RETHINKING AMERICAN ANTITRUST: HOW "COMMON KNOWLEDGE" AND POLICYMAKERS' BEST INTENTIONS HARM CONSUMERS

ERIK HALVORSON*

INTRODUCTION

Antitrust policy and enforcement in the United States has largely been a failure since its inception. For more than a century, policymakers'

* Juris Doctor candidate, Belmont University College of Law, class of 2022. I want to thank the entire editorial team for their help and guidance in developing this Note, especially Professors Jeffrey Usman and Harold See. I would also like to thank my professors from Hillsdale College for generating my interest in this subject and providing me with the tools to write this Note. In particular, I would like to thank Dr. Ivan Pongracic for his continued guidance and support. Finally, I want to thank my friends and colleagues Anthony Clark and Alex Taylor for their advice and support during this process.

well-intended, but misguided, actions have protected competitors at the expense of consumers. To fulfill the laudable goals of the authors of these laws, namely the protection of consumer welfare, antitrust policymakers must reframe their understanding of market order and the nature of competition to create policy that protects consumers rather than competitors. While antitrust authorities rightly focus on the importance of competition for protecting consumers, their misunderstanding of competition has led to ill-conceived policy that is often anti-consumer in nature.

Because the field of antitrust (and economics more generally) contains numerous theoretical and methodological disagreements, the author must identify certain assumptions that underlie this paper: Firstly, markets generally work, that is, they arrive unguided at an outcome which is desirable to all.[1] Second, humans act rationally and in their own self-interest, and finally, incentive structures are powerful and greatly influence the way humans act. As a methodological framework, this Note largely adopts the approach of the Austrian school of economic thought which views the economic problem as a question of how to utilize dispersed knowledge, and the market as a process that moves towards order.[2] This Note also draws on insights from the public choice field of economics, which is distinct from, but in many ways consistent with, the Austrian approach.[3]

The assumptions underlying this Note are not only necessary, but also appropriate. Like every social science, certain assumptions must be made before engaging in economic analysis, and, according to the author, these assumptions and methodological framework are the best way to understand human action as it exists in the real world. While it is unlikely that many (if any) of the framers of antitrust legislation acknowledged these specific assumptions, they largely agreed that antitrust laws existed to protect competition in the market, an idea that coincides with these assumptions.[4]

This Note proceeds in four parts. Section I establishes the overall goals of the foundational antitrust laws in the United States. This section

---

1. A market "works" by utilizing dispersed information to create a spontaneous order that is independent of any specific design. *See* ISRAEL M. KIRZNER, THE MEANING OF MARKET PROCESS 38 (Mario J. Rizzo et al. eds., 1992). This note relies on the assumption that markets are the best way to realize this order.

2. F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 519–20 (1945). This is methodologically distinct from the neoclassical conception of market equilibration.

3. Public Choice Economics takes the principles used to analyze people acting in a marketplace and applies them to those making collective decisions. This methodology's basic contention is that humans do not act differently once they enter spheres of collective action, specifically government. *See generally* William F. Shughart II, *Public Choice*, https://www.econlib.org/library/Enc/PublicChoice.html [https://perma.cc/95FG-G9M4] (last visited Dec. 14, 2021).

4. *See infra* Section I.

reviews the text and legislative history of the foundational American antitrust laws along with other statements made by antitrust authorities. It concludes that the purported primary purpose of antitrust enforcement in the United States was and is to foster competition to protect consumers from abuse by trusts. This section presents a rubric by which U.S. antitrust enforcement can be analyzed later in the paper.

Section II discusses the nature of market competition, focusing primarily on the work of economists F.A. Hayek, Murray Rothbard, and Israel Kirzner. The goal of this section is to establish an understanding of competition that can be used to evaluate the success or failure of antitrust enforcement.[5] A primary deficiency of antitrust enforcement in the past century has been a misunderstanding of market competition. Correcting this misunderstanding is vital to reforming antitrust law.

Section III provides an overview of the common perception of trusts in the United States. Therein, the accuracy of these perceptions is evaluated. The conclusions of this section undercut the primary justifications for antitrust legislation, namely the dangers associated with powerful trusts. This section then uses the rubric established to analyze the success of major antitrust litigation throughout the last century. This review reveals that antitrust enforcement has traditionally labeled firms as "anticompetitive" simply for providing better products, services, or prices than their competitors, a protectionist approach antithetical to the original goals of fundamental antitrust laws. Rather than learning from past failures, misguided antitrust enforcement has escalated, continuing into the computer era, and has been levied against tech giants such as Microsoft and Google. Unsurprisingly, the losers in this escalation are, again, the consumers.

Section IV proposes modest but powerful reforms to antitrust policy. The theme of these proposals is a deeper and more comprehensive understanding of competition and the market process, with the goal of creating more consumer-centric antitrust policy.

I. THE GOALS OF U.S. ANTITRUST

> *[F]or over 100 years, the antitrust laws have had the same basic objective: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up.*[6]

---

5. *See infra* Section III.

6. FEDERAL TRADE COMMISSION OVERVIEW OF ANTITRUST LAWS, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/HN3C-LW83] (last visited July 21, 2021).

Since the passage of the Sherman Act in 1890, the dogmatic American perception of antitrust has been as follows: big business is a threat to consumers that can only be curbed by government intervention. To protect consumers, the government must be vigilant and foster competition in the marketplace or else monopolists will inevitably take over the system.[7] The Sherman Act was the first major federal antitrust law in U.S. history, and marked the beginning of over one hundred years of antitrust legislation primarily focused on consumer protection with an emphasis on fostering market competition.[8]

A. The Sherman Act (1890)[9]

The Sherman Act of 1890 outlawed "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce"[10] and made it a felony to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations."[11] Broken into just seven short sections, Sherman's plain text left unanswered many questions about what companies may or may not do under the law. The statutory language did not make clear what constituted a restraint of trade, nor did it define monopolization.[12] In fact, a plain reading of the statute did not distinguish between monopolies gained by restraining trade and those gained by providing a superior product or service.[13] A review of the legislative history, however, reveals that the Congress that passed the Sherman Act intended to criminalize anticompetitive behavior, not superior market performance.[14]

---

7. *See* William F. Shughart II & Fred S. McChesney, *Public Choice Theory and Antitrust Policy,* 142 PUBLIC CHOICE 385, 386 (2009). This "big is bad" perception undergirded the structure-conduct-performance paradigm of industrial organization for the first part of the 20th century. While mainstream economics has since moved on from this approach, antitrust law and enforcement has been slow to follow. Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1698 (1986).

8. *See* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 67, 67 (1982). Lande states "it is unanimously agreed that Congress enacted these laws to encourage competition." *Id.*

9. 15 U.S.C. § 1 et. seq.

10. *Id.* § 1

11. *Id.* § 2

12. Every firm seemingly seeks to restrain trade between consumers and competitors and "monopolize" the market as it attempts to gain customers and defeat competitors in the marketplace. The plain text did not differentiate between this normal market phenomena and more nefarious actions like collusion or price-fixing. This vague statutory charge gives courts a "blank check" to intervene in the economy. Easterbrook, *supra* note 7, at 1702.

13. Robert H. Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 FORDHAM L. REV. 2349, 2351 (2013).

14. *See* Lande, *supra* note 8, at 82.

The Congress that passed the Sherman Act was focused on regulating trusts and monopolies that "unduly restrained trade."[15] With the Sherman Act, "Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent."[16] Judge Robert Bork, a leading authority on American antitrust, concluded that Sherman's framers were primarily concerned with fostering competition and preventing monopolization to combat rising consumer prices.[17] The Sherman Congress was concerned that large businesses would use their power and influence to transfer wealth from consumers to their own coffers by driving competitors out of business and then inflating consumer prices.[18] This fear of predatory pricing (acknowledged by concept but not by name) was not Congress's only distributive goal, however. According to some, Congress preferred distributive equity to economic efficiency when the gains from economies of scale would go to the trust or monopolist.[19] Thus, the Sherman Act primarily sought to protect consumers from what Congress believed was extraction of rents by trusts.

The Congressional debates about Sherman are replete with accusations about big businesses pilfering from the American people. Congressmen referred to trust prices as "extortion,"[20] "extorted wealth,"[21] and "robbery."[22] Others accused big business of stealing "untold millions from the people"[23] and "impoverishing" them through "robbery."[24] Yet another claimed that trusts "extort from the community . . . wealth which ought . . . to be generally diffused over the whole community."[25] It is clear the Sherman Congress saw the law as a necessary safeguard to protect consumer wealth from big business theft.[26]

---

15. *Id.*

16. Standard Oil Co. v. Fed. Trade Comm'n, 340 U.S. 231, 248–49 (1951) (quoting A.E. Staley Mfg. Co. v. Fed. Trade Comm'n, 135 F.2d 453, 455 (7th Cir. 1943)).

17. Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 16 (1966). While the legislative history certainly backs up Bork's conclusion that Congress was concerned about rising consumer prices, the post-Civil War United States was experiencing a period of great deflation, not inflation. *See* Lande, *supra* note 8, at 97. Thus, Congress was acting out of a fear of rising prices, not reacting to their existence.

18. 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman).

19. Lande, *supra* note 8, at 83.

20. 21 CONG. REC. 2461.

21. *Id.*

22. *Id.* at 2614 (statement of Sen. Coke).

23. *Id.* at 4101 (statement of Rep. Heard).

24. *Id.* at 4103 (statement of Rep. Fithian) (reading a letter from a constituent).

25. *Id.* at 2728 (statement of Sen. Hoar).

26. Lande, *supra* note 13, at 2358; *but cf.* Bork, *supra* note 17, at 7. Lande concludes the intent of Sherman's framers was to prevent unfair transfers of wealth from consumers to trusts, whereas Bork concludes Sherman's framers sought to promote economic efficiency to maximize consumer surplus. Regardless, the congressional record makes clear that the Sherman Act was primarily concerned with protection of the welfare of consumers.

While Sherman's drafters did fear consumer extortion by big business, they also acknowledged the economic gains provided by trusts.[27] Congress feared that big businesses would hoard the economic gains from their market positions, not that they were inefficient producers.[28] At least some Congressmen recognized that monopolies could be gained through a competitive market process and could serve consumers. In an exchange between Senators Edmunds and Kenna, Edmunds made clear that the term "monopoly" as used in the Sherman Act did not apply to fairly gained monopolies.[29] When questioned about a monopolist who gained his market position "by virtue of his superior skill," Edmunds answered that Sherman "does not apply . . . to such a person at all."[30] He continued by explaining that a monopoly, as used in Sherman, did not include producers who gained their market position simply by excelling in an open marketplace.[31] The Sherman Act, at least according to Senator Edmunds, only outlawed monopolies gained by unfair trade practices, not mere superior performance.[32] Thus, it is clear that monopoly, while explicitly outlawed by the plain text of Sherman, was not the target of the law. Rather, Congress sought to regulate the possible negative consequences of monopolization and anticompetitive behavior.[33]

Like most laws, however, the passage of the Sherman Act was motivated by more than one interest. The turn of the 20th century saw the rise of anti-big business sentiment, prompted not only by a desire to stabilize prices, but also to check the perceived power of the trusts.[34] Senator Sherman described monopolization as "a kingly prerogative, inconsistent with our form of government"[35] and feared that trusts "may disturb social order."[36] Others like Senator Hoar thought the concentration of production was "a menace to republican institutions."[37] Chief Justice White perhaps best described the socio-political landscape of 1890, stating that "the vast accumulation of wealth in the hands of corporations and individuals" led to "the widespread impression that their power had been and would be exerted to oppress individuals and injure the public

27. *See* Lande, *supra* note 8, at 89–93.
28. *Id.*
29. 21 CONG. REC. 3151 (exchange between Sens. Edmunds and Kenna).
30. *Id.*
31. *Id.* at 3152–53.
32. *Id.*
33. It took twenty years for the Supreme Court to adopt this interpretation of Sherman, which it did in Standard Oil Co. v. United States, 221 U.S. 1 (1911).
34. Lande, *supra* note 8, at 96–101. Lande argues that fear of rising prices could not be the only motivation for the passage of Sherman because the country was encountering stable or deflated prices at the time. He contends that Congress also feared the social and political power wielded by the trusts.
35. 21 CONG. REC. 2457 (quoting Sen. Sherman).
36. *Id.* at 2460.
37. *Id.* at 3146 (quoting Sen. Hoar).

generally."[38] The solution proposed by the Sherman Act was "to restructure the economy in ways ensuring a 'fair' process for economic, social, and political decision making by reducing the unfairly accumulated power of the trusts."[39] Congress sought to do this primarily by fostering competition in the marketplace. While there is debate concerning the role of small business protection[40] and the influence of special interests[41] on Sherman's passage, it is evident that Congress intended to protect consumers by protecting the market process. The Sherman Act would regulate the market only insofar as was "necessary" to guarantee market competition. This competition would help keep consumer prices low and ensure that trusts were not able to unduly influence the economic, social, and political conditions of the times through power accumulated by anticompetitive behavior.

This common understanding of Sherman is primarily rooted in the law's legislative history, as the plain text of the act is vague.[42] Courts that have interpreted Sherman largely agreed that its primary purpose is to protect consumers by prohibiting anticompetitive behavior in the marketplace. This interpretation of Sherman was codified by the Supreme Court in the landmark 1911 case *Standard Oil Co. v. United States*.[43] In *Standard Oil*, the Court articulated the so-called "rule of reason" which established that "undue restraint of the course of trade" was "indeed synonymous with, restraint of trade."[44] Therefore, only those actions that unduly restrained trade or unreasonably monopolized were in violation of the Sherman Act.[45] This extratextual standard codified in *Standard Oil* serves as the rubric for analyzing alleged Sherman violations to this day. When ruling on the validity of an alleged antitrust violation, courts apply the rule of reason to determine whether an action was reasonable and thus

38. *Standard Oil*, 221 U.S. at 50.

39. Lande, *supra* note 8, at 101.

40. *See* Robert H. Bork, *The Goals of Antitrust Policy*, 57 THE AM. ECON. REV. 242, 242 (1967) (arguing that Sherman's legislative history supports a policy of small business protection, even if that policy is many times at odds with Sherman's primary purpose of consumer protection); *but see* Lande, *supra* note 8, at 103–05 (stating there is "little support in the legislative history" for the contention that Sherman was intended to protect small businesses). Both Bork and Lande acknowledge, however, that the judiciary has placed a great emphasis on the small business protection. Their disagreement is over Congress's intention.

41. *See generally* Gary D. Libecap, *The Rise of the Chicago Packers and the Origins of Meat Inspection and Antitrust* (Nat'l Bureau of Econ. Rsch., Working Paper No. 29, 1991).

42. "The antitrust laws are among the least precise statutes enacted by Congress." Lande, *supra* note 8, at 81.

43. *Standard Oil*, 221 U.S. at 1. Justice White first articulated this interpretation of the Sherman Act in his dissenting opinion in *United States v. Trans-Missouri Freight Ass'n*. 166 U.S. 290, 323 (1897) (White, J., dissenting). It was not until *Standard Oil*, however, that a majority of the Court adopted the rule of reason.

44. *Standard Oil*, 221 U.S. at 61–62.

45. *Id.*

legal, or whether it "unduly" restrained trade and thus violated the Sherman Act.[46] This interpretation restates the understanding of the goals of the Sherman Act stated above. Sherman aims to protect consumers by guaranteeing a fair and open marketplace, not dominated by a few firms wielding concentrated power and wealth.[47]

The Sherman Act was the first federal antitrust legislation in the United States. While the statute's text and legislative history reveal several policy goals, Congress's primary objective was to protect consumers from abuse, whether that be in the form of inflated prices or undue influence by trusts onto the fundamental institutions of the country. With the Sherman Act, Congress "set the tone for future antitrust legislation" in the United States.[48]

B. The Twin Supplements of 1914

Almost twenty-five years after the passage of Sherman, Congress felt that additional antitrust legislation was necessary.[49] It responded by passing two "interlocked"[50] laws: the Federal Trade Commission ("FTC") Act[51] and the Clayton Act.[52] Both Acts supplemented Sherman and expanded how the federal government pursued the goals of the 1890 legislation.[53]

The FTC Act created the Federal Trade Commission, a body charged with enforcing antitrust laws in the United States.[54] The law also

---

46. Even before Standard Oil there was concern about the arbitrariness of judges subjectively deciding the reasonableness of market actions. *See* United States v. Addyston Pipe & Steel Co., 85 F. 271, 283 (6th Cir. 1898) ("In such a case there is no measure of what is necessary to the protection of either party, except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition."). Despite these critiques, however, the rule of reason continues to be the standard for Sherman enforcement. Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).

47. *Standard Oil*, 221 U.S. at 50.

48. Lande, *supra* note 8, at 106.

49. "All agree that while the Sherman law is the foundation stone of our policy on this question, additional legislation is necessary." S. REP. NO. 63-597, at 8 (1914).

50. 51 CONG. REC. 13164 (1914).

51. 15 U.S.C. § 41 et. seq.

52. *Id.* §§ 12–27

53. "Subsequent antitrust laws represented either extensions of the same ideas to different economic arenas, or attempts to better implement the same fundamental principles." *See* Lande, *supra* note 8, at 106. As stated by Representative Morgan, "Monopoly is the evil we wish to control. Competition is the thing we wish to maintain." 51 CONG. REC. 8855; *see also* SENATE COMM. ON INTERSTATE COM., CONTROL OF CORPORATIONS, PERSONS, AND FIRMS ENGAGED IN INTERSTATE COMMERCE, S. REP. NO. 62-1326, at 2 (1913) (Sherman "should stand as the fundamental law upon the subject, and that any supplemental legislation for more effectual control and regulation of interstate and foreign commerce should be in harmony with the purpose of the existing statute.").

54. 15 U.S.C. § 41. The Federal Trade Commission along with the Department of Justice prosecutes federal antitrust enforcement in the United States. FED. TRADE COMM'N,

outlawed "[u]nfair methods of competition in or affecting commerce."[55] The text of the law did not define what constituted "unfair methods of competition" but a review of the legislative history reveals that Congress intended the same general goals as the Sherman Act, namely to protect consumers from abuse.[56] While the debates about the FTC Act did contain much more discussion of economic efficiency than those about Sherman, these efficiency concerns were focused primarily on protection of the consumer rather than pure economic growth.[57] Like the Congress that passed Sherman, the 1914 Congress was primarily concerned with distributive equity between firms and consumers.[58]

Reminiscent of the debates surrounding the passage of Sherman, the debates about the FTC Act were filled with accusations of corporate extortion.[59] Like their predecessors twenty-five years prior, congressmen accused trusts of unfairly extracting wealth from the public via unfair business practices and immoral monopolization.[60] They also feared that the growing trusts would wield social and political power along with economic power, further oppressing the public.[61] Such fears should sound familiar as they are the very same fears articulated before the passage of Sherman. Thus, it is not surprising that the FTC Act was primarily "an attempt more effectively to accomplish the Sherman Act's goals."[62]

The Clayton Act, passed a few months later, was also a supplement of the Sherman Act. Unlike the FTC Act, however, Clayton took a more focused approach to antitrust, outlawing the acquisition of rival companies' stock when "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[63] The purpose of Clayton, as stated by the Senate Judiciary Committee, was "to arrest the creation of

---

THE ENFORCERS, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/3NPD-TVPF] (last visited July 5, 2021).

55. 15 U.S.C. § 45(a)(l).

56. Lande, *supra* note 8, at 107–08.

57. *Id.* at 110–12. *See* S. REP. NO. 62-1326 at 13 (1913) (applauding the efficiency gains provided by large firms but warning that such efficiencies must be sacrificed if they would lead to an unacceptable amount of market concentration).

58. Lande, *supra* note 8, at 112–13.

59. "[T]he fraud and the theft which is being practiced upon the people of this country . . . which mulct the people of this country out of hundreds of millions of dollars each year. . . . [The people] are also being compelled to pay arbitrarily fixed and unjustly high prices for what they consume, they are being robbed . . . ." 51 CONG. REC. 13223 (1914) (statement of Sen. Lane).

60. Lande, *supra* note 8, at 106–08, 112–14.

61. *Id.* at 118–19.

62. Professor Lande considers the FTC Act's solution as "more ameliorative than innovative." *Id.* at 119.

63. 15 U.S.C. § 18 (1914). Section 7 of the Clayton Act was amended in 1950 by the Celler-Kefauver Act which expanded the 1914 limits on horizontal merger. The most impactful change made by Celler-Kefauver was its bars on vertical and conglomerate mergers. The goals of Celler-Kefauver, however, largely mirrored the goals of Clayton. For a more in-depth discussion of the 1950 amendments, see Lande, *supra* note 8, at 130–36.

trusts, conspiracies, and monopolies in their incipiency and before consummation."[64] The major distinction between Clayton and its progeny was its approach, namely that Clayton addressed specific, anticompetitive activity whereas Sherman and the FTC Act outlawed broad categories of behavior. In passing Clayton, Congress continued its progression of antitrust legislation, remaining focused on the three primary objectives of federal antitrust: consumer well-being,[65] distributive equity,[66] and curbing perceived trust power.[67]

II. THE NATURE OF COMPETITION[68]

Competition is a process—not an equilibrium condition.[69]

An overview of the socio-economic conditions and legislative debates that preceded the passage of the fundamental U.S. antitrust laws clearly illustrates that the overarching goal of antitrust was the promotion of competition. This conclusion raises the question: What exactly is competition? Furthermore, is antitrust law based on a correct or flawed understanding of competition and the market process?

Antitrust law is based on neoclassical competition theory, also known as perfect competition theory.[70] This theory, which dominated twentieth-century economics, conceives of the market as an equilibrium state. It judges the competitiveness of a given market against the academic construct of "perfect competition."[71] This artificial state exists when the following four criteria are met: (1) the relevant market contains sufficiently numerous firms so no firm can impact the market price or market supply, (2) the goods in the market are homogenous, (3) there are no barriers to entry into the market, and (4) all relevant information is known to every

---

64. United States v. United Shoe Mach. Co., 264 F. 138, 162 (E.D. Mo. 1920), *aff'd*, 258 U.S. 451 (1921) (quoting Senate Judiciary Report) (The Clayton Act "seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the Act of July 2, 1890, or other existing anti-trust acts.").

65. "The only reason why trusts and combinations are declared illegal is because they are organized and operated for the express purpose of more effectively exploiting the people by taking advantage of their necessities and controlling the price of those necessities to the consumers, as well as the purchase price which they have to pay for the raw material." 51 CONG. REC. 9556 (1914) (statement of Rep. Hamlin).

66. "The chief purpose of antitrust legislation is for the protection of the public, to protect it from extortion practiced by the trust." *Id.* at 14223 (statement of Sen. Thompson).

67. "[A]ll of the power represented by this wealth is lodged in the hands of a few men. Can anyone doubt the danger which such concentration permits? . . . [I]t is too great a power to be concentrated—it affords too great a temptation to frail humanity." *Id.* at 9186 (remarks of Rep. Helvering).

68. This section provides a limited overview, not a comprehensive discussion of competition theory.

69. DOMINICK T. ARMENTANO, ANTITRUST AND MONOPOLY 2 (2d ed. 1990).

70. *Id.* at 14–15.

71. F.A. HAYEK, INDIVIDUALISM AND ECONOMIC ORDER 92 (1st ed. 1948).

market participant.[72] When these artificial characteristics are present, no firm has an advantage over another. Per characteristics one and two, if a firm raises their price, consumers will purchase from a different seller because the products are identical. Per characteristic three, if, for some reason, demand increases permitting all firms to raise prices, more firms will enter the market to compete away any profits resulting from the price increase. Per characteristic four, no firm has a cost advantage in production technology which would allow them to reap profits. In short, "perfect competition" requires identical products sold by identical producers at identical prices, and the competitiveness of a market is determined by how well it mirrors the outcome of this model.[73] This creates analytical problems because the market envisioned by perfect competition theory is not "competitive" in any recognizable understanding of the term.[74]

In fact, neoclassical theory labels some of the most competitive and pro-consumer phenomena as anti-competitive.[75] According to this conception of competition, circumstances such as product differentiation, price variation, or strategic marketing would be anti-competitive. In reality, however, such things are the hallmark of a competitive society. For example, consumers flock to low-price producers such as Walmart every day because of its vast array of products, yet perfect competition theory would call such things anti-competitive as they would violate the criteria that goods and prices are homogenous.[76] The wide variation in consumer tastes necessitates a litany of options for almost every conceivable product niche and consumer preference. From toothpaste to automobiles, clothing brands to cell phones, product and price differentiation abounds. And the result? Consumers with products and services tailor-made for their specific needs and budgets, all at the tips of their fingers. To perfect competition theory, this is the height of an anti-competitive world, but to the layperson, it is the fruit of a competitive society.

Competition—real competition—is the process by which firms battle to gain the consumer dollar. It is not a specific end state or market structure. When they are successful, firms flex their earned market power.

---

72. *Id.* at 95.

73. *Id.* at 92.

74. *Id.*

75. "The peculiar nature of the assumptions from which the theory of competitive equilibrium starts stands out very clearly if we ask which of the activities that are commonly designated by the verb 'to compete' would still be possible if those conditions were all satisfied. Perhaps it is worth recalling that, according to Dr. Johnson, competition is 'the action of endeavouring to gain what another endeavours to gain at the same time.' Now, how many of the devices adopted in ordinary life to that end would still be open to a seller in a market in which so-called 'perfect competition' prevails? I believe that the answer is exactly none. Advertising, undercutting, and improving ('differentiating') the goods or services produced are all excluded by definition—'perfect' competition means indeed the absence of all competitive activities." *Id.* at 96.

76. The same is true for higher-priced, luxury items. The point is that consumers highly value choice, both in terms of price and product alternatives.

But even then, such firms must be responsive to consumers.[77] If they are not, their influence will quickly dissipate. In a truly free market, firms can only earn profits through voluntary transactions with consumers.[78] Thus, market power comes from consumer service, not monopolization.[79] Firms must earn the ability to affect supply and market prices; they cannot force anyone to comply with their edicts.[80] Perfect competition theory imagines a world without market power, but this is neither realistic nor desirable. In a truly competitive society, there are winners and losers. The winners are those who have best served consumer needs, the losers are those who failed to do so.[81] Via their patronage, consumers grant these firms the very market power neoclassical theory rejects as anti-competitive.

Neoclassical competition theory contains two more flawed assumptions that are of grave consequence to antitrust policy. First, perfect competition theory assumes that a competitive market can only exist absent barriers to entry.[82] This assumption does not account for the dynamics of a real-world market. While barriers to entry can take many forms, they can be placed into two broad categories: structural and legal. Structural barriers to entry are such phenomena as economies of scale.[83] These "barriers" do not implicate any of the problems antitrust laws seek to address. Firms that can grow to realize economies of scale operate more efficiently than their competitors. If such firms do not adequately pass the efficiency gains to their customers, a less efficient firm will be able to enter the market and sell at a lower price.[84] Thus, the mere threat of competition regulates markets subject to structural barriers to entry and prevents consumer abuse.[85]

---

77. MURRAY N. ROTHBARD, MAN, ECONOMY, AND STATE, WITH POWER AND MARKET 634 (2d ed. 2009).

78. *Id.*

79. *Id.*

80. *See id.*; *see also* ARMENTANO, *supra* note 69, at 42.

81. "In a competitive struggle the firms that use the best practices survive. Mistakes are buried." Frank H. Easterbrook, *Limits of Antitrust*, 63 TEX. L. REV. 1, 5 (1984).

82. HAYEK, *supra* note 71, at 95.

83. Economies of scale can generally be described as the efficiency gains that result as a firm's output grows. *See generally* Aubrey Silberston, *Economies of Scale in Theory and Practice*, 82 THE ECON. J. 369 (1972).

84. *See* WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 281 (1981).

85. Some of the antitrust laws' framers understood this. "Fair competition is competition which is successful through superior efficiency. Competition is unfair when it resorts to methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper. Without the use of unfair methods no corporation can grow beyond the limits imposed upon it by the necessity of being as efficient as any competitor. The mere size of a corporation which maintains its position solely through superior efficiency is ordinarily no menace to the public interest." 51 CONG. REC. 12146 (1914) (statement by Sen. Hollis). For a more in-depth discussion of this idea, see William J. Baumol, Elizabeth E. Bailey & Robert D. Willig, *Weak Invisible Hand Theorems on the Sustainability of Prices in a Multiproduct Monopoly*, 67 AM. ECON. REV. 350 (1977).

The second type, and only true, barriers to entry are those instituted by the government.[86] In a market society, producers are free to create and sell any type of product they desire.[87] The primary determinant of their success is their ability to effect voluntary transactions with consumers.[88] It is only the government that can use force to restrict the creation and sale of products or services.[89] These barriers to entry plainly erode the competitiveness of a market, but that is a problem that antitrust laws are not designed to fix. In fact, the legislature that drafted the antitrust laws likely granted the government monopoly in the first place.[90]

The final, and most consequential flaw in perfect competition theory is its perfect information assumption. According to the theory, information asymmetries are anti-competitive.[91] This characterization turns competition and the market process on its head and "assumes away the main task which only the process of competition can solve."[92] Resource conditions, consumer preferences, and future innovations are not given variables, but rather results of competition that can only be realized through the competitive process.[93] When antitrust authorities intervene into the market, they act with the same ignorance and many times, their interference does more harm than good.[94]

The economy is not static, nor are the motives or methods of economic actors necessarily known or given.[95] Even further, economic actors may not know all the constraints they face.[96] The world is dynamic. Economic actors only know a fraction of variables such as resource conditions, consumer preferences, and technological advancement.[97] Furthermore, these variables are always changing.[98] Because of this dynamism, the market constantly moves towards order but never reaches equilibrium.[99] Thus, the fundamental flaw of the neoclassical (and antitrust) conception of competition is that only an equilibrated market is a

86. ROTHBARD, *supra* note 77, at 678.
87. *Id*.
88. *Id.* at 676.
89. *Id.* at 678.
90. *Cf.* Fred L. Smith, Jr., *The Case For Reforming the Antitrust Regulations (If Repeal Is Not an Option)*, 23 HARV. J. L. & PUB. POL'Y 23, 56 (1999).
91. HAYEK, *supra* note 71, at 94–95.
92. *Id.* at 96.
93. F.A. Hayek, *Competition as a Discovery Procedure*, 5 Q.J. AUSTRIAN ECON. 9, 9–10 (2002).
94. Easterbrook, *supra* note 81, at 3.
95. *Id.* at 1.
96. *See* KIRZNER, *supra* note 1, at 187–88.
97. *Id.*
98. HAYEK, *supra* note 71, at 81–82.
99. "[A] true equilibrium presupposes that the relevant facts have already been discovered and that the process of competition has thus come to an end." Hayek, *supra* note 93, at 15.

competitive one. Such a conception cannot be reconciled with the real world and moreover, is not a standard that protects consumers.

The creators of the fundamental antitrust laws were correct in identifying competition as the most powerful market regulator. The fact that their understanding of competition was wrong does not discredit the notion that market competition is a laudable policy goal. Antitrust theory should adopt an understanding of competition that is focused on the market process rather than market structures. In other words, antitrust law should focus on ensuring that competition is possible, not on achieving specific end states. Neoclassical competition theory fails primarily because it envisions competition as a static end rather than a dynamic process.[100] This mistake inevitably leads to erroneous conclusions and anti-consumer outcomes.

The market process is characterized by ignorance and discovery.[101] Rather than imagining the market as a static, equilibrium state, it is crucial to understand that the market is an equilibrating mechanism that is constantly pursuing, but will never reach equilibrium due to the ever-changing conditions of the market.[102] The force driving this equilibrating mechanism is the process of discovery by market participants, i.e., the process of competition.[103] Market participants push the market towards equilibrium by discovering and acting upon opportunities for personal gain. Because information is dispersed throughout society and is too vast and contextualized to be understood by a single entity, the economic problem is how to utilize this dispersed information in a manner that best satisfies the multitude of goals and priorities of the millions of market participants.[104] The market process is the way in which this knowledge is best utilized, and people's individual ends are achieved.

The object of antitrust—business competition—is simply a manifestation of the market process at work. It is a dynamic process, not a static equilibrium condition.[105] Thus, it is certain that wildly competitive markets present in ways that do not conform to the standard perfect competition model.[106] The failures of the antitrust laws can primarily be attributed to this flawed conception of competition.

---

100. *See* KIRZNER, *supra* note 1, at 40–41.

101. *Id.* at 44.

102. *Id.* at 45.

103. *Id.*

104. "The economic problem of society is thus not merely a problem of how to allocate 'given' resources . . . It is rather a problem of how to secure the best use of resources known to any of the members of society, for ends whose relative importance only these individuals know. Or, to put it briefly, it is a problem of the utilization of knowledge which is not given to anyone in its totality." HAYEK, *supra* note 71, at 77–78.

105. ARMENTANO, *supra* note 69, at 26.

106. HAYEK, *supra* note 71, at 96.

III. THE SUCCESS(?) OF U.S. ANTITRUST

> *In many of the classic antitrust cases, both public and private, the indicted defendant firms had lowered their prices, expanded their outputs, engaged in rapid technological change, and generally behaved in ways consistent with an efficient and rivalrous market process.*[107]

As evidenced by the debates surrounding the passage of the antitrust laws, perception of American big business at the turn of the 20th century was unfavorable, to say the least.[108] The American public saw men like Vanderbilt, Carnegie, and Schwab as the new aristocracy; titans of industry who gained their incredible fortunes on the backs of the working class. These men were compared to "those old German barons who, from their eyries along the Rhine, swooped down upon the commerce of the noble river, and wrung tribute from every passenger that floated by."[109]

According to Professor Letwin, "the public hated the trusts fervently."[110] Whether or not they knew the reality of the situation, the American people were convinced that the trusts were a threat to their ideals and way of life.[111] This conviction was reinforced daily by politicians and newspapers.[112] In February 1888, for example, the New York Times published articles and editorials concerning the trusts on every day but one.[113] The discourse during the years preceding the passage of the Sherman Act found public policy discussions dominated by the perceived dangers of the trusts.[114] While hatred of big business was allegedly "one of the oldest American political habits,"[115] this period of American history seemed especially replete with animosity.

Regardless of the motivation or scope of the public's hatred, such contempt was largely misplaced. The industrialists commonly remembered as ruthless businessmen could more accurately be described as capitalist champions, enriching themselves by serving the society around them. [116] Cornelius Vanderbilt, for example, primarily made his fortune in shipping. Aside from establishing new trade routes throughout the northeastern United States, Vanderbilt dramatically cut rates for existing passenger

---

107. ARMENTANO, *supra* note 69, at 2.
108. LETWIN, *supra* note 84, at 54.
109. BURTON W. FOLSOM, JR., THE MYTH OF THE ROBBER BARONS 13 (7th ed. 2013).
110. LETWIN, *supra* note 84, at 55.
111. *Id.* at 56.
112. *Id.*
113. *Id.* at 57.
114. *Id.* at 58.
115. *Id.* at 59.
116. *See generally* FOLSOM, *supra* note 109.

routes.[117] He also drastically cut fares for postage and transatlantic voyages through innovative business practices and an obsession with efficiency.[118] James Hill privately built a transcontinental railroad from St. Paul to Seattle at a time when every other railroad company was receiving massive subsidies.[119] Not only did Hill do this without a dime of taxpayer money, his rail line was also "the best built, the least corrupt, the most popular, and the only transcontinental never to go bankrupt."[120] Through similar talent and innovation, Hill was also able to massively expand American exports to Asian markets, something that would likely not have been possible if not for his low shipping costs.[121]

Outside of transportation, Charles Schwab helped cut the price of steel from $28 to $11.50 per ton while working for Carnegie Steel.[122] Later, after taking over Bethlehem Steel, Schwab continued his success, selling steel for almost half the price of his competitors while still paying the highest salaries in the industry.[123] John D. Rockefeller, the man at the center of the infamous *Standard Oil* case, also made his money through innovation and consumer service. As a businessman, Rockefeller sought to furnish "the best . . . at the lowest price."[124] He saw his business as "refining oil for the poor man" and thus "he must have it cheap and good."[125] Rockefeller was able to capture ninety percent of the United States' oil market by dropping the price of oil from fifty-eight cents per gallon to eight cents per gallon,[126] all while paying his employees above market wages.[127] When Rockefeller and Standard Oil dominated the petroleum industry, the costs and prices of refined oil fell, industry output expanded, and the quality of the product increased.[128]

While these entrepreneurs did earn fortunes unheard of at the time, they did so by bettering the lives of every American. The men who are still remembered as "Robber Barons" shaped the future of the country, not through exploitation and robbery, but ingenuity, resilience, and hard work.

---

117. *Id.* at 3. Vanderbilt cut the fare from New York to Albany from three dollars to one dollar, then to ten cents, then to eventually nothing; opting instead to pay for his operation purely from concessions. *Id.* at 3–4. Vanderbilt also cut the fare from New York City to Hartford from five dollars to one dollar by operating more efficiently than his competition. *Id.* at 4.

118. *Id.* at 7–9.

119. *Id.* at 17.

120. *Id.* at 17–18.

121. *Id.* at 33–34.

122. *Id.* at 67.

123. *Id.* at 71.

124. *Id.* at 83.

125. *Id.* Rockefeller accomplished his goal. Not only did consumers prefer his oil, but the working class was able to light their homes for one cent per hour, a luxury unheard of before Rockefeller. *Id.*

126. *Id.*

127. *Id.* at 93.

128. ARMENTANO, *supra* note 69, at 66.

Like the public perception, however, antitrust authorities saw these people as threats that needed to be contained. Prosecution of the trusts was thought to be necessary, even if the results were largely harmful to the average citizen.

A. Northern Securities Co. et al. v. United States[129]

One of the first industry titans subject to antitrust enforcement was James Hill, "the swashbuckling railroad man who built the Great Northern."[130] Even though Hill's Great Northern Railroad was the only transcontinental railroad built without heavy federal subsidies, it became the target of antitrust enforcement after merging with other American railroads to form the Northern Securities Company.[131]

After the Mexican War and the acquisition of California, Americans were excited by the proposition of westward expansion.[132] Following a decade of surveying possible routes and the passage of the Pacific Railroad Act in 1862, Congress granted several railroad companies massive land grants and subsidies to spur the growth of transcontinental railroads.[133] While this government investment did create a race to become the first railroad to reach the West Coast, the projects did not go as planned. Because Congress paid per mile of track laid, subsidized companies spent little time planning their routes, opting instead to lay track as quickly as possible.[134] Such short-sighted decision making ultimately failed as these lines were poorly made, inefficient, and over budget.[135]

Unlike his subsidized counterparts, James Hill was a meticulous planner.[136] He personally oversaw the construction of his line and developed the communities that it ran through to ensure steady demand for his services.[137] Thanks to his forward thinking and focus on building a durable and efficient railroad, Hill was able to build a line from St. Paul to Seattle without any federal subsidies and became "America's greatest railroad builder."[138] Building on this success, Hill bought stock in the bankrupt Northern Pacific as well as the struggling Union Pacific and Burlington railroad companies.[139] In 1901, Hill placed these companies, along with Great Northern, under a holding company called the Northern Securities Company in order to prevent stock manipulation from

129. N. Sec. Co. v. United States, 193 U.S. 197 (1904).
130. LETWIN, *supra* note 84, at 182.
131. *Id.*
132. FOLSOM, *supra* note 109, at 18.
133. *Id.*
134. *Id.*
135. *See id.* at 18–21.
136. *See id.* at 26–27.
137. *Id.* at 27.
138. *Id.* at 17, 34.
139. *Id.* at 36.

competitors and to tap into the lumber, meat-packing, and cotton markets further south.[140] When the Northern Securities Company was formed, the railroad industry was the most competitive it had ever been as a result of others adopting Hill's philosophy and business model.[141] Nevertheless, the Department of Justice, prompted by President Roosevelt, sued the holding company for antitrust violation.[142]

Motivated by his belief that James Hill was a "trust magnate" and Northern Securities was "a very arrogant corporation," President Theodore Roosevelt urged the courts to break up Hill's holding company as violative of Sherman.[143] In order to shock the voters into agreeing with his perception of the trusts, Roosevelt created a public spectacle out of the *Northern Securities* case.[144] While his actions made for a great and memorable case, "great cases . . . make bad law,"[145] and *Northern Securities* certainly proved that maxim to be true.

In a five to four decision, the Supreme Court held that the simple existence of the Northern Securities holding company violated the Sherman Act.[146] Using an extremely literal interpretation of the text of Sherman, the Court concluded "[t]hat every combination or conspiracy which would extinguish competition between otherwise competing railroads . . . and which would in that way restrain such trade or commerce, is made illegal by the act."[147] The majority's conclusion was irrationally literal and not connected to the goals of Sherman or the reality of the freight market.

The Court did not address the fact that the formation of the Northern Securities Company was a change in name only.[148] The men who operated the railroads contained within the holding company were coordinating their behavior far before the arrangement became official.[149] What started as a price war and competitive business rivalry between two successful railroads eventually developed into coordination of joint rates.[150] The railroads' coordination led to a steady flow of freight which increased the efficiency and economy of each line involved.[151] The collaboration led to low rates that continued for years before the issue was ever litigated.[152] In fact, between the holding company's formation in 1901 and court-

---

140. *See id.* For a more in-depth overview of the formation of the Northern Securities Company, see LETWIN, *supra* note 84, at 184–95. *See also* ARMENTANO, *supra* note 69, at 54.

141. FOLSOM, *supra* note 109, at 36.

142. *Id.* at 37.

143. *Id.*

144. LETWIN, *supra* note 84, at 183.

145. N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

146. *Id.* at 327.

147. *Id.* at 331.

148. *See* LETWIN, *supra* note 84, at 195.

149. *Id.*

150. ARMENTANO, *supra* note 69, at 53–54.

151. *Id.* at 54.

152. *Id.*

ordered dissolution in 1904, rail rates continued to decline, despite the alleged anti-competitive merger.[153] Nevertheless, the majority did not consider these economic facts or analysis when it ruled that the railroads' arrangement was an impermissible restraint on trade.[154]

The lengthy and expensive court battle that ended with the dissolution of Northern Securities did nothing more than mandate a return to the status quo and an interpretation of the Sherman Act that would not last another decade.

B. Standard Oil Co. v. United States[155]

John D. Rockefeller and his company Standard Oil were the next to come into the antitrust crosshairs. After capturing nearly ninety percent of the American petroleum refining industry at the end of the nineteenth century, Standard Oil seemed poised to continue its astronomical growth.[156] Rapidly changing market conditions, however, quickly proved this proposition to be less and less secure.[157] By 1906 when a federal antitrust suit was brought against Standard Oil, the company was facing intense market competition.[158] Standard Oil's share of the domestic petroleum products market fell from eighty-eight percent in 1890, to sixty-four percent by 1911.[159] Furthermore, the company's oil production as a percentage of total market supply had been whittled down to only eleven percent, less than one third of what it was a decade prior.[160] So, while it would be "patently absurd" to suggest that Standard Oil was restraining trade and monopolizing the petroleum industry during the first decade of the twentieth century, the company was nevertheless convicted under the Sherman Act in 1909 and ordered to dissolve.[161]

The original Standard Oil trust was formed in 1882 and operated until 1892 when it was declared illegal by the Supreme Court of Ohio.[162] Seven years later, a nearly identical entity was incorporated as the Standard Oil Company of New Jersey, and this second company was targeted by federal antitrust authorities.[163] Regardless of the name or technical legal status of the entity, Standard Oil brought dozens of companies under its control during the latter half of the nineteenth century in order to harness

---

153. D. T. ARMENTANO, THE MYTHS OF ANTITRUST 62 (1972).
154. ARMENTANO, *supra* note 69, at 55.
155. Standard Oil Co. v. United States, 221 U.S. 1 (1911).
156. ARMENTANO, *supra* note 69, at 66.
157. *Id.*
158. *Id.* at 67.
159. *Id.*
160. *Id.*
161. *Id.* at 67–68.
162. *Id.* at 64–65.
163. *Id.* at 65. For a good overview of the history of the Standard Oil Company, see *United States v. Standard Oil Co.,* 173 F. 177, 180–85 (C.C.E.D. Ms. 1909).

the gains from economies of scale in the petroleum industry.[164] By buying out smaller, less efficient competitors, Standard Oil created a large, vertically integrated company that was able to produce and distribute petroleum products at a fraction of the cost of its rivals, all while constantly improving product quality.[165]

The consumer-friendly fruits of Standard Oil's labor did not convince the trial court, however. Using the same interpretation as the *Northern Securities* Court, the trial court applied a literal application of the Sherman Act and convicted Standard Oil for coordinating the actions of its component companies.[166] The trial court did not consider the reasonableness or economic impact of Standard Oil's actions or the immense public benefits that resulted from them.[167] Rather, the mere existence of a holding company was found to be in violation of Sherman and Standard Oil was ordered to dissolve into its component parts.[168]

On appeal, the Supreme Court upheld the conviction.[169] Unlike the trial court, however, the Supreme Court justified its decision based on the so-called "rule of reason," stating that Standard Oil's coordinating practices violated the Sherman Act because they unduly restrained trade.[170] In its opinion, the Supreme Court did not offer much, if any, justification for its decision. Rather it simply concluded that Standard Oil's continued, but waning market success violated Sherman. And while Chief Justice White's majority opinion accused the company of unfair and anticompetitive behavior, examples or explanations of such conduct were nowhere to be found.[171]

At the time *Standard Oil* was decided, oil prices and costs were falling, output was expanding, product quality was increasing, and more than one hundred other firms were competing with the Standard Oil Company.[172] While the courts did claim that the defendant company was restraining trade and harming the public, a review of the market conditions at the time, and even the opinions themselves, reveal little support for this contention. The dissolution of Standard Oil seems to have been motivated much more by the fear of big business than an actual concern for consumer welfare.[173] If the goal of antitrust enforcement is to foster competition and

---

164. ARMENTANO, *supra* note 69, at 59–60. Much of Standard Oil's early success was a result of Rockefeller's investment in railway tank cars, pipelines, storage facilities, and other cost saving measures. Standard Oil's innovation allowed the company to provide superior quality petroleum products at a fraction of the cost of its competitors.

165. FOLSOM, *supra* note 109, at 88–89.

166. *Standard Oil Co.*, 173 F. at 185.

167. ARMENTANO, *supra* note 69, at 69.

168. *Standard Oil Co.*, 173 F. at 192–93.

169. Standard Oil Co. v. United States, 221 U.S. 1, 81–82 (1911).

170. *Id.* at 61–62.

171. ARMENTANO, *supra* note 69, at 70–71.

172. *Id.* at 71.

173. *See Standard Oil Co.*, 221 U.S. at 50.

protect consumers, the *Standard Oil* conviction seemed to punish a company for doing exactly that. Even if a case could be made that Standard Oil's actions were anti-consumer, market competition was regulating the oil giant long before the federal government got involved.[174]

C. United States v. Aluminum Co. of America[175]

Like *Standard Oil* three decades earlier, the prosecution of the Aluminum Company of America ("Alcoa") depicted the use of antitrust to punish a firm that was too successful. To put it bluntly, Alcoa was convicted for serving customers too well, not for anti-competitive behavior.

In the early twentieth century, Alcoa was the industry leader in aluminum products. By 1937, it was producing almost one-half billion tons of aluminum and selling it for twenty-two cents per pound.[176] The company's investment in research was responsible for "crucial technical breakthroughs in aluminum and related products."[177] While it is true that Alcoa was the only producer of virgin ingot in the United States, that was simply because no other firm was able to compete with Alcoa's quality and low prices to earn a market share. Many firms considered entering the market and competing with Alcoa but decided not to even though they possessed the necessary capital.[178]

The company's meteoric success drew the attention of the Federal Trade Commission which commenced an investigation but eventually found no wrongdoing by the company.[179] That did not stop the Department of Justice from suing on nearly identical allegations[180] and charging Alcoa with nearly 140 counts of anti-competitive behavior.[181] The prosecution took four years and involved 155 witnesses, 1803 exhibits, and a 58,000 page record.[182] When all was said and done, however, the district court dismissed the government's case and found Alcoa innocent of all charges, including the charge that Alcoa had violated the Sherman Act via its dominance of the virgin ingot market.[183]

Relying on Supreme Court precedent, the district court applied the rule of reason and held that the simple existence of a monopoly did not

---

174. *See* ARMENTANO, *supra* note 69, at 66–68.

175. United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).

176. ARMENTANO, *supra* note 69, at 103.

177. *Id.*

178. "Why no competitors in primary ingot? Simply put, Alcoa had no direct competition for one essential reason: no competitor could expect to match, much less excel, its economic performance during this period." *Id.*

179. *Id.* at 104.

180. *Id.*

181. *Id.* at 100.

182. *Id.*

183. United States v. Aluminum Co. of Am., 44 F. Supp. 97, 224 (N.Y.S.D. 1941) ("[N]one of the monopolization charges has been satisfactorily proved and in regard to them the Government has not shown that it is entitled to any relief.").

violate Sherman.[184] Only monopolies gained by anti-competitive behavior violated Sherman and Alcoa did not engage in such actions.[185] According to the district court, this case was a prime example of a company that gained its market position by way of its superior business acumen rather than anti-competitive manipulation.[186] Furthermore, the district court found that Alcoa faced stiff competition[187] for its virgin ingot from other sources such as imported primary ingot, "scrap" or "secondary aluminum," and other metals such as steel, nickel, tin, zinc, copper, and lead.[188] Thus, the district court found that the relevant market for consideration was much larger than simply the domestic market for primary ingot.[189]

On appeal, Judge Learned Hand reversed the trial court's judgment as to primary ingot and found Alcoa guilty of monopolizing the virgin ingot market in violation of the Sherman Act.[190] The appellate court defined the relevant market much more narrowly than the lower court and found that Alcoa monopolized the primary ingot market because it held a 90 percent market share.[191] This characterization failed to illustrate the business realities on the ground. If the appellate court had considered Alcoa's actual competition, the company's market share would have been reduced by nearly two-thirds down to thirty-three percent of the market.[192] To exclude the producers of secondary ingot "was an arbitrary construction, which proves only that markets defined narrowly enough can make a monopoly out of any firm."[193] Put simply, the appellate court's decision flipped the rule of reason on its head. Alcoa was convicted under Sherman simply because it qualified as a monopoly in an artificially created market, even though there was little evidence of it acting anti-competitively.

The court's opinion clearly illustrates its economic confusion. Whereas the district court properly understood the goals of the antitrust laws,[194] the appellate court conflated the success of market competitors with competition itself and failed to enforce Sherman as it was intended. In fact, the appellate division's opinion went so far as to explicitly reference Alcoa's superior business skill as the primary reason it was convicted:

> Nothing compelled [Alcoa] to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think

184. *Id.*
185. *Id.* at 165.
186. *Id.* at 146.
187. *Id.* at 165.
188. *Id.*
189. *Id.*
190. United States v. Aluminum Co. of Am., 148 F.2d 416, 432 (2d Cir. 1945).
191. ARMENTANO, *supra* note 69, at 111.
192. *Id.* at 110–11.
193. *Id.* at 111.
194. *Aluminum Co. of Am.*, 44 F. Supp. at 160–61.

> of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel.[195]

The court demonized Alcoa for its well-earned success, explicitly punishing the company for possessing the best employees and know-how in the business. It condemned the company's "superior skill, foresight, and industry"[196] as anti-competitive with no reference to or consideration of consumer welfare. Such an outcome is a return to the supposedly abandoned standard from *Northern Securities* and is antithetical to the goals of the antitrust laws.

The Sherman Act was passed to protect consumers by preventing producers from restricting production and raising prices. Here, the court explicitly punished Alcoa for *expanding* production because their expertise and capital investments made it impossible for less efficient and competent firms to enter the market.[197] In the end, "Alcoa was convicted of being the efficient single supplier in an artificially defined relevant market,"[198] not for restraining trade and abusing consumers.

D. Brown Shoe Co., Inc. v. United States[199]

Unfortunately, *Alcoa* was not the last time that confusion concerning the nature of competition led to the punishment of successful, consumer-serving companies. Two decades later, spurred by a recent amendment of the Clayton Act, the government's enforcement of antitrust had abandoned even the pretext of consumer protection.[200] In *Brown Shoe*, the government sought to prevent the merger of the G. R. Kinney Company, Inc. ("Kinney"), and the Brown Shoe Company, Inc. ("Brown"), to protect other competitors in the market who would not be able to compete with low, post-merger prices.[201]

When the suit was brought, Kinney manufactured less than 0.5% of the nation's shoes and retailed less than 2% of the nation's shoes.[202] Post-merger, Brown was one of four companies that manufactured 23% of the

---

195. *Aluminum Co. of Am.*, 148 F.2d at 431.
196. *Id.* at 430.
197. *Id.* at 431.
198. ARMENTANO, *supra* note 69, at 112.
199. Brown Shoe Co. v. United States, 370 U.S. 294 (1962).
200. The Congress that passed the amendment "spoke not of efficiency or high consumer prices but rather of the 'rising tide of industrial concentration'—an evil that it apparently regarded as worth condemning for its own sake." Herbert J. Hovenkamp, *Progressive Antitrust*, 2018 U. ILL. L. REV. 71, 86 (2018).
201. *Brown Shoe Co.*, 370 U.S. at 298.
202. *Id.*

nation's shoes.[203] At the time, it was the fourth largest shoe manufacturer in the country and produced about 4% of the country's footwear.[204] By the time of trial, Kinney stores sold approximately 1.6% of the nation's non-rubber shoes, 1% of the nation's men's shoes, 1.5% of the nation's women's shoes, and 2% of the nation's children's shoes.[205] Despite these modest figures, the Court still considered the merged companies' operations "extensive retail activity" worthy of prosecution.[206]

Although there were over 1,000 shoe manufacturing plants and over 70,000 retail outlets that sold shoes in the United States in 1956, the government charged, and the courts held that the pending merger violated Section 7 of the amended Clayton Act.[207] In its analysis, the district court was primarily concerned with future market concentration and the potential of future monopolization following a period of low prices and heightened quality.[208] The Supreme Court took a similar tact, holding that the merger risked future oligopoly.[209] While the Court did pay lip service to the notion that antitrust is about protecting competition, not competitors, it nevertheless ordered a complete divestiture of Brown and Kinney because Congress "desire[d] to promote competition through the protection of viable, small, locally owned businesses."[210] While claiming it was doing the opposite, the Court yet again conflated the protection of market competitors with competition itself, and consumers paid the price.

The courts' opinions lacked any serious explanation of how the pending merger would harm consumers at the present or in the future other than vague assertions of potential monopolization. Fearing a future decrease in output and rise in prices, the courts blocked the merger, even though the exact opposite trend was occurring at the time.[211] In short, the merger was scrapped because it promised to serve consumers so well that other companies simply could not compete.[212]

Brown Shoe represents yet another iteration of the use of antitrust policy to punish successful companies. As of that decision, antitrust authorities no longer concerned themselves with preventing high prices or consumer abuse. Rather, protectionism and the reduction of corporate concentration became the targets of antitrust policy in the latter half of the

---

203. *Id.* at 300.
204. *Id.* at 302–03.
205. *Id.* at 303.
206. *Id.*
207. ARMENTANO, *supra* note 69, at 241.
208. *Id.* at 241–42.
209. *Brown Shoe Co.*, 370 U.S. at 333.
210. *Id.* at 344. The Court claims the merger "is not rendered unlawful by the mere fact that small independent stores may be adversely affected," but that claim simply cannot be reconciled with the outcome. *Id.*
211. ARMENTANO, *supra* note 69, at 246.
212. *See id.*

twentieth century.[213] Under this regime, companies and consumers simply were out of luck. If a merger or business decision would "result in lower prices or in higher quality for the same price" with which "the independent retailer can no longer compete,"[214] then economic progress and consumer welfare were sacrificed. While this approach flaunts the original goals of the antitrust laws, it has controlled the modern era.[215] The cases outlined above are by no means comprehensive,[216] but merely some of the most egregious examples of misguided antitrust enforcement in the last 100 years. Unfortunately, this alarming trend has not only continued, but accelerated, at the turn of the century.

E. The Latest Missteps: Antitrust in the Era of Tech

The technological progress of the last fifty years has created astronomical wealth and powerful companies unprecedented in American history. However, it also has renewed an age-old fear of tyrannical big business. Unsurprisingly, this fear has renewed the approach of *Brown Shoe* by fueling antitrust enforcement that is more concerned with business competition than consumer protection.

1. In re IBM Corp.[217]

Described as "the antitrust division's Vietnam,"[218] the prosecution of the International Business Machines Corporation ("IBM") was one of the nation's longest antitrust suits.[219] The case lasted thirteen years including "700 trial days over the course of nearly seven years, preceded by six years of discovery."[220] The case produced "87 live witnesses; 860 deposition witnesses (whose testimony was read aloud to an empty bench, a process that consumed 70 trial days); 104,400 trial transcript pages [and] 17,000 exhibits."[221] The direct cost of litigation on the parties is estimated to be between fifty and one hundred million dollars.[222] In the end, the parties

---

213. Hovenkamp, *supra* note 200, at 85–86.

214. United States v. Brown Shoe Co., 179 F. Supp. 721, 738 (E.D. Mo. 1959).

215. Hovenkamp, *supra* note 200, at 85.

216. *See, e.g.*, United States v. United Shoe Mach. Co., 264 F. 138 (E.D. Mo. 1920), *aff'd*, 258 U.S. 451 (1922); Standard Oil Co. v. United States, 337 U.S. 293 (1949); United States v. Aluminum Co. of Am., 377 U.S. 271 (1964); Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332 (1982).

217. In re Int'l Bus. Machs. Corp., 687 F.2d 591 (2d Cir. 1982).

218. Robert Pear, *Antitrust Policies Affect Not Just Corporate Futures*, N.Y. TIMES, Jan. 10, 1982, § 4, at 2.

219. *In re Int'l Bus. Machs. Corp.*, 687 F.2d at 594.

220. John E. Lopatka, *United States v. IBM: A Monument to Arrogance*, 68 ANTITRUST L.J. 145, 145 (2000).

221. *Id.*

222. *Id.*

stipulated to dismiss the case, finding it was "without merit."[223] By this point, after almost a decade of litigation, the computer market had changed so radically that IBM's competitors had surpassed it[224] and the issues at hand were no more than a "historical curiosity."[225]

The government's initial investigation began in 1967 after complaints by competitors in the computer market.[226] Two years later, the government filed suit, alleging that IBM had monopolized the general-service computer market and maintained its seventy-four percent market share through anti-competitive actions.[227] While the government accused IBM of predatory pricing, illegal bundling, and premature announcement of products, the company's success was due to superior efficiency, not the alleged anti-competitive actions.[228] The defendant company's practices, while certainly aimed at promoting its own success, were simply reactions to consumer demand and competitor behavior, not insidious monopolization to extract wealth from consumers.[229] Nevertheless, the government viciously pursued IBM for over a decade, costing the company and taxpayers tens of millions of dollars.[230]

The prosecution of IBM is yet another example of antitrust enforcement targeted at a successful company whose only sin was to fairly beat out its competitors and reap the appropriate rewards.[231] While the eventual dismissal of the case against IBM refuted a renewed use of Sherman to punish companies simply for maintaining a large market share, its fevered prosecution demonstrated how misguided antitrust enforcement has become.

That said, *IBM* also teaches a powerful lesson about the regulatory force of market competition. By the time the government dismissed the case, IBM had lost a large part of its market share, not because of antitrust regulation, but simple market competition and technological innovation.[232] While some firms may maintain market dominance for a period, only those that continually serve customers and provide the best products prevail in the long run.[233] What is more, government regulation in the form of antitrust stifles innovation in pursuit of an artificially constructed vision of what

---

223. *In re Int'l Bus. Machs. Corp.*, 687 F.2d at 594.

224. Ryan Young & Clyde Wayne Crews, Jr., *The Case Against Antitrust: Ten Areas Where Antitrust Policy Can Move on from the Smokestack Era*, COMPETITIVE ENTER. INST. 13 (2019).

225. *U.S. vs. IBM*, N.Y. TIMES, Feb. 15, 1981, https://www.nytimes.com/1981/02/15/business/us-vsibm.html [https://perma.cc/YUA6-5QKQ].

226. FRANKLIN M. FISHER ET AL., FOLDED, SPINDLED, AND MUTILATED: ECONOMIC ANALYSIS AND *U.S. V. IBM* 11 (1983).

227. Lopatka, *supra* note 220, at 147.

228. *Id.* at 147–48.

229. *Id.* at 148.

230. *Id.* at 145.

231. *Id.* at 148.

232. Young & Crews, *supra* note 224, at 13.

233. Lopatka, *supra* note 220, at 158–59.

antitrust enforcers project the market should look like.[234] This approach is not in keeping with any respectable understanding of industrial organization.

IBM serves as a conspicuous example of the failures of the current antitrust regime. Rather than learning from past mistakes, the prosecution of IBM compounded some of the most egregious misapplications of the antitrust laws from the past century. In short, rent-seeking competitors prompted the initial investigation,[235] the allegations relied on the discredited "big is bad" theory of antitrust,[236] and the litigation squandered millions of taxpayer dollars with no cognizable benefit to consumers.[237] Unfortunately, the prosecution of Microsoft fifteen years later was more of the same.

2. *United States v. Microsoft Corp.*[238]

In many ways, the prosecution of Microsoft largely mirrored the prosecution of IBM. At the end of the twentieth century, Microsoft had catalyzed a drop in market prices for software.[239] While software prices did fall generally during this period, prices in those categories where Microsoft participated fell by sixty percent as compared to prices in categories where the company did not participate which only fell by fifteen percent.[240] What is more, as Microsoft increased its market share, it continued to decrease its prices.[241] Thus, in these highly competitive technology markets, it is very likely that the company's top position was a result of its superior product, good business decisions, and cheaper prices.[242] Nevertheless, Microsoft's success drew the attention of the antitrust authorities.

Prompted by competitors in the software market, the Federal Trade Commission first investigated Microsoft in the early 1990s.[243] The investigation did not yield any prosecutable violations of antitrust law and the parties reached a consent decree in 1994.[244] Four years later, the Department of Justice and various other parties aligned against the company sued Microsoft on nearly identical grounds, alleging violations of the Sherman Act.[245] The suit alleged a litany of violations including anti-

---

234. *Id.* at 160.

235. FISHER ET AL., *supra* note 226, at 11.

236. Lopatka, *supra* note 220, at 148.

237. *Id.* at 145.

238. United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

239. STAN J. LIEBOWITZ & STEPHEN E. MARGOLIS, WINNERS, LOSERS & MICROSOFT: COMPETITION AND ANTITRUST IN HIGH TECHNOLOGY 156 (1999).

240. *Id.*

241. *Id.* In fact, Microsoft's prices appeared to be lower in markets it dominated than in those it did not. *Id.* at 136.

242. *Id.* at 135, 227.

243. *Id.* at 245; Chris Butts, *The Microsoft Case 10 Years Later: Antitrust and New Leading "New Economy" Firms*, 8 NW. J. OF TECH. AND INTELL. PROP. 275, 280 (2010).

244. Butts, *supra* note 243, at 280.

245. LIEBOWITZ & MARGOLIS, *supra* note 239, at 245.

competitive network effects, path dependence, and predatory bundling.[246] The theories undergirding these allegations were nothing more than "empty conjecture" and "hardly the stuff upon which antitrust policy should be based,"[247] yet, that did not stop the district court from convicting Microsoft and accepting the plaintiffs' proposed remedy almost word for word.[248] On June 7, 2000, the district court ordered Microsoft to break up its software and hardware units into separate companies.[249] While this order was ultimately overturned on appeal,[250] the unsound reasoning undergirding the initial order calls into question the ability of courts and enforcers to adjudicate antitrust claims in the era of big tech.

The economic consequences of the proposed Microsoft break-up would have been dire for consumers and technological innovation:

> The remedy proposed by the government and adopted by the judge in the Microsoft case is likely to increase software prices to consumers, impose additional costs upon software developers, retard innovation in the operating system, reduce competition in the workstation/server marketplace, and lead to confusion and frustration among consumers who will be purchasing computers with non-standardized operating systems.[251]

The subsequent increase in software prices was projected to cost American consumers between $50 and $125 billion over a three-year period.[252] Foreign consumers could have faced as much as a $310 billion price hike over the same period had the break-up occurred.[253] It is hard to imagine that Microsoft engaged in such widespread anti-competitive action that these increased prices could be justified as a boon to consumers. Even if the allegations undergirding the lawsuit were true, there is no evidence to suggest that Microsoft's actions amounted to an extraction of hundreds of billions of dollars from consumers.

In reality, the allegations against Microsoft were largely baseless.[254] Microsoft's market dominance was gained through superior products, lower prices, and skillful business decisions.[255] What is more, by the time the suit

---

246. *Id.* at 248. The briefs were reminiscent of the Congressional debates surrounding the passage of Sherman. Parties aligned against Microsoft portrayed the company as a threat to the American way of life and the underpinnings of a free society. *Id.*

247. *Id.* at 117.

248. *Id.* at 274.

249. Stan J. Liebowitz, *An Expensive Pig in a Poke: Estimating the Cost of the District Court's Proposed Breakup of Microsoft*, ASS'N FOR COMPETITIVE TECH. 1–2 (2000).

250. United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

251. Liebowitz, *supra* note 249, at iii.

252. *Id.*

253. *Id.*

254. LIEBOWITZ & MARGOLIS, *supra* note 239, at 245.

255. *Id.* at 135, 227.

against Microsoft was finally resolved, the products at the heart of the controversy had been replaced by competing products and Microsoft had been unseated by rivals like Apple and Google.[256] Once again, market competition, not antitrust enforcement, proved to be the best regulator of so-called monopolists.

IV. MOVING FORWARD: HOW TO CRAFT CONSUMER-FOCUSED ANTITRUST POLICY

The continued failures of antitrust enforcement have led many critics to call for a complete repeal of the antitrust laws.[257] However, while antitrust enforcement may possibly be fatally flawed, a total repeal of the system is almost guaranteed to be a political impossibility.[258] Thus, reformers should seek to recalibrate antitrust in a way consistent with its original aims that cuts away the deadwood of the last century of bad public policy. To do this, either Congress or the courts can and should take the following steps. First, policymakers should abandon all per se categories of antitrust violation and the structure-conduct-performance paradigm and instead rely solely on the rule of reason informed by a more accurate understanding of competition.[259] Second, the current antitrust regime should be supplanted with a more cautious approach to market intervention.[260] Finally, all collateral, protectionist policy goals should be purged from antitrust enforcement.[261] All of these changes are not only more politically feasible than total repeal, but would also bring about discrete policy changes that would prevent some of the most egregious blunders of antitrust enforcement from reoccurring.

A. Recalibrating the Rule of Reason

As the history of antitrust enforcement has shown, a focus on market concentration protects competitors at the expense of consumers. This occurs because the current antitrust regime does not understand the nature of competition. Thus, the neoclassical conception of competition must be abandoned. Competition is not an equilibrium state that can be

---

256. Young & Crews, *supra* note 224, at 15.

257. *E.g.*, ARMENTANO, *supra* note 69, at 271; Fred L. Smith, Jr., *Why Not Abolish Antitrust?*, 7 REGUL. 23 (1983).

258. One need only look at the recent revival of political populism to see that fear of big business is alive and well. *See* Shannon Bond, *Google Hit With 2nd Lawsuit Testing Its Monopoly Power—This One Over Digital Ads*, NPR (Dec. 16, 2020, 4:28 PM), https://www.npr.org/2020/12/16/947249782/google-hit-with-second-antitrust-suit-alleging-illegal-monopoly-in-online-ads [https://perma.cc/5JA2-U624]; *see also* 2020 DEMOCRATIC PARTY PLATFORM, 19 (2020).

259. Easterbrook, *supra* note 81, at 10.

260. *See* Easterbrook, *supra* note 7, at 1700–01.

261. *Id.* at 1703.

known but rather a dynamic process of discovery. Markets are not static, but rather, variable. Intense competition exists in markets that do not fit the artificial constructs of certain academic paradigms. Courts and prosecutors alike must appreciate these realities when adjudicating antitrust cases. Only then will the antitrust laws fulfill their original purposes and protect consumers rather than competitors.

Aside from improving the decision-making of antitrust authorities, a corrected understanding of competition will also necessitate discrete policy changes. First, antitrust should eliminate all per se categories of violations.[262] Second, the structure-conduct-performance paradigm should be abandoned, along with all the tools that accompany it.[263] These approaches perpetuate the "big is bad" misconception that has plagued antitrust and sustain the false notion that markets are only competitive if they meet certain artificial criteria. In reality, competitive markets take many shapes, sizes, and levels of concentration. Firms compete by diversifying their products and services, innovating, and engaging in countless other rivalrous activities. This leads to winners and losers in the marketplace. The per se and market concentration approaches label these activities as anti-competitive, but that could not be further from the truth. Competition protects consumers because it rewards firms that serve customers and punishes those that do not. Rigid constructs like per se categories and the structure-conduct-performance paradigm wrongly conflate competitors with competition. Policymakers must abandon such approaches if antitrust is to truly focus on consumer protection.

Instead of rigid, academic constructs, the rule of reason should govern every antitrust case. At least then, courts—armed with a proper understanding of competition—will be able to individually evaluate each case and determine whether the actions at issue are anti-competitive, and more importantly, how they will impact consumers. While this approach still charges judges with the daunting task of evaluating the nature of specific markets and particular business decisions, it at least allows for discretion and caution in market intervention.

The fundamental inquiry under the rule of reason is whether an action unduly restrains trade.[264] In application, this inquiry has largely centered on how the action at issue impacts competing firms in the relevant

---

262. The Supreme Court has slowly abandoned more and more per se categories of violation as it has realized the errors of its ways. *See* Easterbrook, *supra* note 81, at 10.

263. The structure-conduct-performance paradigm is the idea that one can ascertain the competitiveness of a market simply by observing its structure and concentration. It is built on the neoclassical conception of competition. Easterbrook, *supra* note 7, at 1696. The Department of Justice and Federal Trade Commission should abandon the Lerner Index, the Herfindahl-Hirschman Index, Profit Studies, and Cross Elasticity Measurements (the primary tools of the structure-conduct-performance paradigm) for antitrust enforcement because they are poor measurements of market competition and lead to absurd results.

264. Standard Oil Co. v. United States, 22 U.S. 1, 61–62 (1911).

market.[265] This is misguided. Rather than evaluating whether competitors are harmed, courts should look to the action's impact on consumers: Is output decreasing? Are prices increasing? Has innovation stalled? If the answers to these questions are no, then the defendant firm is likely just the winner of the competitive market process rather than a monopolist.

When applying the rule of reason, courts should not ask whether the action at issue furthers their imagined conception of what the relevant market *should* look like, but rather, does the action at issue prevent consumer decisions from dictating firms' long-run market success? If it does not, then the action at issue is not an undue restraint of trade because the trade occurring in the market is dictated by voluntary decisions of market participants, not monopolistic structures. This reframed rule of reason that incorporates a proper understanding of competition would serve as a powerful step to reorienting antitrust enforcement in a consumer-focused direction.

B. Recapturing Modesty in Market Intervention

Armed with a corrected understanding of competition, antitrust enforcers such as the Department of Justice and Federal Trade Commission should adopt a more cautious approach to antitrust action. These agencies must acknowledge their own limits in terms of understanding what competition looks like in each market. Thus, those tasked with protecting competition should be slow to prosecute and err on the side of non-intervention. As indicated by judges for well over a century, lawyers and bureaucrats are ill-equipped to explain whether a market is competitive.[266] So, when in doubt, antitrust enforcers should err on the side of caution. They can wait and see whether the action at issue is in fact anti-competitive, or whether they simply do not understand all the relevant facts. Whereas errors of non-intervention are eventually corrected by the market process (or later intervention) errors of intervention stifle innovation, punish competitive firms, and inflict injury onto consumers.[267] Furthermore, errors of intervention are more likely to become entrenched in the legal system because of the doctrine of *stare decisis*.[268] Thus, while this Note does not go as far as to suggest the implementation of a legal presumption of non-violation, the antitrust regime would do well to adopt a culture of temperance.

---

265. *See, e.g.*, *id.*; United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).

266. *See* United States v. Addyston Pipe & Steel Co., 85 F. 271, 283–84 (6th Cir. 1898); *see also* Easterbrook, *supra* note 81, at 2.

267. Easterbrook, *supra* note 81, at 3, 15.

268. *Id.* at 5–6.

A specific way the antitrust enforcers can inculcate such a culture is by adopting a policy of non-intervention in the economic frontier.[269] Burgeoning markets present an especially challenging task for antitrust laws as the knowledge problem outlined above is heightened in such arenas. There, antitrust authorities are more likely to stifle innovation than prevent monopolization because they simply cannot know the dynamics and intricacies of such markets.[270] Economists are quick to assert a monopoly explanation when faced with market phenomena they do not understand.[271] The approach should be just the opposite. The antitrust laws should assume markets, particularly those on the innovation frontier, are competitive. By adopting a policy of non-intervention on the economic frontier, antitrust authorities would promote innovation and economic development; all things that serve consumers.

C. Abandoning Antitrust Protectionism

Perhaps the most insidious consequence of the failures of their implementation has been the use of the antitrust laws for purposes explicitly not connected to consumer protection. The first misuse of the antitrust laws is as a means of rent-seeking. As of 2019, ninety-five percent of antitrust suits were brought privately by competitors, not the Department of Justice or Federal Trade Commission.[272] Unfortunately, this is not a new phenomenon.[273] As it turns out, it is usually easier to accuse a rival of anti-competitive practices than it is to continually innovate, cut costs, and serve customers. This "if you can't beat 'em, sue 'em" mentality is not what the antitrust laws were designed for and harms rather than protects consumers.

The second misuse of the antitrust laws is their utilization for economic protectionism. Part of this trend is the conflation of competition with competitors that has been discussed throughout, but that does not explain the entire picture. Judges have routinely used the notion of "consumer welfare" to pursue their individual ideas of distributive equity.[274] While these may be laudable goals, they are far outside the purview of the antitrust laws.[275] Furthermore, such an endeavor invariably involves making a series of political decisions, a job for the legislature, not

---

269. Smith, *supra* note 90, at 44–45.

270. *Id.* at 46–47.

271. R. H. Coase, *Industrial Organization: A Proposal for Research*, *in* 3 POL'Y ISSUES & RSCH. OPPORTUNITIES IN INDUS. ORG. 59, 67 (1972).

272. Young & Crews, *supra* note 224, at 9.

273. "From July 1976 to July 1977, private parties filed 1,600 antitrust suits in federal courts, while the government filed only 78. Antitrust encourages firms to win their competitive fights by relying on Washington lawyers and lobbyists instead of engineers, scientists, and computer experts." Smith, *supra* note 257, at 28.

274. *See* Easterbrook, *supra* note 7, at 1704.

275. *Id.*

the judiciary.[276] The antitrust laws should be used to protect consumers and promote competition in the economy. If this endeavor is to be successful, judges and policymakers must adopt a cautious and humbled approach to enforcement.

CONCLUSION

These policies will not fix the antitrust system. Rather, they will act as a triage to (hopefully) prevent future examples of failed antitrust enforcement. At the very least, the implementation of these reforms will prevent years of costly litigation, mitigate the use of antitrust as a tool for rent-seeking, and slow the punishment of innovative and successful companies. Such goals would help lead to a freer (if not free) market economy. In the meantime, market advocates need to continue to inform the public of the perverse implementation of antitrust laws to prime a future where total reform is possible.

276. "Courts can use economics to protect consumers; they cannot achieve any other goal except at some cost to consumers, and they are not authorized to decide how much should be surrendered for whose benefit." *Id.* at 1703.