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## HISTORIC ORIGINS OF ANTI-TRUST LEGISLATION

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### I

In applying what is commonly, albeit unfortunately, known as our anti-trust laws,<sup>1</sup> the courts of this country have occasionally resorted to the use of rules of statutory interpretation which permits not only an examination of the legislative history of the acts but also a consideration of the history of the times out of which they emerged.<sup>2</sup>

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1. The habit of legislative assemblies and the members of the bench and bar of referring to the vast body of the law designed to suppress offensive business conduct and behavior usually associated with monopolistic enterprise as our "anti-trust law" has been so long indulged in that it has perhaps become long-since useless to register a word of protest against the continued use of this unhappy term. But if for no other reason than our interest in better public relations it would appear best for lawyers and judges to desist from further use of the term and not prolong the existence of the paradox by which we cherish the trust as one of the most distinctive and useful instrumentalities of Anglo-American jurisprudence on the one hand while we formulate and enforce the most voluminous body of "anti-trust law" on the other. To the layman it must appear incongruous indeed that in the field of the law we who as skilled workmen legalize and magnify the importance of the trust as a wholesome institution founded on faith and confidence proceed by our "anti-trust law" so to restrict its activities as to imply that it is dangerous in design and odious and opprobrious in its operations. The editors of American Jurisprudence, Corpus Juris and Corpus Juris Secundum have wisely refrained from discussing the subject matter of what is commonly called "anti-trust laws" under that title and have more appropriately discussed it under the title "monopolies." The American Bar Association might some time consider whether it should continue to designate two of its most active and popular sections often embracing the same members, by the names Real Property, Probate and Trust Law and Anti-Trust Law as though the sections are supposed to work at cross purposes.

2. In a prefatory note by the author of one of the most recent treatises on our anti-trust laws the increased use of this judicial method of statutory interpretation and the practical benefits to be derived from its proposed expanding use are thus discussed:

"The Supreme Court is paying increasing attention to legislative history. No sound lawyer can neglect such legislative history when the statutes are drawn in such broad and general terms as the anti-trust laws of the United States. When this legislative history is examined, the words of these statutes take on their full meaning, and the implications of the words reveals the true purpose of Congress. In close questions, resort to the statutory history is of genuine value.

"It is essential that the economic conditions existing at the time of the enactment of the anti-trust laws be compared with the economic con-

There is not now, nor was there before the enactment of the anti-trust laws, a unanimity of opinion by the courts in this country as to the wisdom of or the method of applying the rule of statutory construction which permits an examination of the legislative history of a statute or defines the limits of the examination when it is undertaken. It is, nevertheless, generally held that where a statute is ambiguous or of doubtful or uncertain meaning, courts may, for the purpose of determining the intent of the legislature in adopting it, and of giving the statute the exact meaning and effect intended, resort to an examination of its legislative history.<sup>3</sup> This method of determining the meaning of a statute is not generally used by the courts of England in con-

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ditions existing at the time a particular piece of litigation is under consideration. This is because these are laws of economics. Economic conditions underlying each case are just as important for comparative purposes as any other factor in anti-trust litigation." 1 TOULMIN'S ANTI-TRUST LAWS xix (1949).

3. The following cases selected from a large number of decisions in different jurisdictions where the rule has been applied will suffice to show the extent to which the courts resort to this method of determining legislative intent: *Harrison v. Northern Trust Co.*, 317 U.S. 476, 63 Sup. Ct. 361, 87 L.Ed. 407 (1943); *U. S. v. Wrightwood Dairy Co.*, 315 U.S. 110, 62 Sup. Ct. 523, 86 L.Ed. 726 (1942); *U.S. v. Dickerson*, 310 U.S. 554, 60 Sup. Ct. 1034, 84 L.Ed. 1356 (1940); *McLean v. U.S.*, 226 U.S. 374, 33 Sup. Ct. 122, 57 L.Ed. 260 (1912); *Lewis Publishing Co. v. Morgan*, 229 U.S. 288, 33 Sup. Ct. 867, 57 L.Ed. 1190 (1913); *Penn Mutual Life Insurance Co. v. Lederer*, 252 U.S. 523, 40 Sup. Ct. 397, 64 L.Ed. 698 (1920); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 41 Sup. Ct. 172, 65 L.Ed. 349 (1921); *U.S. v. Bhagat Singh Thind*, 261 U.S. 204, 43 Sup. Ct. 338, 67 L.Ed. 616 (1923); *Edwards v. Douglas*, 269 U.S. 204, 46 Sup. Ct. 85, 70 L.Ed. 235 (1925); *U.S. v. Missouri Pacific R.R.*, 278 U.S. 269, 49 Sup. Ct. 133, 73 L.Ed. 322 (1929); *Southern Pacific Co. v. R.R. Commission*, 194 Cal. 734, 231 Pac. 28 (1924); *People v. Lloyd*, 304 Ill. 23, 136 N.E. 505 (1922); *City of New Albany v. Lemon*, 198 Ind. 127, 149 N.E. 350, 152 N.E. 723 (1926); *State ex rel. Coleman v. Kelly*, 71 Kan. 811, 81 Pac. 450 (1905); *Plunkett v. Old Colony Trust Co.*, 233 Mass. 471, 124 N.E. 265 (1919); *Rapid Ry. v. Michigan Public Utilities Commission*, 225 Mich. 425, 196 N.W. 518 (1923); *Manson v. Village of Chisolm*, 142 Minn. 94, 170 N.W. 924 (1919); *State v. Eckhardt*, 232 Mo. 49, 133 S.W. 321 (1910); *Koch v. Koch*, 79 N.J. Eq. 24, 80 Atl. 113 (1911); *People ex rel. Fleming v. Dalton*, 158 N.Y. 175, 52 N.E. 1113 (1899); *Caldwell v. State*, 115 Ohio St. 458, 154 N.E. 792 (1926); *In re Miles's Estate*, 272 Penn. 329, 116 Atl. 300 (1922); *Red River National Bank v. Ferguson*, 109 Texas 287, 206 S.W. 923 (1918); *Foster v. Sawyer County*, 197 Wisc. 218, 211 N.W. 768 (1928).

The difference in opinion and method of the courts in the use of this rule lies largely in the way the courts construe the meaning of the term "legislative history." The generally accepted view is that by this term is meant the history and progress of a bill in the legislative assembly which enacted it, including the journals, committee reports and debates on the bill when it was under consideration (although courts have frequently declined to consider such debates or to hold that they formed the basis for judicial construction after considering them) and the amendments and changes made after the original act was passed. Frequently the courts fail to distinguish between strict legislative history and the general history of the condition of the times when the act under consideration was passed.

struing acts of Parliament,<sup>4</sup> and though it is widely used by the courts in this country it has been held that an examination of the debates and reports of a legislative body is not always a certain means of determining legislative intent.<sup>5</sup>

But the rule which permits a consideration of the history of the times when a legislative act was adopted as an aid to the judicial interpretation of the act and the extent to which it may be applied perhaps has a closer association with and has been more frequently resorted to in the construction of our anti-trust laws than in any other single field of American legislation.

Consideration of the history of the times contemporaneous with the adoption of a legislative act had been frequently and in many cases effectively resorted to in judicial interpretation prior to the adoption of our anti-trust laws,<sup>6</sup> and the same method of judicial determination of the meaning of legislative acts has been applied since that time to other important legislation.<sup>7</sup> And, while this method of statutory construction has no counterpart in English judicial history, the rule is now definitely and securely established as a part of our law.<sup>8</sup>

4. In setting out the ten rules observed in the construction of statutes Blackstone made no reference to a judicial practice of examining legislative history of acts of Parliament. 1 BLACKSTONE 87-91.

Reg. v. Oxford, L.R. 4 Q.B. Div. 245 (1879); Reg. v. Hartford College, L.R. 3 Q.B. Div. 693 (1878); Arding v. Bonner, 2 Jur. (N.S.) 763 (1856); Ewart v. Williams, 3 Drew. 21 (1854); Barbat v. Allen, 7 Exch. 609 (1852); Salkeld v. Johnson, 2 C.B. 749 (1846); *In re* York, 2 Q.B. 1 (1841).

5. U. S. v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 17 Sup. Ct. 540, 550, 41 L.Ed. 1007 (1897); Aldridge v. Williams, 3 Howard 9 (1845).

6. Preston v. Browder, 1 Wheat. 115 (1816); Aldridge v. Williams, 3 Howard 1 (1844); U. S. v. Anderson, 9 Wall. 56 (1870); U. S. v. Union Pacific R.R., 91 U.S. 72 (1875); Winona & St. P. R.R. v. Barney, 113 U.S. 618, 5 Sup. Ct. 606 (1885); Rector of Holy Trinity Church v. U.S., 143 U.S. 457, 12 Sup. Ct. 511 (1892); Smith v. Townsend, 148 U.S. 490, 13 Sup. Ct. 634 (1893); U. S. v. Denver & R. G. Ry., 150 U.S. 1, 14 Sup. Ct. 11 (1893).

7. U. S. v. Wong Kim Ark., 169 U.S. 649, 18 Sup. Ct. 456, 42 L.Ed. 890 (1898); People of Puerto Rico v. Shell Co., 302 U.S. 253, 58 Sup. Ct. 167, 82 L.Ed. 235 (1937); Great Northern Ry. v. U.S., 315 U.S. 262, 62 Sup. Ct. 529, 86 L.Ed. 836 (1942); Railroad Commission of Wisconsin v. Chicago B. & Q. R.R., 257 U.S. 563, 42 Sup. Ct. 232, 66 L.Ed. 371 (1922); U.S. v. Wrightwood Dairy Co., 315 U.S. 110, 62 Sup. Ct. 523, 86 L.Ed. 726 (1942); Kirschbaum v. Walling, 316 U.S. 517, 62 Sup. Ct. 1116, 86 L.Ed. 1638 (1942); U. S. v. Congress of Industrial Organizations, 335 U.S. 106, 68 Sup. Ct. 1349, 92 L.Ed. 1849 (1948); Fogarty v. U.S., 340 U.S. 8, 71 Sup. Ct. 5, 95 L.Ed. 10 (1950); U.S. v. Champlin Refining Co., 341 U.S. 290, 71 Sup. Ct. 715, 95 L.Ed. 949 (1951); Brannan v. Stark, 342 U.S. 451, 72 Sup. Ct. 433, 96 L.Ed. 497 (1952); U. S. v. Universal C. I. T. Credit Corp., 73 Sup. Ct. 227 (1952); U. S. v. Henning, 73 Sup. Ct. 114 (1953).

8. See cases cited in footnote 3.

From the time of Mr. Justice Harlan's famed dissent in the first case before the Supreme Court of the United States involving the Sherman Anti-Trust Act,<sup>9</sup> and continuing in different cases down to our own period, the Supreme Court of the United States,<sup>10</sup> the Supreme Court of the State of Missouri<sup>11</sup> and other courts of different jurisdictions<sup>12</sup> have, either in the course of applying the rules and axioms used in aid of statutory interpretation, or simply by the process of judicial notice, reviewed widely the condition of the times when our anti-trust statutes were passed and considered with great latitude the contemporary history of that era.

## II

A number of things contributed to the use by the courts of this method of interpreting and giving effect to our anti-trust statutes. These statutes were originally passed by Congress and the legislatures of several of the states prior to the adoption of the modern technique for drafting legislation. They have no preambulatory statements of legislative policy. They have no definitions of terms. They are not made up of paragraphs with numerical divisions, alphabetical subdivisions or otherwise classified resubdivisions precisely providing what specific acts they prohibit, what exact conduct they forbid or what practices are exempt from their operations. They are replete with general terms: "combination in restraint of trade," "restraint of trade or competition," "conspiracy in restraint of trade," "lawful trade," "full and

9. U. S. v. E. C. Knight & Co., 156 U.S. 1, 15 Sup. Ct. 249 (1895).

10. U. S. v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 17 Sup. Ct. 540, 41 L.Ed. 1007 (1897); Standard Oil Company of New Jersey v. U.S., 221 U.S. 1, 31 Sup. Ct. 502 (1911); U. S. v. American Tobacco Co., 221 U.S. 106, 31 Sup. Ct. 632, 55 L.Ed. 663 (1911); Chicago Board of Trade v. U.S., 246 U.S. 231, 38 Sup. Ct. 242, 62 L.Ed. 683 (1918); National Association of Window Glass Mfrs. v. U. S., 263 U.S. 403, 44 Sup. Ct. 148, 68 L.Ed. 358 (1923); Maple Flooring Mfrs. Ass'n v. U. S., 268 U.S. 563, 45 Sup. Ct. 578, 69 L.Ed. 1093 (1925); Paramount Famous Lasky Corp. v. U. S., 282 U.S. 30, 51 Sup. Ct. 42, 75 L.Ed. 145 (1930); Atlantic Cleaners & Dyers, Inc. v. U. S., 286 U.S. 427, 52 Sup. Ct. 607 (1932); Appalachian Coals, Inc. v. U. S., 288 U.S. 344, 53 Sup. Ct. 471 (1933); Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 Sup. Ct. 982 (1940); Great Northern Ry. v. U. S., 315 U.S. 262, 62 Sup. Ct. 529 (1942); Harrison v. Northern Trust Co., 317 U.S. 476, 63 Sup. Ct. 361 (1943); U. S. v. South-Eastern Underwriters Ass'n., 322 U.S. 533, 64 Sup. Ct. 1162 (1944).

11. State *ex inf.* Hadley v. Standard Oil of Ind., 218 Mo. 1, 116 S.W. 902 (1909); State *ex inf.* Attorney General v. Ark. Lbr. Co., 260 Mo. 212, 169 S. W. 145 (1914); State *ex rel.* Barrett v. Boeckeler Lbr. Co., 301 Mo. 445, 256 S.W. 175 (1923); State *ex rel.* Barrett v. Carondelet Planing Mill Co., 309 Mo. 353, 274 S.W. 780 (1925); State *ex inf.* Barker v. Armour Packing Co., 265 Mo. 121, 176 S.W. 382 (1915); Co-Operative Live Stock Commission v. Browning, 260 Mo. 324, 168 S.W. 934 (1914).

12. U. S. v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945); U. S. v. Aluminum Co. of America, 91 F. Supp. 333 (S.D. N.Y. 1950).

free competition," "combination in the form of trust," "monopolize," "combine or conspire . . . to monopolize." They deal with grave questions of great importance.<sup>13</sup> The Sherman Anti-Trust Act,<sup>14</sup> originally passed by Congress July 2, 1890, which followed in purpose and design the similar acts adopted in the different states, except that it was made applicable to operations in interstate commerce, embraced terms that have been considered as lacking in clarity and precision and abounding in vagueness "perhaps not uncalculated."<sup>15</sup> At the same time as was said by the late Chief Justice Hughes in *Appalachian Coals Inc. v U. S.*<sup>16</sup> "as a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in Constitutional provisions."

Neither the revolutionary effect the historic origins of this legislation was destined to have on the judicial interpretation of it nor the tremendous impact the legislation was to have on the business and economy of the nation was foreseen at the time of its enactment. At first, grave doubts were expressed as to whether such legislation was necessary. Such doubts were intensified as a result of a decree entered in a case in New York, brought under the common law as it existed prior to anti-trust legislation, dissolving a corporation on the ground that it had violated its corporate charter in joining a combination or trust;<sup>17</sup> and further as a result of a decision by the Supreme Court of Ohio in which the attorney general successfully prosecuted a quo warranto action under the law prior to anti-trust legislation to oust the Standard Oil Company from that state on the ground that it had abused its corporate franchise by becoming a party to a trust agreement against public policy.<sup>18</sup> Attacks against the legislation on the

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13. State *ex inf.* Hadley v. Standard Oil Co., 218 Mo. 1, 116 S.W. 902, 1013 (1909).

14. 15 U.S.C.A. §§ 1-7.

15. Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 Sup. Ct. 982 (1940).

16. 288 U.S. 344, 53 Sup. Ct. 471 (1933).

17. People v. North River Sugar Refining Co., 121 N.Y. 582, 24 N.E. 834 (1890). In affirming the decision of the trial court in that case (7 N.Y. Sup. 406) the court of appeals in an opinion released on June 24, 1890, and but a little more than a week before the enactment of the Sherman Anti-Trust Act on July 2, 1890, perhaps not unmindful of the trend of contemporary events involving the subject matter of the momentous decision it was rendering, said (24 N.E. l.c. 841) ". . . It becomes needless to advance into the wider discussion of monopolies and competition and restraint of trade, and the problems of political economy. Our duty is to leave them until some proper emergency compels our consideration."

18. State *ex rel.* Attorney General v. Standard Oil Co., 49 Ohio State 137, 30 N.E. 279. The decision rendered in this case on March 2, 1892, had the effect, without the aid of anti-trust legislation, of nullifying the trust device as a method of combination and resulted, in the same year, in the voluntary dissolution of the original Standard Oil Company trust. II NEVINS, STUDY IN POWER, JOHN D. ROCKEFELLER INDUSTRIALIST AND PHILANTHROPIST, Chapter 31, pp. 221-244 (1953).

ground that it was unconstitutional had to be repelled.<sup>19</sup> Officials charged with its enforcement were, on the one hand, baffled by doubts as to whether it was meant to apply only to combinations formed after its enactment or to those already existing,<sup>20</sup> and, on the other hand, intimidated by threats of professional and political ostracism.<sup>21</sup> Results of the first litigation involving it were not satisfactory.<sup>22</sup> For more than a decade its usefulness and effectiveness to obtain the purposes for which it was intended were in doubt.<sup>23</sup>

19. A portion of the first anti-trust act in Missouri enacted in 1889 (Laws Missouri 1889, p. 97) was declared unconstitutional by the Supreme Court of Missouri in 1892 in a quo warranto proceeding, *State ex rel. Attorney General v. Simmons Hardware Co.*, 109 Mo. 118, 18 S.W. 1125 (1892), but, anticipating this, the Missouri General Assembly in 1891 repealed the Act of 1889 and enacted a new anti-trust law (Laws Missouri 1891, p. 186). The law has later been declared not to be in conflict with the Constitution in *State ex inf. Crow v. Armour Packing Co.*, 173 Mo. 356, 73 S.W. 645 (1903).

In other states anti-trust laws have been upheld as not repugnant to the Constitution in *Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App. 1, 44 S.W. 936 (1898); *State ex rel Astor v. Schlitz Brewing Co.*, 104 Tenn. 715, 59 S.W. 1033 (1900).

In *U. S. v. Joint Traffic Ass'n*, 171 U.S. 505, 19 Sup. Ct. 25, 45 L.Ed. 259 (1898) the Supreme Court of the United States, after a bitter attack on the Sherman Anti-Trust Act on the ground that it was unconstitutional, made by some of the ablest and most prominent counsel in the country, declared that it was not repugnant to the provisions of the Constitution of the United States in an opinion which has not been successfully challenged for more than a half century. It is interesting to note that Mr. James C. Carter, one of the most eminent American lawyers at the time and then at the height of his distinguished professional career, later said in his *LAW, ITS ORIGIN, GROWTH AND FUNCTION*, p. 211 (1907), "I think it safe to say, that the decision will not be followed by the tribunal which declared it."

20. In his autobiography at pages 455-467, Theodore Roosevelt charged that the administrations of Presidents Harrison and Cleveland had failed in prosecuting anti-trust cases because of this uncertainty as to the purpose of the act.

21. II NEVINS, *STUDY IN POWER*, JOHN D. ROCKEFELER INDUSTRIALIST AND PHILANTHROPIST, Chapter 31, p. 230-231.

22. In Missouri the first cases under the new law supplanting that declared unconstitutional in the *Simmons Hardware Company* case (See Footnote 19) were: *State ex rel. Crow v. Aetna Insurance Co.*, 150 Mo. 113, 51 S.W. 413 (1898); *State ex rel. Crow v. Firemen's Fund Insurance Co.*, 152 Mo. 1, 52 S.W. 595 (1898); *State ex inf. Crow v. Continental Tobacco Co.*, 177 Mo. 1, 75 S.W. 736 (1903). And; following the decision in the Knight case, the Supreme Court of the United States decided under the Sherman Act the following cases in the order here shown: *U. S. v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 17 Sup. Ct. 540, 41 L.Ed. 1007 (1897); *U. S. v. Joint Traffic Ass'n*, 171 U.S. 505, 19 Sup. Ct. 25, 43 L.Ed. 259 (1898); *Hopkins v. U. S.*, 171 U.S. 578, 19 Sup. Ct. 40, 43 L.Ed. 300 (1898); *Anderson v. U. S.*, 171 U.S. 604, 19 Sup. Ct. 50, 43 L.Ed. 300 (1898); *Addyston Pipe and Steel Co. v. U. S.*, 175 U.S. 211, 30 Sup. Ct. 96, 44 L.Ed. 136 (1899); *W. W. Montague & Co. v. Lowry*, 193 U.S. 38, 24 Sup. Ct. 307 (1904). None of these, after the first two, were of historic significance.

23. In *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 68 Sup. Ct. 996, l.c. 1003 (1948) the Court said:

"The Knight decision (*U. S. v. E. C. Knight Co.*, 156 U.S. 1, 15 Sup. Ct. 249, 39 L.Ed. 325) made the statute a deadletter for more than a decade . . ."

It was not until prosecutions to enforce it were vigorously pursued on both a local and national level against the chief offenders and until the courts construed the provisions of the legislation in the light of its basic historic purposes<sup>24</sup> that it came to be considered an effective means of restraining big business organizations in their monopolistic practices.

Although it had been demonstrated in Missouri that the anti-trust act of that state could be used successfully as an effective weapon against the trusts,<sup>25</sup> and although the Supreme Court of the United States had by its decision in *U. S. v. Trans-Missouri Freight Ass'n.*<sup>26</sup> shocked the business world in holding that railroad pools were void under the Sherman Anti-Trust Act<sup>27</sup> and by its decision in *U. S. v. Joint Traffic Ass'n.*<sup>28</sup> had given permanency to the existence of the act by declaring that it was constitutional, and by its decision in the case of *Northern Securities Company v. U. S.*<sup>29</sup> had revealed that the act had teeth,<sup>30</sup> it was not until the concerted drive against the oil<sup>31</sup> and tobacco industries had resulted in epoch-making

II BEARD, *THE RISE OF AMERICAN CIVILIZATION*, 341, said, "On the open confession of those who passed it, the Sherman Anti-Trust Law, signed in 1890, was nebulous in meaning and for ten years practically nothing worthy of note was done under its prohibitions."

24. The pursuit of this policy in Missouri was first evidenced by *State ex inf. Hadley v. Standard Oil Co.*, 218 Mo. 1, 116 S.W. 902 (1908) which became a landmark case in early anti-trust litigation. The same policy to enforce the Sherman Anti-Trust Act resulted in the historic decision of the Supreme Court of the United States in *Northern Securities Co. v. U. S.*, 24 Sup. Ct. 436 (1904) followed by the more decisive opinion in *Standard Oil Co. of New Jersey v. U. S.*, 221 U. S. 1, 31 Sup. Ct. 502 (1910). In *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U. S. 219, 68 Sup. Ct. 996, l.c. 1003, Mr. Justice Jackson commented that the first of these cases brought back to life the Sherman Anti-Trust Act and in the second case the act had a second rebirth.

25. In *State ex rel. Crow v. Firemen's Fund Insurance Co.*, 152 Mo. 1, 52 S.W. 595 (1899) the Supreme Court of Missouri sustained ouster proceedings against certain fire insurance companies brought under the anti-trust statute then in effect, which the court held were not violative of the Constitution, and said, "A trust is a contract, combination, confederation, or understanding, expressed or implied, between two or more persons, to control the price of a commodity or service for the benefit of the parties thereto, and to the injury of the public, and which tends to create a monopoly." The court said that the combinations in that case were in olden times called "contracts in restraint of trade" but that now they are called "trusts," but added, "There is no difference in the principle. There is a difference in the extent and methods. Those the courts condemned long ago were as mere saplings compared to the mammoth oaks when considered along side of those of today."

26. 166 U.S. 290, 17 Sup. Ct. 540, 41 L.Ed. 1007 (1897).

27. III WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 429 (1923).

28. 171 U.S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259 (1898).

29. 24 Sup. Ct. 436 (1908).

30. III WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY*.

31. William H. Taft, after his term as President and before he became Chief Justice, in *THE ANTI-TRUST ACT AND THE SUPREME COURT* (1914), page 85, said  
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decisions that the legislation as a part of our national policy was found to be both practical and effective.<sup>32</sup> These decisions, rendered more than two decades after the adoption of the original legislation, confirmed the people in the conviction that the legislation was a means by which to suppress the evil consequences of combined capital and monopolistic practices. In the sweeping and dramatic movement which accompanied the litigation leading up to and following these momentous decisions, there was perhaps nothing which contributed more to the confirmation of that conviction than the fact that the courts took account of the spirit of popular revolt against the condition of the times, as disclosed in an examination of contemporary events, in interpreting and giving effect to this legislation.<sup>33</sup>

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"The Standard Oil Trust was probably one of the chief reasons for passing the statute (the Sherman Anti-Trust Act) in 1890."

32. In III WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY*, 444, it is said that the Standard Oil Company and American Tobacco Company cases "produced a profound sensation in the country and revived the hopes, somewhat shaken by previous decisions, that the national power was adequate to deal with the trusts."

33. The case against the Standard Oil Company in Missouri was a quo warranto proceeding filed originally in the Supreme Court against it and a number of other large oil companies on March 29, 1905, by the attorney general. Preliminary to a consideration of the merits the court first determined that the special commissioner appointed to hear the evidence had the power to compel the appearance of certain witnesses before him in an opinion reported in *State ex inf. Hadley v. Standard Oil Co. of Indiana*, 194 Mo. 124, 91 S.W. 1062, following which the special commissioner heard voluminous testimony in which the policy and the practices of the respondents were laid bare. An exhaustive report by the special commissioner in which he recommended ouster and the assessment of large fines was confirmed in *State ex inf. Hadley Attorney General v. Standard Oil Co.*, 218 Mo. 1, 116 S.W. 902 (1908). On writ of error this decision of the Supreme Court of Missouri was reviewed and affirmed by the Supreme Court of the United States in *Standard Oil Company of Indiana v. State of Missouri*, 224 U.S. 270, 32 Sup. Ct. 406 (1911). In that case the Supreme Court of Missouri, in interpreting the anti-trust statute said, 116 S.W. 1020:

"The statutes in question are bottomed upon those police powers which are inherent rights of sovereignty, and in pursuance thereof the Legislature enacted them for the purpose of suppressing the many evils which had grown up under the widespread system of trusts and combinations extending over the entire country, including this state, and to the great injury and detriment of the people. The necessity and wisdom of such statutes are vouched for by their enactment in almost every state in the Union, as well as by the Congress of the United States, and by the many decisions of the various courts throughout the country sustaining their constitutionality and giving force and efficacy thereto."

Sometime after the institution of that case in Missouri a similar action was filed under the Sherman Anti-Trust Law in the United States District Court for the Eastern District of Missouri to enjoin the Standard Oil Company of New Jersey and a large number of subsidiary corporations from operating contrary to the provisions of the Sherman Anti-Trust Act. The Circuit Court of Appeals affirmed the decree for the complainant entered in the District Court in *U.S. v. Standard Oil Co. of New Jersey*, 173 Fed. 177 (1909), and on appeal to the Supreme

## III

Resort to history as a means of making effective this legislation is a logical and approved course in the natural development of the law.<sup>34</sup> It is in keeping with the Blackstone formula for statutory interpretation,<sup>35</sup> and its basic purpose is to ascertain and give effect to the intention of the legislature. In the pursuit of that purpose the courts have sought to find what existing evils the legislatures and the Congress sought to suppress by the enactment of the legislation, to examine the condition of the law at the time the legislation was enacted with respect to the degree of its effectiveness in suppressing the regnant evils, to construe the purpose of the legislature in giving an effective remedy for the evils in the light of the

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Court of the United States that court in *Standard Oil Co. of New Jersey v. U.S.*, 221 U.S. 1, 31 Sup. Ct. 502 (1910), again affirmed the decree entered by the District Court. For a review of the effect of these decisions and other similar cases against the Standard Oil Company brought in the states of Texas, Minnesota, Tennessee, Ohio and Mississippi, see II NEVINS, *STUDY IN POWER, JOHN D. ROCKEFELLER INDUSTRIALIST AND PHILANTHROPIST*, Chapter 36, 356-385. In applying anti-trust legislation in these cases the courts followed what had become a definite trend in resorting to a consideration both of the history of the legislation and the conditions of the times when it originated.

34. As was said by Oliver Wendell Holmes, Jr., at pages 1, 2 and 37 of *The Common Law* (1881), published long before he became a member of the court which often recognizes and applies this concept,

"The life of the law has not been logic: it has been experience. The felt necessities of the times, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past . . .

"However much we may codify the law into a series of seemingly self-sufficient propositions, those propositions will be but a phase in a continuous growth. To understand their scope fully, to know how they will be dealt with by judges trained in the past which the law embodies, we must ourselves know something of that past. The history of what the law has been is necessary to the knowledge of what the law is."

35. "There are three points to be considered in the construction of all remedial statutes; the old law, the mischief and the remedy: that is, how the common law stood in the making of the act; what the mischief was, for which the common law did not provide; and what remedy the Parliament hath provided to cure this mischief. And it is the business of the judges so to construe the act, as to suppress the mischief and advance the remedy." I BLACKSTONE 87.

conditions obtaining at the time, and, honestly and faithfully, when considered historically, to put upon the language used its plain and rational meaning and promote its object and manifest purpose.<sup>36</sup>

In one of the early anti-trust cases in Missouri the supreme court announced the extent it felt under obligation to go in giving effect to the purpose of the legislature. It declared that it was the duty of the court in examining the history of the times to consult the newspapers and the general literature of the period.<sup>37</sup> Before and since that time the Supreme Court of Missouri, the Supreme Court of the United States and courts of other jurisdictions have, in construing and applying our anti-trust legislation, resorted to an examination of newspapers,<sup>38</sup> magazine articles,<sup>39</sup> historical works,<sup>40</sup> biographies,<sup>41</sup> general literature,<sup>42</sup> law review articles,<sup>43</sup> party plat-

36. *Union Electric Co. v. Morris* 222 S.W. 2d 767, 770 (1949); *Haynes v. Unemployment Compensation Commission* 183 S.W. 2d 77, 81 (1944); *American Bridge Co. v. Smith* 179 S.W. 2d 12, 15 (Mo. 1944); *State ex rel Klein v. Hughes* 173 S.W. 2d 877 (Mo. 1943); *Artophone Corporation v. Coale* 133 S.W. 2d 343, 347 (Mo. 1939); *Wallace v. Woods* 102 S.W. 2d 91, 93, 98 (Mo. 1936); *Cummins v. Kansas City Public Service Co.* 66 S.W. 2d 920 (Mo. 1933); *Decker v. Diemer*, 229 Mo. 296, 129 S.W. 936, 944 (1910).

37. In *Co-Operative Livestock Commission Co. v. Browning*, 260 Mo. 324, 168 S.W. 934, 938 (1914), the court said,

"If we look back of the year 1899 (when this class of legislation was first enacted in this state, of which the present statutes are amendatory), which it is our duty to do, it will be seen from the current literature of the day, and especially to the great daily papers of the country, that those who were engaged in almost all classes of production, manufacture, transportation, and financial business, were organizing their respective businesses into pools, trusts, and combines, for the purpose of limiting competition, reducing expenses, and increasing their profits, with no intention, however, at that time, if I am correctly informed, to restrict commerce or to increase the price of the necessities of life."

38. *Standard Oil Co. of New Jersey v. U.S.*, 221 U.S. 1, 31 Sup. Ct. 502 (1911).

39. *U.S. v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533, 64 Sup. Ct. 1162 (1944); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 60 Sup. Ct. 982 (1940); *Standard Oil Co. of New Jersey v. U.S.*, 221 U.S. 1, 31 Sup. Ct. 502 (1911).

40. *U.S. v. Champlain Refining Co.*, 71 Sup. Ct. 715, l.c. 723 (1951); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 60 Sup. Ct. 982 (1940); *U.S. v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533, 64 Sup. Ct. 1162 (1944); *Standard Oil Co. of New Jersey v. U.S.*, 221 U.S. 1, 31 Sup. Ct. 502 (1911); *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, 71 Sup. Ct. 240 (1951).

41. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 60 Sup. Ct. 982 (1940).

42. *U.S. v. Champlain Refining Co.*, 71 Sup. Ct. 715, l.c. 723 (1951); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 60 Sup. Ct. 982 (1940); *U.S. v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533, 64 Sup. Ct. 1162 (1944); *Standard Oil Co. of New Jersey v. U.S.*, 221 U.S. 1, 31 Sup. Ct. 502 (1911); *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, 71 Sup. Ct. 240 (1951).

43. *U.S. v. Champlain Refining Co.*, 71 Sup. Ct. 715, l.c. 723 (1951); *U.S. v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533, 64 Sup. Ct. 1162 (1944); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 60 Sup. Ct. 982 (1940); *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, 71 Sup. Ct. 240 (1951).

forms,<sup>44</sup> debates in Congress,<sup>45</sup> testimony offered before committees in Congress,<sup>46</sup> opinions expressed by men of prominence before Congressional committees,<sup>47</sup> messages of the President to Congress,<sup>48</sup> statements made by a distinguished judge before a bar association and judicial conference,<sup>49</sup> and a wide variety of other miscellaneous historical material.<sup>50</sup>

Judicial acknowledgment that courts have used such extrinsic aids to the construction of our anti-trust statutes verifies the validity of the principle that in the exercise of their function as interpreters of the law judges rely not alone on relevant material evidence submitted in a given case and on reasoning and precedent derived from an examination of judicial decisions, but, whether avowedly or not, they resort also to a consideration of such general information of conditions prevailing when an act under their scrutiny was passed as they may reasonably obtain from all other available, reliable sources. Nor would it be contrary to what we know from human experience to say that in the use of extrinsic aids to the construction of these statutes judges cannot separate themselves from their own knowledge of and experience with the conditions of the times when these statutes originated when they themselves lived through and were a part of those times. Judges would be more than human if they did not take into account their own knowledge of conditions contemporaneous with the adoption of a statute they are called upon to interpret, but they would also be less than judicious if they did not also supplement or enlarge their knowledge of such conditions by examining the authentic sources of information, perhaps altogether extraneous from that found in court opinions,

44. *U.S. v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533, 64 Sup. Ct. 1162, (1944).

45. *U.S. v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533, 64 Sup. Ct. 1162 (1944); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 60 Sup. Ct. 982 (1940); *U.S. v. Trans-Missouri Freight Ass'n.*, 17 Sup. Ct. 540 (1897); *U.S. v. Aluminum Co. of America*, 148 F. 2d 416 (1945).

46. *U.S. v. Trans-Missouri Freight Ass'n.*, 17 Sup. Ct. 540 (1897); *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, 71 Sup. Ct. 240 (1951).

47. *U.S. v. Champlain Refining Co.*, 71 Sup. Ct. 715, l.c. 723 (1951); *U.S. v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533, 64 Sup. Ct. 1162 (1944); *Standard Oil Co. of New Jersey v. U.S.*, 221 U.S. 1, 31 Sup. Ct. 502 (1911); *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, 71 Sup. Ct. 240 (1951).

48. *U.S. v. Champlain Refining Co.*, 71 Sup. Ct. 715, l.c. 723 (1951); *U.S. v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533, 64 Sup. Ct. 1162 (1944).

49. *U.S. v. Oregon State Medical Society*, 72 Sup. Ct. 690, l.c. 695 (1952).

50. *Standard Oil Co. of New Jersey v. U.S.*, 221 U.S. 1, 31 Sup. Ct. 502 (1911); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 60 Sup. Ct. 982 (1940); *U.S. v. Champlain Refining Co.*, 71 Sup. Ct. 715, l.c. 723 (1951); *U.S. v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533, 64 Sup. Ct. 1162 (1944).

which constitute their historic foundations.<sup>51</sup> Judges could not divest themselves of the use of such knowledge nor could they deprive themselves of the privilege of research in such fields of historic information even if they were to attempt to do it by the enforcement of the most rigid rules of interpretation.<sup>52</sup>

Whether or not the Hughes concept that this legislation has the generality and adaptability comparable to that found to be desirable in constitutional provisions<sup>53</sup> is correct, interpretation and application of the anti-trust 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.<sup>54</sup> Like the Constitution, they were designed as a framework and were meant by their architects to

51. "The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis." HOLMES, *THE COMMON LAW* 35-37 (1881).

52. For a candid and unrestrained judicial acknowledgement of that point of view, see *State ex rel Colman v. Kelly*, 71 Kan. 811, 81 Pac. 450, 451 (1905) where the Court said:

"The history and conditions of the people within the jurisdiction of a court at the time of the passage of an act which it is called upon to construe for the purpose of determining its validity are familiar to a court, and its knowledge of the same should aid it in assuming the proper view point from which to discover the object of the law . . . The history of a state, which should include the facts surrounding the enactments of its legislature, and the questions therein raised upon the passage of every law of an economic nature, as well as the doings of its people and the public questions which have agitated their minds, is known by a court. If the act under consideration be one passed immediately before a court is called upon to construe it, it is as familiar with the conditions of the people as any well-informed citizen of the state. . . . It knows the enterprises of the people of the state in a business way quite as well as it understands the agricultural conditions. It also knows those general facts concerning the public aims and interests of the state in social and economic ways which all well-informed people know, . . . A court cannot divest itself of the knowledge of all these things in construing a statute or constitutional provision, even if it were disposed so to do."

For more recent expressions of the same idea, see, *United States v. Champlin Refining Co.*, 71 Sup. Ct. 715, 719 (1951); *Prewitt v. Warfield*, 156 S.W.2d 238, 239 (Ark. 1941); *Holt v. Howard*, 175 S.W. 2d 384 (Ark. 1943).

53. *Ante*, note 16.

54. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 60 Sup. Ct. 982, 994-996 (1940); *Standard Oil Co. v. U.S.*, 221 U.S. 1, 31 Sup. Ct. 502, 512-516 (1910); *U. S. v. American Tobacco Co.*, 221 U.S. 106, 31 Sup. Ct. 632, 648 (1910).

be completed as a permanent structure by judicial decision in the process of their application and usage.<sup>55</sup> 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,<sup>56</sup> 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 under 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.<sup>57</sup> 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,<sup>58</sup> 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.<sup>59</sup> 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 years, through the aid of judicial interpretation, has been used to apply to conditions and to meet problems far beyond the expectation and the

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55. POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 47-48 (1938).

56. *Standard Oil Co. of New Jersey v. U.S.*, 221 U.S. 1, 31 Sup. Ct. 502 (1910); *U.S. v. Trans-Missouri Freight Ass'n.*, 166 U.S. 290, 17 Sup. Ct. 540 (1897); *Appalachian Coals, Inc. v. U.S.*, 288 U.S. 344, 53 Sup. Ct. 471 (1933); *State ex inf. Hadley v. Standard Oil Co.*, 218 Mo. 1, 116 S.W. 902 (1909); *Co-Operative Live Stock Commission Co. v. Browning*, 260 Mo. 324, 168 S.W. 934 (1914); *State ex rel. Barrett v. Boeckeler Lumber Co.*, 301 Mo. 445, 256 S.W. 175 (1923). The judges who wrote the decisions in each of these cases lived through the times which produced the original anti-trust legislation.

57. *Marbury v. Madison*, 1 Cranch 137, 171-175 (1803); *Martin v. Hunter's Lessee*, 1 Wheat. 304, 323-359 (1816); *Sturges v. Crowningshield*, 4 Wheat. 122, 192-193, 199-203 (1819); *McCulloch v. Maryland*, 4 Wheat. 316, 403-410 (1819); *Dartmouth College v. Woodward*, 4 Wheat. 518, 628, 641-652 (1819); *Cohens v. Virginia*, 6 Wheat. 264, 406, 416-423 (1821); *Gibbons v. Ogden*, 9 Wheat. 1, 187-190 (1824).

58. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 60 Sup. Ct. 982 (1940); *U.S. v. Southeastern Underwriters Ass'n.*, 322 U.S. 533, 64 Sup. Ct. 1162 (1944).

59. *Everson v. Board of Education of Ewing Tp.*, 330 U.S. 1, 67 Sup. Ct. 504 (1947); *American Communications Ass'n. v. Douds*, 339 U.S. 382, 70 Sup. Ct. 674 (1950).

purposes of its authors.<sup>60</sup> As provisions of the Constitution have been referred to as the bulwark of our liberties,<sup>61</sup> so the Sherman Anti-Trust Act has been called a charter of freedom.<sup>62</sup> Both the Constitution and anti-trust legislation originated in and were the products of times characterized by "felt necessities" for improving existing conditions.<sup>63</sup>

Points of parallelism could be further multiplied. But the parallelism in interpretation is that with which we are here concerned. The rule that permits courts to resort to extraneous aids by examining contemporary history in the interpretation of legislation is also applied in the interpretation of constitutional provisions.<sup>64</sup> And it has been used in the same way.<sup>65</sup> The great contribution of Marshall to the Constitution of the United States in the form of interpretative supplements resulted from his genius in analytical reasoning and his power of interpreting and applying its provisions and its purposes in a grand and exalted manner to the exigencies of the times with which he was intimately familiar and of which he was a very important part.<sup>66</sup> The judges of the Supreme Court of today, in interpreting

60. POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 48.

61. 1 STORY, *LIFE AND LETTERS OF JOSEPH STORY* 247 (1851); *Martin v. Hunter's Lessee*, 1 Wheat. 304, 326 (1816).

62. *Appalachian Coals, Inc. v. U.S.*, 288 U.S. 344, 53 Sup. Ct. 471 (1933). For an interpretation of the meaning of this reference to the Sherman Anti-Trust Act by Chief Justice Hughes, see Yankwich, 14 F.R.D. 201-204.

63. The conditions of the times which compelled action leading to the formation of the Constitution are discussed in 5 MARSHALL, *LIFE OF WASHINGTON*, First Edition, Chapter 2, pages 65-152, as they are also reviewed in the cases cited *ante*, note 57. See also 1 BEVERIDGE, *LIFE OF JOHN MARSHALL*, 310-311; BEARD, *AMERICAN GOVERNMENT AND POLITICS* Chap. 3, pages 34-59 (1912); 1 BEARD, *THE RISE OF AMERICAN CIVILIZATION*, Chap. 7 (1927). The condition of the times which compelled the enactment of anti-trust legislation have been described in *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 60 Sup. Ct. 982 (1940) and *U.S. v. Southeastern Underwriters Ass'n.*, 322 U.S. 533, 64 Sup. Ct. 1162 (1944). See also BEARD, *CONTEMPORARY AMERICAN HISTORY, 1877-1913* (1914).

64. *State of Rhode Island v. Commonwealth of Massachusetts*, 37 U.S. 657, 12 Pet. 657, 9 L.Ed. 1233 (1838); *Wheeling P. & C. Transportation Co. v. Wheeling*, 99 U.S. 273, 25 L.Ed. 412 (1878); *Storrs v. Heck*, 238 Ala. 196, 190 So. 78 (1939); *Ex parte Russell*, 163 Cal. 168, 126 Pac. 875, 876 (1912); *State ex rel. McKay v. Keller*, 140 Fla. 346, 191 So. 542 (1939); *Warfield Natural Gas Co. v. Ward*, 286 Ky. 73, 149 S.W.2d 705 (1941); *State ex rel. McGaughey v. Grayston*, 349 Mo. 700, 163 S.W.2d 335 (1942); *First Trust Co. of Lincoln v. Smith*, 134 Neb. 84, 277 N.W. 762 (1938); *City of Middletown v. City Commission of Middletown*, 3 Ohio Sup. 150, 138 Ohio St. 596, 37 N.E.2d 609 (1939); *Harris v. City of Fort Worth*, 142 Texas 600, 180 S.W.2d 131 (1944).

65. *Everson v. Board of Education of Ewing Tp.*, 330 U.S. 1, 67 Sup. Ct. 504 (1947).

66. See his historic opinions in *Marbury v. Madison*, 1 Cranch 137, 171-175 (1803); *Sturges v. Crowninshield*, 4 Wheat. 122, 192-193, 199-203 (1819); *McCulloch v. Maryland*, 4 Wheat. 316, 403-410 (1819); *Dartmouth College v. Woodward*, 4 Wheat. 518, 628, 641-652, (1819); *Cohens v. Virginia*, 6 Wheat. 264, 406, 416-423 (1921); *Gibbons v. Ogden*, 9 Wheat. 1, 187-190 (1824).

the same constitutional provisions in their resort to history, find it not alone in the decisions of Marshall and his contemporaries, but also in the fragments gathered from the writings of those who lived through those times and the products of scholars and historians who have in the cause of research labored in the field where that history was made.<sup>67</sup> This is well illustrated in recent decisions of the Supreme Court in applying the First Amendment, where the judges, in interpreting the amendment in the light of modern conditions, have gone beyond the announcements of the meaning of the amendment as found in the basic cases construing the concept of religious liberty and have further considered the history of the constitutional era as it is told in periodicals, biographies, legislative journals, debates, proceedings in ratification conventions, letters, addresses and books produced in the period and have referred to secondary historical material found in the writings of later authors and scholars who have reproduced the history of those times.<sup>68</sup>

In the same way, judges who wrote the first basic interpretative opinions of anti-trust legislation, in their resort to history for extrinsic aids, did not find it necessary to assign the sources from which the facts of history of the times of the enactment of the legislation were obtained.<sup>69</sup> The judges knew these historic facts and their significance, and their knowledge of that history was perhaps more incisive and real than that gleaned from the writings of scholars and historians.<sup>70</sup> But, in later times, the judges who have written such interpretative opinions have probed deep into the vast sources of historic material concerning those times.<sup>71</sup>

Whether this type of statutory interpretation has resulted in judicial legislation,<sup>72</sup> whether it is what Dean Pound describes as judicial empiri-

67. *Everson v. Board of Education of Ewing Tp.*, 330 U.S. 1, 67 Sup. Ct. 504 (1947); *American Communications Ass'n. v. Douds*, 339 U.S. 382, 70 Sup. Ct. 674 (1950).

68. *Ibid.*

69. *Standard Oil Co. of New Jersey v. U.S.*, 221 U.S. 1, 31 Sup. Ct. 502 (1910); *U.S. v. Trans-Missouri Freight Ass'n.*, 166 U.S. 290, 17 Sup. Ct. 540 (1897); *Appalachian Coals, Inc. v. U.S.*, 288 U.S. 344, 53 Sup. Ct. 471 (1933); *State ex inf. Hadley v. Standard Oil Co.*, 218 Mo. 1, 116 S.W. 902 (1909); *Co-Operative Life Stock Commission Co. v. Browning*, 260 Mo. 324, 168 S.W. 934 (1914); *State ex rel. Barrett v. Boeckeler Lumber Co.*, 301 Mo. 445, 256 S.W. 175 (1923).

70. Compare the resume of the history of the times as set out in *Co-Operative Live Stock Commission Co. v. Browning*, 260 Mo. 324, 168 S.W. 934, 938 (1914) and in *U.S. v. Southeastern Underwriters Ass'n.*, 322 U.S. 533, 64 Sup. Ct. 1162, 1174-1175 (1944).

71. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 60 Sup. Ct. 982 (1940); *U.S. v. Southeastern Underwriters Ass'n.*, 322 U.S. 533, 64 Sup. Ct. 1162 (1944).

72. As was charged by Harland, J. in his dissent in *U.S. v. American Tobacco Co.*, 221 U.S. 106, 31 Sup. Ct. 632, 653 (1910).



cism,<sup>73</sup> whether it is the result of the arbitrary operation of the dogmatic doctrine of the separation of powers,<sup>74</sup> whether it is in keeping with the satirical philosophy of Mr. Dooley that the Supreme Court follows the election returns,<sup>75</sup> whether it represents a use of history to deepen the mysteries of the science of the law<sup>76</sup> 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,<sup>77</sup> 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.

Since we are now so far removed from the era which first produced this legislation that the judges who will write interpretative opinions in anti-trust litigation in the future will find it necessary to resort to a consideration of the history of the times, unassisted by their first-hand knowledge of and experience in that history, we shall here further consider the history of that period which is extant and that will be available to the judges who will in the future examine it.

#### IV

The times immediately preceding the adoption of our anti-trust laws witnessed a mighty transformation in the life and habits of the American people.<sup>78</sup> The cessation of war between the states released energies which were swiftly diverted to the exploitation and development of our vast

73. POUND, *THE SPIRIT OF THE COMMON LAW*, Chap. 7, pp. 166-192 (1921).

74. POUND, *THE FORMATIVE ERA OF AMERICAN LAW*, 48-50 (1938); POUND, *THE SPIRIT OF THE COMMON LAW* 170-181 (1921); Ferguson, Address before Section of Anti-Trust Law of the American Bar Association in Washington, D.C., April 1953, reported in *Proceedings of that Section*, pp. 17-20.

75. This frequently misquoted expression seems to have originated with the celebrated satirist Finley Peter Dunne, whose once renowned, but now almost forgotten, fictitious Irish commentator Mr. Dooley tartly observed in terms paraphrasing the slogan "The Constitution Follows the Flag," following the decision by the Supreme Court of the United States of the highly controversial issues raised in the *Insular* cases, in which the Court announced a doctrine considered unsound in legal circles, but which met with popular approval,

"No matter whether th' constitution follows th' flag or not, th' Supreme Court follows th' iliction returns."

76. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* (1941).

77. 2 PUSEY, CHARLES EVANS HUGHES 692-693 (1951); POUND, *THE FORMATIVE ERA OF AMERICAN LAW*, Chap. 3, pp. 81-137 (1938); 1 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 560-561 (1923); WARREN, *HISTORY OF THE AMERICAN BAR* 561 (1911).

78. The story of this dramatic epoch of the nation's history might be pieced together from statements of historic facts found in the judicial decisions of the times. But learning history by this method would be too tedious and laborious. Nor could history learned this way be expected to be adequate. The times were so packed with important incidents and momentous movements which shaped the

natural resources and to the emancipation and acceleration of the latent powers of the united nation. Under the leadership of men of daring and resourcefulness, and assisted by contributions of private capital and public land grants amounting to more than 180 million acres, railroads were hastily constructed across and throughout the country, providing outlets and markets for all localities and military cohesion and commercial consolidation for the nation.<sup>70</sup> The western frontier disappeared.<sup>80</sup> The remainder of what had formerly been considered an inexhaustible amount of free lands vanished before the march of a rapidly increasing population.<sup>81</sup> Towns and cities grew with surprising swiftness.<sup>82</sup> Industries emerged and expanded with prodigious haste.<sup>83</sup> Mineral deposits, coal and oil were brought forth with relentless energy and in enormous quantities.<sup>84</sup> Fabulous fortunes with

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history of the nation, and the narratives and chronicles of the events and activities of the people are so widely diffused, though excessively voluminous, that we could not hope to find even a small part of them summarized or mentioned in judicial decisions. We can here attempt only to sketch some of the things that occurred which appear historically significant and make but scant references to some of the sources from which the history of the times may be more completely and accurately ascertained.

79. As an excellent example of the statement of historic facts in judicial decisions, see the opinion of Justice David Davis in *U.S. v. Union Pacific R.R.*, 91 U.S. 224 (1875), and of Justice S. J. Field in *Winona & St. P. R.R. v. Barney*, 113 U.S. 618, 5 Sup. Ct. 606 (1885), both of which support the statements in the text. See also, 2 SULLIVAN, *OUR TIMES*, 257, 265; 1 BEARD, *RISE OF AMERICAN CIVILIZATION* 637; 2 BEARD, 128, 136-140; BILLINGTON AND HEDGES, *WESTWARD EXPANSION*, Chaps. 31 and 34 (1949) and their bibliographical notes pp. 823-825, 829-830; HADLEY, *RAILROAD TRANSPORTATION: ITS HISTORY AND ITS LAWS* (1885); STICKENY, *THE RAILROAD PROBLEM*.

80. Perhaps the most notable discussion of the significance of the frontier in moulding the character and determining the habits and conduct of the American people and the revolutionary effect of the passing of the frontier is that of TURNER in *THE FRONTIER IN AMERICAN HISTORY* (1920). See also, PAXSON, *HISTORY OF THE AMERICAN FRONTIER* (1924); BILLINGTON AND HEDGES, *WESTWARD EXPANSION* (1949).

81. For a summary of the effect upon the character of the people wrought by the vanishing free lands, see 1 SULLIVAN, *OUR TIMES*, 141-150. See also, TURNER, *THE FRONTIER IN AMERICAN HISTORY*, 303; BILLINGTON AND HEDGES, *WESTWARD EXPANSION*, Chaps. 33, 34 and 35.

82. BEARD, *THE RISE OF AMERICAN CIVILIZATION*, 204-207, 254-256; HOWE, *THE CITY—THE HOPE OF DEMOCRACY*, Chap. 2; WEBER, *THE GROWTH OF CITIES IN THE NINETEENTH CENTURY* (1899); NICHOLSON, *THE VALLEY OF DEMOCRACY*, Chapters 3 to 6 (1918).

83. 2 SULLIVAN, *OUR TIMES*, Chap. 15; BEARD, *THE RISE OF AMERICAN CIVILIZATION*, Chap. 20; MOODY, *THE TRUTH ABOUT THE TRUSTS* (1904).

"With a stride that astounded statisticians the conquering hosts of business enterprise swept over the continent; twenty-five years after the death of Lincoln, America had become, in the quantity and value of her products, the first manufacturing nation of the world." 1 BEARD 176.

84. MOODY, *THE TRUTH ABOUT THE TRUSTS*; HACKER, *THE SHAPING OF THE AMERICAN TRADITION*, 684-694 (1947); 2 SULLIVAN, *OUR TIMES*, Chaps. 15 and 16; TARBELL, *HISTORY OF THE STANDARD OIL COMPANY* (1904); NEVINS, *STUDY IN POWER: JOHN D. ROCKEFELLER, INDUSTRIALIST AND PHILANTHROPIST* (1933).

incredible swiftness flowed into the hands of a few men, who applied their energies and their genius to the expansion and mastery of gigantic business and industrial enterprises and the mass production and distribution of the essential articles of commerce and trade.<sup>85</sup> It was an era of supreme triumph for business enterprise.<sup>86</sup>

Among the changes wrought which were destined to affect widely the economy of the nation were those having to do with business organization. To the bold and daring adventurer in business, where opportunities for expansion beckoned repeatedly, the advantages of organized capital became obvious. The corporation with its association of stockholders using their combined capital and commanding expanded credit succeeded the individually owned business. Railroads revolutionizing transportation; factories furnishing products for trade in great abundance; and industries producing in mammoth volume oil, steel, coal, copper, lead, sugar, tobacco, salt, meat, whiskey and everything people used all rose to positions of preeminence in business through corporate organization and operation.<sup>87</sup>

The concept of combination as a means of attaining business advantages came to encompass more than the corporate device. Corporations are chartered by the state and are amenable to the laws under which they are permitted to operate. They are subject to such control as the law imposes on them, and they cannot escape such publicity concerning their affairs as the law prescribes. Whether it was to avoid the consequences of such publicity and control, or for obtaining other advantages regardless of the risks, combinations known as pools<sup>88</sup> were effectively resorted to by business and industrial giants in this era, until they were declared within the prohibitive

85. 2 SULLIVAN, *OUR TIMES*, Chap. 18; 2 BEARD, *RISE OF AMERICAN CIVILIZATION*, Chapters 20, 23, 25; MOODY, *THE TRUTH ABOUT THE TRUSTS*; HACKER, *THE SHAPING OF THE AMERICAN TRADITION*, 681-877; DEWEY, *FINANCIAL HISTORY OF THE UNITED STATES* (1922); LLOYD, *WEALTH AGAINST COMMONWEALTH* (1892).

86. It was the age of captains of industry, typical of whom in the railroad industry were: Garrett, Harriman, Hill, Huntington, Stanford; in the steel industry: Carnegie, Gary, Schwab; in mining, Guggenheim and Clark; in packing, Armour and Swift; in banking, Cooke and Morgan; and in oil, Rockefeller. As capitalists with varied interests, there were Gould, Vanderbilt. As speculator there was Bet-cha-a-million Gates. George Randolph Chester described the popular urge of the time in *GET-RICH-QUICK WALLINGFORD*; McCutcheon, in *BREWSTER'S MILLIONS* (1903); Warner and Mark Twain, in *THE GILDED AGE* (1873). See also, BEARD, *THE RISE OF AMERICAN CIVILIZATION*, Chap. 20.

87. HENDRICK, *AGE OF BIG BUSINESS* (1919); TARBELL, *THE NATIONALIZING OF BUSINESS* (1936); BEARD, *THE RISE OF AMERICAN CIVILIZATION*, Chap. 20; MEADE, *TRUST FINANCE* (1903); LLOYD, *WEALTH AGAINST COMMONWEALTH*; BRANDEIS, *OTHER PEOPLE'S MONEY* (1914).

88. Although the first anti-trust act in Missouri was directed against certain types of combinations, one of which was specifically designed as "pools," and although this type of combination is now rarely discussed with other

provisions of the Sherman Anti-Trust Act.<sup>80</sup> From the period of the Civil War till near the end of the century, pools of business combinations were used by railroads and in the steel, coal, salt, whiskey and other industries.<sup>80</sup>

Although immense quantities of capital were involved in pools, this form of business combination lacked legal stability. In practical operation, pools were formed by competitors, who sought to avoid price wars, conquests for markets and other consequences of competition by entering into informal understandings to fix prices, divide territory and limit or accelerate output. The contracts were as insecure as the frailties of character of those who made them, and they sometimes resulted in intensifying the very kind of ruinous competitive practices they were designed to prevent.<sup>91</sup>

The holding company<sup>92</sup> was the last of the methods of business combination to come into frequent use by big business men during the period.

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classifications of monopolistic enterprises, lawyers and judges have seemed willing to define pools largely in language used by the dictionaries. In *Kilbourn v. Thompson*, 103 U.S. 168, 26 L.Ed. 377 (1880), the Supreme Court of the United States said:

"The word 'pool', in the sense here used, is of modern date, and may not be well understood, but in this case it can be no more than that certain individuals are engaged in dealing in real estate as a commodity of traffic."

In *Green v. Higham*, 161 Mo. 333, 61 S.W. 798 (1901), the Supreme Court of Missouri defined the word in language quoted from the *Century Dictionary*, thus:

"A joint adventure by several owners of a specified stock or other security temporarily subjecting all their holdings to the same control for the purpose of a speculative operation, in which any sacrifice of the shares contributed by one, and any profit on the shares contributed by another, shall be shared by all alike."

In *Mollyneaux v. Wittenburg*, 58 N.W. 205, 208 (1894), the Supreme Court of Nebraska adopted the definition used in *Webster's Dictionary*, thus:

"A pool is defined to be 'a combination of persons contributing money to be used for the purpose of increasing or depressing the market price of stocks, grain, or other commodities; also the aggregate of sums so contributed.' *Webster; Black's Law Dictionary*, p. 910."

89. *Addyston Pipe and Steel Co. v. U.S.* 175 U.S. 211, 20 Sup. Ct. 175, 44 L.Ed. 136 (1899); *U. S. v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L.Ed. 1007 (1897).

90. In *SEAGER AND GULICK, TRUST AND CORPORATION PROBLEMS* (1929), Chap. 7, it is shown how the Michigan Salt Association, originating in 1876, the Steel Rail Pool formed in 1887, the Associated Pipe Works formed in 1897, the Wire Nut Pool formed in 1895, the Structural Steel Association formed in 1897, the Steel Plate Association formed in 1900, and the Addyston Pipe and Steel Company, which was dissolved in 1899, were giant industrial combinations operating as pools. See *U.S. v. Trans-Missouri Freight Assn.* cited in note 89 for a discussion of how the pool idea was used by the railroads.

91. 2 SULLIVAN, *OUR TIMES*, 321-322.

92. The dominant characteristics of this type of business combination were defined in *North American Co. v. Securities and Exchange Commission*, 327 U.S. 686, 66 Sup. Ct. 785, 794, 90 L.Ed. 945 (1946), to be the ownership of securities by which it is possible to control or substantially to influence policies and management of one or more operating companies in a particular field of enterprise. See similar explanation of the basic purpose of holding companies in *Cities Service Co.*

Holding corporations within the law were made possible by the adoption in New Jersey in 1889, on the eve of the birth of anti-trust legislation, of statutes which permitted one corporation to own or deal in stocks of another.<sup>93</sup> Prior to that time it had been the policy of the states to withhold such privileges from corporations. The adoption of a statute which released this restraint against interlocking corporate interests<sup>94</sup> had the effect of bringing to New Jersey an avalanche of capital which was permitted to operate within the law through these new giants of business enterprise.<sup>95</sup>

But the type of combination which originated and grew into the most effective instrumentality of business organization during that period was the trust.<sup>96</sup> The idea of combining business units under a trust agreement and the evolution of the trust device as a means of exercising control of affiliated business entities originated and reached full fruition with the founders of the Standard Oil Company and their capable legal staff.<sup>97</sup> The parent organization of that immense business enterprise was an Ohio corporation

93. For a review of the origin and development of this instrumentality for organizing capital, see MONTAGUE, *TRUSTS OF TODAY* (1904).

94. See BRANDEIS, *OTHER PEOPLE'S MONEY* (1914) for a discussion of the enormous power that later became vested in banks, industries, railroads and business institutions to control and dominate the operation of business enterprises through the use of the principle of the holding corporation.

95. Ridicule and derision of New Jersey for her statutes, which were said to have provided in that state a refuge for the disconsolate in the house of the holding company, did not abate until the adoption of the Seven Sisters, a series of legislative acts enacted during the administration of Governor Woodrow Wilson, designed to terminate the mischief that the state had brought to the country in permitting big business interests to grow bigger with the sanction of the law. Not only were the Seven Sisters statutes in New Jersey supplemented by later provisions permitting one corporation to own and deal in stocks of another, as had been first provided by the statutes of 1889, but other states also have since that time amended their corporation codes so as to permit this type of corporate practice.

96. Of the transformations that occurred in the period, none was perhaps more complete than that which gave a new meaning to this ancient and honorable word. Having an origin in Biblical usage relating to the most sacred incidents and hallowed human relationships (Psalms 40:4; Luke 24:21; Timothy 6:20), and a use associated with one of the most revered concepts of English and American jurisprudence (*ante*, note 1), this venerable word was seized upon, after the most careful deliberation and mature reflection by those who were shaping the foundations for the expansion of business and industrial combinations, to characterize a type of business organization that was to dominate the field of business enterprise during this dramatic period of its supreme triumph.

97. Samuel C. T. Dodd an attorney of Franklin, Pennsylvania, who was hired by Standard Oil Company about the time the first trust agreement of April 8, 1879, was prepared, and who, during the remainder of his professional career, devoted himself solely to the legal work of the Standard Oil Company, is sometimes given the credit for originating the trust idea for business combination purposes. This is probably incorrect. Myron P. Keith and Judge Rufus P. Ranney, both distinguished attorneys of Cleveland, who had previously represented the Rockefellers, their associates and the Standard Oil Company, had likely considered the idea with Henry M. Flaker, one of the able associates of John D. Rockefeller, before Dodd joined the legal staff. See 1 NEVINS, Chap. 21.

organized on January 10, 1870, and first operating from offices in Cleveland, where it acquired the property of Rockefeller, Andrews and Flagler, co-partners and pioneers in the petroleum industry.<sup>98</sup> As that corporation and its officers acquired the assets of other petroleum industries in other states, it made agreements for the newly-acquired industries to continue operating their business for the Ohio corporation. Later, as it acquired the stock in other corporations of other states, it caused such stock to be transferred to and held by the secretary of the Standard Oil Company, as trustee. The business of the corporation and its expanding interests grew rapidly, and, while the contracts for the continuing operations by former owners and the expedient of the trust device furnished a coveted veil of secrecy for the Cleveland corporation, apprehensions as to the hazardous legal status of such combination of interests led the owners of the Standard Oil Company to draft a form of trust agreement on April 8, 1879, under which three trustees were designated to take title to all the stocks of subsidiary corporations, the business of all of which was to have a common management. A period of doubt as to the stability of such a combination followed, during which time able counsel, in cooperation with the managers of this amazingly successful enterprise, considered whether to form a corporation to operate the separate properties in each state, under the management and control of a central corporation acting as a holding company, or to form a partnership by the stockholders of all the corporations, or to use the trust device. The conclusion that the trust device afforded the greatest advantages led to a consolidation of the great majority of all the petroleum industries in the country under the celebrated Standard Oil trust agreement dated January 2, 1882.<sup>99</sup>

98. The history of the origin, growth and operation of the Standard Oil Company, one of the most fascinating stories of all American business enterprise, may be found in NEVINS, *A STUDY IN POWER* (1953); TARBELL, *HISTORY OF THE STANDARD OIL COMPANY* (1904); LLOYD, *WEALTH AGAINST COMMONWEALTH* (1892); MONTAGUE, *THE RISE AND PROGRESS OF THE STANDARD OIL COMPANY* (1903); MOODY, *THE TRUTH ABOUT THE TRUSTS* (1904) 109-132; DODD, *COMBINATIONS: THEIR USES AND ABUSES* (1894). Bits of the history of this phenomenal enterprise are scattered through newspaper and magazine articles, books, committee reports and in numerous judicial decisions where its affairs have been the subject of frequent litigation.

99. This historic instrument, unquestionably the work of Dodd, was set out in full in the complaint filed in *Standard Oil Co. of N. J. v. U. S.*, 221 U.S. 1, 31 Sup. Ct. 502 (1910). The list of persons, partnerships and corporations who were parties to it are set out in the opinion in that case, as are some of the principal provisions of the agreement. This opinion also contains a list of the corporations the stocks of which were wholly or partially held by the trustees. Nevins says (1:429, note 24) the trust agreement is published in full in *House Trust Investigation, 1888*, p. 307, in *Report of the Commissioner of Corporations on the Petroleum Industry, Part I, and Position of the Standard Oil Company in the Petroleum*

This plan of trust organization, used first for the purpose of uniting all the colossal power of the Standard Oil Company and its congeries of affiliates, furnished the model for trust organization which was used by other innumerable business and industrial combines through the remaining years of the transformation era. The vastness of the holdings of the combinations of capital organized on the trust idea was not publicly realized until after the manufacturing census of 1900, when it was revealed that the manufacturing industries of the country organized and operating under trust forms of combination had assets aggregating approximately nine billion dollars. And, following the publicity of information obtained as a result of state and Congressional investigations, when Moody wrote his *Truth about the Trusts* in 1904, it appeared that a literal octopus of combinations of capital in the form of trusts reigned absolutely supreme in the business, industrial and financial affairs of the country. The extent of the capital and assets owned by these gigantic industrial, manufacturing and financial trusts was staggering and incomprehensible.<sup>100</sup>

But these times of transformation marked by an unprecedented aggregation of wealth and power were plagued also by appalling evils. Recurrent, prolonged and devastating depressions brought business failures, unemployment, poverty, sickness of heart and dreadful emotional stress to millions of people. Unassimilated immigrants, disappointed and displaced farmers seeking refuge in overcrowded industrial plants, unemployed victims of competitive chaos, and families without sustenance and without homes lodged in slums and tenements, and augmented the "Shame of the Cities." Business, advancing along the new highways of steel, by-passed and eliminated the mills established at favorable places on the streams and the one-man proprietors of the crossroad stores. Crop failures, higher costs of farm machinery, increased interest rates, depressed prices of farm products, exorbitant shipping costs, withdrawn credits and inevitable mortgage foreclosures drove legions of families from the farms. Independent business enterprises, small manufacturers and lesser industries, limited and restricted by rigid credit requirements, discriminated against by more powerful competitors, handicapped by arbitrary price-fixing which deprived them of profits, intimidated by threats of boycotting, required to pay freight rates on their

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100. MOODY, *THE TRUTH ABOUT THE TRUSTS* (1904); FLINT *INDUSTRIAL COMBINATIONS* (1899); ELY, *MONOPOLIES AND TRUSTS* (1900); JENKS, *THE TRUST PROBLEM* (1900); 2 BEARD, *Chap. 20*.

own commodities and to contribute to the rates paid by their larger competitors, harried by espionage, threatened with recrimination by competitive combinations, awed by the brazen conduct by which cunning and ruthless business barons had exacted favors and acquired coercive power, and driven to the brink of economic ruin, were in large numbers absorbed by the feigned benevolence of more highly organized and more pitilessly powerful competitors.

Farmers, traders, laborers, individual business proprietors and small business enterprises were frequently rendered helpless and often disappeared in the fierce wars of the leviathons of the new order for the control of the railroads, industries and finance of the country. Victims of these battles for supremacy came to realize that the economic laws of supply and demand, competition in business and freedom in trade, on which the economic foundations of the nation were laid, were no longer effective; that the ideals of equality of opportunity, individual freedom, self-reliance and personal initiative, which had sustained the character of the nation, were losing their pre-eminence. Strikes, violence, destruction of property, absence of self-restraint, bribery and scandal in high places were the order of the day. Everywhere there was evidence that the civilization men had known and helped to form was falling away before the sweeping advance of a new day in which the concentration of economic power was supreme.

The policies and conduct of those who waged the titanic struggle for control were notorious. Secret agreements fixing prices, dividing territory, granting advantages to the favored and exacting exorbitant payments from competitors were made between railroads and enterprises seeking to eliminate competitors and obtain monopolies. One of the most infamous of such contracts was that made by the South Improvement Company,<sup>101</sup> with certain railroad companies on January 18, 1872. By this contract the railroad com-

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101. This "mysterious" corporation, as it has been called, about the origin of which there has been much controversy (partially summarized by Nevins 1:102 *f*), was organized in 1870 and on January 2, 1872, passed into the hands of oil refiners, including the Rockefellers and their associates. Whether John D. Rockefeller had the leading part in its activities as is indicated by Ida M. Tarbell in her *HISTORY OF THE STANDARD OIL COMPANY*, or whether he had less to do with it as is indicated by Nevins in his *STUDY OF POWER*, there were certain coincidences in the history of that company and that of the Standard Oil Company which caused the Tarbell version of it to be accepted by the public. One of these was the fact that the day before the South Improvement Company passed into the hands of the oil refiners the capital stock of the Standard Oil Company was increased from one million dollars, for which it was originally incorporated, to two million.



panies agreed to pay rebates<sup>102</sup> to South Improvement Company ranging from one-fourth to one-half of the total rates charged. By the same contract the railroad companies agreed to pay drawbacks<sup>103</sup> on oils transported for others and to furnish South Improvement Company daily with waybills of all oil shipments, showing the name of the shipper, the name of the consignee, the amount shipped, the origin of the shipment, the quantity and its destination. The contract further provided that the railroads would cooperate with the company to maintain its business against loss by competition, and to that end to lower or raise the gross rates for such times and to such extent as might be necessary to overcome such competition.<sup>104</sup> Although the railroads withdrew from the contract soon after it was executed,<sup>105</sup> it is mentioned here because it illustrates many of the evil practices of the times, including the facilities used for destroying competition by espionage, by fixing rates, by granting rebates and drawbacks, and by absorbing the business of ruined competitors; and it also shows how the combinations of organized capital worked together to eliminate competition and create a monopoly for the control of a commodity for which there was a great public need.

The policies and methods used by the Standard Oil Company and the railroads during the era of transformation have perhaps received more pub-

102. The term "rebate" as used in this contract referred to one of the most pernicious practices in which railroads indulged and which ultimately led to the righteous indignation of the public against them. By this contract to pay rebates, the railroads agreed that, after charging the shipper the regular rate, they would secretly return to the shipper a portion of the freight collected. There was no law prohibiting the payment of rebates, but the practice has since been made unlawful. 49 U.S.C.A., Secs. 41-43. See *U.S. v. Standard Oil Co. of Ind.*, 155 Fed. 305 (D.C. 1907), where District Judge Landis assessed a penalty of the huge sum of \$29,240,000 for violations of this Act, and *Standard Oil Co. of Ind. v. U.S.*, 164 Fed. 376 (7th Cir. 1908), where the Circuit Court of Appeals reversed the case.

103. By the agreement to pay "drawbacks" the railroads became obligated to collect from competitors of South Improvement Company the regular freight rate and then give to that company from one-fourth to one-half of the freight the competitor paid. That part of the contract has been called savage, destructive, devastating and utterly indefensible. 1 NEVINS 114.

104. The terms of this contract and facts relating to the circumstances under which it was made, the persons and corporations it involved, and the purpose of the parties to it are set out in Part I of a SUMMARY OF A REPORT OF THE COMMISSIONER OF CORPORATIONS ON THE PETROLEUM INDUSTRY, PRICES AND PROFITS, 1907. It is discussed extensively in TARBELL'S HISTORY OF THE STANDARD OIL COMPANY and in NEVINS' STUDY IN POWER. For Nevins' conclusions about it see 1 NEVINS, 130-131. It is also discussed in various other historical works where the story of the Standard Oil Company is told.

105. For the latest account of how the public learned of the existence of the contract, the sharp criticism of it and of all those connected with it, the public revolt against it—as expressed in mass meetings in the oil regions, the negotiations of the parties to it with those who were in revolt against it and the final decision of the railroads to withdraw from it, see 1 NEVINS, 102-131.

licity and have been more widely discussed than those of other business enterprises of the time. This has been partly due to the disclosures made by state and Congressional investigations conducted soon after the consequences of their conduct were publicly realized. It has also been due to disclosures made by evidence and testimony in early litigation involving these organizations. From these disclosures and from the general information subsequently obtained concerning business policies and practices of the time, it is manifest that during the struggle for power the dominant purpose of those who rose to positions of control in transportation, manufacturing, commerce and finance was that of obtaining monopolistic advantages. To attain these advantages competitors were ruthlessly eliminated, and the victor in the conquest was able, at the expense of the public and through the cooperation of other victors in similar conquests, to fix prices, control markets and realize profits unhindered and unrestrained.<sup>106</sup>

Against these outrageous practices, flagrant abuses and their alarming consequences there arose a prolonged and bitter protest. The protest was

106. The condition of these times, the trend toward monopolistic control, and the evils that prevailed have been discussed by a multitude of judges, investigating committees, historians, biographers and writers in different capacities. The Supreme Court of the United States has frequently referred to these conditions, but discussed them more in detail in the following cases: *U.S. v. Southeastern Underwriters Assn.*, 322 U.S. 533, 64 Sup. Ct. 1162 (1944); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 60 Sup. Ct. 982 (1940); *Standard Oil Co. of New Jersey v. U.S.*, 221 U.S. 1, 31 Sup. Ct. 502 (1911); *U. S. v. Trans-Missouri Freight Assn.*, 166 U.S. 290, 17 Sup. Ct. 540 (1897). These conditions have been discussed in numerous Missouri cases, among which are *State ex inf. Hadley v. Standard Oil Co.*, 218 Mo. 1, 116 S.W. 902 (1909); *Co-Operative Livestock Commission Co. v. Browning*, 260 Mo. 324, 168 S.W. 934 (1914); *State ex rel. Barrett v. Boeckeler Lbr. Co.*, 301 Mo. 445, 256 S.W. 175 (Mo. 1923). In the following cases also fragments of history of these times in the light of Congressional intent may be found: *U.S. v. Aluminum Company of America*, 148 F.2d 416 (2nd Cir. 1945); *U. S. v. Aluminum Company of America*, 91 F. Supp. 333 (S.D.N.Y. 1950); *Atlantic Cleaners & Dyers, Inc. v. U.S.*, 286 U.S. 427, 52 Sup. Ct. 607 (1932).

Numerous reports of investigating committees also contain valuable information. Among these which have been consulted here are Parts 1 and 2 of the *SUMMARY OF A REPORT OF THE COMMISSIONER OF CORPORATIONS OF THE PETROLEUM INDUSTRY* (1907). Among other works which contain valuable historic information are *BEARD, THE RISE OF AMERICAN CIVILIZATION* (1930); *BEARD, CONTEMPORARY AMERICAN HISTORY 1877-1913* (1914); *SULLIVAN, OUR TIMES, Vols. 1 and 2*; *BRANDEIS, OTHER PEOPLE'S MONEY* (1914); *MONTAGUE, TRUSTS OF TODAY* (1904); *DODD, COMBINATIONS: THEIR USES AND ABUSES* (1894); *LLOYD, WEALTH AGAINST COMMONWEALTH* (1892); *MONTAGUE, RISE AND PROGRESS OF THE STANDARD OIL COMPANY* (1903); *TARBELL, HISTORY OF THE STANDARD OIL COMPANY* (1904); *MOODY, THE TRUTH ABOUT THE TRUSTS* (1904); *NEVINS, A STUDY IN POWER: JOHN D. ROCKEFELLER, INDUSTRIALIST AND PHILANTHROPIST* (1953); *TURNER, THE FRONTIER IN AMERICAN HISTORY* (1920); *PAXSON, HISTORY OF THE AMERICAN FRONTIER* (1924); *HADLEY, RAILROAD TRANSPORTATION: ITS HISTORY AND ITS LAWS* (1885); *BILLINGTON AND HEDGES, WESTWARD EXPANSION* (1949).

first made by enraged victims of the conquest for power in localities where the blows fell hardest.<sup>107</sup> It leaped across the space between battlegrounds and grew spontaneously from field and factory. It attracted national attention, when, from the agrarian states, where people close to the soil felt keenest the pinch of monopolistic practices, there came a great groundswell of discontent, bitter resentment and articulate indignation.<sup>108</sup> The protest rose above the din of incendiary propaganda,<sup>109</sup> on the winds of which it was carried across the nation,<sup>110</sup> and found expression in enlightened quarters, among scholars,<sup>111</sup> economists,<sup>112</sup> historians<sup>113</sup> and others of broad experience and of great eminence.<sup>114</sup> Organizations of an aroused and angry people worked with fanatical zeal to make the protest more effective and resounding.<sup>115</sup>

Newspapers fanned the sweeping flames of public protest. On Christmas Day in 1887 the *St. Louis Post-Dispatch* boomed from its headlines "At Last Jay Gould and Russell Sage to Face the Music. The U. S. Government will make them disgorge their plunder. A suit for \$10,000,000 to be entered against the millionaires."<sup>116</sup> Magazines joined in publishing information about the policies and the practices of some of the great combinations in

107. *Ante*, footnote 105.

108. This has been later described in HICKS, *THE POPULIST REVOLT* (1931); TARBELL, *THE NATIONALIZING OF BUSINESS 1878-1889* (1936); BUCK, *THE GRANGER MOVEMENT 1870-80* (1913); BUCK, *THE AGRARIAN CRUSADE* (1921); PAINE, *THE GRANGER MOVEMENT IN ILLINOIS* (1904); BEARD, *THE RISE OF AMERICAN CIVILIZATION*, Chap. 22.

109. DONNELLY, *THE PEOPLE'S MONEY* (1895); HARVEY, *COIN'S FINANCIAL SCHOOL* (1894). The latter of these has been said to be "an amazing piece of propaganda and misinformation" (HACKER, 867). In 1 SULLIVAN, *OUR TIMES*, 175-180, the extent of its circulation and the estimate of its wide popularity and influence on a contemporary statesman is discussed. The fact that it has largely disappeared from the library shelves of today is indicated by a search made for a copy in numerous libraries, resulting in the location of only one in the rare book collection in the Library of Congress in Washington, D.C.

110. For a bibliography of material concerning the times, see BILLINGTON AND HEDGES, *WESTWARD EXPANSION*, 823-834.

111. STRONG, *OUR COUNTRY* (1885); ELY, *MONOPOLIES AND TRUSTS* (1900); HADLEY, *RAILROAD TRANSPORTATION* (1885).

112. GEORGE, *PROGRESS AND POVERTY* (1879); VEBLÉN, *THE THEORY OF THE LEISURE CLASS* (1889), *THE THEORY OF BUSINESS ENTERPRISE* (1904).

113. TARBELL, *HISTORY OF THE STANDARD OIL COMPANY* (1904); MONTAGUE, *RISE AND PROGRESS OF THE STANDARD OIL COMPANY* (1903); GUNTON, *TRUSTS AND THE PUBLIC* (1900).

114. MOODY, *THE TRUTH ABOUT THE TRUSTS* (1904); GREENE, *CORPORATION FINANCE* (1899); HOBSON, *THE EVOLUTION OF MODERN CAPITALISM* (1894); RIIS, *HOW THE OTHER HALF LIVES* (1890); 2 BRYCE, *THE AMERICAN COMMONWEALTH* (1888); STEFFENS, *SHAME OF THE CITIES* (1904).

115. BAKER (David Grayson), *American Chronicle* (1945); 1 and 2 SULLIVAN, *OUR TIMES* (1926); WHITE, *AUTOBIOGRAPHY* (1946).

116. *St. Louis Post-Dispatch*, December 25, 1887.

the fields of business and finance.<sup>117</sup> Extensive literature of exposure swept the country,<sup>118</sup> Poets,<sup>119</sup> satirists,<sup>120</sup> novelists<sup>121</sup> and other men of letters<sup>122</sup> contributed to the rising flame of protest and revolt.

Dissemination of the facts disclosed by the reports of investigating committees, by the testimony of some of those who stood accused, and by inquiries made by those who sought to trace every wrong to its underlying cause increased the public anger. The evils of the hour had struck at the bases of the American system and had endangered the traditional American character. Public indignation grew. The spirit of revolt rose in everyone who had been wronged. 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, fix prices, crush opposition, favor the few to the detriment of the many, corrupt public officials and produce immense quantities of wealth for the few at the expense of the many. The revolt was against every business and every practice which tended to deprive the public of the advantages of free competition.

It was difficult to isolate the cause or identify the culprit that had brought on these public wrongs. It was obvious that no single cause and no single culprit could be charged with all the mischief that had occurred in the revolutionary movement. A new economic order had arisen. A system of aggregated capital with vested interests and having special privileges had captured the control of the industries and business of the country. Through the machinery of combinations and interlocking directorates, the system had become a curse as a result of its bigness and its power.<sup>123</sup> In the public mind, the trust came to represent the system. The trust became a curse. It was an octopus devouring the vitals of the nation. Public indignation centered on this "monster" of the new order. It had triumphed against every

117. *TARBELL'S HISTORY OF THE STANDARD OIL COMPANY* was first published in McClure's in 1903. For a list of such material published in the magazines and journals during the time, see bibliography on Trusts, Third Edition, 1907, with supplements of 1913 and 1931, in the Library of Congress, Washington, D.C.

118. *BAKER (David Grayson), AMERICAN CHRONICLE (1945); WHITE, AUTOBIOGRAPHY (1946).*

119. Markham, "The Man with the Hoe" (1899).

120. *DUNNE, MR. DOOLEY IN THE HEARTS OF HIS COUNTRYMEN (1898), MR. DOOLEY'S PHILOSOPHY (1900), MR. DOOLEY'S OPINIONS (1901); CLEMENS AND WARNER, THE GILDED AGE (1873).*

121. *BELLAMY, LOOKING BACKWARD (1889); HOWELLS, THE RISE OF SILAS LAPHAM (1885); NORRIS, THE OCTOPUS (1901), THE PIT (1901).*

122. *GARLAND, MAIN TRAVELLED ROADS (1894).*

123. *BRANDEIS, OTHER PEOPLE'S MONEY, Chap. 8, "A Curse of Bigness."*

attempt to control it in the business world. If it could be brought within the control of the people at all, it had to be done through the law.

### V

The common law in effect at the time furnished no adequate remedy against the evils that had infested the economy and that had enraged the people. The trust was its own creation. But a trust as known at common law was the antithesis of the trust that had gained dominion of the American economic order. The trust at common law had not sought special privilege. It had not acquired monopolistic control. It had not destroyed individual rights. It had not absorbed by coercion or eliminated by force its competitors. It had not made contracts which stifled lawful commerce or restrained the free course of trade. But the trust that had incited the wrath of the American people had done all of these things. It was the proverbial wolf in sheep's clothing. It had come into the economic scene within the limits and, as an instrumentality of the common law and by making contracts which had restrained and hindered the progress of lawful trade, by coercion, by discrimination and by the use of methods which shocked the business world and which stunned the conscience of the nation, it had risen to a position of mastery.

Although the common law of England had long condemned monopolies and the granting of special privileges or the making of contracts which hindered lawful trade<sup>124</sup> and although these basic common law principles had become a part of our system of jurisprudence and were considered essential to the protection of our fundamental, individual rights,<sup>125</sup> contracts which were in unreasonable restraint of trade at common law were not unlawful in the sense of being criminal, but they were simply void and unenforceable.<sup>126</sup> The later tendency in England and in this country to relax the enforcement of laws in restraint of trade in order to encourage the extension of commerce, and the absence of any concept that penalties should be ap-

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124. For a complete discussion of the status of the common law and the statutes in effect in England at the time of Blackstone as to monopolies and similar offenses of forestalling, regrating and engrossing, see 4 BLACKSTONE'S COMMENTARIES 158-160.

125. For a more complete statement of this idea, see the dissenting opinion of Mr. Justice Field in the Slaughter-House cases, 83 U.S. 36, 83, 96-97 (1872).

126. In *U.S. v. Addyston Pipe and Steel Co.*, 85 Fed. 271 (6th Cir. 1898), a United States Circuit Court of Appeals, in discussing the purpose of Congress in passing the Sherman Anti-Trust Law, pointed out in language frequently quoted and referred to in many subsequent decisions of courts throughout the country the inadequacy of the common law to provide a remedy against the evils of the times.

plied for the violation of such laws in the interest of protecting the public against the consequences of such violation, had created a condition whereby positive action in an affirmative sense under the common law could not be used effectively to suppress the evils of the new system or to control the trusts which were the perpetrators of them.<sup>127</sup> The situation was so desperate that, even after the adoption of the first laws to control the trusts in Missouri, the Supreme Court, reviewing the conditions which trusts had caused, said:<sup>128</sup>

“‘Competition is the life of trade.’ Pools, trusts, and conspiracies to fix or maintain the prices of the necessities of life strike at the foundations of government; instill a destructive poison into the life of the body politic; wither the energies of competitors; blight individual investments in legitimate business; drive small and honest dealers out of business for themselves, and make them mere ‘hewers of wood and drawers of water’ for the trust; raise the cost of living and lower the price of wages; take from the average American freeman the ability to supply his family with necessary, adequate, and wholesome food; force the boys away from school, and into the various branches of trade and labor, and the girls into workshops and other avenues of business, and make them bread-winners while they are yet almost infants, because the head of the house cannot earn enough to feed and clothe his family. The people are helpless to protect themselves. The powers that be must protect them, or, as surely as history records the story of republican government in Rome, so surely will the foundations of our government be shaken, and its perpetuity threatened.”

## VI

Unsatisfied with the prospects for obtaining relief against the trusts, which had come to symbolize every form of combination using monopolistic practices and from which every business and political wrong emanated, through action against them in the courts, the public protest, early in its development, turned for relief to the representatives of its people in the Con-

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127. *State ex. inf. Hadley v. Standard Oil Co.*, 218 Mo. 1, 116 S.W. 902 (1903); *State ex. inf. Crow v. Armour Packing Co.*, 173 Mo. 356, 73 S.W. 645 (1909); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 60 Sup. Ct. 982 (1940); *Standard Oil Co. v. U.S.*, 221 U.S. 1, 31 Sup. Ct. 502 (1910); *U.S. v. American Tobacco Co.*, 221 U.S. 106, 31 Sup. Ct. 632 (1910); *U.S. v. Trans-Missouri Freight Assn.*, 166 U.S. 290, 17 Sup. Ct. 540 (1910); *U.S. v. Addyston Pipe and Steel Co.*, 85 Fed. 271 (6th Cir. 1898).

128. *State ex. inf. Crow v. Armour Packing Co.*, 173 Mo. 356, 73 S.W. 645 (1903).

gress of the United States and in the legislatures of the various states. Although action by state legislatures for the regulation of business had earlier been held invalid,<sup>129</sup> and the idea had been subsequently discouraged,<sup>130</sup> more recent decisions had definitely established the fact that state legislatures were vested with power reasonably to regulate business in the public interest.<sup>131</sup> The demand for legislative relief became so sweeping and persistent that both of the major political parties in 1888 announced through their national platforms positive opposition to trusts and monopolies.<sup>132</sup>

Missouri was in the midst of this national uprising, and her legislature was one of the first to respond to the public demand. One of the first bills introduced in the Missouri House of Representatives in 1889 was House Bill No. 2 entitled "An Act for the Punishment of Pools, Trusts and Conspiracies . . ." A large number of other bills for the same purpose were introduced during that session of the Missouri General Assembly, and a substitute bill for all of these was passed with an emergency clause by practically a unanimous vote.<sup>133</sup> That act made it unlawful for any person or business

129. *Ogden v. Saunders*, 12 Wheat. 213 (U.S. 1827).

130. The Civil War amendments to the Constitution of the United States were said to have been passed with the idea that they could be used to check the tendency arising among the states to disregard the rule announced in *Ogden v. Saunders* and impose restraints on business enterprises.

131. The Slaughter-House cases, 16 Wal. 36, 83 U.S. 394 (1872); the Granger cases (1876): *Munn v. Illinois*, 94 U.S. 113 (1876); *Peik v. Chicago and Northwestern Ry.*, 94 U.S. 164 (1876); the Minnesota Rate case: *Chicago, M. & St. P. Ry. v. State of Minnesota*; *Chicago, M. & St. P. Ry. v. State of Minnesota*, 134 U.S. 418, 10 Sup. Ct. 462 (1890).

132. BRANDON, PLATFORMS OF THE TWO GREAT POLITICAL PARTIES 1856-1928.

133. House Journal, 35th General Assembly of Missouri 1889, p. 222, shows that, while the legislature of 1889 was in session, Governor David R. Francis addressed a message to the General Assembly calling its attention to the fact that the legislature of Kansas had passed a resolution calling attention to the existence of a "beef and pork combine" or "trust" and that evils of such an organization could be most effectively remedied by uniform legislation by the states, and he recommended action as thus proposed.

In the final vote on the bill that was passed, there were 98 votes for it and 1 against it; 39 members were absent. In the vote on the emergency clause, 100 voted for it and 2 against it. House Journal 952-954.

For proceedings showing overwhelming sentiment in favor of this legislation, see House Journal 1889, pp. 22, 222, 864, 904, 952-954, 1257, 1284; Senate Journal 1889, pp. 127, 150, 151, 348, 410; and House Journal 1891, pp. 171, 381, 566, 868.

That local influence was exercised on members of the General Assembly is indicated by a communication sent by "The Wheel," a farmers alliance from New Madrid, urging that the Senate pass antitrust legislation. Three books of the time relate the activities of farmers alliances and other organizations. They are ASHBY, *THE RIDDLE OF THE SPHINX* (1890); MORGAN, *HISTORY OF THE WHEEL AND ALLIANCE* (1899); CLOUD, *MONOPOLIES AND THE PEOPLE* (1873).

unit to join with another by any means "to regulate or fix the price of any article of merchandise or commodity," or to limit the output of any commodity. It provided that anyone who violated the act was subject to the payment of a fine and imprisonment.<sup>134</sup> In 1891, anticipating that its act passed two years before would be declared unconstitutional,<sup>135</sup> the legislature repealed the act of 1889 and enacted a new anti-trust law which contained the same provisions as the original law as to price-fixing and limiting output, and added new provisions placing on officers and stockholders of corporations the responsibility of seeing that their corporations do not participate in illegal price-fixing and agreements for limitation of output, and subjecting them to penalties if they do. It contained provisions also for the forfeiture of its charter by a corporation for violating the act and other provisions designed to assist in the enforcement of the law.<sup>136</sup> The legislature of 1895 made the law extend to certain kinds of insurance companies and mining operations and added other provisions to promote more effective enforcement.<sup>137</sup> In 1899 the legislature added provisions to the law making it unlawful for two or more persons or corporations to combine "to control or limit the trade" in any commodity, or "to limit competition in such trade" by discrimination or by boycott. It also added provisions which gave enforcing officers additional specific powers.<sup>138</sup>

By the act of 1907 the legislature repealed the law as it then existed and enacted a new law making it unlawful for any person to participate with another in any agreement or understanding in restraint of trade or competition. It provided that any person so participating shall be deemed and adjudged guilty of a conspiracy in restraint of trade. It prohibited all persons from participating in any understanding "to regulate, control or fix" the price of any article of merchandise or commodity. It prohibited understandings to control and limit trade or limit competition by discrimination or boycott and "designed or made with a view to lessen, or which tend to lessen full and free competition" in trade.<sup>139</sup> In 1913 the law was finally

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134. Mo. Laws 1889, 96-98.

135. *Ante*, footnote 19.

136. Mo. Laws 1891, 186-189.

137. Mo. Laws 1895, 237-240.

138. Mo. Laws 1899, 314-322.

139. Mo. Laws 1907, 673-384.



amended in the form which it has retained since that time<sup>140</sup> and as it appears in our statutes today.<sup>141</sup>

During the period between the time the General Assembly of Missouri first considered and enacted and last amended anti-trust legislation, other states passed and amended similar acts. The State of Kansas is said to have been the first state to adopt an anti-trust act. The order in which the different states passed their anti-trust laws is uncertain. Some of the states had anti-monopoly provisions in their constitutions. By the time the Sherman Anti-Trust Act was passed on July 2, 1890, fourteen states and territories had in effect constitutional provisions prohibiting monopolies, and thirteen states had passed statutes known as anti-trust statutes. No complete or accurate list of state anti-trust laws has been compiled.<sup>142</sup>

Protests and demands for positive legislative action to which the Legislature of Missouri responded almost unanimously in 1889, and to which the legislatures of many other states responded with similar promptness, were made on a national scale and with no less emphasis before the Congress of the United States. These protests were made and the first anti-trust laws were passed before the public had the benefit of all the information contained in the exposure literature,<sup>143</sup> and prior to the attacks on the general abuses of the day by some of the leading magazines and by some of the commentators on contemporaneous events just after the turn of the century, which were referred to as the literature of the muckrakers.<sup>144</sup> But the protests

140. Mo. Laws 1913, 549-556.

The House and Senate Journals of each General Assembly of Missouri which originally enacted and later amended or modified the anti-trust law show that in most cases, the legislature proceeded by vote of large majorities.

When the law was being considered, the Governors of Missouri, two of whom as Attorney-Generals had experience in the enforcement of the law, made recommendations to the legislature which received its consideration. GUITAR AND SHOEMAKER'S MESSAGES AND PROCLAMATIONS OF GOVERNORS OF THE STATE OF MISSOURI:

David R. Francis, Vol. VII, 221, 233, 257-259, 354.

Lon V. Stephens, Vol. VIII, 326-365.

Joseph Wingate Folk, Vol. IX, 316-320; 375-377; 383-384.

Herbert S. Hadley, Vol. X, 28-31.

Elliott W. Major, Vol. XI, 24.

141. Mo. REV. STAT. Chap. 416 (1949).

142. SEAGER AND GULIC, TRUST AND CORPORATION PROBLEMS (1929).

143. This was a term applied to articles containing factual material about the economic and political conditions of the times, typical of which was that produced by Ida Tarbell on the Standard Oil Company and Lincoln Steffens on the shame of Minneapolis and Tweed days in St. Louis, published in McClure's in 1903 and 1904.

144. The term "muckrakers" was applied by President Theodore Roosevelt to the authors of magazine articles and books of the time which attacked the trusts and general political and economic conditions, their work being likened to that of the man with the muckrake in Bunyan's "Pilgrim's Progress."

representing the feeling of many people had been made in channels that had unquestionably reached the members of Congress.<sup>145</sup>

In 1887 the Congress, in response to the strict demand for legislative relief against railroad abuses, had passed the historic Interstate Commerce Act.<sup>146</sup>

Investigations of the activities of the railroads had produced startling information, and newspapers throughout the country had carried the facts disclosed by these inquiries to the people. The Senate reports of the investigations of the railroads had connected the abuses practiced by the railroads with the Standard Oil Company. These reports indicated that the Standard Oil Company had been the beneficiary of millions of dollars in the form of rebates granted by the railroads.<sup>147</sup> The investigation of the committee of the House revealed that the Standard Oil Company had exercised coercive power over competitors and over railroads. This committee heard complaints of producers, distributors and refiners concerning rebating, price-cutting, excessive charges and secrecy of operations.<sup>148</sup> Federal power exercised against the railroads would not reach the trusts such as the Standard Oil Company. From every area in the nation demand that the Federal power be used against the trusts continued to increase from the time of the

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145. *PROGRESS AND POVERTY* by Henry George had appeared in 1879. *OUR COUNTRY* by Josiah Strong had appeared in 1885. William Dean Howells had produced *THE RISE OF SILAS LAPHAM* in 1885. And, during the year preceding the adoption of anti-trust legislation by Congress, the immensely popular English Ambassador, James Bryce, had published his first edition of *THE AMERICAN COMMONWEALTH*, in which he said (Vol. 2, pp. 703-718):

"The most remarkable economic feature of the years that have elapsed since the war has been the growth of great fortunes . . .

"The growth of vast fortunes has helped to create a political problem, for they become a mark for the invective of the more extreme sections of the Labor Party. But, should its propaganda so far prosper as to produce legislative attacks upon accumulated wealth, such attacks will be directed (at least in the first instance), not against individual rich men, but against incorporated companies, since it is through corporations that wealth has made itself obnoxious. . . . He who considers the irresponsible nature of the power which three or four men, or perhaps one man, can exercise through a great corporation, such as a railroad or telegraph company, the injury they can inflict on the public as well as on their competitors, the cynical audacity with which they have often used their wealth to seduce officials and legislators from the path of virtue will find nothing unreasonable in the desire of the American masses to regulate the management of corporations and narrow the range of their actions. The same remark applies with even more force, to combinations of men not incorporated but acting together, the so-called Trusts, i.e., commercial rings or syndicates. The next few years, or even decades, may be largely occupied with the effort to deal with these phenomena of a commercial system far more highly developed than the world has yet seen elsewhere."

146. 49 U.S.C.A., Secs. 1-15.

147. 1 TOULMIN'S ANTI-TRUST LAWS, 94.

adoption of the Interstate Commerce Act. During the years 1888 and 1889 bills directed against the trusts were introduced and considered. On December 4, 1889, Senator John Sherman of Ohio introduced the bill which, after extensive debate, was adopted on July 2, 1890.<sup>149</sup> The adoption of the Act was the response of Congress to an irresistible demand that the Federal power be used to restrain combinations of capital from a further perpetration of their economic abuses against competitors and the people.

Space will not permit here a review of the historic background of the various Acts of Congress collateral to and supplementing the Sherman Anti-Trust Act.

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This discussion of some of the historic incidents and movements out of which the first anti-trust legislation originated and the references here made to the sources of some of the materials which have a bearing upon the history of the times will indicate something of the task that will confront the judges of the future who, in deciding litigated cases under the Act, will turn to history for the purpose of aiding them in determining and applying legislative intent.

Fascinating and enlightening as the history underlying this legislation may be and important as the knowledge of it may become to the judges who are called upon to interpret and apply it, the wonder is how a judge of the Big Case,<sup>150</sup> as every case against large operators will necessarily be,<sup>151</sup> may have the physical endurance, the stoutness of heart and the clarity of mind sufficient to enable him to hear and grasp the facts, apply the technical rules regarding competition, conspiracy, restraint of trade and monopolistic principles, and then review the vast range of history for the purpose of determining whether and to what extent the legislation applies.

This is but a phase of the whole anti-trust law problem, which presents one of the greatest challenges of the law to the bench and bar of this generation.

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149. In 1903 Congress caused to be published a large volume entitled "Bills and Debates on Trusts." This volume contains the various bills introduced and the debates on the bills.

150. MCALLISTER, *The Big Case: Procedural Problems in Anti-Trust Litigation*, 64 HARV. L. REV., 27-61 (1950).

151. The enormity of the judicial task in the Big Case appears in that of *U. S. v. Morgan*, now pending before Judge Harold Medina of the United States Circuit Court of Appeals for the 2nd Circuit. In this case the complaint was filed October 30, 1947. Pre-trial hearings began March 29, 1948. Trial began November 28, 1950, and continued until May 20, 1953, when an adjournment was had to consider pending motions. The record already comprises 108, 546 pages together with the trial minutes embracing 23,962 pages in thirty-two bound volumes. In addition,