Article

Anticompetitive Effect

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INTRODUCTION

Legal standards are inherently vulnerable to the substantive limitations of language.[1] It is notoriously difficult for lawmakers to demarcate the boundaries of acceptable conduct precisely. Inherently nebulous terms such as "reasonable," "sufficient," "foreseeable," and "justified" pervade the law. Of course, this is not to say that it is impossible to craft substantive law with some specificity. One would properly deride a law that simply provided that illegal behavior is unlawful. Nor is it to say that legislatures are necessarily unjustified in employing standards whose borders are somewhat indeterminate.[2] But when a legislature builds an area of law around a fundamental, yet ill-defined, concept, it becomes difficult to craft doctrine without relying on conclusory labels. And conclusory labels fall prey to hopeless circularity.

Antitrust is such an area of law. The fundamental premise of competition law is straightforward, purporting as it does to condemn "anticompetitive" behavior.[3] Remarkably, despite the concept's definitive importance, the law has yet to give full definition to this amorphous term. There is widespread agreement

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1. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 600 (1992).

2. *See, e.g.*, Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 62–69 (1992) (explaining when the benefits of standards overcome the disadvantages of imprecise definitions).

3. *See* CAMPBELL R. MCCONNELL & STANLEY L. BRUE, ECONOMICS: PRINCIPLES, PROBLEMS, AND POLICIES 598 (16th ed. 2005).

that monopoly, which is characterized by artificially high prices and low levels of market output, is undesirable.[4] Thus, most agree that plaintiffs or government entities should challenge conduct that is likely to result in such conditions under the Sherman and Clayton Acts.[5] For this reason, almost all advocate the prohibition of horizontal price-fixing, market sharing, and merger to monopoly.[6] Yet, harmonious interpretation of antitrust law disappears outside this narrow band of unanimity.[7] Scholars vociferously debate the proper reach of antitrust laws that seek to regulate commercial behavior in the name of social welfare.[8] The state of being "anticompetitive" lies at the heart of this controversy.[9] Unfortunately, multiple schools of thought give this concept competing and irreconcilable definitions.[10]

The repercussions of the courts' failure to articulate definitive goals and determinate standards are serious.[11] Experts continue to debate the proper intellectual foundation of the competition laws, which renders a conclusive definition of objectionable effects elusive.[12] It is still unclear whether antitrust law should properly be concerned with maximizing aggregate or consumer welfare.[13] Monopolization standards have been

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4. *See* United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

5. *See generally* MCCONNELL & BRUE, *supra* note 3, at 598–600 (describing the goals of antitrust legislation).

6. *See* Val D. Ricks & R. Chet Loftis, *Seeing the Diagonal Clearly: Telling Vertical from Horizontal in Antitrust Law*, 28 U. TOL. L. REV. 151, 160 n.27 (1996) (discussing judicial condemnation of these activities).

7. *See, e.g.*, Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1438 n.272 (2009) (explaining that courts agree on the goal of antitrust law, but disagree on the goal's definition).

8. *See id.*

9. *See id.*

10. *See* Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C. L. REV. 219, 226–28 (1995) (describing the Harvard and Chicago schools of antitrust analysis).

11. *See* Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 257 (2003).

12. *See* Barak D. Richman, *The Antitrust of Reputation Mechanisms: Institutional Economics and Concerted Refusals to Deal*, 95 VA. L. REV. 325, 327–28 n.7 (2009); Stucke, *supra* note 7, at 1437–42.

13. *Compare* Dennis W. Carlton & Ken Heyer, *Appropriate Antitrust Policy Towards Single-Firm Conduct* 7–8, 16 (Econ. Analysis Grp., Antitrust Div., U.S. Dep't of Justice, Discussion Paper No. 08-2, 2008), *available at* http://ssrn.com/abstract=1111665 (discussing activities that may raise total welfare while harming consumer welfare), *with* Steven Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST

characterized as vacuous and self-contradictory.[14] In light of the recent financial crisis, an aversion to market concentration itself has resurfaced.[15] Even if one demarcates a single standard—though such agreement has yet to be reached—intertemporal effects complicate analysis.[16] Platitudes about efficiency, consumer welfare, and anticompetitive effect abound.[17] But while enforcers, courts, and academics routinely frame their findings in such terms, these fundamental concepts remain disturbingly ill-defined. The courts cannot even agree whether price increases attributable to challenged conduct constitute cognizable harm, absent a distinct showing of a reduction in output.[18]

Of course, antitrust jurisprudence is not entirely nebulous. There is indeed widespread consensus that competition law exists to promote consumer welfare.[19] Conduct that is antithetical to consumer well-being is thus subject to scrutiny under the Sherman Act.[20] But this obviously raises a further definitional question. Specifically, what constitutes consumer injury? And must one prove such injury directly or can it be presumed in appropriate circumstances? This seemingly prosaic inquiry in fact masks a Pandora's Box of intricate questions, unsettled law, and indeterminate analysis. This Article seeks to investigate, and answer, four of these questions.

The first, fundamental issue concerns the nature of antitrust injury itself. Does harm to the competitive process alone suffice to demonstrate a violation of the Sherman Act or must such a disruption be tethered to a resulting injury? There are strong intuitive reasons for believing that courts should con-

L.J. 311, 329–33 (2006) (discussing antitrust's focus on the consumer welfare standard). For further discussion, see Michael L. Katz & Howard A. Shelanski, *Mergers and Innovation*, 74 ANTITRUST L.J. 1, 7 (2007).

14. *See* Elhauge, *supra* note 11.

15. *See* Am. Bar Ass'n, *Interview with J. Thomas Rosch, Commissioner, Federal Trade Commission*, *in* ANTITRUST, Spring 2009, at 32, 41.

16. *See* Alan Devlin & Michael Jacobs, *Antitrust Divergence and the Limits of Economics*, 104 NW. U. L. REV. (forthcoming 2010) (manuscript at 6), *available at* http://ssrn.com/abstract=1429541.

17. *See* Stucke, *supra* note 7.

18. *See infra* Part III.A.

19. *See* Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (stating that the Sherman Act creates "a consumer welfare prescription") (quoting ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 66 (1978)).

20. *See* Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1041 (1987).

demn unilateral or concerted conduct that quashes otherwise viable competition under the antitrust laws, even if the restriction cannot be tied to a concomitant, social benefit. After all, competition law purports to facilitate a vigorous competitive process, which in turn promises to yield a plethora of social benefits.[21] Even if one believes that antitrust harm is inextricably linked to the welfare of a protected class, it may not be unreasonable to presume injury to that class in the absence of competition. The view that antitrust law protects a robust level of active competition bears considerable explanatory power, in particular for Europe's antitrust regime.[22] Whether it does so in the United States is rather more difficult, for although the United States rightly views competition as the harbinger of socially desirable outcomes, an interesting question remains unsettled. Specifically, can a plaintiff challenge the elimination of competition under the Sherman Act when it fails to show harm that can befall the relevant protected class?[23]

The second issue relates to the identity of this "protected class." We have already noted the commonly accepted fact that antitrust law seeks to advance consumer welfare.[24] But should the law be concerned about individual purchasers in a specific market or should "consumers" be given a more expansive interpretation? Companies that are manufacturers in one market are often important consumers in others.[25] Should the law adopt a narrow view, and consider the interests of those individuals who purchase goods or services in the relevant market, or should the law consider the well-being of purchasers and sellers in unison? The distinction between "consumer" and "aggregate" welfare is an important one, especially for merger policy, but also for the optimal rules brought to bear on product tying, predatory pricing, and a host of other historically suspect busi-

21. *See* MCCONNELL & BRUE, *supra* note 3.

22. This can most readily be traced to Germany's ordoliberal tradition, which has played a significant role in the development of European Commission competition law. *See* Nicola Giocoli, *Competition Versus Property Rights: American Antitrust Law, The Freiburg School, and the Early Years of European Competition Policy*, 5 J. COMPETITION L. & ECON. 747, 773 (2009).

23. *See* Fishman v. Estate of Wirtz, 807 F.2d 520, 533 (7th Cir. 1986). We discuss this case in some detail below. *See infra* Part II.A.

24. *See also* Brodley, *supra* note 20, at 1020 (explaining that consumer welfare is a dominant term in antitrust discourse).

25. *See* Alan Devlin & Bruno Peixoto, *Reformulating Antitrust Rules to Safeguard Societal Wealth*, 13 STAN. J.L. BUS. & FIN. 225, 271 (2008) [hereinafter *Reformulating Antitrust Rules*].

ness practices.[26] The courts have yet to devise a specific answer to the question of whether competition law should concern itself with total welfare, which creates a fundamental dilemma at the heart of antitrust jurisprudence.[27]

Until the courts specify consumer or aggregate welfare as the normative baseline of antitrust analysis, the proper treatment courts should give to numerous forms of behavior remains unidentifiable. The most serious ensuing question is whether prolonged price increases constitute antitrust harm, absent a showing of a restriction in output. Economists typically object to behavior that results in reduced consumption and production, given the resulting loss in social wealth.[28] They are rarely preoccupied by questions of distribution.[29] But a standard focused on the well-being of consumers might object to wealth transfers in favor of producers, so that price increases are themselves worthy of condemnation. This would hold true irrespective of whether the heightened cost triggers a reduction in market output. The courts are currently split on whether output restrictions are the sine qua non of an antitrust offense.[30]

The third issue concerns time. Commercial conduct regularly creates asymmetric intertemporal effects, with losses today, but potentially overriding gains tomorrow, and vice versa. Can negative repercussions in the present be offset by potential gains in the future, thus rendering an otherwise anticompetitive practice innocuous? If the answer is yes at a theoretical level, can intertemporal analysis be conducted at all reliably? It may be that we can define "anticompetitive" in the abstract and

26. For one of the authors' elaborations on this point, see *id. passim*, which explores the impact of an aggregate welfare standard on multiple layers of antitrust doctrine.

27. *But see* Fed. Trade Comm'n v. Univ. Health, Inc., 938 F.2d 1206, 1222–23 (11th Cir. 1991) (holding that, in order to be relevant to antitrust analysis, merger-specific efficiencies must benefit consumers).

28. *See, e.g.*, DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 95–99 (4th ed. 2005).

29. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 13 (3d ed. 1986).

30. *Compare* Chi. Prof'l Sports Ltd. v. Nat'l Basketball Ass'n, 95 F.3d 593, 597 (7th Cir. 1996) ("The core question in antitrust is output. . . . A high price is not itself a violation of the Sherman Act."), *with* Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n, 884 F.2d 504, 508 (9th Cir. 1989) (holding that antitrust concerns arise "when the restraining force of an agreement or other arrangement affecting trade becomes unreasonably disruptive of market functions such as price setting, resource allocation, market entry, or output designation").

yet be incapable of identifying it in practice. Even if intertemporal effects can be both calculated and weighed—a heroic assumption—over what time frame should price and output effects be considered for the purpose of declaring them anticompetitive? Clearly, antitrust law suffers from serious epistemological limitations.

The fourth problem—a related one—involves the tension between static and dynamic efficiency. Monopoly is typically deemed inimical to consumer welfare, yet such conditions may be the driving force of innovation, which promises to yield overriding consumer benefits.[31] Consumers are apt to be myopic proponents of their own interests, taking technological innovation for granted and demanding interoperability in the present.[32] Thus, in certain situations, anticompetitive conditions can paradoxically be the driving force for overriding procompetitive outcomes in the future.[33] Yet consumers are unlikely to recognize this fact and indeed may clamor for erroneous antitrust intervention to "cure" what are in fact procompetitive conditions.[34] The fact that competition can remain concealed behind heavily concentrated market structures adds yet a further layer of complexity to an already intricate concept.

The purpose of this Article is two-fold. The first task is prescriptive. It highlights the law's failure to incorporate definitional clarity in the jurisprudence it has created and explains the positive repercussions of that shortcoming. The second is normative. In addressing the preferred nature of anticompetitive effect, we reach three specific conclusions. First, U.S. law should explicitly adopt a specific normative baseline for competition policy. More specifically, the courts should directly embrace the aggregate-welfare model, with qualified exceptions. Such action would enable the courts to specify how certain

31. *See* Thomas O. Barnett, *Interoperability Between Antitrust and Intellectual Property*, 14 GEO. MASON L. REV. 859, 860 (2007); *cf.* J. Gregory Sidak & David J. Teece, *Dynamic Competition in Antitrust Law*, 5 J. COMPETITION L. & ECON. 581, 586–90 (2009) (discussing the relationship between innovation and market concentration, but opining that monopoly is not a sine qua non of innovation).

32. *See* Alan Devlin et al., *Success, Dominance, and Interoperability*, 84 IND. L.J. 1157, 1159 (2009).

33. This is most likely to be the case where anticompetitive conditions result from the grant of intellectual property.

34. *See* Devlin et al., *supra* note 32, at 1172 (arguing that regulation focusing on immediate consumer welfare may undermine innovation).

practices should be construed.[35] The optimal rules applied to product tying, predatory pricing, Williamson mergers, and refusals to deal depend intimately on the specific metric by which to judge anticompetitive effect.

Second, to establish anticompetitive effect, a plaintiff should be required to demonstrate conduct-specific price increases that are apt to be durable. Given the continuously downward-sloping nature of most demand curves, such price effects will typically be associated with reductions in market output.[36] Yet, price increases can take place on the vertical portions of demand curves, which will not result in any declination in supply. If a defendant can establish that the price increase associated with its challenged conduct was incapable of reducing consumption in the relevant market, and carried some larger benefit, such proof should be a complete defense. The circumstances in which we could envision a defendant making such a showing, however, are narrow.

Third, courts and commentators should recognize the grave indeterminism that underlies one's attempt to apply sound theory to practice. Given economists' inability both to quantify and to weigh all the competitive effects of a challenged practice, we can rarely be completely confident that a scrutinized practice is anticompetitive or not. Society must therefore accept some residual uncertainty concerning what is, and is not, objectionable. In such cases, decision theory provides the avenue of last resort.[37]

Part I of this Article conducts a brief overview of the development of the U.S. antitrust regime. We explore the evolving nature of what the Supreme Court has considered to be improper conduct. In doing so, we demonstrate how "anticompetitive effect" has taken on a somewhat amorphous nature. Part II begins by explaining how economics bestows this concept with theoretical specificity. Economic theory suggests that an aggre-

35. We believe that the most direct result of such an approach would be to realign antitrust policy more closely with what the law originally envisioned—namely, maintaining active levels of competition.

36. Indeed, sustained price increases are generally achievable only by first reducing market output. *See generally* CARLTON & PERLOFF, *supra* note 28, at 61–64 (explaining the basics of supply curves).

37. One of the authors has recently completed a paper on conducting optimal error analysis in antitrust law. *See* Alan Devlin & Michael Jacobs, *Antitrust Error*, 52 WM. & MARY L. REV. (forthcoming 2010), *available at* http://ssrn.com/abstract=1573693.

gate-welfare model should underlie antitrust doctrine. We advocate the qualified adoption of this standard. Were the law explicitly to embrace this total-welfare approach, however, ambiguities would still remain. Part III explores a variety of difficult, ensuing questions. In particular, to what extent, if any, does anticompetitive mean more than a "lack of competition" under an aggregate-welfare standard? How should the courts treat conduct that unquestionably gives rise to enhanced prices, but does not result in observable restrictions in output? And how should courts assess practices that result in offsetting intertemporal effects? The answers to these and related questions are of considerable importance to the ongoing development of U.S. antitrust law.

I. THE EVOLVING CONCEPT OF "ANTICOMPETITIVE" BEHAVIOR

The history of U.S. antitrust enforcement is replete with instances of directional instability, for the concept of improper conduct has proven malleable, confused, and uncertain. Enacted in 1890, the Sherman Act prohibits monopolization and concerted conduct in restraint of trade.[38] Given the infamously opaque language of the statute,[39] it fell to the courts to give meaning to what Congress proscribed.[40] The one transcendent principle that one can derive from the case law is that the Sherman Act prohibits "anticompetitive" behavior. Markets that are unfettered by rival-imposed restrictions on competition are presumed to function more effectively than those which are monopolized.[41] This assumption, which finds powerful support in the economics literature, can fairly be said to drive U.S. antitrust policy.[42] The conclusion easily follows that courts should employ antitrust policy to protect a vigorous process of rivalry, such that unilateral or concerted conduct that quashes competition is rightly condemned under the Sherman Act. The idea

38. 15 U.S.C. §§ 1–7 (2006).

39. *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1183 (1989) ("One can hardly imagine a prescription more vague than the Sherman Act's prohibition of contracts, combinations or conspiracies in restraint of trade . . . .").

40. *See* State Oil Co. v. Khan, 522 U.S. 3, 20 (1997).

41. *See, e.g.*, Edward Cavanagh, *Antitrust Remedies Revisited*, 84 OR. L. REV. 147, 148 (2005).

42. *See* CARLTON & PERLOFF, *supra* note 28, *passim*.

that competition law simply prohibits "anticompetitive" behavior ostensibly provides a satisfactory guiding principle.

The reality of the modern economy, however, which is characterized by high levels of innovation and faltering dominance on the part of many large companies, proves rather more complex than might first appear.[43] In the real-life setting, determining whether many forms of commercial conduct ultimately promote or restrict competition proves to be difficult.[44] This determination is complicated by the fact that limitations on competition today may deflect that rivalry to an alternative venue, where it may yield greater long-run value to society.[45] This Article is concerned with the question of whether "anticompetitive" does and should mean more than "a lack of current competition." Exploring this issue in detail requires us briefly to explore some of the leading judicial pronouncements on the purpose of the Sherman Act and the behavior it condemns.

A. STATUTORY BACKGROUND AND EARLY ANTITRUST JURISPRUDENCE

Congress passed the Sherman Act at a time of powerful public aversion to the trusts that had enveloped the economy.[46] As explained by Justice Harlan, "the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people, namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations."[47] Judge Learned Hand similarly promoted what some may deem the noneconomic gains of the 1890 Act, observing that no problem "is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the

43. *See* Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 925–31 (2001).

44. *See, e.g.*, Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458–59 (1993) (discussing the difficulty of distinguishing competitive from anticompetitive behavior).

45. This economic phenomenon underlies the purpose of the intellectual property laws that restrict static efficiency to promote a larger gain in dynamic efficiency. *See generally* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 297–300 (2003) (explaining the effect of patent protections on demand and cost curves).

46. The oil, steel, railroad, and sugar industries in particular had come under the ownership of powerful trusts.

47. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 83 (1911) (Harlan, J., concurring in part and dissenting in part).

concentration of capital into vast combinations to control production and trade and to break down competition."[48] Consistent with that view, Judge Learned Hand condemned the actions of an efficient company whose only crime was to meet unsatisfied consumer demand with ever-increasing capacity and output.[49] Translated into colloquial terms, the court condemned an already dominant company for continued expansion at the detriment of its rivals.[50] From this perspective, it was not the inefficiency of monopoly that invoked antitrust's wrath, but the sociopolitical power that such dominance bestowed on its holder. Throughout this period, protecting the competitive process was clearly the key goal of antitrust policy.[51] In its 1940 decision in *Apex Hosiery Co. v. Leader*, the Supreme Court famously clarified the "evil" at which the Sherman Act was directed.[52] It explained that the "end sought was the prevention of restraints to free competition . . . which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers."[53]

It is not at all clear that the first fifty years of antitrust jurisprudence was based on a misconception of original legislative intent.[54] Indeed, there is a strong basis for supposing that Congress was not directly concerned with elevating notions of economic efficiency beyond other political goals that might be implicated by an antitrust regime.[55] Instead, the legislature likely sought to facilitate a vigorous process of competition that would promise to bring about a variety of benefits, which might include the diffusion of economic power, reduced levels of con-

48. United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416, 428 n.1 (2d Cir. 1945).

49. *Id.* at 431 ("[W]e can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel.").

50. *See* Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 375 (7th Cir. 1986).

51. *See Alcoa*, 148 F.2d at 428 n.1.

52. Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (3d Cir. 1940).

53. *Id.*

54. *Cf.* BORK, *supra* note 19, at 19–21 (arguing that the Sherman Act was intended to promote economic efficiency).

55. *See, e.g.*, Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979).

centration, and free access to markets and consumers, as well as efficiency gains.[56]

But of course the goal sought to be accomplished by the antitrust laws is distinct from the manner in which such an end is achieved.[57] The courts were thus faced with an obvious question, the resolution of which was far from axiomatic: what particular rules best comport with the notion that antitrust should impede the sweeping tide of concentration? The specific rules enunciated by the courts in the early years of the U.S. antitrust regime are instructive.

Perhaps surprisingly, the story of early U.S. antitrust law is one of inaction. The Supreme Court in 1895 allowed a merger to monopoly to proceed—a result that would not be countenanced in the twentieth century and beyond.[58] Antitrust enforcement came of age in the celebrated 1911 case of *Standard Oil*, which established the rule of reason as the primary tool of analytic inquiry.[59] Under the rule of reason, courts found those restraints that reduced competition by more than they promoted it to be illegal under the Sherman Act.[60] However, from the mid-1910s through Roosevelt's New Deal, antitrust enforcement took a back seat to direct regulatory intervention.[61] One notable trait of the jurisprudence of this time, however, concerned intellectual property. In the 1930s and 1940s, the Supreme Court viewed intellectual property rights, and patents in particular, with significant distaste.[62] Given the perceived benefits of competition, the Court viewed patent rights as being antithetical to the purpose of the Sherman Act. After all, it had previously noted that "[t]he very object of [obtaining a patent] is monopoly."[63] This view, as we shall see, is telling and its gen-

56. *Cf. id.* (suggesting that a fear of concentrated economic power and potential gains in efficiency may have been the motivating force behind early antitrust statutes).

57. *See id.*

58. *See* United States v. E.C. Knight Co., 156 U.S. 1, 11–18 (1895).

59. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 66 (1911).

60. *See id.* at 61–62.

61. *See* Giocoli, *supra* note 22, at 750.

62. *See* HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 250 (2005).

63. E. Bement & Sons v. Nat'l Harrow Co., 186 U.S. 70, 91 (1902).

eral import has vast consequences for optimal antitrust policy.[64]

An especially important case during this time was the Second Circuit's decision in *United States v. Aluminum Company of America* (*Alcoa*).[65] This monopolization case, which proved to be the single most important guide to the law governing dominance for at least forty years,[66] concerned the actions of an exceptionally successful company in the aluminum business.[67] Alcoa's innate success got it in trouble when the U.S. Justice Department charged the company with illegal monopolization and sought its dissolution.[68] In 1945, Judge Learned Hand wrote an opinion that might be considered—at least by some—as something of a blemish on his otherwise outstanding record.[69] He reasoned that Alcoa was guilty under section 2 of the Sherman Act because it had "progressively . . . embrace[d] each new opportunity as it opened, and . . . face[d] every newcomer with new capacity already geared into a great organization."[70] While at first blush this might appear to be an apt description of predatory conduct, a more scrutinizing view reveals otherwise. Under this reasoning, the Second Circuit had in effect rendered active competition by a dominant company illegal. According to Judge Learned Hand, a monopolist violated the Sherman Act when it expanded output to meet unsatisfied demand.[71] Yet this is precisely the conduct deemed desirable by efficiency-based economics.[72] Ironically, the holding of *Alcoa* is

64. As explored at length below, patents and other forms of exclusivity do not necessarily serve to quash competition. Rather, they deflect that competition to another forum. In the case of patents, competition is shifted away from rivalry in the production and marketing of competitive goods to the laboratory, where investment takes place in research and development. *See infra* Part III.B.

65. 148 F.2d 416 (2d Cir. 1945).

66. *See* Sara M. Biggers et al., *Intellectual Property and Antitrust: A Comparison of Evolution in the European Union and United States*, 22 HASTINGS INT'L & COMP. L. REV. 209, 268 (1999).

67. *See Alcoa*, 148 F.2d at 421.

68. *See id.*

69. *See* Richard A. Epstein, *Monopolization Follies: The Dangers of Structural Remedies Under Section 2 of the Sherman Act*, 76 ANTITRUST L.J. 205, 210–14 (2009).

70. *Alcoa,* 148 F.2d at 431.

71. *See id.* at 424–26.

72. Fortunately, it is widely recognized today that sound antitrust policy should hinder vigorous competition on the part of any sellers, including monopolists. *See, e.g.*, R.W. Int'l Corp. v. Welch Food, Inc., 13 F.3d 478, 488 (1st Cir. 1994) ("It is in the interest of competition to permit dominant firms to engage

in irreconcilable tension with the famous and oft-quoted remark of Judge Learned Hand in the very same case, that "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins."[73]

B. ANTITRUST DOCTRINE AND THE WARREN COURT

In the lead up to the 1960s, antitrust doctrine adhered to the so-called S-C-P paradigm, which found a nefarious connection between market structure, improper conduct (which was thought to be facilitated by industry structure), and unusually high levels of return (performance).[74] The resulting doctrine, which might fairly be characterized as striking a populist note, arguably reached its high mark in the 1960s.[75] During this time, the Warren Court embraced a highly interventionist reading of the Clayton and Sherman Acts, employing the Acts to strike down many mergers with de minimis market effects and finding a host of business practices to be per se illegal.[76]

The case law of the Warren Court provides powerful insight into what the Justices of the time viewed as being anticompetitive and hence objectionable under the antitrust laws. Perhaps most notable during this era was the Court's hostility to efficiency as a goal of the Sherman Act.[77] Indeed, the Court viewed enhanced efficiency as antithetical to the purpose of the antitrust laws when it cemented the market position of companies perceived to be dominant.[78] It is clear during Earl Warren's tenure that anticompetitive was indeed synonymous with reduced levels of active competition, defined as the number of entities engaging in viable competition.[79] Such unconstrained competition was seen to yield a panoply of benefits, including

in vigorous competition, including price competition." (quoting Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 341 (1990))).

73. *Alcoa*, 148 F.2d at 430.

74. *See* Herbert Hovenkamp, *United States Competition Policy in Crisis: 1890–1955*, 94 MINN. L. REV. 311, 346–59 (2009).

75. *See* Giocoli, *supra* note 22, at 756 (observing that "[t]he zenith of SCP-style antitrust law came in the 1960s").

76. *See* Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 103 n.206 (2007).

77. *See* Fed. Trade Comm'n v. Proctor & Gamble Co., 386 U.S. 568, 580 (1967).

78. *See id.*

79. *See* Thomas E. Kauper, *The "Warren Court" and the Antitrust Laws: Of Economics, Populism, and Cynicism*, 67 MICH. L. REV. 325, 330–32 (1968).

freedom of choice on the part of consumers, liberal access to markets by prospective sellers, and dispersion of power.[80]

As a result, the Court condemned entire swathes of commercial conduct deemed inimical to these goals. The Court summarily struck down resale price maintenance, even where a manufacturer purported only to set a maximum price at which its dealers could sell to the public.[81] The Court looked with even greater disdain on tying arrangements,[82] which the Justices viewed as giving rise to monopoly leverage and restricted access to markets and products for consumers and competitors alike.[83] Exclusive dealing contracts were viewed similarly.[84] Prices set by large companies that were deemed at all "predatory" were condemned, notwithstanding the significant benefits to consumers of low prices.[85] Group boycotts and concerted refusals to deal were eliminated without reference to the ultimate effect of such practices on consumers or other groups.[86] The exchange of price information between horizontal competitors was judged to be necessarily illegal.[87] And even a joint venture amongst fringe rivals in a market to create a name brand with which to compete against larger competitors was struck down as illegal per se by virtue of the ancillary restraints that the venture imposed.[88]

The preceding forms of commercial behavior that the Supreme Court condemned shared a common theme—they appeared to restrict free competition in some manner. The degree to which the restrictions would harm consumers or frustrate entry by competitors was deemed irrelevant—at least implicitly—for an unhindered process of rivalry was seen by the Warren Court as paramount.[89] This approach to antitrust reflected

80. *See id.*

81. *See* Albrecht v. Herald Co., 390 U.S. 145, 153–54 (1968).

82. Product tying occurs when a seller conditions the sale of a product or service ("the tying product") on the purchase of a second product or service ("the tied product"). *See* Int'l Salt Co. v. United States, 332 U.S. 392, 394 n.5 (1947).

83. *See id.* at 395–96; United States v. Loew's, Inc., 371 U.S. 38, 47–48 (1962).

84. *See* Fed. Trade Comm'n v. Brown Shoe Co., 384 U.S. 316, 321 (1966) (holding that exclusive dealing "conflicts with the central policy of both § 1 of the Sherman Act and § 3 of the Clayton Act").

85. *See* Utah Pie Co. v. Cont'l Baking Co., 386 U.S. 685, 694–703 (1967).

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

87. *See* United States v. Container Corp. of Am., 393 U.S. 333, 337–38 (1969).

88. *See* United States v. Sealy, Inc., 388 U.S. 350, 357–58 (1967).

89. *See* Crane, *supra* note 76, at 103.

what has been called a "competition equality" model of populism.[90]

But if the preceding per se rules adopted by the Court can be questioned from an economic perspective, the Justices' merger rulings were completely irreconcilable with such an approach. In *Von's Grocery Store*, the Court found the merging parties' occupying a mere 7.5 percent of the market to be objectionable.[91] And in *Brown Shoe*, the Court found that a prospective merger that would yield a firm with only five percent of the market violated the Clayton Act.[92] Such market shares would grant to their possessors no economic power over the market-clearing price.

The Court's holdings in *Von's Grocery Store* and *Brown Shoe* cannot be reconciled with an economic-efficiency approach.[93] But of course the Justices of the time were concerned with goals beyond efficiency,[94] and this is the fundamental point.[95] "Anticompetitive" need not be synonymous with economic efficiency, which is but one interpretation of the goals of the antitrust laws.[96] And it is important to note that the relative weight to be placed on the various objectives of competition policy will vary depending on the context. For instance, at a time of reduced international competition, which might yield

90. *See* E. Thomas Sullivan, *The Economic Jurisprudence of the Burger Court's Antitrust Policy: The First Thirteen Years,* 58 NOTRE DAME L. REV. 1, 1 (1982).

91. *See* United States v. Von's Grocery Co., 384 U.S. 271, 276 (1966).

92. Brown Shoe Co. v. United States, 370 U.S. 294, 343–46 (1962). *Brown Shoe* is often cited today for its applauded assertion that antitrust law protects competition rather than competitors. *Id.* at 320. Those citing the decision often miss the irony that the outcome in *Brown Shoe* was antithetical to this asserted principle.

93. Judge Posner has colorfully characterized the antitrust jurisprudence of the Warren Court era as an "intellectual disgrace." *See* RICHARD A. POSNER, ANTITRUST LAW, at viii (2d ed. 2001).

94. *See* Alan Devlin, *Antitrust in an Era of Market Failure*, 33 HARV. J.L. & PUB. POL'Y 557, 565–66 (2010) [hereinafter *Era of Market Failure*].

95. Although the antitrust jurisprudence of the Warren Court was anathema to many economists, it may in fact have been the most faithful to congressional intent. *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 76 (3d ed. 2005) (noting that the legislative history does not support efficiency-based goals). Since the Sherman Act is a common-law statute, however, original legislative intent—assuming that it can even be discerned with any accuracy—is of little, if any, importance. Congress clearly left it to the judiciary to define the substance of the antitrust laws. *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978).

96. *See Era of Market Failure*, *supra* note 94, at 566.

less pressure on countries to become more efficient for the sake of global competitiveness, it may be more reasonable to advance noneconomic goals. But as the cost of losing economies of scale and scope grows, perhaps in light of a developing economic context that requires greater efficiency, it may no longer be deemed acceptable to stifle efficiency in favor of other social goals.[97]

In traditional industrial settings, it is sometimes possible to square such sociopolitical goals as dispersion of economic power with efficiency-based concerns, for a vigorous process of competition will tend to yield both.[98] Fierce rivalry between a large number of firms ensures that dominance on the part of any one will be constrained and will also result in higher output.[99] Active competition promises lower prices, which is surely consistent with congressional intent in enacting the 1890 Act.[100] It is only when a tension emerges between concentration and efficiency that problems arise. The Warren Court may have failed to realize that such a tension is capable of emerging. Crucially, however, that tension is apt to arise more frequently and acutely today, especially in the context of innovation markets.[101] It is for this reason that modern antitrust law must be cautious in tying the definition of "anticompetitive effect" to an absence of competition, for restrained competition, higher prices, and market concentration can paradoxically lead to overriding social benefits in at least some contexts.[102] This is most likely to be the case in the new-economy setting.

97. It might also be noted that, during the Warren Court era, the tension between efficiency and sociopolitical goals of containing concentration was less extreme than it is today, where new economy markets play a role of ever-increasing importance. *See id.* at 573–75.

98. This is not to say, of course, that the concentration-inhibiting rules of the Warren Court did not carry efficiency costs, for the prohibition of mergers that would not yield heightened market power serves to inhibit the attainment of cost savings and other efficiencies. *See id.* at 569.

99. *See generally* MCCONNELL & BRUE, *supra* note 3, at 460–83 (explaining monopolistic competition).

100. *See* HOVENKAMP, *supra* note 95, at 50–51.

101. *See* Posner, *supra* note 43, at 931–36.

102. Nevertheless, as we explain below, there may be a strong basis for treating conduct that explicitly eliminates competition as inimical to the antitrust laws, without further reference to ultimate downstream effects. *See infra* Part II.A.

C. AFTER THE WARREN COURT

The jurisprudence of the Warren Court is now considered discredited by those of an economic persuasion.[103] Beginning in the late 1970s, the Chicago School emerged with extraordinary influence in the antitrust field, bringing with it an unyielding focus on economic analysis as the sole relevant tool of antitrust scrutiny.[104] The School succeeded in convincing the courts and enforcement agencies that political concerns such as limiting concentration and ensuring ease of access to markets were in themselves irrelevant and, indeed, often diametrically opposed to the only relevant factor, which is efficiency.[105] This influence was most dramatically demonstrated by a number of leading decisions of the Burger Court, which discarded its predecessor's populist conception of anticompetitive effect in favor of stringent economic analysis focused on a measure of efficiency.[106] In doing so, it rejected the structuralist approach.[107]

The turning point for this change of direction lay in the Supreme Court's 1977 decision in *GTE Sylvania*.[108] There, the Burger Court jettisoned the dogmatic use of per-se-illegal analysis that had defined its predecessor and employed rule-of-reason analysis to demonstrate that vertical, non-price-based restraints were not necessarily illegal, due to their ability to spur interbrand competition.[109] A series of revolutionary decisions followed. In *Professional Engineers*, the new Court clarified that antitrust inquiry under the rule of reason "focuses directly on the challenged restraint's impact on competitive conditions."[110] In *BMI*, the plaintiff alleged that the issuance of blanket licenses to copyright-protected songs by BMI and

103. *See* C. Paul Rogers III, *The Antitrust Legacy of Justice William O. Douglas*, 56 CLEV. ST. L. REV. 895, 943–44 (2008).

104. *See* Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 931–32 (1979).

105. Although Chicago's historical fidelity to the intent of Congress is questionable, the normative case for granting efficiency hegemonic status is compelling. For perhaps the strongest effort to tie congressional intent in 1890 to concerns of economic efficiency, see BORK, *supra* note 19, at 50–71.

106. *See* E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L.J. 1571, 1604–05 (2004).

107. *See* Jessica Jackson, Note, *Much Ado About Nothing? The Antitrust Implications of Private Equity Club Deals*, 60 FLA. L. REV. 697, 704 (2008).

108. *See* Cont'l T. V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

109. *Id.* at 52–59.

110. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978).

ASCAP, the industry's two largest companies, constituted illegal price-fixing.[111] The Supreme Court declined to adopt a per se rule of illegality, as its predecessor had been inclined to do.[112] Instead, it analyzed the challenged arrangement under the rule of reason, ultimately finding it to be lawful as the sole, lawful way for copyright holders to protect their property rights.[113]

Having largely adopted the Chicago School's view that antitrust law should be concerned with maximizing consumer welfare, the Supreme Court has reversed course on a vast array of per se rules. The Court has clarified that even predatory, below-cost pricing by dominant companies is not illegal, absent a further showing that the challenged conduct carries with it a "dangerous probability" of recoupment.[114] Price squeezes are no longer necessarily illegal.[115] A dominant firm's obligation to deal with its rivals has been narrowed to the point that some question its ongoing relevance.[116] The per se rule against vertically imposed maximum and minimum resale prices has been overruled.[117] Outright condemnation of product tying has been reversed.[118] To prevail on a claim of bundling or requirements contracts, a plaintiff must now show that the tying firm has monopoly power in the tying market and that the arrangement promises to foreclose a substantial volume of commerce in the tied market.[119]

111. Broadcast Music, Inc. v. CBS, 441 U.S. 1, 6, 15 (1979).

112. *Id.* at 6–7.

113. *Id.* at 16, 24–25.

114. *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993).

115. *See* Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109, 1119–20 (2009).

116. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407–11 (2004). The Supreme Court did emphasize, however, that it did not overrule its earlier decision in *Aspen Skiing Co. v. Aspen Highlands Skiing*, 472 U.S. 585 (1985). Instead, it clarified that the decision constituted the outer boundary of section 2 liability for refusals to deal. *Id.* at 409.

117. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886–89 (2007); State Oil Co. v. Khan, 522 U.S. 3, 7, 22 (1997).

118. *Compare* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 44 (2006) (holding that "a patent does not necessarily confer market power"), *with* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 13–17 (1984) (holding that "if the Government has granted the seller a patent or similar monopoly over the product, it is fair to presume that the inability to buy the product elsewhere gives the seller market power").

119. *See Jefferson Parish*, 466 U.S. at 15–16.

More recently, the Court has explained the purpose of the antitrust laws is to correct market failures.[120] This characterization is interesting because the purported failure lies not in any inherent trait of the market, but in the actions of those entities that occupy it. In this respect, the Sherman Act might better be thought of as a mechanism for preventing those with an interest in doing so from hindering the otherwise effective functioning of the market. Nevertheless, use of the antitrust laws as a corrective device to alleviate shortcomings more quickly and effectively than would free-market processes operating alone tells us little about what constitutes a "failure." It is with this fundamental concept that this Article is concerned.

One can thus observe a dramatic arc in the definition of "anticompetitive" conduct. During the Sherman Act's 120-year reign, the fundamental concept of what that legislation proscribes has proven highly unstable. It has unquestionably been an evolving concept—one that mirrors the prevailing political mood of the day.[121] Still, "anticompetitive effect" is arguably more determinate a concept in the present than in any time in the past.[122] It has become clear that the antitrust laws are not concerned with dispersing economic power, at least until the 2008 credit crisis.[123]

Yet, even today, the concept of objectionable, "anticompetitive" conduct remains disturbingly ill-defined. While it is indeed true that rules govern some conduct—for instance, horizontal price-fixing and market-sharing agreements are illegal per se[124]—and that vast swathes of other conduct are assessed under the rule of reason to measure how they comport with notions of economic efficiency, centered in particular on consumer welfare, significant questions remain unanswered. In particu-

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

121. Prevailing political mood also played an important role in the rise of the Chicago School, since its emergence largely coincided with a rightward movement during the 1980s. Ronald Reagan's appointment of leading conservative judges helped to cement the adoption of Chicago principles within the law. *See, e.g.*, Eleanor M. Fox, *What Is Harm to Competition? Exclusionary Practices and Anticompetitive Effect*, 70 ANTITRUST L.J. 371, 379 (2002); Gary Minda, *Antitrust at Century's End*, 48 SMU L. REV. 1749, 1769 (1995).

122. *See* Fred S. McChesney, *Talking 'Bout My Antitrust Generation: Competition for and in the Field of Competition Law*, 52 EMORY L.J. 1401, 1402, 1407 (2003).

123. *See Era of Market Failure*, *supra* note 94, at 563.

124. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940) (quoting Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 458 (1940)).

lar, should antitrust law analyze conduct under a total-welfare standard? Can conduct found objectionable under the relevant standard be revived by pointing to long-run, beneficial consequences of that behavior? Should actions that result in demonstrable price increases be condemned without inquiry into the effect of that behavior on market output? Perhaps most fundamentally of all, can injury to the competitive process in itself suffice to establish an antitrust violation without engaging in further analysis to determine the ensuing impact on consumer or total welfare? Although these issues will not arise in every—or even most—cases, they remain fundamental, and their resolution will have a determinative impact on the outcome of at least some antitrust lawsuits. We now seek to answer these questions.

II. DEFINING "ANTICOMPETITIVE EFFECT"

As the preceding section explained, the nature of the conduct proscribed by the Sherman Act has evolved in tandem with the larger sociopolitical climate of which antitrust policy is merely a part. Today, however, there is widespread agreement about what is anticompetitive, and hence objectionable, under the antitrust laws. The view is one based in economics and focused, for the most part, on "consumer welfare."[125] Representatively, Fred McChesney proclaims that "[a]nticompetitive now is clearly defined as that which raises price, restricts quantity, or lowers quality."[126] His is not a controversial view.[127] Yet, while this definition of objectionable conduct may find widespread agreement, it is not sufficiently precise for the purpose of larger antitrust analysis.

125. *See, e.g.*, Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll., 128 F.3d 59, 63 (2d Cir. 1997); Reazin v. Blue Cross & Blue Shield of Kan., Inc., 899 F.2d 951, 960 (10th Cir. 1990); Monahan's Marine, Inc. v. Bos. Whaler, Inc., 866 F.2d 525, 528 (1st Cir. 1989); Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc., 784 F.2d 1325, 1333 (7th Cir. 1986).

126. McChesney, *supra* note 122, at 1407.

127. *See, e.g.*, Wallace v. Int'l Bus. Machs. Corp., 467 F.3d 1104, 1107 (7th Cir. 2006) (explaining that "the goal of antitrust law is to . . . keep prices low for consumers' benefit"); Valley Drug Co. v. Geneva Pharm., Inc., 344 F.3d 1294, 1304 (11th Cir. 2003) (defining as "anticompetitive" those practices that "diminish output and raise prices"); *see also* 10 PHILLIP E. AREEDA ET AL., ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1780a (1996) (explaining that antitrust condemns practices "tending to restrict output and elevate prices and profits above the competitive level").

In particular, is it indeed the case that conduct which results in higher prices but not lower quantity violates the antitrust laws? How should the courts approach restrictions that raise price and depress output in the present, but yet are said to promote innovation or otherwise to yield offsetting benefits? Perhaps most fundamentally of all, this proffered definition does not address the extent to which conduct must be tied to final consequences in the form of price and output. So, for instance, are restrictions on the buyer-side of the market objectionable when such restraints cannot be directly tied to downstream price effects?[128] Can a defendant's explicit quashing of competition in a market amount to cognizable anticompetitive effect without further inquiry?[129] These questions are fundamental, and yet conventional wisdom, which definitively casts anticompetitive effect in terms of price and output effects, does not yield satisfactory answers.

It is notable that this representative definition of anticompetitive effect does not turn on a challenged practice's impact on the nature of competition in a market. For sure, agreements restricting competition amongst entities engaged in horizontal rivalry surely result in higher prices, reduced quantities of goods or services, and potentially lower quality. But the intensity of active competition in a market need not always correlate perfectly or even strongly with price, output, or quality. More vexingly still, reduced in-market competition may be associated with diminished quantity and higher price, yet greater quality. This phenomenon is most apparent in new-economy industries founded on intellectual property.[130] The pharmaceutical industry is likely the paradigmatic example, given that it would

128. *See* Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 325 (2007) (holding that the first prong of the test to determine predatory bidding requires that "the predator's bidding on the buy side must have caused the cost of the relevant output to rise above the revenues generated in the sale of those outputs").

129. *See* Fishman v. Estate of Wirtz, 807 F.2d 520, 533 (7th Cir. 1986) (holding that the "use of monopoly power to preclude . . . competition" to acquire a natural monopoly is in violation of the Sherman Act).

130. Vertically intrabrand restraints imposed by a manufacturer on its dealers may have similar effects. Those restraints may lead to dealers charging higher prices than would otherwise be the case, thus yielding "anticompetitive" results. But such restraints may alleviate dealers that engage in active pre- and post-sales services of the freeriding that might otherwise plague them, thus ensuring higher quality to the consumer, even if it is combined with higher prices. And similar intrabrand restraints may in fact trigger offsetting *inter*brand competition, which promises to yield larger consumer benefits.

largely cease to exist but for patent protection.[131] For this reason, under today's law a monopolist's refusal to share its facilities with its rivals will rarely give rise to antitrust liability, even if that refusal results in consumers receiving less output and paying higher prices.[132] Although this effect in the present may perhaps be characterized as "anticompetitive," in a more important respect it may be anything but. The right to refuse to deal is a hallmark of a property right, which gives incentives to research, invest, and commercialize that may yield vastly greater consumer benefits than mere low prices and higher output in the short run.[133] Pursuant to this phenomenon, there may be a counter-intuitive relationship between reduced levels of active competition and long-term consumer welfare, particularly in the innovation context.

So, the definition of anticompetitive effect requires more than increased prices, diminished supply, or lower quality, though these are surely traits that may be deemed undesirable from an antitrust-policy standpoint. An important question ensues: to what extent can a plaintiff demonstrate anticompetitive impact without reference to output, price, and quality as they might impact the ultimate consumer? Put differently, can a plaintiff demonstrate injury to the competitive process by showing reduced competition alone?

This Part begins by exploring this crucially important question. One of the authors happened to write perhaps the seminal opinion dealing with this issue. We begin by discussing this case, *Fishman v. Estate of Wirtz*, in which a plaintiff sought to establish antitrust injury by showing that the defendants' actions eliminated competition to obtain a monopoly.[134] No evidence was introduced that the challenged conduct would result in heightened downstream prices or reduced output.[135] But nor was evidence introduced establishing that that conduct would result in heightened quality, lower prices, or some other

131. *See* Benjamin Roin, *Unpatentable Drugs and the Standards of Patentability*, 87 TEX. L. REV. 503, 511 (2009).

132. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004); *see also infra* note 244 and accompanying quotation.

133. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 3.1 (5th ed. 1998) (noting that "legal protection of property rights creates incentives to exploit resources efficiently").

134. *Fishman*, 807 F.2d at 525.

135. *Id.* at 563 (Easterbrook, J., dissenting).

benefit to consumers.[136] This might appear to counsel indifference, but as we now explore, we believe that indeterminate effects on consumers should not lead the courts to condone conduct that axiomatically quashes active competition without a concomitant, offsetting benefit.

A. IS "ANTICOMPETITIVE" COTERMINOUS WITH AN "ABSENCE OF COMPETITION"? THE INTRIGUING CASE OF *FISHMAN V. ESTATE OF WIRTZ*

One possessing a moderate familiarity with the law might note that antitrust law prohibits conduct by firms that threatens to disrupt the smooth functioning of the economy. Such a person might declare further that an unhindered competitive process provides a plethora of benefits that run the gamut from lower prices to higher quality for consumers, who are the intended beneficiaries of competition law.[137] Such comments would not be controversial. Whether behavior that interferes with an otherwise unhindered competitive process is appropriately challengeable under the antitrust laws, however, is a difficult question. There is some precedential value for answering this inquiry in the affirmative, without regard to demonstrable price and output effects. In this regard, Justice Black gave perhaps the definitive account of antitrust policy of his era, opining:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.[138]

136. *Id.* at 537 (majority opinion) ("The defendants here have not suggested any procompetitive benefit which will result from the challenged conduct."); *see also id.* ("[T]here seems to be no way of telling whether IBI or CPSC would be a 'better' owner from the perspective of basketball fans.").

137. *See* Brunswick Corp. v. Riegel Textile Corp., 752 F.2d 261, 266 (7th Cir. 1984) ("The purpose of the antitrust laws as it is understood in the modern cases is to preserve the health of the competitive process—which means, so far as a case such as this is concerned, to discourage practices that make it hard for consumers to buy at competitive prices—rather than to promote the welfare of particular competitors.").

138. N. Pac. Ry. v. United States, 356 U.S. 1, 4 (1958).

This articulate description of the role of active competition in the antitrust regime is both helpful and largely accurate. Competition can be assumed to generate a variety of social benefits, such that its elimination similarly can be assumed to yield social ills. But a number of crucially important caveats are in order. First, a complicating factor is that reduced competition can mask offsetting gains. For instance, intellectual-property protection reduces active competition in the marketplace, but greatly enhances it in research and development.[139] Not only is this deflection of competition subtle (and hence potentially vulnerable to being ignored), it is immensely valuable to society (which magnifies the cost of ignorance). A further complicating factor lies in defining a desirable level of competition. During the structuralist era, it was erroneously assumed that rising concentration meant reduced levels of competition.[140] In fact, economists have subsequently demonstrated that even duopolies can be highly competitive and that economies of scale dictate the optimal concentration of a competitive market.[141]

With these qualifications in mind, competition-eliminating conduct can in itself be fairly said to violate the antitrust laws, without further inquiry into the ultimate effect of that conduct on downstream price and output. We believe a 1986 opinion of the U.S. Court of Appeals for the Seventh Circuit, *Fishman v. Estate of Wirtz*, provides a particularly helpful context in which to explore this issue.[142]

In that case, the plaintiffs competed with the defendant, Chicago Professional Sports Association, to obtain the Bulls, which the district court found to be a natural monopoly in the presentation of live professional basketball in Chicago.[143] The

139. *See* Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 993 (1997).

140. *See* William H. Page & John R. Woodbury, *Paper Trail: Working Papers and Recent Scholarship*, 7 ANTITRUST SOURCE 1, 2 (2008), *available at* http://www.abanet.org/antitrust/at-source/08/08/Aug08-pTrail8=6f.pdf (observing the "Warren Court's strict treatment of mergers in markets that exhibited a trend toward concentration").

141. *See* Timothy F. Bresnahan & Peter C. Reiss, *Entry and Competition in Concentrated Markets*, 99 J. POL. ECON. 977 (1991); Frank H. Easterbrook, *The Chicago School and Exclusionary Conduct*, 31 HARV. J.L. & PUB. POL'Y 439, 440 (2008); Timothy J. Muris, *Economics and Antitrust*, 5 GEO. MASON L. REV. 303, 303–06 (1997).

142. Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986).

143. *Id.* at 525, 532.

trial judge determined that the successful bidders refused to lease the relevant sports stadium, which was found to be an "essential facility."[144] This effectively cut off all competition for acquisition of the professional basketball franchise.[145] The question of interest was whether competition to obtain a natural monopoly was protected by the antitrust laws.[146] The relevant argument was that substituting one monopolist for another has no impact on consumer welfare, such that no antitrust liability could ensue.[147] One of the authors of the present Article, Judge Cudahy, wrote an opinion for the Seventh Circuit, in which he found that the Sherman Act protects the process of competition itself, including rivalry to obtain a natural monopoly.[148] Specifically, he determined that "the antitrust laws are concerned with the competitive process, and their application does not depend in each particular case upon the ultimate demonstrable consumer effect. A healthy and competitive process is presumed to be in the consumer interest."[149] Judge Easterbrook dissented in strong terms.[150]

Fishman is the paradigmatic case in which the ambiguous meaning of "anticompetitive" leaves the proper outcome in some doubt. There is no question that the case describes an anticompetitive act giving rise to an anticompetitive effect, but the case law is not entirely clear whether the correct result is liability.[151] Liability seems to turn on just how firmly the courts have embraced consumer welfare as the limited and exclusive criterion of the concerns of the antitrust laws. The dissent cites many cases that it reads as requiring a demonstrable showing of consumer injury,[152] and the majority responds with cases—leading with *Otter Tail Power Co. v. United States*[153]—where the court found an antitrust violation in situations where competition for acquisition of a "natural monopoly" was suppressed. In *Otter Tail*, for example, although the Court had no trouble finding liability, no consumer injury was evident on the facts

144. *Id.* at 530.
145. *Id.* at 533.
146. *Id.* at 531.
147. *Id.* at 533, 535.
148. *Id.* at 536.
149. *Id.*
150. *See id.* at 563–85.
151. *Id.* at 533–36.
152. *Id.* at 564–65.
153. 410 U.S. 366 (1973).

and the need for such injury was not mentioned by the opinion.[154] The opinion implicated consumer welfare neither implicitly or explicitly. In fact, the absence of consumer effect was specifically pointed out by the dissent.[155] There was no doubt, in studying cases cited in the *Fishman* opinion and the dissent, that competitive injury to the consumer was an important aspect for a plaintiff to claim in ferreting out violations of the antitrust laws.[156] But, up until *Fishman*, no case had held that there was no violation if anticompetitive acts occurred in the acquisition of a natural monopoly and the consequences at the retail level were unknown.[157]

As has been noted, the purposes and impact of the Sherman Act have shifted over its history to implicate larger political and economic concerns.[158] Thus, consumer injury came to the fore as a factor in antitrust analysis when economists, with a principal focus on efficiency, assumed a leading role in antitrust scholarship. Efficiency supplanted an earlier predominant concern with equity and fair play in business dealings.[159] As a political matter, efficiency appealed to more conservative observers, who were insistent that the antitrust laws were not aimed at "bigness" per se, but only at activities that inhibited competition at the retail level. This latter emphasis had a universal appeal insofar as it sought to optimize the allocation of resources in a world of scarcity. It was not difficult to persuade believers in the wondrous powers of free markets that competition at the consumer level should be the sole concern of antitrust. But *Fishman* was an effort to examine the state of the

154. *See id.* at 368–72.

155. *Id.* at 388–89 (Stewart, J., concurring in part and dissenting in part).

156. Indeed, the *Fishman* majority noted that "the enhancement of consumer welfare is an important policy—probably the paramount policy—informing the antitrust laws." *Fisherman*, 807 F.2d at 535.

157. Most recently, the Supreme Court weighed in on the legality of predatory bidding in upstream markets. Rather than trying to tie reduced input prices upstream to any negative impact on consumers downstream, the Court simply held that the Sherman Act protects "competition and innovation on the buy side of the market." Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 324 (2007); *see also* Gregory J. Werden, *Competition, Consumer Welfare, & the Sherman Act*, 9 SEDONA CONF. J. 87, 92 (2008) (dismissing the argument that the legality of Weyerhaeuser's conduct should have turned on a formal assessment of "consumer welfare" effects because such an approach would "adopt an unreasonably narrow definition of 'consumer welfare' and wrongly elevate it from a statutory goal to an operational test for liability").

158. *See supra* Part I.

159. *See supra* Part I.

cases as of 1986 and could not purport to be an in-depth examination of what ideally should define a violation. And, as we have noted, the emphasis of standards under the antitrust laws has shifted historically as political concerns have changed their focus.[160] It is of interest, therefore, that under a total-welfare analysis as in *Fishman*—as opposed to a more limited, exclusive inquiry into the well-being of ultimate downstream consumers—liability, as urged by the majority, might be even clearer as the proper outcome.

In fact, Judge Easterbrook hints at such an approach in his treatment of *Otter Tail*, which is the main citation casting doubt on the thesis that consumer injury is an essential ingredient of liability under the Sherman Act.[161] Judge Easterbrook argues, in effect, that in *Otter Tail* there was competition in generation—upstream from the electricity-delivery process—as well as downstream at retail distribution, and that generation was potentially affected by the anticompetitive denial of transmission accommodation.[162]

Judge Easterbrook thus asserts that the anticompetitive use of transmission is significant because the cost of generation may ultimately flow through and affect the regulated price to consumers.[163] His test is, therefore, formally keyed to consumer welfare, but in substance relies on his beliefs about aggregate welfare.[164] In *Otter Tail*, however, there is no discussion by the Court about whether retail prices are in fact affected, or whether this was significant or relevant.[165] The conclusion to be derived from the case may be, then, that anticompetitive acts impair welfare and efficiency at some level, and that this is enough without need to demonstrate an almost necessarily speculative relationship to the consumer. Thus, the test itself should perhaps be framed in terms of total welfare, rather than

160. *See supra* note 121 and accompanying text.

161. *Fishman*, 807 F.2d at 571 (Easterbrook, J., dissenting).

162. *Id.* ("Otter Tail used its bottleneck to prevent [the retail distributor] from receiving the benefit of ongoing competition at the generating level.").

163. *Id.*

164. Notably, Judge Easterbrook connects consumer welfare with allocative efficiency, portraying the terms as "cousins" and "close relatives." He seems to believe the two are harmonious, and perhaps even synonymous, goals. *Id.* at 567, 570. Yet these two goals can come into inescapable conflict. In the case of first-degree price discrimination, for instance, allocative efficiency reaches its peak, whereas consumer welfare is zero.

165. Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

consumer welfare. Such an approach renders distortions at any level in the market—be it upstream or downstream—objectionable. Judge Easterbrook in his *Fishman* dissent tries to show that the anticompetitive acts in that case probably did not affect the consumer.[166] This conclusion is necessarily speculation, however, and there is no good reason that the bias of the law should be protective of interference with competition when all its consequences are unknown.[167] Under the antitrust laws, the bias should be to protect free markets wherever they can exist without attempting to trace the elusive consequences of their disruption.[168]

Fishman thus illustrates why a total-welfare standard may provide a superior vehicle in which to construe the legality of competition-eliminating practices that have a tenuous negative impact on consumers. A strict consumer-welfare approach would ignore blatant distortions, the impact of which cannot reliably be traced downstream, though they bear self-evident harm to entities upstream. By construing business practices through the lens of aggregate welfare, it becomes apparent that harm to an excluded competitor may indeed evidence competitive injury, at least when that harm is not matched or exceeded by a concomitant gain elsewhere. Of course, in *Fishman*, one could argue that the loss to the plaintiff equaled the gain to the party that acquired the stadium. Such a supposition's accuracy cannot be verified without knowing the subjective utility of acquisition to each entity, which would vary depending on the efficiency with which each could operate the facility. Thus, we

166. *Fishman*, 807 F.2d at 571.

167. Indeed, it is not the case that consumer benefits could not have flowed from the plaintiff's acquisition of the stadium in lieu of what ultimately transpired. It could be that the plaintiff would have operated the facility more efficiently than the entity that acquired it, for instance, which would presumably inure to the benefit of consumers. An entity that could employ a resource more efficiently than others would rationally bid a greater sum than its rivals, *ceteris paribus*, but its superior efficiency would allow it to enjoy greater returns at any given price.

168. It warrants emphasizing that the law regularly employs presumptions, which are justified on the basis that they are more often correct than not. It is difficult to envision a presumption more likely to hold true in the vast majority of instances than the presumption that competition yields a variety of social benefits, including consumer welfare, that will be lost if that competition is eliminated. The fact that in a small minority of instances the elimination of competition will not harm consumers hardly warrants a reversal of that presumption, particularly if there is no showing that the restriction in competition does not actually *benefit* consumers.

advocate a total-welfare approach that is all-encompassing in its protection. Upstream entities, every bit as much as downstream consumers, ought to be entitled to the fruits of a competitive process.[169] We believe that such an approach most faithfully comports with long-established, and never-overruled, Supreme Court precedent.[170]

Fishman is therefore a good example of why a total-welfare standard may be preferable to one limited to consumer welfare. Competition generally produces efficiency at all economic levels in which it may take place. Therefore, it seems reasonable to reward competition—and sanction its obstruction wherever it may be involved, whether at the consumer level or elsewhere. It may be possible in individual cases to identify curtailments of welfare through impairments of competition at the producer or distributor levels, and to determine whether these curtailments result in a loss at, for example, the consumer level. This is the process by which Judge Easterbrook, for example, seeks to justify the finding of liability in *Otter Tail* (even though the Supreme Court opinion contains no such analysis).[171]

But such an analysis seems speculative, possibly labyrinthine, and unnecessary. Is it not simpler and equally justifiable to focus on aggregate welfare, thus protecting the process of competition in situations where its absence cannot be tied to social gains, without attempting to trace all the efficiencies and inefficiencies to determine the impact on a particular level? If the best that can be said is that elimination of upstream competition may sometimes result in zero improvement in total efficiency in all markets combined, then illegality in all instances strikes us as the appropriate rule.

Although courts have differed on this question,[172] we conclude that antitrust plaintiffs need not be required to demonstrate downstream consumer injury in all cases. Where challenged conduct explicitly quashes competition in a cognizable market, and the relevant restriction is not of the kind that

169. *Accord* Werden, *supra* note 157, at 97.

170. Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 236 (1948).

171. *Fishman*, 807 F.2d at 571 (Easterbrook, J., dissenting).

172. *See, e.g.*, Clarett v. Nat'l Football League, 306 F. Supp. 2d 379, 398–99 (S.D.N.Y. 2004) (rejecting as "rigid" a "price or output" rule that would allow any commercial behavior not having either such effect to escape antitrust condemnation), *rev'd in part, vacated in part*, 369 F.3d 124 (2d Cir. 2004).

lends itself to offsetting benefit, a court may fairly presume anticompetitive effect.

B. THE FEASIBILITY OF AN AGGREGATE-WELFARE STANDARD

Much of the debate concerning the precise definition of anticompetitive effect can be traced to the question whether aggregate or consumer welfare is the appropriate benchmark of antitrust analysis.[173] As the next Part begins by exploring, the law is as yet unsettled as to whether a practice that increases price but has no effect on output can be challenged under the Sherman or Clayton Acts. Similarly, the proper treatment of product tying depends very much on whether one adheres to a total- or consumer-welfare framework. The choice between these two benchmarks is equally important for merger analysis.

The first question is obvious: what is the difference between the two models? As the name might suggest, aggregate or total welfare refers to the combined wealth of sellers and purchasers in a market.[174] The model does not differentiate between wealth in the hands of either group. In contrast, consumer welfare is often, though not exclusively, meant to refer to the consumer surplus in a market—that is, the combined difference between each consumer's reservation price and the price he or she ultimately pays.[175] To complicate matters, however, the term "consumer welfare" is occasionally used in a manner synonymous with total welfare.[176] When we use the term, we shall use it to refer to the economic measure of consumer surplus only.

This Article does not seek to articulate an unqualified view on the relative virtues of adhering to a consumer or total-welfare paradigm for all purposes, though we believe that the

173. *See, e.g.*, John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 236 n.215 (2008).

174. *See* David Pettit, *Submarkets and Supermarkets:* FTC v. Whole Foods Market *and the Resurrection of* Brown Shoe, 16 GEO. MASON L. REV. 971, 979 n.62 (2009).

175. *See* Brodley, *supra* note 20, at 1032.

176. *See, e.g.*, BORK, *supra* note 19; *see also* Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1, 5–6 (1982) (discussing the difficulty of defining "consumer welfare").

aggregate standard is generally to be preferred.[177] For one, we consider that such an approach comports most closely with the one, transcendent principle that has characterized the history of U.S. antitrust enforcement—namely, that competition itself is of primary concern.[178] If one construes the antitrust laws as protecting the process of competition, and thus aiding all those who stand to benefit from such rivalry, then limiting the law's coverage to downstream consumers alone is incongruous. In electing an appropriate lodestar, it is also surely relevant that a "consumer-welfare" approach may reduce net societal utility in at least some instances. Seeking to maximize cumulative wealth in society is hardly an unreasonable objective, yet a consumer-welfare goal is partially inconsistent with it. Moreover, even if one's normative position is based only on consumer well-being, it remains true that seller-side efficiencies can percolate through to individual consumers.[179] Capital markets and employee stock ownership directly facilitate the distribution of profits to individuals. In this sense, it may be inaccurate to demarcate producers and consumers into two distinct groups that are separated by an impermeable barrier through which no wealth can flow.[180]

Nevertheless, the aggregate-welfare model—if adopted without qualification—would carry some controversial repercussions. This is especially so in the merger arena, in which courts would nevertheless permit so-called Williamson mergers that confer market power at the expense of consumers.[181] Oliver Williamson famously demonstrated that mergers that yield heightened market power at the expense of consumers, but that

177. *See also Reformulating Antitrust Rules*, *supra* note 25 (advocating the adoption of an aggregate-welfare standard).

178. *See supra* Part I.

179. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 4 (1992) (rev. 1997) [hereinafter MERGER GUIDELINES] (noting that producer-side efficiencies can benefit consumers).

180. In addition, it is wholly inaccurate to treat companies that are sellers in one market as sellers for all purposes. Such companies are simultaneously consumers in others. Why would antitrust law protect them in the latter setting, but not in the former? This point is pursued further below.

181. More specifically, Williamson mergers would theoretically be permitted. Whether such combinations would be approved depends on whether the merging parties credibly conveyed information about the producer-side efficiencies they envisioned that the merger would achieve. This is notoriously difficult in practice, so the legality of Williamson mergers is for the most part academic for present purposes.

simultaneously create supply-side efficiencies, are likely to enhance social welfare even if the efficiency gains are modest.[182] Only the Canadian antitrust authorities currently contemplate a complete efficiencies defense of a merger that causes increased prices.[183] Williamson mergers do not pass muster under the Justice Department and FTC's current merger guidelines.[184] Whether this view is defensible, at least at the theoretical level, turns on whether the U.S. agencies ought to be concerned with total, rather than consumer, welfare.[185] From a purely normative perspective, however, we believe that the desirability of such combinations turns in part on consumers' access to capital markets, which would allow them to share in companies' wealth.

Although there may be occasions in which an unwavering promotion of aggregate welfare may lead to controversial application (or nonapplication) of the antitrust laws, we believe that there is good ground to base analysis largely on such a total-welfare model. The Supreme Court would implicitly seem to have adopted at least a variant of it in the monopsony context, noting that the Sherman Act

> does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.[186]

This is a resounding endorsement of the notion that active competition is itself the primary goal of the antitrust laws and that the distortion of that competition is supposed to carry a variety of undesirable consequences.[187] If antitrust jurispru-

182. *See* Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 21–23 (1968).

183. *See* Competition Act, R.S.C., 1985 C-34, § 96 (Can.).

184. *See* MERGER GUIDELINES, *supra* note 179, § 4 ("[T]he Agency considers whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm consumers in the relevant market, e.g., by preventing price increases in that market."); *see also* Fed. Trade Comm'n v. Procter & Gamble Co., 386 U.S. 568, 574 (1967) (taking into account the cognizable efficiencies of a merger when finding an acquisition unlawful).

185. As a practical matter, it is difficult to identify merger-specific efficiencies. They are hard to demonstrate ex ante and even more difficult to separate from non-merger-specific efficiencies ex post.

186. Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 236 (1948) (citations omitted).

187. *See id.*; *see also* MERGER GUIDELINES, *supra* note 179, § 0.1 (stating that one purpose of the Guidelines is to "challenge[] competitively harmful mergers").

dence looks to the importance of competition above all, the only standard by which to give objective meaning to that command would seem to be total welfare. For if we look only to a strict reading of consumer welfare, we would render the Supreme Court's explicit command meaningless. And, as has been explored above, one cannot reliably equate antitrust injury to reduced competition in all cases, because such reduced rivalry may in fact mask offsetting benefits.[188]

Aggregate-welfare analysis carries with it an attractive harmony, in contrast to the artificial and formalistic nature of a literal consumer-welfare standard. It is undeniable that large companies that are sellers in one market are extraordinarily important consumers in others.[189] It is somewhat incongruous to give them no importance in the former setting and yet bestow hegemonic status on them in the latter. Ultimately, society should be concerned first with maximizing societal wealth. This is not to say of course that concerns of distribution are unimportant, but it is to emphasize that presumably we would like to maximize the size of the pie before we divide it up.

Finally, a total-welfare approach may be most useful in analyzing practices whose impact on consumers is somewhat indeterminate, though the net social benefit of the relevant conduct may be significant. Product tying[190] represents an apt example. Although the economics of requirements contracts are highly intricate, and certainly beyond the scope of this Article, the primary objection to this form of conduct lies in opposition to price discrimination.[191] It is rarely the case that tying arrangements can be used to "leverage" monopoly power from a tying market to an otherwise competitive tied one.[192] Such con-

188. Of course, where one can be confident that diminished levels of competition cannot be tied to an offsetting gain, whether in the present or the future, one can properly condemn the challenged restraint. *See* Fishman v. Estate of Wirtz, 807 F.2d 520, 535–38 (7th Cir. 1986). This was precisely the case in *Fishman*. *See supra* Part II.A.

189. *See Reformulating Antitrust Rules*, *supra* note 25, at 271.

190. *See* Int'l Salt Co. v. United States, 332 U.S. 392, 394 n.5 (1947).

191. *See* Scheiber v. Dolby Labs., Inc., 293 F.3d 1014, 1020 (7th Cir. 2002) ("The naive objection [to tying arrangements] is that they extend monopoly; the sophisticated objection is that they facilitate price discrimination."). We note in passing that bundling, or "fixed proportions" tying arrangements, should rarely be challenged under the antitrust laws.

192. *See* Alan Devlin, *A Neo-Chicago Perspective on the Law of Product Tying*, 44 AM. BUS. L.J. 521, 532–48 (2007) [hereinafter *A Neo-Chicago Perspective*].

duct obviously increases the profit of the tying company—for they would otherwise not be imposed—but the net economic impact of price discrimination remains uncertain.[193] First-degree price discrimination results in perfect allocative efficiency and zero deadweight loss, but the complete elimination of consumer welfare.[194] A total-welfare standard would unhesitatingly approve such discrimination, while a consumer-welfare approach would be equally quick to condemn it. The efficiency impact of more realistic forms of second- and third-degree discrimination remains indeterminate, though there is reason to believe that it can be total-welfare enhancing in at least some situations.[195] Importantly, the welfare effects are more likely to be desirable the more accurate the discrimination.[196] Requirements contracts may operate as unusually precise metering devices.[197] For this reason, it might be reasonable to presume that tying is more often than not desirable from a total-welfare standpoint, particularly in light of the myriad producer- and consumer-side efficiencies likely to accompany such arrangements.[198]

Notwithstanding the normative case for antitrust's adoption of a total-welfare standard, it is far from clear that the Supreme Court has unreservedly embraced such a lodestar. In *Brooke Group*, for instance, the Court held below-cost pricing by a monopolist to be legal in certain situations, notwithstanding its admission that such pricing comes at the cost of efficiency.[199] While this might imply reliance on an aggregate-welfare

193. *See* Glynn S. Lunney, Jr., *Copyright's Price Discrimination Panacea*, 21 HARV. J.L. & TECH. 387, 397–98 (2008).

194. *See* Douglas M. Kochelek, *Data Mining and Antitrust*, 22 HARV. J.L. & TECH. 515, 527 (2009).

195. *See* Thomas F. Cotter, *The Procompetitive Interest in Intellectual Property Law*, 48 WM. & MARY L. REV. 483, 547 (2006); Gianluca Faella, *The Antitrust Assessment of Loyalty Discounts and Rebates*, 4 J. COMPETITION L. & ECON. 375, 381 (2008); Jerry A. Hausman & J. Gregory Sidak, *Google and the Proper Antitrust Scrutiny of Orphan Books*, 5 J. COMPETITION L. & ECON. 411, 424 (2009).

196. *See* EINER ELHAUGE & DAMIEN GERADIN, GLOBAL ANTITRUST LAW AND ECONOMICS 633 (2007).

197. *See A Neo-Chicago Perspective*, *supra* note 192.

198. *See* David S. Evans, *Why Different Jurisdictions Do Not (and Should Not) Adopt the Same Antitrust Rules*, 10 CHI. J. INT'L L. 161, 175 (2009).

199. *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224–25 (1993). One should note, though, that the Supreme Court's approach to predatory pricing can be justified under a total-welfare standard on

standard, some scholars have argued that the Court has in fact been recently guided by a consumer-welfare standard.[200] Nevertheless, we believe that a total-welfare standard has the most explanatory power, given the Court's explicit command that the Sherman Act protects more than end consumers alone.[201] We use this interpretation to argue in Part III that output restrictions are a sine qua non of an antitrust offense, though we would place the burden of demonstrating the absence of such an effect on defendants.

III. A DEFINITIONAL DILEMMA: ESTABLISHING ANTICOMPETITIVE EFFECT IN ELUSIVE CASES

The preceding discussion demonstrated that the fundamental concept of "anticompetitive effect" is not fixed, but rather has evolved quite dramatically over time. Nor does the concept now enjoy a clear definition, for considerable uncertainty remains. We have explained that a court can legitimately regard an action as anticompetitive, even when it does not directly impact consumers. In attempting to inject much-needed specificity into the state of being anticompetitive, we have also made the case for a total-welfare approach. In this Part, we analyze some of the most difficult issues that straddle the indeterminate border between pro- and anticompetitive conduct. In the first section, we consider the possibility of a practice's increasing price, but not reducing output. In the second, we explore the paradoxical fact that anticompetitive conditions today may mask procompetitive results in the future. Finally, we note the great difficulty involved in measuring the long and short run.

A. MEASURING STATIC EFFICIENCY: THE RELATIVE EFFECT OF A PRACTICE ON PRICE AND OUTPUT

As explored previously, there is at present some uncertainty as to whether contemporary antitrust law is ultimately con-

the ground that asking courts to distinguish harmful acts of below-cost pricing from at-cost pricing could result in excessive error costs.

200. *See, e.g.*, Kirkwood & Lande, *supra* note 173; *see also* Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 399, 435–36 (2009) (arguing that the Supreme Court follows an antitrust standard and not a total-welfare standard).

201. *See* Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 ANTITRUST L.J. 707, 722–23 (2007).

cerned with consumer or total welfare.[202] Although courts and commentators typically understand "consumer welfare" to denote the combined difference between purchasers' reservation prices and the prices they in fact pay, the Supreme Court explicitly lifted the term from Robert Bork's *The Antitrust Paradox*, which defined the phrase in terms of total welfare.[203] Moreover, the jurisprudence of the Court governing monopsonistic behavior strongly suggests that downstream consumers are not the sole beneficiaries of the antitrust laws.[204] For this reason, we believe that the Court should embrace the role of aggregate welfare more explicitly when it next enjoys an appropriate opportunity.

A fundamental question, which remains unanswered definitively in the law, is whether courts should condemn a practice as "anticompetitive" when it results in increased prices but no discernible reduction in output. Those affiliated with the Chicago School would answer this question in the affirmative.[205] Nevertheless, the law remains unsettled, as the very few cases to have considered the issue illustrate.

In *Chicago Professional Sports Ltd. v. National Basketball Ass'n* (*Bulls II*), Judge Easterbrook opined in dicta that "[t]he core question in antitrust is output. . . . A high price is not itself a violation of the Sherman Act."[206] This interpretation, which would presumably deem elevated prices legal if they did not bear the potential to reduce output, has been subtly echoed elsewhere. Illustratively, the Ninth Circuit in *Rebel Oil Co. v. Atlantic Richfield Co.* adopted an aggregate-welfare principle, holding that "an act is deemed *anticompetitive* under the Sherman Act only when it harms both allocative efficiency *and*

202. *See supra* Part II.B.

203. *See* Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (quoting BORK, *supra* note 19, at 66).

204. *See* Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 236 (1948).

205. *See* William H. Page, *Legal Realism and the Shaping of Modern Antitrust*, 44 EMORY L.J. 1, 44 (1995) (describing the Chicago School's position that a "rearrangement of commercial relationships or a change in the dispersion of prices is not viewed as anticompetitive unless it affects output in the market"); *see also* Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373, 375–76 (1966) (finding that courts' "primary criterion" for violation of the Sherman Act is based on a practice's impact on output).

206. Chi. Prof'l Sports Ltd. v. Nat'l Basketball Ass'n, 95 F.3d 593, 597 (7th Cir. 1996).

raises the prices of goods above competitive levels or diminishes their quality."[207] Nevertheless, this definition of anticompetitive effect is inconsistent with the one adopted by other courts, which requires only an increase in price or a decrease in output, but not both.[208]

So a fundamental antitrust question has yet to be resolved by the courts, though we offer an opinion on the proper path forward. Where an identifiable market impact is a predicate of demonstrating antitrust injury,[209] a plaintiff should be able to satisfy her burden by demonstrating price effects alone. The burden would then shift to the defendant to prove that the identified price effects did not carry, and were not capable of carrying, corresponding output restrictions. We envision that the number of situations in which a defendant could make such a showing would be limited.

Before proceeding further, though, we must first address an important question: to what extent is it possible for an antitrust defendant (or defendants) to increase the market price without impacting total supply? Courts commonly supposed that a seller can increase the price at which it sells its product only by reducing output, which artificially enhances the market-clearing price.[210] This is not true in an unqualified sense, however, as virtually every seller in the United States has the ability to increase price by at least some modest amount above

207. Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995).

208. *See, e.g.*, United States v. Visa U.S.A., Inc., 344 F.3d 229, 238 (2d Cir. 2003); Sicor Ltd. v. Cetus Corp., 51 F.3d 848, 854 (9th Cir. 1995).

209. We explained above that, in certain limited circumstances, a plaintiff may not need to establish downstream effects in order to make out a viable antitrust claim. Where competition has been demonstrably quashed, and where that elimination of competition cannot be linked to a cognizable social benefit, anticompetitive effect should be presumed to exist. At that stage, it would be incumbent upon a defendant to prove that the challenged restriction did not carry injurious effect. *See supra* Part II.A. The present section considers the question of what kind of identifiable market effect can be considered "anticompetitive."

210. *See, e.g.*, *In re* Linerboard Antitrust Litig., 305 F.3d 145, 152 (3d Cir. 2002) (explaining that "[a] reduction in supply will cause prices to rise"); L.A.P.D., Inc. v. Gen. Elec. Corp., 132 F.3d 402, 404 (7th Cir. 1997) (noting that higher prices "occur[] when firms with market power curtail output"); Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994) (explaining that an entity exercises market power by "cutting back output in the market and thus driving up prices"); Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 961 F.2d 667, 670 (7th Cir. 1992) (observing that "only a reduction in output allows producers to raise price").

marginal cost without seeing a noticeable drop in demand.[211] Nevertheless, it remains generally correct that a company can charge monopoly prices only by reducing the supply of the monopolized good made available to consumers.[212] This will be the case in any market with a downward-sloping demand curve, which almost all markets possess.[213] In these settings, the imposition of monopoly prices will necessarily carry with it an output restriction, thus counseling antitrust scrutiny under both the consumer- and aggregate-welfare models.

The classic demand curve is illustrated below, as Model (a). When such a curve slopes continuously downward, the only way for a company to charge a higher price is to make less of its product available. This is illustrated by the move from Q_1 to Q_2, which triggers a price increase from P_1 to P_2. As noted, most markets are characterized by downward-sloping demand curves, so price increases can generally be assumed to coincide with reductions in supply.[214]

Nevertheless, there are instances in which significant price increases may be possible without triggering an offsetting reduction in demand. This can occur when the price rise takes place within a vertical portion of a demand curve, which is where demand is perfectly inelastic—such demand curves are "kinked."[215] Depending on the market, there may be a considerable range of prices within which output may neither drop nor rise. This is most unlikely to occur with respect to luxury goods, and is more probable with respect to necessities.[216] For example, imagine a particular drug, which lacks substitutes

211. *See* POSNER, *supra* note 93, at 195. Judge Posner gives the example of book publishing, which is a ferociously competitive industry in which all sellers have the ability to set supracompetitive prices (i.e., above marginal cost) without seeing a large reduction in demand. *Id.* He points out that this is a form of market power, but that it is of a kind that is "utterly immaterial to antitrust policy." *Id.*

212. *See* Alan J. Meese, *Antitrust Balancing in a (Near) Coasean World: The Case of Franchise Tying Contracts*, 95 MICH. L. REV. 111, 138 (1996).

213. *See generally* MCCONNELL & BRUE, *supra* note 3, at 40–45 (explaining the law of demand and demand curves).

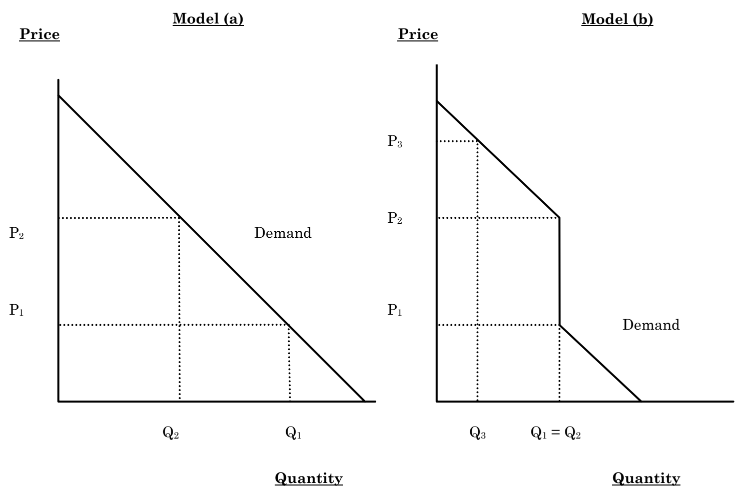
214. *See* WALTER NICHOLSON & CHRISTOPHER SNYDER, INTERMEDIATE MICROECONOMICS AND ITS APPLICATION 14–15 (10th ed. 2007).

215. *See* George J. Stigler, *The Literature of Economics: The Case of the Kinked Oligopoly Demand Curve*, 16 ECON. INQUIRY 185, 188–94 (1978).

216. *Cf.* David W. Opderbeck, *Patent Damages Reform and the Shape of Patent Law*, 89 B.U. L. REV. 127, 131–32 (2009) (observing that necessary goods have relatively inelastic demand).

and is of critical importance to effective medical treatment. If that drug constitutes a small percentage of the overall cost of treating a particular set of patients, even a significant percentage increase in price may not result in a reduction in the number of patients receiving the drug. Model (b), below, illustrates how a price increase from P_1 to P_2 may not have an impact on output.

Nevertheless, there are limits to how far market participants can raise prices without causing a reduction in demand. The most obvious ceiling lies in consumers' budgetary constraints. Quite obviously, one cannot spend more than one has. In addition, at a sufficiently high price, almost any good or service will be construed by consumers as being substitutable by other options. Moreover, if the price of an input into a downstream good or service increases sufficiently to become a significant element of the cost of producing that downstream good or service, then further price increases are likely to decrease ultimate downstream demand and, hence, upstream demand for the input. In this way, upstream price increases may not result in immediate output restrictions, but could have such an effect over a longer time frame. This possibility is demonstrated in Model (b) where price increases from P_2 to P_3.



One can perhaps best explore this principle in the merger arena. How should the courts and enforcement agencies treat an acquisition that results in increased prices, but not reduced supply? And how should acquisitions be treated that have not yet caused a reduction in output, but have the potential to should prices increase further (as in P_2 to P_3 in Model (b), above)? A 2005 decision of the Federal Trade Commission (FTC) is illuminative.

In *In re Evanston Northwestern Healthcare Corp.*, the FTC challenged a consummated merger in which Evanston Northwestern Healthcare Corporation acquired Highland Park Hospital.[217] Bringing suit for a violation of section 7 of the Clayton Act four years after the merger, the FTC contended, and the defendant did not dispute, that prices had increased significantly post-consummation.[218] The case posed a number of challenging issues, but relevant for our purposes is the Commission's discussion on the question of output. The defendant argued that the FTC had failed to meets its burden by not showing that the merger reduced supply in the relevant market.[219] In response to that contention, the full Commission wrote:

> More fundamentally, respondent incorrectly assumes that there is a relatively constant relationship in the hospital market between quantity and price. The record reflects that this is not the case. When MCOs negotiate with hospitals, for the most part they are faced with an all-or-nothing decision about whether to include the hospital in their network because, as Hillebrand testified, it is "very, very difficult" for an MCO to steer its PPO members to particular in-plan hospitals through differential pricing. . . . Steering also is not an option for HMO plans because HMOs charge members uniform rates for all hospitals in their networks and preclude members from using other hospitals. Thus, generally, output declines only after the hospital exceeds the price at which the MCO is willing to enter into any contract with the hospital, at which point the output drops very substantially. In other words, there is a substantial range of prices, including prices at supracompetitive levels, over which an MCO will decide to include a hospital in its networks without a material change in the level of the hospital's services demanded by the MCO. The fact that complaint counsel did not prove a drop in market-wide output thus is not a deficiency in complaint counsel's case.[220]

The FTC's ruling here is of considerable importance. This is not only because it constitutes one of the most direct assessments of the output-versus-price distinction for the purpose of

217. *In re* Evanston Nw. Healthcare Corp., No. 9315, 2005 WL 2845790, § I.A (F.T.C. Oct. 20, 2005), *aff'd in part, vacated in part*, 2007 WL 2286195, § I (F.T.C. Aug. 6, 2007).

218. Complaint at 5, *In re* Evanston Nw. Healthcare Corp., 2005 WL 2845790 (F.T.C. Feb. 10, 2004) (No. 9315), *available at* http://www.ftc.gov/os/caselist/0110234/040210emhcomplaint.pdf.

219. *In re Evanston*, 2007 WL 2286195, § V.C.3.b.

220. *Id.*

identifying an antitrust violation. It is also because the FTC is an expert agency, whose view should be entitled to significant respect. The substance of its holding strikes us as largely correct. Economists may be indifferent to a static state of affairs in which a merger creates a wealth transfer but no allocative or productive distortions. However, one might fairly challenge a situation in which a merger drains consumer wealth without any concomitant social benefit.[221] It is not the case, for instance, that the defendant proved that increased merger prices carried offsetting advantages. Defendants in other cases might be able to show that the wealth transfer facilitated procompetitive investment in other markets or resulted in other efficiencies. Like the FTC, we would not put the burden of establishing an output restriction on an antitrust plaintiff. Since significant price increases will almost always result in, or from, diminished output due to the downward-sloping nature of most demand curves, presuming reduced supply from a demonstrated price rise is a most reasonable heuristic.

More fundamentally however, even adopting an aggregate-welfare standard, the defendant could not point to an *increase* in total welfare. Rather, it could merely contend that the challenged acquisition left undisturbed that welfare. The FTC, on the other hand, found that the price rise may have taken place within the vertical portion of the relevant demand curve (see *supra* Model (b) between P_1 and P_2, for instance).[222] But it was at pains to emphasize that the purported absence of an output restriction was the result of chance, for had the price risen even slightly higher, there may have been a catastrophic drop in supply.[223] Another way to think of this determination is that the merger carried with it a "dangerous probability" of an output restriction.[224] Courts have long deemed such a showing acceptable to establish a violation of section 2's attempted-monopolization prong.[225] Although it may be a somewhat more complicated issue in the case of a consummated merger, as the

221. Indeed, one might say that price increases not accompanied by offsetting gains can be condemned on account of the fact that quality-adjusted output has in fact fallen. The authors would like to thank Professor Michael Jacobs for bringing this insight to their attention.

222. *In re Evanston*, 2007 WL 2286195, § V.C.3.b.

223. *Id.*

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

225. *See, e.g.*, *id.*

competitive impact of the merger should be provable at that stage,[226] demonstrated monopoly prices coupled with a showing that output restrictions were and remain probable should suffice. It would seem (though of course it is impossible from our vantage point to know) that the defendant in *Evanston* would have been unable to prove in defense that its price increases were incapable as a matter of fact of resulting in diminished supply.

The crucial question—it seems to us—is whether heightened prices, absent an output restriction, can be shown to yield social benefits. If not, then they should be condemned, if durable and shown to emanate from challenged conduct by a dominant firm, acquirer, or group of companies operating in union.[227] But if a defendant can show that the increased prices carried some cognizable social benefit, such as facilitating cross-subsidization of R&D or other desirable and nonabstract activities, and that there was no output restriction, it should escape antitrust liability.

We consider one other interesting possibility. How should the law treat an acquisition that does not result in enhanced market power, but nevertheless yields significantly higher prices? This might seem paradoxical, for one might fairly assume that every company will set price at profit-maximizing levels.[228] But one feature of capital markets is that money will flow to resources that are being under-utilized. If venture capitalists or others observe companies whose management is not setting optimal prices, acquisitions will inevitably follow. One possibility is that the original owner may have been constrained by reputational factors or simply been ignorant of the price the market would have supported.

Our conclusion is straightforward. There is nothing wrong from an antitrust perspective about a company acquiring an under-priced asset and setting price at the profit-maximizing

226. *See* United States v. Gen. Dynamics Corp., 415 U.S. 486, 501 (1974).

227. The durability point is key, for ephemeral market distortions are not properly within the purview of the antitrust laws. *See, e.g.*, Colo. Interstate Gas Co. v. Natural Gas Pipeline Co., 885 F.2d 683, 695–96 (10th Cir. 1989); Dimmitt Agri Indus., Inc. v. CPC Int'l, Inc., 679 F.2d 516, 530 (5th Cir. 1982).

228. In other words, one might doubt the possibility of such an acquisition yielding an appreciable price rise because, if demand at the pre-acquisition price were inelastic, the original owner would have already set the price at a higher level.

level.[229] In such a situation, the acquisition has not enhanced the level of market power; it has merely facilitated profit-maximizing pricing. Setting price at market levels can act as an important signaling mechanism to the market, which can attract entry where none would otherwise take place, and can make further funds available to the acquiring entity to devote to cross-subsidization of other projects or to improving infrastructural support for the acquired good.[230] Were the courts to embroil themselves in disputes over acquisitions that did not quash competition or create additional market power, they would not only inject unwelcome levels of uncertainty into acquisition decisions—they would deputize themselves as price-regulatory agencies. This is something that courts should definitely not do.[231]

B. DYNAMIC EFFICIENCY AND THE PARADOXICAL CONCEPT OF COMPETITION

"Competition" often conjures up an image of a host of sellers vying with one another for customers' attention. Haggling with a vendor over price terms at a market fair, with other sellers offering similar products as far as the eye can see, is perhaps the paradigmatic example. The economist's notion of "perfect competition," which constitutes the holy grail of antitrust policy,[232] envisions a comparable environment. It requires a large number of sellers offering homogeneous goods, a similarly large number of purchasers, free entry and exit, and no transaction costs.[233] The markets never realize such conditions in practice, of course, though certain markets for securities come

229. For a controversial view against this position, see generally J. THOMAS ROSCH, CONCURRING STATEMENT OF COMMISSIONER J. THOMAS ROSCH: *FEDERAL TRADE COMMISSION V. OVATION PHARMACEUTICALS, INC.* (2008), *available at* http://www.ftc.gov/os/caselist/0810156/081216ovationroschstmt.pdf.

230. *See, e.g.*, 3A PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW § 720a (3d ed. 2008) ("Monopoly pricing and monopoly profits are neither an 'exclusionary' act nor an 'abuse' of monopoly power under §2 [sic]. . . . On the contrary, high prices encourage entry and expansion of rivals.").

231. *See* Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 92 F.3d 593, 597 (7th Cir. 1996) ("[T]he antitrust laws do not deputize district judges as one-man regulatory agencies."); *see also* Pac. Bell Tel. Co. v. LinkLine Commc'ns, Inc., 129 S. Ct. 1109, 1121 (2009).

232. *See, e.g.*, Ariel Katz, *Making Sense of Nonsense: Intellectual Property, Antitrust, and Market Power*, 49 ARIZ. L. REV. 837, 872 (2007).

233. *See* W. KIP VISCUSI ET AL., ECONOMICS OF REGULATION AND ANTITRUST 79–80 (4th ed. 2005).

close.[234] But the model of perfect competition is the starting point of much antitrust analysis.[235] In many ways, this is a formal model of behavior that approximates the hustle and bustle of the large, open-market fair just described.

Such competition is of course to be desired. The purpose of the Sherman and Clayton Acts therefore appears straightforward. Antitrust might reasonably be thought of as a system that protects a vigorous process of rivalry, perhaps of the kind that most people might envision when thinking of competition. It would hardly do if the hypothetical fair became monopolized, such that only a single vendor catered to the crowd of prospective purchasers. For that reason, monopoly is viewed (usually correctly) as the prime evil at which the antitrust laws are directed.[236] As explained above, perfect competition yields allocative and productive efficiency in the long run, while monopoly results in deadweight loss and wealth transfers.[237] A challenged practice is therefore "anticompetitive" if its effect is to shift the market-clearing point further away from the perfectly competitive optimum and toward short-run equilibrium under monopoly.[238]

Although this characterization is reasonably accurate in most applications, it is seriously misleading insofar as it is presented as an unqualified principle.[239] There emerges a counterintuitive, but potentially crucial, tension between perfect competition and long-run welfare. In particular, there *may* be a relationship between supracompetitive returns and innovation.[240]

234. *See* West v. Prudential Sec., Inc., 282 F.3d 935, 939 (7th Cir. 2002).

235. *See* HOVENKAMP, *supra* note 95, at 2–3.

236. *See, e.g.*, United States v. Griffith, 334 U.S. 100, 107 (1948) ("[M]onopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised.").

237. *See* CARLTON & PERLOFF, *supra* note 28, at 69–73.

238. It is unlikely that a long-run monopoly equilibrium can exist, given the inducement for entry such conditions create.

239. At its most fundamental, a potentially important tension exists between competition and innovation. *See* Elhauge, *supra* note 11, at 301–05 (discussing this tension). And, as we explain below, that possibility fundamentally obscures the concept of what is "anticompetitive" for the purposes of the antitrust laws.

240. *Compare* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (1950) (arguing that monopoly is more conducive to innovation than is competition), *with* Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, *in* THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609 (1962) (contending that competition is a superior catalyst for innovation than monopoly).

This relationship is not yet fully understood and has been subject to considerable, and so far unresolved, debate in the academic literature.[241] Nevertheless, there is at least some reason to think that an antitrust system that attempted to eliminate monopoly in all its forms would be a destructive tool of public policy. Dominance may be thought of as the proverbial pot of gold at the end of an unforgiving process of competition.[242] Monopoly, if earned through innovation, business acumen, or rugged entrepreneurship, is a crucial determinant of long-run incentives. If one takes away the prize for winning, companies are left with scant incentive to undertake the risky and cut-throat path of competition. The judiciary has long recognized the importance of preserving the drive to win. In 1945, Judge Learned Hand famously declared that the dominant firm, "having been urged to compete, must not be turned upon when [it] wins."[243] More recently, the Supreme Court in 2004 framed monopoly in laudatory terms, explaining:

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth.[244]

This is all well and good. By recognizing the rights of monopolists to charge monopoly prices, the courts facilitate a vigorous process of competition. The irony, of course, is that all companies chase the same prize and, in the process, reach a stalemate that results in a competitive market structure. The monopoly award therefore becomes an unattainable fiction and operates as a key driver of a robust economy.

A problem conceivably emerges, however, when the process of competition, instead of creating a stable, multi-firm equilibrium, produces a conclusive victor. Even if the law elects not to condemn the resulting monopolist for the acquisition of its position, antitrust enforcers might be tempted to impose a variety of painful restrictions in the name of preserving, fostering,

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241. *See* Michael A. Carrier, *Two Puzzles Resolved: Of the Schumpeter–Arrow Stalemate and Pharmaceutical Innovation Markets*, 93 IOWA L. REV. 393, 403–10 (2008).

242. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

243. Alcoa, 148 F.2d 416, 430 (2d Cir. 1945).

244. *Trinko*, 540 U.S. at 407.

or perhaps directly inducing a viable process of competition. Here the law encounters a serious tension. Either enforcers should stand back and allow monopolists to engage in profit-enhancing practices that may perhaps cement their position or they should strictly police monopolistic behavior to curtail price gouging of consumers or to prevent competitors' being crushed in their incipiency. To the extent the law succeeds in preventing exclusionary conduct of the kind that can frustrate entry by equally or more efficient firms, it is to be applauded.[245] But the risk is that antitrust intervention premised on preventing nefarious monopolistic conduct that aims to perpetuate dominance may easily exceed its mandate. It is all too easy to mistake pro-competitive or efficient conduct by the dominant firm for improper, exclusionary behavior, since both forms of behavior can disadvantage or injure rivals.[246] The lure of attacking genuinely competitive, monopolistic conduct may become irresistible. And if one observes an increasing incidence of monopoly in the economy, one might understandably begin to yield to this temptation.

The imprudence of such an approach lies in the possible relationship between monopoly and innovation. In the new economy, in which technological innovation yields an ongoing variety of ever-novel products, sequential monopoly may mask vigorous competition.[247] This competition takes place not in the marketplace, as with traditional industries, but in the research lab as companies race to outdo one another in technological contests. In this world, technological quality matters far more to consumers than price and, as a result, dominance may be ephemeral.[248] Monopoly can persist in such an environment only if it continues to innovate apace with its fringe rivals.[249] But it is crucial to allow successful innovators lawfully to displace incumbent firms and subsequently to extract monopoly profits free from antitrust condemnation.

245. *See* POSNER, *supra* note 93, at 194–95.

246. *See, e.g.*, Am. Bar Ass'n Section of Antitrust Law, *Comments on Draft Bulgarian Antitrust Law*, 60 ANTITRUST L.J. 245, 258 (1991); Herbert Hovenkamp, *Merger Actions for Damages*, 35 HASTINGS L.J. 937, 956 (1984).

247. *See* POSNER, *supra* note 93, at 249.

248. *See* Steven C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft*, 7 GEO. MASON L. REV. 617, 655 (1999).

249. *See* Jonathan M. Jacobson, *Do We Need a "New Economy" Exception for Antitrust?*, ANTITRUST, Fall 2001, at 89, 90.

How do these general considerations translate into identifiable antitrust issues? Perhaps the most important example involves monopolists' right to refuse to license intellectual property. If the law respects that right as inviolate, monopoly returns and hence the law has preserved incentives to invent. But if the law instead allows incursion by rivals into a dominant firm's intellectual property, the result is diluted incentives, though greater short-run consumer welfare. The normative question as to which approach is to be preferred is somewhat indeterminate, as the following section explains. But the point for now is that the question of what behavior is "anticompetitive" is both elusive and yet of the utmost importance. Refusing to license intellectual property that is indispensable to viable competition in the market is surely anticompetitive in the sense that such a move forecloses competition in the short run. Yet, that same refusal may perpetuate a system of incentives that propels a dynamic form of competition in research and development, which might fairly be characterized as procompetitive. This fact injects yet another complication into the threshold, yet essential, question of to what precisely "anticompetitive" refers.

Whether the government should employ the antitrust laws to disrupt monopolized markets and inject greater levels of active competition turns in part on the debate between Schumpeter and Arrow as to whether competition or monopoly best promotes long-run innovation.[250] This debate continues to rage and the issues involved are complex.[251] But although we could not attempt to resolve the controversy within the confines of this Article, we can certainly observe that a judicial or executive attempt to force competitive market structures on concentrated markets founded on intellectual property or historical business acumen would be folly. Moreover, we make an important point concerning the policy prescriptions of the Schumpeterian view on monopoly and innovation. We are skeptical that monopolists who are not subject to competitive pressures from fringe rivals or potential entrants would be highly innovative. We suspect that biting competitive pressures are required to

250. *See* Richard J. Gilbert, *Looking for Mr. Schumpeter: Where Are We in the Competition–Innovation Debate?*, *in* 6 INNOVATION POLICY AND THE ECONOMY 159 (Adam B. Jaffe et al. eds., 2006).

251. *See* Gregory J. Werden, *Should the Agencies Issue New Merger Guidelines?: Learning from Experience*, 16 GEO. MASON L. REV. 839, 847 n.59 (2009).

propel research and development at its realizable rate. Darwinian incentives to survive must surely be the key long-term determinant of high levels of innovation.

Yet, this view does not mean that the antitrust laws should assail successful innovators' monopolistic positions. Markets that were kept at close-to-perfectly competitive conditions would not yield the kind of ex post returns necessary to cover the costs (magnified by the risk of failure) of ex ante research.[252] In this sense, monopoly itself does not yield higher levels of innovation, but may itself be a (wholly desirable) result of highly competitive innovation markets. To dilute monopoly may therefore be to take away the prize that spurred the arrival of new technologies. Markets that antitrust enforcers now wish to render more "competitive" may unintentionally be damaged beyond repair in the long run. Thus, it seems self-evident to us that competition drives innovation,[253] but that that competition need not take the form that Arrow described. If competition in research and development yields valuable innovation, which in turn yields monopoly, then that dominance may fairly be said to be consistent with competition.[254]

C. Measuring the Long and Short Run

We now arrive at a final difficult issue, which is a natural offshoot of the one we just considered. If there is indeed a trade-off between short-run static efficiency and long-run dynamic efficiency, this fact has profound repercussions for how the law should define anticompetitive effect.[255] The problem encountered is not conceptual, for most would agree that long-run benefits, discounted to present value, should be weighed against short-run losses. If the latter costs outweigh former gains, then the practice can be condemned as anticompetitive. But it is most certainly a practical problem, in that one cannot easily quantify the relevant costs and benefits. This leads to an indeterminate normative instruction: although we might agree

252. It must be recalled that an ex post return is wholly inadequate if it covers the cost of ex ante research alone, for the return will have to be magnified to compensate for the ex ante risk of failure, which never came to pass.

253. *See* Christopher R. Leslie, *Antitrust and Patent Law as Component Parts of Innovation Policy*, 34 J. CORP. L. 1259, 1264–65 (2009).

254. *See* Devlin et al., *supra* note 32.

255. *See* Barnett, *supra* note 31 (exploring the asymmetric importance of static and dynamic efficiency and concluding that the latter should control the path of antitrust enforcement).

on what is theoretically anticompetitive, we cannot reliably identify such conduct in practice.

The problem emanates from the fact that the beneficial long-run gains of controversial practices are at once both uncertain and immeasurable.[256] If one believes that robust property rights are desirable, so that dominant companies can legitimately refuse to grant access to their competitors, it is because one expects the incentives bestowed by strong exclusive rights to yield greater levels of innovation in the long run, which will outweigh the present-day cost of monopoly. One who adheres to a different interpretation—such as the Court of First Instance in Europe[257]—believes (at least implicitly) that the indeterminate long-run boon to innovation is too remote to justify the ills monopoly currently inflicts on consumers by monopoly. Neither position is demonstrably incorrect, but presumably reflects differing cultural and sociopolitical experiences.[258]

Although this Article provides us an insufficient forum in which fully to address the various issues attendant upon comparing the long and short run, including the full role of decision theory in suggesting superior rules, it is fitting to conclude the discussion of anticompetitive effect on the following note: even if we have arrived at a sufficiently advanced state of affairs that economists and lawyers can reach definitional accord on the concept of "anticompetitive effect," our practical ability to identify such effect in practice remains elusive. Since no conclusive solution to the epistemological limitations of statistical analysis and economic theory appears likely in the near future, antitrust law's profound incongruity remains. No one can specify precisely what behavior competition ought to condemn in all cases. That fact ought to be unsettling.

CONCLUSION

Courts and scholars have long criticized the Sherman Act for "its indefinite language, its elusive meaning, and its ambiguous charges."[259] We do not believe the statutory language's in-

256. *See* Devlin & Jacobs, *supra* note 16 (manuscript at 11).

257. Case T-201/04, Microsoft Corp. v. Comm'n, 2004 E.C.R. II-4463.

258. For one of the authors' extended discussion of this point, see Devlin & Jacobs, *supra* note 16.

259. Roger D. Blair & John E. Lopatka, Albrecht *Overruled—At Last*, 66 ANTITRUST L.J. 537, 552 (1998); *accord* WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 4 (1965).

determinate nature to be objectionable, however, as courts would seem well placed to bring about doctrinal specificity in light of emerging economic and sociopolitical thought. An abstract, but transcendent, principle of the kind found in the antitrust statutes might be expected to yield more finely tuned jurisprudence than would the legislature's ex ante demarcation of specific rules. Yet, one might reasonably question whether the judiciary has succeeded in giving force to Congress's infamously vague command of 1890. At least one scholar has characterized antitrust law's primary mode of analysis as "representing nothing more than a muddled set of platitudes with no meaningful standards."[260] Is competition law therefore hopelessly imprecise?

Such a diagnosis might be going too far, for the courts have demarcated the boundaries of certain forms of behavior with some particularity. For instance, dominant firms can refuse to deal with their rivals.[261] Cartel activity, such as horizontal market sharing and price-fixing, is illegal.[262] Yet the Supreme Court has retracted numerous rules in recent years, exposing increasing swathes of commercial activity to the nebulous scrutiny of the rule of reason.[263] This Article has explored the substance of that mode of analytic inquiry, explaining that the ultimate issue is a simple one: is the challenged activity "anticompetitive"? Unfortunately, the state of being anticompetitive is far from straightforward and so U.S. competition law remains frustratingly indeterminate. Although consumer welfare, viewed through the lens of efficiency, has emerged as the essential determinant of antitrust legality, this analytic lodestar proves insufficient for many purposes.

In exploring the elusive, yet fundamental, concept of anticompetitive effect, we have attempted to inject some specificity into a field desperately in need of it. Although intertemporal effects complicate analysis, we believe that dynamic efficiency considerations should largely control in the face of opposing static effects.[264] Moreover, although "anticompetitive" must be

260. Gabriel E. Feldman, *The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*, 58 AM. U. L. REV. 561, 562 (2009).

261. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408–10 (2004).

262. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940).

263. *See supra* notes 110–16 and accompanying text.

264. *Accord* Barnett, *supra* note 31.

regarded as encompassing more than a lack of in-market competition, conduct that eliminates active rivalry can fairly be condemned where no attendant, offsetting benefit is demonstrated. This holds true even if a plaintiff fails to introduce evidence of downstream effects. Consistent with this interpretation, we find that an aggregate-welfare approach to competition law is generally preferable. For this reason, conduct that is incapable of yielding output restrictions should not suffice for the purpose of showing an objectionable market impact.[265] Further evolution along the lines we have suggested would be of significant benefit. Nevertheless, in light of our discussion, it ought not to be surprising that some threshold uncertainty in the substance of antitrust law will remain. That is the necessary cost of the legal standard laid down by Congress, which left it to the courts to allow the law to evolve in light of contemporary theory.

265. As noted above, however, it should be incumbent on a defendant to demonstrate that the challenged conduct did not result, and could not in the circumstances have resulted, in diminished output. A plaintiff would make a prima facie case by showing conduct-specific price increases.