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Competition and Cooperation on Sherman Island: An Antitrust Ethnography

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COMPETITION AND COOPERATION ON SHERMAN ISLAND: AN ANTITRUST ETHNOGRAPHY

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I. Introduction

From William Howard Taft, Hans B. Thorelli, and William Letwin, to, more recently, Earl W. Kintner, Martin J. Sklar and Herbert Hovenkamp, antitrust lawyers, historians, scholars and groupies have pondered the American historical context that spawned the Sherman Act.[1] While the "facts" regarding the emergence of American antitrust policy thus have been well documented, study and debate continue with regard to the original and continuing purposes of America's guardian of "competition" — antitrust law. Although it could be tempting to dismiss this continuing study as being merely of academic interest, domestic and international events suggest that America, as one of the principal purveyors of antitrust in the industrial age,[2] owes it to itself and to those who

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1. *See, e.g.*, WILLIAM H. TAFT, THE ANTITRUST ACT AND THE SUPREME COURT (1914) (analyzing early case history and doctrinal development under the Sherman Act); HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY (1954) (discussing the history and development of the central characteristics and problems of antitrust policy and lessons to be learned by nations and international bodies which are attempting to control or repress monopoly); WILLIAM H. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT (1965) (discussing the historic origins and evolution of the Sherman Act); EARL W. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES (1978) (discussing and collecting the legislative history of the Sherman Act); MARTIN J. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916 (1988) [hereinafter SKLAR, CORPORATE RECONSTRUCTION] (analyzing the evolution of antitrust policy in the context of the reconstruction of American capitalism); HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836-1937 (1991) (developing a comprehensive intellectual history of antitrust and other commercial regulation).

2. Competition laws, of course, have a history that long predates the Sherman Act. *See, e.g.*,

would follow in its footsteps to continue evaluating and studying its historical experience with competition policy.[3]

By focusing our attentions on "cultural conceptions of competition," the Symposium editors have challenged us to consider the broader role that competition as a cultural norm has played in that experience.[4] More than just an economic policy reflected in the antitrust laws, competition is a pervasive component of the fabric of American life that emerges in discussions of all aspects of political, social and economic institutions. As a category of human relations, however, competition exists only in relation to other norms. "Cooperation" and "individualism" are as much a part of the American culture as is "competition,"[5] and at the source of each are "relationships" — social, economic, and political. We define ourselves, our families, our governments, even our civilizations in terms of these

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Lambros E. Kotsiris, *An Antitrust Case In Ancient Greek Law*, 22 INT'L LAW. 451, 451-57 (1988) (analyzing ancient Greek law treatment of price-fixing cartel); William Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355, 355-56 (1954) (tracing English common law roots of U.S. antitrust policy). Donald Dewey, *The Common-Law Background of Antitrust Policy*, 41 VA. L. REV. 759, 759-86 (1955) (same); James May, *Antitrust Practice And Procedure In The Formative Era: The Constitutional And Conceptual Reach Of State Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495, 497 (1987) (analyzing role of state antitrust law in the formation of early competition policy); David Millon, *The First Antitrust Statute*, 29 WASHBURN L.J. 141, 141-45 (1990) (examining the "ideological context" of the early antitrust statutes).

3. As William Kovacic recently wrote, "[s]o important are perceptions of history that a sense of the origins and evolution of American competition policy is as necessary to antitrust literacy today as is the mastery of legal rules or price theory." William E. Kovacic, *Public Choice and the Origins of Antitrust*, *in* THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC CHOICE PERSPECTIVE 243, 245 (Fred S. McChesney & William F. Shugart, eds., 1995). The use, and abuse, of antitrust history, however, is a source of lively debate. *See, e.g.*, Daniel R. Ernst, *The New Antitrust History*, 35 N.Y.U. L. REV. 879, 881-83 (1990) (offering persuasive critique of the invocation of antitrust history in pursuit of a present day antitrust agenda). Nevertheless, while the dogged search for a "usable past," *id.* at 883, can detract from the value of historical research, the fact remains that "[p]erceptions of the past influence antitrust in the present." Kovacic, *supra*, at 244. The ultimate goal must lie in distinguishing those historical facts which simply inform us from those that should properly influence our interpretation of antitrust doctrine.

4. Professor Daniel Ernst associates this kind of call to "locat[e] antitrust within the fullest possible context in American culture" with a "new antitrust history" movement. Ernst, *supra* note 3, at 885. He numbers among the representatives of that movement commentators that eschew the "pursuit of legislative intent" as a source for present day ideological advantage. *Id.* at 888; *see also* James May, *Historical Analysis of Antitrust Law*, 35 N.Y. L. SCH. L. REV. 857, 868-71 (1990) (highlighting the role of economic and historical analysis in the field of antitrust).

5. The interaction of competition and cooperation has been a frequent theme in antitrust analysis. *See, e.g.*, Polk Bros., Inc. v. Forest City Enter., 776 F.2d 185, 187-88 (7th Cir. 1985) ("Cooperation is the basis of productivity. . . .[a]ntitrust [l]aw is designed to ensure an appropriate blend of cooperation and competition, not to require all economic actors to compete full tilt at every moment."); *see also* Donald F. Turner, *Cooperation Among Competitors*, 61 NW. U. L. REV. 865, 865-71 (1967) (reiterating the necessary "blend" of cooperation and competition).

relationships; be they "competitive," "cooperative" or "individualistic." Each of these concepts, however, masks a complex of assumptions about human behavior and character, the role of government and the character of business. Those assumptions are deeply rooted in the American historical experience, indeed in the broader history of the development of western civilizations, and are in a continuing state of evolution.

Nevertheless, antitrust commentary, particularly under the influence of modern economic discourse, has not directly focused on the cultural role of "competition," assuming, at least at the surface, that the cultural primacy of competition had been definitively caste by America's embrace of free market capitalism.[6] Inherent in the adoption of Adam Smith's paradigm is the assumption that humanity is best accepted as "self-interested." Capitalism's allure is that it holds the promise of harnessing that self-interest, and, through the magic of the "invisible hand," channeling it into the production of the greatest common good.[7] "Cooperative" relationships are simply not the focal point of study.

Antitrust can be productively evaluated in a broader context. Indeed, although the attention of antitrust commentators to a variety of previously under-emphasized factors has yielded crucial insights into antitrust's content and evolution,[8] a more focused assessment of

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6. Use of the simpler label "market system" may belittle the crucial role that "capitalism" plays in defining the American economic system; the two terms are not synonymous. A combination of both is required to describe fully both the mechanism for making production and distribution decisions and the source of energy for the system. Thus, the use here of "free market capitalism." *See* ROBERT HEILBRONER, 21ST CENTURY CAPITALISM 95-96 (1993).

7. In *The Wealth of Nations*, Smith wrote: ". . .[E]very individual. . .intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. . . .By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it." ADAM SMITH, THE WEALTH OF NATIONS 477-78 (E. Cannan ed. 1976) (1776).

8. *See generally* HOVENKAMP, *supra* note 1, at 241-349 (presenting comprehensive intellectual history of nineteenth century political and economic thought, emphasizing in part their impact on the emergence of antitrust); SKLAR, CORPORATE RECONSTRUCTION, *supra* note 1, at 47-53 (discussing role of property rights); Andrew I. Gavil, *Reconstructing The Jurisdictional Foundation Of Antitrust Federalism*, 61 GEO. WASH. L. REV. 657, 669-83 (1993) (discussing impact of regulation theory and the Supreme Court's dormant commerce clause decisions on emergence of federal antitrust legislation); James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257, 258-62 (1989) (presenting a comprehensive study of the evolution of constitutional, economic and political theory in the nineteenth century as it influenced state and later federal antitrust legislation); David Millon, *The Sherman Act And The Balance Of Power*, 61 S. CAL. L. REV. 1219, 1220 (1988) (arguing that Sherman Act reflected "deeply rooted ideology. . .aimed at control[ling] political power through decentralization of economic power"); William H. Page, *Ideological Conflict and the*

"cultural" attitudes about human relationships can add yet another piece to the antitrust puzzle. Particularly as we ponder the fate of stressed domestic industries, as well as the relevance of the Sherman Act to the world's emerging free market capitalist economies, we would do well to evaluate whether identifiable cultural attitudes about competition, cooperation and individualism can be found in America of the nineteenth century, and, if so, whether any fair generalizations about those attitudes can be made, particularly with respect to their possible influence on adoption of antitrust legislation. Such an effort is prompted not solely because of the problems inherent in transporting the legal culture of one society to another,[9] but because an appreciation of the fuller picture of American relationships may be instructive for antitrust policy makers, be they domestic or foreign, in connection with their attempts to evaluate more fairly the American antitrust experience.

To help in the undertaking, this Article borrows from the literature and methodology of "law and anthropology,"[10] particularly that of "ethnography." Ethnography, defined as "the qualitative, long-term study of a society by a researcher who lives among the people, learns their language, and strives to participate in their culture,"[11]

Origins of Antitrust Policy, 66 TUL. L. REV. 1, 3-23 (1991) (addressing the ideological conflict that has characterized antitrust throughout its history); William H. Page, *Legal Realism and the Shaping of Modern Antitrust Law*, 44 EMORY L.J. 1, 3 (1994) [hereinafter Page, *Legal Realism*] (arguing that antitrust law reflects economic theory and market reality); Rudolph J. Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263, 264-65 (questioning accepted view of relationship between competition and antitrust); Rudolph J. Peritz, *A Genealogy of Vertical Restraints Doctrine*, 40 HASTINGS. L.J. 511, 516-27 (1989) (discussing tension between property rights and competition).

9. *See* JUNE STARR & JANE F. COLLIER, HISTORY AND POWER IN THE STUDY OF LAW: NEW DIRECTIONS IN LEGAL ANTHROPOLOGY 131-98 (1989) (collecting several works of legal anthropology that focus on "Exporting and Extending Legal Orders"); Spencer Weber Waller, *Neo-Realism and the International Harmonization of Law: Lessons from Antitrust*, 42 KAN. L. REV. 557, 562-69 (1994) (discussing more specifically problems associated with the export of U.S. antitrust doctrine).

10. While I use the phrase "law and anthropology," as opposed to other possible formulations, I do so simply as an act of convention, with no intention of wading into the debate over the appropriate nomenclature that should apply to the intersection of the two disciplines. *See, e.g.*, LAW AND ANTHROPOLOGY xiv-xv (Peter G. Sack, ed. 1992). That intersection has a rich tradition that has been associated with the legal realist movement and the emergence generally of "law and social science." *See* WILLIAM W. FISHER III, ET. AL., AMERICAN LEGAL REALISM 232-36 (1993) (discussing the historical integration of social sciences with law). Moreover, the past influence of legal realism on the evolution of antitrust provides a further reason why it is fitting to associate the inquiry into past influences on antitrust law with anthropology. Page, *Legal Realism*, *supra* note 8, at 3.

11. John M. Conley & William M. O'Barr, *Legal Anthropology Comes Home: A Brief History of the Ethnographic Study of Law*, 27 LOY. L.A. L. REV. 41, 45 (1993).

presents a promising paradigm for evaluating competition as culture. A frequent subject of legal ethnography has been dispute resolution models and techniques in various cultures,[12] and in its pure sense, it demands painstaking, empirical study. An "antitrust ethnography" invites "observation," and perhaps a new "translation"[13] of our one hundred year plus experiment with antitrust, as it reveals American attitudes regarding "cooperation," "competition" and "individualism." With apologies to anthropologists everywhere, this Article will take great liberties with the concept.[14]

To facilitate use of the antitrust ethnography, we will visit "Sherman Island" on the eve of adoption of the "Sherman Act."[15] Bent on obtaining a better understanding of the "cultural conceptions of competition" on Sherman Island that may have influenced adoption of the Act, we will be called upon in the following pages to "live among the people" of Sherman Island, to "learn their language," and to "strive to participate in their culture."[16] Along the way, I offer three hypotheses.

The first hypothesis is that "competition," "cooperation" and "individualism" should not be confined to their economic meanings. In

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12. This particular use of legal ethnography can be traced to the pioneering work of Llewellyn and Hoebel. KARL N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY (1941). More recent monographs include JOHN M. CONLEY & WILLIAM M. O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE (1990); CAROL J. GREENHOUSE, ET. AL., LAW AND COMMUNITY IN THREE AMERICAN TOWNS (1994); LAWRENCE ROSEN, THE ANTHROPOLOGY OF JUSTICE: LAW AS CULTURE IN ISLAMIC SOCIETY (1989).

13. I use "translation" here in the sense explored by James Boyd White, to describe a method of integrating the different "discourse systems" that frequently characterize various disciplines. JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM 19-20 (1990) (suggesting that, to be successful in the legal field, one needs to balance various styles, vocabularies and methodologies stressing the importance of that variety for language). White provides a useful critique of the assumption that economics, particularly the language of economics, can be the adequate tool it is often represented to be for "translating" the full range of social relations. *Id.* White implores us to accept that "the most profound obligation of each of us in using his or her language is to try and recognize what it leaves out, to point to the silence that surrounds it — to acknowledge the terrible incompleteness of all speech, and thus to leave oneself open to hearing other truths, in other languages." *Id.*; *cf.* Elizabeth Mertz, *Language, Law and Social Meanings: Linguistic/Anthropological Contributions to the Study of Law (Review Essay)*, 26 L. & SOC'Y REV. 413 (1992) (reviewing two anthropological studies of the influence of language on law as a determinant of social transformation).

14. Although this, too, appears to be somewhat of a "tradition." *See, e.g.*, Axel Leijonhufvud, *Life Among the Econ*, 11 WEST. ECON. J. 327, 327-37 (1973) (presenting an ethnographic parody focusing on the culture of economists).

15. 26 U.S. Stat. 209, July 2, 1890.

16. This prospect will no doubt strike most antitrust lawyers and scholars as not all too bad an approximation of the shared experience we have encountered on route to obtaining the identity of "antitrust lawyer."

the broader context of social systems, they describe categories of human relationships. Such relationships can be distinctly of one or another category, or at once evidence characteristics of each. A single society might even be comprised of varying combinations of competitive, cooperative and individualistic relations in social, economic and political life.

Second, despite the American rhetorical tradition of lauding "individualism" and disparaging "cooperative," or "collective" relationships, the legal framework that emerged in the nineteenth century in support of commercial relations largely facilitated cooperative economic relationships. The most prominent evidence of this framework is found in the emergence of the private business corporation in the first half of the nineteenth century. Indeed, it was that cooperative structure, supported by developments in constitutional, property and contract law, that set the stage for modern conceptions of competition law. The interaction of corporate, contract, constitutional and property law, however, produced a cultural "antitrust paradox."[17] The law of private business corporations, with its collectivist orientation, evolved with an overlay of "individualistic" notions of property and contract, producing a uniquely American "corporate capitalist" market system. Through the separation of management from ownership in the corporate device and the adoption of the "corporate personality," activities driven by individualistic motivations were provided with a communal foundation, one that greatly enhanced the possibilities to pursue personal wealth and power. And while widespread economic advancement may have been a principal consequence of this form of corporate device, so was the diminution of communal-individualism. This paradox has always been and remains a hidden source of tension in American antitrust policy.

Finally, I suggest that the pursuit of economic "progress" was an additional factor that largely influenced the growth of cooperative economic organizations, and ultimately the emergence of a commercial infrastructure that included antitrust legislation. Indeed, the

17. The phrase has been somewhat immortalized by former Judge Robert H. Bork, whose 1978 book of the same title maintained that the antitrust laws, which were, in his view, designed to achieve economic efficiency and to thus enhance consumer welfare, had in fact been interpreted by the Supreme Court — at least as of the time the book was written — to achieve the opposite result. *See* ROBERT H. BORK, THE ANTITRUST PARADOX 3-11 (1978); *See also* United States v. Trans-Missouri Freight Assoc'n, 166 US 290, 355 (1897) (J. White dissenting) ("Progress, and not reaction, was the purpose of the act of Congress").

pursuit of "progress" continues to influence government enforcement of the antitrust laws.

One possible conclusion of the study, therefore, is that cultural conceptions of competition, cooperation and individualism "competed," along with the goal of progress, for center stage in the policy making arena. Different attitudes towards competition, cooperation and individualism emerged across a broad range of relational issues as different social, legal and political interest groups coalesced into "movements" that sought to encourage the governing authorities on the Island to address specific needs for greater doses of one or the other. The tension among these movements influenced the development of the laws of contract, property, tort, procedure, banking, corporations and, ultimately, "antitrust." Before proceeding with a discussion of these propositions, however, several caveats are in order.

The history of Sherman Island evidences, perhaps not surprisingly, that people are variously competitive, cooperative, and individualistic in different settings, and that "self-interest" is not easily defined. The tension in Sherman Island's past between "competition," "cooperation" and "individualism" has taken many turns, has never been finally resolved, and remains as much a source of cultural tension today as it was in 1890. In short, there is no evidence of a monolithic "culture of competition" to be found in the American antitrust experience. The development of America's commercial legal infrastructure proceeded over a long period of time, during which competition, cooperation, and individualism interacted with one another as well as with emerging social, political and economic institutions and philosophies to produce the America of 1890 that adopted the Sherman Act.

Conversations about the value of Sherman Island's experience for newly emerging free market capitalist economies, or about domestic industries currently facing upheaval and transition, must therefore commence with the realization that there may not be any clear "answer" to the question: "Why antitrust?" And, if there were an answer, that answer might be different at various points in the industrial development of the Island. As a consequence, the newly emerging free market capitalist nation intent on making use of Sherman Island's experience would likely benefit from assessing the state of debate on the Island, as well as the state of its legal infrastructure, in toto, at a point in Sherman Island's industrial history that most closely parallels its own. Such an assessment must neces-

sarily take account of the broader range of economic and social relationships that set the stage for antitrust policy on the Island.

Finally, given the limited goals of our Symposium discussion, this Article does not purport to be a comprehensive study of the relevant anthropological, sociological, historical or legal sources available to evaluate life in the American nineteenth century. That literature is rich, intricate and extensive, and certainly not amenable to brief synthesis. The goals of this Article are far more modest. It should be viewed instead as an invitation to further study — interdisciplinary study — that more fully seeks to integrate anthropological methodologies into the study of a subject that has historically been viewed as insulated and arcane, increasingly confined to the insights of economics — of "competition law." It is a "first word," not a "last word."

I. THREE HYPOTHESES

A. *Competition As Culture*

In 1937, Margaret Mead edited a survey of cultural studies under the title "Competition And Cooperation Among Primitive Peoples."[18] Reissued with additional commentary in 1961,[19] the book collected some thirteen previously undertaken studies of "primitive peoples" for the sole purpose of evaluating their competitive and cooperative relationships from the viewpoint of "culture and personality."[20] While the original studies varied somewhat in methodology, Mead's re-evaluation of them proceeded with some common definitions and parameters.[21] "Competition" was defined as "the act of seeking or endeavoring to gain what another is endeavoring to gain at the same time;"[22] "cooperation" as "the act of working together

18. MARGARET MEAD, COMPETITION AND COOPERATION AMONG PRIMITIVE PEOPLES (1st ed. 1937).

19. MARGARET MEAD, COMPETITION AND COOPERATION AMONG PRIMITIVE PEOPLES (rev. ed. 1961). All references herein are to the revised, 1961 edition.

20. *Id.* at 1. "Culture" is later defined as meaning "human culture, the whole complex of traditional behavior which has been developed by the human race and is successively learned by each generation." *Id.* at 17. She continues: "A *culture* is less precise. It can mean the forms of traditional behavior which are characteristic of a certain society, or of a group of societies, or of a certain race, or of a certain area, or of a certain period of time." *Id.* at 17-18.

21. The studies involve the Arapesh of New Guinea, the Eskimo of Greenland, the Ojibwa of Canada, the Bachiga of East Africa, the Ifugao of the Philippine Islands, the Kwakiutl of Vancouver Island, the Manus of the Admiralty Islands, the Iroquois, the Samoans, the Zuni of New Mexico, the Bathonga of South Africa, the Dakota and the Maori of New Zealand. *Id.* at 20-457.

22. *Id.* at 8.

to one end."[23] The definitions focused the survey at the outset on "competitive and cooperative *habits*," defined as "a usual or customary mode of action."[24] Competitive and cooperative habits, thus defined, were to be evaluated across economic, social, political, and educational relationships in each study.[25]

Mead's original "Interpretative Statement"[26] offers the observation, however, that the various cultures studied can usefully be categorized not only as "competitive" and "cooperative," but as "individualistic."[27] But Mead expressly distanced her use of "individualistic" from the colloquial "rugged individualism":

> To make our analysis complete, we had to add a third category which we called *individualistic* behavior, that is, behavior in which the individual strives towards his goal without reference to others. . . .It must not be confused with "rugged individualism," or given the aura of exploitation by others, or aggression toward others, which surrounds the word in current speech.[28]

With these three categories in place, the study also sought to distinguish "collective" and "individualistic" *activities,* which simply describe "modes of overt behavior," from competitive, cooperative, or individualistic *behavior,* which would turn on ultimate motivations.[29] To illustrate the distinction, Mead concludes: "[s]o a man who hunts alone in the bush in order to contribute his kill to a communal feast is engaged in an individual activity inasmuch as he is working alone, but he is nevertheless engaged in a cooperative enterprise."[30] Additional distinctions of particular interest were drawn between "competition" and "rivalry," as well as between "cooperation" and "helpfulness":

> [W]hereas competition was behavior oriented toward a goal in which the other competitors for that goal were secondary, rivalry was behavior oriented toward another human being, whose worsting was the primary goal, and the object or position for which they competed was secondary. . . . In

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23. *Id.*

24. *Id.*

25. *Id.* at 9-14 (highlighting "Points To Watch For" in the thirteen studies' observations with respect to economics, social organization, political structure, views of life and the educational process).

26. "Conclusion" is deliberately avoided in favor of the "Interpretative Statement," in order to emphasize the non-definitive nature of the survey, as well as the continuing need for further consideration of the issues it posed. *Id.* at 458.

27. *Id.*

28. *Id.* at 16.

29. *Id.*

30. *Id.*

> cooperation, the goal is shared and it is the relationship to the goal which holds the cooperative individuals together; in helpfulness, the goal is shared only through the relationship of the helpers to the individual whose goal it actually is. The emphasis is on the relationship to that individual, not upon the goal itself.[31]

Yet, while some such categorization seemed possible, it was apparent as well that:

> no society is exclusively competitive or exclusively cooperative. The very existence of highly competitive groups implies cooperation within the groups. Both competitive and cooperative habits must coexist within the society. . . .
>
> Nor did competition . . . necessarily mean conflict, and cooperation, solidarity. In the cooperative societies competition is often introduced and acts as an associative mechanism.[32]

Mead also adds that isolating cooperative and competitive "habits" within the studies "proved unprofitable," leading to a substitution of a more broadly focused definition of cooperative and competitive "social systems."[33]

While it would be inappropriate and insupportable to extrapolate any lessons from these studies that would apply to nineteenth century American culture, several useful observations nevertheless seem possible. The pitfalls inherent in any attempt to define "cultural conceptions" of competition, cooperation and individualism are immediately apparent. Because a single society can exhibit various combinations of the three and, indeed, those combinations may vary

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31. *Id.* at 17. The parallel between Mead's "competition" versus "rivalry," and modern antitrust law's attempt to distinguish between "competition" and "predation" is striking. *See, e.g.*, Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985) (distinguishing fair competitive business practices with "predatory" practices that attempt to exclude rivals for reasons other than efficiency). In an attempt to distinguish hard competition from "predation," the Court in *Aspen* held: " 'Thus, 'exclusionary' comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.' " *Id.* at 605 n.32 (quoting 3 PHILIP AREEDA & DONALD F. TURNER, ANTITRUST LAW 78 (1978)). The Court added that "[i]f a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory." *Id.* at 605 (quoting ROBERT H. BORK, THE ANTITRUST PARADOX 138 (1978)); *see also* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 119 (rev. ed. 1982) ("In ordinary discourse, competition means personal rivalry, with one individual seeking to outdo his known competitor. In the economic world, competition means almost the opposite. There is no personal rivalry in the competitive market place. . . . The essence of a competitive market is its impersonal character.").

32. MEAD, *supra* note 19, at 460.

33. Such systems are defined as "societies in which distribution of goods is a major competitive activity and societies in which such goods enrich the whole group and contribute to its security. . . ." *Id.* at 462.

substantially with respect to different relationships within the society, complexity abounds and caution must be the rule in approaching any such evaluation. Second, it also seems quite apparent that "competition," "cooperation," and "individualism," as descriptive terms, simply cannot be confined to their economic definitions. As Mead repeatedly points out, the studies are about relationships that span the entire spectrum of human interaction.[34] Finally, one could clearly debate, as well, the very definitions of the terms used by Mead and the inherent problems associated with any attempt to evaluate one culture based on the language of another. If Mead's definitions are "western," however, they can certainly serve as at least a starting point for any discussion of behavior in a western society.

B. The American Cultural Tradition of Cooperation

Although a similar comprehensive study of nineteenth century American culture is far beyond the scope of this Article, it nevertheless appears to be worthwhile to use Mead's definitions and these observations to evaluate not the whole, but a part of the American culture in the period preceding adoption of the Sherman Act — the law of commercial relations.[35] Through much of the nineteenth century, that law expanded the possibilities for establishing different forms of commercial relationships. No single area of the law did so with greater fervor and consequence than the area of corporate law.

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34. *Id.* at 2-3.

35. In support of a "cultural" approach to analyzing law, Lawrence Rosen offers the following observations:

> [I]t appears more fruitful to view law as part of the larger culture, a system which, for all its distinctive institutional history and forms, partakes of concepts that extend across many domains of social life. In law . . . one has the opportunity to see ordinary assumptions put to the test of scope and implication, and though the response may be peculiar to its own domain, analyzing the realm of the law as a cultural phenomenon is no more unusual than viewing aspects of a society through the behavior of its members in the public market-place, the family dwelling, or the house of worship. . . . [A]s people attempt to comprehend their circumstances and orient themselves toward them they grasp that world through categories and assumptions that are themselves cast up by the full range of historical factors that shape their lives. The anthropologist's task is to sort out these influences and to see how, given the particular issue under study, a balanced apportionment of the contributing factors best accounts for the matter at hand.

ROSEN, *supra* note 12, at 5; *see also* June Starr & Jane F. Collier, *Historical Studies of Legal Change*, 28 CURRENT ANTHR. 367, 368 (1987) ("Culture is adept in shaping different legal forms, and law is powerful in redefining social issues and even in restructuring the relationships among groups in society itself, a fact recognized by both the powerful and the weak.").

Before exploring the evolution of corporate law, however, it will be necessary to assess the powerful influence of individualism that pervaded political and social life. As in Mead's framework,[36] to understand American cultural conceptions of competition, we will also have to take account of American cultural conceptions of cooperation and individualism. What emerges is a tangle of conflicting self-perceptions and behavioral patterns. Popular conceptions of individualism collided with the communal social structures that emerged from the Revolutionary War period. Legal doctrine, especially the law of corporations, reflected those tensions by facilitating cooperative relationships necessary to economic progress, but by doing so with adaptations designed to integrate those new forms into the broader culture of individualism. Those adaptations, while reflecting a perhaps uniquely American mix of competition, cooperation and individualism, may well have contributed to the eventual need for "anti-trust" legislation, particularly at the federal level.

1. Individualism in American Life

The definition of "individualism," particularly as it might describe early American culture, is a topic of intense debate. In popular use, the term frequently has been a synonym for a "rugged individualism" in which satisfaction of personal wants reigns supreme.[37] There is also significant evidence of a more communal conception of the term. Tocqueville, for example, distinguished "individualism" from "egoism," defining the former as "a calm and considered feeling which disposes each citizen to isolate himself from the mass of his fellows and withdraw into the circle of family and friends; with this little society formed to his taste, he gladly leaves the greater society to look after itself."[38] In contrast, he defined egoism as "a passionate and exaggerated love of self which leads a man to think of all things in terms of himself and to prefer himself to all."[39]

Tocqueville quite clearly associated the American character with

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36. *See supra* notes 19-34 and accompanying text (discussing Mead's "culture and personality" study of "primitive peoples").

37. As noted above, Mead disassociated her use of the term from this popular one. *See supra* note 28 and accompanying text.

38. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 506 (J.P. Mayer, ed. 1969).

39. *Id.* Combining Tocqueville's definitions with Mead's, the urge to associate "individualism" with "competition" and "egoism" with "rivalry" is irresistible. *See supra* note 32 and accompanying text (illustrating a broad application of the various meanings of the terms). Competition, however, also may be a means to establish or foster communal relations.

an enlightened self-interest and consequent communal concept of individualism, not egoism.[40] The equality that flows from democratic institutions, he argued, breeds autonomy in political, social and economic life.[41] But that autonomy, that "individualism," necessarily forges community. "Citizens who are bound to take part in public affairs must turn from the private interests and occasionally take a look at something other than themselves."[42] He continued, arguing that "ambition makes a man care for his fellows, and, in a sense, he often finds his self-interest in forgetting about himself."[43] Indeed, he observed that in America, "self-interest" was of the communal, not the egoistic variety.[44] He further emphasized the communal nature of American individualism, albeit based on a narrowly conceived "community," in noting the role of private "associations" in American life.[45]

More recent commentators similarly have associated the nineteenth century concept of individualism with a communalism that sets it apart from its twentieth century step-child. Lawrence Friedman asserts that "[t]hose who spoke about development of the self [in nineteenth century American life] were thinking of a self quite unlike its twentieth-century descendant. It was a God-fearing, hard-working, disciplined, traditional self, as far as private life was concerned."[46] But this "individualism" was tied inexorably to traditional institutions of family, community and, ultimately, "law":

> This image of the individual presupposed a particular kind of society and generated a particular kind of legal order. In this society individuals (men at least) were set free from economic restraints, but remained bound to past values. The powerful socializing forces of a face-to-face society remained

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40. TOCQUEVILLE, *supra* note 38, at 506.

41. *Id.* at 507-08. As Lawrence Friedman put it more recently:

> [D]ominant theory [in the nineteenth century] tended to equate individualism or individual liberty with economic liberalism. Thus individualism was essentially a political and economic creed; it put faith in the "invisible hand" and in democratic government; it was coupled with a (largely implicit) belief that people would and could govern and control themselves, without paternalism, without the authority of nobles and kings — that they could be trusted to manage on their own.

LAWRENCE M. FRIEDMAN, THE REPUBLIC OF CHOICE 28 (1990).

42. TOCQUEVILLE, *supra* note 38, at 510.

43. *Id.*

44. Tocqueville viewed "self-interest," defined in an enlightened, "communal" sense, as a force that combats excess individualism and its extreme, egoism. *Id.* at 525-28.

45. *Id.* at 513-17. He observed that, in addition to their political activism, "Americans of all ages, all stations of life, and all types of disposition are forever forming associations." *Id.* at 513.

46. FRIEDMAN, *supra* note 41, at 27.

largely intact: the authority of family, neighbors, teachers and preachers.[47]

Barry Allen Shain recently expanded on these views of nineteenth century life, with a comprehensive reevaluation of what he terms the "Myth of American Individualism."[48] Shain argues persuasively that early American culture was characterized by "local communalism," whose adherents " 'did not espouse the ethic of individualism' but instead backed a localism in which freedom 'was possible only within a community of like-minded men.' "[49] Indeed, Shain faults Tocqueville's reading of American individualism as giving insufficient weight to the influence of communalism in American life.[50] In Shain's view, Tocqueville and other contemporary European observers "had confused America's localism, communalism, and particularism with social and political individualism."[51] He attributes to them, therefore, partial responsibility for promoting the "myth" of American individualism.[52]

Even if Tocqueville misperceived the nature of American individualism to some degree,[53] he nevertheless concluded that American political and commercial institutions provided a significant check on its potential excesses.[54] "Individualism," even in the nominally communal sense that he defined it, was both a consequence of the prominent role that "equality" plays in democracy, and a long-term threat to it.[55] The isolationism from broader public discourse and political life that it could ultimately engender, he argued, would prove fertile ground to aspiring despots.[56] And although he perceived America's "free institutions" as playing a substantial role in combatting that prospect,[57] he also maintained that alone they ap-

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47. *Id.* at 32.

48. BARRY ALLEN SHAIN, THE MYTH OF AMERICAN INDIVIDUALISM: THE PROTESTANT ORIGINS OF AMERICAN POLITICAL THOUGHT (1994).

49. *Id.* at 48 (quoting James A. Henretta, *The Morphology of New England Society in the Colonial Period*, 2 J. INTERDISCIPLINARY HIST. 379, 399 (1971)).

50. *Id.* at 91.

51. *Id.*

52. *Id. But see* KENNETH L. KARST, BELONGING TO AMERICA 175 (1989) ("By the beginning of the nineteenth century, the dominant form of American individualism was the competitive pursuit of wealth and status, founded on a legal base that guaranteed not only the security of property and transactions but the freedom of contract.").

53. *See supra* notes 47-54 (explaining two commentators' extensions of Tocqueville's impression of American individualism).

54. TOCQUEVILLE, *supra* note 38, at 508.

55. *Id.* at 507.

56. *Id.* at 506-08.

57. *Id.* at 506-13. Tocqueville concludes that "[t]he free institutions of the United States and

peared unlikely to be up to the task of satiating even communal individualism.[58] Another outlet for both achieving satisfaction and curbing materialism was needed.[59] That outlet was commerce.[60]

Tocqueville asserts that America of the early nineteenth century was characterized not just by the pursuit of political and social relations, but by the pursuit of economic relations.[61] Thus, in democratic "equality" he finds not only the engine of social and political individualism, but the engine of commerce.[62] He notes, however, that he was "more struck by the innumerable multitude of little undertakings than by the extraordinary size of. . .their industrial enterprises."[63] Through Tocqueville's eyes, therefore, democracy's production in America of equality and, in turn, individualism — again, defined as narrowly focused, even "self-interested"[64] communalism — led to a peculiarly American character. While in theory avoiding egoism, it thrived on the pursuit of small-scale social, economic and political relations.[65] "Freedom to associate," not "freedom to be left alone" was the cultural norm.[66] Consistent with this vision of life,

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the political rights enjoyed there provide a thousand continual reminders to every citizen that he lives in society. . . . I maintain that there is [therefore] only one effective remedy against the evils which equality may cause, and that is political liberty." *Id.* at 512-13. For a critical analysis of Tocqueville's argument, see ROBERT A. DAHL, A PREFACE TO ECONOMIC DEMOCRACY 35-51 (1985).

58. TOCQUEVILLE, *supra* note 38, at 552-54.

59. *Id.* at 552.

60. *Id.* Tocqueville states that: "[i]n democratic countries where money does not carry its possessor to power . . . rich men tend not to know what to do with their leisure . . . . [N]othing has brighter luster than commerce. . . ." *Id.*

61. *Id.* at 552-53.

62. *Id.* at 551-55. In this context, he also argues that the direction of economic development will be away from agriculture in the direction of "trade and industry." *Id.* at 552.

63. *Id.* at 554.

64. *See supra* notes 38-46 and accompanying text (analyzing the various definitions that lead to a "self-interested communalism).

65. As Friedman points out, freedom to structure economic relations prompted the transition from commercial relationships based on status or custom to those based on contract. FRIEDMAN, *supra* note 41, at 27. Indeed, that transition largely was facilitated by the emergence of a legal infrastructure that supported commercial relations, particularly "[t]he *idea* of contract, ..." which Friedman describes as "one of the basic building blocks of nineteenth-century law." *Id.*

66. Although as a legal concept this right of association has evolved slowly over time, Lawrence Tribe views it as a concrete response to those who would fault the Constitution as being "an unacceptably individualistic document, one insufficiently sensitive to the social dimension of humanity and the communal dimension of society. . . ." LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1010 (2d ed. 1988). Moreover, my emphasis here on the communal nature of individualism in early American life is by no means intended to endorse the positions taken by those commentators who would use the observation as a basis for limiting constitutional rights today, such as the right to privacy. *See, e.g.*, STEPHEN B. PRESSER, RECAPTURING THE CONSTITUTION: RACE, RELIGION AND ABORTION RECONSIDERED 16-17, 20 (1994) (expressing that the

the Constitution guaranteed freedom of association, and contract, but for very salutary purposes. Individuals were freed from the yoke of government so that they might be better able to associate in order to take part in shaping it. In personal social and economic affairs, too, the point was not to create a nation of islands, but to free individuals so they might freely associate — that is, pursue communal activities.

But, as Tocqueville recognized, the potential for the deterioration of communal individualism into egoism is great, and egoism can feed the desire to aggregate political and economic power.[67] Perhaps based on his perception that the seeds of such an egoism were present in American life, he warns in a powerful passage of the commercial, and ultimately the political, consequences of egoism:

> Indeed there is a very dangerous phase in the life of democratic peoples. When the taste for physical pleasures has grown more rapidly than either education or experience of free institutions, the time comes when men are carried away and lose control of themselves at sight of the new good things they are ready to snatch. Intent only on getting rich, they do not notice the close connection between private fortunes and general prosperity. There is no need to drag their rights away from citizens of this type; they themselves voluntarily let them go. They find it a tiresome inconvenience to exercise political rights which distract them from industry. . . . They cannot waste their precious time in unrewarding work. . . . Such folk think they are following the doctrine of self-interest, but they have a very crude idea thereof, and the better to guard their interests, they neglect the chief of them, that is, to remain their own masters.[68]

These words could easily have been spoken on the floor of the Senate during debates over the adoption of the Sherman Act. The classically American themes of equality, distrust of big institutions, and preservation of small-scale communal relations are all present

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rights of the individual were important to the framers not for furthering a selfish desire, but for protecting one's morality and spirituality).

67. TOCQUEVILLE, *supra* note 38, at 540.

68. *Id.* In describing these views of Tocqueville, Leo Strauss and Joseph Cropsey state:

> This unexpected shift from a decent materialism to a more or less thoroughgoing pursuit of material comforts is concomitant with the rise of a commercial spirit. . . . Commerce readily transforms the simple desire for modest comforts into a caricature of its former self. It comes to be regarded as itself the noblest pursuit, and beguiles the faculties of the men of most competence in the society. Men of superior intellect are diverted from politics to business, from public life to private affairs. In commerce, these men find adequate outlets for their distinctive talents, as well as freedom from the conformity and vulgarity of political life. In fact, these men threaten to form the nucleus of a new aristocracy. . . .

HISTORY OF POLITICAL PHILOSOPHY 766-67 (Leo Strauss & Joseph Cropsey, eds. 3d ed. 1987).

— as products of democratic, and perhaps American, cultural norms.

2. *The American Corporation's Evolution from Communal-Individualist to Egoistic-Rival*

From the vantage point of the early twentieth century, Henry W. Ballantine could simply state that "[m]uch of the industrial and commercial progress of the 19th and 20th centuries has been made possible by the corporate mechanism."[69] But that "mechanism" was unknown to the commercial world prior to the mid-nineteenth century. How and why it came into being, and how it reflects the cultural paradox of nineteenth century American commercial life, set the stage for and greatly influenced the emergence of American antitrust law.

The term "corporation," along with many of its essential legal characteristics, has been traced to Roman law.[70] In its early incarnation, however, and for most of its history, the corporation was associated with public, not private endeavor, usually of the political, and only later of the commercial variety.[71] Individual political acts were required to award special corporate charters, and they frequently represented grants of exclusive privilege.[72] This was the "corporation" known to Adam Smith, and condemned by him.[73]

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69. HENRY W. BALLANTINE, BALLANTINE ON CORPORATIONS 1 (1927). By the middle of the twentieth century, Adolph Berle, in a sweeping defense of the achievements of the corporation, maintained: "[t]his singular organization has succeeded in being at once legal institution, economic institution, and agency and chief heir of the explosion of technical progress which is the outstanding achievement of our generation." ADOLPH A. BERLE, JR., THE 20TH CENTURY CAPITALIST REVOLUTION 9 (1954).

70. *See, e.g.*, HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 215 (1983) ("[T]he term 'corporation' . . . was derived from Roman Law, as were many of the terms used to define it and many of the rules applicable to it."). Berman also recounts the lineage of "company," originally a form of family-based partnership, an association of "companions," that later evolved into a business form that grew beyond family. *Id.* at 353.

71. *See generally* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 188-89 (2d ed. 1985) (explaining that prior to the 19th century nearly all corporations were non-business entities, being mostly churches, charities, and cites, later evolving into banks and utility companies); KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 96-97 (1989) (stating that most corporations chartered from 1789 to 1861 were created for the purposes of improving transportation, and later banking, insurance, and manufacturing).

72. HALL, *supra* note 71, at 96-97. The 1623 English Statute of Monopolies, for example, did not abolish the practice of the government granting exclusive corporate charters, it merely transferred the authority to do so from the Crown to Parliament. *See generally* THORELLI, *supra* note 1, at 26 (noting that the Statute, which sanctioned exclusive privileges to corporations, laid the foundation of modern patent law).

73. SMITH, *supra* note 7, at 493. Smith argued that corporations of the exclusive privilege vari-

As Lawrence Friedman observes, "[u]ntil about the middle of the [nineteenth] century, the corporation was by no means the dominant form of business organization. Most commercial enterprises were partnerships."[74] The private business corporation, formed with the sanction of state law but freely available to all without special legislative charter, is a creation of nineteenth century American state law.[75] Its emergence appears to be attributable to the increased demand for corporate charters,[76] the "cumbersome" nature of individual legislative action,[77] and a conscious government policy of promoting economic growth, combined with the realization that the needs of technological progress, particularly in transportation and communication, demanded a more widely available cooperative mechanism for raising capital.[78]

The states thus played a crucial role in facilitating this reconstruction of American commercial relations. Beginning with a limited general corporation statute adopted by New York in 1811, the practice of states adopting general corporation statutes spread rapidly.[79] Eventually the states engaged in a competition of sorts to liberalize their corporation laws,[80] thereby attracting the revenues as-

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ety had the same tendencies as monopolies, *id.* at 69, and were even injurious to themselves. *Id.* at 144-45.

74. FRIEDMAN, *supra* note 71, at 190; *see also* ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 36-37 (1977) (discussing the development of industrial management in the United States).

75. FRIEDMAN, *supra* note 71, at 195; *see also* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 112-14 (1977) (tracing the development of American corporate law through the eighteenth and nineteenth centuries).

76. FRIEDMAN, *supra* note 71, at 190.

77. *Id.*

78. *Id.; see also* HORWITZ, *supra* note 75, at 111 (emphasizing relationship between competition and economic development). Kermit Hall cites several reasons for the movement towards adoption of state general corporation laws:

> First, they equalized the opportunity to secure the legal advantages of incorporation while encouraging economic growth through private dealings. Second. . .[they] democratized entrepreneurship during the early stages of industrial growth. Third, these laws 'also equalized the opportunity for different sections of [a] state to undertake local improvement projects with their own resources without having to bargain politically for the privilege.'

HALL, *supra* note 71, at 98-99 (quoting RONALD E. SEAVOY, ORIGINS OF THE AMERICAN BUSINESS CORPORATION, 1784-1855 6 (1982)); *see also* Millon, *supra* note 8, at 1255 (discussing reasons for adoption by states of general incorporation statutes).

79. HALL, *supra* note 71, at 98-99.

80. For an account of the competition among states for corporate patronage, see Christopher Grandy, *New Jersey Corporate Chartermongering, 1875-1929*, 49 J. ECON. HIST. 677 (1989), *reprinted in* 1 BUSINESS AND GOVERNMENT IN AMERICA SINCE 1870 145-60 (Robert F. Himmelberg, ed. 1994); *see also* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW

sociated with status as the "state of incorporation."[81] The partnerships and family associations of the past would give way to the private business corporation. The "corporate reconstruction of American capitalism" was under way.[82] Proponents and opponents of this new commercial order found common ground in asserting the "inevitability" of corporate growth and concentration.[83]

The private corporation's past association with monopoly and exclusive privilege, however, meant that it was greeted with skepticism and even hostility.[84] The disdain for large-scale political institutions evident in early American culture, was easily transferred to large-

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1870-1960 83-84 (1992) [hereinafter HORWITZ, 1870-1960] (providing a critical analysis of the development of U.S. corporate laws). As a response to the perception that legislatively granted corporate charters were inequitable and reflected undue interference by government in the operation of free markets, the movement towards adoption of general corporation laws was also, in the view of Kermit Hall, "evidence of the laissez-faire thread that ran through the antebellum economy." HALL, *supra* note 73, at 99; *see also* May, *supra* note 8, at 262-88 (discussing laissez-faire constitutionalism as well as contemporary political and economic theory as part of the "conceptual context" for emergence of antitrust); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins Of Laissez-Faire Constitutionalism*, 3 L. & HIST. REV. 293, 320 (1985) (tying emergence of general corporation statutes to development of laissez-faire constitutionalism). Ironically, early challenges to Section 1 of the Sherman Act urged the Court to declare it unconstitutional on the grounds that it unduly interfered with individual liberty and freedom of contract. *See, e.g.*, United States v. Joint-Traffic Ass'n, 171 U.S. 505, 559, 571-72 (1898) (rejecting Fifth Amendment challenge to Section 1 of the Sherman Act).

81. State competition to liberalize corporate laws culminated with New Jersey's adoption in 1888 of amendments to its corporation law authorizing corporations, for the first time, to own the stock of other corporations. CHRISTOPHER GRADY, NEW JERSEY AND THE FISCAL ORIGINS OF MODERN AMERICAN CORPORATION LAW 41-45 (1993) (tracing the development of New Jersey's General Corporation Act). The rapid substitution of the "holding company" for the trust and much of modern subsidiary corporate forms was a consequence. *See, e.g.*, HORWITZ, 1870-1960, *supra* note 80, at 83-84 (stating that the passage of the New Jersey corporation law inspired other states to follow suit and repeal many restrictions on corporate consolidation). Yet, even as the states competed to liberalize their corporation laws, attracting greater revenues to their treasuries, they became concerned over the consequences of unbridled corporate growth. Thus, both the development of corporate law and the emergence of the antitrust movement paralleled one another, both originating at the state level. *See, e.g.*, Gavil, *supra* note 8, at 658 n.1. (noting that commentators agree that opposition to the trusts "developed as a grass-roots movement that bore its first fruit at the state level"); HOVENKAMP, *supra* note 1, at 266 (attempting to reconcile efforts by states simultaneously to liberalize corporation laws and regulate trusts).

82. *See generally* SKYLAR, CORPORATE RECONSTRUCTION, *supra* note 1 (tracing the historical development of American markets and corporate laws); *cf.* ROBERT H. WIEBE, THE SEARCH FOR ORDER 1877-1920 76-132 (1967) (exploring evolution of American values from those of the small town to those of the emerging urban middle class).

83. *See generally* HORWITZ, 1870-1960, *supra* note 80, at 80-85 (stating that in the 1890's the trend in American economic thought was that the emergence of large scale corporations and consolidation was inevitable).

84. FRIEDMAN, *supra* note 71, at 194; *see also* TONY A. FREYER, REGULATING BIG BUSINESS: ANTITRUST IN GREAT BRITAIN AND AMERICA, 1880-1990 11-42 (1992) (offering comparative evaluation of late nineteenth century responses to big business).

scale social and economic organizations that appeared to be inconsistent with equality, posing a direct threat to communal individualism.[85] This hostility grew as the corporation gave way to pools and combines, which in turn gave way to the trusts, and ultimately to the holding companies of the late nineteenth century. Indeed, through the eyes of a prominent observer of late nineteenth century American life, competitive, corporate capitalism presented a paradox. It was both a product of the individualism and free association that constituted America's response to its colonial experience and a grave threat to them:

> The power of groups of men organized by incorporation as joint-stock companies, or of small knots of rich men acting in combination, has developed with unexpected strength in unexpected ways, overshadowing individuals and even communities, and showing that the very freedom of association which men sought to secure by law when they were threatened by the violence of potentates may, under the shelter of the law, ripen into a new form of tyranny.[86]

Something went awry in the pursuit of ever greater degrees of commercial cooperation. Even as the law gave its imprimatur to the general business corporation, it embraced characteristics for it that increasingly distanced the corporation from its predecessors. Although corporations, like those predecessors, were communal in nature, aggregations of human and economic resources, assembled with the help of legal sanction in pursuit of cooperative and productive enterprise, they were also becoming individualistic. In a great and, perhaps, uniquely American irony, the corporation, a necessarily cooperative undertaking, was being functionally integrated with individualism. This integration of communalism and individualism was particularly evident in the corporation's separation of management from ownership[87] and in the law's recognition of it as an individual "personality."[88]

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85. For an excellent account of the period, see Millon, *supra* note 8, at 1224-28 (discussing concentration of economic wealth in late nineteenth century and public reaction to it); *see also* SAMUEL P. HAYS, THE RESPONSE TO INDUSTRIALISM: 1885-1914, 71-93 (1959) (discussing "THE INDIVIDUAL IN AN IMPERSONAL SOCIETY" with particular focus on the rise of large, private business corporations).

86. 2 JAMES BRYCE, THE AMERICAN COMMONWEALTH 591-92 (3d ed. 1908).

87. As Alfred Chandler recounts, "As late as the 1840's, with very few exceptions, owners managed and managers owned." Alfred D. Chandler, Jr., *The Emergence of Managerial Capitalism*, 58 BUS. HIST. REV. 473, 473 (1984), *reprinted in*, HIMMELBERG, *supra* note 80 at 31-61.

88. The features of the modern corporation — limited shareholder liability, separation of management from ownership, corporate personality, and perpetual life — evolved throughout the nineteenth century. *See* HOVENKAMP, *supra* note 1, at 11-64 (providing a history of classical political

The separation of management from ownership permitted small groups of professionalized management to reap the benefits of the corporate form in terms of raising capital, while pursuing narrowly defined material goals that were not necessarily in the interest of the bulk of the stockholders or the public.[89] The fact that industrialists could, relying on "Social Darwinism," assert emphatically that they merely represented survival of the fittest,[90] represented an astonishing paradox. The "they" were the beneficiaries of a legal construct adapted to promote economic productivity and the expansion of wealth. "Rugged individualism"[91] hardly had anything to do with the success of "robber barons"[92] and "captains of industry;"[93] exploitation of cooperative legal structures did.

The association of the corporation, an organization, with the characteristics of personality, of "individuality," also was particularly crucial to its status. Thurman Arnold persuasively argued in 1937 that it was this identification of the corporation as an "individual" that later begot "the mystical philosophy that put the corporate organization ahead of the governmental organization in prestige and power. . . ."[94] In that association, the corporation avoided, at least initially, condemnation of the sort reserved for government at the time of the American Revolution, and the inherent contradiction of abhorring large governmental organization, but not large commercial organization, persisted for a time.[95] The "symbol" of individual-

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economy and the business corporation in the U.S.); HORWITZ, 1870-1960, *supra* note 80, at 65-107 (tracing the development of corporate theory).

89. THORELLI, *supra* note 1, at 255; *see also* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 121 (1932) (discussing the separation of corporate management from ownership and the concept of "limited liability"). For a discussion of the ameliorating influence of external, as well as internal changes in corporate governance since Berle and Means's 1932 book, see OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS 135-36 (1975). *But see* Louis A. Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515, 550-52 (1985) (collecting recent scholarship that acknowledges disparity between interests of corporate management and shareholders and noting significance of that disparity for antitrust).

90. *See, e.g.*, HOVENKAMP, *supra* note 1, at 350 (discussing views of Andrew Carnegie); RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 58 (rev. ed. 1992) (discussing views of William Graham Sumner on success of industrialists).

91. See *supra* note 30 and accompanying text.

92. *See generally* MATTHEW JOSEPHSON, THE ROBBER BARONS (1962) (discussing role of entrepreneur from the Civil War to the end of the nineteenth century in the development of America into a "unified industrial society").

93. *See* Thorstein Veblen, *The Captains of Industry*, *in* THE PORTABLE VEBLEN 377-94 (Max Lerner, ed. 1948).

94. THURMAN W. ARNOLD, THE FOLKLORE OF CAPITALISM 186 (1937).

95. *Id.* at 187-88.

ism was successfully grafted onto an organization, facilitating its growth and success even as it masked its true nature.[96] As Arnold notes, "[t]he *laissez faire* religion, based on a conception of a society composed of competing individuals, was transferred automatically to industrial organizations with nation-wide power and dictatorial forms of government."[97] Nevertheless, even as the myth of the "individualized corporation" took hold as a legal construct in a fashion that appeared consistent with historic, American cultural norms,[98] its reality challenged American cultural sensibilities.[99] As Herbert Hovenkamp succinctly puts it, "[t]he American business corporation had become a person but had lost its soul."[100]

But long before the corporation yielded the trust, and the trust the holding company, the common law sought to balance the developing law of corporate cooperation with another emerging body of law: "competition."[101] As both a legal and a cultural phenomenon, therefore, the corporation and its progeny became a focal point for debating "cooperation," "competition" and "individualism," since it possessed characteristics of all three. The interplay of these categories of human relationships in the emergence of corporate capitalism was and remains a controlling feature of American antitrust law — one that is a product of American cultural norms.

The Sherman Act thus was born of both a devotion to and an aversion to "cooperation." Far from being an attempt to implement competition, it was offered as an antidote to excessive cooperation in

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96. *Id.*

97. *Id.* at 189.

98. Arnold observed: "It is a familiar social phenomenon to see the symbols of the habits of pioneer times transferred as a social philosophy to later institutions to prove that we still are following the examples of our fathers." *Id.* at 188.

99. Typically, economic analysis of the corporation has not been concerned with the corporation's cultural origins. Rather, economists have increasingly viewed the corporation as a "product of a series of organizational innovations that have had the purpose and effect of economizing on transaction costs." *See, e.g.,* Oliver E. Williamson, *The Modern Corporation: Origins, Evolution, Attributes,* 19 J. ECON. LIT. 1537 (1981) (arguing that transaction cost economizing largely explains the major features of the business corporation).

100. HOVENKAMP, *supra* note 1, at 16; *see also* FRIEDMAN, *supra* note 71, at 194 ("The word 'soulless' constantly recurs in [nineteenth century] debates over corporations.").

101. For a more thorough account of the origins of the private corporation and its relationship to competition law, see HORWITZ, *supra* note 75, at 109-39. In his later volume, Horwitz explores the evolution of the legal attributes of the modern corporation, such as limited liability and constitutional rights. *See* HORWITZ, 1870-1960, *supra* note 80, at 72-78; *see also* HOVENKAMP, *supra* note 1, at 11-64 (explaining the development of the "classical corporation", along with related concepts of "vested corporate rights", "the corporate personality", "limited liability", and corporate power).

the form of individualistically-motivated cooperative social structures that threatened the continued survival of communally-motivated individualism. As Arnold put it:

> In this atmosphere the antitrust laws were the answer of a society which unconsciously felt the need of great organizations, and at the same time had to deny them a place in the moral and logical ideology of the social structure. They were part of the struggle of a creed of rugged individualism to adapt itself to what was becoming a highly organized society.[102]

C. *The Imperative of Progress*

There is no over-arching theory that can rationalize all of the factors that influenced the adoption of antitrust legislation by the 51st Congress. While some antitrust historians have collected evidence to support singular purpose explanations of the Sherman Act's legislative history,[103] and yet others have offered interest-group explanations for its passage,[104] the Act was and remains a focal point for many conflicting American cultural perceptions. Today, as in 1890, we debate as a society what Louis Brandeis once labeled "the curse of bigness."[105] And while some decry "big government," whereas others decry "big business," easy applause can always be gotten in America by condemning something that is "big."[106] The American desire to balance communal individualism, based as it had been in the Revolutionary War period and for a time thereafter on small scale social and economic units, with an overpowering desire to pursue mass economic progress, even if it demands ever larger institutions, capable of fully exploiting the resources of a rapidly growing nation, remains a cultural paradox.

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102. ARNOLD, *supra* note 98, at 211; *see also* WALLER, *supra* note 9, at 579-80 (discussing Arnold's observations and role of "cultural myth" in emergence of the Sherman Act).

103. *See, e.g.*, Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966) (identifying efficiency as the primary purpose of the Sherman Act's framers); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 93-96 (1982) (preventing wealth transfers as the primary purpose of the Sherman Act's framers). For a critique of the approach taken by Bork and Lande, see Ernst, *supra* note 3 at 882-83.

104. *See* William E. Kovacic, *Public Choice and the Origins of Antitrust*, *in* THE CAUSES OF ANTITRUST: THE PUBLIC CHOICE PERSPECTIVE, *supra* note 3 at 243-53 (discussing the work of Bourdeaux, Di Lorenzo and Parker).

105. *See* LOUIS D. BRANDEIS, THE CURSE OF BIGNESS 99-181 (1935) (differentiating between regulation of competition and regulation of monopoly).

106. For a thought-provoking, empirically-based challenge to the modern association of corporate "bigness" with "efficiency," see WALTER ADAMS & JAMES W. BROCK, THE BIGNESS COMPLEX: INDUSTRY, LABOR AND GOVERNMENT IN THE AMERICAN ECONOMY (1986).

Antitrust has provided a lens, however, for focusing those disparate values, and it has done so by consistently emphasizing one, in particular — "progress." Drawn with regularity to those industries perceived as being most crucial to economic development, and those most in turmoil in their time, antitrust has consistently played a role in defining the pattern of industrial progress. From the railroads,[107] to oil[108] and steel,[109] on to manufacturing,[110] then retailing,[111] and more recently, service and high technology industries,[112] antitrust has been compelled to make its mark by advancing a seemingly perpetual agenda for progress.[113]

That agenda has forced a continuing process of assessment and reassessment of American cultural conceptions of competition, cooperation and individualism. In emphasizing one or another of those norms, however, antitrust policy-makers have been and continue to be guided by their own perceptions of how best to implement an antitrust policy that supports general government policies favoring economic growth. And while William Baxter[114] and James C. Miller III[115] may have thought the road to growth was paved with less government, less antitrust and freer markets, even if "bigger" business was a consequence, whereas Anne K. Bingaman favors more government antitrust enforcement and perhaps harbors suspicions of big business[116] — yet both could find common ground in articulating

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107. United States v. Trans-Missouri Freight Assoc., 166 U.S. 290 (1897).

108. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).

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

110. United States v. Int'l Harvester Co., 274 U.S. 693 (1927); United States v. Aluminum Co., 148 F.2d 416 (2d Cir. 1945).

111. American Tobacco Co. v. United States, 328 U.S. 781 (1946); United States. v. Crescent Amusement Co., 323 U.S. 173 (1944); Morton Salt Co. v. Suppiger Co., 314 U.S, 488 (1942).

112. Community Comm. Co. v. City of Boulder, Co. 102 S. Ct. 835 (1982); United States v. Western Electric Co., Inc., 46 F.3d 1198 (D.C. Cir. 1995).

113. The trend is quite evident and most striking when the cases are presented chronologically, as in Professor Thomas Morgan's recently published antitrust casebook. *See* THOMAS D. MORGAN, CASES AND MATERIALS ON MODERN ANTITRUST LAW AND ITS ORIGINS (1994); *see also* Eugene V. Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. CHI. L. REV. 567 (1947) (arguing that the degree of competition achieved in U.S. industrial organization will dictate society's success in maintaining high levels of production, employment and commerce).

114. William F. Baxter, *Responding to the Reaction: The Draftsman's View*, 71 CAL. L. REV. 618, 619-20 (1983) (discussing "Consumer Welfare As The God of Antitrust Law" in the context of the 1982 merger Guidelines).

115. *See, e.g.*, James C. Miller III, *Reindustrialization Through The Free Market*, 53 ANTITRUST L.J. 121, 121-130 (1984) (discussing role of "industrial policy" to restore long-term industrial growth).

116. *See, e.g.*, ANNE K. BINGAMAN, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION,

the purpose of their chosen paths: economic growth.

III. *Conclusion: Sherman And The World*

This "antitrust ethnography" suggests that the Sherman Act arose not from a desire to implement competition in a positivist sense. That task could hardly have been the point of a negative prohibition such as the Sherman Act.[117] The legal foundations for capitalism lie elsewhere, in the laws of contract, property, equality and liberty.[118] Instead, the Sherman Act was conceived as a device for curbing the excesses of cooperative commercial institutions, which, because of their integration with individualism of the "egoist" variety, threatened to restrict the continued existence of traditional, small-scale individualistic/communal social and economic relations. The need for legislation was a push from below, from the states, which had in pursuit of economic progress facilitated the creation of large corporate structures that intermingled various cultural needs of nineteenth century Americans. If we today remain uncertain, or at best divided, with respect to those underlying cultural issues, it is fair too to ask: what wisdom do we have to offer others?

U.S. DEPARTMENT OF JUSTICE, ANTITRUST ENFORCEMENT AND AMERICAN PROSPERITY, ADDRESS BEFORE THE ANTITRUST SECTION OF THE NEW YORK BAR ASSOCIATION, Jan. 26, 1995 (discussing role of antitrust in provoking economic progress); Andrew I. Gavil & Stephen H. Wenc, *Clinton Antitrust: A Look At The First Year*, 23 J. REPRINTS ANTITRUST L. & ECON. 5, 28 & n.73, 33-34 (1994) (noting presence of this theme in speeches and press releases from the first year of the Clinton Antitrust Division).

117. The Federal Trade Commission Act, by contrast, adopted in 1914 at the height of progressive influence over antitrust, reflects a more clearly articulated attempt to implement a policy of competition. *See* 15 U.S.C. §§ 41-58 (1988) (providing for the establishment of the Federal Trade Commission and dealing with the promotion of export trade and the prevention of unfair methods of competition). This role for the Commission is particularly evident in its rule-making authority. *Id.* § 45 (giving the Commission the authority to prohibit unfair practices); *see also* BRANDEIS, *supra* note 109, at 112-24 (stating that regulation is essential in order to preserve competition, as excesses of competition may lead to monopoly). Brandeis argued that "regulated competition" is the only reasonable alternative to monopoly, which he viewed as the inevitable result of unregulated competition. *Id.* at 104. Consistent with this view, he endorsed creation of the Federal Trade Commission and suggested that it should "have ample powers of investigation, not only as mainly for the purpose of detecting and exposing lawless business, but in order to foster and build up law-abiding business." *Id.* at 134-35.

118. *See generally* JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM (1924) (discussing capitalism and economic policy in the United States and Great Britain). For a review of the historical uses of law by colonial powers to transform underdeveloped colonies through imposition of capitalism, see YASH GHAI, ROBIN LUCKHAM & FRANCIS SNYDER, THE POLITICAL ECONOMY OF LAW (1987), an anthology of largely Marxist writings that address the role of law in transforming colonized peoples to capitalism; *see also* Sally Engle Merry, *Law And Colonialism (Review Essay)*, 25 L. & SOC'Y REV. 890, 909-12 (1991) (discussing "LAW AND CAPITALIST TRANSFORMATION").

Others may not share the American mix of cultural conceptions of competition, cooperation and individualism, or be inclined to make the same cultural compromises America made in assembling its nineteenth century legal infrastructure. While many marvel at the engine of self interest, others may view it with apprehension. We should know. Americans throughout our history have simultaneously exhibited enthusiasm for economic growth and apprehension for the safety of our cherished political, social and economic freedoms in the face of large institutions, be they governmental or economic.[119] And while early Americans formulated those feelings based upon their colonial experience, later generations have faced their own demons, only to arrive at the same state of cultural impasse. Ironically, despite the many differences among Americans that can flow from distinct historical encounters with authority, there persists common ground, a core American, and perhaps not so American, character, that desperately wants to balance the desire for personal autonomy, the profound need for community and the fear of the "leviathan," however clothed.[120] Culturally, we looked to antitrust in 1890, and continue to do so today, to resolve that imbalance. And that is a tall order for competition law to fill.

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119. *See, e.g.*, Millon, *supra* note 8, at 1236-47 (discussing impact of liberalism and republicanism on American aversion to large concentrations of economic wealth). For an excellent presentation of the argument that "the main significance of large size in units of social organization" — be they social, commercial or governmental — "lies in their tendency to substitute compulsion in place of persuasion, to emphasize discipline rather than liberty," see Louis A. Schwartz, *Institutional Size and Individual Liberty: Authoritarian Aspects of Bigness*, 55 NW. U. L. REV. 4 (1960); *see also* Richard Hofstadter, *What Happened To The Antitrust Movement?*, *in* THE PARANOID STYLE OF AMERICAN POLITICS AND OTHER ESSAYS 188, 195-204 (1965) (stating that the "sweeping language" of the Sherman Act reflected the uncertainties of Congress and the American public as to the role of the government in antitrust law).

120. Describing the "Paradox of Community," in the conclusion to their study "Law and Community in Three American Towns," Greenhouse, Yngverson and Engel offer the following observation about this observed conflict:

> The myth of community, on the one hand, emphasizes harmony, or 'getting along' and a distinctive 'way of life' that links people in a collective endeavor with other like-minded individuals. The ethic of individualism, on the other hand, emphasizes self-reliance, toughness, and autonomy — qualities that are posed as being central to progress and 'getting along' in a market economy. The ambiguity of 'getting along' (either as harmony or progress) captures the tension to which we refer. Here we see the inherent contradictions of an ideology of community in which harmony is extolled but where only the tough (spiritually, economically) can belong.

Greenhouse, *supra* note 2, at 173.