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The Constitutional Moment That Wasn't: 1912-1914 and the Meaning of the Sherman Act

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Alan J. Meese: “The Constitutional Moment That Wasn’t: 1912-1914 and the Meaning of the Sherman Act”

Dear readers, the Network Law Review is delighted to present you with this month's **guest article** by Alan J. Meese, Ball Professor of Law and Dean's Faculty Fellow and Director at the William & Mary Center for the Study of Law and Markets.

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The *Curse of Bigness* sketches Tim Wu's NeoBrandeisian vision.[1] Wu invokes Learned Hand's assertion that Congress preferred, "*because of its indirect social or moral effect*", a "*system of small producers, each dependent for his success upon his own skill and character*" to one where nearly all "*must accept the direction of a few.*"[2] Such a regime would treat concentration (Bigness) as a distinct antitrust harm, regardless of whether such concentration reduces or increases prices.[3] Of course, modern law rejects Wu's approach. Wu blames Robert Bork, who convinced courts that antitrust should only combat "*one very narrow type of harm: higher prices to consumers.*"[4]

However, significant evidence suggests that the Sherman Act mandates a consumer-focused approach. Robert Lande's review of the legislative history concluded that Congress "*subordinate[d] all other concerns to the basic purpose of preventing firms with market power from directly harming consumers.*"[5] Lande's conclusion echoed Standard Oil v. United States,[6] where the Court concluded that 'in restraint of trade' was a term of art referencing practices producing monopoly or its consequences.[7] The Court identified three such consequences: higher prices, reduced production, and reduced quality.[8] Congress thereby authorized courts to use reason to discern whether practices offended the 'public policy of the Act' by producing such evils.[9] Applying this standard, the Court distinguished between normal methods of industrial development and new means of combination with the purpose of excluding others from the trade.[10] Absent the latter, *i.e.*, unreasonable restraints, no firm could maintain a lasting monopoly, because others could also adopt reasonable restraints (*i.e.*, normal methods) and thus compete on equal footing with the putative monopolist.[11]

Wu does not discuss Lande's widely-cited work, except as 'Further Reading' critiquing Bork's approach.[12] Wu's informative discussion of *Standard Oil* does not mention the price/output/quality standard or the Court's interpretive methodology.[13] Instead, Wu

suggests an interpretive approach that bypasses Lande and *Standard Oil*. Wu concludes that "*trying to find the true original meaning of the Sherman Act*" is "*an impossible task*."[14] Instead, Wu finds that meaning in a Constitutional Moment, beginning with the 1912 Presidential campaign and culminating with the 1914 Clayton Act and FTC Act.[15] This moment ostensibly clarified the Sherman Act's Brandeisian essence.

The 1930s purportedly produced one such moment.[16] The Supreme Court invalidated some measures that nominally counteracted the Depression.[17] Some advocated formal constitutional amendments contravening these decisions. Simultaneously, states, Congress, and FDR reiterated an alternative constitutional vision. The 1936 elections vindicated this vision, and the Court acquiesced, 5-4.[18] This acquiescence became unanimous.[19] The Constitution changed.

What about 1912-1914? The 1912 presidential race presented starkly different visions. Eugene Debs and Theodore Roosevelt rejected antitrust and competition, advocating state-supervised monopolies.[20] President Taft and Woodrow Wilson "*promised to restore a competitive economy by fighting the trusts with the antitrust law and new regulations.*"[21] Thus, "*the public was clearly engaged with and voting on what kind of economic order they wished to live in.*"[22] Wilson prevailed "*based on economic and antitrust policies directly taken from Louis Brandeis[.]*"[23] Congress passed the 'stronger' 1914 Clayton and FTC Acts; the latter banned unfair methods of competition.[24]

These electoral debates and enactments produced a Brandeisian Sherman Act, Wu says.

> "*The importance of these new laws lies not just in their specific provisions, but instead in their democratic resolution of the uncertainty surrounding the purpose of the Sherman Act. […] When we add up the popular vote for President and the subsequent passage of stronger antitrust laws in 1914, it becomes clear that the Wilson-Brandeis economic program enjoyed a powerful democratic validation, one arguably of constitutional significance.*"[25]

This (constitutional) change, Wu says, "*ratified and toughened the Sherman Act*" without changing its text.[26] If accurate, Wu's account renders the legislative history assessed by Lande and *Standard Oil's* statutory exegesis irrelevant indicia of post-1914 meaning and implies a rejection of the consumer-focused Rule of Reason.

Wu offers a creative and thought-provoking interpretation of the events of 1912-1914. However, three distinct historical facts deprive these events of the sort of Constitutional status Wu proposes.

1. **Candidate Taft embraced *Standard Oil* and rejected anti-Bigness**

Assume *arguendo* that Wilson promised a Brandeisian regime. Wilson won 42 percent of the popular vote. Taft earned 23 percent, cementing the powerful democratic validation Wu invokes.[27] Taft embraced *Standard Oil* and rejected anti-Bigness.

Taft addressed antitrust throughout his presidency. After the election, he published a monograph.[28] These writings delivered a coherent antitrust vision that anticipated and then embraced *Standard Oil*'s consumer-focused standard and safe harbor for normal conduct. In particular, Taft concluded that:

1. The Sherman Act banned "*combinations [...] which through restraint of trade . . . should suppress competition, establish monopoly, and control prices.*"[29]
2. Large "*aggregations of capital*," when "*legitimate*" and "*properly controlled*", were "*natural results of modern enterprise and [...] beneficial to the public.*"[30]
3. Antitrust and "*the proper operation of competition*" could "*properly control*" these aggregations, such that "*the public will soon share with the manufacturer the advantage in economy of operation and lower prices.*"[31]
4. The Sherman Act properly banned firms from using "*great size*" to "*coerce*" customers or rivals via unprofitable pricing or exclusive agreements.[32]
5. "*[E]conomies [...] due to the concentration under one control of large capital and many plants*" and using "*low price [...] and good quality*" were lawful if "*the*

business is a profitable one."[33]

6. *Standard Oil* gave the Sherman Act "*an authoritative construction which is workable and intelligible.*"[34]
7. "*Aggregation of many existing plants under one company*" would only impact competition if: (1) "*the company thereby effects great economy, the benefits of which it shares with the public*" or (2) "*takes some illegal method to avoid competition and to perpetuate a hold on the business.*"[35]

Despite differing terminology, this vision replicated *Standard Oil*. Coercive conduct excluding rivals was unreasonable, while efficiencies and above-cost pricing were not. Banning the former would prevent firms from excluding rivals, and entry or potential entry would ensure low prices, sharing efficiencies with the public.[36] "*[T]he evil aimed at was not the mere bigness of the enterprise.*"[37] Instead, Bigness was sometimes necessary for "*progress*" and the "*greatest economy[.]*"[38] Presumably Taft's voters — who supplied decisive support for an antitrust-based regime — rejected anti-bigness in favor of a consumer-focused standard, thereby depriving Wilson's approach of any "*powerful democratic validation.*"[39]

2. **Candidate Wilson did not invariably mimic Brandeis.**

Wu implies that Wilson embraced Brandeis's anti-Bigness views. One historian, however, "*wonder[ed] to what extent [Wilson] was ever a convert to Brandeis' [anti-bigness] philosophy.*"[40] This scholar highlights Wilson's campaign statement that:

> "*Big business is no doubt to a large extent necessary and natural. The development of business upon a great scale, upon a great scale of co-operation, is inevitable, and, let me add, is probably desirable.*"[41]

Wilson also asserted: "*I am for big business; I am against the trusts.*"[42] The distinction, this author concludes:

> "*[R]ested upon the means by which growth took place. Big business, in his view, grew by economy and efficiency of operation, i.e., by normal interplay in a free market; but 'a trust does not bring efficiency to the aid of business; it buys efficiency out of business.'*" [43]

Other campaign speeches also suggest that Wilson's views on efficiency and Bigness overlapped significantly with Taft's. About six weeks before the election, Wilson opined:

> "*There is a world of difference between the big business that grows by enterprise and economy, by efficiency, by working capital, every dollar of which is real and is used, and that which is artificially built up by agreements arrived at by gentlemen sitting in rooms where they put together units of every kind, good plants with bad plants, efficient businesses with inefficient business, and then pay those who get up the scheme [...] a large bonus [of] stocks and bonds.*" [44]

The next day Wilson said:

> "*I admit that anything that is built up by the legitimate process of business, by working capital, by economy, by efficiency, by growth, is natural; and I am not afraid of it, no matter how big it gets, because it can stay big only by doing its work more thoroughly than anybody else.*" [45]

Finally:

> "*I am not jealous of the size of any business that has grown to that size. I am not jealous of any process of growth, no matter how huge the result, provided the result was indeed obtained by the processes of wholesome development, which are the processes of efficiency, of economy, of intelligence, and of invention.*" [46]

These are hardly the thoughts of a candidate opposed to Bigness as such. [47] Such views could not support any wholesale "democratic validation" of Brandeis's views.

3. **The Supreme Court did not acquiesce in displacing *Standard Oil*'s Rule of Reason.**

Unlike the 1937 Court, the 1920s Court did not acquiesce in Wu's purported change. [48] In FTC v. Gratz [49] and FTC v. Sinclair Refining, [50] the Court read Section 5 of the FTC Act narrowly and not as 'stronger' than the Sherman Act, as Wu suggests. [51] *Gratz* noted the lack of "*monopoly or combination*" and the absence of evidence that the "*public suffered injury*." [52] The Court opined that "*[i]f real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved.*" [53] *Sinclair* unanimously held that Section 5 did not "*interfere with ordinary business methods.*" [54] Instead, "*those who adventure their time, skill and capital should have large freedom of action in the conduct of their own affairs.*" [55]

Shortly thereafter, in American Linseed Oil v. United States, a Section 1 decision, the Court quoted *American Tobacco* — which had reiterated *Standard Oil* — for the proposition that Section 1 did not prohibit "*normal and useful contracts to further trade by resorting to all normal methods.*" The Court cited *Sinclair* — a Section 5 case — for the same proposition and invoked *Sinclair*'s definition of 'competition', namely, "*the play of contending forces ordinarily engendered by an honest desire for gain.*"

If anything, the Court assimilated Section 5 into *Standard Oil*'s Rule of Reason and

not *vice versa*.[56] Four years later the Court, *per* Chief Justice Taft, reiterated that *Standard Oil* had properly construed the Sherman Act.[57] The Court's post-1914 Sherman Act jurisprudence showed no sign of any legal change, constitutional or otherwise.

Wu commendably concedes that the original meaning of the Sherman Act may not support his NeoBrandeisian vision. However, the Constitutional Moment he proposed did not occur. Proponents of the NeoBrandeisian Sherman Act must look elsewhere for legal authority to implement their vision.

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