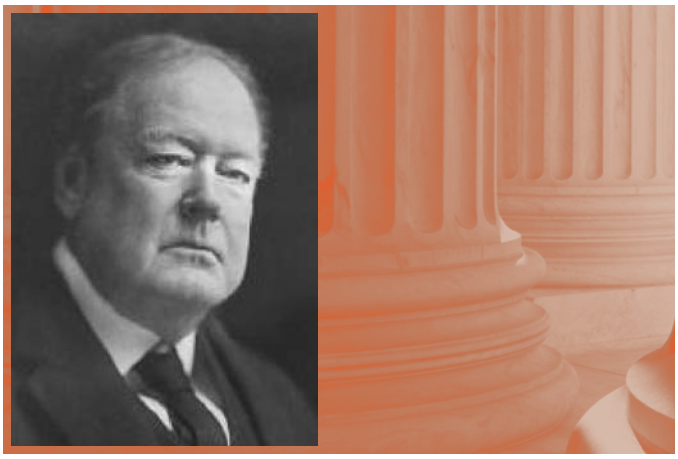
Antitrust, Vol. 24, No. 3, Summer 2010.



TRUSTBUSTERS

Chief Justice Edward Douglass White And the Birth of the Rule of Reason

BY WILLIAM KOLASKY

WHEN THE SHERMAN ANTITRUST ACT was enacted in 1890, most observers were skeptical—if not downright cynical—as to its value. Even John Sherman, whose name the Act carried, doubted its utility. In a newspaper interview, Sherman said he feared that the Judiciary Committee's rewrite of his original bill had rendered the Act "totally ineffective in dealing with combinations and Trusts."[1] Sherman hoped later Congresses would "restore in substance the original design of the bill."[2]

However justified Sherman's pessimism may have been at the time, the Supreme Court over the next fifteen years proved him wrong. Through a series of decisions, many by 5–4 votes, the Court interpreted the Sherman Act in a manner that preserved the original design of the Act, just as Sherman had hoped. In so doing, they helped make the Sherman Act into "the Magna Carta of free enterprise."[3] This article examines the role of the leading player in this struggle, Edward Douglass White, who joined the Court in 1894 just as the drama was beginning and whose ascendancy to Chief Justice presaged its successful culmination in the Court's twin 1911 decisions in *Standard Oil* and *American Tobacco*, dissolving two of the country's largest and most infamous trusts.

Like John Sherman, Edward Douglass White was a most unlikely trustbuster. "Ned," as he was known to family and friends, was born into a prominent family in antebellum Louisiana.[4] His grandfather, James White, had moved from Pennsylvania to Louisiana shortly after the Revolutionary War, well before Louisiana became part of the United States in 1807. Devout Catholics, the Whites were quickly accepted into the circle of wealthy Creoles who dominated the territory both financially and politically. His father, the first Edward D. White, served one term as governor of Louisiana and five terms in the U.S. House of Representatives, before retiring in 1843 to assume active management of his sugar plantation in one of the most picturesque areas of Louisiana.

"Ned" White was born in 1845, just two years before his father's death, the youngest of five children. He was raised until the age of six on the plantation, when he left to begin his schooling in New Orleans. At the age of thirteen, White enrolled in Georgetown University, but dropped out before completing his degree to enlist in the Confederate army at the beginning of the Civil War. He was taken prisoner in the Union capture of Port Hudson in July 1863, shortly after Gettysburg. Held for several months as a prisoner of war, he apparently was treated well enough that he came to believe the Union's victory was for the best, later exclaiming: "My God . . . what if we had succeeded!"[5]

Following his release, young Ned White settled in New Orleans, where he quickly developed one of the largest law practices in the city. Following his father's lead, White became active in Democratic Party politics in Louisiana, and in 1877, the newly elected Democratic governor, Francis Nicholls, a close friend, appointed him an Associate Justice of the Supreme Court of Louisiana. White served only briefly. The Democrats lost the next election, and the new Republican-controlled legislature enacted a constitutional amendment requiring Justices to be at least thirty-five, forcing White (who was one year short of that number) to resign. White returned to private practice and became recognized as one of the leading lawyers in Louisiana.

In 1888, Nicholls was again elected governor and promptly asked the legislature to appoint White to the U.S. Senate. A serendipitous series of events then led to White being appointed to the Supreme Court in 1894, just three years after he arrived in the Senate. On July 7, 1893, Justice Samuel Blatchford of New York died. President Grover Cleveland, the only Reconstruction-era Democratic president, who was also from New York, had a long-running feud with New York Senator David Bennett Hill. Cleveland nominated William Hornblower to replace Blatchford, without consulting Hill. Senator Hill regarded Hornblower as an enemy because Hornblower had served on a New York City Bar committee that had accused Hill of having directed the falsification of election returns when he was governor. The Senate, at Hill's urging, rejected Hornblower's nomination. Hill signaled he would support the nomination of Rufus Peckham, also of New

William Kolasky is a partner in the Washington, DC office of WilmerHale, where he practices antitrust law. From 2001–2002, he served as Deputy Assistant Attorney General for International Enforcement in the Antitrust Division of the U.S. Department of Justice. He also teaches antitrust law at the Washington College of Law, American University, and is an Associate Editor of ANTITRUST. *Mr. Kolasky thanks Mary Lou Steptoe for her very helpful editorial suggestions.*

If there were any truth to Holmes' dictum that "[g]reat cases, like hard cases, make bad law," *Standard Oil* should have made very bad law. There was probably no more notorious trust in the United States during the Progressive Era than Standard Oil.

York. Instead, Cleveland nominated Rufus's brother, Wheeler Peckham, who had been even more prominent in the City Bar's investigation. Again at Hill's insistence, the Senate rejected Wheeler Peckham. After his next candidate declined the nomination, the President, in February 1894, nominated White, certain the Senate would not reject one of its own. The day before his announcement of the nomination, Cleveland reportedly commented: "Tomorrow I'll name a man whom the Senate will unanimously confirm and for whom that little [expletive deleted] himself will be compelled to vote."[6] As Cleveland predicted, the Senate quickly confirmed White's nomination after Hill seconded the nomination, observing that White "is offensive to no one." One year later, Cleveland granted Hill's earlier wish and appointed Rufus Peckham to the Court.

E.C. Knight: White's First Encounter with Antitrust

The Sherman Act arrived at the Supreme Court during White's first full term in 1895. The case, *United States v. E.C. Knight Company*,[7] one of the few brought by President Benjamin Harrison, sought to block the American Sugar Refining Co.—widely known as the "Sugar Trust"—from acquiring four of the last five independent sugar refiners in the United States, giving it a 98 percent share of all sugar refining. In a decision many saw as virtually nullifying the Act, the Court, by a vote of 8–1, affirmed the dismissal of the government's complaint. Accepting that the planned acquisitions would have created a monopoly over the manufacture of sugar, the Court held that the Act applied only to interstate commerce, not to manufacturing, reasoning that "[c]ommerce succeeds to manufacture, and is not a part of it."[8] Justice John Marshall Harlan registered a vigorous but lonely dissent, arguing that control over the manufacture of sugar necessarily carried with it control over the sale of that sugar in interstate commerce. Justice White, new to the Court, silently voted with the majority.

Harlan's dissent in *E.C. Knight* was characteristic of his jurisprudence. Holmes once referred to Harlan as one of "the last of the great tobacco spittin' judges, often wrong, but never uncertain."[9] During his nearly thirty-five-year tenure on the Court, Harlan became widely known as "the great dissenter" for his regular dissents from the Fuller Court's laissez-faire decisions both in the area of economic regulation and civil rights.[10] Like White, Harlan's family had been slave-owners before the Civil War, in his case in the border state of Kentucky.[11] Harlan, however, had fought in the Union Army and was a fervent believer in a strong national government. Justice David Brewer, who served with him, described Harlan's jurisprudence by saying he "goes to bed every night with one hand on the Constitution and the other on the Bible, and so sleeps the sweet sleep of justice and righteousness."[12] Oliver Wendell Holmes, who also served with Harlan, was less kind, famously writing to his friend Sir Frederick Pollock that Harlan's mind was like "a powerful vise, the jaws of which couldn't be got nearer than two inches to each other."[13]

Trans-Missouri: White First Advocates a "Rule of Reason"

The next antitrust case to reach the Court was *Trans-Missouri Freight Association*,[14] in which the government sued to enjoin an association of railroads created to jointly set the rates the railroads charged for traffic over their lines. The Court, in a 5–4 opinion by Rufus Peckham, found the association to be an unlawful restraint of trade under the Sherman Act. Refusing to give any weight to the legislative history, Justice Peckham rejected the defendants' argument that the Act condemned only unreasonable restraints of trade.[15] Instead he held the Act had to be interpreted literally, writing that,

> [w]hen, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by congress.[16]

Justice White dissented, joined by Justices Field, Gray, and Shiras. White argued that when a statute uses technical terms, such as "restraint of trade," the meaning of which has been "conclusively settled by long usage and judicial construction," those terms must be given "the generally accepted meaning affixed to the words at the time the act was passed."[17] White then surveyed the decisions applying the common law rule against restraints of trade, showing that they condemned only those contracts that unreasonably restrained trade. Noting that "the plain intention" of the Act "was to protect the liberty of contract and the freedom of trade," White closed by declaring that "[i]f the rule of reason no longer determines the right of the individual to contract . . . what becomes of the liberty of the citizen or of the freedom of trade?"[18]

Robert Bork has criticized Justice White's dissent, arguing that his initial formulation of the "rule of reason" would have required the courts to inquire into the reasonableness of the rates charged in a price-fixing agreement in order to find it unlawful.[19] Bork's criticism is unfair. As the case was argued before the Supreme Court, the government conceded the reasonableness of the restraint so there was no occasion for the Court to decide whether the restraint was reasonable or not. And there is nothing in White's survey of the common law restraint of trade decisions to suggest that the reasonableness of the prices charged would be relevant to whether the restraint was reasonable. To the contrary, the common law decisions White reviewed that had found prior restraints to be reasonable all involved situations where the restraint was ancillary to the sale of a business or to

an employment contract—the very circumstances in which the Supreme Court subsequently came to use the rule of reason to uphold restraints under the Sherman Act as well.

Justice Peckham's Unsuccessful Effort to Develop a Direct vs. Indirect Effects Test

Even Justice Peckham soon recognized that his literal reading of the Sherman Act in *Trans-Missouri* could not stand. On October 24, 1898, in two decisions delivered the same day, both written again by Justice Peckham, the Court took a major step toward White's view that the Act condemned only restraints that would have been found unreasonable at common law.

The first of these decisions was *Hopkins v. United States*.[20] *Hopkins* was a suit commenced by the government to dissolve the Kansas City Live-Stock Exchange, the rules of which permitted only members of the Exchange to trade livestock in Kansas City and fixed the commissions members could charge for selling livestock. The Supreme Court reversed the district court's grant of an injunction, holding that the trading of livestock was not in interstate commerce, that the Exchange's rules therefore had only an indirect effect on commerce, and for that reason did not violate the Act. In an opinion for a unanimous Court, Justice Peckham recognized, as Justice White had argued in *Trans-Missouri*, that the Act "must have a reasonable construction."[21] Peckham proposed, however, that the test of reasonableness should be whether the effect of the agreement was to restrain commerce directly, in which case it would be illegal, or only "indirectly or remotely," in which case it was beyond the Act's reach.[22]

In the second decision, *United States v. Joint Traffic Association*,[23] Peckham attempted to further develop his proposed distinction between direct and indirect restraints as a test of reasonableness. In *Joint Traffic*, the defendants challenged the Act's constitutionality, arguing that as construed in *Trans-Missouri*, the Act would condemn a wide range of normal business arrangements, such as the formation of a partnership or the sale of a business with a covenant from the seller not to destroy its value by engaging in a similar business. In response, Justice Peckham, citing *Hopkins*, agreed that the Act "must have a reasonable construction," and that these normal business arrangements would not be illegal under the Act.[24] Peckham insisted, however, that the test of reasonableness could be satisfied by limiting the Act to restraints whose effect on interstate commerce was direct, rather than indirect. Justice White again dissented, but this time without writing an opinion.

Justice Peckham relied on his direct/indirect test of reasonableness one last time in the next term in *Addyston Pipe*.[25] Much more attention has been focused over the years on the court of appeals opinion, written by William Howard Taft, then a circuit court judge, than on the Supreme Court's decision affirming the court of appeals.[26] Taft's opinion is justifiably famous for his development of the ancillary restraints doctrine, almost all of which was dicta since the case itself involved a naked horizontal market allocation/price fixing agreement of the kind the Supreme Court had already twice found unlawful under the Sherman Act in *Trans-Missouri* and *Joint Traffic*.

The Supreme Court's decision marked the Court's first significant movement away from its earlier decision in *E.C. Knight*, which had seemed to place manufacturing outside the ambit of interstate commerce and therefore beyond the reach of the Act. In *Addyston Pipe*, the Court, in yet another opinion written by Justice Peckham (maintaining his near-monopoly of early Supreme Court antitrust opinions), held that an agreement among a group of manufacturers of cast-iron pipe to allocate customers and fix prices on pipe they sold across state lines directly restrained interstate commerce and was therefore covered by the Act. In finding their agreement unlawful, Justice Peckham rejected the defendants' argument that their agreement could not violate the Act so long as the prices at which they sold cast-iron pipe were reasonable. But unlike in his earlier decision in *Trans-Missouri*, Peckham now seemed to acknowledge that some direct restraints of trade might be reasonable, writing that, "we do not think that at common law there is any question of reasonableness open to the courts *with reference to such a contract"*—that is, a naked price-fixing agreement.[27] He explained, "We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade."[28]

Northern Securities: Great Cases Can Make Good Law

Northern Securities,[29] the first antitrust case brought by Theodore Roosevelt and the beginning of his reputation as a Trustbuster, also marked a watershed in the Court's move toward a rule of reason test for applying the Sherman Act. The Northern Securities Company was a new stock company, created by J.P. Morgan to combine the holdings of two warring railroad barons, E.H. Harriman, who controlled the Northern Pacific, and James J. Hill, who controlled the Great Northern and (backed by Morgan) the Chicago, Burlington, and Quincy. The combination would have controlled virtually all traffic between Chicago/St. Paul and the Pacific Northwest.

With such colorful personalities and large stakes, *Northern Securities* was the first antitrust case to capture the public's imagination. It was argued in the Supreme Court by Roosevelt's Attorney General, Philander Knox, and the Court handed Roosevelt a major victory when it ruled, by a 5–4 vote, that the formation of Northern Securities had violated the Sherman Act. Justice Harlan delivered the plurality opinion for himself and three other Justices. In it, Justice Harlan sought to turn back the clock, arguing for the same literal interpretation of the Act that Justice Peckham had advanced in *Trans-Missouri*. With extravagant use of italics, Harlan proclaimed that the Court's earlier opinions stood for the proposition that "*every* combination or conspiracy which would extinguish competition between otherwise competing railroads engaged in *interstate trade or commerce*, and which would *in that way* restrain *such* trade or commerce, is made illegal by the act."[30] To Harlan, a merger of competitors like *Northern Securities* was thus per se unlawful.

The four dissenting justices, in two opinions, one by Justice White and one by Justice Oliver Wendell Holmes, Jr., adopted an equally extreme reading of the Act, but reached the contrary conclusion. In the first of these dissents, Holmes, who had been appointed to the Court by Roosevelt just one year earlier, agreed with Harlan that "every" means "every." He, too, therefore, rejected the notion that the Act only prohibited unreasonable restraints of trade, with the reasonableness of a restraint being measured by its effect on competition, commenting acidly that "[t]he act says nothing about competition."[31] Holmes argued instead that the Act did not apply to mergers at all because, at common law, the term "restraint of trade" was limited to "contracts with a stranger to the contractor's business . . . which wholly or partially restrict the freedom of the contractor in carrying on that business as otherwise he would."[32] The term, Holmes wrote, did not embrace the formation of a business combination, even if accomplished through merger or acquisition. To support his reading, Holmes resorted to a *reductio ad absurdum* line of reasoning, arguing that if the act reached the "fusion" of two businesses, by merger or otherwise, it would "mean the universal disintegration of society into single men, each at war with all the rest, or even the prevention of all further combinations for a common end."[33] This would, he concluded, "make eternal the *bellum omnium contra omnes* and disintegrate society so far as it could into individual atoms."[34]

White, notwithstanding his earlier advocacy for using a rule of reason to apply the Act, joined Holmes' opinion, but wrote a separate dissent as well.[35] In it, White argued that the acquisition of stock in a corporation created by a state was not interstate commerce even if the corporation engaged in interstate commerce. He argued, therefore, that the Act would be unconstitutional if it embraced the acquisition of such stock, and was saved only because, as Holmes had shown, it could be interpreted not to reach such transactions.

Fortunately for the future of antitrust, while eight of the nine Justices appeared to reject using a standard of reasonableness for applying the Act, the pivotal vote was cast by Justice David Brewer. In a short opinion, Brewer—while noting that he was with the majority in the Court's earlier decisions and continued to believe those cases were rightly decided—wrote he was now persuaded

> that in some respects the reasons given for the judgments cannot be sustained. Instead of holding that the anti-trust act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade, and as such within the scope of the act."[36]

Applying this reasonableness standard, Justice Brewer cast the deciding vote for the government, holding that the creation of the Northern Securities Corporation had violated the Act because "a single railroad is, if not a legal, largely a practical, monopoly."[37] The merger of the two competing roads had therefore "broadened and extended their monopoly," making it an unreasonable combination in restraint of trade.

The press immediately recognized the significance of Justice Brewer's concurring opinion. *The New York Times* ran an article entitled, "Justice Brewer's Opinion: Thinks Anti-Trust Act Applies Only to Unreasonable Restraints of Commerce."[38] But because of the splintered opinions, *Northern Securities* left open the question of whether a majority of the Court would join Justice Brewer in adopting a reasonableness standard for applying the Act.

Roosevelt, for his part, was disgusted by the performance of his new Justice, Oliver Wendell Holmes. Henry Adams reported that "Theodore went wild about" Holmes' dissent,[39] proclaiming that he "could carve out of a banana a judge with more backbone."[40] Roosevelt later wrote his friend Senator Henry Cabot Lodge, "Holmes should have been an ideal man on the bench. As a matter of fact, he has been a bitter disappointment."[41] Holmes himself was well aware of Roosevelt's reaction. Following Roosevelt's death in 1921, Holmes wrote to Pollock that his dissent "broke up our incipient friendship," and that he had been told that "if he had not been restrained by his friends," Roosevelt "would have made a fool of himself and would have excluded me from the White House."[42] Holmes' opinion of Roosevelt likewise was never the same. In the same letter, Holmes described Roosevelt as "a rather ordinary intellect" but a "shrewd and I think pretty unscrupulous politician," closing with the epitaph: "He played all his cards—if not more. R.i.p."[43]

Standard Oil and *American Tobacco*

The splintered decision in *Northern Securities* created considerable uncertainty as to how the Court would interpret the Sherman Act in future cases. That uncertainty was not resolved until the Supreme Court's twin decisions in *Standard Oil*[44] and *American Tobacco*[45] in 1911.

If there were any truth to Holmes' dictum that "[g]reat cases, like hard cases, make bad law,"[46] *Standard Oil* should have made very bad law. There was probably no more notorious trust in the United States during the Progressive Era than Standard Oil. The company was the subject of numerous muckraking articles and books, including, most famously, Ida Tarbell's two-volume, *The History of the Standard Oil Company*, published in 1904. Standard Oil's conduct in using discriminatory rebates from railroads and predatory pricing to force smaller refiners out of business or into its arms through acquisition had provided much of the impetus behind the Sherman Act's original enactment.[47] Teddy Roosevelt's prosecution of Standard Oil, following his victory in *Northern Securities*, cemented his reputation as a trustbuster.

In November 1906, Roosevelt filed suit in Missouri seeking the dissolution of Standard Oil, naming as defendants not only the company but also sixty-five companies under its control and its senior officers, including John D. Rockefeller himself.[48] By the time the suit ended, Standard Oil also faced state antitrust actions in some twenty-one states from Texas to Connecticut. The federal action was tried to a special examiner, who heard testimony from some 444 witnesses who delivered 11 million words of testimony; the proceedings filled 12,000 pages in 21 thick volumes. In November 1909, almost exactly three years after the action was filed, the Eighth Circuit ruled unanimously that Standard Oil and its thirty-seven subsidiaries had violated both Sec-

White held that the "rule of reason" must therefore be the "guide" by which the Sherman Act should be applied. He further held that the reasonableness of the restraint should be determined solely by its effect on competition . . . .

tions 1 and 2 of the Sherman Act, and gave the company just thirty days to divest itself of its subsidiaries. William Howard Taft, who had succeeded Roosevelt as president, described it as a "complete victory" for the government.[49]

By the time the Supreme Court decided *Standard Oil*, the Court's make-up was radically different from the Court that heard *Northern Securities* just seven years earlier. In his single term as President, Taft appointed six new Justices to the Court, almost certainly a record.[50] These Justices were for the most part very conservative, and included Horace Lurton, who had sat with Taft on the Sixth Circuit and been on the panel that decided *Addyston Pipe*. Among the Justices no longer on the Court was Rufus Peckham, who died in 1909. Indeed, only one of the five Justices who had given Peckham his majority in *Trans-Missouri* was still on the bench—the great dissenter, John Marshall Harlan. When Chief Justice Melville Fuller died in 1910, Taft also had an opportunity to pick a new chief. His choice: Justice Edward Douglass White.

White was in many ways a natural choice for Chief Justice. He was, at the time, the second most senior Justice, behind only Justice Harlan. A prodigious worker, White had written 245 opinions between 1900 and 1910, an output exceeded only by the former Chief Justice, Melville Fuller.[51] In addition, White had become a close personal friend of Taft's. The two men shared common economic and political views, and even resembled each other physically—like Taft, White had an imposing physique, standing over 6 feet tall and weighing well over 200 pounds. Taft was particularly impressed with White's dissent in *Trans-Missouri*, sharing his belief that a "rule of reason" should govern the application of the Sherman Act.[52] White was also well regarded by his fellow Justices. Before Taft made his selection, Holmes wrote to Pollock that he regarded White as "the ablest man likely to be thought of," praising both his thinking, which he called "profound," and his political skills on the Court.[53] Finally, and not unimportantly, White was acceptable to the progressive wing of the Republican Party and to Southern Democrats, both of which groups would be critical to Taft's reelection.

The change in the Court's personnel required the *Standard Oil* case, which was first argued in the 1910 term, to be reargued at the beginning of the 1911 term. There was therefore great anticipation when it was announced that the Court would issue its decision on May 15, 1911. After the markets had closed, promptly at 4 p.m., Chief Justice White announced the Court's decision. For the next forty-nine minutes, White read aloud substantial portions of his eighty-two-page opinion.[54] By a unanimous decision, the Court affirmed the lower court's judgment that Standard Oil had violated both Sections 1 and 2 of the Sherman Act, as well as its decree dissolving the company.

Beyond giving the government a complete victory, Chief Justice White's opinion for eight of the nine Justices finally enshrined the rule of reason as the governing standard for applying both Sections 1 and 2 of the Sherman Act. Reviewing the common law treatment of monopolies and restraints of trade, White concluded that the common law had recognized that "contracts or acts which . . . had a monopolistic tendency, especially those which were thought to unduly diminish competition and hence to enhance prices" should be classified as unlawful restraints of trade.[55] White then reviewed the Court's earlier antitrust decisions. While conceding that those decisions contained "general language," which "when separated from its context" might "justify the conclusion that it was decided that reason could not be resorted to for the purpose of determining whether the acts complained of were within the statute," he insisted that "the nature and character of the contract or agreement in each case was fully referred to and suggestions as to their unreasonableness pointed out in order to indicate that they were within the prohibitions of the statute."[56]

White held that the "rule of reason" must therefore be the "guide" by which the Sherman Act should be applied.[57] He further held that the reasonableness of the restraint should be determined solely by its effect on competition, so that the Act would prohibit:

> all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act, or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing, trade, but, on the contrary were of such a character as to give rise to the inference . . . that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy.[58]

White went on to reject Standard Oil's argument that its conduct had been reasonable, writing that when the acts complained of unduly restricted competition, they could not be saved "by indulging in general reasoning as to the expediency or non-expediency of having made the contracts."[59]

What is remarkable in rereading White's original formulation of the rule of reason is how well it sets out the basic analytical framework we still use to evaluate both alleged restraints of trade and single firm conduct under Sections 1 and 2 of the Sherman Act. White's formulation focuses on the effect of the conduct on competitive conditions, and on whether it has caused or is likely to cause the types of harm the antitrust laws are designed to prevent—restriction of output and enhanced prices. It also focuses on whether the conduct served any legitimate purpose in "developing trade"—i.e., expanding output. And, finally, it rejects the notion that conduct that harms competition can be saved by an evaluation of its overall "expediency or nonexpediency."

Despite his agreement with the result, the Court's adoption of the rule of reason triggered one of the most memorable outbursts in Supreme Court history by the seventy-eight year old John Marshall Harlan, who had been sitting on the Court for over three decades. Harlan had long been a fervent advocate for strong antitrust enforcement. As early as his 1871 campaign for governor of Kentucky, Harlan had campaigned against railroad monopolies, arguing that corporate power posed as much of a threat to liberty as slave power,[60] and he was the only Justice to object when the Court nearly gutted the Sherman Act in its decision in *E.C. Knight*.

A newspaper report described Justice Harlan in the spring of 1911 "as almost bald and with few teeth left but still erect in carriage, elastic of step, and attentive in conversation," although he was sometimes observed "nodd[ing] off now and then while sitting on the bench."[61] In *Standard Oil*, while concurring in the outcome, Harlan wrote a strongly worded opinion, concurring in part and dissenting in part. In it, he accused White of distorting the Court's prior decisions and engaging in judicial legislation by adopting a rule of reason for applying the Sherman Act, rather than accepting that the Act's language condemned "every" restraint of trade.[62] In his concurrence in *American Tobacco*, Harlan added that White's effort to make it appear that his rule of reason was consistent with the Court's prior decisions surprised him "quite as much as would a statement that black was white or white was black."[63]

On the bench, Harlan was even harsher. Those present in the courtroom reported that Harlan "[h]aving refreshed himself with whiskey . . . denounced his colleagues from the bench in improvised language that is said to have made them blush."[64] Angrily banging the bench, Harlan accused his fellow Justices of putting words into the Sherman Act which Congress did not put there, concluding mockingly: "You may now restrain commerce, provided you are reasonable about it."[65] President Taft, who was a friend of both White and Harlan, wrote his daughter that Harlan's concurrence was "a nasty, carping, and demagogic opinion, directed at the Chief Justice . . . ."[66]

The patrician Justice Charles Evans Hughes, newly appointed to the Court, recalled it in his memoirs, decades later: "With a passionate outburst seldom if ever equaled in the annals of the Court, [Justice Harlan] brought his services to a dramatic conclusion. He went far beyond his written opinion, launching into a bitter invective, which I thought most unseemly. It was not a swan song but the roar of an angry lion. Almost at the opening of the next Term, he was gone."[67] Justice Oliver Wendell Holmes likewise commented on it nearly a year later in a letter to Pollock, noting that Chief Justice White "abhorred the outbreak of Harlan in the Oil and Tobacco cases."[68] While there is no way of knowing whether Harlan's outburst contributed to it, White did not write another significant antitrust opinion in the remaining decade he served as Chief Justice, before being succeeded by the man who appointed him, William Howard Taft.

While not as colorful, the general reaction to the rule of reason was initially almost as unfavorable as Justice Harlan's. The business community feared that the test, which had been applied to break up both Standard Oil and American Tobacco, foreshadowed an era of vigorous antitrust enforcement, and gave businesses too little guidance as to how the law would be applied.[69] The progressives, led by Robert LaFollette and Louis Brandeis, thought the rule of reason gave conservative judges too much discretion to decide what was reasonable and what was unreasonable, and would therefore lead to under-enforcement of the antitrust laws.[70] The result was that for the only time since the Sherman Act was enacted in 1890, antitrust policy became a major issue in the election of 1912.[71] But that's a story for another day. ■

---

1 *Mr. Sherman Gives Up Hope*, N.Y. TIMES, Apr. 8, 1890, at 4.

2 *Id.*

3 United States v. Topco Assocs., 405 U.S. 596, 610 (1972).

4 This brief biographical sketch of White's life is based largely on Robert Highsaw's excellent biography of White: ROBERT B. HIGHSAW, EDWARD DOUGLASS WHITE: DEFENDER OF THE CONSERVATIVE FAITH (1981).

5 *Id.* at 20.

6 *Id.* at 53.

7 156 U.S. 1 (1895).

8 *Id.* at 12.

9 LOREN P. BETH, JOHN MARSHALL HARLAN: THE LAST WHIG JUSTICE 174 (1992).

10 Harlan, for example, was the lone dissenter from the Court's notorious decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896), upholding separate, but equal schools for African-American students.

11 In addition to Beth's, *supra* note 9, there is one other excellent biography of Harlan: LINDA PRZYBYSZEWSKI, THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN (1999). This brief sketch of his life is based on these two biographies.

12 JEFFREY ROSEN, THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA 102 (2007).

13 Letter from Oliver Wendell Holmes to Sir Frederick Pollock (Apr. 5, 1919), *in* 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 8 (Mark D. Howe ed., 1941) [hereinafter HOLMES-POLLOCK LETTERS].

14 166 U.S. 290 (1897).

15 *Id.* at 318. Had Justice Peckham looked at the legislative history, he would have found that Senator Sherman himself intended that the courts should "appl[y] old and well recognized principles of . . . common law," and that the Act was not intended to condemn all combinations, but only those "made with a view to prevent competition . . . or to increase the profits of the producer at the cost of the consumer." *Remarks of Senator John Sherman*, 21 CONG. REC. 2456–57 (Mar. 21, 1890).

16 *Trans-Missouri*, 166 U.S. at 328.

17 *Id.* at 353.

18 *Id.* at 355 (White, J. dissenting).

19 ROBERT BORK, THE ANTITRUST PARADOX 33–41 (1979).

20 171 U.S. 578 (1898).

21 *Id.* at 600.

22 *Id.*

23 171 U.S. 505 (1898).

24 *Id.* at 568.

25 Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

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

27 *Addyston Pipe*, 175 U.S. at 238.

28 *Id.* at 244.

29 193 U.S. 197 (1904).

[30] *Id.* at 331.

[31] *Id.* at 403 (Holmes, J., dissenting).

[32] *Id.* at 404.

[33] *Id.* at 407.

[34] *Id.* at 411. Holmes' dissent in *Northern Securities* was consistent with his general view of the Sherman Act. In correspondence, Holmes described the Act in such unflattering terms as a "humbug," "idiotic," "absurd," and "foolish," complaining in one letter about the number of Sherman Act cases coming before the Court, saying it was a law "which I loathe and despise." *See* Alfred S. Neely, *A Humbug Based on Economic Ignorance and Incompetence—Antitrust in the Eyes of Justice Holmes*, 1993 UTAH L. REV. 1, 1 n.3 (1993); *but cf.* Spencer Weber Waller, *The Antitrust Philosophy of Justice Holmes*, 18 S. ILL. U. L.J. 283 (1994).

[35] *Northern Securities*, 193 U.S. at 411 (White, J., dissenting).

[36] *Id.* at 360–61 (Brewer, J., concurring).

[37] *Id.* at 363.

[38] *Justice Brewer's Opinion: Thinks Anti-Trust Act Applies Only to Unreasonable Restraints of Commerce*, N.Y. TIMES, Mar. 15, 1904, at 2.

[39] Letter from Henry Adams to Elizabeth Cameron (Mar. 20, 1904), *quoted in* ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES 48 (2000).

[40] EDMUND MORRIS, THEODORE REX 316 (2001).

[41] Letter from Theodore Roosevelt to Henry Cabot Lodge (Sept. 4, 1906), *quoted in* ALSCHULER, *supra* note 39, at 49.

[42] Letter from Oliver Wendell Holmes, Jr., to Sir Frederick Pollock (Feb. 9, 1921), *in* 2 HOLMES-POLLOCK LETTERS, *supra* note 13, at 63–64.

[43] *Id.* at 64.

[44] Standard Oil Co. v. United States, 221 U.S. 1 (1911).

[45] Am. Tobacco Co. v. United States, 221 U.S. 106 (1911).

[46] *Northern Securities*, 193 U.S. at 364 (Holmes, J., dissenting).

[47] *See, e.g.*, *Remarks of Senator John Sherman*, 21 CONG. REC. 2457–58 (Mar. 21, 1890).

[48] *See* RON CHERNOW, TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR. 537–59 (1998).

[49] *Id.* at 553–54.

[50] LEWIS L. GOULD, THE WILLIAM HOWARD TAFT PRESIDENCY 121–22 (2009).

[51] HIGHSAW, *supra* note 4, at 57.

[52] *Id.* at 59; *see also* GOULD, *supra* note 50, at 129.

[53] Letter from Oliver Wendell Holmes to Sir Frederick Pollock (Sept. 24, 1910), *in* 1 HOLMES-POLLOCK LETTERS, *supra* note 13, at 170.

[54] CHERNOW, *supra* note 48 at 554.

[55] *Standard Oil*, 221 U.S. at 56–57.

[56] *Id.* at 64.

[57] *Id.* at 66.

[58] *Id.* at 58.

[59] *Id.* at 65.

[60] ROSEN, *supra* note 12, at 92.

[61] PRZYBYSZEWSKI, *supra* note 11, at 75–76.

[62] *Standard Oil*, 221 U.S. at 94, 99 (Harlan, J., concurring in part and dissenting in part).

[63] *American Tobacco*, 221 U.S. at 191–92 (Harlan, J., concurring in part and dissenting in part).

[64] ROSEN, *supra* note 12, at 116.

[65] CHERNOW, *supra* note 48, at 555.

[66] PREZYBYSZEWSKI, *supra* note 11, at 183.

[67] CHARLES EVAN HUGHES, THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVAN HUGHES (David J. Danelski & Joseph S. Tulchin eds., 1973), *quoted in* BETH, *supra* note 9, at 200.

[68] Letter from Oliver Wendell Holmes, Jr., to Sir Frederick Pollock (Mar. 21, 1912), *in* 1 HOLMES-POLLOCK LETTERS, *supra* note 13, at 190.

[69] THOMAS K. MCCRAW, PROPHETS OF REGULATION 115–16 (1984).

[70] *See* MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 317–18 (2009).

[71] *See generally* JAMES CHACE, 1912: WILSON, ROOSEVELT, TAFT & DEBS: THE ELECTION THAT CHANGED THE COUNTRY (2004).