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Some Influences of Justice Holmes' Thought on Current Law - Monopolies and Restraint of Trade

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A study of monopolies and restraints of trade is dramatic and thereby interesting as a subject; and its importance is not confined to those affected by the results flowing from variations in the development. There is an objective interest arising from the dramatic element which conflict creates.

The history of the Sherman Act is marked by tension at every stage of its unfolding. The conflict is not always that of persons; nor the diversities of personal concern; there are conflicts of opinion; there are the tensions arising from economic forces, vast in the sense that they exist as irresistible tendencies, and hidden in the sense that their strength and direction are not observed nor noted even by those whose fortunes they affect. A conflict exists between the popularly held ideals and the economic forces, forces with the nature of the oceantide subject to regulation and yet not to complete control. The history of monopolies and restraints of trade in our era is marked by the tension of struggle.

These incompatibles find as an ultimate binder the age-old and universal contest between the urge for oneness and the ideal of individualism, which now asserts itself in economics, and well stated in respect to the art forms of the period by Nietzsche:

"... the mystery doctrine of tragedy: The fundamental knowledge of the oneness of everything existent, the conception of individuation as the prime cause of evil, and of art as the joyous hope that the bonds of individuation may be broken in augury of a restored oneness."

Tension arises in matching production and distribution. Marx, in earlier work, as economist, viewing the industrial revolution, in its beginning, saw the basic problem as an equipose of production and distribution. This analysis was accepted; the cartel form, since common in Europe, is the pattern. Henry Ford referred before the Temporary National Economic Committee to an era of mass production, and to mass consumption as its counterpart; Professor Ezekiel there said that we had not learned in times of peace to maintain a purchasing power equal to the goods and services we are able to produce. Professor Beard, a student of American reactions believes, without in this instance reflecting the general popular view, that our destiny is a technological society continental in scope. The factual background

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1 The quotation from Frederick Nietzsche is found in THE PHILOSOPHY OF NIETZSCHE—THE BIRTH OF TRAGEDY. The Modern Library. The translation is by Clifton P. Fadiman.
of the cases now to be reviewed reflects this tension between production and distribution in distress sugar, distress coal and distress oil; overproduction unable to find an outlet at a price consistent with the stability of the market. Justice Holmes, while yet in the Massachusetts Supreme Court, as early as 1896, in *Vegelahan v. Gunter* stated that a superficial reading of industrial history made plain that free competition means combination, of an ever increasing might and scope. This occurred in a dissent where Holmes upheld peaceful picketing as a proper incident of labor combination.

The conflict of ideas is present in the remedial changes which economic conditions made necessary. There is a diversity of approach. The *United States Steel* and *International Harvester* cases approved vertical expansion; statutes later fixed the price of bituminous coal. Cooperative action in the milk industry under supervision of the Department of Agriculture was legalized. For a time a like condition prevailed in the oil industry. The Interstate Commerce Commission was authorized to approve consolidations of railways. Marketing arrangements in respect to raisins, controlled by state action, were approved. Distinction was made, however, between action under state or national authority and private action. The means approved by public action became illegal in the milk and oil industries when initiated by private persons. Existing monopolies of the press consisting of membership associations and in insurance consisting of rating bureaus were opened up by decision or statute so that all might enter. Public regulation spread but did not override the Sherman Act. The suit brought by the State of Georgia against the railroads places the Sherman Act in an overriding position; the control exercised by the Interstate Commerce Commission was there rejected as a defense. In all the variations the Sherman Act thus remains dominant. The paramount idea in the Sherman Act is the exclusion of coercion. This concept appears in all of the cases. Trends of cartelization give way to price leadership; coercion is always excluded. It is the political idea in which the Sherman Act originated. Meantime economic forces have become more potent than political ideas.

The period of Holmes' various opinions from the Supreme Bench is marked by technological advance. Industrial expansion is in a developing stage. The problems created thereby were emerging. Holmes' opinions reflect the issues; and his work, especially the earlier opinions, permit us to see the problems of monopoly and restraint of trade in their beginnings. In the earlier part of the period we can separate the various factors; the later period of solutions is on the contrary marked by constant change and flux. The remedial actions begin in the latter part of the period and appear only at the close of Holmes' service in the Court. There was an attempt at remedial action after 1914 in the Clayton Act. The period is also one

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2 *161 Mass. 92, 44 N. E. 1077 (1896).*

3 *The suit brought by Georgia against the railroads appears in Georgia v. Pennsylvania Railroad Co., 324 U. S. 439, 65 Sup. Ct. 716, 89 L. Ed. 1051 (1945).*
of definition. Form was given to the Sherman Act. The meaning of the statute was defined; conspiracy, and intent were defined. The statute assumed a certain character. In this period also the states were acting in the field of monopolies and restraint of trade; the patterns which the states used were later to be copied and expanded by the Federal Government. The states were using price fixing as a means of control; not the cooperative price fixing which federal statutes authorized in the thirties; it is, however, that form of approach used in a negative way. *Tyson and Brother v. Banton* is an example; there Holmes, in his dissent, casts many of the Lockeian ideas aside and relies upon a use of police power. Down this road the succeeding decade marched; the police power became the basis of action in the exercise of both state and federal power.

Holmes' opinions lift us from conflict to reconciliation, which is a difference of approach; it is not a reconciliation of the forces at work in the economy. The conflict of solutions came in the years following the period we review. Holmes' views define the emerging problems and indicate the background of the later remedial solutions. The opinions have a marked quality. Holmes is entirely non-political in the sense that he is never partisan, his approach is objective, he does not join any of the conflicting forces, he has no view point. He was criticised that he did not make surveys. His role was otherwise, he became the arbiter of the ultimate facts, detachment was necessary. If a certain dramatic interest is missing because Holmes fought no battles and took no side, there is thereby, an intenser value in his work. There are two salient features in the work which create its values, namely, objectiveness in the presence of the merging problems, and an appreciation of the factors which are at work. Thus, Holmes was able to say, in Massachusetts, that competition, in an industrial era, meant combination, and later, in *Tyson and Brother v. Banton*, to point to the rising tide of the police power. Reconciliation arises in Holmes' thought, beyond the objective and the analytical, in the suggestion, even the assumption, of society equal to self discipline. The means used is elucidation, it has the quality of creative work as described by Coleridge:

"This power . . . reveals itself in the balance or reconcilement of opposite or discordant qualities: of sameness, with difference; of the general, with the concrete; the idea with the image; the individual with the representative; the sense of novelty and freshness with old and familiar objects; a more than usual state of emotion with more than usual order; judgment ever awake and steady self-possession with enthusiasm and feeling profound or vehement . . ."

In this article I shall analyze Justice Holmes' opinions respecting monopolies and restraint of trade. Since they cover a variety of matters, synthesis is necessary, and, therefore, a method of approach. The material adapts itself into two broad divisions, namely, the Sherman Act, and the powers of the states. The part relating

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5 The quotation from Coleridge is found in the *Biographia Literaria*, J. M. Dent and Sons, LTD. and E. P. Dutton and Co.
to the Sherman Act is marked by two further divisions, namely, the scope of the statute, and the definition of the statute in its legal sense. This division is arbitrary if a purely legalistic approach is made; there any difference between the scope and the definition of the statute disappears and leaves solely a question of law. Since the cases, as an entirety, show that the intent of Congress is ultimately determined by the Court, there is ground for separating the scope of the statute and its definition. Definition emerges only where scope is left beyond dispute. So, there are three divisions, the scope of the Sherman Act, the definition of the Sherman Act, and the powers of the states. The scope of the statute develops in these topics: (1) competition; (2) price fixing; which subdivides into: (a) action by producers, (b) lateral agreements, (c) indirect and associational activity; and, (3) integration and size. The definition of the statute evolves in the headings: (1) patents, (2) labor unions, (3) intent, (4) conspiracy, (5) the effect of violations on contract relations, (6) action outside the United States, (7) suits by private persons. The powers of the states unfold under the themes: (1) classification under the Fourteenth Amendment, (2) statutory standards and remedies, and (3) price fixing.

We consider now the scope of the Sherman Act, by examining Holmes’ views on competition. The source is the dissenting opinion in Northern Securities Company v. United States.6 There, the appeal brought up for review a decree of the Circuit Court for the District of Minnesota, entered in an equity suit, brought by the United States, and which enjoined the Northern Securities Company from acquiring any further stock of the Northern Pacific Railway Company, or the Great Northern Railway Company, from voting stock already acquired, from paying dividends thereon; and also forbade the exercise of any control over the railways by the Northern Securities Company; and found that the stock already held was acquired by a conspiracy in restraint of trade and in violation of the Sherman Act.

The decree was affirmed. Four justices dissented; Justices White and Holmes wrote separate dissenting opinions and the dissenter concurred in each.

The Great Northern Railway Company and the Northern Pacific Railway Company were competing and mainly parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound. The Northern Pacific properties became insolvent and receivers were appointed. The bondholders attempted a reorganization by consolidation with the Great Northern. It was enjoined on the application of a stockholder of the Great Northern under a Minnesota statute forbidding the merger of railroads having parallel or competing lines. Messers. Hill and Morgan, stockholders in the respective companies, and their associate shareholders, then formed a holding company, under the laws of New Jersey, known as The Northern Securities Company, and the holding company exchanged its capital stock for a controlling interest in the capital stock of each of the railway

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companies. Meanwhile the two railways had acquired control of the Chicago, Burlington and Quincy Railway Company by giving their joint bonds in exchange for capital stock.

The majority of the justices found on the facts that the separate railway companies ceased, under the arrangement, to be in active competition along their respective lines and became a consolidated corporation with the principal, if not the sole object, of eliminating competition. This combination was held to be a trust, or at least a combination in restraint of interstate commerce, as defined in the Sherman Act, since the combination was a restraint upon the freedom of commerce which Congress intended to protect and which the public interest required.

Justice Holmes, in his dissenting opinion, first analyzed the statute. Sec. 1 of the statute reaches two classes of cases, namely, contracts in restraint of trade, and combinations or conspiracies in restraint of trade. Contracts in restraint of trade were at common law those restricting the freedom of the contractor in carrying on his business as he otherwise would. The objection to these was on the contractor's own account. The point Holmes has in mind here is currently described as injury to initiative. Combinations or conspiracies in restraint of trade were efforts to keep others out of the business, and the objection to these was their effect upon strangers and a supposed consequent effect on the public at large. Public policy excludes these because such agreements monopolize or attempt to monopolize trade or commerce. Sec. 2 of the statute imposes like penalties as Sec. 1 upon a single person who, without combination, monopolizes or attempts to monopolize commerce among the states. The reference to "trusts" is to a sinister power exercised by a combination in keeping rivals out and ruining those already in business. Sec. 7 gives an action to a person injured in his business or property by the forbidden conduct. It refers to outsiders.

Holmes' views on competition appear in this analysis of the statute and are then expanded as consequences. The statute says nothing about competition; it does not look primarily to competition. Combination in restraint of trade and monopoly both connote the exclusion of strangers to the combination. The words of the statute do not require all existing competition to be kept, and only prevent the repression of competition by contracts or combinations in restraint of trade; and the evil character of these flows from other features than the suppression of competition. The statute is directed against the ferocious extremes of competition with others. The abolition of competition by any form of union is not unlawful. Holmes makes two references to consequences: the purpose of the statute is not the universal disintegration of society into single men "each at war with all the rest;"—not the reconstruction of society.

The majority of the justices held that a limitation of competition was per se a violation of the statute; Holmes did not agree either in the reading of the statute or in the possible consequences; the statute was directed at the abridgment of free-
SOME INFLUENCES OF JUSTICE HOLMES

by coercion; the public interest must be viewed in relation to an industrial and technological era; and the problems could not be solved by disintegrating such a society into atoms.

The depth of this opinion is in the exact analysis of the factors at work in the economy. The National Recovery Act, the cooperative price fixing arrangements, the power of the Interstate Commerce Commission to authorize consolidation of railways and motor carriers (McLean Trucking Co. v. United States) later justified Holmes' position. The opinion rests on three ideas: legal freedom to engage in independent business adventures, recognition of the expanding nature of an industrial and technological society, and self discipline as a means of control rather than a society of single men each at war with all of the rest.

Price is a basic factor in the exchange of goods; under orthodox theory it is fixed by the market; it relates to loss and profit. It is a weather vane in the economic system. Veblen put the price system and the industrial system in opposition: the former emphasizing profit, the latter emphasizing production; and believed production the better social objective. Others believe that profit supports initiative. In this part of our review we meet three forms of action respecting prices namely; (1) action by producers; (2) action by lateral agreement; and (3) indirect and associational activity. There is a natural transition in the subject at this point; in the first opinion we consider Justice Holmes reviewing action by producers, restates his concept of competition; and in a later opinion, concerning indirect and associational activity, discusses the control of competition by the limitation of production.

Dr. Miles Medical Co. v. Park and Sons Co. brought up for review the dismissal of a bill of complaint for want of equity. The lower court had held that the plaintiff, a producer of proprietary medicines, might not have injunctive relief against those inducing its wholesale agents and retailers to breach contracts by which they had agreed not to sell the plaintiff's products below the wholesale and retail prices fixed by the contract. The agreement with the jobbers and wholesalers was open to construction as either consignment or sale. The majority interpreted the bill as extending to sales between the jobbers and wholesale dealers. The retail agreement was clearly a sale and not an agency contract. The majority of the Justices held that the exercise of control was not by virtue of production and ownership but by agreement which was invalid since it destroyed competition among the dealers and fixed prices contrary to the public interest.

The Sherman Act is not directly involved; there is a refusal to allow equitable relief because of public policy, much as in the later case of Morton Salt Co. v. Suppiger Co. where a licensor attempted to extend by agreement a patent monopoly on machinery to salt tablets.

8 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502 (1911).
Justice Holmes defined the issue as whether a purchaser might contract that he would not sell the goods below a certain price, and marked the ground of the majority holding as the benefit to consumers and the general public. He would not accept that idea; the value and importance to the public of competition in production or distribution and in fixing a fair price is exaggerated. The decisive factor in competition is conflicting desire making choice necessary. When the price of a desired something rises above the point of a willingness to give up other things buying stops. Necessities are different and must "sooner or later be dealt with like rations in a shipwreck." Profitable return depends upon an equilibrium of several desires which determines the fair price. Knaves cut reasonable prices for ulterior purposes and production and sale are impaired. Combinations in restraint of trade are not here involved since they exclude others from a business naturally open to them. The underlying idea of this dissent is that of a free enterprise system; the method of approach is the application of Say's Law to the economy as a whole rather than to segments of it.

On the law Justice Holmes went beyond the seller announcing in advance a resale price as a matter of right; he allowed a means of activation by agreement. The majority concurred in the former concept; but it believed that in agreement a coercive element might be present. *United States v. Colgate Co.*\(^1\) brings out the first part of Holmes' thesis; it held that an indictment will not lie under the Sherman Act because of the fixing of resale prices and a refusal to deal with those who do not conform. The majority's view on the second concept in Holmes' thesis is illustrated by *United States v. Schrader's Son Inc.*\(^2\) there the indictment was sustained upon agreements, express or implied, that the resale prices be observed. Holmes, without opinion, dissented.

"Unfair methods of competition in commerce" came under the jurisdiction of the Federal Trade Commission by Sec. 5 of the Clayton Act in 1914, and Justice Holmes reasserted his thought on price fixing by producers. *Federal Trade Commission v. Beech-nut Co.*\(^3\) brought up a judgment of the Circuit Court of Appeals for the Second Circuit which set aside an order of the Federal Trade Commission requiring the respondent to cease and desist from a plan of resale of its products, whereby it selected jobbers, wholesalers and retailers willing to resell at prices it suggested and insisted that they discontinue sales to all others who cut the suggested price, limited turn over orders solicited by its salesmen to those who observed the price, and maintained a list of selected customers to which it added or removed names upon the basis of declarations to maintain the price, and devised a method of marking its goods in order to trace price cutters.

The majority of the Justices held that the plan was unlawful under the statute on the ground that it constrained the trader to maintain the prices suggested and

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\(^1\) 250 U. S. 300, 39 Sup. Ct. 465, 63 L. Ed. 992 (1919).
\(^2\) 252 U. S. 85, 40 Sup. Ct. 251, 64 L. Ed. 471 (1920).
\(^3\) 257 U. S. 441, 42 Sup. Ct. 150, 66 L. Ed. 307 (1922).
thereby suppressed competition among the retail distributors. Justice Holmes narrowed the basis of the decision in his dissent; the guilt was a dangerous tendency to hinder competition or to create monopoly; the respondent had a monopoly of its own goods; no one could compete with it. The action taken hindered competition among those who purchased for resale; yet, under the law, this competition depended upon the will of the respondent. The statute refers to unfair methods of competition. To whom is the respondent's conduct unfair? Thus we return to the nature of competition and the process controlling prices in a free economy discussed by the dissent in *Dr. Miles Medical Co. v. Park and Sons Co.*, and there attributed to conflicting desires as the regulators of the market. Holmes was far from hedonistic. His ambition was different; "—to believe when the end comes, for till then it is always in doubt, that one has touched the superlative."¹³ That adjective can hardly apply to the view of competition found in the two dissents. The productivity of the industrial age, however, had not yet been appraised. The first dissent was written in 1911, before Veblen had noted, in the wilderness, the unbounded productive capacity of the machines, an idea neither presented nor suggested by the material before the Court. Later the police power became the means of those who held to the theory of wider consumption, and there we shall find that Holmes had a part.

These dissents later became a part of the Sherman Act; the Miller-Tydings Act of 1937 made contracts prescribing minimum prices for the resale of commodities bearing a trade mark lawful when permitted as intrastate transactions. The conflict, however, continued. The Final Report of the Temporary National Economic Committee found unanimously that the price fixing laws undermined the advantages of mass production to the consumer. The Sherman Act remains, nevertheless, the overriding power where price fixing agreements, authorized by state statutes, are a part of coercive purpose in respect to interstate commerce. *United States v. Frankfort Distilleries*¹⁴ is a recent decision on that point.

What defines competition? Is competition the war of 'every man with every other man'? Is existing competition holy? Is competition solely the right to be free from coercion? Is price control by producers a restraint of competition? Are agreements fixing resale prices coercive in an evil way? Are conflicts in social desires determinants of competition? Is mass distribution on the widest scale the test of competition? Is mass distribution possible under the competition of the market as defined by Say?

We find in these problems a clash of ideas which, however, does not make the entire pattern; also, there is a clash of economic forces, the necessity and demand for a share of distribution meets the older idea of owner control. Justice Holmes saw combination as the heritage of an industrial era. How clearly he real-

¹³ The reference to Justice Holmes' ambition is found in the *HOLMES—POLOLOCK LETTERS*, Harvard University Press.
ized the need for mass distribution and the demand for participation in mass distribution is not yet apparent. Thus far he has asserted the idea that a free market still has a place. Our review, however, is not yet complete. We must await the opinions in which Justice Holmes discusses the Sherman Act as part of a police power necessary to control combination in aid of the natural laws of competition. We reach that part now in considering lateral agreements.

Lateral agreements are arrangements among two or more competitors designed to fix the prices of goods in a given industry. On this subject we shall examine one opinion by Justice Holmes; he wrote but one in this field of price control. This expression on lateral price control influenced a later decision of the Court on lateral agreements, and also foreshadows decisions in the field of indirect and associational activity which the Court reached across a dissent by Holmes entered in an intervening case. This single opinion on lateral agreement price fixing is interesting because it reflects the precise character of Holmes' thought in the capacity to define and the courage to exclude; but its interest does not cease there; neither does its influence on later decisions entirely define its value. It clarifies the nature of the offense of lateral price fixing under the Sherman Act by defining its essence, an influence of value in view of the confusions which arose later in disposing of reasonableness as a price test.

*Swift and Company v. United States* was an appeal from the Circuit Court of the United States for the Northern District of Illinois. A bill in equity alleged violations of the Sherman Act in that the defendants, engage in buying live stock and selling fresh meats in divers states, had combined to restrain competition among themselves by: refraining from bidding in order to depress prices; artificial bidding in order to stimulate shipments; monopolizing commerce by combining "to arbitrarily, from time to time, raise, lower and fix prices, and to maintain uniform prices at which they will sell"; making uniform charges for cartage, which otherwise would be without charge; and, arranging with railroads to receive rebates and rates less than the lawful rate. The bill had a general allegation that the defendants were in conspiracy with each other, with the railroads, and with others, to obtain a monopoly of the supply and the distribution of fresh meats. The defendants demurred to the bill, whereby, they admitted the facts alleged and rested upon the point that the bill did not set forth definite or specific facts within the statute. The trial court overruled the demurrer and an injunction issued. Justice Holmes wrote the opinion of the Supreme Court sustaining the decree.

The vital element in the opinion is Holmes' approach. He excludes any discussion of the separate items as entities; the acts, each standing alone, may be lawful. The earlier sections of the bill alleged an intent to restrain competition among the defendants. An intent to monopolize appeared in the eighth section pertaining to raising, lowering and fixing prices. The general allegation of a conspiracy of the

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defendants with each other, with railroads, and with others to monopolize the supply and distribution of fresh meats colored all of the specific charges as the successive elements of a single connected scheme. The law is then applied to the facts in these words: "the statute gives this proceeding against combinations in restraint of commerce among the states and against attempts to monopolize the same." Holmes examined the facts alleged and the allegation of intent and finding them within the statute declined to go further. Price fixing was alleged in the bill as part of a scheme to monopolize commerce and it was colored by the general allegation that the defendants were conspiring with one another, the railroads, the others to monopolize the supply and distribution of fresh meats. The essence of the offense was the combination in restraint of trade and the conspiracy and intent to monopolize. Thus the statute dominates the facts; the general absorbs the particular; the evidence is drawn into the law; and there finds its significance.

In United States v. Socony-Vacuum Oil Co.,16 decided in 1940, the opinion stated: "Thus for over forty years this Court has consistently and without deviation adhered to the principle that price fixing agreements are unlawful per se under the Sherman Act..." (p. 218) The case, brought up by certiorari, involved a conviction in criminal proceedings under the Sherman Act of oil companies on an indictment and jury finding that the defendants had conspired to raise and maintain the spot market prices of gasoline and the prices to jobbers and consumers through buying up distress gasoline and removing it as a market factor; there was an arrangement for the control of spot market gasoline by ascertaining its quantity and arranging for its purchase. The trial court had charged the jury that if the combination had the power to raise the prices and had acted together for that purpose the combination was illegal and the reasonableness of the prices was not a factor in the matter. The Court charged however that the price rise must be caused by the combination. The Circuit Court of Appeals had reversed the conviction on the ground that the trial court's charge was based on the theory of such a combination being illegal per se.

As yet we have not reached a discussion of price fixing by indirect action and associational activity; lateral agreements merge with that field of law not upon the facts, which are quite different, but upon Justice Holmes' definition of the offense under the Sherman Act—so penetrating in its analysis that it clarifies the application of the law to either set of facts. The discussion in United States v. Socony-Vacuum Oil Co. is of interest in that it gives a basis of contrast and thereby a test of Holmes' view; and the comparison becomes more helpful still if we bring into the equation the decision in Appalachian Coals Inc. v. United States,17 a case decided after Holmes had retired from the Court.

The approach which Holmes made in Swift and Company v. United States rested on the concept that the Sherman Act was directed at combinations in restraint

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16 310 U. S. 150, 60 Sup. Ct. 811, 84 L. Ed. 1129 (1940).
of trade and attempts to monopolize; it absorbed the price fixing allegation into these terms. *Appalachian Coals Inc. vs. United States* finds its rationale in the approach which Holmes used in *Swift and Company v. United States*. A brief statement of the facts is necessary. The suit was in equity. Coal producers in Virginia, West Virginia, Kentucky and Tennessee had formed an exclusive sales organization known as Appalachian Coals Inc., with power to fix prices except on sales for future delivery. The trial court found there was concerted action which affected the market and tended to stabilize prices and raise prices to a higher level than free competition would permit. The facts showed that the capacity of the mines exceeded the demand; distress coal existed under competitive conditions; the sales agency was organized to remove the distress conditions. An injunction was issued. The Supreme Court reversed the decree and dismissed the bill without prejudice on the ground that the evidence showed the defendants could not fix the price of coal in the consuming market. The defendants had fixed their own prices; sales were not made in the territory but at points where competition was met from other fields of production.

The tensions which arise from commercial action under the Sherman Act produce further and different action, and result in variations in commercial attitude and action. The cases we have thus far reviewed, and the associational activity cases which we review next, lead to price leadership. There is another case which influenced the trend of commercial action; therefore, *United States v. Trenton Potteries* must be brought into our review. The defendants were found guilty upon a jury verdict in criminal proceedings under the Sherman Act. The indictment charged a combination to fix and maintain uniform prices for the sale of sanitary pottery in restraint of commerce. The defendants asked the trial court for a charge which the Supreme Court construed as submitting to the jury an issue on the reasonableness of the prices which resulted from the combination. The Supreme Court held that the trial court properly withdrew this issue from the jury and properly charged that an agreement by the members of a combination respecting prices which the members charged for their commodity was in itself an undue and unreasonable restraint of trade. Justice Holmes joined in the decision. The combination controlled 82 per cent of the production; the Court held that a combination to control prices in so large a part of the industry was a restraint of trade. In a narrower view the defendants asserted that the reasonableness of the prices was a material fact. In *Swift and Company v. United States* Holmes subordinated price fixing to the statutory proscription of restraint of trade and attempts to monopolize. The reasonableness of the prices created by a combination in restraint of trade was within this test once a restraint arising from combination appeared.

Justice Holmes approached lateral price fixing in *Swift and Company v. United States* upon the statutory ultimates of combination to restrain trade and attempts

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to monopolize; a position based on good statutory construction, and economically necessary, as the facts in *Appalachian Coals Inc. v. United States* later demonstrated. The view that price fixing *per se* is unlawful implies the additional facts of combination and restraint, and rests on the point that the reasonableness of the forbidden action is immaterial.

The decision in *Swift and Company v. United States*, that lateral agreements creating monopoly by conspiracies respecting prices are void, when taken with the emphasis on price agreements *per se* in *United States v. Trenton Potteries* opened the way to associational activity and indirect price fixing through price leadership. Such associational activity is now our subject. Associational activity is generally concerned with production. Production, however, affects price. The relation between production and distribution is a vital price factor. Marx saw this problem at the beginning of the Industrial Revolution; Veblen focused economic attention on the relation in the American economy during the period of Holmes' judicial work. We shall here explore further Holmes' concept of a free market in his opinions concerning private effort to control supply and demand. We reach here the contribution Holmes made to the process of reconciliation. We find the philosophy by which Holmes sought to bring the conflicting factors in the economy, and the conflict between the statute and the economy, into accord. The pattern of the sequence is dissent, then the recognition of a necessary limitation of the position taken in order to bar coercion, and, finally, the acceptance of Holmes' views by the majority. This sequence is a dramatic incident. The definition of a free market as including knowledge, the necessity for the exchange of information respecting vital market factors, the reconciliation of economic diversities through self discipline, acting for the benefit of the community as a whole, are the concepts worthy of our interest.

*American Column Co. v. United States*19 was an appeal from the District Court for the Western District of Tennessee; it brought up for review a decree granting a permanent injunction under the Sherman Act forbidding the continuance of a trade association. Mills manufacturing hardwood in the Southwest had formed the American Hardwood Manufacturers Association which set in operation among its members an "Open Competition Plan" on the theory that knowledge of prices would keep prices at stable and normal levels. The members made a daily report of their sales, including exact copies of orders taken, and of their shipments, including copies of invoices. They reported monthly on production and stock and filed price lists for the ensuing month showing the shipping point on which the prices were based. The association made an independent inspection of grading for the purpose of comparing prices. The secretary of the association sent the members weekly reports of sales, including the price and name of the purchaser, monthly summaries of production and the stock of each member, the pros-

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pective monthly price lists of other members, reports of market conditions and of changes in the producing and consuming ends of the industry. The members met monthly for discussion; later they met weekly and in districts. Questionnaires developed in detail information on production and distribution. At the meetings and in the literature distributed to members the officers warned against overproduction, price shading and price cutting, and urged a price level creating reasonable profit. If a member did not report pursuant to the plan, the overall report of the secretary was not sent, and membership ceased upon failure to report for twelve days in a period of six months.

The majority of the Court held that the plan was a combination to restrict production and increase prices by agreement and a direct restraint upon commerce. It found that the purpose was to secure harmonious individual action in respect to production and prices, among naturally competing dealers, without specific agreement, under the direction of a single interpreter of the purpose. The plan was found to have sanctions, coercive power, in business honor and in possible social penalties since the reports exposed immediately any deviator to his associates.

Justice Holmes dissented. Knowledge of the stock on hand, of the probable demand, and of the prices paid would tend to equalize the prices asked. But intelligent interchange in commerce depends upon full knowledge of the facts, and combination to obtain and distribute such knowledge is not an unreasonable restraint of trade. While the combination here is of sellers only, it may be assumed that buyers are not less active. Unreasonable restraint of trade is an attempt to override the normal market; attempts to conform to normal market conditions are reasonable acts. The members are not bound by any sanctions that would not obtain in an all wise socialistic government acting for the community's benefit. The members are free to follow the plan or not as they wish.

Justice Holmes agreed with the majority's concept that coercion being present such a plan was invalid. In the subsequent case of United States v. American Linseed Oil Co.20 Justice Holmes concurred in holding a plan invalid where the record showed that the members deposited government bonds as security for performance of the arrangement and they agreed to a forfeiture upon a breach of the plan, and where there was evidence also of policing by the association.

Let us turn now to the two cases in which the majority finally accepted the views which Justice Holmes had expressed in American Column Co. v. United States by dissent. The names of these cases are Maple Flooring Manufacturers Association v. United States21 and Cement Manufacturers Protective Association v. United States,22 decided on June 1, 1925, about five years after the decision in American Column Co. v. United States. Justice Holmes was sitting in Court.

The appeal in *Maple Flooring Manufacturers Association v. United States* was from a decree of the District Court for the Western District of Michigan awarding an injunction to the government under the Sherman Act. The owners of timber lands and sawmills producing or purchasing rough lumber from which they made finished flooring had formed a trade association. The association computed and distributed the average costs of flooring among the members, distributed a booklet stating the freight rates from Cadillac, Michigan to several thousand points in the United States, gathered and supplied information as to sales, prices and inventories, which it had collected from members, and held monthly meetings for discussion of the industry and for an exchange of views. The decree was reversed and the activities declared valid under the Sherman Act. The Court held that neither price fixing nor coercion was established and that the gathering and distribution of information on the essential elements of a business and the application of individual intelligence to production, prices, or transportation costs, were not restraints of trade even where the result tended to equalize prices.

*Cement Manufacturers Protective Association v. United States* brought up for review, by appeal, a decree of the District Court for the Southern District of New York enjoining the continuance of a trade association among certain manufacturers of cement. The business of the members was largely in contracts for future delivery wherein they undertook to supply cement for a specific job—a particular building or road—and without binding the purchaser to take a given quantity; the specified price declined with the market; thus the contracts were of an optional nature. On rising markets buyers would at times take an advantage by calling for more cement than the specified job required. The association investigated the various buyers' needs and supplied this information to its members and thereby orders in excess of the contract were refused; the association also distributed books showing the freight rates from certain basing points to numerous places of delivery. The members exchanged credit information; there were monthly meetings and discussion. The decree was reversed on the grounds stated in *Maple Flooring Manufacturers Association v. United States*; and it was further held that the gathering of information to prevent imposition was not a restraint of trade since the members were left free to act or not to act and that this result followed even if most of the sellers would in ordinary course act upon the information and refuse to make deliveries which were not within the contracts.

Justice Holmes concurred in these opinions.

In both cases the associational activity related in some of its aspects to freight rates; in the cement case the basing point is suggested. The validity of the basing-point system was sustained there because of the absence of any agreement respecting the basing points, which also had the sanction of prior individual use, and the necessity of adjusting the individual price to the freight rate in order to allow all mills to compete in any territory; the book stating the various freight rates thereby served the purposes of competition. The use did not extend to a system of de-
livered prices reached by agreement. Sugar Institute Inc. v. United States,\(^{23}\) illustrates the contrast; there concerted action created an inference of agreement. Furthermore the basing system was not discriminatory. Corn Products Refining Co. v. Federal Trade Commission\(^ {24}\) and Federal Trade Commission v. Staley Manufacturing Co.\(^ {25}\) are also cases in contrast; in the latter cases deliveries were made from a point more adjacent and the price computed on the basing point. In the cement case there was adjustment in the price in order to equalize the freight rate. The basing-point system, when implemented by agreement, results in price uniformity on delivered goods regardless of the point of delivery or point of origin; it makes location immaterial. Rebates and hidden allowances to purchasers disturb the stability of the market. These practices are indicated in many of the cases; Swift and Company v. United States is an example among the opinions written by Justice Holmes. Control may thus be necessary for the purpose of enforcing discipline, and there is, therefore, an incentive to equalize disturbing conditions which competition creates. The Temporary National Economic Committee recommended that the basing-point system be declared illegal by federal legislation, allowing, however, a brief time for readjustment since relocation of plant equipment would result; it found that the system created plant concentration and implemented the efforts of combinations to fix prices. Justice Holmes' opinions do not discuss the basing-point system. It is a later development of the conflicting interests and economic forces which rest within the range of the Sherman Act. We can, therefore, now sum up Justice Holmes' contribution to the problem of associational activity in terms of the specific problem with which he dealt; that concerned associational activity in the control of production.

The reconciliation of conflicting statutory provisions is judicial work requiring a high degree of capacity; the reconciliation of the conflicts which emerge from an economy, the conflicts between production and distribution for example, an issue mingling with the issues of personal interest, demands a creative capacity exceeding that of the judicial process and needs not only an analytical approach to the facts but a philosophic bent of mind placing the emphasis on "knowing" rather than on "doing". The presence of this talent may not be denoted by a negative approach. Therefore, in assaying Justice Holmes' work in the opinions discussed in this section we must first put to one side the negative qualities of his work. Justice Holmes did not approve conspiracies fixing prices that created monopoly; he did not approve coercion in associational activity; he did not approve conspiracies creating monopolies by interference with established freight rates. These are the negative side of his work. There is a further and constructive trait, constructive in the sense that it is creative, and creative in the sense that it brings cooperation and self discipline to the surface as a means in reconciliation of the

\(^{23}\) 297 U. S. 553, 56 Sup. Ct. 629, 80 L. Ed. 859 (1936).
\(^{24}\) 324 U. S. 726, 65 Sup. Ct. 961, 89 L. Ed. 1320 (1945).
\(^{25}\) 324 U. S. 746, 65 Sup. Ct. 971, 89 L. Ed. 1338 (1945).
conflicts characterizing the free market in an industrial era. The free market in Justice Holmes' conception rested on knowledge of all of the factors in the market and the use of intelligence by both buyer and seller whereby commerce became "an intelligent interchange made with full knowledge of the facts as a basis for a forecast of the future..." The free market in theory created profit and the motivation of cooperative action rested in the preservation of a free market in the interests of the community as a whole. The element of coercion is rejected, and the necessary harmony flows from self discipline and enlightened selfishness. The concept is not hortatory only, but realistic in the sense that Emerson's law of compensation is realistic. It has justification in experience. Historically the peoples who have excelled in commercial affairs have had a keen sense of responsiveness to law as the foundation of stability in affairs. The Romans and the English are examples. The interest of these peoples in their legal systems was not only intense but also omnipresent. The self discipline that reflects responsiveness to law, a responsiveness that is natural and spontaneous, inherent and intuitive, in turn creates the stability on which the success of commerce depends. The responsiveness to law and to commercial sense are thus the reverse sides of the same medal; they are evidences of character and of a sense of form. To the problem of the normal market Justice Holmes applied creatively the legal process of reconciliation.

There is a further quality of Justice Holmes' work in this field. It rests in the elucidation of the economic and legal truths involved. The method and the purpose are stated simply and explained clearly whereby the best that is thought and known becomes current. Matthew Arnold has summed up this type of effort as the ultimate expression of the social ideal and described the men who undertake it as the true apostles of equality:

"The great men of culture are those who have had a passion for diffusing, for making prevail, for carrying from one end of society to the other, the best knowledge, the best ideas of their time; who have labored to divest knowledge of all that was harsh, uncouth, difficult, abstract, professional, exclusive; to humanize it, to make it efficient outside the clique of the cultivated and learned, yet still remaining the best knowledge and thought of the time, and a true source, therefore, of sweetness and light."26

Emerson, Arnold, and Justice Holmes used cultural development as a means of reaching practical ideals. The history of monopolies and restraint of trade is marked by conflict, and the problems, divers in nature, have created a diversity of remedies. The Mirror of Justice has many uses. Addison pointed out that it not only separates the gold from the dross, but has also a compulsory process whereby it may adapt recalcitrant powers to its purpose. The opinions we have just examined are the expression by Justice Holmes of the ideal state—of the "ought" rather than the "must". In the third part of this paper we shall review Justice Holmes' opinions

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26 The quotation from Matthew Arnold is found in the essay Culture and Anarchy, The MacMillan Company.
on the constitutionality of the exercise by the states of a police power in these matters. We turn to the final division of this first section now and discuss the opinions concerning the problems of integration and size.

Integration of an industry creates continuity in the productive process. It is described in *United States v. United States Steel Corporation*27 as a facility of industrial progress based on the need and value of continuity in manufacture from the ore to the finished product. Integration of the steel process was sustained. Justice Holmes concurred in the decision that integration alone was not a violation of the Sherman Act. Since Justice Holmes did not write the opinion in the steel case we turn to *National Association of Window Glass Manufacturers v. United States*,28 seeking there his reasoning. That appeal brought up for review a decree of the District Court for the Northern District of Ohio enjoining, under the Sherman Act, an agreement between the manufacturers of hand-blown window glass and a labor union comprising all of the labor in the industry. A wage scale was established and issued by agreement between the union and the producers to one set of factories for a given period and to another set for a second and different period with no factory receiving it for both periods. Labor and the means of production were integrated. The background of the agreement rested in machinery dispensing with hand blowers of glass, fixing the price for both machine and hand products, and reducing the trained hand workers to twenty-five hundred men, less than enough to run the hand factories continuously. The purpose of the arrangement was to secure employment for all of the men during the season of production and to give all of the labor to the factories and divide it equally among them. Justice Holmes first pointed out that the contract was not necessarily within the Sherman Act and then turned to examine the facts. They showed human labor disappearing before a force more cheaply obtainable, created by water or coal. Thus, the agreement was based on a fact. The factories could not run at a profit when undermanned; labor needed full employment. The integration of labor and of the facilities of production satisfied here an economic need. Integration in and by itself was not a violation of the Sherman Act.

Power rather than its use was the determining consideration of the Government's position in the *Steel* case. Power is "unlawful regardless of purpose" and "in ascendency there is the menace of monopoly." Thus the Court described the contention of the Government. Integration merges into size. Size is used with the connotation of power. The suggested measure of power is the percentage of control in production. An uncertain rule of thumb is the result. Forty-five per cent may be too little; ninety percent enough. The application of the rule is precarious because the legal test is not a percentage formula but Section 2 of the Sherman Act prohibiting monopolies—"Every person who shall monopolize or attempt to monopolize." Integrations are the result of planning; growth may be natural. Both result

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27 251 U. S. 417, 40 Sup. Ct. 293, 64 L. Ed. 343 (1920).
in size. The tendency to concentration in industry and commerce has been summed up by Professor Levi in a paper in the Chicago Law Review.\textsuperscript{29} He traces three merger movements, namely 1898 to 1903, 1925 to 1929, and 1940 to 1946. The natural trend of technological expansion and mass production has been intensified by two wars. A divergent tendency is found in the public utility field when integration rests on securities alone. Disintegration of security control has been sanctioned there by statute.\textsuperscript{30} *North American Company v. Securities and Exchange Commission*\textsuperscript{31} sustained the statute and an order requiring a gas and electric holding company to restore integrate units to a local economic and geographic basis. The industrial trend, however, has been toward concentration. The cases discuss size. The problem of integration merges with the problem of size. The *Steel* case is an example.

What were Justice Holmes' views respecting size in its connotation of power? Where did he place the decision? He used the tests of intent and attempts to monopolize under Sec. 2 of the Act. He avoided thereby the test of size in its connotation of power. The result was reached by construction of the statute. It rested on legal definition. Size and power are not made the criteria. The inference is that Justice Holmes did not believe that size in itself was either an economic or legal test, that the scope of the Sherman Act did not exclude size in industrial development, that Justice Holmes did not regard size as a social or economic evil in an era of industrial expansion and technological development. The result is placed upon an interpretation of the statute and is reached by legal definition. One note of economic philosophy is heard and one only. The disintegration at which the statute aimed did not reduce "all manufacture to isolated units of the lowest degree." Justice Holmes avoided size and its connotation of power and made intent to monopolize and attempts to monopolize the rationale of decision.

The relation of size in industrial development to the Sherman Act is stated in the dissenting opinion in *Northern Securities Company v. United States*; Justice Holmes applied and developed his reasoning in *United States v. Winslow*,\textsuperscript{32} which passed upon a combination among manufacturers of machines designed to make different parts of shoes. Monopoly was the test in the earlier case. Size "has nothing to do with the matter." "A monopoly of 'any part' of the commerce among the states is unlawful."

"There is a natural feeling that somehow or other the statute meant to strike at combinations great enough to cause just anxiety on the part of those who love their country more than money, while it viewed such little ones as I have supposed with just indifference. This notion, it may be said, somehow breathes from the pores of the act, although it seems to be contradicted in every way by the words in detail and it has occurred to

\textsuperscript{29} 14 Univ. of Chicago Law Review 153 (1947).
\textsuperscript{30} 15 U. S. C. A., Sec. 79 et seq.
\textsuperscript{31} 327 U. S. 686, 66 Sup. Ct. 784, 90 L. Ed. 945 (1946).
\textsuperscript{32} 227 U. S. 202, 33 Sup. Ct. 253, 57 L. Ed. 481 (1913).
me that it might be that when a combination reached a certain size it might have attributed to it more of the character of a monopoly merely by virtue of its size than would be attributed to a smaller one. I am quite clear that it is only in connection with monopolies that size could play any part.” (p. 407).

We mark especially the following sentence: “I am quite clear that it is only in connection with monopolies that size could play any part.” The sequence says that size is sometimes natural and a result which becomes illegal only by intent or by combination or conspiracy. How far did Justice Holmes go with this thought? Let us turn to United States v. Winslow. The appeal there was from a judgment of the District Court for the District of Massachusetts sustaining a demurrer to an indictment under the Sherman Act containing two counts, the first under Sec. 1 of the act alleging a combination in restraint of the trade of the defendants and the second a conspiracy in restraint of the trade of others. A demurrer admits the truth of the allegations and creates an issue of their sufficiency in law. The action of the District Court on the demurrer is obscure. It apparently held that neither count was good without further evidence. On the appeal the Supreme Court limited the issue to the validity of the combination set out in the indictment and removed an issue as to leases of the machinery by holding that the District Court had construed the indictment as referring to the combination alone. The defendants manufactured machinery for making shoes. Many of the machines were patented. Prior to the action here challenged one defendant made sixty per cent of the lasting machines, a second defendant eighty per cent of the welt sewing machines and outside stitching machines and ten per cent of the lasting machines, and a third made seventy per cent of the heeling machines and eighty per cent of the metallic fastening machines. In 1899 the defendants organized the United Shoe Machinery Company from the businesses of their several companies, the new company combined all of the business into a single factory in Massachusetts and carried on all of the business formerly done by the separate companies. Neither count in the opinion of the Supreme Court was good. Justice Holmes noted in passing that the objective was greater efficiency. Analyzing the facts alleged, he found that the constituent business had been non-competitive before the combination because of the patents and that each company supplied machinery for a separate process and that together they did not cover the entire process of manufacture. The percentage of the control of production was immaterial since it was the same as existed before the combination. Then turning to the law Justice Holmes restated the atom analogy used in the Northern Securities Company dissent—“the statute does not extend to reducing all manufacture to isolated units of the lowest degree.” He went then to the questions of intent and attempts. The combination had not changed the situation in respect to competition. The intent had not advanced the matter beyond its prior stage; monopoly was no nearer accomplishment than before. The conduct was therefore not an attempt. The approach used is intent tested by the legal sufficiency of attempt. Size is disregarded and we are on the common law implications of the
act. The statute requires an intent and an overt act reaching the dignity of an attempt as defined in the common law.

The atom approach is rejected and legal definition of the statute is the basis of decision. In the second part of this paper we discuss Justice Holmes' definitions of the legal scope of the statute. The subject intrudes here since Justice Holmes made legal definition, namely, intent and attempts, the criteria of decision in cases where size was presented with a connotation of power. How far has Justice Holmes' view on this issue influenced the subsequent development of the law? Some believe that a different judicial approach to the statute is emerging at present whereby the purpose of the statute turns to the crushing of monopolistic power per se rather than the exclusion of coercive practices.3 What light do Justice Holmes' decisions cast on the recent decisions? We shall discuss briefly two of the recent cases and the first is United States v. Aluminum Co. of America.34 The defendant's control of the aluminum ingot market was found to be over ninety per cent and subject only to importation from abroad. The Court held this to be a monopoly under Sec. 2 of the act and construed the statute as based on the premise that great industrial combinations are inherently undesirable. It placed the decision, however, upon abuse of the power in the past. The Court found unlawful practices designed to continue the original monopolistic control and to forestall competition by anticipating all increases in the demand. On the matter of intent the Court wrote: "no intent is relevant except that which is relevant to any liability, criminal or civil, i. e., an intent to bring about the forbidden act." The acts of exclusion by anticipating demand were found to have fostered the monopoly. Thus the rationale of the decision is precisely the test that Justice Holmes applied—an intent which raised the conduct to the dignity of an attempt—the attempt being found in the Aluminum case to have reached accomplishment. The second recent case is American Tobacco Co. v. United States.35 There we find no departure from Justice Holmes' view. An indictment with four counts was laid against certain tobacco companies engaged in the purchase, manufacture, and sale of tobacco products, mainly cigarettes. The indictment rested on both sections of the act. A verdict of guilty on each of the counts was returned. The Supreme Court granted certiorari upon the question whether actual exclusion of competitors is necessary to the crime of monopolization under Sec. 2 of the act. The trial court had charged the jury that the joint acquisition or maintenance by the several defendants of the power to control and dominate commerce to such an extent as to exclude competitors and with an intent to exercise the power was within Sec. 2 of the act when it was the result of a conspiracy formed for the purpose. The charge was sustained as proper and the actual exclusion of competitors was held immaterial. In the charge monopoly and the intent to exercise the monopolistic power were set out as necessary elements. The

element of conspiracy to monopolize as set out in the charge was within the language of Sec. 2 of the act—"or combine with any other person or persons, to monopolize a part of the trade or commerce." In reviewing the legal definitions of the act in the second part of this paper we shall find that Justice Holmes was of the opinion that the Sherman Act struck at conspiracies per se. The application of the law in the two recent cases is identical with the approach used by Justice Holmes although the view of industrial organization expressed in the Aluminum case is not in accord with the atom analogy found in the dissent in Northern Securities Company v. United States and restated in the prevailing opinion in United States v. Winslow.

Economic scope does not include legal definition. We met intent and attempts at the close of the first part of this paper. These are legal terms subject to a tradition. Now we are to examine Justice Holmes' views on the legal meaning of the statute. We shall expect an elucidation of the act in respect to common law doctrines and its relation to authorized activities.

The common law doctrines lead to a discussion of intent and the nature of conspiracy, including the effect of acts done outside the United States. The relation of the statute to authorized activities will reveal Justice Holmes' views on the effect of the statute on private contracts, suits under the statute by private persons, labor unions, and patents.

What effect does intent have under the statute? The answer is found in Swift and Company v. United States. It was argued there that the acts charged in the indictment were lawful and that intent could make no difference. Justice Holmes pointed first to the elements of conspiracy—the plan could make the parts unlawful. The statute struck at conspiracies in restraint of trade. If such a conspiracy was found as a fact then there was a forbidden result. Intent was immaterial. The objective test, established in the law of torts, created an intended result. He went on to define the statute: it reached conspiracies in restraint of trade and attempts to monopolize. At the common law an attempt was conduct which created a dangerous probability of a forbidden result. There, intent is important. It gives color to acts not sufficient in themselves to produce the forbidden result. In attempts, the acts in themselves may not be sufficient to bring about the forbidden result. Taken with the intent however the dangerous probability may exist. The statute strikes at dangerous probabilities as well as completed results.

Intent is further clarified when we examine Justice Holmes' definition of conspiracy. In Nash v. United States there was an indictment under both sections of the act and each alleged a conspiracy. On demurrer it was argued that the indictment did not set forth an overt act. Writing for the Court, Justice Holmes held that the statute punished conspiracies on a common law footing and did not make

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86 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232 (1913).
the doing of any act other than the act of conspiracy a condition of liability. Both sections of the act are therefore directed at conspiracies per se.

Does a conspiracy differ from a contract? Justice Holmes held a conspiracy in restraint of trade to be more than a contract in restraint of trade in that it is the result of the contract. In United States v. Kissel, it was argued that the statute of limitations was a plea in bar to an indictment which alleged an unlawful conspiracy in restraint of trade extending from 1903 to date and alleged overt acts in pursuance of the conspiracy within the limitations period. The plea, Justice Holmes held, was a denial only and not a bar to the action. A conspiracy is indeed an agreement; but its legal force may not be exhausted by the initial act. It is the result of an agreement. It may involve the continuous cooperation of the conspirators. It is neither exhausted by the original act nor do the successive acts create a series of distinct conspiracies. The continuando may not be disregarded; and if found, the statute of limitations does not bar a prosecution for a conspiracy resulting from an agreement made before the three year period.

What conspiracies does the statute reach in respect to territory? Commerce in scope is international. Secs. 1 and 2 of the statute include commerce with foreign nations by express reference. Justice Holmes construed the statute as addressed to persons within the power of the courts. In American Banana Co. v. United Fruit Co., a suit was brought for triple damages under Sec. 7 of the act alleging that the government of Costa Rica had used its power and soldiers to seize the plaintiff's banana plantation with the purpose of creating a monopoly in the defendant which had instigated the governmental action. The acts of a sovereign are not unlawful and a conspiracy in the United States could not make them so. Here the conspiracy was outside the United States. Where the conspiracy is set in motion by persons in the United States, and by steps taken in the United States, the Sherman Act reaches it. Justice Holmes concurred in United States v. Sisal Sales Corporation in which the Court sustained a bill to enjoin a conspiracy between residents of the United States and Mexico to monopolize the importation into the United States from Mexico of fibers used for the manufacture of binder twine. The current law follows the distinction and is illustrated by United States v. National Lead Co. There a conspiracy to control world commerce in titanium, an ore especially suitable for the manufacture of white paint, was enjoined upon proof that the conspiracy was entered into the United States by acts done in the United States and abroad.

In respect to common law doctrines Justice Holmes related intent to the statute by the objectives of the statute. Intent was material only in so far as it gave meaning to the facts and the statutory requirements. He defined the statute as aimed at

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89 274 U. S. 268, 47 Sup. Ct. 592, 71 L. Ed. 1042 (1927).
conspiracies on the common law basis, i. e., *per se*. He separated contract from conspiracy, treating the latter as a result capable of continuity. He limited the statute to conspiracies supported by acts done in the United States.

What is the relation of the Sherman Act to the authorized forms of activity? Did Justice Holmes seek there to reconcile the statute with the established forms? Or did he restrict the act by interpretation? In the main he tended to restrict the statute by interpretation. In these types of conflicts he never gave the statute an over-riding weight. Let us turn to specific applications in the opinions.

The taint of illegality created by the statute does not invalidate private contracts made with the violator. On this point Justice Holmes was in the minority. In *Continental Wall Paper Company v. Voight and Sons Company* the corporate plaintiff was the result of a combination to restrain trade in the manufacture and sale of wall paper. The defendant was compelled to sign a contract to buy its requirements from the plaintiff at fixed prices and to covenant that it would not sell at lower prices or on better terms than the plaintiff. After purchasing wall paper and accepting delivery the defendant refused to pay the purchase price; when sued it set up the illegality of the combination as a defense. Upon demurrer the Supreme Court held that the defense was good. Justice Holmes dissented: the action was not upon the general agreement but upon distinct transactions; the defendant was an unwilling actor in the general agreement and it neither alleged duress nor rescinded nor offered to pay the reasonable price. The rationale of the dissent is that the illegality does not extend beyond the field marked out by the statute—"the policy of not furthering the purposes of the trust is less important than the policy of preventing people from getting other people's property for nothing when they purport to be buying it." In recent decisions the Court tends to follow Justice Holmes' view but not without reservations and distinctions. *Bruce's Juices Inc. v. American Can Company*, which involved the Robinson-Patman Act, is an example. There the defense was rejected.

Strict construction appears also in those opinions of Justice Holmes concerning suits under the statute by private persons. In *Fleimann v. Welsback Co.* a stockholder of a corporation brought a bill in equity joining the corporation in which he held stock and other corporations and also individuals and asking triple damages under Sec. 7 of the act alleging that the defendants had secured control of the plaintiff's company pursuant to a conspiracy directed to the control of municipal lighting in the United States and had then driven the corporation out of business by misconduct of its affairs. The action was therefore a stockholders action brought on behalf of a corporation and its stockholders. Justice Holmes sustained a dismissal of the bill. The statute as it then read allowed an action at law; the stockholder could not cut off the right of a jury trial provided in the act

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43 240 U. S. 27, 36 Sup. Ct. 233, 60 L. Ed. 505 (1916).
by resorting to equity doctrines. Common law doctrine was followed here in limiting the statute. In *Paine Lumber Co. v. Neal* manufacturers of doors and sashes brought a bill in equity to enjoin a labor union from continuing a secondary boycott and alleging that there was a restraint of trade under the act. Writing for the majority Justice Holmes held that a private person could not maintain a suit for an injunction under Sec. 4 of the act. The act is limited in these decisions by construction, held within the framework of the common law, and treated as a criminal statute adapted to public rather than private uses, while recognizing the private right of action for triple damages, subject to the common law right of trial by jury. Congress did not share this view. An amendment of the statute in 1914 gave private persons the right to sue in equity for injunctive relief and authorized the issuance of preliminary injunctions upon a showing of probable irreparable loss or damage and the giving of a bond.

Organized labor and the Sherman Act: What part did Justice Holmes take in the elusive effort to reach definition? We find little in direct expression. There are concurrences in majority opinions and in dissents. We lack, except in one instance that concerns the law of agency, the benefit of opinions. The concurrences and dissents, however, reflect an attitude and project a pattern. Justice Holmes joined in the decision in *Loewe v. Lawlor* wherein the Court held that a boycott conducted by a labor organization was within the Sherman Act when a restraint of trade is shown, and that the injured manufacturer may maintain an action for triple damages under Sec. 7 of the act. The Clayton Act of 1914 provided in Sec. 6 that labor organizations should not be construed as illegal combinations in restraint of trade under the Sherman Act. This amendment was tested in *Duplex Co. v. Deering,* which was a suit in equity by a manufacturer of printing presses to restrain a boycott. The majority of the Court pointing to the words "lawful" and "legitimate" in the amendment and to the use of a secondary boycott beyond the immediate labor dispute held that the Clayton Act was not a bar. *Bedford Cut Stone Company v. Journeymen Stone Cutters Association of North America* followed the same line. In each of these cases Justice Holmes joined in the dissenting opinion which went on the ground that the Clayton Act expressly stated that the conduct involved should not be a violation of any law of the United States. We infer that Justice Holmes was of the opinion that Congress had limited the Sherman Act by Sec. 6 of the Clayton Act. Limitation rather than reconciliation marks the opinions where the issues concern conflicts between the Sherman Act and authorized activities.

Justice Holmes’ judicial work touches labor organizations at one other point, namely, the liability of the members of the union for acts of officers. After the

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44 244 U. S. 459, 37 Sup. Ct. 718, 61 L. Ed. 1256 (1917).
46 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488 (1908).
47 254 U. S. 443, 41 Sup. Ct. 172, 65 L. Ed. 349 (1921).
48 274 U. S. 37, 47 Sup. Ct. 522, 71 L. Ed. 916 (1927).
Supreme Court had sustained the cause of action, *Loewe v. Lawlor* was tried and the plaintiffs had a verdict. The case went to the Supreme Court again upon the appeal from the judgment. The sole issue was the authority of the officers of the union to create liability in the members. Justice Holmes writing for the Court applied the common law of agency, namely, the delegated authority and what the members knew or ought to have known of the acts of the officers to whom authority had been delegated. The judgment was affirmed. Congress disagreed with this application of the common law and in Sec. 6 of the Norris-LaGuardia act provided that in order to create liability in members of a union there must be clear proof of actual participation, or actual authorization or ratification after actual knowledge of the acts. In view of this statute the rule applied by Justice Holmes in *Lawlor v. Loewe*, namely, the scope of the authority, was rejected in *Brotherhood of Carpenters v. United States* decided at the 1946 term of the Court.

Patents raise two questions which concern monopolies and restraint of trade; first, the conflict between the patent monopoly and the Sherman Act; secondly, the extent of the monopoly created by the patent statute.

Agreements respecting patents may create a combination respecting patents. Justice Holmes noted that the action so taken is in the field of public policy which is in the control of Congress. The Sherman Act expresses the policy.

The extent of the monopoly granted by the patent is a matter of greater difficulty. The policy stated in the Sherman Act casts a shadow there. Justice Holmes was of the opinion that the Sherman Act does not extend to the construction of grants under the patent statutes. In the first part of this paper we found Justice Holmes stating that desires fix prices. In *Dr. Miles Medical Co. v. Park and Sons Co.* he could see no ultimate harm in a vendor's fixing a resale price by agreement. The thought reappears in the patent field. When it was urged that the exercise of the monopoly of use would result in domination, Justice Holmes answered that the resulting domination "is one only to the extent of the desire for the teapot or film feeder, and if the owner prefers to keep the pot or feeder unless you will buy his tea or films, I cannot see in allowing him the right to do so anything more than an ordinary incident of ownership, or at most, a consequence of the Paper Bag case - - -." This idea assumes and confides in the economic law of a free market; it overlooks the demand and the need for mass consumption and use. Let us note at once that in these views Justice Holmes was in a minority. The difference between Justice Holmes and his colleagues goes to the root of the subsequent litigation respecting patents which has been extensive and which is difficult to synthesize. The difference is stated in *Motion Picture Patents Company v. Universal Film Manufacturing Company* and the view of the majority in that decision is the basis of

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the last decided case—Transparent-Wrap Machine Corporation v. Stokes and Smith Co. where the opinion is by Justice Douglas.

In a series of cases the Court held that a patentee could not, where title had passed, fix by notice the retail price at which sales could be made. In each of these cases Justice Holmes without opinion dissented. Bauer and Co. v. O'Donnell, Straus v. Victor Talking Machine Co.; Boston Store of Chicago v. American Graphophone Company.

Congress followed the majority. The Clayton Act provided in Sec. 3 that sales or leases of goods, either patented or not, conditioned upon a fixing of prices, or an agreement not to use the goods of a competitor, are unlawful where the effect is to substantially lessen competition.

Motion Picture Patents Company v. Universal Film Manufacturing Company was decided on the same day as the Straus case. It came up by certiorari from the Second Circuit. The action was for the infringement of a patent. The plaintiff owned a patent for a mechanism designed to feed film in a uniform and accurate movement through a motion picture projector; it licensed the Precision Machine Company to manufacture and sell the machines with a restriction however that the machines be used solely to project film covered by another patent owned by the plaintiff and upon other terms and conditions fixed by the plaintiff. A plate on the machine stated the restrictive terms of the license. The licensee sold one of the machines to the operator of a motion picture theatre in New York City, which later sublet the theatre to another. The Universal Film Manufacturing Company made film and sold it to an exchange which supplied it to the sublessor of the theatre for use in the machine and it was used. The patent on the film described in the license restriction had in the meantime expired. The plaintiff gave notice and then brought its action for an infringement of the patent covering the feeding mechanism. The District Court dismissed the bill; the Supreme Court affirmed.

The majority were of the opinion that the patentee was limited to the exact grant; and therefore, the materials used in the patented device fell under the general law; that the patent owner's election to use the invention was limited by the grant; that after title had passed restrictions could not attach since they opened the way to a monopoly which had not been granted; that the public benefit was the primary object of the patent statutes and that the concept of private benefit had been urged only after the corporate organization of business. Dissenting, Justice Holmes noted that the patent was property and the owner could permit use of it or not. The condition was therefore lawful and not an attempt to extend the monopoly to unpatented articles. Domination could not escape the economic law of the market. Buyers were free to reject the offer if they desired. The patentee had the legal right.

83 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041 (1913).
to keep the invention if the incentive to buy his materials was not sufficient. He added that the contrary prior decisions in the lower courts, long undisturbed, had tended to create a rule of property.

In summary: Justice Holmes used the common law doctrines to give flexibility to the Sherman Act. He related intent to the statutory objectives whereby it became material in some cases, immaterial in others, according as it gave color to the overt acts or not. He completed the thought by putting conspiracy on the footing of an illegal act *per se*. In relating the statute to authorized activities Justice Holmes limited the statute; he hardly ever attempted reconciliation. He did not allow the statute to cast a shadow; he gave it only a coordinate place with recognized activities. In arguing this position in respect to patents, he reasserted a belief in the power of a free market to resist domination. The patentee, like the vendor of the patent medicine who wished to fix the resale price by agreement, would find himself bound by the inexorable economic law set in motion by a balancing of costs and desires. Justice Holmes was fully conscious of the concentration in industry which marked his era. The mass production was leading to the necessity of mass consumption and a demand for mass use. Justice Holmes rested, however, upon the free market and therefore saw no need for limiting property rights.

The states have a concurrent power over monopolies and restraint of trade subject, however, to the political and property rights guaranteed by the Federal Constitution and more especially by the provisions of the Fourteenth Amendment excluding discrimination, arbitrary action, and interference with contract and property rights. We reach the third part of our paper now and turn to the views which Justice Holmes expressed on this subject.

The issues which came before the Court arose in a large degree from economic conditions similar to those we found in the background of the cases which concerned the Sherman Act. Over production, especially in agricultural products, motivates many of the statutes which the Court reviewed. We meet distress sugar.

State statutes reflect a determined opposition to discrimination. The remedy often takes the form of an indirect price fixing. The objective is not only to remove discrimination. It reaches beyond uniform price to a restraint on price cutting directed to the object of driving out competition in the interest of future monopoly. There is also an unexpressed effort to open up to general use and enjoyment the goods and facilities of the community. The ordinance fixing the price for the resale of theatre tickets is an example.

The issues to be decided here are quite different from those discussed in the first two parts of this article. Here we are not concerned with economic scope or legal definition. The issue is whether the action taken by the state is permissible under the Constitution of the United States. It does not renew the earlier struggle between Hamilton's concept of a strong central government and Jefferson's concept of local government. It reflects, however, the Jeffersonian idea. Justice Holmes
was prepared to go a long way in that direction. The legal means he used were a limitation of the constitutional restraints and a new concept of the police power.

Limitation of the constitutional controls did not originate with Justice Holmes. There are opinions by other justices which sustain the powers of the states. The Court in this period was moving from an abstract to a factual application of the Fourteenth Amendment. The contribution which Justice Holmes made was the rationalization of the attitude. He gave the idea form. He reduced it to legal concept. Later the concepts which Justice Holmes developed here were generalized and gave impetus to the more flexible constitutional concepts of the later period. We are not concerned with that aspect of Justice Holmes’ influence here. We are reviewing the opinions dealing with the powers of the states over monopolies and restraint of trade. We are seeking the ideas which Justice Holmes developed in the conflicts between the exercise of power by the states in this field and the Fourteenth Amendment. These are found in three legal formulas, namely, classification, standards of action, and freedom of contract. Is a statute operating on a specific evil—a particular form of restraint or monopoly—arbitrary because of classification? What standards must the states follow if any? Is regulation an arbitrary restraint of the freedom of contract? These are the points on which we shall seek legal definition. We shall review the opinions for the purpose of finding these definitions and the bases on which they were developed. We shall find that the scales were retained. If Justice Holmes was prepared to limit the constitutional restraints, he had, however, no patience with action which did not conform to legal tradition. He insisted upon legal standards of action.

Upon one point Justice Holmes went beyond the majority of the Court and broke new ground. The discussion of freedom of contract led finally to a discussion of the police power and of business charged with a public interest. There Justice Holmes gave a new definition. It was a minority view. It was a minority view which was to travel far. It was a minority view which was later to become the law of the Court. It was a minority view which created a political concept for the expansion of the powers of the federal government during the decade of the thirties in order that it might grapple with a catastrophic economic depression. It was used as a legal concept to enable the states to do their parts while an expansion of the power over commerce enabled the federal government to do its part.

May a state legislature pick out a conspicuous example in a field of activity which it believes inimical to the public interest and deal with that activity without covering the entire field? Where a particular class of activity is singled out does a denial of the equal protection of the laws result? Logical doctrine is not required, Justice Holmes held, by the provisions of the Fourteenth Amendment. *Carroll v. Greenwich Insurance Co.* came to the Court on appeal from the District Court in Iowa. An Iowa statute made it a misdemeanor for officers, agents or employees

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56 199 U. S. 401, 26 Sup. Ct. 66, 50 L. Ed. 246 (1905).
of two or more fire insurance companies to enter into an agreement relating to
rates, commissions to be paid agents, or the manner of transacting business. A
bill in equity was brought to restrain enforcement of the statute. It was argued that
a particular line of business had been singled out. It happened that Iowa had a
general statute prohibiting all contracts or combinations to fix prices. Justice
Holmes did not rest on that point. He went on to hold that if an evil is specially ex-
experienced in a particular branch of business and the state legislature, acting on
practical experience, had so decided, by the legislative process, the prohibition
need not be stated in all embracing terms. In Central Lumber Co. v. South Dakota\(^5\)
a South Dakota statute forbade discrimination between different sections of the
state by selling a commodity at a lower rate in one section of the state than in an-
other. It was argued that the statute affected only a particular class and, in singling
out dealers who had several lumber yards, operated in the interest of independent
dealers. Justice Holmes replied that a legislature may direct its law against what it
daems the evil without covering the whole field of possible abuses even if the for-
bidden act does not differ in kind from those allowed. Legislation which is special
in character is not forbidden where the policy is not purely arbitrary. A conspicuous
example may be dealt with although logically it may not be distinguished from
others not embraced in the prohibition. In these cases we find a definition—arbi-
trary exercise of power—and a recognition of the legislative process as a means
of determining public policy.

The point came back to the Court in 1940 in Tigner v. Texas.\(^6\) There the
petitioner had been indicted under the Texas anti-trust statute for participation in
a conspiracy to fix the retail price of beer. The statute provided that it should not
apply to agricultural products or live stock in the hands of a producer or raiser.
Connolly v. Union Sewer Pipe Co.,\(^7\) which had invalidated a statute with a like
exemption, was urged. The Court found an historical basis for the exemption in
the statute and cited Carroll v. Greenwich Insurance Co. in overruling the Connolly
case.

Justice Holmes applied the same reasoning in respect to the remedies open to
the states in the enforcement of their anti-trust statutes. In Standard Oil Company
of Kentucky v. Tennessee\(^8\) a decree had been entered against the appellant for-
bidding it to do any business, other than interstate commerce, in Tennessee. It
was grounded upon a finding of a violation of the state anti-trust act. The statute
made a violation of it a crime punishable by a fine or imprisonment or both. By a
separate provision it directed that every foreign corporation which violated the
statute should be denied the right to do business in the state. The charter of a
domestic corporation violating the statute was forfeited. The attorney general was

\(^5\) 226 U. S. 157, 33 Sup. Ct. 66, 57 L. Ed. 164 (1912).
\(^6\) 310 U. S. 141, 60 Sup. Ct. 879, 84 L. Ed. 1124 (1940).
\(^7\) 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679 (1902).
\(^8\) 217 U. S. 413, 30 Sup. Ct. 543, 54 L. Ed. 817 (1910).
directed to enforce the provisions of the statute by due process of law. The statute was challenged on the ground of equal protection of the laws. Justice Holmes pointed out that natural persons had under the statute the advantages afforded by the criminal law while the attorney general could proceed against corporations by a bill in equity and without any of the forms of the criminal law except perhaps trial by jury. However, the Fourteenth Amendment allowed practical differences to be met by corresponding differences of treatment. A threat of fine or imprisonment might be efficient for men. In the case of corporations, imprisonment is impossible and fines less serious. The threat of ouster is more likely to achieve the result. There was, therefore, no inequality of which the appellant could complain.

The ideas which we find in these three cases are: legislation may proceed upon a cautious advance and a distrust of generalities, which is the traditional legislative approach; and legislators, proceeding on practical experience, may reach, through the legislative process, results of limited application; and neither cautious advance nor limited application invalidates the result of the legislative process under the provisions of the Fourteenth Amendment. The reference to the legislative process here is significant. Justice Holmes developed this concept further in the cases discussing the nature of the police power of the states under the Fourteenth Amendment—cases which we shall reach later.

What standards are required in the statutory definition of state action? Does vagueness of definition invade the due process clause? Does the other extreme, namely, singleness of purpose, invade the equal protection clause? Justice Holmes wrote law on these points which was decisive, penetrating and elucidative.

First we shall consider standards in relation to definiteness. The background of our first case brings to us again the realization of conflict—conflict between the interests of industry and agriculture. Reconciliation had been attempted by a state statute. Justice Holmes rejected the effort as an invasion of the due process clause. He reasserted his concept of the free market and defined value. Kentucky solved the problem of price in industry and agriculture by enacting two statutes. The statute of 1890 and the constitution forbade trusts to combine for the purpose of depreciating an article below its real value or enhancing the cost of an article above its real value. The statute of 1906 made it lawful for any number of persons to combine crops of wheat, tobacco, corn, oats, hay, or other farm products, which they had raised, for the purpose of obtaining a better price than separate sales would bring. In *International Harvester Co. v. Kentucky,* the appellant had been indicted and convicted in three separate counties for entering into agreements with other companies for the purpose of fixing the price of harvesters and fixing the price above the real value. The Kentucky Supreme Court reconciled the statutes as making combinations for the purpose of controlling prices lawful unless entered upon for the purpose or with the effect of fixing a price greater or less than the

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real value. It defined real value as the market value under fair competition and normal market conditions. Writing for the Court Justice Holmes declared this application of the law invalid under the Fourteenth Amendment. He passed by the claim of unequal protection and thereby avoided any approval of the Connolly case which the Court later overruled. He went to the due process clause and found that no standard of conduct had been established. A person was required to guess at his peril what his product would have sold for if combinations had not existed and nothing else affecting values had occurred. He reiterated what he had stated in the dissent in the *Northern Securities* case, namely, that combinations are a part of modern reality—"... if business is to go on, men must unite to do it and must sell their wares." He restated the economic concept of value that he had expressed in the *Dr. Miles Medical Co.* and *Motion Picture Patents* cases: "Value is the effect in exchange of the relative social desire for compared objects expressed in terms of a common denominator."

Next we meet distress sugar cane. Louisiana sought to meet the problem of overproduction and its effect on prices. It enacted a statute that was generally directed to the continuous operation of the refineries in the state and against the depression of the price paid for the cane. It set up an elaborate system of administrative control. However, it contained a provision that the systematic paying of a less price in Louisiana for sugar cane than the price paid in any other state would make the person so doing presumptively a party to a conspiracy or combination in restraint of trade and subject to penalties. The provisions respecting the operation of the refineries indicated that the statute was directed at the American Sugar Refining Co. The statute was held invalid under the equal protection clause. Justice Holmes noted that it operated by its terms on refineries operating in the state and that a powerful rival not operating refineries in the state might systematically pay a less price for sugar cane in the state with none of the consequences set up in the statute. This case is *McFarland v. American Sugar Co.*

Time brought new approaches to the economic problems which these cases disclosed. Agriculture was distinguished from industry and an exception permitted in state statutes. The cooperative movement developed. Federal statutes regulated production. Administrative law developed. The power to make rules and regulations was delegated to administrators. The equality of treatment and definiteness in the exercise of the regulatory power which developed with the new forms of approach find their justification and elucidation in these opinions of Justice Holmes. The necessity of a standard of conduct with the definiteness of that established in the law of torts was of such basic validity that it survived all changes and asserted itself in the new administrative forms.

"... nor shall any state deprive any person of life, liberty, or property, without due process of law." How far is the right of contract protected by these words

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in the Fourteenth Amendment? Is the contract right a liberty or property which is beyond regulation? Does the clause merely exclude arbitrary restraint? Does it permit reasonable regulation and prohibition imposed in the interest of the community?

On this issue Justice Holmes developed ideas which became "first a catechism and then a code." He uttered the ideas in the pursuit of thought and not by way of taking sides in differences of opinion assumed to be decisive in the destiny of man. No one was freer than he of the illusion that the decision of a case one way rather than another might bring the world to an end. Here destiny entered his thought, if at all, no further than a happy willingness to go along with the great experiment in popular government which had been undertaken on this continent and which he had expressed with precision and power in the Abrams dissent—"It is an experiment as all life is an experiment."

Here he was pursuing also the precise relationship between the thought and the expression. He was analyzing words to ascertain meaning and searching for words to denote a thought. The discussion of the Amendment in the Court had led to two phrases—"the police power", and "business clothed with a public interest". Justice Holmes, finding no limitation in the Constitution, dismissed the first phrase as an apology and the second as a fiction "intended to beautify what is disagreeable to the sufferers". Beyond this analysis of words in the light of reality there is but one expression of political application—"We fear to grant power and are unwilling to recognize it when it exists."

This insistence on a relationship between language and thought may have been also a summary of the judicial trend and a charting of the deep and silent current of the law. The events that later threw a new light on Justice Holmes' ideas were an economic emergency which demanded sweeping state and federal action in order to stay its force, and, later, a challenge to the democratic theory and to proceeding with the experiment free from fear.

We have but two cases to examine. First we go back to Central Lumber Co. v. South Dakota. The statute made it a crime to destroy competition by selling at a lower rate in one section than in another. In addition to the equal protection point which we have already considered it was argued that the statute interfered with freedom of contract. Justice Holmes, writing for the Court, in sustaining the statute disposed of the point in respect to the interference with freedom of contract in these words: "as the law does not otherwise encounter the Fourteenth Amendment, it is not to be disturbed on this ground." This is the genesis of Justice Holmes' idea. Alone the point respecting freedom of contract was not sufficient. Later the idea was rejected by the Court and became the subject of a shattering dissent.

The dissent was written in Tyson and Brother v. Banton. A New York statute declared that the price of admission to theaters was affected with a public

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interest. Those engaged in the resale of tickets were required to secure a license. It forbade the resale of any ticket at a price in excess of fifty cents over the price printed on the ticket. A suit in equity was brought in the United States District Court to restrain the enforcement of the statute. The bill was dismissed; there was an appeal to the Supreme Court; and there the majority held that an owner's right to fix the price at which property is sold or used is an attribute of property and within the due process clause. The majority also rejected the legislative declaration that places of entertainment and admission therein are affected with a public interest. The dissenting opinions of Justices Stone and Sanford developed the material fact from the record that the brokerage business as it had developed prior to the statute had created a virtual monopoly of the best seats.

Justice Holmes in his dissent held that the New York legislature had the power to enact the statute under the provisions of the due process clause. A state legislature can do whatever it sees fit to do unless restrained by some express prohibition in the Constitution of the United States. Subject to compensation, when compensation is due, a state legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it. People had come to believe that theaters were devoted to a public use. The police power and the notion that a business is clothed with a public interest were apologies and fictions used to beautify what may be disagreeable. They had no denotation in thought. Even if fashionable conventions were applied here theaters were as much devoted to public use as anything could be.

The dissent in its full sweep subsequently became the law of the Court. In Nebbia v. New York64 the power of the New York legislature to regulate the price of milk was sustained. The power of the federal government under the similar clause in the Fifth Amendment was sustained in United States v. Rock Royal Co-operative65 and Sunshine Coal Co. v. Adkins.66 The statute struck down in Tyson and Brother v. Banton was reenacted in New York and sustained in Kelly and Sullivan v. Moss.67 The sanctions for the economic changes and controls emerging after 1932 found their legal footing in this dissent and in a sharper emphasis on the commerce power. Power was granted and recognized where it existed.

We may sum these cases up and characterize this phase of Justice Holmes' work as an effort to secure a coordination of thought with expression. Definition must precede understanding. It opens the roadway on which action may travel. Definition here opened the way to legislative action as a means of economic and social control. Monopoly and restraint of trade became subject to control by legislation directed at price. The result invaded the Lockeian concept of property. The era of mass consumption and mass use was following logically on the already

66 310 U. S. 381, 60 Sup. Ct. 907, 84 L. Ed. 1263 (1940).
fully developed process of mass production. The attitude in these opinions is radical only to the extent that Justice Holmes had found Justice William Allen—a colleague in the Massachusetts Supreme Court in the early nineties—radical:

"As with others whom I have known that were brought up in similar surroundings, his Yankee caution and sound judgment were leavened with a touch of enthusiasm capable of becoming radical at moments, and his cultivation had destroyed rather than fostered his respect for the old merely as such."\(^6\)

To those who reach into the world of ideas and coordinate thought and expression so that action is possible, humanity is indebted. The conservative or radical coloring of the resulting action does not count. The free play of ideas is the value and creates the eternal values.

"Unless we are to accept decadence as the necessary end of civilization, we should be grateful to all men like William Allen, whose ambition, if it can be called so, looks only to remote and mediated command; who do not ask to say to anyone, Go, and he goeth, so long as in truthful imagination they wield, according to their degree, that most subtile and intoxicating authority which controls the future from within by shaping the thoughts and speech of a later time."

The right of every person and business to be free of coercion, economic or political—a sense of the expansive nature of modern industry—the subjection of price to the test of monopoly and a free market—the subordination of size and integration to the test of monopoly—the reference of the Sherman Act in its legal aspects to the background of the common law—the correlation of the statute to the established forms of activity as an equal among equals—property rights as the basis of action but subject to regulation by due exercise of the legislative process within the constitutional limitations—expression as the projection of thought, denotative words—these summarize the thought which we have here found. This thought, charged by an endeavor to bring reality and intellectual and emotional ideals into accord, glows. Its influence, reaching beyond acceptance in case and statute law and in popular thought, merges and is lost in the universal and omnipresent effort of art to place life on a plane where it has meaning.

\(^6\) 154 Mass. 607 (1891).