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How the Consumer-Welfare Standard Transformed Classical Antitrust Law

By William Markham, © 2021.[1]

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PREFACE TO THE REVISED VERSION OF THIS ARTICLE (Written in November 2021)

I have been an antitrust attorney for the past thirty-three years and am intimately familiar with the modern doctrines used to interpret and apply American antitrust law. In this article, I explain the common-law origins of American antitrust law and its originally intended purposes, recount how this law has been understood and enforced since its enactment, and argue that in the modern era this excellent law has been undermined and betrayed by the absurdly misnamed "consumer-welfare standard," whose only significant contribution to antitrust has been to permit monopolistic and exclusionary practices to proliferate with impunity in every part of our commerce. I then explain how this law could be easily reformed so that it again accomplishes its intended purpose -- ensuring that American commerce is largely free of unlawful restraints of trade and monopolization -- *i.e.*, business practices that were deemed unlawful restraints of trade at common law and private efforts to seize or keep control of an entire line of commerce (monopolization).

Classical antitrust was enforced most vigorously from the late 1930s to the mid-1970s. That period largely coincides with the longest run of broad-based economic prosperity and progress that our country has ever enjoyed. Consumer-welfare jurisprudence was first conceived during the 1960s and was increasingly adopted by the federal courts from the mid-1970s onward, until it eventually became the unquestioned underpinning of American antitrust law: it is really a set of microeconomic principles applicable to markets for basic commodities that has been added to the common-law doctrines on restraint of trade and unauthorized monopoly in order to render those doctrines almost impossible to enforce. The result has been confusion about what antitrust law means and is supposed to do -- and more than forty years of judicial tolerance of monopolistic practices and common-law restraints of trade. Our entire economy and society have been transformed for the worse in consequence.

The casual reader can read a summary of these matters in the introduction to this article. Their full statement is set forth in the remainder of the article, along with numerous citations to case law and various other sources. The citations to case law are accompanied by *verbatim* quotations or sometimes shorthand summaries of each ruling, along with specific page numbers where the quotation or ruling appears in each case. Even those who disagree with my arguments should find this article to be a useful reference source that organizes and explains the common-law doctrines, the principles of classical antitrust, and the principles of consumer-welfare jurisprudence, with exact citations to controlling authorities throughout.

This article was originally published in the *Journal of the Antitrust and Competition Law Section of the California Lawyers Association* (Fall Issue, 2021). I have since revised and supplemented it, and the revised version appears below. In the revised version, I have provided a further explanation of the common-law doctrines on monopoly, which were first established in England in the early part of the seventeenth century, and which directly led to the English Parliament's

promulgation of the Statute of Monopolies in 1624. I have also revised my proposed reforms of antitrust law and provided supplemental commentary and annotations throughout.

Antitrust law, as it was originally written, established a wise, prosperous organizing principle for our society, one that in the modern era we have largely abandoned at great cost to our economy and society in all the ways that deeply matter. Reviving classical antitrust law cannot alone resolve the many challenges that we must address during the twenty-first century, but without it I fear that we cannot successfully address any of them. Too many of our private markets are now controlled by monopolies, monopsonies, duopolies, and oligopolies. In direct consequence, we have gradually become accustomed to enduring the many ill effects of a monopolistic economy. The remedy lies in classical antitrust law.

Classical antitrust draws upon the accumulated wisdom of the common law to ensure that, wherever possible, our commerce and trade shall be open, free of private restraint, and governed by competition, which keeps everyone honest, hard-working, and useful. That way lies prosperity, innovation, opportunity, commercial honesty, and a society teeming with self-reliant business owners and close collaborators who all have a great stake in our society's success. No privilege or pedigree is required to join such a society, but only a willingness to work in order to provide a good or service that is useful to others. Antitrust doesn't try to direct or manage society. It only establishes and enforces an organizing principle -- competition -- which naturally brings out the best in each of us as a matter of practical necessity.

In contrast, monopolistic economies deliver monopoly rents to a tiny minority, but just about everyone else gets the short end of the stick. Among other things, monopolistic economies generally discourage innovation and independent business initiatives, and by their very nature they fail to deliver lasting prosperity or sufficient opportunity for most people. They also render too many of us overly dependent in some way or other on dominant firms, which as a general rule underpay their suppliers and employees, then overcharge and underserve their customers. It is not because these dominant firms are wicked, but only that they have the power to treat their counterparties in this manner and eventually use this power to their own advantage. Perhaps worst of all, monopolistic economies usually exert a corrosive, demoralizing influence on the societies where they exist. Monopoly is therefore a very poor and short-sighted organizing principle. Competition is the antidote, and antitrust provides it, if we will only enforce it in its classical sense once again.

Lastly, my work on this article has become a labor of love for me, and I mean to add more commentary and annotations to it as I find the time to do so.

William Markham, November 15, 2021.

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INTRODUCTION

Since the late 1970s, antitrust law in the United States has been transformed out of recognition and rendered largely toothless by consumer-welfare jurisprudence, which was first developed in the 1960s by "neo-classical price theorists" at the University of Chicago, then embraced by Robert Bork and other conservative jurists, who believed that antitrust law imposed excessive, harmful burdens on successful companies. Their consumer-welfare standard and its related teachings were adopted by the Burger Supreme Court in the late 1970s, after which the leading treatise on antitrust law, Areeda and Hovenkamp's *Antitrust Law,* reported these decisions, explained their underlying logic, and developed it further. That treatise, long regarded as the bible of modern American antitrust law, has been regularly consulted by federal judges seeking guidance in their antitrust cases, leading to innumerable published decisions that incorporated its consumer-welfare precepts. The treatise in turn has reported, explained and analyzed those court decisions, further confirming consumer-welfare's primacy in the antitrust canon, and leading to yet more federal decisions premised on this view of antitrust law. It has been by this self-reinforcing feedback loop that consumer-welfare jurisprudence has swept the field in the modern era, transforming American antitrust law.

The federal courts have had the authority to develop this approach, since the principal antitrust law, the Sherman Act, confers on them the obligation to develop a federal common law of competition and commerce that is supposed to govern the interstate and foreign commerce of the United States. For all that, consumer-welfare jurisprudence in my view has badly overshot its mark and should be largely abandoned before it occasions even further harm. The courts can and should use their common-law authority to reform our antitrust law accordingly.

The change is needed because consumer-welfare jurisprudence has gone much too far, not only weeding out opportunistic and ill-conceived cases that never should have been brought, but also severely limiting the reach of antitrust law, so that it now prohibits only the most egregious instances of anticompetitive conduct, but little else. Some jurists might believe that this approach has been beneficial. I respectfully disagree and argue in this article that the best possible reform of our antitrust laws would be a simple, ringing restoration of the classical doctrines on restraint of trade and unauthorized monopoly. Those doctrines remain on the books and can be easily re-affirmed without doing violence to principles of *stare decisis*.

Thankfully, my call for antitrust reform is not merely that of an obscure litigator whose lonely voice remains unheard in the wilderness. Rather, the era of consumer-welfare jurisprudence finally seems to be nearing its end, or at least its unquestioned primacy in the antitrust canon: mainstream Democrats, moderate Republicans, progressive leftists, populist right-wingers, *Economist*-magazine liberals like me, and, far more important, many federal judges both conservative and liberal all seem to favor a revival of classical antitrust. The left-wing progressives and right-wing populists perhaps wish to push matters much further, while skeptical conservatives generally accept that some sort of reform of our antitrust law is now needed. Antitrust reform thus appears to be headed our way.

Indeed, Justice Kavanaugh has already written two forceful, eloquent antitrust decisions (one a concurrence), which remind me of President Theodore Roosevelt's preferred approach to antitrust enforcement: announce strong antitrust principles, enforce them vigorously against the worst offenders, and aim in that manner to prod all others to restrain their anticompetitive inclinations. That is likely the best approach and the one most likely to elicit bipartisan support as well as a simpler, more sensible administration of our antitrust laws. I add that Congressional reform of the kind now being debated should afford further, highly welcome relief: at a minimum, it should clarify that the aim of antitrust law is to prevent and redress restraint of trade and monopolization, not promote maximal output in each market.

As I explain below, American antitrust law is supposed to enforce across all markets the common-law prohibitions of *restraint of trade* and *unauthorized monopoly*. These classical doctrines are codified in the Sherman Act and constitute a political and commercial judgment, discerned from centuries of experience, concerning what kinds of business practices are most likely to promote our broader prosperity, economic opportunity, honest dealings, low prices for consumers, and a healthy democracy. Regrettably, those doctrines sometimes seem to have become distant third cousins in modern antitrust jurisprudence, which for these past forty years has been largely guided by consumer-welfare jurisprudence.

According to the consumer-welfare theory, antitrust law exists solely to ensure that sellers "maximize" their output in all markets. When they do so, antitrust law offers no reproach or relief. That is the proper explanation of the misnamed consumer-welfare standard. It is premised on revisionist history, promises analytical clarity and simplicity, delivers the opposite, and serves in practice to absolve most restraints of trade and most kinds of monopolizing conduct, with catastrophic consequences for our commerce, national economy, polity, and society.

Even so, the classical doctrines of antitrust law largely remain on the books and should be revived and enforced again with vigor, as they were most notably during the long, prosperous post-WWII era. Consumer-welfare jurisprudence has been used to abrogate a succession of per se rules, but not the classical precepts. Rather, consumer-welfare jurisprudence has imposed additional, largely impossible burdens of proof that antitrust plaintiffs must meet in addition to the classical requirements. It is past time to remove the consumer-welfare obstacles from antitrust prosecutions.

Targeting Naked Restraints and Exclusionary Practices That Undermine Competition**.** The north star of antitrust should cease to be the standard consumer-welfare tests – restricted marketwide output and unprovable supracompetitive prices. Rather, the lynchpins of antitrust should again be the *doctrine of ancillary restraints* in cases that concern non-compete covenants or collusion and the *exclusionary-practices test* in cases that concern a defendant's exclusionary conduct.

The Doctrine of Ancillary Restraints: The First Principle of Antitrust Law**.** The doctrine of ancillary restraints is used to determine whether two independent defendants have practiced a "naked" restraint of trade whose primary purpose is to restrict or suppress competition between them, or whether they have observed an "ancillary" restraint of trade that reasonably and narrowly

facilitates a legitimate transaction or collaboration. This test is used to identify (1) oppressive restrictions imposed by overreaching covenantees that use them to limit or suppress competition in their markets; and (2) conspiracies of competitors against suppliers or customers.

The Exclusionary-Practices Test, Restated. The exclusionary-practices test asks whether an antitrust defendant has used one or more business practices that meet the following criteria: (1) the defendant's practices have the effect of undermining, burdening, or excluding one or more of the defendant's competitors; (2) by so doing, they substantially lessen competition in the defendant's market -- *i.e.*, they impair, prevent, or suppress competitive interplay in this market and thereby insulate the defendant from meaningful competitive discipline, or at least that is their clear and necessary tendency; and (3) the defendant does not use these practices to develop or improve its own products or services, or at most it uses the practices in a way that inflicts needless burdens or costs on competitors. In other words, the exclusionary-practices test identifies and condemns business practices that antitrust defendants use not to build a better mousetrap, but to hinder or prevent others from building their own.

If a business practice meets the above three criteria, it fails the exclusionary-practices test, is deemed "exclusionary," and therefore constitutes predicate conduct for any antitrust claim that requires a showing of the defendant's exclusionary conduct. Proof of a defendant's exclusionary conduct never suffices to establish an antitrust violation, but is a necessary showing for many antitrust claims -- namely, all claims made under Section 2 of the Sherman Act (15 U.S.C. § 2) ("Section 2"), as well as some claims made under Section 1 of the Sherman Act (15 U.S.C. § 1) ("Section 1") and Section 3 of the Clayton Act (15 U.S.C. § 14).[2]

The doctrine of ancillary restraints and the exclusionary-practices test should again become the lynchpins of American antitrust law: they identify the very kinds of practices that antitrust law was established to prohibit and redress. By placing these standards at the very forefront of antitrust, and by narrowing or abrogating various consumer-welfare doctrines, the classical doctrines on restraint of trade and monopolization can be fully restored and guided by easily understood, easily applied rules against *naked restraints of trade* and *exclusionary conduct*. Judges and juries could readily understand and rule on these matters, and antitrust claims would cease to be obscured by often elusive microeconomic arguments about market output, efficient practices, and supracompetitive pricing put forth by competing experts. None of that was ever supposed to be central to antitrust.

Broadly speaking, restraint of trade as used in the common law and original antitrust cases prohibited the following commercial practices: (1) contracts and concerted business arrangements that, for the sake of hindering or suppressing competition, restrain or prevent

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[2] A defendant might sometimes use a naked restraint of trade to exclude rivals and monopolize a market. The defendant's practices in such a case would fail both the doctrine of ancillary restraints and the exclusionary-practices test and would constitute violations of Section 1 and Section 2.

counterparties or others from plying their trades or competing in a market; (2) business arrangements by which sellers or buyers in a market combine their operations in order to control the market; and (3) collusion between buyers or sellers to take advantage of their common sellers or customers (e.g., conspiracies to fix prices, allocate markets or rig ostensibly competitive bidding). Classical antitrust enforced these doctrines, holding offenders in violation of Section 1 of the Sherman Act. Classical antitrust also used these doctrines to explain the meaning of unlawful monopolization in violation of Section 2 of the Sherman Act. Namely, the offense of monopolization condemned a company's deliberate efforts to gain control of a market by acquiring or sabotaging its rivals, but never reached a company that became a monopoly by its commercial excellence or because its market naturally admitted only one seller. Those doctrines should be revived and vigorously enforced. Lastly, Section 7 of the Clayton Act should prevent many more mergers and acquisitions than it has done these past forty years. I explain below an easy, simply administered approach that is faithful to the original Clayton Act and its amendment in 1950 by the Celler-Kefauver Act.

Crucially, all of these doctrines remain on the books and are sometimes enforced by courts disinclined to require the strict showings of consumer-welfare jurisprudence. If these doctrines were openly enforced in all cases and unburdened by consumer-welfare requirements, our antitrust law would be revived, fulfill its purpose, and lay a necessary foundation for our country's long-term prosperity.

This is not an esoteric matter that matters only to antitrust practitioners and concerned companies. Under-enforcement of antitrust law has led to a profusion of economic, political, and social harms of the very kind that antitrust law was originally enacted to prevent and redress – the myriad, worsening evils of unfettered monopoly and oligopoly, which typically include lower overall productivity, diminished economic prosperity, a less innovative economy, higher consumer prices, fewer career and business opportunities, extreme and rising inequality of wealth, and the private capture of public governance. Restoring classical antitrust law by itself cannot answer all of the many challenges that our country faces, but without it we likely cannot enjoy long-term, broad-based economic prosperity that rests on sound fundamentals, nor expect social comity or reliably honest governance. Monopolistic economies do not nurture those outcomes and likely render them impossible for any extended duration. The common law was right on these points, and history proves the point. It is long past time to revive our antitrust law and enforce it according to its intended meaning.

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THE COMMON LAW OF TRADE RESTRAINTS AND MONOPOLIES

The original antitrust laws of the United States were codifications of existing common-law doctrines that prohibited restraints of trade and the willful, unauthorized acquisition of monopoly power. At common law, offending contracts, combinations, and monopolies were unenforceable and subject to equitable decrees. The antitrust laws rendered them civil and even criminal offenses and gave private litigants strong incentives to bring claims against offenders.[3]

The common-law doctrines were generally understood at the time and so were not explained in the antitrust statutes themselves.[4] In modern times, the common-law doctrines have perhaps become unfamiliar to many jurists and the general public, so that a review of them seems vitally important to understanding why we have antitrust laws, what they are supposed to do, and why we have gone so badly astray in the modern era. I therefore offer the following review of the common-law doctrines that were codified in our antitrust laws.

Restraint of Trade

At common law, a *contract in restraint of trade* meant a covenant by which the covenantor promised to the covenantee not to practice a specified trade or profession, participate in a

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3 *See* § III.C, *infra*.

4 *See generally* Albert H. Walker, *History of the Sherman Law of the United States of America* (1910) (digitized by Google) at 14 ("[W]hat is this bill? A remedial statute to enforce, by civil process in the courts of the United States, the common law against monopolies. How is such a law to be construed ? Liberally, with a view to promote its object.") (Senator Sherman, co-drafter and principal sponsor, addressing Congress) (*see also Apex Hosiery Co. v. Leader*, 310 U.S. 469, 497 (1940) ("The common law doctrines relating to contracts and combinations in restraint of trade were well understood long before the enactment of the Sherman law. They were contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like practices, which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market. Such contracts were deemed illegal and were unenforcible [sic] at common law. But the resulting restraints of trade were not penalized and gave rise to no actionable wrong. Certain classes of restraints were not outlawed when deemed reasonable, usually because they served to preserve or protect legitimate interests, previously existing, of one or more parties to the contract.").

specified line of commerce, or compete in some way against the covenantee.[5] Such restraints were permitted only when they were "subordinate and ancillary" to legitimate transactions or collaborations (*i.e.*, reasonably used to perform a legitimate transaction or collaboration, and narrowly drafted to restrain the covenantor only so far as this purpose required).[6]

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5 *See United States v. Addyston Pipe & Steel Co*., 85 F. 271, 279 (6th Cir. 1898), *aff'd after modification on other ground* 175 U.S. 211 (1899) ("From early times it was the policy of Englishmen to encourage trade in England, and to discourage those voluntary restraints which tradesmen were often induced to impose on themselves by contract. Courts recognized this public policy by refusing to enforce stipulations of this character. The objections to such restraints were mainly two. One was that by such contracts a man disabled himself from earning a livelihood with the risk of becoming a public charge, and deprived the community of the benefit of his labor. The other was that such restraints tended to give the covenantee, the beneficiary of such restraints, a monopoly of the trade, from which he had thus excluded one competitor, and by the same mean might exclude others."); *id*. 85 F. at 280 (the principal objection to contracts was that covenantees used them to "reduce competition and create monopolies"); *see also Alger v. Thacher*, 19 Pick. 51, 54 (Mass., 1837) ("The unreasonableness of contracts in restraint of trade and business is very apparent from several obvious considerations: (1) Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions; and they expose such persons to imposition and oppression. (2) They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves. (3) They discourage industry and enterprise, and diminish the products of ingenuity and skill. (4) They prevent competition and enhance prices. (5) They expose the public to all the evils of monopoly; and this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business, and engross the market. Against evils like these, wise laws protect individuals and the public by declaring all such contracts void."); *Mitchel v. Reynolds*, 1 P.Wms. 181, 190 (1711) (Parker, C.J.) ("The mischief which may arise from [such restraints of trade are] (1) to the party by the loss of his livelihood and the subsistence of his family; (2) to the public by depriving it of an useful member. Another reason is the great abuses these voluntary restraints are liable to; as, for instance, from corporations who are perpetually laboring for exclusive advantages in trade, and to reduce it into as few hands as possible.").

6 *See Addyston Pipe & Steel*, 85 F. at 280-282 (offering extended explanation of these points and concluding that "no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the full enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party."); *see also Horner v. Graves*, 7 Bing. 735, 743, 131 Eng. Rep. 284 (1831) ("An agreement in general restraint of trade is illegal and void; but an agreement which operates merely in partial restraint

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For example, a producer of steel could not sign up rivals to agreements by which they all renounced their right to make steel forever in exchange for money; but the seller of a successful business might lawfully give a covenant to his buyer by which the seller became obliged not to open a competing business for a stated duration and within a stated distance of the business sold, so as to protect its goodwill. At common law, the restraint of trade in the first example (imposed on the steel producers) would have been deemed "general" and therefore unlawful, while the restraint described in the second example (imposed on the seller of a business) would have been deemed subordinate and ancillary to a legitimate transaction and therefore lawful. Even in the second example, the seller could not lawfully agree to foreswear all future work in the same line of business, or to do so for any duration if the prohibition absolutely barred him from performing this work anywhere in the country, since any ancillary restraint of trade could not be "general," but only "partial," and must therefore be limited in scope and duration.[7] Any offending trade restraint in a contract was unenforceable and could be enjoined or declared null and void.[8]

At common law, a *combination or conspiracy in restraint of trade* was an agreement between two or more rival sellers by which they established a monopoly, excluded others from competing in their market, fixed their prices, rigged bids, or allocated sales within their market.[9] Restraints

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of trade is good, provided it be not unreasonable, and there be a consideration to support it. In order that it may not be unreasonable, the restraint imposed must not be larger than is required for the necessary protection of the party with whom the contract is made. A contract, even on good consideration, not to use a trade anywhere in England is held void in that country as being too general a restraint of trade."); *Oregon Steam Nav. Co. v. Winsor*, 87 U.S. 64, 66 (1873) ("Questions about contract in restraint of trade must be judged according to the circumstances on which they arise, and in subservience to the general rule that there must be no injury to the public by its being deprived of the restricted party's industry, and that the party himself must not be precluded from pursuing his occupation and thus prevented from supporting himself and his family.").

7 *See Addyston Pipe & Steel*, 85 F. at 280-282.

8 *See id.*

9 *See N. Sec. Co. v. United States*, 193 U.S. 197, 404 (1904) ("Combinations or conspiracies in restraint of trade ... were combinations to keep strangers to the agreement out of the business. The objection to them was not an objection to their effect upon the parties making the contract, the members of the combination or firm, but an objection to their intended effect upon strangers to the firm and their supposed consequent effect upon the public at large. In other words, they were regarded as contrary to public policy because they monopolized, or attempted to monopolize, some portion of the trade or commerce of the realm.") (Holmes, J., dissenting on other grounds); *United States v. E. C. Knight Co.*, 156 U.S. 1, 25 (1895) ("[A] general restraint of trade has often resulted from combinations formed for the purpose of controlling prices by destroying the opportunity of buyers and sellers to deal with each other upon the basis of fair,
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of this kind were always unenforceable and could be enjoined, dissolved or declared void *ab initio.*[10]

Lastly, the common law condemned restraints of trade because of their *tendency* and *likely effects*. Contracts in restraint of trade subjected covenantors to idleness and penury in exchange for immediate gain; deprived society of their labor and skill; and allowed covenantees gradually to monopolize their markets.[11] Combinations and conspiracies in restraint of trade deprived the public of the protections afforded by vigorous competition between competing sellers and competing buyers.[12]

Unauthorized Monopolies

At common law, sellers could not combine in order to end competition in their market and thereby gain a *de facto* monopoly: contracts intended to give effect to such arrangements could be declared *ultra vires* and void, and the offending combinations could be enjoined or dissolved. Technically, a monopoly was an official, public grant of an exclusive concession to practice a commercial activity in a stated place for a stated duration, but the term was also used to describe a seller or group of sellers that contrived to control a market. All private efforts to establish a

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open, free competition. Combinations of this character ... have always been condemned as illegal because of their necessary tendency to restrain trade. Such combinations are against common right, and are crimes against the public.") (Harlan, J., dissenting on other grounds); Sir William Erle, Chief Judge of Court of Common Pleas, *Law Relating to Trade Unions* 5-7 (1869) ("Restraint of trade, according to a general principle of the common law, is unlawful.... [A]t common law every person has individually, and the public also have collectively, a right to require that the course of trade should be kept free from unreasonable obstruction.... "[T]he right to a free course for trade is of great importance to commerce and productive industry, and has been carefully maintained by those who have administered the common law."). Restraints of this kind were always unenforceable and could be enjoined, dissolved or declared void *ab initio.*

10 *See* n. 9, *supra*.

11 *See n. 5, supra*.

12 *See, e.g., Craft v. McConoughy*, 79 Ill. 346, 350, 22 Am. Rep. 171, 174 (1875) ("So long as competition was free, the interest of the public was safe. The laws of trade, in connection with the rigor of competition, was all the guaranty the public required; but the secret combination created by the contract destroyed all competition, and created a monopoly against which the public interest had no protection.") (invalidating a combination among grain dealers).

monopoly were deemed inequitable and obnoxious to the law, and contracts and legal forms used for this purpose were unenforceable.[13]

In contrast, authorized public authorities could properly bestow monopoly charters of limited duration to encourage useful, novel inventions (patent rights); authors' works (copyrights); and private investment in public works and common carriers (franchise rights). Authorized public authorities could also protect the public by allowing professional guilds to regulate their respective professions and restrict entry to qualified practitioners. Otherwise, public authorities lacked any lawful power to limit entry or participation in any trade or commerce, except to impose general regulations applicable to everyone,[14] and a public grant of a monopoly might be

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[13] *See N. Sec.*, 193 U.S. at 339–41 (listing numerous common-law decisions that condemned combinations that gave the combining parties control over a line of commerce); *see also Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420, 451 (1837) ("A monopoly, then, is an exclusive privilege conferred on one, or a company, to trade or traffick in some particular article; such as buying and selling sugar or coffee, or cotton, in derogation of a common right. Every man has a natural right to buy and sell these articles; but when this right, which is common to all, is conferred on one, it is a monopoly, and as such, is justly odious."); *Richardson v. Buhl,* 77 Mich. 632, 43 N.W. 1102, 1110 (1889). ("[C]onsolidation of separate, otherwise competing, companies into one large corporation amounted to a restraint of competition, and an illegal monopoly…."); *People v. Chicago Gas Trust Company,* 130 Ill. 268, 22 N.E. 798, 801–803 (1889) (same); *Distilling & Cattle Feeding Co. v. People,* 156 Ill. 448, 41 N.E. 188, 202 (1895); *see, e.g.*, *Arnot v. Coal Co*., 68 N.Y. 558, 565 (1877) (decreeing invalid a contract between two coal companies by which they established a monopoly over the sale of anthracite coal in part of New York State) ("A combination to effect such a purpose is inimical to the interests of the public. [A]ll contracts designed to effect such an end are contrary to public policy, and therefore illegal. If they should be sustained, the prices of articles of pure necessity, such as coal, flour, and other indispensable commodities, might be artificially raised to a ruinous extent far exceeding any naturally resulting from the proportion between supply and demand.").

[14] *See Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 763–64 (1884) ("I do not mean to say that there are no exclusive rights which can be granted, or that there are not many regulative restraints on civil action which may be imposed by law. There are such. The granting of patents for inventions, and copyrights for books, is one instance already referred to. This is done upon a fair consideration, and upon grounds of public policy…. So, an exclusive right to use franchises, which could not be exercised without legislative grant, may be given; such as that of constructing and operating public works, railroads, ferries, etc…. So, licenses may be properly required in the pursuit of many professions and avocations which require peculiar skill or supervision for the public welfare…. But this concession does not in the slightest degree affect the proposition ... that the ordinary pursuits of life, forming the large mass of industrial avocations, are and ought to be free and open to all, subject only to such general regulations, applying equally to all, as the
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later deemed *ultra vires* and illegitimate, as happened at common law in England, where the common-law doctrines on monopoly were first developed.[15]

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general good may demand; and the grant to a favored few of a monopoly in any of these common callings is necessarily an outrage upon the liberty of the citizen as exhibited in one of its most important aspects, – the liberty of pursuit. [S]uch a grant [is] beyond the legislative power, and contrary to the constitution....").

[15] *See In re Monopolists, Propounders, and Projectors*, *Trin*. 44 Eliz. lib. 11, f. 84, 85; le case de monopolies, 3 Inst. 181 (Coke, C.J.) (Subject to limited exceptions, "all grants of monopolies are against the ancient and fundamentall laws of this kingdome."). Brief History of Monopolies in England: In England, the royal monarchy (the "Crown") historically had the power to grant a monopoly concession or letters patent that conferred on the grantee the exclusive right for a term of years to make and sell a specified product or operate a specified industry in a designated location. From the mid-1500s onward, the Crown increasingly abused this power by granting monopolies to all manner of manufacturers and common tradesmen, giving each the exclusive right to engage in a commonplace commercial activity within a designated area for a term of years, such as a tradesman's exclusive right to sell salt and starch in a town. The Crown granted these monopolies in exchange for very high taxes, which were their inducements; and the grantees, having paid dearly for their monopoly concessions, used them to generate monopoly profits by selling necessary commodities and commonplace articles to captive customers at exorbitant prices and otherwise on one-sided terms and conditions. This practice was widely and deeply resented everywhere in England, and was the cause of riots, ceaseless public clamoring for relief, and eventually a direct confrontation between the Crown and Parliament. To avert a constitutional crisis and possible civil war, the Crown and Parliament agreed in 1601 that common-law courts would (1) adjudge challenges made to any grant or exercise of a monopoly; and (2) develop a common law of monopolies and patents. Vested with this authority, the common-law courts invalidated numerous monopolies previously granted by the Crown, established authoritative standards and procedures for granting monopolies and patents, and eventually decreed that the Crown's patents and monopolies (prior, existing, and future) were contrary to law and therefore void and unenforceable. Parliament confirmed this ruling by promulgating its Statute of Monopolies in 1624, which incorporated the common-law doctrines on monopoly, and which in fact was authored by the preeminent jurist of the era, Edward Coke, who before joining Parliament had served as Chief Judge of the Court of Common Pleas, where he issued the rulings that rendered acts of the Crown and statutes of Parliament subject to the common laws of England. Thereafter, monopolies and patents in England must satisfy the common-law standards or else were invalid. Those standards subsequently informed the standards for patents and monopolies in all countries that adopted the common laws of England (the United States, Canada, Australia, and numerous other countries of the British Commonwealth). Brief History of Monopolies in the American Colonies and the United States: Public grants of monopolies were never abused in the United States in the same way as they had been in England. Indeed, a principal cause of the American Revolution was American
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Lastly, an unauthorized monopolist could never defend its ill-gotten monopoly by arguing that it had not charged excessive prices or otherwise abused its control of an entire market: the danger lay in (1) a monopolist's mere power to overcharge and underserve customers without losing much business; (2) the likelihood that sooner or later the monopolist would somehow use this power to its advantage and to the detriment of its counterparties (customers, suppliers, and other businesses); and (3) the usual tendency of monopolists to offer inferior wares at higher prices, as was often the case in England, where chartered monopolies and patents for basic commodities proliferated until Parliament outlawed them and the common-law courts declared them to be contrary to law and unenforceable.[16]

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colonialists' rebellion against English trading companies that claimed monopoly concessions in colonial commerce. After the United States was formed, public authorities granted monopolies only sparingly and in accordance with the common-law standards. *See Butchers' Union Slaughter-House,* 111 U.S. at 763–64 (explaining when public authorities in the United States would authorize limited monopolies). Broadly speaking, popular sentiment in the United States was even more hostile to monopolies than it was in England, and in both countries monopolists were regarded in the same light as usurers, engrossers, and blackmailers. In the United States, the term "monopoly" came to refer to a seller or combination of sellers that privately and intentionally gained control over an entire market. Lastly, American courts deemed unauthorized and improperly granted monopolies to be "odious" to the law and properly enjoined or dissolved. *See Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 52–57 (1911) (referring to the history of monopolies in England, and explaining that state and federal courts in the United States generally deemed unauthorized monopolies to be "odious" to the law, and that these courts also condemned trade restraints that unreasonably restricted marketplace competition and therefore tended to lead to monopoly, including combinations formed by rival sellers to end competition in their market or exclude other sellers).

[16] *See E. C. Knight*, 156 U.S. at 25 (at common law, trade restraints were "illegal because of their necessary tendency to restrain trade.") (Harlan, J., dissenting on other grounds); *see, e.g.*, *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666, 672 (1880) (decreeing unlawful "an association of substantially all the manufacturers of salt in a large salt-producing territory," and declaring that "[p]ublic policy unquestionably favors competition in trade to the end that its commodities may be afforded to the consumer as cheaply as possible, and is opposed to monopolies which tend to advance market prices, to the injury of the general public. The clear tendency of such an agreement is to establish a monopoly, and to destroy competition in trade, and for that reason, on grounds of public policy, the courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public."); *State of California ex rel. Van de Kamp v. Texaco, Inc.*, 46 Cal. 3d 1147, 1167 (1988) (summarizing the "clear majority view at common law," which was that combinations of business operations that resulted in a monopoly were unlawful because of
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ANTITRUST LAW WAS ORIGINALLY DIRECTED AGAINST THE GREAT INDUSTRIAL TRUSTS

American antitrust law codified and reinvigorated the common-law doctrines against restraint of trade and unauthorized monopoly. It was enacted to establish general, charter principles for American commerce and specifically to redress the problems that a broad consensus of Americans believed had been and would continue to be caused by the great industrial monopolies and business "trusts" that emerged during the Second Industrial Revolution (c., 1865 to 1914). A brief overview of this era provides an invaluable understanding of this key point.

The Rise of the Great Industrial Trusts During the Second Industrial Revolution

The Second Industrial Revolution was a remarkable period of extraordinary invention and progress in many parts of the world, especially in Europe and North America. During this period, Americans played a pioneering role in developing and harnessing industrial processes to grow food, make goods, construct buildings and structures, transport people and cargo, furnish utilities, and organize work and living arrangements.[17]

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their "purpose, tendency, or natural consequences"); *Standard Oil*, 221 U.S. at 52 ("The evils which [in England] led to the public outcry against monopolies and to the final denial of the power to make them may be thus summarily stated: (1) The power which the monopoly gave to the one who enjoyed it, to fix the price and thereby injure the public; (2) The power which it engendered of enabling a limitation on productin [sic]; and (3) The danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale.").

[17] Among the many striking advances of the era were the introduction and increasing use of mass-produced steel; the laying of steel railroads and use of greatly improved locomotives for regional and transcontinental transport; industrial shipping; macadamized roads paved with asphalt; gas-fired internal-combustion engines; automobiles; greatly improved cable telegraph networks and the first telephone systems; still photography; the greatly improved use of kerosene, gasoline, and coal for lighting and heating; the earliest uses of electrical power; a growing array of chemical compositions for industrial uses; the laying of steel pipelines for carrying water, sewage, petroleum products, and other liquids; greatly improved industrial mining and manufacturing systems; and the increasingly ubiquitous use of standardized machinery, tools, and parts to produce food and finished goods of every description. Towards the end of this era, industrialists initiated the mass production of automobiles and began to build airplanes. These remarkable technologies and new industries came one after the other at a dizzying space. *See generally* Peter N. Stearns, *The Industrial Revolution in World History,* 61-68 (2018); Hugh Brogan, *The Penguin History of the United States of America,* 377-406 (2nd
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To manage the new industrial work, American companies opened and operated mines, mills, foundries, factories, pipelines, and vast logistical operations, and they employed professional managers to direct and oversee hundreds of thousands of wage laborers, who performed increasingly specialized tasks, often doing so in increasingly large, busy cities. To fill these jobs, the United States began to receive legions of immigrants from all parts of Europe, Asia Minor, China, and elsewhere. All of these developments transformed the country: the largely agrarian, homogenous society of farmlands and trading centers that existed before the Civil War (1861–1865) swiftly evolved into a bustling, polyglot, increasingly urban, and highly industrialized society.[18]By the outbreak of the First World War in 1914, the United States had already become the world's greatest and most dynamic industrial power.[19]

To succeed, the great commercial endeavors of the era required enormous funding and were largely undertaken by well-connected, sophisticated entrepreneurs who had close ties to the wealthiest investors.[20] The firms that became most successful in the new industrial economy quickly grew very large and sought to limit competition in their markets so as to avert strong competition on price, which they feared might ruin their costly investments.[21] In one industrial market after another, the largest sellers combined and thereafter acquired all other substantial sellers.[22]

State prosecutors in some states challenged some of these combinations as *ultra vires* transactions, since the combining businesses were incorporated under corporate charters that did not authorize either the combinations themselves or the unregulated monopolies created by them, which rather constituted combinations in restraint of trade.[23] But state officials proved no match

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Rev. Ed. 2001); Michael Hiltzik, *Iron Empires: Robber Barrons, Railroads, and the Making of Modern America,* (Introduction) (2020).

[18] *See generally* Stearns, at 61–68; Brogan*,* at 377–406.

[19] *See generally* Stearns, at 61–68; Brogan, at 377–406.

[20] *See* Brogan, at 381-91.

[21] *See id*.

[22] *See* Stearns at 61–68; Brogan*,* at 377–406.

[23] *See, e.g.*, *State v. Vanderbilt*, 37 Ohio St. 590, 593–95 (1882) ("The attempted consolidation [of competing railroads] was *ultra vires* of the corporations joining therein…. The attempted consolidation is contrary to public policy. The [railroads] are competitive, and the object of the consolidation is to prevent competition. It is the settled public policy of the country not to permit consolidation of competing [railroads]. In nine states of the Union this principle has been incorporated in strong terms into the constitution.... In six states the same principle has been
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for the great industrialists of the late 1800s, and many likely accepted bribes to refrain from taking the ineffectual measures available to them.

In the meantime, sellers intent on combining found a more promising method: they began to use "business trusts" to combine their operations under the laws of New York and New Jersey, which permitted the practice. These trusts designated trustors (the combining sellers), properties held in trust (the sellers' respective stock or their operations and assets), one or more trustees (to manage the sellers' businesses), and beneficiaries (the sellers). Using these trusts, the largest sellers in one industrial market after another united their operations, enlarged them further by acquiring other competitors or their assets, and thereby gained control over their markets. The largest trusts also acquired their suppliers and commercial customers, foreclosing yet more competition at different levels of distribution, and they also began to combine with other large trusts to form immense industrial conglomerates.[24] In this manner, the great industrial trusts quickly gained dominant positions in the great new markets of the era. Towards the end of the nineteenth century, they had become so dominant in their markets, and so large, wealthy and powerful, that they easily outmatched public authorities charged with regulating them and appeared poised to dominate not only the national economy, but American society.[25]

The Standard Oil Trust offers an instructive example. Its head, the legendary John Rockefeller, formed the Standard Oil Company in Cleveland in 1863 while the Civil War was being waged on numerous fronts. He and a partner astutely managed the business and made shrewd acquisitions, and their company emerged as a leading concern by the end of that war. From 1870 onwards, Standard Oil steadily acquired some competitors and purposefully ruined others in order to avert meaningful competition. To this end, Standard Oil colluded with giant railroad carriers to obtain preferential shipping rates; purchased numerous competitors after threatening to ruin them if they did not accept its miserly purchase proposals; and impeded and ruined independent competitors by various means, such as (a) using its control of pipelines to cut off supplies of crude petroleum to rival refineries; (b) buying land along the pathways of rival pipeline projects and then using it to uphold or prevent the completion of these projects; (c) selling refined petroleum products at below-cost prices in places where any competing refiner made sales until the rival went out of business; and (d) bribing state legislators to deny competitors required regulatory approval. By 1880, Standard Oil had become the kingpin of the petroleum industry in the United States,

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established by statute.... In twelve states there is no general provision authorizing consolidation. Such action can be there taken only by special act.... All of the remaining States, with the exception of two (California and Nevada), impose various limitations upon the power of consolidation. This principle of public policy is recognized by the courts. The policy of the state of Ohio upon the subject is the same.... This court has recognized the public policy which forbids monopolies.") (internal citations omitted).

[24] *See generally* Brogan, at 381–391; Stearns, at 61–68.

[25] *See* Brogan, at 381–391; Stearns, at 61–68.

controlling its extraction, transport, refinement into various petroleum products, and final delivery to customers for various industrial and household uses.[26]

To avoid increasingly hostile state regulators and legal proceedings in Ohio, Standard Oil moved its operations to New York City in 1882 and there formed a "business trust," which held the stock of Standard Oil as well as the stock of most other remaining refiners and distributors of petroleum in the country. At the time of its formation, this trust's holdings included refiners that handled more than 90% of all petroleum in the country as well as an indispensable pipeline system (over 4,000 miles long) that alone could provide required crude petroleum to petroleum refiners. John Rockefeller became the principal "trustee" of this trust, and in that capacity he acted as the manager and director of nearly the entire petroleum industry of the United States from 1882 onward.[27]

Rockefeller's Standard Oil Trust treated its counterparties with brutal ruthlessness. Its distinguishing characteristic was that it drove mercilessly hard bargains with everyone. It underpaid suppliers and employees while taxing them with overbearing demands; it overcharged its customers, except when offering pockets of them below-cost goods for a short duration in order to destroy a local competitor; it bribed public officials; and it systematically co-opted or destroyed its competitors. Everyone who dealt with this trust resented but submitted to its demands.[28]

The Standard Oil Trust was one of many such trusts. Other trusts and giant industrial conglomerates accomplished comparable feats of monopolization in most of the other great industries of the era. These giant industrial trusts incited widespread fear and apprehension in the United States in the late 1800s.[29]

As I explain below, antitrust law was established to prevent and redress this kind of business conduct and to ensure that, once curtailed, it would not arise again in some new form. As originally conceived, antitrust law was supposed to check the industrial trusts' economic power and increasing control of entire industries. More broadly, it was also intended to establish a regime of competition that would underpin American commerce for the ages.

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[26] Matt Clayton, The Gilded Age: A Captivating Guide to an Era in American History at 48–51 (2021); Brogan, at 385, 389–90.

[27] *See* Clayton, at 48–51 (2021); Brogan, at 385, 389–90.

[28] *See* Clayton, at 48–51 (2021); Brogan, at 385, 389–90.

[29] *See* Brogan, at 381–391; Stearns, at 61–68.

The American Antitrust Movement of the Late 1800s

In the United States, unlike Europe, the economic and social conditions of the Second Industrial Revolution never gave rise to a powerful socialist movement. Instead, the American public preferred and increasingly demanded vaguely defined "antitrust relief" – laws suitable to the American polity that would check and prevent the abuses of the great industrial trusts. The broad antitrust movement of the late 1800s was widespread and strong, having begun among farmers, traders, merchants, and displaced businesses, and having evolved into one of the great social movements of the era. By the late 1880s, public demands for antitrust relief were a highly popular rallying cause in every part of the country and perhaps the only issue on which there was bipartisan agreement among Democrats and Republicans (which at the time were very different formations from their current incarnations). Those who demanded antitrust relief did not belong to a single group or ascribe to a common platform, but at best constituted a diverse coalition, one whose constituents had differing aims and policy preferences. It was ever thus in America.[30]

For all that, there was one animating fear that united the entire movement, infused the historic public debates, and informed the original antitrust laws of the various states and the United States: it was the fear and profound distrust of the giant trusts' unchecked economic power. This matter is easily confirmed by even a casual review of the era's Congressional debates, similar debates in various state legislatures, contemporary newspaper articles, politicians' speeches, and court decisions.[31]

Here is how Senator Sherman, a conservative Republican, characterized the matter in 1890 when addressing Congress to explain the antitrust law that would later bear his name:

> This bill [a draft version of the Sherman Act] does not seek to cripple combinations of capital and labor; the formation of partnerships or corporations; but only to prevent and control combinations made with a view to prevent competition or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer…. Associated enterprise and capital are not satisfied with partnerships and corporations competing with each other, and have invented a new form of combination, commonly called 'trusts,' that seeks to avoid competition by combining and controlling corporations, partnerships and individuals

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[30] *See* Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* 29-32 (2018); Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 Md. L. Rev. 766, 771-777 (2019); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. Pa. L. Rev. 1051, 1053-54 (1979); John J. Flynn, *The Reagan Administration's Antitrust Policy, Original Intent, and the Legislative History of the Sherman Act*, 33 Antitrust Bull. 259, 304-305 (1988); Rudolph J. Peritz, *A Counter-History of Antitrust Law*, 1990 Duke L.J. 263, 314-315 (1991).

[31] *See* Walker, at 13–16.

engaged in the same business, and placing the power and property of the combination under the government of a few individuals, and often under the control of a single man called a trustee, a chairman or a president. The sole object of such a combination is to make competition impossible.... It dictates terms to transportation companies. It commands the price of labor without fear of strikes, for in its field it allows no competitors. Such a combination is far more dangerous than any heretofore invented, and when it embraces the great body of all the corporations engaged in a particular industry in all the states of the Union, it tends to advance the price to the consumer of any article produced. It is a substantial monopoly injurious to the public, and by the rule of both the common law and the civil law is null and void and the just subject of restraint by the courts....

It is this kind of combination we have to deal with now. If the concentrated powers of this combination are entrusted to a single man, it is a kingly prerogative, inconsistent with our form of government, and should be subject to the strong resistance of the state and national authorities.

If we will not endure a king as a political power, we should not endure a king over the production, transportation and sale of any of the necessaries of life. If we would not submit to an emperor, we should not submit to an autocrat of trade with power to prevent competition and to fix the price of any commodity…. These trusts and combinations are great wrongs to the people. They have invaded many of the most important branches of business. They operate with a double-edged sword. They increase beyond reason the cost of the necessaries of life and business, and they decrease the cost of the raw material, the farm products of the country. They regulate prices at their will, depress the price of what they buy, and increase the price of what they sell. They aggregate to themselves great enormous wealth by extortion, which makes the people poor. Then making this extorted wealth the means of further extortion from their unfortunate victims, the people of the United States, they pursue unmolested, unrestrained by law, their ceaseless round of peculation under the law, till they are fast producing that condition of our people in which the great mass of them are servitors of those which have this aggregated wealth at their command. [32]

[32] *See* Walker, at 13-15 (quoting Senator John Sherman's speech in Congress in 1890 to explain the purposes of the Sherman Act of 1890).

The Original Meaning of American Antitrust Law

What was the antitrust remedy demanded by the public? After much debate, and with strong disagreement on emphasis, the consensus was that the best antidote to the power of the industrial trusts was to dust off and reinvigorate the common-law doctrines on restraint of trade and monopolies and treat them as actionable offenses when committed in the interstate or foreign commerce of the United States.[33]

The courts would be charged with applying and developing this law,[34] and to this end they would proceed from the following general precepts: first, the law against restraint of trade would forbid competitors to conspire against their common sellers or customers and also forbid companies to use contracts or coordinated business arrangements in order to impose unreasonable restrictions on market participants that would prevent or hinder them from competing or plying their lawful trades; second, the law against unauthorized monopolies would prevent any company from using contracts, combinations or business practices to undermine or co-opt competitors and thereby gain or preserve control over an entire line of commerce; third, the courts would have broad authority to grant traditional common-law remedies, such as decrees of avoidance, dissolution, and divestiture, as well as a sweeping array of statutory remedies not available at common law: treble damages and attorney's fees to a prevailing plaintiff in a private action, and civil fines and even criminal penalties in successful public prosecutions; and fourth, the federal version of this law would concern only the interstate and foreign commerce of the United States, and each state

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33 *See* 36 Cong. Rec. 522 (Jan. 6, 1903) ("We undertook by law to clothe the courts with the power and impose on them and the Department of Justice the duty of preventing all combinations in restraint of trade. It was believed that the phrase 'in restraint of trade' had a technical and well-understood meaning in the law.") (statement of Senator Hoar, co-drafter); Walker, at 14 ("[W]hat is this bill? A remedial statute to enforce, by civil process in the courts of the United States, the common law against monopolies. How is such a law to be construed? Liberally, with a view to promote its object.") (quoting Senator Sherman, co-drafter and principal sponsor).

34 *See* George F. Edmunds, *The Interstate Trust and Commerce Act of 1890*, 194 No. Am. Rev. 801, 813 (1911) ("[A]fter most careful and earnest consideration by the Judiciary Committee of the Senate it was agreed by every member that it was quite impracticable to include by specific description all the acts which should come within the meaning and purpose of the words 'trade' and 'commerce' or 'trust', or the words 'restraint' or 'monopolize', by precise and all-inclusive definitions; and that these were truly matters for judicial consideration") (Senator Edmunds, co-drafter of Sherman Act, explaining the final wording of the Sherman Act); *see also* Walker, at 47) ("The Sherman law, when it was approved by President Harrison on July 2, 1890, was like the Constitution of the United States when it was framed in 1787, in that it was expressed in brief, broad and comprehensive language, requiring some judicial construction and many diversified applications to different cases for its practical development into generally recognized law.").

would bear responsibility for enacting and enforcing its own competition law for its intrastate commerce. That is American antitrust law in its original, essential conception.[35]

Thus conceived, antitrust law was enacted across the land: from the late 1880s onwards, numerous States enacted their own antitrust laws, [36]and in 1890 the U.S. Congress, acting almost unanimously,[37] enacted the Sherman Act, which became the country's first national antitrust law.[38] To redress perceived gaps in the law, Congress enacted the Clayton Act and the Federal Trade Commission Act in 1914.[39] Congress further supplemented these laws by its passage of the Robinson-Patman Act (1936), which clarified and expanded the Clayton Act's prohibition of commercial price discrimination,[40] and by its passage of the Celler-Kefauver Act (1950), which

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35 *See Apex Hosiery*, 310 U.S. at 497–98 ("In seeking more effective protection of the public from the growing evils of restraints on the competitive system effected by the concentrated commercial power of 'trusts' and 'combinations' at the close of the nineteenth century, the legislators found ready at their hand the common law concept of illegal restraints of trade or commerce. In enacting the Sherman law they took over that concept by condemning such restraints wherever they occur in or affect commerce between the states. They extended the condemnation of the statute to restraints effected by any combination in the form of trust or otherwise, or conspiracy, as well as by contract or agreement...and they gave both private and public remedies for the injuries flowing from such restraints. (....) This Court has since repeatedly recognized that the restraints at which the Sherman law is aimed, and which are described by its terms are only those which are comparable to restraints deemed illegal at common law."); *see also* 15 U.S.C. §§ 1-7 (original Sherman Act passed in 1890); 15 U.S.C. §§ 8-11 (supplemental statutes enacted in 1894).

36 *See Texaco,* 46 Cal. 3d at 1154–62 (discussing state antitrust laws that were adopted around the same time as the Sherman Act, including antitrust laws adopted in Arkansas, California, Kansas, Maine, Michigan, Mississippi, Missouri, Nebraska, New York, North Dakota, Ohio, South Dakota, Tennessee and Texas.); *see, e.g.*, *Marin Cty. Bd. of Realtors, Inc. v. Palsson*, 16 Cal. 3d 920, 925 (1976) ("A long line of California cases has concluded that the Cartwright Act is patterned after the Sherman Act and both statutes have their roots in the common law.").

37 The vote in the House was unanimous, and in the Senate all but one member voted for the bill. *See* Walker, at 34, 41-46.

38 *See* 15 U.S.C. §§ 1-7 (original Sherman Act passed in 1890); 15 U.S.C. §§ 8-11 (supplemental statutes enacted in 1894).

39 These laws are now codified at 15 U.S.C. § 12 *et seq*.

40 *See* 15 U.S.C. § 13. The Clayton Act's original prohibition of price discrimination was directed against predatory pricing schemes conducted by dominant sellers to undermine
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closed a loophole and expanded the reach of the Clayton Act's prohibition of anticompetitive mergers and acquisitions.[41]

As originally conceived, antitrust laws were meant to ensure that, as a general rule, the interstate and foreign commerce of the United States would be conducted by private parties whose vigorous competition with one another would regulate and guide their behavior[42] Wherever possible, markets would be generally competitive, and sellers and buyers in them would vie against one another and thus keep one another honest, even if this approach to commerce proved not to be the most efficient possible way to produce goods and provide services.[43]

The immediate aim of antitrust was to curtail and check the immense power of the giant industrial trusts, and the larger purpose was to prevent marketwide restraints of commerce, corrupt trading practices, and the purposeful monopolization of entire markets.[44] The underlying

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lesser rivals. The Robinson-Patman Act supplemented this prohibition to protect smaller commercial customers from large chain-store buyers that could otherwise prevail on manufacturers to give them preferential prices. *See F.T.C. v. Morton Salt Co.*, 334 U.S. 37, 43 (1948) (explaining why Congress enacted the Robinson-Patman Act – to ensure that large commercial buyers could not undermine competition in their markets by prevailing on sellers to give them favorable prices for commodities, except where the lower prices were justified by cost-efficiencies or competitive conditions).

41 *See Brown Shoe Co. v. United States*, 370 U.S. 294, 315–18 (1962) (explaining that the Celler-Kefauver Act amended the Clayton Act's prohibition of anticompetitive acquisitions so that it reached asset acquisitions, vertical mergers, and conglomerate mergers, and further explaining that the purpose was to arrest a general tendency towards economic concentration in the country's private markets).

42 *See N. Sec.*, 193 U.S. at 337 (1904).

43 *See* Walker, at 47–62; *see also United States v. Aluminum Co. of Am.,* 148 F.2d 416, 428–29 (2d Cir. 1945) ("Alcoa") ("Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.").

44 *See Apex Hosiery*, 310 U.S. at 497–98 (explaining these points, excerpt quoted at n. 3, *supra*); *Standard Oil*, 221 U.S. at 50 ("The main cause which led to the [Sherman Act] was the thought that it was required by the economic condition of the times; that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to
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rationale was that curtailing these practices would preserve the best traditions and potential of American society, protect society from the unchecked power and likely malign influence of dominant industrial combinations, and thereby afford better opportunities and greater prosperity for a larger number.[45]

CLASSICAL ANTITRUST LAW

The Charter Principles of Classical Antitrust Law

From the time the Sherman Act became law in 1890 until the mid-1970s, the federal courts expressly acknowledged or impliedly presumed that federal antitrust law, so far as it applied, existed to protect marketplace competition from (1) any contract, combination or conspiracy that was an actionable restraint of trade at common law, and (2) monopolization, as well as attempts and conspiracies to monopolize (seize control of an entire market). I refer to this period as the "classical era of antitrust."

During this era, the federal courts construed the federal statutes to establish the charter principles of American commerce, which broadly stated were as follows: the interstate and foreign commerce of the United States must be free of undue restraints of trade, monopolization of any

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oppress individuals and injure the public generally."); *see id*. at 83–84 ("All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The nation had been rid of human slavery,—fortunately, as all now feel,—but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people; namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessaries of life. Such a danger was thought to be then imminent, and all felt that it must be met firmly and by such statutory regulations as would adequately protect the people against oppression and wrong. Congress therefore took up the matter and gave the whole subject the fullest consideration…. Guided by these considerations, and to the end that the people, so far as interstate commerce was concerned, might not be dominated by vast combinations and monopolies, having power to advance their own selfish ends, regardless of the general interests and welfare, Congress passed the anti-trust act of 1890….") (Harlan J., concurring in part and dissenting in part on unrelated grounds).

[45] *See* Walker, at 16 ("[T]he general complaint against trusts is that they prevent competition") (Senator Teller, explaining why he and his colleagues voted for the law); *see also Alcoa*, 148 F.2d at 427–29 (explaining these points after examining the original statutes and early case law); *see also United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 323–24 (1897) (explaining that the Sherman Act was intended to protect competition, prevent any combination from destroying it in any line of commerce, and thereby promote economic opportunity and self-reliant commercial enterprise, both of which are vital to a healthy economy and society).

market, and any serious attempt or conspiracy to monopolize any market.[46] Accordingly, the following commercial practices shall not be tolerated in the interstate or foreign commerce of the United States: (1) undue restraints of trade – i.e., any contract, combination, or conspiracy that constitutes a restraint of trade at common law and is used to impose unreasonable restrictions on marketwide competition, including conspiracies of independent sellers against customers, conspiracies of independent buyers against suppliers, and all non-ancillary agreements and conspiracies to fix prices, rig bids, or allocate markets among sellers or among buyers;[47] (2) monopolization – *i.e.*, serious attempts, conspiracies, and successful efforts to control a market

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[46] *See N. Sec.*, 193 U.S. at 337 (the Sherman Act establishes "a rule for interstate and international commerce ... that it should not be vexed by combinations, conspiracies, or monopolies which restrain commerce by destroying or restricting competition.").

[47] *See* 15 U.S.C. § 1; *see also Addyston Pipe & Steel*, 85 F. at 279–84 (agreement between railroad companies to set prices is an unlawful restraint of trade even if the prices thus established are reasonable or fair); *N. Sec.*, 193 U.S. at 331–32 ("[T]he natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promoting trade and commerce; ... to vitiate a combination such as the act of Congress condemns, it need not be shown that the combination, in fact, results or will result, in a total suppression of trade or in a complete monopoly, but it is only essential to show that, by its necessary operation, it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition...."); *Standard Oil*, 221 U.S. at 58-60 (Section 1 codifies common-law prohibition of unreasonable restraints of trade, which are contracts and business arrangements that impose "an undue limitation on competitive conditions"); *Nash v. United States*, 229 U.S. 373, 376 (1913) (The Sherman Act forbids "contracts and combinations" that "by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade."); *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918) ("Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) ("[F]or over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense."); *id.* at 221 ("Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference.").

by suppressing or co-opting competitors;[48] (3) unjustified price discrimination in sales of any commodity to commercial customers that harms either competition between the seller and its customers or downstream competition;[49] (4) commercial bribery;[50] (5) exclusive-dealing or tie-in arrangements for the sale of commodities, when the likely result of any such arrangement would be a substantial lessening of competition in a distinct line of commerce (relevant market);[51]

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[48] *See* 15 U.S.C. § 2; see also *United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966) (*"The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."); *Alcoa,* 148 F.2d at 429–32 (a firm that purposefully acquires or preserves a monopoly over a given line of commerce commits unlawful monopolization in violation of Section 2); *Am. Tobacco Co. v. United States*, 328 U.S. 781, 809–10 (1946) (concerted conduct to acquire or preserve monopoly power is unlawful under Section 2); *Apex Hosiery,* 310 U.S. at 497 (The Sherman Act codified and enlarged the common-law prohibitions of contracts in restraint of trade and conspiracies in restraint of trade, and it also outlawed willful efforts to gain control over any line of the interstate and foreign commerce of the United States by excluding or combining with rival sellers).

[49] *See* 15 U.S.C. § 13(a)-(b), (d)-(f); *see also Morton Salt*, 334 U.S. at 43 ("The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price.").

[50] *See* 15 U.S.C. § 13(c).

[51] *See* 15 U.S.C. § 14; *see also Tampa Elec. Co. v. Nashville Coal Co.,* 365 U.S. 320, 327 (1961) (Exclusive dealing contract violates Section 3 of the Clayton Act when "it [is] probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected.");*Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 605 (1953) ("Tying arrangements, we may readily agree, flout the Sherman Act's policy that competition rule the marts of trade. Basic to the faith that a free economy best promotes the public weal is that goods must stand the cold test of competition; that the public, acting through the market's impersonal judgment, shall allocate the Nation's resources and thus direct the course its economic development will take. Yet tying agreements serve hardly any purpose beyond the suppression of competition. By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market.").

(6) a firm's acquisition of another firm or its assets, when the likely result would be a substantial lessening of competition in a distinct line of commerce (relevant market);[52] and (7) certain kinds of interlocking directorates.[53]

During the classical era, no case ever suggested that the Sherman Act's prohibitions must be limited only to offending trade restraints and monopolization that, in addition, demonstrably reduce overall output in the markets where they are practiced. On the contrary, the decisions established that the Sherman Act reflected a political judgment, inspired by the common-law doctrines, that marketplace competition shall be the organizing principle of American commerce, even if it is not the most efficient way to produce goods and services, but in the expectation that it is the best way over time to promote long-term prosperity and protect not only the economy, but society at large from the corrupting influence and pernicious effects of cartels and ill-gotten monopolies. Markets must therefore be free of offending trade restraints and monopolization, regardless of their short-term effect on marketwide output.[54]

Perhaps the most eloquent description of these points appears in the landmark *Alcoa* decision, which was written by a legendary appellate judge (Learned Hand) after the Supreme Court directed him to decide an antitrust appeal brought by federal antitrust authorities. In this decision, Judge Hand offered the following summary of the Sherman Act's underlying premises and

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52 *See* 15 U.S.C. § 18; *see also Brown Shoe*, 370 U.S. at 315–18 ("The dominant theme pervading congressional consideration of the 1950 amendments [of the Clayton Act] was a fear of what was considered to be a rising tide of economic concentration in the American economy. Apprehension in this regard was bolstered by the publication in 1948 of the Federal Trade Commission's study on corporate mergers. Statistics from this and other current studies were cited as evidence of the danger to the American economy in unchecked corporate expansions through mergers. Other considerations cited in support of the bill were the desirability of retaining 'local control' over industry and the protection of small businesses. Throughout the recorded discussion may be found examples of Congress' fear not only of accelerated concentration of economic power on economic grounds, but also of the threat to other values a trend toward concentration was thought to pose. [Congress] hoped to make plain that [Section 7 of the Clayton Act] applied not only to mergers between actual competitors, but also to vertical and conglomerate mergers whose effect may tend to lessen competition in any line of commerce in any section of the country.... [I]t is apparent that a keystone in the erection of a barrier to what Congress saw was the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency. Congress saw the process of concentration in American business as a dynamic force; it sought to assure the Federal Trade Commission and the courts the power to brake this force at its outset and before it gathered momentum.").

53 *See* 15 U.S.C. § 19.

54 *See* n. 43, *supra*.

prohibitions after examining its legislative history, statutory language, other antitrust statutes, and the Supreme Court's prior antitrust rulings:

> [I]t is no excuse for 'monopolizing' a market that the monopoly has not been used to extract from the consumer more than a 'fair' profit. The [Sherman] Act has wider purposes.... Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone. Such people believe that competitors, versed in the craft as no consumer can be, will be quick to detect opportunities for saving and new shifts in production, and be eager to profit by them. In any event the mere fact that a producer, having command of the domestic market, has not been able to make more than a 'fair' profit, is no evidence that a 'fair' profit could not have been made at lower prices.... [Congress] did not condone 'good trusts' and condemn 'bad' ones; it forbad all. Moreover, in so doing it was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. These considerations, which we have suggested only as possible purposes of the Act, we think the decisions prove to have been in fact its purposes.
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> (....)
>
> [T]here can be no doubt that the vice of restrictive contracts and of monopoly is really one, it is the denial to commerce of the supposed protection of competition....
>
> We have been speaking only of the economic reasons which forbid monopoly; but, as we have already implied, there are others, based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results. In the debates in Congress Senator Sherman himself in the passage quoted in [a footnote] showed that among the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them.... Throughout the history of [federal antitrust statutes] it has been constantly assumed that one of their purposes was to perpetuate and

> preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.[55]

The Underlying Rationale for Classical Antitrust Law

The judicial policies that underpinned the charter principles of antitrust were explained in the common-law decisions and early antitrust cases. The statutory supplements and ringing court decisions in the post-WWII era merely reinforced the ancient common-law doctrines. These policies are simple to recite and necessary to a proper understanding of the original purpose of antitrust law.

First, every person is entitled to practice a lawful trade and to compete to make sales and purchases, and every business to offer its services or wares, subject only to properly exercised public authority and regulation, which in appropriate cases can be delegated to private actors.[56]

Second, private markets should be naturally regulated by uncorrupted commercial rivalry between rival sellers and between rival buyers at each stage of every supply chain. That is the best way to promote economic opportunity, commercial honesty, and good trading practices without repressive public regulation that itself leads to public corruption and a stultified, excessively bureaucratic economy.[57]

Third, competitive rivalry in our markets, if vigorous, protects all market participants. If suppliers compete to make sales to competing dealers that in turn make sales to competing commercial customers, all of them will tend to act on their best behavior and to deal fairly with their counterparties in all dealings. A seller that overcharges its customers will lose them to another seller that offers better terms. A customer that drives an overly hard bargain will find that suppliers have sold their wares to other, more reasonable customers. At the very end of a supply chain, retail sellers will not abuse consumers for fear of losing their business. More generally, competitive rivalry at each stage of a supply chain keeps market participants honest and prevents them from taking advantage of their counterparties. Competitive markets thus encourage best practices, commercial honesty, innovation, and responsive dealings: laggards,

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55 *Alcoa,* 148 F.2d at 427–29 (summarizing the premises and purposes of the Sherman Act).

56 *See* Section II, *supra*.

57 *See* Walker, at 13–16; *Alcoa*, 148 F.2d at 429–32.

swindlers, overly hard bargainers, and the hidebound will tend to lose business to rivals that are enterprising, honest, accommodating, and innovative.[58]

Lastly, a business may lawfully become a monopoly or dominant firm in a highly concentrated market only if it does so by its superior skill, happenstance, or a market's structural limitations, but it cannot acquire or maintain its dominance by any commercial practice that needlessly impedes or prevents any rival from competing against it.[59]

Limitations and Required Clarifications During the Era of Classical Antitrust

During the classical era of antitrust (c. 1890 to 1975), the federal courts clarified how the Sherman Act's general prohibitions would be applied in specific cases. Their early decisions confirmed that these prohibitions codified common-law doctrines, examined these doctrines closely, and applied them *ad hoc.* Later decisions during this period developed and refined administrable standards and rules by which all antitrust cases would be decided.[60] During this

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58 *Alcoa*, 148 F.2d at 427 (L. Hand, J.) (The Sherman Act protects customers from price-gouging imposed by monopolists, and it also has "wider purposes" and therefore forbids the willful acquisition or preservation of a monopoly position even when the monopolist does not charge monopoly rents. The animating theory is "that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone. [C]ompetitors, versed in the craft as no consumer can be, will be quick to detect opportunities for saving and new shifts in production, and be eager to profit by them.").

59 *See id.,* 148 F.2d at 429–30; *Grinnell Corp*., 384 U.S. at 570–71 ("The offense of monopoly under s 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.").

60 *See* Walker, at 295-96 (commenting on the "numerous judicial decisions" that interpreted and applied the Sherman Act during its first twenty years, and observing that these decisions, "with a close approach to unanimity," agreed on the meaning of the Sherman Act's prohibitions); *see also Trans-Missouri Freight Assn.,* 166 U.S. at 340-343 (1897) (expansive statement of the law of restraint of trade, so that it encompasses all contracts by which companies combine to control any line of commerce and thereby avert price competition, regardless of whether they charge reasonable prices or unreasonably high prices); *Addyston Pipe & Steele*, 85 F. at 279–284 (explaining doctrine of ancillary restraints); *Alcoa,* 148 F.2d at 428–29 (examining the original statutes and early case law, and finding that they agreed on the following matters: "[T]he vice of restrictive contracts and of monopoly is really one, it is the denial to commerce of the supposed protection of competition…. We have been speaking only of
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period, the federal courts also examined the constitutionality of the Sherman Act (*i.e.*, whether its provisions violated or must be reconciled with any provision of the United States Constitution) as well as possible conflicts between the Sherman Act and any other federal or state law.

This work entailed conflicting decisions and dissenting opinions and gave rise to important limitations on federal antitrust law, but until the mid-1970s no court decision openly challenged the universal understanding that the Sherman Act, so far as it applied, protected marketplace competition from all unreasonable restraints of trade and the monopolization offenses, not only those that demonstrably lessoned overall output in a market.

Below I offer commentary on certain limitations of antitrust law imposed during its classical era and review the federal courts' gradual adoption of administrable standards and rules for use in all antitrust cases. I also refer my readers to my article on antitrust exemptions and immunities, including those used to reconcile federal antitrust law to other provisions of the U.S. Constitution and our federal system of government. These exemptions and immunities form part of classical antitrust jurisprudence: unlike consumer-welfare jurisprudence, they did not purport to recharacterize the law, but only to limit its applicability under specified circumstances.

The Commerce-Clause Limitation and Early Price-Fixing Cases Led to a Great Era of Industrial Consolidation

While the Sherman Act's meaning seemed clear to its contemporaries, its *reach* occasioned strong disagreement. In its first antitrust ruling, given in 1895, the Supreme Court adopted an extraordinarily narrow reading of the Constitution's Commerce Clause,[61] holding that the Sherman Act did not apply to manufacturing performed within a state, since Congress lacked authority to regulate intrastate activities; rather, the Sherman Act governed only the interstate transport and sale of commodities, but never their manufacture or production, which by

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the economic reasons which forbid monopoly; but, as we have already implied, there are others, based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results. In the debates in Congress Senator Sherman himself in the passage quoted in the margin showed that among the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them.... Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.").

[61] Congress' power to regulate interstate commerce is conferred by the Constitution's Commerce Clause. *See* U.S. Const., art. I, § 8 ("The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States....").

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definition could be done only in one place at a time.[62] Shortly afterwards, the Supreme Court confirmed in a string of rulings that price-fixing by rival sellers of commodities was unlawful *per se* under the Sherman Act.[63]

By these early rulings, the Supreme Court established that (1) the Sherman Act prohibited rival sellers from fixing prices or enforcing other naked restraints of competition when dealing in the interstate transport and sale of commodities;[64] but (2) this law did not reach mining, agriculture, or manufacturing operations, so that producers of commodities could combine with impunity to dominate the production of any commodity.[65] Sellers that acted in interstate commerce could not allocate markets or fix prices to escape the pressures of competition, but producers could avert competition altogether by combining their operations under the laws of any state that permitted them to do so, which usually meant under New Jersey law.

Sellers were guided accordingly. The Supreme Court's rulings on the Sherman Act directly led to an unprecedented wave of large-scale mergers and market consolidation from the mid-1890s to the early 1900s. These mergers were so significant that they lastingly reshaped American commerce, and their effects persist to the present day.[66] For example, the legendary financier J.P. Morgan oversaw the formation of the United States Steel Company in 1901 by combining the operations of steel producers that collectively produced nearly 70% of all steel made in the

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[62] *See E. C. Knight*, 156 U.S. at 16–17. This ruling permitted the infamous Sugar Trust to proceed with its challenged acquisitions of several large sugar refineries by which it gained ownership and control over 98% of all refined sugar produced in the United States. *See id*. at 18.

[63] *See Trans-Missouri Freight*, 166 U.S. at 339 (holding that agreements among railroad operators to fix their respective rates were unlawful under Section 1 even if the rates are reasonable); *U.S. v. Joint-Traffic Ass'n*, 171 U.S. 505, 568-570 (1898) (agreement between railroad companies to set prices is an unlawful restraint of trade under Section 1 even if the prices thus established are reasonable or fair); *Addyston Pipe & Steele*, *Co.* 85 F. at 291 (covenants to fix prices and coordinate bidding made between producers of cast-iron pipes were violations of Section 1).

[64] *See Trans-Missouri Freight,* 166 U.S. at 339; *Joint-Traffic Assn.*, 171 U.S. at 568-570 (1898) (agreement between railroad companies to set prices is an unlawful restraint of trade under Section 1 even if the prices thus established are reasonable or fair); *Addyston Pipe & Steele, Co.* 85 F. at 291 (covenants to fix prices and coordinate bidding made between producers of cast-iron pipes were violations of Section 1).

[65] *See E. C. Knight*, 156 U.S. at 16–17.

[66] *See* Vaheesan*,* at 783-786.

United States, and shortly afterwards US Steel enlarged itself even further by acquiring its largest remaining competitor.[67]

The Supreme Court's severe limitation of the Sherman Act's reach under the Commerce Clause was gradually lessened by a succession of decisions from the early 1900s onward,[68] but it was abrogated only much later, in the landmark case of *Wickard v. Filburn* in 1942.[69] In the meantime, the many large mergers conducted at the turn of the century were largely left intact, but federal prosecutors obtained decrees of dissolution that "busted up" some of the most egregious monopolists, bringing a few major cases with great fanfare during Theodore Roosevelt's Administration (1901-1909), and discretely bringing many more cases during William Howard Taft's Administration (1909-1913) and Woodrow Wilson's Administration (1913-1921).[70]

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[67] *See* Charles R. Morris, *The Tycoons: How Andrew Carnegie, John D. Rockefeller, Jay Gould, and J.P. Morgan invented the American supereconomy* 255-258 (2005); Len Boselovic, *Steel Standing: U.S. Steel celebrates 100 years, PG News – Business & Technology*, (Feb. 25, 2001).

[68] *See, e.g.*, *Swift & Co. v. United States*, 196 U.S. 375, 396-397 (1905) (ruling that several combinations to control production and sale of commodity within various states was part of overall plan to restrain interstate commerce, and that this outcome fell within Congress' authority under the Commerce Clause because the effect on interstate commerce was "not accidental, secondary, remote, or merely probable," but rather was the plan's "direct object," so that "the case [was] not like *United States v. E. C. Knight Co*."); *see generally United Leather Workers' Int'l Union, Loc. Lodge or Union No. 66 v. Herkert & Meisel Trunk Co.*, 265 U.S. 457, 468–69 (1924) ("The *Knight* Case has been looked upon by many as qualified by subsequent decisions of this court. The case is to be sustained only by the view that there was no proof of steps to be taken with intent to monopolize or restrain interstate commerce in sugar, but only proof of the acquisition of stock in sugar manufacturing companies to control its making.").

[69] *See Wickard v. Filburn*, 317 U.S. 111, 124 (1942) ("The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce....").

[70] *See* Walker, at 179-216, 270-284 (recounting the federal government's prosecution of Sherman Act claims during the Administrations of Theodore Roosevelt and William Howard Taft); *see also* Vaheesan, at 787 ("Although the administrations of Theodore Roosevelt, William Howard Taft, and Woodrow Wilson launched a vigorous anti-monopoly campaign, these efforts, at most, undid only a part of the consolidation that resulted from the merger mania between 1897 and 1904…. Given the creation of monopolies in a number of key industries, the public clamored for government action. The administrations of Theodore
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Developing Administrable Standards for Restraint of Trade

A second notable dispute concerned a disagreement over proper construction of Section 1. Did it bar all restraints of trade or only unreasonable ones? This disagreement, although it occasioned lengthy dissents in the earliest opinions, seems to have been more semantic than substantive: courts that viewed the prohibition as absolute defined restraints of trade narrowly, so that the term as defined included only practices that other courts would have characterized as unreasonable restraints.[71] This debate was definitively resolved in *Standard Oil* and again in *Chicago Board of Trade*, both of which clarified that Section 1 prohibited only "undue" or "unreasonable" restraints of trade.[72]

It was not until much later, however, that the courts adopted a "structured rule of reason" that set forth administrable standards for deciding whether a challenged trade restraint was unreasonable. The structured rule was adopted by federal courts long after they had adopted the consumer-welfare standard, and the test incorporates consumer-welfare principles and was never a part of classical antitrust jurisprudence.[73]

During the classical era, the federal courts established various *per se* rules against certain kinds of trade restraints, finding that they were unreasonable as a matter of law. The decisions from

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Roosevelt and especially of William Howard Taft and of Woodrow Wilson initiated a number of major monopolization suits.").

[71] *Compare, e.g.*, *N. Sec.*, 193 U.S. at 331–32 (all restraints of trade are outlawed, but the term refers only to a practice intended to "prevent [the] play of competition" and that "restrains instead of promoting trade and commerce") *with Standard Oil*, 221 U.S. at 58-60 (Section 1 codifies common-law prohibition of unreasonable restraints of trade, which are contracts and business arrangements that impose "an undue limitation on competitive conditions").

[72] *See Standard Oil*, 221 U.S. at 58-69; *Chicago Board of Trade*, 246 U.S. at 238 ("Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.").

[73] *See generally* Areeda and Hovenkamp, *Fundamentals of Antitrust Law* (3rd ed. 2010) at §§16.09 *et seq*. (explaining the "structured rule of reason," which entails a rigorous three-step analysis and shifting burdens of proof); *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019 (10th Cir. 1998) ("Courts have imposed a consistent structure on rule of reason analysis by casting it in terms of shifting burdens of proof."); *Bhan v. NME Hospitals, Inc*., 929 F.2d 1404, 1413 (9th Cir. 1991) (explaining the test); *United States v. Brown Univ*., 5 F.3d 658, 669 (3d Cir. 1993) (same).

this era condemned many such restraints, but rarely condemned a practice under the so-called rule of reason, which was a famously (or infamously) open-ended standard offered by Justice Brandeis in *Chicago Board of Trade* that in essence constituted an expansive restatement of the doctrine of ancillary restraints:

> [T]he legality of an agreement or regulation [under the Sherman Act] cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

***Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918)**.[74]

Developing Administrable Standards for Monopolization

Another matter that remained unsettled was the development of administrable standards for adjudicating claims under Section 2 (monopolization, attempted monopolization and conspiracy to monopolize).

In several early cases, the Supreme Court held that direct competitors, by combining their operations, had restrained and monopolized a "part" of interstate commerce in violation of Sections 1 and 2.[75]

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74 This statement of the law was used not so much to try claims under a distinct rule-of-reason standard as it was to decide whether a challenged restraint should be condemned *per se.* Detractors have bristled at its supposed lack of precision and clear guidance, but defenders regard it as a great restatement of the classical prohibition of contracts and conspiracies that gratuitously suppress competitive interplay.

75 *See Standard Oil* , 221 U.S. at 72–77 (holding that defendants, which were numerous companies and several individuals engaged in the petroleum industry, unlawfully
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But the Supreme Court reached the contrary conclusion in a strikingly similar case brought during the same period, absolving a holding company and 180 steel producers that had combined their operations under its auspices and had thereby become by far the largest steel company in the country and the producer of one-half of its steel (other evidence placed its share of overall production at 70-90%, but the court adopted the lesser figure).[76]

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restrained trade and committed attempted monopolization and monopolization by placing under common ownership and management their respective assets and operations and thereby obtaining control of nearly the entire petroleum industry of the United States);*United States v. Union Pacific R. Co*., 226 U.S. 61, 88 (1912) (holding that defendants, which were two railroads, unlawfully restrained and monopolized commerce in violation of Sections 1-2 when they united their operations under common ownership and management, ended their former competition with one another, and thereby established one seller's uncontested control over a large part of the transcontinental rail system); *United States v. Reading Co.*, 253 U.S. 26, 59–60 (1920) (holding that defendants restrained trade and combined unlawfully in violation of Sections 1-2 by forming a combination of coal producers, coal sellers, and railroad companies that produced one-third of anthracite coal sold in the United States and dominated its production, transport, and sale in Pennsylvania and neighboring regions); *United States v. S. Pac. Co.*, 259 U.S. 214, 229–32 (1922) (holding that defendants, which were two railroad companies, violated Sections 1-2 by combining their assets and operations, operating as single business, and thereby restraining and monopolizing "the carrying trade in some parts from the East and Middle West to the [West] Coast, and for the traffic moving to and from Central and Northern California); *id*., 259 U.S. at 230-31 ("Such combinations, not the result of normal and natural growth and development, but springing from the formation of holding companies, or stock purchases, resulting in the unified control of different [rail] roads or systems, naturally competitive, constitute a menace and a restraint upon that freedom of commerce which Congress intended to recognize and protect [by enacting the Sherman Act] and which the public is entitled to have protected.... one system of railroad transportation cannot acquire another, nor a substantial and vital part thereof, when the effect of such acquisition is to suppress, or materially reduce the free and normal flow of competition in the channels of interstate trade."); *cf. Int'l Harvester Co. v. State of Missouri ex inf. Att'y Gen*., 234 U.S. 199, 209-215 (1914) (declining to invalidate a state's enforcement of its own antitrust statute against a "combination" of sellers that sold 85-90% of farm implements sold within that state, and stating that "[i]t is too late in the day to assert against [state antitrust] statutes which forbid combinations of competing companies that a particular combination was induced by good intentions and has had some good effect. The purpose of such statutes is to secure competition and preclude combinations which tend to defeat it.").

1[76] *See United States v. U.S. Steel Corp*., 251 U.S. 417, 444–445 (1920) (absolving defendants of attempted monopolization or monopolization, where defendants were a holding company and 180 steel producers, which the holding company had acquired and re-organized to operate as one integrated business that made one-half of all steel sold in the United States; the grounds for this ruling were that the defendants, after combining, faced competition from
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In the first series of cases, the court emphasized how the defendants had purposefully acquired or aimed to acquire a monopoly, which it deemed to be control over a distinct "part" of interstate commerce, and which was unlawful if purposefully acquired and was not excused even if the defendants had not abused their control by overcharging customers. In the outlier case, the court did not consider whether the defendants controlled any "part" of interstate commerce and concluded from ambiguous evidence that they had combined operations to improve their production methods and attain economies of scale, not to eliminate competition and control prices. These cases provided extensive, important commentary on the purposes of the Sherman Act, its common-law origins, and the general meaning of its prohibitions, but they did not develop required showings or a definition of monopoly that could be used to review all Section 2 claims. Their differing outcomes underscored the need for improved guidelines for adjudicating Section 2 claims.

Subsequent decisions cured this gap, establishing administrable standards and a corresponding nomenclature (*e.g.*, relevant markets, monopoly power, anticompetitive conduct, etc.) as well as the necessary elements to prove each kind of Section 2 claim. For monopolization, the Supreme Court adopted a two-part test: namely, the offense is proven upon a sufficient showing that (1) the defendant possesses monopoly power in a properly defined relevant market (*i.e.*, within a specified region, the defendant dominates or controls the sale of a distinct category of products that lack reasonable substitutes; and thus situated the defendant sets its prices without regard to the prices of any rival seller and can profitably charge a monopoly price); *and* (2) the defendant "willfully" acquired or maintained its monopoly power by using anticompetitive practices, which are practices that primarily serve to eliminate competition, not improve the defendant's own offerings.[77]

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independent producers and therefore did not control prices for steel sold in the United States; and that the defendants combined their operations not to gain control over the production and sale of steel, but only to streamline their production methods and attain economies of scale.).

[77] *See United States v. E. I. du Pont de Nemours & Co*., 351 U.S. 377, 380-400 (1956) ("Market delimitation is necessary ... to determine whether an alleged monopolist violates s 2. The ultimate consideration is ... whether the defendants control the price and competition in the market for such part of trade or commerce as they are charged with monopolizing.... [A manufacturer's] control in the above sense of the relevant market depends upon the availability of alternative commodities for buyers: i.e., whether there is a cross-elasticity of demand between [the manufacturer's product] and [other products]. This interchangeability is largely gauged by the purchase of competing products for similar uses considering the price, characteristics and adaptability of the competing commodities.... Monopoly power is the power to control prices or exclude competition.... Whatever the market may be, we hold that control of price or competition establishes the existence of monopoly power under s 2.... In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes
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These standards remain on the books, have been further refined in the modern era (*see* preceding footnote) and have also been modified and supplemented by the requirements of the consumer-welfare standard.

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make up that 'part of the trade or commerce', monopolization of which may be illegal....An element for consideration as to cross-elasticity of demand between products is the responsiveness of the sales of one product to price changes of the other."); *Grinnell*, 384 U.S. at 570–71 ("The offense of monopoly under s 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."); *Microsoft*, 253 F.3d at 51 ("The Supreme Court defines monopoly power as the power to control prices or exclude competition. More precisely, a firm is a monopolist if it can profitably raise prices substantially above the competitive level. (....) Because such direct proof is only rarely available, courts more typically examine market structure in search of circumstantial evidence of monopoly power. Under this structural approach, monopoly power may be inferred from a firm's possession of a dominant share of a relevant market that is protected by entry barriers."); *Image Tech. Servs., Inc. v. Eastman Kodak Co*., 125 F.3d 1195, 1206 (9th Cir. 1997) ("Courts generally require a 65% market share" protected by market barriers to show that defendant has monopoly power.); *Broadcom Corp. v. Qualcomm Inc*., 501 F.3d 297, 308 (3d Cir. 2007) ("The second element of a monopolization claim under § 2 requires the willful acquisition or maintenance of monopoly power.... [T]he acquisition or possession of monopoly power must be accompanied by some anticompetitive conduct on the part of the possessor. Anticompetitive conduct may take a variety of forms, but it is generally defined as conduct to obtain or maintain monopoly power as a result of competition on some basis other than the merits. Conduct that impairs the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way may be deemed anticompetitive."). <u>Further Explanation of Terms Used</u>: A monopolist's power to exclude rivals from a market usually arises from its legal rights (e.g., patent rights), its control of an upstream input, or its control of a downstream outlet. A monopolist controls prices in a market because no competitor can undersell it even if it charges prices that are substantially higher than an efficient seller's cost to supply the product. This circumstance arises when (1) there is no other seller in the market; or the market's only other sellers lack the means to supply the products at issue in sufficient quantities or quality, and they cannot procure sufficient means to do so because of market barriers; and (2) new firms cannot enter the market because of market barriers. Thus situated, a monopolist is unconstrained by the prices of any rival seller and usually raises its prices to the monopoly price, which is its most profitable possible price on the demand curve for the products at issue. A monopolist's price is invariably higher than a competitive price, which is set by competitive interplay and tends towards the lowest price that an efficient seller can profitably charge for a stated quantity (i.e., the seller's marginal cost to supply requested products, including a competitive profit or return on investment).

Public Industrial Policy and Managed Trade During the Great Depression

The core premise of federal antitrust law was incompatible with the federal government's efforts to supervise and coordinate the production and distribution of commodities and other goods during the nadir of the Great Depression. In a desperate bid to revive a moribund economy, Congress enacted industrial-policy legislation in 1933 that suspended federal antitrust law and authorized producers of commodities to coordinate sales, establish production quotas, and set prices and wages under the supervision of federal authorities.[78] The Supreme Court rejected an antitrust challenge to one such arrangement,[79] but in 1935 it invoked constitutional grounds to strike down key provisions of Congress' industrial-policy legislation.[80] In a similar vein, Congress passed another law in 1937 that authorized individual States to permit vertical price-setting schemes undertaken by a producer and its sellers. This law remained in effect until Congress repealed it in 1975 after finding that it had led to increased retail prices.[81]

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[78] *See* The National Recovery Act of 1933, Pub. L. 73–67, 48 Stat. 195 (to encourage growth and full employment at higher wages, this law suspended federal antitrust law, authorized federal supervision of entire industries, and, subject to this federal supervision, allowed producers in various industries to coordinate and set prices, production quotas, market allocations, and wages); *see generally* Wu, at 78, 92.

[79] *See Appalachian Coals v. United States*, 288 U.S. 344, 359-378 (1933), *overruled on unrelated ground by Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984). In *Appalachian Coals*, the Supreme Court rejected a Sherman Act challenge to an agreement among rival coal producers in Appalachia to appoint a single sales agent to coordinate their sales, set prices, set wages, allocate profits, and thereby ensure that the producers did not undercut one another's prices and thus bring ruin upon themselves. In that decision, the Court went out of its way to identify the unfavorable economic circumstances that beset the Appalachian coal industry, and it endorsed industry-wide collaboration as an appropriate means to address these threats to the industry's stability and prosperity. That approach constituted a radical departure from the classical common-law doctrines.

[80] *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) ("On both the grounds we have discussed, the attempted delegation of legislative power and the attempted regulation of intrastate transactions which affect interstate commerce only indirectly, we hold the code provisions here in question [key provisions of the National Industrial Recovery Act of 1933] to be invalid and that the judgment of conviction must be reversed.").

[81] *See Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 904–05 (2007) ("In 1937, Congress passed the Miller–Tydings Fair Trade Act, 50 Stat. 693, which made vertical price restraints legal if authorized by a fair trade law enacted by a State. Fifteen years later, Congress expanded the exemption to permit vertical price-setting agreements between a
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The federal policy of managed industry not only suspended antitrust law and raised constitutional concerns, but also failed to accomplish its purposes – which were to spur economic activity, increase employment, and restore general prosperity. Franklin D. Roosevelt's Administration therefore pivoted away from this policy from the late 1930s onward, when it chose instead to favor expansive, aggressive enforcement of the Sherman Act to prevent market concentration. Strong antitrust enforcement thus became a hallmark of American governance from the late 1930s onwards. This approach was continued by ensuing Administrations until the election of Richard Nixon in 1968, and it was generally embraced by the federal courts until the late 1970s, when Nixon's judicial appointees began to develop a common-law of consumer-welfare jurisprudence.[82]

5. *During Its Classical Era, Antitrust Existed to Protect Marketwide Competition*.

The above limitations and gaps in the law never led to a fundamental revision or re-interpretation of the Sherman Act. During the classical era of antitrust, the federal courts largely agreed on the meaning and purpose of the its prohibitions, which are summarized above. The principal limitation, the Supreme Court's narrow reading of the Commerce Clause, faded from view and was whittled away shortly after it was announced, and then was abrogated in 1942. A second cross-current, the industrial policy of the 1930s, vanished even more quickly because it did not work. By the late 1930s, the Roosevelt Administration had definitively abandoned its efforts at managing industry and looked instead to aggressive antitrust enforcement to underpin a competitive economy sustained not only by its large industries, but also by a profusion of new, small, independent businesses, which would create work, provide pay, and furnish goods and services to a languishing economy.

The Roosevelt Administration's heightened antitrust enforcement proved remarkably successful. To manage the effort, Roosevelt hired a renowned antitrust attorney, Thurmond Arnold, who in turn assembled a large, distinguished team of attorneys and microeconomists. They collaborated to write a new playbook for enforcing federal antitrust law and established a tradition of strong public antitrust enforcement that continued until the late 1960s. They studied markets to look for suspected violations and anticompetitive tendencies, conducted disciplined, careful investigations, used cease-and-desist correspondence to stop some anticompetitive practices, brought cases to stop or prevent others, and by their excellent briefing of issues in their cases helped to establish very good antitrust jurisprudence. These efforts also encouraged private plaintiffs and state prosecutors to bring their own actions against antitrust offenders.

Cumulatively, heightened antitrust enforcement in the postwar era had a profound, enduring effect on American commerce. American businesses increasingly took care to avert antitrust complications by eschewing obviously anticompetitive practices that implicated any of the *per se*

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manufacturer and a distributor to be enforced against other distributors not involved in the agreement. McGuire Act, 66 Stat. 632. In 1975, however, Congress repealed both Acts.").

[82] Wu, at 78-83; Vaheesan, at 792–93.

rules under Section 1, and by remaining focused on the quality of their own offerings rather than seeking to undermine and exclude rivals or collude with them. Market concentration was also halted in many instances by merger challenges. Those are the very outcomes that antitrust is intended to promote.

In an economy where antitrust is enforced in this manner, many companies might grow very large and operate in concentrated markets that naturally can accommodate only a few efficient sellers that produce at scale to meet the demands of all customers, and some companies might even become monopolies because of the excellence of their offerings or the structure of their markets. But few or none will deliberately undermine rivals to gain and keep control of a market and thereafter seek monopoly rents (because of heightened enforcement of Section 2); gratuitous market concentration will gradually become less pronounced, alleviating non-cooperative oligopolistic conduct (because of heightened enforcement of Section 7 of the Clayton Act); and in concentrated markets firms will be less likely to collude secretly to set prices or restrict output (because of heightened enforcement of Section 1). Antitrust, if properly enforced, eventually leads to these outcomes and largely deters the most brazen kinds of exclusionary and collusive conduct. Instead, companies must compete by the quality of their offerings and are kept honest and innovative by their competition with one another in most markets. Those circumstances in turn encourage the best kinds of commercial practices and formation of new businesses across the entire economy.

That at least is the theory of classical antitrust. It seems to have been vindicated by history: the era of heightened antitrust enforcement in the United States (the late 1930s to the late 1960s) largely coincided with the post-WWII era (c. 1945-1973), which is when the American economy enjoyed its longest run of widespread prosperity and world-class commercial excellence. Robust antitrust enforcement alone cannot account for this extraordinary economic performance, but it likely provided a necessary underpinning by obliging companies to compete to prosper and by largely foreclosing exclusionary tactics and collusion as viable commercial strategies.

During the post-WWII era, vigorous antitrust enforcement was also associated with good governance and uncorrupted democracy, just as it had been when it was first enacted to check the original industrial trusts.[83] During the interwar, and the during the frenzy of WWII itself, powerful monopolies supported and funded nationalist-authoritarian movements in Nazi Germany, Mussolini's Italy, and Imperial Japan in exchange for immense franchises, contracts, and commercial advantages. These authoritarian movements in turn were impelled by their own internal dynamics to launch unprovoked wars of naked aggression (later called the Second World War) and to commit unspeakable atrocities against vulnerable minorities in the lands that they controlled. [84]After the war, many scholars and prominent political leaders opined that the nationalist-authoritarian movements could not have gained power anywhere without

83 *See* Wu, at 78–81; Vaheesan, at 779.

84 *See id*.

monopolists' support, and that monopolistic economies had corrosive effects on society that create fertile grounds for these kinds of movements.[85]

On this telling, the distinguishing characteristics of monopolistic economies are winner-take-all-markets; a sur-abundance of people who lack any apparent means of independently succeeding in their own ventures; a chronic lack of meaningful commercial innovation; regulatory capture; extreme disparities in wealth and income; and a pervasive, economy-wide dependence on dominant firms (suppliers require their orders and customers their products, and many employees find their best or only opportunities at dominant firms or at companies that supply a dominant firm). Cumulatively, those circumstances are propitious for unscrupulous demagogues and deranged true-believers in extremist movements, which gain popular favor, momentum, and consequential political and social force.[86] During the postwar era, many American politicians and commentators seemed attentive to these issues and credited antitrust not only for nurturing a prosperous, innovative economy, but also for helping to protect American society from the vices and failings of monopolistic economies.[87] In earlier times, the same kinds of concerns had informed the common-law doctrines and original antitrust debates, and they were revived amid new circumstances after the Second World War.[88]

THE CONSUMER-WELFARE STANDARD HAS CONTORTED AND EMASCULATED FEDERAL ANTITRUST LAW

It all changed with President Nixon's overhaul of the Supreme Court, which ever since has been a largely conservative court dominated by jurists who often have been skeptical of the merits of federal antitrust law, and who have narrowed its reach and meaning while completely redefining its intended purpose. From the late 1970s onward, the Supreme Court and lower federal courts have adopted one restrictive or unworkable antitrust doctrine after another, all of them premised on the absurdly misnamed consumer-welfare standard, which has *harmed* consumers by permitting every species of monopoly and trade restraint to hinder and suppress competition with

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85 *See id*.

86 *See id*.

87 *See id*.

88 *See id*.

impunity, so long as the offenders take care not to charge prices that are demonstrably and provably supracompetitive.[89]

The Consumer-Welfare Standard, Explained

The consumer-welfare standard was originally formulated by a legendary conservative jurist, Robert Bork, who was famously hostile to federal antitrust law, believing that it did more harm than good and imposed indefensible burdens on American businesses. To develop this standard, Judge Bork relied heavily on the antitrust teachings of the so-called "Chicago School," which purported to apply neo-classical price theory to antitrust issues, an exercise that almost invariably entailed making a complicated, counter-intuitive showing as to why the defendant's conduct should not be condemned as an antitrust violation. Once the Supreme Court adopted this approach to antitrust, it was more fully developed and explained with more nuance and moderation in a widely respected treatise on antitrust law compiled by two highly regarded law professors, the late Philip Areeda of Harvard Law School and his protegé, Herbert Hovenkamp, who now teaches law and economics at the University of Pennsylvania. That treatise in turn has long served as the authoritative guide to federal antitrust law that is routinely consulted by federal judges in antitrust cases.[90]

According to the consumer-welfare standard, the *only* proper purpose of federal antitrust law is to *promote maximum productive efficiency*, which is usually if not always best accomplished by permitting sellers and other market participants to make commercial agreements among themselves and to conduct commerce and allocate resources as they deem fit to do without any hindrance imposed by federal antitrust law.[91] Antitrust law should therefore condemn conduct only when (1) it constitutes an antitrust offense under classical antitrust jurisprudence; *and* (2) its effect or necessary tendency is to reduce overall output of a good or service in a properly defined

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[89] Wu, at 102-109; Vaheesan, at 792–800. *Cf*. Lino A. Graglia, *The Antitrust Revolution*, 9 *Engage* 3, 38 (2008) ("In what is surely one of the most amazing reversals of direction ever in a major field of law, nearly all of this was changed in the Burger (1969-'86) and Rehnquist (1986-'05) Courts and continues to be changed in the Roberts Court. After an era of continuous expansion, antitrust has entered an era of almost continuous contraction. The per se rule is essentially gone, rejected explicitly in some areas and implicitly in others, giant mergers are regularly approved, monopolists are permitted to compete vigorously, predatory pricing claims are treated with extreme skepticism, price discrimination is treated like predatory pricing, conspiracies have been made more difficult to prove, the paradoxical single-firm conspiracy concept is gone, and summary judgment is available to antitrust defendants.") (approvingly stated).

[90] *See* Wu, at 102–109.

[91] *See* Robert H. Bork, *The Antitrust Paradox: A Policy at War With Itself* locs. 634, 696, 733 (Digital Ed. 2021).

market. Under this standard, an antitrust plaintiff must prove the traditional elements of its claim and further prove that the defendant's conduct has diminished or inevitably must diminish overall output in a given line of commerce.[92]

That is the consumer-welfare standard. Its title is a misnomer, since it is solely concerned with conduct that lessens overall output in a given market: an alleged antitrust violation might severely harm customers, but if it does not reduce or promise to reduce marketwide output, it is absolved.[93] Under the consumer-welfare standard, the apprehended evil is *economic inefficiency, not harm to consumers*, much less the unchecked power of giant industrial monopolies and combinations. A business commits an antitrust violation *only* when it charges captive customers so much for its goods that the customers end up purchasing fewer of them, thus ensuring that resources that otherwise would have been used to make these goods are instead diverted to another, less efficient use in another market.[94]

Consumer-welfare jurists describe this diversion of resources as the "social cost" of monopoly pricing. This theory depends on the following economic precepts. A monopolist or cartel, if it chooses, can raises the price of its product, or reduce marketwide output of it and thereby force

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92 *See id.; see also* Robert H. Bork, "Legislative Intent and the Policy of the Sherman Act," 9 *Journal of Law and Economics*, at 7 (1966), reprinted in *The Political Economy of the Sherman Act: The First One Hundred Years*, at 39 (1991) (When enacting the Sherman Act, "Congress intended the courts to implement ... only that value we would today call consumer welfare.... [T]he policy the courts were intended to apply is the maximization of wealth or consumer want satisfaction. This requires courts to distinguish between agreements or activities that increase wealth through efficiency and those that decrease it through restriction of output."); *id*. at 43-47, 52-58, 61-70 (arguing that the Sherman Act condemns only trade restraints and monopolization that lessen "economic efficiency," which occurs when a cartel fixes prices or allocates markets, and which otherwise occurs only when the challenged practices are used to eliminate marketwide competition in order to restrict marketwide output and force customers to pay supracompetitive prices); *see generally* Herbert Hovenkamp, *Federal Antitrust Policy: the Law of Competition and Its Practice,* at 62-64, 77 (3rd Ed. 2005) ("The consumer welfare principle in use has become identical with the principal that the antitrust laws should strive for optimal allocative efficiency" – a concept whose "cruder" statement is that antitrust law exists to promote the "highest output and lowest prices in the market in question.").

93 *See generally* Hovenkamp*,* at 63-64 (according to consumer-welfare jurisprudence, "[a]ntitrust enforcement should be designed in such a way as to penalize conduct precisely to the point that it is inefficient, but to tolerate or encourage it when it is efficient," and "the decision to make this market efficiency model the exclusive guide for antitrust policy is nonpolitical…. Thus if a practice produces greater gains to business than losses to consumers, it is efficient and should not be illegal under the antitrust laws.").

94 *See id*.

customers to bid up its price. In direct consequence, customers overall will purchase and receive less of the product, while paying more for it; the monopolist or cartel will generate higher profits from lesser overall output; and the national economy will be deprived of the additional output of the product that would have been produced in a competitive market. In contrast, sellers in a competitive market can survive only by charging prices as low as those charged by their competitors. This circumstance usually means that over time the price for a product sold in a competitive market will be the lowest price that an efficient seller can charge to cover its marginal cost to supply the product, including a competitive profit (return on investment). When a product is sold at such prices, customers buy more of it, and sellers therefore produce more of it to meet customers' increased demand.[95]

It is that deprivation of output alone that bothers proponents of the consumer-welfare standard. They refer to it as the "dead weight of monopoly."[96] Related harms entailed by the same conduct are monopoly rents,[97]and lost competitor investment.[98] All of these harms result in less output and less efficient economic production, which in turn are the only proper concerns of antitrust law, according to consumer-welfare jurisprudence. A monopolist that can practice perfect price-discrimination should be permitted to do so if the practice allows it to maintain the same level of output that sellers would provide in a competitive market, which is possible if the seller's price discrimination is calibrated to its customers' different reservation prices and not too costly to administer.[99]

Under the consumer-welfare standard, the telltale signal of a cognizable antitrust offense is "supracompetitive prices" – prices higher than those that a seller could profitably charge in a competitive market.[100] According to the theory, supracompetitive prices can be profitably

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95 *See generally* id. *at* 17-26.

96 *See generally id.* at 18-20.

97 *Id*. *at* 20-23.

98 *Id*. at 23-26.

99 *See id.* at 575 ("Perfect price discrimination has two important results. First, the [amount] of traditional monopoly profits, or producers' surplus, is increased. Everything that would be consumers' surplus in a competitive market may become monopoly profits under perfect price discrimination. Second, output under perfect price discrimination is ... the same as under perfect competition. For this reason perfect price discrimination is often said to be as efficient as perfect competition, even though one result of perfect price competition is that customers are far poorer and the seller far richer.").

100 *See Rebel Oil Co. v. Atl. Richfield Co*., 51 F.3d 1421, 1433 (9th Cir. 1995) ("[A]n act is deemed anticompetitive under the Sherman Act only when it harms both allocative
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charged for an extended duration only by a monopolist or cartel whose customers are largely beholden to it for want of a viable alternative.[101] Even then, supracompetitive prices are unobjectionable when they do not result in lesser output – an outcome that is possible when a monopolist can implement "perfectly calibrated" price discrimination.[102]

It is only when a monopolist or cartel successfully imposes supracompetitive prices without practicing perfect price discrimination that market inefficiencies occur: buyers pay more to receive less of the product in question; and the monopolist or cartel earns higher profits from selling less of the product in question. Therefore, the monopolist or cartel makes less and delivers less of the product to the buyers, resulting in the diversion to other markets of inputs that would be used to make the product if it were sold in a competitive market.[103] In a competitive market, sellers would have sold the product at lower prices, buyers would have purchased more of the product, and sellers therefore would have made and delivered more of it. Inputs that would have been used to make this product in a competitive market are diverted to less efficient uses elsewhere in the economy when this market is monopolized or allocated by a price-fixing cartel. That diversion of inputs to other markets is the sole concern of the consumer-welfare standard.[104] That is the sole or principal evil to be prevented and redressed by the Sherman Act, according to consumer-welfare jurisprudence.[105]

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efficiency and raises the prices of goods above competitive levels or diminishes their quality.") (*citing Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223–225 (1993) (holding that a seller's predatory pricing, even if undertaken to destroy rival sellers, becomes unlawful under the Sherman Act only if the plaintiff can show that the seller, after excluding its rivals by predatory pricing, is likely to "recoup" the cost of predatory pricing by imposing supracompetitive prices).

101 *See* William M. Landes & Richard A. Posner, "Market Power in Antitrust Cases," 94 *Harv. L. Rev*. 937, 937 (1981) ("The term 'market power' refers to the ability of a firm (or a group of firms, acting jointly) to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded."); *see, e.g.*, *Microsoft*, 253 F.3d at 51 ("[A] firm is a monopolist if it can profitably raise prices substantially above the competitive level.").

102 *See* Hovenkamp, at 575.

103 *See* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ("Areeda & Hovenkamp"), at ¶¶403-405 (Wolters Kluwer online, 2021).

104 *See id*.

105 *See Rebel Oil*, 51 F.3d at 1433.

In theory, consumer-welfare jurisprudence acknowledges that harm to competition can also occur when the "quality" of output is reduced by the challenged conduct,[106] but the courts almost never find a defendant liable on this ground.[107] Indeed, there are vanishingly few cases in which the courts have even taken up the matter in earnest. Perhaps the most well-known instance occurred in the *Glen Holly* case, in which the Ninth Circuit held that a plaintiff had adequately pled an antitrust claim under Section 1 by alleging that two sellers, whose offerings competed directly, agreed to remove one of their product offerings from the market, thereby obliging customers to buy the sole remaining offering; this conduct, if presumed true, was actionable under Section 1 because it "limited consumers' choice to one source of output."[108] But even this example shows how narrow is the reach of antitrust under the consumer-welfare standard: under classical antitrust law, any such agreement between the only two sellers in a market would be readily condemned as market allocation, or as an unlawful "combination," and at best could be justified only if the defendants were able to show at trial that they had removed one of their offerings in order to improve the other under a joint collaboration agreement – which would have been a highly implausible and difficult showing. Any complaint alleging such an agreement *never* would have been dismissed on the pleadings as it was by the district court in *Glenn Holly*. Even more startling, the most aggressive proponents of consumer-welfare jurisprudence have cast doubt on the very *theory* of harm to competition caused by the removal of an entire product offering in order to force consumers to buy the only remaining version of the product at a higher price.[109]

To justify using the consumer-welfare standard, its proponents have argued that federal antitrust law was originally enacted and should always be enforced only to prevent trade restraints and monopolizing conduct that result in sub-optimal output, supracompetitive prices, and the ensuing misallocation of resources in the national economy, which is the "social cost" of monopoly. Only these matters constitute "harm to competition" under the consumer-welfare standard. Nothing else should be condemned as an antitrust violation, nor was ever intended to be condemned.[110].

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106 *Id*.

107 *See* Areeda & Hovenkamp*, supra* note 93 at ¶¶ 403-405.

108 *See Glen Holly Enter., Inc. v. Tektronix Inc.*, 343 F.3d 1000, 1010–11 (9th Cir.), *opinion amended on denial of reh'g*, 352 F.3d 367 (9th Cir. 2003).

109 *See Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1202 (9th Cir. 2012) ("[A]llegations that an agreement has the effect of reducing consumers' choices or increasing prices to consumers does not sufficiently allege an injury to competition. Both effects are fully consistent with a free, competitive market.").

110 *See* Bork*,* at loc. 696, 733; *see also* Bork, "Legislative Intent and the Policy of the Sherman Act," at 39, 43-47, 52-58, 61-70; *see generally* Hovenkamp, at 62-64; Areeda & Hovenkamp, at ¶¶402-405.

On this telling, the evil to be averted is not an exclusionary firm's willful cornering of its market, nor collusion by dominant rivals to suppress competition, nor the incremental acquisition of market power by exploitive covenantees, nor the many economic and social harms that arise from these kinds of practices, but only reduced output in a given line of commerce.(((See Bork, at loc. 696, 733; see also Bork, "Legislative Intent and the Policy of the Sherman Act," at 39, 43-47, 52-58, 61-70; see generally Hovenkamp, at 62-64; Areeda & Hovenkamp, at ¶¶402-405.)))[111]

If a widget company commits a classical violation, and if in so doing it also causes less widgets to be produced in the United States, it can be held liable for an antitrust violation. Otherwise, it gets a free pass. Indeed, monopolies are to be encouraged and congratulated for their contributions to the economy unless they restrict overall output in their lines of commerce.[112]

Perhaps the most forthright characterization of consumer-welfare jurisprudence is the following passage from *Rebel Oil*, a famous antitrust decision rendered by the Ninth Circuit in 1995 (with original citations preserved in the quotation):

> Competition consists of rivalry among competitors. *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1040 (9th Cir.1987), *aff'd*, 496 U.S. 543 … (1990). Of course, conduct that eliminates rivals reduces competition. But reduction of competition does not invoke the Sherman Act until it harms consumer welfare. *Products Liab. Ins. Agency, Inc. v. Crum & Forster Ins. Cos*., 682 F.2d 660, 663 (7th Cir.1982); *see Reiter v. Sonotone Corp*., 442 U.S. 330, 343 … (1979) (Congress designed the Sherman Act as a "consumer welfare prescription") (quoting Robert H. Bork, The Antitrust Paradox 66 (1978)). Consumer welfare is maximized when economic resources are allocated to their best use. *National Gerimedical Hosp. and Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378, 387–88 & n. 13 [1981], … and when consumers are assured competitive price and quality. *Products Liab. Ins*., 682 F.2d at 663–64. Accordingly, an act is deemed anticompetitive under the Sherman Act only when it harms both allocative efficiency and raises the prices of goods above competitive levels or diminishes their quality.

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111 *See* preceding discussion, *supra*.

112 *See Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (Scalia, J.) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.").

The Ninth Circuit Court of Appeals, explaining the consumer-welfare standard in the case of *Rebel Oil Co. v. Atl. Richfield Co*., 51 F.3d 1421, 1433 (9th Cir. 1995).

Apart from everything else, this theory of federal antitrust law is *contrary* to the original aim of antitrust law, which was to deter and prohibit undue restraint of trade and monopolization even if doing so entailed a sacrifice of commercial efficiency.[113]

The Practical Significance of the Consumer-Welfare Standard

In practice, the consumer-welfare standard has been usually impossible to satisfy. That is because its principal required showing – supracompetitive prices – is usually difficult or impossible to make in most markets, in which sellers offer differentiated products or services that are sold at varying prices, often under confidential contracts, so that a defendant's prices might be higher than those of its rivals, but justified by its brand, or by superior or additional features in its product, or because the defendant offers related services that its rivals do not provide or provide in slightly different ways.[114] Also, it is usually difficult or impossible to ascertain a firm's true marginal cost – the economic cost of selling an additional unit; but Chicago School price theory posits that a monopolist or cartel charges supracompetitive prices only when its pricing is higher than its marginal costs, including the cost of attracting capital investment (i.e., paying reasonable profits to investors).[115]

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113 *See* Sections III & IV, *supra*.

114 *See* Areeda & Hovenkamp, at ¶504 ("[T]he technical measure of [supracompetitive pricing] ... can seldom be used explicitly in antitrust cases…. Many firms do not sell their products at a single price. Rather, they have a schedule of prices, to which they may not adhere consistently. They have different prices for differing conditions of sale, different size containers, different transaction sizes, different degrees of risk assumption, and perhaps for different classes of customers. In addition, the firm may offer several differentiated products whose prices and costs vary from one to the next.").

115 *Id*. (explaining the practical impossibility of proving "the excess of price over marginal cost to find market power"); *see also Microsoft,* 253 F.3d at 51 ("[D]irect proof [that a firm profitably charges supracompetitive prices] is only rarely available....").

That means that antitrust plaintiffs usually must make a poorly defined substitute showing, using "indirect evidence" to prove that a defendant's challenged practices likely have resulted in reduced output.[116] In most cases, the courts find these proofs to be deficient.[117]

It turns out that supracompetitive prices can be readily shown only in *perfectly competitive markets*, where such prices *will never be charged,* except when a secret cartel organizes and enforces a marketwide conspiracy to fix prices or allocate markets. In perfectly competitive markets, all sellers offer an undifferentiated commodity at the market price (say, sweet corn by the bushel delivered to Chicago wholesalers on November 1, 2021). The market price, in turn, is the price that it costs efficient sellers to bring the commodity to market, including a minimally reasonable profit. If any seller strays above this price, it will instantly lose all future sales to other sellers that continue to charge the market price. If a seller charges below the market price, its ensuing sales will be done at a loss, and it will be quickly inundated with orders that will harm it the more it fills them.[118] In such a market, sellers have no power over their prices, and every seller can deprive every other of business if the other charges uncompetitive prices or otherwise imposes unfair terms of trade. That is a perfectly competitive market. It is perfectly competitive precisely because many sellers vie to make sales of an undifferentiated commodity that buyers will readily buy from any seller that offers it at the market price.[119] Cartels might occasionally try to fix prices and allocate sales in such markets, giving rise to conduct that is condemned under the consumer-welfare standard. It is the mere low-lying fruit of antitrust law, but seemingly the only target of consumer-welfare jurisprudence.[120]

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116 *See Ohio v. Am. Express Co*., 138 S. Ct. 2274, 2284 (2018) ("*Amex*") ("Direct evidence of anticompetitive effects would be proof of actual detrimental effects on competition, such as reduced output, increased prices, or decreased quality in the relevant market. Indirect evidence would be proof of market power plus some evidence that the challenged restraint harms competition.").

117 *See Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2161 (2021) ("[C]ourts have disposed of nearly all rule of reason cases in the last 45 years on the ground that the plaintiff failed to show a substantial anticompetitive effect.") (*citing Brief for 65 Professors of Law, Business, Economics, and Sports Management as Amici Curiae 21*, n. 9 ("Since 1977, courts decided 90% (809 of 897) on this ground")).

118 *See generally* Hovenkamp*,* at 3-12 (explaining how firms set prices in perfectly competitive markets).

119 *See generally id.; see also* Paul A. Samuelson, *Economics,* at 483-509 (1st Ed. 1948).

120 Wu, at 104–109; Vaheesan, at 792–800.

In contrast to a perfectly competitive market, a monopolized market is one in which one seller or a cartel offers a product or service which customers cannot procure from any other seller, and which they use for purposes that cannot be fulfilled by any other product or service.[121] Proving the hypothetical price of such a product in a competitive market is often difficult, and it becomes a meaningless exercise when the service in question is funded by advertisers rather than customers, which is the case for online services such as Facebook's social-media network.

Most markets, however, are neither perfectly competitive, nor monopolized, but are said to be "monopolistically competitive." Sellers in these markets have varying degrees of market power over subsets of customers, and each tries to distinguish its offerings from those of rival sellers by brand, product features, service options, financing terms, and so forth. It is almost impossible to measure supracompetitive prices in these markets, since by their very nature they include differentiated products or services.[122]

There lies the rub. Supracompetitive prices can be readily shown only in markets where they typically cannot be charged – i.e., in perfectly competitive markets. In consequence, antitrust claims in the modern era too often fail because the consumer-welfare standard requires a showing of a classical antitrust offense, plus a further showing of supracompetitive prices, but this second showing usually cannot be made by direct evidence in the very markets where classical antitrust offenses are most likely to occur – markets that have been monopolized or are monopolistically competitive.[123] The courts have limited any possible daylight by usually taking

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121 *See generally* Hovenkamp, at 12-14 (explaining how monopolies and cartels set prices in monopolized or cartelized markets); *see also* Samuelson, at 493–509.

122 *See* Samuelson, at 491-493.

123 *Cf*. Areeda & Hovenkamp, at ¶ 504 (explaining practical difficulties of proving that a defendant is charging supracompetitive prices). In fairness, during the consumer-welfare era the Supreme Court has expressly clarified that restraint of trade concerns all "undue" restrictions on competition, *see Amex*, 138 S. Ct. at 2283, and that restraint of trade encompasses a broader range of business practices than do attempted or actual monopolization, *see Copperweld*, 467 U.S. at 768 ("§ 1 prohibits any concerted action in restraint of trade or commerce, even if the action does not threaten monopolization."); *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 190 (2010) ("Section 1 applies only to concerted action that restrains trade. Section 2, by contrast, covers both concerted and independent action, but only if that action monopolizes or threatens actual monopolization, a category that is narrower than restraint of trade."). A necessary corollary is that a plaintiff should never be obliged to prove supracompetitive prices or restricted marketwide output in a Section 1 case, since, by definition, those practices can be implemented only by a monopolist or cartel. *See id*. This point is impliedly confirmed by Supreme Court decisions during the consumer-welfare era. *See, e.g.*, *California Dental Ass'n v. F.T.C.*, 526 U.S. 756, 781 (1999) (remanding case for full rule-of-reason review of dental association's restrictions of dental advertising, since the restraints were binding on most
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a skeptical, narrow view of "indirect evidence" used to show how a defendant's challenged practices have reduced economic efficiency in such markets.[124]

The upshot is easy to state. In the age of consumer-welfare antitrust, countless plaintiffs have forgone claims that would likely have prevailed on simple proofs in the era of classical antitrust jurisprudence, while countless others have made the attempt in vain, devoting much of the case to proving supracompetitive prices or other harms to economic efficiency, and paying fortunes to expert economists to prepare supporting reports, but all too often with the same luck as Don Quixote enjoyed when trying to joust against the windmills of Spain. In these cases, any court so inclined can find fault with the plaintiff's evidence, or merely find that the plaintiff has failed to provide preponderant evidence of supracompetitive prices, which properly speaking do not exist or are usually impossible to discern or demonstrate in markets that are monopolistically competitive or monopolized.[125]

Even so, some antitrust claims have miraculously survived the consumer-welfare standard. Most notably, when the charging offense is a trade restraint challenged under a *per se* or quick-look standard, the courts presume "harm to competition" (i.e., macroeconomic inefficiency) and do not oblige the plaintiff to demonstrate how the offense resulted in supracompetitive prices or

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dentists in various local markets and, as worded, appeared likely to result in less competition on price and quality in these markets, but with no required showing of supracompetitive prices or restricted market output); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986) (an association of dentists violated Section 1 under the rule of reason by enforcing a rule that none of its members could provide x-rays to their payors, since the rule was binding on the "great majority" of dentists in three counties in Indiana and tended to diminish marketwide competition among them). Nonetheless, some lower courts appear to have overlooked this key distinction, using the same requirement of harm to competition for claims under Section 1 and Section 2, and thus rendering all such claims overly difficult to prove. *See, e.g.*, *Rebel Oil*, 51 F.3d at 1433 (for purposes of antitrust law, actionable harm to competition occurs only when the defendant's exclusionary conduct results in supracompetitive prices, restricted output, and a misallocation of economic resources). Even if the reform that I recommend in this article is not adopted, the courts should clarify the foregoing points and make clear that harm to competition under Section 1 does not require proof that the defendant has acted as only a monopolist or marketwide cartel can do. Otherwise, Section 1 would be rendered a largely superfluous statute that merely duplicates Section 2 and even imposes an additional requirement (proof of concerted conduct) that is not required under Section 2. *See Copperweld*, 467 U.S. at 768.

[124] *See Alston*, 141 S. Ct. at 2161 (the overwhelming majority of rule-of-reason cases fail on the ground that the plaintiff has failed to show harm to competition); Vaheesan, at 792–800.

[125] *See Alston*, 141 S. Ct. at 2161; Vaheesan, at 792–800.

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restricted output.[126] This concession has mattered less than it should, since the same courts have abolished *most* of the per se prohibitions from the classical era, finding that these prohibitions cannot be reconciled with the ideal of "economic efficiency" extolled by consumer-welfare jurisprudence.[127]

The courts have also been willing to issue preliminary injunctions to prevent anticompetitive mergers and acquisitions challenged under Section 7 of the Clayton Act by the Federal Trade Commission or the U.S. Department of Justice.[128] To do so under the current standards, the plaintiff must show that each seller's market share in a properly defined market; then calculate the sum of each market share squared. The resulting number, if sufficiently high, confirms that the market is "highly concentrated" according to the DOJ-FTC Horizontal Merger Guidelines of 2010. Any such merger is presumptively anticompetitive and subject to injunction or divestiture, especially if it directly eliminates existing competition between the merging parties. Even then, the merger's proponents can try to justify it by arguing that on balance it is pro-competitive.[129]

In these cases, the required threshold showings are so high that successful challenges are usually made only to patently anticompetitive mergers, which likely would never have even been *attempted* in the classical era. Antitrust law during the consumer-welfare era has thus failed to check rampant, pervasive market consolidation. Public prosecutors and private claimants,

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[126] For *per se* violations, harm to competition is presumed, and there is no need to show supracompetitive prices or a reduction of output. *See Amex*, 138 S. Ct. at 2283 ("A small group of restraints are unreasonable *per se* because they always or almost always tend to restrict competition and decrease output."). For quick-look violations, harm to competition is presumed, but the defendant is afforded an opportunity to justify its use of the challenged trade restraints, after which the plaintiff can rebut the asserted justification as either a pretext or as unnecessarily restrictive because a lesser restraint could readily accomplish the defendant's stated purposes. *See Law*, 134 F.3d at 1020 (a quick-look review is used when a trade restraint is not unlawful per se, but "has obvious anticompetitive effects," in which case the court need not conduct a market analysis and can directly decide "whether the procompetitive justifications advanced for the restraint outweigh the anticompetitive effects.").

[127] *See* Section V.C, *infra.*

[128] *See, e.g., F.T.C. v. H.J. Heinz Co*., 246 F.3d 708, 715-725 (D.C. Cir. 2001); *F.T.C. v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008); *F.T.C. v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 337–39 (3d Cir. 2016).

[129] *See generally H.J. Heinz*, 246 F.3d at 715–25.

knowing what to expect, choose not to challenge most of them. The net effect has been very modest relief, which has resembled mere tinkering at the edges.[130]

Lastly, a few courts sometimes invoke classical antitrust doctrines still on the books to condemn especially egregious misconduct that plainly exposes the defendant's exclusionary aims and practices, but these cases are rare and always vulnerable to challenge on appeal on the ground that the plaintiff failed to show harm to competition – i.e., supracompetitive prices or reduced marketwide output.[131]

Indeed, the consumer-welfare standard has not been absolutely fatal to American antitrust law only because it has been superimposed on existing classical precepts, even if many of the bright-line rules have been abrogated by consumer-welfare jurisprudence. Courts inclined to enforce antitrust law expansively have therefore been able to recite the consumer-welfare standards in passing while imposing antitrust liability that typically depends at bottom on classical doctrines. Courts disinclined to find antitrust liability have tended to apply the consumer-welfare standard more rigorously to absolve defendants, except those that have committed a core cartel offense (price-fixing, market-allocation, or bid-rigging secretly undertaken by orthodox cartels).

None of this should come as any surprise. The consumer-welfare standard was initially developed and applied by judges who did not want to enforce antitrust law at all, and the

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[130] *See generally* U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines (2010); Vaheesan, at 800–03 (merger challenges in the modern era are infrequent and made only in accordance with the FTC-DOJ's highly exacting merger guidelines, which are predicated on consumer-welfare analysis). Note: the Biden Administration's antitrust enforcers have been much more aggressive in their challenges of proposed mergers; they undertook their effort *after* this article was written. The courts so far have largely ruled against their challenges on the basis of the kinds of narrow consumer-welfare analysis described in this article.

[131] *See, e.g., F.T.C. v. Qualcomm Inc.*, 969 F.3d 974, 982–1003 (9th Cir. 2020) (a district court held that defendant, a maker of computer chips for smartphones, had committed unlawful restraint of trade and monopolization by (1) fraudulently obtaining standard-essential patents ("SEPs") that rendered its computer chips the compulsory industry-standard for smartphones, and (2) thereafter using its SEPs to exclude rivals and force its customers to pay exorbitant royalties: specifically, the defendant obtained the SEPs from neutral standard-setting organizations only on condition that it sell or license its chips or technology to all comers, including rival chip makers; but afterwards the defendant largely refused to sell or license its chips or technology to rivals and obliged its captive customers to accept licenses under which they must pay royalties to it based on the number of smartphones that they sell, including those that used a rival's chip; but on appeal this judgment was reversed for want of showing of harm to competition within the meaning of the consumer-welfare standard).

standard was one that sounded eloquent and easily applied on paper, but meant in practice that the antitrust laws would hardly ever be enforced.[132] Here is how Professor Eleanor Fox stated the matter when this transformation of antitrust law was underway, but not yet completed:

> Proponents of one currently popular formula for the solution of all antitrust problems would examine challenged behavior to determine whether it is primarily output-restricting and therefore inconsistent with short-run aggregate consumer welfare as adduced from neo-classical price-theory. If so, the business activity would be condemned. If not, it would be encouraged. This conception of antitrust would prohibit almost nothing at all.

Law Professor Eleanor Fox, explaining in 1980 how the consumer-welfare standard would severely limit the reach of antitrust law.[133]

Consumer-Welfare's Evisceration of Classical Antitrust's Bright-Line Rules to Protect Competition

From the start, consumer-welfare jurists allowed that certain kinds of trade restraints should remain unlawful *per se*, but only those that fit within their extraordinarily narrow construct.[134] Using this analysis, they have shortened the list of *per se* offenses, so that it now includes only secret conspiracies between "horizontal competitors" to fix prices, allocate markets, and rig bids.

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132 Wu, at 102-09 ; Vaheesan, at 792–800.

133 Eleanor Fox, "*The Modernization of Antitrust: A New Equilibrium,*" 66 *Cornell L. Rev*. 1140 (1989) (reprinted in *The Political Economy of the Sherman Act: The First One Hundred Years* 260 (1991).

134 *See Leegin*, 551 U.S. at 886 ("Resort to *per se* rules is confined to restraints, like those mentioned, that would always or almost always tend to restrict competition and decrease output. To justify a *per se* prohibition a restraint must have manifestly anticompetitive effects, and lack any redeeming virtue."); *see generally* Areeda & Hovenkamp, at ¶2000 (explaining how naked price-fixing and market-allocation can be successfully employed only by a cartel – i.e., a group of sellers that collectively wield market power – since only such sellers can increase their profits by restricting output or levying supracompetitive prices).

During the consumer-welfare era, the Supreme Court has struck down and abrogated the classical *per se* rules against vertical market allocations,[135] vertical maximum price-fixing,[136] resale price maintenance (vertical minimum price fixing),[137] most kinds of group boycotts,[138] and most kinds of tie-in arrangements,[139] all of which used to be treated as trade restraints that were unlawful per se under Section 1.

During the consumer-welfare era, the courts have also adopted other restrictive doctrines that have further limited the reach of antitrust law, such as the doctrines on antitrust injury,[140]

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[135] *See Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977) (abrogating *per se* rule against manufacturer restraints that prohibit a distributor from selling its products in specified locations or to specified categories of customers).

[136] *See State Oil Co. v. Khan*, 522 U.S. 3, 7 (1997) (abrogating *per se* rule against vertical maximum price-fixing – which is a producer's requirement that its sellers not sell its products above specified prices).

[137] *See Leegin*, 551 U.S. at 907 (abrogating *per se* rule against resale price maintenance – which is a producer's requirement that its sellers not sell its products below specified prices).

[138] *See Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 294 (1985) (limiting the *per se* rule against group boycotts); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998) (further limiting the *per se* rule against group boycotts, so that it applies only to agreements between direct competitors to withhold their facilities, products or services from one or more targeted customers in order to deprive them of inputs or sales channels that they require to compete proficiently).

[139] *See Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15–17 (1984) (significantly limiting *per se* rule against tie-in arrangements); *Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 31 (2006) (abrogating *per se* rule against tie-ins of a patented tying product and a tied product).

[140] *See Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.*, 429 U.S. 477, 489 (1977) (to prevail on an antitrust claim, a plaintiff must prove its antitrust injury, which is harm that "should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."); *Rebel Oil*, 51 F.3d at 1433 (the doctrine of antitrust injury requires a private plaintiff to "prove that his loss flows from an anticompetitive aspect or effect of the defendant's behavior....").

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circumstantial evidence of antitrust conspiracies,[141] predatory pricing,[142] beneficial monopoly,[143] beneficial vertical price-fixing,[144] beneficial price discrimination,[145] beneficial tie-in arrangements,[146] "two-sided markets",[147] and the presumption of legality for all vertical mergers.[148] Crucially, it is the consumer-welfare standard that underpins these other doctrines, so that all of them properly belong within the category of consumer-welfare jurisprudence.

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141 *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587-88 (1986) ("On summary judgment the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. But antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case.... Conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.").

142 *See Brooke Grp.*, 509 U.S. at 222–23 (severely limiting, or rendering unprovable, the rule against predatory pricing and primary-line price discrimination, doing so by requiring plaintiff to prove that (1) the defendant has sold its products at prices lower than its own costs, and (2) the defendant is likely to recoup its loss after driving its rivals from the market).

143 *See Trinko,* 540 U.S. at 407 (2004).

144 *See Leegin*, 551 U.S. at 887–892 (explaining why resale price maintenance should not be unlawful *per se* and recounting its various procompetitive, beneficial uses and effects).

145 *See generally* Hovenkamp*,* at 574–575 (explaining how a monopolist's perfect price discrimination does not result in any reduction of output); *id*. at 578–581 (explaining how rules against price discrimination abet cartels that practice price-fixing, impose unreasonable enforcement costs, and do not distinguish between procompetitive and anticompetitive practices).

146 *See generally* Hovenkamp, at 399-410 (explaining how economic efficiency can be improved by tie-in arrangements, warning against the cost of enforcing rules against tie-in arrangements that do not diminish economic efficiency, and explaining how locked-in customers forced to buy after-market products likely should pursue contract claims, not antitrust claims).

147 *See Amex*, 138 S. Ct. at 2287 (to prevail on a claim for unlawful restraint of trade "in two-sided transaction markets," such as a credit-card platform that affords credit to customers and immediate payments to merchants, the plaintiff must define a single market that captures these transactions and show how the challenged trade restraint has increased the cost or reduced the overall number of these transactions).

148 *See Alberta Gas Chemicals Ltd. v. E.I. Du Pont de Nemours & Co*., 826 F.2d 1235, 1244 (3d Cir. 1987) ("Indeed, respected scholars question the anticompetitive effects of
(Con't at bottom of next page…)

Collectively, the various consumer-welfare doctrines have been repeatedly used during the past forty years to defeat antitrust claims, exonerate the defendant, and absolve conduct that likely would have been condemned during the classical era.[149] Under the consumer-welfare standard, very little conduct is prohibited by federal antitrust law, and conduct that would have been readily deemed unlawful and therefore rarely or never attempted is openly tolerated under our modern antitrust law.[150]

The Consequences of Consumer-Welfare Jurisprudence

The debate is anything but academic. The consumer-welfare standard, as presumably intended, has severely limited the reach and force of federal antitrust law, which in its modern version prevents only the most egregiously anticompetitive behavior. For this reason, antitrust law has ceased to accomplish its original purposes. That has mattered greatly. It has been during the forty-year period of consumer-welfare jurisprudence that the American economy has ceased to be one characterized by competitive markets. Instead, markets in the United States have been increasingly dominated by monopolies, duopolies, and closed oligopolies that overcharge and underserve their captive customers, underpay their suppliers and employees, and stifle threatening innovators before they can get their operations off the ground.

In 2016, the *Economist* published a groundbreaking study on the dearth of competition in American markets, which described the modern economy of the United States in the following terms.

> After a bout of consolidation in the past decade the [American airline industry] is dominated by four firms with tight financial discipline and many shareholders in common. And the return on capital is similar to

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vertical mergers in general.") (citing William H. Page, "Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury, "47 *U. Chi. L. Rev*. 467, 495 (1980)s ("Foreclosure [by vertical merger] does not, however, reflect an actual reduction in competition in any meaningful sense."); R. Bork, *The Antitrust Paradox* 226, 237 (1978) ("Antitrust's concern with vertical mergers is mistaken. Vertical mergers are means of creating efficiency, not of injuring competition.... [The] foreclosure theory is not merely wrong, it is irrelevant."); Herbert Hovenkamp, "*Merger Actions for Damages*," 35 Hastings L.J. 937, 961 (1984) ("[O]f all mergers, vertical acquisitions are the most likely to produce efficiencies and the least likely to enhance the market power of the merging firms").

149 *See Alston*, 141 S. Ct. at 2161; *see generally* Graglia, 37-42 (2008).

150 *See* F. Rowe, "New Directions in Competition and Industrial Organization Law in the United States", *Enterprise Law of the 80's,* 177, 201 (1980) ("Carried to its full logical rigor, as it has been by the Chicago School of economics, economic analysis keyed solely to 'efficiency' and 'consumer welfare' has revealed with stark simplicity that there will be very little remaining of antitrust.").

> that seen in Silicon Valley. What is true of the airline industry is increasingly true of America's economy as a whole. Profits have risen in most rich countries over the past ten years but the increase has been biggest for American firms....
>
> Profits are an essential part of capitalism. They give investors a return, encourage innovation and signal where resources should be invested. Their accumulation allows investment in bold new ventures…. But high profits across a whole economy can be a sign of sickness. They can signal the existence of firms more adept at siphoning wealth off than creating it afresh, such as those that exploit monopolies. If companies capture more profits than they can spend, it can lead to a shortfall of demand. This has been a pressing problem in America….
>
> High profits can deepen inequality in various ways. The pool of income to be split among employees could be squeezed. Consumers might pay too much for goods. In a market the size of America's prices should be lower than in other industrialised economies. By and large, they are not. Though American companies now make a fifth of their profits abroad, their naughty secret is that their return-on-equity is 40% higher at home. [T]he most troubling aspect of America's profit problem [is] its persistence. Business theory holds that firms can at best enjoy only temporary periods of 'competitive advantage' during which they can rake in cash. After that new companies, inspired by these rich pickings, will pile in to compete away those fat margins, bringing prices down and increasing both employment and investment. It's the mechanism behind Adam Smith's invisible hand. In America that hand seems oddly idle…. The obvious conclusion is that the American economy is too cosy for incumbents.

***The Economist*, commenting in 2016 on the chronic, pervasive lack of competition throughout the American economy.**[151]

Dave Leonhardt of *The New York Times* performed independent research in 2018 and reached similar conclusions: large firms have increasingly dominated American commerce and use their dominance to exploit their counterparties – their suppliers, employees, and customers.[152]

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151 *The Economist*, "*Too much of a good thing*," (Mar. 26, 2016). https://www.economist.com/briefing/2016/03/26/too-much-of-a-good-thing.

152 *See* David Leonhardt, "*The Charts That Show How Big Business Is Winning*," *The New York Times* (June 17, 2018), https://www.nytimes.com/2018/06/17/opinion/big-business-
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Indeed, a surprising number of markets in the United States have become highly concentrated, including markets for various online services, broadband internet, cable television, wireless telephone, hospital services, air travel, beer, and numerous other markets.[153] Before the coronavirus pandemic began in early 2020, the number of start-ups in the American economy had been in decline since 1979, resulting in a clear loss of innovation and commercial dynamism.[154]

As the *Economist* explained in its above study, large firms not only hold dominant positions across the American economy, but generate far higher pre-tax profits from their sales in U.S. markets than they do from their sales in foreign markets.[155] That sounds like the very kind of harm that the consumer-welfare standard supposedly seeks to prevent (unless all of these incumbents have successfully practiced perfect price-discrimination all the while, which would seem to be an impossible scenario as well as a highly unwelcome one to most people).

The consumer-welfare standard, it appears, has failed even according to its own myopic terms: plaintiffs have been too often rebuffed by stringent applications of the standard, and many have been discouraged from even trying to meet it. Modern antitrust law, informed by the consumer-welfare standard, has failed even to redress the one evil that the standard was purportedly invented to redress. As happened before during the original Gilded Era, dominant firms in our own era increasingly control the country's markets and regularly abuse this control to charge supracompetitive prices that result in the misallocation of resources, lesser overall output, and

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mergers.html (explaining how in the 1980s small companies – those that employ less than 50 employees – collectively employed millions more employees than did large firms – those that employ more than 10,000 employees, but now the reverse is true, and explaining how large firms in recent years have been able to "take advantage of workers, consumers, taxpayers, and small businesses.").

[153] David Autor, *et al*., "*Concentrating on the Fall of the Labor Share*," 107 *Am. Econ. Rev.: Papers & Proceedings* 180, 183 (2017) (identifying "a remarkably consistent upward trend in concentration" in various industries that provide manufacturing, finance, services, utilities, retail trade, and wholesale trade).

[154] *See* Ryan A. Decker, et al., "*Where Has All the Skewness Gone? The Decline in High-Growth (Young) Firms in the U.S.*," 86 *Eur. Econ. Rev.* 4 (2016) (finding a decline in the firm entry rate since 1979); *see also* Ian Hathaway & Robert E. Litan, "Declining Business Dynamism in the United States: A Look at States and Metros", at 1, fig. 1 (2014) (finding a decline in the firm entry rate between 1978 and 2011) (Brookings Institution, https://www.brookings.edu/search/?s=Hathaway+Litan).

[155] *See The Economist*, *"*Too much of a good thing,*"* (Mar. 26, 2016) (quoted at length above).

the dead weight of monopoly pricing.[156] But the consumer-welfare standard, rather than redress even this circumstance, weeds out cases that by its own standards it should condemn. The standard is too difficult to prove and largely unworkable, and more than anything else it resembles a "get-out-of-jail-for-free" card that adroit monopolists and oligopolies can readily invoke to defeat antitrust challenges.

In direct consequence, the private markets of the United States have become far less competitive than they otherwise would have been. Indeed, a persistent, endemic dearth of competition has become the hallmark of our modern economy: this fatal flaw in the national commerce has foreclosed business opportunities, stifled innovation, diminished general prosperity, and given rise to various popular discontents. Our antitrust laws, hobbled by consumer-welfare doctrines, have permitted this state of affairs and as currently interpreted are largely powerless to redress it.

It is time, then, to reform federal antitrust law.

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[156] *See id.*

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THE SIMPLEST, BEST WAY TO REFORM AMERICAN ANTITRUST LAW

The antidote is simple. The federal courts have long recognized their authority to develop and elaborate a common law of American commerce under the Sherman Act and its sequel statutes.[157] The courts should exercise this prerogative to clarify that the consumer-welfare standard is never a *sine qua non* of any antitrust claim, but at most one method among others to prove a relevant market, a defendant's monopoly power or a defendant's anticompetitive conduct. The lynchpins of antitrust, however, should be the *exclusionary-practices test* for exclusionary conduct and the *doctrine of ancillary restraints* for collusion and oppressive covenants.

The Exclusionary-Practices Test. The exclusionary-practices test incorporates classical antitrust jurisprudence and is used to determine whether an antitrust defendant has used exclusionary practices to restrict, prevent or suppress competition in a properly defined relevant market. Proof of this point is always required (but never sufficient) to prove a claim of

[157] *See Leegin*, 551 U.S. at 899–900 ("From the beginning the Court has treated the Sherman Act as a common-law statute. Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on restraints of trade evolve to meet the dynamics of present economic conditions. The case-by-case adjudication contemplated by the rule of reason has implemented this common-law approach."); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 271–72 (2d Cir. 1979) ("The Sherman Antitrust Act of 1890 has been characterized as a charter of freedom. For nearly ninety years it has engraved in law a firm national policy that the norm for commercial activity must be robust competition…. In passing the Sherman Act, Congress recognized that it could not enumerate all the activities that would constitute monopolization. Section 2, therefore, in effect conferred upon the federal courts a new jurisdiction to apply a common law against monopolizing."); *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 98, n. 42 (1981) ("In antitrust, the federal courts act more as common-law courts than in other areas governed by federal statute."); *see also* Edmunds (co-drafter), at 813 ("[A]fter most careful and earnest consideration by the Judiciary Committee of the Senate it was agreed by every member that it was quite impracticable to include by specific description all the acts which should come within the meaning and purpose of the words 'trade' and 'commerce' or 'trust', or the words 'restraint' or 'monopolize', by precise and all-inclusive definitions; and that these were truly matters for judicial consideration"); 36 Cong. Rec. 522 (Jan. 6, 1903) ("We undertook by law to clothe the courts with the power and impose on them and the Department of Justice the duty of preventing all combinations in restraint of trade. It was believed that the phrase 'in restraint of trade' had a technical and well-understood meaning in the law.") (statement of Senator Hoar, co-drafter); *see also* Walker, at 47–48.

monopolization or attempted monopolization under Section 2.[158] This same proof is likewise required (but not sufficient) to prove certain other antitrust claims (e.g., competitor suits brought under Section 1 or Section 3 of the Clayton Act to challenge a rival's exclusive-dealing, tie-ins or bundled discounts).

The Exclusionary-Practices Test: Its Essential Inquiry and Terms of Art. The essential inquiry made by the exclusionary-practices test is whether a defendant has used a business practice (the "accused practice") to develop, offer, or improve its own products (variously called "pro-competitive conduct," "competing on the merits," or "efficiency-enhancing conduct"), or whether the defendant has used the accused practice to restrain, prevent or suppress competition in its market ("exclusionary conduct"). If the accused conduct is pro-competitive, it is blameless under the antitrust laws and does not constitute predicate conduct for any claim that requires proof of the defendant's exclusionary conduct. If the accused conduct is exclusionary, it constitutes the necessary predicate conduct, and the defendant will be held liable for an antitrust violation if the other required elements of the violation are also present (*e.g.*, in a claim for monopolization, it is also necessary to establish that the defendant has acquired or maintained monopoly power in a properly defined relevant market).

Different Courts Have Used Varying Terminology to Describe the Exclusionary-Practices Test. The courts have used varying terms of art to make this same essential inquiry, asking whether the defendant's accused practice is "pro-competitive," "competition on the merits," or "efficiency-enhancing conduct."[159]

Despite the slightly different phrasing, these cases have established the following standard or test. Namely, a defendant's accused practice is exclusionary if (1) it imposes significant or prohibitive burdens or restrictions on marketwide competition; and (2) it is not pro-competitive (or, what is the same thing, it is not "competition on the merits" or "efficiency-enhancing conduct").[160] The harm to marketplace competition must be sufficient to insulate the defendant from competitive discipline imposed by a rival that can deprive it of business: it might be

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158 *See Microsoft*, 253 F.3d at 58 ("[H]aving a monopoly does not by itself violate § 2. A firm violates § 2 only when it acquires or maintains, or attempts to acquire or maintain, a monopoly by engaging in exclusionary conduct as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.").

159 *See Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008) ("Anticompetitive conduct tends to impair the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way."); *see also Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585, 605 (1985) ("If a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as predatory.").

160 *See Cascade Health*, 515 F.3d at 894; *Aspen Skiing*, 472 U.S. at 605.

sufficient to show the exclusion of a single rival where the defendant's monopoly has come under threat from one rival, and the defendant uses various exclusionary practices to run the rival out of business and thereby suppress this one threat to its monopoly.[161] It might also be sufficient to show that the defendant uses trade restraints with many customers (e.g., exclusive-dealing contracts or bundled rebates), and that cumulatively they foreclose competition for such a substantial part of the market that no substantial rival can make enough sales to attain a foothold in the market or produce at scale and thereby pose a competitive threat.[162] But mere harm to a rival or even various rivals is by itself insufficient to prove the requisite harm to marketplace competition caused by the accused practice: it must "harm the competitive process and thereby harm consumers."[163]

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161 *See Microsoft*, 253 F.3d at 59–80 (examining a series of accused practices to determine whether each one was an exclusionary practice that defendant used to suppress one competitor's nascent threat to its monopoly, and finding that some of them were exclusionary practices that defendant used for this purpose); *see also Aspen Skiing Co.*, 472 U.S. at 610–11 (defendant, a monopolist, engaged in exclusionary conduct by refusing to continue its dealings with its only competitor, since by this refusal the defendant harmed its own customers and forsook short-term profits in order to weaken its competitor and enlarge its monopoly in the market; the accused conduct had the requisite effect on competition because there were only two sellers in the market, and by the accused conduct the defendant definitively weakened its only rival, relegating it to a marginal role in the market).

162 *See Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1302–03 (9th Cir. 1982) (ruling that it is appropriate to consider the defendant's "aggregate pattern of conduct" in the relevant market to determine whether it has used exclusive-dealing covenants and other restrictive covenants with many customers in order to foreclose competition in a substantial part of the market) (citing *Fortner Enterprises v. U. S. Steel Corp.*, 394 U.S. 495, 504 (1969)); *see also Orchard Supply Hardware LLC v. Home Depot USA, Inc.*, 967 F. Supp. 2d 1347, 1362 (N.D. Cal. 2013) ("a defendant who restrains trade by an obvious pattern and practice of entering into individual contracts should not be allowed to do piecemeal what he would be prohibited from doing all at once.").

163 *Microsoft*, 253 F.3d at 58 (D.C. Cir. 2001) ("[Defendant's exclusionary conduct] must harm the competitive process and thereby harm consumers. In contrast, harm to one or more competitors will not suffice."). Crucially, the *Microsoft* court did not require a showing of supracompetitive prices or restricted marketwide output to establish harm to consumers; instead, it examined whether the defendant's accused practices effectively suppressed the only competitive threat to its monopoly by undermining a rival's business before it could evolve and disrupt the defendant's business model. *See id*. 253 F.3d at 59-80.

In the landmark *Microsoft* case, the D.C. Circuit announced a five-step inquiry for making similar determinations.[164]

> Whether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern: the means of illicit exclusion, like the means of legitimate competition, are myriad. The challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it. From a century of case law on monopolization under § 2, however, several principles do emerge. First, to be condemned as exclusionary, a monopolist's act must have an anticompetitive effect. That is, it must harm the competitive process and thereby harm consumers. In contrast, harm to one or more competitors will not suffice.(....) Second, the plaintiff ... must demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect.(....) Third, if a plaintiff successfully establishes a prima facie case under § 2 by demonstrating anticompetitive effect, then the monopolist may proffer a procompetitive justification for its conduct. If the monopolist asserts a procompetitive justification—a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal—then the burden shifts back to the plaintiff to rebut that claim. Fourth, if the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit.(....) Finally, in considering whether the monopolist's conduct on balance harms competition and is therefore condemned as exclusionary for purposes of § 2, our focus is upon the effect of that conduct, not upon the intent behind it. Evidence of the intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct.

United States v. Microsoft Corp., 253 F.3d 34, 58–59 (D.C. Cir. 2001) (explaining a five-step inquiry for determining whether a monopolist has used exclusionary conduct to gain or keep its monopoly).

My Proposed Exclusionary-Practices Test. From the foregoing principles, I have derived the following standard for identifying a defendant's exclusionary practices and propose it as my

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[164] The *Microsoft* decision uses some terms that have been adopted by consumer-welfare jurisprudence, but it uses them in their classical sense, and while it cites some of the leading consumer-welfare cases (an inevitability in modern times), the logic of its principles and findings are derived from the classical jurisprudence that it also cites – particularly *Standard Oil*, *Chicago Board of Trade*, *Alcoa*, and *Grinnell*. *See Microsoft*, 253 F.3d at 58–80.

“exclusionary-practices test”: An antitrust defendant will be deemed to have used exclusionary practices if its challenged trade restraints or other business practices (the "accused practices") meet the following three criteria: (1) the accused practices have the effect of undermining, burdening, or excluding one or more of the defendant’s competitors; (2) by so doing, they substantially lessen competition in the defendant's market -- *i.e.*, they impair, prevent, or suppress competitive interplay in this market and thereby insulate the defendant from meaningful competitive discipline, or at least that is their clear and necessary tendency; and (3) the defendant does not use these practices to develop or improve its own products or services, or at best uses them for this purpose, but in a manner that causes needless or gratuitous harm to competitors and the competitive process in the defendant's market. In other words, the exclusionary-practices test identifies and condemns business practices that antitrust defendants use not to build a better mousetrap, but only to hinder or prevent all others from doing so.

If a business practice meets the above three criteria, it fails the exclusionary-practices test, is deemed "exclusionary," and therefore constitutes predicate conduct for any antitrust claim that requires a showing of the defendant's exclusionary conduct. Proof of a defendant's exclusionary conduct never suffices to establish an antitrust violation, but is a necessary showing for many antitrust claims -- namely, all claims made under Section 2 of the Sherman Act (15 U.S.C. § 2) (“Section 2”), as well as some claims made under Section 1 of the Sherman Act (15 U.S.C. § 1) (“Section 1”) and Section 3 of the Clayton Act (15 U.S.C. § 14).

Use of Exclusionary-Practices Test in Section 2 Cases. Under my proposed reform of antitrust law, the exclusionary-practices test would be used as follows to decide claims under Section 2. A defendant would be held liable for monopolization if the following matters were proven: (1) the defendant acquired or maintained a monopoly in a properly defined relevant market; and (2) to do so, the defendant used an accused practice (a trade restraint or other business practice) that fails the test. For an attempt, the necessary proofs would be as follows: (1) the defendant nearly acquired monopoly power in a properly defined relevant market; (2) to do so, the defendant used an accused practice that fails the test; and (3) the defendant must have intended to acquire a monopoly – a point that can be inferred from its conduct. For conspiracy to monopolize, it would be necessary to meet the elements of attempted monopolization or monopolization and further show that two or more independent defendants conspired to procure the monopoly or near-monopoly for one legal person (one of the defendants or some other legal person). A private plaintiff must also show that the defendant's use of trade restraints was a substantial cause of harm to the plaintiff's business or property. The doctrine of antitrust injury would be treated as a narrowly construed affirmative defense that the defendant must prove, as I explain below. There would be no requirement of proving restricted output or supracompetitive prices in the relevant market.

Use of Exclusionary-Practices Test in Cases Arising Under Section 1 or Section 3 of the Clayton Act. Under my proposed reform of antitrust law, the exclusionary-practices test would be used as follows to decide any claim under Section 1 or Section 3 of the Clayton Act that requires a showing of the defendant’s exclusionary conduct. Namely, a defendant would be held liable for unlawfully restraining trade if the following matters were proven: (1) the defendant’s trade

restraints fail the exclusionary-practices test; and (2) the defendant used these trade restraints in a way that substantially lessened marketwide competition in a properly defined market – i.e., the trade restraints durably foreclosed competition for a substantial part of overall sales, or durably deprived threatening rivals of an input or sales outlet that they required to compete proficiently, and in consequence competitive interplay in the market was substantially diminished. A private plaintiff must also show that the defendant's use of trade restraints was a substantial cause of harm to the plaintiff's business or property. The doctrine of antitrust injury would be treated as a narrowly construed affirmative defense that the defendant must prove (see below). There would be no requirement of proving restricted output or supracompetitive prices in the relevant market.

More broadly, the exclusionary-practices test would be used in antitrust cases to identify exclusionary practices – trade restraints or other business practices that are (1) unrelated or not reasonably related to the defendant's development or improvement of its products; and (2) used by the defendant to restrain, prevent or suppress marketwide competition. Those are the very evils that the Sherman Act was originally supposed to prevent and redress.

The Doctrine of Ancillary Restraints. The doctrine of ancillary restraints, first announced by Judge William Howard Taft in 1899, governs two categories of antitrust claims: (1) collusion (*i.e.*, collusion between buyers against suppliers and collusion between sellers against their customers); and (2) restrictive covenants that unduly prevent covenantors from competing against their covenantees. The ancillary-restraints doctrine concerns agreements by which two or more parties have agreed not to compete against one another in some way ("non-compete agreements"). These agreements include conspiracies to fix prices, allocate markets, rig bids, or refrain from soliciting or hiring the counterparty's employees. According to the ancillary-restraints doctrine, a non-compete agreement is blameless under antitrust law if it is "ancillary" to a legitimate transaction or collaboration: it must be narrowly tailored to its purposes and reasonably calculated to promote the successful performance of the transaction or collaboration. If a non-compete agreement is not ancillary to a legitimate transaction or collaboration, it is an unlawful restraint of trade in violation of Section 1.[165] In many cases, the covenantee is held liable to the covenantor when the offending covenant impedes or altogether prevents the latter

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165 *Addyston Pipe & Steel*, 85 F. at 279–84 (explaining doctrine of ancillary restraints); *L.A. Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1395 (9th Cir. 1984) ("The common-law ancillary restraint doctrine was, in effect, incorporated into Sherman Act section 1 analysis by Justice Taft in [*Addyston Pipe*]. [T]he doctrine teaches that some agreements which restrain competition may be valid if they are subordinate and collateral to another legitimate transaction and necessary to make that transaction effective.... Generally, the effect of a finding of ancillarity is to remove the per se label from restraints otherwise falling within that category."); *Polk Bros. v. Forest City Enters., Inc.*, 776 F.2d 185, 188–89 (7th Cir. 1985) (naked restraints are horizontal covenants between competitors that exist merely to suppress competition; as such, they are unlawful per se; ancillary restraints are horizontal covenants between competitors that restrain their competition, but exist to facilitate "a larger endeavor whose success they promote;" as such, they are reviewed under the rule of reason).

from developing its business and earning profits. There is no need to establish the covenantee's market power when applying this doctrine, but in many cases the covenantee is a monopolist or near-monopolist or at least wields significant market power, especially in labor markets.

The Core Function of Both Tests, and Their Suggested Application in Specific Cases. The exclusionary-practices test and ancillary-restraints doctrine distill antitrust to its essentials and solve the problems antitrust law was enacted to redress. They never punish commercial excellence and target only cartels, buyers' conspiracies, sellers' conspiracies, overreaching covenantees who favor monopolistic practices, and exclusionary business practices typically used by dominant firms to suppress competition and take control of entire markets. If the consumer-welfare standards were no longer obligatory burdens of proof, and if claims were governed instead by the exclusionary-practices test (for exclusionary conduct) and the doctrine of ancillary restraints (for collusion and oppressive covenants), antitrust would once again fulfill its original and enduring purpose -- ensuring that the interstate and foreign commerce of the United States is not burdened by undue restraints of trade or monopolization. Below I explain how these tests should be used in specific kinds of cases.

Non-Compete Covenants. When two or more independent firms agree in some way not to compete against one another, their agreement is unlawful *per se* under Section 1, unless they can show that it is ancillary to a legitimate transaction or collaboration that they have undertaken.[166] Such agreements include naked horizontal restraints, such as horizontal price-fixing, horizontal market-allocation, and employers' no-poaching agreements. If a covenantor (the party that relinquishes its right to compete) suffers competitive injury because of the agreement, the covenantee can be held liable to it under Section 1.

Group Boycotts. A group boycott (concerted refusal-to-deal) constitutes a *per se* violation of Section 1 if its demonstrable aim is to deprive the target of inputs or sales channels that it requires to become or remain a viable competitor in the relevant market. When a defendant can plausibly argue that the boycott improves its own offerings or those of another participant, the boycott should be condemned only if (1) its use substantially forecloses access on commercially reasonable terms to necessary inputs or sales channels; or (2) its use forecloses a significant part of overall competition for sales in a market; and (3) the defendant lacks a redeeming justification sufficient to overcome its anticompetitive effects.

Exclusive Dealing and Tie-Ins. Exclusive-dealing and tie-ins between sellers and buyers often serve legitimate functions and should enjoy a rebuttable presumption of legality when neither counterparty has market power. Their use should constitute a violation of Section 1 when (1) the exclusive dealer or tying seller has market power; (2) the exclusive deal or tie-in, or its marketwide use, substantially lessens competition in the relevant market; and (3) the exclusive

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166 *See* preceding note.

dealer or tying seller lacks a redeeming business justification.[167] Comment: for the tie-in, the defendant's market power is its market power is in the tying-product market, and the substantial lessening of competition is the forbidden harm in the tied-product market.

Vertical Price-Fixing. Vertical price-fixing imposed by a manufacturer should be presumptively unlawful under Section 1, but can be saved if the manufacturer can justify its use by showing how it improves the manufacturer's offerings. Vertical price-fixing imposed at the behest of any dealer or reseller should be unlawful *per se*. The old distinction between *Colgate* pricing policies and concerted vertical price-fixing should be abolished because it is unworkable and leads to unpredictable outcomes.[168]

Gatekeeper Firms. a gatekeeper firm (i.e., one that controls an essential input or facility required to compete) commits predicate antitrust misconduct when it denies others access to necessary inputs or sales channels on commercially reasonable terms. If it does so by contract or in connivance with another firm, it should be held in violation of Section 1; and if it does so to acquire, gain or preserve its own near-monopoly or monopoly in any market, it should be held in violation of Section 2.[169]

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167 Tie-ins and exclusive dealing of commodities can be challenged under Section 1 or Section 3 of the Clayton Act, 15 U.S.C. § 14.

168 *Compare United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (permits a manufacturer to announce the lowest prices at which dealers can sell its products and to give notice that it will refuse to supply any dealer that undersells these prices) *with United States v. Parke, Davis & Co.*, 362 U.S. 29, 43 (1960) (manufacturer and its dealers restrain trade unlawfully if manufacturer announces the lowest prices at which dealers can sell its products, gives notice that it will refuse to supply any dealer that undersells these prices, and then takes further acts to ensure that its dealers honor its pricing policy.).

169 *See Otter Tail Power Co. v. United States*, 410 U.S. 366, 377 (1973) ("The record makes abundantly clear that Otter Tail used its monopoly power in the towns in its service area to foreclose competition or gain a competitive advantage, or to destroy a competitor, all in violation of the antitrust laws. The District Court determined that Otter Tail has a strategic dominance in the transmission of power in most of its service area and that it used this dominance to foreclose potential entrants into the retail area from obtaining electric power from outside sources of supply. Use of monopoly power to destroy threatened competition is a violation of the attempt to monopolize clause of s 2 of the Sherman Act. So are agreements not to compete, with the aim of preserving or extending a monopoly. In *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 [1945], a cooperative news association had bylaws that permitted member newspapers to bar competitors from joining the association. We held that that practice violated the Sherman Act, even though the transgressor had not yet achieved a complete monopoly.").

Standard-Essential Patents. A defendant commits predicate antitrust misconduct when it obtains a standard-essential patent (SEP) or a fraudulently procured patent and thereafter uses it in a way that substantially lessens competition in the relevant market. If the defendant does so by contract or connivance, it commits a violation of Section 1. If the defendant uses this practice to acquire, gain or preserve its own near-monopoly or monopoly, it commits a violation of Section 2. One leading decision already recognizes this rule.[170]

Monopolization and Other Exclusionary Conduct. The exclusionary-practices test should be used to assess Section 2 claims, conspiracies against targeted rivals under Section 1, and all other antitrust claims that implicate exclusionary conduct. The fundamental inquiry should be whether the defendant uses the accused practice to improve its offerings or prevent competition. In Section 1 cases, the plaintiff must also show that (1) the accused trade restraints are accomplished by contract or connivance with another firm; and (2) the accused trade restraints substantially lessen competition in the relevant market by foreclosing competition for a substantial part of overall sales, or by preventing access to necessary inputs or sales channels. In Section 2 cases, the defendant's use of the accused practice must have significantly contributed to its acquisition or maintenance of a monopoly or near-monopoly position in the relevant market.

Predatory Pricing. Predatory pricing constitutes predicate antitrust misconduct when a firm uses it to drive rivals out of business and thereby gain or preserve a monopoly or near-monopoly position. There should be no required showing of the predator's ability to recoup its loss-making sales.

The exclusionary-practices test and the doctrine of ancillary restraints should be thus construed and become the lynchpins of antitrust law. In addition, the courts should further revive antitrust law by adopting the following modifications or abrogations of consumer-welfare jurisprudence.

Horizontal Mergers: Standing Presumptions. A merger or acquisition of a rival's business should be presumptively unlawful if it takes place or results in a market that is "moderately concentrated," *per* existing HHI guidelines. Absent extraordinary circumstances, such a merger

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170 *Broadcom*, 501 F.3d at 314 (3d Cir. 2007) ("We hold that (1) in a consensus-oriented private standard-setting environment, (2) a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms, (3) coupled with an SDO's reliance on that promise when including the technology in a standard, and (4) the patent holder's subsequent breach of that promise, is actionable anticompetitive conduct. This holding follows directly from established principles of antitrust law and represents the emerging view of enforcement authorities and commentators, alike. Deception in a consensus-driven private standard-setting environment harms the competitive process by obscuring the costs of including proprietary technology in a standard and increasing the likelihood that patent rights will confer monopoly power on the patent holder.").

or acquisition should be prohibited if it takes place or results in a market that is "highly concentrated."[171]

Vertical Mergers: Standing Presumptions. A vertical merger or acquisition should be presumptively unlawful if it raises dual barriers to entry (i.e., barriers to entry at two levels of distribution), or if it exposes rivals at either level of distribution to a plausible threat of increased costs or limited access to a necessary input or sales channel. Existing case law supports this rule.[172]

Preemptive Mergers. A merger or acquisition of a rival's business should not be permitted if its purpose is to avert or stifle a competitive threat posed by a disruptive or innovative rival.

Antitrust Injury Treated as an Affirmative Defense. Proving antitrust injury should never be a plaintiff's burden, but a defendant can still invoke the doctrine of antitrust injury as a narrowly construed affirmative defense. The doctrine, which defendants routinely employ to confuse issues, should be clearly stated as follows: when a defendant has committed an antitrust violation, a private plaintiff cannot obtain money damages caused by the violation if the plaintiff's damages arise from increased competition with the defendant rather than harm caused by the defendant's exclusionary practices or exercise of market power acquired or maintained by committing the antitrust violation. Competitors are usually entitled to lost profits caused by their exclusion. Customers and suppliers are usually entitled to recover the higher prices that they paid to sellers or the lower prices that they received from buyers because of the antitrust violation.

The Purpose of Antitrust Law. The courts and Congress should confirm that the Sherman Act, the Clayton Act, the FTC Act, and their amendments exist to prevent firms from unduly restraining or monopolizing the interstate and foreign commerce of the United States. If the immediate aim was to check the increasing power and encroachments of the original industrial trusts, the larger aim will always be to keep our commerce free of undue trade restraints and monopolists that employ exclusionary practices. I can think of no better way to promote general prosperity,

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[171] The Herfindahl–Hirschman Index or "HHI" is used by the DOJ, the FTC and the courts to measure the degree of market concentration in a given relevant market. It is used most frequently to review proposed or contested mergers, and is also used to detect cartel activity and assess the competitive performance of markets. *See Malaney v. UAL Corp.*, 2010 WL 3790296, at *12 (N.D. Cal. 2010), *aff'd*, 434 F. App'x 620 (9th Cir. 2011) ("The Herfindahl–Hirschman Index ("HHI") is an index used to measure concentration in a market, which is calculated by squaring the market share of each firm competing in a market and then summing the resulting numbers. DOJ uses HHI numbers to determine thresholds for when an industry is considered highly concentrated or when potential mergers require investigation.").

[172] *See Fruehauf Corp. v. F. T.C.*, 603 F.2d 345, 352 (2d Cir. 1979) (if a vertical merger obliges competitors to vertically integrate, and if this vertical integration by itself does not create inherent efficiencies, it poses a probable threat to competition and may be properly enjoined under Section 7 of the Clayton Act).

economic opportunity, honest business practices, innovation, low prices, social comity, and sound democratic governance.

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