Northern Illinois University Law Review

Volume 31 | Issue 1 Article 4

11-1-2010

Misreading Knight

Josh Hess

Misreading *Knight*

JOSH HESS*

I. INTRODUCTION

On October 26, 1911, the United States Attorney General filed a "petition for injunction and dissolution of U.S. Steel"[1] under the Sherman Anti-Trust Act.[2] It was a fool's errand. The suit came less than two decades after the government's devastating defeat in another antitrust case, *United States v. E.C. Knight*.[3] There, the Supreme Court held that the Sherman Act's prohibition on "combination[s] . . . in restraint of trade"[4] did not reach the simple combination of large sugar manufacturers[5]—even if the combined entity controlled 98% of the country's supply of the underlying product.[6] Con-

* Many thanks to those who offered their thoughts and suggested revisions, including, among others, Professor Cushman, Professor Ortiz, and Professor Nelson.

1. William H. Page, *The Gary Dinners and the Meaning of Concerted Action*, 62 SMU L. REV. 597, 610 (2009).

2. United States v. U.S. Steel Corp., 223 F. 55, 58 (D.N.J. 1915), *aff'd,* 251 U.S. 417 (1920). The Sherman Act prohibits "combination[s] . . . in restraint of trade" and "combin[ations] . . . to monopolize." *Id.* at 58 (quoting the Sherman Act, 15 U.S.C. § 1 (2006)).

3. United States v. E.C. Knight (*Sugar Trust*), 156 U.S. 1 (1895).

4. *Id.* at 6 (quoting the Sherman Act, 15 U.S.C. § 1 (2006)).

5. *Id.* at 17.

6. Norman R. Williams, *Constitutional "Niches": The Role of Institutional Context in Constitutional Law*, 54 UCLA L. REV. 1847, 1881 (2007).

gress's power to regulate interstate commerce did not extend that far.[7] Yet the government's case against U.S. Steel was similar to the case against the Sugar Trust. It was a large combination of iron and steel manufacturers.[8] How, then, could the government have hoped for success?

The answer to this as-yet unresolved question says more about the significance of *E.C. Knight*, and the Court's pre-New Deal jurisprudence, than *U.S. Steel* itself. *Knight* has been criticized as "a great victory for laissez-faire conservatism"[9]—the product of a "massive . . . entry into the socioeconomic scene" by a conservative judiciary bent on preserving the prevailing industrial order against popular discontent.[10] It was, some say, just the beginning. Conventional wisdom holds that, before the New Deal, the Supreme Court was a bastion of activist conservatism—manipulating doctrine to advance a laissez-faire political and economic agenda.[11] Yet the decision to prosecute U.S. Steel, and the reasons behind it, do not fit into that traditional narrative. To hear the conventionalists tell it, *Knight* should have been an important tool in a ready-made arsenal against the enemies of laissez-faire. Yet some contemporaries were not persuaded that the Court was wielding the *Knight* doctrine to advance business interests. In fact, many observers believed that *Knight*—the would-be shield of capitalism—had been *overruled* by 1911. In three respects, observers thought it had been fundamentally upended.

They were wrong, of course—but the reasons for their mistake are also significant. Contemporaries thought *Knight* was overruled because they thought the case had been wrongly decided. Yet the Court's purported blunder was not its failure to hew closely to established doctrine or its willingness to flout it to advance a political agenda. Rather, contemporaries thought the Court was trying too hard to adopt clear legal rules which were, as a practical matter, unsustainable.

This realization—that contemporaries did not see the pre-New Deal Court abusing *Knight's* landmark Commerce Clause doctrine—is of more than historical significance. At present, there is an ongoing project to broadly re-evaluate the pre-New Deal Court's jurisprudence. This includes its reading of the Commerce Clause. Where the conventional wisdom saw a Court warping the Constitution to fit its conservative agenda, some like UVA Professors Barry Cushman and Charles McCurdy see a Court more interested in adherence to neutral legal principles than previously acknowl-

---

7. *Knight*, 156 U.S. at 16-17.

8. United States v. U.S. Steel Corp. (*Steel Trust*), 251 U.S. 417, 437 (1920).

9. ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895, 181 (Harper & Row, 1969) (1960).

10. *Id.* at 1-2.

11. Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1091 (2000).

edged. This article offers a limited defense of this so-called revisionist movement against claims that contemporary Court observers did not see that same principled neutrality. In the course of seeking an explanation for the decision to prosecute U.S. Steel, it examines the contemporary view of *E.C. Knight* and finds evidence that substantiates the "revisionist" reading of that case.

In short, with historical context, it is not difficult to see why the government might have thought it could succeed against U.S. Steel despite the holding in *E.C. Knight*. Yes, the cases were factually similar and *Knight* was still good law. But, by 1911, Court observers widely believed *Knight* had been overruled for three reasons. First, some misread *Knight* as a broad holding that the government could never prosecute manufacturing companies under the Sherman Act. When the Court later upheld a Sherman Act prosecution of a manufacturer, they believed *Knight* was dead. Second, others read *Knight* as categorically insulating holding companies, like U.S. Steel, from Sherman Act prosecution. When the Court later permitted prosecution of holding companies, they believed *Knight* had been repudiated. Third, two cases decided the year *U.S. Steel* began led some to believe that the formalistic, line-drawing approach to the Commerce Clause epitomized in *Knight* had fallen to a more pragmatic one. As evidenced by its pleadings, the government accepted this widely held view of *Knight* and proceeded with the ultimately futile case against the Steel Trust. This is significant. The belief that *Knight* had been overruled and the underlying assumptions clash with the conventional view that the pre-New Deal Court was a bastion of conservative activism.

II. THE UNLIKELY DECISION TO PROSECUTE U.S. STEEL

Perhaps, if viewed in isolation, the decision to prosecute U.S. Steel does not seem so odd. It was a giant of American industry—once the largest industrial organization in the world.[12] At its formation, the U.S. Steel Corporation enjoyed a capitalization equaling twenty-five percent of the Gross National Product;[13] and at the time the government brought suit, it enjoyed a fifty percent market share.[14] But the government did not make its decision in a vacuum.

12. Page, *supra* note 1, at 598.
13. *Id.*
14. *Id.* at 601.

A. THE SHADOW OF *E.C. KNIGHT*

Less than two decades before, the Supreme Court decided the landmark case *United States v. E.C. Knight*. There, the government brought suit against a combination of sugar refiners, which it alleged violated the Sherman Act's prohibition on restraints of trade.[15] While the Court agreed that the combination represented a "monopoly in manufacture,"[16] it held that Congress's ability to regulate through the Sherman Act was limited by the scope of its power over interstate commerce.[17] That power did not extend, the Court reasoned, to "[c]ontracts [and] combinations" to manufacture.[18] Only with proof of an "intention to put a restraint upon trade or commerce"[19] could a combination of manufacturers be held subject to the Sherman Act. There was no such proof in *Knight*.[20]

Knight should have haunted U.S. Steel's would-be prosecutors. It did not go by unnoticed. As William Howard Taft reflected in 1914 in *The Anti-Trust Act and the Supreme Court*:

> The effect of the decision in the Knight case upon the popular mind, and indeed upon Congress as well, was to discourage hope that the statute could be used to accomplish its manifest purpose . . . . So strong was the impression made by the Knight case that [some] concluded that the evil must be controlled through State legislation, and not through a national statute . . . .[21]

What is more, the decision to prosecute the Sugar Trust was a terrible blunder. Contemporaries—specifically the legislators who drafted the Sherman Act—knew full well that such a suit would fail.[22] An early version of the Sherman Act, "entitled 'A Bill to declare unlawful trusts and combinations in restraint of trade and production,'" aimed to give the government broad power to "dissolve combinations 'extending to two or more States,'"[23] but Congress abandoned it.[24] Lawmakers, relying on Supreme

15. United States v. E.C. Knight Co., 156 U.S. 1, 2-4 (1895).

16. *Id.* at 11.

17. *Id.* at 12 ("That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the state.").

18. *Id.* at 16-17.

19. *Id.* at 17.

20. *Knight*, 156 U.S. at 17.

21. WILLIAM HOWARD TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT 60 (1914).

22. *See* Charles McCurdy, *The* Knight Sugar *Decision of 1895 and the Modernization of American Corporation Law, 1869-1903*, 53 BUS. HIST. REV. 304, 323-27 (1979).

23. *Id*. at 324.

Court cases "demonstrat[ing] that the federal bench had long maintained [in defining Congress's Commerce Clause power] a rigid distinction between transportation and traffic, on the one hand, and production or manufacturing, on the other," concluded that the bill went too far.[25] A redraft of the bill abandoned any pretense of regulating combinations of manufacturers—it was aimed at contracts "destroy[ing] . . . competition by exacting rebates from carriers and by engaging in questionable marketing practices such as exclusive-dealing contracts, predatory price discrimination, and agreements to divide markets."[26] Chairman George Edmunds of the Judiciary Committee specifically "concluded that the Sugar Trust could not be reached through the commerce power."[27]

Furthermore, the material factual allegations in *U.S. Steel* were similar to those lodged against the Sugar Trust. In *Knight*, the defendant was a holding company[28]—a horizontal corporate combination formed through the acquisition of stock in the major sugar refineries across the country.[29] It enjoyed a national monopoly in the manufacture of sugar,[30] and the chief complaint against the corporation was essentially its size: it enjoyed a "power to control the manufacture of refined sugar" that was so great as to be "indispensable" to "a large part of the population of the United States."[31] The trust was not a menace by virtue of any "[c]ontracts to buy, sell, or exchange goods to be transported among the several states,"[32] but solely because of contracts to combine manufacturing concerns.[33] These things were all basically true in *U.S. Steel*: the defendant was a holding company with investments in a number of national manufacturers.[34] According to the Court's opinion, the government's chief complaint was once more "that the size of the corporation, the power it may have, not the exertion of the power, [was] an abhorrence to the law . . . ."[35] And compelling evidence of ef-

---

24. *Id.* at 325.
25. *Id.* at 324.
26. *Id.* at 325-27.
27. *See* McCurdy, *supra* note 22, at 325.
28. Tony Freyer, *The Sherman Antitrust Act, Comparative Busiess Structure, and the Rule of Reason: America and Great Britain, 1880-1920*, 74 IOWA L. REV. 991, 1006 (1989).
29. United States v. E.C. Knight, 156 U.S. 1, 9 (1895); McCurdy, *supra* note 22, at 328.
30. *Id.* at 10-11.
31. *Id.* at 12.
32. *Id.* at 13.
33. *Id.* at 17.
34. United States v. U.S. Steel Corp., 251 U.S. 417, 437 (1920).
35. *Id.* at 450. This was admittedly a somewhat uncharitable characterization. *Id.* ("The government, therefore, is reduced to the assertion that the size of the corporation, the power that it may have . . . is an abhorrence to the law . . . .").

forts to control the sale or transportation of goods in interstate commerce was conspicuously scarce.[36]

This is not to say that the factual case against the Steel Trust was every bit as weak as the case against the Sugar Trust. But whatever evidentiary improvements the government thought it enjoyed in the case against U.S. Steel would not have been enough, alone, to reassure them that *Knight* was not a serious obstacle. The government needed evidence that U.S. Steel did more than just combine manufacturers—it needed proof of an intent to restrain the actual sale or transport of products across state lines.[37] In this regard, the government pled two factual allegations tending to show intent to restrain interstate commerce—but neither was sufficient to cast aside anxiety about *Knight*.

First, William Page argues that the government brought suit partly because of evidence that "executives of American steel manufacturers gathered in a series of social events and meetings that became known as the Gary dinners."[38] Indeed, the Gary dinners do make an appearance in the government's pleadings.[39] At these dinners, the executives disclosed the prices at which their products would be sold as part of a "general under-

36. *Id.* at 441 (summarizing the opinion of District Judge Woolley, with which the Court "concur[red] in the main." *Id.* at 442.).

37. *Knight*, 156 U.S. at 17 ("There was nothing in the proofs to indicate any *intention* to put a restraint upon trade or commerce . . . .") (emphasis added); *see also* TAFT, *supra* note 21, at 59 ("But the truth is, as is shown by the above quotation from the opinion of Chief-Justice Fuller, the case for the Government [against the Sugar Trust] was not well prepared at the circuit. No direct evidence that the sales of sugar across State lines, and the control of the business of such sales and of prices, were the chief object of the combination was submitted to the court."); WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 165 (Random House 1965) (1954); Donald J. Smythe, *The Supreme Court and the Trusts: Antitrust and the Foundation of Modern American Business Regulation from* Knight *to* Swift, 39 U.C. DAVIS L. REV. 85, 100 (2005). See *U.S. Steel,* 251 U.S. at 437 for a discussion of evidence that U.S. Steel controlled means of transportation.

38. Page, *supra* note 1, at 597.

39. J.M. DICKINSON & HENRY E. COLTON, *United States of America v. United States Steel Corporation and Others.* THE MAKING OF MODERN LAW: TRIALS, 1600-1926. 238-40 (Gale 2010) http://galenet.galegroup.com/servlet/MMLT?af=RN&ae=Q4200638257&srchtp=a&ste=14 (last visited Dec. 5, 2010). The government did make other price fixing allegations. *See, e.g.*, *id.* at 194-200. It is unclear that any of these was any more compelling than the Gary dinners allegations. From what I can tell, many of the allegations were just conclusory assertions that steel manufacturers fixed production quotas and prices. *See, e.g.*, *id.* Often, the pleadings acknowledged that the price agreements were not reduced to writing—and, in some instances, may have been abandoned. For example, the government alleged that several of the constituent manufacturers met before 1900 to agree to price controls. *Id.* at 141. But after 1904, it acknowledged, the "parties . . . may not have acted under said agreements, nevertheless they have continued to meet and entered into understandings as to the maintenance of prices and the apportionment by sales." *Id.*

standing" [40] that manufacturers would commit themselves to stable prices. The attendees specifically disclaimed any concrete agreements to maintain prices, insisting instead that the only obligations were purely a matter of ethics.[41]

The Gary dinners, however, likely would not have been enough by themselves to reassure the government that *Knight* was not fatal. The illegality of the dinners was hardly clear: they "fell in a gray area [of antitrust law] between a simple declaration of purpose and an express agreement" over prices.[42] Even when combined with other evidence of price collusion,[43] the government should have had reservations. After all, there was a hint of price controls advanced in *Knight* as well, and the Court took note of the government's allegation that the sugar combination "controlled the price of sugar."[44] And to the extent the Court's ultimate opinion in *U.S. Steel* can provide some admittedly imperfect insight into how the case against the Steel Trust appeared at its inception, the dismissiveness with which the Court treated evidence of price fixing by U.S. Steel suggests that it was not particularly compelling. The Court ultimately concluded that "it may be"[45] that the Gary dinners were violations of the law, but U.S. Steel's attempts to persuade competitors to control price instability "were abandoned nine months before [the] suit was brought."[46] In fact, the Court held that U.S. Steel's reliance on mere persuasion through initiatives like the Gary dinners was evidence that it did not control the market.[47]

Second, the government pled that the Steel Trust gained control over railroads, ships, and bridge building companies that consumed steel[48]—steps obviously tending to demonstrate an intent to restrain the sale and transport of goods in interstate commerce. U.S. Steel's "control over transportation," the government argued, "g[ave] it a commanding position over

---

40. Page, *supra* note 1, at 603 (quoting *U.S. Steel*, 223 F. at 159).

41. *Id.* at 601, 609.

42. *Id.* at 612.

43. *Id.* at 611; *see also* Brief for the United States, at 165, 885, 892, 899, United States v. U.S. Steel Corp., 251 U.S. 417 (1920) (No. 481) *reprinted in The United States of America, Appellant, v. United States Steel Corporation Et Al.,* THE MAKING OF MODERN LAW: TRIALS, 1600-1926 (Gale 2010) http://galenet.galegroup.com/servlet/MMLT?af=RN&ae=Q4200713925&srchtp=a&ste=14 (last visited Dec. 6, 2010) [hereinafter U.S. Steel Government Brief].

44. *Knight*, 156 U.S. at 4.

45. *U.S. Steel*, 251 U.S. at 445.

46. *Id.*

47. *Id.* at 444-45 ("The power attained was much greater than that possessed by any one competitor—it was not greater than that possessed by all of them. Monopoly, therefore, was not achieved, and competitors had to be persuaded . . . through the social form of dinners . . . ."); *see also*, Page, *supra* note 1, at 601 (citing *U.S. Steel*, 251 U.S. at 440).

48. DICKINSON & COLTON, *supra* note 39, at 11-15.

its competitors" and was a "burden imposed upon competitors."[49] In its brief to the Supreme Court, the government elaborated that U.S. Steel had acquired two competing[50] railways servicing an important ore-producing region.[51] The government claimed that control of these two lines helped U.S. Steel "fortify its position of dominance" by restricting the supply of ore to, and setting high rates for, its competitors.[52] The consequence of this was allegedly an increase in prices.[53]

It is not at all clear, however, that this was the type of convincing evidence that would have persuaded the government that *Knight* was not a serious problem. In its brief, U.S. Steel responded that these two railways were minimally competitive.[54] Indeed, the defendant noted, they were only competitors at two points.[55] The government did not seem to contest that the railroads were only competitive at two points, responding instead that the railroads could have easily have been expanded.[56] And judging from the opinion of the Court, the government's assertions about control over transportation did not leave much of an impression. Justice McKenna's opinion says little about U.S. Steel's control over transportation. In fact, the Court summarized the opinion of District Judge Woolley, which argued that U.S. Steel "resorted to none of the brutalities or tyrannies that the cases illustrate of other combinations. It did not secure freight rebates . . . ."[57] The Court went on to say that it "concur[red] in the main with [the opinion] of Judge Woolley . . . ."[58] Again, while this evidence may have reassured prosecutors when they decided to take on the powerful Steel Trust, it is difficult to im-

---

49. *Id.*

50. U.S. Steel Government Brief, *supra* note 43, at 688.

51. *Id.* at 157-158.

52. *Id.* at 160.

53. *Id.* at 166. The government also noted that in "1912 the corporation's subsidiaries controlled 100 vessels plying on the Great Lakes. After the formation of the corporation, all of the steamship companies belonging to the various subsidiaries were merged into the Pittsburgh Steamship Co. . . . ." *Id.* at 696. It is hard to know what to make of the independent persuasiveness of these claims as evidence of an intent to restrain interstate transportation.

54. Brief on Behalf of U. S. Steel Corp., Its Dirs. & Subsidiaries, at 11-19, United States v. U.S. Steel Corp., 251 U.S. 372 (1920) (No. 6214) *reprinted in United States of America, Appellant, vs. United States Steel Corporation et al., Appellees*, THE MAKING OF MODERN LAW: TRIALS, 1600-1926 (Gale 2010) December 6, 2010 http://galenet.galegroup.com/servlet/MMLT?af=RN&ae=Q4201361116&srchtp=a&ste=14 (last visited Dec. 6, 2010) [hereinafter U.S. Steel Brief].

55. *Id.* at 343-344.

56. U.S. Steel Government Brief, *supra* note 43, at 688 ("Both roads reached Virginia and Biwabik. At these points Gayley admitted the railroads were competitors.").

57. *U.S. Steel*, 251 U.S. at 440-41.

58. *Id.* at 442.

agine these improvements alone gave the government confidence that it could prevail despite *Knight*.

B. *KNIGHT* WAS STILL GOOD LAW

Nor does it appear that any actual change in the law would have calmed the government's fears of *E.C. Knight*. There is little question[59] that it was still, in fact, good law in 1911. As one article explained, "In the period 1897-1911 . . . [t]he distinction between manufacture or production and trade or commerce, as affirmed in *E.C. Knight*, remained in effect at all times."[60]

Several cases indicate that *Knight* was still an important limit on the scope of the Sherman Act even when *U.S. Steel* was ultimately decided by the Court in 1920.[61] Just two years later, the Court struck down a Sherman Act prosecution of a labor union in *United Mine Workers of America v. Coronado Coal Co*. There, the Court reasoned that the subject of the prosecution was coal mining—production—and not within the reach of the commerce power without a demonstrated intent to restrain commerce.[62] Again, in 1924's *United Leather Workers Int'l Union v. Herkert & Meisel Trunk Co*., the Court, citing *Knight*,[63] struck down a Sherman Act suit against a striking leather workers' union.[64] The Court reasoned within *Knight* framework, holding that a union's attempt to obstruct manufacturing was normally only an "indirect and remote obstruction to . . . commerce" without the "intent" to "monopolize supply" or "control . . . prices."[65] What is more, outside the context of the Sherman Act, the manufactur-

---

59. At least one modern observer does argue that the Court quickly retreated from its holding in *Knight. See* Williams, *supra* note 6, at 1882. ("Even at the time, though, *Knight*'s stated holding was misleadingly broad, as the Court quickly backed down from its categorical proclamation and began searching for ways to accommodate its formal rule with the economic reality that much commerce (as the Court understood it) depended on antecedent or subsequent economic activities."). It is not clear, but McCurdy also seems to imply that the Court made some adjustments to the *Knight* approach to antitrust law in 1903 once it became clear that the states were not adequately regulating abuses of the corporate form. *See also* McCurdy, *supra* note 22, at 308.

60. Martin J. Sklar, *Sherman Antitrust Act Jurisprudence and Federal Policy-Making in the Formative Period*, 35 N.Y.L SCH. L. REV. 791, 800 (1990).

61. *See* Cushman, *supra* note 11, at 1097-99.

62. United Mine Workers of Am. v. Coronado Coal, 259 U.S. 344, 408 (1922).

63. United Leather Workers Int'l Union v. Herkert & Meisel Trunk Co., 265 U.S. 457, 465-69 (1924) (clarifying the status of *Knight*, the Court said, "The Knight case has been looked upon by many as qualified by subsequent decisions of this court. The case is to be sustained only by the view that there was no proof of steps to be taken with intent to monopolize or restrain interstate commerce in sugar, but only proof of the acquisition of stock in sugar manufacturing companies to control its making.").

64. *Id.* at 471.

65. *Id.*

ing/commerce distinction at the heart of *Knight* was still precedential. In 1918, just two years before the *U.S. Steel* decision, the Court struck down a federal child labor law prohibiting the sale in interstate commerce of goods made with underage labor. Regulating manufacturing remained outside Congress's reach: "Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation."[66]

Knight's influence is similarly discernable in the Court's opinion in *U.S. Steel*. There, the Court declined to enforce the Sherman Act against U.S. Steel.[67] Though *Knight* is not cited, the Court was mindful that evidence of U.S. Steel's acquisition of significant productive capacity would not be enough to implicate the Sherman Act without control over the sale of goods in interstate commerce:

> What, then, can now be urged against the corporation? Can comparisons in other regards be made with its competitors and by such comparisons guilty or innocent existence be assigned it? *It is greater in size and productive power than any of its competitors, equal or nearly equal to them all, but its power over prices was not and is not commensurate with its power to produce*.[68]

What's more, two hallmarks of *Knight's* holding appear in *U.S. Steel*. The *Knight* Court made clear that manufacturing entities could only be subject to Sherman Act prosecution where they had demonstrated an intent to restrain interstate commerce beyond mere merger. The Court held that "[t]here was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce" and that merely acquiring another manufacturer by "the sale . . . of manufacturing stock," was not enough.[69] Moreover, implicit in the holding was the principle that the sheer size of a manufacturing entity—even where it controlled nearly all of the national production of a given product[70]—did not alone demonstrate that intent. Both principles played central roles in the 1920 decision. The Court directly refuted the notion that U.S. Steel had implicated the Sherman Act simply by virtue of its size: "the law does not make mere size an offense . . . ." [71] Similarly, the majority opinion of the Court repudiated the claim that the Steel combina-

66. Hammer v. Dagenhart, 247 U.S. 251, 272 (1918).
67. United States v. U.S. Steel, Corp. 251 U.S. 417, 457 (1920).
68. *Id.* at 445 (emphasis added).
69. United States v. E.C. Knight, 156 U.S. 1, 17 (1885).
70. *See* Williams, *supra* note 6.
71. *U.S. Steel*, 251 U.S. at 451.

tion "[was] unlawful regardless of purpose . . . ."[72] It held that, whatever attempts at price fixing U.S. Steel may have undertaken in the past, there was no "evidence of an intention to resume them . . . ."[73]

It is true that some have interpreted,[74] and still interpret,[75] *U.S. Steel* as a decision on the merits rather than a jurisdictional decision about the scope of Congress's commerce power. The Court held, Martin Sklar argues, that U.S. Steel's behavior did not violate the "rule of reason"—a requirement, imported from the common law prohibition on restraints of trade into the Sherman Act, that only unreasonable restraints be punished.[76] This is surely right: the Court plainly considered the reasonableness of U.S. Steel's behavior.[77] But holdings on the merits and on the basis of jurisdiction were not mutually exclusive under the Sherman Act. The jurisdictional manufacturing/commerce distinction in *Knight* was folded into the Court's rule of reason merits analysis. William Letwin, for example, argues that the Court modified the jurisdictional manufacturing/commerce distinction "to do the same work accomplished by the common-law distinction between reasonable and unreasonable restraints."[78] A contemporary writer made the same observation: "The only standard of what is an undue restraint of trade is that of reason. This standard is the same as that of the direct and indirect effect on trade which was laid down in the prior cases."[79] The merger of jurisdictional and substantive elements of the statute is no surprise, as the substantive prohibitions in the Sherman Act expressly turned on the offender's

---

72. *Id*. at 450-51.

73. *Id.* at 445.

74. Prather S. McDonald, *A Colloquial Upon the Sherman Anti-Trust Law*, 1 TENN. L. REV. 1, 4-5 (1922-1923); Myron W. Watkins, *The Change in Trust Policy*, 35 HARV. L. REV. 815, 815-16 (1921-22).

75. *See* Sklar, *supra* note 62, at 814-15.

76. *Id.* at 791-92, 814-15.

77. *See, e.g., U.S. Steel*, 251 U.S. at 445-47, 455-56 (evaluating U.S. Steel's behavior and implicitly contrasting it with that of Standard Oil and American Tobacco).

78. LETWIN, *supra* note 37, at 179-80; s*ee also* Sklar, *supra* note 62, at 801-02. I read Sklar as saying that the jurisdictional manufacturing/commerce was an analog to the common law distinction between "direct and ancillary restraints" of trade, which was in turn used as a stand-in for the "rule of reason" in the Court's jurisprudence.

79. Harold Evans, *The* Standard Oil *and* American Tobacco Cases, 60 U. PA. L. REV. 311, 317 (1911-1912). Evans appears to be using the "direct and indirect restraint of trade standard" as a proxy for the manufacturing/commerce distinction from *Knight.* To support his position, he cites to *Standard Oil Co. v. United States*, 221 U.S. 1, 66 (1911). There, the Court quotes from *Hopkins v. United States*, 171 U.S. 578, 592 (1898): "There must be some direct and immediate effect upon on interstate commerce, in order to come within the [Anti-Trust] act." In turn, the Court in *Hopkins* suggests that the direct/indirect restraint test is, indeed, jurisdictional. It cites *Knight* to support the proposition that "[a]n agreement may in a variety of ways affect interstate commerce, just as state legislation may, and yet, like it, be entirely valid, because the interference produced by the agreement or by the legislation is not direct." *Hopkins*, 171 U.S. at 594 (citing *Knight*, 156 U.S. at 16).

entry into interstate commerce: The act prohibited "every contract, combination in the form of trust or otherwise, or conspiracy in *restraint of trade or commerce among the several states* . . . ."[80]

Furthermore, the Court's handling of the issue of U.S. Steel's intent also reveals *Knight*'s influence. The Court held that the defendant did not operate with the intent necessary for prosecution under the Sherman Act.[81] Both the jurisdictional and substantive components of the Act required a showing of the defendant's intent.[82] With respect to jurisdiction, *Knight* held that only with proof of "intention to put a restraint upon trade or commerce" could a combination of manufacturers implicate Congress's commerce powers and be subject to the Act.[83] With respect to substance, the Court in *Swift v. United States* held that "[t]he [Sherman Act] gives this proceeding against combinations in restraint of commerce among the states and against attempts to monopolize the same. Intent is almost essential to such a combination, and is essential to such an attempt."[84] But the way in which the Court approached the question of intent varies from jurisdiction to substance. The Court was willing to consider the size of a combination as probative evidence only of the substantive intent requirement. In *Standard Oil v. United States*, where the Court summarily dismissed any jurisdictional objections,[85] it held that the defendant's sheer size was prima facie evidence of culpable intent: "[T]he unification of power and control over petroleum and its products . . . gives rise, in and of itself, in the absence of countervailing circumstances . . . to the prima facie presumption of intent and purpose to maintain the dominancy over the oil industry . . . ."[86] Yet *Knight* held that the size of a manufacturing combination is not enough to establish the intent necessary to furnish jurisdiction.[87] And in *U.S. Steel* the Court specifically rejected the government's argument that the defendant's size alone was enough to establish liability without any showing of intent.[88]

---

80. *Knight*, 156 U.S. at 22 (quoting the Sherman Act, 15 U.S.C. § 1 (2006)) (emphasis added).

81. *U.S. Steel*, 256 U.S. at 445.

82. *E.g.*, United States v. Swift, 196 U.S. 375, 396-97 (1905) (considering both questions of substance and jurisdiction through the lens of intent).

83. *Knight*, 156 U.S. at 17.

84. *Swift*, 196 U.S. at 396.

85. Standard Oil Co. v. United States, 221 U.S. 1, 68-69 (1911) (rejecting an argument that the holding in *Knight* forbade the prosecution as "plainly foreclosed" and not worthy of "express notice").

86. *Id.* at 75.

87. In *Knight*, where the defendant controlled 98% of production, *see* Williams, *supra* note 6, the Court held that there was "nothing in the proofs to indicate any intention to put a restraint upon trade or commerce . . . ." *Knight*, 156 U.S. at 17.

88. *U.S. Steel*, 251 U.S. at 450-51.

This suggests that the Court's discussion of intent was aimed primarily at the jurisdictional component of the statute, as there was no clear sign that U.S. Steel's size was relevant to its analysis. The jurisdictional rule set out in *Knight* thus likely played an important role in deciding the outcome of *U.S. Steel*.

As the opinion in *U.S. Steel* and other contemporary cases demonstrate, *Knight* was still good law when *U.S. Steel* began in 1911. That is, the government brought suit against an enormous combination of steel manufacturers—one that would not end for nearly a decade—in the face of clearly adverse precedent. And so the question remains: how could they have hoped to win?

III. CONTEMPORARIES BELIEVED *KNIGHT* WAS OVERRULED

The answer is that the United States initiated the case against U.S. Steel in a climate of confusion. The contemporary legal scholarship was full of bald assertions of *Knight's* irrelevance. One writer insisted, "There can be little doubt that if [*E.C. Knight*] could come before the Supreme Court as an original question at the present day, the court would reach a very different decision from that rendered in 1895."[89] Another opined that "[t]he decision in the *Sugar Trust* case was one of the earliest decisions under the Anti-Trust Act and, in the opinion of the writer, cannot be reconciled with the subsequent decisions of the Supreme Court."[90] And still another: "The *Knight* case, for all practical purposes, must be held to be overruled . . . ."[91] Even the Supreme Court recognized this widespread opinion of *Knight*:

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

Id.

89. Stuart Chevalier, *Has the Sugar Trust Case Been Overruled?*, 44 AM. L. REV. 858, 858 (1910).

90. Victor Morawetz, *The Supreme Court and the Anti-Trust Act*, 10 COLUM. L. REV. 687, 704 (1910).

91. Robert L. Raymond, *The Federal Anti-Trust Act*, 23 HARV. L. REV. 353, 374 (1909-1910).

> The Knight case has been looked upon by many as qualified by subsequent decisions of this court. The case is to be sustained only by the view that there was no proof of steps to be taken with intent to monopolize or restrain interstate commerce in sugar, but only proof of the acquisition of stock in sugar manufacturing companies to control its making.[92]

This confusion was based on three fundamental misreadings of *Knight* and its relationship with later cases—each of which led to the mistaken belief that *Knight* had been overruled.

A. MISUNDERSTANDING THE MANUFACTURING/COMMERCE DISTINCTION

To begin, observers were confused as to the breadth of *Knight*'s exclusion of manufacturers from the Sherman Act's reach. *Knight* actually held that manufacturers who demonstrated an intent to restrain interstate commerce could be held subject to the Sherman Act.[93] But many observers believed that *Knight* completely exempted virtually all manufacturers from Sherman Act prosecution. For instance, when the Supreme Court handed down its decision in the *Sugar Trust* case, the United States Attorney General "concluded that the federal government had no power whatsoever to prosecute close corporations[94] in the manufacturing sector."[95] After the defeat, "he personally 'ripped to shreds' an indictment that a subordinate had secured against American Tobacco . . . ."[96]

He was not alone. While some contemporaries did understand the limitations on the Court's exclusion of manufacturers from Sherman Act regulation, many were confused. One 1903 observer in the *Harvard Law Review*, for instance, said that while he understood "that the Court [did not go] so far as to hold that because the [Sugar] Trust was a manufacturing concern, it was not therefore subject to the jurisdiction of Congress, to the extent that it took part in interstate and foreign trade and commerce . . . an impression to the contrary [enjoyed] considerable popular support."[97] Another author, succumbing to that popular misconception, claimed that

---

92. United Leather Workers Int'l Union v. Herkert & Meisel Trunk Co., 265 U.S. 457, 468-69 (1924).

93. *Knight*, 156 U.S. at 17.

94. As discussed *infra* Part III.B, there was also confusion about *Knight's* bearing on closely held corporations.

95. McCurdy, *supra* note 22, at 330.

96. *Id.*

97. Wm. F. Dana, *The Supreme Court and the Sherman Anti-Trust Act*, 16 HARV. L. REV. 178, 181 (1902-1903).

"[i]n the Sugar Trust case, in 1894, the [C]ourt held in effect that many or most of the so-called 'trusts' at which the act was aimed were not within its scope, because Congress has no power . . . to regulate agricultural or manufacturing industries . . . ."[98]

Because of this overly broad understanding of *Knight*, a subsequent decision upholding Sherman Act regulation of manufacturing entities gave the artificial impression that *Knight* had been fundamentally upended. In *Addyston Pipe v. United States*, "manufacturers and vendors of castiron [*sic*] pipe, entered into a combination to raise the prices for pipe for [several states]."[99] The Court held that "the direct effect of the agreement or combination [was] to regulate interstate commerce,"[100] and the defendant was engaged in behavior subject to regulation by the Sherman Act.[101] One observer, in agreement with others,[102] insisted that "[t]he Knight case, for all practical purposes, must be held to be overruled by the Addyston case."[103] He reasoned that, in the wake of *Addyston*, the Court accepted the practical reality that restraint of interstate commerce was the "inevitable result" of large manufacturing combinations.[104]

This conclusion was grounded in an overly broad understanding of *Knight*. One who realized that *Knight*'s exclusion of manufacturers from the scope of the Sherman Act was not total—that manufacturers with a demonstrated intent to restrain trade could be prosecuted—would not have attached so much importance to the holding in *Addyston Pipe*. As the *Addyston* Court explained, the defendants combined with the "intention" to

---

98. Edward B. Whitney, *Constitutional Questions Under the Federal Anti-Trust Law*, 7 YALE L.J. 285, 285 (1898).

99. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 235-36 (1899).

100. *Id.* at 238.

101. *Id.* at 240.

102. McDonald, *supra* note 76, at 4; *see also* Chevalier, *supra* note 91, at 871-72. To the mind of the writer, the last two cases above mentioned are indistinguishable in their essential facts from that decision. The manufacture and sale of pipes or mantels and the manufacture and sale of sugar would appear to the ordinary intelligence to be controlled by the same legal principles.*Id.*; Whitney, *supra* note 100, at 285-86 (describing the discrepancy between the trial court and court of appeals in the *Addyston* case on whether manufacturers could be "attacked under this act at all . . . .").

103. Raymond, *supra* note 93, at 374.

104. *Id.*

> The Knight Case, for all practical purposes, must be held to be overruled by the Addyston case. It is impossible for the average mind to distinguish the two. To say that the combination in the Knight case restrained only manufacture is ignoring not the "probable intention," as Judge Peckham called it, on the part of the manufacturer, but the inevitable result of the manufacture by combination of over ninety per cent of the sugar refined in the whole country.

Id.

"directly and by means of such combination increase the price for which all contracts for the delivery of pipe within [the relevant territory] should be made."[105] In fact, the defendants "filed the affidavits of their managing officers," wherein they admitted to fixing prices.[106] Again, in *Knight* the Court held that there was no such intent to restrain the sale of goods through, for example, price fixing. The failure to recognize these things—*Knight*'s holding and the way *Addyston Pipe* fit within it—led some to believe that *Knight* had been overruled.

B. MISREADING *KNIGHT* AS A CASE ABOUT HOLDING COMPANIES

The misreading of *Knight*, and its relationship with later cases, did not stop there. To some, *Knight* was not significant for what it said about manufacturers. One observer went so far as to say that *Knight*'s holding had nothing to do with the Sugar Trust's status as a manufacturer.[107] Rather, *Knight* was an important statement about the legality of national corporate combinations.[108] Understanding this view requires some context. Many

---

105. *Addyston Pipe*, 175 U.S. at 240.

106. *Id.* at 224.

107. *See, e.g.*, George F. Canfield, *Is a Large Corporation an Illegal Combination or Monopoly Under the Sherman Anti-Trust Act?*, 9 COLUM. L. REV. 95, 108 (1909).

> In the *Northern Securities* case, Mr. Justice Harlan distinguished the *Knight* case on the ground that "the agreement or arrangement there involved had reference only to the manufacture or production of sugar." But this, it is respectfully submitted, is an entirely erroneous view of the *Knight* case. The agreement or arrangement involved in that case had nothing to do with the manufacture of production of sugar. It had to do with the sales of stock of incorporated companies. These companies, it is true, were engaged in the manufacture and production of sugar, but there is nothing in the opinion of the court to suggest that the decisions would have been different, if the incorporated companies had been trading companies, instead of manufacturing companies.

Id.

108. *See id.* at 108-09.

> What the Government sought was that agreements for the sale of shares of stock, with a view to merging the several sugar refining corporations, should be declared void . . . . This relief was denied upon the broad ground that the subject-matter involved was the sale of shares of stock, that the contracts for the sale of shares of stock, although stock of companies engaged in interstate commerce, were not subject to the jurisdiction of Congress, . . . and that the Act did not authorize Congress to compel the surrender of property which had already passed.

Id.

Sherman Act observers were confused as to what the Sherman Act actually forbade. The language of the Act seemed sweepingly categorical, prohibiting "*[e]very* contract, combination[,] . . . or conspiracy, in restraint of trade or commerce . . . ."[109] Could the Act really prohibit *every* agreement, *every* combination, that somehow restrained trade? Did it mean that forming large corporations, the mere combination of capital, was illegal?[110] Some believed not. They insisted the Act's central prohibition on "restraints of trade" had a preestablished, and more narrow, common law meaning—forbidding only contracts "by which a person carrying on a business agrees with another to abandon or restrict that business."[111] Traditionally falling in this category were arm's-length agreements, those "by which a number of producers combine to reduce competition, either by setting uniform prices, fixing production quotas, dividing the market into exclusive dealing areas, or pooling their profits."[112] Not included, it was thought, were combinations in the form of a new corporation—a new, unified entity.[113] The holding company was among these permitted corporate combinations.[114] As one contemporary scholar suggested, a holding company could not be a conspiracy or combination to restrain trade because it, too, was a unitary entity.[115]

---

109. United States v. U.S. Steel Corp., 223 F. 55, 58 (D.N.J. 1915) (emphasis added) (quoting Sherman Anti-Trust Act, 15 U.S.C. § 1), *aff'd*, 251 U.S. 417 (1920). *See also* Raymond, *supra* note 93, at 376 ("The statute was a piece of trial legislation, a shot into the air; but it was a shot of sweepingly wide range. Unless given a technical meaning, the words of the Act are broad and undefined. It was open to the court to give them an exceedingly comprehensive meaning.").

110. *Cf.* Raymond, *supra* note 93, at 375-67.

111. F.C.G., *The Merger Case*, 17 HARV. L. REV. 474, 476 (1903-1904).

112. LETWIN, *supra* note 37, at 80.

113. Raymond, *supra* note 93, at 376. "Until the decision in the Northern Securities case it was the generally accepted belief among lawyers that . . . a combination in the form of a corporation was valid under the Act. This belief rested on the well-known principle of general law that a corporation is an entity." *Id.* Canfield, *supra* note 109, at 101.

> A corporation lawfully organized under the laws of a State for trade or commerce is certainly not a conspiracy. A corporation, it may be conceded, involves a contract of membership among its stockholders, but such a contract was never regarded as in any sense a contract in restraint of trade.

Id.

114. Commentators appear to have understood the holding company as a species of corporation rather than a loose agreement to restrain trade. *Cf.* Gilbert Holland Motague, *The Defects of the Sherman Anti-Trust Law*, 19 YALE L.J. 88, 90 (1909-1910); Raymond, *supra* note 93, at 376-77 (appearing to say that the defendant in *Knight*—a holding company—was of a corporate form rather than a loose agreement).

115. C.C., *The Northern Securities Case and the Sherman Anti-Trust Act*, 16 HARV. L. REV. 539, 545-47 (1902-1903) (discussing the Northern Securities Company, which, as discussed *infra* notes 131-139 and accompanying text, was a holding company).

With that uncertainty in the background, the holding in *E.C. Knight*, in combination with 1897's *United States v. Trans-Missouri Freight Ass'n*,[116] fed an initial impression that the Sherman Act was to adhere to the narrow common law understanding of restraints of trade—allowing close corporate combinations, but not arms-length agreements between competitors in restraint of trade.[117] On the one hand, the Court in *Knight* rejected a Sherman Act prosecution for formation of a close combination—a holding company.[118] This signaled to some that the Act would not, consistent with the common law, prohibit the mere assembly of corporate entities.[119] The Attorney General, for instance, reflected after *Knight* that "[c]ombinations and monopolies . . . cannot be reached under [the Sherman Act] merely because they are combinations and monopolies . . . ."[120] On the other hand, in *Trans-Missouri Freight Ass'n*, the Court held that an agreement among several railroads to set "reasonable rates, rules, and regulations" among themselves—traditional common law restraints of trade—"put a restraint upon trade or commerce as described in the act."[121] As one writer observed,

> The immediate result of [*Trans-Missouri*] was a rush to consolidation in every branch of industry. If contracts, associations and loose combinations restraining trade in the slightest degree were illegal—the corporation lawyers reasoned—then contracts, associations and loose combinations should be abandoned for consolidation under single ownership in "holding corporations."[122]

The belief that *Knight*, consistent with the common law, excluded corporate mergers from the universe of prohibited restraints of trade was widespread. One author observed that "[m]any, if not most, of the great corporate combinations in the country were formed [after *Knight*]."[123] Indeed, the rate of corporate mergers in the manufacturing sector rose rapidly in the immediate wake of *Knight*.[124] Additionally, on the basis of *Knight's* pur-

---

116. United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290 (1897).

117. *See* Gilbert Holland Montague, *The Defects of the Sherman Anti-Trust Law*, 19 YALE L.J. 88, 89-90 (1909-1910).

118. Freyer, *supra* note 28, at 1006 ("The Sugar Trust was a holding company . . . .").

119. Canfield, *supra* note 109, at 95-96, 105-08.

120. Montague, *supra* note 119, at 89.

121. *Trans-Missouri*, 166 U.S. at 292, 341-42.

122. Montague, *supra* note 119, at 90.

123. Raymond, *supra* note 93, at 376. The author questions whether *Knight* actually held that corporate combinations were legal under the Act, but said that the "generally accepted belief" is that it did. *Id.* at 376-77.

124. Smythe, *supra* note 37, at 95.

ported holding that mere combinations could only indirectly restrain trade, a 1903 article questioned the soundness of a case deeming a corporate combination illegal.[125] Donald Smythe rejects this account, arguing "[t]here is little, if any, evidence that contemporary observers believed *E.C. Knight* would make all mergers immune from antitrust prosecution."[126] He cites to a *Harvard Law Review* article and *New York Times* reporting on *E.C. Knight,* which "stated the holding accurately" and "did not subsequently print any articles that suggested *E.C. Knight* caused an upswing in merger activity."[127] But while one law review article and the *New York Times* may not have been confused as to the import of *Knight's* holding on the legality of corporate mergers, much of the contemporary legal scholarship did seem to be.

All of that changed in 1904. In *Northern Securities Co. v. United States*, the Supreme Court upheld a Sherman Act prosecution of a holding company formed through the merger of two railroad companies.[128]

The holding, much like *Addyston Pipe*, helped feed the perception that *E.C. Knight* had been fundamentally discredited. Contemporaries believed that *Northern Securities* was a complete reversal from what they understood to be the holding in *Knight*. Now, mere acquisition by one company of another's stock was interstate commerce, regulable under the Sherman Act. In 1910's *Has the Sugar Trust Case Been Overruled*, for example, Stuart Chevalier asserted that the *Northern Securities* holding "practically discredit[ed] the Sugar Trust decision."[129] It "expressly decided," purportedly in stark contrast to *Knight*,[130] "that the holding by a single corporation of the stock of two competing railroad companies was commerce within the meaning of the Act."[131] What is more, mergers were not just *subject* to Sherman Act regulation. They were, in the eyes of some, almost flatly illegal. A 1910 writer, for instance, echoed widespread belief that *Northern*

125. *See, e.g.,* Augustine L. Humes, *The Power of Congress Over Combinations*, 17 HARV. L. REV. 83, 89-90 (1903-1904) (suggesting that the logic of *Knight* would compel a finding that a holding company of railroads represented merely an indirect restraint of trade).

126. Smythe, *supra* note 37, at 100.

127. *Id.* at 100-01.

128. Northern Sec. Co. v. United States, 193 U.S. 197, 320-22, 360 (1904).

129. Chevalier, *supra* note 91, at 872. Puzzlingly, Chevalier says that the *Northern Securities* holding was consistent with the Court's prior holding in *Addyston Pipe*, which he says was a break from *Knight*. *Id.* at 871-72. It is not clear what Chevalier believed *Addyston Pipe* and *Northern Securities* had in common, except, maybe, that they took a broader view of the Commerce Clause power than was taken in *Knight*.

130. *Id.* at 873.

131. *Id.* George Canfield also believed that *Knight* held that "*contracts for the sale of shares of stock, although stock of companies engaged in interstate commerce, were not subject to the jurisdiction of Congress, as they affected interstate commerce only indirectly, and that the Act did not authorize Congress to compel the surrender of property which had already passed*." Canfield, *supra* note 109, at 109.

Securities "outlawed almost every industrial concern of the first importance."[132] Another understood *Northern Securities* to hold "that this particular form of consolidation of interests,—a holding corporation uniting rival corporations in such a way as to suppress possible competition between them,—is in violation of the Federal [A]ntitrust [A]ct . . . ."[133] Still another argued that the "Northern Securities case stands squarely for the proposition that . . . a holding company formed for the purpose of exchanging stock of the companies combined is illegal . . . ."[134] The development was "in all its aspects was grave and far-reaching"[135] and "worked an entire change in the law."[136] Much, it seemed, had changed since 1895.

C. MISTAKING *STANDARD OIL* AND *AMERICAN TOBACCO* AS OVERRULING *KNIGHT*

In May, 1911, the Supreme Court handed down *Standard Oil v. United States* and *United States v. American Tobacco Co.*—two cases in which the Court upheld Sherman Act prosecutions of large combinations.[137] These cases, decided just months before the October initiation of *U.S. Steel*, were said to clearly repudiate *E.C. Knight*.[138]

To some, the cases represented a direct attack on *Knight's* characterization of the reach of the commerce power. One observer, who believed the cases repudiated *Knight*,[139] for instance, understood *American Tobacco* to stand for the following: "the mere acquisition of manufacturing plants, at least by corporations, would appear to be unlawful if the purpose is to mo-

---

132. Montague, *supra* note 119, at 110.

133. Bruce Wyman, *The Actual Decision in the Merger Case*, 16 GREEN BAG 258, 260 (1904).

134. Raymond, *supra* note 93, at 374; *see also* David Walter Brown, *The Present Status of the* Northern Securities *Decision*, 7 COLUM. L. REV. 582, 582 (1907).

> The decision was generally interpreted by the Bar and the business community as asserting the general principle, that the unification in a single hand of control over two or more active agencies of inter-state or foreign commerce was, in itself, and without positive exercise of restraint upon the competition between the acquired agencies, a violation of that act . . . .

Id. (citation omitted).

135. D.H. Chamberlain, *The* Northern Securities Company *Case; A Reply to Professor Langdell*, 13 YALE L.J. 57, 57 (1903-1904).

136. Wyman, *supra* note 135, at 258 ("It seldom happens that an entire change in the law is worked by force of a single decision.").

137. *American Tobacco* was decided on May 29, 1911. 31 S.Ct. 623, 632 (1911). *Standard Oil* was decided on May 15, 1911. 221 U.S. 1, 81-82 (1911).

138. Alfred Hayes, *What the Sherman Anti-Trust Act Has Accomplished*, 47 AM. L. REV. 697, 698 (1913).

139. *Id.* at 698.

nopolize."[140] The Court's treatment of *Knight* could not have helped but promote this understanding. In *United States v. American Tobacco Co.*, the Court addressed a contention that the tobacco combination was not within the ambit of the Sherman Act because it was engaged "merely [with] matters of intrastate commerce."[141] The Court refused to consider the jurisdictional Commerce Clause claim because "the want of merit in all the arguments advanced on such subjects is so completely established by the prior decisions of this court, as pointed out in the Standard Oil Case, as not to require restatement."[142] In turn, the *Standard Oil* Court dismissively rejected an argument that the oil trust was not subject to the Sherman Act by virtue of being merely the manufacturer of interstate commodities:

> [A]ll the structure upon which this argument proceeds is based upon the decision in United States v. E.C. Knight Co. The view, however, which the argument takes of that case, and the arguments based upon that view, have been so repeatedly pressed upon this court in connection with the interpretation and enforcement of the anti-trust act, and have been so necessarily and expressly decided to be unsound, as to cause the contentions to be plainly foreclosed and to require no express notice.[143]

This was not, however, a repudiation of *Knight*. The language from *Standard Oil* was a direct response to the blanket claim that the Sherman Act was inapplicable to producers.[144] It was intended to reiterate—as *Knight* made clear—that the Sherman Act was not categorically inapplicable to all manufacturers, no matter what their intentions. The *Standard Oil* Court followed its dismissal of the *Knight* argument with a string cite to cases in which defendants were subject to the Sherman Act because they demonstrated direct ties to interstate commerce or an intent to restrain it.[145]

---

140. *Id.* at 705-06.
141. 221 U.S. 106, 183-184 (1911)
142. *Id.*
143. *Standard Oil Co.,* 221 U.S. at 68-69.
144. *Id.* at 68.

> [Appellants object that] the act, even if the averments of the bill be true, cannot be constitutionally applied, because to do so would extend the powers of Congress to subjects *dehors* the reach of its authority to regulate commerce, by enabling that body to deal with mere questions of production of commodities within the states.

Id.

145. *Id.* at 69 (citing *Northern Sec. Co.*, 193 U.S. 197, 320 (1904) (discussing the prosecution of interstate railroads); Loewe v. Lawler, 208 U.S. 274, 304-06 (1908) (holding a union of hat manufacturers subject to Sherman because they attempted to prevent the buy-

In *Knight*, the Court conspicuously left open the possibility that manufacturing entities, which demonstrated an intent to restrain commerce, could be subject to the strictures of the Sherman Act.[146]

But there are other reasons these cases seemed to abandon *Knight*. As a general matter, the holdings in *Standard Oil* and *American Tobacco* appeared to represent a wholesale reordering of the Supreme Court's approach to the Sherman Anti-Trust Act—a "practically *de novo* consideration of the Act . . . ."[147] The cases, it was said, finally read a traditional limitation on the prohibition on restraints of trade into the Sherman Act. At common law, restraints of trade were only forbidden if they were unreasonable.[148] But it was unclear that this common law tradition informed the meaning of the Sherman Act. One scholar, for instance, asked, "Does the act by its terms prohibit any specified conduct, or does it simply induct the federal courts into a new federal jurisdiction there to operate and obtain results in accordance with the 'standard of reason which had been applied at common

---

ing, selling, and transport of the underlying product); *Swift*, 196 U.S. 375, 397 (1905) (holding that "the subject-matter is sales, and the very point of the combination is to restrain and monopolize commerce among the states in respect to such sales"); W. W. Montague & Co. v. Lowry, 193 U.S. 38, 44-45 (1904) (wherein manufacturers were in an interstate exclusive dealing contract with dealers in which manufacturers would only sell tile to members of the association); Shawnee Compress Co. v. Anderson, 209 U.S. 423, 575-76 (1908) (holding that a cotton compress company sought to monopolize the compress industry by controlling the transportation vital to the industry). The *Shawnee* court stated,

> [T]he . . . purpose [was] . . . to place within their power the control of the compress industry, by purchasing or leasing those plants which are advantageously located in each of the hauling districts or territories established by the carriers [railroads] in their cotton tariffs. Within certain boundaries the haul must be one certain way, and when the Gulf Company seizes the strategic point, under its leases, competition within that district is annihilated.

Id. at 435. The Court in *Northern Securities* appeared to reiterate that manufacturers could be subject to the Antitrust Act if they do something to "directly or necessarily" restrain commerce:

> [A]lthough the act of Congress known as the anti-trust act has no reference to the mere manufacture or production of articles or commodities within the limits of the several states, it does embrace and declare to be illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates *in restraint* of trade or commerce *among the several states or with foreign nations* . . . .

Northern Securities, 193 U.S. at 331.

146. *Knight*, 156 U.S. at 17.

147. Raymond, *supra* note 93, at 36 ("In the two great recent cases, the Supreme Court effectually changed existing law." *Id.* at 32); *see also* McDonald, *supra* note 76, at 4 ("The Tobacco and Standard Oil cases restored the Sherman Law to its original vitality.").

148. Watkins, *supra* note 76, at 816-17; *see also* LETWIN, *supra* note 37, at 79-80.

law'?"[149] Some believed that the Court's early decisions rejected the notion that this rule of reason limited the Act's prohibitions. In *A Colloquial Upon the Sherman Anti-Trust Law*, for instance, Prather McDonald reflected that "[t]he earlier cases had laid down the rule that every restraint of trade, whether reasonable or not, was made illegal by the Sherman Law."[150] Another observer explained that, in the 1897 case *United States v. Trans-Missouri Freight Ass'n*, the Court appeared to reject the notion that "the word 'unreasonable' should be interlined by the court, so that the statute should prohibit only such restraints as should seem to the court or jury unreasonable."[151] All of that changed, however, in 1911. The Court's opinions in *Standard Oil* and *American Tobacco* seemed to definitively embrace a rule of reason.[152] As one article noted, "The new construction given the Sherman Act by the Standard Oil and Tobacco cases was grounded, so it was averred, upon principles of common law."[153] According to another article, eight of the nine Justices in *Standard Oil* "undertook in a solemn *dictum*" to resolve the Court's previous "uncertainty" in favor of the rule of reason.[154] While the Court may have said in *American Tobacco* that it was not adopting the rule of reason, some, like Harold Evans, just did not believe it: "The court says, in the Tobacco Case, it did not 'read the word "unreasonable" into the statute.' With great deference the writer insists that in effect it did."[155] This new approach, it seemed, significantly altered the Court's earlier understanding of the Sherman Act's prohibition on restraints of trade.[156]

---

149. Albert M. Kales, *The Sherman Act*, 31 HARV. L. REV. 412, 414 (1917-1918).

150. McDonald, *supra* note 76, at 5; *but see* Herbert Noble, *The Sherman Anti-Trust Act and Industrial Combinations*, 44 AM. L. REV. 177, 193 (1910) (expressing belief that the lower federal court decision in *American Tobacco* was wrong to suggest that the Supreme Court had not established any limits on the prohibition on restraints of trade); Victor Morawetz, *The Supreme Court and the Anti-Trust Act*, 10 COLUM. L. REV. 687, 692 (1910).

> Although dicta may be found in the opinions of the court which, taken without regard to the context, might seem to indicate that the court considered that *all* contracts and combinations restricting competition in any degree were prohibited by the Anti-Trust Act, no such conclusion can fairly be deduced from these opinions when considered in their entirety.

Id. at 692; TAFT, *supra* note 21, at 89-91.

151. Whitney, *supra* note 100, at 286. Still others recognized this reading of the early Sherman Act cases but nonetheless disagreed that they actually rejected the Rule of Reason. *See, e.g.*, TAFT, *supra* note 21, at 63-64; Morawetz, *supra* note 152, at 692.

152. *See, e.g.*, McDonald, *supra* note 76, at 4.

153. Watkins, *supra* note 76, at 816.

154. Kales, *supra* note 151, at 430-32.

155. Raymond, *supra* note 93, at 41.

156. Harold Evans, *supra* note 81, at 316; *see also* Raymond, *supra* note 148, at 41-42.

Adoption of the rule of reason signaled a whole new approach to the Sherman Act—one purportedly grounded in a more realistic understanding of the prevailing industrial order.[157] As one 1913 article explained, the Court appeared to abandon the categorical and rigid line drawing of the past:

> [In Standard Oil, the Court] re-examined carefully the whole subject, declining on the one hand to construe the words of the Act in such a literal way as to include all acts lessening competition, which would have made the Act impossible of enforcement, and on the other hand to give the words such a narrow or technical meaning that the restraint of trade should be applicable only to contracts entered into between competitors. The Act is held to make unlawful acts of whatever sort the purpose of which is to bring about the evils of monopoly . . . .[158]

Instead, the Sherman Act's prohibitions were to be understood in a far more practical way. "The decisions, when they came, justified those who believed that the logic of facts was stronger than the logic either of theories or even of tolerably well settled law . . . ."[159] What mattered now was "the whole course of conduct of the persons and corporations involved."[160] Primarily, this meant the Court assessed the legality of combinations through an examination of their size[161] and record of bad acts. One writer explained that:

---

157. One modern observer, too, claims that *Standard Oil* "expressly rejected as 'unsound' the formalistic distinction between commerce and manufacture." Bruce Johnsen & Moin A. Yahya, *The Evolution of Sherman Act Jurisdiction: A Roadmap for Competitive Federalism*, 7 U. PA. J. CONST. L. 403, 415 (2004).

158. Hayes, *supra* note 140, at 701-02; McDonald, *supra* note 76, at 4 (*American Tobacco* and *Standard Oil* represented a return to the Act's "original vitality," in contrast to the preexisting "literal interpretation.").

159. Raymond, *supra* note 93, at 32.

160. *Id.* at 38.

161. One article argued that a combination could be held in violation for it sheer size without serious resort to an examination of its bad acts. Sufficiently great size, it argued, created a presumption of bad acts. Kales, *supra* note 151, at 422-23. Another disagreed, however, saying,

> While Chief Justice White indicates that the size of the Standard Oil Company is so vast that it gives rise to the presumption of an intent to monopolize, it would appear to be the view of the Court that mere size in the absence of wrongful purpose does not bring a corporation under the Act.

Hayes, *supra* note 140, at 702.

> Since the *Standard Oil* and *Tobacco Cases*, it has become articulate that a combination . . . which, by reason of its size and preponderant position in the business, has the power and the purpose, or uses its power to exclude others from the business by illegal acts and unlawful and unfair methods of competition, is an attempt at monopoly, and a restraint of trade and illegal at common law, and, if interstate commerce is involved, under the Sherman Act.[162]

This sea change represented a direct repudiation of *Knight* to some because they believed that the new framework had been anticipated by Justice Harlan's dissent in *E.C. Knight*. Harlan rejected the Court's "rigid, technical, and narrow" understanding of the federal government's power to deal with corporate combinations.[163] He had a broad view of the commerce power, saying, "[t]he jurisdiction of the general government extends over every foot of territory within the United States."[164] As a restraint on Congress's power to regulate commerce under the Sherman Act, Harlan rejected the Court's application of the manufacturing/commerce distinction.[165] But he seemed to offer another restraint, which would be echoed decades later in *Standard Oil* and *American Tobacco*—the common law rule of reason. He said that "a partial restraint of trade . . . is tolerated by the law . . . 'provided it not be unreasonable . . . .'"[166] What's more, Harlan placed emphasis on the Sugar Trust's size as a basis for its illegality under the Sherman Act.[167] According to William Howard Taft, Harlan's dissent

---

162. Albert M. Kales, *Good and Bad Trusts*, 30 HARV. L. REV. 830, 830-31 (1916-1917).

163. United States v. E.C. Knight, 156 U.S. 1, 19 (1895) (Harlan, J., dissenting); *see also* Cushman, *supra* note 11, at 1094 (contrasting Justice Harlan's approach with the majority's).

164. *Knight*, 156 U.S. at 33 (Harlan, J., dissenting).

165. *Id.* at 34-36 (Harlan, J., dissenting).

166. *Id.* at 24 (Harlan, J., dissenting) (quoting Or. Stream Navigation Co. v. Winsor, 87 U.S. 64 (1873)).

167. *Id.* at 43-44 (Harlan, J., dissenting).

> [I]t is conceded that the object of this combination was to obtain control of the business of making and selling refined sugar throughout the entire country. Those interested in its operations will be satisfied with nothing less than to have the whole population of America pay tribute to them . . . . And it is proved—indeed, is conceded—that that object has been accomplished to the extent that the American Sugar Refining Company now controls 98 per cent of all the sugar refining business in the country, and therefore controls the price of that article everywhere. Now, the mere existence of a combination having such an object and possessing such extraordinary power is itself, under settled principles of law,—there being no ad-

"bec[a]me the position of the court" in *Standard Oil*[168]—emphasizing the language from Harlan's opinion discussing common law limitations on the prohibition on restraints of trade.[169] Puzzlingly though, Taft acknowledges that Harlan's concurrence in *Standard Oil* specifically criticized the Court's adoption of the rule of reason as "judicial legislation."[170]

D. THE GOVERNMENT BELIEVED *KNIGHT* HAD BEEN OVERRULED

The government's arguments against U.S. Steel indicate that it, too, joined the widespread belief that *Knight* was overruled. It only cites *Knight* twice—in one instance relegated to a footnote[171]—and in neither instance does it address the manufacturing/commerce distinction. [172] Instead, the government uses language from *E.C. Knight* to argue that a combination need not achieve "absolute monopoly" to be liable under the Sherman Act.[173]

Throughout, the government highlighted U.S. Steel's size and anti-competitive behavior, not its attempts at restraint of trade and transportation. In a section of its brief titled, "Substance of the Charge," the government does not allege, at least directly, the Steel Corporation's restraint of sale or transportation. Instead, the summary emphasized that U.S. Steel combined "with the purpose and effect of unduly restricting competition" and achieved "overwhelming power, unduly restricting competition in the iron and steel trade as a whole and in practically every important branch . . . ."[174] And in its pleadings and its brief to the Court, the government further underscored U.S. Steel's size, control over manufacturing, and anticompetitive behavior.[175] Between pages 790 and 873 of its brief, for instance, the government detailed U.S. Steel's dominance of a variety of markets in the manufacturing of steel products.[176]

> judged case to the contrary in this country,—a direct restraint of trade in the article for the control of the sales of which in this country that combination was organized.

Id.

168. TAFT, *supra* note 21, at 91-92 (quoting Justice Harlan's discussion of the common law's toleration for some "partial restraint[s] of trade") (quoting *Knight*, 156 U.S. at 24); *see also* McDonald, *supra* note 76, at 3 ("Mr. Justice Harlan dissented and his dissent finally became the law in the Standard Oil and Tobacco cases.").

169. *See* TAFT, *supra* note 21, at 92-93.

170. *Id.* at 91.

171. U.S. Steel Government Brief, *supra* note 43, at 73 n.1.

172. *See id.* at 73 n.1, 245.

173. *See id.* at 245 (quoting *Knight*, 156 U.S. at 16).

174. *Id.* at 17-18.

175. *See id*. at 139, 147, 149, 154, 157, 790-873.

176. U.S. Steel Government Brief, *supra* note 43, at 790-873.

The government also made arguments consistent with each of the three theories that *Knight* was overruled. It signaled that it believed there was no longer a carveout for manufacturers with no demonstrated intent to restrain sale or transportation. Relying partly on *Addyston Pipe*, for example, the brief brazenly declared that "[i]t has never been doubted that combinations of this type, embracing a dominant proportion of those engaged in a particular industry and formed for the express purpose of suppressing competition . . . are combinations in restraint of trade."[177] At another point, the government said that "*[e]very* combination which by its necessary effect or because of the character of the means employed threatens the normal operation of the law of competition . . . is . . . within the purview of the Act."[178] Similarly, the government thought holding companies were now per se illegal: "In three leading cases in this Court," the brief insisted partly in reliance on *Northern Securities* and *Standard Oil*, "the holding company as a means of combining able competitors has been adjudged illegal."[179] And, finally, the government seemed comfortable that the Court's line drawing tilt had been eclipsed by a general standard of reasonableness: "whether restriction of competition through voluntary combination is undue depends primarily upon the extent of the restriction. *Without attempting to draw an exact line*, the restriction is certainly due when the combination embraces units which together occupy a preponderant position."[180]

Given all this, it seems the government thought it could prevail against U.S. Steel because it believed, as did so many others, that *Knight* had been effectively overruled—by *Addyston Pipe*, *Northern Securities*, or *Standard Oil* and *American Tobacco*. This is not to say that there was nothing else that helped reinforce the government's belief that this was a case worth litigating. As mentioned above, there certainly were some factual differences between the cases against the sugar and steel trusts that could help explain the decision. What's more, it could not have hurt that the composition of the Supreme Court had completely changed hands between 1895 and the initiation of *U.S. Steel* in 1911.[181] And there were doubtless any number of extrajudicial political or other pressures to prosecute. But the close alignment between the government's arguments and the widespread beliefs about *Knight*, *Addyston Pipe*, *Northern Securities*, and *Standard Oil* is a strong indication that the United States saw an opening against U.S. Steel because it also believed *Knight* had been overruled.

---

177. *Id.* at 82.

178. *Id.* at 77 (emphasis added).

179. *Id.* at 213.

180. *Id.* at 78 (emphasis added).

181. Members of the Supreme Court of the United States, http://www.supremecourtus.gov/about/members.pdf (last visited Sept. 26, 2009).

And this fact is itself revealing. The belief in *Knight's* irrelevance, and the background assumptions permitting that belief, conflict with the traditional narrative attached to the pre-New Deal Court's jurisprudence.

IV. THE LAISSEZ-FAIRE COURT?

The conventional view of *Knight* is that it gutted the Sherman Act as a weapon against business interests[182] and inaugurated an era of *laissez-faire* activism on the Supreme Court. In *Conservative Crisis and the Rule of Law*, Arnold Paul characterized *Knight* as "a great victory for *laissez-faire* conservatism[,]"[183] which "seemed to leave little left of the Sherman Act."[184] Further, he said that "[n]umerous scholarly books and articles have been written on the *E.C. Knight* case and its deleterious influence on American constituional history until the late 1930's."[185] Similarly, Erwin Chemerinsky claims that until 1937, "the Court was controlled by conservative Justices deeply committed to laissez-faire economics and strongly opposed to government economic regulations. Many federal laws were invalidated as exceeding the scope of Congress's commerce power . . . ."[186] The Court purportedly advanced its political agenda behind a cloud of judicial hand waiving—stockpiling a broad body of rules, which could be opportunistically employed to support its extrajudicial objectives.[187]

This traditional view of the Court's pre-New Deal Commerce Clause jurisprudence (as well as its other decisions)[188] is subject to reevaluation.

---

182. McCurdy, *supra* note 22, at 308 ("[T]he conventional contention [is] that a Court 'infused with the spirit of laissez faire' consciously provided the modern industrial corporation with 'a charter of liberty' [in *Knight*].").

183. PAUL, *supra* note 9, at 181.

184. *Id.* at 179; *see also* Paul D. Moreno, *"So Long As Our System Shall Exist": Myth, History, and the New Federalism*, 14 WM. & MARY BILL RTS. J. 711, 736 (2005) ("The progressives claimed that the Court had eviscerated the Sherman Antitrust Act of 1890 by distinguishing 'manufacture' from 'commerce,' as well as 'direct' and 'indirect' effects on interstate commerce, in the 1895 sugar trust case.").

185. PAUL, *supra* note 9, at 181 n.66 (citing EDWARD S. CORWIN, TWILIGHT OF THE SUPREME COURT, ch. i (1934); EDWARD S. CORWIN, THE COMMERCE POWER VERSUS STATES RIGHTS, 151-56, 189-209 (1936)). Edward Corwin also described *Knight* as "[t]he initial case illustrative of the Court's new [laissez-faire] ideology. . . ." *Id.* at 151-53.

186. Richard A. Bales, *Explaining the Spread of At-Will Employment as an Interjurisdictional Race to the Bottom of Employment Standards*, 75 TENN. L. REV. 453, 466 n.116 (2008) (quoting ERWIN CHEMERINKSY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 243 (2d ed. 2002)); *see also* Cushman, *supra* note 11, at 1091-92 (quoting exponents of the traditional view that the pre-New Deal Court twisted doctrine to advance their economic agenda).

187. Cushman, *supra* note 11, at 1091-92 (quoting exponents of the traditional view).

188. *See, e.g.,* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1386 (2001) ("Today, many scholars are engaged in an effort to legitimize judicial review during the Lochner era on the

Some modern scholars reject the received wisdom that the Justices' political conservatism significantly controlled Court doctrine. Charles McCurdy, for instance, argues: "[T]he conventional contention that a Court 'infused with the spirit of laissez faire' consciously provided the modern industrial corporation with 'a charter of libery' simply cannot be sustained."[189] Rather, the *Knight* decision was "a last desperate attempt" to preserve states' power to regulate corporate structure.[190] Barry Cushman adds that the Court's post-*Knight* decisions hardly cast the Court as a panel of right-wing scrooges. *Knight* ultimately was not a substantial obstacle to Sherman Act regulation of business interests.[191] In fact, the Court used *Knight* on more than one occasion to protect *labor unions* from Sherman Act regulation.[192] Cushman explains that the Court's decisions in this area were, in fact, grounded in preestablished constitutional principles. "The *Knight* case and those that followed it were . . . decided against the backdrop of a well developed dormant Commerce Clause jurisprudence . . . ."[193] *Knight's* declaration of the Court's "[a]ffirmative Commerce Clause doctrine . . . was the flip side" of preexisting "dormant Commerce Clause" decisions[194] that were established in the "late nineteenth and early twentieth centuries . . . ."[195] McCurdy, too, sees a basis for *Knight's* manufacturing/commerce distinction in preexisting doctrine.[196]

While Cushman and McCurdy would not necessarily make such a claim, broad acceptance of their accounts would have implications for the ongoing argument about the proper application of the Commerce Clause today. In the 1995 Supreme Court case *United States v. Lopez*, the Court struck down a law as an abuse of Congress's power over interstate commerce for the first time in sixty years.[197] Chief Justice Rehnquist's opinion for the Court held that there were only "three broad categories of activity that Congress may regulate under its commerce power[:] . . . the channels

---

ground that decisions during that era reflected established jurisprudence, and thus were 'law,' and not 'politics.'").

189. McCurdy, *supra* note 22, at 308.

190. *Id.* at 308-09.

191. Cushman, *supra* note 11, at 1094-95 (quoting GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 163, 163 (1997)).

192. *Id.* at 1097-98.

193. *Id.* at 1125.

194. *Id.* at 1126. The affirmative Commerce Clause doctrine defined the limits of Congress's power to regulate commerce, whereas the dormant Commerce Clause decisions defined the limits of states' power to regulate commerce. *See id.*

195. *Id.* at 1101.

196. *See* McCurdy, *supra* note 22, at 314 ("[The] rigid distinction between traffic and the organization of production was, in part, a purely formal deduction from prevailing juridical conceptions of corporate competence.").

197. Randy Barnett, *The Original Meaning of the Commerce Clause,* 68 U. CHI. L. REV. 101, 101 (2001) (citing United States v. Lopez, 514 U.S. 549 (1995)).

of interstate commerce[,] . . . the instrumentalities of interstate commerce, . . . [and] those activities having a substantial relation to interstate commerce . . . ."[198] But Justice Thomas, in his concurring opinion, proposed an alternative categorization of the Commerce power: the *Knight* categories. Rejecting the "sweeping" "substantial effects formula" endorsed by Chief Justice Rehnquist,[199] Justice Thomas urged the Court to "temper [its] Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause."[200] He clarified what the original understanding of the term "commerce" meant, saying "[a]t the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting . . . ."[201] Justice Thomas continued, noting "[c]ommerce" did not include "productive activities such as manufacturing and agriculture."[202] Professor Randy Barnett defends Justice Thomas's position, and argues that the Associate Justice's understanding of the original meaning of the Commerce Clause is correct, and that the Court should utilize that "original meaning" approach to interpreting the Constitution.[203] Standing in Justice Thomas and Barnett's way, however, is the prevailing view that the *Knight* doctrine was merely an instrument of *laissez-faire* activism.[204] For instance, Justice Souter's dissent in *Lopez* argued that the pre-New Deal restrictive view of the commerce power "complemented the Court's activism in limiting the enforceable scope of state economic regulation."[205] That "activism," Souter explained, sprung from the Court's preference for *laissez-faire* economics.[206] Cushman and McCurdy's account, if substantiated, would help

198. *Lopez*, 514 U.S. at 558.
199. *Id.* at 584-85.
200. *Id.* at 584.
201. *Id.* at 585.
202. *Id.* at 586.
203. *See* Barnett, *supra* note 199, at 101-04, 147.
204. *See* Steven G. Gey, *The Myth of State Sovereignty*, 63 OHIO ST. L.J. 1601 (2002).

> This narrow, neoclassical definition of commerce was adopted by the Court during the latter part of the nineteenth century. The memory of the political ramifications these opinions had on the Court, coupled with the economic flaws of the neoclassical worldview that generated this constricted view of "commerce" probably explains the fact that no other Justice joined Justice Thomas' opinion urging a return to this interpretation of the Commerce Clause.

Id. at 1666 n.236 (citations omitted).
205. *Lopez*, 514 U.S. at 605.
206. *Id.* at 606.

> The fulcrums of judicial review in [the pre-New Deal Court's substantive due process] cases were the notions of liberty and property characteristic of laissez-faire economics, whereas the

remove some of this tarnish from the doctrine embraced by Justice Thomas and Barnett.

In evaluating the revisionists' account of the pre-New Deal Court, Barry Friedman examines contemporaries' view of the Court's decisions.[207] Friedman says, "commentators at the time criticized the work of [the Court] precisely in the terms of the conventional story."[208] Outside observers, who were "fully aware of [the] jurisprudential antecedents" upon which *Lochner*-era judges purported to rely,[209] criticized the Court for infusing their decisions with their private political beliefs.[210] Friedman stops short of alleging that cynically critical public opinion completely undermines the revisionist claim that the Court's decisions were grounded in the law.[211] He comes close, however, noting "[i]t is difficult to know what to make of revisionist claims in light of overwhelming contemporary commentary that outright accused judges of importing biases into the law."[212]

Friedman is correct that the views of contemporaries are relevant to the debate as to whether the pre-New Deal Court was guided by its conservative political leanings or, in the alternative, adherence to relatively "neutral" legal principles.[213] Obviously the popular view of the Court's behavior is not determinative of what the Court was actually doing, but it is helpful. As Friedman notes, contemporaries were likely to be aware of the preexisting doctrine upon which the Court relied in the pre-New Deal era.[214] They were, therefore, less vulnerable to the hindsight bias that cannot help but obstruct the views of modern scholarship.

> Commerce Clause cases turned on what was ostensibly a structural limit of federal power, but under each conception of judicial review the Court's character for the first third of the century showed itself in exacting judicial scrutiny of a legislature's choice of economic ends and of the legislative means selected to reach them.

Id.

207. Friedman, *supra* note 190, at 1388.

208. *Id.* at 1403.

209. *Id.* at 1405.

210. *Id.* at 1407-08.

211. *Id.* at 1388 ("Revisionists may well be accurate in their jurisprudential claim . . . .").

212. Friedman, *supra* note 190, at 1420. Friedman focuses on the Court's substantive due process decisions, but he does mention contemporary criticism of *Knight* as a nod to big business. *Id.* at 1424.

213. This is perhaps an overly-reductive characterization of the revisionist position. Barry Cushman, for instance, argues that the Court's formalism was, at some level, grounded in consequentialism. *See* Cushman, *supra* note 11, at 1099. The dormant Commerce Clause doctrine, which existed before *Knight*, Cushman argues, was cultivated to advance a "free trade" view of the Commerce Clause—"break[ing] down local barriers to interstate trade . . . ." *See* i*d.* at 1101-02.

214. Friedman, *supra* note 190, at 1405.

In large part, however, contemporaries' belief that *Knight* had been overruled is consistent with the *revisionist* understanding of *Knight* and its progeny. It is doubtless true that some observers believed *Knight* was a momentous decision, which grievously undermined the Sherman Act. One 1898 article said that "[i]n the Sugar Trust case, in 1894, the court [*sic*] held in effect that many or most of the so-called 'trusts' at which the act was aimed were not within its scope . . . ."[215] Similarly, a later article opined that "the practical effect of the decision was to limit narrowly the Sherman Act, to paralyze the efforts of the Department of Justice, and to defeat the very purpose of the Sherman Act by stimulating the formation of large companies when agreements between competitiors were held to be illegal."[216] Ultimately though, the fact that so many believed that *Knight* was overruled undermines the traditional view that *Knight* inaugurated a period of conservative activism respecting the Commerce Clause and Sherman Act. That is, many contemporaries did not see the Court opportunistically calling on the *Knight* doctrine to shield big business interests from antitrust regulation.[217]

Even more notably, the background normative assumptions that fed the belief that *Knight* had been overruled also clash with the traditional narrative. Contentions that *Knight* had been overruled were rooted in criticism of *Knight*. But the criticism was not that the Court was playing fast and loose with doctrine to advance its private agenda. Just the opposite: Observers sensed that the Court's approach in *Knight* and after was too concerned with adherence to legal rules and insufficiently attentive to reality—and that, eventually, the Court must realize its formalism was unworkable. William Howard Taft, for instance, argued in a 1914 book that the Court began the process of overruling *Knight* in 1899's *Addyston Pipe* decision.[218] Taft tacitly acknowledged that the *Knight* holding was not drawn from thin air. In a chapter on "The Sugar Trust Case," he began by describing a circuit court case preceding *Knight—In re Green*—which clearly anticipated the rule handed down in *Knight*.[219] There, Taft explained, a whiskey "distilling company had acquired seventy distilleries in the whole country [and] had united them for the purpose of controlling the business of distilling whisky . . . ."[220] The court held, however, that "[t]he effort to control the production and manufacture of distillery products by the enlarge-

215. Whitney, *supra* note 100, at 285.

216. Hayes, *supra* note 140, at 698; *see also* TAFT, *supra* note 21, at 60; Chevalier, *supra* note 92, at 863-64.

217. *See generally* Friedman, *supra* note 189; Witney, *supra* note 100; Hayes, *supra* note 140.

218. TAFT, *supra* note 21, at 70.

219. *Id.* at 49-53.

220. *Id.* at 50.

ment and extension of business was not an attempt to monopolize trade and commerce in such products within the meaning of the statute . . . ."[221] The problem with *Knight*, then, was not that it was legally unfounded—but that it was unrealistic. Taft said the reality that the Sugar Trust was seeking more than control of manufacturing, that it was seeking "control of the business of such sales and of prices . . . must have been easily capable of proof."[222] Taft believed that, "by combining manufacturing plants," industrial trusts inevitably "monopolized the countrywide trade in the products made" and were rightly subject to the Sherman Act.[223] Beginning with *Addyston Pipe*, he argued, the Court began to recognize this.[224]

Like Taft, Stuart Chevalier, author of *Has the* Sugar Trust *Case Been Overruled?*,[225] also grounded his belief that *Knight* had been overruled in criticism of the decision. That criticism was not that the decision was a function of the Justices' callous political impulses, but instead was "a single careless and ill considered decision of a great court . . . ."[226] He stated that "There could be little doubt that if [*Knight*] could come before the Supreme Court as an original question at the present day, the court would reach a very different decision . . . ."[227] Again, the Court's unsustainable error was that it was being unrealistic. Chevalier contended that, "[r]eviewing the case as a whole, it is difficult to see how the court could reach the conclusion that the primary purpose of the combination was to manufacture rather than to sell."[228] Chevalier argued that, ultimately, Justice Harlan's *Knight* dissent, which was purportedly more pragmatic,[229] would become the view of the Court.[230]

The theme—that the Court overruled[231] *Knight* because of its impracticality, not the justices' infidelity to doctrine—reappeared in Victor Morawetz's *The Supreme Court and the Anti-Trust Act*. Like Taft, Morawetz

---

221. *Id.* at 52 (quoting *In re* Greene, 52 F. 104 (1892)).
222. *Id.* at 59.
223. TAFT, *supra* note 21, at 70.
224. *Id.*
225. Chevalier, *supra* note 91.
226. *Id.* at 858.
227. *Id.*
228. *Id.* at 863.
229. *Id.* at 861.

> Mr. Justice Harlan alone dissented, but his opinion will rank as one of the ablest of his many able deliverances; and in the mind of the writer it completely answers every argument of the court. [He recognized] the admitted fact that the purpose of the gigantic combination was to obtain a more perfect control over the business of refining and selling sugar in this country . . . .

Id.

230. Chevalier, *supra* note 91, at 872.
231. Morawetz, *supra* note 92, at 704.

credited the *Knight* decision as enjoying support in preexisting law.[232] The Court's approach, however, was too narrow—it failed to take account of what Morawetz believed was the true purpose of the sugar combination—"to monopolize interstate commerce . . . ."[233] The Court's failure to think more expansively in *Knight*, Morawetz implied, failed to promote "the best interests of the whole country"[234]—it would have adverse practical consequences.[235]

More generally, the notion that *Standard Oil* and *American Tobacco* completely reworked the preexisting Sherman Act framework was the product of observers' belief that the Court's categorical formalism—not just in *Knight*, but also in *Trans-Missouri* and *Northern Securities*—was an unsustainable impediment to *business* interests.[236] From *Knight* to the later *Trans-Missouri* and *Northern Securities*, the Court appeared to swing wildly from immunizing virtually all corporate combinations to invalidating virtually all corporate combinations.[237] What resulted was a significant "*impasse*" between "business and law."[238] *Knight* led to a spurt of "great

---

232. *Id.* at 705.

> The Supreme Court appears to have assumed that the constitutional question presented was whether Congress had power to regulate a manufacturing business, or the acquistion or the use of property for manufacturing purposes merely because, ultimately, the products of the busines might become the subject matter of interstate commerce, or because the property might be used in such a manner as to affect interstate commerce. *Undoubtedly the court was right in holding that Congress had not that power* . . . .

Id. (emphasis added).

233. *Id.* at 706.

234. *Id.* at 707.

> Such construction and such enforcement of the Anti-Trust Act . . . would carry out its true intent and purpose and would be for the best interests of the whole country. A decision following the supposed authority of the *Sugar Trust* case [however] . . . . would not be accepted by the people of the United States as a final solution of the trust problem.

Id. at 707.

235. McCrudy, too, takes note of legal scholars' calls for a more "realistic" jurisprudence in the wake of *Knight*. *See* McCrudy, *supra* note 22, at 342.

236. Somewhat relatedly, Victor Morawetz argued that the Court's narrow approach in *Knight* risked provoking a popular backlash, which would yield "socialistic" legislation. *See* Morawetz, *supra* note 92, at 707.

237. *Knight* was thought to protect all corporate mergers, while the later *Trans-Missouri* and *Northern Securities* decisions were believed to reject a "reasonableness" limitation on the Sherman Act's prohibitions and hold that all corporate mergers were illegal. See *supra* notes 119-139 and accompanying text.

238. *See* Raymond, *supra* note 93, at 375.

corporate combinations,"[239] but then, the "Northern Securities case struck a severe blow at the corporate combination."[240] After *Northern Securities*, where the Court upheld the Sherman Act prosecution of a railroad holding company,[241] it was "not only possible but probable that every great combination in the country [was] liable to prosecution and dissolution under the Anti-Trust Act."[242] The Court's "literal approach," began with *Trans-Missouri's* apparent rejection of the rule of reason,[243] "was ruinous to business."[244] What was needed, then, was a more practical approach—something between the Scylla and Charybdis of *Knight* and *Trans-Missouri*/*Northern Securities*. As a 1910 article argued, "The law must strike not at the principle of combination but at *monopoly* control"—it must allow corporate mergers, but not monopolies.[245] *Standard Oil* and *American Tobacco* seemed to answer that call. By adopting the traditional, perhaps more realistic, understanding of prohibitions on restraint of trade, the Court "free[d] honest business men from their doubt[]" while "leav[ing] malefactors, actual and intending, where they were, in peril of the law."[246] This new approach appeared far more realistic than the purported formalism of earlier opinions. As one observer explained: "The decisions, when they came, justified those who believed that the logic of facts was stronger than the logic either of theories or even tolerably well settled law."[247] The new rule represented not only a repudiation of *Knight*,[248] but also a rejection of *Trans-Missouri* and *Northern Securities*.[249] It ironically ended the threat posed to business interests by the formalism exemplified by *Knight*.

---

239. *Id.* at 377.
240. *Id.*
241. *See* Northern Sec. Co. v. United States, 193 U.S. 197, 320-22, 360 (1904).
242. Raymond, *supra* note 93, at 375.
243. *See supra* notes 119-125 and accompanying text.
244. McDonald, *supra* note 76, at 4.
245. Raymond, *supra* note 93, at 378.
246. Andrew Alexander Bruce, *The Supreme Court and the* Standard Oil *Case*, 73 CENT. L.J. 111, 112 (1911). Bruce says that the Court's purported embrace of the rule of reason was "dictum" and that the Court had "not injected the word 'reasonable' or 'unreasonable'" into the statute. *Id.* But, he does say that, in the *Standard Oil* case, the Court "reaffirmed the law of the past and has merely interpreted the Sherman Act and the 'restraint of trade and commerce,' . . . in accordance with the general acceptation in the past of the meaning of those words and as any sane legislature would have interpreted them . . . ." *Id.* He also rejects criticism of *Standard Oil*'s puported adoption of the rule of reason as unsustainable formalism—merely "the opinion of men who think . . . that human language can always be definite . . . ." *Id.*
247. Raymond, *supra* note 93, at 32.
248. *See* Johnsen, *supra* note 1159.
249. Evans, *supra* note 81, at 316.

V. CONCLUSION

Out of context, the 1911 decision to prosecute U.S. Steel is surprising. The government should have feared, in the wake of *E.C. Knight*, that a combination of manufacturers, like U.S. Steel, was not subject to Sherman Act regulation without an amply demonstrated intent to restrain interstate commerce. *Knight* was still good law. But contemporaries widely believed *Knight* had been overruled. Some, reading *Knight's* manufacturing/commerce distinction as categorically exempting manufacturers from prosecution in all circumstances, believed the successful prosecution of pipe manufacturers in *Addyston Pipe* signaled *Knight's* demise. Others originally read *Knight* as a statement that holding companies, like the Sugar Trust and U.S. Steel, were not illegal under the Sherman Act. *Northern Securities*, invalidating a holding company under the Sherman Act, appeared to upend *Knight*. And, finally, the Court's holdings in *Standard Oil* and *American Tobacco* seemed to completely jettison the preexisting Sherman Act framework and adopt an approach vindicating Justin Harlan's dissent in *Knight*. The government, in its pleadings and briefs, echoed these threads of confusion. To the extent the United States initiated this case with a hope of winning, it likely did so because it, too, believed *Knight* overruled.

The fact that so many believed *Knight* overruled is significant. The traditional view of *Knight* and the Court's subsequent decisions is profoundly cynical. *Knight*, it is said, is among the first in a line of decisions in which the Court simply drew from a stockpile of doctrine to rationalize its efforts to advance a *laissez-faire* agenda. Yet contemporaries, untainted by hindsight bias, did not see the Court drawing on *Knight* to advance a political agenda. In fact, the belief that *Knight* had been overruled was often grounded in assumptions antithetical to the traditional view of the pre-New Deal Court. Contemporaries were anxious to see *Knight* overruled because the Court's stubborn adherence to bright line rules was unrealistic and, in some ways, bad for business. This observation is consistent with the revisionist account of the pre-New Deal Court—that the Court was, in fact, guided by relatively neutral legal principles as opposed to advancing its conservative agenda.