Antitrust's Fairness Goal

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Abstract

Today, most courts and commentators would say that the purpose of antitrust law is to protect competition in order to promote consumer welfare. But the antitrust statutes do not mention consumer welfare, and neither do the voluminous legislative histories. What Congress was actually trying to stop was the exploitation of consumers and suppliers by trusts and monopolies. These giant combinations and firms raised prices to consumers and reduced payments to suppliers to take their trading partners' wealth for themselves. Congress regarded this expropriation as deeply unfair, akin to robbery or extortion. The ultimate goal of antitrust law, in short, was not to enhance an economic measure of welfare but to stop the unfair treatment of consumers and suppliers.

Recognizing this paramount goal would strengthen antitrust enforcement in three major ways. First, it would help courts reject unwarranted limits on antitrust liability. This Article describes several of those limits, all based on economic models of welfare, and explains how focusing on exploitation would make it easier to discard them. Second, this focus would increase popular and political support for antitrust enforcement. The American people and their

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elected representatives do not back antitrust action because of technical concepts like consumer welfare and the competitive process. They support it because it protects them from unfair exploitation. Third, the goal will make it easier for courts to reject an array of doctrines that impose needless restrictions on antitrust action.

Many Americans also fear the power of huge firms like Apple, Google, and Amazon. This power enables these firms to distort the political process and downplay the preferences of their workers and communities. These concerns were important to the legislators who passed the antitrust laws and who call for especially close scrutiny of the tech giants' conduct today. The growth of gigantic firms in the digital age also presents antitrust with new challenges. Taking advantage of network effects and economies of scale, these firms grow naturally into dominant positions, but they also take steps to block competitors. Courts have recognized their exclusionary conduct but have struggled with asserted justifications and remedies. These issues are the next frontier for antitrust.

I. INTRODUCTION

Scholars have been writing about the goals of the antitrust laws for decades, yet there is still no consensus. Most courts and commentators support the consumer welfare standard—the view that the purpose of antitrust law is to maintain competition in order to promote consumer welfare.[1] But the consumer welfare standard is under attack. During the Biden administration, both the head of the Antitrust Division of the Department of Justice ("DOJ") and the Chair of the Federal Trade Commission ("FTC") rejected the standard, arguing that the aim of antitrust is not to maximize the welfare of consumers but to preserve competition.[2] Many scholars agree with these officials that consumer

1. *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (reasoning that the legislative debates indicated that "Congress designed the Sherman Act as a 'consumer welfare prescription'" (citation omitted)); FTC v. Actavis, Inc., 570 U.S. 136, 161 (2013) (Roberts, C.J., dissenting) ("The point of antitrust law is to encourage competitive markets to promote consumer welfare."); Sharif Pharmacy, Inc. v. Prime Therapeutics, LLC, 950 F.3d 911, 914 (7th Cir. 2020) ("It has long been recognized that the primary purpose of the federal antitrust laws is to protect the welfare of customers."); ROBERT H. BORK, THE ANTITRUST PARADOX 61 (1978) ("'Competition' [meant] a shorthand expression . . . designating any state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs through judicial decree."); HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE 2 (2005) ("The only articulated goal of the antitrust laws is to benefit consumers . . . .").

2. Jonathan Kanter, Assistant Att'y Gen. for Antitrust Div., U.S. Dep't of Just., Remarks at the New York City Bar Association's Milton Handler Lecture (May

welfare is flawed, but they do not agree on what should replace it. Some favor a broader concept of welfare—total welfare—which takes into account the welfare of producers as well as consumers.[3] Others maintain that *consumer welfare* cannot be the antitrust standard because antitrust law also protects *suppliers* like workers and farmers.[4] Yet others agree with Kanter and Khan that the touchstone is not welfare at all but rather competition or the competitive process.[5]

In this Article, I argue that Congress did pass the antitrust laws to maintain competition. But Congress wanted to maintain competition for a specific purpose—to protect consumers and suppliers from exploitation, not to promote a technical economic concept of welfare. Welfare differs significantly from exploitation. Welfare refers to an

18, 2022), https://www.justice.gov/archives/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association; Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 737–38 (2017). While at the FTC, however, Chair Khan did not, to my knowledge, support any enforcement actions that were inconsistent with the consumer welfare standard. *See infra* note 237 and accompanying text.

3. *See* Mark Glick & Darren Bush, *Breaking Up Consumer Welfare's Antitrust Policy Monopoly*, 56 SUFFOLK U. L. REV. 201, 250–63 (2023) (proposing that the consumer welfare standard should be replaced with the general welfare standard); *see generally* Alan J. Meese, *Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act: How Harvard Brought Us a Total Welfare Standard and Why We Should Keep It*, 85 N.Y.U. L. REV. 659 (2010) (outlining the total welfare standard movement).

4. *See* Warren Grimes, *Adam Smith, the Competitive Process, and the Flawed Consumer Welfare Standard*, 69 GRUR INT'L 3, 3–4 (2020); Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 ANTITRUST L.J. 707, 713–14 (2007).

5. *See* Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice*, CPI ANTITRUST CHRON., Apr. 2018, at 12, 18; Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, 87 U. CHI. L. REV. 595, 596 (2020); Warren Grimes, *Breaking Out of Consumer Welfare Jail: Addressing the Supreme Court's Failure to Protect the Competitive Process*, 16 RUTGERS BUS. L. REV. 49, 50 (2020); Eleanor M. Fox, *Against Goals*, 81 FORDHAM L. REV. 2157, 2159–60 (2013); Barak Orbach, *How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2253, 2253 (2013).

economic measure of well-being.[6] Exploitation is unfair.[7] As the legislative histories make clear, Congress passed the antitrust laws to protect consumers and suppliers from being treated unfairly[8]—in particular, to prevent firms from gaining market power by anticompetitive means and using that power to exploit consumers and vulnerable suppliers.

Shifting the focus from welfare to exploitation is not only historically more accurate, but it also commands broader support. To exploit someone is to injure them for your own benefit, and that is broadly understood to be unfair. When two firms eliminate competition between them and raise the prices they charge their customers, they exploit those customers by forcing them to pay more in order to increase the perpetrators' profits. The result is an unfair transfer of wealth, no different in effect and lack of justification than robbery or extortion. The ultimate point of antitrust is to prevent this unfairness.

To be sure, the exploitation of consumers by firms with market power harms economic welfare. If consumers are forced to pay higher prices, and there is no compensating benefit to them, consumer surplus will fall.[9] Likewise, other common measures of welfare, like total welfare, allocative efficiency, and output, will also decline. But focusing on unfairness and exploitation rather than welfare has numerous advantages. First, it is more faithful to Congress' original intent,

6. One common measure of consumer welfare is consumer surplus, the difference between a consumer's valuation of an item and the price the consumer pays for it. For a more technical definition, see *infra* note 9.

7. *See Exploit*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/exploit (defining "exploit" as "to make use of meanly or unfairly for one's own advantage") (last visited Oct. 22, 2025).

8. In his classic analysis of the legislative histories of the antitrust laws, Robert Lande also concluded that Congress' overarching motivation was fairness, not economic welfare. *See* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 70 (1982). As a co-founder and Director of the American Antitrust Institute, Robert Lande is a widely cited antitrust expert who has testified before Congress, spoken internationally, and held leadership roles in major legal organizations. *Robert H. Lande Biography*, U.S. DEP'T OF JUST. (Jan. 3, 2024), https://www.justice.gov/archives/atr/robert-h-lande-biography.

9. Consumer surplus is the difference between what consumers are willing to pay for a good and how much they actually paid for it. *See* DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 736 (3d ed. 2000).

expressed in both the legislative debates and the statutory text.[10] The legislative histories never mention welfare, and neither do the statutes themselves. Instead, the senators and representatives who supported antitrust legislation continually equated what they were doing to stopping unfairness.[11] They routinely used terms like robbery, theft, and extortion.[12] And they applied those terms to exploitative conduct regardless of whether the victims were downstream consumers or upstream suppliers, like workers or small farmers.[13] Robert Bork is famous for maintaining that the sole goal of antitrust is consumer welfare (by which he meant total welfare or economic efficiency).[14] But in his original analysis of the legislative history, he reached a conclusion very similar to mine. He declared that congressional concern with trusts and monopolies "derived in large measure from a desire to protect consumers from monopoly *extortion*."[15]

Second, focusing on unfairness increases the appeal of antitrust enforcement to the American people and their elected representatives, who support antitrust action because it protects them from the unfair expropriation of their wealth, not because it enhances technical economic concepts like consumer surplus or the competitive process.[16]

Third, this change will make it easier for courts to reject doctrines that impose unwarranted restrictions on antitrust enforcement. As explained below, courts have relied on doctrines derived from economic models to insulate anticompetitive behavior from antitrust liability, even when the behavior results in the exploitation of consumers

10. *See infra* Sections II.A and II.B.

11. *See infra* Section II.A; *see also* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131, 204–11 YALE L.J. 175 (2021) (emphasizing the legislative concern with fair prices).

12. *See infra* notes 47–51, 85 and accompanying text.

13. *See infra* Section II.A.

14. *See Robert H. Bork, Alexander M. Bickel Professor of Law, 1962-82*, YALE L. SCH. CTR. FOR THE STUDY OF CORP. L., https://www.ccl.yale.edu/the-history-of-business-law-at-yale-archives/bork-robert-h-modern-era (last visited Oct. 26, 2025). In addition to serving as Solicitor General of the United States and acting Attorney General, Bork was a Yale Law School professor and served on the U.S. Court of Appeals. *Id.*

15. Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 11 (1966) (emphasis added).

16. *See infra* Part III.

or vulnerable suppliers.[17] For example, many courts insist on proof that the defendant restricted output even when the defendant's price increases were unjustified or its profit margins were enormous.[18] Focusing on exploitation would avoid those errors.

The proposed goal expressly eliminates one of the most common criticisms of consumer welfare—that it only mentions consumers and ignores antitrust's other protected class: suppliers. In contrast, the goal advocated here explicitly includes vulnerable suppliers and makes clear that the protections of antitrust are symmetric: they shield consumers from the anticompetitive exercise of seller power, and small suppliers without market power from the anticompetitive exercise of buyer power.[19]

To be sure, the statutory text simply prohibits conduct that reduces competition.[20] It does not prohibit conduct that exploits consumers or, for that matter, conduct that reduces consumer welfare. Indeed, the statutes do not even define competition. The absence of a definition means that Congress was using competition in the ordinary sense, as rivalry—the striving of firms to take business from each other by offering customers better terms.[21] The question is why Congress wanted to prohibit conduct that lessened rivalry.

The answer is in the legislative history. The voluminous legislative debates make clear that Congress wanted to stop conduct that reduced rivalry because it would enable its perpetrators to raise prices, suppress wages, or otherwise exploit consumers and vulnerable

17. *See infra* Part IV.

18. *See infra* Section IV.A.1.

19. As explained in Part IV, the proposed goal refers to *vulnerable* suppliers—small suppliers without market power—because that is the focus of congressional concern and because suppliers with significant market power are not easily exploited.

20. The Sherman Act prohibits agreements in "restraint of trade" and "monopolies." 15 U.S.C. § 1. The Clayton Act bans conduct that may "lessen competition" or "create a monopoly." *Id.* § 14. All of these terms refer to conduct that reduces competition. *See infra* Section II.B.

21. *See* Eric A. Posner, *Market Power, Not Consumer Welfare: A Return to the Foundations of Merger Law*, 86 ANTITRUST L.J. 205, 209 (2024) ("Competition means rivalry. In the words of a modern dictionary, competition refers to 'the effort of two or more parties acting independently to secure the business of a third party by offering the most favorable terms.'" (citing *Competition*, MERRIAM-WEBSTER, www.merriam-webster.com/dictionary/competition)); *see also* Kanter, *supra* note 2 ("Competition starts with rivalry.").

suppliers like workers and small farmers.[22] In economic terms, such conduct would create market power—the ability to depart from the competitive result—and allow the perpetrators to transfer the wealth of consumers or suppliers to themselves.[23] In short, Congress wanted to preserve competition to protect consumers and vulnerable suppliers from a particular form of unfairness—exploitation.[24]

Congress was also deeply troubled by the size and resources of the trusts and monopolies.[25] Their market power enabled them to exploit trading partners, but their sheer size and overall power threatened to create deeply undesirable social and political consequences. The legislators believed that large firms crowded out small businesses, dominated local communities, distorted the political process, and increased the inequality of income and wealth.[26] While there was little or no support for breaking up big firms, the legislators felt that it was vital to prevent large firms from maintaining or increasing their size through

22. *See infra* Section II.A.

23. For precise definitions of "market power" and "monopoly power" (a substantial degree of market power), see John B. Kirkwood, *Market Power and Antitrust Enforcement*, 98 B.U. L. REV. 1169, 1172–73 (2018). For a precise definition of "monopsony power" (market power exerted by a buyer against a supplier), see John B. Kirkwood, *Powerful Buyers and Merger Enforcement*, 92 B.U. L. REV. 1485, 1493 (2012).

24. This formulation automatically takes into account justifications. Exploitation requires injury and, if the rivalry-enhancing aspects of a practice offset its exploitative effects, there has been no injury, and the conduct is justified. In other words, conduct that reduces some aspect of rivalry (e.g., price competition) but also enhances some other aspect (e.g., quality competition) is not exploitative and therefore justified if it produces net benefits for consumers or vulnerable suppliers. *See infra* Part II.

Melamed and Petit combine market power and economic welfare in their description of the essential characteristics of an antitrust violation; they state that the antitrust laws "prohibit[] . . . conduct that creates or is likely to create market power for reasons that are unrelated to economic efficiency." A. Douglas Melamed & Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, 54 REV. INDUS. ORG. 741, 746 (2019). This formulation would be identical to mine if "reasons that are unrelated to economic efficiency" means reasons that are unlikely to generate benefits for consumers or suppliers that offset the exploitative effects of market power.

25. *See infra* Section II.A.1.

26. *See, e.g.*, 21 CONG. REC. 2598 (1890) (showing Senator George's concern about the tendency of the current system to "crush out all small men, all small capitalists, all small enterprises").

anticompetitive conduct.[27] The antitrust laws were passed in part to ensure that their conduct was closely scrutinized. By preventing large firms from excluding competitors or colluding with other large firms, Congress believed it was both protecting consumers and preserving a more egalitarian society.

Today, these concerns are magnified. In digital markets, where network effects and economies of scale are pronounced, it is easy for the first firm to develop a new product to become the market leader and remain there for years.[28] Indeed, many of our most important digital markets are now firmly dominated by enormous firms like Apple, Microsoft, Alphabet (the parent of Google), Meta (the parent of Facebook and Instagram), and Amazon.[29] All of these firms have been accused of antitrust violations.[30] And the breadth of the antitrust charges has grown. Lately, for example, big social media platforms have been accused of colluding to suppress unfavorable information about vaccines.[31]

In short, just as the Congresses that passed the antitrust laws intended, the tech giants are being closely scrutinized for anticompetitive conduct. But in many of these cases, the issue of remedy remains open. Beyond enjoining the illegal conduct, what more should be done? Should the offending firms be split into pieces, or should they be forced

27. *See infra* Section II.A.1.

28. William T. Robinson, Gurumurthy Kalyanaram & Glen L. Urban, *First-Mover Advantages from Pioneering New Markets: A Survey of Empirical Evidence*, 9 REV. INDUS. ORG. 1, 1–2 (1994) ("The survey results consistently show that market pioneers tend to maintain market share advantages over later entrants.").

29. Shivan Rajput, *How Does Big Tech Dominate the Digital World?*, GEOSTRATA (Sep. 30, 2024), https://www.thegeostrata.com/post/big-tech-tightens-its-grip-how-companies-like-apple-and-google-dominate-the-digital-world.

30. In recent years, the federal antitrust agencies have sued every one of the tech giants for monopolization or anticompetitive mergers. *See, e.g.*, *Justice Department Sues Apple for Monopolizing Smartphone Markets*, U.S. DEP'T OF JUST. (Mar. 21, 2024), https://www.justice.gov/archives/opa/pr/justice-department-sues-apple-monopolizing-smartphone-markets; *Department of Justice Prevails in Landmark Antitrust Case Against Google*, U.S. DEP'T OF JUST. (Apr. 17, 2025), https://www.justice.gov/opa/pr/department-justice-prevails-landmark-antitrust-case-against-google.

31. *See* The Editorial Board, Opinion, *Antitrust and the Anti-Vaxxers*, WALL ST. J. (July 18, 2025, at 17:48 ET), https://www.wsj.com/opinion/childrens-health-defense-v-wp-company-trusted-health-initiative-doj-antitrust-vaccines-b84135b7?st=cKtTLF&reflink=desktopwebshare_permalink.

to share their assets with rivals or interoperate with them? The remedy issue in big tech cases represents the next major frontier of antitrust analysis.

This Article proceeds in four steps. Following this introduction, Part II sets forth the basis for expressing the goal of antitrust law as protecting consumers and vulnerable suppliers from rivalry-reducing conduct that exploits them. Part II covers the legislative histories of the antitrust statutes, their language, the relevant case law, and the reasons why the American people support antitrust enforcement. Part II also shows that Congress was disturbed by the size, resources, and power of giant firms and combinations like Standard Oil and the beef trust and passed the antitrust laws in part to keep them in check. Part III examines the contemporary critiques of consumer welfare and finds that they are largely mistaken. But Part III also concludes that stopping exploitation, not promoting a technical concept of welfare, is the preeminent goal of antitrust law. Part IV shows that focusing on exploitation would make it easier to rebut four unwarranted limitations on antitrust enforcement. Part V addresses a final point: why the preeminent goal should be expressed as protecting *vulnerable* suppliers.

II. THE BASIS FOR THE CONCERN WITH EXPLOITATION

This Part explains why the fundamental goal of antitrust law is to protect consumers and vulnerable suppliers from exploitation. It begins with the legislative history, where the concern with unfair, exploitative pricing is unmistakable. It then turns to the statutory language, the case law, and the basis for popular support of antitrust enforcement, all of which reinforce the central concern.

A. Legislative History

The senators and representatives who passed the antitrust laws declared, over and over again, that they wanted to stop price fixing, monopolization, and other forms of anticompetitive conduct because such conduct exploited consumers and vulnerable suppliers like workers and farmers.[32] It raised the prices that consumers paid or depressed the payments that suppliers received, making them poorer and the

32. *See, e.g.*, 21 CONG. REC. 2457 (1890) (statement of Rep. Taylor).

perpetrators richer.[33] Legislators repeatedly compared the conduct to robbery or extortion and condemned it not because it reduced economic efficiency but because it was unfair to consumers and suppliers.[34] Congress' overarching goal was to halt this exploitation.

The legislative debates do not mention welfare, allocative efficiency, or consumer surplus. The objection to trusts and monopolies was not that they caused these economic harms but rather that they exploited their customers and suppliers.[35] Members of Congress noted that the trusts reduced output, but they cared about output reduction because it led to higher prices, not because it diminished efficiency or the size of the gross domestic product.[36] Limiting supply was the mechanism by which the trusts raised prices.[37] Congress frequently noted that trusts and monopolies drove smaller competitors out of business, and many legislators were upset at the elimination of these small businesses, but virtually no one thought that small firms should be protected at the expense of consumers.[38] On the contrary, several congressmen stated that the antitrust bills would not make it illegal to combine with competitors or acquire a monopoly if that resulted in lower prices or better products for consumers through greater productive efficiency.[39] The goal was to reward firms when they treated consumers fairly and penalize them when they tried to engage in unfair exploitation.

The leading legislators decried the great size of the trusts, which they said not only crushed small firms but also increased inequality and distorted the political process.[40] But again, these troubling effects were not made an independent ground for illegality. Rather, they reinforced

33. *Id.*

34. *Id.*

35. *Id.*

36. 21 CONG. REC. 137 (1890).

37. *See, e.g.*, *id.* (recording Senator Turpie's definition of a trust as a combination whose intent was to sell at an "enhanced price, by suppressing or limiting the supply and by other devices").

38. *See, e.g.*, *id.* at 2598 (showing Senator George's concern about the tendency of the current system to "crush out all small men, all small capitalists, all small enterprises"). But Senator George did not call for protecting small businesses when it would result in higher prices for consumers.

39. *See infra* Sections II.A.1 and II.A.2.

40. *See supra* note 65 and accompanying text.

the importance of combating conduct by large firms that suppressed rivalry and exploited consumers or vulnerable suppliers.

1. Sherman Act

Senator Sherman condemned combinations in restraint of trade because "[s]uch a combination is far more dangerous than any heretofore invented, and, when it embraces the great body of all the corporations engaged in a particular industry in all of the States of the Union, it tends to advance the price to the consumer of any article produced."[41] Sherman regarded the resulting overcharges as unfair to consumers; he called them "extortion which makes the people poor" and "extorted wealth."[42] He rejected the claim that the trusts actually lower prices through "better methods of production [because] all experience shows that this saving of cost goes to the pockets of the producer."[43] He expressed great sympathy for the individual entrepreneurs who were driven out of business by the trusts, but never stated that the courts should intervene if that would harm consumers. On the contrary, he believed that the trusts ordinarily drove out competitors through predatory pricing, and preventing predation would benefit consumers.[44]

Senator Teller agreed. The reason Congress was acting, he explained, was not to protect competitors but to protect consumers from price increases.[45] Congress viewed these price increases as reprehensible, not because they distorted the efficiency of the economy—a point no one made—but because they were exploitative—they took consumers' wealth without providing anything comparable in return. Representative Heard stated: "[w]ithout rendering the slightest equivalent therefor these illegal conspiracies against honest trade have stolen

41. 21 CONG. REC. 2457 (1890).

42. *Id.* at 2461.

43. *Id.* at 2460.

44. *See id.* at 2569 ("[I]f a humble man starts a business in opposition to them, solitary and alone, in Ohio or anywhere else, they will crowd him down and they will sell their product at a loss or give it away in order to prevent competition . . . .").

45. *See id.* at 2571. ("When [Standard Oil] interfere[s] with somebody who has sunk a well in Ohio and they run down the price of oil until they shut him up, he may have his remedy against them. But that is not what we are complaining of. We are complaining that . . . Standard Oil Company has a tendency to reduce and destroy competition, and thereby, by destroying competition, to put up improperly the price of oil.").

untold millions from the people."[46] And Senator George agreed, declaring: "[t]hey aggregate to themselves great, enormous wealth by extortion which make the people poor."[47] Representative Coke referred to trust overcharges as "robbery."[48] Likewise, Representative Fithian quoted a constituent letter asserting that the trusts were "impoverishing the people" through "robbery."[49] Additionally, Senator Hoar compared monopolistic pricing to a "transaction the only purpose of which is to extort from the community . . . wealth which ought . . . to be generally diffused over the whole community."[50]

Congress objected to the trusts' treatment of their small suppliers for the same reason. One representative stated that the beef trust "robs the farmer on the one hand and the consumer on the other."[51] Congressman Bland agreed: "there is no trust in this country that today is robbing the farmers of the great West and Northwest of more millions of their hard-earned money than this so-called Big Four beef trust of Chicago."[52] Senator Sherman noted the symmetry in the trusts' exploitation of their customers and suppliers:

> [t]hey operate with a double-edged sword. They increase beyond reason the cost of the necessaries of life and business, and they decrease the cost of the raw material, the farm products of the country. They regulate prices at their will, depress the price of what they buy and increase the price of what they sell.[53]

Moreover, all of these basic concerns pervaded the subsequent antitrust statutes.

46. *Id.* at 4101.
47. *Id.* at 1768.
48. *Id.* at 2614.
49. *Id.* at 4103.
50. *Id.* at 2728.
51. *Id.* at 4098.
52. *Id.* at 4099.
53. *Id.* at 2461 (quoting Sen. George).

Congress understood that the trusts often achieved significant cost savings.[54] Through massive capital investments and economies of scale and scope, they attained levels of productive efficiency that their smaller competitors could not match.[55] But the legislators believed that the trusts did not pass on this superior efficiency to consumers in the form of lower prices or higher-quality products.[56] Instead, the economies they realized simply inflated their profits.[57] As mentioned above, Senator Sherman declared: "[i]t is sometimes said of these combinations that they reduce prices to the consumers by better methods of production, but all experience shows that this savings of cost goes to the pockets of the producer."[58] In short, the touchstone was impact on consumers or suppliers. When conduct exploited consumers or suppliers, it was to be prohibited. When it benefited them, it was to be allowed.

For the same reason, Congress did not condemn a single firm that obtained a monopoly by developing a new product or outperforming its rivals. In a famous passage, Senator Hoar stated that "a man who merely by superior skill and intelligence . . . got the whole business because nobody could do it as well as he could was not a monopolist . . . ."[59] In Hoar's view, Section 2 of the Sherman Act did not bar the acquisition of monopoly power through innovation or other forms of superior performance. Hoar's statement has become a fundamental part of antitrust law, repeated in Learned Hand's classic opinion in *United States v. Aluminum Co. of America*[60] and endorsed in *Trinko*.[61] It means that American antitrust law does not prohibit conduct that is likely to benefit consumers, even if the conduct results in a monopoly. On the

54. *See* Lande, *supra* note 8, at 89–93 (recognizing that the legislative history of the Sherman Act applauds corporate productive efficiency and that the trusts that existed at the time often increased efficiency, leading to benefits for consumers).

55. *See id.* at 90.

56. *See id.* at 90–91.

57. *See id.* ("The trusts were condemned despite their efficiency in large part because they kept the fruits of such efficiency.").

58. 21 Cong. REC. 2460 (1890).

59. *Id.* at 3152.

60. 148 F.2d 416, 430 (2d Cir. 1945) (declaring that it is contrary to the "prime object" of the Sherman Act to condemn a firm that gains a monopoly "merely by virtue of . . . superior skill, foresight and industry").

61. Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (noting that monopoly power is not itself illegal because it is a spur to innovation).

contrary, when firms provide consumers with better products, it is the fair treatment they expect from the marketplace.

While the predominant concern of Congress was the exploitation of consumers and vulnerable suppliers, a number of legislators also objected to the sheer size and power of the trusts and monopolies. In Professor Lande's words, "[a]larm over corporate aggrandizement of economic, social, and political power pervaded the debate."[62] Senator Sherman declared: "[i]f we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life. If we would not submit to an emperor we should not submit to an autocrat of trade . . . ."[63] Agreeing, Senator Hoar stated that monopolies were "a menace to republican institutions themselves."[64] Professors Glick and Bush found that for Congress, the "damage from the excessive influence of large firms ran the gamut of limiting the opportunities of small business, undermining political democracy through domination of the political process, creating income inequality, distorting corporate governance, harming innovation and growth, and yes, raising prices and lowering output to consumers."[65]

Congress did not make any of its social and political concerns a separate offense. The Sherman Act does not prohibit large firm size, great overall corporate power, or any of their disturbing consequences. Instead, reducing the social and political consequences of large firm size was seen as an important side benefit of antitrust enforcement.

62. Lande, *supra* note 8, at 99.

63. 21 CONG. REC. 2457 (1890).

64. *Id.* at 3146.

65. Glick & Bush, *supra* note 3, at 204. Glick and Bush note that Senator Sherman stated that no problem is more threatening to the public mind "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." *Id.* at 208 (quoting 21 CONG. REC. 2460 (1890)). Likewise, Senator George worried about the tendency of the current system to "crush out all small men, all small capitalists, all small enterprises." *Id.* (quoting CONG. REC. 2598 (1890)). Senator Edmunds, the principal author of the Sherman Act, emphasized that combinations and monopolies had not only crushed competition but resulted in an "unnatural and unequal distribution of wealth and power," which is one of the "great evils that affect civilization and true progress." George F. Edmunds, *The Interstate Trust and Commerce Act of 1890*, 194 N. AM. REV. 801, 815 (1911).

2. Clayton Act

Twenty-four years after the passage of the Sherman Act, Congress enacted the Clayton Act[66] and the Federal Trade Commission Act.[67] The Clayton Act was meant to broaden the reach of antitrust enforcement, to ensure that all forms of anticompetitive conduct were identified and prohibited.[68] But Congress' goal had not changed. Its aim was still to prevent behavior that reduced rivalry and exploited consumers or vulnerable suppliers.

Senator Thompson summed up the goal: "[t]he chief purpose of antitrust legislation is for the protection of the public, to protect it from extortion practiced by the trust . . . ."[69] Representative Morgan declared that "the one thing we wish to maintain, and retain and sustain, is competition," and that such competition was necessary to prevent firms from having "the power to arbitrarily control prices and thus exact unjust profits from the people."[70] Representative Hamlin stated that "[t]he only reason why trusts and combinations are declared illegal is because they are organized and operated for the express purpose of the more effectively exploiting the people."[71] Senator Cummins explained that Congress aimed to protect "the people against the rapacity and the avarice of monopoly."[72]

Senator Thompson also reiterated the principle that Senator Hoar expressed in 1890—protecting consumers from exploitation does not mean depriving them of the benefits of superior efficiency, even if monopoly results.[73] Practices that make consumers or vulnerable suppliers better off are widely viewed as fair.

66. 15 U.S.C. §§ 12–27.

67. *Id.* §§ 41–58.

68. STEPHANIE W. KANWIT, 1 FED. TRADE COMM'N § 18:1 (rev. ed. 2026) ("As enacted in 1914, § 8 of the Clayton Act was part of a broad legislative plan (which included the Federal Trade Commission Act) to supplement and strengthen the Sherman Act.").

69. 51 CONG. REC. 14223 (1914).

70. *Id.* at 9265.

71. *Id.* at 9556.

72. *Id.* at 14256.

73. *Id.* at 14223 ("The chief purpose of antitrust legislation is for the protection of the public, to protect it from extortion practiced by the trust, but at the same time not to take away from it any advantages of cheapness or better service which honest, intelligent cooperation may bring.").

The same theme was apparent in the 1950 debates over amending the Clayton Act. One representative argued that the legislation would help "the average man to make a place for himself in business and protect[] the consuming public from unfair exploitation."[74] Similarly, Congressman Carroll stated that monopoly prices were "outrageous."[75] Further, Senator Kilgore asserted that opponents of the bill had forgotten about the American consumer, whom the government had a duty to protect against "unjust exploitation."[76]

But like the Sherman Act, the Clayton Act and its 1950 amendments were not enacted solely because Congress wanted to protect consumers and vulnerable suppliers from extortion. A number of legislators also thought it was important to preserve competition because competitive markets prevented the excessive concentration of wealth and reduced the threat that industrial combinations posed to democracy. One representative stressed that "all of the power represented by this wealth is lodged in the hands of a few men. Can anyone doubt the danger which such concentration permits?"[77] Senator Kefauver endorsed the 1950 amendments with this dramatic claim:

> I am not an alarmist, but the history of what has taken place in other nations where mergers and concentrations have placed economic control in the hands of a very few people is too clear to pass over easily. . . . It either results in a Fascist state or the nationalization of industries and thereafter a Socialist or Communist state.[78]

Like the Sherman Act, the Clayton Act does not make exceptional firm size or political influence illegal. Its prohibitions apply only when the conduct it covers (mergers, exclusive dealing, etc.) is likely to lessen competition or create a monopoly.[79] But when a large firm

74. 95 CONG. REC. 11506 (1949) (statement of Rep. Bennett).

75. *Id.* at 11492.

76. *Corporate Mergers and Acquisitions: Hearings on H.R. 2734 Before a Subcomm. of the Senate Comm. on the Judiciary*, 81st Cong., 1st & 2d Sess. 180 (1950) (statement of Sen. Kilgore).

77. 51 CONG. REC. 9186 (1914) (statement of Rep. Helvering).

78. 96 CONG. REC. 16452 (1950).

79. *See, e.g.*, 15 U.S.C. § 14 ("It shall be unlawful for any person engaged in commerce . . . to lease or make a sale or contract for sale of goods, wares,

engages in such conduct, Congress felt that its size and aggregate power magnified the importance of antitrust enforcement.

3. Federal Trade Commission Act

Passed in the same year as the Clayton Act, the Federal Trade Commission Act ("FTC Act") created a new administrative agency and directed it to identify and prohibit "unfair methods of competition."[80] Here, Congress used the term "unfair" and intended it to cover not only anticompetitive practices but conduct we would today call consumer protection violations, like fraud and deceptive advertising.[81] On the antitrust side, however, Congress' goal was the same as before: to stop behavior that subjected consumers or vulnerable suppliers to unfair, exploitative pricing.

Senator Newlands, the principal sponsor of the Act, declared that the FTC Act was meant to halt "extortionate prices" and "unfair or unreasonable" prices.[82] Senator Lane maintained that the American people are "being compelled to pay arbitrarily fixed and unjustly high prices for what they consume, [and] they are being robbed."[83] Representative Morgan stated that Congress aimed to "secure the people from unjust tribute levied by monopolistic corporations."[84] From numerous statements like these, Professor Lande concluded:

> Congress' descriptive use of the terms "exactions," "extortionate profits," "theft," and "looting" is evidence of its great displeasure and suggests congressional condemnation of supracompetitive prices not because they caused allocative inefficiency, but rather because they

merchandise, machinery, supplies or other commodities . . . where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.").

80. 51 CONG. REC. 11090 (1914).

81. Senator Newlands stated that unfair competition includes "every practice and method between competitors upon the part of one against the other that is against public morals." *Id.* at 11112.

82. S. REP. NO. 597, app., at 24–25 (1914).

83. 51 CONG. REC. 13223 (1914).

84. *Id*. at 8854.

"unfairly" transferred wealth from consumers to producers.[85]

Congress also made clear that a practice was not an unfair method of competition simply because it enabled a firm to grow large or achieve market dominance. Echoing Senator Hoar, Senator Hollis declared: "[t]he mere size of a corporation which maintains its position solely through superior efficiency is ordinarily no menace to the public interest."[86] On the contrary, "[f]air competition is competition which is successful through superior efficiency."[87] By stimulating competition based on efficiency, Representative Stevens, a House manager of the bill, argued that Section 5 would benefit consumers. He stated that Section 5 would regulate the "efficiency of our organizations and institutions so that the people can get the benefit of that efficiency."[88] These statements mirror the view expressed in the legislative debates on the Sherman and Clayton Acts—the antitrust laws condemn conduct that exploits consumers, not conduct that benefits them.[89]

4. Commentators

Leading commentators agree that Congress' fundamental goal in passing the antitrust laws was not economic efficiency, total welfare, consumer surplus, or other economic concepts but protecting consumers and vulnerable suppliers, like workers, from competition-reducing conduct that exploits them. Of course, conduct that exploits consumers would normally reduce economic efficiency, total welfare, and consumer surplus.[90] But Congress' ultimate aim was not to enhance

85. Lande, *supra* note 8, at 114.

86. 51 CONG. REC. 12146 (1914).

87. *Id.*

88. *Id.* at 8850.

89. The Robinson-Patman Act, passed in 1936, is an exception. *See infra* Section II.B.3 (explaining that the principal aim of the Robinson-Patman Act is to protect small businesses, even if that harms consumers).

90. This is because this exploitative conduct is completely contrary to the total welfare standard. *See* John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 FORDHAM L. REV. 2425, 2432 (2013) ("This desire to protect consumers and small suppliers from anticompetitive conduct is itself an element of total welfare, since it represents a 'taste' or preference for fairness.").

economic welfare but to shield consumers and vulnerable suppliers from the exercise of market power that unfairly takes their wealth.[91]

In his original review of the Sherman Act's legislative history, Bork reached the same conclusion. He stated that Congress' concern with trusts and monopolies "derived in large measure from a desire to protect consumers from monopoly extortion."[92] After a much more extensive review of the legislative histories and other sources of meaning, Professor Lande and I concurred: "[t]he fundamental goal of antitrust . . . is to protect consumers in the relevant market from anticompetitive behavior that exploits them—that unfairly transfers their wealth to firms with market power—not to increase the total wealth of society."[93]

Professor Hovenkamp also agreed that "[t]he only articulated goal of the antitrust laws is to benefit consumers."[94] He explained that Congress wanted to protect consumers not because it would increase economic efficiency but because it would insulate them from exploitation. Specifically, it would prevent monopolists from taking their wealth.[95] Judge Easterbrook concurred that the ultimate goal was consumer protection; in a colorful passage, he stated that the choice the legislators saw "was between leaving consumers at the mercy of trusts and authorizing the judges to protect consumers. However you slice the legislative history, the dominant theme is the protection of consumers from overcharges."[96]

91. *See supra* Section II.A; *see also infra* Section II.B.

92. Bork, *supra* note 15.

93. John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 192 (2008).

94. HOVENKAMP, *supra* note 1.

95. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 50 (3d ed. 2005) ("[T]he primary intent of the Sherman Act's framers was . . . the distributive goal of preventing monopolists from transferring wealth away from consumers." (citing Robert H. Lande, *Wealth Transfers As the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982)); *id.* at 76 ("[T]he legislative history of the Sherman Act shows a great deal of concern for the fact that monopolists transfer wealth away from consumers, but no concern at all for any articulated concept of efficiency.").

96. Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1703 (1986).

In a recent article, Eric Posner argues that Congress' overarching aim was simply to protect "competition."[97] Posner maintains that Congress wanted to preserve competition because it lowers prices, limits the political power of large firms, and enhances opportunities for small business.[98] Like this Article, therefore, Posner recognizes that Congress had two overarching goals—to protect consumers from unfair prices and to curtail the political and social power of large firms.[99] Moreover, like this Article, Posner acknowledges that excessive social and political power are not independent grounds for illegality.[100] Instead, courts must adopt a general test that *both* protects consumers from higher prices and produces political and social benefits. The general test he proposes is *marketwide profit margins*.[101] In other words, courts should determine whether competition has been reduced by asking whether marketwide profit margins have increased or will likely increase. In most instances, this test is tantamount to an exploitation test, since conduct that increases profit margins would normally raise prices to consumers or depress payments to suppliers.[102]

B. Statutory Language

The legislative histories reflect a deeply felt desire to protect consumers and vulnerable suppliers from unfair, exploitative pricing. The statutory language generally accomplishes this goal. Congress

97. *See* Posner, *supra* note 21, at 206.

98. *See id.* at 209–11.

99. *See id.*

100. In Posner's view, that is because courts cannot evaluate political and social benefits on a case-by-case basis. *See id.* at 230–31.

101. *Id.* at 208–09.

102. In one instance, though, Posner appears to go too far. He would block a merger to a monopoly that would increase profit margins even if the merger would reduce costs so much that prices would fall and consumers would benefit. Posner believes the merger should be stopped because the merged firm could use its higher profit margin to exert more political influence or drive out small firms. But that appears to put more weight on social and political consequences than Congress intended. Congress never indicated that the impact on small firms or the political process should trump the effects on consumers. *See* Lande, *supra* note 8, at 103 n.149 (reviewing the legislative history and finding that only one representative "expressed an intent to protect small businesses at the expense of consumers").

used broad terms like "restraint of trade,"[103] "monopolize,"[104] and "lessen competition"[105] to prohibit a wide range of competition-reducing behavior that is likely to result in unfair pricing or other forms of exploitation. To be sure, the statutory language does not reach every instance of exploitation. Section 1 of the Sherman Act requires an agreement;[106] Section 2 requires actual or prospective monopoly power;[107] and Section 7 of the Clayton Act requires an acquisition.[108] But these were the situations Congress was most familiar with, and within these situations, the language broadly prohibits exploitation.

All of the statutes require some adverse effect on competition—on rivalry.[109] For that reason, I have stated the fundamental goal as stopping *rivalry-reducing* conduct that exploits consumers or vulnerable suppliers. It is also true that the statutes do not mention exploitation. But they do not mention consumer welfare, total welfare, economic efficiency, the competitive process, firm size, or political power either. As Professor Hovenkamp has emphasized, the ultimate goals of antitrust enforcement are not identified in the antitrust statutes.[110] Rather, they are contained in the legislative histories.[111] But given the primacy of text in current methods of statutory construction, it is important to show that the text of the antitrust laws is consistent with their legislative histories.

1. Sherman Act

Section 1 of the Sherman Act bans "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce."[112] This prohibition has two parts. The first part requires

103. *See infra* note 112 and accompanying text.

104. *See infra* notes 120–22 and accompanying text.

105. *See infra* note 128 and accompanying text.

106. *See* 15 U.S.C. § 1.

107. *See id.* § 2.

108. *See id.* § 18.

109. *See* Posner, *supra* note 21 ("Competition means rivalry.").

110. *See* Herbert J. Hovenkamp, *The Antitrust Text*, 99 IND. L.J. 1063, 1065 (2024) (elaborating on the various ways the statutes fail to set forth the steps necessary to fulfill the ultimate goals of antitrust enforcement).

111. *See supra* Section II.A.

112. 15 U.S.C. § 1.

a contract, combination, or conspiracy—some sort of multilateral action, usually described as an agreement. The second part requires a restraint of trade. To restrain trade is to restrict or limit it, to reduce its volume, or curtail how it occurs.[113] Both are likely to exploit consumers or vulnerable suppliers. An agreement to limit the volume of trade—to reduce output—would ordinarily raise prices, lower wages, or otherwise transfer wealth away from consumers or workers.[114] Likewise, an agreement to curb some aspect of rivalry, such as price competition, would ordinarily create market power and enable the parties to the agreement to exploit their customers or suppliers.[115]

Pre-Sherman Act and early Sherman Act case law reflected this understanding. Professor Hovenkamp found that the phrase "in restraint of trade" already "had an established meaning prior to passage of the Sherman Act, and early antitrust cases understood it in the same way. To 'restrain trade' meant to lessen or reduce the volume of trade or commerce and thus to increase prices."[116] Accordingly, courts were concerned about a reduction in the volume of trade, not because they cared about output as such, but because they cared about the effect of output on prices.[117] Output was an instrumental variable, not an independent value. Professor Hovenkamp explains: "[e]ven non-economist judges and legislators understood early on the link between reduced

113. *See Restraint of Trade*, MERRIAM-WEBSTER, https://www.merriam-webster.com/legal/restraint%20of%20trade (defining the term as "an attempt or intent to eliminate or stifle competition, to effect a monopoly, to maintain prices artificially, or otherwise to hamper or obstruct the course of trade and commerce as it would be if left to the control of natural and economic forces") (last visited Oct. 26, 2025).

114. This basic economic principle is echoed in the legislative history of the Sherman Act. *See, e.g.*, 21 CONG. REC. 4101 (1890) (statement of Rep. Heard) ("[T]he very object of these giant schemes of combined capital is not to increase the volume of supply, and thus lessen the cost of any useful commodity, but rather to repress, reduce, and control the volume of every article that they touch, so that the cost to consumers is increased while the expenditure for production is lessened, and thereby their profit secured.").

115. *See* John B. Kirkwood, *Collusion to Control a Powerful Customer: Amazon, E-Books, and Antitrust Policy*, 69 U. MIA. L. REV. 1, 61 (2014) (outlining various ways in which market power can be created, including collusion, which eliminates price competition).

116. Hovenkamp, *supra* note 110, at 1069.

117. *See id.* at 1075.

output and higher prices, their principal target."[118] Professor Lande agrees: "[a] normal result of arrangements that reduce trade or output, of course, is higher prices."[119]

In short, the text of Section 1 is consistent with the legislative history in that both express a congressional intent to prohibit restraints on rivalry because they are likely to result in the exploitation of consumers or vulnerable suppliers.

Section 2 of the Sherman Act was added at the end of the legislative debates to cover unilateral conduct that causes the same type of harm. Section 2 makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce."[120] Section 2 pivots on a single term—monopolize—and, unlike restraint of trade, there was no pre-existing case law to give it meaning.[121] There were, however, dictionaries, and Senator Edmunds, the principal architect of the Act, relied on one to explain to the Senate what "monopolize" meant:

> the best answer I can make to both my friends is to read from Webster's Dictionary the definition of the verb "to monopolize": 1. To purchase or obtain possession of the whole of, as a commodity or goods in market, with the view to appropriate or control the exclusive sale of; as to monopolize sugar or tea. . . . 2. To engross or obtain by any means the exclusive right of, especially the right of

118. *Id.* at 1072. The Supreme Court also recognized this link when it stated that the concern of Section 1 was the "capacity to reduce output *and* increase price." NCAA v. Alston, 594 U.S. 69, 88 (2021) (emphasis added) (citing Ohio v. Am. Express Co., 585 U.S. 529, 541 (2018)).

119. Robert H. Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 FORDHAM L. REV. 2349, 2369 (2013). A pre-Sherman Act treatise made the same point. *See* T. CARL SPELLING, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS 144 (1892) ("The natural result of the sale of a railroad to a rival line destroys competition and generally restrains, that is, lessens traffic by increasing rates.").

120. 15 U.S.C. § 2.

121. *See* Hovenkamp, *supra* note 110, at 1078 (explaining that "no body of legal rules existed for determining § 2's principal offenses: namely, what it means to 'monopolize' or 'attempt to monopolize'").

> trading to any place, or with any country or district . . . .[122]

This definition is problematic. It states that a firm can monopolize a commodity if it controls the exclusive sale of that commodity, regardless of how it acquired or maintained that control. Like other definitions of the time, it indicates that to monopolize is simply to be the sole seller of a good, even if the firm attained that position by creating a popular product that no one else offered.[123] This definition would render innovation—or other forms of superior performance—illegal whenever it results in 100% control of a market.

Senator Hoar immediately disavowed that definition. He declared that "a man who merely by superior skill and intelligence . . . got the whole business because nobody could do it as well as he could was not a monopolist."[124] For Senator Hoar, monopolization required anticompetitive conduct—"something like the use of means which made it impossible for other persons to engage in fair competition, like . . . the buying up of all other persons engaged in the same business."[125] Senator Hoar's principle—that a firm does not "monopolize" when it acquires a monopoly through innovation—has now been enshrined in the case law.[126] This means that Section 2 prohibits conduct likely to exploit consumers but not conduct likely to benefit them.[127] As a result, only the first category is regarded as unfair competition.

122. 21 CONG. REC. 3152 (1890).

123. *See, e.g.*, Lande, *supra* note 119, at 2378 (reviewing definitions and concluding that "[t]his shows that 'monopolize' simply meant to acquire a monopoly").

124. 21 CONG. REC. 3152 (1890).

125. *Id.*

126. *See* United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966) (stating the requirements for monopolization).

127. Senator Hoar may have been trying to protect small competitors when he said that Section 2 was meant to prevent conduct that "made it impossible for other persons to engage in fair competition." *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW § 633 (5th ed. Supp. 2025). At the same time, Hoar never suggested that Section 2 should protect small competitors *at the expense of consumers*. To the contrary, the only concrete example he gave of the kind of conduct Section 2 prohibited was "the buying up of all other persons engaged in the same business"—conduct that would ordinarily harm consumers.

2. Clayton Act

The Clayton Act supplements the Sherman Act by banning specific practices that Congress thought posed a particular risk to competition. The Clayton Act singles out four practices—price discrimination, exclusive dealing arrangements, acquisitions, and interlocking directors and officers—and generally prohibits them where the effect of the practice "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."[128]

Like the Sherman Act, the Clayton Act does not define its critical terms: "competition" and "monopoly." Congress doubtlessly thought these terms were so commonplace that it did not need to define them. As noted, "[c]ompetition means *rivalry*"—the striving of firms to win business from each other by offering lower prices or better products.[129] "Monopoly" means *the only seller* of a product or service.[130] The legislative history, discussed above, indicates that the fundamental goals of the Clayton Act were identical to the fundamental goals of the Sherman Act.[131] Congress wanted to stop conduct that would reduce rivalry or create a monopoly because such conduct is likely to result in the exploitation of consumers, forcing them to pay higher prices or accept lower quality products to increase the profits of the perpetrators. Court decisions rendered soon after the passage of the Clayton Act understood that this was the Act's primary goal.[132]

128. *See, e.g.*, 15 U.S.C. § 14 (prohibiting exclusive dealing arrangements that have this effect).

129. Posner, *supra* note 21 (emphasis added).

130. *See* Kirkwood, *supra* note 23, at 1173 n.14.

131. *See* Lande, *supra* note 8, at 128 (stating that in the Clayton Act, Congress "wanted to implement essentially the same goals as those embodied in the Sherman and FTC Acts").

132. *See* Hovenkamp, *supra* note 110, at 1095 ("Early decisions interpreted the Clayton Act's 'substantially lessen competition or tend to create a monopoly' language to refer to conduct that they associated with higher prices. No decisions disagreed with that principle.").

3. Robinson-Patman Act

In 1936, Congress enlarged the Clayton Act's prohibitions on price discrimination by passing the Robinson-Patman Act.[133] The Robinson-Patman Act explicitly adopted a protectionist goal—making price discrimination illegal not only when it threatened to harm competition but also when it threatened to injure individual competitors.[134] The Robinson-Patman Act accomplished this goal by adding a provision that prohibited price discrimination when it impeded competition between customers of the discriminating seller.[135] This made it presumptively illegal for a seller to favor a large customer with lower prices if the discrimination reduced the ability of smaller customers to compete. While that provision protected small competitors, it could hurt consumers, since larger customers often passed on their lower prices to consumers.[136] The aim of the Robinson-Patman Act, in short, was inconsistent with the aim of the other antitrust laws because it was passed not to protect consumers from exploitation but to protect small firms from the competition of big buyers.[137]

To be sure, discrimination induced by big buyers can reduce competition. There are at least ten situations in which buyer-induced discrimination may lessen rivalry and lead to the exploitation of vulnerable suppliers or consumers.[138] For example, a big buyer "may obtain discriminatory concessions that are so large and long-lasting that they enable it to drive out or greatly diminish the market share of smaller rivals, increasing downstream concentration and making tacit or explicit collusion more likely."[139] Indeed, Aslihan Asil found empirical evidence of exactly this problem in the liquor industry. Discounts

133. The Robinson-Patman Act was enacted to resolve the holes left by the enactment of the Clayton Act. *See* H.R. REP. NO. 74-2287, at 7 (1936) (describing the price discrimination language of the Clayton Act "inadequate, if not almost a nullity" during debate on the need for the Robinson-Patman Act).

134. *See* 15 U.S.C. § 13.

135. *Id.* § 13(a) ("It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . .").

136. *See* John B. Kirkwood, *Reforming the Robinson-Patman Act to Serve Consumers and Control Powerful Buyers*, 60 ANTITRUST BULL. 358, 361 n.17 (2015).

137. *See id.* at 362.

138. *See id.* at 364, 368.

139. *Id.* at 368.

obtained by big retailers enabled them to drive out smaller retailers, and the resulting increase in concentration caused liquor prices to rise, exploiting consumers.[140]

Overall, though, the purpose of the Robinson-Patman Act—and its effect in most cases—is to protect small competitors at the expense of consumers and vulnerable suppliers. As a result, this Article does not address the Robinson-Patman Act in detail.

4. Federal Trade Commission Act

Congress further complemented the Clayton Act with the FTC Act, which created the Federal Trade Commission and charged it with identifying and enjoining "unfair methods of competition."[141] Like the other federal antitrust statutes, the FTC Act did not define its critical terms. It did not specify what "unfair" or "competition" meant, nor did it address whether an "unfair method of competition" is unfair to competitors, unfair to consumers, unfair to vulnerable suppliers, or all three. Again, however, the legislative history made clear that Congress' predominant goal was to halt consumer exploitation. The legislators who passed the FTC Act repeatedly described their aim as stopping extortionate, unfair, or unreasonable prices, which they saw as a form of robbery.[142]

5. Summary of Language and Legislative History

In short, the statutory language of the antitrust laws, though brief, carries out the purposes Congress expressed in the legislative history. Taken together, the language and legislative history indicate that the overarching goal of the Sherman Act, the Clayton Act, and the FTC Act is to forestall rivalry-reducing conduct that exposes consumers or vulnerable suppliers like workers and small farmers to exploitation. At the same time, Congress did not intend to prohibit conduct that benefits those protected groups, even if it reduces some aspect of rivalry.[143] The

140. *See* Aslihan Asil, Can Robinson-Patman Enforcement Be Pro-Consumer? 31–52 (Dec. 5, 2024) (unpublished manuscript), https://ssrn.com/abstract=4833711.

141. 15 U.S.C. § 45(a)(2).

142. *See infra* Section II.A.3.

143. More precisely, conduct by sellers was not meant to be barred, even if it reduced some aspect of rivalry among them, if it benefited consumers. And likewise

first category of conduct was viewed as extortionate and unfair. The second was viewed as fair and often laudatory.

C. Case Law

In this section, I discuss the three principal phases of antitrust case law. In the first, the courts emphasized Congress' proximate goal—preserving competition. While the cases recognized that competition would keep prices low and output high and thus protect consumers from exploitation, the emphasis was on competition rather than exploitation. In the second phase, the courts adopted Bork's view that the ultimate goal of antitrust law was to promote consumer welfare. Bork interpreted consumer welfare, however, as total welfare—the welfare of the entire society, including producers as well as consumers. Since total welfare is a common measure of economic efficiency, some decisions interpreted the Supreme Court's endorsement of consumer welfare as an endorsement of economic efficiency. In the second phase, therefore, a number of cases proclaimed that the ultimate purpose of antitrust law was to increase economic efficiency. Scholars soon showed, however, that efficiency had little support in the legislative history and that Congress' fundamental goal was true consumer welfare—the view that Congress prohibited anticompetitive behavior in order to enhance the welfare of consumers, not producers. In the third phase, therefore, the cases overwhelmingly adopted true consumer welfare as the overarching goal of antitrust law. In many cases, moreover, this goal was connected to the prevention of excessive prices and other forms of exploitation.

1. Phase One: Competition

Initially, the Supreme Court focused on Congress' instrumental goal—preserving competition. The Court took a firm stance against price fixing because it led directly to higher prices, Congress' principal concern.[144] But in these initial cases, the Court did not describe the

for conduct by buyers that benefited suppliers. *See* Kirkwood, *supra* note 90, at 2429–30.

144. The Court's hostility to price fixing was "revolutionary." AREEDA & HOVENKAMP, *supra* note 127, at § 104. Before the Sherman Act, common law courts generally viewed price-fixing agreements as unobjectionable or, at worst,

purpose of antitrust law as protecting consumers or vulnerable suppliers but rather simply as preserving competition. In 1904, in its first merger case, the Court declared: "the anti-trust act[] has prescribed the rule of free competition among those engaged in [interstate] commerce."[145] In 1918, in his classic formulation of the Rule of Reason, Justice Brandeis stated: "[t]he 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."[146] In 1951, the Court elevated competition to the center of our national economic policy.

> The heart of our national economic policy long has been faith in the value of competition. In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, "Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent."[147]

After World War II, two leading decisions were comfortable declaring that the prime reason Congress wanted to preserve competition was not to prevent the exploitation of consumers but to maintain unconcentrated market structures, even if the result harmed consumers. In *United States v. Aluminum Co. of America*[148] and *Brown Shoe Co. v. United States*,[149] the Second Circuit and the Supreme Court, respectively, stated that Congress, deeply concerned with industrial concentration, preferred fragmented markets, even if the consequence was

unenforceable; they did not give consumers a right to recover damages. As a result, "[t]here was no effective law against price fixing in the United States before the antitrust movement." *Id.* Under the Sherman Act, however, the "government or even private parties forced to pay higher prices for monopolized goods had an action." *Id.* at 79. Within a decade after 1890, the Court condemned two price-fixing cartels. *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

145. N. Sec. Co. v. United States, 193 U.S. 197, 331 (1904).

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

147. Standard Oil Co. v. FTC, 340 U.S. 231, 248–49 (1951) (quoting A.E. Staley Mfg. Co. v. FTC, 135 F.2d 453, 455 (7th Cir. 1943)); *see also* Orbach, *supra* note 5, at 2270 n.96 (collecting cases).

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

149. 370 U.S. 294 (1962).

higher prices.[150] This populist view of competition, in which the presence of many small sellers was more important than low prices, may have reflected the nation's prosperity and international dominance in the years after World War II.[151] In those years, when the country faced little foreign competition, it could afford to pay higher prices in pursuit of social values. But by the late 1970s, when the country was struggling with stagflation and a rising tide of imports,[152] the courts' disregard of consumer interests provoked a backlash.

2. Phase Two: Consumer Welfare, Total Welfare, and Efficiency

In the antitrust area, the backlash was led by Robert Bork. In 1978, he published *The Antitrust Paradox*, in which he argued that both congressional intent and sound administration indicated that the antitrust laws have a single goal—consumer welfare.[153] In his original analysis of the legislative history of the Sherman Act, Bork reached the same conclusion I have: Congress' overarching goal was to protect consumers from exploitation.[154] In *The Antitrust Paradox*, however, he shifted ground sharply and wrote that consumer welfare did not refer to the welfare of consumers but to total welfare—the welfare of the entire society, including both producers and consumers.[155] Because

150. *See Aluminum Co. of Am.*, 148 F.2d at 429; *Brown Shoe Co.*, 370 U.S. at 344.

151. *See* Michael McKenna, *America's Postwar Dominance Built the Modern World*, WASH. TIMES (Sep. 3, 2025), https://www.washingtontimes.com/news/2025/sep/3/americas-postwar-dominance-built-modern-world/ (explaining the benefits to the United States that came from the end of World War II).

152. *See* Trevor R. Jones, *From Exports to Imports: How Corporate America Changed Its Views on Trade in the 1970s*, AM. AFFS. J. (2024), https://americanaffairsjournal.org/2024/05/from-exports-to-imports-how-corporate-america-changed-its-views-on-trade-in-the-1970s/ (describing the change in the American economy in the 1970s).

153. BORK, *supra* note 1, at 66.

154. *See* Bork, *supra* note 15 (stating that Congress' support for the Sherman Act "derived in large measure from a desire to protect consumers from monopoly extortion").

155. *See* BORK, *supra* note 1, at 90 ("Consumer welfare . . . is merely another term for the wealth of the nation."); *see also* Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 148 (2011) (footnote omitted) ("Bork explicitly equated the term 'consumer welfare' with 'the wealth of the nation,' a term that economists would understand as 'social welfare.'").

social welfare is often equated with economic efficiency,[156] Bork was effectively asserting that the sole goal of antitrust was efficiency.[157] His allies in the Chicago School supported him and argued that "competition" meant a process for maximizing efficiency.[158]

Bork ultimately lost the battle for efficiency. While he helped convince many courts and scholars that the goal of antitrust is consumer welfare, he did not persuade them that consumer welfare meant total welfare.[159] On the contrary, scholars showed that congressional intent heavily favored a true consumer welfare standard—a standard that protects consumers in the relevant market from exploitation.[160] As a result, while some decisions initially followed Bork, either by citing him or by explicitly mentioning efficiency,[161] few courts today assert that the goal of antitrust law is to increase economic efficiency.[162]

156. *See* Posner, *supra* note 21, at 221 (noting that "[o]ther scholars would follow in Bork's footsteps" and use "the term 'total surplus' to mean efficiency"). Total surplus is the sum of producers' surplus and consumers' surplus and thus is a common measure of social welfare or economic efficiency.

157. *See id.* ("Bork notoriously claimed that Section 7 actually sought to maximize efficiency . . . .").

158. *See id.* at 222.

159. *See id.* at 225.

160. For accounts tracing and defending a true consumer welfare standard, see generally Lande, *supra* note 8; Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213 (1985); Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397 (2009); Steven C. Salop, *Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336 (2009); Kirkwood & Lande, *supra* note 93; Kirkwood, *supra* note 90.

161. *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (describing the Sherman Act as a "consumer welfare prescription" (quoting BORK, *supra* note 1, at 66)); Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 20 (1979) (stating that per se illegality was inappropriate for conduct "designed to 'increase economic efficiency'" (quoting United States v. U.S. Gypsum Co., 438 U.S. 422, 441 n.16 (1978))); Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 375 (7th Cir. 1986) ("[T]he emphasis of antitrust policy shifted from the protection of competition as a process of rivalry to the protection of competition as a means of promoting economic efficiency . . . .").

162. *See* Herbert Hovenkamp, *Implementing Antitrust's Welfare Goals*, 81 FORDHAM L. REV. 2471, 2476 (2013) ("[C]ourts almost invariably apply a consumer welfare test.").

3. Phase Three: Consumer Welfare and Exploitation

Today, when courts describe the aims of U.S. antitrust law, they virtually always say that Congress prohibited anticompetitive behavior in order to benefit consumers. Indeed, three times in recent years, the Supreme Court has explicitly equated harm to competition with harm to consumers. Twice, the Court has said that the purpose of the rule of reason, the most frequently applied test of illegality in antitrust, is to "distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest."[163] Most recently, the Court stated: "[a]lways, [t]he goal is to distinguish between restraints . . . harmful to the consumers and [those] . . . that are in the consumers' best interest."[164] While the Court did not mention exploitation, restraints that harm consumers by taking their wealth exploit them.

In the third phase, the case law is essentially uniform. I have conducted three surveys of the cases and found the same result in each instance. Here is the conclusion from the 2013 survey:

> [i]n the last two decades, in short, a majority of decisions, at all levels of the federal courts, have described the overarching goal of the antitrust laws as the protection of consumers rather than the maximization of social welfare. Most decisions, of course, did not address the issue, but those that did typically characterized the ultimate purpose as protecting consumers, not enhancing efficiency. In buy-side cases, the courts likewise placed the emphasis on protecting small suppliers from exploitation, not promoting total welfare. No court has allowed a practice or transaction that was shown likely to harm consumers or small suppliers on the ground that it would improve economic efficiency.[165]

Cases decided in the last few years have followed this pattern. They recognize that Congress passed the antitrust laws to prevent

163. Ohio v. Am. Express Co., 585 U.S. 529, 541 (2018) (quoting Leegin Creative Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007)).

164. NCAA v. Alston, 594 U.S. 69, 81 (2021) (quoting *Amex*, 585 U.S. at 541).

165. Kirkwood, *supra* note 90, at 2443–44.

anticompetitive behavior, and they understand that Congress wanted to preserve competition in order to protect consumers from higher prices, reduced choice, and other forms of exploitation. Most commonly, judges simply say that the goal is to safeguard competition to protect consumers or promote consumer welfare.[166] Often, courts make the connection to exploitation more specific, noting that restraints on competition produce increased prices, lower output, or diminished quality,[167] all of which lead, directly or indirectly, to the exploitation of consumers. In a few instances, courts employ the language of exploitation, stating that the antitrust laws are intended to shield consumers from "excessive" prices and "overcharges." For example, one decision quoted Justice Stevens' explanation for the damages provision in the Sherman Act: "Congress was primarily interested in creating an effective remedy for consumers who were forced to pay excessive prices by the giant trusts and combinations that dominated certain interstate markets."[168] The same decision quoted a statement from the Seventh Circuit: "the principal purpose of the antitrust laws is to prevent overcharges to consumers."[169]

In short, while the case law rarely, if ever, uses the word exploitation, courts now generally recognize that the fundamental goal of

166. *See, e.g.*, St. Luke's Hosp. v. ProMedica Health Sys., Inc., 8 F.4th 479, 486 (6th Cir. 2021) ("The focus is on guarding the competitive process and on protecting the welfare of consumers . . . ."); Always Towing & Recovery, Inc. v. City of Milwaukee, 2 F.4th 695, 703 (7th Cir. 2021) ("The Sherman Act is designed 'to protect consumers from injury that results from diminished competition . . . .'" (quoting Agnew v. NCAA, 683 F.3d 328, 334–35 (7th Cir. 2012))); Sharif Pharmacy, Inc. v. Prime Therapeutics, LLC, 950 F.3d 911, 914 (7th Cir. 2020) ("It has long been recognized that the primary purpose of the federal antitrust laws is to protect the welfare of customers.").

167. *See, e.g.*, Impax Lab'ys, Inc. v. FTC, 994 F.3d 484, 493 (5th Cir. 2021) ("Anticompetitive effects are those that harm consumers. Think increased prices, decreased output, or lower quality goods."); Flannery Assocs. LLC v. Barnes Fam. Ranch Assocs., LLC, 727 F. Supp. 3d 895, 907–08 (E.D. Cal. 2024) ("[R]educing output and increasing prices 'are precisely the kinds of harms to competition . . . antitrust laws were intended to prevent.'" (quoting City of Oakland v. Oakland Raiders, 20 F.4th 441, 457 (9th Cir. 2021))).

168. Carefirst of Md., Inc. v. Johnson & Johnson, 745 F. Supp. 3d 288, 308 (E.D. Va. 2024) (quoting Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 459 U.S. 519, 530 (1983)).

169. *Id.* (quoting Kochert v. Greater Lafayette Health Servs., Inc., 463 F.3d 710, 715 (7th Cir. 2006)).

antitrust law is to protect consumers and vulnerable suppliers from rivalry-reducing behavior that creates market power and enables the perpetrators to raise prices, lower wages, or otherwise take the wealth of consumers or vulnerable suppliers for themselves. This is the definition of exploitation.[170]

D. Popular Support

The same understanding animates popular support for the antitrust laws. Popular support is important because it increases the impact of the antitrust laws. Greater popular support for antitrust enforcement is likely to mean larger agency budgets, more enthusiasm for new legislation, and greater momentum behind existing cases.[171] Popular support also illuminates the purpose of the antitrust laws. It helps explain why they were passed in the first place, why Congress has kept them on the books for more than a hundred years, and why Congress continually funds antitrust enforcement.

The American people support antitrust enforcement for the same reason that Congress enacted the antitrust laws.[172] The antitrust laws protect consumers and vulnerable suppliers like workers from exploitation.[173] While this protection enhances consumer welfare and supplier welfare, the fundamental basis for popular support is not welfare but fairness. Consumers and workers regard it as unfair when their wealth is taken without justification by monopolies, monopsonies, or cartels. They resent being exploited by firms that acquire market power, monopoly power, or monopsony power without earning it. As I stated in *The Essence of Antitrust*,

> [p]eople object to such exploitation because, like robbery or extortion, it is an unwarranted transfer of wealth, harming its victims . . . without providing offsetting benefits. When market power provides offsetting benefits—when it was created by a superior product, for example,

170. *See* MERRIAM-WEBSTER, *supra* note 7.

171. Kirkwood, *supra* note 90, at 2429.

172. *Id.*

173. *See supra* Section II.A (discussing the purposes of antitrust laws).

> or cost reductions that were passed on—the American people do not appear to regard it as unfair.[174]

Many other scholars have recognized this fact. Clark Havighurst and Barak Richman declared: "the antitrust laws enjoy general political support principally because the consuming public resents the idea of illegitimate monopolists enriching themselves at their expense."[175] Philip Nelson and Lawrence White stated: "the transfer of consumers' surplus from buyers to the monopolist clearly weighs importantly in the political support for antitrust policy."[176] A pioneering survey by Daniel Kahneman, Jack Knetsch, and Richard Thaler found that many consumers regard monopolistic exploitation as unfair, whether or not they are the victims.[177] In his famous book, *Thinking Fast and Slow*, Kahneman summarized the overarching principle: a "basic rule of fairness, we found, is that the exploitation of market power to impose losses on others is unacceptable."[178] The same principle applies to the supply side of markets. Maurice Stucke found that people object to monopsony because it exploits sellers.[179] Eleanor Fox believes that people fundamentally support antitrust enforcement because they distrust private power, which is often used to abuse them.[180]

Senator Amy Klobuchar, who wrote an entire book extolling antitrust enforcement,[181] argued that the American people wanted

174. Kirkwood, *supra* note 90, at 2448.

175. Clark C. Havighurst & Barak D. Richman, *The Provider Monopoly Problem in Health Care*, 89 OR. L. REV. 847, 860 (2011).

176. Philip B. Nelson & Lawrence J. White, *Market Definition and the Identification of Market Power in Monopolization Cases: A Critique and a Proposal* 6 (NYU, Working Paper No. EC-03-26, 2003), http://www.ssrn.com/abstract=1292646.

177. *See* Daniel Kahneman, Jack L. Knetsch & Richard Thaler, *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 735 (1986).

178. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 306 (2011).

179. *See* Maurice E. Stucke, *Looking at the Monopsony in the Mirror*, 62 EMORY L.J. 1509, 1558 (2013) (concluding that consumers object to the exploitation of sellers, stating: "[w]e see this with consumers' willingness to pay more for the increasing number of 'Fair Trade' products.")

180. *See* Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORN. L. REV. 1140, 1153 (1981).

181. AMY KLOBUCHAR, ANTITRUST: TAKING ON MONOPOLY POWER FROM THE GILDED AGE TO THE DIGITAL AGE (2021).

antitrust legislation because they resented trusts and monopolies that increased their profits by exploiting consumers and workers.[182] As she put it, the public viewed the trusts as "monopolies that were making tons of money off their backs."[183] The public's concern with exploitation was compounded by outrage over growing inequality. Senator Klobuchar stated: "[a]s the monopolists got richer, the public got angrier. The seeds for a growing populist movement and for laws limiting the power of the trusts were sown by the outrage Americans felt as they experienced monopoly-produced disparities in power and wealth."[184]

Members of the public repeatedly expressed their anger. The leader of the Grange movement, for example, fulminated against increases in railroad rates because they amounted to "robbery."[185] Senator La Follette railed against trusts and combinations because "extortionate prices have been exacted from consumers."[186] Likewise, workers rebelled against their exploitation by trusts and other industrialists.[187] In short, Senator Klobuchar concluded, the passage of the Sherman Act was a "story of how when economics get out of whack and *greed shoves too many people down*, in this country, in this democracy, the people push back."[188]

Senator Klobuchar asserted that today's focus on economic welfare and the technical economic analysis it has spawned has reduced the political and emotional support for antitrust enforcement:

> [t]he antitrust movement went from one grounded in the body politic to one led principally (and "led" is probably too strong a word) by academicians, lawyers, and highly paid experts and PhD-trained economists hired to explain the nuances of market definition, allocative efficiency, and cross elasticity of demand—in-the-weeds arguments that simply don't carry the same political juice as colonists throwing chests of tea into Boston Harbor, union workers leading national protests at factory gates, and

182. *Id.* at 59–60.
183. *Id.* at 59.
184. *Id.* at 60.
185. *Id.* at 66.
186. *Id.* at 116.
187. *Id.* at 60.
188. *Id.* at 61 (emphasis added).

> farmers with pitchforks reaming out their elected representatives about exorbitant rail rates.[189]

Klobuchar called for a renewed emphasis on the true motivation for antitrust law—the deeply felt need to protect consumers and workers from unfair, exploitative pricing.

III. CRITIQUES OF CONSUMER WELFARE

Today, the prevailing paradigm is that antitrust law exists to promote consumer welfare.[190] The New Brandeisians, a group of public officials and scholars who share Brandeis' distrust of large corporations,[191] have famously objected to consumer welfare on multiple grounds. They argue, for example, that antitrust's obsession with consumer welfare has restricted its vision and betrayed its "founding values."[192] According to the New Brandeisians, the consumer welfare standard is flawed in four principal ways: it ignores vulnerable suppliers like workers; it cares only about low prices; it does not recognize that the real goal of the antitrust laws is protecting the competitive process; and it is indifferent to the political influence of large firms.[193] As this Section demonstrates, this critique is misplaced. At the same time, there are powerful reasons to deemphasize consumer welfare. It is not

189. *Id.* at 121.

190. *See* sources cited *supra* note 1.

191. *See* A. Douglas Melamed, *Antitrust Law and Its Critics*, 83 ANTITRUST L.J. 269, 270 (2020) (describing the New Brandeisians and noting that they include Professor Tim Wu, former FTC Chair Lina Khan, and Senator Elizabeth Warren). Wu's most recent book repeats the title of Brandeis' famous critique. *See generally* TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018) (warning of the dangers of extreme corporate concentration).

192. Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 983 (2019).

193. Much of this critique was originally expressed in Lina Khan's famous student note. *See, e.g.*, Khan, *supra* note 2, at 737 ("[T]he undue focus on consumer welfare is misguided. It betrays legislative history, which reveals that Congress passed antitrust laws to promote a host of political economic ends—including our interests as workers, producers, [and] entrepreneurs . . . ."); *id.* at 716 ("[A]ntitrust law now assesses competition largely with an eye to the short-term interests of consumers, not producers or the health of the market as a whole . . . .").

the original goal of antitrust law and does not generate the emotional and political force of the foundational concern with unfairness.

A. Suppliers

The simplest and superficially most appealing attack on consumer welfare is that it ignores antitrust's other protected class—suppliers like workers and small farmers.[194] The New Brandeisians are correct that in a buy-side case—a case alleging anticompetitive conduct by buyers—the antitrust laws do protect suppliers. Two Supreme Court decisions, issued sixty years apart, take this position,[195] as do most lower court cases.[196] Virtually all commentators concur.[197]

As a result, the issue is not substantive but rhetorical. When someone articulates the fundamental purpose of antitrust, should they explicitly mention suppliers as well as consumers? Some scholars say no. They argue that consumer welfare is so widely accepted and habitually used that the best course is to treat "consumer welfare" as a term of art that includes suppliers.[198] Other scholars think it is preferable to use a new term that covers suppliers as well as consumers, such as "trading partner" welfare.[199] Neither of these solutions is ideal. Courts

194. *See, e.g.*, Kanter, *supra* note 2 ("[T]he consumer welfare standard has a blind spot to workers [and] farmers . . . .").

195. *See* Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 324–25 (2007) (holding that a predatory bidding plaintiff can prevail by showing harm to suppliers, not consumers); Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 235 (1948) ("It is clear that the agreement is the sort of combination condemned by the Act, even though the price-fixing was by purchasers, and the persons specially injured under the treble damage claim are sellers, not customers or consumers."); *see also* Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co., 305 F.3d 1124, 1133–34 (10th Cir. 2002) ("The Supreme Court's treatment of monopsony cases strongly suggests that suppliers . . . are protected by antitrust laws even when the anti-competitive activity does not harm end-users.").

196. *See* Kirkwood & Lande, *supra* note 93, at 233–36; Orbach, *supra* note 5, at 2276.

197. *See, e.g.*, Grimes, *supra* note 4, at 7–8; C. Scott Hemphill & Nancy L. Rose, *Mergers That Harm Sellers*, 127 YALE L.J. 2078, 2089 (2018); Werden, *supra* note 4, at 719–20.

198. *See, e.g.*, Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 65, 66 (2019).

199. *See* Laura Alexander & Steven C. Salop, *Antitrust Worker Protections: The Rule of Reason Does Not Allow Counting of Out-of-Market Benefits*, 90 U. CHI. L.

could treat "consumer welfare" as a term of art that includes the welfare of workers, raw material suppliers, middlemen, and others who are not literally consumers. But then the goal of antitrust law would lack the rhetorical force of expressly identifying vulnerable suppliers like workers. The "trading partner" solution is better, since it plainly embraces both suppliers and customers, but trading partner is not a term that is familiar to most lawyers and judges. As a result, it will, at least initially, "require[] an explanation every time one uses it."[200] In contrast, the exploitation goal expressly refers to consumers, vulnerable suppliers, and workers.

B. Price Effects

A number of the New Brandeisians claim that the consumer welfare standard is defective because it leads courts to focus exclusively on price effects while ignoring harmful effects on choice, product quality, or innovation.[201] In fact, though, courts frequently do consider such non-price effects. While plaintiffs tend to emphasize price effects because they are easier to prove,[202] plaintiffs often allege non-price effects, and courts routinely address them.[203] The critics have not pointed to any case in which non-price harms were overlooked.

REV. 273, 293 (2023) ("A better characterization of the 'consumer welfare standard' is that competitive restraints that harm the trading partner participants in the relevant market—whether downstream purchasers, workers, other input suppliers—violate the Sherman Act.").

200. Hovenkamp, *supra* note 198, at 79.

201. *See* Khan, *supra* note 2, at 716 ("[A]ntitrust doctrine views low consumer prices, alone, to be evidence of sound competition."); *id.* at 737; Wu, *supra* note 5, at 5 ("[T]he importance of demonstrated price effects has weakened the law's ability to deal with some of the most serious anticompetitive harms.").

202. *See* Melamed & Petit, *supra* note 24, at 753 ("Some data are easier to obtain, and some facts are easier to establish. So public and private antitrust enforcers have, for reason of prudence or pragmatism, focused on price and output effects. Enforcers and courts do examine non-price effects . . . .").

203. *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 57, 79, 87 (D.C. Cir. 2001) (condemning practices that suppressed nascent competitors, limited choice, and hindered innovation); *see also* D. Daniel Sokol, *Antitrust's "Curse of Bigness" Problem*, 118 MICH L. REV. 1259, 1273 (2020) ("[A]ntitrust courts have dealt with non-price issues . . . on a regular basis.").

C. The Competitive Process

The New Brandeisians assert that the fundamental goal of antitrust is not to promote consumer welfare but to protect the competitive process. For them—and a significant number of scholars—the ultimate test of a good antitrust case is not whether consumers or suppliers have been protected from exploitation but whether competition and the competitive process have been preserved. In her famous student note, FTC Chair Lina Khan wrote: "[a]ntitrust law and competition policy should promote not welfare but competitive markets."[204] DOJ Antitrust Division Chief Jonathan Kanter declared that "the goal of antitrust law is to protect competition."[205]

As discussed above, an adverse effect on competition is necessary for an antitrust violation; there must be some restriction of rivalry.[206] But it is not enough to show that conduct restricted rivalry or harmed the competitive process in one way if it enhanced rivalry and the competitive process in another way. In such mixed cases, it is necessary to invoke another test as well, such as consumer welfare or consumer exploitation, to determine the net impact of a practice on rivalry. Terms like competition and the competitive process cannot resolve mixed cases. They are ambiguous.

Einer Elhauge[207] concurs. He states: "Kanter is right that antitrust law protects 'competition and the competitive process.'"[208] But, as Elhauge notes, "the consumer welfare standard was never an alternative to that legal test. It was only a method to resolve deep ambiguities about what 'competition and the competitive process' means, and

204. Khan, *supra* note 2, at 737.

205. Kanter, *supra* note 2 ("Antitrust law protects competition and the competitive process . . . ."); *see also* Khan, *supra* note 2, at 737 ("By refocusing attention back on process and structure, this approach . . . would also promote actual competition.").

206. Khan, *supra* note 2, at 797.

207. Before his current role as the Petrie Professor of Law at Harvard Law School, Elhauge clerked for Justice Brennan and chaired the Obama Campaign's Antitrust Advisory Committee. *See Einer R. Elhauge*, HARVARD.EDU, https://hls.harvard.edu/faculty/einer-r-elhauge/ (last visited Oct. 26, 2025).

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

Kanter offers no alternative to resolve them."[209] Elhauge illustrates a mixed case with a merger that increases rivalry in one way and diminishes it in another:

> [t]o take a simple concrete case, suppose a merger between two firms in a ten-firm market makes the merged firm a more efficient and vigorous competitor. Does that decrease "competition" because it eliminates one competitor or increase it because we now have more vigorous competition among the nine that remain? Nothing in the "competition and the competitive process" test helps provide an answer.[210]

To get a definite answer, one must combine an effect on rivalry with an effect on consumers or suppliers.[211]

Kanter and another leading New Brandeisian, Tim Wu, seem to realize this. They both recognize the vagueness in the term "competitive process" and define it, but the definition simply adopts the consumer welfare standard. In effect, the competitive process is harmed only when consumers are harmed. Kanter states that the "competitive process is . . . charging lower prices so customers buy your goods instead of a rival's."[212] Wu defines the competitive process as "competition on the basis of price and quality."[213] Both definitions invoke the consumer welfare standard. They hold that conduct promotes the competitive process when it provides consumers with lower prices or higher quality. Conversely, conduct harms the competitive process when it

209. *Id.*

210. *Id.*

211. In his lengthy defense of the competitive process test, Gregory Werden addresses Elhauge's hypothetical but does not explain how the test would enable a court to decide whether the merger is desirable or undesirable. Werden notes that "the law recognizes that a merger can increase concentration and yet enhance competition by strengthening the merged firm." Gregory J. Werden, *The Competitive Process Standard*, 86 ANTITRUST L.J. 579, 637 (2024). But he does not specify how a court would tell whether competition is likely to be enhanced despite the increase in concentration.

212. Kanter, *supra* note 2.

213. Wu, *supra* note 5, at 9.

results in higher prices, lower quality, or other forms of consumer exploitation.[214]

Hovenkamp agrees that terms like "competition" and "the competitive process" are empty by themselves. He states that invoking the competitive process "cannot produce useful tools for decision making about competition issues. It operates as a slogan, not a goal."[215] He adds: "[a]s an antitrust goal, protection of the competitive process suffers from one substantial weakness: it does not say anything."[216] In short, the fundamental goal of antitrust law cannot be stated as protecting competition or the competitive process unless those terms are defined in terms of the effects that matter.

D. Political Influence

The New Brandeisians also claim that antitrust law has ignored the political power of the tech giants.[217] These firms have the resources to spend large amounts on lobbying, campaign donations, and political messaging, enabling them to influence the political process in ways that a smaller firm cannot match.[218] To curb this influence, the critics want antitrust law to be more aggressive—to attack conduct that increases the size and profits of the tech giants, even if it does not harm consumers.[219]

214. Likewise, in a buy-side case, Kanter links the competitive process to supplier welfare. *See* Kanter, *supra* note 2 (stating that the competitive process is "paying higher salaries so you attract talent away from a competitor").

215. Herbert Hovenkamp, *The Slogans and Goals of Antitrust Law*, 25 N.Y.U. J. LEGIS. & PUB. POL'Y 705, 705 (2023).

216. *Id.* at 747; *accord* Daniel Francis, *Antitrust Without Competition*, 74 DUKE L.J. 353, 429 (2024).

217. *See, e.g.*, Khan, *supra* note 2, at 767.

218. Cecilia Kang & Kenneth P. Vogel, *Tech Giants Amass a Lobbying Army for an Epic Washington Battle*, N.Y. TIMES (June 5, 2019), https://www.nytimes.com/2019/06/05/us/politics/amazon-apple-facebook-google-lobbying.html (describing an effort by Amazon, Apple, Facebook, and Google to join forces to lobby against antitrust laws).

219. *See* Khan, *supra* note 2, at 740 (asserting that the consumer welfare goal overlooks Congress' "understanding that concentration of economic power also consolidates political power, 'breed[ing] antidemocratic political pressures'" (citation omitted)).

Some of the most famous opinions in antitrust law have taken that position. As discussed earlier, the iconic opinions in *United States v. Aluminum Co. of America*[220] and *Brown Shoe Co. v. United States*[221] claimed that Congress, deeply concerned with industrial concentration, preferred fragmented markets, even if the consequence was higher prices.[222] Those decisions, however, were issued many years ago, during the era of widely shared prosperity that stretched from the end of World War II to the late 1970s. More recently, social divisions have intensified, wages have stagnated, and inequality has soared. Since 1979, the average real wage of non-managerial workers has barely budged—the average real wage in 2014 was the same as it was in 1979.[223] The wages of the least educated workers actually dropped.[224] At the same time, the share of income and wealth captured by the top one percent tripled. In 1979, the top one percent accounted for approximately eight percent of national income; in 2017, they took in nearly twenty-four percent.[225] Ordinary workers, in short, have not only seen little increase in their own income, but they are also falling further behind those at the top. This disparity has contributed to an unprecedented decline in life expectancy. In the last thirty years, deaths from suicide,

220. 148 F.2d 416 (2d Cir. 1945).

221. 370 U.S. 294 (1962).

222. *See Aluminum Co. of Am.*, 148 F.2d at 429; *Brown Shoe Co.*, 370 U.S. at 344.

223. *See* ABHIJIT V. BANERJEE & ESTHER DUFLO, GOOD ECONOMICS FOR HARD TIMES 239 (2019).

224. *See id.* ("Among high school dropouts, high school graduates, and those with some college, real weekly earnings among full-time male workers in 2018 were 10 to 20 percent below their real levels in 1980.").

225. *See id.* at 238. For other accounts of this sharp rise in inequality, see THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 343 (2014) (Arthur Goldhammer trans., 2014) (providing evidence of the history of income inequality in the United States among different social groups). *See also* JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY 3–11 (2012) (addressing factors leading to increased inequality and the weakening of the American economy, such as persistent monopoly power and distortionary economic policies); JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS 14–25 (2010) (showing that a vanishingly small share of workers receive the benefits of America's economic growth).

alcoholism, and drug abuse have risen sharply among working-class Americans.[226]

These developments have removed the popular and political support for using antitrust law to reduce the political influence of the tech giants, where the result would be higher prices and lower wages for the typical American worker. Such a step would elevate the desire to curb political power over the desire to protect consumers and suppliers from exploitation, and there is little support in the legislative history, the case law, or popular opinion for doing so.[227] Antitrust already curbs political power by preventing firms from increasing their profits—and thus their ability to influence the political process—through anticompetitive behavior.[228] This is an important side benefit of antitrust enforcement. But to go beyond that—to reduce political power at the expense of consumers and suppliers—exceeds that congressional mandate. It would put antitrust in conflict with the people it is supposed to protect. It would force antitrust to punish marketplace success, simply because such success often leads to greater political influence.[229]

Moreover, if courts felt they were supposed to sacrifice consumer and supplier interests to curtail the political power of big firms, how far should they go? How much of a price increase should be

226. *See, e.g.*, David Leonhardt & Stuart A. Thompson, Opinion, *How Working-Class Life Is Killing Americans, in Charts*, N.Y. TIMES (Mar. 6, 2020), https://www.nytimes.com/interactive/2020//03/06/opinion/working-class-death-rate.html ("Over the past three decades, deaths of despair among whites without a college degree—especially those under age 50—have soared.").

227. *See, e.g.*, Tara Siegel Bernard, *Less Takeout, More Produce Swapping: How Inflation Is Altering People's Behavior*, N.Y. TIMES (June 28, 2022), https://www.nytimes.com/2022/06/28/your-money/inflation-consumer-behavior.html# (discussing how inflation is the main cause of stress among adults polled); *see also* Talmon Joseph Smith, *Wages May Not Be Inflation's Cause, but They're the Focus of the Cure*, N.Y. TIMES (Apr. 7, 2023), https://www.nytimes.com/2023/04/07/business/economy/wages-prices.html (discussing the current relationship between wages and inflation).

228. *See* Kanter, *supra* note 2 (noting that markets free from restraints "offer more economic opportunity and less risk of corporate power dominating our democratic and social wellbeing").

229. *See* Ramsi Woodcock, *Digital Monopoly Without Regret*, 1-2020 CONCURRENCES 53, 55 (2020) ("Doing away with the consumer welfare standard would effectively prohibit size, exposing firms that win by being better than the competition to as much liability as firms that win by making competitors worse.").

tolerated to diminish Amazon's size or political influence?[230] "Absent concrete answers, incorporating political considerations into an antitrust case would leave judges at sea."[231] They would have to rely on their own preferences rather than objective tests,[232] at least until enough decisions were made so that the tradeoffs became clear. Until that point, the rule of law would suffer. Businesses would lack certainty—they would be forced to guess what they can and cannot do—and compliance would be more difficult.[233] Even more concerning, conduct that benefited consumers and workers would be discouraged.[234]

E. Implications

In short, all four of the New Brandeisian critiques of consumer welfare are misplaced. Courts using the consumer welfare standard do protect suppliers and do consider non-price effects.[235] Moreover, "competition" and "the competitive process" are deeply ambiguous, making them insufficient to resolve mixed cases. In order to get a definite answer in a mixed case, a court must ask whether rivalry has been reduced and whether consumers or vulnerable suppliers have been exploited. Finally, while Congress was deeply troubled by the political and social consequences of large firms, Congress did not want antitrust enforcers to take steps to reduce the power of large firms if the result would be

230. *See* Hovenkamp, *supra* note 215, at 717 ("Targeting 'bigness' as such usually benefits competitors at the expense of consumers and labor.").

231. *See* John B. Kirkwood, *Tech Giant Exclusion*, 74 FLA. L. REV. 63, 101 (2022).

232. *See* Melamed & Petit, *supra* note 24, at 747 ("If antitrust law were understood to pursue multiple and perhaps conflicting or ill-defined objectives, antitrust decision-makers would be free to make largely unconstrained value choices."); *see also* Douglas H. Ginsburg, *Bork's "Legislative Intent" and the Courts*, 79 ANTITRUST L.J. 941, 950 (2014) (stating that before consumer welfare became the standard, "courts were freely choosing among multiple, incommensurable, and often conflicting values").

233. *See* Melamed & Petit, *supra* note 24, at 747 ("[A] limited-purpose antitrust law [focused exclusively on consumer welfare] . . . makes the law more predictable and thus facilitates compliance by firms and other economic agents.").

234. The lack of an objective test is likely to breed "excessive caution by businesses uncertain about the consequences of aggressive or novel forms of competition." Melamed, *supra* note 191, at 286.

235. *See* Melamed & Petit, *supra* note 24, at 753–54.

higher prices or other consumer harm. Instead, Congress wanted that power reduced through actions that protected consumers or vulnerable suppliers.[236]

In practice, moreover, the New Brandeisians appear to have realized that their rhetoric went too far. To my knowledge, neither Jonathan Kanter nor Lina Khan brought or continued any case that threatened to reduce consumer welfare. They too wanted to protect consumers and vulnerable suppliers from exploitation and would not sacrifice that goal to achieve a social or political objective.[237]

There is, however, a powerful reason to deemphasize consumer welfare and emphasize the goal of protecting consumers and vulnerable suppliers from unfair, exploitative pricing. This switch will strengthen antitrust enforcement in multiple ways. First, it will ground antitrust enforcement in the original intent behind the statutes. It will return antitrust to its roots. Second, it will increase the popularity of antitrust action in Congress and the courts because the principal reason Congress and the American people support antitrust enforcement is that it protects consumers and suppliers from exploitation. That is likely to lead to more appropriate funding and more victories in court. Third, the goal will make it easier for courts to reject an array of doctrines that impose needless restrictions on antitrust action.

IV. STRENGTHENING ANTITRUST DOCTRINE

Recognizing the fundamental fairness goal will strengthen antitrust doctrine. As Section A suggests, it will make it easier for courts to reject unwarranted restrictions on enforcement, such as the four "limits" discussed below. As Section B indicates, it will also help courts justify a current but controversial aspect of antitrust doctrine, the bar on considering out-of-market efficiencies.

236. This is not to say that no criticism of the consumer welfare standard is valid. Glick and Bush point out that consumer welfare is difficult to measure because of the economic problem of aggregating the welfare of individuals. For their broad critique, see Glick & Bush, *supra* note 3, at 250–60.

237. This is not only my impression, but Susan Athey, the principal economist at the DOJ during the Biden administration, confirmed it. She told me that all the cases DOJ brought during her tenure were within the consumer welfare framework. According to Douglas Melamed, she made a similar statement to him.

A. Rebutting Limits on Enforcement

In *The New Limits on Antitrust Enforcement*,[238] I identified four doctrines that block or impede legitimate antitrust enforcement. I referred to these doctrines as the output limit, the profit margin limit, the aftermarket limit, and the two-sided platform limit.[239] As explained below, the first two are restrictions on the evidence a plaintiff can present. The third and fourth are restrictions on the circumstances in which liability can be shown. In *New Limits*, I explained why each of these restrictions is frequently unjustified and why each should be abandoned or curtailed.[240] Courts can accomplish this reform more readily by recognizing that the overarching goal of antitrust law is to halt practices that reduce rivalry, augment market power, and exploit consumers or vulnerable suppliers.

1. Output Limit

The output limit severely limits a plaintiff's ability to use price increases to establish liability, even though price increases are the evidence of exploitation that Congress cited most frequently.[241] The output limit holds that a plaintiff cannot rely on price increases to show that the defendant had market power or that its conduct caused anticompetitive effects unless the plaintiff "prove[s] that the defendant's output fell."[242] Robert Bork took this limit to the extreme. He argued that output should be used as the supreme test of liability in every antitrust case.[243] He declared: "[t]he task of antitrust is to identify and prohibit those forms of behavior whose net effect is output restricting and hence detrimental."[244]

This emphasis on output is excessive. To be sure, output can be a useful indicator. If the defendant's output increased after it raised prices, that suggests that the price increase reflected a product

238. John B. Kirkwood, *The New Limits on Antitrust Enforcement*, 52 FLA. ST. U. L. REV. 319 (2025).

239. *Id.* at 319–20.

240. *Id.*

241. *See supra* Section II.A.

242. Kirkwood, *supra* note 238, at 323.

243. BORK, *supra* note 1, at 122.

244. *Id.*

improvement rather than the pure exercise of market power, which would tend to decrease output. But output should not be a litmus test.[245] In the first place, the available data may not permit the plaintiff to produce a reliable statistical analysis of whether the defendant's conduct reduced output.[246] In those circumstances, requiring proof of output reduction is perverse. Moreover, in many cases, other evidence will allow the court to resolve the critical issues without the need to address output.[247] In addition, sometimes output reduction is not the right requirement. Some types of conduct will harm consumers or suppliers even though they *increase* output.[248] But the most important reason to deemphasize output is that it distracts courts and juries from the central issue in an antitrust case—have consumers or vulnerable suppliers been exploited?

As Part III demonstrated, the central aim of antitrust is not to maximize output but to prevent exploitation.[249] Yet the output limit seeks to exclude the most direct evidence of exploitation—evidence that the defendant increased the prices it charged consumers, lowered the product quality it provided, restricted the choices it offered, or slowed the pace of product development. Such evidence ought to be admitted—and ought to have a high priority—unless the defendant offers clear proof that it has not exploited consumers. This proof may include evidence that output increased, but when the plaintiff introduces direct evidence of exploitation, the burden of addressing the impact on output should fall on the defendant, not the plaintiff.

245. *See* John M. Newman, *The Output-Welfare Fallacy: A Modern Antitrust Paradox*, 107 IOWA L. REV. 563, 563 (2022) (discussing output welfare as the fallacy that "lies at the core of modern antitrust").

246. *See* Kirkwood, *supra* note 238, at 335.

247. For example, the defendant may contend that it increased prices not because the challenged conduct allowed it to exercise market power, but because its costs had increased. That explanation can be tested with cost data. Likewise, the defendant may argue that it increased prices because it had substantially upgraded product quality. That explanation can be tested by asking whether the defendant had made nontrivial product improvements. Finally, the defendant would still have exercised market power, even if it had made substantial product improvements, if it had charged more for those improvements than the full cost of making them. *See id.* at 328–35.

248. *See id.* at 332–33.

249. *See supra* Part III.

2. Profit Margin Limit

Persistent, extraordinary profit margins also provide direct evidence of exploitation. Profit margins measure the excess of revenues over costs,[250] so when a defendant's profit margin is high, it indicates that the defendant has been transferring wealth from its customers to itself and that its prices are not justified by higher costs. High profit margins do not necessarily prove that the defendant has engaged in anticompetitive behavior. For instance, a defendant's margins may be large because it just introduced a popular new product. However, absent clear proof of procompetitive conduct, a large and sustained profit margin strongly suggests exploitation.

Yet courts rarely rely on the defendant's profit margin to determine whether it has market power or monopoly power. Instead, courts employ the traditional method of appraising power: they define a relevant market and measure the defendant's share within it.[251] This approach is not only traditional; it is invariable. Precedent mandates market definition,[252] and courts *always* determine whether market power or monopoly power exists by defining a relevant market.[253] Some decisions say that power may be established through direct economic evidence.[254] But direct economic evidence is never central to the decision.

250. *Profit Margin*, OXFORD ENG. DICTIONARY.COM, https://www.oed.com/search/dictionary/?scope=Entries&q=profit+margin) (last visited Oct. 26, 2025).

251. *See* AREEDA & HOVENKAMP, *supra* note 127, at § 502 ("Instead of trying to measure the degree by which a profit-maximizing monopoly price exceeds the competitive price, courts traditionally attempt to infer market power from the defendant(s)' market share.").

252. *See, e.g.*, Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965) ("Without a definition of [the relevant] market there is no way to measure [defendant's] ability to lessen or destroy competition."); McWane, Inc. v. FTC, 783 F.3d 814, 828 (11th Cir. 2015) ("Defining the market is a necessary step in any analysis of market power . . . ." (citation omitted)).

253. To the best of my knowledge, there are no exceptions.

254. *See, e.g.*, Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 307 (3d Cir. 2007) (stating that "monopoly power may be proven through direct evidence of supracompetitive prices" or may be inferred from "the structure and composition of the relevant market"); Harrison Aire, Inc. v. Aerostar Int'l, Inc., 423 F.3d 374, 381 (3d Cir. 2005) (stating the same as in *Broadcom Corp.*). Likewise, the Supreme Court has recognized the evidentiary value of high profits. FTC v. Actavis, Inc., 570 U.S. 136,

Instead, courts rarely use it, either because they think it is not clear enough,[255] or because the parties do not offer it.[256] The decisive evidence is market share, which depends on market definition.

This approach places too much weight on market definition and too little weight on a firm's actual pricing power, demonstrated by its ability—or inability—to earn sustained supracompetitive margins. Market definition is fraught with difficulties. Done correctly, it is no less technical than measuring power through direct economic evidence.[257] It requires attention to multiple factors; it is "rarely sufficient to establish the degree of market power that a firm possesses,"[258] and "its binary result works poorly in differentiated markets."[259] Moreover, placing greater emphasis on profitability would not mean dispensing with market definition. Courts can infer the relevant market from the profit margin evidence. For example, if the evidence shows that DuPont earned an exceptional rate of return on cellophane for decades,[260] the relevant market should be defined as cellophane, not all flexible wrapping materials.[261]

Courts should place greater weight on profit margin evidence. Where profit margins have been exceptionally high for many years, there is a very good reason to infer market or monopoly power,[262] and

157 (2013) ("[H]igher-than-competitive profits [are] a strong indication of market power."). But the Court has never dispensed with market definition.

255. *See* Gregory J. Werden, *Why (Ever) Define Markets? An Answer to Professor Kaplow*, 78 ANTITRUST L.J. 729, 733 n.17 (2013) ("[T]he courts typically find insufficient any direct evidence of market power.").

256. *See* United States v. Microsoft Corp., 253 F.3d 34, 50–51 (D.C. Cir. 2001) (stating that "such direct proof is only rarely available").

257. *See* AREEDA & HOVENKAMP, *supra* note 127, at § 515 ("[O]ne should not be misled into thinking that the exercise of market definition is inherently less technical than assessing power directly [through] . . . economic methods. If market definition is performed correctly, it is also quite technical.").

258. *Id.*

259. *Id.* ("Once a market is defined, a particular firm's output must be counted as either inside or outside of the relevant market, with no gradations in between. This can lead to serious errors.").

260. *See id.* at 516. ("[D]ata both in and out of the record showed extraordinarily high profits for DuPont on cellophane sales from the 1920s on, and as late as 1950 DuPont earned profits of 20 percent after taxes.").

261. *Id.*

262. Kirkwood, *supra* note 238, at 326–27.

that inference has grown stronger as economists have become increasingly adept at converting accounting profits into economic profits.[263] Further, a small but significant number of courts, government agencies, and scholars have relied on substantial and sustained margins as evidence of pricing power.[264]

Again, though, the most telling reason to utilize profit margin evidence is that it is direct evidence of exploitation. Indeed, it is more powerful evidence of exploitation than a price increase. A price increase may be justified by higher costs, but a high profit margin shows that prices substantially exceed costs. As a result, the defendant is taking wealth from its customers without being compelled by higher costs to do so.

3. Aftermarket Limit

The aftermarket limit precludes a plaintiff from claiming that a defendant's restrictions in the aftermarket create monopoly power. The aftermarket limit holds that a firm cannot exercise monopoly power in the aftermarket if consumers are aware of its aftermarket restrictions and it faces competition in the primary market.[265] In those circumstances, an attempt to create monopoly power in the aftermarket will simply cause consumers to switch to another primary market competitor.[266]

To illustrate the dynamics, take Hewlett-Packard ("HP"), which sells printers (its primary market product) and toner cartridges (its aftermarket product). The aftermarket limit says that HP cannot charge a monopoly price for its toner cartridges by forbidding purchasers of its printers from using any other toner cartridges if (a) purchasers know of this restriction and (b) have plenty of other choices in the printer market. Under these circumstances, if HP tried to charge a monopoly price for its toner cartridges, purchasers would switch to another printer. In short, competition among producers forces all of them to charge competitive prices for both printers and toner cartridges. HP cannot exercise monopoly power in the aftermarket.[267]

263. *Id.* at 323.
264. *Id.* at 338.
265. *Id.* at 347.
266. *Id.* at 323–24.
267. *Id.* at 345–46.

The aftermarket limit hinges not only on competition in the primary market but also on the knowledge of purchasers. Purchasers must be aware of the defendant's aftermarket restraints and must be able to calculate the consequences of those restraints for the total price they must pay over the life of the product for the defendant's primary market product and its aftermarket products. Otherwise, they cannot compare the full life cycle price of the defendant's products with the full life cycle price of competing products. As *New Limits* points out, however, courts routinely apply the aftermarket limit so long as purchasers are aware of the existence of the defendant's aftermarket restrictions.[268] Purchasers do not have to understand—or be able to calculate—the full life cycle price of the defendant's products.[269] But that allows defendants to exploit their customers. Purchasers who do not—or cannot—determine the full life costs of the defendant's products end up paying supracompetitive prices for the defendant's aftermarket products.

New Limits applies this analysis to Apple's restraints on the distribution of iPhone apps.[270] As *New Limits* recounts, Apple prevents app developers from avoiding Apple's App Store in two principal ways.[271] First, Apple requires app developers to distribute their apps to iPhone users exclusively through the App Store.[272] As a result, app developers cannot reach Apple's enormous customer base—over a billion consumers own iPhones—except through Apple.[273] In consequence, Apple can charge a very high price for this access.[274] Second, Apple prohibits app developers from steering users to a payment system other than Apple's own system, which means that users must pay a thirty percent commission charge on most app transactions.[275] This has allowed Apple to earn exceptional profits on App Store transactions for at least a decade.[276]

268. *Id.* at 347.

269. *Id.* at 336.

270. *Id.* at 352–58.

271. *Id.* at 352.

272. *Id.*

273. Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 935–36 (N.D. Cal. 2021).

274. *Id.*

275. Kirkwood, *supra* note 238, at 352.

276. *Id.* at 343–46.

Despite this striking evidence of exploitation, the district court invoked the aftermarket limit.[277] It reasoned that if consumers knew about Apple's closed distribution system when they purchased their iPhone, they could not be hurt.[278] And it found that consumers almost certainly did know about Apple's "walled garden."[279] More precisely, it found that Epic had not proved that consumers were unaware of Apple's restraints.[280] The Ninth Circuit agreed. "Given the total lack of evidence on consumer-unawareness,"[281] it held that "Epic cannot establish its proposed aftermarkets."[282]

In short, both the district court and the Ninth Circuit held that Apple could not be exercising monopoly power over iPhone app distribution because consumers surely knew that Apple restricted distribution and, if they objected, they could switch to an Android phone.[283] But awareness of Apple's walled garden did not mean that most consumers knew about Apple's high commission charges or its immense profit margins. There was no evidence that any consumers were aware of either fact. In consequence, consumers' *incentive* to switch phones was sharply reduced. And in fact, consumers rarely switched. Each year, only a tiny percentage of consumers replaced their iPhone with an Android phone, even when they were upgrading their phone.[284] Moreover, there is no evidence that consumers ever switched from an iPhone to an Android phone—or chose an Android phone in the first

277. *Id.* at 345.

278. *Epic Games*, 559 F. Supp. 3d at 1025 ("[T]here is no evidence in the record demonstrating that consumers *are unaware* that the App Store is the sole means of digital distribution on the iOS platform.").

279. *Id.* at 1024 ("For consumers, iOS has always been a closed system, and the App Store has been a 'walled garden' with respect to native apps from its inception . . . .").

280. *Id.* ("[I]t is undisputed by the parties that a key distinguishing feature of the iOS platform is its closed platform model, as compared to the open Android platform maintained by its main competitor Google. At the very least, previous consumers of iOS devices would have been familiar with the iOS platform and the App Store model when they repurchased a device prior to 2011.").

281. Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 981 (9th Cir. 2023).

282. *Id.*

283. *Epic Games*, 559 F. Supp. 3d at 1031; *Epic Games*, 67 F.4th at 999.

284. *Epic Games*, 559 F. Supp. 3d at 960 ("[V]ery low switching rates exist, with only about 2% of iPhone users switching to Android each year.").

instance—because Apple's commission charges on app transactions were extraordinarily high.

Thus, competition in the smartphone market does not actually discipline competition in the market for iPhone apps. In consequence, Apple has been able to earn an exceptionally large profit margin on App Store transactions for many years. In *Epic Games*, the district Court found that Apple's profit margin on App Store transactions—its total margin, accounting for all costs, not just marginal costs—exceeded seventy percent for nearly a decade.[285] This means that for every ten dollars in commission revenue Apple received, only three dollars were needed to cover Apple's entire costs; seven dollars were pure profit. In short, Apple has been exploiting its App Store customers for years.

New Limits explains why consumers have typically ignored Apple's high commission charges and the exceptional profit margins that resulted. In brief, consumers are humans, not economic calculating machines.[286] They do not exhibit the hyper-rational behavior that the aftermarket limit assumes. As a result, they do not discover Apple's prices and terms in the aftermarket, combine those with Apple's prices and terms in the primary market, calculate a full lifecycle cost of buying an iPhone, and compare that cost to the full life cycle cost of a competing smartphone. Instead, they focus entirely, or almost entirely, on the primary market—on the hardware, software, and price of an iPhone.[287]

The behavioral economics literature demonstrates why this occurs. Numerous studies have found that consumers are afflicted by heuristics, biases, and other limitations that prevent them from behaving with the rigor and energy that the aftermarket limit assumes.[288] Those limitations include bounded rationality, anchoring, loss aversion, present bias, and search fatigue.[289] Moreover, even if consumers had none of these characteristics—even if they were hyper-rational—they would devote little time to app commission charges because those charges

285. *See id.* at 1037.

286. Kirkwood, *supra* note 238, at 352.

287. *See id.* at 356.

288. *Id.* at 357.

289. *Id.* at 355–58.

constitute only a tiny proportion of the total cost of a new smartphone.[290]

In short, there are many reasons why the aftermarket limit does not apply to the smartphone aftermarket. Those reasons explain why Apple has been able to earn extraordinary profits on its App Store commissions for over a decade. But the inference also works in the opposite direction. Apple's persistently high profit margins indicate that there must be some impediments—some barriers—that prevent competition in the smartphone market from precluding the exercise of monopoly power in the aftermarket. Once again, sustained and substantial exploitation points to the existence of a competitive problem.[291]

4. Two-Sided Platform Limit

The fourth and final new limit on antitrust enforcement is the two-sided platform limit. Fashioned by the Supreme Court in *Ohio v. American Express Co.*,[292] this doctrine holds that in cases involving two-sided transaction platforms, the relevant market must also be two-sided.[293] It cannot consist of the product or service offered to users on one side of the platform, or the product or service offered to users on the other side, but instead must be defined as transactions between the two groups of users.[294] Thus, if a platform serves merchants on one side and credit cardholders on the other, the relevant market must combine the merchants and cardholders into a single market that consists of transactions between them.[295]

This limit and its corollary—that market power and anticompetitive effects must be evaluated across both sides of the platform simultaneously—has precipitated an avalanche of criticism. *Amex* has quickly become one of the least respected opinions in modern antitrust

290. *Id.* at 355–56.

291. To be sure, Apple's App Store restraints may be needed to protect the security and privacy of iPhone users. Whether that is true, as Apple argues, is beyond the scope of this Article. It is worth noting, though, that Apple's commission revenues greatly exceed the costs Apple incurs in providing security and privacy protection.

292. 585 U.S. 529, 535 (2018).

293. *Id.* at 534.

294. *Id.*

295. *See id.* at 544–45.

law.[296] Scholars have called the opinion "wrong," "alarming," "deeply flawed," "tortured," "a mistake," "nonsense," "inappropriate," "regressive," "a house of cards," and incoherent.[297] I have called it a failure.[298]

One of its most egregious flaws was the Court's refusal to accept the plaintiffs' direct evidence of exploitation. The plaintiffs contended that Amex had exploited merchants and consumers in two ways.[299] First, its merchant fees exceeded those of the other major credit cards, and merchants passed on those higher fees to consumers in the form of higher retail prices.[300] Second, Amex compounded the harm to merchants and consumers by repeatedly *increasing* its merchant fees.[301] The Supreme Court ruled, however, that neither type of harm showed that Amex had market power or that its conduct had anticompetitive effects.[302]

There was no doubt that Amex's merchant fees were higher than those of Visa and MasterCard.[303] The Supreme Court characterized this fact as a fundamental feature of competition among the credit card companies.[304] The trial court found, moreover, that Amex's higher fees, combined with its anti-steering provisions, caused other credit card companies to raise their fees[305] and induced merchants to raise the

296. *See* Steven C. Salop et al., *Rebuilding Platform Antitrust: Moving on from* Ohio v. American Express, 84 ANTITRUST L.J. 883, 883 (2022) (stating that *Amex* "may be the worst antitrust decision in many decades").

297. *See* Brief of the American Antitrust Institute as Amicus Curiae in Support of Plaintiff, Counter-Defendant-Appellant at 27–28, Epic Games, Inc. v. Apple Inc., 67 F.4th 946 (9th Cir. 2023) (Nos. 21-16506 & 21-16695), 2022 WL 332874, at *21–22.

298. John B. Kirkwood, *Antitrust and Two-Sided Platforms: The Failure of American Express*, 41 CARDOZO L. REV. 1805, 1805 (2020).

299. *Amex*, 585 U.S. at 550.

300. *Id.*

301. *Id.*

302. *Id.* at 548, 552.

303. *Id.* at 548.

304. *See id.* at 538–39 ("While Visa and MasterCard earn half of their revenue by collecting interest from their cardholders, . . . Amex instead earns most of its revenue from merchant fees." To generate more fees, Amex encourages its cardholders to spend more by providing "better rewards than other networks." To fund those rewards, "Amex must charge merchants higher fees than its rivals.").

305. United States v. Am. Express Co., 88 F. Supp. 3d 143, 216 (E.D.N.Y. 2015) (finding that "prohibitions on merchant steering . . . enabled American Express's competitors to charge higher all-in fees").

prices they charged consumers.[306] But the Supreme Court rejected this evidence of harm—this direct evidence of exploitation—because this was a two-sided market and harm on the merchant side could be offset by benefits on the cardholder side. In other words, Amex could have increased cardholder rewards so much that benefits to cardholders outweighed the impact of higher fees on merchants and their customers. In short, the plaintiffs had not shown net harm or exploitation in the two-sided market as a whole.[307]

The Court's analysis was incorrect, both factually and conceptually. For example, when Amex raised its fees repeatedly, it allocated only part of the extra revenue to greater cardholder rewards.[308] Amex actually *increased* its exploitation of merchants and consumers. Further, the Court ignored a basic proposition of antitrust law. Under basic antitrust law, defendants cannot justify anticompetitive behavior by claiming that they diverted the resulting profits to desirable activity like raising the wages of their workers or expanding the services they provide customers. Those collateral benefits are not cognizable and cannot excuse the harm defendants caused by depriving consumers of the fruits of competition—lower prices and greater choice.[309] The Court overlooked this point completely.

Moreover, the Court asserted that Amex had increased the value of its services by expanding its cardholder rewards.[310] But a price increase is not justified—it is, in fact, exploitative—if it exceeds the cost of providing the additional value. If a firm spends two dollars on additional value but increases the price by ten dollars, it is exercising market

306. *Id.* (finding that Amex's anti-steering provisions have "resulted in increased prices for consumers . . . not only those customers who use American Express cards, but also shoppers who instead prefer to pay using a lower-rewards GPCC card, debit card, check, or cash").

307. *See Amex*, 585 U.S. at 544–49.

308. *See Amex*, 88 F. Supp. 3d at 196 (noting that the fee increases "were not paired with offsetting adjustments on the cardholder side of the platform").

309. *See* Kirkwood, *supra* note 298, at 1820–25; Hemphill & Rose, *supra* note 197, at 2107 ("Nor may a horizontal agreement be defended on the ground that the resulting extra profit induces or is spent on increased innovation."); *see also* United States v. Phila. Nat'l Bank, 374 U.S. 321, 370 (1963) (rejecting the claim that "anticompetitive effects in one market could be justified by procompetitive consequences in another").

310. *See Amex*, 585 U.S. at 538–39.

power and exploiting its customers.[311] Here, as noted above, Amex's fee increases produced more revenue than it spent on additional rewards.[312] The Court also rejected the evidence of fee increases because they could have been driven by an increase in demand for Amex's card.[313] The Court pointed out that industry output "grew dramatically from 2008 to 2013," suggesting a sharp increase in demand for credit cards.[314] But Amex's fee increases had largely preceded the expansion in industry output.[315] In short, there was no good ground for dismissing either the evidence of repeated fee increases or the evidence that Amex charged higher fees than its rivals. Both represented direct evidence of exploitation, and that exploitation should have created a presumption of liability.

5. Resolution

These four limits on antitrust enforcement impede legitimate and desirable antitrust enforcement. In most cases, they are unwarranted. They are especially unjustified when there is direct evidence of exploitation—direct evidence that the defendant's conduct has led to higher prices, lower wages, reduced choice, or other extortion of consumers or suppliers. When the plaintiff presents substantial direct evidence of exploitation, courts should disregard the four limits and find a violation unless the defendant plainly shows that its conduct benefited consumers or vulnerable suppliers on balance.

311. *See* Kirkwood, *supra* note 238, at 345.

312. *Amex*, 88 F. Supp. 3d at 196 (noting that the fee increases "were not paired with offsetting adjustments on the cardholder side of the platform").

313. *Id.* at 198–99 ("Nonetheless, like the district court in *Visa I*, this court does take note of the ease with which American Express is able to identify and target merchant segments for differential pricing based on its estimates of merchant demand in each industry—demand which, as previously discussed, and as recognized in *Visa* is largely a reflection of the degree to which Amex cardholders insist on using their cards.")

314. *Amex*, 585 U.S. at 549.

315. *See* Kirkwood, *supra* note 298, at 1836 n.151 (noting that Amex raised fees from 2005 to 2010, whereas the output increase occurred from 2008 to 2013).

B. Reinforcing Valid Doctrine

Where existing doctrine is correct but controversial, showing that the doctrine helps prevent exploitation would make it easier for courts to sustain the doctrine. One good example is out-of-market efficiencies.

Out-of-market efficiencies are benefits that flow to consumers, workers, or others who are not in the relevant market.[316] Defendants continue to argue that courts should count these out-of-market benefits when determining whether the defendants' conduct is justified.[317] For example, suppose the leading hospitals in a metropolitan area agree not to hire each other's nurses. That agreement is likely to lower wages in the relevant market, the labor market. But the hospitals may argue that the agreement is justified because it creates offsetting benefits in the product market. By lowering wages, the agreement will reduce the hospitals' costs, and they may argue that they will pass on the savings to consumers in the form of lower hospital prices.

As a general rule, antitrust courts will not consider such out-of-market efficiencies.[318] Some decisions, however, arguably do consider them, most notably the recent cases involving the NCAA's restraints on athlete compensation.[319] Every one of those cases at least discussed whether those labor market restraints might be justified by product market benefits—specifically, whether consumers would be more likely to watch college athletics if the athletes were unpaid (i.e., they were amateurs rather than professionals).[320]

316. *See* Epic Games, Inc. v. Google LLC (*In re* Google Play Store Antitrust Litig.), 147 F.4th 917, 944 (9th Cir. 2025) (referring to out-of-market efficiencies as "cross-market procompetitive benefits").

317. More precisely, whenever a court has to determine whether the procompetitive effects of the defendant's conduct outweigh its anticompetitive effects, defendants often assert that the court should take into account procompetitive effects that occur *outside* the relevant market. *See id.* at 933–37.

318. *See generally* Alexander & Salop, *supra* note 199 (discussing the effects of anticompetitive conduct that balances multi-marketing with out-of-market benefits in antitrust litigation).

319. *See* NCAA v. Alston, 594 U.S. 69, 74 (2021); NCAA v. Bd. of Regents, 468 U.S. 85, 92–93 (1984); O'Bannon v. NCAA, 802 F.3d 1049, 1052 (9th Cir. 2015).

320. *See Alston*, 594 U.S. at 94; *Bd. of Regents*, 468 U.S. at 96; *O'Bannon*, 802 F.3d at 1073.

There are very good reasons, however, to uphold the rule against out-of-market efficiencies. Considering them is inconsistent with the statutory text, numerous cases, and the capacities of courts and juries.[321] Considering them is also inconsistent with the fundamental goal of antitrust law.[322] Nothing in the voluminous legislative history suggests that Congress was willing to tolerate the exploitation of consumers or vulnerable suppliers if the conduct in question generated side benefits elsewhere in the economy.

V. VULNERABLE SUPPLIERS

The suppliers who most deserve protection from anticompetitive behavior by powerful buyers are individuals and small firms without significant market power, such as delivery drivers, contract nurses, and small farmers. These suppliers typically operate in atomistically competitive markets and cannot command prices, wages, or other forms of compensation that exceed the competitive level. As any microeconomics textbook makes clear, however, they can be exploited by buyers with monopsony power.[323] They are *vulnerable* suppliers.

In contrast, some suppliers have significant market power. They can charge supracompetitive prices and earn profits that exceed the competitive level. Buyers with "countervailing power"[324] can induce them to reduce their prices, but in many cases, that is a benefit to competition and consumers, not a harm. When the source of supplier market power is oligopoly pricing rather than innovation, there is no competitive or consumer value in preserving the market power of those suppliers. And the legislative histories of the antitrust laws show no solicitude for such suppliers. Reducing their prices closer to, but not below, the competitive level does not exploit them.

The elected officials who passed the antitrust statutes were concerned about vulnerable suppliers—suppliers without significant market power. In the Sherman Act debates, the legislators repeatedly singled out small farmers, declaring that the trusts exploited them by suppressing the prices they paid for farm products.[325] Indeed, one

321. *See, e.g.*, Alexander & Salop, *supra* note 199, at 286–97.

322. *See supra* Section II.A.

323. *See infra* notes 328–30 and accompanying text.

324. *See infra* note 332 and accompanying text.

325. *See supra* Section II.A.

representative stated that the beef trust "robs the farmer on the one hand and the consumer on the other."[326] In general, moreover, the legislators were concerned about the plight of individuals, who could be exploited as purchasers or as suppliers. Senators and representatives referred to protecting "the consumer," "the farmer," "the people," "the public," and "the community."[327] There is no evidence that Congress regarded firms with significant market power as vulnerable to exploitation.

Congressional concern reflected the economics of buyer power. While Congress did not use the terms "monopsony power" and "countervailing power," Congress' desire to protect individuals and small firms from exploitation suggests that, in economic terms, Congress wanted to protect suppliers without market power from the exercise of *monopsony* power but had no interest in protecting suppliers with significant, unjustified market power from the exercise of *countervailing* power.

Monopsony power is the mirror image of monopoly power.[328] In the classic case, the monopsonist restricts the amount it purchases from atomistically competitive suppliers, such as small farmers or individual workers, to reduce the price or wage it pays them.[329] This reduction in price exploits the suppliers, enriching the monopsonist at their expense.[330] But it does not benefit consumers. On the contrary, because output falls, the amount of product reaching consumers is reduced, and consumer prices are likely to increase.[331] Understandably, Congress wanted to stop this exploitation, which takes the wealth of vulnerable suppliers without enhancing the welfare of consumers.

In contrast, *countervailing power* is exerted against suppliers with market power, which reduces their power and often benefits consumers.[332] Buyers with countervailing power typically deploy it by playing suppliers with market power off against each other, promising

326. 21 CONG. REC. 4098 (1890).

327. *See supra* Section II.A.

328. For a detailed discussion of monopsony power and countervailing power, see John B. Kirkwood, *Powerful Buyers and Merger Enforcement*, 92 B.U. L. REV. 1485, 1493–1512 (2012).

329. *Id.* at 1495.

330. *Id.*

331. *Id.* at 1498.

332. *See id.* at 1500–02.

to steer business to the supplier that offers the lowest price.[333] By dangling significant additional business in front of each supplier, the buyers induce some of them to cut prices, and because the buyers often compete with each other downstream, they are likely to pass on the suppliers' price cuts to consumers in the form of lower downstream prices.[334] In short, the exercise of countervailing power against suppliers with significant market power is likely to lower suppliers' prices closer to the competitive level and reduce consumer prices as well.

Countervailing power is not always benign. As discussed earlier, there are at least ten situations in which the exercise of countervailing power is likely to dampen competition upstream—such as by reducing innovation by suppliers, or to suppress competition downstream—such as by eliminating a maverick retailer and raising retail prices.[335] In consequence, there should be no blanket exemption in the antitrust laws for the exertion of countervailing power. At the same time, as the statutory language and legislative history show, stopping the anticompetitive exercise of countervailing power was not part of Congress' fundamental aim in passing the antitrust laws.[336] Thus, it is most accurate to state the ultimate goal of antitrust law as protecting consumers and *vulnerable* suppliers—individuals and small firms without significant market power—from exploitation. This squarely puts the focus on protecting workers and farmers, the vulnerable groups most often mentioned in the legislative debates.[337]

333. *Id.* at 1502.

334. *Id.*

335. *See id.* at 1536–58; *see also* Kirkwood, *supra* note 136, at 367–68 (outlining five different settings in which harm to competition can occur).

336. *See supra* Section II.A (discussing Congress' ultimate goals when passing the antitrust laws).

337. Suppliers who are typically vulnerable, such as workers and small farmers, could become less vulnerable if they acquire market power by unionizing or forming agricultural co-ops. The legislative history does not address the issue. But my judgment is that suppliers in these organizations should still be categorized as vulnerable suppliers; we do not want to allow buyers to reduce rivalry among themselves to lower the payments made to unionized workers or co-op members. For a discussion on how antitrust laws are applied to farmers as vulnerable suppliers, see generally John Lauck, *Toward an Agrarian Antitrust: A New Direction for Agricultural Law*, 75 N.D. L. REV. 449 (1999).

VI. CONCLUSION

The original, fundamental goal of antitrust law is not consumer welfare. While Congress did pass the antitrust laws to benefit consumers, its driving motivation was not to enhance their economic welfare but to protect them from unfair, exploitative pricing. As Part II established, the legislative history is clear that Congress objected to trusts and monopolies largely because they raised prices and suppressed payments to suppliers in order to take the wealth of consumers and suppliers for themselves. Congress regarded this exploitation as deeply unfair, akin to robbery or extortion.

The consumer welfare standard is useful analytically; it enables courts to reach the right results in particular cases. But deemphasizing consumer welfare and emphasizing fairness and exploitation is likely to strengthen antitrust enforcement in several major ways. It will ground antitrust in the original intent; it will resonate more powerfully with Congress and the American people, leading to better funding and more court victories; and it will help judges reject doctrines that impose needless limits on antitrust action.