. ARTHUR

PAUL H. BRIETZKE*

In an influential 1986 article,¹ Thomas Arthur argues against a “constitutionalization” of antitrust. Courts have, he contends, ignored the clear legislative history of the Sherman Act,² instead treating this statute as a “blank check.” According to Arthur, judicial interpretations turned this Act into a “standardless delegation,” with courts constantly encroaching upon the legislative sphere while making antitrust policy “wholesale.” This setting “sail on a sea of doubt” makes litigation costly and its results uncertain. In such a climate, advising antitrust clients is equally speculative.³ Arthur’s analyses are powerful, in no small measure because he ignores the “multi-valued social/political approach” to antitrust that attracted a great deal of interest a few years ago.⁴ Instead, he pursues a unitary and internally consistent approach that is distinct from, yet broadly in agreement with, that of the Chicago School of law and economics.⁵ I will argue that,

* Professor of Law, Valparaiso University. This article is drawn from research for my forthcoming book, *THE IDEOLOGIES OF ANTITRUST*. I am grateful for an NEH Summer Grant under the late Bob Cover at Yale Law School and a Summer Research Grant from Valparaiso University. These grants made my research possible.

1. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CALIF. L. REV. 263 (1986).

2. 15 U.S.C. §§ 1-7 (1982).

3. Arthur, *supra* note 1, at 267-69, 277, 290, 297, 375. See also *id.* at 308: “[n]either precedent nor original legislative intent governed Sherman Act cases. What did govern was the Supreme Court’s view of the public interest.”

4. *Id.* at 320. See also, e.g., Flynn, *Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy*, 125 U. PA. L. REV. 1182 (1977). Cf. Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979); Schwartz, *Institutional Size and Individual Liberty: Authoritarian Aspects of Bigness*, 55 Nw. U.L. REV. 4 (1960).

5. Arthur, *supra* note 1, at 367: “Courts cannot pick and choose among noneconomic policy arguments, permitting some and condemning others, without engaging in inappropriate legislative policymaking.” (But why would a choice among contemporary economic policies be more appropriate?) Many of Arthur’s analyses revolve around his interpretations of *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898). These analyses echo Chicago School preoccupations. See also *id.* at 301, quoted *infra* text accompanying note 93. Compare this formulation with Judge Taft’s *Addyston*, 85 F. at 280, 282-83, quoted *in part, infra* text accompanying note 89. See also Arthur, *supra* note 1, at 346, 351 (discussing and applying R. BORK, *THE ANTITRUST PARADOX* 63, 129 (1978)).

once the politics of antitrust are taken into account, the constitutionalization of antitrust becomes desirable and even inevitable; we need an economic constitution that corresponds with our political one. This constitutionalization is very different from Arthur's, and I will first describe it in sections I-III of my article. I will then try to join issue with Arthur in sections IV-V, to offer a commentary on many of his thoughtful arguments.

I. JEFFERSON AND HAMILTON

Arthur's approach to his topic is historical, and a history of antitrust law should also be an economic history. Such a history would be simplistic if it reduced everything to a struggle between agrarian and industrial interests, between ideological Jeffersons and ideological Hamiltons. But a properly-qualified analysis of antitrust as based on the ideas of these worthies, highlights our awareness of living in a Hamiltonian world, while yearning for the Jeffersonian world that can be recaptured only in bits and pieces.⁶ The Jeffersonian desire is to diffuse wealth and power, to protect "small, local, responsible" businesses from "large, politically irresponsible, absentee-owned, and possibly corrupt giants."⁷ Judge Bork satirizes this attitude

6. C. CRAMER, *AMERICAN ENTERPRISE: FREE AND NOT SO FREE* 14 (1972); Scheiber, *Public Economic Policy and the American Legal System: Historical Perspectives*, 1980 *Wis. L. REV.* 1159, 1172. North versus South, capital versus labor, agriculture versus industry — each juxtaposition has an element of truth. But the central opposition of elements is more accurately stated as lying between a pre-industrial spirit and a cosmopolitan spirit: Jefferson, Calhoun, Henry George, and LaFollette versus Hamilton, Webster, Theodore Roosevelt, and the F.D.R. of the early New Deal. Bunzel, *The General Ideology of American Small Business*, 70 *POL. SCI. Q.* 87, 90 (1955).

According to R. DAHL & C. LINDBLOM, *POLITICS, ECONOMICS AND WELFARE* 231 (1976):

[W]e . . . have had to embrace two unreconciled ideologies, one for public declamation, the other for private use. The one is radically egalitarian and if pursued would demand a revolutionary transformation in the whole structure of our society; the other is radically hierarchical and its pursuit has in fact led to a revolutionary transformation of the whole agrarian structure of society that prevailed before the Civil War. [H]ierarchical relationships play in the lives of ordinary people a decisive part that Jefferson . . . or Jackson . . . would have said was irreconcilable with democracy and hardly distinguishable from tyranny.

Building on similar ideas, B. KARL, *THE UNEASY STATE: THE UNITED STATES FROM 1915 TO 1945*, 231 (1983), concludes that:

Our acceptance of the consequences of industrialism and technology no longer allows us to regard the agrarian past as an alternative, and perhaps heightens the agonies and the uncertainties. Americans still resist the controls that modern technology seems to require. We still rest our faith on some kind of populism, an inner sense of rightness of individual choice over scientific knowledge and community self-control over a benevolent management by the state [and, presumably, by large corporations].

7. I P. AREEDA & D. TURNER, *ANTITRUST LAW* § 109(b) (1978). See also C. KAYSER & D. TURNER, *ANTITRUST LAW* 17-18 (1965) (antitrust is "firmly anchored in Jeffersonian socio-political commitments"); Berthoff, *Independence and Enterprise: Small Business in the*

as a futile yearning for an "independent yeomanry,"⁸ a yearning that can readily be seen at work in the opinions of the elder Justice Harlan, Justices Brandeis and Douglas, Chief Justice Warren, and Judge Learned Hand, and in many arguments by government officials over the years.⁹

The Hamiltonian ideal found its modern organizational home in the large corporations organized after the Civil War and, later, in trade associations, in elite business schools and their ideology of "managerialism,"¹⁰

American Dream, in *SMALL BUSINESS IN AMERICAN LIFE* 28 (S. Bruchy ed. 1980) (Jeffersonian ideal is to have the largest feasible number of independent enterprises, bending their knee only to divine providence); Bunzel, *supra* note 6, at 99.

8. R. BORK, *supra* note 5, at 54.

9. See *FTC v. Proctor and Gamble Co.*, 386 U.S. 568 (1967) (Douglas, J.); *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) (Warren, C.J.); *Standard Oil of California v. United States*, 337 U.S. 293, 315 (1949) (Douglas J., dissenting); *American Column and Lumber Co. v. United States*, 257 U.S. 377, 413 (1921) (Brandeis, J., dissenting); *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 82 (1911) (Harlan, J., concurring in part and dissenting in part); *United States v. Aluminum Co. of America*, 148 F.2d 416, 427 (2d Cir. 1945) (L. Hand).

10. Managerialism records the effects of a "Managerial Revolution" in the running of large businesses. It applies business school techniques that in part rationalize and civilize the blatant predacity of the "robber barons"; most management decisions are turned into technical problems rather than deep value questions. Managerialism reinterprets laissez faire by adding cooperation, among nominal competitors and between business and government, to the list of business values: optimism, individualism, traditionalism, pragmatism, and materialism. That these are also the quintessentially American values testifies to this country's status as a "business civilization." Managerialism faces a dilemma while promoting the long-term business planning dictated by its professional canons, under competitive conditions which make such planning impossible or at least uncertain of result. This dilemma is usually resolved through the taming of markets that facilitates private planning but is frowned upon by antitrust officials. Business relations with government create tensions within managerialism, since it is difficult to buy into Leviathan for some purposes and not others. When cooperation succeeds and privileges and subsidies flow to a corporation from government, this is regarded as the ordinary state of affairs. The failure of cooperation (e.g., an antitrust prosecution) is seen to result in a government "intervention" which destroys business "confidence." Managerialism is in more or less constant battle with the bureaucratic ideology described *infra* at note 15. R. BELLAH, *HABITS OF THE HEART* 47 (1985); T. COCHRAN, *THE AMERICAN BUSINESS SYSTEM: A HISTORICAL PERSPECTIVE, 1900-1955*, at 3 (1957); H. COMMANGER, *THE AMERICAN MIND* 19 (1950); E. EPSTEIN, *THE CORPORATION IN AMERICAN POLITICS* 47, 53 (1969); H. LASKI, *AMERICAN DEMOCRACY*, 165, 170, 172, 186, 191 (1948); I. M. LERNER, *AMERICA AS A CIVILIZATION* 312 (1957); A. SHONFIELD, *MODERN CAPITALISM: THE CHANGING BALANCE OF PUBLIC AND PRIVATE POWER* 376 (1965); F. SUTTON, *THE AMERICAN BUSINESS CREED* 285-86, 327 (1956).

The most striking thing about managerialism is its persistence over time. Statements by its devotees from the 1920s could have been written by Milton Friedman or F.A. Hayek. Today, corporate ideologues write and speak as if the 1960s and 1970s never happened, drawing their inspiration from the 1950s that were, under Eisenhower, a coming to terms with the New Deal. Trade association ideologies of the 1920s were used almost intact by a big business defending against new antitrust attacks from the 1950s onwards. Perhaps the best short list of the benefits claimed for managerialism comes from Hawley, *Essay*, in *HERBERT HOOVER AND THE CRISIS OF AMERICAN CAPITALISM* 3, 5 (J. Huthmacher & W. Susman eds. 1973): "The

in Wall Street law firms, and most recently in the Chicago School of law and economics.¹¹ These organizations constantly argue for the Hamiltonian business boosterism that is typified by Herbert Hoover's tenure as Secretary of Commerce. According to this theory, through a selective laissez faire government is to help but not hinder business by curbing democratic threats to "property" and by fertilizing a national "efficiency" in economic activity. As Hamilton recommended, government socialized or partly subsidized many business risks, while most business benefits remained in private hands. In reality, however, business pursues its Hamiltonian ends pragmatically, by whatever means promise a quick profit, and frequently portrays this process as an unselective laissez faire that is more consistent with Jefferson's ideas.¹²

It took longer for the Jeffersonian ideal to find its modern organizational home. This lag, both a cause and effect of the early dominance of Hamiltonian business arguments, accounts for many characteristics of early antitrust decisions, characteristics that still influence us today.¹³ Jefferson's disciples sought a genuine political equality and believed in the power of reason to guide experiments in liberty. But they were handicapped in the pursuit of these ends by their belief as to means: the best government is the least government. Although Populists and Progressives, Jefferson's heirs, came to see governmental intervention, Hamiltonian means, as indispensable to progress, they were unable to organize this intervention effectively. The

outcome would be a technically innovative yet regulated, stable and secure system, rationalized and directed by competent, scientific experts, composed of efficient, small cooperating functional units, and filled with cooperative individuals conforming to group standards and meshing into the overall machine."

11. See *infra* notes 94, 116, 173 and accompanying text.

12. H. CROLY, *THE PROMISE OF AMERICAN LIFE* 34, 44 (1909); D. HINSHAW, *HERBERT HOOVER: AMERICAN QUAKER* 125-26 (1950); R. McCLOSKEY, *AMERICAN CONSERVATISM IN AN AGE OF ENTERPRISE* 23 (1951); G. STEINER, *GOVERNMENT'S ROLE IN ECONOMIC LIFE* 137, 145 (1953); Votaw, *Traditional Business Concepts v. Reality: The Role of the State in the Gap Between*, in *THE CORPORATE DILEMMA: TRADITIONAL VALUES VERSUS CONTEMPORARY PROBLEMS* 142, 143 (D. Votaw & S. Sethi eds. 1973); Beer, *The Idea of a Nation*, *THE NEW REPUBLIC*, July 19, & 26, 1982, at 23, 24. See C. CRAMER, *supra* note 6, at 406; C. DAHL & C. LINDBLOM, *supra* note 6, at 231, *quoted supra* at note 6; *id.* at 482; M. LERNER, *IDEAS ARE WEAPONS* 447 (1939) (Jeffersonian natural rights conscripted to serve the doctrine of vested rights that reduced state and federal regulatory powers over business); Scheiber, *supra* note 6, at 1162 (a study of state mercantilism in Ohio); F. SUTTON, *supra* note 10, at 190; Bunzell, *supra* note 6, at 99-100 (Hamiltonian drift away from the "independents" in proprietorship). *THE FEDERALIST* NO. 1, at 21 (A. Hamilton) (B. Wright ed. 1966) [hereinafter *THE FEDERALIST*], finds that, as a mercantilist, Hamilton favored government aid to manufacturing and banking, and opposed what would later be called humanitarian aid to the underprivileged.

13. See *infra* notes 84, 89, 93-94, 108, 114-15, 119-21, 130 and accompanying text. The critical features of the large corporation were in place by 1910, and perhaps as early as 1890, while an equivalent but "upstart" bureaucratization of government had to wait until late in the 1920s. This time lag was in part responsible for the early pro-business "tilt" in antitrust decisions.

New Deal accelerated the gradual infiltration of the Jeffersonian ideal with Hamiltonian means, allowing the ideal to find its methods and organizational power base in administrative agencies and elite law schools. Summarizing this process, Secretary of Agriculture Henry Wallace told Louisiana farmers in 1935 that the New Deal enabled ordinary people to fight back against Hamiltonians — with Hamiltonian weapons.¹⁴

The history of the New Deal is one of a drift from aggressive to more modest Hamiltonian means, a drift to an increased emphasis on antitrust as the sporadic and unintrusive regulatory scheme described below.¹⁵ Like an-

14. P. IRONS, *THE NEW DEAL LAWYERS* 181 (1982) (quoting Wallace). The New Deal's Agricultural Adjustment Administration "lawyers, spiritual and political heirs of the Jeffersonian tradition in their personal views . . . [appeared] before the Supreme Court to defend their statute wrapped in Hamilton's mantle." *Id.* See also Ekirch, *American Intellectual History*, in *READINGS IN AMERICAN INTELLECTUAL HISTORY* 2, 13 (C. MacFarland ed. 1970); I. HOROWITZ, *IDEOLOGY AND UTOPIA IN THE UNITED STATES: 1956-1976*, at 177 (1977); B. KARL, *supra* note 6, at 22, 120-21; J. ROHR, *TO RUN A CONSTITUTION: THE LEGITIMACY OF THE ADMINISTRATIVE STATE* 74 (1986) (for Woodrow Wilson, the desire to respond positively to the problems of complex society recalled the need for the Hamiltonian government described in *The Federalist No. 72* as "adequate to the exigencies of the union"); A. SHONFIELD, *supra* note 10, at 307 (quoting Schlesinger's *Age of Jackson*).

15. Like legislators, judges, and many business executives, government administrators portray themselves as disinterested servants of the people rather than of selfish private interests. Under their Welfare or Reform Liberalism, a Progressive idealism implemented during the New Deal and after, the market is in a more or less permanent need of state intervention. The regulatory schemes of government administrators will work well if they are designed well since, by analogy with many business school and law school teachings, the administration of antitrust, etc. enforcement is merely the instrumental application of a professional expertise and creativity to democratically-determined ends. R. BELLAH, *supra* note 10, at 212; J. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* 58 (1978); J. LANDIS, *THE ADMINISTRATIVE PROCESS* 12 (1938); E. REDFORD, *ADMINISTRATION OF NATIONAL ECONOMIC CONTROLS* 229-30, 232 (1952); J. ROHR, *supra* note 14, at 175, 184; Frug, *The Ideology of Bureaucracy in American Law*, 97 *HARV. L. REV.* 1277, 1298 (1984).

The foundation for an activist enforcement of antitrust was provided by L. BRANDEIS, *THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS* (O. Fraenkel ed. 1934) (first published prior to World War I), and by A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932) (the separation of ownership and control in the corporation). Thurmond Arnold quickly carried these ideas into practical effect when he was appointed to head the Antitrust Division of the Justice Department in 1938. Some of the conceptual tools for doing this were provided by Harvard law professors Felix Frankfurter and James Landis, by the Brownlow Report, and by the various reports of the Temporary National Economic Committee. Arnold and his successors did antitrust battle with the managerialism described *supra* at note 10. They had the immense advantage of arguing before two long-serving devotees of an administrative expertise, Justices Black and Douglas. The "curse of bigness" ideology, of an administrative expertise in detecting antitrust violations, was almost always successful in the courts from 1940 to 1975. In outline, the argument came to be that one or a few firms regularly raise prices by restricting output, through either monopoly or an explicit or tacit collusion. The excessive profits which are the object of this exercise reflect barriers to entry created by defendants (barriers against new producers entering the market), rather than efficiency or

titrust officials, business executives claim to pursue a mainstream Americanism consisting of moderately Jeffersonian ends through a few Jeffersonian and many Hamiltonian means.¹⁶ These rival claims give rise to what Clarence Cramer calls "the basic dilemma in economics as well as in politics: we want governmental action, yet we abhor it. We want a free economy, but we want certain regulations. Inevitably, it has been the abuse of freedoms that leads to the demands for controls . . ." ¹⁷ Reflected in this "dilemma" are the perennial questions of whether ostensibly democratic ends justify often rather elitist means, whether the means will subvert the ends, and how committed the parties are to announced ends in the first place.

II. MADISON'S SCHEME AND ITS WEAKNESSES

Constantly considering these perennial questions while refereeing anti-trust claims, courts have adopted rather Madisonian means for dealing with Cramer's dilemma. Less ideological than Jefferson or Hamilton, Madison pragmatically addressed the classic problem of liberal political theory: How can state neutrality be maintained in a world seen to be dominated by conflicting private and public claims? How, in other words, can government be kept at arm's length from both Hamilton's special interests of business and the threats of security and property posed by Jeffersonian democrats?

With some justification over the long history of antitrust, judges feel

economies of scale. Fewer products sold at higher prices increase unemployment and inflationary pressures, and much business activity thus results in a loss in public welfare. M. DIMOCK & H. HYDE, BUREAUCRACY AND TRUSTEESHIP IN LARGE CORPORATIONS 109 (1940) (Temporary National Economic Committee Monograph No. 11); Edwards, *Large Enterprises and Public Policy*, in PUBLIC POLICY TOWARD COMPETITION 9, 12-13 (1962); Joffe, *Beyond Antitrust*, 28 CATH. U.L. REV. 1, 59-63 (1978); McCraw, *Regulation in America*, 49 BUS. HIST. REV. 159, 162 (1975); Schwartz, Book Review, *On the Uses of Economics: A Review of the Antitrust Treatises*, 128 U. PA. L. REV. 244, 244-45 (1979); B. KARL, *supra* note 6, at 121-22; Mason, *Introduction*, in THE CORPORATION IN MODERN SOCIETY 1, 16 (E. Mason, ed. 1970); J. ROHR, *supra* note 14, at 134-57. See also REPORT OF THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT (Brownlow Report), 74th Cong., 2d Sess. (1937).

16. R. HEILBRONER, THE ECONOMIC TRANSFORMATION OF AMERICA 168 (1977); R. HUBER, THE AMERICAN IDEA OF SUCCESS 386 (1971); J. HURST, LAW AND MARKETS IN UNITED STATES HISTORY: DIFFERENT MODES OF BARGAINING AMONG INTERESTS 14-15 (1982) [hereinafter J. HURST, LAW AND MARKETS IN UNITED STATES HISTORY]; I M. LERNER, *supra* note 10, at 409-10 (discussing Herbert Croly's definition, presumably from 1909, of an American "welfare state" pursuing Jeffersonian ends through Hamiltonian means, so as to respond to the felt exigencies of industrial society); Samuelson, *Economic Thought and the New Industrialism*, in PATHS OF AMERICAN THOUGHT 219, 226-27 (A. Schlesinger & M. White eds. 1963); Beer, *supra* note 12, at 24-25; Scheiber, *supra* note 6, at 1161.

17. C. CRAMER, *supra* note 6, at 406. One cause of this "dilemma" is that "[b]usinessmen, from Hamilton on, have never opposed government aid to business, only government hindrance in business affairs." *Id.* (emphasis in original).

themselves less likely to abuse power than do private or public bureaucrats. The federal judiciary thus appointed itself the balance wheel of antitrust, inclining first to one side and then another to counteract ambition with ambition while maintaining what particular judges perceive as a state neutrality. However, judges' perceptions change from time to time, and this has a significant effect on the drift of antitrust policy. A partly instinctive judicial choice of the middle ground creates a self-maintaining process which keeps factions occupied with playing the antitrust game, which moderates the extremities of partisanship that might otherwise endanger democratic processes.¹⁸ This judicial choice of a middle ground is evident in the antitrust opinions of Justice McReynolds, whose perceptions of state neutrality are staging a bit of a comeback, and in the antitrust opinions of the Burger Court (1970-1987).¹⁹

By adopting a middle ground, courts sometimes keep Hamiltonians and Jeffersonians from becoming judges in their own cause. Courts thus reduce the likelihood that judgments will be biased and integrity corrupted, as was Madison's expressed hope in *The Federalist No. 10*. A shrewd and experienced political manipulator, Madison justified a scheme which survives today under very different circumstances. Summarized briefly, the goal of *The Federalist No. 10* is to legitimate government activity by eliminating some of the opportunities for "instability, injustice, and confusion." The chief functions of Madison's scheme are to "break and control" the vice of faction.²⁰ According to Madison, specialization within government creates the rivalry among interests that helps keep government too weak to

18. THE FEDERALIST NO. 10, *supra* note 12, at 134 (J. Madison); *id.* at 132 (justice holds the balance between debtors and creditors, and over questions of encouraging manufacturing and apportioning taxes); Klare, *Judicial Deradicalization of the Wagner Act and the Origins of the Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 310 (1978). See also C. ARGYRIS, UNDERSTANDING ORGANIZATIONAL BEHAVIOR 156 (1960); T. ARNOLD, THE BOTTLENECKS OF BUSINESS 116 (1940) ("[t]he pull against a balance wheel is always greatest when the balance wheel is most needed."); K. DOLBEARE & P. DOLBEARE, AMERICAN IDEOLOGIES 45 (1971); M. LERNER, *supra* note 12, at 432 n.11 (citing Charles Beard, Madison's "awareness of the relation between economic interest and political action was striking"); A. SHONFIELD, *supra* note 10, at 334 (quoting Edward Mason, relations between governmental and business leadership are more distant in the U.S. than in France, Holland, or Britain); *infra* note 60 and accompanying text. Quoting Walton Hamilton's description of the Sherman Act, T. ARNOLD, *supra*, at 138, notes that: "How to grant power and withhold discretion is an age-old enigma, just as likely to be solved as squaring the circle. . . . It was James Madison, the father of the Constitution — not Karl Marx — who taught that the function of policy is to obtain a just balance among the interests which make up the commonwealth."

19. See *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 (1930) (McReynolds, J.); *United States v. American Linseed Oil Co.*, 262 U.S. 371 (1923) (McReynolds, J.); P. BRIETZKE, THE IDEOLOGIES OF ANTITRUST chs. 5A, 5B, 8B, 8C (forthcoming). See also *infra* notes 27, 129 and accompanying text.

20. THE FEDERALIST NO. 10, *supra* note 12, at 129-32 (J. Madison).

abuse rights. Further, he feels that factions, what we now call single-interest groups, are inevitable because of self-love, fallible reasons, and the unequal distribution of property. Madison thus takes advantage of the American fondness, echoed by the Chicago School of law and economics, for explaining almost all actions in terms of self-interest, that undemanding standard that is easy to understand because it defers to human weaknesses.²¹

For Madison, factions are organized around a common passion or interest adverse to what *The Federalist No. 10* calls "the permanent and aggregate interests of the community."²² Accordingly, the *causes* of faction cannot be eliminated without enforcing the uniformity of opinion and property-holding that destroys liberty. (This is the result many business critics ascribe to an activist enforcement of antitrust laws.) Therefore, the best that Madison's government can do is to control *effects* by rendering factions "unable to concert and carry into effect schemes of oppression,"²³ suggesting Madison's anticipation of the need for something like Section 1 of the Sherman Act.²⁴ Madison's creativity lies in his desire to channel passions through the very same instruments that excite them. Like the anti-

21. *Id.*; G. CAVANAUGH, AMERICAN BUSINESS VALUES IN TRANSITION 8 (1976); L. EISENSTEIN, THE IDEOLOGUES OF TAXATION 7 (1961); E. EPSTEIN, *supra* note 10, at 293; P. NONET & P. SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW 42 (1978); D. TRUMAN, THE GOVERNMENTAL PROCESS 5 (1960). *But see also* United States v. Topco Assocs., Inc., 405 U.S. 596 (1972) (Marshall, J.):

If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this too is a decision that must be made by Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decision making.

Id. at 611.

Madison's vice of faction/pluralism/natural balance wheel "model" enables us to see the full breadth and depth of interest group activity in a fluid, predominantly middle-class, society. It is thus a much richer model than Marx's or the muckraking indictments in, e.g., "the 'world according to Nader.'" P. NAVARRO, THE POLICY GAME: HOW SPECIAL INTERESTS AND IDEOLOGUES ARE STEALING AMERICA 3-6 (1984) (discussing ideas of Arthur Bentley and David Truman). *See also* M. OLSON, THE LOGIC OF COLLECTIVE ACTION 124 (1965) (Truman's and Bentley's belief that group equilibrium is just and otherwise desirable).

Madison was preoccupied with instability and injustice in Greek city-states, medieval cities, and early modern Europe. The scarcity of *The Federalist* discussions of the general welfare and the meaning of justice does not support the conclusion that its authors advocated laissez faire or rugged American individualism. THE FEDERALIST NO. 1, *supra* note 12, at 20-21, 31 (A. Hamilton). When factions oppress the weak, "anarchy may as truly be said to reign as in a state of nature." Avoiding this anarchy leads factions to submit to a government which protects the weak as well as themselves, and to participate in large coalitions only if these favor principles of justice. THE FEDERALIST NO. 51, *supra* note 12, at 358-59 (J. Madison).

22. THE FEDERALIST NO. 10, *supra* note 12, at 130 (J. Madison).

23. *Id.* at 133.

24. 15 U.S.C. § 1 (1982). *See infra* note 82.

trust laws, Madison's scheme retains a broad right to organize while regulating some organizational means and ends. Starting or joining an organization thus became a popular way to augment the individual's power for the playing of factional games.²⁵

In Madison's time, liberty of business as well as of conscience thrived on the divided authority an atomistic competition afforded. Through much of the nineteenth century, Jefferson's and Jackson's disciples — farmers and small town businessmen — mobilized fury against Hamiltonian organizations that violated their expectations of a diffusion of property and power. Yet Madison's "classic liberal notion of a society of free, equal, competing individuals" was gradually shoved aside by the emerging reality of free, often unequal, and ferociously competing interest groups.²⁶ The Civil War shook our faith in a just and self-correcting harmony of interests. State and local rivalries abated more quickly in business than in politics. A national and, later, a multinational economic system came to straddle a decentral-ized political order. Madison could not foresee the technological and organi-zational imperatives that began to press for political recognition and re-ward. Until recently, America was virtually the only country to achieve democracy before passing over the economic development "hump" and, late in the nineteenth century, many saw this hump as putting democracy at risk. Madison's political system was unable to absorb so large an economic

25. THE FEDERALIST NO. 10, *supra* note 12, at 130-33 (J. Madison); *id.* at 358 (aim at "so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable"); Cavanaugh, *supra* note 21, at 8 (citing Tocqueville).

Wills traces a crucial Madisonian insight back to David Hume:

Honour is a great check upon mankind; But where a considerable body of men act together, this check is, in a great measure, removed, since a man is sure to be approved of by his own party, for what promotes the common interest; and he soon learns to despise the clamours of adversaries.

G. WILLS, EXPLAINING AMERICA: THE FEDERALIST 190-91 (1981) (quoting Hume's "On the Independency of Parliament"). The values to be protected by *The Federalist No. 10* exist in a "density of weave" which is "disjunctive yet correlative, inclusive yet distinguishable — private right and common good," public and private faith and liberty, rules of justice and rights of the minor party, distrust of public engagements and alarm for private rights, etc. *Id.* at 257.

26. H. DRUCKER, THE POLITICAL USES OF IDEOLOGY 129 (1974). See also E. EPSTEIN, *supra* note 10, at 302; Hofstadter, *What Happened to the Antitrust Movement?*, in THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 188, 196 (1965); Kirshen, *The Relation Between Liberty and Legal Duty*, 35 MAINE BULL. 27, 28 (1932).

Madison made an unstated assumption that he was describing and coping with autonomous individuals; no provision was made for pluralistic social groups. A. MILLER, DEMOCRATIC DICTATORSHIP: THE EMERGENT CONSTITUTION OF CONTROL 144 (1981). The criticisms of Madison's system in the text notwithstanding, democratic procedures are still fairly effective, and there is the appearance and often the reality of multiple access points to the political system and of a regional, ethnic, cultural, and economic diversity. See J. SCHNEIDER, IDEOLOGICAL COALITIONS IN CONGRESS 21 (1979).

transformation quickly enough to prevent concentrations of power.²⁷

Because large corporations have the advantages of organization, wealth with which to finance pressures on government, patronage, influence over the mass media, and a backlog of claimed successes in performing public functions, they frequently had, and continue to have, their way. There were few credible challenges to business power until the Depression, and reforms were kept within the safe confines of business ideals such as competition. In 1938, James Landis argued that rates, wages, conditions, and the resolution of employee and public grievances are:

in fact governance. . . . [B]ecause of the rapidity and directness of their execution, the penalties that private management can impose possess a coercive force and effect that government even with its threat of incarceration cannot equal. [United States Steel] either by itself or in combination . . . can virtually determine what policies with reference to production and sale of steel we shall pursue as a nation.²⁸

Worried about factions arising from an unequal ability to *acquire* property, Madison and many others did not attend to the inequality of *control* over property that confers much greater actual power through such organizations as corporations and administrative agencies. Even if this power is not exercised, or is exercised in ways consistent with the public interest, fears of a future malevolence remain. In *The Federalist No. 51*, Madison terms this state of affairs the “precarious security” offered by “hereditary or self-appointed authority”;²⁹ the antitrust analogue seeks to curb

27. Hofstadter, *supra* note 26, at 196; A. MILLER, *supra* note 26, at 69-148; K. DE SCHWEINITZ, *INDUSTRY AND DEMOCRACY: ECONOMIC NECESSITIES AND POLITICAL POSSIBILITIES* 142 (1964). The “happy consequence” Madison assumed in *The Federalist No. 10*, that small groups will arise naturally but fail to coalesce, was regularly disproved. P. STEINBERGER, *IDEOLOGY AND THE URBAN CRISIS* 106 (1985). In the 1920s, the economist Walton Hamilton remarked on the paradox of a diffusion of political power combined with a concentration of wealth and economic prestige. This combination subordinated public welfare to organized wealth and the drive to exploit technology and economies of scale. 5 J. DORFMAN, *THE ECONOMIC MIND IN AMERICAN CIVILIZATION* 435-36 (1951) (quoting Hamilton).

28. J. LANDIS, *supra* note 15, at 11. See also E. EPSTEIN, *supra* note 10, at 191, 212; J. HURST, *LAW AND MARKETS IN UNITED STATES HISTORY*, *supra* note 16, at 118; E. KEARNY, THURMOND ARNOLD, *SOCIAL CRITIC: THE SATIRICAL CHALLENGE TO ORTHODOXY* 82 (1970); H. LASKI, *supra* note 10; at 389; Schwartz, *supra* note 4, at 4. Statements analogous to Landis’ can also be made about government agencies:

Strengthened by the dependence of government on their skills and allegiance, often removed from direct civilian control, these agencies acquire the power and the opportunity to further their own organizational interests. . . . In effect, the state shares its “monopolously” with the coercive apparatus it has created.

P. NONET & P. SELZNICK, *supra* note 21, at 42-43.

29. THE FEDERALIST NO. 51, *supra* note 12, at 358 (J. Madison). See also G. KOLKO, *WEALTH AND POWER IN AMERICA* 68-69 (1962) (even if managers “act benevolently toward

economic power in its "incipiency." Dissenting in *United States v. Columbia Steel*³⁰ in 1948, Justice Douglas put it thusly:

The philosophy of the Sherman Act is that . . . [i]ndustrialized power should be . . . scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men. The fact that they are not vicious men but respectable and social-minded is irrelevant.³¹

The checks and balances of federalism and a separation of powers leave governmental power fragmented, difficult to mobilize, slow to act, and tending toward inefficiency and even corruption in economic regulation. Madison's scheme was thus regularly set aside during the twentieth century in order to deal with crises like wars and recessions, and to entrench the policymaking process that often joins legislative committees, administrative agencies, and organized clienteles in symbiotic relationships.³² As Madison supposed, powerful industries often have conflicting interests that cancel each other out: railroads collide with trucking companies, and exporters do battle with importers. But many industry interests and efforts overlap and reinforce each other in attempts to establish a "good climate" for business and, often, to veto policies advanced by workers, consumers, environmentalists, women, and minorities. Trade associations are particularly effective in presenting a united front on policy issues.³³

A large number of veto groups have grown up in America over the

their workers and the larger community, their actions still would not be the result of social control through a formal democratic structure and group participation . . . ; they would be an arbitrary *noblesse oblige* by the economic elite."); J. POLE, *THE PURSUIT OF EQUALITY IN AMERICAN HISTORY* 121 (1978).

30. *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948).

31. *Id.* at 536 (Douglas, J., dissenting). Though Justice Douglas dissented, his view prevailed when Congress amended Section 7 of the Clayton Act only two years later. See 15 U.S.C. § 18 (1982) which, among other things, allows punishment of incipient violations. Federal Trade Commission Act, § 5, 15 U.S.C. § 45 (1982) also allows punishment for incipient violations.

32. B. KARL, *supra* note 6, at 6; C. LINDBLOM, *POLITICS AND MARKETS* 94 (1977); A. MELONE, *LAWYERS, PUBLIC POLICY AND INTEREST GROUP POLITICS* 17 (1977); Salaman & Siegfried, *Economic Power and Political Influence: The Impact of Industry Structure on Public Policy*, 71 AM. POL. SCI. REV. 1026, 1030 (1977). See also R. LANE, *POLITICAL IDEOLOGY: WHY THE AMERICAN COMMON MAN BELIEVES WHAT HE DOES* 155 (1962) (checks and balances in part responsible for the bickering that prevents arrangements from becoming settled); M. SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE* 10 (1964); G. STEINER, *supra* note 12, at 333 (pressure groups create confusion, conflict, and weakness in public economic policy). See also *infra* note 140 and accompanying text.

33. R. CHRISTENSON, *IDEOLOGIES AND MODERN POLITICS* 239 (1973); E. EPSTEIN, *supra* note 10, at 72.

years, each with a mercurial power over particular public policies. Madison's worst fears, of what we would now call the corporate state³⁴ or fascism, have not been realized. But our political system cannot set priorities until it has purchased, with subsidies and other privileges, the acquiescence of each group capable of vetoing a particular program. Veto groups have no right to dominate a particular governmental structure or function, for their powers have not been explicitly surrendered by the broader public. They therefore cannot be held accountable under Madison's scheme; they cannot be defeated by the "regular vote" that *The Federalist No. 10* proposed as the main remedy.³⁵

Economic and bureaucratic power are disliked and feared in part because they are veiled in the mystery of private meetings and are not subjected to public participation and debate. Hopes for checks and balances to emerge within organizations unlikely to be run along Montesquieu's lines, hopes enshrined in corporations law and administrative law, have frequently provided futile.³⁶ Further, checks and balances cannot have anything like

34. I.e., political representation by and administration through industrial-occupational groups, rather than by territorial divisions. M. OLSON, *supra* note 21, at 113. This was a concern in the U.S. from the 1920s onwards, and is reflected in the early trade association cases and the *Schechter* case that held that the National Recovery Administration was unconstitutional. Buzzell, *supra* note 6, at 100; Ward, *Comparative Economic Systems*, 5 POL. STUD. REV. ANN. 198, 203 (I. Horowitz ed. 1981).

35. THE FEDERALIST NO. 10, *supra* note 12, at 132 (J. Madison). See THE FEDERALIST NO. 51, *supra* note 12, at 357 (J. Madison) (power is legitimate when "surrendered by the people"); P. NONET & P. SELZNICK, *supra* note 21, at 42-43, *quoted supra* at note 28; Stedman, *Political Parties, Interest Groups, and Public Policy*, in THE POLICY VACUUM 135, 151-52 (R. Spadaro ed. 1975); G. STEINER, *supra* note 12, at 334 (quoting Douglas, J.) ("[t]he gravest danger we face today is economic and political disintegration into competitive groups, each placing its own interests above the national interest").

According to Shonfield:

[P]rivate enterprise has had some striking successes in actually capturing a number of enclaves inside the structure of the Federal government. And even where its marauding parties have not been able to establish full rights of conquest, they do seem in several instances to have taken up permanent residence inside and to be living on terms of equality with those officially in charge.

A. SHONFIELD, *supra* note 10, at 334. Late in the New Deal, the adoption of a Keynesian model of economic recovery was delayed by business hostilities caused in part by antitrust policies. B. KARL, *supra* note 6, at 159.

36. T. ARNOLD, *supra* note 18, at 97, 110; J. LANDIS, *supra* note 15, at 10. There is factionalism in all organizations, of course. Developing arguments similar to Madison's, D. LILIENTHAL, *BIG BUSINESS: A NEW ERA* (1953), finds a great deal of decentralization and competition within large corporations. Latham finds that corporate oligarchies are moderated by the appearance of "party factions" brandishing democratic symbols. Latham, *The Body Politic of the Corporation*, in THE CORPORATION IN MODERN SOCIETY 218, 222 (E. Mason ed. 1970).

For Eisenberg, corporations law is a constitutional law, regulating parties' rights and duties and delimiting corporate power in relation to the outside world. M. EISENBERG, *THE STRUCTURE OF THE CORPORATION: A LEGAL ANALYSIS* (1976). See also Chayes, *The Modern*

their desired effects without an effective challenger on each side of an issue. The automatic check assumed by theories of countervailing power, that strong groups consistently arise to oppose similar groups, frequently does not materialize. Some would-be veto groups are poorly organized, "unorganized, or as in the case of the poor, unorganizable." Such groups "stayed out in the cold, away from the American banquet,"³⁷ although business and government agencies sometimes purport to represent their interests.

Madison's scheme is brilliant but far from perfect. Unlike antitrust law, it does not attempt to define abuses by factions or identify who is authorized to declare an abuse. If, as Madison suggests in his *The Federalist No. 49*, opinion is the basis of faction, how can government control factions when opinion fuels factions in government? How, in other words, can particularistic interests be kept in check by a government that in no small measure derives its power from their support? Madison's scheme operated to give some groups a check on state power, while giving the state few correlative checks on group power. The market was apparently to provide some of these correlative checks. For Willard Hurst:

[O]ur tradition relied as much on the impersonally competitive market to prevent abuse of private economic power as on [our]

Corporation and the Rule of Law, in *THE CORPORATION IN MODERN SOCIETY* 25 (19th century model of a corporation as a republic in miniature); Frug, *supra* note 15, at 1378 (some corporate checks and balances in proxy fights, shareholders' derivative suits, and the market for corporate control). Yet business has no effective separation of powers, independent agencies, or, often, policies which cancel each other out. R. LANE, *THE REGULATION OF BUSINESSMEN* 84 (1954). In the 1930s, courts began to recognize the separation of corporate ownership from control that removes many checks which formerly curbed abuses of power and wealth. See *Liggett v. Lee*, 288 U.S. 517, 565 (1933) (Brandeis, J., dissenting); A. BERLE & G. MEANS, *supra* note 15.

Attempts were also made to create internal checks and balances in, for example, the Federal Trade Commission:

The very existence of a five-man Commission of divided political affiliations and differing philosophies, combined with the intervention of an administrative process through which varying internal views of staff personnel are manifested, gives multiple safeguards against misjudgment"

Oppenheim, *Federal Antitrust Policy: Guideposts to a Revised Antitrust Policy*, 50 *MICH. L. REV.* 1139, 1220 (1952). But the "principal-agent relationship is especially diffuse in bureaucratic organizations"; government bureaucrats rarely if ever take orders from citizens or determine objectives on the basis of citizen desires. Leibenstein, *Microeconomics and X-Efficiency Theory*, *PUBLIC INTEREST*, special issue, 1980, at 97, 107. Like their corporate counterparts, governmental bureaucrats are captains of 10s, 100s, and 1000s. With their organizational power to prevent or retard action and their official position protected by law, they rival the power of political chiefs. A. BERLE, *POWER* 314 (1969).

37. P. NAVARRO, *supra* note 21, at 6 (quoting Thomas McCraw). See also P. ASCH, *ECONOMIC THEORY AND THE ANTITRUST DILEMMA* 110 (1970); G. MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* 363 (1966). It is sometimes argued that "restraints of trade" make subsidies for unorganized groups necessary. These subsidies can pyramid, so as to threaten political institutions. T. ARNOLD, *supra* note 18, at 127.

constitutional limitations to prevent abuse of public power

This proposition was present, though mostly implied, in the early years when the simple conditions of society offered little occasion to bring the matter to explicit statement.³⁸

Therefore, until it was perceived to fail frequently late in the nineteenth century, the market justified private purposes. It helped keep them aligned with public purposes and subject to public control by consumers rather than by voters.

III. HOW CONSTITUTIONALIZATION CAME TO ANTITRUST

Our political system left room for attempts at the legal rehabilitation of markets. In *The Federalist No. 51*, Madison conceded that "[t]he provision for defense must . . . be made commensurate to the danger of attack. . . . It may even be necessary to guard against dangerous encroachments, by still further precautions." In *The Federalist No. 10*, "the principal task of modern legislation" is described as "the regulation of . . . various and interfering interests." The antitrust legislation of 1890, 1914, and 1950 lies squarely within this Madisonian tradition, for it helps complete the "partial agency" in each other's activities that Madison's *The Federalist No. 47* found essential to "Effective Control."³⁹ Business had acquired a variable and uncertain but very real influence over government

38. J. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAWS OF THE UNITED STATES, 1780-1970, at 41 (1970) [hereinafter J. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION]. See also R. BELLAH, *supra* note 10, at 50 (Americans "suspect all groups powerful enough to avoid the operation of the free market."); R. DAHL, A PREFACE TO DEMOCRATIC THEORY 29 (1956); J. HURST, LAW AND MARKETS IN UNITED STATES HISTORY, *supra* note 16, at 67 (the market helps "keep social peace by contributing to a humane balance of power between government and private interests and by promoting constructive outlets for creative energy"), 118 (the "qualified legal autonomy of the market" made it "not the least source of external curbs on official power."); R. NADER & M. GREEN, CORPORATE POWER IN AMERICA 4 (1973); G. STEINER, *supra* note 12, at 335 (quoting V.O. Key); G. WILLS, *supra* note 25, at 29. A "politics of interest groups and small-constituency units is unlikely to develop its own checks." Government can provide the checks, but not "if it is broken into units corresponding to the interests which have developed power." G. MCCONNELL, *supra* note 37, at 363.

39. THE FEDERALIST NO. 10, *supra* note 12, at 131 (J. Madison); THE FEDERALIST NO. 51, *supra* note 12, at 356-57 (J. Madison); M. FAINSOD, L. GORDON, & J. PALAMOUNTAIN, GOVERNMENT AND THE AMERICAN ECONOMY 915 (3d ed. 1959); G. WILLS, *supra* note 25, at 119 (quoting THE FEDERALIST NO. 47, *supra* note 12 (J. Madison)). See also THE FEDERALIST NO. 51, *supra* note 12, at 356 (J. Madison) (each governmental unit must be given "the necessary constitutional means and personal motives to resist encroachment of the others."); R. DAHL & C. LINDBLOM, *supra* note 6, at 480 (Americans value the goal of reciprocal control highly); N. PRESTON, POLITICS, ECONOMICS, AND POWER 82 (1967). Like the "pure democracy" discussed in THE FEDERALIST NO. 10, *supra* note 12, at 133 (J. Madison), a selective laissez faire arguably offers "no cure for the mischiefs of faction" under conditions we might today describe as those of a market failure.

de facto, and government had to be given a modest de jure influence over business through a policing of markets. Just as public authority was weakened by its division under the Constitution, so too must private power be kept divided through the antitrust laws. But this had to be done cautiously, maintaining the kind of delicate balance associated with the Constitution to "avoid both the Scylla of private monopoly and the Charybdis of statism."⁴⁰ We would lose rather than gain from a court-sponsored transfer of power from economic royalists to political royalists.

The regulation of corporate power raises acute questions of feasibility and fairness, so the need arose for a sensitive economic federalism analogous to the political one. Ideally under such a system alternate sources of power would be identified and protected, yet prevented from becoming additional veto groups that would create still more governmental paralysis. The number of industrial and governmental leadership positions would increase. This would create the additional access and control points that stimulate diversity and experimentation. The innovations that would result would force responses from groups which otherwise enjoy the quiet life, secure in their unaccountable power. Conflicts of group interest could then serve as the vehicles for reform and progress sought by the likes of Judge Wyzanski and the Progressive economist John R. Commons.⁴¹ For example,

40. E. KINTER, AN ANTITRUST PRIMER xiv (2d ed. 1973).

41. United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 347 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954) (for Judge Wyzanski, antitrust speaks "to the industrial and political ideals of an open society founded on the faith that tomorrow will produce a better than the best"); M. OLSON, *supra* note 21, at 115 (discussing ideas of J.R. Commons and G.D.H. Cole). See also Brewster, *The Corporation and Economic Federalism*, in THE CORPORATION IN MODERN SOCIETY 72 (E. Mason ed. 1970); M. FAINSD, L. GORDON & J. PALAMOUNTAIN, *supra* note 39, at 579; I. HOROWITZ, *supra* note 14, at 167; Brodley, Book Review, 24 STAN. L. REV. 1155, 1168 (1972). See generally A. BERLE, *supra* note 36, at 144 (power limited by alternate sources of its supply); A. BRETON & R. WINTROBE, THE LOGIC OF BUREAUCRATIC CONDUCT 109 (1982); H. COMMANGER, *supra* note 10, at 338-39 (early in the twentieth century, there developed a perceived need for a new, experimental public administration, to break through a rigid separation of powers and political dependence); E. EPSTEIN, *supra* note 10, at 188 (quoting E.E. Schattschneider, the "function of democracy has been to provide the public with . . . an alternative power system, which can be used to counterbalance the economic power."); J. LANDIS, *supra* note 15, at 11 ("it is only intelligent realism for [regulation] to follow the industrial rather than the political analogue"); D. TRUMAN, *supra* note 21, at 437; Zinn, *Introduction*, in NEW DEAL THOUGHT xv, xxv (H. Zinn ed. 1966) ("[t]he Madisonian argument that political stability would be assured in a federal republic of many states . . . applied also in the economic sphere, where no single economic interest, fierce as it might be in its own domain, ever developed a concern wide enough to embrace society at large."); Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511, 1566-67 (1984) (antitrust as an "instrument of statecraft for a pluralistic polity," which "maintains a balance of enterprise and power").

Key facts about America are that mobility and federalism also extend to the economy, and that the Constitution set up a national common market. Friedman, *Law and Small Business in the United States: One Hundred Years of Struggle and Accommodation*, in SMALL

the recent growth of treble damage antitrust suits brought by private plaintiffs increases the number of control points over private activity, and private plaintiffs promote a range of antitrust policies which often differ significantly from government's.

Antitrust responds to what Willard Hurst calls our "constitutional ideal." This ideal is the stubbornly-persistent demand that organized power be accountable to someone other than the immediate power-holder or to something impersonal, such as an effective market. Claims of competence and caring, and of fidelity and fiduciary responsibility, do not satisfy the ideal by themselves. Outside actors and forces must develop and impose standards. These standards require power to be used rationally, in ways responsive to our changing perceptions of a democratic society, and with a "humane regard for the worth and dignity of individuals."⁴²

In such a system, consumers, shareholders, directors, managers, government officials, congressional committees, courts, and some other groups such as Ralph Nader's, are all would-be agents of accountability for the general public. All perform essential functions, yet all operate under differing disabilities and unaccountabilities. Their overlapping rivalries are thus essential for a society eager to forestall concentrations of unaccountable power. (America and, since World War II, Germany thus pursue activist

BUSINESS IN AMERICAN LIFE 305, 306 (S. Bruchy ed. 1980). Knee-jerk responses to economic problems — get government off our backs or decentralize the economy — are unrealistic. Rather, we must, in the manner recommended by Tocqueville, strengthen associations and movements by which individuals influence and moderate government action. Filling the gap between citizen and state with an active participation will moderate the isolating tendencies of private ambition and the despotic proclivities of government. R. BELLAH, *supra* note 10, at 211-12.

42. J. HURST, LAW AND MARKETS IN UNITED STATES HISTORY, *supra* note 16, at 97. See also H. COMMANGER, *supra* note 10, at 222-23 (Walter Lippmann saw a distinctively American faith in law as a regulator and director of the socio-economic system, and in a "Higher Law" — "the denial that men may be arbitrary in human transactions"); J. HURST, LAW AND MARKETS IN UNITED STATES HISTORY, *supra* note 16, at 111; J. HURST, LAW AND SOCIAL ORDER IN THE UNITED STATES 45-46 (1977); *id.* at 242-43 (trends in corporate and administrative law and practice worked against the constitutional ideal; shareholders' concern is limited to dividends and capital gains and is implemented by buying and selling shares; and directors' information is often limited); *id.* at 270-71 (under the ideal, legal processes encourage an examination of values and of the meaning and effectiveness of social relations); A. NEALE, THE ANTITRUST LAWS OF THE U.S.A. 47 (2d ed. 1970) (American public opinion is "first, that private unaccountable persons should not wield significant amounts of economic power; secondly, that should they seek to do so, they should be checked by a rule of law."); Hurst, *Problems of Legitimacy in the Contemporary Legal Order*, 24 OKLA. L. REV. 224, 224-28 (1971); Leibenstein, *supra* note 36, at 107 *quoted supra* at note 36. See also Samuels, *The Economy as a System of Power and its Legal Bases: The Legal Economics of Robert Lee Hale*, 27 U. MIAMI L. REV. 261, 352 (1973). Hale wrote that: "Somebody must in the nature of things have the power to act arbitrarily — the company, the legislature, the commission or the court. I find it hard to predict in whose hands the power is least likely to be abused." *Id.*

“antitrust” policies; France and Britain, more tolerant of a concentrated power, use narrower and more passive schemes). Our constitutional ideal means that power can rarely be seized by the frontal attack of, for example, a coup in the Third World. Rival agents of accountability will almost automatically slide into effective opposition before the groundwork for seizure can be laid. Rivals frequently seek the right to leadership by attacking another group, by trading charges of “populist” and “monopolist” in antitrust matters. During the Progressive Era, for example, Midwestern bankers sought to re-establish their power by attacking the “Wall Street sharks.”⁴³

The constitutional ideal and the ideal of economic federalism are large chunks of what amounts to our unwritten or English-style constitution.⁴⁴ In an influential book published the same year as the Sherman Act, 1890, Christopher Tiedeman finds that:

[The] flesh and blood of the Constitution, instead of its skeleton, is here, as well as elsewhere, unwritten; not to be found in the instrument promulgated by a constitutional convention, but in the decisions of the courts and the acts of the legislature, which are published and enacted in the enforcement of the written Constitution. [Thus our] written Constitution . . . is just as flexible, and yields just as readily to the mutations of public opinion as the unwritten constitution of Great Britain . . . — *within the broad limitations of the written Constitution* . . . [which] are made to mean one thing at one time, and at another time an altogether different thing.⁴⁵

43. R. WIEBE, *BUSINESSMEN AND REFORM: A STUDY OF THE PROGRESSIVE MOVEMENT* 189 (1962).

44. See Grey, *Do We Have an Unwritten Constitution?*, 27 *STAN. L. REV.* 703 (1975); G. WILLS, *supra* note 25, at 267 (“much . . . may be extraconstitutional; may exist in ways that the Constitution’s ratifiers did not have in mind; may have grown up outside the Constitution’s purview”); *infra* notes 45-51 and accompanying text.

45. C. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES: A PHILOSOPHICAL INQUIRY INTO THE FUNDAMENTALS OF AMERICAN CONSTITUTIONAL LAW* 43-44 (1890 & reprint 1974). Charles Merriam, the influential University of Chicago political scientist, wrote in much the same vein: there have been major changes since the enactment of the Constitution, changes in the balance of power among branches, in federal-state relations, and in the roles played by political parties, minorities, and women. There is thus a constant need for the kind of readjustment and reorganization seen in industry. C. MERRIAM, *THE WRITTEN CONSTITUTION AND THE UNWRITTEN ATTITUDE* 8-9, 30 (1931). The “Constitution is not an idol but a spirit; not a form of words but a set of political attitudes and habits of behavior.” *Id.* at 30.

For Tiedeman, the Constitution defines “the order and structure of the body politic,” of which constitutional law is the “anatomy and physiology.” C. TIEDEMAN, *supra*, at 16. Our Constitution displays some slight and radical departures from the English constitution, but English precedents were followed in the many uncontroversial matters considered by the Framers. Constitutions are effective only so far as they faithfully reflect the national will, *id.* at 18, 27, 37, but this does not necessarily mean that Tiedeman would admire contemporary

These arguments are picked up and applied at some length to antitrust by Rush Limbaugh:

[I]nterpretation and application of the antitrust statutes have followed a course similar to the interpretation and application of constitutional provisions. The anti-trust acts, like the provisions of the Constitution, were framed in terms long used in and having their foundations on the traditions of the common law. Like the Constitution, they were designed as a framework and were meant by their architects to be completed as a permanent structure by judicial decision in the process of their application and usage. The judges who first interpreted and applied anti-trust acts resorted to a consideration of the history of the times when they were enacted, as they knew that history first-hand and from experience, just as the judges who first interpreted and applied the provisions of the Constitution of the United States and statutes implementing and giving effect to government until it resorted to a consideration of the history of the times when that instrument was framed to determine, from their first-hand knowledge of and experience with that history, what was meant and intended by those provisions. As the judges, who did not and who shall not hereafter know first-hand and from experience the history of the period when anti-trust laws were first enacted, or who are unwilling to rely solely on their recollection of such history, resort to a consideration of that history as it is found both in judicial decisions and in extraneous source material from which written history is formulated, so judges who are now called upon to interpret and apply constitutional provisions, long after the time when the Constitution was framed and ratified, resort to a consideration of the history of that period as it appears in judicial decisions and also in extraneous material concerning the history of the times. As the Constitution, because of its generality and flexibility, through the expediency of judicial interpretation, has been made adaptable to conditions unforeseen by its authors, so the anti-trust legislation which has existed for more than three score [now one hundred] years, through the aid of judicial interpretation, has been used to apply to conditions and to meet problems far beyond the expectation and the purposes of its authors.

Whether this type of statutory interpretation [in antitrust]

antitrust law. He noted the "extraordinary demands of the great army of discontents" for social legislation, and he applauded "the disposition of the courts" to "seize hold of the general provisions of state and federal constitutions in order to invalidate such interferences with private rights." *Id.* at 80-81.

has resulted in judicial legislation, whether it is what Dean Pound describes as judicial empiricism, whether it is the result of the arbitrary operation of the dogmatic doctrine of the separation of powers, whether it is in keeping with the satirical philosophy of Mr. Dooley that the Supreme Court follows the election returns, whether it represents a use of history to deepen the mysteries of the science of the law or whether it is in fulfillment of our traditional judicial purpose to adapt by interpretation the great generalities of our Constitution and legislation to the social and economic needs of the times, it is so firmly imbedded in our judicial policy that it is likely to be followed in the application of our anti-trust legislation so long as such legislation remains in its present form.⁴⁶

Our formal Constitution is all but silent on issues of institutional competence and on economic matters, particularly the regulation of corporations and agencies which posed little or no threat when the Constitution was first promulgated. Like our Constitution but unlike those in, for example, communist party-states, antitrust is a system of constraint rather than mobilization, of negative proscriptions rather than the positive prescriptions of more interventionist regulations and the planned economy. Many anti-trust rules are "constitutive" — they define the moves and even the game of economic activity, subject only to restrictions in the formal Constitution itself. Antitrust doctrines are much like the unwritten principles the Court attaches to one vague clause or another in the Constitution: privacy and substantive due process, for example. Adapting the constitutional tradition of filling gaps in antitrust laws with what they hope are society's fundamental principles, the justices seek to balance out many social forces, not merely the conventional parts of government.⁴⁷ This balancing is accom-

46. Limbaugh, *Historic Origins of Antitrust Legislation*, 18 Mo. L. REV. 215, 226-27, 229-30 (1953) (citations omitted). See J. FREEDMAN, *supra* note 15, at 126 (antitrust arguably reflects the subtle realities, the more innovative and accommodating resiliencies of constitutional practice); J. HURST, *DEALING WITH STATUTES* 2 (1982) (congressional practices flesh out constitutional standards); C. MERRIAM, *supra* note 45, at 9, 11 (each generation produces a new constitution through "fundamental changes in spirit and in form," which are "effected" by interpretation, statute, or common custom); *infra* notes 151-53 and accompanying text. According to Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. CHI. L. REV. 567, 570 (1947): "Federalism, the separation of Church and State, capitalism, the antitrust tradition, the separation of powers, [and the autonomy of educational bodies] — all . . . betray the same jealous preoccupation with the problem of power. . . . We are anarchists by inheritance."

47. A. BERLE, *supra* note 36, at 360, 396-97 (Sherman Act is given "quasi-constitutional status," and it is "implemented" by the Clayton Act); J. ELY, *DEMOCRACY AND DISTRUST* 4 (1980); M. FAINSOD, L. GORDON, & J. PALAMOUNTAIN, *supra* note 39, at 614 (antitrust is "an accepted, almost revered, part of the basic rules of the game . . . resembling a constitutional provision"); R. UNGER, *KNOWLEDGE AND POLITICS* 68 (1975) (distinguishing

plished through what amounts to judicial review of private action: the "legislation" of a cartel or trade association, or the "imperial" presidency of a large corporation.

Antitrust doctrines seek to describe the liberal democratic economy that is presumably entailed by a liberal democratic society. There may currently be a reduced concern over concentrations of market power, but there is arguably a heightened concern over the distribution of such resources as information, strategic position, organizational forms, technological skills, and so forth. The question is whether allocations of decision-making power which flow from the varying distributions of these resources serve democratic purposes. Legal theorists like Stephen Burton and Ronald Dworkin put our constitutional ideal thusly: the "community" wants to know by what right economic power is exercised, and it demands answers which are based on legal logic tight enough to leave little room for arbitrary or oppressive behavior.⁴⁸ This standard leaves unanswered questions about who gets to define community interests and to evaluate the logic used, questions that provoke much ideological argument in antitrust. Changes in the economic constitution are not necessarily related to those in the political Constitution. For example, the "new federalism" of the 1970s' Burger Court, which gave the states more latitude, coincided with its "state action" antitrust doctrines which curbed states' discretion. The Court later eroded both sets of doctrines; it expanded the states' economic discretion under the antitrust laws while curbing it in other respects.⁴⁹

constitutive from technical rules); J. VANCISE, *THE FEDERAL ANTITRUST LAWS* 62 (3d ed. 1975); Arthur, *supra* note 1, at 328, 329 n.367; Grey, *supra* note 44, at 714, 716-17; Oppenheim, *supra* note 36, at 1146; Pitofsky, *supra* note 4, at 1055 (citing Charles Lindblom). See also G. CAVANAUGH, *supra* note 21, at 173 ("[t]he American political system is democratic; the economic system is aristocratic"); M. LERNER, *supra* note 12, at 429 (capitalism generated governmental and public forces hostile to it, and it "became the function of the Court to check these forces and lay down the lines of economic orthodoxy."); A. SHONFIELD, *supra* note 10, at 381 (antitrust is "the authentic expression of the nostalgia for the automatic checks and balances which used to keep management in its place"); C. TAEUSCH, *POLICY AND ETHICS IN BUSINESS* 47 (1931) (the democratic ideal has been extended from political organization to cover all phases of social life — e.g., education); M. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 289 (1967); Oppenheim, *supra* note 36, at 1146-47 (antitrust's negative proscriptions do not seek to displace "the organic checks and balances . . . of the economic system upon which we depend to bring into rough balance the private and public interests"). But see Arthur, *supra* note 1, at 329 n.367 ("no one has ever claimed" that antitrust values are so fundamental that they can be explicated in a constitutional fashion).

48. See S. BURTON, *AN INTRODUCTION TO LAW AND LEGAL REASONING* 168-69, 179 (1985); R. DWORKIN, *LAW'S EMPIRE* (1986); R. DWORKIN, *A MATTER OF PRINCIPLE* (1985); G. KOLKO, *supra* note 29, quoted *supra* at note 29; Joffe, *supra* note 15, at 35.

49. Compare *National League of Cities v. Usery*, 426 U.S. 833 (1976) (5-4 decision, in which an unclear but fairly broad state immunity is held to bar application of Fair Labor Standards Act to state employees), with *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) (very narrow "state action" immunity from antitrust laws applied in the same year). The Court then flip-flopped, broadening state antitrust immunity while narrowing state immunity

Antitrust laws have survived substantially unchanged for so long as to become much more than mere statutes. We should thus take seriously the Supreme Court's frequent characterization of them as an economic constitution. In *Appalachian Coals v. United States*⁵⁰ in 1933, Chief Justice Hughes reasoned that:

[a]s a charter of freedom, the [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape. The restrictions the act imposes are not mechanical or artificial. Its general phases . . . set up the essential standard of reasonableness.⁵¹

Thomas Arthur thinks *Appalachian* is a poor decision,⁵² and in it the Court

from other types of federal economic regulation. Compare *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (overruling *Usery* by 5-4 vote), with *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985) (applying the broad *California Retail Liquor v. Midcal Aluminum*, 445 U.S. 97 (1980), state action antitrust exemption, to allow a state to fix trucking rates through consultations with groups of trucking companies which can agree among themselves) and *Fisher v. City of Berkeley*, 475 U.S. 260 (1986) (rent control ordinance not preempted by federal antitrust laws — a new tack in the Court's analysis).

50. *Appalachian Coals v. United States*, 288 U.S. 344 (1933).

51. *Id.* at 359-60. See also *NBO Indus. Treadway Co. v. Brunswick Corp.*, 523 F.2d 262, 279 (3d Cir. 1975), cert. denied, sub nom., *Treadway Co. v. Brunswick Corp.*, 429 U.S. 1090 (1977) (there is "danger in permitting statesmen long deceased to control the contemporary meaning of [antitrust] statutes which are almost an economic constitution for our complex national economy"); A. WALKER, HISTORY OF THE SHERMAN ACT OF THE UNITED STATES OF AMERICA (1980) (Sherman Act is like the Constitution in its "brief, broad and comprehensive language, requiring some judicial construction and many diversified applications . . . for its practical development"). The "Sherman Act has shown extraordinary elasticity. It may bend at times, but it always bounces back. Thus it is like a constitutional provision rather than an ordinary statute, and its history tells much about our national attempt to create an economy . . . both disciplined and free." I. ARNOLD, FAIR FIGHTS AND FOUL 122 (1965).

An interesting example of ideological reinterpretation (see *infra* text accompanying notes 55-64) comes from the Senate's leading current spokesman for a lax antitrust policy: the generality and adaptability found in *Appalachian* is not a license to aggrandize government but a mandate to use power carefully in the service of basic ends. Hatch, *Evaluation of Current Antitrust Enforcement and the Need for Legislation*, 12 Sw. U.L. REV. 284, 287 (1981).

52. *Appalachian* is termed an application of the "discretionary rule of reason," developed by Justice Brandeis in *United States v. Chicago Bd. of Trade*, 246 U.S. 231 (1918), "to a cartel that was thinly disguised as a joint selling agency." Arthur, *supra* note 1, at 306. See also *infra* note 91. *Appalachian* may not have involved "a naked restraint, but surely it was clad in no more than a string bikini." Arthur, *supra* note 1, at 342. Perhaps, but *Appalachian* arguably required a *borderline* characterization — of whether the *per se* rule or rule of reason should apply, or whether the restraint of trade is naked or ancillary, see *infra* notes 93-95 and accompanying text — since *Appalachian* was decided before *Virginia Excelsior* focused our inquiries on the degree of pricing autonomy retained by members of the joint selling agency.

does seem to be trading on the Constitution as a symbol of wisdom, balance, and restraint. But a "generality and adaptability" is obviously required from antitrust law; like the Constitution, its ambiguous criteria must be applied to ever-changing circumstances of great public import under conditions of imperfect knowledge. Coming at the end of a conservative phase, the *Appalachian* Court may have been trying to deflect the more radical aspirations Franklin D. Roosevelt expressed a year earlier. Roosevelt saw "the task of government in relation to business" as one of assisting in "the development of an economic declaration of rights, an economic constitutional order" establishing "the minimum requirement of a more permanently safe order of things" by, among other initiatives, improving the distribution of purchasing power.⁵³ Over time, Roosevelt's initial social democratic vision did not win out over the Court's liberal democratic vision of our economic constitution. The Roosevelt Court did, however, become progressively more activist in enforcing fairly rigid antitrust proscriptions of economic power.

By 1958 ideas and the ideology of *Appalachian* were treated as commonplace by the Court in *Northern Pacific Railway Co. v. United States*,⁵⁴ as well as by one of the heads of the Antitrust Division during the Eisenhower Administration.⁵⁵ By the time *United States v. Topco Associates*⁵⁶ was decided in 1972, antitrust had become "the Magna Carta of free enterprise," as "important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamen-

See *Virginia Excelsior Mills, Inc. v. FTC*, 256 F.2d 538 (4th Cir. 1958).

In *Appalachian*, Chief Justice Hughes "began by downplaying the need for a statutory standard." Arthur, *supra* note 1, at 307. "This *may* be so, but only because Hughes was searching for a constitutional standard with which to, e.g., rebut Roosevelt's demand. See *infra* text accompanying note 53. Under the Brandeis/Hughes rule of reason, the Court "must bury itself in facts and make a subjective judgment of legality." Arthur, *supra* note 1, at 307. See *also id.* at 298-307. True, but I will argue that such subjectivity inheres in any antitrust standard the Court may adopt — including the one proposed by Arthur. See *infra* notes 135, 139-43, 150 and accompanying text.

53. Roosevelt, *Commonwealth Club Address, 1932*, in *AMERICAN PRINCIPLES AND ISSUES: THE NATIONAL PURPOSE* 128, 134 (O. Handlin ed. 1961). See also Marcus, *Some Characteristics of Recent Court Decisions Applying the Antitrust Laws*, in *COMPARATIVE ADMINISTRATIVE THEORY* 291, 293 (P. Le Breton ed. 1968) (discussing Section 7 of the Clayton Act); Blake and Jones, *In Defense of Antitrust*, 65 U. COLO. L. REV. 377, 382-83 (1965) (the "strong libertarian streak" in antitrust law, which like securities regulation is unique in positing a minimum of political interference).

54. *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4-5 (1958) (Black, J.).

55. T. KOVALEFF, *BUSINESS AND GOVERNMENT DURING THE EISENHOWER ADMINISTRATION* 50 (1980) (quoting Stanley Barnes, who headed the Division for part of that era who stated that there is "almost universal" public recognition that the Sherman Act is a "charter of freedom," a "part of the warp and woof of our economic life" that aims at legal simplicity and flexibility).

56. *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972).

tal personal freedoms."⁵⁷ This reference to the Magna Carta is felicitous; like the Magna Carta, the antitrust laws could be repealed tomorrow. But repeal would seriously damage the political careers of antitrust's proponents because the fundamental policies embodied both in the Magna Carta and in the antitrust laws are so highly esteemed.⁵⁸ As with British applications of the Magna Carta, the Court has remained fairly cautious in antitrust. Since the Court's "switch in time" in 1937, we have learned that economic freedoms are not really as important as the "fundamental personal freedoms" mentioned in *Topco*, and economic freedoms thus do not receive so zealous a protection.

Topco goes on to echo the Equal Protection Clause of the fourteenth amendment: "every business, no matter how small," has "the freedom to compete — to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster."⁵⁹ The *Topco* Court in effect announces a goal of equal opportunity through antitrust, and equal opportunity becomes the most distinctive and compelling element in American ideologies when it is used to tame wealth and power. This philosophy is embodied in *United States v. Terminal Railroad*⁶⁰ and *Associated Press v. United States*,⁶¹ which required an equal access to "bottleneck" facilities essential to carrying on a particular business, and *United States v. United Shoe Machinery Corp.*,⁶² which went so far as to call for an "automatic check and balance from equal forces in the industrial market."⁶³ *Radiant Burners v. Peoples Gas Light & Coke Co.* and *Silver v. New York Stock Exchange* seemed to add a "commercial" due process to antitrust — at least for a time.⁶⁴ In cases like *Eastern Railroad Presidents Conference v.*

57. *Id.* at 610. This language has been reaffirmed as recently as 324 Liquor Corp. v. Duffy, 107 S. Ct. 720 (1987). See *Topco*, 405 U.S. at 611, quoted *supra* at note 21; FTC v. Sun Oil Co., 371 U.S. 505, 520 (1963); Schwartz, "Justice" and Other Non-economic Goals of Antitrust, 127 U. PA. L. REV. 1076, 1079 (1979).

58. See C. TIEDEMAN, *supra* note 45, at 77.

59. *Topco*, 405 U.S. at 610. Justifying the Robinson-Patman Act (1936), Rep. Wright Patman argued that this "Magna Carta of small business" would "give equal rights, equal privileges, and equal benefits to all alike," thereby maintaining "opportunity for all young people" and protecting local communities from monopoly control. Berthoff, *supra* note 7, at 38 (quoting Patman).

60. 326 U.S. 1 (1945).

61. 224 U.S. 383 (1912).

62. 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

63. *Id.* at 347 (emphasis supplied); D. RAE, EQUALITIES 64 (1981).

64. See *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963) (requirement of notice and opportunity to be heard before relationship with Exchange terminated, described by some as a "procedural due process"); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) (requirement that "objective" criteria be applied by trade association to a prospective member's application, termed by some a "substantive due process"); Schwartz, *supra* note 57, at 1079. See also Automobile Dealer Franchise Act of 1956, 15 U.S.C. §§ 1221-1225 (1976), especially §§ 1221(e), 1222. But see *Northwest Wholesale Stationers v.*

Noerr Motor Freight, Inc.,⁶⁵ *California Motor Transport Co. v. Trucking Unlimited*,⁶⁶ and *Otter Tail Power Co. v. United States*,⁶⁷ the Court, like Madison, sought to preserve a group's right to seek advantage from government while outlawing group actions that prevent other groups from doing the same.⁶⁸ The Warren Court (1953-1970) sometimes seemed to display more concern for the "rights" of individual firms than for establishing the sufficient conditions of economic rivalry. This spirit is rather subdued on today's Court, although *Arizona v. Maricopa County Medical Society*⁶⁹ echoes much of this "civil rights" approach to antitrust.⁷⁰

Government is no monolith. Within both state and federal governments there is a great deal of competition for the "business" of regulating business among advocates of antitrust and of more interventionist schemes, such as the detailed regulation of "natural" monopolies like public utilities, thoroughly-planned industrial polices, and corporate welfare programs. These enthusiasms differ chiefly in the extent to which the rivals would replace market mechanisms with their own efforts. In the Madisonian fashion of playing each off against the others, business executives, Congress, the President, and the courts all seek to be the final arbiter among these bureaucratic specializations. A judicial arbitration that creates checks and balances among regulators is manifest in cases like *Silver, Otter Tail Power*, and *Philadelphia National Bank*.⁷¹ The more interventionist attempts to

Pacific Stationery and Printing, 472 U.S. 284 (1985).

Samuel Gompers described the Clayton Act (which is primarily about antitrust) as labor's "Magna Carta." 3 J. DORFMAN, *THE ECONOMIC MIND IN AMERICAN CIVILIZATION: 1865-1914*, at 340 (1949) (quoting Gompers). These analogies are felicitous: Parliament could significantly amend or even abolish Magna Carta, just as Congress could change the antitrust laws. But this is not a likely eventuality. These laws have become almost too sacred to touch — in broad outline. See *supra* notes 57-58 and accompanying text.

65. 365 U.S. 127 (1961).

66. 404 U.S. 508 (1972).

67. 410 U.S. 366 (1973).

68. See B. OWEN & R. BRAEUTIGAM, *THE REGULATION GAME: STRATEGIC USE OF THE ADMINISTRATIVE PROCESS* 34 (1978).

69. 457 U.S. 332 (1982).

70. See A. OKUN, *EQUALITY AND EFFICIENCY: THE BIG TRADEOFF* 13 (1975) ("The domain of rights is part of the checks and balances on the market designed to preserve values that are not denominated in dollars."); Gellhorn & Tatum, *Making Sense Out of the Rule of Reason*, 35 CASE W. RES. L. REV. 155, 162 (1984); Kauper, *The "Warren Court" and the Antitrust Laws: Of Economics, Populism and Cynicism*, 67 MICH. L. REV. 325, 333 (1968).

71. See *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963); R. BORK, *supra* note 5, at 3; H. GORTNER, *ADMINISTRATION IN THE PUBLIC SECTOR* 39, 42-43, 55 (1977); P. NONET & P. SELZNICK, *supra* note 21, at 42; A. SHONFIELD, *supra* note 10, at 376; Frug, *supra* note 15, at 1374; Green and Nader, *Economic Regulation vs. Competition: Uncle Sam the Monopoly Man*, 82 YALE L. J. 871, 876 (1973) (business dominates a regulatory agency through the sheer volume of argument and through the ability to make initial decisions that place the agency in a defensive position).

regulate corporations often produce discouraging and confusing results, so the Court has constitutionalized such antitrust rules as:

the senior controls over American business. [The Court] asserted its power to prevent a potentially chaotic situation; . . . it found a fairly well-defined idea system or philosophy embodied in the Constitution and the history of American democracy; and . . . it utilized the system of federal courts as an institutional framework for giving effect to its decrees.⁷²

Seeking a doctrine of permissible power, the Court legitimates power by holding it accountable, by seeing that it is more or less competently and fairly exercised for public purposes. Court decisions are then subjected to the kind of academics' "higher criticism" (such as Thomas Arthur's) that is usually reserved for constitutional law. These academics often find judicial power to be enhanced if appropriate values and organizational accommodations are displayed over antitrust, and if decisions are genuinely principled and "neutral." Antitrust policies must be moderate in order to maintain a play in their "constitutional" joints and to transcend the immediate result and the politics of the day.⁷³ Moderation, neutrality, and even craftsmanship exist chiefly in the eyes of the beholder, so academics' evaluations help fuel ideological debates over antitrust.

Despite the purported absolutes and occasional forays into economic analysis, judicial craftsmanship in antitrust occasionally revolves around the kind of loose interest balancing seen in constitutional law and in many other areas. For Justice Blackmun, the balancing of state and federal interests or "of harm and benefit is . . . a process with which federal courts are well acquainted in the antitrust field."⁷⁴ This familiarity seemed to breed the Burger Court's contempt; concurring and dissenting opinions proliferated as

72. A. BERLE, *supra* note 36, at 364. See Comment, *From Dartmouth College to Bellotti: The Political Career of the American Business Corporation*, 6 OHIO N.U.L. REV. 392, 412 (1979) (discussing judicial attempts to apply the Federal Corrupt Practices Act).

73. Sullivan, *Economics and More Humanistic Disciplines: What are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214, 1243 (1977). See also A. BICKEL, *THE LEAST DANGEROUS BRANCH* 49-50 (1976); J. ELY, *supra* note 47, at 4; A. MASON, *THE SUPREME COURT FROM TAFT TO BURGER* 229 (1979) J. ROHR, *supra* note 14, at 132; G. STEINER, *supra* note 12, at 92.

Edward Mason elaborates on the antitrust "doctrine of permissible power":

Some power there has to be, both because of inescapable limitations to the process of atomization and because power is needed to do the job the American public expects of its industrial machine. There is no reason, however, to tolerate positions of market power that can be lessened by appropriate antitrust action unless it can be shown that this lessening substantially interferes with the job to be done.

M. FAINSD, L. GORDON, & J. PALAMOUNTAIN, *supra* note 39, at 612 (quoting Mason).

74. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 611-12 (1976) (Blackmun, J., concurring). See also Boyer, Book Review, 82 MICH. L. REV. 971, 977 (1984).

a deeply divided Court sought to hold power accountable by mechanically balancing any two or more values that antitrust or constitutional rivals throw into the hopper. The Burger Court version of principled decision-making made us painfully aware that outcomes turn on who becomes the balancer for the moment, and on which ideological promptings will thus prevail.

There is nevertheless much Madisonian value in the role of the anti-trust "balance wheel" that the Court explicitly assigned itself in *Silver*.⁷⁵ Courts are relatively free of litigants' preoccupations, and judges may thus have a somewhat clearer vision of the public interest, or at least a somewhat greater sensitivity to widely shared but unorganized interests. Economic activities and rival regulatory schemes are moving in many directions at once. Having properly disclaimed the role of a "brake" upon this process in *Silver*, the Court in effect approaches antitrust like a handicapper approaches a horse race. Courts have decisively rejected theories of countervailing power for antitrust⁷⁶ because the courts themselves want to be the countervailers, to make competitions for antitrust results a little more equal and to increase judicial power in the process. For example, Congress created the Federal Trade Commission in 1914 as a powerful antitrust counterweight to the courts. But courts immediately trimmed the Commission's power, finding that its "multiple impersonation" of "the role of complainant, judge, jury, and counsel" both violate separation of powers and poach on the judges' preserve.⁷⁷ Having pruned the FTC too harshly during the 1920s, the courts let the Commission grow slowly to a new vigor and then selectively pruned it again in the 1980s.⁷⁸

The Supreme Court has been more explicit about the constitutionalization of antitrust than have academic commentators, although Thomas Arthur disparages the process as one of setting "sail on a sea of doubt."⁷⁹ Courts usually pursue, and often give effect to, the constitutional canons of

75. *Silver*, 373 U.S. at 367. See T. ARNOLD, *supra* note 18.

76. *Appalachian Coals v. United States*, 288 U.S. 344, 372-74 (1933), hinted that the theory of countervailing power was favored by the Court, but this was later rejected decisively. See *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 611 (1972) quoted *supra* at note 21; *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211 (1951); *supra* note 37 and accompanying text. See also D. TRUMAN, *supra* note 21, at 486; Wright, *supra* note 12, at 37.

An excellent example of the antitrust Court-as-handicapper is *Ford Motor Co. v. United States*, 405 U.S. 562 (1972). Ford had merged with Autolite Sparkplugs illegally and, in a detailed and Draconian remedy, the court handicapped Ford so as to provide Autolite with a competitive advantage in starting life again as an independent producer.

77. *John Bene & Sons v. FTC*, 299 F. 468, 471 (2d Cir. 1924).

78. See *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972). But see *Ethyl Corp. v. FTC*, 729 F.2d 128 (2d Cir. 1984); *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980).

79. Arthur, *supra* note 1, at 266.

antitrust: moderation, balance, and accountability. The judges' essentially impossible task is to maintain an ad hoc equilibrium in shifting situations while at the same time maintaining a consistency in doctrine and results. This task is complicated by ideologically-charged descriptions of situations under litigation, and by the difficulty of measuring the effects of a shifting power and influence directed at narrow areas and shrouded in secrecy. Thus the only attempts to evade the constitutional ideal that get curbed are those that are felt to be too bold or otherwise too dangerous. Power plays are usually kept within manageable bounds, and power itself is kept somewhat fluid by enforcing occasional changes in conduct, organization, and ideological blandishments. Courts scale down their aims so as to maintain a "pluralism": an attempt to control only some of the many effects of a Madisonian vice of faction, through a minimal representation of most "affected interests" and some assurance that no interest is grossly overrepresented.⁸⁰ Courts consistently curbed the FTC's power in the 1920s and the power of certain large corporations and certain associations of corporations from 1940 to 1975. But there has been no sustained attempt to break the violence of faction, which would require the wholesale restructuring of industries and government itself. In sum, courts have achieved an imperfect and uneven, but nonetheless very real and necessary, constitutionalization of antitrust.

IV. THE INCORPORATION OF INSIGHTS INTO AN ANTITRUST HODGE-PODGE

Most statutes contain at least one "is" and one "ought," which interact in complex ways over the life of the statute.⁸¹ This doctrine is exemplified in Section 1 of the Sherman Act.⁸² In 1890, Congress found the "is" of the trusts to be inconsistent with the good life. Every agreement in restraint of trade "ought" therefore to be prohibited. This "ought" was to be derived from the "is" through what Congress then thought to be the natural means:

80. D. TRUMAN, *supra* note 21, at 488. See also A. BRETON & R. WINTROBE, *supra* note 41, at 109; Hoover, *Rugged Individualism*, in AMERICAN PRINCIPLES AND ISSUES: THE NATIONAL PURPOSE 229, 230 (O. Handlin ed. 1961) (excerpted from N.Y. Times, Oct. 23, 1928, § 1, at 2, col. 1.); J. HURST, LAW AND SOCIAL ORDER IN THE UNITED STATES, *supra* note 42, at 244-45; A. ROSE, THE POWER STRUCTURE: POLITICAL PROCESS IN AMERICAN SOCIETY 483 (1967); F. SUTTON, *supra* note 10, at 287-88; M. VILE, *supra* note 42, at 288.

81. See J. HURST, DEALING WITH STATUTES, *supra* note 46, at 78-79.

82. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (1982).

prosecutions in courts. (The only existing federal regulatory agency, the Interstate Commerce Commission, was then very new and not widely trusted.) Exactly how we were to get from the "is" to the "ought" was left to the courts. Justice Peckham tried to get to the "ought" through a flat-footed application of the "plain meaning" rule of statutory interpretation in *United States v. Trans-Missouri Freight Association*:⁸³ the prohibition of "every" restraint meant just that, *every* restraint. Business lawyers quickly disputed Peckham's approach: so broad an "ought" can never be absolute, just as the phrase "Congress shall make no law . . . abridging the freedom of speech" does not mean exactly what it says. A brilliant Circuit Court Judge who later became President and Chief Justice, William Howard Taft, came to the rescue in *United States v. Addyston Pipe & Steel Co.*⁸⁴ Finding that Congress had used Sherman Act words in their common law sense, Taft tried to amend Peckham's "ought" so as to prohibit only *unreasonable* restraints of trade.

Thomas Arthur would eliminate much of the uncertainty in a constitutionalized antitrust by reinstating Taft's *Addyston* as the focus for contemporary analysis. Arthur's goal is laudable, but his means are rather dubious. Judge Taft's exercise of judicial power was appropriate only if the words of the Sherman Act had an agreed common law meaning which was accepted by Congress. This was not the case; Congress did not know what it wanted to do in 1890, but it knew enough in 1914 to reject Taft's approach.⁸⁵ Even if *Addyston* was adequate for the world of 1898, so formalistic a common law treatment of antitrust is an inadequate basis for incorporating subsequent political, economic, and doctrinal insights.⁸⁶ The sources of uncertainty in antitrust are as many and as varied as they are in constitutional

83. 166 U.S. 290 (1897). The "plain meaning" rule has been called a tautology: "Words should be read as saying what they say." R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 229 (1975). Arthur, *supra* note 1, at 294-95, argues that this rule was applied in *Trans-Missouri* because the defendants did not offer, and Justice Peckham could not devise for himself, an operational rule of reason standard. I would argue that Peckham could not devise an adequate standard in 1897 because the main lines of a "purpose and effect" analysis did not become clear until *United States v. American Linseed Oil Co.*, 262 U.S. 371 (1923). Plain meaning interpretations survive in a modified form in modern antitrust. See, e.g., *infra* notes 149-51 and accompanying text.

Willard Hurst offers a very different but no less valid view of *Trans-Missouri*, terming it a "leading example of the influence of a statutory text in allocating the burden of persuasion on legislative intent." J. HURST, *DEALING WITH STATUTES*, *supra* note 46, at 51. In contrast to *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899), which uses the common law as a frame of reference, the frame in *Trans-Missouri* is the statute — in a nascent public law approach. See J. HURST, *DEALING WITH STATUTES*, at 48-49; *infra* notes 84, 88-90, 108, 126 and accompanying text.

84. 85 F. 271 (6th Cir. 1898).

85. See *infra* notes 98-107 and accompanying text. *But see* Arthur, *supra* note 1, at 272.

86. See *infra* notes 108-32 and accompanying text.

law, and an *Addyston*-based analysis would not resolve them effectively.⁸⁷

A. Addyston and the Delusive Quest for Original Intent

In *Addyston*, six manufacturers of cast iron pipe agreed to fix prices and to allocate some territories among themselves. Judge Taft flatly outlawed this conduct.⁸⁸ But he also went further, in the *dicta* on which Arthur relies. Taft's selected reading of English and American common law decisions gave rise to the kind of law reform effort we might expect from a Restatement of Contracts draftsman. The "five classes of covenants in restraint of trade" Taft examined show that:

[N]o *conventional* restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee. . . . The *main purpose* . . . suggests the measure of protection needed and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined. . . . [I]f the restraint exceeds the necessity presented by the main purpose . . . , it is void for two reasons: First, because it oppresses the covenantor, without any *corresponding benefit* to the covenantee; and second, because it tends to a *monopoly*.⁸⁹

The "five classes" of "conventional" restraints that are the basis for Taft's criteria bear little resemblance to the categories of concern in a contemporary antitrust situation.⁹⁰ His criteria are unlikely to eliminate uncer-

87. See *infra* notes 133-77 and accompanying text.

88. Taft explained that:

[W]e do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract [as here]. Its tendency was certainly to give defendants the power to charge unreasonable prices, had they chosen to do so. But, if it were important, we should unhesitatingly find that the prices charged in the instances which were in evidence were unreasonable.

Addyston, 85 F. at 293.

89. *Addyston*, 85 F. at 282 (emphasis supplied). See also *id.* at 282-83; *infra* note 108. Taft states that "these five classes" do not "include all of those upheld as valid at the common law; but it would certainly seem to follow" that the criteria he goes on to propose would cover all "conventional" restraints. *Addyston*, 85 F. at 282 (emphasis supplied). Taft does not tell us why this is so, however. In contrast to Arthur's approach, some other antitrust commentators treat *Addyston* as part of an insignificant background to the "modern" law.

90. The "five classes" concern:

covenants in partial restraint of trade [which] are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer . . . ; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere . . . with the business of the firm; (4) by the buyer of property not to . . . [interfere] with the business retained by the seller; and (5) by an assistant, servant, or agent not to compete with his master or em-

tainty as Arthur hopes, by reducing the judicial subjectivity inherent in extensive fact-based inquiries.⁹¹ Taft's tests require the judge to determine a "main purpose" which defendants have become skilled at concealing. This main purpose only "suggests" the legally-appropriate breadth of the restraint; another factual inquiry in the form of a cost-benefit analysis is apparently required, one that balances the costs of oppression to the covenant or against a "corresponding benefit to the covenantee." This test does not address the more common situation today, benefit to the covenantor and oppression of the covenantee, and Taft's reference to the restraint tending to a "monopoly" becomes, under today's law, an unnecessary attempt to read Sherman Act section 2 into section 1 of the Sherman Act.⁹²

Thomas Arthur reformulates Taft's tests as the centerpiece of his analysis: "[n]aked restraints are those which only restrict output, while ancillary restraints promote wealth-creating voluntary exchanges and facilitate joint productive activities."⁹³ This reformulation makes Taft into a prophet

ployer

Id. at 281. Most contemporary antitrust cases revolve around very different restraints, restraints on the sale of goods or services falling into the following categories: information exchanges within trade associations, horizontal or vertical price fixing, horizontal or vertical territorial or customer divisions, boycotts, tie-ins, and requirements and exclusive-dealing contracts. These categories are not dealt with as such by Taft. *But see also id.* at 293, *quoted supra* at note 88.

91. *See supra* note 46. It is, indeed, a too-broad rule of reason inquiry which provoked Taft's worries about courts setting "sail on a sea of doubt, . . . [through] the power to say . . . how much restraint of competition is in the public interest, and how much is not." *Addyston*, 85 F. at 284. *See Arthur, supra* note 1, at 298, 342. Fortunately, the Court has applied a narrower rule of reason in several recent cases, *see infra* note 95.

92. Section 2 of the Sherman Act provides that:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2 (1982). For the text of Section 1, *see supra* note 82.

Early cases interpreted section 2 as a mere supplement to section 1. *See, e.g., Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911). But ever since *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), section 2 has been an independent basis for antitrust liability; a section 1-type restraint of trade need not be proved. *See United States v. United Shoe Mach., Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

For an example of a court struggling to discover the "main purpose" of a restraint, struggling in ways which echo form versus substance inquiries in tax law matters, *see Purchasing Assocs., Inc. v. Weitz*, 13 N.Y.2d 267, 246 N.Y.S.2d 600, 196 N.E.2d 245 (1963).

93. Arthur, *supra* note 1, at 301. This quote continues as follows: "The only question of degree in this inquiry is whether the challenged restraint is reasonably related to the productive business transaction to which it is ancillary." *Id.* "Market power issues arise only in those rare cases where an ancillary restraint may have given the defendants monopoly power." *Id.* at

for the Chicago School of law and economics, whose adherents would prohibit only those restraints of trade that restrict output. Such restraints should be prohibited because they are "inefficient" or, as Arthur prefers to call them, naked. All other restraints, ancillary restraints for Arthur, would be permitted because they maximize consumer welfare in the eyes of Chicagoans and of Arthur. Consumers would not necessarily pay less or receive goods and services of higher quality; the wealth maximized through these restraints will often be that of producers, and we are expected to remain indifferent about how this wealth gets distributed.⁹⁴ But the distribution of wealth among producers, and among producers, distributors, and consumers, is as important a *political* concern in antitrust as it is under the tax laws and under individual and corporate welfare programs.

Arthur's criterion would thus change the politics and the economics of Sherman Act section 1 analyses substantially, but in purely legal terms, he seems to be drawing a distinction without a difference. Arthur seeks to replace the well-grooved distinction between the per se rule and the rule of reason with a distinction between naked and ancillary restraints. But the court's finding of a naked or "manifestly anticompetitive" restraint is currently the basis for applying the per se rule, while the ancillarity of a restraint forces a court into a rule of reason analysis.⁹⁵ To this extent, Taft's

302. But these tests are as slippery as Taft's. See *id.* at 323, 340; *supra* notes 89-92; *infra* note 95 and accompanying text. For example, ancillary restraints aid "productive business transactions," Arthur at 271, which leaves unanswered the question: Productive for whose benefit? Taft would at least weigh the benefits against the oppression of the "covenantor." *Addyston*, 85 F. at 282. There is a slight and tangential basis in *Addyston* for Arthur's reformulation: Taft observes in passing that *some* common law decisions enforce a restraint which is "only an incident to the main purpose of a union of . . . capital, enterprise, and energy to carry on a successful business, and one useful to the community." *Id.* at 280. Arthur here follows a time-honored tradition among antitrust commentators, of adding to or trimming older cases to accommodate current preferences.

94. See, e.g., R. BORK, *supra* note 5; Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696 (1986); Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984) [hereinafter Easterbrook, *Limits*]. See also *infra* notes 130, 173 and accompanying text. Producers' and consumers' interests often conflict, and the economically-rational producer will impose a restraint which maximizes his wealth rather than the consumer's.

95. Arthur, *supra* note 1, at 271. Arthur would replace "today's per se rules, with their talismanic emphasis on the specific form of a restraint, with a unitary per se rule against naked restraints of all varieties." *Id.* at 341. But this would arguably do little more than shift the "talismanic emphasis" to the question of whether a restraint is naked or ancillary. See *supra* notes 91-92 and accompanying text. Arthur is properly concerned that antitrust courts will deal with a good faith business planning punitively and after the fact. Arthur, *supra* note 1, at 344. But he does not detail how his naked/ancillary standard would reduce this tendency markedly, and he ignores the (limited) credence courts do give to good faith attempts to comply with the antitrust laws. See, e.g., *Associated Press v. United States*, 326 U.S. 1 (1945). See also *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 367 (1963) (Stewart, J., dissenting), which arguably acquires greater force after *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985) (narrowing the applicability of the *Silver* majority's

tests have already been incorporated by an antitrust law that has had to develop further since 1898.⁹⁶

By inquiring into legislative history, Arthur tries to attribute his reading of Taft's intentions to the Congress of 1890.⁹⁷ In the many examinations of the legislative history of the Sherman Act, each examiner comes up with a slightly or markedly different congressional intent.⁹⁸ These efforts suffer from the defects of inquiries into the "original intent" of the Constitution's framers. Isolated quotations from one senator or another will support almost any intention concerning antitrust. Like the "original intent" underlying the Constitution, the legislative history of the Sherman Act becomes a kind of Rorschach Test; the meaning each examiner projects into ambiguous material is more interesting than the material itself.

Like most other legislative historians, Thomas Arthur ignores the fact that the Sherman Act was not passed by the self-confident Congress of recent years but by legislators making a "relatively limited and unskillful use of their endowments."⁹⁹ Their faith in markets shaken, the congressmen

opinion).

Arthur seems to be even more worried about a too-broad rule of reason. *See supra* notes 52, 91. Fortunately, the Court has applied a narrower or "mini" rule of reason in several recent cases. This narrower rule arguably eliminates almost all differences of analysis or result which might arise between applications of the *per se*/rule of reason distinction and of the naked/ancillary restraint distinction. In these cases, the Court takes a "quick look" under the rule of reason, to see if the restraint is naked or, what amounts to the same thing, "manifestly anticompetitive." If the restraint is deemed naked, the *per se* rule applies; this rule is thus applied more flexibly. If the restraint is not naked, the Court pursues a more elaborate rule of reason inquiry. *See NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984); *Arizona v. Maricopa Medical Soc'y*, 457 U.S. 332 (1982); *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979).

96. *See infra* notes 108-31 and accompanying text.

97. Arthur, *supra* note 1, at 277, 279-92. Citing floor statements by Sen. Sherman, Arthur concludes that "majority-view" common law decisions were "incorporated" into the Act, that some senators concurred with Sherman, and that none objected to his reading. *Id.* at 280-81 & nn.72-74. Judge Taft is then seen to have adopted this majority view, to come up with a "truer version of the old law." *Id.* at 281 (quoting Thorelli). *See supra* notes 89-93 and accompanying text. *But see infra* notes 99-108 and accompanying text.

98. *See* the inquires into legislative history cited *supra* note 82, and in Arthur, *supra* note 1, at 273 n.29; 1 E. KINTNER, FEDERAL ANTITRUST LAW 125-242 (1980); W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT (1965); Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966); Clark, *Antitrust Comes Full Circle: The Return to the Cartelization Standard*, 38 VAND. L. REV. 1125, 1136-46 (1985); Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 82-106 (1982). Other similar studies include: H. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION (1954); A. WALKER, *supra* note 51. *See also* R. DICKERSON, *supra* note 83, at 242: courts should not speculate about what the original legislature would have done or about what the current legislature might do.

99. J. HURST, DEALING WITH STATUTES, *supra* note 46, at 10 (general characterization

who passed the Sherman Act faced great and urgent popular demands with no legislative or executive branch staffers to fall back on, and with no "expert" testimony to point the way. When the Sherman Act was passed there was virtually no relevant legal or economic expertise to draw upon. Congress was worried that the Court would later construe anything it might do as impairing private obligations or as exceeding congressional powers under a Commerce Clause that was then interpreted narrowly. The Sherman Act was thus a stab in the dark, and the last thing congressmen wanted was for a court to lob the antitrust ball back to them.¹⁰⁰ But this is exactly what the *Standard Oil Co. of New Jersey v. United States*¹⁰¹ Court did in 1911, and Congress feared that the courts would use *Standard Oil's* confused extrapolations from Taft's *Addyston* opinion to condone many restraints of trade. The Clayton and Federal Trade Commission Acts¹⁰² were thus introduced in 1914 as counterweights to judicial interpretation. William Howard Taft reacted by writing a book which argued, in effect, that this legislation was unnecessary because his *Addyston* criteria were adequate to the situation.¹⁰³ Congress considered this argument and rejected it by enacting the new legislation.

of Congress at about that time).

100. *Id.* at 11, 16; C. TIEDEMAN, *supra* note 45, at 58-59. See J. HURST, DEALING WITH STATUTES, *supra* note 46, at 12 (at the time, Congress "lacked the resources of tradition, experience, or operating skill to meet the demand"). But see also Arthur, *supra* note 1, at 332. During the 1890 Sherman Act debates, concrete questions asked on the floor of Congress were evaded through general answers that merely tracked the statutory language. 1 P. AREEDA & D. TURNER, *supra* note 7, § 106, at 14. The revolutionary effects of the Sherman Act were not foreseen by the 1890 Congress. Some doubted the need for it, given a limited success in curbing the trusts through cases like *State ex rel. Attorney General v. Standard Oil Co.*, 49 Ohio St. 137, 30 N.E. 279 (1892), and *People v. North River Sugar Refining Co.*, 121 N.Y. 582, 24 N.E. 834 (1890). Limbaugh, *supra* note 46, at 219, 219 nn.17-18. See *id.* at 221 n.23 (quoting 2 C. BEARD, THE RISE OF AMERICAN CIVILIZATION 341 (n.d.): "[O]n the open confession of those who passed it," the Sherman Act "was nebulous of meaning and for ten years practically nothing worthy of note was done under its prohibitions"). But see *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). In *Addyston*, 85 F. at 296-301, Taft was at pains to distinguish the facts from those in the Court's first Sherman Act decision, *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895). *Knight* held that the then-narrow commerce clause powers of Congress did not extend to restraints on manufacture, as distinct from those on interstate transport. *Id.*

Arthur does admit that Congress can at most "make basic policy choices for courts to apply in good faith to individual cases." Arthur, *supra* note 1, at 276. See also *id.* at 290 n.124 and accompanying text, citing 21 CONG. REC. 2460 (1890) (which quotes Sen. Sherman for a similar proposition). Arthur's admission describes what more or less happened subsequently. See *infra* notes 164-66 and accompanying text. Antitrust is the "outstanding example" of Congress, and others, using courts to develop the content and extend the range of official policy. A. SHONFIELD, *supra* note 10, at 321, 326.

101. 221 U.S. 1 (1910).

102. 15 U.S.C. §§ 12-27 (1982), and 15 U.S.C. §§ 41-51 (1982) respectively.

103. See W. TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT (1914).

Many jurists would permit only the narrowest use of legislative history. There is a "danger of inventing fictitious and fanciful legislative purposes," through a "bootstrap operation of formulating 'legislative purpose' with one eye on the situation to which it is to be applied."¹⁰⁴ Judge Bork arguably falls into this trap when he attributes the single Chicago School goal of maximizing consumer welfare to the 1890 Congress that promulgated the Sherman Act.¹⁰⁵ Unlike Arthur or Bork, Areeda and Turner "concur with what we perceive to be the main thrust of the case law." Inexplicit statutes and an unilluminating legislative history do not "compel or even strongly suggest a different course of antitrust interpretation."¹⁰⁶ As in constitutional interpretation, a broader "history of the times" offers a more reliable basis for construing the Sherman Act:

Basically, the protest and revolt were against every movement and tendency to concentrate economic power in monopolistic enterprises to the extent that any combination could restrict production [Arthur's and the Chicago School's sole concern], fix

104. R. DICKERSON, *supra* note 83, at 93-94. See also *NBO Indus. Treadway Co., v. Brunswick Corp.*, 523 F.2d 262, 279 (3d Cir. 1975), *quoted supra* at note 51; R. DICKERSON, *supra* note 83, at 164 (a Canadian jurist gibes that Americans are permitted to refer to the statute where the legislative history is ambiguous); J. HURST, *DEALING WITH STATUTES*, *supra* note 46, at 34, 54 (English judges altogether reject evidence of legislative history as incompetent and unreliable). See generally M. RADIN, *ON ANGLO-AMERICAN LEGAL HISTORY* § 192 (1936) (discussing conflict between common law and statutory law).

Justice Jackson expands on the dangers of relying on legislative history in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395-97 (1951) (considering the now-repealed "fair trade law" exemption to Section 1 of the Sherman Act), *quoted in* R. DICKERSON, *supra* note 83:

Resort to legislative history is only justified where the face of the Act is inescapably ambiguous I cannot deny that I have sometimes offended against that rule. But to select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions. . . . Moreover, it is only the words of the bill that have presidential approval, where that approval is given. . . .

Moreover, there are practical reasons why we should accept whenever possible the meaning which an enactment reveals on its face. Laws are intended for all of our people to live by; and the people go to law offices to learn what their rights under those laws are. Here is a controversy which affects every little merchant in many States. Aside from a few offices in the larger cities, the materials of legislative history are not available to the lawyer who can afford neither the cost of acquisition, the cost of housing, or the cost of repeatedly examining the whole congressional history. . . .

By and large, I think our function was well stated by Mr. Justice Holmes: "We do not inquire what the legislature meant; we ask only what the statute means."

105. See R. BORK, *supra* note 5, at 61-66, 82-84; Arthur, *supra* note 1, at 319 (*quoting* R. BORK, *supra* note 5, at 61, and criticizing his Chicago School view as justifying "virtually any exercise of judicial power").

106. I P. AREEDA & D. TURNER, *supra* note 7, §§ 105-106. A court may attribute the result to congressional intent as a substitute for thought and analysis.

prices, crush opposition, favor the few to the detriment of the many, corrupt public officials and produce immense quantities of wealth for the few¹⁰⁷

B. Addyston as Water Under the Bridge

Judge Taft all but ignored this history of the times, a history which should have been fresh in his mind, when he interpreted the Sherman Act as a mere supplement to the remedies of a restated common law. Industrial and transport trusts were busy arrogating privileges and destroying rights, in ways clearly inconsistent with the purposes of trusts under a common law which had failed. But Taft was more worried about the fate of a private common law which, he felt, could still be perfected. He worried that the nascent public law of the Sherman Act would, under successors to *Trans-Missouri*, be used to solve the problem of the trusts in ways that destroyed the older common law. *Addyston* thus reads as if Taft had applied the then-popular canon of construction that statutes in derogation of the common law shall be strictly (narrowly) construed. This canon was rejected when antitrust began to be constitutionalized, rejected because it came from a nineteenth century judicial source hostile to the legislative process.¹⁰⁸ The

107. Limbaugh, *supra* note 46, at 241. See also *id.* at 217, 222, 228-30; J. HURST, DEALING WITH STATUTES, *supra* note 46, at 51 (the history of the times was considered by judicial notice in *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897)). See also *supra* note 83 and accompanying text. Limbaugh, *supra* note 46, at 224-25 nn.38-50, cites *United States v. Champlin Refining Co.*, 341 U.S. 290 (1951), *Standard Oil v. FTC*, 340 U.S. 231 (1951), *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 553 (1944), *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), *Standard Oil of N.J. v. United States*, 221 U.S. 1 (1910), and *Trans-Missouri*, for the proposition that courts glean the antitrust history of the times from "newspapers, magazine articles, historical works, biographies, general literature, law review articles, party platforms, debates in Congress, testimony offered before committees in Congress, . . . messages of the President to Congress, statements made by a distinguished judge before a bar association and judicial conference, and a wide variety of otherwise historical material." Limbaugh, *supra* note 46, at 224-25. 1 P. AREDA & D. TURNER, *supra* note 7, § 107, at 17, defines the goal of antitrust as the efficient pursuit of marketplace demands and "also those expressed collectively through laws, social conventions, and government purchases, subsidies, and taxes." But see also Arthur, *supra* note 1, at 284-85.

108. See *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350 (1943) (Jackson, J.); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 279-80, 283-87 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899); J. HURST, DEALING WITH STATUTES, *supra* note 46, at 64 n.79; Arthur, *supra* note 1, at 290 (admitting that, where the "common law failed to provide operational legal rules," the courts had to "develop" such rules to implement basic congressional policies); Horack, *The Common Law of Legislation*, 23 IOWA L. REV. 41, 50 (1937); Limbaugh, *supra* note 46, at 242-43; *supra* note 83 and accompanying text.

The rule or presumption that a statute in derogation of the common law is not intended to change the common law sometimes limits legislative power, and sometimes veils "unacknowledged value preferences which may not stand close examination." J. HURST, DEALING WITH STATUTES, *supra* note 46, at 64. Judge Taft *may* have been using this canon in an attempt to save the Sherman Act from an unconstitutional vagueness — an irrelevant issue today. See

“common law” of antitrust continued to evolve through the infusion of a public law, and the *Addyston* criteria were finally found to be insufficiently rich in the implications needed to deal with complex new issues.

The terms of an ideological debate begun by Justice Peckham and Judge Taft in 1897-98¹⁰⁹ are still being fleshed out today. The debate is ideological in the sense that it concerns what antitrust law “ought” to be, with almost no pure facts for guidance. Positivist attempts to describe only the “is” of an antitrust law preoccupied with so hotly-contested an “ought” could only lead to confusion. Edward Purcell, Jr. sets this confusion in a broader historical context:

The tendency to see the actual [“is”] as the good [“ought”] generated the profoundly ideological character of American politics Americans never abandoned the [Jeffersonian] democratic ideal, and hence conflict continually erupted. Since the ideal remained, and since there were always some who dissented, the actuality was frequently attacked in the name of the ideal. . . . [O]pponents were continually led to idealize the existent. . . . [W]hen the ideal was juxtaposed to the reality, the existent appeared sadly lacking.¹¹⁰

Addyston, 85 F. at 295-98; See also J. HURST, DEALING WITH STATUTES, *supra* note 46, at 63.

Taft admits that the “disposition to use every means to reduce competition and create monopolies has grown so much of late” that the focus of the common law should change. *Addyston*, 85 F. at 280. Yet he develops his criteria from cases in five traditional categories which do not speak to this tendency. See *supra* notes 88-92 and accompanying text. Taft contends that the original strictures of the common law have not been relaxed “as conditions of civilization and public policy have changed.” Such a conclusion is “unwarranted by the authorities when all of them are considered.” *Addyston*, 85 F. at 283. But Taft cites and seeks to minimize many of the English and American case decisions which do support this conclusion. See *id.* at 282-86. For example, the leading case of *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, 1894 App. Cas. 535, 567 (discussed at length in *Addyston*, 85 F. at 282-83), enforced a worldwide 25-year restraint on the production of armaments. A more general and naked restraint is difficult to imagine. The case law shows that English and American courts only sporadically curbed the exercise of private economic power, under the assumption that the resolution of private disputes adequately vindicated the public interest. See Limbaugh, *supra* note 46, at 242-43.

For Taft, the main purpose of the Sherman Act was to enhance remedies; restraints “at common law were not unlawful in the sense of being criminal or giving rise to a civil action for damages.” *Addyston*, 85 F. at 279. *But see, e.g.*, *King v. Norris*, 96 Eng. Rep. 1189 (K.B. 1758) (a price fixing agreement concerning salt can support a criminal conviction); *Anon.-Dyer’s Case*, Y.B. 2 Hen. 5, fo. 5, pl. 26 (1415) (restraint on employment held void at common law, “and per Dieu, if the plaintiff were here, he should go to prison till he paid a fine to the king”). See also Arthur, *supra* note 1, at 284 (a federal antitrust solution is needed because of limitations on state courts’ jurisdiction and state enforcement resources — points that Taft did not make).

109. See *supra* notes 83-84 and accompanying text.

110. E. PURCELL, THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND

Having tried to idealize the law existing prior to the Sherman Act, Taft could not win the ideological debate easily; his common law criteria often "appeared sadly lacking" to courts going through successive stages in antitrust analysis.

With slight alterations in the dates, the four intellectual "tides" G. Edward White describes in *Tort Law in America* help us to plot the drift away from *Addyston* in antitrust. These overlapping stages or fashions in legal analysis are: a Langdellian formalism, 1800-1910 (1880-1920 and after for antitrust); legal realism, 1910-1945 (about 1920-1940, an interregnum for antitrust); consensus legal thought, 1945-1970 (the late New Deal consensus over the activist enforcement of antitrust law, 1940-1975); and a neo-formalism thereafter.¹¹¹ These theories of adjudication lag behind the intellectual currents fashionable elsewhere in society, probably because judges come to the bench late in life and trace their formative influences back to an earlier intellectual era. For example, Louis Brandeis' ideas find their fullest expression in opinions written by Justice Douglas thirty to fifty years later,¹¹² and turn-of-the-century Progressivism finds its vindication in the influences of Chief Justice Warren.¹¹³ Born too late to have been greatly influenced by Progressivism and the formative stages of legal realism, the younger members of the Burger and Rehnquist Courts remain open to the seductively synthetic powers of a neo-formalism in law and in Chicago School economics.

White's first stage, Langdellian legal science, 1880 to 1920 and beyond for antitrust, is an extrapolation from the common law tradition of formalism that empowered Judge Taft as it had his English brethren. Harvard's Langdell taught that abstract general principles could be used to resolve concrete disputes in a scientific way. Words and concepts have a concrete meaning that can be rationally developed and elaborated under clear rules of logic and precedent acceptable to all.¹¹⁴ This is the mechanical jurisprudence Judge Taft used: put antitrust or any other facts in the hopper, turn

THE PROBLEM OF VALUES 271 (1973).

111. Fleming, Book Review, 1980 AMERICA B. FOUND. RES. J. 614, 615 (review of G. WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* (1980)).

112. See *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 538-44 (1973); *SEC v. Medical Community for Human Rights*, 404 U.S. 403, 407-11 (1972) (Douglas, J., dissenting); *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 315-21 (1949) (Douglas J., dissenting); *United States v. Columbia Steel*, 334 U.S. 495, 534-40 (1948) (Douglas, J., dissenting), quoted *in part*, *supra* text accompanying note 31.

113. See *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *United States v. E.I. DuPont De Nemours and Co.*, 351 U.S. 377, 414-26 (1956) (Warren, C.J., dissenting); G. WHITE, *EARL WARREN: A PUBLIC LIFE* 294-302 (1982).

114. R. UNGER, *supra* note 47, at 93-94; Klare, *supra* note 18, at 277-78 (discussing a "conceptualist formalism," 1885-1930); Merritt, *Owen Fiss on Paradise Lost: The Judicial Bureaucracy in the Administrative State*, 92 YALE L.J. 1469, 1472-77 (1983).

the crank, and out pops the correct result. He seemed to find rather than make an antitrust law, through a process which homologized that which is to be with that which has always been under the common law, changing as little as possible. Attempts by Congress in 1890 and 1914 to make genuinely new antitrust laws were thus met with uncharitably narrow judicial interpretation like Taft's. Antitrust statutes were seen to infringe a common law judge's conceptual and political power, and thus to endanger a traditional separation of powers.¹¹⁵

This seemingly benign positivism was met head-on by Populism, Progressivism, and the intellectual forces of modernism. The import of these movements escaped the many judges who later refused to give credence to the intellectual history of their times: "Stravinsky, Picasso, Joyce, Einstein, and Freud each radically challenged the effort to structure reality into a single, determinate, rationalizable order. . . . [E]ach inaugurated a search for a new kind of order consistent with their attack upon the simpler conception of rationality held by their predecessors" ¹¹⁶ In law, the challenge and search came to be called legal realism. A simpler common law conception of rationality like Taft's was seen to be manifestly inadequate. Common law values and the meaning of phrases like "naked restraint" and the "main purpose" of a contract were deemed totally subjective. Results under a common law conception then became indeterminate, except as they can be predicted from a particular judge's disposition. Unable to set limits on the revolt against the rigidities of formalism, legal realism became like other modernisms, a reign of terror against precision, logic, and analytical methods.¹¹⁷

A mostly older and conservative group of Supreme Court justices did not take kindly to these tenets. The liberals, Brandeis, Cardozo, and Stone, reflected some tenets of legal realism and the related but milder "sociologi-

115. By late in the nineteenth century, the growth of the common law had captured the ambitions and imaginations of judges and academics. It was "the true law compared with which legislation was marginal, exceptional, and indeed intrusive." J. HURST, *DEALING WITH STATUTES*, *supra* note 46, at 41-42. The "capricious and sporadic method" of statutes was seen to infuse "illegitimate principles into an otherwise symmetrical jurisprudence." Horack, *supra* note 108, at 41. Professionally-trained judges were deemed safer guardians of the law than a legislature "because they develop a cautious appreciation of the necessities of certainty and continuity." *Id.* at 50. Arthur pursues these necessities in a Langdellian, positivist way, while denying that courts have the authority to impose social and political goals in the guise of construing statutes. Arthur, *supra* note 1, at 333. Yet this is arguably just what Taft did in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

116. Ackerman, *Law and the Modern Mind*, 103 *DAEDALUS* 119, 125 (1974).

117. R. UNGER, *supra* note 47, at 93-94. Legal realism undermined the view that law was made "pursuant to the positivist's closed model of deductive logic. . . . [Realism disturbed] this tidy world of clipped analysis and gentlemanly dispute, heavily laden with footnotes." Flynn, *supra* note 4, at 1184.

cal" jurisprudence of Roscoe Pound and others in their opinions. But except for Brandeis,¹¹⁸ these tendencies were rather muted in the liberals' approach to antitrust. Holmes, the Court's leading legal realist at the time, did not believe in the antitrust enterprise and adopted a surprisingly formalistic approach to it.¹¹⁹ It is thus difficult to trace the influences of legal realism, such as G. Edward White's second tide, on antitrust, except to note the Court's growing uncertainty. This uncertainty seemed to stem from a realization that formalism and its underlying conservatism were inadequate for dealing with new restraints of trade, restraints limited only by the imaginations of highly-paid lawyers and corporate managers. The best evidence of this uncertainty is *Appalachian*¹²⁰ in which Chief Justice Hughes, a moderate conservative, repudiated Taft's common law approach by inaugurating the constitutionalization of antitrust. He was uncertain, however, about how to apply this insight to the *Appalachian* facts, and he wound up writing a rather formalistic opinion.¹²¹

Formalism retained a significant influence over antitrust until Justice Douglas' landmark *United States v. Socony-Vacuum Oil Co.*¹²² decision in 1940. The Depression and the New Deal had by then furnished justifications for putting a revolt against formalism into practice, through what Robert Summers calls a "pragmatic instrumentalism."¹²³ Summers' is an adroit characterization because it suggests a positive program rather than the nihilism of a legal realism. Yet the legal theory of the time gave judges no guidance over what they were to be pragmatic about or instrumental for. Judges were thus receptive to new ideological blandishments about antitrust to replace Taft's conservative tenets that were widely considered to have failed during the Depression. Thurmond Arnold and his successors at the

118. See *American Column & Lumber Co. v. United States*, 275 U.S. 377, 413-19 (1921) (Brandeis, J., dissenting); *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918).

119. See *National Ass'n of Window Glass Mfrs. v. United States*, 263 U.S. 403 (1923); I O. HOLMES, *HOLMES-POLLOCK LETTERS* 163 (1941) (Holmes, on Apr. 23, 1910) ("I don't disguise my belief that the Sherman Act is a humbug based on economic ignorance and incompetence").

120. *Appalachian Coals v. United States*, 288 U.S. 344 (1933).

121. See *supra* notes 51-53 and accompanying text. It was as if Hughes, C.J., was learning something from realists like Jerome Frank. See R. DICKERSON, *supra* note 83, at 25, 25 n.50, 238.

122. 310 U.S. 150 (1940). In *Socony*, Douglas created the modern per se rule of antitrust liability that was hinted at in *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927) (Stone, J.) (an opinion with a trace of legal realism about it); and originally in *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1896). See *supra* note 83 and accompanying text.

123. R. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* (1982). See *Socony*, 310 U.S. 150; R. UNGER, *supra* note 47, at 96 (instrumental rationality judgments cannot pretend to create generality, stability or a coherent theory of adjudication, and judges thus make legislative and administrative judgments which undermine a traditional separation of powers); *infra* note 144 and accompanying text.

Justice Department and at the Federal Trade Commission eagerly provided new cajolery about an administrative expertise at detecting antitrust violations.¹²⁴

The Court's 1937 discovery that property rights need not be fundamental¹²⁵ had as marked an effect on antitrust as on constitutional law. This discovery enabled the Court to homologize longstanding antitrust statutes with a broader constitutional and administrative law, rather than with the private common law of *Addyston* that protected property rights too zealously to serve as a vehicle for reform. The opportunities for reform were provided by an explosion of cases reaching courts from new administrative agencies or, in the case of antitrust, from bureaucracies reinvigorated late in the New Deal. Justices Douglas and Black approached antitrust cases in the same way as they approached constitutional cases, by refusing to tie liberals' hands with Justice Frankfurter's notions of a judicial self-restraint. The influence of big business and of conservative antitrust precedents had to be undone, and this was accomplished through an activism rather plausibly portrayed as a deference to the congressional will of thirty to eighty years earlier. To do this, Douglas and Black had to reject the *Addyston* common law model of case-by-case interstitial lawmaking, which depends upon the initiative and means of private litigants for sporadic vindications of the public interest. The Court adopted a constitutional style of policymaking for antitrust instead, and extended its opinions far beyond the ambit of the facts in cases that are the ostensible reasons for the exercise. Such policymaking frankly incorporated the legal realist insight that the interpretation of antitrust and other statutes is inescapably a kind of legislation by courts and by agencies like the FTC.¹²⁶

The consensus policy of an activist enforcement of antitrust, corresponding to G. Edward White's third tide, lasted until about 1975. This policy was part of a liberal legal vision, an ever-unfolding status quo of more of the same from the Court. Through a "reasoned elaboration," judi-

124. See *supra* note 15 and accompanying text; *infra* note 144 and accompanying text.

125. See *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); *NLRB v. Jones and Laughlin Steel Co.*, 301 U.S. 1 (1937); *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

126. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) (Justice White's argument that judicial activism in antitrust is justified by the fact that Congress can change the results if it does not like them), *quoted infra* at text accompanying note 162; J. HURST, *DEALING WITH STATUTES*, *supra* note 46, at 11 (courts allocate "responsibility for social processes between market processes and legal processes"); *id.* at 25-28; R. DICKERSON, *supra* note 83, at 238; Arthur, *supra* note 1, at 308-09 (Roosevelt's Court appointees rejected the *Appalachian Coals* permissiveness towards cartels while retaining its constitutional approach to antitrust); Klare, *supra* note 18, at 268, 275-77; *id.* at 270 (discussing a "social conceptualism" which seems similar to White's consensus legal thought and to Summers' pragmatic instrumentalism); *infra* notes 151, 157 and accompanying text. *But see* Arthur, *supra* note 1, at 330 (citing 21 CONG. REC. 2460 (1890) which quotes Sen. Sherman).

cial statements of antitrust law gradually became more sweeping, dogmatic, and impossible to reconcile with cases like *Addyston*, which were decided during an earlier stage of judicial analysis.¹²⁷ Discussing a 1941 labor law decision, Karl Klare could also be describing the hodge-podge found in many post-World War II antitrust and constitutional law opinions when he wrote:

Phelps Dodge contained a chaotic amalgam of conceptualism and realism, ruleboundedness and ad hoc balancing, deference to nonjudicial sources of law and unhesitating faith in the superiority of the judicial mind. This jurisprudential melange transcended political lines and attitudes as to whether the proper judicial role is one of activism or restraint. I believe that all of modern legal consciousness partakes of this hodge-podge character.¹²⁸

The consensus over the further elaboration of this hodge-podge in antitrust — a consensus which had kept the concepts fluid since 1940 — began to collapse around 1975, after the retirement of Justices Black and Douglas. What followed was a rather confused neo-formalism, G. Edward White's fourth tide of neo-conceptualism. This neo-formalism amounts to a conservative self-restraint by the Burger and Rehnquist Courts. These Courts have retained much of the activist antitrust doctrines of the Warren Court, recently by narrow majorities.

The liberal activism of Justices Black and Douglas in antitrust can be undone only by a countervailing conservative activism, consistently exerted by a Court majority that does not yet exist. Beginning in the mid-1970s, academics widely criticized the accumulation of antitrust contradictions, which were frequently no more than Black's or Douglas' hunches. These academic criticisms were given further impetus by a confused Burger Court that was not self-confident, that was unable to replace Warren Court precedents with something better or as good. The Burger Court was somewhat more willing to listen to business' justifications for its conduct, and somewhat less willing to defer to the expertise of government officials. This Court seemingly adopted whichever argument sounded more sophisticated for the moment and changed the law as little as possible.¹²⁹

127. See L. BERKSON, *THE SUPREME COURT AND ITS PUBLICS* 49 (1978); R. BORK, *supra* note 5, at 15 (knowing too little economics, the Court made its job almost impossible by adopting an "undiscriminating and unreflective activism" based on judgments about which interest groups should be helped); Macneil, *Bureaucracy, Liberalism, and Community — American Style*, 79 *Nw. U.L. REV.* 900, 913 (1984-85); White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 *Va. L. REV.* 279 (1973).

128. Klare, *supra* note 18, at 334 (discussing *Phelps Dodge v. NLRB*, 313 U.S. 177 (1941)).

129. See, e.g., *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984); Jeffer-

The revolt against formalism having more or less exhausted formalism as well as itself, we seem to be cycling back toward a neo-formalism. Positivist calls for a legal regularity in antitrust, including calls, such as Arthur's, for the interstitial, case-by-case lawmaking of a common law formalism, are reinforced by the creative scholarship of a closed system, by the comprehensive, abstract, and relentless methodology of Chicago School economics. Academic synthesis is preceding judicial innovation as it did during the New Deal, and Chicagoans have won a few impressive victories in the Supreme Court.¹³⁰ But Chicagoans face what may be called a growing revolt against neo-formalism; Critical Legal Studies followers deconstruct Chicago School doctrines, and economists and legal philosophers point out the Chicago School's ethical, logical, and factual errors. So far, Chicagoans have held their ground through rapid and effective reformulations, but these efforts have slowed the pace of their expansionist enterprise and have repelled judges who are looking for simple solutions. The cyclical nature of antitrust — a common law consensus succeeded by a constitutional one, with periods of self-doubt sandwiched in between — suggests the likely outcome of these debates: the Chicago Schools' critics will go on to found a full-blown neorealism, and this will be followed by a new consensus policy for antitrust.

son Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984); Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979). *But see also* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977); United States v. General Dynamics Corp., 415 U.S. 486 (1974) (arguably a decision restricted so narrowly to its facts as to be of slight precedential value).

130. See G. WHITE, *supra* note 111, at 209-12; Arthur, *supra* note 1, at 375; Flynn, *supra* note 4, at 1185 (the Chicago School amounts to positivism reborn, requiring only a "collective bending at the knee by bench and bar before the 'science' of economics"); Nonet, *Legitimation of Purposive Decisions*, 68 CAL. L. REV. 263, 294 (1980).

The list of Chicago School antitrust victories in the Supreme Court is short: Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (roughly, a conspiracy to violate the antitrust laws cannot exist when it does not make good economic sense for the parties to conspire in that fashion); *GTE*, 433 U.S. 36 (the rule of reason rather than the per se rule applies to vertical — manufacturer to dealer — customer and territorial allocations, because such restrictions often have procompetitive advantages). See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (a partial victory, when some Chicago School dicta from Judge Bork get homologized with the consensus view of monopolization). See also *United States v. General Dynamics*, 415 U.S. 486 (1974) (in a case which seems narrowly restricted to its facts, the Court requires more analytical rigor in market definitions, a tendency the Chicago School subsequently applauded). But the Court rejected as improvident a Chicago School-inspired invitation to turn the per se rule concerning vertical price fixing into a rule of reason: *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). In *Jefferson Parish*, a Chicago School-inspired analysis of tying and/or exclusive dealing contracts failed by a 5-4 vote. In some other decisions which seem to be narrowly restricted to their facts, the Court's confused departures from previous law seemingly owe little or nothing to Chicago School analysis. See, e.g., *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); *infra* note 152 and accompanying text.

The Reagan counterrevolution is thus unlikely to result in permanent changes in antitrust. This counterrevolution involves the lax enforcement of antitrust and other statutes, without a congressional consensus for dismantling most statutory bases for regulatory power. No politician wants to risk his career by explicitly repealing fundamental values such as those expressed by the economic "Magna Carta" that is antitrust.¹³¹ So long as the statutory bases remain in place for antitrust, the bureaucratic will to power is going to reassert itself through an activist enforcement — when Reaganite administrators are no longer around to repress it. Many of Reagan's judicial appointees will then have to turn against a laxity that has no legal basis, unless the Chicago School can come up with a more elegant rationale for doing nothing. *Addyston* is not such a rationale. It is a brilliant period piece, brilliantly defended by Thomas Arthur, but as Thomas Wolfe proved, you can't go home again.¹³² Too many political, economic, and doctrinal insights lie between *Addyston* and the firmly constitutionalized antitrust of today.

V. UNCERTAINTY IN ANTITRUST

Uncertainty in antitrust is manifest and extreme. Although antitrust frequently seems on the verge of a breakthrough, it always relapses into confusion. Piecemeal extensions and contractions in antitrust and other governmental economic interventions reflect both a political opportunism and changing perceptions of what improves the performance of business. The outcomes of intervention illustrate a failure to deal with emerging problems promptly and efficiently — a private sector often outrunning the will and capacity of the public sector to supervise it under statutory mandates. Antitrust policies become more technical and more complex in the process, and hence more confusing and boring for all but the *cognoscenti*.

There are many reasons for the uncertainty of antitrust. Much of the uncertainty is inevitable, and little of it can be specifically attributed to what Thomas Arthur describes as a constitutionalization: the judges' conversion of the Sherman Act into a standardless delegation of power to themselves, a result of their failure to make *Addyston*¹³³ the centerpiece of antitrust analysis.¹³⁴ *Addyston* could not have prevented the significant uncertainties discussed in section IV (B) above, those resulting from a hodge-podge of different case decisions from different eras in antitrust analysis. In

131. See C. TIEDEMAN, *supra* note 45, at 77; *supra* notes 45, 57, 58 and accompanying text.

132. See T. WOLFE, *YOU CAN'T GO HOME AGAIN* (1940).

133. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898).

134. Arthur, *supra* note 1, at 268, 272, 290, 375; *supra* notes 2, 3, 95 and accompanying text. See also S. BURTON, *supra* note 48, at 165, 223; Fargo, *Intractable Cases: The Role of Uncertainty in the Concept of Law*, 55 N.Y.U.L. REV. 195, 208 (1980).

Standard Oil, the confused extrapolation from *Addyston*, Chief Justice White found that “[b]oth as to the law and as to the facts, the opposing contentions pressed in the arguments are numerous, and . . . so irreconcilable that it is difficult to reduce them to some fundamental generalization, which, by being disposed of, would decide them all.”¹³⁵ Things have gone from bad to worse on this front since 1911.

The “is” and “ought” of the Sherman Act and its judicial interpretations interacted in complex and sometimes surprising ways for nearly a century. Throughout this time a residual uncertainty always remained, even if the text and context of the Sherman Act were properly appraised and reappraised. This uncertainty can be resolved only through further legislation, which has not been forthcoming, or through judicial lawmaking. The precedents that result are the means to a task made no less essential by congressional inaction — resolving disputes. These means are superior to resolving disputes by flipping a coin, “if the court has first made an honest but unsuccessful effort to balance the actual probabilities of [statutory] meaning and not let mechanical application override the most probable result.”¹³⁶

Taft’s *Addyston* criteria are as amenable to a formalist or neo-formalist “mechanical application” as are any other antitrust criteria. Thomas Arthur’s Taftian approach would merely shift the focus of uncertainty from a conventional per se rule/rule of reason distinction to the naked/ancillary restraint distinction he espouses. Like the conventional distinction, Arthur’s turns on a characterization, a pigeonholing that can be simpleminded or sophisticated in its application. Courts have not “set sail on a sea of doubt” because of a constitutionalization of antitrust, as Arthur alleges, but because they sometimes use a too-broad rule of reason — a danger Taft recognized and courts now seek to minimize.¹³⁷ The same danger would arise from a too-broad category of ancillary restraints.

Hart and Sacks recommend that a “creative elaboration” be applied to statutory interpretation “because a rational court and a rational legislature would presumably apply the same basic standard: What best fits with the

135. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1910). Arthur argues that *Standard Oil* placed a heavy emphasis on statutory construction, and it thus continued the “traditional approach” begun in *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290 (1896). Arthur, *supra* note 1, at 298. See *supra* note 83 and accompanying text. I would add that *Standard Oil* also continues the tradition of an ad hoc, fact-bound determination begun in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff’d*, 175 U.S. 211 (1899). Like Taft’s, Chief Justice White’s “words . . . are empty.” Arthur, *supra* note 1, at 298, referring to White but not Taft. See *supra* notes 88-95 and accompanying text. See also Arthur, *supra* note 1, at 298, 303.

136. R. DICKERSON, *supra* note 83, at 229. See *id.* at 221; *infra* notes 147, 166 and accompanying text.

137. See *Addyston*, 85 F. at 284; Arthur, *supra* note 1, at 272, 297-98, 342; *supra* notes 52, 79, 91, 95 and accompanying text. But see Arthur, *supra* note 1, at 301, 340.

rest of the statutory and legal system?"¹³⁸ The problem is that, over the long history of antitrust, elaborations of *Addyston's* and many other criteria have been too numerous and sometimes too creative. Courts have tried all conceivable combinations of criteria and found them wanting; the doctrinal possibilities are more or less exhausted. Many lawyers, economists, judges, and academics (Thomas Arthur excepted) do not try to resolve even the most blatant contradictions in the materials of antitrust. They opt instead for ever-more-subtle distinctions and a heightened scrutiny of rival analyses. The complexity of antitrust generates much income for the many professionals needed to deal with it, and complexity offers opportunities to circumvent antitrust rules or to profit from them in unexpected ways.

Thomas Arthur is sensitive to the extreme delays and expense that forestall and jumble new antitrust initiatives, and he mentions the periodic attempts at procedural reforms.¹³⁹ But Arthur's analyses play down two other sources of uncertainty — failure to recognize diversity in congeries of partly conflicting antitrust policies, and inflexibility. Antitrust law does not adapt fast enough when socio-economic conditions change, as public and private bureaucratization proceeds apace, and as business finds new ways to circumvent the law. There are other reasons for the uncertainty of antitrust, reasons Arthur does not claim to address. These are the uncertainties of a political climate that changes rapidly and radically from time to time; of a lack of information, expertise, and often a simple competence; and of the widespread confusion of antitrust theories with events occurring in the real world. The latter confusion was as widespread among Harvard School economists in the 1960s as it is among their Chicago School rivals today, although formulae and graphs may give the deceptive appearance of precision to their divergent attempts at analyzing the real world.

The most important source of uncertainty that seldom gets discussed is that antitrust policy is made by a *ménage à trois*. Governmental and business plaintiffs consistently put forth their Jeffersonian arguments, business defendants reflexively adopt Hamiltonian responses, and judges try to reflect Madisonian and other interests. These actors form a triangle, perhaps a juristic version of Michel's "iron triangle."¹⁴⁰ This relationship, stable in

138. R. DICKERSON, *supra* note 83, at 244 (citing Hart and Sacks).

139. Arthur, *supra* note 1, at 323, discussing the 1979 Report of President Carter's Commission for the Review of Antitrust Laws and Procedures.

140. Michel described an "iron law of oligarchy": democracy varies inversely with organization. D. BLACK, *THE BEHAVIOR OF LAW* 85 (1976). Some see as a corollary to this law an anti-democratic "triangle": an interest group, a legislative committee, and an agency get together to make rules in their mutual interest and at the expense of the public interest. American experience shows that law and economic activity are joint products of groups from the private and public sectors. See Reiter & Hughes, *A Preface on Modelling the Regulated United States Economy*, 9 *HOFSTRA L. REV.* 1381 (1981); *supra* note 27 and accompanying text.

geometry but extremely unstable in human affairs, is inherently incapable of creating a consistent flow of antitrust results and doctrine. The intense ideological competitions that result should not surprise us, since high-stakes competitions are supposedly what antitrust is all about. These competitions legitimate the "big case" in antitrust, although Arthur attributes its legitimation to *Chicago Board of Trade v. United States*.¹⁴¹

Antitrust cases are regular parts of the constant ebb and flow of threats and benefits between corporations and government agencies. Defendants emphasize business benefits and agency threats, and government plaintiffs emphasize agency benefits and business threats.¹⁴² Plaintiff and defendant are always pushing as hard as they can in opposite directions, so that antitrust law comes to turn on exaggerated oppositions between pairs. These pairs are variations on the plaintiff versus defendant theme: antitrust "hawks" versus "doves," Harvard School versus Chicago School, per se rule versus rule of reason. Thomas Arthur does not explain why his rejuvenated naked versus ancillary restraint distinction would be an improvement, why it would not quickly become another false dichotomy. (The dichotomies of antitrust are false because business behavior is alternately good, bad, and indifferent, depending on what is done, who evaluates it, and the criteria (s)he selects.)

Antitrust plaintiffs will cleverly assert their expertise at detecting the badness in anything like bigness, or in acting big by getting together to restrain trade. Anything so inherently bad must be adjudged illegal "as such," per se, under a "devil" theory of antitrust. Defendants will creatively argue that unfettered business activity is such a good thing that the court must listen carefully to, and approve under a rule of reason, long-winded justifications for behavior alleged to violate the antitrust laws. What is a poor court to do, when each rival will do his utmost to make his definition of the problem and the solution "stick?" Sometimes the court falls back on intuition to reach an unclear decision which seeks to balance the parties and their arguments, in a caricature of the process Madison had in mind. The public interest is served to a limited extent by the fact that plaintiffs' and defendants' self-interested blandishments must be fitted into a third judicial ideology, to form an attractive picture of how markets should function under law.

As in constitutional law, the judicial approach to antitrust is largely an ideology of process, of maintaining the procedures and remedies through which the parties' values and interests can be expressed and pressed. Al-

141. Arthur, *supra* note 1, at 303-04, citing *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918).

142. See M. EDELMAN, *THE SYMBOLIC USES OF POLITICS* 1, 14 (1964).

though Thomas Arthur disputes the point,¹⁴³ this emphasis on process values affords the public some protection against a judge who seeks to implement personal policy preferences. Unfortunately, this public benefit is more than offset by the costs to the public of leaving the judicial ideology dependent upon the parties' cajolery for its substance. Only "rarely and perhaps fortuitously may an [antitrust] opinion be expected to rise above its source in the presentations of counsel."¹⁴⁴ Many will think that exceptions to this rule lack moral force and guidance, as, e.g., *obiter dicta*, in an adversarial system of justice.

The rules of the game compel judges, and thus the parties and their lawyers and economists, to prove that frequently confused and confusing case decisions offer successively better approximations of an ideal rationality. Past and present case decisions absorb ideology, fads, and new nuances in the way political novels do, through attempts to show the relationship between theory and experience over time. Judge Wyzanski puts a brave face on this process: "champions of the anti-trust laws" frequently see only "judicial timidity" and an "economic innocence." But courts "would not have been given, or allowed to keep" so much power over antitrust, "and they would not so freely have altered from time to time the interpretation of its substantive provisions, if courts" had proceeded with "surgical ruthlessness" to the "immediate realization of the social, political, and economic advantages of dispersal of power."¹⁴⁵

This moderation and an uncertainty in antitrust can lead a judge to

143. See Arthur, *supra* note 1, at 304, 308, 310, 326.

144. M. MASSEL, *COMPETITION AND MONOPOLY: LEGAL AND ECONOMIC ISSUES* 132 (1964) (quoting Judge Clark). See Brigham, *Judicial Impact Upon Social Practices: A Perspective on Ideology*, 9 *LEGAL STUD. F.* 47, 51 (1985); Easterbrook, *Limits*, *supra* note 94, at 10 (by taking the parties' positions as givens, the judge forfeits the opportunity to create gains by formulating the best rule to apply to future situations); Feinman, Book Review, 78 *MICH. L. REV.* 722, 728 (1980); *supra* notes 107-08 and accompanying text.

Discussing the Slaughter-House Cases, 16 Wall. (83 U.S.) 36 (1873), Louis Lusky notes: "The Court split five to four. . . . No one spoke for a third view, probably for the understandable (if inadequate) reason that neither of the opposing set of litigants would have been aided by it. . . ." J. ELY, *supra* note 47, at 22-23 (quoting Lusky). Ely sees a useful "middle ground between the chaos . . . complainants were inviting and the tautology to which the Court seems to have ended up lashing itself." *Id.* at 23.

145. *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 348 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). See also J. STONE, *SOCIAL DIMENSIONS OF LAW AND JUSTICE* 440 (1966) (uncertainty in antitrust includes uncertainty about the applicability and range of an economic theory); Arnold, *The Emperor's Old Clothes: The Folklore of Capitalism Revisited*, 52 *YALE L.J.* 188, 194 (1962); Arthur, *supra* note 1, at 309-11 (antitrust judges feel that they must play the inconsistent roles of a passive applier of settled precedents, economic regulatory commissioner, and activist lawgiver); Easterbrook, *Limits*, *supra* note 94, at 75; *supra* notes 73-75, 78 and accompanying text. These views are rejected by the arguably simplistic attitudes of Justices Clark and McReynolds, see *infra* notes 149-50 and accompanying text.

search for an intent to harm or for conduct of the "smoking gun" variety where the statute does not require it, or to attach a modest penalty to ringing denunciations of behavior. Rome was not built in a day, and neither was Rome Cable;¹⁴⁶ the "gerrymandered" market definitions that were used to strike down monopolies and mergers during the 1960s and 1970s were built up in the case law step by step, with each step seeming a logical and even a necessary extension of its predecessors. The ostensibly revolutionary *Continental T.V., Inc., v. GTE Sylvania*¹⁴⁷ is now more than a decade old. Yet the Court remains confusingly silent and we must continue to guess at *Sylvania's* implications, although most antitrust academics worth their salt have offered rival visions of exactly what it means.

It requires a good deal of *chutzpah* in a judge to play the antitrust game at all. Justice Tom Clark, for example, previously headed President Truman's Antitrust Division and adopted a cautious and conservative approach to antitrust while on the Bench.¹⁴⁸ Clark could nevertheless describe the judicial ideology as follows:

Antitrust is not a riddle in which the participants try to guess the answer syllable by syllable. . . . The problem is simple. Are the parties keeping within the law? The evidence is no guesswork either. Perhaps the economists try to reduce it to an enigma, but the court is able to see through their gyrations and come out about right.¹⁴⁹

Justice McReynolds, another conservative in antitrust, expressed similar sentiments in a more mystical way: Sherman Act proscriptions cannot "be evaded by good motives. The law is its own measure of right and wrong . . . and the judgment of the courts cannot . . . set up against it . . . some

146. *United States v. Aluminum Co. of America*, 377 U.S. 271 (1964) (invalidating merger between a leading producer of aluminum cable and a small producer of aluminum and copper cable, by manipulating market definitions).

147. 433 U.S. 36 (1977), *overruling* *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967). *GTE* thus applies a rule of reason to a vertical (manufacturer to dealer) allocation of a sales territory, but leaves unclear whether this rule of reason (rather than a *per se* rule) is to apply to other categories of restraint of trade — categories where precedents other than *Schwinn* require that the *per se* rule be applied.

148. *See, e.g., Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961); *Theater Enter., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954).

149. Clark, *A Judicial View*, in *ANTITRUST AND THE JUDICIAL PROCESS: THE BENCH AS AN ECONOMIC FORUM* 17, 18 (1968) (proceedings of Conference Board's 7th Conference on Antitrust Issues). *See also* J. VAN CISE, *supra* note 47, at 23 (a court treats an antitrust case like a doctor would a patient, applying general knowledge in light of particular symptoms); Austin, *The Emergence of Societal Antitrust*, 47 N.Y.U.L. REV. 903, 904 (1972) (citing Kaysen and Turner's discussion of the view that antitrust "proscription descends automatically upon the appearance of certain market disturbances"). *But see supra* note 145 and accompanying text.

good results.”¹⁵⁰

A significant factor in avoiding uncertainty in antitrust becomes the judges' faith in their ability to avoid it. McReynolds' and Clark's confidence in themselves and in “the law” is essential to eliminating the paralyzing indecisiveness over antitrust issues displayed by Justice Frankfurter in *Standard Oil Co. of California v. United States*¹⁵¹ in 1949. Such indecisiveness grew apace on the Burger Court that was not self-confident, leading Lawrence Sullivan to observe that:

[D]icta about the Sherman Act's “indeterminacy” may have a self-fulfilling quality if the Court in future decisions treats as uncertain what by its own standards should be a clear analysis. When fairness and efficiency indicate a need to limit and systematize analysis the Court should respond by defining and following the necessary inquiry rather than by disparaging the predictability of the process.¹⁵²

Should we join Thomas Arthur and lay all of the uncertainty I have outlined at the feet of a constitutionalized yet standardless antitrust? Without blaming the effect on constitutionalization, we can agree with Arthur that a doctrinal incoherence makes both antitrust litigation and advising business clients costly and uncertain of result. Courts should try not to punish good faith business planning. We can accept Arthur's assertion that the narrow margin for business error under the antitrust laws creates a “chilling effect on ancillary restraints,” without accepting his conclusion that this is “inconsistent with the 1890 Congress' choice.”¹⁵³ Antitrust policy

150. *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 44 (1930) (quoting *Standard Sanitary Manf. Co. v. United States*, 226 U.S. 20, 49 (1912)). *But see supra* note 145 and accompanying text.

151. 337 U.S. 293 (1949). After agonizing over his decision for many pages, Justice Frankfurter opts for a “plain meaning” interpretation, *id.* at 311, reminiscent of *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1896). *See supra* note 83.

Congress has authoritatively determined that those practices [exclusive dealing contracts] are detrimental where their effect may be to lessen competition [under Section 3 of the Clayton Act]. It has not left at large for determination in each case the ultimate demands of the “public interest,” as the English lawmakers . . . have recently chosen to do. *Trans-Missouri*, 166 U.S. at 311. This is a good description of the self-restraint advocated by Frankfurter but rejected by Justices Black and Douglas. *See supra* note 126 and accompanying text.

152. Sullivan & Wiley, *Recent Antitrust Developments*, 27 U.C.L.A. L. REV. 265, 329 (1979) (footnotes omitted) (discussing *United States v. United States Gypsum*, 438 U.S. 422 (1978)). *See also infra* text accompanying note 164. This comment can also be applied to *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984), *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979), and *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). *See supra* notes 95, 147. Arthur, *supra* note 1, at 325, approves of *Gypsum* as a recognition of the damage done to an antitrust rule of law by other cases!

153. Arthur, *supra* note 1, at 343-44. *See also id.* at 268, 290, 334, 375; *supra* notes 93,

must rely on deterrence for its success. Few violations are detected, much less prosecuted, and a "chilling effect" encourages businesses to keep well clear of violating the antitrust laws while allowing courts to take some account of good faith efforts to comply with the laws' strictures. The Chicago School has convinced some people that this chilling effect markedly decreases the efficiency of business, but the jury is still out on the question. For example, there is no consensus among judges or legislators over how to deal with the kind of business planning Arthur claims is hurt most by a standardless delegation — planning for "joint activity" with competitors or distributors.¹⁵⁴ To some, such planning looks suspiciously like an anticompetitive restraint of trade to some.

Thomas Arthur's many interesting examples do not add up to prove his conclusion that courts regularly make antitrust policy wholesale, under a standardless delegation. Antitrust courts, he says, frequently encroach on the legislative sphere, thwarting the majority will by acting like unaccredited regulatory agencies or like Old Testament lawgivers. His encroachment argument is plausible only under outmoded notions of a separation of powers, and it was the inability to hold business power accountable under such notions that led to the constitutionalization of antitrust in the first place. A court has to adopt a regulatory approach to the regulations of antitrust, at least when it reviews actions taken by the FTC under standards the court might not accept if it were not deferring to the FTC's expertise.¹⁵⁵ Such judicial behavior is incomprehensible under the common law of *Addyston*,¹⁵⁶ but it is consistent with the intent of the Congress that created the FTC in 1914 and with the delegation doctrine which began to develop in the 1920s. The Court or the FTC also acts as an antitrust lawgiver on occasion because Congress has not acted more specifically and the Court or FTC must step in to protect persons or property. As with the Constitution, the generality and vagueness of the Sherman Act provoke "the broadest and possibly most difficult . . . lawmaking." The Court has "free rein," but "only so far as it is *probably* a matter of indifference,

95, 97-104, 107 and accompanying text.

154. Arthur, *supra* note 1, at 323. See also *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362 (1963) (courts should not engage in too-broad of an economic investigation, since businesspeople must be able to assess the competitive consequences of a merger before the fact); *supra* notes 35-36, 77 and accompanying text (some of the failures of traditional separation of powers notions); *supra* note 95. Compare *Continental T.V., Inc., v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (permitting, under a rule of reason, planning through territorial divisions agreed by a manufacturer and its distributors), with *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1971) (prohibiting such planning, under the per se rule, among grocery store owners who formed an association).

155. See *John Bene & Sons v. FTC*, 299 F. 468 (2d Cir. 1924), quoted *supra* at text accompanying note 77; Arthur, *supra* note 1, at 328; *supra* notes 78, 115 and accompanying text. But see Arthur, *supra* note 1, at 328, 329 n.367.

156. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898).

under the statute and its proper context, which of the available implementing alternatives it selects."¹⁵⁷

Properly understood, the Court's antitrust lawmaking is not standard. It is implicitly but consistently guided by the oldest canon of statutory construction: "suppress the mischief and advance the remedy"¹⁵⁸ that Congress had in mind. The Sherman Act is a vital and dynamic element in American life, and the "mischief" and the Court's understanding of it will thus change from time to time.¹⁵⁹ Antitrust is not standardless in another sense; its criteria are precedent-bound, much more so than in most other fields of law. With one exception,¹⁶⁰ the *Illinois Brick*¹⁶¹ doctrine is strictly adhered to in antitrust: "we must bear in mind that considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation. This presumption of adherence to our prior decisions" supports the reaffirmation of a precedent we may not want to follow for other reasons.¹⁶² Arthur admits that Congress can at most "make basic policy choices for courts to apply in good faith to individual cases."¹⁶³ This is basically what happens. No one has recently accused the Court of bad faith in dealing with the ferocious com-

157. R. DICKERSON, *supra* note 83, at 240 (emphasis supplied). See also *supra* notes 44-48, 126 and accompanying text.

158. Heydon's Case, 76 Eng. Rep. 637 (Ex. Ch. 1584).

159. See R. DICKERSON, *supra* note 83, at 245-47 (quoting C. Curtis) ("[b]etter be prophetic than archaeological, better deal with the future than the past"); *id.* at 245; J. HURST, *DEALING WITH STATUTES*, *supra* note 46, at 16, 27-28, 41-42; C. MERRIAM, *supra* note 45, at 14; Limbaugh, *supra* note 46, at 224 n.36 (citing antitrust cases which arguably suppress the mischief and advance the remedy, but which do not cite *Heydon's Case*); *supra* notes 44-48 and accompanying text. See also C. TIEDEMAN, *supra* note 45, at 149-53 (rules of interpretation can be "thrown to the winds" while securing the "concordance of the written law and the prevalent sense of right," yet "the real character of the rule cannot be changed by giving it the name of construction"). *Id.* But see also R. DICKERSON, *supra* note 83, at 81-82 (warning that *Heydon's Case* encourages idle speculations which go beyond appropriate evidence of legislative intent).

160. See *supra* note 147.

161. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

162. *Id.* at 736 (citation omitted) (White, J.). See also, e.g., *Arizona v. Maricopa County Soc'y*, 457 U.S. 332, 354 (1982) quoted *infra* at text accompanying note 164; *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609 n.10 (1971). Admittedly, the *Illinois Brick* doctrine prevailed by only a 5-4 vote in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1983). Arthur seems confusingly wrong on this point, while arguing that the Court does not adhere to a settled statutory construction in antitrust; the precedents of a constitutionalized antitrust can thus be overruled because they are too confused to create reliance interests. Adopting the *Addyston* criteria would put the onus of reformulating the Sherman Act back where it belongs — on Congress. Arthur, *supra* note 1, at 270, 308, 330, 332. See *supra* note 3.

163. Arthur, *supra* note 1, at 276. See *id.* at 290: where the "common law failed to provide operational legal rules," for antitrust, a court must "develop" them to implement basic congressional policies. Fine, but the *Addyston* criteria have failed over time to provide "operational legal rules," see *supra* notes 108-32 and accompanying text.

plexities of antitrust. Precedents in antitrust occasionally receive a hypocritical treatment from the courts, but this occurs no more often than in many other fields of law and certainly less often than in constitutional law.

Justice Stevens summarizes the process thusly: “[b]y articulating the rules of [antitrust] law with some clarity and by adhering to rules that are justified in their general application, . . . we enhance the legislative prerogative to amend the law.”¹⁶⁴ Willard Hurst adds that the “original delegation may be tentative and general, but may gain more legislative direction . . . by legislative silence in the face of administrative action or court rulings brought specifically to the attention of legislators.”¹⁶⁵ We can count on sophisticated and affluent plaintiffs and defendants to call each and every important antitrust decision to Congress’ attention. The deep morality of following rules with which courts supervise market relationships (subject to Congress changing the rules) provides the “rule of law” that Thomas Arthur cannot find in antitrust.¹⁶⁶ Antitrust generalities are eagerly sought by courts to make their difficult task easier, yet courts mistrust *vague* generalities; the distinction between the two turns on the intellectual respectability of the generality’s subsuming principle. For example, it “may seem a far cry from the might of the railroad magnate to a section in a motion picture distribution contract, yet the cases under the Sherman Act treating of both were aimed at unnatural growth and maintenance of control.”¹⁶⁷ Whether such a principle, “unnatural growth and maintenance of control,” is respectable intellectually often turns on the evaluator’s ideological disposition.

164. *Maricopa*, 457 U.S. at 354. See also text accompanying *supra* note 152. But see *infra* note 165.

165. J. HURST, DEALING WITH STATUTES, *supra* note 46, at 17. But see also R. DICKERSON, *supra* note 83, at 179 (subsequent legislative action or inaction can be a basis for determining current intent, but it is a “highly unreliable” basis for determining original intent). It is also difficult to prove that the legislature is aware of the relevant decision; legislators may be busy with what they think are more important matters. *Id.* at 181.

166. See *id.* at 247 (fidelity to the coherence of the legal order as a curb on judicial discretion); J. SHKLAR, LEGALISM 1, 8, 10, 33, 106 (1964). But see Arthur, *supra* note 1, at 325-26, 376.

A fear of the arbitrary and the expedient gives legalism its political force. J. SHKLAR, *supra*, at 15. When legalism “becomes self-conscious, when it challenges other views, it is a full-blown ideology.” *Id.* at 10. Legalism (or the rule of law) is the belief that legal rules are superior to individualized choices. A. MELONE, *supra* note 32, at 208. See also J. ELY, *supra* note 47, at 4.

167. E. HODGES, THE ANTITRUST ACT AND THE SUPREME COURT 92 (1941). See *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) on the often-used but rather vague distinction between natural and unnatural growth in Section 2 of the Sherman Act monopolization cases.

VI. SUMMARY: THE POLITICS OF ANTITRUST

In this article I have argued that much of the uncertainty in antitrust results from causes other than its constitutionalization, properly understood. There are procedural shortcomings; uncertainties of political climate; a recurring incompetence and a vested interest in the complexity that can be bent to one's advantage; and a confusion of means with ends, of theory with practice, and of what "is" in antitrust with what "ought" to be — and vice versa. Antitrust law often lags behind socio-economic changes and then tries to catch up all at once. A hodge-podge of antitrust precedents accumulating over different historical stages in legal analysis causes a great deal of uncertainty, particularly with regard to the amount of formalism or neo-formalism a court will incorporate in a particular decision.¹⁶⁸

Judges have devised means for coping with the uncertainties of antitrust, many of which are extrapolations from the ordinary "legal process" means used to ameliorate uncertainty in other fields of the law. Judges have also adopted the Constitution as a symbol and a model for the wisdom, balance, caution, and judicial self-confidence needed in antitrust. As in constitutional law, judges apparently court the approval of antitrust academics and/or Congress by displaying appropriate values and organizational accommodations, by trying to reach principled decisions which maintain some play in the joints and transcend case facts and the politics of the day. Unfortunately, the loose interest balancing sometimes seen in antitrust is no more conducive to certainty than it is in constitutional law. Nevertheless, courts consistently try to suppress the mischief and advance the remedy Congress had in mind, in precedent-bound ways that Congress can always change.¹⁶⁹ This is the main difference between a constitutionalized antitrust and the Constitution itself.

The judges having done their best with antitrust, much uncertainty remains. Some of this uncertainty reflects failures of judicial and scholarly imaginations, but much of it reflects failures in political processes, what the Chicago School might term political market failures, *and* attempts to ameliorate these failures. The uncertainty flowing from this amelioration is an uncertainty with a purpose, the curbing of a Madisonian vice of faction that comes to light only when broad historical trends in antitrust are examined. Maintaining an ad hoc balance of power among groups jockeying their way through ever-shifting circumstances is bound to spawn legal uncertainties, but the Madisonian endeavor is so important that we must put up with these uncertainties. Such a use of antitrust laws is justified because their legislative history is ambiguous and the broader history of their times di-

168. See *supra* notes 27, 53, 111-35, 139 and accompanying text.

169. See *supra* notes 40, 51, 57, 73-74, 138, 143-45, 149-51, 158, 160-66 and accompanying text.

rectly supports a Madisonian antitrust. Even Thomas Arthur recognizes that society "must often accept a degree of uncertainty in order to regulate dangerous activities that are difficult to define."¹⁷⁰

The mere consistency of static antitrust rules is not truth, and the most we can hope for is that an approximate or conventional truth will emerge from a hierarchy of antitrust values that evolve in a dialectical or zig-zag fashion. The economics of maintaining competition, which the Chicago School would transmute into the maximizing of efficiency or consumer welfare, certainly takes a high place in this hierarchy. Its place in the hierarchy is just below certain political ideals, however. This position is shown by the way courts resolve the infrequent conflicts that have arisen between efficiency and the political ideals¹⁷¹ I call accountability and an economic federalism. Under them, antitrust courts seek to counter ambition with ambition, so as to approximate a State neutrality and integrity. Notions of what amounts to neutrality and integrity change from time to time, and these notions are always subject to "Cramer's dilemma."¹⁷² As the antitrust "balance wheel," courts thus regularly inquire into the means and ends of corporate and governmental power. A modicum of representation is given the unrepresented and the poorly organized, such as consumers. Yet courts try to avoid creating additional veto groups that can paralyze governmental or business activity, and courts try to abstain from making antitrust policy out of personal preferences. Pursuing a doctrine of permissible power, courts move toward a more democratic economy by seeking to insure that power is used competently and fairly for public purposes. Chicagoans are angered by the fact that, under a constitutionalized antitrust, we are not indifferent

170. Arthur, *supra* note 1, at 325. See *supra* notes 83-92 and accompanying text. But see Arthur, *supra* note 1, at 301, 320, 346, 367. See also *supra* note 5.

171. *FTC v. Proctor & Gamble Co.*, 386 U.S. 568, 580; *Brown Shoe Co. v. United States*, 370 U.S. 294, 344; and *Aluminum Co. of America*, 148 F.2d at 427, are the only apparent examples of political values explicitly conflicting with efficiency. Political values win, and these precedents have been shaken only slightly by direct hits from the Chicago School. The DEPARTMENT OF JUSTICE MERGER GUIDELINES (June 14, 1984) cast serious doubt on the continued vitality of these precedents. But these guidelines will likely be repealed by the next president's antitrust administrators. See J. HURST, LAW AND MARKETS IN UNITED STATES HISTORY, *supra* note 16, at 11; Arthur, *supra* note 1, at 319 (efficiency too general and adaptable a goal to produce consistent results in antitrust litigation); *supra* note 107 and accompanying text.

Economics gives focus to antitrust interpretations but does not lay down a blueprint for the law. Economics theories are inadequate in some areas and conflict in other areas. The data required to manipulate economics theories is frequently unavailable within a reasonable time and expenditure of other resources. Because antitrust does not exist in a vacuum, it operates within the parameters of other governmental policies. 1 P. AREEDA & D. TURNER, *supra* note 7, §§ 105, 107. Nevertheless, "populist goals . . . are substantially served by a pro-competitive policy framed in economic terms." *Id.* § 105, at 13.

172. *Supra* note 17 and accompanying text. See also *supra* notes 6-16, 18, 25, 29-31, 35, 41-43, 95 and accompanying text.

about how wealth gets distributed among large and small producers, distributors, and consumers.¹⁷³

Americans attach great importance to these kinds of accountability, probably because ours is a "thin" political consensus, limited to the procedures rather than the substance of governance.¹⁷⁴ By forestalling an excessive power used to pursue a private self-interest, accountability mechanisms seek to keep enough power in reserve to implement such genuinely public purposes as may be agreed upon. One of the few things members of the antitrust ménage à trois — corporate managers; senior officials at the Antitrust Division, and at the FTC, to a lesser extent; and Supreme Court justices — have in common is that they in roughly equal measure exercise a power that floats free of its social base. They are subject to far fewer of the cross-cutting influences brought to bear on, for example, members of Congress and the President. They are usually accountable to none but themselves or, what amounts to the same thing, to their organization. Corporate management "appoints the board and the board endorses management in a mystical self-perpetuating process, which albeit efficient, is plainly illegitimate. . . . Ideologically, . . . [the large corporation] has become a mere collection of persons and matter with considerable potential power . . . floating dangerously in a philosophic limbo."¹⁷⁵ Antitrust Division and FTC officials do not face voters or shareholders, and they do not issue profit-and-loss statements or stocks which rise and fall. Like business executives, they are subject to occasional takeovers by persons much like themselves, and to occasional congressional and judicial inquiries, which seldom prove much of a hindrance. Federal judges have lifetime tenure, of course.¹⁷⁶

Capturing free-floating (unaccountable) power by organizational means usually proves a good "investment." It takes little power to capture the "float," relative to the power the float then exerts on your behalf. Functionally-similar government bureaus, trade associations, rate bureaus, monopolists, would-be monopolists, price leaders, and so forth capture the float

173. See *supra* notes 39-42, 47-48, 75-76, 80, 95 and accompanying text.

174. See R. BELLAH, *supra* note 10, at 287. See also *supra* note 42 and accompanying text.

175. G. LODGE, *THE NEW AMERICAN IDEOLOGY* 206, 208 (1978). See *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 377 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954), *quoted supra* at note 41; Bock, *Overview*, in *CONCENTRATION: ISSUES, CONVICTIONS AND FACTS* 1, 4 (1976) (Conference Bd. Antitrust Forum Bull. No. 9); J. LANDIS, *supra* note 15, at 10-11, *quoted supra* at text accompanying note 28; *supra* notes 42, 140-53 and accompanying text.

176. P. NONET & P. SELZNICK, *supra* note 21, at 42-43, *quoted supra* at note 28; McCraw, *supra* note 15, at 171. See R. BORK, *supra* note 5, at 416 (the Division and the FTC are "their own clients," with "little at stake other than their own theory"); K. & P. DOLBEARE, *supra* note 18, at 229 (main differences in American ideologies concern where power is located and the nature of the political process); Samuels, *supra* note 42, *quoted supra* at note 42.

in various economic and political markets, to entrench a strategic position and to make scapegoats of rivals. Intense competitions among rivals frequently result in temporary captures only. An instability of power renders unstable the balance of antitrust arguments justifying or refuting the power of the float. This is particularly so when an inevitable overreaching leaves a powerholder in an exposed position — the position of the courts and of big business late in the 1920s, and of the Antitrust Division and the FTC in the late 1970s.¹⁷⁷

While the immediate goal of antitrust arguments is to forestall or win a lawsuit, there is also a vague, longer-term aim of converting power into authority by reducing the public distrust of your unaccountable power. In the end, the message of all antitrust ideologues is the same: “[t]rust us and all will be well, for we know what we’re doing.” It is the granting and withholding of legitimacy to such claims that takes antitrust the furthest away from an economics goal of maintaining competition in markets for goods and services. Even as they watch each other jealously, antitrust plaintiff, defendant, and judge are joint venturers in the legitimation of our system for allocating power — just like their colleagues who manipulate the political constitution. Apart, perhaps, from a few Chicagoans, no one thinks that legitimation comes cheap, and everyone except those seeking radical changes in the system think legitimation worthwhile.

177. Joffe, *supra* note 15, at 43; McCraw, *supra* note 15, at 159. See A. BERLE, *supra* note 36, at 148 (political and economic power always interact but do not merge, and they seldom take over each other’s decisionmaking functions permanently); R. NEELY, HOW COURTS GOVERN AMERICA 102 (1981) (any bureaucracy seeks power and influence, and it will overreach to attain them). See also T. ARNOLD, *supra* note 18, at 113-14 (successful attacks on American democracy come from political and industrial machines seizing arbitrary power without a frontal attack).

During the 1960s, Robert Moses sought power through New York State public economic enterprises, and he used patronage to immunize his influence. Moses was powerful in the political parties but never succeeded in attracting voters. A. BERLE, *supra* note 36, at 152. In another example from New York, Consolidated Edison assumed that *it* could make the trade-offs between electric power and environmental quality. Communicating with consumers in full-page ads, it sought to overcome public antagonism with political and financial “clout,” and to keep government off balance with assertions of private property rights and the limited role of the State. These tactics permitted wasteful and uncoordinated interventions for some purposes by, e.g., the Scenic Hudson River Preservation Society. G. LODGE, *supra* note 175, at 212-13. A more neutral characterization is that Consolidated carelessly left loose ends, bits of free-floating power that environmentalists and government agencies could mop up and consolidate for their own purposes.