

## JOHN GRAVER JOHNSON'S INTELLECTUAL FOOTPRINT ON THE JURISPRUDENCE OF THE SHERMAN ACT AND THE COMMERCE CLAUSE

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### I. INTRODUCTION

John Graver Johnson was a Philadelphia lawyer whose practice thrived in the late nineteenth and early twentieth centuries. Professionally, he was a mere practitioner for most of his life. He eschewed prominence by rejecting countless prestigious public positions offered to him, including two appointments to the Supreme Court of the United States. He did this for the love of his practice.

However, it cannot be implied that his accomplishments are not worthy of illustrious recognition. Johnson tried thousands of cases in various courts—from the Pennsylvania Superior Court to the Supreme Court of the United States. His clientele included both the poor and the social elite. His analytical abilities, shrewd legal skills, and photographic memory were unparalleled by his peers at the time. And while his achievements were considerable, there are few recent works written about him.<sup>1</sup>

A quote by George Sharswood, former Chief Justice of the Supreme Court of Pennsylvania, details the likely reason Johnson does not have the enduring recognition he unquestionably deserves:

In the reports we find at least some evidence of the judges who helped to elucidate, to state and to perpetuate the law; but what,

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1. The University of Pennsylvania Press published *Barnie Winkelman's* biography of John G. Johnson in 1942, but that work is not currently in print. See BARNIE WINKELMAN, JOHN G. JOHNSON: LAWYER AND ART COLLECTOR (1942).

even in the case of the greatest of the great lawyers, remains of the brilliant arguments which won verdicts and secured decisions? The court rooms themselves, which were the theatres of their triumphs and the audiences, which, entranced, hung upon their lips, have not more completely vanished than has the remembrance of their utterances.<sup>2</sup>

Because Johnson avoided status and prestige, history gave him a forceful but passing glance. The literature that is available will never be able completely to recall the brilliant arguments he devised and the strategies he employed to win many of his cases. Nor will it be able to give a full account of the effects he personally had on the lives of those with whom he interacted. His profession did not lend itself to this sort of recognition, and indeed, he may have wanted it this way.

This article seeks to examine two of Johnson's achievements. First, the article discusses Johnson's efforts in *United States v. E. C. Knight Co.* ("*Knight*"), where the Supreme Court held that Congress could not regulate intrastate manufacturing processes under its Article I Commerce Clause power.<sup>3</sup> This article further discusses the subsequent expansion of Congress's regulatory authority throughout most of the twentieth century. In this respect, it briefly illuminates the impact Johnson's original arguments have had on federalism jurisprudence.

Second, this article illustrates how Johnson's arguments in *Northern Securities Co. v. United States* for an economic-driven and practical approach to antitrust law were antecedent to the Court's ultimate adoption of a "rule of reason" approach to antitrust inquiries under the Sherman Act.<sup>4</sup> It further discusses the actual genesis of the "rule of reason" and a few of the other landmark cases that Johnson argued in this respect.

Accordingly, the article proceeds as follows: Section II briefly describes Johnson's biographical and professional background. Section III discusses the progressive political environment during the late nineteenth and early twentieth centuries in which Johnson's practice with large corporations thrived. Section IV explains the statutory and constitutional bases implicated in *Knight*. Section IV.A introduces *Knight* and discusses its disposition as well as some of Johnson's subsequent notable cases involving the Commerce Clause. Section IV.B briefly elucidates the

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2. Hampton L. Carson, *John G. Johnson, A Great American Lawyer*, 3 CORNELL L. Q. 100, 117 (1918).

3. *United States v. E. C. Knight Co.*, 156 U.S. 1, 13 (1895) ("The fact that an article is manufactured for export to another State does not, of itself, make it an article of interstate commerce . . .").

4. *N. Sec. Co. v. United States*, 193 U.S. 197, 331 (1904) ("[T]he act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces *all* direct *restraints* imposed by any combination, conspiracy or monopoly upon such trade or commerce.") (emphasis in original).

continuing federalism concerns over Congress's power to regulate broadly various types of activity under the Commerce Clause. Finally, Section V describes Johnson's influence on modern antitrust jurisprudence.

To be sure, the efforts in this article do not nearly capture the breadth and true impact of Johnson's work. It cannot do that; no biographical work could. It attempts only to demonstrate how his arguments in a series of Supreme Court cases have contributed to important federal law. It is the author's hope that this discussion will encourage further writing on Johnson and his impact on other important constitutional, antitrust, and corporate legal doctrines that are not covered in this article.

## II. A BRIEF BIOGRAPHY

John Graver Johnson was born in Chestnut Hill, Pennsylvania, in 1841.<sup>5</sup> His mother was a milliner, and his father was a blacksmith.<sup>6</sup> He graduated from high school in 1857 with a term average that placed him second in his class.<sup>7</sup> He was immediately interested in the law and, upon graduating from high school, he began studying it in the late hours of the evening while working as a scrivener in the Philadelphia offices of Benjamin Rush.<sup>8</sup> Johnson eventually became associated with the offices of Philadelphia lawyer William F. Judson, where he "supported himself . . . by collecting rents, by engrossing deeds and copying legal papers."<sup>9</sup> While working in Judson's office, he began attending George Sharswood's lectures at the Law Department of the University of Pennsylvania.<sup>10</sup> After eventually passing the bar and graduating from the Law Department in 1863, he became Judson's successor shortly after Judson prematurely passed away.<sup>11</sup>

The few works on Johnson's life make clear his natural, striking wit and impressive legal skills. For example, his obituary in the April 14, 1917 edition of the *New York Times* stated that, as a schoolboy, Johnson frequently memorized Shakespeare plays for amusement.<sup>12</sup> Hampton

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5. Henry McAllister, *John G. Johnson, Lawyer*, 26 *DICTA* 149, 149 (1942).

6. *Id.*

7. Carson, *supra* note 2, at 100 (noting Johnson's average of monthly results in written examinations while he was in high school).

8. Mary Louise Ramsey, *Art and the Law: The Two Loves of John G. Johnson*, 60 *A.B.A. J.* 1400, 1400 (1974).

9. Carson, *supra* note 2, at 101.

10. *Id.*

11. *Id.* According to Ramsey, this position became incredibly lucrative during the economic panic of 1873. Ramsey, *supra* note 8, at 1400. During this time, Johnson's firm had the job of foreclosing many of the mortgages which it held as trustee. *Id.* And, "under the practice then prevailing, [the firm] received a fee equal to 5 per cent of each mortgage foreclosed." *Id.*

12. *John G. Johnson, Noted Attorney, Dies*, *N.Y. TIMES*, April 14, 1917, at E2,

Carson's brief account of Johnson's career, chronicled in the 1918 edition of the Virginia Law Register, stated that Johnson, as a student in William Judson's office, was forced to labor unrelentingly over preliminary drafts of legal documents and complete a variety of other legal tasks:

Whatever might be argued, as was done later, against the barbarous terminology, the tautologies, the subtleties, and the too minute insistence upon purely formal matters, there can be no doubt that the legal wit of man never devised a more searching method of analysis in determining the substance of a controversy, or in narrowing allegations to specific issues, whether of law or fact, than the now obsolete system of pleading. It enabled a man of fine analytical powers to cultivate the faculty of legal diagnosis, and it was in this that . . . Johnson . . . excelled all competitors . . .<sup>13</sup>

Thus, practicing the methods of legal reasoning within the confines of precedent and statutory authority—and practicing those methods *ad nauseam*—helped acquaint Johnson with the practice of law.

Yet despite his wit, Johnson was a pragmatist who would hesitate to take cases he did not believe he could argue successfully.<sup>14</sup> He was not interested in politics and did not care for using law as a means to enact social reform.<sup>15</sup> As an illustration of his lack of interest in politics and public service, Johnson politely turned down a seat on the Supreme Court of the United States offered to him by President Garfield in 1881.<sup>16</sup> He declined the same offer from President Cleveland years later.<sup>17</sup> It was even alleged in a letter written by Secretary of State Dean Acheson to President Truman that, in proffering his reasons for turning down President Cleveland's offer, Johnson explained, "I would rather talk to the damned fools than listen to them."<sup>18</sup>

In all probability, Johnson never held public office because he did not want the responsibilities and ethical obligations of these positions to

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available at <http://query.nytimes.com/mem/archive-free/pdf?res=F30714FD3E5E11738DDDAC0994DC405B878DF1D3> (last visited July 26, 2011).

13. Carson, *supra* note 2, at 102.

14. See McAllister, *supra* note 5, at 151 (discussing Johnson's practices in giving legal opinions).

15. Barnie F. Winkelman, *Carnegie, Frick and John G. Johnson*, 7 TEMP. L. Q. 397, 413 (1933).

16. *John G. Johnson, Noted Attorney, Dies*, *supra* note 12.

17. *Id.*; McAllister, *supra* note 5, at 152. In addition to his Supreme Court offers, President McKinley unsuccessfully attempted to convince Johnson to become Attorney General. *John G. Johnson, Noted Attorney, Dies*, *supra* note 12.

18. Letter from Dean Acheson to Harry S. Truman (Oct. 8, 1957) in *AMONG FRIENDS: PERSONAL LETTERS OF DEAN ACHESON* 131 (David S. McLellan & David C. Acheson eds., 1980).

jeopardize his private practice.<sup>19</sup> In that vein, he was at heart a respecter of *stare decisis* and did not typically inquire into the policies behind the law, except insofar as those policies could benefit his cases. Indeed, there can be little question that he embodied the purest form of a practicing lawyer.

As a practitioner, Johnson argued an astounding number of cases throughout his lifetime at both the state and federal levels, including 1525 cases in the Supreme Court of Pennsylvania, forty-three in the appellate courts of other jurisdictions, sixty-nine in Federal District Courts and Courts of Appeals around the country, and 168 in the Supreme Court of the United States.<sup>20</sup> Indeed, this impressive body of work engulfs over 300 bound volumes of his personal papers. Amazingly, however, these statistics represent his work mostly in appellate courts. Unfortunately, there is no easily-accessible, complete record of the cases he handled at the trial level, even though his trial practice was quite extensive.<sup>21</sup>

His clientele extended from the poor to titans of industry in the late nineteenth and early twentieth centuries.<sup>22</sup> He rejected retainers he thought were too excessive, and his fees were by no means extreme.<sup>23</sup> He was motivated primarily by the novelty of the legal issues that cases presented, not the prestige of the client,<sup>24</sup> ostensibly a function of “his love for his profession, his zest for battle, and the lure of the game . . . .”<sup>25</sup> Even when he was at the peak of his career, he would not refuse a case simply because it would render an insignificant fee or involve a trivial piece of property.<sup>26</sup> Regardless of his reasons, Johnson’s life was remarkable, and he had a profound effect on the law.

### III. HIS GREATEST YEARS

Johnson’s most notable years in practice spanned the early twentieth century after the apex of industrial expansion in the United States.<sup>27</sup> His reputation as an effective business advocate at this time was pervasive

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19. Winkelman, *Carnegie, Frick and John G. Johnson*, *supra* note 15, at 413.

20. Carson, *supra* note 2, at 117.

21. *Id.* at 112. For a more detailed account of Johnson’s trial-level endeavors, *see id.* at 110-17.

22. *See* McAllister, *supra* note 5, at 150 (noting that Johnson stated, “If those New York fellows [titans of industry like J.P. Morgan] want to see me they can come to Philadelphia, and if they came . . . and Johnson was . . . in conference with some poor washer woman . . . they would have to cool their heels in the anteroom until he got through.”); Winkelman, *Carnegie, Frick and John G. Johnson*, *supra* note 15, at 398 (discussing the demographics of Johnson’s clients).

23. Winkelman, *Carnegie, Frick and John G. Johnson*, *supra* note 15, at 400.

24. Carson, *supra* note 2, at 107.

25. Winkelman, *Carnegie, Frick and John G. Johnson*, *supra* note 15, at 400.

26. *John G. Johnson, Noted Attorney, Dies*, *supra* note 12.

27. Winkelman, *Carnegie, Frick and John G. Johnson*, *supra* note 15, at 398-403.

among important Wall Street businessmen.<sup>28</sup> For example, Barnie Winkelman described the intense competition for Johnson's services in a historic controversy between Andrew Carnegie and Henry Clay Frick over partnership shares in Carnegie Steel Company.<sup>29</sup> It was also said that J.P. Morgan would arrange special trains that could take Johnson from Philadelphia to New York City for private consultations.<sup>30</sup>

That industry was in need of his valuable counsel more than ever during these critical years is subject to little contention.<sup>31</sup> This was principally because the "[r]apid economic development" of the late nineteenth century had inevitably "provoked [intense] political responses."<sup>32</sup> These responses included the Progressive Movement, which sought to end the mounting industrial monopolies that had developed and grown in remarkable haste. The perception among many was that large trusts were attempting unjustly to extinguish all competition so that they could charge excess prices and control the levers of democracy in the United States.<sup>33</sup> As evidence of the common sentiment, President Theodore Roosevelt, one of the undisputed champions of the Progressive Movement, issued a warning on the need for prophylactic government regulation of the expanding "industrial system": "More and more it is evident that the State, and if necessary the nation, has got to possess the right of supervision and control as regards the great corporations which are its creatures."<sup>34</sup> It was in this environment that Johnson's practice thrived on a national level.

While industry leaders demanded his services in many contexts,<sup>35</sup> he exhibited his greatest contributions to Supreme Court jurisprudence in his arguments against the expansion of Congress's use of the Commerce Clause<sup>36</sup> to regulate business, as well as in his endeavors to interpret the Sherman Act.<sup>37</sup> The questions on the Commerce Clause arose in Johnson's

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28. *Id.* at 398.

29. *Id.* at 404 (noting that Carnegie's "frantic efforts" to obtain Johnson's services were to no avail because Frick "got him first." (quoting JOHN K. WINKLER, *INCREDIBLE CARNEGIE* (1931))).

30. McAllister, *supra* note 5, at 150.

31. See GRETCHEN RITTER, *GOLDBUGS AND GREENBACKS: THE ANTIMONOPOLY TRADITION AND THE POLITICS OF FINANCE IN AMERICA, 1865-1896* 126 (1997) (discussing aspects of the anti-business environment during this time).

32. *Id.* Professor Ritter also notes that "[w]orkers responded [adversely] to the appearance of the wage system, the loss of shop floor control, and the segmentation of communities that accompanied the advance of the corporation." *Id.*

33. See BERNADETTE BREXEL, *PROSECUTING TRUSTS: THE COURTS BREAK UP MONOPOLIES IN AMERICA* 7 (2006) (discussing the anti-trust sentiments that existed during this time).

34. EDMUND MORRIS, *THEODORE REX* 30 (2001).

35. See *supra* note 29.

36. U.S. CONST. art. 1, § 8, cl. 3 (stating that Congress shall have power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

37. See Winkelman, *Carnegie, Frick and John G. Johnson*, *supra* note 15, at 415-17

cases principally because the government began utilizing the Sherman Act<sup>38</sup> as a primary weapon to break up large, anticompetitive trusts.<sup>39</sup>

Within this framework, Section IV of this article discusses one of Johnson's greatest victories in the Supreme Court: *United States v. E. C. Knight Co.* In its decision in *Knight*, the Court functionally limited the government's ability to use the Sherman Act to its fullest extent.<sup>40</sup> While the basic holding in *Knight* lasted for nearly a decade, Johnson's arguments in Commerce Clause cases eventually fell to the losing end in subsequent cases.<sup>41</sup> Those losses paved the way for the rapid expansion of Congress's regulatory powers under the Commerce Clause, an interpretation which lasted until the late twentieth century.

Finally, despite his ultimate shortcomings in interpreting the Commerce Clause, Johnson's work in important antitrust cases in the early twentieth century helped facilitate the Court's adoption of an economic-driven and practical approach to assessing antitrust inquiries under the Sherman Act. Those matters are further discussed in Section V.

#### IV. THE SHERMAN ACT AND THE COMMERCE CLAUSE

In its original form, the Sherman Act limited two types of restraints on trade. First, section 1 provided that: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."<sup>42</sup> Section 2 contained a prohibition on monopolization in restraint of trade or commerce.<sup>43</sup> Both provisions were written so as to utilize the full benefit of constitutional regulatory power by textually mirroring the language of the Commerce Clause itself.<sup>44</sup> The key on the scope of the applicability of the Sherman Act, then, would turn on the Court's interpretation of the scope of the Commerce Clause.

Before *Knight* was decided, the Supreme Court had adopted a slightly

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(discussing some of Johnson's most notable accomplishments).

38. Sherman Act, 15 U.S.C. §§ 1-7 (2008).

39. See MORRIS, *supra* note 34, at 60-63 (describing President Roosevelt's preference for a strict antitrust enforcement policy).

40. See *infra* Section IV.A (discussing *Knight* and its consequent history).

41. See *id.* (discussing Johnson's failed attempts to invoke the essential holding in *Knight*).

42. Sherman Act, ch. 647, § 1, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 1 (2008)).

43. *Id.* at § 2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .").

44. Compare *id.* with U.S. CONST. art. 1, § 8, cl. 3 (Congress shall have power "[t]o regulate Commerce with foreign Nations, and among the several States . . .").

broader view on the ability of Congress to regulate activities under the Commerce Clause.<sup>45</sup> In *Knight*, as will be shown, Johnson was able to seize advantage of a narrow point of reasoning derived from the Court's prior decisions to present an argument against regulation of his client's manufacturing and refining activities on Commerce Clause grounds.

A. *Knight and Johnson's Approach*

In *Knight*, the defendant American Sugar Refining Company ("American Sugar") had purchased four sugar refineries in Philadelphia.<sup>46</sup> With the purchases, the company had acquired roughly ninety-eight percent of the sugar refining market in the United States.<sup>47</sup> Shortly after the acquisitions, the Cleveland Administration brought suit against American Sugar under the Sherman Act,<sup>48</sup> on the ground that the contracts by which it had made the purchases constituted illegal combinations in restraint of trade and commerce.<sup>49</sup> The government sought injunctive relief to prevent the acquisitions.<sup>50</sup> American Sugar retained Johnson to argue the case at the trial level, and he saw the case through to its argument in the Supreme Court.<sup>51</sup>

As discussed, the national sentiment was growing impatient toward big business.<sup>52</sup> It seemed, thus, that Johnson faced an uphill battle. In fact, the executives of American Sugar were extremely concerned that the company would inevitably lose the case.<sup>53</sup> As Bernie Winkelman notes,

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45. See generally *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824) (defining the contours of the commerce power and noting that commerce is "intercourse"). To be sure, before and after *Knight* was decided, the Court's Commerce Clause jurisprudence remained somewhat confusing. It had allowed regulation where an activity touched upon matters that affected the channels of commerce. See Bradford C. Mank, *After Gonzales v. Raich: Is the Endangered Species Act Constitutional Under the Commerce Clause?*, 78 U. COLO. L. REV. 375, 381-83 (2007) (discussing the Court's early approach toward Congress's ability to regulate activity affecting interstate commerce (citing *Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936))). The Court also allowed Congressional regulation where *intrastate* activities exerted some effect on national commerce or where the regulation implicated an important matter of public interest. See, e.g., *Champion v. Ames (Lottery Case)*, 188 U.S. 321 (1903) (permitting regulation where the purchase and transportation of lottery tickets involved interstate channels because of the relative harmful nature of the regulated items).

46. *United States v. E.C. Knight Co.*, 156 U.S. 1, 9 (1895).

47. Winkelman, *Carnegie, Frick and John G. Johnson*, *supra* note 15, at 415.

48. HANNIS TAYLOR, *THE ORIGIN AND GROWTH OF THE AMERICAN CONSTITUTION* 436 (1998).

49. *Knight*, 156 U.S. at 9.

50. *Id.*

51. Winkelman, *Carnegie, Frick and John G. Johnson*, *supra* note 15, at 415-16.

52. Brexel, *supra* note 33.

53. See WINKELMAN, *JOHN G. JOHNSON: LAWYER AND ART COLLECTOR*, *supra* note 1, at 175 (discussing the concern of the sugar executives during the proceedings).



however: “Johnson’s defense was bold and brilliant. It conceded practically all the facts set forth in the bill of complaint[, but] . . . interposed a legalistic objection, that could have been made only by one who was confident of the temper of the court . . . [and] the finely balanced forces of the day.”<sup>54</sup>

Johnson, however, was much more than confident. He urged a narrow construction of the Act, arguing that the Commerce Clause only permitted regulation of activities that directly affected interstate commerce, not those intrastate activities—such as the refining of sugar—which merely had an incidental effect.<sup>55</sup> As Johnson explained in American Sugar’s brief to the Supreme Court of the United States:

The Congress . . . has no jurisdiction over articles which are manufactured, because of the fact that they are manufactured with an intent later to sell the same to citizens of another State, or to transport them to another States. No article forms part of the trade or commerce which can be regulated by Congress until it is bought, sold or exchanged, for the purpose of such transit, or is put in the way of transit by being delivered to a carrier, or otherwise.<sup>56</sup>

The argument appeared to draw on an inference implicit from cases such as *Gibbons v. Ogden*. Where *Gibbons* helped define the scope of commerce that was wholly intrastate, in part by stating that Congress could regulate intrastate activities if they exerted an effect on national commerce,<sup>57</sup> Johnson contended that the refining process of American Sugar did not in any way have such an effect because it was, in essence, simply the middle of a comprehensive economic process designed to sell finished sugar.

This strategy placed the probability of defeat solely on the persuasiveness of the noted argument. American Sugar’s executives were initially quite apprehensive about the approach, but Johnson felt that it presented the only “real promise of success.”<sup>58</sup> Thus, he frequently

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54. Winkelman, *Carnegie, Frick and John G. Johnson*, *supra* note 15, at 416.

55. *Id.* One commentator opines that Johnson’s ability to form this argument was based in part on the lack of specificity in the government’s complaint. See Rudolf Sobernheim, *Book Review of John G. Johnson – Lawyer and Art Collector*, 42 COLUM. L. REV. 719, 721 (1942) (discussing how Attorney General Olney doubted the Sherman Act’s validity and attempted to plead the case narrower than would show a “monopoly of commerce”).

56. Appellees’ Brief at 17, *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895) (No. 15,548).

57. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824) (“Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior.”).

58. WINKELMAN, JOHN G. JOHNSON: LAWYER AND ART COLLECTOR, *supra* note 1, at 175.

“brushed aside the many suggestions that came from [the executives] as to [additional] facts and legal conclusions that should be presented to the court[,]” leaving all of the case’s tactical decisions to himself.<sup>59</sup> It was even documented that, despite the obvious importance of the case, he would frequently make the anxious sugar magnates wait in his office for extended periods of time while he served other poorer clients.<sup>60</sup>

The Court in *Knight*, speaking through Justice Fuller, adopted Johnson’s proposed narrow construction of the act.<sup>61</sup> Specifically, it held:

[T]he contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the States or with foreign nations. . . . [And while i]t is true that the bill alleged that the products of these refineries were sold and distributed among the several States, . . . [t]here was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected [is] not enough to entitle complainants to a decree.<sup>62</sup>

Thus, the act did not reach the refining activities of American Sugar; otherwise, it would have represented an unconstitutional use of Congress’s Commerce Clause authority.

Also implicit in Johnson’s argument was the contention that a broad reading of the Commerce Clause would diminish States’ rights. He stressed that construing the Sherman Act to reach the manufacturing process would inevitably bring about a federal stranglehold on local transactions that the states were better equipped to deal with themselves.<sup>63</sup>

The State of Pennsylvania might forbid the manufacture of sugar within its limits. Congress could not prevent this, because such regulation would not interfere with trade or commerce between the States, even though such trade might indirectly be affected. [To allow as much would be a] “pretension . . . [that] would extend to contracts between citizen and citizen of the same State, would control the pursuits of the planter, the grazier, the manufacturer, [and] the mechanic . . . .<sup>64</sup>

The Court did not ignore this federalism apprehension.<sup>65</sup> It seemed to

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59. *Id.*

60. *Id.*

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

62. *Id.* at 17.

63. WINKELMAN, JOHN G. JOHNSON: LAWYER AND ART COLLECTOR, *supra* note 1, at 176.

64. Appellees’ Brief at 18, *United States v. E. C. Knight Co.*, *supra* note 56 (quoting *Veazie v. Moore*, 55 U.S. (14 How.) 568, 574 (1852)).

65. *Knight*, 156 U.S. at 13.

hang its decision partially on this reasoning: “[I]t is vital that the independence of the commercial power and of the police power, and the delimitation between them . . . should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States . . . .”<sup>66</sup>

This decision for a time solidified a more formalistic view on Congress’s Commerce Clause power.<sup>67</sup>

To say that *Knight* was a landmark victory for Johnson would be to understate its true effect on his practice. *Knight* helped catapult Johnson to the status of one of Wall Street’s preeminent attorneys. In particular, within a short time after *Knight*, Johnson defended “the American Tobacco Company, Northern Securities Company, Great Northern Railway, Northern Pacific Railway, Standard Oil Company and United States Steel Company” in major Supreme Court cases that dealt with a variety of complex legal matters.<sup>68</sup>

#### B. *The Court’s Subsequent Expansion of the Commerce Power*

Within a few years of *Knight*, the Court began to expand its interpretation of Congress’s power under the Commerce Clause, perhaps bending to lawmakers’ fears that “huge combinations of capital” were being “designed to dominate essential industries and the necessities of life.”<sup>69</sup> For Johnson, this meant that it would become more difficult to use many of the same arguments that brought him success in *Knight*. Presciently, this prediction was confirmed with his involvement in *Northern Securities Co. v. United States*, where the Court held that the combination of the Great Northern and Northern Pacific Railway Companies in one holding entity constituted an illegal restraint of trade in

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66. *Id.*

67. It is also important to note that Justice Harlan dissented in *Knight*, arguing that the Court’s interpretation of the Commerce power was too narrow. *Id.* at 21-24 (Harlan, J., dissenting). He also drew on *Gibbons*, reasoning that commerce should encompass more than the “mere physical transportation of articles of property, and the vehicles or vessels by which such transportation is effected.” *Id.* The American Sugar acquisitions, he wrote, could be seen to have exerted an unlawful restraint on trade by virtue of their effect on prices and competition, notwithstanding the fact that they superficially involved only the sugar refining process in Pennsylvania. *Id.* at 32-33. Moreover, he alleged that such restraints “disturb[] or unreasonably obstruct[] freedom in buying and selling articles manufactured to be sold to persons in other States or to be carried to other States.” *Id.* at 33. This reasoning was relied upon in later Commerce Clause cases. *See infra* Section IV.B.

68. Gerard J. St. John, *John G. Johnson: Giant of the Philadelphia Bar*, THE PHILADELPHIA LAWYER Vol. 69, No. 4 (Winter 2007), available at <http://www.philadelphiabar.org/page/TPLWinter07Johnson?appNum=1> (last visited July 26, 2011).

69. Winkelman, *Carnegie, Frick and John G. Johnson*, *supra* note 15, at 422.

violation of the Sherman Act.<sup>70</sup>

In arguing *Northern Securities*, Johnson emphasized the productive and economic purpose of the combination, stressing that its principal effects were “to help competitive interstate and international commerce” by increasing railroad use and efficiency from the eastern seaboard to the Pacific Ocean.<sup>71</sup> He also stressed, as he did in *Knight*, that any *restraint* on commerce as a result of the combination would be incidental and negligible, and reading the act to reach the transaction would render its application unconstitutional.<sup>72</sup> The Court rejected this characterization of the Sherman Act and refused to extend *Knight* to the facts, reasoning:

[T]he act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces *all* direct *restraints* imposed by any combination, conspiracy or monopoly upon such trade or commerce . . . [including] combinations even among *private* manufacturers or dealers whereby *interstate* or *international commerce* is [affected or] restrained.<sup>73</sup>

The implicit effect of the holding was to expand Congress’s reach under the Commerce Clause despite *Knight*.

Justice Holmes dissented, joined by Justices Fuller, White and Peckham, expressing worry that the decision would have the effect of expanding the scope of federal regulatory authority over countless local transactions.<sup>74</sup> His words on the wisdom of the Court’s decision reflected his concern:

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law

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70. *N. Sec. Co. v. United States*, 193 U.S. 197, 197 (1904). For more on the intricacies of *Northern Securities*, see WINKELMAN, JOHN G. JOHNSON: LAWYER AND ART COLLECTOR, *supra* note 1, at 207-23.

71. Winkelman, *John G. Johnson and the N. Sec. Case*, 15 TEMP. L. Q. 493, 503-04 (1941). However, as will be shown, Johnson’s argument in *Northern Securities* for a more rational, economic-based approach to analyzing antitrust cases was subsequently embraced by the Court. See *infra* Section V (reciting and discussing Johnson’s arguments).

72. See *Knight*, 156 U.S. at 9 (detailing this argument).

73. *N. Sec.*, 193 U.S. at 331 (emphasis in original).

74. See *id.* at 410-11 (Holmes, J., dissenting) (“[I]f the restraint on the freedom of the members of a combination caused by their entering into partnership is a restraint of trade, every such combination, as well the small as the great, is within the act.”).

will bend.<sup>75</sup>

This concern seemed to signal the Court's later approach as it eventually embraced a much broader interpretation of Congress's power under the Commerce Clause in cases even outside of the antitrust context.<sup>76</sup>

Johnson's adamant insistence on the viability of the Court's interpretation of the Commerce Clause in *Knight* led to other losses.<sup>77</sup> Despite these losses, some of the positions Johnson skillfully articulated in *Knight* and *Northern Securities* have frequently resurfaced.<sup>78</sup> It is important to keep in mind that, even though Johnson's arguments were

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75. *Id.* at 400-01.

76. *See, e.g.,* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964) (holding that, if interstate commerce is affected, Congress can use its Commerce Clause power to ban discrimination in places of public accommodation despite the inherently local nature of the conduct in question); *see also* Mank, *After Gonzales v. Raich, supra* note 45, at 384-85 (discussing the pro-regulation shift in the Court's Commerce Clause jurisprudence from 1937 until 1995).

77. In 1907, the Roosevelt Administration brought suit against American Tobacco Co., alleging violations of the Sherman Act; the defendant hired Johnson as lead counsel. *United States v. Am. Tobacco Co.*, 221 U.S. 106, 183-84 (1911). *See* Daniel A. Crane, *Harmful Output in the Antitrust Domain: Lessons from the Tobacco Industry*, 39 GA. L. REV. 321, 327-28 (2005) (discussing the facts of the suit and noting that, at one point, the subsidiaries which constituted American Tobacco held roughly ninety percent of the cigarette market). In the case, the government alleged that American Tobacco "proceeded to expand its control over . . . facets of the tobacco industry through a series of aggressive tactics, such as pricing below cost to discipline . . . [other] tobacco manufacturers into cooperation" all in violation of the antitrust laws. *Id.* at 328 (citing *Am. Tobacco*, 221 U.S. at 157). The Court ordered the dissolution of American Tobacco. *Am. Tobacco*, 221 U.S. at 181-83. The Court also flatly rejected the argument that the combination should be treated as beyond Congress's regulatory reach in light of *Knight* solely because the majority of its business was technically confined to tobacco manufacturing activities that did not directly affect interstate commerce. *See id.* at 183-84 (rejecting American Tobacco's argument in this regard). Specifically, the Court stated:

We do not, for the sake of brevity, moreover, stop to examine and discuss the various propositions urged in the argument at bar for the purpose of demonstrating that the subject-matter of the combination which we find to exist and the combination itself are not within the scope of the Anti-trust Act because when rightly considered they are merely matters of intrastate commerce and therefore subject alone to state control. We have done this because the want of merit in all the arguments advanced on such subjects is so completely established by the prior decisions of this court . . . as not to require restatement. *Id.*

78. *See, e.g.,* *Gonzales v. Raich*, 545 U.S. 1, 42-45 (2005) (O'Connor, J., dissenting) ("We enforce the 'outer limits' of Congress'[s] Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government." (citing *United States v. Lopez*, 514 U.S. 549, 557 (1995))); *see also* *Lopez*, 514 U.S. at 552-58 (discussing the importance of maintaining an outer limit of the Commerce Clause power so as to prevent evisceration of the dual system of government established by the structure of the Constitution).

waged in the late nineteenth and early twentieth centuries while negative public sentiment was mounting against industry,<sup>79</sup> he was still able to convince the Court to adopt a more restrained view of the Commerce power in *Knight*, after such a view had become increasingly unpopular among the citizenry and political establishment of the United States.<sup>80</sup>

#### V. JOHNSON'S INFLUENCE ON ANTITRUST JURISPRUDENCE

Interestingly enough, Johnson's argument in *Northern Securities* that suggested the benefits of a perceived anticompetitive combination should be compared to its detrimental economic effects actually foreshadowed the Court's antitrust jurisprudence in later years.<sup>81</sup> As noted, in arguing *Northern Securities*, Johnson contended that the Sherman Act should not condemn activities that lacked pernicious intent and anticompetitive effect and that the Court should inquire into the pro-competitive justifications of any combination.<sup>82</sup> As Johnson argued specifically:

Such alliances as that of Burlington with the Northern Pacific and Great Northern, are particularly valuable, because of the opportunity thereby afforded of securing a large number of markets in a great and rich territory, under a fairly permanent transportation policy. They are of enormous value to the people along the lines of the railroads, to the country generally, and to the world . . . . To transact business large investments must be made, and the condition prerequisite to such investments, is reasonable assurance of continuance . . . . It is incumbent upon the United States, when it seeks to condemn an arrangement which has promoted the interest of the whole Nation, by pretending it was intended to restrain trade, to establish, very convincingly, the existence of the illegal intent it alleges to have existed.<sup>83</sup>

The Court ultimately endorsed a "rule of reason" approach that permitted such an inquiry.<sup>84</sup> This is one of Johnson's greatest and most enduring legal achievements. Perhaps unsurprisingly, Johnson himself argued on behalf of the defendants in the first Supreme Court case formally

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79. Brexel, *supra* note 33 and accompanying text.

80. *See supra* notes 60-62.

81. *See, e.g.*, *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918) (applying a test which considers whether the challenged conduct *unreasonably* restrains trade, and suggesting that this test requires an inquiry into the "facts peculiar to the business").

82. *See Winkelman, John G. Johnson and the N. Sec. Case, supra* note 71 and accompanying text.

83. Brief for Appellant at 17, *N. Sec. Co. v. United States*, 193 U.S. 197 (1904) (No. 277).

84. *See infra* text accompanying note 98.

adopting the rule of reason: *Standard Oil Co. v. United States* (“Standard Oil”).<sup>85</sup>

The facts leading to *Standard Oil* are well documented. As Bernie Winkelman noted:

The oil monopoly—America’s first great industrial combination—had become an established fact as early as 1877, with a single company controlling at least ninety percent of the business of refining and marketing petroleum . . . . The rush to the oil fields had rivaled the incursion into California, precipitated by the sudden discovery of gold . . . .<sup>86</sup>

The initial positive reception to Standard Oil had slowly begun to wear off, however, near the end of the nineteenth century as the public developed an increasing fear of the company’s sales practices.<sup>87</sup> Namely, Standard Oil practiced predatory price discrimination in order to maintain its hold on the oil markets in various regions of the country, and its tarnished executives frequently sought to evade the law when it seemed to help maximize profits.<sup>88</sup> It was finally in 1907, after numerous state-initiated prosecutions of its subsidiaries, that Standard Oil was indicted and President Taft’s Attorney General, George Wickersham, brought a suit seeking dissolution of the combination under the Sherman Act.<sup>89</sup> At the time the action was brought, Standard Oil controlled roughly over half of the oil refining activities in the United States.<sup>90</sup> Standard Oil retained Johnson as defense counsel.

The government’s case against Standard Oil was concrete and extensive. At the foundation of the case was the allegation that both John D. and William Rockefeller created numerous partnerships engaged in the business of refining crude oil, and that, through these partnerships, the executives of Standard Oil orchestrated an anticompetitive and illegal combination.<sup>91</sup> At the time of most of the alleged misconduct, the combination had controlled over “90 per cent of the business of producing, shipping, refining and selling petroleum” in the United States.<sup>92</sup>

Moreover, the government attempted to show that Standard Oil used various illegal share transfers within its subsidiary partnerships to restrain

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85. *Standard Oil Co. v. United States*, 221 U.S. 1, 65-68 (1911) (endorsing the rule of reason).

86. WINKELMAN, JOHN G. JOHNSON: LAWYER AND ART COLLECTOR, *supra* note 1, at 237.

87. *Id.* at 239.

88. *See id.* (discussing the business practices that made Standard Oil a subject of ill repute).

89. *See id.* at 234 (chronicling the events that led to the case against Standard Oil).

90. *Id.* at 236.

91. *Standard Oil Co. v. United States*, 221 U.S. 1, 32 (1911).

92. *Id.* at 32-33.

trade in oil and petroleum byproducts.<sup>93</sup> It further alleged the means by which Standard Oil carried out its monopoly and misconduct:

[T]he combination and its members obtained large preferential rates and rebates in many and devious ways over their competitors from various railroad companies, and that by means of the advantage thus obtained many, if not virtually all, competitors were forced either to become members of the combination or were driven out of business . . . .<sup>94</sup>

In defending Standard Oil, Johnson naturally raised the same contentions that he did in *Knight*, arguing that his client's business activities did not exert a direct and unreasonable effect on interstate commerce because those activities only involved the refining process and were thus outside of Congress's regulatory power under the Commerce Clause.<sup>95</sup> Yet, by this time—and in the face of cases like *Northern Securities*—*Knight* had become a toothless decision.<sup>96</sup> Indeed, the Court rejected the argument and ultimately held that Standard Oil should be dissolved.<sup>97</sup>

However, in issuing its decision, the Court relied on the assumption that Standard Oil comprised an *unreasonable* combination in restraint of trade, implying that the mere fact that the company maintained a market monopoly was not necessarily sufficient to find liability under the antitrust laws.<sup>98</sup> This holding was based on Johnson's argument that mere exclusion by competition in itself should not be the basis for a finding of monopolization. Rather, liability should only be inferred where a monopoly was maintained or acquired via exclusion by illegal means.<sup>99</sup>

There may be fraud, intimidation and other tortious acts, of a systematic rather than sporadic character and operation, and therefore effective as means of exclusion. It is along these lines that we reach the exclusion which is the essence of monopolizing . . . . It is not therefore a test of monopolizing what properties and plants a concern owns, or how extensive their product is, or how great the volume of its business is in relation to the whole of the business or the business of anybody else, or what power is in the

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93. *Id.*

94. *Id.*

95. *See id.* at 68-69 (discussing counsel's argument invoking the Commerce Clause).

96. *See id.* (noting that this argument was "so necessarily and expressly decided to be unsound as to cause the contentions to be plainly foreclosed and to require no express notice").

97. *Id.* at 79-81.

98. *Id.* at 75-77.

99. *See* Brief for Appellants at 92, *Standard Oil Co. v. United States*, 221 U.S. 1 (1911) (no number in original) (discussing the factors that should be taken into consideration when assessing whether a combination runs afoul of the antitrust laws).



course of trade inherent in that volume of business. The essential thing is [whether] there [are] illegal means used to restrain and exclude others.<sup>100</sup>

The victory for Johnson in this case, thus, rested precisely with the word “unreasonable.” The Court recognized that activities regulated under the antitrust laws should reflect true economic principles and concerns.<sup>101</sup> It explained that its decision against Standard Oil rested on the company’s anticompetitive conduct which suggested “a conviction of a purpose and intent which . . . [was] so certain as practically to cause the subject not to be within the domain of reasonable contention.”<sup>102</sup> Thus, Johnson’s pragmatic approach in favor of the “rule of reason” that he first endorsed in *Northern Securities* was finally embraced.

Although *Standard Oil* was ostensibly limited to the Sherman Act’s regulatory provisions with regard to monopolies, the Court has subsequently endorsed economic reasonableness inquiries as appropriate in various other cases falling under the antitrust laws.<sup>103</sup> Thus, Johnson’s contributions in the latter regard are among his most important and enduring.

## VI. CONCLUSION

Johnson’s successes were a function of his remarkable legal skills. However, it is also true that his losses never diminished the respect he had earned among his peers. Justice Henry Brown once stated, “Speaking among ourselves [in the Supreme Court of the United States], we call Mr. Johnson ‘The King of the American Bar.’”<sup>104</sup> Indeed, this article cannot adequately express Johnson’s brilliance in arguing the cases discussed. It presents only a small piece of his life and career. Many of the arguments

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100. *Id.*

101. WINKELMAN, JOHN G. JOHNSON: LAWYER AND ART COLLECTOR, *supra* note 1, at 243 (“The court had in fact adopted the contention which Johnson had so strongly urged upon it in the *Northern Securities* case . . . [where h]e had fought against a ruling which would condemn ‘bigness’ as such . . .”).

102. *Standard Oil*, 221 U.S. at 77. Justice Harlan criticized the test. *See id.* at 89-91 (Harlan, J., concurring in part and dissenting in part) (noting that the Court’s decision to conduct a reasonableness inquiry in antitrust cases is against the plain language of the Sherman Act and amounts to “judicial legislation”).

103. *See, e.g.*, *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 117 (1984) (concluding that the rule of reason approach should be applied in some circumstances when assessing organizations that require a “certain degree of cooperation . . . if the type of competition that . . . member institutions seek to market is to be preserved”); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 57-60 (1977) (holding that certain types of vertical restraints should be analyzed under the rule of reason where price is not a controlling factor).

104. Carson, *supra* note 2, at 119.

he waged have recurred throughout the twentieth century in the Court's Commerce Clause and antitrust cases. But it is important to remember that Johnson first waged them in a tumultuous political environment for business interests—not because he necessarily sympathized with his client's causes—but because he took seriously his role as an advocate.