The Lost Origins of Antitrust

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Over the last decade, the once-sleepy field of antitrust has suddenly sprung to the forefront of public attention. The digitalization of the economy, the expansion of Big Tech, and the rise of platform monopolies have all raised deep questions about the nature of corporate power and law's capacity to constrain it. Some scholars have argued that antitrust enforcement must be reinvigorated in substance and broadened in scope in order to combat rapidly rising economic inequality. Others have argued that antitrust law is ill-equipped to address these broad moral issues and instead must be re-focused on its traditional principles of consumer welfare maximization. Still others have argued for a mixed approach, asserting that antitrust law should be interpreted to protect a range of values, including political, economic, social, and moral goals. But despite their sharp disagreements, the dominant theories of antitrust share a common understanding about the proper means of achieving them: antitrust law is—and has always been—about promoting competition. The best way to pursue the ultimate goals of antitrust, this view holds, is to preserve rivalry between firms in the marketplace. In other words, the supreme evil of market regulation is cooperation, and antitrust regulators must do everything in their power to stop it.

But, as this Article shows, the conventional wisdom about the underlying principles of antitrust is based on a misunderstanding of history. In particular, the dominant accounts of antitrust today underestimate the role that economic cooperation played in informing legislators' beliefs about how to regulate markets. Historically, politicians, legislators, and policymakers frequently voiced the opinion that capitalism required a careful balancing of competition with its counterpart, cooperation. Functioning markets required rivalrous behavior, to be sure, but they also required cooperative behavior. Corporations needed to raise capital, hire employees, and sign contracts. All of these actions involved the crafting of agreement between economic actors with diverse interests. They also, importantly, required the active intervention of the law. When the pillars of American antitrust law were being laid, this dynamic was well-recognized. From the Sherman Antitrust Act of 1890 to the Clayton Antitrust Act of 1914 to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, market regulation was structured around a careful balancing of competing forces. Legislators did not wish to eliminate cooperation from the American economy—they wished to channel it.

This lost history of antitrust law sheds light on the broader question of how corporate law both shapes and is shaped by beliefs about the ideal ordering of economic activity. Should a national economy be structured around large corporations or small ones? Should it be focused on increasing production or protecting resources? Should it balance incomes,

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or increase the rewards to success, or incentivize moral behavior, or something else entirely? These fundamental questions were all at play during the key moments of antitrust law, and the ways that society fashioned answers to them have had long-standing effects on the direction of the American economy. And while some would argue that one single principle (say, efficiency, or competition or sustainability) should triumph over others, these principles were never firmly established through legislation and remain deeply contested. More broadly, this Article aims to reignite a conversation about the purpose of markets and how we as a society should regulate them. Antitrust has played an outsized role in determining the way that citizens, firms, and regulators envision our economy. Indeed, it is the most axiomatic (if not the most enforced) tenet of economic regulation today that anti-competitive behavior is illegal. But it was not always so, and it might not be again.

INTRODUCTION

In his farewell address to the American people in 2025, President Joe Biden warned the nation that an "oligarchy" was taking shape in the country, made up of "extreme wealth, power, and influence."[1] This "tech-industrial complex," he argued, posed a steep danger to

1. *Farewell Address of President Joe Biden*, N.Y. TIMES (Jan. 15, 2025), https://www.nytimes.com/2025/01/15/us/politics/full-transcript-of-president-bidens-farewell-address.html (on file with the *Journal of Corporation Law*).

American democracy.[2] The spread of misinformation, the decline of newspapers, the rise of social media, and the rapidly increasing powers of artificial intelligence all created unprecedented risks for society, not just for Americans, but for all humankind.[3]

Biden's ominous comments about the structure of the American economy come in the wake of years of rising clamor about the abuses of big business. In recent years, Amazon has been accused of stifling small merchants, mistreating workers, and artificially raising prices for consumers.[4] Google has faced charges of monopolizing the market for internet search and unlawfully harvesting user data.[5] Facebook has been criticized for skewing democratic elections and encouraging toxic (and sometimes criminal) behavior online.[6]

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2. *Id.*

3. *Id.*

4. *See* Dave Michaels & Dana Mattioli, *FTC Sues Amazon, Alleging Illegal Online-Marketplace Monopoly*, WALL ST. J. (Sept. 26, 2023), https://www.wsj.com/tech/ftc-sues-amazon-alleging-illegal-online-marketplace-monopoly-6bd9af23?gaa_at=eafs&gaa_n=ASWzDAhd-wX2eWAOKkzU1UPoSa4Ld7Lo-Ed-Mulz7utg3kkSiAEI_caTiQUsFwdjIfs0%3D&gaa_ts=68d8e5a9&gaa_sig=7KdVznjeEYPHyFdOrKX32QpfKzO0sT6OuaaciIkFt_TP8f0CcWqePm9zb0XFJC4-C5fSXCi0f4qjQzJsf4-GYA%3D%3D (on file with the *Journal of Corporation Law*) (discussing the FTC and several states suing Amazon for illegally wielding monopoly power); Jodi Kantor, Karen Weise & Grace Ashford, *Inside Amazon's Worst Human Resources Problem*, N.Y. TIMES (Oct. 24, 2021), https://www.nytimes.com/2021/10/24/technology/amazon-employee-leave-errors.html (on file with the *Journal of Corporation Law*) (discussing Amazon's leave policies and the effects on its employees); Catherine Thorbecke, *US Labor Department Accuses Amazon of Failing to Keep Warehouse Workers Safe*, CNN (Jan. 18, 2023), https://edition.cnn.com/2023/01/18/tech/amazon-osha-citation [https://perma.cc/25SW-8TQ3] (discussing accusations by the U.S. Labor Dept. against Amazon's warehouse conditions).

5. *See A Court Says Google Is a Monopolist. Now What?*, ECONOMIST (Aug. 6, 2024), https://www.economist.com/business/2024/08/06/a-court-says-google-is-a-monopolist-now-what (on file with the *Journal of Corporation Law*) (discussing a recent court ruling that may have significant implications on the tech industry); Cade Metz et al., *How Tech Giants Cut Corners to Harvest Data for A.I.*, N.Y. TIMES (Apr. 6, 2024), https://www.nytimes.com/2024/04/06/technology/tech-giants-harvest-data-artificial-intelligence.html (on file with the *Journal of Corporation Law*) (discussing tactics of Big Tech including OpenAI, Google, and Facebook in creating their intelligence systems); Tim Wu & Stuart A. Thompson, *The Roots of Big Tech Run Disturbingly Deep*, N.Y. TIMES (June 7, 2019), https://www.nytimes.com/interactive/2019/06/07/opinion/google-facebook-mergers-acquisitions-antitrust.html (on file with the *Journal of Corporation Law*) (visualizing acquisitions of big tech).

6. *See e.g.*, TIM WU, THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS (2016) (discussing tactics used to gain the attention of individuals in the tech industry); Georgia Wells, Jeff Horwitz & Deepa Seetharaman, *Facebook Knows Instagram Is Toxic for Teen Girls, Company Documents Show*, WALL ST. J. (Sept. 14, 2021), https://www.wsj.com/tech/personal-tech/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739?gaa_at=eafs&gaa_n=ASWzDAgfk-QNXu73LaX-APDUj2i3UM2RIGD1LgF0zBZLtcGh4cinzgef0AgoIDA_2t3A%3D&gaa_ts=68d8eac8&gaa_sig=MowY9JiF8iQY9S-R158jpH3kOvyhkVIRlp6a4CcTU13IyN5zHnORKVkpQhKkz-1fNwsE1OtKm_msEFsu9-fIRQ%3D%3D (on file with the *Journal of Corporation Law*) (analyzing Facebook's knowledge of Instagram's harmful effects on teen girls via its internal studies); Jeff Horwitz & Katherine Blunt, *Instagram Connects Vast Pedophile Network*, WALL ST. J. (June 7, 2023), https://www.wsj.com/tech/instagram-vast-pedophile-network-4ab7189?gaa_at=eafs&gaa_n=ASWzDAjgPDcWCP_UNDE3-64pjtlS-Nhb2NVI7vmFFW9C3RWNz8IhQMyFwrV0womF2cFA%3D&gaa_ts=68d8eb72&gaa_sig=5UnepzFaWUFmnJuOjgsd-nGh20e_QU1hz08_WpPkhmicy5BDDPQAWcGZRcZ_0xRfcSDgTghZ1tTVDV2J_Bu78A%3D%3D (on file with the *Journal of Corporation Law*) (discussing Meta's attempts to curb child-sex content as Instagram connects a vast network of pedophiles); *Facebook Offers a Distorted View of American News*, ECONOMIST (Sept. 10, 2020), https://www.economist.com/graphic-detail/2020/09/10/facebook-offers-a-distorted-view-of-american-news (on file with the *Journal of Corporation Law*) (visualizing Facebook's partisan news sites and the activity on the platform).

OpenAI, the world's most valuable artificial intelligence company, has been accused of engaging in copyright infringement on a massive scale and releasing powerful AI products that pose a threat to humanity.[7] Corporate power has never seemed more ominous.

In response to this outcry over the perceived abuses of corporations, a number of commentators have asserted that the answer to our economic woes lies in our antitrust laws. Some assert that we need to reinvigorate our regulatory focus on the perils of "bigness" and strive to break up dominant companies as they emerge.[8] In their view, as corporations have grown in size and power, a range of important values—from economic equality to the bargaining power of workers to the incentives for innovation—have been sacrificed, and market regulators must readjust their priorities to take these harms into account.[9] Others argue that antitrust regulators should instead re-focus their attention on the promotion of consumer welfare.[10] They assert that market monitors are ill-placed to weigh broad

7. *See* Blake Brittain, *US Newspapers Sue OpenAI for Copyright Infringement Over AI Training*, REUTERS (Apr. 30, 2024), https://www.reuters.com/legal/us-newspapers-sue-openai-copyright-infringement-over-ai-training-2024-04-30/ (on file with the *Journal of Corporation Law*) (discussing recent lawsuits by newspapers over OpenAI's activity); Andrew Ross Sorkin et al., *A Safety Check for OpenAI*, N.Y. TIMES (May 20, 2024), https://www.nytimes.com/2024/05/20/business/dealbook/openai-leike-safety-superalignment.html (on file with the *Journal of Corporation Law*) (discussing former employees in the AI industry and their concerns about the lack of guardrails for AI).

8. *See* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 710 (2017) (arguing that "the current framework in antitrust—specifically its pegging competition to 'consumer welfare,' defined as short-term price effects—is unequipped to capture the architecture of market power in the modern economy"); Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 235–36 (2017) ("Given the current distribution of business ownership assets in the United States, market power can be a powerful mechanism for transferring wealth from the many among the working and middle classes to the few belonging to the 1% and 0.1% at the top of the income and wealth distribution."); Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. ONLINE 1, 4 (2015) (describing "the channels through which market power contributes to inequality and set[ting] forth a wide range of possible antitrust policy adjustments that might be considered in response to that market power or inequality more generally"); Eric A. Posner & Cass R. Sunstein, *Antitrust and Inequality*, 2 AM. J.L. & EQUAL. 190, 190 (2022) (arguing that "[a]ntitrust enforcement agencies seeking to reduce inequality might adjust their priorities and target markets that are disproportionately important for low-income people"); MARC JARSULIC ET AL., REVIVING ANTITRUST: WHY OUR ECONOMY NEEDS A PROGRESSIVE COMPETITION POLICY 1 (2016) (arguing that "[i]ncome inequality is rising, middle-class incomes are stagnant, and much of the current economic policy debate is centered on finding ways to counter these trends" and that a "renewed focus on antitrust enforcement could make a significant contribution toward accomplishing this goal"); Tim Wu, *Taking Innovation Seriously: Antitrust Enforcement If Innovation Mattered Most*, 78 ANTITRUST L.J. 313, 319 (2012) (arguing that "[t]he simplest description of antitrust's innovation policy is this: it should use enforcement policy to raise the costs of exclusion, therefore promoting outside innovation and forcing the incumbent to respond in kind"); C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PA. L. REV. 1879, 1882 (2020) (positing that "[i]dentifying anticompetitive conduct is a familiar and pervasive problem in antitrust enforcement, but it is heightened by the uncertainties associated with innovation and technological change"); TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 4 (2018) (exploring how "the classic antidote to bigness—the antitrust and other antimonopoly laws—might be recovered and updated to face the challenges of our times").

9. *See* Khan, *supra* note 8, at 718; WU, *supra* note 8, at 82 ("Merger control has wandered so far from Congress's expressed intent in 1950 as to make a mockery of the democratic process."); Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131, 132 (2018).

10. *See* Elyse Dorsey et al., *Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement*, 47 PEPP. L. REV. 861, 862 (2020) (arguing that "the consumer welfare standard offers a rigorous, objective, and evidence-based framework for antitrust analysis"); A. Douglas Melamed & Nicholas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, 54 REV. INDUS.

questions of morality and must rather reinvigorate their protection of consumers from rising prices.[11] Still others believe that antitrust regulators must balance all of these political, economic, and social goals in deciding on their enforcement priorities.[12]

ORG. 741, 743 (2019) (arguing that "the [consumer welfare] standard is capable of addressing the economic concerns critics have raised, and that the proposed alternatives would make things worse—not better"); Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405, 2406 (2013); Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293, 293 (2019) ("Most fundamentally, there is agreement that the goal of protecting consumer welfare is and should be the lodestar of modern antitrust enforcement."); Murat C. Mungan & John M. Yun, *A Reputational View of Antitrust's Consumer Welfare Standard*, 61 HOUS. L. REV. 569, 570 (2024) (arguing that "there may be important and underappreciated costs associated with departures from the consumer welfare standard"); Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 852 (2014) ("The core of Bork's argument—that antitrust law should discard objectives other than the promotion of competition leading to superior market performance—has weathered the critics and stood the test of time."); John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 240 (2008) ("The antitrust laws reflect our desire for competition and competitive prices for everyone—buyers as well as sellers."); Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336, 338 (2010) (arguing that "the true consumer welfare standard is the better standard for achieving the goals of antitrust legislation"). Critiques of the consumer welfare model of antitrust have abounded. *See, e.g.*, Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979) ("It is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws."); Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION. L. & ECON. 133, 135 (2010) (arguing that "under all present interpretations of the term 'consumer welfare,' there are several sets of circumstances in which the application of antitrust laws may hurt consumers and reduce total social welfare").

11. *See, e.g.*, ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 423 (1978) ("There is no prospect either in antitrust or in the society generally that equality of condition will be achieved, but antitrust demonstrates some of the costs of moving toward it."); Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1, 4 (1982) ("Economic attributes of wealth maximization should guide courts generally, but economics must yield when democratic processes of consent call for more distributive policies."); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 933–34 (1979) ("The basic tenet of the Chicago school, that problems of competition and monopoly should be analyzed using the tools of general economic theory . . . has triumphed."); Daniel Crane, *Antitrust and Wealth Inequality*, 101 CORNELL L. REV. 1171, 1228 (2016) (arguing that "[a]ntitrust law is generally ill positioned to describe how the pie is allocated or to prescribe how it should be allocated" and that "[w]ealth equality does not belong to antitrust law's domain"); Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607, 609 (2003) ("[A]ntitrust has no moral content and is unconcerned about the distribution of wealth."). *But see* Maurice E. Stucke, *Morality and Antitrust*, 2006 COLUM. BUS. L. REV. 443, 449 (arguing that "fostering a moral component to antitrust crimes may more effectively deter these violations at a lower social cost, encourage other nations to increase their prosecution of cartel behavior, and prevent antitrust from slipping into irrelevancy").

12. *See* Thomas J. Horton, *Rediscovering Antitrust's Lost Values*, 16. U. N.H. L. REV. 179, 179 (2018) (tracing "Congress's consistent balancing and blending of social, political, moral, and economic values and objectives over the course of nearly 120 years of antitrust legislation"); Zephyr Teachout, *Corporate Rules and Political Rules: Antitrust as Campaign Finance Reform* 1 (Fordham L. Legal Stud. Rsch. Paper No. 2384182, 2014). For a survey of the debates, see Herbert Hovenkamp, *Whatever* Did *Happen to the Antitrust Movement?*, 94 NOTRE DAME L. REV. 583, 583 (2018) (arguing "[a]ntitrust in the United States today is caught between its pursuit of technical rules designed to define and implement defensible economic goals, and increasingly political calls for a new antitrust 'movement.' The goals of this movement have been variously defined as combatting industrial concentration, limiting the economic or political power of large firms, correcting the maldistribution of wealth, controlling high profits, increasing wages, or protecting small business. None of those goals is new."); Herbert Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. PA. L. REV. 1843, 1843 (2020) (exploring "the ideology, political impulses, and economics that produced the [Chicago] School and that account for its durability").

While observers sharply disagree about the spirit and substance of antitrust law, they generally agree on one thing: that the best means of achieving this diverse array of goals is competition.[13] The path to more efficient markets, or more moral ones, is through promoting and enhancing corporate rivalry.[14] Competition, in short, is capitalism's cure-all.[15]

This conventional wisdom, that competition lies at the foundation of our antitrust laws, is based on a set of both positive and normative assumptions about market regulation. From a positive perspective, it asserts that our antitrust laws were, in fact, intended to promote corporate competition.[16] Drawing on legislative history, public comments, and case law, these theories assert that the legislators who enacted the primary antitrust laws—the Sherman Antitrust Act of 1890, the Clayton Antitrust Act of 1914, and the Hart-Scott Rodino Antitrust Improvements Act of 1976—were motivated by an intention to protect competitive markets.[17] The normative version of the competition claim, meanwhile, asserts that our antitrust laws *should* be used to promote competition because doing so is desirable based on some external rationale.[18] Sometimes, the argument is that competition is

13. *See* Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363, 370 (1965) ("[T]he statutory language of all the major antitrust laws after the Sherman Act explicitly requires the preservation of *competition*." (emphasis in original)); Barak Orbach, *How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2253, 2253 (2013) ("[A]ntitrust has always been and will always be about the preservation of competition."); Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CALIF. L. REV. 797, 798 (1987) ("Antitrust law is a pro-competition policy."); Khan, *supra* note 9, at 132 (explaining that "Congress originally passed antitrust laws to safeguard against excessive concentrations of private power and to protect market structures that distributed individual opportunity and prosperity. For most of the last century, enforcers of antitrust law achieved this end not by focusing on any specific outcome but by ensuring that markets were structured in ways that promoted openness and competition.").

14. *See* WU, *supra* note 8, at 88 (noting that "[t]he 'protection of competition' test is focused on protection of a process, as opposed to the maximization of a value. It is based on the premise that the legal system often does better trying to protect a process than the far more ambitious goal of maximizing an abstract value like welfare or wealth."); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 1 (1984) ("The goal of antitrust is to perfect the operation of competitive markets.").

15. *See* BORK, *supra* note 11, at 7; Khan, *supra* note 8, at 710.

16. *See* N.C. State Bd. of Dental Exam'rs v. F.T.C., 574 U.S. 494, 515 (2015) ("The Sherman Act protects competition . . . ."); Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) ("It is competition, not competitors, which the Act protects."); N. Pac. Ry. v. United States, 356 U.S. 1, 4 (1958) (explaining that "[t]he 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."); Orbach, *supra* note 13, at 2253.

17. *See, e.g.*, James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880–1918*, 50 OHIO ST. L.J. 257, 288 (1989) ("Most debate participants [in 1890 and 1914] . . . expressed substantial concern over anticompetitive activity and exhibited a strong continuing belief in traditional political and economic perspectives."); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 67 (1982) (noting the unanimous agreement among scholars that the foremost intent of Congress in passing these laws was to promote competition); Allyn A. Young, *The Sherman Act and the New Anti-Trust Legislation: I*, 23 J. POL. ECON. 201, 213 (1915) ("There can be little doubt but that the public policy which the [A]ct was intended to embody is that competition should be maintained, artificial monopoly destroyed, and its growth prevented."). *But see* William L. Letwin, *Congress and the Sherman Antitrust Law: 1887–1890*, 23 U. CHI. L. REV. 221, 256 (1956) ("Congressmen were no more in favor of unlimited competition than the economists were.").

18. *See generally* Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C. L. REV. 219 (1995) (exploring the values that underlie competing theories of antitrust law).

consistent with the American tradition of free markets and freedom of contract.[19] Sometimes, it is that competition is desirable for efficiency- or utility-maximizing reasons.[20] Sometimes, it is that competition promotes fairness and equality.[21] But regardless of the rationale, the basic thrust is clear. Antitrust law is, and should remain, a pro-competition law.

But, as this Article will demonstrate, competition-based theories of antitrust underestimate the extent to which competition's counterpart—cooperation—has informed our ideas about how markets work and how they should be regulated. At pivotal moments in the history of regulating capitalism, when legislators and policymakers thought deeply about the proper functioning of the economy, cooperation played a central part in their debates. Far from elevating competition into a lodestar, antitrust laws were in fact based on a careful balancing of competition and cooperation. A better understanding of the American tradition of regulating markets, thus, requires a recognition that competition was never viewed as an unalloyed good. There were deep disagreements about the nature of competition, where it should take place, and where it should give way to agreement and harmony.[22]

In fact, increasing cooperation between economic actors has often been a driving force behind lawmakers' interventions in the market. Legislators have, at various times, lauded the ability of businesses to reach agreements with others, sought to promote better cooperation among small businesses, and defended the right of workers to cooperate with one another.[23] More generally, they have recognized that one of the fundamental mechanisms of capitalism is the corporation: a large agglomeration of investors, directors, officers, and

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19. *See* Ariel Katz, *The Chicago School and the Forgotten Political Dimension of Antitrust Law*, 87 U. CHI. L. REV. 413, 418–29 (2020) (exploring the political traditions that underlie antitrust law); *see generally* Edward H. Levi, *The Antitrust Laws and Monopoly*, 14 U. CHI. L. REV. 153 (1947) (exploring the anti-monopoly tradition in American history).

20. *See* Bork & Bowman, Jr., *supra* note 13, at 365 (arguing "[w]hy should we want to preserve competition anyway? The answer is simply that competition provides society with the maximum output that can be achieved at any given time with the resources at its command. Under a competitive regime, productive resources are combined and separated, shuffled and reshuffled in search for greater profits through greater efficiency."); Ernest Gellhorn, *An Introduction to Antitrust Economics*, 1975 DUKE L.J. 1, 1 ("The objective of antitrust law is to assure a competitive economy, based upon the belief that through competition consumer wants will be satisfied at the lowest price with the sacrifice of the least amount of scarce resources. To express this in economic terms, competition maximizes both allocative efficiency (making what the consumer wants) and productive efficiency (using the least amount of resources)."); FRANCIS A. WALKER, POLITICAL ECONOMY 2763 (3d ed. 1896) ("[R]ightly viewed, perfect competition would be seen to be the order of the economic universe, as truly as gravity is the order of the physical universe, and to be not less harmonious and beneficent in operation."); Herbert Hovenkamp, *Antitrust and Innovation: Where We Are and Where We Should Be Going*, 77 ANTITRUST L.J. 749, 750 (2011) ("Neither antitrust nor intellectual property law has any moral content. Their sole purpose is to make the economy bigger.").

21. *See* Lande, *supra* note 17, at 86–87; Lawrence Anthony Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214, 1214 (1977) (arguing that antitrust scholarship should expand from narrowly focused economic analysis to more broad humanistic disciplines such as philosophy and sociology).

22. *See* Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378, 380 (2020) (arguing that "[w]hile deploying the legal concept of competition to undermine disfavored forms of economic coordination, antitrust law also quietly underwrites certain major exceptions to principles of competition, notably, the business firm itself").

23. *See* discussion *infra* Part II.

workers cooperating towards common ends.[24] To be sure, legislators have generally accepted that competition *between* corporations is important to the proper functioning of the economy, but even here, they have recognized limits.[25] They have sometimes decried "ruinous competition" and sought to promote consolidations and mergers between competitors in order to strengthen domestic industries.[26] Competition has never been the sole force behind market regulation, and in many ways, cooperation provides a better lens for understanding how capitalism, and our antitrust laws, really work.

This Article argues that the single-minded focus on competition as the chief aim of our antitrust laws has skewed the law and policy of economic regulation in dangerous ways. First, the competition narrative has simultaneously narrowed and biased the enforcement priorities of market regulators, favoring certain market structures over others and creating a patchwork of conflicting standards that provide little guidance to companies. Second, by misrepresenting the rich and diverse conversations that American society has had over the proper form and function of capitalism, the competition narrative has impoverished our dialogue about the nature of markets and their role in society. And finally, by elevating competition into a totem of capitalism, we have overlooked models of "cooperative competition" that might better address the pressing economic, social, and political issues of our day. The path to rectifying these failures lies in a rediscovery of the twin pillars of capitalism: competition and cooperation.

The Article begins with a review of the three dominant theories of antitrust regulation today: the consumer welfare model, the economic equality model, and the mixed values model. As Part I will show, all three models rely on a conception of antitrust law as a form of pro-competition regulation. Consumer welfare theorists assert that corporate competition leads to lower prices, better quality, and other benefits to consumers. Economic equality theorists argue that competition reduces wealth disparities. Mixed values theorists argue that it can contribute to a range of political, economic, and social goals. All rely centrally on competition as the mechanism for achieving their diverse ends.

Part II challenges the assumption that competition was in fact the sole driving force behind American antitrust law. It explores the legislative history, text, and subsequent interpretation of the three landmark laws of American antitrust regulation—the Sherman Antitrust Act of 1890, the Clayton Antitrust Act of 1914, and the Hart-Scott-Rodino Antitrust Improvements Act of 1976—and demonstrates that, at all three moments, market cooperation featured prominently in the debates. Many commentators pointed out the dangers of too much competition within a market and therefore stressed the importance of protecting the ability of businesses to collaborate with one another. Cooperation and competition formed the twin pillars of antitrust law, with neither taking precedence over the other.

Part III concludes the Article by exploring the consequences that the competition narrative has had on our markets. It synthesizes the historical findings to provide a descriptive account of how current antitrust law misrepresents the original intent of legislators and leads to overly-narrow conceptions of market dynamics. It then sets forth an agenda for regulatory reform that would better balance the forces of competition and cooperation within the economy.

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24. *See* discussion *infra* Part II.B.
25. *See* discussion *infra* Part II.C.
26. *Id.*

I. THEORIES OF ANTITRUST

In 2021, in the first sentence of the landmark opinion of *NCAA v. Alston*, Supreme Court Justice Neil Gorsuch made a simple yet sweeping assertion about the purposes of antitrust: "In the Sherman Act, Congress tasked courts with enforcing a policy of competition on the belief that market forces yield the best allocation of the Nation's resources."[27] Based on this premise, Gorsuch struck down an agreement among universities over the rules for college athletes—in this case, the provision of non-cash education-related benefits—because, Gorsuch held, universities should be *competing* over such rules, not cooperating with one another over them.[28] Regardless of what one makes of the wisdom of paying college athletes, it is certainly striking to see the extent to which competition has swamped other considerations in our legal analysis of both market and non-market interactions. This Part explores how that shift occurred through an analysis of the three dominant theories of antitrust law: the consumer welfare model, the economic equality model, and the mixed values model. As this Part shows, although these theories take widely divergent stances on the ultimate goals of antitrust law, they adopt remarkably similar assumptions about the proper route to achieving those goals. In short, they believe that competition is the only appropriate means.

A. Consumer Welfare

For at least the last four decades, the single most dominant theory of antitrust law has been the consumer welfare model.[29] This theory of market regulation asserts that regulators, in enforcing the antitrust laws, should be guided solely by the interests of consumers.[30] The Sherman Act, for example, prohibits contracts and conspiracies "in restraint of trade," and so, consumer welfare theorists assert, in order to determine whether a contract or conspiracy is an illegal restraint of trade that violates the Sherman Act, we must first ask whether it harms consumers.[31] While the precise definition of what counts as "consumer welfare," and what doesn't, varies within the field, the theory generally focuses on some combination of price, quality, and output, drawing on economic analysis to identify efficiency-increasing and efficiency-destroying practices.[32] The consumer welfare model of antitrust, controversial when first articulated by Robert Bork in the 1970s, has since come

27. NCAA v. Alston, 594 U.S. 69, 73 (2021) (citations omitted).

28. *Id.* at 100.

29. *See* BORK, *supra* note 11; Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 7–8 (1966); Posner, *supra* note 11, at 932 ("[T]he proper lens for viewing antitrust problems is price theory."); Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1702 (1986); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 83–86 (2011); Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311, 329–33 (2006).

30. *See* BORK, *supra* note 11, at 66.

31. *See* Phillip Areeda, *The Rule of Reason—A Catechism on Competition*, 55 ANTITRUST L.J. 571, 572 (1986).

32. *See id.* ("Competitive rather than monopolistic price levels; more rather than less output; innovation; minimum cost production; and the availability of free choices in the marketplace for consumers and producers alike. All of these benefits of competition are often summed up in the shorthand term 'consumer welfare.'"); Alan J. Meese, *Reframing the (False?) Choice Between Purchaser Welfare and Total Welfare*, 81 FORDHAM L. REV. 2197, 2198–99 (2013).

to dominate thinking about antitrust and market regulation in general.[33] As the Supreme Court wrote in *Reiter v. Sonotone Corp.*, "Congress designed the Sherman Act as a 'consumer welfare prescription.'"[34]

The consumer welfare theory of antitrust rests on two separate legal justifications, one factual, one normative. First, it asserts that, in enacting the primary antitrust laws, Congress in fact intended to promote consumer welfare above all other considerations. As Robert Bork wrote in his influential treatise, *The Antitrust Paradox*, "[t]he legislative history of the Sherman Act, the oldest and most basic of the antitrust statutes, displays the clear and exclusive policy intention of promoting consumer welfare."[35] Second, consumer welfare theorists argue that, regardless of the actual intent of legislators, the antitrust laws should still be interpreted using a consumer-welfare lens because doing so is better for society. Incentivizing market arrangements that help consumers, and disincentivizing ones that harm them, leads to more efficient markets that, in the end, will maximize society's overall well-being.[36] Both of these justifications—about the intent and the policy of our antitrust laws—lead consumer welfare theorists to conclude that regulators and judges should analyze antitrust issues through the lens of consumer interest.[37]

If maximizing consumer welfare is the goal of antitrust, then how can courts and regulators go about pursuing that goal? In other words, if we want to help American purchasers, how do we assess a decision by, say, Facebook to acquire another social media company, say, Instagram?[38] For consumer welfare theorists, the answer is clear: we ask whether the practice or the transaction will decrease competition.[39] If Facebook's acquisition of Instagram will increase competition, by for example allowing Instagram to invest more heavily in its technology or expand into new markets where other firms had previously

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33. *See* Thomas A. Lambert & Tate Cooper, *Neo-Brandeisianism's Democracy Paradox*, 49 J. CORP. L. 347, 350–52 (2024).

34. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979).

35. BORK, *supra* note 11, at 61.

36. Douglas H. Ginsburg, *Bork's 'Legislative Intent' and the Courts*, 79 ANTITRUST L.J. 941, 951 (2014); PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW 1103–13 (1978); Posner, *supra* note 11, at 933; *see also* Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1 (1982) (discussing the two primary competing theories of antitrust law's purpose).

37. *See* Bork, *supra* note 29, at 7 (arguing that "Congress intended the courts to implement (that is, to take into account in the decision of cases) only that value we would today call consumer welfare. To put it another way, the policy the courts were intended to apply is the maximization of wealth or consumer want satisfaction. This requires courts to distinguish between agreements or activities that increase wealth through efficiency and those that decrease it through restriction of output."). *But see* Chirstopher Grandy, *Original Intent and the Sherman Antitrust Act: A Re-Examination of the Consumer-Welfare Hypothesis*, 53 J. ECON. HIST. 359, 359 (1993) (examining the legislative history of the Sherman Antitrust Act and concluding that "of the variety of goals expressed in the debates, Congress appeared to reject consumer welfare [and, i]f anything, Congress seemed more concerned with producer, rather than consumer, welfare").

38. *See* Shayndi Raice & Spencer E. Ante, *Insta-Rich: $1 Billion for Instagram*, WALL ST. J. (Apr. 10, 2012), https://www.wsj.com/articles/SB10001424052702303815404577333840377381670?gaa_at=eafs&gaa_n=ASWzDAiM6StJAg3TfdArYf8sSsLo1gTbOuXnNYW8Q9a0EqBaDbcT9JTc06TkwPfCo%3D&gaa_ts=68d9d701&gaa_sig=OZfYzvXwsxi3ql5BIky_SL8xSw5VkRc6LGzkLuFvixB-VnpWYWr-PCCe8dDnc91JcosgYv7ZIOBBeSO9-hurA%3D%3D (on file with the *Journal of Corporation Law*).

39. *See* Ginsburg, *supra* note 36, at 943–46; Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 ANTITRUST L.J. 707, 724–29 (2007); Gregory J. Werden, *Competition, Consumer Welfare, & the Sherman Act*, 9 SEDONA CONF. J. 87, 87–92 (2008).

dominated, then it should be upheld. If it will decrease competition, by for example, reducing Instagram's incentives to steal market share from Facebook, then it should be struck down. In the view of consumer welfare theorists, then, the best way to promote the interests of buyers is to maintain healthy levels of competition between corporations.[40] Firms seeking to increase their profits through larger market share will be constantly driven to provide superior products at lower prices.[41] This redounds to the benefit of consumers—who will be able to purchase better goods for less money—and to firms—who will have incentives to innovate and improve the efficiency of their operations.[42] While of course there will be losers in this market, such as the firms that cannot produce their products at the low prices or that are unable to respond sufficiently quickly to changes in consumer demand, overall, competition produces a more efficient economy that benefits us all.[43]

Given the weight that consumer welfare models assign to competition, it is perhaps surprising how ill-defined their conception of competition is.[44] Numerous definitions have been offered at various times, many of them conflicting.[45] Some argue that competition means rivalry between firms to sell goods or services in the marketplace.[46] Others argue that it means the state of a market in which firms price their goods at marginal cost.[47] Some argue that competition is simply the process that maximizes economic efficiency.[48] Others argue that competition occurs even when there is a single provider of a good—a monopoly, that is—so long as the provider can imagine a theoretical rival eventually springing into existence.[49] Still others simply turn competition into a tautology: competition exists whenever consumer welfare is maximized.[50]

As this brief summary demonstrates, competition plays a central, if slightly shifting, role in the models of consumer welfare theorists. Antitrust law, in their view, is aimed at

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40. *See* Bork & Bowman, *supra* note 13, at 365.

41. *See* Jonathan B. Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, 74 ANTITRUST L.J. 575, 577 (2007).

42. *Id.*

43. This, of course, is an over-simplified assumption. Scholars have identified a range of ways in which procompetitive conduct can lead to future reductions in competition, and vice versa. *See, e.g.*, J. Gregory Sidak & David J. Teece, *Dynamic Competition in Antitrust Law*, 5 J. COMPETITION L. & ECON. 581 (2009); Bruce H. Kobayashi, *The Law and Economics of Predatory Pricing*, *in* ANTITRUST LAW AND ECONOMICS 116 (Keith N. Hylton ed., 2010); Douglas H. Ginsburg & Joshua D. Wright, *Dynamic Analysis and the Limits of Antitrust Institutions*, 78 Antitrust L.J. 1 (2012).

44. *See* Maurice E. Stucke, *What Is Competition?*, *in* THE GOALS OF COMPETITION LAW 27 (Daniel Zimmer ed., 2012); Maurice E. Stucke, *Reconsidering Competition*, 81 MISS. L.J. 107, 109–11 (2011).

45. *See* Paul J. McNulty, *Economic Theory and the Meaning of Competition*, 82 Q.J. ECON. 639, 639 (1968) ("There is probably no concept in all of economics that is at once more fundamental and pervasive, yet less satisfactorily developed, than the concept of competition.").

46. *See, e.g.*, John Vickers, *Competition Policy and the Consumer Welfare Standard*, 13 J. ANTITRUST ENF'T 1, 8 (2024) (defining competition as "opportunities to offer customers good deals").

47. *See, e.g.*, PHILIP AREEDA & HERBERT HOVENKAMP, I ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 3–4 (1978).

48. *See* Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 ANTITRUST L.J. 713, 718–21 (2014) (discussing Bork's definition of "competition").

49. *See, e.g.*, John M. Yun, *Potential Competition, Nascent Competitors, and Killer Acquisitions*, *in* THE GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY 652 (Joshua D. Wright & Douglas H. Ginsburg eds., 2020).

50. *See* BORK, *supra* note 11, at 61 (defining competition as "the state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs through judicial decree").

maximizing consumer welfare, generally understood as some amalgamation of price, output, and quality. The means for achieving this aim is to prohibit market behaviors—such as mergers or contractual agreements—that restrict competition. Judges and regulators, in other words, must uphold transactions that lead to increased competition and must strike down transactions that lead to decreased competition. Competition is the key.

B. Economic Equality

While consumer welfare theories of antitrust focus on efficiency, economic equality theories focus instead on fairness.[51] They assert that, in the absence of meaningful legal constraints, market forces can lead to dramatic disparities in income and wealth between individuals, and that the antitrust laws can and should be used to reduce these disparities.[52] By preventing concentrations of economic power in the hands of ever-larger corporations, antitrust can lead to more equitable outcomes that ensure better wages for workers, fewer unfair market practices, and more balanced economic opportunities.[53] Antitrust, in short, is a tool for economic egalitarianism.[54]

Economic equality theories have gone by various names at various times—ranging from the bland ("distributional antitrust,"[55] "progressive antitrust,"[56] "non-economic antitrust"[57]) to the grand ("hipster antitrust"[58] and "neo-Brandeisianism"[59])—but they all share a belief that antitrust has a role to play in ensuring a fairer distribution of society's wealth.[60]

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51. *See* Khan, *supra* note 8, at 740 (arguing that the Sherman Act's central aim was for market access and equality and to oppose concentration); Khan & Vaheesan, *supra* note 8, at 279; Baker & Salop, *supra* note 8, at 4; JARSULIC ET AL., *supra* note 8, at 1; Ioannis Lianos, *Competition Law as a Form of Social Regulation*, 65 ANTITRUST BULL. 3, 62–68 (2020); Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1668–69 (2020).

52. *See* Khan & Vaheesan, *supra* note 8, at 235–36 ("Given the current distribution of business ownership assets in the United States, market power can be a powerful mechanism for transferring wealth from the many among the working and middle classes to the few belonging to the 1% and 0.1% at the top of the income and wealth distribution.").

53. *Id.* at 275–93.

54. *See* William E. Kovacic, *The Chicago Obsession in the Interpretation of US Antitrust History*, 87 U. CHI. L. REV. 459, 482 (2020) ("The modern US antitrust era is said to be a time when the Chicago [s]chool recast antitrust goals from an egalitarian perspective to a cramped concern with economic effects, especially prices paid by consumers."); Elettra Bietti, *Self-Regulating Platforms and Antitrust Justice*, 101 TEX. L. REV. 165, 181–89 (2022) (articulating the evolution of the Chicago school's approach to antitrust law).

55. *See* Baker & Salop, *supra* note 8, at 24–25 (advocating for antitrust law to explicitly seek the reduction of inequality).

56. *See* Crane, *supra* note 11, at 1171 (arguing against claims that regulating monopoly power is central to combatting wealth inequality).

57. *See, e.g.*, WU, *supra* note 8, at 9.

58. *See* Wright et al., *supra* note 10, at 294–95 (offering a brief definition and explanation of "hipster antitrust"); Derek E. Bambauer, *To Be Continued: Technology Policy in the First Hundred Days*, 2021 U. ILL. L. REV. ONLINE 170, 172–73 (discussing challenges for proponents of a progressive antitrust agenda).

59. *See* WU, *supra* note 8, at 82; Kathryn Judge, *Brandeisian Banking*, 133 YALE L.J. F. 916, 916–18 (2024) (noting that the concept of unit-banking has been overlooked in neo-Brandeisian scholarship); Yunsieg P. Kim, *A Revolution Without a Cause: The Digital Markets Act and Neo-Brandeisian Antitrust*, 2023 WIS. L. REV. 1247, 1259–71 (writing on the neo-Brandeisian antitrust movement).

60. It should be noted that these categories are not perfectly consonant and, in some instances, might be seen as motivated more by moral or political goals than equality per se. *See* Khan, *supra* note 8, at 740; Khan &

Their arguments, like consumer welfare arguments, are grounded in both positive and normative assertions about the nature of markets and market regulation. First, they assert that Congress intended to promote economic equality when it enacted the core components of antitrust law, and, second, they argue that such a goal is justifiable on moral, political, and pragmatic grounds.[61] From a historical perspective, they conclude that the antitrust laws were designed to restore some measure of equality in the face of mounting concentrations of wealth at the turn of the century.[62] They point to commentary around the time of the passage of the Sherman Act that decried the dangers to democracy that stemmed from wealth disparities, and assert that these dangers were the core problem that the antitrust laws were designed to solve.[63] From a moral standpoint, equality-focused theorists argue that rediscovering the egalitarian thrust of antitrust law would be beneficial for society.[64] Antitrust, in their view, is an effective tool for reducing wealth disparities—by, for example, preventing monopolies from forming or prohibiting unfair trade practices—and should be used more vigorously to pursue this end.[65] They find grounding for these arguments in Sherman's own statements in defense of his law, where he stated that

> The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition.[66]

Vaheesan, *supra* note 8, at 279; Baker & Salop, *supra* note 8, at 4; JARSULIC ET AL., *supra* note 8, at 1; Lianos, *supra* note 51, at 3.

61. *See* Kovacic, *supra* note 54, at 482.

62. *See* Khan, *supra* note 8, at 740 (explaining that "[a]nimating this vision was the understanding that concentration of economic power also consolidates political power, breeding antidemocratic political pressures. This would occur through enabling a small minority to amass outsized wealth, which they could then use to influence government. But it would also occur by permitting private discretion by a few in the economic sphere to control the welfare of all, undermining individual and business freedom. In the lead up to the passage of the Sherman Act, Senator George Hoar warned that monopolies were a menace to republican institutions themselves.").

63. *See id.*; Khan & Vaheesan, *supra* note 8, at 265–66 (explaining that "[a]t the most basic level, proponents [of the Sherman Act] understood that concentration of economic power concentrates political power, posing a threat to democracy akin to monarchy or dictatorship. Responding to the large industrial entities that had developed through the late 1800s, one article denounced the growth of concentrated economic power as a great, unscrupulous, powerful plutocracy. Another warned of the political menace that was resident in these stupendous aggregations of wealth. The Sherman Act itself was widely understood as following in a tradition that "aimed to control political power through decentralization of economic power." (citations removed)); United States v. Aluminum Co. of Am., 148 F.2d 416, 428 (2d Cir. 1945) ("In the debates in Congress Senator Sherman himself . . . showed that among the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them.").

64. *See* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175, 179–80 (2021) (offering a description of the "moral economy vision"); Posner & Sunstein, *supra* note 8, at 190; Baker & Salop, *supra* note 8, at 3 (citing rising levels of economic inequality).

65. *See* Paul, *supra* note 64, at 179–80; Posner & Sunstein, *supra* note 8, at 190.

66. 21 CONG. REC. 2460 (1890).

Despite the serious disagreements between consumer welfare- and egalitarian-theories of antitrust over the goals of antitrust, there is one area in which the two theories have surprising overlap: the role of competition. At the center of the equality theory of antitrust lies a basic assumption that competition is the right way to promote equality in the marketplace.[67] In markets marked by high levels of competition, firms will be less able to extract excess value from other actors, and this will curb the kinds of mass concentrations of wealth typical of monopolistic markets. Monopolies, after all, are able to raise prices above levels that would prevail in competitive markets, and this shifts wealth from groups who are relatively poor (consumers) to groups who are relatively rich (shareholders).[68] Meanwhile, monopsonies in the labor market—that is, when there is a single employer—are able to push salaries below levels that would prevail in competitive markets, and this again shifts wealth from relatively poor groups (workers) to relatively rich ones (shareholders).[69] Antitrust, by restoring competition to the market, can thus play an important role in reducing economic inequality at all of these levels. Some scholars have even asserted that competition-oriented antitrust could reduce racial and gender inequality by reducing structural failures in markets.[70]

Economic equality models of antitrust tend to rest on traditional views of competition as simple rivalry between firms, although, like consumer welfare models, they struggled to outline its contours. Some have defined competition as "how rivalry plays out in the market among multiple competitors" and "[t]he heart of the competitive process is the guarantee that everyone participating in the open market—consumers, farmers, workers, or anyone else—has 'the free opportunity to select among alternative offers."[71] Others have argued that "the best guardian of competition is a competitive process," and, in order to determine whether a "competitive process" exists, one must look at "how a market is structured and whether a single firm had acquired sufficient power to distort competitive outcomes."[72] Still others have suggested that antitrust law should be guided by a "protection of competition" standard focused on a single question: "is the complained-of conduct (or merger) merely part of the competitive process, or is it meant to suppress or even destroy competition?"[73]

Whatever competition may mean, it plays a central role in the theories of antitrust egalitarians. In their view, antitrust laws must be interpreted as a tool for reducing economic inequality, and the best means for achieving equality is through competition in the marketplace. Enhanced rivalry between firms should reduce excessive prices, redistribute power and wealth from rich groups to poorer ones, and promote broader economic opportunity.

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67. *See* Khan, *supra* note 8, at 737 ("The current framework in antitrust fails to register certain forms of anti-competitive harm and therefore is unequipped to promote real competition . . . . Antitrust law and competition policy should promote not welfare but competitive markets.").

68. *See* Posner & Sunstein, *supra* note 8, at 190.

69. *Id.* at 196.

70. *Id.* at 198–99.

71. Jonathan Kanter, Assistant Att'y Gen., Remarks at New York City Bar Association's Milton Handler Lecture (May 18, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association [https://perma.cc/3TRJ-4BLH].

72. Khan, *supra* note 8, at 745–46.

73. WU, *supra* note 8, at 9.

C. Mixed Values

While consumer welfare theories focus on efficiency, and egalitarian theories focus on equality, a competing theory of antitrust argues that antitrust law is too broad and complicated to be understood as promoting any single value. Instead, mixed value theories assert, antitrust is aimed at promoting a range of values, including equality and efficiency, but also other values: morality, fairness, democracy, and others.[74] The mixed values model of antitrust asserts that any other reading of the antitrust laws requires interpreters to ignore entire bodies of commentary—by legislators, politicians, and judges—showing that market regulation was always informed by a diverse set of viewpoints about the nature of markets and politics.[75]

The mixed values theory of antitrust has the advantage of being obviously (perhaps trivially) true—legislators have ever and always had mixed motives for what they do, and it is a rare law on which all legislators agree.[76] But, as mixed values theorists are quick to point out, the Sherman Antitrust Act and subsequent antitrust laws were particularly varied in their motivations and intentions due to the unsettled nature of economic theory at the time they were enacted.[77] Markets, after all, are not neatly divided from ordinary life. They touch on every aspect of daily activity: education, health, politics, housing, and much more.[78] For that reason, when legislators have sought to lay out the legal foundations of capitalism, they have always attempted to promote a variety of values, some of them

74. *See* Douglas H. Ginsburg, *Bork's 'Legislative Intent' and the Courts*, 79 ANTITRUST L.J. 941, 947–49 (discussing the academy's rejection of Bork's antitrust thesis) (2014); *but see id.* at 951 (explaining that "judicial endorsement of the consumer welfare standard has no doubt led to a more efficient allocation of scarce resources"); Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 559 (2012) ("[L]egal institutions (including antitrust law) and informal ethical, moral, and social norms can promote overall wellbeing to the extent that they promote fair competition and deter unfair competition."); Kenneth G. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1191–92 (1977); RICHARD HOFSTADTER, *What Happened to the Antitrust Movement?*, *in* THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 188 (2008); Darren Bush, *Too Big to Bail: The Role of Antitrust in Distressed Industries*, 77 ANTITRUST L.J. 277, 277 (2010); Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1157 (1981) (noting scholars that have articulated a "multivalued view of antitrust"); Spencer Weber Waller, *Bringing Globalism Home: Lessons from Antitrust and Beyond*, 32 LOY. U. CHI. L.J. 113, 128 (2000) ("Other countries have avoided this unproductive fight over the nature of antitrust law and more properly conceive competition policy as a continuum of governmental responses to particular types of markets, forms of ownership, and business conduct.").

75. *See* Pitofsky, *supra* note 10, at 1075 ("This paper has argued that the trend toward use of an exclusively economic approach to antitrust analysis excludes important political considerations that have in the past been seen as relevant by Congress and the courts."); Elzinga, *supra* note 74, at 1191–92; Stucke, *supra* note 74, at 564 ("[T]he U.S. antitrust community never agreed that antitrust's goals were only economic or that antitrust only had one goal—to promote economic welfare.").

76. *See generally* John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397 (2017) (arguing that in hard cases, "Congress" has not actually formed an intention on the precise question at issue and that judges should candidly acknowledge their own creative role rather than pretend to reconstruct legislative intent).

77. *See* Pitofsky, *supra* note 10, at 1052–60 (arguing for the consideration of certain non-economic concerns).

78. Saule T. Omarova & Graham S. Steele, *Banking and Antitrust*, 133 YALE L.J. 1162, 1169 (2024); Elzinga, *supra* note 74, at 1200.

complementary, but some of them conflicting.[79] Just as importantly, legislators had widely divergent ideas about how an ideal economy should work and therefore prioritized different values in their own speeches and letters.[80] Some focused on promoting the interest of workers.[81] Some focused on promoting efficiency.[82] Some focused on protecting democratic institutions from the corrupting influence of wealth.[83] Needless to say, with such a wide array of statements and intentions to pick and choose from, mixed values theories have little agreement among themselves about the particular values to balance and how judges should balance them. Some focus on balancing efficiency and fairness.[84] Others argue that judges should balance economic, political, and moral goals.[85] Still others argue that judges should weigh economic efficiency against the political objectives of self-policing markets (that is, markets free from government intervention) and de-concentration (that is, the ability of individual merchants to practice their trade).[86]

Indeed, the infinity of potential combinations of intentions is one of the core critiques of the mixed values theory of antitrust.[87] Without a unifying principle, the critique goes, judges called upon to interpret the antitrust laws will have too much discretion to impose their own sets of values on markets without regard to the law.[88] Businesses, in turn, will have little guidance about permissible and impermissible behaviors in the market and will

79. *See* Pitofsky, *supra* note 10, at 1064 ("[W]e know that conflicts between political and economic goals do arise-for example, when a merger generating efficiencies contributes significantly to economic concentration in a given market.").

80. *See* Lande, *supra* note 17, at 83 ("Congress wanted the economy to function efficiently primarily to provide consumers the benefits of free competition."); Pitofsky, *supra* note 10, at 1060, 1061–65 (noting that "the most authoritative and exhaustive reviews of the legislative history have detected a series of vague and not always consistent strands of legislative intent").

81. *See, e.g.*, WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT (1965).

82. *See* Robert H. Lande, *Proving the Obvious: The Antitrust Laws Were Passed to Protect Consumers (Not Just to Increase Efficiency)*, 50 Hastings L.J. 959, 961–62 (1999) (citing scholarship arguing that among the varied legislative goals of antitrust laws was economic efficiency).

83. *See* Pitofsky, *supra* note 10, at 1053–55 (describing lawmakers' concern that concentrated corporate power could facilitate the overthrow of democratic institutions).

84. Stucke, *supra* note 74, at 613 (regulators should balance "(1) an effective, competitive process by enhancing efficiency, while promoting economic freedom; (2) a level playing field for small and mid-sized enterprises; and (3) fairness").

85. HOFSTADTER, *supra* note 74, at 199–200 (explain that "[t]he goals of antitrust were of three kinds. The first were economic; the classical model of competition confirmed the belief that the maximum of economic efficiency would be produced by competition, and at least some members of Congress must have been under the spell of this intellectually elegant model, insofar as they were able to formulate their economic intentions in abstract terms. The second class of goals was political; the antitrust principle was intended to block private accumulations of power and protect democratic government. The third was social and moral; the competitive process was believed to be a kind of disciplinary machinery for the development of character, and the competitiveness of the people-the fundamental stimulus to national morale-was believed to need protection.").

86. Harlan M. Blake & William K. Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422, 425–27 (1965); Louis B. Schwartz, *'Justice' and Other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1076, 1076 (1979).

87. *See* Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL'Y 217, 217–18 (2010) ("The Court had read into the Sherman Act an assortment of vague and, ironically, anti-competitive social and political goals, such as protecting small traders from their larger, impersonal (and more efficient) rivals.").

88. *Id.*

be subject to potentially harsh consequences if a particular regulator or judge adopts a new interpretation or stance on the issue.[89] This kind of uncertainty is inconsistent with the rule of law and will have damaging consequences for the economy.[90]

But despite these deep disagreements, mixed values theories of antitrust also rely centrally on competition as the proper means of achieving their varied aims. Even if they cannot agree on a single *goal*, there is substantial consensus around the promotion of competition as the *method*.[91] Competition is viewed as a kind of all-purpose remedy that can—and should—be used to promote a range of values, from economic to social to political to moral.[92] Mixed values theories tend to adopt conventional views of competition as the presence of rivalry between firms, but they occasionally expand into more expansive definitions, such as processes that maximize overall well-being.[93] The idea is that markets typified by high levels of rivalry between suppliers of a good are better than markets in which there are low levels of rivalry, or none at all. It will spur economic efficiency, dispersions of wealth, upright moral character of corporate executives, protection of democratic processes, and all the other many goals of market regulation.

As this brief survey of antitrust interpretation demonstrates, there is a remarkable level of uniformity among the major interpretive theories about the proper role of competition in capitalism. In their view, our antitrust laws were designed to promote competitive markets because competitive markets are good for citizens—even if the nature of that good is debated. The basic public policy of the antitrust laws, they agree, is the preservation and promotion of competition.[94]

II. THE LOST ORIGINS OF ANTITRUST

But is it really true that competition is the all-purpose tool of antitrust that conventional wisdom holds it to be? This Part argues that, at least from a historical perspective, it is not. When one examines the historical origins of the principal federal antitrust laws, one

89. *See e.g.*, Hovenkamp, *supra* note 12, at 585 (describing "movement antitrust" as having "goals that are unmeasurable and fundamentally inconsistent, although with their contradictions rarely exposed").

90. *See id.* at 588 (arguing that movement antitrust "does antitrust policy a great disservice by making its legitimate targets almost impossible to define and not providing ammunition for attacking them when they are defined").

91. *See* Stucke, *supra* note 74, at 596 ("Competition . . . represents the means "to achieve broader government objectives for the economy or for a given industry"); Lawrence A. Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships*, 68 CALIF. L. REV. 1, 4 (1980) (explaining that "[t]o that Court, the idea of competition included political and social objectives. Among those were easing market access, protecting dealer independence, promoting good faith in transactions, and correcting extreme disparities in bargaining power. The Warren Court also was interested in assuring, on grounds of equity and fairness, and regardless of supposed impact on resource allocation, that prices be closely related to cost. It sought each of these goals as an end in itself. Competition could foster all of them.").

92. Pitofsky, *supra* note 10, at 1060 ("[P]reservation of a competitive system, in part through vigorous antitrust enforcement, will protect small business against the use of unfair tactics by larger companies to gain advantages unrelated to superior skill or efficiency of those larger units."); Elzinga, *supra* note 74, at 1195 ("In the long run, more competition will mean less accumulation of wealth from capitalized monopoly positions.").

93. *See* Stucke, *supra* note 74, at 597 ("[O]ur conception of competition (as defined in part by our competition policy) must promote (or at least not impede) overall well-being.").

94. *See* Young, *supra* note 17, at 213 ("There can be little doubt but that the public policy which the [A]ct was intended to embody is that competition should be maintained, artificial monopoly destroyed, and its growth prevented.").

quickly discovers that there was always a counterpart to competition: cooperation. While many politicians, legislators, and economists believed that competition (both between individuals and firms) was a powerful force for good in the economy, they also recognized its limits. They believed that unrestrained competition could have harmful effects on society and that a better version of capitalism required a careful balancing of competition and cooperation. Individuals and firms needed to preserve some realms in which they could work together in the efficient production of goods and services—on employment conditions, on product safety, on industrial best practices—and a wholesale foreclosing of these opportunities would be just as harmful as a wholesale ban on competition. This Part will focus on three foundational antitrust laws—the Sherman Antitrust Act of 1890, the Clayton Antitrust Act of 1914, and the Hart-Scott-Rodino Antitrust Improvements Act of 1976—to demonstrate the surprisingly important role that cooperation played in the crafting of the nation's market regulation.

A. The Sherman Antitrust Act

1. The Background

The Sherman Antitrust Act was enacted in 1890 at the height of the Gilded Age. It was a time of both dizzying economic growth and massive wealth inequality.[95] On the one hand, innovations in steam, steel, electricity, and railroads were leading to dramatic improvements in the quality of everyday Americans.[96] On the other, robber barons like John D. Rockefeller, Andrew Carnegie, and Cornelius Vanderbilt were amassing enormous fortunes from their carefully—often ruthlessly—constructed corporate empires.[97] One of the central questions of the age was whether these two developments—the enormous growth in the power and wealth of corporations, on the one hand, and the tangible improvements to regular citizens' lives from the technologies, goods, and services that corporations provided—were inherently linked.[98] In other words, was concentration of wealth the inevitable result of capitalism, or was it, instead, a distortion of it?

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95. *See generally* CHARLES W. CALHOUN, FROM BLOODY SHIRT TO FULL DINNER PAIL: THE TRANSFORMATION OF POLITICS AND GOVERNANCE IN THE GILDED AGE (2010) (explaining the increasing salience of economic concerns among the electorate); ROBERT W. CHERNY, AMERICAN POLITICS IN THE GILDED AGE, 1868–1900 (1997) (surveying economic and political concerns during the Gilded Age) ; JOHN A. GARRATY, THE NEW COMMONWEALTH: 1877–1890 (1969) (describing a rapid economic transformation across society); *see also* RICHARD WHITE, THE REPUBLIC FOR WHICH IT STANDS: THE UNITED STATES DURING RECONSTRUCTION AND THE GILDED AGE, 1865–1896 4–5 (2017) (noting the uneven economic conditions following the Reconstruction era).

96. *See generally supra* note 95 (listing a collection of books that explore the rapidly changing economics of the Gilded Age).

97. *See generally* HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION (1955) (examining the historical evolution of antitrust policy, and how captains of industry, John D. Rockefeller and Andrew Carnegie, contributed to this evolution); RON CHERNOW, TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR. (1998) (detailing the life of John D. Rockefeller); CLARENCE D. LONG, WAGES AND EARNINGS IN THE UNITED STATES, 1860–1890 (1960) (studying compensation trends during the Gilded Age).

98. *See* Letwin, *supra* note 17, at 238 ("Nor did economists attribute such advantages only to combinations: they were adopting a theory which led them to conclude that even outright monopolies, or at least some of them, were also inevitable and potentially beneficial."); Peter R. Dickson & Philippa K. Wells, *The Dubious Origins of the Sherman Antitrust Act: The Mouse That Roared*, 20 J. PUB. POL'Y & MKTG 3 (2001) (tracing the "dubious"

There were many sides in this debate. The robber barons themselves, with the Social Darwinist Andrew Carnegie leading the way, argued that corporations benefited society and that their growth was inextricably linked with the great improvements they were making in American lives. As Carnegie wrote in his influential 1889 essay, *The Gospel of Wealth*:

> We conclude that this overpowering, irresistible tendency toward aggregation of capital and increase of size in every branch of product cannot be arrested or even greatly impeded, and that, instead of attempting to restrict either, we should hail every increase as something gained, not for the few rich, but for the millions of poor, seeing that the law is salutary, working for good and not for evil. Every enlargement is an improvement, step by step, upon what has preceded. It makes for higher civilization, for the enrichment of human life, not for one, but for all classes of men. It tends to bring to the laborer's cottage the luxuries hitherto enjoyed only by the rich, to remove from the most squalid homes much of their squalor, and to foster the growth of human happiness relatively more in the workman's home than in the millionaire's palace.[99]

Carnegie argued, somewhat ironically, that the "law of competition" (to which, he said, "we owe our wonderful material development")[100] was at the centerpiece of this new American industrial age, but, in fact, the largest industrial corporations were increasingly making use of a new legal innovation, the trust, that made cooperation the centerpiece of their empires.[101] Trusts allowed a number of nominally independent companies to share common management, set mutually-agreed-upon prices and output, and plan long-term business strategies.[102] Greater cooperation between companies—both horizontally and vertically—meant more efficient production processes, less corporate waste, and better-quality products.[103] John D. Rockefeller, the founder of Standard Oil, decried "ruinous competition" and argued that the future of American industry lay in more trusts and ever larger combinations.[104]

In opposition to the Social Darwinists and the robber barons who defended corporate behavior was arrayed a motley assortment of farmers, laborers, and shopkeepers who denounced it.[105] They believed that the actual behavior of corporate executives was both inefficient and unethical.[106] This complaint was held by broad cross-sections of society,[107]

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origins of the Sherman Antitrust Act through the legislative debate reported in the Congressional Record and contemporary commentary in the newspapers, particularly the New York Times).

99. ANDREW CARNEGIE, *Popular Illusions About Trusts*, *in* THE GOSPEL OF WEALTH AND OTHER TIMELY ESSAYS 91 (1901).

100. *Id.*

101. *See* THORELLI, *supra* note 97, at 73–75 (discussing the types and prevalence of organized business restrictions or combinations).

102. *See* Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 FORDHAM L. REV. 2279, 2293 (2013) (examining the origins of U.S. antitrust laws between 1888 and 1890).

103. *See* Andrew Carnegie, *The Bugaboo of Trusts*, 148 N. AM. REV. 141, 146 (1889) (discussing the public anxiety surrounding industrial trusts).

104. *See, e.g.*, CHERNOW, *supra* note 97.

105. *See* THORELLI, *supra* note 97, at 54–160 (introducing a historical and contextual analysis of the factors that led up to the creation of U.S. federal antitrust laws).

106. *Id.*

107. *Id.*

but no one articulated it more vociferously, or as effectively, as the grassroots farmers' movement known as the Grange.[108] The National Grange of the Order of Patrons of Husbandry was a nationwide organization formed after the Civil War to promote the interests of farmers. Grangers engaged in numerous political and economic activities, from lobbying for farmer-friendly state laws to educating farmers on agricultural best practices to exposing the unscrupulous behaviors of railroads and banks.[109] But the centerpiece of their platform was cooperation—they argued that, if farmers wished to protect their interests against the growing power of corporate trusts, they needed to work together towards common ends.[110] As one early Grange tract wrote, "Let the farmers of the country take hold unitedly in this matter of cooperation, using the calm judgment for which, as a class, they have always been noted, and they can hurl from power those who have pandered to the monopolizing tendency of capital."[111] The Grange was quite successful in mobilizing public opinion against the trusts, and throughout the 1880s, political pressure built for lawmakers to take action.[112] As Samuel Dodd, a lawyer for the Standard Oil Company who invented the infamous trust structure, warned Boston merchants in 1889, there was "an earnest popular prejudice against trade combinations."[113]

Numerous scholars studying the new forms of industrial organization dominating the machine age also took skeptical views of competition as an organizing principle for the American economy. They wrote of the dangers of "excessive competition"[114] and the enormous "wastes of private competition."[115] Edwin Seligman, a professor of political economy at Columbia, encapsulated the ambivalent views of economists when he said that "[c]ompetition is not in itself bad. It is a neutral force which has already produced immense benefits, but which may, under certain conditions, bring in its train sharply defined evil."[116] Others highlighted the desirability of greater industrial cooperation. John Bates Clark, an economist, wrote an article in 1888 entitled *The Limits of Competition* that argued that the unification of separate workers and companies was both inevitable and desirable:

> Combinations have their roots in the nature of social industry and are normal in their origin, their development, and their practical working. They are neither to be deprecated by scientists nor suppressed by legislators. They are the result of an evolution, and are the happy outcome of a competition so abnormal that the continuance of it would have meant widespread ruin. A successful attempt to suppress them by law would involve the reversion of industrial systems to a

108. *See id.* at 59–63 (discussing the rise of Agrarian Discontent in the United States, particularly among farmers in the West and South, during the years following the Civil War).

109. *Id.* at 335–433.

110. THORELLI, *supra* note 97, at 399.

111. JONATHAN PERIAM, THE GROUNDSWELL: A HISTORY OF THE ORIGIN, AIMS, AND PROGRESS OF THE FARMERS' MOVEMENT 92 (1874).

112. *See* LETWIN, *supra* note 81, at 54–70 (illustrating the situation in which many corporations came under attack before the passage of the Sherman Act).

113. Samuel Dodd, *Address Before the Merchants' Association of Boston*, 5 RY. & CORP. L.J. 97, 97 (1889).

114. *See* DAVID AMES WELLS, RECENT ECONOMIC CHANGES AND THEIR EFFECT ON THE PRODUCTION AND DISTRIBUTION OF WEALTH AND THE WELL-BEING OF SOCIETY 74 (1889) (noting that excessive market competition can result from an expansion of supply, as seen in the copper industry).

115. *See* Richard T. Ely, *Report of the Organization of the American Economic Association*, 1 PUBL'N AM. ECON. ASS'N 5, 16 (1886) (suggesting that private individual activities should be subject to state supervision).

116. *Id.* at 27.

> cast-off type, the renewal of abuses from which society has escaped by a step in development. Combinations are to be accepted, studied, and, probably, regulated.[117]

But a common sentiment among economists was that competition and cooperation were opposed forces that needed to be managed and regulated, with should receive ultimate legal supremacy over the other. As David Ames Wells, another political economist, wrote, the key was to find a proper balance between cooperation and competition:

> The problem, therefore, which society under this condition of affairs has presented to it for solution is a difficult one, and twofold in nature. To the producer, the question of importance is. How can competition be restricted to an extent sufficient to prevent its injurious excesses? To the consumer. How can combination be restricted so as to secure its advantages and at the same time to curb its abuses?[118]

Scholars, policymakers, corporate executives, and farmers voiced a diverse range of views about the ideal form of the economy, but it was common among all of them to highlight the importance of cooperation. Indeed, the machine age had brought about an increasing recognition in all sectors of society that when individuals combined forces, whether on a factory floor or on a stock exchange, they could be better, more efficient, and even (potentially) more moral. The days of the individual, self-sustaining trader, grower, or merchant were over, and the days of combination had begun.

2. The Legislation

The legislative history of the bill that eventually became the Sherman Antitrust Act was long and filled with misfires. In July 1888, Republican Senator John Sherman of Ohio offered a resolution, approved by the Senate, for the Committee on Finance to study trusts and combinations to understand whether they "prevent free and full competition" or "foster monopoly or to artificially advance the cost to the consumer of necessary articles of human life."[119] Between January and October 1888, some 16 separate antitrust bills were introduced.[120] Sherman introduced an initial bill on the subject on August 14, 1888, but this bill was not acted upon, and he reintroduced it again, with some amendments, in January 1889, and then yet again (for the last time) on December 4, 1889.[121] This version, however, went through heavy amendment in the legislative debates that followed before finally being enacted on July 2, 1890.[122]

The circuitous route to ratification of the nation's first antitrust law stemmed from the deep disagreements that legislators had about how the nation's economy should work. The initial text of Sherman's bill matched his initial resolution asking for a study of the trust problem. It would have outlawed "all arrangements, contracts, agreements, trusts, or

117. John B. Clark, *The Limits of Competition*, 2 POL. SCI. Q. 45, 55 (1887).

118. David Ames Wells, *Recent Economic Changes*, 35 POPULAR SCI. MONTHLY 584, 586 (1889).

119. S. Res. Directing the Committee on Finance To Inquire into Control of Trusts in Connection with Revenue Bills., 50th Cong., 1st Sess., 19 CONG. REC. 6041 (1888).

120. THORELLI, *supra* note 97, at 173.

121. S.1, 51st Cong., 21 CONG. REC. 92 (1889).

122. *See* THORELLI, *supra* note 97, at 174 (showing that the Sherman Act underwent numerous amendments).

combinations . . . [that] tend, to prevent full and free competition . . . . [or] advance the cost to the consumer of any such articles."[123] But the final version said nothing about competition or consumer costs. Instead, it contained two basic prohibitions. Section 1 prohibited "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce."[124] Section 2 prohibited persons from "monopoliz[ing], or attempt[ing] to monopolize, or combin[ing] or conspir[ing] with any other person or persons, to monopolize any part of trade or commerce . . . ."[125] The elimination of competition as the guiding light of the Sherman Antitrust Act was driven by many considerations, but one of the most central ones was that legislators worried that the law went beyond the powers of government.[126] Legislators sought to ground the law, instead, in the more traditional language of common law concepts of trade restraints and monopolies.[127]

In the Congressional debates over the bill, legislators lined up to denounce trusts and combinations in the most colorful terms, but they were often vague about what exactly was wrong about these entities. Democratic Senator James Jones of Arkansas said that

> [H]aving been allowed to grow and fatten upon the public, [the trusts'] success is an example of evil that has excited the greed and conscienceless rapacity of commercial sharks until in schools they are to be found now in every branch of trade, preying upon every industry, and by their unholy combinations robbing their victims, the general public, in defiance of every principle of law or morals.[128]

Congressman John Heard of Missouri, after describing the formation of the dressed beef combination, said that "this giant robber combination, while perhaps the most damaging of all of its class to the interests of our people, is only one of many which by their methods extort millions from the citizens of this Republic without adding one cent of value to our productions or one iota of increase to our prosperity."[129] Sherman himself described the problem as a lack of competition,

> This bill does not seek to cripple combinations of capital and labor, the formation of partnerships or of corporations, but only to prevent and control combinations made with a view to prevent competition, or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer.[130]

But he struggled to define what he meant by competition—or how profits could come from other sources than the consumer. "I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations."[131] In the end, he concluded, it was the job of courts to sort these problems out.[132]

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123. 21 CONG. REC. 1167 (1889).
124. 15 U.S.C. § 1.
125. *Id.* § 2.
126. *See* THORELLI, *supra* note 97, at 174 (showing that the Sherman Act granted government officials enormous power to regulate).
127. *Id.*
128. 20 CONG. REC. 1457 (1889).
129. 21 CONG. REC. 4101 (1890).
130. *Id.* at 2457.
131. *Id.* at 2460.
132. *Id.* at 2459–60.

But several legislators pointed out that market competition had downsides that could only be remedied by cooperation. In numerous speeches, lawmakers pointed out that corporations, the central actors in the economy, were themselves simply associations of individuals and capital to work towards common ends.[133] Facilitating greater cooperation between individuals was essential to the industrial age's improvements. Lawmakers were particularly solicitous to the interests of small farmers and workers, who, they argued, should be allowed to share information with one another, form alliances, and engage in joint action in order to level the playing field against the trusts.[134] Democratic Senator James George of Mississippi, for example, stated that

> [I]f this bill passes as it now stands, the farmers and laborers of this country who are sending up their voices to the Congress of the United States, asking, pleading, imploring us to take action to put down trusts, these farmers and these laborers will find that they themselves in their most innocent and necessary arrangements, made solely for defensive purposes against the operations of these trusts, will be brought within the punitory provisions of this bill.[135]

Republican Senator George Edmunds similarly argued for more balance in the bill.[136] "The fact is," he remarked, "that this matter of capital, as it is called, of business, and of labor, is an equation, and you can not disturb one side of the equation without disturbing the other."[137]

> Now if you say to one side of that equation, "You may make the value or the prices of this iron by your combination for wages in the whole Republic or on the continent, but the many for whom you have made the iron shall not arrange with his neighbors as to the price they will all sell it for, so as not destroy each other," the whole business will certainly break.[138]

Markets, Edmunds argued, should be less competitive and more cooperative.

> We can not shut up our eyes, Mr. President, to the fact that if capital combines, if great industrial establishments combine . . . labor is compelled to combine to defend itself; and so the country has been turned and other countries have been turned in the last forty years into great social camps of enemies when they ought to be one great camp of co-operative friends.[139]

Republican Senator William Stewart of Nevada went even further, arguing that markets, like governments, were founded on the cooperative spirit of individuals. "Combination, co-operation, is the foundation of all civilized society."[140] "I believe that the true remedy against [corporate] trusts is that of counter combinations among the people. I

133. *See id.* at 2728 (containing Senator Hoar's remarks that "large corporations . . . are themselves but an association or combination or aggregation of capital on the other side"); *Id.* at 2729 (containing Senator Edmunds's statement that "there is no corporation in the world and never can be, for business purposes at any rate, that is not simply a form of association of human beings just like the association of the laborers").

134. 20 CONG. REC. 1458–60 (1889).

135. *Id.* at 1458.

136. 21 CONG. REC. 2726 (1890).

137. *Id.* at 2727.

138. *Id.*

139. *Id.*

140. *Id.* at 2564.

believe in co–operation."[141] He gave for an example the Chicago beef trust, which, he said, all agreed was an evil.[142] The best way to respond to the power of the beef trust, he said, was not to outlaw it, but rather to encourage Chicago consumers to join together, form an association, and supply themselves with beef through their joint efforts. As he concluded:

> These evils of combination, of course, are great, but the question is, do they not grow out of civilization itself, the foundation of which is organization, and without organization me would be savages? Should we not rather encourage organizations among the people to meet the grasping disposition of the favored few? The great trouble from the beginning of civilization has been that the few have combined against the many, being more competent, and that the few in various ways secure to themselves special privileges against the masses. I say let the masses combine.[143]

As he concluded, "Do not strike at civilization and say that you will abandon the idea of cooperation, which is absolutely necessary, without which we could not exist as a nation or remain in any civilized state."[144]

Senator Orville Platt of Connecticut was deeply critical of Sherman's bill, arguing that it was based on a flawed conception of the economy.[145] Competition, he said, drove prices down below their fair value and made it impossible for farmers, laborers, miners, merchants, and others to earn a living, with damaging consequences for all of society.[146]

> This bill proceeds upon the false assumption that all competition is beneficent to the country, and that every advance of price is an injury to the country . . . There never was a greater fallacy in the world. Competition, which this bill provides for as between any two persons, must be full and free. Unrestricted competition is brutal warfare, and injurious to the whole country. The great corporations of this country, the great monopolies of this country are every one of them built upon the graves of weaker competitors that have been forced to their death by remorseless competition.[147]

He argued that, in order to prevent "ruinous competition," the law should provide that every person in business had a "right, a legal and a moral right, to obtain a fair profit upon his

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141. 21 CONG. REC. 2565 (1890).

142. *Id.*

143. *Id.* at 2566.

144. *Id.* Senator George Hoar shared this pro-cooperative sentiment. He stated

> The laborer who is engaged lawfully and usefully and accomplishing his purpose in whole or in part in endeavoring to raise the standard of wages is engaged in an occupation the success of which makes republican government itself possible and without which the Republic cannot in substance, however it may nominally do in form, continue to exist. I hold, therefore, that as legislators we may constitutionally, properly, and wisely allow laborers to make associations, combinations, contracts, agreements for the sake of maintaining and advancing their wages, in regard to which, as a rule, their contracts are to be made with large corporations who are themselves but an association or combination or aggregation of capital on the other side.

Id. at 2728.

145. 21 CONG. REC. 2729–30 (1890).

146. *Id.* at 2729.

147. *Id.*

business and his work."[148] Any combination formed to raise prices to a "fair and reasonable" level ought to be encouraged, not outlawed.[149]

Despite these ambiguities and disagreements, the Sherman Antitrust Act passed with wide margins in both legislative chambers. In the Senate, 52 senators (including Edmunds, Platt, and Stewart) voted in favor of the Act, and only one voted against it.[150] In the House, 242 Congressmen voted in favor of the law.[151] None voted against it.[152] On July 2, 1890, President Benjamin Harrison signed it into law.[153]

3. The Aftermath

The passage of the Sherman Antitrust Act was, ironically, followed by a period of tremendous consolidation within the nation's economy.[154] In industries as diverse as sugar, oil, steel, cotton, and whiskey, a wave of mergers led to a dramatic decrease in the number of companies operating in American markets.[155] By one estimate, in the period from 1895 to 1904, mergers of manufacturing firms led to 2,274 companies being consolidated into just 157 companies.[156] By 1905, U.S. Steel, Dupont, National Biscuit (Nabisco), AT&T, Standard Oil, and General Electric had all been formed and maintained dominant positions in their respective industries.[157]

Despite the accelerating pace of corporate mergers and acquisitions, the federal government did little with the Sherman Act to resist the monopolies. In the first decade after the passage of the Act, federal prosecutors brought remarkably few cases under it.[158] The

148. *Id.* at 2730.

149. *Id.*

150. 21 CONG. REC. 3153 (1890).

151. *See* THORELLI, *supra* note 97, at 210.

152. *Id.*

153. Sherman Antitrust Act, 15 U.S.C. §§ 1–38 (1890).

154. *See, e.g.*, WU, *supra* note 8, at 12.

155. Two important legal drivers behind this merger wave were the Supreme Court's decisions in the *Trans-Missouri* and *Addyston Pipe* cases. *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 324 (1897) (prohibiting all restraints on trade, irrespective of reasonableness); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 229 (1899) (explaining that "[w]hile unfriendly or discriminating legislation of the several states may have been the chief cause for granting to Congress the sole power to regulate interstate commerce, yet we fail to find in the language of the grant any such limitation of that power as would exclude Congress from legislating on the subject and prohibiting those private contracts which would directly and substantially, and not as a mere incident, regulate interstate commerce."). Both cases involved associations, or pools, of competing firms who sought to cooperate together to stabilize market conditions in their industries (railroad freight and pipe manufacturing, respectively). The decisions struck down these arrangements as violations of the Sherman Act. *Trans-Missouri Freight Ass'n*, 166 U.S. at 290; *Addyston Pipe & Steel Co.*, 175 U.S. at 229. By imposing restrictions on collaborations among competitors, the cases provided incentives for competitors to merge together rather than continue as separate entities. *See e.g.*, NAOMI LAMOREAUX, THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895–1904 (1988); RALPH L. NELSON, MERGER MOVEMENTS IN AMERICAN INDUSTRY 1895–1956 (1959); Charles M. Yablon, *The Historical Race Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880–1910*, 32 J. CORP. L. 323, 355 (2007) (describing consensus views about why there was a merger boom).

156. WU, *supra* note 6, at 12.

157. LAMOREAUX, *supra* note 155, at 182.

158. *See* Collins, *supra* note 102, at 2345 ("Only seven cases—four bills in equity and three criminal cases were brought by the United States during the two and a half years that President Harrison remained in office after the passage of the Sherman Act.").

Harrison administration—which ran from 1889 to 1893—brought just seven antitrust cases, one of which was against a labor union.[159] The Cleveland administration—which ran from 1893 to 1897—brought eight cases, four of which were against labor unions.[160] Sherman Act prosecutions reached their low point during the McKinley administration—which ran from 1897 to 1901—during which time the federal government brought just three cases under the law.[161] Part of the problem was that President McKinley believed that it was simply too difficult to sort out which types of economic cooperation were bad and which were good.[162] As he stated in his 1899 Annual Message, there was deep disagreement about the virtues of big business.[163] "Different [s]tates take different views as to the proper way to discriminate between evil and injurious combinations and those associations which are beneficial and necessary to the business prosperity of the country," he remarked.[164]

It was not immediately clear that Theodore Roosevelt, who became president in 1901 following the assassination of President McKinley,[165] would revive the Sherman Act. He is now known as a trustbuster, but in his early career, he had expressed somewhat equivocal views of corporate power. In a 1899 letter, written when he was governor of New York, Roosevelt had said that "[t]here is a great (although largely irrational) feeling against trusts, and blind demand for an immediate remedy of all evils, real and imaginary, that they cause."[166] In 1900, in his Annual Message to the state legislature, Roosevelt had declared that "[m]uch of the legislation not only proposed but enacted against trusts is not one whit more intelligent than the mediaeval bull against the comet, and has not been one particle more effective."[167] But as president, Roosevelt had a change of heart—at least partially in response to John D. Rockefeller and Standard Oil's efforts to defeat Roosevelt's legislative agenda.[168] During Roosevelt's seven years in office, his administration brought 44 antitrust cases, including the groundbreaking prosecution of the railroad conglomerate, Northern Securities, and, most famously of all, the case against Standard Oil.[169] During this unprecedented boom in antitrust enforcement, Roosevelt insisted that he was not seeking to prevent the growth of corporations.[170] In his first Annual Message to Congress as president, on December 3, 1901, Roosevelt highlighted that the dramatic increase in the scale of

159. THORELLI, *supra* note 97, at 376.

160. *Id.* at 384.

161. *Id.* at 405.

162. President William McKinley, Third Annual Message (Dec. 5, 1899), *reprinted by* A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 6356, 6362 (James D. Richardson ed., 1917).

163. *Id.*

164. *Id.*

165. *Theodore Roosevelt*, HIST. (June 30, 2025), https://www.history.com/articles/theodore-roosevelt [https://perma.cc/C9RB-G939].

166. THEODORE ROOSVELT, *Letter from Theodore Roosevelt to Bellamy Storer, Sept. 11, 1899*, *in* THE LETTERS OF THEODORE ROOSEVELT 1068–69 (Elting Elmore Morison ed., 1951).

167. THEODORE ROOSEVELT, *Annual Message to the Legislature of New York, Jan. 30, 1900*, *in* 17 THE WORKS OF THEODORE ROOSEVELT 51 (1925).

168. *See* BRUCE BRINGHURST, ANTITRUST AND THE OIL MONOPOLY: THE STANDARD OIL CASES 1890–1911 129 (1979) (explaining Roosevelt's change of heart).

169. *See* Collins, *supra* note 102, at 2346 (charting actions brought by the Department of Justice under various administrations).

170. Theodore Roosevelt, *President Theodore Roosevelt, 1901 Annual Message to Congress*, *in* 15 MESSAGES AND PAPERS OF THE PRESIDENTS 6646–48 (1917).

corporations was a natural consequence of modern industrial life—it could not be reversed unless one wished to reverse the benefits of the Industrial Revolution.[171] Instead, he wished for a reasonable accommodation between the benefits of cooperation between individuals and the benefits of competition between firms:

> There is a wide-spread conviction in the minds of the American people that the great corporations known as trusts are in certain of their features and tendencies hurtful to the general welfare. This springs from no spirit of envy or uncharitableness, nor lack of pride in the great industrial achievements that have placed this country at the head of the nations struggling for commercial supremacy. It does not rest upon a lack of intelligent appreciation of the necessity of meeting changing and changed conditions of trade with new methods, nor upon ignorance of the fact that combination of capital in the effort to accomplish great things is necessary when the world's progress demands that great things be done. It is based upon sincere conviction that combination and concentration should be, not prohibited, but supervised and within reasonable limits controlled; and in my judgment this conviction is right.[172]

In short, Roosevelt sought to channel the cooperative features of corporations towards more moral ends.

The Supreme Court, meanwhile, proved somewhat divided on the proper interpretation of the Sherman Act. In one of the first major decisions on the law, the 1904 case of *Northern Securities Co. v. United States*, Justice John Harlan, writing for the five justices in the majority, held that a railroad holding company had violated the Sherman Act when it combined with another railroad company. "Congress has the power to establish rules by which interstate and international commerce shall be governed, and, by the Anti-Trust Act, has prescribed the rule of free competition among those engaged in such commerce," Harlan wrote.[173]

> As in the judgment of Congress the public convenience and the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce . . . that must be, for all, the end of the matter if this is to remain a government of laws, and not of men.[174]

But Justice Oliver Wendell Holmes wrote a blistering dissent, joined by three other justices, in which he rejected Harlan's assertion that promoting competition was the goal of the Act. "The [A]ct says nothing about competition," he wrote.[175] "It was the ferocious extreme of competition with others, not the cessation of competition among the partners, that was the evil feared."[176] It would be nonsensical to think that two individuals in the same trade could not form a corporation for the purpose of pursuing some venture, even if that meant the two would cease to compete with one another.[177] The Sherman Act did not "apply to an arrangement by which competition is ended through community of

171. *Id.*
172. *Id.*
173. N. Sec. Co. v. United States, 193 U.S. 197, 331 (1904).
174. *Id.* at 337–38.
175. *Id.* at 403.
176. *Id.* at 405 (Holmes, J., dissenting).
177. *Id.*

interest."[178] It did not "require that all existing competitions shall be maintained."[179] In fact, it did not even "look primarily, if at all, to competition."[180] What did it require?

> It simply requires that a party's freedom in trade between the states shall not be cut down by contract with a stranger. So far as that phrase goes, it is lawful to abolish competition by any form of union. It would seem to me impossible to say that the words 'every contract in restraint of trade is a crime punishable with imprisonment' would send the members of a partnership between, or a consolidation of, two trading corporations to prison—still more impossible to say that it forbade one man or corporation to purchase as much stock as he liked in both . . . . According to popular speech, every concern monopolizes whatever business it does, and if that business is trade between two States, it monopolizes a part of the trade among the States. Of course, the statute does not forbid that. It does not mean that all business must cease.[181]

Seven years later, the Supreme Court revisited this debate in the landmark case of *Standard Oil Co. of New Jersey v. United States*. In an 8–1 decision, the Supreme Court held that Rockefeller's Standard Oil Company had violated the Sherman Antitrust Act by monopolizing the petroleum market.[182] In deciding the case, though, the Court fundamentally transformed the way that antitrust was interpreted by introducing a new "rule of reason" that asked whether a restraint on trade was "unreasonable" in order to determine whether it violated the Act.[183] The rule of reason has since become a guiding light of antitrust law, cited approvingly by the Supreme Court over decades of its jurisprudence.[184] The introduction of this rule of interpretation was driven at least in part by Justice Edward White's recognition that any other interpretation could potentially destroy the ability of individuals and firms to work together.[185] Holding that *all restraints on trade* were illegal, he pointed out, would mean that all *contracts* were illegal and thus that "the statute would be destructive of all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce."[186] Such a result could not possibly have been the intention of Congress.[187] "Freedom to contract was the essence of freedom from undue restraint on the right to contract," he concluded.[188] Agreement and rivalry both had roles to play in the market.

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178. *N. Sec. Co.*, U.S. at 405 (Holmes, J., dissenting).
179. *Id.* at 405–06.
180. *Id.* at 406.
181. *Id.*
182. Standard Oil Co. v. United States 221 U.S. 1, 82–83 (1911).
183. *Id.* at 61–62.
184. *See* Lee Loevinger, *The Rule of Reason in Antitrust Law*, 50 VA. L. REV. 23, 29–35 (1964) (evaluating the difference between per se and "rule of reason" approaches in antitrust jurisprudence); Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337, 371 (2000) (arguing that a workable approach to the "rule of reason" is complicated by the current antitrust regime); Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1384 (2009) (discussing the practical difficulties of the "rule of reason" approach).
185. *Standard Oil Co.*, 221 U.S. at 63.
186. *Id.*
187. *Id.*
188. *Id.* at 62.

B. The Clayton Antitrust Act

1. The Background

In the aftermath of the *Standard Oil* decision, numerous commentators across the political spectrum argued that the Supreme Court, by introducing the rule of reason, had eviscerated the Sherman Act. They asserted that allowing corporations to engage in "reasonable" restraints on trade fatally weakened the government's ability to police monopolies and their abusive behaviors. In 1912, both the Republican and Democratic parties included in their platforms a call for supplementary legislation strengthening the Sherman Act. The Democratic Party platform, for example, stated that "we regret that the Sherman Anti-trust Law has received a judicial construction depriving it of much of its efficiency, and we favor the enactment of legislation which will restore to the statute the strength of which it has been deprived by such interpretation."[189] When Woodrow Wilson won the election, he made it clear that additional antitrust legislation was one of his top priorities.[190]

Just how antitrust law could be "strengthened" was, again, a matter of tremendous disagreement. Reform proposals varied widely. In the legislature, a variety of possibilities were debated, everything from adding a long list of specific business practices that were prohibited by the Act to a total repeal of the Sherman Act itself.[191] Still others proposed that a new regulatory commission be created to approve price-fixing agreements that businesses agreed among themselves.[192] Louis Brandeis, the future Supreme Court justice and then activist lawyer, wrote that, "the proper function of the government is to encourage not combination, but cooperation" and "[t]here is the large field for constructive legislation."[193]

President Woodrow Wilson himself argued that economic regulation needed to be guided by a firmer sense of ethical duty. "We can't abolish the trusts; we must moralize them," he said in a 1905 speech.[194]

> Our thinkers, whether in the field of morals or the field of economics, have before them nothing less than the task of translating law and morals into the terms of modern business . . . We shall never moralize society by fining or even dissolving corporations; we shall only inconvenience it. We shall moralize it only when we make up our minds as to what transactions are reprehensible, and bring those transactions home to individuals with the full penalty of the law.[195]

But as Wilson recognized in his writings, cooperation and competition worked hand in hand. In his 1913 book, *The New Freedom*, he explained that "a modern corporation is a means of co-operation in the conduct of an enterprise which is so big that no one man

189. EDWARD STANWOOD, A HISTORY OF THE PRESIDENCY: FROM 1897–1916 262 (1916).

190. *See* LETWIN, *supra* note 81, at 270–71 (discussing Wilson's strategizing with Congressional Democrats).

191. *Id.* at 268.

192. *Id.*

193. LOUIS BRANDEIS, *Letter from Louis Brandeis to Charles Richard Crane*, *in* LETTERS OF LOUIS BRANDEIS 510, 511 (Melvin I. Urofsky & David W. Levy eds., 1972).

194. WOODROW WILSON, *Address on Trusts and Labor Unions at New Rochelle, New York*, *in* 16 PAPERS OF WOODROW WILSON 14, 14 (Athur S. Link ed., 1974).

195. WOODROW WILSON, *Politics*, *in* 17 PAPERS OF WOODROW WILSON 322–25 (Arthur S. Link ed., 1974).

can conduct it, and which the resources of no one man are sufficient to finance."[196] In an earlier book, *The State*, he argued that competition was essential to the functioning of the market, but there was a middle path between laissez-faire capitalism and socialism.[197] "The limit of state functions is the limit of necessary cooperation on the part of society as a whole, the limit beyond which such combination ceases to be imperative for the public good and becomes merely convenient for industrial or social enterprise," he wrote.[198]

> There are relations in which men invariably have need of each other, in which universal cooperation is the indispensable condition of even tolerable existence . . . . The divisions of labor and the combinations of commerce may for the most part be left to contract, to free individual arrangement, but the equalization of the conditions which affect all alike may no more be left to individual initiative than may the organization of government itself. Churches, clubs, corporations, fraternities, guilds, partnerships, unions, have for their ends one or another special enterprise for the development of man's spiritual or material well-being: they are all more or less advisable.[199]

Cooperation, thus, played an essential role in Wilson's vision of a moral economy. As he concluded,

> [C]ooperation is necessary . . . when it is indispensable to the equalization of the conditions of endeavor, indispensable to the maintenance of uniform rules of individual rights and relationships, indispensable because to omit it would inevitably be to hamper or degrade some for the advancement of others in the scale of wealth and social standing.[200]

2. The Legislation

On February 26, 1913, the Senate Interstate Commerce Committee issued a report calling for additional antitrust legislation to simultaneously strengthen the Sherman Act—to better prevent monopoly—and clarify it—to give businesses more certainty about what types of behavior were prohibited.[201] The committee endorsed competition as the centerpiece of antitrust law, stating, among other things, that "the progress of the world depends in a large measure upon that fair, reasonable rivalry among men which has hitherto characterized the advances of civilization."[202] But it also recognized that there was a lively debate about where competition was appropriate and where it wasn't.[203] "The committee will not at this time enter upon an extended argument respecting the policy of maintaining competition or competitive conditions in the business of the country," the report explained.[204]

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196. WOODROW WILSON, THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE 11 (1913).

197. WOODROW WILSON, THE STATE: ELEMENTS OF HISTORICAL AND PRACTICAL POLITICS 662–63 (1889).

198. *Id.* at 664.

199. *Id.* at 665.

200. *Id.* at 664.

201. S. REP. NO, 62–1326, at 2 (1913).

202. *Id.*

203. *Id.*

204. *Id.*

> It is well understood that there are many distinguished students and highly trained thinkers who believe that the age of competition is past, and that for the struggle which competition involves there should be substituted combination and cooperation, under such regulation and supervision as will protect the people from the oppression of monopolistic power, and added to the students and thinkers who have reached this conclusion through mere observation and investigation there are many men engaged in commerce, and who therefore speak from a practical standpoint, who have also concluded that some form of regulated monopoly or concentration should be adopted.[205]

Consistent with the position of the Interstate Commerce Committee, Democratic Congressman Henry D. Clayton of Alabama, in introducing his new bill to supplement the Sherman Act, made competition the centerpiece of his law. His bill explicitly incorporated competition into the governing standard of antitrust law. Section 2 prohibited firms from engaging in price discrimination where the effect of such discrimination "may be to substantially lessen competition or tend to create a monopoly."[206] Section 3 prohibited exclusive dealing contracts where the effect was to "substantially lessen competition or tend to create a monopoly."[207] And Section 7 prohibited corporations from acquiring the stock of another corporation where the effect of such acquisition "may be to substantially lessen competition . . . or tend to create a monopoly."[208] The Clayton Act was paired with a Federal Trade Commission Act, which established a government body devoted to preventing "unfair methods of competition."[209] So, for the first time in the history of antitrust, competition had been incorporated into the law.

At the same time, the legislative debates surrounding the Clayton Act demonstrated that many legislators had nuanced views about competition and, in many cases, viewed the law more as a tool for promoting cooperation and collaboration than competition, at least in some sectors of the economy. Numerous legislators, for example, focused on the importance of promoting better coordination among laborers.[210] Some of the first prosecutions under the Sherman Act had been against unions, and many legislators believed this to be inconsistent with the intent of the law.[211] Senator Augustus Bacon and Congressman Charles Bartlett even introduced an alternative bill that would have provided that it was not unlawful for employees to "enter into any arrangements, agreements, or combinations with a view of lessening their hours of labor, or of increasing their wages, or of bettering their condition" or for farmers to enter into arrangements or combinations aimed at

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205. *Id.*

206. An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies, Pub. L. No. 63-212, § 2, 38 Stat. 730, 730–31 (1914).

207. *Id.* § 3.

208. *Id.* § 7.

209. 15 U.S.C. § 45.

210. *See* Dallas L. Jones, *The Enigma of the Clayton Act*, 10 INDUS. & LAB. REL. REV. 201, 202–03 (1957) (discussing a pressure campaign from organized labor to amend the Clayton Act to exclude labor from its reach); DAVID DALE MARTIN, MERGERS AND THE CLAYTON ACT 7 (1959) (noting one labor leader's fear that the antitrust law would be used against union organizing).

211. *See* Loewe v. Lawlor, 208 U.S. 274 (1908) (holding that union activity that restrained interstate trade violated federal antitrust laws).

"enhancing the price of agricultural or horticultural products."[212] The bill lost out to the Clayton Act, but its spirit was brought into debates on the law as legislators increasingly sought to protect the ability of workers and farmers to cooperate together.[213]

Other legislators stated that they were voting for the bill in order to protect working men and women against the unfair leverage that large corporations possessed over them. Republican Congressman Thomas Konop, for example, delivered an impassioned speech on the virtues of workers organizing collectively to defend their rights:

> We are aiming at the gigantic trusts and combinations of capital and not at associations of men for the betterment of their condition . . . . Let us put the man above the dollar and exempt all associations of men organized for the betterment of their condition . . . . . What is it that makes our country so great? Not the idler, not the men who sit amidst downy bolsters and costly appliances, but the men who work with hand and brain. These are the men who contribute to our country's greatness. These are the men who produce the wealth of this country. It is true that both capital and labor are essential in our industrial progress, both are entitled to consideration, but the men who labor are entitled to higher consideration, because they are the producers of all wealth and capital . . . . What we should do is not to hamper these great organizations of laborers and farmers of the land, but to encourage them in the conservation of the health and welfare of the great masses.[214]

Congressman Percy Quin of Mississippi echoed Konop's sentiments when he denounced the "great and powerful influence of monopolistic corporations."[215] "How have these financial kings, many of them common thieves, filling high places, operated for the last few years?" he asked.[216]

> The powerful trusts of this country have not only held up the public and forced them to pay an exorbitant price for all the necessities of life, but they have been able to hold the produce of the farm down to the minimum price. They have forced the farmers to pay big prices for what they buy and compelled them to accept small prices for what they raise on their farms. This greed of organized wealth has held the wages of the poor men, women, and children in factories and mines down to the lowest scale, and the tills of the powerful have been filled with dollars coined out of this poor, human labor.[217]

In other words, the problem with the American economy was not just that corporations had driven up prices. It was also that the law allowed stockholders and managers to work together, while small businesses and workers were forced to fend for themselves. This was a fundamentally unequal playing field in which ordinary market forces no longer functioned.

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212. Allyn A. Young, *The Sherman Act and the New Anti-Trust Legislation II*, 23 J. POL. ECON. 305, 321 (1915).

213. *Id.*

214. 51 CONG. REC. 9545 (1914).

215. *Id.* at 9546.

216. *Id.* at 9547.

217. *Id.*

Another area in which legislators sought to strengthen cooperation was among individual farmers. Senator Albert Cummins of Iowa, for example, stressed the great value of allowing farmers to share knowledge and build relationships with each other. "I have never heard it suggested," he said, "that these associations where farmers gather together in a neighborhood, a county, a state, for the purpose of exchanging information, of increasing acquaintance, of cultivating good fellowship, were contrary to the antitrust law."[218] The Sherman Act "was not designed to prevent cooperation of this sort."[219] Congressman Horace Towner of Iowa lauded the great benefits that farmers' societies had bestowed on American households:

> The benefits of farmers' organizations designed to induce a larger production, better quality, cheaper transportation rates, better prices, and better market facilities are generally recognized . . . Local cooperative association is perhaps the most effective means by which conditions in regard to the matters stated can be improved, and such improvement will result in benefit for the consumer as well as the producer. To restrain such associations would be absurd. To declare them unlawful would be the very height of folly.[220]

Finally, a number of legislators sought to ensure that the Clayton Act would not interfere with the American tradition of freedom of contract.[221] The ability of individuals and firms to reach binding agreements among themselves was a foundational feature of the economy, they asserted.[222] Without it, markets simply could not exist.[223] Senator James Lewis, for example, argued that the freedom of individuals to transact with one another was sacrosanct.

> [W]here we attempt in this body to pass a law which specifically says that A shall not contract with B that the latter shall receive from the former supplies, we invalidate a contract between A and B in the face of the specific provision of the Constitution that allows to each individual liberty of transactions between himself and another individual, and we could not pass such an act as that without doing two things—invading the domain of personal liberty to contract and violating the domains of personal rights of contract.[224]
>
> Only that conduct of A against the world and against the community may be interdicted by law, unless the [A]ct is contrary to good morals and to justice, while an arrangement which is made between A and B as to sales between

218. *Id.* at 13,981.

219. 51 CONG. REC. 13,981 (1914).

220. *Id.* at 9548.

221. It should be remembered that just nine years prior, the Supreme Court had handed down its infamous decision in *Lochner v. New York*, holding that a law regulating the working hours of bakers violated bakers' right to freedom of contract. Lochner v. United States, 198 U.S. 45, 53 (1905). Justice Oliver Wendell Holmes wrote a blistering dissent arguing that "a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*." *Id.* at 75 (Holmes, J., dissenting); *see also* Rudolph Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263, 267 (previewing the two competing theories of antitrust law).

222. 51 CONG. REC. 14,204–05 (1914).

223. *Id.*

224. *Id.*

> themselves, a contract between themselves, is a different matter, and law designed to prevent such contracts as that infringes the personal liberty of individuals.[225]

Freedom to cooperate with others, legislators asserted, formed an essential part of the American conception of economic liberty.[226]

In the end, the Clayton Act included specific provisions aimed at protecting the right to cooperate in the market. In Section 6 of the Act, the law provided that:

> The labor of a human being is not an article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof.[227]

With these provisions in place, the Senate passed the Act on October 5, 1914, with a vote of 35–24.[228] The House of Representatives passed it on October 8, 1914, by the wide margin of 245–52.[229] President Woodrow Wilson signed the Clayton Antitrust Act into law on October 15, 1914.[230]

3. The Aftermath

In the years after the passage of the Clayton Antitrust Act, courts and policymakers increasingly struggled to balance antitrust law's seemingly conflicting pursuit of competition and cooperation. What counted as competition? What counted as cooperation? Where was the line between permissible market profit-seeking and impermissible market manipulation? These were vexing problems that led early courts to establish a range of conflicting and ambiguous standards for business.[231]

In the next several decades, through the steady process of judicial interpretation, competition began to play a larger and larger role in antitrust analysis, and cooperation receded from the field. The Clayton Act had introduced competition into antitrust law's explicit standard of review, and this forced litigants to defend their actions in terms of their procompetitive effects.[232] Over time, the promotion of corporate competition migrated from interpretations of the Clayton Act—where it was explicitly mentioned in the statutory language—into interpretations of the Sherman Act—where it was not.[233] By the middle of the century, the Supreme Court was stating the Sherman Act was "a comprehensive charter of

225. *Id.*

226. *Id.*

227. An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies, Pub. L. 63-212, § 6, 38 Stat. 730, 731 (1914).

228. 51 CONG. REC. 16,170 (1914).

229. *Id.* at 16,344.

230. *The Clayton Antitrust Act*, HIST., ART & ARCHIVES, https://history.house.gov/HistoricalHighlight/Detail/15032424979 [https://perma.cc/3BWM-37WN].

231. *See* Peritz, *supra* note 221, at 279–300 (discussing the competitive effects under the so-called "rule of reason" approach).

232. *Id.*

233. *Id.*

economic liberty aimed at preserving free and unfettered competition as the rule of trade."[234]

But still, echoes of the cooperative values of antitrust law resurfaced from time to time. After all, markets relied on countless contracts, agreements, and combinations, and courts were hesitant to strike all of these down. In the *Chicago Board of Trade v. United States* case, for example, the Supreme Court was faced with determining whether commodity market rules governing when and at what price members could buy and sell grain on the exchange violated the Sherman Act.[235] The government argued that the rule constituted an illegal effort at price-fixing and, thus, violated the Sherman Act's prohibitions of restraints on trade.[236] The Chicago Board of Trade responded that its rule was motivated by a desire "not to prevent competition or to control prices, but to promote the convenience of members by restricting their hours of business and to break up a monopoly in that branch of the grain trade acquired by four or five warehousemen in Chicago."[237] The Supreme Court agreed with the Board and upheld its market rules. As Justice Brandeis explained,

> [T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates, and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question, the court must ordinarily consider the facts peculiar to the business to which the restraint is applied, its condition before and after the restraint was imposed, the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.[238]

Brandeis concluded that the exchange rule "has helped to improve market conditions."[239]

A similar result was reached in *Appalachian Coals Inc. v. United States*, a case involving an association of coal miners who had agreed among themselves to set fixed prices and sell their coal through a mutual sales agent.[240] Despite the seemingly clear anti-competitive effect of this agreement among coal producers, the Court found that the combination did not violate the Sherman Act's prohibitions on restraints on trade.[241] As the Court wrote,

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234. N. Pac. Ry. v. United States, 356 U.S. 1, 4 (1958) (explaining that for good measure, he added that "[i]t 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 conductive to the preservation of our democratic political and social institutions. Even were that premise open to question, the policy unequivocally laid down by the Act is competition").

235. Bd. of Trade v. United States, 246 U.S. 231 (1917).

236. *Id.* at 238.

237. *Id.* at 237.

238. *Id.* at 238.

239. *Id.* at 240.

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

241. *Id.*

> A co-operative [e]nterprise, otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions, where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities.[242]

Once again, a court had stressed that the ability of merchants to cooperate over the rules of their transactions was essential to the proper functioning of the economy.[243]

Scholars, too, recognized that elevating competition into the sole goal of antitrust law had troubling implications if taken to its logical endpoint.[244] Some questioned whether competition was an appropriate goal for lawmakers and judges to pursue.[245] Others sought to reconcile the contradictions of competition with increasingly complicated conceptions of it.[246] The economist Allyn A. Young, for example, wrote in an influential 1915 article in the Journal of Political Economy that, while corporations were competing to defeat their rivals, this did not mean that they were seeking to become monopolies.[247] As he explained:

> It is often urged that to attempt to maintain competition by prohibiting attempts to monopolize is illogical, since monopoly is the goal of competition, and achieved monopoly is merely the result of thoroughly successful competition. The aim of each competitor is to aggrandize his own business at the expense of his rivals, and just so far as he leaves his rivals in partial possession of the field he falls short of complete success. The simplicity of this reasoning makes it attractive, but it is too simple to fit the facts of the case . . . . There is a substantial difference between competing and "attempting to monopolize" in purpose and consequently in methods. The ordinary competitor . . . does not have the establishment of monopoly in mind as an end. He strives to increase his profits by increasing his trade, and in so doing he usually endeavors to acquire as much as he can of the custom enjoyed by his competitors. But the thing directly sought is such increase of his profits as is possible under competitive conditions. The effect of his policies on his competitors is secondary and, generally speaking, indirect. The phrase "attempting to monopolize" on the other hand is meaningless if it does not refer to conscious efforts to get rid of the limitations which competition sets upon one's ability to buy and sell at such prices and on

242. *Id.* at 373–74.

243. The importance of economic cooperation also played a role in the formation of the National Industrial Recovery Act of 1933. The landmark legislation was a centerpiece of the Franklin D. Roosevelt's New Deal program that sought to end the Great Depression, and, importantly for our purposes, authorized trade associations to enact codes of fair competition, providing them an exemption from the antitrust law. *See* Barak Orbach, *The Present New Antitrust Era*, 60 WM. & MARY L. REV. 1439, 1448–50 (2019) (discussing the "fairness era" that "emerged from the repudiation of laissez-faire constitutionalism").

244. *See generally* Gilbert H. Montague, *'Coöperation' and the Anti-Trust Laws*, 63 ANNALS AM. ACAD. POL. & SOC. SCI. 69 (1916) (suggesting that there is a change in the commercial and industrial world from competition to cooperation); Young, *supra* note 17, at 214–15 (considering the idea that monopoly is merely the result of competition).

245. *See* Montague, *supra* note 244, at 69 (suggesting that there is a change in the commercial and industrial world from competition to cooperation).

246. *See* Young, *supra* note 17, at 214–15 (considering the idea that monopoly is merely the result of competition).

247. *Id.*

> such terms as one pleases. The elimination of competition through the absorption or crippling of competing establishments becomes the direct and primary object, and the methods used are adapted to this end.

In other words, Young concluded, corporations weren't competing to eliminate their rivals.[248] They were competing to maximize their profits.[249] If that *happened* to require the elimination of their rivals, that was merely an incidental effect of an otherwise beneficial strategy. "The contention that 'to compete' and 'to attempt to monopolize' are synonymous is clearly unsound," he concluded.[250] "They are definitely antagonistic in principle."[251]

C. The Hart-Scott-Rodino Antitrust Improvements Act

1. The Background

During the early years of the 1970s, the American economy, after a long period of expansion following the post-war boom, suddenly ground to a halt.[252] The combined effects of inflation, economic stagnation, oil crises, and the costly war in Vietnam all contributed to a period of severe economic retrenchment.[253] Unemployment shot up from 3.5% in December 1969 to a high of 9% in May 1975, the highest since the end of World War II.[254] The U.S. economy contracted, falling from a 7.2% rate of real GDP growth in 1972 to a -2.1% rate in 1974.[255] A stock market crash destroyed some 48% of the share value of public companies in the period between 1972 and 1974.[256]

Politicians seeking to reverse America's economic woes reached different conclusions about the source of the problem. Some believed that the increasing globalization of the world economy had rendered American companies unable to keep pace with foreign rivals, who could produce goods more cheaply and efficiently.[257] In their minds, American companies could only compete internationally if they grew larger, that is, if they could ramp up production and increase market share, particularly through the use of mergers and acquisitions.[258] Other countries, after all, were allowing—and in some cases actively supporting—the formation of national champions, and so, the argument went, should the American government.[259]

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248. *Id.*
249. *Id.*
250. *Id.* at 215.
251. Young, *supra* note 17, at 214–15
252. *See* JOHN STEELE GORDON, AN EMPIRE OF WEALTH: THE EPIC HISTORY OF AMERICAN ECONOMIC POWER 382–86 (2004) (describing the state of the American economy through the years).
253. *Id.*
254. *Databases, Tables & Calculators by Subject*, U.S. BUREAU OF LAB. STATS, https://data.bls.gov/timeseries/LNS14000000?years_option=all_years [https://perma.cc/T8HM-YLF8].
255. E. Philip Davis, *Comparing Bear Markets—1973 and 2000*, 183 NAT'L INST. ECON. REV. 78, 81 (2003).
256. *Id.* at 79.
257. *See* Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST L.J. 865, 872–73 (1997) (highlighting the rise of economic globalization and international competition by the mid-1970s).
258. *Id.*
259. *Id.*

But to other observers, the problem lay not in the dearth of large corporations in the American economy, but rather in their overabundance.[260] They argued that inflation, unemployment, and economic stagnation all stemmed from the increasing consolidation of markets into the hands of a few gargantuan firms.[261] The decade marked the high point of the age of the conglomerate, the sprawling corporations that acquired businesses in widely diverse industries in order to diversify revenue streams.[262] Symbolic of the era was Gulf and Western Industries, which ran an automotive supply business but eventually acquired a book company, a sugar company, an insurance company, a cigar company, the motion picture company Paramount Pictures, and the video game company Sega.[263] Most of these business lines were added through mergers and acquisitions, not through organic growth.[264] Reacting to the growth of these conglomerates, numerous politicians argued that American antitrust law needed to be strengthened, both in process and in substance, in order to combat the consolidation of industry and reignite American growth.[265]

2. The Legislation

On March 21, 1975, Senator Philip Hart introduced a bill entitled the "Antitrust Improvements Act" to the Senate.[266] As the title suggested, his bill included a series of provisions aimed at improving the federal government's ability to enforce its antitrust laws.[267] The bill contained three core changes to federal antitrust: it increased the powers of the Justice Department to investigate antitrust violations, it required companies to notify the Federal Trade Commission before completing large mergers or other acquisitions, and it authorized state attorneys general to file *parens patriae* actions on behalf of their citizens for antitrust violations.[268] The bill introduced the most sweeping changes to antitrust law since the Clayton Act of 1914, and, while it largely left intact the substantive standards of the Sherman and Clayton Acts, it made major alterations to the process by which these standards were enforced.[269]

Hart and other supporters of the bill defended the law by reference to its pro-competitive effect.[270] They argued that the American economy was suffering as a result of the many monopolies and oligopolies that had been constructed in recent years.[271] In his speech introducing the bill to the Senate, for example, Hart pointed out that "currently, one

260. *Id.* at 873.

261. *Id.* at 871.

262. *See, e.g.*, WILLIAM MAGNUSON, FOR PROFIT: A HISTORY OF CORPORATIONS 227–28 (2022) (describing how KKR became successful).

263. *See* Chris Yogerst, *How Paramount's First Big Sale Spurred a New Hollywood Era in 1966*, HOLLYWOOD REP. (July 8, 2024), https://www.hollywoodreporter.com/business/business-news/paramount-first-big-sale-gulf-western-1966-1235940696/ (on file with the *Journal of Corporation Law*) ("Paramount was taken over by Gulf + Western in late 1966 in what The New York Times called its 'biggest coup yet.'"); *Founder of Sega to Quit Top Post*, N.Y. Times, Nov. 2, 1983, at D2.

264. Yogerst, *supra* note 263.

265. *See* Horton, *supra* note 12, at 196–211 (discussing various bills considered to reform antitrust law).

266. S. 1284, 94th Cong. (1975).

267. *Id.*

268. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1390–91.

269. *See* 121 CONG. REC. 8143 (1975) (amending Antirust civil process acts).

270. *See* Horton, *supra* note 12, at 208–10 (describing underlying assumptions of those supporting the Act).

271. *See* 121 CONG. REC. 8143 (1975) (arguing in support of the pro-competitive elements of the legislation).

dollar out of every four dollars consumers spend goes to buy products produced by a concentrated industry."[272] This concentration was not produced by companies outcompeting their competitors, but rather by their acquiring them.[273] The federal government was ill-equipped to prevent anti-competitive mergers because it simply lacked the means to find out about them in advance.[274] "Until recently," he said, "the only method the Antitrust Division and Federal Trade Commission had to be aware of pending mergers or acquisitions was to read the general and trade press."[275] "In other words, if the Wall Street Journal missed one, so well may the Federal Trade Commission and the Antitrust Division."[276] And once two companies had merged, it was implausible for the federal government to challenge the transaction, even if it had an anti-competitive effect.[277] "After an illegal merger has taken place, securing adequate relief is extremely difficult," Hart explained.[278] "Once the eggs of the two companies have been scrambled, it becomes difficult, if not impossible, to pull them apart."[279] Congressman Hugh Scott, a co-sponsor of the bill, put it more simply. "Our system works best when we have full competition."[280]

But other legislators pointed out that atomized competition between individual entrepreneurs was inconsistent with the evolution of the modern economy and that greater cooperation among investors, producers, and sellers was essential in American capital formation, such as Senator James Buckley of New York, who remarked that "members of the investment community" understood the importance of mergers and acquisitions.[281]

> They understand the business service that is so often accomplished through mergers between corporations in fashions that have nothing whatsoever to do with the kind of concentration of market power that our antitrust laws were designed to prevent . . . They see, in other words, that the implications of this legislation . . . will be to dramatically curtail the ability of people to move from one investment to another and all that this has meant down through the years to permit our system of capital formation and mobility of capital to perform its wonders.[282]

He opposed the bill's tendency to restrict American companies' freedom to engage in mergers, acquisitions, and divestitures.[283]

Senator Paul Fannin, an Arizona Republican, focused on the harmful international ramifications of more stringent antitrust enforcement against American companies.[284] If American companies wanted to be able to compete against foreign rivals abroad, he argued, they needed to be able to cooperate with domestic rivals at home:

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272. *Id.*
273. *Id.*
274. *Id.*
275. *Id.*
276. 121 CONG. REC. 8143 (1975).
277. *Id.* at 15,310 (1976) (statement of Sen. Philip Hart).
278. *Id.*
279. *Id.*
280. *Id.* at 8148 (statement of Sen. Hugh Scott).
281. 122 CONG. REC. 16,928 (1976) (statement of Sen. James Buckley).
282. *Id.*
283. *Id.*
284. *Id.* at 16,930 (statement of Sen. Paul Fannin).

> We find ourselves lacking in that ability many times because of our inability to join our companies together to bring about an operation that can compete. We are in competition with countries such as Japan, West Germany, and France, countries that do not have all those restrictions that we have. In fact, in Japan, for instance, they have their government going hand in glove with their industries to see that they are in a position to compete in the other countries of the world. In fact, we have many reasons to be very jealous of what they are doing because it is working a great hardship on our industries and on the consumers in this country.[285]

New York Senator Jacob Javits highlighted the problem of globalization and argued that excessively rigid antitrust enforcement in the United States had harmed American companies.[286] Antitrust law had simply not kept pace with the radical changes in the market structure of the global economy.[287] "For many years, experts have been pointing out how the rigid application of the antitrust laws has put our exporters at a serious disadvantage," he remarked.[288] As a result, "a deep conflict" had arisen between "our antitrust philosophy and other major national policies."[289] "Uncertainty about the enforcement of U.S. antitrust law extraterritorially," he concluded, "is the greatest single inhibitor to increased foreign trade and investment."[290] He also took issue with Brandeis' elevation of competition into the "true test of legality" under the antitrust laws, arguing that "there is obvious uncertainty and unpredictability in applying that kind of test."[291]

The Hart-Scott-Rodino Antitrust Improvements Act suffered through an extraordinarily long and amendment-filled approval process, but it was finally signed into law by President Gerald Ford on September 30, 1976.[292] In a speech delivered in connection with the signing, Ford focused single-mindedly on its pro-competitive effects and entirely overlooked the other side of the debate on the benefits of market cooperation, declaring, "[a]ntitrust laws provide an important means of achieving fair competition." Further, Ford said,

> Our nation has become the economic ideal of the free world because of the vigorous competition permitted by the free enterprise system. Competition rewards the efficient and innovative business and penalizes the inefficient. Consumers benefit in a freely competitive market by having the opportunity to choose from a wide range of products . . . Individual initiative and market competition must remain the keystones to our American economy. I am today signing this antitrust legislation with the expectation that it will contribute to our competitive economy.[293]

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285. *Id.* at 16,936.
286. 122 CONG. REC. 16,711 (1976) (statement of Sen. Jacob Javits).
287. *Id.*
288. *Id.* at 16,712.
289. *Id.*
290. *Id.*
291. 122 CONG. REC. 16,711 (1976) (statement of Sen. Jacob Javits).
292. *Signing Statement on Hart-Scott-Rodino Antitrust Improvements Act*, AM. PRESIDENCY PROJECT https://www.presidency.ucsb.edu/documents/statement-signing-the-hart-scott-rodino-antitrust-improvements-act-1976 [https://perma.cc/YU2A-7RKJ] [hereinafter *President General Ford, Signing Statement*].
293. *Id.*

Competition, it can be argued, had come to believe, was the sole *raison d'etre* of antitrust law for Ford.

3. The Aftermath

With the passage of the Hart-Scott-Rodino Antitrust Improvements Act in 1976, the foundations of antitrust had been laid.[294] The substantive requirements of the Sherman and Clayton Acts, combined with the procedural notification requirements of the Hart-Scott-Rodino Act, have formed the basic scaffolding of antitrust analysis and enforcement ever since. Each year, corporate executives, dealmakers, and law firms closely analyze the DOJ's enforcement efforts, the FTC's notification thresholds, and judicial decisions to structure their advice on market behavior.[295]

Fifty years of caselaw have cemented competition as the central guidepost of antitrust analysis.[296] Any semblance of cooperation serving as a counterbalance against competition in the regulation of markets has disappeared from the judicial repertoire. Emblematic of this shift was the landmark Supreme Court decision in *Verizon v. Trinko* from 2004, where the Court held that Verizon had not violated the antitrust laws by providing inferior service to AT&T customers who were using Verizon's networks under a network sharing agreement.[297] Justice Antonin Scalia, writing for the majority, explained that "compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion."[298] Cooperation was the evil that antitrust sought to eliminate, and competition was the good that it sought to promote. Scalia's praise for competition led to an unusually frank discussion of what companies were competing *for*: to eliminate competition and become monopolies. As Scalia explained:

> 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.[299]

As a result, Scalia concluded, "[t]o safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct."[300] Despite framing cooperation as the "supreme evil" of antitrust, Scalia admitted that it might occasionally be required for a market to function properly. "Under certain circumstances, a refusal to cooperate with rivals can constitute

294. *See President General Ford, Signing Statement*, *supra* note 292 (explaining the improvements the Hart-Scott-Rodino Antitrust Improvement Act will have upon Anti-trust law).

295. *See, e.g.*, WILSON SONSINI GOODRICH & ROSATI, 2023 ANTITRUST YEAR IN REVIEW (2023), https://www.wsgr.com/a/web/vzuhaWrontQnC19JS4xz2B/antitrust-report-2023.pdf [https://perma.cc/E4JZ-LMNT].

296. *See* HOVENKAMP, *supra* note 29, at 83–86 (arguing competition is the central principle of antitrust law analysis).

297. Verizon Commc'ns. Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 415 (2004).

298. *Id.* at 408.

299. *Id.* at 407.

300. *Id.*

anticompetitive conduct and violate [the Sherman Act]," Scalia said.[301] But Scalia left it to future courts to sort this muddle out.[302]

III. IMPLICATIONS

The previous Part set forth a historical survey of the origins and debates around the principal federal antitrust laws. It focused, in particular, on the complicated ideas that politicians, scholars, and economists held about the interplay between competition and cooperation in the economy. Taken together, I believe that these stories raise doubts about the conventional wisdom regarding the central mechanisms of antitrust law. Antitrust was not always about competition, as conventional accounts assume. Instead, it was also about cooperation. Many legislators argued that they wished to *reduce* competition and *increase* cooperation in the American economy. And while promoting rivalry in the marketplace has come to dominate judicial and scholarly analysis of antitrust law, at key moments in the formation of antitrust law, a counternarrative focused on the importance of balancing the forces of antagonism with the forces of harmony.

This Part will turn to the implications of this revised historical understanding of our antitrust laws. In particular, it will make three arguments. First, it will argue that, by elevating competition into the single standard of antitrust analysis, we have led antitrust doctrine down a dead-end path, creating a patchwork of conflicting and ambiguous standards that provide little guidance to corporations, regulators, and judges. Second, it will argue that, by ignoring the role of cooperation in the capitalist tradition, we have impoverished our understandings of the nature of markets and their role in social life. And finally, it will argue that a more conscious balancing of cooperation and competition in antitrust law, what I term "cooperative competition," would be both consistent with the original intent of our antitrust statutes and improve regulators' ability to address the pressing political, economic, and social problems of our day.

A. The Perils of Competition

Competition is a flawed legal standard. It has not provided corporations with clear, objective rules on what types of behavior are permissible in the marketplace, and it has not provided judges with useful guidance about how to judge those behaviors when they emerge. In practice, it has proven an ambiguous and contradictory concept, one that has forced scholars and courts alike into contortions to develop coherent frameworks for understanding and analyzing corporate behavior.

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301. *Id.* at 408.

302. Frank Easterbrook of the Seventh Circuit Court of Appeals provided an alternative formulation that recognized more clearly the role of cooperation in antitrust. "The thoughts associated with [the Chicago school of antitrust] came from *doubts* about the model of atomistic competition. Through much of this century antitrust policy has come to grief because it was under the sway of that model. Judges were apt to condemn every practice that did not look like hearty yeomen competing from moment to moment. The prescription of this model, the dissolution of much economic organization, also would have dissolved efficient forms of cooperation. The task of antitrust policy is to find the right balance of competition and cooperation." Easterbrook, *supra* note 29, at 1707. *See also* Lester G. Telser, *Cooperation, Competition, and Efficiency*, 28 J.L. & ECON. 271, 272 (1985) ("[C]ompetition may require some cooperation in order to obtain efficiency.").

Let us start with the simplest conception of competition. At its most basic, in the context of economic activity, competition refers to the phenomenon of economic actors competing with one another. What are they competing for? To eliminate their competitors.[303] They might do so by selling a better product or charging a lower price, or they might do so by acquiring their competitors or merging with them. Some might claim, of course, that the ultimate goal of competition is not the elimination of competition, but rather the maximization of profits. But as economists have long recognized, profits must come from somewhere, and it is often at the expense of other competitors. It is always more profitable to be a monopoly than to operate in a competitive market, that is, where there are many buyers and sellers. Indeed, by definition, in a market with perfect competition, sellers have no profit at all.[304]

An even cursory glance at this simple conception of competition should reveal to an alert observer that there is a problem. The simple conception of competition cannot serve as a good legal standard for judging corporate behavior. A rule that states that "A must engage in B," where "B" is defined as "seeking to eliminate B" creates a classical paradox. One cannot satisfy the standard without violating the standard. Of course, one might imagine a rule that required corporations to seek to eliminate their competitors, but once they were successful at doing so, it forced them to create new competitors for them to best once again, in a kind of capitalist version of the myth of Sisyphus. But, to my knowledge, no politician has ever seriously proposed such a system.[305]

There is another, even more fundamental contradiction in the simple conception of competition: until we arrive at a fully atomized economy of individual merchants, there can always be more competition. If we wanted to maximize competition, we could simply ban all forms of cooperation in the economy, including the formation of corporations, the employer-employee relationship, and indeed any contract at all. All of these arrangements, after all, require individuals to cease competing on the open marketplace in one form or another. Corporations, at their heart, are simply legal vehicles for enhancing the ability of individuals—investors, managers, employees, and others—to cooperate towards common ends. Facebook's teams of software engineers cooperate to develop the company's code. Ford's welders and riveters work together to manufacture the company's cars. Harvard's professors work together to provide comprehensive education to the university's students. If the goal is competition, then these types of conglomerations should be prohibited. Such a rule would maximize the number of simple competitors in a given field, but it would, of course, be absurd. No one seriously thinks that such a world of atomized competition would be better, and so no one seriously asserts that competition should be understood in these terms.

Judges and scholars have long recognized, at least implicitly, that the simple conception of competition cannot serve as the organizing principle of antitrust law, and so they

303. Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 265 (2003) ("[P]erfectly desirable competitive behavior can 'foreclose competition' and 'destroy a competitor,' such as when a firm figures out how to make a better or cheaper product and thus takes away market sales from rivals and drives them out of the market.").

304. *See* RICHARD G. LIPSEY & K. ALEC CHRYSTAL, ECONOMICS 146–47 (2007).

305. Perhaps the closest version to this might be the process described by Frank Easterbrook as "erosion." In this view, a monopoly that extracts excess profits will have its market position eroded by the arrival of new competitors, so long as the barriers to entry are sufficiently low. *See* Easterbrook, *supra* note 14, at 31–33.

have articulated other ones. Competition should not be understood as the behavior of economic actors seeking to eliminate rival actors; it is something else. It is the economic structure that minimizes price and maximizes volume.[306] It is not a static state but rather a dynamic process.[307] Long-run competition can be achieved through short-term cooperation.[308] Competition is consumer welfare.[309] Competition is efficiency.[310] All of these rival concepts suffer from their own peculiar flaws. Most notably, they all drift further and further away from the ordinary meaning of competition and into their own idiosyncratic versions superimposed on antitrust law based on a set of political and moral values.

As might have been expected, the elevation of such a flawed concept into the central governing standard of antitrust law has, in fact, led to a thicket of conflicting caselaw and confused doctrine. Nowhere is this more evident than in the evolution of the Sherman Act. Section 2 of the Sherman Act provides that:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony.[311]

The provision seems admirably clear, as far as statutes go. It is illegal to monopolize, or to seek to monopolize, a trade. But this, however, is no longer the law, at least under current interpretations of it. By 2004, in the *Verizon v. Trinko* case, the Supreme Court was regularly interpreting the Sherman Act to *permit* monopoly so long as it was properly acquired.[312] "The opportunity to charge monopoly prices—at least for a short period—is what attracts business acumen in the first place," Justice Scalia wrote for the Court.[313] And what is it that distinguishes legal monopolies from illegal ones, according to Scalia? "[T]his offense requires, in addition to the possession of monopoly power in the relevant market, the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[314] In other words, if a company *seeks* to become a monopoly, it is engaging in prohibited anti-competitive behavior. But if instead it simply *happens* into a monopoly as a result of its "superior business acumen," it is engaging in permissible competitive conduct.

One can hardly imagine an interpretation more divorced from the plain meaning of the statute. But it should come as no surprise. By 2004, when the Supreme Court was deciding the case, the competition narrative had long been established as the predominant understanding of antitrust. There was little sense of an alternative, and, in fact, no justice

306. *See* AREEDA & HOVENKAMP, *supra* note 47, at 3–4.

307. *See* WU, *supra* note 14, at 9 ("It is based on the premise that the legal system often does better trying to protect a process than the far more ambitious goal of maximizing an abstract value like welfare or wealth.").

308. *See, e.g.*, Donald F. Turner, *Cooperation Among Competitors*, 61 NW. U. L. REV. 865, 865 (1967).

309. *See, e.g.*, BORK, *supra* note 11, at 61.

310. *See, e.g.*, Gellhorn, *supra* note 20, at 1.

311. 15 U.S.C. § 2.

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

313. *Id.* at 407.

314. *Id.*

dissented from Scalia's majority opinion.[315] Competition has become the unquestioned—and, indeed, unquestionable—goal of antitrust.

B. The Virtues of Cooperation

The elevation of competition and the disappearance of cooperation in antitrust law have not just led to a thicket of doctrinal problems.[316] It has also impoverished our understanding about the nature of markets. The competition narrative has contributed to the view that the economy is an arena somehow cut off from ordinary life, one not subject to the normal ethical values that otherwise govern human society. Individuals, when they leave their homes to commute to work in the morning, are transformed from moral beings guided by ethical constraints, into hyper-rational, self-interested actors seeking to extract resources from their fellow citizens. Anything other than this competitive dynamic in the marketplace is not just inconsistent with the American tradition of capitalism. It is illegal under the antitrust laws.

But the competition narrative has caused us to lose sight of the moral underpinnings of capitalism, ones that were much clearer in the past. The modern economy was not constructed solely out of the destructive ethos of corporate warfare. It was also heavily dependent on a host of cooperative behaviors: agreements, partnerships, the building of trust and the promise of mutual gain. Indeed, early theorists of capitalism often stressed that capitalism required a fundamentally ethical people. Adam Smith, the father of modern capitalism, ushered in this view of the economy in his own writings.[317] Smith, of course, is most often remembered as the inventor of the "invisible hand" analogy of capitalism.[318] And in his oft-quoted remark in *The Wealth of Nations*, he wrote that "it is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest."[319] Popular commentators take from these dispersed statements the view that Smith believed in the basically beneficial effects of competition. But, in fact, his conclusions in *The Wealth of Nations*, were drawn from his earlier work in moral philosophy, *The Theory of Moral Sentiments*. There, he wrote that morality was the foundation of all human interaction:[320]

315. Justice Stevens wrote a concurrence arguing that the plaintiff did not have standing to bring the lawsuit at all. *See Verizon Commc'ns. Inc.*, 540 U.S. at 416 (Stevens, J., concurring).

316. For a recent example of this doctrinal thicket, one need only look at the FTC and DOJ's 2024 withdrawal of their guidelines governing collaborations among competitors. In a joint statement announcing the change, the agencies wrote that the guidelines "no longer provide reliable guidance to the public about how enforcers assess the legality of collaborations involving competitors." Press Release, FTC, FTC and DOJ Withdraw Guidelines for Collaboration Among Competitors (Dec. 11, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/12/ftc-doj-withdraw-guidelines-collaboration-among-competitors [https://perma.cc/2AG6-GWDJ]. The statement recommended that companies should instead consult the "relevant statutes and caselaw to assess whether a collaboration would violate the law." *Id.* In other words, they should go back and re-examine the Sherman Act's words.

317. Glory Maria Liu, Inventing the Invisible Hand: Adam Smith in American Thought and Politics, 1776–Present (June 2018) (Ph.D. dissertation, Stanford University) https://stacks.stanford.edu/file/kz017qj1474/Liu_FullDiss_Inventing-augmented.pdf [https://perma.cc/JAH2-QNZV].

318. *Id.*

319. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 26–27 (R.H. Campbell et al. eds., 1976).

320. ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 13–14 (1759).

> What is it which prompts the generous, upon all occasions, and the mean upon many, to sacrifice their own interests to the greater interests of others? . . . . It is reason, principle, conscience, the inhabitant of the breast, the man within, the great judge and arbiter of our conduct . . . . It is from him only that we learn the real littleness of ourselves, and of whatever relates to ourselves, and the natural misrepresentations of self-love can be corrected only by the eye of this impartial spectator. It is he who shows us the propriety of generality and the deformity of injustice; the propriety of resigning the greatest interests of our own, for the yet greater interests of others, and the deformity of doing the smallest injury to another, in order to obtain the greatest benefit to ourselves.[321]

Smith held a basically altruistic view of humans, not a competitive one, and this view was essential to his conclusions about capitalism. In *The Wealth of Nations*, for example, he described the vast array of people involved in the production of even the simplest of goods in English life.[322] A wool coat required the "joint labour" of shepherds, sorters, wool-combers, carders, dyers, scribblers, spinners, weavers, fullers, dressers, merchants, ship-builders, sailors, ropemakers, and many more.

> If we examine, I say, all these things, and consider what a variety of labour is employed about each of them, we shall be sensible that, without the assistance and co-operation of many thousands, the very meanest person in a civilized country could not be provided, even according to, what we very falsely imagine, the easy and simple manner in which he is commonly accommodated.[323]

This was the miracle of capitalism—its remarkable ability to get people to work together.[324]

A similar evolution has taken place in corporate law. The corporation, at its heart, is a legal entity, created by the state, for the purpose of facilitating cooperation—between stockholders, between managers, between employees, and between each of these constituencies. At the end of the 19th century, commentators would regularly describe corporations in this cooperative light and, indeed, would denounce corporations that extracted too much profit from their employees or customers as unethical.[325] Recall Senators Stewart's words about the Sherman Act: "Do not strike at civilization and say that you will abandon the idea of cooperation, which is absolutely necessary, without which we could not exist as a nation or remain in any civilized state."[326] But a century of legal and political development slowly chipped away at this vision of the corporation and replaced it with market efficiency and shareholder value as the sole legal considerations of corporate directors.[327] By 1970, the economist Milton Friedman was remarking that the sole responsibility of corporate

321. *Id.*
322. SMITH, *supra* note 319, at 23.
323. *Id.*
324. *Id.*
325. *See* MAGNUSON, *supra* note 262, at 138–39.
326. 21 CONG. REC. 2566 (1890)
327. *See, e.g.*, William Magnuson, *The Failure of Market Efficiency*, 48 BYU L. REV. 827 (2023).

executives was to "make as much money as possible while conforming to the basic rules of the society."[328] Moral and ethical constraints had given way to the profit motive.

These broader legal shifts have not had merely theoretical effects on the economy. The Supreme Court has repeatedly stated that it will reject antitrust arguments based on any consideration—moral, social, or political—other than the promotion of competition. The most recent major antitrust decision in the Supreme Court, *NCAA v. Alston*, affirmed this view. The case involved NCAA policies restricting payments to college athletes, which a group of athletes alleged violated the Sherman Act.[329] In his opinion for the Court, Justice Gorsuch wrote that "[t]his Court has regularly refused . . . requests from litigants seeking special dispensation from the Sherman Act on the ground that their restraints of trade serve uniquely important social objectives beyond enhancing competition. . . . The statutory policy of the [Sherman] Act is one of competition and it precludes inquiry into the question whether competition is good or bad."[330] And again: "[U]ntil Congress says otherwise, the only law it has asked us to enforce is the Sherman Act, and that law is predicated on one assumption alone—competition is the best method of allocating resources in the Nation's economy."[331] The Court struck down the NCAA's restrictions as unlawful restraints of trade.

Knowing that this was the test that the Supreme Court would apply, the litigants themselves had framed their arguments in terms of competition. The players argued that college athletics was a product (a "collegiate sports product," in their language) in which universities "compete for the labor of student-athletes."[332] The athletic conferences replied that the NCAA was a joint venture that established rules on student-athletes' compensation because doing so was "necessary for creation of a desirable product."[333] But entirely missing from either side of this debate were the deeper moral questions at issue. Was it fair for a conglomeration of college coaches, conference commissioners, and television networks to enrich themselves to the tune of billions of dollars a year while the athletes themselves, who were risking life and limb in their sports, had their compensation severely restricted? Was it right for the NCAA to sanction athletes who signed pictures of themselves for a few thousand dollars, or who received housing and transportation benefits that allowed them to attend college debt-free? Was college athletics fundamentally a business focused on maximizing profit, or was it a part of a university's broader mission to pursue knowledge? These were important—and relevant—questions that went entirely unaddressed. The litigants could not justify their actions based on moral grounds because, if they did, they would lose the case. Instead, the universities and their students were forced to articulate their positions in terms of fundamentally antagonistic market forces out to maximize their profit at the expense of the other.[334]

328. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970) https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html (on file with the *Journal of Corporation Law*).

329. NCAA v. Alston, 594 U.S. 69, 73–74 (2021).

330. *Id.* at 94–95 (2021) (internal punctuation omitted).

331. *Id.* at 96 (internal punctuation omitted).

332. Brief for Respondents at 4, NCAA v. Alston, 594 U.S. 69 (2021) (No. 20-512), 2021 WL 859705.

333. Brief for Petitioners at 13, NCAA v. Alston, 594 U.S. 69 (2021) (No. 20-512), 2021 WL 398167.

334. *See id.* at 101–03 (showing petitioners using market theory grounds to argue their case).

Rediscovering the cooperative origins of antitrust would enrich our ability to have conversations about the purpose and ends of markets. Throughout the debates on the principal federal antitrust laws, legislators voiced their support for various forms of greater agreement and harmony within the economy. Sometimes they meant cooperation among small producers to share information among themselves. Sometimes they meant cooperation among workers to obtain better working conditions or pay. Sometimes they meant cooperation among American companies to pursue broader foreign policy goals. We should not foreclose companies, executives and workers from articulating and defending their actions in these broader moral terms.

C. Cooperative Competition

How would a more balanced vision of antitrust work? Recognizing the cooperative origins of antitrust, importantly, does not require us to abandon its competitive origins. The competition narrative played an essential part in the debates around the antitrust laws, and, in the Clayton Act, explicitly formed part of the standard for examining the legality of market behavior. Rivalry between firms to attract the business of consumers is an important feature of all modern economies. It provides incentives for innovation, efficiency and flexibility, and it has provided enormous benefits to American workers, consumers and businesspeople. As President Joe Biden remarked in 2021, "the heart of American capitalism is a simple idea: open and fair competition."[335]

But recognizing the role of competition in promoting prosperity should not prevent us from recovering a more balanced vision of antitrust law, one that recognizes that competition and cooperation as complementary forces. This view of antitrust as a tool for promoting "cooperative competition," is more consistent with the historical origins of antitrust. Antitrust law is not premised, and never has been, on the belief that competition between economic actors is the sole permissible form of economic behavior. It is based, instead, on a mixture of opinions about the promise and peril of market competition, as well as the promise and peril of its counterpart cooperation. A blended analysis of market behavior, one that assesses the legality of a market practice on a more holistic analysis of the nature of the behavior and the market, could provide a fairer and more transparent legal standard while simultaneously opening up new avenues for addressing economic harm.

A cooperative competition model of antitrust might, for example, ask regulators to analyze the broader purpose behind a transaction. Rather than simply assess a contract or transaction solely in terms of whether it increases competition (however that might be measured), regulators would instead explore the rationales driving the transaction, how they affect market dynamics, and their wider effects on society. Cooperative behaviors that promote some value underlying the antitrust laws—such as the balancing of the power of workers with those of employers, or the protection of small businesses, or the promotion of international trade—might well be upheld if not outweighed by the harms from a reduction of competition. While this type of balancing would necessarily involve complex assessments, it would be no more complicated than assessing the level of competition in a

335. President Joe Biden, Remarks at Signing of Executive Order Promoting Competition in the American Economy (July 9, 2021), https://bidenwhitehouse.archives.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy [https://perma.cc/B7G5-W76R].

market. It might also lead to different results than under current doctrine. Antitrust scholars have long assumed that the purpose of antitrust is the opposite—to reduce price and increase volume. But lower prices and more vigorous rivalry are not always beneficial, particularly in markets involving scarce resources or harmful externalities.

Consider, for example, the oil and gas industry.[336] Long criticized for its role in contributing to pollution and environmental harm, the oil and gas sector has defended its actions as responsive to market signals. Energy companies are no more free to set prices and production than any other company operating in a competitive market. When demand for oil and gas increases—which it has been doing for well over a century—they increase production. If they ignore market demands, other competitors are willing and able to fill the void and send them into bankruptcy. Competition between energy companies has simultaneously driven up production and kept prices down—in 2023, U.S. crude oil production reached an all-time high of 12.3 million barrels per day, more than any country had ever produced;[337] and, by one measure, in 2020 the price of oil was the same as it was in 1860, one-hundred sixty years before.[338] But if both for the interests of national security and environmental protection, it would be preferable for oil production to be reduced and price to be increased. One way to accomplish this might well be to allow energy companies to cooperate with one another by, for example, agreeing on production limits or price minimums. Cartels such as OPEC have a notorious reputation for misbehavior and favoritism, but their basic goal of reducing the overuse of limited resources could well have broader application in industry. Antitrust law has long stood in the way of such joint efforts.

Another area where greater cooperation between competitors holds promise is in the field of artificial intelligence. In the last few years, technology scholars, politicians and even industry leaders have raised concerns about the dramatic increase in the powers of machine-learning technology and the dangerous repercussions of its wider use.[339] But the hyper-competition that marks the field, and particularly the perception that there will be tremendous rewards for the first-mover, has caused technology companies to develop and deploy artificial intelligence models at a breakneck pace, often before sufficient testing or guardrail implementation has occurred.[340] The results have been predictably disastrous. Some models have led to disturbing and dangerous interactions with users.[341] Others have

336. For an in-depth discussion of the potential applications of domestic energy cartels, see James W. Coleman, *State Energy Cartels*, 42 CARDOZO L. REV. 2233 (2021).

337. *United States Produces More Crude Oil Than Any Country, Ever*, U.S. ENERGY INFO. ADMIN. (Mar. 11, 2024), https://www.eia.gov/todayinenergy/detail.php?id=61545 [https://perma.cc/ZA5H-D4ZE].

338. *See Oil and Commodity Prices Are Where They Were 160 Years Ago*, ECONOMIST (Apr. 27, 2020), https://www.economist.com/graphic-detail/2020/04/27/oil-and-commodity-prices-are-where-they-were-160-years-ago (showing the price of oil over several centuries) (on file with the *Journal of Corporation Law*).

339. *See* Kevin Roose, *A Conversation with Bing's Chatbot Left Me Deeply Unsettled*, N.Y. TIMES (Feb. 16, 2023), https://www.nytimes.com/2023/02/16/technology/bing-chatbot-microsoft-chatgpt.html (discussing the nature of AI chatbots) (on file with the *Journal of Corporation Law*); Margot E. Kaminski & Meg Leta Jones, *Constructing AI Speech*, 133 YALE L.J. F. 1212, 1212 (2023) (suggesting that technology does not inherently disrupt law).

340. *See* Karen Weise & Cade Metz, *The Race to Dominate A.I.*, N.Y. TIMES (Dec. 8, 2023) https://www.nytimes.com/2023/12/08/briefing/ai-dominance.html (examining the recent history of AI and what to expect in the future) (on file with the *Journal of Corporation Law*).

341. *See* Roose, *supra* note 339.

been blamed for disseminating illegal or harassing content.[342] Still others have been criticized as potentially having destabilizing global ramifications.[343] More cooperation among the major tech companies around the rules governing the development, training and use of artificial intelligence models might prove a useful way to reduce the prisoners' dilemma dynamic that currently typifies the field.

To be sure, cooperation has downsides. We rightly worry about the abusive practices of monopolies, and we know that market collusion can, in some instances, lead to higher prices, worse products, and fewer incentives to innovate. We might well conclude that the dangers of cooperation in any given field—whether energy, technology, or some other area—outweigh the benefits. We might even believe that handing these decisions to judges is a recipe for doctrinal confusion. But current doctrine forecloses us from even asking these questions. Competition has become the supreme good of antitrust, and cooperation has become the supreme evil. In the process, we have taken an array of regulatory tools off the table and hampered the creation of workable rules for understanding and shaping our economy.

CONCLUSION

For too long, antitrust law has been blinkered by an unwavering belief that market competition was the sole goal of our principal federal antitrust statutes. But this belief is based on shaky historical foundations and overlooks the significant evidence that legislators sought to protect the right of companies and individuals to cooperate with one another. Until the competition narrative is set aside in favor of this more balanced vision of market regulation, we are likely to remain beholden to a flawed and dangerous conception of capitalism that prioritizes certain values over others. The marketplace does not have to be a battlefield. It can also be a place of alliance and pact-making. Antitrust would do well to remember that.

342. *See* James Rundle, *FBI Warns Hackers' Use of AI Is Growing. So Is the Bureau's*, WALL ST. J. (May 9, 2024) https://www.wsj.com/articles/fbi-warns-hackers-use-of-ai-is-growing-so-is-the-bureaus-26a9f0e5?gaa_at=eafs&gaa_n=ASWzDAjqNhr0OGSbgaCI27r540m7Xha0lkNY9rAx_1DspK06PSUyyE-4hINLIXblRcM%3D&gaa_ts=68dab83e&gaa_sig=rFnqneLnd3oICIwiF9RMosUsbdo-Bmkd0WTu8hv2RfA_xHjMci73n198pwi09Jne-hw8DkgjoqYXYtJDxhyu9w%3D%3D (on file with the *Journal of Corporation Law*) (finding that cybercriminals use AI to create new ways to hide in compromised networks); Natasha Singer, *Teen Girls Confront an Epidemic of Deepfake Nudes in Schools*, N.Y. TIMES (Apr. 8, 2024), https://www.nytimes.com/2024/04/08/technology/deepfake-ai-nudes-westfield-high-school.html (on file with the *Journal of Corporation Law*) (demonstrating AI-developed harassment).

343. *See* Matt Egan, *AI Could Pose 'Extinction-Level' Threat to Humans and the US Must Intervene State Dept.-Commissioned Report Warns*, CNN (Mar. 12, 2024), https://www.cnn.com/2024/03/12/business/artificial-intelligence-ai-report-extinction (finding "catastrophic" national security risks posed by AI).