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The Evolving Populisms of Antitrust

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Sandeep Vaheesan*

The Evolving Populisms of Antitrust

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I. INTRODUCTION

By all outward appearances, antitrust enforcement has been a technocratic enterprise for many decades. It is an elite, behind-the-scenes affair: economists and lawyers represent the parties involved in antitrust matters.¹ Federal judges decide the antitrust matter that periodically appears on their docket, and the parties and courts rarely allow cases to reach a jury.² Political interest in antitrust can be described as modest.³ Presidential candidates may, at most, issue boilerplate statements on “enforc[ing] the antitrust laws so that all Americans benefit from a growing and healthy competitive free market economy.”⁴ This lack of attention is quite a contrast to the past, particularly the late nineteenth and early twentieth centuries, when antitrust was a topic of public interest and even inspired its own popular movements.⁵ A defining issue of the 1912 presidential election was how to tackle the trusts.⁶ The three main candidates offered contrasting approaches to this problem and presented them as central elements of their platforms.⁷ To contemporary practitioners and scholars, however, this popular interest in antitrust is little more than a historical curiosity, far removed from the specialized antitrust machinery of the twenty-first century.⁸

Perhaps based on the declining public interest in antitrust, some commentators have argued that the substance of antitrust jurisprudence can be divided into “populist” and “technocratic” eras. They have asserted a tension between the two concepts. According to this

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1. See generally Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159 (2008); Richard Hofstadter, *What Happened to the Antitrust Movement?*, in THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 102, 103–04 (1965).
 2. Crane, *supra* note 1, at 1184.
 3. See *id.* at 1167–70 (describing the declining number of references to antitrust in the political platforms of the two principal parties).
 4. Senator Barack Obama, Presidential Campaign Statement for the American Antitrust Institute (Feb. 2, 2008), archived at <http://perma.unl.edu/5TBB-9C3X>.
 5. Hofstadter, *supra* note 1, at 109–12.
 6. Albert A. Foer, *The Politics of Antitrust in the United States: Public Choice and Public Choices*, 62 U. PITT. L. REV. 475, 497 (2001).
 7. See, e.g., WOODROW WILSON, THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE (1913); William Kolasky, *Theodore Roosevelt and William Howard Taft: Marching Toward Armageddon*, ANTITRUST, Spring 2011, at 97; Theodore Roosevelt, The New Nationalism (Aug. 31, 1910).
 8. Of course, the technocratic model of antitrust is not without its critics. See generally Harry First & Spencer Weber Waller, *Antitrust’s Democracy Deficit*, 81 FORDHAM L. REV. 2543 (2013).

view, populist antitrust is in conflict with economics but has thankfully been relegated to the past.⁹ This account, however, is an oversimplification of a complex reality. As the late Robert Bork observed, the goals of antitrust are a separate question from the specific rules to apply to business conduct.¹⁰ Bork recognized that in antitrust, as in any area of law, the goals come first and the appropriate rules follow. He wrote, “[a]ntitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals? Everything else follows from the answer we give.”¹¹

From its inception, antitrust law has sought to protect some relatively vulnerable group from the power of big businesses. Even when it has been the standard-bearer of elite opinion, the Supreme Court has applied the antitrust laws in the name of protecting a particular group of non-elite Americans from the predations of powerful business enterprises. In other words, antitrust has always been populist and claimed to “speak for the vast majority of Americans who work hard and love their country”¹² and “against a variety of . . . ‘fat cats’ and ‘Big Men.’”¹³ As articulated by the Supreme Court, antitrust law has spoken against big business on behalf of consumers, small producers, or both. The Supreme Court, however, has always relied on economics to inform its formulation of specific antitrust rules. The prevailing economics of antitrust have changed over time but economic thinking has been a constant in the Court’s antitrust opinions. From its inception, antitrust jurisprudence has been a mixture of populist goals and economically-informed legal rules.

The particular non-elite group championed by antitrust law has evolved over the 120 years since the enactment of the Sherman Act. Antitrust jurisprudence can be divided into three eras of populism, each with its own goals and understandings of how a market economy functions. In the first four decades, the Supreme Court described the antitrust laws primarily as statutes intended to protect small busi-

9. See, e.g., Ken Heyer, *A World of Uncertainty: Economics and the Globalization of Antitrust*, 72 ANTITRUST L.J. 375, 376 n.2 (2005); Abbott B. Lipsky, Jr., *Antitrust Economics—Making Progress, Avoiding Regression*, 12 GEO. MASON L. REV. 163, 163–64 (2003); Geoffrey A. Manne & E. Marcellus Williamson, *Hot Docs vs. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication*, 47 ARIZ. L. REV. 609, 617 n.32 (2005); Fred S. McChesney, *Debate: Public Choice: Do Politics Corrupt Antitrust Enforcement? Economics Versus Politics in Antitrust*, 23 HARV. J.L. & PUB. POL’Y 133, 134–35 (1999); D. Daniel Sokol, *Antitrust, Institutions, and Merger Control*, 17 GEO. MASON L. REV. 1055, 1105–06 (2010); Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405, 2405–06 (2013).

10. ROBERT BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 7 (1993).

11. *Id.* at 50.

12. MICHAEL KAZIN, *THE POPULIST PERSUASION: AN AMERICAN HISTORY* 1 (1998).

13. *Id.*

nesses¹⁴ from larger businesses and mentioned consumers infrequently—and even then, often only indirectly. The Court’s antitrust economics, for example, comprehended the effects of cartels and monopolies, appreciated the power of scale economies, and recognized how contractual restraints can protect intangible property. Starting in the late 1930s, the Supreme Court explicitly considered the interests of consumers in its antitrust decisions and recognized that they are often harmed by the practices of business. At the same time, the Court maintained its interest in preserving small businesses and on occasion had to decide between whose ox would be gored—that belonging to consumers or small business. The economics of the era prized the free play of the price system and viewed price restraints, tying, and large mergers with suspicion. In the 1970s, the Supreme Court abandoned its commitment to protecting small businesses and held that consumers are the primary group that antitrust law should protect. And, as the Court embraced consumer welfare as the proper goal of the antitrust laws, it adopted an economic paradigm that placed great faith in the self-regulating power of concentrated markets and questioned the benefits of strict antitrust rules.

Today, some antitrust commentators have called for the Supreme Court to abandon its focus on protecting consumers and focus exclusively on maximizing so-called economic efficiency, regardless of its distributional consequences.¹⁵ In more concrete terms, according to this school of thought, the antitrust enforcement agencies and courts should be indifferent toward whether a dollar goes to consumers in the form of savings or to producers and shareholders in the form of profits. The courts should reject this approach and strengthen the historic commitment of antitrust law to consumer populism. Enshrining consumers as the principal protected class of antitrust law has, at least, four bases for support.¹⁶ First, consumer protection would be true to the legislative intent of Congress in enacting the antitrust laws—preventing unjustified wealth transfers from consumers to producers. Second, in adhering to Congressional intent, consumer-oriented antitrust would address the dramatic growth in inequality in recent decades and promote a more progressive distribution of wealth.

14. This Article uses “small business” as shorthand for both small- and medium-sized businesses.

15. See, e.g., Dennis W. Carlton, *Does Antitrust Need to be Modernized?*, J. ECON. PERSP., Summer 2007, at 155.

16. Even as it treats consumers as the main beneficiaries of antitrust enforcement, the Supreme Court should not forget small producers who may be victims of powerful buyers in monopsonistic and oligopsonistic markets. The arguments in favor of consumer protection often apply with equal force to the protection of small suppliers like family farmers and workers. See John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 FORDHAM L. REV. 2425, 2426 (2013).

Antitrust law can prevent producers from engaging in anticompetitive conduct that transfers wealth from consumers to generally more affluent shareholders and executives. Third, this consumerist approach would protect a group generally incapable of organizing itself due to its size—after all, nearly all adult-age Americans are consumers. Fourth, consumer-oriented antitrust would help build a popular constituency for competition law enforcement, which is essential for the long-run vitality of the legal regime. Given the political power of large businesses and their general opposition to the antitrust laws, the antitrust community should establish consumers as a core constituency if the antitrust mission is to remain viable and thrive in the long run.

This Article proceeds as follows. Part II discusses the Supreme Court's rulings in the early era of antitrust: 1890–1930s. During this period, the Court articulated the antitrust laws as preserving the commercial viability and freedom of small businesses. The Court recognized the harms from cartels and monopolies and also the benefits of scale economies. Part III reviews the Supreme Court's antitrust decisions in the mid-twentieth century. Between late 1930s and early 1970s, the Court showed concern for consumer well-being but also remained committed to the protection of small businesses. The Court during this era prized the free setting of prices and frowned on attempts to restrain the operation of the price mechanism. It also took a hostile stance to mergers, tying, and most vertical restraints. Part IV turns to the current era of antitrust jurisprudence that dates from the mid-1970s to the present. The Supreme Court has held unequivocally that the antitrust laws exist for the protection of consumers and has declined to defend businesses from vigorous competition. At the same time, the Court has shown greater faith in the benefits of big business conduct and taken a more benign view of mergers, vertical restraints, and monopolies. Part V argues that the legal regime should remain committed to consumer protection. Part VI concludes.

II. THE PRIMACY OF SMALL PRODUCERS: 1890–1930s

With the passage of the Sherman Act in 1890, Congress gave the federal courts a virtual blank slate. The Sherman Act speaks of “restraint of trade”¹⁷ and “monopolization”¹⁸ without giving these terms substantive content. The Supreme Court had to decide on the goals of the antitrust laws and articulate specific rules on what business practices were permissible.

17. 15 U.S.C. § 1 (2012).

18. *Id.* § 2.

A. Populism of the Era: Championing the Cause of Small Producers

In the first four decades of the new law, the Supreme Court gave voice to the popular antimonopoly sentiment of the period—preserving small producers in the new economic environment. Its solicitude was directed at farmers and small firms. The Court’s focus on small producers and general neglect of consumers may not be surprising because the idea of consumers as a distinct constituency was still in its infancy.¹⁹ The Court’s rhetorical commitment to small producers is, however, quite remarkable given its generally proelite and pro-laissez-faire ideology at the time.²⁰ The Court during this era aggressively invalidated both federal and state regulation aimed at addressing the power imbalance between big business, on one hand, and members of the public, on the other hand—a judicial philosophy reflected in the *Lochner v. New York* decision.²¹

Despite the Court’s general proelite outlook, it lamented the demise of the small producer in the late nineteenth century. It described the history of the small businessman over the course of the late nineteenth century in moving detail in *United States v. Trans-Missouri Freight Ass’n*.²² Due to the rise of the trusts and other large business entities, the Court stated that “[t]rade or commerce under those circumstances may . . . be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein.”²³ These ruined businessmen may “be unable to readjust themselves to their altered surroundings.”²⁴ In *United States v. American Tobacco Co.*, the Court romanticized the small-scale, local tobacco processors that defined the industry before the rise of the American Tobacco trust²⁵:

The manufacture of the product in this country in various forms was successfully carried on by many individuals or concerns scattered throughout the country, a larger number, perhaps, of the manufacturers being in the vicinage of production, and others being advantageously situated in or near the principal markets of distribution.²⁶

19. Meg Jacobs, *State of the Field: The Politics of Consumption*, 39 REV. IN AM. HIST. 561, 561 (2011).

20. See Erwin Chemerinsky, *Under the Bridges of Paris: Economic Liberties Should Not Be Just for the Rich*, 6 CHAP. L. REV. 31, 33–34 (2003) (“[A]dvocacy of economic liberties in the Supreme Court has been about protecting the interests of corporations and the wealthy to be free from government regulation. Certainly, this was true during the *Lochner* era.”).

21. 198 U.S. 45, 64 (1905).

22. 166 U.S. 290 (1897).

23. *Id.* at 323.

24. *Id.*

25. *United States v. Am. Tobacco Co.*, 221 U.S. 106, 156 (1911).

26. *Id.* at 156.

The Court aimed to protect smaller business from the power of their larger rivals and preserve opportunities for independent entrepreneurs. It condemned Standard Oil's "intent to drive others from the field and to exclude them from their right to trade, and thus accomplish the mastery which was the end in view."²⁷ Similarly, American Tobacco's tactics were deemed improper because they were "devised in order to monopolize the trade by driving competitors out of business, which were ruthlessly carried out upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible."²⁸ Likewise, the Court condemned practices that resulted in the "exclusion of competitors."²⁹ It also stressed that the Sherman Act sought to prevent monopolies from destroying "equality of opportunity" for the independent entrepreneur.³⁰

In *Board of Trade v. United States*, the Court upheld the exchange's restrictions on trading because these rules helped farmers and country dealers participate in wholesale markets on more favorable terms.³¹ Specifically, the Court noted that the Board's regulations yielded the following benefits to small producers:

(a) It created a public market for grain "to arrive." Before its adoption, bids were made privately. Men had to buy and sell without adequate knowledge of actual market conditions. This was disadvantageous to all concerned, but particularly so to country dealers and farmers. . . . (e) It increased the number of country dealers engaged in this branch of the business; supplied them more regularly with bids from Chicago; and also increased the number of bids received by them from competing markets. (f) It eliminated risks necessarily incident to a private market, and thus enabled country dealers to do business on a smaller margin. In that way the rule made it possible for them to pay more to farmers without raising the price to consumers. (g) It enabled country dealers to sell some grain to arrive when they would otherwise have been obliged either to ship to Chicago commission merchants or to sell for "future delivery."³²

The Court's concern for small business also extended to industries suffering from cyclical downturns. In *Maple Flooring Manufacturers Ass'n v. United States*, the Court recognized the joint management of slumps in an industry as a legitimate activity.³³ It worried about the "economic disturbances produced by business crises resulting from overproduction"³⁴ and welcomed "the conduct of commercial operations becom[ing] more intelligent through the free distribution of

27. *Standard Oil Co. v. United States*, 221 U.S. 1, 76 (1911).

28. *American Tobacco*, 221 U.S. at 181-82.

29. *Swift & Co. v. United States*, 196 U.S. 375, 394 (1905).

30. *Ramsay Co. v. Assoc. Bill Posters of U.S. & Can.*, 260 U.S. 501, 512 (1923); *United States v. Am. Linseed Oil Co.*, 262 U.S. 371, 388 (1923).

31. *Bd. of Trade v. United States*, 246 U.S. 231, 240-41 (1918).

32. *Id.*

33. *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925).

34. *Id.* at 582.

knowledge.”³⁵ Conduct that “produce[d] fairer price levels” was treated with favor, a sign of the Court’s concern for producers.³⁶ In deciding the propriety of joint selling efforts by coal producers, the Court considered it relevant that the industry was experiencing severe economic distress. It stated that the “evidence leaves no doubt of the existence of the evils at which defendants’ plan was aimed. . . . [The industry] suffered from overexpansion and from a serious relative decline through the growing use of substitute fuels. It was afflicted by injurious practices within itself—practices which demanded correction.”³⁷

The Supreme Court held dealer freedom to be another independent goal of the antitrust laws. Specifically, it wanted small business to operate free of external interference and restraint. The Court held that unless there is an intent to establish or maintain a monopoly, the Sherman Act “does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.”³⁸ Private restraints on dealer freedom were also seen as generally obnoxious to the antitrust laws. In *Dr. Miles Medical Co. v. John D. Park & Sons*, the Court stated: “All interference with individual liberty of action in trading, . . . if there is nothing more, are contrary to public policy, and therefore void.”³⁹ In a decision involving firms in the lumber industry, the Court disapproved of the defendants’ joint conduct because it impeded the commercial freedom of both wholesalers and retailers.⁴⁰

At times, the Court even viewed parties involved in cartel arrangements sympathetically due to their loss of business freedom—a perspective that modern antitrust observers would find quite alien. The cartel participant was treated as a victim to the conspiracy to which it was a party. The Court condemned bid rigging, citing, in part, how “[i]t is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded [as improper].”⁴¹ In *United States v. Joint Traffic Ass’n*, the Court described the dire fate that would await a railroad that attempted to break away from a collusive arrangement.⁴² In such an event, this aberrant railroad would soon be en-

35. *Id.* at 583.

36. *Id.*

37. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 372 (1933).

38. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1920).

39. *Dr. Miles Med. Co. v. John D. Park & Sons*, 220 U.S. 373, 406 (1911).

40. *E. States Retail Lumber Dealers’ Ass’n v. United States*, 234 U.S. 600, 612, 614 (1914).

41. *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 245 (1899).

42. *United States v. Joint Traffic Ass’n*, 171 U.S. 505 (1898).

gaged in a “war between itself on the one side and the whole association on the other, in the course of which rates would probably drop lower than the company was proposing, and lower than it would desire or could afford.”⁴³

At the same time, the Court was not oblivious to how anticompetitive behavior harmed consumers. It cited higher prices as one of the ill effects of antitrust violations, showing concern for the consuming public. The Court stated that collusion “compel[led] the public to pay an increase over what the price would have been, if fixed by competition between defendants.”⁴⁴ In *Northern Securities Co. v. United States*, the Court feared the possibility of railroad consolidations that allowed a holding company to “obtain the absolute control throughout the entire country of rates for passengers and freight, beyond the power of Congress to protect the public against their exactions.”⁴⁵

As a distinct group, however, consumers were alluded to indirectly and often only as an afterthought. The Court did not view consumers as a group in the same way it viewed farmers, manufacturers, and dealers. It described how higher railroad rates from collusion would harm “the sale of the products of the farm, the workshop and manufactory” and obliquely observed that it “also largely influences the price to be paid by every one who consumes any of the property transported over the line of railway.”⁴⁶ And the Court notably omitted the traveling public and exhibited a producer orientation when it stated “[t]he business which the railroads do is of a public nature, closely affecting almost all classes in the community—the farmer, the artisan, the manufacturer and the trader.”⁴⁷

Further revealing its producer bias, the Court often spoke of high prices from the perspective of businesses rather than consumers. The Court described collusion as a practice that “restrains instead of promot[es] trade and commerce.”⁴⁸ High prices were characterized as a burden on commerce.⁴⁹ The Court treated collusive conduct as “a direct restraint upon the trade, and therefore any contract or combination which enhanced the price might in some degree restrain the trade in the article.”⁵⁰ Similarly, a railroad merger that reduced competition was viewed as a clog on the flow of commerce.⁵¹ The Court in *United States v. Terminal Railroad Ass’n* condemned railroad rates

43. *Id.* at 564.

44. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff’d*, 175 U.S. 211, 237 (1899).

45. *N. Sec. Co. v. United States*, 193 U.S. 197, 343 (1904).

46. *United States v. Trans-Mo. Freight*, 166 U.S. 290, 336 (1897).

47. *Id.* at 333.

48. *Joint Traffic Ass’n*, 171 U.S. at 577.

49. *Addyston Pipe*, 175 U.S. at 245.

50. *Id.*

51. *N. Sec. Co. v. United States*, 193 U.S. 197, 352 (1904).

that disadvantaged local businesses that shipped goods.⁵² It stated that the terminal's discriminatory rates are "obviously injurious to the commerce and manufacturers of St. Louis."⁵³ These discriminatory rates placed local producers at a competitive disadvantage, vis-à-vis manufacturers in other regions.⁵⁴

B. Rules of the Era: Hostility to Cartels and Vertical Restraints but Permissive Toward Other Practices

In the early years of antitrust, the Supreme Court demonstrated economic understanding in formulating antitrust rules. The Court revealed an awareness of many economic concepts that modern antitrust practitioners cite with regularity—output and price effects from monopoly and collusive pricing, economies of scale, the costs and benefits of price transparency, and the protection of intangible assets.

The Court adopted a strict prohibition on horizontal agreements between direct competitors that restricted price competition. It declined to evaluate whether fixed rail rates were "reasonable."⁵⁵ The "subject of what is a reasonable rate is attended with great uncertainty. What is a proper standard by which to judge the fact of reasonable rates?"⁵⁶ The Court adopted a per se ban on horizontal price-fixing, stating "[t]he natural and direct effect of [the agreement in this case and *Trans-Missouri*] is the same, viz. to maintain rates at a higher level than would otherwise prevail."⁵⁷ The Court applied the same categorical bar on bid rigging and stated "[t]he question is as to the effect of such combination upon the trade in the article, and if that effect be to destroy competition and thus advance the price, the combination is one in restraint of trade."⁵⁸ The per se rule against horizontal price fixing was not reconsidered by the Court during this period.⁵⁹ The Court refused to examine the reasonableness of the fixed prices, observing "[t]he reasonable price fixed today may through economic and business changes become the unreasonable price of to-morrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed."⁶⁰

The Court deemed vertical restraints—agreements between manufacturers and distributors that stipulated resale prices or prevented

52. *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 408 (1912).

53. *Id.*

54. *Id.* at 407.

55. *United States v. Trans-Mo. Freight*, 166 U.S. 290, 331 (1897).

56. *Id.*

57. *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 565 (1898).

58. *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 245 (1899).

59. *See, e.g., United States v. Trenton Potteries Co.*, 273 U.S. 392, 398 (1927).

60. *Id.* at 397.

distributors from carrying the products of rival manufacturers, for example—to be in violation of the antitrust laws. In *Dr. Miles*, it held minimum resale price maintenance to be per se illegal.⁶¹ It stated that “[t]he agreements are designed to maintain prices after the complainant has parted with the title to the articles, and to prevent competition among those who trade in them.”⁶² It noted the functional similarity between a horizontal cartel between retailers and resale price maintenance agreements between the manufacturer and every one of its retailers.⁶³ And just as the retailers could not invoke higher profits in the defense of a horizontal cartel, the manufacturer could not invoke them as a defense of resale price maintenance.⁶⁴ The Court in *Standard Fashion Co. v. Magrane-Houston Co.* treated an exclusive dealing arrangement between a textile manufacturer and a retailer as presumptively illegal.⁶⁵ It quoted the Court of Appeals decision with approval, observing that “[t]he restriction of each merchant to one pattern manufacturer must in hundreds, perhaps in thousands, of small communities amount to giving such single pattern manufacturer a monopoly of the business of the community.”⁶⁶ Similarly, *United Shoe Machinery Corp. v. United States* invalidated an exclusivity agreement promoting monopoly.⁶⁷

The Court, however, did not believe that all business restraints should be subject to the per se rule. It made the critical observation that all contracts and business combinations restrain trade “in some remote and indirect degree” but that does not mean all contracts and business combinations run afoul of the antitrust laws.⁶⁸ In applying this dictum to a particular example, the Court stated that covenants not to compete are not inherently anticompetitive.⁶⁹ The Court noted that some contractual restraints “exhibit a strong tendency towards enabling the parties to make such a contract in relation to the sale of the property” and grant the “vendor the freest opportunity to obtain the largest consideration for the sale of that which is his own.”⁷⁰ The *Dr. Miles* Court, while outlawing resale price maintenance, recognized that many restraints have benign effects. In distinguishing resale price maintenance contracts from less harmful restraints, it implied

61. *Dr. Miles Med. Co. v. John D. Park & Sons*, 220 U.S. 373 (1912).

62. *Id.* at 407.

63. *Id.* at 407–08.

64. *Id.*

65. *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 357 (1922).

66. *Id.*

67. *United Shoe Mach. Corp. v. United States*, 258 U.S. 451, 457–58 (1922).

68. *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 568 (1898).

69. *United States v. Trans-Mo. Freight*, 166 U.S. 290 (1897).

70. *Id.* at 328.

that some restraints on competition could facilitate the sale of businesses and protect goodwill and other intangible assets.⁷¹

While outlawing horizontal price fixing, the Court was more tolerant of horizontal cooperation that did not directly set prices, especially in the 1920s and 1930s. In *Chicago Board of Trade*, the Court refused to treat the Board's restrictions on after-hours trading as per se illegal.⁷² In part, the Court cited the information benefits of channeling trades to the open market with public bids: market participants could make more knowledgeable decisions and be less vulnerable to opportunistic conduct.⁷³ Justice Brandeis in this opinion introduced and applied his famously expansive definition of the rule of reason—an open-ended examination of the economic effects of a challenged practice.⁷⁴ In *Maple Flooring*, the Court declined to treat information sharing between rivals as an antitrust violation.⁷⁵ While it acknowledged this cooperation contributed to greater uniformity in pricing, the Court also stated that this information sharing promoted the “intelligent conduct of business operations.”⁷⁶

The Court in *Appalachian Coals*—a case decided during the Great Depression when the antitrust laws were effectively suspended for several years⁷⁷—went the furthest in its tolerance for horizontal cooperation. The Court refused to condemn a joint selling arrangement between rival coal producers as per se illegal.⁷⁸ It stated:

The unfortunate state of the industry would not justify any attempt unduly to restrain competition or to monopolize, but the existing situation prompted defendants to make, and the statute did not preclude them from making, an

71. *See Dr. Miles Med. Co. v. John D. Park & Sons*, 220 U.S. 373, 407 (1912) (“The present case is not analogous to that of a sale of good will, or of an interest in a business, or of the grant of a right to use a process of manufacture. The complainant has not parted with any interest in its business or instrumentalities of production.”).

72. *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 241 (1918).

73. *Id.*

74. *See id.* at 238 (“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.”).

75. *Maple Flooring Mfr. Ass'n v. United States*, 268 U.S. 563, 586 (1925).

76. *Id.* at 583.

77. Howard A. Shelanski, *Enforcing Competition During an Economic Crisis*, 77 ANTITRUST L.J. 229, 234–35 (2010).

78. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933).

honest effort to remove abuses, to make competition fairer, and thus to promote the essential interests of commerce.⁷⁹

In *Northern Securities*, a major merger case of the era,⁸⁰ the Court recognized the potential anticompetitive effects of horizontal mergers. The Court ruled that the merger between parallel railroad lines running from Chicago to the West Coast was illegal. It found that the merger “may have been for the pecuniary benefit of those who formed or caused it to be formed. But the interests of private persons and corporations cannot be made paramount to the interests of the general public.”⁸¹

While it understood the harmful effects of monopoly on consumers,⁸² the Court did not condemn companies on account of size alone. At the same time it lamented the effect of large-scale industry on small producers,⁸³ the Court stated this dislocation “seems to be the inevitable accompaniment of change and improvement.”⁸⁴ It recognized the concept of natural monopoly in *Terminal Railroad*. The duplication of railroad terminals and bridges across the Mississippi in St. Louis was found to be infeasible and undesirable.⁸⁵ The unified ownership of this rail infrastructure created a system “of the greatest public utility.”⁸⁶ On this basis, the Court refused to order the defendants to divest bridges and terminals, as the government wanted, and instead mandated nondiscriminatory access to competing railroads.⁸⁷ The Court articulated the benefits of vertical integration and scale in ruling against the government in its monopolization suit against U.S. Steel.⁸⁸ It noted the “value of the continuity of manufacture from the ore to the finished product” and added that “[t]he Corporation is undoubtedly of impressive size and it takes an effort of resolution not to be affected by it.”⁸⁹ It held that “the law does not make mere size an offence or the existence of unexercised power an offence.”⁹⁰

In determining illegality in monopolization cases, the Court, instead of focusing on size alone, looked at the specific acts of the dominant firm against smaller rivals. In *American Tobacco*, the Court

79. *Id.* at 372.

80. A prior merger case before the Supreme Court was decided on constitutional grounds. The Court held that under prevailing Commerce Clause jurisprudence Congress did not have the authority to regulate mergers in manufacturing. *See United States v. E. C. Knight Co.*, 156 U.S. 1 (1895).

81. *N. Sec. Co. v. United States*, 193 U.S. 197, 352 (1904).

82. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 52 (1911).

83. *United States v. Trans-Mo. Freight*, 166 U.S. 290, 322 (1897).

84. *Id.* at 322–23.

85. *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 403 (1912).

86. *Id.* at 405.

87. *Id.* at 410–11.

88. *United States v. U.S. Steel*, 251 U.S. 417, 442 (1920).

89. *Id.* at 442, 451.

90. *Id.* at 451.

found the defendant liable for monopolization because, among other things, it engaged in price wars intended to drive competitors out of the market or accept a buyout, divided world markets with its main rival, and acquired manufacturing plants not to use them but to shut them down.⁹¹ The Court in *Standard Oil* ruled against the defendant because it had orchestrated a railroad boycott of competing oil refiners and resorted to aggressive price cutting with the aim of acquiring competitors at fire-sale prices.⁹² In *Terminal Railroad*, the Court condemned the defendant consortium for refusing to grant membership to all railroads seeking access to St. Louis on nondiscriminatory terms.⁹³

III. THE DUELING POPULISMS OF THE MID-TWENTIETH CENTURY: LATE 1930s–EARLY 1970s

Starting in the late 1930s, the Supreme Court expressly embraced the protection of consumers as a principal antitrust objective. The Court aimed to protect consumers from the high prices and reduced choice that resulted from monopolistic and collusive conduct. Yet, the Court continued to hold the preservation and protection of small producers as an antitrust concern. These goals created conflicts for the Court. At times, the conduct of powerful firms can help one group of ordinary Americans, consumers, but hurt another, smaller businesses. In the event of this tension between the two protected classes of antitrust, the Court favored the protection of small businesses. In formulating antitrust rules, the Court generally rejected restraints on the free play of market pricing and believed that tying, refusals to deal, and mergers between large businesses harmed consumers, small producers, or both.

A. Protecting Both Consumers and Small Producers

Beginning in the late 1930s, the Court held the American consumer to be a beneficiary of the antitrust laws. The functional shift arguably came in a 1940 decision that showed how much the Court's approach to conduct in distressed industries had changed in less than a decade. In *United States v. Socony-Vacuum Oil Co.*, the Court ruled that it would not tolerate collusive behavior at the expense of the consuming public, even if the industry was in the midst of a general slump.⁹⁴ The case involved facts reminiscent of those in *Appalachian*

91. *United States v. Am. Tobacco Co.*, 221 U.S. 106, 182–83 (1911).

92. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 42–43 (1911).

93. *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 411 (1912).

94. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *see id.* at 221 (“Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies.”).

Coals, in which the Court in 1933 had refused to treat a joint selling program in the coal industry as per se illegal.⁹⁵ In *Socony-Vacuum*, decided just four years after *Appalachian Coals*, the Court did not view similar collaborative self-help efforts in the oil industry with sympathy. The defendants' joint buying program attempted to remove the "overhang"⁹⁶ of refined petroleum products from the market and raise prices.⁹⁷ The Court deemed this collaborative scheme a per se violation of the antitrust laws and stated that "*jobbers and consumers in the Mid-Western area paid more for their gasoline than they would have paid but for the conspiracy.*"⁹⁸

Although the Court offered a strained reconciliation of its decision in *Socony-Vacuum* with the ruling in *Appalachian Coals*,⁹⁹ its break with the recent past was all too apparent. Regardless of circumstances, firms could no longer engage in "self-help" measures that resulted in economic injury to consumers. The Court did not treat the depressed state of the oil industry as an excuse for cartel-like behavior. It rejected the "elimination of so-called competitive evils [as a] legal justification for such buying programs"¹⁰⁰ and further added that such justifications attacked the very aim of the Sherman Act.¹⁰¹

The rhetorical shift in favor of consumers came in another decision in 1940. In *Apex Hosiery Co. v. Leader*, the Court rejected the petitioner's attempt to use the Sherman Act to enjoin a sit-down strike by workers.¹⁰² It held that the antitrust laws exist for the protection of consumers, stating that the Sherman Act barred practices that tended to "restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury."¹⁰³ The majority acknowledged that the union-organized strike did reduce competition between workers.¹⁰⁴ However, this type of restraint alone is not enough under the antitrust laws unless it has "an effect upon prices in the market or otherwise . . . deprive[s] purchasers or consumers of the advantages which they derive from free competition."¹⁰⁵

95. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933).

96. *Socony-Vacuum*, 310 U.S. at 220.

97. *Id.* at 190-91.

98. *Id.* at 220 (emphasis added).

99. *See id.* at 216 ("Unlike the plan in the instance case, the plan in the *Appalachian Coals* case was not designed to operate vis-à-vis the general consuming market and to fix the prices on that market. Furthermore, the effect, if any, of that plan on prices was not only wholly incidental but also highly conjectural.").

100. *Id.* at 220.

101. *Id.* at 220-21.

102. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 513 (1940).

103. *Id.* at 493.

104. *Id.* at 501.

105. *Id.*

The promotion of low prices was an important goal of antitrust law in this period. In a case involving movie distribution, the Court focused its solicitude on a narrower segment of consumers and noted that the conduct at issue deprived “low-income members of the community” from watching the most popular films.¹⁰⁶ In another case, the Court frowned upon cooperative “price maintenance.”¹⁰⁷ It described free price competition as “an object of special solicitude under the antitrust laws.”¹⁰⁸ Recognizing the anticonsumer effects of supplier market power, the Court noted on another occasion that consumers could “be forced to accept the higher price because of their stronger preferences for the product.”¹⁰⁹ It quoted the progressive scholar Adolph Berle and wondered, “Are these behemoths good at making goods—or merely good at making money? Do they come out better because they manufacture more efficiently—or because they ‘control the market’ and collect unduly high prices from the long-suffering American consumer?”¹¹⁰

The preservation of consumer choice was a running theme in the Court’s mid-twentieth century antitrust jurisprudence. The Court noted the importance of consumers being able to choose from competing products.¹¹¹ Even if consumers ultimately had to commit to a single supplier through a long-term contract, the value of choice at the bidding stage was emphasized.¹¹² In addressing the block booking of film distributors, the Court stated this type of product bundling deprived the television stations of their ability to purchase the films that they desired.¹¹³ The high court also framed consumer choice from the perspective of producers, citing the harm to consumers when producers are prevented from “free competition for . . . [consumers’] patronage in the market.”¹¹⁴

In *United States v. Philadelphia National Bank*, the Court articulated the importance of consumer choice.¹¹⁵ The majority stated that competition allowed consumers to choose the service bundle that best suited their needs. Reviewing the facts of the bank merger before it, the Court described how competition benefited consumers. The Court wrote: “Competition among banks exists at every level—price, variety

106. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 219 (1939).

107. *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

108. *United States v. General Motors Corp.*, 384 U.S. 127, 148 (1966).

109. *Fornet Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 504 (1969).

110. *Simpson v. Union Oil Co.*, 377 U.S. 13, 22 n.9 (1964).

111. *See N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 6 (1958) (“At the same time buyers are forced to forego their free choice between competing products.”).

112. *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 661 (1964).

113. *United States v. Loew’s, Inc.*, 371 U.S. 38, 49 (1962), *abrogated by* *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

114. *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 504 (1969).

115. *United States v. Phila. Nat’l Bank*, 374 U.S. 321 (1963).

of credit arrangements, convenience of location, attractiveness of physical surroundings, credit information, investment advice, service charges, personal accommodations, advertising, miscellaneous special and extra services—and it is keen.”¹¹⁶ The Court offered a rich account of consumer choice and championed it for not just lower prices but also for its positive effects on quality and other nonprice dimensions.

While it held consumers to be a protected class of antitrust law, the mid-twentieth-century Supreme Court remained dedicated to the protection of small business. In *Brown Shoe Co. v. United States*, the Court elaborated on the Congressional concerns about concentration.¹¹⁷ The Court noted that the legislative history of the Celler-Kefauver Amendments showed Congress aimed to encourage and maintain local control over industry and small business.¹¹⁸ It described these goals as the “economic way of life sought to be preserved by Congress.”¹¹⁹

The Court speculated that consolidation, left unchecked, would undermine and eventually eliminate small producers in the economy. The Court in *United States v. Von's Grocery Co.* feared the eventual demise of small businesses in the grocery retailing market in Los Angeles.¹²⁰ In holding a merger between two supermarkets with a combined market share of less than 10 percent to be illegal, the majority noted that “Congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipency.”¹²¹ Without judicial intervention against consolidation, the Court predicted the marketplace would “inevitably gravitate from a market of many small competitors to one dominated by one or a few giants.”¹²² In a case involving a combination between manufacturers of jars and other containers, the Court stated that allowing the merger would compel other firms to combine to “seek[] the same competitive advantages sought by Continental in this case.”¹²³

The preservation of small business was a regular theme during the period. In his famous opinion in *United States v. Aluminum Co. of America (Alcoa)*,¹²⁴ Judge Learned Hand noted that the purpose of the antitrust laws was to preserve small firms “which can effectively com-

116. *Id.* at 368.

117. *Brown Shoe Co. v. United States*, 370 U.S. 294, 316 (1962).

118. *Id.* at 315.

119. *Id.* at 333.

120. *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966).

121. *Id.* at 277.

122. *Id.*

123. *United States v. Cont'l Can Co.*, 378 U.S. 441, 464 (1964).

124. 148 F.2d 416 (1945). The *Alcoa* ruling has the precedential value of a Supreme Court decision because the Court could not achieve a quorum.

pete with each other.”¹²⁵ Pronouncing the basis for preferring an economy of many small producers to an economy of a few behemoths, Judge Hand said that “[i]t 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.”¹²⁶ The Court underscored its general concern for the independent businessman in *Klor’s Inc. v. Broadway-Hale Stores Inc.*¹²⁷ Although the conduct at issue apparently affected only one small retailer in San Francisco, injury to even one competitor was a source of concern to the antitrust laws. The defendants’ behavior was *not* to be “tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy.”¹²⁸

Beyond supporting their basic economic viability, the antitrust decisions of the era also stressed protecting competitive opportunities for small businesses. The Supreme Court, in a case involving the distribution practices of movie studios, recited the district court’s findings, stating that the defendants’ contracts “deprived [second-run movie theaters] of any opportunity to exhibit the restricted pictures, which were the best and most popular of all new feature pictures.”¹²⁹ The Court, furthermore, decried how the restrictions reduced revenues for some second-run movie theaters.¹³⁰ The Associated Press’s restrictive by-laws were ruled illegal for similar reasons.¹³¹ By denying wire reports to rivals of its members, the Associated Press “limit[ed] the opportunity of any new paper to enter these cities”¹³² and reduced nonmembers’ “opportunity to buy or sell the things in which the groups compete.”¹³³ The Court condemned conduct that “foreclose[d] competitors from any substantial market.”¹³⁴ The prevention of foreclosure of competitors was a recurring concern in the Court’s antitrust rulings from the 1950s through the early 1970s.¹³⁵

125. *Id.* at 429.

126. *Id.* at 427.

127. 359 U.S. 207 (1959).

128. *Id.* at 213.

129. *Interstate Circuit v. United States*, 306 U.S. 208, 219 (1939).

130. *Id.* at 231.

131. *Associated Press v. United States*, 326 U.S. 1, 21 (1945).

132. *Id.* at 13.

133. *Id.* at 15.

134. *Intern’l Salt Co. v. United States*, 332 U.S. 392, 396 (1947), *abrogated by* *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006) (citing *Fashion Originators’ Guild of Am., Inc. v. Fed. Trade Comm’n*, 312 U.S. 457 (1941)).

135. *See, e.g.*, *United States v. Topco Assoc.*, 405 U.S. 596, 610 (1972); *United States v. Lowe’s, Inc.*, 371 U.S. 38, 48 (1962), *abrogated by* *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006); *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 328 (1961); *N. Pac. Ry. Co. v. United States*, 256 U.S. 1, 6 (1958); *Times-Picayune v. United States*, 345 U.S. 594, 608–09 (1953).

The antitrust rulings of the era also valued the competitive autonomy of small businesses. The Court disapproved of a leading fashion guild's boycott of stores as a means of stopping the sale of pirated designs because it deprived both retailers and clothing manufacturers of the freedom to transact with whom they desired.¹³⁶ Contracts that stipulated maximum resale prices were held to "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."¹³⁷ When addressing the termination of a stock broker's privileges at the New York Stock Exchange, the Court observed that the "antitrust laws serve, among other things, to protect competitive freedom, i.e., the freedom of individual business units to compete unhindered by the group action of others."¹³⁸ It invalidated contractual restraints that restricted the geographical territories where small dealers could sell their goods.¹³⁹

Other decisions from the era went even further in their commitment to protecting dealer freedom. The Supreme Court offered a passionate defense of the small dealer.¹⁴⁰ It stated, for example, that independent owners of gasoline stations had "all or most of the indicia of entrepreneurs."¹⁴¹ It struck down resale price maintenance contracts for depriving these retailers of "[p]ractically the only power they have to be wholly independent businessmen, whose service depends on their own initiative and enterprise."¹⁴² The Court condemned contracts that "coercively laced into an arrangement . . . thousands of persons whose prices otherwise might be competitive."¹⁴³ Unless checked, the Court believed that the contractual restraints imposed by large businesses represented an existential threat to small business.¹⁴⁴

The goals of protecting consumers and small producers, while not intrinsically at odds, can conflict. In the event the actions of antitrust defendants hurt small producers but benefited consumers, the Supreme Court generally valued the interests of small businesses over the interests of consumers. It stated that an antitrust violation may be found "even though a combination may temporarily or even permanently reduce the price of the articles manufactured or sold."¹⁴⁵ In

136. *Fashion Originators' Guild*, 312 U.S. at 465.

137. *Kiefer-Stewart Co. v. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951), *overruled* by *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

138. *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 359-60 (1963).

139. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 379-80 (1967), *overruled* by *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

140. *Simpson v. Union Oil Co. of Cal.*, 377 U.S. 13, 20-21 (1964).

141. *Id.* at 20.

142. *Id.* at 20-21.

143. *Id.* at 21.

144. *Schwinn & Co.*, 388 U.S. 365 (1967).

145. *Fashion Originators' Guild of America, Inc. v. Fed. Trade Comm'n*, 312 U.S. 457, 467 (1941).

Utah Pie Co. v. Continental Baking Co., the Court faced a stark choice—protect consumers or small business?¹⁴⁶ The defendant had cut prices to the benefit of consumers but to the detriment of its rivals.¹⁴⁷ Revealing its preference for small producers, the Court cited this fact to rule against the defendant: “[T]he evidence shows a drastically declining price structure which the jury could rationally attribute to continued or sporadic price discrimination.”¹⁴⁸

Corporate consolidations also raise the possibility of helping consumers and hurting small firms. Once again, when forced to choose between the two protected classes of the era, the Court chose small producers over consumers. It was not blind to how consolidation could benefit consumers.¹⁴⁹ But it held that a marketplace with many players trumped a more concentrated field that delivered lower prices to consumers.¹⁵⁰ “Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.”¹⁵¹

B. Rules of the Period: Faith in the Price System and Skepticism Toward Mergers, Collaborative Conduct, and Vertical Restraints

In an era of dueling populisms, the Supreme Court showed an almost absolute commitment to the free play of the price system and was correspondingly hostile to practices that interfered with the market process. The Court described prices as the “central nervous system”¹⁵² of the market economy. Per this view, prices are set through a dynamic competitive process, and collusive conduct short-circuits this

146. *Utah Pie Co. v. Cont'l Baking Co.*, 386 U.S. 685 (1967).

147. *See id.* at 703 (“The frozen pie market in Salt Lake City was highly competitive. At times Utah Pie was a leader in moving the general level of prices down, and at other times each of the respondents also bore responsibility for the downward pressure on the price structure.”).

148. *Id.*

149. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) (“The retail outlets of integrated companies, by eliminating wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, can market their own brands at prices below those of competing independent retailers. Of course, some of the results of large integrated or chain operations are beneficial to consumers.”).

150. *See, e.g., Fed. Trade Comm'n v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967).

151. *Brown Shoe*, 370 U.S. at 344.

152. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1964). (“Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy.”).

core mechanism of the American economy.¹⁵³ It condemned horizontal cooperation that allowed businesses to exercise collective control over pricing, even if these practices meant price stabilization as opposed to the complete fixing of prices.¹⁵⁴

Along with deeming horizontal price fixing to be per se illegal, the Court also extended this harsh treatment to horizontal conduct that could indirectly bring about price maintenance or stabilization. In *United States v. Container Corp.*, the Court applied a presumption of illegality against an information-sharing program among competitors.¹⁵⁵ It stated that “[t]he result of this reciprocal exchange of prices was to stabilize prices though at a downward level”¹⁵⁶ and stressed the importance of an unfettered price mechanism. Price was deemed “too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition.”¹⁵⁷

The Court also categorically condemned horizontal market division, whereby competitors agreed not to serve the same territories, product lines, or customers. In *Timken Roller Bearing Co. v. United States*, the Court ruled horizontal market division to be per se illegal and rejected the defendants’ joint venture and trademark justifications.¹⁵⁸ The Court condemned the market division of a group of mattress manufacturers without engaging in a rule of reason analysis.¹⁵⁹ In support of its per se approach, the Court cited how the market allocation was “part of ‘an aggregation of trade restraints’ including unlawful price-fixing and policing.”¹⁶⁰ Although some defendants claimed that market division, on net, promoted competition, the Court declined to consider this defense, stating “[i]f a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion this too is a decision that must be made by Congress and not by private forces or by the courts.”¹⁶¹

Given the high value it placed on a price system free of external restraints, the Court treated vertical price restraints with comparable hostility. Minimum resale price maintenance was consistently

153. *See id.* at 221 (“The reasonableness of prices has no constancy due to the dynamic quality of the business facts underlying price structures. Those who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since those prices would not be subject to continuous administrative supervision and readjustment in changed conditions.”).

154. *Id.* at 221–22.

155. *United States v. Container Corp.*, 393 U.S. 333 (1969).

156. *Id.* at 336.

157. *Id.* at 338.

158. *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598–99 (1951), *overruled by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

159. *United States v. Sealy, Inc.*, 388 U.S. 350 (1967).

160. *Id.* at 357 (quoting *Timken*, 341 U.S. at 598).

161. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 611–12 (1972).

treated as a per se violation.¹⁶² The Court sometimes did not even draw a distinction between horizontal and vertical price-fixing, holding in one decision that “[p]rice fixing, reasonable or unreasonable, is ‘unlawful per se.’”¹⁶³ It justified this categorical condemnation of resale price maintenance on the basis that these contracts could lead to prices above what a competitive market would set.¹⁶⁴

Because the practice interfered with the free play of market forces, the Court also treated maximum resale price maintenance as per se illegal.¹⁶⁵ In addition to the threat of prices that may be *above* competitive levels, maximum resale price maintenance could also lead to prices *below* competitive levels. The Court offered a list of undesirable economic effects from maximum resale price maintenance: contractual price ceilings could discourage the provision of services, limit the non-price competition faced by large distributors, and serve as a cover for minimum resale price maintenance.¹⁶⁶

In contrast to its consistently unfavorable view of vertical price restraints, the Court expressed more ambivalence toward vertical nonprice restraints. For example, it thought that exclusive dealing contracts had both positive and negative economic effects and should be analyzed under the rule of reason. The Court in a 1949 decision stated that exclusive dealing “may well be of economic advantage to buyers as well as to sellers, and thus indirectly of advantage to the consuming public.”¹⁶⁷ Exclusive dealing could provide the following benefits to buyers: reliable supply, price protection, predictable long-term costs, and reduced need for storage.¹⁶⁸ And from a seller’s perspective, exclusive dealing could reduce sales expenses, provide price protection, and offer predictability in long-term demand.¹⁶⁹ In light of the ambiguous effects of exclusivity provisions in contracts, the Court articulated a structured rule of reason for analyzing exclusive dealing contracts.¹⁷⁰ An exclusive-dealing arrangement was illegal only if it

162. See *Simpson v. Union Oil Co.*, 377 U.S. 13, 24 (1964); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 47 (1960); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 724 (1944).

163. *Bausch & Lomb*, 321 U.S. at 720 (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1961)); see *Fashion Originators’ Guild of America, Inc. v. Fed. Trade Comm’n*, 312 U.S. 457 (1941); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927)).

164. *Simpson*, 377 U.S. at 21–22.

165. *Kiefer-Stewart Co. v. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951), *overruled by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

166. *Albrecht v. Herald Co.*, 390 U.S. 145, 152–53 (1968), *overruled by State Oil Co. v. Khan*, 522 U.S. 3 (1997).

167. *Standard Oil Co. v. United States*, 337 U.S. 293, 306 (1949).

168. *Id.*

169. *Id.* at 306–07.

170. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327–28 (1961).

was “probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected.”¹⁷¹

Likewise, the Court hesitated to apply the per se rule to exclusive territories for distributors.¹⁷² In *White Motor Co. v. United States*, the Court asserted that it did not have sufficient experience to deem exclusive territories to be per se illegal.¹⁷³ While these restraints could serve to suppress competition, the Court did not believe that this was the inevitable result.¹⁷⁴ Exclusive territories could, for example, facilitate the entry of new firms, and so the Court held that it needed to “know more than we do about the actual impact of these arrangements on competition to decide whether they have such a ‘pernicious effect on competition and lack . . . any redeeming virtue.’”¹⁷⁵ Four years after *White Motor*, the Court moved away from a full rule of reason approach and adopted a bifurcated approach to exclusive territories.¹⁷⁶ They were per se illegal when the manufacturer transferred title to its distributors. When the manufacturer “retain[ed] title, dominion, and risk with respect to the product,”¹⁷⁷ however, exclusive territories were still analyzed under the rule of reason.

Tying—whereby sellers require customers to purchase Product B as a condition of purchasing product A—was seen as generally harmful. The Court acknowledged that some forms of tying are benign and would have no effects on the larger market. As an example of innocuous tying, it described a single grocery store—in a hypothetical market with a dozen players—that required customers to purchase flour and sugar as a bundle.¹⁷⁸ The predominant view on tying, however, was negative. In several decisions from the period, the Court held that tying serves no purpose except the exclusion of competitors. The Court’s approach to tying during the era was described succinctly in *Standard Oil of California v. United States*: “Tying agreements serve hardly any purpose beyond the suppression of competition.”¹⁷⁹ The Court rejected the defendant’s argument that tying was required to protect product quality and ultimately consumer goodwill.¹⁸⁰

The Supreme Court took a strong stance against mergers, although the economic rationales were not always consistent due to the occa-

171. *Id.* at 327.

172. Per an exclusive territories arrangement a manufacturer restricts where each retailer can sell the manufacturer’s products.

173. *White Motor Co. v. United States*, 372 U.S. 253, 266 (1963).

174. *Id.* at 263.

175. *Id.* (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958)).

176. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), *overruled by Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

177. *Id.* at 80.

178. *N. Pac. Ry. Co.*, 356 U.S. at 6–7 (1958).

179. *Standard Oil of Cal. v. United States*, 337 U.S. 293, 305 (1949).

180. *Id.*

sional conflict between protecting consumers and protecting small businesses. At times, the Court enjoined mergers because they threatened to lead to higher prices and reduced service quality for consumers. In *Philadelphia National Bank*, the Court enjoined the merger between two leading Philadelphia-area banks because of the likelihood of adverse effects on consumers.¹⁸¹ The existing level of competition benefited consumers and the merger could lead to reduced access to credit and diminished banking services.¹⁸² The Court stated that a merger that created an entity with 30% of the market share would be presumptively illegal.¹⁸³

The Court, on occasion, considered the potential long-term harm from mergers.¹⁸⁴ In a government challenge against the merger of Clorox (a bleach manufacturer) and Procter & Gamble (a maker of a number of household goods, but not bleach), the Court believed the enhanced marketing capabilities of the combined entity would deter new entry and limit price competition.¹⁸⁵

Mergers could also be illegal when they undermine competitors. Even as it accepted that mergers could generate proconsumer efficiencies,¹⁸⁶ the Court feared these cost savings would threaten the viability of smaller rivals. In *Brown Shoe*, the Court recognized that the merger at issue, by facilitating vertical integration between manufacturing and retailing and permitting larger volume purchases, could lead to lower costs and ultimately lower prices for consumers.¹⁸⁷ By creating these efficiencies and lowering costs, mergers could force the remaining firms to merge too, or face the real risk of failure.¹⁸⁸ On these grounds, the Court declined to recognize efficiencies as a defense to an otherwise illegal merger. Because corporate mergers inevitably seemed to violate the antitrust laws, Justice Stewart noted in his dissent in *Von's Grocery* that the “sole consistency that I can find [in merger cases] is that . . . the Government always wins.”¹⁸⁹

The Court established an expansive definition of predatory pricing—temporary price cuts aimed at injuring rivals. In *Utah Pie*, the Court affirmed a jury verdict that found that the defendant had engaged in predatory pricing.¹⁹⁰ The Court stated that the defendant’s

181. *United States v. Phila. Nat'l Bank*, 374 U.S. 321 (1963).

182. *Id.* at 371–72.

183. *Id.* at 364.

184. *Fed. Trade Comm'n v. Procter & Gamble Co.*, 386 U.S. 568, 579 (1967).

185. *Id.*

186. *See id.* at 580 (“Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition.”).

187. *Brown Shoe Co. v. United States*, 370 U.S. 294, 343–44 (1962).

188. *United States v. Von's Grocery Co.*, 384 U.S. 270, 277–78 (1966).

189. *Id.* at 301 (Stewart, J., dissenting).

190. *Utah Pie Co. v. Cont'l Baking Co.*, 386 U.S. 685, 685 (1967).

aggressive and targeted price cutting in the Salt Lake City market forced the plaintiff and other competitors to cut prices, or otherwise lose sales.¹⁹¹ It found that it was reasonable to conclude that this aggressive price competition would weaken the plaintiff's ability to compete in the future.¹⁹² In addition to the defendant's price discounting, the Court placed significant stock in the documentary evidence showing the defendant's "predatory intent to injure Utah Pie."¹⁹³

The Court viewed refusals to deal, whether collective or unilateral, as suspect. In *Fashion Originators Guild*, the Court declined to consider the business justifications of the defendants who organized the group boycott.¹⁹⁴ In rejecting the defendants' claim that their action was necessary to mitigate the threat of pirated fashion designs, the Court ruled the boycott was illegal because it harmed competing textile manufacturers.¹⁹⁵ The Court struck down the Associated Press's by-laws that prevented some newspapers from obtaining access to its wire reports.¹⁹⁶ The Court recognized that being deprived of access to Associated Press news reports did not "inhibit competition in all of the objects of that trade." However, the injurious effect on competing newspapers was sufficient for the Associated Press' restrictive by-laws to run afoul of the antitrust laws.¹⁹⁷ The Court declined to consider business justifications in support of group boycotts and stated that "[e]ven when they operated to lower prices or temporarily to stimulate competition they were banned."¹⁹⁸

In *United States v. Lorain Journal Co.*, the Court affirmed the illegality of a dominant local newspaper's conditional refusal-to-deal.¹⁹⁹ It stressed that freedom to deal, while a "general right,"²⁰⁰ is, as with "[m]ost rights[,] . . . qualified."²⁰¹ The newspaper's conduct was illegal because the paper aimed to destroy a new radio station and monopolize advertising in the town of Lorain, Ohio.²⁰²

191. *Id.* at 699–700.

192. *Id.* at 699.

193. *Id.* at 702.

194. *Fashion Originators' Guild of Am. v. Fed. Trade Comm'n*, 312 U.S. 457, 457 (1941).

195. *Id.* at 467–68.

196. *Assoc. Press v. United States*, 326 U.S. 1, 1 (1945).

197. *Id.* at 18–19.

198. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959).

199. *Lorain Journal Co. v. United States*, 342 U.S. 143, 143 (1951).

200. *Id.* at 155.

201. *Id.* (quoting *Am. Bank & Trust Co. v. Fed. Reserve Bank of Atlanta*, 256 U.S. 350, 358 (1921)).

202. *Id.* at 152–53.

IV. CONSUMERS AS THE PROTECTED CLASS OF ANTITRUST: 1970s–PRESENT

Beginning in the 1970s, antitrust jurisprudence broke decisively from its dual populisms. The Supreme Court began to hold that the antitrust laws exist only for the protection of consumers and that the preservation of small businesses is not a valid antitrust objective. The antitrust laws are now defined as a “consumer welfare prescription.”²⁰³ In addition, the Court adopted a new economic paradigm that has greater faith in the consumer benefits from the practices of large firms. Many types of conduct, previously treated as inherently anticompetitive, are thought today to have the promise of benefiting consumers.

A. Consumer Welfare as the Principal Aim of the Antitrust Laws

The Supreme Court in the 1970s²⁰⁴ departed from its earlier decisions and held that antitrust laws exist only to protect consumers. It has described the Sherman Act as seeking to foster “consumer interests”²⁰⁵ and as a “consumer welfare prescription.”²⁰⁶ The Court no longer considers the protection of small businesses as one of the goals of antitrust enforcement. Harm to small producers is relevant only if consumers are likely to be injured as a result. Even as it has entered a period of overall conservatism starting in the 1970s and continuing through the present,²⁰⁷ the Court continues to speak in populist terms and officially champion the cause of ordinary Americans in their capacity as consumers.

The Court has treated prices above competitive levels as a primary antitrust evil. Elevated prices due to price-fixing have been described as “unusually damaging”²⁰⁸ to consumers. The Court in *Reiter v. Sonotone* went further and emphasized the significance of consumers in

203. See, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

204. See, e.g., *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

205. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984).

206. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 106 (1984) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 334 (1979)) (internal quotation marks omitted).

207. See Ari Berman, *Why the Supreme Court Matters*, THE NATION, Apr. 11, 2012 (“When President Gerald Ford nominated him in 1975, Justice John Paul Stevens occupied the ideological center of the Supreme Court. By the time he retired in 2010, he was the Court’s most liberal member. Over those thirty-five years, the Court changed far more than Stevens did. ‘What was once on the extreme right is now merely conservative,’ wrote University of Chicago constitutional law professor Cass Sunstein. ‘What was once conservative is now centrist. What was centrist is now left wing. What was once on the left no longer exists.’”).

208. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 782 (1975).

the larger economy and their opposition to high prices.²⁰⁹ In holding that a consumer had a right to seek damages for the anticompetitive behavior of the manufacturer-respondents, the Court stated that “where petitioner alleges a wrongful deprivation of her money because the price of the [product] she bought was artificially inflated by reason of respondents’ anticompetitive conduct, she has alleged an injury to her ‘property.’”²¹⁰

As a corollary to the antitrust opposition to high prices, low prices have been described as a desirable end: “Low prices benefit consumers regardless of how those prices are set”²¹¹ The Court has refrained from adopting antitrust rules that it fears would “discourag[e] . . . price cut[s] . . . , thus depriving consumers of the benefits of lower prices in the interim.”²¹² It has commended aggressive producer conduct that can lower prices.²¹³

The Court has looked beyond just low prices and has articulated consumers’ interest in product quality. In *National Society of Professional Engineers v. United States*, it stated antitrust law’s interest in the availability of high quality goods and services and, in the context of engineering services, listed them as including “quality, service, safety, and durability.”²¹⁴ The Court has described how blanket music licenses—horizontal collaboration among artists—allow radio stations and others to obtain a broad portfolio of music.²¹⁵ The Court has stressed consumers’ interest in high quality goods.²¹⁶ In this vein, “the antitrust laws do not require manufacturers to produce generic goods that consumers do not know about or want”²¹⁷ and now recognize that consumers benefit from the provision of retail services.²¹⁸

Enabling consumer choice has been described as another objective of the antitrust laws. The Court has stated the importance of consumers having the freedom to “select the best bargain” and “evaluate the true cost” of products.²¹⁹ It has lauded some of the collaborative ef-

209. *Reiter*, 442 U.S. at 342 (1979).

210. *Id.*

211. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990).

212. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993).

213. *See Weyerhaeuser Co. v. Ross-Simmons Hardware Lumber Co.*, 549 U.S. 312, 324 (2007) (“In the first stage of a predatory-bidding scheme, the predator’s high bidding will likely lead to its acquisition of more inputs. Usually, the acquisition of more inputs leads to the manufacture of more outputs. And increases in output generally result in lower prices to consumers.”).

214. *Nat’l Soc. of Prof’l Engineers v. United States*, 435 U.S. 679, 695 (1978).

215. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 20 (1979).

216. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

217. *Id.* at 897.

218. *Id.* at 890.

219. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15 (1984), *abrogated by Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

forts of the NCAA for having expanded “the choices available to sports fans.”²²⁰ Conduct that “limit[s] consumer choice by impeding the ‘ordinary give and take of the market place’”²²¹ has been viewed dimly. The Court has aspired to enhance consumer choice, allowing consumers to pick between “low-price, low-service brands; high-price, high-service brands; and brands that fall in between.”²²² *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, a dispute between the two main ski mountain operators in the Colorado town, even pointed to consumer surveys to reach its outcome.²²³ It observed that a sizeable fraction of skiers wanted to ski at both resorts in the Aspen area, instead of just one or the other.²²⁴

As the Court has embraced consumer welfare as the sole goal of the antitrust laws, it has concurrently disclaimed injury to competitors as a sufficient basis for imposing liability on defendants. The Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* rejected the respondent’s claim for damages because its injury arose from a competitive market.²²⁵ The Court held that the antitrust laws do not exist to compensate parties injured on account of increased competition because these laws “were enacted for the protection of competition not competitors.”²²⁶ In a drastic reorientation from the prior period, the Court stated, “the antitrust laws do not require the courts to protect small business from the loss of profits due to continued competition.”²²⁷ It effectively repudiated the decision in *Utah Pie* and held the “loss of profits due to . . . price competition” cannot be the basis of an antitrust suit.²²⁸

More generally, the Court has held that businesses are not a protected class of the antitrust laws. It has stated “[t]he purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market.”²²⁹ Even in the context of the Robinson-Patman Act, an antitrust law

220. *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101–02 (1984).

221. *Fed. Trade Comm’n v. Ind. Fed. Of Dentists*, 476 U.S. 447, 459 (1986) (quoting *Nat’l Soc. of Prof’l Engineers v. United States*, 435 U.S. 679, 692 (1978)).

222. *Leegin*, 551 U.S. at 890.

223. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

224. *Id.* at 606.

225. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (“At base, respondents complain that by acquiring the failing centers petitioner preserved competition, thereby depriving respondents of the benefits of increased concentration. The damages respondents obtained are designed to provide them with the profits they would have realized had competition been reduced.”).

226. *Id.* at 488 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

227. *Cargill Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 116 (1986).

228. *Id.* at 117.

229. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993).

aimed at protecting small businesses,²³⁰ the Court has tried to limit the statute's potential to undermine a proconsumer vision of the anti-trust laws generally.²³¹ In its most recent Robinson-Patman Act decision, the Court stated that it "would resist [an] interpretation geared more to the protection of existing competitors than to the stimulation of competition."²³²

Although it no longer views the protection of small businesses as an ultimate goal of the antitrust laws, the Court does recognize competitive harms to competitors if their injury also produces consumer harm. Even in the era of the antitrust laws as a "consumer welfare prescription," competitors can still bring successful suits under the antitrust laws. They must, however, show that their injury also resulted in harm to consumers. The *Aspen Skiing* decision captured the distinction between harm to *only* competitors, a noncognizable injury under the antitrust laws, and harm to competitors *and* consumers, a cognizable injury. It stated, "whether [the defendant's] conduct may properly be characterized as exclusionary cannot be answered by simply considering its effect on [the plaintiff]. In addition, it is relevant to consider its impact on consumers"²³³

The Court has refused to permit antitrust suits that fail to show harm to consumers from proceeding to trial. Injured competitors must demonstrate harm to the market as a whole, not just economic injury to themselves.²³⁴ The "plaintiff here must allege and prove harm, not just to a single competitor, but to the competitive process, *i.e.*, to competition itself."²³⁵

When competitor-plaintiffs have established harm to the competitive process and consumers, the Supreme Court has found that the antitrust laws may have been violated. In *Aspen Skiing*, the Court affirmed a jury verdict for the plaintiff, which was the defendant's main competitor.²³⁶ The Court found that the defendant's conduct against the plaintiff had injured not only the plaintiff but also harmed consumers.²³⁷ The Court in *Eastman Kodak Co. v. Image Technical Services, Inc.* affirmed the Ninth Circuit's decision denying the defendant summary judgment in a suit brought by a competitor.²³⁸ The

230. Sandeep Vaheesan, *The Great A&P and the Struggle for the Soul of Antitrust*, 98 IOWA L. REV. BULL. 55, 60–61 (2013).

231. John B. Kirkwood, *The Robinson-Patman Act and Consumer Welfare: Has Volvo Reconciled Them?*, 30 SEATTLE U. L. REV. 349, 374 (2007).

232. *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 181 (2006).

233. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985).

234. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 31–32 (1984), *abrogated by* *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

235. *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998).

236. *Aspen Skiing*, 472 U.S. at 605.

237. *Id.* at 610.

238. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992).

Court held that the defendant's conduct had excluded the plaintiff from the market for servicing photocopiers, which resulted in higher prices for consumers—"exactly the harm that antitrust laws aim to prevent."²³⁹

The 1990 decision in *FTC v. Superior Court Trial Lawyers Ass'n* illustrated the sea change in antitrust jurisprudence since the days of *Appalachian Coals*.²⁴⁰ A group of trial attorneys had agreed not to represent indigent criminal defendants in the District of Columbia, as a means of pressuring the city's government into increasing their hourly rates.²⁴¹ At the time the boycott was organized, the members of the public defenders' bar in the District of Columbia earned "\$30 per hour for court time and \$20 per hour for out-of-court time."²⁴² In other words, these lawyers were providing a constitutionally guaranteed right to indigent criminal defendants in return for modest compensation. The boycott succeeded, and the city government agreed to raise all hourly rates for public defenders to \$35 per hour.²⁴³ In response to the successful boycott, the Federal Trade Commission brought an enforcement action against the trial lawyers.²⁴⁴

Although the Court acknowledged that the Federal Trade Commission's decision to proceed with an enforcement action against the attorneys was controversial,²⁴⁵ it held that the lawyers in organizing the boycott had committed a per se violation of the Sherman Act. It ruled that the lawyers' defenses were not valid because the Sherman Act "precludes inquiry into the question whether competition is good or bad."²⁴⁶ In contrast to its decision in *Appalachian Coals* nearly sixty years earlier, the Court was not willing to soften the application of the Sherman Act to a group of sympathetic small producers.

B. Rules of the Chicago School Era: Hostility to Collusion but General Faith in Self-Regulating Markets

In this consumer-centric era of antitrust, the Court has embraced a radically more positive view of big business behavior. The Court continues to view collusion and other horizontal agreements not to compete harshly. In most other areas, however, the Court has adopted a much more benign view of corporate conduct. It has relaxed its treatment of vertical restraints of all types, tying, mergers, and monopoli-

239. *Id.* at 478.

240. Fed. Trade. Comm'n v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990).

241. *Id.* at 416–17.

242. *Id.* at 415.

243. *Id.* at 418.

244. *Id.* at 418–19.

245. *Id.* at 421.

246. *Id.* at 424 (quoting Nat'l Soc. of Prof'l Engineers v. United States, 435 U.S. 679, 695 (1978)).

zation. The Court has adopted the view, often described as Chicago School, on account of the outsized influence of economists and law professors from the University of Chicago, that vertical restraints and dominant firm behavior are often efficiency enhancing and beneficial to consumers.²⁴⁷

The Supreme Court continues to treat collusive conduct between horizontal rivals as per se illegal. The Court in *Professional Engineers* was not faced with explicit price fixing but rather conduct that restricted price competition between engineers.²⁴⁸ It reiterated that “an agreement that ‘interfere[s] with the setting of price by free market forces’ is illegal on its face,”²⁴⁹ holding that “while this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.”²⁵⁰ The Court has declined to adopt the rule of reason for maximum price fixing between rivals.²⁵¹ It noted, among other things, that the maximum price agreement “may be a masquerade for an agreement to fix uniform prices, or it may in the future take on that character.”²⁵² Collusion has been described as the “supreme evil of antitrust.”²⁵³ The Court in a per curiam opinion, *Palmer v. BRG of Georgia, Inc.*, also deemed a market allocation scheme between two bar review preparatory services as per se illegal, irrespective of the preexisting competition between the parties.²⁵⁴

While horizontal collusion remains per se illegal, the Court has steadily relaxed its treatment of vertical restraints over the past forty years, due in large part to the purported threat of free riding. In arguably the Court’s first major decision of the Chicago School era, the 1977 ruling in *Continental T.V., Inc. v. GTE Sylvania Inc.* overturned the rule that exclusive territories are per se illegal when the title on goods passes to distributors.²⁵⁵ This decision held that all vertical territorial restraints should be evaluated under the rule of reason.²⁵⁶ The Court stated that “[t]he market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition.”²⁵⁷ On the one hand, it recognized that exclusive territories can reduce

247. See, e.g., Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 926–28 (1978).

248. Nat’l Soc. of Prof’l Engineers v. United States, 435 U.S. 679 (1978).

249. *Id.* at 692 (quoting *United States v. Container Corp.*, 393 U.S. 333, 337 (1969)).

250. *Id.*

251. *Arizona v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332 (1982).

252. *Id.* at 348.

253. *Verizon Comm’n, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 390, 408 (2004).

254. *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49–50 (1990) (per curiam).

255. *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

256. *Id.*

257. *Id.* at 51.

competition between distributors of a single manufacturer.²⁵⁸ On the other hand, the Court held that new entrants can grant exclusive territories to “induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer.”²⁵⁹ In the Court’s view, incumbent manufacturers can also use exclusive territories to prevent no-frills dealers and distributors from free riding on the promotional efforts and services of rival dealers—a recurring theme in the Court’s decisions in vertical restraint cases.

Along with moving nonprice vertical restraints into the rule of reason category, the Court has overturned long-standing per se rules for vertical price restraints. The nearly thirty-year-old per se rule against maximum vertical price fixing was reversed in 1997.²⁶⁰ The Court questioned the rationales offered in 1968, asserting that manufacturers have an incentive to set maximum prices at a level that permits retailers to “offer consumers essential or desired services.”²⁶¹ In line with the new consumer orientation of antitrust, the Court did not view the adverse effects of maximum price fixing on some dealers to be an antitrust concern.²⁶²

In an even more momentous decision, the Court overruled the nearly-century-old prohibition on resale price maintenance in 2007.²⁶³ The result was not unexpected and followed multiple decisions that had increased the evidentiary hurdles for plaintiffs in resale price maintenance cases.²⁶⁴ The Court acknowledged that resale price maintenance could be used to facilitate a manufacturer or retailer cartel or protect a dominant retailer from lower cost competitors.²⁶⁵ In adopting the rule of reason for resale price maintenance, the *Leegin* Court recited many of the same justifications it had offered in *Sylvania*. The Court held that this practice could be used to aid new entry and to encourage retailers to provide services.²⁶⁶ As in *Sylvania*, the Court spoke of the dangers of free riding and stated that, absent resale price maintenance, “discounting retailers can free ride on retailers who furnish services and then capture some of the increased demand those services generate.”²⁶⁷

258. *Id.* at 55.

259. *Id.*

260. *State Oil Co. v. Khan*, 522 U.S. 3, 3 (1997).

261. *Id.* at 17.

262. *See id.* (“[A]lthough vertical maximum price fixing might limit the viability of inefficient dealers, that consequence is not necessarily harmful to competition and consumers.”).

263. *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 877 (2007).

264. *See, e.g.*, *Bus. Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 731 (1988); *Mon-santo Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984).

265. *Leegin*, 551 U.S. at 893.

266. *Id.* at 891–92.

267. *Id.* at 890.

The Court has softened its stance on tying since the 1970s. The per se prohibition on tying has not been overturned but its application has been cabined.²⁶⁸ Tying is now illegal only when the defendant has market power in the market for the tying product and can “force a purchaser to do something that he would not do in a competitive market.”²⁶⁹ Only if this forcing “is probable” is tying per se illegal.²⁷⁰ In other words, the so-called per se ruling against tying has been, for all intents and purposes, converted to a structured rule of reason. The Court has further held that market power cannot be presumed when the tying product is patented.²⁷¹ The Court observed, “the vast majority of academic literature recognizes that a patent does not necessarily confer market power.”²⁷² Even in the context of tying involving intellectual property, plaintiffs must establish that the defendant has market power.²⁷³

Mergers and joint ventures are now viewed in a more positive light and presumed to generate proconsumer efficiencies. In a 1974 case involving consolidation in coal mining, the Court moved away from its earlier antimerger stance.²⁷⁴ The Court rejected the government’s reliance on production-based market shares, holding that they cannot be the basis for blocking a merger in the coal industry.²⁷⁵ It instead held that in the coal industry indicators of future output and market shares, like coal reserves, should guide merger analysis.²⁷⁶ In *BMI*, the Court recognized the collaborative blanket license between owners of copyrighted music benefited consumers and stated “[m]any consumers clearly prefer the characteristics and cost advantages of this marketable package.”²⁷⁷ On this basis, the Court rejected per se treatment of the joint venture’s pricing arrangements.²⁷⁸ In general, it has been more willing to recognize and credit efficiencies from large horizontal mergers and other business integrations.²⁷⁹

The Court has imposed a high burden on claims of predatory pricing, repeatedly doubting that it is a common anticompetitive strategy.

268. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 2 (1984), *abrogated by Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

269. *Id.* at 1–14.

270. *Id.* at 15–16.

271. *Ill. Tool Works*, 547 U.S. 28.

272. *Id.* at 44.

273. *Id.* at 46.

274. *United States v. Gen. Dynamics Corp.*, 415 U.S. 486 (1974).

275. *Id.* at 501.

276. *Id.* at 503–04.

277. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 22–23 (1979).

278. *Id.* at 24.

279. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984); *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101–02 (1984).

It has ignored the empirical research on the topic²⁸⁰ and asserted that “there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful.”²⁸¹ Predatory pricing is described as a *certain* profit sacrifice *today* in return for an *uncertain* increase in profits *tomorrow*, which suggests it is unlikely to be a “rational” strategy.²⁸² The Court has feared that a predatory pricing rule more favorable to plaintiffs could deter price competition and actually harm consumers.²⁸³ With these concerns in mind, it has articulated a two-part test that strongly favors defendants accused of predation.²⁸⁴

Collective and unilateral refusals to deal are also treated more leniently today. As with tying, the Court has narrowed the scope of the per se rule against group boycotts. The Court, for example, has declined to condemn categorically expulsions from joint ventures.²⁸⁵ In addressing a joint venture dispute, it stated that “[w]holesale purchasing cooperatives must establish and enforce reasonable rules in order to function effectively.”²⁸⁶ Per se condemnation of the expulsion is warranted only “if the cooperative possesses market power or exclusive access to an element essential to effective competition.”²⁸⁷ The Court has refused to apply the per se rule to a unilateral refusal to deal by a firm with market power.²⁸⁸ Under these circumstances, it has held that the defendant was merely exercising “market power that is *lawfully* in the hands of a monopolist.”²⁸⁹ In 2004, it went even further and stated that imposing antitrust liability for unilateral refusals to deal could lead to a parade of horrors, including reduced investment and innovation, and collusion between the parties.²⁹⁰

V. WHY CONSUMER WELFARE SHOULD MEAN CONSUMER WELFARE

Although the Supreme Court in recent decades has described the antitrust laws as a “consumer welfare prescription,” the exact mean-

280. Sandeep Vaheesan, *Reconsidering Brooke Group: Predatory Pricing and the Empirical Learning*, 12 BERKELEY BUS. L.J. (forthcoming 2014).

281. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986).

282. *Id.* at 588–89.

283. *Id.* at 594.

284. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222–24 (1993).

285. *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284 (1985).

286. *Id.* at 296.

287. *Id.*

288. *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 133–40 (1998).

289. *Id.* at 136.

290. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407–08 (2004).

ing of “consumers” is not entirely settled. The obvious view of “consumer welfare prescription” is protection of the group of individuals and businesses that purchase goods and services. This intuitive definition has not been universally accepted, however. Robert Bork defined consumer welfare in a “narrow, restrictive and highly technical”²⁹¹ fashion to include both consumer surplus *and profits that accrued to shareholders and other business owners*. Under Bork’s reasoning, owners of business will ultimately use their dividends and capital gains for consumption and should be treated as consumers. Per this view, the antitrust laws should seek to maximize “output” and be indifferent to whether a dollar goes to consumers in the form of lower prices or to producers in the form of higher profits. The nonintuitive definition of “consumers” has been criticized as misleading and even “Orwellian.”²⁹² Some scholars, however, have embraced this definition of consumer welfare and argued that the antitrust laws should not be concerned with distributional outcomes.²⁹³ To differentiate the two definitions of consumer welfare, Steven Salop has described the formulation that focuses exclusively on consumers as the “true” consumer welfare standard.²⁹⁴

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291. John J. Flynn, *The Reagan Administration’s Antitrust Policy, “Original Intent” and the Legislative History of the Sherman Act*, 33 ANTITRUST BULL. 259, 265 (1988).
292. John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 199 (2008).
293. See, e.g., Dennis W. Carlton, *Does Antitrust Need to be Modernized?*, 21 J. ECON PERSP. 155 (2007); Ken Heyer, *Welfare Standards and Merger Analysis: Why Not the Best?*, 2 COMPETITION POL’Y INT’L 29 (2006), archived at <http://perma.unl.edu/3R6A-QPR7>; Thomas W. Ross & Ralph A. Winter, *The Efficiency Defense in Merger Law: Economic Foundations and Recent Canadian Developments*, 72 ANTITRUST L.J. 471, 473–77 (2005).
294. As Salop has noted, the Bork consumer welfare, if correctly applied, would require examining any gains and losses to competitors and factoring them into the cost–benefit analysis of challenged mergers or conduct. In effect, despite what it claims, the Bork consumer welfare standard would require a return to the antitrust jurisprudence of the mid-twentieth century. See Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336, 343 (2010). See also Albert A. Foer, *The Goals of Antitrust: Thoughts on Consumer Welfare in the U.S.*, in PHILIP MARSDEN (ED.), HANDBOOK OF RESEARCH IN TRANS-ATLANTIC ANTITRUST 566, 566 (2006) (arguing “the declaration of victory of the Chicago School [of economic efficiency as the dominant goal in antitrust] is premature,” and concluding “that, despite the fact that a still-vague concept of consumer welfare dominates antitrust thinking in the US today, there is actually no consensus on the meaning of consumer welfare and no adherence to a single goal.”). For a case study of how the true consumer welfare standard differs from Bork’s “consumer” welfare standard in practice, see Alan A. Fisher, Robert H. Lande & Stephen F. Ross, *Counterpoint: The Canadian Competition Tribunal Gets It Wrong*, ANTITRUST MAG., Fall 2000 at 71.

As the economics of antitrust move away from a priori theories and toward a richer account of market dynamics, the antitrust agencies and courts should explicitly reject the Bork definition of “consumer welfare” and strengthen their commitment to the true consumer welfare standard. This approach to antitrust enforcement is appropriate on at least four grounds. First, and most importantly in a political system in which the legislature makes laws, Congress demonstrated a primary interest in protecting consumers. In enacting the antitrust laws, Congress lacked awareness of economic efficiency as defined by Bork. But, Congress did express concern with anticompetitive wealth transfers from consumers to producers. Second, along with advancing Congressional intent, a consumer-oriented antitrust agenda can promote a more progressive distribution of wealth—an important public policy objective at a time when income inequality has been rapidly rising. Third, consumers are a large group, encompassing the overwhelming majority of Americans, and consequently cannot organize themselves effectively. The courts can act as “trustees” and protect the interests of this large but comparatively powerless group. Fourth, the U.S. competition law regime requires a popular constituency to survive in the long run. A consumer focus can revive the long-departed “antitrust movement” of the late nineteenth and early-twentieth centuries and ensure that the antitrust laws have a political counterweight to balance their powerful opponents in the *Fortune* 500.

Even as consumer welfare should be the primary focus of the antitrust laws, other groups also merit antitrust protection. In many instances, protecting consumers demands the protection of small businesses from the predatory conduct of larger rivals.²⁹⁵ Moreover, the policy considerations that favor the protection of consumers often also support the protection of workers,²⁹⁶ farmers,²⁹⁷ and other small

295. See, e.g., Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 *ANTI-TRUST L.J.* 527 (2013), archived at <http://perma.unl.edu/XE69-H3MP>.

296. See Press Release, U.S. Dep’t of Justice, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements, Sep. 24, 2010, archived at <http://perma.unl.edu/FUQ7-QJEA> (“The Department of Justice announced today that it has reached a settlement with six high technology companies—Adobe Systems Inc., Apple Inc., Google Inc., Intel Corp., Intuit Inc. and Pixar—that prevents them from entering into no solicitation agreements for employees. The department said that the agreements eliminated a significant form of competition to attract highly skilled employees, and overall diminished competition to the detriment of affected employees who were likely deprived of competitively important information and access to better job opportunities.”).

297. See Press Release, Justice Department Files Antitrust Lawsuit Challenging George’s Inc.’s Acquisition of Tyson Foods Inc.’s Harrisonburg, VA., Poultry Processing Complex, May 10, 2011, archived at <http://perma.unl.edu/7TBV-FX67> (“The Department of Justice filed a civil antitrust lawsuit today challenging George’s Inc.’s acquisition of Tyson Foods’ Harrisonburg, Va., chicken processing

suppliers against the anticompetitive conduct of monopsonistic and oligopolistic buyers. As John Kirkwood has argued, the “essence of antitrust” is the protection of consumers and small sellers against large suppliers and purchasers.²⁹⁸ Because consumer cases will continue to comprise the bulk of the antitrust docket, the discussion below speaks exclusively in terms of consumers.

A. Prevention of Wealth Transfers from Consumers to Producers is an Important Theme in the Legislative Histories of the Antitrust Laws

The legislative histories of the antitrust laws reveal that Congress was concerned with monopolies and cartels for a number of reasons. The Congresses that enacted the three principal antitrust statutes, however, made no mention of economic efficiency—a concept that economists only defined after the passage of the Federal Trade Commission Act and Clayton Act in 1914. In contrast, Congress did show, among other concerns, opposition to monopolies and cartels using their market power to transfer wealth from consumers to themselves.

The substantive sections of the three primary antitrust laws are phrased in general terms. Congress enacted the Sherman Act in 1890 and the Clayton and Federal Trade Commission Acts in 1914. The Sherman Act prohibits “[e]very contract . . . in restraint of trade”²⁹⁹ and punishes “[e]very person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce.”³⁰⁰ The two statutes from 1914 are hardly more specific. The Federal Trade Commission Act outlaws “unfair methods of competition.”³⁰¹ And the Clayton Act bars, among other practices, acquisitions whose “effect . . . may be substantially to lessen competition, or tend to create a monopoly.”³⁰²

Given the general wording of the antitrust laws, courts and scholars have looked to the legislative histories to determine Congressional intent in enacting the antitrust laws. Robert Bork claimed that Congress was interested in one and only one goal—promoting economic efficiency, defined as the sum of consumer surplus and business profits when it enacted the antitrust laws (hereafter “total welfare” or “efficiency”).³⁰³

complex. The department said that based on the information gathered thus far, the acquisition eliminates substantial competition between the two companies for the procurement of services of chicken growers in the Shenandoah Valley area.”)

298. Kirkwood, *supra* note 16, at 2426.

299. 15 U.S.C. § 1 (2012).

300. *Id.* § 2.

301. *Id.* § 45.

302. *Id.* § 18.

303. Bork, *supra* note 10, at 51.

Many legal scholars have studied the legislative histories of the main antitrust statutes and shown that Bork's economic efficiency argument is not supported by the Congressional debates.³⁰⁴ The legislative histories do not indicate that Congress had an interest in promoting efficiency or some proxy of it. As a basic matter, it is very unlikely that Congressmen in 1890 even knew of efficiency as Bork defined it.³⁰⁵ In fact, economists themselves were still only in the early stages of defining or understanding a concept like efficiency—an idea that they formally described only in the 1920s.³⁰⁶ In 1914, Congress was no more aware of total welfare than it was in 1890.³⁰⁷ And, regardless of the precise state of economic learning at the time, economists played little, if any, role in drafting or publicly promoting the Sherman Act, Clayton Act, or the Federal Trade Commission Act.³⁰⁸ Bork's reading of the legislative history appears to be an imposition of his ideology on a complex and rich Congressional debate.³⁰⁹ The irony of a so-called constitutional originalist imposing his personal vision on the antitrust laws—in contradiction to the wishes of Congress—has not been lost on legal scholars.³¹⁰

Congressmen involved in enacting the antitrust statutes, contrary to Bork's claims of legislative monomania, expressed multiple aims. Some feared that monopolies and trusts, if unchecked, would lead to the demise of independent entrepreneurs. For example, Senator George, in the debate preceding the passage of the Sherman Act, lamented the rise of large-scale industry and predicted that this development, if left to its own devices, would eventually "crush out all small men, all small capitalists, all small enterprises."³¹¹ Several Congressmen also endorsed the Federal Trade Commission Act because it would aid in the protection of small business. Speaking in support of the Federal Trade Commission Act, Senator Reed stated Congress was seeking to keep markets open to independent entrepreneurs.³¹²

304. See, e.g., Peter C. Carstensen, *Antitrust Law and the Paradigm of Industrial Organization*, 16 U.C. DAVIS L. REV. 487, 487–88 (1983); Flynn, *supra* note 291, at 272–73; Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1146 (1981); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982); David Million, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1235 (1988).

305. Flynn, *supra* note 291, at 272–73.

306. Carstensen, *supra* note 304, at 487–88.

307. Lande, *supra* note 304, at 109.

308. *Id.* at 88–89, 109.

309. Flynn, *supra* note 291, at 289.

310. See, e.g., Leonard Orland, *The Paradox in Bork's Antitrust Paradox*, 9 CARDOZO L. REV. 115, 124 (1987); James Boyle, *A Process of Denial: Bork and Post-Modern Conservatism*, 3 YALE J.L. & HUMAN. 263, 280 (1991).

311. 21 CONG. REC. 2598 (1890).

312. 51 CONG. REC. 13,231 (1914).

Others described their fears about the concentrated private power of monopolies and trusts and wondered whether American political institutions could survive in the “new economy.” Senator John Sherman questioned whether the United States could entrust the control of manufacturing and transportation to a “few men sitting at their council board in the city of New York.”³¹³ Senator George Hoar went even further and warned that “these great monopolies . . . are a menace to republican institutions themselves.”³¹⁴

Similar concerns arose when the Federal Trade Commission and Clayton Acts were debated nearly twenty-five years later. Congressman F.C. Stevens claimed that he echoed the concerns of the public and stated that “this wealth, and power growing out of it, may be not only used to the detriment but also may be a potential source of injury and oppression.”³¹⁵ In advocating for the passage of the Clayton Act, Senator Borah predicted a spectacular overthrow of the existing economic and political system in response to the oppressive power of big business. He alleged that monopolies and trusts “divide our people into classes, breed discontent and hatred, and in the end riot, bloodshed, and French revolutions.”³¹⁶

Although Congressional debates did not focus on a single goal, Robert Lande has shown that a principal aim of the antitrust laws was to prevent unfair wealth redistribution.³¹⁷ Specifically, Congress sought to prevent wealth transfers from “consumers to firms with market power.”³¹⁸ In the debates over the Sherman Act, higher prices were condemned in starkly moralistic terms. Senator Sherman described monopolistic overcharges as “extorted wealth.”³¹⁹ Congressmen Coke and Heard were no less uncertain in their denunciation, respectively characterizing the higher prices that resulted from the trusts as “robbery”³²⁰ that had “stolen untold millions from the people.”³²¹ Other members of Congress used comparably evocative language in condemning the redistributive effects of cartels and monopolies.³²²

The prevention of wealth transfers also animated the debates over the Federal Trade Commission Act and Clayton Act. The language condemning wealth transfers was similar to the rhetoric employed in the debates in 1890. Senator Newlands, a primary sponsor of the Federal Trade Commission Act, stressed the “unreasonable and extortion-

313. 21 CONG. REC. 2570 (1890).

314. *Id.* at 3146.

315. 51 CONG. REC. 8850 (1914).

316. *Id.* at 15,955.

317. Lande, *supra* note 304, at 145.

318. *Id.*

319. 21 CONG. REC. 2461 (1890).

320. *Id.* at 2614.

321. *Id.* at 4101.

322. Lande, *supra* note 304, at 93–96.

ate prices” from collusive behavior and monopolies.³²³ Representative Morgan hoped the new statute would “minimize the power of the large industrial corporation to concentrate wealth . . . and secure the people from unjust tribute levied by monopolistic corporations.”³²⁴ In debating the Clayton Act, Representative Hamlin stated that the only reason to prohibit cartels and trusts is that they exploit “the people by taking advantage of their necessities and controlling the price of those necessities to the consumers.”³²⁵ Senator Cummins, in a similar vein, aimed his ire at “the rapacity and the avarice of monopoly.”³²⁶

When deciding between the consumer welfare and total welfare standard, the legislative histories of the antitrust laws unquestionably favor the consumer welfare standard. They reveal no Congressional understanding of, let alone support for, the total welfare standard. Bork’s claim that Congress was interested only in promoting total welfare is false. The members of Congress who drafted the antitrust laws described a number of aims in establishing the U.S. competition law regime—neoclassical economic efficiency was not one of them. In fact, the Supreme Court’s pluralistic approach to antitrust in the mid-twentieth century has a much stronger grounding in the legislative histories of the antitrust laws than the total welfare goal espoused by Bork and others.

Congress aimed to protect the consuming public against cartel and monopoly overcharges and showed no indication that it sought to promote the more abstract, and then-unknown, concept of economic efficiency. It is apparent that Congress, in enacting the antitrust laws, was not indifferent between the economic rents of businesses with market power and the consumer benefits from competition. As members of Congress indicated in debates over the antitrust laws, consumers were intended to be one of the primary protected classes of U.S. competition policy.

B. Consumer-Oriented Antitrust Enforcement Can Promote More Progressive Wealth Distribution

Over the past forty years, income inequality has risen substantially with a larger fraction of income accruing to the wealthiest sliver of the U.S. population. A consumer-oriented antitrust regime, in adhering to Congressional intent, can help contain this rapid growth in economic disparity. While its role in remedying inequality is arguably not as significant as that of labor and tax laws, antitrust enforcement

323. *Report of the Senate Committee on Interstate Commerce, Appendix: Statement by Sen. Newlands*, S. Rm. No. 597, 63d Cong., 2d Sess. 23 (1914).

324. 51 CONG. REC. 8854 (1914).

325. *Id.* at 9556.

326. *Id.* at 14,256.

can be an important instrument for policymakers seeking to create a more equitable distribution of economic resources.

The economist Emmanuel Saez has performed extensive empirical analysis of income distribution in several industrialized nations and found that income inequality in the United States has risen dramatically since the late 1970s.³²⁷ The share of income accruing to the top 10% of the income distribution has displayed a U-shape since the Second World War.³²⁸ The top decile's share was around 45% before the U.S. entry into the war, declined to about 33%, and remained at approximately that level until the 1970s.³²⁹ Beginning in the 1970s, the top ten percent's share of income has risen dramatically, growing to almost 50% in 2007.³³⁰ The increase in the top one percent's income share is even more dramatic. This most affluent percentile has seen its income share more than double from 9% in the 1970s to nearly 24% in 2007.³³¹ Today, income concentration at the top is at a level comparable to the late 1920s, a period of notorious economic disparity.³³²

This disparity has continued to grow even at a time when labor productivity and per capita income have increased. Between 1976 and 2007, real income per family grew at an annual rate of 1.2%.³³³ Labor productivity has also grown at a healthy clip, albeit not as rapidly as it did in the previous thirty-year period.³³⁴ When the gains to the top one percent are excluded, however, the real income of the remaining ninety-nine percent grew at an anemic 0.6% annually.³³⁵ Approximately 58% of growth in this three-decade period went to the top one percent.³³⁶ Over the past decade, growth has been even more concentrated among the most affluent. During the economic boom from 2002–2007, more than two-thirds of income growth accrued to the one percent.³³⁷

Incredibly, the numbers have become even more skewed in recent years. From 2009–2012, 95 percent of the gains from economic growth

327. See generally THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2014).

328. Emmanuel Saez, *Striking It Richer: The Evolution of Top Incomes in the United States (Update with 2007 Estimates)*, UNIV. OF CAL. BERKELEY (Aug. 5, 2009), <http://eml.berkeley.edu/~saez/saez-UStopincomes-2007.pdf>, archived at <http://perma.unl.edu/8YNY-XCPH>.

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. Anthony B. Atkinson, Thomas Piketty & Emmanuel Saez, *Top Incomes in the Long Run of History*, 49 J. ECON. LITERATURE 3, 8 (2011).

334. *United States: Labor Productivity Growth*, INT'L MONETARY FUND, http://www.imf.org/external/pubs/ft/weo/2003/01/chp1figs/Box1_2.pdf (last visited June 25, 2014), archived at <http://perma.unl.edu/EP7M-R9V2>.

335. *Id.*

336. Atkinson, Piketty & Saez, *supra* note 333, at 9.

337. *Id.*

went to the highest-earning percentile of the U.S. population.³³⁸ In other words, the economic pie has grown, but the wealthiest Americans have captured an ever-larger slice and left less for the overwhelming majority of the population.

Current levels of inequality are undesirable for multiple reasons. Polls have repeatedly shown that a majority of Americans—even among conservatives and the wealthy—favor a more equal distribution of income and wealth. Americans overwhelmingly support higher taxes on the wealthy and other policies that would contribute to a more equal distribution of wealth.³³⁹ Poorer Americans are more likely to favor more egalitarian economic policies than their more affluent counterparts.³⁴⁰ Furthermore, in terms of maximizing social welfare, it seems reasonable to think that an additional dollar provides greater marginal benefit to a poor person than a rich person. And growing research suggests that reducing economic inequality can yield significant societal benefits. These include increased life expectancy, reduced morbidity, lower crime rates, higher economic growth, and less intense boom-and-bust cycles in the economy.³⁴¹

While the contribution of market power is hard to quantify, it promotes rising economic disparity.³⁴² Higher prices cause some consumers to forgo the product—the so-called deadweight loss.³⁴³ As Congressmen discussed in the debates leading up to the enactment of the antitrust laws, another harm of monopolies and cartels is the transfer of wealth from consumers to producers.³⁴⁴ Consumers, who continue to purchase the goods or service, pay more than they would in a competitive market. Higher prices transfer wealth from consumers to producers, who earn larger profits.³⁴⁵ The magnitude of the

338. Emmanuel Saez, *Striking It Richer: The Evolution of Top Incomes in the United States (Updated with 2012 Preliminary Estimates)*, UNIV. OF CAL. BERKELEY (Sept. 13, 2009), <http://eml.berkeley.edu/~saez/saez-UStopincomes-2012.pdf>, archived at <http://perma.unl.edu/TMQ3-RDKG>.

339. BENJAMIN I. PAGE & LAWRENCE R. JACOBS, CLASS WAR?: WHAT AMERICANS REALLY THINK ABOUT ECONOMIC INEQUALITY, 75–93 (2009).

340. *Id.* at 96–102.

341. See, e.g., MICHAEL MARMOT, THE STATUS SYNDROME: HOW SOCIAL STANDING AFFECTS OUR HEALTH AND LONGEVITY 13–36 (2005); Joseph E. Stiglitz, *Inequality is Holding Back the Recovery*, N.Y. TIMES, Jan. 20, 2013, at SR1, archived at <http://perma.unl.edu/MSH3-MYVA>.

342. See, e.g., Maurice E. Stucke, *Lessons from the Financial Crisis*, 77 ANTITRUST L.J. 313, 335–36 (2010) (“For example, consumers may be paying supracompetitive overdraft fees to large financial institutions, which in turn distribute the rents unequally (namely to the CEOs and other senior executives).”)

343. Lande, *supra* note 304, at 72.

344. *Id.* at 74–75.

345. *Id.*

wealth redistribution from monopolies and cartels is estimated to be several times larger than the corresponding deadweight loss.³⁴⁶

In general, wealth transfers arising from monopolies and reduced competition are likely to be regressive in nature, shifting economic resources from comparatively poorer households to wealthier households. In most industries, consumers are, on average, less affluent than the executives and owners of businesses with market power. First, poorer households devote a larger fraction of their income to consumption than wealthier households.³⁴⁷ Second, wealthier households have larger holdings of stocks and other ownership interests in businesses.³⁴⁸ Of course, consumers are not better off than shareholders in every single industry. It is easy to think of markets in which consumers are likely wealthier than the owners of businesses. For example, in the market for private jets, the typical purchaser is probably wealthier than the average shareholder in the aircraft manufacturer. However, in industries like energy, food, healthcare, and transportation, consumers are, on average, almost certainly not as wealthy as shareholders. As a result, the assumption that consumers are not as affluent as shareholders seems reasonable.³⁴⁹

Market simulations suggest that creating more competitive markets can, in fact, produce a more equal distribution of wealth. Economic modeling has shown that reduced producer market power can lead to a more equal distribution of wealth and improve the economic circumstances of less affluent U.S. households. In the absence of monopoly, William Comanor and Robert Smiley have estimated that, even with a conservative estimate of monopoly profits, there would be a substantial redistribution of wealth away from the most affluent and to the overwhelming majority of Americans.³⁵⁰ Similar modeling exercises for the Australian economy yielded comparable results, with increased competition transferring wealth from affluent shareholders to less affluent consumers.³⁵¹

346. See, e.g., *id.*; Russell Pittman, *Consumer Surplus as the Appropriate Standard for Antitrust Enforcement*, 3 COMPETITION POL'Y INT'L 205, 208 (2007).

347. Irene Powell, *The Effect of Reductions in Concentration on Income Distribution*, 69 REV. ECON. & STAT. 75, 78 (1987).

348. William S. Comanor & Robert H. Smiley, *Monopoly and the Distribution of Wealth*, 89 Q. J. ECON. 177, 184 (1975).

349. Pittman, *supra* note 346, at 208.

350. Comanor & Smiley, *supra* note 348, at 193 ("The wealthiest 2.4 percent of the total number of households now accounts for slightly more than 40 percent of total wealth. In the absence of monopoly their share would fall to approximately 32 percent. The effect of monopoly has thereby been to increase the relative wealth holdings of these families by about 20 percent. Furthermore, it can be observed that mean wealth holdings of the bottom 28 percent of families are again positive in the absence of monopoly.")

351. John Creedy & Robert Dixon, *The Distributional Effects of Monopoly*, 38 AUSTRALIAN ECON. PAPERS 223, 233-34 (1999); John Creedy & Robert Dixon, *The Rela-*

Industry studies have found similar distributional effects from increased competition. In manufacturing industries that produce basic items like cigarettes, soap, and sugar, Irene Powell found that even modest reductions in market concentration can flatten the income distribution.³⁵² Russell Parker and John Connor estimated in their 1978 study that increased competition in the food processing industry *alone* could save consumers \$12 billion annually, which at that time “re-present[ed] [on a per household basis] about a month’s rent for an average family of modest means.”³⁵³

With consumers in general not being as affluent as shareholders, antitrust enforcement can prevent regressive wealth transfers from consumers to producers with market power. Competitive markets ensure that economic benefits flow to consumers in the form of lower prices rather than to producers in the form of higher profits. Enjoining anticompetitive mergers can prevent firms from enhancing their market power, raising prices, and capturing wealth from consumers. Enforcement actions against cartels and dominant firms that exclude rivals can also enhance market competition. Importantly, antitrust enforcement need not be focused exclusively on markets that serve final consumers in order to benefit consumers. Because increases in input costs are often passed along in large measure to final consumers, antitrust action against producers in intermediate industries—industries that sell goods and services to other businesses—can also yield substantial consumer benefits.³⁵⁴

More competitive markets can lead to lower prices, higher quality goods and services, and increased innovation—benefits that accrue to consumers—and lower profits for businesses with market power and reduced income for owners. Given that the typical business executive and shareholder are wealthier than the average consumer, vigorous antitrust enforcement can stem and perhaps even reverse regressive wealth transfers. In other words, antitrust law can ensure that the fruits of economic growth are broadly distributed.

The potential for antitrust enforcement to reduce income inequality is not to suggest that antitrust law is the only, or even principal, public-policy tool to address this societal problem. Antitrust enforcement is not a panacea for existing levels of economic inequality in the United States. Ultimately, Congress will likely need to revise labor and tax laws if it wants to halt and reverse the growing economic ine-

tive Burden of Monopoly on Households with Different Incomes, 65 *ECONOMICA* 285, 291 (1998).

352. Powell, *supra* note 347, at 81.

353. Russell C. Parker & John M. Connor, *Estimates of Consumer Loss due to Monopoly in the U.S. Food-Manufacturing Industries*, *UNIV. OF WIS.-MADISON AGRIC. & APPLIED ECON.* 32 (1978), <http://www.aae.wisc.edu/fsrg/publications/Archived/wp-19.pdf>, archived at <http://perma.cc/EL6K-D4TW>.

354. Pittman, *supra* note 346, at 210–11.

quality in the United States. A more progressive tax code and stronger collective bargaining rights for workers, among other initiatives, are the likely keys to addressing economic disparities.³⁵⁵

Yet, policymakers are not restricted to one tool in creating a more egalitarian society. Enforcement of the antitrust laws can play a small but important role in the larger campaign against economic inequality. Critically, antitrust enforcement can become more consumer-oriented without Congressional action. The Chicago School revolution occurred largely in the Department of Justice, Federal Trade Commission, and federal courts with little input from Congress.³⁵⁶ Appointing influential conservatives to the antitrust agencies³⁵⁷ and the federal courts³⁵⁸ prompted this sea change. A vigorous consumer-oriented antitrust regime, true to Congress's intent in enacting the competition laws, would require similar progressive appointments to the antitrust agencies and the federal judiciary. Progressive nominations to the antitrust agencies and federal judiciary seem more attainable in the near term than major revisions to tax and labor laws.³⁵⁹

Further, the executive branch alone could do more to strengthen antitrust enforcement.³⁶⁰ For example, the Department of Justice and Federal Trade Commission, which exercise principal control over merger review, could lower concentration thresholds in their Horizontal Merger Guidelines³⁶¹ and block more consolidations. In addition, the Federal Trade Commission could promulgate rules to restrict anticompetitive practices by dominant firms like exclusive dealing and tying.³⁶² Even if the overall significance of antitrust is not as great as that of labor and tax laws, a consumer-oriented antitrust enforcement regime may be easier to implement in the short run than major revisions to statutory law.

355. Saez, *supra* note 328, at 4.

356. Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 250 (1985).

357. Jerrold G. Van Cise, *Antitrust Past—Present—Future*, 35 ANTITRUST BULL. 985, 994–96 (1990).

358. Flynn, *supra* note 291, at 303.

359. *See infra* Part V.C.

360. Lina Khan & Sandeep Vahoesan, *How America Became Uncompetitive and Unequal*, WASH. POST, Jun. 13, 2014, http://www.washingtonpost.com/opinions/how-america-became-uncompetitive-and-unequal/2014/06/13/a690ad94-ec00-11e3-b98c-72cef4a00499_story.html, archived at <http://perma.unl.edu/5ETW-TYQD>.

361. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010).

362. *A Brief Review of the Federal Trade Commission's Investigative and Law Enforcement Authority*, FED. TRADE COMMISSION (July 2008), <http://www.ftc.gov/about-ftc/what-we-do/enforcement-authority>, archived at <http://perma.unl.edu/KH7N-7REB>.

C. Consumers Are Generally Unable to Sustain Political Movements to Protect Their Interests

Not all groups can organize and protect their interests equally well. In general, smaller groups, in which each member has a greater individual stake, are more successful in advancing their interests in the economic and political systems than larger groups. Businesses in concentrated industries are more likely than hundreds of millions of consumers to succeed in persuading Congress and state legislatures to enact their preferred policies. A recent paper, which examined polls and thousands of Congressional decisions, found that large corporations (and the very rich) exercise disproportionate influence over politics.³⁶³ Given this political imbalance between big business and consumers, the courts can serve as trustees for this group that is too large to organize and advance its interests in the marketplace or political process.

Some argue that legal rules should focus exclusively on increasing efficiency. Under this perspective, legal regimes like antitrust should focus solely on maximization of total welfare and be indifferent to questions of distribution.³⁶⁴ Accordingly, the elected branches of government should be entrusted to address distributional issues.³⁶⁵ The basis for this efficiency-distribution dichotomy is that distribution is a “value” question that should be decided through democratic, rather than judicial, decision-making.³⁶⁶ Of course, economic efficiency premised on the belief “in individual and institutional greed in a world of absolute property and contract rights”³⁶⁷ is hardly a “value-neutral” concept.

The practical problem with the efficiency-distribution dichotomy is that it relies on an idealized conception of democratic politics. Consumers and producers are neither equal in the marketplace nor in the political system. Gains to producers are not likely to be distributed equitably, even if supported by popular sentiment.

As a large group encompassing nearly every resident of adult age, consumers have difficulty organizing politically to protect, let alone advance, their interests. The political scientist Mancur Olson described this phenomenon in terms of individual economic incen-

363. Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. (forthcoming Fall 2014), archived at <http://perma.unl.edu/LE2-SZG6>.

364. Louis Kaplow, *On the (Ir)Relevance of Distribution and Labor Supply Distortion to Government Policy*, 18 J. ECON. PERSP. 159, 159–60 (2004).

365. *Id.* at 168.

366. *Id.*

367. Flynn, *supra* note 291, at 262.

tives.³⁶⁸ In large groups, individuals typically do not have adequate *economic* motivation to participate in collective activity and, if anything, have an incentive to free ride on the efforts of others.³⁶⁹ Individual members can obtain the benefits of collective action without contributing to it.³⁷⁰ Moreover, the efforts of one person in a collective project are unlikely to be decisive.³⁷¹ As a result, public goods whose benefits accrue to a large group are likely to be underprovided in the absence of some coercive pressure.³⁷² An individual in a very large group is comparable to a firm in a perfectly competitive market—unilateral attempts to raise the market price are almost certain to be self-defeating.³⁷³

In contrast, groups composed of a few large members, such as firms in oligopolistic industries, are less likely to face a free-rider problem because of larger individual incentives.³⁷⁴ At times, it may even be in the economic interest of a single firm to act for a group of rivals, even if the other members refuse to contribute to the effort.³⁷⁵ This is analogous to how an oligopolist may find it profitable to raise its prices even if its competitors do not follow suit.³⁷⁶ A political science textbook from 1958 captured the comparative organizational capacity of business and consumers: “the lobbyists for electric utilities, for example, are eternally on the job; the lobbyists for the consumers of this monopolistic service are ordinarily conspicuous by their absence.”³⁷⁷

As Olson himself recognized, this theory does not suggest that small groups inevitably triumph over large groups or that producers in concentrated industries always win out over diffuse consumers. Human behavior is far more complex than the homo economicus model would suggest.³⁷⁸ Consumers can organize and have organized to create a more just marketplace and society through collective action. In the United States, this consumer activism has come in three major waves: at the turn of the twentieth century, in the 1930s, and in the 1960s and 1970s.³⁷⁹ This organized activism helped enact new laws to ensure safer food and drugs, more affordable necessities, and

368. MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 43–52 (1965).

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.* at 49–50.

376. *Id.* at 50.

377. V.O. KEY, JR., *POLITICS, PARTIES, AND PRESSURE GROUPS* 166 (1958).

378. OLSON, *supra* note 368, at 60.

379. Lizabeth Cohen, *Colsten E. Warne Lecture: Is It Time for Another Round of Consumer Protection? The Lessons of Twentieth-Century U.S. History*, 44 J. CONSUMER AFF. 234, 235 (2010).

cars that would not maim and kill passengers due to poor design.³⁸⁰ These movements also helped create organizations that to this day promote the consumer interest: Consumers Union, Consumers Federation of America, and Public Citizen just to name a few.³⁸¹

Of course, a discussion of consumer movements would be remiss in not mentioning the critical role of African-American consumers and their allies in ending segregation in the Southern United States and fighting racial discrimination throughout the country.³⁸² Notable examples of consumer activism in the civil rights movement included boycotts of stores that did not hire African-Americans and sit-ins at lunch counters that refused to serve black patrons.³⁸³

The successes of consumer movements in the past, however, should not be a basis for optimism about consumer action generally. Collective consumer efforts have been victorious only sporadically. They have succeeded at times of great economic, political, and social adversity when the injustices of existing arrangements became unacceptable to a critical mass of Americans.³⁸⁴ In recent decades, just when they have seemed on the verge of a major political victory, consumer groups have been defeated—and quite decisively at that—by powerful business interests. The ill-fated effort to establish a federal Consumer Protection Agency in the late 1970s is a good example of this process.³⁸⁵

The long periods between major successes are illustrative of the limits of consumer activism in the political process. More than thirty years elapsed between the unsuccessful attempt to create a Consumer Protection Agency during the Carter presidency and the successful creation of the Consumer Financial Protection Bureau (CFPB) in 2010—two years after the worst financial crisis and recession since the Great Depression.³⁸⁶ This history suggests that a unique confluence of events is likely required for consumer interests to score major triumphs in Washington.³⁸⁷

The organizational representations of consumers and producers illustrate Olson's theory of collective action in practice. Among business organizations, the Chamber of Commerce has an annual budget

380. *Id.* at 235–36.

381. Robert N. Mayer, *The US Consumer Movement: A New Era Amid Old Challenges*, 46 J. CONSUMER AFF. 171, 173 (2012).

382. Stacy Kinlock Sewell, *The “Not-Buying Power” of the Black Community: Urban Boycotts and Equal Employment Opportunity, 1960–1964*, 89 J. AFR.-AM. HIST. 135 (2004).

383. *Id.* at 139.

384. Herbert Jack Rotfeld, *A Pessimist's Simplistic Historical Perspective on the Fourth Wave of Consumer Protection*, 44 J. CONSUMER AFF. 423, 424–25 (2010).

385. *See, e.g.*, Cohen, *supra* note 379, at 239–40.

386. Mayer, *supra* note 381, at 173–74.

387. *Id.* at 174

of more than \$250 million.³⁸⁸ Other broad business organizations include the Business Roundtable and the National Association of Manufacturers. In addition, most major industries have influential trade associations, such as the American Petroleum Institute, National Retail Federation, and Tobacco Institute. Individual businesses also frequently undertake independent political lobbying and public relations campaigns. Large companies often individually devote millions of dollars to lobbying and political campaign donations.³⁸⁹ For example, firms in the (1) finance, insurance, and real estate and (2) healthcare sectors contributed \$87 million and \$41 million, respectively, to presidential campaigns in the 2012 election.³⁹⁰

The contrast between business and consumer groups is striking. Consumer groups are fewer in number, and those few have far less resources at their disposal.³⁹¹ As an illustration, in the battle over the creation of the CFPB, for instance, consumer advocates and their allies had to overcome a *150-to-one* disadvantage in funding versus their financial sector opponents.³⁹² The political inequality between consumer and producer groups is too apparent.³⁹³

Recent legal developments further enhance the influence of big business on the political process. The 2010 Supreme Court decision in *Citizens United v. Federal Election Commission* invalidated federal ban on independent political spending by corporations and unions.³⁹⁴

388. Devin Leonard, *Tom Donohue: Obama's Tormentor*, BUSINESSWEEK (Nov. 3, 2010), http://www.businessweek.com/magazine/content/10_46/b4203070002219.htm, archived at <http://perma.unl.edu/3AMA-JRN7>.

389. Eduardo Porter, *Unleashing the Campaign Contributions of Corporations*, N.Y. TIMES, Aug. 28, 2012, <http://www.nytimes.com/2012/08/29/business/analysts-expect-a-flood-of-corporate-campaign-contributions.html?pagewanted=all>, archived at <http://perma.unl.edu/5YYV-PFPE>.

390. *Presidential Candidates: Contributions by Sector*, OPENSECRETS, <http://www.opensecrets.org/pres12/sectorall.php?cycle=2012> (last visited June 25, 2014), archived at <http://perma.unl.edu/JS5Q-7XY9>.

391. Consumers Union, the largest consumers' organization, has a budget of around \$250 million per annum. Other notable organizations, such as Public Citizen, however, have much smaller budgets of around \$10 million. See Mayer, *supra* note 381, at 173.

392. Paul Starr, *A Wasted Crisis? Why the Democrats Did So Little to Change Wall Street*, NEW REPUBLIC, July 12, 2013, <http://www.newrepublic.com/article/113570/wasted-crisis-why-democrats-did-so-little-change-wall-street#>, archived at <http://perma.unl.edu/DEW8-BD7H>.

393. Michael Pertschuk, *Consumer Priorities, Macro-Concentration, and the Scope of the FTC's Deconcentration Authority*, 9 ANTITRUST L. & ECON. REV. 31, 35 (1977).

394. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 336–66 (2010). *Citizens United* “gave corporations and unions the green light to spend unlimited sums on ads and other political tools, calling for the election or defeat of individual candidates.” John Dunbar, *The ‘Citizens United’ Decision and Why It Matters*, CTR. FOR PUB. INTEGRITY (Oct. 18, 2012, 6:12 PM), <http://www.publicintegrity.org/2012/10/18/11527/citizens-united-decision-and-why-it-matters>, archived at <http://perma.unl.edu/ZYT5-5627>.

In the 2012 presidential election, corporations, other organized interests, and wealthy individuals collectively poured billions of dollars into campaigns, political action committees (PACs), and the new Super PACs.³⁹⁵ The power of money in American politics raises fundamental questions about the character of democracy in the United States and how far it falls short of aspirational ideals.³⁹⁶

Given the comparative powerlessness of the hundreds of millions of American consumers in the political process, the courts, in applying the antitrust laws, can act to advance the interests of the consuming public. Federal judges, with life tenure, are much more immune to political pressures than members of Congress and executive branch agencies.³⁹⁷ They can use the antitrust laws to remedy, in part, the power imbalance between producers and consumers. The famous footnote four in *United States v. Carolene Products* stated that a heightened standard of judicial review is warranted only when the challenged legislation affected “a discrete and insular minorit[y]”³⁹⁸ unable to protect itself in the political branches of government. In interpreting the antitrust laws as a consumer protection policy, the Court could follow a similar logic—protecting a group that is too large to organize and exercise influence in either the market or politics.³⁹⁹

D. Building a Consumer-Based “Antitrust Movement” Is Essential for the Long-Term Vitality of the Antitrust Laws

While antitrust law counts large corporations among its opponents, it notably lacks a durable popular constituency of its own. If surveyed, the antitrust practitioners and scholars who form the antitrust community would probably support the preservation of the antitrust laws in overwhelming numbers. Regardless of their views on specific antitrust rules or the appropriate level of enforcement, they likely realize that they have a very specific set of skills, which prevents an easy transition to another field of law or line of work.⁴⁰⁰ The

395. *Independent Spending Totals*, N.Y. TIMES, <http://elections.nytimes.com/2012/campaign-finance/independent-expenditures/totals> (last visited Sept. 11, 2014), archived at <http://perma.unl.edu/4Q2W-QRVM>; *The 2012 Money Race: Compare the Candidates*, N.Y. TIMES, <http://elections.nytimes.com/2012/campaign-finance> (last visited Sept. 11, 2014), archived at <http://perma.unl.edu/9DWN-4G55>.

396. LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 282 (2008).

397. Gary Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine*, 41 HASTINGS L.J. 905, 970 (1990).

398. *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938).

399. See Minda, *supra* note 397, at 936 (“[F]ree rider and collective action problems suggest that consumers may be unable to organize opposing lobbies to make their wishes known on most public policy matters, thus leaving the field open to special interest groups to inordinately influence decisionmaking.”).

400. Foer, *supra* note 6, at 482–83.

American Antitrust Institute, a public interest organization committed to promoting antitrust enforcement and competitive markets, has built a network of antitrust practitioners and scholars and serves as a consistent and prominent voice in support of U.S. competition laws.⁴⁰¹ Yet, the idea of an “antitrust movement” is a distant historical curiosity.

In the face of persistent big business and conservative attacks, antitrust enforcers need to convey their relevance to the everyday economic concerns of Americans and establish a popular constituency among consumers. Just as antitrust enforcers can aid consumers, consumers can offer vital popular support for the U.S. competition law regime.

In tracing the decline of the so-called antitrust movement of the late nineteenth and early twentieth centuries, the historian Richard Hofstadter found that even as popular interest in antitrust had waned, antitrust enforcement had increased significantly.⁴⁰² He attributed the decline of the antitrust movement to diminished public hostility toward big business in the mid-twentieth century.⁴⁰³ Hofstadter argued that this negative feeling had declined for multiple reasons. Government and organized labor had checked the power of concentrated capital to some extent.⁴⁰⁴ Also, in the years following the Second World War, ordinary Americans felt they benefitted from the big-business-dominated economy.⁴⁰⁵ Moreover, and most significantly, most Americans no longer aspired to be independent entrepreneurs, who often could not compete against the much larger trusts and monopolies.⁴⁰⁶ Instead, many Americans in the years following the Second World War hoped to work in a bureaucratic capacity at a leading corporation.⁴⁰⁷

Despite the decline of an antitrust movement, antitrust enforcement in the mid-twentieth century was vigorous. Hofstadter believed that this legal regime was useful in limiting the economic and political power of large corporations.⁴⁰⁸ He did not lament the disappearance of a popular movement on behalf of the antitrust laws because the legal regime was functioning as Congress had intended. In fact, he expressed a strong preference for the antitrust landscape of 1965 over

401. *About Us*, AM. ANTITRUST INST., <http://www.antitrustinstitute.org/content/about-us> (last updated 2014), archived at <http://perma.unl.edu/PZ5-XD3T>.

402. See Hofstadter, *supra* note 1, at 189 (“[O]nce the United States had an antitrust movement without antitrust prosecutions; in our time there have been antitrust prosecutions without an antitrust movement.”).

403. *Id.* at 213.

404. *Id.* at 215.

405. *Id.*

406. *Id.* at 222–23.

407. *Id.*

408. *Id.* at 236.

that of 1895. He wrote, “the fate of antitrust is an excellent illustration of how a public ideal . . . can become embodied in institutions with elaborate, self-preserving rules and procedures, a defensible function, and an equally stubborn capacity for survival. Institutions are commonly less fragile than creeds.”⁴⁰⁹ Hofstadter believed that the antitrust laws, due to their institutionalization, were here to stay.⁴¹⁰

History since Hofstadter’s death in 1972 brings his sanguine outlook for antitrust into question. Antitrust enforcement is, on the whole, more limited today than it was when Hofstadter wrote his article. Some of the evolution in antitrust thinking has brought greater coherence to the doctrine.⁴¹¹ At the same time, the practical effects of the Chicago School, part of the elite-supported law and economics movement,⁴¹² cannot be ignored. Whatever the intentions of its members may be, the philosophy of the Chicago School has had the effect of reducing the role of antitrust enforcement in public policy into a technocratic matter.⁴¹³ Today, the United States arguably “lack[s] an antitrust movement *and* antitrust prosecutions.”⁴¹⁴

The experience during the Reagan Administration contradicted Hofstadter’s belief about the strong roots of antitrust. Arguably, the Reagan years represented not just a natural evolution of the antitrust rethinking that began in the 1970s, but “a broad-scale attack on almost every aspect of antitrust enforcement.”⁴¹⁵ The Department of Justice and Federal Trade Commission largely ignored enforcement outside of garden-variety price-fixing and a few horizontal mergers in highly concentrated industries.⁴¹⁶ And, moreover, many notable judicial appointees of Reagan subscribed to an often unsupported theoretical worldview hostile to antitrust law, reducing the likelihood of

409. *Id.* at 228

410. *See id.* at 234 (“No one seems prepared to suggest that the antitrust enterprise be cut back drastically, much less abandoned, and Congress has consistently supported its enlarged staff Even business itself accords to the principle of antitrust a certain grudging and irritated acceptance, and largely confines its resistance to the courts.”).

411. Robert Pitofsky, *Antitrust in the Next 100 Years*, 75 CALIF. L. REV. 817, 821–22 (1987).

412. STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 182 (2008).

413. Kirkwood & Lande, *supra* note 292, at 193–95; First & Waller, *supra* note 8, at 2568–72.

414. First & Waller, *supra* note 8, at 2543.

415. Eddie Correia, *Antitrust Policy After the Reagan Administration*, 76 GEO. L.J. 329, 329 (1987).

416. Robert Pitofsky, *Antitrust Policy in a Clinton Administration*, 62 ANTITRUST L.J. 217, 217 (1993).

success for parties who remained committed to enforcing the U.S. competition laws.⁴¹⁷

Even allowing for some revival in enforcement since the Reagan years, the long-term vitality and sustainability of the antitrust laws are far from certain. At a basic level, the U.S. antitrust regime has not fully recovered from the minimal enforcement of the 1980s.⁴¹⁸

Antitrust, and consumer protection more broadly, once enjoyed strong bipartisan support,⁴¹⁹ but this is no longer the case. Public antitrust enforcement appears to be tied closely to the party of the sitting president: with modest upticks under Democratic presidents and minimal enforcement during Republican administrations.⁴²⁰ In the George W. Bush Administration, the Department of Justice's enforcement agenda had a near-exclusive focus on price-fixing and bid rigging.⁴²¹ Further, the Bush Department of Justice issued a report on Section 2 of the Sherman Act⁴²² that even a prominent defense-side antitrust attorney described as "reflecting the free market fundamentalism that has characterized Bush Administration economic policy generally."⁴²³ In rather scathing terms, a bipartisan majority of the five-member Federal Trade Commission refused to endorse the report.⁴²⁴ With the election of President Barack Obama in 2008, anti-

417. Marc Allen Eisner & Kenneth J. Meier, *Presidential Control versus Bureaucratic Power: Explaining the Reagan Revolution in Antitrust*, 34 J. POL. SCI. 269, 277 n.7 (1990).

418. Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 555 (2012).

419. See, e.g., President Richard Nixon, Special Message to the Congress on Consumer Protection (Oct. 30, 1969) ("I believe the [Federal Trade] Commission should also consider the extent to which Section 5 of the Federal Trade Commission Act, broadly interpreted, may be used more effectively to cope with contemporary consumer problems."); Attorney General John N. Mitchell, Address before the Georgia Bar Association (June 6, 1969) ("[T]he evidence strongly supports our belief that the antitrust laws have served us well, perhaps more successfully than the 1890 Congress could have envisioned.").

420. Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1450-53 (2009).

421. See Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, eSCHOLARSHIP (Apr. 10, 2007), <http://escholarship.org/uc/item/4x44j66x#page-1>, archived at <http://perma.unl.edu/KTM2-KTVT>.

422. *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*, U.S. DEP'T OF JUSTICE (Sept. 2008), <http://www.usdoj.gov/atr/public/reports/236681.htm>, archived at <http://perma.unl.edu/5BY5-ZXVT>.

423. William Kolasky, *The Justice Department's Section 2 Report: A Mixed Review*, ANTITRUST SOURCE 1, 2 (Oct. 2008), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Oct08_FullSource10_27f.authcheckdam.pdf, archived at <http://perma.unl.edu/72FG-MMPK>.

424. See Press Release, Fed. Trade Comm'n, Statement of Commissioners Harbour, Leibowitz, and Rosch on the Issuance of the Section 2 Report by the Department of Justice (Sept. 8, 2008) (on file with the Fed. Trade Comm'n), archived at <http://perma.unl.edu/7DT5-E55S> ("[T]he Department's Report is chiefly concerned with firms that enjoy monopoly or near-monopoly power, and prescribes a legal regime

trust enforcement appears to have increased, but even here the extent of the revival is hotly contested.⁴²⁵

Looking beyond recent Republican presidents, many elements of the conservative movement now appear to oppose antitrust enforcement outright as part of their larger antiregulation agenda.⁴²⁶ For example, in 2012, Senator Rand Paul (R-KY) introduced a bill that would deprive the Federal Trade Commission of authority to investigate and remedy antitrust violations.⁴²⁷ While the bill did not make it out of committee, its introduction alone should worry those who believe the antitrust laws serve a valuable social function. And key segments of the conservative movement oppose the very existence of the antitrust laws. For instance, conservative and libertarian think-tanks, backed by big business,⁴²⁸ call for further retrenchment and even outright abolition of the antitrust laws.⁴²⁹

Organized groups that might be sympathetic toward antitrust and support enforcement have generally shied away from offering consistent support in recent decades. Small business, which was at the core of the original antitrust movement, has lost most of its interest.⁴³⁰

that places these firms' interests ahead of the interests of consumers. At almost every turn, the Department would place a thumb on the scales in favor of firms with monopoly or near-monopoly power and against other equally significant stakeholders.”).

425. Compare Daniel A. Crane, *Has the Obama Justice Department Reinvigorated Antitrust Enforcement?*, 65 STAN. L. REV. ONLINE 13, 13 (2012) (“With only a few exceptions, current enforcement looks much like enforcement under the Bush Administration.”), with Jonathan B. Baker & Carl Shapiro, *Evaluating Merger Enforcement During the Obama Administration*, 65 STAN. L. REV. ONLINE 28, 34 (2012) (“It is too early to reach a comparably definitive conclusion about merger enforcement at the DOJ during the Obama Administration, but nothing in Daniel Crane’s article seriously challenges our interpretation of the preliminary data as demonstrating that the necessary reinvigoration has taken place.”).
426. Robb Mandelbaum, *Republicans Begin Regulation Battle*, N.Y. TIMES, (Feb. 10, 2011), <http://boss.blogs.nytimes.com/2011/02/10/republicans-fire-first-shots-in-the-war-over-regulation/>, archived at <http://perma.unl.edu/RLS8-A6Q2>.
427. Christopher Sagers, *BREAKING NEWS: Rand Paul Proposes to Repeal Federal Antitrust as to “Individuals”*, ANTITRUSTCONNECT BLOG (Apr. 4, 2012), <http://antitrustconnect.com/2012/04/04/breaking-news-rand-paul-proposes-to-repeal-federal-antitrust-as-to-%E2%80%9Cindividuals%E2%80%9D/>, archived at <http://perma.unl.edu/ZTX6-EWN9>.
428. See Eric Lichtblau, *Cato Institute Is Caught in a Rift Over Its Direction*, N.Y. TIMES, Mar. 6, 2012, <http://www.nytimes.com/2012/03/06/us/cato-institute-and-koch-in-rift-over-independence.html?pagewanted=all>, archived at <http://perma.unl.edu/K2BY-LDEY>; Joel Achenbach, *The Tempest*, WASH. POST, May 28, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/05/23/AR2006052301305_pf.html, archived at <http://perma.unl.edu/NNK5-94M4>.
429. See, e.g., EDWIN S. ROCKEFELLER, THE ANTITRUST RELIGION 1, 13-14 (2007); Robert A. Levy, *Antitrust: The Case for Repeal*, CATO INSTITUTE (Jan. 11, 2003), <http://www.cato.org/publications/commentary/antitrust-case-repeal>, archived at <http://perma.unl.edu/YH7B-6TJE>.
430. Foer, *supra* note 6, at 488.

Some ostensible small business organizations are, in fact, known for their conservative or libertarian philosophy,⁴³¹ and are unlikely to be in favor of antitrust law.

When businesses do support antitrust enforcement, it is typically only in discrete instances in which their interests are threatened by a dominant firm.⁴³² In fact, very large businesses sometimes complain to antitrust authorities about the practices of other very large businesses. Microsoft is an interesting illustration of this phenomenon. In the 1990s, Microsoft was in the crosshairs of antitrust enforcers around the world for its exclusionary behavior toward Netscape and others.⁴³³ And the company is still subject to binding decrees in Europe.⁴³⁴ In recent years, however, the software giant has become a champion of antitrust enforcement against Google because of alleged anticompetitive conduct that has harmed Microsoft affiliates such as Bing and Expedia.⁴³⁵ Yet, it would be foolhardy to believe that Microsoft—one of antitrust's most prominent *bête noirs*—and other big businesses that expect benefits from discrete action will be reliable champions of antitrust enforcement, especially when they may violate the antitrust laws in the future.

Labor unions have not been supportive of antitrust enforcement, even though both are typically thought of as being the product of progressive politics. While labor organizations have taken an interest in consumer issues throughout their history,⁴³⁶ unions and antitrust law have often had a contentious relationship. In the early years of the Sherman Act, antitrust actions were often used to dissolve unions and

431. See, e.g., John Tozzi, *Is the Small Business Lobby Really All About Big Business?*, BUSINESSWEEK (Sep. 26, 2012), <http://www.businessweek.com/articles/2012-09-26/is-the-small-business-lobby-really-all-about-big-business>, archived at <http://perma.unl.edu/V2QA-HN9X>.

432. Foer, *supra* note 6, at 488.

433. See, e.g., Nicholas Economides, *The Microsoft Antitrust Case*, 1 J. INDUSTRY, COMPETITION & TRADE 7, 7 (2001).

434. See Aoife White, *Almunia Gets Tough as EU Prepares to Block UPS's TNT Bid*, BLOOMBERG (Jan. 15, 2013, 3:14 AM), <http://www.bloomberg.com/news/2013-01-15/almunia-gets-tough-as-eu-prepares-to-block-ups-s-bid-for-tnt.html>, archived at <http://perma.unl.edu/4DPX-VUAP>.

435. See, e.g., Nick Wingfield & Claire Cain Miller, *A Political Brawler, Now Battling for Microsoft*, N.Y. TIMES, Dec. 14, 2012, <http://www.nytimes.com/2012/12/15/technology/microsoft-battles-google-by-hiring-political-brawler-mark-penn.html?pagewanted=all>, archived at <http://perma.unl.edu/8ZNW-AM2Y>; Edward Wyatt, *A Victory for Google as F.T.C. Takes No Formal Steps*, N.Y. TIMES, Jan. 3, 2013, <http://www.nytimes.com/2013/01/04/technology/google-agrees-to-changes-in-search-ending-us-antitrust-inquiry.html>, archived at <http://perma.unl.edu/6XM4-UK4Y>.

436. LIZABETH COHEN, *A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA* 401–10 (2003).

break strikes rather than challenge the power of large businesses.⁴³⁷ The Clayton Act importantly provided an explicit antitrust exemption for labor organizations.⁴³⁸ And yet, the tension between antitrust and organized labor did not end with that important statute. Labor organizations at times have seen businesses in concentrated markets as allies and hoped to share the oligopoly and monopoly rents in the form of higher wages and improved benefits for members.⁴³⁹ Unions have feared that competition resulting from antitrust enforcement would mean a smaller producer surplus from which to draw compensation.⁴⁴⁰

At present, antitrust seems largely inaccessible and invisible to the public. The lack of public interest in antitrust has aided its opponents. Even on the rare occasion when antitrust cases are in the news, a heavy reliance on technical jargon creates a chasm between consumers and antitrust specialists and acts as a barrier to popular support.⁴⁴¹ When specific antitrust cases or the broader legal regime is under attack, antitrust enforcers do not have a constituency, outside of the specialized antitrust community, to draw on for public support.⁴⁴² Without a popular constituency, the opponents of antitrust enforcement, who are wealthy and powerful, can undercut even the most committed enforcers.⁴⁴³

The proponents of antitrust enforcement need to build their own constituency among consumers. Public indifference to the antitrust laws is not inevitable. Even if a sustained consumer movement has been elusive in the United States, American consumers show acute awareness of pocketbook issues and voice their concerns about perceived unfair practices by business. Some recent events illustrate how consumers are, in fact, attuned to how much they pay for essential goods and services. In 2011, public anger over Bank of America's proposed \$5 monthly fee on its debit cards forced the bank to scrap the

437. *See, e.g.*, *Loewe v. Lawlor*, 208 U.S. 274, 304–09 (1908) (holding that secondary boycotts by labor unions were illegal under the Sherman Act and that individual union members could be held liable for damages).

438. 15 U.S.C. § 17 (2012).

439. Foer, *supra* note 6, at 489; Randall Marks, *Labor and Antitrust: Striking a Balance Without Balancing*, 35 AM. U. L. REV. 699, 716 (1986).

440. Foer, *supra* note 6, at 489.

441. Spencer Weber Waller, *The Language of Law and the Language of Business*, 52 CASE W. RES. L. REV. 283, 337 (2001).

442. “Nader’s Raiders” leveled this same criticism at antitrust enforcement four decades ago. *See* MARK J. GREEN, ET AL., *THE CLOSED ENTERPRISE SYSTEM: RALPH NADER’S STUDY GROUP REPORT ON ANTITRUST ENFORCEMENT* 436–37 (1972).

443. *See, e.g.*, James B. Stewart, *Baffling About-Face in American-US Airways Merger*, N.Y. TIMES, Nov. 15, 2013, at B1 (discussing the massive lobbying campaign of American Airlines and US Airways against the government challenge to their merger, which ultimately appears to have persuaded the Department of Justice to settle the case instead of block the transaction in court).

plan.⁴⁴⁴ Spikes in gasoline prices are a frequent source of public discontent, recently in the Midwest⁴⁴⁵ and California.⁴⁴⁶ Going back to the 1960s and '70s, Ralph Nader became a widely admired figure for his research and advocacy on how deceptive marketing practices and poorly designed products harmed consumers.⁴⁴⁷ A more consumer-oriented antitrust regime can tap into the public interest in the availability of affordable and high quality goods and services.

Rhetoric is a key determinant of whether consumers begin to take an interest in antitrust enforcement. Antitrust enforcers—private and public—should not expect to win over many consumers, untutored in economics, through the use of “market definition,” “coordinated effects,” or “small but significant and nontransitory increase in price.”⁴⁴⁸ An accessible, jargon-free language of competition and its role in consumer protection is critical. If antitrust actions are presented in terms of preserving and promoting affordably priced, high-quality goods and services, consumers are much more likely to appreciate the value of enforcement.

The American Antitrust Institute’s short film entitled *Fair Fight in the Marketplace*⁴⁴⁹ offers lessons on how to speak in a language that can attract a broad audience and build a base of support for competition. This documentary tied the technocratic world of antitrust today to the pocketbook concerns of Americans. It discussed three major antitrust cases from the 1990s—price fixing in the lysine industry, Mylan’s monopolization of two widely prescribed anti-anxiety drugs, and Microsoft’s exclusionary campaign against Netscape.⁴⁵⁰ The film eschewed antitrust jargon and theory and instead offered personal stories on the harm from the challenged cartels and monopolies—farmers forced to pay higher prices for a critical ingredient of cattle feed, computer users deprived of alternative operating systems, and senior citizens unable to purchase vital medicines.⁴⁵¹

444. Tara Siegel Bernard, *In Retreat, Bank of America Cancels Debit Card Fee*, N.Y. TIMES, Nov. 1, 2011, <http://www.nytimes.com/2011/11/02/business/bank-of-america-drops-plan-for-debit-card-fee.html>, archived at <http://perma.unl.edu/HZU5-GGGU>.

445. Sabina Zawadzki, *U.S. Midwest Gasoline Prices Expected to Cool After Spike*, REUTERS (May 22, 2013, 6:02 PM), <http://www.reuters.com/article/2013/05/22/us-energy-gasoline-prices-idUSBRE94L18Y20130522>, archived at <http://perma.unl.edu/XE6M-NLEA>.

446. John Bussey, *California’s Gas Price: Is There a Villain?*, WALL ST. J., Oct. 19, 2012, <http://online.wsj.com/news/articles/SB10000872396390444592704578064851501999088>, archived at <http://perma.unl.edu/AD79-QXHB>.

447. Mayer, *supra* note 381, at 181.

448. Stucke, *supra* note 418, at 556.

449. FAIR FIGHT IN THE MARKETPLACE (Filmmakers Collaborative SF 2006).

450. *Id.*

451. *Id.*

Enforcement in sectors providing essential goods and services and other everyday items—for example energy and food—is likely to draw the greatest consumer interest. And the agencies can point to many such examples. In recent years, the Department of Justice and Federal Trade Commission have brought actions against companies in the beer,⁴⁵² electricity,⁴⁵³ gasoline,⁴⁵⁴ prescription drugs,⁴⁵⁵ and wireless communications⁴⁵⁶ industries.

The supporters of stronger antitrust enforcement and consumers should view each other as natural allies. The lack of general interest in antitrust over the past several decades is a testament to its current technocratic obscurantism. Antitrust enforcement has proceeded in an ostensibly consumerist direction and challenged the anticonsumer conduct of many high profile corporations. Despite these developments, antitrust has gained little, if any, public traction. Consumers have a stake in the price and availability of life's necessities (and more). Antitrust enforcement can protect consumers from anticompetitive conduct, and consumers can lend support to antitrust enforcers threatened by powerful business interests.

VI. CONCLUSION

Some scholars divide the history of antitrust jurisprudence into eras of “populism” and “economics” and claim a fundamental conflict between the two concepts. A review of Supreme Court decisions on antitrust reveals a more complex picture and shows the importance of distinguishing the general goals of antitrust law from its specific rules. Antitrust law, as articulated by the Supreme Court, has always sought to protect a nonelite group of Americans against the power of big business—the very essence of populism.⁴⁵⁷ And the Court has ar-

452. Press Release, U.S. Dep't of Justice, Justice Department Files Antitrust Lawsuit Challenging Anheuser-Busch InBev's Proposed Acquisition of Grupo Modelo (Jan. 31, 2013) (on file with the U.S. Dep't of Justice), *archived at* <http://perma.unl.edu/BF9P-HHCQ>.

453. Press Release, U.S. Dep't of Justice, Justice Department Requires KeySpan to Disgorge \$12 Million in Profits from Anticompetitive Agreement (Feb. 22, 2010) (on file with the U.S. Dep't of Justice), *archived at* <http://perma.unl.edu/V3RG-GSW4>.

454. Press Release, Fed. Trade Comm'n, FTC Charges Unocal with Anticompetitive Conduct Related to Reformulated Gasoline (Mar. 4, 2003) (on file with the Fed. Trade Comm'n), *archived at* <http://perma.unl.edu/9PLX-QDGN>.

455. Press Release, Fed. Trade Comm'n, Mylan, Nation's Second Largest Generic Drug Maker, Charged with Restraint of Trade, Conspiracy & Monopolization (Dec. 21, 1998) (on file with the Fed. Trade Comm'n), *archived at* <http://perma.unl.edu/5S2G-RLLE>.

456. Press Release, U.S. Dep't of Justice, Justice Department Files Antitrust Lawsuit to Block AT&T's Acquisition of T-Mobile (Aug. 31, 2011) (on file with the U.S. Dept. of Justice), *archived at* <http://perma.unl.edu/9LC8-NWNV>.

457. Kazin, *supra* note 12, at 1.

ticulated specific rules to achieve this populist goal using economics. In other words, antitrust decisions have aimed to advance populist goals through economically informed rules.

The substance of antitrust populism and economics has changed over time. In the decades immediately following the passage of the Sherman Act, the Supreme Court often spoke of protecting small producers and displayed infrequent and often only indirect concern for consumers. The Court in the early era proscribed certain horizontal and vertical restraints, but viewed large scale and many forms of horizontal collaboration more favorably. Starting in the 1940s, the Court adopted consumer protection as a principal aim of the antitrust laws, but continued to champion the cause of small businesses as well. It became more skeptical of many business practices and treated horizontal and vertical price restraints, tying, and mergers between large firms as problematic. The Court has, since the 1970s, held that the antitrust laws exist only to protect consumers and also taken the position that most forms of business conduct can benefit consumers.

Although some argue that antitrust law should seek to maximize economic efficiency or total welfare and ignore distributional consequences, antitrust enforcers and the courts should continue to apply the antitrust laws as a consumer protection regime. This consumer orientation has four primary grounds of support. First and foremost, Congress, as revealed in the legislative histories of the antitrust laws, sought to prevent large firms from using their market power to raise prices and transfer wealth from consumers. In contrast, no one involved in the Congressional debates discussed total welfare—or probably even had an awareness of this academic concept. Second, consumer-oriented antitrust enforcement can be one important policy tool to contain the growing economic chasm between the rich and everyone else with market power by preventing wealth transfers from consumers to producers. Third, given how consumers often cannot organize politically on account of their vast numbers, the federal courts can serve as trustees for this group and protect its interests from better-organized producer groups. Last, just as antitrust can help consumers, consumers can provide needed political support for antitrust enforcement. By establishing a consumer constituency, antitrust enforcers can ensure the continued vitality of U.S. competition laws. They can establish, to paraphrase Richard Hofstadter, antitrust prosecutions *with* an antitrust movement. In deciding between competing interests, antitrust law should categorically prefer one dollar of purchasing power for a consumer over one dollar of additional rents for a powerful corporation.