THE COMPETITIVE PROCESS STANDARD

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INTRODUCTION 580
I. CONTEXT FOR THE STANDARDS DEBATE: CRIMINAL ANTITRUST ENFORCEMENT 584
A. The Mother Per Se Rule 584
B. Consumer Welfare in Modern Decisions 589
C. Constitutional Issues in Criminal Sherman Act Enforcement 591
II. THE FOCUS OF ANTITRUST ENFORCEMENT: PROCESS VS. OUTPUT 595
A. Antitrust Philosophies 595
B. The Consumer Welfare Standard 597
C. The Rise of Output as the Focus of Antitrust Law . . . 601
D. The False Idol of Output 604
E. Competition and Output in More Sophisticated Models 607
F. Proving What Cannot Be Seen 610
III. THE COMPETITIVE PROCESS STANDARD 612
A. The Basic Idea 612
B. Per Se and Quick Look Treatment 614
C. Rule of Reason Treatment 619
D. Monopolization and Unfair Methods of Competition 622
E. Mergers 628
IV. OBJECTIONS TO THE COMPETITIVE PROCESS STANDARD 633
A. Professor Herbert Hovenkamp 633
B. Professor Einer Elhauge 637
C. Professor Jonathan Baker 641
CONCLUSION 643

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INTRODUCTION

Whether U.S. antitrust law is governed by the "consumer welfare standard" is doubtful,[1] but an ongoing antitrust policy debate is framed as whether antitrust law should abandon that standard.[2] This latest round of the standards debates began with an attack on antitrust orthodoxy by the New Brandeis Movement,[3] and it heated up with the appointment of Jonathan Kanter as assistant attorney general in charge of the Antitrust Division of the Department of Justice.

In written responses to questions from members of the Senate Judiciary Committee, prior to his confirmation hearing, Mr. Kanter stated:

> I have voiced concerns that the application of the consumer welfare standard has been inconsistent, vague, and insufficient to keep pace with market realities. Effective antitrust enforcement requires a deep understanding of market realities and facts to determine whether the conduct at issue harms competition and the competitive process. Enforcement authorities should use state-of-the-art analytical tools to analyze key facts and empirical evidence with the aim of protecting competition and the competitive process.[4]

In his responses to the Committee, Mr. Kanter commented: "Antitrust law protects the competitive process. A healthy and competitive economy can yield a wide range of benefits for all Americans."[5]

In one of his first speeches after taking office, Assistant Attorney General (AAG) Kanter set out "five pillars of an effective civil antitrust enforcement regime," the first of which was recognizing that "the purpose of antitrust law is to protect competition."[6] He argued that the "antitrust community lost its

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[1] *See, e.g.*, GREGORY J. WERDEN, THE FOUNDATIONS OF ANTITRUST: EVENTS, IDEAS, AND DOCTRINES 323–36 (2020) [hereinafter WERDEN, FOUNDATIONS]; Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 ANTITRUST L.J. 713, 723–43 (2014) [hereinafter Werden, *Antitrust's Rule of Reason*].

[2] *See, e.g.*, ABA ANTITRUST LAW SECTION, REPORT OF THE TASK FORCE ON THE FUTURE OF COMPETITION LAW STANDARDS (2020).

[3] *See* TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 135–38 (2018) [hereinafter WU, THE CURSE OF BIGNESS]; Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131, 132 (2018) [hereinafter Khan, *The New Brandeis Movement*]; Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 720–22, 737–46 (2017) [hereinafter Khan, *Amazon's Antitrust Paradox*]; Tim Wu, *The "Protection of the Competitive Process" Standard* (Columbia L. Sch. Pub. L. Research Paper, Paper No. 14-612, 2018), scholarship.law.columbia.edu/faculty_scholarship/2290.

[4] S. COMM. ON THE JUDICIARY, 117TH CONG., QUESTIONS FOR THE RECORD, JONATHAN KANTER, NOMINEE TO BE ASSISTANT ATTORNEY GENERAL OF THE ANTITRUST DIVISION 1 (2021), www.judiciary.senate.gov/imo/media/doc/Kanter%20Responses%20to%20Questions%20for%20the%20Record.pdf.

[5] *Id.* at 4.

[6] Jonathan Kanter, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Antitrust Enforcement: The Road to Recovery (Apr. 21, 2022), www.justice.gov/opa/speech/assistant-

North Star" by diverting its focus to "welfare effects" and trying "to decide who should win and lose rather than allowing competition and competitive markets to govern that determination."[7] He asserted that "Congress has chosen the values we are to preserve, and it has squarely settled on upholding a competitive process in free markets."[8]

A few weeks later, AAG Kanter directly attacked the consumer welfare standard.[9] He argued that "consumer welfare is a catch phrase, not a standard," and he explained that it "is a mistake to confuse . . . goals with the standard courts are to apply."[10] He also argued that the "overarching problem" with the consumer welfare standard "is that it does not reflect the law as passed by Congress and interpreted by the courts. The legislated goals of the antitrust laws are clear—Congress sought to protect competition and the competitive process."[11]

This article elaborates the "competitive process standard" and dispels assertions by its opponents that it is a "slogan,"[12] "mantra,"[13] "cipher,"[14] or that it is "nebulous."[15] This article also responds to recent advocacy of the consumer welfare standard prompted by the New Brandeis Movement[16] and by AAG Kanter's speeches.[17]

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attorney-general-jonathan-kanter-delivers-keynote-university-chicago-stigler. The speech was delivered at a conference titled *Antitrust: What's Next* held at the Stigler Center for the Study of the Economy and the State. A video of the speech is available at www.youtube.com/watch?v=fJdQTs11D1Y&t=900s.

[7] Kanter, *supra* note 6.

[8] *Id.*

[9] Jonathan Kanter, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks at New York City Bar Association's Milton Handler Lecture (May 18, 2022), www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association. A video of the speech is available at www.youtube.com/watch?v=DY8yGpzmCSs&t=1538s.

[10] Kanter, *supra* note 9.

[11] *Id.*

[12] Herbert J. Hovenkamp, *The Slogans and Goals of Antitrust Law*, 25 N.Y.U. J. LEGIS. & PUB. POL'Y 705, 711, 745–46, 751 (2023).

[13] Brianna L. Alderman & Roger D. Blair, *Antitrust Concerns and Kanter's Cures*, ANTITRUST, Fall 2022, at 18, 21.

[14] John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 IND. L.J. 501, 514 (2019).

[15] Murat C. Mungan & John M. Yun, *A Reputational View of Antitrust's Consumer Welfare Standard*, 61 HOUS. L. REV. 569, 575 (2023).

[16] *See, e.g.*, A. Douglas Melamed & Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, 54 REV. INDUS. ORG. 741 (2019); Jonathan B. Baker, *A Competitive Process Goal Won't Strengthen Antitrust*, NETWORK L. REV. (Aug. 26, 2022), www.networklawreview.org/baker-goal.

[17] *See* Einer Elhauge, *Should the Competitive Process Test Replace the Consumer Welfare Standard?*, PROMARKET (May 24, 2022), www.promarket.org/2022/05/24/should-the-competitive-process-test-replace-the-consumer-welfare-standard.

The consumer welfare standard and the competitive process standard are alternative ways to focus antitrust law. In economic terms, the competitive process standard focuses on market structure and conduct, while the consumer welfare standard focuses on market performance. In legal terms, the competitive process standard focuses on the first few links of the causal chain connecting suspect conduct to its ultimate effects, while the consumer welfare standard considers the whole chain but focuses on the last link.

The competitive process standard first analyzes the essential nature of suspect conduct. If conduct is not unambiguously procompetitive or anticompetitive, the competitive process standard assesses the proximate effect of the conduct on incentives and opportunities to engage in marketplace competition.[18] This limited assessment employs many of the same tools of economic analysis as the consumer welfare standard, but demands less from them because the effects of interest are not ultimate effects on price, output, or consumer welfare.

This difference in focus normally should not be outcome determinative, but it can be. If the consumer welfare standard requires the plaintiff to prove that challenged conduct caused an output reduction, the consumer welfare standard sometimes favors defendants relative to the competitive process standard. If the consumer welfare standard makes consumer harm sufficient to establish a violation, the consumer welfare standard sometimes favors plaintiffs relative to the competitive process standard.

A difference in focus arguably was determinative in *American Express*,[19] where the Supreme Court evidently applied the consumer welfare standard. The issue before the Court was whether the plaintiffs had carried their initial burden of demonstrating an anticompetitive effect. The district court held that they had, in part because price competition on the merchant side of the market was "frustrated to the point of near irrelevance."[20] The Supreme Court, however, held that the plaintiffs failed to carry their burden because they had not demonstrated an output reduction.[21]

A difference in focus arguably was determinative in *Qualcomm*,[22] where the Ninth Circuit evidently applied the competitive process standard. The

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[18] The New Brandeis Movement instead proposes simple rules that obviate economic analysis. *See* Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 279–85 (2017); Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, 87 U. CHI. L. REV. 595 (2020).

[19] Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).

[20] United States v. Am. Express Co., 88 F. Supp. 3d 143, 209 (E.D.N.Y. 2015).

[21] *Am. Express*, 138 S. Ct. at 2287–88.

[22] FTC v. Qualcomm Inc., 969 F.3d 974 (9th Cir. 2020).

district court found that certain Qualcomm patent licensing practices violated contractual commitments and allowed Qualcomm to obtain higher royalties.[23] The issue before the court was whether the plaintiff demonstrated an anticompetitive effect, and the Ninth Circuit held that it had not because the plaintiff did not show "harm to competition,"[24] even if the practices did harm both rivals and consumers.

A difference in focus could prove determinative if the Supreme Court were to rule on the constitutionality of criminal Sherman Act enforcement. Criminal enforcement relies on the "mother per se rule"—antitrust law's venerable categorical prohibition of price fixing, bid rigging, and customer or market allocation. Part I argues that the legal rationale of the mother per se rule was, in essence, the competitive process standard, and that jurisprudence cited in support of the consumer welfare standard has not eroded that rationale. Part I also explains how the competitive process standard helps defend criminal enforcement under the mother per se rule.

Part II begins by explaining that a standard in antitrust is one component of an overall philosophy. While other components determine the depth and breadth of antitrust enforcement, standards determine the focus and hence the character of the conduct assessment and specific litigation burdens.

Part II then recounts how the consumer welfare standard, and advocacy of it, focus the conduct assessment on market performance and enshrine output as the key indicator. Part II argues that the Supreme Court made output into a false idol of worship in *American Express*.[25] Part II proceeds to explain why harm to competition need not be associated with output reduction and illustrates why output reduction can be exceedingly difficult to prove even if it surely has occurred.

Part III presents the competitive process standard in the abstract and in four major contexts. Part III identifies concerted conduct that should be treated as per se illegal because it corrupts the competitive process, and concerted conduct that should be subject to a quick look because it softens competition. Part III also outlines the application of the standard in rule of reason cases, with focus on the plaintiff's burden.

Part III then considers unilateral exclusionary conduct, explaining what constitutes competition on the merits and why it is privileged under the competitive process standard. Finally, Part III addresses the assessment of mergers and explains the meaning of lessening of competition. The merger discussion emphasizes two points of divergence between the competitive process

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[23] FTC v. Qualcomm Inc., 411 F. Supp. 3d 658, 751–58, 773–97 (N.D. Cal. 2019).
[24] *Qualcomm*, 969 F.3d at 995–96, 998–1003.
[25] *Am. Express*, 138 S. Ct. 2274.

standard and the consumer welfare standard—the treatment of efficiencies and the lessening of buyer competition.

Part IV identifies and responds to specific objections to the competitive process standard posed by Professors Jonathan Baker, Einer Elhauge, and Herbert Hovenkamp. All three fear the unknown consequences of applying the competitive process standard, even though it is the standard courts generally have applied.

Professor Hovenkamp argued that the competitive process standard is too permissive on exclusionary conduct, but the decisions he criticized properly confined antitrust law to the domain of competition. Professor Elhauge argued that the Supreme Court has adopted the consumer welfare standard, but the decision rationale of each case he cited invoked the competitive process standard. Professor Baker credited the consumer welfare standard for all that is good in antitrust law, but the competitive process standard should get the credit.

Part V provides concluding comments. Part V begins with the goals of antitrust law and how the preoccupation with that subject diverted attention from the singular means chosen by Congress to advance those goals, which is to protect the competitive process. The competitive process standard keeps antitrust law on the path that Congress mapped.

I. CONTEXT FOR THE STANDARDS DEBATE: CRIMINAL ANTITRUST ENFORCEMENT

A. The Mother Per Se Rule

The core of antitrust law is the Sherman Act's "mother per se rule," which condemns price fixing, bid rigging, and allocation of customers or markets, without regard to the impact the conduct has on performance or the justifications that might be offered. The Supreme Court developed the mother per se rule in criminal cases, and the stated rationale was, in essence, the competitive process standard.

A per se rule in antitrust law is a special case of the rule of reason, which governs all Section 1 cases.[26] The Supreme Court announced the rule of reason in the 1911 *Standard Oil* decision[27] and explained it in *Chicago Board*

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[26] *See, e.g.*, R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 890 F.2d 139, 151 (9th Cir. 1989) (en banc); PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1509a, LEXIS (database updated May 2024); LAWRENCE ANTHONY SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 196 (1977).

[27] Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 62, 66 (1911). The Court suggested that the rule of reason was already well developed in the common law on restraints of trade, but it was not. *See* WERDEN, FOUNDATIONS, *supra* note 1, at 207–30.

of Trade: "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."[28] The Court has never departed from this test.[29]

In the 1913 *Nash* case, the Supreme Court rejected the contention that the rule of reason deprived Section 1 of the clarity the Constitution demands of criminal laws.[30] Writing for the Court, Justice Oliver Wendell Holmes Jr. observed that the rule of reason condemned restraints that "prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade," as evidenced by "intent or the inherent nature of the contemplated acts."[31] Holmes observed that Section 1 "does not make the doing of any act other than the act of conspiring a condition of liability."[32]

Justice Holmes hinted at the mother per se rule, perhaps because prior decisions had condemned price-fixing schemes under what amounted to a per se rule.[33] The Supreme Court confirmed in 1917 that *Standard Oil* had not overruled those prior decision,[34] and in 1927 the Court addressed price fixing again in *Trenton Potteries*.[35]

The case concerned manufacturers accounting for over 80 percent of U.S. production of "sanitary pottery," i.e., toilets.[36] The Second Circuit had set aside numerous Section 1 convictions,[37] primarily on the grounds that the jury was not given this proposed instruction:

> The essence of the law is injury to the public; it is not every restraint of competition and not every restraint of trade that works an injury to

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[28] Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918).

[29] The Court has applied the rule of reason in ways that can be criticized. Indeed, the application in *Chicago Board of Trade* has been criticized. *See, e.g.*, ROBERT H. BORK, THE ANTITRUST PARADOX 41–47 (1978). The worst application of the rule of reason was *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933).

[30] Nash v. United States, 229 U.S. 373, 376–78 (1913).

[31] *Id.* at 376.

[32] *Id.* at 378.

[33] *See, e.g.*, United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898); United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290 (1897).

[34] *See* Thomsen v. Cayser, 243 U.S. 66, 84–85 (1917).

[35] *See* United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

[36] *Id.* at 394.

[37] Twenty individuals and 23 corporations were convicted, and eight of the individuals were sentenced to prison terms of six months. The prison sentences were stayed pending appeal and later suspended after the convictions were upheld by the Supreme Court. *Id.* at 393–94; Criminal Docket, United States v. Trenton Potteries, No. 32 CR 566 (S.D.N.Y. Mar. 17, 1928), appliedantitrust.com/02_early_foundations/4_early_pf_cases/11_trenton1927/trenton_potteries_sdny_indictment8_8_1922orig.pdf.

> the public; it is only an undue and unreasonable restraint of trade that has such an effect and is deemed to be unlawful.[38]

The trial judge instead charged the jury that "the law is clear that an agreement on the part of the members of a combination controlling a substantial part of an industry, upon the prices which the members are to charge for their commodity, is in itself an undue and unreasonable restraint of trade and commerce."[39] The Supreme Court sided with the trial judge, holding that reasonableness of "the prices actually agreed upon . . . was immaterial."[40]

The Court reasoned that the Sherman Act was "based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition."[41] And the Court declared that the "aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition."[42] Thus, the Court concluded that price-fixing agreements were "in themselves unreasonable or unlawful restraints."[43]

The *Socony-Vacuum* case[44] concerned a Depression-era scheme to prop up slumping gasoline prices. The DOJ argued that "the purpose and effect of the conspiracy charged was to fix and control the market price of gasoline and that such a combination is unlawful per se."[45] A jury given a per se instruction[46] convicted numerous defendants of violating Section 1.[47]

The Seventh Circuit understood Supreme Court precedent to hold that the legality of concerted action under Section 1 turned on "the effect which the action has on fair competition," and that "a price fixing agreement is not per se unlawful under all circumstances."[48] The court set aside the convictions on the basis that "it was a jury question as to the effect which the plan

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[38] *See* Trenton Potteries Co. v. United States, 300 F. 550, 553 (2d Cir. 1924).

[39] *Trenton Potteries*, 273 U.S. at 396.

[40] *Id.* at 401. The Second Circuit had not included "the prices actually agreed upon" as an element of reasonableness, but the proposed instruction did refer to "injury to the public." *Id.* at 395, 401.

[41] *Id.* at 397.

[42] *Id.*

[43] *Id.* As the Court later characterized the holding, it was that certain restraints necessarily are "unreasonable restraints within the meaning of the Sherman Act because they eliminate competition." Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 458 (1940).

[44] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[45] United States v. Socony-Vacuum Oil Co., 105 F.2d 809, 820 (7th Cir. 1939).

[46] *Id.* at 832–33.

[47] The jury returned guilty verdicts against 16 corporations and 30 individuals, but the trial court set aside 11 of the convictions and granted new trials for 18 defendants, leaving 12 corporations and 5 individuals to pursue appeals. *See id.* at 814. No prison sentences were imposed. *Socony-Vacuum*, 310 U.S. 150, 165 n.2.

[48] *Socony-Vacuum*, 105 F.2d at 825.

in operation had upon fair competition and its resultant effect upon restraint of trade."[49]

The Supreme Court reversed, holding that "under the Sherman Act[,] a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*."[50] The Court explained:

> Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive.[51]

Critically, this passage attributes the mother per se rule to Congress and the text of the Sherman Act. Nothing in the Court's opinion suggests that it adopted a providential rule based on an implicit error-cost assessment.

The Court further explained that, if the law entertained justifications for price fixing, the Sherman Act's "philosophy would be supplanted by one which is wholly alien to a system of free competition."[52] And the Court observed that the agreement itself is what Section 1 "strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other."[53]

Neither the circumstances in which the price fixing occurs nor its actual or intended impact matter under the mother per se rule:

> The effectiveness of price-fixing agreements is dependent on many factors, such as competitive tactics, position in the industry, the formula underlying price policies. 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.[54]

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[49] *Id.* at 831.
[50] *Socony-Vacuum*, 310 U.S. at 223.
[51] *Id.* at 221.
[52] *Id.*
[53] *Id.* at 225 n.59.
[54] *Id.* at 225–26 n.59. For this proposition, the Court cited comments from economist Isaiah Leo Sharfman, who argued:

The Supreme Court briefly stated the holding and rationale of *Socony-Vacuum* in two 1950s civil cases. In *McKesson & Robbins*, the Court declared that "price fixing is contrary to the policy of competition underlying the Sherman Act and that its illegality does not depend on a showing of its unreasonableness, since it is conclusively presumed to be unreasonable."[55]

In *Northern Pacific*, the Court stated that "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[56]

The Court's point in these cases was that unreasonableness was not a distinct element, requiring distinct proof, because a pernicious effect on competition was inherent in the conduct. When a defendant is criminally charged with violating the mother per se rule, the question for the jury is whether a defendant engaged in the conduct charged, including whether the defendant's conduct fits into in a category subject to the rule.[57]

While the stated rationale of the mother per se rule is the competitive process standard, it also can be justified by the consumer welfare standard: Effective implementation of agreements subject to the mother per se rule normally would harm consumer welfare,[58] and administrative convenience justifies ignoring whether conspirators have the power to harm consumer welfare and whether they take acts in furtherance of their agreement.

> The object of the Anti-Trust Laws as they have developed over a period of more than 40 years has been to retain the essence of competition. That principle, under the existing economic order, is sound and indispensable. Because independent price fixing is essential, concerted action in the fixing of uniform prices, whether they be reasonable or unreasonable, is condemned.

I.L. Sharfman, *The Anti-Trust Act of 1890 and Trade Associations*, *in* THE FEDERAL ANTI-TRUST LAWS: A SYMPOSIUM CONDUCTED AT COLUMBIA UNIVERSITY 75, 93 (Milton Handler ed., 1932).

[55] United States v. McKesson & Robbins, Inc., 351 U.S. 305, 309–10 (1956) (resale price maintenance case).

[56] N. Pac. Ry. Co v. United States, 356 U.S. 1, 5 (1958) (tying case).

[57] The boundaries of the categories are a question of law, and "easy labels do not always supply ready answers." Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1, 8 (1979).

[58] Some advocates of the consumer welfare standard perceive no harm to consumer welfare from a buyer cartel, but buyer cartels are per se unlawful, and the DOJ has criminally prosecuted many. *See* Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 ANTITRUST L.J. 707, 716 (2007).

B. CONSUMER WELFARE IN MODERN DECISIONS

Advocates of the consumer welfare standard argue that the Supreme Court adopted it, and the *Sylvania* decision[59] has been cited as the vanguard.[60] The case concerned a territorial restraint employed by a manufacturer with a "relatively insignificant" market share.[61] Under the Court's precedents, the practice was per se unlawful,[62] but the Court viewed such treatment as contrary to *Northern Pacific*'s admonition that per se rules are appropriate only for "manifestly anticompetitive" conduct.[63]

The Court declared "that departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . formalistic line drawing."[64] This was a triumph for economics[65] and Robert Bork,[66] but it shed no light on the applicable standard. The Supreme Court rejected per se treatment for non-price vertical restraints on the basis that they "promote interbrand competition," which is "the primary concern of antitrust law."[67] The Court's reasoning was just as consistent with the competitive process standard as with the consumer welfare standard.

The 1979 *Sonotone* decision is said to have adopted the consumer welfare standard in quoting Robert Bork's assertion that the Sherman Act was designed "as a 'consumer welfare prescription.'"[68] But the Court quoted only the last few words and did so only for the purpose of explaining that the Sherman Act's legislative history was not in conflict with the Court's conclusion that consumers suffered an injury in their "property" when they paid overcharges resulting from Sherman Act violations.

Five years later, the Supreme Court quoted the same few words in condemning the NCAA's "television plan" for college football, which severely

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[59] Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

[60] *See, e.g.*, Douglas H. Ginsburg, *Bork's "Legislative Intent" and the Courts*, 79 ANTITRUST L.J. 941, 943–45 (2014).

[61] *Sylvania*, 433 U.S. at 38.

[62] *See* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 382 (1967).

[63] *Sylvania*, 433 U.S. at 50 (citing N. Pac. Ry. Co v. United States, 356 U.S. 1, 5 (1958)).

[64] *Id.* at 58–59.

[65] In the main text of his opinion, Justice Powell cited three antitrust commentaries by economists and a leading introductory textbook. *Id.* at 55–57.

[66] Justice Powell cited Bork once. *Id.* at 56. The Ninth Circuit opinion cited him five times. GTE Sylvania Inc. v. Cont'l T.V., Inc., 537 F.2d 980, 1002–04 nn.37–40 (9th Cir. 1976) (en banc).

[67] *Sylvania*, 433 U.S. at 52 n.19, 54.

[68] Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) ("[The floor debates] suggest that Congress designed the Sherman Act as a 'consumer welfare prescription.'") (quoting BORK, *supra* note 29, at 66 ("The Sherman Act was clearly presented and debated as a consumer welfare prescription.")).

limited broadcasting of games to protect live attendance.[69] The arrangement was not a classic cartel, and the Court declined to apply the mother per se rule.[70] But the Court had no difficulty in applying the rule of reason.[71]

The television plan plainly reduced viewer and broadcaster welfare, but the Court seemed more concerned with the competitive process. The Court observed that,

> whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition. Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition.[72]

The Court applied this observation by noting that the television plan made price and output "unresponsive to consumer preferences," which was significant because the Sherman Act was designed as a "consumer welfare prescription."[73] The Court's illustration of this unresponsiveness was that schools fielding successful football teams were denied the rewards from greater television revenue.[74] Consistent with the competitive process standard, the Court pinpointed the television plan's interference with normal market mechanisms but not any adverse welfare effects.

The Supreme Court's most recent references to "consumer welfare" do not imply adoption of the consumer welfare standard. The *Leegin* majority opinion referred to "competition and consumer welfare," implying that competition promotes welfare.[75] And the majority commented that the rule of reason "distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest."[76] But the rationale for overruling the per se rule against minimum resale price maintenance was not consumer welfare.

The *Leegin* majority observed that the "economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance," all of which were ways in which resale price maintenance could "increase interbrand competition."[77] But consumers can be harmed in the

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[69] NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 91–94, 107–08 (1984).

[70] *Id.* at 100–03.

[71] *Id.* at 103–08.

[72] *Id.* at 104 (footnotes omitted).

[73] *Id.* at 107.

[74] *Id.* at 107 n.33 (citing Bd. of Regents of the Univ. of Okla. v. NCAA, 546 F. Supp. 1276, 1291 (W.D. Okla. 1982)).

[75] *See* Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 902, 906 (2007).

[76] *Id.* at 886.

[77] *Id.* at 889, 891.

process. Literature cited by the majority showed that resale price maintenance could profitably attract marginal customers while reducing the welfare of consumers overall.[78]

In *NCAA v. Alston*, the Supreme Court commented: "Judges must remain aware that markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare."[79] That view is compatible with any standard and mandated by none. The Court referred to consumers in rejecting the contention that they benefited from the NCAA's restraint on student-athlete compensation.[80] The restraint was condemned because it harmed competition for student athletes.[81]

C. Constitutional Issues in Criminal Sherman Act Enforcement

The Sherman Act is a criminal statute, and the DOJ has always devoted substantial resources to criminal enforcement of the Act against corporations and individuals. Moreover, prison sentences became routine after violations became felonies in 1974.[82]

The Constitution requires that each element of a crime "be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt."[83] Offenses within the mother per se rule have a single substantive element[84]—that the defendant knowingly entered into an agreement that constitutes price fixing, bid rigging, or the allocation of customers or markets.

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[78] *Id.* at 893 (citing Howard P. Marvel & Stephen McCafferty, *The Welfare Effects of Resale Price Maintenance*, 28 J.L. & Econ. 363 (1985)). The dissent cited other literature making this point in terms more accessible to non-economists. *See id.* at 910–11 (Breyer, J., dissenting) (citing, e.g., William S. Comanor, *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 Harv. L. Rev. 983, 990–1000 (1985)).

[79] NCAA v. Alston, 141 S. Ct. 2141, 2166 (2021).

[80] *Id.* at 2152–53.

[81] *Id.* at 2151–52.

[82] Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 3, 88 Stat. 1706, 1708 (1974).

[83] Jones v. United States, 526 U.S. 227, 232 (1999); *see, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 476–78 (2000); United States v. Gaudin, 515 U.S. 506, 510 (1995); Davis v. United States, 160 U.S. 469, 487 (1895) ("[T]he burden of proof . . . . is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime.").

[84] The Supreme Court held that "intent is an element of a criminal antitrust offense." United States v. U.S. Gypsum Co., 438 U.S. 422, 435 (1978). But lower courts subsequently clarified that intent is not a separate element of the offense under the mother per se rule. *See* United States v. Nippon Paper Indus. Co., 109 F.3d 1, 6–7 (1st Cir. 1997); United States v. Brown, 936 F.2d 1042, 1046 (9th Cir. 1991); United States v. Koppers Co., 652 F.2d 290, 296 n.6 (2d Cir. 1981); United States v. Gillen, 599 F.2d 541, 544–45 (3d Cir. 1979). To come within the scope of the Sherman Act, conduct also must be in, or affect, interstate commerce. The "proper analysis focuses, not upon actual consequences, but rather upon the potential harm that would ensue if the conspiracy were successful." Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 330 (1991).

Socony-Vacuum held that such conduct violates Section 1 even though "no overt act is shown [and] it is not established that the conspirators had the means available for accomplishment of their objective."[85] This holding embodies the competitive process standard, under which the illegality flows directly from the nature of the conduct.

The consumer welfare standard works differently. A. Douglas Melamed and Nicholas Petit assert that an antitrust offense under that standard "has three basic elements: anticompetitive conduct, which is basically conduct that is not efficiency-based competition on the merits; an increase or likely increase in market power; and a causal relation between the two."[86]

Melamed and Petit assert that per se rules are compatible with the consumer welfare standard[87] and can emerge through a common-law process.[88] As Justice Stevens explained in *Professional Engineers*:

> Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.[89]

As a matter of administrative convenience, the Supreme Court can presume that certain conduct harms performance, but no judge-made presumption can be invoked in a criminal case.[90] In *Francis v. Franklin*, the Supreme Court held that the due process clause prohibits the government "from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime."[91]

Judge-made presumptions also deny the right to trial by jury. The Supreme Court held that jury instructions relieving the government of any part of its burden "subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases."[92]

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[85] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 225 n.59 (1940).

[86] Melamed & Petit, *supra* note 16, at 746; *see also* Beatriz Del Chiaro da Rosa, FTC v. Qualcomm *and the Need to Reboot Antitrust Goals*, 30 U. MIA. BUS. L. REV. 267, 269 (2022) ("[T]he consumer welfare standard requires an analysis of two prongs: the impact of the challenged conduct on competition; and the impact of the challenged conduct on consumers.").

[87] Melamed & Petit, *supra* note 16, at 756, 767, 769.

[88] *Id.* at 756.

[89] Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 688 (1978).

[90] A former chair of the ABA Antitrust Section recently contended that criminal prosecutions under Section 1 are based on an unconstitutional presumption. *See generally* Roxann E. Henry, *Per Se Antitrust Presumptions in Criminal Cases*, 2021 COLUM. BUS. L. REV. 114.

[91] 471 U.S. 307, 313 (1985) (citing, e.g., Sandstrom v. Montana, 442 U.S. 510, 517 (1979)).

[92] Carella v. California, 491 U.S. 263, 265 (1989) (per curiam).

In criminal antitrust enforcement, grounding the mother per se rule on the consumer welfare standard also raises separation of powers issues. "Only the people's elected representatives in Congress have the power to write new federal criminal laws."[93] If the competitive process standard is implied by text of the Sherman Act, it follows that Congress made it a crime to engage in price fixing, bid rigging, and customer or market allocation. If the consumer welfare standard played any role, then the Supreme Court, not Congress, criminalized that conduct.

Constitutional defenses are raised in criminal antitrust cases. In 1972, the Ninth Circuit heard the appeal of five companies convicted of price fixing. Appellants contended that the mother per se rule denied them due process by operating as "a conclusive presumption" of an element of the crime.[94] The Ninth Circuit agreed that the Constitution did not allow a presumption that would relieve the government of its burden on any element of the offense, but also agreed with the government that the per se rule was a "rule of law" predating the rule of reason, rather than a "rule of evidence."[95]

In a 1980 bid-rigging and market-allocation trial, the jury was instructed that

> certain types of conduct are regarded as unreasonable per se. This means that the mere doing of the act itself constitutes an unreasonable restraint on commerce and it is not necessary to consider why the acts were committed or what effect it had on the industry. Agreements

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[93] United States v. Davis, 139 S. Ct. 2319, 2323 (2019); *see also* Liparota v. United States, 471 U.S. 419, 424 (1985); United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812).

[94] United States v. Mfrs.' Ass'n of the Relocatable Bldg. Indus., 462 F.2d 49, 50 (9th Cir. 1972). Appellants relied on *Morissette v. United States*, 342 U.S. 246 (1952), which held that intent could not be presumed. *Id.* Whether the mother per se rule presumes intent was at issue in *United States v. Brighton Bldg. & Maint. Co.*, 598 F.2d 1101 (7th Cir. 1979). The Seventh Circuit agreed with the government's contention that: "Since the *per se* rules define types of restraints that are illegal without further inquiry into their competitive reasonableness, they are substantive rules of law, not evidentiary presumptions. It is as if the Sherman Act read: 'An agreement among competitors to rig bids is illegal.'" *Id.* at 1106. The same issue was addressed in *United States v. Cargo Serv. Stations, Inc.*, 657 F.2d 676 (5th Cir. Unit B 1981). The Fifth Circuit reasoned:

> Price fixing . . . is an activity with inevitable anticompetitive effects; because of its inevitable effects the Supreme Court designated it illegal *per se*. In other words, price fixing is an unreasonable restraint prohibited by the antitrust laws. We think it follows that if price fixing is inevitably an unreasonable restraint of trade, the intent to fix prices is equivalent to the intent to unreasonably restrain trade.

Id. at 683 (footnote and citations omitted).

[95] *See Relocatable Bldg. Indus.*, 462 F.2d at 52. Two of the defense lawyers published an article pressing their case: James J. Brosnahan & William J. Dowling III, *The Constitutionality of the Per Se Rule in Criminal Antitrust Prosecutions*, 16 SANTA CLARA L. REV. 55 (1975). They argued that the Section 1's per se rule "is a rule of convenience or expedience" and that the "element of unreasonableness is essential to a finding of liability." *Id.* at 65, 74.

> among competitors to rig bids or allocate customers are such per se unreasonable restraints of trade and illegal.[96]

Appealing a Section 1 felony conviction, one conspirator argued that "this charge improperly withdrew the question of reasonableness from the jury by the use of a conclusive presumption."[97]

The Third Circuit rejected the argument:

> Since an agreement to fix prices is by its very nature a restraint on competition within the meaning of § 1 of the Sherman Act and lacks any redeeming virtue, there was no need for the government to prove that the prices fixed were unreasonable. The government proved every fact necessary to constitute the crime alleged.[98]

Much later, participants in a buyers cartel presented the same issue in appealing their Section 1 convictions.[99] Appellants argued that applying the mother per se rule created "an unconstitutional presumption in violation of the Supreme Court's decision in *Francis v. Franklin*."[100] The Eleventh Circuit declined the request "to overrule *Socony-Vacuum*," which read the mother per se rule into the text of the Sherman Act and held that unreasonableness was not a distinct element of the offense.[101]

In two recent cases, the Ninth Circuit rejected constitutional challenges to prosecutions under the mother per se rule, and the Supreme Court denied certiorari petitions.[102] The petitions contended that unreasonableness is a distinct element of a Section 1 offense, so the Sixth Amendment demands that unreasonableness be submitted to a jury, and the Fifth Amendment demands that unreasonableness be proved beyond a reasonable doubt.[103]

One petition contended that the contrary decisions by appeals courts "relied on various legal fictions."[104] The other petition contended that those courts

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[96] United States v. Koppers Co., 652 F.2d 290, 293 (2d Cir. 1981).

[97] *Id.*

[98] *Id.* at 295–96 (cleaned up). The Third Circuit disposed of a similar argument in much the same way. *See* United States v. Fischbach & Moore, Inc., 750 F.2d 1183, 1195–97 (3d Cir. 1984).

[99] *See* United States v. Giordano, 261 F.3d 1134, 1136 (11th Cir. 2001).

[100] *Id.* at 1143.

[101] *Id.* at 1143–44.

[102] *See* United States v. Lischewski, 860 F. App'x 512 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 2676 (2022); United States v. Sanchez, 760 F. App'x 533 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 909 (2020).

[103] Petition for Writ of Certiorari at 14–24, *Lischewski*, 860 F. App'x 512 (No. 21-852); Petition for Writ of Certiorari at 12–13, *Sanchez*, 760 F. App'x 533 (No. 19-288).

[104] Petition for Writ of Certiorari at 3, *Lischewski*, 860 F. App'x 512.

had "engaged in legal and semantic gymnastics."[105] Both contentions misapprehended the rationale of the mother per se rule.

Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies unreasonably restraining trade, and "the criterion to be used in judging the validity of a restraint on trade is its impact on competition."[106] Applying this criterion demands "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint."[107] The enquiry meet for a case in which the government alleges criminal conduct within the mother per se rule is merely whether the allegation is true.

The DOJ will continue to undertake felony prosecutions of violations of Section 1 of the Sherman Act and rely on the mother per se rule. And defendants will to pose every available objection, including constitutional objections. The DOJ will continue to defeat such objections if the Sherman Act is focused by the lens of the competitive process standard, but any other standard could be fatal to criminal Section 1 enforcement. This reality overhangs the standards debate.

II. THE FOCUS OF ANTITRUST ENFORCEMENT: PROCESS VS. OUTPUT

A. ANTITRUST PHILOSOPHIES

The prohibitions in antitrust statutes read more as ideas than as rules. To turn these ideas into something concrete requires an antitrust philosophy, and the debate over antitrust policy, now more than ever, is a clash of philosophies.[108] The consumer welfare standard and the competitive process standard are alternatives for one component of an antitrust philosophy—the "focus."

To describe how these standards focus antitrust, it is useful to employ the terminology of the structure-conduct-performance paradigm, a framework developed by industrial organization economists to characterize and

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[105] Petition for Writ of Certiorari at 16, *Sanchez*, 760 F. App'x 533.

[106] NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 104 (1984) (footnote omitted).

[107] Cal. Dental Ass'n v. FTC, 526 U.S. 756, 781 (1999).

[108] *See, e.g.*, KRISTA BROWN ET AL., THE COURAGE TO LEARN: A RETROSPECTIVE ON ANTITRUST AND COMPETITION DURING THE OBAMA ADMINISTRATION AND FRAMEWORK FOR A NEW, STRUCTURALIST APPROACH 14 (2021), www.economicliberties.us/wp-content/uploads/2021/01/Courage-to-Learn_12.12.pdf ("The consumer welfare standard . . . is better understood as an ideological lens through which to organize antitrust law."); *The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt? Hearing Before the Subcomm. on Antitrust, Competition, and Consumer Rights of the S. Comm. on the Judiciary*, 115th Cong. 2 (2017) (statement of Berry C. Lynn, Exec. Dir., Open Markets Institute), www.judiciary.senate.gov/imo/media/doc/12-13-17%20Lynn%20Testimony.pdf (referring to the "'Consumer Welfare' philosophy").

categorize factors and forces related to competition.[109] The paradigm is presented as a diagram in which structure and conduct determine performance. The competitive process consists of structure and conduct, and performance is the result of the process.

Structure is the setting of competition. It consists of the number and size distribution of firms, conditions of entry, and technology. Conduct is the manifestation of competition. It consists of actions such as pricing policies, research & development, and practices with which antitrust is concerned. Performance is the outcome of competition. It consists of price, output, variety, innovation, and any other bottom-line metric that might matter to society.

Put another way, the competitive process is the game, and performance is its final score. The competitive process standard focuses antitrust analysis on the game to the exclusion of the score. The consumer welfare standard focuses antitrust analysis on the score, although not to the exclusion of the game. Because of the close relationship among structure, conduct, and performance, switching the focus between performance and process need not materially affect an antitrust case.

A second component of an antitrust philosophy is "intensity," which is the main determinant of the stringency of enforcement. Greater intensity means greater willingness to infer requisite effects on the game or score from equivocal evidence. The Chicago School's philosophy, which focuses on the score, is notable mainly for its low intensity.[110] A low intensity translates into heavy burdens on plaintiffs.

The final component of an antitrust philosophy is "scope," which relates to boundary issues. Among the many boundary issues are the antitrust-patent interface and the use of behavioral remedies. Confining antitrust to a narrow scope makes it more law enforcement than economic regulation. Giving antitrust a broad scope allows it to serve diverse objectives.

The New Brandeis Movement argues that there has been massive underenforcement of antitrust law. For this, the Movement blames the "Chicago School

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[109] *See, e.g.*, JOE S. BAIN, INDUSTRIAL ORGANIZATION 4–17 (2d ed. 1968); F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 5 (3d ed. 1990). The structure-conduct-performance paradigm never lost its pedagogic value, but it did lose favor when industrial organization economics deemphasized market structure as a predictor of performance.

[110] *See* Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1700–02 (explaining that the Chicago School adherents were "reasonably sure" that cartels and mergers to monopoly were "harmful to consumers" but doubted "that other intervention is worth the costs"); George L. Priest, The Limits of Antitrust *and the Chicago School Tradition*, 6 J. COMPETITION L. & ECON. 1, 7 (2010) (stating that the key "propositions of the Chicago School tradition" are "(1) that markets are superior to any form of governmental, including judicial, intervention; and (2) that judicial interventions generally have no coherent analytical basis").

focus on 'consumer welfare,'" and it argues that antitrust should "focus on structures and processes of competition, not outcomes."[111] When unpacked, this argument is seen to embed an important insight within a mistake and a lament.

The mistake is equating the Chicago School's low intensity with the consumer welfare standard.[112] The intensity and focus components of an antitrust philosophy can be freely mixed and matched. The lament is that non-economic values can no longer be invoked to justify finding conduct in violation of antitrust law when there is no cogent economic rationale.[113] And the insight is that the Chicago School's focus on performance created undue impediments to finding antitrust violations when there is a cogent economic rationale.

B. The Consumer Welfare Standard

The consumer welfare standard derived from basic welfare analysis explaining why competition is preferred to monopoly. The first work on antitrust policy to present what became the conventional analysis appears to have been a 1927 book by economist Myron W. Watkins.[114] But the work of Robert H. Bork, decades later, was far more influential.[115]

Bork's views began to emerge in a 1963 *Fortune* magazine article arguing that antitrust law seeks to preserve competition because doing so maximizes economic welfare.[116] Bork then published a major article prompted

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[111] Khan, *The New Brandeis Movement*, *supra* note 3, at 132; *see also* Khan, *Amazon's Antitrust Paradox*, *supra* note 3, at 737–44; Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice*, CPI ANTITRUST CHRON., Apr. 2018, at 12, 15–16.

[112] *See* Eleanor Fox, *"Consumer Welfare" and the Real Battle for the Soul of Antitrust*, PROMARKET, Apr. 19, 2023, www.promarket.org/2023/04/19/consumer-welfare-and-the-real-battle-for-the-soul-of-antitrust ("The problem we face is not that we have a consumer welfare standard . . . . The problem is that the Supreme Court has embedded laissez faire presumptions that have led to rules of law that entrench incumbents and preserve concentrated, non-competitive markets.")

[113] On the Chicago School's success, see Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 835, 851–53 (2014); Douglas H. Ginsburg, *Judge Bork, Consumer Welfare, and Antitrust Law*, 31 HARV. J.L. & PUB. POL'Y 449, 453–54 (2008); WU, THE CURSE OF BIGNESS, *supra* note 3, at 105.

[114] MYRON W. WATKINS, INDUSTRIAL COMBINATIONS AND PUBLIC POLICY 84–111 (1927). Watkins drew on A.C. PIGOU, THE ECONOMICS OF WELFARE 235–37, 931–38, 947–49 (1920).

[115] In particular, Bork influenced the Supreme Court's thinking about antitrust. *See generally, e.g.*, Ginsburg, *supra* note 113.

[116] Robert H. Bork & Ward S. Bowman Jr., *The Crisis in Antitrust*, FORTUNE, Dec. 1963, at 138, 138–39 [hereinafter Bork & Bowman, FORTUNE]. The article was republished in slightly expanded form to kick off a debate in the *Columbia Law Review* titled *The Goals of Antitrust: A Dialogue on Policy*: Robert H. Bork & Ward S. Bowman Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363 (1965); Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377 (1965); Robert H. Bork, *Contrasts in Economic Theory: I*, 65 COLUM. L. REV. 401 (1965); Ward S. Bowman Jr., *Contrasts in Economic Theory: II*, 65 COLUM. L. REV. 417 (1965);

by antitrust decisions supporting their holdings with asserted non-economic values. He argued that the legislative history of the Sherman Act signaled a singular concern for the welfare of consumers, which cartels threatened.[117]

Harvard scholars Carl Kaysen and Donald F. Turner had argued that one goal of antitrust was the "protection of competitive processes by limiting market power."[118] Bork was uncertain about what this meant: If it was "preserving rivalry for its own sake," he opined that "there seems no point in it."[119] And if it was "maximizing competition" (i.e., the number of competitors), he argued, "it does not state a goal that is even conceivable."[120]

In his magnum opus, *The Antitrust Paradox*, Bork argued that antitrust law was confused because the word "competition" was ambiguous and judges used it in different ways.[121] He identified five possible meanings, the first of which was "the process of rivalry." In arguing that this meaning was unworkable in antitrust law, Bork ignored the word "process" and mistakenly equated "rivalry" with the number of rivals.[122]

Bork concluded that antitrust law uses the word "competition" metonymically, as "a shorthand expression, a term of art, designating any state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs through judicial decree."[123] In this way, Bork defined "competition" as ideal market performance, rather than as the process that generates that performance.[124]

The term "consumer welfare," however, has multiple meanings.[125] Bork's notion of "consumer welfare" was the collective economic welfare of all

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Harlan M. Blake & William K. Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422 (1965).

[117] Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

[118] CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 44 (1959). Both authors earned PhDs in economics at Harvard and both were on the Harvard faculty when the book was written.

[119] Robert H. Bork, *Antitrust and Monopoly: The Goals of Antitrust Policy*, 57 AM. ECON. REV. (PAPERS & PROCS.) 242, 252 (1967).

[120] *Id.*

[121] BORK, *supra* note 29, at 58.

[122] *Id.* at 58–59. Equating "rivalry" with the number of rivals was odd in view of the fact that the most common usage of the word was in sports, where the word nearly always referred to a relationship involving exactly two parties.

[123] *Id.* at 61.

[124] The *Oxford English Dictionary* defines "competition" as it applies to commerce: "Rivalry in the market, striving for custom between those who have the same commodities to dispose of." *Competition*, *in* THE COMPACT OXFORD ENGLISH DICTIONARY (2d ed. 1991). "Striving for custom" is the essence of the process of competition in economics and antitrust law.

[125] *See CPI Talks with Eleanor M. Fox*, CPI ANTITRUST CHRON., Nov. 2019, at 7, 7 ("The advocates of the consumer welfare epithet do not say what they mean.").

members of society.[126] Economists analyzing competition issue normally confine attention to the relevant market and use the term "consumer welfare" to mean the welfare of the market's buyers (even if they are businesses).[127] Economists use the term "total welfare" to refer to the combined welfare of the buyers and sellers in the relevant market, and many economists argue that total welfare is the proper welfare metric for policy analysis.[128]

Consumer welfare and total welfare in the relevant market are the metrics most antitrust commentators associate with the "consumer welfare standard."[129] Some, however, refer to "trading partner welfare," to signify a flexible metric that looks to the side of the market opposite the conduct of concern.[130] A few commentators argue that antitrust law protects only final consumers.[131] And a few suggest that "consumer welfare" can encompass the whole of the public interest.[132]

The "consumer welfare standard" also has multiple meanings,[133] which vary in the extent to which focus is concentrated on performance.[134] One version

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[126] *See* BORK, *supra* note 29, at 90–91 (equating "society's wealth" with "consumer welfare"); *id.* at 110–12 (arguing that income distribution should not be a concern of antitrust law).

[127] Contrary to the claims of many of Bork's critics, his usage of the term "consumer welfare" was not inconsistent with the usage of the term in economics at the time. *See* Werden, *Antitrust's Rule of Reason*, *supra* note 1, at 718. The critics neglect the fact that Bork's "consumer welfare" was the welfare of final consumers throughout the economy. *See id.* at 721–23.

[128] *See, e.g.*, Dennis W. Carlton, *Does Antitrust Need To Be Modernized?*, J. ECON. PERSPS., Summer 2007, at 155, 157–58; Ken Heyer, *Welfare Standards and Merger Analysis: Why Not the Best?*, COMPETITION POL'Y INT'L, Autumn 2006, at 29; Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968). Also supporting this view are Richard D. Cudahy & Alan Devlin, *Anticompetitive Effect*, 95 MINN. L. REV. 59, 85–93 (2010). Richard D. Cudahy was a Seventh Circuit judge. *Id.* at 59.

[129] *See, e.g.*, Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471, 473–75 (2012); Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 137–38 (2011).

[130] *See, e.g.*, C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 YALE L.J. 2078, 2080, 2091–92 (2018); Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 65, 78–79 (2019).

[131] *See, e.g.*, J. Thomas Rosch, *Monopsony and the Meaning of "Consumer Welfare": A Closer Look at* Weyerhaeuser, 2007 COLUM. BUS. L. REV. 353; Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 ANTITRUST L.J. 669 (2005).

[132] *See, e.g.*, Caron Beaton-Wells, *Antitrust's Neglected Question: Who Is "The Consumer"?*, 65 ANTITRUST BULL. 173 (2020); Mark Glick, *How Chicago Economics Distorts "Consumer Welfare" in Antitrust*, 64 ANTITRUST BULL. 495 (2019).

[133] As observed by AAG Kanter, the consumer welfare standard means different things to different people. *See* Kanter, *supra* note 9 ("[I]f you ask five antitrust experts what the consumer welfare standard means, you will often get six different answers."). Professor Nicolas Petit distinguishes three versions of the consumer welfare standard. The "strict version" serves as a decisional test. The "soft version" operates as a guide "in the formulation of legal rules." And the "even looser version" is just a "priority setting device." Nicolas Petit, *A Theory of Antitrust Limits*, 28 GEO. MASON L. REV. 1399, 1403 (2021).

[134] For the least focus on performance, see Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks at the National Lawyers Convention (Nov. 14, 2019), *in The*

of the consumer welfare standard holds that concrete performance harm is necessary and sufficient for conduct to be unlawful under antitrust law.[135] In this version, the consumer welfare standard defines the proof requirements or serves as the decisional rule.

To most commentators, the "consumer welfare standard" is a high-level guide for formulating proof requirements and rules of law. These commentators view performance harm as necessary, but not sufficient, for an antitrust violation, and they maintain that antitrust law is concerned with the competitive process, although it is focused on performance.[136] This version of the consumer welfare standard is now under attack.

A. Douglas Melamed explains what he calls the consumer welfare standard through a series of propositions:

> Anticompetitive conduct can increase the actor's market power only by impairing the competitive process. By definition, market power reflects harm to the competitive process. Market power diminishes economic welfare when it is used to increase price, reduce output, or harm rivals and when it reduces incentives for product improvement, cost reduction, or innovation. Antitrust law is thus about protecting the competitive process in order to promote economic welfare.[137]

Carl Shapiro advocates "replacing the term 'consumer welfare standard' with the term 'protecting competition standard' to make clear that the goal of antitrust is to protect and promote competition."[138] Under this standard,

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Future of Antitrust: New Challenges to the Consumer Welfare Paradigm and Legislative Proposals, 69 CATH. UNIV. L. REV. 657, 661 (2020) ("The consumer welfare standard is agnostic to considerations other than the actual competitive process . . . .").

[135] *See* Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 435–39 (2009); 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, 336–37 (2010); Christine S. Wilson, Thomas J. Klotz & Jeremy A. Sandford, *Recalibrating the Dialogue on Welfare Standards: Reinserting the Total Welfare Standard into the Debate*, 26 GEO. MASON L. REV. 1435, 1444–45 (2019); OECD, CONSUMER WELFARE STANDARD ADVANTAGES AND DISADVANTAGES COMPARED TO ALTERNATIVE STANDARDS: OECD COMPETITION POLICY ROUNDTABLE BACKGROUND NOTE 10–11 (2023).

[136] *See, e.g.*, Joseph Farrell & Michael L. Katz, *The Economics of Welfare Standards*, COMPETITION POL'Y INT'L, Autumn 2006, at 3, 6, 8; Melamed & Petit, *supra* note 16, at 746; A. Douglas Melamed, *Response: Antitrust Law Is Not That Complicated*, 130 HARV. L. REV. 163, 166–67 (2017); *The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?: Hearing Before the Subcomm. on Antitrust, Competition, and Consumer Rts., S. Comm. on the Judiciary*, 115th Cong. (2017) (prepared statement of Abbott B. Lipsky, Jr., Antonin Scalia Law School, George Mason University), www.judiciary.senate.gov/imo/media/doc/12-13-17%20Lipsky%20Testimony.pdf

[137] A. Douglas Melamed, *Antitrust Law and its Critics*, 83 ANTITRUST L.J. 269, 271–72 (2020).

[138] *See* Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It*, ANTITRUST, Summer 2021, at 34, 38.

"A business practice is judged to be anticompetitive [i.e., unlawful] if it harms trading parties on the other side of the market as a result of disrupting the competitive process."[139]

C. THE RISE OF OUTPUT AS THE FOCUS OF ANTITRUST LAW

Under perfect competition, suppliers lack any trace of market power. Consequently, they take the market price as given and produce up to the point at which their marginal costs of production equal the market price. Output is socially optimal because the value consumers place on the marginal unit of output—the price they pay—equals the social cost of providing it—the marginal cost of production.[140]

In simple, static textbook models, moving from competition to monopoly results in a price increase and an output restriction. Successful cartels do the same thing.[141] The output restriction of monopolies and cartels reduces social welfare as compared with the competitive optimum.[142]

The association between output and social welfare is robust; shrinking the metaphoric pie by reducing output implies that someone must get less. The optimality of competition breaks down only when the social cost of producing a good exceeds producers' private cost. For example, breaking up American Tobacco injected competition into the industry, and output soared,[143] but that imposed substantial social costs.

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[139] *Id.* at 38; *see also* Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996, 2018 (2018) (stating that under "the consumer welfare standard . . . a merger is judged to be anticompetitive if it disrupts the competitive process and harms trading parties on the other side of the market.").

[140] In both the classroom and the courtroom, the analysis is done at the level of a single market, but the optimality of competition was proved across the entire economy. *See generally* Kenneth J. Arrow & Gérard Debreu, *Existence of an Equilibrium for a Competitive Economy*, 22 ECONOMETRICA 265 (1954).

[141] Many of the cartels (then called "pools") inspiring the Sherman Act restricted output because businessmen saw that as the best way to keep prices up. *See* WERDEN, FOUNDATIONS, *supra* note 1, at 12.

[142] *Cf.* Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 378 (7th Cir. 1986) (Posner, J.) ("The main economic objection to monopoly is that the monopolist restricts output compared to what it would be under competition.").

[143] The remedy in *United States v. American Tobacco Co.*, 221 U.S. 106 (1911), divided the assets among 14 successors. *See* United States v. Am. Tobacco Co. 191 F. 371, 411 (C.C.S.D.N.Y. 1911). The major tobacco products were divided among four companies, with one of them, R.J. Reynolds, getting no cigarette assets. *See id.* at 392–93. Reynolds quickly introduced the low-priced Camel brand, which became the industry leader. Annual per capita cigarette consumption for persons aged at least 15 increased from 138 in 1910 to 1365 in 1930. U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE 45 tbl.1 (1964), digirepo.nlm.nih.gov/ext/document/101584932X202/PDF/101584932X202.pdf.

Chicago School scholars sought to build on a foundation of basic economics. In the 1963 *Fortune* magazine article mentioned above, Robert Bork and Ward Bowman addressed the question: "Why should we want to preserve competition anyway?"[144]

> The answer is simply that it is the chief glory of competition that it gives society the maximum output that can be achieved at any given time with the resources at its command. . . . Output is seen to be maximized because there is no possible rearrangement of resources that could increase the value to consumers of total output.[145]

In a 1966 law review article, Bork asserted that antitrust law rests "upon the premise that the law's exclusive concern is with the maximization of wealth or consumer want satisfaction."[146] And he argued that:

> Acceptance of consumer want satisfaction as the law's ultimate value requires the courts to employ as their primary criterion the impact of any agreement upon output, and thus to determine whether the net effect of the agreement is to create efficiency, and thereby increase output or, alternatively, to restrict output.[147]

Later, in *The Antitrust Paradox*, Bork wrote: "The task of antitrust is to identify and prohibit those forms of behavior whose net effect is output restricting and hence detrimental."[148]

Professor Bork painted with a broad brush on accomplishing the "task of antitrust." He argued that antitrust law should "appraise any questioned practice . . . to determine whether it contains any likelihood of creating output restriction."[149] Later, Judge Bork stressed the centrality of output to antitrust and inferred an inability of a practice to restrict output in part from a defendant's market share of just six percent.[150]

Professor Frank Easterbrook proposed filters for courts to apply before undertaking the "heroic efforts" required by the rule of reason.[151] One such filter was "whether evidence is consistent with a reduction in output."[152] Judge Easterbrook later saw no antitrust problem in a mere dispute over money

[144] Bork & Bowman, FORTUNE, *supra* note 116, at 138.

[145] *Id.* at 138–39.

[146] Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373, 375 (1966).

[147] *Id.*

[148] BORK, *supra* note 29, at 122.

[149] *Id.*

[150] *See* Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 217, 221, 228–29 (D.C. Cir. 1986).

[151] Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 17–18 (1984).

[152] *Id.* at 18.

between the NBA and the Chicago Bulls. He declared: "The core question in antitrust is output. Unless a contract reduces output in some market, to the detriment of consumers, there is no antitrust problem."[153]

In the leading treatise, Herbert Hovenkamp asserts: "The dominant view of antitrust policy in the United States is that it should promote some version of economic welfare. . . . Tradeoffs between allocative and productive efficiency may occasionally be necessary, but the overall goal is markets that maximize output, whether measured by quantity or quality."[154]

More recently, Hovenkamp wrote: "The consumer welfare principle in antitrust is best understood as pursuing maximum output consistent with sustainable competition. . . . More practically and in real world markets, the principle tries to define and identify anticompetitive practices as ones that reduce market wide output below the competitive level."[155] Hovenkamp argues that output is "the primary indicator of consumer welfare,"[156] and he identifies "competitive harm" with "output reduction."[157]

Supreme Court jurisprudence generally has confined output to a secondary role, while acknowledging the connection between market power and output. For example, in *Fortner*, the Court recited a standard definition of market power: "Market power is usually stated to be the ability of a single seller to raise price and restrict output, for reduced output is the almost inevitable result of higher prices."[158]

In *BMI*, the Court declared that, in deciding whether conduct should get per se treatment, the "inquiry must focus on" whether its purpose and effects "are to threaten the proper operation of our predominantly free-market economy—that

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[153] Chi. Pro. Sports Ltd. P'ship v. NBA, 95 F.3d 593, 597 (7th Cir. 1996).

[154] AREEDA & HOVENKAMP, *supra* note 26, ¶ 114a; *see also* Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 65, 66–68 (2019); Herbert J. Hovenkamp, Antitrust: What Counts as Consumer Welfare (July 20, 2020) (unpublished article), scholarship.law.upenn.edu/faculty_scholarship/2194. For similar views, see Jonathan M. Jacobson, *Another Take on the Relevant Welfare Standard for Antitrust*, ANTITRUST SOURCE (Aug. 2015), www.americanbar.org/content/dam/aba/publishing/antitrust-magazine-online/aug15_full_source.pdf.

[155] Herbert Hovenkamp, *Antitrust's Borderline* 4 (Univ. of Penn. Inst. for L. & Econ., Research Paper No. 20-44, 2020), ssrn.com/abstract=3656702.

[156] *Id.* at 3; *see also* Hovenkamp, *supra* note 12, at 763–67.

[157] Hovenkamp, *supra* note 12, at 761–62, 768; *see also* Thomas A. Lambert, *A Decision-Theoretic Rule of Reason for Minimum Resale Price Maintenance*, 55 ANTITRUST BULL. 167, 174 n.28 (2010) ("I am defining competition in terms of output, where a defendant's action is procompetitive if it leads to greater market output and anticompetitive if it leads to a reduction in market output.").

[158] Fortner Enters., Inc. v. U.S. Steel Corp., 394 U.S. 495, 503 (1969).

is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . ."[159]

In *NCAA*, the Court indicated that a "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis."[160] The Court confirmed antitrust law's deep suspicion of any naked output restraint without enshrining output as antitrust law's North Star.

In *Indiana Federation of Dentists*, the Court placed greater importance on output by holding that "'proof of actual detrimental effect, such as a reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'"[161] But the Court held only that output reduction was one way to prove market power. The Court did not suggest that output reduction was necessary or sufficient for an antitrust violation.

Most recently, in *Alston*, the Court observed that "some agreements among competitors so obviously threaten to reduce output and raise prices that they might be condemned as unlawful *per se* or rejected after only a quick look."[162] The Court, however, upheld a determination of illegality under the rule of reason with no indication that the restraint had reduced output in the relevant market.[163]

D. The False Idol of Output

In contrast to the foregoing decisions, the Supreme Court majority in *American Express* worshiped the false idol of output. The case concerned contract provisions prohibiting merchants that accept AmEx cards from steering customers from one credit card to another, which they otherwise would do because of differences in merchant fees.[164] The district court enjoined the

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[159] Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19–20 (1979); *see also* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 70 (1977) (White, J., concurring).

[160] NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 110 (1984).

[161] FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 460–61 (1986) (quoting 7 PHILLIP E. AREEDA, ANTITRUST LAW, ¶ 1511, 429 (1986)).

[162] NCAA v. Alston, 141 S. Ct. 2141, 2156 (2021).

[163] *See generally id.* The relevant market was a labor market in which student athletes provide services to schools in exchange for scholarships. *Id.* at 2151–52. The plaintiffs were not obliged to prove an output reduction. *See* O'Bannon v. NCAA, 802 F.3d 1049, 1070–71 (9th Cir. 2015) (holding that plaintiffs, similar to those in *Alston*, need not prove a reduction in output in order to show anticompetitive effects); *see also In re* NCAA Athletic Grant-In-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1066 (N.D. Cal. 2019) (noting that plaintiffs had been granted summary judgment on the issue of anticompetitive effects on the strength of *O'Bannon*).

[164] United States v. Am. Express Co., 88 F. Supp. 3d 143, 160–67 (E.D.N.Y. 2015). Steering to other payments methods, such as cash, was permitted by the contracts. *Id.* at 162–63, 165.

anti-steering provisions, but the Second Circuit reversed,[165] and the Supreme Court affirmed.[166]

American Express, Master Card, and Visa all had used anti-steering provisions until the latter two consented to drop them in 2010. American Express went to trial in 2014, and the district court found that price competition among the credit card companies for merchants' business was "frustrated to the point of near irrelevance . . . as a result of American Express's" continued use of the anti-steering provisions.[167] By a 5–4 majority, the Supreme Court held that such frustration *did not* indicate that the anti-steering provisions were anticompetitive.[168]

The Court endorsed the burden-shifting approach[169] that lower courts had applied for decades.[170] The Court held that the plaintiffs' initial burden was to demonstrate that the challenged conduct had a "substantial anticompetitive effect."[171] Had the demonstration been made, the restraints would have been deemed unlawful unless justified. But the Court held that American Express was not obliged to justify frustrating price competition on the merchant side of the market "to the point of near irrelevance."[172]

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[165] United States v. Am. Express Co., 838 F.3d 179, 206–07 (2d Cir. 2016).

[166] Ohio v. Am. Express Co., 138 S. Ct. 2274, 2290 (2018).

[167] *Am. Express*, 88 F. Supp. at 209. Nearly all of the 6.4 million merchant locations accepting AmEx cards could not steer customers who presented a credit card. A merchant contracting with American Express was barred even from steering a customer from a Visa card to a Discover card. *Id.* at 165. When Master Card and Visa dropped their anti-steering provisions, Discover concluded that competing on merchant fees still did not make sense because the only merchants free to steer were the small merchants that did not accept AmEx cards. *Id.* at 222.

[168] *See generally Am. Express*, 138 S. Ct. 2274. The Supreme Court majority imposed an especially heavy burden because the restraint at issue was vertical. *Id*. at 2285 n.7.

[169] *Id*. at 2284.

[170] The watershed was the publication of volume 7 of the Areeda treatise. 7 PHILLIP E. AREEDA, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION (1986). Professor Areeda synthesized the case law into a three-step burden shifting approach. *Id.* ¶ 1502, at 371–72. After Professor Areeda said the courts used this approach, they did use it.

[171] *Am. Express*, 138 S. Ct. at 2284. In consecutive paragraphs, the Court described the burden both with and without the qualifier "that harms consumers in the relevant market." *Id.* The Court omitted the qualifier in *NCAA v. Alston*, 141 S. Ct. 2141, 2160 (2021) (quoting *Am. Express*, 138 S. Ct. at 2284). The phrase "in the relevant market" is not limiting because the relevant market is always the locus of harm. The reference to "consumers" evidently was not meant to be limiting. The majority did not focus on cardholders to the exclusion of merchants, and its key holding was that the relevant market included both. *See Am. Express*, 138 S. Ct. at 2285–88. The Court previously refused to limit the protections of antitrust law to consumers. *See* Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 236 (1948) ("The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." (citation omitted)).

[172] *Am. Express*, 88 F. Supp. at 209.

The Supreme Court majority asserted that the anti-steering provisions did "not prevent Visa, MasterCard, or Discover from competing against Amex by offering lower merchant fees."[173] But the undisturbed finding of the district court was that American Express's contracts did, in fact, prevent Visa, Master Card, and Discover from lowering merchant fees. The anti-steering provisions eliminated the potential to gain business by lowering the fees and thus undermined the competitive process.

The district court found that the anti-steering provisions "sever[ed] the typical link between merchants' demand for network services and the price charged" by "denying merchants the opportunity to influence their customers' payment decisions and thereby shift spending to less expensive cards."[174] Merchants were presented with a binary choice—either warmly welcome the AmEx card every time it was presented or decline the card every time and lose sales.

In explaining how the plaintiffs failed to carry their initial burden, the majority stressed the absence of proof of an output reduction.[175] The majority observed that market output increased substantially, while the dissenters observed that output might have increased even more without the anti-steering provisions.[176]

For transactions completed at the point of sale, where steering is most apt to occur, the Federal Reserve System estimated that the dollar volume of credit card transactions grew 1.0% per year between 2009 and 2012, while the dollar volume of debit card transactions, which were not subject to the anti-steering provisions, grew 11.6% per year.[177] This data suggests that American Express's anti-steering provisions might have diverted transactions away from credit cards.

The Supreme Court's resolution of *American Express* was suggested by an amicus brief filed on behalf of 15 academics who unreservedly proclaimed that "[o]utput is the touchstone of antitrust analysis."[178] The Court's majority

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[173] *Am. Express*, 138 S. Ct. at 2290.

[174] *Am. Express*, 88 F. Supp. at 207, 209.

[175] *Am. Express*, 138 S. Ct. at 2287–88. There was an absence of proof, not a failure, as observed by petitioner's counsel at oral argument. *See* Transcript of Oral Argument at 4, 11–12, Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018) (No. 16-1454). American Express's counsel stressed that output had increased and insisted that it was the plaintiffs' burden to identify the output effect of the anti-steering provisions. *Id.* at 41–42, 52.

[176] *Am. Express*, 138 S. Ct. at 2302 (Breyer, J., dissenting).

[177] FED. RSRV. SYS., THE 2013 FEDERAL RESERVE PAYMENTS STUDY: RECENT AND LONG-TERM TRENDS IN THE UNITED STATES: 2000–2012, DETAILED REPORT AND UPDATED DATA RELEASE 159 (2014), www.frbservices.org/binaries/content/assets/crsocms/news/research/2013-fed-res-paymt-study-detailed-rpt.pdf (noting also that the estimates are compound growth rates).

[178] Brief for *Amici Curiae* Antitrust Law & Economics Scholars in Support of Respondents at 3, Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018) (No. 16-1454); *see also id.* at 14–16;

opinion did not go quite so far, and it might have gone as far as it did only because of deep skepticism that a vertical restraint can ever be anticompetitive.

E. Competition and Output in More Sophisticated Models

Simple textbook models of competition and monopoly used to motivate antitrust policy abstract from the mechanics of trade, but more sophisticated models are built around particular trading mechanisms. Models of auctions, bargaining, and non-linear vertical contracting, which are used in analyzing antitrust cases, are all highly instructive. In these models, market power can be exercised without output restriction.[179]

Auctions are good way for sellers to assure fair value, particularly for rare and valuable items. The world's rarest postage stamp—the 1856 British Guiana one cent magenta—was auctioned by Sotheby's in 2014 and again in 2021.[180] Collusion among the bidders could have reduced the price paid, but it could not have altered the fact that there is only one 1856 British Guiana one cent magenta, or the fact that no more can be produced.

A well-advertised public auction operates as a competitive market and arrives at a price equal to the second-highest willingness to pay among all potential bidders.[181] This is not true, however, if the competitive process is corrupted by fraud on the part of either the auctioneer or the bidders,[182] and common law addressed such frauds.[183]

Bid rigging among buyers is prosecuted as a felony under the Sherman Act.[184] In recent years, the DOJ secured the convictions of over a hundred individuals for rigging bids in real estate foreclosure auctions.[185] Past cases

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Daniel A. Crane, *Harmful Output in the Antitrust Domain: Lessons from the Tobacco Industry*, 39 GA. L. REV. 321, 341 (2005) ("[O]utput [is] the Holy Grail of modern antitrust enforcement.").

[179] For additional arguments against focusing on output, see John M. Newman, *The Output-Welfare Fallacy: A Modern Antitrust Paradox*, 107 IOWA L. REV. 563 (2022).

[180] *The Story of the One Cent Magenta*, STANLEY GIBBONS, www.stanleygibbons.com/collecting-stamps/one-cent-magenta/magenta-history.

[181] *See, e.g.*, Paul Milgrom, *Auctions and Bidding: A Primer*, J. ECON. PERSPS., Summer 1989, at 3, 7–8; *see also* Paul Milgrom & Robert J. Weber, *A Theory of Auctions and Competitive Bidding*, 50 ECONOMETRICA 1089 (1982); William Vickrey, *Counterspeculation, Auctions, and Competitive Sealed Tenders*, 16 J. FIN. 8 (1961).

[182] Bid rigging among buyers in auctions has been formally modeled. *See* R. Preston McAfee & John McMillan, *Bidding Rings*, 82 AM. ECON. REV. 579 (1992).

[183] *See* Edmund H. Bennett, *Auction Sales*, 22 AM. L. REG. (n.s.) 1, 13–18 (1883).

[184] *See* Lisa M. Phelan, Joseph Charles Folio III & Hannah Elson, *Where Have We Been, and Where Are We Going? The Criminal Prosecution of Buyer Cartels*, CPI ANTIRUST CHRON., June 2021, at 24.

[185] *See, e.g.*, Press Release, U.S. Dep't of Just., Real Estate Investor Pleads Guilty to Rigging Bids at Foreclosure Auction (Aug. 6, 2021), www.justice.gov/opa/pr/real-estate-investor-pleads-guilty-rigging-bids-foreclosure-auctions (noting 136 convictions for bid rigging in real estate foreclosure auctions).

of bid rigging by buyers involved auctions for antiques, banknotes, postage stamps, scrap metal, and used machinery. In all of these cases, the bid rigging could not have affected output.[186]

Bid rigging among competing sellers in procurement auctions also is prosecuted as a felony under the Sherman Act.[187] During the 1980s and 1990s, the DOJ had 500 bid-rigging cases involving construction projects.[188] In these cases, the projects were fully specified by a government procurement agency prior to the bidding,[189] so the bid rigging could not have reduced output.

Auctions are a mechanism for matching buyers with sellers. When a matching mechanism is not needed, trading parties often bargain over terms. Bargaining is a good way to set the terms of trade in deals large enough to justify the transaction costs inherent in bargaining. The economic theory of bargaining generally predicts an equal division of the gains.[190]

The gains from trade are determined by the alternative to reaching agreement, termed "outside options" or "walk-away values." When two firms compete, each serves as an outside option when the other firm bargains with trading partners. And when each of the firms is the best outside option for many of the trading partners, their merger significantly affects the terms of many agreements.[191]

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[186] Some merger cases present the comparable scenario of merging firms that compete through a process akin to an auction. *See, e.g.*, United States v. Bertelsmann SE & Co., 646 F. Supp. 3d 1 (D.D.C. 2022) (finding the proposed merger of book publishers unlawful on the basis that it would reduce competition for authors).

[187] The Antitrust Division's Procurement Collusion Strike Force, established in November 2019, has prosecuted more than 50 defendants. Manish Kumar, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks at the Second Annual Spring Enforcers Summit (Mar. 27, 2023), www.justice.gov/opa/speech/deputy-assistant-attorney-general-manish-kumar-delivers-remarks-second-annual-spring.

[188] CCH publishes case summaries, which are collected in indexed transfer binders. The indexes identify bid rigging cases and further break them down by subject. The transfer binders for 1980–96 list 320 cases involving road construction, 87 involving electrical construction, and 93 involving other sorts of construction.

[189] Professor Hovenkamp posits that bid rigging occurs in a setting where quantity is not specified by the procurement. Hovenkamp, *supra* note 12, at 774. Such auctions have been studied in economics. *See* Robert G. Hansen, *Auctions with Endogenous Quantity*, 19 RAND J. ECON. 44 (1988).

[190] The basic theory assumes symmetry between the parties apart from their outside options, which accounts for the equal division. *See* John Nash, *Two-Person Cooperative Games*, 21 ECONOMETRICA 128, 130 (1953); John Nash, *The Bargaining Problem*, 18 ECONOMETRICA 155, 155 (1950). In applied work, economists often allow for asymmetry between the parties, even apart from their outside options, to allow for an unequal division of the gains. Empirical bargaining models capture any asymmetry in knowledge, belief, or patience in a parameter said to reflect "bargaining power." *See* Ken Binmore, Ariel Rubinstein & Asher Wolinsky, *The Nash Bargaining Solution in Economic Modelling*, 17 RAND J. ECON. 176, 186–87 (1986).

[191] *See, e.g.*, Gautam Gowrisankaran, Aviv Nevo & Robert Town, *Mergers When Prices Are Negotiated: Evidence from the Hospital Industry*, 105 AM. ECON. REV. 172 (2015); Henrick

When close competitors sell or buy through bargaining, the economic theory of bargaining is used to explain, and possibly quantify, the lessening of competition from their merger and resulting price effects.[192] The federal enforcement agencies have used bargaining theory in successfully challenging hospital mergers.[193]

When terms of trade are determined through bargaining, a lessening of competition need not produce an output reduction. The key insight, provided by the theory of bilateral monopoly, is that both parties understand that the competitive output maximizes the combined gain from trade.[194] Trading partners share an incentive to contract in a manner that avoids a supracompetitive price that induces a restriction of output. Instead, they divide the gains from trade through a lump-sum payment.

Monopoly does not produce any output restriction if the monopolist practices first-degree price discrimination by making a separate offer to each customer. If the offers are non-transferable, and customers cannot trade among themselves, a monopolist, with perfect information and no transaction costs, charges each customer the maximum that that customer is willing to pay. The result is the competitive output.[195]

First-degree price discrimination by a monopoly is a theoretical construct, but something similar is feasible. A monopolist can engage in non-linear pricing by charging the same unit price to all customers and by also charging a fixed fee that differs across customers. The unit price can be set at marginal cost—the competitive price, while market power is exercised through the fees. If the fees are not set too high through miscalculation, the result is the competitive output.

A firm exercising substantial market power has an incentive to employ contracts that minimize output reduction, and many sorts of contracts operate like the non-linear pricing schemes posited by economic models.[196] The incentive

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Horn & Asher Wolinsky, *Bilateral Monopolies and Incentives for Merger*, 19 RAND J. ECON. 408 (1988).

[192] *See, e.g.*, Aviv Nevo, Deputy Asst. Att'y Gen. for Econ., Antitrust Div., U.S. Dep't of Justice, Mergers That Increase Bargaining Leverage, Remarks at the Conference on Antitrust in Highly Innovative Industries (Jan. 22, 2014), www.justice.gov/atr/file/517781/dl.

[193] *See, e.g.*, FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 346 (3d Cir. 2016); ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559, 562, 570–71 (6th Cir. 2014); FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069, 1084–85 (N.D. Ill. 2012).

[194] This insight is credited to WILLIAM J. FELLNER, COMPETITION AMONG THE FEW 245–47 (1949).

[195] This insight is due to PIGOU, *supra* note 114, at 240–44. A proof is provided by Hal R. Varian, *Price Discrimination*, *in* 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 597, 602–03 (Richard Schmalensee & Robert D. Willig eds., 1989).

[196] Contracts work much the same way if the marginal price is appreciably lower than the average price, as with bundling and loyalty rebate schemes. *See* William James Adams & Janet L.

to employ such contracts is increased if market power also is exercised by the customers in their downstream markets. Economists term the exercise of market power at two adjacent levels "double marginalization." Double marginalization reduces both the total profits in the supply chain and the welfare of final consumers.

The upshot of the foregoing is that conduct can be anticompetitive in character and can create market power while creating no observable output reduction. An example is a three-to-two merger with an indivisible product sold through separate auction for each buyer. The merger would cause every buyer to pay more but not buy less. In the same setting, a trade restraint effectively reducing the number of bidders, or their incentive or ability to compete, would cause buyers to pay more but not buy less.

F. Proving What Cannot Be Seen

Non-merger antitrust cases usually involve conduct that has already occurred, so it is possible to observe the world with the challenged conduct in place. In many cases, it is also possible to observe the world before the conduct began or after it ended. In these cases, economists make before-and-after comparisons that systematically account for the impacts of material differences between the before and after worlds.

There are limits to what can be gleaned from such comparisons because it is never possible to observe the but-for world—the world that never existed because the challenged conduct did occur. As the *American Express* dissenters lamented, "to require actual proof of reduced output is often to require the impossible."[197]

Consider the LCD conspiracy.[198] It surely caused prices to be higher,[199] and output to be lower, than in the but-for world, but identifying these impacts was problematic. The product was a type of flat panel display, and the conspiracy began early in the product's commercialization. During the conspiracy's

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Yellen, *Commodity Bundling and the Burden of Monopoly*, 90 Q.J. Econ. 475 (1976); *see also* Fiona M. Scott Morton & Zachary Abrahamson, *A Unifying Analytical Framework for Loyalty Rebates*, 81 Antitrust L.J. 777 (2017). A wise man observed: "The intricate pricing schemes reported in the antitrust literature are testimony to the fact that the imagination of a greedy entrepreneur outstrips the analytic ability of the economist." Walter Y. Oi, *A Disneyland Dilemma: Two-Part Tariffs for a Mickey Mouse Monopoly*, 85 Q.J. Econ. 77, 77 (1971).

[197] Ohio v. Am. Express Co., 138 S. Ct. 2274, 2302 (2018) (Breyer, J., dissenting).

[198] *See* United States v. Hsiung, 778 F.3d 738 (9th Cir. 2015) (upholding convictions); *In re* TFT-LCD (Flat Panel) Antitrust Litig., 586 F. Supp. 2d 1109 (N.D. Cal. 2008) (denying motion to dismiss damages action).

[199] A threshold problem for proving an output reduction would have been measuring output. LCD panels were produced in a range of qualities and a vast array of sizes, both of which evolved substantially during the life of the conspiracy.

five-year life, production costs declined as methods advanced, and sales increased as LCD displays displaced outmoded CRTs. The impact of the conspiracy was slight relative to all that was going on.

The conspiracy successfully fixed prices,[200] so a reduction in output could be inferred via the law of demand, which states that the amount purchased declines as the price increases. But the *American Express* majority refused to make a comparable inference.[201] The majority quoted *Brooke Group*, in which the Court had refused to infer non-competitive performance from price increases, reasoning that "growing product demand" plausibly explains price increases when "output is expanding at the same time."[202]

Brooke Group concerned alleged predation—a subset of exclusionary practices that works by taking a loss in order to offer customers value that the rivals cannot match, thereby depriving the rivals of sales.[203] Predation temporarily expands output, but successful predation is followed by a recoupment period during which output is less than it otherwise would have been. A predation case could come to trial before any opportunity to recoup, but that did not happen in *Brooke Group*.

Petitioner introduced generic cigarettes at a low price, and respondent then began marketing generic cigarettes.[204] Intense price competition ensued, during which respondent allegedly engaged in predation.[205] The Supreme Court held that demonstrating harm to competition required not only proof of pricing below cost, but also proof that the alleged predator had a likelihood of recouping its losses from pricing below cost.[206]

The Court reviewed the evidence of actual recoupment and focused on the fact that generic cigarette sales continued to rise. The Court recognized that

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[200] This fact was proved to the highest standard of proof. The government sought to apply 18 U.S.C. § 3571(d), which provided an alternative maximum fine of double the pecuniary gain from the offense. The indictment alleged a gain of at least $500 million, and the jury found that the government proved that allegation beyond a reasonable doubt. The court imposed a fine of half the $1 billion alternative maximum. *Hsiung*, 778 F.3d at 760–61.

[201] *See Am. Express*, 138 S. Ct. at 2288–89.

[202] *Id.* (quoting Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 237 (1993)). In *Leegin*, the Court refused to infer harm to competition from price increases associated with resale price maintenance. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 895–97 (2007). Both refusals were justified.

[203] *See* Weyerhaeuser v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 319 (2007) (explaining that "a firm engaged in a predatory-pricing scheme makes an investment"); Covad Commc'ns Co. v. Bell Atl. Corp., 398 F.3d 666, 676 (D.C. Cir. 2005) ("[I]n the vernacular of antitrust law, a 'predatory' practice is one in which a firm sacrifices short-term profits in order to drive out of the market or otherwise discipline a competitor.").

[204] *Brooke Group*, 509 U.S. at 214–15.

[205] *Id.* at 212–17.

[206] *Id.* at 222–27.

sales might have "expanded at a slower rate than it would have absent" the alleged predation, and aptly observed that "[s]uch a counterfactual proposition is difficult to prove in the best of circumstances."[207]

The landmark *Standard Oil* case was tried long after the conduct at issue.[208] The government proved "wrong inflicted upon the public" by pointing to "the wrecks resulting from crushing out . . . the individual rights of others."[209] But the government did not prove output reduction. Between the 1882 founding of the Standard Oil Trust and the 1909 trial, U.S. petroleum production increased by 500%.[210]

In *Silver Blaze*, Sherlock Holmes draws attention to the "curious incident of the dog in the night-time."[211] That the "dog did nothing" meant something,[212] and nothing can mean something to an economist in contrast with the but-for world. But proving that challenged conduct caused an output reduction can be impossible because the but-for world itself is unprovable.[213]

III. THE COMPETITIVE PROCESS STANDARD

A. THE BASIC IDEA

Antitrust law is a declaration of faith in markets to promote a variety of social interests, and the competitive process standard is an expression of that faith. The idea is to protect the competitive process and accept whatever comes. The competitive process standard builds on the observation of Justice Hugo Black in *Northern Pacific*:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an

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[207] *Id.* at 233. The Court, however, went on to cite evidence that the respondent contributed to the expansion rather than slowed it. *Id.* at 234.

[208] *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 31–45 (1911).

[209] *Id.* at 47.

[210] *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, 1789–1945, at 146 (1949) (showing that output increased from 30.4 to 183.2 million barrels per year).

[211] 1 ARTHUR CONAN DOYLE, *Silver Blaze*, *in* THE NEW ANNOTATED SHERLOCK HOLMES 387, 411 (Leslie S. Klinger, ed. 2005).

[212] *Id.*

[213] Simplistic but-for comparisons suffice to establish damages under a relaxed proof standard. *See* J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 565–68 (1981).

> environment conducive to the preservation of our democratic political and social institutions.[214]

Just as Professor Tim Wu explained of his "protection of competition standard," the competitive process standard "makes the antitrust law akin to the 'rules of the game,' and make enforcers and judges referees, calling out fouls and penalties, with the goal of ultimately improving the state of play, by protecting a competitive process that actually rewards firms with better products."[215]

As the term is used here, an antitrust "standard" specifies the focus of inquiry. When a court inquires into the effect of a particular practice within a particular context, the standard tells the court what to look for. There is a tendency to presume that the effects of interest must be tangible things, such as output reduction, and that is so under the consumer welfare standard.[216] In contrast, the competitive process standard holds that the effects of interest are intangible things, such as the intensity of competition.

A useful way to contrast the competitive process and consumer welfare standards is by reference to the causal chain running from conduct under review to its ultimate effects on market performance. The competitive process standard focuses the inquiry on the conduct itself, and if the conduct is not unambiguously procompetitive or anticompetitive, the inquiry proceeds just one more link in the causal chain. The competitive process standard inquires into the proximate effects of the conduct on the incentives and opportunities of competitors.

The consumer welfare standard focuses instead on the bottom of the causal chain, but it does not ignore any part of the chain. As most advocates of the consumer welfare standard explain it, adverse effects at the bottom of the causal chain are necessary but not sufficient to establish an antitrust violation.

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[214] N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958). The Court previously had observed: "The heart of our national economic policy long has been faith in the value of competition." Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951). The *Northern Pacific* passage was quoted in several subsequent opinions. *E.g.*, Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 756 (1988) (Stevens, J., dissenting); Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 695 (1978); *see also* City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 398 (1978) ("Congress . . . sought to establish a regime of competition as the fundamental principle governing commerce in this country.").

[215] Wu, *supra* note 111, at 13. The two standards are indistinguishable in concept but could diverge in practice. Professor Wu associates himself with the New Brandeis Movement, which favors simple rules that obviate economic analysis.

[216] In case law, "anticompetitive effects" often refers to tangible performance effects, but the phrase also refers to intangible process effects. *See, e.g.*, FTC v. Actavis, Inc. 570 U.S. 136, 148–49 (2013); Town of Hallie v. City of Eau Claire, 471 U.S. 34, 42–43 (1985); United States v. U.S. Gypsum Co., 438 U.S. 422, 440–41 (1978); Brown Shoe Co. v. United States, 370 U.S. 294, 297–98, 337 (1962).

Also necessary are bases for deeming the conduct anticompetitive and assigning it causal responsibility for the adverse effects.[217] Proving an antitrust case, therefore, can be complicated undertaking.

Complications and complexities in the causal chain often pose substantial proof problems under the consumer welfare standard. As just discussed, proving an output reduction can be exceedingly difficult. In addition, adverse performance could be self-evident but the connection to challenged conduct unclear. And even when challenged conduct plainly causes adverse performance effects, it does not immediately follow that the conduct violates antitrust law; the character of the conduct still matters. The competitive process standard eliminates many of the complications and complexities.

The competitive process standard applies somewhat differently in different contexts. The following subparts first examine its application to concerted conduct under Section 1 of the Sherman Act, with separate discussions of the per se rule and the quick look as well as the rule of reason. Application of the competitive process standard is then discussed for single-firm conduct under Section 2 of the Sherman Act and the prohibition on unfair methods of competition of Section 5 of the FTC Act. Finally, the standard's application is discussed in the context of mergers under Section 7 of the Clayton Act.

B. Per Se and Quick Look Treatment

The competitive process standard views corruption of the competitive process as the supreme evil of antitrust,[218] which can never be justified.[219] In antitrust doctrine, disallowing justification implies per se treatment, so the competitive process standard compels per se treatment for conduct serving no purpose other than to corrupt the competitive process.

The competitive process can be undermined in many ways, but it can be truly corrupted only by a horizontal restraint—"an agreement among competitors on the way in which they will compete with one another."[220] Not all horizontal restraints corrupt the competitive process, however. Exceptions

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[217] *See, e.g.*, Melamed, *supra* note 137, at 271.

[218] *Cf.* Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004) (stating that "collusion" is "the supreme evil of antitrust").

[219] *Cf. Pro. Eng'rs*, 435 U.S. at 695 ("[T]he statutory policy precludes inquiry into the question whether competition is good or bad.").

[220] NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 99 (1984). A restraint can be horizontal even if the parties were never both active in any relevant market. *See* Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49–50 (1990) (per curiam).

include standard setting[221] and restraints ancillary to a legitimate integration of economic activity.[222]

Price fixing, bid rigging, and customer or market allocation are horizontal restraints that serve no purpose other than to corrupt the competitive process. The mother per se rule, which condemns them, thus flows directly from the competitive process standard.[223] No other recognized category of restraint so clearly warrants per se treatment under the competitive process standard.[224]

The per se rule is categorical,[225] and the assignment to per se categories is based on essential nature of restraints. In *BMI*, the Supreme Court observed that the assignment "will often, but not always, be a simple matter."[226] At issue was blanket licensing of the repertoires of music copyright collectives. The Second Circuit condemned the practice as per se unlawful price fixing,[227]

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[221] *See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501 (1988); Golden Bridge Tech., Inc. v. Motorola, Inc., 547 F.3d 266, 273 (5th Cir. 2008); Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 308–10 (3d Cir. 2007). The standard-setting process can be corrupted. *See* Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 571–73 (1982); DM Rsch., Inc. v. Coll. of Am. Pathologists, 170 F.3d 53, 57–58 (1st Cir. 1999).

[222] *See* Texaco Inc. v. Dagher, 547 U.S. 1, 7–8 (2006) ("[T]he ancillary restraints doctrine . . . governs the validity of restrictions imposed by a legitimate business collaboration, such as a business association or joint venture, on nonventure activities."); Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 223–24 (D.C. Cir. 1986) ("To be ancillary, and hence exempt from the per se rule, an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction. The ancillary restraint is subordinate and collateral in the sense that it serves to make the main transaction more effective in accomplishing its purpose."); Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185, 188–90 (7th Cir. 1985) ("A restraint is ancillary when it may contribute to the success of a cooperative venture that promises greater productivity and output."); Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 ANTITRUST L.J. 701, 705–11 (1998).

[223] The competitive process standard implies the per se prohibition of solicitation of agreements within the mother per se rule, but the text of Section 1 of the Sherman Act limits its prohibition to contracts, combinations, and conspiracies.

[224] The Supreme Court has declared "group boycotts" per se illegal. United States v. Gen. Motors Corp., 384 U.S. 127, 145–47 (1966); Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959). "Exactly what types of activity fall within the forbidden category is, however, far from certain." Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 294 (1985); *see also* PLS.com, LLC v. Nat'l Ass'n of Realtors, 32 F.4th 824, 835 (9th Cir. 2022) ("Precisely which group boycotts qualify as *per se* violations of the Sherman Act has been a source of confusion for decades."). In the Ninth Circuit, "a per se prohibition applies where competitors enter into a horizontal agreement to boycott a firm and the boycott's initiator had no purpose other than disadvantaging the target." Honey Bum, LLC v. Fashion Nova, Inc., 63 F.4th 813, 820 (9th Cir. 2023). This narrow conception of the group boycott per se rule is consistent with the competitive process standard.

[225] *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007) ("The *per se* rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work . . . ."); *Nw. Wholesale Stationers*, 472 U.S. at 289 ("This *per se* approach permits categorical judgments with respect to certain business practices that have proved to be predominantly anticompetitive.").

[226] Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1, 9 (1979).

[227] CBS, Inc. v. Am. Soc'y of Composers, Authors & Publishers, 562 F.2d 130, 140 (2d Cir. 1977).

so the Supreme Court's first task was characterizing the practice "as falling within or without that category of behavior to which we apply the label '*per se* price fixing.'"[228]

The Court followed the logic of the competitive process standard. The blanket license did not "threaten the proper operation of our predominantly free-market economy," so the price-fixing label did not apply.[229] And the blanket license was not per se unlawful because it was not a "naked restraint of trade with no purpose except stifling of competition."[230]

Socony-Vacuum observed that "the machinery for price-fixing is an agreement on the prices to be charged or paid for the commodity" and announced that the mother per se rule extended to any "combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity."[231] The competitive process standard supports a per se prohibition that extends to any such corruption of the price-setting process.

United States v. Reicher[232] concerned a fraud that corrupted a price-setting process in an odd way. Reicher bid on a contract to construct a building for Los Alamos National Laboratory. He then learned that his was the only bid received and that the project was apt to be canceled unless the lab got at least two. So he persuaded a qualified bidder to sign a blank bid form, which he filled out. The trial court set aside a guilty verdict,[233] but the Tenth Circuit reinstated it because Reicher created a false "appearance of legitimate competition,"[234] just as with traditional bid rigging.[235]

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[228] *Broad. Music*, 441 U.S. at 9.

[229] *Id.* at 19–23.

[230] *Id.* at 20 (cleaned up) (quoting White Motor Co. v. United States, 372 U.S. 253, 263 (1963)); *see also Leegin*, 551 U.S. at 886 ("To justify a *per se* prohibition a restraint must have manifestly anticompetitive effects and lack any redeeming virtue." (cleaned up)); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 49–50 (1977) ("*Per se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive."); N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) ("[C]ertain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable . . . .").

[231] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940). The Supreme Court subsequently held that an agreement among beer wholesalers to eliminate credit terms, i.e., to require payment in advance or on delivery, came within the mother per se rule. *See* Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 650 (1980) (per curiam). The Court also held that an agreement among physicians on maximum fees charged to insurance companies came within the prohibition. *See* Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 356–57 (1982).

[232] 983 F.2d 168 (10th Cir. 1992).

[233] United States v. Reicher, 777 F. Supp. 901, 906 (D.N.M. 1991).

[234] *Reicher*, 983 F.2d at 172.

[235] An agreement that a bidder submit a high "complementary" bid corrupts the competitive process and has been held to constitute per se unlawful bid rigging even when the complementary bidder had no interest in competing prior to the agreement. *See* United States v. W.F. Brinkley & Son Const. Co., 783 F.2d 1157, 1159–60 (4th Cir. 1986).

In the spirit of *Socony-Vacuum*, the competitive process standard supports extending the mother per se rule to agreements that do not literally allocate customers or markets, but are of that nature, i.e., agreements not to solicit rivals' customers or employees.[236] Significant competition could remain, but a non-solicitation agreement corrupts the competitive process if it serves no legitimate purpose.

When special circumstances counsel caution in applying a per se rule to a naked or nearly naked restraint, courts take a quick look at proffered justifications. The quick look emerged as a distinct mode of analysis in *Professional Engineers*[237] and *NCAA*.[238]

The former case concerned an ethical rule barring engineers from submitting bids for services that specified prices. The Supreme Court declared: "While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement. It operates as an absolute ban on competitive bidding, applying with equal force to both complicated and simple projects and to both inexperienced and sophisticated customers."[239]

The latter case concerned the NCAA's television plan. The Court declined to apply the per se rule because "horizontal restraints on competition [were] essential if the product [was] to be available at all."[240] But the "anticompetitive consequences" of limiting college football telecasts were "apparent" on the face of the restraint.[241]

Consistent with the competitive process standard, the Supreme Court declared in *California Dental Association* that quick look treatment is appropriate when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect."[242] The case concerned a self-regulatory ban on false or misleading advertising, which had been interpreted to bar inexact price advertising, such

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[236] In criminal cases, courts appropriately have held that the per se rule against customer allocation encompasses non-solicitation agreements. *See* United States v. Brown, 936 F.2d 1042, 1043–45 (9th Cir. 1991); United States v. Coop. Theatres of Ohio, Inc., 845 F.2d 1367, 1370–73 (6th Cir. 1988); *see also* United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1086–90 (5th Cir. 1978) (combining non-solicitation with account balancing when customers did switch).

[237] Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679 (1978).

[238] NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984).

[239] *Pro. Eng'rs*, 435 U.S. at 692.

[240] *NCAA*, 468 U.S. at 101.

[241] *Id.* at 106.

[242] Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999). The Court was likely unanimous on this point. *See id.* at 771.

as "low prices."[243] The FTC found a per se violation and alternatively condemned the conduct after a quick look.[244]

The Ninth Circuit upheld the FTC's assessment,[245] but the Supreme Court reversed on a 5–4 vote. The majority observed that the restraint was "designed to avoid false or deceptive advertising in a market characterized by striking disparities between the information available to the professional and the patient."[246] The majority held that quick look treatment was inappropriate because the practice did not have an "obvious anticompetitive effect."[247]

The competitive process standard supports quick look treatment for practices that "soften" the competitive process rather than corrupt it. The process is corrupted by restraints that preclude actions to gain patronage or prevent them from succeeding. The process is softened by restraints that blunt the incentive to gain patronage or reduce the reward.

Competition is softened, for example, by sharing revenues or profits. The limiting case is a cartel: If a group of competitors pool their profits and distribute them in fixed shares, the sharing eliminates all incentive to gain business at the expense of a competitor, so it eliminates all competition. Complete sharing comes within the scope of the mother per se rule,[248] and a much lesser degree of sharing should be subject to quick look treatment.[249]

Another mechanism for softening competition is an industry-imposed tax,[250] which could fund legitimate activity. If the tax is keyed to revenue or output, it is a marginal cost partially passed through in higher prices. The margin earned on incremental sales is reduced, and so the incentive to gain sales at the expense of rivals is reduced. A practice that raises prices and blunts the incentive to gain patronage should be subject to quick look treatment.[251]

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[243] *See* Cal. Dental Ass'n v. FTC, 128 F.3d 720, 723–24 (9th Cir. 1997).

[244] *See* Cal. Dental Ass'n, 121 F.T.C. 190, 333 (1996).

[245] *Cal. Dental Ass'n*, 128 F.3d at 726–27.

[246] *Cal. Dental Ass'n*, 526 U.S. at 771 (footnotes omitted).

[247] *Id.* at 778.

[248] *See* Citizen Publ'g Co. v. United States, 394 U.S. 131, 135 (1969) ("Pooling of profits pursuant to an inflexible ratio at least reduces incentives to compete for circulation and advertising revenues and runs afoul of the Sherman Act."). Prior to the Sherman Act, revenue and profit pooling agreements were common and sometimes held to be void as a matter of public policy. *See*, *e.g.*, Anderson v. Jett, 12 S.W. 670, 672 (Ky. 1889); Hooker & Woodward v. Vandewater, 4 Denio 349, 353–54 (N.Y. Sup. Ct. 1847).

[249] The case most on point held to the contrary. California v. Safeway, Inc., 651 F.3d 1118, 1134–39 (9th Cir. 2011) (en banc). The case concerned a mutual assistance agreement under which a supermarket chain not picketed during a labor dispute paid 15% of the revenue gained to chains that were picketed.

[250] The cartel in *Addyston Pipe* initially used a tax system to boost prices but found that it was not having the desired effect. *See* United States v. Addyston Pipe & Steel Co., 85 F. 271, 273–74 (6th Cir. 1898).

[251] The notable cases on point held that the conduct was per se illegal price fixing. One case involved a multiple listing service database for San Diego County financed out of subscription

C. Rule of Reason Treatment

The rule of reason "focuses directly on the challenged restraint's impact on competitive conditions."[252] As explained by Justice Brandeis in *Chicago Board of Trade*, the rule of reason asks whether a restraint "merely regulates and perhaps thereby promotes competition" or whether it "may suppress or even destroy competition."[253] In that case, the Court upheld the Chicago Board of Trade's "call rule" because the evidence indicated that it was the former type restraint rather than the latter.

The Board offered three ways to trade grain for delivery in Chicago: A spot sale required immediate delivery, whereas a future sale required delivery at a specified future date. And a sale "to arrive" required delivery within a short time. Grain sold to arrive typically was in transit to Chicago and could have been sold on spot market when it arrived. The "call rule" required buyers of grain "to arrive" to offer the price set in "the call" session at the end of the trading day. The call rule protected uninformed sellers in dealing with well-informed buyers.[254]

The rule of reason asks for a "conclusion about the principal tendency" of a restraint,[255] and litigation generates that conclusion through burden shifting.[256] The "plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect,"[257] and the vast majority of cases end at the first step when the plaintiff fails.[258] The most important issue, therefore, is what is required to carry the initial burden.[259]

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fees taxed per agent at a level that generated revenue in excess of the operating cost. *See* Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1144–47 (9th Cir. 2003). Two other cases concerned a fee of one percent of gross payroll paid by electrical contractors to fund collective bargaining and other legitimate activities. *See* Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, Inc., 814 F.2d 358, 368–71 (7th Cir. 1987); Nat'l Elec. Contractors Ass'n, Inc. v. Nat'l Constructors Ass'n, 678 F.2d 492, 501 (4th Cir. 1982).

[252] Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 688 (1978).

[253] Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918).

[254] *See* WERDEN, FOUNDATIONS, *supra* note 1, at 131–35.

[255] Cal. Dental Ass'n v. FTC, 526 U.S. 756, 781 (1999). The dissenters agreed with this characterization. *Id.* (Breyer, J., concurring in part and dissenting in part).

[256] *See* NCAA v. Alston, 141 S. Ct. 2141, 2160 (2021); Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018).

[257] *Alston*, 141 S. Ct. at 2160 (quoting *Am. Express*, 138 S. Ct. at 2284).

[258] *See* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 828 (2009) (finding that from 1999 to 2009, courts ruled against plaintiffs at the first stage in 97% of rule of reason cases).

[259] If the plaintiff carries the initial burden, the defendant has a burden of justification. And if the defendant provides a legitimate justification, the plaintiff has the burden of establishing a suitable less restrictive alternative. An alternative not always mentioned by courts is for the plaintiff to show that the principal tendency of the restraint is to harm competition notwithstanding the justification. This alternative can be seen as a step four in the burden shifting. *See* Michael A. Carrier, *The Four-Step Rule of Reason*, ANTITRUST, Spring 2019, at 50–51. Or it can be seen as a step three.

The Supreme Court endorsed both direct and indirect proof of "an anticompetitive effect," which the Court distinguished on the basis that direct proof bypasses separate proof of market power: "Direct evidence of anticompetitive effects would be proof of actual detrimental effects on competition, such as reduced output, increased prices, or decreased quality in the relevant market. Indirect evidence would be proof of market power plus some evidence that the challenged restraint harms competition."[260] Typically, the two types of proof are combined.[261]

The Court's treatment of "direct" proof was, at best, misleading.[262] The Court relied on *Indiana Federation of Dentists*, which held that "proof of actual detrimental effect, such as a reduction of output, can obviate the need for an inquiry into market power."[263] That proposition is both a very different proposition and widely accepted,[264] although courts often insist on a definition of the relevant market to provide context for evaluating the proffered evidence.[265]

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[260] *Am. Express*, 138 S. Ct. at 2284 (cleaned up).

[261] *Cf.* MacDermid Printing Sols. LLC v. Cortron Corp., 833 F.3d 172, 183 (2d Cir. 2016) ("[I]n no precedential opinion in this Circuit has a plaintiff successfully proved an adverse effect on competition without offering evidence of changed prices, output, or quality.").

[262] It might not be sufficient to demonstrate an effect that might be observed if a challenged practice were anticompetitive. *Cf.* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 895 (2007) (holding that "Respondent is mistaken in relying on pricing effects absent a further showing of anticompetitive conduct" because higher prices are consistent with both procompetitive and anticompetitive explanations of resale price maintenance). And it always is necessary to connect the demonstrated effect with the challenged conduct. *Cf. In re* Publ'n Paper Antitrust Litig., 690 F.3d 51, 64 (2d Cir. 2012) ("All evidence, including direct evidence, can sometimes require a factfinder to draw inferences to reach a particular conclusion . . . ."); Edward J. Sweeney & Sons, Inc. v. Texaco, 637 F.2d 105, 116 (3d Cir. 1980) (reasoning that it is a fallacy to assume "a causal connection between two events merely because one follows the other").

[263] FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 460–61 (1986) (cleaned up).

[264] *See, e.g.*, Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 307 (3d Cir. 2007) ("The existence of monopoly power may be proven through direct evidence of supracompetitive prices and restricted output."); Geneva Pharms. Tech. Corp. v. Barr Lab'ys Inc., 386 F.3d 485, 500 (2d Cir. 2004) ("Monopoly power . . . can be proven directly through evidence of control over prices or the exclusion of competition, or it may be inferred from a firm's large percentage share of the relevant market."); Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995) ("If the plaintiff puts forth evidence of restricted output and supracompetitive prices, that is direct proof of the injury to competition which a competitor with market power may inflict, and thus, of the actual exercise of market power.").

[265] *See, e.g.*, *Am. Express*, 138 S. Ct. at 2285 ("[C]ourts usually cannot properly apply the rule of reason without an accurate definition of the relevant market."); New Orleans Ass'n of Cemetery Tour Guides & Cos. v. New Orleans Archdiocesan Cemeteries, 56 F.4th 1026, 1036 n.13 (5th Cir. 2023) ("[E]ven when parties present direct evidence of anticompetitive effects, a market definition inquiry is necessary."); Republic Tobacco Co. v. N. Atl. Trading Co., 381 F.3d 717, 737 (7th Cir. 2004) ("[I]f a plaintiff can show the rough contours of a relevant market, and show that the defendant commands a substantial share of the market, then direct evidence of anticompetitive effects can establish the defendant's market power . . . .").

Delineation of the relevant market maps the locus of competition and competitive harm by the products and places involved, and the relevant market typically plays a central role in a plaintiff's proof.[266] Despite well-known shortcomings, market share is useful in proving market power,[267] and market coverage is useful in proving a restraint's market impact.[268]

Whether a plaintiff purports to rely on direct evidence, indirect evidence, or both, the core of the plaintiff's proof is a cogent narrative. Under the competitive process standard, this narrative must explain how competition works and how the challenged restraint adversely affects competition.

Trade restraints can harm the competitive process in two general ways, labeled "collusion" and "exclusion" in reference to their competitive impact in limiting cases. Collusion is the limit of the class of restraints that diminish incentives to compete on any important dimension of competition.[269] Exclusion is the limit of the class of restraints that diminish opportunities to compete on any of those dimensions. A given restraint might be seen to do either or both.

Restraints in the collusion class are nearly always horizontal.[270] Horizontal restraints blatantly eliminating competition are subject to per se or quick look treatment. In challenging a horizontal restraint with more subtle anticompeti-

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[266] *See* Gregory J. Werden, *Why (Ever) Define Markets? An Answer to Professor Kaplow*, 78 ANTITRUST L.J. 729, 740–43 (2013); *see also* Agnew v. NCAA, 683 F.3d 328, 337 (7th Cir. 2012) ("[A] plaintiff's threshold burden under the Rule of Reason analysis involves the showing of a precise market definition . . . ."); Cnty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1159 (9th Cir. 2001) ("Under the rule of reason burden-shifting scheme, plaintiffs first must delineate a relevant market and show that the defendant plays enough of a role in that market to impair competition significantly." (cleaned up)); Donald F. Turner, *The Role of the "Market Concept" in Antitrust Law*, 49 ANTITRUST L.J. 1145, 1145 (1980) ("The key of antitrust is some economic assessment, and you cannot judge the potential impact of a variety of practices without some sense of what the market is in which that conduct is taking place.").

[267] *See* Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965) ("Without a definition of [the relevant] market there is no way to measure [the defendant's] ability to lessen or destroy competition."); Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 611 (1953) ("[T]he essence of illegality in tying agreements is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next. Solely for testing the strength of that lever, the whole and not part of a relevant market must be assigned controlling weight.").

[268] *See* Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961) ("[T]he threatened foreclosure of competition must be in relation to the market affected."); United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593 (1957) ("Substantiality can be determined only in terms of the market affected.")

[269] Economic actors act in their own interest. Collusion works not because rivals are instilled with an esprit de corps but rather because they fear retribution.

[270] The *American Express* case presented a rare exception. The anti-steering provisions in American Express's merchant contracts governed their acceptance for all credit cards and prevented Discover from gaining charge volume by cutting its merchant fees. *See* United States v. Am. Express Co., 88 F. Supp. 3d 143, 222 (E.D.N.Y. 2015).

tive effects, a plaintiff must detail a mechanism through which the conduct imposes a cost on competitive initiatives or denies a benefit from them. In addition, a convincing narrative must include a basis for viewing the competitive impact as significant.

Restraints producing exclusion-type harms typically are vertical. To challenge a vertical restraint with subtle anticompetitive effects, a plaintiff must detail a mechanism through which the restraint forecloses opportunities for competitive initiative. In addition, a convincing narrative must include a basis for viewing the competitive impact as significant.

All of this seems familiar because antitrust doctrine comports well with the competitive process standard. This is clearly seen in the *Discon* case,[271] which arose after NYNEX, one of the regional Bell operating companies following the break-up of AT&T, engaged in fraudulent affiliate transactions to deceive regulators and boost rates. A company called Discon lost business to the affiliated company as part of the fraud, and its Sherman Act claim was dismissed.

The Second Circuit reversed, finding that a group boycott theory stated a plausible claim.[272] The Supreme Court granted certiorari to address the application of the *Klor's* per se rule against group boycotts.[273] The Court understood *Klor's* to have "inferred injury to the competitive process itself from the nature of the boycott" and declared that "the plaintiff here must allege and prove harm . . . to the competitive process, *i.e.*, to competition itself."[274] The Court held that the plaintiff's allegations fell short.[275]

The district court later granted summary judgment in favor of NYNEX, observing that "not every bad act committed in business gives rise to an antitrust claim, even if harm to consumers ultimately results."[276] The court held that undisputed facts established that the plaintiff could not show that the fraud "caused market-wide harm to competition, not just harm to Discon itself or to consumers in general."[277]

D. MONOPOLIZATION AND UNFAIR METHODS OF COMPETITION

Although inspired by the exclusionary tactics of Standard Oil, Senator John Sherman's original bill included nothing like Section 2, which was added by

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[271] NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998).
[272] *See* Discon, Inc. v., NYNEX Corp., 93 F.3d 1055, 1064 (2d Cir. 1996).
[273] *Discon*, 525 U.S. at 130 (citing Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959)).
[274] *Id.* at 134–35.
[275] *Id.* at 136–39.
[276] Discon Inc. v. NYNEX Corp., 86 F. Supp. 2d 154, 165 (W.D.N.Y. 2000).
[277] *Id.*

the Senate Judiciary Committee when it rewrote the bill.[278] The floor debate on Section 2 consisted of two Committee members answering questions. Senator George F. Hoar implied the competitive process standard when he explained that Section 2 prohibited obtaining a monopoly by "means which made it impossible for other persons to engage in fair competition."[279]

From the outset of the *Standard Oil* case, the government declared that it challenged only "unfair methods of competition,"[280] and the Supreme Court repeated this phrase.[281] The Court explained that Standard Oil maintained "dominancy over the oil industry, not as a result of normal methods of industrial development, but by new means of combination which were resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed."[282]

The lower courts took up the task of interpreting Section 2 with minimal guidance from the Supreme Court,[283] but a Sixth Circuit decision in a criminal case did a commendable job.[284] The court understood the verb "to monopolize" in Section 2 to mean "to exclude" by means other than "efficiency in producing and marketing a better and cheaper article than any one else."[285] The court stressed that there was no Section 2 violation if "all competitors . . . enjoy the free opportunity" to compete.[286]

After *Standard Oil*, commentators began using the term "unfair competition" to characterize exclusionary conduct that should be deemed unlawful.[287] The leading academic writer on the trust problem, economist John Bates

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[278] *See* WERDEN, FOUNDATIONS, *supra* note 1, at 29–31.

[279] 21 CONG. REC. 3152 (1890).

[280] *See* Complaint at 97, 173–74, 176, 178, 181–82, United States v. Standard Oil Co. of N.J., 173 F. 177 (C.C.E.D. Mo. 1909) (No. 5371). In prior cases, courts had struggled with the meaning of Section 2 but had no doubt about whether competition on the merits remained lawful. *See, e.g.*, Whitwell v. Cont'l Tobacco Co., 125 F. 454, 462–63 (8th Cir. 1903); *In re* Greene, 52 F. 104, 115 (C.C.S.D. Ohio 1892).

[281] Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 43 (1911) (referring to "unfair methods of competition, such as local price cutting at the points where necessary to suppress competition").

[282] *Id.* at 75. The Supreme Court condemned American Tobacco for six specific "methods devised in order to monopolize the trade by driving competitors out of business." United States v. Am. Tobacco Co., 221 U.S. 106, 181–83 (1911).

[283] *See* Gregory J. Werden, *How Chief Justice White Hampered Development of Limiting Principles for Section 2 of the Sherman Act and What Can Be Done About It Now*, 13 OHIO ST. BUS. L.J. 63, 79–86 (2019).

[284] Patterson v. United States, 222 F. 599 (6th Cir. 1915).

[285] *Id.* at 619.

[286] *Id.* at 620–21.

[287] *E.g.*, Bruce Wyman, *Unfair Competition by Monopolistic Corporations*, 42 ANNALS AM. ACAD. POL. & SOC. SCI. 67 (1912). Wyman taught antitrust at Harvard University. *Id.*

Clark, defined the term to include "any practice whose natural result is to make survival depend on other qualities than industrial efficiency."[288]

New economics PhD William S. Stevens published a 1914 article titled *Unfair Competition*,[289] which was relied upon in the Senate debate on the FTC Act.[290] He asserted:

> Fair competition in an economic sense signifies a competition of economic or productive efficiency. On economic grounds an organization is entitled to remain in business so long and only so long as its production and selling costs enable it to hold its own in a free and open market. . . . If all have an equal chance to survive, it is economically proper that those failing through lack of efficiency should be destroyed. The community is entitled to the most efficient service that can be given.[291]

In the FTC Act debate, Senator Joseph T. Robinson acknowledged a debt to Stevens and observed: "Nearly all normal business men can distinguish between 'fair competition' and 'unfair competition.' Efficiency is generally regarded as the fundamental principle of the former—efficiency in producing and in selling; while oppression or advantage obtained by deception or some questionable means is the distinguishing characteristic of 'unfair competition.'"[292]

The Section 5 prohibition of unfair methods of competition was drafted by George Rublee.[293] In a memorandum for President Woodrow Wilson, he wrote: "Fair competition is competition which is successful through superior efficiency. Competition is unfair when it resorts to methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper."[294] Senator Henry F. Hollis gave a speech in support of Section 5 incorporating Rublee's memorandum, including his distinction between fair and unfair competition.[295]

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[288] John Bates Clark & John Maurice Clark, The Control of Trusts 103 (rewritten and enlarged ed. 1914).

[289] William S. Stevens, *Unfair Competition*, 29 Pol. Sci. Q. 282 (1914).

[290] 51 Cong. Rec. 11108, 11230, 11300 (1914).

[291] Stevens, *supra* note 289, at 282–83.

[292] 51 Cong. Rec. 11230–31 (1914).

[293] *See* George Rublee, *The Original Plan and Early History of the Federal Trade Commission*, 11 Proc. Acad. Pol. Sci. 114, 115–18 (1926); Oral Hist. Rsch. Off., Columbia Univ., The Reminiscences of George Rublee 103–20 (1972) (reciting interviews with George Rublee conducted by Wendell H. Link from 1950 to 1951), doi.org/10.7916/d8-y9f9-p751.

[294] Memorandum from George Rublee Concerning Section 5 of the Bill to Create a Federal Trade Commission 3 (July 10, 1914) (transmitted to President Woodrow Wilson by Secretary of the Interior Franklin K. Lane), www.wlf.org/wp-content/uploads/2021/07/Rublee-1914-Memo-to-Lobby-for-the-Passage-of-Section-5.pdf.

[295] 51 Cong. Rec. 12145–49 (1914).

The law on exclusionary conduct developed little over the next six decades. The leading case was *Alcoa*, in which Judge Learned Hand mused:

> A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that, although, the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: finis opus coronat. The successful competitor, having been urged to compete, must not be turned upon when he wins.[296]

In 1975, Harvard law professor Donald F. Turner made progress in the first Milton Handler lecture.[297] He drew on the competitive process standard in arguing that "[t]he critical question . . . is . . . the nature of the conduct by which monopoly is obtained or maintained."[298] The issue, he asserted, is "whether or not the conduct creating or maintaining a monopoly consisted of competition on the merits, such as superior skill, superior products, and superior efficiency."[299]

The Areeda-Turner treatise contended that exclusionary conduct "comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way."[300] And the Supreme Court endorsed this view in *Aspen Skiing*.[301]

The meaning of "unnecessarily restrictive" was unclear. A firm could go out of its way to impair rivals' opportunities while otherwise engaging in competition on the merits. Or a firm could merely fail to create opportunities for rivals. Only the former scenario involves exclusionary acts of volition that can be subjected to prohibitory remedies, and only the former are condemned under the competitive process standard.

Courts often observe that Section 2 is concerned with the competitive process,[302] although some do so while also referring to the consumer welfare

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[296] United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945).

[297] Donald F. Turner, *The Scope of "Attempt to Monopolize,"* 30 REC. ASS'N BAR CITY N.Y. 487, 494 (1975). Turner arguably was the leading antitrust scholar at the time.

[298] *Id.* at 493.

[299] *Id.* at 494.

[300] 3 PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 626b, at 78 (1978).

[301] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n.32 (1985).

[302] *E.g.*, St. Luke's Hosp. v. ProMedica Health Sys., 8 F.4th 479, 486 (6th Cir. 2021); FTC v. Qualcomm Inc., 969 F.3d 974, 990 (9th Cir. 2020); Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 453 (7th Cir. 2020); Phila. Taxi Ass'n v. Uber Techs., Inc., 886 F.3d 332, 344 (3d Cir. 2018);

standard.[303] And courts agree that competition on the merits is lawful.[304] Such conduct is privileged under the competitive process standard, while nothing is privileged under some versions of the consumer welfare standard. If competition on the merits makes consumers worse off, some argue that the conduct is unlawful under the consumer welfare standard.[305]

Competition on the merits is not well defined in economics or law. In *Microsoft*, the D.C. Circuit indicated that competition on the merits "involves, for example, greater efficiency or enhanced consumer appeal."[306] Like Learned Hand and Donald Turner, the D.C. Circuit identified sources of competitive advantage that can be exploited lawfully through competition on the merits. But an actual definition is needed if competition on the merits is to be privileged.

To compete on the merits is to offer better value, as opposed to preventing rivals from doing so. A manufacturer competes on the merits by pricing close to cost and by passing through cost reductions from improving production methods or solving coordination problems. A manufacturer also competes on the merits by improving a product's appearance or performance or by creating something new.[307]

Exclusionary conduct gains patronage by keeping rivals from offering better value. One class of exclusionary conduct is predation—money-losing methods for taking business from rivals.[308] Predation by a seller usually involves aggressive price cutting reinforced by adding money-losing

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McWane, Inc. v. FTC, 783 F.3d 814, 835–36 (11th Cir. 2015); Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1072 (10th Cir. 2013) (Gorsuch, J.); Town of Concord v. Bos. Edison Co., 915 F.2d 17, 21 (1st Cir. 1990) (Breyer, C.J.); Fishman v. Estate of Wirtz, 807 F.2d 520, 536 (7th Cir. 1986).

[303] *E.g.*, *In re* EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig., 44 F.4th 959, 985 (10th Cir. 2022); Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 896, 901, 904 (9th Cir. 2008); Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 308 (3d Cir. 2007); United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) (per curiam).

[304] *See Qualcomm*, 969 F.3d at 991; *Viamedia*, 951 F.3d at 463–64; Retractable Techs., Inc. v. Becton Dickinson & Co., 842 F.3d 883, 892–93 (5th Cir. 2016); New York v. Actavis PLC, 787 F.3d 638, 653 (2d Cir. 2015); LePage's Inc. v. 3M, 324 F.3d 141, 179 (3d Cir. 2003); *Microsoft*, 253 F.3d at 59; Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1062 (8th Cir. 2000); Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I., 883 F.2d 1101, 1110 (1st Cir. 1989).

[305] *See* Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311, 326, 338–41 (2006); Steven C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft*, 7 GEO. MASON L. REV. 617, 653–61 (1999).

[306] *Microsoft*, 253 F.3d at 59.

[307] Professor Elhauge also argues that the foregoing conduct should be privileged. *See* Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 316–20 (2003). To describe what is privileged, he uses the phrase "conduct that succeeds by improving the [defendant's] own efficiency," *id.*, but non-predatory price competition is, and ought to be, privileged, although it does not affect efficiency.

[308] *See supra* note 203 and accompanying text.

capacity.[309] Another class of exclusionary conduct involves conduct that forecloses rivals' opportunities[310] or raises their costs.[311]

The competitive process standard suggests the "no economic sense" test, under which "conduct is not exclusionary or predatory unless it would make no economic sense for the defendant but for the tendency to eliminate or lessen competition."[312] The Tenth Circuit adopted the test,[313] and the Seventh Circuit endorsed it as a sufficient condition:[314] The plaintiff can prevail by establishing that conduct could not be profitable absent gains from eliminating competition. The no economic sense test is easily satisfied when conduct serves no legitimate business purpose.[315] On this basis, the D.C. Circuit condemned numerous actions by Microsoft.[316]

A few circuits have outlined a burden-shifting approach that assigns the burden of justification to the defendant.[317] If the justification is that the practice is competition on the merits,[318] only a minimal burden of production should be assigned to defendants,[319] and there should be no weighing of pro-

[309] A classic example is *Mogul Steamship Co. v. McGregor, Gow, & Co.* [1892] A.C. 25 (HL) (appeal taken from Eng.). The case concerned a group of ship owners that excluded a competitor from Chinese tea ports through a concerted campaign of price cutting, exclusivity rebates, and adding capacity termed "fighting ships." *See* B.S. Yamey, *Predatory Price Cutting: Notes and Comments*, 15 J.L. & ECON. 129, 137–41 (1972).

[310] A classic example comes from *United States v. American Tobacco Co.*, 221 U.S. 106 (1911). American Tobacco controlled inputs (notably the foil used in cigarette packaging) and retail distribution. *Id.* at 156–75.

[311] *See* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986). A oft-cited example comes from *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965). *See* Oliver E. Williamson, *Wage Rates as a Barrier to Entry: The Pennington Case in Perspective*, 82 Q.J. ECON. 85 (1968).

[312] *See* Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 ANTITRUST L.J. 413, 413 (2006).

[313] Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1075 (10th Cir. 2013) (Gorsuch, J.) ("Put simply, the monopolist's conduct must be irrational but for its anticompetitive effect.").

[314] *See* Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 461–62 & n.13 (7th Cir. 2020). The court rejected the no economic sense test as a necessary condition. *See id.* at 462 n.13 (citing AREEDA & HOVENKAMP, *supra* note 26, ¶¶ 651b3, 772c2).

[315] The no economic sense test is not a sacrifice test. The cost of the conduct to the defendant is immaterial, even if it is zero. The no economic sense test presumes that every action is rational and enquires into what makes an action profitable.

[316] *See* United States v. Microsoft Corp., 253 F.3d 34, 59–64, 67–79 (D.C. Cir. 2001) (en banc) (per curiam).

[317] *See* FTC v. Qualcomm Inc., 969 F.3d 974, 991 (9th Cir. 2020); McWane, Inc. v. FTC, 783 F.3d 814, 833 (11th Cir. 2015); *Microsoft*, 253 F.3d at 58–59.

[318] The D.C. Circuit indicated that "justification" included the contention that challenged conduct was "indeed a form of competition on the merits." *Microsoft*, 253 F.3d at 59.

[319] The D.C. Circuit suggested a minimal burden by using the verbs "proffer" and "assert" to describe what a defendant must do to shift the burden back to the plaintiff when claiming "that its conduct is indeed a form of competition on the merits." *Id.*

and anti-competitive effects.[320] As Donald Turner explained, it is the nature of conduct that matters, and under the competitive process standard, competition on the merits is privileged.

E. MERGERS

Section 7 of the Clayton Act and its legislative history imply the competitive process standard. Section 7 prohibits a merger when its effect "may be substantially to lessen competition."[321] And the legislative history indicates that "to lessen competition" means to reduce the "intensity of competition."[322] The legislative history further underscores the point by observing that a merger can reduce the number of competitors and yet "afford greater competition."[323]

The Merger Guidelines issued last year by the Department of Justice and Federal Trade Commission also articulate the competitive process standard:

> Competition is a process of rivalry that incentivizes businesses to offer lower prices, improve wages and working conditions, enhance quality and resiliency, innovate, and expand choice, among many other benefits. Mergers that substantially lessen competition or tend to create a monopoly increase, extend, or entrench market power and deprive the public of these benefits. Mergers can lessen competition when they diminish competitive constraints, reduce the number or attractiveness of alternatives available to trading partners, or reduce the intensity with which market participants compete.[324]

The level of market concentration is a useful predictor of the intensity of market competition, but it is by no means a sufficient statistic. If it were, an increase in concentration would be necessary for a Section 7 violation, and non-horizontal mergers would be lawful per se. But that is not the law, nor is it a policy that many support. Economics and law agree that competition is not just a numbers game.

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[320] *But see McWane*, 783 F.3d at 833 ("If the court accepts the defendant's proffered justifications, it must then decide whether the conduct's procompetitive effects outweigh its anticompetitive effects."); *Microsoft*, 253 F.3d at 59. In *Kodak*, the Supreme Court sent the case back for trial after holding that liability would turn "on whether 'valid business reasons' can explain" the actions complained of. Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 483–86 (1992) (quoting Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985)). The Court did not comment on the burdens at trial. *Id.*

[321] 15 U.S.C. § 18.

[322] H.R. REP. NO. 81-1191, at 7–8 (1949) (which made Section 7 into a formidable anti-merger law).

[323] *Id.* at 6–7; *see also* 95 CONG. REC. 11459, 11496 (1949) ("Obviously, those mergers which enable small companies to compete more effectively with giant corporations generally do not reduce competition, but rather, intensify it.") (statement of Rep. Hale Boggs).

[324] DEP'T OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES (2023) § 1 [hereinafter 2023 MERGER GUIDELINES], www.justice.gov/atr/2023-merger-guidelines.

Competition is to economics like gravity is to physics: Although fundamental, it cannot be observed directly, nor is there a generally accepted theory of how it works.[325] Like the force of gravity, the intensity of competition is observed through its impact on what can be observed and measured. Unlike the force of gravity, the intensity of competition is gauged only relative to theoretical benchmarks. To say that a merger reduces the intensity of competition is to say that it causes the market to perform less like perfect competition or more like a monopoly.

Because the intensity of competition is reflected in market performance, the competitive process standard is applied to the assessment of mergers in much the same way as the consumer welfare standard. For example, quantitative tools for predicting price effects from mergers are useful in determining whether a merger significantly lessens competition because the magnitude of predicted price effects is a representation of the impact of the merger on the intensity of competition.[326]

Although the standard typically does not matter in merger litigation, merger-generated efficiencies are treated differently by different standards. Under the consumer welfare standard, legality turns on whether a merger lessens welfare. If the applicable metric were total welfare in the relevant market, higher prices to customers would be traded off against the profit gains to the merging firms,[327] but the new Merger Guidelines reject such a trade-off, as do courts.[328]

In the first insightful judicial appellate treatment of efficiencies, the Eleventh Circuit declared "that whether an acquisition would yield significant efficiencies in the relevant market is an important consideration in predicting whether the acquisition would substantially lessen competition."[329] But the court also observed that "once it is determined that a merger *would* substantially lessen competition, expected economies, however great, will not insulate the merger from a section 7 challenge."[330]

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[325] *See generally* RICHARD PANEK, THE TROUBLE WITH GRAVITY: SOLVING THE MYSTERY BENEATH OUR FEET (2019).

[326] While not clear on the point, this appears to be the approach taken in the new Merger Guidelines. *See* 2023 MERGER GUIDELINES, *supra* note 324, § 4.2.A (explaining that the agencies use quantitative models that "focus on the firms' short-run incentives to change price" to "give an indication of the scale and importance of competition, not to precisely predict outcomes").

[327] This is the trade-off proposed by Williamson, *supra* note 128.

[328] *See* 2023 MERGER GUIDELINES, *supra* note 324, § 3.3 ("The merging parties must demonstrate through credible evidence that, within a short period of time, the benefits will prevent the risk of a substantial lessening of competition in the relevant market.").

[329] FTC v. Univ. Health, Inc., 938 F.2d 1206, 1222 (11th Cir. 1991).

[330] *Id.* at 1222 n.29.

The court held that efficiencies are relevant to "the ultimate issue—the acquisition's overall effect on competition."[331] The court explained that "a defendant who seeks to overcome a presumption that a proposed acquisition would substantially lessen competition must demonstrate that the intended acquisition would result in significant economies and that these economies ultimately would benefit competition."[332]

Decisions by other circuits have been consistent with the analysis of the Eleventh Circuit. The Ninth Circuit held that a prima facie case can be rebutted by "evidence that the proposed merger will create a more efficient combined entity and thus increase competition."[333] The court stressed that "the language of the Clayton Act must be the linchpin of any efficiencies defense," so the requisite showing is that the "merger enhances rather than hinders competition because of the increased efficiencies."[334]

The Third Circuit agreed with the Ninth Circuit "that the 'language of the Clayton Act must be the linchpin of any efficiencies defense.'"[335] And it quoted the Ninth Circuit in holding that "'a successful efficiencies defense requires proof that a merger is not, despite the existence of a prima facie case, anticompetitive.'"[336]

The D.C. Circuit read circuit precedent to hold that "efficiencies could rebut a prima facie showing, which is not invariably the same as an ultimate defense to Section 7 illegality."[337] The court agreed with the Eleventh Circuit that "'once it is determined that a merger would substantially lessen competition, expected economies, however great, will not insulate the merger from a section 7 challenge.'"[338]

None of these cases explained how a court would determine whether credible, merger-specific efficiencies prevent a merger from lessening competition. The easy cases are those in which the merging firms prove that one of them would not be a significant competitor in the relevant market absent the merger. In such cases, the government's prima facie case is entirely undone by the defendants' proof.

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[331] *Id.* at 1222.

[332] *Id.* at 1223.

[333] Saint Alphonsus Med. Ctr.–Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 790 (9th Cir. 2015).

[334] *Id.* (quoting United States v. Long Island Jewish Med. Ctr., 983 F. Supp. 121, 137 (E.D.N.Y. 1997)).

[335] FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 348–49 (3d Cir. 2016) (quoting *Saint Alphonsus*, 778 F.3d. at 790); *see also* FTC v. Hackensack Meridian Health, 30 F.4th 160, 175 (3d Cir. 2022).

[336] *Penn State Hershey*, 838 F.3d at 349 (quoting *Saint Alphonsus*, 778 F.3d. at 790).

[337] United States v. Anthem, Inc., 855 F.3d 345, 353–55 (D.C. Cir. 2017) (citation omitted).

[338] *Id.* at 355 (quoting FTC v. Univ. Health, Inc., 938 F.2d 1206, 1222 n.29 (11th Cir. 1991)).

Also straightforward are cases in which the merging firms prove that merger-specific cost reductions are so great that the merged firm will lower its prices, which then pressures rivals to do the same. A general reduction in prices is decisive under a welfare standard that uses the metric of consumer welfare in the relevant market. Under the competitive process standard, a general reduction in prices also suffices to establish that the effect of the merger is to enhance the intensity of competition.[339]

In the borderline case, merger-specific efficiencies reduce the merging firms' marginal costs by exactly the amount of the "compensating marginal cost reductions."[340] The merger has no effect on prices, so consumer welfare is unchanged. And because the intensity of competition is reflected by market performance, the merger does not lessen competition.[341] The merged firm enjoys a higher price-cost margin,[342] but the reason is enhanced efficiency, and the incremental margin is classified as "economic rent" or "quasi-rent" rather than profit.[343]

The challenging cases are those in which the merger affects competition in the relevant market in two opposing, and incommensurate, ways. This can occur with merger-specific product improvements or new products. The government has to prove a substantial lessening of competition, so it is up to the government to prove that the efficiency effect on competition is substantially outweighed by the opposing effect.

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[339] The 2010 Horizontal Merger Guidelines stated:

> The Agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market. To make the requisite determination, the Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm customers in the relevant market, e.g., by preventing price increases in that market.

DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 10 (2010) (footnote omitted). The second sentence attributed evidentiary significance to net price effects, but the first sentence made the decisive test whether the merger is "anticompetitive."

[340] *See* Luke M. Froeb & Gregory J. Werden, *A Robust Test for Consumer Welfare Enhancing Mergers Among Sellers of a Homogeneous Product*, 58 ECON. LETTERS 367 (1998); Marie Goppelsroeder, Maarten Pieter Schinkel & Jan Tuinstra, *Quantifying the Scope for Efficiency Defense in Merger Control: The Werden-Froeb-Index*, 56 J. INDUS. ECON. 778 (2008); Gregory J. Werden, *A Robust Test for Consumer Welfare Enhancing Mergers Among Sellers of Differentiated Products*, 44 J. INDUS. ECON. 409 (1996).

[341] This discussion presumes that the merger does not affect any other dimension of competition. The merger might, for example, lessen (or enhance) innovation competition.

[342] The Lerner Index or price-cost margin (price minus marginal cost, all divided by price) is a standard way to compare real-world performance to performance under perfect competition. *See* Kenneth G. Elzinga & David E. Mills, *The Lerner Index of Monopoly Power: Origins and Uses*, 101 AM. ECON. REV. 558 (2011); A.P. Lerner, *The Concept of Monopoly and the Measurement of Monopoly Power*, 1 REV. ECON. STUD. 157 (1934).

[343] *See generally* Armen A. Alchian, *Rent*, *in* 7 THE NEW PALGRAVE DICTIONARY OF ECONOMICS 90–93 (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed., 2008).

The issue of how to assess an alleged harm to competition between merging buyers was presented by a merger of large health insurers that contracted for services with hospitals and physicians groups.[344] The government alleged that the merger would substantially lessen competition in many markets, including 35 local markets for the "purchase of healthcare services by commercial insurers."[345]

The merging firms contended that paying less for healthcare services was an efficiency that rendered the merger procompetitive in the markets in which they provided insurance. The trial court rejected this efficiency claim on multiple grounds and held that the merger violated Section 7 in health insurance markets without addressing the alleged lessening of competition in the purchasing of healthcare services.[346]

The D.C. Circuit affirmed, over the dissent of Judge Kavanaugh,[347] who thought "the record evidence overwhelmingly demonstrate[d]" that the merger would reduce what the merging firms pay providers.[348] In his view, the merger was lawful if this was a cognizable efficiency, but unlawful if it was an anticompetitive effect. This meant that the only viable theory of a Section 7 violation was one the district court did not rule on, requiring that the case be remanded.[349]

Judge Kavanaugh asserted that the merger was unlawful if the merging firms would pay less by exercising "monopsony power," but lawful if they would exercise "bargaining power," and the distinction was whether output was reduced.[350] This distinction comes from the textbook monopsony model, in which the only purchaser of an item exercises its power by purchasing less and thereby reducing the price paid.[351]

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[344] United States v. Anthem, Inc., 236 F. Supp. 3d 171 (D.D.C. 2017), *aff'd*, 855 F.3d 345 (D.C. Cir. 2017).

[345] Complaint at 5, 24–27, *Anthem*, 236 F. Supp. 3d 171 (No. 16-cv-01493), www.justice.gov/atr/file/903111/download.

[346] *Anthem*, 236 F. Supp. 3d at 179, 216–31, 231–53.

[347] *Anthem*, 855 F.3d 345.

[348] *Id.* at 373–74 (Kavanaugh, J., dissenting).

[349] *Id.* at 373.

[350] *Id.* at 377–78.

[351] For standard presentations, see Roger D. Blair & Jeffrey L Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 301–03 (1991) (with graphs); Roger G. Noll, *"Buyer Power" and Economic Policy*, 72 ANTITRUST L.J. 589, 594–95 (2005) (without graphs). The utility of the textbook model is limited by the fact that real-world supply curves tend to be rather flat over the short term and relevant range, so textbook monopsony power does not exist. *See* Jonathan M. Jacobson, *Monopsony 2013: Still Not Truly Symmetric*, ANTITRUST SOURCE (Dec. 2013), www.americanbar.org/content/dam/aba/publishing/antitrust-magazine-online/dec13_full_source.pdf.

In textbook monopsony, resources are misallocated and total welfare reduced.[352] Some advocates of the consumer welfare standard see resource misallocation as the only legitimate basis for antitrust concern,[353] and Judge Kavanaugh evidently reasoned from that premise. He took the position of some commentators[354] that the exercise of "bargaining power," "buyer power," or "countervailing power" is not a matter of antitrust concern.[355] This view is inconsistent with the competitive process standard.

Judge Kavanaugh would have remanded the case with instructions to determine whether the merged firm would "obtain lower provider rates from hospitals and doctors because of its exercise of unlawful monopsony power."[356] He implied that the remand would have been to determine whether the government had proved that the merged firm would purchase less from healthcare providers. Of course, the government had not.

In healthcare markets, the price system does not play its usual role of "central nervous system."[357] An insurer does not reduce payments to hospitals or physicians by purchasing less. Any output reduction would be a delayed result from reduced payments as hospitals were forced to close their doors and fewer top students went to medical school. Section 7, however, focuses on competition in the foreseeable future, rather than the relevant market's long-run performance.

IV. OBJECTIONS TO THE COMPETITIVE PROCESS STANDARD

A. Professor Herbert Hovenkamp

Professor Herbert Hovenkamp characterizes the competitive process standard as "a kind of minimalism that requires antitrust policy to umpire the competitive game, but little more."[358] In an important sense, that is correct: The

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[352] Downstream consumers are harmed if the monopsonist is also a monopolist in the relevant output market, but consumers are unaffected if the downstream market is competitive, which is possible if the monopsonist's power is confined to a single location and the relevant downstream market is much larger.

[353] Others purporting to advocate the consumer welfare standard argue variously that harm to trading partners is a basis for concern and that antitrust is concerned only with the consumers at the end of the supply chain. *See* John D. Shively, *When Does Buyer Power Become Monopsony Pricing?*, ANTITRUST, Fall 2012, at 87, 89.

[354] *See, e.g.*, Dennis W. Carlton & Mark Israel, *Proper Treatment of Buyer Power in Merger Review*, 39 REV. INDUS. ORG. 127, 128 (2011); Zhiqi Chen, *Defining Buyer Power*, 53 ANTITRUST BULL. 241 (2008).

[355] *Anthem*, 855 F.3d at 378 (Kavanaugh, J., dissenting) ("[T]he exercise of *bargaining power* by Anthem-Cigna is *procompetitive* . . . .").

[356] *Id.*

[357] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 n.59 (1940).

[358] Hovenkamp, *supra* note 12, at 746.

competitive process standard is indifferent to who wins or loses, as long as competition is on the merits.

Professor Hovenkamp cites the *Rambus*[359] and *Qualcomm*[360] cases as evidence that the competitive process standard is a "toothless instrument for pursuing anticompetitive conduct."[361] In both cases, however, the courts reasonably held that the FTC failed to demonstrate harm to competition. The conduct might have been objectionable, but not on antitrust grounds.

The founders of Rambus developed a faster architecture for dynamic random access memory (DRAM) and applied for a patent. Rambus later joined the Joint Electron Device Engineering Council (JEDEC), which adopted a standard incorporating Rambus technologies. Several years later, while JEDEC was developing a next-generation standard incorporating more Rambus technology, Rambus withdrew from JEDEC. And three years after that, Rambus begin asserting patent rights.[362]

The FTC found that Rambus disregarded JEDEC's policy under which "members were expected to reveal the existence of patents and patent applications that later might be enforced against those practicing the JEDEC standards."[363] And the FTC found that Rambus's failure to disclose allowed it to avoid licensing "on RAND terms."[364] But the FTC could "neither confirm nor reject the possibility that JEDEC would have preferred Rambus's technologies over the alternatives" even with full disclosure.[365]

The D.C. Circuit held that, "if deception raises the price secured by a seller, but does so without harming competition, it is beyond the antitrust laws' reach."[366] The court rejected the notion that Section 2 of the Sherman Act condemns "any conduct that permits a monopolist to avoid constraints on the exercise of [its] power."[367] The court reasoned that Rambus's deception did not violate Section 2 if JEDEC "would have standardized the very same technologies" with disclosure, and the FTC did not rule that out.[368]

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[359] Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008).
[360] FTC v. Qualcomm Inc., 969 F.3d 974 (9th Cir. 2020).
[361] Hovenkamp, *supra* note 12, at 746.
[362] *Rambus*, 522 F.3d at 459–60.
[363] Rambus Inc., 142 F.T.C. 98, 619 (2006). For a detailed explication of the events and the FTC's analysis of them, see *id.* at 669–89, 713–16.
[364] *Id.* at 761. "RAND" stands for reasonable and non-discriminatory. *Id.* at 619.
[365] Rambus Inc., 143 F.T.C. 85, 104 (2007).
[366] *Rambus*, 522 F.3d at 464.
[367] *Id.* at 466.
[368] *Id.* at 466–67.

Qualcomm held numerous patents on cellular technology, some subject to FRAND commitments.[369] Qualcomm also was a major supplier of the "modem chips" that cellular devices use to transmit and receive data. Qualcomm did not assert its patents against rival suppliers of modem chips, but neither did it license them. Qualcomm licensed makers of cellular devices and enforced a "no license, no chips" policy, under which it sold modem chips only to licensed makers of cellular devices.[370]

On appeal, the FTC argued that Qualcomm's refusal to license rival suppliers of modem chips breached FRAND commitments, which violated Section 2 of the Sherman Act because it had "the effect of substantially contributing to the acquisition or maintenance of monopoly power."[371] The FTC's theory was that the "no license, no chips" policy allowed Qualcomm to obtain additional royalties, labeled a "surcharge," which undermined competition among modem chip suppliers.[372]

The Ninth Circuit held that, "in order to make out a § 2 violation, the anticompetitive harm identified must be to *competition itself*" and that the FTC had "identifie[d] no such harm."[373] The court properly rejected the FTC's suggestion that the surcharge distorted the choice of modem chip supplier.[374] Professor Hovenkamp contends that it is wrong to "exonerate" Qualcomm's conduct because it "resulted in higher prices,"[375] but the competitive process standard focuses on the process of competition rather than its results.

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[369] "FRAND" stands for "fair, reasonable, and non-discriminatory." FTC v. Qualcomm, Inc., 969 F.3d 974, 983 (9th Cir. 2020).

[370] *Id.* at 983–85.

[371] Brief of the Federal Trade Commission at 69, *Qualcomm*, 969 F.3d 974 (9th Cir. 2020) (No. 19-16122), www.ftc.gov/system/files/documents/cases/144_2019_11_22_ftc_answering_brief.pdf.

[372] The FTC's economic expert argued that the surcharge squeezed the margins earned by rival suppliers of modem chips, but on appeal, the FTC disclaimed any argument about the rivals' margins. *See id.* at 67. For an analysis of the surcharge, see Gregory J. Werden, *FTC v. Qualcomm: The Sky Is Not Falling*, CPI ANTITRUST CHRON., Oct. 2020-II, at 35, 38–39.

[373] *Qualcomm*, 969 F.3d at 996; *see also id.* at 998 ("We hold that the district court's 'anticompetitive surcharge' theory fails to state a cogent theory of anticompetitive harm.").

[374] *Id.* at 1000. The FTC asserted the "same mechanism of anticompetitive harm" as the per-processor license in *Caldera, Inc. v. Microsoft Corp.*, 87 F. Supp. 2d 1244 (D. Utah 1999). FTC Brief, *supra* note 371, at 37–38. That license required PC makers to pay the full MS-DOS license fee on each PC produced. *Id.* at 37. Installing a rival operating system, therefore, meant paying the full price for two operating systems. *Id.* Qualcomm's surcharge did not distort competition in a similar fashion because paying the surcharge did not entitle a device maker to a Qualcomm modem chip at no extra charge; indeed, the district court found that Qualcomm charged "monopoly prices" for modem chips. FTC v. Qualcomm Inc., 411 F. Supp. 3d 658, 692, 695, 800 (N.D. Cal. 2019).

[375] *See* Hovenkamp, *supra* note 12, at 749–50.

Professor Hovenkamp wonders how the competitive process standard applies to tying.[376] Tying need not undermine the competitive process,[377] so a fact-intensive assessment is required, as with the license restrictions on PC manufacturers in the *Microsoft* case. There, the court held that the restrictions that tied Internet Explorer to Windows were anticompetitive because they substantially frustrated the distribution of rival browsers that threatened to undermine the operating system monopoly enjoyed by Windows.[378]

Tying can be procompetitive,[379] anticompetitive,[380] or competitively neutral[381] according to modern economic analysis. Professor Hovenkamp charges that "[t]he term 'competitive process' adds little" to the economic analysis,[382] but it adds the discriminating eye that sorts cases into the three categories. The competitive process standard looks to the purpose that tying serves and how that purpose relates to competition, rather than how tying affects performance.

The competitive process standard applies the rule of reason as Justice Brandeis explained it in *Chicago Board of Trade*:

> [T]he 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.[383]

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[376] *Id.* at 747–48.

[377] For decades, the Supreme Court believed that tying invariably undermined the competitive process. *See, e.g.*, Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 305–06 (1949) ("Tying agreements serve hardly any purpose beyond the suppression of competition.").

[378] *See* United States v. Microsoft Corp., 253 F.3d 34, 60–62 (D.C. Cir. 2001) (en banc).

[379] *See generally, e.g.*, David S. Evans & Michael Salinger, *Why Do Firms Bundle and Tie? Evidence from Competitive Markets and Implications for Tying Law*, 22 YALE J. REGUL. 37 (2005); Edward M. Iacobucci, *Tying as Quality Control: A Legal and Economic Analysis*, 32 J. LEGAL STUD. 435 (2003); Benjamin Klein & Lester F. Saft, *The Law and Economics of Franchise Tying Contracts*, 28 J.L. & ECON. 345 (1985); Marius Schwartz & Gregory J. Werden, *A Quality-Signaling Rationale for Aftermarket Tying*, 64 ANTITRUST L.J. 387 (1996).

[380] *See generally, e.g.*, Dennis W. Carlton & Michael Waldman, *The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries*, 33 RAND J. ECON. 194 (2002); Jay Pil Choi, *Tying and Innovation: A Dynamic Analysis of Tying Arrangements*, 114 ECON. J. 83 (2004); Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 AM. ECON. REV. 837 (1990).

[381] *See generally, e.g.*, Ward S. Bowman, Jr., *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19, 23–29 (1957); M.L. Burstein, *The Economics of Tie-In Sales*, 42 REV. ECON. & STAT. 68 (1960); Robert S. Hansen & R. Blaine Roberts, *Metered Tying Arrangements, Allocative Efficiency, and Price Discrimination*, 47 S. ECON. J. 73 (1980); Frank Mathewson & Ralph Winter, *Tying as a Response to Demand Uncertainty*, 28 RAND J. ECON. 566 (1997).

[382] Hovenkamp, *supra* note 12, at 748.

[383] Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918).

In contrast, the consumer welfare standard has been invoked to argue that tying should be per se illegal.[384]

B. PROFESSOR EINER ELHAUGE

Professor Einer Elhauge takes issue with AAG Kanter's views on the competitive process standard.[385] He argues that the consumer welfare standard is not an alternative to the competitive process standard, but rather "only a method to resolve deep ambiguities about what 'competition and the competitive process' means."[386] Focusing on the competitive process, however, resolves ambiguities more simply and more satisfyingly.

Elhauge illustrated the ambiguities with a hypothetical merger:

> To take a simple concrete case, suppose a merger between two firms in a tenfirm market makes the merged firm a more efficient and vigorous competitor. Does that decrease "competition" because it eliminates one competitor or increase it because we now have more vigorous competition among the nine that remain?[387]

Both of Elhauge's suggested answers are too simplistic. The competitive process standard calls for an assessment of the merger's overall effect on the intensity of competition in the relevant market. Having fewer competitors need not mean that competition is less intense, and having one more vigorous competitor need not mean that competition is more intense.

The statutory test of Section 7 is whether the merger substantially lessens competition. When both merging firms are tiny, their merger has an insubstantial effect on competition. When the merger creates a dominant firm or entrenches one, the merger substantially lessens competition even if the merged firm is "a more efficient and vigorous competitor." In the vast middle ground, the law recognizes that a merger can increase concentration and yet enhance competition by strengthening the merged firm.[388]

Professor Elhauge asserts that AAG Kanter is "mistaken" in arguing that the consumer welfare standard has a "blind spot" when it comes to competitive harm suffered by workers and farmers.[389] Elhauge declares that: "Any

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[384] *See, e.g.*, Einer Elhauge & Barry Nalebuff, *The Welfare Effects of Metering Ties*, 33 J.L. ECON. & ORG. 68 (2017); Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397 (2009).

[385] *See* Elhauge, *supra* note 17.

[386] *Id.*

[387] *Id.*

[388] *See supra* Part III.E. The credibility of the efficiency claims would be a central issue. A credible claim identifies a merger-specific asset complementarity and explains how it leads to the new or improved product or a significant reduction in marginal cost.

[389] Elhauge, *supra* note 17.

anticompetitive harm to upstream suppliers will suppress upstream output, and if that has any effect on downstream output, it will be to reduce it and thus harm consumer welfare."[390]

The consumer welfare standard might not be blind to harm suffered by workers and farmers, but Elhauge's version of the standard is myopic. He acknowledges harm to consumer welfare only if output is curtailed both in the market where the workers or farmers act as sellers and in the corresponding downstream market in which final consumers are the buyers. The competitive process standard does not focus on output and is indifferent to whether final consumers are harmed.

Professor Elhauge further argues that the Supreme Court adopted the consumer welfare standard. He cites four cases "for which the adoption of a consumer welfare standard cannot be dismissed as dicta because it was necessary to their holdings":[391]

> In *Brooke* and *Weyerhaeuser*, it was necessary for the holdings that, respectively, below-cost pricing and overbidding without subsequent recoupment should be allowed as procompetitive because they benefit consumer welfare while they exist without harming them in the long run, rather than condemned as anticompetitive because they inefficiently impede rival competition while they exist. In *Leegin*, it was necessary for the holding that the prior per se rule against vertical minimum price-fixing agreements should be overruled because such agreements could benefit "consumer welfare" with higher service levels, rather than condemned per se because they restrain free market choice and could eliminate some dealers. Finally, in *Jefferson Parish*, it was necessary for the holding that the quasi per se rule against ties with tying market power but no substantial tied foreclosure share should be retained because such ties could increase the exploitation of that market power in a way that harmed consumer welfare, rather than allowed on the ground that such ties did not harm "competition" because they did not increase the degree of tied or tying market power.[392]

In *Brooke Group*, the Supreme Court held that a predatory-pricing plaintiff must demonstrate below-cost pricing and a likelihood of recouping the resulting losses.[393] Professor Elhauge argues that below-cost pricing is proconsumer absent recoupment, so the recoupment requirement can be explained only by a

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[390] *Id.*.
[391] *Id.*
[392] *Id.*
[393] Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–24 (1993).

consumer focus.[394] The Court, however, held that recoupment is necessary for harm to competition: "That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for the protection of *competition*, not *competitors*."[395]

In *Weyerhaeuser*, the Supreme Court held that a plaintiff alleging predatory overbidding must make the showing required by *Brooke Group*.[396] Again, Professor Elhauge argues that the conduct is proconsumer absent recoupment, but the Court held the opposite. *Weyerhaeuser*'s rationale was that, absent "recoupment, a strategy of predatory bidding makes no economic sense because it would involve short-term losses with no likelihood of offsetting long-term gains."[397] The Court observed that failed predatory-bidding schemes need not benefit consumers and successful schemes could have "little or no effect on consumer prices because a predatory bidder does not necessarily rely on raising prices in the output market to recoup its losses."[398]

In *Leegin*, the Supreme Court overruled the long-standing per se rule against minimum resale price maintenance.[399] Professor Elhauge argues that the consumer welfare standard was necessary for *Leegin*'s holding because resale price maintenance "could benefit 'consumer welfare' with higher service levels" but inevitably "restrain[s] free market choice and could eliminate some dealers."[400] This argument, however, misapprehends the competitive process standard and the Court's reasoning.

The rationale for abandoning the per se rule against resale price maintenance was "that economics literature is replete with procompetitive justifications."[401] The Court stressed that "reducing intrabrand competition" through resale price maintenance can "stimulate interbrand competition" by "encourag[ing]

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[394] Professor Elhauge advocates the version of the consumer welfare standard with a consumer welfare metric. The recoupment requirement is not supported by the version of the consumer welfare standard with the total welfare metric. Pricing below marginal cost is a boon to consumers in the relevant market, but the resulting resource misallocation reduces total welfare.

[395] *Brooke Grp.*, 509 U.S. at 224 (cleaned up); *see also id.* at 225 ("If circumstances indicate that below-cost pricing could likely produce its intended effect on the target, there is still the further question whether it would likely injure competition in the relevant market."); *id.* at 226 ("Evidence of below-cost pricing is not alone sufficient to permit an inference of probable recoupment and injury to competition."); *id.* ("[C]utting prices in order to increase business often is the very essence of competition . . . ." (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986)).

[396] Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 315, 325–26 (2007).

[397] *Id.* at 325.

[398] *Id.* at 324.

[399] Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 881–82 (2007).

[400] Elhauge, *supra* note 17.

[401] *Leegin*, 551 U.S. at 889.

retailers to invest in tangible or intangible services or promotional efforts" on which "discounting retailers can free ride."[402] The Court observed that consumers sometimes benefit from resale price maintenance,[403] but the Court rightly viewed resale price maintenance as procompetitive whenever used to attract customers.

In *Jefferson Parish*, the Supreme Court held that tying is per se illegal when it restrains "competition on the merits by forcing purchases that would not otherwise be made."[404] The Court noted that tying can be used to extract more profit from sales of the tying product[405] but declared: "When the seller's power is just used to maximize its return in the tying product market, where presumably its product enjoys some justifiable advantage over its competitors, the competitive ideal of the Sherman Act is not necessarily compromised."[406]

Professor Elhauge asserts that the consumer welfare standard was necessary for *Jefferson Parish*'s application of the per se rule to scenarios "with tying market power but no substantial tied foreclosure share" because "such ties could increase the exploitation of that market power in a way that harmed consumer welfare."[407] In fact, the Court "refused to condemn tying arrangements unless a substantial volume of commerce is foreclosed."[408]

The Court also explained that tying can harm consumers and yet be lawful because it does not harm competition:

> Similarly, when a purchaser is "forced" to buy a product he would not have otherwise bought even from another seller in the tied-product

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[402] *See id.* at 890. This explanation was first put forward by Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86, 89–96 (1960). The majority barely mentioned explanations that do not involve free riding. Such explanations were mentioned in the amicus brief filed by the United States. *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 14–16, *Leegin*, 551 U.S. 877 (No. 06-480). The dissent dismissed these explanations by declaring that they had not been presented "with sufficient clarity for a generalist judge to understand." *Leegin*, 551 U.S. at 921 (Breyer, J., dissenting). For an overview of current thought, see Benjamin Klein, *The Evolving Law and Economics of Resale Price Maintenance*, 57 J.L. & ECON. S161, S161–64 (2014).

[403] *Leegin*, 551 U.S. at 890–91 The services benefit marginal customers, but higher prices harm inframarginal customers. The net effect could be a reduction in overall consumer welfare. *See supra* note 78 and accompanying text.

[404] Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 27 (1984); *see also id.* at 12 ("Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such 'forcing' is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.").

[405] *Id.* at 15 n.23.

[406] *Id.* at 14.

[407] Elhauge, *supra* note 17.

[408] *Jefferson Par.*, 466 U.S. at 16.

market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed.[409]

C. Professor Jonathan Baker

Professor Jonathan B. Baker also takes issue with AAG Kanter's views on the competitive process standard.[410] Baker strongly advocates the consumer welfare standard's focus on performance and argues that, by turning a blind eye to performance, the competitive process standard empowers judges to do as they please. But Baker wrongly presumes that a standard overrides all precedent and that existing precedent is grounded on the consumer welfare standard.

Professor Baker argues that the competitive process standard is a complete unknown, although it has been the life and logic of antitrust law. The competitive process standard was the source of the mother per se rule and the substance of the rule of reason.

Professor Baker asserts that a "serious focus on process (as distinct from outcomes) would not consider market power; it would look for rivalry alone," and he worries that a competitive process might be deemed sound as long as any rivalry existed.[411] But no concept of marketplace competition could fail to appreciate that substantial market power saps its vitality. Monopoly is the total absence of competition, and substantial market power is partial absence.

Professor Baker similarly frets that plainly anticompetitive horizontal mergers could be permitted on the basis that four firms, or even fewer, are "enough to preserve that process."[412] But any merger that substantially lessens competition harms the competitive process. The health of the competitive process is reflected in the intensity of competition, which is the concern of Section 7.

Professor Baker also worries that "the structural presumption" applicable in Section 7 cases "might be undermined to the point where it applies only to mergers to monopolies."[413] But the competitive process standard supplied the rationale for the structural presumption in the first place, and the consumer welfare standard arguably is in tension with it.[414]

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[409] *Id.*
[410] *See* Baker, *supra* note 16.
[411] *Id.*
[412] *Id.*
[413] *Id.*
[414] *See* Douglas H. Ginsburg & Joshua D. Wright, Philadelphia National Bank: *Bad Economics, Bad Law, Good Riddance*, 80 ANTITRUST L.J. 377, 377–80 (2015).

Professor Baker posits that the competitive process standard might allow "courts to forbid conduct that reduces buyer choice or supplier opportunities" with no expectation that the conduct would "enhance market power."[415] The competitive process standard, however, looks to the nature of the conduct rather than its impact on buyers or suppliers.[416] Competition on the merits is never unlawful under the competitive process standard.

Professor Baker speculates that the competitive process standard might "weaken antitrust law's prohibitions against anticompetitive exclusionary conduct."[417] He posits a dominant firm constrained by less efficient rivals and supposes "exclusionary conduct that harms its rivals in a way that makes them less of a competitive constraint."[418] He conjectures that a court might "find no antitrust violation on the ground that the inefficient rivals could not successfully compete in the long run."[419]

Professor Baker does not specify particular conduct or indicate what makes it exclusionary because market performance is what matters to him. Competition on the merits is permitted under the competitive process standard no matter how it affects performance. And conduct that serves only to weaken rivals can be condemned by the competitive process standard without the need to establish adverse effects on performance.

Professor Baker contrasts the competitive process standard with "[s]ensible antitrust doctrines," which "encourage firms to succeed by providing better or less expensive products and services to their buyers, and more attractive terms and conditions to their suppliers."[420] Such conduct, however, is privileged under the competitive process standard but not under the consumer welfare standard.[421]

Professor Baker also posits that "a pizza parlor torches a hated pizza parlor rival located across the street."[422] He worries that the competitive process standard might condemn the conduct even with "no practical reduction in the

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[415] Baker, *supra* note 16.
[416] The competitive process standard "can and should draw on more than a century of economics that have sought to better understand how markets actually work in practice." Wu, *supra* note 111, at 18.
[417] Baker, *supra* note 16.
[418] *Id.*
[419] *Id.*
[420] *Id.*
[421] Professor Steven C. Salop advocates the consumer welfare standard and opposes any safe harbor for new product introductions or cost reductions. *See supra* note 305 and accompanying text.
[422] *See* Baker, *supra* note 16.

supply of pizza or increase in pizza prices."[423] Baker evidently hypothesizes pizza parlors so numerous that losing one has no impact.

If this hypothesis were true, the competitive process standard would not condemn the arson because competition is unaffected. Consistent with the competitive process standard, antitrust law holds that: "Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws . . . ."[424] But the loss of a single pizza parlor in the real world is apt to affect competition, and eliminating a rival with an arson attack is anticompetitive.

CONCLUSION

Much is written on the goals of antitrust law, but the question was authoritatively answered in 1911 by George F. Edmunds, the principal author of the Sherman Act:[425]

> The expansion of business of every sort and the dangerous combinations that have attempted (in many instances too successfully) to absorb the business of the country into their own hands, to crush out fair and useful competition, and so dominate and monopolize the industries and trade of the Republic, have been so great that the result is the unnatural and unequal distribution of wealth and power, which the experience of centuries has shown to be among the great evils that affect civilization and true progress. The Act of 1890 was designed and framed to check and, so far as possible, prevent these great and growing evils.[426]

Robert Bork began the perennial debate over antitrust law's goals by critiquing the manner in which he saw antitrust cases being decided: "A value will be announced as pertinent with a confidence that is matched only by the mystery that shrouds its derivation. A very specific decision is then whelped from the value premise without benefit of midwifery by any visible minor premise."[427] To Bork, the "suddenly appearing value [was] a *deus ex machina*

[423] *Id.*

[424] Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225 (1993).

[425] John Sherman spearheaded antitrust legislation and merited the credit he got from the popular name of the statute, but he did not write the Sherman Act. *See* WERDEN, FOUNDATIONS, *supra* note 1, at 25–39. Sherman's bill was completely rewritten by the Senate Judiciary Committee, which Edmunds chaired, and Edmunds was the main author of both Section 1 and Section 2. *Id.*

[426] George F. Edmunds, *The Interstate Trust and Commerce Act of 1890*, 194 N. AM. REV. 801, 815–16 (1911).

[427] Bork, *supra* note 117, at 8.

by which the court rescue[d] itself from the perplexing tasks of economic analysis and judgment."[428]

Largely due to Robert Bork[429] and others in the Chicago School, the midwifery of economics became important in antitrust law.[430] Bork and the Chicago School prompted increasingly sophisticated economic analysis over the ensuing decades. But Bork and the Chicago School also made generations of judges overly skeptical about antitrust claims, got them preoccupied with output, and sometimes caused them to lose sight of the primacy of the competitive process.

If Bork accurately caricatured judicial decision-making, he nevertheless misidentified the error, which was interpreting antitrust law in a manner that promoted every value that Congress hoped to promote. "Every statute purposes, not only to achieve certain ends, but also to achieve them by particular means . . . ."[431] And the sole means through which antitrust law achieves any ends is by protecting the competitive process. This is the point made by AAG Kanter in the speeches quoted in the introduction.

That the Sherman Act protects the competitive process was the basis of the mother per se rule against price fixing, bid rigging, and customer or market allocation. And the simple logic of the mother per se rule has saved criminal antitrust enforcement from constitutional attacks. Courts should reject any interpretation of the Sherman Act that imperils criminal enforcement,[432] including the consumer welfare standard.

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[428] *Id.*

[429] *See* Kenneth Heyer, *Consumer Welfare and the Legacy of Robert Bork*, 57 J.L. & ECON. S19, S23 (2014) ("Bork was a strong and influential figure, shepherding economics to the forefront of antitrust analysis."); William E. Kovacic, *Out of Control? Robert Bork's Portrayal of the U.S. Antitrust System in the 1970s*, 79 ANTITRUST L.J. 855, 855 (2014) ("Among academics who have written about antitrust since the Sherman Act's adoption in 1890, Robert Bork's influence on doctrine, policy, and debate in the United States is unequaled. No scholar has left such a deep and durable imprint on the U.S. antitrust system.").

[430] *See* Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 928 (1979). Bork was a star pupil of Aaron Director, who pioneered the use of economic theory to understand how business practices worked. *Id.* at 925–26.

[431] Dir., Off. of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 136 (1995); *see also* Eleanor M. Fox, *Against Goals*, 81 FORDHAM L. REV. 2157, 2159–60 (2013); Werden, *Antitrust's Rule of Reason*, *supra* note 1, at 743, 745, 759.

[432] A canon of construction is that a statute should be interpreted to avoid placing its constitutionality in doubt. *See* Gomez v. United States, 490 U.S. 858, 864 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question."); United States v. Del. & Hudson Co., 213 U.S. 366, 408 (1909) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.").

FTC Chair, and self-proclaimed adherent of the New Brandeis Movement, Lina Khan advocated "return[ing] the law to focusing on the competitive process" as part of the Movement's plan to revitalize antitrust.[433] While antitrust law never abandoned the competitive process standard, advocacy of the consumer welfare standard has distorted litigation, and antitrust doctrine should be purged of this influence.

Protecting the competitive process might or might not further the political ends that Congress hoped antitrust law would further or the political ends now pursued by the New Brandeis Movement. The competitive process standard bars any specific consideration of those ends. Antitrust law is an instrument only for advancing the policy of competition.

The competitive process standard imposes a substantial burden on every antitrust plaintiff to show that the challenged conduct corrupts or undermines the competitive process. It is not enough to show that impugned conduct harms trading partners, offends social norms, violates contractual or regulatory obligations, or constitutes a crime.

Antitrust law is concerned with the health of the competitive process, not with the performance it delivers. Performance can have substantial evidentiary value, but should never be part of the test of legality. Application of the competitive process standard relieves plaintiffs of the burden to prove performance effects, especially output restriction. Output restriction need not result from conduct that harms the competitive process, and restriction of output can be exceptionally difficult to prove even when it surely has occurred.

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[433] Khan, *The New Brandeis Movement*, *supra* note 3, at 132; *see also* Khan, *Amazon's Antitrust Paradox*, *supra* note 3, at 717, 739, 745–46. The New Brandeis Movement's idea of focusing on the competitive process seems to be different from the approach advocated by this article. *See supra* note 18.