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Progressive Antitrust

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Introduction

Several American political administrations have worn the label "progressive." Presidential candidates from both political major parties have run and served under that banner for more than a century, through the 2016 election season. Most of these administrations or intending administrations have advocated interventionist antitrust policies, reflecting a belief that markets are fragile and needing repair, that certain interest groups require greater protection, or in some cases that antitrust policy is an extended arm of regulation. This paper argues that most of this progressive antitrust policy was misconceived. The progressive state is best served by a fundamentally neoclassical antitrust policy whose principal goal is the preservation of market competition as measured by consumer welfare. This result is best measured by sustainable output of goods and services as high as market forces permit.

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The rhetoric of progressive antitrust policy makers has generally not spoken of market failure, which occurs when a market is unable to reach an equilibrium that provides economic satisfaction and growth consistent with competition. Rather, the articulated concerns have stepped into such areas as the distribution of wealth or protection of specific interest groups. These have included the threats posed by concentration of wealth, big business, industrial concentration and excessive mergers, harmful vertical integration, high entry barriers, or abuses of intellectual property rights. To varying degrees these views about antitrust characterized the antitrust policy of the original Progressive Era, the era from the Second New Deal through World War Two, and the 1950s and 1960s Warren Court Era. It was much less true of the Clinton and Obama administrations, whose antitrust policies have been more consistent with neoclassical goals articulated as furthering consumer welfare.

As used here, the term "progressive" refers to a political rhetoric and set of policy choices that have been prominent in American politics since the late nineteenth century. Progressivism was really not seen as a distinctive "movement," however, until it was cast that way by Richard Hofstadter in the 1950s.[1] The original Progressive movement was relatively short lived, lasting from the 1890s until the election of Warren Harding in 1920.[2] Since then, several political movements and Presidential aspirants have taken on the name "progressive," including Franklin D. Roosevelt and the much longer lived New Deal. President Eisenhower used "progressive" rhetoric, speaking of his philosophy as "progressive moderation."[3] Richard Nixon spoke like a conservative but often followed a progressive policy agenda. Nelson Rockefeller, a frequent presidential candidate who became Vice President under Gerald Ford, was more explicitly progressive. His wing of the Republican party styled itself as Progressive Republicanism[4] and has a website presence to this day.[5] Both Bill Clinton and Barak Obama sometimes characterized their policies as "progressive," and the term figured prominently in the campaign rhetoric of both Hillary Clinton and Bernie Sanders in the 2016 Presidential election.

Historically, progressivism was bipartisan. The first acknowledged progressive president was Theodore Roosevelt, a Republican and self-proclaimed "trust buster."[6] Roosevelt nominated Oliver Wendell Holmes, Jr., to the Supreme Court, mistakenly believing Holmes to be a progressive.[7] Unsurprisingly, he was angered when Holmes dissented from the *Northern Securities* case, the first Supreme Court antitrust decision to condemn a merger.[8] Both

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[1] RICHARD HOFSTADTER, THE AGE OF REFORM (1955).
[2] *See* JOHN WHITECLAY CHAMBERS II, THE TYRANNY OF CHANGE: AMERICA IN THE PROGRESSIVE ERA, 1890-1920 (3d ed. 2000); DORIS KEARNS GOODWIN, THE BULLY PULPIT: THEODORE ROOSEVELT, WILLIAM HOWARD TAFT, AND THE GOLDEN AGE OF JOURNALISM (2013)
[3] GEOFFREY KABASERVICE, RULE AND RUIN: THE DOWNFALL OF MODERATION AND THE DESTRUCTION OF THE REPUBLICAN PARTY, FROM EISENHOWER TO THE TEA PARTY 14 (2012).
[4] *See* Angelo Lopez, *The Rise and Fall of the Progressive Republican*, EVERYDAY CITIZEN (March 13, 2010).
[5] http://progressiverepublicans.org/.
[6] *See*, e.g., GOODWIN, *supra*, note 2.
[7] *See* PAUL D. MORENO, THE AMERICAN STATE FROM THE CIVIL WAR TO THE NEW DEAL 86-92 (2013); Richard H. Wagner, *A Falling Out: the relationship Between Oliver Wendell Holmes and Theodore Roosevelt*, 27 J. Sup. Ct. Hist. 116 (2002).
[8] SILAS BENT, JUSTICE OLIVER WENDELL HOLMES 251 (1932) (Quoting an angry Roosevelt as saying "I could carve out of a banana a Justice with more backbone than that."). On the history surrounding the quotation, as well as its questioned authenticity, *see* OWEN M. FISS, TROUBLED BEGINNINGS OF THE

Presidents William Howard Taft and Herbert Hoover occasionally took on the label, although with less enthusiasm than Roosevelt did. More recently, the name "progressive" has been worn principally by Democrats and ignored or even reviled by most Republicans and libertarians.

Intellectually, "progressivism" refers to a collection of theories about the appropriate role and obligations of the State. *First* is a strong belief in marginalism, a revolution in economics that initially obtained a footing in progressive political thinking in the 1900s and 1910s, and went on to dominate mainstream economic policy in the 1930s and after. Most fundamentally, marginalism forced policy makers to construct their ideas about value from the future rather than the past, and thus to incorporate rational expectations and risk management into public decision making. In addition, the concept of declining marginal utility historically supported concerns about wealth distribution.[9] *Second* is a strong commitment to science, including social science, in policy making. Looking to current science for policy has made the progressive state less stable than its less empirical alternatives, but it has also enabled progressives to move away from unappealing policy choices rather than getting stuck in the past. A good example of this is the progressive record on race relations.[10] *Third* is a belief in broad political participation – a characteristic that is even more prominent today than during the original Progressive Era, and that applies to both economic and political markets. Finally is a strong commitment to institutionalism, or the idea that traditional markets are only one of the many ways by which resources move through society. One manifestation of progressive institutionalism is its increased reliance on public decision making by sector-specific government agencies.[11] To one degree or another progressives from every period have defended these principles, while progressivism's critics have diminished them.

Progressives have almost always argued for a mixed economy, valuing markets as the primary mechanism for deploying resources, but with a broader conception of market failure and greater confidence in regulatory alternatives than were held by most political opponents on the right.[12] Progressives generally occupy a position between socialists, who believe that most elements of production should be state controlled; and extreme laissez faire, which would leave everything except a small number of stringently defined public goods to the market. When marginalism overran economics in the early twentieth century its immediate impact was to displace an economic ideology committed to the robustness of markets, with one that saw markets as more fragile and intervention as more desirable.[13] Many of the early British

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MODERN STATE, 1888-1910, 8 OLIVER WENDELL HOMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 138 n. 94 (1993). President Roosevelt was complaining about Holmes's dissenting opinion in United States v. Northern Securities, 193 U.S. 197 (1904).

[9] *See* HERBERT HOVENKAMP, THE OPENING OF AMERICAN LAW: NEOCLASSICAL LEGAL THOUGHT, 1870-1970 at 25-35 (2015).

[10] *See*, e.g., Herbert Hovenkamp, *Racism and Public Law in the Progressive Era*, ___ Ariz. L. Rev. ___ (2017), currently available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2812257).

[11] *See* Herbert Hovenkamp, *Appraising the Progressive State*, 102 IOWA L. REV. 1063 (2017).

[12] *See*, e.g., JACOB S. HACKER AND PAUL PIERSON, AMERICAN AMNESIA: HOW THE WAR ON GOVERNMENT LED US TO FORGET WHAT MADE AMERICA PROSPER (2016); and Herbert Hovenkamp, *book review*, NEW RAMBLER (May 9, 2016).

[13] HOVENKAMP, OPENING, supra note 9.

marginalists became socialists[14] Those views moderated over time, however, as marginalist economics became both more technical and more preoccupied with foundational assumptions.[15] Today marginalism dominates the entire field of economics and has been able to accommodate both interventionist and laissez faire schools of thought. That is to say, today we are all marginalists, although we are not all progressives.

Overall, progressive administrations have produced an impressive economic record, at least when compared with real world alternatives. Since the late 1920s when current data on GDP growth were first collected, economic growth during Democrat administrations has been roughly double by that measure than growth during Republican administrations.[16] Both Herbert Hoover and Franklin D. Roosevelt, the first two presidents within this reporting period, should probably be regarded as outliers. The onset of the Great Depression dominated Hoover's term in office, giving his administration the most negative GDP numbers in the twentieth century, approximately -10%. By contrast, Roosevelt presided over both the recovery and the lead-up to World War II, giving him the most positive numbers, approximately +8%.[17] If one strikes both of them off, GDP growth during Democratic administrations is roughly 1.7 times GDP growth during Republican administrations.[18] The same thing can be said about job creation, an alternative measure. Democrat administrations have overseen the creation of roughly twice as many private sector jobs per time period as Republican administrations.[19]

To be sure, these data oversimplify and distort in a number of ways. First, there too few data points. The period since 1928 encompasses about ninety years but only fifteen presidential administrations.[20] Second, the data align progressivism with the Democrats and non-Progressivism with Republicans, even though there is substantial overlap and nuance to complicate these distinctions. As noted above, progressivism did not become strongly identified with the Democratic Party until the final quarter of the twentieth century. Third, the data identify the period with occupancy of the White House, ignoring Congress. In sum, these data are hardly conclusive about progressive economic performance.[21] But they certainly are sufficient to belie any critique to the effect that progressive statecraft is bad for the economy, at least when

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[14]*Id*. at 208-209; Prue Kerr, *Joan Robinson and Socialist Planning in the Years of High Theory*, 31 CAMBRIDGE J. ECON. 489 (2007).

[15]HOVENKAMP, OPENING, *supra*, note 9 at 91-105, 110-114.

[16]Statistics are summarized in Hovenkamp, *Appraising*, *supra* note 11; and more fully developed in Alan S. Blinder and Mark W. Watson, *Presidents and the U.S. Economy: An Econometric Exploration* (July 2014), available at http://www.princeton.edu/~mwatson/papers/Presidents_Blinder_Watson_July2014.pdf. *See also The Economy Under Democratic and Republican Presidents*, Joint economic Committee on Banking, United States Congress (March 2016), available at http://www.jec.senate.gov/public/_cache/files/aa8a57a8-ac12-45c8-8f72-b3261c4c798a/jec-fact-sheet---the-economy-under-democratic-vs.-republican-presidents.pdf ("the economy has performed much better during Democratic administrations. Economic growth, job creation and industrial production have all been stronger.").

[17]Hovenkamp, *Appraising*, *supra* note 11.

[18]Blinder and Watson, *supra* note 16.

[19]Hovenkamp, *Appraising*, *supra* note 11.

[20]Hoover, FDR, Truman, Eisenhower, Kennedy, LBJ, Nixon, Ford, Carter, Reagan, Bush I, Clinton, Bush II, Obama, Trump.

[21]Indeed, the authors of the original study were agnostic about causation, disclaiming any explanation that credits democrats with superior economic policy in these areas. Blinder and Watson, *supra* note 16.

compared with real world alternatives. Critiques of Progressive economic performance too often suffer from a Nirvana fallacy, which compares them to an imagined perfect free market regime that has never existed, rather than the ones that non-progressives actually achieved.[22]

The progressive record in *antitrust* policy tells a different story than the macroeconomic data, however, particularly prior to the Clinton administration. Not only have progressives been expansionist in antitrust policy, they also pursued policies that did not fit well into any coherent vision of the economy, often in ways that hindered rather than furthered competitiveness and economic growth, and that injured the very interest groups it was designed to protect. For much of its history progressive antitrust policy has exhibited fairly strong special interest protectionism.

This article very briefly assesses the historical record of progressive antitrust policy. Then it turns to a critique, concluding that although the progressive State's expanded ideas about the role of regulation may be justified, as a general matter these views should not spill into antitrust policy. Rather, the country is best served by a more-or-less neoclassical antitrust policy with consumer welfare, or output maximization, as its guiding principle. Not only is such a policy consistent with overall economic growth, it is also more likely to provide resistance against special interest capture, which is a particular vulnerability of the progressive State.

The Progressive Antitrust Record

The Sherman Act was passed in 1890, prior to the beginning of the Progressive Era and reflected largely populist concerns.[23] Although both Gilded Age populism and progressivism tilted left in important respects, there were sharp differences between them. Populism was to a much greater extent politics in the raw, with small business, including farmers, being the principal interest groups seeking protection. The perceived threats were big business, focused mainly on the railroads and banks. Populism was initially heavily agrarian, and became aligned with the much more urban labor movement only later.[24] As most populist movements, it was also quite anti-intellectual, strongly suspicious of higher learning.[25] By contrast, progressivism immediately infiltrated American universities and became a dominant force among intellectuals, particularly students of economics and the social sciences.[26] Beginning already in the early twentieth century and accelerating through the New Deal, progressivism represented the union of

[22] *See* Hovenkamp, *Appraising*, *supra* note 11.

[23] The classic histories are HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION (1955). WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT (1981). *See also* RUDOLPH J.R. PERITZ, COMPETITION POLICY IN AMERICA, 1888–1992: HISTORY, RHETORIC, LAW (1996). For a briefer history, more focused on the interest group question, *see* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE, Ch. 2 (5th ed. 2016). On the economic foundations of historical United States Antitrust Policy, *see* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937 (1991).

[24] *See, e.g.*, WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 40-48 (1989).

[25] *See* RICHARD HOFSTADTER, ANTI-INTELLECTUALISM IN AMERICAN LIFE 34-51, 151-155 (1962).

[26] *See* MARY O. FURNER, ADVOCACY AND OBJECTIVITY: A CRISIS IN THE PROFESSIONALIZATION OF AMERICAN SOCIAL SCIENCE, 1865-1905 (1975); DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE (1991).

big universities and big government that has been a powerful feature of America's political and ideological landscape ever since.

The first twenty-five years of American antitrust policy under the Sherman Act lacked direction. Richard Olney, the first Attorney General charged with enforcing the statute, was completely unenthusiastic.[27] With Olney's support, the Sherman Act was used most frequently as a union-busting device,[28] which hardly seems consistent with its populist roots. When Olney departed in 1895 to become Secretary of State during the Cleveland and later McKinley administrations, enforcement picked up. Cartels[29] and some mergers[30] were condemned, and a little later two large monopolies were dismantled.[31] However, neither government enforcers nor the Supreme Court used antitrust to challenge patent practices.[32]

The first set of explicitly progressive antitrust reforms were the Clayton Act and the Federal Trade Commission Act, both passed in 1914 during Woodrow Wilson's first term.[33] The Clayton Act's provisions included a now largely discredited theory of predatory price discrimination;[34] heightened scrutiny of tying arrangements and exclusive dealing, which started out soundly enough but went off the rails during the New Deal;[35] a more aggressive but largely unsuccessful anti-merger provision;[36] and a largely unsuccessful attempt to create a labor immunity from antitrust prosecution.[37] By contrast, the Federal Trade Commission Act created a government investigatory and enforcement agency, foreshadowing the proliferation of agencies that developed during the New Deal.[38]

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[27]*See* LETWIN, LAW AND ECONOMIC POLICY, *supra* 117-143; Scott C. James, *Prelude to Progressivism: Party Decay, Populism, and the Doctrine of "Free and Unrestricted Competition" in American Antitrust Policy, 1890-1897*, 13 STUDIES IN AMERICAN POLITICAL DEVELOPMENT 288 (1999).

[28]For example, Olney used a Sherman Act injunction against the Pullman railroad strike. *See* Herbert Hovenkamp, *Labor Conspiracies in American Law, 1880-1930*, 66 TEX. L. REV. 919 (1988). For contemporary perspective, see Allyn A. Young, *The Sherman Act and the New Anti-Trust Legislation*, 23 J. POL. ECON. 417, 420 (1915); James A. Emery, *Labor Organizations and the Sherman Law*, 20 J. POL. ECON. 599, 612 (1912).

[29]United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897); United States v. Joint Traffic Ass'n., 171 U.S. 505 (1898); United States v. Addyston Pipe & Steel co., 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

[30]Northern Securities Co. v. United States, 193 U.S. 197 (1904).

[31]Standard Oil Co. v. United States, 221 U.S. 1 (1911); United States v. American Tobacco Co., 221 U.S. 106 (1911).

[32]Henry v. A.B. Dick Co., 224 U.S. 1 (1912) (approving patent tie); E. Bement & Sons v. National Harrow Co., 186 U.S. 70 (1902) (approving product price fixing in patent license). *See* Herbert Hovenkamp, *The Emergence of Classical American Patent Law*, 58 ARIZ. L. REV. 263, 284-288 (2016).

[33]Clayton Act, codified at 15 U.S.C. §§12-27; Federal Trade Commission Act, codified at 15 U.S.C. §§41-58.

[34]15 U.S.C. §13; *see* discussion *infra*, text at notes 65-79.

[35]*See* discussion *infra*, text at notes 47-48.

[36]15 U.S.C. §18. The original provision reached only stock acquisitions, not asset acquisitions, and did not apply to vertical mergers. As a result, it was effectively hobbled until amended in 1950. See 4 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶902-903 (4th ed. 2016); and United States v. Columbia Steel Co., 334 U.S. 495 (1948).

[37]Hovenkamp, *Labor Conspiracies*, *supra* note 28.

[38]*See* GERARD C. HENDERSON, THE FEDERAL TRADE COMMISSION (1924)

Ideologically, this early legislative record was fairly moderate. The substantive Clayton Act provisions provided a set of "effects" tests for anticompetitive practices. These served to migrate United States antitrust policy away from the Sherman Act's intent based doctrine that strongly reflected common law tort theory.[39] Each of the Clayton Act's substantive provisions condemned a practice "where the effect may be substantially to lessen competition or tend to create a monopoly."[40] The FTC Act was also intended to use economic expertise to reach a broader set of practices than those condemned by the Sherman Act, although that potential was largely unrealized until the Warren Court era.[41]

The early progressives were the first to see competition issues in certain uses of intellectual property rights, but these concerns were quite moderate when compared to what happened during and after the Second New Deal. Prior to passage of the Clayton Act the Supreme Court held a very benign attitude toward anticompetitive patent practices, although most litigants apparently did not see the antitrust issues. In *Bement* (1902) the Supreme Court upheld product price fixing when the price fixing agreement was contained in a patent cross-license.[42] Six years later it approved a dominant firm's practice of buying up competing patents in its primary technology, allowing them to lie unused, and then obtaining injunctions against rivals based on these unused patents.[43] And in 1912 it found no antitrust issue raised by a tying arrangement in which the patentee conditioned the use of its patented mimeograph machine on the user's exclusive use of its ink, stencils, and paper.[44]

The last two of these cases attracted the attention of Congress, however, and the 1914 Clayton Act prohibited tying arrangements involving patented goods "where the effect may be substantially to lessen competition…."[45] The Supreme Court responded by reversing itself in the *Motion Picture Patents* case, striking down an arrangement in which the owners of the Edison film projection technology required users of the machine to show only its own films.[46] That particular case very likely involved an appropriate application of competition policy,[47] but during

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[39]*See* 1 RICHARD S. MARKOVITS, ECONOMICS AND THE INTERPRETATION AND APPLICATION OF U.S. AND E.U. ANTITRUST LAW 88 (2014); *and see* Herbert Hovenkamp, *Reimagining Antitrust: the Revisionist Work of Richard S. Markovits*, 94 TEX. L. REV. 1221 (2016).

[40]15 U.S.C. §§13, 14,18 (using similar effects language for price discrimination, tying, and mergers).

[41]FTC v. Brown Shoe Co., Inc., 384 U.S. 316 (1966) (FTC Act reaches more broadly than Sherman Act).

[42]Bement v. Nat'l Harrow Co., 186 U.S. 70 (1902).

[43]Cont'l Paper Bag Co. v. E. Paper Bag Co., 210 U.S. 405 (1908).

[44]Henry v. A.B. Dick Co., 224 U.S. 1 (1912).

[45]5 U.S.C. §14. *See* Herbert Hovenkamp, *Patent Exhaustion and Federalism: A Historical Note*, 102 VIRGINIA L. REV. ONLINE 25, 28-29 (2016).

[46]Motion Pictures Patents Co. v. Universal Film Mfg. Co., 243 U.S. 504 (1917), *overruling* Henry v. A.B. Dick Co., 224 U.S. 1 (1912).

[47]The Court did not really "apply" the Clayton Act. Rather it found patent "misuse" but was persuaded by the fact that Congress had reached a similar conclusion. See id. at 517:

> We are confirmed in the conclusion which we are announcing by the fact that since the decision of Henry v. A. B. Dick Co. supra, the Congress of the United States, the source of all rights under patents, as if in response to this decision, has enacted a law making it unlawful for any person engaged in interstate commerce 'to lease or make a sale or contract for sale of goods, . . *whether patented or unpatented*, … on the condition, agreement or understanding that the lessee or purchaser thereof shall not use . . . the goods . . . of a competitor … where the effect of such

and after the Second New Deal patent tying policy became untethered from any realistic conception of competition policy, condemning ties when there was no reasonable possibility that the products in question could ever be monopolized.[48]

Antitrust Policy and the New Deal

Antitrust policy became much less moderate during the New Deal – and in both directions. Roosevelt's short-lived "First" New Deal was characterized by a remarkable lack of enthusiasm for antitrust enforcement.[49] The First New Deal's approach to business reflected an ideology of associationalism, or managed competition, which was in significant part a leftover from the Hoover administration.[50] Starting with the premise that the Depression was caused by excess capacity and overproduction, associationalism valued trade associations as a way of limiting output.[51] Rule making by these associations, which closely monitored output and price, walked a very thin line between "managing" competition and outright collusion. Suffice it to say that within a policy obsessed with overproduction a neoclassical antitrust concern with maintaining high output was not a good fit.[52]

Associationalist policy came to an abrupt end with the onset of the Second New Deal and FDR's installation of Thurman Arnold as head of the Antitrust Division in 1938.[53] Politically, the sudden switch may very well have been triggered by the Supreme Court's hostile reaction toward associational policies intended to limit output, reflected in the *Panama Refining* and *Schechter* decisions.[54] By that time, however, it seemed pretty clear that managed competition was not working. These policies would very likely have fallen of their own political weight had the Supreme Court not killed them.[55] In any event, FDR had become disenchanted with output limitation as a cure for the depression and turned to the opposite course, which was the output stimulating options offered by John Maynard Keynes.[56]

Thurman Arnold's Antitrust Division rewrote public antitrust enforcement policy. No antitrust enforcement agency before or since has had such a strong conception of market failure

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lease, sale … may be to substantially lessen competition or tend to create a monopoly in any line of commerce.' (38 Stat. at L. 730, chap. 323.)

[48]*See* discussion *infra*, text at notes 84-86.

[49]*See* HOVENKAMP, OPENING, *supra*, note 9 at 208-212; ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE 373 (1966).

[50]*See* Ellis W. Hawley, *Herbert Hoover and the Sherman Act, 1921-1933: an Early Phase of a Continuing Issue*, 74 IOWA L. REV. 1067 (1989); Ellis W. Hawley, *Herbert Hoover, the Commerce Secretariat, and the Vision of an "Associative State*," 1921-1928, 61 J. AM. HIST. 116 (1974).

[51]The leading legal theoretician of associationalism was Arthur Jerome Eddy, author of THE NEW COMPETITION: AN EXAMINATION OF THE CONDITIONS UNDERLYING THE RADICAL CHANGE THAT IS TAKING PLACE IN THE COMMERCIAL AND INDUSTRIAL WORLD (1912).

[52]*See* HOVENKAMP, OPENING, *supra* note 9 at 210.

[53]*See* IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME 229-241 (2014); SPENCER WEBER WALLER, THURMAN ARNOLD: A BIOGRAPHY (2005).

[54]Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); Schechter Poultry Co. v. United States, 295 U.S. 495 (1935).

[55]*See* HOVENKAMP, OPENING, *supra* note 9 at 284-285.

[56]*See* WILLIAM J. BARBER, DESIGNS WITHIN DISORDER: FRANKLIN D. ROOSEVELT, THE ECONOMISTS, AND THE SHAPING OF AMERICAN ECONOMIC POLICY, 1933-1945 at 48-58 (2006); HOVENKAMP, OPENING, *supra* note 9 at 270-288.

or faith in antitrust policy as the corrective. Some of the very industrial associations that the first New Deal had facilitated became the subject of antitrust attack.[57] Under Arnold's leadership antitrust developed an expansive theory of competitive harm, launching full scale attacks on vertical integration,[58] oligopoly,[59] and perceived abuses of intellectual property rights, particularly patents.[60] These views were also strongly reflected in the seventy-three volumes of TNEC economic studies and hearings, which blasted industrial concentration, vertical integration, and patents as sources of economic dysfunction.[61]

Many of the most prominent Legal Realists proselytized these views when they acquired high profile government positions.[62] Most notable were William O. Douglas, a Yale law professor who became chairman of the Securities and Exchange Commission and then a long-serving Associate Justice on the Supreme Court. Second was Jerome Frank, who was also Chairman of the Securities and Exchange Commission and then a judge on the Second Circuit Court of Appeals. Both Douglas and Frank were particularly hostile toward intellectual property rights because of their monopolistic tendencies.[63] For its part, the Antitrust Division began to pursue patent practices aggressively, obtaining antitrust condemnation for tying arrangements involving patents where there was no serious threat to competition.[64]

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[57] *E.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). On the different treatments of petroleum industry output limitations during the First and Second New Deals, *see* Danial A. Crane, *The Story of United States v. Socony-Vacuum: Hot Oil and Antitrust in the Two New Deals*, in ANTITRUST STORIES 91-119 (Eleanor M. Fox & Danial A. Crane, eds. 2008). *See also* Parker v. Brown, 317 U.S. 341 (1943) (creating "state action" antitrust exemption in order to rescue raisin allocation program created as part of First New Deal).

[58] *See* discussion *infra*, text at notes 80-90.

[59] E.g., Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939); American Tobacco Co. v. United States, 328 U.S. 781 (1946).

[60] *See* discussion *infra*, text at notes 62-63.

[61] There were 43 monographs and 30 volumes of hearings. *See, e.g.*, Roy C. Cook, *Control of the Petroleum Industry by Major Oil Companies* 51–52 (TNEC Monograph No. 39, 1941); Daniel Bertrand et al., *The Motion Picture Industry—A Pattern of Control* (TNEC Monograph No. 43, 1941); Clair Wilcox, Competition and Monopoly in American Industry 220–25 (TNEC Monograph 21, 1940). *See also Publications of the Temporary National Economic Committee*, 31 AM. ECON. REV. 347 (1941).

[62] *See* HOVENKAMP, OPENING, *supra* note 9 at 198-199.

[63] *See, e.g.*, Mercoid Corp. v. Mid-Continent Invest. Co., 320 U.S. 661 (1944) (*Mercoid I*, Douglas, J.); 320 U.S. 680 (1944) (*Mercoid II*, Douglas, J.); Standard Brands v. Smidler, 151 F.2d 34, 38-39 (2d Cir. 1945) (Frank, J., concurring); E. Wine Corp. v. Winslow-Warren, ltd., 137 F.2d 955 (2d Cir. 1943) (Frank, J.). In the latter opinion Frank argued forcefully that trademarks evidenced nothing more than protection of monopolies for the benefit of business persons).

[64] *E.g.*, Int'l Salt Co. v. United States, 332 U.S. 392 (1947). Contemporaneously, the Supreme Court applied harsh standards for patent validity. *See* Jungersen v. Ostby & Barton Co., 335 U.S. 560, 566 (1949) (requiring "inventive genius," and provoking Justice Jackson's famous statement in dissent that "the only patent that is valid is one which this Court has not been able to get its hands on."). For good critiques, *see* WARD S. BOWMAN, JR., PATENT AND ANTITRUST LAW: A LEGAL AND ECONOMIC APPRAISAL 239-56 (1973); William F. Baxter, *Legal Restrictions on Exploitation of the Patent Monopoly: An Economic Analysis*, 76 YALE L.J. 267, 312-13 (1966). *See also* United States v. Univis Lens Co., 316 U.S. 241 (1942) (condemning resale price maintenance of patented intermediate goods); United States v. New Wrinkle, Inc., 342 U.S. 371 (1952) (similar).

The Robinson-Patman Act

Congress also played a significant role in the formation of New Deal antitrust policy. Its most important antitrust legislation during this era was the 1936 Robinson-Patman Act. In it Congress targeted "price discrimination"[65] by amending §2 of the Clayton Act. This made it one of the "antitrust laws," even though the case law that developed under it became inconsistent with fundamental antitrust principles.[66]

The ideology of the Robinson-Patman Act was closely aligned with that of the National Industrial Recovery Act's Codes of Fair Competition. These Codes tended to regard as unfair any form of price cutting that imposed hardship on smaller competitors.[67] The original section of the Clayton Act, which the Robinson-Patman Act substantially modified, had been based on a theory of predatory price discrimination under which a large firm such as Standard Oil would drive competitors out of business by charging a very low price in a competitor's town, subsidizing the predatory price cuts by charging high prices in a town where it already had a monopoly.[68] In this way it was thought a dominant firm could expand its monopoly. This price discrimination theory of predatory pricing is highly controversial, with many critics arguing that it is economically senseless.[69] Today actions brought under this theory are called "primary line," denoting that the defendant and the victim (usually the plaintiff) are competitors, and thus at the same distribution level.[70]

The 1936 amendments to §2 of the Clayton Act, sponsored by Senator Joseph T. Robinson (Democrat, Arkansas) and Representative Wright Patman (Democrat, Texas), contemplated a completely unrelated practice – namely, injuries suffered by a dealer forced to pay a higher wholesale price than competing dealers purchasing from the same seller. The statute was the principal piece of federal antitrust legislation emanating from the anti-chain store movement, and was initially intended to limit the buying practices of large grocery chains, most notably A & P.[71] Its principal drafter was H. B. Teegarden, who was not affiliated with Congress, but was general counsel for the United States Wholesale Grocers Association, a

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[65]While the statute denominated the practice it condemned "price discrimination," in fact it reached simple differences in price. Economic price discrimination occurs when two sales have different ratios of price to marginal (variable) cost.

[66]15 U.S.C. §13. On the many inconsistencies between the Robinson-Patman Act and basic antitrust goals, *see* 14 HERBERT HOVENKAMP, ANTITRUST LAW, Ch. 23 (3d ed. 2012).

[67]*See id., and* 1 THE ROBINSON-PATMAN ACT: POLICY AND LAW 14 (Paul H. La Rue, ed. 1980).

[68]The theory actually antedated the Sherman Act. *See* Frederic Jessup Stimson, *Trusts*, 1 HARV. L. REV. 132, 134 (1887) (large firm could use high prices in monopoly towns to subsidize predatory pricing in competitive towns).

[69] The critiques are summarized and evaluated in HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 23, §8.8. *See also* D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 GEO. WASH. L. REV. 2064 (2015).

[70]The most recent example in the Supreme Court is Brooke Group Ltd. V. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993). *See* 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶726 (4th ed. 2015).

[71]*See* Daniel Scroop, *The Anti-Chain Store Movement and the Politics of Consumption,* 60 AM. Q. 925 (2008). Another popular, nonantitrust legislative initiative was state statutes that taxed chain stores at progressively higher rates as the number of stores held by one company increased. *See* Liggett v. Lee, 288 U.S. 517, 565 (1933) (striking down such a statute and producing a vigorous dissent by Justice Brandeis).

powerful lobbying organization in behalf of small grocers.[72] The theory was that giant multi-store corporations were able to undersell smaller, mom & pop stores because they forced their suppliers to charge them a lower price for retail items than they charged the smaller stores.[73] The statute was so badly drafted, however, that its principal target became discriminatory selling practices rather than discriminatory buying practices.[74] The principal violators of the statute became manufacturers or distributors who sold to two different dealers in competition with each other at different prices.

The Robinson-Patman Act differed from previous antitrust statutes in one important respect. While the Sherman Act and the Clayton Act had substantial interest group support, in both cases the statutory language that emerged was brief and at least verbally consistent with sound economics. The Sherman Act prohibited agreements that "restrain trade" in §1 and that "monopolize" in §2. The Clayton Act prohibited practices whose "effect may be substantially to lessen competition." In contrast, the Robinson-Patman Act was much more detailed and explicitly embraced a more private theory of injury, which was price discrimination whose effect may be "to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them…."[75] For example, if a favored dealer received a price of $10, all the statute required was that a disfavored dealer was required to pay more and that it was thus injured in its ability to compete with the favored dealer. Nothing in the statute required an injury to competition in the economic sense, which would be lower output or higher prices. Indeed, the statute was routinely applied in highly competitive markets where no such injury was likely.[76] Because it contained no market power requirement it could be applied against small and large sellers alike.[77]

Public enforcement of the Robinson-Patman Act proved to be even more anticompetitive than the statute itself contemplated. For example, it was interpreted to prohibit quantity discounts if some buyers were too small to qualify for the largest discount.[78] The Federal Trade Commission even interpreted the statute to condemn "backhaul" allowances, which were discounts given to buyers who agreed to pick up their own goods rather than having them

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[72]*See* FREDERIC ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 11-12 & n. 38 (1962); CORWIN D. EDWARDS, THE PRICE DISCRIMINATION LAW 22 (1959). *See* Statement of Rep. Patman that "Mr. Teegarden wrote this bill." Hearings on H.R. 8442, H.R. 4995, H.R. 5062 to Amend the Clayton Act before the House Comm. On the Judiciary, 74th Cong., 1st Sess. 9 (1935).

[73]*See* FTC, *Final Report on the Chain-Store Investigation*, S.doc. No. 4, 74th Cong. 1st Sess. (1935).

[74]Buyers' liability was added as a "belated floor amendment." 15 U.S.C. §13(f). *See* ROWE, *supra* note 72 at 423); Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69, 75-76 (1979). *See* 14 HERBERT HOVENKAMP, ANTITRUST LAW ¶2361 (3d ed. 2012).

[75]15 U.S.C. §13.

[76]*See, e.g.*, Chroma Lighting v. GTE Prods. Corp., 111 F.3d 653, 654 (9th Cir. 1997) (summarizing case law and concluding that lack of harm to competition is not a defense in a Robinson-Patman Act case); *and see* Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 ANTITRUST L.J. 125 (2000).

[77]*See* 14 HOVENKAMP, *supra* note 74 at ¶2301b; Herbert Hovenkamp, *Market Power and Secondary-Line Differential Pricing*, 71 GEO. L.J. 115 (1983). Congress itself acknowledged the issue. *See* H.R. REP. NO. 2287, 74th Cong., 2d Sess., at 8 (1936) ("The existing law has in practice been too restrictive in requiring a showing of general injury to competitive conditions …, whereas the more immediately important concern is in injury to the competitor victimized by the discrimination.").

[78]FTC v. Morton Salt Co., 334 U.S. 37 (1948).

delivered. For example, if a buyer located in Milwaukee had its own trucks that made deliveries to Chicago, a Chicago-based seller might offer this buyer a discount if it picked up the goods on a "backhaul" – loading them onto the buyer's own empty truck after it had made a Chicago delivery and thus avoiding additional shipping costs. The problem with this practice, as the FTC saw it, is that it discriminated against other buyers who did not have trucks or make deliveries to Chicago. These would have to pay for their shipping, putting them at a competitive disadvantage.[79]

Vertical Integration and Related Practices

Vertical integration occurs when a firm does something for itself that it might otherwise purchase on the market. For example, an automobile manufacturer might integrate vertically "upstream" by purchasing or building its own spark plug manufacturing facility.[80] Or a producer of taxicabs might integrate "downstream" by acquiring its own cab operating companies.[81] Firms can integrate vertically by ownership, as when they build or acquire an upstream or downstream facility. They can also integrate vertically by means of long term "relational" contracts, such as franchise agreements or similar arrangements with independently owned dealers and suppliers.[82] Today most instances of vertical integration are regarded as competitively benign unless a firm has a virtual monopoly position in a market and threatens to use vertical control as a device for excluding rivals.

Historically, however, that has hardly been the case. One of the problems was that for much of antitrust history vertical practices were so poorly understood.[83] While economists generally recognized that vertical integration could reduce costs and improve product quality, the strong mentality of small business protectionism did not necessarily result in approval. One thing that vertical integration unquestionably did was injure smaller businesses who had not vertically integrated themselves.[84]

Antitrust policy from the New Deal through the early 1970s became an economically irrational war on vertical integration of all types. The period saw the development of per se rules against tying arrangements[85] and condemnation of practices such as exclusive dealing in competitive markets where competitive harm was virtually unthinkable. Even Justice Douglas, otherwise a progressive antitrust activist, foresaw the result of the 1949 *Standard Stations* exclusive dealing decision that required Standard Oil to permit its stations to sell multiple brands of gasoline: the refiners would respond by building their own "service station empires."[86]

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[79]*See* Advisory Opinion #147, 72 F.T.C. 1050 (1967).
[80]*See* Ford Motor Co. v. United States, 405 U.S. 562 (1972) (condemning Ford's acquisition of Autolite, a spark plug manufacturer, and ordering divestiture).
[81]United States v. Yellow Cab Co., 332 U.S. 218 (1947) (condemning cab manufacturer Checker's acquisition of Yellow Cab operating company).
[82]*See* Friedrich Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135 (1957)
[83]*See* HOVENKAMP, OPENING, *supra* note 9 at 220-241.
[84]*Ibid*. On this point, see Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 731-736 (2017) (advocating greater use of antitrust policy to condemn vertical integration for yielding excessive leverage and foreclosure, although not articulating standards).
[85]Northern Pacific Rwy. V. United States, 356 U.S. 1 (1958); Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953); *see* HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 23 at §§10.3, 10.7.
[86]Standard Oil Co. of Cal. V. United States, 337 U.S. 293, 318-320 (1949) (Douglas, J., dissenting).

Results of that sort were documented over and over: harsh antitrust conditions restricting vertical long-term contracting forced firms to build their own dealerships. In the process, they completely destroyed the very small, locally owned businesses that the decisions were intended to protect.[87]

The law of vertical mergers suffered a similar fate. For example, in the *Du Pont (GM)* case the Supreme Court, acting at the behest of the government, condemned a merger between du Pont and General Motors on the theory that GM would favor Du Pont as a supplier when it made purchase decisions for automobile fabrics and paints.[88] Or in the *A&P* case the Seventh Circuit embraced the government's allegation that vertical integration by A&P permitted the grocery chain to acquire food products "at cost" while others had to pay significant markups.[89] In this and several similar cases the government and the Court completely lost sight of the fact that a principal reason firms integrated vertically is in order to eliminate market transactions by dealing with each other.[90] The very cost savings that vertical integration offered became the rationale for antitrust condemnation.

The Warren Court Era

The antitrust jurisprudence of the Warren Court (1954-1969) inherited most of the New Deal's antitrust initiatives and added some new ones. Most noticeably was its treatment of economic efficiency almost as an affirmative evil rather than a goal to be pursued. This was coupled with an antitrust policy that was intended to protect small business at the expense of consumers, manifested by an aggressive merger policy that condemned mergers even among very small firms. One good illustration is *Brown Shoe*, a government-brought merger case in which the Supreme Court agreed that a merger should be condemned precisely because it enabled the post-merger firm to undersell smaller rivals. In condemning the merger, the District Court had written:

> [I]ndependent retailers of shoes are having a harder and harder time in competing with company-owned and company-controlled retail outlets. National advertising by large concerns has increased their brand name acceptability and retail stores handling the brand named shoes have a definite advertising advantage. Company-owned and company-controlled retail stores have definite advantages in buying and credit; they have further advantages in advertising, insurance, inventory control . . . and price control. These advantages result in lower prices or in higher quality for the same price and the independent retailer can no longer compete….[91]

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[87]*See* Herbert Hovenkamp, *The Law of Vertical Integration and the Business Firm: 1880-1960*, 95 IOWA L. REV. 863, 884-885 (2010).

[88]United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 588-589 (1957). According to the government's allegation du Pont "formed the combination with General Motors with the intention of getting a preference in the trade of General Motors." *Brief for the United States* 113, 1956 WL 88967.

[89]United States v. N.Y. Great Atl. & Pac. Tea Co., 173 F.2d 79, 85 (7th Cir. 1949).

[90]*Accord* United States Yellow Cab Co., 332 U.S. 218 (1947); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

[91]United States v. Brown Shoe, 179 F. Supp. 721, 738 (E.D.Mo. 1959). In approving this reasoning, the Supreme Court wrote:

The Warren Supreme Court was hardly an island. *Brown Shoe*, just as nearly all of the merger cases of the Era, had been brought by the United States government, which had articulated a *public* interest in preventing post-merger firms from charging lower prices than their rivals would be able to meet.[92] The Democrat-controlled Congress itself had reflected these concerns in 1950 when it amended the merger statute.[93] It spoke not of efficiency or high consumer prices but rather of the "rising tide of industrial concentration" – an evil that it apparently regarded as worth condemning for its own sake.[94]

The same thing occurred in the law of distribution by vertical contract. The *Schwinn* case applied the Sherman Act to condemn a manufacturer's attempts to restrict the geographic areas in which individual dealers could operate – in this case of a declining bicycle manufacturer with a non-dominant market position. Once again, the government was the challenger.[95] In *Albrecht*, another one of the more harmful antitrust decisions of the Warren Era, the Court condemned

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> In an industry as fragmented as shoe retailing, the control of substantial shares of the trade in a city may have important effects on competition. If a merger achieving 5% control were now approved, we might be required to approve future merger efforts by Brown's competitors seeking similar market shares. The oligopoly Congress sought to avoid would then be furthered and it would be difficult to dissolve the combinations previously approved. Furthermore, in this fragmented industry, even if the combination controls but a small share of a particular market, the fact that this share is held by a large national chain can adversely affect competition. Testimony in the record from numerous independent retailers, based on their actual experience in the market, demonstrates that a strong, national chain of stores can insulate selected outlets from the vagaries of competition in particular locations and that the large chains can set and alter styles in footwear to an extent that renders the independents unable to maintain competitive inventories. A third significant aspect of this merger is that it creates a large national chain which is integrated with a manufacturing operation. The retail outlets of integrated companies, by eliminating wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, can market their own brands at prices below those of competing independent retailers. Of course, some of the results of large integrated or chain operations are beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.

Brown Shoe, 370 U.S. at 343-344. *Cf.* the Federal Trade Commission's decision in In re Foremost Dairies, Inc., 60 F.T.C. 944, 1084 (1962) (condemning a merger because the efficiencies that resulted would give the post-merger firm a "decisive advantage … over … smaller rivals").

[92]*See Brief for the United States* 136-137, *Brown Shoe*, 1961 WL 101890; and Herbert Hovenkamp, *The Law of Vertical Integration and the Business Firm: 1880-1960*, 95 IOWA L. REV. 863, 910 (2010).

[93]Celler-Kefauver Act, Pub. L. No. 81-899, 64 Stat. 1125 (1950) (rewriting §7 of the Clayton Act).

[94]*See* Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 247 (1960) ("Underlying the legislative deliberations was the conviction that small business and the dispersion of economic power are salutary and should be encouraged by the new section 7."); Herbert Hovenkamp, *Derek Bok and the Merger of Law and Economics*, 21 UNIV. MICH. J.L. REFORM 515, 521-522 (1988).

[95]United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), *overruled* by Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977). *See* HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 23 at §11.6.

manufacturer attempts to control their dealer's *maximum* prices.[96] Neither *Schwinn* nor *Albrecht* seriously attempted to locate their rationales in any antitrust policy concerned with low consumer prices or even promotion of economic welfare. Rather, the articulated concerns were restraints on alienation and the freedom of small dealers to exercise their own independent business judgment.

The Democrat Party Platform, 2016

The concerns about industrial concentration articulated above might seem like ancient history were it not that they reappeared in the 2016 Platform of the Democratic Party, at least nominally supported by the Hillary Clinton campaign.

The antitrust platform of the Democratic Party for the 2016 Presidential Election was longer and more detailed than any antitrust plank since the Progressive Era. It was also a worrisome step back, however, to the extent that it identified "corporate concentration" rather than high prices as the principal problem to be addressed.[97] The plank speaks at length about the need to stop "corporate concentration," but with little mention of consumer welfare, output, or prices.

The problem with articulating concerns in this fashion is that they are ambiguous about the constituency to be protected, although frankly that may have been intended. To the extent that economic concentration produces fewer firms per market, competition might of course be

[96]Albrecht v. Herald Co., 390 U.S. 145 (1968), *overruled* by State Oil Co. v. Khan, 522 U.S. 3 (1997). For a good discussion, *see* Roger D. Blair and John E. Lopatka, *The Albrecht Rule After Khan: Death Becomes Her*, 74 NOTRE DAME L. REV. 123 (1998); *and see* HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 23 at §11.5c.

[97] The full text of the platform's antitrust plank reads:

> **Promoting Competition by Stopping Corporate Concentration**
>
> Large corporations have concentrated their control over markets to a greater degree than Americans have seen in decades—further evidence that the deck is stacked for those at the top. Democrats will take steps to stop corporate concentration in any industry where it is unfairly limiting competition. We will make competition policy and antitrust stronger and more responsive to our economy today, enhance the antitrust enforcement arms of the Department of Justice (DOJ) and the Federal Trade Commission (FTC), and encourage other agencies to police anti-competitive practices in their areas of jurisdiction. We support the historic purpose of the antitrust laws to protect competition and prevent excessively consolidated economic and political power, which can be corrosive to a healthy democracy. We support reinvigorating DOJ and FTC enforcement of antitrust laws to prevent abusive behavior by dominant companies, and protecting the public interest against abusive, discriminatory, and unfair methods of commerce. We support President Obama's recent Executive Order, directing all agencies to identify specific actions they can take in their areas of jurisdiction to detect anticompetitive practices—such as tying arrangements, price fixing, and exclusionary conduct—and to refer practices that appear to violate federal antitrust law to the DOJ and FTC.

https://www.demconvention.com/wp-content/uploads/2016/07/Democratic-Party-Platform-7.21.16-no-lines.pdf. A separate section of the platform dealing with pharmaceutical pricing speaks of pay-for-delay settlements, but it is not clear whether the platform is proposing a stronger antitrust solution or simply legislation that would ban them outright.

blunted and consumers would pay higher prices. Small business would generally benefit from their larger rivals' higher prices. Through the history of the antitrust laws, however, phrases such as "economic concentration" or "corporate concentration" have been code for small business protectionism. For example, the *Brown Shoe* merger case which condemned a merger because it enabled the post-merger firm to charge lower prices, also identified Congress' central concern in amending the merger statute as the increasing business concentration.[98] Clearly, however, the concern was *not* that concentrated markets produce higher prices that injure consumers, but rather that large firms could take advantage of efficiencies that permit them to charge lower prices, thus benefitting consumers but harming smaller rivals.

The Progressive State and Antitrust Welfare Tests

While embracing progressive rhetoric generally, both the Clinton and Obama administrations were far more cautious in antitrust. This was true for several reasons. First was limitations imposed by a Supreme Court that was much less enthusiastic about antitrust policy during the Chief Justiceships of Rehnquist and Roberts than during those of Chief Justice Vinson, Warren, or even Chief Justice Burger. Second was an increasing alignment between the Democratic Party and American business as the Republican party drifted more toward populism.

Third, and more fundamentally, antitrust policy during the Clinton and Obama administrations explicitly embraced consumer welfare as an antitrust model for enforcement.[99] For example, policy guidelines for merger enforcement issued by the Reagan administration in 1982[100] and revised in 1984[101] both articulated an efficiencies defense for mergers, but described it in only general terms, saying little about how relevant efficiencies must be measured. When the efficiencies statement in the Merger Guidelines was again revised in 1997, during the Clinton Administration, it re-defined qualifying efficiencies under a consumer welfare test: efficiencies would be recognized only if they were sufficient to produce post-merger prices that were no higher than prior to the merger.[102] That definition is preserved in the current 2010 Guidelines issued during the Obama administration.[103] The result is that the standard that governs both

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[98] *Brown Shoe*, 370 U.S. at 315. On *Brown Shoe*, *see* discussion *supra*, text at notes 90-91.

[99] See, e.g. , Anne K. Bingaman, *Change and Continuity in Antitrust Enforcement* (speech by Head of Clinton Administration Antitrust Division, Oct. 21, 1993), available at https://www.justice.gov/atr/speech/change-and-continuity-antitrust-enforcement (advocating consumer welfare approach); Anne K. Bingaman, *Report from the Antitrust Division*, Spring, 1994 (April 8, 1994), available at https://www.justice.gov/atr/file/519441/download (same); Assistant Attorney General Bill Baer Remarks at Chatham House, June 18, 2015, available at https://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-remarks-chatham-house-annual-antitrust (Head of Obama Administration Antitrust Division, promoting consumer welfare as antitrust goal).

[100] United States Department of Justice, 1982 Merger Guidelines V., available at https://www.justice.gov/archives/atr/1982-merger-guidelines.

[101] United States Department of Justice, 1984 Merger Guidelines §3.5, available at https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11249.pdf.

[102] United States Department of Justice and Federal Trade Commission, 1992 Horizontal Merger Guidelines, revised April 8, 1997, §4, available at https://www.ftc.gov/sites/default/files/attachments/merger-review/hmg.pdf.

[103] United States Depatment of Justice and Federal Trade Commission, Horizontal Merger Guidelines §10 (Aug. 19, 2010), available at https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.

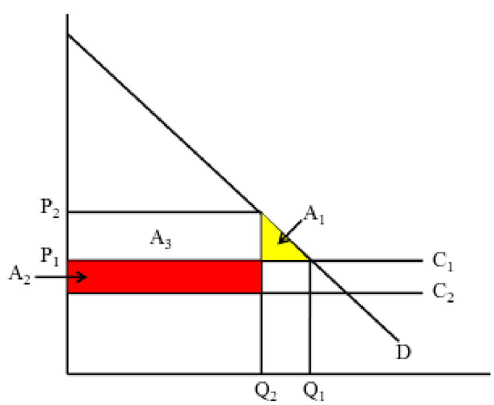
substantive merger analysis and the efficiencies defense is impact on consumer prices. If a merger is reasonably expected to raise prices, it will be challenged.

The Meaning of "Consumer Welfare"

When economists speak of "welfare," they usually mean Pareto optimality, Kaldor-Hicks efficiency, or some closely related concept of "general" or "total" welfare. What all these conceptions share is that welfare includes the surplus, or wealth net of costs, enjoyed by both producers and consumers. For example, under Kaldor-Hicks efficiency, sometimes called potential Pareto efficiency, a move is efficient is all gainers gain enough to compensate all losers fully, leaving them indifferent. Actual compensation is not required, but only that the gains be sufficiently large to produce compensation necessary to make everyone either a winner or indifferent.

By contrast, consumer welfare looks only at one blade of the scissors. If consumers lose from a practice then it is counted as inefficient, or anticompetitive, even if producers gain more than consumers lose. The consumer welfare model is fundamentally neoclassical in its understanding of markets, but it articulates the goal of antitrust as higher output and thus lower prices. So in the classic example, suppose a merger of two large firms creates significant market power, raising prices by a total amount of $1000. This merger also produces savings in production costs of $1200, however. So the amount that producers gain in productive efficiency exceeds the amount that consumers lose. This merger would be proclaimed efficient under a general welfare standard because it produces net gains. It would be anticompetitive and unlawful under a consumer welfare standard, however, because it produces consumer losses and we disregard the producer gains. The most salient characteristic of this merger analyzed under a consumer welfare test is that it reduces output.

In a well known article in 1968 Oliver Williamson illustrated such a result, using a variant of this figure:[104]



A1= deadweight loss from monopoly
A2=production efficiency gains

[104]Oliver E. Williamson, *Economies as an Antitrust Defense: the Welfare Trade-Offs*, 58 AM. ECON. REV. 18 (1968).

The figure illustrates a market that was competitive prior to a merger, joint venture, or other antitrust practice that simultaneously produced market power and cost savings. Prior to this merger the market was competitive with price (P_1) equal to cost (C_1). The merger did two things simultaneously. First, it created market power enabling the firms to raise their price to P_2. Second, however, it produced efficiency gains facilitating a cost reduction to C_2. In the figure the triangle A_1 is the "deadweight loss," or efficiency loss occasioned by the price increase and corresponding output reduction. Rectangle A_2, by contrast, is the gains in productive efficiency. Rectangle A_3 measures the higher prices paid by consumers, but these are a "wash" because they represent losses to consumers that are precisely offset by producer gains. Even though this merger raises prices, it is efficient if rectangle A_2 is larger than triangle A_1. Williamson surmised that this might often be the case. Stated in this way, the case for a general welfare test seems quite appealing.

There are numerous problems with the Williamson model, however. First, it presumes a market that was perfectly competitive prior to the merger and monopolized thereafter. The effect of pre-merger perfect competition is to minimize the amount of consumer harm because the lost sales are taken away from marginal consumers who place a very low value on the product.[105] If price-cost margins were significantly higher prior to the merger (shifting Q_2 and Q_1 to the left), then the amount of wealth taken from consumers would be higher and the gains enjoyed by the producers would be less because they would be spread over lower remaining output.[106] A merger or other antitrust practice such as Williamson illustrated, which shifted a market from perfectly competitive to monopolized would be an extraordinary event. In most cases where mergers, joint ventures, or related practices are conducive to the creation of market power the market is already highly concentrated to begin with, exhibiting high price-cost margins. Mergers that produce actual consumer losses but even greater efficiency gains are very likely a rarity, and American antitrust law has never identified such a case.[107]

Second, the efficiencies that accrue in the Williamson model must take place at lower output levels than prevailed prior to the merger. If the efficiencies were so substantial that they resulted in higher output, then there would be no tradeoff. Consumers and producers would both benefit and the merger would survive under both a general welfare and a consumer welfare test. Tradeoffs occur only in the area of output-reducing mergers. By far the biggest source of merger-generated efficiencies is economies of scale, but these generally occur at higher rather than lower output.

To be sure, some efficiencies can result from practices that reduce output. One example is plant specialization economies that increase both scale economies and market power. For instance, prior to a merger Firm A and Firm B might have been producing 40 units of Alpha and

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[105]That is, as the demand curve approaches marginal cost consumer surplus per purchase becomes ever smaller until the final consumer is willing to pay precisely marginal cost but no more.

[106]*See* Herbert Hovenkamp, *Antitrust and Efficient Mergers*, ___ GMU L. REV. __ (2017) (in press), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2664266.

[107]Canadian antitrust policy expressly contemplates approval of a merger under these circumstances, and its courts claim to have found a merger that satisfied this requirement. *See*.Comm'r of Competition v. Superior propane, Inc., (2003) 23 CPR (4th) 316 (FCA). *See also* Darwin V. Neher, David M. Russo, and J. Douglas Zona, *Lessons from the Superior-ICB Merger*, 12 GMU L. REV. 289 (2003); Daniel J. Gifford & Robert T. Kudrie, *Rhetoric and Reality in the Merger Standards of the United States, Canada, and the European Union*, 72 ANTITRUST L.J. 423 (2005).

40 units of Beta in their respective plants, and in both cases these output levels may have been inefficiently low. By reorganizing production after the merger, the post-merger firm AB might produce 70 units of Alpha in one of the plants and 70 units of Beta in the other one. In that case 70 units might be sufficient to attain productive efficiencies even though that is a lower number than the 80 units that were produced previously. Assuming the post-merger firm had some market power, prices would be higher. We would still have to ascertain whether the increase in productive efficiency resulting from the scale economy outweighed the harm to consumers caused by the 10 unit output reduction.[108]

Other efficiencies may occur at lowered output levels, such as improvements in technology or management, but one must always query whether an output-reducing practice such as a merger is really necessary in order to attain them. American antitrust merger policy requires that claimed efficiencies be "merger specific," which means that they could not be attained except via the merger.[109] For other types of practices, such as joint ventures, the equivalent standard is whether there is a "reasonably less restrictive alternative" that could attain the efficiency but without creating the market power.[110]

A third problem with the Williamson model was the assumption that the merger or joint activity in question creates a single firm monopoly that exercises its power unilaterally while other firms are unaffected. The majority of mergers and other practices challenged under the antitrust laws do not fall into this category. Rather, they create market power because they are thought to be collusion facilitators. That is, by increasing market concentration or creating a dominant firm they give rival firms in the market an incentive to reduce their own output or increase their prices as well. In such cases, however, the efficiency gains accrue only to the merging firm while the price increase affects the entire market. For example, if two 20% firms should merge into a 40% firm, the result might be that the market is more conducive to collusion or anticompetitive price leadership. This would permit firms representing the remaining 60% of the market to raise their prices as well. In that case, however, the market wide output reductions and resulting consumer injury are experienced across the entire market, while only 40% experiences the efficiency gains. This makes the tradeoff much less favorable.

Finally are insurmountable measurement difficulties in applying a general welfare test. The Williamson figure above is an elegant picture that seriously oversimplifies the problem. In order to determine whether efficiency gains to producers exceed losses to consumers we must measure the areas of rectangle A_2 and triangle A_1 in the picture and net them out. Measuring the

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[108] A somewhat similar situation can occur in airline mergers. For example, two carriers may fly the same route in competition, each carrying 100 passengers in planes whose capacity is 200 passengers. If the two carriers merged they might cut the number of flights on this route in half, but raise the price so that each plane now carries 180 passengers. The post-merger carrier would be flying more efficiently even though prices would be higher. Under a general welfare test the antitrust authority would still have to determine whether the efficiency gain from the fuller planes exceeded the consumer loss from higher prices.

[109] *See* 4A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶973 (4th ed. 2016). See FTC v. H.J. Heinz Co., 246 F.3d 708 (D.C.Cir. 2001) (condemning merger after concluding that claimed efficiencies were not merger specific). *See also* FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 350 (3d Cir. 2016) (similar); Saint Alphonsus Med. Center-Nampa, Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 791-792 (9th Cir. 2015) (similar).

[110] *See* C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COL. L. REV. 927 (2016); 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶1505 (4th ed. 2017).

efficiency gains entails that we know the size of the cost reduction achieved by this particular practice. That will give us the measurement C_2-C_1, or the height of rectangle A_2. Then we must also know the output range, from the origin to Q_2, over which the efficiencies occur. We will also have to identify what amount of the efficiency gain consists of fixed costs and what amount consists of variable costs, for only the latter will affect the price. For the tradeoff we would also need to know the size of the post-merger price increase ($P_2 – P_1$), and the output reduction (Q_2-Q_1) over which it would occur. That would give us the two legs of the deadweight loss "triangle." In the case of a linear demand curve, such as the one in the picture, computing the area would then be easy. Demand curves in the real world are never linear, however, meaning that area A1 is not really a triangle at all. In that case, computing the size of the deadweight loss area requires computing the location of the actual demand curve, in addition to the size of the two legs.

To the best of my knowledge no American court has ever based a judgment on an attempt to make these computations, certainly not in any case where the tradeoff is reasonably close. Of course, not all cases are close. If the merger or joint venture creates no market power, then there is nothing to trade off, so any efficiency gains whatsoever makes the transaction positive. The same thing is true in reverse if a merger creates market power but produces no measurable efficiency gains.

In very sharp contrast, assessing the same transaction under a consumer welfare test is relatively easy. One needs to know whether output (Q_2 to Q_1) has gone down or price (P_1 to P_2) has gone up. That is the only issue to be considered, and the size of the output reduction or price increase does not matter. In sum, an antitrust policy guided by output effects as a standard is far easier to administer than a general welfare alternative.

This is not to say that evaluation of a merger or joint venture under a consumer welfare test is always easy. The hard cases are ones in which a merger or joint venture threatens the exercise of market power but the defendants claim that the efficiency gains are so substantial that they will fully offset any threatened price increase, producing output that is at least as high as it was prior to the occurrence. This is the standard that the federal antitrust agencies currently apply in evaluating mergers.[111]

To summarize, most of the intuitive rationales for a general welfare test for antitrust policy disappear upon even moderately close inspection. The administrative cost savings alone are very likely sufficient to justify a consumer welfare approach.

Does that mean that antitrust is trading away a certain amount of efficiency for convenience? Perhaps, but not very much and not necessarily any at all. First, as suggested above, it is hard to find even a single case in the United States where the choice of a welfare test

[111]U.S. Dept. of Justice and Federal Trade Commission Horizontal Merger Guidelines §10 (Aug. 19, 2010), available at https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf. (…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." In a related footnote it states that it will weight immediate efficiencies more heavily than those that are likely to accrue only over a longer term; and that cost savings in fixed costs alone are unlikely to benefit consumers. n. 15.).

has made a difference.[112] Of course, any test can alter incentives. In this case the choice of a consumer welfare test will tend to favor mergers or other antitrust activity whose provable efficiency gains are sufficient to offset any predicted price increase. Firms may have to alter their strategies in order to comply, and a few practices that produce only marginal efficiency benefits might be abandoned. Finally, consent decrees can be shaped accordingly. For example if a merger between two multi-store chains or airlines threatens higher prices in a few markets but not others, then the Government may insist on partial divestitures in the markets where consumer harm is predicted.

But a strictly followed consumer welfare approach, condemning a restraint or practice only when it realistically threatens an anticompetitive output reduction, has one additional advantage: properly followed, it gets antitrust out of the business of favoring particular special interest constituencies other than consumers themselves.

Technical Complexity and the Long Run

Small business favoritism or other types of capture are not the only reason that antitrust has been accused of being overly aggressive. Often antitrust overreaching results from complex models that call for more intervention even when the focus is limited to practices that decrease economic welfare or output. They typically do this through increasing reliance on long run projections.

The simplest neoclassical economic models tend to favor non-intervention. They see both collusion and monopoly as unstable, undermined by the mobility of existing rivals or entry of new ones. They also tend to see prices and costs in fairly simple terms, with competition driving prices to short run marginal costs. While recognizing that intellectual property rights restrict asset mobility and can even create monopoly in some cases, they are inclined to take IP rights at face value, rarely questioning their legitimacy and relatively unconcerned about their anticompetitive use. As soon as one adds in concerns about excessive patent issuance and low patent quality, strategic acquisitions and enforcement by non-practicing entities, or anticompetitive licensing practices, the IP/Antitrust landscape becomes much more complicated.[113]

By contrast, models that call for more aggressive intervention are typically more complex, involving such things as variations on oligopoly theory and strategic responses, monopolistic competition theory, or heightened views about the relevance of market structure and entry barriers.[114] These models frequently advocate for antitrust consideration of long run

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[112] *See* John O. McGinnis & Andrew M. Meerkins, *Dworkinian Antitrust*, 102 IOWA L. REV. 1, 34 (2016) (few if any decisions have turned on the difference); Roger D. Blair & D. Daniel Sokol, *Welfare Standards in U.S. and E.U.: Antitrust Enforcement*, 81 FORDHAM L. REV. 2497, 2500 (2013) ("most of the time, the welfare standard does not matter"); Herbert Hovenkamp, *Implementing Antitrust's Welfare Goals*, 81 FORDHAM L. REV. 2471, 2474 (2013) (same).

[113] On the practices that antitrust law has recognized, or not, *see* HERBERT HOVENKAMP, et al., IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY Law (3d ed. 2016).

[114] *See* EDWARD CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION: A REORIENTATION OF THE THEORY OF VALUE (1933); JOE S. BAIN, BARRIERS TO NEW COMPETITION: THEIR CHARACTER AND CONSEQUENCES IN MANUFACTURING (1956); JOE S. BAIN, INDUSTRIAL ORGANIZATION (1959).

economic strategies such as above cost "limit" pricing;[115] increased reliance on merger law's potential competition doctrines, which emphasize longer run concerns;[116] or the use of structural remedies such as breaking up firms in order to pursue oligopoly. These theories share a preoccupation with long run developments that are extremely difficult to predict, particularly in litigation. In general, the longer a prediction's timeline, the more alternatives must be considered and ruled out. As a result, long run theories are frequently impossible to manage with antitrust doctrine.[117]

Even an antitrust policy that is dedicated to protecting consumer welfare must choose among competing models of economic behavior and effects. That always leads to questions about administrability and, in turn, about the status of a particular theory. Is it merely in the theory stage, undergoing testing, or has it survived strenuous attempts at falsification? A theory that is worth a place in the economic literature remains useless in litigation unless it can enable predictions that are sufficiently robust to make it a reliable policy guide.

The problem of determining how antitrust should respond to new theory has no easy solutions. One thing that can help is close judicial attention to experts, and exclusion of testimony that does not meet the standards of the discipline. This includes careful review in order to make sure that the theory fits the facts of the case and is not subject to equally likely but harmless alternative explanations.[118] Ultimately, however, antitrust cannot avoid complexity. The Merger Guidelines themselves, widely approved by the courts, rely on standards derived from Cournot oligopoly theory and models of product differentiation that were unknown to the classical political economists.[119] The problem is exacerbated by the Seventh Amendment right to a jury trial, particularly when coupled with expansive recognition of private antitrust damages actions. Here, I would align myself with those who believe that pleading requirements and

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[115]On these dominant firm strategies, *see* 3 & 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, Ch. 7 (4th ed. 2015); *and see* discussion *infra*, text at notes __. A "limit" price is one that is above the dominant firm's costs but calculated either to exclude rivals or to limit their growth, particularly when alternatives are available.

[116] For example, the "actual potential entrant" doctrine, which condemned a merger on the theory that a merging firm could have entered a new market in a more socially beneficial way by building a new plant rather than acquiring an existing one. E.g., Yamaha Motor Co., LTD v. FTC, 657 F.2d 971 (8th Cir. 1981). *See* HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 23, §13.4b.

[117]Although some attempt to do so. *See, e.g.*, Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017) (advocating increased use of long-run considerations in dealing with Amazon's market dominance).

[118]*See e,g.*, Rebecca Haw, *Adversarial Economics in Antitrust Litigation: Losing Academic consensus in the Battle of the Experts*, 106 NW. U. L. REV. 1261 (2012); Herbert Hovenkamp, *Economic Experts in Antitrust Cases* §23, in MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY (David L. Faigman, et al, eds. 2002 and supp.). For comprehensive coverage of the treatment of expert testimony in antitrust cases see 1 & 1A PHILLIP E. AREEDA, HERBERT HOVENKAMP, ROGER D. BLAIR, AND CHRISTINE PIETTE DURRANCE, ANTITRUST LAW ¶¶309, 390-399 (4th ed. 2014).

[119]George J. Stigler, *A Theory of Oligopoly*, 72 J.POL. ECON. 44 (1964). For elaboration, *see* HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 23, §12.4a.

summary judgment rules must be used to limit the scope of jury evaluation of issues that jurors are poorly equipped to understand.[120]

At the same time, a prominent feature of progressive policy making – and one that has contributed significantly to its success – is willingness to follow the best science of the day and incorporate its results into practice.[121] This does not require flitting from one theory to another. It does entail, however, that once a theory has attained significant acceptance among the community of economists it cannot be excluded simply because it is complex. It *can* be excluded, however, to the extent that it fails to make sufficiently robust predictions about the consequences of its use.

Using Antitrust to Address Regulatory Goals

Antitrust law in the United States is dedicated to the proposition that competitive markets are valuable and worth preserving. Nevertheless, a substantial portion of the micro-economy is publicly regulated, ranging from complete government ownership of providers such as the Post Office, public education, and some other services, to government control over pricing, entry, and other decisions ordinarily made by private firms. This regulation ranges from modest to extensive.

Economists often write as if correction of market failure and restoration of competition-mimicking equilibria is the exclusive goal of regulation.[122] If that were true, regulation and antitrust would be located on approximately the same page. Historically, however, regulatory goals have been far more diverse. The actual articulated goals of regulation have included universal service, protection from excessive, or "ruinous" competition, control of harmful externalities, risk management, nondiscrimination, protection of small or locally owned business, consumer protection from unfair or fraudulent practices, or protection from insolvency or the extremes of business cycles. Some of these regulatory goals contemplate long run concerns such as limitations on investment in durable productive assets. For example, in many regulated markets a firm can build a new production facility only by obtaining the regulator's permission. New hospital facilities require certificates of need, new power plants or television stations require licenses, and traditional New York City taxicabs require a medallion. Of course, a fair amount of regulation is justified by nothing more than interest group advancement or protectionism. This naturally invites the question whether antitrust should seek in some way to track or maintain consistency with these varied and often inconsistent goals, or perhaps even to resist them when they deviate from antitrust's own conception of the public interest.

What should be the role of antitrust in a progressive economy that is more intensely regulated than the one that existed when the Sherman Act or even the Clayton Act were passed? Antitrust could pursue one of three very general routes. First, it could develop an interventionist

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[120] Herbert Hovenkamp, *The Rule of Reason*, ___ Florida L. Rev. __ (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2885916. For a strongly contrary position, particularly on the jury, *see* Edward D. Cavanagh, *The Jury Trial in Antitrust Cases: an Anachronism?*, 40 AM. J. TRIAL ADVOC. 1 (2016).

[121] *See* discussion *supra*, text at notes 9-10.

[122] E.g., ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS (1988); W. KIP VISCUSI AND JOHN M. VERNON, & JOSEPH E. HARRINGTON, JR., ECONOMICS OF REGULATION AND ANTITRUST (4th ed. 2005).

approach that recognizes the same diversity of goals and interest group pressures as regulatory policy generally. As illustrated above, progressive antitrust actually did some version of this over much of its history, sometimes even using antitrust to fill perceived "gaps" in the regulatory framework.[123] Second, it could pursue internally a set of essentially neoclassical goals, limiting its own decision making to markets in which the government has not asserted conflicting regulatory policies, and avoiding situations where antitrust and regulatory goals might be in conflict. Finally, it could act as a "super-enforcer" of orthodox competition, taking a more proactive approach by actually limiting or disciplining regulation that conflicts with its own neoclassical principles. The approach suggested here is a version of the second.[124]

The antitrust policy that is easiest to justify sticks to its essentially neoclassical roots, which means pursuing maximum output by maintaining market competition. Neither the statutes nor the expertise of courts or the FTC justifies pursuit of anything else. Under ordinary rules of statutory construction, the highly general language of the antitrust laws must yield to much more specific regulatory mandates from the same level of government.[125]

Substantively, antitrust policy is concerned with restraints on competition, generally defined as practices that reduce output and produce higher market prices. To some extent an output-maximizing policy may also be consistent with other regulatory goals, such as redistributing wealth or providing broad, although not necessarily universal, service. On the latter, one important difference occurs when the regulatory goal of universal service calls for provision even to those that cannot pay its full incremental cost. While regulatory policy might either permit or compel that outcome,[126] a consumer welfare based antitrust policy would not. Even a highly competitive firm not operating under regulatory constraint would typically not sell to a new customer at a price less than incremental cost.

The relevant question for antitrust policy is whether it should pursue these goals when they deviate from the ordinary rules of competitive output maximization. The answer is a robust no.

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[123]*E.g.*, Otter Tail Power co. v. United States, 410 U.S. 366 (1973), which created an antitrust-enforced duty to deal with rivals in order to repair a perceived gap in federal regulation by the then Federal Power Commission (now FERC), which controlled many aspects of the defendant's business but did not impose a duty to deal with competitors.

[124] *See* discussion *infra*, text at notes 137-151.

[125]"*Generalia Specialibus Non Derogant*" – the provisions of a general statute must yield to those of a special one, provided that the two laws are of "equivalent dignity." See, e.g., Nitro-Lift Tech., LLC v. Howard, 133 S.Ct. 500, 504 (2012) (per curiam). *See* SIR PETER BENSON MAXWELL, ON THE INTERPRETATION OF STATUTES 212 (1875) ("a general act is to be construed as not repealing a particular one, that is, one directed towards a special object or a special class of objects."). In the United States, *see* HENRY CAMPBELL BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 328 (2d ed. 1911) (in cases of "irreconcilable conflict, it is the special and specific provisions which must control and the general provisions which must yield"). Black was the author of BLACK'S LAW DICTIONARY.

[126] E.g., AT&T, Inc. v. United States, 629 F.3d 505, 507 (5th Cir. 2011) (noting the practice prior to passage of the 1996 Telecommunications Act of using telephone rates with high price-cost margins to urban customers to subsidize below cost rates to "expensive, unprofitable rural customers."). See Jim Chen, *The Nature of the Public Utility: Infrastructure, the Market, and the Law*, 98 Nw. Univ. L. Rev. 1617 (2004).

A case in point is wealth distribution. Even if using antitrust as a wealth distribution device was thought to be justified, the obstacles standing in the way of rational achievement seem enormous. First, it is too episodic, having a strong impact on the parties to litigation but largely ignoring everyone else. Second, nothing in the competition-promoting language of the antitrust laws provides any calculus for wealth distribution. Is absolute equality the goal? If not, where does antitrust stop?

To be sure, the promotion of competitive markets with high output may also be conducive to the more even distribution of wealth. But antitrust has no statutory mandate and no tools for redistributing wealth *beyond* that point or in conflict with it. For example, a highly competitive market may make its most efficient producers wealthier than others, but antitrust policy would be hard pressed to find a rationale for making such a producer less efficient merely to equalize wealth when the result would be lower output overall. Goals of universal service very largely fall into the same category. Regulatory policy traditionally meets such goals by setting rates significantly above cost to one group of people (such as urban phone users) in order to subsidize nonremunerative rates to others (such as rural subscribers). If such policies are to be implemented at all it must be by regulatory authorities with the power to set rates and, in many cases, to prevent third parties from cream-skimming in pockets where returns are high.[127]

Some have advocated the existence of market power as a signal justifying the use of antitrust law to redistribute wealth.[128] The correlation between market power and lopsided wealth distribution certainly exists, although its strength is subject to dispute.[129] For example, very large firms such as Microsoft have significant market power, but more than 70% of its shares are owned by institutional holders who issue mutual funds or similar instruments.[130] As a result ownership is very widespread. Further, firms with market power need not be extremely large companies. Relatively small firms operating in local markets can also have significant power.[131] Finally, a significant amount of wealth inequality results from innovation, not from anticompetitive practices.

In any event, even to the extent a correlation exists between competition and more equal wealth distribution, that hardly justifies an antitrust policy at odds with an output maximization

[127] Cream skimming occurs when a competitor is able to enter high margin portions of a regulated firms market, thus depriving the latter of the returns necessary to subsidize lower rates in a different market. *See* 2 ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 223 (2d ed. 1986); Jim Chen, *Creamskimming and Competition*, 48 NEW ENG. L. REV. 7 (2013).

[128] Lina M. Khan and Sandeep Vaheesan, *Market Power and Inequality: the Antitrust Counterrevolution and its Discontents*, 11 HARV. L. & POL'Y REV. (2016) (forthcoming), currently available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2769132; Lina M. Khan, Amazon's Antitrust Paradox, 126 Yale L.J. 710 (2017).

[129] For one effort finding a significant correlation, see Sean Ennis, et al., *Inequality: A Hidden Cost of Market Power* (Working Paper, OECD Directorate for Financial and Enterprise Affairs, Competition Committee, Feb. 16, 2017), available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2015)10&docLanguage=En

[130] http://www.nasdaq.com/symbol/msft/ownership-summary.

[131] E.g., Fred Johnson Cement Block Co. v. Waylite Co., 182 F.Supp. 914 (D.Mn. 1960) (permitting monopolization claim against regional cement company to proceed).

goal. The consumer welfare principle already serves to eliminate exercises of market power that reduce output, whether or not the result is more desirable wealth distribution.

To be sure, antitrust policy does not pursue every instance of market power. For example, monopolists are permitted to keep their lawfully acquired market positions so long as they do not engage in exclusionary practices, and we do not have a policy of breaking up concentrated industries whose firms are not fixing prices simply because we believe that they would behave more competitively.[132] Our reluctance to carry the pursuit of market power this far does not depend on any limitation inherent in the consumer welfare test. The main reason antitrust does not go further is concerns about administrability. Another is that we do not want to give up too much productive efficiency in order to attain greater competitiveness. In order to go further, antitrust would have to develop rules that break up firms with market power for lesser offenses – or perhaps for no offense at all, other than the status of having market power.[133]

Further, the remedial problems would be daunting. Breaking up large firms is a very poor wealth distribution device once we consider their ownership, which often consists of millions of relatively small stockholders, much of it in pension funds and similar vehicles. A little over half of Americans have some investment in stocks or equity funds.[134] In addition, of course, are concerns about productive efficiency. Judicially mandated breakup of large firms would often lead to higher costs. To say that courts are poor estimators of scale and scope economies is a serious understatement.

Protection of small business for its own sake should also be excluded as an antitrust goal. The long and terrifying experience with the Robinson-Patman Act illustrates some of the problems.[135] If pursued relentlessly, such a policy could drive the economy into the dark ages, forbidding cost-saving innovations because smaller competitors are unable to claim them. A policy of condemning every merger or joint venture that injured small business would place alarming costs on consumers. Once again, antitrust provides no calculus for doing this. If small business needs government assistance, it should come from much more explicit legislative policy, stating the qualifications for such assistance and metering its terms.

In general, *any* policy of promoting reduced output in pursuit of some alternative goal should be off the antitrust table. Even superficially interest-group-neutral policies such as managing risk in order to mitigate the downward effects of business cycles are bad candidates for resolution under the antitrust laws. Already in 1898 the Supreme Court rejected a "ruinous

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[132] On the history of such proposals, HOVENKAMP, OPENING, *supra* note __ at 214-219.

[133] On the possibilities for a law of "no fault" monopoly, *see* Barak Orbach and Grace Campbell Rebling, *The Antitrust Curse of Bigness*, 85 S.CAL. L.REV. 605, 631-633 (2012); William E. Kovacic, *Failed Expectations: the Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA. L. REV. 1105, 1125-1128 (1989); Milton Handler and Richard M. Steuer, *Attempts to Monopolize and No-Fault Monopolization*, 129 U.PA.L.REV. 125 (1980). For one widely discussed but now abandoned proposal, *see* 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶630-638 (4th ed. 2015). *See* particularly *id*. at 68, which notes my own dissents from the proposal, originally made in the first edition by Phillip E. Areeda and Donald Turner.

[134] http://www.gallup.com/poll/190883/half-americans-own-stocks-matching-record-low.aspx (Gallup poll, Apr. 20, 2016).

[135] *See* discussion *supra*, text at notes 65-79.

competition" defense to price fixing in the railroad industry.[136] By that time railroad trackage in the United States was seriously overbuilt in some places. The result was competition that drove prices so low that some railroads were unable to recover their fixed costs and were being forced into bankruptcy.[137]

Recognition of a ruinous competition defense would implicate antitrust in long run considerations about how to deal with industry wide overinvestment. Conceding that railroad overbuilding was factually true, it would leave the policy maker with several choices. One would be to let competition run its course, knowing that some firms would go out of business until capacity and demand were once again in equilibrium. That is the way competition solves this problem, and it is very likely the one that has occurred most frequently. For an efficient economy, there is much to be said for it. Another might be price supports or subsidies that would keep the most troubled railroads alive. Whether this is advisable is dubious because it involves consumer or public funds in support of inefficient producers, to say nothing of subsidized maintenance of unneeded capacity. That is, such a policy would operate as a wealth transfer from consumers to inefficient firms.

In any event, privately orchestrated price fixing such as occurred in the railroad cartels would be a very poor vehicle for dealing with industry-wide excess capacity. It would not yield the minimum price needed for survival of the least efficient firms. Rather, a cartel would set its profit-maximizing price, which would likely be much higher than that. That means that even the more efficient firms that did not need help would increase their prices as well, and consumer harm could be significantly greater. Further, once we permitted a "business cycle" or "ruinous competition" defense to price fixing, we could expect that it would be asserted and litigated very frequently. The same thing is very largely true of the book publishers cartel intended to force Amazon to increase its prices for electronic books.[138] We might dispute whether Amazon was setting its prices too low, but permitting a cartel of publishers to set those prices is the worst possible solution, ensuring only that the publishers would maximize their profits.

More generally, however, this is essentially a "regulatory" decision, which would require either legislation or a specialist regulator to identify troubled railroads and then determine how best to respond. If a decision is made to provide support, the qualifications for and the amount of any subsidy would have to be identified. Looking at the longer run, a regulator might attempt to predict the demand for railroad trackage and limit new construction accordingly. In sum, while we might want to debate whether this is reasonable government action in *any* setting, it clearly is not reasonable in the guise of making antitrust policy, and certainly not under the language of any United States antitrust statute in existence today.

So antitrust policy makers should keep their sights on antitrust's own legitimate goal, which is policing output reducing restraints on competition. They must also accept regulation as

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[136]United States v. Joint-Traffic Ass'n., 171 U.S. 505, 576 (1898) ("A ruinous competition is, as they say, apt to be carried on until the weakest of the combatants goes to destruction.) The defense was also asserted and rejected in United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), modified and affirmed, 175 U.S. 211 (1899).

[137]*See* Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 YALE L.J. 1017, 1040-1041, 1057-1058 (1988).

[138]United States v. Apple, Inc., 791 F.3d 290 (2d Cir. 2015), cert. denied, 136 S.Ct. 1376 (2016). *See* Herbert Hovenkamp, *Antitrust and Information Technologies*, 68 FLA. L. REV. 419, 438-440 (2016).

a fact of legal and economic life. Antitrust has no general mandate to "fix" federal or state regulation gone awry. To the extent possible, antitrust must accept regulatory regimes and devise optimal antitrust policy against the backdrop that they provide. That fact leads to some subsidiary issues. One is determining when antitrust should simply stand aside, concluding that the regulatory framework in place is not consistent with additional rule making from another source. That question is considered below under the heading of express or implied repeal. Another is whether antitrust can ever second guess, displace, limit, or even strike down a regulatory regime because the outcomes it provides are inconsistent with an overriding goal of promoting competition. The answer to this question is almost never for federal regulation, but occasionally for regulation imposed by state or local governments.[139] That question is addressed below under the issue of antitrust's role in policing special interest capture. The more pervasive regulation is in the economy, the more likely these issues are to arise and the more important their resolution.

Express and Implied "Repeal"

Theoretically, the occasions for conflict between federal antitrust law and other regulatory regimes statutes are manifold. Both federal and state statutes and even local ordinances restrict entry, limit asset mobility, specify prices to be charged by groups of firms, or raise rivals' costs. The federal intellectual property laws, particularly patent law, have been assailed for limiting entry and mobility without providing offsetting benefits by facilitating innovation.

Nevertheless, decisions about the legitimate purpose or capacity of alternative regulatory regimes are not antitrust's to make. They are left to Congress and state legislatures or governmental subdivisions, plus their executives. The one thing antitrust decision makers can and must do, however, is police output-reducing restraints in the market "residual" that remains after the government's other branches have made their regulatory choices. That means that antitrust tribunals usually have the role of deciding whether and how an antitrust claim in a regulated industry should proceed.

Unless Congress says otherwise, antitrust rarely has a role to play in the affairs of government agencies or state-owned enterprise.[140] Private parties who contract with government agencies can be held liable under the antitrust laws, however, for the way they perform their contracts.[141] The story for regulated but privately owned enterprise is more complex. Even here, however, most government regulation fails to raise a significant antitrust issue. Exceptions occur mainly when regulation interferes with market pricing or output determination mechanisms, restricts new entry, or excludes products or firms that might compete but for the

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[139] *See* discussion *infra*, text at notes 137-152.

[140] *See* United States Postal Service v. Flamingo Indus., Ltd., 540 U.S. 736 (2004) (U.S. Post Office not a "person" who can be sued under antitrust laws). Subsequently Congress passed legislation that treated the Post Office more as a private firm and made it subject to the antitrust laws. 39 U.S.C. §409C(1)(B) (2006). *See also* Sea-Land Service, Inc. v. Alaska Railroad, 659 F.2d 243 (D.C.Cir. 1981) (government agency not susceptible to antitrust injunction). *See* D. Daniel Sokol, *Competition Policy and Comparative Corporate Governance of State-Owned Enterprises*, 2009 B.Y.U. L. REV. 1713 (2009).

[141] Thomas v. Network Solutions, Inc., 176 F.3d 500, 508-509 (D.C.Cir. 1999), cert. denied, 528 U.S. 1115 (2000) (contractor who chose to perform contract with federal agency in anticompetitive manner could be held liable).

regulation. That is to say, regulation is most prone to antitrust challenge when it interferes with price, output, or business entry or mobility, all of which are things that properly functioning markets should do quite well on their own.

Fifty years ago the solution to this problem was simpler than it is today, although more draconian, at least for federal regulation. When regulation was thought to be "pervasive," courts recognized implied immunity that ousted antitrust law from the entire regulatory regime.[142] The immunity was said to be implied because nothing in the language of the regulatory provision explicitly eliminated antitrust. Rather, application of the antitrust laws was thought to produce harmful interference with a pervasive regulatory scheme and the government agency's authority to administer it.

Today our view of this relationship is both more subtle and more complex. On the one hand, every market is subject to at least some form of regulation. On the other, no market is regulated so pervasively as to deny firms the power to engage in any competitively relevant decision making. As a result, in most cases application of the antitrust laws in a particular market is a matter of degree.

While this state of affairs adds jurisdictional complexity to antitrust analysis, it is also entirely consistent with the progressive proposition that ours is a "mixed" economy. Some decisions are made by the market, others are made by one or multiple government regulators,[143] and yet others by a mixture of public and private decision. For a few practices Congress has created an express antitrust exemption, and that ends the inquiry.[144] For others, however, implied immunity doctrine attempts to determine whether antitrust intervention in a certain circumstance is appropriate. The relevant question is sometimes said to be what Congress intended, although that is frequently not the question that the tribunal actually addresses.

Today, implied regulatory immunity is "transactional" rather than global. It looks not at the pervasiveness of the regulatory scheme so much as the particular practice that is alleged to be

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[142]*E.g.*, United States v. Nat'l Assn. of Securities Dealers (NASD), 422 U.S. 694, 726-728 (1975) (SEC's regulation of security issuance sufficiently pervasive to oust antitrust); Hughes Tool Co. v. TWA, Inc., 409 U.S. 363 (1973) (similar, Civil Aeronautics Board); Pan Am. World Airways, Inc. v. United States, 371 U.S. 296 (1963) (similar); Otter tail Power co. v. United States, 410 U.S. 366 (1973) (lack of pervasiveness of federal scheme for regulating electric power provided some room for antitrust); United States v. Borden Co., 308 U.S. 188 (1939) (Agriculture Secretary's regulation of milk industry not sufficiently "pervasive" to create antitrust immunity).

[143]In certain areas regulation is shared between federal and state regulators. *See, e.g.*, Oneok, Inc. v. Learjet, Inc., 135 S.Ct. 1591 (2015) (under deregulation, natural gas regulation is shared, giving wholesale transactions to federal government and retail transactions to the states; not even state antitrust law is preempted); Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004) (1996 Telecommunications Act divides regulatory authority between FCC and state regulators).

[144]For example, the federal McCarran-Ferguson Act creates an express immunity from antitrust for the "business of insurance" as regulated by state law. *See* Group Life and Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979) (direct involvement in pharmaceutical distribution not part of business of insurance); Pireno v. N.Y. State Chiropractic Assn, 458 U.S. 119 (1982) (medical peer review not part of business of insurance). On other explicit antitrust immunities, *see* 1B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶249-257 (4th ed. 2013) (agricultural organizations, Health Care Quality Improvement, medical school residency matching, export and shipping associations, newspaper joint ventures, sports and sports broadcasting, labor and union organizing, and several others).

an antitrust violation, and the degree of private as opposed to government control over that particular practice. As the Supreme Court has put it, a claim of implied antitrust immunity is weaker when the particular challenged practice is "neither compelled nor approved by any governmental, regulatory body."[145] It elaborated:

> To be sure, where Congress did intend to repeal the antitrust laws, that intent governs,…but this intent must be clear. Even when an industry is regulated substantially, this does not necessarily evidence an intent to repeal the antitrust laws with respect to every action taken within the industry.…Intent to repeal the antitrust laws is much clearer when a regulatory agency has been empowered to authorize or require the type of conduct under antitrust challenge.[146]

This approach largely transfers away from Congress and to the courts the power to determine the contours of immunity, at least in those situations where Congress has not explicitly spoken to the issue. For example, in the above quoted *National Gerimedical Hospital* case the Supreme Court held that although health care reimbursement plans administered by provider networks were heavily regulated by federal law, the regulations did not extend to supervision of a network's decision to exclude a particular hospital. To the extent such decisions were privately made, unsupervised, and potentially anticompetitive, the antitrust courts were empowered to determine their lawfulness.[147]

That creates a principle that is relatively easy to state, although not always to apply: when a particular challenged practice is within the jurisdiction of a federal agency and the agency exercises actual oversight, then an antitrust court should stand aside, or at least wait until the regulatory agency has a chance to decide what it wishes to do.[148] By contrast, if the action falls outside of the agency's control or if the agency is not actively monitoring, then antitrust can step in. In all cases it is important to remember that this query addresses the issue of antitrust immunity, not of ultimate illegality.

Antitrust and Capture: Federal, State, and Local

Antitrust tribunals must discern the meaning and scope of regulation before they decide whether and how to proceed. Are there circumstances when they can go further? That is, do they have a role in combatting harmful instances of regulatory capture by special interest groups? That would of course put antitrust law on a collision course with the regulatory regime. Conduct can be fully managed by a regulator and yet be a complete product of legislative capture if that is how legislators designed a particular scheme. This question is all the more important in a progressive State because so much of government control is exercised through legislation. Indeed, combatting capture effectively is one of the most serious problems facing progressive administrations, and also accounts for some of the most relentless criticisms from detractors.[149]

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[145]Nat'l Gerimedical Hosp. v. Blue Cross, 452 U.S. 378 (1981).
[146]*Id*. at 389.
[147]*Id.* at 389-390.
[148]The latter decision to wait and see comes under the rubric of "primary jurisdiction." *See* 1B AREEDA & HOVENKAMP, *supra* note 132 at ¶244.
[149]Hovenkamp, *Appraising the Progressive State*, *supra* note 11.

On the one hand, the antitrust laws with their spare, competition-enforcing language, largely judicial administration, and concern for consumer welfare, would appear to be a good vehicle for limiting capture. On the other hand, nothing in the legislative history of the antitrust laws suggests that Congress ever saw antitrust as a useful way to combat the regulatory excesses of government. Indeed, the one occasion that it has spoken to the issue was a limitation rather than an authorization.[150] Antitrust's concern has always been with private restraints on competition.

Economically harmful capture occurs when a particular interest group is able to control the decision making of a government institution for its own benefit. Interest group capture is economically harmful to the extent that favoring one group makes the overall economy smaller. For example, a widespread criticism of traditional agency command-and-control regulation was that it insulated regulated firms from competition at the expense of consumers, by making prices higher, protecting weak and inefficient firms, requiring firms to overinvest or carry large amounts of excess capacity, or raising compliance costs.[151] When deregulation began addressing these concerns the result was to shift a greater amount of oversight to antitrust law.[152]

The relationship between antitrust and capture embodies three different concerns. First is the ability of antitrust policy to identify harmful instances of capture and do something about them that does not exceed its legitimate mandate to police private anticompetitive conduct. Second is identifying the proper approach to capture by the federal government and its agencies. Third is the ability of antitrust to combat legislative capture by the states or local government.

The issues that antitrust confronts in considering capture are both technical and political. They are technical to the extent that a well-designed regulatory scheme uses experts to identify instances of market failure and produce corrective measures. For example, experts might conclude that retail electric power is a natural monopoly that is optimally delivered by a single firm with an exclusive franchise but regulated rates. To the extent this judgment is purely technical, antitrust generally lacks both the competence and the authority to second guess it. Doing so would be nothing less than a full frontal attack on the government's regulatory prerogative.

What antitrust policy does instead is substitute a notion of political competence for technical competence. That is to say, antitrust defers to expert decision makers and limits its role to ensuring that these decision makers are acting in accordance with their statutory mandate rather than merely serving private interests. In particular, it tries to ensure that the government regulator rather than private entities are the effective decision makers.

At the verbal level, antitrust policy takes a very different approach to this problem depending on whether the regulation at issue is federal or from state or local government. Most obviously, the previously noted canon that general statutes such as the antitrust laws must yield

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[150]Local Government Antitrust Act, Pub. L. 98-544, 98 Stat. 2750 (1984), 15 U.S.C. §§34-36 (limiting antitrust liability of municipal governments whose regulation fails to qualify for the state action immunity).

[151]*See, e.g.*, Harvey Averch & Leland L. Johnson, *Behavior of the Firm Under Regulatory Constraint*, 52 AM. ECON. REV. 1052 (1962); *and see* Herbert Hovenkamp, *The Takings Clause and Improvident Regulatory Bargains*, 108 YALE L.J. 801 (1999) (book review).

[152]*See* 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶241 (4th ed. 2013).

to the specific applies only to statutes from the same level of government.[153] By contrast, the Supremacy Clause governs the relationship between federal antitrust and the regulations of state and local government. So even a highly specific state statute or local ordinance must yield to federal antitrust law if that is what federal law requires.

For federal regulation, Congress has never suggested by statutory language or otherwise that antitrust law should ride herd on the competitive imperfections of other federal regulatory regimes. Rather, the antitrust goal is much more modest, which is to ensure that the federal agency actually has jurisdiction over the practice in question and, if so, that it is not in dereliction of its obligation to exercise regulatory power. That is, the domain of antitrust law in areas regulated by other regulatory regimes is to look for instances of private anticompetitive conduct that are in fact disguised as public conduct. Having done that, antitrust has gone about as far as it can. As the Supreme Court articulated the query in the *Trinko* case, it is whether the government agency is operating as "an effective steward of the antitrust function."[154]

To the extent that a federal regulatory regime leaves competitive decision making in private hands, without effective review, the antitrust laws can apply. As a Seventh Circuit decision put it in declining immunity, the courts insists on an analysis that "focuses on the extent to which an administrative agency has actually exercised its supervisory powers over the particular practices at issue."[155] It continued:

> [O]utside the context of a pervasive regulatory scheme,…immunity is proper when the relevant agency's scrutiny and approval of the challenged practice is active, intrusive and appropriately deliberative. Put another way, an antitrust court, before relinquishing jurisdiction over allegedly anticompetitive activities, must be convinced that the agency has exercised its independent judgment in reflecting upon and approving the activity at issue.[156]

Notwithstanding the substantial differences in regulatory authority imposed by the Supremacy Clause, Supreme Court jurisprudence involving the regulations of state and local government has largely adopted the same analysis as is applied to federal regulation. The Court has simply used different terminology to express it. Under the "state action" doctrine states can regulate pretty much as they please as far as antitrust law is concerned.[157] However, the conduct must be adequately "authorized" by the state itself, and any private conduct must be adequately supervised.[158] Meeting these requirements is within state power, meaning that the Supremacy

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[153]*See* discussion *supra*, text at note 119.
[154]Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP 540 U.S. 398, 413-414 (2004). The case did not literally involve immunity because the Federal Communications Act contained an antitrust savings clause, but that did not affect the Court's judgment that the conduct was unreachable under the antitrust laws. *See id*. 406-407.
[155]American Agric. Movement, Inc. v. Board of Trade of City of Chicago, 977 F.2d 1147, 1158 (7th Cir. 1992).
[156]*Id*. at 1167.
[157]Of course, state and local regulation may raise numerous nonantitrust issues under both United States Constitutional provisions, such as the Due Process, Equal Protection, and Takings Clauses; and federal legislation such as 42 U.S.C. §1983.
[158]This specific two-part requirement came from the Supreme Court's decision in California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980). In the context of state regulatory agencies,

Clause does not stand in the way.

In its two most recent decisions involving state regulation the Supreme Court has addressed both of these prongs, authorization and supervision, and found them lacking. In the *Phoebe-Putney* case it held that a state corporation act applying to hospitals did not authorize a merger to monopoly simply because the state statute expressly permitted one hospital authority to acquire the stock or assets of another hospital. The Court might have noted that virtually every state corporation statute authorizes acquisitions of other corporations, but that does not mean that these statutes override the federal antitrust policy against unlawful mergers. So a central message is that state authorization must be clear and specific about exactly what it is authorizing. Not only must it authorize conduct, it must also authorize or at least clearly contemplate *anticompetitive instances* of that conduct.[159]

Subsequently, in its *North Carolina Dental* decision the Supreme Court condemned under the antitrust laws a professional dental association's declaration that the provision of teeth whitening services constituted unauthorized practice if the person performing the services was not a licensed dentist.[160] Although the North Carolina Dental Association had been declared an "agency" by state statute, it was completely controlled by practicing dentists who were not substantively answerable to any higher authority within the state. The Supreme Court required that the allegedly anticompetitive actions of interested private decision makers, whether or not denominated a state "agency," must receive supervision from a superior state decision maker who did not have an interest in the market in question. This could be an office of an already created agency, such as the Secretary of State or Attorney General. It could even be a court, provided that the court had authority to pass judgment on the competitive merits of the challenged decision and not just on procedure.

Justice Alito's dissent[161] in *North Carolina Dental* exposes the most fundamental issue relating to federal antitrust oversight over anticompetitive state decision making. He complained that the majority was imposing federal antitrust policy on a state governance regime because it was not "structured in a way that merits a good-government seal of approval."[162]

That objection exposes an important fault line on the question of federal power to control anticompetitive conduct by the states. At one extreme, federal antitrust policy might simply assert authority consistent with its authorization under the Supremacy and Commerce Clauses. This would give federal law substantial power to preempt or condemn anticompetitive state or local government actions, using federal antitrust standards to determine what is competitive. At the other extreme, federal antitrust policy might simply conclude that its business is limited to

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see FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992) (finding state action immunity for some states whose insurance agencies engaged in active review of proposed rate increases, but not for other states that did not perform such review).

[159]FTC v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003 (2013). The same requirement of specificity applies to a state's grant of regulatory power to governmental subdivisions. *See, e.g.,* Community Communications Co. v. Boulder, 455 U.S. 40 (1982) (generic home rule provision authorizing municipality to regulate did not create federal antitrust immunity against allegedly anticompetitive regulation).

[160]North Carolina State Bd. of Dental Examiners v. F.T.C., 135 S.Ct. 1101 (2015).

[161]Joined by Justices Scalia and Thomas.

[162]*Id*. at 1117.

"private" markets and it should stay out of any state government decision concerning resource allocation within that state, no matter how anticompetitive or captured.[163]

That federal antitrust law would take the route indicated in the majority opinion in *North Carolina Dental* is both historically defensible and advisable. While current interpretations of the Commerce Clause might authorize federal antitrust law to intrude more deeply into state economies, there is little in the history of the antitrust laws indicating an intent to do so. Indeed, the antitrust "state action" doctrine as currently articulated cedes a great deal of power to the states. It basically tells them that they can regulate as anticompetitively as they please, so long as they are clear about what they are doing and sufficiently "public" in carrying it out. If they had wanted the dentists to have the power to exclude teeth whitening by all except licensed dentists they could have articulated that goal and ordered a state official to enforce such a scheme. The Supremacy Clause would not stand in the way. Subsequent to the *North Carolina Dental* decision, Judge Calabresi made this point in rejecting a Federal Equal Protection challenge to a substantively similar rule supervised by the Connecticut Department of Public Health.[164] As Judge Calabresi observed, "[m]uch of what states do is to favor certain groups over others on economic grounds. We call this politics. Whether the results are wise or terrible is not for us to say, as favoritism of this sort is certainly rational in the constitutional sense."[165]

Seen in this way antitrust state action doctrine is not so much a limitation on state power as an assurance that the state's exercise of its power will be transparent, thus making it more accountable to its own voters. Beyond that, antitrust can do very little more.

Is Consumer Welfare a Deficient Test for Progressive Antitrust?

Most critiques of the consumer welfare test for antitrust law have come from the right, and have argued that antitrust should also consider producer gains – that is, the test should be based on general, or "total" welfare rather than consumer welfare. Robert Bork championed this approach, as well as Oliver Williamson and others.[166] Today, however, some of those arguing for a more progressive antitrust believe that the consumer welfare test does not go far enough.

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[163]Very likely most of the harm from the anticompetitive North Carolina Dental rule was visited on its own residents, because they were most likely the ones to obtain teeth cleaning services in the state. Contrast this with Parker v. Brown, 317 U.S. 341 (1943), which upheld an anticompetitive output restriction on raisins even though 90% of them were exported outside the state, thus entailing that most of the cartel's benefit went to California raisin growers, while most of the harm was visited on consumers located elsewhere. *See* Herbert Hovenkamp, *Rediscovering Capture: Federalism, Antitrust, and the North Carolina Dental Case*, CPI ANTITRUST CHRONICLE (April, 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2570807.

[164]Sensational Smiles, LLC v. Mullen, 793 F.3d 281 (2d Cir. 2015).

[165]*Id*. at 287.

[166]ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 66, 97 (1978); Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 13 (1966); Oliver E. Williamson; *Economies as an Antitrust Defense: the Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968). *See also* Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471 (2012); Alan J. Meese, *Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act: How Harvard Brought Us a Total Welfare Standard and Why We Should Keep it*, 85 N.Y.U.L.REV. 659 (2010).

Generally, they object that a consumer welfare approach (1) is overly focused on short run considerations; (2) is insufficiently attentive to issues of wealth distribution; and (4) sacrifices the interests of small business, inconsistently with the intent of the drafters. In addition, they tend to believe that vertical integration and related contracting practices are more harmful than we have been led to believe and should be governed by more aggressive rules.[167] Further, competitively aggressive pricing is an important source of antitrust harm and the current tests for predatory pricing, particularly its recoupment requirement, are seriously underdeterrent.[168]

Critical to any coherent antitrust policy is administrability.[169] Simply ticking off concerns and assigning them to antitrust policy is worse than useless unless they can be tied to a coherent set of rules for determining liability and remedies.[170] For example, if we say that small business protectionism should be an antitrust goal then we must have antitrust rules for implementing it. A rule that simply says that in every antitrust dispute the smaller firm or interests aligned with them should win would drive the economy into the stone age. We would end up condemning mergers simply because they reduce costs, above cost price cuts because smaller firms are unable to match them, or cost-saving vertical integration because unintegrated firms cannot claim the same cost savings. So where does one draw the line? One serious advantage of an output maximizing rule is that it provides a rational target to shoot at, although one must not exaggerate ease of implementation

Further, unclear rules may require firms to stop competing aggressively for fear of stepping over some poorly defined line. For example, a poorly designed, overly aggressive predatory pricing rule may induce firms to charge higher prices in order to avoid liability. If that is the case we will end up putting more rather than less monopoly into the economy. An aggressive per se rule against various types of vertical contracting might induce firms either to use less efficient modes of distribution or else eliminate small business altogether by integrating vertically into retailing.[171]

The same thing is largely true of making the distribution of wealth into an antitrust issue. First, as noted previously whether antitrust should recognize wealth distribution as an antitrust goal distinct from maximizing output is doubtful. Most of those advocating the wealth distribution issue rest their arguments on a link between uneven wealth distribution and market

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[167]E.g., Khan, *supra* note __ at 731-736.
[168] Id. at 744-746.
[169]*See* Herbert Hovenkamp, *Implementing Antitrust's Welfare Goals*, 81 FORDHAM L. REV. 2471 (2013).
[170] For example, Khan, *supra* note __ laudably recites a series of problems in the economy, particularly in networked markets, but then advocates mainly for significantly reducing the market shares making one susceptible to predatory pricing liability (id. at 791-792); and having a more aggressive rule quasi-per se toward vertical integration in cases where vertical integration might enable a firm to use its position in one portion of its business to benefit another portion (id. at 794-795). Perhaps realizing the difficulties inherent in these approaches, she then suggests public utility style regulation as an alternative (Id. at 796-799).
[171]*See, e.g.*, Standard Oil Co. of Cal. V. United States, 337 U.S. 293, 318-320 (1949) (Douglas, J., dissenting); *and see* discussion *supra*, text at note __. Justice Douglas, normally a believer in expansive antitrust liability in service to small business, dissented from the majority decision condemning an oil refiner's exclusive dealing because he predicted – correctly – that refiners would respond by terminating the contracts with independent dealers and opening wholly owned retail stations.

power.[172] To the extent that competitive markets and high output encourage more desirable wealth distributions, then this goal is already built into an antitrust policy of maximizing output, which is the same thing as maximizing competition. In that case, however, antitrust is best off to forget about the distribution of wealth as an *independent* antitrust goal and simply go about the business of ensuring output-maximizing practices and business structures. By contrast, to the extent that a goal of wealth distribution differs from output maximization, I frankly can see no way that antitrust law could implement it. Antitrust is neither a tax and transfer system, nor one that is structured in a way that permits managed cross-subsidization.

One thing we could do, of course, is develop more aggressive rules for pursuing certain anticompetitive practices. To the extent that these rules served to eliminate even more monopoly from the economy they would be completely consistent with an output maximizing antitrust policy, not at variance with it. For such rules the problem is not the articulation of the goal, but rather its administration. A case in point is the current law governing predatory and related forms of strategic pricing. The rules that we use today are admittedly somewhat under deterrent.[173] For well over a half century economists have been able to model various anticompetitive "limit" pricing strategies in which dominant firms set entry deterring prices, or pricing designed to limit the growth of smaller rivals.[174] These prices are said to be "sustainable," because they are above all relevant measures of cost. As a result a firm can pursue them indefinitely.[175]

To be sure, using antitrust to condemn long-run above cost pricing strategies can theoretically be fully consistent with the consumer welfare principle. The theory is that the long-run pricing strategy causes more consumer harm because it results in less competition, and thus lower output, than a more competitive alternative. The availability of long run limit pricing strategies invite the dominant firm to make a tradeoff between the height and the duration of monopoly prices. Charging the short-run profit maximizing price entails high prices for the immediate future but relatively quick entry and dissipation toward the competitive level. By contrast, charging a lower "limit" or entry-deterring price means that immediate monopoly profits per unit will be lower, but they will last a longer time, and perhaps indefinitely.

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[172]*See* discussion *supra*, text at notes __; *and, e.g.*, THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 302-303 (2013); Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. 1, 10–13 (2015); Lina Khan & Sandeep Vaheesan, Market Power and Inequality: the Antirust Counterrevolution and its Discontents, 11 Harv. L. & Pol'y rev. 235 (2017). *See also* JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE (2012).

[173]*See* Herbert Hovenkamp, *The Areeda-Turner Test for Exclusionary Pricing: A Critical Journal*, 46 REV. INDUS. ORG. 209 (2015).

[174]*E.g.*, Joe S. Bain, *A Note on Pricing in Monopoly and Oligopoly*, 39 AM. ECON. REV. 448 (1949) (modelling limit pricing); MARY J. BOWMAN & GEORGE L. BACH, ECONOMIC ANALYSIS AND PUBLIC POLICY 388-389 (2d ed. 1949) (noting limit pricing by Alcoa). See also Darius W. Gaskins, Jr., *Dynamic Limit pricing: Optimal pricing Under Threat of Entry*, 3 J. ECON. THEORY 306 (1971); Peter Pashigan, *Limit Price and the Market Share of the Leading Firm*, 16 J.INDUS. ECON. 165 (1968). See also Oliver E. Williamson, *Predatory pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284 (1977) (finding limit pricing to be the most rational strategy for dominant firms). Cf. Phillip Areeda & Donald Turner, *Williamson on Predatory Pricing*, 87 YALE L.J. 1337 (1978).

[175] *See* STEPHEN MARTIN, INDUSTRIAL ORGANIZATION IN CONTEXT 228-230 (2009) (describing limit pricing strategy by U.S. Steel).

The real issue in choosing an antitrust rule to govern exclusionary pricing is not selection or rejection of consumer welfare as an antitrust goal. Rather, as the history of predatory pricing law illustrates all too painfully, the problems relate to coherence, fact finding, and management. Many of the long-run strategies require computations that no court could possibly manage, such as the difference between a firm's short-run profit-maximizing price and its actual price.[176] These theories would find fully profitable prices, covering both fixed and variable costs, to be too low and result in injunctions requiring the firms to raise its prices even further.[177] That is, the theories would require a firm to charge its short-run profit-maximizing price rather than some lower price intended to deter or delay competitive entry. To the extent courts are prone to make errors firms can be expected to charge even higher prices in order to avoid antitrust prosecution, thus harming consumers even more. The measurement problem becomes absolutely intractable in cases involving multi-product firms with significant fixed or common costs.[178] In such a case there is no non-arbitrary way of allocating costs among various products. Alternatively, one might either forbid a firm from cutting its price in response to new entry – thus requiring a patently irrational act – or else provide that once a firm has cut its price in anticipation of entry it be forbidden from raising it later.[179]

The average variable cost test for predation, which is currently the law, is certainly not perfect and is very likely under deterrent, but to this point no superior test has emerged.[180]

Another area of complaint is vertical restraints, and the call for return to increased use of per se rules.[181] Clearly, no general case can be made that vertical restraints increase the market power of suppliers, although they may occasionally serve to extend the power of some dealers or to facilitate dealer collusion. There is also no good case that per se rules against vertical restraints would benefit small business. Today many retailers are in fact quite large companies,

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[176]*See* Frederic M. Scherer, *Predatory Pricing and the Sherman Act: A Comment* 89 HARV. L. REV. 869 (1976) (arguing for such an approach)

[177] *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶736b (4th ed. 2016).

[178] A common cost is one that is shared by two or more products but not readily attributable to each. For example, a firm producing multiple products from the same plant will have to provide light and heat to the entire plant, and these costs must then be assigned arbitrarily among the individual products. It poses a particular problem for regulated industries. *See, e.g.*, Robert W. Crandall & J. Gregory Sidak, *Is Structural Separation of Incumbent Local Exchange Carriers Necessary for Competition*, 19 YALE J. REG. 335, 405 (2002) (noting arbitrariness in allocation of common costs for regulatory purposes).

[179] *See*, e.g., William J. Baumol, *Quasi-Permanenc of Price Reductions: A Policy for Prevention of Predatory Pricing*, 89 YALE L.J. 1 91979); accord Aaron S. Edlin, *Stopping Above-Cost Predatory Pricing*, 111 YALE L.J. 941, 945 (2002).

[180]*See* Herbert Hovenkamp, *The Areeda-Turner Test for Exclusionary Pricing: A Critical Journal*, 46 REV. INDUS. ORG. 209 (2015). On judicial attempts – thus far all unsuccessful – at fashioning a more aggressive test, *see* AREEDA & HOVENKAMP, *supra* note __ at ¶737.

[181] See, e.g., Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: the Antitrust Counterrevolution and its Discontents*, 11 HARV. L. & POL'Y REV. 235, 274 -275 (2017) (arguing that the case for a move from per se rules to the rule of reason for vertical restraints was "empirically unsupported' and "dramatically undercut antitrust enforcement"). On resale price maintenance in particular, see Marina Lao, *Free Riding: An Overstated, and Unconvincing, Explanation for Resale Price Maintenance*, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK 196, 210 (Robert Pitofsky, ed., 2008). See also Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397 (2009) (urging a quasi per se rule for many tying arrangements).

some of them larger than the manufacturers who supply them. Further, a supplier who effectively loses the power to attain optimal distribution through independent dealers is likely to terminate them and switch to self distribution. In that case an aggressive antitrust rule ends up harming the very interests it was intended to protect.[182]

Conclusion

The benefits of robust market competition are substantial, as four centuries of capitalism and the dramatic failures of many nonmarket alternatives have revealed. But market-based economies and legal systems vary, and the variations have not been equally successful. Further, competitive markets are neither self-creating nor self-executing. They must be supported by well-managed institutions or else they will fail to provide socially desirable results. In addition, when markets fail, different markets call for different types of repairs.

These propositions are obvious to most historians and other students of world economies. The highest overall standards of living belong not to radically individualistic and laissez faire societies, nor to highly socialized ones. Rather, the relationship between economic performance and degrees of government intervention is an inverted U. The highest standards belong to those states that have a middle-range mixture of private, market-based ordering and government imposed organization, and a rational and predictable system for distinguishing where one ends and the other begins.[183]

So what is the role for antitrust in this mixture? A serious problem with the progressive antitrust record is lack of coherence. This results in part from exaggerated expectations about what antitrust can accomplish. In addition is a stunning lack of specificity about exactly how courts should be administering antitrust law under such a diverse and poorly articulated set of goals. Antitrust is at once to be a cure for monopoly, for bigness, for the hardships facing small business, for inequalities of wealth, and for numerous other market imperfections.

A progressive regulatory policy toward industry and business should proceed in two steps. First it should identify market circumstances that need correction and act accordingly. Market failure is certainly a justifiable rationale for regulatory intervention, but it need not be the only one. Concerns with wealth distribution, universal service, or management of risk are all legitimate regulatory goals for progressive statutory intervention, although not for antitrust.[184] Then, for all that remains antitrust should remain as the "residual" regulator, operating in more-or-less neoclassical fashion with maximization of output as its underlying goal. Designing an optimal policy for progressive market intervention generally is more difficult than designing a

[182] *See* discussion *supra*, note __ (noting that Justice Douglas correctly made this production in his *Standard Stations* dissent).

[183] *See* HACKER & PIERSON, AMERICAN AMNESIA *supra*, note __; Herbert Hovenkamp, *book review*, NEW RAMBLER (May 9, 2016).

[184] Universal service in particular was an avowed goal of New Deal policy in both rural electrification and telecommunications, particularly telephone. On rural electrification, *see* President Franklin D. Roosevelt's signing statement on the Rural Electrification Act, Ch. 432, 49 Stat. 1363 (1936) (codified as amended at 7 U.S.C. §§ 901- 950) (Sep. 22, 1944), available at http://www.presidency.ucsb.edu/ws/?pid=16560; on telecommunications, *see* ROBERT BRITT HORWITZ, THE IRONY OF REGULATORY REFORM: THE DEREGULATION OF AMERICAN TELECOMMUNICATIONS 126-153 (1989) (early FCC).

progressive policy for antitrust, whose goal is singular and at least conceptually capable of being implemented.

Markets -- and accordingly, antitrust law -- are ineffective institutions for distributing wealth.[185] Further, even within a progressive state, antitrust's goal is not to shelter small business, protect inefficient firms, regulate price or output or prohibit discrimination, channel innovation, provide for universal service, or protect against economic cycles. Rather it is to promote consumer welfare through classically competitive markets, understanding that consumers benefit from high output, high quality,[186] and low prices. As a result, there is no antinomy between a hard neoclassical antitrust policy that is committed to free markets within its domain, and an empirically-based theory of market regulation whose concerns range more widely. Far too many progressives – well intended people such as Justices Brandeis, Douglas, and Chief Justice Earl Warren – failed to appreciate this distinction. While they were progressive in their regulatory policy, they also saw antitrust itself as a heavy handed regulator, and often for economically indefensible goals. Perhaps as a result, anti-progressives have often viewed antitrust as useless or perhaps even socially harmful. A well designed antitrust policy must avoid both extremes.

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[185] For some of the many problems, see Daniel A. Crane, *Antitrust and Wealth Inequality*, 101 CORNELL L. REV. 1171 (2016).

[186] Quality can be measured in a number of ways and includes both tangible and intangible factors. *See, e.g.*, Allen P. Grunes & Maurice E. Stucke, *No Mistake About it: The Important Role of Antitrust in the Era of Big Data*, 14 APR-ANTITRUST SOURCE 1 (2015) (loss of privacy as a quality element).