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The Evolving Populisms of Antitrust

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THE EVOLVING POPULISMS OF ANTITRUST

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Scholars often divide the eras of U.S. antitrust law into those of “populism” and “economics” and posit a fundamental conflict between the two concepts. Generally, the decisions of the current antitrust era are described as economic, and the mid-twentieth century period is labeled as populist. A review of Supreme Court decisions on antitrust reveals a more complex picture. From the enactment of the Sherman Act in 1890, the Court’s antitrust rulings have spoken of populist goals and aimed to advance these objectives through economically informed rules. Populism versus economics is thus a false dichotomy.

The populism and economics of antitrust jurisprudence have changed over time. In the decades following the passage of the Sherman Act, the Supreme Court often spoke of protecting small producers and displayed only secondary concern for consumers. The Court in the early era proscribed certain horizontal and vertical restraints but viewed many forms of dominant firm and horizontal conduct more favorably. Starting in the late 1930s, the Court adopted consumer protection as a principal aim of the antitrust laws but continued to champion the cause of small businesses as well. Its economics took a marked shift away from faith in the market and treated many forms of horizontal and vertical conduct as inherently problematic. The Court has since the 1970s held that the antitrust laws exist only to protect consumers and also adopted the view that most forms of business conduct can benefit consumers.

Although some scholars argue that antitrust law should seek to maximize “economic efficiency” and ignore distributional consequences, antitrust enforcers and the courts should continue to apply the antitrust laws as a consumer protection regime. First and foremost, Congress, as revealed in the legislative histories of the antitrust laws, showed an interest in preventing large firms from using their market power to raise prices and transfer wealth from consumers. Second, consumer-oriented antitrust enforcement can be one important policy tool to contain growing economic inequality by preventing wealth transfers from consumers to producers. Third, given how consumers often cannot organize politically on account of their vast numbers, antitrust enforcers can serve as trustees for this group and protect its interests from better-organized producer groups. Last, just as antitrust can help consumers, consumers can provide needed political support for antitrust enforcement.

I. INTRODUCTION

By all outward appearances, antitrust enforcement has been a technocratic enterprise for more than a half-century. Antitrust enforcement today is an elite, behind-the-scenes affair: expert economists and lawyers, whether in private practice or a government agency, represent the

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parties involved in antitrust matters. Federal judges, who are nominated by the President and confirmed by the Senate, decide the periodic antitrust case that appears on their docket and rarely allow the matters to reach a jury. Not surprisingly, political and public interest in antitrust can generously be described as modest. Presidential candidates may, at most, issue brief statements on “enforc[ing] the antitrust laws so that all Americans benefit from a growing and healthy competitive free market economy.” This lack of attention is quite a contrast to the past, particularly the late nineteenth and early twentieth centuries, when antitrust was a topic of public interest and even inspired its own popular movements. One of the defining issues of the 1912 presidential election was the question of what was to be done with the trusts. The three main candidates offered contrasting approaches to this problem and presented them as central elements of their platforms. To contemporary antitrust practitioners and scholars, however, this popular and populist interest in antitrust is little more than a historical curiosity, far removed from the specialized antitrust machinery of the twenty-first century.

Perhaps because the waxing and waning public interest in antitrust seems supportive of such a division, some scholars have argued that the substance of antitrust jurisprudence can also be neatly divided into populist and technocratic eras, positing some inherent tension between

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1 See generally Richard Hofstadter, What Happened to the Antitrust Movement?, in THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 102, 103-04 (1965); Daniel A. Crane, Technocracy and Antitrust, 86 TEX. L. REV. 1159 (2008).  
2 See Crane supra note 1, at 1184 (“Only about 1% of private federal antitrust cases are tried before juries.”).  
3 See id. at 1167-70 (describing the declining number of references to antitrust in the political platforms of the two principal parties).  
5 Hofstadter, supra note 1, at 109-12.  
“populism” and “economics.” This view, however, is an oversimplification of a complex reality. As the late Robert Bork observed, the goals of antitrust are a separate question from the specific rules to apply to business conduct. Bork recognized that in antitrust, as in any area of law, the goals come first and following that the appropriate rules can be debated. He wrote “[a]ntitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals? Everything else follows from the answer we give.”

From its inception, antitrust law has sought to protect some relatively vulnerable group from the power of big businesses. Even when it has been the standard-bearer of elite conservative opinion, the Supreme Court has articulated the antitrust laws as a legal regime that speaks on behalf of some group of non-elite Americans and aimed to protect them from the economic predations of powerful business enterprises. In other words, antitrust has always been populist, in the definition of historian Michael Kazin. It has spoken on behalf of consumers, small producers, or both against big business. The Supreme Court has always relied on economics to inform its formulation of specific antitrust rules. The prevailing economics of antitrust has evolved and arguably become more sophisticated over time but economic thinking has always been apparent in the Court’s antitrust opinions. Antitrust jurisprudence has always been a mixture of populism and technocracy.

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8 See, e.g., Geoffrey A. Manne & E. Marcellus Williamson, Hot Docs v. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication, 47 ARIZ. L. REV. 609, 617 n.32 (2005) (“The decidedly post-Chicago notion of “consumer choice” or “consumer sovereignty,” for example, as antitrust’s animating principle may be populism disguised as economics.”).
10 Id. at 50.
11 See MICHAEL KAZIN, THE POPULIST PERSUASION: AN AMERICAN HISTORY 1 (1998) (“In every campaign season, scores of politicians – both liberal and conservative – vow to fight for “middle-class taxpayers” and against a variety of “bureaucrats,” “fat cats,” and “Big Men.” Such images and countless others like them make up the language of populism. Whether orated, written, drawn, broadcast, or televised, this language is used by those who claim to speak for the vast majority of Americans who work hard and love their country. That is the most basic and telling definition of populism: a language whose speakers conceive of ordinary people as a noble assemblage not bounded narrowly by class, view their elite opponents as self-serving and undemocratic, and seek to mobilize the former against the latter.”) (emphasis added).
The group that antitrust law has championed has shifted over the 120 years since the enactment of the Sherman Act. Antitrust jurisprudence can be divided into three eras of populism, each with its own goals and understandings of how a market economy functions. In the first four decades, the Supreme Court described the antitrust laws primarily as statutes intended to protect small businesses from larger businesses and spoke of consumers infrequently and even then often only directly. The economics of antitrust decision-making recognized the effects of cartels and monopolies, appreciated power of scale economies, and conceived of harmful free riding. Starting in the early 1940s, the Supreme Court explicitly considered the interests of consumers in its antitrust decisions and recognized that they were often harmed by the practices of business. At the same time, the Court maintained its interest in preserving small businesses and on occasion had to decide whose “ox would be gored” – that belonging to consumers or small business. The economics of the era prized the free play of the price system and viewed contractual restraints, tying, and mergers with disfavor. The Supreme Court in the 1970s abandoned its commitment to protecting small businesses and held that consumers are the only group that antitrust law should protect. And, as it embraced consumer welfare as the proper goal of the antitrust laws, the Court adopted an economic framework that displayed great faith in the self-regulating power of even concentrated markets and questioned the benefits of stringent antitrust rules.

Today, many antitrust commentators have called for the Supreme Court to abandon its focus on protecting consumers and focus exclusively on maximizing “economic efficiency” regardless of its distributional consequences.\(^\text{12}\) In more concrete terms, according to this school of thought, the antitrust agencies and courts should be indifferent toward whether a dollar goes to consumers in the form of savings or to producers and shareholders in the form of profits. The

\(^{12}\text{See, e.g., Dennis W. Carlton, Does Antitrust Need to be Modernized?, 21 J. ECON PERSPS. 155 (2007).}\)
Supreme Court should reject this approach and strengthen its commitment to consumer populism as the primary goal of antitrust law. In enshrining consumers as a principal protected class of antitrust law, the Supreme Court would be advancing multiple desirable objectives. First, the Court would be true to the legislative intent of Congress in enacting the antitrust laws – preventing wealth transfers from consumers to producers. Second, the Court would address the dramatic growth in inequality in recent decades and promote a more progressive distribution of wealth. Antitrust law can prevent producers from engaging in anticompetitive conduct that transfers wealth from consumers to more affluent shareholders and executives. Third, the Court would be protecting a group incapable of organizing itself politically due to its size and heterogeneity – after all, nearly all adult-age Americans are consumers. Fourth, the Court would build a popular constituency for antitrust, which is essential for the long-run vitality of the antitrust laws. Given the political power of large businesses and their general opposition to the antitrust laws, public and private antitrust enforcers must establish consumers as their core constituency if the antitrust mission is to remain viable and thrive in the long run.

This Article proceeds as follows. Part II discusses the Supreme Court’s rulings in the early era of antitrust. During this period, the Court articulated the antitrust laws as preserving the commercial viability and freedom of small businesses and appreciated the harms from cartels and monopolies and also the benefits of scale economies. Part III reviews the Supreme Court’s antitrust decisions in the mid-twentieth century. Between the late 1930s and early 1970s, the Court showed growing concerns for consumers but also remained committed to the protection of small businesses. The Court during this era prized the free setting of prices and frowned on any attempts to restrain the operation of the price system. It also took a hostile approach to mergers, tying and most vertical restraints. Part IV turns to the current era of antitrust jurisprudence that
dates from the mid-1970s to the present. The Supreme Court has held unequivocally that the antitrust laws exist only for the protection of consumers and dismissed any other objectives as improper. At the same time, the Court has shown greater faith in the self-regulating power of markets and taken a more benign view of mergers, vertical restraints and monopolies. Part V argues that as the economics of antitrust becomes more empirical and sophisticated the legal regime must remain committed to consumer protection.

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

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

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

In the first four decades of the new law, the Supreme Court gave voice to the popular the anti-monopoly sentiment of the period—preserving small producers in the new economic environment. Its solicitude was directed at farmers and small firms. The Court’s focus on small producers and general neglect of consumers may not be surprising because the idea of consumers as a distinct constituency was still very much in its infancy.\(^{13}\) The Court’s rhetorical commitment to small producers is, however, quite remarkable given its generally conservative and pro-laissez-faire ideology at the time.\(^{14}\) The Court during this era aggressively invalidated both federal and state regulation aimed at addressing the power imbalance between business, on one


\(^{14}\) Erwin Chemerinsky, *Under the Bridges of Paris: Economic Liberties Should Not Be Just for the Rich*, 6 CHAP. L. REV. 31, 33-34 (2003) (“[A]dvocacy of economic liberties in the Supreme Court has been about protecting the interests of corporations and the wealthy to be free from government regulation. Certainly, this was true during the *Lochner* era.”).
hand, and workers and consumers, on the other hand – a judicial philosophy synonymous with the *Lochner* decision.\textsuperscript{15}

The Supreme Court lamented the demise of the small producer in the late nineteenth century. It described the history of the independent entrepreneur over the course of the late nineteenth century in moving detail in *United States v. Trans-Missouri Freight Association*.\textsuperscript{16} Due to the rise of the trusts and other large business entities, the Court stated that “[t]rade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein.”\textsuperscript{17} It added that these ruined businessmen may “be unable to readjust themselves to their altered surroundings.”\textsuperscript{18} In *United States v. American Tobacco Co.*, the Court spoke fondly of the small-scale, local tobacco processors that defined the industry prior to the rise of the American Tobacco trust.\textsuperscript{19} It stated that “[t]he manufacture of the product in this country in various forms was successfully carried on by many individuals or concerns scattered throughout the country, a larger number, perhaps, of the manufacturers being in the vicinage of production, and others being advantageously situated in or near the principal markets of distribution.”\textsuperscript{20}

The Court aimed to protect smaller business from the power of their larger rivals and preserving opportunities for independent entrepreneurs. The Court in *Standard Oil Co. v. United States* condemned Standard Oil’s “intent to drive others from the field and to exclude them from their right to trade and thus accomplish the mastery which was the end in view.”\textsuperscript{21} Similarly, in *American Tobacco*, the Court found the tobacco giant’s tactics improper because it used

\begin{footnotes}
\footnotetext[15]{198 U.S. 45 (1905).}
\footnotetext[16]{166 U.S. 290 (1897)}
\footnotetext[17]{Id. at 322}
\footnotetext[18]{Id.}
\footnotetext[19]{221 U.S. 106, 156 (1911).}
\footnotetext[20]{Id. at 156.}
\footnotetext[21]{221 U.S. 1, 76 (1911)}
\end{footnotes}
“methods devised in order to monopolize the trade by driving competitors out of business, which were ruthlessly carried out upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible.”\textsuperscript{22} Likewise, in Swift \textit{v. United States}, the Court deemed the practices of the defendants to be illegal because they resulted in the “exclusion of competitors.”\textsuperscript{23} It also stressed how the Sherman Act intended to prevent monopolies from destroying “equality of opportunity” for the independent entrepreneur.”\textsuperscript{24}

In \textit{Chicago Board of Trade v. United States}, the Court viewed the defendants’ restricting on trading positively because it aided farmers and country dealers to participate in wholesale markets on more favorable terms.\textsuperscript{25} Specifically, the Court noted that the Board’s rule had, among others, the following benefits to small producers:

“(a) It created a public market for grain ‘to arrive.’ Before its adoption, bids were made privately. Men had to buy and sell without adequate knowledge of actual market conditions. This was disadvantageous to all concerned, but particularly so to country dealers and farmers. . . . (e) It increased the number of country dealers engaged in this branch of the business; supplied them more regularly with bids from Chicago; and also increased the number of bids received by them from competing markets. (f) It eliminated risks necessarily incident to a private market, and thus enabled country dealers to do business on a smaller margin. In that way the rule made it possible for them to pay more to farmers without raising the price to consumers. (g) It enabled country dealers to sell some grain to arrive when they would otherwise have been obliged either to ship to Chicago commission merchants or to sell for ‘future delivery.’”\textsuperscript{26}

The Court’s concern for small business also extended to industries suffering from cyclical troubles. In \textit{Maple Flooring Manufacturers Association v. United States}, the Court recognized the joint management of business cycles in an industry as a legitimate activity.\textsuperscript{27} It worried about

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\item[22] \textit{American Tobacco}, 221 U.S. at 181-82.
\item[23] 196 U.S. 372, 394 (1905).
\item[25] 246 U.S. 231, 240-41 (1918).
\item[26] \textit{Id.}
\item[27] 268 U.S. 563 (1925).
\end{itemize}
\end{footnotesize}
the “economic disturbances produced by business crises resulting from overproduction”²⁸ and welcomed “the conduct of commercial operations becom[ing] more intelligent through the free distribution of knowledge.”²⁹ The Court viewed conduct that “produce[d] fairer price levels” positively, a sign of its concern for producers.³⁰ Similarly, in Appalachian Coals, Inc. v. United States, the Court considered it relevant that the coal industry was experiencing severe economic distress. It stated that the “evidence leaves no doubt of the existence of evils at which defendants’ plan was aimed. . . . [The industry] suffered from over-expansion and from a serious decline through the growing use of substitute fuels. It was afflicted by injurious practices within itself – practices which demanded correction.”³¹

The Supreme Court held “dealer freedom” to be an independent goal of the antitrust laws. Specifically, it wanted small business to operate free of external interference and exploitation. The Court in United States v. Colgate & Co. held that unless there is an intent to establish or maintain a monopoly the Sherman Act “does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.”³² Private restraints on dealer freedom were also seen as generally obnoxious to the antitrust laws. In Dr. Miles Medical Co. v. John D. Park & Sons, the Court stressed the importance of preserving dealer freedom.³³ It stated as a general rule: “All interference with individual liberty of action in trading, . . . , if there is nothing more, are contrary to public policy, and therefore void.”³⁴ In another decision, the Court disapproved of

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²⁸ Id. at 563.
²⁹ Id. at 582-83.
³⁰ Id. at 582.
³¹ 288 U.S. 344, 372 (1933).
³² 250 U.S. 300, 307 (1920).
³³ 220 U.S. 373, 409.
³⁴ Id. at 407.
the defendants’ joint conduct because it impeded the commercial freedom of both wholesalers and retailers in the lumber industry.\textsuperscript{35}

At times, the Court even viewed parties involved in cartel arrangements sympathetically due to their loss of business freedom – a perspective that modern antitrust observers would find quite foreign. The cartel participant was treated as a victim to the conspiracy to which it was a party. In \textit{United States v. Addyston Pipe}, the Court condemned the bid rigging at issue, citing how “[i]t is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded.”\textsuperscript{36} In \textit{United States v. Joint Traffic Association}, the Court described the dire fate that would await a railroad that attempted to break away from a collusive arrangement.\textsuperscript{37} In such an event, this “deviant” railroad would soon be engaged in a “war between itself on the one side and the whole association on the other, in the course of which rates would probably drop lower than the company was proposing, and lower than it would desire or could afford.”\textsuperscript{38}

The Court was not indifferent to how anticompetitive behavior harmed consumers. It often cited higher prices as one of the harms of antitrust violations and thus showed concern for the consuming public. The Court in \textit{Addyston Pipe} stated the defendants’ conduct “compel[led] the public to pay an increase over what the price would have been if fixed by competition

\textsuperscript{35} See Eastern States Retail Lumber Dealers Association v. United States , 234 U.S. 600, 612, 614 (1914) (“The circulation of these reports not only tends to directly restrain the freedom of commerce by preventing the listed dealers from entering into competition with retailers, as was held by the district court, but it directly tends to prevent other retailers who have no personal grievance against him, and with him he might trade, from so doing, they being deterred solely because of the influence of the report circulated among the members of the associations.”)
\textsuperscript{36} 175 U.S. 211, 244 (1899).
\textsuperscript{37} 171 U.S. 505 (1898).
\textsuperscript{38} \textit{Id.} at 564-65.
between defendants.” 39 In *Northern Securities Co. v. United States*, the Court feared the possibility of railroad consolidations that allowed a holding company to “obtain the absolute control throughout the entire country of rates for passengers and freight, beyond the power of Congress to protect the public against their exactions.” 40

As a distinct group, consumers were alluded to indirectly and often almost only as an afterthought. The Court did not view consumers as a group in the same way it viewed farmers, manufacturers, and dealers. In *Trans-Missouri Freight*, the Court described how higher railroad rates would harm “the sale of the products of the farm, the workshop and manufactory” and perfunctorily observed that it “also largely influences the price to be paid by everyone who consumes any of the property transported over the railway.” 41 And yet, it notably omitted the consuming public when it stated “[t]he business which the railroads do is of a public nature, closely affecting almost all classes in the community – the farmer, the artisan, the manufacturer and the trader.” 42

Revealing its producer bias, the Court often spoke of high prices from the perspective of businesses rather than consumers. The Court in *Joint Traffic Association* described collusion as a practice that “restrains instead of promoting trade and commerce.” 43 In *Addyston Pipe*, high prices were characterized as a burden on commerce. 44 The Court described the collusive conduct as “a direct restraint upon the trade, and therefore any contract or combination which enhanced

39 *See Addyston Pipe*, 175 U.S. at 237 (“The defendants were by their combination therefore able to deprive the public in a large territory to the advantages otherwise accruing to them from the proximity of defendants’ pipe factories and, by keeping prices just low enough to prevent competition by Eastern manufacturers, to compel the public to pay an increase over what the price would have been if fixed by competition between defendants[.]”) 40 193 U.S. 197, 343 (1906).
41 *Trans-Missouri Freight*, 166 U.S. at 336.
42 Id. at 322.
43 *Joint Traffic Association*, 171 U.S. at 577.
44 *Addyston Pipe*, 175 U.S. at 245.
the price might in some degree restrain the trade in the article.” \(^{45}\) Similarly, in *Northern Securities*, railroad mergers that reduced competition were viewed as a clog on the flow of commerce. \(^{46}\) The Court in *United States v. Terminal Railroad Association* viewed high, discriminatory rail rates with hostility because of their adverse effects on small producers. \(^{47}\) It stated that the terminal’s discriminatory rates are “obviously injurious to the commerce and manufacturers of St. Louis.” \(^{48}\) These discriminatory rates placed local producers at a competitive disadvantage vis-à-vis producers in other geographic locations. \(^{49}\)

### b. Rules of the Era: Hostility to Cartels and Vertical Restraints but Permissive toward Other Practices

While its analysis may not live up to the expectations of the modern antitrust community, the Supreme Court in the early years of antitrust demonstrated economic understanding in formulating antitrust rules. The Court revealed an awareness of many economic concepts that modern antitrust practitioners cite with regularity – output and price effects from monopoly and collusive pricing, economies of scale, price transparency, and free riding.

The Court adopted a strict prohibition against horizontal restraints that restricted price competition. In *Trans-Missouri Freight*, the Court declined to evaluate whether the fixed rail rates were “reasonable.” \(^{50}\) It stated that “subject of what is a reasonable rate is attended with great uncertainty. What is a proper standard by which to judge the fact of reasonable rates?” \(^{51}\)

The Court in *Joint Traffic Association* applied a per se prohibition on restraints that restricted

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\(^{45}\) *Id.*
\(^{46}\) *Northern Securities*, 193 U.S. at 352.
\(^{47}\) 224 U.S. 383, 408 (1912).
\(^{48}\) *Id.* at 408.
\(^{49}\) *See id.* at 407 (“These rates are applied to all traffic destined to cross the river, with certain exceptions to which we shall later refer, which originates within an irregular area of which St. Louis is the center, and having a diameter of from one to two hundred miles. This arbitrary operates to cast a burden upon short hauls, which has led to much complaint, as being both discriminatory and extortionate.”).
\(^{50}\) *Trans-Missouri Freight*, 166 U.S. at 331.
\(^{51}\) *Id.*
horizontal price competition, stating “[t]he natural and direct effect of [the agreement in this case and Trans-Missouri] is the same, viz., to maintain rates at a higher level than would otherwise prevail.”52 In Addyston Pipe, the Court applied the same categorical bar on bid ridding and stated “[t]he question is as to the effect of such combination upon the trade in the article, and if that effect be to destroy competition and thus advance the price, the combination is one in restraint of trade.”53 This per se rule against horizontal price fixing was reiterated in United States v. Trenton Potteries Co.54 As in Trans-Missouri Freight, the Court refused to examine the reasonableness of the fixed prices, observing “[t]he reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed.”55

The Court similarly viewed vertical restraints as obnoxious to the antitrust laws. In Dr. Miles, it held minimum resale price maintenance to be per se illegal. It stated that “[t]he agreements are designed to maintain prices, after the complainant has parted with the title to the articles, and to prevent competition among those who trade in them.”56 It noted the similarity between a horizontal cartel between retailers and resale price maintenance agreements between the manufacturer and every one of its retailers.57 And just as the retailers could not invoke higher profits in the defense of a horizontal cartel, the manufacturer cannot invoke them as a defense of resale price maintenance.58 The Court in Standard Fashion Co. v. Magrane-Houston Co. treated an exclusive dealing arrangement between a textile manufacturer and a retailer as presumptively

52 Joint Traffic Assoc., 171 U.S. at 565.
53 Addyston Pipe, 175 U.S. at 245.
54 273 U.S. 392 (1927).
55 Id. at 397.
56 Dr. Miles, 220 U.S. at 373.
57 Id. at 407-08.
58 Id.
illegal.\textsuperscript{59} It quoted the Court of Appeals decision with approval, observing that “[t]he restriction of each merchant to one pattern manufacturer must in hundreds, perhaps in thousands, of small communities amount to giving such single pattern manufacturer a monopoly in the business of the community.”\textsuperscript{60}

The Court, however, did not believe that all restraints should be subject to the per se rule. In \textit{Joint Traffic Association}, the Court made the obvious but critical observation that all contracts and business combinations restrain trade “in some remote and indirect degree” but that does not mean all contracts and business combinations run afoul of the antitrust laws.\textsuperscript{61} In \textit{Trans-Missouri Freight}, the Court stated that covenants not to compete are not inherently anticompetitive. The Court noted that some contractual restraints “exhibit a strong tendency towards enabling the parties to make such a contract in relation to the sale of the property” and grant the “vendor the freest opportunity to obtain the largest consideration for the sale of that which is his own.”\textsuperscript{62} The \textit{Dr. Miles} Court, while outlawing resale price maintenance, recognized that many restraints have benign effects. In distinguishing the resale price maintenance contracts from less harmful restraints, it implied that restraints on competition could facilitate the sale of businesses and protect goodwill and other intangible assets.\textsuperscript{63}

Furthermore, while outlawing horizontal price fixing, the Court took a more relaxed approach to horizontal cooperation that did not directly fix prices, especially in the 1920s and 1930s. In \textit{Chicago Board of Trade}, the Court refused to treat the Board’s restrictions on after-

\begin{itemize}
\item \textsuperscript{59} 258 U.S. 346 (1922).
\item \textsuperscript{60} Id. at 357.
\item \textsuperscript{61} Joint Traffic Assoc., 171 U.S. at 568.
\item \textsuperscript{62} Trans-Missouri Freight, 166 U.S. at 328-29.
\item \textsuperscript{63} See Dr. Miles, 220 U.S. at 407 (“The present case is not analogous to that of a sale of good will, or of an interest in a business, or the grant of a right to use a process of manufacture. The complainant has not parted with any interest in its business or instrumentalities of production.”)).
\end{itemize}
hours trading as per se illegal. In part, the Court cited the informational benefits of redirecting trading to the open market with public bids: market participants could make more informed decisions and be less vulnerable to opportunistic conduct. In *Maple Flooring*, the Court declined to treat information sharing between rivals as an antitrust violation. While it acknowledged that this cooperation contributed to greater uniformity in pricing, the Court also stated that this information sharing promoted the “intelligent conduct of business operations.”

The Court in *Appalachian Coals* – a case decided during the Great Depression when the antitrust laws were effectively suspended for several years – went the furthest in its tolerance for horizontal cooperation. The Court refused to condemn a joint selling arrangement between rival coal producers as per se illegal. It stated that “the unfortunate state of the industry would not justify any attempt unduly to restrain competition or to monopolize, but the existing situation prompted defendants to make, and the statute did not preclude them from making, an honest effort to remove abuses to make competition fairer, and thus to promote the essential interests of commerce.”

In *Northern Securities*, a major merger case of the era, the Court recognized the potential anticompetitive effects of horizontal mergers. The Court ruled that the merger between parallel railroad lines running from Chicago to the West Coast was illegal. It found that the merger “may have been for the pecuniary benefit of those who formed or caused it to be formed.

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64 *Chicago Bd. of Trade*, 246 U.S. at 64.
65 *See id.* at 241 (“But within the narrow limits of its operation the rule helped to improve the conditions thus: (a) It created a public market for grain ‘to arrive.’ Before its adoption, bids were made privately. Men had to buy and sell without adequate knowledge of actual market conditions. This was disadvantageous to all concerned, but particularly so to country dealers and farmers.”).
66 *Maple Flooring*, 268 U.S. at 586.
67 *Id.* at 582.
69 *Appalachian Coals*, 328 U.S. at 344.
70 *Id.* at 372.
71 A prior merger case before the Supreme Court was decided on constitutional grounds. The Court held that under prevailing Commerce Clause jurisprudence Congress did not have the authority to regulate mergers in manufacturing. *See United States v. E.C. Knight Co.*, 156 U.S. 1 (1894).
But the interests of private persons and corporations cannot be made paramount to the interests of the general public.\textsuperscript{72} 

While it understood the harmful effects of monopoly on consumers,\textsuperscript{73} the Court did not condemn companies on account of size alone. The Court believed that scale gave rise to significant cost savings and was an important source of economic progress. At the same time it lamented the effect of large-scale industry on small producers, the Court in \textit{Trans-Missouri Freight} stated that this “seems to be the inevitable accompaniment of change and improvement.”\textsuperscript{74} In \textit{Terminal Railroad}, the Court found the duplication of railroad terminals and bridges across in the Mississippi in St. Louis to be infeasible.\textsuperscript{75} It further concluded that unified ownership of this rail infrastructure created a system “of the greatest public utility.”\textsuperscript{76} On this basis, the Court refused to order the defendants to divest railroad bridges and terminals, as the government wanted.\textsuperscript{77} The Court in \textit{United States v. United States Steel} spoke of the benefits of vertical integration and scale.\textsuperscript{78} It noted the “value of the continuity of manufacture from the ore to the finished product” and added that “[t]he Corporation is undoubtedly of impressive size and it

\textsuperscript{72} \textit{Northern Pacific}, 193 U.S. at 352.
\textsuperscript{73} See \textit{Standard Oil}, 221 U.S. at 52 (“The evils which led to the public outcry against monopolies and to the final denial of the power to make them may be thus summarily stated: 1. The power which the monopoly gave to the one who enjoyed it to fix the price and thereby injure the public; 2. The power which it engendered of enabling a limitation on production; and, 3. The danger of deterioration in quality of the monopolized article which it was deemed as the inevitable resultant of the monopolistic control over its production and sale.”).
\textsuperscript{74} \textit{Trans-Missouri Freight}, 166 U.S. at 322-23.
\textsuperscript{75} See \textit{Terminal Railroad}, 224 U.S. at 403 (“Suppose it were required of every railroad company to effect its entrance to this city, as best it could and establish its own terminal facilities, we would have a large number of passenger stations, freight depots and switch yards scattered all over the vast areas and innumerable vehicles employed in hauling passengers and freight to and from those stations and depots. Or suppose it became necessary in the exigency of commerce that all incoming trains should reach a common focus, but every railroad company provide its own track; then not only would the expense of obtaining the necessary rights of way be so enormous as to amount to the exclusion of all but a few of the strongest roads, but, if it could be accomplished, the city would be cut to pieces with the many lines of railroad intersecting it in every direction, and thus the greatest agency of commerce would become the greatest burden.”).
\textsuperscript{76} Id. at 409.
\textsuperscript{77} Id. at 410-11.
\textsuperscript{78} 251 U.S. 417, 442.
takes an effort of resolution not to be affected by it.” 79 It held that “the law does not make mere size an offense or the existence of unexerted power an offense.” 80

In determining illegality in monopolization cases, the Court, instead of focusing on size alone, looked at the specific acts of the dominant firm. In American Tobacco, the Court found the defendant liable for monopolization because, among other things, it engaged in price wars intended to drive competitors out of the market or accept a buyout, divided world markets with its main rival, and acquired manufacturing plants not to use them but to shut them down. 81 The Court in Standard Oil ruled against the defendant because it had orchestrated a railroad boycott of competing oil refiners and resorted to price wars with the intention of acquiring competitors. 82 In Terminal Railroad, the Court condemned the consortium for failing to grant membership to all railroads seeking access to St. Louis on non-discriminatory terms. 83


Starting in the late 1930s, the Supreme Court incorporated the protection of consumers as a principal purpose of the antitrust laws. The Court aimed to protect consumers from the high prices and reduced choice that resulted from monopolistic and collusive conduct. At the same time, the Court continued to hold that the preservation of small producers was of antitrust concern. At times, the conduct of powerful firms had the potential to help consumers but hurt smaller rivals. In the event of this tension between the two protected classes of antitrust, the Court more often than not favored the protection of small businesses. In formulating antitrust rules, the Court generally rejected restraints on the free play of market pricing and believed that tying, refusals-to-deal, and mergers harmed consumers, small producers, or both.

79 Id. at 442.
80 Id. at 451.
81 American Tobacco, 221 U.S. at 182-83.
82 Standard Oil, 221 U.S. at 42-43.
83 Terminal R.R., 224 U.S. at 411.
a.  Protecting Both Consumers and Small Producers

Starting in the late 1930s and early 1940s, the Court in its antitrust rulings began showing solicitude for the American consumer. The functional shift came in a 1940 decision that showed how much the Court’s approach to conduct in distressed industries had changed in less than five years. In *United States v. Socony-Vacuum Oil Co.*, the Court ruled that it would no longer tolerate collusive behavior at the expense of the consuming public, even if the industry was in the midst of a general slump. The case involved facts reminiscent of those in *Appalachian Coals*, in which the Court in 1936 had refused to treat a joint selling program in the coal industry as per se illegal. In *Socony-Vacuum*, decided just four years after *Appalachian Coals*, the Court did not view similar collaborative self-help efforts in the oil industry with any sympathy. The joint buying program of the defendants attempted to remove the “overhang” refined petroleum products from the market. The Court deemed this collaborative scheme a per se violation of the antitrust laws and stated that “[p]rices rose and jobbers and consumers in the Mid-Western area paid more for their gasoline than they would have paid but for the conspiracy.”

Although it attempted to reconcile its decision with the ruling in *Appalachian Coals*, the Court’s break with the recent past was all too apparent. Regardless of circumstances, firms could no longer engage in “self-help” measures that resulted in economic injury to consumers. The Court did not treat the depressed state of the oil industry as an excuse for the collusive behavior. It rejected the “elimination of so-called competitive evils [as a] legal justification for such buying

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84 310 U.S. 150 (1940).
85 *Appalachian Coals*, 288 U.S. at 344.
86 Id. at 220.
87 *Socony-Vacuum*, 310 U.S. at 190-91.
88 Id. at 220.
89 See id. at 216 (“Unlike the plan in the instance case, the plan in the Appalachian Coals was not designed to operate vis-à-vis the general consuming market and to fix the prices on that market. Furthermore, the effect, if any, of that plan on prices was not only wholly incidental but also highly conjectural.”).
programs” and further added, with a tone of exasperation, that such justifications had often been invoked in the past.

The rhetorical shift in favor of consumers arguably came in another decision in 1940, *Apex Hosiery Co. v. Leader.* The Court rejected the petitioner’s attempt to use the Sherman Act to enjoin a sit-down strike by workers. The Court held that the antitrust laws exist for the protection of consumers, stating that Sherman Act sought to prevent restraint that tended to “restrict production, raise price or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.” The majority acknowledged that the union-organized strike did reduce competition between workers but held that this type of restraint is of no concern to the antitrust laws unless it has “an effect upon prices in the market or otherwise [deprives] purchasers or consumers of the advantages which they derive from free competition.”

The promotion of low prices remained a constant goal of antitrust law in this period. The Court in *United States v. Parke, Davis & Co.* frowned on conduct that resulted in “price maintenance.” In *United States v. General Motors,* the Court reiterated its commitment to protecting price competition and described it as “as an object of special solicitude under the antitrust laws.” The Court in *Fortner Enterprises, Inc. v. U.S. Steel Corp.* noted how consumers could “be forced to accept the higher price because of their stronger preferences for the product”
of a firm with market power.\textsuperscript{98} Simpson v. Union Oil Co. quoted Adolph Berle and wondered, “Are these behemoths good at making goods – or merely good at making money? Do they come out better because they manufacture more efficiently – or because they 'control the market' and collect unduly high prices from the long-suffering American consumer?”\textsuperscript{99} In FTC v. Procter & Gamble Co., the Court went even further in its protection of consumers from high prices. The majority believed that consumers were paying an unnecessary premium for a commodity product – bleach – on account of the defendant’s advertising campaign.\textsuperscript{100}

Along with protecting consumers from high prices, the Supreme Court also spoke in favor of preserving consumer choice. In one of the earlier cases of the second antitrust era, the Court focused its solicitude on a narrower segment of consumers and found that the conduct at issue would deprive “low-income members of the community” from watching the most popular films.\textsuperscript{101} The Court in Northern Pacific Railway Co. v. United States noted the importance of consumers being able to choose from competing products.\textsuperscript{102} Even if consumers ultimately had to commit to a single supplier through a long-term contract, the value of choice at the bidding stage was emphasized.\textsuperscript{103} The preservation of consumer choice was a running current in the Court’s mid-twentieth-century antitrust jurisprudence. The Court in United States v. Loew’s Inc. stated that the block booking of the defendant film distributors deprived the television stations of

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\item\textsuperscript{98} 394 U.S. 495, 504 (1969).
\item\textsuperscript{99} 377 U.S. 13, 22 n.9 (1964).
\item\textsuperscript{100} FTC v. Procter & Gamble Co., 386 U.S. 568, 572 (1967) (“Since all liquid bleach is chemically identical, advertising and sales promotion are vital. In 1957 Clorox spent almost $ 3,700,000 on advertising, imprinting the value of its bleach in the mind of the consumer. In addition, it spent $ 1,700,000 for other promotional activities. The Commission found that these heavy expenditures went far to explain why Clorox maintained so high a market share despite the fact that its brand, though chemically indistinguishable from rival brands, retailed for a price equal to or, in many instances, higher than its competitors.”).
\item\textsuperscript{101} Interstate Circuit v. United States, 306 U.S. 208, 219 (1939).
\item\textsuperscript{102} 356 U.S. 1, 6 (1958) (“At the same time buyers are forced to forego their free choice between competing products.”).
\item\textsuperscript{103} See United States v. El Paso Natural Gas Co., 376 U.S. 651, 661 (1964) (“Unsuccessful bidders are no less competitors than the successful ones. The presence of two or more suppliers gives buyers a choice.”).
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ability to purchase the films that they desired. In *Fortner*, the Supreme Court framed consumer choice from the perspective of producers and described the harms to consumers when producers are prevented from “free competition for [consumers’] patronage in the market.”

The Court in *United States v. Philadelphia National Bank* articulated the value of consumer choice. The majority spoke of how competition allowed consumers to choose the service bundle that best suited their needs. In reviewing the facts of the bank merger before it, the Court described how competition benefited consumers. The Court wrote: “Competition among banks exists at ever level—price, variety of credit arrangements, convenience of location, attractiveness of physical surrounding, credit information, investment advice, service charges, personal accommodations, advertising, miscellaneous special and extra services—and it is keen.” The Court offered a rich account of consumer choice and championed it for not just lower prices but for its positive effects on quality and other non-price dimensions.

While it embraced consumer protection, the mid-twentieth-century Supreme Court carried over a primary goal of the earlier era of antitrust and continued to treat the preservation of small businesses as a principal goal of the antitrust laws. In *Brown Shoe Co. v. United States*, the Court elaborated on the Congressional concerns about concentration. The Court noted that the legislative history of the Celler-Kefauver Amendments showed that Congress aimed to protect local control over industry and small business. It described these goals as the “economic way of life sought to be preserved by Congress.” The Court in *United States v. Von’s Grocery Co.* feared the eventual demise of small businesses in the grocery retailing market.

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104 See 371 U.S. 38, 48 (1962) (“Television stations forced by appellants to take unwanted films were denied access to films marketed by other distributors.”).
105 *Fortner*, 394 U.S at 504.
107 *Id.* at 368.
109 *Id.* at 315.
110 *Id.* at 333.
in Los Angeles. In ruling in favor of the United States, the Court noted that, “Congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipiency.” Without judicial intervention, the Court predicted a marketplace that would “inevitably gravitate from a market of many small competitors to one dominated by one or a few giants.” In *United States v. Continental Can Co.*, the Court described the threat to small business in negative terms. It feared that permitting the merger before it would impel other firms to combine “seeking the same competitive advantages sought by Continental in this case.” In *United States v. Pabst Brewing Co.*, the Court expressed similar concerns about the loss of small brewers through a wave of mergers.

This desire to preserve of small businesses was a running theme in the Court’s decisions. In his famous opinion in *United States v. Aluminum Co. of America*, which has the precedential value of a Supreme Court decision because the Court could achieve a quorum, Judge Learned Hand noted that the purpose of the antitrust laws was to preserve small firms “which can effectively compete with each other.” Articulating the basis for preferring an economy of many small producers to an economy of a few behemoths, Judge Hand decision said that “[i]t is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his skill and character, to one in which the great mass of those engaged must accept the direction of a few.” In *Klor’s Inc v. Broadway-Hale Stores Inc.*, the Court’s general concern for the independent businessman was made clear. Although the

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112 *Id.* at 277.
115 *Id.* at 464.
117 148 F.2d 416, 429 (1945).
118 *Id.* at 427.
conduct at issue affected only one small retailer in San Francisco, the Court stated that the injury to even one competitor was a source of concern to the antitrust laws. It stated that the defendants’ behavior was not to be “tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy.”120

Beyond supporting their economic viability, the antitrust decisions of the era also stressed protecting opportunities for small businesses to compete. In Interstate Circuit v. United States, the Supreme Court ruled against the defendants because their contracts “deprived [second-run movie theaters] of any opportunity to exhibit the restricted pictures which were the best and most popular of all new features pictures.”121 The Court, furthermore, decried how the restrictions reduced revenues for some second-run movie theaters.122 The Court in Associated Press v. United States held the wire service’s by-laws to be illegal.123 By denying some newspapers of its wire reports, the Associated Press “limit[ed] the opportunity of any new paper to enter these cities”124 and reduced their “opportunity to buy or sell the things in which the groups compete.”125 In International Salt Co. v. United States, the Court deemed conduct that “foreclose[d] competitors from any substantial market” as per illegal.126 The prevention of foreclosure of competitors was a running concern in the Court’s antitrust ruling throughout the 1950s and 1960s.127

The Court’s antitrust rulings also emphasized protecting the freedom of small businesses in the marketplace from external restraints. In Fashion Originators Guild of America v. FTC, the

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120 Id. at 213.
122 Id. at 231.
123 326 U.S. 1 (1945).
124 Id. at 14.
125 Id. at 15.
Court condemned the guild’s conduct because it deprived the freedom of both retailers and clothing manufacturers to transact with who they desired.\textsuperscript{128} The Court in \textit{Kiefer-Stewart Co. v. Seagram & Sons} held the maximum resale price maintenance contracts at issue to be per se illegal.\textsuperscript{129} The Court stated that these contracts “cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.”\textsuperscript{130} In \textit{Silver v. NYSE}, the Court observed that the “antitrust laws serve, among other things, to protect competitive freedom, i.e., the freedom of individual business units to compete unhindered by the group action of others.”\textsuperscript{131}

Other decisions from the era went even further than merely defending “dealer freedom” and spoke of the general need to protect small businesses from the power of larger business entities. The Supreme Court in \textit{Simpson} offered an extended and passionate defense of the independent small dealer.\textsuperscript{132} The Court recognized that gasoline retailers like the plaintiff had “all or most of the indicia of entrepreneurs”\textsuperscript{133} and denounced the resale price maintenance contracts as depriving these retailers of “practically the only power they have to be wholly independent businessmen, whose service depends on their own initiative and enterprise.”\textsuperscript{134} The Court condemned the contracts that “coercively laced into an arrangement . . . thousands of persons whose prices otherwise might be competitive.”\textsuperscript{135} The Court in \textit{United States v. Arnold, Schwinn & Co.} also spoke in defense of small business and the described grave threat to its existence if the power of large business was not checked.\textsuperscript{136} In striking down the defendant’s

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\item \textsuperscript{128} 312 U.S. 457, 465 (1941).
\item \textsuperscript{129} 340 U.S. 211 (1951).
\item \textsuperscript{130} Id. at 213.
\item \textsuperscript{131} 373 U.S. 341, 359 (1963).
\item \textsuperscript{132} 377 U.S. at 13.
\item \textsuperscript{133} Id. at 20.
\item \textsuperscript{134} Id.
\item \textsuperscript{135} Id. at 21.
\item \textsuperscript{136} 388 U.S. 365 (1967).
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territorial restrictions on distributors, the Court said that these contractual restraints could impede the ability of small dealers to compete and promote their eventual demise at the hands of larger manufacturers and distributors.\textsuperscript{137}

The goals of protecting consumers and small producers, while not intrinsically at odds, did sometimes clash. In the event that the conduct of antitrust defendants hurt small producers but benefited consumers, the Supreme Court generally prized the protection of small businesses over the protection of consumers. In \textit{Fashion Originators Guild}, the Court stated that an antitrust violation may be found “even though a combination may temporarily or even permanently reduce the price of the articles manufactured or sold.”\textsuperscript{138} As described earlier, in \textit{Utah Pie}, the Court placed the protection of small producers above the protection of consumers. It held the defendant liable for aggressive price-cutting that injured the plaintiff but produced savings for consumers. Revealing its preference for small producers, the Court cited as a fact against the defendant that “the evidence shows a drastically declining price structure which the jury could rationally attribute to continued or sporadic price discrimination.”\textsuperscript{139}

Corporate consolidations also raised the possibility of helping consumer and hurting small firms. Once again, when forced to choose between the two protected classes of the era, it chose small producers over consumers. While the Court was not oblivious to how consolidation could benefit consumers,\textsuperscript{140} it rejected these arguments and held that preserving a marketplace with many players trumped permitting a more concentrated marketplace that delivered lower prices to consumers.\textsuperscript{141} In \textit{Brown Shoe}, the Court held that “Congress appreciated that occasional

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\item\textsuperscript{137} \textit{Id.} at 379-80.
\item\textsuperscript{138} \textit{Fashion Originators Guild}, 312 U.S. at 467.
\item\textsuperscript{139} \textit{Utah Pie}, 386 U.S. at 702-03.
\item\textsuperscript{140} \textit{Brown Shoe}, 370 U.S. at 344.
\item\textsuperscript{141} See, e.g., \textit{Proctor & Gamble}, 386 U.S. at 580.
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higher costs and prices might result from the maintenance of fragmented industries and markets.
It resolves these competing considerations in favor of decentralization.”\textsuperscript{142}

\textit{b. Rules of the Period: Faith in the Price System and Skepticism toward Mergers, Collaborative Conduct, and Vertical Restraints}

The Supreme Court in the era of dueling populisms showed an almost absolute commitment to the free play of the price system and hostility to practices that interfered in any way with price setting. The Court in \textit{Socony-Vacuum} described prices as the “central nervous system”\textsuperscript{143} of the market economy. According to the Court, prices are set through a dynamic competitive process and collusive conduct short-circuits this core mechanism of the American economy.\textsuperscript{144} It thus condemned horizontal cooperation that allowed businesses to exercise collective control over pricing, even if these practices meant price stabilization as opposed to the complete fixing of prices.\textsuperscript{145} The Court over the period did not reconsider the per se illegality of horizontal price fixing schemes.\textsuperscript{146}

Along with deeming horizontal price fixing to be per se illegal, the Court extended this harsh treatment to horizontal conduct that could indirectly bring about price maintenance or stabilization. In \textit{United States v. Container Corp.}, the Court applied the per se rule to an information sharing program among competitors.\textsuperscript{147} It stated that “[t]he result of this reciprocal exchange of prices was to stabilize prices though at a downward level”\textsuperscript{148} and stressed the

\textsuperscript{142} \textit{Brown Shoe}, 370 U.S. at 344.
\textsuperscript{143} \textit{Socony-Vacuum}, 310 U.S. at 224 n.59.
\textsuperscript{144} \textit{See id.} at 221 (“The reasonableness of prices has no constancy due to the dynamic quality of the business facts underlying price structures. Those who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since those prices would not be subject to continuous administrative supervision and readjustment in changes conditions.”).
\textsuperscript{145} \textit{Id.} at 221-22.
\textsuperscript{147} 393 U.S. 333 (1969).
\textsuperscript{148} \textit{Id.} at 336.
importance of an unfettered price mechanism, noting that “[p]rice is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition.”¹⁴⁹

As a predictable corollary of the per se illegality of horizontal price restraints, the Court categorically condemned horizontal market division, as well. In *Timken Roller Bearing Co. v. United States*, the Court ruled horizontal market division to be per se illegal and rejected the defendants’ joint venture and trademark justifications.¹⁵⁰ The Court in *United States v. Sealy, Inc.* categorized the market division as horizontal, rather than vertical, in nature and held the practice could be condemned without engaging in a rule of reason analysis.¹⁵¹ In support of its per se approach, it cited how the market allocation was “part of ‘an aggregation of trade restraints’ including unlawful price-fixing and policing.”¹⁵² In *United States v. Topco Associates, Inc.*, the Court reaffirmed the per se ban on horizontal market allocation.¹⁵³ Although the defendants claimed that their horizontal restraints promoted competition between Topco and non-Topco supermarkets, the Court declined to consider this defense, stating “[i]f a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion this too is a decision that must be made by Congress and not by private forces or the courts.”¹⁵⁴

Given the high value it placed on a price system free of external restraints, the Court viewed vertical price restraints with comparable hostility. Minimum resale price maintenance was consistently treated as a per se violation when effected through joint conduct.¹⁵⁵ The Court sometimes did not even draw a clear distinction between horizontal and vertical price-fixing and

¹⁴⁹ *Id.* at 338.
¹⁵⁰ 341 U.S. 393 (1951).
¹⁵² *Id.* at 357-78.
¹⁵³ 405 U.S. 596 (1972).
¹⁵⁴ *Id.* at 611-12.
broadly held in one resale price maintenance case that “[p]rice fixing, reasonable or unreasonable, is ‘unlawful per se.’”156 The Court justified this categorical condemnation of resale price maintenance on the basis that these contracts could lead to prices above what a competitive market would set.157

Because the practice interfered with market forces in the same fashion as horizontal price fixing and minimum resale price maintenance, the Court also treated maximum resale price maintenance as per se illegal.158 In addition to the threat of prices that may be above competitive levels, the Court believed that maximum resale price maintenance could lead to prices below competitive levels. In Albrecht v. Herald Co., the Court offered a list of undesirable economic effects from maximum resale price maintenance.159 The Court declared that contractual price ceilings could discourage the provision of services, limit the non-price competition faced by large distributors, and serve as a cover for minimum resale price maintenance.160

In contrast to its consistently unfavorable view of vertical price restraints, the Court expressed more ambivalence toward vertical non-price restraints. For example, it thought that exclusive dealing contracts had both positive and negative economic effects and thus should be analyzed under the rule of reason. The Court in Standard Oil of California stated the exclusive dealing “may well be of economic advantages to buyers as well as to sellers, and thus indirectly of advantage to the consuming public.”161 Exclusive dealing could provide the following benefits to buyers: reliable supply, price protection, predictable long-term costs, and reduced need for

156 Bausch & Lomb, 321 U.S. at 719.
157 See Simpson, 377 U.S. at 21-22 (“By reason of the lease and “consignment” agreement dealers are coercively laced into an arrangement under which their suppliers is able to impose noncompetitive prices on thousands of persons whose prices otherwise might be competitive.”).
160 Id. at 152-53.
161 337 U.S. at 306.
storage.\textsuperscript{162} And from a sellers’ perspective, exclusive dealing could reduce selling expenses, provide price protection, and offer a predictable long-term demand.\textsuperscript{163} Given the ambiguous effects of exclusivity provisions in contracts, the Court in \textit{Tampa Electric Co. v. Nashville Coal Co.} articulated a structured rule of reason for analyzing exclusive dealing contracts.\textsuperscript{164} It held that an exclusive dealing arrangement was illegal only if it is “probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected.”\textsuperscript{165}

Likewise, the Court was reluctant to deem exclusive territories for distributors to be per se illegal. In \textit{White Motor Co. v. United States}, the Court asserted that it did not have sufficient knowledge to deem exclusive territories to be per se illegal.\textsuperscript{166} While these restraints could serve to suppress competition, the Court refused to accept that this was an inevitable result.\textsuperscript{167} It noted that exclusive territories could facilitate the entry of new firms and held that it needed to learn “more than we do about the actual impact of these arrangements on competition to decide whether they have such a ‘pernicious effect on competition and lack any redeeming virtue.’”\textsuperscript{168}

The Court in \textit{Arnold Schwinn} moved away from a full rule of reason approach and adopted a bifurcated approach to exclusive territories.\textsuperscript{169} It held that exclusive territories are per se illegal when the manufacturer transfers title to its distributors. Exclusive territories, however, remained subject to the rule of reason when the manufacturer “retains title, dominion, and risk with respect to the product.”\textsuperscript{170}

\begin{itemize}
\item \textsuperscript{162} \textit{Id.} at 306-07.
\item \textsuperscript{163} \textit{Id.}
\item \textsuperscript{164} 365 U.S. 320, 327-28 (1961).
\item \textsuperscript{165} \textit{Id.} at 327.
\item \textsuperscript{166} 372 U.S. 253 (1963).
\item \textsuperscript{167} \textit{Id.} at 263.
\item \textsuperscript{168} \textit{Id.}
\item \textsuperscript{169} 388 U.S. at 365.
\item \textsuperscript{170} \textit{Id.} at 379-80.
\end{itemize}
Although not all tying arrangements were subject to the per se rule, the Court generally believed that tying had harmful effects. The Court acknowledged that some forms of tying are benign and would have no effects on the larger market. It offered the example of one of a dozen grocery stores in a market that required customers to purchase flour and sugar as a bundle. The predominant thinking on tying, however, was generally negative. In several decisions from the period, the Court held that tying serves no purpose except the exclusion of competitors. The Court’s approach to tying during the era was described succinctly in *Standard Oil of California v. United States*: “Tying agreements serve hardly any purpose beyond the suppression of competition.” The Court did not accept that tying was required for the defendant to protect consumer goodwill.

The Supreme Court took a strong stance against mergers, although the economic rationales were not always consistent. This result is not surprising because the Court, as described, aimed to protect both consumers and small businesses. At times, the Court enjoined mergers because they threatened to lead to higher prices and reduced service quality for consumers. In *Philadelphia National Bank*, the Court enjoined the merger between two leading Philadelphia-area banks because of the likelihood of adverse effects on consumers. The Court observed that the existing level of competition benefited consumers and that the merger could lead to reduced access to credit and diminished banking services. In *Procter & Gamble*, the Court observed that the market for bleach featured high entry barriers on account of the large advertising outlays by the leading supplier. By combining two large entities, the Court

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171 *Northern Pac. Ry.*, 356 U.S. at 6-7.
173 *Id.*
174 374 U.S. at 321.
175 *Id.* at 371-72.
176 386 U.S. at 578-79.
believed that the merger would allow the market leader to increase its marketing expenditures, reducing the threat of new entry and more vigorous price competition.\footnote{Id. at 580.}

The Court accepted that mergers could generate efficiencies that benefited consumers but rejected this as a defense because these efficiencies would threaten the viability of smaller rivals. The Court in Proctor & Gamble noted that mergers could create “[p]ossible economies.”\footnote{Id. at 343-44.} In Brown Shoe, the Court recognized that the merger, by facilitating vertical integration between manufacturing and retailing and permitting larger volume purchasers, could lead to lower costs and ultimately lower prices for consumers.\footnote{See Von’s Grocery, 384 U.S. at 377-78 (“This merger cannot be defended on the ground that one of the companies was about to fail or that the two had to merge to save themselves from destruction by some larger and more powerful competitor. What we have on the contrary is simply the case of two already powerful companies merging in a way which makes them even more powerful than they were before. If ever such a merger would not violate s 7, certainly it does when it takes place in a market characterized by a long and continuous trend toward fewer and fewer owner-competitors which is exactly the sort of trend which Congress, with power to do so, declared must be arrested.”) (emphasis added).} In Von’s Grocery, the Court implied that mergers could create efficiencies and lower cost structures for the merged entities, increasing the pressure on the remaining firms to merge.\footnote{Id. at 301.} Because large businesses with lower costs had a competitive advantage over smaller rivals, however, the Court declined to acknowledge efficiencies as a defense to an otherwise illegal merger. Given how the Court ruled against mergers whether they helped or hurt consumers, Justice Potter Stewart in his dissent in Von’s Grocery noted the “sole consistency that I can find in [merger cases], the Government always wins.”\footnote{Id. at 386 U.S. at 685.}

The Court, in its major predatory pricing decision of the era, established standards that defined predatory pricing expansively. In Utah Pie, the Court affirmed a jury verdict that found that the defendant had engaged in predatory pricing.\footnote{Id. at 580.} The Court stated that the defendant’s aggressive and targeted pricing cutting in the Salt Lake City market injured the plaintiff and

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\item \footnote{Id. at 301.}
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other competitors in their ability to make sales. It found that it was reasonable to conclude that
this aggressive price competition would weaken the plaintiff’s ability to compete in the future.
In addition to the defendant’s price discounting, the Court placed significant stock in the
documentary evidence from the defendant showing “its predatory intent to injure Utah Pie.”

The Court viewed refusals to deal, collective or unilateral, as highly problematic. In
*Fashion Originators Guild*, the Court declined to consider the business justifications of the
defendants who organized the group boycott. In rejecting the defendants’ claim that their
action was necessary to mitigate the threat of “pirated” fashion designs, the Court ruled that the
boycott was illegal given how it harmed competing textile manufacturers. In *Associated Press*,
the Court held as illegal the wire service’s by-laws that prevented some newspapers from
obtaining access to its reports. The Court recognized that being deprived of access to AP
reports did not “inhibit competition in all of the objects of that trade.” It, however, ruled that the
weakening of competing newspapers through the AP’s restrictive by-laws was sufficient to run
afoul of the antitrust laws.

In *Klor’s*, the Court once again refused to consider business justification in support of a
group boycott and stated that “[e]ven when they operated to lower prices or temporarily to
stimulate competition they were banned.” And in *United States v. Lorain Journal Co.*, the
Court condemned a conditional refusal to deal by a newspaper that had local dominance. It
stressed that unilateral refusals-to-deal while a “general right” are as with “[m]ost rights . . .

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183 *Id.* at 699-700.
184 *Id.* at 699.
185 *Id.* at 702.
186 *Fashion Originators Guild*, 312 U.S. at 457.
187 *Id.* at 467-68.
188 *Associated Press*, 326 U.S. at 1.
189 *Id.* at 17-18.
190 *Klor’s*, 359 U.S. at 212.
191 342 U.S. 143 (1951).
qualified.”192 It held the defendant’s conduct to be illegal because the defendant aimed to destroy the new radio station and monopolize advertising in the town of Lorain, Ohio.193

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

Beginning in the 1970s, antitrust jurisprudence departed from its recent past. The Supreme Court began to hold that the antitrust laws exist only for the protection of consumers and that the preservation of small businesses is not a valid antitrust objective. In addition, the Court adopted a new economic paradigm that reflected greater faith in a marketplace left to its own devices. Forms of conduct that were previously treated as inherently anticompetitive were seen as having the potential to benefit consumers. The Court has embraced the idea of the antitrust laws as a “consumer welfare prescription” and also adopted permissive rules toward many forms of cooperative and unilateral business conduct.

a. Consumer Welfare as the Only Legitimate Aim of the Antitrust Laws

In the mid-1970s, the Supreme Court broke decisively with its recent jurisprudence and held that the antitrust laws exist only to protect consumers. It has described the Sherman Act as seeking to foster “consumer interests”194 and as a “consumer welfare prescription.”195 The Court ceased to consider the protection of small businesses as one of the goals of antitrust enforcement. It considered the harms to small producers insofar as their interests are aligned with the interests of consumers. That is, if the harm to small producers is a surrogate of harm to consumers, the Court will consider the plight of small businesses. Protecting small businesses, however, is no longer an end in itself for the antitrust laws. Even as it has entered a period of overall

192 Id. at 155.
193 Id. at 152-53.
conservatism starting in the 1970s and continuing through the present,\(^{196}\) the Court continues to speak in populist terms – protecting the American consumer.

The Court has frequently described the antitrust laws as protecting consumers through both the prevention of high prices above competitive levels and the promotion of low prices. In *Goldfarb v. Virginia State Bar*, the Court described the defendants’ price-fixing activities as “unusually damaging”\(^{197}\) to consumers. The Court in *Reiter v. Sonotone* went further and emphasized the significance of consumers in the larger economy and their interest in lower prices.\(^{198}\) In holding that the consumer-petitioner had a right to seek damages for the anticompetitive behavior of the manufacturer-respondents, the Court stated that “where petitioner alleges a wrongful deprivation of her money because of the price of the hearing aid she bought was artificially inflated by reason of respondents’ anticompetitive conduct, she has alleged an injury in her ‘property.’”\(^{199}\)

Along with compensating consumers for overcharges from high pricing, low prices have been described as a desirable end in several instances. The Court in *Atlantic Richfield Co. v. USA Petroleum Co.* said that “[l]ow prices benefit consumers regardless of how those prices are set.”\(^{200}\) In support of antitrust restraint, the Court in *Brooke Group v. Brown & Williamson* expressed concerns about adopting a predatory pricing rule that would “discourag[e] a price cut . . ., thus depriving consumers of the benefits of lower prices in the interim.”\(^{201}\) On a similar note,

\(^{196}\) See Ari Berman, *Why the Supreme Court Matters*, THE NATION, Apr. 11, 2012 (“When President Gerald Ford nominated him in 1975, Justice John Paul Stevens occupied the ideological center of the Supreme Court. By the time he retired in 2010, he was the Court’s most liberal member. Over those thirty-five years, the Court changed far more than Stevens did. ‘What was once on the extreme right is now merely conservative,’ wrote University of Chicago constitutional law professor Cass Sunstein. ‘What was once conservative is now centrist. What was centrist is now left wing. What was once on the left no longer exists.’”).

\(^{197}\) 421 U.S. 773, 782 (1975).


\(^{199}\) Id.


the Court in *Weyerhaeuser Co. v. Ross-Simmons Hardware Lumber Co.* described in positive terms how increased producer output could benefit consumers through lower prices.\(^{202}\)

The Court has looked beyond just low prices and articulated consumers’ interest in product quality and choice. In *National Society of Professional Engineers v. United States*, it stated antitrust law’s interest in the availability of high quality goods and services and, in the context of engineering services, listed them as including “quality, service, safety, and durability.”\(^{203}\) In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, the Court discussed how the defendants’ practices permitted radio stations to obtain access to a broad portfolio of music.\(^{204}\) The Court in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* highlighted consumers’ interest in high quality goods.\(^{205}\) It stated that “the antitrust laws do not require manufacturers to produce generic goods that consumers do not know about or want”\(^{206}\) and noted that consumers benefit from the provision of services by retailers.\(^{207}\)

Several decisions have held the promotion of consumer choice as another valid purpose of the antitrust laws. The Court has stated the importance of consumers having the freedom to “select the best bargain” and “evaluate the true cost” of products.\(^{208}\) It has lauded some of the collaborative efforts of the NCAA for having expanded “the choices available to sports fans.”\(^{209}\)

In *FTC v. Indiana Federation of Dentists*, the Court treated the conduct of the defendants harshly because it “limit[ed] consumer choice by impeding the ‘ordinary give and take of the market

\(^{202}\) 549 U.S. 312, 324 (2007).
\(^{204}\) 441 U.S. 1, 20 (1979).
\(^{205}\) 551 U.S. 877 (2007).
\(^{206}\) Id. at 897.
\(^{207}\) See id. at 890 (“Consumers might learn, for example, about the benefits of a manufacturer’s product from a retailer that invests in fine showrooms, offers product demonstrations, or hires and trains knowledgeable employees. Or consumers might decide to buy the product because they see it in a retail establishment that has a reputation for selling high-quality merchandise.”).
\(^{209}\) NCAA, 468 U.S. at 101-02.
place.” The *Leegin* Court referred to the desirability of enhancing consumer choice and allowing consumers to pick between “low-price, low-service brands; high-price, high-service brands; and brands that fall in between.” The Court in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, a dispute between the two main ski mountain operators in the Colorado town, even pointed to consumer surveys to reach its outcome. It observed that survey data indicated that a sizeable fraction of skiers sought to ski at both resorts in the Aspen area.

As the Court has embraced consumer welfare as the sole goal of the antitrust laws, it has simultaneously disclaimed that antitrust should seek to protect small businesses. The Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* rejected the respondent’s claim for damages because its injury arose from a more competitive market. The Court held that the antitrust laws do not exist to compensate parties injured on account of increased competition because these laws “were enacted for the protection of competition not competitors.” In *Cargill Inc. v. Monfort of Colorado, Inc.*, the Court reaffirmed this holding, ruling that “the antitrust laws do not require the courts to protect small business from the loss of profits due to continued competition.” It disowned the rule articulated in *Utah Pie* and held that the “loss of profits due to . . . price competition” cannot be the basis of an antitrust suit.

More generally, the Court rejected the notion of the antitrust laws existing to protect businesses in *Spectrum Sports, Inc. v. McQuillan*. The Court stated that “[t]he purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the

211 *Leegin*, 551 U.S. at 890.
213 *Id.* at 606.
215 *Id.* at 488.
217 *Id.* at 117.
public from the failure of the market.”

Even in the context of the Robinson-Patman Act, the antitrust statute aimed most at protecting small businesses, the Court declined to deviate from its pro-consumer vision of the antitrust laws. In its most recent Robinson-Patman Act decision, *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, the Court stated that it “would resist [an] interpretation geared more to the protection of existing competitors than to the stimulation of competition.”

The Supreme Court in the 1990 decision in *FTC v. Superior Court Trial Lawyers Association* revealed how much its antitrust jurisprudence has changed since the days of *Appalachian Coals.* A group of trial attorneys had agreed not to represent indigent criminal defendants in the District of Columbia in order to pressure the city’s government into increasing their compensation. At the time the boycott was organized, the members of the public defenders’ bar in the District of Columbia earned $30 per hour for court time and $20 per hour for out-of-court time. In other words, these lawyers were providing a constitutionally guaranteed right to indigent criminal defendants in return for very modest compensation. The boycott succeeded, and the city government agreed to raise all hourly rates for public defenders to $35 per hour. In response to the successful boycott, the Federal Trade Commission brought an enforcement action against the trial lawyers.

Although the Court acknowledged that the FTC’s decision to proceed with an enforcement action against the attorneys was controversial, it held that the lawyers in organizing the boycott had committed a per se violation of the Sherman Act. It ruled that the

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219 *Id.* at 458.
222 *Id.* at 416-17.
223 *Id.* at 415.
224 *Id.* at 418.
225 *Id.* at 418-19.
226 *Id.* at 421.
lawyers’ defenses were not valid because the Sherman Act “precludes inquiry into the question whether competition is good or bad.” In contrast to its decision in Appalachian Coals nearly sixty years earlier, the Court was not willing to soften the application of the Sherman Act to a group of sympathetic small producers.

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

The Court has refused to permit antitrust suits that fail to show harm to consumers from proceeding to trial. In Jefferson Parish, the Court agreed that the anesthesiologist-respondents may have suffered harm but held that they failed to demonstrate harm to the market as a whole. Similarly, in NYNEX Corp. v. Discon, Inc., the Court ruled that the “plaintiff here must allege and prove harm, not just to a single competitor, but to the competitive process, i.e., competition itself.”

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227 Id. at 424.
228 *Aspen Skiing*, 472 at 605.
229 466 U.S. at 31-32.
When competitor-plaintiffs have established harm to the competitive process and consumers, however, the Supreme Court has held in favor of them. In *Aspen Skiing*, the Court affirmed a jury verdict for the plaintiff, which was the defendant’s main competitor.\(^{231}\) The Court found that the defendant’s conduct against the plaintiff had injured not only the plaintiff but also harmed consumers.\(^{232}\) The Court in *Eastman Kodak Co. v. Image Technical Services, Inc.* affirmed the Ninth Circuit’s decision denying the defendant summary judgment in a suit brought by a competitor.\(^{233}\) The Court held that the defendant’s conduct had excluded the plaintiff from the market for servicing photocopiers, which resulted in higher prices for consumers – “exactly the harm that antitrust laws aim to prevent.”\(^{234}\)

\(b.\) **Rules of the Chicago School Era: Hostility to Collusion but General Faith in Self-Regulating Markets**

In this consumer-centric era of antitrust, the Court has embraced a radically more positive view of how markets function. The Court continues to view collusion and other horizontal agreements not to compete harshly. In other areas, however, the Court has adopted a much more benign view of large business conduct. It has relaxed its treatment of vertical restraints of all types, tying, mergers, and even monopolization. The Court has adopted the view, often described as “Chicago School” on account of the outsized influence of economists and law professors from the University of Chicago, that vertical restraints and dominant firm behavior are often “efficiency-enhancing” and thus beneficial to consumers.\(^{235}\)

The Supreme Court continues to treat collusive conduct between horizontal rivals as per se illegal. The Court in *Professional Engineers* was not faced with explicit price fixing but rather

\(^{231}\) 472 U.S. at 585.
\(^{232}\) Id. at 610.
\(^{234}\) Id. at 478.
conduct that restricted price competition between engineers.\textsuperscript{236} It reiterated that “an agreement that ‘interfere[s] with the setting of price by free market forces’ is illegal on its face,” holding that “while this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.”\textsuperscript{237} In \textit{Arizona v. Maricopa County Medical Society}, the Court declined to adopt the rule of reason for maximum price fixing between rivals.\textsuperscript{238} It noted, among other things, that the maximum price agreement may be a “masquerade for an agreement to fix uniform prices, or it may in the future take on that character.”\textsuperscript{239} Although a monopolization case, the Court in \textit{Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko} described collusion as the “supreme evil of antitrust.”\textsuperscript{240} The Court in per curiam opinion \textit{Palmer v. BRG of Georgia, Inc.} also deemed a market allocation scheme between two bar review preparatory services as per se illegal and condemned these arrangements irrespective of the preexisting competition between the parties.\textsuperscript{241}

While horizontal collusion remains per se illegal, the Court has steadily relaxed its treatment of vertical restraints over the past forty years, due in large part to the purported threat of “free riding.” In arguably the Court’s first major decision of the “Chicago School” era, the 1977 ruling in \textit{Continental T.V., Inc. v. GTE Sylvania Inc.} overturned the rule that exclusive territories are per se illegal when the title on goods passes to distributors and held that they are always to be evaluated under the rule of reason.\textsuperscript{242} The Court stated that “the market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of

\textsuperscript{236} 435 U.S. at 679.
\textsuperscript{237} Id. at 682-83.
\textsuperscript{238} 457 U.S. 332 (1982).
\textsuperscript{239} Id. at 348.
\textsuperscript{240} 540 U.S. 390, 407 (2004).
\textsuperscript{242} 433 U.S. 36 (1977).
intrabrand competition and stimulation of interbrand competition.”

On the one hand, it recognized that exclusive territories can reduce competition between distributors of a single manufacturer. On the other hand, the Court held that new entrants can grant exclusive territories to “induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of product unknown to the consumer.”

Furthermore, in the Court’s view, incumbent manufacturers can use exclusive territories to prevent “no frills” dealers and distributors from “free-riding” on the promotional efforts and services of rival dealers – a recurring theme in the Court’s decisions in vertical restraint cases.

Along with moving non-price vertical restraints into the rule of reason category, the Court has also overturned long-standing per se rules for vertical price restraints. In State Oil, the Court held that maximum vertical price fixing is no longer per se illegal, overturning the nearly thirty-year rule established in Albrecht. The Court questioned the rationales offered in Albrecht, asserting that manufacturers have an incentive to set maximum prices at a level that permits retailers to “offer consumers essential or desired services.” In line with the new consumer orientation of antitrust, the Court did not view the adverse effects of maximum price fixing on some dealers to be a salient concern.

In an arguably even more momentous decision, the Court in Leegin overruled the nearly-century old prohibition on resale price maintenance in 2007. The result was not unexpected and followed multiple decisions that had increased the evidentiary hurdles for plaintiffs in resale

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243 Id. at 51.
244 Id. at 55.
245 Id.
246 Id.
247 State Oil, 522 U.S. at 3.
248 Id. at 17.
249 Id.
250 Leegin, 551 U.S. at 877.
price maintenance cases.\footnote{See, e.g., Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 768 (1984) (“We conclude that the Court of Appeals applied an incorrect standard to the evidence in this case. The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.”); Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 731 (1988) (“[W]e do not agree with petitioner's contention that an agreement on the remaining dealer's price or price levels will so often follow from terminating another dealer 'because of [its] price cutting' that prophylaxis against resale price maintenance warrants the District Court's per se rule. Petitioner has provided no support for the proposition that vertical price agreements generally underlie agreements to terminate a price cutter. That proposition is simply incompatible with the conclusion of GTE Sylvania and Monsanto that manufacturers are often motivated by a legitimate desire to have dealers provide services, combined with the reality that price cutting is frequently made possible by 'free riding' on the services provided by other dealers. The District Court's per se rule would therefore discourage conduct recognized by GTE Sylvania and Monsanto as beneficial to consumers.”).} It acknowledged that resale price maintenance could be used to facilitate a manufacturer or retailer cartel or protect a dominant retailer from lower-cost competitors.\footnote{Leegin, 551 U.S. at 893.} In adopting the rule of reason for resale price maintenance, the \textit{Leegin} Court recited many of the same justifications it had offered in \textit{Sylvania}. The Court held that this practice could be used to aid new entry and to encourage retailers to provide “services.”\footnote{Id. at 891-92.} As in \textit{Sylvania}, the Court spoke of the dangers of “free riding” and stated that absent resale price maintenance “discounting retailers can free ride on retailers who furnish services and then capture some of the increased demand those services generate.”\footnote{Id. at 890.}

The Court has also softened its stance on tying since the 1970s. In \textit{Jefferson Parish}, the Court did not overturn the per se prohibition on tying but instead cabined its application.\footnote{Jefferson Parish, 466 U.S. at 2.} The Court held that tying was illegal only when the defendant has market power in the market for the tying product and can “force a purchaser to do something that he would not do in a competitive market.”\footnote{Id. at 1-14.} Only if this forcing “is probable” is tying per se illegal.\footnote{Id. at 15-16.} In other words, the so-called per se ruling against tying was converted to a structured rule of reason. The Court in \textit{Illinois Tool Works v. Independent Ink} held that market power cannot be presumed when the
tying product is under patent.\textsuperscript{258} The Court observed, “the vast majority of academic literature recognizes that a patent does not necessarily confer market power.”\textsuperscript{259} Even in the context of tying involving intellectual property, plaintiffs must therefore establish that the defendant has market power.\textsuperscript{260}

Mergers and joint ventures are now viewed in a more positive light and seen as generating efficiencies or being competitively neutral in the vast majority of cases. In \textit{United States v. General Dynamics Corp.}, the Court broke with its recent precedents in merger cases and adopted a less hostile position toward corporate consolidations.\textsuperscript{261} The Court rejected the government’s reliance on production-based market shares, holding that they cannot be the basis for blocking a merger in the coal industry.\textsuperscript{262} It instead held that in the coal industry indicators of future output, like coal reserves, should guide merger analysis.\textsuperscript{263} In \textit{BMI}, the Court recognized that the collaborative blanket license between owners of copyrighted music benefited consumers and stated “[m]any consumers clearly prefer the characteristics and cost advantages of this marketable package.”\textsuperscript{264} On this basis, the Court rejected per se treatment of the joint venture’s pricing arrangements.\textsuperscript{265} In \textit{Copperweld} and \textit{NCAA}, the Court again noted that horizontal collaboration and mergers can generate efficiencies.\textsuperscript{266}

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\textsuperscript{258} 547 U.S. 28 (2006).
\textsuperscript{259} \textit{Id.} at 44.
\textsuperscript{260} \textit{Id.} at 46.
\textsuperscript{261} 415 U.S. 486 (1974).
\textsuperscript{262} \textit{Id.} at 501.
\textsuperscript{263} \textit{Id.} at 503-04.
\textsuperscript{264} 441 U.S. at 22-23.
\textsuperscript{265} \textit{Id.} at 24.
\textsuperscript{266} See \textit{Copperweld}, 467 U.S. at 769 (“[M]ergings of resources may well lead to efficiencies that benefits consumers.”); \textit{NCAA} 468 U.S. at 101 (“What the NCAA and its member institutions market in this case is competition itself – contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, al must be agreed upon, and all restrain the manner in which institutions compete.”).
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The Court has imposed a high burden to establishing predatory pricing, repeatedly doubting that it is a common anticompetitive strategy. In *Matsushita v. Electrical Industries Co. v. Zenith Radio Corp.*, the Court claimed, “there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful.” The Court described predatory pricing as a certain profit sacrifice today in return for uncertain elevated profits tomorrow. The Court feared that a predatory pricing rule more favorable to plaintiffs could deter price competition and actually harm consumers. The Court in *Brooke Group* reiterated the *Matsushita* Court’s concerns about deterring beneficial price competition and articulated a two-part test that places high hurdles to establishing a predation claim.

Collective and unilateral refusals-to-deal are also treated more leniently today than they were in the past. As with tying, the Court has narrowed the scope of the per se rule against group boycotts. The Court in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.* declined to condemn a group purchasing association’s decision to expel a member. It stated that “[w]holesale purchasing cooperatives must establish and enforce reasonable rules in order to function effectively.” It held that per se condemnation of the expulsion was warranted only “if the cooperative possesses market power or exclusive access to an element essential to effective competition.” In *Discon*, the Court refused to deem the unilateral refusal to deal of a firm with market power as per se illegal. The Court held that the defendant was merely exercising

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268 See id. at 588-89 (“A predatory pricing conspiracy is by nature speculative. Any agreement to price below the competitive level requires the conspirators to forgo profits that free competition would offer them. The forgone profits maybe considered an investment in the future.. For the investment to be rational, the conspirators must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered.”).
269 Id. at 594.
270 *Brooke Group*, 509 U.S. at 209.
272 Id. at 296.
273 Id. at 297.
274 525 U.S. at 128.
“market power that is lawfully in the hands of a monopolist” and that the plaintiff failed to establish harm to the competition process. The Trinko Court went even further and stated that imposing antitrust liability for unilateral refusals-to-deal could lead to reduced investment and innovation, courts acting as regulatory bodies, and collusion between the parties.

V. **Why Consumer Welfare Should Mean Consumer Welfare**

Although the Supreme Court in recent decades has described the antitrust laws as a “consumer welfare prescription,” the exact meaning of “consumers” has been intensely debated. The obvious view of “consumer welfare prescription” is the protection of the group of individuals and businesses that purchase goods and services. This intuitive definition has not been universally accepted, however. Robert Bork defined consumer welfare, in what the late John Flynn described as a “narrow, restrictive and highly technical” manner, to include both consumer surplus and profits that accrued to shareholders and other business owners. Under Bork’s reasoning, owners of business are also consumers because they will ultimately use their dividends and capital gains in consumption. Therefore, the antitrust laws should be indifferent to whether a dollar goes to consumers in the form of lower prices or to producers in the form of higher profits and should seek to maximize “output.” The use of “consumers” in this non-intuitive manner has been criticized as misleading and even “Orwellian.” Many scholars have embraced this definition of consumer welfare and argued that the antitrust laws should not

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275 Id. at 136.
276 Id. at 135.
277 Trinko, 540 U.S. at 407-08.
279 See John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 199 (2008) (“Bork used ‘consumer welfare’ as an Orwellian term of art that has little or nothing to do with the welfare of true consumers. His desire to maximize “consumer welfare” (which he defines as economic efficiency) carries with it no concern about the wealth extracted from consumers and transferred to firms with market power as a result of the higher prices that arise from cartel or other prohibited behavior. Bork thus defined ‘consumers’ to include monopolists and cartels!”).
concern themselves with distributional outcomes.\textsuperscript{280} To differentiate the two definitions of consumer welfare, Steven Salop has described the formulation that focuses exclusively on consumers as the “true” consumer welfare standard.\textsuperscript{281}

As the economics of antitrust become move away from a priori theorizing and toward a richer account of market dynamics, the antitrust agencies and the courts should reject the Bork definition of “consumer welfare” and embrace the true consumer welfare standard – a criterion that should capture competitive prices as well as quality, variety and innovation.\textsuperscript{282} This approach to antitrust enforcement is appropriate and desirable for four reasons. First, and most importantly in a political system in which the legislature makes laws, Congress demonstrated a primary interest in protecting consumers. In enacting the antitrust laws, Congress showed no awareness of economic efficiency as defined by Bork but did express concern with wealth transfers from consumers to producers. Second, a consumer-oriented antitrust agenda can promote a more progressive distribution of wealth – an important public policy objective at a time when inequality has been rapidly rising. Third, consumers are a large group, encompassing the overwhelming majority of Americans, and consequently cannot organize themselves effectively. Antitrust enforcers and courts can act as “trustees” and protect the interests of this large but comparatively powerless group. Fourth, the U.S. competition law regime requires a popular constituency to survive in the long run. A consumer-focus can revive the long-departed antitrust movement of the late nineteenth and early twentieth centuries and ensure that the


\footnotesize{\textsuperscript{281} As Salop has noted, the Bork consumer welfare, if correctly applied, would require examining any gains and losses to competitors and factor them into the cost-benefit analysis of challenged mergers or conduct. In effect, despite what it claims, the Bork consumer welfare standard would require a return to the antitrust jurisprudence of the mid-twentieth century. See Steven C. Salop, \textit{Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard}, 22 LOY. CONSUMER L. REV. 336, 343 (2009).}

antitrust laws have a political counterweight to balance their powerful opponents in the Fortune 500.

Whether the promotion of consumer welfare ought to be the sole goal of antitrust enforcement or whether the multiple stated goals in the legislative histories of the antitrust laws can be promoted in a coherent manner is beyond the scope of this paper. In many instances, however, protecting consumers demands the protection of small businesses from the predatory conduct of larger rivals. Moreover, the policy considerations that favor protection of consumers often also support the protection of workers and farmers against the harmful conduct of monopsonistic or oligopolistic buyers.

a. Prevention of Wealth Transfers from Consumers to Producers is a Running Theme in the Legislative Histories of the Antitrust Laws

The legislative histories of the antitrust laws reveal that Congress was concerned with monopolies and cartels for a number of reasons. The Congresses that enacted the three principal antitrust statutes, however, made no mention economic efficiency – a concept that economists only defined after the passage of the Federal Trade Commission Act and Clayton Act in 1914. In

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284 See Press Release, U.S. Dep’t of Justice, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements, Sep. 24, 2010, available at http://www.justice.gov/atr/public/press_releases/2010/262648.htm (“The Department of Justice announced today that it has reached a settlement with six high technology companies-Adobe Systems Inc., Apple Inc., Google Inc., Intel Corp., Intuit Inc. and Pixar-that prevents them from entering into no solicitation agreements for employees. The department said that the agreements eliminated a significant form of competition to attract highly skilled employees, and overall diminished competition to the detriment of affected employees who were likely deprived of competitively important information and access to better job opportunities.”).
285 See Press Release, Justice Department Files Antitrust Lawsuit Challenging George’s Inc.’s Acquisition of Tyson Foods Inc.’s Harrisonburg, VA., Poultry Processing Complex, May 10, 2011, available at http://www.justice.gov/atr/public/press_releases/2011/270975.htm (“The Department of Justice filed a civil antitrust lawsuit today challenging George's Inc.'s acquisition of Tyson Foods' Harrisonburg, Va., chicken processing complex. The department said that based on the information gathered thus far, the acquisition eliminates substantial competition between the two companies for the procurement of services of chicken growers in the Shenandoah Valley area.”).
contrast, Congress did reveal, among other concerns, significant fears about monopolies and cartels using their market power to transfer wealth from consumers to themselves.

The three primary antitrust laws speak in general terms. Congress enacted the Sherman Act in 1890 and the Clayton Act and Federal Trade Commission Act in 1914. The Sherman Act prohibits “every contract . . . in restraint of trade”\(^\text{286}\) and punishes “every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce . . ..”\(^\text{287}\) The two statutes from 1914 are hardly more specific. The Federal Trade Commission Act outlaws “unfair methods of competition”\(^\text{288}\), and the Clayton Act bars acquisitions whose “effect . . . may be substantially to lessen competition, or tend to create a monopoly.”\(^\text{289}\) Given the general wording of the antitrust laws, courts and scholars have looked to their legislative histories to determine Congress’s intent in enacting the antitrust laws.

Robert Bork claimed that Congress was interested in one and only goal – promoting economic efficiency as defined as the sum of consumer surplus and business profits – when it enacted the antitrust laws.\(^\text{290}\) Many scholars have shown that this is an erroneous and misleading reading of Congress’s intent. The legislative histories reveal a multitude of aims from the representatives and senators involved in crafting the antitrust statutes that aimed to prevent monopolies and cartels. These goals included preserving small business, preventing undue concentration of economic and political power, and protecting consumers from high prices. Professor Lande has shown through methodical research that one goal played a prominent role in the debates leading up to the enactment of the primary antitrust statutes – preventing wealth transfers from consumers to producers.

\(^{290}\) Bork, supra note 9, at 51.
Many legal scholars have studied the legislative histories of the main antitrust statutes and shown that Bork’s economic efficiency argument is not supported in the Congressional debates. The legislative histories show no indication that Congress had an interest in promoting economic efficiency or some proxy of it. As a basic matter, it is doubtful that Congressmen in 1890 knew of economic efficiency as Bork defined it. In 1914, Congress did not show any more awareness of the Bork concept of efficiency than it did in 1890. In fact, economists themselves were still only in the early stages of defining or understanding a concept like efficiency – an idea that was only formally described in the 1920s. And, notably, economists played little, if any, role in drafting or publicly promoting the Sherman Act, Clayton Act or the Federal Trade Commission Act. Bork’s reading of the legislative history appears to be an imposition of his ideology on a complex and rich Congressional debate. The irony of a so-called constitutional originalist violating his own philosophy and imposing his personal vision on the antitrust laws has not been lost on legal scholars.


292 Flynn, supra note 278, at 272-73.

293 Lande, supra note 291, at 109.


296 See Flynn, supra note 278, at 289, (“One could go on with instances of Judge Bork's manipulating the legislative history of the antitrust laws to accord with his ideology of what the law ought to mean rather than his undertaking a reflective, open-minded search for normative values the draftsmen of the basic antitrust laws intended be achieved in the judicial administration of the Act. Suffice it to say, the legislative histories of the various antitrust laws fail to exhibit anything resembling a dominant concern for economic efficiency.”).

297 See, e.g., Leonard Orland, The Paradox in Bork’s Antitrust Paradox, 9 CARDOZO L. REV. 115, (1987) (“At best it is inconsistent—at worst it is disingenuous—for a scholar who deplores judicial activism because it is undemocratic simultaneously to condemn ‘populist hostility to big business;’ to attack ‘fresh antitrust assaults on business’ as ‘essentially nihilistic;’ to be concerned that such ‘attitudes have ... found reflection in Congress;’ and to express ‘fear’ of ‘popular moods’ which may influence additional legislative antitrust proscriptions: ‘But there is more to fear than that [erroneous Supreme Court opinions]. A new era of antitrust expansion seems likely to begin in Congress, which is influenced by popular moods.’”).
Congressmen involved in enacting the antitrust statutes, contrary to Bork’s claims, expressed multiple aims. Some spoke of how failure to check the power of monopolies and trusts would lead to the demise of independent entrepreneurs. For example, Senator George in the debate preceding the passage of the Sherman Act lamented the rise of large-scale industry and predicted that this development, if left to its own devices, would eventually “crush out all small men, all small capitalists, all small enterprises.”²⁹⁸ Several Congressmen also supported the Federal Trade Commission Act because it would aid in the protection of small business. Speaking in support of the Federal Trade Commission Act, Senator Reed stated that Congress was seeking to keep markets open to independent entrepreneurs.²⁹⁹

Others described their fears about the concentrated private power that arose from monopolies and trusts and wondered whether American political institutions could survive in the “new economy.” Senator John Sherman questioned whether the United States could entrust the control of manufacturing and transportation to a “few men sitting at their council board in the city of New York.”³⁰⁰ Senator George Hoar went even further and warned that “these great monopolies . . . are a menace to republican institutions themselves.”³⁰¹ Similar concerns arose when the Federal Trade Commission Act and Clayton Act were debated nearly twenty-five years later. Congress F.C. Stevens claimed that he echoed the concerns of the public and stated that “this wealth, and power growing out of it, may be not only used to the detriment but also may be a potential source of injury and oppression.”³⁰² In advocating for the passage of the Clayton Act, Senator Borah predicted eventual overthrow of the existing economic and political system due to the oppressive power of big business. He alleged that monopolies and trusts “divide our people

²⁹⁸ 21 Cong. Rec. 2598 (1890)  
²⁹⁹ 51 Cong. Rec. 13,231 (1914).  
³⁰⁰ 21 Cong. Rec. 2570 (1890).  
³⁰¹ Id. at 3146.  
³⁰² 51 Cong. Rec. 8850 (1914).
into classes, breed discontent and hatred, and in the end riot, bloodshed, and French
revolutions.”

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

The prevention of wealth transfers also animated the debates over the Federal Trade
Commission Act and Clayton Act. The language condemning wealth transfers was remarkably
similar to that used in the 1890 debate. Senator Newlands, a primary sponsor of the Federal
Trade Commission Act, stressed the “unreasonable and extortionate prices” from collusive
behavior and monopolies. Representative Morgan hoped the new statute would “minimize the
power of the large industrial corporation to concentrate wealth . . . and secure the people from
unjust tribute levied by monopolistic corporations.” In debating the Clayton Act,
Representative Hamlin stated that the only reason to prohibit cartels and trusts is that they exploit

\begin{footnotesize}
303 Id. at 15,955.
304 Lande, supra note 291, at 145.
305 Id.
306 21 Cong. Rec. 2461 (1890).
307 Id. at 2614.
308 Id. at 4101.
309 Lande, supra note 291, at 93-96.
311 51 Cong. Rec. 8854 (1914).
\end{footnotesize}
“the people by taking advantage of their necessities and controlling the price of those necessities to the consumers.”\textsuperscript{312} Senator Cummins, in a similar vein, aimed his ire at “the rapacity and the avarice of monopoly.”\textsuperscript{313}

The legislative histories of the antitrust laws favor the consumer welfare standard and reveal no awareness of, let alone support for, the total welfare standard. Bork’s claim that Congress was interested only in promoting total welfare is false. The Congresses that enacted the antitrust laws showed no understanding of the modern concept of economic efficiency and revealed a number of aims in establishing the U.S. competition policy regime. Lande has shown that a principal thread in the legislative histories of the antitrust laws is the prevention of wealth transfers from consumers to producers. Congress aimed to protect the consuming public against cartel and monopoly overcharges and showed no indication that it sought to promote the more abstract, and then-unknown, concept of economic efficiency. It is apparent that the antitrust laws are not indifferent in choosing between the profits of businesses with market power and the economic benefits of competition to consumers. As the Congress made clear in the debates leading up to the passage of the antitrust laws, consumers are intended to be one of the primary protected classes of U.S. competition policy.

\textit{b. Consumer-Oriented Antitrust Enforcement Can Promote More Progressive Wealth Distribution}

Over the past forty years, income inequality has risen substantially, with a larger and larger fraction of income accruing to the wealthiest sliver of the U.S. population. A consumer-oriented antitrust regime can help contain and perhaps reverse this rapid growth in economic disparities. While its role in remedying inequality is almost certainly not as significant as that of

\textsuperscript{312} \textit{Id.} at 9556.  
\textsuperscript{313} \textit{Id.} at 14,256.
labor and tax laws, antitrust enforcement can be an important instrument for policymakers seeking to create a more equitable distribution of economic resources.

The economist Emmanuel Saez has performed extensive empirical analysis of income distribution in several industrialized nations and found that income inequality in the United States has risen dramatically since the late 1970s. The postwar decades were marked by significant economic equality. The share of income accruing to the top 10% of the income distribution has displayed a U-shape since the Second World War.\(^{314}\) The top decile’s share was around 45 percent before the U.S. entry into the war, declined to about 33 percent, and remained at approximately that level until the 1970s.\(^ {315}\) Beginning in the 1970s, the share of income going to the top 10% has risen dramatically, rising to almost 50 percent in 2007.\(^ {316}\) The run up in incomes among the top 1% is even more dramatic – the share accruing to this most affluent percentile has more than doubled from 9 percent in the 1970s to nearly 24 percent in 2007.\(^ {317}\) Income concentration at the top today is at a level comparable to the late 1920s, a period known for wide economic disparities.\(^ {318}\)

This divide has grown even at a time when labor productivity and per capita income have increased. Between 1976 and 2007, real income per family grew at an annual rate of 1.2%.\(^ {319}\) Labor productivity has also grown at a healthy clip, albeit not as rapidly as it did in the previous thirty years.\(^ {320}\) When, however, the gains to the top 1 percent are excluded, the growth rate in the average real income of the remaining 99 percent of the population grew at an anemic 0.6 percent


\(^{315}\) Id.

\(^{316}\) Id.

\(^{317}\) Id.

\(^{318}\) Id.


annually.\textsuperscript{321} Approximately 58\% of growth in this three-decade period went to the top 1 percent.\textsuperscript{322} The gains from growth have accrued even more disproportionately to the very affluent over the past decade. During the economic boom from 2002-2007, more than two-thirds of income growth accrued to the 1\%.\textsuperscript{323} In 2010, the first year of positive economic growth since the financial crisis, the numbers are even more skewed: 93\% of the gains from economic growth went to the highest-earning percentile of the U.S. population.\textsuperscript{324} In other words, the size of the total pie has grown, but the wealthiest Americans have captured a larger and larger slice of the gains and left less for other segments of the population.

Current levels of inequality are undesirable for multiple reasons. Polls have repeatedly shown that a majority of Americans favor a more equal distribution of income and wealth. Americans have overwhelmingly favored higher taxes on the wealthy and other policies that would contribute to a more equal distribution of wealth.\textsuperscript{325} And unsurprisingly, poorer Americans are more likely to favor more egalitarian economic policies than their more affluent counterparts.\textsuperscript{326} Furthermore, in terms of maximizing social welfare, it seems reasonable to think that an additional dollar provides greater marginal benefit to a poor person than a rich person. And growing research suggests that reducing economic inequality can yield significant societal benefits. These include increased life expectancy, reduced morbidity, lower crime rates, higher economic growth, and less intense boom-and-bust cycles in the economy.\textsuperscript{327}

\textsuperscript{321} Id.
\textsuperscript{322} Atkinson, Piketty & Saez, \textit{supra} note 319, at 9.
\textsuperscript{323} Id.
\textsuperscript{326} Id.
While it is hard to ascribe the precise role of less competitive markets in contributing to inequality, it is likely one of many causes of rising economic disparities.\textsuperscript{328} Higher prices lead to some consumers substituting away to alternative goods – the so-called deadweight loss.\textsuperscript{329} As Congressmen discussed in the debates leading up to the enactment of the antitrust laws, another harm of monopolies and cartels is that they transfer wealth from consumers to producers.\textsuperscript{330} Consumers, who continue to purchase the good or service, pay more than they would in a competitive market. These high prices reduce consumer surplus – the difference between how much consumers are willing to pay and how much they actually pay – and transfer this amount to producers in the form of higher profits.\textsuperscript{331} The magnitude of the wealth transfers from monopolies and cartels is generally estimated to be several times larger than the corresponding deadweight loss.\textsuperscript{332}

In general, the wealth transfers arising from monopoly and reduced competition are likely to be regressive in nature, shifting economic resources from comparatively poorer households to wealthier households. In most industries, consumers are, on average, less affluent than the shareholders of producers. First, poorer households devote a larger fraction of their income to consumption than wealthier households.\textsuperscript{333} Furthermore, wealthier households have larger

\textsuperscript{328} See Maurice E. Stucke, \textit{Lessons from the Financial Crisis}, 77 \textit{ANTITRUST} L.J. 313, 335-36 (2010) (“For example, consumers may be paying supracompetitive overdraft fees to large financial institutions, which in turn distribute the rents unequally (namely to the CEOs and other senior executives).”).

\textsuperscript{329} Lande, \textit{supra} note 291, at 72.

\textsuperscript{330} \textit{Id.} at 74-75.

\textsuperscript{331} \textit{Id.}

\textsuperscript{332} See \textit{id}. (“The relative size of the transferred wealth and the allocative inefficiency will vary considerably from case to case depending upon a number of factors. Under market conditions most likely to be encountered, however, the transferred wealth usually will be between two and forty times as great as the accompanying allocative inefficiency.”). Russell Pittman, \textit{Consumer Surplus as the Appropriate Standard for Antitrust Enforcement}, 3 \textit{COMPETITION POL’Y INT’L} 205, 208 (“In the proposed merger of the Santa Fe and Southern Pacific Railroads in the mid-1980’s, I estimated that transfers from shippers to the merged railroad would be anywhere from two to five times the value of the direct welfare loss, depending on the assumptions made regarding certain demand and cost parameters.”).

holdings of financial assets and other ownership interests in producers.\textsuperscript{334} Of course, consumers are not better off than shareholders in every single industry. It is easy to think of markets in which consumers are likely wealthier than the owners of producers. For example, in the market for private jets, the typical purchaser may very well be wealthier than the average shareholder in the aircraft manufacturer. In industries like energy, food, healthcare and transportation, however, it is almost certainly the case that consumers are not as wealthy as shareholders. And, in general, the assumption that consumers are not as affluent as shareholders seems to be reasonable.\textsuperscript{335}

Market simulations have suggested that creating more competitive markets can, in fact, lead to a more equal distribution of wealth. These modeling efforts have shown that reduced producer market power can lead to a more equal distribution of wealth and improve the economic circumstances of less affluent U.S. households. In the absence of monopoly, William Comanor and John Smiley have estimated that, even with a conservative estimate of monopoly profits, there would be a substantial redistribution of wealth away from the most affluent and to the overwhelming majority of Americans.\textsuperscript{336} In manufacturing industries producing basic items like cigarettes, soap, and sugar, Irene Powell found that even modest reductions in market concentration can improve income distribution by a nontrivial amount.\textsuperscript{337} Russell Parker and John Connor estimated in their 1978 study that increased competition in food processing industry alone could save consumers $12 billion annually, which at that time “represent[ed] about a

\textsuperscript{335} Pittman, \textit{supra} note 332, at 208.
\textsuperscript{336} Comanor & Smiley, \textit{supra} note 334, at 193 (“The wealthiest 2.4 percent of the total households now accounts for slightly more than 40 percent of total wealth. In the absence of monopoly their share would fall to approximately 32 percent. The effect of monopoly has thereby been to increase the relative wealth holdings of these families by about 20 percent. Furthermore, it can be observed that mean wealth holdings of the bottom 28 percent of families are again positive in the absence of monopoly.”).
\textsuperscript{337} Powell, \textit{supra} note 333, at 81.
month’s rent for an average family of modest means. A Similar modeling exercises for the Australian economy yielded comparable results, with increased competition transferring wealth from affluent shareholders to less affluent consumers. While the complete elimination of supply-side market power would dissipate economic rents to producers, it would also likely lead to a loss of economies of scale and ultimately harm consumers. Yet, it is evident that reducing market power and increasing competition can improve the distribution of wealth.

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

340 Powell, supra note 333, at 81.
341 See Pittman, supra note 332, at 210 (“It is true, . . ., that a good deal of merger activity takes place in markets for intermediate goods. It may be that we can say nothing about the progressivity of regressivity of transfers between different groups of owners, but that is not the end of the story. Most of us teach our students that cost increases – in this case, merger-induced transfers – generally get passed along. They may or may not get passed along 100 percent, but under most circumstances a significant portion is passed along.”).
innovation – benefits that accrue to consumers – and lower profits for businesses with market power and reduced income for their owners. Given that the typical business executive and shareholder are wealthier than the average consumer, antitrust enforcement can stem and reverse regressive wealth transfers.

The possible role of antitrust enforcement in addressing income inequality is not to suggest that antitrust law is the only – or even one of the most important – public policy tools to address this long-term problem. Antitrust is hardly a panacea for the existing levels of economic inequality in the United States. Ultimately, Congress will likely need to revise labor and tax laws and strengthen financial system regulation if it wants to halt and reverse the growing economic inequality in the United States. A more progressive tax code and stronger collective bargaining rights for workers, among other things, are the likely keys to stemming and reversing economic disparities.342

Yet, policymakers are not forced to use only one instrument in remedying inequality. Enforcement of the antitrust laws can play a role in the larger strategy of tackling inequality. Importantly, antitrust enforcement can become more consumer-oriented without any intervention by Congress. The Chicago School revolution happened largely in the Department of Justice, Federal Trade Commission, and federal courts, with little input from Congress.343 Of course, this sea change in antitrust philosophy almost certainly would not have happened without

342 See Saez, supra note 314, at 4 (“The labor market has been creating much more inequality over the last thirty years, with the very top earners capturing a large fraction of macroeconomic productivity gains. A number of factors may help explain this increase in inequality, not only underlying technological changes but also the retreat of institutions developed during the New Deal and World War II – such as progressive tax policies, powerful unions, corporate provision of health and retirement benefits, and changing social norms regarding pay inequality. We need to decide as a society whether this increase in income inequality is efficient and acceptable and, if not, what mix of institutional reforms should be developed to counter it.”).

343 See Herbert J. Hovenkamp, Antitrust Policy After Chicago, 84 MICH. L. REV. 213, 250 (1985) (“Congress could rewrite the antitrust laws and make concerns for efficiency express, but it has not done so. In fact, the widely proclaimed Chicago School “revolution” has pretty much passed Congress by. Historically, liberals have been fairly successful in getting Congress to write liability-expanding antitrust statutes. However, with only a few trivial exceptions, free marketers have had no such luck.”).
conservatives leading the antitrust agencies\textsuperscript{344} and being appointed to the federal courts.\textsuperscript{345} A commitment to consumer-oriented antitrust – true to Congress’s intent in enacting the competition laws – would require progressive appointments to the antitrust agencies as well as the federal judiciary. But, progressive nominations to the antitrust agencies and federal judiciary seem more attainable than major revisions to tax and labor laws.\textsuperscript{346} Even if the overall significance of antitrust is not as great as that of labor and tax laws, a consumer-oriented antitrust enforcement regime may be easier to realize in the short and medium term than major revisions to these other bodies of law.

c. \textit{Consumers Are Generally Unable to Maintain Sustained Political Movements to Protect Their Interests}

Not all groups can organize and protect their interests equally as well. In general, smaller groups, in which each member has a greater individual stake, are more successful at advancing their interests in the economic and political systems than larger groups are. Typically, though not inevitably, producers in concentrated industries are more likely than hundreds of millions of consumers to succeed in persuading Congress and state legislatures to enact their preferred policies. Given this disparate efficacy in collective action, antitrust enforcers, along with other public and private parties entrusted to protect consumers, can serve as trustees for this group that is too large to organize itself and advance its interests in the marketplace or the political process.

\textsuperscript{344} See Jerrold G. Van Cise, \textit{Antitrust Past—Present—Future}, 35 \textsc{Antitrust Bull.} 985, 994-95 (1990) (“Assistant Attorney General William Baxter, in charge of the Antitrust Division, declared: ‘Although not always . . . corporate size would seem to be a symptom of efficiency and success,’ and that the ‘sole goal of antitrust is economic efficiency.’”); \textit{id.} at 996 (“[FTC Chairman James Miller] explained that the Commission’s goal of efficiency was also derived from the Chicago school of economics, and he candidly revealed that its economic approach emphasized “economic efficiency and consumer welfare . . . as key antitrust objectives, as opposed to ‘fairness’ or protection of small business.’”).

\textsuperscript{345} Flynn, \textit{supra} note 278, at 303 (“A rigid belief in the eternal verity of the neoclassical model also appears to have been a litmus test in the [Reagan] Administration’s selection of some prominent academics for nomination to the federal judiciary.”).

\textsuperscript{346} See \textit{infra} Part V.c.
Economists, who favor the Bork definition of “consumer” welfare, have argued that legal rules should focus exclusively on promoting their conception of efficiency. That is, legal regimes like antitrust should focus solely on wealth maximization. They should be indifferent to distributional issues and leave that to the elected branches of government. The basis for this efficiency-distribution dichotomy is that distribution is a “value” question that should be decided through democratic, rather than judicial, decision-making. Aside from how economic efficiency is not a “value-neutral” concept, the practical problem with the efficiency-distribution dichotomy is that it relies on an idealized conception of democratic politics. Consumers and producers are equal neither in the marketplace nor in the political system. Gains to producers are not likely to be distributed equitably, even if popular sentiment supports that.

As a large group encompassing nearly every resident of adult age, consumers have difficulty organizing politically to protect, let alone advance, their interests. In contrast, small groups can organize to protect and further their interests more effectively in the political system. The political scientist Mancur Olson described this phenomenon in terms of individual economic incentives. In large groups, collective efforts may founder because individuals have an incentive to free ride. Individual members can obtain the benefits of collective action without contributing to it. And moreover, the efforts of one person in a collective project are unlikely

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348 Id. at 168.
349 Id.
350 See Flynn, supra note 278, at 262 (“It has been the [Reagan] Administration’s view that “efficiency” as defined by the Chicago School law and economics theorists, a price based theory developed well after the adoption of the major antitrust laws, is or ought to be the sole goal of antitrust policy. . . . The Administration’s policy is based on a moral premise that individual and institutional greed in a world of absolute property and contract rights, without regard for other moral objectives, should be the sole guide for defining what the law of antitrust ‘ought’ to be.”).
352 Id.
353 Id.
to be decisive.\textsuperscript{354} As a result, public goods whose benefits accrue to a large group are likely to be underprovided in the absence of some coercive force.\textsuperscript{355} An individual in a very large group is comparable to a firm in a perfectly competitive market – unilateral attempts to raise the market price are almost certain to be self-defeating.\textsuperscript{356} In contrast, groups composed of a few large members, such as firms in concentrated industries, are much less likely to face a free-rider problem because of the larger individual incentives.\textsuperscript{357} At times, it may even be in the economic interest of a single firm to act for a collective group, even if the other members refuse to contribute to the effort.\textsuperscript{358} This is analogous to how an oligopolist may find it profitable to raise its prices even if its competitors do not follow suit.\textsuperscript{359}

As Olson himself recognized, this theory does not suggest that small groups inevitably triumph over large groups or that producers in concentrated industries always win out over diffuse consumers. Human behavior is far more complex than the homo economicus model would suggest.\textsuperscript{360} Consumers can and have organized to create a more just marketplace whether through economic or political organization, or both. In the United States, this consumer activism has come in three major waves: at the turn of the twentieth century, in the 1930s, and in the 1960s and 1970s.\textsuperscript{361} This organized activism helped enact new laws to ensure safer food and drugs, more affordable necessities, and cars that would not maim and kill passengers due to poor design.\textsuperscript{362} These movements also helped build organizations that to this day promote the

\begin{itemize}
  \item \textsuperscript{354} \textit{Id.}
  \item \textsuperscript{355} \textit{Id.}
  \item \textsuperscript{356} \textit{Id.}
  \item \textsuperscript{357} \textit{Id.}
  \item \textsuperscript{358} \textit{Id.} at 49-50.
  \item \textsuperscript{359} \textit{Id.} at 50.
  \item \textsuperscript{360} See \textit{id.} at 60 (“Economic incentives are not, to be sure, the only incentives; people are sometimes motivated by a desire to win prestige, respect, friendship, and other social and psychological objectives.”).
  \item \textsuperscript{362} \textit{Id.} at 235-36.
\end{itemize}
consumer interest: Consumers Union, Consumers Federation of America, and Public Citizen just
to name a few.\textsuperscript{363} And, of course, a discussion of consumer movements would be remiss in not
mentioning the critical role of African-American consumers and their allies in ending
segregation in the Southern United States and fighting racial discrimination throughout the
country.\textsuperscript{364} Notable examples of consumer activism in the civil rights movement included
boycotts of stores that did not hire African-Americans and sit-ins at lunch counters that refused
to serve black patrons.\textsuperscript{365}

Even with the successes of consumer movements in the past, their limits must be
acknowledged. Collective consumer efforts have typically thrived at times of economic adversity
when consumers have been especially sensitive to the price and availability of necessities or
during exceptional periods in history when large groups of Americans came together to
challenge the injustices of existing institutions and laws.\textsuperscript{366} In recent decades, just when they
have seemed on the verge of a major political victory, consumer groups have been defeated –
and quite decisively at that - by powerful business interests. The ill-fated effort to create a federal
Consumer Protection Agency in the late 1970s is a good example of this process.\textsuperscript{367} The long

\begin{footnotesize}
\begin{enumerate}[\textsuperscript{363}]
\item \textit{Id.}
\item Herbert Jack Rotfeld, \textit{A Pessimist’s Simplistic Historical Perspective on the Fourth Wave of Consumer Protection}, 44 J. CONSUMER AFFAIRS 423, 424 (2010).
\item See, e.g., Cohen, \textit{supra} note 361, at 239 (“[W]hen Jimmy Carter moved into the White House, having
campaigned on a pro-consumer platform, having reappointed Esther Peterson as his consumer adviser, and having
vowed to push through the [Consumer Protection Agency], hopes rose that now, at last, the CPA would become the
law of the land. Instead, the bill went down to defeat in 1978 and would never be resuscitated—until the much
narrower proposal for a Consumer Financial Protection Agency surfaced recently.”); \textit{id.} at 239-40 (“Between 1970
and 1978 corporate America mobilized at a whole new scale and pace from its standard, business-as-usual, self-
advertisement of the postwar era. Focused on the CPA as the line-in-the sand that they had to defend against a
headstrong and threatening consumer movement, business groups marched into battle. Longstanding organizations
like the U.S. Chamber of Commerce, the National Association of Manufacturers, the National Federation of
Independent Business, and the Grocery Manufactures Association, were joined by the newer Business Roundtable,
founded in 1972 to unite the CEO’s of leading corporations, and a specially formed Consumer Issues Working
Group, which by 1978 had more than 400 corporate and trade association members. For American business leaders,
\end{footnotesize}
periods between major successes are illustrative of the limits of consumer activism in the political process. More than thirty years that elapsed between the unsuccessful attempt to create a Consumer Protection Agency during the Carter presidency and the successful creation of the Consumer Financial Protection Bureau in 2010. This three-decade lack of major success suggests that an exceptional confluence of factors is likely required for consumer interests to score major triumphs in Washington.

The organizational representation of consumers and producers shed further light on the profound power disparity between the two. Among business organizations, the Chamber of Commerce has an annual budget of more than $250 million. Other broad business organizations include the Business Roundtable and the National Association of Manufacturers. In addition, most major sectors have influential trade associations, such as the American Petroleum Institute, National Retail Federation, and Tobacco Institute. Moreover, individual businesses frequently engage in political lobbying and public relations on their own. Large companies often individually devote millions of dollars to lobbying and political campaign donations. For example, (1) the finance, insurance and real estate and (2) health care sectors contributed $87 million and $41 million, respectively, to presidential campaigns in the 2012 election. The contrast with consumer groups is striking. Consumers Union, the largest

the CPA—to quote a few spokesmen—was a “Trojan Horse threat to American business,” “the most serious threat to free enterprise and orderly government ever to be proposed in Congress,” and an insulting attack on the “honesty and responsibility of American business.”).

Mayer, supra note 363, at 174.

Id.


consumers’ organization, has a budget in excess of $200 million per annum.\footnote{Id. at 173.} Other notable organizations, such as Public Citizen, however, have much smaller budgets of around $10 million.\footnote{Id.} The political inequality between consumer and producer groups is too real to be ignored.\footnote{Id.}

Perhaps not surprisingly to many, the U.S. political system appears to be more sensitive to the needs of the affluent than the poor. Given how poorer households devote a larger fraction of their income to consumption,\footnote{Powell, supra note 333, at 378.} this political inequality would suggest that consumer interests are likely to be discounted in the political system. For example, through empirical analysis, Larry Bartels, a political scientist, has found that United States senators are much more responsive to the interests of high-income constituents than middle-income constituents and are more responsive to both groups than to low-income constituents.\footnote{Larry M. Bartels, Unequal Democracy: The Political Economy of the New Gilded Age 260-61 (2008).} Although he does not draw definitive conclusions on why the wealthy have disproportionate voice in politics, he finds that campaign donations and personal contact with government officials likely play a role.\footnote{Id. at 281.} Notably, he finds no evidence that lower voter turnout by the poor explains their virtual invisibility in the political system.\footnote{Id.}

Recent developments only strengthen the influence of the affluent over the political process. The 2010 Supreme Court decision in \textit{Citizens United v. Federal Election Commission}
invalidated one of the major remaining restrictions on private money in politics.\textsuperscript{380} In the 2012 presidential election, corporations, other organized interests, and wealthy individuals poured millions of dollars into campaigns, political action committees (PACs), and the new Super PACs.\textsuperscript{381} The power of money in American politics raises fundamental questions about the nature of U.S. democracy and how far it falls short of aspirational ideals.\textsuperscript{382}

Given the comparative powerlessness of the hundreds of millions of American consumers in the political process, antitrust enforcers can fill this critical void. Agencies like the Antitrust Division at the Department of Justice and the Federal Trade Commission and private enforcers should act as trustees for voiceless consumers. Together with regulatory bodies like the Consumer Product Safety Commission and the Consumer Financial Protection Bureau, antitrust enforcers should view themselves as part of a general consumer protection mission that tackles the lack of competition and informational problems that can injure consumers in the marketplace.\textsuperscript{383} Without these governmental bodies serving as watchdogs for the consumer against large, politically powerful producers are likely to obtain economic rents at the expense of consumers. Constant vigilance from antitrust enforcers is essential in protecting one group to

\begin{itemize}
\item \textsuperscript{380} 558 U.S. 310 (2010).
\item \textsuperscript{381} 2012 Elections: The Aftermath, N.Y. TIMES, Nov. 12, 2012, available at http://topics.nytimes.com/top/reference/timestopics/subjects/c/campaign_finance/index.html (“The 2012 elections were the most expensive in history, as the two main presidential candidates set lofty fund-raising goals and money flooded in to “super PACs,” independent political committees that have been supercharged by a series of court decisions. The final price tag from all levels of voting was estimated at more than $6 billion. President Obama and his Republican opponent, Mitt Romney, both raised more than $1 billion apiece. And the scale of outside spending was similarly staggering: more than $1 billion, about triple the amount in 2010.”).
\item \textsuperscript{382} Bartels, supra note 377, at 282 (“[T]he fact that senators consistently appear to pay no attention to the views of millions of constituents in the bottom third of the income distribution must be profoundly troubling to anyone who accepts Dahl’s stipulation that “a key characteristic of democracy continued responsiveness of the government to the preferences of its citizens, considered as political equals.””)
\item \textsuperscript{383} See Neil W. Averitt & Robert H. Lande, Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law, 65 ANTITRUST L.J. 713, 713 (1997) (“Antitrust and consumer protection law share a common purpose in that both are intended to facilitate the exercise of consumer sovereignty or effective consumer choice. Consumer sovereignty exists when two fundamental conditions are present. There must be a range of consumer options made possible through competition, and consumers must be able to choose effectively among these options.”).
\end{itemize}
which nearly every American belongs, a group so large that it cannot advance its interests through sustained organized efforts.

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

While antitrust counts large corporations among its opponents, it notably lacks a constituency of its own. If surveyed, the antitrust practitioners and scholars who form the antitrust community would probably and in overwhelming numbers support the continuation of the current legal regime. Regardless of their views on specific antitrust rules or the appropriate level of enforcement, they likely realize that they have a very specific set of skills that would not be easily transferred to another field of law or line of work.\textsuperscript{384} The American Antitrust Institute, a public interest organization committed to promoting antitrust enforcement and competitive markets, has built a network of antitrust practitioners and scholars and serves as a consistent and influential voice in support of U.S. competition laws.\textsuperscript{385} Yet, the idea of an “antitrust movement” is a distant historical curiosity. In the face of big business and conservative attacks, antitrust needs to convey its relevance to everyday purchasing concerns for the American public and establish a popular constituency among consumers. Just as antitrust can aid consumers, consumers can offer vital support to the U.S. competition law regime.

In tracing the decline of the so-called antitrust movement of the late nineteenth and early twentieth centuries, the historian Richard Hofstadter found that even as popular interest in antitrust had waned antitrust enforcement had increased significantly.\textsuperscript{386} He attributed the decline of the antitrust movement to diminished public hostility toward big business in the mid-twentieth

\textsuperscript{384} Foer, supra note 6, at 482-83.
\textsuperscript{385} American Antitrust Institute, About Us, available at http://www.antitrustinstitute.org/content/about-us.
\textsuperscript{386} Hofstadter, supra note 1, at 103 (“[O]nce the United States had an antitrust movement without antitrust prosecutions; in our time there have been antitrust prosecutions without an antitrust movement.”).
century.\textsuperscript{387} Hofstadter argued that this negative feeling had declined for multiple reasons. Government and organized labor had checked the power of concentrated capital to some extent.\textsuperscript{388} Also, economic performance following the Second World War was perceived as delivering significant benefits to ordinary Americans.\textsuperscript{389} Moreover, and even more significantly according to Hofstadter, most Americans no longer aspired to be independent entrepreneurs, who had often been unable to compete against the much larger trusts and monopolies.\textsuperscript{390} Instead, for many Americans in the years following the Second World War, the “good life” involved, in part, working in a bureaucratic position at a leading corporation.\textsuperscript{391}

Despite the decline of an antitrust movement, antitrust enforcement in the mid-twentieth century was vigorous. Hofstadter believed that this legal regime was useful in limiting the economic and political power of large corporations.\textsuperscript{392} He did not lament the disappearance of a popular movement on behalf of the antitrust laws because the legal regime was functioning as Congress had intended. In fact, he expressed a strong preference for the antitrust landscape of 1965 over that of 1895. He wrote, “the fate of antitrust is an excellent illustration of how a public ideal, . . ., can become embodied in institutions with elaborate, self-preserving rules and procedures, a defensible function, and an equally stubborn capacity for survival. Institutions are

\textsuperscript{387} Id. at 127.
\textsuperscript{388} Id. at 129.
\textsuperscript{389} Id.
\textsuperscript{390} Id. at 136-37.
\textsuperscript{391} Id.
\textsuperscript{392} See id. at 150 (“Although the full range of evils anticipated seventy-five years ago from concentration and monopoly has not materialized, the traditional American fear of concentrated power seems hardly less pertinent today. The American economy, whether or not is concentration is still significantly increasing, is extremely concentrated as it stands, and its business structure has brought into being a managerial class of immense social and political as well as market power. This class is by no means evil or sinister in its intentions, but its human limitations often seem even more impressive than the range of its powers, and under modern conditions we have a right to ask again whether we can ever create enough checks to restrain it.”).
commonly less fragile than creeds." Hofstadter believed that the antitrust laws, due to their institutionalization, were here to stay.

History since Hofstadter’s death in 1972 brings his sanguine outlook for antitrust into question. Antitrust enforcement is much weaker today than it was when Hofstadter wrote his article. Certainly, some of the evolution in antitrust thinking has brought greater coherence to the doctrine. At the same time, the practical effects of the Chicago School, part of the larger elite-supported law and economics movement, cannot be ignored. It has promoted the marginalization of antitrust and held that this body of law should be concerned with one comparatively modest task – maximizing efficiency. And efficiency alone is hardly a concept that will motivate special interests, let alone the general public, to support the antitrust laws.

The experience of the Reagan Administration showed that antitrust enforcement was not as strongly rooted as Hofstadter had believed. The Reagan years represented not merely a natural evolution of the antitrust rethinking that began in the 1970s but “led to a broad-scale attack on

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393 Id. at 142.
394 See id. at 148 (“No one seems prepared to suggest that the antitrust enterprise be cut back drastically, much less abandoned, and Congress has consistently supported its enlarged staff. . . . Even business itself accords to the principle of antitrust a certain grudging and irritated acceptance, and largely confines its resistance to the courts.”).
395 See Robert Pitofsky, Antitrust in the Next 100 Years, 75 CAL. L. REV. 817, 822 (1987) (“[M]any pre-1965 attitudes about antitrust were predicated on the idea that efficiencies were expendable and that certain goals of antitrust, such as preventing monopolized or highly concentrated markets, could be pursued without taking account of the magnitude of loss in terms of efficiency. As the 1960’s and 1970’s progressed, and firms in the industrial sector found themselves challenged abroad and at home by foreign rivals, one had to reconsider whether the country could afford an antitrust policy that was profligate in its efficiency considerations.”).
396 See STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT 182 (2008) (“Especially important in moving law and economics from a barely tolerated minority to a dominant presence in legal academia was the Olin Foundation’s two-decade-long investment in law and economics programs at the top-ranked law schools in the country. Olin believed that law and economics represented a rare crack in the liberal legal network, a beachhead for conservatives otherwise locked out of elite legal academia. Beginning in a period when most of those schools had only a handful of law and economics scholars, Olin’s strategic patronage increased the visibility and prestige of law and economics, intensified the networking and productivity of its practitioners, and drew ambitious future law professors into its sphere.”).
397 Kirkwood & Lande, supra note 279, at 193-95.
almost every aspect of antitrust enforcement.” The Department of Justice and Federal Trade Commission largely ignored enforcement outside of the garden-variety price-fixing and a few horizontal mergers in highly concentrated industries. And moreover, Reagan’s judicial appointees espoused a theoretical worldview hostile to antitrust and reduced the likelihood of success for those parties who did remain interested in enforcing the U.S. competition laws.

Even allowing for some revival in enforcement since the Reagan years, the long-term vitality and sustainability of the antitrust laws are far from certain. At some basic level, the U.S. antitrust regime has not fully recovered from the minimal enforcement of the 1980s. Antitrust, and consumer protection more broadly, once enjoyed strong bipartisan support, but this is no longer the case. Public antitrust enforcement appears to be tied closely to the party of the sitting president: with modest upticks under Democratic presidents and minimal enforcement during Republican administrations. Under the Bush administration, the Department of Justice’s enforcement program was focused almost exclusively on price fixing and bid rigging and little

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400 Robert Pitofsky, *Antitrust Policy in a Clinton Administration*, 62 ANTITRUST L.J. 217, 217 (1993) (“During the eight years of the Reagan Administration, the country witnessed about as minimal an antitrust program as can be imagined. Enforcement at the federal level was exclusively against cartel behavior and some few horizontal mergers of enormous size—accompanied by a rhetorical assault on the value of antitrust (other than as a deterrent to price-fixing) as a regulatory regime.”).
401 Marc Allen Eisner & Kenneth J. Meier, *Presidential Control versus Bureaucratic Power: Explaining the Reagan Revolution in Antitrust*, 34 J. POLI. SCI. 269, 277 n.7 (1990) (“The triumph of the Chicago school was not related to empirical evidence. The Chicago school, in fact, declared a variety of empirical tests irrelevant and argued that its position was closer to the heart of the microeconomic price theory. The Chicago school victory was a political victory not an empirical one.”).
403 See, e.g., Richard Nixon, Special Message to the Congress on Consumer Protection (Oct. 30, 1969) (“I believe the [Federal Trade] Commission should also consider the extent to which Section 5 of the Federal Trade Commission Act, broadly interpreted, may be used more effectively to cope with contemporary consumer problems.”); John Mitchell, Attorney General of the United States, Address at the Georgia Bar Association (June 6, 1969) (“[T]he evidence strongly supports our belief that the antitrust laws have served us well, perhaps more successfully than the 1890 Congress could have envisioned.”).
else. Further, the Bush-era Department of Justice issued a report on Section 2 of the Sherman Act, which even a prominent defense-side antitrust attorney described as “reflecting free market fundamentalism.” In rather scathing terms, a bipartisan majority of the five-member Federal Trade Commission refused to endorse the report. With the election of President Obama, antitrust enforcement appears to have increased but even here the extent of the revival is hotly debated.

Looking beyond recent Republican presidents, recent developments support the view that the conservative movement now increasingly opposes antitrust enforcement as part of its larger anti-regulation agenda. For example, in 2012, Senator Rand Paul (R-KY) introduced a bill that would deprive the Federal Trade Commission of authority to investigate and remedy antitrust

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405 See Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement* 6 n.30 (2007), available at http://escholarship.org/uc/item/4x44j66x#page-1 (“We agree that there has been continuity in some enforcement norms, particularly the prohibitions on naked horizontal price-fixing and market division. But other antitrust areas, particularly those involving exclusionary conduct, have been and remain contested ground as to which perspectives have varied. We see horizontal merger enforcement as an in-between case, characterized by substantial agreement over time on fundamental economic principles, but also subject to variation in enforcement approaches, which has been particularly evident in the minimalist enforcement policy of the Antitrust Division during the second term of the Reagan administration and during the George W. Bush administration. For this reason, we have not avoided use of the pendulum metaphor in discussing merger policy.”).


408 See Statement of Commissioners Harbour, Leibowitz, and Rosch on the Issuance of the Section 2 Report by the Department of Justice (Sept. 8, 2008), available at http://www.ftc.gov/os/2008/09/080908section2stmt.pdf (“[T]he U.S. Supreme Court has declared that the welfare of consumers is the primary goal of the antitrust laws. However, the Department’s Report is chiefly concerned with firms that enjoy monopoly or near monopoly power, and prescribes a legal regime that places these firms’ interests ahead of the interests of consumers. At almost every turn, the Department would place a thumb on the scales in favor of firms with monopoly or near-monopoly power and against other equally significant stakeholders.”).

409 Compare Daniel A. Crane, *Has the Obama Justice Department Reinvigorated Antitrust Enforcement?*, 65 STAN. L. REV. ONLINE 13, 13 (2012) (“With only a few exceptions, current enforcement looks much like enforcement under the Bush Administration.”) with Jonathan B. Baker & Carl Shapiro, *Evaluating Merger Enforcement During the Obama Administration*, 65 STAN. L. REV. ONLINE 28, 34 (2012) (“It is too early to reach a comparably definitive conclusion about merger enforcement at the DOJ during the Obama Administration, but nothing in Daniel Crane’s article seriously challenges our interpretation of the preliminary data as demonstrating that the necessary reinvigoration has taken place.”).

violations. While it did not make it out of committee, even its introduction should worry those who believe the antitrust laws serve a valuable social function. And key parts of the conservative movement oppose the very notion of antitrust laws as a matter of principle. For instance, conservative and libertarian think tanks, backed by big business, call for further retrenchment and even outright abolition of the antitrust laws.

Organized groups that might be sympathetic toward antitrust and support enforcement have generally shied away from offering consistent support in recent decades. Small business, which was at the core of the original antitrust movement, has lost most of its interest. Some prominent small business organizations are, in fact, known for their conservative or libertarian philosophy, and are unlikely to be in favor of antitrust. When businesses do support antitrust enforcement, it is typically only in discrete instances in which their interests are threatened by a dominant firm. And often times, these are very large businesses complaining about the conduct of other very large businesses. Microsoft is an interesting illustration of this phenomenon. In the 1990s, it was in the crosshairs of antitrust enforcers around the world for its exclusionary behavior toward Netscape and others. It is still subject to binding decrees in

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414 Foer, supra note 6, at 488.
415 See, e.g., John Tozzi, Is the Small Business Lobby Really All About Big Business?, BUSINESSWEEK, Sep. 26, 2012, available at http://www.businessweek.com/articles/2012-09-26/is-the-small-business-lobby-really-all-about-big-business (“The conservative leanings of the National Federation of Independent Business, the small business lobbying group that describes itself as “a nonprofit, nonpartisan organization,” have never been much of a secret. The group made its name in the 1990s thwarting Bill Clinton’s health reform and more recently led the unsuccessful Supreme Court challenge to President Barack Obama’s health law. The NFIB regularly opposes higher taxes and regulation, and its political action committee stands squarely with GOP candidates.”).
416 Foer, supra note 6, at 488.
417 See, e.g., Nicholas Economides, The Microsoft Antitrust Case, 1 J. INDUS., COMPETITION & TRADE 7 (2001).
Europe. In recent years, however, the software giant has become a champion of antitrust enforcement against Google because of alleged anticompetitive conduct that has harmed Microsoft affiliates such as Expedia. Yet, it would be far-fetched to imagine that Microsoft — one of antitrust’s most prominent bête noirs — and other large big businesses that expect monetary benefits from a one-time action will become consistent champions of antitrust enforcement.

Labor unions have also not been supportive of antitrust enforcement, even though both are typically thought of as being the product of progressive politics. While labor organizations have taken an interest in consumer issues throughout their history, unions and antitrust enforcement have often had a contentious relationship. In the early years of the Sherman Act, antitrust actions were often used to dissolve unions and break strikes rather than challenge the power of large businesses. The Clayton Act importantly provided an explicit antitrust exemption for labor organizations. And yet, the tension between antitrust and organized labor did not end with that important statute. Labor organizations at times have seen concentrated industries as allies and sought to capture the oligopoly and monopoly rents in the form of higher

wages and improved benefits for members.\textsuperscript{423} Unions have feared that a more competitive market would mean a smaller producer surplus from which to draw wages.\textsuperscript{424}

Recognizing the power of antitrust’s opponents and its lack of a constituency, the proponents of antitrust enforcement need to build their own constituency among consumers. At present, antitrust seems largely inaccessible and invisible to the public. The lack of public interest in antitrust has aided its opponents. Even when antitrust is in the news, the heavy reliance on technical jargon creates a chasm between consumers and antitrust specialists, creating a barrier to popular support.\textsuperscript{425} When antitrust is under attack, its proponents do not have a constituency, outside of the small antitrust community, to draw on for public support. This makes it easier for the opponents of antitrust to characterize it as just another example of wasteful bureaucracy.

Yet, public indifference to the antitrust laws is not inevitable. Even if a sustained consumer movement has been elusive in the United States, American consumers show acute awareness of pocketbook issues and voice their concerns about perceived unfair practices by business. Two recent examples illustrate how consumers are, in fact, attuned to how much the pay for essential goods and service. In 2011, public anger over Bank of America’s proposed $5 monthly fee on the use of its debit cards forced the bank to scrap the plan.\textsuperscript{426} Drivers in California expressed widespread frustration over the spike in gasoline prices in October 2012,

\textsuperscript{423} Foer, \textit{supra} note 6, at 489; Randall Marks, \textit{Labor and Antitrust: Striking a Balance without Balancing}, 35 AM. U. L. REV. 699, 716 (1986)
\textsuperscript{424} Foer, \textit{supra} note 6, at 489.
\textsuperscript{425} Spencer Weber Waller, \textit{The Language of Law and the Language of Business}, 52 CASE W. L. REV. 283, 337 (2001) (“While the Microsoft litigation perhaps has put antitrust back in the public eye, it remains a highly technical discourse that shuts out those who have not mastered its arcane terminology. The rise of industrial economics has been one of the principal forces that transformed antitrust from a populist movement to one more typically debated in expert circles.”).
even though a clear causal explanation of the price increase was not evident. Going further back to the 1960s, Ralph Nader became a widely admired figure for his research and advocacy on how deceptive marketing practices and poorly designed products were harming consumers.

A more consumer-oriented antitrust regime can tap into the public interest in the availability of affordably priced, high quality goods and services. Antitrust enforcers – private and public – should not expect to win over many consumers, untutored in economic or industrial organization, through the use of “market definition,” “coordinated effects,” or perhaps worst of all “small but significant and non-transitory increase in price.” An accessible, jargon-free language of competition and its role in consumer protection is critical. If antitrust actions are presented in terms of preserving and promoting affordably priced, high-quality goods and services, consumers are much more likely to appreciate the value of enforcement.

Certainly, enforcement in certain sectors, say energy, is likely to draw more interest than enforcement in other sectors, for example, marine hose. The Department of Justice and Federal Trade Commission have brought a number of cases in recent years that involved basic goods and services – beer, electricity, gasoline, prescription drugs, and wireless

428 Mayer, supra note 363, at 181.
429 See Stucke, supra note 402, at 556 (“Antitrust’s increased technicality and the use of unappealing, abstract economic concepts broadened the gap between antitrust enforcement and public concern.”).
communications. Given consumer interest in the price and availability of these products, antitrust and consumers should view each other as natural allies. Antitrust can protect consumers from anticompetitive conduct, and consumers can lend support to antitrust enforcers facing attacks from business interests. It is almost remarkable that antitrust enforcement has proceeded over the past several decades and yet gained so little public traction.

The American Antitrust Institute offers enforcers lessons on how to speak in a language that will draw a broader audience and build a base of support for competition. In 2006, it produced a short-film entitled *Fair Fight in the Marketplace*. This documentary tied the esoteric world of antitrust to the pocketbook concerns of Americans. It discussed three major antitrust cases from the 1990s – price fixing in the lysine industry, Mylan’s monopolization of two widely prescribed anti-anxiety drugs, and Microsoft’s exclusionary campaign against Netscape. The film eschewed antitrust jargon and theory and instead offered personal stories on the harm resulting from the challenged cartels and monopolies – farmers forced to pay higher prices for a critical ingredient of cattle feed, computer users deprived of alternative operating systems, and senior citizens unable to purchase vital medicines.

VI. CONCLUSION

Antitrust scholars often divide eras into those of “populism” and “economics” and posit a fundamental conflict between the two concepts. A review of Supreme Court decisions on antitrust reveals a more complex picture and shows the importance of distinguishing the general goals of antitrust law from its specific rules. Antitrust law, as articulated by the Supreme Court, has always sought to protect a non-elite group of Americans against the power of big business,

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436 *Fair Fight in the Marketplace* (Filmmakers Collaborative 2006).
437 *Id.*
438 *Id.*

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the quintessential example of populism. And it has articulated specific rules toward achieve this populist goal using economics. The Court’s rulings have thus sought to advance populist goals through economically informed rules.

The populism and economics of antitrust jurisprudence have changed over time. In the decades following the passage of the Sherman Act, the Supreme Court often spoke of protecting small producers and displayed only secondary concern for consumers. The Court in the early era proscribed certain horizontal and vertical restraints but viewed large scale and many forms of horizontal collaboration more favorably. Starting in the late 1930s, the Court adopted consumer protection as a principal aim of the antitrust laws but continued to champion the cause of small businesses as well. Its economics took a marked shift away from faith in the market and treated many forms of horizontal and vertical conduct as inherently problematic. The Court has since the 1970s held that the antitrust laws exist only to protect consumers and also taken the position that most forms of market conduct can benefit consumers.

Although some scholars argue that antitrust law should seek to maximize “total welfare” and ignore distributional consequences, antitrust enforcers and the courts should continue to apply the antitrust laws as a consumer protection regime. This consumer orientation has four primary grounds of support. First and foremost, Congress, as revealed in the legislative histories of the antitrust laws, showed an interest in preventing large firms from using their market power to raise prices and transfer wealth from consumers. In contrast, none of the Congressmen involved in the debates discussed maximizing total welfare as one of the legal regime’s goals. Second, consumer-oriented antitrust enforcement can be one important policy tool to contain the growing economic chasm between the rich and non-rich by preventing wealth transfers from consumers to producers. Third, given how consumers often cannot organize politically on
account of their vast numbers, antitrust enforcers can serve as trustees for this group and protect its interests from better-organized producer groups. Last, just as antitrust can help consumers, consumers can provide needed political support for antitrust enforcement. By establishing a consumer constituency, antitrust enforcers can ensure the continued vitality of U.S. competition laws and establish, to paraphrase Richard Hofstadter, antitrust prosecutions with an antitrust movement. In deciding between competing interests, antitrust law should categorically prefer one dollar of purchasing power for a consumer over one dollar of additional profits for a monopolist.