A COUNTER-HISTORY OF ANTITRUST LAW

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INTRODUCTION

When we make antitrust arguments, we employ the rhetoric of competition. We simply take for granted the received learning that competition policy (and its celebrated logic of efficiency) has always provided the ground for antitrust arguments.¹

But this longstanding rhetorical consensus has settled nothing. As trained producers of antitrust arguments, we know that the rhetoric of competition allows for the expression of deep-seated disagreements about competition policy. Take, for example, arguments for "free competition." To recognize the conflict lodged in calls for free competition, we need go no further than an inquiry about the restraining mechanism: What do we want to free competition from? Do we want to free it from governmental power? Or from market power? If we are concerned with governmental interference with markets, then, for example, any Department of Justice intervention to reform a market process or overturn its consequences is bad. If, on the other hand, we are concerned with market power, then government participation can be good when it dissipates that power. If these alternatives appear to offer the possibility of clear policy choice, then consider the more difficult and more realistic form of the question about free competition: How do we make policy that reflects distrust of both kinds of power?²

The dilemma of "free competition" is just one of many normative conflicts captured in the rhetoric of competition.³ Although the foregoing formulation might seem new, we all understand antitrust history as a series of attempts to balance the normative implications of competition

1. For the only recent questioning of the assumption about the unrivaled policy of competition, see Peritz, *The "Rule of Reason" in Antitrust Law: Property Logic in Restraint of Competition*, 40 HASTINGS L.J. 285 (1989). See also *Northern Sec. Co. v. United States*, 193 U.S. 197, 403 (1904) (Holmes, J., dissenting) (observing that the Sherman Act "says nothing about competition").

2. This ideological problem provides currency for the idea of anti-trust, an idea that need not be limited to the historical emergence and disappearance of a particular legal form (or fiction) called a "trust." Instead, it makes good ideological sense, given the individualistic (liberal) tradition marked by John Locke, Immanuel Kant, and others, that there would and should appear a statute institutionalizing anti-trust of anti-monadic power, regardless of that power's location in the public or private spheres, as we imagine them today. On the other hand, Locke, Hobbes, and other contractarians sought to legitimize the transition from monadic natural rights to societal coercion through the fictive mechanism of agreement. Given this founding myth of social contract, how can a statute institutionalize an economy where "contract[s] . . . in restraint of trade," are proscribed? Sherman Act § 1, 15 U.S.C. § 1 (1988) (effective July 2, 1890). Isn't the contractarian formation of society by its nature a restraint of trade? Isn't that its purpose? If so, then it seems that we should only distrust monadic power, power exercised by individuals, whose strength prevails despite the social compact creating a community of interest.

3. The logic of efficiency has done no better. For an analysis of the logic's incoherence, as well as its failure to rationalize one area of antitrust, see Peritz, *The Predicament of Antitrust Jurisprudence: Economics and the Monopolization of Price Discrimination Argument*, 1984 DUKE L.J. 1205.

policy. In short, our framework for reading antitrust doctrine is the historical development of the Supreme Court's "rule of reason" jurisprudence. Two fundamental failings, however, characterize this familiar history of the "rule of reason"—one failing well-known and the other only recently recognized.

The notorious problem with the "rule of reason" is its open-endedness, its incoherence, its unrealizability. Judicial balancing of competitive effects under the "rule of reason" has called for argument about secondary policy implications, such as the need for fair methods of competition or the efficiency effects of competitive markets. But what have we meant by each of these implied policies? And which of them applies to an evaluation of market conduct, such as fixing prices or buying rivals? When is an implication so important, or a combination so consequential, or a transgression so threatening, that the conduct should always be illegal? If not illegal *per se*, how do we weigh and balance these elements in a rule of reason analysis? To use familiar antitrust discourse, how do we determine (consistently) the effects on competition?

There is a second problem with this familiar view of antitrust history as a series of attempts to balance social values implicated in the rhetoric of competition. Despite its apparent open-endedness, the rhetoric of competition has restricted our understanding of antitrust law in two influential ways. First, because the economic logic of price theory has persuaded many of us to accept its claims of unrivaled precision and logical structure, we presume (or fear) that arguments founded in social values but not reflected in the current antitrust discourse of economics⁴ simply cannot be adjudicated in a structured way. But don't be misled. There are lots of alternative structures. The conundrum of "free competition" can illustrate one alternative structure: The desire for competition free of government power can be understood as an impulse toward the value of individual liberty. On the other hand, the desire for competition free of market power is reflected in the conventional models of perfect and workable competition—that is, in a commitment to equality in the marketplace. A structured analysis of competition policy based on these impulses toward liberty and equality can help us begin to make sense of antitrust law and policy, including the historical relationship

4. This discourse primarily focuses on efficiency, though more recently it has included redistribution in the narrow sense of consumer well-being. See generally Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982) (Congress' antitrust objective was to prevent the formation of market power and super-competitive consumer prices). For an extended analysis of the analytical inadequacies and rhetorical overcompensations of some price theorists in the colonized area of price discrimination, see Peritz, *supra* note 3.

between competition policies and efficiency logics. But it is only a beginning.

Remembering commitments to liberty and equality as factors in the production of competition rhetoric is helpful. It is inadequate, though, to the task of understanding antitrust history, for the rhetoric of competition has confined our understanding of antitrust law in a second way as well. The steady din of competition rhetoric has numbed our faculties and kept us from remembering that competition policy has never been the sole normative ground for antitrust laws. Fresh readings of case materials, legislative histories, and other texts constituting the discourse of antitrust demonstrate that antitrust law always has been produced by a fundamental tension between competition policy and common law property rights.⁵ In other words, the rhetoric of competition has obscured the full scope of antitrust's history of normative conflict and, thus, the full scope of familiar terms such as fair competition or efficiency. To understand these terms of engagement, to uncover the relationship between competition policy and efficiency logics, and to develop a satisfactory methodology that clarifies antitrust without the normative distortion of current price theory, our analysis must take into account one hundred years of claims founded in common law property rights.

Take, for example, the theme of "fair profit" heard throughout the congressional debates over the Sherman Act:

[E]very man in business . . . has a right, a legal and moral right, to obtain a fair profit upon his business and his work; and if he is driven by fierce competition to a spot where his business is unremunerative, I believe it is his right to combine for the purpose of raising prices until they shall be fair and remunerative.⁶

In short, the force of competition was sometimes seen as having destructive effects. Not only in the congressional debates but also in Supreme Court doctrine, competition was considered ruinous when it destroyed a property owner's right to a fair profit on his work.

For a recent variation on the fair profit theme, recall for a moment the Supreme Court's turn to a "free rider" rationale for permitting manufacturers to impose restraints on their distributors and dealers:

[N]ew manufacturers . . . can use the restrictions in order to induce competent and aggressive retailers . . . to engage in promotional activi-

5. See generally Peritz, *supra* note 1, at 289-90, 303-24 (discussing the conflict between state regulation of competition and the rights of property owners).

6. 21 CONG. REC. 2730 (1890) (statement of Sen. Platt); see also Peritz, *supra* note 1, at 297-303 (discussing the logic of "fair profit," i.e., that a fair return on one's labor is a social good worthy of government enforcement); Peritz, *A Genealogy of Vertical Restraints Doctrine*, 40 HASTINGS L.J. 511, 516-27 (1989) (analyzing how the Court in its early interpretations of the Sherman Act viewed the roles of competition and "fair price").

ties or to provide service and repair facilities necessary to the efficient marketing of their products.⁷

In other words, a manufacturer can protect the promoting retailer's expectation of a fair profit earned from its promotional work by, for example, granting it an exclusive territory or, in the alternative, simply terminating price cutting rivals. As Posner and Easterbrook have written, "When people use a valuable good [such as the goodwill created by promotional work] without paying for it, economists call them free riders."⁸ In sum, the free-rider rationale reflects concern over uncompensated takings of another's property—something akin to theft. These calls for a right to a fair profit, spanning almost a century, are examples of an extensive body of antitrust doctrines inspired by the normative appeal of common law property rights.⁹

Such conflict may be surprising initially, given the conventional wisdom that competitive markets depend upon property rights: Without the freedom to sell or exchange one's property, there can be no competition. While this notion remains viable, it has become equally clear that there is another facet to the historical relationship between competition policies and private property rights—a facet that reflects a conflict co-extensive with the dependency. One fundamental dispute, often repeated in the past century of antitrust argument, crystallizes this tension: On the one hand, competition policy calls for the enjoining of mergers that result in firms whose market power might allow them to dominate their rivals. On the other hand, prohibiting owners from selling their business impinges on their fundamental right to sell or exchange their property. This minimalist rendering of a conflict between competition policy and common law property rights is an accurate abstract of the opinions published in the well-known case of *Northern Securities Co. v. United States*.¹⁰ This conflict represents one encounter in an ongoing struggle between two rhetorics, two sets of assumptions and beliefs about antitrust law.¹¹ It is this struggle that has produced antitrust discourse.

In light of these findings, I believe we can make good sense of antitrust discourse and competition policy without submitting to price theory's impoverished ethic of wealth maximization. Moreover, we can

7. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 55 (1977). For an extended analysis of the free rider rationale, see Peritz, *supra* note 6, at 554-74.

8. R. POSNER & F. EASTERBROOK, *ANTITRUST LAW* 177 (2d ed. 1984).

9. For full analyses of the tensions between competition policy and common law property rights and explanations of their joint production of doctrines, including the free rider rationale, see Peritz, *supra* note 6.

10. 193 U.S. 197 (1904). See Peritz, *supra* note 1, at 321-36.

11. It can also be understood in terms of the tension embodied in the notion of "free competition," the conflict between impulses toward liberty (of contract) and equality (of marketplace rivals).

learn something new about the relationship between wealth maximization and competition policy. I propose that we can make antitrust law workable¹² by viewing it as the product of tensions between the rhetorics of competition policy and private property rights, each rhetoric animated by impulses toward liberty and equality. This structured analysis of antitrust discourse, which I call a "genealogy" or a "counter-history,"¹³ can sharpen our understanding of antitrust law, including the volatile relationship between competition policy and efficiency logic. It does not require the sacrifice of antitrust's traditional political economy of value pluralism.¹⁴ Rather, this framework of two rhetorics or logics in productive conflict can revitalize an antitrust economy of pluralism by challenging the view that unfettered competition represents the only positive norm for antitrust. Further, this challenge clears the way for disputing the related claim that concern about wealth transfers, special solicitude for small business, or other so-called "anti-competition" sentiments constitute negative values that should or can be subordinated. Instead, a genealogy helps us remember that these sentiments, as well as those traditionally associated with competition, are historical products of tensions between competition policy and common law property rights. Antitrust doctrine and policy make sense when understood as products of the tension between these two social forces.

We have learned to comprehend antitrust history as a series of disagreements about competition policy. Taking this view as my framework for this paper, I divide antitrust discourse into three historical periods, each era typified by one form of disagreement over competition policy. But no form ever has succeeded its forerunner, as one paradigm might be

12. My use of the term "workable" is not intended as an allusion either to the body of economic analysis founded in the notion of "workable competition" or to the antitrust policy analysis based on that body of work. See generally REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY ANTITRUST LAWS 320-39 (1955) [hereinafter 1955 ATTORNEY GENERAL'S REPORT]; P. AREEDA, ANTITRUST ANALYSIS 40 (3d ed. 1981); Clark, *Toward a Concept of Workable Competition*, 30 AM. ECON. REV. 241 (1940); Stocking, *The Rule of Reason, Workable Competition, and Monopoly*, 64 YALE L.J. 1107 (1955). Nor is it intended as an allusion to other recent renditions of "workability." See, e.g., Arthur, *Workable Antitrust Law: The Statutory Approach to Antitrust*, 62 TUL. L. REV. 1163 (1988) (arguing that moving from a constitutional approach to a statutory approach can make antitrust law workable); Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696 (1986) (price theory as basis for workable antitrust policy).

13. See generally M. FOUCAULT, *Nietzsche, Genealogy, History*, in LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS 139-64 (D. Bouchard ed. 1977); M. FOUCAULT, *Two Lectures*, in POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS 78-108 (C. Gordon ed. 1980). Cf. F. NIETZSCHE, *THE USE AND ABUSE OF HISTORY* (1874) (A. Collins trans. 1949); H. WHITE, *METAHISTORY: THE HISTORICAL IMAGINATION IN NINETEENTH-CENTURY EUROPE* 41-42, 331-74 (1973) (Nietzschean historiography).

14. For a summary of this political economy of pluralism, see *infra* text accompanying notes 65-80. For a snapshot of this dynamic process of antitrust discourse production, see Peritz, *supra* note 1, at 336-41.

thought to displace its predecessor.¹⁵ Rather, we have welcomed each new form as an illumination or supplement to an evolving policy of competition.¹⁶ Thus, we have retained all three forms as familiar ingredients in our current antitrust discourse.

There are four parts to this Article. Parts I, II, and III set forth dual accounts of three historical periods of antitrust discourse—accounts of the production factors for antitrust argument. Each of the first three Parts recounts a dual history of antitrust discourse—the orthodox history of one disagreement over competition policy, followed by a counter-history or genealogy of the disagreement. Part IV reports the recent effusion of scholarly attention to antitrust's formative years and describes its relationship to a genealogical approach. The Article concludes with a few remarks about the prospects for freeing antitrust argument from the prison of price theory, and for reconstituting antitrust as public interest law.

I. FIRST DISAGREEMENT ABOUT COMPETITION AS CONSTITUTING THE FORMATIVE PERIOD: LITERALISTS AND RULE OF REASONISTS

In the twenty years following the Sherman Act's passage, two factions on the Supreme Court held conflicting convictions about the statute. According to the orthodox view of those early years, literalists and rule of reasonists disagreed over a technical inatter—the prospect of reading the statute literally. In sharp contrast, a genealogical approach leads to an account of the factional dispute as a fundamental disagreement about the relationship between congressional competition policy and common law property rights.

A. *The Orthodox View: The Impossibility of Literalism*

Although federal antitrust law originated in a statute—the Sherman Act of 1890¹⁷—judges and scholars have viewed the statute as little more than a congressional mandate to develop a federal common law of competition.¹⁸ Thus, it is not surprising that we pay more attention to court

15. See T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 92 (2d ed. 1970) (describing scientific revolutions as "non-cumulative developmental episodes in which an older paradigm is replaced in whole or in part by an incompatible new one").

16. See, e.g., 1955 ATTORNEY GENERAL'S REPORT, *supra* note 12, at 132. For a recent attempt to apply a modern version of Spencer's Social Statics, see Maleski, *Sociobiology and the California Public Trust Doctrine: The New Synthesis Applied*, 25 NAT. RESOURCES J. 429, 436 (1985) (suggesting that the process of legal evolution is a response to ever-changing social conditions).

17. Chapter 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1988)).

18. *Northern Pac. R.R. v. United States*, 356 U.S. 1, 4 (1958); *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911); *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

doctrine than to statutory language or legislative history. For example, although the statute refers individually to "every contract, combination . . . or conspiracy in restraint of trade,"¹⁹ a forest of paper has gone to exegesis of an agglomerative "agreement" doctrine. Moreover, although the statute prohibits "every" such restraint, court doctrine has limited the statute's application to *unreasonable* restraints. As a final example, the statute says nothing about "competition," although we take that to be the underlying policy. Nonetheless, these slippages seem legitimate enough, given a common law court's admitted function of developing and shaping legal doctrine. In practice, few scholars and no judges have expressed reservations about this common law vision of antitrust.²⁰

However, in the midst of this settled view of antitrust as an evolving common law of competition, there remains a nagging difficulty: Given the current consensus that the Supreme Court's adoption of the "rule of reason" in 1911 represents the birth of modern antitrust law, what do we do with the preceding jurisprudence of "literalism"?²¹ Do we treat it as the evolutionary precursor to modern antitrust? Or as some pre-rational forebear? There are, of course, numerous possibilities.

Here is the orthodox treatment: Supreme Court doctrine in antitrust's formative period, 1890-1911, is usually understood as a series of technical disagreements between the "literalist" and "rule of reason" factions. The literalists are portrayed as naifs who took the Sherman Act at its word—that "every contract, combination . . . or conspiracy, in restraint of trade" should be illegal.²² Under this view, the Court finally got it right when the "rule of reason" faction secured a majority in two companion cases—*Standard Oil* and *American Tobacco*: Because every agreement to sell something to someone restrains one's ability to sell it to

19. 15 U.S.C. § 1 (1988) (emphasis added).

20. *But see, e.g.,* Arthur, *supra* note 12 (asserting that antitrust should be viewed as a statute-based legal domain); Spivack, *Monopolization Under Sherman Act, Section 2*, 50 ANTITRUST L.J. 285 (1982) (accord).

21. For divergent approaches, see 1955 ATTORNEY GENERAL'S REPORT, *supra* note 12; *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988) ("restraint of trade" within the Sherman Act invokes the dynamic potential of the common law, unlimited by the static content assigned to the term in 1890).

Generally, the early cases are read in one of two ways—either as section 1 cases that have nothing to do with *Standard Oil's* section 2 doctrine (which raises a problem with *Northern Securities*) or as consistent with *Standard Oil* (that is, the price fixing agreements are always unreasonable and thus, illegal *per se*). Justice Taft's opinion, while a circuit court judge, in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899), however, is cited with some frequency because it is understood as consistent with *Standard Oil's* rule of reason. For an analysis of the similarities and differences between them, see Peritz, *supra* note 1, at 313-41.

22. Sherman Act, § 1, 15 U.S.C. § 1 (1988) (emphasis added).

someone else, all agreements restrain trade.²³ Thus, only *unreasonable* restraints should be considered illegal, unless we want to proscribe all commercial agreement. A "literalist" reading of the Sherman Act would render illegal not only price-fixing cartels, but also partnership agreements and even simple contracts for the sale of goods. Certainly, Congress could not have intended such folly. Accordingly, the well-known story concludes, we must apply a "rule of reason" as the framework for analyzing the effects of conduct "in restraint of trade." In short, only *unreasonable* restraints of trade should raise antitrust concern.²⁴

The moral of this familiar story is clear enough—the force of reason restrained the zeal of "literalism."²⁵ Certainly, no one can argue with the congressional desire to champion competition in the face of commercial markets overrun by the merger and cartelization crusades of the late 19th century. But the naive ardor of "literalism" produced a doctrine that proved not only unworkable in practice but also alarming in implication.²⁶ Truly productive regulation of competition, the story concludes, demanded a jurisprudence of reason. A "literalist" reading of the Sherman Act would have imposed competition, whatever the costs to society. Accordingly, we moderns have learned to appreciate the "literalists" as sincere simpletons whose interpretive intemperance taught us to recognize the need for reason's rule, a need that they themselves did not understand.

B. *A Genealogical View: Property Rights in Restraint of Competition*

A genealogical account of antitrust's formative period offers a critically different view of the battles between literalists and rule of reasonists and, in so doing, sheds new light on an old archive of misunderstood records. These records chronicle conflict: They report a series of battles over the relationship between competition policy and common law property rights, battles whose opening maneuvers are dramatized in congressional debates preceding the Sherman Act's passage in 1890. After

23. See *Standard Oil Co. v. United States*, 221 U.S. 1, 52-55 (1911); *United States v. American Tobacco Co.*, 221 U.S. 142 (1911); *Chicago Bd. of Trade v. United States* 246 U.S. 231 (1918).

24. See, e.g., L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 181 (1977) (rule of reason allows inquiry only into whether an arrangement significantly decreases competition).

25. *Addyston Pipe*, 85 F. at 271, is an exception. *Addyston Pipe* is treated as reasonable doctrine because of its direct/ancillary distinction. While we post-realists might not consider it workable, the literalists did. Indeed, it has reappeared in recent court doctrine. See, e.g., *Business Elecs. Corp.*, 485 U.S. at 730. For an analysis of why this distinction finally proved inadequate to the rule of reasonists, see Peritz, *supra* note 1, at 338 (constitutional rhetoric of liberty).

26. See, e.g., *Northern Sec. Co. v. United States*, 193 U.S. 197, 403 (1904) (Holmes, J., dissenting) (observing that if the purchase of shares in competing companies is a violation because of its potential effect on competition, there is hardly any transaction concerning commerce that may not be made a crime).

President Harrison signed the bill into law, Supreme Court opinions interpreting the Sherman Act disclose a twenty-year war between two factions disputing the relationship between competition policy and common law property rights. When the property rights defenders finally mustered a majority under the "rule of reason" in the *Standard Oil* opinion, new struggles erupted in the halls of Congress—this time culminating in the passage of the Clayton and Federal Trade Commission Acts of 1914.²⁷ As we all know, both statutes deploy the rhetoric of competition.

Unlike the orthodox view of the formative years, this counter-history is not a narrative account of the evolving common law of antitrust. Rather, it is a correspondence of struggles between factions holding two radically opposed views of competition policy.²⁸

This narrative begins on January 21, 1888, early in the first session of the 50th Congress, with Representative Henry Bacon's (D. N.Y.) introduction of a resolution directing the House Committee on Manufactures to investigate trusts in several industries and to recommend suitable legislation.²⁹ In the midst of this investigation, both the Democratic and Republican parties adopted antitrust platform planks. On July 30, the House Committee on Manufactures issued an interim report.³⁰ Within two weeks, Senators John H. Reagan (D. Tex.) and John Sherman (R. Ohio) introduced antitrust bills. Both were referred to the Senate Finance Committee, whose chairman was Senator Sherman.³¹ (Senator Sherman's home state of Ohio had been the domicile of John D. Rockefeller's Standard Oil Trust.) Almost a month later, the Finance Committee reported to the full Senate the Sherman bill, with the following operative language: "That all arrangements, contracts, agreements, trusts, or combinations . . . made with a view, or which tend to prevent full and free competition . . . or which tend to advance the cost to the consumer . . . are hereby declared to be against public policy, unlawful, and void."³² Floor debate on this bill began on January 23, 1889, in the Senate's second session.

27. Federal Trade Commission Act, Pub. L. No. 63-717, ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41-77 (1988)); Clayton Act, Pub. L. No. 63-212, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-27 (1988)).

28. Note that I did not characterize this as an eternal return of the *same* conflict.

29. H.R. MISC. DOC. No. 124, 50th Cong., 1st Sess., 19 CONG. REC. 719 (1888) (in substitution of H.R. REP. NO. 67, introduced by Representative William E. Mason (R. Ill.)). The resolution directed the House Judiciary Committee to investigate certain charges about trusts' high prices to consumers. 1 E. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 53 (1978).

30. S. 3440 and S. 3445, 50th Cong., 1st Sess., 19 CONG. REC. 7512 (1888).

31. 1 E. KINTNER, *supra* note 29, at 38.

32. S. 3445, 50th Cong., 2d Sess., 20 CONG. REC. 1120 (1889) (as amended).

After fifteen months of consideration and sometimes heated exchange, the full Senate by a roll-call vote of 31-28 accepted a motion to refer Senator Sherman's bill to committee—this time to the Committee on the Judiciary.³³ Only six days after the bill's referral, Committee Chairman George F. Edmunds (R. Vt.) reported a substitute bill that looked nothing like its predecessor. In place of Senator Sherman's 1888 language of "full and free competition" and "cost to the consumer," the 1890 bill substituted "contract . . . in restraint of trade" and "monopolize, or attempt to monopolize . . . trade."³⁴ Six days later, the 1890 bill passed by a roll-call vote of 52-1.³⁵ Despite drastic differences in statutory language and limited debate over the 1890 bill, we now take for granted that there are, or should be, no significant differences between the two versions. We assume that antitrust policy is properly founded in free competition and its connection to consumer prices, even though the language referring to these policies was jettisoned. Neither history nor logic compels this view.

Indeed, Senator Sherman expressed opposition to the substitute bill. He stated that the substitute would be,

totally ineffective in dealing with combinations and Trusts. All corporations can ride through it or over it without fear of punishment or detection. It is manifest that if any relief is to be had it must be as a result of popular opinion or by the action of the House, where amendments may be provided which will restore in substance the original design of the bill.³⁶

Why was Senator Sherman so adamantly opposed to the new bill? To restate the question, what significance can be attributed to the substitution of the familiar common law language of "restraint of trade" and "monopolization" for the rhetoric of "full and free competition" and "advancing the cost to the consumer"? A fresh look at the congressional debates provides a persuasive answer.

Reflecting the split vote that committed Senator Sherman's bill to Senator Edmunds' Committee on the Judiciary, floor debate was split into two rhetorical camps.³⁷ Senator Sherman and other supporters of the original bill's language of "full and free competition" made frequent reference to "the industrial liberty of citizens," which included not only "the interest of the consumer" but also "the right of every man to work,

33. 21 CONG. REC. 2731 (1890) (Sen. Walthall's (D. Miss.) motion).

34. S.1, 51st Cong., 1st Sess., 21 CONG. REC. 2901 (1890).

35. 21 CONG. REC. 3152-53 (1890). After several days of deliberation on the Conference Reports, the Bill was passed. See Peritz, *supra* note 1, at 303 n.88.

36. *Mr. Sherman Gives Up Hope*, N.Y. Times, Apr. 8, 1890, at 4, col. 4, (reporting comments appearing in the *St. Louis Globe-Democrat*), reprinted in 1 E. KINTNER, *supra* note 29, at 24 n.1, 153.

37. For an extended study of the debates, see Peritz, *supra* note 1, at 291-313.

labor, and produce in any lawful vocation."³⁸ They denounced "combinations of capital" that "make competition impossible."³⁹ In contrast to today's overdetermined focus on consumers, their notion of industrial liberty included a sense of the public as both competitors and employees of the new large combinations of capital, whose power rendered "the boasted liberty of the citizen . . . a myth."⁴⁰ These concerns for consumer and producer liberty also implicated political liberty. In short, Senator Sherman and his allies believed that industrial liberty was the victim of private agreements between competitors, agreements such as trusts and cartels. Industrial liberty was seen as a product of competitive markets populated by numerous and roughly equal rivals.

But there was another side to the debates, another kind of concern expressed about competition. In this rhetorical camp were those persons who believed that competition could sometimes be as dangerous as combinations. They believed that agreements to mitigate the effects of competition were sometimes justifiable. The following statement by Senator Orville H. Platt (R. Conn.) in the debate just prior to the original bill's referral to the Committee on the Judiciary captures this position:

The true theory of this matter is that prices should be just and reasonable and fair, that prices . . . should be such as will render a fair return to all persons engaged in its production, a fair profit on capital, on labor, and on everything else that enters into its production. . . . [E]very man in business . . . has a right, a legal and a moral right, to obtain a fair profit upon his business and his work; and if he is driven by fierce competition to a spot where his business is unremunerative, I believe it is his right to combine for the purpose of raising prices until they shall be fair and remunerative.⁴¹

In contrast to the view expressed by Senator Sherman, Senator Platt (and his allies) believed that industrial liberty required the freedom to enter into contracts to combat the effects of brutal competition. As Representative Stewart (R. Vt.) later said in the House debates, "It is just as necessary to restrict competition as it is to restrict combination."⁴²

Congress's last-minute turn to the common law language of "monopolization" and "restraints of trade" was a reaction against the original bill's explicit and unmediated imposition of "full and free competition" as the only natural and legitimate form of commerce. The bill, as passed, used familiar language that carried with it stable images drawn from a common law tradition grounded in freedom of contract

38. 21 CONG. REC. 2457 (1890).

39. *Id.* (Sen. Sherman); *id.* at 1768 (Sen. George (D. Miss.)).

40. *Id.* at 2561 (Sen. Teller (R. Colo.)).

41. 21 CONG. REC. 2729-30 (1890).

42. 21 CONG. REC. 5956 (1890) (discussing FIRST CONFERENCE REPORT, 51ST CONG., 1ST SESS.).

principles and private property rights, including the right to a "fair profit."⁴³

Thus, when Justice Holmes wrote some fifteen years later that the Sherman Act "says nothing about competition,"⁴⁴ he not only was teaching his literalist brethren a lesson about the art of literalism; he also was taking the rule of reasonists' side in the formative era's penultimate Court battle to capture the normative ground of antitrust law. Seven years later, the rule of reasonists emerged triumphant in the era's last supreme judicial conflict over the relationship between competition policy and common law property rights, when they announced the *Standard Oil* and *American Tobacco* opinions. Disagreement over the meaning of competition policy would no longer take the form of literalist against rule of reasonist.

But in the two decades preceding *Standard Oil*, these two factions fought numerous battles over treatment of open price-fixing cartels and secret bid-rigging schemes. In cases like *Trans-Missouri Freight Association*, price-fixers and rule of reasonist dissenters agreed that the "plain intention of the law was to protect the liberty of contract and the freedom of trade."⁴⁵ If the government intervened to stop parties from entering into a reasonable contract to forestall ruinous competition, they claimed, then unreasonable prices would be the consequence. Unhealthy competition and unreasonable prices would prevail due to the illegitimate exercise of judicial authority.⁴⁶ Echoing congressional speeches about fair price, Justice White's dissents developed a "rule of reason" to argue for the right to fix fair prices to protect a fair return on one's property.⁴⁷ But for twenty years, the literalists prevailed. Justice Peckham, in contrast, made it clear that all price fixing agreements were illegal, regardless of the reasonableness of the prices fixed: "Competition . . . is a necessity for . . . securing in the end just and proper rates."⁴⁸ In short, competition was seen as the only legitimate arbiter of fair price.

Even if consumers benefit from lower prices, Justice Peckham concluded for the literalist majority, private agreements in restraint of trade would drive "out of business the small dealers and worthy men whose lives have been spent therein."⁴⁹ Firms of relatively small size (and

43. For an extended analysis of this point, see Peritz, *supra* note 1, at 303-13.

44. *Northern Sec. Co. v. United States*, 193 U.S. 197, 403 (1904) (Holmes, J., dissenting).

45. *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 355 (1897) (White, J., dissenting).

46. *Id.*

47. See Peritz, *supra* note 6, at 516-27.

48. *Trans-Missouri Freight*, 166 U.S. at 333.

49. *Id.* at 323.

roughly equal) are at the core of the literalist view of industrial liberty, since,

it is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others.⁵⁰

The literalists believed that Congress was concerned with maintaining a viable middle class of independent entrepreneurs.

The rule of reason faction disagreed. Justice White insisted that the "utmost liberty of contracting" was necessary to avert a state of industrial warfare.⁵¹ To justify a railroad cartel's right to fix (reasonable) prices, Justice White referred to the Court's earlier affirmation of a union strikebreaking injunction in the infamous Pullman Company case—*In re Debs*.⁵² In that case, according to the rule of reasonists, the trial court's literalist interpretation of the Sherman Act in enjoining the striking union made the Act "embrace every peaceable organization or combination of the laborer to benefit his condition either by obtaining an increase of wages or diminution of the hours of labor."⁵³ Putting the railroad capitalists in the position of union wage labor, Justice White suggested that combination was appropriate not only to equalize bargaining power in labor's struggle to win a fair wage from capital, but also to eliminate competition between railroads in their efforts to salvage a "fair profit" from their invested capital. For Justice White, combination was the only civilized alternative to industrial warfare between capitalists—and well worth the price of entrepreneurial independence. For Justice Peckham, the Sherman Act reflected a congressional policy endorsing competition, which legitimized the commercial harm of less-than-fair profits.

But when *Standard Oil* announced the "rule of reason" in 1911, not even Justice Peckham counted himself among the literalists. Joining in the new majority's rhetoric of property rights, Justice Peckham apparently agreed that the "rule of reason" was necessary "to prevent [the Sherman Act] from destroying all liberty of contract and all substantial right to trade, and thus causing the act to be at war with itself by annihi-

50. *Id.* at 324.

51. *Id.* at 355-56.

52. 158 U.S. 564 (1895).

53. *Trans-Missouri Freight*, 166 U.S. at 356. It is interesting to note that Justice White's concern for labor's right to organize did not lead him to dissent from Justice Peckham's literalist opinion for a unanimous court in *Debs*. Apparently, the analogy between capitalists and labor was only a debating point. Justice White dissented to support the former's right to combine, but not the latter's. He voted with a unanimous court to enjoin the union strikes in *Debs*.

lating the fundamental right of freedom to trade."⁵⁴ What might have convinced Justice Peckham to defect to the rule of reasonist camp?

The answer lies in a merger case seven years earlier that already had splintered the Court's literalist majority. *Northern Securities Co. v. United States* produced four opinions, including two dissents calling for the "rule of reason." Justice Peckham joined in both dissents. The issue of individual property rights, although already addressed in the earlier cartel cases, reappeared in the merger context but with compelling force because, very simply, merger cases involve the legality of buying and selling businesses. For Justice Peckham (and for us moderns), such agreements embody the clearest exercise of property rights—freedom of contract. If property rights and freedom of contract protect anything at all, they protect the right to sell one's property, one's business. The conflict between property rights and competition policy, between liberty of contract and equality among rivals, could not be ignored in *Northern Securities* because the merger involved two competing railroads with over 9000 miles of parallel track. Certainly this merger restrained trade. If the Sherman Act were applied literally to this merger and to all mergers, then the statute would prevail over the fundamental property right to sell one's business. As Justice White wrote, "[T]he principle that the ownership of property is embraced within the power of Congress to regulate commerce, whenever that body deems that a particular character of ownership . . . may restrain commerce . . . , is in my opinion, in conflict with the most elementary conceptions of rights of property."⁵⁵ This sort of logic converted Justice Peckham into a disciple of the "rule of reason."

54. *United States v. American Tobacco Co.*, 221 U.S. 142, 180 (1911) (Justice Peckham sided with Justice White's majority opinion).

55. *Northern Sec. Co. v. United States*, 193 U.S. 197, 370 (1904) (White, J., dissenting). For a full analysis of this point and the importance of the common law distinction between direct and ancillary restraints, first developed in then Circuit Judge Taft's *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899), opinion and recently revived in Justice Scalia's *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988), opinion, see Peritz, *supra* note 1, at 313-24; Peritz, *supra* note 6, at 549-54. Justice Peckham's participation in this "rule of reason" dissent also suggests a "logical" link to his earlier competition-based literalism. In his earlier opinions, Peckham articulated a notion of industrial liberty consonant with his reading of "liberty" as used in the fourteenth amendment: In *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), he had already characterized it as the "liberty of the citizen to pursue any livelihood or vocation, and for that purpose to enter into all contracts which might be proper, necessary and essential to carrying out those objects to a successful conclusion." *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 571 (1898) (Justice Peckham described his holding in *Allgeyer*). Peckham's turn from competition to property logic can also be understood as his continuing commitment to individual liberty: In price-fixing cases, the liberty to conduct one's business must be protected. In merger cases, the liberty to sell one's business merits the same security. Though these two freedoms appear to conflict when viewed in terms of competition and property logics, they do seem to correspond to Peckham's commitment to individual liberty.

This property rhetoric later attracted the new majority for the *Standard Oil* opinion's formal announcement of the "rule of reason" in 1911. But in the federal and state legislatures, there was swift and widespread reaction against the Court's new category of reasonable trusts, even though the Standard Oil Trust was found unreasonable and thus illegal. The groundswell of activity included passage of antitrust provisions in twenty states as well as congressional hearings on antitrust legislation. These hearings resulted in two new statutes, both written in the rhetoric of competition. (Justice Holmes could no longer proclaim that the antitrust laws said nothing about competition.) Although different in design, both the Clayton and Federal Trade Commission Acts of 1914 said something about competition. The Clayton Act proscribed a series of practices, including mergers, whose effects "may be to substantially lessen competition."⁵⁶ The statute's legislative history clearly reflected a desire to proscribe mergers (and the other listed practices) in their incipency⁵⁷—that is, before they substantially lessened competition. Moreover, the Federal Trade Commission (FTC) was established to investigate and enjoin "unfair methods of competition," that is, to regulate competition.⁵⁸

As we have seen, Congress responded to the Court's shift to a "rule of reason" by making explicit its commitment to competition policy. Given the Court's concern for the protection of property rights, the stage was reset for further attempts to work out the tensions between competition policy and common law property rights, between commitments to liberty and equality. Would the "rule of reason," a Sherman Act doctrine, be applied to the new statutes? Or might the Court take the new statutes as an expression of congressional rejection of the "rule of reason"? Would they simply be treated as separate statutes? Whatever jurisprudential course the Court would follow, at the very least, the tension between property rights and competition policy was recharged.

56. 15 U.S.C. § 13(a) (1988).

57. Here is how the Senate described the purpose of the Clayton Act:

Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by [the Sherman Act], or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipency and before consummation

S. REP. NO. 698, 63d Cong., 2d Sess. 1 (1914), quoted in *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 597 (1956).

58. 15 U.S.C. § 45(a)(2) (1988).

II. SECOND DISAGREEMENT ABOUT COMPETITION AS CONSTITUTING ANTITRUST'S MIDDLE PERIOD: THE RULE OF REASON

According to the orthodox view, antitrust's formative period ended with the *Standard Oil* opinion's announcement of the "rule of reason." With the technical question of literalism resolved, the Court could then turn to the meaningful problem of determining the competitive effects of conduct falling under the antitrust laws. On balance, does the conduct under scrutiny regulate competition? Or does it restrain competition? The middle period began with the sensible recognition of a technical need for a "rule of reason." But it ended in normative chaos, with the "rule of reason" out of control. The balancing of competitive effects grew to mean too many different things to too many people. The "rule of reason" exploded to constitutional proportions.

Viewed from a genealogical perspective, the Court's adoption of a "rule of reason" resolved nothing. Not only did the underlying tension between competition policy and common law property rights continue to produce antitrust doctrine, but the congressional enactments of 1914 sought to make explicit the primary importance of competition policy. During the Great Depression years, the first "fair-trade" Act,⁵⁹ which permitted resale price maintenance in states with enabling statutes, called into question the primacy of competition policy. Court doctrine oscillated, too, between a "rule of reason" standard and per se illegality, with occasional swings into per se legality. In short, no era had ended. Nor had another begun. The issues remained: What values constituted competition policy and property rights?⁶⁰ What Court doctrines and statutes did these tensions produce? When one rhetoric dominated, did that domination tilt decisions or statutes in favor of one class—large producers or small, for example? Or were the implications indeterminable?

A. *The Orthodox View: Balancing Competitive Effects*

Antitrust's middle period began with the *Standard Oil* opinion's pronouncement of the "rule of reason." But it is Justice Brandeis' opin-

59. Miller-Tydings Resale Price Maintenance Act of 1937, ch. 690, 50 Stat. 693; later extended by the McGuire Resale Price Maintenance Act of 1952, ch. 745, 66 Stat. 631, *repealed* by the Consumer Goods Pricing Act of 1975, 89 Stat. 801.

60. Although I have mentioned them only in passing, the tensions between liberty and equality raise equally difficult questions about the internal dynamics of both competition policy and property rights. These will be highlighted in some of the analysis that follows. See *infra* notes 155-77 and accompanying text.

ion in *Chicago Board of Trade v. United States* that we remember for the rule's most eloquent restatement:

[T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.⁶¹

The restraint at issue was the Chicago Board's "Call" Rule, which required members doing business in one category—grain to arrive in the period between the session's close and its opening the next business day—to conduct such business only at the Board's closing price. Government attorneys characterized this requirement as simple price-fixing. Board attorneys argued that the Rule's purpose was "not to prevent competition or to control prices, but to promote the convenience of members by restricting their hours of business and to break up a monopoly in that branch of the grain trade acquired by four or five warehousemen in Chicago."⁶² The Court agreed with the Board's view, concluding that the Rule's regulation of business hours "helped to improve market conditions."⁶³

In assessing competitive effects under the "rule of reason," the Court considered something as far afield as a tendency "to shorten the working day or, at least, limit the period of most exacting activity."⁶⁴ Were there any limits to this "rule of reason" analysis? In theory, perhaps not. But in practice, the Court's balancing jurisprudence was limited to a small number of counterweights. Indeed, during antitrust's middle period, the Court most commonly evaluated only four competitive effects under the "rule of reason"—competitive effects that are referred to throughout antitrust discourse.

First of all, there has been widespread concern about the process of competition—about unfair methods of competition. This attention to process has not been confined to the FTC Act's language of "unfair

61. *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1917).

62. *Id.* at 237.

63. *Id.* at 240.

64. *Id.* at 241.

methods of competition" and associated rules and opinions.⁶⁵ In the context of merger doctrine in section 7 of the Clayton Act, the Court has interpreted congressional policy regarding vertical integration as founded in a desire to prevent such mergers when they "deprive . . . rivals of a fair opportunity to compete."⁶⁶ As an element of predatory pricing doctrine under section 2 of the Sherman Act, the Court requires evidence of predatory intent, which traditionally has included proof of unfair methods of competition such as industrial spying.⁶⁷ As a final example, even in the hard-core section 1 offense of horizontal price-fixing, the Court found that a joint selling agency among 170 coal producers was justified, in significant part, by the defendants' "honest effort to remove abuses, to make competition fairer, and thus to promote the essential interests of commerce."⁶⁸ This attention to fair process makes good sense, given the likelihood that market participants must be persuaded of the system's fairness and legitimacy.⁶⁹

Second, we are all familiar with the importance attached to wealth transfers that can result from anti-competitive practices, at least insofar as the wealth is transferred from consumers. Whether wealth is extracted by a single-firm monopoly, or multi-firm oligopolies or cartels, both the Court and Congress have considered competition policy a means of controlling monopoly pricing. In his landmark study of antitrust legislation, Robert Lande has argued forcefully that wealth transfers constituted Congress' original and primary concern.⁷⁰ Although this is an overstate-

65. 15 U.S.C. § 45(a)(1) (1988).

66. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1961) (citing H. R. REP. NO. 1191, 81st Cong., 1st Sess. 8 (legislative history of 1950 Celler-Kefauver Amendment to the Clayton Act)); see also *E.I. du Pont Co. de Nemours & Co. v. United States*, 353 U.S. 586 (1957) (unfairness of buying stock in General Motors for the alleged purpose of becoming its major supplier of certain paints and fabrics).

67. See, e.g., *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967) (proof of predatory intent required to prove violation of Clayton Act). The Court has not spoken to this issue in recent years. Since Areeda & Turner's influential article, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975) (looking to "the relationship between a firm's prices and its costs in order to define a rational dividing line between legitimately competitive prices and prices that are properly regarded as predatory"), only the Fifth and Ninth Circuits have allowed evidence other than cost/price data. See, e.g., *International Air Indus., Inc. v. America Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), cert. denied, 424 U.S. 943 (1976); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), cert. denied, 459 U.S. 825 (1982). For a thoughtful analysis, see Circuit Judge Breyer's opinion in *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983).

68. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 372 (1932). This is not, of course, the only example of section 1 price fixing that has been judged according to the rule of reason. For further discussion, see *infra* text accompanying notes 101-29.

69. See, e.g., North, *Structure and Performance: The Task of Economic History*, 16 J. ECON. LITERATURE 963, 975-76 (1978). Those with the market opportunity and inclination to act unfairly might disagree.

70. Lande, *supra* note 4, at 150-51.

ment of congressional intent, the Court consistently has expressed concern about consumers. For example, even if a cartel price is "reasonable," the danger of higher prices, of future wealth transfers, is sufficiently important to support a cartel's dissolution:

The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow.⁷¹

In the context of monopolization under section 2 of the Sherman Act, an analogous concern with predatory (low) prices arises from the belief that the motivation for driving competitors out of business is the resulting power to charge monopoly prices.

Third, competition has long been associated with efficiencies of different varieties—even before Robert Bork's implausible and inaccurate account of the Sherman Act's passage as an ode to Herbert Spencer's Social Statics.⁷² For example, the Court was amenable to an efficiency argument almost sixty years ago, when a group of 170 independent coal producers charged with forming a joint selling agency to fix prices responded that they organized the Appalachian Coal Company "for the purpose of promoting efficiency and economy."⁷³ More recently, the Court has allowed relatively small and struggling manufacturers to reorganize their distribution and dealer networks in order to compete more efficiently with established manufacturers, even when such efforts restrain intra-brand competition.⁷⁴ Although there are serious questions

71. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 213 (1939). This opinion is recognized as the most extreme statement of what once was the rule that horizontal price-fixing is illegal per se. For an insightful analysis of the current state of per se illegality in the rule of reason paradigm, see Krattenmaker, *Per se Violations in Antitrust Law: Confusing Offenses with Defenses*, 77 GEO. L.J. 165 (1988).

72. R. BORK, *ANTITRUST PARADOX* 66-69 (1978). Too much effort has already been expended in demonstrating that Bork's account is mistaken. For a painstaking point-by-point demolition of Bork's thesis, see Flynn, *The Reagan Administration's Antitrust Policy, "Original Intent" and the Legislative History of the Sherman Act*, 33 *ANTITRUST BULL.* 259 (1988). See also Peritz, *supra* note 1, at 289-90 & n.22. Although I do not recall Bork making an explicit reference to Spencer, the neo-classical view of laissez-faire expounded by Bork is grounded in the Social Darwinian (and sociobiological) simplification that the best win and that it is best that they do. My reference to Spencer is an allusion to Justice Holmes's well-known dissenting opinion in *Lochner v. New York*, 198 U.S. 45, 74 (1905) ("The fourteenth amendment does not enact Mr. Herbert Spencer's Social Statics.").

73. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 346 (1932).

74. The watershed case was *White Motor Co. v. United States*, 372 U.S. 253 (1963) (affirming grant of summary judgment against appellant, a small truck manufacturer who had engaged in franchise contracts restricting dealers, noting that such agreements may be within the "rule of reason"). For an opinion written after the middle period, see *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (holding that respondent television manufacturer's vertical restrictions on franchises were not per se violations of the Sherman Act and should be evaluated under the rule of reason).

about the nature of the relationship between competition and efficiency, everyone assumes that the two are related.⁷⁵

Finally, we have been attracted not only by the virtues of competition as a political economy, as a mechanism for controlling not only economic power, but also by the social and political influence associated with economic power. Judge Learned Hand's well-known Second Circuit opinion in *United States v. Aluminum Company of America*, written while sitting as the highest Court by special designation,⁷⁶ stated that one of the purposes of section 2 of the Sherman Act (which proscribes monopolization) "was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other."⁷⁷ In the massive *Brown Shoe* case, involving both horizontal and vertical merger doctrine under section 7 of the Clayton Act, Chief Justice Warren wrote:

[W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.⁷⁸

Of course, it has not been established that smaller business units result in higher costs, even in heavy industry. In fact, empirical research over the last fifty years has shown that smaller business units tend to be more efficient.⁷⁹ But whatever the relationship between firm size and efficient

75. See Peritz, *supra* note 1, at 289 n.20; Peritz, *supra* note 6, at 554-76 (analyzing free rider doctrine as founded in notion of efficient distribution); Peritz, *supra* note 3, at 1279-82 (explicating efficiency logics found in Posner's writings about price discrimination).

76. 148 F.2d 416, 421 (2d Cir. 1945). The Second Circuit panel heard this appeal after four members of the Supreme Court had conflicts of interest; the matter was referred to the circuit court under the 1944 amendment to 15 U.S.C. § 29. See Act to Amend the Expediting Act, ch. 239, 58 Stat. 272 (1944), repealed by Judicial Code and Judiciary Act, ch. 646, 62 Stat. 869, 989 (1948).

77. *ALCOA*, 148 F.2d at 429; see also Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. CHI. L. REV. 567, 577-80 (1947) (discussing Judge Hand's ruling in the *ALCOA* case).

78. *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) (discussing legislative history of Celler-Kefauver Amendment to section 7 of the Clayton Act). Senator Kefauver stated in floor debates:

I think that we are approaching a point where a fundamental decision must be made in regard to this problem of economic concentration. Shall we permit the economy of the country to gravitate into the hands of a few corporations . . . ? Or on the other hand are we going to preserve small business, local operations, and free enterprise?

96 CONG. REC. 16,450 (1950), quoted in *United States v. Von's Grocery Co.*, 384 U.S. 270, 276 n.10 (1966).

79. See Adams & Brock, *Reaganomics and the Transmogrification of Merger Policy*, 33 ANTITRUST BULL. 309, 338-46 (1988) [hereinafter Adams & Brock, *Reaganomics*] (arguing that merger induced giant businesses do not benefit from enhanced performance); Rostow, *supra* note 77, at 568 & n.3; Shepherd, *Three "Efficiency School" Hypotheses About Market Power*, 33 ANTITRUST BULL. 395, 395-410 (1988) (criticizing the Chicago "efficiency school" hypothesis that monopolies are more efficient). See also FEDERAL TRADE COMMISSION, *RELATIVE EFFICIENCY OF LARGE, MEDIUM-*

operation, a special solicitude for small business has been an important implication of competition policy.⁸⁰

The Court's balancing of these various competitive effects soon blossomed into a rhetoric of constitutional dimension. The Sherman Act was described as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."⁸¹ Chief Justice Hughes wrote: "As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. . . . Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness."⁸²

But while the Court was balancing competitive effects under a constitution-like "rule of reason," scholars and some practitioners criticized the jurisprudence as vague, as too flexible. They called for clarity, for constraints. In the still well-respected *Report of the Attorney General's Committee to Study Antitrust Laws*, a group of private practitioners, government attorneys, and scholars expressed "a modern view of the Sherman Act [that] can start with *Standard Oil Co. of New Jersey v. United States*."⁸³ What was modern about the panel's view was its claim that "with its Rule of Reason to translate into law each advance in economic teaching, the Act has kept abreast of the times."⁸⁴ In short, the rule of reason was recharacterized as the economic idea of "workable competition."⁸⁵ Within a few years, Professors Kaysen and Turner published

SIZED, AND SMALL BUSINESS 12-14 (TNEC Monograph No. 13, 1941) (finding large size most efficient in 11% of total test, medium size in 55%, and small size in 34%); Adams & Brock, *The "New Learning" and the Euthanasia of Antitrust*, 74 CAL. L. REV. 1520, 1546-64 (1986) (presenting empirical refutation of the "mythology of bigness," that is, the presumed relationship between bigness and operating efficiency, including the Schumpeterian view that technological advancement calls for dominant firms); Scherer, Book Review, 86 YALE L.J. 974, 986-88 (1977) [hereinafter Scherer, Review] (review of R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976)) (arguing that the goals of efficiency and preservation of small business are not contradictory). Cf. FEDERAL TRADE COMMISSION STAFF REPORT, *CONGLOMERATE MERGER PERFORMANCE: AN EMPIRICAL ANALYSIS OF NINE CORPORATIONS* 33-60 (1972) (finding sizable mergers followed by insignificant operational changes directed at improving efficiency); D. RAVENSCROFT & F. SCHERER, *MERGERS, SELL-OFFS, AND ECONOMIC EFFICIENCY* 212, 224 (1987) (finding that productivity and efficiency losses accompany the average merger); F. SCHERER, A. BECKENSTEIN, E. KAUFER & R. MURPHY, *THE ECONOMICS OF MULTI-PLANT OPERATION—AN INTERNATIONAL COMPARISONS STUDY* 237-354 (1975) (finding that large mergers result in minimal efficiency benefits); Mueller, *Mergers and Market Share*, 67 REV. ECON. & STAT. 259, 266 (1985) (finding no support for hypothesis that mergers improve efficiency).

80. For evidence of this strain of Jeffersonian entrepreneurialism in vertical restraints context, see Peritz, *supra* note 6, at 567-74 (discussing *White Motor Co. v. United States*, 372 U.S. 253 (1963) and *Continental TV, Inc. v. GTE Sylvania Inc.*, 733 U.S. 36 (1977)).

81. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958).

82. *Appalachian Coals v. United States*, 288 U.S. 344, 359-60 (1933).

83. 1955 ATTORNEY GENERAL REPORT, *supra* note 12, at 5.

84. *Id.* at 132. For an extended analysis, see Peritz, *supra* note 3, at 1223-31.

85. 1955 ATTORNEY GENERAL'S REPORT, *supra* note 12, at 132.

their concise and influential treatise on antitrust and economics, which also called into question the value of non-“economic” policies.⁸⁶

The middle period, the era of constitutional antitrust, began to crumble with the publication, first in *Fortune* magazine and then in the *Columbia Law Review*, of “The Goals of Antitrust: A Dialogue on Policy.” In that debate, Robert Bork and Ward Bowman argued that efficiency should constitute antitrust’s only social goal. If we continue to disagree about the implications of competition, they claimed, antitrust would “remain” hopelessly at war with itself.⁸⁷ They concluded that the “rule of reason” could mean only the logic of neo-classical economics.

B. *A Genealogical View: Balancing Property Rights and Competition Policy*

This counter-history of antitrust’s middle period does not dispute claims of the incoherence and unworkability of “rule of reason” jurisprudence. Rather, it challenges the orthodox view of the underlying problem, the belief that the instability of the middle period’s constitution-like jurisprudence derived from a fundamental disagreement about the legitimate implications of competition policy. I submit that we cannot make sense of antitrust law until we remember that the disagreement involved more than competition. We can take two steps to supplement our traditional analysis. First, we can think of competition rhetoric as the set of arguments produced by an internal tension between commitments to liberty and equality. Second, we can think of competition as one rhetorical pattern in tension with another network of arguments associated with common law property rights. Property rhetoric is complex, too, on account of its own internal tension between liberty and equality. In short, competition rhetoric reproduces only one element of a more considerable disagreement underlying antitrust law during the middle period.

To sketch the contours of a counter-history, to provide an account of the more considerable disagreement, attention will be focused on examples of price-fixing doctrine that fall into three familiar categories. These three categories are per se legality, “rule of reason” balancing, and

86. C. KAYSER & D. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS (1959). Compare Kaysen, *The Corporation: How Much Power? What Scope?*, in *THE CORPORATION IN MODERN SOCIETY* 85-105 (E. Mason ed. 1960) (describing socio-economic foundations of corporations’ social and political power).

87. See Bork & Bowman, *The Crisis in Antitrust*, *FORTUNE*, Dec. 1963, at 138; *The Goals of Antitrust: A Dialogue on Policy*, 65 *COLUM. L. REV.* 363 (1965) (symposium, consisting of a critique of antitrust policy by Robert Bork and Ward Bowman, then at Yale; a defense of antitrust policy by Harlan Blake and William Jones, then at Columbia; and rebuttals). For an extended critique of the Chicago School’s claims, within the doctrinal context of price discrimination, see Peritz, *supra* note 3, at 1231-92.

per se illegality. Think of each category as produced by conflicts between competition policy and common law property rights. If a practice is illegal per se, then the text's rhetoric might reflect competition policy's temporary advantage over property rights. When the "rule of reason" standard is applied, the tension might exhibit a moment of rhetorical equipoise. If a practice is seen as legal per se, the text might reflect an ephemeral triumph of property rights. Imagine each case, each set of opinions, and each legislative activity as one battle in an unending series of battles between the social force of these two rhetorics.

What follows is an exemplary history of the swing of reason's pendulum through the pit of price-fixing doctrine, beginning with two well-known cases from the category of per se illegality.⁸⁸

1. *Price-Fixing as Illegal Per Se.* In *United States v. Trenton Potteries Co.*, twenty individuals and twenty-three corporations were convicted of price-fixing.⁸⁹ The defendants were engaged in the manufacture or distribution of eighty-two percent of the vitreous pottery fixtures produced in the United States for use in bathrooms.⁹⁰ In the course of their criminal trial and appeal, these members of the Sanitary Potters' Association argued that the price agreement was a reasonable restraint of trade because the agreed prices were reasonable. But this Court did not concern itself with "so uncertain a test as whether prices are reasonable."⁹¹ Explicitly referring to the literalist opinions in the early cartel cases, Justice Stone wrote that agreements to fix prices "may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed."⁹² The opinion included only an oblique reference to freedom of contract, to the right to sell one's property: The Sherman Act was characterized as "a limitation of rights, . . . which may be pushed to evil consequences and therefore restrained."⁹³ In other words, this exercise of property rights was considered so threatening to competition policy

88. I will mix the vertical and horizontal varieties of price-fixing, despite their modern separation, because both doctrines reflect similar structures and dynamics. This is consistent with the traditional view, although the analysis is different.

89. 273 U.S. 392, 393 (1927). For a detailed analysis of an extended attempt to grapple with the tension in the context of vertical price-fixing, see Peritz, *supra* note 6, at 516-27 (discussing *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911)).

90. *Trenton Potteries*, 273 U.S. at 394.

91. *Id.* at 398.

92. *Id.* at 397.

93. *Id.* at 398 (quoting *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 49 (1912)).

that no weight was given to a right to set reasonable prices. As Justice Stone concluded,

[W]hatever difference of opinion there may be among economists as to the social and economic desirability of an unrestrained competitive system, it cannot be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition.⁹⁴

It is not surprising that a rule of per se illegality appears as the product of an unmitigated commitment to competition. What might be eye-opening is the Court's explicit reference to a disagreement among economists about the value of competition.

A second example of the per se category, the legacy of a literalist commitment to competition policy, is *United States v. Socony-Vacuum Oil Co.*, in which the government argued that the major oil companies' program of purchasing surplus gasoline from independents maintained prices at "artificially high and non-competitive levels."⁹⁵ The major oil companies instituted this buying program because so much oil had been discovered and produced that wholesale prices dropped below the cost of production. Such overproduction persisted despite attempts by Texas, Oklahoma, and other states to prorate (i.e., regulate) production. The major oil companies purchased pre-market "distress gasoline" at the market price. They argued that their conduct was reasonable because the prices were not "arbitrary and noncompetitive."⁹⁶ Indeed, they set no prices. Instead, they sought only the "elimination of a competitive abuse, [which] may tend . . . to produce fairer price levels."⁹⁷ Again, the Court accorded no weight to the property rhetoric of fair price. Here is how the opinion described the evil of this practice: "[A]s a result of the payment of fair going market prices, a floor was placed and kept under the spot markets."⁹⁸ According to Justice Douglas, "[Congress] has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies."⁹⁹

These two specimens of price-fixing doctrine comport with our traditional understanding of antitrust law as founded in competition pol-

94. *Id.* at 397. To be precise, the Court considered the cartel per se illegal in the sense that the defendants were not permitted to offer proof of reasonable prices or good intentions. However, the Court did take account of their market power by noting that the cartel had a combined market share of 82%. Thus, the Court took into account more than proof of the price fixing agreement and so, in the strictest sense, the conduct was not illegal per se.

95. 310 U.S. 150, 166 (1940) (quoting the indictment).

96. *Id.* at 160.

97. *Id.* at 159.

98. *Id.* at 220.

99. *Id.* at 221.

icy, though both practice a kind of "literalism" long after the "rule of reason's" jurisprudential victory—that is, both declare *every* (price-fixing) agreement in restraint of trade illegal. These cases conform to our traditional view of price-fixing doctrine because they practice competition rhetoric, but without reference to the literalist canon of statutory interpretation. In sum, *Socony-Vacuum* exhibits a commitment to competition policy, unpersuaded by claims that the conduct in question would save independent oil companies.¹⁰⁰

This legacy of literalism, however, did not occupy the field of price-fixing doctrine. In the years between these two opinions, the Court did apply a "rule of reason" standard to an intervening price-fixing case. As we shall see, the Court opinion in *Appalachian Coals v. United States* reflects a standoff between property and competition rhetorics.¹⁰¹ Moreover, this opinion is not an anomaly: Several recent price-fixing cases have been judged according to a "rule of reason." In the 1978 *Broadcast Music, Inc. v. CBS* opinion, for example, the Court's recognition of an important property interest provided the impetus for explicit acknowledgment that the price fixing rule of per se illegality must be understood, after all, as a strict form of antitrust's "rule of reason" jurisprudence.¹⁰²

2. *Price-Fixing as a Reasonable Restraint of Trade.* Decided in the early years of the Great Depression, *Appalachian Coals* arose in economic circumstances similar to those recounted seven years later in the 1940 *Socony-Vacuum* opinion. The bituminous coal industry was crumbling under the weight of overproduction and decreasing demand. Moreover, coal production technology and sharp industry practices increased the industry's inventory of "distress coal." One hundred and thirty-seven independent coal producers combined to form Appalachian Coals, Inc., an exclusive sales agency established to help small coal miners in the four-state "Appalachian territory." The participants represented over seventy percent of the producers in the Appalachian territory. Ac-

100. This repeats the literalist contradiction, seen in *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897), between the goal of preserving independent entrepreneurs and the means—keeping competition free of agreements between competitors. As the Court would realize in *Appalachian Coals v. United States*, 288 U.S. 344, 375-77 (1933), discussed *infra* text accompanying notes 101-14, limited cooperation to help independents through hard times might be preferable to mergers.

101. 288 U.S. 344 (1933).

102. 441 U.S. 1, 24 (1978) ("[T]he blanket license [of ASCAP and BMI] has provided an acceptable mechanism for at least a large part of the market for the performing rights to copyrighted musical compositions . . . [It should not] automatically be declared illegal . . . Rather, . . . it should be subjected to a more discriminating examination under the rule of reason."). To explain how price-fixing can sometimes be illegal per se requires more than competition rhetoric. It requires a recognition of the social force of common law property rights.

according to the three-judge district court, "the evidence in the case clearly shows that they have been acting fairly and openly, in an attempt to organize the coal industry and to relieve the deplorable conditions resulting from overexpansion, destructive competition, wasteful trade practices, and the inroads of competing industries."¹⁰³ Nonetheless, the government convinced the panel to issue an injunction against the sales agency, since the district court found "that the effect of [the] combination is to eliminate all competition among themselves and to fix uniform prices at which their product will be offered for sale."¹⁰⁴ Certainly this injunction against price fixing, notwithstanding claims of destructive competition, is the anticipated consequence of the familiar rule of per se illegality articulated in both *Trenton Potteries* and *Socony-Vacuum*.

On appeal, the government reminded the Court that the "District Court found that concerted action and elimination of competition, through the combination, will affect market conditions and tend to raise prices to a higher level than would prevail under conditions of free competition."¹⁰⁵ The government concluded that, "137 different producers have given to a common agent the power to fix the price at which their product shall be sold."¹⁰⁶ Such effects on competition seem typical of price fixing agreements, including those found illegal per se in *Trenton Potteries* and *Socony-Vacuum*. In sharp contrast to those cases, however, the *Appalachian Coals* Court not only applied a "rule of reason" analysis but also found Appalachian Coals Company to be a reasonable restraint of competition, even though it eliminated all competition among its members. What impelled the Court to apply a "rule of reason" analysis?¹⁰⁷

The striking difference between the *Appalachian Coals* opinion and the two per se illegality opinions is the Court's responsiveness to arguments about "the unfortunate state of the industry," "the industry . . . in distress," and the "evil conditions" to be cured.¹⁰⁸ Unlike *Socony-Vacuum*'s disdain for arguments about destructive competition, this Court observed: "When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon

103. *United States v. Appalachian Coals*, 1 F. Supp. 339, 341 (W.D. Va. 1932).

104. *Appalachian Coals*, 288 U.S. at 352 (government arguing to the Supreme Court the appropriateness of the district court's findings).

105. *Id.* at 353.

106. *Id.* at 355.

107. I am not interested here in parsing the niceties of the analysis of purpose, power, and effect. My question relates to the more difficult issue of why this mode of analysis was chosen, not how it was applied.

108. *Appalachian Coals*, 288 U.S. at 372.

profitable production are prostrated, the wells of commerce go dry.”¹⁰⁹ If the property logic is not clear enough, consider this: “The fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, does not mean that the abuses should go uncorrected.”¹¹⁰ Or this: “[N]umerous producing companies have gone into bankruptcy or into the hands of receivers, many mines have been shut down, the number of days of operation per week have been greatly curtailed”¹¹¹ Finally, in discussing the ease of new entry into the market, the Court underscored the industry’s plight: “The price of these [mining] lands at the present time would be less than half of the value of two or three years ago, and considerably less on a royalty basis.”¹¹²

In short, the opinion can be understood as an attempt to balance a commitment to preserving some minimum value of property put to commercial and social use, and a second commitment to competition free of combination. In sharp contrast to *Socony-Vacuum*’s sacrifice of independent oil companies on the altar of per se illegality, this Court determined that the goal of preserving “independent” (read “small”) mining companies was more important than maintaining competition between them. While there certainly are factual differences between the two cases, it is significant that the rhetorical difference between the two opinions is the Court’s emphatic embrace in *Appalachian Coals* of arguments about property rights. It is important to remember, however, that the Court did not find the conduct legal per se. That is, the commitments to competition policy and property rights were insoluble in the abstract; rather, the “rule of reason” allowed for an ad hoc, fact-based resolution of this particular case. Here, apparently, the Court felt that the competitive market’s injury to property rights outweighed the combination’s injury to competition policy. In reconsidering price fixing doctrine, however, the Court was unwilling to tip the balance toward property rights.

This case is not an anomaly, free-floating in a paradigm of price-fixing as illegal per se. In recent years, a number of opinions have adopted doctrines akin to the “rule of reason” of *Appalachian Coals*.¹¹³ Neither do these recent opinions herald a paradigm shift to price-fixing as conduct judged only under a “rule of reason” standard. Instead, each

109. *Id.*

110. *Id.* at 374.

111. *Id.* at 364.

112. *Id.* at 369.

113. See, e.g., *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447 (1986); *NCAA v. Board of Regents*, 468 U.S. 85 (1984); *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979); *National Soc’y of Professional Eng’rs v. United States*, 435 U.S. 679 (1978).

mode of analysis constitutes one category produced by a tension between competition and property rhetorics.¹¹⁴

One example of this recent treatment of price-fixing is *Broadcast Music, Inc. v. CBS*.¹¹⁵ Broadcast Music, Inc. (BMI) and the American Society of Composers, Authors and Publishers (ASCAP) are the two dominant firms in the business of selling to users, such as CBS, licenses to copyrighted musical compositions. Composers and other copyright owners, whose exclusive right to perform their works in public for profit derives from the Copyright Act of 1897, grant ASCAP or BMI rights to license their works in exchange for royalties determined according to a schedule reflecting the nature and amount of use of each work. Since a government consent decree some forty years ago, these blanket licenses have been non-exclusive. In consequence, copyright owners retain the right to license their works individually. CBS argued that ASCAP's and BMI's requirements of a single license fee for a blanket license (that is, a single price for an entire block of musical compositions) constitutes illegal price-fixing.¹¹⁶

Was this a "per se" price-fixing scheme, like *Trenton Potteries*, with copyright owners agreeing to eliminate price competition between them for musical compositions? Or "rule of reason" price fixing, like *Appalachian Coals*, with the formation of a sales agency representing independent composers in an attempt to create an efficient sales organization and increase demand for their product? What views and what rhetorical forms did the opinions take? As in the latter case, the Court in *BMI* applied a "rule of reason." In dissent, Justice Stevens argued that the Court had a sufficient basis not only for determining the propriety of the "rule of reason" but also for finding the conduct under scrutiny to be an unreasonable restraint of trade.¹¹⁷

Writing for the Court, Justice White asserted that the blanket license is not a "naked restrain[t] of trade with no purpose except stifling of competition."¹¹⁸ Among the justifications for this proposition was the Copyright Act of 1976, which permits blanket licenses as one method of

114. As well as a third, per se legality.

115. 441 U.S. 1 (1979). Of course, some Court opinions have exhibited the language of per se illegality. See, e.g., *Catalano, Inc. v. Target Sales*, 446 U.S. 643, 647 (1980) ("It has long been settled that an agreement to fix prices is unlawful per se.").

116. *BMI*, 441 U.S. at 4-7.

117. *Id.* at 31-35 (Stevens, J., dissenting).

118. *Id.* at 20 (quoting *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963)) (justifying "rule of reason" treatment for a new category of vertical non-price restraints). For an extended discussion of *White Motor*, see Peritz, *supra* note 6, at 554-62 (relating application of "rule of reason" standard to vertical restraints doctrine). There is, at the very least, a question of form and function: How can it be that a "blanket" license is not a "naked" restraint? It can easily be a "cover" for some restraint.

exercising some property rights of copyright ownership. Thus, both ASCAP and BMI could be seen as "integrat[ing] sales, monitoring, and enforcement against unauthorized copyright use."¹¹⁹ They both could be portrayed as protecting, indeed enhancing, the value of affiliated copyright holders' property interests. This protection was especially important with intangible property like copyrights, where the possibility of multiple use without consumption and without the owner's knowledge left the "'owner' . . . [without] any real way to demand reimbursement for the use of his property."¹²⁰ In addition to recognizing the importance of protecting these property rights, the Court characterized the repertoire of music created by the blanket license as an entirely "different product," and ASCAP and BMI as each "a separate seller offering its blanket license, of which the individual compositions are the raw material."¹²¹ The Court added, "Here, the whole is truly greater than the sum of its parts."¹²² Accordingly, ASCAP and BMI blanket licenses constitute new property with, apparently, new rights.

The opinion's property rhetoric and its "rule of reason" standard are not all that separate it from the rule of per se illegality. In a few sentences, Justice White trivializes the rule of per se illegality for price fixing. His terms of admonishment are familiar—they recapitulate the familiar view of the old disagreement between literalists and rule of reasonists: The court of appeals is chastened for its "literal approach" to the problem, for not going beyond the notion that "the blanket license involves 'price fixing' in the literal sense."¹²³ Rather, "this is not a question simply of determining whether two or more potential competitors literally 'fixed' a 'price.'"¹²⁴ Reflecting (the former) Chief Justice White's view of the literalists, the current Justice White wrote, "Literalness is overly simplistic and often overbroad. When two partners set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act."¹²⁵

The *BMI* opinion has allowed us to inspect connections between literalism, per se illegality, and competition rhetoric, as well as connections between the "rule of reason" and property rhetoric, all in the context of price-fixing doctrine. Given the property rights catalogued, an

119. *BMI*, 441 U.S. at 20.

120. *Id.* at 19 n.32 (citing *Twentieth Century Music Corp. v. Aiken*, 373 U.S. 151, 162 (1975)).

121. *Id.* at 22.

122. *Id.* at 21-22. This astonishing bit of formalism seems somewhat out of place. It is perhaps an argument in anticipation of a tying claim under section 3 of the Clayton Act. Indeed, Justice Stevens in his dissent asserts that the difficult issue in the case emerges from section 3. *Id.* at 28-30.

123. *Id.* at 8.

124. *Id.* at 8-9.

125. *Id.* at 9.

unmitigated commitment to competition policy—a rule of per se illegality—could not emerge.

Yet, if the “rule of reason” reflects a balancing of commitments to competition policy and property rights, what can explain the effective absence of competition rhetoric? Two explanations come to mind. First, the opinion might reflect Justice White’s (unconscious) bias in favor of the practices under scrutiny and thus a tilt toward per se legality. Second, the opinion addresses only the preliminary question of categorization—whether this conduct should be analyzed under a “rule of reason.” If we view Justice White as making the strongest case in favor of the “rule of reason” and against per se illegality, then we would expect an emphatic property rights argument.

To demonstrate the workings of competition rhetoric under the “rule of reason,” we can turn to Justice Stevens’ dissent. In asserting that the blanket licenses are unreasonable restraints of trade, Justice Stevens produced little property rhetoric.¹²⁶ Most of the opinion tabulates the license’s anti-competitive effects—higher prices, additional benefits to already popular composers, and harms to other composers. Moreover, the opinion asserts, a clearinghouse could produce the efficiency and market-organizing benefits attributed to ASCAP and BMI, without the attendant restraints on trade. In arguing that the blanket licenses are illegal under the “rule of reason,” the dissent concludes:

Antitrust policy requires that great aggregations of economic power be closely scrutinized. That duty is especially important when the aggregation is composed of statutory monopoly privileges. Our cases have repeatedly stressed the need to limit the privileges conferred by patent and copyright strictly to the scope of the statutory grant. . . . ASCAP and BMI exercise monopoly powers that far exceed the sum of the privileges of the individual copyright holders.¹²⁷

In genealogical terms, Justice Stevens argues that on balance, competition policy should be imposed to limit the value of copyrights to that obtainable by individual holders under the property rights granted by the patent and copyright statutes. Any greater benefit is the consequence not of their property rights, but rather the product of ASCAP and BMI blanket licensing agreements, agreements in (unreasonable) restraint of trade.

In tandem, the two opinions in *BMI* reveal the tension underlying a “rule of reason” analysis. Moreover, it is clear that the “rule of reason”

126. Indeed, the dissent characterizes the statutory property right of copyright in the competition rhetoric of “monopoly.” *Id.* at 28. Blanket licensing is deemed “a classic example of economic discrimination.” *Id.* at 32. In terms of property rhetoric, this characterization involves an illegitimate transfer of wealth from owner to licensee; that is, an extraction of value from property beyond that authorized by the statute creating the property right.

127. *Id.* at 37.

has settled nothing. Instead, it provides a discursive space for recurring conflicts between competition policy and property rights. For example, Justice White for the majority deems the blanket license a "different product" created by ASCAP and BMI, apparently with property rights independent of, and in addition to, statutory copyright entitlements.¹²⁸ By emphasizing this proposition, the opinion seems to call for more than a "rule of reason" analysis. The Court's opinion implies a finding that the blanket license is a reasonable restraint of trade. Here is the majority's implied rationale: The blanket license is a new product, created by operation of freedom of contract; it exchanges one's property right to benefit from copyright ownership for the promise of royalties. This new product is endowed with new property rights. Exercising these new property rights cannot be a price-fixing agreement because there is only one new property owner—the licensing agency. By contrast, for Justice Stevens the blanket license creates neither a new product nor new owners. Rather, the license is a tying together of old products and an agreement among numerous property owners. Given the monopoly power granted to each copyright holder and the market power of ASCAP and BMI, as well as the higher prices and less restrictive alternative of a clearinghouse, competition policy calls for the limitation of property rights to those granted to copyright holders under the congressional statute.¹²⁹

Although the "rule of reason" seems to provide a discursive space for ad hoc resolutions of conflicts between competition policy and property rights, several questions are raised about the historical dimensions of the balancing process. Is there a "tilt" toward competition policy or property rights? If so, is it historically contingent? Or does it always tilt toward, say, property rights? Is it perhaps an empirical matter, an appropriate subject for a lengthy investigation? Leaving these questions to further study, our focus now shifts to opinions clearly dominated by property rhetoric.

128. *Id.* at 22.

129. A second way of analyzing the disagreement between Justices White and Stevens is to focus on the question of property rights. For Justice White, ASCAP and BMI have the operative property right and thus, the freedom to alienate the new product. For Justice Stevens, the copyright holders are granted a statutory entitlement that should be construed narrowly—that is, construed to exclude the liberty to maximize their return by entering into agreements with other holders. If a garden variety price fixing cartel is illegal (because freedom of contract does not justify a combination in restraint of trade), why should this cartel be treated any differently? Within the rhetoric of property rights, the question turns on the allocation of property rights. But because both allocations are highly plausible, the process is indeterminable—property logic cannot help us allocate property rights. For an analysis of the problem of indeterminability of property rights in the context of vertical restraints doctrine, see, e.g., Peritz, *supra* note 6, at 525-27.

3. *Price-Fixing as Legal Per Se.* The third and final category of price-fixing doctrine is that of per se legality. Two examples from vertical price fixing (or resale price maintenance) are illuminating. First, the *United States v. General Electric* case illustrates the rhetorical power of one fundamental property logic—the common law rights of a consignor. Second, the repealed “fair trade” laws, which used to allow manufacturers to set resale prices in states with enabling statutes, not only foreshadow the frailties of current doctrine but also share the property logic working in the Chicago School’s price theoretical approach to antitrust.

Although *General Electric* was not the first opinion to determine that a common law consignment limits congressional competition policy, it is the most arresting example of that view. General Electric was the owner of three patents that secured a monopoly of the manufacture, use, and sale of electric lights. Together with its major licensee, Westinghouse, General Electric in 1921 controlled eighty-five percent of the total business in electric lights.¹³⁰ Aside from its own direct sales to large customers, General Electric’s distribution plan involved “direct sales” of lamps “on consignment” and “negotiated by agents.”¹³¹ As stated in the form consignment agreement, “All of the lamps in such consigned stock . . . remain the property of the company until the lamps are sold.”¹³² Upon delivery of the lamps to the purchaser, “the title passes directly from [GE] to those purchasers.”¹³³ Despite General Electric’s monopoly power and despite the dealers’ loss of liberty to set their own prices, Chief Justice Taft left no doubt that the resale price maintenance agreements were legal per se: “The owner of an article, patented or otherwise, is not violating the common law, or the Anti-Trust Law, by seeking to dispose of his article directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer.”¹³⁴

In short, exercise of the common law device of retaining title in goods forestalled the operation of competition policy. This property right by retained title, which predates the Sherman Act by several centuries,¹³⁵ insulated owners from liability for otherwise illegal resale price

130. *United States v. General Elec. Co.*, 272 U.S. 476, 481 (1926). Consignment rights in particular were recognized as superior to competition policy under the Sherman Act as early as *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911). For an extended discussion, see Peritz, *supra* note 6, at 516-27, 531-44.

131. *General Elec. Co.*, 272 U.S. at 481-82.

132. *Id.*

133. *Id.* at 482, 484.

134. *Id.* at 488; see also *id.* at 493-94 (affirming the trial court’s dismissal of case).

135. For perhaps the earliest reference, see MALYNES, *ANCIENT LAW MERCHANT* (1622) (1986 ed.).

maintenance for seventy-five years. This insulation from liability lasted from the Sherman Act's passage in 1890 to 1964, when the *Simpson v. Union Oil Co.* opinion announced that resale price maintenance was illegal per se, whether ancillary to straight sales transactions or to consignments.¹³⁶ For the last twenty-five years, the Court has considered competition policy more important than common law property rights of consignment in the context of resale price maintenance, although recent Court doctrine has almost erased the category of resale price maintenance.¹³⁷

There have been other kinds of property rights, some of which still retain the rhetorical power to legitimate restraints of competition. I have written elsewhere, for example, about the "free rider" rationale for permitting manufacturers to restrain competition among their distributors and dealers.¹³⁸ Moreover, there is recent evidence that the consignment mechanism may be in revival.¹³⁹ The problem with such a revival is its impact on independent entrepreneurs and its anti-competitive effects in most producer markets, which are already under-competitive, whether because of markets characterized by oligopoly or nonopolistic competition.

A second example of property rights in restraint of competition policy is the repealed "fair trade" law—the Miller-Tydings Resale Price Maintenance Act of 1937.¹⁴⁰ Congress passed the statute to enable manufacturers in interstate commerce to set minimum retail prices for goods identified with the manufacturer, by trademark or other means, in states that permitted such conduct in intrastate commerce. In short, state legislatures could decide whether resale price maintenance was legal per se or illegal per se. The great majority of states passed statutes rendering the practice legal per se.

Why tolerate a manufacturer's decision to do business only with distributors and retailers who agree to sell name-brand goods at the manu-

136. The consignment right retained its pre-Sherman Act common law force, according to *Dr. Miles. General Electric* simply corroborated that view. In *Simpson v. Union Oil Co.*, 377 U.S. 13, 24 (1964), the Court found resale price maintenance illegal per se, on account of a "coercive type of 'consignment' agreement." In practical terms, were all consignments "coercive"? Because the opinion later indicated that competition policy trumps all consignments, coercion was not considered to be a necessary element of proof.

137. See, e.g., *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988); see also Peritz, *supra* note 6, at 549-54, 576 (discussing *Business Elecs.*).

138. Peritz, *supra* note 6, at 549-62, 567-75.

139. *Business Elecs. Corp.*, 485 U.S. at 733 (citing *United States v. General Elec. Co.*, 272 U.S. 476, 486-88 (1926), for the proposition that "*Dr. Miles* does not apply to restrictions on price to be charged by one who is in reality an agent of, not a buyer from, the manufacturer.").

140. Chapter 690, 50 Stat. 693, amended by McGuire Resale Price Act Amendment of 1952, ch. 745, 66 Stat. 631 (expressly extending producer's right to non-parties of resale price maintenance agreements), repealed by Consumer Goods Pricing Act of 1975, 89 Stat. 801.

facturer's designated price? Why legislate the demise of intra-brand competition on price and foster parallel pricing at the manufacturer level? Two sorts of rationales were given, one in congressional hearings and the other in a Supreme Court opinion published just before the "fair trade" bill's passage. Although the two underlying reasons benefited different market participants, they share a common property logic.

In 1936, just before Congress passed the Miller-Tydings Act, the Supreme Court established the constitutionality of state fair-trade laws. In *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, Justice Sutherland explained the basis for Illinois' power to permit intrastate vertical price fixing: "The primary aim of the law is to protect the property—namely, the good will—of the producer, which he still owns."¹⁴¹ The opinion goes on to clarify the policy basis for the statute:

We are here dealing not with a commodity alone, but with a commodity plus the brand or trade-mark which it bears . . . [The distributors] own the commodity; they do not own the mark or the good will that the mark symbolizes. And good will is property in a very real sense, injury to which, like injury to any other species of property, is a proper subject for legislation. . . . The ownership of good will, we repeat, remains unchanged, notwithstanding the commodity has been parted with. . . . [The statute] proceeds upon the theory that the sale of identified goods at less than the price fixed by the owner of the mark or brand is an assault upon the good will¹⁴²

The Illinois statute, one of thirty-seven state "fair trade" laws in force by 1937,¹⁴³ created (or recognized) a property right to set a price, even though title and possession had passed, and the producer was no longer the "owner" of the commodity. The basis was an intangible right in the producer/trade-mark owner, deemed superior to rights associated with title and possession of the commodity. The commodity owner argued, to no avail, that the price-fixing statute "has the effect of denying to the owner of property the right to determine for himself the price at which he will sell" and as such, violates the fifth and fourteenth amendments.¹⁴⁴ The Court approved Illinois' allocation of property rights in trade-marked or name-brand goods, without expressing any concern about the effects on competition.

The Miller-Tydings Act extended a state's power to enable vertical price fixing in identified goods that were once in interstate commerce. In effect, Congress empowered states to repeal the rule of per se illegality, announced some twenty-five years earlier in the *Dr. Miles Medical Co.*

141. 299 U.S. 183, 193 (1936).

142. *Id.* at 194-95.

143. See 1 E. KINTNER, *supra* note 29, at 462.

144. *Old Dearborn Distrib.*, 299 U.S. at 191-92. This rationale is another example of the indeterminacy of property rights. See *supra* note 129.

opinion, and replace it with a rule of per se legality.¹⁴⁵ Unlike Justice Sutherland's opinion for the Court, the congressional debates did not reflect a policy to protect or extend producer's property rights. Instead, supporters of the bill pointed to loss-leader tactics by large stores, precisely the practice that led Dr. Miles Medical Company some twenty-five years earlier to seek an injunction against a " 'cut rate and department store,' " to stop it from "malicious[ly] interfer[ing] with a contract" to fix resale prices.¹⁴⁶ Both Dr. Miles and supporters of the Miller-Tydings Act complained that such conduct caused a wave of small business failures.¹⁴⁷ These "fair trade" statutes were offered as mechanisms for assuring that small businesses could get a fair price for their goods. In sharp contrast to the Court's focus on producer property rights inherent in good will, Congress expressed concern for independent retailers' ability to compete with Sears, Woolworth, and other chain stores. Nonetheless, the two rationales shared a property rhetoric unconcerned with price competition and consumer interests. The bill passed with very little debate and stayed in force until its repeal in 1975.

Thus, despite *Dr. Miles'* rule of per se illegality, resale price maintenance was in fact legal per se in thirty-six states until 1975.¹⁴⁸ The twin property rhetorics of protecting producer goodwill and preserving independent entrepreneurs (though not their independence) were finally overthrown when Congress was persuaded to change its view of the practice. Sentiment in favor of repeal was virtually unanimous. As its House sponsor and Chairman of the Committee on the Judiciary, Peter Rodino (D. N.J.), remarked:

Representative [Barbara] Jordan [(D. Tex.)] noted the remarkable unanimity for repealer. The States, the courts, the antitrust agencies, consumer groups and large segments of the business community concur that these laws are no longer necessary. . . . It is unconscionable that we should, by means of special interest legislation which artificially alters the forces of free competition, deny the consumer the benefits of prices set by a free and open marketplace.¹⁴⁹

In contrast to the property rhetoric of the Miller-Tydings Act debates favoring independent retailers and that of associated caselaw espousing

145. *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911).

146. *Id.* at 375, 394.

147. See HOUSE COMMITTEE ON THE JUDICIARY, *RESALE PRICE MAINTENANCE*, H. R. REP. NO. 382, 75th Cong., 1st Sess. 5 (1937) [hereinafter HOUSE REPORT] (additional views submitted by Rep. Celler) (denouncing the practice of "loss-leader" selling).

148. 120 CONG. REC. 37,770 (1974) (remarks of Sen. Edward W. Brooke, introducing S. 4203). There is some question about the number of producers who fair-traded and the number of states that enforced their statutes by 1975. See HOUSE REPORT, *supra* note 147, at 3 (listing states which had adopted or were in process of adopting fair trade acts in 1937).

149. 121 CONG. REC. 23,659 (1975). The congressional authorization of resale price maintenance was repealed by the Consumer Goods Pricing Act of 1975, 89 Stat. 801.

the importance of protecting producer goodwill, competition rhetoric provided the ground for the Act's repeal. The House Committee Report, for example, quoted the following testimony from a Deputy Attorney General in the Antitrust Division of the Department of Justice:

[R]esale price maintenance provides convenient cover for patently illegal conspiracies in restraint of trade: State "fair trade" laws give rise to agreements among competing manufacturers, among competing wholesalers, among competing retailers, and among manufacturers competing with others at different distribution levels. Additional activities, such as boycotting of retailers refusing to enter "fair trade" contracts and the enforcing of resale price maintenance in States without "fair trade" statutes, have been inseparable concomitants of the "fair trade" laws.¹⁵⁰

Consistent with this competition rhetoric in favor of repeal, the same House Committee Report responded in similar fashion to the two justifications, founded in property rhetoric, in favor of "fair trade" laws: First of all, several studies found that small businesses were more likely to fail in fair trade states. "Moreover," the Report found, "there is some indication that 'fair trade' laws can actually work to stifle market entry by new small retail businesses."¹⁵¹ A letter from a small business association stated that "a return to a more competitive free enterprise system is a legislative action to everyone's benefit."¹⁵² Second, the Chairman of the Federal Trade Commission responded to the justification that resale price maintenance protects the producer's property interest in goodwill:

This argument reveals the anticompetitive essence of the fair trade laws. Simply put, the argument assumes an identity between cost and value and thereby begs the question of the competitive marketplace by denying the consumer the right to assign his own value to the intangible asset of trademark or image.¹⁵³

In sum, the shift from "fair trade" to its repeal was accompanied by a rhetorical shift from property rights to competition policy.

Whether the *General Electric* opinion's reliance on common law consignment rights, or "fair trade" supporters' commitments to producer and retailer interests, property rhetoric produced the policy and language of justification for the per se legality of vertical price fixing. In sharp contrast, those who argued that price fixing, both vertical and horizontal, should be illegal per se deployed the rhetoric of competition. Between the two per se categories, the "rule of reason" standard constituted a rhetorical standoff, a middle ground on which the two rhetorics met,

150. HOUSE REPORT, *supra* note 147, at 3-4.

151. *Id.* at 4-5.

152. 120 CONG. REC. 37,772 (1974) (statement of Oliver O. Ward, President of Smaller Business Association of New England, Inc., appended to remarks of Senator Brooke, *supra* note 148).

153. HOUSE REPORT, *supra* note 147, at 5.

where they battled for pyrrhic victories in ad hoc determinations of legality, only to meet again in the eternal return of controversies governed by the "rule of reason."

The image of endless battle under the "rule of reason" is familiar to students of antitrust. Indeed, the conventional wisdom is that the high cost and high risk of a "rule of reason" case is usually not worth the payoff. In short, the modern expansion of the "rule of reason" category in practical terms appears to insulate firms from liability to private plaintiffs. As we shall see, this expansion and the federal enforcement agencies' decreased activity both can be attributed, at least in part, to the private property and liberty of contract commitments propelling current price theory.

III. THIRD DISAGREEMENT ABOUT COMPETITION AS CONSTITUTING ANTITRUST'S CURRENT PERIOD: EFFICIENCY AND POPULISM

Under the price theory view, antitrust's middle period saw the "rule of reason" unravel into an incoherent series of balancing acts. Portrayed as a constitution-like charter of economic liberty, the Sherman Act beckoned judges to consider an open set of elements in determining the competitive effects of mergers, price fixing, and other controversial commercial conduct. Almost twenty-five years ago, a small group of "radical" scholars led by Robert Bork and Ward Bowman of Yale Law School, simplified the problem by redefining the disagreement about competition policy. They concluded that the economic logic of efficiency is the only realizable and neutral mechanism for serving the goal of competition. All other elements balanced under the "rule of reason" are really forms of populism—an anti-competitive social policy that should be discarded. In short, price theorists have convinced some of us that the disagreement about competition should be resolved by redefining competition policy as economic efficiency.

A counter-history can describe the consequences of redefining the disagreement about competition as the price theorists' antitrust paradox.¹⁵⁴ The account that follows explicates one price theorist's representations of efficiency and populism, by looking at their relationships to competition and property rhetorics. Professor (now judge) Posner's versions of both wealth maximization and populism exhibit strong connections to competition. Further, Posner's price theory rests on a limited form of "liberty"—an unmitigated commitment to freedom of contract, a

154. A counter-history can look at the development of price theory scholarship, for example, to illuminate the rhetorical interplays that have produced it. For a discursive history of price theory scholarship in the doctrinal context of price discrimination, see Peritz, *supra* note 3.

noble belief whose limitations render it narrowly ideological. Surely liberty encompasses more than freedom of contract. Moreover, the so-called antitrust paradox is an invention with anti-democratic implications, insofar as it is founded on the notion that populism is bad because it is political. Finally, efficiency cannot be distinguished from populism on account of the latter's politics of wealth redistribution. It turns out that price theory has its own politics of wealth redistribution. The difference between them lies in who wins and who loses.

A. *The Price Theoretical View: Solving the Paradox of Competition*

According to the price theoretical view, there is no disagreement about the meaning of competition. Competition means efficiency. There is a disagreement, but it is the residue of years of anti-competition sentiment—populism. Simply put, populism rests upon a special solicitude for small business, upon a desire to insulate one class of commercial actors from the rigors of competition. Why should we grant such special dispensation? Are store owners somehow more deserving than store managers or marketing managers? Should we not require them all to play according to the same rules? The price theoretical model, it is claimed, embodies such a non-discriminatory set of rules—the rules of free competition. In short, antitrust policy should be concerned with competition, not with competitors. Concern for competitors is wrong for two sets of reasons.

First, concern for competitors is simply inconsistent with preserving the process of competition because it frustrates the very mechanism that rewards efficient firms and penalizes inefficient ones. Even when markets are dominated by large firms, the monopoly profits earned will serve as magnets to draw new competitors and new investment into the market. Consumers benefit from this natural process of attracting capital because prices will decrease, quality and variety will increase, and more consumers will be able to afford goods and services. In short, allocative efficiency will be improved: Society's resources will be channeled to their most productive and most desired use.

Second, concern for competitors is an unacceptable political decision. It is unacceptable for two reasons. It is illegitimate because the Sherman Act was intended to benefit consumers, not small businesses. Congress recognized that consumer welfare was best served by "full and free competition," not special favors. Moreover, concern for competitors is unacceptable because it calls for the government to intervene in the market, a process that interferes with the politically neutral goal of economic efficiency. Concern for small businesses is political favoritism that

not only transfers wealth to (undeserving) small businesses but also frustrates the neutral goal of allocative efficiency.¹⁵⁵

The Supreme Court, the Department of Justice's Antitrust Division, and the FTC all have adopted some parts of the price theory model. No one speaking for any of these three institutions, however, has ever written an antitrust opinion or issued a set of antitrust agency guidelines explicitly based only on the price theory goal of wealth maximization.¹⁵⁶ Furthermore, a recent wave of scholarship has called into question the price theorists' characterization of the disagreement over competition as well as the policy choice of wealth maximization.¹⁵⁷ Apparently, disagreement over antitrust policy persists. According to the price theoretical version of the current disagreement about competition, the paradox remains unresolved since populism persists.

B. *A Genealogical View: Competition and its Relationships to Efficiency and Populism*

This Section presents a preliminary treatment of competition and its relationships to efficiency and populism. Three questions will be considered in an introductory fashion: First, what do price theorists say about the relationship between competition and efficiency? Second, what do they say about the relationship between competition and populism?

155. R. BORK, *supra* note 72, at 90-106 (1978); R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976). For a useful summary of the basic assumptions and principles of Chicago School antitrust scholarship, see Shepherd, *supra* note 79, at 400-09 (assumption number one, that market dominance merely reflects superior performance or economies of scale, is self-contradictory).

156. Professor Hovenkamp makes this point, applying it as well to agency guidelines. See Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 223 (1985). Although some have characterized *Continental TV, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), as evidence of the Court's adoption of economic efficiency as the unrivaled rationale for that particular case, the Court's reference does not constitute a commitment to wealth maximization.

First, the language of the opinion refers not to allocative efficiency, but instead to productive efficiency—that is, to “allowing the manufacturer to achieve certain efficiencies in the distribution of his products.” *Id.* at 54. There is no necessary relationship between productive efficiency and allocative efficiency unless we have perfect competition. Peritz, *supra* note 3, at 1290. Moreover, the Court did not take into account the productive efficiency effects on distributors and dealers; nor did it offer any rationale for choosing the manufacturer's productive efficiency interests over those of its distributors and dealers. Perhaps the Court presumed that the manufacturer made some determination of overall productive efficiency based on its economic interest in minimizing the retail price to maximize its (derived) demand.

Second, there is no theoretical basis for asserting that “free riders” are inconsistent with wealth maximization. For example, to the extent that a promoting retailer can sell a product and services for a higher price in one market and a discounting retailer the same product without services in a second (isolated) market, the manufacturer could expect greater demand, in much the same way that price discrimination generates greater demand. As we know, price discrimination can be wealth-maximizing behavior.

157. See *infra* notes 181-92 and accompanying text.

Finally, what can we learn about the content and the implications of the asserted paradox between efficiency and populism?

1. *The Relationship Between Wealth Maximization and Competition.* Although price theorists do not agree on one meaning for efficiency, most of the time price theorists claim they mean wealth maximization. In short, they assert that antitrust policy should serve only the goal of maximizing the cumulative market value of goods, services, good will, and other private property. There are serious difficulties with this formulation, beginning with the allocation of property rights, the identification of winners and losers, and the quantification of gains and losses.¹⁵⁸ Antitrust scholars and others concerned with such problems already have surveyed this ground with great care and their steps need not be retraced.¹⁵⁹

What *does* merit further attention is the asserted relationship between wealth maximization and competition policy. Two familiar formulations have been offered by Richard Posner.¹⁶⁰ Although both conclude that competitive markets are the proper mechanism for maximizing the cumulative value of private property, each has a slightly different emphasis, whose implications become clear when analyzed within the rhetorical framework of competition policy and private property rights.

First, Posner in his well-known book, *Antitrust Law: An Economic Perspective*, states that "since, in an economic analysis, we value competition because it promotes efficiency—i.e., as a means rather than as an end—it would seem that whenever monopoly would increase efficiency it should be tolerated, indeed encouraged."¹⁶¹ In short, the traditional

158. See, e.g., Peritz, *supra* note 3; cf. *Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980) [hereinafter *Symposium*].

159. Hovenkamp, *supra* note 156, at 231-33 (observing that efficiency as wealth maximization ignores the way that wealth is distributed, and the identity of the gainers and losers become irrelevant); *Symposium*, *supra* note 158 (especially Kennedy & Michelman, *Are Property and Contract Efficient?*, at 711; Coleman, *Efficiency, Utility, and Wealth Maximization*, at 509; Kornhauser, *A Guide to the Perplexed Claims of Efficiency in the Law*, at 591; Dworkin, *Why Efficiency?*, at 563; Baker, *Starting Points in the Economic Analysis of Law*, at 939).

160. There have been numerous others as well. Perhaps the clearest formulation belongs to Robert Bork. Bork avoids all of Posner's difficulties by first defining productive efficiency as business success, then by defining his references to efficiency as calls to productive efficiency. R. BORK, *supra* note 72, at 91, 104-06 (1978). Thus, the only proper policy implication of Bork's transparent formulation is free-marketeering—that is, no antitrust intervention. If the practice is successful, it is efficient and should be applauded. If the practice is unsuccessful, why waste enforcement resources? For an extended critique of this sort of circularity, unencumbered by history, by empirical study, or by useful logic, see, e.g., Adams & Brock, *Reaganomics*, *supra* note 79, at 323-39.

161. R. POSNER, *supra* note 155, at 22. I will take Posner to mean wealth maximization, even though he sometimes seems to mean productive efficiency and other times Pareto Optimality. For the clearest statement of efficiency's meaning as wealth maximization, see R. POSNER & F. EASTER-

view of competition as an important end in itself is turned on its head: Competition is valued only when it serves wealth maximization. That is, competition is valued only as a means for increasing the cumulative market value of private property.

This sort of justification for rules promoting competition, monopoly, or any other state of affairs might appear to be a modern form of utilitarianism: A rule is Good when its effect is a society that, overall, is better off (wealthier). Even if we ignore the classical criticisms of utilitarianism (even if we agree, for example, that society overall being better off is more important than some individuals being worse off) wealth maximization does not help us accomplish this goal. Here is one reason that wealth maximization does not tell us whether society overall is better off: While utility purports to take into account any and every preference, wealth maximization takes into account only those that can and are exercised in commercial markets. In consequence, three effects result: non-economic goals are ignored, those without the wealth to vote for their preferences are ignored, and those who believe that their votes in political markets serve to protect their non-economic preferences are ignored. A good example of the first and third is clean air or water, a non-economic preference that is considered a public good, as regulated by environmental legislation. A good example of the second instance is the poor person who "prefers" canned dog food to canned stew, or a public shelter to an apartment overlooking Central Park. In all three instances, wealth maximization does not give us a useful picture of how society's resources are allocated or an appealing account of how they should be. While wealth may be an important social good, it is not the only Good that our society values.¹⁶²

Thus, the choice of maximizing the value of private property in commercial markets is not neutral. It turns out to be just another political choice, whose claim to priority requires justification: Why choose wealth as the value to be maximized and why maximization as the standard for evaluation? For example, why choose a possibly efficient monopoly (which Posner both chooses and portrays as economically unlikely) over the multiple virtues of small businesses? Or, why permit

BROOK, ANTITRUST CASES AND MATERIALS 9-10 (1980). For a critical analysis of Posner's efficiency logics, which lead to an efficiency nightmare of productively inefficient dominant firms, see Peritz, *supra* note 3, at 1287-92.

162. Kennedy & Michelman, *Are Property and Contract Efficient?*, in *Symposium*, *supra* note 158, at 721-23. See generally Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967) (arguing that courts' determinations of when government action constitutes a taking diverges from traditional notions of utility and fairness). Nor is it a proxy for a utilitarian summation of society's preferences, assuming the possibility of quantification and cumulation.

producers to impose vertical restraints on independent retailers? If the answer is "because it maximizes wealth," then the respondent must make a moral argument about why wealth maximization is more important than economic opportunity or wealth transfers or any other policy preference that traditionally has been associated with antitrust.¹⁶³

In formulating a second relationship between competition and wealth maximization, Judge Posner seems to have recognized this need to justify the normative ground of price theory. In an article attempting to re-ground price theory in liberal theory and to distinguish wealth maximization from its utilitarian cognate, Posner has alluded to something along the lines of Kantian personal autonomy.¹⁶⁴ Although the reference is vague, in that neither definition nor citation to Kant is given, it is clear

163. For an example of the view that Congress has chosen to give preference to small businesses, see *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 436 (2d. Cir. 1957). See also *United States v. Von's Grocery*, 384 U.S. 270 (1966); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1961). For examples of the view that antitrust doctrine has evidenced a commitment to preserving independent retailers' freedom to do business as they choose, see *Continental T.V., Inc. v. GTE Sylva Inc.*, 433 U.S. 36, 61-62 (1977) (White, J., concurring); *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 748-57 (1988) (Stevens, J., dissenting).

164. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979). In some sense, Posner attempts a synthesis of utilitarian and libertarian ethics, much as Vilfredo Pareto attempted in his 1909 work on allocative efficiency. Here is a thumbnail sketch of the intellectual history to contextualize both attempts. The classical utilitarian ethic is majoritarian: If a rule or policy makes society, on balance, better off, then it is a good rule or policy. A libertarian critique would focus on those who are not better off. Kant, for example, argued against utilitarianism by asserting that people should be treated as ends, not means. A utilitarian ethic was unacceptable, in part because it treated individuals as means to an end of a better society. Skipping a few centuries, we can understand Pareto's 1909 work, *Manuel d'Economie Politique*, as an attempt to resolve this conflict: A rule or policy should be considered efficient if at least one person is better off and no one is worse off. This is the standard economic notion of allocative efficiency. Note that in this sense of efficiency, society is better off because at least one individual is better off, and no one is worse off.

Thus, Paretan efficiency can be understood as an attempt to synthesize utilitarian and libertarian ethics. The problem, of course, is the impossible burden imposed on policymakers and rulemakers: If anyone is worse off, the recommended change is inefficient. The more recent form of Kaldor-Hicks or potential Pareto efficiency can be understood as an attempt to formulate a workable standard of efficiency. This form of cost-benefit analysis is termed potential Pareto efficient because a surplus of benefits over costs suggests that winners could pay losers. They need not pay anyone. But because they could and still, as a class, be better off, the Kaldor-Hicks standard is met. Of course, this formulation re-introduces the problem of losers that libertarians found unacceptable in utilitarianism. Using wealth as the value, rather than utility, would seem to offend both camps. Utilitarians would not recognize wealth as an adequate presentation of utility. Libertarians would view the wealth maximization form of cost-benefit analysis as sharing the defect of utilitarianism's view of individuals as means not ends.

Posner attempts to formulate a new synthesis by linking wealth maximization directly with the Kantian notion of personal autonomy—a restatement of the libertarian ethic of individual liberty. Posner's attempt at a synthesis of marketplace liberalism and libertarianism is notable, if at all, because it fails so dismally. It leaves us with precisely the same set of questions about the relationship between individual liberty and social good, at least within the constraints of choosing between utilitarian and libertarian ethics.

that this so-called "Kantian" turn is an attempt to re-ground price theory in an ethic of individualism.

Here is a summary of the argument. In brief, Posner claims that wealth maximization can be understood as a liberal value because it is the product of market transactions between willing buyers and sellers. An individual willingly enters into a market transaction (or other transactions that Posner describes as market-like) only when she believes that she will be better off than she is before the transaction. If the transaction results in a loss, then we can assume that she *ex ante* consented to the (risk of) loss. Posner claims, therefore, that all consensual market transactions are conduct serving the Kantian notion of personal autonomy (and, presumably, the libertarian notion of individual liberty). Thus, market transactions, because they instantiate the ideal of personal autonomy, should be the rule. Moreover, we already know that market transactions, free of government intervention, maximize wealth. With an idealized image of free competition as the connecting link, the chain is complete: On one side, personal autonomy is linked to free competition. On the other, wealth maximization is also linked to free competition. By some commutative principle of logic, personal autonomy and wealth maximization are linked. The inference is that wealth maximization can serve as a proxy for personal autonomy. In consequence, the goal of wealth maximization is a neutral principle, even though some individuals lose wealth. It is neutral because the free competition required for wealth maximization is, at the same time, a mechanism that permits every participant to exercise personal autonomy. In short, wealth maximization supports a commitment to liberty.¹⁶⁵

Posner's first formulation of wealth maximization as a social good is an appeal to the property rhetoric of enabling society to increase the value of its holdings. This social good is defined as depending on a competition rhetoric disciplined by a commitment to liberty—that is, as depending on free competition. In his second (libertarian) formulation, this property rhetoric is legitimized by, again, linking it to a competition rhetoric driven by a commitment to liberty—to competition free of govern-

165. What is interesting about this formulation is that it seems to recoup the loss suffered in the move from the traditional Pareto Optimality standard to the Kaldor-Hicks version of allocative efficiency. That is, the appeal of the Paretan determination is its dependence on the fact that no one is worse off—pretty close to a neutral standard. Kaldor-Hicks allows for losers, as long as there is a net gain. With the turn to "personal autonomy," Posner can claim that even losers are better off. It is the process that is good, even when the result is not. Even losers are winners, just for the taste of it, just for the enjoyment of exercising one's commercial preferences.

I leave to another day a detailed Kantian critique of Posner's questionable sense of "personal autonomy." For three excellent articles that provide ground for an extended critique, see Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 371-77 (1973); Massey, *Kant on Self-Respect*, 21 J. HIST. PHIL. 57 (1983); Richards, *Rights and Autonomy*, 92 ETHICS 3 (1981).

ment intervention. But in the latter, the commitment to liberty is itself legitimized by reference to the liberal philosopher Kant. In sum, the two formulations draw connections among competition and property rhetorics, and liberty.

Liberty is the connective tissue in Posner's two formulations of wealth maximization. In particular, liberty of contract provides the link between his property and competition rhetorics. The rhetorical limits of this commitment to liberty become clear when one recognizes that neither formulation mentions equality. A commitment to equality is absent from both competition and property rhetorics in both formulations of wealth maximization. Indeed, as we shall see, it is populism that displays a commitment to equality. For Posner, Bork and others, it is an asserted conflict between commitments to liberty and equality that underlies the paradox invented between wealth maximization and populism, between economic and sociopolitical concerns.

2. *The Relationship Between Populism and Competition.* Posner's *Antitrust Law: An Economic Perspective* provides a useful starting point for summarizing an influential price theorist's view of the relationship between populism and competition.¹⁶⁶ Under the heading of "Sociopolitical Objections to Monopoly," Posner recounts two non-"economic" objections to monopoly, each of which involves a form of redistribution. First, "monopoly transfers wealth from consumers to the stockholders of monopolistic firms."¹⁶⁷ In other words, one populist (but for Posner, non-"economic") concern is the wealth transfer associated with monop-

166. R. POSNER, *supra* note 155. In some ways, Robert Bork's rhetorical excesses may be more entertaining than those of Posner, if not more enlightening. He calls the Clayton Act's introduction of populism the "'Typhoid Mary' of the protectionist disease." Bork, *The Place of Antitrust Among National Goals*, in NAT'L INDUS. CONFERENCE BD., BASIC ANTITRUST QUESTIONS IN THE MIDDLE SIXTIES, FIFTH CONFERENCE ON THE IMPACT OF ANTITRUST ON ECONOMIC GROWTH 18 (1966). Whatever Bork might have meant by populism, popular and populist concerns were evident as early as the Sherman Act's legislative debates. See, e.g., Peritz, *supra* note 1, at 285.

167. R. POSNER, *supra* note 155, at 18. The text claims and later mounts an argument that the wealth transfer from consumers does not end up in the monopolist's pockets because it is "dissipated in the purchase of inputs into the activity of becoming a monopolist." *Id.* In other words, we don't have to worry about monopolists getting rich because they spend the money on the socially wasteful and productively inefficient activity of maintaining their monopoly. Somehow, that does not make me less concerned either about monopolies or about the associated wealth transfer. For a critique of Posner's claim, see Shepherd, *supra* note 79, at 401, 411-14.

The text also recounts a "second argument" about fostering collusion "to manipulate the political process to obtain protective legislation aimed at increasing the industry's profits." *Id.* For my purposes, insofar as the aim is the transfer of wealth from consumers to producers, I treat this second argument as a restatement of the first.

oly.¹⁶⁸ Although a populist policy to create competition—for example by dissolving the monopolist to create several firms of roughly equal size—would seem to be a logical mechanism for reversing this transfer of wealth, it is not. This connection between populism and competition is illusory because, as Posner has already informed us, the wealth transferred to the monopoly might be efficient—that is, it might be wealth-maximizing. Thus, a rule based on a policy to redistribute wealth from monopolies to consumers, a policy to equalize wealth, could be inefficient. Any argument to equalize competition by, for example, restructuring an industry, that has as its purpose redistribution of wealth is inefficient and, by Posner's definition, populist. It is a commitment to equality that identifies the argument or objection as populist.

Posner's second example of a non-"economic" objection to monopoly is the "policy of restricting the freedom of action of large business firms in order to promote small business."¹⁶⁹ An asserted conflict between commitments to liberty and equality underlies the very logic of Posner's second formulation of "populism"—that the policy of favoring competition among numerous and roughly equal firms is built upon the practice of restricting large business firms' liberty of contract. According to this view of "populism," a commitment to equalizing rivalry, to establishing workable competition, is antithetical to liberty of contract, to laissez-faire competition, and thus, to wealth maximization. Though many controversial claims underlie Posner's second characterization of "populism," for the sake of brevity, only two will be addressed here.

First, there is the explicit claim that "populism's" commitment to equality is founded on a rejection of (big business firms') liberty. This claim makes sense, of course, only because Posner assumes that competition always insinuates liberty and that equality is always antithetical to liberty. Only if both of these assumptions hold does "populism" then conform to Posner's characterization. But neither assumption stands up to scrutiny. To begin, it is not clear that competition always insinuates liberty. For example, enjoining the merger of all firms in an industry can, but need not, be seen as pro-competitive and anti-liberty (of contract). Even if one believes that competition always insinuates a commitment to liberty, liberty and equality need not be seen as antithetical. Indeed, it is a commonplace that liberty and equality are always interdependent, that each requires the other as a condition for its livelihood. For example, the greater a dominant firm's market power, the more it

168. Insofar as the distribution of wealth is an issue that can be separated from wealth maximization, Posner calls it a political or populist concern. For a discussion of efficiency's dependency on the distribution of wealth, a well-known relationship, see, e.g., Peritz, *supra* note 3, at 1292-95.

169. R. POSNER, *supra* note 155, at 19.

diminishes the liberty of rivals, customers, and suppliers. Redistributing market power to equalize it would increase liberty. Indeed, one could even say that it would "maximize" liberty, though it would leave some worse off. In short, it is not self-evident that "populism's" commitment to equality precludes a commitment to liberty. Posner's view notwithstanding, "populism" can be seen as being entirely compatible with competition, liberty, and equality.

Second, Posner's version of "populism" is founded on an unspoken and controversial assumption that efficiency varies directly with size.¹⁷⁰ Thus, competition on the merits (whatever that means) would favor large business firms. Another inference from his assumption is that small firms, to survive, must be protected from more efficient large ones. The assumption underlying this inference has no basis in fact, although it does tend to justify bigness. To the contrary, empirical studies tend to show that large firms are less efficient.¹⁷¹

Moreover, there is the dark underside of Ronald Coase's theory of the firm.¹⁷² Coase asserts that a firm's size is a function of efficiency.¹⁷³ That is, a firm will expand as long as production by fiat is more efficient than production by market transactions. Until the certainty of the former becomes more costly than the information lost, the firm will continue to expand. The theory assumes that viable competitive markets are producing valuable information. But as markets become less competitive, the information becomes less valuable. In consequence, greater efficiency losses associated with increased firm size are tolerable because less information is lost. There is a momentum that builds: As market structure becomes less competitive, firms are less constrained by the opportunity cost of lost information when assessing the tradeoff between fiat and contract. In short, the tendency toward concentration increases.¹⁷⁴

Even in those situations in which Coase's theory of the firm makes sense, the practice can be much more complex. For example, Coase ignores the propensity to overvalue certainty and the firm's desire to insulate itself from market discipline. Thus, it seems, the success of large businesses cannot be attributed categorically to efficiency. One plausible alternative inference from the facts is that such success is based instead on the "background" rules, including contract, tort, and property law.

170. R. POSNER, *supra* note 155, at 19. See also Blake, *Conglomerate Mergers and the Antitrust Laws*, 73 COLUM. L. REV. 555, 570 (1973) (preferential access to capital resulting from conglomerate mergers threatens a probable injury to competition).

171. See authorities cited *supra* note 79.

172. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937).

173. *Id.*

174. See generally *United States v. Von's Grocery*, 384 U.S. 270 (1966); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1961).

In other words, what we call "liberty of contract" might favor large firms so much that some smaller firms' efficiency advantages are lost. If large firms are permitted to enter into contracts "freely," then for example, a large firm can sell below cost to drive a more efficient local firm out of business and recoup its losses from monopoly profits in uncontested locations. A (populist) policy of "protecting" local firms from such practices would be consistent with competition on the merits. Here at least, populism, (productive) efficiency, and competition are entirely compatible. Nonetheless, following Posner's "economic" "logic" of wealth maximization, restricting the liberty of large firms would be anti-competitive and inefficient.¹⁷⁵

It appears that both wealth maximization and populism can be compatible with competition. This is the true paradox, price theory's formulation notwithstanding. Populism is no more anti-competitive than wealth maximization. Both enjoy strong rhetorical connections to competition policy. The conflict between wealth maximization and populism rests on the tension between commitments to liberty and equality. It is a tension captured in the conundrum of "free competition." Price theory rests on a preference for liberty of contract and the associated ideal of competition free of government power. Populism rests on a preference for eliminating gross inequalities and the associated ideal of competition free of private power. Price theory proceeds from an unmitigated commitment to individual liberty, which is understood as antithetical to a commitment to equality. In sharp contrast, populism adheres to the view that a strong commitment to equality is entirely consistent with a strong commitment to individual liberty.¹⁷⁶

Whatever else price theory has accomplished, it has not solved the paradox of competition. Instead, one of its leading proponents, Robert Bork, has invented a false paradox to which Richard Posner and other

175. Although Posner does point out that firms taking in monopoly profits have an incentive to expend resources to protect these profits from other firms, and that such costs are socially wasteful, the observation leads nowhere. It leads nowhere because, as a practical matter, all that the monopoly firm is doing is competing. There are only two alternatives—either not allowing the dominant firm to compete or limiting the modes of competition. First, Posner obviously would not invoke a rule to stop powerful firms from competing; even if he did, how could he enforce the rule? If instead, he would limit the ways in which a monopoly can compete, he would be doing nothing different from the limited and ineffective "rule of reason" analysis he has suggested elsewhere. POSNER, *supra* note 155, at 12-15 (social cost of competing for monopoly); *id.* at 184-96, 211 (Sherman Act section 2 analysis).

176. For a closely-reasoned argument demonstrating that neither private property nor freedom of contract regimes are necessarily more efficient than state-of-nature or forced-sharing-for-need regimes, see Kennedy & Michelman, *supra* note 158, at 712. Of course, there are other notions of equality, some of which might be compatible with a primary commitment to liberality of contract—non-discrimination, for example. The point remains, however, that Posner is committed to liberty of contract first and foremost.

price theorists subscribe.¹⁷⁷ Moreover, as I have shown in another context, both efficiency and populism are understood most usefully as products of the rhetorical forces of competition policy and private property rights.¹⁷⁸ Both price theory and populism include a politics of wealth distribution: Both a regime of liberty of contract and a regime committed to recognizing the impact of economic power in bargain transactions produce predictable patterns of wealth distribution. Finally, both price theory and populism have strong yet complex relationships with “free competition.” The complexities result from differing views of the connections between economic liberty and commercial equality.

IV. RECENT SCHOLARLY ATTENTION TO THE FORMATIVE PERIOD: TOWARD A FOURTH DISAGREEMENT ABOUT COMPETITION

This Section chronicles a new wave, if not a new era, of antitrust scholarship whose common movement is a (re)turn to antitrust’s earliest period. That turn then serves as the context for a genealogical approach to antitrust. Finally, the Section concludes that a genealogical approach leads us to a fourth disagreement about competition, a disagreement that is already evident in policies considered and adopted.

Price theory’s appeal seems to have been two-dimensional: first, there is the appeal of its normative foundation, usually called “consumer welfare”; second, there is the attraction of its methodological claims of certainty. Because the phrase “consumer welfare” shares semantic elements with the Ralph Nader consumerist movement, there has been a feeling that Robert Bork, Richard Posner, and other price theorists share the Naderites’ concerns for consumers. Nothing could be farther from the truth, we have learned. Where Naderites call for commercial firms to take social responsibility for their products, services, and effects on society, price theorists believe that firms only have a responsibility to their shareholders to maximize earnings. “Consumer welfare,” for price theorists, means laissez-faire capitalism—economic activity free of democratic constraints. Even those unfamiliar with price theory have seen its impact in the Reagan years, especially evident in the reticence of federal enforcement agencies, whether the Department of Justice’s Antitrust Division or the Environmental Protection Agency, to prosecute corporate violators of the law. We simply cannot be confident that powerful producers’ interests correlate with consumer well-being or other civic concerns. Even if we were so confident, consumer well-being can be inconsistent

177. See *supra* text accompanying notes 158-76.

178. Peritz, *supra* note 1, at 289 n.22.

with other individual and social interests. Wealth maximization seems to be an impoverished ethic.

Many recognize that price theory is a legacy of the classical economics in decline a hundred years ago, at the time of the Sherman Act's passage. Its legacy is not only normative but also methodological. Price theory shares classical economics' assumptions and beliefs about the way markets (and thus, the world) works. More than that, price theory is a formalistic enterprise rooted in a pre-Realist view of legal reasoning. To the extent that Robert Bork, for example, believes that a turn to the general principle of efficiency, or even a less general principle of wealth maximization, can make antitrust law coherent, he is ignoring Justice Holmes's well-worn aphorism that general principles do not decide concrete cases. Bork and his fellow neo-classicists are asking us to buy into a mechanical jurisprudence long-ago dismissed as inadequate and misleading.¹⁷⁹ Furthermore, we moderns understand that legal reasoning calls for analogical and inductive analysis, not just the deductive formalism so often seen in price theory practices. Thus, theoretical price analysis seems too limited and too unrealistic in its practice.

In addition to being dissatisfied with price theory's claims of normative and methodological value, some perceive a similarity in the political economic climates of 1890 and 1990. In 1890, John D. Rockefeller could ignore an Ohio Supreme Court decision upholding the state's right to dissolve the Standard Oil Trust. He simply picked up his corporate formalities and moved to New Jersey.¹⁸⁰ Today, a number of multinational corporations are bigger and more powerful than many nation-states. At the very least, multinational corporations are capable of moving quickly to take advantage of opportune differences in their supply and demand markets. To the extent that firms are able to demand and secure favorable legal regimes, they are politically unaccountable. They can pack their passports and their corporate formalities, and move out of a

179. See, e.g., Cohen, *Transcendental Nonsense and the Functional Approach*, 25 COLUM. L. REV. 809, 812 (1935) (when metaphors of traditional jurisprudence become reasons for decisions rather than devices to formulate decisions, one is "apt to forget the social forces which mold the law and the social ideals by which the law is to be judged"); Flynn, *supra* note 72, at 264 (in the Bork reading of the legislative history, "a latter-day economic theory is being used to translate the basic values the Congress which adopted the Sherman Act sought to preserve into the narrow and rigid values underlying one brand of current economic theory"); Peritz, *supra* note 3, at 1249 (finding Bork's claims "historically, practically, and theoretically unsound"); Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 606-07 (1908) (warning of the dangers of a scientific legal system in which the ghosts of departed masters dominate: "[T]heir sound methods are forgotten while their unsound conclusions are held for gospel").

180. See H. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* 82 (1955).

country. There is reason some are deeply troubled by such corporate unaccountability.

For a growing number of antitrust scholars and practitioners, dissatisfaction with price theory and a reluctance to return to the "constitutional" jurisprudence that preceded it has led to a search for alternatives. A surprisingly large number of scholars have turned to historical analysis.¹⁸¹ Perhaps the turn reflects a reaction to price theory's static analysis, its refusal to take into account changes in context. The wealth of historical analysis also indicates a resistance to Robert Bork's well-known attempt to overcome the generally accepted direction of time and argue that the Sherman Act was passed for purposes not historically possible. This fable made an easy target for more careful students of antitrust history, including John Flynn, Eleanor Fox, Robert Lande, and David Millon.¹⁸²

Associated with these historical critiques were several different kinds of histories, written about the formative years of antitrust, typically 1890 to 1914 or 1918. David Millon has written a political history of the formative years that traces the Sherman Act's roots to both liberal and republican conceptions about political economy.¹⁸³ He has captured the relationship between the cultural context of populism and the material

181. Of course, other sorts of critiques have appeared as well. See L. SULLIVAN, *ANTITRUST* (1976); Curran, *Beyond Economic Concepts and Categories: A Democratic Refiguration of Antitrust Law*, 31 ST. LOUIS U.L.J. 349, 349 (1987) (economic efficiency in antitrust law is one of the "rational concepts [which] are first perceived as modes of constructive thought, but ultimately become doctrines that limit options and block alternatives, destroying justice and democracy"); Flynn, *supra* note 72; Harris & Jorde, *Antitrust Market Definition: An Integrated Approach*, 72 CALIF. L. REV. 1 (1984) (criticizing existing market definitions and suggesting a more sophisticated approach to market definitions in antitrust matters); Hovenkamp, *supra* note 156; Lande, *supra* note 4, at 68 ("Congress passed the antitrust laws to further economic objectives, but primarily objectives of a distributive rather than of an efficiency nature"); Ponsoldt & Lewyn, *Judicial Activism, Economic Theory and the Role of Summary Judgment in Sherman Act Conspiracy Cases: The Illogic of Matsushita*, 33 ANTITRUST BULL. 575 (1988); Salop, *New Economic Theories of Anticompetitive Exclusion*, 56 ANTITRUST L.J. 57 (1987) (suggesting a theory of anticompetitive exclusion which allows competition that benefits consumers and deters exclusionary conduct harmful to consumers); Scherer, *Review, supra* note 79 (criticism of the "Antitrust Unorthodoxy" in Posner's book, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976)); Spivak, *supra* note 20; Sullivan, *The Economic Jurisprudence of the Burger Court's Antitrust Policy: The First Thirteen Years*, 58 NOTRE DAME L. REV. 1 (1982) (comparison of Burger Court's antitrust jurisprudence with the antitrust precedents and established twentieth century jurisprudential models).

182. John Flynn has argued skillfully that Robert Lande's economic reading of the antitrust laws' legislative histories as paeans to consumer wealth transfers suffers the same infirmity of historical analysis. See Flynn, *supra* note 72, at 264. Nonetheless, I believe that Lande's convincing refutation of Bork's claims has provided a valuable service to antitrust scholars and policy makers. See Lande, *supra* note 4, at 65; Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981).

183. Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL L. REV. 1219, 1220 (1988) (the Sherman Act was a final effort on behalf of a long standing tradition—"opposition to monopoly power and faith in the efficacy of competition to prevent it").

conditions of existence, namely the emergence of powerful and frightening accumulations of capital. We are reminded that individual feelings of powerlessness are not just symptoms of postmodernism, and that the Sherman Act was conceived as a mechanism for righting the imbalance between political and economic spheres. James May devoted one section of a paper to a history of state antitrust law in a formative era—an account of “The Other Half of Antitrust: State Statutory and Common Law, 1880-1918.” In this paper, May sought to retrieve the economic logic of the era in order to provide a fuller context for understanding early federal antitrust law, as well as to take issue with Robert Bork’s view of those years as devoid of economic analysis.¹⁸⁴ This investigation allows us to “remember” the logics then associated with competition policy. Herbert Hovenkamp, in his assessment of economic analysis of antitrust, devotes a section of the essay to “The Role of Economics in Federal Antitrust Policy: 1890-1980.”¹⁸⁵ As Frederick Rowe¹⁸⁶ did before him, Hovenkamp describes changes in antitrust analysis as related to paradigm shifts in modes of economic analysis. That is, Hovenkamp believes that “flaws in the Chicago model’s basic premises will one day cause it to be eclipsed, just as previously ascendant doctrines have been eclipsed.”¹⁸⁷ Economic and antitrust history are depicted as cycles driven by paradigm shifts.

Each of these careful studies seeks to expand the limits of antitrust discourse. Each historicizes the prevailing view and then reaches back in time to recover arguments, policies, and visions eclipsed by the ascendancy of new views and by the passage of time. The same can be said of the historical critiques of Eleanor Fox, Robert Lande, and John Flynn. Eleanor Fox finds strong evidence of a concern for the competitive process.¹⁸⁸ John Flynn has remarked that the competitive process can be understood as a means of allocating property rights.¹⁸⁹ Robert Lande makes a persuasive claim that the antitrust laws were passed to protect consumers from wealth transfers associated with monopoly pricing.¹⁹⁰ Each of these historical investigations corroborates the view that anti-

184. May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495, 497-507 (1987).

185. Hovenkamp, *supra* note 156, at 217-26. For a more recent historical analysis that follows themes earlier explored in Peritz, *supra* note 1, Peritz, *supra* note 3, Millon, *supra* note 183, and May, *supra* note 184, see Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA L. REV. 1019 (1989).

186. Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511 (1984).

187. Hovenkamp, *supra* note 156, at 213.

188. Fox, *supra* note 182.

189. Flynn, *supra* note 72.

190. Lande, *supra* note 4.

trust discourse always has included arguments founded in competition rhetoric rather than wealth maximization. Moreover, each authenticates the view that antitrust law has embodied precisely the social policies that Posner and other price theorists dismiss as "populist." Each offers strong evidence of persistent regard for the process of competition, monopoly prices, and the virtues of small and medium-sized business firms. These concerns are populist in the familiar sense that Congress passed major legislation in 1890, 1914, 1936, 1950, and 1975 to promote these values. In this familiar sense, price theory's anti-populism is also anti-democratic.

All of this historical scholarship provides the context for another kind of history of antitrust law—what I call a genealogy or counter-history of antitrust discourse. This approach differs in three ways from most of the historical works described above. First, its focus is legal discourse or rhetoric. What emerges is an account of the historical changes in antitrust argument, changes in the ways lawyers, judges, and scholars have talked and written about antitrust law. These historical changes are taken apart and inspected under varying lights, including the economic and political views of the times.

Second, the approach is a counter-history, a history of forgotten claims and unheard arguments. It is the silent counterpart of traditional histories, the unseen twin of the familiar rhetoric of competition. This genealogy looks beyond or beside competition rhetoric to its counterpart—property rhetoric. This counter-history of competition policy is a history of private property rights. Its value is the powerful descriptive framework produced. It makes sense of historical and doctrinal problems either created by or left unanswered by both traditional antitrust analysis and price theory.

Third, a genealogy proceeds from a fundamentally different understanding of history. Traditional doctrinal and some historical analysis produces a cloistered, culture-free account of changes in legal doctrine. Its underlying assumption is that doctrine is progressing, getting better, or at the very least, that doctrine can be pushed in the "right" direction. Price theory produces what Arthur Leff has called a picaresque narrative,¹⁹¹ a history of law's heroic pursuit of efficiency. A genealogy calls into question the evolutionary and the picaresque views of history, neither of which comports with our experience or our analysis of antitrust law.

191. Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 451 (1974) (analogizing R. POSNER, *ECONOMIC ANALYSIS OF LAW* (1973) to a picaresque novel).

Some recent historical studies, including several works mentioned above, produce structuralist histories: They portray history as a series of paradigm shifts that underlie changes in antitrust doctrine. These efforts apply a useful and plausible historiography, particularly because the historical motor for change, the paradigm-shift, is understood as a politicized process.¹⁹² Nonetheless, two unacceptable implications emerge: First, history is viewed as the process of one paradigm eclipsing another; second, normal practice within a paradigm is characterized as synthetic, whereas revolutionary practice between paradigms is conflictual.

These implications are unacceptable for a number of reasons. First, antitrust argument does not exhibit these tendencies. For example, this Article's account of disagreements over the meaning of competition shows that paradigms do not shift. Rather, traces, combinations, and permutations of earlier arguments persist. They are not eclipsed; they are sometimes imprisoned and are always worthy of parole. Second, the analytical distinction between normal and revolutionary practices does not hold. Antitrust law and, for that matter, all law reflects conflict—both social conflict over policies and their consequences, and individualized conflict in the adjudication of disputes. If normal practice were not conflictual, then Holmes would be wrong: General principles could decide concrete cases. Third, the view that there is one paradigm can blind us to some of the conflicts taking place before our eyes. In antitrust, the widely-held belief that a competition paradigm always has provided the exclusive ground for antitrust obscures the textual fact that private property rights are always at issue in antitrust cases.

In sum, a genealogical approach allows us to represent the conflicts that always reside in the political artifacts of legal rules and policies. It helps to make us more resourceful lawyers and scholars. It comports more closely with our sense of political processes, whether legislative, administrative, or judicial.¹⁹³ Within antitrust discourse, a genealogical approach enables us to historicize current discourse, portray the folly of any depoliticized account, and retell stories of struggle that comport with our experiences as lawyers, scholars, and members of political communities.

192. T. KUHN, *supra* note 15.

193. For a recent example of a thoughtful historical analysis that nonetheless fails to grasp the distinction between institutional and rhetorical history, see Cartensen, *How to Assess the Impact of Antitrust on the American Economy: Examining History or Theorizing?*, 74 IOWA L. REV. 1175 (1989).

CONCLUSION

In observing the Sherman Act's centennial, it is important to remember that antitrust law for most of its existence has been understood as a public interest law designed to regulate the exercise of private economic power. The historical animus for its enactment was the tidal wave of corporate consolidation, which took two forms—the holding company (then called the trust) and the cartel. In sharp opposition to the view held by modern price theorists and the Reagan-Bush administrations, Congress did not pass the Sherman Act to maintain the status quo, to constrain itself and the Executive from regulating market behavior. Rather, it passed the Sherman Act and ensuing legislation to resuscitate and sustain robust competition, which had been asphyxiated by holding companies such as the Standard Oil Trust and overrun by cartels such as the Trans-Missouri Freight Association.¹⁹⁴

Those representing the interests of the trusts and cartels argued that any regulation of their exercise of liberty of contract, whether motivated by a desire to destroy rivals or to cooperate with them, was both unconstitutional and unreasonable. Nonetheless, the early "Literalists" determined that Congress had the power and the intent to subordinate these individual rights to the public interests furthered by competition policy. Current per se offenses can be understood as legacies of this view. Under the "rule of reason," which has dominated antitrust discourse since 1911, courts have sought to mediate the tension between individual rights of liberty and property, and public interests understood as commitments to competition and equality.

Although, as I have already described, the tension is not so simple, the simplification is useful for summation purposes. It is useful for two reasons. First, in reminding us of property logic's role in the production of antitrust discourse, this distillation underscores the historical inadequacy and analytical limitations of the orthodox view that competition policy always has been the sole normative basis for antitrust. Second, it emphasizes the crucial role of liberalism's fundamental tension between commitments to liberty and equality. These two tensions—between competition policy and property rights, and between commitments to liberty and equality—have produced the last century of antitrust law and policy. These four elements have armed history's combatants in antitrust's own Hundred Years' War. Given this framework, I will conclude with three comments.

First, I intend to make no grand pronouncements about the framework or the genealogical method, but only a few particular claims. I

194. See *supra* text accompanying notes 29-58.

claim only that the framework and method have helped me in my earlier studies of antitrust's formative years and vertical restraints doctrine, to settle some persistent problems left unresolved by traditional and price theoretical studies; in this Article the framework and method provide a basis for thinking differently about price fixing doctrine and for understanding the implications of Bork's invention and Posner's elaboration of an "antitrust paradox." Finally, I have raised a few methodological questions about current antitrust historiographies. My second and third comments are offered as suggestions toward re-organizing price-fixing doctrine and as criticisms aimed toward scrapping the "antitrust paradox" and its misguided formulations of efficiency and populism.

Second, this Article's double history of price-fixing policy and doctrine under the "rule of reason" offers some helpful insights for making sense of the area. To begin, it is clear that price-fixing has not been treated uniformly as illegal *per se*. There always have been "exceptions," which I characterize as the tangible artifacts of a much older counter-policy associated with individual property rights—the protoplasm of our common law tradition. This counter-policy has been animated by a desire to help some commercial actors protect their property, to some extent, from the rigors of competition. One obvious example is the *General Electric* opinion's special treatment of common law consignment transactions, allowing the producer to retain title and thus to set retail prices.¹⁹⁵ A more recent example is the *BMI* opinion's characterization of the blanket license as a new product, thereby permitting the association to treat the bundle of copyrighted compositions as one product (rather than defining the association as a form of agreement among individual copyright holders).¹⁹⁶

The counter-policy of individual property rights, which predates not only the Sherman Act but also the Constitution, has been accompanied by variable effects on competition policy. In *General Electric*, the producer had a virtual monopoly on the manufacture of electric light bulbs; by foreclosing the possibility of competition among retailers, the Court pulled the plug on all competition in the industry.¹⁹⁷ In *BMI*, the Court rhapsodized on the pro-competitive effects of blanket licensing of copyrighted compositions.¹⁹⁸

The direct (though unexamined) consequence of this counter-policy is the effect on property rights themselves. In functional terms, the Court's exercise of property logic (re)defines and thus, (re)allocates prop-

195. See Peritz, *supra* note 1; see also sources cited *supra* notes 130-37.

196. See *supra* text accompanying notes 115-29.

197. See *supra* text accompanying notes 130-33.

198. See *supra* text accompanying notes 115-29.

erty rights among market participants. Retailers in *General Electric* were left with no ownership rights over the consigned items.¹⁹⁹ In sharp contrast, BMI and ASCAP, in a position analogous to GE retailers, were deemed the producers and owners of a new product—the blanket license. Despite Justice Stevens' cogent dissent, the Court ruled that the copyright holders' licensing arrangement not only created property rights for ASCAP and BMI but also left undisturbed copyright holders' individual property rights.²⁰⁰ One contrast between the two cases lies in the proliferation of property rights. In *General Electric*, the producer's rights were seen as antithetical to the retailers' rights—a zero-sum game of shifting property rights from one holder to another. In *BMI*, producers' rights were characterized as supplemented by retailers' new property rights—a positive-sum game of extending property rights from one holder to another.

If we believe the Court in *BMI*, then the proliferation of property rights improved competition. If the Court in *General Electric* had allowed retailers to set prices, as the Court has done in some recent cases,²⁰¹ then competition between dealers would have resulted.²⁰² Is it possible that the proliferation of supply-side property rights can enhance competition? On this principle, for example, intra-brand competition would be taken more seriously than it is in current vertical restraints doctrine. Lower prices provoked by enhanced competition also would shift wealth from producers to consumers. In *General Electric*, consumers probably had to pay more for lights and so were left with less wealth. A similar wealth transfer to consumers might have resulted if the Court had adopted Justice Stevens' view in *BMI*.

A new analysis of price fixing would begin by looking not only at the competitive effects of antitrust doctrine but also at its impact on property rights. Experience in more price-fixing cases and in other doctrinal areas would allow us to test hypotheses about the relationship between property rights and competition. For now, price fixing agreements should be presumptively illegal because such agreements decrease property rights and appropriate property. In more familiar terms, they suspend competitors' obligations to make independent decisions about prices and they transfer wealth from consumers. My tentative view is that a defendant can overcome the presumption of illegality only by proving that the agreement diminishes neither competitors' property rights nor trading partners' property (wealth). Neither General Electric nor ASCAP/BMI

199. See *supra* text accompanying notes 130-33.

200. See *supra* text accompanying notes 115-29.

201. See, e.g., *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984).

202. For proposals to change vertical restraints doctrine, see Peritz, *supra* note 6.

could have carried that burden and thus, their conduct would have been, in current terms, illegal *per se*.

Third, I think it important to recognize that the so-called "antitrust paradox" is a hoax. There is more to the hoax than the historical impossibility of wealth maximization as a late-19th century social policy, already uncovered in numerous careful studies of the period. There is more to it than the associated methodological claim—the unperformable promise that adherence to efficiency "logic" will rationalize antitrust decisionmaking. As a matter of fundamental public policy, the "paradox" obfuscates the anti-competitive impact of price theory's form of efficiency—wealth maximization. It also obscures the strong connections between populism and competition. Moreover, it is clear that both "efficiency" and "populism" have significant "non-economic" effects; each produces a recognizable pattern of wealth distribution. At bottom, the "paradox" simply replays one familiar tension at the heart of liberal theory—the relationship between commitments to liberty and equality. Price theory takes one view of the tension as an unarticulated assumption: That a primary commitment to liberty is both justified and antithetical to a commitment to equality. That view is neither self-evidently true nor politically uncontroversial.

In short, re-instituting antitrust as public interest law calls for reasoned elaborations of populism's value-pluralism and efficiency's multiple meanings. It calls for a recognition of competition policy's relationship to private property rights—still observed but not articulated in recent Court opinions and scholarly writing. In particular, we must comprehend not only the competitive effects of market conduct, but also the distributive effects of antitrust doctrine—that is, the reallocation of property rights among producers, dealers, and consumers. Finally, we should not ignore the social and political by-products of conduct and doctrine, the connections between individual liberty and equality. Whether in price fixing doctrine or agency merger guidelines, antitrust law produces and ratifies not only competitive but also distributive and socio-political effects.