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The Common Law, Labor and Antitrust

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The inextricable link between American labor law and the law of antitrust has been subject historically to the contradictory currents favoring competition on the one hand and contract and combination on the other. The current approach of "New Antitrust" theorists, favoring an increased level of tolerance toward business combinations, has not carried over to labor combinations. Instead, recent applications of antitrust law to labor issues has resulted in new restrictions on organized labor in the interests of "competition." Professor Minda suggests that this paradox would be best resolved by the development of new doctrines, in both labor law and antitrust law, resting upon alternate principles such as diversity and fair profit. The ultimate goal would be a unified legal doctrine capable of operating consistently within the framework of contemporary political oscillations.

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INTRODUCTION

Since early common law, scholars, policy makers and judges have struggled to resolve a basic problem posed by two fundamentally different ways of understanding how combinations and competition further free trade. For example, free trade arguments can emphasize the sanctity of competitive freedom or the importance of protecting the security of property interests. Free trade can be defined to protect a competitor's freedom to contract on the one hand or the security of contractual expectations on the other. Free trade can be seen to authorize the deconcentration *or* concentration of private economic power, depending on how one values the benefits and dangers of competition on the one hand or of collectivization and combination on the other.

This paradox in the concept of free trade has plagued labor and antitrust law from its inception.[1] Contract and combination are both neces-

1. Labor and antitrust litigation in English and American law can be viewed as a two hundred year old debate over the meaning and consequence of various competing legal (or what I have called "free trade") conceptions of competition and combination. The antecedents of the legal concepts developed from separate and distinct doctrinal categories formed within earlier common law eras. For an early analysis of the contradictory patterns of the early common law of competition, see Wyman, *Competition and the Law*, 15 HARV. L. REV. 427 (1902).

For the common law background of early trade restraint law, see: J. HEYDON, THE RESTRAINT OF TRADE DOCTRINE (1971); W. HOLDSWORTH, SOME MAKERS OF THE ENGLISH LAW 111-32 (1966); W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT (1967); C. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960 (1985); M. TRE-

sary to understand what we mean by free trade, yet at the same time, they threaten the notion of competition basic to any concept of free trade.[2] Free trade doctrine differentiates between competition and combination for meaning and coherence, and yet the notion of free trade is mutually dependent upon the two opposing concepts of competition and combination. Free trade thus exists within a tension created by the opposing and mutually dependent principles of combination and competition. Throughout the history of trade restraint law, judges have

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BILCOCK, THE COMMON LAW OF RESTRAINT OF TRADE: A LEGAL AND ECONOMIC ANALYSIS 1-59 (1986); Blake, *Employment Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960).

For an illustration of mainstream view of the history of modern labor and antitrust law, see H. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION (1955); Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394 (1971); *see also* Hovenkamp, *Labor Conspiracies in American Law, 1880-1930*, 66 TEX. L. REV. 919 (1988).

A new generation of historians and legal critics have now challenged the mainstream story of labor and antitrust law by revealing how the law of labor and antitrust reflected contradictory commitments to competitive freedom. *See* Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1111, 1207 (1989) [hereinafter *American Labor Movement*] (demonstrating how the "gilded age" of labor law was premised upon contradictory commitments to competitive freedom on the one hand and property interests and contractual expectations on the other); Peritz, *The "Rule of Reason" in Antitrust Law: Property Logic in Restraint of Competition*, 40 HASTINGS L.J. 285 (1989) [hereinafter *"Rule of Reason"*] (illustrating how the early formative era of antitrust vacillated between contradictory notions of competition policy and common-law property rights). *See also* C. TOMLINS, *supra*; Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Guilded Age*, 1985 WIS. L. REV. 767 [hereinafter *Ambiguities of Free Labor*]; Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978); May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495 (1987); Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 219 (1988); Peritz, *A Genealogy of Vertical Restraints Doctrine*, 40 HASTINGS L.J. 511 (1989) [hereinafter *Genealogy*]; Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981).

2. As concepts, free trade, competition and combination share a *supplementary* relation because an understanding of one depends on the others. Hence, competition and combination are inextricably linked in their relation to free trade. *See generally* Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 751-55, 758-61 (1987); Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1288-89 (1984) (describing the supplementary relation between law and society); Peller, *Reason and the Mob: The Politics of Representation*, 2 TIKKUN 28 (1987). *See generally* J. DERRIDA, OF GRAMMATOLOGY 141-64 (G. Spivak trans. 1976).

This article utilizes the technique of deconstruction to reveal how concepts of competition and combination have come to define contradictory notions of free trade policy reflected within the ambiguities of early common law doctrine as well as the judicially created doctrines created under modern labor and antitrust legislation.

"Deconstruction" of "deconstructive practice" is a technique for engaging in a form of critical interpretation of legal doctrine for purposes of uncovering contradiction and opposition within supposedly determinant bodies of legal doctrine. *See* Balkin, *supra*, at 744. Deconstructive practice is also aimed at revealing "how doctrinal arguments are informed by and disguise ideological thinking." *Id. See also* Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985, 986, n.5 (1990) ("By deconstruction, I mean the technique of exposing hierarchical oppositions and demonstrating their difference and mutual dependence for purposes of illustrating the ideological basis of privileging one opposite over the other"). This Article utilizes the technique of deconstruction for developing a deconstructive history of labor and antitrust law.

unsuccessfully attempted to create various doctrinal devices to mediate this tension. Their efforts have resulted in contradictory patterns of common law doctrine that have failed to resolve the conceptual challenge posed by the perception of free trade as both combination and competition. My thesis is that these contradictory patterns of free trade doctrine transcend particular historical periods of the common law, and that the common law patterns of free trade doctrine have traces that can be found in the doctrinal and theoretical discourses of modern labor and antitrust law.

Today, the modern statutory structures of labor and antitrust have replaced the common law regime with separate and self-contained legal systems, but in doing so they have reproduced the contradictory patterns of analysis of trade restraint doctrine at early common law.[3] Scholars now recognize that the current worlds of labor and antitrust law are plagued by fundamental paradoxes.[4] Labor unions claim that collective

3. There has been considerable interest in the nineteenth century common law regimes of labor and antitrust law. *See, e.g.*, P. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979); R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1979) (antitrust); W. LETWIN, *supra* note 1; M. TREBILCOCK, *supra* note 1; Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983) (labor); May, *supra* note 1 (antitrust); Peritz, *"Rule of Reason"*, *supra* note 1 (antitrust).

Commentators challenging the intellectual foundations of the modern statutes have looked to the common law as a bench mark for measuring the validity of the underlying premises of contemporary labor or antitrust law. This approach has led some to believe that the common law regime works better than the modern statutory systems. *See, e.g.*, Epstein, *supra*, at 1357 ("My conclusion is that this (for ease of expression) New Deal legislation is in large measure a mistake that, if possible, should be scrapped in favor of the adoption of a sensible common law regime relying heavily upon tort and contract law"). Others have looked to the common law for guidance in restructuring modern doctrine and fashioning new interpretations of the modern statutes. *See, e.g.*, Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661 (1982); Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 136-40 (1984). Some have used the common law as a basis for establishing a forceful critique of the modern doctrine while rejecting the idea that the common law regime is to be preferred. *See, e.g.*, Klare, *supra* note 1 (labor); Peritz, *"Rule of Reason"*, *supra* note 1 (antitrust). Finally, a group of new legal critics have re-examined nineteenth-century common law to illustrate how old common law concepts have affected modern legal discourse. *See, e.g.*, Forbath, *American Labor Movement*, *supra* note 1 (illustrating how the courts continue to treat labor and capital interests on marketplace terms which dominated the early common law origins of labor law); Peritz, *"Rule of Reason"*, *supra* note 1 (illustrating how antitrust's formative years were dominated by a tension between legal paradigms of competition policy and common law property rights).

4. *See, e.g.*, R. BORK, *supra* note 3 (1978) (antitrust scholar arguing that antitrust law of the Warren Court era is hopelessly contradictory and self-defeating); Epstein, *supra* note 3 (conservative scholar arguing that the modern law of labor relations is a "mistake" because it lacks a coherent rationale for protecting individual liberty); Klare, *Traditional Labor Law Scholarship And The Crisis of Collective Bargaining Law: A Reply To Professor Finkin*, 44 MD. L. REV. 731 (1985) (labor scholar arguing that collective bargaining law is in a severe state of crisis); Peritz, *"Rule of Reason"*, *supra* note 1 (antitrust scholar arguing that the New Antitrust law associated with the scholarship of Professor Bork is contradictory); Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73, 73 (1988) (labor law scholar arguing that "[t]here is a paradox in the current world of labor relations"); Weiler, *Promises To Keep: Securing Workers' Rights To Self-Organization Under The NLRA*, 96 HARV. L. REV. 1769 (1983) (labor law scholar

bargaining law has served to justify managerial prerogatives, non-participatory decisionmaking, and a theory of labor regulation which is antagonistic to labor combinations.[5] Modern antitrust scholars, policy makers and judges, dissatisfied with the Warren Court's philosophy of antitrust, have developed a New Antitrust law[6] that justifies business practices and combinations that once had been considered to be anti-competitive and offensive to the policy of antitrust.[7] The result is a law of collective bargaining that is becoming increasingly antagonistic to labor combinations, and a law of antitrust that is becoming increasingly favorable to business combinations.

While it is true that the rules and regulations governing labor and business have changed, the overall power relationship which the law has regulated since early common law has never been reversed. The standard story that is told about the common law of labor and antitrust—that the law exhibited a marked tendency to privilege the interests of the marketplace over other competing interests—is a story which remains true of labor and antitrust law in the twentieth century. Today, the courts continue to treat labor and capital in marketplace terms, which exploit the ambiguities in free trade doctrine to favor the interests of production, efficiency and profit maximization over other competing interests such as fairness, equality and solidarity.

I will attempt to make sense of this ironic development in labor and antitrust law by surveying labor and antitrust cases at different historical moments[8] and by pointing out strikingly similar patterns in the development of free trade doctrine at common law. My goal will be to redis-

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illustrating how the decline in collective bargaining is attributable to employers' coercive resistance to the representation process, which is designed to encourage and promote collective bargaining).

5. *See, e.g.*, AFL-CIO Chief (President Lane Kirkland) Calls Labor Law a Dead Letter, Wall St. J., Aug. 16, 1984, at 8, col. 2. *See also* Stone, *supra* note 4, at 75-76; Weiler, *supra* note 4, at 1774-87.

6. The New Antitrust is associated with the work of lawyer-economists of the "Chicago School" who have campaigned for the use of microeconomic analysis to develop a new approach to antitrust policy. *See* Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979). *See also* THE ANTITRUST REVOLUTION (J. Kwoka & L. White eds. 1989); R. BORK, *supra* note 3; R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976); *but see* Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213 (1985).

7. *See, e.g.*, Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981); Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979); Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1076 (1979).

8. The cases are drawn from different eras in the common law of England and America—the mercantile, laissez faire, and modern. While this article utilizes history to develop two understandings of free trade doctrine, there is no attempt to "fix" or "periodize" a particular historical period with a particular legal model or "understanding" of "free trade". Instead, the goal will be to discover how competing strands of doctrine within different historical moments support different understandings and normative conclusions about free trade doctrine. This article thus asserts that the history of free trade doctrine is not a history of legal doctrine unique to particular historical periods but rather is a history of privileged conceptions of free trade. *See also supra* note 2. The different "understandings" of free trade and the historical eras I seek to develop and characterize are intended

cover the common law patterns that have survived the modern statutory systems of labor and antitrust law. The survey of common law doctrine will thus be used to suggest how courts and legislatures have molded modern law into a legal form similar to its common law origins that continues to be caught up in, but that ultimately fails fully to accept, the contradictions of combination and competition. In labor law, these contradictions presume the necessity of choosing between adversarial and cooperative approaches. In antitrust, they posit the inevitability of making sharp policy choices between the goals of economic efficiency and political pluralism.

Part I introduces the historical and intellectual foundations of trade restraint law for labor and business. In this part, I will seek to uncover two basic long-term traditions in trade restraint doctrine at common law by examining the "legal architecture" of early trade restraint doctrine. Part II describes how the common law of trade restraint shifted between property based concepts of competition to ones based on contract. Part III will describe how American common law was influenced by ideas of combination and collectivism which became popular during the late nineteenth century. In this "formative era,"[9] trade restraint theorists sought to develop a homologous doctrine that reconciled highly individualistic notions of trade restraint law with the inevitability of large combinations. Part IV will illustrate how the modern statutory structures of labor and antitrust law have reproduced the common law patterns of legal argumentation.

I

FOUNDATIONS: THE AGE OF PROPERTY

The legal conception of free trade developed out of a long history involving diverse political, social and economic conditions in England and America.[10] The earliest recorded trade restraint cases were decided by the English courts during what has been described as the "Age of Property."[11] During this medieval period the common law sought to develop an understanding of economic and property rights in the midst of a political and economic system governed by church and state and subject to royal privileges and monopolies. Lawyers of this time argued

to be viewed as "ideal types," describing general characteristics of different jurisprudential theories of trade restraint law.

9. Terms such as "Golden Age," "Grand Style," "Formative Era," and "Gilded Age," have been used by scholars to characterize early nineteenth century American law. *See, e.g.*, C. HAAR, THE GOLDEN AGE OF AMERICAN LAW (1965); K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960); R. POUND, THE FORMATIVE ERA OF AMERICAN LAW (1938); Forbath, *American Labor Movement*, *supra* note 1; Hovenkamp, *supra* note 1.

10. *See* M. TREBILCOCK, *supra* note 1, at 3-29.

11. P. ATIYAH, *supra* note 3, at 90.

for a generalized right to work but only within the context of preserving the right of the state to regulate and restrict the communal property of the King.[12] The idea of freedom of trade was perhaps best understood at this time as "freedom of property" or "liberty of the estate."[13]

Early common law protected individuals' freedom to work, but it also upheld restrictive guilds, customs and coercive statutes that compelled employment at wages fixed by statute and restricted movement from the place of employment.[14] At times, considerations of equity and the importance of economic development required the legal system to recognize a "right to work,"[15] but often the common law restricted this right in order to uphold the status relations and fixed social interests of the guilds, chartered corporations and state-sanctioned monopolies. The thrust of English law in the mercantilist era reflected the norms favoring the "freedoms" of "social, property-based and family-oriented conventions."[16]

However, in developing a legal concept of "free trade" or in preserving a fundamental "right to work," common law judges found themselves pulled in two opposite directions at once. Judges discovered that the process of free trade could destroy itself either through agreements eliminating the threat of competition or through certain methods or practices that established a monopoly within a particular trade. Legal rules were needed to protect one's property from restrictive trade agreements without infringing one's freedom to agree. The realization that the legal system might be required to control the methods of competition or that the law might refuse to enforce certain agreements that were the product of free will seemed antithetical to the ideals of free trade and competition. The paradox posed by such cases was that the law might be required to interfere with the right to work and the individual's freedom to contract in order to save competition from its own self-destruction.[17]

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12. Atiyah has argued that in medieval times "men were not absolutely free. They owed duties to their feudal lord, to their fellow men, to the Church, to God, and their 'tenure' of property was a transient thing." *Id.* at 86.

13. *Id.* at 85 (citing C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM 137 (1962)).

14. *See* M. TREBILCOCK, *supra* note 1, at 3-14.

15. *Id.* at 11-12.

16. *Id.* at 10-13.

17. A group of business competitors might agree to coordinate their trade efforts in order to pursue competition to its "bitter end." But if competition includes the right to establish combinations and cartels in restraint of trade, then competition will eventually be replaced by monopoly. The process of free trade and contract might therefore lead to conspiracies in restraint of trade, cartel agreements and ultimately monopoly, the opposite of free competition. These arguments came to reflect the theory of ruinous competition in the formative era of antitrust law: "the notion that competition may at times be detrimental to the interests of both the firms in the market as well as society as a whole." Hovenkamp, *The Antitrust Movement and the Rise of Industrial Organization*, 68 TEX. L. REV. 105, 128 (1989).

A. Early Trade Restraint Law Involving Merchants

Initially, there were three categories of early trade restraint cases.[18] The first category, unfair competition, developed out of early trademark infringement cases, but it extended to a variety of involuntary and voluntary restraints, characterized as "unfair" business practices, involving misrepresentation, fraud, disparagement or coercion.[19] A second, separate body of early common law precedents was concerned with the problem of state sponsored monopoly. These cases, mainly of English origin, involved the legality of monopoly by grant of franchise and the developing law of contracts in restraint of trade.[20] Finally, there was a third category of cases of English origin that dealt with the problem of monopoly power. From these three categories there emerged a two-headed concept of free trade—one head strongly supporting competition among individual actors, the other affirming the necessity of combinations even if that meant restraining competition.

1. The Early Common Law of Unfair Competition

"All competition is prima facie tortious."[21]

This strand of early common law doctrine emphasized the need to protect individuals from certain forms of competition that the law regarded as "unfair"[22] in that they threatened private property and the value of fair profit or return from investment in property. The common law of unfair competition came to be classified as part of the law of torts,[23] which later emerged as a distinct body of law.[24] While it is difficult to define the term "unfair competition" with precision, judges have frequently referred to ideas of "fair play and honesty" as a touchstone.[25] It has been said that "[m]isrepresentation, misappropriation, diversion of trade, interference with trade relations, attacks upon competitors" are

18. *See, e.g.*, M. TREBILCOCK, *supra* note 1, at 7-8.

19. For a general discussion of the cases, see J. MILLER, UNFAIR COMPETITION 15-22 (1941); *see also*, Mitchell, *Unfair Competition*, 10 HARV. L. REV. 275 (1896); Wyman, *supra* note 1.

20. *See, e.g.*, Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355 (1954); D. DEWEY, MONOPOLY IN ECONOMICS AND LAW 123-28 (1959).

21. Chaffee, *Unfair Competition*, 53 HARV. L. REV. 1289, 1304 (1940).

22. The law of unfair competition has a history extending back over the last two centuries. *See generally*, J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION (1973); Callman, *What is Unfair Competition*, 28 GEO. L.J. 585 (1940); Chaffee, *supra* note 21; Handler, *Unfair Competition*, 21 IOWA L. REV. 175 (1936); Mitchell, *supra* note 19; Wyman, *supra* note 1.

23. Handler, *supra* note 22, at 180. The deliberate infliction of economic harm and the prima facie tort now cover the early common law offenses involving claims of "unfair competition." *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 949-62 (4th ed. 1971). *See also* Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391, 423-41 (1975).

24. *See* Chaffee, *supra* note 21, at 1302-05.

25. *See generally*, 1 J. MCCARTHY, *supra* note 22, § 1.4, at 12-14. Included within the definition of unfair competition were a variety of "dirty tricks" utilized by competitors which resulted in economic injury to a competitor's business or interfered with an existing economic relation.

the "stuff out of which the law of unfair competition was built."[26]

Unfair competition litigation arose out of a common fact pattern. Typically, an action would be brought by someone claiming he had sustained an injury as a result of some offensive conduct of the defendant. The plaintiffs' loss in these cases involved mainly the possibility or expectancy of business or profit.[27] The plaintiff would claim that he had been deprived of free access to a market or had been denied the opportunity to gain profits or business. Relying upon the competitive maxim that he who succeeds in winning a fortune has succeeded by being the ablest competitor, the defendants would argue that the plaintiff's injury was the result of fair and legitimate competition on the merits. Both sides would assert the "right to work" and the paradoxical "right" to be free from interferences by others' work. Each side would rely upon the values of "equity" and "economic development" as a basis for defending their respective interests.[28]

The fact that economic injury had occurred as a result of the defendant's conduct was, of course, not itself sufficient to establish that conduct was unfair. Competition may cause injury. Yet, the idea that the law might allow some people to inflict harm on others was subsequently recognized in the common law maxim *damnum absque injuria*.[29] The early law of unfair competition suggested, however, that a contrary principle would be recognized whenever the injury was the result of "abnormal" or "unnatural" methods of competition. The search for the abnormalities of competition ultimately rested upon the need to protect the exclusive interests of property from competition of other uses.

For example, a basic assumption essential for the legal recognition of a right to work was that individuals should be allowed to enter markets, to have free access in order to enjoy the benefits of their labor. If competition was to be free and effective, parties should be allowed to enter a market and engage in vigorous competition and recover the value of their labor even if a rival was subsequently injured.[30] In the famous

26. Handler, *supra* note 22, at 212. The judicial doctrines of unfair competition developed on a "trial and error" basis, without any real concern for an underlying policy of "competitive etiquette." *Id.* at 179.

27. *See, e.g.*, Chaffee, *supra* note 21, at 1291.

28. *See* M. TREBILCOCK, *supra* note 1, at 53-59.

29. *See* Ames, *How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor*, 18 HARV. L. REV. 411, 420 (1905); Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 3 (1894). The principle of *damnum absque injuria* is discussed in Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 1025-56. Singer notes that "the category of *damnum absque injuria* was partially excluded, sometimes ignored and always obscured by the jurists." *Id.* at 1025.

30. *See, e.g.*, Holmes, *supra* note 29, at 3 ("[A] man has a right to set up a shop in a small village which can support but one of the kind, although he expects and intends to ruin a deserving widow who is established there already.")

Schoolmaster's Case,[31] for instance, the English Court of Common Pleas held in 1410 that a master of a grammar school could not prevent another master from starting a second school even though claimant's business had been damaged as a result. The injury was not actionable because the court held that the claimant merely had "a ministry for a time [being]" and because the provision of another school was a "virtuous and charitable thing." The *Schoolmaster's Case* is viewed as the "foundation stone of the privilege to engage in a private business or to enter new markets" even if a rival is subsequently injured.[32]

The privilege to enter markets established the need for state intervention in private economic affairs whenever the action of a rival blocked entry. The first cases to recognize this principle were cases where physical violence was used to deny a competitor entry into a market. *Keeble v. Hickeringill*,[33] decided in 1706, is a classic example. In that case, the defendant, standing on his own land adjacent to plaintiff's, fired a gun to scare away ducks that the plaintiff was attempting to attract with a decoy. The plaintiff sued the defendant claiming that the defendant had maliciously deprived him of the use and benefit of a decoy pond.[34] The English court held that the malicious interference with the defendant's occupation was actionable even though no action would lie if the plaintiff caused the same damage by setting up his own decoys. The result was seen as corollary to the principle of the *Schoolmaster's Case*.

> One schoolmaster sets up a new school to the damage of an antient school, and thereby the scholars are allured from the old school to come to his new. (The action was held there not to lie). But suppose Mr. Hickeringill should lie in the way with his guns, and fright the boys from going to school, and their parents would not let them go thither; sure that schoolmaster might have an action for the loss of his scholars.[35]

As early as 1614, Lord Coke could thus proclaim that ". . . at the common law, no man could be prohibited from working in any lawful trade, for the law abhors idleness, the mother of all evil . . . and therefore the common law abhors all monopolies, which prohibit any from working in any lawful trade . . . ."[36]

There were cases decided late in this era (mid-1700s) which contra-

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31. Hilary Term, Y.B. Hen. 5, fo. 47, pl. 21 (1410).

32. S. OPPENHEIM & G. WESTON, UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION: CASES AND COMMENTS 5 (3d ed. 1974).

33. 11 East 574, 103 Eng. Rep. 1127 (K.B. 1706).

34. 103 Eng. Rep. at 1128.

35. 11 East at 576, 103 Eng. Rep. at 1128. Professor Chaffee has argued that *Keeble* and the *Schoolmaster's Case* were about the right of a competitor to enter a market where "birds or customers might be obtained," a prospective right involving the possibility of obtaining business. Chaffee, *supra* note 21, at 1291.

36. Ipswich Tailors' Case, 11 Coke 53a, 77 Eng. Rep. 1218, 1219-20 (1614), *cited and quoted* in M. TREBILCOCK, *supra* note 1, at 7-8.

dicted the principle of the *Schoolmaster's Case*, reflecting the concern of the common law with the dangers of unregulated competition. The restrictive employment covenant cases, upholding the right of a tradesman to restrict the future competition of a journeyman, are one example.[37] A tradesman's right to work might be restrained if journeymen in his employ were allowed to use the benefits of their training to destroy their former employer's business. These cases reflected an attitude about competition that recognized that restrictions on free entry into markets and free contract might be necessary to protect free trade.

Thus, these cases established a dichotomy. On the one hand, if the right to work and enter markets allowed competitors to combine and boycott, then the law would be encouraging the formation of monopoly, the antithesis of free trade as competition. Similarly, if the purpose of law was to protect the product of labor as an incident of property, then the enforcement of property rights might also lead to monopoly. On the other hand, freedom to compete also entailed the idea that restrictions in contracts of employment might also be a necessary component of the right to work. The right to work would not be effective if the law refused to protect the product of one's labor. As William Letwin has noted, "[i]f the common law recognized each man's right to work at a lawful trade, as the courts of this period became fond of asserting, that right was neither simple nor absolute."[38]

Courts frequently used the doctrine of malice to mediate between free trade cases favoring combination and those encouraging free competition. For example, if a competitor intentionally sought to destroy a rival by threat of force, or by an inducement of contractual breach, courts would find an actionable interference with the trade of another.[39] Actions done out of spite or ill-will were also likely to be found to be malicious and hence actionable.[40] But when malice was found to exist in

37. *See infra* notes 48-60 and accompanying text. Another example involved contract cases in which the assertion was made (usually by the defendant) that the contract resulting from free trade was illegal or against public policy or both. *See, e.g.*, Holman v. Johnson, 1 Cowp. 341, 343, 98 Eng. Rep. 1120, 1121 (1775) ("No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act"). *See generally* A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACTS: THE RISE OF THE ACTION OF ASSUMPSIT 524-25 (1987). Yet another example were common law cases of "enticement" that protected the employment interest of one employer against the competition for workers by another employer. *See* Hart v. Aldridge, 1 Cowp. 55, 98 Eng. Rep. 964 (1774). *See generally* M. LINDER, THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW (1989).

38. W. LETWIN, *supra* note 1, at 28.

39. *See, e.g.*, W.P. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 984 (5th ed. 1984); Gerret v. Taylor, 1621 Cro. Jac. 567, 79 Eng. Rep. 485. This was particularly evident in the subsequent development of the law of labor combinations. *See* W. ROGERS, WINFIELD AND JOLOWICZ ON TORT 524-31 (12th ed. 1984).

40. An early twentieth century example is Tuttle v. Buck, 107 Minn. 145, 119 N.W. 946 (1909); *Recent Case*, 22 HARV. L. REV. 616. In *Tuttle* the plaintiff, a barber by trade, claimed that a local banker in his village set out to ruin his business by establishing a series of competing barber

conjunction with elements of combination, as in labor combinations cases, then combination was usually the real basis for finding that an interference was malicious.[41]

Since the underlying definition of unfair competition was so manipulable,[42] the concept of malice failed to instruct judges how to determine whether a motive was rational or irrational, fair or unfair. For this reason, malice failed to resolve the two contradictory patterns of free trade doctrine—one pattern establishing the defendant's "freedom" to practice some method of competition, and the other justifying the plaintiff's right to contract, combine and be "free" from "unfair" interference. Questions of malice merely deferred the contradictions to a before-the-fact inquiry of motive.

Of course, there is another way to understand how the concept of

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shops for the sole purpose of damaging his trade. In holding that the plaintiff could commence his action, the court concluded that "when a man starts an opposition place of business, not for the sake of profit to himself, but regardless of loss to himself, and for the sole purpose of driving his competitor out of business, and with the intention of himself retiring upon the accomplishment of his malevolent purpose, he is guilty of a wanton wrong and an actionable tort." *Id.* at 151, 119 N.W. at 948. The court ultimately found that the complaint was insufficient to state a cause of action because the plaintiff failed to allege that "the defendant was intentionally running the business at a loss to himself, or that after driving the plaintiff out of business the defendant closed up or intended to close up his shop." *Id.* *Tuttle* illustrates how evil motive can justify exceptions to the broad right of free trade.

41. *See* W. ROGERS, *supra* note 39, at 524-31; Forbath, *American Labor Movement*, *supra* note 1, at 1169. There is at least one sense in which one might attempt to use an understanding of malice to make sense of the common law cases. Malice might mean more than an intention to inflict some temporal injury.

Richard A. Epstein has argued that in its "pure form," malice "refers to actions done out of spite or ill will, whereby someone is prepared to impose costs upon himself solely to make someone else worse off." Epstein, *supra* note 3, at 1368. Defined in this way, malice would be negated by a showing of economic self-interest. An injury resulting from competition which can not be explained as a consequence of the pursuit of economic self-interest would be "unjustified" because it would not represent the type of rivalry generated by rational profit seeking behavior. Under Epstein's theory, malice mediates the tension between different understandings of free trade by distinguishing between rational and irrational forms of competition.

Epstein's argument presents practical difficulties, especially when one considers that malice requires an examination of the before-the-fact motives for some conduct. Even if malice had some "pure" conceptual meaning defined by economic self-interest, a judge searching for evidence of pure malice would lack an interpretative guide for discerning whether damages caused by competition were rationally motivated by economic self-interest or by some other "irrational" motive. Like judges at early common law, Epstein seeks to ground the contradictory logics of free trade doctrine within a factual inquiry of motive. His basic method for resolving the contradictions of free trade doctrine, however, assumes that there is such a thing as a "context" which can be located for determining how cases should be decided. But such a context has never existed. The facts of particular cases neither tell judges how to determine motive nor do they instruct judges in choosing between conflicting interpretations of motive. *See generally* Frug, *supra* note 2, at 1304-05. While the meaning of malice requires a fact-bound context, the meaning of "facts" is boundless in the sense that any given factual context is open to further redescription and deconstruction. The "facts themselves" merely "restate the problem" posed by the oppositional concepts of competition and combination relied upon by the analyst for evaluating legitimate forms of free trade practices.

42. "What was fair yesterday may be unfair today. What is deemed unfair by one group of businessmen may be regarded as eminently proper by another." Handler, *supra* note 22, at 175.

malice was in fact used in the common law, however poorly articulated.[43] "Malice" may have represented a conclusion that individual judges utilized to give effect to their notions about "good" and "bad" competitive behavior. Common law judges looked to the circumstances of the cases to find evidence of the defendant's intent and then invoked that "intent" to justify their reading of the facts. The defendant's actions were malicious, not because they were malicious in some pure sense, but rather because the challenged conduct was spiteful of a particular vision of good conduct in the same way that malicious conduct was spiteful of people in the pure sense of the term.[44]

The contradictory pattern of the unfair competition decisions made sense in terms of a theory of private law that justified legal protection for each person's property and the right to the enforcement of one's agreements. In thinking of property as things or objects which are the repository of labor, judges were developing a labor theory of value to explain why competition might become tortious.[45] Legal intervention to correct the outcome of economic processes was necessary whenever someone acted in malicious disregard of the fruits of labor owned by another. Because property rights in the mercantilist state represented the will of the state, all interference was prima facie actionable unless justified. The theory of justification was quite broad because state intervention was found to be necessary only when the methods of business rivalry were found to be undesirable, unnatural or contrary to ethical sentiment.[46]

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43. Ellen Kelman's study of labor picketing cases in America during the late nineteenth century illustrates how legal concepts of "malice" disguised a persuasive underlying ideology that favored conceptions of free trade advantageous to business. Kelman, *American Labor Law and Legal Formalism: How "Legal Logic" Shaped and Vitiated the Rights of American Workers*, 58 ST. JOHN'S L. REV. 1, 33-44 (1983).

44. The use of concepts like malice permitted judges to determine for themselves whether certain methods of competition were fair or unfair. The law of picketing and boycott, which courts applied against labor unions in the second half of the nineteenth century, is a clear example of how courts utilized concepts of malice and motive to legitimize judicially biased decisionmaking. *Id.* at 44-45. The early law of picketing and boycotts thus had much in common with the early common law of unfair competition cases, even though judges did not recognize the relevance of these cases to unfair competition doctrine. *See, e.g.*, Chaffee, *supra* note 21, at 1291; *see also infra* notes 89-115 and accompanying text.

45. I believe this point was originally developed by Duncan Kennedy. *See* Kennedy, *The Role of Law in Economic Thought*, 34 AM. U.L. REV. 944, 954 (1985). According to Professor Kennedy, "[t]he classical legal thinkers provided crucial support for the labor theory of value by showing that the idea of respect for the labor of others could, all by itself, generate through the process of legal reasoning a vast, detailed code of particular rules about what could be property and about what constituted an actionable injury to property." *Id.* at 955. Common law judges "justified this legal protection by reference to 'natural law,' meaning a universal ethical sentiment that a man had a right to the product of his labor." *Id.* at 954. Kennedy goes on to argue that a subsequent generation of legal theorists developed a theory of market value to justify a new universal legal ethic based on exchange value, namely, private law would protect the gains made from market trades as an element of property. *Id.* at 955.

46. Hence, the state would enforce property rights without regard to the desires of persons coerced or restrained. *See* Kennedy, *supra* note 45, at 954.

The conception of property prevailing at this time suggests that the early common law courts were developing an argument based on the notion that a person has a right to the product of his or her labor.[47] Yet, the common law's commitment to protect the "right to work" actually involved contradictory commitments to protect competitive freedom while upholding the security of property interests. The common law of unfair competition stood in contradiction because there was no principled basis for determining which view of competition should prevail in a given case—competition as freedom of action or competition as security from competitive action.

2. *The Early Common Law of Contracts in Restraint of Trade*

Contract restrains competition; but competition cannot exist without contract.[48]

The early common law of contracts in restraint of trade developed from early decisions of the English courts in their effort to protect individual rights from the excessive regulations of the mercantilist state.[49] The first reported decisions on restraints of trade involved attempts by merchants in England to prolong the subservience required of apprentices and journeymen working in particular crafts or guilds.[50] The legal issues presented by these early restraint of trade cases involved the lawfulness of what today would be known as restrictive employment covenants.

The apprentice or journeymen cases are similar to the unfair competition cases in that both involved claims based on the right to work. The journeymen cases, however, were different because they involved the

47. *See also* Peritz, *"Rule of Reason"*, *supra* note 1, at 307 (discussing a similar property logic in the early discourse of antitrust law).

48. *See, e.g.*, P. ATIYAH, *supra* note 3, at 127 (discussing how judges at early common law sought to uphold freedom of contract in so far as encouraging freedom of enterprise, but not insofar as it was used to destroy freedom of enterprise).

49. M. TREBILCOCK, *supra* note 1, at 3. Nearly every aspect of economic life was subject to church and state regulation in the mercantilist era.

50. Davenant v. Hurdis, cited in Darcy v. Aleelen (The Case of Monopolies), 11 Coke 84, 88 (1603), is the first reported restraint of trade case. It involved a dispute between two guilds over the right to control trade through restrictive bylaws which restricted work by non-members. The English court held that "a rule of such nature as to bring all trade and traffic into the hands of one company or one person to exclude all others is illegal." *Id.* *See also* John Dyer's Case, Y.B. 2 Hen. 5, fo. 5, pl. 26 (C.P. 1414). Other notable early restraint of trade cases involving the crafts and guilds include Colgate v. Bacheler, 78 Eng. Rep. 1097 (Q.B. 1602); The Case of the Blacksmiths of South-Mims, 2 Geo. 210, 74 Eng. Rep. 485 (C.P. 1587); An Anonymous Case, Moore K.B. 115, 72 Eng. Rep. 477 (Q.B. 1578). These early restraint of trade cases are analyzed in M. TREBILCOCK, *supra* note 1, at 7-10; Blake, *supra* note 1, at 632-37.

These apprentice or journeymen cases involved an employment relationship created by a contractual relation that imposed a unilateral restraint by a merchant or master craftsman. While these cases involved master-servant status relations, they nonetheless represent disputes between two coequals asserting conflicting rights to work. For this reason, I have treated these cases as restraints of trade involving merchants rather than labor.

prior consent of the coerced person in establishing social status or in ordering production and distribution of goods and services. The property claim in these cases thus questioned the "free will" of private parties as expressed in their agreement. In order to protect the right to the product of one's labor, common law judges were required to decide whether they should enforce a private agreement not to compete.

The indenture contract common in the era of guilds required the apprentice to refrain from competing with the master for a specified period of time after the completion of training. In the few cases which raised the issue, the courts consistently held that restraints restricting the right to work were unlawful, without regard to claims of reasonableness or justification. For this reason these cases are usually cited for the proposition that the common law originally treated all restraints as violating the principle of economic freedom and therefore void.[51] For reasons which soon became apparent to the common lawyer, this would never become the dominant rule.

In the first reported case involving a contractual restraint of trade, the 1414 *John Dyer's Case*,[52] the English bench held that a six-month trade restriction in the indenture contract with the master was unenforceable because it was found to be contrary to the common law. While the English bench allowed the journeyman to breach the indenture contract, it is not clear that the decision was based on a general aversion to trade restraints. Indeed, if the common law was to be consistent in its protection of free trade, why allow apprentices to breach contracts of indenture?

One answer, provided by Blake and other commentators, is that the early trade restraint cases were actually anti-free trade cases in that they sought to assist the guilds and legislative bodies in shoring up the crumbling values of the medieval economic system against enterprising master craftsmen who were breaking from the traditional patterns of trade.[53] Thus, these cases can be read as rejecting the values of economic *laissez faire*.[54]

On the other hand, these cases might be seen to support *laissez faire* free trade policies even if they were motivated by considerations which served the restrictive trade practices of the guild system. For example, the English courts interpreted *Dyer's Case* as establishing that it was illegal to prohibit or restrain any person from engaging in trade because the restraint was found to be "against the benefit of the commonwealth."[55]

51. Blake, *supra* note 1, at 631-32.

52. Y.B. 2 Hen. 5, fo. 5, pl. 26 (1414).

53. Blake, *supra* note 1, at 637.

54. *Id.* at 637.

55. Colgate v. Bacheller, 78 Eng. Rep. 1097 (1601). *See also* M. TREBILCOCK, *supra* note 1, at 9. The English bench recognized exceptions to the principle announced in *Colgate*. A court would

The state's interest in promoting the right to work and the marketability of business could support a free trade argument in *Dyer's Case*: indenture contracts deprived the individual of the right to work and denied the public the advantages of competition even though they also aided the interests of the guild system. The very same principle could support the contrary result that the policy of free trade might require the law to enforce restrictions on competition in order to enhance the long-run benefits of economic development.

Indeed, the common law was bound to enforce trade restraint contracts for the very reason that it must enforce property rights.[56] By protecting the right of property against indenture contracts, English judges resisted free trade arguments that were gravitating toward an alternative understanding of free trade which recognized the legitimacy of combination. This alternative understanding acknowledged that free trade depends upon exclusive ownership rights of property and that these rights might be combined under contract. Exclusivity of the property right might lawfully restrain the competitive freedoms of others.

A precursor of the modern approach to the common law of contracts in restraint of trade is *Mitchel v. Reynolds*,[57] one of the most frequently cited English cases in commercial law. In *Mitchel*, a baker assigned a lease for a bake shop to a journeyman baker. The lease required the journeyman to give a bond stipulating that he would not practice his baker's trade in the parish for the term of the lease. The journeyman breached the bond and an action was brought by the original baker to enforce the trade restriction contained in the bond. The journeyman contended that the bond was an illegal trade restraint because it interfered with the practice of his trade. Having found the restraint lawful, Lord Macclesfield systematically set out to draw some fundamental legal distinctions to control future cases.[58]

Lord Macclesfield first concluded that restraints of trade could be

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enforce a restraint, if the court found it to be necessary to protect the goodwill of the restraining party, *see* Rogers v. Parrey, 80 Eng. Rep. 1012 (1613), or if the court found it to be specifically limited to a geographic area, *see* Broad v. Jollyfe, 79 Eng. Rep. 509 (1620). These cases were ultimately replaced by the rule of reason standard enunciated in Nordenfelt v. Maxim Nordenfelt Guns & Ammunition, App. Cas. 535 (H.L. 1894). Indeed, in National Society of Professional Engineers v. United States, 435 U.S. 679, 688-89 (1978), the Supreme Court has viewed the early restrictive covenant cases, particularly Mitchel v. Reynolds, 24 Eng. Rep. 347 (Q.B. 1711), as the earliest cases applying a rule of reason in antitrust.

56. "To own property implied the right to dispose of property by contract and if a reasonable man disposed of his property in a way he considered good, it was not for the court to tell him he was mistaken." W. LETWIN, *supra* note 1, at 42.

57. 24 Eng. Rep. 347 (Q.B. 1711). In National Society of Professional Engineers v. United States, 435 U.S. 679 (1978), the Supreme Court concluded that *Mitchel* established the principle that antitrust law "focuses directly on the challenged restraint's impact on competitive conditions." *Id.* at 688.

58. *See* Blake, *supra* note 1, at 629-30.

classified as voluntary or involuntary.[59] Involuntary or coerced restraints were considered unnatural and hence unlawful. However, because the restraint in *Mitchel* was part of an agreement for the transfer of a business, it was deemed voluntary. This led Lord Macclesfield to the next important distinction: "general" versus "particular" restraints. A contract in restraint of trade could be valid only if the restraint was particular (i.e., limited as to time and place) and the contract "appeared to be made upon a good and adequate consideration, so as to make it a proper and useful contract."[60] A general restraint was deemed invalid because it went beyond what was necessary to protect the plaintiff's interest in the agreement.

The general-particular distinction was ultimately unsuccessful because judges looked to the boundaries of the sovereign territory to determine the restricted area of the restraint. A restraint was "general" if it applied to the entire country, and "partial" if it applied to a political subdivision.[61] What was general or particular thus came to depend upon irrelevant considerations of political sovereignty. Common law principles of equity, and the interests of economic development, would ultimately bring the common law closer to the view that even partial restraints of trade must be regulated in order to protect a tradesman from agreements that monopolize the market.

3. *The Early Common Law of Monopoly*

> *"[T]he Said grant to the plaintiff of the sole making of cards within the realm was utterly void . . . it is a monopoly, and against the common law."*[62]

In medieval times, it was not uncommon for the King to grant merchants an exclusive right to do business.[63] These "royal grants of monopoly" flourished in England during the sixteenth century and ultimately created problems for Parliament as it attempted to regulate economic affairs for the commonwealth. While Coke is credited with the view that monopolies were contrary to the "ancient and fundamental laws of the realm,"[64] it is far from clear that early mercantile law had a consistent policy on the question.[65]

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59. 24 Eng. Rep. at 349.

60. *Id.*

61. *See, e.g.*, Prugnell v. Grosse, 82 Eng. Rep. 919 (K.B. 1648). *See also* Hovencamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA L. REV. 1019, 1034 (1989).

62. *The Case of Monopolies*, 11 Coke 86a, 77 Eng. Rep. 1262 (K.B. 1603).

63. *See* J. HEYDON, *supra* note 1, at 6.

64. *Cited in* J. HEYDON, *supra* note 1, at 6.

65. In fact, the concept of "monopoly" was not recognized in the earliest cases involving what Coke characterized later as anti-monopoly decisions. *See* W. LETWIN, *supra* note 1, at 22. According to Letwin, the "legal concept then existing which came closest to the notion of monopoly was 'engrossing.'" *Id.*

The early common law of monopoly proper involved royal grants of patents and licenses to merchants who were seeking to compete with the established guilds.[66] According to Letwin, the cases on monopoly proper were "brought about mainly by disturbances within the monopolistic system administered largely by the guild, and by objections not to the broad economic effect of monopolies but to the political power which the crown exercised in granting them."[67] One of the first reported English decisions on monopoly, *Darcy v. Allen*, also known as *The Case of Monopolies*,[68] involved the legality of a royal grant by patent of the exclusive right to manufacture and import playing cards into the United Kingdom. Queen Elizabeth had granted Darcy, her groom, the playing cards patent. In 1601, after Queen Elizabeth had agreed to have the legality of royal patents reviewed in the courts, Allen, a haberdasher, made and sold some playing cards, and Darcy brought an infringement action on his patent. The English court held that the royal patent was void because it was contrary to the common law.[69]

In finding that the royal patent was "against the common law," the court noted three offending "inseparable incidents to every monopoly against the commonwealth":

> 1. That the price of the same commodity will be raised, for he who has the sole selling of any commodity, may and will make the price as he pleases. . . . The 2d incident to a monopoly is, that after the monopoly granted, the commodity is not so good and merchantable as it was before: for the patentee having the sole trade, regards only his private benefit, and not the common wealth. . . . 3. The Queen was deceived in her grant; for the Queen, as by the preamble appears, intended it to be for the weal public, and it will be employed for the private gain of the patentee, and for the prejudice of the weal public; . . .[70]

The notion that monopoly leads to higher prices is now regarded to be part of the modern economic argument for opposing monopolies. Indeed, in their antitrust casebook, Posner and Easterbrook, refer students at the beginning of their studies to this case as an example of how "judges, long before there was an organized discipline of economics, made a number of assertions about the economic consequences of . . . monopoly—that the price . . . would be higher, that the quality of the product would be lower, and that employment in the . . . industry would

66. *See* Letwin, *supra* note 20, at 359.

67. W. LETWIN, *supra* note 1, at 23.

68. 11 Coke 84b, 77 Eng. Rep. 1260 (K.B. 1603).

69. The Statute of Monopolies, 21 Jac., ch. 3, enacted by Parliament in 1623, reinforced the limited significance of the decision in the Case Against Monopolies by prohibiting royal grants of monopoly privilege (except for limited-term patents) while allowing the customary monopoly privileges of cities, boroughs, guilds, corporations, chartered trading companies, and express grants of monopoly privilege by Parliament. The statute, like the decision in the Case Against Monopolies forbade crown-granted monopolies, but little else. *See* M. TREBILCOCK, *supra* note 1, at 8.

70. 11 Coke at 86b-87a, 77 Eng. Rep. at 1263-64.

be reduced."[71] The intuitive notion for condemning monopoly at common law, namely, that prices would be higher, is treated today as economically sound.[72]

While the *Case of Monopolies* seemed to reflect Coke's belief that the common law was against monopolies, the Court's decision was more about a constitutional conflict involving Parliament and the Crown, which entailed a quite different view about monopoly. Although the court found that the Queen's royal grant was contrary to the common law, it also found that the grant was offensive to an Act of Parliament which prohibited the importation of playing cards into England from abroad. Parliament presumably wanted to encourage domestic competition, whereas the Queen wanted to protect merchants' right to work in England by recognizing their exclusive right of importation. The litigation, then, can be seen as presenting two views of free trade. One view sought to encourage domestic competition by protecting individuals from foreign competition,[73] and the other view sought to expanding the competitive freedom of those who lacked the capability to manufacture the product domestically. Both views advance different views of free trade—one to compete, the other to combine.

B. Early Trade Restraint Law Involving Labor

Common law notions of labor relations grew out of diverse legal sources involving the early law of master-servant, the law of domestic relations and the criminal law of conspiracy.[74] These divergent sources espoused two contradictory views of the work relation. One view saw the work relation as a system of rights and duties establishing a cooperative unit not unlike the family.[75] The employer was master and the worker or servant was "bonded" to the master in the same way that a wife was bonded to her husband or a slave to his master. This bonding in the relation between master and servant both constrained and liberated the employee, for while it established a rigid hierarchy of rights and responsi-

71. R. POSNER & F. EASTERBROOK, ANTITRUST CASES, ECONOMIC NOTES AND OTHER MATERIALS 4 (2d ed. 1981).

72. *Id.* at 11. Posner and Easterbrook, however, note that the English court's assertion that monopoly leads to unemployment incidents is "plausible," but that the assertion that monopoly leads to degradation of product quality does not have an obvious economic basis. *Id.*

73. This view has its modern counterpart in the horizontal merger decisions of the Warren Court, which have sought to give effect to the Jeffersonian ideal that the law should protect small competitors from ruinous competition of large competitors. *See, e.g.*, Brown Shoe v. United States, 370 U.S. 294 (1962).

74. *See, e.g.*, 3 COMMONS & GILMORE, A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 59-236 (1910); M. GLENDON, THE NEW FAMILY AND NEW PROPERTY ch. 4 (1981); C. GREGORY & H. KATZ, LABOR AND THE LAW, ch. 1 (3d ed. 1979); R. STEINFELD, THE INVENTION OF FREE LABOR IN THE UNITED STATES ch. 2 (forthcoming); Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

75. *See* R. STEINFELD, *supra* note 74, ch. 2; M. GLENDON, *supra* note 74, at 143-44.

bilities, it also provided the legal basis for recognizing paternalistic obligations for the care of employees.

A different view of work shaped the approach of the law in dealing with concerted activities of free labor. Initially, the common law of labor conspiracies saw the relation between the employer and the employee as a part of a potentially violent competitive struggle. In the early trade union cases, the law embraced a conspiracy view that repressed disorder and guaranteed owners the use of their property without interference from protesting workers.[76] While the early law of employment advanced a conception of work based on paternalistic conceptions of cooperation, the law of labor conspiracy adopted a hierarchical conception of employment relations that subordinated the interests of workers to those of their masters. In these cases the law was prepared to interfere with the free market by strengthening the hand of employers.

1. The Early Common Law of Employment Relations

"Employer and employee have always been closely bound together."[77]

The early common law of England treated the employment relation in terms that seem strange to modern observers. Work and family were not viewed as being within separate and distinct legal spheres; a paid laborer, indentured servant or slave was frequently considered to be part of the family and hence within the legal sphere of domestic relations law. Under the law of master and servant, free labor was legally bound to the master's property claim to the servant's services performed during the relationship. Without doubt, the law of master and servant reflected the realities of the power disparities favoring masters. Nevertheless, in characterizing work as part of the law of master and servant, common law doctrine developed on the basis of a paternalistic ethos that softened somewhat the power disparities of the relation.

The paternalism of the early common law can be seen in the way English law defined the duration of service relationships of servants. According to Blackstone, the general rule on duration was:

> If the hiring be general, without any particular time limited, the law construes it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons, as well when there is work to be done as when there is not.[78]

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76. This "repressive" approach in the law of labor conspiracies was popular between 1806 and 1840. *See* Hurvitz, *American Labor Law and the Doctrine of Entrepreneurial Property Rights: Boycotts, Courts, and the Juridical Reorientation of 1886-1895*, 8 INDUS. REL. L.J. 307, 318 (1986). The labor conspiracy theory in America was drawn from the English Combination Acts, which prohibited two or more workers from withholding their labor to obtain higher wages. *See* Hovenkamp, *supra* note 1, at 922.

77. M. GLENDON, *supra* note 74, at 143. *See also* R. STEINFELD, *supra* note 74.

78. W. BLACKSTONE, COMMENTARIES *425.

Blackstone's rule reflected the requirements of the English Statute of Labourers, which imposed a duty on all persons to work and prohibited termination of the employment before the end of a term.[79] The imposition of the duty to work carried with it a corresponding obligation on the part of the employer to maintain the worker during the course of employment.

The early common law of both England and the United States viewed the employment relation in status terms that presumed continuity in the relation. Employment was assumed to be fixed for a certain time period determined by custom or statute, terminable only for "reasonable cause" and only upon "reasonable notice." While the rule on duration of employment was far from equitable in its subsequent application,[80] the rule nevertheless provided most nineteenth century employees a measure of job security and protection from arbitrary treatment; protections they would not have likely obtained themselves in the impersonal market.

More importantly, the early common law on duration served to reinforce a view of work as a relation of mutually dependent obligations and duties. Certainly, the early law of master and servant enforced a harsh view of the work relation in upholding the authority and "rule" of master. The same legal regime, however, also recognized that the relation between master and servant established at least minimal duties on the master, independent of the contract of employment. A sense of moral obligation based on paternalism and mastership may have restrained an otherwise oppressive regime of bondage.

2. *The Early Common Law of Labor Conspiracy*

The "Anomalies of Free Labor."[81]

The early common law of labor conspiracy ultimately presented judges with the most difficulty in terms of preserving a coherent doctrine of free trade. In England, judges used the law of criminal conspiracy to condemn both labor organizations and primary strikes for higher wages.[82] The English common law of labor conspiracy was codified by

79. *See* 23 Edw. 3, ch. 1 (1349); 5 Eliz., ch. 4 (1562).

80. As Jay Feinman has explained:

> English law thus attempted to adapt to changing conditions and new situations, but more was involved than a simple desire to do justice between the parties. The Master and Servant Act of 1824 made breach of a service contract by an employee a criminal offense, while breach by an employer was still only a civil wrong.

Feinman, *supra* note 74, at 121.

81. *See* Forbath, *Ambiguities of Free Labor*, *supra* note 1.

82. English law was unequivocal in its condemnation of labor conspiracies. While the eighteenth-century law of England permitted the individual to unilaterally seek better wages and working conditions, it regarded the *combined* effort on the part of workers as a threat to free trade. *See*, J. BRYAN, THE DEVELOPMENT OF THE ENGLISH LAW OF CONSPIRACY 115-58 (1909); M. TURNER, THE EARLY AMERICAN LABOR CONSPIRACY CASES: THEIR PLACE IN LABOR LAW (1967); W. LETWIN, *supra* note 1, at 46-52 (1965); Forkosch, *The Doctrine of Criminal Conspiracy*

the Combinations Acts enacted in the eighteenth and early nineteenth centuries, which made a joint refusal to work unless the employer paid higher wages a criminal conspiracy.[83]

In America, some judges assumed that labor combinations were illegal under received common law.[84] The few American cases that were reported, however, suggest that American antebellum labor decisions condemned the activities of labor combinations only when coercive activity was directed at others, for example, where labor was seeking to create a "closed shop."[85] This "difference" in the law of the early English and American labor, however, had little practical consequence, since American judges were prone to find that union activity was inherently coercive or offensive whenever the concerted refusal to work became effective. While it may be doubtful whether American judges actually adopted a conspiracy theory of labor to condemn otherwise peaceful primary strikes for higher wages,[86] it is clear that American courts made it difficult for labor to compete with business combinations on an equal footing.

American judges were prone to hold that workers were allowed to strike for higher wages, but not if they restrained the employer's liberty over property, or interfered with the liberty of other workers to contract at lower wages.[87] On the other hand, businessmen were free to employ

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and Its Modern Application to Labor, 40 TEX. L. REV. 303 (1962). The English Combination Act of 1799, 39 Geo. 3, ch. 81 (1799), which prohibited combinations of workers only, and the Combinations Act of 1800, 38 Geo. 3, ch. 106 (1800), which superseded it and which prohibited combinations of workers and masters, incorporated the common law doctrine of criminal conspiracy. These statutes were repealed by the Trades Union Act of 1871, 34 & 35 Vict., ch. 31 (1871) and by the Combinations Act of 1875, 38 & 39 Vict., ch. 86 (1875), which removed combinations of workers and masters from the sanctions of the criminal law. In contrast to England, America had a more tolerant legal outlook of trade unions. *See* Witte, *Early American Labor Cases*, 35 YALE L.J. 825, 825-26 (1926).

83. *See, e.g.*, Orth, *English Combination Acts of the Eighteenth Century*, 5 LAW & HIST. REV. 175, 181-83, 196 (1987); Hovenkamp, *supra* note 1, at 922.

84. *See, e.g.*, Commonwealth v. Pullis (Mayor's Ct. Philadelphia 1806), *reported in* 3 COMMONS & GILMORE, *supra* note 74, at 59, 233-36. *See also* Hovenkamp, *supra* note 1, at 922. Hovenkamp notes that "[d]uring the balance of the nineteenth century, British law actually was more tolerant of labor organizing than was American law," since the English Combination Acts were repealed in England in the 1820s and this was evidently not reflected in the common law in America. *Id.* at 922 n.18.

85. *See* C. GREGORY & H. KATZ, *supra* note 74, at 13-30; Forbath, *American Labor Movement*, *supra* note 1, at 1149 n.170; Hovenkamp, *supra* note 1, at 922-23 n.21; Petro, *Unions and the Southern Courts: The Conspiracy and Tort Foundations of the Labor Injunction (Pt. 3)*, 60 N.C.L. REV. 544, 550 (1982). Professor Holt has argued that the labor conspiracy cases in America reflected a class bias against labor. *See* Holt, *Labour Conspiracy Cases in the United States, 1805-1842: Bias and Legitimation in Common Law Adjudication*, 22 OSGOODE HALL L.J. 591, 655-56 (1984). *See also* Hurvitz, *supra* note 76, at 319. *See generally*, C. TOMLINS, *supra* note 1; Forbath, *supra* note 1.

86. Professor Hovenkamp, for example, reports that "no American case before the 1890s condemned laborers for the simple act of combination in order to increase wages." Hovenkamp, *supra* note 1, at 922-23.

87. From the perspective of nineteenth century legal theorists, freedom meant implementing the free will of individuals, not groups, and that freedom was defined in terms of the individual's

workers on any terms they saw fit and to exercise their liberties of property free of collective restraint.[88] Hence, in the labor market, the courts would protect the freedom of individuals to contract, free from the coercive restraints of collective action. In the product market, however, the courts were primarily concerned with protecting the liberty of employers to use their property productively. What tended to go without legal protection was the freedom of workers to act in concert in the labor market to improve their economic conditions and thereby gain economic and social independence.

Attempts to justify this view of labor conspiracy were based upon ideas of "natural law" and highly individualistic notions of free will and autonomy that presupposed a vision of freedom as the exercise of free will, and ignored opposing views of freedom to associate and combine. Early labor conspiracy doctrine actually disguised one concept of freedom in favoring another. In the very first reported labor decision in America, *The Cordwainer's Case*,[89] decided in 1806, a Philadelphia court acknowledged that there was nothing unlawful about workers seeking to combine to raise their wages *so long as* they did nothing to interfere with the *freedom* of other workers wishing to labor at different wages. The court held that a concerted strike by a union of journeymen cordwainers (shoemakers) for higher wages constituted an indictable criminal conspiracy because *freedom* of trade had been restrained, i.e., freedom of other workers to work at lower wages.[90]

But there was no analytical reason why courts could not have applied the principle of freedom from restraint to allow workers to combine to protect themselves from the contractual constraint of the employment relation. Indeed, the court's association between the rule and the applicable result was premised upon a view of conspiracy that protected the *freedom* of particular individuals that favored particular values over other values. The court's theory of labor conspiracies allowed replacement workers to trade free of restraint in order to allow employers to

right to be "free" from the coercive restraint imposed by groups. *See* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 22 (1977); C. TOMLINS, *supra* note 1, at 48-49. Professor Forbath suggests that workers' organizations accepted this double standard, because "[e]arly nineteenth-century artisans and journeymen hewed to a radical version of anti-monopoly, 'equal rights' ideology: it was an outlook that was more concerned with ensuring that the law bar illegitimate 'combinations' and 'conspiracies' on capital's part than with ensuring that courts impose no bounds on workers' combinations." Forbath, *American Labor Movement*, *supra* note 1, at 1150, n.170.

88. *See infra* notes 101-14 and accompanying text.

89. Commonwealth v. Pullis, *reported in* 3 COMMONS & GILMORE, *supra* note 74, 59-248.

90. As Professor Tomlins put it: "[c]ordwainers were entitled to seek the advancement of their wages in association, but not to make oppression of their employers' liberty of industry, or of other workers' liberty to labor at whatever wages they chose, the price of success. Association could be used to overcome the disadvantage of propertylessness, but it could not be used to threaten property itself." C. TOMLINS, *supra* note 1, at 37.

exercise domain over their property. What went without protection was the freedom of union workers to pursue their legitimate objectives by the most effective means possible. What also went unprotected was the freedom of others who were willing to employ workers at union scale but who were coerced from doing so by the employers' agreement to boycott.[91] The notion that a collective of workers might embody the aggregate free will of its members, or that other employers might choose to exercise their liberty to employ union members at different wages was irrelevant to the court's decision. This also meant that whenever labor scarcity strengthened the workers' effort, the courts were more likely to find an illegal conspiracy since it would be easier for judges to find that the employer or third parties were "coerced."[92] Thus, even though both sides could claim that the same rules protected their liberty, independence, and free will,[93] the courts were much more inclined to find protection for only one side in the struggle.[94] Consequently, the legal regime essentially repressed concerted labor activities and guaranteed owners

91. For example, in the *Cordwainer's Case*, Commonwealth v. Pullis, *reported in* 3 COMMONS & GILMORE, *supra* note 74, 59-248, journeymen agreed to boycott other journeymen who had agreed with the union to pay union scale.

92. Labor shortage and worker mobility were thus seen by the prosecution as evidence of the coercive threats posed by laborers striking for higher wages. *See* C. TOMLINS, *supra* note 1, at 4. The power of organized labor in markets experiencing labor shortages might be held in check by free entry of workers from other markets.

Whether American workers enjoyed occupational mobility is the subject of debate. Professor Forbath reports that "sophisticated quantitative histories" have shown that unskilled and poor American workers were comparatively immobile in the nineteenth-century and that occupational mobility was generally "varied and uneven" for most American workers at that time. Forbath, *American Labor Movement*, *supra* note 1, at 1119. By contrast, Professor Hovenkamp has argued that at least by the turn of the century labor was "inherently an easy entry industry," citing the fact that striking unskilled workers "often produced carloads of 'scabs' within a day or two after a strike began." Hovenkamp, *supra* note 1, at 946. Recent social histories of the nineteenth century, however, reveal that "unskilled workers enjoyed precious little mobility throughout the century." *Id.* (*citing* Chudacoff, *Success and Security: The Meaning of Social Mobility in America*, 10 REV. AMER. HIST. 101 (1982)); Conk, *Social Mobility in Historical Perspective*, 3 MARXIST PERSP. 52 (1978); Henretta, *The Study of Social Mobility: Ideological Assumptions and Conceptual Biases*, 18 LAB. HIST. 165 (1977).

93. In his article on the Philadelphia *Cordwainer's Case*, Walter Nelles reported that the lawyers for the prosecution and defense relied upon the same rules but nevertheless asserted contradictory legal arguments emphasizing polar positions of freedom of action. Nelles, *The First American Labor Case*, 31 YALE L.J. 165, 175 (1931). The defendants emphasized in their arguments to the jury that it would be a derogation of the "natural and unalienable rights of man, and [would be] inconsistent with democracy to apply the English doctrine of criminal conspiracy against the Cordwainer's society." *Id.* The prosecution, on the other hand, sought to downplay the "appeals to passion" of the defense by arguing that "the object of the society was not freedom, but compulsion." *Id.* at 175-76. Had the court instead emphasized the freedom (or security) of union workers to combine, the same rule of "freedom of trade" would have led them to decide for the defendants.

94. Philadelphia *Cordwainer's Case* was followed by at least eighteen other prosecutions of workers for conspiracies in restraint of trade in the next three decades. *See* Witte, *supra* note 82, at 826.

the use of their property without interference, even when labor shortages granted organized labor economic power.

No better example of this can be seen than by contrasting how judges responded in labor conspiracy cases to how they decided trade restraints cases involving merchants. With respect to business conspiracies, the early common law was apparently consistent with the labor cases in holding that combinations of businessmen were lawful unless the combination used its power to coerce third parties into a position of competitive disadvantage.[95] Business conspirators, however, had a decided advantage since they could accomplish their results without having to resort to overt acts of coercion or conspiracy. For example, in industries with high fixed costs, which create "barriers to entry," a combination of merchants could effectively fix prices or cartelize markets without having to coerce or intimidate anyone.[96] Moreover, at early common law the presumption was that legitimate competition might injure a competitor, and that the resulting injury would not be actionable.[97]

The coherence of early free trade doctrine depended upon the ability of the legal system to defend a unified system of trade restraint law for labor and capital that would preserve individual liberty while maintaining the security of free trade from arbitrary and oppressive interference of groups. From a conceptual point of view, it might seem logical to treat combinations of workers and merchants under a unified doctrine of common law restraints. A labor union is a monopoly or cartel sales

95. Early treatise writers in America reported that the prevailing legal opinion in the nineteenth century prohibited illegitimate combinations and conspiracies of business that were found to be coercive of the rights of others. *See, e.g.*, A. EDDY, THE LAW OF COMBINATIONS EMBRACING MONOPOLIES, TRUSTS, AND COMBINATIONS OF LABOR AND CAPITAL; CONSPIRACY AND CONTRACTS IN RESTRAINT OF TRADE 486 (1901).

The English common law developed a view which condemned business combinations or cartels, resulting in criminal conspiracy indictments in several cases. *See* R. v. Mawbey, 101 Eng. Rep. 736 (1796); R. v. Eccles, 168 Eng. Rep. 240 (1783); R. v. Norris, 96 Eng. Rep. 1189 (1758); R. v. Journeymen-Tailors of Cambridge, 88 Eng. Rep. 9 (1721). As most commentators of the period have suggested, it would be a mistake to find a general policy in these decisions. M. TREBILCOCK, *supra* note 1, at 12. *See also* Allen, *Criminal Conspiracies in Restraint of Trade at Common Law*, 23 HARV. L. REV. 531, 535 (1910); Dewey, *The Common Law Background of Antitrust Policy*, 41 VA. L. REV. 759, 768-69 (1955).

In the United States, the common law appears to have recognized that price fixing agreements were void and unenforceable. *See* Richardson v. Buhl & Alger, 77 Mich. 632, 658 (1889); H. THORELLI, *supra* note 1, at 36; Hovenkamp, *supra* note 1, at 932. But there were both English and American cases in the early common law which upheld the legality of price fixing agreements. *See* Hovenkamp, *supra* note 1, at 932, nn.78-79. As Donald Dewey concluded in his study of the early common law cases: "So far as merchants were concerned prosecutions for conspiracy to monopolize or restrain trade were virtually unknown." D. DEWEY, MONOPOLY IN ECONOMICS AND LAW 119 (1959).

96. *See* Hovenkamp, *supra* note 1, at 946 (discussing an analogous point involving the law of business combinations at the end of the nineteenth century).

97. *Id.* at 933.

agency marketing labor services of its members at a uniform price.[98] Labor economists have regarded the modern labor union "as a monopolistic seller of services governed by a maximization principle; the union thus becomes analogous to a business firm marketing a commodity."[99] Indeed, the classical economists of the nineteenth century believed that workers' combinations could not be distinguished from combinations of employers to lower wages or of sellers to raise prices.[100] And, of course, the question of the common law of restraint at this time was whether unions should be suppressed as unlawful combinations in restraint of trade.[101]

On the one hand, there are fundamental differences between the labor and business organizations, which might justify different legal treatment. A labor organization, by definition, acts in a concerted manner through its members. However, by the late nineteenth century, judges frequently focused on the collective assertion of power by workers in order to justify legal condemnation.[102] These judges usually argued that an act, lawful when performed by a single individual, may become unlawful when done by many in concert. Moreover, courts viewed business organizations as if they were individual persons capable of exercising independent free will.[103] Hence, business entities were combinations only when two or more distinct firms acted in concert, while on the other hand the concerted activities of workers working for a single firm were "conspiratorial, because each laborer was a distinct person."[104] Even when comparing business conspiracy cases, it has been said that labor cartel cases were distinguishable from business cartels because human labor was the "product" restricted in a labor strike.[105]

Yet, a business organization, whether a corporation or a sole proprietorship, represents an aggregate of power relationships involving people

98. *See* Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 999 (1984).

99. Ross, *The Trade Union as a Wage Fixing Institution*, 37 AM. ECON. REV. 566, 566 (1947). *See also* J. DUNLOP, WAGE DETERMINATIONS UNDER TRADE UNIONS 5 (1944).

100. *See, e.g.*, A.V. DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY 190-201 (2d ed. 1914).

101. The classic view of labor organizations as monopolistic sellers of labor has persisted in modern times. *See, e.g.*, Mason, *Labor Monopoly and All That*, 66 VA. L. REV. 1183, 1185-92 (1980) ("Whether labor unions are monopolies is a question hardly worth considering. Whatever else a union is, it is certainly an agreement among workers not to compete for jobs"). *See also* Leslie, *Principles of Labor Antitrust* 66 VA. L. REV. 1183, 1185-91 (1980).

102. *See* Hovenkamp, *supra* note 1, at 922. Judges were prone to view collective assertion of power by workers as a threat to the state, or as one New York trial judge proclaimed, a "socialistic crime." People v. Wilzig, 4 N.Y. 403, 425 (1886). Some judges feared that if combinations of labor were allowed to boycott employers there "will be the end of government." Crump v. Commonwealth, 84 Va. 927, 946 (1888), *cited in* Forbath, *American Labor Movement*, *supra* note 1, at 1169.

103. *Id.* at 959; *see also* Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593 (1988).

104. Hovenkamp, *supra* note 1, at 959.

105. *Id.* at 948.

and property that could have been understood at common law as a collectivity similar in form to that of a labor organization.[106] Even when acting alone, a business can be viewed as a collective entity.[107] Because businesses do combine, by merger or otherwise, what might appear to be a single and separate business entity may in fact be the result of a new combination of power and influence. The resulting combination can present restraint of trade problems that are substantially similar to those presented by overt combinations or conspiracies. Yet, at common law, mergers were a lawful alternative to otherwise unenforceable agreements to restrain trade.[108] In seeking to preserve "freedom of trade" from the dangers of combinations and restraints, common law judges were thus confronted with logical reasons for developing a system of trade doctrine that would treat labor and business restraints of trade alike.

The doctrine of labor conspiracy soon collapsed, because juries could not ignore the obvious inequities of the rules they were asked to apply in decision making. Indeed, one of the most telling aspects of the early labor conspiracy cases was that although criminal convictions were common, substantial fines were not. The absence of substantial fines in the early labor cases suggests that the juries were seeking to soften the unfairness of the rules through "jury nullification."[109] By mid-nine-

106. Theories of the business corporation have followed a contradictory pattern, attempting to justify the phenomenon of collective organization in individualistic terms, apparently in response to contradictory patterns of economic practice. *See* Bratton, *The New Economic Theory of the Firm: Critical Perspective from History*, 41 STAN. L. REV. 1471 (1989). Professor Horwitz, however, has argued that the particular conception of "corporate personality" came to dominate legal thinking about management corporation which came to view corporate organization in terms of a single entity. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1985). Whether theory dominated practice as Professor Horwitz claims, or practice determined theory as Professor Bratton asserts, both authors agree that the history of legal theory dealing with the corporation reflected choice between a collective and individualistic understanding of corporate enterprise.

107. A. BERLE AND G. MEANS' THE MODERN CORPORATION AND PRIVATE PROPERTY (rev. ed. 1968) projects a picture of the modern corporation as a powerful group of managers. Such a view of corporate organization emphasized the political power of the collective relations within the firm. Bratten, *supra* note 106, at 1497-98. The new economic theory of the corporation, however, has advanced a single entity view of corporation under a theory which views the firm as a "nexus of contracts." *Id.* at 1498-1501. This "nexus of contract" theory of the modern corporation has been challenged on the ground that it fails to capture the relational nature of corporate organization. *See* Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 640-41 (1988) ("The image of the corporation as the fee simple owner of its own property is an image that has outlived its usefulness. A better paradigm would focus on the industrial relations between and among the thousands of persons who participate in the ongoing affairs of the business or who depend on its success."); *but see* Williamson, *The Modern Corporation: Origins, Evolution, Attributes*, 19 J. ECON. LIT. 1537 (1981).

108. *See* Hovenkamp, *supra* note 1, at 958.

109. At this time in American legal history, there was a universally recognized practice allowing lawyers to argue both the law and facts to juries in criminal cases. Nelles, *supra* note 93, at 173. This practice, which allowed lawyers to make "appeals of passion" to jurors while emphasizing the equity of their legal positions, apparently was quite successful, since juries refused to impose substantial fines. M. TURNER, *supra* note 82, at 39-58. "[N]o American workers were sentenced to jail before the Civil War, and most fines ranged from $1.00 to $10.00." V. HATTAM, UNIONS AND

teenth century, these cases were no longer submitted to juries as business attorneys discovered a new tort theory for structuring a free trade doctrine for labor. This did not mean that the theory of labor conspiracy became irrelevant for the subsequent development of law. To the contrary, the logic of the labor conspiracy cases was merely deferred to new civil law doctrines that emerged in the post-bellum period of American law.

II

THE CLASSICAL ERA: THE AGE OF CONTRACT

The initial approach of the early common law of trade restraints became out-dated by the time of the Civil War. A new notion argued that contract rights could be a form of property, and that exchange value could guide trade restraint law. Laissez-faire notions of liberty of contract were instrumental in developing this new understanding of free trade law. The courts first sought to reconcile the tension between competition and combination.[110] As Letwin explained in his study of the English common law on monopolies:

> On the one hand, the Common Law was inclined to uphold contracts in restraint of trade for the same reasons that moved it to sustain any good contract. To own property implied the right to dispose of property by contract, and if a reasonable man disposed of his property in a way he considered good, it was not for the court to tell him he was mistaken. On the other hand, the common law was inclined to invalidate contracts in restraint of trade because they deprived the public of the advantages of competition. . . . The conflict of these principles and their application to the particular circumstances of each case have resulted in the general rule, still true today, that some contracts in restraint of trade are good and others are bad.[111]

The ideal of economic liberty in the classical era[112] was linked to an abstract conception of contract that was hostile to the property founda-

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POLITICS: THE COURT AND AMERICAN LABOR 57-58 (Ph.D. dissertation 1987), *cited in* Forbath, *supra* note 1 at 1150 n.170. Unions were immune from liability for the acts of their members, since labor organizations were assumed to be unincorporated associations. *See* Hovenkamp, *supra* note 1, at 959.

110. This was a time when the Lochner era in constitutional law was just getting off the ground. For a history of the Justice Field and the Lochner Court, *see* McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AM. LEGAL HIST. 970 (1975).

111. W. LETWIN, *supra* note 1, at 42.

112. The classical era of legal thought, sometimes known as the "formalist" era, was dominant during the later half of the nineteenth century. Duncan Kennedy has brilliantly described the structure of classical legal thought characteristic of this era. *See* Kennedy, *Toward Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. L. & SOC. 3 (1980).

tions of mercantilism.[113] The laissez-faire idea of contract asserted the importance of protecting value rather than things,[114] and emphasized that an ideal system of law and economy would arise only out of the will of individuals contracting freely within the market.[115]

In the classical era, lawyers apparently internalized a vision of competition as a politically neutral, autonomous process of self-interested conduct based on free contract.[116] In accordance with this way of thinking, freedom became associated with the production of value and competition was seen as a "pure" or "perfect" process for realizing that freedom.[117] Economic freedom became a principle for organizing society on the basis of an understanding of competition as an autonomous, self-regulating process.

The ideal of "free contract" was, however, premised upon contradictory commitments and policies. Free contract ideology oscillated between commitments to freedom of action, on the one hand, and security of contractual expectations, on the other. Contract as freedom of action

113. Adam Smith in his *Wealth of Nations* argued the case in favor of free contract as the soundest principle for organizing society as a generalized attack on mercantile policy. *See* P. ATIYAH, *supra* note 3, at 221. The idea of the "invisible hand" suggested that contract negotiations in a free market could be self-regulating, and that the regulations of the mercantile regime were unnecessary, if not inefficient.

114. *See, e.g.*, Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFFALO L. REV. 325, 329 (1980). Professor Vandevelde has called this phenomenon the "dephysicalization of property," that is, that a valuable interest could be declared the object of property rights independent of some physical object.

115. "The notion was that the idea of individual freedom could be used to deduce a complete set of rules which would fully subordinate the state enforcers to the private intentions of the parties." Kennedy, *supra* note 45, at 954. *See also* Note, *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract and Tort*, 93 HARV. L. REV. 1510, 1534 (1980) (Nuckleby). Judges and lawyers who subscribed to laissez faire beliefs apparently believed that in the ideal legal system all legal obligations arise from the will of individuals contracting within a society unrestrained by arbitrary public or oppressive private interference. Thus "[l]aissez-faire theory both assumes and asserts that it makes sense to advocate state neutrality with respect to the market. Economic and social inequalities that persist after the institution of the liberal state (that is, the institution of 'political equality') are deemed to be natural and beyond the proper scope of state activity." Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1502 (1983). According to Horwitz, "[l]iberalism [in nineteenth century legal thought] stood for a subjective theory of value, a conception of individual self-interest as the only legitimate animating force in society. In addition, liberalism stood for night-watchman state, denying any conception of an autonomous public interest independent of the sum of individual interests". Horwitz, *Republicanism and Liberalism in American Thought*, 29 WM. & MARY L. REV. 57, 66-67 (1987).

116. Trebilcock describes how the conception of equity in the laissez-faire era was rooted in "the sort of individualistic belief in the fundamental value of moral autonomy that is captured by the idea of 'natural rights' as found in John Locke's SECOND TREATISE ON GOVERNMENT." M. TREBILCOCK, *supra* note 1, at 19.

117. The coherence of the classical view of contract law, for example, depended on a claim that a formal system of rights could intelligently define a boundary separating each individual's private sphere of legally protected autonomy from arbitrary public or private power. *See* MENCH, THE HISTORY OF MAINSTREAM LEGAL THOUGHT IN POLITICS OF LAW-A PROGRESSIVE CRITIQUE, 18, 23-26 (Kairys ed. 1982).

or contract as security justified either the need for regulation of contracts in restraint of trade or the need for the enforcement of a restraint to uphold free contract.

The tension in the common law of trade restraint was experienced sharply in the labor combination cases. In the laissez-faire era, the courts allowed combination and economic harm by competing businesses but prohibited economic harm by labor organizations. Employers were free to destroy workers' freedom to contract at union wages, but labor unions were not free to destroy the employers' freedom to contract with nonunion labor. The cases thus presented sharp conflicts that showed the difficulties in creating a homologous trade doctrine based on common law doctrine. If peaceful activities of labor combinations were illegal, then might not the same result hold true for business combinations involving the concerted and self-interested effort of economic actors to impoverish another? If courts justified the labor conspiracy cases on the basis of liberty of contract, then might not the same hold true for business combinations which resulted in the very same injury? Ultimately, questions of this sort forced a shift in common law thinking from the older notions of laissez-faire to a new industrial concept of free trade based on entrepreneurial control over property and contract.[118]

The contours of the modern doctrine of trade restraint law were ultimately shaped by a handful of landmark decisions decided at mid-nineteenth century. In 1842, for example, Chief Justice Samuel Shaw decided the important Massachusetts case of *Commonwealth v. Hunt*.[119] Justice Shaw's decision in *Hunt* can be seen as working to establish a new tort framework based on the notion of "interference" with the contract or "business of another."[120] The new concept of "interference" was successful in establishing a formal set of rules for resolving labor and business combinations which claimed neutrality and disinterest in the underlying struggle between labor and business. These new common law rules, however, contradicted the laissez-faire principle of state noninterference in the free play of market activity.

A. Business Trade Restraints

1. Contracts in Restraint of Trade

"If the restriction is reasonable it is in no way injurious to the public."[121]

118. Professor Hurvitz has shown how the early labor boycott cases decided around 1890 reflected the idea of "entrepreneurial property rights"—the idea that contractual freedom meant preserving entrepreneurial dominion over tangible property. *See* Hurvitz, *supra* note 76, at 344-50.

119. 45 Mass. (4 Met.) 11 (1842). For a discussion of the *Hunt* case, see Nelles, *Commonwealth v. Hunt*, 32 COLUM. L. REV. 1828 (1932); *see also*, LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 183-206 (1967).

120. *See* Hurvitz, *supra* note 76, at 327.

121. *Cf.* M. TREBILCOCK, *supra* note 1, at 128.

By the mid-nineteenth century, the law of voluntary business restraints shifted to new contract ideas. In England, freedom of contract appears to have displaced the fair price and property notions of the mercantilist era with a new analysis that upheld even general restraints of trade.[122] In *Hitchcock v. Cocker*,[123] for example, the English court upheld a life-time non-competition restraint on a druggist's assistant on the ground that the restraint was the product of bargained for consideration. Because the parties were presumed to know what was in their best interest, it was "impossible for the court, looking at the record, to say whether, in any particular case, the party restrained has made an improvident bargain or not."[124]

Similarly, in the 1853 decision *Tallis v. Tallis*,[125] the English bench followed the "traditional rule" that all general restraints are "prima facie invalid," but placed the burden to establish illegality on the party seeking to avoid the restraint.[126] A rigorous free contract analysis became the basis for establishing the rule that even general restraints were valid unless successfully challenged in court. Such a rule suggested that nearly every contractual restraint of trade was presumptively enforceable.[127]

The "high water mark" of free contract rhetoric in the laissez-faire era of employment restraints was *Rousillon v. Rousillon*,[128] an 1880 decision of the English courts. In this case the court announced that there had never been a rule condemning unlimited restraints because "the cases in which an unlimited prohibition has been spoken of as void relate only to circumstances in which such a prohibition has been unreasonable."[129] *Rousillon* effectively reversed the rule which condemned most general restraints.[130] As Blake observed, "[f]or more than thirty years thereafter all restraints of trade [in England and America], including postemployment restrictions, were examined with a presumption of validity if their scope was roughly coterminous with the area of the covenantee's business activity."[131]

A rule of reason approach ultimately established a new framework

122. *See, e.g.*, M. HORWITZ, *supra* note 87, at 262; *see also* M. TREBILCOCK, *supra* note 1, at 20 ("In the *laissez faire* era, free consent was understood by the courts, and probably large segments of the middle class, as something quite untouched by the background of social and economic conditions against which a choice or promise was made.. Provided that neither of the agents was the subject of force or fraud by the other party with respect to the agreement, the agent was held to have freely consented.") (footnote omitted).

123. 112 Eng. Rep. 167 (1837).

124. *Id.* at 175.

125. 118 Eng. Rep. 482 (1853).

126. *See* Blake, *supra* note 1, at 642.

127. *See* M. TREBILCOCK, *supra* note 1, at 23.

128. 14 Ch. D. 351 (1880).

129. *Id.*; *see also* M. TREBILCOCK, *supra* note 1, at 23.

130. Blake, *supra* note 1, at 641-42.

131. *Id.*; *see also* M. TREBILCOCK, *supra* note 1, at 23-24.

for analyzing business restraint problems. This approach was first recognized in the 1894 English decision of the House of Lords, *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*[132] In *Nordenfelt*, the court held that "restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case."[133] After *Nordenfelt* it was presumed that general restraints were again illegal, unless shown to be reasonable due to some special circumstance. Therefore, the case reversed the presumption of the early English unfair competition cases, which established a general presumption that interference with competition was prima facie tortious. This reversal was in line with the case law following *Mitchel* upholding restraints if they were found to be the product of lawful bargaining. The underlying rationale behind the English cases, including those decisions after *Nordenfelt*, was an understanding of competition as an expression of liberty of contract. This contract analysis remained the dominant factor in English law governing restrictive covenant and unfair competition cases.[134]

The rule of reason of *Nordenfelt*, however, left a number of questions unresolved. First, it was not clear which standard governed determining the meaning of "adequate" protection for the covenantee.[135] Nor did the rule provide judges with meaningful guidance for determining when a trade restriction was "reasonable" and thus justified. The application of the reasonableness test merely instructed common law judges to balance the respective interests in reference to the interests of the parties and the interests of the public. No guidance was given for measuring the respective "interests" concerned. The significance of the rule, however, was that it converted disputes of competing claims of right into a medium for furthering broader social goals.[136]

Thus, while legal issues could not be decided in the abstract—"every case turns on its special facts"—the facts themselves presented new problems as judges attempted to work out the uncertainties in the reasonableness test. What was "adequate" protection? What restrictions were

132. [1894] App. Cas. 535 (H.L. 1894), *affirming* [1893] I Ch. 630 (C.A. 1892). The *Nordenfelt* decision is discussed in M. TREBILCOCK, *supra* note 1, and Blake, *supra* note 1. In *Nordenfelt*, the court unanimously held that a general covenant not to compete in the sale of a business was valid, because it was reasonably necessary to protect the interests of the covenantee and was not contrary to the public interest.

133. In *Nordenfelt*, Lord M. Naughton recognized that "there is obviously more freedom of contract between buyer and seller than between master and servant or between an employer and a person seeking employment." [1894] App. Cas. at 566. *See also* Blake, *supra* note 1, at 642.

134. A new rule of reason, free of the restraints of freedom of contract was finally recognized in Mason v. Provident Clothing & Supply Co., [1913] App. Cas. 724; *see also* Herbert Morris, Ltd. v. Saxelby, [1916] I App. Cas. 688. *See* Blake, *supra* note 1, at 643.

135. *See* M. TREBILCOCK, *supra* note 1, at 67.

136. *See generally*, Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 560 n.81 (1972).

to be deemed reasonable? Whose interests count? These questions posed the very same contradictions of the "rule" of the general-particular distinction or that of "free trade" and "competition." Attempts to resolve trade restraint issues by focusing on the "facts" or "contexts" enabled American judges to reach new formulations under the rule of reason in making decisions about whether trade restraints were unreasonable.

2. *Business Combinations in Restraint of Trade*

> *"What one man may lawfully do singly, two or more may lawfully agree to do jointly. The number who united to do the act cannot change its character from lawful to unlawful."*[137]

While the common law during the nineteenth century was hardly consistent on the subject, there were a number of American cases decided at the turn of the century suggesting that agreements between competitors to fix prices were unenforceable but not illegal. Herbert Hovenkamp, for example, in his study of combinations in restraint of trade in the *formative era* (1880-1930), concluded that the Sherman Act of 1890 "departed from the common law by declaring contracts in restraint of trade illegal and unenforceable."[138]

Even though business conspiracies to restrain trade were sometimes found to be criminal, these cases usually involved findings of coercion, intimidation or illegal object. According to Hovenkamp, a business conspiracy was not illegal at this time unless it was a conspiracy to do something independently illegal.[139] The business combination cases could thus be seen to be consistent with the rule of *Commonwealth v. Hunt*,[140] where strikes for higher wages were lawful unless the means employed or end sought were coercive.

This symmetry in the common law of combinations was hardly symmetrical in its consequences. First, it was clear that the judicial assessment of legitimate means and objectives for labor and business combinations would depend on highly contested assumptions about acceptable norms of competitive behavior.[141] What might be seen as fair competitive behavior for business was likely to be judged an illegal form of coercion for labor. Commentators have suggested that the finding of an illegal means or object often was merely a disguise for making certain legal choices about the respective values of business or labor.[142]

It is clear that by the late nineteenth century the cards were stacked

137. Bohn Manufacturing Co. v. Hollis, 54 Minn. 223, 234, 55 N.W. 1119, 1121 (1893), *quoted in* Hovenkamp, *supra* note 1, at 934.

138. Hovenkamp, *supra* note 1, at 933.

139. *Id.* at 934.

140. *See supra* note 124.

141. *See supra* notes 51-52 and accompanying text.

142. *See* C. TOMLINS, *supra* note 1, 90-91; Kelman, *supra* note 43, at 6-7.

against labor organizations for other reasons as well. Even if the rules were applied with equal determination against both labor and capital, labor combinations suffered the "brunt of the attack."[143] Labor combinations were at a disadvantage from the outset, because they did not enjoy the protections of the corporate form of organization, which insulated business combinations from the reach of state and, later, from federal antitrust laws.[144] Worker combinations were subject to charges of illegal conspiracy whenever they acted, since the courts perceived the concerted actions of the workers, rather than their organization, as the real parties in interest. Businessmen, however, acting in concert could rely upon the corporate entity to shield their actions from conspiracy charges. Moreover, labor injunctions would enjoin all workers associated with the organization, while an injunction issued against the corporation would only enjoin corporate agents. Finally, businessmen had other alternatives available to them for pursuing their illegal objectives. They could easily escape the consequences of illegal price-fixing holdings by opting for then legal forms of horizontal integration such as mergers and asset acquisitions.[145] Hence, while the common law was moving toward a unitary approach to labor and business combinations, the law was obviously tilted in favor of business.

The double standard in the application of the late nineteenth century common law of combinations did find support from treatise writers of that era who saw business combinations and contracts in restraints of trade as inevitable means for sustaining industrial efficiency.[146] Lacking a firm grounding in an economic theory of competition and monopoly,[147] legal and economic scholars defined competition as *rivalry* between buyers and sellers of either commodities or labor,[148] and endorsed the idea of a double standard for labor and capital.[149] Business combinations were

143. Hovenkamp, *supra* note 1, at 958.

144. *See* Hovenkamp, *supra* note 1, at 948-62 (discussing antitrust litigation under the Sherman Act in the formative era); Millon, *supra* note 1, at 1258-63 (discussing state antitrust litigation prior to 1890).

145. *Id.* at 958. *See also* R. NELSON, MERGER MOVEMENTS IN AMERICAN INDUSTRY, 1895-1956, 71-89 and 134-36 (1959).

146. *See* Hovenkamp, *supra* note 1, at 935-45. *See also* Hovenkamp, *supra* note 6, at 220.

147. Much of the early common law of trade restraint developed without the benefit of an economic theory of competition and monopoly. *See* Hovenkamp, *supra* note 1, at 936. Hovenkamp notes that "[f]ew historians or legal scholars have appreciated that until late in the nineteenth century classical political economy lacked any concept resembling the modern theory of competition." *Id.* at 935.

148. What was missing from such a view of competition was "the notion that competition is horizontal—that it refers to relationships between people operating at the same level in the same market, such as two sellers of shoes in the same city or two prospective employees seeking the same job." Hovenkamp, *supra* note 1, at 936-37. The rivalry view of competition also lacked an appreciation of consumer surplus—"the concept that consumers are often willing to pay monopoly prices rather than do without." *Id.* at 937.

149. The relevant literature is reviewed in Hovenkamp, *supra* note 1, at 935-45.

deemed socially beneficial because they produced scale economies, resulting in savings that more than offset price increases resulting from monopoly. Labor combinations, however, were found to be socially undesirable because it was thought that they failed to offer efficiencies for production, and instead resulted in higher wage costs.[150] A theory of market value was thus relied upon to justify differing views about business and labor combinations. The belief that labor combinations failed to produce "value" in the product market argued in favor of a law of combinations that favored business over capital.

A vociferous and influential advocate of this view was the man who came to be known as the father of the modern business trade association, Arthur Jerome Eddy. Eddy, the author of a well known legal treatise on combinations[151] and a popular book entitled *The New Competition*, espoused the belief at the turn of the century that competition was a "fetish that men ignorantly worship" and that combination and cooperation was the only true foundation of society.[152] To bring peace and harmony to society, Eddy argued that the law should favor combinations of business and condemn those of labor.

Like most late nineteenth century legal theorists, Eddy believed that a new cooperative understanding of free trade was needed to uphold the benefits of business combinations, because they increased production and were thus moving in the direction of "more for less."[153] Labor combinations, however, were condemned because these organizations were "all in the direction of less for more money."[154] Eddy was thus making popular what most American political economists believed at the turn of the century.[155]

These views represented a shift from a labor theory of property to a new theory of value based on market exchange. The significance of this shift is that the law no longer regarded the product of labor as the crucial factor for enforcing property rights. This new theory was administered in light of a legal analysis of after-the-fact justifications of trade restraints involving large organizations. The new theory based on the model of market exchange can be seen to reflect a remnant of the mercantilism's general hostility toward competition.

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150. Hence, "[w]hen mainstream American political economists around 1900 viewed business combinations, they saw increased efficiencies from economies of scale, lower overall prices, better product quality, and higher profits. But the same economists looked at labor combinations and saw only higher product prices with no accompanying efficiencies to offset them." *Id.* at 940.

151. A. EDDY, *supra* note 95.

152. A. EDDY, THE NEW COMPETITION ch. 8 (1915). Eddy's ideas of competition are discussed in Hovenkamp, *supra* note 1, at 24.

153. EDDY, *supra* note 152, at 51.

154. *Id.*

155. Hovenkamp, *supra* note 1, at 940.

B. Labor Trade Restraints.

1. The New Common Law of Employment Contracts

> *"[I]t is from the nature of things impossible to uphold freedom of contract and the right of private property without recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights."*[156]

By the end of the nineteenth century the common law rules dealing with the termination of the employment relation were transformed by a transactional or market exchange model understanding of contract.[157] In America, the early common law of employment relations followed the English rule and relied upon a presumption that, unless the employment relation specified otherwise, the relation was intended to be long-term (usually one year) and further, could be terminated only after reasonable notice.[158] While American judges initially followed this rule,[159] the law in America soon broke with the English rule.

The shift in common law can be traced to the 1877 publication of a treatise on master-servant law, by an obscure Albany, New York, lawyer, Horace Gray Wood, which set forth what would become the majority rule in future decisions:

> With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring of will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. . . . [I]t is an indefinite hiring and is determinable at the will of either party.[160]

While Wood purported merely to describe the state of the law existing at his time, it is clear that the rule he advanced departed from the rule followed by common law judges sitting in 1877.[161] Wood's rule granted employers absolute control and power over the employment relations by transforming a status relationship into one governing a discrete contract transaction.[162] There now appears to be general agreement that Wood

156. Coppage v. Kansas, 236 U.S. 1, 17 (1911) (Pitney, J.).

157. The ascendancy of contract law was a relatively modern event in the development of the common law. That Blackstone devoted only forty pages to the subject in his four volume *Commentaries* suggests that eighteenth century lawyers subordinated contract law to the law of property. HORWITZ, *supra* note 21, at 162. By the close of that century there were signs that the common law was changing; courts upheld executory contracts and recognized the idea of expectation damages. *Id.* at 173. At this time the common law shifted its emphasis from such property ideas as possessing title to things to the notion that nontangible contract interests could be protected. "It is at this point that contract begins to be understood not as transferring the title of particular property, but as creating an expected return. Contract then becomes an instrument for protecting against changes in supply and price in a market economy." *Id.* at 174.

158. *See supra* notes 84-87 and accompanying text.

159. *See, e.g.*, Adams v. Fitzpatrick, 125 N.Y. 124, 26 N.E. 143 (1891); Davis v. Gorton, 16 N.Y. 255 (1857); *see also* Minda, *The Common Law of Employment At-Will in New York: The Paralysis of Nineteenth Century Doctrine*, 36 SYRACUSE L. REV. 939, 968-69 (1985).

160. H. WOOD, THE LAW OF MASTER AND SERVANT § 134 (1877).

161. *See* Feinman, *supra* note 74, at 126.

162. *See* Minda, *supra* note 159, at 982.

invented his own rule.[163]

Despite its questionable origins, Wood's Rule was quickly accepted by American courts as part of the common law.[164] The quick acceptance of Wood's Rule was certainly influenced by the emerging ideas of contract, which increasingly analyzed problems in terms of a market or commodity exchange process.[165] While prior to 1860 the law of employment had been rooted in master-servant relations and concepts of status, it later developed into a contract understanding of employer-employee relations in the context of a market economy that had been transformed by the industrial revolution.

Wood's Rule conceived the employment relation as the result of a discrete market transaction involving a contract for the sale of goods between strangers. The right of contract termination was determined exclusively in light of voluntary consent at the time of hire; reliance and expectation interests during the relation were either ignored or found to be irrelevant. The subject matter of the relation was "transactionalized" or "commodified" in the sense that the employment relationship was perceived as a series of one-shot transactions involving the exchange of commodities. Labor was thus treated like any other commodity subject to the exchange process.

The commodification of the employment relation reflected laissez-faire ideas about neutral markets and neutral law. Wood's Rule, for instance, marked a shift away from the paternalistic ethos of mercantile law, which had recognized obligations based on the master-servant relationship. The notion of paternalism had little place in a legal regime that attempted to structure order in the context of the impersonal market. The idea of a neutral state and neutral law provided the intellectual and political basis for advancing a view of labor relations as a component of "a neutral market society."[166] The employer's "unfettered" right to terminate employment relations was consistent with the view that favored non-intervention of the state in the market economy.

On the other hand, there were other common law cases decided at this time that broke from the values of laissez-faire, and endorsed the need for state interference and regulation. These cases were premised on the idea that freedom of contract may justify state intervention in order to preserve the benefit created by the parties' bargain. Instead of developing an understanding of the employment relation on the basis of absolute principles, or neutral law, these cases developed a view of employment based on the relationship between individuals.

163. *See, e.g.*, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341 (1974).

164. New York, for example, adopted the rule in the 1895 decision, Martin v. New York Life Ins. Co., 148 N.Y. 117, 42 N.E. 416 (1895).

165. *See* Vandevelde, *supra* note 114, at 333-40.

166. *See, e.g.*, Horwitz, *supra* note 115, at 69.

For example, an important aspect of the new contract analysis of employment relations was the idea that the law of contract might protect the employer's expectancy interests from third party interference. With the 1853 landmark decision in *Lumley v. Gye*,[167] the English courts recognized that the cause of action for enticement applied to protect the prospective interests created by an employment contract. In *Lumley*, a famous opera singer had signed an executory contract with Lumley, a theatre owner, for an exclusive performance on a particular date. The defendant, Gye, induced the singer to breach her contract with Lumley and perform at his theatre. A majority of the Queen's Bench held that Lumley stated a cause of action for the wrongful and malicious interference with his personal service contract.

By establishing a contract theory for the enticement action, *Lumley* enabled judges to provide expectation damages for the loss of expected profits and good will. As the law developed, judges began recognizing that intangible property was created by expectations and, like physical property, was worthy of legal protection. Under this view of contract, laissez-faire failed to produce the maximum public advantage.

The contract theory of *Lumley* opened the door for future courts to protect employer interests in employment at-will cases even where no contract had been breached. In *Walker v. Cronin*,[168] the Massachusetts Supreme Judicial Court held, in 1871, that a union could be liable in tort for maliciously inducing union members to leave their employment, even though the employment relation was terminable at-will. While the employer had no right to require his employees to remain in service, the court concluded that the employer had an existing contractual interest in the at-will contracts that could be protected against "malicious interferences."[169] By emphasizing the expectancy interests of the employer, the *Walker* court indicated that the gist of the action had little to do with procuring a breach of contract, but, rather, with the intentional interference with an expectancy interest created by the contract.

Wood's Rule and *Lumley* thus presented two different views of the work relationship. In the employment at-will cases decided after Wood published his treatise, the courts tended to treat the employment relation as a discrete market transaction involving a purchase and sale between strangers. The right of contract termination was determined exclusively in terms of contractually defined promises; voluntary consent became a crucial factor in determining the right of termination. On the other hand, in the interference tort cases decided after *Lumley*, judges tended to treat at-will agreements as establishing important reliance and expec-

167. 2 El. & Bl. 216, 118 Eng. Rep. 749 (K.B. 1853).

168. 107 Mass. 555 (1871).

169. *Id.* at 563-64.

tation interests independent of specifically defined promises. In the interference tort cases, the at-will contract was seen to give rise to valuable expectancy interests of the employer which the law would protect against third party inferences.[170] In the at-will termination cases, the same relation was seen to be freely terminable by the employer, even for a wrongful reason, provided the agreement was silent on the employee's right to security. The expected value of the employer was protected in the interference cases; whereas, the expectancy interests of the employee were ignored in the termination cases. In both cases, judges asserted a free contract rationale for their decision.

These two different ways of analyzing employment contracts served to legitimate legal outcomes understood as the product of the "free will" of contracting parties. Under Wood's Rule, the employer's unfettered right to terminate an at-will employment relation was explained as the product of the bargain struck by the parties. In cases following *Lumley*, the employer's expectancy interests in at-will contracts was protected in order to protect the value created by contract. Notions of free exchange and market value were the hinge upon which the oscillation between the two different understandings of employment contract turned.

These different views of employment contracts also worked against the interests of labor combinations. By the turn of the century, the contract justification for Wood's Rule was used in nearly every state to allow employers to employ workers under contracts forbidding membership in a union, so-called "yellow-dog" employment contracts. The Rule gained full constitutional status as a result of the Supreme Court's substantive due process decisions in *Adair v. United States*[171] and *Coppage v. Kansas*.[172] In *Adair* the Court held that a federal law prohibiting "yellow-dog" employment contracts was unconstitutional, because it violated freedom of contract and thus abridged substantive rights guaranteed by the fifth amendment. The Court applied the *Adair* precedent in *Coppage* to hold unconstitutional a state statute forbidding yellow-dog contracts. The Court had little trouble finding that labor was uncoerced in being forced to choose between their job and joining a union, because it viewed the work relation as an exchange relation. As Justice Pitney explained for the Court in *Coppage*:

> [t]he term "coerce" [cannot be applied] to the mere insistence by the employer, or its agent, upon its right to prescribe terms upon which alone it would consent to a continuance of the relationship of employer and employee. . . . Of course, if . . . the representative of the railway company

170. *See* Minda, *supra* note 159, at 981-86.

171. 208 U.S. 161 (1908).

172. 236 U.S. 1 (1915). *See also* Casebeer, *Teaching An Old Dog Tricks: Coppage v Kansas And At-Will Employment Revisited*, 6 CARDOZO L. REV. 765 (1985); Lesnick, *The Consciousness of Work And the Values of American Labor Law*, 32 BUFFALO L. REV. 833 (1983).

> was otherwise within his legal rights in insisting that [the employee] should elect to remain in the employ of the company or to retain his membership in the union, that insistence is not rendered unlawful by the fact that the choice involved a pecuniary sacrifice to [the employee].[173]

The concept of economic liberty advanced by Justice Pitney in *Coppage* viewed free trade as an autonomous exchange process involving the exercise of free wills.[174] When the employment relation is viewed as merely an exchange of services for wages, it becomes easy to understand why judges would not find coercion in a requirement that forced an employee to choose between a job or a union.[175] In *Coppage*, the legal constraints of the negotiation were deemed fair and just in the absence of physical duress. Economic duress resulting from economic disadvantage was irrelevant because the common law had replaced the labor theory of value of property with a concept of value based on a contract theory of market exchange.[176]

The "yellow-dog" contract was enforced, because the Supreme Court concluded that the employment contract had positive market value that deserved to be protected from interference.[177] Once the employment relation was created, it gave rise to an exchange-value which, like physical property, deserved legal protection. It made no difference whether the contract was terminable at-will, since after *Lumley* the courts recognized that even prospective contracts created value. On the other hand, arguments seeking to abolish the yellow-dog contract tried to undermine the exchange-value process by establishing that labor could not be treated as a commodity under the contract.

2. Commonwealth v. Hunt

> *"The legality of a combination depends upon the purpose sought to be accomplished and the ends used to effect these ends."*[178]

In *Commonwealth v. Hunt*, members of the Boston Journeymen Bootmaker Society had been convicted in the trial court of acting in concert in refusing to work for any employer who hired nonunion labor. Chief Justice Shaw of the Massachusetts Supreme Court reversed the convictions, holding that neither the purpose of the combination nor the means employed were unlawful.[179] In the absence of evidence of an unlawful means or unlawful objective, a combination of workers seeking

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173. 236 U.S. at 8-9.

174. *See* Lesnick, *supra* note 172, at 843-44.

175. *Id.* at 843.

176. For modern libertarian legal scholars such as Richard Epstein, this view has continuing merit, for in his view "[i]t is too much to ask of any system of rules that it correct whatever asserted social imbalances exist before the contract formation." Epstein, *supra* note 3, at 1372.

177. *See* Casebeer, *supra* note 172, at 770-83.

178. Commonwealth v. Hunt, 45 Mass. 111, 123 (1842).

179. *Id.*

higher wages was not unlawful. The earlier conspiracy cases were narrowly distinguished on the ground that labor combinations were criminal only if the means and the ends of the combination were deemed illegal.

Hunt did not signal a more hospitable era for labor combinations. In fact, while the *Hunt* decision was instantly regarded as a "landmark" decision[180] and frequently cited as establishing the legality of labor organizations and their right to strike, the decision apparently had comparatively little immediate effect upon the development of the law of labor combinations.[181] The real significance of *Hunt* was the new tort theory of liability it advanced for dealing with labor combinations.

In commenting on the criminal indictment brought against the union in *Hunt*, Chief Justice Shaw posed the following hypothetical to illustrate a point about competition of business and labor:

> Suppose a baker in a small village had the exclusive custom of his neighborhood, and was making large profits by the sale of his bread. Supposing a number of those neighbors, believing the price of his bread too high, should propose to him to reduce his prices, or if he did not, that they would introduce another baker; and on his refusal, such other baker should, under their encouragement, set up a rival establishment, and sell his bread at lower prices; the effect would be to diminish the profit of the former baker, and to the same extent to impoverish him. And it might be said and proved, that the purpose of the associates was to diminish his profits, and thus impoverish him though the ultimate and laudable object of the combination was to reduce the cost of bread to themselves and their neighbors. The same thing may be said of all competition in every branch of trade and industry; and yet it is through that competition, that the best interests of trade and industry are promoted.[182]

In Shaw's view, there was little difference between business combinations which boycott competitors and the labor boycott involved in *Hunt*. Economic injuries resulting from boycotts in either case are lawful so long as those involved utilized "fair and honorable and lawful means" and the end was one which benefited the public at large.[183]

The problem, of course, was that the ends-means test placed judges in position of deciding for themselves if a particular means or ends adopted by labor was "honorable" or "lawful." The old "repressive" regime of labor conspiracy was merely transferred to a new framework of

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180. *See* Nelles, *supra* note 119. Herbert Hovenkamp has called the *Hunt* decision "the most important American labor combination case of the first half of the nineteenth century." Hovenkamp, *supra* note 1, at 923.

181. There were only three conspiracy cases involving labor unions in the next twenty years following Chief Justice Shaw's decision in *Hunt*. The absence of criminal indictments may be explained by the almost complete absence of strikes during this period. *See* Witte, *supra* note 82, at 829. It was not until around 1869-1870 that the doctrine of criminal conspiracy passed out of vogue in the common law of labor combinations.

182. 45 Mass. at 134.

183. *Id.*

analysis under which judges during the 1880s reached substantive conclusions not unlike those reached by judges in the years prior to 1842.[184] Judges could now declare lawful the right of workers to join unions and to peacefully combine in pursuit of higher wages, and yet uphold civil and criminal labor prosecutions on the ground that an unlawful means or objective had been utilized by labor in pursuit of its otherwise lawful rights. Treatise writers could now record the beginning of the "modern law of labor combinations"—a period in which "the legal battle ground [had] shifted from a fight over the right of labor unions to exist to a contest as to what means may lawfully be used by labor organizations in the economic struggle over the price of labor."[185]

Nevertheless, *Hunt* is an important decision because it foreshadows the development of modern labor and trade regulation doctrine. In creating a dichotomy between lawful and unlawful means and ends, *Hunt* spawned a new interest-balancing analysis for rationalizing the contradictions of the labor combination cases. The means-ends test would therefore simultaneously authorize and limit the exercise of individual freedom in workplace disputes.

The means-ends test was destined to fail because it too lacked a method for deciding whether a particular means or objective of labor should be classified as lawful or unlawful. Because there was no rational theory that common law judges could look to in deciding whether a secondary boycott or a strike to obtain a closed shop was an unlawful means or objective, decisionmaking was indeterminant.[186] The underlying dichotomy, like so many others, was not grounded in a theory which would help judges to make the crucial legal classifications. Each judge subjectively had to determine whether the union was pursuing legitimate or illegitimate means or objectives. The analytic loop ultimately led to subjective decision making and the charge: "Government by judges, not law."[187]

Criminal and civil prosecutions for labor conspiracies became comparatively insignificant after *Hunt* was decided. An even more powerful

184. The relevant case law is discussed by Professor Hurvitz in his study of the early boycott cases of New York and Pennsylvania. *See* Hurvitz, *supra* note 76, at 320-28.

185. F. Sayre, *Survey*, Jan. 7, 1922, at 558, *cited in* Witte, *supra* note 82, at 825.

186. *See, e.g.*, State v. Glidden, 55 Conn. 46 (1887); State v. Stewart, 59 Vt. 273, 9 A. 559 (1887); *State v. Donaldson*, 32 N.J.L. 151 (1867); *see generally*, WELLINGTON, LABOR AND THE LEGAL PROCESS 7-46 (1968).

187. It is also "well-known history" that the judges who were called upon to decide labor cases at this time reflected sympathies and prejudices that brought them to restrain unions and their activities as effectively as they had in the criminal conspiracy cases. Without question, the ends-means test, was an open invitation for judges to decide these cases in accordance with their personal values and prejudices. According to Harry Wellington, the result was that "[t]he growth and development of unions and of collective bargaining was wrongly impeded, the courts were rightly viewed as instruments of the employer class; they were brought into disrepute, and their general effectiveness was reduced." WELLINGTON, *supra* note 186, at 26.

weapon had been discovered for impeding labor union activities—the labor injunction and civil damage remedy.[188] The gradual decline in criminal labor conspiracy prosecutions thus changed neither the role of the courts nor the thrust of the law in its opposition to labor. By the conclusion of the Civil War, litigation involving labor union activity had merely shifted from the criminal to the civil side of the state and federal courts.[189] The logic of the criminal conspiracy doctrine was transformed to create a new unified doctrine for imposing civil liability in tort. This new tort doctrine also promised to revolutionize the law of labor and business combinations by providing a new unified legal theory for both.

III

THE FORMATIVE ERA: THE AGE OF COMBINATION

By the end of the nineteenth century, common law thinking was influenced by major social, economic and political transformations unfolding in society. With the rise of the industrial revolution, a movement toward new forms of organization was occurring on a massive scale in the labor and product markets. With the birth of the modern corporation and the industrial trade union organization, the common law began to recognize competition as a legal form of struggle representing the expression of the evolutionary nature or of what Justice Holmes called the "free struggle for life."[190] In this modern "formative" era,[191] the common law sought to accommodate the power associated with corporations and unions. The organizational impulse of the late nineteenth century encouraged lawyers to think of free trade and competition as natural processes that ultimately led to a natural tendency to combine.[192] These impulses ultimately led to doctrinal disintegration.

A. The Combination Movement

"Competition is a fetish that men ignorantly worship, but the cult has had

188. *See* Witte, *supra* note 82; *see also*, F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION (1930). For a description of the background of the origins of the Labor Injunction, see Nelles, *A Strike and Its Legal Consequences: An Examination of the Receivership Precedent for the Labor Injunction*, 40 YALE L.J. 507 (1931); Bonnett, *The Origin of the Labor Injunction*, 5 S. CAL. L. REV. 105 (1931).

189. *See* Witte, *supra* note 82, at 826.

190. Vegelahn v. Guntner, 167 Mass. 92, 107, 44 N.E. 1077, 1081 (1896) (Holmes, J., dissenting).

191. Labor and antitrust scholars frequently cite the period from 1880-1911 as the "formative" era, because it was the time when the common law shifted to new conceptions of trade restraint law. *See, e.g.*, Hovenkamp, *supra* note 1; *see also supra* note 11.

192. *See* Peritz, *"Rule of Reason"*, *supra* note 1, at 306. These same "impulses" influenced the development of the industrial organization theory of economics, inspiring economists at the turn of the century to advance economic arguments in defense of business "trusts." *See* Hovenkamp, *supra* note 17, at 126-27.

its day, the sanctity of the god is being assailed . . . ."[193]

The unprecedented change caused by the growth of large industrial business and labor organizations placed in doubt the classical legal and economic theories which assumed that free trade was motivated by the natural tendency of man to compete.[194] Between 1897 and 1903 union membership quadrupled and capital concentration increased at an unprecedented rate.[195] The country was experiencing profound change and discontinuity. As Lawrence Friedman observed, "[b]etween 1847 and 1900 the population swelled; the cities grew enormously; the Far West was settled; the country became a major industrial power, transportation and communication vastly improved; overseas expansion began."[196] While Willard Hurst described the feeling before 1850 as the great "release of energy," the theme at the end of the nineteenth century was, in Friedman's view, "a narrowing sky, a dead frontier, life as a struggle for position, competition as a zero-sum game, the economy as a pie to be divided, not a ladder stretching out beyond the horizon."[197] One of the basic changes occurring at this time in response to the "narrowing" of perspective was the propensity of Americans to form and join groups for self-protection, to integrate activities and accumulate wealth.[198]

The propensity towards groups reflected a new attitude about collec-

193. A. EDDY, *supra* note 152, at 2.

194. What was questioned was the belief that the natural tendency to compete would overcome the then current wave of combination. Indeed by 1890, it was apparent that the combination movement was hardly a momentary aberration in the natural development of competitive markets. The incredible growth of big business following the civil war made it abundantly clear that there was a long-term combination tendency emerging in the commercial economy. This was, after all, the period in American history where the giant business trusts came into existence and multiplied at an exponential rate. The Standard Oil trust first appeared in 1882, and major trusts organized in the Cotton Oil, Sugar, Whiskey, Envelope, Cordage, Oil-cloth, Paving-pitch, School-Slate, and Meat industries soon followed. The Trusts and subsequently the holding companies of the 1880s established the organizational basis for the modern corporations of the twentieth century. At approximately the same time in American history there was a similar combination tendency occurring in the labor markets of the economy. *See, e.g.*, L. FRIEDMAN, CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC STUDY 17-26 (1965); J. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 6, 71-78 (1975).

195. *See* HURST, *supra* note 194. The concentration of economic power "tied the lives of an increasing proportion of people to the market and the division of labor; they were either wage or salary earners, or small producers or traders in specialized ranges of goods or services." *Id.* at 75. In the labor market, concentrations began to grow with the formation of the Farmers' Alliance, the Knights of Labor, and the American Federation of Labor. *Id.* Beginning sometime after 1850, workers, first in the skilled crafts and later in the non-skilled industrial industries, joined large international unions and demanded that their employers engage in a collective effort to determine wage rates and many other terms and conditions of employment. By 1870, combinations of workers were seriously confronting the power of giant business combinations. *See generally* S. PERLMAN & P. TAFT, HISTORY OF LABOUR IN THE UNITED STATES, 1896-1932 (1935).

196. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 295 (1973).

197. *Id.* at 296.

198. *Id.*

tivities and organization.[199] The movement toward ever-increasing combinations led some to believe that concentration of labor and capital would ultimately lead to "the organization of the world"[200]—one big union and one big trust which would undermine the atomistic order of competitive markets and the individualistic ethic.[201] These changes ultimately called into question the notion that trade restraint law could be rationally organized on the basis of a legal structure founded upon contract, property or tort.

The new "release of energy"[202] also called for a new common law of trade restraint, which would be more responsive to the needs of organizations. A new approach was necessary because the older property and contract ideas based on individualistic values no longer served a society that was being transformed by the "combination tendency."[203] For some, this "tendency" meant a loss in belief in laissez-faire individualism.[204]

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199. The new forms of organizations were more than just new ways of organizing labor or capital. As Professor Friedman has observed, "[O]rganization in the later half of the 19th century was more than a matter of clubs and societies. Noticeably, many strong interest groups developed—labor unions, industrial combines, farmers' organizations, occupational associations—to jockey for position and power in society. These groups molded, dominated, shaped American law." *Id.* at 296-97.

The emergence of the modern corporation and its counterpart, the modern labor union, presented a major challenge to a system of law which was committed to individualistic notions of freedom of contract and trade. Both the corporation and the labor union are, after all, prominent examples of non-individualistic or collectivist legal institutions. It would be difficult for these new organizations to survive in a legal world which had an exclusively individualistic mindset, unless the creative energies of individualism could find a way to allow these associations to exist as individual entities. First, the new organizations asserted collective interests which sought expression in the law independent from that of the individual. Second, the new forms of organization needed a legal basis for excluding and defining who was in and who was out of the organization.

The pressure to accommodate and legitimate the new forms of organization led to the development of new legal doctrines. In corporation law, for example, the Supreme Court in an 1886 decision, Santa Clara Co. v. Southern Pac. R.R., 118 U.S. 394 (1886), declared that a corporation was a "person" under the 14th Amendment, and thus entitled to the same protection that is normally accorded individuals. The decision gave rise to the "entity theory" of the corporation which has in turn provided the courts with the basis for treating corporations and other associations as "an artificial aggregation of individuals." *See* Horwitz, *supra* note 106. This "artificial entity" theory of the corporation had the effect of legitimating large scale business enterprises within a legal system that was hostile to state regulation of business.

Just the opposite development, however, can be identified in the early development of legal concepts applied to labor unions and conspiracies in restraint of trade. As Christopher Tomlins has observed, the common law of trade restraints denied labor organizations a lawful personality or legal entity. C. TOMLINS, *supra* note 1, at 59.

200. Vegelahn v. Guntner, 167 Mass. 92, 108, 44 N.E. 1077, 1081 (1896) (Holmes, J., dissenting).

201. Some thought that business combinations arose as the natural result of "a survival of the fittest." Thus John D. Rockefeller proclaimed that big business and the trusts were "merely a survival of the fittest . . . the working out of a law of nature and a law of God." W. GHENT, OUR BENEVOLENT FEUDALISM 29 (1902), *cited in* May, *supra* note 1, at 568 n.370.

202. HURST, *supra* note 194, at 6; *see also supra* note 189.

203. O. W. HOLMES, COLLECTED LEGAL PAPERS 279-82, 293-97 (1920).

204. In the popular and intellectual literature of the late nineteenth century there was a substan-

The combination movement in America thus presented the legal system with the necessity of choosing not only between free trade policies favoring either competition or combination, but also choosing between interests represented by labor and capital. There were at least three general alternatives for dealing with the combination movement. One alternative was to treat the movement as a natural development of competition and to accept combinations as beyond the law's capacity to prevent or regulate. Classical legal and economic theories, for example, suggested that legal intervention was unnecessary because the "natural tendency to compete would overcome the wave of combinations."[205] A second alternative, suggested by nineteenth-century legal treatise writers such as Eddy, was to treat the trend to combination as the inevitable by-product of the demise of competitive markets that the legal system should either ignore or affirmatively encourage in light of sound public policy.[206] A third alternative was to see the movement toward combination as evidence that the existing laws or ground rules of competition had gaps or ambiguities that needed to be corrected.[207]

B. The Rise and Fall of the Common Law's Unified Approach

"Competition, then, is the legalized form of struggle for annihilation."[208]

In the formative era, Anglo-American law moved to a new common law of trade restraints based on what drafters of the Sherman Antitrust Act characterized as industrial liberty.[209] In building on the constitutional liberty of contract cases,[210] judges advanced the idea that indus-

tial body of opinion renouncing the faith of legal individualism and advocating the new faith in the benefits of combinations and collectivist structures. *See*, Hovenkamp, *supra* note 1, at 935-45.

205. Peritz, *"Rule of Reason"*, *supra* note 1, at 306-07.

206. *See* A. EDDY, *supra* note 152, at 10-11.

207. It is to this view that the American legal system turned in the modern era. *See infra* notes nn. 262-395 and accompanying text (Part IV).

208. A. EDDY, *supra* note 152, at 20 (quoting A.T. HADLEY, DICTIONARY OF PHILOSOPHY AND PSYCHIATRY (J.M. Baldwin ed.)).

209. *See, e.g.*, Peritz, *"Rule of Reason"*, *supra* note 1, at 292-97 (describing the notion of industrial liberty as it existed in the competition logic of various legislators who ultimately drafted the Sherman Antitrust Act of 1890).

210. By the end of the nineteenth century the Supreme Court, as part of its substantive due process theory, adopted the notion that freedom of contract was a "liberty" guaranteed by the due process clause of the constitution. Allgeyer v. Louisiana, 165 U.S. 578 (1897). After 1900 the Supreme Court used the notion of a constitutional liberty of contract to invalidate state laws regulating conditions of labor. *See, e.g.*, Adkins v. Childrens Hospital, 261 U.S. 525 (1923); Lochner v. New York, 198 U.S. 45 (1905).

The substantive due process liberty of contract cases were themselves informed by the common law understanding of free markets as supposedly neutral ordering devices. As Cass Sunstein has noted, "[m]arket ordering under the common law was understood to be a part of nature rather than a legal construct, and it formed the baseline from which to measure the constitutionally critical lines that distinguished action from inaction and neutrality from impermissible partisanship." Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987). This element in the liberty of contract cases served to develop the logic that business organizations had associational liberties which protected

trial organizations, like people, had "liberties" which the law would protect under a free trade policy. These liberties were structured by the two natural tendencies of free trade—competition and combination. Judges saw these tendencies as establishing the freedom of business from both governmental power and, paradoxically, the restraining consequences of market power.

Notions of industrial liberty, however, did not extend to labor organizations in the same way.[211] Labor organizations, because they were not viewed as legal entities capable of exercising collective freedoms, were perceived as inherently threatening to industrial liberty.[212] While the common law would uphold the freedom of each worker to join a union, judges would unhesitatingly restrain the coercive effect of worker combinations in limiting the exercise of entrepreneurial interests.[213] The liberties of labor organizations were instead structured by individualistic notions of free trade that recognized the right of individuals to combine for mutual support and self-protection, except when such combination threatened the liberty of another.

This curious development in the common law of trade restraints occurred in the context of early decisions in England and America involving claims by labor and merchants that they had been injured by competition, as well as American cases involving the right of laborers to picket and boycott for higher wages. These early tort cases encouraged judges to justify a common law doctrine for labor and business that attempted to reconcile the tension between free trade as competition or combination.[214] The early labor picketing cases in America, however, served to illustrate that the notion of legal justification required a policy judgment which could only be determined on the basis of a value judgment concerning the underlying economic and ideological controversy involving labor and management. Just as the reality of social power could not be assumed away through a belief in the objective nature of the common law, judges were forced to create legal justifications that at-

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them from unreasonable interference. *See, e.g.*, Hovenkamp, *supra* note 103, at 1631 (discussing the rate regulation cases, such as Munn v. Illinois, 94 U.S. 113 (1877)).

211. *See, e.g.*, Hurvitz, *supra* note 76 (describing how notions of entrepreneurial property rights were defined to restrict the liberties of labor organization in period from 1886-1895).

212. *See* Hovenkamp, *supra* note 1, at 959-60.

213. *See* Hurvitz, *supra* note 76, at 361.

214. *Id.* at 333-54. The idea that competition might be legally protected was a well recognized principle at the turn of the century. *See* Singer, *The Legal Rights Debate in Analytical Jurisprudence From Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 982, 1012-13. John Salmond argued that "[c]ompetition, though hurtful to individuals, is not wrongful." J. SALMOND, FIRST PRINCIPLES OF JURISPRUDENCE 160-61 (1893). Statements such as Salmond's reflected the emerging idea that economic liberty corresponds to the freedom to interfere with the property interests of others; that property restrains competition. *See* Peritz, *"Rule of Reason"*, *supra* note 1, at 303-13 (discussing the property logic of the common law on the eve of the Sherman Act).

tempted to make the rule of law consistent with the reality of social and economic inequality and domination.

1. The Labor-Merchant Cases

> *"Partnerships, corporations, trusts, are all in the direction of more for less money; labor unions and farmers' organizations are all in the direction of less for more money."*[215]

In the view of the legal system, competition provided a broad justification for the infliction of economic harm whenever the injury was found to be the result of "fair" competition. In doing so, judges purported to evaluate labor and business combinations under the same legal standards. The notion of legal justification, however, meant different things for business and labor. An example of this can be drawn from a pair of Massachusetts decisions decided in the mid-nineteenth century.

In *Bowen v. Matheson*,[216] the Massachusetts Supreme Court decided in 1867 that a combination of Boston shipping masters could lawfully exclude a competitor from the market by refusing to deal with nonmembers. A combination of businessmen could thus claim that their industrial liberty granted them a broad privilege to inflict economic harm on a competitor. According to Judge Chapman:

> If their effect is to destroy the business of shipping masters who are not members of the association, it is such a result as in the competition of business often follows from course of proceeding that the law permits. New inventions and new methods of transacting business often destroy the business of those who adhere to old methods. Sometimes associations break down the business of individuals, and sometimes an individual is able to destroy the business of associated men. It would be nothing novel if the plaintiff in the exercise of his ingenuity should in his turn adopt some improvement that shall compel the defendants to dissolve their connection.[217]

In *Carew v. Rutherford*,[218] a case decided three years after *Bowen*, Judge Chapman refused to follow his own precedent. In *Carew*, the plaintiff had made a contract to furnish stone for the construction of a cathedral in Boston, and had employed journeymen to do the work. The defendants were members of a union representing stonecutters in Boston. The defendants passed a resolution and fined the plaintiff, a non-member, five hundred dollars for having certain stonecuttings done in New York. The plaintiff paid the fine and then brought suit to recover the money paid. Judge Chapman concluded that the association's fine amounted to duress and was thus not justified as a "fair" method of competition.

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215. A. EDDY, *supra* note 95, at 51.
216. 96 Mass. 499 (1867).
217. *Id.* at 503-04.
218. 106 Mass. 1 (1870).

Consequently, the defendants were liable for all damage resulting from their concerted refusal to deal with a competitor.

In defending his decision, Judge Chapman acknowledged the principle he had relied upon in deciding the *Bowen* case:

> Every man has a right to determine what branch of business he will pursue, and to make his own contract with whom he pleases and on the best terms he can. He may change from one occupation to another, and pursue as many different occupations as he pleases, and competition in business is lawful. He may refuse to deal with any man or class of men.[219]

This principle did not apply, however, because Chapman concluded that the extraction of a five hundred dollar fine was an "unfair" method of competition.[220] Injuries resulting from competition were actionable in tort, because the defendant journeymen were found to have engaged in fraud, disparagement or coercion. The *Carew* outcome was thus explained on the basis of "facts" demonstrating that the union's conduct amounted an "unfair" method of competition causing injury.

However, Judge Chapman failed to explain why on the one hand, the five hundred dollar fine in *Carew* was unfair, yet, on the other hand, the exclusion of a competitor from the market in *Bowen* was fair. Why should the union's refusal to deal in *Carew* be treated differently from the concerted refusal to deal in *Bowen* which had the consequences of destroying a competitor's business, an injury which might far exceed $500? For that matter, why should the conduct of the union in *Carew* be treated differently from an lawful strike for higher wages? For example, Charles O. Gregory has argued that the union's motive in *Carew* was quite reasonable when judged in light of the organization's interest in protecting trade standards.[221] Certainly, the imposition of a fine is in substance no different from concerted pressures of a strike for future wage rates.[222] Gregory concluded that these cases reflected an underlying bias that certain methods of competition were fair and others were not.

Chapman's decision in *Bowen*, however, was consistent with the rules applied by the English House of Lords in *Mogul Steamship Company v. McGregor*.[223] *Mogul*, an 1892 decision, held that a combination of shippers could lawfully exclude rival competitors by predatory pricing

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219. *Id.* at 14.

220. The defendants were found to have acted with the unlawful object of restricting the plaintiff's business by obtaining from him a sum of money which he was under no legal duty to pay. *Id.* at 15. In other words, the legal justification of *damnum absque injuria* failed, because the court found that a particular method of competition was *damnum et injuria*.

221. C. GREGORY & H. KATZ, *supra* note 74, at 55-59.

222. *Id.*

223. 23 Q.B.D. 598 (1889), *aff'd*, 1892 App. Cas. 25. The common law of trade restraint of England is highly relevant, because the early American labor and trade restraint cases relied heavily upon English precedent.

even though they intended to inflict serious economic harm. The *Mogul* decision was important because it established what seemed to be a clear immunity for business combinations which inflict economic injuries through the exertion of competitive power.

The *Mogul* decision was also significant because the court's opinion suggested that a similar result might apply to labor organizations. In *Allen v. Flood*,[224] for example, a majority of the House of Lords seemed ready to extend the broad immunity principle of *Mogul* to cover the activities of labor organizations. In *Allen*, the majority concluded that it was not tortious conduct for a group of union workers to refuse to work for a third party that employed members of rival union, even though their conduct was activated by malice.[225] *Allen*, together with *Mogul*, suggested that the questions of intent, malice and combination were irrelevant to the question of liability for economic harms resulting from competition.

But, three years after *Mogul* was decided, the House of Lords held in *Quinn v. Leatham*[226] that a union's secondary boycott of a non-union employer was actionable as a civil conspiracy for the malicious purpose of injuring a third party. *Mogul* was distinguished on the purported ground that the defendants could not justify their conduct as legitimate trade competition. The court distinguished *Allen* on the ground that the defendant had acted individually and had not conspired with others as in *Quinn*. Thus, evidence of malice and conspiracy was the basis for distinguishing the contrary principle established by *Mogul* and *Allen*.

These factual distinctions are tenuous at best, given that in all three cases the defendants were seeking to expand their scale of operations at the expense of a rival organization. The only real difference in these cases was that *Mogul* and *Bowen* dealt with business combinations while *Quinn* and *Carew* concerned labor combinations that were seeking to monopolize their operations. Either *Quinn* and *Carew* were flatly inconsistent with *Allen*, *Mogul* and *Bowen*, or the law was developing a double standard in *Quinn* and *Carew* favoring business at the expense of labor organization.[227]

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224. (1898) A.C. 1.

225. *Id.* at 151.

226. (1901) A.C. 495.

227. *See* C. GREGORY & H. KATZ, *supra* note 74, at 46-51. The reasoning exhibited in the House of Lords Trilogy—*Mogul*, *Allen* and *Quinn*—and its American counterpart—*Bowen* and *Carew*—has been subjected to scholarly criticism. One powerful argument that the legal realists put forward in the 1920s and 1930s, attacked the reasoning process the judges employed in cases following the English trilogy. *E.g.*, Cook, *Privileges of Labor Unions in the Struggle for Life*, 27 YALE L.J. 779, 787-90 (1918). The realists showed that the courts in these cases spoke of liberty of contract and the privilege of competition and then assumed it to be a matter of logical deduction that the existence of a privilege establishes the basis for the recognition of some right. They demonstrated that privilege and right are not correlatives; even if the defendant has a privilege to enter into a market that does not establish a right of access. The distinction between "rights" and "privileges" or

In finding that the competitive injury in the business cartel cases was justified, judges believed that the injury was the natural consequence of competition, because they assumed that systematic infliction of harm was a daily occurrence in the marketplace. In developing the notion that an interference with another's business was an actionable wrong in the labor combination cases, judges were adhering to a system of "industrial liberty" which viewed labor boycotts as a threat to entrepreneurial property rights.[228] Since labor combinations were thought to threaten the market value of production, and since market value was the measuring rod of the protection afforded property, it made sense to restrict the organizational "liberties" of laborers. Moreover, with the rapid growth of large industrial enterprises, entrepreneurs faced loss of control over their capital, if they were denied legal protection against "interference" from workers claiming higher wages and participatory rights. Common law judges saw nothing inconsistent in finding that business organizations could exercise a liberty which had value as property, while at the very same time denying the liberties of labor combinations because they threatened entrepreneurial property.

The inconsistencies in the Massachusetts boycott cases and in those of the English House of Lords Trilogy were the result of an attempt to reconcile the tension between different views of free trade by emphasizing the interests and values of market exchange and entrepreneurial property as opposed to fairness, equality and solidarity. In the labor cases, "freedom of trade" became a principle that protected the right to do business and the right to work against the interferences of workers' concerted activities. In the business combination cases, however, "freedom of trade" embraced the opposing principle that recognized the legitimacy of contracts and combinations even when they might restrain the freedom of others.

The common law thus reflected different visions of free trade that privileged particular conceptions of free trade over others. Opposing conceptions of free trade were, however, always present and capable of "undoing" the coherence of doctrine by revealing how alternative free trade arguments could support contrary legal positions and outcomes. Hence, while judges believed that their vision of free trade was predicated on a coherent conception of free trade, the existence of opposing conceptions of free trade served to undermine the foundation or completeness of

"liberties" is based on Wesley Hohfeld's celebrated article, *Fundamental Legal Conceptions*, 23 YALE L.J. 16, 59 (1913), 26 YALE L.J. 710 (1916-17).

228. *See, e.g.*, Hurvitz, *supra* note 76, at 327-56 (examining the logic of the labor boycott cases in the formative era, 1886-1895); Hovenkamp, *supra* note 1, at 935-48 (examining the intellectual history of legal and economic writers and the theory of competition in approximately the same time frame, 1880-1930).

their decisions.[229] The possibility of legal revision was always possible, given that free trade derived meaning from the mutually opposing concepts of competition and combination.

2. *Labor Picketing and Doctrinal Disintegration*

> *"One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return."*[230]

The first cases to confront the judiciary with the disharmony of the common law rules were the labor picketing cases decided at the end of the nineteenth century. In *Vegelahn v. Guntner*[231] the majority of the Massachusetts Supreme Court upheld an injunction that prohibited workers from peacefully picketing to persuade other workers not to work for the employer. The specific issue was an open question in Massachusetts, since no court had established rules on the legality of peaceful picketing in a case where no physical interference was established and where there was no claim that an existing contractual relation was impaired. The majority enjoined the picketing on the ground that threats of violence might be implied from the conduct of the strikers, since moral intimidation fell outside the realm of allowable competition.

In a now famous dissent, Justice Holmes concluded that unity of organization is necessary to make the contest of labor effectual in its "free struggle for life."[232] According to Holmes:

> Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.[233]

Holmes' vision of free trade emphasized that the law may have purposes other than the prevention of harm, and that judicial consideration of other purposes might establish a privilege allowing a group of workers to inflict economic harms.[234]

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229. A deconstructive history of early trade restraint doctrine thus reminds us that the history of free trade concepts is not a history of individual legal concepts of free trade frozen within particular historical periods, but rather a history of "favored conceptions held in opposition to disfavored conceptions." Balkin, *supra* note 2, at 753 (footnote omitted).

230. 167 Mass. 92, 108, 44 N.E. 1077, 1081 (1896) (Holmes, J., dissenting).

231. *Id.* 167 Mass. 92, 44 N.E. 1077 (1896).

232. *Id.* at 107, 44 N.E. at 1081 (Holmes, J., dissenting).

233. *Id.* at 108, 44 N.E. at 1081.

234. *See also* Singer, *supra* note 214, at 1040-42 (discussing Holmes' theory of legal justification stated in his famous article, *Privilege, Malice and Intent*, *supra* note 29. In *Vegelahn*, Holmes expounds ideas of legal privilege to refute the idea that free competition is necessarily incompatible with exclusion of competitors. That the combination of workers might injure the business of the employer was consistent with his understanding of free competition. According to Holmes, free competition meant the freedom actually to injure a competitor so long as legitimate methods of rivalry were utilized and the struggle conformed to generally recognized rules of conduct. Thus,

An alternative view of free trade, however, was expressed by Judge Allen for the majority. Instead of focusing on the necessity of combination as a means for effective competition, he emphasized the destructive impact of combination as the crucial element of the wrong to be enjoined. According to Allen's opinion:

> A combination among persons merely to regulate their own conduct is within allowable competition, and is lawful, although others may be indirectly affected thereby. But a combination to do injurious acts expressly directed to another, by way of intimidation or constraint, either of himself or of persons employed or seeking to be employed by him, is outside of allowable competition, and is unlawful.[235]

The disagreement between these two jurists reflects the contradiction of the two understandings of industrial liberty at common law. Judge Allen's majority decision reflected the view that contract and property were essential values furthering industrial liberty. When he stated that "[a]n employer has a right to engage all persons who are willing to work for him, at such prices as may be mutually agreed upon,"[236] Allen was asserting a view of industrial liberty associated with early nineteenth century views as expressed, for example, in the Philadelphia *Cordwainer's Case*. By contrast, Holmes' view of competition reflected the perspective of the early unfair competition cases—that competition is a privilege which can be restrained only if a justification can be established.

Holmes' concept of privilege, like the concept of justification in the unfair competition cases, was in fact an open-ended standard which required judges to consider the nature of the damage and the effect of the act, and to compare them.[237] According to Holmes, the judge's task was to decide cases on the basis of the policy and purpose underlying the law. Claims of privilege or justification require judges to decide questions of policy which must be determined by the particular character of the case and will depend on different reasons according to the nature of the affair.[238]

Holmes' concept of privilege was in fact a plea for judges to be more self-conscious about their policy analysis. In his view, there may be sound reasons for allowing people to inflict damage on each other, but that "in all such cases the ground of decision is policy; and the advantage to the community, on the one side and the other, are the only matters really entitled to be weighed."[239] His concept thus embraced contradictory purposes. The tension between free trade as competition and as

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Holmes assumed that the inefficient, below-standard competitor would be excluded by superior rivals in the contest of free competition on the merits.

235. 167 Mass. at 98-99, 44 N.E. at 1077-78.

236. *Id.* at 97, 44 N.E. at 1077.

237. *Id.*

238. *Id.*

239. Holmes, *supra* note 29, at 9. *See also* Singer, *supra* note 214, at 1041.

combination would in Holmes' view be resolved by judicial considerations of "policy."[240] While Holmes acknowledged that the question of whether economically damaging behavior should be privileged is normally one addressed by the legislature, he argued that the courts must sometimes determine such questions. In short, Holmes argued that judges and lawyers could no longer pretend that free trade doctrine for labor and business developed in a politically neutral and logical manner.

This analysis of policies and purposes, however, fared no better than other approaches. Thus, while the courts of Massachusetts could reason that it was an illegitimate and hence tortious objective for workers to strike for a closed shop,[241] the courts in New York could reach just the opposite result finding that such a purpose was "in the eye of the law thought sufficient to justify the harm."[242] Of course, individual judges within the same case could reach equally contradictory conclusions. In Massachusetts, for example, the Supreme Court was able to utilize Holmes' *Vegelahn* dissent to reach a contrary result.

In *Plant v. Woods*,[243] the majority of the Massachusetts Court held that strikes to obtain closed shops were unlawful as a matter of law because they threatened to injure the plaintiffs in their business, and "molested and disturbed them in their efforts to work at their trade."[244] The Court recognized that workers had a right "to dispose of one's labor with full freedom," a right which "is a legal right, and . . . entitled to legal protection."[245] Purporting to follow Holmes' analysis in *Vegelahn*, the majority reasoned that "in many cases the lawfulness of an act which causes damage to another may depend upon whether the act is for justifiable cause. . . ."[246] In concluding that the defendant's strike was not justified, the majority reasoned that "principles of trade competition" could not shelter or justify an injury to business or interference with trade.

The "principles of trade competition" and the "natural law of business" thus became metaphors the Massachusetts courts used to support legal conclusions hostile to the competition of labor organizations. These metaphors were powerful, because the imagery of "natural laws" and "business" sought to persuade the legal profession that limitations on the

240. Holmes emphasized that questions of policy must be resolved by objective, external standards as opposed to subjective, internal standards.

241. *See, e.g.*, Folsom v. Lewis, 208 Mass. 336, 338, 94 N.E. 316, 317 (1911); Martineau v. Foley, 225 Mass. 107, 113 N.E. 1038 (1916); W.A. Snow Iron Works v. Chadwick, 227 Mass. 382, 116 N.E. 801 (1917).

242. Exchange Bakery & Restaurant Inc. v. Rifkin, 245 N.Y. 260, 263, 157 N.E. 130 (1927) *reh'g denied*, 245 N.Y. 651, 157 N.E. 895 (1927).

243. 176 Mass. 492, 57 N.E. 1011 (1900).

244. *Id.* at 502, 57 N.E. at 1015.

245. *Id.* at 498, 57 N.E. at 1013.

246. *Id.* at 499, 57 N.E. at 1014.

freedom of workers to organize were consistent with the ideas of human freedom.[247] This mode of analysis assumed that industrial liberty meant the freedom of entrepreneurial property against unwanted interference of combinations in the labor market.[248]

While individual laborers could exercise their liberty to choose when to "sell" their services, laborers could no longer assert a property right to the product of their service, since market exchange now determined the value of their product. Moreover, while laborers could claim the liberty to establish their own combinations, the activities of their combinations were constrained by the businesses of others. From the perspective of judges, the principles of industrial liberty established a body of sensible doctrine for structuring the tension of competition and combination. Of course, from labor's perspective this view of free trade meant "freedom to choose" between working at a fixed substandard wage or doing without.

C. *The Sherman Antitrust Act and the Commodification of Labor*

On July 2, 1890, Congress enacted the Sherman Antitrust Act,[249] which marks the beginning of a new era of antitrust law. While the common law continues to have a measure of influence on the new federal law of antitrust, most modern commentators agree that the Sherman Antitrust Act represents a break from the common law of trade restraint.[250]

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247. *See* Kelman, *supra* note 43, at 33-39.

248. The liberty of business to combine and inflict damage was privileged because exchange value was itself treated as a form of property which had value deserving legal protection. *See* Forbath, *American Labor Movement*, *supra* note 1, at 1170. Hence, "[b]ecause boycotts, and strikes injured employers' profit-making activities, and therefore their 'pecuniary interests,' they trenched on employers' property." *Id.*

249. The modern law of antitrust was created by two sections of the Act which gave the judiciary new concepts for resolving trade restraint issues. The first section provided that: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared illegal . . . ." 15 U.S.C. § 1 (1982). The second section, seeking to compliment the first, provided that: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ." 15 U.S.C. § 2 (1982).

250. The conventional wisdom is that the Sherman Act was the product of a confused and highly ambiguous legislative process. *See, e.g.*, P. AREEDA & D. TURNER, ANTITRUST LAW 15 (1978). By 1890 public concern focused on the evils associated with the trusts and great combinations of the 1880s. Some viewed the trusts as "menacing" and "dangerous" to the free enterprise system. This concern was subsequently translated into legislative action culminating in the Sherman Act. But little consensus can be found on precisely what Congress intended by its legislation. *See, e.g.*, Hovenkamp, *supra* note 6, at 249-50. Professor Peritz has recently revealed how there were in fact two different legislative proposals introduced in 1888 and 1890, each of which presented a different view and understanding of free trade and the problem of combinations and trusts. *See* Peritz, *"Rule of Reason"*, *supra* note 1, at 291-313 (describing how the language and debate over the 1888 and 1890 bills reflected two logics of free trade—a competition logic of industrial liberty, and a property logic of fair price). Professor Peritz's study of the legislative history illustrates how the contradictory patterns of free trade doctrine were reproduced in the legislative debate concerning the

But this is not how the Sherman Act developed in its formative years.[251] To appreciate the continuing hold of common law logic on the early interpretations of federal antitrust law it is important to recall that the very first cases raising antitrust issues under the Sherman Act were labor, not business, cases.

One of the first cases to apply the Sherman Act to labor was *In Re Debs*,[252] which arose out of the great Pullman strike of 1894. The Pullman Car Company, seeking to reduce labor costs in the face of the severe depression, reduced wages of its employees by 20 percent, while maintaining the high salaries and dividends of its executives. Several thousand Pullman workers, organized by the American Railway Union headed by Eugene V. Debs, went out on strike and boycotted trains hauling Pullman cars. The strike and boycott blocked the delivery of mails in Chicago and elsewhere thereby obstructing interstate commerce.

President Grover Cleveland called out federal troops to end the strike and reestablish free movement of interstate commerce. When violence and disorder erupted, Debs and his associates were arraigned in federal circuit court, convicted of contempt, and sentenced to imprisonment. In sentencing Debs, the district court invoked the authority of the Sherman Antitrust Act on the ground that the strike constituted a conspiracy in restraint of trade. When Debs sought review by way of habeas corpus in the Supreme Court, the Court denied the writ.

Justice Brewer, who wrote the opinion of the Court, rendered a forceful decision based on national supremacy and the commerce power. In his view, the federal government had "all the attributes of sovereignty" necessary to resolve the labor dispute without having to rely

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Sherman Act. Peritz's study also refutes the claims of Judge Robert Bork, who has argued the view that the drafters of the Act intended their legislation to reflect the single goal of economic efficiency. *See* R. BORK, *supra* note 3, at 61-66. For a contrary view supporting Professor Peritz, *see* Pitofsky, *supra* note 7.

251. It is clear that as of 1890 there was little consensus on the meaning of concept of "competition" in trade restraint law. *See, e.g.*, Peritz, *The Predicament of Antitrust Jurisprudence: Economics and the Monopolization of Price Discrimination Argument*, 1984 DUKE L.J. 1205, 1209-13. Indeed, shortly after the Sherman Act was enacted, Justice Holmes proclaimed that the Act "says nothing about competition." Northern Securities Co. v. United States, 193 U.S. 397, 403 (1904). But see Peritz, "*Rule of Reason*," *supra* note 1, at 288 n.17 (arguing that Holmes in *Northern Securities* was aligning himself with a view of competition based on a "property-driven" logic).

252. 158 U.S. 564 (1894). For a discussion of the Pullman strike and Eugene Debs, see H. LIVESAY, SAMUEL GOMPERS AND ORGANIZED LABOR IN AMERICA, 139-44 (1978); A. LINDSEY, THE PULLMAN STRIKE (1942); Forbath, *American Labor Movement*, *supra* note 1, at 1161-65. For a discussion of the *Debs* litigation in terms of the constitutional dilemma it posed see A. KELLY & W. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT, 564-66 (4th ed. 1970). *See also* LaRue, *Constitutional Law and Constitutional History*, 36 BUFF. L. REV. 373, 381-86, 389-91 (1987). The first application of the Sherman Act in a labor dispute involved a New Orleans Longshoreman's strike which was enjoined as a restraint of trade. United States v. Workingmen's Amalgamated Council, 54 F. 994 (C.C.E.D. La.), *aff'd*, 57 F. 85 (5th Cir. 1893).

upon the Sherman Act as the District court had done.[253] "The strong arm of the national government may put forth," he stated "to brush all obstructions to the freedom of interstate commerce or the transportation of the mails."[254] The appeal to national supremacy and the commerce power appeared to justify the decision, and most commentators, including President Cleveland accepted the Court's reasoning as manifestly evident. Yet there was irony in the Court's decision. If federal supremacy could so potently deal with a too-militant labor union, then why, as historians of the period have wondered,[255] was the federal government so helpless in dealing with monopolies and trusts as they obstructed interstate commerce prior to 1890?

Moreover, after 1902 the labor movement was under continuous attack in the federal courts especially in cases brought under the Sherman Act.[256] The first in this series was the *Danbury Hatters* case, *Loewe v. Lowlor*.[257] In *Danbury Hatters*, the Supreme Court held that a concerted refusal to work or a boycott was an illegal combination in restraint of trade. The case involved a secondary boycott called by the United Hatters of America in their campaign to organize the hat manufacturing industry, which consisted of small, proprietor-operated factories.

The Court applied the Sherman Act and held that a concerted refusal to work or boycott obstructing interstate commerce was an illegal combination in restraint of trade. Chief Justice Fuller concluded that "[t]he combination charged falls within the class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes. . . ."[258] This principle of trade restraint law was said to be based on the rule, "at common law every person has individually, and the public also has collectively, a right to require that the course of trade should be kept free from unreasonable obstruction."[259] Fuller refused to apply another Supreme Court decision involving a similar boycott by manufacturers and wholesalers of tiles,[260] and he held that all combinations of labor and capital in restraint of trade were illegal under the federal legislation.

Fuller reasoned that the obstruction in the free flow of building tiles was no different than the obstruction in the flow of labor. Combinations of labor and capital were treated alike, because labor was no different

253. 158 U.S. at 599.

254. *Id.*

255. *See, e.g.*, A. KELLY & W. HARBISON, *supra* note 252, at 531.

256. *See* H. LIVESAY, *supra* note 252, at 144.

257. 208 U.S. 274 (1908). *See generally*, Ernst, *The Labor Exemption, 1908-1914*, 74 IOWA L. REV. 1151 (1989).

258. *Id.* at 294.

259. *Id.* at 295-96.

260. W.W. Montague & Co. v. Lowry, 193 U.S. 38 (1904).

from the purchase and sale of commodities that the Sherman Act sought to protect from market obstructions. In treating labor as an article of commerce, the Supreme Court decided that employers had a common law right to be protected from the unwanted interferences of unions. Labor was thus commodified under a theory of free trade which subordinated the interests of employees to the entrepreneurial interests of the employer with tragic human consequences.

IV

THE MODERN STRUCTURES OF LABOR AND ANTITRUST LAW

Labor and antitrust law is now codified in separate federal statutes established by the National Labor Relations Act of 1935 (NLRA)[261] and the Sherman Antitrust Act of 1890[262] and their various amendments. These statutes are premised upon the belief that combinations of labor and business must be dealt with separately because they require different regulations, methodologies and concerns. The basic assumption of American labor law is that competition in labor markets should be regulated by a law of collective bargaining that sanctions the establishment of labor as legal collectivity.[263] The basic purpose of labor legislation was to protect the rights of labor combinations. Individual workers would be protected by their union, not government, and their rights would be guaranteed by a collective agreement, not law.[264]

A basic assumption of modern antitrust law is that individuals in product markets should be encouraged to engage in socially redeeming forms of competition.[265] While there is considerable disagreement over the range of possible policy goals for antitrust, everyone agrees that "competition" is a legitimate and basic policy objective.[266] A basic purpose of antitrust legislation is to regulate and curtail acts of business monopolization and conspiracies in restraint of trade that are injurious to consumer welfare. The objective is to establish a system of rules that distinguishes competitively desirable activity from activity that is anticompetitive and hence undesirable.

Except for occasional issues involving the propriety of prosecuting labor unions under the antitrust laws,[267] labor relations law and trade

261. 29 U.S.C. §§ 151-69 (1982).

262. 15 U.S.C. §§ 1-7 (1988).

263. *See, e.g.*, Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 9 (1988).

264. *Id.* at 9.

265. *See, e.g.*, L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 182 (1977).

266. *See, e.g.*, Peritz, "*Rule of Reason*", *supra* note 1, at 285.

267. For nearly a century, the law concerning the scope of the antitrust exemption for labor unions has been in a "state of flux" because the Supreme Court has been unable to develop a consis-

regulation law are seen today as separate and unconnected areas of federal law. The post-New Deal approach to labor and antitrust represents a marked, and ultimately unsuccessful, departure from the common law approach that treated labor and business problems under a unified body of legal doctrine. Legal decisionmaking in the post-New Deal era attempts, again unsuccessfully, to separate two contradictory notions imbued in our historic understanding of "free trade"—notions reflected in the age-old debate about the relation free trade shares with ideas of combination and competition. In this Part, I will attempt to sketch the basic features of labor and antitrust law that reflect the contradictory nature of the common law of trade restraint.

A. Antitrust Law

1. Modern Antitrust

"A policy at war with itself"[268]

Modern federal law of antitrust is said to commence when the Supreme Court adopted the American "rule of reason" in 1911. In *Standard Oil Co. v. United States*,[269] Chief Justice White concluded that the statutory phrase, "every . . . restraint of trade,"[270] was intended to include only "every unreasonable" restraint. The American "rule of reason" is said to have launched the modern approach to antitrust, because it was seen to have established a new analytical tool for antitrust judges in making judgments about the competitive consequences of business conduct.[271]

But there was hardly anything "new" about the logic of the rule of reason as such. The rule of reason approach can be traced to the 1893 *Nordenfelt* decision of the English House of Lords.[272] As previously noted, *Nordenfelt* held that a general covenant not to compete in the sale of a business was valid, because it was reasonably necessary to the protect the interests of the covenantee and was not contrary to the public interest.[273] In *Standard Oil*, Chief Justice White followed a similar logic in concluding that the exercise of monopoly power by the Standard Oil trust was "unreasonable" and hence unlawful.[274] Indeed, in *Standard Oil*, Justice White relied upon common law notions upheld in *Nordenfelt*,

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tent theory for distinguishing between union activity that is subject to antitrust sanctions and union activity that is subject, if at all, only to labor law and its remedies. *See, e.g.*, Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252 (1955).

268. R. BORK, *supra* note 3.

269. 221 U.S. 1 (1911).

270. 15 U.S.C. § 1 (1982).

271. Peritz, *"Rule of Reason"*, *supra* note 1, at 285-86.

272. *See supra* notes 123-27 and accompanying text.

273. *Id.* at note 123.

274. 221 U.S. at 74-77. A similar holding was reached in the Tobacco Trust case, United States v. American Tobacco, 221 U.S. 106 (1911).

that "freedom to contract was the essence of freedom from undue restraint on the right to contract" to condemn the economic power of a combination of competitors.[275] While *Nordenfelt* and *Standard Oil* reflect different outcomes under the rule of reason, both cases affirm a view of free trade and competition which upholds contracts which restrain competition.[276]

Justice White's rule of reason served to launch an alternative antitrust jurisprudence that challenged the literal approach to the meaning of restraints of trade.[277] The literalist approach was the product of a highly formalistic understanding of free trade which reflected older common law ideas of free will and duress. In the very first business case to reach the Court under the Sherman Act, *United States v. Trans-Missouri*,[278] a majority of the Justices adopted a literal interpretation of the statute and held a railroad cartel agreement to fix prices was illegal without regard to claims of justification based on reasonable restraint. Justice Peckham, for the majority, reasoned that the statute condemned all restraints of trade no matter how reasonable they might appear. In his view, "[c]ompetition will itself bring charges down to what may be reasonable, while, in the case of an agreement to keep prices up, competition is allowed to play."[279] According to Peckham, "[c]ompetition, free and unrestricted, is the general rule."[280]

Justice Peckham's literal interpretation reflected common law notions of free trade as unrestrained competition: a view which had characterized the nineteenth century business cartel cases such as *Bowen* and *Mogul*.[281] Peckham's literal approach to restraints of trade assumed that the notion of free trade could protect competitors from all restraints of

275. 221 U.S. at 62. According to Justice White, freedom to compete necessarily entailed the freedom to contract and combine for the purpose of launching an effective effort in the market. White found this principle to be established by English and American common law. The common law of monopolization, however, provided a less than convincing or coherent basis for the result reached by Justice White. It was far from clear, for example, whether the Standard Oil Company would have been condemned under the common law of monopoly or law of voluntary restraints. Rudy Peritz argues that in addition to the common law of restraint of trade, Justice White was also articulating a view of industrial liberty found in the "constitutional rhetoric of liberty to contract." Peritz, *"Rule of Reason"*, *supra* note 1, at 331.

276. For a discussion of the different meanings of the "rule of reason" in early English and American law, *see* Freyer, *The Sherman Antitrust Act, Comparative Business Structure, and the Rule of Reason: America and Great Britain, 1880-1920*, 74 IOWA L. REV. 991 (1989). *See also* Peritz, *"Rule of Reason"*, *supra* note 1, at 331. In *American Tobacco*, Justice White justified the rule of reason approach to antitrust as necessary "to prevent [the Sherman] Act from destroying all liberty of contract and all substantial right to trade, and thus causing the act to be at war with itself by annihilating the fundamental right of freedom to trade . . . ." 221 U.S. at 180.

277. *See, e.g.*, Sullivan, *The Viability of the Current Law on Horizontal Restraints*, 75 CALIF. L. REV. 835, 836-37 (1987).

278. 166 U.S. 290 (1897).

279. *Id.*

280. *Id.* at 337.

281. *See supra* notes 215-26 and accompanying text.

trade. His theory of trade restraints was reflected in the contradictory logic of industrial liberty, which affirmed that business should be free of governmental interference as well as the restraints of private market power.[282]

Peckham's view of free trade opposed a different perspective of free trade that emphasized the link between contract or combination and free trade.[283] Indeed, Justice White, in dissent, argued that a literal interpretation of the antitrust statute would work to weaken free trade and competition by denying liberty of contract.[284] He cited *In Re Debs* to point out that Peckham's approach would ultimately "embrace every peaceable organization or combination of laborers to benefit his condition either by obtaining an increase of wages or diminution of the hours of labor."[285] In other words, a literal interpretation of free trade would deny labor organizations the most effective means for competing with the power of large industrial organizations.[286]

Justice White's alternative rule of reason approach helped to establish a new two-level structure for resolving the contradictory common law norms of free trade in the modern context.[287] His "rule of reason" standard, along with Peckham's literal approach, worked to establish a new dialectic for expressing trade restraint norms—a dialectic which a subsequent generation of antitrust decision-makers have used to resolve trade restraint problems in terms of "specific and general antitrust norms."[288] This dialectic has now been embodied in a never ending debate about per se and rule of reason approaches to antitrust,[289] which some have argued has produced a "policy at war with itself."[290]

2. *The Polarities of Modern Antitrust Law*

Milton Handler observed some time ago that "we have had polar positions in antitrust" since its inception and "indeed we still do."[291]

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282. *See* Text at note 300 *infra*.

283. 166 U.S. at 355-56 (White, J., dissenting).

284. *Id.* at 356. *See also* Peritz, *"Rule of Reason"*, *supra* note 1, at 318.

285. 166 U.S. at 356.

286. Peritz, *"Rule of Reason"*, *supra* note 1, at 318.

287. "[T]he 'literalist' and 'rule of reason' factions involved much more than a lawyerly argument over proper techniques of statutory interpretation. Rather, the underlying conflict was normative and involved a choice between two competing visions of society." Peritz, *"Rule of Reason"*, *supra* note 1, at 318.

288. Sullivan, *supra* note 277, at 837.

289. The *per se* rule was first enunciated by Justice Brandeis in Board of Trade v. United States, 246 U.S. 231, 238 (1918). The modern version of the rule of reason was set forth in United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 210-28 (1940).

290. BORK, *supra* note 3. *See also* Krattenmaker, *Per Se Violations in Antitrust Law: Confusing Offenses with Defenses*, 77 GEO. L.J. 165, 167 (1988) (arguing that "[a]t best, the concept of per se violations has always suffered from some form of judicial schizophrenia." *Id.*).

291. Handler, *The Polarities of Antitrust*, 60 NW. U.L. REV. 751, 751 (1966).

The polarities of modern antitrust law reflect the two basic opposing models or two levels of antitrust.[292] The general standard of legality is the "rule of reason," which requires antitrust courts to consider claims that a challenged restraint of trade promotes competition rather than suppresses it. The per se rule applies to cases involving particular types of trade restraints, such as price-fixing agreements, division of markets, group boycotts and tying arrangements.[293] A continuing problem for modern antitrust law has been the difficult task of developing criteria for the frequent and troublesome borderline cases.[294]

This pattern of general versus specific (i.e., rule of reason versus per se) has resulted in contradictory patterns of antitrust doctrine, because these two levels of antitrust analysis reflect different understandings of free trade or which have plagued judges since the inception of early trade restraint law. The advantages of the per se approach is well understood in antitrust. Judicial decision is relatively simple and straightforward once the per se logic is found to apply. The process of decisionmaking in per se cases calls for merely categorizing relevant fact patterns and evaluating these facts in terms of the given rule. Business practices found to be per se illegal cannot be defended on the grounds that they are reasonable. Arguments claiming that some restraint is necessary for enhancing efficiency or competition are thus deemed irrelevant.

In foregoing justifications of reasonableness, per se rules of illegality also make it much easier for decision-makers to establish antitrust violations. Like the strict scrutiny equal protection standard of constitutional law,[295] per se rules, once invoked, usually translate into violations. In this important sense, per se rules of illegality favor competition rules that embrace values of access, smallness, diversity, and pluralism in their rejection of coercion and exploitation of monopoly power.

The rule of reason, on the other hand, favors a view of free trade as contract and combination. Like the rational basis standard of equal protection,[296] the rule of reason usually results in upholding the challenged restraint.[297] While occasional exceptions can be found,[298] the rule of rea-

292. *See, e.g.*, Levi, *A Two-Level Anti-Monopoly Law*, 47 NW. U.L. REV. 567 (1953); M. HANDLER, ANTITRUST IN PERSPECTIVE, ch. 1 (1957).

293. *See, e.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

294. *Compare, e.g.*, United States v. Socony-Vacuum Co., 310 U.S. 150 (1940) with Board of Trade of City of Chicago v. United States, 246 U.S. 231 (1918). *See also* Blake, *The Rule of Reason and Per Se Offenses in Antitrust Law* (Colum. Univ. Center for Law and Econ. Studies Working Paper No. 10, 1984) (unpublished).

295. *See, e.g.*, San Antonio Indep. School Dist. v. Rodiguz, 411 U.S. 1, 17 (1973). *See, e.g., Note, Impermissible Purposes and Equal Protection Clause*, 86 COLUM. L. REV. 1184, 1185-87 (1986) (authored by Melanie Meyers).

296. *See, e.g.*, New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

297. *See, e.g.*, Blecher, *Schwinn—An Example of a Genuine Commitment to Antitrust*, 44 ANTITRUST L.J. 550, 553 (1975); Brunet & Sweeney, *Integrating Antitrust Procedure and Substance After*

son generally favors the values of entrepreneurial property and industrial liberty in shielding admitted restraints from legal intervention.

Indeed, the rule of reason has become the legal basis for sanctioning the exercise of monopoly power in a variety of contexts—the United Shoe Machinery monopoly,[299] the combination creating the United Steel Corporation,[300] twenty two exclusionary by-laws of the Chicago Board of Trade,[301] monopoly power of the International Harvester Company,[302] trade association exchanges of information,[303] exclusionary patent agreements,[304] and vertical territorial restraint requirements in exclusive dealer agreements.[305] These cases sanctioning business combinations and restraints of trade have all resulted from arguments claiming to advance a pro-combination view of competition.[306] The common wisdom in the antitrust bar is that the rule of reason means either settlement or a decision for the defendant.[307]

Judicial efforts justifying reasonable restraints of trade or delimiting categories of per se illegality have not been edifying, because judges have been unable to agree upon a single definition of "competition" for deciding particular cases. These problems have led scholars of different political persuasions to question the wisdom and usefulness of the current version of the rule of reason.[308] The oscillation between per se violations and the rule of reason in antitrust is characteristically indeterminant, because there is no over-riding principle or theory for determining which view or understanding of antitrust should prevail. In this way, the choice

North West Wholesale Stationers: Evolving Antitrust Approaches to Pleadings, Burden of Proof, and Boycotts, 72 VA. L. REV. 1015, 1018 (1986). *See also* Blake, *supra* note 294.

298. *See, e.g.*, NCAA v. University of Oklahoma, 468 U.S. 85, 88 (1984) (television network licensing agreement held to be a restraint of trade under the rule of reason standard because it restrained price and output). *See also*, Fox & Sullivan, *Antitrust-Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U.L. REV. 936, 954-56 (1987).

299. *See* United States v. United Shoe Machinery Co., 247 U.S. 32 (1918) (merger held lawful); United States v. United Shoe Machinery Corp., 258 U.S. 451 (1923) (lease arrangement held lawful). *But see* United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1953) (Judge Wyzanski's decision finding that the Corporation's leasing system was unreasonable and hence illegal.)

300. United States v. United States Steel Corp., 251 U.S. 417 (1920).

301. Chicago Board of Trade v. United States, 246 U.S. 321 (1918).

302. United States v. International Harvester Co., 274 U.S. 693 (1927).

303. Appalachian Coals, Inc. v. United States, 288 U.S. 244 (1933).

304. Standard Oil Co. of Indiana v. United States, 283 U.S. 163 (1931).

305. Continental T.V. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

306. There have been exceptions where antitrust courts have found restraints of trade to be illegal under the rule of reason; *see, e.g.*, National Collegiate Athletic Assoc. v. Board of Regents, 467 U.S. at 119-20; Eiberger v. Sony Corp. of America, 622 F.2d 1068 (2d Cir. 1980), but the vast majority of rule of reason cases result in a finding of legality.

307. *See, e.g.*, Flynn, *Rethinking Sherman Act Section 1 Analysis*, 49 ANTITRUST L.J. 1593, 1609 (1980).

308. *See, e.g.*, Posner, *The Next Step in the Antitrust Treatment of Restrictive Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1980); Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1 (1978).

between per se and rule of reason reproduces the tension posed by earlier common law categories, which raised similar choices involving general versus particular restraints, and fair versus unfair methods of competition. Drawing the line between per se and rule of reason, or free trade and contract, has never been a successful exercise in antitrust, because line drawing assumes it is possible to favor one side of the duality or the other.

Hence, we find antitrust judges reverting to common law modes of balancing in fruitless efforts to steer a "middle path that leads to enduring progress, balancing the need for change with the need for certainty and order."[309] Thus, in *United States v. Addyston Pipe & Steel Co.*,[310] Judge (later Chief Justice) Taft concluded that the attempt of a cartel of cast iron pipe manufacturers to divide the market and fix-prices was unlawful, because the cartel's restraints were not "ancillary" to any legitimate business purpose. Taft's ancillarity requirement has structured the rule of reason in subsequent cases to allow antitrust judges to balance the harm of trade restraints against the alleged benefits of the business practice in question.

More recently, in *Broadcast Music, Inc. v. Columbia Broadcasting System*,[311] the Burger Court relied upon Taft's ancillarity requirement to uphold a blanket licensing agreement against a per se attack on the ground that an admitted restraint on competition was ancillary to efficiency and output enhancement. In shifting to the ancillary restraint analysis, the Court concluded that an after-the-fact balancing of the competitive benefits and harms was required to determine whether the restraint should be upheld under a modified rule of reason analysis. This most recent development in horizontal restraint doctrine has the potential for immunizing most horizontal restraints not yet classified as per se illegal.

The ancillary restraint analysis of *Broadcast Music* resembles early common law doctrines of trade restraint that attempted to resolve the tension between combination and competition by reverting to ad hoc ideas of legal justification and privilege. For example, in finding that a blanket licensing agreement restricting price competition was lawful because it promoted contract efficiency, the Court in *Broadcast Music* was advancing a notion that has roots not only in Judge Taft's *Addyston Pipe* decision, but also in cases such as *Bowen* and *Mogul*.[312] In those cases, the logic of free trade as combination justified business cartels and concerted boycotts, even though they had the effect of eliminating competi-

309. Handler, *supra* note 291, at 764.

310. 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

311. 441 U.S. 1 (1979).

312. *See supra* notes 215-26 and accompanying text.

tion. Hence, when Judge Chapman in *Bowen* said: "[n]ew inventions and new methods of transacting business often destroy the business of those who adhere to old methods,"[313] he was articulating an idea which could support Justice White's conclusion in *Broadcast Music* that "[n]ot all arrangements among actual or potential competitors that have an impact on price are per se violations of the Sherman Act or even unreasonable restraints."[314] According to one long-standing notion of free trade, combinations in restraint of trade may be viewed as competition fostered by new ways for transacting business.

The notion of ancillary restraints has failed to mediate the tension between combination and competition, because, like the general versus particular distinction of *Mitchell v. Reynolds*,[315] or the rule of reason of *Nordenfelt*,[316] ideas of ancillarity merely reproduce underlying normative choices about the merits or demerits of free trade as combination and competition. Hence, the term "restraint of trade" in modern antitrust law is now understood as containing what Justice Scalia has recently called a "dynamic potential."[317] In *Business Electronics v. Sharp Electronics Corp.*,[318] Justice Scalia, writing for the Court, concluded that the per se standard in antitrust, like the rule of reason, must be allowed to evolve "with new circumstances and new wisdom," otherwise the concept of restraint of trade would lead to a "chronologically schizoid statute."[319] In recognizing that the line of per se illegality was subject to the "dynamic potential" within "restraint of trade," Justice Scalia merely acknowledged the "dynamic" of opposing concepts of free trade as competition and combination since early common law. This "dynamic potential" within "restraint of trade" has had important consequences. In antitrust, it has allowed judges to reach ironic results—to develop an understanding of antitrust which is infinitely more accepting of monopoly.

3. *The New Antitrust*

> *"If competition is a disintegrating and wasteful force then it cannot possibly be 'a stimulus to productive efficiency,' and it is not."*[320]

313. 106 Mass. at 14.

314. 441 U.S. at 23.

315. *See supra* notes 62-66 and accompanying text.

316. *See infra* notes 337-53 and accompanying text.

317. 485 U.S. 717 (1988).

318. *Id.* In *Sharp Electronics*, the Court held that an agreement between a manufacturer and a dealer to terminate another dealer for price discounting did not constitute a per se illegal vertical price restraint, because there was lacking a specific agreement setting resale prices. This reasoning is highly formalistic. *See* Liebeler, *Resale Price Maintenance and Consumer Welfare: Business Electronics Corp.*, 36 UCLA L. REV. 889, 909-10 (1989).

319. *Id.* at 732.

320. A. EDDY, *supra* note 95, at 28.

This ironic turn in antitrust can be seen in light of the new antitrust approach of the Chicago school of law and economics.[321] The "new" Chicago school approach to antitrust, and the controversy it has provoked, vividly illustrate how the paradox of free trade doctrine has continued to frustrate and perplex the development of a workable theory of antitrust. In emphasizing the past failures of antitrust to offer a stable concept of competition, antitrust scholars working within the theoretical framework of microeconomics associated with the University of Chicago have argued that the only legitimate goal for antitrust law is efficiency and the maximization of wealth.[322] These scholars have argued that business restraints of trade should be immunized from antitrust prosecutions whenever it can be shown that the challenged practice promotes economic efficiency.

In developing a definition of competition under an ancillary theory structured by the economic notions of efficiency,[323] and justified under a strained interpretation of legislative history,[324] these scholars articulate a new antitrust law which defines free trade as the natural tendency of competition to lead to efficiency. But there is hardly anything really new about the so-called "new" antitrust. The advocates of the new antitrust reproduce the views of people like Arthur Jerome Eddy, who preached the faith of business combinations at the end of the nineteenth century by arguing the efficiency-enhancing quality of contract integration.[325] The methodology of the new antitrust advocates resembles the methods and arguments that nineteenth century theorists advanced in finding industrial monopoly to be natural, inevitable and lawful.[326] Like judges at early common law, these antitrust scholars have adopted an approach to trade restraint problems that privileges one side in the continuing free trade debate about ideas of competition and combination.

The modern critics of antitrust, however, have reached a new level of success in converting antitrust scholars and judges to their pro-combi-

321. *See, e.g.*, BORK, *supra* note 3; Posner, *supra* note 6.

322. *See, e.g.*, R. BORK, *supra* note 3, at 89.

323. *See, e.g.*, R. BORK, *supra* note 3, at 26-30. According to Judge Bork, Taft's "doctrine of naked and ancillary restraints offered the Sherman Act a sophisticated rule of reason, a method of reserving socially valuable transactions by defining the scope of an exception for efficiency-creating agreements within an otherwise inflexible *per se* rule." *Id.* at 30. For a critique of this approach from within the model of antitrust economics, *see* Hovenkamp, *supra* note 6, at 213, 255-83. *See also* Peritz, *"Rule of Reason" supra* note 1, at 289, n.22.

324. Fox, *The Battle for the Soul of Antitrust*, 75 CALIF. L. REV. 917, 918 (1987) (*citing* R. BORK, *supra* note 3, at 90-117); Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 45 (1984). *See also* Hovenkamp, *supra* note 6, at 249-55.

325. *See supra* notes 218-20 and accompanying text. *See also* Hovenkamp, *supra* note 1, at 941 (discussing how Arthur Eddy adopted the views of classical economists who believed that business combinations, unlike labor combinations, advanced the public interest because they advanced productive efficiency).

326. *See* Hovenkamp, *supra* note 1, at 939.

nation perspective. In *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[327] for example, the Burger Court utilized this approach to overturn a decade of antitrust precedent which had held that non-price vertical restraints were per se illegal. The Court's new rule of reason analysis found that hence forth non-price vertical restraints must be judged lawful, if their competitive harms are outweighed by market enhancement of output resulting from efficiency.

This result has encouraged at least one Chicago school practitioner, Judge Richard A. Posner, to argue that the Court should now consider adopting a new rule of per se legality in vertical restraint cases to protect the assumed efficiency-enhancing quality of vertical restraints from antitrust attack.[328] As one pair of commentators have recently observed about the new approach as applied to vertical restraint problems generally: "this approach singles out the value of maximizing the economic freedom of persons and private collectives proposing vertical restraints in the marketing process; at its worst, the theory protects without question the property and contract rights of those who have the power to impose the restraint."[329]

The challenge provoked by the advocates of the new antitrust has also served to establish a new coalition of critics who argue that they are "battling for the soul of antitrust."[330] The new coalition of antitrust scholars describe "themselves as faithful interpreters of the law," who understand "the real history of antitrust" as representing "concern for consumers; concern for the 'little man'; interest in access, diversity, and pluralism; and condemnation of coercion and exploitation."[331] In their view, the new economics of antitrust is "at war with law."[332] The new coalition represents those who call for a return to the 1960s philosophy of antitrust associated with the Warren Court. The Warren Court philosophy of antitrust was one which emphasized values which can be located within the history of common law trade restraint—ideas of fair price, smallness in scale, and the democratic importance of deconcentration of economic power. The new coalition scholars believe that antitrust law can be separated from the politics of Chicago school ideology by returning to "humanistic values" and "a view of law based on fairness

327. 433 U.S. 36, 58 (1977), *overruling* United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967).

328. *See* Posner, *supra* note 308.

329. Flynn & Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*, 62 N.Y.U. L. REV. 1125, 1144 (1967). *See also* Peritz, *Geneology*, *supra* note 1.

330. *See* Fox, *supra* note 324. *See also* Fox, *The Politics of Law and Economics in Judicial Decision Making: Antitrust As A Window*, 61 N.Y.U. L. REV. 554 (1986); Fox & Sullivan, *supra* note 298.

331. Fox, *supra* note 324, at 918-19.

332. Fox, *supra* note 324, at 556-57.

and justice."[333]

The debate between the new antitrust scholars and the new coalition has thus come to reflect the two polar views of trade restraint law found at common law. One understanding of free trade, rooted in the age of property, developed concepts of fair price, communitarian conceptions of property, and a labor theory of value to support a law of trade restraint which exhibited concern for the "little man," pluralism and protection against coercion and exploitation.[334] This view of free trade has come to reflect itself in the views of the new coalition. A different understanding of free trade, rooted in the classical era, developed highly individualistic concepts of the right to work, contract and trade to support a law of trade restraint favorable to business combinations and the restraining activities of business.[335] This alternative conception exhibits a belief in the natural tendency of business organizations to combine and be efficient. This view of free trade characterizes the approach of the New Antitrust scholars who have developed economic arguments to defend entrepreneurial property rights against antitrust attack, much in the same way that judges in the nineteenth century defended the property interests of business from the competition of labor combinations. In this way, one can understand scholars' current debate over antitrust as a debate provoked by the polarities of free trade within a common paradigm that accepts competition as a central antitrust value.

What has gone unexpressed has been a persistent and unyielding countervailing perspective of trade restraints advancing communitarian notions of competition policy based on common law concepts that favored collectivist values. The possibility of an alternative competition paradigm derived from the historical context of antitrust's formative years has led a new breed of antitrust scholar to advocate a communitarian theory of antitrust that differs sharply from the orthodox view that antitrust must be founded on some determinant concept of competition, whether the New Coalition scholar's claim of Jeffersonian policies, or the efficiency analysis of the New Antitrust practitioners. Rudolph J. Peritz thus argues that a new communitarian perspective to antitrust law promises to "recapture the positive values associated with combinations, small business, fair profit, and other doctrinal formulations that we currently associate with negative values such as 'anticompetitive' practices or 'anti-efficiency policies.' "[336] Scholars' antitrust debates have thus come to reproduce the age-old tension created by the opposing views of free trade as competition and combination.

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333. *Id.* at 559.

334. *See supra* notes 22-24 and accompanying text.

335. *See supra* notes 122-25 and accompanying text.

336. Peritz, *"Rule of Reason"*, *supra* note 1, at 342.

B. Labor Law

1. Values and Assumptions of Modern Labor Law

The federal statutory scheme that now defines modern labor law has been judicially interpreted to justify a theory of labor regulation which is antagonistic to labor combinations. Hence, while the decision in the *Danbury Hatters* case has now been overruled by statute and decision,[337] the underlying values and assumptions of that decision have not been abolished. Even in this post-New Deal era the Supreme Court has continued to apply the free trade logic of *Danbury Hatter* and the values of entrepreneurial property interest to restrict rights established under the National Labor Relations Act and its various amendments.

James B. Atleson has shown how modern labor law has come to reflect a number of core common law values.[338] According to Atleson the most critical assumption of labor law is "continuity of production," which holds that production must be maintained unless the labor statute "clearly" requires otherwise.[339] Hence, in *NLRB v. Mackay Radio & Telegraph Co.*,[340] the Supreme Court held that an employer can lawfully hire permanent replacements during an economic strike because an employer has the right to "protect and continue his business" even though employees have a statutory right to strike.[341] According to Atelson, the *Mackay* doctrine follows the logic of nineteenth century cases like *Plant v. Woods* and *Walker v. Cronin*, which protect the freedom of replacement workers from the competition of union strikers, and which allowed

337. First, Congress in 1914 amended the Sherman Act with the Clayton Antitrust Act, 15 U.S.C. §§ 12, 17 (1988), which provided, among other things, that "labor of a human being is not a commodity or article of commerce" and that:

> [n]othing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor . . . instituted for the purpose of mutual help . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws.

338. *See* J.B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 7-9 (1983). *See also* Lesnick, *Book Review*, 32 BUFFALO L. REV. 833 (1983); Minda, *Book Review*, 52 GEO. WASH. L. REV. 474 (1984).

339. J.B. ATLESON, *supra* note 338, at 7. A second assumption is that employees "unless controlled, will act irresponsibly." *Id.* A third assumption, developed from the classical master-servant law, justifies the imposition of a "limited status" on employees in the management of the enterprise. *Id.* at 8. This assumption has worked to "limit the scope of permissible concerted behavior" by grounding employees in a theory which conditions the exercise of statutory protection of employees in terms of overriding interests of the common enterprise. *Id.* A fourth assumption presumes that the "common enterprise" is primarily under management's ownership and control. *Id.* "Thus, employee rights to solicit and pamphlet for union organization on company property are limited by property interests, unrecognized in the statute, and rarely made subject to detailed analysis." *Id.* Finally, a fifth assumption holds that employees have only limited rights in the management of the organization because employee participation "would interfere with inherent and exclusive managerial rights of employers." *Id.* at 9.

340. 304 U.S. 333 (1938).

341. *Id.* at 345.

employers to hire permanent replacements to continue production.[342] *Mackay*, when seen from the perspective of its common law predecessors, *Plant* and *Walker*, illustrates the continuing hold of the industrial liberty model on labor law thinking.

This way of thinking has also served to perpetuate the inevitability of common law values and assumptions. Howard Lesnick has illustrated how the prevailing values and assumptions of labor law have worked to reinforce a "consciousness of work" which reproduces the common law understanding of employment contracts as discrete transactions, a view subsequently enshrined as a constitutional liberty in *Coppage v. Kansas*.[343] Hence, "[t]he prevailing consciousness of work sees work as an exchange relation, the giving up of leisure, the expending of effort, in return for compensation (income, status)."[344] This view of work assumes that the sole meaning of employment is defined by a theory of market exchange and individual self-interest. Lesnick argues that the market exchange theory of the work relation, a theory which has guided development of law from early common law to the modern, projects a polarized and hence incomplete understanding of the meaning of work.[345]

The prevailing consciousness of work has also come to reflect itself in collective bargaining law. Karl Klare has shown, for example, how the rights and promises of the Wagner Act of 1935 have been devalued and sacrificed to the private interests of employers as property owners.[346] Hence, in *NLRB v. Fansteel Metallurgical Corp.*,[347] the Supreme Court held in 1939 that a sit-down strike was unprotected under the Wagner Act even though the sit-down was a defensive response to the employers unlawful refusal to recognize the representative of the employees as their chosen bargaining representative. *Fansteel* imposes upon unions the obli-

342. J.B. ATLESON, *supra* note 338, at 33-34.

343. Lesnick, *supra* note 338, at 843.

344. Lesnick, *supra* note 338, at 843. According to Lesnick, "[v]iewing work as an exchange relation leads one to find no coercion in a requirement that an employee abandon either a job or the opportunity to join a union, and to regard as coercive a requirement that the employer abandon a criterion of its decision to hire." *Id.*

345. As Lesnick explains:

> Finally, seeing the value of work as a means toward self-sufficiency reinforces the tendency in us to polarize—that is, to see only as antithetical—our individualist, competitive aspect and our urge toward cooperation and mutuality. It skews our response to that polarity toward the individualist pole, wherein all communitarian pulls are experienced as threats to the self, and "fellow workers" are seen largely as competitors. Within the traditional model, it seems axiomatic that one's co-workers are competing sellers of labor in a series of bilateral relationships or prospective relationships with employers. The fundamental idea of unionization was to break with that model, to substitute a collaborative for a competitive vision. And in many ways . . . the difficulty with much of what has happened to labor and to the labor movement over the past century inheres in the fact that it attempted to express a different model in the context of the prevailing concept of work. The very attempt is delegitimated by that concept.

Lesnick, *supra* note 338, at 851-52.

346. *See* Klare, *supra* note 1; Klare, *supra* note 4.

347. 306 U.S. 240, 253-54 (1939).

gation of maintaining the "good industrial behavior" of their membership and thus undermined the struggle for control over the production process, which was "part of a struggle that had been going on throughout the industrial epoch and which continues today."[348]

In developing a law of collective bargaining contracts, modern labor law has been motivated by both repressive and democratic impulses. According to Klare, the accommodation of these contradictory impulses has resulted in a "delicately balanced vision" of industrial self-government which seeks to "institutionalize and co-opt the authentic, emancipatory aspirations of collective bargaining while not succumbing inordinately to the repressive impulses constantly urged upon the courts by business."[349]

Hence, "[l]abor law simultaneously *encourages* and *confines* worker self-expression through industrial conflict."[350] In *Elk Lumber*,[351] for example, the National Labor Board held that a slowdown in pursuit of otherwise legitimate collective bargaining objectives was unprotected concerted activity even though the same employees would have been legally protected if they had quit work instead and gone out on strike.[352] The crucial difference was that a strike requires employees fate to be determined by market forces, whereas a slowdown allows employees to actually seize a measure of control over their fate on the production floor. By upholding the employer's right to control production, the Board and the courts have assumed, as a matter of course, that industrial conflict must be regulated by market forces so as to ensure maximum possible continuation of production.

Katherine Stone, in turn, has argued that the Supreme Court, in its

348. Klare, *supra* note 4, at 817-18. As Klare explains, "[i]t is a struggle of and by workers on the shop floor to humanize labor; to gain direct control over the conditions and pace of work; to broaden autonomy and dignity on the job; and to challenge the hierarchy of industrial life." *Id.* at 818. For a history of the struggle for control of the shop floor, *see* D. MONTGOMERY, WORKERS' CONTROL IN AMERICA: STUDIES IN THE HISTORY OF WORK, TECHNOLOGY & LABOR STRUGGLES (1979); D. MONTGOMERY, THE FALL OF THE HOUSE OF LABOR (1987); Stone, *The Origins of Job Structures In the Steel Industry*, in LABOR MARKET SEGMENTATION 27 (1975).

349. Klare, *Critical Theory And Labor Relations Law*, in POLITICS OF LAW 75 (Kaireys ed. 1982).

350. *Id.*

351. NLRB v. Elk Lumber Co., 91 N.L.R.B. 333 (1950).

352. In *Elk Lumber*, the employer unilaterally reduced the pay scale of car loaders by approximately one-half because of certain improvements that allegedly made their work easier. In response, the car loaders decided to slow down their work level by loading only one car per day, even though they could have loaded more. The car loaders were subsequently discharged and the statutory issue presented involved the question whether the slowdown was protected activity. The Board, in upholding the right of the employer to discharge loaders who were slowing down, found that slowdowns are unprotected because employees had attempted to interfere with the production process. In the Board's view, "this constituted a refusal on their part to accept the terms of employment set by their employer without engaging in a stoppage, but to continue rather to work on their own terms." *Id.* at 337. *See also* J.B. ATLESON, *supra* note 338, at 52-53.

interpretations of the Labor Act, has established a model of *industrial pluralism* to legitimate a system of labor relations which restricts employee participation in the system of self-government established by collective bargaining.[353] The metaphors of industrial government thus seek to affirm the value of worker participation, while the actual system of self-governance works to limit such participation. Hence, in *Fiberboard Prods. Corp. v. NLRB*,[354] and more recently in *First National Maintenance Corp. v. NLRB*[355] the Supreme Court adopted the notion that employers have the absolute right to control certain subjects of bargaining which go to the "core of entrepreneurial control"[356] or which are not "amenable to resolution through the bargaining process."[357]

As a result of these decisions the market constraints of the employer, or as Stone has noted, the "employer's view of its market constraints"[358] have become the relevant factors for determining the scope of the duty to bargain. In subsequent cases, the Labor Board has suggested that decisions motivated by a concern for profitability are outside the duty to bargain obligation.[359] As Stone points out, the result is that "[t]he realm of mandatory bargaining has gotten very small and no longer encompasses most of the decisions that unions need to influence."[360] Consequently, subjects such as subcontracting, product design

353. *See* Stone, *supra* note 1.

354. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964). In *Fibreboard*, the Court held that a decision to subcontract out maintenance work was a mandatory subject of bargaining because the subcontracting issue was found in that case to be of "vital concern" to management and labor. Justice Stewart's concurring opinion, however, undercut the breadth of the Court's reasoning in setting forth what was a highly influential notion—that the bargaining obligation of employers does not include decisions which are at the "core of entrepreneurial control." *Id.* at 223.

See Stone, *supra* note 4, at 89 (Stewart's concurrence established a direct/indirect distinction for distinguishing mandatory subjects).

355. First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). In *First National Maintenance*, the Court adopted a balancing test to determine whether a decision to close part of a business was a mandatory subject of bargaining. This test, however, requires bargaining "only if the benefit, for labor-management relations and the collective bargaining process, outweigh the burden placed on the conduct of the business." *Id.* at 679. Stone argues that the Court's decision in *FNM* "signified a major retreat from the ideal of industrial democracy and shared decision making between management and labor over the terms and conditions of employment. . . . Most notably, it introduced, as a factor to be balanced, the degree of burden that bargaining would place on management." Stone, *supra* note 4, at 91 (footnotes omitted).

356. 379 U.S. at 223 (Stewart, J., concurring).

357. 452 U.S. at 678.

358. Stone, *supra* note 4, at 91.

359. While the Board initially was unable to reach a consensus on how to interpret the Supreme Court's decision in *First National Maintenance*, *see* Otis Elevator Co., 269 N.L.R.B. 891 (1984), the Board now emphasizes the factor whether the decision depends on "contractual labor costs" or "bargaining unit labor costs" to determine whether it is amenable to collective bargaining. *See* DeSoto, Inc., 278 N.L.R.B. 788, 809-10 (1986); Inland Steel Container Co., 275 N.L.R.B. 929, 936 (1985). *See also* Stone, *supra* note 4, at 95 ("The NLRB's post-*Otis* approach insulates most employer decisions involving capital investment or corporate transformation.").

360. Stone, *supra* note 4, at 96.

and the decision to close down a plant are likely to be found to be within the exclusive control of management because efficiency and entrepreneurial property interests were given priority over the interests of employees.

While the theory of collective bargaining as mini-democracy has successfully rationalized functions between competing forums (the Board, the courts and labor arbitrators), the structure has been unable successfully to mediate the tension between collective and individual interests.[361] Labor arbitration cannot be counted on to establish a consistent and fair structure of industrial self-government, because the union's collective interest may not serve the interest of the individual. "Arbitration is no longer a cure-all because a union's good faith cannot be presumed."[362] The idea that collective bargaining protects individual rights by protecting collective rights has become "strained."[363]

Federal law of labor relations in the modern era has thus come full circle in, first, recognizing the right of workers to compete collectively with their employer in determining the content and form of their relation but then establishing a law of management prerogatives and a theory of collective bargaining that justifies the restriction of employee participation because of the employer's right to compete for wealth, power and prestige.[364] The basic assumption that individual workers would be protected by their union, not government, and that their rights would be preserved by collective bargaining, not law, has become untenable. The inevitable need to protect the interest of the individual worker from group oppression has given rise to a dialectic that is at war with the basic premises of collective self-government.

2. *The Polarities of Modern Labor Law*

Modern labor law, like modern antitrust law, has been plagued by polarities and paradoxes. In seeking to uphold a law committed "to

361. Stone, *supra* note 1, at 1541-44.

362. *Id.* at 1541 (discussing how the individual's right to attack a union's handling of grievance and arbitration decision under Hines v. Anchor Motor Freight Inc., 424 U.S. 554 (1976) has served to undermine the notion of group representation).

363. *Id.* at 1542 ("Permitting individuals to attack union decisions and independently to litigate contract issues undermines the notion of group representation, for 'what was made collectively could be promptly unmade individually.' ") (footnote omitted).

364. *See* Stone, *supra* note 4; Klare, *The Labor-Management Cooperation Debate: A Workplace Democracy Perspective*, 23 HARV. C.R.-C.L. L. REV. 39 (1988).

Ironically, state law of employment at-will has moved in just the opposite direction in recognizing that at-will employees have relational interests in their jobs which deserve protection against unjust termination. *See, e.g.*, Linzer, *The Decline of Assent: At-Will Employment As A Case Study Of The Breakdown Of Private Law Theory*, 20 GA. L. REV. 323 (1986). In New York, however, the judiciary has tenaciously resisted efforts to reform its common law rule even though the Court of Appeals has recognized the need for reform. *See* Minda, *The Common Law of Employment in New York: The Paralysis of Nineteenth Century Doctrine*, 36 SYRACUSE L. REV. 941 (1985).

change the unit of labor from individual to collective,"[365] the modern structures of labor law have established doctrines that ultimately fail to affirm the interests of the very people that the law of collective bargaining was designed to protect and affirm. In responding to the need for other doctrines protecting the interests of individual workers, labor law has developed anti-collectivitist principles that threaten the theory of collective bargaining.

While the Wagner Act guaranteed the right of employees to exercise collective rights of self-organization,[366] the Taft-Hartley amendments protected the right of the individual "to refrain from any or all of such activities. . . ."[367] While the theory of labor arbitration under the *Steelworkers Trilogy* places heavy reliance on the importance of labor arbitration, individual union members are granted a right to attack a union's handling of a grievance or the resulting arbitration decision under section 301, if the union breached its duty of fair representation.[368] Consequently, the polarity between collective and individual interest in labor law *values* yet *limits* employee participation in workplace governance.[369]

A similar set of polarities also regulates the power of labor and management. Stone, for example, has recently illustrated how current labor regulation can be understood in terms of two different forms of labor laws that affect the market power of unions.[370] "Constitutive" regulation[371] serves to establish and enable the collective entity, the union, to engage in its collective bargaining responsibilities. The unfair labor practices section of the Act perform a "constitutive" function in that they "express commitment to change the unit of labor from individual to collective."[372]

The Labor Act also seeks to regulate the power of unions under regulation that Stone calls "power broker" rules, i.e., rules that "influence the power relations between organized labor and employers."[373] Power broker regulation is represented by "legal rules [that] determine what actions labor and management may take vis-a-vis each other to fur-

365. Stone, *supra* note 1, at 85.

366. 49 Stat. 449, § 7 (1935).

367. 61 Stat. 136, § 7 (1947).

368. *See, e.g.*, Hines v. Anchor Motor Freight Inc., 424 U.S. 554 (1976).

369. Klare, *supra* note 349, at 75. As Klare explains: "The justice of worker participation is acknowledged, yet that participation is carefully controlled and restricted. This is achieved by sharply deflecting the exercise of worker power away from such concerns as the organization of the work process and long range enterprise goals and planning. Rather, the 'legitimate' exercise of worker participation and power tends to be confined to 'market' (as opposed to 'production') concerns, *i.e.*, to the terms of sale of labor power." *Id.*

370. Stone, *supra* note 1, at 82-86.

371. *Id.* at 82 ("[T]hey enable and facilitate the creation of the entity, 'organized labor.' ").

372. *Id.* at 82-83.

373. *Id.* at 82.

ther their own separate interests."[374] Stone calls regulation of this type "power broker rules" because they are "rules which broker, or allocate, the relative power of management and labor."[375]

Because they allocate the power between management and the union, power broker rules affect the extent to which constitutive rules facilitate and enable the union to act as a collective entity. Indeed, it is Stone's thesis that "while the constitutive effect of labor laws is empowering for unions, the power broker effect, through recent interpretations of the statute, has become a limitation on union power in the market place."[376] The duty to bargain over investment decisions is one example.[377] In finding that the factor of profitability is a relevant factor for determining whether an investment decision is amenable to collective bargaining, the NLRB and the courts have adopted a rule which "brokers" power in favor of management.

Another example is the *Wright Line* case.[378] In that case, the Board held that an employer could rebut a prima facie showing of discrimination under § 8(a)(3) by demonstrating a "legitimate business reason" for its action, even if its action was unlawfully motivated.[379] As Stone notes, *Wright Line* shifts the decision-maker's attention away from motive to legal justifications based on the employer's claims of legitimate business reasons.[380] In other words, the new legal concept of justification works to define and limit the power of labor organizations by adopting a theory of brokerage based on profit maximization. This concept of brokerage, of course, has roots in the system of industrial liberty established by the common law in the late nineteenth century.

The polarities of labor law, like those of antitrust, call for interpretive concepts like justification and business efficiency to reconcile the tension between constitutive and power broker regulation, that is, collective versus individual rights. But while the concept of the market has limited the activities of individuals and labor organizations, it has ultimately failed to reconcile underlying tensions posed by opposing values and interests. Like the polarities of antitrust, those of labor law can also be understood to reflect the longstanding contradictions of common law doctrines of free trade. The very choice between collective and individ-

374. *Id.* at 85.

375. *Id.*

376. *Id.* at 82.

377. *Id.* at 85-86.

378. 251 N.L.R.B. 1083 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981). The Supreme Court approved the Board's *Wright Line* burden of proof test in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).

379. *Id.* at 1088.

380. "Business justification takes the trier of fact out of the hazy world of motive into the clear light of business rationality. It makes it possible for an anti-union action to escape sanction so long as it can be 'justified,' even if justified after the fact." Stone, *supra*, note 1, at 100.

ual approaches, or constitutive or power broker regulation, reflects prior attempts to construct opposing doctrinal models to rationalize the exercise of power by collectives and individuals, combinations and competitors, or more specifically, labor and capital. This underlying tension is thus yet another illustration of the continuing hold of the common law methods of trade restraint.

3. *The Plea for A New Law of Labor Relations*

The continuing influence of common law logic has also given rise to pleas for a new law of labor relations. Richard A. Epstein, for example, has recently argued that "New Deal [labor] legislation is in large measure a mistake that, if possible, should be scrapped in favor of the adoption of a sensible common law regime relying heavily upon tort and contract law."[381] Epstein argues that a new common law of labor relations can be reconstructed from a particular normative account of labor relations doctrine as it existed in the nineteenth century.[382] Epstein claims that the common law framework established by the nineteenth century law of trade restraint reflects "a basic intellectual orientation in favor of limited government and the maximization of private autonomy."[383]

In developing an autonomy-based theory of free trade based on the logic of the English merchant cases such as *Mogul* and the American picketing cases such as *Plant v. Wood*,[384] Epstein has stated that "[t]here is little need for the NLRB under a sensible version of common law rules, for the one thing that courts know well is the law of contract, property, and torts."[385] He thus asserts that the complications of the existing administrative labor law system could be spared by relying upon a national labor relations policy structured by the common law of at-will contracts.[386]

Epstein's proposal for a new common law of labor relations, however, assumes that it is possible to reconcile the need to protect individual interests from the restraint of collective interests without outright condemning all combinations. Hence, Epstein argues that restraint of trade itself should not be illegal, but only when unlawful means are used such as force, fraud, and inducement of breach of contract.[387] Like common law judges, Epstein believes that a concept of malice or coercion can be developed which would mediate the tension between various concepts of

381. Epstein, *A Common Law for Labor Relations*, *supra* note 3, at 1357.
382. *Id.* at 1364-86.
383. *Id.* at 1359.
384. *Id.* at 1367-79.
385. *Id.* at 1403.
386. *Id.* at 1403. *See also* Epstein, *In Defense of the Contract at Will*, 51 CHI. L. REV. 947 (1984).
387. Epstein, *supra* note 3, at 1369.

free trade as competition and as combination, but do it in a way that individual interests are protected against the restraining consequences of groups. But Epstein's proposal is flawed, because all attempts to ground the contradictions of free trade logic in some fixed idea of individual liberty or fair competition will ultimately become undone by the dialectic of opposing ideas of free trade. Questions of malice require judges to look to the facts, but the facts themselves are subject to contradictory interpretations based on different normative conceptions of free trade as competition and combination.[388] Returning to the common law will therefore reestablish the current paradoxes in merely a different, but strangely similar setting.

There have been other pleas for a new law of labor relations. One of the most significant recent debates in labor law involves the question whether the adversarial model of labor relations should be "junked" in favor of a model of labor cooperation.[389] Advocates of cooperative approaches to labor relations argue that labor law is now organized by an adversarial theory which assumes that the interests of employers and employees are inexorably in conflict. For example, by forbidding the formation of cooperative alliances between workers and management, section 8(a)(2) maintains an artificial wall between workers and management. Those who argue for cooperative approaches claim that this situation is counterproductive, because it does not allow American business to take advantage of the new labor-management relation concepts that the Japanese have pioneered.[390] Defenders of the adversarial model argue that cooperative approaches will destroy collective bargaining by undermining effective representation of separate and distinct interests.[391]

The debate over adversarial and cooperative approaches in labor law is structured by the mistaken assumption that one must choose between these different approaches.[392] These debates are examples of a general belief that opposing values can be reconciled and intelligently cabined by some model or theory of proper labor relations, or concept of market competition. But, as we have seen, there is no *method* or *model* that can do that. The tension between adversarial and cooperative models merely expresses in a different context and a different way the dialectic between competition and combination. Conceptually, the debate over approaches to labor relations and antitrust are simply different aspects of the same

388. *See supra* note 44.

389. The debate is succinctly summarized in Klare, *supra* note 364. *See also* Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C.L. REV. 499 (1986).

390. *See, e.g.*, Note, *Rethinking the Adversarial Model in Labor Relations: An Argument for Repeal of Section 8(a)(2)*, 96 YALE L.J. 2021, 2021 (1987).

391. *See, e.g.*, Kohler, *supra* note 389, at 518-34.

392. *See* Klare, *supra* note 364, at 51 ("[i]t is a mistake to imagine that we face a choice between adversarial and cooperative industrial relations models.") *See also* Klare, *Workplace Democracy and Market Reconstruction: An Agenda For Legal Reform*, 38 CATH. U.L. REV. 1 (1989).

debate involving the same tensions and paradoxes. It is another illustration of how the laws of labor relations and antitrust have become captive to doctrines that have limited the possibilities for future growth and development. And therein lies the legacy of the common law of trade restraint.

CONCLUSION

The contradictory nature of the common law of trade restraint has continued to influence the development of modern labor and antitrust law. The legal images of the two understandings of free trade at common law have resulted in an antitrust law that justifies monopoly on the basis of oscillations between two levels of antitrust analysis, and the development of a law of labor relations that assumes the necessity of union participation in corporate management but denies such participation in most important decisions affecting employee interests. When seen in light of the intellectual history of trade restraint law, the modern state of labor and antitrust doctrine evokes a sense of deja vu.

The paradox posed by the different ways of understanding how combinations and competition further free trade is inevitable, because judges will never be able to avoid making substantive value choices. The contradictions inherent within the concept of free trade are resolvable, if at all, only by resort to a more self-conscious acceptance that the underlying core issues at stake raise highly contested political questions involving the empowerment of individuals, groups and organizations. For the nineteenth century jurists in *Mogul* and *Vegelahn*, the legal issues required them to make political choices about which group to empower or protect. The political nature of the issues has remained present, although submerged, in the labor and antitrust decisions in the modern era. If there is a lesson to be learned from a deconstructive of labor and antitrust law, it is that the task of privileging interests calls for a policy decision that cannot be resolved by legal logic alone.

It would seem then that the future for labor and antitrust may lie in the development of new doctrines that embody the necessity of political empowerment as an explicit component of regulation of economic activities under law. Instead of following methods valuing competition over combination, or vice versa, what is needed is a methodology that acknowledges the politics of choosing between conflicting and different interests. Such a method might accept, not struggle against, the dialectic between combination and competition. Concepts of interests,[393] self-real-

393. *See, e.g.*, Stone, *supra*, note 1, at 166-68 (arguing for a concept of interest linked to "an objective definition of labor and management that has enough correspondence to employee subjective perception to permit the formation of a collective identity" in labor-management relations).

ization,[394] and positive values of fair profit, political freedom and diversity[395] could become the new hinges upon which the oscillation between combination and competition turns. At the very least, what seems apparent is the need for a doctrine that accepts the inevitability of politics.

In this article, I have tried to make some sense of the current state of the law by revealing how the paradoxes of labor and antitrust have plagued judicial decision-making since the earliest point in the development of the common law of trade restraint. The discovery of a long-term pattern in the logic of competition doctrine is important in understanding the current state of modern labor and antitrust law. The next cycle of labor and antitrust reformers cannot hope to avoid the paradoxes of the past without first reflecting upon their own history. Change can only be brought about by recapturing the alternative social and political conceptions of labor and capital that have been relegated to the margins of labor and antitrust law.

394. *See, e.g.*, Klare, *supra*, note 364, at 47-50 (arguing for "a vision of workplace institutions and practices that will encourage economic growth and prosperity consistent with expanded and equitably distributed self-realization opportunities." *Id.* at 47).

395. *See, e.g.*, Peritz, *supra*, *"Rule of Reason"* note 1, at 342 ("Placing competition into its logical and historical context allows us to recapture the positive values associated with combinations, small businesses, fair profit, and other doctrinal formulations that we currently associate with negative values such as 'anticompetitive' practices or 'anti-efficiency' policies"); Minda, *Interest Groups, Political Freedom and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine*, 41 HASTINGS L.J. 905 (1990) (offering a descriptive and normative framework to support a proposed modification of the *Noerr-Pennington* antitrust doctrine to foster political freedom and efficiency).