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Despite the obvious importance of the question to a statute as vaguely phrased as the Sherman Act, the federal courts in all the years since 1890 have never arrived at a definitive statement of the values or policies which control the law's application and evolution. The question of values, therefore, remains central to controversy about this basic law and its interpretation. More than one factor bears upon the answer to the question. Courts do not and should not, for example, attempt to administer any policy a legislature may seek to thrust upon them.[1] Nevertheless, a starting point is the question of legislative intent.[2] In this paper I propose to examine that question. My conclusion, drawn from the evidence in the Congressional Record, is that Congress intended the courts to implement (that is, to take into account in the decision of cases) only that value we would today call consumer welfare. To put it another way, the pol-

1 I have discussed elsewhere the problem of judicially administrable standards under the Sherman Act. See Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, 74 Yale L.J. 775, 829-847 (1965). My conclusion there is that consumer welfare provides a proper standard and that most other suggested policies do not. In that article, however, I seriously underestimated the clarity of the legislative intent behind the Sherman Act which a closer study of the full record reveals.

2 The attribution of any intent to a legislature involves a number of problems and assumptions. My justification for ignoring the difficulties inherent in the very concept of legislative intention lies primarily in the fact that courts and lawyers do regularly "find," describe, and rely upon such intentions. What I have to say in this paper, therefore, should not be taken as an attempt to describe the actual state of mind of each of the congressmen who voted for the Sherman Act but merely as an attempt to construct the thing we call "legislative intent" using conventional methods of collecting and reconciling the evidence provided by the Congressional Record.

This paper relies upon research undertaken for the American Enterprise Institute for Public Policy Research which is designed to eventuate in a study of the legislative history of the major antitrust statutes. I wish to acknowledge my gratitude to Professor Ward S. Bowman of the Yale Law School for his comments on the penultimate draft of this article.

icy the courts were intended to apply is the maximization of wealth or consumer want satisfaction. This requires courts to distinguish between agreements or activities that increase wealth through efficiency and those that decrease it through restriction of output.

Failure to settle the issue of values has led inevitably to a degree of irresponsibility in the judicial process. Often a court will apply a value in deciding a Sherman Act case without explaining either the selection of the value or the method of its application to the facts. A value will be announced as pertinent with a confidence that is matched only by the mystery that shrouds its derivation. A very specific decision is then whelped from the value premise without benefit of midwifery by any visible minor premise. One is tempted, and perhaps occasionally entitled, to suspect that such a suddenly appearing value is a *dues ex machina* by which the court rescues itself from the perplexing tasks of economic analysis and judgment that rigorous adherence to a consumer-welfare value premise would sometimes require.

It would be possible to illustrate the use of values other than consumer welfare in a number of cases, but the fact of judicial reliance upon such values is surely not in dispute,[3] and excerpts from two well-known opinions of Judge Learned Hand may therefore suffice to illustrate the point. Values other than consumer welfare apparently played large roles in Judge Hand's reasoning in both the *Alcoa* and *Associated Press* cases.

In *Alcoa*, the Court of Appeals for the Second Circuit judged illegal Aluminum Company of America's large market position in virgin aluminum ingot. In an assertion seemingly important to his argument, Judge Hand said:

> "We have been speaking only of the economic reasons which forbid monopoly; but . . . there are others, based upon the belief that great industrial consolidations are inherently undesirable, *regardless of their economic results*. In the debates in Congress Senator Sherman himself . . . showed that among the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them."[4] (Emphasis added.)

3 Among many examples that might be cited of opinions employing values other than consumer welfare are Chicago Board of Trade v. United States, 246 U.S. 231 (1918) (Brandeis, J.); Associated Press v. United States, 326 U.S. 1, 25-29 (1945) (concurring opinion of Frankfurter, J.); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948) (Douglas, J.); Fashion Originators' Guild v. Federal Trade Commission, 312 U.S. 457 (1941) (Black, J.).

4 United States v. Aluminum Co. of America, 148 F.2d 416, 428 (2d Cir. 1945). In a footnote Judge Hand supports his assertion by two quotations from Senator Sherman and a page citation to Senator George. These passages are analyzed to determine whether they support Hand's thesis at pp. 39-42, *infra*.

Without pausing to explain what the noneconomic helplessness of the individual might consist of, what category of individuals was involved, or how the concept applied to the facts of the case before him, Judge Hand moved on to another formulation of noneconomic values supposedly embedded in the statute:

> "Throughout the history of these statutes [the antitrust laws, including the Sherman Act] it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other."[5] (Emphasis added.)

This passage was followed immediately by: "We hold 'Alcoa's' monopoly of ingot was of the kind covered by Sec. 2 [of the Sherman Act]."

The italicized phrases in each of the foregoing quotations indicate that Judge Hand was asserting that the nebulous values he derived from the legislative history, or from prevalent assumptions about the legislative history, were powerful enough to require a court to override considerations of consumer welfare. He did not inform us whether that was true in all cases where the "economic" value of consumer welfare conflicted with these other values or, if not, how to predict the cases in which one or the other of these conflicting values would take precedence.

But Judge Hand went further even than this. In his *Associated Press* opinion he asserted that the Fifty-first Congress had given the federal courts virtual carte blanche to choose the values they would implement through the Sherman Act. Approaching his topic through a rapid survey of antitrust doctrine and using a cluster of trade association cases for his springboard, Judge Hand said:

> "[T]he injury imposed upon the public was found to outweigh the benefit to the combination, and the law forbade it. We can find no more definite guide than that."

5 148 F.2d at 429. Earlier in the opinion Judge Hand said that Congress "did not condone 'good trusts' and condemn 'bad' ones; it forbade all. Moreover, in so doing it was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependant for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. These considerations, which we have suggested only as possible purposes of the Act, we think the decisions prove to have been in fact its purposes." *Id*. at 427. It was not made clear how the factual question of what legislators intended is proven one way or the other by judicial decisions. Judge Hand's speculations concerning possible purposes can only be tested against the legislative record.

Certainly such a function is ordinarily "legislative"; for in a legislature the conflicting interests find their respective representation, or in any event can make their political power felt, as they cannot upon a court. . . . But it is a mistake to suppose that courts are never called upon to make similar choices: i.e., to appraise and balance the value of opposed interests and to enforce their preference. The law of torts is for the most part the result of exactly that process, and the law of torts has been judge-made, especially in this very branch. Besides, even though we had more scruples than we do, we have here a legislative warrant, because Congress has incorporated into the Anti-Trust Acts the changing standards of the common law, and by so doing has delegated to the courts the duty of fixing the standard for each case.[6]

The liberating potential of this judicial equivalent of free verse or "tennis with the net down" was demonstrated as Judge Hand went on to note that Associated Press' by-laws made attainment of membership more difficult for newspapers in competition with present members, that non-members were disadvantaged by being unable to get Associated Press news, that the First Amendment expresses an important value in our society, and, finally, that this value weighed against the Sherman Act legality of the by-laws.[7] The method by which Judge Hand moved from First Amendment values to the illegality of the by-laws left a great deal—in fact, almost everything—to be desired. Passing that, however, the propriety of Judge Hand's consideration of First Amendment values at all demands that Congress' "incorporation" of "the common law" into the Sherman Act have been intended to delegate a value-choosing role to the federal judiciary.

I do not wish to focus upon Judge Hand. He is cited here merely as an authoritative and persuasive spokesman for positions which are widely held and which I wish to dispute. There would be little point in reviewing here all of the positions that have been advanced concerning the broad social, political, and ethical mandates entrusted to the courts through the Sherman Act, or in naming the persons who have urged them, for there is not a scintilla of support for most such views anywhere in the legislative history. The only value other than consumer welfare which is even suggested by the record is protection of small businessmen, but, as will be argued, that value was given only a complementary and not a conflicting role. The legislative history, in fact, contains no colorable support for application by courts of any value premise or policy other than the maximization of consumer welfare. The legislators did not, of course, speak of consumer welfare with the precision of a modern economist but their meaning was unmistakable.

A point which requires emphasis at the outset is the distinction, alluded to above, between conflicting and complementary values. I recognize that many of the legislators who voted for the Sherman Act may have had values in mind in

6 United States v. Associated Press, 52 F. Supp. 362, 370 (1943).

7 *Id.* at 368-373.

addition to or other than consumer welfare. There was, for example, repeated expression of concern over the injury trusts and railroad cartels inflicted upon farmers and small businessmen. It by no means follows, however, that Congress intended courts to take such concerns into account under the statute. A legislator may be moved to vote for a statute by his perception that it will affect a range of values which are not reflected in the criteria that the law requires the courts to use. In the case of the Sherman Act it seems quite clear that this was the situation. Not only was consumer welfare the predominant goal expressed in Congress but the evidence strongly indicates that, in case of conflict, other values were to give way before it. This means that such other values are superfluous to the decision of cases since none of them would in any way alter the result that would be reached by considering consumer welfare alone. For a judge to give weight to other values, therefore, can never assist in the correct disposition of a case and may lead to error. In short, since the legislative history of the Sherman Act shows consumer welfare to be the decisive value it should be treated by a court as the only value.

. . . THE PURPOSE OF ANTITRUST LEGISLATION WAS CONSUMER WELFARE AND THAT THAT POLICY WAS TO GUIDE THE COURTS.

Following these guidelines, then, the following arguments, which will be supported by evidence from the record, seem to me, when taken together, to establish conclusively that the legislative intent underlying the Sherman Act was that courts should be guided exclusively by consumer welfare and the economic criteria which that value premise implies.

1. Both in the bills introduced and in the debates there are a number of explicit statements that the purpose of antitrust legislation was consumer welfare and that that policy was to guide the courts.

2. The rules of law which Congress foresaw are inconsistent with any value premise other than consumer welfare. Congress contemplated that the statute would strike at three basic phenomena: cartel agreements; monopolistic mergers; and predatory business tactics.

    a. A rule of *per se* illegality for cartel agreements (agreements whose purpose is not to produce efficiency but merely to eliminate competition) discloses a policy judgment that firms should fare well or ill according to the standards consumers impose in a competitive marketplace. Such a rule leaves a court no discretion to weigh other values which might legitimate the cartel: for example, the preservation of existing small businessmen, or the welfare of those businessmen who would prefer a shorter work day if their rivals would agree to close down too. The flat prohibition of cartel agreements which Congress envisaged seems fully consistent only with the idea that output should not be artificially restricted, and that desire is in turn explained only by a concern for consumer well-being.

b. A rule against monopolistic mergers, taken by itself, may appear less unequivocally to imply a consumer welfare rationale. The fact that the rule is phrased in terms of monopoly rather than absolute size suggests such a rationale, but the rule could conceivably reflect values of the sort Judge Hand sketched in his *Alcoa* opinion. The argument for this rule in Congress, however, shows that it derived in large measure from a desire to protect consumers from monopoly extortion. Insofar as other classes, such as small producers who sold to or bought from monopolists, were to be benefited, that benefit was not seen as conflicting with the consumer-welfare rationale but rather as reinforcing it. Where producer and consumer welfare might come into conflict, as will be seen under point 3 below, Congress chose consumer welfare as decisive.

c. A similar policy ambiguity may seem at first glance to accompany a rule outlawing predatory business practices. A law against "unfair" commercial tactics could be rooted in moral or humane considerations, a wish to introduce Marquis of Queensbury rules into the commercial arena, either for the sake of the combatants or of the spectators. An alternative hypothesis is provided, however, by an economic theory widely held then as now. Business firms with large capital or low ethics were thought capable of gaining or preserving monopoly positions by crushing rivals with tactics, such as selling below cost, which do not reflect superior efficiency. This theory leads the legislator who entertains it to outlaw injury to competitors only when it is a step toward monopoly and does not result from the exercise of efficiency. The terms of the arguments made in Congress as well as the attitude of Congress toward efficiency indicate that this second hypothesis explains the congressional antipathy to "unfair" practices. The rule thus rests on a consumer-welfare rationale.

3. Congress was very concerned that the law should not interfere with business efficiency. This concern, which was repeatedly stressed, was so strong that it led Congress to agree that monopoly itself was lawful if it was gained and maintained only by superior efficiency. Thus the desire to protect small firms from annihilation by monopoly-minded rivals did not extend an inch beyond the bounds of the consumer-welfare rationale. Small producers would be equally threatened by a rival on its way to monopoly through superior efficiency. The noneconomic helplessness of the individual to which Judge Hand referred would, moreover, seem to be the same before any monopoly, no matter how gained. Only a consumer-welfare value which, in cases of conflict, sweeps all other values before it can account for Congress' willingness to permit efficiency-based monopoly. To break up such monopolies because rivals could not meet their prices would be to impose lower output and higher prices upon consumers.

4. That Congress did not wish courts to apply criteria expressing values other than consumer welfare is also strongly suggested by its preferred method of dealing with situations in which consumer welfare was not to be controlling. The primary examples were farm and labor organizations. Most of the congressmen who spoke to this issue favored the complete exemption of such organizations from the coverage of the statute. Senator Edmunds, who appears to have played the primary role in drafting the bill which became the Sherman Act, wished to include such groups within the law's sweep. The Act as passed was silent on the issue. It may be uncertain, therefore, whether Congress had an intention on this issue and, if it did, what that intention was. But it is clear that those who did not wish farm and labor organizations judged by consumer-welfare criteria adopted the technique of exempting them from the bill altogether. No one suggested that the matter be handled by letting the courts balance the values that these congressmen thought were in play. This raises a fairly strong inference that no values other than consumer welfare were to be considered in those cases which were intended to come within the statute's coverage.

5. Given the narrow view of the commerce power that prevailed in 1890 it is extremely unlikely that the Fifty-first Congress intended to give the courts the power to make broad social or political decisions through the Sherman Act. The federal commerce power was circumscribed not merely by the wide category of commerce that was intrastate but also by its nature as a commercial power. It was generally assumed, that is, that the ends to be accomplished by the exercise of the commerce power must themselves be of a commercial nature. This assumption would not impose a consumer-want-satisfaction rationale upon the statute—the category of commercial purposes comprises more than that—but it does tend to rule out an intention to achieve the broad noncommercial goals that are sometimes attributed to the Sherman Act. The discussions of the commerce power in Congress, as well as the phrasing given the statute by the Judiciary Committee, bear out this thesis.

6. Congress recognized that broad areas of discretion were being delegated to the courts but not one speaker suggested that that discretion included the power to consider any values other than consumer welfare. Senator Sherman, on the other hand, was as explicit as could be desired that the criteria by which the delegation was to be controlled were those relating to consumer welfare. The statute's incorporation of a highly artificial version of "the common law" further demonstrates the consumer-welfare limits of the discretion delegated to the courts.

7. The complete absence of any expression of values which conflict with consumer welfare among those urging antitrust legislation is itself compelling evidence that no such values were intended. Those few legislators who urged that producer welfare override consumer interests in some cases did do, significantly, in opposing the bills drafted by Senators Sherman and Reagan.

Finally, an objection to the thesis advanced here will be discussed. This consists of the argument that the legislative intent underlying the statute is essentially unknowable because the Judiciary Committee draft which was enacted was totally different from Sherman's and Reagan's drafts which were discussed. It can be shown, however, that the policies of the drafts were the same so that the debates are fully applicable to the Act as it stands today.

The narrative of the drafting, discussion, and enactment of the Sherman Act has been told by others.[8] I will give only the briefest outline here.

Senator Sherman introduced S.1 in December 1889.[9] It was called up for debate before the Senate in Committee of the Whole on February 27, 1890, and subjected to a detailed, scathing attack upon its constitutionality and efficacy. The Finance Committee, of which Sherman was the leading member, responded by reporting a modified version of S.1 on March 18. Neither the criticisms nor the modifications concerned the bill's criteria for illegality. Debate on the modified bill began on Friday, March 21, with a lengthy explanation of S.1 and its policies by Sherman. The process of discussion and amendment continued through Thursday, March 27, when the bill was referred to the Judiciary Committee for redrafting. The Judiciary Committee's redraft of S.1, which ultimately became the Sherman Act, was reported back on April 2 and passed the Senate, by a vote of 52 to 1, on April 8. House debate followed and a proposed House amendment, with a Senate amendment in response, led to two conferences before both houses receded and the bill was enacted as it had first come from the Senate. President Harrison signed the bill on July 2, 1890.

Prior to the redraft of S.1 by the Senate Judiciary Committee the Senate in Committee of the Whole had adopted so many amendments in the nature of additions that the bill had become a monstrosity. The more important additions for our purposes were those proposed by Senator Reagan (D., Texas), which dealt with the same problems as Sherman's bill, and Senator Ingalls (R., Kansas),

8 See, particularly, Thorelli, The Federal Antitrust Policy 164-214 (1954).

9 Sherman had introduced in the preceding Congress a resolution directing the Committee on Finance to inquire into and report on measures to control anticompetitive agreements and combinations. Apparently in order to justify the delegation of such a question to the Committee on Finance, of which Sherman was the most influential member, rather than to the more appropriate Committee on the Judiciary, to which he did not belong, the resolution directed that proposed measures be taken up in connection with any bill raising or reducing revenue. The Senate adopted the resolution without debate. Later in that same Congress Sherman introduced a bill, S.3445, which was referred to the Finance Committee and reported back in amended form. The Senate discussed this bill but took no action on the subject during the 50th Congress. This bill was reintroduced by Sherman as S.1 in the 51st Congress. The provisions of the resolution and of Sherman's bill are discussed *infra* at note 11.

which placed a prohibitive tax upon dealings in options and futures. These and a host of minor amendments made the bill so complex as to be incomprehensible. It was for this reason, as well as because of widespread doubt concerning the constitutionality of the various measures as framed, that the Judiciary Committee was asked to write a new draft.

With this outline of the order of events in mind we may proceed to consider the evidence of Congress' intent.

I. Explicit Policy Statements

The views of Senator Sherman (R., Ohio), are crucial to an understanding of the intent underlying the law that bears his name. Sherman was the prime mover in getting antitrust legislation considered and pressed through the Senate. He was also by far the most articulate spokesman for antitrust in Congress. It will be seen, moreover, that though Sherman's bill was completely rephrased by the Judiciary Committee, of which he was not a member, the final bill, in its substantive policy aspects, embodied Sherman's views.

Sherman's views on the policy to be served by antitrust legislation are clear. They appear on the face of the bill he drafted and reported from the Committee on Finance, S.1. Section 1 of that bill declared illegal two classes of "arrangements, contracts, agreements, trusts, or combinations": (1) those "made with a view, or which tend, to *prevent full and free competition*," and (2) those "designed, or which tend, *to advance the cost to consumer*" of articles of commerce.[10] Sherman employed these two criteria of illegality in every measure he presented to the

10 The complete section read:

> That all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view or which tend to prevent full and free competition in the importation, transportation, or sale of articles imported into the United States, or in the production, manufacture, or sale of articles of domestic growth or production, or domestic raw material that competes with any similar article upon which a duty is levied by the United States, *or* which shall be transported from one State or Territory to another, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed or which tend to advance the cost to the consumer of any such articles are hereby declared to by against public policy, unlawful, and void.

The second section of the bill provided for private suits to recover the sum paid for any goods "included in or advanced in price by said combination." The third made participation in a prohibited arrangement, etc., a criminal offense and punishable by a fine of not more than $10,000, imprisonment for not more than five years, or both. 21 Cong. Rec. 1765 (1890). Sherman dropped the third section when he reported the Finance Committee's modified version on March 21, 1890. *Id.* at 2455.

Senate.[11] The first test, which subjects all firms to market forces, is hardly a means of preserving social values that consumers are not willing to pay for. It can be reconciled only with a consumer-welfare policy. The second test is even more explicit. The touchstone of illegality is raising prices to consumers. There were no exceptions. Sherman wanted the courts not merely to be influenced by the consumer interest but to be controlled completely by it.

SHERMAN WANTED THE COURTS NOT MERELY TO BE INFLUENCED BY THE CONSUMER INTEREST BUT TO BE CONTROLLED COMPLETELY BY IT.

Sherman's speeches in support of his fill fully bear out this reading. He said, for example, that his bill sought "only to prevent and control combinations made with a view to prevent competition, or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer;"[12] that a combination which embraced "the great body of all the corporations engaged in a particular industry" tended "to advance the price to the consumer," and was "a substantial monopoly injurious to the public;"[13] and, speaking

11 These tests were used in S.3445, Sherman's bill in the 50th Congress, and in every draft of S.1 which he offered to the 51st. The same policy orientation is shown by the terms of the resolution he offered and the Senate adopted in the 50th Congress:

> *Resolved*, That the Committee on Finance be directed to inquire into and report, in connection with any bill raising or reducing revenue that may be referred to it, such measures as it may deem expedient to set aside, control, restrain, or prohibit all arrangements, contracts, agreements, trusts, or combinations between persons or corporations, *made with a view, or which tend to prevent free and full competition* in the production, manufacture, or sale of articles imported into the United States, or which, against public policy, *are designed or tend to foster monopoly or to artificially advance the cost to the consumer* of necessary articles of human life, with such penalties and provisions, and as to corporations, with such forfeitures, as will tend *to preserve freedom of trade and production, the natural competition of increasing production, the lowering of prices by such competition*, and the full benefit designed by and hitherto conferred by the policy of the government to protect and encourage American industries be levying duties on imported goods.

(Emphasis added.) 19 Cong. Rec. 6041 (1888).

The first two italicized passages above indicate, as the text discusses, the evils which Sherman wished to avert. The third italicized passage shows the benefits he wished to secure. The evils are described as prevention of competition, monopoly, and the artificial advancement of prices to consumers. The benefits are freedom of trade and production, increasing production, and the lowering of prices by the competition of increasing production. It could hardly be clearer that Sherman wanted to stop restrictions of output and permit efficiency. These are goals, as the text will argue, which can only be related to consumer welfare. (The last sentence of this resolution reflects the Republican's contention that protective tariffs were beneficial to consumers as well as producers. The inconsistency of this argument with the arguments for antitrust was either not apparent to Sherman and the Republican majority-though pointed out incessantly by the Democrats-or did not perturb them. In any event, the tariff approach to domestic competition was never suggested by Sherman or others who supported his antitrust objectives.)

12 21 Cong. Rec. 2457 (1890).

13 *Ibid.*

of the trusts, "If they conducted their business lawfully, without any attempt by these combinations to raise the price of an article consumed by the people of the United States, I would say let them pursue that business."[14]

Though an economist of our day would describe the problem of concern to Sherman differently, as a misallocation of resources brought about by a restriction of output rather than one of high prices, there is no doubt that Sherman and he would be talking about the same thing. Indeed, Sherman demonstrated more than once that he understood that higher prices were brought about by a restriction of output. In defending his bill's constitutionality, for example, he asked, wholly rhetorically, whether Congress had not the power to "protect commerce, nullify contracts that restrain commerce, turn it from its natural courses, increase the price of articles, and thereby diminish the amount of commerce?"[15] This and other remarks suggest that Sherman and his colleagues identified the phrase "restraint of commerce" or "restraint of trade" with "restriction of output."[16] If this identity can be carried over to the wording of the Sherman Act, as I believe it can, the meaning of that statute becomes clear and its consumer orientation indisputable.

After Sherman in importance in the legislative career of the statute stand the members of the Senate Judiciary Committee which reworded the bill after most of the debate had taken place. The members of that Committee were Edmunds (R., Vermont); Hoar (R., Massachusetts); Ingalls (R., Kansas); Evarts (R., New York); Wilson (R., Iowa); Coke (D., Texas); Vest (D., Missouri); George (D., Mississippi); and Pugh (D., Alabama). Of these men, four—George, Coke, Vest, and Pugh who comprised the Democratic minority—gave explicit evidence that they agreed with the consumer-welfare rationale offered by Sherman. Of the five Republicans, none gave evidence of disagreement with that policy and several gave indirect evidence, to be discussed in later sections of this paper, that they agreed.

George was a vociferous critic of the constitutionality and efficacy of Sherman's bill on such issues as the inability of the commerce to deal with manufacturing and the difficulties of proving intent,[17] but his agreement with that bill's value premise is shown by the bill he drafted. George's bill employed the

14 *Id.* at 2569.

15 21 Cong, Rec. 2462 (1890).

16 S.1 was entitled a bill "to declare unlawful trusts and combinations in restraint of trade and production." The phrase "in restraint of production" seems hardly to bear any other reading than "in restriction of production," and this throws light upon the companies phrase "in restraint of trade." Apparently Sherman thought of production and trade as separable phases of the economic process, and the two phrases together are subsumed within the modern phrase "restriction of output." The idea that restriction of output was at the root of the problem to be dealt with, was expressed by others as well. Senator Pugh and Representative Heard both expressed that idea. See pp. 18-20 *infra*.

17 See, for example, 21 Cong. Rec. 1765-1772 (1890).

same tests for illegality as Sherman's—the prevention of competition and the advancement of costs to consumers.[18] George's speeches showed him to be concerned with the effect of the trusts upon the small producers who sold to or bought from them, but his bill confirms the internal evidence in his speeches that he did not wish the courts to protect small producers at the expense of consumers. George's concern for producers was entirely complementary to his concern for consumers.[19]

Coke offered his own bill, very similar to Reagan's, and Reagan's bill, as will be shown,[20] appeared to reflect the same policies as Sherman's bill. But Coke criticized Sherman's draft for omitting criminal sanctions. His argument that private damage suits would not provide adequate relief confirms his agreement with Sherman concerning the policy the law should serve:

> "How would a citizen who has been plundered in his family consumption of sugar by the sugar trust, or in his consumption of cotton-bagging under the trust covering that indispensable article, or in is consumption of iron or steel by the iron and steel trust recover his damages under the clause? It is simply an impossible remedy offered to him. . . . If the party damnified . . . were a great corporation, a wealthy association, it could employ lawyers and perhaps be able to show some direct damage, but how could the consumers of the articles produced by these trusts, the vast mass of our people—the individuals—go about showing the damages they had suffered? . . . I think the constituents of all of us, the consumers of products which are raised and manufactured in the country, would be absolutely without a remedy under the bill of the Senator from Ohio."[21]

Vest accepted Sherman's goals but doubted the effectiveness of his bill, saying, after he had heard Sherman's lengthy exposition of his views, that if the bill "would effect what he [Sherman] claims for it, I should vote and speak for it until my strength was exhausted in this Chamber."[22] He preferred Coke's bill as likely

18 *Id.* at 96 and 2657.

19 George's speeches are analyzed at pp. 40-42 *infra*.

20 See pp. 21-22 and notes 57, 81 and 82 *infra*.

21 21 Cong. Rec. 2615 (1890).

22 21 Cong. Rec. 2570 (1890). Earlier Vest had said, "I sympathize with the objects of the Senator from Ohio. . . . [B]ut in my judgment to pass a law which the Supreme Court would declare to be unconstitutional is simply to invite additional disaster." *Id.* at 2467.

to prove more effective.[23] Vest's acceptance of the consumer-welfare rationale was also shown by his argument that the real remedy for the evil of the trusts was the elimination of the protective tariff because "We know very well that competition always reduces prices." He said it was no argument for tariffs, even if it were true, that steel rails were as cheap in England as in the Unites States: "I say if you let these two manufacturing interests compete together and create competition, you then secure lower prices to the consumer."[24] He spoke of American manufacturers coming together to "create these combines at the expense of the consumer in order to enhance their own profits."[25]

Pugh supported Sherman's bill on a consumer-welfare rationale and perceived the connection between artificially raised prices and restriction of output:

> "[T]he existence of trusts and combinations to limit the production of articles of consumption entering into interstate and foreign commerce for the purpose of destroying competition in production and thereby increasing prices to consumers has become a matter of public history, and the magnitude and oppressive and merciless character of the evils resulting directly to consumers and to our interstate and foreign commerce from such organizations are known and admitted everywhere. . . ."[26]

Two other senators not on the Judiciary Committee—Gray (D., Delaware) and Teller (R., Colorado)—also stated explicitly that antitrust legislation should serve consumer welfare. Gray did so by introducing an amendment which employed the same consumer-interest tests for illegality as Sherman's bill.[27] Teller disclosed his policy objectives when he stated he might vote for Sherman's bill, though he was "not very much moved by it" because of its lack of an adequate remedy:

23 *Id.* at 2570-2571.

24 *Id*. at 2466.

25 *Ibid.*

26 *Id.* at 2558. Pugh quoted the first section of Sherman's bill-which dealt with agreements and combinations preventing full and free competition or advancing prices to consumers-and asserted that such arrangements violated the public policy of the United States. *Ibid.*

27 *Id.* at 2657. Gray offered as an amendment the bill originally drafted by George and introduced by him as S.6. This bill employed Sherman's criteria for illegality but substituted as remedies a disability to sue for certain rights in the federal courts and a power and duty in the President to suspend all customs duties and import taxes on articles of the type involved in the described agreement or combination. Gray preferred this bill because he thought Sherman's unconstitutional. *Ibid.*

> "Now, how does this bill reach the great evil against which it is aimed? The Standard Oil Trust has been spoken of . . . . But what can we do about it? We do not dissolve the corporation. What do we do? Anybody who is damaged can sue them. When they interfere with somebody who has sunk a well in Ohio and they run down the price of oil until they shut him up, he may have his remedy against them. But that is not what we are complaining of. We are complaining that Standard Oil Company has a tendency to reduce and destroy competition, and thereby, by destroying competition to put up improperly the price of oil. Who suffers by that? The sixty-five millions of people in the United States who use oil; and how do they suffer? How much damage have they sustained? It is inconsequential individually, but great to the whole mass of the people."[28]

In this passage Teller also shows that predatory attacks by the trusts upon their smaller rivals were not to be outlawed simply to preserve competitors but because of the effect of the resulting monopoly upon consumers.

The debate in the House of Representatives contains similar evidence of the purpose of the Sherman Act, though the debate there was shorter and less enlightening concerning the question of values than was the debate in the Senate. One of the clearest statements of the evil which the bill was designed to cure was made by Representative Heard (D., Missouri) in his excoriation of the "dressed-beef combine":

> "[T]his giant robber combination, while perhaps the most damaging of all of its class to the interests of our people, is only one of many which by their methods extort millions from the citizens of this Republic without adding one cent of value to our productions or one iota of increase to our prosperity. In fact, the very object of these giant schemes of combined capital is not to increase the volume of supply, and thus lessen the cost of any useful commodity, but rather to repress, reduce, and control the volume of every article that they touch, so that the cost to consumers is increased while the expenditure for production if lessened, and thereby their profit secured."[29]

28 *Id.* at 2571.

29 21 Cong. Rec. 4101 (1890). He continued: "We know that by such means the trusts which control the markets on sugar, nails, oils, lead, and almost every other article of use in the commerce of this country have advanced the cost of such articles to every consumer, and that without rendering the slightest equivalent therefor these illegal conspiracies against honest trade have stolen untold millions from the people." *Ibid.*

Heard clearly envisaged the law as one which would prohibit market control that led to restriction of output. He correctly stated that such restriction injured those who sell to trusts as well as consumers,[30] but his concern for such small producers was limited to the restriction-of-output situation and thus did not contradict or add to his consumer-welfare rationale. Statements by Representatives Culberson[31] (D., Texas); Wilson[32] (D., West Virginia); Anderson[33] (R., Kansas); Fithian[34] (D., Illinois); and Taylor[35] (R. Ohio), also indicate that they viewed consumer welfare as the policy of the legislation. Culberson reported the Senate bill favorably from the House Judiciary Committee and Taylor was the chairman of that committee.

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30 *Ibid.*

31 *Id.* at 4089, 4090.

32 Wilson devoted his speech primarily to the encouragement given trusts by the protective tariff, but he had printed in the Congressional Record some of his newspaper articles which show that his objection to trusts was their tendency to raise prices by limiting supplies of the articles which they controlled. *Id*. at 4096-4097.

33 Anderson opposed railroad rate pools because of their adverse effect upon farmers and consumers. He rejected the argument that pools should be legal if the rates agreed upon were "just and reasonable":

> The question is whether the people shall be protected by the safeguard of competition between carriers, as they are by competition between merchants, or whether we shall legalize combinations so that the railroads may hereafter charge whatever they see fit in defiance of common law and justice.
>
> The gentleman from Vermont talks about "indiscriminate competition" between railroads. What about "indiscriminate competition" between merchants, or between lawyers, or between doctors, or between mechanics?
>
> Does anybody say you should pass a law preventing "indiscriminate competition" between merchants? Not at all. But when these high and holy railroad millionaires come here . . . , then for some mysterious reason we are called upon to legalize their pools, to "regulate" competition between them lest they hurt each other . . . .

Cong. Rec. 5959 (1890).

34 Fithian, in a speech apparently greatly expanded in the printed version, spoke of the need for relief for his farmer constituents but he was also concerned with the impact of trusts upon consumers and phrased his arguments in those terms: "Competition when left free, and when combinations are not formed to prevent the operation of natural laws, will regulate the price of every commodity and will bring the price down to the level of an honest profit." 21 Cong. Rec. 4102 (1890).

35 Taylor, the Chairman of the House Judiciary Committee which recommended passage of S.1 as it came from the Senate, opposed trusts because of their injurious effect upon both farmers and consumers. Of the beef trust he said: "This monster robs the farmer on the one hand and the consumer on the other. This bill proposes to destroy such monopolies, such destructive tyrants . . . ." *Id.* at 4098. Even when defending the protective tariff, a topic that occupied many of the speakers, Taylor did so on the ground that it created lower prices beneficial to consumers. Despite the fallacy of his argument, this demonstrates that Taylor, like most other legislators, was not willing to argue for a policy of preferring producers to consumers.

Additional evidence of the intent of the House of Representatives is provided by the bills introduced there. In the Fifty-first Congress no antitrust bill introduced in the House—or the Senate, either, for that matter—mentioned a value other than consumer welfare. I have counted ten House bills which related explicitly to consumer welfare, and the remainder, given the economic theories of the time, were fully consistent with that value. The ten explicit bills were introduced by Representatives McRae (D., Arkansas); Fithian (D., Illinois); Henderson (R., Iowa); Conger (R., Iowa); Blanchard (D., Louisiana); Anderson (D., Mississippi); Enloe (D., Tennessee); Richardson (D., Tennessee); Lane (D., Illinois); and Perkins (R., Kansas).[36]

Explicit value statements in the Senate and the House, then were overwhelmingly in favor of the proposition that Congress intended the Sherman Act to be interpreted in accordance with the principles of consumer welfare. Those few legislators who spoke against that value were, as we shall see in a later section, in opposition to Sherman's bill and also, significantly, to the bill introduced by Senator Reagan (D., Texas).

II. The Proposed Rules of Law

I have already indicated the policy which underlies rules against cartel agreements (sometimes referred to as loose combinations), monopolistic mergers (tight combinations), and predatory tactics. In this section I will attempt to show that those rules were in fact contemplated by Congress.

a. Cartels

Doubt has been expressed about the clarity of the congressional intent with respect to cartels.[37] Yet it seems plain that Congress intended to outlaw "loose combinations" of the sort typified by price-fixing and market-division agreements between competitors. (I am speaking here of agreements not involving any significant efficiency-creating integration.) The evidence for this intent is of several sorts.

The language of the Sherman Act itself seems to distinguish between cartels and tighter arrangements similar to mergers. Section 1 refers to "Every contract, combination in the form of trust or otherwise, or conspiracy." Aside from the differing connotations of the words "contract," "combination," and "conspiracy," there is the obvious point that the drafters chose to modify only the word "com-

36 McRae, H.R. 91, Bills and Debates in Congress Relating to Trusts [hereinafter cited as Bills and Debates], S. Doc. No. 147, 57th Cong., 2d Sess. (1903), 417; Fithian, H.R. 202, *id.* at 421; Henderson, H.R. 270, *id.* at 425; Conger, H.R. 286, *id.* at 427; Blanchard, H.R. 402, *id.* at 431; Anderson, H.R. 509, *id.* at 433; Enloe, H.R. 811, *id.* at 435, and H. Rec. 30, *id.* at 459; Richardson, H.R. 826, *id.* at 437; Lane, H.R. 3819, *id.* at 449; and Perkins, H.R. 3844, *id.* at 451.

37 Thorelli, *op. cit. supra* note 8 at 185, seems to find Sherman's intention with respect to cartels, "simple agreements, pools and similar loose associations" somewhat ambiguous.

bination" with the phrase "in the form of trust or otherwise." The word "trust" originally gained currency to describe anticompetitive combinations because the trust device was used to gather industries or large parts of them under single ownership and control. It is arguable, therefore, that its use in the Sherman Act indicated that the "trust" was but one member of the general class of close-knit "combinations" while it was not a member of the classes of "contracts" or "conspiracies."[38] The distinction between the latter two terms may have been that between formal agreements and informal, probably secret, understandings. In any event, the obvious setting apart of the word "combination" in a way which seems to indicate common ownership and control suggests that something else was meant by the other two words, and that something else could hardly have been anything other than cartels. This argument is rather speculative, however, and clearer evidence exists.

Sherman's original draft of S.1, as well as Reagan's and the other bills, supports the theory that Congress intended to prohibit cartels by employing words that suggest every range of coordination from the loosest general understanding to the tightest-knit integration.[39] In the debates, moreover, Sherman plainly demonstrated an intention to outlaw cartels. He expounded his legislative aims, for instance, by reading to the Senate at great length from judicial opinions which he stated were representative of the common law he said his bill would enact. The cases he read from or described held illegal a market-division cartel agreement[40] as well as monopolistic mergers and the predatory extraction of railroad rebates by the Standard Oil Trust.

. . . Sherman plainly demonstrated an intention to outlaw cartels.

38 The word "trust" was used very loosely in the debates and sometimes, as in Reagan's bill, seemed to mean any arrangement that was formed for the purpose of suppressing competition. Some legislators, however, appeared to use the word to mean an arrangement involving integration by ownership. See Sherman's remarks at 21 Cong. Rec. 2457 (1890).

39 S.1 as drafted by Sherman applied to "all arrangements, contracts, agreements, trusts or combinations." The words suggest a progression from the loosest sort of understanding between independent firms to the tightest integration by ownership. George's bill, S.6, applied to "all contracts, arrangements, agencies, trusts, or combinations." Bills and Debates, 411. It is subject to similar analysis.

Reagan's amendment provided criminal penalties for persons creating or participating in trusts and specified that "a trust is a combination of capital, skill, or acts" for any or all of six stated purposes, among which were: creating or carrying out any restrictions in trade; limiting or reducing production or increasing or reducing prices; preventing competition; or creating a monopoly. Bills and Debates, 218. The use of the disjunctive seems significant, and a combination of either "skill" or "acts" alone could hardly be anything other than a cartel agreement. Coke's amendment in the Senate resembled Reagan's wording on this point, 21 Cong. Rec. 2613, (1890) as did a number of bills introduced in the House: H.R. 179, H.R. 830, H.R. 846, H.R. 3925, H.R. 8980. See Bills and Debates 419, 439, 441, 455, 457, respectively.

40 Chicago Gas Light and Coke Co. v. The People's Gas Light and Coke Co., 121 Ill. 530 (1887), held void on grounds of public policy an agreement dividing territories between two gas companies in Chicago. With respect to some of the other cases cited it is not clear whether the courts or Sherman viewed the arrangements as essentially mergers or cartels. See Craft v. McConoughy, 79 Ill. 346 (1875).

Sherman's intention to outlaw cartels was understood by his colleagues, and the remarks of Senators Stewart (R., Nevada) and Platt (R., Connecticut), who favored certain cartels show that not only Sherman's bill but Reagan's would enact such a rule. Stewart objected to both bills because they would ban competitors' agreements to limit output during periods of "overproduction" and "depression.[41] Platt attacked Sherman's measure because, "Unrestricted competition is brutal warfare . . . ."[42] He favored a rule that would permit agreements to charge prices that were "just and reasonable and fair."[43] The Senate paid no attention to either Platt or Stewart and, in the Committee of the Whole, adopted Reagan's amendment and reported Sherman's bill with its various additions and amendments to the Senate.[44]

The intention of both houses of Congress to outlaw cartels is also shown by the extended sparring that took place over the Bland amendment the House added to the Senate bill. Representative Bland (D., Missouri) offered a two-part amendment to make clear that the bill covered "every contract or agreement entered into for the purpose of preventing competition in the sale or purchase of any commodity, or to prevent competition in transportation."[45] The House had before it then the Senate Judiciary Committee's draft which may have seemed less clear than the Sherman and Reagan bills to those who had not followed the Senate debates. The House adopted Bland's amendment[46] but the Senate Judiciary Committee objected to the first part as beyond Congress' power under the commerce clause.[47] Indeed, the switch from Sherman's and Reagan's wording to the Judiciary Committee's seems originally to have been motivated largely by

41 21 Cong. Rec. 2605-2606; 2643 (1890). Stewart rather marred the consistency of his position when he read the price-fixing clause of Reagan's bill and announced: "If two or more persons fix the price at which they will sell any article they have got to go to the penitentiary. Well, I think they ought to. [laughter.]" *Id.* at 2644.

42 21 Cong. Rec. 2729 (1890).

43 *Ibid.* Platt said, "The conduct of this Senate for the past three days . . . has not been in the line of the honest preparation of a bill to prohibit and punish trusts. It has been in the line of getting some bill with that title that we might go to the country with. . . . [T]he whole effort has been to get some bill headed 'A bill to punish trusts' with which to go to the country." *Id.* at 2731. This remark is often quoted to suggest that Congress had no serious intention in passing the Sherman Act. More likely, however, the statement simply reflects Platt's strong disapproval of a measure which would outlaw cartels he thought desirable. Platt was opposed to Sherman's consumer-welfare policy, and his charge should be evaluated with that in mind.

44 Reagan's amendment was adopted by a vote of 34 to 12 on March 25, 1890. 21 Cong. Rec. 2611 (1890). S.1 was reported from the Committee of the Whole to the Senate on March 26. *Id*. at 2662.

45 *Id*. at 4099.

46 *Id.* at 4104.

47 *Id.* at 4559-4560.

the very doubts of constitutionality which Bland's amendment provoked. Senator Hoar (R., Massachusetts), who reported the Judiciary Committee's reaction to the Bland amendment stated he thought the remainder of the amendment concerning transportation was covered in the Senate bill already, but there was no harm in adding Bland's proposal.[48] Had matters stopped there it would have been clear that cartels were illegal. If the Senate bill, which became the Sherman Act, covered railroad rate cartels (which was what the House was driving at in the second part of the Bland amendment), it certainly covered other cartels. But for the question of the reach of the commerce power, the first part of the Bland amendment was surely covered by a bill which made no distinction between transportation and other goods or services.

A day later, however, Hoar said some members thought the Judiciary Committee's revision of the Bland amendment was not as precise and well guarded as it might be. He did not explain, but his motion to recommit was agreed to.[49] The committee came back with a very different amendment under which agreements preventing competition in transportation were illegal only if rates were "raised above what is just and reasonable."[50] The Senate agreed,[51] perhaps because this approach to transportation seemed more in keeping with the railroad rate philosophy of the recently enacted Interstate Commerce Act. The House refused to accept the Senate amendment and ultimately both the Senate and the House agreed to recede from their respective amendments, leaving the bill as it had first come from the Senate.[52]

The inference from this maneuvering is that all cartels were to be illegal, regardless of the price they set. The Senate Judiciary Committee's objection to the first part of the Bland amendment is probably to be taken at face value. Hoar's statement that the bill already covered the second part of the Bland amendment indicates not only that the unamended bill made railroad cartels flatly unlawful but that it had that effect upon all other cartels since there is nothing in the wording of the statute or the debates to suggest the Senate had intended a distinction. Indeed, Hoar's words may have been the factor that galvanized the senators who favored a different rule for railroads to press for a revision specifying a "just and reasonable" standard for railroad rate agreements. This move constitutes an admission that the general language of the bill permitted no such construction. By receding afterward the Senate appears to have indicated again that the flat rule applied to all cartels.

48 *Id*. at 4560.

49 *Id*. at 4599.

50 *Id*. at 4735.

51 *Ibid.*

52 *Id.* at 5950-5961; 5981-5983; 6116-6117; 6312-6314.

No contrary implication can be drawn from the House's recession. The House had not attempted to distinguish between railroad and other cartels. By the time of the recession, particularly in view of Hoar's first statement, it may very well have seemed that Bland's amendment was unnecessary to the House's purposes.[53]

The evidence appears unmistakable that the Congress intended to outlaw cartels.

b. and c. Monopolistic mergers and predatory practices

There is no need to spell out all the evidence that Congress intended to outlaw both mergers (or other forms of close-knit combination) that created monopoly and predatory business tactics. Sherman's description of the common law which his bill would enact,[54] his other remarks,[55] the speeches of a number of legislators,[56] and the language of the bills introduced[57] sufficiently establish this point. No one, to my knowledge, has ever challenged it. The important point is that these rules were typically justified in terms of consumer welfare. Sherman stated the general case against both monopolistic mergers and predatory practices:

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53 See the remarks of Culberson, *id.* at 5951 (as to the first part of Bland's amendment), and of Edmunds, *id.* at 6116; Vest, *ibid*. and *id.* at 4123; and Hoar (as to the second part of Bland's amendment), *id*. at 4560.

54 Handy v. Cleveland and Marietta Railroad Co., 31 Fed. 689 (1887), involved the predatory extraction of railroad rebates by the Standard Oil Co.; Richardson v. Buhl, 77 Mich. 632 (1889); People v. Chicago Gas Trust Co., 130 Ill. 268 (1889); and People v. North River Sugar Refining Co., 121 N.Y. 582, 623, 626 (1890), involved monopolistic mergers and acquisitions.

55 See 21 Cong. Rec. 2457, 2459-2462, 2569 (1890).

56 *E.g.*, Edmunds, *id.* at 2726; Reagan, *id.* at 2645; Pugh, *id*. at 2558; Culberson, *id.* at 4089.

57 Reagan's amendment clearly aimed at predatory practices and monopolistic mergers as well as cartels. Among the purposes for which it was forbidden to enter into "a combination of capital, skill, or acts" was "to limit or reduce the production or to increase or reduce the price of merchandise or commodities." Bills and Debates, 218. This provision seems curiously asymmetrical at first glance. Reduction of output and increase of prices occur together. The seemingly anomaly of permitting combinations to increase production but forbidding combinations to lower prices may, however, be resolved by the theory of predation. A combination formed with the intention of increasing production may have seemed to Reagan to display an intention to create efficiency by cutting costs. But the intention to lower prices may have seemed unrelated to costs and therefore to imply a further intent to injure rivals improperly. This interpretation is given substance by the fact that Reagan introduced much the same bill as S.3440 in the 50th Congress, but there listed as a prohibited purpose "To limit, to reduce, or to increase the production or prices of merchandise or commodities." Bills and Debates, 5. His later bill in the same Congress, S. 3476, amended this so as not to prohibit an intent to increase production. Bills and Debates, 33, and his amendment to S.1 in the 51st Congress followed that pattern. The parallel bills offered in the House by Anderson, H.R. 11213 and H.R. 11279, underwent the same evolution. Bills and Debates, 55 and 57. These changes strongly suggest an attempt to preserve efficiency-creating combinations while prohibiting predatory combinations.

Reagan's bill also prohibited combinations to create monopolies. It has already been shown, note 39, *supra*, that it prohibited cartels. Its adoption by the Senate in Committee of the Whole, therefore, strongly supports the argument that the Senate proposed to enact the rules discussed in the text.

> "The sole object of such a combination is to make competition impossible. It can control the market, raise or lower prices, as will best promote its selfish interests, reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist. Its governing motive is to increase the profits of the parties composing it. The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer. It dictates terms to transportation companies, it commands the price of labor without fear of strikes, for in its field it allows no competitors. Such a combination is far more dangerous than any heretofore invented, and, when it embraces the great body of all the corporations engaged in a particular industry in all the States of the Union, it tends to advance the price of the consumer of any article produced, it is a substantial monopoly injurious to the public, and, by the rule of both the common and the civil law, is null and void and just subject of restraint by the courts, of forfeiture of corporate rights and privileges, and in some cases should be denounced as a crime, and the individuals engaged in it should be punished as criminals. It is this kind of a combination we have to deal with now."[58]

The emphasis in this passage is upon the harm done to consumers. Sherman also mentions that a combination of the sort he describes allows no strikes but that is clearly an additional evil and not a test for illegality to be applied independently of consumer welfare. If there were any ambiguity in the passage, it would be removed by the wording of his bill which specifies only consumer-welfare tests. Other legislators spoke of the evils of the trusts in respects other than their harmful effect upon consumers, but, like Sherman, none of them suggested that these harmful effects could take place in any case not involving injury to consumers. The language is always fully consistent with the view that concern for farmers, laborers, or small businessmen was complementary to concern for consumers and not to override it in case of conflict between the interests of consumers and other groups. Other factors, particularly the one to be discussed in the next section, demonstrate that this interpretation is the correct one.

58 21 Cong, Rec. 2457 (1890).

III. The Preservation of Efficiency; the Legality of Monopoly Gained Through Efficiency

Congress' position with respect to efficiency cannot be explained on any hypothesis other than that consumer welfare was in all cases the controlling value under the Sherman Act.

Sherman took great pains to stress that his bill would in no way interfere with efficiency. It would outlaw only those mergers which created great market power. "[The bill] aims only at unlawful combinations. It does not in the least affect combinations in aid of production where there is free and fair competition."[59] He stressed the legality of efficiency repeatedly,[60] citing partnerships and corporations as two forms of combination which were efficiency-creating and therefore lawful.[61] He said corporations "ought to be encouraged and protected as tending to cheapen the cost of production."[62] He also praised the efficiency-creating corporate merger.[63]

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59 *Ibid.* The words "in aid of production" obviously refer to efficiency.

60 *E.g.*, "If their [the individuals'] business is lawful they can combine in any way and enjoy the advantage of their united skill and capital, provided they do not combine to prevent competition." *Ibid.*

61 Sherman stated the case for partnerships:

> The right to combine the capital and labor of two or more persons in a given pursuit with a community of profit and loss under the name of a partnership is open to all and is not an infringement of industrial liberty, but is an aid to production . . . . The same business is open to every other partnership, and, while it is a combination, it does not in the slightest degree prevent competition.

Ibid.

Sherman attributed to the corporate form of combination an efficiency-creating potential even greater that that of partnerships, presumably because corporate enterprise is likely to operate on a larger scale. In any event, Sherman's praise for the corporate form of organization strikingly demonstrated that he wished to preserve efficiency precisely because it enriches consumers:

> The combination of labor and capital in the form of a corporation to carry on any lawful business is a proper and useful expedient, especially for great enterprises of a quasi public character, and ought to be encouraged and protected as tending to cheapen the cost of production, but these corporate rights should be open to all upon the same terms and condition. . . . Experience has shown that they are the most useful agencies of modern civilization. They have enabled individuals to unite to undertake great enterprises only attempted in former times by powerful governments. The good results of corporate power are shown in the vast development of our railroads and the enormous increase of business and production of all kinds.

Ibid.

62 See the last quotation in note 61, *supra*.

63 When corporations unite merely to extend their business, as connecting lines of a railway without interfering with competing lines, they are proper and lawful. Corporations

Not once did Sherman suggest that courts should blunt or discourage efficient size or conduct in the interest of any social or political value. The only limit he urged to the creation of efficiency by combination was justified explicitly in terms of consumer welfare. He thought combinations of monopolistic size would not pass their efficiencies on to consumers:

> "It is sometimes said of these combinations [the monopolistic trusts] that they reduce prices to the consumer by better methods of production, but all experience shows that this saving of cost goes to the pockets of the producer. The price to the consumer depends upon the supply, which can be reduced at pleasure by the combination."[64]

Here again Sherman identified injury to consumers as occurring through restriction of output by firms with market control.

The Senate later adopted an amendment to Sherman's bill offered by Senator Aldrich (R., Rhode Island) which stated:

> "*Provided further*, That this act shall not be construed to apply to or to declare unlawful combinations or associations made with a view or which

footnote 63 cont'd

tend to cheapen transportation, lessen the cost of production, and bring within the reach of millions comforts and luxuries formerly enjoyed by thousands.

21 Cong. Rec. 2457 (1890).

The progression in Sherman's argument-partnerships to corporations to corporate mergers-indicates that he perceived these three forms of integration as essentially the same economic phenomenon. All are capable of benefiting consumers by creating efficiency.

64 *Id.* at 2460. Sherman's argument here is not necessarily correct. A monopolistic merger may create such efficiency that the net effect will be an increase in output. There is no way of telling in advance, or even afterward, in all probability, whether the net effect of such a merger will be restriction or increase of output.

The passage quoted in notes 61 and 63 *supra*, and in the text here show that when Sherman proposed to outlaw the prevention of "full and free competition" he did not refer to any elimination of rivalry between firms. The combinations he favored all eliminate such rivalry. The phrase "full and free competition" must be read to refer to a market whose structure is effectively competitive. Sherman gives few clues as to the structure he envisaged, though he seemed willing to allow rather high percentages. It is not necessary to conclude that Sherman would have required a market power test for cartels because such agreements, not being "in aid of production," could not benefit consumers and could only be motivated by a desire to restrict output.

> tend, by means other than by a reduction of the wages of labor, to lessen the cost of production or reduce the price of any of the necessaries of life, nor to the combinations or associations made with a view or which tend to increase the earnings of persons engaged in any useful employment."[65]

The adoption of this amendment by the Senate in Committee of the Whole indicates agreement with Sherman's position on efficiency, though Thorelli warns that at the time of adoption the Senate was concerned primarily with Ingalls' amendment to prohibit trading in futures and options.[66] The last clause of the amendment appears merely to reflect the Senate's desire to exempt labor unions from the scope of the law.

The most dramatic illustration of Congress' agreement with Sherman's position, however, was the decision to make legal the gaining of monopoly by superior efficiency. The Judiciary Committee draft made it an offense to "monopolize," not to have a monopoly. The wording itself suggests that an activity rather than a status was to be outlawed, and that in turn suggests that there were lawful means of gaining a monopoly position. The issue was raised by Senator Kenna (D., West Virginia) who asked:

> "Is it intended by the committee, as the sections seems to indicate, that if an individual engaged in trade . . . by his own skill and energy, by the propriety of his conduct generally, shall pursue his calling in such a way as to monopolize a trade, his action shall be a crime under this proposed act?"

65 21 Cong. Rec. 2654-2655 (1890).

66 Thorelli, *op. cit. supra* note 8, at 195. Aldrich's suggestion, however, accords with Sherman's position and it seems reasonable that the Senate agreed with his amendment when it adopted it. No senator spoke against efficiency and others praised it. Teller, for example, pointed out that "A trust may not be always an evil. A trust for certain purposes, which may mean simply a combination of capital, may be a valuable thing to the community and the country." 21 Cong. Rec. 2471 (1890). Blair was seemingly concerned about efficiency when he suggested that Sherman's bill be amended by striking out the words "to prevent full and free competition" and inserting in their place the words "to permit a monopoly," and also to change the phrase "intended to advance the cost" to read "primarily intended to enhance [sic]" the cost to the consumer. *Id.* at 2566-2567. Blair was troubled by the ambiguity of the word "competition" and probably wished by the first change to ensure that the courts did not strike down every combination that eliminated some rivalry. The second suggestion seems to recognize that combinations may be foreseen to have both an output-restricting and an efficiency-creating tendency and that only those made with the primary intent of restricting output should be unlawful. The court would have to weigh or assess which of the two contradictory tendencies was intended or expected to predominate in order to predict the net impact for good or ill upon consumers. Reagan's apparent desire to preserve efficiency-creating combinations is discussed in note 57, *supra.*

Kenna then framed a hypothetical:

> "Suppose a citizen of Kentucky is dealing in shorthorn cattle and by virtue of his superior skill in that product it turns out that he is the only one in the United States to whom an order comes from Mexico for cattle of that stock for a considerable period, so that he is conceded to have a monopoly of that trade with Mexico; is it intended by the committee that the bill shall make that man a culprit?"[67]

This example was somewhat muddy since it was not clear whether the trader had achieved control of the supply of cattle or had merely had success with Mexican customers. Edmunds' initial answer to the question preserved the ambiguity,[68] but further discussion clarified the committee's intent.

Senator Hoar said he had put in the Judiciary Committee the precise question asked by Kenna because he had the same difficulty. He was answered, and he thought all the members of the committee agreed to the answer, that "monopoly" was a technical term known to the common law. The "clear and legal signification" of the term, said Hoar, showed: "It is the sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him." Hoar then went on to remove the ambiguity from Kenna's hypothetical:

> "I suppose, therefore, that the courts of the United States would say in the case put by the Senator from West Virginia that a man who merely by superior skill and intelligence, a breeder of horses or raiser of cattle, or manufacturer or artisan of any kind, got the whole business because nobody could do

67 21 Cong. Rec. 3151 (1890).

68 Kenna had gone on to say that the bill provided a penalty for any citizen "who happens by his skill and energy to command an innocent and legitimate monopoly of a business." Edmunds replied, "It does not do anything of the kind, because in the case stated the gentleman has not any monopoly at all. He has not bought off his adversaries. He has not got the possession of all the horned cattle in the United States. He has not done anything but compete with his adversaries in trade, if he had any, to furnish the commodity for the lowest price." *Id*. at 3151-3152. Since Edmunds mentioned both the absence of possession of all the cattle and the absence of merger or improper tactics, it would be difficult from this answer alone to say that real monopoly gained through efficiency was intended to be lawful.

Gray proposed to cure the difficulty Kenna pointed out by amending section 2 to require a combination or conspiracy to monopolize. *Id*. at 3152. This would have left a gap in the law for single-firm conduct and so was rejected. It indicates, however, that Gray did not wish growth by efficiency hindered in any way.

> it as well as he could was not a monopolist, but that it involved something like the use of means which made it impossible for other persons to engage in fair competition, like the engrossing, the buying up of all other persons engaged in the same business."[69]

Hoar's answer, then, is that monopolies gained by merger or predatory tactics are illegal but monopolies gained by superior efficiency are not. Edmunds then explained further and supported Hoar's position.[70] No contrary position with respect to the desirability of legalizing monopoly gained through efficiency or the meaning of the statute was expressed. Apparently satisfied with the construction put on Section 2 by Hoar and Edmunds, the Senate promptly passed the bill, 52 to 1.

> THE SENATE'S CONSCIOUS ELECTION TO LEGALIZE MONOPOLY BY EFFICIENCY, THEREFORE, IS HIGHLY SIGNIFICANT—A CLEAR CHOICE OF CONSUMER WELFARE AND THOSE VALUES CONSISTENT WITH IT OVER COMPETING VALUES . . .

Congress' decision to permit monopoly achieved by efficiency is completely inconsistent with the view that courts should use the Sherman Act to ameliorate the noneconomic "helplessness of the individual" before "great aggregations of capital" or that they may take into account the alleged desirability of preserving for its own sake an economy of small business units. Monopoly by efficiency is as effective as monopoly by predation in driving smaller rivals from an industry, and it would seem to have whatever undesirable social or political side effects that any monopoly or large industrial size may be thought to imply. Monopoly by

69 *Ibid.*

70 Edmunds said the best answer he could give to Kenna was to read from Webster's Dictionary the definition of the verb "to monopolize":

> 1. To purchase or obtain possession of the whole of, as a commodity or goods in market, with the view to appropriate or control the exclusive sale of; as, to monopolize sugar or tea.

Edmunds interjected: "Like the sugar trust. One man, if he had capital enough, could do it just as well as two." He went on from the dictionary:

> 2. To engross or obtain by any means the exclusive right of, especially the right of trading to any place, or with any country or district; as, to monopolize the India or Levant trade.

Id. at 3152.

The second definition quoted may make Edmund's first answer to Kenna, note 68, *supra*, more meaningful. Kenna's Kentuckian had gotten all the trade with a country, and Edmunds, though his dictionary indicated that such trade could be "monopolized," had stated that under Kenna's hypothetical circumstances the cattle trader had not violated the statute. Perhaps Edmunds' two answers may be made consistent if the first answer is read as relying upon the absence of merger and predatory tactics rather than upon lack of possession of all the cattle in the United States.

efficiency, however, is probably beneficial to consumers and to small business suppliers and customers of the monopolists—at least by comparison with the policy alternative. Breaking up monopoly gained by efficiency is likely to impose higher costs at that level of the distributive or productive chain to the detriment of consumers and all vertically related firms. The Senate's conscious election to legalize monopoly by efficiency, therefore, is highly significant—a clear choice of consumer welfare and those values consistent with it over competing values, including that of preserving small business units in the same market.

IV. Proposals to Exempt Labor and Farm Organizations

A number of senators spoke in favor of exempting from the statute's coverage organizations of laborers to raise wages and organizations of farmers to raise the price of farm products.[71] The Senate in Committee of the Whole adopted such exemptions,[72] but Edmunds opposed them,[73] and when the bill came back from the Judiciary Committee, where Edmunds had played a major part in its phrasing, no explicit exemption remained. It may be debatable, since some senators had thought the exemption inherent in the bill without being expressed, whether the Senate intended the exemption or not. The significant fact for present purposes, however, is that not one legislator suggested that the conflicting values of consumer interest versus farmer and laborer interests be delegated to the courts for resolution case by case. The universally favored techniques were either full exemption from or full application of the statute. The Senate's all-or-nothing approach here, where many clearly regarded conflicting values as in play, tends to buttress the view that all cases to which the statute did extend were to be decided exclusively upon considerations related to consumer welfare.

V. The Narrow Scope of the Commerce Power

The notion abroad today that the Fifty-first Congress breathed broad social and political values into the Sherman Act is an anachronism. The Congress and the Supreme Court of 1890 had no such expansive view of federal power generally, and of the commerce power in particular, as has become familiar in recent times. The limitations upon Congress' commerce power were thought to be of two

71 Sherman, 21 Cong. Rec. 2562, 2611 (1890); George, S.6, Bills and Debates, 411; Teller (objecting to Sherman's and Reagan's bills for not having exemptions for labor and farm organizations), 21 Cong. Rec. 2561-2562 (1890); Hoar, *id.* at 2728; Coke, *id*. at 2615; Gray (offering George's bill as an amendment to S.1), *id.* at 2657; Aldrich, *id*. at 2654-2655; Hiscock (objecting to the lack of a labor exemption in Sherman's bill), *id*. at 2468; Stewart, *id.* at 2643.

72 *Id.* at 2612.

73 *Id.* at 2726-2729.

sorts—the reach of the power, defined by the interstate-intrastate distinction, and the nature of the power, defined by the commercial-noncommercial distinction. These limitations are related, both being based on concepts of federalism and limited central government. For that reason it is logically and psychologically probable that men who favored a short reach in the commerce power would favor a narrow definition of the goals for which the power could be exercised. There is ample evidence in the Congressional Record that the Fifty-first Congress took a limited view of the reach of the interstate concept[74] and it is correspondingly unlikely that they took a broad view of the values the power could be used to implement directly.

More direct evidence of Congress' view of the goals to be directly implemented through the commerce power comes both from the general trend of legislation under that clause and statements made in the course of the passage of the Sherman Act. The first major commerce clause legislation was the Interstate Commerce Act of 1887. Congress there confined its law to matters bearing directly upon the movement of commerce—terms and conditions of interstate transportation by railroad. It apparently believed that the commerce power did not enable Congress to prevent the starting of unnecessary railroad enterprises or to regulate railroad financial operations such as fictitious capitalization.[75] Up to 1890 Congress had not even attempted to exercise a general "police power" under the commerce clause, and it was not until 1895 that a very modest beginning was made with a statute barring lottery tickets from movement in interstate commerce. In 1903, the Supreme Court, divided five to four, upheld the statute as within the commerce power. Even then the majority felt obliged to use a "pollution-of-commerce" rationale, analogizing the statute to the prohibition of the interstate movement of diseased cattle.[76] Congress moved slowly into the field of social legislation, and the Supreme Court struck many such laws down for over forty years after the passage of the Sherman Act. Since Congress was experimenting timidly with the commerce power as a vehicle for social reform well after 1890, and the Supreme Court was resisting well into the 1930's. It seems farfetched to suppose that Congress intended to enact broad social welfare measures through the Sherman Act.

This general argument is borne out by the legislative history of the statute. Sherman's argument for the constitutionality of his bill rested entirely on the theory that it would facilitate the flow of interstate commerce: "[Congress] may 'regulate commerce;' can it not protect commerce, nullify contracts that restrain

74 *E.g.,* Hoar, *id*. at 2568; Reagan, *id*. at 2469-2470, 2601; Stewart, *id*. at 2566; Gray, *id*. at 2657; Coke, *id*. at 2614.

75 Elder, A Handbook of the Interstate Commerce Act 4 (1931).

76 Champion v. Ames, 188 U.S. 321 (1903).

commerce, turn it from its natural courses, increase the price of articles, and therefore diminish the amount of commerce?"[77]

Edmunds, who proposed the final phrasing of the statute's relation to commerce in the Judiciary Committee, took a very limited view of federal power. He said the Constitution did not give and ought not to give Congress "power to enter into the police regulations of the people of the United States."[78] Edmunds maintained that Congress lacked the power under the commerce clause to abolish the sugar trust.[79] He opposed Ingalls' proposal to tax dealings in options and futures because it was essentially a "police measure" and the Supreme Court would say that Congress had no power "to regulate the good order of society."[80] It is hardly conceivable that a man with such views could have drafted a bill intended to hand over to federal courts, operating under a delegation of the commerce power, the right to adjust social and political ills of a noncommercial nature.

The Judiciary Committee dropped the wording of Sherman's and Reagan's bills and instead employed the phraseology not merely of the common law but of Sherman's reasoning about Congress' power over commerce. The redrafted bill spoke in terms of the diminution or lessening of the flow of commerce which Sherman had said resulted from control of the market—that is, in terms of contracts, combinations and conspiracies "in restraint of trade or commerce" and monopolizations of such trade or commerce. This adroit phrasing not only imported the substantive criteria which Sherman had proposed but was calculated to satisfy both broad and narrow constructionists of the commerce power's reach. The Act's reach would depend upon the Supreme Court's demarcation of the line between interstate and intrastate. But the wording also indicated that the test for illegality was entirely the effect upon commerce, not an effect upon some other thing or condition, such as a supposed social or political evil, which had merely some requisite jurisdictional effect upon commerce.

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77 21 Cong. Rec. 2462 (1890). This reading of Sherman is confirmed by his subsequent remark:

> [T]he object aimed at by this bill is to secure competition of the productions of different States which necessarily enter into interstate and foreign commerce. These combinations strike directly at the commerce over which Congress alone has jurisdiction. "Congress may regulate interstate and foreign commerce," and it is absurd to contend that Congress may not prohibit contracts and arrangements that are hostile to such commerce.

Ibid.

The phrases "strike directly" at commerce and "hostile to" commerce could hardly be employed to mean anything other than diminish commerce.

78 *Id.* at 2727.

79 *Id.* at 2728.

80 *Ibid.*

This evidence of the Fifty-first Congress' view of the scope of the commerce power is of course not conclusive of the point sought to be established here. But it does tend strongly to indicate the improbability of the proposition that Congress intended to delegate noncommercial criteria to the federal courts. More than that, Sherman's commerce clause argument and the wording of the final bill suggest not merely that the statute's intended goals were commercial but that they related entirely to safeguarding the flow of commerce against diminution, against, in a word, a restriction of output.[81] Edmunds' views on this point were shared by other members of the Judiciary Committee and the Senate.[82] Edmunds told the Senate that the Judiciary Committee had unani-

81 See note 77 *supra* and related text. It is significant that the Senate did not discuss its power "to regulate the good order of society" in connection with Sherman's or Reagan's bills, or any other antitrust proposals, but only with relation to Ingalls' proposed prohibition of dealings in options and futures. This strongly suggests that the antitrust proposals were not viewed as attempts to reach values or ends other than the removal of obstructions to the free flow of interstate commerce.

82 Seven of the nine members of the Judiciary Committee expressed views which indicate their conceptions of the scope of Congress' power under the commerce clause. Six of the seven appear to have held views in 1890 which indicate they would not have supported any bill designed to accomplish social or political objectives unrelated to the freedom and volume of the flow of interstate commerce. Such objectives many of them thought entirely reserved to the "police power" of the individual States. These senators were Edmunds, the committee chairman, Hoar, Vest, George, Coke, and Pugh. The seventh, Ingalls, while he did not speak of the commerce clause, expressed such a broad view of constitutional powers generally that he might well have been willing to accept a federal "police power" under the commerce clause.

Edmunds views have been cited in the text. Hoar thought that Congress' only jurisdiction was to "protect" interstate and foreign commerce, 21 Cong. Rec. 2567 (1890). He apparently thought the commerce power limited to freeing the flow of commerce and to transactions rather immediately concerned with an actual interstate movement.

Vest was more explicit. He said the Constitution did not give Congress power "to legislate as it sees proper, under the general and nebulous presumption of the general welfare." *Id.* at 2463. He seemed to think that the power did not extend beyond a strict definition of commerce. *Id*. at 2465.Vest thought that even Sherman's bill was unconstitutional and said it "destroys all my ideas of the limitations of the Constitution." *Id.* at 2570. He favored Coke's bill which merely prohibited shipment of trust products out of any State that had declared trusts unlawful. *Id.* at 2570-2571. He insisted that "the police power of the State is an entirely different jurisdiction, as distinct and separate from the interstate-commerce clause in the Federal Constitution as any two subjects can possibly be." *Id.* at 2603. See also, *Id.* at 2645 and 4560.

George seemed to take a more limited view of the commerce power than any other senator. He thought, as did others, that the ends to be served by legislation under the commerce power had to be commercial in nature. *Id*. at 1768, 1770. He thought that even Sherman's bill was far too broad. *Id*. at 1771. Indeed, George said Congress could not reach the prevention of full and free competition in manufacturing because there was nothing in such a rationale that "would not authorize Congress to make any other regulation they might deem wise in such production . . . ." *Id.* at 1769. He was clear that there was no such power under the commerce clause and that nothing was added by the fact that the manufacturers competed with imported goods on which a duty was paid. See generally, *id.* at 1768-1772. Reagan's bill he thought also unconstitutional. *Id*. at 2560. In fact, at one point, George thought no conceivable worthwhile legislation could be laid under the commerce power. *Id.* at 2598. See also, *id*. at 2598-2600. He thought even the draft of the Judiciary Committee would prove disappointing to the people. "It covers professedly a very narrow territory, leaving a very large number of these institutions, these trusts, or whatever we may call them, entirely without the purview of the bill. That is not

mously determined to "frame a bill that should be clearly within our constitutional power."[83] What discussion there was on the topic in the House of Representatives paralleled the majority position in the Senate.[84]

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footnote 82 cont'd
the fault of the Committee, Mr. President. The bill has been very ingeniously and properly drawn to cover every case which comes within what is called the commercial power of Congress." *Id.* at 3147.

Coke as has been noted, drafted a bill which backed up State police power by prohibiting transportation of goods made by trusts from States that declared such trusts unlawful. The only other sanction was a presidential power and duty to suspend duty collections on goods of the type controlled by a domestic trust. He thought Sherman's and Reagan's bills liable to George's constitutional objections. *Id.* at 2614. Coke's belief that Congress could do little more than support State police power suggests that he thought Congress had no police power under the commerce clause which would enable it to reach noncommercial ends.

Pugh defended the constitutionality of Sherman's bill on a rationale much like Sherman's. That is, Pugh argued that the agreements and combinations described in the bill "hinder, interrupt, and impair the freedom and fairness" of commerce. *Id.* at 2558. The only arguable word is "fairness" but Pugh was clearly not referring to a moral standard independent of the free flow of commerce. Sherman's bill, which Pugh quoted, would bear no such construction. Probably the word refers to predatory practices which were thought to impede the free flow of commerce, or possibly, to the unfairness to consumers with which Sherman's bill was explicitly concerned.

The other three members of the Judiciary Committee said nothing directly in point. It may be conceded, for the sake of argument, that Ingalls' disquisition on the tax power, in connection with his bill on dealings in options and futures, reveals a frame of mind which was not likely to find difficulties in achieving any desired end though an exercise of any power, though it seems a trifle odd that he did not attempt to lay his bill under the commerce power. See *id*. at 2648-2652. Wilson's remarks on the commerce power are beside the present point, *id.* at 2602-2604, except for an offhand remark that the police powers belong wholly to the States, *id.* at 2604. Evarts appears to have said nothing at all on the subject.

Among the senators not on the Judiciary Committee who spoke to this point, a similar majority took a restricted view of the commerce power which rules out any intention to accomplish noneconomic objectives through the Sherman Act. Sherman, as we have seen, invoked the commerce power on purely economic grounds. Even Reagan thought that the primary attack upon trusts had to be made by the States and that Sherman's bill went beyond the commerce power. *Id*. at 2469-2470, 2601. His view of the reach of his own bill is shown by his remark that, since it rested on the commerce power, farm and labor organizations would probably not be affected by it. *Id.* at 2561-2562. Eustis, in opposing Ingalls' amendment concerning futures and options, contended that Congress had no power to reach "the whole question of police, of policy, and of public morality." *Id*. at 2646. See also, *id*. at 2651-2652. Turpie, on the other hand, may have believed that Congress had a police power with respect to interstate commerce as broad as that of the States with respect to intrastate commerce. *Id.* at 2557.

83 *Id.* at 3148.

84 In reporting the bill Culberson assured the House:

> There is no attempt to exercise any doubtful authority on this subject, but the bill is confined strictly and alone to subjects over which, confessedly, there is no question about the legislative power of Congress . . . .

Id. at 4089.

VI. The Criteria Delegated to the Federal Courts

Those who have described the Sherman Act as the delegation of broad discretion to the courts, in some respects comparable to the powers delegated to or assumed by the courts under the great clauses of the Constitution, are of course quite correct. Congress specified a value, a core of meaning, and left it to the courts to elaborate a framework of subsidiary rules in the course of examining great numbers of market structures and forms of market behavior over a period of many years. But those who, like Judge Hand, think the delegation essentially unconfined are in error. Many legislators in the Fifty-first Congress remarked the fact of delegation, but none suggested that it was without standards.[85] The standards intended can easily be found.

As always John Sherman provides the clearest and best statement on the subject. Speaking of his own bill, whose policy, as we shall see, is to be equated with that of the subsequent Judiciary Committee draft that became law, Sherman said:

> "The first section, being a remedial statute, would be construed liberally, with a view to promote its object. It defines a civil remedy, and the courts will construe it liberally; they will prescribe the precise limits of the constitutional power of the Government; *they will distinguish between lawful combinations in aid of production and unlawful combinations to prevent competition and in restraint of trade . . . .*"[86] (Emphasis added.)

Sherman could hardly have said more clearly that the law was to delegate to the courts the task of distinguishing between those arrangements and combinations which increase efficiency and those that restrict output.

85 Aside from Sherman, Edmunds and Turpie in the Senate referred specifically to the fact that the statute would delegate much to the courts. *Id*. at 3148 and 2558. In the House Culberson, Wilson, Bland, Cannon, Morse, and Kerr referred to the delegation. *Id*. at 4089, 4092, 4099 and 5953, 4099, 5953, and 6313, respectively. The House had not of course heard the Senate debates which gave content to the bill's words, and several of the speakers there viewed the delegation as dangerously vague.

86 *Id.* at 2456. Later in the same speech, his main presentation of the topic to the Senate, Sherman stated: "I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law, as the courts of England and the United States have done for centuries. This bill is only an honest effort to declare a rule of action . . . ." *Id.* at 2460. The declaration of a "rule of action" is hardly equivalent to the bestowal of unconfined discretion. The reference in this passage to the common law also defines the range of the courts' discretion, as will be shown in the text.

Judge Hand was correct, of course, in viewing the Sherman Act's common law terminology as expressing the delegation of discretionary powers to the courts, but he and many other commentators appear to have misinterpreted the role of "the common law" in Sherman Act adjudication. The problem seems at first more difficult than it is because there was in 1890 no unitary body of common law doctrine which could give meaning to the statute. The common law of restraints of trade and monopolies has been a variable growth, composed of diverse and even contradictory strains, many of them obviously irrelevant to the concerns of the Sherman Act. Yet Sherman and many of his colleagues repeatedly assured the Senate, without objection by anyone, that they proposed merely to enact the common law.

There is no mystery, for Sherman and the others also repeatedly stated what the common law was. The fact that their statements did not accurately mirror that confused body of precedent does not obscure what they intended to convey. It is clear from the debates that "the common law" relevant to the Sherman Act is an artificial construct, made up for the occasion out of a careful selection of recent decisions from a variety of jurisdictions plus a liberal admixture of the senators' own policy prescriptions. It is to this "common law," holding full sway nowhere but in the debates of the Fifty-first Congress, that one must look to understand the Sherman Act.

I have already mentioned that the only cases cited by Sherman as representative of the common law held illegal and predatory extraction of railroad rebates by the Standard Oil Co., cartel agreements, and monopolistic mergers. But this extensive discussion of "the" common law was by no means the only occasion upon which Sherman told the Senate what the law was. He identified his bill—which struck at agreements preventing full and free competition or tending to advance costs to consumers—with the common law. The first point in Sherman's first speech on behalf of his bill was the categorical assertion that the bill "does not announce a new principle of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government."[87] And later: "It is the unlawful combination, tested by the rules of common law and human experience, that is aimed at by this bill, and not the lawful and useful combinations."[88]

Sherman defined "monopoly" with a quotation from one of his selected common law cases: "Any combination the tendency of which is to prevent competition in its broad and general sense, and to control, and thus at will enhance, prices to the detriment of the public, is a legal monopoly."[89] And he concluded

87 *Id.* at 2456.

88 *Id.* at 2457.

89 *Id.* at 2459.

his review of the decisions by claiming for the common law generally a policy uniformity despite a variability in the law itself:

> "I might add to the cases cited innumerable cases in nearly all the States and in England, and in all of them it will appear that while the law in respect to contracts in restraint of trade and combinations to prevent competition and to advance the price of necessaries of life has varied somewhat, but in all of them, whether the combinations are by individuals, partnerships, or corporations, when the purpose of the combination or its plain tendency is to prevent competition, the courts have enforced the rule of the common law and have vigorously used the judicial power in subverting them."[90]

The internal inconsistency of this passage may suggest that Sherman was quite conscious that "the" common law upon which he based his bill did not in fact exist and that he was deliberately imposing a fictitious uniformity upon the precedent.

In his discussion of trusts Sherman identified consumer welfare as the policy of the common law in this area:

> "[W]hen [a combination] embraces the great body of all corporations engaged in a particular industry in all of the States of the Union, it tends to advance the price to the consumer of any article produced, it is a substantial monopoly injurious to the public, and, by the rule of both the common and the civil law, is null and void and the just subject of restraint by the courts . . . ."[91]

No senator challenged Sherman's representations of the common law, and two—Vest and Teller, the former a member of the Judiciary Committee—supported it. Speaking in support of Coke's amendment, Vest quoted the first section:

90 *Ibid.*

91 *Id.* at 2457.

> "That a trust is a combination of capital or skill by two or more persons, firms, or corporations for the purpose of creating or employing restrictions on trade, or limiting the production, increasing or reducing the price of merchandise or commodities, or preventing competition in the making, manufacture, sale or purchase of merchandise or commodities, or creating a monopoly in the manufacture, making, sale or purchase of any merchandise or commodity with intent to forestall the market value of any merchandise or commodity."

and stated, "There is a trust unlawful under the common law."[92] In fact, Vest went so far as to claim that a provision of Coke's bill which conditioned the application of its sanctions upon states declaring such trusts unlawful, was surplusage because of the uniformity of the common law on the topic in all states.[93]

Teller thought the states should attempt to reach the trusts with additional legislation, but he fully agreed with Sherman's statement of the law: "I understand that some of these trusts have been disturbed by the recent decisions of the courts of the country, which, as the Senator from Ohio [Sherman] showed the other day, have been all in one line, and I suppose no lawyer needs to have any argument made to him that these combinations and trusts are illegal without statute."[94]

. . . THE TASK OF THE COURTS WOULD BE TO DISTINGUISH BETWEEN COMBINATIONS WHICH CREATE EFFICIENCY AND THOSE WHICH RESTRAIN TRADE.

There can hardly be any question that the discretion delegated to the courts by the Sherman Act was that of determining the consumer interest in particular cases and assessing legality accordingly. This is shown by Sherman's explicit statement that the task of the courts would be to distinguish between combinations which create efficiency and those which restrain trade. We have seen that by "restrain trade" Sherman meant "restrict output." The terms of the delegation are further shown by the policy of "the common law" which Sherman, Vest, and Teller, without contradiction, spelled out for the Senate.

92 *Id.* at 2603.

93 *Id.* at 2604. Vest's assertion had the incidental effect of equating Reagan's bill and the common law since Reagan and Coke defined "trusts" in language which was the same in all material respects.

94 *Id.* at 2560.

VII. The Absence of Expressed Values Other Than Consumer Welfare

Of those senators who supported the policy of Sherman's bill (as distinct from its constitutional footing or the remedies it provided), and they comprised the great majority of all who expressed views, not one suggested that the courts should in any case give weight to a value inconsistent with consumer welfare. It may be useful to examine some of the passages in the debates which have upon occasion been cited as expressive of conflicting views. A showing that these passages do not require, or in many cases even allow, such an interpretation should assist in establishing the intended exclusivity of the consumer welfare policy.

In the passage from the *Alcoa* opinion quoted first at the beginning of this paper, it will be recalled, Judge Hand attributed to Sherman "a desire to put an end to great aggregations of capital because of the helplessness of the individual before them." This helplessness was a noneconomic reason why "great industrial consolidations are inherently undesirable, regardless of their economic results." For this proposition Judge Hand relied upon two passages excerpted from Sherman's speeches. In the first, Sherman, speaking of trusts, said:

> "If the concentrated powers of this combination are intrusted to a single man, it is a kingly prerogative, inconsistent with our form of government, and should be subject to the strong resistance of the State and national authorities. If anything is wrong this is wrong. If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity."[95]

It is at once apparent that Sherman's language not only fails to require Judge Hand's reading but refutes it. Sherman here analogizes the form of economic tyranny practiced by the trust to a political form, the "kingly prerogative." The latter is "inconsistent with our form of government," and so, by analogy, is the trust, the "autocrat of trade." If there were any doubt whatever about Sherman's meaning, it would be removed by the last sentence quoted. The thing which Sherman denounces is the "power to prevent competition and to fix the price of any commodity"—the power, in short, to injure consumers.

95 *Id.* at 2457.

The second passage quoted by Judge Hand came as part of a rhetorical crescendo in Sherman's opening speech urging adoption of his bill:

> "The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition. These combinations already defy or control powerful transportation corporations and reach State authorities. They reach out their Briarian arms to every part of our country. They are imported from abroad. Congress alone can deal with them, and if we are unwilling or unable there will soon be a trust for every production and a master to fix the price for every necessity of life."[96]

It is rather difficult to see what it is in this passage that might support the interpretation given it by Judge Hand. Either in or out of context, Sherman's words here are entirely consistent with his constant reference to the effect of the trusts upon consumers as the touchstone of illegality under his bill. Sherman does speak of inequalities of condition, wealth and opportunity, but it is abundantly clear that he does not suggest that the courts will or should use the law he proposes to create greater equality by dissolving large aggregations of capital regardless of the adverse impact this may have upon consumers by destroying efficiency. Sherman specifically complains only of those inequalities which are created by "the concentration of capital into vast combinations to control production and trade and to break down competition." He had explained already that these were to be forbidden because of their harmful impact upon consumers. If Sherman can be construed in this passage to welcome other forms of equality which would follow from the dissolution of monopolistic mergers, such results are clearly no more than a welcome by-product of a decision arrived at upon consumer welfare grounds. The same is clearly true of Sherman's remark that the combinations "reach State authorities." He was obviously not suggesting that, contrary to its explicit terms, the sanctions of his bill would be invoked upon proof that a trust had bribed or otherwise improperly influenced a state authority. The most that can be said of this passage is that Sherman took occasion to recount all of the sins of the trusts. To find in these words a mandate for a court to make a decision counter to the consumer welfare—in contradiction to everything else he had said on the topic—requires an effort beyond the merely heroic.

96 *Id.* at 2460.

Senator George frequently expressed concern over the plight of the small producer, and Judge Hand cited a page of one of his speeches which does contain some oratory that sounds as if it might support Judge Hand's thesis:

> "It is a sad thought to the philanthropist that the present system of production and exchange is having that tendency which is sure at some not very distant day to crush out all small men, all small capitalists, all small enterprises. This is being done now. We find everywhere over our land the wrecks of small independent enterprises thrown in our pathway. So now the American Congress and the American people are brought face to face with this sad, this great problem: Is production, is trade, to be taken away from the great mass of the people and concentrated in the hands of a few men . . . ."[97]

There is, in truth, a great deal of sympathy for small producers expressed in George's speeches. It seems abundantly clear, however, that George did not propose that the law's impact should ever be altered by that sympathy. He viewed the small producer interest and the consumer interest as complementary rather than conflicting and demanded action in the name of small producers only in situations where the same action would be required by the prevalent theory of consumer welfare. George agreed with Sherman's policy of protecting consumers,[98] and mentioned only two other situations as justifying, questions of constitutional power aside, the intervention of law: the imposition of lower prices upon small sellers by monopolistic combinations;[99] and the extraction of higher prices from small pro-

97 *Id*. at 2598. George was here recording his sentiments preparatory to announcing his inability to find any constitutional power in the Senate to deal with the problem. And, in fact, George thought that because of Congress' limited power the bill finally passed did not cover many cases. See note 82, *supra*. Thus, even if one thought that George did wish in the abstract to serve values that might conflict with consumer welfare, it would seem probable that he did not believe the Sherman Act would bear any such construction.

98 *Id*. at 1767-1768. George there complained that Sherman's double damage provision would not prove a sufficient encouragement to consumer lawsuits. Significantly, George read Sherman's bill as oriented entirely to consumer protection and his own bill employed the same tests as Sherman's. The difference between George's bill and Sherman's, aside from issues of constitutional power, lay in the remedies provided. This indicates that George was willing to have a law which was triggered only by injury to consumers but which, in such cases, had the further effect of protecting producers who were injured by the same cause. George's intent, therefore, could be carried out by applying only consumer-welfare criteria in the decision of cases.

99 Because he read Sherman's bill as requiring an intent to raise prices to consumers, George objected: "This leaves unpunished and perfectly lawful all those combinations which have proven so disastrous, that have for their object a decrease in the price to be given to the producer . . . ." *Id*. at 1767. Sherman met that objection by providing that a tendency toward a prohibited result would suffice to

ducers by monopolistic suppliers.[100] These are all cases which would call for the same legal intervention on a consumer-welfare rationale.[101] That George's concern for small producers was entirely complimentary to his concern for consumers is further shown by the fact that the bill he drafted employed precisely the same consumer-welfare criteria as Sherman's bill.[102] No man who proposed that the courts should favor producers over consumers in some cases would draft a law which made it illegal in every case to advance the cost of goods to consumers.[103] This reading also squares with George's participation as a member of the Judiciary Committee in the decision to permit monopoly gained by efficiency.

ANALYSIS DEMONSTRATES . . . THAT, WITH THE EXCEPTION OF THOSE FEW MEN WHO FAVORED A REASONABLE-PRICE TEST FOR CARTELS, IN NO CASE DID THE SPEAKER INTEND THAT COURTS IN DECIDING CASES SHOULD EVER PREFER THE PRESERVATION OF SMALL BUSINESS TO CONSUMER WELFARE.

There are scattered remarks by other legislators which might suggest to a casual reader that preservation of small business for its own sake was advocated. Analysis demonstrates, however, that, with the exception of those few men who favored a reasonable-price test for cartels, in no case did the speaker intend that courts in deciding cases should ever

footnote 99 cont'd
bring the law into play. *Id*. at 2461. George's case would thus be covered by the law since a combination to force purchase prices down can only operate by restricting purchases. This necessarily restricts the combination's output and injures consumers. Thus, once the issue of which injury was intended drops out, a consumer-welfare test also covers the wrong done to the small suppliers. George seems to have recognized this. Otherwise his objection to Sherman's bill on this point would have been broader than that the bill required an advance in prices to consumers to be intended. Later in the same speech George appeared to recognize explicitly this relationship between monopoly and monopsony: "[These trusts] operate with a double-edged sword. They increase beyond reason the cost of the necessaries of life and business and they decrease the cost of the raw material, the farm products of the country. They regulate prices at their will, depress the price of what they buy and increase the price of what they sell." *Id*. at 1768.

100 He gave the example of the cotton-bagging trust which injured "those small farmers, white and colored, who raise a few bales of cotton." *Id.* at 3147-3148. At times George referred to small producers who purchased from a trust as "consumers." *Id.* at 3149. Apparently he applied the term to anyone who purchased and did not resell in the same form. Ultimate consumers were merely part of a larger class. This does not affect the analysis, however, for any raising of prices to intermediate purchasers would raise the price to ultimate consumers as well.

101 See note 99 *supra.*

102 See p. 17 *supra.*

103 Those who did not wish to favor producers at the expense of consumers in some cases-such as in times of business depression-quite logically opposed Sherman's and Reagan's bills. See pp. 22-23 *supra.* George's bill, had it been seriously discussed, should have drawn precisely the same attack as Sherman's from these men. It is also significant that George, though he made almost every other conceivable attack upon Sherman's bill, never once joined those few who denounced its consumer orientation.

prefer the preservation of small business to consumer welfare.[104] Beyond this, it is impossible to find even colorable language suggesting most of the other broad

104 Shortly before the reference of S.1 to the Judiciary Committee, Edmunds said of the bill, then composed, in the part germane here, primarily of Sherman's draft plus Reagan's addition:

> I am in favor of the scheme [of the bill] in its fundamental desire and motive-most heartily in favor of it-directed to the breaking up of great monopolies which get hold of the whole of a particular business or production in the country and are enabled, therefore, to command everybody, laborer, consumer, producer and everybody else, as the sugar trust and the oil trust, and whatever. Although for the time being the sugar trust has perhaps reduced the price of sugar, and the oil trust certainly has reduced the price of oil immensely, that does not alter the wrong of the principle of any trust; and that in the brief definition of my friend from Texas [Reagan], is a phrase which covers every combination to get control of the life and the industry and the producing and the consuming classes of the country. I am in favor, most earnestly in favor, of doing everything that the Constitution of the United States has given Congress power to do to repress and break up and destroy forever the monopolies of that character, because in the long run, however seductive they may appear in lowering prices to the consumer for the time being, all human experience and all human philosophy have proved that they are destructive of public welfare and come to be tyrannies, grinding tyrannies, that have sometimes in other countries produced riots, just riots in the moral sense, and so on.

21 Cong. Rec. 2726.

Edmunds here identifies several categories of persons injured by the trusts, one of which is the category of consumers. He also states that the reduction of the prices of sugar and oil does not justify the trusts in those commodities. But evidence within and without this paragraph indicates that Edmunds was not advocating tests for legality not derived from a consumer-welfare rationale. Edmunds' language posits no conflict in the interests of these groups. Laborers, consumers, producers, and everybody else are injured by the trusts and abolition of trusts will benefit all of these groups. It would be entirely consistent with that position to construe the statute in accordance with consumer interests alone unless, in case of a conflict between the interests of the groups he named there was no reason to believe Edmunds would have preferred another group over consumers. Instead, there is reason to believe, however, that Edmunds assigned decisive weight to the consumer interest. His remark about the price of sugar and oil is consistent with this. The reduction in price is identified twice in the paragraph as a reduction only "for the time being." In "the long run" such monopolies will become "grinding tyrannies." This is consistent with the prevalent theory that monopolies are established by short-run low prices, which last only until rivals are ruined or join the trust, and are followed by low-run high prices. Edmunds' reference to the false seductiveness of the low prices of the trusts seems a recognition that the desirability of economic arrangements is properly judged by their effect upon consumers. Low prices are not seductive if your criterion is their effect upon rival producers.

This reading of Edmunds' remarks tends to be confirmed by his drafting of section 2 of the Sherman Act, see Thorelli, *op. cit. supra* note 8, at 212, his exchange with Kenna concerning the legality of monopoly by efficiency, see pp. 29-30 *supra*, and his acquiescence in Hoar's explanation of section 2, p. 30 *supra*. As already noted, monopoly by efficiency would appear to be disastrous to rival producers and as potentially tyrannous to labor as any other monopoly. It may be thought differ from other monopoly primarily in its net impact upon consumers. Thus, Edmunds much have considered the consumer interest decisive.

Mason, in the House of Representatives, however, may fairly be counted as preferring in some cases to protect small business at the expense of consumers: "Some say that the trusts have made products cheaper, have reduced prices; but if the price of oil, for instance, were reduced to one cent a barrel it would not right the wrong done to the people of this country by the 'trusts' which have destroyed legitimate competition and driven honest men from legitimate business enterprises." 21 Cong. Rec. 4100 (1890).

social or political purposes that have occasionally been suggested as relevant to the application of the Sherman Act.[105]

* * *

Having presented the evidence that leads me to conclude the Fifty-first Congress intended courts to apply a consumer-welfare policy exclusively, I turn to consider an objection. This is that the views of Senator Sherman and the discussion that turned on his and Reagan's proposals are irrelevant to the bill which the Judiciary Committee drafted and Congress enacted.[106]

The view that the debates which swirled around Sherman's draft of S.1 are largely irrelevant to the statute which ultimately emerged results from overestimating the severity of the break represented by the Judiciary Committee's redrafting of the bill. Walton Hamilton and Irene Till phrased this misunderstanding succinctly:

"The great bother is that the bill which was arduously debated was never passed, and that the bill which was passed was never really discussed. . . . The

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105 *E.g..,* Hoar, in asking that the Judiciary Committee draft be passed by the Senate without amendment, said, "The complaint which has come from all parts and all classes of the country of these great monopolies, which are becoming not only in some cases an actual injury to the comfort of ordinary life, but are a menace to republican institutions themselves, has induced Congress to take the matter up." 21 Cong. Rec. 3146 (1890). The reference to "the comfort of ordinary life" sounds like the consumer interest. The supposed threat of some trusts to "republican institutions" gives no reason to suppose that Hoar wanted courts to weigh such an imponderable standard in the decision of specific cases. He said nothing else of the sort, and his views on the commerce power, note 82 *supra,* and monopoly by efficiency, pp. 29-30 *supra*, preclude such an interpretation. Hoar was at most citing a by-product value of antitrust legislation. Bland in the House also denounced the effect of trusts on farmers but only in situations where the trust would also injure consumers. 21 Cong. Rec. 4099 (1890). The necessity to engage in analysis of such isolated remarks and shreds of casual rhetoric merely emphasizes how little there is in the legislative history to support theories that Congress intended courts to weigh social and political values other than consumer welfare in the application of the law.

106 I have not thought it worthwhile to consider in the text the often-heard statement that the Act must be construed in the light of the forces of Populism and agrarian discontent which are said to have provided much of the pressure for its passage. Not too much attention should be paid to such statements because they are essentially meaningless. Populism and the agrarian movements had not focussed on the general problem dealt with by the Sherman Act sufficiently to develop principles that a judge could apply predictably. This entire paper, moreover, is a refutation of the suggestion that Populist emotions, insofar as they might require a deviation from a consumer-welfare policy were enacted by Congress. Such emotions entered the debate on Ingalls' amendment, which was not enacted, and probably contributed to the sentiment in favor of exempting farm and labor organizations. But they left no traces elsewhere in the Sherman Act. Indeed, Sherman recognized the complaints of farmers and workingmen but said, "They can not see the cause or source of this evil . . . ." 21 Cong. Rec. 2569 (1890). See also, Edmunds, *id.* at 2728, 3148; Hoar, *id.* at 2568. The men who shaped the Sherman Act undoubtedly felt the pressure of popular discontent with the "trusts," but they chose their own remedy.

> [Judiciary] committee turned a deaf ear to all that the Senate had said and done and went its own way. Intent, therefore, forsakes the Congressional Record for the capacious recesses of that flexible corpus called the common law."[107]

The authors also state that the law "is to this day strangely enough called the Sherman Act—for no better reason, according to its author [Hoar], than that Senator Sherman had nothing to do with it whatever."[108] These assertions are provocative, to say the least, and it is unfortunate that Hamilton and Till do not indicate the evidence upon which their statements rest.[109]

My own study of the Congressional Record leads me to conclude that the policy of the bill so "arduously debated" was carried forward into the Judiciary Committee's draft and enacted. The popular name of the statute correctly attributes paternity to Sherman. There is no reason to doubt this other than the fact that the Judiciary Committee recast S.1 in common law terms. Common sense alone, moreover, makes the Hamilton-Till thesis dubious. The shortness of the Senate debate over the Judiciary Committee's redraft certainly suggests that the Senate thought it knew what the draft meant, and that can be explained only on the theory that the proceeding discussions of Sherman's policy were fully applicable to the new draft. In fact, when Hoar brought the redraft in he told the Senate, "I shall not undertake to explain the bill, which is well understood."[110] There are other good reasons to believe that the Senate thought the Judiciary Committee draft represented the basic polices espoused by Sherman. He was by far the most articulate and thorough speaker on the question of what goals antitrust should serve. Those who spoke overwhelmingly agreed with his position on this issue. Disagreement was largely confined to questions of remedies and the constitutional reach of Sherman's measure. The reference to the Judiciary Committee was finally made, after having been voted down twice, because of concern with those matters as well as the meaning and constitutionality of the various additions, such as the Ingalls amendment, which had been

107 Hamilton and Till, Antitrust in Action 11 (TNEC Monograph No. 16, 1940).

108 *Id*. at 10. The authors cite Hoar's autobiography for his claim. Thorelli and others have since identified Edmunds as the principle draftsman of the statute in its final form. Thorelli, *op. cit. supra* note 8, at 210-214.

109 They state only that their materials came very largely from the Senate and House bills and from the debates in the 51st Congress as reported in the Congressional Record, but "to equip each sentence, almost each phrase, with its particular citation would be as cumbersome as it is unnecessary." Hamilton and Till, *op. cit. supra* note 107, at 5.

110 21 Cong. Rec. 3145 (1890).

made to S.1.[111] The one major issue which arose in connection with the Judiciary Committee draft, the issue of monopoly due to efficiency, was, moreover, explained by Hoar and Edmunds and resolved in a manner consistent with Sherman's consumer-welfare rationale.

Even more clear-cut evidence is supplied by the role of "the common law" in the Senate's deliberations. Prior to the Judiciary Committee reference Sherman's bill and policy were firmly and repeatedly identified with the common law. Sherman gave the Senate an extended discussion of common law cases and principles which he said his bill would enact for federal enforcement. He repeatedly used common law terminology, "restraint of trade," as interchangeable with his bill's reference to prevention of full and free competition and advancement of costs to consumers.[112] Even the title of his bill made the point: "A bill to declare unlawful trusts and combinations in restraint of trade and production."[113] That title not only identified the consumer-welfare tests of the bill with the common law of restraints of trade, but, by adding the term "restraint . . . of production" suggested that the evil was restriction of output. We have seen that Sherman made the same point in defending his bill as a proper exercise of the commerce power and in identifying the mechanism by which trust's advanced costs to consumers. No senator challenged Sherman's version of the common law or his assertion that his bill merely enacted it. Senators Vest and Teller explicitly agreed with Sherman.

THAT TITLE NOT ONLY IDENTIFIED THE CONSUMER-WELFARE TESTS OF THE BILL WITH THE COMMON LAW OF RESTRAINTS OF TRADE, BUT, BY ADDING THE TERM "RESTRAINT . . . OF PRODUCTION" SUGGESTED THAT THE EVIL WAS RESTRICTION OF OUTPUT.

When the Judiciary Committee, which had not been asked to alter or amend Sherman's policy in any way, reported back a redraft that made the test of illegality the "restraint of trade or commerce" members of the Senate had every reason to think that this use of the common law phrase carried Sherman's policy views with it. This is particularly true because Vest, who had agreed with Sherman on this point, was a member of the committee. In reporting the redraft, moreover, Hoar three times identified it with the common law. He said the committee had "affirmed the old doctrine of the common law in regard to all inter-

111 See, for example, 21. Cong. Rec. 2597-2611, 2655, 2656-2657, 2659-2660, 2731 (1890). The monstrosity which S.1 had become by amendment and the confusion which surrounded it prior to its commitment to the Judiciary Committee can be seen by comparing the reprint of March 25, 1890, Bills and Debates, 217, with that of March 26, *id*. at 227, and then reading 21 Cong. Rec. 2723-2726 (1890) up to Edmunds' speech. The confusion which attended Ingalls' amendment is reflected in the discussion, *id.* at 2646-2662.

112 *E.g., id.* at 2456, 2457, 2462.

113 Bills and Debates 69.

state and international commercial transactions."[114] In replying to Kenna on monopoly by efficiency he said the offense of monopolizing prohibited by section 2 of the bill was defined by the common law,[115] and, in an argument very like that of Sherman's, he said:

> "The common law in the States of the Union of course extends over citizens and subjects over which the State itself has jurisdiction. Now we are dealing with an offense against interstate and international commerce, which the State can not regulate by penal enactment, and we find the United States without any common law. The great thing that this bill does, except affording a remedy, is to extend the common law principles, which protected fair competition in trade in old times in England, to international and interstate commerce in the Untied States."[116]

Edmunds, too, said the committee had decided to "make its [the bill's] definition out of terms that were well known to the law already" and leave it to the courts "in the first instance to say how far they could carry it or its definitions as applicable to each particular case as it might arise."[117] He said the bill "is clear in its terms, is definite in its definitions, and is broad in its comprehension,"[118] statements he could hardly have made had the debates prior to the Judiciary Committee reference not been thought to give content to the common law terminology of the final bill. Morgan expressed the same thought and appeared also to recognize that "the common law" was being made to say new things: "[W]e use common-law terms here and common-law definitions in order to define an offense which is in itself comparatively new . . . ."[119]

The Senate was thus told what "the common law" was and then repeatedly assured that both Sherman's bill and the Judiciary Committee's redraft were enactments of that law. According to a well-known axiom, Sherman's policy and

114 21 Cong. Rec. 3146 (1890).

115 *Id.* at 3152.

116 *Ibid.*

117 *Id.* at 3148.

118 *Ibid.*

119 *Id.* at 3149.

the Judiciary Committee's policy, being equal to the same thing, are equal to each other.

* * *

The contract we call "legislative intent" must be used with care. If for no other reason than its inherent artificially, "legislative intent" cannot properly be used to settle all questions about the bounds of judicial discretion. I offer this paper, therefore, less to demonstrate that Sherman Act issues are only those relevant to consumer welfare—through such weight as "legislative intent" may have surely pulled in that direction—than to rebut contrary claims which purport to rest upon a discernible congressional intention. If values other than consumer welfare are to be made legitimate criteria for Sherman Act litigation, the legitimation will have to proceed from some base other than the "purpose" of the Fifty-first Congress.

It is difficult to resist the conclusion that the most faithful judicial reflection of Senator Sherman's and his colleagues' policy intentions was the rule of reason enunciated by Chief Justice White in the 1911 *Standard Oil* and *American Tobacco* opinions. There was in White's opinions as in Sherman's speeches the idea that the statute was concerned exclusively with consumer welfare and that this meant the law must discourage restriction of output without hampering efficiency.[120] White appears also to have incorporated into his rule of reason those major rules of law which Sherman envisaged as implied by a consumer-welfare policy.[121] The rules implied by the policy are alterable as economic analysis progresses, however. White clearly foresaw this and incorporated that principle of change into his rule of reason.[122]

Courts charged by Congress with the maximization of consumer welfare are free to revise not only prior judge-made rules but, it would seem, rules contemplated by Congress. The Sherman Act defines the class of situations to which it may be applied, but it does not freeze into statutory commands the rules of legality about predation, mergers, and so forth, that many congressmen contemplated. Sherman and others clearly believed that they were legislating a policy and delegating to the courts the elaboration of subsidiary rules. Nothing in the legislative history or in the language of the statute suggests that courts are required to hold any specific type of agreement or behavior unlawful regardless of its prob-

120 See Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, 74 Yale L.J. 775, 801-805, 829-832 (1965), and 75 Yale L.J. 373, 375-377, 375 n.2 (1966).

121 That is, rules against cartel agreements, monopolistic mergers, and predatory practices. See 74 Yale L.J. at 801-805.

122 *Id.* at 802, 805.

able impact upon consumers. In terms of "law," therefore the Sherman Act tells judges very little. A judge who feels compelled to a particular result regardless of the teachings of economic theory deceives himself and abdicates his delegated responsibility. That responsibility is nothing less than the awesome task of continually creating and recreating the Sherman Act out of his understanding of economics and his conception of the requirements of the judicial process.