THE COMMON LAW EVOLUTION OF THE FUNDAMENTAL RULES OF HORIZONTAL RESTRAINTS

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E.C. KNIGHT CO. v. UNITED STATES, 156 U.S. 1 (1895). The question of the constitutionality of the Sherman Act quickly came to a head when in 1895, only five years after the Act was passed, the Supreme Court decided *Knight*, its first antitrust case. As a restraint of trade case, the Justice Department's challenge was straightforward. In March 1892, the American Sugar Refining Company, the corporate successor to the Sugar Trust, arranged to exchange some of its stock for all of the stock of its last substantial competitors, four refineries all located in Philadelphia. At the time, American produced approximately 65 percent of the sugar refined in the United States, while the four Philadelphia refineries (including the E.C. Knight Company) together produced about 33 percent of the country's refined sugar. The acquisition left independent only the Revere Sugar Refinery of Boston, which produced approximately 2 percent of the nation's sugar output. The Department's civil complaint, filed two months later, charged American Sugar and the four Philadelphia refineries with entering into a "contract, combination or conspiracy" in restraint of trade in the form of the stock swap. The relief sought was the cancellation of the stock exchange agreements, the redelivery of the stock to its original owners, and an injunction against further performance of the exchange agreements and further violations of the act.

While acknowledging that the acquisitions would result in American controlling 98 percent of domestic sugar manufacture, an all but unanimous Court held that American was not accountable under the Sherman Act. The Court's opinion, written by Chief Justice Melville W. Fuller, contained two lines of analysis each independently supporting this

result. Both lines turned on the scope of the Sherman Act's subject matter jurisdiction.

First, the Court found that Congress in passing the Sherman Act did not attempt to regulate the rights of corporations, which were creatures of the individual states, to acquire, control, or dispose of property, including exchanges of stock. On this theory corporate stock could not constitute an article of trade or commerce that could be restrained.

Second, the Court held that, even if American in fact had monopolized the *manufacture* of sugar, the government failed to demonstrate that the trust monopolized or otherwise restrained interstate commerce. Fuller drew a sharp distinction between manufacture and commerce and between a direct and an incidental effect on commerce. In Fuller's view, commerce succeeds manufacture, and the mere fact that manufactured products might be sold in interstate trade (even at supracompetitive prices) did not make a manufacturing restraint into a restraint on commerce. Any effect of a restraint of manufacture on commerce could be "incidental" at most and was insufficient to render the manufacturing restraint subject to commerce clause regulation.

This latter conclusion depended primarily on a *reductio ad absurdum* argument. Under Fuller's reading of precedent, the police powers of the state and the commerce powers of the federal government operated over mutually exclusive domains. If the simple effect on commerce of a combination in manufacture was sufficient to establish federal jurisdiction, there would be virtually nothing left for the states to regulate. Since the stock purchases at issue pertained exclusively to the acquisition of manufacturing facilities and since there was no charge that the defendants attempted to restrain trade in sugar once it had been refined, the lower courts properly dismissed the government's complaint.

It is important to keep in mind that the *E.C. Knight* result was motivated by concerns over federalism, not microeconomic policy. There is no suggestion in the opinion that the Court wished to see new, monopolistic consolidations left unregulated. Rather, the majority believed that the states should exercise the regulatory powers they possessed to control any corporate abuses that might arise either from the purchase or exchange of a state's creation and subject to regulation under state corporate law or from manufacturing activities unquestionably within a state's control under its police powers. Indeed, at several points in the opinion Fuller appears to suggest that *E. C. Knight* might have been different if the government's complaint had focused on the Sugar Trust's commercial activities, rather than its acquisition of additional refining capacity. The importance of Fuller's technical reading of the complaint can be seen by comparing the majority's opinion with Harlan's vigorous dissent. Although Harlan's dissent took issue with a number of points in Fuller's opinion, the real difference was in the point of departure. Rather than limit himself strictly to the government's theory of the case stated in the complaint and the specifically requested relief as did Fuller, Harlan would have expanded the antitrust attack to the legality of the Sugar Trust as a whole and not just the legality of the stock purchase agreements. Viewed in this light, the trust itself was reachable under the commerce clause even if the stock purchase agreements were not.

NOTES

1. Although the Court rapidly retreated from the narrow view of subject matter jurisdiction expressed in Knight, the case was not expressedly overruled until 1948 in Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948).

2. For a more detailed analysis of the *Knight* opinions, including those of the lower courts, see Letwin, *The First Decade of the Sherman Act: Judicial Interpretation*, 68 Yale L.J. 900, 914-18 (1959). For a review of the various criticisms of the government's handling of the case, see Letwin, *The First Decade of the Sherman Act: Early Administration*, 68 Yale L.J. 464, 480-81 & n.94 (1959). For more on the sugar trust generally, see Alfred S. Eichner, The Emergence of Oligopoly: Sugar Refining as a Case Study (1969); Zerbe, *The American Sugar Refining Company, 1887-1914: The Story of a Monopoly*, 12 J. L. & Econ. 339 (1969).

UNITED STATES v. TRANS-MISSOURI FREIGHT ASS'N
166 U.S. 290 (1897)

[The Supreme Court's second antitrust case involved the Justice Department's petition in equity to dissolve the Trans-Missouri Freight Association, an unincorporated association of railroads operating west of the Missouri River. The Association had been organized in 1889, the year before the Sherman Act was enacted, by competing railroads "[f]or the purpose of mutual protection by establishing and maintaining reasonable rates, rules and regulations on all freight traffic" between the Missouri River and the Pacific Coast. Under the memorandum of agreement setting up the Association, freight rates were to be set by a committee of members. Proposed changes were subject to a vote by the membership at the Association's monthly meetings. Members agreed to be bound by the Association's rate decisions, except that any member that at the time of the vote gave ten days' written notice could change its rates to a different level specified in the notice. When a member gave notice of such an advance individual rate modification, the Association by majority rule could put the same rate into effect immediately on all other traffic on the line. Members were also free to change rates immediately when necessary to meet competition from non-member railroads, but the good-faith necessity of any such rate changes was subject to investigation by the Association. Members who otherwise deviated from the Association's fixed rates were subject to a monetary fine. Members could withdraw from the Association upon thirty days' notice.

[The bill alleged that Association's members controlled all of the through freight traffic between the Mississippi River and the west coast, that through the Association these members fixed and raised the rates of interstate freight traffic in this region, and that the resulting "unjust and oppressive" rates extracted "great sums of money" from shippers. The petition charged the Association, and eighteen of its members, with a combination in restraint of trade and monopolization in violation of the Sherman Act, and sought an injunction dissolving the association and prohibiting the members from forming any similar combination or agreement for collectively setting rates. The case was heard on the pleadings and dismissed by the trial court. The Circuit Court of Appeals affirmed. The Supreme Court, in a 5-4 decision, reversed and remanded for trial.]

MR. JUSTICE PECKHAM, after stating the facts, delivered the opinion of the court.

* * *

The language of the act includes *every* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations. So far as the very terms of the statute go, they apply to any contract of the nature described. A contract therefore that is in restraint of trade or commerce is by the strict language of the act prohibited even though such contract is entered into between competing common carriers by railroad, and only for the purposes of thereby affecting traffic rates for the transportation of persons and property. If such an agreement restrain trade or commerce, it is prohibited by the statute, unless it can be said that an agreement, no matter what its terms, relating only to transportation cannot restrain trade or commerce. We see no escape from the conclusion that if any agreement of such a nature does restrain it, the agreement is condemned by this act. It cannot be denied that those who are engaged in the transportation of persons or property from one State to another are engaged in interstate commerce, and it would seem to follow that if such persons enter into agreements between themselves in regard to the compensation to be secured from the owners of the articles transported, such agreement would at least relate to the business of commerce, and might more or less restrain it. The point urged on the defendants' part is that

the statute was not really intended to reach that kind of an agreement relating only to traffic rates entered into by competing common carriers by railroad; that it was intended to reach only those who were engaged in the manufacture or sale of articles of commerce, and who by means of trusts, combinations and conspiracies were engaged in affecting the supply or the price or the place of manufacture of such articles. The terms of the act do not bear out such construction. Railroad companies are instruments of commerce, and their business is commerce itself. . . .

An act which prohibits the making of every contract, etc., in restraint of trade or commerce among the several States, would seem to cover by such language a contract between competing railroads, and relating to traffic rates for the transportation of articles of commerce between the States, provided such contract by its direct effect produces a restraint of trade or commerce. What amounts to a restraint within the meaning of the act if thus construed need not now be discussed.

We have held that the Trust Act did not apply to a company engaged in one State in the refining of sugar under the circumstances detailed in the case of *United States* v. *E. C. Knight Company*, 156 U. S. 1, because the refining of sugar under those circumstances bore no distinct relation to commerce between the States or with foreign nations. To exclude agreements as to rates by competing railroads for the transportation of articles of commerce between the States would leave little for the act to take effect upon. . . .

It is said that Congress had very different matters in view and very different objects to accomplish in the passage of the act in question; that a number of combinations in the form of trusts and conspiracies in restraint of trade were to be found throughout the country, and that it was impossible for the state governments to successfully cope with them because of their commercial character and of their business extension through the different States of the Union. Among these trusts it was said in Congress were the Beef Trust, the Standard Oil Trust, the Steel Trust, the Barbed Fence Wire Trust, the Sugar Trust, the Cordage Trust, the Cotton Seed Oil Trust, the Whiskey Trust and many others, and these trusts it was stated had assumed an importance and had acquired a power which were dangerous to the whole country, and that their existence was directly antagonistic to its peace and prosperity. To combinations and conspiracies of this kind it is contended that the act in question was directed, and not to the combinations of competing railroads to keep up their prices to a reasonable sum for the transportation of persons and property. It is true that many and various trusts were in existence at the time of the passage of the act, and it was probably sought to cover them by the provisions of the act. Many of them had rendered themselves offensive by the manner in which they exercised the great power that combined capital gave them. But a further investigation of "the history of the times" shows also that those trusts were not the only associations controlling a great combination of capital which had caused complaint at the manner in which their business was conducted. There were many and loud complaints from some portions of the public regarding the railroads and the prices they were charging for the service they rendered, and it was alleged that the prices for the transportation of persons and articles of commerce were unduly and improperly enhanced by combinations among the different roads. . . .

Why should not a railroad company be included in general legislation aimed at the prevention of that kind of agreement made in restraint of trade, which may exist in all companies, which is substantially of the same nature wherever found, and which tends very much towards the same results, whether put in practice by a trading and manufacturing or by a railroad company? It is true the results of trusts, or combinations of that nature, may be different in different kinds of corporations, and yet they all have an essential similarity, and have been induced by motives of individual or corporate aggran-

dizement as against the public interest. In business or trading combinations they may even temporarily, or perhaps permanently, reduce the price of the article traded in or manufactured, by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class, and the absorption of control over one commodity by an all-powerful combination of capital. In any great and extended change in the manner or method of doing business it seems to be an inevitable necessity that distress and, perhaps, ruin shall be its accompaniment in regard to some of those who were engaged in the old methods. A change from stage coaches and canal boats to railroads threw at once a large number of men out of employment; changes from hand labor to that of machinery, and from operating machinery by hand to the application of steam for such purpose, leave behind them for the time a number of men who must seek other avenues of livelihood. These are misfortunes which seem to be the necessary accompaniment of all great industrial changes. It takes time to effect a readjustment of industrial life so that those who are thrown out of their old employment, by reason of such changes as we have spoken of, may find opportunities for labor in other departments than those to which they have been accustomed. It is a misfortune, but yet in such cases it seems to be the inevitable accompaniment of change and improvement.

It is wholly different, however, when such changes are effected by combinations of capital, whose purpose in combining is to control the production or manufacture of any particular article in the market, and by such control dictate the price at which the article shall be sold, the effect being to drive out of business all the small dealers in the commodity and to render the public subject to the decision of the combination as to what price shall be paid for the article. In this light it is not material that the price of an article may be lowered. It is in the power of the combination to raise it, and the result in any event is unfortunate for the country by depriving it of the services of a large number of small but independent dealers who were familiar with the business and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein. Whether they be able to find other avenues to earn their livelihood is not so material, because it is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others. Nor is it for the substantial interests of the country that any one commodity should be within the sole power and subject to the sole will of one powerful combination of capital. Congress has, so far as its jurisdiction extends, prohibited all contracts or combinations in the form of trusts entered into for the purpose of restraining trade and commerce. The results naturally flowing from a contract or combination in restraint of trade or commerce, when entered into by a manufacturing or trading company such as above stated, while differing somewhat from those which may follow a contract to keep up transportation rates by railroads, are nevertheless of the same nature and kind, and the contracts themselves do not so far differ in their nature that they may not all be treated alike and be condemned in common. . . .

Second. The next question to be discussed is as to what is the true construction of the statute, assuming that it applies to common carriers by railroad. What is the meaning of the language as used in the statute, that "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal"? Is it confined to a contract or combination which is only in unreasonable restraint of trade or commerce, or does it include what the language of the act plainly and in terms covers, all contracts of that nature?

We are asked to regard the title of this act as indicative of its purpose to include only those contracts which were unlawful at common law, but which require the sanction of a Federal statute in order to be dealt with in a Federal court. It is said that when terms which are known to the common law are used in a Federal statute those terms are to be given the same meaning that they received at common law, and that when the language of the title is "to protect trade and commerce against unlawful restraints and monopolies," it means those restraints and monopolies which the common law regarded as unlawful, and which were to be prohibited by the Federal statute. We are of opinion that the language used in the title refers to and includes and was intended to include those restraints and monopolies which are made unlawful in the body of the statute. It is to the statute itself that resort must be had to learn the meaning thereof, though a resort to the title here creates no doubt about the meaning of and does not alter the plain language contained in its text.

It is now with much amplification of argument urged that the statute, in declaring illegal every combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, does not mean what the language used therein plainly imports, but that it only means to declare illegal any such contract which is in *unreasonable* restraint of trade, while leaving all others unaffected by the provisions of the act; that the common law meaning of the term "contract in restraint of trade" includes only such contracts as are in *unreasonable* restraint of trade, and when that term is used in the Federal statute it is not intended to include all contracts in restraint of trade, but only those which are in unreasonable restraint thereof.

The term is not of such limited signification. Contracts in restraint of trade have been known and spoken of for hundreds of years both in England and in this country, and the term includes all kinds of those contracts which in fact restrain or may restrain trade. Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade, and would be so described either at common law or elsewhere. By the simple use of the term "contract in restraint of trade," all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, 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.

Proceeding, however, upon the theory that the statute did not mean what its plain language imported, and that it intended in its prohibition to denounce as illegal only those contracts which were in unreasonable restraint of trade, the courts below have made an exhaustive investigation as to the general rules which guide courts in declaring contracts to be void as being in restraint of trade, and therefore against the public policy of the country. In the course of their discussion

of that subject they have shown that there has been a gradual though great alteration in the extent of the liberty granted to the vendor of property in agreeing, as part consideration for his sale, not to enter into the same kind of business for a certain time or within a certain territory. So long as the sale was the *bona fide* consideration for the promise and was not made a mere excuse for an evasion of the rule itself, the later authorities, both in England and in this country, exhibit a strong tendency towards enabling the parties to make such a contract in relation to the sale of property, including an agreement not to enter into the same kind of business, as they may think proper, and this with the view to granting to a vendor the freest opportunity to obtain the largest consideration for the sale of that which is his own. A contract which is the mere accompaniment of the sale of property, and thus entered into for the purpose of enhancing the price at which the vendor sells it, which in effect is collateral to such sale, and where the main purpose of the whole contract is accomplished by such sale, might not be included, within the letter or spirit of the statute in question. But we cannot see how the statute can be limited, as it has been by the courts below, without reading into its text an exception which alters the natural meaning of the language used, and that, too, upon a most material point, and where no sufficient reason is shown for believing that such alteration would make the statute more in accord with the intent of the law-making body that enacted it.

The great stress of the argument for the defendants on this branch of the case has been to show, if possible, some reason in the attendant circumstances, or some fact existing in the nature of railroad property and business upon which to found the claim, that although by the language of the statute agreements or combinations in restraint of trade or commerce are included, the statute really means to declare illegal only those contracts, etc., which are in unreasonable restraint of trade. In order to do this the defendants call attention to many facts which they have already referred to in their argument, upon the point that railroads were not included at all in the statute. They again draw attention to the fact of the peculiar nature of railroad property. When a railroad is once built, it is said, it must be kept in operation; it must transport property, when necessary in order to keep its business, at the smallest price and for the narrowest profit, or even for no profit, provided running expenses can be paid, rather than not to do the work; that railroad property cannot be altered for use for any other purpose, at least without such loss as may fairly be called destructive; that competition while, perhaps, right and proper in other business, simply leads in railroad business to financial ruin and insolvency, and to the operation of the road by receivers in the interest of its creditors instead of in that of its owners and the public; that a contest between a receiver of an insolvent corporation and one which is still solvent tends to ruin the latter company, while being of no benefit to the former; that a receiver is only bound to pay operating expenses, so he can compete with the solvent company and oblige it to come down to prices incompatible with any profit for the work done, and until ruin overtakes it to the destruction of innocent stockholders and the impairment of the public interests.

To the question why competition should necessarily be conducted to such an extent as to result in this relentless and continued war, to eventuate only in the financial ruin of one or all of the companies indulging in it, the answer is made that if competing railroad companies be left subject to the sway of free and unrestricted competition the results above foreshadowed necessarily happen from the nature of the case; that competition being the rule, each company will seek business to the extent of its power, and will underbid its rival in order to get the business, and such underbidding will act and react upon each company until the prices are so reduced as to make it impossible to prosper or live under them; that it is too much to ask of human nature for one company to insist upon charges sufficiently high to afford a reasonable compensation, and while doing so to see its patrons leave for rival roads who are obtaining its business by offering less rates for doing it than can be afforded and a fair profit obtained therefrom. Sooner than experience ruin from mere inanition, efforts will

be made in the direction of meeting the underbidding of its rival until both shall end in ruin. The only refuge, it is said, from this wretched end lies in the power of competing roads agreeing among themselves to keep up prices for transportation to such sums as shall be reasonable in themselves, so that companies may be allowed to save themselves from themselves, and to agree not to attack each other, but to keep up reasonable and living rates for the services performed. It is said that as railroads have a right to charge reasonable rates it must follow that a contract among themselves to keep up their charges to that extent is valid. Viewed in the light of all these facts it is broadly and confidently asserted that it is impossible to believe that Congress or any other intelligent and honest legislative body could ever have intended to include all contracts or combinations in restraint of trade, and as a consequence thereof to prohibit competing railways from agreeing among themselves to keep up prices for transportation to such a rate as should be fair and reasonable.

These arguments it must be confessed bear with much force upon the policy of an act which should prevent a general agreement upon the question of rates among competing railroad companies to the extent simply of maintaining those rates which were reasonable and fair.

There is another side to this question, however, and it may not be amiss to refer to one or two facts which tend to somewhat modify and alter the light in which the subject should be regarded. If only that kind of contract which is in unreasonable restraint of trade be within the meaning of the statute, and declared therein to be illegal, it is at once apparent that the subject of what is a reasonable rate is attended with great uncertainty. What is a proper standard by which to judge the fact of reasonable rates? Must the rate be so high as to enable the return for the whole business done to amount to a sum sufficient to afford the shareholder a fair and reasonable profit upon his investment? If so, what is a fair and reasonable profit? That depends sometimes upon the risk incurred, and the rate itself differs in different localities: which is the one to which reference is to be made as the standard? Or is the reasonableness of the profit to be limited to a fair return upon the capital that would have been sufficient to build and equip the road, if honestly expended? Or is still another standard to be created, and the reasonableness of the charges tried by the cost of the carriage of the article and a reasonable profit allowed on that? And in such case would contribution to a sinking fund to make repairs upon the roadbed and renewal of cars, etc., be assumed as a proper item? Or is the reasonableness of the charge to be tested by reference to the charges for the transportation of the same kind of property made by other roads similarly situated? If the latter, a combination among such roads as to rates would, of course, furnish no means of answering the question. It is quite apparent, therefore, that it is exceedingly difficult to formulate even the terms of the rule itself which should govern in the matter of determining what would be reasonable rates for transportation. While even after the standard should be determined there is such an infinite variety of facts entering into the question of what is a reasonable rate, no matter what standard is adopted, that any individual shipper would in most cases be apt to abandon the effort to show the unreasonable character of a charge, sooner than hazard the great expense in time and money necessary to prove the fact, and at the same time incur the ill-will of the road itself in all his future dealings with it. To say, therefore, that the act excludes agreements which are not in unreasonable restraint of trade, and which tend simply to keep up reasonable rates for transportation, is substantially to leave the question of reasonableness to the companies themselves. . . .

The claim that the company has the right to charge reasonable rates, and that, therefore, it has the right to enter into a combination with competing roads to maintain such rates, cannot be admitted. The conclusion does not follow from an admission of the premise. What one company may do in the way of charging reasonable rates is radically different from entering into an agreement with other and competing roads to keep up the rates to that point. If there be any competition the extent of the charge for the service will be seriously affected by that fact. Competition will itself bring charges down to what may be reasonable, while in the case of an agreement to keep prices up, competition is allowed no play; it is shut out, and the rate is practically fixed by the companies themselves by virtue of the agreement, so long as they abide by it.

As a result of this review of the situation, we find two very widely divergent views of the effects which might be expected to result from declaring illegal all contracts in restraint of trade, etc.; one side predicting financial disaster and ruin to competing railroads, including thereby the ruin of shareholders, the destruction of immensely valuable properties, and the consequent prejudice to the public interest; while on the other side predictions equally earnest are made that no such mournful results will follow, and it is urged that there is a necessity, in order that the public interest may be fairly and justly protected, to allow free and open competition among railroads upon the subject of the rates for the transportation of persons and property.

The arguments which have been addressed to us against the inclusion of all contracts in restraint of trade, as provided for by the language of the act, have been based upon the alleged presumption that Congress, notwithstanding the language of the act, could not have intended to embrace all contracts, but only such contracts as were in unreasonable restraint of trade. Under these circumstances we are, therefore, asked to hold that the act of Congress excepts contracts which are not in unreasonable restraint of trade, and which only keep rates up to a reasonable price, notwithstanding the language of the act makes no such exception. In other words, we are asked to read into the act by way of judicial legislation an exception that is not placed there by the law-making branch of the Government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language it used. This we cannot and ought not to do. That impolicy is not so clear, nor are the reasons for the exception so potent as to permit us to interpolate an exception into the language of the act, and to thus materially alter its meaning and effect. It may be that the policy evidenced by the passage of the act itself will, if carried out, result in disaster to the roads and in a failure to secure the advantages sought from such legislation. Whether that will be the result or not we do not know and cannot predict. These considerations are, however, not for us. If the act ought to read as contended for by defendants, Congress is the body to amend it and not this court, by a process of judicial legislation wholly unjustifiable. Large numbers do not agree that the view taken by defendants is sound or true in substance, and Congress may and very probably did share in that belief in passing the act. The public policy of the Government is to be found in its statutes, and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials; but when the lawmaking power speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such a case is what the statute enacts. If the law prohibit any contract or combination in restraint of trade or commerce, a contract or combination made in violation of such law is void, whatever may have been theretofore decided by the courts to have been the public policy of the country on that subject.

The conclusion which we have drawn from the examination above made into the question before us is that the Anti-Trust Act applies to railroads, and that it renders illegal all agreements which are in restraint of trade or commerce as we have above defined that expression, and the question then arises whether the agreement before us is of that nature. . . .

Although the case is heard on bill and answer, thus making it necessary to assume the truth of the allegations in the answer which are well pleaded, yet the legal effect of the agreement itself cannot be altered by the answer, nor can its violation of law be made valid by allegations of good intention or of desire to simply maintain reasonable rates; nor can the plaintiffs' allegations as to the intent with which the agreement was entered into be regarded, as such intent is denied on the part of the defendants; and if the intent alleged in the bill were a necessary fact to be proved in order to maintain the suit, the bill would have to be dismissed. In the view we have taken of the question, the intent alleged by the Government is not necessary to be proved. The question is one of law in regard to the meaning and effect of the agreement itself, namely: Does the agreement restrain trade or commerce in any way so as to be a violation of the act? We have no doubt that it does. The agreement on its face recites that it is entered into "for the purpose of mutual protection by establishing and maintaining reasonable rates, rules and regulations on all freight traffic, both through and local." To that end the association is formed and a body created which is to adopt rates, which, when agreed to, are to be the governing rates for all the companies, and a violation of which subjects the defaulting company to the payment of a penalty, and although the parties have a right to withdraw from the agreement on giving thirty days' notice of a desire so to do, yet while in force and assuming it to be lived up to, there can be no doubt that its direct, immediate and necessary effect is to put a restraint upon trade or commerce as described in the act.

For these reasons the suit of the Government can be maintained without proof of the allegation that the agreement was entered into for the purpose of restraining trade or commerce or for maintaining rates above what was reasonable. The necessary effect of the agreement is to restrain trade or commerce, no matter what the intent was on the part of those who signed it.

Reversed, and the case remanded to the Circuit Court for further proceedings in conformity with this opinion.

MR. JUSTICE WHITE, with whom concurred MR. JUSTICE FIELD, MR. JUSTICE GRAY and MR. JUSTICE SHIRAS, dissenting.

It is unnecessary to refer to the authorities showing that although a contract may in some measure restrain trade, it is not for that reason void or even voidable unless the restraint which it produces be unreasonable. The opinion of the court concedes this to be the settled doctrine.

The contract between the railway companies which the court holds to be void because it is found to violate the act of Congress of the 2d of July, 1890, 26 Stat. 209, substantially embodies only an agreement between the corporations by which a uniform classification of freight is obtained, by which the secret under-cutting of rates is sought to be avoided, and the rates as stated in the published rate sheets, and which, as a general rule, are required by law to be filed with the Interstate Commerce Commission, are secured against arbitrary and sudden changes. I content myself with giving this mere outline of the results of the contract, and do not stop to demonstrate that its provisions are reasonable, since the opinion of

the court rests upon that hypothesis. I commence, then, with these two conceded propositions, one of law and the other of fact, first, that only such contracts as unreasonably restrain trade are violative of the general law, and, second, that the particular contract here under consideration is reasonable, and therefore not unlawful if the general principles of law are to be applied to it.

The theory upon which the contract is held to be illegal is that even though it be reasonable, and hence valid, under the general principles of law, it is yet void, because it conflicts with the act of Congress already referred to. Now, at the outset, it is necessary to understand the full import of this conclusion. As it is conceded that the contract does not unreasonably restrain trade, and that if it does not so unreasonably restrain, it is valid under the general law, the decision, substantially, is that the act of Congress is a departure from the general principles of law, and by its terms destroys the right of individuals or corporations to enter into very many reasonable contracts. But this proposition, I submit, is tantamount to an assertion that the act of Congress is itself unreasonable. The difficulty of meeting, by reasoning, a premise of this nature is frankly conceded, for, of course, where the fundamental proposition upon which the whole contention rests is that the act of Congress is unreasonable, it would seem conducive to no useful purpose to invoke reason as applicable to and as controlling the construction of a statute which is admitted to be beyond the pale of reason. The question, then, is, is the act of Congress relied on to be so interpreted as to give it a reasonable meaning, or is it to be construed as being unreasonable and as violative of the elementary principles of justice?

The argument upon which it is held that the act forbids those reasonable contracts which are universally admitted to be legal is thus stated in the opinion of the court, and I quote the exact language in which it is there expressed, lest in seeking to epitomize I may not accurately reproduce the thought which it conveys:

"Contracts in restraint of trade have been known and spoken of for hundreds of years both in England and in this country, and the term includes all kinds of those contracts which in fact restrain trade. Some of such contracts have been held void and unenforcible in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade, and would be so described either at common law or elsewhere. By the simple use of the term 'contract in restraint of trade,' all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforcible as being in unreasonable restraint of trade. When, 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."

To state the proposition in the form in which it was earnestly pressed in the argument at bar, it is as follows: Congress has said every contract in restraint of trade is illegal. When the law says every, there is no power in the courts, if they correctly interpret and apply the statute, to substitute the word "some" for the word "every." If Congress had meant to forbid only restraints of trade which were unreasonable it would have said so; instead of doing this it has said *every*, and this word of universality embraces both contracts which are reasonable and unreasonable.

Is the proposition which is thus announced by the court, and which was thus stated at bar, well founded? is the first question which arises for solution. I quote the title and the first section of the act which, it is asserted, if correctly interpreted, destroys the right to make just and reasonable contracts:

"An act to protect trade and commerce against unlawful restraints and monopolies.

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

Is it correct to say that at common law the words "restraint of trade" had a generic signification which embraced all contracts which restrained the freedom of trade, whether reasonable or unreasonable, and, therefore, that all such contracts are within the meaning of the words "every contract in restraint of trade"? I think a brief consideration of the history and development of the law on the subject will not only establish the inaccuracy of this proposition, but also demonstrate that the words "restraint of trade" embrace only contracts which unreasonably restrain trade, and, therefore, that reasonable contracts, although they, in some measure, "restrain trade," are not within the meaning of the words. It is true that in the adjudged cases language may be found referring to contracts in restraint of trade which are valid because reasonable. But this mere form of expression, used not as a definition, does not maintain the contention that such contracts are embraced within the general terms every contract in restraint of trade. The rudiments of the doctrine of contracts in restraint of trade are found in the common law at a very early date. The first case on the subject is reported in 6 Year Book 5, 2 Hen. V, and is known as *Dier's case*. That was an action of damages upon a bond conditioned that the defendant should not practise his trade as a dyer at a particular place during a limited period, and it was held that the contract was illegal. The principle upon which this case was decided was not described as one forbidding contracts in restraint of trade, but was stated to be one by which contracts restricting the liberty of the subject were forbidden. The doctrine declared in that case was applied in subsequent cases in England prior to the case of *Mitchel* v. *Reynolds*, decided in 1711, and reported in 1 P. Wms. 181. There the distinction between general restraints and partial restraints was first definitely formulated, and it was held that a contract creating a partial restraint was valid and one creating a general restraint was not. The theory of partial and general restraints established by that case was followed in many decided cases in England, not, however, without the correctness of the difference between the two being in some instances denied and in others questioned, until the matter was set finally at rest by the House of Lords in *Nordenfelt* v. *The Maxim Nordenfelt Guns and Ammunition Co.*, reported in (1894) App. Cas. 535. In that case it was held that the distinction between partial and general restraint was an incorrect criterion, but that whether a contract was invalid because in restraint of trade must depend upon whether, on considering all the circumstances, the contract was found to be reasonable or unreasonable. If reasonable, it was not a contract in restraint of trade, and if unreasonable it was. . . .

It is perhaps true that the principle by which contracts in restraint of the freedom of the subject or of trade were held to be illegal was first understood to embrace all contracts which in any degree accomplished these results. But as trade developed it came to be understood that if contracts which only partially restrained the freedom of the subject or of trade were embraced in the rule forbidding contracts in restraint of trade, both the freedom of contract and trade itself would be destroyed. Hence, from the reason of things, arose the distinction that where contracts operated only a partial restraint of the freedom of contract or of trade they were not in contemplation of law contracts in restraint of trade. And it was this conception also which, in its final aspect, led to the knowledge that reason was to be the criterion by which it was to be determined whether a contract which, in some measure, restrained the freedom of contract and of trade, was in reality, when considered in all its aspects, a contract of that character or one which was necessary to the freedom of contract and of trade. To define, then, the words "in restraint of trade" as embracing every contract which in any degree produced that effect would be violative of reason, because it would include all those contracts which are the very essence of trade, and would be equivalent to saying that there should be no trade, and therefore nothing to restrain. The dilemma which would necessarily arise from defining the words "contracts in restraint of trade" so as to destroy trade by rendering illegal the contracts upon which trade depends, and yet presupposing that trade would continue and should not be restrained, is shown by an argument advanced, and which has been compelled by the exigency of the premise upon which it is based. Thus, after insisting that the word "every" is all-embracing, it is said from the necessity of things it will not be held to apply to covenants in restraint of trade which are collateral to a sale of property, because not "supposed" to be within the letter or spirit of the statute. But how, I submit, can it be held that the words "*every* contract in restraint of trade" *embrace all* such contracts, and yet at the same time be said that certain contracts of that nature are not included? The asserted exception not only destroys the rule which is relied on, but it rests upon no foundation of reason. It must either result from the exclusion of particular classes of contracts, whether they be reasonable or not, or it must arise from the fact that the contracts referred to are merely collateral contracts. But many collateral contracts may contain provisions which make them unreasonable. The exception which is relied upon, therefore, as rendering possible the existence of trade to be restrained is either arbitrary or it is unreasonable.

But, admitting *arguendo* the correctness of the proposition by which it is sought to include every contract, however reasonable, within the inhibition of the law, the statute, considered as a whole, shows, I think, the error of the construction placed upon it. Its title is "An act to protect trade and commerce against unlawful restraints and monopolies." The word "unlawful" clearly distinguishes between contracts in restraint of trade which are lawful and those which are not. In other words, between those which are unreasonably in restraint of trade, and consequently invalid, and those which are reasonable and hence lawful. When, therefore, in the very title of the act the well-settled distinction between lawful and unlawful contracts is broadly marked, how can an interpretation be correct which holds that all contracts, whether lawful or not, are included in its provisions? Whilst it is true that the title of an act cannot be used to destroy the plain import of the language found in its body, yet when a literal interpretation will work out wrong or injury, or where the words of the statute are ambiguous, the title may be resorted to as an instrument of construction. . . .

The plain intention of the law was to protect the liberty of contract and the freedom of trade. Will this intention not be frustrated by a construction which, if it does not destroy, at least gravely impairs, both the liberty of the individual to contract and the freedom of trade? If the rule of reason no longer determines the right of the individual to contract or secures the validity of contracts upon which trade depends and results, what becomes of the liberty of the citizen or of the freedom of trade? Secured no longer by the law of reason, all these rights become subject, when questioned, to the mere caprice of judicial authority. Thus, a law in favor of freedom of contract, it seems to me, is so interpreted as to gravely impair that freedom. Progress and not reaction was the purpose of the act of Congress. The construction now given the act disregards the whole current of judicial authority and tests the right to contract by the conceptions of that right entertained at the time of the year-books instead

of by the light of reason and the necessity of modern society. To do this violates, as I see it, the plainest conception of public policy; for as said by Sir G. Jessel, Master of the Rolls, in *Printing &c. Company* v. *Sampson*, L. R. 19 Eq. 462, "if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice."

The remedy intended to be accomplished by the act of Congress was to shield against the danger of contract or combination by the few against the interest of the many and to the detriment of freedom. The construction now given, I think, strikes down the interest of the many to the advantage and benefit of the few. It has been held in a case involving a combination among workingmen, that such combinations are embraced in the act of Congress in question, and this view was not doubted by this court. *In re Debs*, 64 Fed. Rep. 724, 745–755; 158 U. S. 564. The interpretation of the statute, therefore, which holds that reasonable agreements are within its purview, makes it embrace every peaceable organization or combination of the laborer to benefit his condition either by obtaining an increase of wages or diminution of the hours of labor. Combinations among labor for this purpose were treated as illegal under the construction of the law which included reasonable contracts within the doctrine of the invalidity of contract or combinations in restraint of trade, and they were only held not to be embraced within that doctrine either by statutory exemption therefrom or by the progress which made reason the controlling factor on the subject. It follows that the construction which reads the rule of reason out of the statute embraces within its inhibition every contract or combination by which workingmen seek to peaceably better their condition. It is therefore, as I see it, absolutely true to say that the construction now adopted which works out such results not only frustrates the plain purpose intended to be accomplished by Congress, but also makes the statute tend to an end never contemplated, and against the accomplishment of which its provisions were enacted.

UNITED STATES v. JOINT TRAFFIC ASS'N
171 U.S. 505 (1898)

[Thirty-one railroad companies that formed most (but not all) of the lines engaged in transportation between Chicago and the Atlantic coast formed an association "to aid in fulfilling the purpose of the Interstate Commerce act, to cooperate with each other and adjacent transportation associations to establish and maintain reasonable and just rates, fares, rules and regulations on state and interstate traffic, to prevent unjust discrimination and to secure the reduction and concentration of agencies and the introduction of economies in the conduct of the freight and passenger service." Among other things, the articles of association provided that the association would recommend such changes in rates as might be just and reasonable, and that a failure to observe such recommendations would be a violation of the agreement. No member was permitted to deviate from the recommendations, except by a resolution of its board of directors. Any deviation pursuant to such a resolution was not to become effective until thirty days after the resolution was provided to the association, and the managers of the association were instructed to "act promptly upon the same for the protection of the parties" to the agreement.

[The government's civil action charged that the defendants, unlawfully intending to restrain commerce among the several states and to prevent competition among the railroads named as defendants entered into this agreement in order to eliminate competition among the parties to it and that the agreement restrained trade and commerce among the several states. The bill also charged that the defendants unlawfully attempted to monopolize a part of interstate trade and commerce. The government sought relief in the form of a judgment declaring the agreement void and enjoining the parties from operating the roads in accordance with it.

[The Circuit Court for the Southern District of New York dismissed the bill, and the Circuit Court of Appeals affirmed.]

MR. JUSTICE PECKHAM, after stating the case, delivered the opinion of the court.

, we are brought to an examination of the question of the constitutionality of the act, construed as it has been in the *Trans-Missouri case*. . . .

Upon the constitutionality of the act it is now earnestly contended that contracts in restraint of trade are not necessarily prejudicial to the security or welfare of society, and that Congress is without power to prohibit generally all contracts in restraint of trade, and the effort to do this invalidates the act in question. It is urged that it is for the court to decide whether the mere fact that a contract or arrangement, whatever its purpose or character, may restrain trade in some degree, renders it injurious or prejudicial to the welfare or security of society, and if the court be of opinion that such welfare or security is not prejudiced by a contract of that kind, then Congress has no power to prohibit it, and the act must be declared unconstitutional. It is claimed that the act can be supported only as an exercise of the police power, and that the constitutional guarantees furnished by the Fifth Amendment secure to all persons freedom in the pursuit of their vocations and the use of their property, and in making such contracts or arrangements as may be necessary therefor. In dwelling upon the far-reaching nature of the language used in the act as construed in the case mentioned, counsel contend that the extent to which it limits the freedom and destroys the property of the individual can scarcely be exaggerated, and that ordinary contracts and combinations, which are at the same time most indispensable, have the effect of somewhat restraining trade and commerce, although to a very slight extent, but yet, under the construction adopted, they are illegal.

As examples of the kinds of contracts which are rendered illegal by this construction of the act, the learned counsel suggest all organizations of mechanics engaged in the same business for the purpose of limiting the number of persons employed in the business, or of maintaining wages; the formation of a corporation to carry on any particular line of business by those already engaged therein; a contract of partnership or of employment between two persons previously engaged in the same line of business; the appointment by two producers of the same person to sell their goods on commission; the purchase by one wholesale merchant of the product of two producers; the lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop; the withdrawal from business of any farmer, merchant or manufacturer; a sale of the good will of a business with an agreement not to destroy its value by engaging in similar business; and a covenant in a deed restricting the use of real estate. It is added that the effect of most business contracts or combinations is to restrain trade in some degree.

This makes quite a formidable list. It will be observed, however, that no contract of the nature above described is now before the court, and there is some embarrassment in assuming to decide herein just how far the act goes in the direction claimed. Nevertheless, we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade.

We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or manufacturer, restrained commerce or trade within any legal definition of that term;

and the sale of a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the *Trans-Missouri case* as a contract not within the meaning of the act; and it was said that such a contract was collateral to the main contract of sale and was entered into for the purpose of enhancing the price at which the vendor sells his business. The instances cited by counsel have in our judgment little or no bearing upon the question under consideration. In *Hopkins* v. *United States*, decided at this term, *post*, 578, we say that the statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce, and that to treat the act as condemning all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. We also repeat what is said in the case above cited, that "the act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it." To suppose, as is assumed by counsel, that the effect of the decision in the *Trans-Missouri case* is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption and one not called for or justified by the decision mentioned, or by any other decision of this court.

The question really before us is whether Congress, in the exercise of its right to regulate commerce among the several States, or otherwise, has the power to prohibit, as in restraint of interstate commerce, a contract or combination between competing railroad corporations entered into and formed for the purpose of establishing and maintaining interstate rates and fares for the transportation of freight and passengers on any of the railroads parties to the contract or combination, even though the rates and fares thus established are reasonable. Such an agreement directly affects and of course is intended to affect the cost of transportation of commodities, and commerce consists, among other things, of the transportation of commodities, and if such transportation be between States it is interstate commerce. The agreement affects interstate commerce by destroying competition and by maintaining rates above what competition might produce.

If it did not do that, its existence would be useless, and it would soon be rescinded or abandoned. Its acknowledged purpose is to maintain rates, and if executed, it does so. It must be remembered, however, that the act does not prohibit any railroad company from charging reasonable rates. If in the absence of any contract or combination among the railroad companies the rates and fares would be less than they are under such contract or combination, that is not by reason of any provision of the act which itself lowers rates, but only because the railroad companies would, as it is urged, voluntarily and at once inaugurate a war of competition among themselves, and thereby themselves reduce their rates and fares.

Has not Congress with regard to interstate commerce and in the course of regulating it, in the case of railroad corporations, the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition? We think it has. . . .

Upon the point that the agreement is not in fact one in restraint of trade, even though it did prevent competition, it must be admitted that the former argument has now been much enlarged and amplified, and a general and most masterly review of that question has been presented by counsel for the respondents. That this agreement does in fact prevent competition, and that it must have been so intended, we have already attempted to show. Whether stifling competition tends directly to restrain commerce in the case of naturally competing railroads, is a question upon which counsel have argued with very great ability. They acknowledge that this agreement purports to restrain competition, although, they say, in a very slight degree and on a single point. They admit that if competition and commerce were identical, being but different names for the same thing, then, in assuming to restrain competition even so far, it would be assuming in a corresponding degree to restrain commerce. Counsel then add (and therein we entirely agree with them) that no such identity can be pretended, because it is plain that commerce can and does take place on a large scale and in numerous forms without competition. The material considerations therefore turn upon the effects of competition upon the business of railroads, whether they are favorable to the commerce in which the roads are engaged, or unfavorable and in restraint of that commerce. Upon that question it is contended that agreements between railroad companies of the nature of that now before us are promotive instead of in restraint of trade.

This conclusion is reached by counsel after an examination of the peculiar nature of railroad property and the alleged baneful effects of competition upon it and also upon the public. It is stated that the only resort open to railroads to save themselves from the effects of a ruinous competition is that of agreements among themselves to check and control it. A ruinous competition is, as they say, apt to be carried on until the weakest of the combatants goes to destruction. After that the survivor, being relieved from competition, proceeds to raise its prices as high as the business will bear. Commerce, it is said, thus finally becomes restrained by the effects of competition, while, at the same time, otherwise valuable railroad property is thereby destroyed or greatly reduced in value. There can be no doubt that the general tendency of competition among competing railroads is towards lower rates for transportation, and the result of lower rates is generally a greater demand for the articles so transported, and this greater demand can only be gratified by a larger supply, the furnishing of which increases commerce. This is the first and direct result of competition among railroad carriers.

In the absence of any agreement restraining competition, this result, it is argued, is neutralized, and the opposite one finally reached by reason of the peculiar nature of railroad property which must be operated and the capital invested in which cannot be withdrawn, and the railroad managers are therefore, as is claimed, compelled to not only compete among themselves for business, but also to carry on the war of competition until it shall terminate in the utter destruction or the buying up of the weaker roads, after which the survivor will raise the rates as high as is possible. Thus the indirect but final effect of competition is claimed to be the raising of rates and the consequent restraint of trade, and it is urged that this result is only to be prevented by such an agreement as we have here. In that way alone it is said that competition is overcome, and general uniformity and reasonableness of rates securely established.

The natural, direct and immediate effect of competition is, however, to lower rates, and to thereby increase the demand for commodities, the supplying of which increases commerce, and an agreement, whose first and direct effect is to prevent this play of competition, restrains instead of promoting trade and commerce. Whether, in the absence of an agreement as to rates, the consequences described by counsel will in fact follow as a result of competition, is matter of very great uncertainty, depending upon many contingencies and in large degree upon the voluntary action of the managers of the several roads. Railroad companies may and often do continue in existence and engage in their lawful traffic at some profit, although they are competing railroads and are not acting under any agreement or combination with their competitors upon the subject of rates. It appears from the brief of counsel in this case that the agreement in question does not embrace all of the lines or systems engaged in the business of railroad transportation between Chicago and the Atlantic coast. It cannot be said that destructive competition, or, in other words, war to the death, is bound to result unless an agreement or combination to avoid it is entered into between otherwise competing roads.

It is not only possible but probable that good sense and integrity of purpose would prevail among the managers, and while making no agreement and entering into no combination by which the whole railroad interest as herein represented should act as one combined and consolidated body, the managers of each road might yet make such reasonable charges for the business done by it as the facts might justify. An agreement of the nature of this one which directly and effectually stifles competition, must be regarded under the statute as one in restraint of trade, notwithstanding there are possibilities that a restraint of trade may also follow competition that may be indulged in until the weaker roads are completely destroyed and the survivor thereafter raises rates and maintains them.

Coming to the conclusion we do, in regard to the various questions herein discussed, we think it unnecessary to further allude to the other reasons which have been advanced for a reconsideration of the decision in the *Trans-Missouri case.*

The judgments of the Circuit Court of the United States for the Southern District of New York and of the Circuit Court of Appeals for the Second Circuit are reversed, and the case remanded to the Circuit Court with directions to take such further proceedings therein as may be in conformity with this opinion.

Mr. Justice Gray, Mr. Justice Shiras and Mr. Justice White dissented.

Mr. Justice McKenna took no part in the decision of the case.

UNITED STATES v. ADDYSTON PIPE & STEEL CO.
85 Fed. 271 (6th Cir. 1898), *aff'd,* 175 U.S. 211 (1899).

[In 1896, the Justice Department commenced a suit in equity against six manufacturers of cast-iron pipe, which is used among other things in municipal gas and water works. The petition alleged that the defendants were practically the only cast-iron pipe manufacturers in 36 states and territories. The petition further alleged that the defendants had formed an association known as the Southern Pipe Works for the purpose of destroying competition within this region and forcing the public to pay unreasonable prices for cast-iron pipe.

[According to the government, in December, 1894, the six defendants entered into an agreement to last until the end of 1896. The agreement divided the association's area of operation into three categories. First, certain "reserved" cities were allocated to specific members, and each defendant agreed not to sell pipe in a city that had been allocated to another association member. Second, in other regions, known as "pay" territory, members were free to sell against one another, but members had to pay "bonuses" or charges to the association, payable twice monthly, on the volume of any shipments they made into the region. The list of bonus was set by a five-member supramajority vote of the association, and the bonuses collected would distributed among the members according to schedule based on their respective production capacities. Finally, in the remaining, so-called "free" territory, where the defendants faced considerable competition from non-member firms, members were free to sell against each other and to ship without the payment of any bonuses to the association. Where bids were reserved or allocated, the other members of the association would submit padded bids to maintain the pretense of competition.

[The system of bonuses, at least as a method of restricting competition and raising prices, apparently did not work. In May, 1985, only a few months into the bonus system, the association changed its method of operation. Instead of a fixed list of bonuses, the association fixed the price to be bid for each contract proposal, and except for

reserved cities, the members bid among themselves for the right to make the proposal. The firm bidding the highest bonus to be divided among the remaining members firm would become the bidder.

[The government charged that these endeavors amounted to a combination and conspiracy in restraint of trade in the manufacture of cast-iron pipe in violation of the Sherman Act. The petition sought the forfeiture of all pipe transported from one state to another pursuant to the conspiracy, a decree dissolving the unlawful combination, and a permanent injunction prohibiting defendants from forming any similar combination in the future.

[The defendants demurred to the petition in so far as it sought forfeiture, on the grounds that forfeiture could be obtained only from a court of law and not from a court of equity. In addition, the defendants filed an answer, and supporting affidavits from their senior officers, stating (1) that the object of the association was not to raise prices beyond what was reasonable, but only to prevent ruinous competition between the member companies, which would have carried prices far below a reasonable level; (2) that the bonuses charged were not exorbitant profits and additions to a reasonable price, but were deductions from a reasonable price, in the nature of a penalty or burden intended to curb the natural disposition of each member to get all the business possible, and more than its due proportion; (3) that the prices fixed by the association were always reasonable, and were always fixed with reference to the active competition of non-member pipe manufacturers; (4) that the reason why they sold pipe at a cheaper price in the free territory than in the pay territory was because the defendants were willing to sell at a loss to keep their mills running rather than shut them down; and (5) that the stenographer who furnished copies of the minutes of the association and of correspondence between the members had a pecuniary motive in betraying the confidence of his employers. The defendants also submitted affidavits from various cast-iron pipe purchasers, stating that they are satisfied with the prices that they received from the defendants, that the prices are reasonable, and that the prices tended to be considerably lower than the estimates made by the expert engineers of the purchasers prior to advertising the contract.

[The case was heard on the pleadings and the affidavits. The Circuit Court for the Eastern District of Tennessee found that the challenged activities of the defendants involved manufacturing, not interstate commerce, and under the rule of *E.C. Knight* dismissed the petition for lack of subject matter jurisdiction. Accordingly, the trial court did not reach the question of the antitrust merits of the combination. The opinion is reported at 78 Fed. 712 (C.C.E.D. Tenn. 1897). The government appealed.]

Before HARLAN, Circuit Justice, and TAFT and LURTON, Circuit Judges.

TAFT, Circuit Judge, after stating the case, delivered the opinion of the court.

Two questions are presented in this case for our decision: First. Was the association of the defendants a contract, combination, or conspiracy in restraint of trade, as the terms are to be understood in the act? Second. Was the trade thus restrained trade between the states?

The contention on behalf of defendants is that the association would have been valid at common law, and that the federal anti-trust law was not intended to reach any agreements that were not void and unenforceable at common law. It might be a sufficient answer to this contention to point to the decision of the supreme court of the United States in U. S. v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 17 Sup. Ct. 540, in which it was held that contracts in restraint of interstate transportation were within the statute, whether the restraints would be regarded as reasonable at common law or not. It is suggested, however, that that case related to a quasi public employment necessarily under public control, and affecting public interests, and that a less stringent rule of construction applies to contracts restricting parties in sales of merchandise, which is purely a private business, having in it no element of a public or quasi public character. Whether or not there is substance in such a distinction,—a question we do not decide,—it is certain that, if the contract of association which bound the defendants was void and unenforceable at the common law because in restraint of trade, it is within the inhibition of the statute if the trade it restrained was interstate. Contracts that were in unreasonable restraint of trade at common law were not unlawful in the sense of being criminal, or giving rise to a civil action for damages in favor of one prejudicially affected thereby, but were simply void, and were not enforced by the courts. * * *

The effect of the act of 1890 is to render such contracts unlawful in an affirmative or positive sense, and punishable as a misdemeanor, and to create a right of civil action for damages in favor of those injuried thereby, and a civil remedy by injunction in favor of both private persons and the public against the execution of such contracts and the maintenance of such trade restraints.

The argument for defendants is that their contract of association was not, and could not be, a monopoly, because their aggregate tonnage capacity did not exceed 30 per cent. of the total tonnage capacity of the country; that the restraints upon the members of the association, if restraints they could be called, did not embrace all the states, and were not unlimited in space; that such partial restraints were justified and upheld at common law if reasonable, and only proportioned to the necessary protection of the parties; that in this case the partial restraints were reasonable, because without them each member would be subjected to ruinous competition by the other, and did not exceed in degree of stringency or scope what was necessary to protect the parties in securing prices for their product that were fair and reasonable to themselves and the public; that competition was not stifled by the association because the prices fixed by it had to be fixed with reference to the very active competition of pipe companies which were not members of the association, and which had more than double the defendants' capacity; that in this way the association only modified and restrained the evils of ruinous competition, while the public had all the benefit from competition which public policy demanded.

From early times it was the policy of Englishmen to encourage trade in England, and to discourage those voluntary restraints which tradesmen were often induced to impose on themselves by contract. Courts recognized this public policy by refusing to enforce stipulations of this character. The objections to such restraints were mainly two. One was that by such contracts a man disabled himself from earning a livelihood with the risk of becoming a public charge, and deprived the community of the benefit of his labor. The other was that such restraints tended to give to the covenantee, the beneficiary of such restraints, a monopoly of the trade, from which he had thus excluded one competitor, and by the same means might exclude others.

Chief Justice Parker, in 1711, in the leading case of Mitchel v. Reynolds, 1 P. Wms. 181, 190, stated these objections as follows:

> "First. The mischief which may arise from them (1) to the party by the loss of his livelihood and the subsistence of his family; (2) to the public by depriving it of an useful member. Another reason is the great abuses these voluntary restraints are liable to; as, for instance, from corporations who are perpetually laboring for exclusive advantages in trade, and to reduce it into as few hands as possible."

The reasons were stated somewhat more at length in Alger v. Thacher, 19 Pick. 51, 54, in which the supreme judicial court of Massachusetts said:

> "The unreasonableness of contracts in restraint of trade and business is very apparent from several obvious considerations: (1) Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions; and they expose such persons to imposition and oppression. (2) They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves. (3) They discourage industry and enterprise, and diminish the products of ingenuity and skill. (4) They prevent competition and enhance prices. (5) They expose the public to all the evils of monopoly; and this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business, and engross the market. Against evils like these, wise laws protect individuals and the public by declaring all such contracts void."

The changed conditions under which men have ceased to be so entirely dependent for a livelihood on pursuing one trade, have rendered the first and second considerations stated above less important to the community than they were in the seventeenth and eighteenth centuries, but the disposition to use every means to reduce competition and create monopolies has grown so much of late that the fourth and fifth considerations mentioned in Alger v. Thacher have certainly lost nothing in weight in the present day, if we may judge from the statute here under consideration and similar legislation by the states.

The inhibition against restraints of trade at common law seems at first to have had no exception. * * *

After a time it became apparent to the people and the courts that it was in the interest of trade that certain covenants in restraint of trade should be enforced. It was of importance, as an incentive to industry and honest dealing in trade, that, after a man had built up a business with an extensive good will, he should be able to sell his business and good will to the best advantage, and he could not do so unless he could bind himself by an enforceable contract not to engage in the same business in such a way as to prevent injury to that which he was about to sell. It was equally for the good of the public and trade, when partners dissolved, and one took the business, or they divided the business, that each partner might bind himself not to do anything in trade thereafter which would derogate from his grant of the interest conveyed to his former partner. Again, when two men became partners in a business, although their union might reduce competition, this effect was only an incident to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business, and one useful to the community. Restrictions in the articles of partnership upon the business activity of the members, with a view of securing their entire effort in the common enterprise, were, of course, only ancillary to the main end of the union, and were to be encouraged. Again, when one in business sold property with which the buyer might set up a rival business, it was certainly reasonable that the seller should be able to restrain the buyer from doing him an injury which, but for the sale, the buyer would be unable to inflict.

This was not reducing competition, but was only securing the seller against an increase of competition of his own creating. Such an exception was necessary to promote the free purchase and sale of property. Again, it was of importance that business men and professional men should have every motive to employ the ablest assistants, and to instruct them thoroughly; but they would naturally be reluctant to do so unless such assistants were able to bind themselves not to set up a rival business in the vicinity after learning the details and secrets of the business of their employers.

For the reasons given, then, covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time of service. Before such agreements are upheld, however, the court must find that

the restraints attempted thereby are reasonably necessary (1, 2, and 3) to the enjoyment by the buyer of the property, good will, or interest in the partnership bought; or (4) to the legitimate ends of the existing partnership; or (5) to the prevention of possible injury to the business of the seller from use by the buyer of the thing sold; or (6) to protection from the danger of loss to the employer's business caused by the unjust use on the part of the employé of the confidential knowledge acquired in such business.

It would be stating it too strongly to say that these five classes of covenants in restraint of trade include all of those upheld as valid at the common law; but it would certainly seem to follow from the tests laid down for determining the validity of such an agreement that no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party. In Horner v. Graves, 7 Bing. 735, Chief Justice Tindal, who seems to be regarded as the highest English judicial authority on this branch of the law (see Lord Macnaghten's judgment in Nordenfeldt v. Maxim Nordenfelt Co., [1894] App. Cas. 535, 567), used the following language:

> "We do not see how a better test can be applied to the question whether this is or not a reasonable restraint of trade than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party requires can be of no benefit to either. It can only be oppressive. It is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void on the ground of public policy."

This very statement of the rule implies that the contract must be one in which there is a main purpose, to which the covenant in restraint of trade is merely ancillary. The covenant is inserted only to protect one of the parties from the injury which, in the execution of the contract or enjoyment of its fruits, he may suffer from the unrestrained competition of the other. The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined. In such a case, if the restraint exceeds the necessity presented by the main purpose of the contract, it is void for two reasons: First, because it oppresses the covenantor, without any corresponding benefit to the covenantee; and, second, because it tends to a monopoly. But where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly, and therefore would be void. In such a case there is no measure of what is necessary to the protection of either party, except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition. There is in such contracts no main lawful purpose, to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster.

Much has been said in regard to the relaxing of the original strictness of the common law in declaring contracts in restraint of trade void as conditions of civilization and public policy have changed, and the argument drawn therefrom is that the law now recognizes that competition may be so ruinous as to injure the public, and, therefore, that contracts made with a view to check such ruinous competition and regulate prices, though in restraint of trade, and having no other purpose, will be upheld. We think this conclusion is unwarranted by the authorities when all of them are considered. It is true that certain rules for determining whether a covenant in restraint of trade ancillary to the main purpose of a contract was reasonably adapted and limited to the necessary protection of a party in the carrying out of such purpose have been somewhat modified by modern authorities. In Mitchel v. Reynolds, 1 P. Wms. 181, the leading early case on the subject, in which the main object of the contract was the sale of a bake house, and there was a covenant to protect the purchaser against competition by the seller in the bakery business, Chief Justice Parker laid down the rule that it must appear before such a covenant could be enforced that the restraint was not general, but particular or partial, as to places or persons, and was upon a good and adequate consideration, so as to make it a proper and useful contract. Subsequently, it was decided in Hitchcock v. Coker, 6 Adol. & E. 454, that the adequacy of the consideration was not to be inquired into by the court if it was a legal one, and that the operation of the covenant need not be limited in time. More recently the limitation that the restraint could not be general or unlimited as to space has been modified in some cases by holding that, if the protection necessary to the covenantee reasonably requires a covenant unrestricted as to space, it will be upheld as valid. Whittaker v. Howe, 3 Beav. 383; Cloth Co. v. Lorsont, L. R. 9 Eq. 345; Rousillon v. Rousillon, 14 Ch. Div. 351; Nordenfeldt v. Maxim Nordenfeldt Co., [1894] App. Cas. 535. See, also, Fowle v. Park, 131 U. S. 88, 9 Sup. Ct. 658; Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419. But these cases all involved contracts in which the covenant in restraint of trade was ancillary to the main and lawful purpose of the contract, and was

necessary to the protection of the covenantee in the carrying out of that main purpose. They do not manifest any general disposition on the part of the courts to be more liberal in supporting contracts having for their sole object the restraint of trade than did the courts of an earlier time. It is true that there are some cases in which the courts, mistaking, as we conceive, the proper limits of the relaxation of the rules for determining the unreasonableness of restraints of trade, have set sail on a sea of doubt, and have assumed the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest, and how much is not.

The manifest danger in the administration of justice according to so shifting, vague, and indeterminate a standard would seem to be a strong reason against adopting it.

* * *

Upon this review of the law and the authorities, we can have no doubt that the association of the defendants, however reasonable the prices they fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law, because in restraint of trade, and tending to a monopoly. But the facts of the case do not require us to go so far as this, for they show that the attempted justification of this association on the grounds stated is without foundation.

The defendants, being manufacturers and vendors of cast-iron pipe, entered into a combination to raise the prices for pipe for all the states west and south of New York, Pennsylvania, and Virginia, constituting considerably more than three-quarters of the territory of the United States, and significantly called by the associates "pay territory." Their joint annual output was 220,000 tons. The total capacity of all the other cast-iron pipe manufacturers in the pay territory was 170,500 tons. Of this, 45,000 tons was the capacity of mills in Texas, Colorado, and Oregon, so far removed from that part of the pay territory where the demand was considerable that necessary freight rates excluded them from the possibility of competing, and 12,000 tons was the possible annual capacity of a mill at St. Louis, which was practically under the same management as that of one of the defendants' mills. Of the remainder of the mills in pay territory and outside of the combination, one was at Columbus, Ohio, two in northern Ohio, and one in Michigan. Their aggregate possible annual capacity was about one-half the usual annual output of the defendants' mills. They were, it will be observed, at the extreme northern end of the pay territory, while the defendants' mills at Cincinnati, Louisville, Chattanooga, and South Pittsburg, and Anniston, and Bessemer, were grouped much nearer to the center of the pay territory. The freight upon cast-iron pipe amounts to a considerable percentage of the price at which manufacturers can deliver it at any great distance from the place of manufacture. Within the margin of the freight per ton which Eastern manufacturers would have to pay to deliver pipe in pay territory, the defendants, by controlling two-thirds of the output in pay territory, were practically able to fix prices. The competition of the Ohio and Michigan mills, of course, somewhat affected their power in this respect in the northern part of the pay territory; but, the further south the place of delivery was to be, the more complete the monopoly over the trade which the defendants were able to exercise, within the limit already described. Much evidence is adduced upon affidavit to prove that defendants had no power arbitrarily to fix prices, and that they were always obliged to meet competition. To the extent that they could not impose prices on the public in excess of the cost price of pipe with freight from the Atlantic seaboard added, this is true; but, within that limit, they could fix prices as they chose. The most cogent evidence that they had this power is the fact, everywhere apparent in the record, that they exercised it. The details of the way in which it was maintained are somewhat obscured by the manner in which the proof was adduced in the court below, upon affidavits solely, and without the clarifying effect of cross-examination, but quite enough appears to leave no doubt of the ultimate fact. The defendants were, by their combination, therefore able to deprive the public in a large territory of the advantages otherwise accruing to them from the proximity of defendants' pipe factories, and, by keeping prices just low enough to prevent competition by Eastern manufacturers, to compel the public to pay an increase over what the price would have been, if fixed by competition between defendants, nearly equal to the advantage in freight rates enjoyed by defendants over Eastern competitors. The defendants acquired this power by voluntarily agreeing to sell only at prices fixed by their committee, and by allowing the highest bidder at the

secret "auction pool" to become the lowest bidder of them at the public letting. Now, the restraint thus imposed on themselves was only partial. It did not cover the United States. There was not a complete monopoly. It was tempered by the fear of competition, and it affected only a part of the price. But this certainly does not take the contract of association out of the annulling effect of the rule against monopolies. In U. S. v. E. C. Knight Co., 156 U. S. 1, 16, 15 Sup. Ct. 255, Chief Justice Fuller, in speaking for the court, said:

"Again, all the authorities agree that, in order to vitiate a contract or combination, it is not essential that its result should be a complete monopoly. It is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition."

It has been earnestly pressed upon us that the prices at which the cast-iron pipe was sold in pay territory were reasonable. A great many affidavits of purchasers of pipe in pay territory, all drawn by the same hand or from the same model, are produced, in which the affiants say that, in their opinion, the prices at which pipe has been sold by defendants have been reasonable. We do not think the issue an important one, because, as already stated, we do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract. Its tendency was certainly to give defendants the power to charge unreasonable prices, had they chosen to do so. But, if it were important, we should unhesitatingly find that the prices charged in the instances which were in evidence were unreasonable. The letters from the manager of the Chattanooga foundry written to the other defendants, and discussing the prices fixed by the association, do not leave the slightest doubt upon this point, and outweigh the perfunctory affidavits produced by the defendants. The cost of producing pipe at Chattanooga, together with a reasonable profit, did not exceed $15 a ton. It could have been delivered at Atlanta at $17 to $18 a ton, and yet the lowest price which that foundry was permitted by the rules of the association to bid was $24.25. The same thing was true all through pay territory to a greater or less degree, and especially at "reserved cities."

Another aspect of this contract of association brings it within the term used in the statute, "a conspiracy in restraint of trade." A conspiracy is a combination of two or more persons to accomplish an unlawful end by lawful means or a lawful end by unlawful means. In the answer of the defendants, it is averred that the chief way in which cast-iron pipe is sold is by contracts let after competitive bidding invited by the intending purchaser. It would have much interfered with the smooth working of defendants' association had its existence and purposes become known to the public. A part of the plan was a deliberate attempt to create in the minds of the members of the public inviting bids the belief that competition existed between the defendants. Several of the defendants were required to bid at every letting, and to make their bids at such prices that the one already selected to obtain the contract should have the lowest bid. It is well settled that an agreement between intending bidders at a public auction or a public letting not to bid against each other, and thus to prevent competition, is a fraud upon the intending vendor or contractor, and the ensuing sale or contract will be set aside. * * *

The largest purchasers of pipe are municipal corporations, and they are by law required to solicit bids for the sale of pipe in order that the public may get the benefit of competition. One of the means adopted by the defendants in their plan of combination was this illegal and fraudulent effort to evade such laws, and to deceive intending purchasers. No matter what the excuse for the combination by defendants in restraint of trade, the illegality of the means stamps it as a conspiracy, and so brings it within that term of the federal statute.

It is pressed upon us that there was no intention on the part of the defendants in this case to restrain interstate commerce, and in several affidavits the managing officers of the defendants make oath that they did not know what interstate commerce was, and, therefore, that they could not have combined to restrain it. Of course, the defendants, like other persons subject to the law, cannot plead ignorance of it as an excuse for its violation. They knew that the combination they were making contemplated the fixing of prices for the sale of pipe in 36 different states, and that the pipe sold would have to be delivered in those states from the 4 states in which defendants' foundries were situate. They knew that freight rates and transportation were a most important element in making the price for the pipe so to be delivered. They charged the successful bidder with a bonus to be paid upon the shipment of the pipe from his state to the state of the sale. Under their first agreement, the bonus to be paid by the successful bidder was varied according to the state in which the sale and delivery were to be made. It seems to us clear that the contract of association was on its face an extensive scheme to control the whole commerce among 36 states in cast-iron pipe, and that the defendants were fully aware of the fact whether they appreciated the application to it of the anti-trust law or not.

The prayer of the petition that pipe in transportation under the contract of association be forfeited in a proceeding in equity like this is, of course, improper, and must be denied. The sixth section of the anti-trust act, after providing that property owned and in transportation from one state to another or to a foreign country under a contract inhibited by the act "shall be forfeited to the United States," continues "and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law." This requires a like procedure to that prescribed in sections 3309–3391, Rev. St., and involves a trial by jury. The only remedy which can be afforded in this proceeding is a decree of injunction.

For the reasons given, the decree of the circuit court dismissing the bill must be reversed, with instructions to enter a decree for the United States perpetually enjoining the defendants from maintaining the combination in cast-iron pipe described in the bill, and substantially admitted in the answer, and from doing any business thereunder.

UNITED STATES v. ADDYSTON PIPE & STEEL CO.
175 U.S. 211 (1899).

Mr. Justice Peckham, after stating the case, delivered the opinion of the court.

* * *

We conclude that the plain language of the grant to Congress of power to regulate commerce among the several States includes power to legislate upon the subject of those contracts in respect to interstate or foreign commerce which directly affect and regulate that commerce, and we can find no reasonable ground for asserting that the constitutional provision as to the liberty of the individual limits the extent of that power as claimed by the appellants. . . .

We are also of opinion that the direct effect of the agreement or combination is to regulate interstate commerce, and the case is therefore not covered by that of *United States* v. *E. C. Knight Company*, *supra*. . . .

The direct purpose of the combination in the *Knight case* was the control of the manufacture of sugar. There was no combination or agreement, in terms, regarding the future disposition of the manufactured article; nothing looking to a transaction in the nature of interstate commerce. The probable intention on the part of the manufacturer of the sugar to thereafter dispose of it by sending it to some market in another State, was held to be immaterial and not to alter the character of the combination. The various cases which had been decided in this court relating to the subject of interstate commerce, and to the difference between that

and the manufacture of commodities, and also the police power of the States as affected by the commerce clause of the Constitution, were adverted to, and the case was decided upon the principle that a combination simply to control manufacture was not a violation of the act of Congress, because such a contract or combination did not directly control or affect interstate commerce, but that contracts for the sale and transportation to other States of specific articles were proper subjects for regulation because they did form part of such commerce.

We think the case now before us involves contracts of the nature last above mentioned, not incidentally or collaterally, but as a direct and immediate result of the combination engaged in by the defendants.

While no particular contract regarding the furnishing of pipe and the price for which it should be furnished was in the contemplation of the parties to the combination at the time of its formation, yet it was their intention, as it was the purpose of the combination, to directly and by means of such combination increase the price for which all contracts for the delivery of pipe within the territory above described should be made, and the latter result was to be achieved by abolishing all competition between the parties to the combination. The direct and immediate result of the combination was therefore necessarily a restraint upon interstate commerce in respect of articles manufactured by any of the parties to it to be transported beyond the State in which they were made. The defendants by reason of this combination and agreement could only send their goods out of the State in which they were manufactured for sale and delivery in another State, upon the terms and pursuant to the provisions of such combination. As pertinently asked by the court below, was not this a direct restraint upon interstate commerce in those goods?

* * *

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 in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made. Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade. It is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded. All the facts and circumstances are, however, to be considered in order to determine the fundamental question — whether the necessary effect of the combination is to restrain interstate commerce.

If iron pipe cost one hundred dollars a ton instead of the prices which the record shows were paid for it, no one, we think, would contend that the trade in it would amount to as much as if the lower prices prevailed. The higher price would operate as a direct restraint upon the trade, and therefore any contract or combination which enhanced the price might in some degree restrain the trade in the article. It is not material that the combination did not prevent the letting of any particular contract. Such was not its purpose. On the contrary, the more contracts to be let the better for the combination. It was formed not for the object of preventing the letting of contracts, but to restrain the parties to it from competing for contracts, and thereby to enhance the prices to be obtained for the pipe dealt in by those parties. And when by reason of the combination a particular contract may have been obtained for one of the parties thereto, but at a higher price than would otherwise have been paid, the charge that the combination was one in restraint of trade is not answered by the statement that the particular contract was in truth obtained and not prevented. The parties to such a combination might realize more profit by the higher prices they would secure than they could earn by doing more work at a much less price. The question is as to the effect of such combination upon the trade in the article, and if that effect be to destroy competition and thus advance the price, the combination is one in restraint of trade. . . .

The views above expressed lead generally to an affirmance of the judgment of the Court of Appeals. In one aspect, however, that judgment is too broad in its terms — the injunction is too absolute in its directions — as it may be construed as applying equally to commerce wholly within a State as well as to that which is interstate or international only. This was probably an inadvertence merely. Although the jurisdiction of Congress over commerce among the States is full and complete, it is not questioned that it has none over that which is wholly within a State, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce. It does not acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a State, by reason of the fact that the combination also covers and regulates commerce which is interstate. The latter it can regulate, while the former is subject alone to the jurisdiction of the State. The combination herein described covers both commerce which is wholly within a State and also that which is interstate.

In regard to such of these defendants as might reside and carry on business in the same State where the pipe provided for in any particular contract was to be delivered, the sale, transportation and delivery of the pipe by them under that contract would be a transaction wholly within the State, and the statute would not be applicable to them in that case. They might make any combination they chose with reference to the proposed contract, although it should happen that some non-resident of the State eventually obtained it.

The fact that the proposal called for the delivery of pipe in the same State where some of the defendants resided and carried on their business would be sufficient, so far as the act of Congress is concerned, to permit those defendants to combine as they might choose, in regard to the proposed contract

for the delivery of the pipe, and that right would not be affected by the fact that the contract might be subsequently awarded to some one outside the State as the lowest bidder. In brief, their right to combine in regard to a proposal for pipe deliverable in their own State could not be reached by the Federal power derived from the commerce clause in the Constitution.

To the extent that the present decree includes in its scope the enjoining of defendants thus situated from combining in regard to contracts for selling pipe in their own State, it is modified, and limited to that portion of the combination or agreement which is interstate in its character. As thus modified, the decree is

Affirmed.

NOTES

1. In Chattanooga Foundry and Pipe Works v. Atlanta, 203 U.S. 390 (1906), the Supreme Court upheld the right of the City of Atlanta to seek treble damages from injuries it sustained as a purchaser of pipe from two Tennessee members of the *Addyston Pipe* combination.

2. For more on the *Addyston Pipe* case, see Ripley, Trusts, Pools and Corporations (1916); Seager and Gulick, Trust and Corporation Problems ch. 7 (1929); George Bittlingmayer, Price Fixing and the Addyston Pipe Case, 5 Research L. & Econ. (1983); George Bittlingmayer, Decreasing Average Cost and the Competition: A New Look at the Addyston Pipe Case, 25 J.L. & Econ. 201 (1982).

Whether due to the protection afforded by *Knight* in the face of increasing antitrust pressure on price-fixing cartels and other types of informal arrangements, continuing industrialization and technological innovation, or the upturn following the panic of 1893-1894, the period following the Supreme Court's decision experienced an enormous boom in mergers and acquisitions, most notably in the form of multiple horizontal consolidations by holding companies that grew to dominate their markets. The new formations, some of which were reorganizations of previously more informal "trust" arrangements, included the Amalgamated Copper Company, the Associated Merchants Company, the American Cotton Oil Company, the Standard Oil Company, the United States Cast Iron Pipe and Foundry (from the defendants of the *Addyston Pipe* case), the United States Steel Corporation, and the Northern Securities Company.

NORTHERN SECURITIES CO. v. UNITED STATES
193 U.S. 197 (1904).

[Northern Securities was organized in 1901 as a holding company under the laws of New Jersey by the major stockholders in the Great Northern Railway Company and in the Northern Pacific Railway Company, two railroads having competing and substantially parallel line along the northern tier of states from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound, as a vehicle in which to consolidate their holdings. Upon its formation, Northern Securities was authorized to issue up to $400,000,000 in capital stock, although it issued only $30,000 for cash to commence business. Most of the remainder of the stock was issued shortly thereafter in exchange for the outstanding stock of the two railroad companies.

[The Justice Department, at the direction President Theodore Roosevelt, brought suit against Northern Securities, Northern Pacific, Great Northern, and various stockholders, charging that the defendants had entered into a conspiracy in restraint of trade and seeking to enjoin

them permanently from any efforts to combine the two railroad companies under common control.

[Justice Harlan wrote the plurality opinion for four justices supporting the lower court's judgment, and Justice Brewer's concurrence in a separate opinion provided the majority for holding the consolidation unlawful. Justice Peckham, after writing all of the Supreme Court's antitrust opinions except *E.C. Knight* found himself in the minority and joined the dissenting opinions of both Justice Oliver Wendell Holmes and, interesting enough, White, who had vigorously disagreed with Peckham in *Trans-Missouri* and *Joint Traffic.*]

MR. JUSTICE HARLAN announced the affirmance of the decree of the Circuit Court, and delivered the following opinion:

This suit was brought by the United States against the Northern Securities Company, a corporation of New Jersey; the Great Northern Railway Company, a corporation of Minnesota; the Northern Pacific Railway Company, a corporation of Wisconsin; James J. Hill, a citizen of Minnesota; and William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel S. Lamont, citizens of New York. . . .

The Great Northern Railway Company and the Northern Pacific Railway Company owned, controlled and operated separate lines of railway—the former road extending from Superior, and from Duluth and St. Paul, to Everett, Seattle, and Portland, with a branch line to Helena; the latter, extending from Ashland, and from Duluth and St. Paul, to Helena, Spokane, Seattle, Tacoma and Portland. The two lines, main and branches, about 9,000 miles in length, were and are parallel and competing lines across the continent through the northern tier of States between the Great Lakes and the Pacific, and the two companies were engaged in active competition for freight and passenger traffic, each road connecting at its respective terminals with lines of railway, or with lake and river steamers, or with seagoing vessels.

Prior to 1893 the Northern Pacific system was owned or controlled and operated by the Northern Pacific Railroad Company, a corporation organized under certain acts and resolutions of Congress. That company becoming insolvent, its road and property passed into the hands of receivers appointed by courts of the United States. In advance of foreclosure and sale a majority of its bondholders made an arrangement with the Great Northern Railway Company for a virtual consolidation of the two systems, and for giving the practical control of the Northern Pacific to the Great Northern. That was the arrangement declared in *Pearsall* v. *Great Northern Railway Company*, 161 U. S. 646, to be illegal under the statutes of Minnesota which forbade any railroad corporation or the purchasers or managers of any corporation, to consolidate the stock, property or franchises of such corporation, or to lease or purchase the works or franchises of, or in any way control, other railroad corporations owning or having under their control parallel or competing lines. Gen. Laws, Minn. 1874, c. 29; ch. 1881.

Early in 1901 the Great Northern and Northern Pacific Railway companies, having in view the ultimate placing of their two systems under a common control, united in the purchase of the capital stock of the Chicago, Burlington and Quincy Railway Company, giving in payment, upon an agreed basis of exchange, the joint bonds of the Great Northern and Northern Pacific Railway companies, payable in twenty years from date, with interest at 4 per cent per annum. In this manner the two purchasing companies became the owners of $107,000,000 of the $112,000,000 total capital stock of the

Chicago, Burlington and Quincy Railway Company, whose lines aggregated about 8,000 miles, and extended from St. Paul to Chicago and from St. Paul and Chicago to Quincy, Burlington, Des Moines, St. Louis, Kansas City, St. Joseph, Omaha, Lincoln, Denver, Cheyenne and Billings, where it connected with the Northern Pacific railroad. By this purchase of stock the Great Northern and Northern Pacific acquired full control of the Chicago, Burlington and Quincy main line and branches.

Prior to November 13, 1901, defendant Hill and associate stockholders of the Great Northern Railway Company, and defendant Morgan and associate stockholders of the Northern Pacific Railway Company, entered into a combination to form, under the laws of New Jersey, a *holding* corporation, to be called the Northern Securities Company, with a capital stock of $400,000,000, and to which company, in exchange for its own capital stock upon a certain basis and at a certain rate, was to be turned over the capital stock, or a controlling interest in the capital stock, of each of the constituent railway companies, with power in the holding corporation to vote such stock and in all respects to act as the owner thereof, and to do whatever it might deem necessary in aid of such railway companies or to enhance the value of their stocks. In this manner the interests of individual stockholders in the property and franchises of the two independent and competing railway companies were to be converted into an interest in the property and franchises of the holding corporation. Thus, as stated in Article VI of the bill, "by making the stockholders of each system jointly interested in both systems, and by practically pooling the earnings of both for the benefit of the former stockholders of each, and by vesting the selection of the directors and officers of each system in a common body, to wit, the holding corporation, with not only the power but the duty to pursue a policy which would promote

the interests, not of one system at the expense of the other, but of both at the expense of the public, all inducement for competition between the two systems was to be removed, a virtual consolidation effected, and a monopoly of the interstate and foreign commerce formerly carried on by the two systems as independent competitors established." . . .

This charter having been obtained, Hill and his associate stockholders of the Great Northern Railway Company, and Morgan and associate stockholders of the Northern Pacific Railway Company, assigned to the Securities Company a controlling amount of the capital stock of the respective constituent companies upon an agreed basis of exchange of the capital stock of the Securities Company for each share of the capital stock of the other companies.

In further pursuance of the combination, the Securities Company acquired additional stock of the defendant railway companies, issuing in lieu thereof its own stock upon the above basis, and, at the time of the bringing of this suit, held, as owner and proprietor, substantially all the capital stock of the Northern Pacific Railway Company, and, it is alleged, a controlling interest in the stock of the Great Northern Railway Company, "and is voting the same and is collecting the dividends thereon, and in all respects is acting as the owner thereof, in the organization, management and operation of said railway companies and in the receipt and control of their earnings."

No consideration whatever, the bill alleges, has existed or will exist, for the transfer of the stock of the defendant railway companies to the Northern Securities Company, other than the issue of the stock of the latter company for the purpose, after the manner, and upon the basis stated.

The Securities Company, the bill also alleges, was not organized in good faith to purchase and pay for the stocks of the Great Northern and Northern Pacific Railway companies, but solely "to incorporate the pooling of the stocks of said companies," and carry into effect the above combination; that it is a mere depositary, custodian, holder or trustee of the stocks of the Great Northern and Northern Pacific Railway companies; that its shares of stock are but beneficial certificates against said railroad stocks to designate the interest of the holders in the pool; that it does not have and never had any capital to warrant such an operation; that its subscribed capital was but $30,000, and its authorized capital stock of $400,000,000 was just sufficient, when all issued, to represent and cover the exchange value of substantially the entire stock of the Great Northern and Northern Pacific Railway companies. * * * *

The Government charges that if the combination was held not to be in violation of the act of Congress, then all efforts of the National Government to preserve to the people the benefits of free competition among carriers engaged in interstate commerce will be wholly unavailing, and all transcontinental lines, indeed the entire railway systems of the country, may be absorbed, merged and consolidated, thus placing the public at the absolute mercy of the holding corporation.

The several defendants denied all the allegations of the bill imputing to them a purpose to evade the provisions of the act of Congress, or to form a combination or conspiracy having for its object either to restrain or to monopolize commerce or trade among the States or with foreign nations. They denied that any combination or conspiracy was formed in violation of the act.

In our judgment, the evidence fully sustains the material allegations of the bill, and shows a violation of the act of Congress, in so far as it declares illegal every combination or conspiracy in restraint of commerce among the several States and

with foreign nations, and forbids attempts to monopolize such commerce or any part of it.

Summarizing the principal facts, it is indisputable upon this record that under the leadership of the defendants Hill and Morgan the stockholders of the Great Northern and Northern Pacific Railway corporations, having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound combined and conceived the scheme of organizing a corporation under the laws of New Jersey, which should *hold* the shares of the stock of the constituent companies, such shareholders, in lieu of their shares in those companies, to receive, upon an agreed basis of value, shares in the holding corporation; that pursuant to such combination the Northern Securities Company was organized as the holding corporation through which the scheme should be executed; and under that scheme such holding corporation has become the holder—more properly speaking, the custodian—of more than nine-tenths of the stock of the Northern Pacific, and more than three-fourths of the stock of the Great Northern, the stockholders of the companies who delivered their stock receiving upon the agreed basis shares of stock in the holding corporation. The stockholders of these two competing companies disappeared, as such, for the moment, but immediately reappeared as stockholders of the holding company which was thereafter to guard the interests of both sets of stockholders as a unit, and to manage, or cause to be managed, both lines of railroad as if held *in one ownership.* Necessarily by this combination or arrangement the holding company in the fullest sense dominates the situation in the interest of those who were stockholders of the constituent companies; as much so, for every practical purpose, as if it had been itself a railroad corporation which had built, owned, and operated both lines for the exclusive benefit of its stockholders. Necessarily, also, the constituent companies ceased, under such a combination, to be in active competition for trade and commerce along their respective lines, and have become, practically, one powerful consolidated corporation, by the name of a holding corporation the principal, if not the sole, object for the formation of which was to carry out the purpose of the original combination under which competition between the constituent companies would cease. Those who were stockholders of the Great Northern and Northern Pacific and became stockholders in the holding company are now interested in preventing all competition between the two lines, and as owners of stock or of certificates of stock in the holding company, they will see to it that no competition is tolerated. They will take care that no persons are chosen directors of the holding company who will permit competition between the constituent companies. The result of the combination is that all the earnings of the constituent companies make a common fund in the hands of the Northern Securities Company to be distributed, not upon the basis of the earnings of the respective constituent companies, each acting exclusively in its own interest, but upon the basis of the certificates of stock issued by the holding company. No scheme or device could more certainly come within the words of the act—"combination in the form of a trust or otherwise . . . in restraint of commerce among the several States or with foreign nations,"—or could more effectively and certainly suppress free competition between the constituent companies. This combination is, within the meaning of the act, a "trust;" but if not, it is a *combination in restraint of interstate and international commerce;* and that is enough to bring it under the condemnation of the act. The mere existence of such a combination and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected. If such combination be not destroyed, all the advantages that would naturally come to the public under the operation of the general laws of competition, as between the Great Northern and Northern Pacific Railway companies, will be lost, and the entire commerce of the immense territory in the northern part of the United States between the Great Lakes and the Pacific at Puget Sound will be at the mercy of a single holding corporation, organized in a State distant from the people of that territory. * * *

In *United States* v. *E. C. Knight Co.*, it was held that the agreement or arrangement there involved had reference only to the *manufacture* or *production* of sugar by those engaged in the alleged combination, but if it had directly embraced interstate or international commerce, it would then have been covered by the Anti-Trust Act and would have been illegal; in *United States* v. *Trans-Missouri Freight Association*, that an agreement between certain railroad companies providing for establishing and maintaining, for their mutual protection, reasonable rates, rules and regulations in respect of freight traffic, through and local, and by which free competition among those companies was restricted, was, by reason of such restriction, illegal under the Anti-Trust Act; in *United States* v. *Joint Traffic Association*, that an arrangement between certain railroad companies in reference to railroad traffic among the States, by which the railroads involved were not subject to competition among themselves, was also forbidden by the act; in *Hopkins* v. *United States* and *Anderson* v. *United States*, that the act embraced only agreements that had direct connection with interstate commerce, and that such commerce comprehended intercourse for all the purposes of trade, in any and all its forms, including the transportation, purchase, sale and exchange of commodities between citizens of different States, and the power to regulate it embraced all the instrumentalities by which such commerce is conducted; in *Addyston Pipe & Steel Co.* v. *United States*, all the members of the court concurring, that the act of Congress made illegal an agreement between certain private companies or corporations engaged in different States in the manufacture, sale and transportation of iron pipe, whereby competition among them was avoided, was covered by the Anti-Trust Act; and in *Montague* v. *Lowry*, all the members of the court again concurring, that a combination created by an agreement between certain private manufacturers and dealers in tiles, grates and mantels, in different States, whereby they controlled or sought to control the price of such articles in those States, was condemned by the act of Congress. In *Pearsall* v. *Great Northern Railway*, which, as already stated, involved the consolidation of the Great Northern and Northern Pacific Railway companies, the court said: "The consolidation of these two great corporations will unavoidably result in giving to the defendant [the Great Northern] a monopoly of all traffic in the northern half of the State of Minnesota, as well as of all transcontinental traffic north of the line of the Union Pacific, against which public regulations will be but a feeble protection. The acts of the Minnesota Legislature of 1874 and 1881 undoubtedly reflected the general sentiment of the public, that their best security is in competition."

We will not incumber this opinion by extended extracts from the former opinions of this court. It is sufficient to say that from the decisions in the above cases certain propositions are plainly deducible and embrace the present case. Those propositions are:

That although the act of Congress known as the Anti-Trust Act has no reference to the mere manufacture or production of articles or commodities within the limits of the several States, it does embrace and declare to be illegal every contract, combination or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates *in restraint* of trade or commerce *among the several States or with foreign nations;*

That the act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces *all* direct *restraints* imposed by any combination, conspiracy or monopoly upon such trade or commerce;

That railroad carriers engaged in interstate or international trade or commerce are embraced by the act;

That combinations even among *private* manufacturers or dealers whereby *interstate or international commerce* is restrained are equally embraced by the act;

That Congress has the power to establish *rules* by which *interstate and international* commerce shall be governed, and, by the Anti-Trust Act, has prescribed the rule of free competition among those engaged in such commerce;

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;

That the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promotes trade and commerce;

That to vitiate a combination, such as the act of Congress condemns, it need not be shown that the combination, in fact, results or will result in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition;

That the constitutional guarantee of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in *interstate and international* commerce; and,

That under its power to regulate commerce among the several States and with foreign nations, Congress had authority to enact the statute in question.

No one, we assume, will deny that these propositions were distinctly announced in the former decisions of this court. They cannot be ignored or their effect avoided by the intimation that the court indulged in *obiter dicta*. What was said in those cases was within the limits of the issues made by the parties. In our opinion, the recognition of the principles announced in former cases must, under the conceded facts, lead to an affirmance of the decree below, unless the special objections, or some of them, which have been made to the application of the act of Congress to the present case are of a substantial character. We will now consider those objections.

Underlying the argument in behalf of the defendants is the idea that as the Northern Securities Company is a state corporation, and as its acquisition of the stock of the Great Northern and Northern Pacific Railway companies is not inconsistent with the powers conferred by its charter, the enforcement of the act of Congress, as against those corporations, will be an unauthorized interference by the national government with the internal commerce of the States creating those corporations. This suggestion does not at all impress us. There is no reason to suppose that Congress had any purpose to interfere with the internal affairs of the States, nor, in our opinion, is there any ground whatever for the contention that the Anti-Trust Act regulates their domestic commerce. By its very terms the act regulates only commerce among the States and with foreign states. Viewed in that light, the act, if within the powers of Congress, must be respected; for, by the explicit words of the Constitution, that instrument and the laws enacted by Congress in pursuance of its provisions, are the supreme law of the land, "anything in the constitution or laws of any State to the contrary notwithstanding"— supreme over the States, over the courts, and even over the people of the United States, the source of all power under our governmental system in respect of the objects for which the National Government was ordained. An act of Congress con-

stitutionally passed under its power to regulate commerce among the States and with foreign nations is binding upon all; as much so as if it were embodied, in terms, in the Constitution itself. . . .

The means employed in respect of the combinations forbidden by the Anti-Trust Act, and which Congress deemed germane to the end to be accomplished, was to prescribe as *a rule* for *interstate and international* commerce, (not for domestic commerce,) that it should not be vexed by combinations, conspiracies or monopolies which restrain commerce by destroying or restricting competition. We say that Congress has prescribed such a rule, because in all the prior cases in this court the Anti-Trust Act has been construed as forbidding any combination which by its necessary operation destroys or restricts free competition among those engaged in interstate commerce; in other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce. Now, can this court say that such a rule is prohibited by the Constitution or is not one that Congress could appropriately prescribe when exerting its power under the commerce clause of the Constitution? Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. Undoubtedly, there are those who think that the general business interests and prosperity of the country will be best promoted if the rule of competition is not applied. But there are others who believe that such a rule is more necessary in these days of enormous wealth than it ever was in any former period of our history. Be all this as it may, Congress has, in effect, recognized the rule of free competition by declaring illegal every combination or conspiracy in restraint of interstate and international commerce. As in the judgment of Congress the public convenience and the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute, that must be, for all, the end of the matter, if this is to remain a government of laws, and not of men. . . .

No State can, by merely creating a corporation, or in any other mode, project its authority into other States, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce. It cannot be said that any State may give a corporation, created under its laws, authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress. Every corporation created by a State is necessarily subject to the supreme law of the land. And yet the suggestion is made that to restrain a state corporation from interfering with the free course of trade and commerce among the States, in violation of an act of Congress, is hostile to the reserved rights of the States. The Federal court may not have power to forfeit the charter of the Securities Company; it may not declare how its shares of stock may be transferred on its books, nor prohibit it from acquiring real estate, nor diminish or increase its capital stock. All these and like matters are to be regulated by the State which created the company. But to the end that effect be given to the national will, lawfully expressed, Congress may prevent that company, in its capacity as a holding corporation and trustee, from carrying out the purposes of a combination formed in restraint of interstate commerce. The Securities Company is itself a part of the present combination; its head and front; its trustee. It would be extraordinary if the court, in executing the act of Congress, could not lay hands upon that company and prevent it from doing that which, if done, will defeat the act of Congress. Upon like grounds the court can, by appropriate orders, prevent the two competing railroad companies here involved from coöperating with the Securities Company in restraining commerce among the States. In short, the court may make any order necessary to bring about

the dissolution or suppression of an illegal combination that restrains interstate commerce. All this can be done without infringing in any degree upon the just authority of the States.

• • •

We will now inquire as to the nature and extent of the relief granted to the Government by the decree below.

By the decree in the Circuit Court it was found and adjudged that the defendants had entered into a combination or conspiracy in restraint of trade or commerce among the several States, such as the act of Congress denounced as illegal; and that all of the stocks of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company, claimed to be owned and held by the Northern Securities Company, was acquired, and is by it held, in virtue of such combination or conspiracy, in restraint of trade and commerce among the several States. It was therefore decreed as follows: "That the Northern Securities Company, its officers, agents, servants and employés, be and they are hereby enjoined from acquiring, or attempting to acquire, further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies and from exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies, or either of them, by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants and agents, be and they are hereby respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies; that they, together with their officers, directors, servants and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants and agents, be enjoined from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said, The Northern Securities Company, may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies." * * *

The Circuit Court has done only what the actual situation demanded. Its decree has done nothing more than to meet the requirements of the statute. It could not have done less without declaring its impotency in dealing with those who have violated the law. The decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies, but the power of the holding corporation as the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain interstate and international commerce. The exercise of that power being restrained, the object of Congress will be accomplished; left undisturbed, the act in question will be valueless for any practical purpose.

The judgment of the court is that the decree below be and hereby is affirmed, with liberty to the Circuit Court to proceed in the execution of its decree as the circumstances may require.

Affirmed.

* * * *

MR. JUSTICE BREWER, concurring.

I cannot assent to all that is said in the opinion just announced, and believe that the importance of the case and the questions involved justify a brief statement of my views.

First, let me say that while I was with the majority of the court in the decision in *United States* v. *Freight Association*, 166 U. S. 290, followed by the cases of *United States* v. *Joint Traffic Association*, 171 U. S. 505, *Addyston Pipe & Steel Company* v. *United States*, 175 U. S. 211, and *Montague & Co.* v. *Lowry*, 193 U. S. 38, decided at the present term, and while a further examination (which has been induced by the able and exhaustive arguments of counsel in the present case) has not disturbed the conviction that those cases were rightly decided, I think 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. That act, as appears from its title, was leveled at only "unlawful restraints and monopolies." Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. The purpose rather was to place a statutory prohibition with prescribed penalties and remedies upon those contracts which were in direct restraint of trade, unreasonable and against public policy. Whenever a departure from common law rules and definitions is claimed, the purpose to make the departure should be clearly shown. Such a purpose does not appear and such a departure was not intended.

Further, the general language of the act is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen. If, applying this thought to the present case, it appeared that Mr. Hill was the owner of a majority of the stock in the Great Northern Railway Company he could not by any act of Congress be deprived of the right of investing his surplus means in the purchase of stock of the Northern Pacific Railway Company, although such purchase might tend to vest in him through that ownership a control over both companies. In other words, the right, which all other citizens had, of purchasing Northern Pacific stock could not be denied to him by Congress because of his ownership of stock in the Great Northern Company. * * *

But no such investment by a single individual of his means is here presented. There was a combination by several individuals separately owning stock in two competing railroad companies to place the control of both in a single corporation. The purpose to combine and by combination destroy competition existed before the organization of the corporation, the Securities Company. That corporation, though nominally having a capital stock of $400,000,000, had no means of its own; $30,000 in cash was put into its treasury, but simply for the expenses of organization. The organizers might just as well have made the nominal stock a thousand millions as four hundred, and the corporation would have been no richer or poorer. A corporation, while by fiction of law recognized for some purposes as a person and for purposes of jurisdiction as a citizen, is not endowed with the inalienable rights of a natural person. It is an artificial person, created and existing only for the convenient transaction of business. In this case it was a mere instrumentality by which separate railroad properties were combined under one control. That combination

is as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates. The prohibition of such a combination is not at all inconsistent with the right of an individual to purchase stock. The transfer of stock to the Securities Company was a mere incident, the manner in which the combination to destroy competition and thus unlawfully restrain trade was carried out.

If the parties interested in these two railroad companies can, through the instrumentality of a holding corporation, place both under one control, then in like manner, as was conceded on the argument by one of the counsel for the appellants, could the control of all the railroad companies in the country be placed in a single corporation. Nor need this arrangement for control stop with what has already been done. The holders of $201,000,000 of stock in the Northern Securities Company might organize another corporation to hold their stock in that company, and the new corporation holding the majority of the stock in the Northern Securities Company and acting in obedience to the wishes of a majority of its stockholders would control the action of the Securities Company and through it the action of the two railroad companies, and this process might be extended until a single corporation whose stock was owned by three or four parties would be in practical control of both roads, or, having before us the possibilities of combination, the control of the whole transportation system of the country. I cannot believe that to be a reasonable or lawful restraint of trade. * * *

MR. JUSTICE WHITE, with whom concurred MR. CHIEF JUSTICE FULLER, MR. JUSTICE PECKHAM, and MR. JUSTICE HOLMES, dissenting.

In testing the power of Congress I shall proceed upon the assumption that the act of Congress forbids the acquisition of a majority of the stock of two competing railroads engaged in part in interstate commerce by a corporation or any combination of persons.

The authority of Congress, it is conceded by all, must rest upon the power delegated by the eighth section of the first article of the Constitution, "to regulate Commerce with foreign Nations, and among the several States and with the Indian tribes." The proposition upon which the case for the government depends then is that the ownership of stock in railroad corporations created by a State is interstate commerce, wherever the railroads engage in interstate commerce. * * *

The plenary authority of Congress over interstate commerce, its right to regulate it to the fullest extent, to fix the rates to be charged for the movement of interstate commerce, to legislate concerning the ways and vehicles actually engaged in such traffic, and to exert any and every other power over such commerce which flows from the authority conferred by the Constitution, is thus conceded. But the concessions thus made do not concern the question in this case, which is not the scope of the power of Congress to regulate commerce, but whether the power extends to regulate the ownership of stock in railroads, which is not commerce at all. The confusion which results from failing to observe this distinction will appear from an accurate analysis of *Gibbons* v. *Ogden*, for in that case the great Chief Justice was careful to define the commerce, the power to regulate which was conferred upon Congress, and in the passages which I have previously quoted, simply pointed out the rule by which it was to be determined in any case whether Congress, in acting upon the subject, had gone beyond the limits of the power to regulate commerce as it was defined in the opinion. Accepting the test announced in *Gibbons* v. *Ogden* for determining whether a given exercise

of the power to regulate commerce has in effect transcended the limits of regulation, it is essential to accept also the luminous definition of commerce announced in that case and approved so many times since, and hence to test the question for decision by that definition. The definition is this: "Commerce undoubtedly is traffic, but it is something more, it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, *and is regulated by prescribing rules for carrying on that intercourse.*" (Italics mine.)

Does the delegation of authority to Congress to regulate commerce among the States embrace the power to regulate the ownership of stock in state corporations, because such corporations may be in part engaged in interstate commerce? Certainly not, if such question is to be governed by the definition of commerce just quoted from *Gibbons* v. *Ogden*. Let me analyze the definition. "Commerce undoubtedly is traffic, but it is something more, it is intercourse;" that is, traffic between the States and intercourse between the States. I think the ownership of stock in a state corporation cannot be said to be in any sense traffic between the States or intercourse between them. * * * Take the *Knight* case. There as the contract merely concerned the purchase of stock in the refineries, and contained no condition relating to the movement in interstate commerce of the goods to be manufactured by the refining companies, the court held as the right to acquire was not within the commerce clause, the fact that the owners of the manufactured product might thereafter so act concerning the product as to burden commerce, there was no direct burden resulting from the mere acquisition and ownership. On the contrary, in the *Addyston Pipe* case, after stating in the fullest way the paramount authority of Congress concerning commerce, the court approached the terms of the contract in order to determine whether it related to interstate commerce, and if it did, whether it created a direct burden. In doing so, as it found that the contract both related to interstate commerce and directly burdened the same, the contract was held to be void. This case comes within the *Knight* case. It concerns the acquisition and ownership of stock. No contract is in question made by the owners of the stock controlling the railroads in the performance of their duties as carriers of interstate commerce. The sole contention is that as the result of the ownership of the stock there may arise, in the operation of the roads, a burden on interstate commerce. That is, that such burden may indirectly result from the acquisition and ownership. To maintain the contention, therefore, it must be decided that because ownership of property if acquired may be so used as to burden commerce, therefore to acquire and own is to burden. This, however, would be but to declare that that which was in its very nature and essence indirect is direct.

3. But, it is said, it may not be denied that the common ownership of stock in competing railroads endows the holders of the majority of the stock with a common interest in both railroads and with the authority, if they choose to exert it, to so unify the management of the roads as to suppress competition between them. This power, it is insisted, is within the regulating authority of Congress over interstate commerce. In other words, the contention broadly is that Congress has not only the authority to regulate the exercise of interstate commerce, but under that power has the right to regulate the ownership and possession of property, if the enjoyment of such rights would enable those who possessed them if they engaged in interstate commerce to exert a power over the same. But this proposition only asserts in another form that the right to acquire the stock was interstate commerce, and therefore was within the authority of Congress, and is refuted by the reasons and authorities already advanced. . . .

MR. JUSTICE HOLMES, with whom concurred the CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE PECKHAM, dissenting.

I am unable to agree with the judgment of the majority of the court, and although I think it useless and undesirable, as a rule, to express dissent, I feel bound to do so in this case and to give my reasons for it.

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. What we have to do in this case is to find the meaning of some not very difficult words. We must try, I have tried, to do it with the same freedom of natural and spontaneous interpretation that one would be sure of if the same question arose upon an indictment for a similar act which excited no public attention, and was of importance only to a prisoner before the court. Furthermore, while at times judges need for their work the training of economists or statesmen, and must act in view of their foresight of consequences, yet when their task is to interpret and apply the words of a statute, their function is merely academic to begin with—to read English intelligently—and a consideration of consequences comes into play, if at all, only when the meaning of the words used is open to reasonable doubt.

The question to be decided is whether, under the act of July 2, 1890, c. 647, 26 Stat. 209, it is unlawful, at any stage of the process, if several men unite to form a corporation for the purpose of buying more than half the stock of each of two competing interstate railroad companies, if they form the corporation, and the corporation buys the stock. I will suppose further that every step is taken, from the beginning, with the single intent of ending competition between the companies. I make this addition not because it may not be and is not disputed but because, as I shall try to show, it is totally unimportant under any part of the statute with which we have to deal.

The statute of which we have to find the meaning is a criminal statute. The two sections on which the Government relies both make certain acts crimes. That is their immediate purpose and that is what they say. It is vain to insist that this is not a criminal proceeding. The words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction. The construction which is adopted in this case must be adopted in one of the other sort. I am no friend of artificial interpretations because a statute is of one kind rather than another, but all agree that before a statute is to be taken to punish that which always has been lawful it must express its intent in clear words. So I say we must read the words before us as if the question were whether two small exporting grocers should go to jail.

Again the statute is of a very sweeping and general character. It hits "every" contract or combination of the prohibited sort, great or small, and "every" person who shall monopolize or attempt to monopolize, in the sense of the act, "any part" of the trade or commerce among the several States. There is a natural inclination to assume that it was directed against certain great combinations and to read it in that light. It does not say so. On the contrary, it says "every," and "any part." Still less was it directed specially against railroads. There even was a reasonable doubt whether it included railroads until the point was decided by this court.

Finally, the statute must be construed in such a way as not merely to save its constitutionality but, so far as is consistent with a fair interpretation, not to raise grave doubts on that score. I assume, for the purposes of discussion, although it would be a great and serious step to take, that in some case that seemed to it to need heroic measures, Congress might regulate not only commerce, but instruments of commerce or contracts the bearing of which upon commerce would be only indirect. But it is clear that the mere fact of an indirect effect upon commerce not shown to be certain and very great, would not justify such a law. The point decided in *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 17, was that "the fact that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree." Commerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce. If the act before us is to be carried out according to what seems to me the logic of the argument for the Government, which I do not believe that it will be, I can see no part of the conduct of life with which on similar principles Congress might not interfere.

This act is construed by the Government to affect the purchasers of shares in two railroad companies because of the effect it may have, or, if you like, is certain to have, upon the competition of these roads. If such a remote result of the exercise of an ordinary incident of property and personal freedom is enough to make that exercise unlawful, there is hardly any transaction concerning commerce between the States that may not be made a crime by the finding of a jury or a court. The personal ascendency of one man may be such that it would give to his advice the effect of a command, if he owned but a single share in each road. The tendency of his presence in the stockholders' meetings might be certain to prevent competition, and thus his advice, if not his mere existence, become a crime.

I state these general considerations as matters which I should have to take into account before I could agree to affirm the decree appealed from, but I do not need them for my own opinion, because when I read the act I cannot feel sufficient doubt as to the meaning of the words to need to fortify my conclusion by any generalities. Their meaning seems to me plain on their face.

The first section makes "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations" a misdemeanor, punishable by fine, imprisonment or both. Much trouble is made by substituting other phrases assumed to be equivalent, which then are reasoned from as if they were in the act. The court below argued as if maintaining competition were the expressed object of the act. The act says nothing about competition. I stick to the exact words used. The words hit two classes of cases, and only two—Contracts in restraint of trade and combinations or conspiracies in restraint of trade, and we have to consider what these respectively are. Contracts in restraint of trade are dealt with and defined by the common law. They are contracts with a stranger to the contractor's business, (although in some cases carrying on a similar one,) which wholly or partially restrict the freedom of the contractor in carrying on that business as otherwise he would. The objection of the common law to them was primarily on the contractor's own account. The notion of monopoly did not come in unless the contract covered the whole of England. *Mitchel* v. *Reynolds*, 1 P. Wms. 181. Of course this objection did not apply to partnerships or other forms, if there were any, of substituting

a community of interest where there had been competition. There was no objection to such combinations merely as in restraint of trade, or otherwise unless they amounted to a monopoly. Contracts in restraint of trade, I repeat, were contracts with strangers to the contractor's business, and the trade restrained was the contractor's own.

Combinations or conspiracies in restraint of trade, on the other hand, were combinations to keep strangers to the agreement out of the business. The objection to them was not an objection to their effect upon the parties making the contract, the members of the combination or firm, but an objection to their intended effect upon strangers to the firm and their supposed consequent effect upon the public at large. In other words, they were regarded as contrary to public policy because they monopolized or attempted to monopolize some portion of the trade or commerce of the realm. See *United States* v. *E. C. Knight Co.*, 156 U. S. 1. All that is added to the first section by § 2 is that like penalties are imposed upon every single person who, without combination, monopolizes or attempts to monopolize commerce among the States; and that the liability is extended to attempting to monopolize any part of such trade or commerce. It is more important as an aid to the construction of § 1 than it is on its own account. It shows that whatever is criminal when done by way of combination is equally criminal if done by a single man. That I am right in my interpretation of the words of § 1 is shown by the words "in the form of trust or otherwise." The prohibition was suggested by the trusts, the objection to which, as every one knows, was not the union of former competitors, but the sinister power exercised or supposed to be exercised by the combination in keeping rivals out of the business and ruining those who already were in. It was the ferocious extreme of competition with others, not the cessation of competition among the partners, that was the evil feared. Further proof is to be found in § 7, giving an action to any person injured in his business or property by the forbidden conduct. This cannot refer to the parties to the agreement and plainly means that outsiders who are injured in their attempt to compete with a trust or other similar combination may recover for it. *Montague & Co.* v. *Lowry*, 193 U. S. 38. How effective the section may be or how far it goes, is not material to my point. My general summary of the two classes of cases which the act affects is confirmed by the title, which is "An Act to protect Trade and Commerce against unlawful Restraints and Monopolies."

What I now ask is under which of the foregoing classes this case is supposed to come, and that question must be answered as definitely and precisely as if we were dealing with the indictments which logically ought to follow this decision. The provision of the statute against contracts in restraint of trade has been held to apply to contracts between railroads, otherwise remaining independent, by which they restricted their respective freedom as to rates. This restriction by contract with a stranger to the contractor's business is the ground of the decision in *United States* v. *Joint Traffic Association*, 171 U. S. 505, following and affirming *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290. I accept those decisions absolutely, not only as binding upon me, but as decisions which I have no desire to criticise or abridge. But the provision has not been decided, and, it seems to me, could not be decided without perversion of plain language, to apply to an arrangement by which competition is ended through community of interest—an arrangement which leaves the parties without external restriction. That provision, taken alone, does not require that all existing competitions shall be maintained. It does not look primarily, if at all, to competition. It simply requires that a party's freedom in trade between the States shall not be cut down by contract with a stranger. So far as that phrase goes, it is lawful to abolish competition by any form of union. It would seem to me impossible to say

that the words "every contract in restraint of trade is a crime punishable with imprisonment," would send the members of a partnership between, or a consolidation of, two trading corporations to prison—still more impossible to say that it forbade one man or corporation to purchase as much stock as he liked in both. Yet those words would have that effect if this clause of § 1 applies to the defendants here. For it cannot be too carefully remembered that that clause applies to "every" contract of the forbidden kind—a consideration which was the turning point of the *Trans-Missouri Freight Association's* case.

If the statute applies to this case it must be because the parties, or some of them, have formed, or because the Northern Securities Company is, a combination in restraint of trade among the States, or, what comes to the same thing in my opinion, because the defendants, or some or one of them, are monopolizing or attempting to monopolize some part of the commerce between the States. But the mere reading of those words shows that they are used in a limited and accurate sense. According to popular speech, every concern monopolizes whatever business it does, and if that business is trade between two States it monopolizes a part of the trade among the States. Of course the statute does not forbid that. It does not mean that all business must cease. A single railroad down a narrow valley or through a mountain gorge monopolizes all the railroad transportation through that valley or gorge. Indeed every railroad monopolizes, in a popular sense, the trade of some area. Yet I suppose no one would say that the statute forbids a combination of men into a corporation to build and run such a railroad between the States.

I assume that the Minnesota charter of the Great Northern and the Wisconsin charter of the Northern Pacific both are valid. Suppose that, before either road was built, Minnesota, as part of a system of transportation between the States, had created a railroad company authorized singly to build all the lines in the States now actually built, owned or controlled by either of the two existing companies. I take it that that charter would have been just as good as the present one, even if the statutes which we are considering had been in force. In whatever sense it would have created a monopoly the present charter does. It would have been a large one, but the act of Congress makes no discrimination according to size. Size has nothing to do with the matter. A monopoly of "any part" of commerce among the States is unlawful. The supposed company would have owned lines that might have been competing—probably the present one does. But the act of Congress will not be construed to 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.

There is a natural feeling that somehow or other the statute meant to strike at combinations great enough to cause just anxiety on the part of those who love their country more than money, while it viewed such little ones as I have supposed with just indifference. This notion, it may be said, somehow breathes from the pores of the act, although it seems to be contradicted in every way by the words in detail. And it has occurred to me that it might be that when a combination reached a certain size it might have attributed to it more of the character of a monopoly merely by virtue of its size than would be attributed to a smaller one. I am quite clear that it is only in connection with monopolies that size could play any part. But my answer has been indicated already. In the first place size in the case of railroads is an inevitable incident and if it were an

objection under the act, the Great Northern and the Northern Pacific already were too great and encountered the law. In the next place in the case of railroads it is evident that the size of the combination is reached for other ends than those which would make them monopolies. The combinations are not formed for the purpose of excluding others from the field. Finally, even a small railroad will have the same tendency to exclude others from its narrow area that great ones have to exclude others from a greater one, and the statute attacks the small monopolies as well as the great. The very words of the act make such a distinction impossible in this case and it has not been attempted in express terms.

If the charter which I have imagined above would have been good notwithstanding the monopoly, in a popular sense, which it created, one next is led to ask whether and why a combination or consolidation of existing roads, although in actual competition, into one company of exactly the same powers and extent, would be any more obnoxious to the law. Although it was decided in *Louisville & Nashville Railroad Co.* v. *Kentucky*, 161 U. S. 677, 701, that since the statute, as before, the States have the power to regulate the matter, it was said, in the argument, that such a consolidation would be unlawful, and it seems to me that the Attorney General was compelled to say so in order to maintain his case. But I think that logic would not let him stop there, or short of denying the power of a State at the present time to authorize one company to construct and own two parallel lines that might compete. The monopoly would be the same as if the roads were consolidated after they had begun to compete—and it is on the footing of monopoly that I now am supposing the objection made. But to meet the objection to the prevention of competition at the same time, I will suppose that three parties apply to a State for charters; one for each of two new and possibly competing lines respectively, and one for both of these lines, and that the charter is granted to the last. I think that charter would be good, and I think the whole argument to the contrary rests on a popular instead of an accurate and legal conception of what the word "monopolize" in the statute means. I repeat, that in my opinion there is no attempt to monopolize, and what, as I have said, in my judgment amounts to the same thing, that there is no combination in restraint of trade, until something is done with the intent to exclude strangers to the combination from competing with it in some part of the business which it carries on.

Unless I am entirely wrong in my understanding of what a "combination in restraint of trade" means, then the same monopoly may be attempted and effected by an individual, and is made equally illegal in that case by § 2. But I do not expect to hear it maintained that Mr. Morgan could be sent to prison for buying as many shares as he liked of the Great Northern and the Northern Pacific, even if he bought them both at the same time and got more than half the stock of each road.

There is much that was mentioned in argument which I pass by. But in view of the great importance attached by both sides to the supposed attempt to suppress competition, I must say a word more about that. I said at the outset that I should assume, and I do assume, that one purpose of the purchase was to suppress competition between the two roads. I appreciate the force of the argument that there are independent stockholders in each; that it cannot be presumed that the respective boards of directors will propose any illegal act; that if they should they could be restrained, and that all that has been done as yet is too remote from the illegal result to be classed even as an attempt. Not every act done in furtherance of an unlawful end is an attempt or contrary to the law. There must be a certain nearness to the result. It is a question of proximity and decree. *Commonwealth* v. *Peaslee*, 177 Massachusetts, 267, 272. So, as I have said, is the amenability of acts in furtherance of interference with commerce among the States to legislation by Congress. So, according to the intimation of this court, is the question of liability under the present stat-

ute. *Hopkins* v. *United States*, 171 U. S. 578; *Anderson* v. *United States*, 171 U. S. 604. But I assume further, for the purposes of discussion, that what has been done is near enough to the result to fall under the law, if the law prohibits that result, although that assumption very nearly if not quite contradicts the decision in *United States* v. *E. C. Knight Co.*, 156 U. S. 1. But I say that the law does not prohibit the result. If it does it must be because there is some further meaning than I have yet discovered in the words "combinations in restraint of trade." I think that I have exhausted the meaning of those words in what I already have said. But they certainly do not require all existing competitions to be kept on foot, and, on the principle of the *Trans-Missouri Freight Association's* case, invalidate the continuance of old contracts by which former competitors united in the past.

A partnership is not a contract or combination in restraint of trade between the partners unless the well known words are to be given a new meaning invented for the purposes of this act. It is true that the suppression of competition was referred to in *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, but, as I have said, that was in connection with a contract with a stranger to the defendant's business—a true contract in restraint of trade. To suppress competition in that way is one thing, to suppress it by fusion is another. The law, I repeat, says nothing about competition, and only prevents its suppression by contracts or combinations in restraint of trade, and such contracts or combinations derive their character as restraining trade from other features than the suppression of competition alone. To see whether I am wrong, the illustrations put in the argument are of use. If I am, then a partnership between two stage drivers who had been competitors in driving across a state line, or two merchants once engaged in rival commerce among the States whether made after or before the act, if now continued, is a crime. For, again I repeat, if the restraint on the freedom of the members of a combination caused by their entering into partnership is a restraint of trade, every such combination, as well the small as the great, is within the act.

In view of my interpretation of the statute I do not go further into the question of the power of Congress. That has been dealt with by my brother White and I concur in the main with his views. I am happy to know that only a minority of my brethren adopt an interpretation of the law which in my opinion would make eternal the *bellum omnium contra omnes* and disintegrate society so far as it could into individual atoms. If that were its intent I should regard calling such a law a regulation of commerce as a mere pretense. It would be an attempt to reconstruct society. I am not concerned with the wisdom of such an attempt, but I believe that Congress was not entrusted by the Constitution with the power to make it and I am deeply persuaded that it has not tried.

I am authorized to say that the CHIEF JUSTICE, MR. JUSTICE WHITE and MR. JUSTICE PECKHAM concur in this dissent.

NOTES

1. *The Northern Securities* case began President Theodore Roosevelt's reputation as a "trust-buster." The business community was shocked when, after years of consistent presidential and judicial hostility to antitrust enforcement, Roosevelt five months into his administration attacked without warning the formation of the Northern Securities Company, one of J.Pierpont Morgan's newest and largest creations. Since 1885, Morgan had been working to consolidate his railroad empire and rid it of the "price wars" and other manifestations of "destructive competition." By the turn of the century, Morgan had amassed control of thousands of miles of Eastern railroad lines as well as a substantial interest in James J. Hill's Northern Pacific Railway Company and Great Northern Railway Company, two of the four railroads connecting the Pacific Coast with the Mississippi Valley. In 1900, Hill, with Morgan's financial backing, acquired the Chicago, Burlington and Quincy Railway Company (better known as the "Burlington" line) to provide eastward access to the Northern Pacific and Great Northern. Meanwhile, E.H. Harriman, president of the Union Pacific Company, had engineered the takeover of working control of the Southern Pacific Company, so that Harriman controlled the remaining two transcontinental railroad lines. Harriman believed that conjunction of the Northern Pacific and the Burlington threatened his own empire to the south and demanded to buy a one-third interest in the Burlington. Hill and Morgan refused, whereupon Harriman launched a takeover battle for the Northern Pacific. Harriman ultimately failed by a narrow margin.

Given the substantial hostility displayed by the courts to the antitrust laws and the quality of the legal talent arrayed against the government, few contemporary observers thought that the "Merger Case," as it had become known, could result in anything other than a reaffirmation of the *Knight* rule that a mere stock transaction could not implicate the subject matter jurisdiction of the Sherman Act. Particularly in light of the *Knight* decision, the infrequent successes of the Justice Department in the Supreme Court--*Trans-Missouri*, *Joint Traffic*, and *Addyston Pipe*--provided slender reeds against which to rest so fundamental an attack as that against Northern Securities. The second surprise came then as the Supreme Court, in a multiply split decision with no majority opinion, affirmed the lower court's judgment enjoining Northern Securities from voting the stock or otherwise exercising control over its two subsidiary railroad companies and enjoining the railroad subsidiaries from paying dividends to Northern Securities on the stock it held. The plurality opinion, written by Justice John Marshall Harlan, followed the rule laid down seven years earlier in United States v. Trans-Missouri Freight Ass'n and held that "every combination or conspiracy which would extinguish competition between otherwise [competitors]". engaged in interstate trade or commerce, and which in that way restrain such trade or commerce, is made illegal by the act." Moreover, Harlan found that the "natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promotes trade and commerce." Since the holding company consolidated the interstate operations of two prior competing railroads and eliminated competition between them, Harlan would have held the consolidation illegal. Justice David J. Brewer's concurrence, finding that the Northern Securities arrangement unreasonably restrained trade, provided the additional vote necessary for a five-to-four majority to find the consolidation unlawful.

The story of the case, with a forceful president, powerful newspaper editors, and famous individual defendants, is told with great vigor in Letwin, Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act (1965).

2. HARRIMAN V. NORTHERN SECURITIES CO., 197 U.S. 244 (1905). After the Supreme Court's affirmance in the antitrust case, Northern Securities reduced its capital stock and distributed the resulting surplus of its assets comprised of stock in the Northern Pacific and the Great Northern proratably to its shareholders. The original stockholders of Northern Pacific objected to the prorata distribution, claiming that they had not sold their stock to Northern Securities but rather delivered it to be held in trust. Since Northern Securities could no longer hold the stock, the shareholders argued, they were entitled to get back all of the Northern Pacific shares they had contributed. Although the trial court agreed, but the court of appeals and the Supreme Court ultimately disagreed.

After *Northern Securities* was handed down, the Roosevelt Administration embarked on a renewed assault on mergers and acquisitions that it perceived to be anticompetitive. Among these attacks were challenges against the giant Oil and Tobacco Trusts, which provided the Supreme Court with the opportunity to embark on another sea-change in the direction of antitrust law when they came before the Court for review during the presidency of Roosevelt's hand-picked successor in the 1908 election, William Howard Taft.

STANDARD OIL CO. v. UNITED STATES
221 U.S. 1 (1911)

[In 1906, in the wake of its success in *Northern Securities,* the government filed a bill of equity charging Standard Oil Company of New Jersey and approximately seventy other corporations and partnerships under its umbrella, John D. Rockefeller, William Rockefeller, Henry M. Flager, and seven other individuals with conspiring to restrain trade in and monopolize petroleum and petroleum products. The government alleged that, as before the reorganization of the Standard Oil Trust into a corporate holding company, the combination continued to receive rebates and discriminatory rates from the railroads, entered into contracts with competitors to eliminate competition in restraint of trade, and engaged in predatory price-cutting. The government also alleged that the holding company arrangement ensured that the subsidiary companies would not compete with one another.

[The trial court, relying on a straightforward analogy with *Northern Securities,* found that the holding company eliminated competition among its subsidiaries in violation of the Sherman Act. United States v. Standard Oil Co., 173 F. 177 (C.C.E.D. Mo. 1909), *aff'd,* 221 U.S. 1 (1911). Standard Oil's primary defense was that its subsidiaries had not competed against one another since at least their original trust consolidation in 1879, and so the formation of the holding company did not eliminate any actual competition among these companies during at time when the Sherman Act was in force. Although it agreed that the Sherman Act did not apply retroactively, in light of its conclusion that the formation of the holding company in 1899 violated the antitrust laws, the trial court found it unnecessary to consider whether the pre-Sherman Act conduct constituted a violation of the common law.

The court held that the *Northern Securities* rule prohibited the *granting* of the power to the holding company to prevent competition among its subsidiaries, not the exercise of this power.

[So as not to interfere with New Jersey's right to create the holding company corporation in the first instance, the trial court's order of relief cleverly prohibited the holding company from voting its subsidiaries' stock or otherwise attempting to exercise control over their operations as well as prohibited the subsidiaries from paying any dividends on the stock held by the holding company. The court also enjoined all defendants from entering into any similar combination in restraint of trade. Finally, to encourage the prompt dissolution of the holding company structure, the court enjoined the defendant-members of the combination from engaging in interstate commerce in petroleum or petroleum products while the combination continued in existence.

[The defendants appealed.]

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The Standard Oil Company of New Jersey and 33 other corporations, John D. Rockefeller, William Rockefeller and five other individual defendants prosecute this appeal to reverse a decree of the court below. . . .

* * *

Reiterating in substance the averments that both the Standard Oil Trust from 1882 to 1899 and the Standard Oil Company of New Jersey since 1899 had monopolized and restrained interstate commerce in petroleum and its products, the bill at great length additionally set forth various means by which during the second and third periods, in addition to the effect occasioned by the combination of alleged previously independent concerns, the monopoly and restraint complained of was continued. Without attempting to follow the elaborate averments on these subjects spread over fifty-seven pages of the printed record, it suffices to say that such averments may properly be

grouped under the following heads: Rebates, preferences and other discriminatory practises in favor of the combination by railroad companies; restraint and monopolization by control of pipe lines, and unfair practises against competing pipe lines; contracts with competitors in restraint of trade; unfair methods of competition, such as local price cutting at the points where necessary to suppress competition; espionage of the business of competitors, the operation of bogus independent companies, and payment of rebates on oil, with the like intent; the division of the United States into districts and the limiting of the operations of the various subsidiary corporations as to such districts so that competition in the sale of petroleum products between such corporations had been entirely eliminated and destroyed; and finally reference was made to what was alleged to be the "enormous and unreasonable profits" earned by the Standard Oil Trust and the Standard Oil Company as a result of the alleged monopoly; which presumably was averred as a means of reflexly inferring the scope and power acquired by the alleged combination.

Coming to the prayer of the bill, it suffices to say that in general terms the substantial relief asked was, first, that the combination in restraint of interstate trade and commerce and which had monopolized the same, as alleged in the bill, be found to have existence and that the parties thereto be perpetually enjoined from doing any further act to give effect to it; second, that the transfer of the stocks of the various corporations to the Standard Oil Company of New Jersey, as alleged in the bill, be held to be in violation of the first and second sections of the Anti-trust Act, and that the Standard Oil Company of New Jersey be enjoined and restrained from in any manner continuing to exert control over the subsidiary corporations by means of ownership of said stock or otherwise; third, that specific relief by injunction be awarded against further violation of the statute by any of the acts specifically complained of in the bill. There was also a prayer for general relief.

* * *

The court decided in favor of the United States. In the opinion delivered, all the multitude of acts of wrong-doing charged in the bill were put aside, in so far as they were alleged to have been committed prior to the passage of the Anti-trust Act, "except as evidence of their (the defendants') purpose, of their continuing conduct and of its effect." (173 Fed. Rep. 177.)

* * *

The Standard Oil Company of New Jersey was enjoined from voting the stocks or exerting any control over the said 37 subsidiary companies, and the subsidiary companies were enjoined from paying any dividends as to the Standard Oil Company or permitting it to exercise any control over them by virtue of the stock ownership or power acquired by means of the combination. The individuals and corporations were also enjoined from entering into or carrying into effect any like combination which would evade the decree. Further, the individual defendants, the Standard Oil Company, and the 37 subsidiary corporations were enjoined from engaging or continuing in interstate commerce in petroleum or its products during the continuance of the illegal combination.

* * *

We are thus brought face to face with the merits of the controversy.

Both as to the law and as to the facts the opposing contentions pressed in the argument are numerous and in all their aspects are so irreconcilable that it is difficult to reduce them to some fundamental generalization, which by being disposed of would decide them all. For instance, as to the law. While both sides agree that the determination of the controversy rests upon the correct construction and application of the first and second sections of the Anti-trust Act, yet the views as to the meaning of

the act are as wide apart as the poles, since there is no real point of agreement on any view of the act. And this also is the case as to the scope and effect of authorities relied upon, even although in some instances one and the same authority is asserted to be controlling.

So also is it as to the facts. Thus, on the one hand, with relentless pertinacity and minuteness of analysis, it is insisted that the facts establish that the assailed combination took its birth in a purpose to unlawfully acquire wealth by oppressing the public and destroying the just rights of others, and that its entire career exemplifies an inexorable carrying out of such wrongful intents, since, it is asserted, the pathway of the combination from the beginning to the time of the filing of the bill is marked with constant proofs of wrong inflicted upon the public and is strewn with the wrecks resulting from crushing out, without regard to law, the individual rights of others. Indeed, so conclusive, it is urged, is the proof on these subjects that it is asserted that the existence of the principal corporate defendant—the Standard Oil Company of New Jersey—with the vast accumulation of property which it owns or controls, because of its infinite potency for harm and the dangerous example which its continued existence affords, is an open and enduring menace to all freedom of trade and is a byword and reproach to modern economic methods. On the other hand, in a powerful analysis of the facts, it is insisted that they demonstrate that the origin and development of the vast business which the defendants control was but the result of lawful competitive methods, guided by economic genius of the highest order, sustained by courage, by a keen insight into commercial situations, resulting in the acquisition of great wealth, but at the same time serving to stimulate and increase production, to widely extend the distribution of the products of petroleum at a cost largely below that which would have otherwise prevailed, thus proving to be at one and the same time a benefaction to the general public as well as of enormous advantage to individuals.

* * * [W]e shall make our investigation under four separate headings: First. The text of the first and second sections of the act originally considered and its meaning in the light of the common law and the law of this country at the time of its adoption. Second. The contentions of the parties concerning the act, and the scope and effect of the decisions of this court upon which they rely. Third. The application of the statute to facts, and, Fourth. The remedy, if any, to be afforded as the result of such application.

First. The text of the act and its meaning.

* * *

The debates show that doubt as to whether there was a common law of the United States which governed the subject in the absence of legislation was among the influences leading to the passage of the act. They conclusively show, however, that the main cause which led to the legislation was the thought that it was required by the economic condition of the times, that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally.

* * *

There can be no doubt that the sole subject with which the first section deals is restraint of trade as therein contemplated, and that the attempt to monopolize and monopolization is the subject with which the second sec-

tion is concerned. It is certain that those terms, at least in their rudimentary meaning, took their origin in the common law, and were also familiar in the law of this country prior to and at the time of the adoption of the act in question.

We shall endeavor then, first to seek their meaning, not by indulging in an elaborate and learned analysis of the English law and of the law of this country, but by making a very brief reference to the elementary and indisputable conceptions of both the English and American law on the subject prior to the passage of the Anti-trust Act.

a. It is certain that at a very remote period the words "contract in restraint of trade" in England came to refer to some voluntary restraint put by contract by an individual on his right to carry on his trade or calling. Originally all such contracts were considered to be illegal, because it was deemed they were injurious to the public as well as to the individuals who made them. In the interest of the freedom of individuals to contract this doctrine was modified so that it was only when a restraint by contract was so general as to be coterminous with the kingdom that it was treated as void. That is to say, if the restraint was partial in its operation and was otherwise reasonable the contract was held to be valid:

b. Monopolies were defined by Lord Coke as follows:

"'A monopoly is an institution, or allowance by the king by his grant, commission, or otherwise to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade.' (3 Inst. 181, c. 85.)"

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The frequent granting of monopolies and the struggle which led to a denial of the power to create them, that is to say, to the establishment that they were incompatible with the English constitution is known to all and need not be reviewed. The evils which led to the public outcry against monopolies and to the final denial of the power to make them may be thus summarily stated: 1. The power which the monopoly gave to the one who enjoyed it to fix the price and thereby injure the public; 2. The power which it engendered of enabling a limitation on production; and, 3. The danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale. As monopoly as thus conceived embraced only a consequence arising from an exertion of sovereign power, no express restrictions or prohibitions obtained against the creation by an individual of a monopoly as such. But as it was considered, at least so far as the necessaries of life were concerned, that individuals by the abuse of their right to contract might be able to usurp the power arbitrarily to enhance prices, one of the wrongs arising from monopoly, it came to be that laws were passed relating to offenses such as forestalling, regrating and engrossing by which prohibitions were placed upon the power of individuals to deal under such circumstances and conditions as, according to the conception of the times, created a presumption that the dealings were not simply the honest exertion of one's right to contract for his own benefit unaccompanied by a wrongful motive to injure others, but were the consequence of a contract or course of dealing of such a character as to give rise to the presumption of an intent to injure others through the means, for instance, of a monopolistic increase of prices.

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As by the statutes providing against engrossing the quantity engrossed was not required to be the whole or a proximate part of the whole of an article, it is clear that there was a wide difference between monopoly and engrossing, etc. But as the principal wrong which it was deemed would result from monopoly, that is, an enhancement of the price, was the same wrong to which it was thought the prohibited engrossment would give rise, it came to pass that monopoly and engrossing were regarded as virtually one and the same thing. In other words, the prohibited act of engrossing because of its inevitable accomplishment of one of the evils deemed to be engendered by monopoly, came to be referred to as being a monopoly or constituting an attempt to monopolize.

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And by operation of the mental process which led to considering as a monopoly acts which although they did not constitute a monopoly were thought to produce some of its baneful effects, so also because of the impediment or burden to the due course of trade which they produced, such acts came to be referred to as in restraint of trade.

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From the development of more accurate economic conceptions and the changes in conditions of society it came to be recognized that the acts prohibited by the engrossing, forestalling, etc., statutes did not have the harmful tendency which they were presumed to have when the legislation concerning them was enacted, and therefore did not justify the presumption which had previously been deduced from them, but, on the contrary, such acts tended to fructify and develop trade. See the statutes of 12th George III, ch. 71, enacted in 1772, and statute of 7 and 8 Victoria, ch. 24, enacted in 1844, repealing the prohibitions against engrossing, forestalling, etc., upon the express ground that the prohibited acts had come to be considered as favorable to the development of and not in restraint of trade. It is remarkable that nowhere at common law can there be found a prohibition against the creation of monopoly by an individual. This would seem to manifest, either consciously or intuitively, a profound conception as to the inevitable operation of economic forces and the equipoise or balance in favor of the protection of the rights of individuals which resulted. That is to say, as it was deemed that monopoly in the concrete could only arise from an act of sovereign power, and, such sovereign power being restrained, prohibitions as to individuals were directed, not against the creation of monopoly, but were only applied to such acts in relation to particular subjects as to which it was deemed, if not restrained, some of the consequences of monopoly might result. After all, this was but an instinctive recognition

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of the truisms that the course of trade could not be made free by obstructing it, and that an individual's right to trade could not be protected by destroying such right.

From the review just made it clearly results that outside of the restrictions resulting from the want of power in an individual to voluntarily and unreasonably restrain his right to carry on his trade or business and outside of the want of right to restrain the free course of trade by contracts or acts which implied a wrongful purpose, freedom to contract and to abstain from contracting and to exercise every reasonable right incident thereto became the rule in the English law. The scope and effect of this freedom to trade and contract is clearly shown by the decision in *Mogul Steamship Co.* v. *McGregor* (1892), A. C. 25.,

Without going into detail and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal 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 or presumption 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. It is equally true to say that the survey of the legislation in this country on this subject from the beginning will show, depending as it did upon the economic conceptions which obtained at the time when the legislation was adopted or judicial decision was rendered, that contracts or acts were at one time deemed to be of such a character as to justify the inference of wrongful intent which were at another period thought not to be of that character. But this again, as we have seen, simply followed the line of development of the law of England.

Let us consider the language of the first and second sections, guided by the principle that where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary.

As to the first section, the words to be interpreted are: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce . . . is hereby declared to be illegal." As there is no room for dispute that the statute was intended to formulate a rule for the regulation of interstate and foreign commerce, the question is what was the rule which it adopted?

In view of the common law and the law in this country as to restraint of trade, which we have reviewed, and the illuminating effect which that history must have under the rule to which we have referred, we think it results:

a. That the context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice had come to be considered as in restraint of trade in a broad sense.

b. That in view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of

interstate or foreign commerce was brought about could save such restraint from condemnation. The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint.

c. And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated. Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.

And a consideration of the text of the second section serves to establish that it was intended to supplement the first and to make sure that by no possible guise could the public policy embodied in the first section be frustrated or evaded. The prohibitions of the second embrace

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, . . ." By reference to the terms of § 8 it is certain that the word person clearly implies a corporation as well as an individual.

The commerce referred to by the words "any part" construed in the light of the manifest purpose of the statute has both a geographical and a distributive significance, that is it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce.

Undoubtedly, the words "to monopolize" and "monopolize" as used in the section reach every act bringing about the prohibited results. The ambiguity, if any, is involved in determining what is intended by monopolize. But this ambiguity is readily dispelled in the light of the previous history of the law of restraint of trade to which we have referred and the indication which it gives of the practical evolution by which monopoly and the acts which produce the same result as monopoly, that is, an undue restraint of the course of trade, all came to be spoken of as, and to be indeed synonymous with, restraint of trade. In other words, having by the first section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section. And, of course, when the second section is thus harmonized with and made as it

was intended to be the complement of the first, it becomes obvious that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act and thus the public policy which its restrictions were obviously enacted to subserve. And it is worthy of observation, as we have previously remarked concerning the common law, that although the statute by the comprehensiveness of the enumerations embodied in both the first and second sections makes it certain that its purpose was to prevent undue restraints of every kind or nature, nevertheless by the omission of any direct prohibition against monopoly in the concrete it indicates a consciousness that the freedom of the individual right to contract when not unduly or improperly exercised was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented if no extraneous or sovereign power imposed it and no right to make unlawful contracts having a monopolistic tendency were permitted. In other words that freedom to contract was the essence of freedom from undue restraint on the right to contract.

Clear as it seems to us is the meaning of the provisions of the statute in the light of the review which we have made, nevertheless before definitively applying that meaning it behooves us to consider the contentions urged on one side or the other concerning the meaning of the statute, which, if maintained, would give to it, in some aspects a much wider and in every view at least a somewhat different significance. And to do this brings us to the second question which, at the outset, we have stated it was our purpose to consider and dispose of.

Second. The contentions of the parties as to the meaning of the statute and the decisions of this court relied upon concerning those contentions.

In substance, the propositions urged by the Government are reducible to this; That the language of the statute embraces every contract, combination, etc., in restraint of trade, and hence its text leaves no room for the exercise of judgment, but simply imposes the plain duty of applying its prohibitions to every case within its literal language. The error involved lies in assuming the matter to be decided. This is true because as the acts which may come under the classes stated in the first section and the restraint of trade to which that section applies are not specifically enumerated or defined, it is obvious that judgment must in every case be called into play in order to determine whether a particular act is embraced within the statutory classes, and whether if the act is within such classes its nature or effect causes it to be a restraint of trade within the intendment of the act. To hold to the contrary would require the conclusion either that every contract, act or combination of any kind or nature, whether it operated a restraint on trade or not, was within the statute, and thus the statute would be destructive of all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce, or if this conclusion were not reached, then the contention would require it to be held that as the statute did not define the things to which it related and excluded resort to the only means by which the acts to which it relates could be ascertained—the light of reason—the enforcement of the statute was impossible because of its uncertainty. The merely generic enumeration which the statute makes of the acts to which it refers and the absence of any definition of restraint of trade as used in the statute leaves room for but one conclusion, which is, that it was expressly designed not to unduly limit the application of the act by precise definition, but while clearly fixing a standard, that is, by defining the ulterior boundaries which could not be transgressed with impunity, to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute.

But, it is said, persuasive as these views may be, they may not be here applied, because the previous decisions of this court have given to the statute a meaning which expressly excludes the construction which must result from the reasoning stated. The cases are *United States* v. *Freight Association*, 166 U. S. 290, and *United States* v. *Joint Traffic Association*, 171 U. S. 505. Both the cases involved the legality of combinations or associations of railroads engaged in interstate commerce for the purpose of controlling the conduct of the parties to the association or combination in many particulars. The association or combination was assailed in each case as being in violation of the statute. It was held that they were. It is undoubted that in the opinion in each case general language was made use of, which, when separated from its context, would 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. It is, however, also true 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. As the cases cannot by any possible conception be treated as authoritative without the certitude that reason was resorted to for the purpose of deciding them, it follows as a matter of course that it must have been held by the light of reason, since the conclusion could not have been otherwise reached, that the assailed contracts or agreements were within the general enumeration of the statute, and that their operation and effect brought about the restraint of trade which the statute prohibited. This being inevitable, the deduction can in reason only be this: That in the cases relied upon it having been found that the acts complained of were within the statute and operated to produce the injuries which the statute forbade, that resort to reason was not permissible in order to allow that to be done which the statute prohibited. This being true, the rulings in the cases relied upon when rightly appreciated were therefore this and nothing more: That as considering the contracts or agreements, their necessary effect and the character of the parties by whom they were made, they were clearly restraints of trade within the purview of the statute, they could not be taken out of that category by indulging in general reasoning as to the expediency or non-expediency of having made the contracts or the wisdom or want of wisdom of the statute which prohibited their being made. That is to say, the cases but decided that the nature and character of the contracts, creating as they did a conclusive presumption which brought them within the statute, such result was not to be disregarded by the substitution of a judicial appreciation of what the law ought to be for the plain judicial duty of enforcing the law as it was made.

But aside from reasoning it is true to say that the cases relied upon do not when rightly construed sustain the doctrine contended for is established by all of the numerous decisions of this court which have applied and enforced the Anti-trust Act, since they all in the very nature of things rest upon the premise that reason was the guide by which the provisions of the act were in every case interpreted. Indeed intermediate the decision of the two cases, that is, after the decision in the *Freight Association Case* and before the decision in the *Joint Traffic Case*, the case of *Hopkins* v. *United States*, 171 U. S. 578, was decided, the opinion being delivered by Mr. Justice Peckham, who wrote both the opinions in the *Freight Association* and the *Joint Traffic cases.* And, referring in the *Hopkins Case* to the broad claim made as to the rule of interpretation announced in the *Freight Association Case*, it was said (p. 592): "To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act." And in the *Joint Traffic Case* this statement was expressly reiterated and approved and illustrated by example; like limitation on the general language used in *Freight Association* and *Joint Traffic Cases* is also the clear result of *Bement* v. *National Harrow Co.*, 186 U. S. 70, 92, and especially of *Cincinnati Packet Co.* v. *Bay*, 200 U. S. 179.

If the criterion by which it is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the rule of reason becomes the guide, and the construction which we have given the statute, instead of being refuted by the cases relied upon, is by those cases demonstrated to be correct. This is true, because as the construction which we have deduced from the history of the act and the analysis of its text is simply that in every case where it is claimed that an act or acts are in violation of the statute the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be applied. From this it follows, since that rule and the result of the test as to direct or indirect, in their ultimate aspect, come to one and the same thing, that the difference between the two is therefore only that which obtains between things which do not differ at all.

If it be true that there is this identity of result between the rule intended to be applied in the *Freight Association Case*, that is, the rule of direct and indirect, and the rule of reason which under the statute as we construe it should be here applied, it may be asked how was it that in the opinion in the *Freight Association Case* much consideration was given to the subject of whether the agreement or combination which was involved in that case could be taken out of the prohibitions of the statute upon the theory of its reasonableness. The question is pertinent and must be fully and frankly met, for if it be now deemed that the *Freight Association Case* was mistakenly decided or too broadly stated, the doctrine which it announced should be either expressly overruled or limited.

The confusion which gives rise to the question results from failing to distinguish between the want of power to take a case which by its terms or the circumstances which surrounded it, considering among such circumstances the character of the parties, is plainly within the statute, out of the operation of the statute by resort to reason in effect to establish that the contract ought not to be treated as within the statute, and the duty in every case where it becomes necessary from the nature and character of the parties to decide whether it was within the statute to pass upon that question by the light of reason. This distinction, we think, serves to point out what in its ultimate conception was the thought underlying the reference to the rule of reason made in the *Freight Association Case*, especially when such reference is interpreted by the context of the opinion and in the light of the subsequent opinion in the *Hopkins Case* and in *Cincinnati Packet Company* v. *Bay*, 200 U. S. 179.

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Third. The facts and the application of the statute to them.

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[t]he court below held that the acts and dealings established by the proof operated to destroy the "potentiality of competition" which otherwise would have existed to such an extent as to cause the transfers of stock which were made to the New Jersey corporation and the control which resulted over the many and various subsidiary corporations to be a combination or conspiracy in restraint of trade in violation of the first section of the act, but also to be an attempt to monopolize and a monopolization bringing about a perennial violation of the second section.

We see no cause to doubt the correctness of these conclusions, considering the subject from every aspect, that is, both in view of the facts established by the record and the necessary operation and effect of the law as we have construed it upon the inferences deducible from the facts, for the following reasons:

a. Because the unification of power and control over petroleum and its products which was the inevitable result of the combining in the New Jersey corporation by the increase of its stock and the transfer to it of the stocks of so many other corporations, aggregating so vast a capital, gives rise, in and of itself, in the absence of countervailing circumstances, to say the least, to the *prima facie* presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by new means of combination which were resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed, the whole with the purpose of excluding others from the trade and thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce.

b. Because the *prima facie* presumption of intent to restrain trade, to monopolize and to bring about monopolization resulting from the act of expanding the stock of the New Jersey corporation and vesting it with such vast control of the oil industry, is made conclusive by considering, *1*, the conduct of the persons or corporations who were mainly instrumental in bringing about the extension of power in the New Jersey corporation before the consummation of that result and prior to the formation of the trust agreements of 1879 and 1882; *2*, by considering the proof as to what was done under those agreements and the acts which immediately preceded the vesting of power in the New Jersey corporation as well as by weighing the modes in which the power vested in that corporation has been exerted and the results which have arisen from it.

Recurring to the acts done by the individuals or corporations who were mainly instrumental in bringing about the expansion of the New Jersey corporation during the period prior to the formation of the trust agreements of 1879 and 1882, including those agreements, not for the purpose of weighing the substantial merit of the numerous charges of wrongdoing made during such period, but solely as an aid for discovering intent and purpose, we think no disinterested mind can survey the period in question without being irresistibly driven to the conclusion that the very genius for commercial development and organization which it would seem was manifested from the beginning soon begot an intent and purpose to exclude others which was frequently manifested by acts and dealings wholly inconsistent with the theory that they were made with the single conception of advancing the development of business power by usual methods, but which on the contrary necessarily involved the intent to drive others from the field and to exclude them from their right to trade and thus accomplish the mastery which was the end in view. And,

considering the period from the date of the trust agreements of 1879 and 1882, up to the time of the expansion of the New Jersey corporation, the gradual extension of the power over the commerce in oil which ensued, the decision of the Supreme Court of Ohio, the tardiness or reluctance in conforming to the commands of that decision, the method first adopted and that which finally culminated in the plan of the New Jersey corporation, all additionally serve to make manifest the continued existence of the intent which we have previously indicated and which among other things impelled the expansion of the New Jersey corporation. The exercise of the power which resulted from that organization fortifies the foregoing conclusions, since the development which came, the acquisition here and there which ensued of every efficient means by which competition could have been asserted, the slow but resistless methods which followed by which means of transportation were absorbed and brought under control, the system of marketing which was adopted by which the country was divided into districts and the trade in each district in oil was turned over to a designated corporation within the combination and all others were excluded, all lead the mind up to a conviction of a purpose and intent which we think is so certain as practically to cause the subject not to be within the domain of reasonable contention.

The inference that no attempt to monopolize could have been intended, and that no monopolization resulted from the acts complained of, since it is established that a very small percentage of the crude oil produced was controlled by the combination, is unwarranted. As substantial power over the crude product was the inevitable result of the absolute control which existed over the refined product, the monopolization of the one carried with it the power to control the other, and if the inferences[1] which this situation suggests were developed, which we deem it unnecessary to do, they might well serve to add additional cogency to the presumption of intent to monopolize which we have found arises from the unquestioned proof on other subjects.

We are thus brought to the last subject which we are called upon to consider, viz:

Fourth. The remedy to be administered.

It may be conceded that ordinarily where it was found that acts had been done in violation of the statute, adequate measure of relief would result from restraining the doing of such acts in the future. *Swift* v. *United States*, 196 U. S. 375. But in a case like this, where the condition which has been brought about in violation of the statute, in and of itself, is not only a continued attempt to monopolize, but also a monopolization, the duty to enforce the statute requires the application of broader and more controlling remedies. As penalties which are not authorized by law may not be inflicted by judicial authority, it follows that to meet the situation with which we are confronted the application of remedies two-fold in character becomes essential: 1st. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2d. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about.

In applying remedies for this purpose, however, the fact must not be overlooked that injury to the public by the prevention of an undue restraint on, or the monopolization of trade or commerce is the foundation upon which the prohibitions of the statute rest, and moreover that one of the fundamental purposes of the statute is to protect, not to destroy, rights of property.

Let us then, as a means of accurately determining what relief we are to afford, first come to consider what relief

was afforded by the court below, in order to fix how far it is necessary to take from or add to that relief, to the end that the prohibitions of the statute may have complete and operative force.

The court below by virtue of §§ 1, 2, and 4 of its decree, which we have in part previously excerpted in the margin, adjudged that the New Jersey corporation in so far as it held the stock of the various corporations, recited in §§ 2 and 4 of the decree, or controlled the same was a combination in violation of the first section of the act, and an attempt to monopolize or a monopolization contrary to the second section of the act. It commanded the dissolution of the combination, and therefore in effect, directed the transfer by the New Jersey corporation back to the stockholders of the various subsidiary corporations entitled to the same of the stock which had been turned over to the New Jersey company in exchange for its stock. To make this command effective § 5 of the decree forbade the New Jersey corporation from in any form or manner exercising any ownership or exerting any power directly or indirectly in virtue of its apparent title to the stocks of the subsidiary corporations, and prohibited those subsidiary corporations from paying any dividends to the New Jersey corporation or doing any act which would recognize further power in that company, except to the extent that it was necessary to enable that company to transfer the stock. So far as the owners of the stock of the subsidiary corporations and the corporations themselves were concerned after the stock had been transferred, § 6 of the decree enjoined them from in any way conspiring or combining to violate the act or to monopolize or attempt to monopolize in virtue of their ownership of the stock transferred to them, and prohibited all agreements between the subsidiary corporations or other stockholders in the future, tending to produce or bring about further violations of the act.

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But the contention is that, in so far as the relief by way of injunction which was awarded by § 6 against the stockholders of the subsidiary corporations or the subsidiary corporations themselves after the transfer of stock by the New Jersey corporation was completed in conformity to the decree, the relief awarded was too broad . . .

[i]t does not necessarily follow because an illegal restraint of trade or an attempt to monopolize or a monopolization resulted from the combination and the transfer of the stocks of the subsidiary corporations to the New Jersey corporation that a like restraint or attempt to monopolize or monopolization would necessarily arise from agreements between one or more of the subsidiary corporations after the transfer of the stock by the New Jersey corporation. For illustration, take the pipe lines. By the effect of the transfer of the stock the pipe lines would come under the control of various corporations instead of being subjected to a uniform control. If various corporations owning the lines determined in the public interests to so combine as to make a continuous line, such agreement or combination would not be repugnant to the act, and yet it might be restrained by the decree. As another example, take the Union Tank Line Company, one of the subsidiary corporations, the owner practically of all the tank cars in use by the combination. If no possibility existed of agreements for the distribution of these cars among the subsidiary corporations, the most serious detriment to the public interest might result. Conceding the merit, abstractly considered, of these contentions they are irrelevant. We so think, since we construe the sixth paragraph of the decree, not as depriving the stockholders or the corporations, after the dissolution of the combination, of the power to make normal and lawful contracts or agreements, but as restraining them from, by any device whatever,

recreating directly or indirectly the illegal combination which the decree dissolved. In other words we construe the sixth paragraph of the decree, not as depriving the stockholders or corporations of the right to live under the law of the land, but as compelling obedience to that law. As therefore the sixth paragraph as thus construed is not amenable to the criticism directed against it and cannot produce the harmful results which the arguments suggest it was obviously right. We think that in view of the magnitude of the interests involved and their complexity that the delay of thirty days allowed for executing the decree was too short and should be extended so as to embrace a period of at least six months. So also, in view of the possible serious injury to result to the public from an absolute cessation of interstate commerce in petroleum and its products by such vast agencies as are embraced in the combination, a result which might arise from that portion of the decree which enjoined carrying on of interstate commerce not only by the New Jersey corporation but by all the subsidiary companies until the dissolution of the combination by the transfer of the stocks in accordance with the decree, the injunction provided for in § 7 thereof should not have been awarded.

Our conclusion is that the decree below was right and should be affirmed, except as to the minor matters concerning which we have indicated the decree should be modified. Our order will therefore be one of affirmance with directions, however, to modify the decree in accordance with this opinion. The court below to retain jurisdiction to the extent necessary to compel compliance in every respect with its decree.

And it is so ordered.

MR. JUSTICE HARLAN concurring in part, and dissenting in part.

A sense of duty constrains me to express the objections which I have to certain declarations in the opinion just delivered on behalf of the court.

I concur in holding that the Standard Oil Company of New Jersey and its subsidiary companies constitute a combination in restraint of interstate commerce, and that they have attempted to monopolize and have monopolized parts of such commerce—all in violation of what is known as the Anti-trust Act of 1890. 26 Stat. 209, c. 647. The evidence in this case overwhelmingly sustained that view and led the Circuit Court, by its final decree, to order the dissolution of the New Jersey corporation and the discontinuance of the illegal combination between that corporation and its subsidiary companies.

In my judgment, the decree below should have been affirmed without qualification. But the court, while affirming the decree, directs some modifications in respect of what it characterizes as "minor matters." It is to be apprehended that those modifications may prove to be mischievous. In saying this, I have particularly in view the statement in the opinion that "it does not necessarily follow that because an illegal restraint of trade or an attempt to monopolize or a monopolization resulted from the combination and the transfer of the stocks of the subsidiary corporations to the New Jersey corporation, that a like restraint of trade or attempt to monopolize or monopolization would necessarily arise from agreements between one or more of the subsidiary corporations after the transfer of the stock by the New Jersey corporation." Taking this language, in connection with other parts of the opinion, the subsidiary companies are thus, in effect, informed—unwisely, I think—that although the New Jersey corporation, being an illegal combination, must go

out of existence, *they* may join in an agreement *to restrain commerce* among the States if such restraint be not "undue."

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[Trans-Missouri] adjudged that Congress had in unequivocal words declared that "*every* contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of commerce among the several States" shall be illegal, and that no distinction, *so far as interstate commerce was concerned*, was to be tolerated between restraints of such commerce as were undue or unreasonable, and restraints that were due or reasonable. With full knowledge of the then condition of the country and of its business, Congress determined to meet, and did meet, the situation by an absolute, statutory prohibition of "*every* contract, combination in the form of trust or otherwise, in restraint of trade or commerce." Still more; in response to the suggestion by able counsel that Congress intended only to strike down such contracts, combinations and monopolies as unreasonably restrained interstate commerce, this court, in words too clear to be misunderstood, said that to so hold was "to read into the act by way of *judicial legislation*, an exception not placed there by the law-making branch of the Government." "This," the court said, as we have seen, "*we cannot* and *ought not* to do."

It thus appears that fifteen years ago, when the purpose of Congress in passing the Anti-trust Act was fresh in the minds of courts, lawyers, statesmen and the general public, this court expressly declined to indulge in judicial legislation, by inserting in the act the word "unreasonable" or any other word of like import. It may be stated here that the country at large accepted this view of the act, and the Federal courts throughout the entire country enforced its provisions according to the interpretation given in the *Freight Association Case*. What, then, was to be done by those who questioned the soundness of the interpretation placed on the act by this court in that case? As the court had decided that to insert the word "unreasonable" in the act would be "judicial legislation" on its part, the only alternative left to those who opposed the decision in that case was to induce Congress to so *amend* the act as to recognize the right to restrain interstate commerce to a *reasonable* extent. The public press, magazines and law journals, the debates in Congress, speeches and addresses by public men and jurists, all contain abundant evidence of the general understanding that the meaning, extent and scope of the Anti-trust Act had been judicially determined by this court, and that the only question remaining open for discussion was the wisdom of the policy declared by the act—a matter that was exclusively within the cognizance of Congress. But at every session of Congress since the decision of 1896, the lawmaking branch of the Government, with full knowledge of that decision, has refused to change the policy it had declared or to so amend the act of 1890 as to except from its operation contracts, combinations and trusts that *reasonably* restrain interstate commerce.

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In this connection it may be well to refer to the adverse report made in 1909, by Senator Nelson, on behalf of the Senate Judiciary Committee, in reference to a certain bill offered in the Senate and which proposed to amend the Anti-trust Act in various particulars. That report contains a full, careful and able analysis of judicial decisions relating to combinations and monopolies in restraint of trade and commerce. Among other things said in it which bear on the questions involved in the present case are these: "The Anti-trust Act makes it a criminal offense to violate the law, and provides a punishment both by fine and imprisonment. To inject into the act the question of whether an agreement or combination is *reasonable* or *unreasonable* would render the act as a criminal or penal statute indefinite and uncertain, and hence, to that extent, utterly nugatory and void, and would practically amount to a repeal of that part of the act. . . . And while the same technical objection does not apply to civil prosecutions, *the injection of the rule of reasonableness or unreasonableness would lead to the greatest variableness and uncertainty in the enforcement of the law. The defense of reasonable restraint would be made in every case and there would be as many different rules of reasonableness as cases, courts and juries.*" ...

The result was the indefinite postponement by the Senate of any further consideration of the proposed amendments of the Anti-trust Act.

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Now this court is asked to do that which it has distinctly declared it could not and would not do, and has now done what it then said it could not constitutionally do. It has, by mere interpretation, modified the act of Congress, and deprived it of practical value as a defensive measure against the evils to be remedied. On reading the opinion just delivered, the first inquiry will be, that as the court is unanimous in holding that the particular things done by the Standard Oil Company and its subsidiary companies, in this case, were illegal under the Anti-trust Act, whether those things were in reasonable or unreasonable restraint of interstate commerce, why was it necessary to make an elaborate argument, as is done in the opinion, to show that according to the "rule of reason" the act as passed by Congress should be interpreted as if it contained the word "unreasonable" or the word "undue"? The only answer which, in frankness, can be given to this question is, that the court intends to decide that its deliberate judgment, fifteen years ago, to the effect that the act permitted no restraint whatever of interstate commerce, whether reasonable or unreasonable, was not in accordance with the "rule of reason." In effect the court says, that it will now, for the first time, bring the discussion under the "light of reason" and apply the "rule of reason" to the questions to be decided. I have the authority of this court for saying that such a course of proceeding on its part would be "judicial legislation."

* * *

When counsel in the present case insisted upon a reversal of the former rulings of this court, and asked such an interpretation of the Anti-trust Act as would allow reasonable restraints of interstate commerce, this court, in deference to established practice, should, I submit, have said to them: "That question, according to our practice, is not open for further discussion here. This court long ago deliberately held (1) that the act, interpreting its words in their ordinary acceptation, prohibits *all* restraints of interstate commerce by combinations in whatever form, and whether reasonable or unreasonable; (2) the question relates to matters of public policy in reference to commerce among the States and with foreign nations, and Congress alone can deal with the subject; (3) this court would encroach upon the authority of Congress if, under the guise of construction, it should assume to determine a matter of public policy; (4) the parties must go to Congress and obtain an amendment of the Anti-trust Act if they think this court was wrong in its former decisions; and (5) this court cannot and will not *judicially legislate*, since its function is to declare the law, while it belongs to the legislative department to make the law. Such a course, I am sure, would not have offended the "rule of reason."

But my brethren, in their wisdom, have deemed it best to pursue a different course. They have now said to those who condemn our former decisions and who object to all legislative prohibitions of contracts, combinations and

trusts in restraint of interstate commerce, "You may *now* restrain such commerce, provided you are reasonable about it; only take care that the restraint in not undue." The disposition of the case under consideration, according to the views of the defendants, will, it is claimed, quiet and give rest to "the business of the country." On the contrary, I have a strong conviction that it will throw the business of the country into confusion and invite widely-extended and harassing litigation, the injurious effects of which will be felt for many years to come. When Congress prohibited *every* contract, combination or monopoly, in restraint of commerce, it prescribed a simple, definite rule that all could understand, and which could be easily applied by everyone wishing to obey the law, and not to conduct their business in violation of law. But now, it is to be feared, we are to have, in cases without number, the constantly recurring inquiry—difficult to solve by proof—whether the particular contract, combination, or trust involved in each case is or is not an "unreasonable" or "undue" restraint of trade. Congress, in effect, said that there should be *no* restraint of trade, *in any form*, and this court solemnly adjudged many years ago that Congress meant what it thus said in clear and explicit words, and that it *could not* add to the words of the act. But those who condemn the action of Congress are now, in effect, informed that the courts will allow such restraints of interstate commerce as are shown not to be unreasonable or undue.

* * *

After many years of public service at the National Capital, and after a somewhat close observation of the conduct of public affairs, I am impelled to say that there is abroad, in our land, a most harmful tendency to bring about the amending of constitutions and legislative enactments by means alone of judicial construction. As a public policy has been declared by the legislative department in respect of interstate commerce, over which Congress has entire control, under the Constitution, all concerned must patiently submit to what has been lawfully done, until the People of the United States—the source of all National power—shall, in their own time, upon reflection and through the legislative department of the Government, require a change of that policy. There are some who say that it is a part of one's liberty to conduct commerce among the States without being subject to governmental authority. But that would not be liberty, regulated by law, and liberty, which cannot be regulated by law, is not to be desired. The Supreme Law of the Land—which is binding alike upon all—upon Presidents, Congresses, the Courts and the People—gives to Congress, and to Congress alone, authority to regulate interstate commerce, and when Congress forbids *any* restraint of such commerce, in any form, all must obey its mandate. To overreach the action of Congress merely by judicial construction, that is, by indirection, is a blow at the integrity of our governmental system, and in the end will prove most dangerous to all. Mr. Justice Bradley wisely said, when on this Bench, that illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from legal modes of legal procedure. *Boyd* v. *United States*, 116 U. S. 616, 635. We shall do well to heed the warnings of that great jurist.

I do not stop to discuss the merits of the policy embodied in the Anti-trust Act of 1890; for, as has been often adjudged, the courts, under our constitutional system, have no rightful concern with the wisdom or policy of legislation enacted by that branch of the Government which alone can make laws.

For the reasons stated, while concurring in the general affirmance of the decree of the Circuit Court, I dissent from that part of the judgment of this court which directs the modification of the decree of the Circuit Court, as well as from those parts of the opinion which, in effect, assert authority, in this court, to insert words in the Anti-trust Act which Congress did not put there, and which, being inserted, Congress is made to declare, as part of the public policy of the country, what it has not chosen to declare.

THE HISTORY OF THE STANDARD OIL "TRUST"

The original Standard Oil Trust, which was created in 1879 and written in 1882, marks the beginning of the "trust" movement. Because the trust was not a corporation, it did not require state sanction to exist nor was it subject to the state regulation of corporations. The 1882 trust agreement was joined by all the stockholders and members of fourteen corporations and limited partnerships, forty-six individuals, and the controlling stockholders and members of twenty-six additional corporations and limited partnerships. The trust agreement contemplated that separate corporations would be organized initially in the states of Ohio, New York, Pennsylvania, and New Jersey. Each signatory would transfer its assets to the Standard Oil Company in the state in which the assets were located and receive in return stock of the recipient Standard Oil Company equal at par to the appraised value of the transfered assets. The stock itself would be delivered to a board of trustees to be held in trust, and the signatory would receive one "Standard Oil Trust" certificate for each $100 of property or assets it contributed. Dividends paid on Standard Oil stock would be received by the trustees, who in turn would pay dividends on the trust certificates. The nine-member board of trustees (each member to be elected by a majority of votes representing the outstanding trust certificates was given full power to vote

the stock of the various Standard Oil Companies in its discretion and thereby control the operations of these companies. The trust was to terminate twenty-one years after the death of the last survivor of the original nine trustees, unless dissolved beforehand by a specified supermajority vote of the outstanding trust certificates. As long as interstate corporations were prohibited, the trust agreement provided second best contractual means to integrate business activities across state lines.

In the period between 1880 and 1890, the decade before the passage of the Sherman Act, the states were the primary law enforcement opponents against the trusts. Ohio, in particular, was an aggressive participant, and the Standard Oil Trust was its target. Since trusts were not subject to state regulation as corporations, they turned to *quo warranto* proceedings to declare unlawful the participation of corporations within their jurisdiction in trust arrangements. The theory was that membership in a trust abdicated the responsibilities imposed by state law on corporate management and otherwise exceeded the powers of corporations under the state general incorporation law.

In 1892, the Attorney General of the State of Ohio obtained a decree from the Ohio Supreme Court declaring that Standard Oil of Ohio had violated the state's corporation law by operating under the control of the Standard Oil Trust. The Court held that the legal fiction of the separation of a corporation from its shareholders should be recognized only when it serves the ends of justice, and not when it is used to subvert established public policy. Here, the Court found that Standard Oil of Ohio was used as part of an unlawful scheme by its shareholders to control prices and prevent competition in the petroleum industry. Moreover, the trust arrangement in effect made the corporation's directors and officers mere puppets of the trustees, unable to exercise their fiduciary duties to the corporation and its proper stockholders. The Ohio Supreme Court concluded that the identities of the stockholders and the corporation should be merged in this case and that consequently the corporation had entered into an agreement for which it had no authority under the laws of the state. Although the court did not revoke Standard Oil's corporate charter (the usual remedy in a *quo warranto* proceeding), it ordered the corporation to cease performing under the trust arrangement and to ignore on the corporate stock record books the transfer of stock to the trustees. *See* State v. Standard Oil Co., 49 Ohio St. 137, 30 N.E. 279 (1892).

Following this decision, the Standard Oil Trust certificate holders voted to terminate the trust and reorganize under a variety of holding corporations. The trust, which held stock in 84 companies, transferred the shares in 64 of these companies (including Standard Oil of Ohio) to the remaining twenty, of which Standard Oil Company of New Jersey was one. The trust certificates were then exchanged for stock in each of these twenty companies. In 1897, the Ohio Attorney General attacked this reorganization as a sham, and instituted a contempt action against Standard Oil of Ohio for failing to abide by the Ohio Supreme Court's 1892 order.

In response, in 1899, Standard Oil reorganized again under a single holding company, Standard Oil of New Jersey. The shares of the other nineteen holding companies transferred their stock to Standard Oil Company of New Jersey in exchange for its stock, which was then distributed to the shareholders of the remaining nineteen holding companies.

The 1879 and 1882 trust agreements are reprinted in W. Stevens, Industrial Combinations and Trusts 14-27 (1912). The 1882 revision also is contained in State v. Standard Oil Co., 49 Oh. St. 137, 30 N.E. 279, 281-84 (1892). For more on the history of Standard Oil, see I. Tarbell, The History of the Standard Oil Company (1933).

NOTES

1. Former components of the Standard Oil Trust include Exxon (Standard Oil of New Jersey), Mobil (Standard Oil of New York), Amoco (Standard Oil of Indiana), Sohio (Standard Oil of Ohio), and Chevron (Standard Oil of California).

2. The *Standard Oil* case was appealed directly from the trial court to the Supreme Court under the Expediting Act, ch. 544,

32 Stat. 823 (1903). The Expediting Act, passed in 1903 as one of several antitrust procedural reforms, permitted a party to appeal directly to the Supreme Court in government actions for injunctive relief where the trial court certified that immediate consideration by the Supreme Court was "of general public importance in the administration of justice." The Supreme Court could either accept the appeal or, in its discretion, deny the direct appeal and remand the case to the court of appeals. The Expediting Act was repealed in 1984. Pub. L. No. 98-620, § 402(11) (1984).

UNITED STATES v. AMERICAN TOBACCO CO.
221 U.S. 106 (1911)

[In January, 1890, following a severe price war and only months before the Sherman Act was passed, five of the major tobacco product manufacturers, accounting for 95 percent of all domestic cigarette production, organized the American Tobacco Company and conveyed to the new corporation all of their assets, businesses, goodwill and tradenames. Thereafter, American engaged in an aggressive campaign to acquire other companies in the manufacture and sale of tobacco products, including cheroots, smoking tobacco, fine cut tobacco, snuff and plug tobacco. In almost all cases covenants not to compete were obtained from the original owners. In addition, many of the acquired businesses were closed down immediately after their acquisition by American or one of its related companies.

[Following a Justice Department prosecution initiated in 1907, the circuit court held that the American arrangement violated the antitrust laws. Although the circuit court's opinion is surprisingly devoid of caselaw citations, it is clear that the court's conclusion is a straightforward application of *Northern Securities*. Disregarding the original pre-Sherman Act formation of the American Tobacco Company, the court found that the post-Act consolidations, including the merger of American with the Continental Tobacco Company and with the Consolidated Tobacco Company, were sufficient to establish that the law had been violated. In addition, the court found that all but one of the top holding companies in the American pyramid individually constituted an unlawful combination. In making these findings, the court regarded as irrelevant the lack of evidence that the price of tobacco products to consumers had increased, that America had engaged in unfair or improper business practices, or that independent dealers had been coerced into joining the combination.

[The trial court's order enjoined the defendants from engaging in interstate or foreign trade in leaf tobacco or tobacco products, prohibited certain of the defendants from acquiring the plants or businesses of any corporation in which it held stock, and enjoined these

defendants from voting their stockholdings or attempting to exercise any control over their subsidiaries. United States v. American Tobacco Co., 164 Fed. 701 (C.C.S.D.N.Y. 1908).

[The defendants appealed the finding of liability and the entry of releif. The government appealed the dismissal of several of the original defendants and challenged the adequacy of the relief granted.]

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

This suit was commenced on July 19, 1907, by the United States, to prevent the continuance of alleged violations of the first and second sections of the Anti-trust Act of July 2, 1890. The defendants were twenty-nine individuals, named in the margin,[1] sixty-five American corporations, most of them created in the State of New Jersey, and two English corporations. For convenience of statement we classify the corporate defendants, exclusive of the two foreign ones, which we shall hereafter separately refer to, as follows: The American Tobacco Company, a New Jersey corporation, because of its dominant relation to the subject-matter of the controversy as the primary defendant; five other New Jersey corporations (viz., American Snuff Company, American Cigar Company, American Stogie Company, MacAndrews & Forbes Company, and Conley Foil Company), because of their relation to the controversy as the accessory, and the fifty-nine other American corporations as the subsidiary defendants.

The ground of complaint against the American Tobacco Company rested not alone upon the nature and character of that corporation and the power which it exerted directly over the five accessory corporations and some of the subsidiary corporations by stock ownership in such corporations, but also upon the control which it exercised over the subsidiary companies by virtue of stock held in said companies by the accessory companies by stock ownership in which the American Tobacco Company exerted its power of control. The accessory companies were impleaded either because of their nature and character or because of the power exerted over them through stock ownership by the American Tobacco Company and also because of the power which they in turn exerted by stock ownership over the subsidiary corporations, and finally the subsidiary corporations were impleaded either because of their nature or because of the control to which they were subjected in and by virtue of the stock ownership above stated. * * *

We shall divide our investigation of the case into three subjects: First, the undisputed facts; second, the meaning of the Anti-trust Act and its application as correctly construed to the ultimate conclusions of fact deducible from the proof; third, the remedies to be applied.

First. Undisputed facts.

The matters to be considered under this heading we think can best be made clear by stating the merest outline of the condition of the tobacco industry prior to what is asserted to have been the initial movement in the combination which the suit assails and in the light so afforded to briefly recite the history of the assailed acts and contracts. We shall divide the subject into two periods, (*a*) the one from the time of the organization of the first or old American Tobacco Company in 1890 to the organization of the Continental Tobacco Company, and (*b*) from the date of such organization to the filing of the bill in this case.

Summarizing in the broadest way the conditions which obtained prior to 1890, as to the production, manufacture and distribution of tobacco, the following general facts are adequate to portray the situation.

Tobacco was grown in many sections of the country having diversity of soil and climate and therefore was subject to various vicissitudes resulting from the places of production and consequently varied in quality. The great diversity of use to which tobacco was applied in manufacturing caused it to be that there was a demand for all the various qualities. The demand for all qualities was not local, but widespread, extending as well to domestic as to foreign trade, and, therefore, all the products were marketed under competitive conditions of a peculiarly advantageous nature. The manufacture of the product in this country in various forms was successfully carried on by many individuals or concerns scattered throughout the country, a larger number perhaps of the manufacturers being in the vicinage of production and others being advantageously situated in or near the principal markets of distribution.

Before January, 1890, five distinct concerns—Allen & Ginter, with factory at Richmond, Va.; W. Duke, Sons & Co., with factories at Durham, North Carolina, and New York City; Kinney Tobacco Company, with factory at New York City; W. S. Kimball & Company, with factory at Rochester, New York; Goodwin & Company, with factory at Brooklyn, New York—manufactured, distributed and sold in the United States and abroad 95 per cent of all the domestic cigarette and less than 8 per cent

of the smoking tobacco produced in the United States. There is no doubt that these factories were competitors in the purchase of the raw product which they manufactured and in the distribution and sale of the manufactured products. Indeed it is shown that prior to 1890 not only had normal and ordinary competition existed between the factories in question, but that the competition had been fierce and abnormal. In January, 1890, having agreed upon a capital stock of $25,000,000, all to be divided amongst them, and who should be directors, the concerns referred to organized the American Tobacco Company in New Jersey, "for trading and manufacturing," with broad powers, and conveyed to it the assets and businesses, including good will and right to use the names of the old concerns; and thereafter this corporation carried on the business of all. * * *

[The Court then described in some detail various acquisitions made by American in 1891 of companies engaged in the manufacture of plug tobacco, cheroots, cigars, snuff, and smoking tobacco. The Court noted that these acquisitions typically were accompanied by a covenant by the seller not to compete in its former business for a period as long as twenty years, and that American sometimes closed the acquired plants soon after their acquisition. Over the period February, 1891, through October, 1898, American acquired fifteen tobacco companies.]

The corporations which were combined for the purpose of forming the American Tobacco Company produced a very small portion of plug tobacco. That an increase in this direction was contemplated is manifested by the almost immediate increase of the stock and its use for the purpose of acquiring, as we have indicated, in 1891 and 1892, the ownership and control of concerns manufacturing plug tobacco and the consequent increase in that branch of production. There is no dispute that as early as 1893 the president of the American Tobacco Company, by authority of the corporation, approached leading manufacturers of plug tobacco and sought to bring about a combination of the plug tobacco interests, and upon the failure to accomplish this, ruinous competition, by lowering the price of plug below its cost, ensued. As a result of this warfare, which continued until 1898, the American Tobacco Company sustained severe losses aggregating more than four millions of dollars. The warfare produced its natural result, not only because the company acquired during the last two years of the campaign, as we have stated, control of important plug tobacco concerns, but others engaged in that industry came to terms. We say this because in 1898, in connection with several leading plug manufacturers, the American Tobacco Company organized a New Jersey corporation styled the Continental Tobacco Company, for "trading and manufacturing," with a capital of $75,000,000, afterwards increased to $100,000,000. The new company issued its stock and took transfers to the plants, assets and businesses of five large and successful competing plug manufacturers.[1]

The American Tobacco Company also conveyed to this corporation, at large valuations, the assets, brands, real estate and good will pertaining to its plug tobacco business, including the National Tobacco Works, the James G. Butler Tobacco Co., Drummond Tobacco Company, and Brown Tobacco Co., receiving as consideration $30,274,200 of stock (one-half common and one-half preferred), $300,000 cash, and an additional sum for losses sustained in the plug business during 1898, $840,035. Mr. Duke, the president of the American Tobacco Company, also became president of the Continental Company.

* * *

As the facts just stated bring us to the end of the first period which at the outset we stated it was our purpose to review, it is well briefly to point out the increase in the power and control of the American Tobacco Company and the extension of its activities to all forms of tobacco products which had been accomplished just prior to the organization of the Continental Tobacco Company. Nothing could show it more clearly than the following: At the end of the time the company was manufacturing eighty-six per cent or thereabouts of all the cigarettes produced in the United States, above twenty-six per cent of all the smoking tobacco, more than twenty-two per cent of all plug tobacco, fifty-one per cent of all little cigars, six per cent each of all snuff and fine cut tobacco, and over two per cent of all cigars and cheroots.

A brief reference to the occurrences of the second period, that is, from and after the organization of the Continental Tobacco Company up to the time of the bringing of this suit, will serve to make evident that the transactions in their essence had all the characteristics of the occurrences of the first period.

In the year 1899 and thereafter either the American or the Continental company, for cash or stock, at an aggregate cost of fifty millions of dollars ($50,000,000), bought and closed up some thirty competing corporations and partnerships theretofore engaged in interstate and foreign commerce as manufacturers, sellers, and distributors of tobacco and related commodities, the interested parties covenanting not to engage in the business. Likewise the two corporations acquired for cash, by issuing stock, and otherwise, control of many competing corporations, now going concerns, with plants in various States, Cuba and Porto Rico, which manufactured, bought, sold and distributed tobacco products or related articles throughout the United States and foreign countries, and took from the parties in interest covenants not to engage in the tobacco business.

The plants thus acquired were operated until the merger in 1904, to which we shall hereafter refer, as a part of the general system of the American and Continental companies. The power resulting from and the purpose contemplated in making these acquisitions by the companies just referred to, however, may not be measured by considering alone the business of the company directly acquired, since some of those companies were made the vehicles as representing the American or Continental company for acquiring and holding the stock of other and competing companies, thus amplifying the power resulting from the acquisitions directly made by the American or Continental company, without ostensibly doing so. It is besides undisputed that in many instances the acquired corporations with the subsidiary companies over which they had control through stock ownership were carried on ostensibly as independent concerns disconnected from either the American or the Continental company, although they were controlled and owned by one or the other of these companies. • • •

It is of the utmost importance to observe that the acquisitions made by the subsidiary corporations in some cases likewise show the remarkable fact stated above, that is, the disbursement of enormous amounts of money to acquire plants, which on being purchased were not utilized but were immediately closed. It is also to be remarked, that the facts stated in the memorandum in the margin show on their face a singular identity between the conceptions which governed the transactions of this latter period with those which evidently existed at the very birth of the original organization of the American Tobacco Company, as exemplified by the transactions in the first

period. A statement of particular transactions outside of those previously referred to as having occurred during the period in question will serve additionally to make the situation clear. And to accomplish this purpose we shall, as briefly as may be consistent with clarity, separately refer to the facts concerning the organization during the second period of the five corporations which were named as defendants in the bill, as heretofore stated and which for the purpose of designation we have hitherto classified as accessory defendants, such corporations being the American Snuff Company, American Cigar Company, American Stogie Company, MacAndrews & Forbes Company (licorice), and Conley Foil Company.

* * *

[The Court then described the history of acquisitions and activities of the American Snuff Company, the Conley Foil Company (manufacturers of tinfoil for packing tobacco products), the American Cigar Company, the MacAndrews & Forbes Company (manufacturers of licorice paste, which is an essential ingredient in the manufacture of plug tobacco), and the American Stogie Company. The Court also discussed briefly two of American's English corporate subsidiaries, which had been dismissed as defendants by the trial court.]

The Consolidated Tobacco Co.

In June, 1901, parties largely interested in the American and Continental companies caused the incorporation in New Jersey of the Consolidated Tobacco Company, capital $30,000,000 (afterwards $40,000,000), with broad powers and perpetual existence; to do business throughout the world, and to guarantee securities of other companies, etc. A majority of shares was taken by a few individuals connected with the old concerns: A. N. Brady, J. B. Duke, A. H. Payne, Thomas Ryan, W. C. Whitney, and P. A. B. Widener. J. B. Duke, president of both the old companies, became president of the Consolidated. Largely in exchange for bonds the new company acquired substantially all the shares of common stock of the old ones. Its business, of holding and financing, was continued until 1904, when, with the American and Continental companies, it was merged into the present American Tobacco Company.

By proceedings in New Jersey, October, 1904, the (old) American Tobacco Company, Continental Tobacco Company and Consolidated Tobacco Company were merged into one corporation, under the name of The American Tobacco Company, the principal defendant here. The merged company, with perpetual existence, was capitalized at $180,000,000 ($80,000,000 preferred, ordinarily without power to vote).

* * *

The record indisputably discloses that after this merger the same methods which were used from the beginning continued to be employed. Thus, it is beyond dispute: First, that since the organization of the new American Tobacco Company that company has acquired four large tobacco concerns, that restrictive covenants against engaging in the tobacco business were taken from the sellers, and that the plants were not continued in operation but were at once abandoned. Second, that the new company has besides acquired control of eight additional concerns, the business of such concerns being now carried on by four separate corporations, all absolutely controlled by the

American Tobacco Company, although the connection as to two of these companies with that corporation was long and persistently denied.

Thus reaching the end of the second period and coming to the time of the bringing of the suit, brevity prevents us from stopping to portray the difference between the condition in 1890 when the (old) American Tobacco Company was organized by the consolidation of five competing cigarette concerns and that which existed at the commencement of the suit. That situation and the vast power which the principal and accessory corporate defendants and the small number of individuals who own a majority of the common stock of the new American Tobacco Company exert over the marketing of tobacco as a raw product, its manufacture, its marketing when manufactured, and its consequent movement in the channels of interstate commerce indeed relatively over foreign commerce, and the commerce of the whole world, in the raw and manufactured products stand out in such bold relief from the undisputed facts which have been stated as to lead us to pass at once to the second fundamental proposition which we are required to consider. That is, the construction of the Anti-trust Act and the application of the act as rightly construed to the situation as proven in consequence of having determined the ultimate and final inferences properly deducible from the undisputed facts which we have stated.

The construction and application of the Anti-trust Act.

If the Anti-trust Act is applicable to the entire situation here presented and is adequate to afford complete relief for the evils which the United States insists that situation presents it can only be because that law will be given a more comprehensive application than has been affixed to it in any previous decision. This will be the case because the undisputed facts as we have stated them involve questions as to the operation of the Anti-trust Act not hitherto presented in any case. Thus, even if the ownership of stock by the American Tobacco Company in the accessory and subsidiary companies and the ownership of stock in any of those companies among themselves were held, as was decided in *United States* v. *Standard Oil Co.*, to be a violation of the act and all relations resulting from such stock ownership were therefore set aside, the question would yet remain whether the principal defendant, the American Tobacco Company, and the five accessory defendants, even when divested of their stock ownership in other corporations, by virtue of the power which they would continue to possess, even although thus stripped, would amount to a violation of both the first and second sections of the act. Again, if it were held that the corporations, the existence whereof was due to a combination between such companies and other companies was a violation of the act, the question would remain whether such of the companies as did not owe their existence and power to combinations but whose power alone arose from the exercise of the right to acquire and own property would be amenable to the prohibitions of the act. Yet further: Even if this proposition was held in the affirmative the question would remain whether the principal defendant, the American Tobacco Company, when stripped of its stock ownership, would be in and of itself within the prohibitions of the act although that company was organized and took being before the Anti-trust Act was passed. Still further, the question would yet remain whether particular corporations which, when bereft of the power which they possessed as resulting from stock ownership, although they were not inherently possessed of a sufficient residuum of power to cause them to be in

and of themselves either a restraint of trade or a monopolization or an attempt to monopolize, should nevertheless be restrained because of their intimate connection and association with other corporations found to be within the prohibitions of the act. The necessity of relief as to all these aspects, we think, seemed to the Government so essential, and the difficulty of giving to the act such a comprehensive and coherent construction as would be adequate to enable it to meet the entire situation, led to what appears to us to be in their essence a resort to methods of construction not compatible one with the other. And the same apparent conflict is presented by the views of the act taken by the defendants when their contentions are accurately tested. Thus the Government, for the purpose of fixing the illegal character of the original combination which organized the old American Tobacco Company, asserts that the illegal character of the combination is plainly shown because the combination was brought about to stay the progress of a flagrant and ruinous trade war. In other words, the contention is that as the act forbids every contract, and combination, it hence prohibits a reasonable and just agreement made for the purpose of ending a trade war. But as thus construing the act by the rule of the letter which kills, would necessarily operate to take out of the reach of the act some one of the accessory and many subsidiary corporations, the existence of which depend not at all upon combination or agreement or contract, but upon mere purchases of property, it is insisted in many forms of argument that the rule of construction to be applied must be the spirit and intent of the act and therefore its prohibitions must be held to extend to acts even if not within the literal terms of the statute if they are within its spirit because done with an intent to bring about the harmful results which it was the purpose of the statute to prohibit. So as to the defendants. While it is argued on the one hand that the forms by which various properties were acquired in view of the letter of the act exclude many of the assailed transactions from condemnation, it is yet urged that giving to the act the broad construction which it should rightfully receive, whatever may be the form, no condemnation should follow, because, looking at the case as a whole, every act assailed is shown to have been but a legitimate and lawful result of the exertion of honest business methods brought into play for the purpose of advancing trade instead of with the object of obstructing and restraining the same. But the difficulties which arise, from the complexity of the particular dealings which are here involved and the situation which they produce, we think grows out of a plain misconception of both the letter and spirit of the Anti-trust Act. We say of the letter, because while seeking by a narrow rule of the letter to include things which it is deemed would otherwise be excluded, the contention really destroys the great purpose of the act, since it renders it impossible to apply the law to a multitude of wrongful acts, which would come within the scope of its remedial purposes by resort to a reasonable construction, although they would not be within its reach by a too narrow and unreasonable adherence to the strict letter. This must be the case unless it be possible in reason to say that for the purpose of including one class of acts which would not otherwise be embraced a literal construction although in conflict with reason must be applied and for the purpose of including other acts which would not otherwise be embraced a reasonable construction must be resorted to. That is to say two conflicting rules of construction must at one and the same time be applied and adhered to.

The obscurity and resulting uncertainty however, is now but an abstraction because it has been removed by the consideration which we have given quite recently to the construction of the Anti-trust Act in the *Standard Oil Case*. In that case it was held, without departing from

any previous decision of the court that as the statute had not defined the words restraint of trade, it became necessary to construe those words, a duty which could only be discharged by a resort to reason. We say the doctrine thus stated was in accord with all the previous decisions of this court, despite the fact that the contrary view was sometimes erroneously attributed to some of the expressions used in two prior decisions (the *Trans-Missouri Freight Association* and *Joint Traffic cases*, 166 U. S. 290, and 171 U. S. 505). That such view was a mistaken one was fully pointed out in the *Standard Oil Case* and is additionally shown by a passage in the opinion in the *Joint Traffic Case* as follows (171 U. S. 568): "The act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing on interstate commerce, and possibly to restrain it." A Applying the rule of reason to the construction of the statute, it was held in the *Standard Oil Case* that as the words "restraint of trade" at common law and in the law of this country at the time of the adoption of the Anti-trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. B It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. In other words, it was held, not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were reasonable, but that the duty to interpret which inevitably arose from the general character of the term restraint of trade required that the words restraint of trade should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect. The soundness of the rule that the statute should receive a reasonable construction, after further mature deliberation, we see no reason to doubt. Indeed, the necessity for not departing in this case from the standard of the rule of reason which is universal in its application is so plainly required in order to give effect to the remedial purposes which the act under consideration contemplates, and to prevent that act from destroying all liberty of contract and all substantial right to trade, and thus causing the act to be at war with itself by annihilating the fundamental right of freedom to trade which, on the very face of the act, it was enacted to preserve, is illustrated by the record before us. In truth, the plain demonstration which this record gives of the injury which would arise from and the promotion of the wrongs which the statute was intended to guard against which would result from giving to the statute a narrow, unreasoning and unheard of construction, as illustrated by the record before us, if possible serves to strengthen our conviction as to the correctness of the rule of construction, the rule of reason, which was applied in the *Standard Oil Case*, the application of which rule to the statute we now, in the most unequivocal terms, reëxpress and re-affirm.

Coming then to apply to the case before us the act as interpreted in the Standard Oil and previous cases, all the difficulties suggested by the mere form in which the assailed transactions are clothed become of no moment. This follows because although it was held in the *Standard*

Oil Case that, giving to the statute a reasonable construction, the words "restraint of trade" did not embrace all those normal and usual contracts essential to individual freedom and the right to make which were necessary in order that the course of trade might be free, yet, as a result of the reasonable construction which was affixed to the statute, it was pointed out that the generic designation of the first and second sections of the law, when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed. That is to say, it was held that in view of the general language of the statute and the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape by any indirection the prohibitions of the statute.

Considering then the undisputed facts which we have previously stated, it remains only to determine whether they establish that the acts, contracts, agreements, combinations, etc., which were assailed were of such an unusual and wrongful character as to bring them within the prohibitions of the law. That they were, in our opinion, so overwhelmingly results from the undisputed facts that it seems only necessary to refer to the facts as we have stated them to demonstrate the correctness of this conclusion. Indeed, the history of the combination is so replete with the doing of acts which it was the obvious purpose of the statute to forbid, so demonstrative of the existence from the beginning of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised in order to monopolize the trade by driving competitors out of business, which were ruthlessly carried out upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible. We say these conclusions are inevitable, not because of the vast amount of property aggregated by the combination, not because alone of the many corporations which the proof shows were united by resort to one device or another. Again, not alone because of the dominion and control over the tobacco trade which actually exists, but because we think the conclusion of wrongful purpose and illegal combination is overwhelmingly established by the following considerations: *a*. By the fact that the very first organization or combination was impelled by a previously existing fierce trade war, evidently inspired by one or more of the minds which brought about and became parties to that combination. *b*. Because, immediately after that combination and the increase of capital which followed, the acts which ensued justify the inference that the intention existed to use the power of the combination as a vantage ground to further monopolize the trade in tobacco by means of trade conflicts designed to injure others, either by driving competitors out of the business or compelling them to become parties to a combination—a purpose whose execution was illustrated by the plug war which ensued and its results, by the snuff war which followed and its results, and by the conflict which immediately followed the entry of the combination in England and the division of the world's business by the two foreign contracts which ensued. *c*. By the ever-present manifestation which is exhibited of a conscious wrongdoing by the form in which the various transactions were embodied from the beginning, ever changing but ever in substance the same. Now the organization of a new company, now the control exerted by the taking of stock in one or another or in several, so as to obscure the result actually attained, nevertheless uniform, in their manifestations of the purpose to restrain others and to monopolize and retain power in the hands of the

few who, it would seem, from the beginning contemplated the mastery of the trade which practically followed. *d*. By the gradual absorption of control over all the elements essential to the successful manufacture of tobacco products, and placing such control in the hands of seemingly independent corporations serving as perpetual barriers to the entry of others into the tobacco trade. *e*. By persistent expenditure of millions upon millions of dollars in buying out plants, not for the purpose of utilizing them, but in order to close them up and render them useless for the purposes of trade. *f*. By the constantly recurring stipulations, whose legality, isolatedly viewed, we are not considering, by which numbers of persons, whether manufacturers, stockholders or employés, were required to bind themselves, generally for long periods, not to compete in the future. Indeed, when the results of the undisputed proof which we have stated are fully apprehended, and the wrongful acts which they exhibit are considered, there comes inevitably to the mind the conviction that it was the danger which it was deemed would arise to individual liberty and the public well-being from acts like those which this record exhibits, which led the legislative mind to conceive and to enact the Anti-trust Act, considerations which also serve to clearly demonstrate that the combination here assailed is within the law as to leave no doubt that it is our plain duty to apply its prohibitions.

* * *

The remedy.

Our conclusion being that the combination as a whole, involving all its coöperating or associated parts, in whatever form clothed, constitutes a restraint of trade within the first section, and an attempt to monopolize or a monopolization within the second section of the Anti-trust Act, it follows that the relief which we are to afford must be wider than that awarded by the lower court, since that court merely decided that certain of the corporate defendants constituted combinations in violation of the first section of the act, because of the fact that they were formed by the union of previously competing concerns and that the other defendants not dismissed from the action were parties to such combinations or promoted their purposes. We hence, in determining the relief proper to be given, may not model our action upon that granted by the court below, but in order to enable us to award relief coterminous with the ultimate redress of the wrongs which we find to exist, we must approach the subject of relief from an original point of view. Such subject necessarily takes a two-fold aspect—the character of the permanent relief required and the nature of the temporary relief essential to be applied pending the working out of permanent relief in the event that it be found that it is impossible under the situation as it now exists to at once rectify such existing wrongful condition. In considering the subject from both of these aspects three dominant influences must guide our action: 1. The duty of giving complete and efficacious effect to the prohibitions of the statute; 2, the accomplishing of this result with as little injury as possible to the interest of the general public; and, 3, a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition either by way of stock ownership or otherwise of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning.

* * *

Looking at the situation as we have hitherto pointed it out, it involves difficulties in the application of remedies greater than have been presented by any case involving the Anti-trust Act which has been hitherto considered by this court: First. Because in this case it is obvious that a mere decree forbidding stock ownership by one part of the combination in another part or entity thereof, would afford no adequate measure of relief, since different ingredients of the combination would remain unaffected, and by the very nature and character of their organization would be able to continue the wrongful situation which it is our duty to destroy. Second. Because the methods of apparent ownership by which the wrongful intent was, in part, carried out and the subtle devices which, as we have seen, were resorted to for the purpose of accomplishing the wrong contemplated, by way of ownership or otherwise, are of such a character that it is difficult if not impossible to formulate a remedy which could restore in their entirety the prior lawful conditions. Third. Because the methods devised by which the various essential elements to the successful operation of the tobacco business from any particular aspect have been so separated under various subordinate combinations, yet so unified by way of the control worked out by the scheme here condemned, are so involved that any specific form of relief which we might now order in substance and effect might operate really to injure the public and, it may be, to perpetuate the wrong. Doubtless it was the presence of these difficulties which caused the United States, in its prayer for relief to tentatively suggest rather than to specifically demand definite and precise remedies. We might at once resort to one or the other of two general remedies—*a*, the allowance of a permanent injunction restraining the combination as a universality and all the individuals and corporations which form a part of or coöperate in it in any manner or form from continuing to engage in interstate commerce until the illegal situation be cured, a measure of relief which would accord in substantial effect with that awarded below to the extent that the court found illegal combinations to exist; or, b, to direct the appointment of a receiver to take charge of the assets and property in this country of the combination in all its ramifications for the purpose of preventing a continued violation of the law, and thus working out by a sale of the property of the combination or otherwise, a condition of things which would not be repugnant to the prohibitions of the act. But, having regard to the principles which we have said must control our action, we do not think we can now direct the immediate application of either of these remedies. We so consider as to the first because in view of the extent of the combination, the vast field which it covers, the all-embracing character of its activities concerning tobacco and its products, to at once stay the movement in interstate commerce of the products which the combination or its coöperating forces produce or control might inflict infinite injury upon the public by leading to a stoppage of supply and a great enhancement of prices. The second because the extensive power which would result from at once resorting to a receivership might not only do grievous injury to the public, but also cause widespread and perhaps irreparable loss to many innocent people. Under these circumstances, taking into mind the complexity of the situation in all of its aspects and giving weight to the many-sided considerations which must control our judgment, we think, so far as the permanent relief to be awarded is concerned, we should decree as follows: 1st. That the combination in and of itself, as well as each and all of the elements composing it, whether corporate or individual, whether considered collectively or separately, be decreed to be in restraint of trade and

an attempt to monopolize and a monopolization within the first and second sections of the Anti-trust Act. 2d. That the court below, in order to give effective force to our decree in this regard, be directed to hear the parties, by evidence or otherwise, as it may be deemed proper, for the purpose of ascertaining and determining upon some plan or method of dissolving the combination and of recreating, out of the elements now composing it, a new condition which shall be honestly in harmony with and not repugnant to the law. 3d. That for the accomplishment of these purposes, taking into view the difficulty of the situation, a period of six months is allowed from the receipt of our mandate, with leave, however, in the event, in the judgment of the court below, the necessities of the situation require, to extend such period to a further time not to exceed sixty days. 4th. That in the event, before the expiration of the period thus fixed, a condition of disintegration in harmony with the law is not brought about, either as the consequence of the action of the court in determining an issue on the subject or in accepting a plan agreed upon, it shall be the duty of the court, either by way of an injunction restraining the movement of the products of the combination in the channels of interstate or foreign commerce or by the appointment of a receiver, to give effect to the requirements of the statute.

Pending the bringing about of the result just stated, each and all of the defendants, individuals as well as corporations, should be restrained from doing any act which might further extend or enlarge the power of the combination, by any means or device whatsoever. In view of the considerations we have stated we leave the matter to the court below to work out a compliance with the law without unnecessary injury to the public or the rights of private property.

While in many substantial respects our conclusion is in accord with that reached by the court below, and while also the relief which we think should be awarded in some respects is coincident with that which the court granted, in order to prevent any complication and to clearly define the situation we think instead of affirming and modifying, our decree, in view of the broad nature of our conclusions, should be one of reversal and remanding with directions to the court below to enter a decree in conformity with this opinion and to take such further steps as may be necessary to fully carry out the directions which we have given.

And it is so ordered.

MR. JUSTICE HARLAN concurring in part and dissenting in part.

I concur with many things said in the opinion just delivered for the court, but it contains some observations from which I am compelled to withhold my assent.

I agree most thoroughly with the court in holding that the principal defendant, the American Tobacco Company and its accessory and subsidiary corporations and companies, including the defendant English corporations, constitute a combination which, "in and of itself, as well as each and all of the elements composing it, whether corporate or individual, whether considered collectively or separately," is illegal under the Anti-trust Act of 1890, and should be decreed to be in restraint of interstate trade and an attempt to monopolize and a monopolization of part of such trade.

* * *

[Harlan first objected to the failure of the Court to fashion complete relief, although he did not suggest what that relief should be.]

But my objections have also reference to those parts of the court's opinion reaffirming what it said recently in the *Standard Oil Case* about the former decisions of this court touching the Anti-trust Act. We are again reminded, as we were in the *Standard Oil Case*, of the necessity of applying the "rule of reason" in the construction of this act of Congress—an act expressed, as I think, in language so clear and simple that there is no room whatever for construction.

Congress, with full and exclusive power over the whole subject, has signified its purpose to forbid *every* restraint of interstate trade, in whatever form, or to whatever extent, but the court has assumed to insert in the act, by construction merely, words which make Congress say that it means only to prohibit the "undue" restraint of trade.

If I do not misapprehend the opinion just delivered, the court insists that what was said in the opinion in the *Standard Oil Case*, was in accordance with our previous decisions in the *Trans-Missouri* and *Joint Traffic cases*, 166 U. S. 290, 171 U. S. 505, if we resort to *reason*. This statement surprises me quite as much as would a statement that black was white or white was black. It is scarcely just to the majority in those two cases for the court at this late day to say or to intimate that they interpreted the act of Congress without regard to the "rule of reason," or to assume, as the court now does, that the act was, for the first time in the *Standard Oil Case*, interpreted in the "light of reason." One thing is certain, "rule of reason," to which the court refers, does not justify the perversion of the plain words of an act in order to defeat the will of Congress.

By every conceivable form of expression, the majority, in the *Trans-Missouri* and *Joint Traffic cases*, adjudged that the act of Congress did not allow restraint of interstate trade to any extent or in any form, and three times it expressly rejected the theory, which had been persistently advanced, that the act should be construed as if it had in it the word "unreasonable" or "undue." But now the court, in accordance with what it denominates the "rule of reason," in effect inserts in the act the word "undue," which means the same as "unreasonable," and thereby makes Congress say what it did not say, what, as I think, it plainly did not intend to say and what, since the passage of the act, it has explicitly refused to say. It has steadily refused to amend the act so as to tolerate a restraint of interstate commerce even where such restraint could be said to be "reasonable" or "due." In short, the court now, by judicial legislation, in effect amends an act of Congress relating to a subject over which that department of the Government has exclusive cognizance. I beg to say that, in my judgment, the majority, in the former cases, were guided by the "rule of reason;" for, it may be assumed that they knew quite as well as others what the rules of reason require when a court seeks to ascertain the will of Congress as expressed in a statute. It is obvious from the opinions in the former cases, that the majority did not grope about in darkness, but in discharging the solemn duty put on them they stood out in the full glare of the "light of reason" and felt and said time and again

that the court could not, consistently with the Constitution, and would not, usurp the functions of Congress by indulging in judicial legislation. They said in express words, in the former cases, in response to the earnest contentions of counsel, that to insert by construction the word "unreasonable" or "undue" in the act of Congress would be *judicial legislation*. Let me say, also, that as we all agree that the combination in question was illegal under *any* construction of the Anti-trust Act, there was not the slightest necessity to enter upon an extended argument to show that the act of Congress was to be read as if it contained the word "unreasonable" or "undue." All that is said in the court's opinion in support of that view is, I say with respect, *obiter dicta*, pure and simple.

These views are fully discussed in the dissenting opinion delivered by me in the *Standard Oil Case*. I will not repeat what is therein stated, but it may be well to cite an additional authority. In the *Trade-Mark Cases*, 100 U. S. 82, the court was asked to sustain the constitutionality of the statute there involved. But the statute could not have been sustained except by inserting in it words not put there by Congress. Mr. Justice Miller, delivering the unanimous judgment of the court, said: "If we should, in the case before us, undertake to make by *judicial construction* a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do." This language was cited with approval in *Employers' Liability Cases*, 207 U. S. 463, 502. I refer to my dissenting opinion in the *Standard Oil Case* as containing a full statement of my views of this particular question.

For the reasons stated, I concur in part with the court's opinion and dissent in part.

The Call for New Antitrust Legislation

In *Northern Securities* the Supreme Court had held that "every combination or conspiracy which would extinguish competition between [competitors] . . . engaged in interstate trade or commerce, and which in that way restrain such trade or commerce, is made illegal by the act." This interpretation left very little room for judicial interpretation of the substantive boundaries of the law. *Standard Oil* and *American Tobacco*, on the other hand, permitted seemingly unlimited judicial discretion in construing the law under "rule of reason." This apparent reversal of *Northern Securities* outraged many members of Congress who believed in a restrictive antitrust policy. The Court's perceived liberalization of the law was especially outrageous to those who believed that the trust movement was continuing, albeit at a slower pace than at the turn of the century, and that more rather than less antitrust regulation was required. Moreover, apart from the merits of this view, the reversal raised the fundamental question of whether basic federal antitrust policy would turn on the views of individual judges as to what was "reasonable" and "unreasonable" business conduct or on a more clearly defined legislative standard.

A roughly contemporary account also reports general dissatisfaction with the remedy ordered in the Standard Oil and Tobacco cases, and attributes much of the disapproval of the "rule of reason" to an erroneous public perception that the rule was the source of these unsatisfactory results rather than the lower court's administration of relief. *See* Felix H. Levy, The Clayton Law--An Imperfect Supplement to the Sherman Law, 3 Va. L. Rev. 411, 414 (1916). Theodore Roosevelt also briefly mentions the dissatisfaction with the court orders. Theodore Roosevelt, An Autobiography (1914).

Upon assuming the presidency in 1913 Woodrow Wilson joined this debate and urged Congress to strengthen the prohibitions against anticompetitive behavior embodied in the Sherman Act, particularly the laws governing the antitrust propriety of mergers and acquisitions. At the time, two competing legislative approaches were being advanced in Congress--one narrowly targeting specific anticompetitive practices and the other conferring broad quasi-legislative powers on a new independent administrative agency to find and declare business practices unlawful. Wilson ultimately supported both approaches, and the 1914 Congress passed the complementary Clayton Act and the Federal Trade Commission Act as the third leg of Wilson's New Freedom campaign.

The Clayton Act sought to wrest from the courts the discretion to apply the ill-defined judicial "rule of reason" and return to Congress the primacy in antitrust law-making by declaring a variety of specific business practices unlawful whenever the effect of the practice "may be to substantially lessen competition" or "tend to create a monopoly" in any line of commerce. In addition price discrimination, tying arrangements, and exclusive and reciprocal dealing, the Clayton Act specifically addressed mergers and acquisitions. As originally enacted in 1914, Section 7 prohibited acquisitions by one corporation of the stock or other share capital of another corporation where the effect of the acquisition may be substantially to lessen competition between the two corporations, restrain interstate commerce "in any section or community," or to tend to create a monopoly of any line of commerce. Clayton Act § 7, Pub. L. No. 212, ch. 323, 38 Stat. 731-32, § 7 (1914) (current version at 15 U.S.C. § 18 (____)).

By contrast to the Clayton Act, the Federal Trade Commission Act broadly makes unlawful all "[u]nfair methods of competition" and "unfair or deceptive acts or practices" in or affecting commerce. Federal Trade Commission Act § 5, 15 U.S.C. § 45 (____). The FTC Act also established a new independent regulatory agency, the Federal Trade Commission, and endowed it with broad discretion to define and enjoin deceptive trade practices and unfair methods of competition.

CHICAGO BOARD OF TRADE v. UNITED STATES
246 U.S. 231 (1918)

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Chicago is the leading grain market in the world. Its Board of Trade is the commercial center through which most of the trading in grain is done. The character of the organization is described in *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236. Its 1600 members include brokers, commission merchants, dealers, millers, maltsters, manufacturers of corn products and proprietors of elevators. Grains there dealt in are graded according to kind and quality and are sold usually "Chicago weight, inspection and delivery." The standard forms of trading are: (*a*) Spot sales; that is, sales of grain already in Chicago in railroad cars or elevators for immediate delivery by order on carrier or transfer of warehouse receipt. (*b*) Future sales; that is, agreements for delivery later in the current or in some future month. (*c*) Sales "to arrive"; that is, agreements to deliver on arrival grain which is already in transit to Chicago or is to be shipped there within a time specified. On every business day sessions of the Board are held at which all bids and sales are publicly made. Spot ~~sales and~~ future sales are made at the regular sessions of the Board from 9.30 A. M. to 1.15 P. M., except on Saturdays, when the session closes at 12 M. Special sessions, termed the "Call," are held immediately after the close of the regular session, at ~~which sales "to arrive" are made~~. These sessions are not limited as to duration, but last usually about half an hour. At all these sessions transactions are between members only;

but they may trade either for themselves or on behalf of others. Members may also trade privately with one another at any place, either during the sessions or after, and they may trade with non-members at any time except on the premises occupied by the Board.[1]

Purchases of grain "to arrive" are made largely from country dealers and farmers throughout the whole territory tributary to Chicago, which includes besides Illinois and Iowa, Indiana, Ohio, Wisconsin, Minnesota, Missouri, Kansas, Nebraska, and even South and North Dakota. The purchases are sometimes the result of bids to individual country dealers made by telegraph or telephone either during the sessions or after; but most purchases are made by the sending out from Chicago by the afternoon mails to hundreds of country dealers offers to buy, at the prices named, any number of carloads, subject to acceptance before 9.30 A. M. on the next business day.

In 1906 the Board adopted what is known as the "Call" rule. By it members were prohibited from purchasing or offering to purchase, during the period between the close of the Call and the opening of the regular session ~~on the next~~ business day, any wheat, corn, oats or rye "to arrive" at a price other than the closing bid at the Call. The Call was over, with rare exceptions, by two o'clock. The change effected was this: Before the adoption of the rule, members fixed their bids throughout the day at such prices as they respectively saw fit; after the adoption of the rule, the bids had to be fixed at the day's closing bid on the Call until the opening of the next session.

In 1913 the United States filed in the District Court for the Northern District of Illinois this suit against the Board and its executive officers and directors, to enjoin the enforcement of the Call rule, alleging it to be in violation of the Anti-Trust Law (July 2, 1890, c. 647, 26 Stat. 209). The defendants admitted the adoption and enforcement of the Call rule, and averred that its purpose was not to prevent competition or to control prices, but to promote the convenience of members by restricting their hours of business and to break up a monopoly in that branch of the grain trade acquired by four or five warehousemen in Chicago. On motion of the Government the allegations concerning the purpose of establishing the regulation were stricken from the record. The case was then heard upon evidence; and a decree was entered which declared that defendants became parties to a combination or conspiracy to restrain interstate and foreign trade and commerce "by adopting, acting upon and enforcing" the "Call" rule; and enjoined them from acting upon the same or from adopting or acting upon any similar rule.

No opinion was delivered by the District Judge. The Government proved the existence of the rule and described its application and the change in business practice involved. It made no attempt to show that the rule was designed to or that it had the effect of limiting the amount of grain shipped to Chicago; or of retarding or accelerating shipment; or of raising or depressing prices; or of discriminating against any part of the public; or that it resulted in hardship to anyone. The case was rested upon the bald proposition, that a rule or agreement by which men occupying positions of strength in any branch of trade, fixed prices at which they would buy or sell during an important part of the business day, is an illegal restraint of trade under the Anti-Trust Law. But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. A The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. B The District Court erred, therefore, in striking from the answer allegations concerning the history and purpose of the Call rule and in later excluding evidence on that subject. But the evidence admitted makes it clear that the rule was a reasonable regulation of business consistent with the provisions of the Anti-Trust Law.

First: The nature of the rule: The restriction was upon the period of price-making. It required members to desist from further price-making after the close of the Call until 9.30 A. M. the next business day: but there was no restriction upon the sending out of bids after close of the Call. Thus it required members who desired to buy grain "to arrive" to make up their minds before the close of the Call how much they were willing to pay during the interval before the next session of the Board. The rule made it to their interest to attend the Call; and if they did not fill their wants by purchases there, to make the final bid high enough to enable them to purchase from country dealers.

Second: The scope of the rule: It is restricted in operation to grain "to arrive." It applies only to a small part of the grain shipped from day to day to Chicago, and to an even smaller part of the day's sales: members were left free to purchase grain already in Chicago from anyone at any price throughout the day. It applies only during a small part of the business day; members were left free to purchase during the sessions of the Board grain "to arrive," at any price, from members anywhere and from non-members anywhere except on the premises of the Board. It applied only to grain shipped to Chicago: members were left free to purchase at any price throughout the day from either members or non-members, grain "to arrive" at any other market. Country dealers and farmers had available in practically every part of the territory called tributary to Chicago some other market for grain "to arrive." Thus Missouri, Kansas, Nebraska, and parts of Illinois are also tributary to St. Louis; Nebraska and Iowa, to Omaha; Minnesota, Iowa, South and North Dakota, to Minneapolis or Duluth; Wisconsin and parts of Iowa and of Illinois, to Milwaukee; Ohio, Indiana and parts of Illinois, to Cincinnati; Indiana and parts of Illinois, to Louisville.

Third: The effects of the rule: As it applies to only a small part of the grain shipped to Chicago and to that only during a part of the business day and does not apply at all to grain shipped to other markets, the rule had no appreciable effect on general market prices; nor did it materially affect the total volume of grain coming to Chicago. But within the narrow limits of its operation the rule helped to improve market conditions thus:

(*a*) It created ~~a public market for grain~~ "to arrive." Before its adoption, bids were made privately. Men had to buy and sell without adequate knowledge of actual market conditions. This was disadvantageous to all

concerned, but particularly so to country dealers and farmers.

(*b*) It brought into the regular market hours of the Board sessions more of the trading in grain "to arrive."

(*c*) It brought buyers and sellers into more direct relations; because on the Call they gathered together for a free and open interchange of bids and offers.

(*d*) It distributed the business in grain "to arrive" among a far larger number of Chicago receivers and commission merchants than had been the case there before.

(*e*) It increased the number of country dealers engaging in this branch of the business; supplied them more regularly with bids from Chicago; and also increased the number of bids received by them from competing markets.

(*f*) It eliminated risks necessarily incident to a private market, and thus enabled country dealers to do business on a smaller margin. In that way the rule made it possible for them to pay more to farmers without raising the price to consumers.

(*g*) It enabled country dealers to sell some grain to arrive which they would otherwise have been obliged either to ship to Chicago commission merchants or to sell for "future delivery."

(*h*) It enabled those grain merchants of Chicago who sell to millers and exporters to trade on a smaller margin and, by paying more for grain or selling it for less, to make the Chicago market more attractive for both shippers and buyers of grain.

(*i*) Incidentally it facilitated trading "to arrive" by enabling those engaged in these transactions to fulfil their contracts by tendering grain arriving at Chicago on any railroad, whereas formerly shipments had to be made over the particular railroad designated by the buyer.

The restraint imposed by the rule is less severe than that sustained in *Anderson* v. *United States*, 171 U. S. 604. Every board of trade and nearly every trade organization imposes some restraint upon the conduct of business by its members. Those relating to the hours in which business may be done are common; and they make a special appeal where, as here, they tend to shorten the working day or, at least, limit the period of most exacting activity. The decree of the District Court is reversed with directions to dismiss the bill.

Reversed.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.

UNITED STATES V. UNITED STATES STEEL CO.
251 U.S. 417 (1920)

MR. JUSTICE MCKENNA delivered the opinion of the court.

Suit against the Steel Corporation and certain other companies which it directs and controls by reason of the ownership of their stock, it and they being separately and collectively charged as violators of the Sherman Anti-Trust Act.

It is prayed that it and they be dissolved because engaged in illegal restraint of trade and the exercise of monopoly.

The case was heard in the District Court by four judges. They agreed that the bill should be dismissed; they disagreed as to the reasons for it. 223 Fed. Rep. 55. One opinion (written by Judge Buffington and concurred in by Judge McPherson) expressed the view that the Steel Corporation was not formed with the intention or purpose to monopolize or restrain trade, and did not have the motive or effect "to prejudice the public interest by unduly restricting competition or unduly obstructing the course of trade." The corporation, in the view of the opinion, was an evolution, a natural consummation of the tendencies of the industry on account of changing conditions, practically a compulsion from "the metallurgical method of making steel and the physical method of handling it," this method, and the conditions consequent upon it, tending to combinations of capital and energies rather than diffusion in independent action.

The tendency of the industry and the purpose of the corporation in yielding to it were expressed in comprehensive condensation by the word "integration," which signifies continuity in the processes of the industry from ore mines to the finished product.

All considerations deemed pertinent were expressed and their influence was attempted to be assigned and, while conceding that the Steel Corporation, after its formation in times of financial disturbance, entered into informal agreements or understandings with its competitors to maintain prices, they terminated with their occasions, and, as they had ceased to exist, the court was not justified in dissolving the corporation.

The other opinion (by Judge Woolley and concurred in by Judge Hunt, 223 Fed. Rep. 161) was in some particulars, in antithesis to Judge Buffington's. The view was expressed that neither the Steel Corporation nor the preceding combinations, which were in a sense its antetypes, had the justification of industrial conditions, nor were they or it impelled by the necessity for integration, or compelled to unite in comprehensive enterprise because such had become a condition of success under the new order of things. On the contrary, that the organizers of the corporation and the preceding companies had illegal purpose from the very beginning, and the corporation became "a combination of combinations, by which, directly or indirectly, approximately 180 independent concerns were brought under one business control," which, measured by the amount of production, extended to 80% or 90% of the entire output of the country, and that its purpose was to secure great profits which were thought possible in the light of the history of its constituent combinations, and to accomplish permanently what those combinations had demonstrated could be accomplished temporarily, and thereby monopolize and restrain trade.

The organizers, however (we are still representing the opinion), underestimated the opposing conditions and at the very beginning the Corporation instead of relying upon its own power sought and obtained the assistance and the coöperation of its competitors (the independent companies). In other words the view was expressed that the testimony did "not show that the corporation in and of itself ever possessed or exerted sufficient power when acting alone to control prices of the products of the industry." Its power was efficient only when in coöperation with its competitors, and hence it concerted with them in the expedients of pools, associations, trade meetings, and finally in a system of dinners inaugurated in 1907 by the president of the company, E. H. Gary, and called "the Gary Dinners." The dinners were congregations of producers and "were nothing but trade meetings," successors of the other means of associated action and control through such action. They were instituted first in "stress of panic," but, their potency being demonstrated, they were afterwards called to control prices "in periods of industrial calm." "They were pools without penalties" and more efficient in stabilizing prices. But it was the further declaration that "when joint action was either refused or withdrawn the Corporation's prices were controlled by competition."

The Corporation, it was said, did not at any time abuse the power or ascendency it possessed. It resorted to none of the brutalities or tyrannies that the cases illustrate of other combinations. It did not secure freight rebates; it did not increase its profits by reducing the wages of its employees—whatever it did was not at the expense of labor; it did not increase its profits by lowering the quality of its products, nor create an artificial scarcity of them; it did not oppress or coerce its competitors—its competition, though vigorous, was fair; it did not undersell its competitors in some localities by reducing its prices there below those maintained elsewhere, or require its customers to enter into contracts limiting their purchases or restricting them in resale prices; it did not obtain customers by secret rebates or departures from its published prices; there was no evidence that it attempted to crush its competitors or drive them out of the market, nor did it take customers from its competitors by unfair means, and in its competition it seemed to make no difference between large and small competitors. Indeed it is said in many ways and illustrated that "instead of relying upon its own power to fix and maintain prices, the corporation, at its very beginning sought and obtained the assistance of others." It combined its power with that of its competitors. It did not have power in and of itself, and the control it exerted was only in and by association with its competitors. Its offense, therefore, such as it was, was not different from theirs and was distinguished from theirs "only in the leadership it assumed in promulgating and perfecting the policy." This leadership it gave up, and it had ceased to offend against the law before this suit was brought. It was hence concluded that it should be distinguished from its organizers and that their intent and unsuccessful attempt should not be attributed to it, that it "in and of itself is not now and has never been a monopoly or a combination in restraint of trade," and a decree of dissolution should not be entered against it.

was exerted. On the contrary, the only attempt at a fixation of prices was, as already said, through an appeal to and confederation with competitors, and the record shows besides that when competition occurred it was not in pretence, and the Corporation declined in productive powers—the competitors growing either against or in consequence of the competition. If against the competition we have an instance of movement against what the Government insists was an irresistible force; if in consequence of competition, we have an illustration of the adage that "competition is the life of trade" and is not easily repressed. The power of monopoly in the Corporation under either illustration is an untenable accusation.

* * * The company's officers and, as well, its competitors and customers, testified that its competition was genuine, direct and vigorous, and was reflected in prices and production. No practical witness was produced by the Government in opposition. Its contention is based on the size and asserted dominance of the Corporation—alleged power for evil, not the exertion of the power in evil. Or as counsel put it, "a combination may be illegal because of its purpose; it may be illegal because it acquires a dominating power, not as a result of normal growth and development, but as a result of a combination of competitors." Such composition and its resulting power constitute, in the view of the Government, the offence against the law, and yet it is admitted "no competitor came forward and said he had to accept the Steel Corporation's prices." But this absence of complaint counsel urge against the Corporation. Competitors, it is said, followed the Corporation's prices because they made money by the imitation. Indeed the imitation is urged as

an evidence of the Corporation's power. "Universal imitation," counsel assert, is "an evidence of power." In this concord of action, the contention is, there is the sinister dominance of the Corporation—"its extensive control of the industry is such that the others [independent companies] follow." Counsel, however, admit that there was "occasionally" some competition, but reject the suggestion that it extended practically to a war between the Corporation and the independents. Counsel say, "They [the Corporation is made a plural] called a few—they called 200 witnesses out of some forty thousand customers, and they expect with that customer evidence to overcome the whole train of price movement shown since the Corporation was formed." And "movement of prices" counsel explained "as shown by the published prices . . . they were the ones that the competitors were maintaining all during the interval."

The suggestion that lurks in the Government's contention that the acceptance of the Corporation's prices is the submission of impotence to irresistible power is, in view of the testimony of the competitors, untenable. They, as we have seen, deny restraint in any measure or illegal influence of any kind. The Government, therefore, is reduced to the assertion that the size of the Corporation, the power it may have, not the exertion of the power, is an abhorrence to the law, or as the Government says, "the combination embodied in the Corporation unduly restrains competition by its *necessary effect*, [the italics are the emphasis of the Government] and therefore is unlawful regardless of purpose." "A wrongful purpose," the Government adds, is "matter of aggravation." The illegality is statical, purpose or movement of any kind only its emphasis. To assent to that, to what extremes should we be led? Competition consists of business activities and ability—they

make its life; but there may be fatalities in it. Are the activities to be encouraged when militant, and suppressed or regulated when triumphant because of the dominance attained? To such paternalism the Government's contention, which regards power rather than its use the determining consideration, seems to conduct. Certainly conducts we may say, for it is the inevitable logic of the Government's contention that competition must not only be free, but that it must not be pressed to the ascendency of a competitor, for in ascendency there is the menace of monopoly.

We have pointed out that there are several of the Government's contentions which are difficult to represent or measure, and, the one we are now considering, that is the power is "unlawful regardless of purpose," is another of them. It seems to us that it has for its ultimate principle and justification that strength in any producer or seller is a menace to the public interest and illegal because there is potency in it for mischief. The regression is extreme, but short of it the Government cannot stop. The fallacy it conveys is manifest.

The Corporation was formed in 1901, no act of aggression upon its competitors is charged against it, it confederated with them at times in offence against the law, but abandoned that before this suit was brought, and since 1911 no act in violation of law can be established against it except its existence be such an act. /

. . . The Corporation is undoubtedly of impressive size and it takes an effort of resolution not to be affected by it or to exaggerate its influence. But we must adhere to the law and the law does not make mere size an offence or the existence of unexerted power an offence. It, we repeat, requires overt acts and trusts to its prohibition of them and its power to repress or punish them. It does not compel competition nor require all that is possible.

Admitting, however, that there is pertinent strength in the propositions of the Government, and in connection with them, we recall the distinction we made in the *Standard Oil Case* (221 U. S. 1, 77) between acts done in violation of the statute and a condition brought about which "in and of itself, is not only a continued attempt to monopolize, but also a monopolization." In such case, we declared, "the duty to enforce the statute" required "the application of broader and more controlling" remedies than in the other. And the remedies applied conformed to the declaration; there was prohibition of future acts and there was dissolution of "the combination found to exist in violation of the statute" in order to "neutralize the extension and continually operating force which the possession of the power unlawfully obtained" had "brought" and would "continue to bring about."

Are the case and its precepts applicable here? The Steel Corporation by its formation united under one control competing companies and thus, it is urged, a condition was brought about in violation of the statute, and therefore illegal and became a "continually operating force" with the "possession of power unlawfully obtained."

But there are countervailing considerations. We have seen whatever there was of wrong intent could not be executed, whatever there was of evil effect, was discontinued before this suit was brought; and this, we think, determines the decree. We say this in full realization of the requirements of the law. It is clear in its denunciation of monopolies and equally clear in its direction that the courts of the Nation shall prevent and restrain them (its language is "to prevent and restrain violations of" the act), but the command is necessarily submissive to the conditions which may exist and the usual powers of a court of equity to adapt its remedies to those conditions. In other words, it is not expected to enforce abstractions and do injury thereby, it may be, to the purpose of the law. It is this flexibility of discretion—indeed essential function—that makes its value in our jurisprudence—value in this case as in others. We do not mean to say that the law is not its own measure and that it can be disregarded, but only that the appropriate relief in each instance is remitted to a court of equity to determine, not, and let us be explicit in this, to advance a policy contrary to that of the law, but in submission to the law and its policy, and in execution of both. And it is certainly a matter for consideration that there was no legal attack on the Corporation until 1911, ten years after its formation and the commencement of its career. We do not, however speak of the delay simply as to its time—that there is estoppel in it because of its time—but on account of what was done during that time—the many millions of dollars spent, the development made, and the enterprises undertaken, the investments by the public that have been invited and are not to be ignored. . . .

* * * The prayer of the Government calls for not only a disruption of present conditions but the restoration of the conditions of twenty years ago, if not literally, substantially. Is there guidance to this in the *Standard Oil Case* and the *Tobacco Case* [221 U. S. 1, 106]? As an element in determining the answer we shall have to compare the cases with that at bar, but this can only be done in a general way. And the law necessarily must be kept in mind. No other comment of it is necessary. It has received so much exposition that it and all it prescribes and proscribes should be considered as a consciously directing presence.

The Standard Oil Company had its origin in 1882 and through successive forms of combinations and agencies it progressed in illegal power to the day of the decree, even attempting to circumvent by one of its forms the decision of a court against it. And its methods in using its power was of the kind that Judge Woolley described as "brutal," and of which practices, he said, the Steel Corporation was absolutely guiltless. We have enumerated them and this reference to them is enough. And of the practices this court said no disinterested mind could doubt that the purpose was "to drive others from the field and to exclude them from their right to trade and thus accomplish the mastery which was the end in view." It was further said that what was done and the final culmination "in the plan of the New Jersey corporation" made "manifest the continued existence of the intent . . . and . . . impelled the expansion of the New Jersey corporation." It was to this corporation, which represented the power and purpose of all that preceded, that the suit was addressed and the decree of the court was to apply. What we have quoted contrasts that case with this. The contrast is further emphasized by pointing out how in the case of the New Jersey corporation the original wrong was reflected

in and manifested by the acts which followed the organization, as described by the court. It said: "The exercise of the power which resulted from that organization fortifies the foregoing conclusions [as to monopoly, etc.], since the development which came, the acquisition here and there which ensued of every efficient means by which competition could have been asserted, the slow but resistless methods which followed by which means of transportation were absorbed and brought under control, the system of marketing which was adopted by which the country was divided into districts and the trade in each district in oil was turned over to a designated corporation within the combination and all others were excluded, all lead the mind up to a conviction of a purpose and intent which we think is so certain as practically to cause the subject not to be within the domain of reasonable contention."

The *Tobacco Case* has the same bad distinctions as the *Standard Oil Case*. The illegality in which it was formed (there were two American Tobacco Companies, but we use the name as designating the new company as representing the combinations of the suit) continued, indeed progressed in intensity and defiance to the moment of decree. And it is the intimation of the opinion if not its direct assertion that the formation of the company (the word "combination" is used) was preceded by the intimidation of a trade war "inspired by one or more of the minds which brought about and became parties to that combination." In other words the purpose of the combination was signalled to competitors and the choice presented to them was submission or ruin, to become parties to the illegal enterprise or be driven "out of the business." This was the purpose and the achievement, and the processes by which achieved this court enumerated to be the formation of new companies, taking stock in others to obscure the result actually attained, but always to monopolize and retain power in the hands of the few and mastery of the trade; putting control in the hands of seemingly independent corporations as barriers to the entry of others into the trade; the expenditure of millions upon millions in buying out plants not to utilize them but to close them; by constantly recurring stipulations by which numbers of persons, whether manufacturers, stockholders or employees, were required to bind themselves, generally for long periods, not to compete in the future. In the *Tobacco Case*, therefore, as in the *Standard Oil Case*, the court had to deal with a persistent and systematic lawbreaker masquerading under legal forms, and which not only had to be stripped of its disguises but arrested in its illegality. A decree of dissolution was the manifest instrumentality and inevitable. We think it would be a work of sheer supererogation to point out that a decree in that case or in the *Standard Oil Case* furnishes no example for a decree in this.

In conclusion we are unable to see that the public interest will be served by yielding to the contention of the Government respecting the dissolution of the company or the separation from it of some of its subsidiaries; and we do see in a contrary conclusion a risk of injury to the public interest, including a material disturbance of, and, it may be serious detriment to, the foreign trade. And in submission to the policy of the law and its fortifying prohibitions the public interest is of paramount regard.

We think, therefore, that the decree of the District Court should be affirmed.

So ordered.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BRANDEIS took no part in the consideration or decision of the case.

MR. JUSTICE DAY dissenting.

This record seems to me to leave no fair room for a doubt that the defendants, the United States Steel Corporation and the several subsidiary corporations which make up that organization, were formed in violation of the Sherman Act. I am unable to accept the conclusion which directs a dismissal of the bill instead of following the well-settled practice, sanctioned by previous decisions of this court, requiring the dissolution of combinations made in direct violation of the law.

I agree that the act offers no objection to the mere size of a corporation, nor to the continued exertion of its lawful power, when that size and power have been obtained by lawful means and developed by natural growth, although its resources, capital and strength may give to such corporation a dominating place in the business and industry with which it is concerned. It is entitled to maintain its size and the power that legitimately goes with it, provided no law has been transgressed in obtaining it. But I understand the reiterated decisions of this court construing the Sherman Act to hold that this power may not legally be derived from conspiracies, combinations, or contracts in restraint of trade. To permit this would be to practically annul the Sherman Law by judicial decree. This principle has been so often declared by the decisions that it is only necessary to refer to some of them. It is the scope of such combinations, and their power to suppress and stifle competition and create or tend to create monopolies, which, as we have declared so often as to make its reiteration monotonous, it was the purpose of the Sherman Act to condemn, including all combinations and conspiracies to restrain the free and natural flow of trade in the channels of interstate commerce. *Pearsall* v. *Great Northern Ry. Co.*, 161 U. S. 646, 676, 677; *Trans-Missouri Freight Assn. Case*, 166 U. S. 290, 324; *Northern Securities Case*, 193 U. S. 197; *Addyston Pipe Co.* v. *United States*, 175 U. S. 211, 238; . . . .

Nor can I yield assent to the proposition that this combination has not acquired a dominant position in the trade which enables it to control prices and production when it sees fit to exert its power. Its total assets on December 31, 1913, were in excess of $1,800,000,000; its outstanding capital stock was $868,583,600; its surplus $151,798,428. Its cash on hand ordinarily was $75,000,000; this sum alone exceeded the total capitalization of any of its competitors, and with a single exception, the total capitalization and surplus of any one of them. That such an organization thus fortified and equipped could if it saw fit dominate the trade and control competition would seem to be a business proposition too plain to require extended argument to support it. Its resources, strength and comprehensive ownership of the means of production enable it to adopt measures to do again as it has done in the past, that is, to effectually dominate and control the steel business of the country. From the earliest decisions of this court it has been declared that it was the effective power of such organizations to control and restrain competition and the freedom of trade that Congress intended to limit and control. That the exercise of the power may be withheld, or exerted with forbearing benevolence, does not place such combinations beyond the authority of the statute which was intended to prohibit their formation,

and when formed to deprive them of the power unlawfully attained.

It seems to me that if this act is to be given effect, the bill, under the findings of fact made by the court, should not be dismissed, and the cause should be remanded to the District Court, where a plan of effective and final dissolution of the corporations should be enforced by a decree framed for that purpose.

Mr. Justice Pitney and Mr. Justice Clarke concur in this dissent.

UNITED STATES v. TRENTON POTTERIES CO.
273 U.S. 392 (1927)

MR. JUSTICE STONE delivered the opinion of the Court.

Respondents, twenty individuals and twenty-three corporations, were convicted in the district court for southern New York of violating the Sherman Anti-Trust Law, Act of July 2, 1890, c. 647, 26 Stat. 209. The indictment was in two counts. The first charged a combination to fix and maintain uniform prices for the sale of sanitary pottery, in restraint of interstate commerce; the second, a combination to restrain interstate commerce by limiting sales of pottery to a special group known to respondents as "legitimate jobbers." On appeal, the court of appeals for the second circuit reversed the judgment of conviction on both counts on the ground that there were errors in the conduct of the trial. 300 Fed. 550. This Court granted certiorari. 266 U. S. 597. Jud. Code, § 240.

Respondents, engaged in the manufacture or distribution of 82 per cent. of the vitreous pottery fixtures produced in the United States for use in bathrooms and lavatories, were members of a trade organization known as the Sanitary Potters' Association. Twelve of the corporate respondents had their factories and chief places of business in New Jersey; one was located in California and the others were situated in Illinois, Michigan, West Virginia, Indiana, Ohio and Pennsylvania. Many of them sold and delivered their product within the southern district of New York and some maintained sales offices and agents there.

There is no contention here that the verdict was not supported by sufficient evidence that respondents, controlling some 82 per cent. of the business of manufacturing and distributing in the United States vitreous pottery of the type described, combined to fix prices and to limit sales in interstate commerce to jobbers.

The issues raised here by the government's specification of errors relate only to the decision of the court of appeals upon its review of certain rulings of the district court made in the course of the trial. It is urged that the court below erred in holding in effect (1) that the trial court should have submitted to the jury the question whether the price agreement complained of constituted an unreasonable restraint of trade; (2) that the trial court erred in failing to charge the jury correctly on the question of venue; and (3) that it erred also in the admission and exclusion of certain evidence.

REASONABLENESS OF RESTRAINT.

The trial court charged, in submitting the case to the jury, that if it found the agreements or combination complained of, it might return a verdict of guilty without regard to the reasonableness of the prices fixed, or the good intentions of the combining units, whether prices were actually lowered or raised or whether sales were restricted to the special jobbers, since both agreements of themselves were unreasonable restraints. These instructions repeated in various forms applied to both counts of the indictment. The trial court refused various requests to charge that both the agreement to fix prices and the agreement to limit sales to a particular group, if found, did not in themselves constitute violations of law unless it was also found that they unreasonably restrained interstate commerce. In particular the court refused the request to charge the following:

"The essence of the law is injury to the public. It is not every restraint of competition and not every restraint of trade that works an injury to the public; it is only an undue and unreasonable restraint of trade that has such an effect and is deemed to be unlawful."

Other requests of similar purport were refused including a quotation from the opinion of this Court in *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238.

The court below held specifically that the trial court erred in refusing to charge as requested and held in effect that the charge as given on this branch of the case was erroneous. This determination was based upon the assumption that the charge and refusals could be attributed only to a mistaken view of the trial judge, expressed in denying a motion at the close of the case to quash and dismiss the indictment, that the "rule of reason" announced in *Standard Oil Co.* v. *United States*, 221 U. S. 1, and in *American Tobacco Co.* v. *United States*, 221 U. S. 106, which were suits for injunctions, had no application in a criminal prosecution. Compare *Nash* v. *United States*, 229 U. S. 373.

This disposition of the matter ignored the fact that the trial judge plainly and variously charged the jury that the combinations alleged in the indictment, if found, were violations of the statute as a matter of law, saying:

". . . the law is clear that an agreement on the part of the members of a combination controlling a substantial part of an industry, upon the prices which the members are to charge for their commodity, is in itself an undue and unreasonable restraint of trade and commerce; . . ."

If the charge itself was correctly given and adequately covered the various aspects of the case, the refusal to

charge in another correct form or to quote to the jury extracts from opinions of this Court was not error, nor should the court below have been concerned with the wrong reasons that may have inspired the charge, if correctly given. The question therefore to be considered here is whether the trial judge correctly withdrew from the jury the consideration of the reasonableness of the particular restraints charged.

That only those restraints upon interstate commerce which are unreasonable are prohibited by the Sherman Law was the rule laid down by the opinions of this Court in the *Standard Oil* and *Tobacco* cases. But it does not follow that agreements to fix or maintain prices are reasonable restraints and therefore permitted by the statute, merely because the prices themselves are reasonable. Reasonableness is not a concept of definite and unchanging content. Its meaning necessarily varies in the different fields of the law, because it is used as a convenient summary of the dominant considerations which control in the application of legal doctrines. Our view of what is a reasonable restraint of commerce is controlled by the recognized purpose of the Sherman Law itself. Whether this type of restraint is reasonable or not must be judged in part at least in the light of its effect on competition, for whatever difference of opinion there may be among economists as to the social and economic desirability of an unrestrained competitive system, it cannot be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition. See *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290; *Standard Oil Co.* v. *United States*, *supra*; *American Column Co.* v. *United States*, 257 U. S. 377, 400; *United States* v. *Linseed Oil Co.*, 262 U. S. 371, 388; *Eastern States Lumber Association* v. *United States*, 234 U. S. 600, 614.

The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions. Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies. Compare *United States* v. *Cohen Grocery Co.*, 255 U. S. 81; *International Harvester Co.* v. *Kentucky*, 234 U. S. 216; *Nash* v. *United States, supra*. Thus viewed, the Sherman law is not only a prohibition against the infliction of a particular type of public injury. It "is a limitation of rights, . . . which may be pushed to evil

consequences and therefore restrained." *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 49.

That such was the view of this Court in deciding the *Standard Oil* and *Tobacco* cases, and that such is the effect of its decisions both before and after those cases, does not seem fairly open to question. Beginning with *United States* v. *Trans-Missouri Freight Association, supra; United States* v. *Joint Traffic Association*, 171 U. S. 505, where agreements for establishing reasonable and uniform freight rates by competing lines of railroad were held unlawful, it has since often been decided and always assumed that uniform price-fixing by those controlling in any substantial manner a trade or business in interstate commerce is prohibited by the Sherman Law, despite the reasonableness of the particular prices agreed upon. In *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 237, a case involving a scheme for fixing prices, this Court quoted with approval the following passage from the lower court's opinion, (85 Fed. 271, 293):

". . . the affiants say that, in their opinion, the prices at which pipe has been sold by defendants have been reasonable. We do not think the issue an important one, because, as already stated, we do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract." See also, p. 291.

In *Swift & Co.* v. *United States*, 196 U. S. 375, this Court approved and affirmed a decree which restrained the defendants "by combination, conspiracy or contract [from] raising or lowering prices or fixing uniform prices at which the said meats will be sold, either directly or through their respective agents." In *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, 408, decided at the same term of court as the *Standard Oil* and *Tobacco* cases, contracts fixing reasonable resale prices were declared unenforcible upon the authority of cases involving price-fixing arrangements between competitors.

That the opinions in the *Standard Oil* and *Tobacco* cases were not intended to affect this view of the illegality of price-fixing agreements affirmatively appears from the opinion in the *Standard Oil* case where, in considering the *Freight Association* case, the court said (p. 65):

"That as considering the contracts or agreements, their necessary effect and the character of the parties by whom they were made, they were clearly restraints of trade within the purview of the statute, they could not be taken out of that category by indulging in general reasoning as to the expediency or non-expediency of having made the contracts or the wisdom or want of wisdom of the statute which prohibited their being made. That is to say, the cases but decided that the nature and character of the contracts, creating as they did a conclusive presumption which brought them within the statute, such result was not to be disregarded by the substitution of a judicial appreciation of what the law ought to be for the plain judicial duty of enforcing the law as it was made."

* * *

Respondents rely upon *Chicago Board of Trade* v. *United States, supra,* in which an agreement by members of the Chicago Board of Trade controlling prices during certain hours of the day in a special class of grain contracts and affecting only a small proportion of the commerce in question was upheld. The purpose and effect of the agreement there was to maintain for a part of each business day the price which had been that day determined by open competition on the floor of the Exchange. That decision, dealing as it did with a regulation of a

board of trade, does not sanction a price agreement among competitors in an open market such as is presented here.

The charge of the trial court, viewed as a whole, fairly submitted to the jury the question whether a price-fixing agreement as described in the first count was entered into by the respondents. Whether the prices actually agreed upon were reasonable or unreasonable was immaterial in the circumstances charged in the indictment and necessarily found by the verdict. The requested charge which we have quoted, and others of similar tenor, while true as abstract propositions, were inapplicable to the case in hand and rightly refused.

The first count being sufficient and the case having been properly submitted to the jury, we may disregard certain like objections relating to the second count. The jury returned a verdict of guilty generally on both counts. Sentence was imposed in part on the first count and in part on both counts, to run concurrently. The combined sentence on both counts does not exceed that which could have been imposed on one alone. There is nothing in the record to suggest that the verdict of guilty on the first count was in any way induced by the introduction of evidence upon the second. In these circumstances the judgment must be sustained if either one of the two counts is sufficient to support it. *Claassen* v. *United States,* 142 U. S. 140; *Locke* v. *United States,* 7 Cranch 339, 344; *Clifton* v. *United States,* 4 How. 242, 250.

QUESTION OF VENUE.

The trial court instructed the jury in substance that if it found that the respondents did conspire to restrain trade as charged in the indictment, then it was immaterial whether the agreements were ever actually carried out, whether the purpose of the conspiracy was accomplished in whole or in part, or whether an effort was made to carry the object of the conspiracy into effect. The court below recognized that this charge was a correct statement of the general proposition of law that the offensive agreement or conspiracy alone, whether or not followed by efforts to carry it into effect, is a violation of the Sherman Law. *Nash* v. *United States, supra.* And it was clearly the intent and purpose of the trial judge to deal with that aspect of the case in giving it. But the appellate court held the charge erroneous and ground for reversal because the trial judge did not go further and charge the necessity of finding overt acts within the southern district of New York to satisfy jurisdictional requirements. Since the indictment did not charge the formation of the conspiracy or agreement within that district, the court was without jurisdiction unless some act pursuant to the agreement or conspiracy took place there. *Hyde* v. *United States,* 225 U. S. 347; *Easterday* v. *McCarthy,* 256 Fed. 651.

This part of the charge, so far as respondents deemed it objectionable in that the absence of efforts to carry out the agreement might be taken into account in determining whether it was in fact made, was promptly remedied by an instruction, that the jury might consider all the facts in determining whether a combination or conspiracy had been entered into. But respondents made no request to charge with respect to venue or the jurisdictional necessity of overt acts within the district. Neither did they except to the charge as given nor move to dismiss the indictment on that ground. A motion in arrest of judgment was directed to the jurisdictional sufficiency of the indictment but the adequacy of the evidence establishing jurisdiction was not questioned.

The reason for this complete failure of respondents to point out the objection to the charge now urged, or otherwise to suggest to the trial court the desirability of a charge upon the facts necessary to satisfy jurisdictional requirements is made plain by an inspection of the record.

In point of substance, the jurisdictional facts were not in issue. Although the respondents were widely scattered, an important market for their manufactured product was within the southern district of New York, which was therefore a theatre for the operation of their conspiracy, adjacent to the home of the largest group of the respondents located in a single state. The indictment sufficiently alleged that the conspiracy was carried on in the southern district of New York by combined action under it. The record is replete with the evidence of witnesses for both prosecution and defense, including some of the accused, who testified without contradiction to the course of business within the district, the circulation of price bulletins, and the making of sales there by some of the members of the association organized by respondents. The secretary testified that, acting for the association, he effected sales within the district. All of these were overt acts sufficient for jurisdictional requirements. In such a state of the record, the appellate court might well have refused to exercise its discretionary power to disturb the conviction because of the trial court's failure to give a charge not requested. If this failure to guard against the misinterpretation of a correct charge is to be deemed error it was of such slight consequence in the actual circumstances of the case and could have been so easily corrected by the trial judge had his attention been directed to it, that the respondents should not have been permitted to reap the benefit of their own omission.

QUESTIONS OF EVIDENCE.

Omitted

It follows that the judgment of the circuit court of appeals must be reversed and the judgment of the district court reinstated.

Reversed.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER dissent.

MR. JUSTICE BRANDEIS took no part in the consideration or decision of this case.

APPALACHIAN COALS, INC. v. UNITED STATES
288 U.S. 344 (1938)

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

This suit was brought to enjoin a combination alleged to be in restraint of interstate commerce in bituminous coal and in attempted monopolization of part of that commerce, in violation of §§ 1 and 2 of the Sherman Anti-Trust Act, 26 Stat. 209. The District Court, composed of three Circuit Judges, made detailed findings of fact and entered final decree granting the injunction. 1 F. Supp. 339. The case comes here on appeal. 28 U. S. C., 380.

Defendants, other than Appalachian Coals, Inc., are 137 producers of bituminous coal in eight districts (called for

convenience Appalachian territory) lying in Virginia, West Virginia, Kentucky and Tennessee. These districts, described as the Southern High Volatile Field, form part of the coal-bearing area stretching from central and western Pennsylvania through eastern Ohio, western Maryland, West Virginia, southwestern Virginia, eastern Kentucky, eastern Tennessee, and northeastern Alabama. In 1929 (the last year for which complete statistics were available) the total production of bituminous coal east of the Mississippi river was 484,786,000 tons, of which defendants mined 58,011,367 tons, or 11.96 per cent. In the so-called Appalachian territory and the immediately surrounding area, the total production was 107,008,209 tons, of which defendants' production was 54.21 per cent, or 64 per cent if the output of 'captive' mines (16,455,001 tons) be deducted.[1] With a further deduction of 12,000,000 tons of coal produced in the immediately surrounding territory, which, however, is not essentially different from the particular area described in these proceedings as Appalachian territory, defendants' production in the latter region was found to amount to 74.4 per cent.

The challenged combination lies in the creation by the defendant producers of an exclusive selling agency. This agency is the defendant Appalachian Coals, Inc., which may be designated as the Company. Defendant producers own all its capital stock, their holdings being in

[1] "Captive" mines are thus designated as they produce chiefly for the consumption of the owners.

proportion to their production. The majority of the common stock, which has exclusive voting right, is held by seventeen defendants. By uniform contracts, separately made, each defendant producer constitutes the Company an exclusive agent for the sale of all coal (with certain exceptions) which the producer mines in Appalachian territory.[8] The Company agrees to establish standard classifications, to sell all the coal of all its principals at the best prices obtainable and, if all cannot be sold, to apportion orders upon a stated basis. The plan contemplates that prices are to be fixed by the officers of the Company at its central office, save that, upon contracts calling for future deliveries after sixty days, the Company must obtain the producer's consent. The Company is to be paid a commission of ten per cent of the gross selling prices f. o. b. at the mines, and guarantees accounts. In order to preserve their existing sales' outlets, the producers may designate sub-agents, according to an agreed form of contract, who are to sell upon the terms and prices established by the Company and are to be allowed by the Company commissions of eight per cent. The Company has not yet begun to operate as selling agent; the contracts with it run to April 1, 1935, and from year to year thereafter unless terminated by either party on six months' notice.

The Government's contention, which the District Court sustained, is that the plan violates the Sherman Anti-Trust Act,—in the view that it eliminates competition among the defendants themselves and also gives the selling agency power substantially to affect and control the price of bituminous coal in many interstate markets. On the latter point the District Court made the general finding that "this elimination of competition and con-

[8] Exception is made of deliveries on contracts then outstanding and of coal used in the operations of defendant's mines or sold to its employees.

certed action will affect market conditions, and have a tendency to stabilize prices and to raise prices to a higher level than would prevail under conditions of free competition." The court added that the selling agency "will not have monopoly control of any market nor the power to fix monopoly prices."

Defendants insist that the primary purpose of the formation of the selling agency was to increase the sale, and thus the production, of Appalachian coal through better methods of distribution, intensive advertising and research; to achieve economies in marketing, and to eliminate abnormal, deceptive and destructive trade practices. They disclaim any intent to restrain or monopolize interstate commerce; and in justification of their design they point to the statement of the District Court that "it is but due to defendants to say that the evidence in the case clearly shows that they have been acting fairly and openly, in an attempt to organize the coal industry and to relieve the deplorable conditions resulting from overexpansion, destructive competition, wasteful trade practices, and the inroads of competing industries." 1 F. Supp., p. 341. Defendants contend that the evidence establishes that the selling agency will not have the power to dominate or fix the price of coal in any consuming market; that the price of coal will continue to be set in an open competitive market; and that their plan by increasing the sale of bituminous coal from Appalachian territory will promote, rather than restrain, interstate commerce.

First. There is no question as to the test to be applied in determining the legality of the defendants' conduct. The purpose of the Sherman Anti-Trust Act is to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, to afford protection from the subversive or coercive influences of monopolistic endeavor. As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape. The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness. They call for vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce, but they do not seek to establish a mere delusive liberty either by making impossible the normal and fair expansion of that commerce or the adoption of reasonable measures to protect it from injurious and destructive practices and to promote competition upon a sound basis. The decisions establish, said this Court in *Nash* v. *United States*, 229 U. S. 373, 376, " that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade." See *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238; *Window Glass Manufacturers* v. *United States*, 263 U. S. 403, 412; *Maple Flooring Association* v. *United States*, 268 U. S. 563, 583, 584; *Paramount Famous Corp.* v. *United States*, 282 U. S. 30, 43; *Standard Oil Co.* v. *United States*, 283 U. S. 163, 169.

In applying this test, a close and objective scrutiny of particular conditions and purposes is necessary in each case. Realities must dominate the judgment. The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it. " The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains

competition. Every agreement concerning trade, every regulation of trade, restrains." *Chicago Board of Trade* v. *United States, supra.* The familiar illustrations of partnerships, and enterprises fairly integrated in the interest of the promotion of commerce, at once occur. The question of the application of the statute is one of intent and effect, and is not to be determined by arbitrary assumptions. It is therefore necessary in this instance to consider the economic conditions peculiar to the coal industry, the practices which have obtained, the nature of defendant's plan of making sales, the reasons which led to its adoption, and the probable consequences of the carrying out of that plan in relation to market prices and other matters affecting the public interest in interstate commerce in bituminous coal.

Second. The findings of the District Court, upon abundant evidence, leave no room for doubt as to the economic condition of the coal industry. That condition, as the District Court states, " for many years has been indeed deplorable." Due largely to the expansion under the stimulus of the Great War, " the bituminous mines of the country have a developed capacity exceeding 700,000,000 tons " to meet a demand " of less than 500,000,000 tons." In connection with this increase in surplus production, the consumption of coal in all the industries which are its largest users has shown a substantial relative decline. The actual decrease is partly due to the industrial condition but the relative decrease is progressing, due entirely to other causes. Coal has been losing markets to oil, natural gas and water power and has also been losing ground due to greater efficiency in the use of coal. The change has been more rapid during the last few years by reason of the developments of both oil and gas fields. The court below found that " Based upon the assumption that bituminous coal would have maintained the upward trend prevailing between 1900 and 1915 in percentage of total energy supply in the United States, the total substitution between 1915 and 1930 has been equal to more than 200,000,000 tons per year." While proper allowance must be made for differences in consumption in different parts of the country,[5] the adverse influence upon the coal industry, including the branch of it under review, of the use of substitute fuels and of improved methods is apparent.

This unfavorable condition has been aggravated by particular practices. One of these relates to what is called "distress coal." The greater part of the demand is for particular sizes of coal such as nut and slack, stove coal, egg coal, and lump coal. Any one size cannot be prepared without making several sizes. According to the finding of the court below, one of the chief problems of the industry is thus involved in the practice "of producing different sizes of coal even though orders are on hand for only one size, and the necessity of marketing all sizes." Usually there are no storage facilities at the mines and the different sizes produced are placed in cars on the producer's tracks, which may become so congested that either production must be stopped or the cars must be moved regardless of demand. This leads to the practice of shipping unsold coal to billing points or on consignment to the producer or his agent in the consuming territory. If the coal is not sold by the time it reaches its destination, and is not unloaded promptly, it becomes subject to demurrage charges which may exceed the amount obtainable for the coal unless it is sold quickly. The court found that this type of "distress coal" presses on the market at all times, includes all sizes and grades, and the total amount from all causes is of substantial quantity.

"Pyramiding" of coal is another "destructive practice." It occurs when a producer authorizes several persons to sell the same coal, and they may in turn offer it for sale to other dealers. In consequence "the coal competes with itself, thereby resulting in abnormal and destructive competition which depresses the price for all coals in the market." Again, there is misrepresentation by some producers in selling one size of coal and shipping another size which they happen to have on hand. "The lack of standardization of sizes and the misrepresentation as to sizes" are found to have been injurious to the coal industry as a whole. The court added, however, that the evidence did not show the existence of any trade war or widespread fraudulent conduct. The industry also suffers through "credit losses," which are due to the lack of agencies for the collection of comprehensive data with respect to the credits that can safely be extended.

In addition to these factors, the District Court found that organized buying agencies, and large consumers purchasing substantial tonnages, "constitute unfavorable forces." "The highly organized and concentrated buying power which they control and the great abundance of coal available have contributed to make the market for coal a buyers' market for many years past."

It also appears that the "unprofitable condition" of the industry has existed particularly in the Appalachian territory where there is little local consumption, as the region is not industrialized. "The great bulk of the coal there produced is sold in the highly competitive region east of the Mississippi river and north of the Ohio river under an adverse freight rate which imposes an unfavorable differential from 35 cents to 50 cents per ton."[6]

[6] Defendants insist that "the real spread is from 25 cents to $1.84 per ton."

And in a graphic summary of the economic situation, the court found that "numerous producing companies have gone into bankruptcy or into the hands of receivers, many mines have been shut down, the number of days of operation per week have been greatly curtailed, wages to labor have been substantially lessened, and the States in which coal producing companies are located have found it increasingly difficult to collect taxes."

Third. The findings also fully disclose the proceedings of the defendants in formulating their plan and the reasons for its adoption. The serious economic conditions had led to discussions among coal operators and state and national officials, seeking improvement of the industry. Governors of States had held meetings with coal producers. The limits of official authority were apparent. A general meeting of producers, sales agents and attorneys was held in New York in October, 1931, a committee was appointed and various suggestions were considered. At a second general meeting in December, 1931, there was further discussion and a report which recommended the organization of regional sales agencies, and was supported by the opinion of counsel as to the legality of proposed forms of contract, was approved. Committees to present the plan to producers were constituted for eighteen producing districts including the eight districts in Appalachian territory. Meetings of the representatives of the latter districts resulted in the organization of defendant Appalachian Coals, Inc. It was agreed that a minimum of 70 per cent and a maximum of 80 per cent of the commercial tonnage of the territory should be secured before the plan should become effective. Approximately 73 per cent was obtained. A resolution to fix the maximum at 90 per cent was defeated. The maximum of

80 per cent was adopted because a majority of the producers felt that an organization with a greater degree of control might unduly restrict competition in local markets. The minimum of 70 per cent was fixed because it was agreed that the organization would not be effective without this degree of control. The court below also found that it was the expectation that similar agencies would be organized in other producing districts including those which were competitive with Appalachian coal, and that it was "the particular purpose of the defendants in the Appalachian territory to secure such degree of control therein as would eliminate competition among the 73 per cent of the commercial production." But the court added: "However, the formation of Appalachian Coals was not made dependent upon the formation of other regional selling agencies and there is no evidence of a purpose, understanding or agreement among the defendants that in the event of the formation of other similar regional sales agencies there would be any understanding or agreement, direct or indirect, to divide the market territory between them or to limit production or to fix the price of coal in any market or to coöperate in any way." When, in January, 1932, the Department of Justice announced its adverse opinion, the producers outside Appalachian territory decided to hold their plans in abeyance pending the determination of the question by the courts. The District Court found that "the evidence tended to show that other selling agencies with a control of at least 70 per cent of the production in their respective districts will be organized if the petition in this case is dismissed"; that in that event "there will result an organization in most of the districts whose coal is or may be competitive with Appalachian coal; but the testimony tends to show that there will still be substantial, active competition in the sale of coal in all markets in which Appalachian coal is sold."

Defendants refer to the statement of purposes in their published plan of organization,—that it was intended to bring about "a better and more orderly marketing of the coals from the region to be served by this company (the selling agency) and better to enable the producers in this region, through the larger and more economic facilities of such selling agency, more equally to compete in the general markets for a fair share of the available coal business." The District Court found that among their purposes, defendants sought to remedy "the destructive practice of shipping coal on consignment without prior orders for the sale thereof, which results in the dumping of coal on the market irrespective of the demand"; "to eliminate the pyramiding of offers for the sale of coal"; to promote "the systematic study of the marketing and distribution of coal, the demand and the consumption and the kinds and grades of coal made and available for shipment by each producer in order to improve conditions"; to maintain an inspection and engineering department which would keep in constant contact with customers "in order to demonstrate the advantages and suitability of Appalachian coal in comparison with other competitive coals"; to promote an extensive advertising campaign which would show "the advantages of using coal as a fuel and the advantages of Appalachian coal particularly"; to provide a research department employing combustion engineers which would demonstrate "proper and efficient methods of burning coal in factories and in homes" and thus aid producers in their competition with substitute fuels; and to operate a credit department which would build up a record with respect to the "reliability of purchasers." The court also found that "Defendants believe that the result of all these activities would be the more economical sale of coal, and the economies would be more fully realized as the organization of the selling agent is perfected and developed." But in view of the designation of sub-agents, economies in selling expenses would be attained "only after a year or so of operation."

No attempt was made to limit production. The producers decided that it could not legally be limited and, in any event, it could not be limited practically. The finding is that "it was designed that the producer should produce and the selling agent should sell as much coal as possible." The importance of increasing sales is said to lie in the fact that the cost of production is directly related to the actual running time of the mines.

Fourth. Voluminous evidence was received with respect to the effect of defendants' plan upon market prices. As the plan has not gone into operation, there are no actual results upon which to base conclusions. The question is necessarily one of prediction. The court below found that, as between defendants themselves, competition would be eliminated. This was deemed to be the necessary consequence of a common selling agency with power to fix the prices at which it would make sales for its principals. Defendants insist that the finding is too broad and that the differences in grades of coal of the same sizes, and the market demands at different times, would induce competition between the coals sold by the agency "depending upon the use and the quality of the coals."

The more serious question relates to the effect of the plan upon competition between defendants and other producers. As already noted, the District Court found that "the great bulk" of the coal produced in Appalachian territory is sold "in the highly competitive region east of the Mississippi river and north of the Ohio river under an adverse freight rate." Elaborate statistics were introduced with respect to the production and distribution of bituminous coal and the transportation rates from the different producing sections to the consuming markets, as bearing upon defendants' competitive position, together with evidence as to the requirements of various sections and consumers and the relative advantages possessed by reason of the different qualities and uses of the coals produced. It would be impossible to make even a condensed statement of this evidence, (which has been carefully analyzed by both parties,) but an examination of it fails to disclose an adequate basis for the conclusion that the operation of the defendants' plan would produce an injurious effect upon competitive conditions, in view of the vast volume of coal available, the conditions of production, and the network of transportation facilities at immediate command. While strikes and interruptions of transportation may create temporary and abnormal dislocations, the bituminous coal industry under normal conditions affords most exceptional competitive opportunities. Figures as to developed and potential productive capacity are impressive. The court below found upon this point that the capacity of the mines in the Appalachian region operated by others than defendants is 82,660,760 tons, as against the capacity of defendants' mines of 86,628,880 tons, while the present yearly capacity of all mines in southern West Virginia, Virginia, eastern Kentucky and Tennessee is 245,-233,560 tons, based upon an eight-hour working day.

"This excess capacity over actual production," the court said, "could be brought into production at moderate expense and with reasonable promptness." As to potential, undeveloped capacity in Appalachian territory, the court found that in the eight districts in this region not held by any operating, or by any captive, company, there are approximately 760,000 acres containing more than 4,300,-000,000 tons of recoverable coal. In addition, in the same territory "owned by captive companies and not being operated, or owned by operating companies who are using only a very small proportion of their holdings," there is an additional 860,000 acres, containing more than 4,600,-000,000 tons of coal. Within the twenty-four counties in which defendants' mines are located, and immediately adjacent to them, on railroads already operating, "with the exception of short, feeder extensions," there are over 1,620,000 acres of coal bearing land, containing approximately 9,000,000,000 net tons of recoverable coal "comparable both in quality and mining conditions with the coal now being mined in that region." "The opening up of this acreage would involve only the extension of short branch lines from the railroads and the building of mining plants. The price of these lands at the present time would be less than half of the value of two or three years ago, and considerably less on a royalty basis. Coal produced from these districts is available for any market in which Appalachian coal is sold. Conditions in the coal industry are such that new companies are free to enter the business of producing and marketing coal in competition with existing companies." In connection with this proof of developed and potential capacity, the "highly organized and concentrated buying power" that can be exerted must also have appropriate consideration.[7]

[7] J. M. Dewberry, general coal and coke agent of the Louisville & Nashville Railroad, a large consumer of Appalachian coal, testified: "It is a well known fact today that the buying power of these large consumers of coal is more intelligent, more forceful, more far-reaching

Consumers testified that defendants' plan will be a benefit to the coal industry and will not restrain competition. Testimony to that effect was given by representatives of the Louisville & Nashville Railroad, the Norfolk & Western Railroad, and the Chesapeake & Ohio Railroad, " the largest railroad users of coal operating in the Appalachian region," and by representatives of large utility companies and manufacturing concerns.[8] There

than ever before in the history of the industry. And it just sounds to me like a joke for somebody to talk about Appalachian Coals or somebody else dictating the price that they are going to pay. They dictate their own price. The purchaser makes it. And he makes it because of the tremendous force and influence of his buying power. Why, it is nothing these days for one interest or one concern to buy several million tons of coal."

[8] The District Court in its findings, after referring to the railroads above mentioned, continues: "A representative of a large public utility company " (with extensive power lines in the middle west and on the Atlantic seaboard) " consuming annually approximately 2,485,000 tons of coal has stated that the organization and operation of Appalachian Coals, Inc. will not affect competition in the markets in which his company buys coal, and that it will have a beneficial effect on the coal industry. A representative of a power company operating throughout the State of Georgia . . . using from 30,000 to 125,000 tons of coal annually, has stated that the organization and operation of Appalachian Coals, Inc. will not restrain competition in the markets in which his company buys coal. A representative of the Carbide and Carbon Corporation which uses annually about 250,000 tons of bituminous coal, 100,000 tons of coke made from bituminous coal, and 40,000 to 50,000 tons of petroleum coke, and operating plants that consume coal at South Charleston, West Virginia; Niagara Falls, New York; Cleveland, Ohio; Sault Ste. Marie, Michigan; Indianapolis, Indiana, and Fremont and Fostoria, Ohio, has stated that the organization of Appalachian Coals, Inc., will have a beneficial effect in the coal industry and will not restrain competition in the markets in which his company buys coal. The largest purchaser of coal in the States of North Carolina, South Carolina, Georgia and eastern Tennessee who purchases approximately 600,000 tons of coal annually under normal conditions for use by textile mills, located in those States, has stated that the organization and operation of Appalachian

was similar testimony by wholesale and retail dealers in coal. There are 130 producers of coal other than defendants in Appalachian territory who sell coal commercially. There are also " a large number of mines that have been shut down and could be opened up by the owners on short notice." Competing producers testified that the operation of the selling agency, as proposed by defendants, would not restrain competition and would not hurt their business. Producers in western Pennsylvania, Alabama, Ohio and Illinois testified to like effect. Referring to this testimony, the court below added, " The small coal producer can, to some extent, and for the purpose of producing and marketing coal, produce coal more cheaply than many of the larger companies, and is not prevented by higher cost of operation from being a competitor in the market."

The Government criticises the " opinion testimony " introduced by defendants as relating to a competitive situation not within the experience of the witnesses, and also animadverts upon their connections and interests, but the Government did not offer testimony of opposing opinions as to the effect upon prices of the operation of the selling agency. Consumers who testified for the Government explained their dependence upon coal from Appalachian territory.

The District Court commented upon the testimony of officers of the selling agency to the effect " that the organization would not be able to fix prices in an arbitrary way but, by the elimination of certain abuses, and by better advertising and sale organization, the producers would get more in the aggregate for their coal." " Other witnesses for the defendants " said the court, " indicated that there would be some tendency to raise the price but

Coals, Inc. will not control or dominate the price in the markets in which he purchases coal, and that he will be able to purchase coal in an open and competitive market."

that the degree of increase would be affected by other competitors in the coal industry and by producers of coal substitutes."

Fifth. We think that the evidence requires the following conclusions:

(1). With respect to defendant's purposes, we find no warrant for determining that they were other than those they declared. Good intentions will not save a plan otherwise objectionable, but knowledge of actual intent is an aid in the interpretation of facts and prediction of consequences. *Chicago Board of Trade* v. *United States, supra.* The evidence leaves no doubt of the existence of the evils at which defendants' plan was aimed. The industry was in distress. It suffered from over-expansion and from a serious relative decline through the growing use of substitute fuels. It was afflicted by injurious practices within itself,—practices which demanded correction. If evil conditions could not be entirely cured, they at least might be alleviated. The unfortunate state of the industry would not justify any attempt unduly to restrain competition or to monopolize, but the existing situation prompted defendants to make, and the statute did not preclude them from making, an honest effort to remove abuses, to make competition fairer, and thus to promote the essential interests of commerce. The interests of producers and consumers are interlinked. When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry. So far as actual purposes are concerned, the conclusion of the court below was amply supported that defendants were engaged in a fair and open endeavor to aid the industry in a measurable recovery from its plight. The inquiry then, must be whether despite this objective the inherent nature of their plan was such as to create an undue restraint upon interstate commerce.

(2). The question thus presented chiefly concerns the effect upon prices. The evidence as to the conditions of the production and distribution of bituminous coal, the available facilities for its transportation, the extent of developed mining capacity, and the vast potential undeveloped capacity, makes it impossible to conclude that defendants through the operation of their plan will be able to fix the price of coal in the consuming markets. The ultimate finding of the District Court is that the defendants " will not have monopoly control of any market, nor the power to fix monopoly prices "; and in its opinion the court stated that " the selling agency will not be able, we think, to fix the market price of coal." Defendants' coal will continue to be subject to active competition. In addition to the coal actually produced and seeking markets in competition with defendants' coal, enormous additional quantities will be within reach and can readily be turned into the channels of trade if an advance of price invites that course. While conditions are more favorable to the position of defendants' group in some markets than in others, we think that the proof clearly shows that, wherever their selling agency operates, it will find itself confronted by effective competition backed by virtually inexhaustible sources of supply, and will also be compelled to cope with the organized buying power of large consumers. The plan cannot be said either to contemplate or to involve the fixing of market prices.

The contention is, and the court below found, that while defendants could not fix market prices, the concerted action would " affect " them, that is, that it would have a tendency to stabilize market prices and to raise them to a higher level than would otherwise obtain. But the facts found do not establish, and the evidence fails to show, that any effect will be produced which in the circumstances of this industry will be detrimental to fair competition. A coöperative enterprise, otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions, where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities. Voluntary action to rescue and preserve these opportunities, and thus to aid in relieving a depressed industry and in reviving commerce by placing competition upon a sounder basis, may be more efficacious than an attempt to provide remedies through legal processes. The fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, does not mean that the abuses should go uncorrected or that coöperative endeavor to correct them necessarily constitutes an unreasonable restraint of trade. The intelligent conduct of commerce through the acquisition of full information of all relevant facts may properly be sought by the coöperation of those engaged in trade, although stabilization of trade and more reasonable prices may be the result. *Maple Flooring Association* v. *United States, supra; Cement Manufacturers Association* v. *United States*, 268 U. S. 588, 604. Putting an end to injurious practices, and the consequent improvement of the competitive position of a group of producers, is not a less worthy aim and may be entirely consonant with the public interest, where the group must still meet effective competition in a fair market and neither seeks nor is able to effect a domination of prices.

Decisions cited in support of a contrary view were addressed to very different circumstances from those presented here. They dealt with combinations which on the particular facts were found to impose unreasonable restraints through the suppression of competition, and in actual operation had that effect. *American Column & Lumber Co.* v. *United States*, 257 U. S. 377; *United States*

v. *American Linseed Oil Co.*, 262 U. S. 371. Compare *Maple Flooring Association* v. *United States, supra,* at pp. 579–582. In *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, the combination was effected by those who were in a position to deprive, and who sought to deprive, the public in a large territory of the advantages of fair competition, and was for the actual purpose, and had the result, of enhancing prices,—which in fact had been unreasonably increased. *Id.*, pp. 237, 238. In *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, defendants, who controlled 82 per cent of the business of manufacturing and distributing vitreous pottery in the United States, had combined to fix prices. It was found that they had the power to do this and had exerted it. The defense that the prices were reasonable was overruled, as the court held that the power to fix prices involved "power to control the market and to fix arbitrary and unreasonable prices," and that in such a case the difference between legal and illegal conduct could not "depend upon so uncertain a test" as whether the prices actually fixed were reasonable,—a determination which could "be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies." See *United States* v. *Cohen Grocery Co.*, 255 U. S. 81. In the instant case there is, as we have seen, no intent or power to fix prices, abundant competitive opportunities will exist in all markets where defendants' coal is sold, and nothing has been shown to warrant the conclusion that defendants' plan will have an injurious effect upon competition in these markets.

(3). The question remains whether, despite the foregoing conclusions, the fact that the defendants' plan eliminates competition between themselves is alone sufficient to condemn it. Emphasis is placed upon defendants' control of about 73 per cent of the commercial production in Appalachian territory. But only a small percentage of that production is sold in that territory. The finding of the court below is that "these coals are mined in a region where there is very little consumption." Defendants must go elsewhere to dispose of their products, and the extent of their production is to be considered in the light of the market conditions already described. Even in Appalachian territory it appears that the developed and potential capacity of other producers will afford effective competition. Defendants insist that on the evidence adduced as to their competitive position in the consuming markets, and in the absence of proof of actual operations showing an injurious effect upon competition, either through possession or abuse of power, no valid objection could have been interposed under the Sherman Act if the defendants had eliminated competition between themselves by a complete integration of their mining properties in a single ownership. *United States* v. *U. S. Steel Corp.*, 251 U. S. 417; *United States* v. *International Harvester Co.*, 274 U. S. 693. We agree that there is no ground for holding defendants' plan illegal merely because they have not integrated their properties and have chosen to maintain their independent plants, seeking not to limit but rather to facilitate production. We know of no public policy, and none is suggested by the terms of the Sherman Act, that, in order to comply with the law, those engaged in industry should be driven to unify their properties and businesses, in order to correct abuses which may be corrected by less drastic measures. Public policy might indeed be deemed to point in a different direction. If the mere size of a single, embracing entity is not enough to bring a combination in corporate form within the statutory inhibition, the mere number and extent of the production of those engaged in a coöperative endeavor to remedy evils which may exist in an industry, and to improve competitive conditions, should not be regarded as producing illegality. The argument that integration may be considered a normal expansion of business, while a combination of independent producers in a common selling agency should be treated as abnormal—that one is a legitimate enterprise and the other is not—makes but an artificial distinction. The Anti-Trust Act aims at substance. Nothing in theory or experience indicates that the selection of a common selling agency to represent a number of producers should be deemed to be more abnormal than the formation of a huge corporation bringing various independent units into one ownership. Either may be prompted by business exigencies, and the statute gives to neither a special privilege. The question in either case is whether there is an unreasonable restraint of trade or an attempt to monopolize. If there is, the combination cannot escape because it has chosen corporate form; and, if there is not, it is not to be condemned because of the absence of corporate integration. As we stated at the outset, the question under the Act is not simply whether the parties have restrained competition between themselves but as to the nature and effect of that restraint. *Chicago Board of Trade* v. *United States, supra; United States* v. *Terminal Association*, 224 U. S. 383; *Window Glass Manufacturers* v. *United States, supra; Standard Oil Co.* v. *United States*, 283 U. S. 163, 169, 179.

The fact that the suit is brought under the Sherman Act does not change the principles which govern the granting of equitable relief. There must be "a definite factual showing of illegality." *Standard Oil Co.* v. *United States*, 283 U. S. p. 179. We think that the Government has failed to show adequate grounds for an injunction in this case. We recognize, however, that the case has been tried in advance of the operation of defendants' plan, and that it has been necessary to test that plan with reference to purposes and anticipated consequences without the advantage of the demonstrations of experience. If in actual operation it should prove to be an undue restraint upon interstate commerce, if it should appear that the plan is used to the impairment of fair competitive opportunities, the decision upon the present record should not preclude the Government from seeking the remedy which would be suited to such a state of facts. We think also that, in the event of future controversy arising from the actual operation of the plan, the results of the labor of both parties in this litigation in presenting the voluminous evidence as to the industry, market conditions and transportation facilities and rates, should continue to be available, without the necessity of reproducing that evidence.

The decree will be reversed and the cause will be remanded to the District Court with instructions to enter a decree dismissing the bill of complaint without prejudice and with the provision that the court shall retain jurisdiction of the cause and may set aside the decree and take further proceedings if future developments justify that course in the appropriate enforcement of the Anti-Trust Act.

Reversed and remanded.

MR. JUSTICE MCREYNOLDS thinks that the court below reached the proper conclusion and that its decree should be affirmed.

UNITED STATES v. SOCONY VACUUM OIL CO.
310 U.S. 150 (1940)

[In December 1936, the government obtained an indictment against a number of major oil companies operating in the Mid-Western States and their officers. Most of the defendant oil companies were integrated into crude oil production, oil refining and gasoline wholesaling and retailing. The defendant companies sold about 20 percent of their Mid-Western gasoline at company-owned and operated retail service stations and about 24 percent through independent jobbers or wholesalers.

[Since 1925 jobbers were purchasing less of their gasoline on the spot market and more through long-term supply contracts from the major companies and independent refiners. These contracts usually ran for a year or more and covered all of the jobber's gasoline requirements during the period. Typically, the prices to the jobber under contracts were not fixed for the duration. About 80 percent or more of the defendant companies' jobber contracts provided that the price would be the Mid-Continent spot market price on the date of shipment. This spot market price was to be determined by averaging the high and low spot market quotations reported in the Chicago Journal of Commerce and Platt's Oilgram. The contracts also guaranteed the jobbers a customary 2 cent margin on their sales.

[The retail price of gasoline also was pegged historically to the spot price of gasoline. Standard Oil Company (Indiana) was known as the price-leader throughout the Mid-West and it was customary for retail distributors, whether independent or controlled by a major company, to follow Standard's posted retail prices. Standard's posted retail price was determining by adding together the tank car freight rate from the Mid-Continent field, taxes, the customary 2 cent jobber margin and a 3.5 cent service station margin.

[The indictment focused on two buying programs organized by the defendants for the purchase from independent refiners in spot transactions of large quantities of gasoline in the East Texas and Mid-Continent fields. The indictment charged that the purpose and effect of these programs was to raise the spot price of gasoline, and hence the retail price of gasoline, in violation of Sherman Act § 1. After conviction by a jury, the defendants appealed.]

Justice Douglas delivered the opinion of the Court.

II. *Background of the Alleged Conspiracy.*

Evidence was introduced (or respondents made offers of proof) showing or tending to show the following conditions preceding the commencement of the alleged conspiracy in February 1935. As we shall develop later, these facts were in the main relevant to certain defenses which respondents at the trial unsuccessfully sought to interpose to the indictment.

Beginning about 1926 there commenced a period of production of crude oil in such quantities as seriously to affect crude oil and gasoline markets throughout the United States. Overproduction was wasteful, reduced the productive capacity of the oil fields and drove the price of oil down to levels below the cost of production from pumping and stripper [9] wells. When the price falls below such cost, those wells must be abandoned. Once abandoned, subsurface changes make it difficult or impossible to bring those wells back into production. Since such wells constitute about 40% of the country's known oil reserves, conservation requires that the price of crude oil be maintained at a level which will permit such wells to be operated. As Oklahoma and Kansas were attempting to remedy the situation through their proration laws, the largest oil field in history was discovered in East Texas. That was in 1930. The supply of oil from this field was so great that at one time crude oil sank to 10 or 15 cents a barrel, and gasoline was sold in the East Texas field for 2⅛¢ a gallon. Enforcement by Texas of its proration law was extremely difficult. Orders restricting production were violated, the oil unlawfully produced being known as "hot oil" and the gasoline manufactured therefrom, "hot gasoline." Hot oil sold for substantially lower prices than those posted for legal oil. Hot gasoline therefore cost less and at times could be sold for less than it cost to manufacture legal gasoline. The latter, deprived of its normal outlets, had to be sold at distress prices. The condition of many independent refiners using legal crude oil was precarious. In spite of their unprofitable operations they could not afford to shut down, for if they did so they would be apt to lose their oil connections in the field and their regular customers. Having little storage capacity they had to sell their gasoline as fast as they made it. As a result their gasoline became "distress" gasoline—gasoline which the refiner could not store, for which he had no regular sales outlets and which therefore he had to sell for whatever price it would bring. Such sales drove the market down.

[9] Described by one witness as "wells that have gotten down to less than 5 barrels a day, and in some cases down to less than a barrel a day, so that they only have to be pumped, sometimes, an hour or two a day to get all the oil they will produce at that stage of the game."

In the spring of 1933 conditions were acute. The wholesale market was below the cost of manufacture. As the market became flooded with cheap gasoline, gasoline was dumped at whatever price it would bring. On June 1, 1933, the price of crude oil was 25¢ a barrel; the tank car price of regular gasoline was 2⅝¢ a gallon. In June 1933 Congress passed the National Industrial Recovery Act (48 Stat. 195). Sec. 9 (c) of that Act authorized the President to forbid the interstate and foreign shipment of petroleum and its products produced or withdrawn from storage in violation of state laws. By Executive Order the President on July 11, 1933, forbade such shipments. On August 19, 1933, a code of fair competition for the petroleum industry was approved. The Secretary of the Interior was designated as Administrator of that Code. He established a Petroleum Administrative Board to "advise with and make recommendations" to him. A Planning and Coordination Committee was appointed, of which respondent Charles E. Arnott, a vice-president of Socony-Vacuum, was a member, to aid in the administration of the Code. In addressing that Committee in the fall of 1933 the Administrator said: "Our task is to stabilize the oil industry upon a profitable basis." Considerable progress was made. The price of crude oil was a dollar a barrel near the end of September 1933, as a result of the voluntary action of the industry, but, according to respondents, in accordance with the Administrator's policy and desire. In April 1934 an amendment to the Code was adopted under which an attempt was made to balance the supply of gasoline with the demand by allocating the amount of crude oil which each refiner could process with the view of creating a firmer condition in the market and thus increasing the price of gasoline. This amendment also authorized the Planning and Coordination Committee, with the approval of the President, to make suitable arrangements for the purchase of gasoline from non-integrated or semi-integrated refiners and the resale of the same through orderly channels. Thereafter four buying programs were approved by the Administrator. These permitted the major companies to purchase distress gasoline from the independent refiners. Standard forms of contract were provided. The evil aimed at was, in part at least, the production of hot oil and hot gasoline. The contracts (to at least one of which the Administrator was a party) were made pursuant to the provisions of the National Industrial Recovery Act and the Code and bound the purchasing company to buy fixed amounts of gasoline at designated prices on condition that the seller should abide by the provisions of the Code. According to the 1935 Annual Report of the Secretary of the Interior, these buying programs were not successful as "the production of gasoline from 'hot oil' continued, stocks of gasoline mounted, wholesale prices for gasoline remained below parity with crude-oil prices, and in the early fall of 1934 the industry approached a serious collapse of the wholesale market." Restoration of the price of gasoline to parity with crude oil at one dollar per barrel was not realized.

The flow of hot oil out of East Texas continued. Refiners in the field could procure such oil for 35¢ or less a barrel and manufacture gasoline from it for 2 or 2½¢ a gallon. This competition of the cheap hot gasoline drove the price of legal gasoline down below the cost of production. The problem of distress gasoline also persisted.

The disparity between the price of gasoline and the cost of crude oil which had been at $1 per barrel since September 1933 caused losses to many independent refiners, no matter how efficient they were. In October 1934 the Administrator set up a Federal Tender Board and issued an order making it illegal to ship crude oil or gasoline out of East Texas in interstate or foreign commerce unless it were accompanied by a tender issued by that Board certifying that it had been legally produced or manufactured. Prices rose sharply. But the improvement was only temporary as the enforcement of § 9 (c) of the Act was enjoined in a number of suits. On January 7, 1935, this Court held § 9 (c) to be unconstitutional. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388. Following that decision there was a renewed influx of hot gasoline into the Mid-Western area and the tank car market fell.

Meanwhile the retail markets had been swept by a series of price wars. These price wars affected all markets—service station, tank wagon, and tank car. Early in 1934 the Petroleum Administrative Board tried to deal with them—by negotiating agreements between marketing companies and persuading individual companies to raise the price level for a period. On July 9, 1934, that Board asked respondent Arnott, chairman of the Planning and Coordination Committee's Marketing Committee,[16] if he would head up a voluntary, coöperative movement to deal with price wars. According to Arnott, he pointed out that in order to stabilize the retail market it was necessary to stabilize the tank car market through elimination of hot oil and distress gasoline. On July 20, 1934, the Administrator wrote Arnott, described the disturbance caused by price wars and said:

"Under Article VII, Section 3 of the Code it is the duty of the Planning and Coordination Committee to cooperate with the Administration as a planning and fair practice agency for the industry. I am, therefore, requesting you, as Chairman of the Marketing Committee of the Planning and Coordination Committee, to take action which we deem necessary to restore markets to their normal conditions in areas where wasteful competition has caused them to become depressed. The number and extent of these situations would make it impractical for the Petroleum Administrative Board acting alone to deal with each specific situation. Therefore, I am requesting and authorizing you, as Chairman of the Marketing Committee, to designate committees for each locality when and as price wars develop, with authority to confer and to negotiate and to hold due public hearings with a view to ascertaining the elements of conflict that are present, and in a cooperative manner to stabilize the price level to conform to that normally prevailing in contiguous areas where marketing conditions are similar. . . ."

After receiving that letter Arnott appointed a General Stabilization Committee with headquarters in Washington and a regional chairman in each region. Over fifty state and local committees were set up. The Petroleum Administrative Board worked closely with Arnott and the committees until the end of the Code near the middle of 1935. The effort (first local, then state-wide, and finally regional) was to eliminate price wars by negotiation and by persuading suppliers to see to it that those who bought from them sold at a fair price. In the first week of December 1934, Arnott held a meeting of the

General Stabilization Committee in Chicago and a series of meetings on the next four or five days attended by hundreds of members of the industry from the middle west. These meetings were said to have been highly successful in elimination of many price wars. Arnott reported the results to members of the Petroleum Administrative Board on December 18, 1934, and stated that he was going to have a follow-up meeting in the near future. It was at that next meeting that the groundwork for the alleged conspiracy was laid.

III. *The Alleged Conspiracy.*

The alleged conspiracy is not to be found in any formal contract or agreement. It is to be pieced together from the testimony of many witnesses and the contents of over 1,000 exhibits, extending through the 5,900 printed pages of the record. What follows is based almost entirely on unequivocal testimony or undisputed contents of exhibits, only occasionally on the irresistible inferences from those facts.

A. FORMATION OF THE MID-CONTINENT BUYING PROGRAM.

The next meeting of the General Stabilization Committee was held in Chicago on January 4, 1935, and was attended by all of the individual respondents, by representatives of the corporate respondents, and by others. Representatives of independent refiners, present at the meeting, complained of the failure of the price of refined gasoline to reach a parity with the crude oil price of $1 a barrel. And complaints by the independents of the depressing effect on the market of hot and distress gasoline were reported. Views were expressed to the effect that "if we were going to have general stabilization in retail markets, we must have some sort of a firm market in the tank car market." As a result of the discussion

Arnott appointed a Tank Car Stabilization Committee [19] to study the situation and make a report, or, to use the language of one of those present, "to consider ways and means of establishing and maintaining an active and strong tank car market on gasoline." Three days after this committee was appointed, this Court decided *Panama Refining Co.* v. *Ryan, supra.* As we have said, there was evidence that following that decision there was a renewed influx of hot gasoline into the Mid-Western area with a consequent falling off of the tank car market prices.

The first meeting of the Tank Car Committee was held February 5, 1935, and the second on February 11, 1935. At these meetings the alleged conspiracy was formed, the substance of which, so far as it pertained to the Mid-Continent phase, was as follows:

It was estimated that there would be between 600 and 700 tank cars of distress gasoline produced in the Mid-Continent oil field every month by about 17 independent refiners. These refiners, not having regular outlets for the gasoline, would be unable to dispose of it except at distress prices. Accordingly, it was proposed and decided that certain major companies (including the corporate respondents) would purchase gasoline from these refiners. The Committee would assemble each month information as to the quantity and location of this distress gasoline. Each of the major companies was to select one (or more) of the independent refiners having distress gasoline as its "dancing partner," and would assume responsibility for purchasing its distress supply. In this manner buying power would be coördinated, purchases would be effectively placed, and the results would be much superior to the previous haphazard purchasing. There were to be no formal contractual commitments to purchase this gasoline, either between the major companies or between the majors and the independents. Rather it was an informal gentlemen's agreement or understanding whereby each undertook to perform his share of the joint undertaking.

Purchases were to be made at the "fair going market price."

A Mechanical Sub-Committee was appointed to find purchasers for any new distress gasoline which might appear between the monthly meetings of the Tank Car Stabilization Committee and to handle detailed problems arising during these periods.

* * *

B. THE MID-CONTINENT BUYING PROGRAM IN OPERATION.

No specific term for the buying program was decided upon, beyond the first month. But it was started with the hope of its continuance from month to month. And in fact it did go on for over a year, as we shall see.

The concerted action under this program took the following form:

The Tank Car Stabilization Committee had A. V. Bourque, Secretary of the Western Petroleum Refiners' Association, make a monthly survey, showing the amount of distress gasoline which each independent refiner would have during the month. From March 1935 through February 1936 that Committee met once a month. At these meetings the surveys showing the amount and location of distress gasoline were presented and discussed. They usually revealed that from 600 to 800 tank cars of distress gasoline would become available

during the month. Each member of the Committee present would indicate how much his company would buy and from whom. Those companies which were not represented at the meetings were approached by the Mechanical Sub-Committee; "word was gotten to them as to the amount of gasoline that it was felt they could take in that month." Also, as we have stated, the Mechanical Sub-Committee would endeavor to find purchasers for any new distress gasoline which appeared between the meetings of the Tank Car Stabilization Committee. It would report such new surpluses to Bourque. The functions of the Mechanical Sub-Committee were apparently not restricted merely to dissemination of information to the buyers. One of its members testified that he urged the majors to buy more distress gasoline. Throughout, persuasion was apparently used to the end that all distress gasoline would be taken by the majors and so kept from the tank car markets. As the program progressed, most of the major companies continued to buy from the same "dancing partners" with whom they had started.

* * *

Up to June 1935, the expenses incurred by the members of the Mechanical Sub-Committee were charged to and paid by the Planning and Coordination Committee of the Code of Fair Competition for the Petroleum Industry. On May 27, 1935, this Court held in *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, that the code-making authority conferred by the National Industrial Recovery Act was an unconstitutional delegation of legislative power. Shortly thereafter the Tank Car Stabilization Committee held a meeting to discuss their future course of action. It was decided that the buying program should continue. Accordingly, that Committee continued to meet each month through February 1936.

The procedure at these meetings was essentially the same as at the earlier ones. Gradually the buying program worked almost automatically, as contacts between buyer and seller became well established. The Mechanical Sub-Committee met at irregular intervals until December 1935. Thereafter it conducted its work on the telephone.

C. FORMATION AND NATURE OF THE EAST TEXAS BUYING PROGRAM.

In the meetings when the Mid-Continent buying program was being formulated it was recognized that it would be necessary or desirable to take the East Texas surplus gasoline off the market so that it would not be a "disturbing influence in the Standard of Indiana territory." The reason was that weakness in East Texas spot market prices might make East Texas gasoline competitive with Mid-Continent gasoline in the Mid-Western area and thus affect Mid-Continent spot market prices. The tank car rate on gasoline shipments from the East Texas field to points in the Mid-Western area was about ⅛¢ a gallon higher than from the Mid-Continent field. With East Texas spot market prices more than ⅛¢ a

gallon below Mid-Continent spot market prices, there might well be a resulting depressing effect on the Mid-Continent spot market prices.

[To deal with the East Texas problem, the defendants organized another buying program in conjunction with the East Texas Refiners' Marketing Association.]

* * *

Every Monday morning the secretary of the East Texas association ascertained from each member the amount of his forthcoming weekly surplus gasoline and the price he wanted. He used the consensus of opinion as the asking price. He would call the major companies; they would call him. He exchanged market information with them. Orders received for less than the asking price would not be handled by the Association; rather the secretary would refer the buyer to one of the independents who might sell at the lower price. Very few cars were purchased through the Association by others than the major oil companies. The majors bought about 7,000 tank cars through the Asssociation in 1935 and about 2,700 tank cars in the first four months of 1936. And in 1935 the secretary of the Association placed an additional 1,000 tank cars by bringing the purchasers and the independent refiners together. The purchases in 1935 in East Texas were, with minor exceptions, either

at the low or slightly below the low quotation in Platt's Oilgram, following it closely as the market rose in March, April, and May, 1935; they conformed to the market as it flattened out into more or less of a plateau through the balance of 1935 with a low for third grade gasoline of 4⅝¢. This was consistent with the policy of the buying program. For the majors were requested to purchase at the "fair, going market price." And it is clear that this East Texas buying program was, as we have said, supplementary or auxiliary to the Mid-Continent program. As stated in March 1935 in an inter-company memorandum of one of the majors: ". . . with east coast refiners having a program to purchase surplus East Texas gasoline over the next four months, we feel that still further advances can be made in the tank car market and a resultant increase in the service station price."

D. SCOPE AND PURPOSE OF THE ALLEGED CONSPIRACY.

As a result of these buying programs it was hoped and intended that both the tank car and the retail markets would improve. The conclusion is irresistible that defendants' purpose was not merely to raise the spot market prices but, as the real and ultimate end, to raise the price of gasoline in their sales to jobbers and consumers in the Mid-Western area. Their agreement or plan embraced not only buying on the spot markets but also, at least by clear implication, an understanding to maintain such improvements in Mid-Western prices as would result from those purchases of distress gasoline. The latter obviously would be achieved by selling at the increased prices, not by price cutting. Any other understanding would have been wholly inconsistent with and contrary to the philosophy of the broad stabilization efforts which were under way. In essence the raising and maintenance of the spot market prices were but the means adopted for raising and maintaining prices to jobbers and consumers. The broad sweep of the agreement was indicated by Arnott before a group of the industry on March 13, 1935. He described the plan as one "whereby this whole stabilization effort of markets, the holding up of normal sales market structures, the question of the realization of refineries, the working together of those two great groups in order that we may balance this whole picture and in order that we may interest a great many buyers in this so-called surplus or homeless gasoline, can be done along organized lines.

. . ." Certainly there was enough evidence to support a finding by the jury that such were the scope and purpose of the plan.

But there was no substantial competent evidence that defendants, as charged in the indictment, induced the independent refiners to curtail their production.

* * *

IV. *Other Circumstances Allegedly Relevant to the Offense Charged in the Indictment.*

The following facts or circumstances were developed at the trial by testimony or other evidence or were embraced in offers of proof made by respondents.

A. ALLEGED KNOWLEDGE AND ACQUIESCENCE OF THE FEDERAL GOVERNMENT.

Such of the following facts as were included in respondents' offers of proof were not sought to be proved in order to establish immunity from prosecution under the anti-trust laws. For admittedly the authorization under the National Industrial Recovery Act necessary for such immunity [61] had not been obtained. Rather respondents' offers of proof were made in order to show the circumstances which, respondents argue, should be taken into consideration in order to judge the purpose, effect and reasonableness of their activities in connection with the buying program.

* * *

V. *Application of the Sherman Act.*

A. CHARGE TO THE JURY

The court charged the jury that it was a violation of the Sherman Act for a group of individuals or corporations to act together to raise the prices to be charged for the commodity which they manufactured where they controlled a substantial part of the interstate trade and commerce in that commodity. The court stated that where the members of a combination had the power to raise prices and acted together for that purpose, the combination was illegal; and that it was immaterial how reasonable or unreasonable those prices were or to what extent they had been affected by the combination. It further charged that if such illegal combination existed, it did not matter that there may also have been other factors which contributed to the raising of the prices. In that connection, it referred specifically to the economic factors which we have previously discussed and which respondents contended were primarily responsible for the price rise and the spot markets' stability in 1935 and 1936, viz. control of production, the Connally Act, the price of crude oil, an increase in consumptive demand, control of inventories and manufacturing quotas, and improved business conditions. The court then charged that, unless the jury found beyond a reasonable doubt that the price rise and its continuance were "caused" by the combination and not caused by those other factors, verdicts of "not guilty" should be returned. It also charged that there was no evidence of governmental approval which would exempt the buying programs from the prohibitions of the Sherman Act; and that knowledge or acquiescence of officers of the government or the good intentions of the

members of the combination would not give immunity from prosecution under that Act.

The Circuit Court of Appeals held this charge to be reversible error, since it was based upon the theory that such a combination was illegal *per se*. In its view respondents' activities were not unlawful unless they constituted an unreasonable restraint of trade. Hence, since that issue had not been submitted to the jury and since evidence bearing on it had been excluded, that court reversed and remanded for a new trial so that the character of those activities and their effect on competion could be determined. In answer to the government's petition respondents here contend that the judgment of the Circuit Court of Appeals was correct, since there was evidence that they had affected prices only in the sense that the removal of the competitive evil of distress gasoline by the buying programs had permitted prices to rise to a normal competitive level; that their activities promoted rather than impaired fair competitive opportunities; and therefore that their activities had not unduly or unreasonably restrained trade. And they also contend that certain evidence which was offered should have been admitted as bearing on the purpose and end sought to be attained, the evil believed to exist, and the nature of the restraint and its effect. By their cross-petition respondents contend that the record contains no substantial competent evidence that the combination, either in purpose or effect, unreasonably restrained trade within the meaning of the Sherman Act, and therefore that the Circuit Court of Appeals erred in holding that they were not entitled to directed verdicts of acquittal.

In *United States* v. *Trenton Potteries Co.,* 273 U. S. 392, this Court sustained a conviction under the Sherman Act where the jury was charged that an agreement on the part of the members of a combination, controlling a substantial part of an industry, upon the prices which the members are to charge for their commodity is in itself an unreasonable restraint of trade without regard to the reasonableness of the prices or the good intentions of the combining units. There the combination was composed of those who controlled some 82 per cent of the business of manufacturing and distributing in the United States vitreous pottery. Their object was to fix the prices for the sale of that commodity. In that case the trial court refused various requests to charge that the agreement to fix prices did not itself constitute a violation of law unless the jury also found that it unreasonably restrained interstate commerce. This Court reviewed the various price-fixing cases under the Sherman Act beginning with *United States* v. *Trans-Missouri Freight Assn.,* 166 U. S. 290, and *United States* v. *Joint Traffic Assn.,* 171 U. S. 505, and said ". . . it has since often been decided and always assumed that uniform price-fixing by those controlling in any substantial manner a trade or business in interstate commerce is prohibited by the Sherman Law, despite the reasonableness of the particular prices agreed upon." (p. 398.) This Court pointed out that the so-called "rule of reason" announced in *Standard Oil Co.* v. *United States,* 221 U. S. 1, and in *United States* v. *American Tobacco Co.,* 221 U. S. 106, had not affected this view of the illegality of price-fixing agreements. And in holding that agreements "to fix or maintain prices" are not reasonable restraints of trade under the statute merely because the prices themselves are reasonable, it said (pp. 397–398):

"The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions. Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies."

In conclusion this Court emphasized that the Sherman Act is not only a prohibition against the infliction of a particular type of public injury, but also, as stated in *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20, 49, a "limitation of rights" which may be "pushed to evil consequences and therefore restrained."

But respondents claim that other decisions of this Court afford them adequate defenses to the indictment. Among those on which they place reliance are *Appala-*

chian Coals, Inc. v. *United States,* 288 U. S. 344; *Sugar Institute, Inc.* v. *United States,* 297 U. S. 553; *Maple Flooring Mfrs. Assn.* v. *United States,* 268 U. S. 563; *Cement Mfrs. Protective Assn.* v. *United States,* 268 U. S. 588; *Chicago Board of Trade* v. *United States,* 246 U. S. 231; and the *American Tobacco* and *Standard Oil* cases, *supra.*

But we do not think that line of cases is apposite. As clearly indicated in the *Trenton Potteries* case, the *American Tobacco* and *Standard Oil* cases have no application to combinations operating directly on prices or price structures.

And we are of the opinion that *Appalachian Coals, Inc.* v. *United States, supra,* is not in point.

In that case certain producers of bituminous coal created an exclusive selling agency for their coal. The agency was to establish standard classifications and sell the coal of its principals at the best prices obtainable. The occasion for the formation of the agency was the existence of certain so-called injurious practices and conditions in the industry. One of these was the problem of "distress coal"—coal shipped to the market which was unsold at the time of delivery and therefore dumped on the market irrespective of demand. The agency was to promote the systematic study of the marketing and distribution of coal, its demand and consumption; to maintain an inspection and an engineering department to demonstrate to customers the advantages of this type of coal and to promote an extensive advertising campaign; to provide a research department to demonstrate proper and efficient methods of burning coal and thus to aid producers in their competition with substitute fuels; to operate a credit department dealing with the reliability of purchasers; and to make the sale of coal more economical.

That agency was also to sell all the coal of its principals at the best prices obtainable and, if all could not be sold, to apportion orders upon a stated basis. And, save for certain stated exceptions, it was to determine the prices at which sales would be made without consultation with its principals. This Court concluded that so far as actual purpose was concerned, the defendant producers were engaged in a "fair and open endeavor to aid the industry in a measurable recovery from its plight." And it observed that the plan did not either contemplate or involve "the fixing of market prices"; that defendants would not be able to fix the price of coal in the consuming markets; that their coal would continue to be subject to "active competition." To the contention that the plan would have a tendency to stabilize market prices and to raise them to a higher level, this Court replied (p. 374):

"The fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, does not mean that the abuses should go uncorrected or that coöperative endeavor to correct them necessarily constitutes an unreasonable restraint of trade. The intelligent conduct of commerce through the acquisition of full information of all relevant facts may properly be sought by the coöperation of those engaged in trade, although stabilization of trade and more reasonable prices may be the result."

In distinguishing the *Trenton Potteries* case this Court said (p. 375):

"In the instant case there is, as we have seen, no intent or power to fix prices, abundant competitive opportunities will exist in all markets where defendants' coal is sold, and nothing has been shown to warrant the conclusion that defendants' plan will have an injurious effect upon competition in these markets."

Thus in reality the only essential thing in common between the instant case and the *Appalachian Coals* case is the presence in each of so-called demoralizing or injurious practices. The methods of dealing with them were quite divergent. In the instant case there were buying programs of distress gasoline which had as their direct purpose and aim the raising and maintenance of spot market prices and of prices to jobbers and consumers in the Mid-Western area, by the elimination of distress gasoline as a market factor. The increase in the spot market prices was to be accomplished by a well organized buying program on that market: regular ascertainment of the amounts of surplus gasoline; assignment of sellers among the buyers; regular purchases at prices which would place and keep a floor under the market. Unlike the plan in the instant case, the plan in the *Appalachian Coals* case was not designed to operate *vis-à-vis* the general consuming market and to fix the prices on that market. Furthermore, the effect, if any, of that plan on prices was not only wholly incidental but also highly conjectural. For the plan had not then been put into operation. Hence this Court expressly reserved jurisdiction in the District Court to take further proceedings if, *inter alia,* in "actual operation" the plan proved to be "an undue restraint upon interstate commerce." And as we have seen it would *per se* constitute such a restraint if price-fixing were involved.

Nor are *Maple Flooring Mfrs. Assn.* v. *United States* and *Cement Mfrs. Protective Assn.* v. *United States, supra,* at all relevant to the problem at hand. For the systems there under attack were methods of gathering and distributing information respecting business operations. It was noted in those cases that there was not present any agreement for price-fixing. And they were decided, as indicated in the *Trenton Potteries* case, on the

express assumption that any agreement for price-fixing would have been illegal *per se*. And since that element was lacking, the only issues were whether or not on the precise facts there presented such activities of the combinations constituted unlawful restraints of commerce. A majority of the Court held that they did not.

Nor can respondents find sanction in *Chicago Board of Trade* v. *United States, supra,* for the buying programs here under attack. That case involved a prohibition on the members of the Chicago Board of Trade from purchasing or offering to purchase between the closing of the session and its opening the next day grains (under a special class of contracts) at a price other than the closing bid. The rule was somewhat akin to rules of an exchange limiting the period of trading, for as stated by this Court the "restriction was upon the period of price-making." No attempt was made to show that the purpose or effect of the rule was to raise or depress prices. The rule affected only a small proportion of the commerce in question. And among its effects was the creation of a public market for grains under that special contract class, where prices were determined competitively and openly. Since it was not aimed at price manipulation or the control of the market prices and since it had "no appreciable effect on general market prices," the rule survived as a reasonable restraint of trade.

* * *

Therefore the sole remaining question on this phase of the case is the applicability of the rule of the *Trenton Potteries* case to these facts.

Respondents seek to distinguish the *Trenton Potteries* case from the instant one. They assert that in that case the parties substituted an agreed-on price for one determined by competition; that the defendants there had the power and purpose to suppress the play of competition in the determination of the market price; and therefore that the controlling factor in that decision was the destruction of market competition, not whether prices were higher or lower, reasonable or unreasonable. Respondents contend that in the instant case there was no elimination in the spot tank car market of competition which prevented the prices in that market from being made by the play of competition in sales between independent refiners and their jobber and consumer customers; that during the buying programs those prices were in fact determined by such competition; that the purchases under those programs were closely related to or dependent on the spot market prices; that there was no evidence that the purchases of distress gasoline under those programs had any effect on the competitive market price beyond that flowing from the removal of a competitive evil; and that if respondents had tried to do more than free competition from the effect of distress gasoline and to set an arbitrary non-competitive price through their purchases, they would have been without power to do so.

But we do not deem those distinctions material.

In the first place, there was abundant evidence that the combination had the purpose to raise prices. And likewise, there was ample evidence that the buying programs at least contributed to the price rise and the stability of the spot markets, and to increases in the price of gasoline sold in the Mid-Western area during the indictment period. That other factors also may have contributed to that rise and stability of the markets is immaterial. For in any such market movement, forces other than the purchasing power of the buyers normally would contribute to the price rise and the market stability. So far as

cause and effect are concerned it is sufficient in this type of case if the buying programs of the combination resulted in a price rise and market stability which but for them would not have happened. For this reason the charge to the jury that the buying programs must have "caused" the price rise and its continuance was more favorable to respondents than they could have required. Proof that there was a conspiracy, that its purpose was to raise prices, and that it caused or contributed to a price rise is proof of the actual consummation or execution of a conspiracy under § 1 of the Sherman Act.

Secondly, the fact that sales on the spot markets were still governed by some competition is of no consequence. For it is indisputable that that competition was restricted through the removal by respondents of a part of the supply which but for the buying programs would have been a factor in determining the going prices on those markets. But the vice of the conspiracy was not merely the restriction of supply of gasoline by removal of a surplus. As we have said, this was a well organized program. The timing and strategic placement of the buying orders for distress gasoline played an important and significant role. Buying orders were carefully placed so as to remove the distress gasoline from weak hands. Purchases were timed. Sellers were assigned to the buyers so that regular outlets for distress gasoline would be available. The whole scheme was carefully planned and executed to the end that distress gasoline would not overhang the markets and depress them at any time. And as a result of the payment of fair going market prices a floor was placed and kept under the spot markets. Prices rose and jobbers and consumers in the Mid-Western area paid more for their gasoline than they would have paid but for the conspiracy. Competition was not eliminated from the markets; but it was clearly curtailed, since restriction of the supply of gasoline, the timing and placement of the purchases under the buying programs and the placing of a floor under the spot markets obviously reduced the play of the forces of supply and demand.

The elimination of so-called competitive evils is no legal justification for such buying programs. The elimination of such conditions was sought primarily for its effect on the price structures. Fairer competitive prices, it is claimed, resulted when distress gasoline was removed from the market. But such defense is typical of the protestations usually made in price-fixing cases. Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justifications for price-fixing. If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended.

The reasonableness of prices has no constancy due to the dynamic quality of business facts underlying price structures. Those who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since those prices would not be subject to continuous administrative supervision and readjustment in light of changed conditions. Those who controlled the prices would control or effectively dominate the market. And those who were in that strategic position would have it in their power to destroy or drastically impair the competitive system. But the thrust of the rule is deeper and reaches more than monopoly power. Any combination which

tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination. If such a shift is to be made, it must be done by the Congress. Certainly Congress has not left us with any such choice. Nor has the Act created or authorized the creation of any special exception in favor of the oil industry. Whatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike. There was accordingly no error in the refusal to charge that in order to convict the jury must find that the resultant prices were raised and maintained at "high, arbitrary and non-competitive levels." The charge in the indictment to that effect was surplusage.

Nor is it important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible. Price-fixing as used in the *Trenton Potteries* case has no such limited meaning. An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price-fixing was used. That price-fixing includes more than the mere establishment of uniform prices is clearly evident from the *Trenton Potteries* case itself, where this Court noted with approval *Swift & Co.* v. *United States*, 196 U. S. 375, in which a decree was affirmed which restrained a combination from "raising or lowering prices or fixing uniform prices" at which meats will be sold. Hence, prices are fixed within the meaning of the *Trenton Potteries* case if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices. They are fixed because they are agreed upon. And the

fact that, as here, they are fixed at the fair going market price is immaterial. For purchases at or under the market are one species of price-fixing. In this case, the result was to place a floor under the market—a floor which served the function of increasing the stability and firmness of market prices. That was repeatedly characterized in this case as stabilization. But in terms of market operations stabilization is but one form of manipulation. And market manipulation in its various manifestations is implicitly an artificial stimulus applied to (or at times a brake on) market prices, a force which distorts those prices, a factor which prevents the determination of those prices by free competition alone. Respondents, however, argue that there was no correlation between the amount of gasoline which the major companies were buying and the trend of prices on the spot markets. They point to the fact that such purchasing was lightest during the period of the market rise in the spring of 1935, and heaviest in the summer and early fall of 1936 when the prices declined; and that it decreased later in 1936 when the prices rose. But those facts do not militate against

the conclusion that these buying programs were a species of price-fixing or manipulation. Rather they are wholly consistent with the maintenance of a floor under the market or a stablization operation of this type, since the need for purchases under such a program might well decrease as prices rose and increase as prices declined.

As we have indicated, the machinery employed by a combination for price-fixing is immaterial.

Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*. Where the machinery for price-fixing is an agreement on the prices to be charged or paid for the commodity in the interstate or foreign channels of trade the power to fix prices exists

if the combination has control of a substantial part of the commerce in that commodity. Where the means for price-fixing are purchases or sales of the commodity in a market operation or, as here, purchases of a part of the supply of the commodity for the purpose of keeping it from having a depressive effect on the markets, such power may be found to exist though the combination does not control a substantial part of the commodity. In such a case that power may be established if as a result of market conditions, the resources available to the combinations, the timing and the strategic placement of orders and the like, effective means are at hand to accomplish the desired objective. But there may be effective influence over the market though the group in question does not control it. Price-fixing agreements may have utility to members of the group though the power possessed or exerted falls far short of domination and control. Monopoly power (*United States* v. *Patten*, 226 U. S. 525) is not the only power which the Act strikes down, as we have said. Proof that a combination was formed for the purpose of fixing prices and that it caused them to be fixed or contributed to that result is proof of the completion of a price-fixing conspiracy under § 1 of the Act.[59] The indictment in this case charged that this combination had that purpose and effect. And there was abundant evidence to support it. Hence the existence of power on the part of members of the combination to fix prices was but a conclusion from the finding that the buying programs caused or contributed to the rise and stability of prices.

[59] Under this indictment proof that prices in the Mid-Western area were raised as a result of the activities of the combination was essential, since sales of gasoline by respondents at the increased prices in that area were necessary in order to establish jurisdiction in the Western District of Wisconsin. Hence we have necessarily treated the case as one where exertion of the power to fix prices (i. e. the actual fixing of prices) was an ingredient of the offense. But that does not mean that both a purpose and a power to fix prices are necessary for the establishment of a conspiracy under § 1 of the Sherman Act. That would be true if power or ability to commit an offense was necessary in order to convict a person of conspiring to commit it. But it is well established that a person "may be guilty of conspiring although incapable of committing the objective offense." *United States* v. *Rabinowich*, 238 U. S. 78, 86. And it is likewise well settled that conspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiring. *Nash* v. *United States*, 229 U. S. 373, 378. It is the "contract, combination . . . or conspiracy in restraint of trade or commerce" which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other. See *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 402. Cf. *Retail Lumber Dealers' Assn.* v. *State*, 95 Miss. 337; 48 So. 1021. And the amount of interstate or foreign trade involved is not material (*Montague & Co.* v. *Lowry*, 193 U. S. 38), since § 1 of the Act brands as illegal the character of the restraint not the amount of commerce affected. *Steers* v. *United States*, 192 F. 1, 5; *Patterson* v. *United States*, 222 F. 599, 618–619. In view of these considerations a conspiracy to fix prices violates § 1 of the Act though no overt act is shown, though it is not established that the conspirators had the means available for accomplishment of their objective, and though the conspiracy embraced but a part of the interstate or foreign commerce in the commodity. Whatever may have been the status of price-fixing agreements at common law (Allen, Criminal Conspiracies in Restraint of Trade at Common Law, 23 Harv. L. Rev. 531) the Sherman Act has a broader application to them than the common law prohibitions or sanctions. See *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 328. Price-fixing agreements may or may not be aimed at complete elimination of price competition. The group making those agreements may or may not have power to control the market. But the fact that the group cannot control the market prices does not necessarily mean that the agreement as to prices has no utility to the members of the combination. The effectiveness of price-fixing agreements is dependent on many factors, such as competitive tactics, position in the industry, the formula underlying price policies. Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy. See Handler, Federal Anti-Trust Laws—A Symposium (1931), pp. 91 *et seq.*

The existence or exertion of power to accomplish the desired objective (*United States* v. *United States Steel Corp.*, 251 U. S. 417, 444–451; *United States* v. *International Harvester Co.*, 274 U. S. 693, 708–709) becomes important only in cases where the offense charged is the actual monopolizing of any part of trade or commerce in violation of § 2 of the Act. An intent and a power to produce the result which the law condemns are then necessary. As stated in *Swift & Co.* v. *United States*, 196 U. S. 375, 396, ". . . when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against

As to knowledge or acquiescence of officers of the Federal Government little need be said. The fact that Congress through utilization of the precise methods here employed could seek to reach the same objectives sought by respondents does not mean that respondents or any other group may do so without specific Congressional authority. Admittedly no approval of the buying programs was obtained under the National Industrial Recovery Act prior to its termination on June 16, 1935, (§ 2 (c)) which would give immunity to respondents from prosecution under the Sherman Act. Though employees of the government may have known of those programs and winked at them or tacitly approved them, no immunity would have thereby been obtained. For Congress had specified the precise

that dangerous probability as well as against the completed result." But the crime under § 1 is legally distinct from that under § 2 (*United States* v. *MacAndrews & Forbes Co.*, 149 F. 836; *United States* v. *Buchalter*, 88 F. 2d 625) though the two sections overlap in the sense that a monopoly under § 2 is a species of restraint of trade under § 1. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 59–61; *Patterson* v. *United States*, *supra*, p. 620. Only a confusion between the nature of the offenses under those two sections (see *United States* v. *Nelson*, 52 F. 646; *United States* v. *Patterson*, 55 F. 605; *Chesapeake & O. Fuel Co.* v. *United States*, 115 F. 610) would lead to the conclusion that power to fix prices was necessary for proof of a price-fixing conspiracy under § 1. Cf. *State* v. *Eastern Coal Co.*, 29 R. I. 254; 70 A. 1; *State* v. *Scollard*, 126 Wash. 335; 218 P. 224.

manner and method of securing immunity. None other would suffice. Otherwise national policy on such grave and important issues as this would be determined not by Congress nor by those to whom Congress had delegated authority but by virtual volunteers. The method adopted by Congress for alleviating the penalties of the Sherman Act through approval by designated public representatives would be supplanted by a foreign system. But even had approval been obtained for the buying programs, that approval would not have survived the expiration in June 1935 of the Act which was the source of that approval. As we have seen, the buying program continued unabated during the balance of 1935 and far into 1936. As we said in *United States* v. *Borden Co.*, 308 U. S. 188, 202, "A conspiracy thus continued is in effect renewed during each day of its continuance." Hence, approval or knowledge and acquiescence of federal authorities prior to June 1935 could have no relevancy to respondents' activities subsequent thereto. The fact that the buying programs may have been consistent with the general objectives and ends sought to be obtained under the National Industrial Recovery Act is likewise irrelevant to the legality under the Sherman Act of respondents' activities either prior to or after June 1935. For as we have seen, price-fixing combinations which lack Congressional sanction are illegal *per se;* they are not evaluated in terms of their purpose, aim or effect in the elimination of so-called competitive evils. Only in the event that they were, would such considerations have been relevant.

Accordingly we conclude that the Circuit Court of Appeals erred in reversing the judgments on this ground. *A fortiori* the position taken by respondents in their cross petition that they were entitled to directed verdicts of acquittal is untenable.

* * *

The judgment of the Circuit Court of Appeals is reversed and that of the District Court affirmed.

Reversed.

The CHIEF JUSTICE and MR. JUSTICE MURPHY did not participate in the consideration or decision of this case.

Justice Roberts filed a dissenting opinion.