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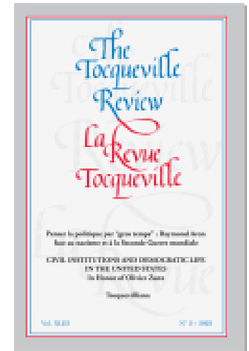

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The Tocqueville Review/La revue Tocqueville, Volume 43, Number 2, 2022, pp. 145-172 (Article)

Published by University of Toronto Press

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The Tocqueville Review/La Revue Tocqueville, Vol. XLIII, n° 2 – 2022

THE "RULE OF REASON" AND AN UNNATURAL MONOPOLY: *UNITED STATES V. TERMINAL RAILROAD*

John K. BROWN

In 1912, the U.S. Supreme Court delivered a unanimous opinion in an antitrust case that received little analytic notice by commentators at the time and scant attention from legal historians ever since.[1] That oversight is puzzling. Its decision in *United States v. Terminal Railroad* was the first antitrust case to follow its rulings in *Standard Oil* and *American Tobacco*.[2] Together, the three decisions laid out the court's new "rule of reason." Central to American antitrust law to the present, the rule asserted that the court could and would distinguish bad trusts that exploited market power unfairly from good monopolies that benefitted the public. In *Standard* and *American*, the justices dissolved those horizontal combinations. In *Terminal Railroad*, however, the court used its new rule to make a monopoly legal. This case of first impression was a turning point in interpretation of the Sherman Antitrust Act. For that reason alone, the dispute and its resolution merit study.

In turn, this long-delayed scrutiny reveals that the logic of the court's unanimous opinion in *Terminal Railroad* was unsupported by history and clashed with facts on the ground in 1912. The justices twisted recent events, and they ignored 30 million pounds of *prima facie* evidence to sanction a horizontal combination originally created to fix prices. If this legalized monopoly then harvested and delivered economies to consumers, that would prove a happy byproduct of the case. The intended result of the court's unanimous opinion was to remove an irritant from the nation's political debates by creating a

legal foundation for monopolies, notwithstanding the Sherman Act. That 1890 statute had outlawed every "contract, combination … or conspiracy in restraint of trade among the several States."[3]

CROSSING THE MISSISSIPPI

The essential business of the Terminal Railroad Association (TRRA) focused on moving railroad freight cars and passenger trains across the Mississippi River at St. Louis. Formed in 1889 by six railroads, by 1902, the Terminal Association was controlled by fourteen proprietary railroads—all of them co-equal owners.[4] In turn, the TRRA provided its services to all railroads that reached the city—twenty-four in 1912. They arrived at St. Louis from every point on the compass, and their every train began or ended its run there. None passed through. Circa 1900, the city ranked second among U.S. rail junctions (behind Chicago), and it was the country's fourth-largest urban center by population.

Why all those railroads terminated in St. Louis would become a paramount issue in the antitrust trial. The Mississippi River provided an obvious but incomplete answer. Located on the river's western shore, St. Louis, Missouri, evolved from a fur-trapping and trading post to the leading city of the west by the 1850s. In that decade, it became a compelling target on the map for the first generation of midwestern railroads. Carriers from the east terminated at East St. Louis, Illinois (on the river's eastern shore). Other lines with transcontinental aspirations started their westward trek from the city. Operating with an exclusive privilege granted by the State of Illinois, the Wiggins Ferry Company provided connecting transfer services for all freight and passengers across the Mississippi River to and from the city.[5] Monopoly and St. Louis had a long and intertwined history.

The Eads Bridge, the city's first bridge over the Mississippi, opened for business in July 1874. It was the first structure of any kind (anywhere in the world) made of steel, and it became an international icon. Roadway traffic and pedestrians used its upper deck; a dual-track railway crossed on the lower level. But area railroads showed scant interest in using the new crossing, at least initially. Their disinterest partly reflected a legal constraint. Carriers chartered to operate in Illinois claimed they could not run in Missouri. Lines incorporated in that state said the same of Illinois. So the quirks of

American federalism and state corporation laws became another factor explaining why so many lines stopped here.

St. Louis Bridge

The St. Louis Bridge in the 1880s, looking across the Mississippi at St. Louis and the Missouri shore in the distance. The competing ferry company operated in the shadow of the bridge. Photo by J. H. Fitzgibbon, public domain, author's collection.

But it is mistaken to assume that the convergence of so many railroads at St. Louis—or at any city—necessarily transformed it into a junction of connecting lines and through services. As at Chicago or Atlanta, railroads came to St. Louis for the business that a city offered. Once there, however, they built their own interconnections to other carriers only grudgingly. A complicated stew of issues delayed those links into the 1880s and later.[6]

The river, the law, technical issues, limited capital, and organizational constraints help explain why the railroads of St. Louis lagged in connecting to the tracks of Eads Bridge. A private-sector corporation had projected and built that crossing, envisioning that it would charge reasonable tolls and earn ample profits.[7] Instead, the St. Louis Bridge Company fell into foreclosure nine months after opening day.

Illinois Makes a Duopoly

Its bankruptcy was all the more notable because St. Louis Bridge held a trump card. Thanks to a provision in its Illinois charter, the company held an exclusive right for twenty-five years that blocked construction of any competing bridge over the river and into downtown. State governments had long granted such monopolies. They encouraged private capital to build infrastructures that public authorities declined to undertake.[8] This kind of legal protection sought to ensure profits so that investors would provide the initial capital needed for construction. After completion, the exclusive right also shielded St. Louis Bridge from "green-mailers" who might project a competing venture only to extract payoffs from the original company.

The Eads Bridge did compete for two years with the long-established Wiggins Ferry Company. Their price competition played a role in driving the bridge company into foreclosure. In April 1877, J. P. Morgan thrashed out a pooling and price-fixing arrangement with Wiggins. The ferry and the St. Louis Bridge Company enjoyed growing profits and duopoly rents for more than a decade. Recollect that those rents had their origins in exclusive charter rights granted to the ferry then to the bridge by the State of Illinois, rights that blocked any competitors in each mode.

Evolving Business Models

As the national economy emerged from the depression of the 1870s, St. Louis railroads ended their embargo against the bridge, resulting in growing traffic and revenues. In these years (circa 1877–1881), the bridge company's core business amounted to a delivery service, a railway Uber for St. Louis. Its locomotives and crews hauled all the freight and passenger cars that needed to cross the river. The

mainline railroads were happy to turn this short-distance, high-cost work over to St. Louis Bridge.

In 1881, the bridge became the leased property of Jay Gould. Then and since, Gould cast a dark reputation as a grasping robber baron, although a recent biography presents a more complicated and balanced portrait.[9] Gould's control of two monopolies, the elevated railways of New York City and the national telegraph network of Western Union, fueled public enmity. Gould had a powerful reason to take control of the bridge because it provided an essential link tying his Wabash Railway (on the east) to his Missouri Pacific and other lines (on the west). This traffic connecting the Gould lines lifted revenues and profits at St. Louis Bridge.

Between 1880 and 1900, the bridge company developed a third business model that grew alongside its initial two. In those decades, railroads across the city and the country learned how to operate as interconnected systems. This development is best seen by comparing the number of loaded freight cars that crossed the Eads Bridge as local traffic (the Uber deliveries inside the region) versus the quantity of through cars that passed through St. Louis *en route* to other destinations.

Figure 1 – Freight Traffic Crossing the Eads Bridge, 1881 vs. 1902 (by carloads)

	Local	Interchange	Total	Interchange % of total
1881	115,992	24,136	140,128	17%
1902	85,031	202,547	288,578	70%

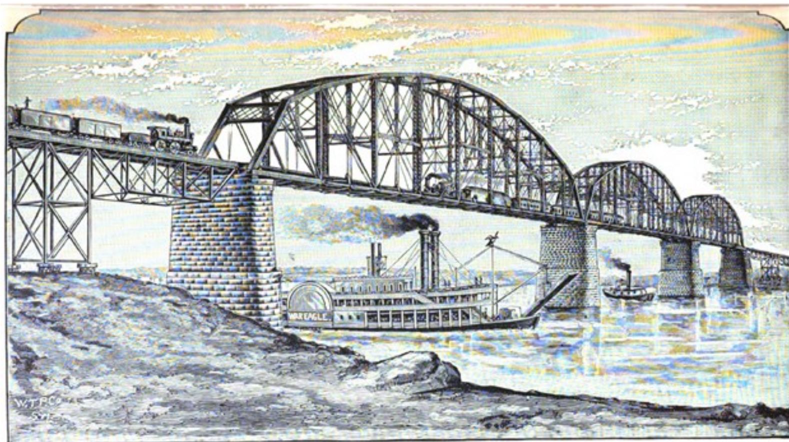
Notes: These data include all loaded freight cars moving over the Eads Bridge (east and west bound). The absolute decline in local business appears surprising given the city's prosperity in those decades, but all rail traffic through the city had new routes available by 1902 (see text). Data from St. Louis Bridge, *Annual Report* (1881), p. 6 and TRRA, *Annual Report*, (1902), p. 9.

The data show a doubling in overall business volume. The corporation that controlled the bridge still hauled all of that traffic over its own tracks, using its own locomotives and crews. Control passed in 1889 from the Gould-dominated St. Louis Bridge and Tunnel Railroad to the new Terminal Railroad Association of St. Louis. The TRRA built extensive yards and interconnections to all

area railroads. Its efforts accelerated the huge expansion in interchange traffic shown in Figure 1, transforming St. Louis into an essential junction point for national commerce.[10]

Why Jay Gould chose to cede his control of the bridge monopoly to the new Terminal Railroad is an essential question. When creating the TRRA, Gould instructed his operating officers to "harmonize operations" and "introduce … economies," while taking no action that would "alarm or disturb the other roads using the bridge."[11] Those appear to be the instructions of a classic corporate bureaucrat, not the injunctions of a robber baron.

Merchants Bridge



The St. Louis Merchants' Bridge. Engraving from Merchants, *Statement* (1892), opposite p. 90, public domain.

But the story is more complicated. During Gould's tenancy (1881-1889), a new venture rose to challenge the Wiggins/Eads duopoly, promising to undercut its high rates. Opening in 1890, this Merchants Bridge crossed the river at a point just to the north of St. Louis, and thus outside of the Illinois charter provision that protected the Eads crossing. Economic theory suggested that this challenge to a price-fixing combination was nearly inevitable. The Merchants company

also built its own captive switching railroad with an extensive network of yards and tracks to connect with mainline carriers. It intended to be a full-fledged terminal company and a formidable competitor of the TRRA. By forming the TRRA, Gould may have sought to counter the challenges (in profits and market share) arising from the new Merchants venture. In competing with the newcomer, the jointly owned, nonprofit Terminal Association presented a benign image compared to the dark specters aroused by Gould.[12]

As matters played out, the promoters of the Merchants company immediately broke their public commitment to compete by price. They quietly colluded over rates and market shares with the Eads and Wiggins companies from opening day.[13] But competition could play out in other realms: expansions into new territories, more connections to railroads, faster or better service.

MORGAN MAKES A MONOPOLY

The Terminal Railroad Association advanced its competitive goals and its coordinating policies simultaneously in its first years. In 1890, it refused to allow the St. Louis Merchants Bridge Terminal Railway to reach the city's central passenger station, a structure that had opened in 1875. In 1894, the TRRA replaced that depot with the largest passenger station in the world. Exceptional among American cities, that union terminal served every passenger railroad in St. Louis, including the Merchants Bridge Terminal Railway.

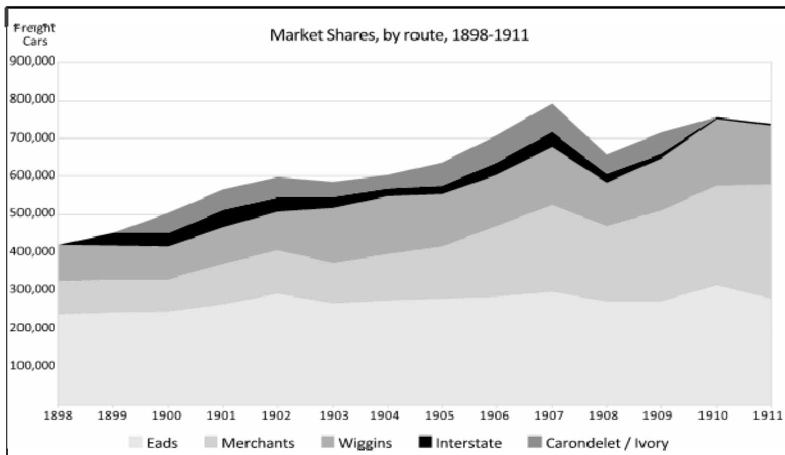
That change in TRRA policy reflected its success a year earlier in acquiring control of the Merchants Bridge and its associated railroad and terminal facilities. And, in 1902, the TRRA bought the Wiggins Ferry Company.[14] Those acquisitions were financed by J. P. Morgan & Company.[15]

With those properties, the Terminal Railroad became the sole provider of rail transfer services over the Mississippi for more than twenty carriers that converged on the city. Its charges to move freight and passengers through its lines and over its bridges and ferries reflected that market power. The TRRA undoubtedly garnered monopoly rents, but those excess profits flowed into the association itself, earmarked for reinvestment. Neither Gould (who had died in 1892) nor the TRRA's proprietary railroads could skim the earnings. Furthermore, the Terminal Railroad chose in 1902 to open its

ownership ranks, growing from the original six to fourteen proprietary railroads.

At the turn of the twentieth century, a great merger movement brought massive consolidations among American manufacturers, railroads, and utility companies. Historians point to an ironic trigger for many of these mergers: the Sherman Act.[16] Under this logic, the managers and lawyers for companies that had quietly colluded to fix prices or market shares chose outright mergers instead because those consolidations appeared to offer better legal protection against prosecution under the antitrust statute. The logic is compelling in other contexts, but not here. The TRRA bought control of both properties (Merchants in 1893 and Wiggins in 1902) to counter takeover bids mounted by major railroads. In response to those bids, the Terminal Association made successful counteroffers (paying premium prices) to replace its informal price fixing agreements with outright monopoly. Figure 2 shows the extent of that control.

Figure 2 – Market Shares



These data show the TRRA monopoly at work. The Missouri Pacific (a TRRA proprietor, hardly a competitor) owned and operated the Carondelet/Ivory ferry. After 1902, all other routes over the river at St. Louis were controlled by the Terminal Association (Interstate was another car-ferry service). Also note the crush of freight business, doubling in a decade (1898-1907).
Notes: Routes combine east and west bound totals of freight cars crossing the river. Graphic by author.

These corporate maneuvers played out against a backdrop of general prosperity, notwithstanding the national depression of the 1890s. In 1880, St. Louis ranked as the sixth-largest U.S. city. In 1890, it rose to fifth, and a decade later it took fourth place. The Terminal Railroad played key roles in that ascendence.

ANTITRUST: FALSE STARTS

From its origins, the Terminal Railroad Association presented itself as a private-sector, public-service corporation: a non-profit and efficient servant of every railroad and shipper in the entire region. Its tracks connected each to all. On the other hand, Joseph Pulitzer's *St. Louis Post-Dispatch* cast the company as a sinister monopoly that extracted tribute from anything and anyone crossing the river. Most of the city's voters and politicians shared that conviction.

Reflecting its unpopularity, the law would come after the company repeatedly from 1895 to 1912. Those episodes shed light on the stuttering development of antitrust law in America. In 1893, a committee of the Illinois Senate published compelling evidence that the Terminal Railroad and the Merchants company were pooling earnings and fixing prices. In 1895, the young Interstate Commerce Commission pressed the U.S. Attorney General to investigate these alleged violations of the Sherman Act. A grand jury took testimony but concluded with no indictments.

In 1903, the Missouri Attorney General, Edward Crow, filed a state case to dissolve the Terminal Association. Tellingly, Crow did not base his prosecution on Missouri's antitrust statute. Between 1889 and 1895, the state had enacted three antitrust laws in succession. All were failures: neutered by lobbyists, ignored by corporations, or struck down by the state supreme court.[17] Instead, the attorney general centered his case on a provision in the state's 1875 constitution that prohibited any merger, pooling, or consolidation of parallel railroad lines. The TRRA based its defense on an 1871 statute that authorized union terminals in Missouri cities. The law encouraged these joint ventures to provide efficient service while minimizing the inevitable disruptions to streets and neighborhoods if carriers built their own dispersed stations.

By a vote of 4 to 3, the Missouri Supreme Court found for the Terminal Railroad, accepting its argument that its combination with

the Merchants company improved the efficiency of all shippers and carriers that served the region.[18] Put differently, a bare majority decided the company fulfilled essential public functions. If a single vote had gone the other way, the court would have construed the TRRA as an illegal monopoly and ordered its dissolution.[19]

ANTITRUST: INTERPRETING THE SHERMAN ACT

Meanwhile, the three branches of the Federal government struggled to define their own stances on monopolies. The Sherman Act (1890) provided a starting point for the judiciary. As historian Martin Sklar describes, the Supreme Court initially took quite a jaundiced view of that sweeping statute. From 1897 to 1911, however, an evolving majority of the justices chose largely to apply the plain text of the act when antitrust cases rose on appeal to the high court.[20] Under such a reading, a divided court in 1904 ordered the dissolution of Northern Securities, the holding company for a merger of two transcontinental railroads: Great Northern and Northern Pacific.

On the heels of that success, in October 1905, President Theodore Roosevelt ordered his attorney general to file antitrust proceedings against the Terminal Railroad Association. With his green light, Roosevelt "made a stronger argument" than ever before, emphasizing "the need for trust control," according to a front-page story in *The New York Times*.[21] From that dramatic start, however, justice slowed to a crawl while a special master took nearly three years to gather evidence. Finally, the U.S. Circuit Court for the Eighth Circuit (sitting in St. Louis) heard two days of oral arguments in early April 1909, then retired to decide the case.[22]

The prosecution's Bill of Complaint threw a catalogue of crimes at the defendants.[23] From its formation in 1889, the Terminal Association had defeated competition, charging "unreasonable and extortionate" fees. It had violated the Sherman Act in 1893 by subsuming the Merchants company. The pooling arrangements between the two bridge companies and Wiggins during the 1890s were likewise illegal. With its 1902 buyout of Wiggins, the TRRA had "stifled and destroyed" interstate competition in passenger and freight services. For all these alleged violations of the Sherman Act, the Department of Justice sought far-reaching changes. The proprietors of the TRRA, the fourteen railroads, should divest their

shares in the association, and the Terminal company should divest itself of the Merchants and Wiggins properties.[24] The prosecution had presented a route map to independent operations and competitive pricing.

In their answer to the Bill of Complaint, counsel for the defendants responded with an audacious offensive. The Terminal Association was a convenience connecting all area railroads. It was not a monopoly. It did not discriminate against any carrier. Its fee structures covered costs and improvements, nothing more. It paid no dividends and reinvested all profits. By combining with the Merchants and Wiggins companies, the Terminal Association enhanced the efficiency of its own yards and belt lines, all railroads in the region, and all the shippers that they served.

With its comprehensive connections across the region, the defense claimed that the Terminal Railroad *promoted* commerce and competition. In its local services for the St. Louis region, its tracks linked every industry and shipper in the area to any point in the country. Shippers paid only a single shipping charge plus a competitive freight rate. Thanks to this unified link, every mainline railroad could compete for the business of any company shipping goods in or out of St. Louis. In its through services for freight and passengers (as distinct from the local traffic that served the city), the Terminal Association competed with routes and carriers through a half-dozen gateways from Chicago to Kansas City.[25] In all, the company put on an impressive display of lawyering. Judge us not by what (they say) we did. Judge us by what (we say) we do.

On May 24, 1909, seven weeks after the two-day trial, the U.S. Circuit Court delivered a hung verdict.[26] Two judges voted to break up the Terminal, reestablishing Wiggins and Merchants as independent properties. Two favored acquittals.[27] Again, the TRRA avoided its own dismemberment by the narrowest margin. Because the circuit judges deadlocked, their votes and their logic pro or con were never revealed. Six months later, Attorney General George Wickersham appealed the case to the U.S. Supreme Court.[28]

Events after the deadlock indicate that the circuit court had split over antitrust interpretation. Initially the Supreme Court refused to hear the matter, instructing the lower court to try the case again in an effort to reach a finding. The circuit judges declined to accept that

order, predicting that they would deadlock again. That sequence suggests that those judges were pressuring the high court to clarify or change its interpretation of the Sherman Act.

The senior associate justice of the Supreme Court, John Marshall Harlan, had stitched together tenuous majorities in cases like *Northern Securities*. But influential voices on the court saw antitrust differently. Oliver Wendell Holmes had dissented vigorously in *Northern Securities*, offering an insight that lives in legal history: "Great cases, like hard cases, make bad law."[29] For Holmes, the national furor against these massive monopolies gave the case great importance. The hard part for Holmes was that the Sherman Act simply could not be accepted for its plain text. For the most part, Holmes believed that judges should defer to legislators. In his view, however, the antitrust statute was "a humbug based upon economic ignorance and incompetence."[30] In banning *all* contracts that had the effect of restraining trade, Holmes believed the statute was too sweeping, catching legitimate business and grasping monopolists alike.[31]

MAKING NEW LAW

Seventeen more months would elapse before the *Terminal* case had its day in the Supreme Court. The high court opened its new term in January 1911 under a new chief, Edward Douglass White. With two new associate justices (Willis Van Devanter and Joseph Lamar), the court began the term with re-arguments in two blockbuster antitrust cases: *Standard Oil* and *American Tobacco*. President Roosevelt had initiated those prosecutions at the peak of his crusade against monopoly. On May 15, 1911, the Chief delivered his majority opinion in *Standard Oil*. The oil trust had trampled on the antitrust statute, and it had to be broken up.

Having delivered up the guilty to be drawn and quartered, White went on to reconsider the Sherman Act. He declared that not all contracts that had the effect of restraining trade were illegal. Henceforth the court would apply a new test. The "rule of reason" would determine which corporations had violated the statute, in contrast to those that had acquired their size and market power by methods that the court adjudged benign.[32]

This new rule derived from an old principle, drawn from English common law. Contracts freely executed by private parties were

presumed valid and beyond the reach of any court unless they were unfair means to oppress competitors or alter prices artificially. In concrete terms, an agreement for competitors to fix prices would be illegal, while those same companies could merge without any quarrel from the law. They merely had to show that price-fixing was not the primary goal in the merger. Seven associate justices joined the chief's opinion.

John Marshall Harlan howled in a lone opinion that concurred at the result while dissenting from its reasoning. Reading from the bench, he agreed that Standard Oil had certainly broken the law but declared White's new rule an abomination. It robbed power from the Congress, set up the court as a tribunal over economics instead of the law, and betrayed a dangerous infection of judicial activism.[33] An observer in the court that day recollected "the almost savage vehemence with which Justice Harlan announced his disagreement."[34]

Two weeks later, again writing the majority opinion, White led the court in dissolving American Tobacco. With its 95 percent market share, American epitomized a bad trust. Still, White's references to his "rule of reason" again angered Harlan. Pointing to that rule, *The New York Times* commented that "the decision was all that the big corporations could ask." The editor of the *Wall Street Journal* admitted that the court had "read into the Sherman law an amendment that never could have passed the Congress." William Jennings Bryan claimed that White had created a loophole by which trusts would evade dissolution.[35] Which brings us back to St. Louis.

In late October 1911, the U.S. Supreme Court heard two days of oral argument in *United States v. Terminal Railroad Association of St. Louis*. Black mourning drapery cast a darker pall and a quieter hush over the justices' always-sober court room, the Old Senate Chamber in the U.S. Capitol. John Marshall Harlan was just a week dead. Six months later, the court was both shorthanded and unanimous when Justice Horace Lurton read the decision in *Terminal Railroad* on April 22, 1912.[36] In St. Louis, a page-one headline crowed in triumph: "*Post-Dispatch* Wins Long Fight On Bridge Monopoly."[37] By their nature, headlines present the news in bold. In this case, however, the TRRA won far more than it lost.

By their unanimous verdict, the justices ended the deadlock and division of the earlier TRRA cases (state and Federal) while extending

the "rule of reason". They found that the Terminal-Merchants-Wiggins combination clearly violated the Sherman Act. To make that determination, they wielded a three-part test that originated in White's *Standard Oil* decision. The combination possessed a monopoly over the region's interstate commerce. It had broken the law to achieve that control. Further violations had preserved that dominance.[38]

With all that out of the way, however, the justices went on to declare that the unified terminal system was a great public convenience. Furthermore, the court had opined in *Standard Oil* that a "fundamental purpose" of the Sherman Act "is to protect, not to destroy, rights of property."[39] So the court did not require the breakup of the Terminal Association properties that the United States had sought. Instead, *U.S. v. Terminal Railroad* became the first case in which the Supreme Court sanctioned a monopoly under the "rule of reason." The justices gave their approval despite considerable evidence in the circuit trial record that the TRRA had colluded with the Wiggins and Merchants companies to fix prices, acts clearly illegal under the Sherman Act. Their sanction reflected exactly the kind of gift to the big corporations that the *New York Times* had described. If Harlan had lived, his dissent would likely have blistered court watchers.

A Natural Monopoly

To justify its qualified approval, the justices offered an extensive discussion of "the geographic and topographic situation" on both sides of the river. By this light, the court was simply acknowledging dictates fixed by geography. According to the opinion, the Mississippi River (on the east) and the narrow Mill Creek Valley (long a rail corridor out of St. Louis to the west) blocked the creation of other competitive routes in accessing St. Louis and thus made the Terminal Railroad essential for all carriers. Whatever its flaws in the past, the justices concluded that the association was a natural monopoly.[40] Under this logic, the interplay of geographic constraints, complicated technology, and burdensome costs meant that a single provider best met public needs, rather than a competitive marketplace.

This natural-monopoly assertion may have been essential in achieving the unanimous verdict. It also was a convenient fig leaf of justification for men who knew they were taking a radically conservative step: transforming a classic bad trust (at least in public

perception) into a good one by little more than judicial fiat. Their logic centered on a key point: the great costs to build and maintain a new bridge over the river prevented any eastern carrier from entering the city on its own and argued for shared use by all.

The New York Times announced the court's verdict with the headline, "St. Louis Terminal Loses."[41] Well buried in the story, the defense counsel, Henry Priest, provided a more accurate summation: "the decision will affect the Terminal on no vital point, and for that reason I consider it a great victory." As it surely was. Crucially, the court did not order the remedy sought by the prosecution and most feared by the Terminal Railroad: outright dissolution into its constituent parts, the fates of Standard Oil and American Tobacco.

FACTS AGAINST THE LAW: THE MCKINLEY BRIDGE

By any accurate reckoning with history, the collusive reflexes of the Terminal's managers and owners, not geography, had throttled competition in railway services for St. Louis. For many years, the managers of St. Louis Bridge and (later) the TRRA colluded with the Wiggins Ferry and the Merchants people to fix prices. The Terminal Association only bought control of those properties after outside parties were on the verge of taking them over. In 1893, a consortium of railroads nearly took working control of the Merchants company. In 1902, the Rock Island railroad launched a bid for Wiggins. New owners of those two properties, terminal companies in their own right, could have brought a measure of competition to St. Louis freight rates and services. Preventing those threats to the profits of the TRRA was worth a lot.

After gaining full control, the Terminal Railroad had invested in those assets while also struggling to move mountains of freight and legions of passengers. Its extensive improvements and interconnections (1902-04) began to knit the parts together. The result helped to optimize the operations of all the carriers it served. The unification of the three terminal operators after 1902 lent some plausibility to the court's hypothesis that the sum served St. Louis better than the parts.

For doubters, however, the third rail bridge over the Mississippi in St. Louis thoroughly demolished the court's presentation of the TRRA as a *natural* monopoly. In 1906, the Illinois Traction System

(ITS) sought permission from the Terminal Association to connect its new interurban tracks to the Merchants Bridge.[42] The 1887 congressional charter for that bridge had stipulated that "all railway companies" would have "equal rights and privileges" to use that crossing.[43] ITS amounted to a railroad, although one powered by overhead electric wires, not steam locomotives. It ran extensive freight and passenger services over a 400-mile route map.[44] The TRRA rejected its application.[45] By this refusal, the Terminal Association had committed a cardinal sin under antitrust law as then conceived. Lawyers described this as foreclosure: one company's use of its market power to prevent another firm from competing.

After that rebuff, ITS secured the requisite approvals from the local, state, and federal governments to build its own new bridge and associated tracks, yards, and terminals on both sides of the river. In September 1910, this McKinley Bridge opened after three years of construction.

McKinley Bridge

The McKinley Bridge shortly after its opening, in a contemporary postcard. Public domain image from author's collection.

The McKinley Bridge crosses the Mississippi at a point between the Merchants and Eads structures.[46] It held a range of latent futures in its engineering. Its designer, Ralph Modjeski, ensured it had sufficient structural strength (easily reenforced if needed) to bear the loadings imposed by mainline steam locomotives. So ITS and its bridge could one day join the Terminal Association, adding its capacity to the whole. Or it could welcome any mainline carrier seeking an independent route to compete against the monopoly.

As ITS had proven in steel, the United States Supreme Court had its facts utterly wrong when stating that, given geographic constraints, no railroad could "even enter St. Louis … without using the facilities entirely controlled by the Terminal Company."[47] To press its case for a natural monopoly, the court's opinion simply ignored both the Illinois Traction System and its McKinley Bridge. It required impressive juridical audacity to overlook a bridge weighing nearly thirty-million pounds. Even as Justice Lurton read the opinion in Washington, DC, every passenger on any St. Louis train crossing the Mississippi could see it plainly.[48]

At its core, the justices' decision in *Terminal Railroad* sought to parse a challenge in time. While acknowledging some of its past sins, they wanted to remake the Terminal Association into a model for a legal monopoly, a blueprint to guide business and law in the future. Until *Terminal Railroad*, the "rule of reason" was only half written.[49] Chief Justice White's opinions in *Standard Oil* and *American Tobacco* had laid down bright lines of illegality. Now a unanimous court had delineated safe harbors under law for some of the new corporate giants. Thanks to its incomplete and often inaccurate reading of the facts, the court described the market conditions and corporate behaviors that would legalize some kinds of monopoly behavior in the future. Notwithstanding the Sherman Act.

By tradition, the conferences, memos, and internal debates that eventually result in Supreme Court opinions are cloaked in secrecy, so many questions must remain unanswered. Some unique issues in *Terminal Railroad*, however, warrant speculations about the case and its resolution. Nearly two-and-a-half years elapsed between the circuit deadlock and the high court trial. Perhaps that delay partly reflected an effort (presumably led by Chief Justice White) to win his brethren to his views. The TRRA had narrowly avoided outright dissolution in

three earlier trials.[50] With White's new rule, the company received the unanimous sanction of the nation's highest court.

Inference also suggests that the justices may have been concerned about public acceptance for a ruling that pivoted the law, challenged the bitter consensus in St. Louis against the TRRA, and countered the national passion condemning monopolies. Until *Terminal Railroad*, the court had never given explicit sanction to such a dominant company. This may explain why the justices hid their new construction of law behind the fabricated façade of a natural monopoly. After all, precedent offered no justification for the outcome they sought.

Perhaps that fact also explains why the justices advanced an argument that had originated with the Terminal Association. In this telling, without the TRRA, each railroad serving St. Louis would lay its own tracks, build its own yards, and "the city would be cut to pieces . . . and thus the greatest agency of commerce would become the greatest burden."[51] This impressive parade of hypothetical horrors was no more than a straw man. After all, the prosecution had sought a limited result in this Federal case: simply to ensure competition between the Terminal, Merchants, and Wiggins companies.

WHY THEN AND WHY CARE?

The passage of time itself helped to explain the Terminal's new protected status under law. Between 1890 and 1910, complicated networked technologies grew commonplace as Americans increasingly lived in interdependent cities: systems of electric light and power, interurban lines, subway and streetcar systems, telephone networks, urban water supplies, and sewer systems. The managers of the capital-intensive businesses or the public utilities that harnessed these systems claimed that coordination and control, resting on monopoly, offered more value at lower cost to customers than was possible in any competitive marketplace. Hundreds of companies in dozens of industries across the country exemplified this kind of natural monopoly. They defined modernity itself. In step with these developments, Progressives crafted the vibrant new field of administrative law to regulate these systems in the public interest.[52] By contrast, the atomistic competition envisioned by the Sherman Act struck many as no longer feasible. Perhaps not even desirable.[53]

In line with shifting regulatory practice, during the presidential campaign of 1912, Theodore Roosevelt turned from his earlier embrace of courts and antitrust. Now he accepted the inevitability of businesses like the Terminal Railroad, and he looked to the Bureau of Corporations to keep monopolies aligned to the public interest.[54] Time had also changed views of the Terminal Association at the Justice Department. When launching the case in 1905, Attorney General William Moody sought to break up the TRRA. Seven years later, as Justice Lurton read the unanimous opinion in *Terminal Railroad* in the court's chambers, Attorney General George Wickersham whispered "Fine" to the Solicitor General Frederick Lehmann. The prosecution and the court offered profuse assurances that this case would in no way challenge or undermine the terminal companies and union stations then operating in dozens of American cities.[55]

As matters played out, the press and public generally approved of the decision in *Terminal Railroad.* Although the TRRA protected far more than it lost, the court issued two specific directives that were popular among the people and merchants of St. Louis. It banned all extra charges, called "arbitraries," that the TRRA had long levied to move inbound freights over the river and into the city from the east. The justices further directed that all carriers had to quote a single freight rate for the greater St. Louis region, ending the bifurcation caused by the Mississippi River. The popularity of these directives explains the headlines touting the case as a loss for the TRRA. More broadly, the court's decision excited little controversy because it reflected a developing societal consensus favoring natural monopolies when monitored and guided effectively by regulators or courts. Even though the TRRA deserved that moniker less than many.

Among the legal community of 1912, *Terminal Railroad* was received with a yawn, apparently perceived as the inevitable outcome of the age. In one early response, the *American Bar Association Journal* believed that the justices wisely struck down "a few particulars" while largely casting the Association as "reasonable and in furtherance of commerce and trade."[56] An article in the *Harvard Law Review* emphasized that the court had asserted a public right (its requirement that the TRRA open its ownership ranks to all carriers) that qualified the private rights of property.[57] In the consensus view of lawyers and

railway officers, *Terminal Railroad* wisely gave the court's sanction to other terminal operators and belt railroads around the country.[58]

U.S. v. Terminal Railroad Association of St. Louis would eventually prove a foundational precedent in an important legal doctrine known as "essential facilities," which developed after 1945.[59] If anything, that doctrine has grown in importance in recent decades. The body of antitrust law that today governs telecommunication companies or internet service providers refers back to *Terminal Railroad.* Like the TRRA's tracks and yards, the central technologies provided by those firms may dominate a market serving many other businesses. But if they are deemed essential, those technologies must remain equally accessible to all users.[60] In recent decades, courts have extended that principle from its original focus on tangible assets like bridges. In recent cases, judges and prosecutors argue that elements of intellectual property are also essential facilities at law when their owners wield those assets to achieve illegal, anticompetitive results.[61]

In the first decades of the twenty-first century, however, this doctrine is under attack. Although a touchstone in many lower court decisions, the Supreme Court has never explicitly endorsed the essential facilities principle.[62] Today the well-funded lawyers at digital giants such as Google, Amazon, Facebook, and Apple are working to erase the concept. Success would strengthen their hand against competitors by enhancing their control of intellectual property and thus their control over markets. Even as the law continues to evolve, *Terminal Railroad* has enduring relevance.

And if we return our focus to 1912, the court's empty language about the natural monopoly at St. Louis suggests that Justice Harlan had a point. Perhaps lawyers and judges wandered into economics at their own peril.

NOTES

[1] For example, Pratt's fine book on the Supreme Court of that period details the *Standard Oil* and *American Tobacco* cases but omits *Terminal Railroad* (*The Supreme Court under White*). Kolasky's article on the "rule of reason" mirrors those choices ("Chief Justice White").

[2] *United States v. Terminal Railroad Association of St. Louis*, 224 U.S. 383 (1912). This article draws extensively from the author's forthcoming history of the Eads Bridge, *Crossing the Gilded Age*, to be published in 2024.

[3] 26 Stat. 209.

[4] The proprietors held the stock of the TRRA and decided matters of policy, chiefly investment priorities. They obligated themselves to give all their trans-Mississippi business at St. Louis to the TRRA, a rule they sometimes violated with no consequence. For its part, the TRRA agreed that it would never discriminate against carriers that were not proprietors. It had violated that rule on three occasions known to the author. The Federal antitrust case detailed one of those episodes of foreclosure. The TRRA amounted to an early and greatly enlarged form of the terminal companies that often owned and operated union stations in the United States by 1900.

[5] In 1819, Samuel Wiggins acquired from the Illinois legislature the right to purchase a mile of Mississippi waterfront in St. Clair County, Illinois, opposite the little fur-trading settlement of St. Louis, Missouri. In 1829, the lawmakers gave to Wiggins the exclusive right to run a Mississippi ferryboat service from St. Clair County. In 1849, the Illinois legislature designated Wiggins's land as the terminus for all new railroads traversing the southern portion of the state. And in 1853, the legislature granted "the right of perpetual succession" to the Wiggins company, blocking forever any attempt by any other company to put on competing boats. With another legislative gift, incorporation in 1853, the Wiggins Ferry Company acquired unlimited life, an authorized capital of $1 million, clear title to 1,500 acres of land, and other attractive perks. Whether at law, on the ground, or on the river, its supremacy was unchallengeable, and its stock highly lucrative to an elite group of insiders.

[6] The issues are far too complicated to explore fully here. To summarize: in any city connecting passenger services required railroads to collaborate to build a union station and to push their own lines to meet at that common

point. Interchanging freight shipments required standard track gauges and car components; interfirm agreements on rates, billing, and routing; and armies of clerks to manage the paperwork. These developments necessitated massive investments of fixed and working capital. A conceptual issue was also central: railroad managers had to learn to place collaboration ahead of competition.

[7] Such private-sector origins were common for long-span bridges in the nineteenth century, the Charles River or Wheeling bridges being famous examples. To clarify this business model, entrepreneurs would create a

company, secure a charter from a state government (in this case, two states: Illinois and Missouri), amass financing, and contract with specialists to build a bridge. Upon completion, that company charged tolls and hoped for profits. This narrative uses a simplified name, St. Louis Bridge, to identify the Eads venture whose complete name was the Illinois and St. Louis Bridge Company.

[8] In nineteenth-century American history, the most consequential case of such a state-chartered privilege was detailed in the Supreme Court case of *Charles River Bridge* (1837) when the justices approved of a state-granted monopoly to a private bridge company, but only if its terms and duration were clearly fixed by that company's charter.

[9] Klein, *The Life and Legend of Jay Gould.*

[10] It may not be self-evident why cars traveling through the region required more facilities and effort than local deliveries, but they did. They passed through a series of freight yards run by at least three different companies, a mainline carrier on each side of the river and the terminal railroad connecting those lines.

[11] Original typescript copy of a letter of Jay Gould (President, Missouri Pacific) and Solon Humphreys (President, Wabash, St. Louis & Pacific) to Messrs. R.S. Hayes, J.F. How and William Taussig, Sept. 10, 1881 – author's collection. At that time, the only operator of trains over the bridge was St. Louis Bridge itself. In pointing to other users, Gould meant carriers that interchanged freight cars or operated passenger trains, all hauled over the river by the bridge company's locomotives and crews.

[12] The longtime operating head of the Eads Bridge, William Taussig, put the matter this way in an 1886 memo to Gould: Such an association "would put a stop to the cry of Monopoly" because "a property owned and operated in common by many and diverging interests will command the sympathy of the public." The prediction would prove wildly incorrect. Taussig, "Scheme" to transfer lease, nd (June 1886) – HC/03/001/001(006), box 15 – JSM.

[13] Taussig to J.S. Morgan & Co., Jan. 21, 1891, original in Morgan Grenfell Archive, London, copy in box 12, folder: I&SLB, 1890s – Carosso Papers.

[14] Starting in 1871, Wiggins transferred freight cars over the river using its own purpose-built ferries. By 1902, the Wiggins company had become a full-fledged terminal operator with its own switching railroads and freight yards on both sides of the river, in addition to its ferry services (for passengers and freight) across the Mississippi.

[15] In 1902, Morgan floated a $50 million bond issue to finance the TRRA acquisition of Wiggins, expansions of stations and yards, a western belt line around the city, and new connections to tie all the parts together. In a move tone-deaf to antitrust concerns, the Terminal Association also earmarked a portion of its new capital to buy the Interstate Car Ferry service. With that, it possessed four of the city's five routes for rail traffic over the river. In touting the Terminal's profitability, Morgan's bond prospectus claimed that the company "controls practically the only

available entrance to St. Louis." Lawyers on the antitrust beat at the Department of Justice could hardly ignore the claim.

[16] Lamoreaux, *The Great Merger Movement.*

[17] Piott, *The Anti-Monopoly Persuasion*, ch. 2. Thelan, *Paths of Resistance*, ch. 13.

[18] *State of Missouri v Terminal Railroad Association of St. Louis*, 182 Mo. 284 (1904).

[19] Attorney General Crow appealed the case – and lost again by a vote of 5 to 2.

[20] Sklar, *The Corporate Reconstruction*, p. 138.

[21] "Roosevelt Aims Blow At St. Louis Monopoly," *The New York Times*, Oct. 7, 1905, p. 1.

[22] It seems anomalous today that the first tribunal to hear this Federal case was not a district court. Under a special act of Congress, however, some antitrust proceedings began with a trial in the circuit court, as happened with *Northern Securities* (Meyer, *A History of Northern Securities*, p. 272). That starting point meant in turn that any appeal would go directly to the U.S. Supreme Court. "Terminal Case Argument Begun By Government," *St. Louis Post-Dispatch*, Apr. 1, 1909, p. 2.

[23] The defendants in the case included the fourteen proprietary railroads as well as the TRRA itself.

[24] All assertions from the "Bill of Complaint," Nov. 25, 1905, pp. 5-27, in *Transcript of Record*, 1912.

[25] All assertions from the "Answer of the Terminal Railroad Association," pp. 28-67, in *Transcript of Record*, 1912.

[26] Because the court deadlocked, there was no opinion for this initial Federal trial. Its bill of complaint and the evidentiary record are found in the documentation associated with the subsequent Supreme Court case.

[27] "Disagree On Terminal Case," *The New York Times*, May 25, 1909, p. 3. Staffing the eighth circuit were judges Elmer Bragg Adams, William Cather Hook, Walter H. Sanborn, and Willis Van Devanter.

[28] "Terminal Suit Is Docketed In The Supreme Court," *St. Louis Post-Dispatch*, Aug. 30, 1910, p. 8

[29] *Northern Securities Company v. United States*, 193 U.S. 400 (1904).

[30] Neely, "A Humbug."

[31] In taking that stance, Holmes broke from his characteristic deference to Congress. He also ignored a fundamental check that has always operated on antitrust prosecutions. Because they originate in the Department of Justice, the Executive Branch must initially (and ultimately) mix economic, legal, and political considerations in weighing its prosecutions and appeals under the Sherman Act. In any case, the sweeping language of the statute ensured that the judiciary would have a major interpretive role in antitrust law.

[32] Sklar, *The Corporate Reconstruction*, pp. 146-47.

[33] For an account of the motives behind passage of the Sherman Act in 1890, see Bougette, *et. al.* For Harlan's opinion, see 221 U.S. 82-106 (1911).

[34] Pratt, *The Supreme Court under White*, pp. 37-40.

[35] Pratt, *The Supreme Court under White*, pp. 41-43. As in *Standard Oil*, Harlan concurred in the result while dissenting from the majority's reasoning.
[36] The vote was seven-to-zero, as Harlan's replacement, Mahlon Pitney abstained (he had missed the arguments), and, for some unstated reason Holmes took no part in the case.
[37] *St. Louis Post-Dispatch*, Apr. 22, 1912, p. 1.
[38] The specific findings can be found at 224 U.S. 383, 395 (1912).
[39] *Standard Oil* decision, quoted in *Terminal Railroad* on 409.
[40] The opinion never used that term explicitly, yet offered detailed "consideration of the natural conditions greatly affecting the railroad situation at St. Louis" (395-98). As U.S. law construed the term in the nineteenth century, "natural monopoly" suggested but did not explicitly reflect environmental or geographic conditions. Richard John explores its varied meanings, focusing on "technological imperatives and economic incentives," as with Western Union in 1888. See John, *Network Nation*, pp. 157-58, 194-95. The leading scholar of monopoly in legal history, Herbert Hovenkamp, recounts the problematic efforts of legislators and judges to craft "a usable model for natural monopoly." See Hovenkamp, *Enterprise*, pp. 110-114 (quotation from 114).
[41] *The New York Times*, Apr. 23, 1912, p. 16.
[42] "Trolley On Merchants'," *St. Louis Post-Dispatch* (Sept. 5, 1906), p. 12.
[43] "Act Authorizing the Construction of a Bridge," (Feb. 3, 1887): 376.
[44] With the advent of electric power, interurban transit enjoyed immense popularity between 1895 and 1920, especially in the American Midwest. Superficially akin to a city streetcar (both typically drew electricity from overhead wires), larger and faster interurban cars connected urban centers and tied rural folk to cities and towns. Some operators like ITS also developed a substantial freight business. See Hilton, *The Electric Interurban*, pp. 144-45, 346-49.
[45] Bullard, "By Bridge," p. 6.
[46] When it finally did inaugurate service over its own new bridge, ITS ran its trains to and from St. Louis on thirty-minute intervals, suggesting that the Merchants crossing could have accommodated that modest volume in addition to its existing traffic. It appears that the Terminal Association simply chose to foreclose access against ITS which had already proven to be a strong competitor, especially against the Wabash (a key owner of the TRRA).
[47] 224 U.S. 398 (1912).
[48] A thorough search of the 3,079 page *Transcript of Record* for the first federal trial found only one passing reference to the ITS. Much of its testimony dated to 1906, the same year that the TRRA foreclosed access to ITS, but a year before ITS began construction of its own bridge. The Terminal Railroad's vigorous and successful efforts to block access to ITS was a matter relevant to the antitrust proceedings, although not addressed in that forum (for unknown reasons). Some inconclusive evidence suggests that ITS pleaded its case for access in local courts but lost. The McKinley Bridge was under construction throughout the circuit court trial, yet it too made no appearance in the record. Even so, that

massive structure thoroughly undermined the natural monopoly formulation of the Supreme Court's 1912 opinion.

[49] More precisely, the tenets of antitrust law under rule-of-reason jurisprudence remained a work in progress at least until 1927. See Hovenkamp, "Rule."

[50] The two Missouri cases and the initial Federal trial.

[51] *Terminal* opinion, p. 403, quoting 182 Missouri 299 (1904).

[52] William J. Novak details the rise of public-service corporations circa 1900, and their sweeping co-constructions in new forms of administrative, regulatory, and corporate law. Characteristically slow to innovate, the Supreme Court's unanimous ruling in *Terminal Railroad* was mostly grounded in contract law. At its ruling came down, however, the public-utility corporation had grown to dominate "the very core of the American legal and political-economic system." See Novak, "The Public Utility Idea," p. 140.

[53] In a significant example of this transformation in American political economy, in 1917 President Woodrow Wilson nationalized all common carrier railroads and terminal companies in the country. Enacted as a wartime measure, the United States Railroad Administration did for the nation what the Terminal Association had achieved in St. Louis. For example, the USRA forced the Pennsylvania Railroad to allow its competitor, the Baltimore & Ohio, to access its Pennsylvania Station in downtown Manhattan. More broadly, the agency rationalized freight and passenger services nearly everywhere.

[54] Crane, "All I Really Need," p. 2027. Sklar, *The Corporate Reconstruction*, pp. 344-45.

[55] "St. Louis Terminal Loses," *The New York Times* Apr. 23, 1912, p. 16.

[56] James *et. al.*, "Reports of Committees," p. 372

[57] Swayze, "Judicial Construction," p. 18. The court's dictate to open ownership to all carriers proved to be a remedy without a problem. Seventeen years would elapse before the next (and last) carrier sought admission to the TRRA.

[58] "City Belt Railways," p. 309.

[59] In a 1945 case, *Associated Press v. United States* 321 U.S. 1 (1945), the Supreme Court built on the precedent of *Terminal Railroad* to conclude that the AP provided an essential service to the newspaper industry and its readers, a service that it could not unilaterally deny to non-members.

[60] Brinsmead, *Essential Interoperability Standards*, ch. 5. Guggenberger, "Essential Platforms," p. 339.

[61] Pitofsky, "The Essential Facilities Doctrine," pp. 452-54.

[62] *Verizon v. Trinko*, 540 U.S. 398 (2004).

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ABSTRACT

The Sherman Act (1890) inaugurated the commitment of the American federal government to block the horizontal combinations or "trusts" then beginning to dominate many industries. But the statute's sweeping language nearly demanded interpretation by the executive branch and the judiciary. Two decisions by the U.S. Supreme Court in 1911, *Standard Oil* and *American Tobacco*, promulgated a "rule of reason" that sent American antitrust law in a new direction, grounded in economic analysis. In its next antitrust case, the court used the rule to uphold a monopoly for the first time. To date, historians have overlooked that case, *United States v. Terminal Railroad Association of St. Louis* (1912). This article reviews the events that led to this prosecution under the Sherman At, and it explores a fallacy at the heart of the justices' unanimous opinion. Contrary to their analysis, the Terminal Railroad of St. Louis lacked any legitimate claim to being a natural monopoly. In turn, their egregious misreading of fact and theory suggests that the justices were ill-equipped to wield economic analysis in shaping antitrust law.