

Dworkinian Antitrust

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ABSTRACT: In this paper we offer a jurisprudential explanation of the structure and evolution of antitrust law, arguing that it provides the best example of Ronald Dworkin's famous theory of integrity in action. Dworkin's jurisprudence describes antitrust law strikingly well because it chooses right answers by considering what guiding principle best fits and justifies the relevant law. In antitrust, the principle of consumer-welfare promotion provides the best fit for antitrust statutes as a whole because, although legislators mentioned other objectives, they did not believe they were in conflict with the first and overriding objective of consumer welfare. Moreover, even if other principles—say, the protection of small businesses—can compete with consumer-welfare promotion in terms of fit, such other principles cannot compete in terms of justification, because they cannot be coherently achieved by judges in antitrust cases and are better undertaken by other kinds of legislation. In contrast, legal positivism—the dominant jurisprudential theory to which Dworkin's integrity played the foil—cannot explain antitrust law, because antitrust decisions often cannot be generated by the sparse statutory text available, even when combined with policy discretion.

Dworkinian jurisprudence thus explains why court decisions in antitrust rely on economic principles rather than statutory text or ad hoc policy. Economic principles provide the most reliable and consistent path to promoting consumer welfare. This distinctive jurisprudence also explicates many unusual features of antitrust doctrine. For instance, the Supreme Court is unusually willing to overrule long-established cases, lower courts sometimes fail to follow older Supreme Court precedent, and courts treat Department of Justice guidelines in the area as powerful determinants of their own decisions. This breakdown of the hierarchy of precedent and the judicial/executive branch cross-pollination cannot be understood through the positivist framework. If economic principles are immanent in law, however, these practices make sense. When the pull of such principles is strong, both the executive and judiciary at all levels are engaged in a joint enterprise of explaining and applying the economics to challenged business practices and agreements, rather than guarding rival areas of policy discretion as typical in our separation-of-powers system.

Dworkin's integrity is not only the best explanation of antitrust jurisprudence, but also an attractive jurisprudence in this area. As a general matter,

Dworkin's theory has been sharply criticized as unworkable, because it is argued that judges have no way of discovering the principles that ought to guide their decision-making. Moreover, people simply disagree about the principles' content or application. While these criticisms have substantial merit in fields like constitutional law, in antitrust, microeconomics does provide consensus principles that can be relatively objectively applied to decide cases.

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“In view of these circumstances, it must be confessed that there is no consistent or intelligible policy embodied in our law by which public officials and business men may distinguish bona fide pursuit of industrial efficiency from an illicit program of industrial empire building.”

—Robert H. Jackson & Edward Dumbauld¹

“[T]here is widespread agreement today among courts, antitrust-enforcement agencies, and antitrust practitioners and scholars about the goals of the antitrust enterprise. . . . [M]ost contentious issues in antitrust are nonideological and no longer require appealing to endogenous preferences or foundational views about the legitimacy of the capitalist order. . . .”

—Daniel A. Crane²

I. INTRODUCTION

Justice Jackson and Professor Crane were talking about the same statutes—and they were both right. America’s competition law dramatically changed course in the 20th century. Once trumpeted as a populist rallying cry, antitrust now is the law that most relentlessly reflects economic analysis. Yet this shift did not flow from statutory revisions by Congress, but from a new way of interpreting the same statutes by the courts and the executive branch. The federal judiciary, at times taking its lead from the Department of Justice Antitrust Division and the Federal Trade Commission (“FTC”), now sketches the boundaries of our competition law. It does so with a sparse statutory framework that provides concepts that appear to defy precise definition like

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1. Robert H. Jackson & Edward Dumbauld, *Monopolies and the Courts*, 86 U. PA. L. REV. 231, 237 (1938).

2. See Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1211–12 (2008) (citation omitted).

“restraint of trade” and “monopolization.” And despite an increase in partisan and ideological divisions in politics and on the Supreme Court, antitrust consensus has steadily increased for decades.

At one time, antitrust was a field of ideological disagreement and political combat. Some thought antitrust could be an instrument of redistribution, suitable to combat the evils of big business and protect “small dealers and worthy men,” or that it could project a Jeffersonian vision that circumscribed the political power of large corporate actors.³ Others rejected efforts to aid competitors and advocated exclusive focus on improving consumer welfare.⁴ Antitrust to that point suffered from fits of inconsistency and economically harmful decisions.⁵ Today, this fundamental dispute has dissipated. Consumer-welfare protection is the dominant paradigm employed by courts, commentators, and practitioners.⁶ Decisions have become more predictable as consumer-welfare analysis has taken hold.⁷

This antitrust sea change is a matter of substantial jurisprudential interest, because it shows how judges can resolve legal questions by reference to coherent principles outside the text of the law. It was certainly not the positive law—provided by competition statutes themselves—that have provided new answers or narrowed judicial discretion. The Sherman Act, antitrust’s oldest and most prominent statute, is renowned for its brevity:

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony⁸

Antitrust’s other principal statutes also lack the length and detail of other congressional statutory schemes.⁹ These statutory texts do not address the

3. *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 323 (1897).

4. *See, e.g., Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 107 (1984).

5. *See generally* ROBERT BORK, *THE ANTITRUST PARADOX* (2d ed. 1993).

6. *See, e.g.,* Michael A. Carrier, *Antitrust After the Interception: Of a Heroic Returner and Myriad Paths*, 55 STAN. L. REV. 287, 287–88 (2002) (reviewing RICHARD A. POSNER, *ANTITRUST LAW* (2d ed. 2001)). There are still a few who would quarrel with the notion that consumer-welfare protection should be antitrust’s exclusive province. *See, e.g.,* Maurice E. Stucke, *Reconsidering Antitrust’s Goals*, 53 B.C. L. REV. 551, 611–12 (2012).

7. *See, e.g.,* Daniel A. Crane, *Antitrust Modesty*, 105 MICH. L. REV. 1193, 1195–97 (2007) (reviewing HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* (2005)).

8. Sherman Antitrust Act, 15 U.S.C. §§ 1–2 (2012).

9. *See* Clayton Antitrust Act, 15 U.S.C. § 12 (2012); Federal Trade Commission Act, 15 U.S.C. §§ 41–77 (2012); Robinson–Patman Act, 15 U.S.C. § 13 (2012).

particularities of which restraints should be condemned. Their open-ended admonitions appear to be largely standards and not rules, raising fundamental questions of how judges are to decide cases according to enacted law, rather than their own policy discretion.¹⁰

Yet the jurists have decided cases with increasing consistency and sophistication. What has guided judges to consistent answers is not text, but principles—in this case economic principles. This jurisprudence of principle stands in contrast to another jurisprudential theory: legal positivism. A positivist's view of antitrust (or the interpretation of any statute) would see the law flowing from statutory text as supplemented by judges' own policy discretion. With the paucity of antitrust statutory text, such a positivist view offers a poor description of antitrust jurisprudence. Thus, while many find antitrust distinctive because of its relentless infusion of economics into law, it also has a distinctive jurisprudence. Antitrust illustrates how appeals to principle not contained in the text of a law can explain an area of law better than positivism's focus on formal law and discretion. Moreover, it turns out in this context to be a normatively attractive kind of jurisprudence, because it has created stable legal consensus not subject to partisan or ideological turbulence that is the hallmark of the rule of law. And yet antitrust's economic principles permit flexible application to new facts and the incorporation of new technical knowledge.

The foremost modern advocate of jurisprudence essentially informed by principle was Ronald Dworkin. His theory, called "law as integrity,"¹¹ was developed as a response to the ideas of positivism. Positivism contends that, when judges are forced to confront new cases not disposed of by the law as written, they inevitably exercise discretion, much like a legislator.¹²

Dworkin did not believe that judges should be conceived of as mini-legislators exercising ad hoc discretion to fill the interstices of the law. But neither was he a legal formalist who contends that a statute, regulation, or constitutional provision, taken alone and sealed from relevant, surrounding principles, would provide answers in every instance. Instead, Dworkin found

10. See, e.g., *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 731 (1988) ("The term 'restraint of trade' in the [Sherman Act], like the term at common law, refers not to a particular list of agreements, but to a particular economic consequence, which may be produced by quite different sorts of agreements in varying times and circumstances."); see also Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 698 (1991) ("The truth is that the legislative history is remarkably fuzzy about the standards Congress expected judges to use in policing restraints on competition. Indeed, the statements of congressmen in debating the Sherman Act repeatedly evidence an express intent to delegate the formulation of such standards to the courts."). Some have argued that the statute should have been interpreted with great emphasis on the text, but acknowledge that the cases have not generally understood the antitrust laws to be capable of generating decisions by reference to the text alone. Daniel A. Farber & Brett H. McDonnell, "Is There a Text in This Class?" *The Conflict Between Textualism and Antitrust*, 14 J. CONTEMP. LEGAL ISSUES 619, 668 (2005).

11. See generally RONALD DWORKIN, *LAW'S EMPIRE* (1986) (discussing law as integrity).

12. H.L.A. HART, *THE CONCEPT OF LAW* 272–76 (3d ed. 2012).

constraints on judges in principle. While applying the integrity theory (what we will term “doing integrity”), the judge is not merely weighing policy objectives to decide what the new rule should be, but instead resorting to both moral and legal principles undergirding the law to find the right answer. If the usual legal materials do not yield a resolution, the judge is bound by the common principles of the community as much as by any formal law. Dworkin asserted that when all of these principles are analyzed correctly, they will yield a single right answer to any given question—the one that best fits with the legal landscape as a whole.

Dworkin’s ideas are not without critics, whose objections often have substantial bite when applied to such matters as constitutional law. For example, some have criticized principles as too vague to be useful. And even if there are coherent principles on point, others have attacked integrity because of the difficulty in selecting between competing principles. Thus, we do not seek to defend integrity as a general matter, but only to show its descriptive power in the field of antitrust. Here, law as integrity explains the jurisprudential method in the field just as much as consumer-welfare promotion explains its substantive content.

Once it is understood that the exclusive goal of antitrust is to increase consumer welfare, a judge will not be forced to choose from among different or competing principles: she is bound to decide the case in whichever way best advances consumer welfare. But the constraints on the judge do not end there. Without more, one could imagine a judge arriving at very different conclusions about the best way to advance consumer welfare and using discretion to create a novel rule in the case before her. In contrast, antitrust does not leave a judge free to speculate on how best to serve the consumer. Rather, she will use economic analysis to determine effects on consumer welfare.

Economics exists as a discipline separate and apart from the world of antitrust and has its own well-established principles not easily subject to judicial manipulation. And unlike most other social sciences, economics (especially the microeconomics that governs antitrust) is relatively objective in its methodology. It relies on evidence and empiricism to test its hypotheses about human behavior, and modifies its prescriptions with new data. Thus, a judge who endeavors to faithfully apply economic analysis—“subprinciples,” in effect—to the antitrust case before her has an independently developed method to advance the consumer-welfare principle. Judges are truly and meaningfully constrained, and thus can arrive at the right answer when the statute and even prior precedent run out.

It might be thought ironic that Dworkin’s theory best explains antitrust. Dworkin was known for his debates with now-Judge Richard Posner on the value of wealth maximization. Dworkin disavowed the value of wealth

maximization as an aim of the law.¹³ As we shall see, the consumer-welfare aims of antitrust often track goals of wealth maximization (or at least employ similar economic tools).¹⁴ Skeptics might therefore object to the use of integrity in antitrust. But Dworkin's integrity framework is agnostic to the input principles. Just as Dworkin's wise judge Hercules refuses to subjugate the principles embodied in the law to his own preferences,¹⁵ so too would Dworkin acknowledge that the substance of the guiding principle does not influence the validity of the theory. The community, informed in this case by microeconomics, accepts consumer welfare as the guiding principle within the domain of antitrust law. Thus, whether or not Dworkin would agree with maximizing consumer welfare as an underlying goal, his theory provides an accurate explanation for antitrust consensus and improvement.

The payoff of using integrity in antitrust is its ability to explain the surprising truth that antitrust law is largely judge made and yet has converged to a very substantial consensus while many other areas of the law, even areas with substantially more extensive textual guidance, remained mired in judicial controversy. Because judicial discretion in antitrust is so meaningfully curtailed by the primacy of economic analysis, it is unsurprising that consensus has grown and the condition of the law has improved. In fact, in this area of law judges have become the transmission belt of principles refined by economics.

Displaying the jurisprudential structure of antitrust also reveals the conditions in which a jurisprudence of integrity may be normatively attractive. To apply such a jurisprudence, the area of the law has to be surrounded by principles around which there is strong community consensus. Without any agreed upon measure of correctness, judicial policymaking is susceptible to discord. For an exemplification of this problem, one need only look at the disagreements surrounding substantive due process in constitutional law.¹⁶ Second, the principles to be applied have to be capable of progressive articulation—that is to say, there needs to be subprinciples that follow from the broader principles that decide particular cases. Dworkinian antitrust, then, helps us predict the other legal spheres when judges might be left to mind the farm.

In Part II, we briefly review the arc that antitrust law has followed. We focus first on the early days of the laws and later tumult during the time of the New Dealer Justices and the Warren Court. While we cannot review all decided cases, we show that the important Supreme Court cases did not embrace a jurisprudence of principle, preferring either a formalism that

13. Ronald Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 201, 211–12 (1980).

14. See *infra* notes 183–222 and accompanying text.

15. DWORKIN, *supra* note 11, at 255.

16. See Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 85–106 (2003) (describing the controversy surrounding substantive due process).

emphasized the categorical prohibitions of the statute or an unguided discretion in which the Justices decided according to their policy preferences. The result was general jurisprudential incoherence. We then explore the gradual acceptance of the economic analysis that serves as the basis for a jurisprudence of principle.

Part III explains the basis of a jurisprudence of principle. We show how Dworkin's theory of integrity provides an alternative to positivism and shows how principles outside the statutory text can guide and limit judicial discretion. We then discuss the criticisms that have been leveled against integrity, setting the stage for our demonstration of why they are inapplicable to antitrust.

In Part IV we offer our jurisprudential explanation for the structure of antitrust law. Making consumer welfare the goal of antitrust follows from the fit and justification model Dworkin provides for law. Consumer welfare provides the best overall fit in for the antitrust statutes and, in any event, is better justified in our political morality than other competing goals. Dworkin's theory also explains what otherwise is peculiar about the development of modern antitrust law—the judiciary's disregard for, and willingness to overrule, established precedents and its inclination to adopt the framework of analysis developed by the Department of Justice and the FTC. When principles (whose articulation is now guided by the economic community), become the driving force of law, precedent and the separation of powers can recede in importance, because decision-makers are not relying on their own discretion to decide hard cases, but appealing to common principles. We then show that the criticisms of integrity do not have much force within the narrow confines of antitrust.

In Part V, we explore the limits of our theory, and objections that may arise. We show for instance, that economic principles can be Dworkinian principles and that microeconomics provides an objective framework for their application. We recognize that in certain cases, especially complex ones, principled economic analysis may not yield one correct answer, or differing economic theories might yield conflicting results. But in these cases, Judge Frank Easterbrook's error-cost framework shows that judges can still pursue consumer welfare under constraint.

In Part VI we show the modern move to a Dworkinian jurisprudence has not resulted in the kind of dangers raised by critics of Dworkin's integrity. It has not resulted in the judiciary adopting conflicting principles or increased discord on antitrust. We analyzed the filings of antitrust cases at the district court from 1970 to 2012, and all antitrust cases from the courts of appeal from 1980 to 2012. As economic principles have taken hold, consensus has certainly not decreased and may well have grown. We demonstrate this in two ways. First, we observe the steady downward trend of antitrust filings at the district court. We then discuss the declining number of antitrust opinions at the courts of appeal and compare the dissent rate in antitrust cases with the

dissent rate in the caseload as a whole. These proxies show the growing antitrust consensus over time and suggest that judges are at least as constrained in antitrust cases as in other areas, despite the lack of congressional guidance.

In Part VII, we briefly discuss whether there are other areas of law where Dworkinian or integrity jurisprudence has similar potential. We argue that Dworkinian integrity is not appropriate throughout the empire of law, but rather in a few localities. We believe that the likeliest areas of law are other ones informed by microeconomic principle, because of the independence and practicality of the subprinciples. We posit that even in economically driven arenas, questions of distribution and resource allocation will need to be left out of the judicial equation, and suggest that cost-benefit analysis in the review of regulations might be fertile ground for a jurisprudence of principle.

II. ANTITRUST'S JURISPRUDENTIAL EVOLUTION

The history of the antitrust law is also a story of legal positivism's inadequacy as a guiding jurisprudence for antitrust. The text of antitrust statutes does not provide detailed guidance for legal decision-making by itself, because the text is both sweeping and spare, and yet is to govern all of economic life. The statutes' broad nature means that a literal reading would ban a huge swath of obviously productive economic activity. But if that reading is rejected, the statutes' lack of detail opens the door to bureaucratic and judicial discretion without clear bounds. The consequence has often been inconsistent decisions that harmed economic prosperity without providing much else of value. It was only when antitrust understood consumer welfare to be its underlying principle that a coherent law could be forged.

A. ANTITRUST'S FORMATIVE YEARS

Congress enacted the Sherman Antitrust Act in 1890.¹⁷ The Act came on the heels of a half-century of some of the most dramatic economic transformation in American history. Deep in the throes of the Industrial Revolution, businesses were getting bigger, richer, and more powerful. Meanwhile, much of the consuming public, farmers, laborers, and small businesses felt powerless or wronged by the sheer size of the industrialists.¹⁸ Conventional wisdom traces the roots of the Sherman Act back to assorted agrarian and populist protests against the railroads or to incipient Progressives and small business interests.¹⁹ But such concerns were not written

17. *Sherman Anti-Trust Act (1890)*, U.S. NAT'L ARCHIVES & RECS. ADMIN., <http://www.ourdocuments.gov/doc.php?flash=true&doc=51> (last visited Aug. 30, 2016). It passed the Senate with only a single dissenting vote and unanimously cleared the House. *Id.*

18. Timothy J. Waters, *Antitrust Law and Policy: Rule of Law or Economic Assumptions?*, in *ECONOMICS & ANTITRUST POLICY* 154 (Robert J. Lerner & James W. Meehan, Jr. eds., 1989).

19. See George J. Stigler, *The Origin of the Sherman Act*, 14 J. LEGAL STUD. 1, 1-7 (1985).

into the language of the statute. Instead the statute was magnificent in its generality: “contracts in restraint of trade” and “attempt[s] to monopolize” were made illegal and punishable criminally.²⁰

In one of its earliest cases, *Trans-Missouri Freight Ass’n*,²¹ the Supreme Court applied the Sherman Act to prohibit cartels among railroads.²² It did so by emphasizing the sweeping language of the statute:

The language of the act includes *every* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations. So far as the very terms of the statute go, they apply to any contract of the nature described. A contract therefore that is in restraint of trade or commerce is by the strict language of the act prohibited²³

The difficulty in the Court’s analysis was that it failed to provide a principle to distinguish this kind of illegal contract at hand—a cartel among railroads—from the myriad of other contracts that restrained trade by imposing obligations on parties that prevented them from sending their goods or services to others.²⁴ In passing, the opinion also identified the protection of the “small dealers and worthy men” as a possible principle relevant to antitrust decision-making,²⁵ but did not show how this consideration would decide cases either. Whatever else it accomplished, *Trans-Missouri* demonstrated the inadequacy of relying on a mechanical reading of the statute.²⁶

20. Sherman Anti-Trust Act of 1890, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2012)). Of course placing restrictions on trade was not novel—the common law recognized the virtues of competition in both England and the United States. Over-simplified, restraints of trade were illegal if they were unreasonable, and reasonableness was left to the sound discretion of the judge. *See, e.g.*, ALBERT A. FOER & ROBERT H. LANDE, AM. ANTITRUST INST., THE EVOLUTION OF UNITED STATES ANTITRUST LAW: THE PAST, PRESENT, AND (POSSIBLE) FUTURE 2 (1999), <http://www.antitrustinstitute.org/files/64.pdf>.

21. *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290 (1897).

22. *Id.* at 342.

23. *Id.* at 312.

24. It did note that some kinds of restraints were legal at common law. *Id.* at 329. However, the Court still seemed doubtful as to whether such contracts should be excepted from the scope of the prohibition. *Id.* But even if they had been, such exceptions still provided no principle to distinguish between legal and illegal restraints. In *United States v. Joint Traffic Ass’n*, the Court did list several types of contracts or agreements that would pass muster, including the “formation of corporations,” a “contract of partnership,” or a “lease or purchase by a farmer . . . of an additional farm,” that were not to be condemned. 171 U.S. 505, 567 (1898). Justice Peckham, the opinion’s author, indicated that agreements with only an “incidental” effect on trade were not within the statute’s domain. *Id.* at 568. But “incidental” is not a principle that provides a helpful criterion of decision.

25. *Trans-Missouri Freight Ass’n*, 166 U.S. at 323.

26. *See, e.g.*, Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CALIF. L. REV. 263, 267, (1986) (noting that, “[a]ccording to the conventional wisdom,

In contrast, in other cases that came soon afterwards, namely *Standard Oil*²⁷ and *American Tobacco*,²⁸ the Court recognized that the statute could not condemn all contracts and held that the act condemned only “unreasonable restraints of trade.” For instance, Justice White, in *American Tobacco*, found that the Sherman Act condemned only those agreements that harmed trade “because of their inherent nature or effect, or because of the evident purpose of the acts”²⁹ But the Court’s rule of reason was not much help either, because it did not tie reasonableness to any principles that could decide concrete cases. For instance, under the Court’s formulation it was even unclear whether a *cartel* might be legal if the price it charged was a “reasonable” one.³⁰

The tendency to read the statute broadly and the lack of principles to guide its direction combined to generate the infamous decision in *Dr. Miles*.³¹ The case featured a scheme wherein a manufacturer controlled the retail prices of its products through agreement with wholesalers and retailers, a practice known as resale-price maintenance.³² The broad language of the Sherman Act was thus potentially applicable. And the Court analogized this vertical price-fixing agreement to horizontal price-fixing agreements that it had previously condemned in cases like *Trans-Missouri*.³³ That this analogy seems superficially reasonable shows that simple analogical reasoning was not a sensible guide for judicial discretion in antitrust, because it mistook surface resemblance for a similar economic structure of business behavior.³⁴

To be sure, in these early years, then-circuit judge William Howard Taft began the rudiments of a jurisprudence of principle in his artful *Addyston Pipe* opinion.³⁵ Taft looked at the English common law and found that it justified a variety of contracts even though some alleged them to be unlawful restraints.³⁶ Examples included partnerships and agreements where a dissociating owner agrees not to compete with the business that he has just

the statute’s language conveys little, if anything of value,” and that both the majority and dissent in *Trans-Missouri* recognized that resort to the common law of restraint of trade was necessary to resolve disputes).

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

28. *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911).

29. *Id.* at 179.

30. See, e.g., Thomas A. Piraino, Jr., *Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act*, 47 VAND. L. REV. 1753, 1753 (1994) (noting that courts have interpreted the rule of reason, which began in *Standard Oil*, as requiring an “inquir[y] into all conceivable circumstances before determining the legality of a particular restraint”).

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

32. *Id.* at 381–82.

33. *Id.* at 408.

34. Moreover, *stare decisis* entrenched the *Dr. Miles*’ per se rule for nearly a century. Despite being economically harmful, it would not be overturned until 2007. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 881 (2007).

35. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898).

36. *Id.* at 279–81.

sold. Taft generalized these cases into a principle: antitrust laws permitted restraints “ancillary” to the accomplishment of a lawful contract, so long as the restraint is “necessary to protect the covenantee in the full enjoyment of the legitimate fruits of his contract, or to protect him from the dangers of an unjust use of those fruits by another party.”³⁷ Moreover, Taft also specifically dismissed one kind of reasonableness defense, famously cautioning courts against evaluating the reasonableness of a price in determining the permissibility of a restraint, arguing that such a test placed the courts on a “sea of doubt” well beyond the judicial competency.³⁸ Here, he reflected an important principle of economic analysis: the inability of a court to replicate the price system and determine reasonable prices on its own.

While Taft’s opinion falls well-short of a fully articulated jurisprudence because it does not tie its generalization of the common law to economic analysis and the economic subprinciples that may better determine concrete cases, it shows how, even at its outset, antitrust law contained the germs of a jurisprudence of principle. Taft, for instance, anticipates the modern economic notion that antitrust should not summarily condemn business practices that promote productive efficiency, when he excepts agreements that are ancillary to a lawful purpose from the reach of Sherman Act section 1.

*B. PROGRESSIVES, NEW DEALERS, AND THE WARREN AND BURGER COURT: A
DOCTRINAL THICKET*

The Progressive and New Deal eras that followed antitrust’s birth did not bring coherence to antitrust law, because no government branches embraced consistent principles to guide discretion. The legislature passed more sweeping statutes, but did not include clear criteria for applying them. Meanwhile, in the executive, the newly created Antitrust Division, with the conspicuous exception of the years under the leadership of former Yale law professor Thurman Arnold, followed a zig-zag line, using discretion to follow a variety of politically motivated policies. And far from bringing order to the law, the judiciary alternated between reading the statutes with a kind of wooden formalism and a reservoir of policy discretion—the former mostly in cases on monopoly and the latter in the area of agreements among competitors.

Social classes dissatisfied with their lot and the consequences of industrialization had given rise to the Progressive Movement, which reached its zenith during the last decade of the 19th century and the first of the 20th. Richard McCormick aptly described a common denominator goal of the movement: “At the very least, privileged corporations had to be restrained, weaker elements in the community protected, and regular means established

37. *Id.* at 282.

38. *Id.* at 284.

for newer interest groups to participate in government.”³⁹ This sensibility was reflected in the relative zeal of antitrust’s next foundational statutes, the Clayton Act and Federal Trade Commission Act (“FTC Act”), both passed in 1914.⁴⁰ Progressives were dissatisfied with the limited sphere in which antitrust had been operating, and the new laws sought to increase its purview to combat unchecked big business.⁴¹ The Clayton Act identified for antitrust scrutiny various vertical restraints, including price discrimination, exclusive dealing, and corporate-stock acquisitions.⁴² But the Clayton Act’s standard for determining whether these practices should be condemned was no more definite than the Sherman Act’s: the specified conduct was to be outlawed if it *may* tend to harm competition.⁴³ In addition, the FTC Act introduced a new administrative actor into the antitrust realm, and empowered it to bring suit to order cessation of business activities under another vague standard: “unfair methods of competition.”⁴⁴

Nor did the executive branch bring coherence by choosing consistent principles in its enforcement philosophy, and instead used discretion to advance the political imperatives of the day. The 1910s saw increased attacks on large businesses and trusts that had attained positions by internal growth or mergers.⁴⁵ Companies had been spurred towards growth in this fashion by the earlier Court decisions, which had strongly condemned growth by cartel arrangements, but they nonetheless now found themselves the target of the Antitrust Division.⁴⁶ But United States mobilization for, and entry into, the First World War slowed antitrust enforcement, and this sentiment for antitrust lenity continued through the 1920s.⁴⁷ When Franklin D. Roosevelt assumed office, the executive became relaxed even as to cartels, as his first round of expansive economic programs required previously unprecedented levels of industry cooperation and price controls.⁴⁸ The antitrust laws remained in a

39. Richard L. McCormick, *The Discovery that Business Corrupts Politics: A Reappraisal of the Origins of Progressivism*, 86 AM. HIST. REV. 247, 257–58 (1981). For a discussion of the origins of the Progressive Movement, see generally *id.*

40. Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. § 12); Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41–77).

41. See FOER & LANDE, *supra* note 20, at 3; Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936, 940 (1987).

42. See FOER & LANDE, *supra* note 20, at 3.

43. *Id.*

44. *See id.*

45. William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1114–15 (1989).

46. *Id.* at 1113–14 (noting the monopolization suits initiated against Standard Oil, American Tobacco, Eastman Kodak, International Harvester, Du Pont, U.S. Steel, United Shoe Machinery, and others).

47. See FOER & LANDE, *supra* note 20, at 11.

48. *Id.*

virtual state of arrest until the appointment of Thurman Arnold as head of the Antitrust Division in 1937.⁴⁹ He brought an approach that was a precursor to the consumer-welfare approach, focusing on a single criterion—“the price to the consumer”—to assess whether a practice should be challenged.⁵⁰ But Arnold left under pressure in 1943, as the administration was determined to protect those business combinations perceived as necessary to the war effort, whatever their effect on price.⁵¹

Nor did the judiciary take a consistent approach. The canonical antitrust opinion of the Progressive era, *Chicago Board of Trade*,⁵² maximized judicial policy discretion by suggesting that judges should decide what horizontal restraints were reasonable by looking at all the facts and circumstances in a given case. In fact, Justice Brandeis, the opinion’s author, suggested that a per se approach to agreement illegality would never be appropriate:

[T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.⁵³

Brandeis’s opinion opens up antitrust decision-making on horizontal restraints to wholesale judicial discretion based on a set of undefined factors. In this case one of the factors was the restraint’s effect on small producers,⁵⁴ but the opinion provided no guidance on how to balance consumer welfare with producer welfare or other interests.⁵⁵ It certainly was the opposite of a principled jurisprudence.

To be sure, the Court was not always so open-ended in their analysis of horizontal restraints. The Court, in *Socony-Vacuum Oil Company*, announced a per se rule against price fixing: “Under the Sherman Act a combination

49. *Id.*

50. ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* 116 (1995).

51. *Id.* at 121.

52. *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918).

53. *Id.* at 238.

54. *Id.* at 240.

55. BORK, *supra* note 5, at 46.

formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.”⁵⁶ As Taft’s opinion in *Addyston Pipe* had anticipated modern antitrust analysis of productive efficiency, so too did *Socony-Vacuum Oil Company* anticipate part of modern antitrust’s analysis. An agreement whose only aim is to reduce allocative efficiency will be condemned.

But in issues of monopoly, the New Deal-era judges tended to take the approach of categorical condemnation, even if the judges then tempered their intervention at the remedial stage. The most influential opinion was probably that of Judge Learned Hand in the *Alcoa* case.⁵⁷ There he suggested that the monopolist should be condemned unless he could show the monopoly was “thrust upon [him].”⁵⁸ Hand even suggested that the demands of customers could be enough to subject a monopolist to condemnation:

It was not inevitable that [Alcoa] should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel.⁵⁹

Thus, if a company had market power, doing the most normal practice in business—anticipating its customers’ needs—might become the basis of a judgment of illegal behavior. This approach had the advantage of providing clear rules, but not workable or economically plausible ones. *Alcoa* itself showed the unworkability of Hand’s standard, because when the time came to fashion a remedy for *Alcoa*’s lawbreaking, the Court flinched and refused to fully break up *Alcoa* or prevent it from engaging in its normal business activities—like anticipating the demands of its customers.⁶⁰

Thus, as a result of confusion in all three branches, antitrust in the Progressive and New Deal eras continued to alternate between sweeping condemnations of business practices based on rigid readings, and more permissive regimes that depend on unguided policy discretion.

The Warren Court is often thought the nadir of antitrust analysis as a matter of economic policy. But its jurisprudential approach was also very weak. For instance, its framework for evaluating challenged mergers created

56. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

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

58. *Id.* at 429.

59. *Id.* at 431.

60. *Id.* at 445–48.

a presumption against business combinations and it justified this presumption with contradictory policy claims. The early Burger Court was not much better. Perhaps concerned with the more freewheeling antitrust analysis in some earlier decisions of the Warren Court, it adopted a categorical reading of the Sherman Act's prohibition against restraints of trade, holding that it was up to Congress to permit partnerships among companies that would be efficient for consumers.

By the time of the Warren Court, economic analysis was common currency among antitrust lawyers, and the Court could not eschew it entirely.⁶¹ For example, the illegality of horizontal-market division, cartelization, price fixing, and group boycotts had already been established, and the Warren Court held the line on existing doctrine.⁶² But economics was not treated as outcome determinative, and the Court also openly operated with policy discretion that often was in tension with economic principles.⁶³

No decision about mergers is more problematic than Chief Justice Warren's opinion in *Brown Shoe*.⁶⁴ The case concerned a government challenge to a proposed merger between two manufacturers and retailers of shoes, which controlled a mere five percent of the national market between them.⁶⁵ The Court's analysis falters at several points, including the odd fashion in which it defined the relevant market.⁶⁶ But for our purposes, the most striking aspects of the case are two jurisprudential failures. First, *Brown Shoe* created a presumption against mergers by claiming that merger suggested a tendency for concentration by its very nature.⁶⁷ This is an example of reading the prohibition against combinations in a rigid way unleavened by any appeal to economic principle defining what combinations might actually be dangerous to competition.

Second, the Court demonstrated that it would supplement this presumption with its own policy discretion. And because it lacked any principled framework, the Court managed to contradict itself in its policy analysis within the space of a single paragraph:

61. See, e.g., *United States v. Cont'l Can Co.*, 378 U.S. 441, 453-55 (1964); *United States v. Aluminum Co. of Am.*, 377 U.S. 271, 279-81 (1964); *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363-64 (1963).

62. See Thomas E. Kauper, *The "Warren Court" and the Antitrust Laws: Of Economics, Populism, and Cynicism*, 67 MICH. L. REV. 325, 326 (1968).

63. See, e.g., *United States v. Von's Grocery Co.*, 384 U.S. 270, 278 (1966); *Brown Shoe Co. v. United States*, 370 U.S. 294, 344-46 (1962).

64. See generally *Brown Shoe*, 370 U.S. 294. See also *Von's Grocery*, 384 U.S. at 282-83 (expressing concern over both the present and future effects of a merger even where there existed a competitive market at the time).

65. *Brown Shoe*, 370 U.S. at 302-04.

66. *Id.* at 339-43. The Court considered only cities with populations of over 10,000 people where both companies had retail outlets instead of the national market.

67. *Id.* at 344.

A third significant aspect of this merger is that it creates a large national chain which is integrated with a manufacturing operation. The retail outlets of integrated companies, by eliminating wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, can market their own brands at prices below those of competing independent retailers. Of course, some of the results of large integrated or chain operations are beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.⁶⁸

The Court begins by suggesting that the Act protects competition, not competitors, and immediately recants by asserting that competitors must be protected.

Further, the Court's analysis of vertical restraints was little improved over the *Dr. Miles* era. For instance, in *Arnold, Schwinn & Co.*, the Court made the per se prohibition of vertical resale-price maintenance depend on the happenstance of whether the distributor parted title with the goods.⁶⁹ The decision proceeds by the parsing of property law to determine whether title has passed to the distributor and thus whether there is continuing agreement—another triumph of formalism over economic analysis.

In antitrust, as in other areas of law, the early Burger Court was more cautious than the Warren Court, but it still did not make much progress in antitrust. And again, there were notable jurisprudential failures. In *Topco*, for example, several relatively small grocery chains wanted to band together to compete against national chains like A&P.⁷⁰ They therefore created a private label of different foods to advertise and sell in their stores.⁷¹ As part of this pact, they agreed not to sell the label in one another's territories.⁷² Despite the obvious economic efficiencies of this arrangement, the Supreme Court condemned the arrangement as per se violation of the antitrust rules.⁷³

The Court justified its decision with a rigid formalism, saying that it was up to Congress to permit these kinds of agreements:

68. *Id.*

69. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 380–81 (1967).

70. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 598–99 (1972).

71. *Id.* at 599–600.

72. *Id.* at 601.

73. *Id.* at 608.

If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this too is a decision that must be made by Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decisionmaking. To analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required.⁷⁴

The obvious difficulty with the Court's position is that such formalism is unlikely to be able to identify the "myriad" circumstances in which agreements would be beneficial. Thus, the early Burger Court's formalism was no more successful in creating a coherent antitrust jurisprudence for horizontal restraints than the discretionary jurisprudence of Brandeis.

C. CONSUMER WELFARE, CONSENSUS, AND THE CHICAGO SCHOOL

In the 1950s and 1960s, a cadre of scholars passed through the University of Chicago Law School and studied under Aaron Director and Edward Levi.⁷⁵ These students, including Robert Bork, Locke Bowman, and Henry Manne, were instrumental in pushing antitrust policy towards economic rationality. The Chicago scholars advocated for a program that hinged on accepting consumer welfare as the organizing objective in antitrust law, and using microeconomic analysis to pursue this principle.⁷⁶

Key to this pursuit was the recognition that the best way to cash out on consumer welfare was by thinking in terms of allocative efficiency and productive efficiency. Allocative efficiency refers to society's resources being "allocated" to their highest value use, which in practice is associated with avoiding the deadweight loss that stems from anticompetitive practices such as monopoly pricing.⁷⁷ Productive efficiency refers to the production of goods at the lowest possible cost, and often hinges on the use of resources within an individual firm.⁷⁸ Allocative efficiency, on the other hand, is concerned with

74. *Id.* at 611-12.

75. See William E. Kovacic, *The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, 36 WAYNE L. REV. 1413, 1145-51 (1990).

76. Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 932 (1979).

77. William J. Kolasky & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, 71 ANTITRUST L.J. 207, 242 (2003) ("At the most general level, a market is said to achieve 'allocative efficiency' when market processes lead society's resources to be allocated to their highest valued use among all competing uses.").

78. *Id.* at 244 ("Productive efficiency exists when all goods are produced at the minimum possible total cost so that there is no possible rearrangement or alternative organization of

the allocation of resources across society as a whole.⁷⁹ Antitrust decision-making could then be framed around doctrine that sought to prevent practices that hurt allocative efficiency while making sure that the practices would not harm productive efficiency.⁸⁰

Beginning in the 1960s and 1970s, scholars began to take courts to task for the economic incoherence that plagued the case law, and for their failure to pursue consumer welfare with these economic tools. In *The Antitrust Paradox*, Bork argued that antitrust had so lost its way that it was not “intellectually respectable” as law.⁸¹ Chicagoans sought to repair this disarray by refocusing antitrust on consumer welfare. As such, the Chicago School was reticent to condemn many of the practices, like tying arrangements, predatory pricing, and resale-price maintenance that had previously been condemned, because they were likely often pro-consumer.⁸² The overarching theme for Chicago Schoolers was to permit a wide variety of business practices so long as they did not harm allocative efficiency, because such freedom of action promoted productive efficiency.

As a result, there was skepticism towards firms’ ability to achieve or enhance monopoly power through unilateral action, and the consequent principle that antitrust law should therefore focus its energies on a relatively few areas of real potential harm to allocative efficiency: cartels and large, monopoly-producing horizontal mergers.⁸³ The writings and ideas of the Chicagoans gradually gained traction with the judiciary, the antitrust bar, and the enforcement agencies. *The Antitrust Paradox* and fellow Chicagoan Richard Posner’s *Antitrust Law*,⁸⁴ among others, became required reading for any lawyer doing significant antitrust work.

The trend for this consistent consumer welfare analysis was advanced during the Reagan Administration. Both the Antitrust Division and FTC expressly disavowed the idea that “bigness is bad,”⁸⁵ opting to relax the merger standards and step down monopolization cases under section 2 of the Sherman Act.⁸⁶ And the shift towards a Chicago-influenced antitrust policy

resources (such as labor, raw materials, and machinery) that could increase the output of one product . . .”).

79. Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 239 (1985) (“Allocative efficiency is a much more global kind of efficiency than is productive efficiency.”).

80. *Id.* at 226 (“Economic efficiency, the pursuit of which should be the exclusive goal of the antitrust laws, consists of two relevant parts: allocative efficiency and productive efficiency.”).

81. See BORK, *supra* note 5, at 418.

82. See Posner, *supra* note 76, at 926–27.

83. See *id.* at 928.

84. See generally RICHARD POSNER, ANTITRUST LAW (1976) (espousing an intellectual framework for antitrust law heavily influenced by Director’s orthodox Chicago views).

85. REPORT OF THE FTC TRANSITION TEAM, *reprinted in* 127 Cong. Rec. 21,349, 21,350 (1981).

86. See, e.g., Kovacic, *Failed Expectations*, *supra* note 45, at 1140 (noting that the Reagan administration initiated only three new monopolization cases between 1981 and 1988).

did not subside thereafter. As Daniel Crane has noted, antitrust has become increasingly technocratic, disappearing from the rhetoric of politicians.⁸⁷ During his campaign, President Barack Obama suggested that he was likely to step up antitrust enforcement on the heels of the George W. Bush Administration's record of laxity.⁸⁸ Yet this has not occurred, and the number and types of cases filed have continued the now decades-long trend of continuity.⁸⁹

Economic analysis and Chicago School ideas have gradually permeated high court jurisprudence and percolated to the lower courts. The Court has made economically sound improvements to the law of resale-price maintenance⁹⁰ and tying,⁹¹ while establishing a reliable test for condemnation of predatory pricing.⁹² Lower courts have rationalized merger controls with the help of the Antitrust Division's guidelines.⁹³ As we discuss below, the Court has not found it necessary to overrule old cases in bulk, because precedents can instead be steadily eroded and replaced with rules that reflect the underlying economic principles.⁹⁴

Thus, modern antitrust law has been a transmission belt of economic principles from the legal academy to the enforcement agencies and finally to the courts. The results have been largely positive, garnering widespread praise.⁹⁵ This story of the antitrust revolution has often been told from an economic perspective. A tale not yet told is how it also represents a kind of jurisprudential revolution, making antitrust law the best example of a jurisprudence of principle in any major area of law. To understand its deep structure, we turn to jurisprudence and, in particular, to the theories of Ronald Dworkin.

87. See Crane, *supra* note 2, at 1160. Crane argues that this trend is not transitory nor the result of antitrust's diminished importance, but the product of a technocratic shift and broad consensus on antitrust enforcement. *Id.* But see Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 COLUM. BUS. L. REV. 335, 335-36 (noting the cyclical history of interventionist and relaxed antitrust enforcement and predicting an eventual return to the former).

88. See Daniel A. Crane, *Has the Obama Justice Department Reinvigorated Antitrust Enforcement?*, 65 STAN. L. REV. ONLINE 13, 13 (2012).

89. See generally *id.* (compiling statistics on antitrust filings by the Antitrust Division during the Obama Administration).

90. See generally *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007); *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

91. *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 35 (1984) (O'Connor, J., concurring).

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

93. See generally *Fed. Trade Comm'n v. Staples*, 970 F. Supp. 1066 (D.D.C. 1997).

94. See William H. Page, *Legal Realism and the Shaping of Modern Antitrust*, 44 EMORY L.J. 1, 49-51 (1995) (postulating that the influence of legal-process theory counseled a narrow and gradual approach to antitrust improvement). The notable exceptions to this trend are *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Khan*, 522 U.S. 3; and *Leegin*, 551 U.S. 877.

95. See, e.g., BORK, *supra* note 5, at ix.

III. DWORKIN'S JURISPRUDENCE OF PRINCIPLE

In this Part, we explicate Dworkin's theory of integrity, including his distinctive theory of statutory interpretation, to set the stage for our claim that this theory best explains and justifies antitrust jurisprudence. Dworkin does not dispute that law contains rules, but he also argues that it contains principles that can be gleaned from other materials. Because of judges' obligation to find the best fit among these materials, Dworkin contends that judges do not exercise discretion even in hard cases. We then examine some of the critics of Dworkin's framework, because we will later show that, however apposite in some contexts, they do not impugn its power in antitrust.

A. LAW AS INTEGRITY AND THE MYTH OF JUDICIAL DISCRETION

For much of the second half of the 20th century, just two men held the Chair of Jurisprudence at Oxford: H.L.A. Hart and Dworkin. While the latter was a student of the former, they developed differing theories on the role of judicial discretion.⁹⁶ To understand the ideas of Professor Dworkin, one must first confront the ideas of his predecessor, H.L.A. Hart, because it was Hart's theory of legal positivism that Dworkin began to counter in the 1970s and 1980s. To Hart, law consists of primary rules, like statutes, that govern primary conduct, and secondary rules that tell us when primary rules are recognized as law.⁹⁷ Primary rules, however, do not govern hard cases because they are open-textured and incomplete.⁹⁸ Thus, judges will often be confronted with problems that are not answered by the law. In these cases, the judges remain bound to settle the cases, but the extant legal materials compel no outcome. The judges will, by necessity, use discretion to supplement the legal rules created by the legislature and effectively create new legal rules.

Dworkin's theory of judicial discretion fundamentally rejects Hart's positivistic framework. Integrity maintains that judges decide cases based on principles—not only the rules laid down by legislatures—and in fact have no discretion, even when deciding hard cases.⁹⁹ If judges exercised discretion, they would be cast into a legislative, not a judicial role. But under the theory of integrity, the constraints of following principles require judges to choose the “right” answer to a problem and thereby prevent them from usurping the role of legislator.

Integrity, however, is not the equivalent of a jurisprudence where answers are dictated by the formalities of rules. It does not posit that the judge will

96. *Some History: How 'Oxford Jurisprudence' Came to Be*, U. OXFORD FAC. L., <https://www.law.ox.ac.uk/research-and-subject-groups/legal-philosophy-oxford/about-us/some-history> (last visited Aug. 30, 2016).

97. See Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 19–20 (1967) (discussing H.L.A. Hart's version of positivism).

98. See generally HART, *supra* note 12.

99. For a complete treatment of integrity, see DWORKIN, *supra* note 11, at 325–54.

find the exact answer she seeks by studying the strict text of the enacted law and formal precedent. Statutory and regulatory language ranges from specific to abstract. Where the statute or regulation is clear, the judge can take comfort in knowing she is following the will of the legislature or agency. But there will not always be clear text or a mandated rule that applies to the case at bar. Here, integrity departs sharply from the positivist framework by claiming that law is also governed by principles not contained within the statutory text.

1. Rules Versus Principles

Confronted with a case that yields no clear answer, integrity first directs judges to differentiate between rules and principles.¹⁰⁰ We are familiar with rules, and with the fact that positivists would have judges legislate on the fringes of rules where their scope and meaning become unclear. Principles, however, are something different. To Dworkin, they are the set of the community's beliefs about rights and obligations that best explain the political structure and legal system as a whole.¹⁰¹ These principles can be gleaned from a survey of laws, decisions, practices and even commonly accepted beliefs that have been enacted or handed down, even where the specific problem before the judge has not been previously contemplated.¹⁰²

Principles and rules also behave differently, insofar as the former can have weight, while the latter cannot.¹⁰³ Counter-instances of a rule undermine its vitality—if too many occur, the rule will be extinguished or changed, with an exception carved out. This is not so with principles, where counter-instances are not exceptions, and a principle can be dispositive in some settings while yielding in others. As an example, Dworkin posits the legal maxim, “[n]o man may profit from his own wrong.”¹⁰⁴ In many cases, the implications of this principle will definitively settle a case. But Dworkin also points out instances where the law in fact allows a wrongdoer to keep his profits, most notably, the long-established law of adverse possession.¹⁰⁵ As another useful example, he posits the principle that auto manufacturers should be held to a higher standard of care than other manufacturers, which could in many instances interfere with a competing principle, that individuals and companies have the freedom to contract.¹⁰⁶ No matter which principle triumphed in a given dispute, the other would not be changed or eradicated,

100. See generally Dworkin, *supra* note 97 (discussing the differences between rules and principles and the practical consequences of the distinctions).

101. *Id.* at 23.

102. See DWORKIN, *supra* note 11, at 243.

103. See Dworkin, *supra* note 97, at 27.

104. *Id.* at 25.

105. *Id.*

106. *Id.* at 27.

and could easily be dispositive in a different situation. But identifying principles is only the judge's first step, as we shall see shortly.

Integrity's treatment of principles begins its divergence from positivism. Certainly, a judge subscribing to a positivist theory of discretion could seek to ascertain community principles and to employ them to reach her decision—doing so would, in many cases, be a hallmark of deliberate and thoughtful judging. But these principles do not bind a positivist judge, certainly not in the strict sense that she is bound from a clear, textually based rule.¹⁰⁷ A judge subscribing to integrity, however, is as bound to the principles she is able to ascertain as she is to a clear legislative directive, and not merely deciding on the basis of what she regards as the best policy. In fact, a judge will often find herself forced to choose between arguments of principle and those of policy in justifying her decision.

2. Principles Versus Policies

Principles and policies behave similarly. They can both have weight, and are not undermined or altered when a competing policy or principle trumps them in a given case. But Dworkin defined policies as justifications for decisions that advance or protect “some collective goal of the community as a whole,” while principles justify decisions by purporting to enforce group or individual rights.¹⁰⁸ The formulation of policies is plainly the stuff of legislation, and the positivist concedes that judges should use policies to help decide cases where there is a dearth of satisfactory alternatives. However, Dworkin is wary of judicial use of policy justifications for two primary reasons. First, there is the objection that judges lack accountability, and are deprived the benefit of various interest groups and outsider input that would enable them to make good policy.¹⁰⁹ Second, judicial policymaking—i.e., judicial craftsmanship of new legislative rules—risks imposing a new duty on a litigant that he did not have at the time he acted—a very problematic result from a legal- and political-theory standpoint.¹¹⁰

To avoid these problems, Dworkin directed judges away from policy and toward principle. He suggests that when a judge is able to discover and faithfully apply principles underpinning a statutory, regulatory, or doctrinal scheme, she is not imposing a new duty on a litigant before her, but rather enforcing the preexisting rights and duties that the litigant already enjoyed. Indeed, the judge, isolated from political pressure as she is, is in the best position to evaluate arguments appealing to rights.¹¹¹ By adopting a

107. See HART, *supra* note 12, at 272–76.

108. Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1059 (1975).

109. *Id.* at 1061–62.

110. *Id.*

111. *Id.* at 1062–63. Of course, elected judges are not entirely isolated from the whims of the majority, but their decisions may be less likely to be subject to the same democratic discipline as an elected legislature.

principles-discovering paradigm, Dworkin claimed to harmonize the relationship between judicial decision-making and institutional constraints.¹¹² Where a judge lacks a principles-based mindset, her approach may be thought decidedly positivist—see how far the law takes her, and then forge ahead alone to formulate new policy. Using principles, however, this tension evaporates. The judge can consider all institutional constraints, and couple them with another demand of principle—consistency.¹¹³ Policies can change over time without intellectual dishonesty. Dworkin argued that this simply is not the case with principle.¹¹⁴

3. Doing Integrity

Dworkin then described a method of using principles to find the right answers. But doing integrity is no easy task. His method is such a labor that he was forced to create a judge called Hercules—a judge with the limitless time, wisdom, and patience necessary to inspect all of the relevant legal materials and precedents.¹¹⁵ But the impossibility of the task laid out does not undermine the validity of his theory, Dworkin claimed, because a conscientious judge will automatically perform many of the same functions as Hercules in developing her own coherent framework of the law. Hercules is simply a heuristic device designed to reveal integrity in its most sophisticated form.¹¹⁶

Integrity requires a two-step approach: a proposed legal theory is first tested for fit, and then for justification.¹¹⁷ The idea behind the model is to allow judges to “decide hard cases by trying to find, in some coherent set of principles about people’s rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community.”¹¹⁸

Preliminarily, integrity requires a judge to examine any potential legal theories for “fit” with existing institutional and political history. The careful jurist’s goal is to discover a theory to resolve the case that would allow a single officer, using the theory, to arrive at the same result as the relevant precedents

112. As we shall see, judges will often consider arguments of policy when interpreting statutes. Yet this is no exercise in positivism, because they will be considering the policies put forth by the legislature, as opposed to substituting their own as a positivist would have them do. Consideration of legislative policies in this statutory realm therefore mirrors principle analysis in common law cases. *See infra* notes 135–36 and accompanying text.

113. Dworkin, *supra* note 108, at 1063–64.

114. We recognize that some may believe that the principles of antitrust do not resemble the principles used in Dworkin’s integrity jurisprudence. We address those objections *infra* in notes 230–53 and accompanying text.

115. DWORKIN, *supra* note 11, at 239.

116. *Id.* at 245.

117. *See generally id.* at 227–58 (describing integrity in detail).

118. *Id.* at 255.

before her.¹¹⁹ Any that cannot be reconciled with the principles underlying the bulk of relevant precedents should not be given credence. Requiring fit screens out many theories that a judge might personally prefer.¹²⁰ Of course, no principle or theory is likely to explain every existing precedent or practice, and integrity does not require this result, but rather counsels judges to find the best fit possible.¹²¹

The more pressing problem for the judge will be to decide which course of action to take when multiple theories fit the decisional history, but would resolve the case at bar differently. Integrity's first move in this situation is to expand the range of cases under consideration.¹²² To borrow Dworkin's example, suppose that three given theories would result in varying damage awards in a tort action alleging emotional injury.¹²³ All three theories are consistent with the existing emotional-injury precedents, which may lead the positivist to conclude that the law is open-textured and allows them complete discretion. Under the theory of integrity, however, the judge cannot limit her search to tort cases awarding emotional damages, but must also ensure fit with cases in other categories of law so long as the underpinnings of the cases are similar.¹²⁴ The theory disavows a rigid compartmentalization of legal concepts and doctrines, because its chief goal is to improve the coherence and justification for law as a whole.¹²⁵

Thus the judge might look to other negligence cases for guidance in her emotional injury inquiry, or even to nuisance or contract cases insofar as they might be undergirded by similar principles. If there is a principled distinction between bodies of law, then a judge need not make a theory fit across the gulf.¹²⁶ Thus, a judge doing integrity would not disregard all categorical distinctions. She may not, for example, import a principle justifying a civil fine into the criminal context because of the different standards of proof.

A judge choosing from among theories is likely to have a plethora of materials to confront when discerning fit. Again, her task is not to find a theory that fits all of the materials, or even the theory that aligns with the most cases, but rather to determine the one that best fits the principles underlying the body of law as a whole.¹²⁷ Of course, even employing this methodology, a judge will be confronted with hard cases where multiple theories can be made

119. *Id.* at 240.

120. For example, Dworkin dismisses out of hand any working theories that might disavow legislative supremacy or favor any roughshod, heavy-handed redistribution of wealth between rich and poor. *Id.* at 255.

121. *Id.*

122. *Id.* at 252.

123. *Id.* at 247–50.

124. *Id.*

125. *Id.* at 251.

126. *Id.* at 251–53.

127. *Id.* at 249.

to fit the precedents. But Dworkin posits that the judge remains constrained nonetheless, by the second requirement of integrity, which he terms “justification.”¹²⁸ At this step, he posits that all functioning justice systems must be rooted in principles of justice, fairness, and procedural due process. In light of this, a judge in a given situation must choose the theory that best reflects the substantive “political morality” of the system and the community as a whole.¹²⁹

Dworkin provided an illustration. He returned to his damages problem, namely, the extent of a tort victim’s right to compensation for negligently caused emotional harm. His omniscient judge Hercules has whittled the contending theories down to two: (1) “People have a moral right to compensation for emotional or physical injury that is the consequence of careless conduct, but only if that injury was reasonably foreseeable by the person who acted carelessly;” and (2) “People have a moral right to compensation for reasonably foreseeable injury but not in circumstances when recognizing such a right would impose massive and destructive financial burdens on people who have been careless out of proportion to their moral fault.”¹³⁰ The judge has exhausted all of his fit inquiries, and cannot arrive at an answer. This is where the enduring values of justice, fairness, and due process come in.¹³¹

Professor Dworkin conceded that different judges performing the same analyses will not invariably arrive at the same answer. But what makes integrity different, he argues, is that disagreements will stem not from disagreements about policy or ideology, but rather from different perceptions about the fit of legal materials or community morality.¹³² While these leave room for

128. *Id.* at 255–56.

129. *Id.* at 256.

130. *Id.* at 241.

131. As Dworkin put it:

[The judge must consider] which of these principles is superior as a matter of abstract justice but also about which should be followed, as a matter of political fairness, in a community whose members have the moral convictions his fellow citizens have. In some cases the two kinds of judgment—the judgment of justice and that of fairness—will come together. . . . [The judge] may think that interpretation [1] is better on grounds of abstract justice, but know that this is a radical view not shared by any substantial portion of the public and unknown in the political and moral rhetoric of the times. He might then decide that the story in which the state insists on the view he thinks right, but against the wishes of the people as a whole, is a poorer story, on balance. He would be preferring fairness to justice in these circumstances, and that preference would reflect a higher-order level of his own political convictions, namely his convictions about how a decent government committed to both fairness and justice should adjudicate between the two in this sort of case.

Id. at 249–50.

132. *Id.* at 250.

interpretation, Dworkin argued that they are independent of the judge's personal preferences, and constraining on the judge nonetheless.

4. Reading Statutes with Integrity

Antitrust analysis places the judge in the realm of statutes. But finding the meaning and scope of a statute is as susceptible to integrity's methodology of fit as the common law tort described above, according to Professor Dworkin. Integrity treats the enacting legislature as author of relevant precedent, albeit one with a charge that differs from a judge.¹³³ The central crux of the inquiry will remain the same—the judge still seeks to read the statute in a way that best fits and justifies the legislative processes and relevant statutory schemes as a whole.

One difference in statutory interpretation quickly emerges, however. When a judge sets out to interpret the meaning of a statute, she is no longer constrained to arguments of principle, but is obligated to consider the policies that the legislature might have intended to promote.¹³⁴ Choosing from among policies is no judicial blank check, however, and any justification in a given case cannot disregard a clear textual purpose. To again borrow Dworkin's example, any arguments made about the ambit of the Endangered Species Act could not disavow the protection of wildlife as a policy or purport to subordinate it to a tangential goal not present on the face of the text.¹³⁵ But in hard cases coming before the judge, she is likely to be faced with competing policies and principles, and must decide how these can be reconciled to best justify the overall scheme.

In light of this, the task of deciphering what goals the legislature meant to promote and how it would react to a given problem extends beyond the familiar methods of legislative history analysis, where the inquiry tends to focus on discerning the intent of the legislative speaker.¹³⁶ Professor Dworkin advocated the use of legislative history to discover intent, but not for the purpose of discovering the mental state of the legislators.¹³⁷ Instead, Dworkin noted the special importance of certain types of legislative statements, which are typically elevated in importance over others. For example, the statement of the bill's sponsor on the floor of the legislature, or a formal statement from a committee hearing tend to garner judicial attention as especially insightful to legislative purpose.¹³⁸ Professor Dworkin doubted the reliability of these statements as indicative of congressional mood, while suggesting that these

133. *Id.* at 313.

134. *Id.* at 339.

135. *Id.*

136. Professor Dworkin offered a thorough rebuttal of what he terms the "speaker's meaning" method of analyzing legislative history, which we will explore more fully *infra* Part IV.B.i.

137. DWORKIN, *supra* note 11, at 342–43.

138. *Id.*

formal statements are political “acts” themselves.¹³⁹ Formal statements made by legislators are deliberate acts, and elected officials choose and receive the ideas in them with “more than ordinary care.”¹⁴⁰ Whether or not they represent what legislators really believe is irrelevant; the importance of these statements to Dworkin is that they are the representations made to the public, and therefore create some expectations as to what the statute might mean.¹⁴¹ Thus, a judge should incorporate these types of statements into her integrity analysis, as they have informed the community’s conceptions of the law; a theory that is consonant with both the text and these statements is to be preferred.¹⁴²

As we shall see, our own characterization of modern antitrust as a jurisprudence of principle mirrors much of the approach of integrity. Integrity, however, has been subject to many criticisms to which we now turn. We do so to set the stage for our explanation of why a jurisprudence of principle in antitrust avoids these criticisms.

B. ATTACKS ON INTEGRITY

Professor Dworkin’s work on discretion has been critiqued on a number of substantive points. Critics have arisen both from the ranks of Hart’s positivist disciples and from other contemporary legal philosophers. While Dworkin’s critics acknowledge the significance of his work, they cast doubt on both Dworkin’s distinction between rules and principles and on the ability of integrity to limit discretion in the way that Dworkin describes.

Joseph Raz, among Dworkin’s earliest critics, finds distinguishing between rules and principles not as simple as Dworkin suggested. Raz describes rules as “prescrib[ing] relatively specific acts[,]” and principles as “prescrib[ing] highly un-specific actions.”¹⁴³ With this definition, the distinction between the two will be “one of degree,” leaving us with many hard cases where “it will be impossible to say that we definitely have a rule or definitely a principle.”¹⁴⁴ Moreover, he argues that principles themselves presuppose the existence of discretion, insofar as they can be vague and require permutation to apply to a given case.¹⁴⁵ Because Dworkin acknowledged that principles can have different weights, Raz contends that the act of weighting will be itself an act of discretion.

139. *Id.*

140. *Id.*

141. *Id.* at 344–45.

142. Dworkin also suggested that the meaning of a statute is not fixed at any specific point in time. That is to say, there is no reason that the only canonical statements of relevant legislation occur at the time of enactment, but can rather be shifted by later statements, reactions, and court decisions. We neither endorse nor rely on this aspect of his methodology.

143. Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 838 (1972).

144. *Id.*

145. *Id.* at 846–47.

Raz also has serious misgivings about Dworkin's comfort with drawing principles from the common political morality of the community. First, he is concerned that the existence of common moral principles is a myth, particularly in diverse and pluralistic societies.¹⁴⁶ Moreover, to the extent that a common morality does exist, it is likely to be on only the highest levels of generality (the more specific the principle posited, the more capacity for disagreement). Thus, any principles fairly representative of community consensus will be far too indeterminate to give the judge guidance in deciding a case where legislatively or judicially created rules have been exhausted.¹⁴⁷

Kent Greenawalt finds integrity's reliance on principles as a method of getting determinate answers problematic.¹⁴⁸ He argues that a judge deciding a hard case and doing integrity will inevitably use discretion, first in choosing the theory or theories of best fit, and then in prioritizing the principles that will dictate the result.¹⁴⁹ He claims that where multiple principles of relatively equal magnitude are implicated, that the judge will inevitably use personal preference in deciding which to implement.¹⁵⁰

All this suggests that a judge doing integrity would really just be mimicking a judge who embraces positivism. But Greenawalt suggests that embracing integrity could have more insidious consequences. A positivist judge in a hard case is under no illusions that the law is determined or that she is compelled to an answer, but instead must weigh social interests and policy arguments.¹⁵¹ The fair judge will therefore acknowledge her own personal preferences and may consciously prevent them from holding undue influence. On the other hand, the judge doing integrity believes that the principles of best fit she has found are independent of her preferences.¹⁵² Because Greenawalt doubts a judge's ability to prioritize principles without injecting her own values, he suggests that the judge doing integrity is less likely to consider opposing viewpoints and may act less restrained than the positivist.¹⁵³

146. *Id.* at 850. Raz considers the myth to be a socially damaging one at that. He suggests that the community's common moral principles will inevitably be the principles of the dominant social group, which marginalizes the morals and practices of minorities and the politically powerless. *Id.*

147. *Id.*

148. Kent Greenawalt, *Discretion and Judicial Discretion: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359, 362 (1975).

149. *Id.* at 386.

150. *Id.*

151. *Id.* at 362.

152. *Id.*

153. Hart himself was another sophisticated critic of Dworkin. He failed to publish a response to Dworkin during his lifetime, but a Postscript to *The Concept of Law* was discovered posthumously. Like Raz, Hart attacked Dworkin's position that principles can have weight while rules do not, and posits that the difference between rules and principles is not so stark as Dworkin imagines. HART, *supra* note 12, at 262. Hart claimed that Dworkin's dichotomy between rules and principles is defeated even by the example he cited. The famous New York case where a court

Scott Shapiro, a more recent critic, finds integrity inconsistent with law's overriding purpose—social planning. The crux of Shapiro's "planning theory" of law is that "laws are plans or planlike norms [that] guide and organize the conduct of members of a community both over time and across persons."¹⁵⁴ Legal systems create these plans to answer pressing questions of moral and political philosophy and to accomplish moral objectives—the balance of rights with utility, maintenance of order, and mechanisms for private order and dispute resolution, just to name a few.¹⁵⁵

But if the purpose of law is planning, "[t]he existence and content of a plan cannot be determined by facts whose existence the plan aims to settle."¹⁵⁶ This, according to Shapiro, is exactly what integrity seeks to do by its prescribed methodology of using community and political morality to solve hard cases. Because the legal materials that exist were created to answer moral questions, interpretations of them to meet new challenges cannot be found by resorting to moral principles.¹⁵⁷ To do so "unsettles" the work that was already done in creation of the norm.¹⁵⁸

Finally, Shapiro points out that Dworkin's methodology was inconsistent with the allocation of trust in the American institutional legal framework. Integrity requires sophisticated analyses into moral and political principles. Shapiro contends that because of the abstract and inaccessible nature of the inquiry, any official entrusted with it would have to be trusted.¹⁵⁹ Yet the community will be unable to monitor or assess the philosophical heavy lifting of judges or political officials doing integrity, thus making that trust impossible. This insulating effect thus undermines integrity's viability.¹⁶⁰

It is not our purpose here to resolve the general debate between Dworkin and his critics. But what is interesting about the jurisprudence of antitrust is that it is one area where criticisms of integrity have little bite. Microeconomic

refused to allow the deceased's murderer to inherit despite the contents of the will is an example of a time where a rule yielded to a stronger principle. *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889). Hart suggested that the existence of this competition shows that rules do not have the all-or-nothing character Dworkin suggests. HART, *supra* note 12, at 262. When it comes to judicial employment of these rules and principles, Hart pointed out that the choosing between principles entails discretion. *Id.* at 275. In doing so, the judge acts like a "conscientious legislator," guided by a "sense of what is best and not" to make her decision. *Id.* Finally, Hart met Dworkin's charge that judicial lawmaking is necessarily *ex post facto*. He posits that the only situations where judges would employ their discretion are where the pedigreed legal materials can truly evince no answer. Thus, while *ex post facto* lawmaking is typically objectionable for its ability to upset expectations, where the law is completely unsettled and incomplete, it is unreasonable for a party to form an expectation of any right or duty. *Id.* at 276.

154. SCOTT J. SHAPIRO, LEGALITY 274 (2011).

155. *Id.* at 309.

156. *Id.* at 278.

157. *Id.* at 311.

158. *Id.*

159. *Id.* at 324–29.

160. *Id.*

principles are now widely accepted in the community. They are clearly different from rules and principles in other cases. Yet they are sufficiently articulate to decide concrete cases and constrain judicial discretion.

IV. INTEGRITY AND ANTITRUST

In this Part, we show that integrity accurately depicts modern antitrust jurisprudence and its overriding interest in consumer welfare. First, we show how integrity's fit and justification approach applies to antitrust. Consumer welfare as antitrust's guiding principle provides the best fit for antitrust statutes as a whole because although legislators mentioned other objectives, they did not believe they were in conflict with the first and overriding objective of consumer welfare. Moreover, even if other principles can compete in terms of fit, they cannot compete in terms of justification, because they cannot be coherently achieved by judges in antitrust cases, and are better undertaken by other kinds of legislation. Thus, consumer welfare is the principle best justified as a matter of modern political morality, which has rule-of-law values that seek to constrain judicial discretion, as well as many other public laws that are better tailored to meet the other goals sometimes attributed to antitrust.

Second, we show that integrity explains the structure of modern antitrust law. As already outlined, after the antitrust revolution, economic principles—rather than statutory text, precedent, or policy discretion—have become central to the development of antitrust. Moreover, integrity explains important but unusual features of antitrust law, such as why the past precedent has little generative power and why the Department of Justice/Federal Trade Commission guidelines have such persuasive power to the judiciary. Finally, the power of integrity in antitrust is also reflected by its ability to answer the critics of integrity in this specific context, even if not in others.

A. *THE DWORKINIAN FIT AND JUSTIFICATION OF CONSUMER WELFARE IN MODERN ANTITRUST*

1. Antitrust's Fit with Consumer Welfare

In this Section we show how Dworkin's theory of statutory interpretation helps the judiciary to choose to advance the consumer-welfare principle in the first place. We agree with the general view that the Sherman Act's dominant concern is consumer welfare.¹⁶¹ But when it comes to the Clayton Act and Robinson–Patman Acts, even Bork and other defenders of consumer welfare concede that many of the legislators who supported the bills sought to reduce concentration and protect small business and independent producers.¹⁶² But the modern Court has largely ignored such objectives.

161. BORK, *supra* note 5, at 61–66.

162. *Id.* at 63.

Indeed, there are very few modern cases where the subsequent statutes are doing work independent of the Sherman Act.

Under a Dworkinian view, consumer welfare remains the best fit for all three statutes. Though legislators enacting the later laws focused on such matters as reducing concentration, they may have thought such measures effective ways of improving consumer welfare. Modern economic theory shows that these objectives are not actually compatible with the promotion of consumer welfare and that they should thus be subordinated to the consumer-welfare goal.

Integrity—this time the theory as applied to statutory interpretation—explains why nonconsumer-welfare goals must yield. As we noted earlier, a judge doing integrity does not examine a law’s legislative history to discover the beliefs or meaning of the speaker, as many examiners of the antitrust bills in Congress have done.¹⁶³ Professor Dworkin noted a substantial number of problems with such an approach: Assuming a judge is able to ascertain the opinions of all the legislators who passed a bill,¹⁶⁴ how is she to decide which of the range of opinions on the issue before her should control? Should it be the most common opinion among enacting legislators, even if they would not have been numerous enough to pass the bill standing alone? Or should she instead blend the opinions into some composite or average opinion? And even assuming the enacting legislators all shared the same opinion, deciphering intent from the complex series of beliefs, expectations, and hopes that they held is no easy task.¹⁶⁵

Professor Dworkin instead prescribed a different sort of inquiry to try to measure the fit of principle with statute: “what position [on the issue before the judge] follows most naturally from [the legislature’s] political convictions, so far as he has been able to discover these?”¹⁶⁶ By convictions, he referred to the set of beliefs that the judge is able to decipher by looking at the legislature’s record as a whole and finding the principles that best underpin a specific legislative scheme.¹⁶⁷ Just as a judge evaluating precedents was charged with finding principles of best fit across the span, she must here find the convictions that best fit, creating “a structured system of ideas, made coherent so far as this is possible.”¹⁶⁸

163. See *supra* notes 137–42 and accompanying text.

164. Professor Dworkin set aside the substantial evidentiary difficulty of doing so, and we follow suit. See DWORKIN, *supra* note 11, at 318–21.

165. *Id.* at 321–27.

166. *Id.* at 328.

167. *Id.* at 329 (A legislator’s “votes should be evidence of her convictions, but they are not statements of them in the way a speaker’s sentences are statements of the thought he uses them to express.”).

168. *Id.* at 330. Recall that integrity does not look only to the actual votes cast, but also has a role for statements in legislative history. Rather than revealing the mental state of the speaker, Professor Dworkin would have us view these statements as “political acts” themselves. Our

Consider now the statutory scheme in antitrust, where we know that conflicting convictions animate the legislative history, particularly with the passage of the Robinson–Patman Act and Celler–Kefauver Amendments to the Clayton Act, with their seeming emphasis on protecting small businesses.¹⁶⁹ However, these laws were not billed as exceptions to the antitrust laws for the purpose of protecting small business, but rather as prophylaxes designed to ferret out early practices that would lead to less competition and thereby harm consumers.¹⁷⁰ Thus, the legislature never disavowed a consumer-protection paradigm, and doubtless many would not have supported a bill they knew to do so (laws that harm the consumer are no easy sell to constituents). In fact, it seems likely that the legislature thought the goals of small-business protection and consumer-welfare promotion perfectly compatible, and that the laws therefore reflect a bad economic understanding, not a shift in congressional design.¹⁷¹

Integrity provides us with a mechanism to deal with just this sort of conflict among legislative convictions. Suppose a legislator voting for the Robinson–Patman Act held the definite opinion that the law should help small grocers withstand the onslaught of chain stores. Yet he also held the more abstract conviction that the antitrust laws generally should exist to promote consumer welfare. Dworkin specifically considered the example of a judge who “suspects that some of [his] concrete opinions are in conflict with, and are condemned by, [his] more general and fundamental political convictions.”¹⁷² The judge may conclude that the legislator made a mistake in deciding that he could protect small grocers here while still honoring consumer welfare, and may thus conclude that his more consistent and fundamental conviction should prevail.¹⁷³ Extrapolating this point to Congress is to come back to our familiar integrity parlance: the consumer-welfare purpose fits better across the statutory scheme, read as a whole and seen in the best light. Reconciling the purpose in this way also helps us to understand more recent judicial hostility towards the prophylactic measures in the later enactments and amendments¹⁷⁴—once we are able to determine our primary purpose, we can use economic subprinciples to show that the prescribed measures are often inconsistent with our goal.¹⁷⁵ This reading of

coherent set of structured ideas must therefore consider these statements along with the voting record in attempting to find principles of best fit. *See supra* notes 138–42 and accompanying text.

169. *See supra* notes 3–10 and accompanying text.

170. *See BORK, supra* note 5, at 47–49.

171. *See id.*

172. DWORKIN, *supra* note 11, at 330.

173. *Id.* at 332.

174. *See* Daniel A. Crane & D. Daniel Sokol, *The Antitrust-Busters with Gavels*, WALL STREET J. (last updated Apr. 26, 2013, 12:14 PM), <http://www.wsj.com/articles/SB10001424127887323789704578442540231412194>.

175. It may well be that Dworkin’s integrity approach is not consistent with interpreting all statutes. For instance, if there were a complex statutory scheme where different interest groups

the statutes explains how the Court has read these different statutes largely in harmony with the consumer-welfare principle.¹⁷⁶

Nevertheless, some may suggest that there remains an ambiguity in the consumer-welfare concept itself. For instance, while Bork termed his admonition a call for a consumer-welfare standard, he was clear that he actually favored a “total surplus” or “aggregate welfare” standard, as is obvious by his claims that the Sherman Act was meant to promote wealth maximization and allocative efficiency.¹⁷⁷ A total-surplus standard includes producer surplus, or the difference between the seller’s cost of provision and the purchase price, as well as consumer surplus.¹⁷⁸ In contrast, consumer surplus would maximize the difference in price the buyers would be willing to pay and what they actually pay.¹⁷⁹

But this disagreement does not substantially undermine a Dworkinian view of antitrust. First, almost no cases have turned on the distinction.¹⁸⁰ Not only do consumer-surplus advocates adopt total-surplus arguments,¹⁸¹ total-surplus advocates often defend their position on consumer-welfare

negotiated different provisions for their benefit, there may be no overriding principle to which to appeal. It would then be difficult to fill in interstices of the statutes with any principle, because there would be only be conflicting values appealing to different interests. But the antitrust statute did begin with a dominant principle and the provisions of the Sherman Act and even subsequent statutes remain sufficiently abstract to permit this principle to continue to predominate. Dworkinian integrity can work here, even if cannot in other statutes, just as Dworkinian integrity has the subprinciples generated by economics to cash out principles here, even if does not in other legal areas.

176. John E. Lopatka & William H. Page, *Monopolization, Innovation, and Consumer Welfare*, 69 GEO. WASH. L. REV. 367, 368 (2001) (“For the most part, the modern Supreme Court has endorsed this goal [of consumer welfare], invoking it in framing the doctrines of attempted monopolization, non-price vertical restraints, maximum resale price fixing, and antitrust injury.” (citation omitted)).

177. Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 7 (1966) (“[T]he policy the courts were intended to apply is the maximization of wealth or consumer want satisfaction. This requires courts to distinguish between agreements or activities that increase wealth through efficiency and those that decrease it through restriction of output.”). Allocative efficiency focuses on putting goods and services in the hands of those that value them the most. Maximum allocative efficiency is attained where “the cost of resources used in production is equal to the consumer’s willingness to pay.” Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 141 (2011).

178. Orbach, *supra* note 177, at 139.

179. ALFRED MARSHALL, *PRINCIPLES OF ECONOMICS* 199 (4th ed. 1898).

180. Roger D. Blair & D. Daniel Sokol, *Welfare Standards in U.S. and E.U.: Antitrust Enforcement*, 81 FORDHAM L. REV. 2497, 2500 (2013) (“Most of the time, the welfare standard does not matter.”); Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1703 (1986) (“There are differences at the margins, such as what if anything to do about price discrimination that rakes in money for large firms but may increase output, but the differences are not very important. In the long run consumers gain the most from a policy that emphasizes allocative and productive efficiency.”); Herbert Hovenkamp, *Implementing Antitrust’s Welfare Goals*, 81 FORDHAM L. REV. 2471, 2474 (2013) (“Few if any decisions have turned on the difference.”).

181. See Blair & Sokol, *supra* note 180, at 2500 n.12 (citing articles contending that a consumer-surplus standard will increase total welfare).

grounds.¹⁸² And it is not surprising that the terms are used interchangeably, because they are so related: The total-surplus standard actually reflects a belief that it is the most effective way to improve consumer surplus in the long term both through innovation or other efficiencies. In other words, recognizing consumer welfare as a long-term goal may be to embrace total surplus in the short run.¹⁸³

In any event, we do not believe this issue makes much difference to the overall success of Dworkinian integrity as a description of the modern antitrust enterprise. To the extent that the standard remains unsettled, judges may have an enclave of discretion in the small class of cases where a consumer-surplus goal would differ from a total-surplus one. But this would be a small pool of discretion surrounded by a vast land of principle.

2. Consumer Welfare as a Dworkinian Justification

Even assuming that the statutory framework can yield goals other than consumer welfare, these cannot be as well-justified in a Dworkinian sense as consumer welfare. It is true that some commentators have continued to argue that antitrust law should reflect other economic and noneconomic aims.¹⁸⁴ Alternative principles suggested include equality, political decentralization, and the protection of small business.¹⁸⁵ But none of these principles reflect a plausible “political morality,” in Dworkin’s term, given that our political morality includes matching statutory schemes to those objectives they can actually carry out effectively, and also rule-of-law values that are concerned with limiting judicial discretion.

The rejection of populist and nonefficiency goals by both the Chicago and Harvard school commentators¹⁸⁶ reflects a determination not only that antitrust is a poor mechanism for accomplishing many of these alternative

182. See, e.g., Thomas O. Barnett, *Maximizing Welfare Through Technological Innovation*, 15 GEO. MASON L. REV. 1191, 1199 (2008) (discussing the importance of innovation for increasing both total and consumer welfare); Alan J. Meese, *Reframing the (False?) Choice Between Purchaser Welfare and Total Welfare*, 81 FORDHAM L. REV. 2197 (2013) (arguing that merger efficiencies may increase consumer surplus in different markets).

183. K. J. Cseres, *Controversies of the Consumer Welfare Standard*, 3 COMPETITION L. REV. 121, 125 (2007).

184. See generally Maurice E. Stucke, *Reconsidering Antitrust’s Goals*, 53 B.C. L. REV. 551 (2012).

185. See Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 50 HASTINGS L.J. 871, 875 (1999) (“A second group of analysts believe that in addition to enhanced economic efficiency, various social, moral, and political goals were important to the antitrust laws’ framers.”); see also generally Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. PITT. L. REV. 503 (2001).

186. William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 35 (“Although Chicago School and Harvard School scholars do not define efficiency identically, the two schools discourage consideration of non-efficiency objectives such as the dispersion of political power and the preservation of opportunities for smaller enterprises to compete.”).

goals, but that their inclusion quickly gives rise to the sort of incoherence and unpredictability that motivated Bork to write *The Antitrust Paradox* in the first place.¹⁸⁷ For example, antitrust is, at best, an inefficient vehicle for promoting equality or distributive goals, which are better accomplished through a direct tax and transfer system.¹⁸⁸ The redistributive effects brought about by a tax and transfer system are not only more certain, they are better targeted and achieved at a lower cost than effects achieved through competition policy.¹⁸⁹ There are similar reasons to be skeptical about antitrust's potential for promoting other equity goals like dispersing political or market power.¹⁹⁰ Given the potential for competing interests and political tradeoffs, sector regulation, legislation and taxation may be more desirable tools than antitrust for addressing concerns about concentrated power and inequality.¹⁹¹

Second, given that it is impossible for antitrust to exclude considerations of efficiency and consumer welfare, adding other goals creates substantial

187. Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 *FORDHAM L. REV.* 2405, 2406 (2013) (“The promotion of economic welfare as the lodestar of antitrust laws—to the exclusion of social, political, and protectionist goals—transformed the state of the law and restored intellectual coherence to a body of law Robert Bork had famously described as paradoxical.”); see also Diane R. Hazel, *Competition in Context: The Limitations of Using Competition Law as a Vehicle for Social Policy in the Developing World*, 37 *HOUS. J. INT’L L.* 275, 337–38 (2015) (“Those who disagree with the inclusion of industrial policy objectives also emphasize that competition law is not a useful tool by which to try to obtain economic equality, and that it is not well suited for achieving employment or other economic or social policy objectives. . . . Beyond competition laws’ limitations in achieving other objectives, many point to the inherent tension that results when considering public interest factors alongside economic factors in a single evaluation, arguing there is no clear way to balance the competing goals.”).

188. Kenneth G. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 *U. PA. L. REV.* 1191, 1195–96 (1977) (finding antitrust is poorly equipped to effect redistribution, protect small businesses or promote neutral treatment of minorities); Joseph Farrell & Michael L. Katz, *The Economics of Welfare Standards in Antitrust*, 2 *COMPETITION POL’Y INT’L*, Jan. 2006, at 10–11 (“A number of reasons suggest that antitrust policy is poorly suited as a redistribution vehicle in comparison with various tax and subsidy schemes.” (citation omitted)).

189. Louis Kaplow, *On the Choice of Welfare Standards in Competition Law* 19 (John M. Olin Ctr. for Law, Econ., & Bus., Discussion Paper No. 693, 2011), http://www.law.harvard.edu/programs/olin_center/papers/pdf/Kaplow_693.pdf (“[I]t is more efficient to confine competition law to the maximization of total welfare and achieve redistribution solely through the tax and transfer system. The same redistribution can be achieved at less cost, or more redistribution at the same cost; in general, all income groups can be made better off.”).

190. Jonathan B. Baker, *Preserving a Political Bargain: The Political Economy of the Non-Interventionist Challenge to Monopolization Enforcement*, 76 *ANTITRUST L.J.* 605, 632 (2010) (describing antitrust as a political bargain rejecting central economic planning in favor of case by case enforcement of competition); Kovacic, *supra* note 45, at 1150 (“The answer may be that the durability of the deconcentration impulse ultimately has little to do with realistic expectations that a broad-based program of Sherman Act divestiture suits will dissolve existing aggregations of market power. Its recurring hold on public policy instead derives from its attractiveness as a symbolic outlet for public antipathy toward large corporate size.”).

191. Blair & Sokol, *supra* note 180, at 2505 (“[W]e believe that sector regulation is better suited to address political tradeoffs because of its broader goals, such as ‘public interest,’ than is antitrust.”).

costs.¹⁹² It is generally thought that the introduction of noneconomic goals into antitrust engenders unpredictability, and sets up the potential for competing principles that cannot be reconciled with any kind of integrity.¹⁹³ The relatively ineffective pursuit of other noneconomic goals threatens to diminish antitrust law's ability to increase consumer welfare, and it is this high-risk, low-reward dynamic that has led to the near-universal rejection of supplementing modern antitrust with other goals. Thus, even if the alternative goals loosely fit the statutory scheme, they cannot be justified as a matter of the jurisprudence of integrity.

B. INTEGRITY EXPLAINS MODERN ANTITRUST JURISPRUDENCE

Integrity also best explains the course and reasoning of modern antitrust. As discussed above, without statutory change and with only sparse statutory guidance, the focus on consumer welfare has transformed economic law. The elaboration of economic principles, not ad hoc judicial discretion within the interstices of open-ended statutes, is the essential stuff of modern antitrust law. We will not elaborate on this issue here, both because we discussed it above,¹⁹⁴ and because many others have focused on centrality of the content of economic principles to antitrust law.

But integrity also explains other distinctive features of modern antitrust, like the role of precedent, that have not been sufficiently noticed. First, unlike in most other cases of statutory interpretation, the Supreme Court has been very willing to overrule precedents, showing that it believed the principles governing this area of law were more powerful than precedents. Second, even those cases which have not been overruled have become less relevant as the discovery of principles has proceeded—again, showing that principles are what matter as judges try to fit cases into these principles in the manner of Dworkinian integrity, rather than trying to find the closest precedent by analogical reasoning or choosing which precedent to follow as a matter of policy discretion. Third, even lower court judges decide cases according to

192. Wright & Ginsburg, *supra* note 187, at 2406–07 (“Indeed, there is now widespread agreement that this evolution toward welfare and away from noneconomic considerations has benefitted consumers and the economy more broadly. Welfare-based standards have led to greater predictability in judicial and agency decision making.”); see also Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CALIF. L. REV. 797, 798 (1987) (“[T]here is no reasonable basis for presuming that courts must give priority or even weight to populist goals where the pursuit of such goals might injure consumer welfare by interfering with competitive pricing, efficiency, or innovation. Indeed, even where there is no such apparent conflict, it is questionable whether populist goals are appropriate factors to consider when formulating antitrust rules. The pursuit of these goals would broaden antitrust’s proscriptions to cover business conduct that has no significant anticompetitive effects, would increase vagueness in the law, and would discourage conduct that promotes efficiencies not easily recognized or proved.”).

193. Kovacic, *supra* note 186, at 35 n.105 (quoting 4 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW 21 (1980)).

194. See *supra* Part II.

principles that are in substantial tension with Supreme Court precedent. Finally, separation of powers seems to dissolve, as judges find antitrust guidance in the joint guidelines of the Department of Justice and Federal Trade Commission.

1. The Supreme Court's Willingness to Discard Precedent

First, the modern Court has shown an uncommon willingness to overrule long-established precedents in antitrust. The most famous example was *Leegin Creative Leather Products v. PSKS*, where the Supreme Court overruled *Dr. Miles*, the 100-year-old case that held vertical price maintenance illegal under the antitrust laws.¹⁹⁵ In contrast, it is now very unusual for the Court to overrule statutory precedents in most other areas of law.¹⁹⁶ There are a variety of rationales for adhering to super-strong *stare decisis* in the interpretation of statutes. The most important being that the legislature is more institutionally competent to make the decision about whether to continue with policy embodied by the precedent or to abandon it.

The usual rationale fits well with the positivists' view of law. Under this perspective, when the decided judicial precedents are controversial, they are likely to represent good-faith disagreements about the best policy for the law. When judges re-encounter the same difficult issue, it is best to defer to the legislature by assuming that if it had wanted to change course, it would have done so after the previous decision, and that the precedent should therefore be upheld. Such an approach is the only way to preserve the democratic legitimacy that accompanies legislation.¹⁹⁷

195. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 882 (2007) ("We now hold that *Dr. Miles* should be overruled and that vertical price restraints are to be judged by the rule of reason."). There are others. *See generally* Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006) (abrogating *Int'l Salt Co. v. United States*, 332 U.S. 392 (1947)); *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968)); *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990) (implicitly overruling *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959)); *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984) (severing ties with the string of cases approving of the intra-enterprise conspiracy doctrine beginning with *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947)); *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (overruling *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)); *see also* Daniel M. Tracer, *Stare Decisis in Antitrust: Continuity, Economics, and the Common Law Statute*, 12 DEPAUL BUS. & COM. L.J. 1, 41-44 (2013) (discussing the diminished role of *stare decisis* in antitrust and compiling the above cases).

196. *See generally* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L. REV. 1361 (1988) (showing that the Court claims it is following a super-strong version of precedent in statutory interpretation).

197. *See, e.g.*, Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 764 (1989) ("Short of a finding of constitutional invalidity, it is democratically illegitimate for an unrepresentative judiciary to overrule, circumvent, or ignore policy choices made by the majoritarian branches."); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 440 (1989) ("As a general rule, however, courts should use controversial background norms sparingly, in deference to the basic principle of democratic primacy.").

But in a Dworkinian jurisprudence this rationale for following precedent loses some force. When doing integrity, a Court is not making a discretionary policy decision but is fitting its decision to principles. Particularly in a world where progress in economic analysis may be making the guiding principles easier to discover, there is no reason to wait for Congress when the Court discerns a better fit. To be sure, a Dworkinian jurisprudence would not dismiss the pull of precedents if they themselves had created coherent principles, but, as we saw from our discussion of antitrust before the modern era, precedents are largely dissonant and thus cannot compete with the consonance of the economic principles of the community.

The *Leegin* Court itself stated that it did not need to follow the usual respect for statutory precedents, because the Sherman Act was a different kind of statute—one that empowered the Court to frame a common law for competition.¹⁹⁸ This perspective too is consistent with a jurisprudence of principles. The classic view of the common law was that it was a process designed to discover principles immanent in the world. This view of the common law also captures the way modern antitrust law works, where economics supplies tractable methods to tease out the objective of consumer welfare.

2. The Supreme Court's Willingness to Ignore Bad Precedents

Second, the Supreme Court frequently ignores prior precedent decided under an approach that did not reflect integrity even when the Court does not outright overrule the precedent. As discussed above, in *Topco*, the Court condemned an agreement among smaller grocery stores to sell a private label each in their own territory.¹⁹⁹ That case followed a rigid formal approach and held that an agreement among competitors that restricted sales by territory was per se illegal.²⁰⁰ The case did not even consider the pro-competitive effects of a partnership that permitted smaller grocery stores to better contest the market dominated by larger chains.²⁰¹

But just seven years later in *BMI v. CBS*, the Court decided that an association owned in part by songwriters could sell a product called a blanket license that was a joint product of these competitors because of certain pro-competitive features, such as the reduction of transaction costs.²⁰² Despite the agreement between competitors, the Court held that the decision would be made under the rule of reason, and would consider the advantages to

198. *Leegin*, 551 U.S. at 889 (“Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act’s prohibition on ‘restraint[s] of trade’ evolve to meet the dynamics of present economic conditions.”).

199. *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972).

200. *Id.* at 608.

201. *Id.* at 610–12.

202. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 20 (1979).

competition.²⁰³ But the *BMI* Court did not even attempt to resolve the tension between its deployment of a rule of reason and *Topco*'s per se condemnation of an agreement among competitors.²⁰⁴

That disregard for prior precedent derives from the Court's shift to a jurisprudence of integrity. It is the principles announced in *BMI* that will have generative force in the future rather than holdings in cases like *Topco*. Previous precedents that either followed a wooden formalism or chose ad hoc policies become inert in a regime informed by principle. They are like barks left adrift on a sea now plied by more modern vessels. Declining to distinguish precedent, however, would be much less sensible under a positivist view of law where precedents provide key guideposts. Without a set of powerful principles as an engine for future decision-making, doctrinal conflict between past precedents would inevitably have led to confusion.

3. Lower Courts' Willingness to Innovate

Finally, the power of principle is so strong that lower court judges are willing to follow principles rather than Supreme Court precedent. The best example of this approach is the most famous lower-court antitrust case of the modern era. In *United States v. Microsoft*, a key issue on appeal was whether Microsoft's tying of its browser to its operating system violated the antitrust laws.²⁰⁵ Until the beginning of the antitrust revolution, tying was per se illegal, because in a formal sense a tie restrains trade—it forces a customer to buy two products together rather than giving him a choice of buying one or the other.²⁰⁶ The long-established per se rule against tying was an excellent example of the rigid interpretive methods that sometimes dominated antitrust.

By the time of *Microsoft*, the Court had relaxed the per se rule, but only to a limited extent. In an opinion in *Jefferson Parish Hospital District No. 2 v. Hyde*, the Court held that ties would no longer be per se illegal if there was no monopoly power in the tying product, because in the absence of such power consumers could simply choose another product at a competitive price.²⁰⁷ But the majority opinion was not of much help to Microsoft because Microsoft had monopoly power in its operating system.²⁰⁸

Nevertheless, the D.C. Circuit held for Microsoft on the issue of tying. It followed the reasoning of a concurring opinion by Justice Sandra Day O'Connor in *Jefferson Parish* that recommended that the rule of reason be used to evaluate all tying arrangements, regardless of the existence of market

203. *Id.* at 24.

204. *Id.* at 9 (briefly distinguishing *Topco* by asserting the Court lacked familiarity with the business practice to formulate a per se rule).

205. *United States v. Microsoft Corp.*, 253 F.3d 34, 84 (D.C. Cir. 2001).

206. *See generally* *Int'l Salt Co. v. United States*, 332 U.S. 392 (1947).

207. *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 13–14 (1984).

208. *Microsoft*, 253 F.3d at 51.

power.²⁰⁹ Thus, to Justice O'Connor, a tie could be legal even in the presence of market power, if there were a coherent business reason for treating tied products as one and not two.²¹⁰ Such synergies advanced rather than retarded consumer welfare. And Justice O'Connor found these synergies in the *Jefferson Parish* decision to require the use of a particular group of anesthesiologists with its surgeons, because doing so would promote better patient outcomes.²¹¹ But while the opinion was well-grounded in the consumer-welfare principles of antitrust, it was not the majority opinion of the Court.

In *Microsoft*, however, the appellate court went further even than Justice O'Connor's concurring opinion by allowing that productive efficiencies gained from a tie might be sufficient to justify a tying arrangement. And while the productive efficiencies of tying the browser to the operation system were not as clear as those in the case of *Jefferson Parish*, the Court observed that it should be deferential in its review of the competitive effects because of the novelty of the products at issue and the pace of technological innovation.²¹² The court worried that condemning computer products as ties with unknown possible synergies risked retarding innovation and thus harming long-term consumer welfare.²¹³

Thus, the *Microsoft* Court was willing to apply economic principles in preference to following the letter of Supreme Court precedent and took a position that went further even than a trailblazing concurring opinion. Even more remarkable is that the opinion represented a unanimous *en banc* decision of the District of Columbia Circuit and included prominent appellate judges appointed by Presidents of both political parties. When a jurisprudence of integrity takes hold, decisions are taken, not for ad hoc policy reasons that may divide judges, but on the basis of discerning consensus principles that unite them. Thus, it tends both to temper differences among judges of different ideologies and even erode the hierarchies between higher and lower courts.

4. The Weakness of Separation Powers in Antitrust

The separation of powers and territoriality of the branches also play a diminished role in antitrust law today and that is also to be expected in a jurisprudence of integrity. Since all branches are seeking to find the immanent principles that determine case outcomes rather than exercising their own discretion, the branch best suited to find the principles takes the lead and the other branches follow its analysis. For example, antitrust is almost unique in the judiciary's willingness to embrace a detailed framework of

209. *Id.* at 94–95.

210. *Hyde*, 466 U.S. at 35–41 (O'Connor, J., concurring).

211. *Id.* at 43–44.

212. *Microsoft*, 253 F.3d at 89–90.

213. *Id.* at 87–88 (finding the consumer demand test prescribed in *Jefferson Parish* to be a proxy for the efficiencies of the tie-in).

analysis generated by the Executive Branch—in particular, the Justice Department and the FTC’s merger guidelines—which are routinely cited by courts. For instance, in the case of *FTC v. Staples*, the district court judge upheld the FTC enjoining of a merger, using the guidelines as the framework for his analysis.²¹⁴ Indeed, the heading of his opinion tracked the headings of the guidelines.²¹⁵ In fact, the merger guidelines play a much greater role in the opinion than Supreme Court precedent on mergers. And *Staples* is only one of more than 250 cases that have relied on the guidelines for its analysis.²¹⁶

Given our separation-of-powers system, this inter-branch symbiosis would ordinarily seem an odd development under a positive view of the law where each branch would be expected to supplement the gaps in a statute with its own discretion and independent policy analysis. But a jurisprudence of principles explains the convergence. When the pull of principles is strong, both the executive and judiciary are joined in a cooperative enterprise of explication. And because it is easier for the Executive Branch to employ experts in the deployment of the subprinciples, the Executive Branch is best positioned to be their primary developer.

Moreover, the nature of these guidelines themselves also reflects a jurisprudence that captures the consensus principles of the community rather than the text of the statute to guide decision-making. The guidelines refer to all kinds of considerations that are not mentioned in the statute. For instance, they offer a definition of how to define the antitrust market and use the Herfindahl–Hirshman index to help define the increase in amount of market power that would create concern about capacity of a merged company to charge supracompetitive prices.²¹⁷ They divide the market effects of a merger

214. Fed. Trade Comm’n v. *Staples*, 970 F. Supp. 1066, 1081–82 (D.D.C. 1997).

215. See generally *id.*; U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES (2010).

216. A Westlaw search restricted to federal district and appellate courts for “merger guidelines” yields 260 cases as of November 6, 2015. More than one person has commented on the institutionalization of the nonbinding guidelines in the case law. See *United States v. Kinder*, 64 F.3d 757, 771 (2d Cir. 1995) (Leval, J., dissenting) (“Although it is widely acknowledged that the Merger Guidelines do not bind the judiciary . . . courts commonly cite them as a benchmark of legality.”); Leah Brannon & Kathleen Bradish, *The Revised Horizontal Merger Guidelines: Can the Courts Be Persuaded?*, ANTITRUST SOURCE 1, 1–2 (Oct. 2010) (noting courts have “relied heavily” on the merger guidelines and quickly adopted new analytic tools with each revision, sometimes even at the expense of their own precedents); Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 804 (2006) (finding that by the late 1980s courts referenced the guidelines in 60% of cases brought under § 7 of the Clayton Act). Another nonbinding source, the Areeda–Hovenkamp antitrust treatise, may be even more influential. See Rebecca Haw Allensworth, *The Influence of the Areeda–Hovenkamp Treatise in the Lower Courts and What It Means for Institutional Reform in Antitrust*, 100 IOWA L. REV. 1919, 1921–22 (2015) (“[T]he treatise [is] the single most-cited antitrust authority, including such ubiquitous cases as the Supreme Court’s 1918 decision in *Chicago Board of Trade*.”).

217. U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES §§ 4–5 (2010).

into unilateral ones (those that occur from the merger itself) and coordinated ones (those that occur from the interactions of the merged firms with others in the industry).²¹⁸ These guidelines are excellent examples of how subprinciples tease out the way economics grounds direct antitrust decision making.

Finally, these guidelines do not themselves seem to be simply an exercise of policy discretion, as enforcement guidelines may be in other areas of law. They appear instead to be trying to formulate a principled framework that will transcend changes in personnel and administrations. Indeed, while the Obama administration is very different in political orientation from the Reagan administration, its reissuance of guidelines was continuous in approach with the much more conservative administration that originated them. Thus, like the embrace of economic principle without statutory revisions and the treatment of precedent, the guidelines by their nature, detail, and the way they have been embraced across the branches and across administrations suggest that Dworkinian integrity better explains antitrust's path than positivism.

C. *TRANSCENDING INTEGRITY'S CRITICS*

Another indication of the capacity of Dworkinian integrity for explaining antitrust jurisprudence is that it is able to meet the most important criticisms leveled at the theory. Greenawalt levied perhaps the most powerful criticism of all. He charges that judges will simply use discretion to decide on which of a variety of principles to apply or how to apply a principle that because of its abstraction is not determinative. But in antitrust, this is not likely. There are consensus economic principles. Moreover, they generate subprinciples that a judge can then use to decide concrete cases. A judge using microeconomic analysis can point to an independent hierarchy of rules and standards not subject to her manipulation.

In this fundamental respect, antitrust is very different from using abstract principles not contained in the case to decide particular cases. Take the contentious question of whether due process guarantees a right to abortion.²¹⁹ Here there appear to be conflicting principles at work—the rights of the mother and the rights of the potential life of the fetus. Or even if we were to agree that the single principle at stake is right to dignity, that principle is itself very abstract with few subprinciples to guide the result in the particular case. The judge may interpret this scope of this dignity principle differently than others. It seems very unlikely that a consensus could be reached in a society made up of people with different values.

Moreover, economic science does more than just identify the relevant considerations. If it did no more, judges doing antitrust analysis would be in

218. *Id.* §§ 6–7.

219. Dworkin, *supra* note 108, at 1102–07.

little better shape than a judge deciding whether a murderer can collect under an inheritance, the famous example posited by Dworkin.²²⁰ In that case, a judge knows she is confronted with the opposing principles of giving effect to the plain language of the will and the idea that “nobody should profit from his own wrong.” Hart, Greenawalt, and other skeptics would disagree with Dworkin that the judge’s choice in how to weigh these principles is objective, and that she will instead be forced to use discretion to arrive at her decision.²²¹ Hart conceded that it might be possible to eliminate discretion if “there was always to be found in the existing law some unique set of higher-order principles assigning relative weights or priorities to such competing lower-order principles.”²²²

Antitrust is capable of meeting the criteria envisioned by Hart. The judge knows the driving purpose of the law is to further consumer welfare, and, unlike the murderer case, has a set of tools that tells her how to weigh the considerations before her to determine if the challenged activity is inimical to consumer welfare on balance. For example, a judge evaluating a predatory-pricing scheme knows that, in general, the lower prices by the would-be predator are a boon to consumers.²²³ Moreover, she knows that such schemes are unlikely to work, even in oligopolistic markets. This is because the predator absorbs all of the losses as prices are cut, but must share the profits when they are ultimately raised again. Thus, in the absence of substantial market power wielded by a single firm, it will be very difficult to show the dangerous possibility of recoupment of lost revenue necessary to succeed on a predatory-pricing claim.²²⁴

Antitrust also meets Raz’s objection that the consensus moral principles employable by the judge may be illusory, insofar as diverse perspectives and backgrounds abound in the community. And in a modern fractured community, Raz further argues, any commonality in principle that does exist is likely to be far too broad to be practically useful in deciding cases where the pedigreed law does not tread.²²⁵ The substitution of economic principles for moral ones again alleviates this concern. The bedrock economic premises that undergird antitrust law—supply and demand, the effects of monopoly, and perfect-competition models—are generally agreed upon.²²⁶ This bipartisan consensus in microeconomic concepts thus removes the elements of judicial

220. See DWORKIN, *supra* note 11, at 317.

221. See *supra* Part III.B.

222. HART, *supra* note 12, at 275.

223. See Crane & Sokol, *supra* note 174.

224. See *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223–27 (1993).

225. See *supra* notes 146–48 and accompanying text.

226. This is not to imply that economists agree on everything; a quick scan through the newspaper will confirm that consensus on systemic and macroeconomics is elusive. Not so in microeconomics, where the discipline takes on a more scientific flavor. See *infra* Part V.B.

subjectivity detected by Raz—the judge need not engage in the difficult (maybe impossible) task of deciphering the community’s shared moral and political principles, but can instead turn to a stable of tools developed by those without robes.

Integrity in antitrust likewise answers Shapiro’s criticisms made in support of his planning theory. Recall the crux of planning theory: the law exists to solve difficult moral dilemmas and resolve disputed moral principles. Shapiro’s attack on integrity proceeds from this premise. Moral principles in dispute cannot be used to decide hard cases before the judge, because the settling of those difficult moral principles was the entire task of the law to begin with—by reopening the inquiry, a judge actually undoes the work of the enacting source of pedigreed law.²²⁷ This identity problem dissipates when tractable principles are substituted for ones that lead to intractable disputes in the absence of law. Given the consensus around those principles, individuals can plan their conduct according to the law.

Shapiro is also concerned with the allocation of trust in the American constitutional framework, and argues that our distrust for unchecked and unaccountable judicial authority persists no matter what kind of principles the judge purports to be applying.²²⁸ But while a judge engaging in high-level moral and political philosophy can be accused of appealing to an inherently subjective field, judges applying economics are subject to the checking function of an outside discipline. Thus, judges are in a better position to be trusted when acting according to principle.

V. SOME OBJECTIONS AND PROBLEMS

In this section we answer some potential objections to the Dworkinian explanation. First, we respond to the argument that consumer welfare cannot be a Dworkinian principle because it is a counsel of policy, rather than a dictate of morality. This criticism is wrong on two counts. First, Dworkin recognized that principles could be derived from statutory policies and that economic principles in any event had moral roots. Second, while some have argued that economic principles cannot generally provide substantial constraint, we show that microeconomic principles at issue in antitrust provide relatively objective framework for deciding cases. Finally, we respond to the claim that even in antitrust there are disputes among economic principles and show that Dworkin integrity in antitrust has ways to handle even the hardest cases in areas of unsettled and evolving economics.

A. ECONOMIC PRINCIPLES AS DWORKINIAN PRINCIPLES

It might be argued that our approach commits one of the errors that Dworkin found with the positivists. In short, the pursuit of consumer welfare

227. See *supra* notes 155–58 and accompanying text.

228. See *supra* notes 159–60 and accompanying text.

is nothing more than an appeal to policy, and the employ of microeconomic subprinciples in pursuit of this goal is nothing more than judicial legislation in the void. That is to say, “principles” of economic analysis differ from the way that Dworkin uses the term.

It is true that consumer-welfare promotion is a policy goal. But unlike courts, as Dworkin notes, “[a] legislature does not need reasons of principle to justify the rules it enacts . . . even though these rules will create rights and duties for the future”²²⁹ Once enacted, our constitutional structure requires that we recognize pursuit of this goal as a right, regardless of whether or not the policy was a wise one in the first place. Thus, when Congress passed the antitrust laws, it created a right to treble damages for anyone aggrieved by behavior harmful to consumer welfare. So a judge seeking to discover the extent of antitrust liability is exploring the boundaries of a principle. As Dworkin himself recognizes, she knows that by finding liability in a hard case she is not policymaking, but rather exploring the scope of the litigants’ rights.²³⁰ Dworkin himself uses the label “[a]rguments of principle” to refer to those cases where a judge seeks to discover the extent of an individual litigant’s rights.²³¹

Nor it is plausible to say that economic principle cannot be a Dworkinian principle because it is not a moral principle. In looking at the common law generally, Dworkin regards “law and economics” as “finding the key to . . . decisions in the ‘economic’ principle that people should always act in whatever way will be financially least expensive for their community as a whole.”²³² That is itself a moral principle that provides an adequate fit for some kinds of concepts, like proximate cause. Dworkin does not find it an adequate fit for justice generally, but that is no matter if, as we argue, the fit is adequate in the specific domain of antitrust.

B. ECONOMIC PRINCIPLES AS OBJECTIVE PRINCIPLES

It might be argued that economics is not exact or objective enough to curtail judicial discretion. Rather, a skeptic might wonder if economics is just a clever new fig leaf meant to disguise judicial discretion and policymaking. Criticisms of the scientific virtue of economics date to the 19th century,²³³ and generally attack the discipline for its lack of predictive power and reliance on

229. DWORKIN, *supra* note 11, at 243–44.

230. *See* Dworkin, *supra* note 108, at 1059–60.

231. *See id.* at 1067.

232. Ralph G. Steinhardt, *Believers Inside the Tent: Ronald Dworkin’s Evangelism and Law’s Empire*, 56 GEO. WASH. L. REV. 431, 455–58 (1988) (book review).

233. Thorstein Veblen, *Why Is Economics Not an Evolutionary Science?*, 12 Q.J. ECON. 373, 385–89 (1898) (describing economics as a “dismal” science that “oscillates like a homogeneous globule of desire of happiness under the impulse of stimuli that shift him about the area, but leave him intact”).

unprovable assumptions.²³⁴ Margaret Schabas has accused economics of being more analogous to history than it is to science or mathematics; both, she reasons, seek to explain and predict human behavior, which renders their laws and findings less repeatable and more vulnerable than conclusions in the hard sciences.²³⁵

Recent events have not done the standing of economics any favors. Critics have pointed to economists and their unrealistic models as enablers of the housing bubble, financial crisis, and subsequent prolonged recession.²³⁶ These criticisms, however, have far less force in the antitrust context. Antitrust law is guided by the “theory-core” of standard microeconomics, where empirically based truths about the functioning of markets have carried the day.²³⁷ While macroeconomics appears to have only weak understanding of the course the business cycle, these uncertainties do not plague microeconomics, anchored by price theory, “which is designed to explain the allocation of resources among alternative ends and the division of the product among co-operating resources.”²³⁸ Here the principles are much more settled.²³⁹

Milton Friedman made the case long ago for the scientific standing of economics when it uses tight theories that hew more closely to the facts. Friedman distinguished between positive and normative economics, insofar as the former relies on observations to describe and predict behavior, while the latter focuses on achieving desired policy outcomes.²⁴⁰ He claims that positive economics is capable of being an objective science on par with any of the physical sciences.²⁴¹ Friedman further posits that normative economics is logically dependent on positive economics, insofar as predictions and debates about the consequences of taking action will inevitably be based on positive economics.²⁴² Friedman also recognizes the inability to conduct control group experiments in economics, but argues that this is insufficient to separate it from the physical sciences—astronomy and quantum physics, for example,

234. See generally, e.g., Daniel M. Hausman, *John Stuart Mill's Philosophy of Economics*, 48 PHIL. SCI. 363 (1981); Alexander Rosenberg, *If Economics Isn't Science, What Is It?*, 14 PHIL. F. 296 (1983).

235. See generally Margaret Schabas, *An Assessment of the Scientific Standing of Economics*, 1986 PHIL. SCI. ASS'N 298 (1986).

236. See Alex J. Pollock, *Is Economics a Science?*, AM. ENTERPRISE INST. (Nov. 6, 2010), <https://www.aei.org/publication/is-economics-a-science> (arguing that economists were blinded by excessive profits into allowing unrealistic assumptions into their models, such as prices always increasing).

237. See, e.g., Pierluigi Barrotta, *The Inexact and Separate Science of Economics*, 61 PHIL. SCI. 318, 318 (1994) (book review).

238. Milton Friedman, *The Methodology of Positive Economics*, in THE PHILOSOPHY OF ECONOMICS: AN ANTHOLOGY 180, 207 (Daniel M. Hausman ed., 1994).

239. See *id.*; cf. Barbara R. Bergmann, *The Current State of Economics: Needs Lots of Work*, 600 ANNALS AM. ACAD. POL. & SOC. SCI. 52, 58 (2005).

240. MILTON FRIEDMAN, *ESSAYS IN POSITIVE ECONOMICS* 2 (1953).

241. *Id.*

242. *Id.*

suffer the same defects.²⁴³ And the predictive power of economics far exceeds that of the other social sciences. In areas like price theory it contains a set of concrete principles and rigid rules that are absent from history, politics, sociology, or psychology.²⁴⁴ Thus, once consumer welfare is understood as the principle behind antitrust law, positive economics provides relatively concrete guidance in how to achieve consumer welfare in concrete cases.

It might still be argued that even if these principles have a coherent core, disagreement and debate bedevil the edges. And that is certainly the case. But the question is one of degree. Microeconomic principles provide more constraint than Dworkinian moral principles like dignity. They can be translated into coherent terms of practical guidance, as shown by the antitrust guidelines, whose essential framework has been accepted by Democratic and Republican Administrations. Principles about human dignity are neither as capable of concrete application nor as consensus-based. Finally, as we discuss below, as the consumer-welfare principle—worked out in application through microeconomics—has become the governing principle of antitrust, judges have reached as much, if not more consensus, as they ever have.

And even in cases where there may be disagreement because the economic subprinciples bearing on consumer welfare are unsettled, a method is available to best advance consumer welfare amid that uncertainty. It is to that method we now turn.

C. HARDEST CASES

Modern antitrust cases are often complicated, especially as business practices grow more complex and industries more high-tech.²⁴⁵ Litigants may be able to offer contrasting economic arguments or models, likely through expert testimony, one of which shows that a practice is pro-competitive, and the other that its harmful. Assuming the economic theories appear to have some validity,²⁴⁶ how can the court use principle to resolve the conflict? Faced with this dilemma, a judge should resolve the dispute consistent with antitrust's lodestar: consumer-welfare promotion. This point requires further elaboration, and our resolution of the question adopts an existing framework because of its consistency with integrity.

243. *Id.* at 6.

244. See generally Douglas W. Hands, *What Economics Is Not: An Economist's Response to Rosenberg*, 51 PHIL. SCI. 495 (1984).

245. See generally Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMPETITION L. & ECON. 153 (2010) (discussing the difficulties of applying antitrust in high-tech, rapidly innovating fields).

246. See John E. Lopatka & William H. Page, *Economic Authority and the Limits of Expertise in Antitrust Cases*, 90 CORNELL L. REV. 617, 650 (2005) (pointing out that judges frequently preclude the presentation of expert economic testimony where the propositions to which the expert would testify lack pedigreed economic validity).

In situations where the economics are exhausted, integrity counsels the adoption of Judge Frank Easterbrook's error-cost framework. Judge Easterbrook accepts that courts faced with business practices whose effects are ambiguous depending on the nuances of the economic theory applied will inevitably make errors.²⁴⁷ Given that, judges must seek to minimize the costs of error. Easterbrook argues that the costs of "false positives"—condemnation of practices that are helpful to competition—outweighs the costs of blessing activity that is ultimately harmful. In explanation, Easterbrook argues that most cases with unknown consequences are unlikely to be harmful on the whole, even if some set of facts exists where it could have a negative effect.²⁴⁸

Moreover, the market is adept at self-correcting for monopoly—a firm reaping above-competitive returns will attract new entry and eventually the firm's dominance will subside.²⁴⁹ Not so with judicial error. *Stare decisis* makes bad economics difficult to displace once officially adopted, even where views later change among economists.²⁵⁰ Compounding this difficulty, judicial errors are likely to impede the presentment of later, superior economic analysis. Litigants with binding law condemning a practice are more likely to deny engaging in a practice rather than defending it as pro-competitive.²⁵¹ Finally, Easterbrook suggests that the quantum of harm to consumers is greater for false positives. He suggests that gains in productive efficiencies typically outweigh the slight increase in cost or decrease in output attendant to most monopolies.²⁵²

It is for these reasons that Easterbrook suggests that an economic theory has to be well-established before it can become a basis for antitrust liability. This error-cost framework for resolving uncertainty is consistent with advancing consumer welfare, because of Easterbrook's persuasive case that in cases of uncertainty, judicial intervention is likely to have higher costs than judicial restraint.

VI. CONSENSUS IN THE COURTS

We have argued that much of antitrust's success and potential for future improvement may be attributable to the embrace of a Dworkinian jurisprudence. There seems to be a substantial agreement that antitrust

247. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2-4 (1984).

248. *Id.* at 15.

249. *Id.* Indeed, Easterbrook posits that the primary purpose of antitrust is to facilitate a speedier arrival at the result which the market would have attained anyway. *Id.* at 2.

250. *Id.* For a vivid example, we look once again at the Supreme Court's 2007 *Leegin* decision. The Justices split 5 to 4, but all agreed that the practice at issue, resale price maintenance, had pro-competitive effects. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 889 (2007); *id.* at 912-14 (Breyer, J., dissenting). Rather, the debate was over the propriety of upending a nearly century old precedent—even one that had clearly outlived its utility. *Compare id.* at 900-01 (majority opinion), *with id.* at 918-20 (Breyer, J. dissenting).

251. Easterbrook, *supra* note 247, at 6-7.

252. *Id.* at 15-16.

doctrine should be organized by the principle of consumer welfare. And because of the constraining effect of economics, judges are guided in the application of this principle to decide specific cases.²⁵³

But critics or skeptics of Dworkinian or integrity jurisprudence may worry that giving judges free rein to interpret a case via economic principles will make things worse in fact. If doing integrity actually encouraged judicial freewheeling, these critics might expect an increase in dissension at the appellate level will sow further confusion. In this Part, we look at the data relating to antitrust filings to see whether these concerns are supported. We considered data from the past 40 years or so from federal courts of appeal, with an eye toward the effect that antitrust jurisprudential convergence has had on the numbers of published antitrust opinions at the courts of appeal, and on the rates of dissent in appellate court decisions. Our data suggests that antitrust consensus on the ground has—at the very least—not been made worse by judicial economic analysis, and may even have improved.

We analyze the number of published antitrust cases over time, both in absolute number and as a percentage of the total caseload. Again, critics of integrity jurisprudence might worry that the number of published antitrust cases would increase because of the uncertainty introduced by economic analysis. Where the law is unsettled, parties are more likely to appeal an adverse decision. By the same token, courts of appeal are more likely to deal with a case presenting open questions of law via a published opinion in order to try and provide guidance to the lower courts.²⁵⁴ (And cases raising well-settled law may be more likely to be disposed summarily via unpublished opinion or order.) Relatedly, we also look at the rate of dissent over time. Because integrity skeptics worry that economic principles provide judges with fertile ground for improvisation, those skeptics might expect to see an increase in the number of dissents between judges of different stripes.²⁵⁵

A. DATA

We used Westlaw to collect the relevant data for analysis. For starters, we used only civil, reported antitrust cases. We excluded criminal cases

253. See, e.g., Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J.L. & ECON. 1, 2–3 (positing that “economically incoherent decisions are . . . rare” and that the importation of economics into antitrust analysis has been a stunning success); Crane, *supra* note 7, at 1210 (observing the wide consensus in the field that has caused it to become more technocratic); Posner, *supra* note 76, at 948 (noting a convergence among all “schools” of antitrust thought).

254. See, e.g., Stephen L. Wasby, *Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish*, 3 J. APP. PRAC. & PROCESS 325, 336–37 (2001) (discussing criteria for publication in the Ninth Circuit).

255. However, circuit court judges are notoriously dissent-adverse. See generally Lee Epstein, William M. Landes & Richard A. Posner, *Why (and When) Judges Dissent*, 3 J. LEGAL ANALYSIS 101 (2011). This understandably leads to a relatively small sample size in the total number of dissents and antitrust dissents, which cautions us from making any too-broad pronouncements from the data.

prosecuted under section 1 of the Sherman Act because we did not wish to magnify consensus. The Justice Department brings criminal cases sparingly, and only against the most egregious anticompetitive behavior, which behavior has been roundly condemned since antitrust's earliest days. Judicial disagreement on substantive antitrust issues in such cases seems unlikely.²⁵⁶ We chose to exclude unpublished cases for ease of administration. We may therefore have obscured the rate of consensus to a certain extent, since contentious and complex cases are more likely to be published than are simple applications of established law.

We sorted the cases by circuit and decade. We separated antitrust cases using a Westlaw search algorithm.²⁵⁷ However, the algorithm was unable to perfectly separate antitrust cases from several other species of cases categorized as similar by the Westlaw Headnote system. Thus, we next filtered the cases manually to determine how many cases concerned substantive antitrust law.²⁵⁸ We did the same for the remaining dissents, to ensure that judges in multi-issue cases were not dissenting on issues unrelated to antitrust.

Finally, we performed one additional filter, to separate cases adjudicating what we term "core" antitrust liability. In short, we used another algorithm to isolate those cases concerned primarily with immunity issues in antitrust law.²⁵⁹ We then filtered these results manually. We classify our results as "substantive" antitrust, which includes issues of immunity (together with the "core" of antitrust), and "core" antitrust, which excludes issues of immunity. The figures that follow include both "substantive" antitrust and the more exclusive "core" antitrust. Substantive antitrust must be included in our discussion, because issues of immunity are an essential part of antitrust law that judges must frequently deal with, and a great deal of dissension on these issues could render agreement on issues of liability moot. But the crux of our integrity inquiry thus far has been on the competitive effects of business practices and agreements. These issues of liability, absent immunity or countervailing patent-law concerns, thus constitute the core of the doctrine,

256. See Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 BYU L. REV. 315, 315–16 (describing the ubiquitous agreement on criminal prosecution of cartels).

257. Our search algorithm was as follows: ATLEAST₂("Sherman Act") "Clayton Act" (monopolize) (cartel) Robinson-Patman "predatory pricing" "facilitating practice" Noerr-Pennington Parker-Brown ATLEAST₄(antitrust) ATLEAST₂(tying).

258. Some of the common types of cases captured by the algorithm that we excluded included cases brought under RICO, the Fair Debt Collection Practices Act, the Lanham Act, and the Bank Holding Company Act, among others. Also excluded were cases finding no jurisdiction for a Sherman Act claim because the challenged business activity did not implicate interstate commerce.

259. Our second search algorithm was as follows: ATLEAST₂("state action") ATLEAST₂(Noerr) "McCarran" "Foreign Trade Antitrust Improvement" ATLEAST₃(immunity) ATLEAST₂(exemption). In addition to the two most common immunities above, other practices can be immune if they constitute the "business of insurance" under the McCarran-Ferguson Act, implicate the Foreign Trade Antitrust Improvement Act, or fall within the statutory or non-statutory labor exemption to the antitrust laws.

especially because questions of immunity are unlikely to raise the same economically based issues.

The two most common types of immunity that arise are state-action immunity and petitioning immunity pursuant to the *Noerr–Pennington* doctrine.²⁶⁰ The former immunizes anticompetitive activity by the state or those supervised by the state, and operates out of federalism concerns.²⁶¹ Because of these additional factors, we would expect these cases to be influenced by principles other than economics, which could lead to a departure from the remainder of antitrust law.²⁶² Similarly, the reason for immunizing petitioning activity or litigation stems in part from the First Amendment and is often not consonant with economic principles.²⁶³ Other types of immunity may arise from similar non-economic concerns.

We note one area of the law that we *include* in our definition of core antitrust cases and that has drawn attention of late—reverse settlements in patent litigation. In 2013, the Supreme Court fractured when it was forced to balance antitrust with the competing demands of the patent system. Patents sanction short-term monopolies as a trade-off for innovation and the lure of new products in the marketplace. *FTC v. Actavis* focused on so-called “reverse settlements,” made commonplace under the Hatch–Waxman Act’s mechanism for generic-drug manufacturers to quickly challenge suspect patents on brand-name drugs.²⁶⁴ A generic-drug manufacturer applied to the Food and Drug Administration for the right to bring its drug to market, claiming that its products did not infringe on patents held by the brand-name drug maker or that the patents were invalid.²⁶⁵ The patentee brand-name manufacturer then bought off the generic manufacturer in exchange for the generic manufacturer’s dropping of the patent challenge and the patentee’s continued exclusivity.²⁶⁶ These reverse-settlement agreements permit the brand-name manufacturer to maintain monopoly profits and prevent the

260. See *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965); *E. R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 137–42 (1961); *Parker v. Brown*, 317 U.S. 341, 351–52 (1943).

261. William H. Page & John E. Lopatka, *State Regulation in the Shadow of Antitrust: FTC v. Tior Title Insurance Co.*, 3 SUP. CT. ECON. REV. 189, 191–93 (1993).

262. The state action doctrine is often referred to as the “*Parker–Brown*” doctrine. See *Parker*, 317 U.S. at 351–52; see also John Cirace, *An Economic Analysis of the “State-Municipal Action” Antitrust Cases*, 61 TEX. L. REV. 481, 485–86 (1982) (finding federalism concerns to give too much leeway to state-operated or sponsored concerns that diminished competition). Judge Easterbrook argues that cartel behavior regulated by the state is likely to have more harmful effects than an unregulated cartel. Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23, 30 (1983). Cartel members typically have incentive to cheat, which mitigates consumer damage. But cheating is more difficult when the business is regulated. *Id.*

263. See Daniel R. Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr–Pennington Doctrine*, 45 U. CHI. L. REV. 80, 82–84 (1977).

264. See *Fed. Trade Comm’n v. Actavis, Inc.*, 133 S. Ct. 2223, 2229–30 (2013).

265. *Id.* at 2228.

266. *Id.* at 2229.

generic manufacturers from entering the market to provide competition—these are certainly anticompetitive harms.²⁶⁷

The five-Justice majority found that these reverse-settlement agreements are subject to antitrust scrutiny, despite the fact that this activity might fall within the exclusionary potential of a valid patent.²⁶⁸ The Court reasoned that it was not possible to determine the scope of monopoly power and antitrust immunity conferred by the patent without placing the settlement in the antitrust crucible to balance anticompetitive harm and pro-competitive effect.²⁶⁹ The three dissenting Justices noted that *Actavis* was not the Court's first wading into the antitrust/patent morass.²⁷⁰ Previous cases had teased out a principle that a patent holder has a right to operate as a monopolist so long as he operates within the scope of his valid patent.²⁷¹ Thus, Justice Roberts found the case an easy one—patent holders are immune from antitrust suits unless and until their patents are invalidated.²⁷² He reasoned that patent law, not antitrust law, should control.

This case, similarly to *Noerr-Pennington* or state-action immunity cases, underscores the difficulties that arise where antitrust intersects with other bodies of law and divergent policies. Yet we conclude that, unlike other immunity doctrines, patent-settlement cases are best left at the core of antitrust, at least for now. The majority in *Actavis* concluded that the patent settlements were subject to the same antitrust scrutiny as other potentially anticompetitive agreements. It thus declined—despite the dissenters' urging—to grant immunity in accommodation of patent law's conflicting aims. This sets patent settlements apart from the other antitrust immunities, where the law has settled upon exemptions for certain anticompetitive behavior.

B. ANTITRUST AS PERCENTAGE OF THE DOCKET

Antitrust cases fell from the 1980s on, both in total number and as a percentage of the docket. Figure 1 shows a steep decline from the 1980s to

267. *Id.* at 2230–34.

268. *Id.*

269. *Id.*

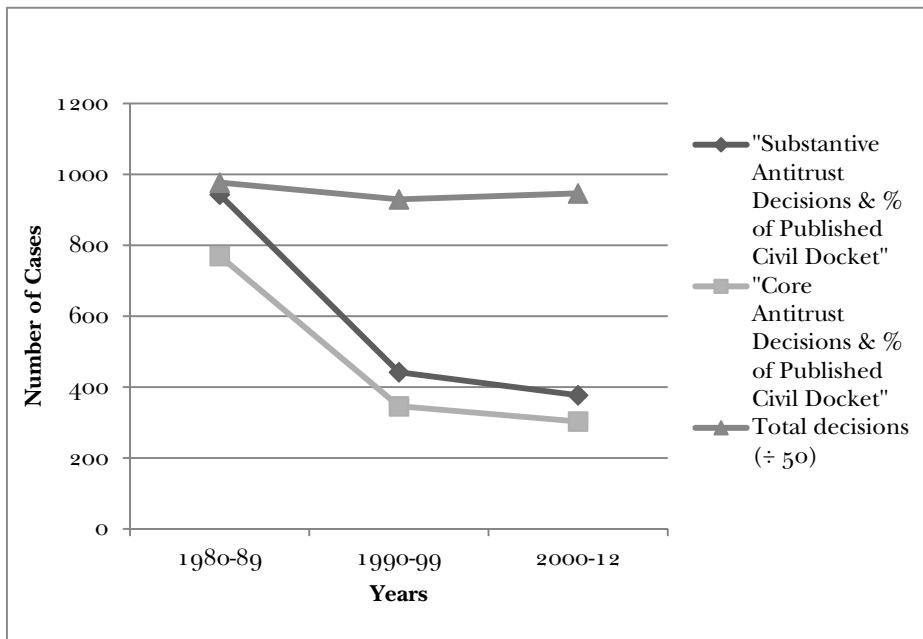
270. *Id.* at 2238–39 (Roberts, C.J., dissenting).

271. *See, e.g.,* Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965) (“A patent by its very nature is affected with a public interest [and] is an exception to the general rule against monopolies . . .”); United States v. Singer Mfg. Co., 374 U.S. 174, 196–97 (1963) (finding that patent holders are subject to the antitrust laws where they exceed their patent's scope); United States v. Line Materials Co., 333 U.S. 287, 300 (1948) (noting that the terms of a patent demarcate the limits of the patent holder's monopoly); United States v. Gen. Elec. Co., 272 U.S. 476, 485 (1926) (finding the Sherman Act applicable to the actions of a patent holder only where the patent's scope is exceeded).

272. *Actavis*, 133 S. Ct. at 2240.

the 1990s, and a more gradual decline from the 1990s to the 2000s.²⁷³ Appeals courts published fewer than half the number of substantive antitrust opinions in the 1990s and 2000s as they did in the 1980s, when nearly two percent of published appellate decisions were antitrust cases. The same downward trend can be seen for core issues of antitrust liability.

**Figure 1: Civil Cases & Antitrust Cases at the Courts of Appeal:
1980–2012**²⁷⁴



One alternative explanation to the phenomenon is tied to the often-astronomical costs of antitrust litigation. The argument would proceed that, where motions to dismiss or summary judgment are denied, defendants, wary of costly, protracted discovery are more likely to settle the case. This is especially true in the antitrust context because of the “one-way fee shifting” that may occur in antitrust.²⁷⁵ Successful plaintiffs’ attorneys collect fees, but there is no reciprocity for prevailing defendants. Of course settlement rates have spiked across subject areas, due in large part to dramatic growth in discovery costs overall. Moreover, the disproportionate burden of discovery

273. Interestingly, the total number of cases in the 2000s remains lower than the 1990s, despite the inclusion of two extra years.

274. We divided the number of total decisions by 50 to make it easier to meaningfully represent on the chart alongside the antitrust cases.

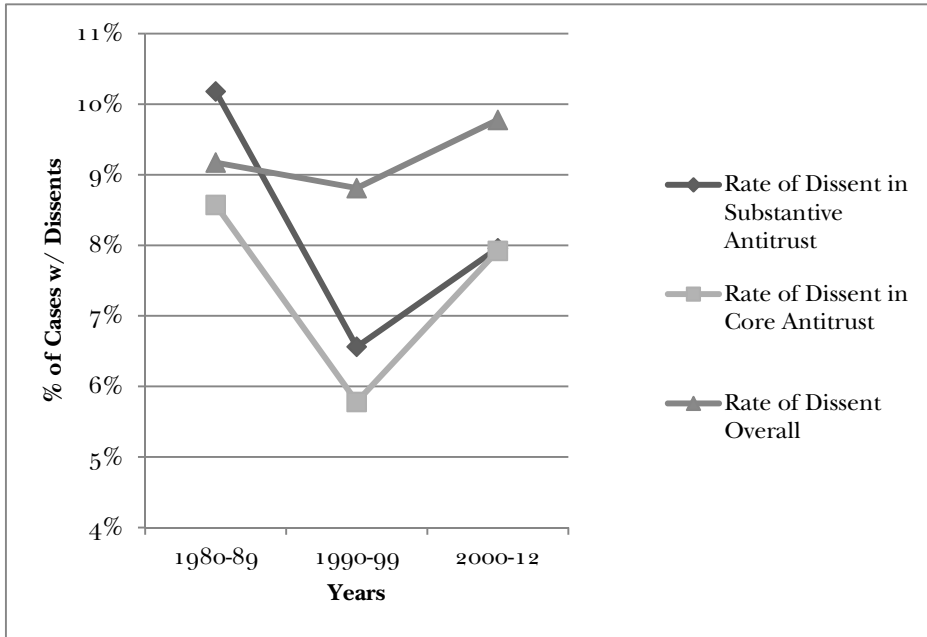
275. See generally William H. Wagener, Note, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. REV. 1887 (2003) (discussing the potential for discovery abuse that accompanies this regime).

on the antitrust defendant is not new, but has been a feature of the laws from the beginning. Doubtless there are other explanations for the decline as well, but even accepting these possibilities, the marked decrease in the antitrust case law produced suggests that integrity has at least not increased the law's uncertainty.

C. DISSENT RATE IN ANTITRUST CASES

Yet the total number of cases does not tell the whole story. Integrity skeptics would have reason for concern if judges regularly dissented in antitrust cases, as such disagreement would be strong evidence of uncertainty. However, as we saw in the number of total published opinions, we see in Figure 2 that the rate of dissent fell sharply from the 1980s to the 1990s. In substantive antitrust cases, the 1980s saw 96 dissenting opinions filed, which meant there was a dissent in 10.18% of the antitrust cases. Antitrust during the 1980s thus produced slightly more disagreement than the average case—the overall rate of dissent was 9.17%. This trend reversed during the 1990s and 2000s. There were only 29 substantive dissents filed during the 1990s and 30 from 2000 to 2012, at rates of 6.56% and 7.96%, respectively. The overall rate was more constant, with dissenting opinions filed in 8.81% of cases during the 1990s and 9.78% during the 2000s. The trend was similar in cases dealing with core issues of liability. Starting in the 1980s judges dissented less in these cases, doing so 8.57% of the time. This was followed by a rate of 5.78% in the 1990s and 7.92% in the 2000s. Obviously, with sample sizes this small, it is not possible to draw any strong conclusions from the data. However, the data does at least suggest, yet again, that economic analysis has not made antitrust law worse or more uncertain.

**Figure 2: Rates of Dissent in All Civil Cases & Antitrust Cases:
1980–2012**



Conclusions should be drawn with care from the foregoing figures. The limitations in available data and a plethora of other factors for which we cannot control prevent us from making any grand statements about what the data shows. The results are, however, inconsistent with the view that the Dworkinian antitrust created more confusion in the courts, and may have increased antitrust consensus among judges. Having thus explored the positive impact of judicial guidance of the law under an integrity scheme, we next consider whether this model is unique to antitrust or if there are other areas where it might be fruitfully employed.

VII. INTEGRITY'S PROVINCE

Antitrust's increasing coherence under the stewardship of the courts could conceivably lead to calls for increased judicial piloting of other substantive areas of the law. But judges will rarely face the Dworkinian-style restraints on discretion that they do in antitrust law. Thus, in this Part, we briefly outline and generalize the factors that have made a Dworkinian approach attractive in antitrust law. This Part concludes with the tentative hypothesis that other areas relying on microeconomic principles are the most likely candidates for Dworkinian jurisprudence, and that judicial review of administrative agency cost-benefit analyses may be one promising area.

Integrity is plausible jurisprudence not within the entire empire of law, but only in a few small areas.

A. REQUIREMENTS

The first prerequisite for appropriate and successful judicial policymaking is the presence of a single guiding principle or purpose of the law. Barring that, multiple goals that are almost universally consistent could be suitable as well. This possibility helps to explain why antitrust remains an acceptable subject for integrity jurisprudence, despite the lingering academic debate about whether the law should maximize consumer surplus or total surplus.²⁷⁶ In almost all cases, a judge could promote both goals with the same decision.²⁷⁷

Consistency of principle, however, is not enough to curtail judicial discretion. Judges are entrusted with antitrust law not just because of the exclusivity of the consumer-welfare principle, but also because of the ubiquity of economic analysis to reach the goal. These economic subprinciples are capable of progressive reticulation. They are useful to judges in deciding the specific case before them, because they provide a toolbox of methods that can predict the consumer welfare consequences of the agreement or practice before the court. As in antitrust, the applicable subprinciples should derive from an independent, relative objective discipline, like microeconomics. Independence denies judges the ability to manipulate the principles to reach a preferred outcome. Moreover, the objective standing of the subprinciples seems crucial, insofar as they must be continually tested and revised to reflect the most current data and reality. Thus, integrity ultimately requires ascertainable and consistent guiding principles and accompanying subprinciples capable of reliably and consistently resolving live cases.

B. AREAS LIKELY SUITABLE FOR INTEGRITY

Given the requirements of singular or consistent guiding principle and independently established and practically useful subprinciples, we next consider which types of substantive law are the most fruitful candidates for increased judicial caretaking under an integrity regime. Our purpose here is modest, and we do not seek to definitively establish or defend any specific substantive areas of the law. Rather, we identify a few of the likely

276. See *supra* notes 179–84 and accompanying text.

277. As relayed above, in the rare class of cases where total surplus could be increased at the expense of consumer surplus, courts seem to have settled the issue by rejecting total surplus justifications. See Herbert Hovenkamp, *Implementing Antitrust's Welfare Goals*, *supra* note 180, at 2476 (“[I]f the evidence in a particular case indicates that a challenged practice facilitates the exercise of market power, resulting in output that is actually lower and prices that are actually higher, then tribunals uniformly condemn the restraint without regard to offsetting efficiencies.”).

characteristics of the type of law suitable for our integrity jurisprudence, and conclude with a possible suggestion that could warrant further exploration.

The first place to turn for a suitable candidate is the underlying language from which the law arises, be it statute, regulation, or constitution. Recall that the antitrust laws are remarkable for their brevity, and are much less detailed than other statutes or regulations.²⁷⁸ This sort of abstract language is likely a prerequisite for Dworkinian jurisprudence. In the presence of a detailed regulatory or statutory scheme, there is far less room for doubt on what Congress or the promulgating administrative agency meant to accomplish. A judge dealing with a concrete scheme is more likely to find herself guided to the answer by the formal text itself, and is less likely to be forced to venture beyond it except in hard cases. Moreover, even when faced with difficult questions, she is likely to have a wealth of traditional legal materials to help guide her analysis. Thus, there is little need for the Dworkinian jurisprudence outlined above.

But abstract language alone does not necessarily make judicial shaping of the law desirable. First, the presence of abstract language does not necessarily tell us whether an underlying guiding principle or general aim of the law exists.²⁷⁹ A judge faced with an abstract provision must therefore analyze the law to ensure that the underlying principle or principles are ascertainable and consistent. An abstract provision with inconsistent guiding principles is inappropriate for integrity, as we have seen from antitrust's troubled past. And even where the underlying principle or purpose of the law is clear, if there are only indeterminate analytical tools or subprinciples to guide analysis, the judge remains unconstrained. Thus, Dworkinian jurisprudence is only likely to be appropriate if the guiding principle of an abstract provision is readily ascertainable, and there are formal subprinciples to guide judicial decision-making.

In light of our criteria, we suspect that those areas of the law that rely on economic analysis are the most likely candidates for fruitful integrity jurisprudence. It is not immediately apparent which other set of subprinciples could exhibit the independence and objective *bona fides* necessary for meaningful constraints. Economic analysis alone is insufficient, however, if there is no agreement on the aims. For example, judicial review of agency cost-benefit analysis conducted in promulgating regulations is an area likely to feature economic analysis prominently. Yet if a reviewing court were forced to make distributional decisions—to decide which group should receive a benefit or cost—then it would be acting in the same way as earlier antitrust courts. Only if the structure of the law ignored distributional outcomes could courts then improve the direction of the law by employing economics to shape

278. See *supra* note 8 and accompanying text.

279. See John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1696–97 (2010).

regulations while being meaningfully constrained and not impinging on the province of the legislature.

VIII. CONCLUSION

Antitrust law is written in such broad term that the language alone does not appear to determine outcomes. Yet it would not be fair to describe antitrust jurisprudence today as reflecting broad judicial discretion to make policy judgments to fill in the interstices of the law. Thus, legal positivism does not provide a very good description of antitrust jurisprudence.

Today, antitrust reflects a consistent focus on a single principle, and that principle is realized in individual cases by operation of a series of subprinciples derived from microeconomics. Thus, a better description of antitrust is found in Dworkin's jurisprudence. Dworkinian integrity also explains unusual features, like antitrust law's relative disregard of precedent and judicial reliance on Department of Justice guidance to inform analysis.

Besides offering a good explanation of antitrust, Dworkinian jurisprudence turns out to be a relatively attractive one for the subject. Unlike other areas where a Dworkinian jurisprudence has been pushed, the principle at issue here is one that reflects consensus in the community and is capable of practical application. It may seem ironic given Dworkin's political leanings that a subject area so greatly influenced by classical economics provides perhaps the best example of his legal philosophy in action. But it is not surprising. Economics provides a series of principles for achieving this goal that command consensus in the community and can provide a normative basis for preferring efficiency. Antitrust shows that judges can be better trusted with more than a legislative text when they have other, objective sources of discipline.