# THE RISE AND FALL OF THE *GREENE* DOCTRINE: THE SHERMAN ACT, HOWELL JACKSON, AND THE INTERPRETATION OF "INTERSTATE COMMERCE", 1890 – 1941

**Harvey Gresham Hudspeth**
*Mississippi Valley State University*

## ABSTRACT

This paper deals with the evolution of the judicial interpretation of the term "interstate commerce" beginning with the enactment the Sherman Anti-Trust Act of 1890 and concluding with the Supreme Court's *U.S. v. Darby* decision some 51 years later. As may be recalled, the Fuller Court's 1895 ruling in *E.C. Knight* all but destroyed Sherman and allowed most corporate monopolies free reign going into the early twentieth century. Even after Sherman's revival in *Northern Securities*, however, the Court's narrow interpretation of "interstate commerce" continued to effectively thwart federal attempts at economic regulation for the next half century. This paper examines the formulation of the so-called "Greene Doctrine" and its author, future Supreme Court Justice Howell Edmunds Jackson as well as their ultimate impact on American constitutional and economic history.

## Introduction: The Microsoft Case – Another Time, Another Trust, Another Jackson

On June 7, 2000, Federal District Court Judge Thomas Penfield Jackson brought anti-trust law into the 21st Century when he declared that the personal computer giant Microsoft was an illegal monopoly and ordered it split into two separate companies. Having previously noted that the Bill Gates-controlled conglomerate used its "Windows" operating systems to run no less than 90% of all PC's, Jackson asserted that Microsoft was thus able to stifle software competition and moreover violated American anti-trust laws by using illegal methods to protect its monopoly in computer operating systems. Condemning the company as "untrustworthy" and "unwilling to accept the notion that it broke the law," Jackson went on to order the most dramatic anti-trust breakup since the AT&T ruling of 1984. Upon learning of Judge Jackson's ruling, Attorney General Janet Reno proclaimed that the court had reaffirmed "the importance of anti-trust law enforcement in the 21st Century and the importance of competition."

Shortly after Judge Jackson's decision was announced, Bill Gates vowed to appeal and the Justice Department pledged to have the appeal immediately reviewed by the Supreme Court.[1] While the Circuit Court of Appeals subsequently reversed Jackson's ruling in part thereby voiding the breakup,[2] Judge Jackson's initial decision to many constitutional scholars must have seemed reminiscent of the Progressive Era spirit of "trust-busting" and Theodore Roosevelt. Similarly, the incoming Bush Administration's

decision in September 2001, not to pursue any further litigation,[3] must have seemed more like a throwback to the Gilded Age spirit of "laissez faire" and Melville Fuller.

Whatever the new administration's logic in electing to drop the Microsoft suit, modern scholars today might do well to look back at an earlier antitrust ruling rendered by an earlier Judge Jackson. Just two years after enactment of the Sherman Anti-Trust Act, Sixth Circuit Court Judge Howell Edmunds Jackson was to issue the very first major court ruling interpreting the dimensions of the new law. As this paper will demonstrate, in the 1892 case of *In re Greene*, this first Judge Jackson employed an entirely different rationale in interpreting Sherman in the shadow of interstate commerce to all but destroy the act. As will be shown, *Greene* paved the way for the infamous *E.C. Knight* decision of 1895. While *Knight* in turn would largely be diminished with the Court's subsequent 1904 ruling in *Northern Securities*, the *Greene* Doctrine was far from dead. Unexpectedly revived in the 1918 case of *Hammer v. Dagenhart*, it would survive in its entirety until its final repudiation in *United States v. Darby Lumber Company* (1941). This paper will examine the forty-nine year history of *Greene* and its consequences as well as its author, Howell Edmunds Jackson.

## From Sherman to *Darby* – A Half Century's Odyssey

In August 1892, Howell Edmunds Jackson presided as senior federal judge over the Sixth Circuit Court of Appeals operating out of Nashville. Appointed to his position by Democratic President Grover Cleveland in 1886, Jackson had previously served as a United States Senator from Tennessee. Prior to that, he had been a prominent West Tennessee attorney who had risen to public attention through his vigorous opposition to Tennessee's post-Reconstruction debt repudiation movement. Born and raised in the rural South, Jackson had little practical experience with corporate monopolies. A former railroad attorney, he had nevertheless as a senator supported the creation of the Interstate Commerce Commission. By the time of Sherman's enactment, however, he was already on the federal bench and so his position on the issue of anti-trust was not clearly known. With the case of *In re Greene*, however, all of that would change. As no less a personage than William Howard Taft was to later agree, involving as it did the very first federal court interpretation of the Sherman Anti-Trust Act of 1890, Howell Jackson's ruling was undoubtedly both his most important and his most unfortunate decision as a federal court judge.[4]

Enacted into law under the administration of Benjamin Harrison, the Sherman Anti-Trust Act declared illegal every contract, combination, or conspiracy in restraint of trade or commerce. While adopted with nearly unanimous congressional approval, recent scholars have noted that the act:

> responded to growing public concerns generated by dramatic Nineteenth Century increases in centralization, consolidation, and apparent predatory business behavior. The congressional deliberations reflected traditional American concerns that anti-competitive conduct potentially imperils distributional

> fairness, productive efficiency, individual economic opportunity, and political liberty.

Nevertheless, rather than specifying the act's application in any detail, Congress left the task of further doctrinal development to the federal courts. Considering the relatively revolutionary nature of the law's purported intent, that did not take long.[5] As former President Taft later related in his 1914 study, *The Anti-Trust Act and the Supreme Court:*

> The first important case under it was known as *In re Greene* (52 Fed. Rep. 104). It arose in August, 1892, on a petition for a writ of habeas corpus presented to Circuit Judge Jackson, afterward Mr. Justice Jackson, to test the legality of a warrant of removal under an indictment found in Massachusetts against Greene as one of the officers of the Whisky Trust, for violating the first and second sections of the act.[6]

Publishing her late husband's biography five year's later, Matilda Gresham, the widow of Jackson's appellate court colleague, Judge Walter Q. Gresham, went into somewhat more detail with regard to *Greene's* background. As she would ultimately recall, the federal government's first prosecution under Sherman was an action brought by Attorney General William Miller and then-Solicitor General Taft against the so-called "Whiskey Trust." Organized in 1887 under the name "Distillers and Cattle Feeders' Trust," this entity had previously enjoyed an informal, "nebulous existence" in a fashion similar to that of the better known Standard Oil Trust.

Initially, the trust's control had been vested in a board of trustees with five different corporations owning and operating distilleries in the vicinity of Peoria, Illinois. By 1888, however, shortly after Distillers and Cattle Feeders' formal organization, the trust had absorbed no less than 811 different distillery corporations and firms operating distilleries all across the nation. While this practice was far from novel at this particular time, as Mrs. Gresham went on to assert, as far as unfair business practices went, Distillers and Cattle Feeders' was one of the few trusts "that used dynamite to bring a recalcitrant into the fold."[7]

Formally organizing itself under the corporate laws of Illinois in early 1890, as the Distillery and Cattle Feeding Company, the "Whiskey Trust," as Mrs. Greene continued her narrative, now appeared confidently determined "to clothe the illegal combination in legal garb." A few months later, however, with Sherman in effect, the federal government formally reacted and in March of 1891, procured indictments against a number of officers and stockholders within the trust. Having opted to bring suit in Massachusetts rather than the trust's home state of Illinois, the government soon found itself under fire by the defendants' lead attorneys, Elihu Root and Richard Onley, future Republican and Democratic cabinet officers respectively, for attempting to try their client in a foreign jurisdiction.

Root and Onley immediately took their plea to the Sixth Judicial Circuit Court of Howell Jackson. As Mrs. Gresham noted:

In every instance was the government defeated. According to the opinion of... Judge Jackson in the Southern District of Ohio...the indictments were not drawn with that technical care which the layman not unjustly thinks has become one of the reproaches of the legal profession. Circuit Judge Jackson, in an elaborate and forcible opinion which for years was pointed to by the combines as its protection, tore the Sherman Act to pieces and refused to enter an order for Greene's removal to Boston for trial.[8]

Noting that the Massachusetts Court in May of 1892 elected to quash all of the indictments which the federal government had previously secured against the Whiskey Trust's defendants, Mrs. Gresham quoted the judge as declaring that the indictment in question had "clearly" been "insufficient according to the elementary rules of criminal pleading." Quoting the court further that the indictment had charged "no offense within the letter or spirit of the Sherman Act," Mrs. Gresham contemptuously concluded, "It is due to Solicitor General Taft to say he had no part in drafting this indictment."[9]

As far as is known, Solicitor-General Taft, who within two years of Mrs. Gresham's insinuations would become Chief Justice Taft, never directly replied to her charges. In 1914, however, he recalled that the indictment in question charged that the Whiskey Trust had acquired and united seventy distilleries across the nation "for the purpose of controlling the business of distilling whisky...and establishing a monopoly." As a means to accomplish this end, Taft later related, the trust "sold its whisky with a contract for a rebate on the price to those who would maintain retail prices, and that by this restraint of trade, it sought to compel purchases, in the market to maintain the price of its whisky." The former president went on to assert that Jackson had "narrowed the application of the statute in such a way"...as to "narrow the law's formal definition of a monopoly" as embracing:

Two leading elements – vis., an exclusive right or privilege on the one side, and a restriction or restraint on the other, which will operate to prevent the exercise of a right or liberty open to the public before the monopoly was secured.[10]

Moving on to the actual facts raised in the Whiskey Trust's indictment, Taft went on to relate that Jackson had determined that notwithstanding the Distillery and Cattle Feeding Company's acquisition of 75% of the nation's distillery products, it did "not appear... that the persons from whom said distilleries were acquired were placed under any restraint, by contract or otherwise, which prevented them from continuing or engaging in such business."

Noting that all other persons who chose to engage in the distillery business "were at liberty to do so," Jackson declared that the "Whiskey Trust's effort to control the production and manufacture of distillery products by the enlargement and extension of business was not an attempt to monopolize trade and commerce in such products" as had been envisioned under Sherman. Looking back on this landmark decision two full decades later, Jackson's former protégé, with the full advantage of retrospect, went on to glumly conclude that the late justice:

"evidently felt that the Constitution did not extend to Congress the power so to qualify the right of acquiring and of disposing of the property as to make the acquisition of property for the purpose of controlling interstate commerce in it or in the products of it a criminal monopoly.[11]"

Taft went on to conclude that *Greene* ultimately set the precedent for *E.C. Knight* by holding that:

> the mere acquisition of plants in different states for the ultimate purpose of using this ownership to control and restrain interstate commerce was a subject only within the jurisdiction of the States and not within the control of congress.[12]

For all of his appreciation and respect for both Howell Jackson's talents and abilities, William Howard Taft could not in any way defend the logic he applied in formulating *Greene.* Nevertheless, notwithstanding Taft's scholarly analysis, Matilda Gresham was unrelenting in her criticism. Despite the fact that her husband had previously served Chester Arthur as Postmaster General and Secretary of the Treasury and subsequently served as Secretary of State in Grover Cleveland's second administration, Mrs. Gresham apparently never could forgive the fact that the Supreme Court appointment to which Judge Gresham so badly aspired had gone instead to Jackson. As she went on to observe: "how a President who really wanted the Sherman Act enforced could promote a judge, in every other respect able and capable, who had torn that law to tatters, is a mystery."[13]

Whether President Harrison ever took *In re Greene* into consideration when he made his surprise appointment of Jackson to the Supreme Court is not known. What is known, however, is that just three months after the *Greene* decision, former president Cleveland decisively defeated Harrison in his bid for a second term of office. Two and one half months later, Justice L.Q.C. Lamar died after only five years on the bench. A Georgia-born Mississippian who had actively served the Confederacy, Lamar had been appointed to the bench by Cleveland in 1888 partially as a means to help restore Southern representation to the high court. With his death coming during the final few weeks of Harrison's term, the lame duck Northern Republican was determined to deny Cleveland the opportunity of appointing another states' rights Southern Democrat to the Bench as Lamar's successor.

In the end, Harrison's decision to appoint Jackson had more to do with Jackson's ruling in another case, *United States v. Patrick.* Always more concerned with cases involving civil rights than anti-trust, Harrison was noticeably impressed when on February 1, 1893, one day after the well-publicized lynching of a black man in Texas, Judge Jackson issued a ruling in Nashville which effectively upheld the constitutionality of the federal Civil Rights Act of 1870. Within forty-eight hours of both the lynching and the ruling (and with less then five weeks left in his term of office), Harrison made his decision. On March 4, 1893, with just one hour left to the Harrison Presidency, Howell Jackson became the outgoing president's fourth and final appointee to the bench. Ironically enough, his elevation came seven months to the day of the *Greene* ruling.

Jackson's tenure on the bench would be remembered as short, but eventful. Just weeks after his appointment, the nation would undergo an economic crisis brought on by the financial "Panic of 1893." Moreover, Jackson would undergo a personal crisis of his own when he learned he had contracted tuberculosis.[14] In the meantime, the Cleveland Administration had determined to attempt a second anti-trust prosecution under Sherman. This time, it would be left to a federal district judge in Pennsylvania to render his court's decision in the case of *United States v. EC Knight Co.* On January 30, 1894, District Judge Butler began examining the government's charges at length.

While the lawsuit in question was ostensibly against the EC Knight Company and three of the nation's other independent sugar refineries, the actual culprit was the American Sugar Refining Company. As the nation's largest sugar refinery, prior to 1892, American Sugar controlled no less than 65 % of America's sugar production capacity. Of the remaining 35 %, all but two percent was under the control of EC Knight and its fellow defendants, Spreckles' Sugar Refining Company, Franklin Sugar Refining Company, and the Delaware Sugar House.[15]

As the Government went on to assert on March 4, 1892, just five months prior to Howell Jackson's ruling in *In re Greene*, and incidentally just twelve months prior to Howell Jackson's elevation to the Supreme Court, American Sugar sought to obtain complete control of the production and price of refined sugar in the United States "through an unlawful and fraudulent scheme to purchase the stock, etc., of the said four defendants." By combining the 33 percent interest of EC Knight and the other defendants with the 65 % share already under its control, American Sugar would therefore control all but two percent of the nation's sugar refining capacity and thus be in a position to restrain "the trade thereof among the other states."

To accomplish this, the Government alleged that American Sugar, EC Knight, and the other defendants had entered into an illegal agreement wherein all of the companies in question would exchange corporate stock with one another so as to effect unified control over 98 % of the nation's sugar refineries. In conclusion, the government contended:

That the American Sugar Refining Company monopolizes the manufacture and sale of refined sugar in the United States and controls the price of sugar. That in making the said contracts the...American Sugar Refining Company combined and conspired with the other defendants named to restrain trade and commerce in refined sugar among the several states and foreign nations. That the said contracts were made with intent to enable the said American Sugar Refining Company to monopolize the manufacture and sale of refined sugar among the several states.[16]

After a recitation of what material facts of the government's charges had thus far been proved, Judge Butler went on to review the provisions of the Sherman Anti-Trust Act and then turned to the principal questions raised. Refusing to consider whether the facts showed a "contract, combination, or conspiracy to restrain trade or commerce," Butler further rejected any consideration of the Government's claim for relief. Butler moreover declared that the Government had failed to prove that the defendants had

entered into a "combination or conspiracy to restrain or monopolize trade or commerce "among the several states or with foreign nations." Finally, noting that the federal government "possesses no jurisdiction over the contracts, business or property of individuals within the states," Butler went on to assert:

> The contracts and acts of the defendants relate exclusively to the acquisition of sugar refineries and the business of sugar refining, in Pennsylvania. They have no reference and bear no relation to commerce between the states or with foreign nations.... The alleged control of refining does not in itself secure such commercial monopoly; and at present none exists. The most that can be said is that it tends to such a result; that it might possibly enable the defendants to secure it, should they desire to do so.[17]

It was not long after this that Butler essentially closed all further debate. Toward the end of his opinion, he declared:

> The discussion need not be extended; the question is not new. It was fully considered in a case which arose under the statute – In re Greene, 52 Fed. 104 – and the opinion of Jackson J., (now of the supreme court,) is so clear and satisfactory that I am restrained from quoting what he says only by his desire to be brief.

With that, Butler ordered the government's bill dismissed with costs.[18] For its part, the Government immediately appealed Butler's ruling to the Appellate Court. Even as his health declined, Howell Jackson's influence as a jurist was to take on a whole new dimension. Less than two months after Butler's ruling, the Third Circuit Court of Appeals upheld the lower court decision. Once again, the issue was whether the federal government had the lawful authority under Sherman to:

> have canceled and declared void certain contracts made by the American Sugar Refining Company with the other defendants, as being the result of a combination or conspiracy to monopolize or restrain interstate or foreign commerce.

After a brief review of the Sherman Anti-Trust Act and the material facts of the case, the three judge appellate panel then proceeded to reach the same conclusion as Judge Butler. In affirming the lower court decree, the appellate court declared:

Enough has been said to indicate the ground upon which our conclusion in this case has been reached, and we do not deem it necessary to say more, inasmuch as the subject has very recently been considered and passed upon in the Case of Greene, 52 Fed.104, by Judge Jackson now one of the justices of the Supreme Court, in whose opinion the earlier cases are sufficiently referred to.[19]

Handed down on March 26th, *E.C. Knight* would be argued before the Supreme Court on October 24th and decided three months later in January 1895. While Howell Jackson would have no direct role in either the argument or the court's final decision, it

is indisputable that he had already made his mark on the case's final outcome. In the meantime, with the court finally adjourning in late May, Howell Jackson's major concern increasingly came to center on his declining health.

Weeks earlier, on May 1st, Jackson had written the Chief Justice proposing that he take charge of a Tennessee case if Pennsylvania justice George Shiras would "relieve" Jackson of another case involving the state of Pennsylvania. He went on to explain that he was "not feeling quite well enough to undertake both of these cases." After a summer's rest at his beloved West Meade home outside of Nashville, Jackson nevertheless returned to Washington in time for the Court's October term. Within three weeks, however, he had to excuse himself again. Hearing legal arguments on October 23rd [20], Jackson would not hear another case argued until the rehearing of the *Pollock v. Farmers Home Loan* case six and one half months later. One day later, ironically, on October 24th, in the absence of Jackson, the Court heard the beginning of argument in the federal government's appeal of *E.C. Knight.*[21] One day after that, on October 25th, as the *New York Herald* later reported:

> Justice Jackson...left...with Mrs. Jackson and his two youngest children for Thomasville, GA, where he will be obliged to remain on account of his health until the coming cold weather is over. Although the Justice has been in better health of late, it is a well-known fact that his disease may come to a crisis at any time. The physicians diagnose his case as diabetes, complicated with heart trouble and diseased lungs. He was very loath to leave home at this time and so soon after his return, but the doctors gave peremptory orders to take him South at once.[22]

With this, the death watch began – the death watch over the Sherman Anti-Trust Act as well as the death watch over Howell Edmunds Jackson. Three months after Jackson's departure from Washington, the Justices had occasion to indirectly review their missing colleague's 1892 decision in *In re Greene.* On January 21, 1895, the Court rendered its ill-fated, yet landmark decision in the case of *United States v. E.C. Knight.* While both the district and appellate courts had based their decisions largely in deference to Jackson's prior opinion, the Justices, perhaps out of a sense of propriety and regard for Jackson's absence, opted to base their decision independently of the 1892 ruling. By a seven-to-one majority, however, the Court employed the same logic previously used by Jackson. The ultimate result all but crippled Sherman by placing most existing monopolies outside the scope of the law.

Notwithstanding the fact that E.C. Knight controlled as much as 98% of the nation's sugar supply, the Court nevertheless determined that it had not acted in conspiracy in restraint of interstate commerce. Giving a narrow interpretation to the meaning of the word "commerce," Chief Justice Melville Fuller, speaking for the Court, drew a distinction between commerce and manufacturing. Conceding that E.C. Knight may well have been a manufacturing monopoly, the Justices nevertheless declared that a manufacturing monopoly did not necessarily violate the Sherman Act per se. Consequently, the

lower courts' verdicts, both based on *Greene*, were confirmed in their entirety. Only Justice John Harlan of Kentucky voted in dissent to the Court's conclusions.[23]

Four months after the Court's ruling in *E.C. Knight*, Howell Jackson was compelled to leave his death bed at West Meade in order to return to Washington. As his final service to his country, he was an active participant in the case of *Pollock v. Farmers' Home Loan* – better known today as the Income Tax Case. Previously unable to hear the original arguments in March, Jackson was obliged to attend the rehearing when the Court, in his absence, rendered a four-to-four tie decision with regard to the tax's constitutionality. While Jackson was known to favor the tax, the tie-breaking vote he was expected to render in the tax's behalf was in effect nullified when one of the Justices who had previously voted to uphold the tax now changed his vote in order to declare the tax illegal. Returning to West Meade shortly thereafter, Justice Jackson died peacefully in his bed on August 8, 1895 – exactly one hundred days following his dissent in *Pollock*.[24]

In the years that followed, the name of Howell Jackson slowly slipped from the public's memory. As the nation continued its struggle over such issues as federal regulation of monopolies and the tax on personal income, the life's work of Justice Jackson would nevertheless live on. Just nine years after the Court's decision in *E.C. Knight*, for example, Jackson's legal logic in *In re Greene* was employed by four of the Court's nine Justices in the case of *Northern Securities v. United States*. As the federal government's first major effort at anti-trust litigation since *E.C. Knight*, *Northern Securities* was subsequently described by none other than Theodore Roosevelt as an effort by "a small group of financiers...to profit by the government's impotence to which we had been reduced by the Knight decision." Noting that these businessmen "had arranged to take control of practically the entire railway system in the Northwest," Roosevelt went on to assert his belief that this was possibly "the first step toward controlling the entire railway system."[25]

To accomplish this goal, the former president went on to assert that the financiers had hoped to organize a new "holding" company under the name "Northern Securities" with its stock exchanged "against the stock of the various corporations engaged in railway transportation, exactly as the Sugar Trust had acquired control of the Knight Company and other concerns." Noting that the Supreme Court's decision in *E.C. Knight* had "explicitly sanctioned the formation of such a company as the Northern Securities Company," Roosevelt had nevertheless instructed his attorney general to file suit for its dissolution.

Recalling criticism from the "representatives of privilege" that he had shown a "lack of respect for the Supreme Court" for having questioned its prior ruling in *Knight*, Roosevelt further recalled the lecture he received from Justice Edward White who ultimately wrote for the Court's dissenting minority:

The parallel between the two cases [the Knight case and the Northern Securities case] is complete. The one corporation acquired the stock of the other and competing corporations in exchange for its own. It was conceded for the purposes of the case, that in doing so monopoly had been brought about in the refining of sugar, that the sugar to be produced was likely to become the subject of interstate commerce, and indeed that part of it would certainly become so. But the power of Congress was decided not to extend to

the subject, because the ownership of the stock in the corporations was not itself commerce.[26]

Moving on from Knight to Jackson's 1892 appellate decision on Sherman, White went on to assert that Jackson had drafted Greene "with that care which was his conceded characteristic and was stated by him with that lucidity which was his wont."[27] After a lengthy recitation of the logic Judge Jackson had first applied a dozen years earlier, the future Chief Justice went on to conclude:

If this opinion had been written in the case now considered it could not more completely than its reasoning does have disposed of the contention that the ownership of stock by a corporation in competing railroads was commerce.[28]

Subsequently going on to praise his late colleague for having "lucidly pointed out" the distinction between regulation that indirectly affects commerce and regulation that constitutes a "direct and therefore illegal burden," White went on to assert that *Greene* and *Knight* must therefore be applied as binding legal precedents so as to defeat the government's case against Northern Securities. On this point, he received the support of the present Chief Justice, Melville Fuller. Joining them were Jackson's successor, Rufus Peckham and, surprisingly, future Supreme Court icon Oliver Wendall Holmes.

Having appointed Holmes to the bench fifteen months earlier, Theodore Roosevelt reportedly felt bitterly betrayed by the young Justice's early adherence to *Greene*. With five of the Court's other justices voting to sustain the government's case, Roosevelt's battle against Northern Securities was narrowly won by a five-to-four margin. Years later, noting Edward White's earlier analogy between *Northern Securities* and *E.C. Knight* (and thus incidentally also with *Greene*), the former president conceded that, "Mr. justice White was entirely correct in his statement. The cases were parallel." He nevertheless went on to argue that the Court's subsequent reversal of *Knight* was as necessary to protect "people against monopoly and privilege" as it had previously been necessary to reverse the Court's 1857 ruling in *Dred Scott* in order to protect "people against slavery and privilege."[29]

Considering the government's victory over Northern Securities one of the great accomplishments of his administration, Roosevelt went on to boast:

> By a vote of five to four the Supreme Court reversed its decision in the Knight case, and in the Northern Securities case sustained the Government. The power to deal with industrial monopoly and suppress it and to control and regulate combinations, of which the Knight case had deprived the Federal Government, was thus restored to it by the Northern Securities case.[30]

Thus by a narrow one vote margin, Jackson's position on federal regulation of monopolies, as had previously been the case with Jackson's position on the federal government's ability to tax personal income, was defeated by the Supreme Court. Far from being dead, however, *Greene* would be cited in one final instance. Fourteen years after its narrow defeat in *Northern Securities*, Jackson's doctrine was resurrected for one final time in the Court's 1918 ruling in the landmark case of *Hammer v. Dagenhart.*

Writing for the Court's majority, Justice William Day cited *Greene* to defeat the federal government's attempt to prohibit the interstate transportation of goods produced by child labor. A former Canton, Ohio attorney who had once regularly appeared before Jackson when he was Sixth Circuit Judge, Day was subsequently appointed to the bench in 1903, ironically by Roosevelt to succeed the retiring Justice Shiras. Now, in one of his best remembered opinions, he cited Jackson's 1892 decision to conclude that the mere manufacture of goods was not in itself commerce. Nor, he added: "do the facts that they are intended for, and are afterwards shipped in, interstate commerce make their production a part of that commerce subject to control of Congress."

Declaring Jackson's ruling as one that "has been recognized often in this court," Day went on to recite the late Justice's logic that:

> When the commerce begins is determined, not by the character of the commodity, nor by the intention of its owner to transfer it to another state for sale, nor by the preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state.[31]

Having voted with the Court's five man majority on *Northern Securities* just fourteen years earlier, Day now effectively reversed his former position in *Greene*. On the other hand, Justice Holmes, having earlier joined the four man dissent in *Northern Securities*, now reversed himself by voting in dissent to Day's ruling. As had been the case with *Northern Securities*, *Hammer* was decided by the narrowest of margins. Unlike the earlier case, however, the Court now, by a one vote margin, sustained Jackson's 1892 ruling, thereby defeating the government's legislation.[32]

Joining with Day was Edward White. Having joined the Court just one year after Jackson, the by-then Chief Justice became the only member of the Court to sustain the *Greene* Doctrine consistently throughout its history from *E.C. Knight* through *Northern Securities*, and finally to *Hammer*. Also voting with Day was conservative Tennesseean James McReynolds. Having briefly served as Howell Jackson's Senate secretary in the early 1880's, the former Nashville attorney subsequently ascended to Jackson's former seat when Woodrow Wilson appointed him to succeed the late Horace Lurton in 1914.[33] With the additional support of conservative Taft appointees Willis Van Devanter and Mahlon Pitney, *Greene* was thus sustained by a five vote margin. Joining with Holmes in his dissent were liberal Wilson appointees Louis Brandeis and John Clarke, as well as McKinley nominee Joseph McKenna.[34]

The impact of *Hammer*, as Day scholar Alice Fleetwood Bertee later noted, "lasted until 1941 and overshadowed Day's other opinions."[35] By returning to a "line of reasoning thought to have been repudiated earlier in the century," the former Canton attorney, with the assistance of both the Chief Justice and Jackson's former private secretary, was thus able to keep the *Greene* Doctrine alive for another two and one half decades. *Hammer*, and with it *Greene*, were not finally overturned until February 3, 1941, in the case of *United States v. Darby Lumber Company*. Just two days after Justice McReynolds' retire-

ment from the bench as the last of the infamous anti-New Deal "Four Horsemen", the Franklin Roosevelt-dominated Court ruled unanimously to adopt the anti-*Greene* principles previously outlined in Justice Holmes' 1918 dissent in *Hammer* and thus sustain the government's proposed Fair Labor Standards Act.[36]

### Aftermath and Conclusions: The Legacy of Howell Edmunds Jackson

*Darby* in effect would serve as the culmination of a half century's constitutional odyssey which began with the enactment of the Sherman Act some fifty-one years earlier. Caught up as it was in the web of "dual federalism" which had dominated the Court since the end of Reconstruction, this earnest attempt to protect the American people from corporate monopoly and other business abuses found itself constantly at the mercy of Howell Jackson's 1892 dichotomy between what constituted "commerce" and what constituted "transportation."

The history of the *Greene* Doctrine is an eerie reflection of the era during which it was under judicial scrutiny. First cited in *E.C. Knight,* it allowed the Gilded Age Court of Melville Fuller to declare, "the fact that an article was manufactured for export to another state did not make it part of interstate commerce." With the advent of the Progressive Era a few years later, however, all of this would change and one year after *Greene's* narrow repudiation in *Northern Securities*, the Supreme Court in *Swift and Company v. United States* ruled that a price-fixing arrangement, although done locally, was nevertheless a restraint on commerce.[37]

Regrettably, as the nation's progressive mood waned in favor of a conservative return to "normalcy," the Court likewise resolved to retreat back into the judicial dogma of the nineteenth century. In *Hammer*, Justice Day was able to resurrect from the grave both Howell Jackson and his doctrine. In the end, the Supreme Court of Edward White managed to revive dual federalist limitations on the federal government's interstate commerce powers so as to prevent Woodrow Wilson's attempt to suppress child labor.

Having previously upheld similar measures designed to prohibit such harmful transactions as lottery tickets and adulterated food and drugs from commerce, the court now declared that it was another matter to prohibit goods, supposedly harmless in themselves, that posed no obstruction to commerce. Similarly reviving Jackson's old distinction between "transportation" and "commerce," the Court went on to rule that the regulation of employment of companies not specifically engaged in transportation was solely within state jurisdiction.[38]

Despite Justice Holmes' legendary "Stream of Commerce" dissent arguing that the use of a power specifically conferred on Congress by the Constitution "is not made any less constitutional because of the indirect effects it may have,"[39] Congress after *Hammer,* nevertheless refrained from attempting to regulate local business activity for the next fifteen years. It was only with the advent of the Great Depression and the New Deal that this attitude began to once again change. After 1937, the Supreme Court of Charles Evans Hughes finally eliminated not only the old distinctions between "transportation"

and "commerce," but also the old distinctions between "direct" and "indirect" effects and burdens.[40]

As was mentioned earlier, the final culmination of this process came with the Court's 1941 ruling in *Darby.* Involving as it did the last major piece of New Deal legislation, *Darby* marked the final step not only in the fifty-one year struggle to define "interstate commerce," but also in a four year struggle between the forces of laissez faire and state welfarism informally known as the "Roosevelt Revolution." Beginning when the Court's 1937 decision in *West Coast Hotel v. Parrish* reversed decades of judicial conservatism by upholding a Washington State statute setting minimum wages for women, the Court over the next four years witnessed dramatic changes both in terms of policy and personnel as the rulings that marked the White and Taft eras were effectively overturned and the remaining justices who had made them were retired. By the end of 1940, only Jackson's former secretary McReynolds remained and it had become clear even to him that further resistance to the Court's new liberalism was useless. With Franklin Roosevelt's unprecedented election to a third term in November, McReynolds could only expect four more years of erosion. Consequently, two weeks after Roosevelt was sworn in for a third term, McReynolds stepped down from the bench effective February 1, 1941. Just two days later, the Court came out with its ruling in *Darby.*[41]

In an eight to nothing decision written by Harlan Stone, the Court overturned *Hammer* (and with it, *Greene*), by declaring that the 1938 Federal Fair Labor Standards Act provisions fixing both minimum wages and maximum hours for employees engaged in interstate commerce were in fact constitutional within the meaning of both the Fifth and the Tenth Amendments. Asserting that the Tenth Amendment was not a limitation upon the authority of the national government to resort to all means reasonable for the exercise of what it considered to be a granted power, the Court went on to declare further that the wage and hour provisions of the federal act did not in effect violate the due process clause of the Fifth Amendment. Specifically addressing *Hammer*, Stone, who within five months would succeed Hughes as Chief Justice, went on to declare:

The conclusion is inescapable that *Hammer v. Dagenhart* was a departure from the principles which have prevailed in the interpretation of the Commerce Clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled.[42]

With that, the *Greene* Doctrine of Justice Howell Edmunds Jackson was finally laid to rest. It had lived for just forty-nine years.

While Jackson's 1892 stand on federal regulation was thus now thoroughly repudiated, the fact that the *Greene* Doctrine survived as good law for nearly a full half century can only be considered a tribute to Jackson's standing as a federal court jurist. Having inspired the court's ruling in both *Knight* and *Hammer*, and having almost caused a reversal of the Court's position in *Northern Securities*, Jackson's 1892 ruling in *In re Greene* has to be regarded as one of the most influential–albeit disastrous–lower court rulings in American history.

Ironically, even with the force of *Darby* behind it, the repudiation of *Greene* was not nearly as absolute as the Court had hoped. As no less a constitutional scholar as C. Herman Pritchett was to later observe:

> While the constitutionality of the Wages and Hours Act was ratified by *Darby*, problems with respect to the coverage of the act remained, for the statute had failed to invoke the total power of Congress over commerce. Rather, it was made applicable to employees engaged "in commerce" or "in the production of goods in commerce." Consequently, there was much confusion as to whether specific employees were covered by the act.[43]

Noting that in the 1968 case of *Maryland v. Wirtz*, the Court had rejected a contention that enforcing the act's standards against state employees in effect violated state sovereignty, Pritchett went on to assert that eight years later, in the case of *National League of Cities v. Usery*, the Justices, by a narrow five-to-four vote, elected to both overrule *Wirtz* and effectively reinstate *Hammer* by declaring that the federal wage and hour standards for state and municipal employees were unconstitutional. While *Usery* was subsequently reversed some nine years later in *Garcia v. San Antonio Metropolitan Transit Authority* (1985),[44] the fact remains that the laissez faire constitutionalism of Howell Edmunds Jackson is still very much alive. With the advent of the second Bush Administration, constitutional scholars will no doubt have to keep that possibility in mind.

## Notes

1. Paul Davidson, "Microsoft Spilt Ordered – Appeal Could Go Directly to the Supreme Court," USA Today, Thursday, 8 June 2000, 1; "Court Splits Microsoft into Two Parts," The Clarion Ledger, (Jackson, MS), Thursday, 8 June 2000, 1.

2. Adam Cohen, "No Split But Microsoft's a Monopolist," Time, 9 July 2001, 36 – 38.

3. "Bush administration no longer interested in breaking up Microsoft, "Greenwood (MS) Commonwealth, Thursday, 6 September 2001, 6.

4. Harvey Gresham Hudspeth, "Jackson, Howell Edmunds," The Tennessee Encyclopedia of History and Culture, Carroll Van West, ed., (Nashville: Rutledge Press, 1998), 492.

5. James May, "Sherman Antitrust Act," *The Oxford Companion to the Supreme Court of the United States*, Kermit L. Hall, ed., (New York: Oxford University Press, 1992), 782-783.

6. William Howard Taft, *The Antitrust Act and the Supreme Court*, (New York: Harper and Brothers Publishers, 1914), 49-50.

7. Matilda Gresham, *Life of Walter Quinton Gresham, 1832-1895*, (Chicago: Rand McNally Company, 1919), 639-640, 648-649. See also: Walter Gresham to Howell Jackson, este 13 July 1892, Harding-Jackson Papers, Southern Historical Collection, University of North Carolina, Chapel Hill, N.C.

8. Ibid.

9. Ibid.

10. Taft, 50 – 53.

11. Ibid.

12. Ibid.

13. Gresham, 650. See Also: 52 *Federal Reporter* 104 (1892).

14. Harvey Gresham Hudspeth, "Howell Edmunds Jackson and the Making of Tennessee's First Native-Born Supreme Court Justice," *Tennessee Historical Quarterly*, Volume LVIII, (Summer 1999), 140-155.

15. 60 *Federal Reporter* 306 (1894)
16. Ibid.
17. Ibid.
18. Ibid.
19. 60 *Federal Reporter* 934 (1894).
20. "Federal and State Courts," *The New York Times*, 24 October 1894, 12.
21. "Arguing the Sugar Trust Case," *The New York Times*, 25 October 1894, 25.
22. "Washington," *The New York Herald*, 26 October 1894, 8.
23. 156 *United States Reports* 1 (1895), See Also: "Won by the Sugar Trust," *The New York Herald*, 22 January 1895, 8; "Trusts Beyond the Reach of Congress," *The New York Herald*, 23 January 1895, 8.
24. Irving Schiffman, "Escaping the Shroud of Anonymity: Justice Howell Edmunds Jackson and the Income Tax Case," *Tennessee Law Review*, Volume 37, 334-348 (1970).
25. Theodore Roosevelt, *An Autobiography*, (New York: The MacMillan Company, 1913), 467-468.
26. Ibid.
27. 193 *United States Reports* 384-385 (1904).
28. Ibid., 385-386.
29. Roosevelt, 468-469.
30. Ibid.
31. 247 *United States Reports* 251, 272 (1918). See Also: William R. Day to Howell Jackson, este 19 February 1893, Hill McAlister Papers, Tennessee State Library and Archives, Nashville, Tennessee.
32. Stephen B. Wood, "Hammer v. Dagenhart," *The Oxford Companion to the Supreme Court of the United States*, 359-360.
33. John M. Scheb, II, "McReynolds, James Clark," *The Oxford Companion to the Supreme Court of the United States*, 542-543.
34. Stephen B. Wood, 359-360.
35. Alice Fleetwood Bertie, "Day, William Rufus," *The Oxford Companion to the Supreme Court of the United States*, 220-221.
36. Stephen B. Wood, 359-360.
37. Robert J. Streamer, "Commerce Power," *The Oxford Companion to the Supreme Court of the United States*, 167-169.
38. Michael Les Benedict, "History of the Court – Reconstruction, Federalism, and Economic Rights," *The Oxford Companion to the Supreme Court of the United States*,389.
39. C. Herman Pritchett, "Darby Lumber Company v. United States," *The Oxford Companion to the Supreme Court of the United States*, 217.
40. Robert J. Streamer, 167-169.
41. Harvey Gresham Hudspeth, "Losing Battles and Winning Wars: Franklin Roosevelt and the Fight to Transform the Supreme Court, 1937-1941", *Essays in Economic & Business History: The Journal of the Economic & Business Historical Society*, Volume XVII, 163,175 (1999).
42. 312 *United States Reports* 100, 115-116 (1941).
43. Pritchett, 217.
44. Ibid.

## References

### Primary Sources

### Books

Gresham, Matilda, *Life of Walter Quinton Gresham, 1832 – 1895*, Rand McNally Company (Chicago, 1919).

Roosevelt, Theodore, *An Autobiography*, The MacMillan Company (New York, 1913).

Taft, William Howard, *The Antitrust Act and the Supreme Court*, Harper and Brothers Publishers (New York, 1914).

## Cases

*Hammer v. Dagenhart*, 247 *United States Reports* 251 (1918).
*In re Greene*, 52 *Federal Reporter* 104 (1892).
*Northern Securities v. United States*, 193 *United States Reports* 384 (1904).
*United States v. Darby Lumber Company*, 312 *United States Reports* 100 (1941).
*United States v. E.C. Knight*, 60 *Federal Reporter* 306 (1894), 60 *Federal Reporter* 934 (1894), 156 *United States Reports* 1 (1895).

## Correspondence

Harding-Jackson Papers, Southern Historical Collection, University of North Carolina, Chapel Hill, North Carolina.
Hill McAlister Papers, Tennessee State Library and Archives, Nashville, Tennessee.

## Periodicals

*Greenwood* (MS) *Commonwealth*
(Jackson, MS) *Clarion Ledger*
*New York Herald*
*New York Times*
*Time*
*U.S.A. Today*

## Secondary Sources
## Articles

Bertie, Alice Fleetwood, "Day, William Rufus," *The Oxford Companion to the Supreme Court of the United States*, Kermit L. Hall, ed, Oxford University Press (New York, 1992).
Hudspeth, Harvey Gresham, "Howell Edmunds Jackson and the Makings of Tennessee's First Native-Born Supreme Court Justice," *Tennessee Historical Quarterly*, Volume LVIII (Summer 1999).
Hudspeth, Harvey Gresham, "Jackson, Howell Edmunds," *The Tennessee Encyclopedia of History and Culture*, Carroll Van West, ed, Rutledge Press (Nashville, 1998).
Hudspeth, Harvey Gresham, "Losing Battles and Winning Wars: Franklin Roosevelt and the Fight to Transform the Supreme Court, 1937 –1941," *Essays in Economic & Business History: The Journal of the Economic & Business Historical Society*, Volume XVII (1999).
Les Benedict, Michael, "History of the Court – Reconstruction, Federalism, and Economic Rights," *The Oxford Companion to the Supreme Court of the United States.*, Kermit L. Hall, ed, Oxford University Press (New York, 1992).
May, James, "Sherman Antitrust Act," Ibid.
Pritchett, C. Herman, "Darby Lumber Company v. United States," Ibid.
Schiffman, Irving, "Escaping the Cloud of Anonymity: Justice Howell Edmunds Jackson and the Income Tax Case," *Tennessee Law Review*, Volume 17 (1970).
Scheb, II, John M, "McReynolds, James Clark," *The Oxford Companion to the Supreme Court of the United States*, Kermit L. Hall, ed, Oxford University Press (New York, 1992).
Streamer, Robert J., "Commerce Power," Ibid.
Wood, Stephen B., "Hammer v. Dagenhart," Ibid.